Uneasy Lies the Head that Wears the Crown: Why Content's Kingdom is Slipping Away

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ABSTRACT

This Article examines the ongoing power struggle between the content industries (with a particular focus on Hollywood) and the technology industry. These two sectors are intertwined like never before, yet their fates seem wildly divergent, with content stumbling while distribution technology thrives.

The Article begins by illustrating that, even before the recession took hold, traditional paid content was in trouble, and that this was and is true across a range of distribution platforms and content types, including theatrical motion pictures, home video, network television, music, newspapers, books, and magazines. The Article next posits six reasons for content's discontent: supply and demand, the decline of tangible media, reduced transaction costs for intangible media, the rise of free content, market forces in the technology industry, and the culture of piracy. The result of these factors has been a migration of audiences from paid professional content to free content, whether user-generated, ad-supported, or pirated.

The Article then briefly contrasts the technology industry's economic success (albeit tempered by the recession) and history of innovation. It next examines Hollywood's responses to technological challenge—responses that have included litigation, legislation, and various business responses. The Article notes that none of these

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responses have been successful so far, and concludes by examining the dilemma that paid content creators and companies now face.

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California's economy is at war with itself. As with the Civil War almost 150 years ago, the factions are split geographically, but this time it is a struggle between Northern and Southern California—specifically, Silicon Valley and Los Angeles.[1] More precisely, the conflict is between content and technology and the outcome may determine the future of the entertainment industry.

Los Angeles, of course, is the center of much of the traditional entertainment industry.[2] Today, the output of that industry is encompassed by the word "content," a catchall that includes motion pictures, television programs, and music, as well as the output of related industries such as radio, newspapers, magazines, books, and, of course, online materials. "Content is king," many people believe, meaning that those various products are more profitable than the technology used to deliver them. That adage may have been true once

1. *See* Georg Szalai, *Commentary: Analyst's Predictions Gives Industry the Willies*, HOLLYWOOD REP., July 15, 2008 ("Digital is and has been a foe for media for many years . . . .") (quoting Sanford C. Bernstein investment analyst Michael Nathanson).

2. Entertainment is a $41 billion industry in Los Angeles County (of which $32.2 billion is attributable to film production), as measured in direct sales figures—and the total direct and indirect impact is $110 billion. LOS ANGELES COUNTY ECON. DEV. CORP., REPORT ON THE CREATIVE ECONOMY OF THE LOS ANGELES REGION, Sept. 2008, at 14, *available at* http://laedc.org/reports/CreativeEconomy-2008.pdf. "Indirect impact" includes wages of employees who "work for firms in the supplier industries, and also for suppliers who sell goods and services to both the direct workers and the employees of the supplier firms" and the tax impacts and economic output of such persons. *See id.,* at 1 n.2, 7-9.

upon a time,[3] but content's value today is being driven towards zero.[4] In the eyes of consumers, content is becoming a commodity—more of a commoner than a king.

In contrast, consider Silicon Valley. Like Los Angeles, this region is, in the terminology of economic geography, a "cluster"—that is, an area with a concentration of one industry.[5] This particular region is, of course, the preeminent home of Internet and computer technology, including Web 2.0[6] distribution and search technologies offered by YouTube, IMDb, Apple's iTunes, Facebook, Twitter, Google, and the like. Many of these companies are thriving (or at least they were prior to the recent economic turmoil). Distribution used to be the exclusive province of Hollywood—movie theaters, television networks, home video, among others—but no longer. Instead, Northern California is the locus[7] of many of the new distribution technologies, and the ascendancy of those technologies has come at the expense of content.

Naturally, no one can ignore the effects of the greater economic crisis on both the content and technology industries. Today, credit is difficult or impossible to obtain and equity capital is equally scarce. These phenomena affect both content and technology. Consumer spending on electronics and appliances dropped 27 percent for the

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3. *See* Szalai, *supra* note 1 ("Content may no longer be king in the entertainment business, as distribution giants Apple and Google seem to prove again and again.") (quoting Lehman Brothers analyst Anthony DiClemente).

4. Chris Anderson, *Free! Why $0.00 Is the Future of Business*, WIRED, Feb. 25, 2008, http://www.wired.com/techbiz/it/magazine/16-03/ff_free?currentPage=all.

5. Harvard Business School, Institute for Strategy and Competitiveness, http://www.isc.hbs.edu/econ-clusters.htm (last visited Mar. 26, 2009).

6. "Web 2.0" is a term used to refer to social networking sites, video sharing sites, wikis, blogs, and other sites and services that emphasize creation and sharing of user-generated content, as opposed to a one-way transmission of professional content. *See* Tim O'Reilly, *What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, O'REILLY MEDIA, Sept. 30, 2005, http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html (last visited Mar. 26, 2009).

7. Los Angeles is not without new media companies, of course, so the contrast between Northern and Southern California is not absolute. Nor, for that matter, are motion picture companies completely absent from the Bay Area, with Lucasfilm and Pixar being the most prominent examples. *See* Lucasfilm, http://www.lucasfilm.com/inside/faq/ (last visited Mar. 26, 2009) (item #1) (specifying address in San Francisco); Pixar, http://www.pixar.com/companyinfo/about_us/contactus.html (last visited Mar. 26, 2009) (specifying address in San Francisco Bay Area city of Emeryville, California). Nonetheless, venture capital activity in Los Angeles is about one-tenth of that of Silicon Valley. *See* Ángel González, *Seattle Venture-Capital Activity Is Among the Fastest Growing*, SEATTLE TIMES, Mar. 11, 2008, http://seattletimes.nwsource.com/html/businesstechnology/2004273736_venturecapital110.html (noting a difference of $1.1 billion in financing versus $10.4 billion in 2007). Thus, the respective concentrations of content in Los Angeles and technology in the Bay Area, and the relative absence of the reverse, are great enough that the geographic implications are significant.

2008 holiday season as compared to 2007[8] and, globally, the mobile phone market is predicted to decline in 2009 by 9 percent and tech spending generally by 3 percent.[9] Ad spending is expected to fall or at best be flat next year,[10] which will hurt both traditional and new media. One veteran observer described the current situation as "the most fragile advertising market that I've ever seen in my twenty-five years as a media and entertainment analyst."[11] Yet there are—at least so far—notable differences between traditional and new media: several studios[12] and a mini-major[13] handed out pink slips for the 2008 holidays, while Google gave its employees free cell phones, a comparatively gentle downgrade from its previous practice of providing $1,000 cash for its holiday bonuses.[14] It's clear already that 2009 will not be as easy for Silicon Valley as that munificence implies[15] —indeed, Microsoft began the year with layoffs of its own[16] and other companies have followed—but nonetheless, inherent differences between the content and technology industries threaten the former for reasons independent of the economic recession affecting all industries.

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8. Ann Zimmerman, Jennifer Saranow & Miguel Bustillo, *Retail Sales Plummet*, WALL ST. J., Dec. 26, 2008, at A1.

9. *See* Alana Semuels, *At Mobile Show, Gear to Phone Home About,* L.A. TIMES, February 16, 2009 (citing Strategy Analytics study), *available at* http://articles.latimes.com/2009/feb/16/business/fi-wireless16; Alana Semuels & Jessica Guynn, *Steady Firms, Shaky Results,* L.A. TIMES, January 23, 2009 (citing Forrester Research), *available at* http://articles.latimes.com/2009/jan/23/business/fi-techearns23.

10. Paul Gough, *Ad Spending Flat for 2009*, HOLLYWOOD REP., Dec. 18, 2008 (reporting on one forecast of flat spending and another of a 10 percent decline); Suzanne Vranica, *Ads to Go Leaner, Meaner in '09*, WALL ST. J., Jan. 4, 2009, at B8 (forecasting a 6.2 percent decline).

11. Meg James, *Slump Creates Drama at NBC*, L.A. TIMES, Dec. 8, 2008, at C1 (quoting Larry Gerbrandt, head of Media Valuation Partners in Beverly Hills).

12. Tim Arango & Brian Stelter, *Jobs Slashed at Viacom and NBC Universal*, N.Y. TIMES, Dec. 4, 2008, at B3.

13. Dade Hayes, *Staff Layoffs Hit Lionsgate*, DAILY VARIETY, Nov. 10, 2008, at 1. A "mini-major" is a film production company that is larger and better capitalized than most production companies, but that is distinguished from a major studio by virtue of having less capital, a smaller film library, and no physical production studios or lots. *Cf.* http://www.variety.com/index.asp?layout=slanguage_result&slang=mini-major&page =Slanguage&display=mini-major.

14. *Google Reportedly Giving Employees Phones, Not Cash Gifts*, L.A. TIMES, Dec. 24, 2008, *available at* http://www.latimes.com/business/la-fi-google24-2008dec 24,0,2099316.story.

15. *Tech Firms' Outlook Grim*, L.A. TIMES, Dec. 25, 2008, at C2.

16. *See* Ashlee Vance, *Microsoft Slashes Jobs as Sales Fall,* N.Y. TIMES, January 22, 2009, *available at* http://www.nytimes.com/2009/01/23/technology/companies /23soft.html.

I. CONTENT STUMBLES

There is little doubt that traditional content is in trouble, and this is true across a range of distribution platforms and content types.[17] Domestic theatrical box office (total dollar amount of tickets sold)[18] and admissions (the number of tickets sold),[19] despite some fluctuation, display a worrisome trend: since 2002 domestic box office has increased at less than 1 percent per year on average, while admissions have *dropped* by about 2 percent per year on average.[20] In other words, a shrinking customer base has had to pay ever higher ticket prices to keep revenues at an essentially steady state. This fact does not make for happy customers. One thing that does excite the public is 3-D movies, but the frozen credit markets are retarding deployment of the necessary projection equipment.[21]

So if fewer people go out to the movies, does that mean that they find their entertainment at home instead? Maybe so, but even when they do, they are not watching traditional media as much as they used to. The home-video business, having peaked in 2004,[22] is declining,[23] and it is unclear whether Blu-ray will prove to be too little,

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17. This Article focuses on the film and television businesses, but discusses other content industries as well.

18. MOTION PICTURE ASS'N OF AMERICA, INC., ENTERTAINMENT INDUSTRY MARKET STATISTICS, 2007, at 3, http://mpaa.org/USEntertainmentIndustryMarketStats.pdf (noting that from 2002 to 2007, domestic box office grew from $9.27 billion to $9.63 billion, which is less than 1 percent growth per year). The 2008 figure was virtually unchanged. Claudia Eller & Richard Verrier, *A Bleak Picture for Big Studios*, L.A. TIMES, Jan. 2, 2009, at A1. Foreign box offices did slightly better, growing at slightly under 3 percent per year over the 2004-2007 period. MOTION PICTURE ASS'N OF AMERICA, INC., *supra* note 18, at 3.

19. MOTION PICTURE ASS'N OF AMERICA, INC., *supra* note 18, at 4 (noting that from 2002 to 2007, domestic theatrical admissions fell from 1.6 billion to 1.4 billion, a decrease of about 2 percent per year); *see also* Eller & Verrier, *supra* note 18 (noting that the 2008 figure is 1.33 billion admissions, a further decrease of 4 percent from 2007); *cf.* MOTION PICTURE ASS'N OF AMERICA, INC., MOVIE ATTENDANCE STUDY, 2007, at 3, http://mpaa.org/MovieAttendanceStudy.pdf (noting that from 2002 to 2007, admissions *grew* from 1,406 million to 1,470 million—less than 1 percent per year). The reason for the inconsistency is not clear, but at best there was sub-1 percent annual growth.

20. *See supra* notes 18-19.

21. David S. Cohen, *Bizzers Love the View of 3-D*, DAILY VARIETY, Dec. 2, 2008, at 4.

22. *See* Nicole LaPorte, *DVD Sales Way Down; High-Def Slow to Rescue,* WRAP, February 15, 2009, http://www.thewrap.com/article/1404 (last visited Mar. 26, 2009).

23. *See* Diane Garrett, *Blu-Ray Not Yet Homevid's Savior*, DAILY VARIETY, Jan. 8, 2009, at 1 (noting that 2008 home video sales were down from 5 to 6 percent as compared to 2007); Georg Szalai, *DVD Market Down 5.7% in 2008*, HOLLYWOOD REP., Jan. 14, 2009; Entertainment Merchant Association, Adams Research, http://entmerch.org/adams_research.html (last visited Mar. 26, 2009) (providing a chart that shows a decline starting in 2004); Entertainment Merchant Association, NPD Research, http://entmerch.org/npd_research.html (last visited Mar. 26, 2009) (same);

too late, and fail to give packaged media enough of a boost.[24] The combination of declines at home and in the theaters has reduced film to "an asset class that is truly in distress," in the words of one commentator.[25] Similarly troubled is the network-television business,[26] which is the traditionally higher-revenue side of television.[27] In contrast, cable is thriving[28]—indeed, the proliferation

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MOTION PICTURE ASS'N OF AMERICA, INC., *supra* note 18, at 17 (discussing that home video business was down 4.1 percent in 2007, and was virtually flat in 2006).

24. One analyst predicts 6 to 7 percent annual declines in consumer home video-spending in 2009, 2010, and 2011, and concludes that growth in Blu-ray sales "is unlikely to stem the decline in standard-def units." Szalai, *supra* note 23; *see also* Susanne Ault, *Consumers Still Lukewarm on Blu-ray Adoption*, VIDEO BUSINESS, Oct. 23, 2008, http://www.videobusiness.com/article/CA6608264.html (noting that the interest in purchasing Blu-ray players has been flat throughout 2008); Ben Fritz, *Blu-Ray Still Waiting for Its Day in the Sun*, VARIETY, Nov. 3, 2008, at 8 (noting that factors retarding adoption of Blu-ray format include the economy, high prices of discs and players, and media attention focused on digital distribution).

25. Dade Hayes & Tatiana Siegel, *Relativity Files Suit Against Citigroup*, VARIETY, Nov. 12, 2008, http://www.variety.com/article/VR1117995717.html?categoryid=16&cs=1 (quoting an unnamed "battle-scarred dealmaker").

26. *See* Mark Harris, *Saving TV*, PORTFOLIO, Sept. 2008, http://www.portfolio.com/culture-lifestyle/culture-inc/arts/2008/08/13/Tracing-the-Decline-of-Network-TV ("At the end of last season, ABC, CBS, and NBC reported their smallest combined audience ever, an event that has become a gloomy yearly occurrence."); Michael Schneider, *Needed: Network Bailout?*, VARIETY, Nov. 23, 2008, http://www.variety.com/article/VR1117996347.html?categoryid=1019&cs=1 (stating that, collectively, ratings of the five major broadcast networks in fall 2008 were down 13 percent among the key "adults 18-49" demographic from a year earlier).

27. Syndication fees for off-network reruns of network programming were often lucrative, for example. Harris, *supra* note 26. This yielded similarly lucrative fees for producers and television stars. Even middle-class workers benefited, as union-labor minimums and residuals are significantly higher for scripted network programming than for scripted cable shows. *See generally* DIRECTORS GUILD OF AMERICA, BASIC AGREEMENT (2005); SCREEN ACTORS GUILD, PRODUCER – SCREEN ACTORS GUILD CODIFIED BASIC AGREEMENT (2005); SCREEN ACTORS GUILD, TELEVISION AGREEMENT (2005); WRITERS GUILD OF AMERICA, THEATRICAL AND TELEVISION BASIC AGREEMENT (2004). In this environment, mid-level stars often received salaries above the minimums. *See* Screen Actors Guild, Entertainment Groups Testify at Group at FCC Public Hearing, http://www.sag.org/content/entertainment-industry-groups-testify-at-fcc-public-hearing (last visited Mar. 26, 2009) (testimony of Screen Actors Guild First National Vice President Anne-Marie Johnson) ("Every working actor has a 'quote,' the amount of money you get for a guest starring role, etc. . . .There is no such thing as getting your quote anymore.") Over at least the last six years, however, they have been suffering from salary compression, often receiving only "scale plus ten" (meaning the union-mandated minimum, plus 10 percent to be paid to the actor's agent as a commission). *See* Lauren Horwitch, *Media Consolidation: Hollywood Versus the Big Six*, BACKSTAGE, Oct. 19, 2006, http://www.backstage.com/bso/news_reviews/multimedia/article_display.jsp?vnu_content_id=1003285440; Valerie Kuklenski, *Wage Wars Insiders' View of the Actors' Contract Dispute*, L.A. DAILY NEWS, June 17, 2001, http://www.thefreelibrary.com/WAGE+WARS+INSIDERS%27+VIEW+OF+THE+ACTORS%27+CONTRACT+DISPUTE.-a079095643 (detailing various causes for salary compression); Dave McNary, *Most Thesps Find Their Pay Stuck at Scale*, VARIETY, Apr. 1,

of cable channels ate away at network television's market share long before the Internet came on the scene. However, "thriving" is a relative term, especially since cable audiences for successful shows can be as little as one-tenth the size of those for successful broadcast programs.[29]

As a result of these factors and the difficult economy,[30] the film and television industries are running scared. Financing movies has been difficult for some time,[31] and is becoming harder every day;[32] the number of independent movies to be produced during 2009 "is set for a tumble," according to individuals involved in that sector of the business.[33] Independent films from the last twenty years have been dependent on a series of financing sources, most of which are now tighter or non-existent:[34] home video presales, foreign presales, gap financing, insurance companies, German tax shelters, state tax incentives,[35] hedge funds, and, most recently, financing from India[36] and the Middle East, especially Abu Dhabi—two sources whose

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2002, at 75. As these references reflect, these phenomena started prior to any shift to online viewing, but this development obviously does not help matters.

28. *See* Harris, *supra* note 26.

29. *See id.* (noting that the audience for TV's top show, *American Idol*, was 28.8 million viewers per week in 2007, whereas "[t]he most popular cable networks average fewer than 3 million viewers a night").

30. Michael Stroud, *Feeling the Squeeze: Woeful Economy Already Taking Its Toll on Showbiz*, HOLLYWOOD REP., Nov. 14, 2008, at 30.

31. Dade Hayes, *Rethinking Independent Film Financing*, VARIETY, Sept. 5, 2008, http://www.variety.com/article/VR1117991730.html?categoryid=3235&cs=1.

32. Steven Zeitchik, *Rousselet Puts Together Film Financing Firm*, HOLLYWOOD REP., Oct. 31, 2008. Every aspect of independent film financing is more difficult today:

> [T]he boom times are over, hedge funds have pulled back, and the enormous amount of equity that recently flooded the movie marketplace is history . . . . [Lenders] are getting stricter . . . . [Loan] pricing is going up . . . . Banks are also becoming more selective . . . . The shakiness of foreign markets is also presenting challenges to lenders . . . . [I]t's the last 25 percent [of a film's budget] that's tougher to find . . . . [Equity investment] will slow down dramatically . . . .

Anthony Kaufman, *Indie Film Financing Still in Good Shape*, VARIETY, Oct. 31, 2008, http://www.variety.com/article/VR1117995058.html.

33. Patrick Frater, *A Warming Weekend*, DAILY VARIETY, Nov. 10, 2008, at 8.

34. Stroud, *supra* note 30, at 30 ("Every single source of capital has suffered a seismic shock that we haven't seen in our lifetimes.") (quoting veteran entertainment attorney and producer Nigel Sinclair).

35. Borys Kit, *Current Economic Swoon Gives States Less Incentive to Back Production Credits*, HOLLYWOOD REP., Nov. 13, 2008, at 10.

36. *See* Anne Thompson & Tatiana Siegel, *DreamWorks, Reliance Close Deal*, VARIETY, Sept. 19, 2008, http://www.variety.com/VR1117992505.html. Notwithstanding the optimistic headline, the Reliance deal is dependent on Dreamworks obtaining a matching amount of debt from third party sources—credit which has not been forthcoming, and the absence of which has endangered the deal. *See* Anne Thompson, *Is DreamWorks' Deal Stalling?*, VARIETY, Dec. 17, 2008, http://www.variety.com/VR1117997578.html.

economic fates have yet to play out.[37] In the past five years, studio films as well have become dependent on outside sources, relying primarily on hedge funds, which have largely withdrawn since early 2008.[38] Historically, many of these financing sources have ultimately lost money and left town sadder but wiser. Not surprisingly, at least five studio independent film divisions[39] collapsed or were in danger of doing so in 2008,[40] the largest mini-major studio has laid off 8 percent of its staff,[41] and studio-financed producer deals are at their lowest level in at least a decade.[42]

Yet another problem for Hollywood is its inefficient cost structure, consisting of bloated star salaries, inflated executive compensation, and complex union rules. Some of this may be changing a bit; star salaries are softening,[43] for instance, as evidence grows that audiences are no longer as drawn to star vehicles as they once were.[44] However, these changes are relative. After all, stars still get millions of dollars, even if not quite so many millions. In addition, union agreements are not getting any simpler: the Writers Guild of America, Directors Guild of America, Screen Actors Guild (SAG), and American Federation of Television and Radio Artists (AFTRA) contracts, for example, add up to about 2,000 pages of opaque

37. *See* Liza Foreman, *International Funds Migrate to L.A.*, HOLLYWOOD REP., Nov. 8, 2008 (discussing financing from India and Abu Dhabi); Ali Jaafar, *Hyde Park Digs Abu Dhabi Pics*, DAILY VARIETY, Nov. 3, 2008, at 1 (discussing Abu Dhabi investments in Hollywood).

38. Jill Goldsmith, *Hollywood Fades as Draw to Equity*, VARIETY, Jan. 18, 2008, http://www.variety.com/article/VR1117979329.html?categoryid=2523&cs=1.

39. These divisions are also referred to as "specialty divisions" or, sometimes, as "classics divisions."

40. These studios include New Line, Warner Independent Pictures, Paramount Vantage, Picturehouse, and United Artists. Gregg Goldstein, *Hey, Buddy, Can You Spare a Dime? In the Face of a Major Economic Retrenchment, Specialty Movies May Be a Dying Breed*, HOLLYWOOD REP., Aug. 29, 2008, at S2; Steven Zeitchik, *Specialty Biz Feels Jitters: Indie Labels Unnerved by Latest Studio Deals*, HOLLYWOOD REP., June 6, 2008, at 1. In addition, Fox Searchlight and Fox Atomic are struggling. Claudia Eller, *Fox Film Unit Aims to Shine Once Again*, L.A. TIMES, Nov. 10, 2008, at C-1. On the other hand, several other studios' independent divisions seem secure, although they may be under increased scrutiny from their corporate parents. Goldstein, *supra.* Bucking the trend, CBS started a theatrical film division, CBS Films, in 2007. Claudia Eller, *CBS Names Head of Movie Division*, L.A. TIMES, Sept. 26, 2007, at C-3.

41. Hayes, *supra* note 13, at 1.

42. *See* Diane Garrett, *Variety Reveals Pacts Facts*, VARIETY, Aug. 10, 2008, http://www.variety.com/article/VR1117990337.html?categoryid=13&cs=1.

43. *See* Elizabeth Guider, *Hollywood Biz Adjusts to Fact that Economy Is Sole Feature Presentation*, HOLLYWOOD REP., Oct. 31, 2008, at 11.

44. *See* Anne Thompson, *Hollywood's A-List Losing Star Power*, VARIETY, Oct. 16, 2008, http://www.variety.com/index.asp?layout=awardcentral&jump=contenders&id=director&articleid=VR1117994204&cs=1.

language—not to mention the additional union agreements for technical and craft workers. Furthermore, talent agreements are not getting any shorter, and profit definitions in those agreements are as detailed as ever. All of these contracts, as well as the complex parceling out of revenue in the form of gross and net participations and a multitude of residuals formulas, impose administrative and transaction costs that burden Hollywood but not Silicon Valley. As a result of these and other factors, the average cost to produce and market a studio film now exceeds $106 million.[45]

Another affliction of the film and television industry is labor discord. Hollywood has been in turmoil since the summer of 2007, having endured unproductive negotiations, a 100-day writers' strike, bitter warfare between the two main actors' unions (SAG and AFTRA), and, more recently, a stalemate between the studios and SAG that shows no sign of ending.[46] The primary cause of these disputes is a struggle over revenue from new media. The writers' strike alone caused estimated losses of over $2 billion to the Los Angeles economy,[47] and the SAG stalemate has slowed studio motion picture production dramatically. Again, these are costs borne by Hollywood but not by Silicon Valley. Moreover, the fact that new

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45. MOTION PICTURE ASS'N OF AMERICA, INC., *supra* note 18, at 7 (providing 2007 figures).

46. *See* Jonathan Handel, *SAG Rejects Studio Offer; Back to Stalemate,* Feb. 21, 2009, http://digitalmedialaw.blogspot.com/2009/02/sag-rejects-studio-offer-back-to.html; *see generally* Jonathan Handel, Digital Media Law, http://digitalmedialaw.blogspot.com/ (chronicling Hollywood labor issues from August 2007 to present).

47. JACK KYSER, NANCY D. SIDHU, CANDICE F. HYNEK & SHANNON SEDGWICK, LOS ANGELES COUNTY ECON. DEV. CORP., *2008-2009 Economic Forecast and Industry Outlook: Mid-Year Update*, July 2008, at 62, *available at* http://laedc.org/reports/Forecast-2008-07.pdf ($2.5 billion estimate). *Cf.* Kevin Klowden & Anusuya Chatterjee, WRITERS' STRIKE OF 2007–2008: THE ECONOMIC IMPACT OF DIGITAL DISTRIBUTION, June 2008, at 3-9, *available at* http://www.milkeninstitute.org/pdf/writers_strike.pdf (analyzing the economic impact of the strike on various sectors, regions, and time periods; asserting a $2.1 billion impact); Richard Verrier, *Study Places a High Cost on Hollywood Writers Strike*, L.A. TIMES, June 6, 2008, http://articles.latimes.com/2008/jun/06/business/fi-writers6 (discussing various studies). These post-mortem figures stand in stark contrast with a very short UCLA report written at the beginning of the strike that predicted a much smaller impact: $380 million. Jerry Nickelsburg, *Stockpiling, Webisodes and a Reality Check: The Economic Impact of the 2007 Writer's Strike on LA*, UCLA ANDERSON FORECAST, Nov. 17, 2007, at 4, *available at* www.econ.umn.edu/news/UCLAAnd_StrikeImpact.pdf; *see also* Dave McNary, *WGA Strike Costs CA $2.1 billion*, VARIETY, June 5, 2008, http://www.variety.com/article/VR1117986933.html?categoryid=18&cs=1 (noting that Nickelsburg continues to adhere to the $380 million figure despite the two $2 billion-plus studies); Dave McNary, *Economist Forecasts Impact of Strike*, VARIETY, Nov. 29, 2007, http://www.variety.com/article/VR1117976653.html?categoryid=2821&cs=1 (reporting on Nickelsburg's study). An even earlier forecast by the Los Angeles County Economic Development Corporation had given a $1 billion estimate. *See* Nickelsburg, *supra* note 47, at 1.

media will no doubt continue to evolve suggests that Hollywood labor and management will struggle against each other for many years to come like scorpions locked in a silicon cage; the industry, in other words, may be entering an indefinite period of labor unrest. "Hollywood's a union town," in the words of a popular labor chant—but Silicon Valley is not.

Other traditional content industries are in trouble as well. The music industry is in shambles,[48] a state that began with illegal downloads from the Napster website[49] and the industry's strategy, which proved ineffective,[50] of suing that site[51] (and other Internet upstarts) and the first MP3 player manufacturer,[52] rather than attempting to turn those technologies to commercial advantage. The industry's miscalculation has had devastating effects that continue today: album sales in 2008 (CDs and downloads combined) fell 14 percent from 2007, and about 30 percent from 2006.[53] Download sales were up sharply,[54] but CD sales were down almost as sharply[55]—the seventh decline in eight years.[56] Furthermore, the increased popularity of downloads does not offset the revenue lost from declining CD sales.[57]

Another prominent content industry, the traditional news business, is faring no better. This state of affairs began with the loss of lucrative classified and help-wanted advertising to eBay, Craigslist, and Monster.com, but became exponentially worse with the rise of the

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48. Posting of Stephen J. Dubner to Freakonomics, http://freakonomics.blogs .nytimes.com (Sept. 20, 2007, 14:07 EST).

49. *See* PETER DEKOM & PETER SEALEY, NOT ON MY WATCH: HOLLYWOOD VS. THE FUTURE 28 (2003). *But see* Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1, 38-41 (2007) (finding no relationship between the download volume of particular songs and legitimate sales of the corresponding album).

50. *See* Matt Richtel, *Music Services Aren't Napster, But the Industry Still Cries Foul*, N.Y. TIMES, Apr. 17, 2002, at C1.

51. *See A&M Records, Inc. v. Napster, Inc.,* 239 F.3d 1004 (9th Cir. 2001).

52. *See Recording Industry Association of America v. Diamond Multimedia Sys.,* 180 F.3d 1072 (9th Cir. 1999).

53. Phil Gallo, *Download, Concerts Hit High Notes*, DAILY VARIETY, Jan. 2, 2009, at 1 (citing a Nielsen SoundScan report).

54. *Id.* (noting a 27 percent increase in units sold compared with 2007).

55. Dawn C. Chmielewski, *Digital Music Downloads Set a Record But Fail To Make Up for Decline in CD Sales*, L.A. TIMES, Jan. 1, 2009, at C3 (noting a 20 percent decrease in units sold compared with 2007).

56. *Id.*

57. Ben Sisario, *Music Sales Fell in 2008, but Climbed on the Web*, N.Y. TIMES, Jan. 1, 2009, at C1.

blogosphere. Today, with both circulation[58] and ad revenue[59] declining, newspapers are disappearing or instituting cutbacks and layoffs,[60] and the continuing disarray at the *Los Angeles Times* is a particularly stark example of the industry's troubles. That newspaper, which changed hands in 2007,[61] spent 2008 shedding reporters,[62] editors,[63] publishers,[64] physical pages,[65] and news sections,[66] and undergoing redesigns[67] on virtually a monthly basis.[68] The newspaper's *annus horribilis* culminated in December 2008 with a bankruptcy filing by its parent company,[69] but even that hasn't stopped the layoffs or the loss of news sections.[70] Elsewhere, in a grim

58. *See* Paul Starr, *Goodbye to the Age of Newspapers (Hello to a New Era of Corruption),* NEW REPUBLIC, March 4, 2009, *available at* http://www.tnr.com/politics/story.html?id=a4e2aafc-cc92-4e79-90d1-db3946a6d119 (last visited February 28, 2009) (newspaper circulation in mid-2008 was 5 percent lower than in previous year).

59. *See* Richard Pérez-Peña, *Resilient Strategy for Times Despite Toll of a Recession*, N.Y. TIMES, February 8, 2009, *available at* http://www.nytimes.com/2009/02/09/business/media/09times.html (newspaper ad revenue fell about 16% industrywide in 2008).

60. David Carr, *Mourning Old Media's Decline*, N.Y. TIMES, Oct. 29, 2008, at B1.

61. Katharine Q. Seelye & Andrew Ross Sorkin, *Tribune Accepts Real Estate Magnate's Bid*, N.Y. TIMES, Apr. 3, 2007, *available at* http://www.nytimes.com/2007/04/03/business/03tribune.web.html?_r=1&oref=slogin.

62. Roger Vincent, *Times Lays Off 10% of Editorial Staff*, L.A. TIMES, Oct. 28, 2008, at C3 (discussing cuts in February, July, and October of 2008).

63. Michael A. Hiltzik, *Publisher of Times Resigns Amid Cuts*, L.A. TIMES, July 15, 2008, at A-1 (noting that the chief editor of the paper left his job in January 2008, and that his predecessor had resigned under pressure in November 2006).

64. *Id.* (noting that the third publisher since 2000 resigned after less than two years on the job).

65. Posting of Russ Stanton, *Editor Addresses Recent Cuts in Staff and Pages*, Readers' Representative Journal, http://latimesblogs.latimes.com/readers/ (July 30, 2008), *available at* http://latimesblogs.latimes.com/readers/2008/07/colleagues-a--1.html (noting that the newspaper cut its page count by 14 percent).

66. In 2008 the standalone Real Estate, Book Review, Sunday Opinion, and Highway 1 automotive sections all disappeared—their content reduced and shrunk into other sections—and the weekly magazine was eliminated in favor of a glossier monthly counterpart. *More Print Sections to Change Starting Next Sunday*, Readers' Representative Journal (July 27, 2008), *available at* http://latimesblogs.latimes.com/readers/2008/07/changes-and-a-n.html.

67. *See id.*; *see also* Kevin Roderick, *LAT Redesign: Nothing to See*, LA OBSERVED, Oct. 21, 2008, http://www.laobserved.com/archive/2008/10/lat_redesign_nothing_to_s.php (critiquing redesign of newspaper).

68. *See* Harold Meyerson, *The L.A. Times's Human Wrecking Ball*, WASHINGTON POST, June 11, 2008, at A19.

69. Phil Rosenthal & Michael Oneal, *Tribune Co. Files for Bankruptcy Protection*, CHICAGO TRIB., Dec. 9, 2008, *available at* http://archives.chicagotribune.com/2008/dec/09/business/chi-081208tribune-bankruptcy.

70. *See* Martin Zimmerman, *L.A. Times to Lay Off 300, Consolidate Sections*, L.A. TIMES, Jan. 31, 2009, *available at* http://www.latimes.com/business/la-fi-times31-2009jan31,0,2110794.story.

first for a national newspaper, the *Christian Science Monitor* announced that it will stop publishing its daily print edition in April 2009;[71] and, meanwhile, Detroit's two major dailies will cut home delivery to three days a week around the same time.[72] Not surprisingly, newspapers in two-paper towns seem particularly vulnerable: One such big city daily, Denver's *Rocky Mountain News*, has shut down,[73] and another, the *Seattle Post-Intelligencer* has gone web-only;[74] the *San Francisco Chronicle* may suffer one of those fates by the time this Article is in print.[75] Even the venerable *New York Times* is struggling to service and restructure its debt[76] and seeking new revenue by running display advertising on its front page.[77] As a result of these economic pressures, newspapers are paring their editorial missions, not only by shedding sections, but also by reducing coverage outside their local areas and shrinking or eliminating their foreign, Washington, and statehouse bureaus.[78]

Similarly, television news finds its viewership shrinking and aging.[79] Book[80] and magazine[81] publishers are in tough shape as well; indeed, one major publishing house, Houghton Mifflin Harcourt, recently instituted an unprecedented freeze on acquisition of new

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71. Stephanie Clifford, *Christian Science Paper to End Daily Print Edition*, N.Y. TIMES, Oct. 28, 2008, at B8.

72. *Detroit Free Press and News Redirect Staff, Resources to Digital Delivery of News*, DETROIT FREE PRESS, Dec. 16, 2008, http://www.freep.com/article/20081216/FREEPRESS/81216032.

73. *See* Richard Pérez-Peña, *Rocky Mountain News Fails to Find Buyer and Will Close*, N.Y. TIMES, Feb. 27, 2009, at B6.

74. *See* William Yardley & Richard Pérez-Peña, *Seattle Paper Shifts Entirely to the Web*, N.Y. TIMES, March 17, 2009, at A1.

75. *See* Richard Pérez-Peña, *Hearst Threatens to End San Francisco Paper*, N.Y. TIMES, Feb. 25, 2009, at B9.

76. Russell Adams, *Times Co. Seeks Buyer for Its Stake in Red Sox*, WALL ST. J., Dec. 26, 2008, at B1; Michael Hirschorn, *End Times*, ATLANTIC, Jan./Feb. 2009, http://www.theatlantic.com/doc/200901/new-york-times; *New York Times Co. Enters Debt-Payment Talks with Lenders*, EDITOR & PUBLISHER, Dec. 9, 2008, http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1003920658.

77. *See* Richard Pérez-Peña, *The Times to Sell Display Ads on the Front Page*, N.Y. TIMES, Jan. 5, 2009, at B3

78. *See* Starr, *supra* note 58 (citing statistics).

79. *See* Harris, *supra* note 26 ("The evening newscasts have been mowed down by cable's heat, spin, and round-the-clock immediacy . . . . Prime-time newsmagazines [are b]arely holding on.").

80. *See* Boris Kachka, *The End*, NEW YORK MAG., Sept. 14, 2008, http://nymag.com/news/media/50279/; Sam Thielman, *Book Biz Faces the Fire,* VARIETY, Dec. 3, 2008, http://www.variety.com/article/VR1117996764.html?categoryid=21&cs=1.

81. Tim Arango, *Time Inc. Plans About 600 Layoffs*, N.Y. TIMES, Oct. 28, 2008, at B8; Richard Pérez-Peña, *Condé Nast Cuts Focus on 2 Magazines*, N.Y. TIMES, Oct. 30, 2008, at B2.

books.[82] And not only is the film business in trouble, but so too is the film *criticism* business, as full-time movie critics have been dropped from many newspapers and magazines.[83] Even the entertainment trade press is affected: the *Hollywood Reporter* laid off a significant number of its reporters in 2008 and *Variety* did so in 2009.[84] Another entertainment sector, the adult film industry, is also under siege.[85] Only the video game industry has demonstrated the possibility of sustained growth,[86] but that prospect has begun to fade as well: Sales have deteriorated,[87] and one of the largest enterprises, Electronic Arts, announced in 2008 a plan to fire 10 percent of its workforce.[88]

People do still consume media the old-fashioned way—but fewer and fewer do so every day,[89] much to the detriment of the Southern California entertainment industry as well as other content industries. As these examples reflect, most of those industries are seeing flat or declining revenues and audiences, and these trends are

82. Tom Engelhardt, *Closing the Book*, L.A. TIMES, Dec. 21, 2008, at A32.

83. Vincent Rossmeier, *Where Have All the Film Critics Gone?*, THE BROOKLYN RAIL, June 2008, http://www.brooklynrail.org/2008/06/express/where-have-all-the-film-critics-gone.

84. *Hollywood Reporter Cuts Staff*, VARIETY, Dec. 4, 2008; Dylan Stableford, *Hollywood Reporter Lays Off 12*, FOLIO, July 15, 2008, http://www.foliomag.com/2008/confirmed-hollywood-reporter-lays-12; *Reed Business Trims Staff,* Variety, Jan. 26, 2009, http://www.variety.com/article/VR1117999073.html?categoryid=2052&cs=1.

85. *See* Amy Kaufman, *Internet Piracy Is Killing Porn's Profits,* WRAP, February 12, 2009, http://www.thewrap.com/article/1394 (last visited Mar. 26, 2009); Joseph Menn, *Porn Producer Sues YouTube Knockoff,* L.A. TIMES. Dec. 11, 2007, *available at* http://www.latimes.com/business/la-fi-vivid11dec11,1,2232727.story.

86. *See* Seth Gilbert, *Slowing Economy Not Stalling Gaming Sales: February NPD Results In*, Mar. 14, 2008, http://metue.com/03-14-2008/npd-february-video-game-retail-stats/ (citing the research firm NPD Group's report of a 34 percent rise in sales in February 2008 as compared with February 2007; the figure encompasses sales of video-game hardware, software, and accessories).

87. Sue Zeidler, *Update 2-U.S. Video Games Sales Fell 7 Pct in September-NPD*, REUTERS, Oct. 16, 2008, http://www.reuters.com/article/rbssLeisureProducts/idUSN1642427920081017 (citing NPD Group's report of a 7 percent decline in sales in September 2008 as compared with September 2007; the figure encompasses sales of video-game hardware, software, and accessories). This decline was described by an analyst as the "first 'true' monthly decline for the industry since March 2006.".*Id.* Sales were nonetheless described as strong, and the analyst pointed out that the result was biased by the fact that sales in September 2007 were exceptionally high due to the release of an enormous hit that month, Halo 3. *Id.* It should also be noted that the video game business is inherently cyclical: the release of a new console triggers new hardware, which then decline over time as demand is satisfied. *See, e.g.,* Video Gaming Console Sales Estimates, http://www.video-games-survey.com/consoles.htm (last visited Mar. 26, 2009) (chart with 1980-2006 data).

88. Posting of Dawn C. Chmielewski & Alex Pham to Technology, http://latimesblogs.latimes.com/technology/ (Dec. 20, 2008, 00:15 EST).

89. Alex Mindlin, *Web Passes Papers as a News Source*, N.Y. TIMES, Jan. 4, 2009, at B3 ("The Internet overtook print newspapers as a news source this year.").

particularly significant among younger people.[90] The handwriting is on the wall—or rather, on the laptop and mobile phone screens.

II. REASONS FOR CONTENT'S DISCONTENT

Why is traditional content losing its vigor? The answer goes deeper than—and the problem predates—the deteriorating national and global economy. Many people focus on piracy, but there are actually six related reasons for the devaluation of content.

A. Supply and Demand

The first of these reasons relates to supply and demand. Demand for entertainment stays relatively constant because demand is largely a function of both cost to the consumer and leisure time—two factors that no amount of marketing or increased supply can affect. The money available for leisure spending is limited, and may decline in a recession.[91] Leisure time, for its part, is essentially constant, as well as scarce, independent of the state of the economy.[92] Money is a well-recognized constraint. Time may be a less obvious factor, but even the rich are unable to squeeze more than twenty-four hours into a day, only some of which are dedicated to entertainment.

In contrast, supply—largely in the form of online content—has grown enormously in the last decade. Some of this is professional content set free from boundaries of time and space, now available worldwide, anytime, and usually at no cost (whether legally or not). Also prevalent is user-generated content (UGC)[93] in various forms:

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90. For example, the younger someone is, the less TV he or she watches. Paul Bond, *Study: Watching TV is Wasted on the Young*, HOLLYWOOD REP., Dec. 18, 2008, at 7. "Millenials"—or people between the ages of 14 and 25—watch the least TV, but "are spending the most time with media in general, making that up with video games, music, and the Internet." *Id.*

91. Indeed, there is dispute as to the validity of the conventional wisdom that motion pictures are recession-proof. Meg James & Dawn C. Chmielewski, *Hollywood May Not Be Recession-Proof This Time*, L.A. TIMES, Oct. 29, 2008, http://articles.latimes.com /2008/oct/29/business/fi-hollyecon29 (suggesting that film and cable-TV businesses may lose market share to free content on the Internet).

92. HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS 3-9 (7th ed. 2007). An exception to scarcity may be the time available for listening to music, since this can be done while commuting, working out, reading, and so forth.

93. UGC is prevalent even though people spend most of their time online consuming rather than creating content. *See* Bill Tancer, CLICK: WHAT MILLIONS OF PEOPLE ARE DOING ONLINE AND WHY IT MATTERS 124-37 (2008). Tancer cites data supporting a (roughly) "1-9-90 rule": 1 percent or fewer interactions on sites such as YouTube or Wikipedia involve creating content; 3 to 9 percent of interactions involve

websites, blogs, YouTube videos, Facebook and MySpace pages, Wikipedia articles, live-streaming video (for example, user-generated live television), and more. Even personal communications such as email, text messages, Facebook messages, and Twitter soak up leisure time in seemingly ever-increasing amounts. Silicon Valley technology made all of this possible. Some UGC appears on commercial blogs like the Huffington Post or even on websites created by traditional content companies, such as CNN's iReport.com. On these websites, which are an example of "crowdsourcing,"[94] people can contribute unfiltered news reports, photos, and videos—all without compensation. Indeed, nonprofessionals create the majority of UGC, and like modern-day friends of Tom Sawyer, most do not care whether they get paid for their efforts.[95] They likewise pay little or nothing to create and distribute the content they create. Add to this glut of content an array of popular video games—another time sink, especially for youth—and the effect on the market for movies and television is toxic: in other words, viewership of such content declines.[96] As that happens, professional content becomes harder to finance.[97]

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modifying content (such as posting comments or editing a Wikipedia entry); and 90 percent of interactions involve consuming—in other words, reading, viewing, or listening to—content. *Id.* Despite the relatively low percentage of content creation, the number of online interactions on sites such as these is enormous, and the small percentage can still lead to a large amount of new UGC.

94. Jeff Howe, *The Rise of Crowdsourcing*, WIRED, June 2006, http://www.wired.com/wired/archive/14.06/crowds.html; Sarah Kershaw, *A Different Way to Pay for the News You Want*, N.Y. TIMES, Aug. 23, 2008, at WK4 (defining crowdsourcing as "a method for using the public, typically via the Internet, to supply what employees and experts once did . . . . In crowdsourcing, the people supply the content . . . .").

95. *See* Steve O'Hear, *YouTube to Pay for User Generated Content,* Jan. 27, 2007, http://blogs.zdnet.com/social/?p=75; Brian Stelter, *YouTube Videos Pull In Real Money*, N.Y. TIMES, Dec. 10, 2008, http://www.nytimes.com/2008/12/11/business/media /11youtube.html (describing a small number of people who are making a living on YouTube). YouTube, Help Center, http://help.youtube.com/support/youtube/bin /answer.py ?answer=82839&topic=14965 (last visited Mar. 26, 2009).

96. CHRIS ANDERSON, THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE 166 (2006).

97. It is worth noting that Silicon Valley—or at least the software industry—is not immune from the effects of UGC, where this challenge takes the form of open-source software, freeware, and shareware. All of these types of software are created with little or no expectation of compensation, although some companies (not usually the software creators) seek to monetize open-source software by providing consulting services or in other ways. *See* Sam Dean, *Waiting for the Next Generation of Open Source Business Models,* Dec. 30, 2008, *available at* https://www.redhat.com/about/whysubscriptions/. These programs thus represent a challenge to established companies, although often not always a serious one. In this realm, although Linux challenges Windows successfully on servers, it does so on client-side PC with little success. *See* Roy Schestowitz, *GNU/Linux Market Share: Why Gartner and IDC Must be Ignored,* March 2, 2009, http://boycottnovell.com/2009/03/02/gartner-and-idc-linux-share/; Matt Asay, *Linux desktop market share is up as much as 61 percent, study finds,* Apr. 3, 2008, *available at*

B. The Decline of Tangible Media

The second reason for the devaluation of content is the loss of physical form.[98] It just seems natural to value a physical thing more highly than something intangible (with obvious exceptions such as money or intangibles that, like a real estate deed, represent proof that its holder owns something valuable). Physical objects have been with us since the beginning of time; distributable intangible content has not. Perhaps for that reason, people tend to focus on per-unit manufacturing costs (which are effectively zero for an intangible such as a movie download) while forgetting about fixed costs (such as the cost of making the movie in the first place). Also, and critically, if you steal something tangible, you deny it to the owner. For instance, a purloined DVD is no longer available for the merchant to sell. However, if you misappropriate content in intangible form, it is still there for others to use. That may be why, even before the Internet, sneaking into movie theaters—misappropriating the right to view a movie—seemed a mere rite of passage, whereas shoplifting a video did not.

C. Reduced Transaction Costs

The third factor is that acquiring content is increasingly frictionless. It is often easier, particularly for young people, to access content on the Internet than through traditional means, and making content available this way is less expensive for the seller. When it is easier to get something—in other words, when transaction costs

http://news.cnet.com/8301-13505_3-9910263-16.html. Likewise MySQL challenges paid software products in the database arena, with some success. *See* Matt Asay, *MySQL: The Database Maverick on the Rise,* June 26, 2006, http://weblog.infoworld.com/openresource/archives/2006/06/mysql_the_datab.html; http://www.mysql.com/why-mysql/marketshare/. So far Google Docs and OpenOffice have not gained much traction in their challenge to Microsoft Word. *See Study Finds Google Docs Struggles to Gain Foothold in Productivity Suite Market Dominated by Microsoft,* Nov. 14, 2008, http://www.clickstreamtech.com/11.14.08.html. The only area in which open-source software seems to have appreciable market share is in web servers, where Linux and Linux-based products have some traction—but even there, Linux's market share is less than 20 percent, with paid products comprising the remainder. *See* Andrew Pociu, *Linux Server Market Share Plummeting*, GEEKPEDIA, Oct. 16, 2007, http://www.geekpedia.com/news193_Linux-server-market-share-plummeting.html. Thus, the software industry seems, at this point, to be much less endangered by these no-profit/low-profit models than the content industries are by UGC.

98. *See* John Perry Barlow, *The Economy of Ideas,* WIRED, Mar. 1994, http://www.wired.com/wired/archive/2.03/economy.ideas.html ("[W]ithout our old methods, based on physically defining the expression of ideas, and in the absence of successful new models for nonphysical transaction, we simply don't know how to assure reliable payment for mental works.").

decline—the thing costs less because competition drives the price down towards the cost of the goods themselves (which is effectively zero for intangible goods), and it thus loses value.

D. The Rise of Free Content

The fourth of these reasons is that most new media business models (like most Internet models generally) are supported by ads rather than pay-per-view or subscription fees, with the notable exceptions of iTunes, iPhone applications,[99] Amazon downloads, and the *Wall Street Journal* online, among others. If there is no cost to the user, why should consumers see the content as valuable? Furthermore, if some content is free, why not all of it? As one commentator noted, in today's world we "want access to everything, we want it now, and we want it for free."[100] While ads impose a cost in the form of user attention, many online ads are easily ignored or blocked, and, similarly, individuals can now skip television advertisements using TiVo or other digital video recorders.

E. Market Forces in the Technology Industry

The fifth reason is the nature of market forces in the technology industry. Computers, web services, and consumer-oriented electronic devices are more valuable when more content is available. In turn, these products make content more usable by providing new distribution channels. Traditional media companies are slow to adopt these new technologies for fear of cannibalizing revenue from existing channels and offending powerful distribution partners, such as Wal-Mart.[101] In contrast, nonprofessionals, long denied access to distribution, rush to use the new technologies, as do pirates of professional content. As a result, technological innovation reduces the market share of paid professional content, and increases the market share of UGC and pirated content. More content of the latter sort in turn stokes demand for the new technological devices and services themselves—a circle effect that is either virtuous or vicious depending on your point of view. This effect has already been powerfully

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99. *See* Saul Hansell, *Why Are iPhone Users Willing to Pay for Content?,* N.Y. TIMES, Feb. 26, 2009, http://bits.blogs.nytimes.com/2009/02/26/why-are-iphone-users-willing-to-pay-for-content/.

100. James Surowiecki, *News You Can Lose*, NEW YORKER, Dec. 22, 2008, at 48.

101. *See* Ronald Grover, *Wal-Mart and Apple Battle for Turf,* BUS. WEEK, Aug. 31, 2006, http://www.businessweek.com/bwdaily/dnflash/content/aug2006/db20060831_806225.htm?chan=topStories_ssi_5.

demonstrated on the PC-connected Internet, but when many people eventually begin to access the Web's digital wares on flat-screen TVs in their living rooms,[102] the market for UGC and pirated content will probably explode beyond anything seen thus far.

F. The Culture of Piracy

Finally, there is the culture of piracy. A generation of consumers have grown up indifferent or hostile to copyright and its corporate owners, particularly in regard to music, movies, and, to a lesser extent, software.[103] The reasons for this attitude vary, but in the music world, for instance, some blame lies at the feet of the major music labels, which for years maintained unrealistically high CD prices, bundled good songs with mediocre ones on the same album, and attempted to sue piracy out of existence. That last approach meant widespread threats and litigation against the industry's own customer base,[104] probably a first for a consumer business. Not until 2003, with Apple's iTunes, did a legal service offering vast amounts of music arise,[105] and only in 2007, almost a decade after the founding of Napster, did the major labels begin offering the non-copy-protected MP3s that consumers demand.[106] Even then, the labels' motives were mixed: the move was as much about diluting Apple's power as about responding to consumer desires.[107] Consumers had to wait another two years before all four major record labels finally allowed Apple to offer music free of digital rights management (DRM) copy protection.[108] In any case, piracy almost certainly leads to a loss of paid business,[109] though not all content pirates would have purchased the content they illicitly downloaded since demand is doubtless greater at a "free" price point than at a higher one.

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102. *See* Troy Wolverton, *Fully Digital Living Room Still a Few Years Away*, MERCURY NEWS, Nov. 10, 2008, http://www.mercurynews.com/ci_10918266.

103. *See* David Pogue, *The Generational Divide in Copyright Morality,* Dec. 20, 2007, http://pogue.blogs.nytimes.com/2007/12/20/the-generational-divide-in-copyright-morality/.

104. Adam Liptak, *Ideas & Trends; The Music Industry Reveals Its Carrots and Sticks*, N.Y. TIMES, Sept. 14, 2003, at WK5.

105. *See* Michelle Quinn & Dawn C. Chmielewski, *Top Music Seller's Store Has No Door*, L.A. TIMES, Apr. 4, 2008, A1.

106. *Napster Offers MP3 Download Store*, VARIETY, May 20, 2008, http://www.variety.com/article/VR1117986154.html?categoryid=1009&ref=ra&cs=1.

107. *Id.*; Jeff Leeds, *Music Industry, Souring on Apple, Embraces Amazon Service*, N.Y. TIMES, Jan. 14, 2008, http://www.nytimes.com/2008/01/14/technology/14clash.html.

108. Dawn C. Chmielewski, *ITunes Embraces 3-Tier Pricing, Will Remove Anti-Copy Software*, L.A. TIMES, Jan. 7, 2009, at C1.

109. *See supra* notes 48-57.

III. FREE CONTENT VS. PAID MEDIA

All these developments have led to a migration away from paid media. Why buy music when there is so much free music available, albeit much of it pirated? Go to a theater, buy a DVD, or watch TV on a conventional set? No need when YouTube, BitTorrent, and Hulu make videos, movies, and TV free for the taking (in some cases legally, in other cases not).[110] Subscribe to a newspaper? Don't bother; most are free online, and there are literally millions of other sources for news, ranging from semi-commercial blogs like the Huffington Post[111] to user-generated content on a huge variety of blogs and web pages. And no need to knuckle under to some editor's choice of content when you can create your own mix through RSS feeds,[112] or use "most popular" lists to see what other users have read. The network news? Also becoming irrelevant, and already too tardy; cable news is more timely and the Internet is up-to-the-minute all day, every day. As for books, magazines, and journals, so much information is available online that whole categories of print publications seem less important: there is no point to buying a celebrity magazine, a dictionary, or an encyclopedia[113] when the web equivalents are free, comprehensive, and more frequently updated (even if potentially less accurate).[114] And if you do buy a book, the existence of Amazon.com means that you'll usually pay less than retail—sometimes a lot less, if used copies are available.

UGC is often (though not always) a flawed or poor substitute for professional content or traditional media[115]—but that is little comfort to the professionals or those who seek professional content. New, competitive goods do not have to be perfect substitutes in order

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110. *See* YouTube, http://www.youtube.com/; BitTorrent, http://www.bittorrent.com/; Hulu, http://www.hulu.com/; *BitTorrent Moves from Piracy to Video Streaming,* Oct. 9, 2007, http://www.reuters.com/article/technologyNews/idUSN0833530820071009. Even if one prefers adult videos, there is no need to buy or rent when UGC and pirated clips are readily available. Menn, *supra* note 85.

111. The Huffington Post is a combination of staff-written articles, user-generated content in the form of blog-like articles, and news aggregated from traditional media sources. *See* The Huffington Post, http://www.thehuffingtonpost.com.

112. RSS, which stands for Real Simple Syndication, allows one to use a single webpage (or, alternatively, a single software application, called a reader) to aggregate and access content from multiple blogs and other sources. *See* What Is RSS? RSS Explained, http://www.whatisrss.com/ (last visited Mar. 31, 2009); RSS – Wikipedia, http://en.wikipedia.org/wiki/RSS_(file_format) (last visited Mar. 31, 2009).

113. Noam Cohen, *Start Writing the Eulogies for Print Encyclopedias*, N.Y. TIMES, Mar. 16, 2008, at WK3.

114. *See infra* notes 142-145 and accompanying text.

115. *See generally* ANDREW KEEN, THE CULT OF THE AMATEUR: HOW TODAY'S INTERNET IS KILLING OUR CULTURE 3 (2007).

to acquire market share at the expense of established product. And, yes, in some cases new media does make money for creators and companies—but the money is much less than it used to be. As NBC Universal's Jeff Zucker lamented, the content industries are being forced to "trad[e] analog dollars for digital pennies."[116] In addition, as marketers attempt to wring more revenue out of ad-supported models by targeting ads more precisely to specific consumers, they run up against privacy concerns that limit their ability to do so.[117] Further complicating matters for content companies are the practices of unbundling and excerpting, which result in a form of cream-skimming that helps consumers but may hurt content companies. After all, people buy ninety-nine cent singles on iTunes rather than more expensive albums in CD form, and watch TV-show clips online rather than entire shows on higher-revenue-generating traditional television.[118]

A few top musicians have foregone even the digital pennies, opting to experimentally release content at no charge or on a pay-what-you-choose basis. Artists such as Radiohead,[119] Nine Inch Nails,[120] and Prince[121] have released music in this way with several apparent goals: (1) growing or reviving a fan base, (2) collecting email addresses for later promotional efforts, and (3) attempting to sell optional physical products (including deluxe boxed sets) and concert tickets.[122] Director Michael Moore recently released a film in this

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116. Brian Stelter, *Serving Up Television Without the TV Set*, N.Y. TIMES, Mar. 10, 2008, at C1.

117. Stephanie Clifford, *Web Privacy on the Radar in Congress*, N.Y. TIMES, Aug. 11, 2008, at C1.

118. Sometimes the viewership for the online clips is comparable to—or even exceeds—that of the offline program itself. This was apparently the case with two *Saturday Night Live* sketches prior to the 2008 presidential election in which Tina Fey played Republican vice-presidential candidate Sarah Palin. Brian Stelter, *Web Site's Formula for Success: TV Content With Fewer Ads*, N.Y. TIMES, Oct. 28, 2008, at B10.

119. Jeff Leeds, *Radiohead to Let Fans Decide What to Pay for Its New Album*, N.Y. TIMES, Oct. 2, 2007, at E1 (discussing how the album was made available as a free or pay-what-you-choose download).

120. Jeff Leeds, *Nine Inch Nails Fashions Innovative Web Pricing Plan*, N.Y. TIMES, Mar. 4, 2008, at E2 (noting that a portion of album made available as a free or pay-what-you-choose download).

121. *Coming This Weekend . . . the Greatest Newspaper Giveaway . . . EVER!*, MAIL ONLINE, July 10, 2007, http://www.dailymail.co.uk/tvshowbiz/article-465229/Coming-weekend--greatest-newspaper-giveaway--EVER.html (stating that the Prince CD was included in the Sunday newspaper at no extra charge).

122. *See* Leeds, *supra* note 119; Leeds, *supra* note 120; MAIL ONLINE, *supra* note 121.

fashion as well, presumably with some of the same goals in mind.[123] Even cookbook writers are testing this approach: a new website now offers free recipes excerpted from published cookbooks, with links allowing the home chef to purchase the books.[124] Whether entire content industries can operate this way is hard to know.

As UGC has become more diverse, professional content has become less so. Thus, at least in some media,[125] recent research indicates that audiences are spending more on a smaller number of hit products—the most popular movies and books, for instance—to the detriment of more specialized content, such as art-house films and mid-list titles.[126] In response to this trend, some studios are planning to produce bigger, but fewer, movies—surely perpetuating the situation even further.[127]

At first glance, these findings and the resulting strategy appear contrary to the "long tail" theory, which holds that the availability of vast amounts of content, coupled with efficient search mechanisms,[128] results in a shift of demand from hits (the high-volume head of the demand curve) to low-volume niche products (the long tail).[129] The theory proposes that enormous amounts of highly specialized content, even at a low volume of sales, can generate significant revenue and profits.[130] However, the analysis is complicated by the fact that there is disagreement on where the head

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123. Brian Stelter, *Michael Moore's Election-Year Freebie*, N.Y. TIMES, Sept. 23, 2008, at E3.

124. Motoko Rich, *A Plan to Sell Cookbooks: Give Away Recipes Online*, N.Y. TIMES, Nov. 1, 2008, at C1; Cookstr, http://www.cookstr.com/ (last visited Apr. 2, 2009).

125. Anita Elberse, *Should You Invest in the Long Tail?*, HARV. BUS. REV., July-Aug. 2008, at 88, 92 ("[S]uccess is concentrated in ever fewer best-selling titles . . . . The importance of individual best sellers is not diminishing over time. It is growing.") (reaching this conclusion based on figures from home-video sales). Counterintuitively, there is evidence that this phenomenon is operating in music as well. *See id.* ("[I]ndependent artists have actually lost share among the more popular titles to superstar artists on the major labels."); *see also* Anita Elberse & Felix Oberholzer-Gee, *Superstars and Underdogs: An Examination of the Long Tail Phenomenon in Video Sales* (Harvard Bus. Sch., Working Paper, No. 07-015, 2008), *available at* http://www.people.hbs.edu/aelberse/papers/hbs_07-015.pdf.

126. *See supra* note 125.

127. Lauren A.E. Schuker, *Warner Bets on Fewer, Bigger Movies,* WALL ST. J., Aug. 22, 2008, at B1. This strategy has been recommended by at least one academic commentator. *See* John Quelch, http://blogs.harvardbusiness.org/quelch/ (Sept. 1, 2008, 19:06 EST).

128. Such mechanisms include search engines, user reviews, and automated recommendations of content. *See, e.g.,* Google, http://www.google.com/; Amazon.com, http://www.amazon.com/gp/help/customer/display.html?ie=UTF8&nodeId=13316081.

129. ANDERSON, *supra* note 96, at 15-26.

130. *Id.*

of the curve ends and the tail begins.[131] Perhaps there is a "body" sandwiched between the head and the tail—composed, for instance, of commercially produced films with limited audiences—in which the head becomes taller and narrower (fewer hits, but each one does more business), the tail becomes longer and perhaps fatter (more amateur content, with somewhat more distribution),[132] and the body becomes narrower and less tall (fewer art-house films, and each of them does less business). These are empirical questions, and there appears to be a paucity of research.

Another trend that reduces the diversity of professional content—one that predates the Internet but continues today—is media businesses consolidating and becoming ever-larger conglomerates[133] as individual companies find it harder and harder to compete. In addition, newspapers are not only consolidating, but increasingly relying on the same small number of wire services, again reducing diversity of professional content.

Some commentators welcome the rise of more easily distributable content with little or no reservation, including content copied and distributed without permission. "Information wants to be free," said Steward Brand, the first of these activists, in 1984.[134] Other activists,[135] and, later, law professors[136] and the Electronic

131. *Compare* Posting of Chris Anderson to Conversation Starter, http://blogs.harvardbusiness.org/cs/ (June 27, 2008, 10:27 EST), *with* Posting of Anita Elberse to Conversation Starter, http://blogs.harvardbusiness.org/cs/ (July 2, 2008, 08:43 EST).

132. *But see* Elberse, *supra* note 125 (suggesting that the tail becomes longer, but remains quite flat); Elberse & Oberholzer-Gee, *supra* note 125 (suggesting the same).

133. For instance, starting with the deregulation of cross-ownership in the mid-1990s, studios and networks began to combine, and now each of the networks has merged with a studio or shares common ownership with one. *See* Sallie Hofmeister, *COMPANY TOWN—NBC Becomes Belle of the Ball in Industry Merger Shuffle – TV: As the Last Remaining Network Without a Studio Partner, Its Value May Be Soaring with Prospective Suitors*, L.A. TIMES, Sept. 9, 1999, at C1. Concentration has increased in newspapers, radio, and cable television as well, and in cross-ownership of newspapers and broadcast-television stations. *See* William Triplett, *Media Ownership Rules Back Into Play*, VARIETY, Mar. 5, 2008, http://www.variety.com/article/VR1117981896.html?categoryid=1064&cs=1.

134. John Perry Barlow, *The Economy of Ideas*, WIRED, *available at* http://www.wired.com/wired/archive/2.03/economy.ideas_pr.html; Information Wants to Be Free – Wikipedia, http://en.wikipedia.org/wiki/Information_wants_to_be_free (last visited Mar. 26, 2009) (quoting Stewart Brand, who had earlier gained fame as the creator in the 1960s of the *Whole Earth Catalog, see* TED, http://www.ted.com/index.php/speakers/stewart_brand.html (last visited Mar. 26, 2009); Stewart Brand – http://en.wikipedia.org/wiki/Stewart_Brand (last visited Mar. 26, 2009).

135. The most notable of these are Richard Stallman, founder and president of the Free Software Foundation, and John Perry Barlow. S*ee id.*; John Perry Barlow, *The Next Economy of Ideas*, WIRED, Oct. 2000, http://www.wired.com/wired/archive/8.10/download.html; Free Software Foundation, http://www.fsf.org (last visited Mar. 8, 2009); Barlow, *supra* note 98; Barlow@eff.org, http://homes.eff.org/~barlow/.

Frontier Foundation, a public-interest law/lobbying firm,[137] have followed,[138] creating a movement of cyberlibertarians and copyright reformers who feel that copyright law has become far too restrictive.[139] They persuasively point to the variety of viewpoints that new technologies have brought to the table. That development is indeed valuable—especially so in a democracy premised on freedom of speech—and it is also true that UGC can be entertaining and is sometimes informative and insightful. These commentators assert that more content is an unalloyed social good.

As pleasant as this utopian notion may be, it is just not true: there are costs to UGC. For one thing, when everyone is a creator, the result is that individuals—and people in the aggregate—spend less money on professional content, so even high-quality professional content suffers. Furthermore, the proliferation of UGC blurs distinctions in quality, particularly in news and information,[140] where some objective standards should remain.[141] Rumors are accepted as fact, celebrity gossip sites no doubt outnumber those on global warming, and neutral expert opinions may carry no more weight on

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136. The most prominent of these are Lawrence Lessig and Jonathan Zittrain. S*ee* LAWRENCE LESSIG, FREE CULTURE (2004), *available at* http://www.free-culture.cc/freeculture.pdf; Jonathan Zittrain, *Normative Principles for Evaluating Free and Proprietary Software*, 71 U. CHI. L. REV. 265 (2004).

137. *See* Electronic Frontier Foundation, http://www.eff.org/, (last visited Mar. 26, 2009).

138. *See* Freeculture.org, http://freeculture.org/ (last visited Mar. 26, 2009); Free Culture Movement – Wikipedia, http://en.wikipedia.org/wiki/Free_Culture_movement (last visited Mar. 26, 2009). The argument that Internet-based information should be free (in one sense or another) has roots in the open-source software, "copyleft," and creative-commons movements, and contrasts with what the copyright reformers label the current "permission culture." *See* Robert S. Boynton, *The Tyranny of Copyright?*, N.Y. TIMES MAG., Jan. 25, 2004, at 40; Creative Commons, http://creativecommons.org/ (last visited Mar. 26, 2009); Copyleft – Wikipedia, http://en.wikipedia.org/wiki/Copyleft (last visited Mar. 26, 2009); Open Source – Wikipedia, http://en.wikipedia.org/wiki/Open_source (last visited Nov. 2, 2008); *supra* note 97.

139. *See infra* note 187 and accompanying text.

140. *See* KEEN, *supra* note 115, at 16.

141. For instance, Chris Anderson, the originator of the long-tail theory, acknowledges that some entries on Wikipedia are of lower quality than those in *Encyclopedia Britannica*, and, more generally, that much content on the Internet is "crap," despite claiming elsewhere that quality is a completely subjective concept. *Compare* ANDERSON, *supra* note 96, at 70-71, 116 *with id.* at 118 ("Obviously, the terms 'high quality' and 'low quality' are entirely subjective"); *see also infra* note 157 and accompanying text. Yet Anderson dismisses this concern by claiming (without providing evidence) that the "odds of getting a substantive, up-to-date, and accurate entry for any given subject are excellent on Wikipedia," and concluding that it is "simply a different animal from *Britannica*." ANDERSON, *supra* note 96, at 70-71; *see also supra* note 112 and accompanying text.

blogs or Wikipedia[142] than those of partisans, the uninformed, or purveyors of deliberate misinformation.[143] The last problem has been so acute on Wikipedia that the site has had to introduce editors and quality checkers into the process,[144] although with only partial success.[145]

Another concern is that the proliferation of niche sources for news leads to self-selection—liberals read the Huffington Post, while conservatives read the Drudge Report—and thus to reinforcement of existing biases. The Internet is not solely to blame for this phenomenon. Indeed, media fragmentation predates the emergence of blogs as a news source: the rise of Fox News on the right took market share from the less ideological CNN and network news programs.[146] More recently, MSNBC, on the left, has benefitted as well, again to the detriment of at least CNN.[147] Nonetheless, the Internet has accentuated the problem. A shared national conversation begins to fade as mass audiences splinter.

Likewise, the development of online communities is not without its dark side. True, people can find friends, romantic partners, and social connections with people of common interests, and previously isolated groups—for instance, gay youth—can now find support never before available. However, it is also true that hate groups and terrorists can—and do—use online communities (and other forms of new media) as tools for communication, recruitment, and indoctrination, and for self-reinforcement of ugly worldviews as members echo each others' thoughts.[148] At the margins, the Internet severely tests the First Amendment's commitment to free speech.

Another problem is the effect that Internet channels of commerce have on their brick-and-mortar counterparts. While

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142. *See* Noam Cohen, *Courts Turn to Wikipedia, but Selectively*, N.Y. TIMES, Jan. 29, 2007, at C3; Katie Hafner, *Seeing Corporate Fingerprints in Wikipedia Edits*, N.Y. TIMES, Aug. 19, 2007, http://www.nytimes.com/2007/08/19/technology/19wikipedia.html.

143. KEEN, *supra* note 115, at 17 ("One person's truth becomes as 'true' as anyone else's.").

144. Katie Hafner, *Growing Wikipedia Refines Its 'Anyone Can Edit' Policy*, N.Y. TIMES, June 17, 2006, http://www.nytimes.com/2006/06/17/technology/17wiki.html; Posting of Noam Cohen to BITS, http://bits.blogs.nytimes.com/ (July 17, 2008, 19:44 EST).

145. *See* Noam Cohen, *Don't Like Palin's Wikipedia Story? Change It*, N.Y. TIMES, Sept. 1, 2008, at C3.

146. Jacques Steinberg, *Fox News, Media Elite*, N.Y. TIMES, Nov. 8, 2004, at C1.

147. *See* Jim Rutenberg, *A Surge on One Channel, a Tight Race on Another*, N.Y. TIMES, Nov. 2, 2008, at A28; Jacques Steinberg, *Cable Channel Nods to Ratings and Leans Left*, N.Y. TIMES, Nov. 6, 2007; Brian Stelter, *Fresh Face on Cable, Sharp Rise in Ratings*, N.Y. TIMES, Oct. 21, 2008, at C1.

148. Web-2.0-booster Chris Anderson acknowledges this, but has nothing critical to say about it. *See* ANDERSON, *supra* note 91, at 50-51.

Amazon, iTunes, and Netflix thrive,[149] bookstores (both independents[150] and chains),[151] music stores (again, both independents[152] and chains),[153] and, perhaps, video stores[154] wither—and, at least in the case of music stores, their customer base grows older.[155] As they disappear, so do the owners and store clerks, who shared their love of books, music, and movies, and who were often experts in those areas.[156] The same effect can be seen in newspaper layoffs: as experienced reporters are laid off, the slack is taken up by ever-more-overworked colleagues who have less depth of knowledge about the subjects they cover, and less time to learn and fact check.[157]

All of these factors have led at least one prominent commentator, Andrew Keen, to dismiss UGC as "an endless digital

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149. iTunes is a purely digital retailer, while Amazon and Netflix are hybrid digital-physical outlets. Nonetheless, by eschewing retail stores and operating solely via mail from warehouses or third-party vendors, the latter two outlets dispense with costly retail storefronts, just as iTunes does.

150. David Streitfeld, *Bookshops' Latest Sad Plot Twist*, L.A. TIMES, Feb. 7, 2007, at A1.

151. Yinka Adegoke & Karen Jacobs, *Borders Explores Sale, Suspends Dividend*, REUTERS, Mar. 20, 2008, http://www.reuters.com/article/mergersNews/idUSN2036347520080320; Jim Milliot, *B&N Confronts Changing Market, Bad Environment*, PUBLISHERS WKLY., Sept. 8, 2008, http://www.publishersweekly.com/article/CA6593589.html.

152. Matt Arado, *Independent Music Stores Haven't Yet Disappeared from Suburbia*, CHI. DAILY HERALD, Sept. 23, 2008, http://www.dailyherald.com/story/?id=235900 (citing statistics from a source that another 100 stores had closed after a Dec. 16, 2007, *New York Times* report); Mindy Farabee, *Facing the Music*, L.A. TIMES, Nov. 9, 2008, at F16 (describing the financial struggles of a sheet-music store losing business to the Internet); Marcelle S. Fischler, *For a 'Dinosaur,' an Exuberant Second Life*, N.Y. TIMES, Dec. 16, 2007, at LI1 ("Since 2003, about 1,200 independent music stores nationwide have closed, with 2,600 still in business . . . .").

153. *Tower Records Will Auction Its Assets*, N.Y. TIMES, Aug. 22, 2006, at C5.

154. The picture for video stores is more complicated than for music stores and bookstores. Blockbuster has shown some improvement recently and, on the independent front, some 12,000 stores survive. *Signs of a Recovery at Blockbuster*, N.Y. TIMES, Aug. 8, 2008, at C2; Maureen Farrell, *The Rebirth of the Small Video-Rental Shop*, FORBES, Aug. 15, 2007, http://www.forbes.com/2007/08/15/blockbuster-walmart-netflix-ent-manage-cx_mf_0815video.html. However, both chains and independents show strength only in the rental market. *See* Entertainment Merchant Association, *Facts About the Video & Video Game Industries,* http://www.entmerch.org/quick_facts.html (last visited Mar. 26, 2009) (providing 2007 figures). In contrast, sell-through (in other words, sales of DVDs rather than rentals), which accounts for about two-thirds of consumer spending on DVDs, is dominated by mass merchants, consumer electronics stores, and online vendors. *See id.*

155. Alex Williams, *The Graying of the Record Store*, N.Y. TIMES, July 16, 2006, http://www.nytimes.com/2006/07/16/fashion/sundaystyles/16store.html.

156. Anthony Tommasini, *Requiem for a Store's Dying Classical Department*, N.Y. TIMES, Oct. 25, 2006, at E1.

157. *See* Starr, *supra* note 58.

forest of mediocrity."[158] That stance is overwrought. Not every knowledgeable person works for a newspaper or has an advanced degree, and not every talented creator has a deal with a movie studio or record label. Indeed, this attitude echoes those of cultural critics of the past, who denied the possibility that art could include photography or cinema. A sweeping rejection of all UGC seems equally unwarranted.

Other commentators advocate the opposite extreme. Extrapolating from evidence that large groups can sometimes solve problems more effectively or accurately than a single expert (the so-called "wisdom of crowds"),[159] they see value in UGC and shed few tears for the dethroning of professional content.[160] One goes so far as to say that "'high quality' and 'low quality' are entirely subjective."[161] These views, too, are simplistic: the expertise of a seasoned reporter, skilled filmmaker, knowledgeable retailer, or talented singer-songwriter has value. Nor are media companies mere gatekeepers—they add value in the form of editing, selection, and marketing. The truth is more nuanced than the false dichotomy presented by many commentators: both forms of content have value. The problem is that, unfortunately, there does not seem to be room for both unlimited quantities of UGC and a wide selection of paid professional content.[162] It is a dilemma with no easy answers.

IV. TECHNOLOGY RISING

In contrast to the stagnation and decline of the content industries, the technology business is marked by innovation. New startups are forming almost every day—or they were, prior to the economic collapse—and existing companies develop new products and

158. KEEN, *supra* note 115, at 3. Keen also extols the virtues of traditional content at every turn, even going so far as to complain that spoof ads on the Internet are compromising "[o]ur trust in conventional advertising." KEEN, *supra* note 115, at 22 (implying a surprisingly credulous audience).

159. JAMES SUROWIECKI, THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES AND NATIONS (2004).

160. DON TAPSCOTT & ANTHONY D. WILLIAMS, WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING 271-75 (expanded ed. 2008); *cf*. *supra* note 94 and accompanying text (defining "crowdsourcing").

161. ANDERSON, *supra* note 96, at 118.

162. Even Anderson, the proponent of the "long tail," acknowledges that the competition between the head of the demand curve (content that is widely consumed, which includes professional content) and the tail (niche content, such as UGC) is a zero-sum game, owing to the limits on "human attention . . . hours in the day . . . [and] disposable income." ANDERSON, *supra* note 96, at 146.

services on a continuing basis. Silicon Valley, in particular, is noted for constant change.

A skeptic would argue that the Valley's bubble burst in 2001. True enough. That region's tempo is more measured today, yet innovation continues. The rise of YouTube is post-bubble. So is Facebook—created in Cambridge by Harvard students, but transplanted to the Valley as soon as it gained traction. Broadband penetration has increased dramatically in the Web 2.0 era,[163] as have video-enabled mobile phones in the last few years; both of these technologies enable both UGC and piracy (among many other things, of course). Google's enormous success is largely post-bubble as well. True, Google's share price fell more than 50 percent in 2008,[164] but, notwithstanding the weight of the recession as well as a reduction in "irrational exuberance,"[165] the Internet today is more of a challenge to Hollywood than it was in 2001.

Not all that is new survives, of course. Startups fail, new products tank, and even healthy hit counts can turn anemic. And, of course, the state of the economy is making things difficult even in the Internet business and related sectors.[166] This trend goes beyond declines in stock prices. Long-troubled Yahoo!, for example, announced in October 2008 that it would cut at least 10 percent of its workforce[167] after having already cut approximately one thousand jobs earlier in the year.[168] In the same vein, the prominent venture-capital firm, Sequoia Capital, made a grim PowerPoint presentation to its portfolio companies in late 2008: the first slide showed a tombstone bearing the words "R.I.P. Good Times."[169]

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163. MOTION PICTURE ASS'N OF AMERICA, *supra* note 18, at 22 (noting that broadband penetration increased from 21.4 percent of all U.S. households in 2003 to 52.9 percent in 2007).

164. *See* Google Finance, Historical Prices, http://www.google.com/finance/historical?cid=694653&startdate=Jan+1%2C+2008&enddate=Dec+31%2C+2008.

165. Robert J. Shiller, *Definition of Irrational Exuberance,* http://www.irrationalexuberance.com/definition.htm (last visited March 26, 2009) (explaining the phrase used by former Federal Reserve Board Chairman Alan Greenspan to describe undue inflation of asset values in a speculative bubble).

166. Steve Johnson & Brandon Bailey, *Will This Downturn Bring Pain to Silicon Valley?*, SAN JOSE MERCURY NEWS, Nov. 8, 2008.

167. Miguel Helft, *Yahoo to Cut About 10% of Workers*, N.Y. TIMES, Oct. 22, 2008, at B1.

168. Miguel Helft, *Yahoo to Cut 1,000 Jobs, and Warns on Growth*, N.Y. TIMES, Jan. 30, 2008, at C3.

169. Sequoia Capital, PowerPoint Presentation on Startups and the Economic Downturn (approx. date Oct. 10, 2008), *available at* http://www.slideshare.net/eldon/sequoia-capital-on-startups-and-the-economic-downturn-presentation?type=powerpoint.

Nonetheless, enough in Silicon Valley has succeeded that the area continues to be a source for exciting developments on a regular basis. Although electronic-based information technology is over sixty years old (the first modern-ish computers date to World War II), the industry has continuously reinvented itself, nourished by a constant flow of venture capital and Stanford-trained computer scientists.

Seemingly prosaic examples tell the story. Consider hard-disk capacities. As measured in megabytes of data that can be stored on a square inch of magnetic material (in the form of a hard disk), such capacities have increased by an astonishing multiple of about five hundred million over the last fifty years.[170] The result is data storage that is faster, smaller, and cheaper, enabling everything from personal computers, laptops, iPods, and digital video recorders to the servers that power the Internet. In addition, consider "Moore's Law," which states that the density of transistors on an integrated circuit chip[171] doubles roughly every two years.[172] This law of exponential growth, first elaborated in a 1965 article that also foresaw "such wonders as home computers . . . and personal portable communications equipment,"[173] has held essentially true since the early 1960s,[174] and has indeed meant that digital devices have become smaller, faster, cheaper, and more feature-rich on an ongoing basis. Another case in point is, of course, the Internet—its amazing growth in users, websites, data traffic, and other measures is by now commonplace. No industry except computing and electronics can boast improvements and growth of these magnitudes—certainly not Hollywood.

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170. John Markoff, *Reshaping the Architecture of Memory*, N.Y. TIMES, Sept. 11, 2007, at C8.

171. The density of transistors on an integrated circuit chip is the number of transistors that can be placed on a chip of a given size, divided by the size. *See* Jon Stokes, *Intel Announces 45nm Breakthrough,* Jan. 27, 2007, http://arstechnica.com/old/content/2007/01/8716.ars. Integrated circuit chips include processor chips, RAM chips, graphic controller chips, and many other types of chips found in personal computers, consumer electronics, cell phones, and all other types of consumer and industrial digital equipment. *See* Programming & Electronics Network, http://library.thinkquest.org/C006657/electronics/integrated_circuit.htm (last visited Mar. 26, 2009).

172. John Markoff, *It's Moore's Law, but Another Had the Idea First*, N.Y. TIMES, Apr. 18, 2005, at C1.

173. Gordon E. Moore, *Cramming More Components onto Integrated Circuits*, ELECTRONICS MAG., Apr. 19, 1965, http://download.intel.com/museum/Moores_Law/Articles-Press_Releases/Gordon_Moore_1965_Article.pdf. The article even included a cartoon illustrating "Handy Home Computers" being sold next to notions and cosmetics in a department store. *See id.*

174. *See* Moore, *supra* note 173 (containing a graph showing the progression from 1962 to 1965); Jonathan Fildes, *Meeting the Man Behind Moore's Law*, BBC NEWS, Nov. 12, 1997, http://news.bbc.co.uk/2/hi/technology/7080646.stm#graph (containing a graph showing the progression from 1970 to 2006).

Subject to the vicissitudes of the greater economy, this dynamic culture seems likely to continue for the foreseeable future, at least until some completely different technology supplants the silicon chip. Perhaps one day we will see the rise of synthetic biological systems; maybe we will jack our brains directly into an organic neural Internet. If so, that technology may come from companies located in such biotech and pharma centers as San Diego, Bethesda, or Orange County, rather than Silicon Valley. Until then, however, the Valley is unlikely to take an Ambien and stop innovating.

V. HOLLYWOOD FIGHTS BACK

Hollywood has always depended on technology, of course. Indeed, the industry's own technical group, the Society of Motion Picture and Television Engineers, is almost a century old.[175] Motion pictures themselves, as well as broadcast television, cable, home video, and satellite, are all technological developments that changed the face of entertainment.

Although technological change has been a constant, it has often been misunderstood and mistrusted by Hollywood.[176] For instance, the commercial advent of television was among the factors that dramatically reduced moviegoing,[177] and was considered a threat to the movie business, although it ultimately probably became that business's savior.[178] Decades later, the industry fiercely resisted another innovation, home video, mistakenly believing that the new medium's cannibalization of theatrical and television revenue streams would be the death of the film industry. Indeed, in 1982, the head of the Motion Picture Association of America, Jack Valenti, testified before Congress on this point in apocalyptic—indeed, almost apoplectic—terms, declaring that "the VCR is to the American film producer and the American public as the Boston [S]trangler is to the

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175. Society of Motion Picture and Television Engineers, http://www.smpte.org/ (last visited Mar. 26, 2009). The organization was founded in 1916. *Id.*

176. *See generally* SCOTT KIRSNER, INVENTING THE MOVIES: HOLLYWOOD'S EPIC BATTLE BETWEEN INNOVATION AND THE STATUS QUO, FROM THOMAS EDISON TO STEVE JOBS (2008); PHILIP E. MEZA, COMING ATTRACTIONS?: HOLLYWOOD, HIGH TECH, AND THE FUTURE OF ENTERTAINMENT 67-90 (2007).

177. In 1944 approximately 61 percent of the U.S. population attended the movies on a weekly basis; by 1964 that number had dropped to 10 percent, where it remained essentially constant through at least 2000. Michelle Pautz, *The Decline in Average Weekly Cinema Attendance: 1930-2000*, ISSUES IN POL. ECON., July 2002, at 14, *available at* http://org.elon.edu/ipe/pautz2.pdf. A statistical analysis indicates that "the number of households with televisions . . . ha[d] a significant impact on the decline of cinema attendance . . . ." *Id.* at 12.

178. *See* Vogel, *supra* note 92.

woman home alone."[179] Ironically, home video turned out to be the savior of the business, and is what sustains it today, accounting for vastly more revenue than theatrical box office.[180] Although a film's cinema release garners the publicity and the glamour, home video is truly the tail that wags the theatrical dog.

No matter the challenges Hollywood faced in the past, today's are even harder because the pace of change has quickened dramatically. Starting in the 1990s, the entertainment and information technology industries began a relationship that has drawn the two sectors ever closer. However, change in Silicon Valley is breakneck—in Los Angeles, not so much. Hollywood now finds itself yoked to an industry that evolves at a very different rate, and the result has been a struggle over revenue, distribution channels, and control.

The entertainment industry has responded in several ways. One has been through brute-force lawsuits, such as Viacom's pending suit against YouTube and Google (YouTube's corporate parent) for copyright infringement related to users' unauthorized posting of Viacom content on YouTube.[181] The case may settle with a blanket license to YouTube, as did a suit against Google by book publishers and authors.[182] Indeed, a Viacom division, MTV Networks, reached a deal with MySpace that places ads in MTV video clips uploaded by

179. *Home Recording of Copyrighted Works*, *Hearing on H.R. 4783, H.R. 4794 H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. (1982), *available at* http://cryptome.info/0001/hrcw-hear.htm. Less dramatically, and less offensively, Valenti also asserted that

> [the film and television industry] are facing a very new and a very troubling assault on our fiscal security, on our very economic life and we are facing it from a thing called the video cassette recorder and its necessary companion called the blank tape.... [Films are] going to be so eroded in value by the use of these unlicensed machines, that the whole valuable asset is going to be blighted . . . beyond all recognition . . . . [T]he VCR is stripping . . . [other] markets [such as television] clean of our profit potential, you are going to have devastation in this marketplace.

Id.

180. In 2004 worldwide studio receipts from theatrical exploitation were $7.4 billion, while the home video figure was $20.9 billion. VOGEL, *supra* note 92, at 91. Television contributed another $16.6 billion in license fees to the film industry, leaving theatrical revenues to account for only 16.5 percent of aggregate worldwide studio receipts. *Id.*

181. Viacom Int'l, Inc. v. YouTube, Inc., No. 1:07-CV-02103 (S.D.N.Y. filed Mar. 13, 2007).

182. *See* Settlement Agreement, Author's Guild v. Google, Inc., No. 05-CV-08136 (S.D.N.Y. filed Sept. 20, 2005), *available at* http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/settlement/Settlement%20Agreement.pdf; James Gibson, *Google's New Monopoly?*, WASH. POST, Nov. 3, 2008, at A21; Miguel Helft & Motoko Rich, *Google Settles Suit Over Book-Scanning*, N.Y. TIMES, Oct. 28, 2008, at B1.

fans without permission; MTV and MySpace will then share the ad revenue.[183] Similarly, MGM reportedly will soon begin posting ad-supported full-length movies on YouTube, as well as running ads next to some MGM clips uploaded by fans without consent.[184] These deals make sense, and may herald the beginning of greater accommodation between studios and Silicon Valley. So far, however, the Viacom-YouTube suit continues, and it could go to the Supreme Court rather than settle.

Another example on the litigation front is a suit by the six major studios against RealNetworks[185] that alleges that its RealDVD product, which allows consumers to copy DVDs (subject to certain restrictions),[186] violates the Digital Millennium Copyright Act (DMCA) by circumventing DVD copy-protection technology.[187] Similar legal action includes the many demand letters and lawsuits filed by the music industry's representative, the Recording Industry Association of America (RIAA), against individual users alleged to have illegally shared music via such systems as BitTorrent. This approach appears to have been only marginally effective and has led to an enormous amount of bad publicity for the industry.[188] In late 2008, the RIAA abandoned lawsuits in favor of agreements with Internet service providers (ISPs) whereby the ISPs would warn customers who were illegally uploading music and ultimately, perhaps, cut off their Internet access entirely.[189]

Another route Hollywood has taken is legislative. Even before the high-profile litigation campaigns, Hollywood tried to build defenses against technology with Washington's help. Largely at the behest of the motion picture and music industries, in 1998 Congress passed two measures strengthening copyright. One, the aforementioned DMCA, introduced into copyright law the concept of technological measures that control access to works subject to

183. Jessica Guynn, *Deal Puts Ads in Video Uploads*, L.A. TIMES, Nov. 3, 2008, at C1; Andrew Wallenstein, *Piracy Faces a 'Game-Changer': MySpace, MTV Test Technology That Will Allow Content Owners To Benefit*, HOLLYWOOD REP., Nov. 3, 2008, at 6.

184. Brad Stone & Brooks Barnes, *MGM to Post Full Films on YouTube*, N.Y. TIMES, Nov. 10, 2008, at B3.

185. *See* Brad Stone, *Studios Sue to Bar a DVD Copying Program*, N.Y. TIMES, Oct. 1, 2008, at C11.

186. *See* Brad Stone, *RealNetworks to Introduce a DVD Copier*, N.Y. TIMES, Sept. 8, 2008, at C1.

187. *See* Digital Millennium Copyright Act, Pub. L. No. 105–304, 112 Stat. 2860 (1998).

188. *See* Freakonomics, Are Record Labels the New Realtors?, Jan. 19, 2009, http://freakonomics.blogs.nytimes.com/2009/01/19/are-record-labels-the-new-realtors/.

189. Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1.

copyright—in other words, copy protection systems or, more broadly, digital rights management (DRM) technology. With the passage of the DMCA, it arguably became, for the first time, a violation of the copyright statute to circumvent such measures,[190] even if for the purpose of making otherwise permissible fair use[191] of the work.[192]

Another 1998 statute, the Sonny Bono Copyright Term Extension Act, lengthened the term of copyright by an additional twenty years, providing protection to works such as early Mickey Mouse films that were about to fall out of copyright and into the public domain.[193] Although this statute is not specifically related to technology, its effect, in combination with the anti-circumvention provisions of the DMCA, has been to enlarge copyright and shrink the range of permissible uses absent the copyright owner's consent. That makes Hollywood happy, but the digerati feel otherwise, as a prominent Silicon Valley copyright lawyer expressed:

> Copyright law has abandoned its reason for being: to encourage learning and the creation of new works. Instead, its principal functions now are to preserve existing failed business models, to suppress new business models and technologies, and to obtain, if possible, enormous windfall profits from activity that not only causes no harm, but which is beneficial to copyright owners.[194]

The conflict between the two industries could not be clearer, and the legislative front continues to evolve.[195] In 2005, in an attempt to reduce piracy at the source, Congress passed the ART Act, making it a federal crime to videotape a movie as it is projected in a theater (for example, by sneaking a camcorder into the theater).[196] More

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190. *See* 17 U.S.C. §§ 1201(a)-(b).

191. *See* 17 U.S.C. § 107 (2007) (defining fair use).

192. *See Universal City Studios, Inc. v. Corley,* 273 F.3d 429, 459 (2d Cir. 2001) (so holding). *But see Chamberlain Group, Inc. v. Skylink Technologies, Inc.,* 381 F.3d 1178, 1202-04 (Fed. Cir. 2004) (contra). The result is that fair use is chilled. *See* Comments of Kartemquin Educational Films, Inc. and The International Documentary Association, *Exemption to Prohibition on Circumvention of Copyright Protection Systems For Access Control Technologies,* Docket No. RM 2008-08 (hearing before the United States Copyright Office), *available at* http://www.copyright.gov/1201/2008/comments/kartemquin-ida.pdf.

193. *See* Pub. L. No. 105–298, § 102, 112 Stat. 2827 (1998); *see also* Eldred v. Ashcroft, 537 U.S. 186 (2003) (upholding the Act).

194. The Patry Copyright Blog, http://williampatry.blogspot.com/2008/08/end-of-blog.html (Aug. 1, 2008, 21:12 EST). Patry is Google's Senior Copyright Counsel—and the author of a prominent treatise on the subject—but emphasizes that the blog is not intended as a statement of Google's position on any issue. *See id.*

195. A rough measure of this is the surprising fact that the Copyright Act has been amended about twenty-five times since 1995. *See* United States Copyright Office, *Copyright Law of the United States*, Oct. 2007, at iv-x, http://www.copyright.gov/title17/circ92.pdf (listing 24 amendments through 2006); *supra* note 190.

196. Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, 119 Stat. 218 (2005). The field is not exclusively federal: the statute does not preempt state laws. 18 U.S.C. § 2319B(f) (2007).

recently, in October 2008, President Bush signed the PRO-IP Act, which established a cabinet-level intellectual property czar and increased penalties for movie and music piracy, among other things.[197]

(Note that Silicon Valley, too, has fought legislatively, obtaining a safe harbor for infringing content on certain type of websites and other services.[198] The contours of this safe harbor are controversial, and are currently being litigated in the high-profile *Viacom v. YouTube* case and others.)[199]

Hollywood's reaction to technology has not been limited to legal avenues, of course; it has mustered business responses as well. One such tactic that the movie industry is using today is to attempt to dilute the power of any one technology company by shifting business to its competitors. For instance, Hollywood is taking this approach against Apple, whose iTunes service has become the dominant distributor of music. In an attempt to deny Apple similar control over paid downloads of movie and television product, the studios have supported Amazon's move to become a leader in this area. The outcome of this gambit is still unknown.

Hollywood is also attempting to build or buy its way into the digital distribution business. This strategy is meeting with some success. On the "build" side, the brightest spot so far is the ad-supported Hulu,[200] which hosts popular television shows and is a joint venture of NBC Universal and News Corporation (parent of Twentieth Century Fox). However, the site's profitability is uncertain and it still has only about one-fiftieth the viewership of YouTube.[201] Old media companies are also directing viewers and readers to their own websites, but these tend to be promotional rather than directly revenue-generating. On the "buy" side, the biggest success is MySpace, bought by News Corporation in 2005, which continues to be popular—albeit less so since the advent of Facebook.[202] Other

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197. Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256 (codified as amended in scattered sections of 15, 17, 18, 19, 42 U.S.C.) [hereinafter PRO-IP Act].

198. DMCA, 17 U.S.C. §§ 512(c)-(n) (stating the notice and takedown procedures).

199. Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, (N.D. Cal. 2008); Viacom Int'l, Inc. v. YouTube, Inc., No. 1:07-CV-02103 (S.D.N.Y. filed Mar. 13, 2007).

200. Brian Stelter, *Web Site's Formula for Success: TV Content With Fewer Ads*, N.Y. TIMES, Oct. 28, 2008, at B10.

201. Tom Lowry, *NBC and News Corp.'s Hulu Is Off to a Strong Start*, BUSINESSWEEK, Sept. 25, 2008, http://www.businessweek.com/magazine/content/08_40/b4102052685561.htm?campaign_id=rss_null.

202. Brian Stelter, *From MySpace to YourSpace*, N.Y. TIMES, Jan. 21, 2008, at C1.

examples are hard to find, however,[203] and a more recent acquisition—CBS's 2008 purchase of CNET[204]—has received negative[205] or lukewarm[206] reviews. Theatrically, digital projection continues to grow, and 3-D films are becoming increasingly popular, but the former seems to be regarded by moviegoers as an incremental improvement, and the effect of the latter is still unclear, although early signs are hopeful.

Another one of Hollywood's responses to technological advances is its internal restructuring of the movie and television businesses. For instance, movies are increasingly released day-and-date internationally (in other words, released on the same day in many countries at once) in an effort to thwart online piracy.[207] Cost structures are also changing in some ways; for instance, as noted above, star salaries are somewhat less stratospheric than a few years ago.[208]

Television is an interesting case: network television and cable seem to be exchanging their DNA, blurring the distinctions between the sort of content carried by each. A key insight is that scripted production on network television is subject to higher union minimums and residuals formulas than cable, particularly basic cable.[209] Perhaps in part as a result of this, some scripted production has

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203. Disney's purchase of Pixar has been very successful, but Pixar is primarily a technology-oriented studio, not an Internet or technology company. *See* Patrick Goldstein, *Pixar's Secret Ingredient? Quality*, L.A. TIMES, Jul. 1, 2008, *available at* http://www.latimes.com/entertainment/la-et-goldstein1-2008jul01,0,2430755.story; Pixar, Corporate Overview, http://www.pixar.com/companyinfo/about_us/overview.htm (last visited Mar. 26, 2009).

204. Brian Stelter, *CBS in Deal to Buy CNet to Increase Online Ads*, N.Y. TIMES, May 16, 2008, at C1.

205. James Surowiecki, *All Together Now?*, NEW YORKER, June 9, 2008, at 52 (arguing that the acquisition is unlikely to create synergies and the price was too high).

206. James Ledbetter, *Network 2.0*, SLATE, May 15, 2008, http://www.slate.com/id/2191526/ (suggesting that there may be "plausible synergies" between the two companies).

207. *See* Lucille M. Ponte, *Coming Attractions: Opportunities and Challenges in Thwarting Global Movie Piracy,* 45 AMER. BUS. L. J., 331, 354-55 (Summer 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1286082; Steven Schwankert, *U.S., China Spar Over Copyright At Conference,* Nov. 7, 2008, http://www.cio.com/article/460825/US_China_Spar_Over_Copyright_At_Conference ("Early release or day-and-date releases (a release date the same as that in other major markets, such as the U.S.) are seen as combatting [sic] piracy by giving consumers the chance to see the film in a cinema before it appears illegally.").

208. *See supra* note 43.

209. *See* DIRECTORS GUILD OF AMERICA, *supra* note 27.

moved to pay cable networks (HBO and Showtime, for example)[210] and, more recently, basic cable networks (such as FX and AMC).[211] In turn, low-cost nonscripted fare, which in the guise of documentary-type programming has always been a staple of cable, has now migrated to network television, primarily in the form of game shows and reality TV,[212] a development accelerated by the 2007-2008 writers' strike.[213] The most recent—and dramatic—example was NBC's elimination of five hours of scripted primetime to make room for a five-nights-a-week primetime Jay Leno show.[214] These changes mean less work, and less high-paying work for Screen Actors Guild (SAG) and Writers Guild of America members in particular, a source of understandably great concern for those unions.[215]

Also roiling the unions are other aspects of the entertainment industry's response to new technology. Several items are flashpoints for SAG in particular: (1) the industry's goal of producing some content for new media without use of union members or coverage by a union agreement; (2) the industry's proposal that it be able to replay certain types of content created for new media without paying residuals (that is, reuse fees); (3) the industry's plan to slice movies and television shows into clips and sell these via the Internet and cell phones; and (4) the industry's continuing integration of products into scripted programming, a heightened form of product placement referred to as "product integration" that arose in response to consumers' use of digital video recorders to skip over conventional commercials and which concerns SAG in part because, unlike

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210. Well-known examples include *The Sopranos*, *Entourage*, *Sex in the City*, *Queer as Folk*, *The L Word*, *Weeds*, *Dexter*, *Californication*, and *Brotherhood*. *See* HBO, http://www.hbo.com/series/index.shtml; Showtime, http://www.sho.com/site/series/home.do.

211. Well-known examples include *The Shield*, *Rescue Me*, *Nip/Tuck*, *Damages*, *Mad Men*, and *Breaking Bad*. *See* FX, http://www.fxnetworks.com/; AMC, http://www.amctv.com/originals/.

212. Well-known examples include *American Idol*, *Big Brother*, *Survivor*, *The Amazing Race*, *Dancing With the Stars*, and *The Apprentice*. *See* Christopher Rocchio, *2008 Reality TV Fall Preview: Coming Soon to a TV Near You*, REALITY TV WORLD, Sept. 2, 2008, http://www.realitytvworld.com/news/2008-reality-tv-fall-preview-coming-soon-tv-near-you-7719.php.

213. *See* Carl DiOrio, *Report: Biz Employment Outlook Worrisome*, HOLLYWOOD REP., Feb. 18, 2009, http://www.hollywoodreporter.com/hr/content_display/television/news/e3i39dad3309e171bf9c59769275d908a09.

214. Meg James, *Prime Time's Script May Get Tossed*, L.A. TIMES, Dec. 10, 2008, at A1.

215. In contrast, some AFTRA members benefit from these changes, since that union has jurisdiction over game, reality and talk shows. *See* AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, 2001-2004 AFTRA NATIONAL CODE OF FAIR PRACTICE FOR NETWORK TELEVISION BROADCASTING.

conventional commercials, product integration is not accompanied by any additional compensation for the actor.[216]

Other content industries have responded to technology as well. In the music industry, one sees the rise of "360 deals," so called because labels entering into such deals with artists claim a piece of essentially all revenue streams, including revenue from touring and merchandise that was previously off-limits to them.[217] In broadcast news, some outlets, such as CNN, are experimenting with deploying "all-platform journalists"—one-man-band reporters who carry laptops, cell phones, and lightweight video cameras.[218] In print (or, more accurately, text-based) journalism, responses to the changing business environment range from the *New York Times*' in-house technology research and development lab[219] to the rise of independent non-profit—and thinly capitalized—newsgathering organizations such as ProPublica and Voice of San Diego.[220] Even typically conservative book publishers may soon try releasing some books online in new ways: on a subscription basis, or at a reduced price—or even for free—under an ad-supported model.[221]

It is fair to ask why the response from Hollywood, as well as from other content industries, has been so belated, and why, in the case of the music business, so much of the early response consisted of threats and litigation.[222] There are likely a variety of reasons for these counter-productive approaches: (1) anger at and denial of

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216. *See* Jonathan Handel, *SAG-Studio Pregame Report,* Feb. 2, 2009, http://digitalmedialaw.blogspot.com/2009/02/sag-studio-pregame-report.html, at Secs. 3(b), (c), (j), (k); Jonathan Handel, *SAG & The Studios: What Are They Fighting Over,* Dec. 7, 2008, http://digitalmedialaw.blogspot.com/2008/12/sag-studios-what-are-they-fighting-over.html, at Secs. 1-3; Jonathan Handel, *No Time for Drama in Contract Talks for Studios, Actors*, L.A. BUS. J., May 26, 2008, *available at*, http://digitalmedialaw.blogspot.com/2008_05_01_archive.html.

217. Jeff Leeds, *The New Deal: Band as Brand*, N.Y. TIMES, Nov. 11, 2007, http://www.nytimes.com/2007/11/11/arts/music/11leed.html.

218. Brian Stelter, *TV Networks Rewrite the Definition of a News Bureau*, N.Y. TIMES, Aug. 13, 2008, at C1.

219. Emily Nussbaum, *The New Journalism: Goosing the Gray Lady*, N.Y. MAGAZINE, Jan. 11, 2009, http://nymag.com/news/features/all-new/53344/.

220. Richard Pérez-Peña, *Web Sites That Dig for News Rise as Watchdogs*, N.Y. TIMES, Nov. 18, 2008, at A1; Starr, *supra* note 58; James Rainey, *A Young Newsroom Flourishes in San Diego,* L.A. TIMES, February 15, 2009, *available* at http://articles.latimes.com/2009/02/15/news/na-onthemedia15; ProPublica, http://www.propublica.org/ (last visited Apr. 2, 2009); Voice of San Diego, http://www.voiceofsandiego.org/ (last visited Apr. 2, 2009).

221. Eric Pfanner, *Google Signs a Deal to E-Publish Out-of-Print Books*, N.Y. TIMES, Nov. 10, 2008, at B8.

222. *See supra* notes 51-52 and accompanying text.

changes in social mores regarding control of intellectual property;[223] (2) fear of self-cannibalization of existing revenue streams, coupled with a failure to recognize that the alternative is to be cannibalized by new market entrants;[224] (3) fear of adverse reaction from powerful existing distribution partners, such as Wal-Mart, and their executives;[225] (4) a frustration with business models that produce dramatically lower revenue than traditional media and distribution channels;[226] (5) a desire on the part of entertainment executives to avoid personal risk (for example, the risk that a new media experiment would fail, with its proponent receiving the blame); and (6) a reluctance on the part of executives to make themselves obsolete.

That last point about the executives' reluctance to make themselves obsolete deserves a word of explanation. The value to the studio of today's home-video executive, for example, comes from such things as his or her knowledge of hard-goods marketing, financial models, distribution channels, physical supply chains, disc replication, and the like, as well as his or her personal relationships with executives in each of these areas. In contrast, just a few years ago a home-video executive would have little understanding of Internet marketing and financial models, distribution channels, and the like, nor would he or she have the corresponding personal relationships. He or she could scarcely be expected to have championed a shift to new distribution media at that time. Indeed, the easiest and most natural reaction would have been to fight new media rather than embrace it.

VI. ONWARD

What next? Hollywood seems sure to survive the challenge posed by the technology industry. Film libraries have always had value,[227] and will no doubt continue to—although the Internet may already have adversely affected that value.[228] Quite apart from technology, markets will expand; for instance, population growth in the United States over the next few decades means more customers.

223. *See* Amy Harmon, *Piracy, or Innovation? It's Hollywood vs. High Tech*, N.Y. TIMES, March 14, 2002, at C1.

224. *See* Rafat Ali, *KeepMedia Review 1: The Magazine Industry's Self Cannibalization Worries,* Aug. 1, 2003, http://www.paidcontent.org/entry/keepmedia-review-1-the-magazine-industrys-self-cannibalization-worries/ (music industry is slowly waking up to need to self-cannibalize).

225. *See* Grover, *supra* note 101.

226. *See supra* note 116 and accompanying text.

227. VOGEL, *supra* note 92, at 92-99.

228. *Id.* at 94 (asserting that this has happened "to some unknown extent").

Internationally, much focus of late has been on the "BRIC nations": Brazil, Russia, India, and China. In those and other countries, rising standards of living, in addition to continued population growth, may mean more business as well. However, even leaving aside the effects of the global recession, the challenges are great: access to markets is not assured, political stability internationally can be elusive (as Russia's 2008 foray into Georgia reminded us), and reduction of piracy in some of the BRIC nations is even harder than in industrialized countries—at best a difficult task, and at worst effectively impossible.

Thus, whether Hollywood will thrive—rather than just survive—is a harder question. Experiments with new media may yet bring profit to old media companies,[229] but they certainly have not done so yet to a material degree.[230] Of course, as greater numbers of films and television programs are played online and become what some dub "move-over content," revenues to the studios will increase. Nonetheless, the question remains: will Internet-based distribution models—much of them ad-supported—ever generate as much gross and net revenue as traditional, paid distribution?[231] If so, how much of that revenue will be captured by Hollywood, and how much by companies that own the new media distribution platforms? And what about programming deployed on cellphones and other mobile devices—what will Hollywood reap from this emerging medium? No one knows the answers, but there has been little good news in these areas for Hollywood of late, and the near future, at least, looks dark.[232]

If the studios continue to lose their grip on distribution and become vertically de-integrated and disintermediated from their own distribution channels, they will be left with content creation as their core business. That is a problem because, fundamentally, the

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229. David Carr, *All of Us, the Arbiters of News*, N.Y. TIMES, Aug. 10, 2008, at C1.

230. *See* Daniel Frankel, *Indie Sector Waiting for Digital Revolution*, VARIETY, Oct. 30, 2008, http://www.variety.com/article/VR1117995036.html ("The Internet isn't paying upfront advances on anything yet . . . . [New media revenue is] not coming very fast.") (quoting Jean Prewitt, the president of Independent Film & Television Alliance); Eric Pfanner, *Digital Music Sales Grow Increase*, N.Y. TIMES, Jan. 25, 2008, at C2 ("[D]igital sales have yet to make up for the shortfall in sales of compact discs."); *supra* note 115 and accompanying text.

231. At least one analyst says no, arguing that aggregate home-video revenues (DVD rental and sales revenues added to video-on-demand and iTunes video revenue) will decline from $17.78 billion in 2007 to $5.85 billion in 2015, a two-thirds decline. Szalai, *supra* note 1. A prediction seven years into the future has to be taken with a grain of salt, however.

232. *See* Posting of Betsy Schiffman to Epicenter, http://blog.wired.com/business/ (July 7, 2008, 12:35 EST) ("'We believe the feature film and TV content businesses are on the verge of structural changes that appear to impact the core revenue and profits of entertainment business models.'") (quoting Lehman Brothers analyst Anthony DiClemente); Szalai, *supra* note 1.

economics of content creation are inferior to those of distribution. The former is an industrial process, painstaking and manual. The latter, in the digital age, is post-industrial and automated.[233] Nothing in Hollywood's production mechanism has become faster or cheaper at anywhere near the rate seen in Silicon Valley, if at all. Even with technological improvements, it still takes a long time to write, develop, design, shoot, and post-produce a movie, for instance. And much of that process—especially for studio films and network television—has become more expensive, not less, in the past few decades.[234] Although Hollywood often receives, and will try to continue to receive, a large share of the revenues from distribution of its content through new media, these revenues are still much lower than those from traditional distribution, and the fundamental differences on the cost side are enormous.

Some commentators contend that the solution to the dilemmas faced by professional content creators is to simply accept that even paid content will eventually become free.[235] They argue[236] that creators will make money from related endeavors, such as advertising, live performances, consulting services,[237] and even, some have suggested, taxes on blank DVDs, DVD burners, or perhaps Internet access.[238] This notion is superficially appealing. It provides some creators with a roadmap to bootstrapping their way into profitability: garage bands can make their music available for free on the Internet (while earning money from low-paying live gigs and boring day jobs, just as they do now) in an effort to build an audience, while famous musicians can further build their audiences, or revive flagging careers, by doing the same.[239]

Yet—appealing though it may be—the idea that these alternative business models are sufficient is nonetheless flawed. For instance, this concept offers little or nothing to most creators, whether mid-level musicians who do not manage to find enough of an audience, novelists (whose opportunities for consulting are virtually nonexistent), or filmmakers, cast and crew (who do not have obvious alternative merchandise or services to sell).

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233. *Cf.* Posting of Saul Hansell to Bits, http://bits.blogs.nytimes.com/ (Aug. 11, 2008, 15:27 EST) (analyzing iTunes profit margins).

234. *See supra* note 44 and accompanying text.

235. *See supra* notes 134-39 and accompanying text.

236. *See* Anderson, *supra* note 4; Barlow, *supra* note 98; Barlow, *supra* note 134.

237. For example, non-fiction authors will theoretically establish their credentials by writing books, even for low advances, and then make money by hiring themselves out as consultants.

238. *See* Boynton, *supra* note 138.

239. *See supra* notes 111-13 and accompanying text.

In addition, this theory fails to explain how corporate entities can make enough money to continue operations as they do today. That may be delightful to anti-establishmentarians, who welcome the disintermediation of what they see as companies leaching off of art's true creators, but sticking it to the man creates a dilemma: who will finance the creation and marketing of professional content while creators are busy bootstrapping themselves? And how do we know that new business models will ever generate sufficient revenue to enable production of professional content, let alone in the quantity to which we have been accustomed?

The fundamental questions are these: Are we willing to let newspapers disappear, blockbuster movies succumb to piracy, and novels be confined to self-publishing? And are we condemned to undergo a period of turmoil and dissolution of existing models of content creation while awaiting the hoped-for time that new ones gain traction? Of course, we may not have any choice. UGC is here to stay, and as for piracy, well, as the copyright reformers argue,[240] massive flouting of a law eventually leads to a change in the law, not in behavior. However, this likely fact does not reduce the loss to society.

If this Article were a screenplay, now would be a good time for the hero to reappear: a handsome prince, perhaps, to restore content to the throne it once occupied. Unfortunately, as tough as it is to craft a good screenplay, it is even harder to restructure an industry. That is an endeavor not for a prince, but rather for all of the king's horses and all of his men and women—who, hopefully, will be able to put the industry back together again, albeit in a new form. Content may be under siege, but it has not lost the war.

240. *See supra* notes 134-39 and accompanying text.