

CULTIVATING CAPABILITIES FOR CREATIVE INDUSTRY UPSTARTS¹

Sean A. Pager²

Recent scholarship and policy debates over copyright protection have been cast as a showdown between large commercial content producers and everybody else: Big Content vs. technology companies; Big Media vs. amateur creators; moguls vs. consumers; copyright industry exports vs. developing country needs; Big Publishers vs. the visually impaired; etc.³ As a consequence, global discussions of cultural policy have polarized between “pro” and “anti-IP” positions. On one side, Big Media seek to buttress existing intellectual property regimes in what they see as an existential battle against digital piracy.⁴ On the other side, critics dwell on the costs of

1. The term “Creative Upstarts” was first coined for the “IP for Creative Upstarts” conference convened by Michigan State University College of Law’s Intellectual Property, Information & Communications Law Program. As elaborated further below, “Creative Upstarts” encompasses a broad set of commercial actors in the creative industries from independent artists in the US to emerging content industries overseas who face significant resource constraints in navigating the copyright system. Held in East Lansing, November 9-10, 2012, the “Creative Upstarts” conference attracted a diverse mix of academics, legal practitioners, creative artists, and government officials for two days of roundtable panel discussions and paper presentations focused on making copyright system and/or alternative paradigms work better for Creative Upstarts. See <http://law.msu.edu/creative/>. The articles in this special symposium issue of the *International Law Review* comprise a selection of papers presented at the conference. The introduction that follows is based on the conference prospectus as well as opening remarks delivered at the conference itself.

2. Associate Professor, Michigan State University College of Law; Associate Director of Intellectual Property, Information & Communications Law Program.

3. See generally YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 393-97 (2006); LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* 25-33 (2008); Sean A. Pager, *Accentuating the Positive: Building Capacity for Creative Industries into the Development Agenda for Global Intellectual Property Law*, 28 AM. U. INT’L L. REV. 223, 229-31 (2012) [hereinafter Pager, *Accentuating*]; Maricel Estavillo, *US Court Rules on Fair Use for Blind Users, Digitisation, Amid Treaty Talks*, INTELLECTUAL PROPERTY WATCH (Oct. 19, 2012), <http://www.ip-watch.org/2012/10/19/us-court-rules-on-fair-use-for-blind-users-digitisation-amid-treaty-talks/>; Catherine Saez, *NGO Views on WIPO Treaty for Blind Reveal Difficulty in Reaching Accord*, INTELLECTUAL PROPERTY WATCH (Nov. 22, 2012), <http://www.ip-watch.org/2012/11/22/ngos-views-on-wipo-treaty-for-blind-reveal-difficulty-in-reaching-accord/>; Alan Story, *Burn Berne: Why the Leading International Copyright Convention Must Be Repealed*, 40 Hous. L. Rev. 763 (2003); THE REPUBLICAN STUDY COMMITTEE, RSC POLICY BRIEF: THREE MYTHS ABOUT COPYRIGHT LAW AND WHERE TO START TO FIX IT 4 (Nov. 16, 2012), available at <http://archive.org/details/RscThreeMythsAboutCopyrightLaw> [hereinafter THE REPUBLICAN STUDY COMMITTEE].

4. See, e.g., Cary H. Sherman, *What Wikipedia Won’t Tell You*, N.Y. TIMES, Feb. 7, 2012, available at <http://www.nytimes.com/2012/02/08/opinion/what-wikipedia-wont-tell-you>

intellectual property rights, including restraints on free speech and access to information.⁵ Copyright laws stand accused of lavishing “corporate welfare” on undeserving oligarchs at the expense of alternative “free culture” models.⁶

The clash between these sharply drawn ideological positions has played out in a series of battles in recent years: the abortive SOPA/PIPA bills in the US Congress,⁷ the ACTA and TPP treaties internationally,⁸ and the ongoing arguments over implementation of the WIPO Development Agenda.⁹ Lost in such debates are the voices of broad swathes of the creative content industries, whose interests do not neatly align with either the “pro” or “anti-IP” camps. This symposium issue highlights some of these neglected voices. It introduces a new rubric, “Creative Upstarts,” to characterize this diverse mix of commercial actors who fall outside the narrow dichotomies around which current copyright discourse is configured. Creative Upstarts encompass both independent artists and producers in developed countries as well as emerging content industries such as Nigeria’s “Nollywood”¹⁰ and Brazil’s *tecnobrega* music scene.¹¹ Recent debates on intellectual property and information policy have neglected Upstart viewpoints, and existing discourse has arguably suffered as a result.¹²

u.html; Dave Neal, *RIAA Chief Wails About SOPA Opposition*, THE INQUIRER (Feb. 9, 2012), <http://www.theinquirer.net/inquirer/news/2145003/riaa-chief-wails-sopa-opposition>. See also *The Internet Blackout’s Grey Area*, MUSIC NOTES BLOG (Feb. 8, 2012), http://www.riaa.com/blog.php?content_selector=riaa-news-blog&blog_selector=Blackout-Grey-Area-&news_month_filter=2&news_year_filter=2012.

5. LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 22-25, 276-86 (2004); see also BENKLER, *supra* note 3, at 26.

6. THE REPUBLICAN STUDY COMMITTEE, *supra* note 3, at 3; Eben Moglen, *Anarchism Triumphant*, <http://moglen.law.columbia.edu/publications/anarchism.html> (last visited Feb. 16, 2013).

7. See *Everything is Connected: Can Internet Activism Turn Into a Real Political Movement?*, THE ECONOMIST, Jan. 5, 2013, at 17.

8. See, e.g., Susan K. Sell, *TRIPS Was Never Enough: Vertical Forum Shifting, FTAs, ACTA, and TPP*, J. INTELL. PROP. L. 447 (2011) (describing concerns raised by push toward “TRIPS-plus” standards through bilateral, regional, and plurilateral agreement); Peter K. Yu, *Six Secrets (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975, 1024-58 (2011).

9. Neil Weinstock Netanel, *Introduction: The WIPO Development Agenda and Its Development Policy Context*, in THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES 1, 2-6 (Neil Weinstock Netanel, ed., 2009); see also Sean Pager, *TRIPS: A Link Too Far—A Proposal for Procedural Restraints on Regulatory Linkage in the WTO*, 10 MARQ. INTELL. PROP. L. REV. 215, 249-51 (2006) (describing how sharply polarized North-South viewpoints on global IP policy have clashed across multiple fora and issues).

10. See Sean Pager, *Folklore 2.0: Why Remixing Traditions is the Best Way to Preserve it*, 2012 UTAH L. REV. 1835, 1851-60 [hereinafter Pager, *Folklore 2.0*].

11. See Ana Santos, *Nurturing Creative Industries in the Developing World: The Case of Alternative Systems of Music Production and Distribution*, 21 MICH. ST. INT’L L. REV. (2013).

12. See Pager, *Accentuating*, *supra* note 3, at 230-36.

While most Creative Upstarts could benefit from copyright protection at some level, their interests are often more nuanced than the maximalist positions advanced by Big Media. Creative Upstarts are often simultaneously producers and consumers of creative content. As such, they are both helped *and* hindered by IP rights. It follows that Creative Upstarts have an interest in achieving a workable balance between the rights of copyright owners and users, between strong protection and reasonable limitations/exceptions. Creative Upstarts may also be less wedded to the existing business models and better positioned to exploit alternative paradigms than traditional media companies. Yet, unlike amateur content creators, Creative Upstarts are commercial entities who ultimately do need to monetize their creative investments. As such, their interest lies in finding a pragmatic solution to funding cultural production rather than trading rhetorical ripostes over “theft” and “piracy” vs. “intellectual monopolies,” “censorship,” and “commodification.”¹³

A Creative Upstarts perspective offers more than just a voice of moderation in an otherwise polarized debate. Attending to Creative Upstart interests also has broader normative implications for copyright law itself. An Upstart perspective can help us move beyond the narrow fault-lines around which existing arguments over copyright policy are waged. Rather than arguing over whether there should be “more” or “less” copyright protection, a Creative Upstart perspective highlights a different set of issues concerned with how these rights are used (or abused) in practice. Focusing on Creative Upstarts shifts our attention away from the particular rights and limitations codified in the statute-books, and directs it instead to capacity constraints that inhibit Upstarts from benefiting from such legal provisions. We can then explore strategies to overcome such constraints and nurture the capabilities for Upstarts to operate more effectively within the copyright system.

While Creative Upstarts represent a heterogeneous group with diverse needs, capacity constraints arguably serve as the defining feature that unites them.¹⁴ Even in markets with well-developed legal institutions, Creative Upstarts confront informational and transactional hurdles that often prevent them from exploiting their intellectual property effectively. Whereas Big

13. See, e.g., Sherman, *supra* note 4; MICHELE BOLDRIN & DAVID K. LEVINE, *AGAINST INTELLECTUAL MONOPOLY* 244 (2008); LESSIG, *supra* note 3, at 33; BENKLER, *supra* note 3, at 210; Fiona Macmillan, *Human Rights, Cultural Property and Intellectual Property: Three Concepts in Search of a Relationship*, in *INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS IN A DIGITAL ENVIRONMENT* 81 (2008).

14. The Creative Upstarts rubric partially maps onto several other dichotomies: “small media” vs. “big”; “alternative” vs. “mainstream”; “independent” vs. “corporate”; “developing world” vs. “developed” (or North/South, Western/non-Western, center/periphery); “emerging” vs. “incumbents”; “outsiders” vs. “insiders”; etc. However, given the diversity of actors embraced within this rubric, a functional definition focused on capabilities offers the most workable basis to categorize the group as a whole.

Content producers have legions of well-paid lawyers and lobbyists at their beck-and-call and can direct vast resources to administer and enforce their IP rights. Creative Upstarts operate under conditions of resource scarcity. Pursuing litigation or even seeking advice from legal counsel can be prohibitively expensive.¹⁵ Given the baroque complexities into which current copyright laws have devolved, Upstarts often lack even a basic awareness of their legal rights and, as a result, fail to take even common-sense measures necessary to use the system to their advantage. Such forgone potential undermines the incentives the copyright systems seek to foster.¹⁶

Capacity constraints for content industries based in developing countries can be even more severe, extending to public sector institutions as well. Such institutional failures effectively nullify the value of legal rights on paper.¹⁷ Moreover, the transnational flow of content in a globalized, digitized world, only accentuates the capabilities divide between copyright “haves” and “have nots.” While alternative revenue models and licensing regimes offer potential solutions to overcome such obstacles, here too, constraints due to lack of information and transactional capacity hamper the ability of Upstarts to avail themselves of these options.

Big Content producers not only have vastly superior legal capabilities, they also enjoy unmatched access to global distribution channels,¹⁸ the commercial clout to cut private deals for privileged treatment on

15. See generally Frank Martinez, *How Would the Creation of a Special Copyright Small Claims Court Affect Designers?*, AIGA.ORG (Oct. 18, 2012), <http://www.aiga.org/creation-of-copyright-small-claims-court/>; Rochelle C. Drefuss, *Re: Small Copyright Claims Court* (Sept. 18, 2012), available at http://www.copyright.gov/docs/smallclaims/comments/noi_10112012/rochelle_drefuss.pdf; Jean M. Prewitt, *Re: Request for Written Comments from the Public Issued on October 24, 2011 by the U.S. Copyright Office in Connection with the Treatment of Small Copyright Claims* (Jan. 17, 2012), available at http://www.copyright.gov/docs/smallclaims/comments/26_ifa.pdf; David P. Trust & Maria D. Matthews, *Second Comments on Alternative Dispute Resolution Mechanism* (Oct. 19, 2012), available at http://www.copyright.gov/docs/smallclaims/comments/noi_10112012/professional_photographers_america_addendum.pdf; Ben Sheffner, *Can You Sue in State Small Claims Court Over Copyright Infringement? Sorry, But No*, COPYRIGHTS & CAMPAIGNS (Aug. 16, 2009), <http://copyrightsandcampaigns.blogspot.com/2009/08/can-you-sue-in-state-small-claims-court.html> (explaining how copyright disputes are governed exclusively by federal jurisdiction; hence authors are precluded from pursuing claims through state small-claims systems).

16. See generally Jeff Price, *How They Legally Steal Your Money*, TUNECORE (July 7, 2011), <http://blog.tunecore.com/2011/07/how-they-legally-steal-your-money.html> (noting substantial sums of money rightfully due to artists and publishers from overseas CROs often go uncollected).

17. See Pager, *Accentuating*, *supra* note 3, at 234.

18. Sean A. Pager, *Beyond Culture vs. Commerce: Decentralizing Cultural Protection to Promote Diversity Through Trade*, 31 NW. J. INT'L L. & BUS. 63, 130, n.395 (2011) (describing the stranglehold major Hollywood studios hold over global distribution) [hereinafter *Beyond Culture vs. Commerce: Decentralizing Cultural Protection to Promote Diversity Through Trade*].

enforcement¹⁹ and licensing,²⁰ and a sympathetic ear from government.²¹ Given such stark asymmetries in capabilities, it is easy to see why copyright skeptics charge that the benefits of the current copyright system are reserved for a privileged few: a handful of superstar artists, greedy moguls, and the dinosaur industries that support them.²² One can debate the truth behind such caricatures.²³ However, rather than assuming such critiques devalue the

19. See, e.g., Annemarie Bridy, *Graduated Response American Style: 'Six Strikes' Measured Against Five Norms*, 23 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1, 5, n.11 (2012) (describing private enforcement deal cut between Big Content rights holders and leading ISP services); Keith Regan, *YouTube Scores Licensing Deal With NBA*, *E-COMMERCE TIMES* (Feb. 27, 2007), <http://www.ecommercetimes.com/story/55996.html> (describing private enforcement deals with YouTube); Brian Stelter, *Some Media Companies Choose to Profit From Pirated YouTube Clips*, *N.Y. TIMES* (Aug. 15, 2008), http://www.nytimes.com/2008/08/16/technology/16tube.html?_r=0; Branwen Buckley, *SueTube: Web 2.0 and Copyright Infringement*, 31 *COLUM. J. L. & ARTS* 235, 262-63 (2008).

20. See Edward Jay Epstein, *Hollywood's Profits, Demystified: The Real El Dorado is TV*, *SLATE.COM* (Aug. 8, 2005), http://www.slate.com/articles/arts/the_hollywood_economist/2005/08/hollywoods_profits_demystified.html (explaining how studio majors exploit corporate affiliations to obtain privileged distribution deals with TV channels); Mike Issac, *Disney Inks YouTube Content Deal to Lure New Audiences*, *WIRED* (Nov. 7, 2011), <http://www.wired.com/business/2011/11/disney-youtube-content-deal/> (describing cross promotion deal between Disney and YouTube).

21. Big Content's sympathetic reception in government springs from many sources: direct lobbying, campaign contributions, and the infamous "revolving door" by which key personnel often move from government to industry, and vice versa. See Justin Elliott, *Dodd Accused of "Bribery" over SOPA Remarks: Hollywood's Top Lobbyist Warns Democrats that His Industry Will Cut off the Money Flows If They Don't Get in Line*, *SALON.COM* (Jan. 23, 2012) (referring to comments made by Christopher Dodd, the head of the Motion Picture Association of America, and himself a former US Senator), http://www.salon.com/2012/01/23/dodd_accused_of_bribery_over_sopa_remarks/; William New, *Revolving Door: US Copyright General Counsel Joins Music Industry*, *INTELLECTUAL PROPERTY WATCH* (Aug. 29, 2012), <http://www.ip-watch.org/2012/08/29/revolving-door-us-copyright-general-counsel-joins-music-industry/>; Zaid Jilani, *How the Revolving Door May Help Kill Competition in the Music Industry*, *REPUBLICREPORT.ORG* (June 21, 2012), <http://www.republicreport.org/2012/revolving-door-competition-music-industry/>; Peter Lattman, *Cravath Hires 2nd Official from Obama Administration*, *DEALBOOK—N.Y. TIMES* (Feb. 6, 2013), <http://dealbook.nytimes.com/2013/02/06/cravath-hires-2nd-top-official-from-obama-administration/> (just six days after stepping down as head of the USPTO, David Kappos signed on as a partner at Cravath, Swaine & Moore); Joelle Tessler, *Meredith Attwell Baker, FCC Commissioner, Joins NBC Universal 4 Months After Approving Comcast Merger*, *HUFFINGTONPOST.COM* (May 11, 2011), http://www.huffingtonpost.com/2011/05/11/meredith-attwell-baker-comcast-nbcuniversal_n_860889.html (Commissioner Baker left the FCC for Comcast).

22. See, e.g. Peter C. DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives* (Northwestern Law & Econ. Research Paper No. 13-01, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2199058.

23. A more realistic appraisal of benefits would take into account the direct and indirect employment benefits that Big Content productions generate in drawing on the talents of a diverse array of supporting artists, actors, and technicians, which, in turn, yields positive spillovers in nurturing careers and sustaining a shared creative infrastructure that Upstarts can also take advantage of. See *Beyond Culture vs. Commerce: Decentralizing Cultural Protection to Promote Diversity Through Trade*, *supra* note 18, at 95-96, 127.

very idea of copyright protection, a more fruitful question is: how can we improve on the status quo to ensure a more equitable distribution of benefits? As it stands, the copyright system may not be configured with the interests of Creative Upstarts at heart. However, it should be.

Creative Upstarts exemplify the potential for creative industries to innovate both commercially and creatively. As digital media have lowered the entry barriers to produce and distribute content, Creative Upstarts are embracing the opportunities. Independent artists and filmmakers are bypassing record labels and studio deals in favor of alternative business models, relying on online platforms to connect with their fans and funders.²⁴ Fledgling industries in developing countries are projecting their diverse voices onto the global stage tapping dispersed audiences through novel distribution channels.²⁵

Creative Upstarts are often less constrained creatively by the imperatives of the mass market than traditional media giants. They can afford to take the chances that lead to artistic breakthroughs.²⁶ Look at the recent Academy Award-winning Big Picture films. They seldom come from the major studios.²⁷ Similarly, you rarely find path-breaking new music on the top 40 lists dominated by major record labels.²⁸ Time and again, artistic innovation starts on the fringes and moves to the mainstream only later.²⁹

24. See Jon M. Garon, *Digital Hollywood 2.0: Reimagining Film, Music, Television and Publishing Distribution as a Global Artist Collaborative*, 21 MICH. ST. INT'L L. REV. (2013).

25. See Ana Santos, *supra* note 11; Pager, *Accentuating the positive*, *supra* note 3, at 242-45; Michael M. Epstein, *Mutiny on the Pirate Ship: Indigenous Infringement and the Development of a Media Asset*, 21 MICH. ST. INT'L L. REV. (2013) (citing success of previously obscure Korean hip-hop artist Psy, whose "Gangnam Style" video has become the number one all-time single on YouTube, as exemplifying the potential for global creators to bypass conventional distribution channels and "go viral").

26. Guy Pessach, *Copyright Law as a Silencing Restriction on Noninfringing Materials: Unveiling the Scope of Copyright's Diversity Externalities*, 76 S.CAL L. REV. 1067, 1090 (2002).

27. See Jean M. Prewitt, *supra* note 15, at 1 (describing hefty share of Best Picture Oscars won by independent filmmakers at Academy Awards in recent decades).

28. See generally Jennifer Castle, *How Record Labels are Stifling Creativity More Than Ever*, TOMCLEMENTS.WORDPRESS.COM (May 6, 2012), <http://tomclements.wordpress.com/2012/05/06/how-record-labels-are-stifling-creativity-more-than-ever/>; Chuck Taylor, *Flavorless Top 40?*, BILLBOARD-THE INTERNATIONAL NEWSWEEKLY OF MUSIC, VIDEO AND HOME ENTERTAINMENT, Jun. 16, 2007, at 6; Mike Lynn, *Mainstream Music Sucks*, MIKE LYNN BLOG (Mar. 18, 2012), <http://mikelynn2626.blogspot.com/2012/03/mainstream-music-sucks.html>; Calvin Wilson, *Jazz Trumpeter Aims to Avoid Making "Boring" Music*, STLTODAY.COM (Mar. 23, 2012), http://www.stltoday.com/entertainment/music/jazz-trumpeter-aims-to-avoid-making-boring-music/article_c41c4262-1d8d-5dd4-b769-5b4a743803cb.html; Editorial, *The Development of Early Electronic Music: From John Cage to Karlheinz Stockhausen*, MAPOFMEANING.COM (Mar. 30, 2010), <http://mapofmeaning.com/2010/03/30/the-development-of-early-electronic-music-from-john-cage-to-karlheinz-stockhausen/>; Robert Helbig, *The History of Indie Music*, NBHAP.COM (Sept. 19, 2011), <http://nbhap.com/3619/article-the-history-of-indie-music/>; Jim Paterson, *Electronic Music*, MFILES.CO.UK, <http://www>.

At the same time, as commercial enterprises, Creative Upstarts are capable of far more ambitious and sustained creative investments than amateurs who produce user-generated content. Dancing babies and lolcats can make us smile, but their pleasures are ephemeral. Producing significant works of authorship almost always consumes economic resources on a scale that make external funding/commercial revenues necessary.³⁰ It is this combination of creative innovation and commercial dynamism that makes Creative Upstarts some of the brightest stars in today's artistic firmament.

If we take seriously the promise of copyright laws as an incentive for creative innovation, Creative Upstarts belong at the center of this calculus, and capabilities should be a central focus of copyright policy. For copyright law to unleash the dynamic potential that Creative Upstarts embody, we need to address systemically the capacity constraints that hold Upstarts back. Removing such obstacles could clear a path to reach new horizons in economic and cultural development.

Focusing on capabilities as a key determinant of development is nothing new. Amartya Sen made capabilities the centerpiece of his Nobel prize-winning work, *Development as Freedom*.³¹ For Sen, empowering human beings with the capabilities to actualize their potential assumed an ethical imperative that has powerful ramifications both for human rights and economic theory. Sen argued that freedom should be understood in terms of positive empowerment rather than negative liberties.³² Rather than measuring development based solely on income levels, Sen stressed the empowerment of human potential.³³

Sen's insights hold important lessons for intellectual property law. After all, intellectual property rights are concerned with a kind of development as well.³⁴ To quote the US Constitution, they exist "to promote the Progress of

mfiles.co.uk/electronic-music.htm (last visited Feb. 13, 2013); Michael Azerrad, *Indie Rock's All Grown Up*, WALL ST. J. (June 1, 2012), <http://online.wsj.com/article/SB10001424052702304019404577420593728223160.html>; Ben Sisario, *When Indie-Rock Genres Outnumber the Bands*, N.Y. TIMES (Dec. 31, 2009), http://www.nytimes.com/2010/01/03/arts/music/03indie.html?_r=0; Henry H. Perritt, *Music Markets and Mythologies*, 9 J. MARSHALL REV. INTELL. PROP. L. 831, 851-52 (2010); Fiona, *supra* note 13, at 84.

29. See Pager, *Folklore 2.0*, *supra* note 10, at 1881; see also Epstein, *Munity on the Pirate Ship*, *supra* note 25 (citing hip-hop's origins as community dance music in the Bronx).

30. See Jane Ginsburg, *The Author's Place in the Future of Copyright*, 45 WILLAMETTE L. REV. 381, 387 (2009); see also Peter S. Grant, *The Cultural Tool Kit: Government Measures to Support Cultural Diversity in a Digital Age*, Sept. 27, 2008, available at http://www.fd.ulaval.ca/sites/default/files/recherche/cultural_tool_kit.pdf. Cf. ANDREW KEEN, *THE CULT OF THE AMATEUR: HOW TODAY'S INTERNET IS KILLING OUR CULTURE* 2-3 (2007).

31. See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

32. *Id.* at 18.

33. *Id.* at 24.

34. See TRIPS Agreement, pmbl. (recognizing developmental objectives of IP rights). Framed as individual rights, intellectual property rights are also widely accepted as having human rights dimensions. See UNDHR; Peter K. Yu, *Reconceptualizing Intellectual*

Science and the useful Arts.”³⁵ We give authors exclusive rights to their work for a limited time as an incentive to encourage investment in creative production. But what kind of rights? And how to measure “Progress”?

Economic theories of intellectual property often equate progress with wealth maximization. They treat copyright laws as nothing more than a set of dials to modulate the field strength of market exclusivity to achieve the optimal output-maximizing level of creative rents, with “optimal” defined in terms of market valuations.³⁶ Such narrow conceptions of “Progress” have attracted mounting criticism. Just as Sen argued that “development” should not be reduced to income alone, critics have argued that IP innovation cannot be captured purely in terms of commercial value. Cultural diversity, artistic integrity, personal expression/identity, democratic discourse, cultural dynamism, dissemination of knowledge—all of these afford richer metrics by which Progress can and should be measured.³⁷

Creative Upstarts represent attractive candidates to deliver Progress on all of these scores. From indie artists in Western cities to emerging content industries throughout the developing world, Creative Upstarts encompass some of the most dynamic, most innovative, and most diverse sources of creative expression on the planet. Yet, to unleash their full potential, we need to do more than merely recalibrate the metrics by which we measure Progress. We should also reconsider the means we use to achieve our desired outcomes. For this, we need to take to heart Sen’s other key insight: that development is a function of capabilities as much as legal rights.

Despite endorsing Sen’s call to transcend narrow economic metrics, recent copyright commentary has arguably devoted insufficient attention to Sen’s emphasis on capabilities:³⁸ Sen argued that rights on paper are useless

Property Interests in a Human Rights Framework, 40 U.C. DAVIS L. REV. 1039, 1059 (2007) (which makes Sen’s focus on human empowerment doubly apt in the IP context).

35. U.S. CONST. art. I, § 8, cl. 8.

36. Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L. J. 283 (1996) (criticizing wealth maximization); see also Madhavi Sunder, *IP3*, 59 STAN L. REV. 257 (2006) (criticizing stunted utilitarianism propagated by IP theorists).

37. See, e.g. Netanel, *supra* note 9, at 6 (arguing that copyright laws should aim to maximize democratic discourse); Sunder *supra* note 29 (advocating an approach to IP protection that fosters personal identities and societal enlightenment); WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* 28 (2004) (emphasizing “semiotic democracy”).

38. Moreover, scholars that have explored the intersections between capability theory and copyright have generally done so from a copy-skeptic perspective in which access to information is posited as the source of capabilities and copyright figures as an obstacle to be circumvented. See, e.g. Julie Cohen, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 23, 225-234 (2012). Madhavi Sunder’s work on traditional knowledge offers a notable exception. Citing Amartra Sen himself, Sunder argues: “we must consider how intellectual property law and policy may enhance the capacity for participating in the processes of knowledge creation.” Sunder offers the example of the Indian GI Act, which

without securing the practical means to empower human flourishing. Substitute “creative” for “human,” and Sen’s insight translates directly to the IP context. If we are serious about “promot[ing] the Progress of Science and the useful Arts,” our policy conversation cannot be reduced solely to a debate about the optimal configuration of rights and exceptions. We also have to consider how these legal provisions function in practice.

The ease by which Creative Upstarts can navigate the copyright system in commercializing their creativity has direct bearing on the values of incentives that copyright confers. Or—to put this point in Coasean terms—transaction costs matter. We therefore need a transaction cost-sensitive theory of copyright that ensures that existing institutions function appropriately with Upstart interests at heart. This means devising low cost solutions to disseminate basic copyright information and to enable Creative Upstarts to register and license their work, to enforce their rights, to protect their artistic integrity, and to navigate around the conflicting rights of others.

Fortunately, there are signs that scholars and policy-makers have started to move in this direction. Examples in the United States include recent initiatives to help documentary filmmakers clear copyrights on the source materials their films incorporate³⁹ and the US Copyright’s Office’s ongoing study of small claims dispute resolution.⁴⁰ Professional guilds and law schools have also stepped up the assistance they provide in important ways.⁴¹ However, such efforts remain selective and incomplete. Moreover,

recognizes the poor as producers of knowledge and promotes their participation in global markets. Rather than focus just on the reception of knowledge goods, the GI Act—and a vast campaign by NGO’s to teach poor people about it—focuses on teaching people how to recognize and market their own knowledge production. The GI Act takes an ‘agent-oriented’ view of development, recognizing that ‘[w]ith adequate social opportunities, individuals can effectively shape their own destiny and help each other.’

Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 L. & CONTEMP. PROB. 97, 123 (2007); see also J. MICHAEL FINGER & PHILIP SCHULER, POOR PEOPLE’S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES (2004) (arguing for a similarly pragmatic view of IP rights in the development context).

39. Michael C. Donaldson, *Best Practice*, <http://www.michaelcdonaldson.com> (last visited Feb. 15, 2013); James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L. J. 882, 948 (2007); PETER JASZI & PATRICIA AUFDERHEIDE, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT 97 (2011).

40. U.S. Copyright Office, *Remedies for Copyright Small Claims*, COPYRIGHT. GOV., available at <http://www.copyright.gov/docs/smallclaims/>.

41. See, e.g. *Art Law Clinic*, WILMERHALE LEGAL SERVICES CENTER, <http://www.law.harvard.edu/academics/clinical/lsc/clinics/art.htm> (last visited Feb. 16, 2013); *Start-up Ventures Clinic*, Duke Law School, <http://law.duke.edu/startupventures/> (last visited Feb. 16, 2013); Vanderbilt Intellectual Property and the Arts Clinic, <http://law.vanderbilt.edu/academics/curriculum/elective-courses/intellectual-property-and-the-arts-clinic/index.aspx> (last visited Feb. 16, 2013); Tulane Entertainment Law Legal Assistance, <http://www.law.tulane.edu/tl>

changing technologies and business models raise new issues that demand attention.⁴² As US policy-makers enter the initial phases of what promises to be a major overhaul of copyright legislation, hopefully such issues will garner the attention they deserve.⁴³

Internationally, one might expect a capabilities approach to have found more fertile ground. After all, the 1994 TRIPS Agreement included a specific provision, Article 67, requiring developed Member States to provide capacity building technical assistance to their less developed counterparts. Moreover, the 2007 WIPO Development Agenda made capacity building for indigenous creators and small enterprises a central pillar of its recommendations.⁴⁴ Yet, as I have explored in detail elsewhere, the promise inherent in such provisions has been undercut by a systematic misalignment of resources and policy emphases.⁴⁵ In part, such misdirected

sAcademicPrograms/index.aspx?id=7222; Chapman Entertainment Contracts Law Clinic, <http://www.chapman.edu/law/legal-clinics/entertainment-contracts.aspx>; Cardozo Indie Film Clinic, <http://www.cardozo.yu.edu/clinics-professional-skills/clinics/indie-film-clinic>; *Keep Your Copyrights Project*, Kernochan Center for Law, Media and the Arts, Columbia Law School, <http://www.keepyourcopyrights.org> (last visited Feb. 16, 2013); Volunteer Lawyers for the Arts, Vlany.org, <http://www.vlany.org/legalservices/index.php> (last visited Feb. 16, 2013); *Resources for Creators*, COPYRIGHT ALLIANCE.ORG, http://www.copyrightalliance.org/creators_resources (last visited Feb. 16, 2013).

42. Questions confronting Creative Upstarts include: should Creative Upstarts embrace alternative business models such as crowd-funding or open licensing? *See generally* Erik Sofge, *The Good, The Bad and The Crowdfunded*, WALL ST. J. (Aug. 18, 2012), <http://online.wsj.com/article/SB10000872396390443991704577579190431157610.html>; C. Steven Bradford, *Crowdfunding And The Federal Securities Laws*, 2012 COLUM. BUS. REV. 1 (2012). Can mass-enforcement mechanisms such as “Copyright troll” litigation or graduated response regimes help Upstarts overcome the enforcement costs entailed in pursuing unauthorized distribution via peer-to-peer filesharing? *See generally* Eriq Gardner, *The Righthaven Experiment: A Journalist Wonders If a Copyright Troll Was Right to Sue Him*, A.B.A. J. (May 1, 2012, 4:20 AM), http://www.abajournal.com/magazine/article/the_righthaven_experiment_a_journalist_wonders_if_a_copyright_troll_was_rig/; John M. Owen, *Graduated Response Systems and The Market for Copyrighted Works*, 27 BERKELEY TECH. L. J. 559 (2012). Will ad-supported content streaming offer a viable revenue source to compensate artists? *See* Ben Sisario, *As Music Streaming Grows, Royalties Slow to a Trickle*, N.Y. TIMES (Jan. 28, 2013), available at http://www.nytimes.com/2013/01/29/business/media/streaming-shakes-up-music-industrys-model-for-royalties.html?_r=1&; Admin, *YouTube Dollars May Come at a Price*, CREATIVITYTECH.COM (Feb. 12, 2013, 7:23 PM), <http://creativitytech.com/?p=363>. On the broader topic of “alternative revenue” models, *see* CHRIS ANDERSON, *FREE: THE FUTURE OF A RADICAL PRICE* 20–22 (2009) (contending that web 2.0 platforms support the provision of free content funded by innovative business models that tap alternative revenue sources); BENKLER, *supra* note 3, at 1-2; Ginsburg, *supra* note 30, at 390-392.

43. *See Chairman Goodlatte Announces Comprehensive Review of Copyright Law*, U.S. House of Representatives Committee on the Judiciary, April 24, 2013, available at: http://judiciary.house.gov/news/2013/04242013_2.html.

44. *See* World Intellectual Property Organization (WIPO), Provisional Comm. on Proposals Related to a WIPO Dev. Agenda (PCDA), June 11–15, 2007, U.N. Doc. PCDA/4/3 Prov.2, Annex I (Aug. 20, 2007), Cluster A.

45. *See* Pager, *Accentuating*, *supra* note 3.

efforts reflect the self-interest of donor nations who furnish assistance that benefits their own export interests, such as beefed up enforcement mechanisms focused on criminal prosecutions.⁴⁶ Part of the blame is due to an emphasis on patent capacity building at the expense of copyright.⁴⁷ Meanwhile, implementation of the Development Agenda has fallen hostage by the ideological clash between IP “maximalists” vs. “subtractionists.”⁴⁸ Unfortunately, the needs of Creative Upstarts fall outside the narrow contours in which such debates are waged.

Furthermore, developing countries themselves have often failed to appreciate the development potential of their indigenous creative industries.⁴⁹ “IP & Development” discourse remains excessively focused on patents. If copyright protection merits consideration at all, it is typically viewed as an impediment to access-to-knowledge.⁵⁰ This failure to consider copyright’s potential upside has many sources, including perceptions of culture as a “frivolous” or “elitist” indulgence and competitive insecurities founded on outdated narratives of “cultural imperialism.”⁵¹ The proliferation of dynamic new creative industries across the developing world demands a policy rethink.⁵²

As digital technologies continue to level the playing field for commercial content production, we need to expand our conception of creative industries to embrace the burgeoning diversity of Upstart creators that such technologies empower. Realizing their potential to drive cultural and economic development will require both proactive policies and practical capacity building.⁵³ After all, digital technologies pose both opportunities and threats. An overhaul of existing legal regimes to respond to such challenges is sorely needed.⁵⁴ The viewpoints and interests of Creative Upstarts deserve a place in this ongoing conversation.

46. *Id.* at 282.

47. *Id.* at 260, 284.

48. *Id.* at 281-82.

49. See Pager, *Folklore 2.0*, *supra* note 10.

50. *Id.*

51. Pager, *supra* note 3, at 259-60.

52. See Pager, *supra* note 10.

53. See Pager, *supra* note 3, at 289-90 (noting that global efforts to nurture creative industries as sources of development and cultural diversity have often neglected the practical capacity building steps required to actualize the incentives afforded by IP rights).

54. While commentators generally accept that reforms are needed, their normative prescriptions diverge dramatically. See, e.g. Fisher, *supra* note 37, at 199-258 (proposing flat-rate licensing model); Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547 (1997) (proposing to redefine copyright’s substantive rights); Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*; 56 STAN. L. REV. 1345 (2004) (proposing new low-cost enforcement regime to deal with high volume file-sharing cases); Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, 4 FIRST MONDAY 8 (1999) available at <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/684/594> (arguing that the internet renders copyright obsolete).

The articles in this symposium issue provide a useful start in marking out key contours of such an Upstart-centric approach. Either explicitly or implicitly, almost all of them respond to the transformative potential that digital technologies pose. Ana Santos and Michael Epstein applaud the emergence of indigenous music industries in Africa and Latin-America based on low-cost digital production and concert-driven business models.⁵⁵ Arul Scaria observes that digital media have dramatically expanded the distribution channels available to India's regional film industries, allowing them to access wealthy, diasporal communities overseas.⁵⁶ Heritiana Ranaivoson similarly surveys the diversity of online music startups in Europe experimenting with a wide range of distribution platforms and revenue models.⁵⁷ Jonathan Garon notes that the potential of digital technologies extend beyond production and distribution; he argues that innovative use of crowd-funding and social media can revolutionize the financing and marketing of Upstart content.⁵⁸

Digital technologies, like all tools, can function as double-edged swords. Most obviously, the low-cost copying and distribution they enable benefits pirates as much as legitimate distributors. Indeed, as Scaria notes, the bulk of Indian content distributed overseas is unauthorized; as a result, the creators do not benefit from the proceeds. At the same time, digital technologies also open the door to new enforcement techniques that sometimes yield draconian results. Scaria particularly laments "John Doe" blocking orders that force ISPs to deny access indiscriminately to Indian websites at the expense of legitimate users/uses. Therefore, it is crucial that regulators and jurists manage these risks through a flexible and balanced legal framework.

Unfortunately, law perennially lags technology, and Creative Upstarts could bear much of the collateral damage. Epstein and Santos worry particularly about the potential for copyright enforcement to stifle the promise of the upstart music scenes proliferating in developing countries. Such industries have flourished through innovative "remix" models. Yet, such industries operate in the shadow of inflexible licensing norms that make little allowance for such grass roots creativity. Moreover, the ability of such informal industries to "fly under the radar" of the copyright system is threatened by the digital connectivity that enables works to "go viral" on a global stage.⁵⁹

55. Epstein, *supra* note 25; Santos, *supra* note 11.

56. See Arul George Scaria, *Industry Firing at the Wrong Target?*, 21 MICH. ST. INT'L L. REV. (2013).

57. See Heritiana Ranaivoson, Maria Iglesias & Anna Vondracek, *The Costs of Licensing for Online Music Services: An Exploratory Analysis for European Services*, 21 MICH. ST. INT'L L. REV. (2013).

58. See Garon, *supra* note 24.

59. See Epstein, *supra* note 25; Santos, *supra* note 11.

Such “borderless” content flows also disadvantage Creative Upstarts in other ways. As Scaria observes, copyright laws remain stubbornly territorial. Without Big Content’s global network of lobbyists and lawyers, they lack effective means to navigate foreign legal systems and enforce their rights.⁶⁰ Ranaivoson similarly provides empirical evidence of the impediments that territorially fragmented copyrights pose to innovation in online music services. Moreover, copyrights in digital content are fragmented in other ways.⁶¹ Ranaivoson notes that the rights to music repertoires are controlled by “an increasing number of different management entities that cannot always accurately identify the rights they manage, due to the dispersed and fragmentary nature of both the rights and rightsholders.”⁶² Ranaivoson demonstrates that such rights fragmentation translates directly into increased transaction costs for those seeking to license the music. Alarming, such increased transaction costs are disproportionately borne by newest and most innovative players in the marketplace.⁶³

Copyright systems have historically relied on collective rights organizations (CROs) to manage the transaction costs entailed in content licensing and enforcement. As Ye Jiang notes, CROs offer both scale economies in managing rights domestically as well as transnational reach through reciprocal agreements with peer organizations abroad.⁶⁴ However, Ranaivoson notes that the CRO model can discriminate against Creative Upstarts whose innovative services may fall outside the “one-size-fits-all” licensing framework within which CROs operate and whose monopolistic rates may be prohibitively expensive for start-ups.⁶⁵ Jonathan Band builds on this critique of CROs as the default answer to licensing hold-ups, delivering a much broader indictment of CRO abuses, inefficiency, lack of transparency, resistance to innovation, and outright corruption. As the title of his article intimates, Band’s global catalogue of CRO misconduct serves as “cautionary tales” for those who would extend such collective models into the digital future.⁶⁶ Band also argues that CROs do not always function with their members’ best interests at heart, noting accusations that tend to favor content intermediaries at the expense of authors and Big Media at the expense of Upstarts.⁶⁷

60. See Scaria, *supra* note 56.

61. See Ranaivoson, *supra* note 57.

62. *Id.* at sect. 3.2.

63. See *supra* notes 14-16 accompanying text.

64. See Ye Jiang, *Changing Tides of Collective Licensing in China*, 21 MICH. ST. INT’L L. REV. (2013).

65. See Ranaivoson, *supra* note 57.

66. See Jonathan Band, *Cautionary Tales About Collective Rights Organizations*, 21 MICH. ST. INT’L L. REV. (2013).

67. See *id.*

Plainly, there is a need for fresh approaches to make the copyright system more responsive to the needs of Creative Upstarts. Perhaps recognizing the obstacles to legal reforms, many of the contributors to this symposium have focused their proposals on novel business models and private ordering solutions. Ana Santos describes innovative approach to marketing music whereby CDs function as both promotional media for upcoming concerts as well as customized souvenirs of the particular concert experience. She also briefly touches on the potential for Creative Commons licenses to contract around copyright's rigid default norms.⁶⁸

Michael Epstein similarly reaches for a private ordering solution to the impending conflict that both he and Santos predict between the Upstart music remix industries in Africa and Latin-America and Big Content rightsholders in the US and Europe. Echoing points made by both Garon and Scaria, Epstein emphasizes the futility and potentially counter-productive effect of a purely enforcement-driven approach to unauthorized use of their content. Instead, he argues that rather than "fighting infringing mash-up culture, [rightsholders should] embrace it."⁶⁹ He proceeds to outline a cooperative "win-win" solution that such an accommodation between Big Content and Southern Upstarts could assume based on shared talent development, promotion, and distribution.⁷⁰

Jon Garon offers a detailed account of his own vision for "Distribution 2.0": a vertically integrated production/distribution/marketing model, that relies on data analytics, audience engagement driven by social media and crowd-funding, and global, multi-channel distribution structured around flexible, hybrid pricing. In Garon's preferred embodiment, his new breed of distributors would be organized as "a collective primarily owned by the creative artists themselves."⁷¹

However, government can also play an important role in innovating beyond the status quo, as several contributors observe. Ye Jiang canvasses possible approaches to collective licensing regulation that China could implement as part of its ongoing revisions to the Chinese Copyright Act. Drawing on a wealth of scholarly literature, she explores a variety of institutional safeguards and "best practices" that could mitigate some of the abuses that Band warns of.⁷² More radically, Jiang also notes that innovative use of technology could replace many of the enforcement and licensing functions currently performed by CROs and allow for more price competition that the current "blanket license" model that CROs favor.

68. See Santos, *supra* note 25.

69. See Epstein, *supra* note 25. Scaria makes a similar point in calling for Indian rights holders to co-opt existing pirate platforms and convert them into licensed distributors. See Scaria, *supra* note 56.

70. See *id.*

71. Garon, *supra* note 24.

72. Jiang, *supra* note 64.

Eliminating blanket licensing could potentially mitigate the “Superstar” biases endemic in creative content industries that disadvantage Upstarts.⁷³

Finally, Ana Santos concludes her contribution with a brief exploration of Brazil’s innovative *Pontos de Cultura* (Points of Culture) initiative. The Culture Points comprise a network of community centers that help ordinary Brazilians engage in digital content production. The potential value of the *Pontos* goes beyond their social function in empowering marginalized communities to express themselves through creative media. As Santos notes, they serve as a distributed network of cultural incubators whose economic potential remains to be fully explored.⁷⁴

By providing developmental capabilities at a grass-roots level, the *Pontos* accord nicely with Amartya Sen’s vision of *Development as Freedom*. We should look for further avenues to invest in Upstart capabilities. The articles in this symposium provide a first step toward establishing the scholarly foundation for such a forward-looking development strategy. With the prospect of major copyright reforms on the horizon in the US and abroad, further contributions toward a Creative Upstart-centric vision of copyright policy are encouraged.

73. See *id.* (citing Ivan Reidel, *The Taylor Swift Paradox: Superstardom, Excessive Advertising and Blanket Licenses*, 7 NYU J. L. & Bus. 731 (2011)).

74. See Santos, *supra* note 11.

