Appropriating value: On the relationship between business models and intellectual property

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APPROPRIATING VALUE: ON THE RELATIONSHIP BETWEEN BUSINESS MODELS AND INTELLECTUAL PROPERTY

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Abstract

In this chapter, we examine how intellectual property ("IP") engages with business models. Business models are conceptual devices constituting and framing the process through which things become assets or objects of investment, elaborating the mechanisms of value creation and delivery and the appropriation of such value through strategic means. Changes in the patterns of production, distribution and consumption in the wake of continued digitisation have come to challenge established value-generating logics. The heterogenic character of the creative industries implies a multitude of business models at play which escapes the rhetoric of universalities, reflecting locally defined understandings and practices of value creation and appropriation. Some of these variations are considered in this chapter.

1. Introduction

With the rise of the creative economy, the effective management and protection of intellectual property, and thus the handling of intangible assets, has become recognised as a matter of growing economic and political importance.[1] Policy makers in the UK and elsewhere have been called upon to modernise established IP frameworks to account for vibrant changes in technology and consumer behaviour, and to pave the way for sustained creativity, innovation and business growth in a globalised, new-media enabled economy.[2] How best to support the new economic order through the purposeful exploitation of intellectual capital by means of IP law is the subject of much debate both in theory and practice; a debate that has expanded beyond the confines of the legal profession to enfold the emerging extremes[3] of rights protectionists and abolitionists, i.e., those advocating the privatisation of intellectual goods and those seeking to strengthen the commons.

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[1] J Howkins, *The Creative Economy: How People Make Money from Ideas* (3rd ed, Penguin 2013).

[2] See for, example, I Hargreaves, Digital opportunity: review of intellectual property and growth (Department for Business, Innovation & Skills 2011).

[3] L Lessig, 'Laws that choke creativity' (*TED*, November 2007) <www.ted.com/talks/larry_lessig_says_the_law_is_strangling_creativity/transcript?language=en> accessed 30 November 2016.

Over the past decades the focus of capital accumulation in developed economies has noticeably shifted from physical assets (such as land, labour and machinery) to non-physical or intangible assets (such as rights, relationships and IP), marking the gradual transition from labour-driven to a knowledge-based production.[4] Intangible assets, including intellectual capital, are increasingly heralded as a source of differentiation and competitive advantage.[5] Property, and the right to its possession and private ownership is a key concept of capitalist structures and often a vital part of the business model architecture. It is the relationship between the business model as a mental frame and heuristic for the development of new value-generating logics, and IP as a means of value appropriation that we are concerned with. However, the concept of IP occupies a controversial place in the literature, fenced by the conflicting views of IP advocates and sceptics, or those accounting for IP as a 'driving force of economic growth and cultural development'[6] and those arguing the opposite: that IP (in the form of intellectual monopolies) is a hindrance to the free market regime as a generator of wealth and welfare.[7] Following a short synopsis of the literatures on business models and on IP, the chapter continues with an analysis of the commercial practices exercised in different sectors of the creative industries, illustrating a diversity of approaches to value creation and its appropriability through IP exploitation.

2. Theoretical perspectives on business models and intellectual property

2.1 What are business models?

The business model concept emerged in the late 1970s as an articulation of the computer-enabled, spreadsheet approach to business planning[8] and since then has evolved into a widely used managerial tool, popularised through an abundance of articles in both academic and non-academic journals. Figure 1 documents the evolution of the business model literature in the social science domain, specifically in business economics, showing the rapid expansion of the topic over the past two decades with more than 1,200 articles published since 1995. The surge in publications is correlated with the growing interest in and demand for new value-generating logics to address the challenges and opportunities of a new media enabled economy.[9] Notwithstanding their growing prominence, business models are contested territory in terms of their conception, purpose and claimed relevance, with non-cumulative, multiple disciplinary studies rendering the resulting body of literature rather fragmented.[10] In

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[4] R Parr and G Smith, *Intellectual Property: Valuation, Exploitation, and Infringement Damages* (John Wiley & Sons 2005); L Hunter, 'A management perspective' in D Bosworth and E Webster (eds), *The Management of Intellectual Property* (Edward Elgar 2006) 66-84.

[5] Hunter (n 4).

[6] A Christie, 'A legal perspective' in D Bosworth and E Webster (eds), *The Management of Intellectual Property* (Edward Elgar 2006) 23.

[7] M Boldrin and D Levine, *Against Intellectual Monopoly* (Cambridge University Press 2008).

[8] J Magretta, *Why business models matter* (Harvard Business School Pub 2002).

[9] C Zott, R Amit and L Massa, 'The Business Model: Recent Developments and Future Research' (2011) 37(4) Journal of Management, 1019-1042.

[10] Zott and others (n 9); S Shafer, HJ Smith and J Linder, 'The Power of Business Models' (2005) 48(3) Business Horizons 199-207; Magretta (n 8).

a comprehensive reading of the existing material[11] nonetheless identify 'some emerging themes', most notably (a) the conception of business models as 'a new unit of analysis that is distinct from the product, firm, industry, or network'; (b) the pursuit of a system-level view of a firm's operations; (c) the accentuation of the interplay between firms and their partners and (d) the study of both value creation and value capture. It is the last theme that is the main focus of this chapter.

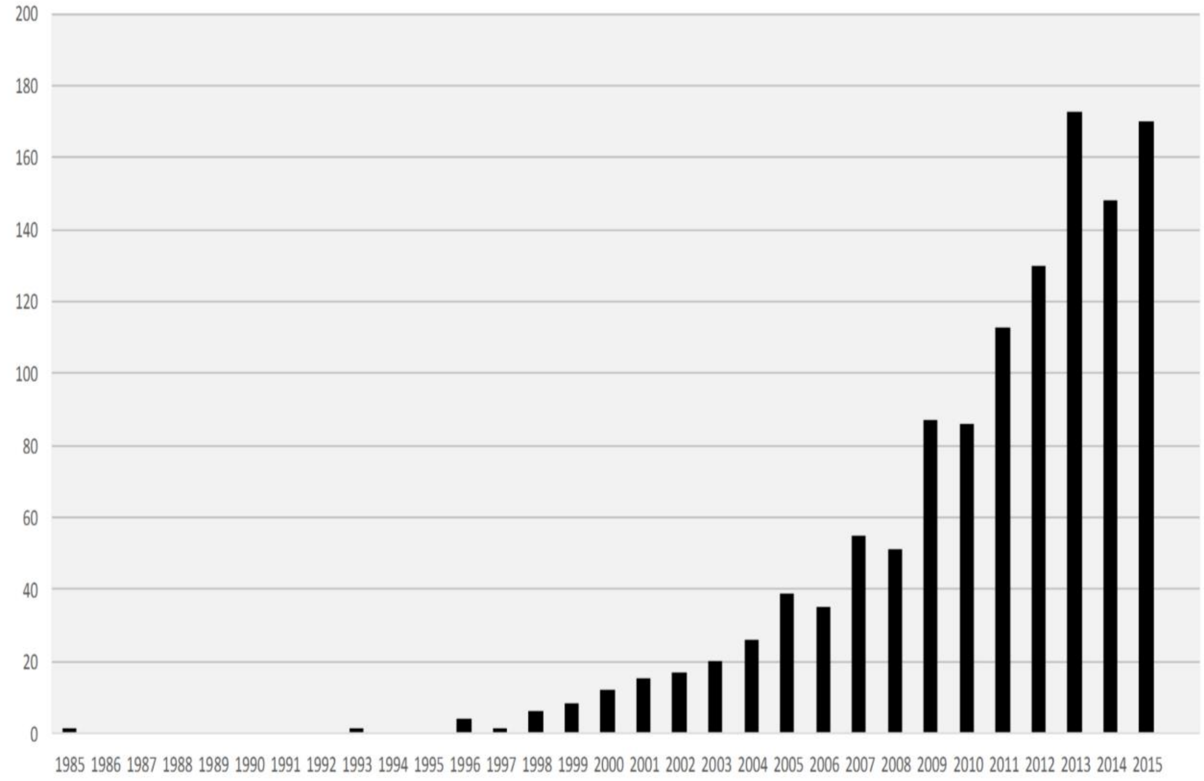

Figure 1: 'Business model' publication history 1985-2015 (number of published items in each year)
Source: Web of Science (Thomson Reuters) Core Collection, compiled April 2016

As with the management discipline as a whole, the concept of business models has been subject to pluralistic tendencies largely reflective of debates between essentialism and anti-foundationalism. The use of business models is often underpinned by an essentialist or functionalist rhetoric and premised on the idea of its accurately capturing the value-generating logic of a firm, and detailing 'a replicable process that produces revenues and profits'.[12] A model, by definition, denotes a simplified description or version of the thing in scrutiny; a form of representation that gives insight into the constituents (objects, concepts, or other entities) and inner workings (relationships) of something. It carries with it the assumption of the scrutinised object—for instance, a firm-- having neatly identifiable,

[11] Zott and others (n 9) 1020.
[12] T. Fuller, L. Warren, S. Thelwall, F. Alamdar, D.T. Rae, 'Rethinking Business Models As Value Creating Systems' (2010) 43(1) Leonardo 96-97.

definitive characteristics that upon discovery might be translated into an accurate facsimile—for instance, a business model. Encapsulated within this is a 'spectator theoretical view of knowledge', according to which knowledge is seen as a representation corresponding with some external reality. The pursuit of replicability in the context of business models hence is contingent on the accumulation of such knowledge about the firm and how its elements may be orchestrated into a coherent, value-generating whole. This is translated into the definition of a business model as 'a conceptual tool containing a set of objects, concepts and their relationships with the objective to express the business logic of a specific firm'.[13] Such business logic ought to describe the kind of value created, how it is delivered and a return is ensured. To systematise the development, documentation and/or communication of a firm's business model,[14] introduced a structural template called the Business Model Canvas; a tool that has gained particular traction in management practice and inspired numerous local adaptations. The original template is composed of nine building blocks that taken together should explain not only an organisation's reason for being but also how it may function, make money, and grow. These are value proposition, customer segments, relationships and channels, key partners, activities and resources, cost structure and revenue streams.

In the absence of a consensual definition of the concept, a plethora of business model references occupy the field; business models manifest as a statement, description, representation, conceptual tool/model, structural template, method, framework, pattern, set or indeed an architecture.[15] Indeed, many authors leave the concept largely undefined. The components of a business model are also much subject to debate, with the most frequently cited items being the firm's value offering, the economic model, the customer interface/relationship, partner network/roles, internal infrastructure/connected activities, and target markets. Despite this, Zott and others find three common concerns: (1) the logic of e-businesses; (2) the mechanisms of value creation and capture; and (3) the management of innovation and technology.[16] The development of the business model as a new unit of analysis is accompanied by attempts to categorise the value-generating logics of firms, either in thick descriptions and accounts of firm practices or on the basis of abstract, decontextualised principles,[17] in the attempt to better understand firm performance but also devise specific courses of action.[18]

As scepticism grew in the aftermath of the dotcom crisis at the turn of the century about the value of business models and their capacity to sustain and/or improve firm

[13] A Osterwalder, Y Pigneur and C Tucci, 'Clarifying Business Models: Origins, Present, and Future of the Concept' (2005) 16(1) Communications of the Association for Information Systems 1, 3.

[14] A Osterwalder and Y Pigneur, *Business model generation: a handbook for visionaries, game changers, and challengers* (Modderman Drukwerk 2009).

[15] Zott and others (9) see also M Morris, M Schindehutte and J Allen, 'The Entrepreneur's Business Model: Toward a Unified Perspective' (2005) 58(6) Journal of Business Research, 726-735.

[16] Zott and others (9).

[17] C Baden-Fuller, A. Guidici, S. Haefliger, and M.S. Morgan, 'Business Models: Concepts, Categories and Consequences' (2015) Working Paper (unpublished) Cass Business School.

[18] Arend R, 'The business model: Present and future--beyond a skeumorph' (2013) 11 Strategic Organization, 390-402.

performance, growing attention has been paid to the fundamental assumptions underlying the concept and the question of what it is that business models do. Questioning the foundationalist assumptions the word 'model' provokes, Magretta argues that business models in essence are stories and as such work to construct narratives as to how businesses work.[19] Developing a new business model becomes a matter of crafting a new story; a story that grows in the level of detail rather than abstraction into templates or formulae. Authors such as Doganova and Eyquem-Renault or Baden-Fuller and Morgan have further burrowed into the ontological dimension of business models and coined a performative view, emphasising their constitutive effects in the process of business formation and/or reformation.[20] Taking inspiration from the entrepreneurship literature in which business models are not depiction but a method of doing business, Doganova and Eyquem-Renault develop a view of business models as market devices that allow entrepreneurs/firms to bring new ideas into being, gradually enacting the reality that they claim to represent.[21] Business models are thus not passive descriptions but framing devices that moderate the transformation of ideas into tradable assets, i.e. property.

2.2 Why focus on business models now?

As an account of a firm's value-generating logic, the prominence of the business model concept arguably reflects the general importance management scholars attribute to value creation.[22] While there is wide agreement on the relevance of the topic itself, the high level of attention attributed to business models both in theory and practice reflects first and foremost the transformational effects of new technologies in general and the internet in particular. As the primary sources of production have shifted from physical to non-physical the practices of value creation have changed accordingly. For the creative industries, ongoing digitisation, the fragmentation of audiences and markets, convergence of technologies and services, and the disintermediation of the value chain have been the major changes,[23] with impacts in the conception of new products, services and processes (via co-creation, participatory practices, and user/customer engagement) as well as changed modes of production (for example, crowdfunding), dissemination (direct selling) and consumption (from owning to experiencing goods). Faced with such transformations offering new opportunities for growth, established companies have found it increasingly difficult to pursue and secure profits from their old

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[19] Magretta (n 8) 3.

[20] L Doganova and M Eyquem-Renault, 'What Do Business Models Do?' (2009) 38(10) Research Policy 1559-1570; C Baden-Fuller and M Morgan, 'Business Models as Models' (2010) 43 (2-3) Long Range Planning 156-171.

[21] Doganova and Eyquem-Renault (n 20).

[22] D Lepak, K Smith and M Taylor 'Value Creation and Value Capture: A Multilevel Perspective' (2007) 32(1) Academy of Management Review 180-194.

[23] Technology Strategy Board (TSB), *Creative Industries Strategy 2013-2016* (2013) <https://connect.innovateuk.org/documents/3220887/3676376/Creative%20Industries%20Strategy%202013-2016?version=1.0> accessed 29 November 2016.

business models as the new economy has disrupted value chains and well-rehearsed business practices.[24]

There is now far less consensus on what value creation is, how it is achieved and how that value might be captured.[25] Repeated calls for new business models, as for example, elaborated by the Technology Strategy Board (2013) in its *Creative Industries Strategy 2013-2016*, seek new calculi for commercial activity to engage and capitalise on the tectonic shifts in the economic landscape. [26]Such calls lift the business model concept into wider consciousness, while carrying with them an element of critique and indeed the assumption of new value-generating logics. It is worthwhile emphasising, however, that authors like Foley[27] argue that certain types of business models such as those capitalising on the availability of new information and communication technologies and associated network externalities, i.e. value derived from the number of people using a particular product or service, are not so much expression of 'new modes of production' but 'modes (in some cases not particularly new) of participation in the pool of surplus value', that is, value gained from capital investment.

Before turning our attention to the changes in business models, we first outline the role and nature of intellectual property in order to understand its role in business models.

2.3 What is intellectual property?

Property is a cornerstone concept of capitalist market structures. Through the attachment of property rights to objects or things, they become established as tradable entities, i.e., something that might be owned, bought and sold, and thus become available for circulation and exchange. Property is 'a general term for the rules that govern people's access to and control of things' including land, natural resources, the means of production, manufactured goods, etc., but also IP. Such rules regulate cooperation, production and exchange in the functioning of markets.[28] Immaterial forms of property are also shaped by such rules. Accordingly, IP is a set of legal doctrines or, more specifically, 'a body of rules, created by the legal system that regulates the documented forms of abstract objects'.[29] As George argues, such objects are not given but 'defined into existence' by the legal system, which then regulates the products of its own making.[30] Regulation materialises the conferment of

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[24] E Bustamante, 'Cultural industries in the Digital Age: some provisional conclusions' (2004) 26(6) Media, Culture & Society, 803-820; S Gudiksen, 'Business Model Design Games: Rules and Procedures to Challenge Assumptions and Elicit Surprises' (2015) 24(2) Creativity and Innovation Management 307-322.

[25] Lepak (n 22).

[26] TSB (n 23)

[27] D Foley, 'Rethinking Financial Capitalism and the "Information" Economy' (2013) 45(3) Review of Radical Political Economics, 257-268.

[28] J Waldron, 'Property and Ownership' in E Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition) <http://plato.stanford.edu/archives/win2016/entries/property/> accessed 29 November 2016.

[29] A George, *Constructing Intellectual Property* (Cambridge University Press 2012) i.

[30] Ibid 99.

enforceable rights, the most common being copyright, patents, trade marks and design rights, as introduced elsewhere in this collection.[31]

Thus protected by law, IP in the form of IP rights, may be owned, bought and sold. However, whilst sharing many of the attributes of other forms of property, it is different from tangible goods (land, machinery, buildings etc.) and as such generally considered 'atypical'.[32] Ideas are non-rival or non-crowdable: entertaining an idea does not preclude its use by someone else.[33] Furthermore, Waldron notes,[34] the protection of ideational objects 'do[es] not directly respond to conditions of scarcity', considered by Hume[35] to be necessary for property relations to make sense. Such distinctions raise questions about the nature and justifications of property as a right applied to intellectual goods. The propertisation of ideational objects is justified on the premise that the creation of ideas requires mental effort or labour that ought to be rewarded. Continental Europe, meanwhile, has been influenced by the Hegelian view of IP that 'an idea belongs to its creator because the idea is a manifestation of the creator's personality or self'.[36] The economic rationale for awarding monopoly or exclusion rights is grounded in incentive theory, designed to encourage and reward innovative behaviour and account for what is commonly regarded as 'market failure'. Thus intellectual monopoly in the form of IP rights corrects the apparent inability of markets to (sufficiently) reward innovators and encourage certain types of (socially desirable) innovation.[37] It is assumed that without adequate compensation 'people are unlikely to invest labour, effort or money and other resources into producing ideational objects and their documented forms'.[38]

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31 Cross ref Pavis, Teilman-Lock, Yilmatekin

32 J Hughes, 'The Philosophy of Intellectual Property' (1988) 77 Geo LJ , 287-366.

33 Howkins (n 1); Waldron (n 28).

34 Waldron (n 28) unnumbered webpage.

35 David Hume, *A Treatise of Human Nature* (first published 1739, L.A. Selby–Bigge and P. H. Nidditch (eds), Clarendon Press 1978).

36 Hughes (n 32) 330.

37 Boldrin and Levine (n 7) 75.

38 George (n 29) 345.

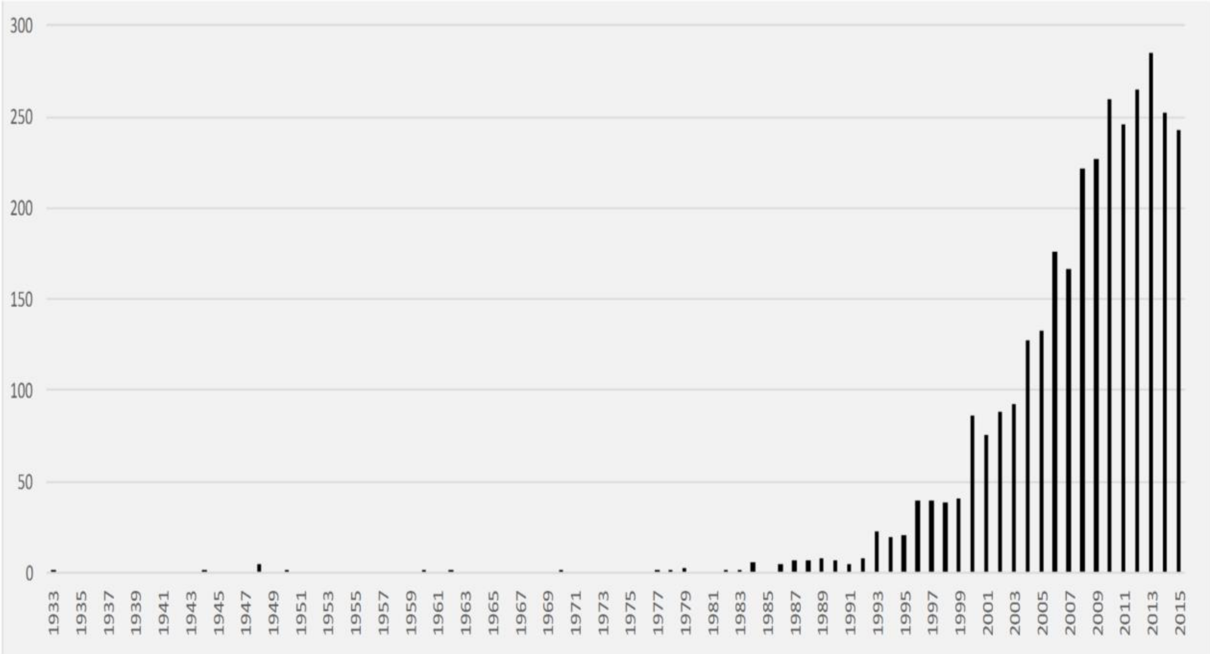

Figure 2: "Intellectual property" publication history 1933-2015 (number of published items in each year)
Source: Web of Science（Thomson Reuters）Core Collection, data compiled in April 2016

In the field of business economics IP has been discussed with growing attention since the mid-1980s (see Figure 2). As a defining resource and output of the creative industries,[39] IP confers exclusive rights to exploitation (often termed monopoly rights) as well as 'natural barriers to imitation'[40]; i.e., access to ideas, and specifically the replication of ideas, is controlled, restricted or prohibited. Again, however, IP is unlike material property in that intellectual property 'delivers ownership but it seldom guarantees or even offers possession'[41], a position exacerbated by the digitisation of images, music, video, and text etc., which are perfectly reproducible, and thus shareable, with no degradation to duplicate copies.

2.4 How are the two aligned? Why is it problematic?

Business models and IP are aligned because at a very basic level, the market economy and the law within which it operates constitute each other. The appropriation of value is at the core of the business model concept. The concern for organisations is not just with the creation of value though the creation of goods and services, but, equally, value capture and future cash flows,[42] thus drawing attention to the role of IP. In as far as IP constitutes a piece of legal infrastructure that enables the appropriation of value through the assertion of monopoly

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39 Department for Culture, Media and Sport (DCMS), 'Foreword' in *Creative Industries Mapping Documents* (2001).

40 G Pisano and D Teece, 'How to Capture Value From Innovation: Shaping Intellectual Property and Industry Architecture' (2007) 50(1) California Management Review 278-96.

41 Howkins (n 1) 82.

42 Pisano and Teece (n 40); see also D Teece, *Dynamic Capabilities and Strategic Management: Organizing for Innovation and Growth* (Oxford University Press 2009).

rights, it is a well-established instrument in the repertoire of appropriation strategies. Property rights are designed to reward creative or innovative behaviour, grant protection of the resulting form and ensure the entitled person a return on its investment. The attachment of rights to the goods of intellectual endeavour is a constitutive part of the process that regulates ownership and access to those products and services created. The restriction of access, in turn, is what is believed to spur further development and growth, in that competitors are required to innovate around existing IP. However, the arrival of the internet and associated products and services, the rise of the network society, transitions in the nature of work and the heightened importance of knowledge, have created a paradoxical relationship between the imperative to protect and the need to share ideas. As participatory and co-creational practices become increasingly common in the conception, development and production of new goods, less restrictive IP arrangements are heralded as enabling the exchange of knowledge and the promotion of collaborative work.[43] Whether IP incentivises or impedes innovation is a matter of controversial debate and not addressed here.[44]

Despite the conceptual interlocking with IP in the capture of value, accounts of the relationship between business models and IP within the context of the creative industries are largely missing from the literature. Exceptions confirm the rule: Searle's[45] IPO-commissioned work on changing business models in the creative industries discusses the cases of television, music and computer games.[46] Searle[47] finds little evidence of IP significantly impacting the structure of business models; instead it is seen as a 'secondary influence', as Walmsley[48] also suggests. However, within the various branches of the creative and cultural industries, there have evolved different strategies of value appropriation, accompanied by conflicting views as to if, and how, to renew copyright-related business models. We now turn to analysis of these emergent approaches to business models and IP.

3. Logics of value creation, delivery and appropriation

The impact of digital technologies gives rise to distinctly different cost structures, with considerably lower production and distribution costs that allow and also drive departure from established practices. It also offers opportunities for the creation of new goods, methods, markets, sources of supply and indeed, the reorganisation of entire industries. In order to understand the impact of these disruptions on the relationship between business models and IP, we discuss examples from a selection of sectors, on the creation, delivery and capturing of value (although it is to be acknowledged that in some texts 'value delivery' is subsumed

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43 Lessig (n 3).

44 See Boldrin and Levine (n 7).

45 N Searle, 'Changing Business Models in the Creative Industries: The Cases of Television, Computer Games and Music' (2011) Intellectual Property Office.

46 See also M David and D Halbert, *The SAGE Handbook of Intellectual Property* (Sage 2014) and M Biagioli, P Jaszi and M Woodmansee, *Making and Unmaking Intellectual Property: Creative Production in Legal and Cultural Perspective* (University of Chicago Press 2015).

47 Searle (n 45) 3.

48 B Walmsley, 'The 21st century business model' in B Walmsley (ed), *Key Issues in the Arts and Entertainment Industry* (Goodfellows Publishers Ltd 2011).

under 'creation'.[49] Whilst for analytical reasons the sub-processes are approached in a consecutive fashion, such linearity does not reflect the complexity of business, where these elements are deeply interwoven. As ideas move from the hypothetical into the practical realm, these sub-processes start to overlap and are often difficult to dissociate. Their separation here illustrates the balance of power across the chain.

3.1 Creating value

Value creation is the 'precondition for value capture'[50] and is based on the provision of goods deemed worth paying for. In the case of the creative industries, it is important to note, however, that 'value creation' is rarely exclusively tailored towards the generation of surplus income–indeed, in the more traditional arts-oriented sectors such a motif is often found to be antithetical to the creation of experiential value. Value creation has most often been identified with content creators— authors, publishers, artists, designers, journalists, film producers, game developers etc. However, the mechanisms of value creation have changed as producers and consumers have started to embrace the possibilities of technology to engage in participatory or collaborative practices, co-creation and peer production,[51] shifting the focus from the dyadic relationship between producers and adopters towards 'value creating ecologies'.[52] These changes, however, might more accurately reflect the case that 'novelty' or 'creativity' rarely emerges in isolation, but rather nests in the messy and dynamic intellectual space of co-producing peers,[53] reminding us of earlier, non author-driven eras, when artists thrived on a 'culture of borrowing', i.e., the individual artist was not seen as genius but 'a craftsman working with material in circulation'.[54] The producer as the 'initiator of change', with the consumer being 'taught to want new things' has given way to more inclusive forms of engagement, as the creation of value is no longer specifically organised around sellers and buyers but the multifarious relationships within a value system. However, it is important not to categorize previous practices as obsolete but rather acknowledge the diversification of productive relationships.

Indeed, 'co-creation' and co-creational practices are not new. Some sectors of the creative industries, for example, fashion design, display what might be described as soft

[49] See, for example, H Chesbrough, 'Business Model Innovation: It's Not Just About Technology Anymore' (2007) 35(6) Strategy & Leadership, 12 - 17.

[50] R Priem, 'A Consumer Perspective on Value Creation' (2007) 32(1) Academy of Management Review 219-35.

[51] G Ritzer and N Jurgenson, 'Production, Consumption, Prosumption: The nature of capitalism in the age of the digital 'prosumer' ' (2010) 10(1) Journal of Consumer Culture, 13-36.

[52] G Hearn, S Roodhouse and J Blakey, 'From Value Chain to Value Creating Ecology' (2007) 13(4) International Journal of Cultural Policy, 419-436.

[53] H Becker, *Art worlds* (University of California Press 1982).

[54] A Ross, 'The Unoriginal Originality of Led Zeppelin' (*The New Yorker*, 14 April 2016). <www.newyorker.com/culture/cultural-comment/the-unoriginal-originality-of-led-zeppelin> accessed 16 April 2016.

'appropriability regimes',[55] where 'copying' is part of the pedagogy and where intellectual property enforcement is difficult to pursue. Raustiala and Sprigman, for example, maintain that digital affordances for copying, prevalent in the fashion world, are only the latest tools of decades-old practices.[56]

As consumption intensifies both in terms of time (speed) and place (opportunity) and through the pluralisation of tastes it generates, new products are developed and markets disintegrate into ever-expanding niches: 'Produce variety and you produce a niche market'.[57] The value in these new products and markets is increasingly co-created. This is seen, for example, in fan cultural production of 'mashups' (audio, video or software composed of content sampled from various sources)[58]; 'scanlations' (translated scans of Japanese manga cartoons)[59], or in 'chipmusic' (electronic compositions of sounds refashioned from home computer and game devices)[60]. Typically, these derivative cultural objects are produced without the original authors' permission, yet fans increasingly recognise and move to protect the value in their creations via commons licensing, while asserting that they are helping to distribute and popularise the original IP.

The games sector perhaps has the greatest experience of co-creation while also manifesting different approaches to the sharing of IP, as production has moved from linear to networked and recursive models, involving users as producers.[61] Coleman and Dyer-Witheford, for example, highlight how the digital capacities that allow games to be played enable players to copy, modify and create games, with their collective production tending 'towards commons models of digital play—in which games are goods shared rather than owned'.[62] Grimes also highlights how shifting social conceptualizations of play found in massively multiplayer online games (MMOGs) confound the leisure and labour division, with the result that authorship and IP are being challenged by game users and developers.[63] MMOGs, she argues, are sites of 'ongoing cultural productions, the result of the combined efforts and participation of both corporate employees (designers, programmers, customer support agents, *et cetera*.) and the games' players. The collaborative and often symbiotic

[55] G Pisano, 'Profiting from Innovation and the Intellectual Property Revolution' (2006) 35(8) Research Policy,1122-1130.

[56] K Raustiala and C Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92(8) Virginia Law Review, 1687-1777.

[57] B Massumi, 'Navigating Movements' in M Zournazi (ed), *Hope: New Philosophies for Change* (Routledge 2002) 224.

[58] V Miller, *Understanding Digital Culture* (Sage 2011).

[59] H-K Lee, 'Between fan culture and copyright infringement: manga scanlation' (2009) 31(6) Media, Culture & Society, 1011-1022.

[60] M Zeilinger, 'Chiptuning Intellectual Property: Digital Culture Between Creative Commons and Moral Economy' (2012) 3(1) Journal of the International Association for the Study of Popular Music, 19-34.

[61] S Humphreys, 'Productive users, intellectual property and governance: the challenges of computer games' (2005) 10(4) *Media and Arts Law Review* 299-310.

[62] S Coleman and N Dyer-Witheford, 'Playing on the digital commons: collectivities, capital and contestation in videogame culture' (2007) 29(6) Media, Culture & Society, 934-53..

[63] S Grimes, 'Online multiplayer games: a virtual space for intellectual property debates?' (2006) 8L6 New Media & Society, 969-990.

aspects of these shared production processes are presenting new challenges to legal concepts such as intellectual property and ownership'.[64] Other forms of player labour include 'modding', or player modification of game software, which is sometimes invited by companies which then exploit users' coding changes in future developments of the software; and websites launched by fans to support fellow users, adding social value to their game playing experience.[65]

Although we began by saying that value creation is based on the provision of goods deemed worth paying for, it is worth noting that what constitutes a 'good', i.e., where the value lies in value creation, is disrupted by the impact of digital. We explore this in greater detail in considering delivery of value.

3.2 Delivering value

Technological advancements have not only brought about novel ways of ideating and developing new goods, 'democratising' the processes of production, but equally have impacted on the mechanisms of value delivery, the structures and processes of distribution. Digitised production, distribution and consumption challenge established value-generating models, with boundaries between firms and industries also starting to move or dissolve.[66] While the distribution of tangible objects or high-cost transmission renders items easily controllable,[67] the internet, especially with its ease of uploading, transmitting, sharing and replicating at marginal costs, poses questions about the binary divisions between production and dissemination, a distinction that has been quite sharply drawn in several media, e.g. music, where record companies have traditionally served as a conduit to independent cultural producers, and the 'tension between individual producers of creative ideas and the machine of cultural industries that produces, promotes and distributes those creative ideas on a mass level'[68] this constitutes a major disruption between the older flow (broadcasting) and publishing (i.e. tangible commodity forms) logics that typified the field into a more 'network' logic.

Digitisation introduces disintermediation, 'unmediated connections between producers and consumers',[69] while also facilitating the introduction of new entrants and players enabled by lowered barriers to entry, the emergence of giants and conglomerates that

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[64] Ibid 973.

[65] P Thompson, R Parker and S Cox, 'Interrogating Creative Theory and Creative Work: Inside the Games Studio' (2016) 50(2) Sociology, 316- 332.

[66] R Amit and C Zott, 'Value creation in e-business.' (2001) 22 Strategic Management Journal, 493-520; Zott and others (n 9).

[67] J Toynbee, 'Creating Problems: Social Authorship, Copyright and the Production of Culture' (2001) The Pavis Papers in Social and Cultural Research <www.open.ac.uk/socialsciences/main/__assets/b3tygo8bmj1zqfqxhw.pdf> accessed 29 November 2016.

[68] G Neff, *Venture Labour: Work and the burden of risk in innovation industries* (MIT Press 2012); Toynbee (n 67).

[69] P Foster and R Ocejo, 'Brokerage, mediation and social networks in the creative industries' in C Jones, M Lorenzen and J Sapsed (eds), *Oxford Handbook of Creative Industries* (Oxford University Press 2015) 413.

dominate technical access, and the unauthorised distribution and re-use of content.[70] Disintermediation involves the disruption of traditional vertical arrangements in which producers are in charge of producing and distributing content. 'Middle-men' such as taste-making talent spotters, promoters, and critics, or production or distribution specialists, such as television broadcasters, newspapers, recording labels or book publishers, are side-stepped.[71] A more horizontal paradigm allows creators and performers to operate independently, reaching audiences directly through social media, communicating with clients directly and selling work without intermediaries. Equally, professional creators and performers face competition from debutants and amateurs who use social media and online distribution to bypass the traditional selection mechanisms and quality filters of production. Simultaneously, companies previously outside the sphere of 'cultural and creative industries' manifest themselves as information providers and publishers. Apple and Google, for example, have developed into media institutions, providing access to information and cultural products. From the perspective of the traditional intermediary who is cut out of the picture, disintermediation is a negative term; for others embracing different social relations and experiences, it is 'reintermediation',[72] although there is debate as to whether control of the technological resources employed is required for the latter[73]. Although social media, digital production tools, and crowd financing all help creators to bypass gatekeepers to industry, tastemakers, traditional mass producers and distributors, the quantity of content online makes the market extremely competitive. As it is difficult to be noticed on the Internet by intermediaries, production companies and audiences, keen prices and voluntary labour to self-promote and improve product discoverability become the focus, with numbers of page views, comments, likes and shares the relevant performance indicators, if not sales. Ross, for example, highlights the 'rapid flourishing' of self-publication and content promotion, yet sees the corporate majors as the primary beneficiaries of strategies that co-opt amateur productions, not only as a site of new content delivery but also as a strategy for under-cutting production costs through pay scales.[74] He writes 'most of the profit in a winner-takes-all IP-driven economy is extracted by intermediaries in the value chain and not by those who are the original innovators'.[75]

The various delivery mechanisms have had different impacts according to sector. In publishing, for example, authors have embraced digital self-publishing, involving the digital production of their IP, its distribution, sale or rental, and promotion. Some choose a hybrid model, working with traditional publishers or agents with some of their intellectual property while self-publishing other work, or perhaps self-publishing out-of-print titles after

[70] J Poort and others, 'Perspectives of creators and performers on the digital era' (2015) 17(5) New Media & Society, 666-690.

[71] P Hirsch and D Gruber, 'Digitizing fads and fashions: Disintermediation and glocalized markets in creative industries' in C Jones, M Lorenzen and J Sapsed (eds), Oxford Handbook of Creative Industries (Oxford University Press 2015) 421-438.

[72] L Lievrouw and S Livingstone, 'Introduction' in L Lievrouw and S Livingstone (eds), *The Handbook of New Media* (Sage 2006).

[73] Hirsch and Gruber (n 71).

[74] A Ross, *Nice work if you can get it: Life and labor in precarious times* (New York University Press 2009) 21.

[75] Ibid 41.

publishers' rights have reverted (although publishers' ability to print a single digital copy on demand has meant that titles may never be out of print, thus challenging the rights reversion mechanism.[76] For both authors and publishers, pricing work, especially for a major online distributor such as Amazon, is an important consideration, as are strategies for boosting the titles' discoverability and selling in quantity. Digital technology also facilitates the myriad forms their intellectual property can take, not only as e-books, but as digital apps, audio or video products etc., with digital rights management software (DRM) controlling consumer manipulations such as copying, sharing, altering, printing, or merely viewing the text again after initial reading.[77]

Perhaps the greatest disruptions to publishing have been prompted by the dominance and industry-altering practices of the sector's largest distributor, Amazon.[78] Amazon launched as an online retailer of printed books in the mid-1990s and with digital books became a publisher; by 2010 its e-book sales overtook its printed book sales.[79] Amazon's pricing and innovations have prompted competitors to adjust their business models, with varying success. For example, traditional wholesaling practices, in which retailers bought publishers' products at wholesale prices and then determined their own retail prices, became outmoded in the era of e-books. Publishers felt the model allowed e-book prices, especially Amazon's 'aggressive discounts', to fall too low, which had the effect of 'eroding consumers' perception of the value of books, cannibaliz[ing] hardcover sales, and would eventually lead to a downward pressure on wholesale prices'.[80] When the major North American publishers changed to an agency model, in which they determined (higher) retail prices and paid retailers commissions on sales, the US government brought a price-fixing lawsuit and forced a compromise. Now publishers set desired e-book list prices and pay commissions, but the retailers determine their own prices.[81] Meanwhile printed book reading continues to be popular.

As Christopherson notes of the US, 'contemporary entertainment media firms are more accurately described as platforms, involved in extracting value from intellectual property'.[82] She continues 'the primary goal (…) is not production and distribution of products but identification of strategies to extract the maximum revenue from intellectual property'. Their focus lies in maximising distribution outlets or platforms for distribution, exploiting back

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[76] M Grewar, B Townley and E Young, *Tales from the drawing board: intellectual property wisdom and woes from Scotland's creative industries* (UK: Institute for Capitalising on Creativity 2015); H Rønning and T Slaata, 'Marketers, publishers, editors: Trends in international publishing' (2011) 33(7) Media, Culture & Society, 1109-1120.

[77] Grewar and others (n 76).

[78] J Biggs, 'Print and ebook revenue down as Amazon slashes prices' (*Techcrunch*, 30 September 2016) < https://techcrunch.com/2016/09/30/print-and-ebook-revenue-down-as-amazon-slashes-prices/ > accessed 2 November 2016.

[79] Miller 2010 in Hirsch and Gruber (n 71); B De los Santos B and M Wildenbeest, 'E-Book Pricing and Vertical Restraints' (2014) NET Institute Working Paper No 14-18 <https://ssrn.com/abstract=2506509> accessed 30 November 2016.

[80] De los Santos and Wildenbeest (n 79) 2.

[81] De los Santos and Wildenbeest (n 79).

[82] S Christopherson, 'Behind the scenes: how transnational firms are constructing a new international division of labor in media work' (2006) 37(5) Geoforum 739, 744.

catalogues and maximising product from new productions, through film, TV, media, publishing, product licenses, etc., an intellectual property focus that also influences the type of products produced. This cross-media or cross-platform strategy, and the increased industry concentration that supports it, both across media e.g. ownership of network and cable, film, and through vertical integration across production and distribution, multiplies venues and increases value through cross-market advertising. TV production, for example, is now outsourced to companies affiliated with the parent company, whereas previously independents would keep intellectual property rights over programmes which might be open to other distribution channels.[83] Rather than investment in programming, cost reduction strategies and demand for programming to fill channels have promoted a large expansion of low-end production, aided by new technologies that reduce production costs in terms of crews and material.

Digital strategies in TV also have evolved to include multi-platform content in addition to televised broadcasts, with delivery via the Internet and multi-media (mobile phone) devices, or a '360-degree' strategy.[84] Debrett illustrates that public TV broadcasters likewise are exploring digital affordances to enhance their services across platforms, deliver programming on-demand, and to increase audience participation by engaging with user-generated content (UGC).[85] As Zoellner notes, 'the arrival of digital media and the internet has eroded traditional broadcasting business models and increased competition in the course of a growing fragmentation of audiences and advertisers across a multichannel, multiplatform media environment'.[86] There is a growing reluctance to invest in documentaries and one-off programmes, in favour of concentrating on those programmes that can be exploited internationally--usually the popular programmes more easily exploited in transferable 'format' productions, and reality and celebrity programmes promising high ratings at relatively low cost.

Within independent film production, as the industry is trying to compensate for declining revenues from DVD and TV rights exploitation, social digital tools have shaped the way organisations engage with users, manage demand uncertainty and respond to the challenges of digital disruption.[87] Digitals tools are appropriated to challenge the orthodoxies

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[83] S Christopherson, 'Beyond the self-expressive creative worker: an industry perspective on entertainment media' (2008) 25 Theory, Culture & Society, 73-95.

[84] G Doyle, 'From Television to Multi-Platform Less from More or More for Less?' (2010) 16(4) Convergence: The International Journal of Research into New Media Technologies, 431-449.

[85] M Debrett, 'Riding the wave: public service television in the multi-platform era' (2009) 31(5) Media, Culture & Society, 807-827.

[86] A Zoellner, 'Professional Ideology and Program Conventions: Documentary Development in Independent British Television Production' (2009) 12(4) Mass Communication and Society 503, 508.

[87] M Franklin and others, 'Innovation in the application of digital tools for managing uncertainty: The Case of UK Independent Film' (2013) 22 Journal of Creativity and Innovation Management, 320-333; SPI Olsberg, '*Building sustainable film businesses: the challenges for industry and government*' (2012) Film i Väst, PACT and the Swedish Film Institute.

of the film value chain, for instance, disintermediating the traditionally geographic and sequential distribution of analogue film products with immediate and global digital distribution, and facilitating new marketing and distribution models, e.g. linking multi-platform content, social media and distribution services to build consumer demand for the film itself.[88] Ryan and Hearn also explore trends in next-generation business models and filmmaking practices, such as young directors broadening their focus beyond cinema to producing for multiple platforms, working more collaboratively in multi-skilled teams, and thinking of themselves more as businesses involved in every aspect of film production and distribution, rather than solely as filmmakers.[89]

Online content providers' business models typically rely on advertising to compensate for the 'free' nature of much Internet content, thus advertising producers and media platforms are scrambling to innovate. Lobato describes the multichannel networks (MCNs) that have emerged as a new kind of media intermediary, specifically focussed on YouTube content, which connect content producers with advertising and marketing specialists in order to maximise the content's value appropriation online.[90] Elsewhere advertising is expanding across channels to engage consumers in making and sharing promotional UGC which is 'supplied in good faith as a form of social communication'[91] but which also acts as a kind of interactive marketing.

For other sectors, multi-platform delivery has provided additional forms of income. In comparison to other sectors, theatre has come lately to digital technologies that help distribute and capture value in intellectual property.[92] Traditionally defined by its production of live cultural experiences, now the sector is considering how its intellectual property can have 'a life beyond the live'[93], delivering live streaming and film broadcasting online and in cinemas to increase audience engagement with and value appropriation of its creative products. Such developments, highlighting the importance of securing appropriate co-production, broadcast, performance, archive, marketing and distribution rights and licenses from the many parties involved in theatre IP (performers, playwrights, translators, musicians, lighting, sound, movement designers, venue owners) aide audience development and company promotion.[94] Although 'event cinema', i.e., the broadcasting of live or recorded

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[88] Franklin and others (n 87).

[89] M Ryan and G Hearn, 'Next generation 'filmmaking': new markets, new methods and new business models' (2010) 136 Media International Australia: Incorporating Culture and Policy, 133-145.

[90] R Lobato, 'The cultural logic of digital intermediaries: YouTube multichannel networks' (2016) 22(4) Convergence: The International Journal of Research into New Media Technologies 348-360.

[91] J Wang, 'New media technology and new business models: Speculations on 'post-advertising' paradigms' (2009) 133 Media International Australia, 110-9.

[92] World Intellectual Property Organization (WIPO) (2016) 'Event Cinema - Theatre Goes to the Movies' < www.wipo.int/ip-outreach/en/ipday/2016/event_cinema.html > accessed 12 November 2016.

[93] Grewar and others (n 76) 51.

[94] Grewar and others (n 76) 51; Institute for Capitalising on Creativity (ICC), 'Blog: Digital dialogues with theatre' (*St Andrews*, 2014) <www.st-andrews.ac.uk/icc/research/grantprojects/capitalisingoncreativityesrc/knowledgetransferpartnershipsktps/intellectualpropertymanagement/#theatreblog> accessed 14 November 2016.

performances to venues around the world, is not new, digital technology has facilitated easier production and lowered the costs of digital recordings and their distribution.[95] Leading opera and ballet companies in particular have used the format to reach global audiences, and to enhance the experiences with footage of rehearsals, backstage operations and artist interviews. However, the production of digital broadcasts requires careful management of IP rights and presents practical challenges which, for some producers and consumers, dilute the experience of live theatre.[96] Equally, the costs of recreating a theatrical performance for the purposes of recording and digital distribution, which include actor and crew salaries, rent for space, costs of props and scenery, playwright royalties, etc., far outstrip the reproduction and distribution costs of other forms of digital content, such as books or music, such that 'the ephemeral nature of theatre and the difficulty of capturing the complete experience on recordable media leave theatre at a distinct economic disadvantage'[97].

As the plethora of research in the area testifies, music has been especially impacted by digital: consider that Apple's iTunes Music Store, launched in 2003 in the United States, was the first means of legal file sharing following the radical disruption caused by Napster's introduction of unauthorised online file sharing, four years earlier.[98] An important feature of digital sales is the choice given to consumers to rent or purchase single tracks or track bundles at prices lower than the cost of complete albums on CD; or to subscribe to music libraries providing unlimited access. Providers also have improved search facilities and personalisation tools. As Bustinza and others, unnumbered manuscript) note, citing Parry and others, 'With the digitalization of music, the dynamics of the music market have dramatically changed.[99] Many new music business models reflect a theoretical shift in understanding what music retail is, presenting music to consumers not as a product but as a service'. Phillips and Street explore the attitudes to copyright of musicians who are negotiating this new terrain and find wide variation, including the desire for strong copyright protection, driven by financial self-interest and/or desire to assert moral rights, as well as ambivalence towards protection that prevents consumption by listeners without financial resources.[100] 'Much turns on the context and values that shape the way 'interest' is understood'.[101] Klein examines the pros and cons of synchronisation licensing, a business model permitting music's commercial use in advertising, computer games, film, TV and

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[95] WIPO (n 92).

[96] Grewar and others (n 76); K Keramidas, 'The Pay's the Thing: Intellectual Property and the Political Economy of Contemporary American Theatrical Production' (2008) PhD Thesis, The City University of New York <http://gradworks.umi.com/33/10/3310662.html> accessed 12 November 2016.

[97] Keramidas (n 96) 151-152.

[98] J Waldfogel, 'Music file sharing and sales displacement in the iTunes era' (2010) 22(4) Information Economics and Policy, 306-314.

[99] O Bustinza and others, 'Music business models and piracy' (2013) 113(1) Industrial Management & Data Systems, 4-22; G Parry, OF Bustinza, F Vendrell-Herrero, 'Servitisation and value co-production in the UK music industry: An empirical study of consumer attitudes' (2012) 135(1) International Journal of Production Economics, 320-32.

[100] T Phillips and J Street, 'Copyright and musicians at the digital margins' (2015) 37(3) Media, Culture & Society, 342-358.

[101] Ibid 346.

phone ringtones, as a relief from dwindling revenues from radio play and from illegal file sharing.[102]

In computer games, one of the few creative sectors that did not exist before digital technology, Searle and White note a shift in business models from the production and one-off sales of boxed games for home game consoles, produced by developers working with games publishers and retailed in bricks-and-mortar shops, to online distribution of games for a variety of platforms (mobile tablets, phones, and hand-held consoles, as well as desk or TV consoles).[103]

In all of these developments it must be remembered, however, that it is not just digital technology that has caused disruption. The combined impact of global economic integration, liberalisation, and industry conglomeration with inter-connected broadcasters, producers and distributors, has also had its impact on the creative industries, disrupting conventional value appropriation models, to which we now turn.

3.3 Capturing value

The production of value requires investment, in whatever form, for example time (including the substantial training or years of practice undergone by practitioners), money, infrastructure, etc. A key concern for market actors is how to ensure return on their investment and secure future revenues, thus raising issues of how value is captured and the role of intellectual property in this process. Value has always been a concern within the cultural and creative industries. 'The immateriality of symbolic artefacts, the ease with which they are copied and the fact that they are not destroyed in consumption means that "they tend towards the condition of a public good". In this context, cultural industries need to find the means of establishing boundaries around, and legitimate claims to their products'. [104] Indeed, in addition to digital changes in delivery methods or concomitant with them is the growth of what Toynbee calls an 'entitlement philosophy'[105], the expectation that online content should be free, the view that the internet is a 'common carrier rather than a publishing medium'. The ever-increasing quantity of freely available creative content raises issues of problems of infringement and enforcement for sectors such as music, film, TV programmes, books, video games and computer software.[106]

As the challenge to value capture has disrupted traditional models, some industries, for example music and film, have been predicting their own demise, claiming that easy duplication and sharing, and thus 'piracy', or copyright infringement, is destroying their bottom line; warning that if left unchecked, not only will the big producers suffer, but also content creators will be deprived of the means to make a living. Indeed, companies are often

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[102] B Klein, ''The new radio': music licensing as a response to industry woe' (2008) 30(4) Media, Culture & Society, 463-478.

[103] N Searle and G White G, 'Business Models' in R Towse and C Handke (eds), *Handbook on the Digital Creative Economy* (Edward Elgar 2013) 45-56.

[104] Garnham 1990 in Toynbee (n67), 6

[105] Toynbee (n 67) 23.

[106] Kantar Media, 'Online Copyright Infringement Tracker. Latest wave of research Mar 16 - May 16' (Cardiff: The Intellectual Property Office 2016).

locked-in to particular value-creating practices or operational patterns, investing enormous resources and 'creative potential' in order to 'maintain problematic strategies rather than explore new ones'.[107] Established record companies, for example, fought to preserve the 'dominant music-as-commodity' model[108] in order to continue exploiting their enormous music catalogues, aided by various forms of DRM protection. Established publishers of content in books and film have followed similar logics, but the internet's introduction of distribution intermediaries has challenged these models, for example with Apple iTunes' pay-as-you-go purchasing, and the pay-monthly model exemplified by Spotify. Music streaming now results in low returns for musicians, who have to attract significant numbers of hits to achieve any revenue. However, given that low-cost dissemination is now something of a fait accompli, musicians have learned to seek remuneration from other streams and residual and ancillary markets, such as concerts and licensing music for commercial uses, and variations on traditional commodities such as CDs and vinyl.

In book publishing, turn-of-the-millennium predictions of multi-media conglomerates buying out small publishers, recasting their business models as revenue generators for the betterment of the corporation as a whole, of enforced media convergence and the subjugation of the printed book, have not fully come true. Indeed, the revenue model prevalent in other media, of advertising as a ubiquitous accompaniment to digital content, has yet to take hold,[109] although recent industry reports find exceptions.[110] Instead publishers are adjusting their business models to work with both convergence, i.e., exploiting intellectual property across the evolving media and platforms, and divergence, continuing to work with printed as well as digital products, particularly succeeding with niche audiences, national/linguistic markets and specialist sellers in the 'long tail'.[111] While the sector has seen major disruption, with books and readers morphing to e-books and e-readers, multi-volume sets becoming multi-media CD-ROMs, then interactive websites and mobile apps, and libraries and bookstores being usurped (especially in the US) by online libraries and retailers, for publishers the aim remains the same–to invest, exploit and promote authors' intellectual property, while generating profit shares for themselves.[112]

This, however, requires that publishers possess adequate rights to suitably fashion the intellectual property. Having played an integral role in the early development of copyright law, the sector has always operated within a strong legal framework for transactions between authors and publishers.[113] This focus continues as publishers add digital rights into their

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[107] W Rothmann and J Koch, 'Creativity in Strategic Lock-ins: The Newspaper Industry and the Digital Revolution' (2014) 83 Technological Forecasting and Social Change 66.

[108] L Dobusch and E Schüßler, 'Copyright Reform and Business Model Innovation: Regulatory Propaganda at German Music Industry Conferences' (2014) 83 Technological Forecasting and Social Change, 24-39.

[109] Grewar and others (n 76).

[110] K Lew, 'DIY intellectual property: How Publishers Develop, Exploit and Deploy Their Own Intellectual Property' (*Publishing Trends*, 11 December 2012) <www.publishingtrends.com/2012/12/diy-ip-how-publishers-develop-exploit-and-deploy-their-own-ip/ > accessed 2 November 2016.

[111] Anderson 2005 in Rønning and Slaata (n 71); Lew (n 104); Grewar and others (n 72).

[112] Grewar and others (n 76); Rønning and Slaata (n 71).

[113] Grewar and others (n 76).

contract negotiations with authors and agents. Publishers are 'future-proofing' IP, aiming to cover potential products 'in all forms known now and yet to be invented'[114], while also re-negotiating contracts for older intellectual property to enable its adaptation to digital forms. Some publishers are seeking to develop more of their own, original IP via in-house creatives, reducing costs and risks further so they can experiment with new models.[115] Publishers also are creating and capturing value by looking beyond the e-book to printing on demand, creating 'vooks', or books enhanced with audio and video content[116] and linked to web-based games and communities;[117] collaborating across sectors to produce interactive mobile apps and video marketing; and promoting discoverability and reader loyalty via social media, targeted email, and personal author-reader communications.[118] Once distributed, digital technology enables publishers' greater control over consumption practices via DRM tools.

In TV, although UK legislation (Communications Act, 2003), has supported independent production companies, allowing them greater control over secondary rights, independents still have the risk and the cost of absorbing production costs for pitches if commissions aren't secured upfront.[119] Faulkner and others show the rapid consolidation in the independent TV sector,[120] in terms of market share and total sectoral revenues, with giant companies such as Endemol UK and All3Media dominating within this. As publicly listed super-indies are under pressure to produce programming that delivers a return, 'inorganic growth and the exploitation of rights become the principal objects of management'.[121] In these circumstances, there is a tendency for the business model 'to retain control over rights and produce high-volume mass market drama with inexpensive talent', and format-based programmes: the 'business is about making money when you're asleep and you can do that with rights'.[122] As Faulkner and others conclude 'the emphasis on creating and exploiting rights in formats, programmes and merchandising fits uneasily with any idea of creativity involving non-routine, the novel and the disruptive'.[123] The focus for independents thus becomes accumulating 'a suite of programmes that other people want to exploit' to guarantee a high pay-out when it comes to selling the company.[124]

Google's purchase of YouTube in 2006 bought it a greater role in the burgeoning online video market, harnessing the IT company's resources to create network and economic capital through advancing 'connected viewing', or integrated 'digital technology and socially

[114] Grewar and others (n 76) 168.
[115] Lew (n 104); Grewar and others (n 72).
[116] Rønning and Slaata (n 71).
[117] Lew (n 104).
[118] Grewar and others (n 76); Rønning and Slaata (n 71).
[119] Zoellner (n 86).
[120] S Faulkner and others, 'Art for Art's Sake or Selling Up?' (2008) 23(3) European Journal of Communication, 295-317.
[121] Ibid 306.
[122] Ibid 307.
[123] Ibid 307.
[124] Ibid 313.

networked communication with traditional screen media practices'.[125] In doing so, it threatens significant portions of the established media's audiences.[126] Initially, YouTube's amateur UGC included much copyrighted music and film video, either directly pirated by its users or restaged in their 'homecasts', and thus attracted infringement lawsuits by the major, typically Hollywood-based, media companies that owned the properties.[127] In response, YouTube introduced software identifying when professionally produced content is uploaded; the company then offers rights holders a removal of the IP or persuades them the content's continued display on the video sharing platform will not harm but help its exploitation, by winning increased audience exposure and generating advertising revenue via Google's AdSense programme.[128] Indeed, the first years of YouTube's history are chiefly marked by its shift from a pre-Google, 'ad-free' business model, to an 'ad-friendly' model following Google's purchase.[129] Seeking more professional content, YouTube began approaching media producers to broadcast their branded content on dedicated YouTube channels and split the advertising proceeds, an initiative which has grown to include more than one million partnerships worldwide as of 2016.[130] Further, YouTube has spawned a new breed of industry intermediary to work between it and its 'exploding' numbers of partners to produce and manage content: the multichannel networks. MCNs 'seek to stabilize runaway growth and respond to 'glocal' dynamics, whilst also justifying their additional stake in the revenue stream by providing a creole mix of talent agency, big data analytics, public relations and marketing'.[131] The MCNs themselves have had to evolve into multiplatform networks (MPNs), which reconfigure content for sharing across the multiple content providers (such as Instagram, Snapchat, Vimeo) that consumers access.[132] While these and other strategies have not fully eradicated intellectual property infringement challenges for YouTube, they have fuelled the platform's radical growth in partnerships, content volume and revenue, while winning away a major portion of the television sector's advertising revenue.[133] The initiatives also have been interpreted as a significant shift by YouTube, from its UGC and communitarian origins to becoming a professionalised network of producers and intermediaries.[134]

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[125] J Holt and K Sanson (2013:1) in S Cunningham, D Craig and J Silver, 'YouTube, multichannel networks and the accelerated evolution of the new screen ecology' (2016) 22(4) Convergence: The International Journal of Research into New Media Technologies 376, 377.

[126] S Cunningham, D Craig and J Silver, 'YouTube, multichannel networks and the accelerated evolution of the new screen ecology' (2016) 22(4) Convergence: The International Journal of Research into New Media Technologies 376, 376-391.

[127] Cunningham and others (n 120); Kim J, 'The institutionalization of YouTube: from user-generated content to professionally generated content' (2012) 34(1) Media Culture & Society, 53-67.

[128] Ibid.

[129] Kim (n 121) 56.

[130] Cunningham and others (n 120).

[131] Cunningham and others (n 120) 377.

[132] Cunningham and others (n 120).

[133] Cunningham and others (n 120) 380.

[134] Cunningham and others (n 120); Kim (n 121).

Fashion design, as an archetypally weak appropriability industry, i.e., having weak IP enforcement rights, has developed its own 'protection' in the form of induced obsolescence--a variation on the first-mover strategy, or innovating to stay ahead of competitors—via high-speed diffusion of ideas 'leading to dissipation of (social) value'.[135] In other words, once a style or fashion has been adopted by too many it is dropped by fashion leaders (thus leading to the ultimate critique of 'that is so-o-o last year'), in favour of the latest designs, and thus the cycle continues. 'Anchoring' of ideas,[136] through their social definition, communication, and critiques, provides designer identification and also serves to ensure a degree of industry stability within a weak IP environment.

As a digitally native industry, the games sector is characterised by more rapid innovation than others and has experimented with much innovation in business models, driven by content creation and its use rather than by research and development findings, as in most other sectors.[137] From box purchase or upfront payments and MMOGs based on monthly subscriptions (with MMOG players known to continue their subscriptions for up to 5 years, playing more than 20 hours per week,[138] the more recent shift is to business models for mobile games and their 'freemium' or 'free-now, buy-later business model'.[139] While the games are free or virtually free to access, players make micropayments to buy in-game assets such as identities, powers, tools etc.--the cost of which may total more than a game on monthly subscription.[140]

Each business model has implications for the timing and quantity of revenue generated and thus resources created for further development by the production company, as well as for user engagement and intellectual property management. In older models such as MMOGs, players not only develop community relations with other players and may take co-creation roles in modifying games, but also develop virtual assets (upgraded character features, tools etc.) having potentially significant exchange value,[141] as in the case of Sony's *EverQuest* game. Despite legal action to prevent users from selling their virtual characters and weapons via Ebay and Yahoo, *EverQuest* players managed to sell between $200 million and $400 million of such assets annually via other websites.[142] Freemium model users play games for less time and tend not to interact with other users as much. Rather than making software

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[135] Raustiala and Sprigman (n 56).

[136] Ibid.

[137] Searle and White (n 103); J Banks and S Cunningham, 'Games and entertainment software' in R Towse and C Handke (eds), *Handbook on the Digital Creative Economy* (Edward Elgar 2013) 416-428.

[138] Humphreys (n 61).

[139] Lin H and Sun C-T, 'Cash Trade in Free-to-Play Online Games' (2011) 6(3) Games and Culture 270-87.

[140] Lin and Sun (n 133); Banks and Cunningham (n 131); Thompson and others (n 65); Scholz E, 'Business models for digital goods: video games (free-to-play games)' (*IPdigIT*, 18 March 2015a) <www.ipdigit.eu/2015/03/business-models-for-digital-goods-video-games-free-to-play-games/> accessed 17 November 2016; EM Scholz, 'Business models for digital goods: video games (episodic games)' (*IPdigIT*, 25 March 2015b) <www.ipdigit.eu/2015/03/business-models-for-digital-goods-video-games-episodic-games/> accessed 17 November 2016.

[141] Grimes (n 63)

[142] Ibid.

modifications themselves or with others in a community, they simply buy game enhancements, thus taking on a more consumer-like role with less awareness of game IP and its ownership.[143] The model focuses on the casual gaming sector and is now ubiquitous, enabled by the lower costs for both players and developers of its smartphone technology. Small developers are able to create the simpler mobile games necessary for the phone platforms and self-publish them via Apple's AppStore and other retailers, thus creating the illusion of a viable business model for third-party developers. However, while barriers to entry are reduced, developers retain the risk in developing the games, which face enormous competition, with some 1000 games uploaded each day to AppStore.[144]

The goal for most production companies is to develop their own intellectual property in order to exploit it across platforms, balancing their portfolios with games at different stages of market maturity, and with different risks. They may also seek to build their brands by expanding their user bases across platforms and languages, merchandising non-games branded products, or by partnering brand owners in other sectors to feature their products within games.[145] However the need to secure steady income often drives developers to 'work-for-hire', creating content and programmes for licensed products, for other producers, including those in non-games sectors.[146]

As examples from music, publishing and games illustrate, although there has been a democratisation of access brought about by digitisation, the control over the productive means such as servers, software, networking platforms, search algorithms etc. has been concentrated in the hands of a few oligopolistic structures of power, making the realization or capturing of value for independents difficult, as seen in the keen pricing of games, books and music etc. With this scenario comes the recognition that 'an advantageous appropriability regime is not always "tight" or characterized by strong intellectual property protections'[147]. Business models for free provision of cultural goods are pursued by an increasing number of market actors in the copyright industries.[148] With predictions that 'the economy of the future will be based more on relationship than possession'[149],indications are that defining and securing value will be based on 'a continued and deepening interaction with an audience or client base'[150] and social media based models, with continued experiments with Creative Commons (CC) licensing and sharing via open platforms such as Flickr and Facebook.[151] Foong describes models using CC licenses which emphasise value built on consumer contact with the product creators ('Connect with Fans') or upon licensing portions of products in

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[143] Lin and Sun (n 133).
[144] Thompson and others (n 65).
[145] Institute for Capitalising on Creativity, 'Blog: Make your assets sweaty' (ICC 2014) <www.st-andrews.ac.uk/icc/research/grantprojects/capitalisingoncreativityesrc/knowledgetransferpartnershipsktps/intellectualpropertymanagement/#gamesblog> or <www.create.ac.uk/?s=sweaty> accessed 13 November 2016.
[146] ICC (n 140); Thompson and others (n 65).
[147] Pisano (n 55) 1122.
[148] Dobusch and Schüßler (n 108).
[149] Howkins (n 1) 90.
[150] Ibid.
[151] D Bollier, 'Intellectual property in the digital age' in B Walmsley (ed), *Key Issues in the Arts and Entertainment Industry* (Goodfellows Publishers Ltd 2011).

order to motivate 'Reason to Buy'.[152] Within certain creative disciplines, free digital distribution of content may be part of a business model in which it serves as promotion for live performances. In other disciplines, however, no such alternative sources of income exist.

4. Conclusion: The relationship between business models and intellectual property

Digitisation is shaping the way new ventures and businesses are being financed (for example, crowdfunding), work is being created and organised (for example, co-working spaces), new combinations are being created (within networks), goods are being delivered (for example, demand-based, direct distribution), and indeed value is being captured. Boundaries are very fluid as IP is being fashioned for multiple platforms, and new products challenge old boundaries. For example, 'content industries' is perhaps a better descriptor than creative industries, enabling the inclusion of video, social media, UGC, mashups and fan outputs; meanwhile the old (literary) publishing sector has to be distinguished from what now encompasses games publishing, news publishing, video publishing etc. 'Advertising' might be better thought of as a cross-media business strategy rather than a creative enterprise in its own right. These major disruptions and constant evolution of creative content, technology and networks mean the challenges to business models are continually changing too. We have seen that there is no established understanding of business models, its use in the literature being sometimes very general and not necessarily related to the creation, delivery and capture of value. It might be said that every organisation has, and has always had, a business model, irrespective of whether this has been clearly articulated, in that it must secure revenue to survive. This, however, does not render 'business model' a very useful concept. At a more generic level, the term seems to have come into use as a response to disruption brought about by digital (and changing ownership of dominant, mainly delivery-based conglomerates and many small production companies). Given the impact of these changes are still ongoing, definitive statements on business models, i.e., that there are dominant business models, may not be forthcoming until responses become more stabilised. We may however agree with a description[153] that 'it is cultural distribution, not cultural production, that is the key locus of power and profit.' And within this, the IP legislative framework lags rather than leads.[154]

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[152] C Foong, 'Sharing with Creative Commons: A Business Model for Content Creators' (2010) Platform: Journal of Media and Communication, 64-93.

[153] N Garnham, 'Concepts of Culture: Public Policy and the Cultural Industries' (1987) in Gray A and McGuigan J, *Studies in Culture: An Introductory Reader* (Arnold 1997) 58.

[154] R Towse, 'Economics of music publishing: copyright and the market' (2016) Journal of Cultural Economics 1, 1-18.