Learning By Doing

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“Tell me one last thing,” said Harry. “Is this real? Or has this been happening inside my head?” “Of course it is happening inside your head, Harry, but why on earth should that mean that it is not real?”

-- Harry Potter and the Deathly Hallows

“Wouldn’t it be great if Camp Half-Blood was a real place?”

So said Topher Bradfield, the children’s activity coordinator of an independent bookstore, BookPeople, in Austin, Texas in 2006, to an audience of young listeners at a dramatic reading of the wildly popular children’s fiction book, The Lightning Thief, by Rick Riordan. The New York Times bestseller chronicles the adventures of one Percy Jackson who learns at the age of 12 that his strange abilities (he can stay underwater for a long time) are the result of his mixed parentage—his father is the Olympic sea god, Poseidon. Percy and other young demi-gods are sent to Camp Half-Blood to train and embrace their destiny. BookPeople sought to capitalize on the book’s popularity by creating a real-life Camp Half-Blood. The camp is held in a state park, with counselors playing the roles of centaurs and Olympic gods, leading young “demi-gods” through epic adventures based on their shared passion for Greek mythology. These book campers don’t just flip through pages; they fight with foam swords, race chariots, and collaborate to save the world. This summer some 600 kids from around the world clamored to get in.

Similar, book-themed camps based on The Lightning Thief and everything from The Little House on the Prairie to Harry Potter have popped up around the country.

Camp Half-Blood epitomizes a shift in the nature of both consumption and entertainment. In today’s economy, “goods and services are no longer

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2 Telephone interview with Topher Bradfield, BookPeople, August 19, 2012.

enough." Today’s consumers demand experiences. From Star Wars to Harry Potter, fans do not just want to watch or read their favorite characters. They want to be them. They want to don the robes of Gryffindor, flick their wands, and drink the butterbeer. As The Economist observes, consumers are made happier through “experiences’ over commodities, pastimes over knick-knacks, doing over having.” The owners of fantasy properties understand this. In the 1970s George Lucas put light sabers in children’s hands. Today, Warner Bros. has the Wizarding World of Harry Potter theme park in Orlando. While child’s play in fantasy worlds is not new, “what is new … is that experiences represent the basis of economic activity.”

The explosion of participatory experiential activity extends to a range of contemporary activities, from karaoke to flashmobs, YouTube to Comic-Con.

To date, much of this elaborate fan activity appears to take place without licenses, perhaps outside even the shadow of the law. Thus far, the owners of copyrights and trademarks in popular fantasy worlds have largely condoned or “tolerated” fan activity. (One enterprising couple hosting a Star Wars wedding sought to cover themselves legally by inviting George Lucas to the party. He rsvpd no.) Why have IP owners, who claim the rights in everything from fictional characters to cultural merchandise (such as lightsabers and wands to games and costumes) based on their stories, largely failed to sue those engaged in such cultural activities based on their works? One might suggest two rationales: first, these activities increase the demand for their commodities, and drive a more impassioned fan base; second, sending cease and desist letters can quickly turn fans’ love into anger.

The emergence of an experience economy may lead some owners of cultural property to reconsider their laissez-faire attitude towards play. I seek here to anticipate this effort, and to explain why law should resist it. To do so, I turn to contemporary cultural theory. I examine theories of learning and performance, including those of Kenneth Arrow, Michael Polanyi, Peggy

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5 The rise of modern brands follows this logic -- Starbucks is not about the coffee alone. Indeed, its new logo drops the word coffee altogether.
7 To take a common example, “in previous eras people rarely if ever bought birthday parties ... [but] today they do so regularly.” Pine & Gilmore, supra note 4, at xix. Entertainment is shifting from the sale of commodities alone to the sale of accompanying experiences. Birthday and dinner parties are just the beginning. There are Harry Potter Weddings, Hunger Game weddings, Twilight weddings, Superman weddings, Shrek weddings, and Star Wars Weddings. As the historian Michael Saler describes, today many people, both adults and children, are “living in imaginary worlds.” MICHAEL SALEK, AS IF: MODERN ENCHANTMENT AND THE LITERARY PREHISTORY OF VIRTUAL REALITY 18 (2012).
8 Comic-Con refers to dozens of comic book fan conventions around the world, and in particular to the largest U.S. convention held annually in San Diego since 1970.
10 See id.
Phelan, Philip Auslander, and Martha Nussbaum. Scholarship on the law of cultural merchandising has thus far largely ignored cultural analysis; I seek to rectify that here.

For those who believe that I am making a mountain out of molehill, I suggest that history offers a sobering lesson. Prior to the 1970s children’s play was largely free of royalty payments, the stuff of homemade Cinderella ball gowns and unbranded toys. Today, we must pay to play. Make no mistake: today child’s play is serious business. Over the past three decades the phenomenon of putting oneself into the story has emerged into a hundred billion dollar-a-year enterprise around a legal right to exclusively license “cultural merchandise.” Cultural play increasingly involves “officially licensed” cultural merchandise, from lightsabers to wands, Darth Vader masks to Harry Potter glasses, action figures to wizard’s and witch’s fare to taste. This market only promises to grow in light of new media offerings of ever more elaborate modes of play, including interactive video games and web portals, such as Pottermore.

Cultural merchandising is so profitable it drives cultural production itself, with Hollywood studios choosing which projects to pursue based in part on the merchandising potential of the film or television series. This should not come as a surprise—the proceeds from merchandising can exceed sales of the underlying works themselves:

- The Lion King film? $952 million.
- The Lion King experience? $1.5 billion.

Any periodization of the new merchandising and experience economy will find at least two time periods, cleaved by Star Wars. Prior to the first Star Wars film’s debut in 1977, entertainment products based on shows such as Howdy Doody in the 1950s, Star Trek in the 1960s, and The Six-Million Dollar Man in the 1970s were licensed for use on a variety of products, from toys, to lunch boxes, to T-shirts. But total retail sales for all merchandising products in 1977 were just under $5 billion annually. The release of Star Wars was “the watershed of modern merchandising,” with the first trilogy itself accounting for about $4 billion in merchandise sales, “nearly double the ticket revenues of the original movie trilogy.” As a treatise on the emergent law of

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11 Entertainment Law 3d: Legal Concepts and Business Practices §4:24 (“Licensed merchandise is a $100 billion-per-year industry.”). This number includes universities and sports team logo licensing.

12 Law of Merchandise and Character Licensing §2.8.


14 Id.

merchandising notes, “After Star Wars, merchandising grew exponentially.”

The Harry Potter brand is estimated to be worth $15 billion.

A commonplace assumption of the entertainment industry today is that intellectual property owners have an absolute right to fully exploit their copyrights and trademarks in a variety of media well-beyond film rights, including toys, video games, theatrical plays, and even theme parks. If anyone is playing with a popular universe, they are doing so only at the sufferance of the copyright and trademark owner. There seems to be popular appeal to the notion that Rowling and Warner Bros. should have the right to control some derivatives from the Harry Potter series, including video games, theme parks, and Lego sets. Courts and laypeople alike seem to share a feeling “that authors should be granted the ability to control the use of their creations. They should have the right to mold the future of their characters, to prevent their abuse or distortion, and to benefit financially in the marketplace.”

But is there any limit? Consider the following examples:

In 2008 Disney sued a Florida couple living on public assistance for $1 million for wearing unlicensed Eeyore and Tigger costumes as part of their family business, Kool Klown Party People Inc., which entertains at children’s parties.

That same year, the holders of copyrights and trademarks in Barney, Bob the Builder, and Thomas the Tank Engine sued the National Discount Costume Company for its adult-sized costumes resembling these characters. While a federal district court found the costumes were dissimilar enough from the characters to avoid copyright liability, the court enjoined the discount shop from using the trademarked names, “Barney,” “Bob the Builder,” and “Thomas the Tank Engine” in their catalogue.

During the Halloween season of 2009, Warner Bros. sent a cease-and-desist letter to a single mom in the U.K. who was planning to host a Harry Potter themed dinner party, serving her own version of butterbeer and

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16 Raysman, supra note 13.
18 1 Entertainment Law 3d: Legal Concepts and Business Practices § 3:33 (focusing on “Need to control rights in multiple media and multiple territories—Multiple media—Potential revenues—Derivative media revenue.”). For a critical appraisal of this emergent right, see generally Stacey L. Dogan & Mark A. Lemley, The Merchandising Right: Fragile Theory or Fait Accompli?, 54 EMORY L.J. 461, 480, 506 (2005). (complaining that trademark owners “act as though the merchandising theory is a fait accompli”).
pumpkin soup. The strapped mom was charging admission. This last case strikes close to home for this writer. Last spring, my property students gifted me with *The Unofficial Harry Potter Cookbook*. If I sell seats at my Harry Potter Dinner Party at the coming law school public interest auction, will Warner Bros. sue me for (in effect) selling my own Bertie Botts Jelly Beans and butterbeer?

Fan activity potentially implicates several rights of a copyright owner, from the reproduction right, to the right to make and control derivative works, to the right of public performance. Owners of trademarks argue that unlicensed merchants are freeriding, profiting from brands built by others. Trademark owners have still other concerns: if an adult engages in lewd behavior while wearing an unauthorized Tigger costume, Disney fears the brand will be tarnished. Consider the recent ranting Elmo and foul-mouthed Cookie Monster bullying toddlers and their parents in Times Square. Can trademark owners stop these unauthorized antics?

How should the law regulate who has the right to bring alive a fictional universe through play? This Article critically considers the current law regulating such human activities, the law of cultural merchandising.

Part I sets the scene by describing the uneasy legal underpinnings of the so-called merchandising right. Economics has been the main driver of merchandising law. Since the 1970s and 1980s courts have recognized a strong but not absolute right of intellectual property owners to exclusively license their characters and literary creations based on the circular and discredited reasoning of “if value, then right.” Courts, recognizing exclusive licensing rights as highly lucrative, have supported them because they are so valuable, oftentimes by steering far from the conceptual moorings of trademark and copyright laws. Call this legal model of granting a copyright and trademark holder rights to demand users to license fan activities, “Pay to Play.”

Scholars have offered important critiques of the so-called merchandising right, arguing that the law extends copyright and trademark beyond their traditional concerns, is built on circular reasoning, and has pernicious effects on competition and innovation. I seek to complement these arguments, by arguing that Pay to Play can extend a copyright and

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23 See *Cookie Monster, Elmo: Monster Behavior in Times Square*, USA Today, April 9, 2013 (describing inappropriate activities of a handful among large numbers people who dress up as characters, from Elmo to Hello Kitty, to make a few extra dollars with tourists in Times Square).
24 See, e.g., Rochelle Dreyfuss; Mark Lemley.
25 See, e.g., Kurtz, supra note 19, at ___ (arguing that copyright law has been stretched beyond its traditional focus on “substantial similarity”); Dogan & Lemley, supra note 18, at 464 (“much of the multi-billion dollar industry of merchandise licensing has grown around a handful of cases from the 1970s and 1980s that established merchandising rights with little regard for the competing legal or policy concerns at stake”).
trademark holder’s rights in ways that intrude excessively on other rights, in particular the ability to play, imagine, and learn with others.26

Recent scholarship has sought to keep open a liberal space for individuals to engage in fan fiction—the practice of extending the fictional world through written stories.27 In this Article, I explore efforts to extend stories through the material world. Fan activity and fan activism allow for new modes of social and experiential learning and innovation that we must understand in order to regulate. Few fictional works have challenged the boundaries between real and unreal as Harry Potter. The intangible fantasy world created by J.K. Rowling has found a life in the real world, from the creation of a global Dumbledore’s Army of young people dedicated to upholding the books’ values in the real world, to a real-world, online Daily Prophet edited by children around the globe. There are scores of unofficial Harry Potter parties, websites, books, and summer camps. Even the fictional pastime of the wizarding world, Quidditch, has been brought to life, with numerous real world Quidditch teams at high schools and universities competing for the chance to win the Quidditch World Cup. Students run on the field with brooms between their legs, while human runners personify the enchanted snitch balls. One day, children may even get a Quidditch scholarship to college.

It may seem easy to dismiss these activities as frivolous. But contemporary cultural theory embraces such engagement as facilitating what education and communication theorists today call “learning by doing.” Part II seeks to better understand the phenomena of experiential activity in fantasy worlds. Theories of tacit knowledge reveal how scientific knowledge must be experimented with in labs and in social settings with mentors and colleagues. The theoretical literature reviewed in this Part suggests that cultural knowledge, too, must be actively experienced, repeated, held, touched, tasted, experimented with, and practiced with others. As Kenneth Arrow famously described the phenomenon of “learning by doing,” in 1962: “Learning is the product of experience. Learning can only take place through the attempt to solve a problem and therefore only takes place during activity.” Arrow was concerned with promoting efficiency.

I turn to new theories of education and learning by doing in online and offline environments, theories of tacit knowledge, and performance theory to seek to understand how physical embodiment and social engagement with the humanities promotes other skills and values, as well. As the authors of a critically acclaimed new book about digital learning write, “The twenty-first

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26 Dogan & Lemley’s excellent, recent critique of the so-called merchandising right offers a broad view of this emergent right, focusing on merchandising of sports and university logos and commercial brands. See Dogan & Lemley, supra note 18. This Article focuses more closely on the implications of a broad merchandising right in the context of play and experiences based on fantasy worlds.

27 For my own work on this topic, see Anupam Chander & Madhavi Sunder, Everyone’s a Superhero: A Cultural Theory of Mary Sue Fan Fiction as Fair Use, 95 CAL. L. REV. 597 (2007).
century ... belongs to the tacit. In the digital world, we learn by doing, watching, and experiencing.”

Performance theorists describe the development of individual agency through physical “embodiment”; Michael Polanyi describes the facilitation of empathy through experience, which he called “indwelling.” As we shall see, fan activity, from discussion sites, to live-action role-playing, purchasing merchandise, and wearing character costumes fosters learning, creativity, and sociability. As Bradfield explains of Camp Half-Blood: "We want [kids] to feel like they've lived inside their favorite book and have something to say as to what is happening in that world." Campers make decisions within the framework of the stories that affect the ways the middle parts of the story unfold. Though the camp has actors, a costume and wardrobe department, makeup and prosthetic effects, in the end “Kids’ imaginations are their most important tool. Their ability to play and problem solve are their biggest assets out there.”

Theories of performance and culture help us understand that play is an important human activity, central to sociality and education. In lieu of Pay to Play, this Part proffers an alternate “Learning By Doing” model for experiential fan activity, a model that heeds the role of play in sociality and education. Recognizing Learning by Doing helps us see that a Pay to Play model carries substantial costs for individuals and society, restricting access to important ways that human beings develop and relate to each other. By putting a price tag on cultural play, Pay to Play reduces the capability of many people to engage in a central social activity.

Learning By Doing presents new challenges to the law and theory of cultural merchandising around play. A near absolute merchandising right raises the cost of play, and impedes new modes of innovation and competition without showing sufficient countervailing benefit for exclusive rights. Fan activity makes us rethink normative goals, as well. Copyright law’s aim is the promotion of learning. Does that include Learning By Doing? The first copyright act, the Statute of Anne, focused on “the encouragement of learned men to compose and write useful books.” In a world of low literacy rates and low levels of education, perhaps that was understandable. But as I argue in my new book, From Goods to a Good Life: Intellectual Property and Global Justice


31 Telephone interview with Topher Bradfield, BookPeople, August 19, 2012.

32 Id.

33 The Founder’s Constitution, Vol. 3 – Article I, Section 8, Clause 5 through Article 2, Section 1 (Philip B. Kurland & Ralph Lerner, eds. 1987) at 36 (quoting An Act for the Encouragement of Learning, By Vesting the Copies of Printed Books in the Author’s or Purchasers of Such Copies 8 Anne, c. 19 (1709)).
today’s Participation Age understands learning as promoting not just more books, but more book clubs and other participatory spaces in which individuals can discuss and debate cultural works, much as envisioned by Habermas in his work on the Enlightenment.  

Cultural merchandise is often dismissed as crass commercialism. But cultural play has salutary benefits. Experiencing and doing with others matters. Our cultural worlds touch us. Fictional worlds become real in the sense that they become artifacts to be referenced and actors that shape our culture and ourselves. We must preserve the capability to critically and creatively engage cultural works with all our senses.

I. CULTURAL MERCHANDISING: THE PAY-TO-PLAY MODEL

Cultural merchandising “refers to the licensing of properties, such as words, names, titles, symbols, designs, or fictional characters, for use on or in association with products. Such merchandise licensing aims to increase consumer demand for both the original property and the related product, and is an increasingly important marketing device. A successful merchandising program may even be more profitable than the work from which the property is derived.”

Hasbro Inc.’s Kenner division started this growth industry by introducing a 3.75 inch action figure in the United States. More recently the familiar Danish toy giant Lego has gotten into the licensing act. Prior to 1999, Lego built its own brand around generic “bricks” from which children could build anything their minds could imagine or which they saw around them. But as the company entered the new millennium and saw its fans leaving for video games and electronic entertainment, Lego faced its first economic losses in decades. The answer? Entertainment licenses. Lego has since signed license deals for official Lego play sets built around such mega properties as Star Wars, Indiana Jones, Spiderman, and Harry Potter.

Today, cultural merchandising fuels cultural production itself; licensing deals finance films. Warner Bros. invested more than $125 million in the motion picture version of J.K. Rowling’s first book in the Harry Potter series, Harry Potter and the Sorcerer’s Stone. The studio underwrote its enormous

36 Raysman, supra note 13.
37 Madore, supra note 15, at __. Takura had introduced a 3.75 inch “Microman” line of action figures in Japan in 1974, released in the United States under the “Micronauts” name in 1976.
38 Citation.
investment with more than $100 million in advances from about 90 domestic licensees and 200 international licensees related to the film’s characters and creations, from Quidditch brooms to wands to candy to costumes. Most of the license agreements included the right to create products for the second Harry Potter movie, which had not yet been released. Lucasfilm’s exclusive deal with toy manufacturer Hasbro just before the 1999 release of its first Star Wars prequel reportedly guaranteed the film company $600 million in royalties. George Lucas received warrants to purchase about 7.4 percent of Hasbro in the transaction. Hasbro predicted that the sale of licensed toy sales alone would top $5 billion for the three prequel films. Given these vast sums, it is not surprising that Hollywood chooses its projects with an eye to their potential for cultural merchandising.

In short: enormous sums of money are riding on merchandising rights. But thus far, though intellectual property owners have acted as if they have an absolute right to exclusively license their works and trade names, the law has been less than clear on the matter, and has been especially vague about drawing lines indicating just how far licensing rights extend. Because neither the legislative branches nor the U.S. Supreme Court have pronounced directly on the reach of cultural merchandising rights, current law sits uneasily on federal appeals court decisions. These decisions are both inconsistent and often stray from the traditional goals of both trademark and copyright law. In the trademark context, in particular, this is persuasive reason to think that the Supreme Court would reject an absolute merchandising right that has emerged in some lower courts, given the Court’s recent emphasis on promoting market competition. Most notably, existing federal appeals court decisions fail to critically consider the multiple effects, economic and social, of an absolute merchandising right.

A. Trademark Rights in Merchandising

The lucrative licensing deals of Warner Bros. for Harry Potter merchandise and Lucasfilm for Star Wars paraphernalia rely primarily—yet uneasily—on a series of federal circuit court trademark decisions from the 1980s. As we shall see, many of these decisions are myopically driven by courts’ concern for the potential economic value of the trademark properties. Rather than focus on the traditional concern of trademark, consumer confusion, these decisions ground a new, so-called merchandising right on a circular reasoning often characterized as “if value, then right”—the misconceived idea that where there is potential economic value a legal right should follow.

39 Law of Merchandise and Character Licensing §2.8, supra note 12.
40 Id.
41 See Dogan & Lemley, supra note 18, at ___ (discussing Court’s recent rulings in Dastar and TrafFix).
42 See, e.g., Kurtz, supra note 19, at ___; Dogan & Lemley, supra note 18, at 480.
This section reviews the recent birth of the so-called “merchandising right” in trademark to shed light on potential future expansions of these laws to cover fan-based activity that is currently “tolerated” by IP owners and allowed to thrive license-free. As we shall see, courts did not always recognize near absolute rights to manufacture toys based on popular entertainment properties.

In the case of Ideal Toy Corp. v. Kenner Products from 1977, Lucasfilms and its licensee, Kenner, sued Ideal Toy for making “Star Team” action-figure dolls similar in concept and appearance to Star Wars characters Darth Vader, C-3PO, and R2-D2. See Figure 1.

Figure 1: “Star Team” action figures by Ideal Toy

The court held that because the Star Team dolls were dissimilar in appearance from the Star Wars action figures, and because Ideal Toy used different trade names for its dolls and not trademarked names such as “Darth Vader” or “R2-D2,” there was no likelihood of consumer confusion as to either source or sponsorship. Most notably, Ideal Toy prevailed even though it admitted to seeking to cash in on the star toy fad, a fad undoubtedly spurred by the Star Wars movies. In this sense, the Star Team manufacturers were “free riding” on the efforts of others—and the court abided this. The court allowed the company to compete in this area so long as its products were not likely to confuse consumers.

But this approach, allowing competition in the manufacture of toys inspired by popular children’s stories, did not last long. In the 1980s Warner Bros. wrangled in a series of disputes with manufacturers of unlicensed toy cars similar in appearance to the “General Lee,” the car featured in Warner Bros.’ popular television series, The Dukes of Hazzard. Defendant Gay Toys manufactured a toy car called the “Dixie Racer,” which was a bright orange Dodge Charger with a confederate flag decal and the numerals 10 on the door.

(the original General Lee was nearly identical but had the numerals 01 on the door). The federal district court in Manhattan denied plaintiff's motion for a preliminary injunction, saying that purchasers of the toy car did not care whether the car was sponsored by the producer of the television show or not—kids just wanted a car that looked like the General Lee to enhance their play. Parents, too, the lower court opined, likely cared little about Warner Bros.' endorsement, preferring instead "the lower prices presumably made available by unlimited competition and the elimination of the producer's royalty."44

The Court of Appeals for the Second Circuit reversed. The appellate court's decision was driven largely by its concern to preserve Warner Bros. lucrative licensing program. "Warner Bros. has licensed other toy manufacturers to produce authorized replicas of the 'General Lee,'" the court observed, adding that "this was not only the custom and practice of the industry, but also that product licensing arrangements were ultimately more profitable than the T.V. series itself."45 The court was up front in its concerns about the potential economic value of exclusive licenses for Warner Bros., stating that Warner Bros. "has a substantial financial interest at stake . . . . If the injunction is denied, Warner Bros. and its licensees will suffer substantial lost sales, and its licensing program will lose much of the confidence reposed in it by the licensees, who also made substantial investments based upon the exclusivity of their licenses."46

The appeals court emphasized the crux of Gay Toys' wrong as unjust enrichment and unfair competition. Citing the 1918 Supreme Court case of International News Service v. Associated Press47 which enjoined a competitor of the Associated Press on a theory of "free-riding," the Second Circuit in Gay Toys concluded that "[t]o deny Warner Bros. injunctive relief would be to enable Gay Toys "to reap where (it has not sown)."48 Gay Toys had "deliberately utilized these [car] symbols to capitalize on the demand created by 'The Dukes of Hazzard' and the 'General Lee'," the court opined, "in order to divert business and increase its sales by misleading consumers as to the source and sponsorship of the 'Dixie Racer'."49 Indeed, copying the look of the General Lee paid off—Gay Toys sold over 500,000 of these toy cars, with a backorder or 700,000 more—well over the sales of the same Dodge Charger

44 Warner Bros., Inc. v. Gay Toys, Inc., 658 F.2d 76. (2nd Cir. 1981). A problematic aspect of the district court decision was its argument that children do not care about a toy's sponsorship—they just want the toy. As the appeals court rightly noted, this line of reasoning was expressly rejected by the legislature, which has held that consumers need not know the name of the source of any particular product or service. The key is whether they believe a product or service comes from a single source. This is known as the "anonymous source doctrine" in trademark law.
45 Id. at 79.
46 Id.
47 248 U.S. 215, 239 (1918).
48 658 F.2d at 80 (quoting INS v. AP, 248 U.S. 215, 239 (1918)).
49 Id. at 78.
toy car before the company had changed its look to resemble the General Lee.\textsuperscript{50} The Seventh Circuit Court of Appeals affirmed a permanent injunction against a separate unlicensed manufacturer of a General Lee look-alike on similar grounds.\textsuperscript{51} In so doing, both circuit courts adopted a rebuttable presumption that “In instances of intentional copying the second comer is generally presumed to have intended to create a confusing similarity of appearance and to have succeeded in doing so.”\textsuperscript{52}

The reasoning regarding likelihood of confusion too is circular. Where the federal district court in Manhattan in Gay Toys found no evidence that purchasers of the toy cars were likely confused as to source, the Second Circuit’s rebuttable presumption helps to ensure that purchasers will be confused about sponsorship in the future. Now that toys must be licensed, purchasers will presume them to be licensed and confused when they are not.

The First Circuit adopted the rebuttable presumption in Boston Athletic Association v. Sullivan.\textsuperscript{53} The Boston Athletic Association (BAA) is a charitable organization whose principle activity has been to organize the annual Boston Marathon, which it had done for nearly a century by time of the case, since 1897. To offset the rising costs of the event, the BAA obtained trademarks in “Boston Marathon” and its unicorn logo in 1985, and sought to maximize the value of those trademarks with an exclusive license to Image Impact to imprint all “Boston Marathon” apparel. Defendants had previously been licensed imprinters and retailers of the BAA prior to the exclusive license issued to Image in 1986. They continued to print and sell “Boston Marathon” t-shirts despite no longer being licensed by the BAA. Having found that BAA’s trademark in the name “Boston Marathon” was valid, the court turned to the central issue of any trademark infringement case—was defendants’ use likely to cause consumer confusion? Notably, while the court pointed to a few isolated instances of consumers who were actually confused as to the source of defendant’s shirts, the most important factor influencing the court’s decision ultimately was not confusion, but the defendants’ intent in adopting their marks. The court reasoned, “when a manufacturer intentionally used another’s mark as a means of establishing a link in consumers’ minds with the other’s enterprise, and directly profits from that link, there is an unmistakable aura of deception. Such a use is,“ the court stated, “by its very nature, ‘likely to cause confusion, or to cause mistake, or to deceive.’”\textsuperscript{54} Again, the court decried copying and unjust enrichment by the defendants. “Defendants’ shirts are clearly designed to take advantage of the Boston Marathon and to benefit from

\textsuperscript{50} Id.
\textsuperscript{51} See Processed Plastic Co. v. Warner Communications, Inc. 675 F.2d 852, 856 (7th Cir. 1982) (finding defendant’s PPC Rebel car, bright orange in color with a confederate flag affixed to the roof and the numerals 07 on the two side door to be confusingly similar to the General Lee).
\textsuperscript{52} Id. at 857.
\textsuperscript{53} 867 F. 2d 22 (1st Cir. 1989).
\textsuperscript{54} Id. at __.
the good will associated with its promotion by plaintiffs,” the court stated, similarly concluding that defendants “thus obtain a ‘free ride’ at plaintiff’s expense.” Putting a contemporary spin on the famous language from *International News v. Associated Press* stating that defendants should not be permitted to “reap where [they have] not sown,” the court stated that in this case, allowing defendants to profit from selling unlicensed “Boston Marathon” t-shirts was akin to their “being given a medal without having run the course.”

In an important critique of the emergent merchandising right, Stacey Dogan and Mark Lemley respond forcefully to the idea that every benefit to be derived from a first-comer’s market should be enjoined as unjust enrichment. “The world is full of free riding,” they observe. “The question is whether a particular type of conduct causes the kind of harm that trademark law ought to address.” Dogan and Lemley argue that the merchandising decisions stray too far from trademark’s traditional public policy concern: consumer confusion. Some acknowledge the merchandising right is far afield of traditional trademark rights, but say the trademark owner has a better claim than anyone else to own the merchandising right. But this reasoning fails to account for the social benefits of limiting control and allowing for a competitive market in ancillary products. Where there is no confusion, customers will benefit from competition, which leads to greater choice, higher quality products, and lower prices. Allowing competition and access to ancillary markets has still other benefits. As Brett Frischman and Mark Lemley describe, there are many salutary effects of “spillovers—uncompensated benefits that one person’s activity provides to another,” which I argue in the next Part includes follow-on learning.

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55 *Id.* at __.
56 *Id.* at __.
57 See Dogan & Lemley, supra note 18, at 480.
58 See Kurtz, supra note 19, at 505 ("not every use of another's creation is wrongful or ‘unjust. A system that allows the non-confusing copying and exploitation of another's creations may achieve greater social utility and economic value than a system that forbids such activities"); Dogan & Lemley, supra note 18, at 482 (commenting that reasoning based on a theory of “freeriding” “has no logical stopping point”).
60 Dogan and Lemley conjecture the U.S. Supreme Court, if it were to confront the legitimacy of an absolute merchandising right, would reject it based on this reasoning, as the Court has recently affirmed that trademark law should not be used to stifle competition or even copying, which is the subject matter of copyright and patent, not trademark. See Dogan & Lemley, supra note 18, at 465.
There is another important argument to consider in the context of trademarks in merchandise that enhances the ability of individuals, especially children, to put themselves into fantasy worlds. In many of these cases, the brand does not serve to identify the source of the product, but is the product itself. Kids want a wand to play Harry Potter, and they or their parents may not care about the sponsorship of the wand at all. In these cases, the brand may be “aesthetically functional,” and it would unduly harm competition to recognize an exclusive right in the mark in such cases. To be sure, some will want to pay more for an “authentic” experience. But does this mean that others should be prohibited from offering competing goods at cheaper prices? As Dogan and Lemley argue, recognizing trademark rights in these contexts has pernicious effects on competition and expressive liberties, as customers seek to express themselves through the brands they wear and use.

In short: the ever-expanding merchandising right rests on judicial interpretations extending trademark rights dramatically based largely on either a Lockean impulse or the circular view that these rights are valuable and thus must be protected. These decisions are driven more by concerns for corporate profit than the public interest. Where trademark is supposed to protect consumers, the merchandise right has been designed to protect a certain category of merchants. As Dogan and Lemley conclude, “a nonconfusion-based merchandising right promotes no legitimate policy goal and imposes significant economic and expressive costs, and therefore should be abandoned.” This article agrees with these prescient critiques of an expansive merchandising right. The time is ripe for lawmakers to more directly consider the economic and social effects of an overly broad merchandising right and to scale back the right where its costs cannot be justified.

Notably, the federal district court in the Gay Toys litigation sought repeatedly to consider both the effects on competition and on children’s play. “Successful children’s television programs usually produce an intense desire among their viewers to act out the parts of characters in the televised dramas,” the court observed. “This, in turn, creates a market for toys which would assist the children in pursuing their fantasies.” The court was not convinced that in light of this phenomenon of children wanting to play with toys related to their less room there is for new innovators to develop and market new products, because the law itself restricts that competition.

62 See Dogan & Lemley, supra note 18, at 502-505 (discussing aesthetic functionality of brands that are products themselves rather than merely source identifiers).

63 Dogan & Lemley, supra note 18, at 500 (“When fans buy Harvard shirts, Chicago Cubs hats, Rolling Stone tattoos, or Winnie the Pooh cakes from the local bakery, they are doing so not because they believe that ... the ... trademark holders made or sponsored the goods, but because the trademark in this context serves an important communicative function for them.”).

64 See generally ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY (2011).

65 Dogan & Lemley, supra note 18, at 478.

66 553 F.Supp. 1018 at 1019.
favorite stories that the “television producer should be entitled—in addition to whatever direct revenue it may obtain by selling its program to networks and independent stations—to exploit such demand for toy imitations by restricting their distribution to its own licensees.” For its part, Gay Toys “did no more than openly assert a right to share in whatever market may have been created by the success of plaintiff’s television show.” But the district court’s hands were tied: the appellate court had established a rebuttable presumption finding confusion where defendants intentionally copied plaintiff’s mark. The district court read the higher court’s opinion as conclusively “adopting the position that a television producer is entitled to monopolize any market created by the popularity of its shows.”

The intuition underlying the appellate courts’ rebuttable presumption is that intentional copying ought to be punished. But this reasoning has been expressly rejected by the U.S. Supreme Court when applied in the trademark context. As the Court stated in TrafFix Devices, Inc. v. Mktg. Displays, Inc., “In general, unless an intellectual property right such as a patent or copyright protects an item, it will be subject to copying.” The Court expressly recognized the benefits of copying outside of the legal protections offered by copyright and patent laws, acknowledging that “Allowing competitors to copy will have salutary effects in many instances.” Copyright and patent laws prohibit copying expressions and inventions for limited duration with a public interest goal in mind: incentivizing innovation. But legislatures have determined that outside the limited confines of copyright and patent, competition—which thrives on copying—ought to be the norm. Trademark protection, which potentially can last forever, is tailored to a wholly different public goal—the prevention of consumer confusion and the efficient functioning of markets. Outside of consumer confusion (and in some cases dilution of a mark’s distinctiveness, to which I will turn next), trademark law seeks to promote efficient markets, which includes fair competition.

In addition to consumer confusion, trademark law protects a mark from the dilution of its distinctive meaning and the loss of consumer goodwill. In HIT Entertainment v. National Discount Costumes, various owners of copyrights and trademarks in the children’s television characters Barney, Bob the Builder, and Thomas the Tank Engine sued a discount costume manufacturer for copyright and trademark violations of their character

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67 Id. The district considered, and properly rejected, defendant’s claim that the color and design of the General Lee was “functional” and thereby not protectable under trademark law.

68 Id. at 1021 (emphasis mine).


70 Id. at 29.


72 552 F.Supp.2d 1099 (C.D. Cal 2008).
appearances and names. The plaintiffs argued that they intentionally did not license adult costumes for these characters for fear that one of these adults would engage in lewd behavior while wearing the costume, thus jeopardizing the goodwill associated with the characters. Interestingly, the federal district court found no evidence that purchasers of the costumes used them to provide children’s entertainment, and thus rejected plaintiffs claim that such uses constitute unfair competition. Furthermore, the court found the costumes themselves did not infringe plaintiff’s copyright or trademarks because they were too dissimilar from the protected characters. However, the court went on to permanently enjoin the costume manufacturer’s use of trademarked names—“Barney,” “Bob the Builder” and “Thomas,” to describe the costumes in their catalogues on the familiar theory that such use was likely to cause confusion as to the sponsorship of the costumes. Notably, the court was so caught up with concerns about unjust enrichment and freeriding on the trademarked names that it failed to consider one of the basic trademark infringement defenses, nominative use. If the costume manufacturer has a right to copy otherwise copyrighted and trademarked costumes, how else can it refer to these costumes without using their trade names? The First Circuit in the Boston Marathon case similarly failed to consider whether defendants in that case were merely making a noninfringing, nominative use of the term “Boston Marathon,” which is quite simply the only efficient way to describe the famous annual racing event in that city.

Copyright and trademark owners in children’s literature, television programs, and characters frequently ground their claims for absolute control over their properties on the goal of protecting children. J.K. Rowling, for example, while allowing a great deal of fan-created fiction stories and art inspired by the Harry Potter series to flourish on the Internet, has expressed particular concern about sexually explicit material that may attract and disturb young children. While these concerns may be valid, trademark and copyright laws are not the proper tools for policing against unsavory uses. Absolute rights to control all adult use of children’s literature tramples on First Amendment and other human rights to enjoy and participate in culture. As I explore in the next section, children and adults alike inhabit cultural universes. Although

73 Lyrick Studios, Inc., the producer of the television show Barney & Friends, has engaged in an extensive campaign to prevent people from dressing in unauthorized Barney costumes. In the words of Lyrick’s general counsel, “We’re afraid that someone presenting himself as Barney could get a child to do something inappropriate.” See Pamela Manson, A Super D-Duper Job, T.X. LAW., Feb. 11, 2002, available at http://www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZWWBSVGGXC.

74 552 F.Supp.2d at 1106-1107. In another case, involving a skit where a man dressed in a chicken costume beat up another dressed as the Barney, a federal district court found no trademark violation in the unauthorized use of the Barney costume because there was no likelihood of confusion as to source, and no copyright violation, reasoning that the chicken skit was a fair use parody. See Lyons Partnership v. Giannoulas, 14 F. Supp. 2d 947 (N.D. Tex. 1998).
many of these fictional universes are geared toward children, they are not exclusively reserved for them. Star Wars, for example, although appropriate for children, is equally if not more popular among adult fans who remember the films from their youth. In law, the argument can be made on the basis of trademark dilution—that the mark loses its distinctiveness through tarnishing association with what might be considered unwholesome behavior. However, efforts to regulate speech activities to protect children have often been struck down by the Supreme Court as impermissibly broaching upon the defendants’ First Amendment rights.\textsuperscript{75}

\textsuperscript{75} See, e.g., Ashcroft v. American Civil Liberties Union, ___ U.S. ___ (year); Reno v. American Civil Liberties Union, ___ U.S. ___ (year).
B. Copyright in Merchandising

Copyright in expressive works—from literature to films to developed characters to cartoons and video games—includes rights to control reproduction, public performance of a work and the right to control and profit from derivative works based on the original.\[^{76}\]

i. 106(1): The reproduction right.

In recent years, some courts have grounded protection for copyright owners over cultural merchandising in the reproduction right.\[^{77}\] There is copyright infringement if defendant’s dolls, toys, or products are “substantially similar” to the plaintiff’s protected work. According to one scholar’s close account of character-based merchandise licensing in the 1970s and 1980s,\[^{78}\] the courts took a more critical view of “substantial similarity” early on (and thus did not find a merchandising right), than they did a decade later. Returning to the case of Ideal Toy Corp. v. Kenner Products,\[^{79}\] in addition to the trademark claims discussed above, the court considered whether the “Star Team” toys violated the copyright in Star Wars characters Darth Vader, C-3PO, and R2-D2. The court noted that while visual and three-dimensional depictions of a literary character could vary, in this case, the films themselves presented highly developed depictions—albeit two-dimensional—of the characters at issue. Nonetheless, the court held that the defendants’ “Star Team” dolls were not substantially similar to the plaintiff’s protected Star Wars properties. In contrast, in Universal City Studios v. J.A.R. Sales,\[^{80}\] a federal district court in California found that an unauthorized E.T. doll—based on the title character from plaintiff’s film, E.T.—The Extra-Terrestrial, was substantially similar to the plaintiff’s copyrighted character.

Early courts’ focus on “substantial similarity” grounded the merchandising analysis under copyright law on traditional principles. But in a detailed analysis of copyright law dealing with character merchandising from the 1970s to the mid-1980s, Leslie Kurtz observed that courts began shifting away from this traditional focus on substantial similarity between plaintiff’s and defendant’s goods, to focus merely the copyrightability of the character itself. As Kurtz found, if courts found a particular character was sufficiently delineated to warrant copyright protection, this often led to a finding of copyright infringement regardless of whether defendant’s use was similar.\[^{81}\] In Universal City Studios v. Kamar Indus.,\[^{82}\] for instance, plaintiff producers of the

\[^{77}\] 17 U.S.C. § 106(1).
\[^{78}\] See Kurtz, supra note 19, at __.
\[^{80}\] Citation (C.D. Cal. 1982).
\[^{81}\] See Kurtz, supra note 19, at 472.
\[^{82}\] 1982 COPYRIGHT L. DECISIONS (CCH) p 25,452 (S.D. Tex. 1982).
film, *E.T.—The Extra-Terrestrial*, sued the manufacturers of mugs with the words “I Love E.T.” and “E.T.—Phone Home.” The court held that E.T. was a highly developed fictional character and that the mugs violated Universal’s copyright in E.T. - even though the mugs just mentioned the name “E.T.” and included no picture of the character. “Focusing on the character’s copyrightability, the court failed to analyze the substantiality of what the defendant had copied,” Kurtz writes, noting, too, that character names are not copyrightable. As Kurtz points out, trademark, not copyright, was the appropriate doctrine under which the case should have been decided. The implications of this case are broad—unmoored from a traditional focus on “substantial similarity,” courts can enjoin as copyright violation any evocation of a copyrighted character.

**ii. 106(2). Derivative works.**

The Copyright Act defines a derivative work as one “based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.” Translations of *Harry Potter* or *The Lightning Thief* books, motion picture versions, musical dramatizations, and abridgements fit squarely within the derivative work right of the respective authors. But what about the kinds of fan activity described here, from Quidditch Leagues to themed dinner parties and summer camps? Does the derivative work right extend to cultural merchandise, from wands to witch’s fare to theme parks?

In a recent analysis of the purpose and scope of the derivative work right, Pamela Samuelson argues the right should be limited to extend to “the nine examples” enumerated by the statute and “close analogues.” Under this analysis, we need to ask: How analogous are the fan activities described here to the derivative works enumerated in the statute? Samuelson categorizes the Act’s nine enumerated derivative works into three groups: “shorter versions,”

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83 Kurtz, supra note 19, at 461-462.
85 In April 2009 students at the University of Michigan performed an unlicensed musical adaptation of several Harry Potter books called *A Very Potter Musical*. Video of the musical became an online viral sensation, attracting millions of viewers. Warner Bros. tolerated the musical after some back and forth with the students. Darren Criss, the composer and lyricist for the musical who also played the starring role as Harry Potter in the student musical, argued that the musical was a parody of the original works. After graduating, Criss joined the cast of the popular television show, *Glee*—illustrating how unauthorized play during one’s earlier years may provide opportunity and training for professional artistic work later in life.
86 Pamela Samuelson, *The Quest for a Sound Conception of Copyright’s Derivative Work Right* at 13 (draft on file with author).
“faithful renditions,” and “transformations of expressions from one medium or genre to another.”

A theme park akin to the Wizarding World in Orlando, which offers an exact replica of Hogsmeade Village and Hogwart’s Castle as depicted in the copyrighted Harry Potter films by Warner Bros., may comprise a “faithful rendition” of the films that is “substantially similar” to the original films. At the same time, a theme park may be considered a “useful article” falling outside the scope of copyright protection; this doctrine may also confound copyright in toys. But as we have seen, courts have recognized copyright in mugs and other articles that either depict or refer to copyrighted characters.

Dinner parties and camps may qualify as transformations of the original work from one medium to another. This would include making real the literary depictions of food, settings, and scenes from the books, as well as copying these from the film versions of the books. At the same time, however, the unscripted aspects of the parties and camp adventures, which would not have a “high degree of expected fidelity” to the originals, arguably push these activities outside the scope of the derivative work right. So too does the fact that “derivatives generally involve the fixation of a second work in tangible form.”

In a highly publicized case, Warner Bros sued a Harry Potter fan, Steve Vander Ark, for publishing an unauthorized “A to Z” reference guide of all things Harry Potter. Notably, the court held that reference books are not analogous to any of the nine enumerated categories of works defined as derivative works in the Copyright Act, stating that “the market for reference guides to Harry Potter works is not exclusively hers to exploit or license.”

Samuelson argues that “courts should be skeptical of novel derivative work claims,” analyzing them for analogousness to the nine enumerated categories in the statute and in light of the purpose of copyright law: to promote learning and innovation. Samuelson notes multiple interests to be considered when determining whether novel uses are derivative works under the statute, from balancing the foreseeable incentive interests of copyright owners and concern to prevent unjust enrichment to the autonomy and expressive interests of new

87 Id. at 15-16.
88 Id. at 36 (“An important statutory limit on the scope of the derivative work right is the exclusion from copyright protection of designs of useful articles (e.g., chairs, bicycles, clothing.”).
89 Id. at __.
90 Id. at 20.
92 Id. at 550. The court expressed concern, however, that Vander Ark’s guide excessively copied verbatim descriptions from the original Potter books. The case settled when RDR Books agreed to rephrase the book so as to steer clear of violating section 106(1) of the Act.
93 Samuelson, supra note __, at 25.
speakers, competition, ongoing innovation, and even the personal property rights of owners of copies.\textsuperscript{94}

\textit{iii. 106(3). The public performance right.}

Section 106(3) of the Copyright Act Copyright also includes the right to enjoin unlicensed “public performances” of certain works. A performance can include a reading or dramatic enactment of a literary work, a live musical performance, screening of a film, playing a recorded piece of music, or singing copyrighted songs. A public performance may also be a derivative work—for example, a dramatic reading of \textit{Harry Potter and the Sorcerer’s Stone} that is simultaneously recorded would implicate multiple rights, from the right to copy under 106(1), to the derivative work right under 106(2), to the public performance right under 106(4) of the Copyright Act. Private performances do not violate the Copyright Act; to come within the ambit of this right, the performance must reach outside one’s family or circle of friends. Thus, while singing a copyrighted tune in the shower is fine, singing copyrighted songs with a large group may run afoul of this right—which makes the parameters of this right infamously broad.

It was a heavy-handed effort to go after Girl Scouts for singing campfire songs that resulted in laws that currently permit small businesses to pipe in broadcast radio and television royalty-free. In the 1990s, the American Society of Composers, Authors, and Publishers (ASCAP) sent letters demanding that some 250 Girl Scout camps across the country pay license fees to sing songs such as “Puff the Magic Dragon” and “Over the Rainbow” around the campfire. One Scout group was so worried about the possibility of being sued that it taught its campers to dance the Macarena sans music. One reporter describes the resulting outcry: “As footage of the silent Macarena appeared on television news programs across the country, ASCAP descended into what its public relations consultant ... described as ‘PR hell.’”\textsuperscript{95}

ASCAP was shamed into backing down. But did its actions cross a legal line? The question has yet to be answered by a court. In the meantime, a host of other popular activities, from “flash mobs”\textsuperscript{96} to lip-synced videos posted to

\begin{footnotesize}
\textsuperscript{94} Samuelson, \textit{supra} note __, at 54.

\textsuperscript{95} \textit{Girl Scouts Are Free to Sing Again; ASCAP’s Bid to Levy Campfire Royalties Backfires}, \textit{CHICAGO TRIBUNE}, Dec. 19, 1996, at 35. The timing was terrible for ASCAP, which had been lobbying Congress to force small businesses and restaurants to pay royalties for playing music in their establishments. But the backlash from the “silent Macarena” led Congress instead to pass the Fairness in Music Licensing Act of 1998, which increased the number of bars and restaurants exempt from having to pay royalties.

\textsuperscript{96} The “flash mob” refers to the practice of large groups of strangers assembling suddenly in a public place to perform a dance in sync together. The flash mob is intended to surprise onlookers. They are often organized through social networking sites such as Twitter and Facebook; participants usually practice together just once or twice before the “performance.”
\end{footnotesize}
YouTube to book-themed summer camps lie uncomfortably in a gray area, potentially violating several rights of copyright owners.

iv. 107. Fair Use.

[Section coming.]

In the next section, I elaborate the social and cultural benefits of cultural participation—from campfire songs and dancing the Macarena in the last century to flash mobs, cosplay, and interactive book camps in this one. I suggest that as demand for interactivity grows in what has been called our Participation Age, we can fruitfully turn to interdisciplinary theories of learning by doing, tacit knowledge, performance, and embodiment to appreciate that there is more to child’s play than meets the eye.

II. LEARNING BY DOING

We increasingly understand that scientific knowledge cannot be wholly captured in a patent application. Arrow’s economic theory of “learning by doing” and theories of the nature of “tacit knowledge” teach that knowledge must be experienced through haptic and social engagement. This Part considers the relevance of these theories, scholarship around “play based learning” and human development and performance theory to the phenomena of cultural play and merchandising.97 What are the benefits of working through culture in the tactile and social ways afforded by cultural tangibles, from playing with foam swords, lightsabers and wands in summer camps to elaborate cosplay (costume play) by adults witnessed at events like the Star Trek convention and the Comic-Con held annually in San Diego? This Part explores the tactile and physical side of cultural knowledge. Like scientific knowledge, cultural knowledge, too, must be actively experienced, repeated, held, touched, experimented with, and practiced. The Article concludes that engaged playing in the fields of culture has both descriptive and prescriptive purchase. Surely, working through culture depicts how we engage culture and develop knowledge. But working through culture goes further still: putting ourselves in the shoes of another is a vehicle for learning from and connecting with others.

A. Learning by doing.

In 1962 Kenneth Arrow observed: “there are sharp differences of opinion about the processes of learning. But one empirical generalization is so

97 Margaret Chon has begun considering the implications of theories of tacit knowledge for copyright. See Margaret Chon, Sticky Knowledge in Copyright 1 (2010) (draft on file with author). ("The tacit knowledge dimension has been explored in the patent and trade secret context but not the copyright context.").
clear that all schools of thought must accept it, although they interpret it in different fashions: *Learning is the product of experience. Learning can only take place through the attempt to solve a problem and therefore only takes place during activity.*” 98 Arrow famously argued that, contrary to expectations, repetitive activity hones understanding, facilitates learning, spurs innovation and ultimately leads to “steadily increasing performance.”99

Repetition and copying to attain mastery are often key components to the processes of learning, creativity, and innovation, not efficiency alone.100 Artists have long set up their easels in museums seeking to develop their own skills by copying the masters.101 Recently The Beatles, notorious for never having licensed their work, have looked more favorably upon interactive technologies that allow individuals to learn, play, and take apart their songs with this goal in mind. Hailed by the *New York Times* as potentially “the most important video game yet made,”102 The Beatles: Rock Band allows users to “come together” with John, Paul, George and Ringo, jamming and creating songs. Learning is a key goal of the game. As Paul McCartney acknowledges, even great musicians hone their skills first through imitation.103 McCartney himself admitted to emulating “Buddy Holly, Little Richard, Jerry Lee Lewis [and] Elvis.” Tomorrow’s musicians learn by miming The Beatles and other rock bands.104

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99 Id. at 155-156. For more recent observations of the role of “learning by doing” in providing firms a competitive advantage outside of patent protection see, e.g., Jonathan N, Barnett, *Private Protection of Patentable Goods*, 25 CARDOZO L. REV. 1251, 1263 (2004). (“On the production side, a first-mover may, as a result of either “learning-by-doing” and/or economies of scale, enjoy cost efficiencies that enable it to offer prices below imitators and preserve its market share.”).


101 Id. at 155-156. For more recent observations of the role of “learning by doing” in providing firms a competitive advantage outside of patent protection see, e.g., Jonathan N, Barnett, *Private Protection of Patentable Goods*, 25 CARDOZO L. REV. 1251, 1263 (2004). (“On the production side, a first-mover may, as a result of either “learning-by-doing” and/or economies of scale, enjoy cost efficiencies that enable it to offer prices below imitators and preserve its market share.”).


103 On this point see generally CORNELIA J. HOMBURG, *THE COPY TURNS ORIGINAL* (1996). I discuss this example in *SUNDER, FROM GOODS TO A GOOD LIFE*, supra note __, at __.

Recently scholars such as Eric Von Hippel and William Fisher have shown that practicing and using patented products—what Fisher calls “equipment,” such as skateboards—can yield innovation by users who modify goods to better suit their work, art, or sport.  

Learning by doing has a social dimension. Arrow describes the role played by personal contacts in the transmission of knowledge, as familiarity and trust facilitate knowledge disclosure and acceptance. Individuals share knowledge through mentoring and apprenticeships with people they know and trust. Personal relationships can override efficiency in knowledge markets. As Arrow concludes, “The production of knowledge is thus basically different in character from the production of goods.”

B. Tacit Knowledge

Theories of tacit knowledge elaborate the social dimension of knowledge. Michael Polanyi famously defined tacit knowledge as implicated by the reality that “we can know more than we can tell.” Others employ the term “sticky knowledge” to explain the same concept. As Margaret Chon describes, “Knowledge is sticky because it adheres to people along social routes rather than through fixed works that can be transacted freely.” Where thus far scholars have studied the implications of tacit or sticky knowledge for patent and trade secret law, Chon has begun to explore the potential relevance of the concept to copyright law. This Article joins in this task,

\[105\] See ERIC VON HIPPEL, DEMOCRATIZING INNOVATION (2005); William Fisher III, User-Innovation, The Implications for Law of User Innovation, 94 MINN. L. REV. 1417 (2010) (concluding that “the most forceful argument in favor of encouraging user modifications with respect to both cultural goods and equipment is not that it would promote economic efficiency or distributive justice, but that it would advance a substantive vision of human flourishing.”).


\[107\] See Barnett, supra note 99, at 1263-64 (arguing that first movers are advantaged by learning by doing and social relations they develop with resellers and retailers, which form a natural barrier to competitors, at least for some period of time).


\[109\] POLANYI, supra note 30, at 4 (emphasis in original).

\[110\] Chon, supra note 97, at __.

\[111\] See, e.g., Dan L. Burk, The Role of Patent Law in Knowledge Codification (2007-08); Katherine J. Strandburg, Norms and the Sharing of Research Materials and Tacit Knowledge, in WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY (Rochelle C. Dreyfuss, et al. eds 2009); Peter Lee, citation (arguing that the success of Silicon Valley is its geography—being near Stanford allowed for fruitful collaborations between the academy and industry).

\[112\] See Chon, supra note 97, at 2 (“This article delves into sticky, or tacit, knowledge, which has been referenced within the law of trade secrets and patents but almost not at all within copyright.”).
considering the insights of tacit knowledge in the context of copyright and trademark laws implicated in cultural play and control of cultural tangibles.

Copyright’s goal is the promotion of knowledge. But tacit knowledge theory suggests that copyrighted products—books, films, music—are only goods. Knowledge lies between the lines. Chon asks to what extent copyright law is underinclusive to the extent that it does not fully attend to tacit knowledge, which suggests knowledge is found less in the ends of copyright production than in the activities, conversations, and social relationships conducted around and through copyrighted works.

Mutual understanding and knowledge exchange emerges through social interactions based on experience and trust. In the context of scientific research, for example, star researchers may hold tacit knowledge that others will only come to know through apprenticing or collaborating with the individual and developing trust and mutual respect. Relationships are crucial to the transfer of tacit knowledge: apprentice and master, student and teacher, colleague and colleague, friend and friend. As Chon puts it, “all cultural products still have some residue of the social”—that is, they need to be socially engaged with others in order to be known. A book may be codified and copyrighted, for example, yet it may not be comprehensible to an audience due to language and other issues of absorptive capacity. “This is a paradigmatic example of strong stickiness,” write Chon. As other examples of tacit knowledge, Chon offers the following:

[S]tudents still fill classrooms and implicitly demand by their presence that teachers explain the contents of their textbooks....Movie-goers, opera lovers, and dance aficionados feel the need to discuss the impact and meaning of what they have just experienced in theaters, gaining insight and perhaps more awareness from different perspectives of critics or others more sophisticated in the audience. Those who visit art museums often feel that they do not comprehend a great piece of art unless it is viewed within the context of an experienced critic’s or docent’s guidance.113

In short, literature is “sticky knowledge” well beyond issues of literal translation. Even in one’s common language, reading literature together in social groups such as book clubs or in diverse classroom settings promotes understanding of the work and of one another.

Knowledge disclosure and understanding is premised on trust between persons, and especially “entrusting oneself to a teacher or a leader.”114 As Chon writes, “knowledge is sticky and not fully disclosed without levels of

113 Id. at 103.
114 Polanyi, supra note 30, at 61 (quoting St. Augustine, “Unless you believe, you will not understand.”).
trust between persons in a social dimension. Interactivity promotes trust, knowledge exchange and what I call “understanding.” In the world of science, paying attention to interactivity may involve visiting another’s lab, scholarly exchanges, and mentor/mentee relationships. In the cultural realm, the analogy may be active and social participation in fantasy lands.

Such knowledge transfer requires a process Polanyi refers to as “indwelling,” defined as the practice of putting oneself in the mindset of another. “[I]ndwelling, or empathy,” Polanyi wrote, “is the proper means of knowing man and the humanities.” Polanyi argued that scientists must “interiorize” knowledge to fully understand and build upon it, Polanyi wrote. “[I]t is not by looking at things, but by dwelling in them, that we understand their ... meaning.” Repetition of a master’s moves, for example, teach a pupil not only crucial skills but the master’s mindset. By dwelling in the master’s moves, “the pupil gets the feel of a master’s skill and may learn to rival him.” According to Polanyi, this is the same process “by which an historian explores a historical personality.”

We may usefully reconsider some current legal doctrines as facilitating transfer of sticky knowledge, for example, cover licenses in copyright law which allow bands to play music, thereby facilitating their learning and understanding of it, or fair use for educational purposes, book reviews, reference guides, and academic literature that more fully seeks to understand a work.

We should be careful to avoid characterizing tacit knowledge as a problem to be resolved, for example through more perfect disclosure in patent law. Sticky knowledge promotes our humanity because it requires engaging with others for learning and mutual understanding. Recalling Arrow, this social dimension is precisely what distinguishes knowledge from other goods. As Sen and Polanyi urge, striving for perfect disclosure is unwise, as that would make us less human. Processes of active and social engagement with cultural knowledge foster mutual understanding and humanity itself. As Polanyi long ago warned, if we “suppose that tacit thought forms an indispensable part of all knowledge, then the ideal of eliminating all personal elements of knowledge would, in effect, aim at the destruction of all knowledge.” In a new forward to a 2010 republication of Polanyi’s work, Amartya Sen writes that “This has subversive implications for the general approach of formalization since it looks for ‘the kind of lucidity which destroys

115 Chon, supra note 97, at __.
116 Polanyi, supra note 30, at 16.
117 Id. at 18.
118 Id. at 30 (offering the example of the chess player who would “enter into a master’s spirit by rehearsing the games he played, to discover what he had in mind.”).
119 Id. at 31.
120 Id. at 20.
121 Id. at 20.
its subject matter.”

C. Play Based Learning

The very first copyright law, the Statute of Anne enacted in England in 1710, was described as “An Act for the Encouragement of Learning.” Born during the Enlightenment, copyright has always been a critical tool for facilitating learning. Today, we largely focus on the learning that accrues from accessing copyrighted works created by others. Yet in the fields of education and human development, nearly a century of clinical studies and theory have elaborated how children learn not by imbibing knowledge from the top-down, but by actively working through the cultural discourses that surround them through “pretend play.” Role-playing is not just a descriptive term for how kids learn; studies document that it is a normatively beneficial way of learning, and one that schools increasingly adopt and encourage. Elaborating on the world around us, children mime to learn social roles and yet also take creative liberties that test established expectations. Culture for children is a sphere not only of entertainment and enjoyment but also of experimentation and innovation. Recent studies show other benefits of role-playing include helping children negotiate conflict, developing self-control and language ability and fostering collaborative skills.

Perhaps most importantly in our diverse and increasingly interconnected world, physically and emotionally inhabiting the role of the other helps children learn empathy for the other, contemplating what it may be like to walk in another’s shoes. Play based learning is not limited to children. A worldwide phenomenon for adults called cosplay, short for “costume role play”, has spread from Japan to other parts of the globe celebrating these same principles. Individuals develop and wear elaborate costumes mimicking their favorite anime or manga characters; gender-switching called “crossplay” is

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123 I discuss this in SUDDER, FROM GOODS TO A GOOD LIFE, supra note 34, at __.
124 For some recent literature, see, e.g., Astrida Seja Kaugars & Sandra W. Russ, Assessing Preschool Children’s Pretend Play: Preliminary Affect in Play Scale-Preschool Version, EARLY EDUCATION & DEVELOPMENT 733, 734 (Sept. 1, 2009) (“pretend play is considered integral to pre-school children’s development since it represents an intersection of cognitive processes, affective processes, and interpersonal processes.”).
125 See id. at 738-39 (“Children who engage in social fantasy play have more often [sic] been found to be more socially competent”); id. at 751 (“Children who expressed more affect in their play and who played with ease demonstrated desirable levels of socioemotional adjustment and low levels of behavior problems.”).
126 See id. at 739 (“boys and girls who engaged in high levels of pretend play performed better on a task assessing understanding of emotions.”).
common, as a vehicle for gaining greater understanding of the other and of challenging traditional gender roles.

Bookpeople’s Camp Half-Blood adopts a self-described “whole learning approach” that seeks to help campers “make meaningful connections between history, mythology, literature, art, science, sports, current events, language and rampant creativity.” The organizers “create an environment, with engaging backstories, that run parallel to the stories in Rick Riordan’s books without copying the books themselves.” This allows campers to “go on their own demigod adventures and let their own story unfold,” meanwhile aiding the camper to “learn and utilize critical lateral problem solving skills and use creative play and teamwork to win the day.”

D. Performance Theory

By “performance” theorists do not refer to “a means by which a text is represented … or “licensed,” but rather refer to performance “as an experience (or set of experiences) of sociability.”

In 1993, performance theorist Peggy Phelan put forth the provocative idea that performance by its nature cannot be reproduced or commodified. In a foundational essay, Phelan writes: “Performance’s only life is in the present. Performance cannot be saved, recorded, documented, or otherwise participate in the circulation of representations of representation: once it does so, it becomes something other than performance.”

To what extent does the Copyright Act implicitly agree with this idea, by giving less protection to performance qua performance? Phelan describes performance as uncommodifiable, and potentially understood as “valueless” because it escapes the reproductive economy. Or is it the ability of performance to resist commodification that makes it priceless? At the same time, Phelan acknowledges that the “pressures brought to bear on performance to succumb to the laws of the reproductive economy are enormous. For only rarely in this culture is the ‘now’ to which performance addresses its deepest

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127 Id.
129 Id.
130 SIMON FRITH, PERFORMING RITES: ON THE VALUE OF POPULAR MUSIC 204 (1996).
132 Id. at 146.
133 Id. at 148 (1993) (performance art is vulnerable to charges of valuelessness and emptiness). As Phelan explains, because live performance that is not recorded “disappears into memory,” it enters a “realm of invisibility” where it “eludes regulation and control. Performance resists the balanced circulations of finance.” For Phelan, “Performance’s independence from mass reproduction, technologically, economically, and linguistically, is its greatest strength.” Id. at 149.
questions valued. (This is why the now is supplemented and buttressed by the
documenting camera, the video archive.)"\textsuperscript{134}

Phelan’s description raises the question whether performance is the
kind of activity the copyright act intends to regulate. Is self-insertion really
reproduction?\textsuperscript{135} Human performance is not mechanical reproduction.
Performing and doing the humanities – from singing to dancing to play-acting – is fundamental to our humanity and facilitates agency. In short, this does not seem to be the kind of copying that the copyright act intended to regulate, as the Act’s permissive take on performance implies.

At the same time, we must be cautious not to essentialize “live”
performance as something unique and more authentic than mediatized
performance. In an important critique of Phelan, Philip Auslander observes
that even “live” performance is mediated by technology. Auslander notes that
“live” performances from rock concerts to operas today are \textit{made for television}
and rock concerts seek to \textit{recreate the record}.\textsuperscript{136}

“Remediation” refers to “the representation of one medium in
another.”\textsuperscript{137} Remediation paradoxically shows us that media does not just
represent reality – for example modern art may not represent reality at all.
Rather, the process of remediation – of modern art’s continual reference to
itself—illustrates that media is itself \textit{real}; the act of remediation reveals media
as an artifact of our world.\textsuperscript{138} Concluding that all performance is remediated or
mediatized – that is, recasting content from one context to another --
Auslander rejects “the argument for ontological differences between live and
mediatized cultural forms.”\textsuperscript{139} This is an important point. I do not argue that
the children’s play of summer camps and birthday parties should be valued or
protected because it is pure and unadulterated, while mediatized
performances—from books to television to films to YouTube—are not. To the
contrary, as performance theorists like Auslander observe, all performance is a
remediation of earlier performance. At Camp Half-Blood, children recast print

\textsuperscript{134} Id. at 146.

\textsuperscript{135} Celia Lury has described how copyright law, born alongside reproductive
technologies, shifted focus from repetition to reproduction. See Celia Lury, Cultural

\textsuperscript{136} Philip Auslander, Liveness 158 (1999).

\textsuperscript{137} See Jay David Bolter & Richard Grusin, Remediation: Understanding New
Media 45 (1999).

\textsuperscript{138} See Id. at 17 (1999) (“Media have the same claim to reality as more tangible
cultural artifacts; photographs, films, and computer applications are as real as
airplanes and buildings.”); see id. at 58 (Paradoxically, by eliminating ‘the real’ or ‘the
world’ as a referent, modernism emphasized the reality of both the act of painting and
its product. Painters offered us their works as objects in world, not as representation of
the external world.”).

\textsuperscript{139} Id. at 159.
media and film. The interactive web portal Pottermore remediates film, allowing participants to be both actor and director.\textsuperscript{140}

Carrie Noland’s work on agency and embodiment sheds light on the value of kids’ and adults remediating shared cultural experiences in new contexts. Noland studies “the ways culture is both embodied and challenged through the corporeal performance.”\textsuperscript{141} Writes Noland, “if bodily motility is...the single most important filtering device in the subject’s negotiations with the external world, then a theory of agency that places movement center stage is essential to understanding how human beings are embodied within—and impress themselves upon—their worlds.”\textsuperscript{142}

Stories touch us and move us. Noland defines embodiment as “the process whereby collective behaviors and beliefs, acquired through acculturation, are rendered individual and ‘lived’ at the level of the body.”\textsuperscript{143} While theorists after Foucault have worried about the ways cultural norms prescribe individual behavior, Noland offers a theory of embodiment and agency, where agency is defined as “the power to alter those acquired behaviors or beliefs for purposes that may be reactive (resistant) or collaborative (innovative) in kind.”\textsuperscript{144} The body is a means through which individuals engage the world. She calls gesture “the organized forms of kinesis through which subjects navigate and alter their worlds.”\textsuperscript{145} Noland argues that embodiment and gestures, though performing the culture around us, are not rote processes. Individuals exert their agency through bodily movement, elaborating their own place in the world. Noland rejects a binary approach to agency and embodiment that would only view embodiment as an act of cultural resistance.\textsuperscript{146} Noland argues that “despite the very real force of social conditioning, human subjects continue to invent surprising new ways of altering the inscribed behaviors they are called on to perform.”\textsuperscript{147}

\textit{E. Development as freedom}

There is a liberty interest in engaging cultural works not just intellectually but also physically, with one’s whole body. Consider the human imperative for physical interaction with cultural works by singing, dancing, dressing up or acting out favorite lines from a favorite film. The philosopher Martha Nussbaum describes how physically performing in dance or theater can itself be liberating, particularly for women. She recalls the Indian

\begin{footnotesize}
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\item \textsuperscript{140} See Jay David Bolter & Richard Grusin, Remediaiton: Understanding New Media 47 (1999).
\item \textsuperscript{141} Noland, supra note 29, at 2.
\item \textsuperscript{142} Id.
\item \textsuperscript{143} Id. at 9.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Id. at 4.
\item \textsuperscript{146} Id. at 3.
\item \textsuperscript{147} Id. at __.
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intellectual Rabindranath Tagore’s emphasis on empowering women through the arts, particularly dance and drama. “Women were his particular concern, since he saw that women were typically brought up to be ashamed of their bodies and unable to move freely, particularly in the presence of men,” Nussbaum writes. “A lifelong advocate of women’s freedom and equality, he saw that simply telling girls to move more freely would be unlikely to overcome years of repression, but giving them precisely choreographed moves to perform, leaping from here to there, would be a more successful incentive to freedom.”

We can witness similar liberating moves on YouTube today. Consider, for example, how Beyoncé’s hit song, “Single Ladies (Put a Ring On It),” has inspired hundreds of individuals to post themselves dancing to the song on YouTube. Although each video entails fans mimicking the pop star’s moves in the original video, the individuality of each dancer is unmistakable. Particularly interesting are the numerous Single Ladies’ videos by gay men, a phenomenon noted on the popular television show “Glee,” which focuses on the tribulations of high school. Recognizing that young gay men struggle to come out to their families and peers during high school, one episode featured a gay football player videotaping himself and two female friends doing their own rendition of “Single Ladies”—until his father walks in and abruptly stops the recording. The young man provocatively lip-syncs Beyoncé’s words, “Acting up … I could care less what you think.” He continues, “I need no permission, did I mention, don’t pay him any attention.” In the hands (and feet) of these men, the song “Single Ladies” is reworked both as a comment on the possibility of gay marriage and on the performance of femininity. These videos persist on YouTube, generating literally millions of views, because Beyoncé invited fans to create their own versions of her hit song. Unlike some artists, Beyoncé seems to embrace participatory culture. She even aired the videos during her world tour.

Dancing, which invites people’s full participation with their heart, body, and soul, epitomizes participatory culture. Fifteen hundred inmates at the Cebu Provincial Detention and Rehabilitation Center in the Philippines performed Michael Jackson’s “Thriller” dance in unison in their prison orange jumpsuits, posting their dance to YouTube. After Jackson’s premature death, they posted another, now somber, tribute to Jackson, with a medley of songs ending with “We Are the World.” Another tribute by the inmates, performed to Jackson’s “Dangerous,” begins with a plea for “No copyright claims please… Let those who loved Michael Jackson enjoy this video! After all, this is 95 percent hard work and only 5 percent of whoever owns the rights to the audio.” The dancing in this case literally offers a liberating respite from the drudgery of imprisonment. Perhaps most importantly, these examples suggest

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148 Martha Nussbaum, draft on file with author, p. 82. I present these examples in my book, Sunder, From Goods to a Good Life, supra note 34.
that participatory culture is more than simply a means of attaining greater freedom and equality. Participation in making music, dance, and stories with and for others is an end of freedom, embodying what it means to be truly free.

III. CRITIQUES

The critic will demur that my elaboration of the social benefits of play posits cultural activity purely in an instrumental light. What about play for play’s sake? Highlighting that learning, critical thinking, social skills and mutual understanding emerge from play should not diminish play as an end in itself. Surely, creative and social play with others in communities of shared meaning is not only a means for attaining greater freedom and mutual recognition. Cultural play is an end of freedom, part of what makes a human life worth living.

We must be wary of a cultural merchandising law that does not pay heed to the broader economic and social dimensions of cultural play and learning by doing. Current law is, in Tom Conley’s words, “commodifying the experience of experience.”151 Property scholars have raised concerns about commodifying body parts and reproductive services. Where do we draw the line on commodifying experiences that foster play, sociability, collaborative innovation, and learning?

I do not argue that all uses promoting “learning” must remain uncommodified. I do not mean to suggest that a poor child without a $30 wand is deprived of the basic human right to imagine. Indeed, one could argue, persuasively, that not buying the wand would facilitate even more imaginative play. I do, however, caution that exclusive licensing rights ought only be granted when justified on traditional legal grounds, such as likelihood of confusion (trademark) and substantial similarity (copyright). In the absence of these concerns, third parties should be free to create and enter into markets that would seek to bring new innovations to more people through cheaper prices. Moreover, even in cases where there is some likelihood of confusion or similarity, we ought to still weigh the factors that would constitute instances of fair use, which in copyright law including noncommercial and transformative use, the amount used, the nature of the underlying work, and the effect on the market for the original.

Another objection will be that children’s play need not require access to popular intellectual properties—indeed, that children’s play is corrupted by obsession with commercial properties at the expense of their own creativity.

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151 Conley likens the practice to commodifying a child’s transitional blanket. Remarks of Tom Conley at “Tangibles and Intangibles” conference held at Harvard University, April 1-2, 2011.
Why can’t today’s children play cowboys and Indians instead of Harry Potter? Or Harry Potter with sticks for wands?\textsuperscript{152} To this, let me offer three replies. First, there is no culture without shared meaning. In that sense, cultural play and collaboration will necessarily revolve around the stories and discourses that children share and encounter together in the world; these cultural works inform them and provide a shared language. Culture is the social glue and shared meaning through which they communicate. Another way of saying this is that while cultural fantasy worlds may be fictional, they comprise “real” artifacts in the world that thereby act on the world – or mediate – between individual in society.\textsuperscript{153}

Second, this is particularly so of profitable intellectual properties, which bombard our discourse. Children inevitably do imagine themselves in these worlds. Moreover, they should be able to exert their agency in these worlds because it is important to be able to speak back against the dominant cultural forces that shape our perceptions of ourselves and others. Third, as I have described elsewhere, critical engagement in the cultural sphere, not just outside of it, helps to promote central skills and values of democratic citizenship – caring, empathy, and critical thinking.\textsuperscript{154}

CONCLUSION

Modern intellectual property laws are understood as a tool for promoting knowledge disclosure. But as learning by doing and theories of tacit knowledge show, knowledge is disclosed not just by reading but by doing and interacting with others in social settings.

Today the emergent Experience Economy threatens to limit and control experiential learning through haptic and social engagement in cultural worlds. I suggest we need to be wary of recent developments. Management scholars ruthlessly advise companies that “more experiences should yield transformations,” and that companies “should charge for ... life-changing ... experiences.”\textsuperscript{155} Management gurus offer that “The greater the (positive) memory created and the longer it lasts, the more value is created,” with value meaning profits.\textsuperscript{156}

Currently the book-themed camps feeding a new generation’s love of reading and learning, and providing spaces for developing agency, empathy, and creativity, are not charging much for these opportunities. The Girl Scouts are not planning to profit from their unauthorized Hogwarts camps. But the question is whether in the future, Warner Bros. will. The result may be a fait accompli, despite Warner Bros.’ currently thoughtful and balanced approach to fans and fan activity. After some embarrassing early missteps, Warner Bros.

\textsuperscript{152} Thanks to Rebecca Tushnet for this query.
\textsuperscript{153} See BOLTER & GRUSIN, supra note 140, at 58.
\textsuperscript{154} SUNDER, FROM GOODS TO A GOOD LIFE, supra note 34, at __.
\textsuperscript{155} PINE & GILMORE, supra note 4, at xvi.
\textsuperscript{156} Id. at xxii.
has stopped sending cease and desist letters to fans, and recognizes that fan activity bolsters the long-term value of their brand. In most cases, Dale Nelson, Vice President and Intellectual Property Counsel says, Warner Bros. “tolerates” fan uses of their brand properties. At the same time, however, she says they are ready to act if a fan is “running a business based on our properties,” or in situations where Warner Bros. believes it is protecting its derivative markets “or potential markets.” “We may not be in that market today,” Nelson says, “but we may be” in the future. So Warner Bros. will not go after the Girl Scouts … unless they see dollar signs in selling the experiences the Girl Scouts have long given kids for free. The Warner Bros. legal team has already considered commercializing the real world Quidditch Leagues, though for now, they have declined to do so.

Warner Bros. could choose to go after the Girl Scouts for reaping what they did not sow. But just such as strategy came back to haunt the American Society of Composers, Authors, and Publishers, or ASCAP, in 1995, when they sought to extract licenses from the Girl Scouts to let girls sing “Over the Rainbow” and “Puff the Magic Dragon” around the campfire. ASCAP was humiliated when local California t.v. stations caught on film one Oakland troop learning to dance the Macarena sans music for fear of violating copyright. The Silent Macarena became a public relations nightmare. Perhaps Warner Bros. will be similarly shamed into acquiescence. Or perhaps it will seek to commodify the experience of experience because this is where the value is, if law will go there.

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