

DECONSTRUCTING DISINTERMEDIATION: A SKEPTICAL COPYRIGHT PERSPECTIVE[♦]

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Abstract

This essay attempts to uncover the impacts of disintermediation in copyright law. I argue that contrary to the common view, within the political economy of networked communication platforms and the Internet, disintermediation in copyright law does not necessarily lead to its expected outcomes. Disintermediation may undermine cultural diversity, decentralization and authors' welfare no less than the traditional corporate media proprietary model. My analysis focuses on the manner in which disintermediation in copyright law tends to stimulate concentrated markets, which channel audience attention to a handful of mega networked intermediaries. The market and media power, which is then held by these intermediaries, has several adverse effects, including: undermining creators' bargaining position; deflated investment in cultural production and finally, extreme reliance on business models of free—yet commodified—distribution of content. These business models, which are based mostly on advertisement revenues, tend to lean toward narrow, limited and homogenous cultural production. From a broader perspective, I argue that, as opposed to the common view, there is no direct correlation between lessening of copyright protection and the proliferation of content flow and distribution channels. The reason is that among other functions, copyright law is also a mechanism that regulates power relationships

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between different institutions and actors in media markets. Regarding this capacity, extreme concentration of media power could derive not only from excessive copyright protection, but also from excessive ability to freely utilize content.

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I. INTRODUCTION - RADICAL DISINTERMEDIATION – WHY AND WHY NOW?

The purpose of this essay is to uncover the impacts of disintermediation in copyright law. I argue that contrary to the common view, disintermediation in copyright law does not necessarily lead to its expected outcomes whereas it may undermine cultural diversity, decentralization and authors’ welfare no less than the traditional corporate media proprietary model.

Calls for disintermediation in the area of copyright law are constantly being raised.¹ The most recent compelling argument was

¹ See, e.g., YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006) (using economic, political and technological analyses to explain how new information technologies make it easier for individuals to collaborate in producing cultural content, knowledge and other information goods without requiring monetary incentives, and thus, calling to reduce the manner in which copyright protects and advances the interests of producers and corporate media); WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* ch. 6 (2004); Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 39, 49–52 (2010) (calling for a significant reduction in the proprietary copyright protection of intermediaries and distributors, and therefore, their incentives to engage in the creative industries); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1

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made by Professor Jessica Litman.² Professor Litman perceives disintermediation as a primary goal of any future copyright reform. Litman's argument intertwines two elements: first, the fact that the economics of digital distribution now make it possible to engage in mass dissemination without significant capital investment;³ and second, the fact that the current, modest share of copyright that creators (as opposed to distributors) enjoy suffices to inspire continued authorship.⁴ The accumulation of these two elements seems to leave little justification for continuing a distributor-centric copyright system which ill-serves both users and creators.⁵

Litman's crystallized argument summarizes approximately a decade of literature that convincingly questioned and criticized the manner in which corporate media relies, builds upon and at times manipulates copyright law. These methods may enrich corporate media's stakeholders, yet concurrently, they undermine users, creators and content activities, which are of less economic value to corporate media.⁶

In a nutshell, an extensive copyright system that supports corporate media is criticized for the fact that it may: (a) undermine cultural diversity and favor only certain types of media products;⁷ (b) disrupt active participation of amateurs, civic-engaged activity and end-users who face difficulties and barriers in accessing and utilizing copyrighted cultural materials;⁸ (c) destabilize authors' and creators' ability to get a fair return on their investment by enabling corporate media to leverage their copyright control as a means to control major distribution

(2003) [hereinafter Netanel, *Impose a Noncommercial Use Levy*] (offering compulsory licensing schemes that legalize file-sharing, among other purposes, in order to mitigate content owners' dominance and control over distribution channels); Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879 (2000) (discussing the existence of a "speech hierarchy" between, on one hand, individuals and non-commercialized entities, and, on the other hand, media conglomerates, and thus, recommending to restructure copyright law in a manner that mitigates these tendencies).

² See Litman, *supra* note 1, at 39–40, 49–52.

³ *Id.* at 12, 29.

⁴ *Id.* at 28.

⁵ *Id.* at 29.

⁶ See Niva Elkin-Koren, *It's All About Control: Rethinking Copyright in the New Information Landscape*, in THE COMMODIFICATION OF INFORMATION 72, 105–09 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 400–12 (1999) [hereinafter Benkler, *Free as the Air to Common Use*]; Yochai Benkler, *Intellectual Property and the Organization of Information Production*, 22 INT'L REV. L. & ECON. 81 (2002); Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785 (2004); Guy Pessach, *Copyright Law as a Silencing Restriction on Noninfringing Materials: Unveiling the Scope of Copyright's Diversity Externalities*, 76 S. CAL. L. REV. 1067 (2003).

⁷ See, e.g., Pessach, *supra* note 6, at 1067–81.

⁸ See, e.g., LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008).

platforms.⁹

From this perspective, it seems only natural to reconstruct copyright law in a manner that “cut[s] the middleman” and focuses on empowering creators and readers. Such a maneuver seems beneficial in several aspects: (a) it is likely to decrease corporate media’s economic incentive to engage in disruptive practices, such as the above-mentioned; and (b) it would make it easier for creators to reach audiences and for readers, listeners and viewers to enjoy a diversified range of creative works.

Commentators further support this argument by adding two additional observations: (a) findings and arguments that authors’ and creators’ incentives diversify and far range from copyright’s direct economic incentive;¹⁰ and (b) the manner in which digitization and networked communication technologies significantly reduce the costs of producing, storing and distributing content and cultural products.¹¹

Put together, a significant reduction in distributors’ and producers’ copyright protection seems compelling. Such a maneuver would better meet creators’ and readers’ needs, as well as serve the public goals that underlie copyright law; that is, it would discourage rent-seeking behaviors that currently dominate the fields of cultural production and make the system more supportive of its underlying goals of advancing the sciences and the arts.¹²

Once moving from theory to practice, the call for radical disintermediation in copyright law has two prongs. The first prong focuses on practical doctrinal proposals regarding how to reconstruct copyright law in a manner that would empower creators and lessen the powers and rights that producers, publishers and distributors pose. Proposals include reforms in termination-of-transfer rights in a manner that would give creators and authors further enhanced powers in exploiting, licensing and distributing their works (as well as getting a fairer share of long-term revenues that are generated by their copyrighted works).¹³ More radical approaches include outreach

⁹ See, e.g., Lital Helman, *When Your Recording Agency Turns into an Agency Problem: The True Nature of the Peer-to-Peer Debate*, 50 IDEA 49 (2009); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 543–46 (2009).

¹⁰ See Tushnet, *supra* note 9, at 523–27; Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29 (2011).

¹¹ See, e.g., Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 6–12 (2004); Litman, *supra* note 1, at 12, 28, 30, 35.

¹² See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (quoting the U.S. Constitution’s Intellectual Property Clause, U.S. CONST. art. I, § 8, cl. 8, which states a social-public purpose “[t]o promote the Progress of Science and useful Arts”); see also L. RAY PATTERSON & STANLEY F. BIRCH, JR., *A UNIFIED THEORY OF COPYRIGHT* 383 (Craig Joyce ed., 2009) (copyright should serve “the public interest in the creation, transmission, and use of knowledge”).

¹³ See Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research*

proposals to eliminate the category of commissioned works made for hire under the second prong of Section 101 of the Copyright Act.¹⁴ Overall, this first prong is aimed at centralizing more power in the hands of originating creators in a manner that would promote further distribution and utilization of their works and provide them with additional revenue.

The second prong is more oblique, yet no less important. The focus here is on copyright policy that would open and support additional channels of distribution that are not dominated by corporate media and their bias toward certain types of content.¹⁵ This framework includes approaches and proposals to legalize peer-to-peer file-sharing platforms because of their potential as alternative channels of distribution.¹⁶ This framework also focuses on developing and supporting robust safe harbors for Internet intermediaries, including content sharing platforms (e.g. YouTube), social networks (e.g. Facebook), search engines and other sophisticated retrieval mechanisms for content provision, such as indexes and linking websites.¹⁷ The logic and driving force underneath this prong is that digital and networked communication technologies will enable robust, diversified, decentralized and diffused forms of cultural production and cultural distribution only if the hedges and obstacles of copyright as a means of control over cultural production and cultural distribution are lessened.

This second prong also tells us something about the manner in which the disintermediation movement in copyright law treats and conceives the notion of *intermediaries* within its reform proposals. When referring to disintermediation, the focus is mostly on producers, publishers, sound recording companies, broadcasters, motion pictures studios and other types of traditional corporate media. As opposed, Internet service providers, content-sharing platforms, search engines, social networks and other types of Internet intermediaries are less captured as proprietary stakeholders that should be the focal point of any copyright reform. To the contrary, such institutions are perceived as key elements in improving society's cultural ecosystem and as the

Agenda, 2011 WIS. L. REV. 141, 160–64 (2011); Litman, *supra* note 1, at 47–48; Tushnet, *supra* note 9, at 543–46.

¹⁴ See Litman, *supra* note 1, at 48 n.219.

¹⁵ See Pessach, *supra* note 6, at 1087–92 (describing the political economy of corporate media under which major content producers control major distribution channels that favor their content).

¹⁶ See FISHER, *supra* note 1; Netanel, *Impose a Noncommercial Use Levy*, *supra* note 1.

¹⁷ See Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512 (2012) (detailing safe harbors for Internet service providers). The first harbor, 17 U.S.C. § 512(i), protects services which are mere conduits for digital transmissions. The second, 17 U.S.C. § 512(a), shields against liability for temporarily storing online material. A third harbor, 17 U.S.C. § 512(c), applies to services that store data at the direction of a user, such as sites which store users' websites. Finally, the fourth harbor, 17 U.S.C. § 512(d), protects "information location tools," such as search engines.

beneficiaries of disintermediation in copyright law.

Seemingly, this distinction is justified because unlike traditional distributors and corporate media, Internet intermediaries are not part of the traditional food chain within the content industries. They do not finance, produce or manage rights in copyrighted works. Rather, Internet intermediaries are perceived as alternative distribution channels through which reforms, such as the above-mentioned, may take place. Within the copyright reform discourse, the notion of intermediaries thus becomes relational and context-based. Traditional corporate media and distributors are objects of criticism and reductionism. At the same time, partial shielding of Internet intermediaries from copyright liability has become the gospel of empowering creators, readers and the public in general.

But, is it really so?

My purpose in this essay is to deconstruct the argument for disintermediation in copyright law. My ideological and moral port of departure is similar to those who call for disintermediation in copyright law. I also support the goal of strengthening the rights of originating authors and creators, as well as the goal of diversifying and decentralizing cultural production. At the same time, I am skeptical about both the presumptions and outcomes of the disintermediation movement. My critique encompasses several layers of argumentation.

The first layer attempts to foresee the long-term implications of the proposed move toward disintermediation in copyright law. I argue that intermediaries are unlikely to disappear in the absence of copyright protection. Intermediaries are here to stay, but instead of the traditional corporate media model of producers and distributors, the proposed reforms are expected to stimulate the further establishment of a handful of mega-intermediaries such as Google, YouTube and Facebook. Although these intermediaries do not necessarily extract direct revenues from selling copyrighted content, they still occupy functions similar to those of traditional corporate media in terms of their centrality within the distribution layer, control over audience attention and implicitly, cultural production. Just like traditional corporate media, commodification and commercialization are fundamental components within the political economy of networked intermediaries, but with one fundamental distinction: commodification through proprietary copyright protection is now partially being replaced with commodification of free (yet commercial) content.¹⁸

The increasing dominance of these networked intermediaries is based on a combination of their partial immunity from copyright

¹⁸ See *infra* Part II(A).

liability¹⁹ and their concurrent ability to engage directly with users, authors and creators while routing around the traditional “middle-man”. Audience attention is being gained by the partially immunized hosting of popular copyrighted content under the Digital Millennium Copyright Act (DMCA)’s notice and take-down regime;²⁰ revenues earned from advertisements and the popularity of the platform makes it attractive to users, creators and authors who now wish to make their content available through the same platform. Seemingly, these are all positive developments, but at the end of the day, it is questionable whether these developments either enhance cultural diversity or strengthen the position of creators, users and the general public.

I will argue that cultural diversity, content production and creators’ welfare might be worse off in this new political economy of media markets. My critique focuses on the fact that under certain conditions, the creative destruction²¹ of traditional corporate media and its replacement by mega networked intermediaries may generate realms that are more concentrated, homogenous and exploitive of creators. This is because like copyright control, control over audience attention is a major factor in disrupting cultural production. It circulates most audience attention to a limited variety of content, which is then responsible for generating audience attention. Thus, circularly, content production is channeled to the same limited variety of content, which is able to maintain audience attention, as well as attract advertisements.²²

¹⁹ See *infra* Part II(C)(1); see also *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 25 (2d Cir. 2012) (clarifying the contours of the “safe harbor” provision in the Digital Millennium Copyright Act, which limits the liability of online service providers for copyright infringement that occurs “by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider,” 17 U.S.C. § 512(c), and acknowledging the applicability of section 512(c)’s safe harbor for content sharing platforms while holding that under §512(c)(1)(A), liability for copyright infringement is conditioned upon knowledge, or awareness of facts or circumstances, that indicate specific and identifiable instances of infringement).

²⁰ See *infra* Part II(C).

²¹ See generally JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81–86 (5th ed. 1976). Schumpeter argues that ordinary competition between similar competitors with slightly differentiated products is not the source of much consumer benefit. *Id.* Rather, monopoly and oligopoly are undercut by the emergence of “the new commodity, the new technology, the new source of supply, the new type of organization” that “strikes [at] . . . the existing firms[.] . . . foundations and their very lives.” *Id.* at 84. This process, which Schumpeter calls “creative destruction,” “expands output and brings down prices.” *Id.* at 85. In the context of the argument for disintermediation in copyright law, the argument for creative destruction would be that by eliminating traditional distributors and corporate media, new and more competitive structures of media markets will emerge.

²² See C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 24–30, 182–83 (W. Lance Bennett & Robert M. Entman eds., 2002) [hereinafter BAKER, MEDIA, MARKETS, AND DEMOCRACY]; C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2153–56 (1992) (arguing that excessive reliance on advertisement (revenue) channels toward content that captures a large portion of the audience and follows the appropriate mood is required for promoting advertisers’ products).

As Part II(C) *infra* demonstrates, the proposed reforms for disintermediation in copyright law stimulate dynamics that concentrate audience attention and disrupt cultural production and cultural distribution no less than traditional distributors and corporate media.

My second related argument is that one must adopt a dynamic approach toward the role of traditional distributors and corporate media institutions (e.g. record companies, publishers and audio-visual corporate entities). Although I share much of the hesitation and critical approach regarding the political economy of traditional corporate media and its misuse of copyright law, I also contend that the political economy of networked intermediaries requires reevaluation of corporate media's functions. I argue that in several aspects, traditional corporate media may mitigate the increasing dominance of mega-networked intermediaries and thus facilitate better social conditions for cultural production. The institutional continuation of traditional corporate media may also offer better prospects in terms of *ex-ante* long-term support and investment in cultural production.²³ Altogether, this means that if corporate media generated threats to creators, users and cultural diversity in the past due to its excessive control over distribution channels, the equilibrium is now shifting. Now, corporate media may be essential in order to counter balance distortions that are generated by networked economics of power law distribution and winner-take-all markets.²⁴

My final argument creates the linkage between copyright policy and the disintermediation movement proposals in this context. I demonstrate how disintermediation in copyright law tends to result in outcomes that are contrary to its underlying goals. Thus, for example, broad safe harbors for commercial content sharing platforms may indeed facilitate new distribution channels, yet, concurrently, they concentrate massive audience attention and distribution power in a handful of commercial networked intermediaries. Additionally, the derivative outcome of weakening traditional distributors and corporate media may result in concentrated media markets, which at the end of the day undermine cultural diversity, creators and users.

From a broader perspective, I argue that, as opposed to the common view,²⁵ there is no direct correlation between lessening of copyright protection and the proliferation of content flow and distribution channels. The reason is that among other functions, copyright law is also a mechanism that regulates power relationships between different institutions and actors in media markets. Regarding this capacity, extreme concentration of media power could derive not

²³ See *infra* Part II(B).

²⁴ See *id.*

²⁵ See, e.g., LESSIG, *supra* note 8; Benkler, *Free as the Air to Common Use*, *supra* note 6.

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only from excessive copyright protection, but also from excessive ability to freely utilize content. At the end of the day, it is very much a question of the power allocation, network effects and corporate media dynamics that both copyright protection and immunity from copyright protection may induce.

Once this aspect is acknowledged, a novel and hidden role of copyright law is unveiled. Copyright law is a dynamic mechanism for regulating power relationships in media and information markets. It does so both by acknowledging copyright protection and by exempting from copyright liability. Hence, under certain economic and social conditions, copyright protection may have a legitimate role in mitigating media and market powers of copyrightless intermediaries that leverage copyright exemptions and limitations as their gateway to control over audience attention.

The remaining parts of this essay proceed as follows. The second part explains why disintermediation might result in media political economy structures which are no less disrupted than the ones of traditional distributors and corporate media. I also explain why, as opposed to the common view, there is no direct correlation between lack of copyright protection and the proliferation of distribution channels and content flow. I finalize the second part by referring to the doctrinal copyright law implications of my analysis, while focusing on safe harbors from liability for copyright infringement and first ownership of entitlements in copyright law. The third part concludes.

Before commencing, I offer one caveat regarding the terminology that this essay addresses: I use the term “traditional corporate media” to characterize entities such as record companies, publishers, distributors, movie studios, broadcasters and other types of content producers and distributors that existed before the emergence of networked communication technologies, as opposed to the term “Internet intermediaries”, which I use to characterize content sharing platforms, social networks, search engines and other prominent digital distributors. This distinction is indeed vague and to a certain degree inaccurate and misleading. The second category, Internet intermediaries, may be highly involved in content distribution, whereas traditional corporate media may be active and highly involved in digital domains. Nevertheless, this distinction and terminology is prominent within the disintermediation movement, which I aim to criticize. Therefore, I follow this terminology throughout the analysis of the essay, while in fact claiming that it is unjustified.

II. DECONSTRUCTING DISINTERMEDIATION IN COPYRIGHT LAW

My purpose in this part is to examine the purported implications of disintermediation in copyright law on media political economy

structures and also envision cultural production environments that skip the middleman. I then continue to examine whether and how traditional media institutions that rely on elements of copyright protection may strike a better equilibrium for cultural production. I finish by discussing the doctrinal implications of my analysis on copyright law, as well as potential critiques and counter arguments.

*A. Configuring and Further Imagining Disintermediation
(in Copyright Law)*

I begin by presuming that copyright law reform efforts towards disintermediation are successful, originating authors and creators are in control over their works, traditional distributors (e.g. record companies, publishers and motion pictures studios) are declining both in terms of their legal rights and in terms of their market share and Internet intermediaries benefit from a legal regime that further strengthens their functions and market share as distribution platforms. Scholarship, as well as field findings from the last decade, provide us with some data to make the following assessments.

Intermediaries are here to stay, with or without the copyrighting of content and cultural production. Intermediaries are essential as a means of coordinating content seekers with content providers. The centrality of content intermediaries only increases with information flow. People are becoming more dependent upon filtering and retrieval mechanisms that enable them to manage their limited resources (particularly in terms of time) for audience attention.²⁶ Internet intermediaries may differ from traditional distributors in terms of their institutional and structural identity. Search engines, content sharing platforms, social networks and online vendors are different from broadcasters, cinema chains, record companies, publishers and newspapers. Yet, at the end of the day, content conduits and content retrieval mechanisms remain essential as matchmakers between people and content.²⁷

Additionally, it is both anticipated and apparent that markets for Internet intermediaries are highly concentrated, with very few entities dominating. Since much of the cost of producing an Internet intermediary (design, technological innovation) is unrelated to the number of users of the service, the average cost of providing service to each additional user may fall as the number of users increases. Economies of scale reduce the level of competition. Cost of entry is rapidly rising while strong network effects give advantages to large-

²⁶ See, e.g., Frank Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, 60 VAND. L. REV. 135 (2007) (discussing information overload in a networked environment, as well as its impact).

²⁷ See Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 Cornell L. Rev. 1149 (2008).

scale intermediaries.²⁸

Another issue affecting the level of competition among Internet intermediaries is stickiness.²⁹ Users' stickiness to a content platform, or to other types of information/social intermediaries, may derive from several sources. One source is users' switching costs.³⁰ A second reason is a network effect under which the network attributes of an intermediary/platform make it more valuable as the number of users increases.³¹ A third related reason is the nature of media products as solidarity goods.³² Elsewhere, I have elaborated on the nature of media products as solidarity goods—goods that people value significantly for the benefits that are created through joint or simultaneous enjoyment by other individuals.³³ Culture is a social phenomenon in the sense that people want to experience, share and consume media products that are related to their social circles of life and to their archetypal models of inspiration and self-identification. Consequently, media products consist of a *cultural network effect*.³⁴ In many cases, the value of a media product for each and every individual is derived, at least partially, by its centrality and significance for other individuals.

To a large degree, these elements of solidarity goods and cultural network effects are valid not only in the context of particular content and creative products, but also in the context of intermediaries and culture conduits. Cultural network effects and cultural lock-ins may be apparent in the context of platforms no less than they are in the context of particular media products. People's cultural experiences, preferences and tastes regarding content and communication platforms are shaped similarly to the manner in which people figure their preferences around certain media products.³⁵

Consolidation and concentration are thus prominent elements in digital media markets and social networks. It is a leveraged mixture of economic, social and cultural elements that together generate this

²⁸ See ELI M. NOAM, MEDIA OWNERSHIP AND CONCENTRATION IN AMERICA, 273-294, 424-425 (2009); Niva Elkin-Koren, *User-Generated Platforms*, in WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 111, 116-17 (Rochelle C. Dreyfuss et al. eds., 2010).

²⁹ See *id.* at 117.

³⁰ *Id.*

³¹ See Pessach, *supra* note 6, at 1074.

³² *Id.* at 1100.

³³ See *Id.* at 1082-87; see also Cass R. Sunstein & Edna Ullmann-Margalit, *Solidarity Goods*, 9 J. POL. PHIL. 129 (2001).

³⁴ See Pessach, *supra* note 6, at 1084-85.

³⁵ Consider the popularity of certain content sharing platforms or social networks (e.g. Facebook). Indeed, there is a strong economic network effect under which the more people that join the network, the more valuable it becomes to its users. Additionally, however, it seems that the popularity and centrality of certain content sharing platforms and social networks also includes a cultural solidarity element under which people gather around the same platform due to the social and cultural function it includes.

tendency. One does not have to look far in order to observe the dominant position of intermediaries such as YouTube, Facebook or Google's search engine.³⁶ Intermediaries may change, empires may fall, but the cycle remains one of concentrated media power, even with the emergence of new distribution platforms.³⁷ Networked realms may bypass and skip traditional intermediaries. Networked realms may also have a somehow overstated rhetoric and proclaimed pretention of empowering diversity and authors. Nevertheless, as set forth in the following subsections, at the end of the day, along with its prospects, the political economy of copyright disintermediation may lead to outcomes and results, which are no less complex and problematic from the perspective of authors, creators, cultural diversity and readers/users.

1. Authors and Creators

I begin by referring to authors and creators while presuming that it is authors and creators, rather than traditional corporate media, who are in control of their copyrights. Even so, the bargaining position of originating authors and creators, versus a handful of Internet intermediaries, may be weaker than it was for traditional distributors and corporate media. The more concentrated the layer of effective networked distribution is, the weaker the bargaining position and economic welfare of authors and creators becomes.

Seemingly, the Internet and networked communication platforms provide almost an unlimited range of distribution platforms. Nevertheless, if one adds the parameter of *effective* audience attention and the ability to effectively reach audiences, in realms of information overflow, reality appears different. What we witness is a reduction in the number of effective distribution platforms, as well as concurrent escalation in their market share.³⁸ At the same time, the popularity of these platforms tends to increase their attractiveness to both users and content providers—a factor which either sustains or increases the centrality and market share of these platforms.

Media markets' tendency toward concentration and conglomeration is indeed far from being novel,³⁹ but the Internet and

³⁶ See Alexa's list of the top websites, which includes Facebook, Google, YouTube, Yahoo!, Twitter and Amazon. *Top Sites*, ALEXA, <http://www.alexa.com/topsites/global> (last visited Apr. 2, 2013).

³⁷ See TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* (2011) (describing the history of the media and telecommunication industries as a cycle of concentrated power which is periodically disrupted by new technologies that then evolve to their own structures of concentrated power).

³⁸ See *supra* notes 26–29 and the sources cited therein; see also Clay Shirky, *Power Laws, Weblogs, and Inequality*, CLAY SHIRKY'S WRITING ABOUT THE INTERNET (Feb. 10, 2003), http://www.shirky.com/writings/powerlaw_weblog.html (arguing that the larger the variety of works, the larger too is the gap between the most popular works and all the rest).

³⁹ See Pessach, *supra* note 6, at 1089 and the sources cited therein.

networked communication tend to further escalate such dynamics. It is now apparent and documented that due to network effects and power law distribution,⁴⁰ the typology of the Internet is such that there is a “a complete absence of democracy, fairness, and egalitarian values on the web [T]he topology of the web prevents us from seeing anything but a mere handful of the billion documents out there.”⁴¹ These attributes are dynamic in terms of the fact that at certain points, an emerging new concentrated cluster may replace one generation and cluster of concentrated distribution channels,⁴² but overall, from one generation to another and within each generation, the element of concentration remains highly apparent in networked content markets.⁴³

This structure of information and media markets is bound to implicate the bargaining position of originating authors and creators, as well as their *ex-ante* sources of financing and their *ex-post* revenues. In the following paragraphs, I demonstrate this argument through several case studies. I will then examine further implications on cultural and content diversity.

The first case study is of YouTube and its relationship with creators and performers who utilize YouTube as a distribution platform. To a large degree, YouTube signifies and symbolizes the premises of the disintermediation movement in copyright law: an open end-to-end distribution platform that is freed from the chains of traditional corporate media, major record companies and other content providers.

⁴⁰ Power law distribution is a term used to describe the phenomena of complex networks in which a small number of nodes—in our case, the most popular platforms and Internet intermediaries—attract most audience attention. See CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* 19, 121 (2006); ALBERT-LÁSZLÓ BARABÁSI, *LINKED: THE NEW SCIENCE OF NETWORKS* 73–77 (2002); NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* 132–33 (2008). Network effects, or network externalities, are “markets in which the value that consumers place on a good increases as others use the good.” Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CALIF. L. REV. 479, 481 (1998). In the context of content intermediaries, the more popular the platform is, the more valuable and usable it is to both content providers and content consumers.

⁴¹ See BARABÁSI, *supra* note 40, at 56; Bernardo A. Huberman & Lada A. Adamic, *Growth Dynamics of the World-Wide Web*, 401 NATURE 131 (1999); see also Lada A. Adamic & Bernardo A. Huberman, *Power-Law Distribution of the World Wide Web*, SCIENCE MAG., Mar. 24, 2000, at 2115; Albert-László Barabási & Réka Albert, *Emergence of Scaling in Random Networks*, SCI MAG., Oct. 15, 1999, at 509. For a critical survey of the literature in this regard, see BENKLER, *supra* note 1, at 241–61.

⁴² One example is the rise of MySpace as a social network and its decline after the emergence of Facebook. Both social networks are paradigmatic examples for the manner in which power law distribution operates in social realms. At the same time, the shift of users from MySpace to Facebook as their prominent social network represents the dynamic nature of winner-take-all markets.

⁴³ See also C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS*, 93–113 (W. Lance Bennett & Robert M. Entman, eds., 2007) (describing and explaining the tendency toward media concentration in networked communication platforms); Lincoln Dahlberg, *The Corporate Colonization of Online Attention and the Marginalization of Critical Communication?*, 29 J. COMM. INQUIRY 160 (2005) (describing the colonization and concentration of audience attention in a networked environment).

In a closer inspection, however, YouTube also demonstrates the potential disruptions and failures of disintermediation in copyright law and its impact.⁴⁴

YouTube is basically a content-sharing platform, which enables end-users to either upload content to the platform or access and view/listen to content that was uploaded to the platform by other users. In terms of market share and popularity, the numbers behind YouTube are a paradigmatic example for the manner in which power law distribution and network effects dominate the Internet. There are more than one billion unique users visiting YouTube every month and more than four billion hours of video viewed each month.⁴⁵ YouTube is adjusted to thirty-nine countries, fifty-four languages, and approximately seventy percent of users' traffic is outside the U.S.⁴⁶

YouTube operates a content partnership program that enables creators who upload content to YouTube to earn revenues from advertisements that appear along with their video clips.⁴⁷ This is YouTube's main and only option that enables creators to get remuneration for making their content available to the public. YouTube's financial reports as an independent revenue source are not public. However, estimates show that in 2012 and 2013, YouTube's annual gross revenues will be approximately 3.5 billion dollars per year.⁴⁸

From the creators' perspective, the following facts are worth mentioning: YouTube does not provide up-front or advance payments to authors and creators. There are also no direct face-to-face negotiations between an originating creator/performer and YouTube. The creator/performer is offered just one "take it or leave it" option, which is joining YouTube's partner program. The partner program is YouTube's only system for rewarding persons who make their creative products available to the public by uploading them in video form onto YouTube. The partner program does not entitle a creator, or a performer, to direct payments for the utilization, distribution and consumption of their content. It only offers payment for the inclusion of advertisements in

⁴⁴ In *infra* Part II(C)(1), I will demonstrate the linkage between copyright law and the political economy of YouTube. In this part, I focus on describing the manner in which disintermediation impacts are reflected through YouTube.

⁴⁵ See *Statistics*, YOUTUBE, http://www.youtube.com/t/press_statistics (last visited Apr. 2, 2013).

⁴⁶ *Id.*

⁴⁷ See *Criteria for YouTube Partnership*, YOUTUBE, <http://support.google.com/youtube/bin/answer.py?hl=en&answer=82839&topic=1100428&ctx=topic> (last visited Apr. 2, 2013).

⁴⁸ See Jonathan Ratner, *Google Deserves More Credit for YouTube Revenue, Analyst Says*, NATIONAL POST, Sept. 18, 2012, <http://www.nationalpost.com/related/topics/Google+deserves+more+credit+YouTube+revenue+analyst+says/7257265/story.html>; Peter Kafka, *YouTube's Gigantic Year is Already Here, Citi Says*, ALL THINGS D (June 21, 2012, 5:50 PM), <http://allthingsd.com/20120621/youtubes-gigantic-year-is-already-here-citi-says/>.

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ones' video clips (musical or audio-visual materials).⁴⁹ Thus, YouTube reserves the right to determine, while not disclosing, the parameters for such payments, as well as their exact amounts.⁵⁰

Much has been rightfully argued about the imbalanced bargaining position of many creators and authors as compared to traditional corporate media and distributors—entities such as record companies, motion picture studios, television broadcasters and other corporate media entities.⁵¹ The point is, however, that networked intermediaries and new platforms for effective distribution may be no less exploitive in their treatment and relationship with creators and authors.⁵² Returning now to the case of YouTube, when one examines the figures, it seems that the overall amount paid by YouTube to producers, creators and performers of video clips does not pass more than five percent of the overall revenues that YouTube generates,⁵³ because the average payment to these persons is approximately one dollar for 1,000 views of

⁴⁹ See the terms and conditions in Google's AdSense online terms and conditions, which also govern payments through YouTube's monetization program. *AdSense Terms and Conditions*, GOOGLE (Feb. 25, 2008), <https://www.google.com/adsense/localized-terms>.

⁵⁰ *Id.*

⁵¹ See ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY: WHY THE FEW AT THE TOP GET SO MUCH MORE THAN THE REST OF US* 189–209 (1995); Günther G. Schulze, *Superstars*, in *A HANDBOOK OF CULTURAL ECONOMICS* 431, 431–36 (Ruth Towse ed., 2003); William A. Hamlen, Jr., *Superstardom in Popular Music: Empirical Evidence*, 73 *REV. ECON. & STAT.* 729 (1991); Sherwin Rosen, *The Economics of Superstars*, 71 *AM. ECON. REV.* 845 (1981). As these sources indicate and survey, the structure of media markets is such that with the exception of a few blockbusters and superstars, most creators, authors and performers suffer from a disadvantaged bargaining position, which significantly undermines their share in revenues that are generated through and due to their creative contributions and outputs. See also Martin Kretschmer, *Does Copyright Law Matter? An Empirical Analysis of Creators' Earnings* (University of Glasgow, Working Paper, 2012), available at <http://ssrn.com/abstract=2063735>. This paper provides empirical evidence that the bottom fifty percent of composers/songwriters earn less than five percent of the total income of the population of composers/songwriters, the bottom fifty percent of literary authors earn under ten percent of total income and the bottom fifty percent of visual creators earn about ten percent of total income. *Id.* Median incomes are close to the poverty line. *Id.* The top ten percent of creators receive a disproportionately large share, with visual creators earning forty-five percent of total income, literary authors earning sixty-five percent of total income and composers/songwriters earning eighty percent of total income. *Id.* See also HUGE LADDIE ET AL., *THE MODERN LAW OF COPYRIGHT AND DESIGNS*, 896–900 (3d ed. 2000); J. H. W. Combe, *Fairness Versus Certainty—Pop Goes the Music Contract* 9 *EUR. INTEL. PROP. REV.* 187 (1987); Jane Tatt, *Music Publishing and Recording Contracts in Perspective*, 9 *EUR. INTEL. PROP. REV.* 132 (1987) (discussing court rulings in the United Kingdom that mention factual evidence regarding the nature and attributes of media markets and creators' lack of welfare and bargaining position within such markets).

⁵² See also Tushnet, *supra* note 9, at 543–46.

⁵³ This calculation is based on the following: According to YouTube statistics, each week, three billion views worth of video clips participate in YouTube's monetization program. Based on an average "revenue share" of one dollar per 1,000 views, see *infra* note 54, the weekly worldwide global revenues of rights' owners (producers, creators, authors and performers) is approximately three million dollars, which means annual revenues of approximately 144 million dollars. According to the estimation that YouTube's annual revenues are approximately 3.5 billion dollars, the sums allocated to rights' owners are approximately five percent of YouTube's revenues. See *Statistics*, *supra* note 46; see also Ratner, *supra* note 48.

a video clip.⁵⁴ Given the fact that YouTube does not finance or invest in the production of the content, a figure of five percent of the revenues—for the entire creative contributions—seems very low, particularly when the whole financial investment and risk fall solely on creators and producers.

When compared to traditional creative industries, this state of affairs does not seem encouraging. For example, within the audiovisual creative industries, the guilds' collective agreements between authors, directors and performers, on the one hand, and motion picture/television studios, on the other, seem to provide authors, creators and performers with financial conditions that are much better than the YouTube scenario, particularly because the financial investment and risk are born entirely by corporate media.⁵⁵ As for the music industry, indeed, there are many reports and evidence regarding the imbalanced allocation of revenues between most artists and record companies.⁵⁶ However, even in this regard, revenues from the “bad” old record company seem higher than the new digital distribution system. If one takes into account elements such as advances, coverage of production costs and even percentages of revenue share, the new boss might be worse than the old bad boss at the end of the day.⁵⁷

Another related aspect is that the type of media product that YouTube provides—on demand streaming of content—functions as an online and offline substitute for other similar media products. In the music industry, for example, YouTube partially substitutes radio broadcasts and downloads through online music stores or other streaming on demand services. The amount of revenues allocated to creators and performers, through YouTube, thus needs to be compared to revenues through other parallel markets, which are now being lost.

Finally, in addition to authors' and creators' economic welfare,

⁵⁴ The data in this regard is hard to obtain since YouTube does not reveal the details of remuneration that authors, creators, producers and performers obtain through its partner program. However, based on talks with people in the music industry, the average rate would be one dollar per 1,000 views of a video clip. In some cases, there is evidence of lower rates, such as one dollar per 2,500 views. See Rebecca Ratcliffe, *YouToo Can Earn £100,000 on YouTube*, GUARDIAN, Jan. 13, 2012, <http://www.guardian.co.uk/money/2012/jan/13/earn-money-youtube-viral-video>. Other evidence mentions revenue rates that are even lower. See Helienne Lindvall, *Music Streaming: What Do Songwriters Really Get From YouTube or Pandora?*, GUARDIAN, Oct. 10, 2012, <http://www.guardian.co.uk/media/2012/oct/10/music-streaming-songwriters-youtube-pandora>.

⁵⁵ See NIKOLAUS REBER, *FILM COPYRIGHT, CONTRACTS AND PROFIT PARTICIPATION* 108–38 (1999); John M. Kernochan, *Ownership and Control of Intellectual Property Rights in Audiovisual Works: Contracts and Practice—Report to the ALAI Congress, Paris, September 20, 1995*, 20 COLUM.-VLA J.L. & ARTS 359 (1996).

⁵⁶ See, e.g., Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 307–10 (2002).

⁵⁷ See David Lowery, *Meet the New Boss, Worse Than the Old Boss?*, TRICHORDIST (Apr. 15, 2012), <http://highlyvolatile.files.wordpress.com/2012/11/msu-meet-the-new-boss.pdf>.

YouTube's model may also give rise to long-term alienation that creators and authors may feel against their almost only effective channels to exposure and audience attention. Ironically, or not, it is the psychological and sociological motives of creativity (the same ones that underlie the disintermediation movement) which make creators and authors disadvantaged. Creators' desire to be exposed and gain as much audience attention (and love) as possible to their creative works is a parameter, which further undermines their bargaining position against a handful of dominant networked intermediaries who control the bottlenecks to audience attention.

In addition to YouTube, there are other instances that may demonstrate the manner in which networked disintermediation and the elimination of the traditional media middleman does not necessarily improve authors' and creators' welfare. One example is the story of the Huffington Post and its acquisition by AOL for more than 300 million dollars.⁵⁸ The acquisition gave rise to protests from many of the 15,000 bloggers who contributed content to the Huffington Post, while making it a success story that led to its sale to AOL.⁵⁹ None of the bloggers, however, received payment for their contributions or benefited from the financial success of the Huffington Post and its acquisition by AOL.⁶⁰ Several of the bloggers filed a class action against AOL and the Huffington Post, which was rejected.⁶¹

For our current discussion, the main question is not whether bloggers who contributed to the Huffington Post were legally entitled to get a share from the Huffington Post's acquisition by AOL. Regardless of the formal legal answer to this question, the story of the Huffington Post sets another example of why a networked disintermediated environment does not necessarily empower and improve authors' and creators' welfare and bargaining position. The growing popularity of the Huffington Post was largely based on bloggers' contributions. Yet, the same popularity also made the Huffington Post attractive and desirable by bloggers who were willing to contribute for free because this was practically the business model dictated by the Huffington Post.⁶² The popularity and centrality of the platform left them very little choice as diffused, decartelized individual contributors.

Another recent example is Instagram's failed attempt to

⁵⁸ See Lauren Kirchner, *AOL Settled with Unpaid "Volunteers" for \$15 Million: Why the HuffPost Bloggers Won't Be So Lucky, and Why That Matters*, COLUM. JOURNALISM REV. (Feb. 10, 2011, 6:00 PM), http://www.cjr.org/the_news_frontier/aol_settled_with_unpaid_volunt.php?page=all&print=true.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See *Tasini v. AOL, Inc.*, 851 F. Supp. 2d 734 (S.D.N.Y. 2012), *aff'd*, 2012 U.S. App. LEXIS 25323 (2d Cir. Dec. 12, 2012).

⁶² *Id.* at 743.

commercially utilize, for advertisement purposes, photos that were uploaded by its users. Instagram, now owned by Facebook, is an online photo-sharing and social networking service that enables its users to take a picture, apply a digital filter to it and share it on a variety of social networking services, including its own.⁶³ The platform is highly popular with more than 100 million users and more than one billion photos that have been uploaded to the platform.⁶⁴ On December 17, 2012, Instagram announced a change to its terms of use that would have seemingly enabled the platform to allow businesses or other entities to pay Instagram to display users' photos and other related information in connection with sponsored content or promotions without any compensation or notification to the user that posted the photo.⁶⁵ There was no apparent option to opt-out of the changed terms of use.⁶⁶ This extreme maneuver by Instagram garnered severe criticism from privacy advocates, as well as consumers, and after only one day, Instagram apologized and indicated that it would remove the controversial language from its terms of use.⁶⁷

The Instagram case study demonstrates that there are limits to the scope and degree of exploitation that networked intermediaries can impose on their contributing photographers. Selling uploaded photos to third parties, for advertisement purposes, seemed one step too far. It also departed from the norm of what are seemingly "free markets," according to the content itself, to not be directly sold or otherwise commodified.

At the end of the day, however, Instagram's new updated terms and conditions,⁶⁸ as well as the terms and conditions prior to this failed attempt,⁶⁹ were, and remain, terms and conditions that are not open to bargaining, negotiation or opting out because the user-photographer authorizes Instagram to display advertisements and promotions on, about or in conjunction with his content without receiving any remuneration or payment; thus, the manner, mode and extent of such advertising and promotions are subject to change without specific notice

⁶³ See INSTAGRAM, <http://instagram.com/> (last visited Apr. 2, 2013).

⁶⁴ See *Instagram Press Center*, INSTAGRAM, <http://instagram.com/press/> (last visited Apr. 2, 2013).

⁶⁵ Declan McCullagh, *Instagram Says It Now Has the Right to Sell Your Photos*, CNET (Dec. 17, 2012, 9:54 PM), http://news.cnet.com/8301-13578_3-57559710-38/instagram-says-it-now-has-the-right-to-sell-your-photos/.

⁶⁶ See Julianne Pepitone, *Instagram Can Now Sell Your Photos for Ads*, CNN MONEY (Dec. 18, 2012, 6:14 PM), <http://money.cnn.com/2012/12/18/technology/social/instagram-sell-photos/index.html>.

⁶⁷ See Instagram's official announcement, *Updated Terms of Service Based on Your Feedback*, INSTAGRAM, <http://blog.instagram.com/post/38421250999/updated-terms-of-service-based-on-your-feedback> (last visited Apr. 2, 2013).

⁶⁸ See *Terms of Use*, INSTAGRAM (Jan. 19, 2013), <http://instagram.com/about/legal/terms/updated/>.

⁶⁹ See *id.*

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to users. From this perspective, Instagram remains another example for the manner in which a networked disintermediated environment may indeed open new distribution channels, and yet at the same time, also generate dynamics in which creators (in this context, photographers) are exploited. The photographers freely provide creative works, which the platform may then utilize for profit-motivated activities with no financial compensation to the originating creators.

To conclude, it is far from evident that authors' and creators' welfare and bargaining position in a disintermediated networked environment are indeed better than within the realms of traditional distributors and corporate media. Disintermediation tends to stimulate concentrated clusters of content distribution platforms, which then dictate unilateral terms and conditions with no direct negotiations between such neo-distributors and creators. The blurred boundaries between sharing and self expression, on one hand, and rewarding authors and creators, on the other hand, also tend to complicate and flatten the element of authors' welfare. Many of the contributors to platforms such as YouTube and Instagram are amateurs who do not expect to be rewarded. Monetary compensation does not function as a main source of incentive for this category of creators. Yet, at the same time, the popularity, centrality and market share of the platform tends to also make it essential for professional elements, within the creative industries, which do require financing and monetary compensation.

Finally, a reference regarding the exception of blockbusters and superstars: One may dispute the above-mentioned analysis by setting examples for the exceptional. A recent example is the unprecedented success of "Gangnam Style"—a pop single by the South Korean musician PSY.⁷⁰ In a short period of less than six months, this song became the most viewed video clip in YouTube history with more than one billion views.⁷¹ Although there is no concrete information, the estimations are that, based on an average of \$0.001 per view tariff, PSY's earnings from YouTube have reached one million dollars.⁷² This is indeed an impressive amount, which represents the manner in which the Internet supports global super stardom. Yet, it is also a somewhat misleading number because it is the exception and not the general rule. It exemplifies the fact that disintermediation not only maintains but also further stimulates winner-take-all markets in which a handful of very few blockbusters and superstars sweep most audience attention and

⁷⁰ See Psy, *Gangnam Style*, YOUTUBE (Jul. 15, 2012), <http://www.youtube.com/watch?v=9bZkp7q19f0&list=PLEC422D53B7588DC7&index=9>.

⁷¹ Youkyung Lee & Ryan Nakashima, '*Gangnam Style*' Riches Grow by Clicks and Bounds, but Mostly Overseas, NEW YORK TIMES, Dec. 6, 2012, http://www.nytimes.com/2012/12/07/business/global/gangnam-style-riches-grow-by-clicks-and-bounds-but-mostly-overseas.html?_r=0.

⁷² See *Id.*

financial revenues. From an allocative perspective, this means that the curve of an entire market's revenue allocation is of skewed distribution. It has a high left side denoting the few works that achieve "winner take all" status. It then descends in a steep slope and ends in a "tail," representing the silent majority of works which receive considerably less monetary compensation. Regarding most authors and creators, the welfare effects of disintermediation, therefore, still seem to be reductive.

2. Advertisements, Monetization and Content Diversity

I have already mentioned monetization and its relation to authors' and creators' welfare. The phenomena of monetization and its centrality in digital disintermediated markets requires further elaboration because of its impact on content diversity. Monetization has become a common buzzword for the ability of authors and creators to earn proceeds from digital utilization of their content, mostly through the inclusion of advertisements along with their content. To a large degree, monetization signifies *the* alternative to traditional corporate media market structures because it enables free consumption and distribution of content together with remuneration to authors and creators (through advertisement revenues). A scrutinized inspection reveals, however, that reliance on advertisements' monetization as a source and institutional framework for cultural production may have negative impacts, which go beyond the question of creators' and authors' economic welfare.

Monetization establishes creators' welfare on advertisement revenues, which in turn are based on the popularity of their content. Hence, in order to successfully monetize their content, creators must come up with content that is popular enough to attract a significant number of views. Disintermediation thus leads to an extreme version of the traditional corporate media model. In his analysis and critique of corporate media, C. Edwin Baker demonstrates how advertising-supported media operates as a "market for eyeballs," which sells audiences to advertisers and consequently leans towards media products that have a relatively wide appeal and gloss over.⁷³ In the past, the pressure to sell as many eyeballs as possible was on corporate media. In a disintermediated networked environment, skipping the middleman means that the same pressures go down the stream while being imposed on creators themselves. The only difference is that, as opposed to corporate media, individual creators and authors lack the financial resources required to spread risks between different types of cultural products or seek and develop other distribution platforms.

⁷³ See BAKER, MEDIA, MARKETS, AND DEMOCRACY, *supra* note 22.

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With the above-mentioned description, I am not arguing that advertisements' supported content distribution platforms are becoming the sole channel for content production and content distribution in a networked environment. I do argue, however, that as their centrality increases, such platforms are emerging as a new corporate media model that screens and impacts on pay per content models, which are also commercial by their nature. Proliferation of advertisements' supported free content distribution platforms may impose pressures that weaken other competing models of content distribution, while leaving little breathing space for other forms of cultural production and cultural distribution that are not dependent and influenced by the necessity of selling eyeballs to advertisers.

In such a reality, at least to some degree, the same pressures that disrupted cultural production, in periods prior to the emergence of the Internet, are now increasing due to the toxic combination of audience attention concentration, information overflow, and the dominance of profit motivated commercial intermediaries. In this sense, there is something misleading in our fascination from the seemingly "free" empowering culture of networked intermediaries. Under certain market conditions, the cost of free content is no less pricey than the cost of content that is being paid for.

The above-mentioned analysis does not ignore the rise of amateur and collaborative cultural production and their fundamental contribution to content diversity.⁷⁴ Significant portions of amateur and collaborative cultural production, as well as other types of creative activities, may lack reliance on copyright's economic incentives, yet add and contribute to the diversity of cultural production. Regarding this edge of content and cultural production, the impact of monetization seems less significant. However, one cannot ignore the fact that there are limits to the types of content and media products that are generated by amateurs and collaborative platforms. Additionally, lack of reliance on economic incentives does not, by itself, resolve issues related to concentration and the limited number of intermediaries with effective audience attention. Even amateurs, who lack reliance on economic incentives, may still strive for popularity and audience attention; thus, in this instance, they

⁷⁴ See BENKLER, *supra* note 1 (using economic, political, and technological analyses to explain how new information technologies make it easier for individuals to collaborate in producing cultural content, knowledge and other information goods, without requiring monetary incentives); LESSIG, *supra* note 8; Balkin, *supra* note 11, at 7–16; Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002); Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 CALIF. L. REV. 597 (2007); Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951 (2004); Madhavi Sunder, *IP³*, 59 STAN. L. REV. 257 (2006). *See also* Tushnet, *supra* note 9 (citing literature with findings and arguments that authors' and creators' incentives diversify and far range from copyright's direct economic incentive).

would also be exposed to the above-mentioned constraints and pressures.

This last point also explains why phenomena which are unique to the networked environment, such as “the long tail,” may not be sufficient to solve disruptions in networked cultural production, such as the above-mentioned. The “long tail theory” maintains that the combination of Internet technology and digitization significantly contributes to the increase of diversity. The argument is that the ease of access and search provided by the Internet, combined with the lack of physical constraints, allows cultural consumers to turn away from popular cultural works and toward a long tail of “niche” diverse tastes. Consequently, creators, authors and producers are able to succeed not only by appealing to the widest common denominator, but also by appealing to more unique and sophisticated tastes.⁷⁵ I do not ignore, nor undermine, the power, importance and potential of the long tail phenomena. I do argue, however, that this potential may be undermined by counter dynamics, such as the above-mentioned, which influence both the supply and demand side of cultural production and cultural distribution.⁷⁶

3. Taking Stock

Let me summarize my argument thus far. I argued that the weakening of traditional intermediaries, the empowerment of originating creators and even the diminishment of copyright do not necessarily lead to their expected outcomes and prospects in a networked environment.

The hope and vision of ubiquitous cultural production carried by open platforms is apparently both dependent upon and disrupted by a handful of dominating commercial networked intermediaries. New digital intermediaries such as YouTube are hybrids. They do not function only as mere conduits of data (content natural data pipes). Rather they occupy concurrent functions of direct involvement in

⁷⁵ See ANDERSON, *supra* note 40.

⁷⁶ See Anita Elberse, *Should You Invest in the Long Tail?*, 86 HARV. BUS. REV. 88 (2008) (arguing, based on online sales data, that the Internet increases the relative power of hits); Anindya Ghose & Bin Gu, *Search Costs, Demand Structure and Long Tail in Electronic Markets: Theory and Evidence* (NET Institute Working Paper No. 06-19, 2006), available at <http://ssrn.com/abstract=941200> (arguing that the internet is skewed towards popular contents in terms of search costs). Similarly, I do not ignore the fact that authors and creators may earn revenues from sources other than monetizing direct exploitation of their creative works. Thus, for example, exposure and popularity, which are gained through the internet, could be translated into revenues from live performances or merchandizing. The point is that such an option does not negate dynamics such as the ones described in the main text. Additionally, as long as popularity remains a major factor in securing financial reward, the dynamics of disintermediation seem to remain the same, even if revenues do not derive directly from monetizing the creative work itself.

content provision. The fact that such intermediaries provide user-friendly platforms for sharing content does negate the additional fact that these intermediaries are also in the business of facilitating and controlling the layer of digital content distribution.

The emergence of these intermediaries is to a large degree a consequence of power law distribution, economic and social tendencies. These intermediaries do not necessarily commodify content and culture through the traditional “copyrighting culture” path, which tags a price to the sale of the creative work itself. Yet, their extreme reliance on advertisements and selling eyeballs is no less influential in the commodification of culture.

For creators and authors who do seek economic welfare and economic incentives, networked models of monetizing free content are no less parasitic than traditional corporate media. The bargaining position of creators and authors versus networked intermediaries is no less imbalanced than what it used to be as compared to traditional distributors and corporate media, only now markets seem more concentrated and more alienated in their structuring of correspondence and deliberation with creators and authors.

Pressures toward ruinous competition in manufacturing blockbuster hits that generate popularity are still apparent as they were before, if not stronger. Concurrently, *ex-ante* sources for financing and supporting cultural and creative ventures may decline. One reason is the fact that originating authors and creators may lack financial advances and long-term support that they previously benefitted from. A second reason is that the dominance of free content distribution platforms has spillovers on pay-per-content platforms and their ability to finance and support cultural production. Destructive competition of “old corporate media” is not necessarily a good thing if what it means is loss of cultural production and cultural distribution institutions, which operate and function differently than free content platforms supported by advertisements. Finally, the relationship between networked intermediaries and diffused creators may leave fewer paths for the collective organization of creators and authors.⁷⁷

From a broader perspective, the same externalities that characterized traditional corporate media markets⁷⁸ are still apparent. The political economy of free content in commercial spheres is not as free as it may seem. Even if not directly, people and society at large do

⁷⁷ Indeed, the case study of Instagram demonstrates that effective reaction by a significant number of Internet users does have an influence on Internet intermediaries and content platforms. *See supra* notes 63–69 and accompanying text. Yet, such reactions seem limited to relatively severe circumstances, whereas in most circumstances, Internet users, creators and authors would be diffused, not organized, under one entity and with a high degree of collective action problems due to their balkanized structure.

⁷⁸ *See supra* notes 7–11, accompanying text and the sources cited therein.

pay for free content through the constraints, limitations and biases that such a model imposes. Specifically, the economics of attention that free content markets generate may not necessarily support diversity and robust cultural production.

All this does not mean that networked communication platforms are absent of civic-engaged, collaborative and individual frameworks for cultural production and cultural distribution. Indeed, there are strong elements of liberation and democratization in the paths that new end-to-end distribution channels offer. However, at the same time, forms of cultural production, which require substantial investment, and likewise, creators who do seek economic welfare, as well as significant exposure in prominent platforms, are expected to face obstacles and disruptions similar, and no less significant than the ones they faced in prior decades of corporate media.

My purpose in the following sections is to consider the potential impact of two parameters on the political economy of networked cultural production. The first parameter deals with the potential role of the traditional content middleman and corporate media. I argue that this institutional layer may have a positive contribution in mitigating some of the above-mentioned disruptions. The second parameter deals with the impact of copyright disintermediation on the above-mentioned disruptions. I argue that to a certain degree and in some aspects, disintermediation in copyright law leads to outcomes that oppose the ones it envisions.

Before entering this phase, one additional caveat is worth emphasizing. I do not wish to ignore, or undermine, the failures and cultural disruptions of traditional corporate media. Nor do I ignore the manner in which certain elements of broad and extensive copyright protection further induce such failure and disruptions.⁷⁹ I do argue, however, that the realpolitik of networked cultural production sets power relationship dynamics that are complex and multifold. In such dynamics, copyright schemes that weaken traditional distributors and corporate media may end up with outcomes that are not socially desirable. Likewise, under certain conditions, legal regimes that strengthen emerging open and free content distribution platforms may also result in outcomes that weaken the same creators and users for whom the strengthening of such platforms is aimed.

*B. Reconsidering the Role of Traditional Corporate Media
(Professional Media Intermediaries)*

What if in a networked environment, “old school” media

⁷⁹ See Pessach, *supra* note 6.

institutions remain prominent? In Part C *infra*, I will analyze the interface between copyright law and such a scenario. The question I wish to discuss in this section is how the continuing salience of traditional distributors and corporate media would impact networked cultural production and cultural distribution. The intuitive answer seems to be that the continuing existence and dominance of corporate media would bring the same failures and disruptions that characterized the political economy of commercial media institutions in decades prior to the emergence of networked communication platforms. Presuming that the power allocation and structure of media markets remain as they were before, this may indeed be an accurate estimation. Reality, however, portrays a different picture under which networked intermediaries, such as the ones described in the previous section, are gradually emerging while changing the political economy of networked media markets. Once taking into account this transformation, the role of traditional distributors and corporate media seems different.

Corporate media institutions may now function as institutions that balance and mitigate the economic and communicative power that is held by mega-networked intermediaries. The disadvantaged, and to some degree helpless bargaining position of atomized creators, authors and performers may be upgraded (at least to a certain degree) when their creative resources are aggregated and represented by corporate media institutions. Thus, for example, individual and diffused creators and performers have no option other than complying with YouTube's online terms and conditions. *Code* is all and it is a "take it or leave it" bargain. Corporate media entities with a significant portfolio of content, such as sound recording companies, may be better off in terms of their negotiation position and are more likely to be approached and negotiated on a face-to-face individual level.

Collective bargaining has always been a component that mitigates and improves the welfare and creative conditions of authors, at least in certain particular cultural sectors.⁸⁰ In a networked environment with the new allocation of media power, traditional corporate media may function as aggregators that strike a better equilibrium in terms of negotiation and bargaining position against networked intermediaries. This is not just an economic matter, but also a matter of the creative terms and conditions under which content is presented and distributed. As opposed to individual creators who tend to face a unilateral option of terms and conditions, corporate media institutions may have more

⁸⁰ See *supra* note 55 and the sources cited therein; see also Ariel Katz, *Copyright Collectives: Good Solution, But For Which Problem?*, in WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY LAW: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY, *supra* note 28; Guy Pessach, *Collective Administration of Copyright—The Role of Justice and Fairness Considerations*, 2 HAIFA L. REV. 261 (2006).

influence when negotiating with major intermediaries and platforms.

Another related element refers to what C. Edwin Baker described as the importance of maintaining media structures that facilitate many different types of media institutions that check and balance each other.⁸¹ The general notion is of as many different kinds of media institutions as possible, both market-oriented and public, so structural diversity enables each type of media institution to cover, supplement and counterbalance the drawbacks of other institutions.⁸² Baker argues that effective performance of the media's multitude of political and cultural roles requires a mixed system, which encourages different kinds of media organizations, as well as different forms of ownership and control.⁸³ Baker wrote his proposal in 2002, alongside the emergence of the Internet and networked communication platforms, but before their full establishment and take-over of media markets.⁸⁴ At that point, Baker's justified focus was on mitigating the deficiencies and power of traditional corporate media markets.⁸⁵ Baker recommended and hoped for an expansion of public-supported and professional media that would coexist with commercial media.⁸⁶

In today's communicative world, one may presume that networked amateur culture and the blogosphere would fall well within Baker's vision. At the same time, and from a broader perspective, Baker's general insight was that media's structural diversity and diffusion are highly important for the ecology of media markets. Decentralization and diversification are mechanisms for increasing competition and reducing concentrated media market power. Additionally, there is a strong non-economic dimension, according to heterogeneity, in cultural production and cultural distribution that has an inherent value of its own. If in the past it was the concentrated nature of corporate media, which required a cure, today traditional distributors and media entities may mitigate, balance and diversify the power and role of networked intermediaries.

With all of its deficiencies, traditional corporate media also carries a cultural legacy of commitment to the creative industries, which is currently absent in the commitments and cultural DNA of networked intermediaries. Book publishers, the motion picture industry, television broadcasters and the music industry are all entities, which though

⁸¹ See BAKER, MEDIA, MARKETS, AND DEMOCRACY, *supra* note 22, at 176–93; see also Guy Pessach, *Media, Markets, and Democracy: Revisiting an Eternal Triangle*, 17 CAN. J.L. & JURISPRUDENCE 209, 215–17 (2004).

⁸² BAKER, MEDIA, MARKETS, AND DEMOCRACY, *supra* note 22, at 187-92.

⁸³ *Id.* at 190

⁸⁴ *Id.* at 285-306 (including the postscript of the book which discusses the impact of the internet. The book was published in 2002).

⁸⁵ *Id.* at 63-95.

⁸⁶ *Id.* at 187-92.

commercial, have a past and proficiency that carries a strong commitment to cultural production. Hence, their continuation into the networked era may enrich the flat surface of global networked intermediaries.

Another aspect is the element of financial investment in cultural production. The contemporary model of networked intermediaries, content-sharing platforms and social networks is such that they function mostly as windows for displaying content and as tubes for delivering content. The anticipation and presumption is that users, individuals and collaborative peer production function as sources and suppliers of creative materials. Regarding certain types of information and cultural products, this model may function well. Online encyclopedias, such as Wikipedia, are one example. Alongside, however, are other types of creative and cultural products that require substantial financial investment and long-term commitment, while not being suitable for voluntary individual contribution or collaborative peer production. In such instances, the role of the creative industries becomes imminent.

One additional aspect that must be taken into account is the strong element of risk, which characterizes investment in cultural production. Cultural production is partially a “nobody knows” market, which involves both high risks and high returns for successful media products.⁸⁷ Here also, institutions, which specialize in particular types of cultural production, may be more suitable for allocating risks and prospects between portfolios of cultural products. This “cross subsidy” argument was criticized when it was relied upon to justify broad copyright protection.⁸⁸ Specifically, it was argued that instead of stimulating investment in a diverse range of cultural works, broad copyright protection is utilized to allocate risk between several copyrighted media products, all of which have the potential of being successfully commercialized in as many derivative and ancillary copyright markets as possible.⁸⁹ At least to some degree, this critique seems justified. Yet, if one puts aside attempts to establish broad copyright protection, on cross subsidy arguments, as a practical matter, certain cultural industries do utilize cross subsidy strategies to support either more risky or less profitable cultural products. For example, a professional publishing house, which focuses on specific types of books, may adopt a cross subsidy strategy in a manner that supports marginal and more risky projects in its unique area of expertise,

⁸⁷ See RICHARD E. CAVES, *CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE* 2–5 (2000); see also Paul Goldstein, *Copyright and Legislation: The Kastenmeier Years*, 55 L. & CONTEMP. PROBS. 79, 83 (1992).

⁸⁸ See Benkler, *Free as the Air to Common Use*, *supra* note 6, at 397–98; Pessach, *supra* note 6, at 1097–98; Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 332 (1996).

⁸⁹ See Benkler, *Free as the Air to Common Use*, *supra* note 6, at 397–400.

especially if its motivation and considerations for publication are not purely financial.⁹⁰

Such and similar dynamics of risk allocation may occur in the context of music, television and other cultural production activities. Institutions, which specialize in particular types of cultural production, may be more suitable than diffused individuals for allocating risks and prospects between portfolios of cultural products. Indeed, there is an inherent tension between the efficiency, deep pockets, coordination advantages and stability of corporate production, on one hand, and their inherent tendency to leave less breathing space for grassroots creative activity, on the other hand. I do not ignore this tension. Nor do I aim for hegemony of concentrated corporate media. I do argue, however, that a “middle class” of cultural production facilitation, coordination and creative resources management is likely to reach better results than edgy realms of diffused individuals confronting a handful of networked intermediaries.

Finally, a middleman between creators and networked intermediaries may also have the ability to filter and overcome some of the biases and failures that individual creators and performers confront when negotiating networked intermediaries. Such biases include collective actions problems and biases, which are related to information problems or over-optimism regarding the proceeds of monetization.⁹¹ Traditional corporate media indeed suffers from certain types of agency problems and conflict of interests in their relationship with authors, creators and artists represented by them.⁹² Nevertheless, a concurrent element is a certain relationship of representation, commitment and joint interest. Within this complex framework, the professional corporate media intermediary functioned both as a filter and as leverage in advancing the creator that it represented.

At this juncture as well, disadvantages, which traditionally characterized the relationship between creators and corporate media, are now reshaping their guise through the relationship between creators and networked intermediaries. It is a mixture of information problems, concentrated markets, limited financial resources, inferior bargaining position and creators’ strive for exposure which make them both dependent, and to a large degree, irrational in their relationship with

⁹⁰ See ANDRÉ SCHIFFRIN, *THE BUSINESS OF BOOKS: HOW THE INTERNATIONAL CONGLOMERATES TOOK OVER PUBLISHING AND CHANGED THE WAY WE READ* (2000) (describing how cross subsidy strategies by independent book publishers provided support for less popular, yet culturally valuable, books).

⁹¹ See HANS ABBING, *WHY ARE ARTISTS POOR?: THE EXCEPTIONAL ECONOMY OF THE ARTS* (2002) (describing the exceptional economics of the creative industries and the manner in which authors, creators and artists are subordinated to information problems over optimism and exposure desire, which may impact their rational decision making process).

⁹² See *supra* note 51 and the sources cited therein.

those who gate-keep networked channels of distribution and the gateways for online public exposure. Traditionally, these were elements that corporate media utilized against originating authors and creators (at least those who did not fall into the relatively rare rubric of blockbusters), whereas guilds and collective bargaining functioned as partial mechanisms to overcome such biases.⁹³

In a networked environment it seems that traditional corporate media may function as a partial filter of such biases between originating creators and networked intermediaries because the role of corporate media, in the pyramid, has changed. In the past, corporate media's control over both the layer of content production and the distribution layer was a central cause for the drawbacks of corporate media and the disadvantaged position of creators. The emergence of networked intermediaries tends to unchain this tendency for convergence, while replacing it with more extreme media concentration by networked intermediaries, which now operates on a global level. This means that traditional corporate media is now less exposed to failures of convergence, while it may have a role in tuning down networked intermediaries concentrated communicative power.

In conclusion, along with their many prospects, the new realms of networked cultural production and cultural distribution also impose new challenges to be met, particularly of concentrated and alienated media power, which authors and creators have to confront. In such new realms, traditional corporate media may have a positive function of striking a better equilibrium for diversified cultural production and sustainment of creative sectors. My purpose in the next section is to examine the linkage between copyright policy of disintermediation and the accomplishment of such goals.

C. *Interfacing With Copyright Law*

What is the relationship between political economy dynamics, such as the above-mentioned, and copyright law? Seemingly, there is no direct relation between such dynamics and copyright law. Rather, these dynamics are a derivative of the new technological and economic conditions that networked communication platforms impose. Creative destruction and Schumpeterian competition⁹⁴ are apparently the cause for the new political economy of networked media markets. To some extent, this is indeed the situation. Additionally, legal regulation has an impact either by imposing barriers or by opening paths for emerging new forms of cultural production and cultural distribution.

The disintermediation movement in copyright law focuses on two

⁹³ See *supra* note 55, *infra* note 118 and the sources cited therein.

⁹⁴ See *supra* notes 26–37 and the sources cited therein.

grand themes. The first theme is opening and empowering additional, competitive, diffused and decentralized distribution platforms.⁹⁵ The second theme is vesting more rights in the hands of originating authors and creators in a manner that would increase authors' welfare and also provide authors with more control over the manner in which their works are utilized.⁹⁶ Both themes are desirable in terms of their underlying goals. Nevertheless, when one examines the practical paths to implementing these goals, it seems that along with advantages and benefits, these paths may also nudge against their underlying goals. Disintermediation in copyright law may lead to outcomes that are contrary to its purported goals.

1. The Interface of Ubiquitous Distribution and Copyright Safe Harbors for Content Sharing Platforms

The first theme of opening and empowering additional distribution channels is closely linked to Internet service providers' safe harbors within copyright law, and particularly, the statutory safe harbor for hosting services providers. The Digital Millennium Copyright Act, enacted in 1998 and codified in Title 17, § 512 of the United States Code, includes four main safe harbors for Internet services providers.⁹⁷ Section 512(c) provides a safe harbor for hosting services providers. Formally, § 512(c) applies to services that store data at the direction of a user, such as sites that store users' websites. It deals with "[i]nformation residing on systems or networks at [the] direction of users," and it limits service providers' liability for content posted or hosted at the direction of end users.⁹⁸

This provision protects those service providers that receive no "financial benefit directly attributable to the infringing activity," where the provider has neither the right, nor the ability, to control the activity and where, if properly notified, the service provider suppresses access to the infringing content.⁹⁹ However, it does not protect service providers with actual or constructive knowledge of infringing content who do not, on their own initiative, move quickly to disable access.¹⁰⁰ The legislative history of § 512(c) lists as an example of the applicability of the safe harbor, "providing server space for a user's web site, for a chatroom, or other forum in which material may be posted at the direction of users."¹⁰¹ On the other hand, material not covered includes material "that resides on the system or network operated by or

⁹⁵ See *supra* notes 13–14, accompanying text and the sources cited therein.

⁹⁶ See *supra* notes 15–17, accompanying text and the sources cited therein.

⁹⁷ See 17 U.S.C. § 512 (2012).

⁹⁸ 17 U.S.C. § 512(c) (2012).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See H.R. REP. NO. 105-551(II), at 53 (1998).

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for the service provider through its own acts or decisions and not at the direction of a user.”¹⁰²

With the emergence of WEB 2.0 and content sharing platforms, a central question arose: whether and under what conditions content sharing platforms may shelter under the safe harbor of § 512(c). Several scholars, including Timothy Wu and Lawrence Lessig, expressed the view that § 512(c)’s safe harbor also applies to the activity of content sharing platforms and other types of WEB 2.0 applications.¹⁰³ Lessig pointed out that with the enactment of the DMCA, the safe harbors for Internet service providers were part of a quid pro quo for the enactment of anti-circumvention prohibitions.¹⁰⁴ Copyright owners were given much more control over their portfolio of copyrighted works; but Congress simultaneously reduced the liability of content intermediaries and service-providers by shifting from an *opting-in* strict liability regime to an *opting-out* “notice and take down” regime.¹⁰⁵

Overall, the judiciary followed this direction. Court rulings vary in their nuisances, but at the end of the day, the general direction of courts is that content sharing platforms also benefit from § 512(c)’s safe harbor.¹⁰⁶ The most recent decision that attempts to set principles for such a scenario is the Court of Appeals decision in *Viacom International, Inc. v. YouTube, Inc.*¹⁰⁷ After five years in the courts, the Second Circuit finalized parameters for applying § 512(c) in the context of content sharing platforms, such as YouTube, while determining that content sharing platforms may benefit from § 512(c)’s safe harbor according to the following determinations and parameters:

- (a) Content sharing platforms fall within the definition of “service provider” in § 512(c).

¹⁰² *Id.*

¹⁰³ See Lawrence Lessig, *Make Way for Copyright Chaos*, N.Y. TIMES, Mar. 18, 2007, <http://www.nytimes.com/2007/03/18/opinion/18lessig.html?ex=1331870400&en=a376e7886d4b4cf62&ei=5088&partner=rssnyt>; Tim Wu, *Does YouTube Really Have Legal Problems?*, SLATE (Oct. 26, 2006, 4:28 PM), <http://slate.com/id/2152264> (“In 1998, [information residing on systems or networks at direction of users in § 512(c)] meant Geocities and AOL user pages. But in 2006, that means Blogger, Wikipedia, Flickr, Facebook, MySpace, and, yes, YouTube—all the companies whose shtick is ‘user-generated content.’”).

¹⁰⁴ Lessig, *supra* note 85.

¹⁰⁵ See H.R. REP. NO. 105-551(II), at 54.

¹⁰⁶ See *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2011); *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627 (S.D.N.Y. 2011); *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132 (N.D. Cal. 2008); see also Mary Rasenberger & Christine Pepe, *Copyright Enforcement and Online File Hosting Services: Have Courts Struck the Proper Balance?*, 59 J. COPYRIGHT SOC’Y 627, 662–92 (2012).

¹⁰⁷ *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).

(b) Knowledge or awareness of facts or circumstances that indicate *specific and identifiable* instances of infringement is a prerequisite for the obligation to remove and take down infringing materials.

(c) “The right and ability to control” infringing activity does not require “item-specific” knowledge of infringement, yet it does not suffice with a general ability to remove or block access to materials posted on a service provider’s website. What is required is some type of “substantial influence on the activities of users,” without necessarily acquiring knowledge of specific infringing activity.

(d) Software functions of replication, playback and the related videos feature occur “by reason of the storage at the direction of a user” within the meaning of 17 U.S.C. § 512(c)(1).¹⁰⁸

The Court of Appeals decision in *Viacom International, Inc. v. YouTube, Inc.* was given approximately seven years after YouTube was established and six years after it was acquired by Google.¹⁰⁹ Today, as already mentioned, YouTube is much more than a mere content sharing platform that operates solely “by reason of the storage at the direction of a user.”¹¹⁰ It is a major distribution platform, which operates on behalf of and together with creators and rights owners.

The dominant and unprecedented market and power position that YouTube has managed to obtain is, however, mostly due to § 512(c)’s safe harbor regime. It is the safe harbor regime that enabled the hosting and public provision of endless amounts of popular copyrighted cultural materials, and it is this ability that made the platform so dominant in terms of its market share. The growing popularity of the platform was largely based on its ability to cover entire portfolios of content (“full repertoire”) under one umbrella and highly demanded (copyrighted) content. The ability to do so without any need to obtain *ex-ante* authorizations from copyright owners and with the safe harbor’s limited legal risk is what facilitated the economic and cultural conditions for the current market domination of YouTube, particularly due to elements of network economics.¹¹¹ Practically, § 512(c)’s safe harbor regime, which obliged YouTube to remove (ex-post) infringing materials based on a takedown notice by copyright owners, was not a real obstacle in establishing the platform’s dominance. By itself, such an obligation did not prevent the rapid growth in the platform’s popularity and the immense portfolio of popular copyrighted content that it hosted.

Once this dominant market position was achieved, however, it was

¹⁰⁸ *Id.* at 26.

¹⁰⁹ See Andrew Sorkin and Jeremy Peters, Google to Acquire YouTube for \$1.65 Billion, N.Y. TIMES, Oct. 9, 2006, <http://www.nytimes.com/2006/10/09/business/09cnd-deal.html>.

¹¹⁰ *Id.* at 42.

¹¹¹ See *supra* notes 26–37, accompanying text and the sources cited therein.

also the stage to move toward business models, which are based on collaboration and revenue-sharing with creators and rights owners, only now from a completely different negotiation (or one may say, coercive) position. At this stage, authors, creators and rights owners were faced with a highly dominant and popular intermediary, which attracts a significant portion of audience attention and which is already partially shielded from legal liability for the hosting of their materials. Under such conditions, YouTube's ability to launder its content activities under its own terms was considerable. Authors, creators and performers have very few options other than agreeing to YouTube's terms and conditions or vanishing from audiences' awareness.

Evaluating the impact and desired scope of § 512(c)'s safe harbor, thus, needs to be assessed also from a *macro* perspective. The task at stake is not only assessing potential harms to copyright owners against the value of the safe harbor in supporting user-generated content, amateur content and new channels of distributions. Another long-term question is whether, and how, audience attention and popularity, which are gained through immunized, costless provisions of large repertoires of copyrighted works, are being translated to dominant bottleneck market positions of content provision. Thus, the latter tend to foreclose, rather than open, ubiquitous and diversified cultural production and distribution.

Disintermediation, through the current structure and interpretation of § 512(c), therefore, may to some degree be a short-term illusion. At the end of the day, it leads to market structures that are no less concentrated and imbalanced. It is doubtful whether YouTube would have reached such a dominant position without § 512(c)'s safe harbor. The anchor for stimulating the network effects, which made YouTube's platform so popular and dominant, was its ability to provide entire repertoires of cultural works without payment or the need to obtain *ex-ante* authorization from rights owners. Additionally, this dominant position is further strengthened due to the fact that it also raises barriers to entry for competing media institutions, which do require *ex-ante* authorizations from copyright owners in order to distribute creative content.

Put together, the current structure and interpretation of § 512(c) has spillovers that are somehow contradictory to its purported goal of opening new channels of distribution. Concurrently, § 512(c) may also push ahead the concentration, commodification and commercialization of networked media markets. Thus, we tend to ignore the fact that commercial entities are very likely to gloom over the safe harbor and leverage it to obtain dominant market positions, which then implement and further enhance biases similar to the ones of commercial media markets.

This does not mean that the concept of safe harbors for Internet service providers as a means to support new distribution channels is undesirable. It does mean, however, that the structure and particulars of safe harbors, such as § 512(c), are of vital influence on media ecology. For example, the above-mentioned analysis may justify a distinction between a broad safe harbor for technologies and end-user products, as opposed to a narrow safe harbor for services and content platforms. Such a distinction focuses on supporting and sheltering diffused, bottom-up activities, rather than commercial nodes of facilitation. Thus, for example, file-sharing software, which is capable of substantial non-infringing uses, should be exempted from indirect liability for copyright infringement, whereas content-sharing platforms should be exposed to a higher degree of scrutiny. Both instances combine public-regarding prospects together with risks to copyright owners. Yet, technologies and end-user products are less exposed to commercial and commodification dynamics by single entities, such as the ones previously described.¹¹²

Additionally, one may also consider a regime under which only non-commercial platforms, or individuals, would benefit from a safe harbor for content sharing platforms. Within the current version of § 512(c), this would mean a broad interpretation of the term “financial benefit directly attributable to the infringing activity.”¹¹³ Such a broad definition would also cover instances of financial benefit from attracting eyeballs, which in turn creates advertising revenue or increases the value of the company from subscriber fees or other payments. Thus far, this element, within § 512(c), has not received much judicial discussion, and the courts’ general approach has been to narrowly interpret and apply the element of “financial benefit attributed to the infringing activity.”¹¹⁴ This current approach is lacking, however, a macro-regulatory perspective, which takes into consideration the impacts of leveraging neo-commercialized networked-intermediaries through broad safe harbors for their involvement in managing content sharing platforms.

The more general conclusion is that there is no direct unified correlation between safe harbors from copyright liability and the

¹¹² See Guy Pessach, *An International-Comparative Perspective on Peer-to-Peer File-Sharing and Third Party Liability in Copyright Law: Framing the Past, Present, and Next Generations’ Questions*, 40 VAND. J. TRANSNAT’L L. 87 (2007) (discussing the legality of file-sharing software under different legal regimes while focusing on the structural positive spillovers that peer-to-peer file sharing software may generate in terms of their ability to open new and diffused distribution channels).

¹¹³ 17 U.S.C. § 512 (2012).

¹¹⁴ *Id.* See Rasenberger & Pepe, *supra* note 106, at 686–87; see also *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1117 (9th Cir. 2007); *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d at 645.

advancement of diversity and the public interest. At the end of the day, it is very much a question of the power allocation and network effects that a particular safe harbor regime tends to stipulate. As long as commercial forces are apparent and involved in the semi-immunized activity of content provision, exemptions from copyright liability may induce corporate media dynamics that are similar to the ones that overbroad copyright protection tends to generate.

2. Copyright Ownership and Entitlements Rules

I now turn to the second theme within the copyright disintermediation movement, which is vesting more rights, and particularly initial ownership rights, in the hands of originating authors and creators. The purpose of these proposals is to increase authors' welfare, as well as provide them with more control over the manner in which their works are being utilized. Practically, proposals in this regard include proposals for reforms in the termination-of-transfers right in a manner that would enable creators and authors further enhanced powers in exploiting, licensing and distributing their works (as well as getting a fairer share of long-term revenues that are generated by their copyrighted works).¹¹⁵ More radical approaches include a proposal to eliminate the category of commissioned works made for hire under the second prong of § 101 of the Copyright Act.¹¹⁶

Here also, the underlying goals are desirable. Nevertheless, at the end of the day, it is somehow doubtful whether, by itself, locating more property rights down the stream—in the hands of originating authors—would accomplish the underlying goals of such a maneuver. The question remains whether and how creators and authors are able to effectively manage their rights under the new power relations and economic conditions of networked intermediaries.

As previously described, networked market conditions may be such that creators' and authors' control over their rights is practically being manipulated and taken over by code and other adhesion terms of networked intermediaries.¹¹⁷ If so, then mitigating, or even abolishing doctrines such as the work made for hire doctrine would not do much. At least to some degree, collective arrangements that are weaved around the transfer of copyrights to middlemen, such as audio-visual producers and distributors, may strike better outcomes than locating rights in the hands of diffused and balkanized creators.¹¹⁸ If authors and creators are

¹¹⁵ See Cohen, *supra* note 13, at 160–64; Litman, *supra* note 1, at 47–48; Tushnet, *supra* note 9, at 543–46.

¹¹⁶ See Litman, *supra* note 1, at 48 n.219.

¹¹⁷ See *supra* Part II(A)(1).

¹¹⁸ See Adriane Porcin, *Of Guilds and Men: Copyright Workarounds in the Cinematographic Industry*, 35 HASTINGS COMM. & ENT. L.J. 1 (2012); see also *supra* note 55 and the sources cited therein.

not able to fully utilize, enforce and benefit from their rights, then such an initial allocation does not seem to fulfill its underlying goals.

By the above-mentioned, I do not wish to romanticize or idealize monetary arrangements and governance regimes in corporate creative industries.¹¹⁹ I do argue, however, that rather than focusing solely on initial ownership/allocation of copyright entitlements, the focus should be on preventing market structures and conditions that nearly nullify the acknowledgment of authors as first owners of their copyrights. What is required instead, therefore, is a dual regime that on one hand protects originating authors and creators against the creative industries, yet on the other hand, supports defaults that enable the accumulation of rights in the hands of producers and distributors in order to counterforce powerful networked intermediaries.

Within the political economy of networked intermediaries, decentralized and diffused control over copyrighted works may weaken the bargaining position of authors and creators. Authors and creators may initially own their copyrights, but gaps in negotiation positions would nearly prevent them from effectively utilizing their proprietary rights. Thus, legal regimes that enable the concentration and accumulation of rights in middleman corporate entities may strike a better equilibrium. Copyright law, thus, has to accomplish two accumulative goals. One goal is protecting authors' and creators' welfare vis-à-vis the creative industries for whom and with whom they work. The second concurrent goal is a copyright regime that enables entities within the creative industries to own and manage portfolios of copyrighted works in a manner that would strike a better balance against networked intermediaries.

Returning now to the disintermediation movement proposals in this context, it seems that these proposals do not fully account for the accumulation of these two goals. Instead of dealing directly with the distributive welfare interface between creators and the creative industries, these proposals presume that with legal defaults (of entitlements allocation) on their side, authors and creators will be able to improve both authors' welfare and cultural production. This, however, is an optimistic and unrealistic scenario.

D. *Counter Arguments*

My analysis and recommendations may give rise to several counter-arguments, including the following:

¹¹⁹ See, e.g., Porcin, *supra* note 118 (describing some of the failures and disruptions in the collective agreements between the screen play writers and directors' guilds and the motion pictures studios); see also *supra* notes 51, 56 and the sources cited therein.

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(a) The essay's analysis ignores many of the pros, prospects and advantages that networked communication platforms generate, including the democratization of cultural production and the diminishment of barriers to entry that existed within the political economy of traditional corporate media. Even if there are disadvantages to commercial networked intermediaries, their benefits far outweigh their disadvantages. Hence, it is important to maintain legal conditions, such as § 512(c)'s safe harbor, which enable and support the emergence and sustainment of decartelized cultural production, including in the context of content sharing platforms.

(b) The essay's analysis also ignores the immense wealth of cultural materials that are preserved and made publicly accessible through content sharing platforms, such as YouTube, due to the limited legal liability of content sharing platforms under § 512(c)'s notice and takedown regime.

(c) There is no justification to rely, or continue to support, corporate media institutions, which have a history and rooted governance regimes of undermining diversity, competition and authors' welfare.

(d) There are other more suitable and balanced schemes and institutions that may overcome the disruptions of concentrated commercial networked intermediaries. Institutions such as collecting societies (collective administration of copyright) or compulsory licensing schemes are capable of mitigating the cons of disintermediation without strengthening traditional corporate media. Thus, the latter is more susceptible in terms of its ability to advance authors' welfare, cultural diversity and public values.

These counter arguments are all worthy of consideration and they demonstrate the complexities and multi-folded nature of media markets. Nevertheless, these arguments do not negate the analysis which was set forth in previous sections. My particular answers are as follows:

I do not ignore the prospects and many advantages that networked communication platforms carry. Nor do I ignore the fact that their prosperity requires legal regimes with elements that support decentralization and open end-to-end distribution channels.¹²⁰ My only concern is that the current networked political economy does not support these principles and that dominant commercial intermediaries, which are shielded from copyright liability, tend to undermine the goals of the disintermediation movement in copyright law.

What I recommend is not the abolishment of legal principles that support an open, robust and diversified networked creative

¹²⁰ See generally Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001) (discussing the advantages, utility and social benefits of decentralized end-to-end communications platforms).

environment, but rather an acknowledgment that this goal would not be fulfilled through disintermediation in copyright law. There are other elements in copyright law, such as a robust fair use exemption,¹²¹ that would better support these goals. At the same time, in my view, copyright law is also a regulatory mechanism that can, and should, prevent dynamics of media and content concentration, which characterize copyrightless, yet commercial, media markets.

The regulatory goal of copyright is to strike a culturally desired equilibrium. One edge of achieving this goal is by limiting the scope and breadth of copyright protection in order to prevent enclosure of cultural and creative spheres.¹²² This edge focuses on preventing the concentration of excessive power in the hands of copyright owners. The other extreme edge, though less noticed, deals with instances in which enclosure of creative spheres is stimulated by immunity from copyright liability.¹²³ My focus in this essay was on this second edge. Once acknowledged, this edge demonstrates why, although generally desired, safe harbors such as § 512(c) of the DMCA should be better adjusted to distinguish between their contribution and their concurrent potential negative impact on socially desired cultural production. Under this perspective, fulfilling the prospects of networked communication platforms requires attention and responses to both edges from which excessive power can derive.

As for the immense wealth of cultural materials facilitated by copyright disintermediation and safe harbors for content sharing platforms, this is indeed a considerable argument. Nevertheless, there are two additional elements that are worthy of consideration in this context. The first refers to the distinction (and the tension) between preservation and provision of *past* cultural materials, on one hand, and *future* forecasted cultural production and cultural distribution, on the other hand. I do not ignore the value of content sharing platforms as custodians of cultural preservation and public provision of existing cultural materials.¹²⁴ It is a different issue, however, as to what is the impact of commercial networked intermediaries on *future* cultural production. As demonstrated in Part II(A) *supra*, when it comes to contemporary and future cultural production, copyright disintermediation may have an adverse impact on creative and cultural processes. This impact may be no less influential than the positive role of networked intermediaries in preserving and making accessible

¹²¹ 17 U.S.C. § 107 (2012). Fair Use is an affirmative defense for what would otherwise be an infringing act. *See also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985).

¹²² *See, e.g.*, Pessach, *supra* note 6; *see also supra* notes 1–8 and the sources cited therein.

¹²³ *See supra* Part II(C).

¹²⁴ *See* Guy Pessach, [Networked] Memory Institutions: Social Remembering, Privatization and its Discontents, 26 CARDOZO ARTS & ENT. L.J. 71 (2008).

existing cultural materials. The second related element is that networked cultural preservation and public provision of existing cultural works may be achieved through civic-engaged and not-for-profit initiatives. These institutions do not raise the same disruptions and disadvantages that commercial networked intermediaries may raise. As already mentioned,¹²⁵ such a distinction could and should be made within doctrinal copyright law.

The third counter argument focuses on the caution that is required when turning to traditional distributors and corporate media as saviors of the disruptions imposed by networked intermediaries. The argument is that one cannot ignore corporate media's history and rooted governance regimes of undermining diversity, competition and authors' welfare. Consequently, corporate media need not be the address for fixing emerging failures of networked intermediaries. Although I agree with the hesitation and caution regarding traditional distributors and corporate media, I beg to differ on their potential future role.

From an institutional point of view, the question is not corporate media's conduct in the past, but rather their potential future role in the new political economy of networked communication platforms. In this context, traditional distributors and corporate media may have an important role in achieving a more balanced media environment, while also utilizing its expertise and experience in cultural production.¹²⁶ Additionally, as opposed to the past, the emerging power of networked intermediaries functions as an element that mitigates and counterbalances traditional corporate media. The question, therefore, is not a question of sympathy to traditional distributors and corporate media, but rather the fact that with appropriate checks and balances, traditional distributors and corporate media may have a contributive role in advancing the goals of diversity, decentralization and investment in cultural production.

Finally, there is the argument that there are institutions, other than traditional corporate media, which are more suitable for mitigating and balancing the drawbacks of networked intermediaries. For example, collecting societies¹²⁷ and compulsory licensing schemes.¹²⁸ The

¹²⁵ See *supra* note 114 and accompanying text.

¹²⁶ See *supra* Part II(B).

¹²⁷ Collective administration of copyright by collecting societies is a concept where the management and protection of copyright in works is undertaken by a society of owners of such works. This is a model where copyright holders themselves opt for a business model in which the rights to use their content are not negotiated at arms length with the end user. Instead, these users negotiate with intermediaries or collectives, whom at a later time compensate the right holders from the fees they collect. See Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293 (1996).

¹²⁸ Compulsory licenses are instances in which the law authorizes certain uses of copyrighted works without the need to obtain *ex-ante* authorization from copyright owners, but only the legal obligation to pay consideration for such utilization. Absent a voluntary agreement, the amount of

argument is that responses and solutions to the emerging powers of networked intermediaries need not only be through other competing media entities. Thus, for example, collective organization of authors and creators, through a collecting society, can improve their bargaining position and welfare vis-à-vis prominent networked intermediaries (e.g. YouTube) without generating the common disadvantages that corporate media tends to generate. Similarly, compulsory licensing schemes can integrate between just compensation for creators of a diverse range of works along with the proliferation of new open distribution platforms. Under a compulsory license model, such platforms, or their users, would be required only to pay compensation, but not to obtain *ex-ante* authorization for the utilization of creative works.

These are all compelling proposals. Nevertheless, they do not provide a comprehensive response to the problems that were previously raised in the context of disintermediation. Compulsory licenses and collecting societies may indeed mitigate some of the lack in the context of authors' and creators' welfare. Additionally, these are solutions that support private and transformative uses of copyrighted works, while merging users' empowerment and just compensation for creators.¹²⁹ Nevertheless, these mechanisms are not intended, or able, to overcome the structural and institutional cultural production hurdles which derive from networked disintermediation. These mechanisms are not able to fine-tune cultural production against the disadvantages of networked intermediaries. Problems of *ex-ante* financing for cultural production, media concentration and control over networked distribution channels would not be solved by mechanisms such as compulsory licenses and collective administration of copyright.

Moreover, at least to some degree, solutions such as compulsory licensing schemes and collective administration of copyright may even further support and stimulate networked dynamics of media concentration and homogenous content, such as the ones described in Part II(A) *supra*. As previously described, networked copyrightless market systems are subordinated to such dynamics. Collective licensing and compulsory license schemes practically establish a liability rule regime¹³⁰—a regime that guarantees equitable remuneration to authors,

royalties is to be determined by a judicial authority. In the context of networked communication platforms, several proposals have been made to subordinate certain cultural production and distribution activities (e.g. file sharing) to a compulsory licensing scheme. See FISHER, *supra* note 1; Netanel, *Impose a Noncommercial Use Levy*, *supra* note 1.

¹²⁹ See Netanel, *Impose a Noncommercial Use Levy*, *supra* note 1.

¹³⁰ Under a liability rule regime, copyright owners (and property owners in general) only have a right to be compensated *ex-post* for the use of their copyrighted materials, albeit without having an *ex-ante* exclusive right to prevent unauthorized use of their works. See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996). In the

creators and other rights owners while dissolving their ability to control, manage and decide upon the utilization of their creative works. Consequently, although compulsory licenses and collective administration of copyright may improve authors' welfare vis-à-vis networked intermediaries, such mechanisms might also further strengthen the dominance and media powers of networked intermediaries. This is all because of networked intermediaries' *ex-ante* ability to freely use copyrighted works, subordinated to payment. This in turn leads us back to the dynamics described in previous parts.

III. CONCLUSION – COPYRIGHT'S DYNAMISM

Disintermediation in copyright law does not necessarily lead to its expected outcome in terms of cultural diversity, decentralization and authors' welfare. The political economy of copyrightless media markets may be no less disrupted than the political economy of proprietary media markets. The reason for this unexpected observation is that excessive media and market power derive not only from the grant of property rights in creative works, but also from leveraging free utilization of cultural works as a source for market domination. My analysis unveils a novel regulatory function of copyright law. Copyright law is not only about regulating incentives to create and access works of authorship. Copyright law is also about regulating power relationships in media markets. Copyright has an institutional role in designing media and cultural environments that are more diversified, decentralized and author supportive than copyrightless environments. Copyright's regulatory role thus becomes Janus-faced. Its aim is dual: (a) limiting the scope and breadth of copyright protection in order to prevent enclosure of cultural and creative spheres; and (b) using copyright protection as a means to allocate media power between different vertical institutions in order to improve and diversify cultural production.