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Beyond IP—The Cost of Free: Informational Capitalism in a Post IP Era

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Abstract

Critical copyright scholarship rightly emphasizes the social costs of ordering cultural production through proprietary intellectual property law regimes. This scholarship also celebrates the virtues of free content and free access, particularly in digital domains. The purpose of this article is to question this critique, which tends to pair proprietary intellectual property protection with informational capitalism and the commodification of culture. This article argues that the drawbacks of cultural commodification and informational capitalism are also apparent in market-oriented media environments that are based on free distribution of content. The article makes a novel contribution by untying the seemingly Gordian knot binding proprietary IP to capitalist structures of corporate media. Media environments based on free distribution of content are no less vulnerable to market powers. This analysis has significant normative implications for the desirability of contemporary approaches that advocate mobilization towards non-proprietary “beyond IP” legal regimes.

Keywords

Copyright—Economic aspects; Knowledge economy

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Beyond IP—The Cost of Free: Informational Capitalism in a Post-IP Era

GUY PESSACH*

Critical copyright scholarship rightly emphasizes the social costs of ordering cultural production through proprietary intellectual property law regimes. This scholarship also celebrates the virtues of free content and free access, particularly in digital domains. The purpose of this article is to question this critique, which tends to pair proprietary intellectual property protection with informational capitalism and the commodification of culture. This article argues that the drawbacks of cultural commodification and informational capitalism are also apparent in market-oriented media environments that are based on free distribution of content. The article makes a novel contribution by untying the seemingly Gordian knot binding proprietary IP to capitalist structures of corporate media. Media environments based on free distribution of content are no less vulnerable to market powers. This analysis has significant normative implications for the desirability of contemporary approaches that advocate mobilization towards non-proprietary “beyond IP” legal regimes.

Les travaux critiques d'érudition sur le droit d'auteur insistent avec raison sur les coûts sociaux liés au fait de régir la production culturelle par le biais du droit de la propriété intellectuelle. Ces travaux vantent également les mérites du libre contenu et du libre accès, particulièrement dans l'univers numérique. L'objectif de cet article est de remettre en question cette critique qui cherche à associer la protection de la propriété intellectuelle avec le capitalisme de l'information et la marchandisation de la culture. Cet article fait valoir que les inconvénients du capitalisme de l'information et de la marchandisation de la culture se retrouvent également dans l'univers médiatique axé sur le marché fondé sur la libre distribution des contenus. Il crée un apport novateur en tranchant le nœud gordien qui semble relier la propriété intellectuelle à la structure capitaliste des médias corporatifs. L'univers

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des médias fondé sur la libre distribution des contenus n'en est pas moins vulnérable aux forces du marché. Cette analyse possède d'importantes implications normatives sur la souhaitabilité de l'approche contemporaine qui préconise une mobilisation envers un régime légal « au-delà de la propriété intellectuelle ».

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IN THE PAST TWO decades, legal scholars have written extensively about the political economy of corporate media and the manner in which copyright protection and proprietary control over creative works negatively affect such goals and values as autonomy, self-fulfillment, creative freedom, political capability, and cultural diversity.¹

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1. See *e.g.* Brett M Frischmann, "Evaluating the Demsetzian Trend in Copyright Law" (2007) 3:3 *Rev L & Econ* 649 (questioning the efficiency of IP and copyright law in particular as a mechanism for regulating cultural production); Yochai Benkler, "Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain" (1999) 74 *NYU L Rev* 354 [Benkler, "Free as the Air"] (explaining copyright's constraints on free speech and democratic public discourse); Yochai Benkler, "Intellectual Property and the Organization of Information Production" (2002) 22 *Int'l Rev L & Econ* 81 [Benkler, "Intellectual Property and the Organization of Information Production"] (arguing that legal ordering of cultural production through intellectual property regimes tends to enclose and narrow cultural production to homogenous commercially viable creative works); Neil Weinstock Netanel, "Market Hierarchy and Copyright in Our System of Free Expression" (2000) 53:6 *Vand L Rev* 1897 [Netanel, "Market Hierarchy"] (discussing the linkage between IP regimes and the concentration of media markets, and demonstrating how copyright law establishes "speech hierarchies" between, on the one hand, individuals and non-commercialized entities, and, on the other hand, media conglomerates, while inflicting unequal capacities to participate in speech activities and the democratic discourse); Margaret Chon, "Intellectual Property and the Development Divide" (2006) 27:6 *Cardozo L Rev* 2821 (discussing the conflict between IP law and distributive justice); Amy Kapczynski, "The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism" (2012) 59 *UCLA L Rev* 970 [Kapczynski, "The Cost of Price"] (arguing that IP regimes bear costs not only in terms of efficiency but also in terms of distributive justice and informational privacy); Molly Shaffer Van Houweling, "Distributive Values in Copyright" (2005) 83 *Tex L Rev* 1535 at 1562-1566 (describing the ways in which current copyright schemes conflict with distributive values); Margaret Chon, "Intellectual Property from Below: Copyright and Capability for Education" (2007) 40 *UC Davis L Rev* 803 (discussing copyright's burdens on distributive values and human capacities, particularly in the context of the right to education); Madhavi Sunder, "IP3" (2006) 59 *Stan L Rev* 257 (explaining and demonstrating the limits of current copyright schemes in supporting and enhancing individual creativity).

The basic argument of critical copyright scholarship is that the political economy of informational capitalism is largely based upon the commodification of informational and creative resources. Owners utilize these private entitlements in ways that maximize profits but at the same time impair the public interest and democratic values attached to speech, communication, and cultural activities.² As a result, the commodification of culture through proprietary entitlements and private control raises concerns from a democratic point of view.³

Critical copyright scholarship also emphasizes the copyright's role in shaping the political economy of corporate media.⁴ Control over the means of production and distribution is gained through a mixture of government-issued entitlements in creative resources (*e.g.*, copyright) and distribution platforms (*e.g.*, telecommunications licenses).⁵ Within this framework, the traditional corporate media model is based on producer-consumer relationships and the copyrighting of culture—that is, the commodification of content through proprietary protection.⁶ This economic model pivots around the extraction of revenue from the distribution of and provision of access to content.⁷ At the same time, a market-oriented media system fails to provide the public with the whole array of media products that the society desires.⁸ Media markets tend to produce a wasteful abundance of content that responds to mainstream tastes while neglecting civically, educationally, and culturally pluralistic content.⁹ Additionally,

2. *Ibid*; See also Guy Pessach, "Copyright Law as a Silencing Restriction on Noninfringing Materials: Unveiling the Scope of Copyright's Diversity Externalities" (2003) 76 S Cal L Rev 1067 at 1076-1081, 1087-1097 [Pessach, "Copyright as a Silencing Restriction"].
3. See generally Ronald V Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property* (Michigan: Westview Press, 1996) at 79-103.
4. See Yochai Benkler, "From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access" (2000) 52 Fed Comm LJ 561 at 562 [Benkler, "From Consumers to Users"] (describing the manner in which telecommunications law and intellectual property law allocate entitlements in creative resources and physical distributions platforms).
5. *Ibid*.
6. *Ibid*; See also Pessach, "Copyright as a Silencing Restriction," *supra* note 2 at 1076-1081, 1087-1092, nn 41-44.
7. See generally Harold L Vogel, *Entertainment Industry Economics: A Guide for Financial Analysis*, 8th ed (New York: Cambridge University Press, 2010); Pessach, "Copyright as a Silencing Restriction" *supra* note 2; Bettig, *supra* note 3 at 79-103 (Indeed, the traditional corporate media model is also highly dependent upon advertisement revenue. Nevertheless, extracting direct revenues from distributing and selling content was and still is a pivotal source of income for traditional corporate media).
8. See C Edwin Baker, *Media, Markets and Democracy*, (New York: Cambridge University Press, 2002) at 1-96 [Baker, "Media, Markets and Democracy"].
9. *Ibid*.

the nature of corporate media as advertising-supported favours media products that have a wide appeal and are suitable for selling the advertised products over media that attends to the diversity of people's actual needs and interests.¹⁰

The emergence of the Internet is perceived by critical copyright scholars as a unique opportunity to significantly improve society's informational and cultural ecology, if only the right regulatory and legal choices are made.¹¹ In broad strokes, the argument is that new information technologies make it easier for individuals, groups and communities to collaborate in producing and exchanging cultural content, knowledge, and other information goods without requiring the involvement of commercial, profit-motivated media entities.¹² New, cheaper methods of producing, storing, and distributing content provide fertile ground

10. *Ibid* at 24-30, 182-183.

11. See generally Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven: Yale University Press, 2006) [Benkler, "The Wealth of Networks"] (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 law and telecommunications law protect and advance the interests of producers and corporate media); Lawrence Lessig, *Remix: Making Art And Commerce Thrive In The Hybrid Economy* (London: The Penguin Press, 2008) [Lessig, "Remix"] (describing the prospects and creative potential of networked communication platforms as well as the constraints imposed by IP laws); William W. Fisher III, *Promises To Keep: Technology, Law, and the Future of Entertainment* (Stanford: Stanford University Press, 2004) at 199-259 (offering compulsory licensing schemes that legalize online content engagements, including file-sharing, among other purposes, in order to realize the prospects of digitization while mitigating content owners' dominance and control over distribution channels); Jack M Balkin, "Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society" (2004) 79 NYU L Rev 1 (arguing that: (a) digital technologies alter the social conditions of speech while making possible widespread cultural participation and interactions that previously could not have existed on the same scale; and (b) copyright law and telecommunications law impose both restrictions and private ordering regimes of exclusivity that conflict with and restrict the prospects of digitization); Jessica Litman, "Real Copyright Reform" (2010) 96 Iowa L Rev 1 at 12, 28, 30, 35 (describing how the economics of digital distribution now make it possible to engage in mass dissemination without significant capital investment; and second, the fact that the current, modest share of copyright that creators (as opposed to distributors) enjoy suffices to inspire continued authorship. According to Litman, the accumulation of these two elements seems to leave little justification for continuing a distributor-centric copyright system which poorly serves both users and creators. Litman, therefore, calls for a significant reduction in the proprietary copyright protection of intermediaries and distributors, and therefore, their incentives to engage in the creative industries).

12. *Ibid*.

for the emergence—and constant demonstration of the existence—of enhanced schemes for sustaining culture and knowledge beyond IP.¹³

From this perspective, the traditional distributor-centric, proprietary-based cultural and informational industries appear both unjustified and counterproductive in terms of the public interest in cultural diversity, decentralization of media spheres, and individuals' self-fulfillment. It seems only natural that a shift from producer-consumer cultural industries to civically engaged cultural spheres would be feasible, if one could only dissolve the strong attachment of cultural production to intellectual property protection as a governing institution.¹⁴

Critical copyright scholarship does not stop at criticizing the traditional corporate media model, it also offers an alternative model of creative activities that rests upon concepts of free content, free access, and openness.¹⁵ This scholarship shows that there is much to be looked for beyond intellectual property, particularly in light of persuasive evidence and arguments that authors'

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13. See Balkin, *supra* note 11 at 6-12 (arguing that digital technologies alter the social conditions of speech while making possible widespread cultural participation and interactions that previously could not have existed on the same scale. Balkin also emphasizes the fact that the digital revolution has: (1) drastically lowered the costs of copying and distributing information; (2) made it easier for content to cross cultural and geographical borders; and (3) lowered the costs of transmission, distribution, appropriation, and alteration of content while commenting and building upon it.) Litman, *supra* note 11 at 1, 12, 28, 30, 35 (discussing the ways in which digitization and networked communication technologies significantly reduce the costs of producing, storing and distributing content and cultural products).
 14. For a survey of such approaches see Guy Pessach, "Deconstructing Disintermediation – A Skeptical Copyright Perspective" (2013) 33 *Cardozo Arts & Ent LJ* 833 at 835-38 [Pessach, "Deconstructing Disintermediation"].
 15. See Lessig, "Remix", *supra* note 11 (arguing and demonstrating how digital technologies provide tools for a "Read/Write" culture in which users and consumers take an active role in cultural production for non-profit-motivated reasons. This in turn leads to cultural and creative spheres in which models of sharing economy and hybrid economies flourish, particularly if legal [de]regulation reduces the scope, scale and intensity of copyright protection); Chris Anderson, *Free: The Future of A Radical Price* (New York: Hyperion, 2009) [Anderson, "Free"] (examining the rise of business models which give products and services to customers for free, often as a strategy for attracting users and relying upon other sources of revenues); Yochai Benkler, "Coase's Penguin, or, Linux and the Nature of the Firm" (2002) 112 *Yale LJ* 369 [Benkler, "Coase's Penguin"] (exploring and demonstrating the virtues of commons based peer production in a networked environment); Anupam Chander & Madhavi Sunder, "Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use" (2007) 95:2 *Calif L Rev* 597; Dan Hunter & F Gregory Lastowka, "Amateur-to-Amateur" (2004) 46 *WM & Mary L Rev* 951 (elaborating on the rising role of amateur culture in networked environments).

and creators' incentives are far more diverse than intellectual property's direct economic incentive.¹⁶

The purpose of this article is to untie the seemingly Gordian knot between proprietary intellectual property protection and capitalist structures of corporate media. I argue that media environments based on free distribution of content are no less vulnerable to corporate market powers.¹⁷ Free content and departure from traditional proprietary intellectual property regimes do not necessarily lead to true, effective freedom for individuals.

Recent scholarship in the areas of communications studies and critical Internet studies examines the emergence of a new political economy in which networked information industries are built upon free flow of information and content.¹⁸ This literature describes what many of us experience on a daily basis: a highly concentrated industry in which revenues are extracted mostly from selling advertisements and users' personal data.¹⁹ The scholarship focuses on informational capitalism, which uses data, information and content as means of production and circulation to make profit and accumulate wealth.²⁰

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16. See Rebecca Tushnet, "Economies of Desire: Fair Use and Marketplace Assumptions" (2009) 51 WM & Mary L Rev 513 at 523-27; Diane Leenheer Zimmerman, "Copyrights as Incentives: Did We Just Imagine That?" (2011) 12 Theor Inq L 29 (presenting findings and arguments that authors' and creators' incentives deviate from copyright's direct economic incentive); Eric E Johnson, "Intellectual Property and the Incentive Fallacy" (2012) 39 Fla St UL Rev 623; Karl Raustiala & Christopher Sprigman, *The Knockoff Economy: How Imitation Sparks Innovation* (New York: Oxford University Press, 2012) (discussing the empirical question of whether IP incentives matter for innovation); Benkler, "The Wealth Of Networks", *supra* note 11 (arguing that the technological, communicative and social conditions of digital communication networks stimulate and facilitate civic-engaged not-for-profit knowledge and cultural production activities).
 17. See Part I below.
 18. See Jaron Lanier, *Who Owns the Future* (New York: Simon and Schuster, 2013); Evgeny Morozov, *To Save Everything Click Here: The Folly Of Technological Solutionism* (New York: PublicAffairs, 2013); Astra Taylor, *The People's Platform: Taking Back Power And Culture In The Digital Age* (Toronto: Random House Canada, 2014); Robert W McChesney, *Digital Disconnect: How Capitalism Is Turning The Internet Against Democracy* (New York: The New Press, 2013); James Curran, Natalie Fenton & Des Freedman, *Misunderstanding the Internet* (Oxford: Routledge, 2012); Christian Fuchs, *Internet and Society: Social Theory in the Information Age* (New York: Routledge, 2008).
 19. See also Peter Menell, "Brand Totalitarianism" (2014) 47 UC Davis L Rev 787 at 805; Julie E Cohen, "What is Privacy For?" (2013) 126 Harv L Rev 1904 at 1915-17; Morozov, *supra* note 18 at 153-54, 161-63, 258-59, 349-50; Taylor, *supra* note 18 at 191-213; Curran, Fenton & Freedman, *supra* note 18 at 82-84.
 20. See Fuchs, *supra* note 18 at 99 (defining informational capitalism and discussing different approaches to informational capitalism).

The key features of this networked environment include a strong tendency towards selling “eyeballs” (audience attention) to advertisers;²¹ utilization of big data;²² and the use of information flows about consumer behaviour to target advertisements, search results, and other content.²³ Similar such features include stealth advertisement; sophisticated systems of predictive analytics;²⁴ commodification of consumers’ data;²⁵ and free utilization of content.²⁶ These features represent a brave new world that is the opposite of what one anticipates when looking beyond intellectual property protection. In such “beyond IP” realms, industrialized corporate structures, media concentration, content biases, abridged creative diversity, and deflated authorial welfare may outweigh the drawbacks of traditional corporate media.²⁷

A second, related aspect of informational capitalism is its growing dependence on free content and information as elementary means of production. In a political economy that does not extract revenues through the direct commercialization and sale of content, but rather from the commercialization of personal information and users’ attention, free content and free information are the main bait for obtaining and monetizing both audience attention and users’ personal information.

21. See Part I below.

22. See Part I below. See also Lanier, *supra* note 18 (critically analyzing the downsides of a networked economy in which users give away valuable information about themselves in exchange for free online content, products and services; at the same time online firms accrue large amounts of data—leading to concentrated wealth and power—at virtually no cost); Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Cambridge: Harvard University Press, 2015) (critically describing and analyzing big data practices and their utilization for leveraging price discrimination practices, profits and power).

23. Katherine J Strandburg, “Free Fall: The Online Market’s Consumer Preference Disconnect” (2013) U Chicago Legal F 95 at 122-32 (surveying different online business models of behavioural and contextual advertising that are based on users’ data collection, including their online activities, engagements and searches).

24. See Pasquale, *supra* note 22 (critically surveying a variety of areas in which predictive analysis are being utilized for marketing, price discrimination, and financial gains practices).

25. See Omer Tene & Jules Polonetsky, “To Track or “Do Not Track”: Advancing Transparency and Individual Control in Online Behavioral Advertising” (2012) 13 Minn J L Sci & Tech 281 at 335; Giacomo Luchetta, “Is the Google Platform a Two-Sided Market?” (Libera Università Internazionale degli Studi Sociali, 2012), online: <<https://ssrn.com/abstract=2048683>>; Adam Thierer & Berin Szoka, “Targeted Online Advertising: What’s the Harm & Where Are We Heading” (The Progress & Freedom Foundation Progress on Point Paper, Vol 16, No 2, 2009), online: <<https://ssrn.com/abstract=1348246>>.

26. See Part I below.

27. See Part I, below, for more on this topic.

Spheres beyond intellectual property thus represent a social contradiction between their empowering functions and their vulnerability to exploitation and commodification. Free flow and distribution of content undoubtedly stimulate social conditions that empower individuals, promote innovation, and advance cultural democracy. Yet, at the same time, they provide no safeguards against patterns that imitate the logic and drivers of proprietary cultural industries. In fact, they simultaneously create new opportunities to make profits and accumulate property through the commodification and commercialization of users' attention and personal information.

Although the emergence of networked informational capitalism is well addressed in the academic literature,²⁸ there is hardly any reference to the linkage between networked informational capitalism and components, both legal and ideological, that are derived from and associated with free distribution of content in cultural and informational zones in which intellectual property's governance is less salient. I argue that informational capitalism is linked not only to elements of proprietary control, but also to elements of free flow and non-proprietary modes of content circulation. This argument questions the conventional wisdom of critical copyright scholarship, which tends to pair proprietary protection with informational capitalism and the commodification of culture.²⁹

By making this claim, I am not arguing for the restoration of an expansionist and intellectual property-centric approach. I do argue, however, that certain segments of free content markets stimulate pressures that go against the values of a democratic culture.³⁰ Moreover, I argue that conceptual frames such as "free culture" can impair the ability to fully comprehend and respond to the challenges imposed by the contemporary industrial economics of freely distributed content.³¹ This argument bears significant normative implications because it emphasizes the

28. See *e.g.* Cohen, *supra* note 19 at 1915; Manuel Castells, *The Rise of the Network Society* (West Sussex: Blackwell, 1996) at 14.

29. For the conventional approach see *e.g.* Netanel, "Market Hierarchy", *supra* note 1; Niva Elkin-Koren, "It's All About Control: Rethinking Copyright in the New Information Landscape" in Niva Elkin-Koren & Neil Weinstock Netanel, eds, *The Commodification of Information* (The Hague: Kluwer Law International, 2002) 79 at 105-109; Benkler, "Free as the Air" *supra* note 1; Mark S Nadel, "How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing" (2004) 19 Berkeley Tech LJ 785.

30. See Balkin, *supra* note 11 at 6-12 (presenting and elaborating on the characteristics of a democratic culture).

31. See Lawrence Lessig, *Free Culture: How Big Media Uses Technology And The Law To Lock Down Culture and Control Creativity* (New York: The Penguin Press, 2004) (popularizing the term "free culture" as a counter to the common proprietary model of corporate media and cultural production).

limits and fickleness of the call for copyright deregulation as a means to advance the public interest. On the contrary, intellectual property may, paradoxically, have a role to play in culminating and mitigating informational capitalism. Intellectual property may play a dual role in this regard: first, by shifting revenue sources and incentives back to the creative content itself (from advertisements and the commercialization of users' personal data),³² and second, by decentralizing the market power of networked corporate media platforms.³³

Indeed, there is a contradiction between the manner in which intellectual property's control and commodification functions nourish corporate media, on one hand,³⁴ and the manner in which intellectual property may counterbalance informational capitalism on the other hand.³⁵ The regulatory challenge, therefore, is to acknowledge and respond to the fact that the drawbacks of market-oriented media environments are based on free distribution of content.

The article proceeds as follows. Part I describes the political economy of contemporary markets based on free distribution of content. Part II discusses the implications of these findings for copyright policy. Part III concludes.

I. INFORMATIONAL CAPITALISM BEYOND IP

Examination of contemporary communicative and cultural spheres reveals that creative and informational zones beyond the traditional proprietary corporate media model occupy prominent segments of the Internet. Much of people's informational engagements, both as conveyors and as recipients, are conducted through frameworks and platforms that rely upon open access to and free flow of content.³⁶ Many such activities are stripped of intellectual property regulation. Even if intellectual property protection applies to these activities in theory,

32. *Ibid* at 288.

33. See also Guy Pessach, "Deconstructing Disintermediation – A Skeptical Copyright Perspective" (2013) 33 *Cardozo Arts & Ent LJ* 833 at 865-68 [Pessach, "Deconstructing Disintermediation"].

34. See Pessach, "Copyright Law as a Silencing Restriction", *supra* note 2 at 1092, 1077-1081, 1097 (discussing how in an industrial, corporate-media institutional structure, broad and extensive copyright protection tends to support commercialized mass-media products and restrict other forms of creative and cultural engagements); See also Elkin-Koren, *supra* note 29.

35. See Part II below.

36. See *e.g.* Anderson, Free, *supra* note 15; Benkler, "The Wealth of Networks", *supra* note 11; Lessig, "Remix", *supra* note 11; see also major online platforms such as YouTube <www.youtube.com>; Instagram <www.instagram.com>.

as a practical matter the operative communicative and business models presume free distribution of content and information.

Search engines' retrieval services, the blogosphere, content-sharing platforms, certain types of online music services, online newspapers, social networks, instant messaging, voice services and many other segments of our informational and cultural lives are now "free as the air to common use."³⁷ Content, information and other types of creative output are distributed for free. Resources such as photographs, video clips, visual images, game applications, music, and textual materials may be formally protected by copyright and other types of intellectual property rights,³⁸ yet the economic and communicative schemes through which they are produced and exchanged are in many instances schemes of free access and free distribution. As a matter of law in action, intellectual property rights do not function as a mechanism to govern the production, exchange and distribution of such creative materials.

At least to some degree, this shift was less a consequence of well-planned *ex ante* reforms to intellectual property law, and more a consequence of the Internet's unique technological and communicative conditions.³⁹ At the same time, legal policy also partially supported the creation and expansion of zones that are practically ungoverned by proprietary intellectual property regimes. The United States provides several prominent examples in this regard: (a) the broad interpretation and application of the fair use defense, including in the context

37. Benkler, "Free as the Air", *supra* note 1.

38. Copyright Act, RSC 198, c C-42, s 5(1). (Copyright's subject matter covers, among other works, literary works, dramatic works, musical works and artistic works).

39. See Anderson, "Free", *supra* note 15; Benkler, "The Wealth of Networks", *supra* note 11 (presenting the theory that networked communication platforms are characterized by the attributes of scale, scope and production capacity, which in turn empower non-market forms of social production); Balkin, *supra* note 11 (arguing that digital technologies alter the social conditions of cultural and creative engagements while making possible widespread cultural participation and interactions that previously could not have existed on the same scale). Balkin also emphasizes the fact that the digital revolution has: (1) drastically lowered the costs of copying and distributing information; (2) made it easier for content to cross cultural and geographical borders; and (3) lowered the costs of transmission, distribution, appropriation, and alteration of content while commenting and building upon it); *Ibid.*

of search engines' activities;⁴⁰ (b) a limited and narrow approach to third party liability for contributory copyright infringement;⁴¹ (c) the creation of safe harbours for content-sharing platforms through notice and takedown procedures;⁴² and (d) the narrow interpretation of the distribution right in digital domains.⁴³

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40. See *Kelly v Arriba Soft Corp.*, 336 F (3d) 811 (9th Cir 2003) (determining that reproduction and public display of thumbnail-sized images of visual materials within the results pages of a search engine are considered fair-use); *Perfect10 Inc v Amazon.com Inc*, 508 F (3d) 1146 (9th Cir 2007) (characterizing a search engine's display of thumbnail images as fair use under the transformative use doctrine); *Authors Guild Inc v Hathitrust*, 755 F (3d) 87 (2d Cir 2014) (determining that the creation of a database of ten million books, of which perhaps up to seven million were protected by copyright, using digitized copies of books from research library collections, is considered fair-use as long as the database is utilized only as a full-text searchable information resource that allows patrons to find books relevant to their research projects); *Authors Guild v Google Inc*, 804 F (3d) 202 (2d Cir 2015) (determining that Google's scanning of millions of books and indexing their contents to serve up some snippets in response to user search queries is a transformative fair-use).
41. See *Sony Corp of America v Universal City Studios Inc*, 464 US 417 (9th Cir 1984) followed by *MGM Studios Inc v Grokster Ltd*, 545 US 913 (US 2005). Under the *Sony* decision, one who manufactures and distributes a technology will not be liable for infringement committed by its users as long as the technology has "substantial non-infringing uses." The *Grokster* decision, which dealt with the legality of a piece of file-sharing software, added to the *Sony* test a requirement that the maker must not have acted with the intent of inducing its users to infringe copyright. Under the *Sony* decision and the *Grokster* decision, there is an immunity from indirect liability for copyright infringement for technologies that are capable of substantial non-infringing uses unless there is inducement to infringe copyright).
42. See 17 USC § 512(c) (2012) [DMCA]; *Viacom International Inc v YouTube Inc*, 676 F (3d) 19 at para 39 (2d Cir 2012) [Viacom]; *UMG Recordings Inc v Shelter Capital Partners LLC*, 667 F (3d) 1022 (9th Cir 2011) [UMG]; *Capitol Records Inc v MP3tunes LLC*, 821 F Supp (2d) 627 (SDNY 2011) [Capitol]; *Io Group Inc v Veoh Networks Inc*, 586 F Supp (2d) 1132 (ND Cal 2008) [Io Group]. See also Mary Rasenberger & Christine Pepe, "Copyright Enforcement and Online File Hosting Services: Have Courts Struck the Proper Balance?" (2012) 59:3 J Copyright Soc'y USA 627 at 662. The *Digital Millennium Copyright Act*, enacted in 1998 and codified in Title 17, § 512 of the United States Code, includes four main safe harbours for Internet service providers. Section 512(c) provides a safe harbour for hosting services providers. Court rulings regarding section 512(c) vary in their nuances, but at the end of the day, the general direction of courts is that content sharing platforms also benefit from § 512(c)'s safe harbour.
43. See Peter S Menell, "In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age" (2011) 59:1 J Copyright Soc'y USA 201 (surveying and critically analyzing the interpretation of the exclusive right of distribution (17 USCS § 106(3) in digital contexts). As Menell demonstrates, the courts' inclination was to adopt a narrow interpretation of the distribution right, which does not apply the distribution right in digital contexts. See also *Capitol Records Inc v Thomas*, 579 F Supp (2d) 1210 (D Minn 2008) (concluding that the distribution right applies only with regard to the distribution of copies of a copyrighted work and not their making available digitally).

These are all examples of a US legal policy that facilitated and legitimized large-scale networked activities beyond the reach of intellectual property's proprietary control, affecting even profit-motivated corporate media activity.⁴⁴

The Canadian legal situation seems less clear and homogenous in this regard. Although the Supreme Court of Canada has explicitly acknowledged the status of users' rights in copyright law, this acknowledgment has not resulted in further judicial decisions to parallel the United States approach of narrowing copyright owners' proprietary control.⁴⁵ Indeed, in what is known as the "Copyright Pentology," the Supreme Court of Canada issued, in one day, five copyright decisions, all of which represent a public-regarding approach towards copyright law.⁴⁶ None of these decisions, however, indicates either explicit or implicit support for the establishment of contemporary networked media environments (as the aforementioned US court decisions indicate).

In its earlier *SOCAN* decision—which was not a part of the Copyright Pentology—the Supreme Court of Canada was asked to decide the legality of Internet service providers' caching of music files.⁴⁷ In its decision, the Court explicitly protected the ability of Internet service providers to deploy innovative

44. See sources cited *supra* notes 40-43 (most of the cases cited involved large-scale profit motivated corporate entities such as Google, YouTube (owned by Google) and Amazon, which have successfully sheltered themselves within IP's negative spaces).

45. *CCH Canadian Ltd v Law Society of Upper Canada*, [2004] 1 SCR 339, 236 DLR (4th) 395.

46. *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 SCR 345, 347 DLR (4th) 287; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231; *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 35, [2012] 2 SCR 326; *Re:Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38, [2012] 2 SCR 376. For a further discussion of these cases see Michael Geist, *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013).

47. *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45, [2004] 2 SCR 427.

technologies such as caching to improve Internet efficiency.⁴⁸ In *BMG Canada Inc v John Doe*, the Federal Court determined that downloading a song for personal use falls within the private copying exemption in subsection 80(1) of the *Copyright Act*.⁴⁹ The Court stated that uploading a musical file through a peer-to-peer file-sharing platform does not constitute infringement either. On appeal, the Federal Court of Appeal, declined to rule whether copyright infringement indeed took place. Notwithstanding this refusal, the appellate decision still included several remarks to support the conclusion that both downloading and uploading of copyrighted files through a peer-to-peer file-sharing network might constitute copyright infringements. For one, the Court of Appeal questioned whether peer-to-peer file sharing indeed involves reproduction on an “audio recording medium” and therefore could be sheltered under the exemption for private copying. In addition, the Court of Appeal questioned whether, in the context of peer-to-peer file-sharing, the act of private copying is done “for the purposes of distribution” and would therefore fall outside the exemption for private copying. Lastly, the Court of Appeal doubted the lower court’s interpretation of the terms “authorization” and “distribution” while raising the possibility that these terms are broad enough to capture actions that make copyright-protected materials available for downloading through peer-to-peer networks. Altogether, the *BMG Canada Inc v John Doe* affair cannot be classified as a decision that leans towards the creation and expansion of zones that are practically ungoverned by proprietary intellectual property regimes.

Together with the unique attributes of networked communication platforms,⁵⁰ legal policies to expand zones ungoverned by proprietary intellectual

48. More specifically, Internet service providers were privileged from liability for copyright infringement under section 2.4(1)(b) of the *Copyright Act*, which exempts from liability a “person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter” at para 27. In deciding so, the Supreme Court emphasized the “public interest in encouraging intermediaries who make telecommunications possible to expand and improve their operations without the threat of copyright infringement” at para 114. The court added that “to impose copyright liability on intermediaries would obviously chill that expansion and development” (para 114) and that “the creation of a “cache” copy, after all, is a serendipitous consequence of improvements in Internet technology, is content neutral, and...ought not to have any legal bearing on the communication between the content provider and the end user” (para 115). “Caching” the court added, “is dictated by the need to deliver faster and more economic service, and should not, when undertaken only for such technical reasons, attract copyright liability” (para 116).

49. See *BMG Canada Inc v John Doe*, 2004 FC 488, [2004] 3 FCR 241, affd in part 2005 FCA 193, [2005] 4 FCR 81.

50. See *supra* notes 11, 13-15, and 39 and accompanying text.

property regimes have influenced the centrality, scope, and scale of free content distribution within creative and information industries. YouTube was established as a leading platform for free audio-visual and musical content due in large part to the safe harbour for content sharing platforms established by section 512(c) of the United States *Digital Millennium Copyright Act*.⁵¹ Instagram owes its centrality as a platform for sharing photographs and visual images to the same provision.⁵² Google Books' legality is based entirely on the US fair use defense.⁵³ Online music services such as Last.fm⁵⁴ are able to provide free access to music through a technological design that relies on the legality of embedding content from other platforms' content.⁵⁵ A variety of other content exchange and distribution platforms are based on US copyright law's narrow approach to third party liability, including the rule that technological devices capable of substantial non-infringing uses are not subjected to contributory liability.⁵⁶ For example, software such as Kodi/XBMC,⁵⁷ which facilitates free distribution of content including copyright-protected content, is immune from copyright infringement liability, a fact that ensures its widespread use.

By making these observations, I am not arguing that such legal policies may not be justified on their particular merits.⁵⁸ I do argue, however, that such legal policies, taken together, contributed to the emergence of a new cultural ecosystem in which commercial and profit-motivated corporate media entities cluster around and build upon the free distribution of content.

51. See *Viacom*, *supra* note 41; See also Pessach, "Deconstructing Disintermediation", *supra* note 14 at 863-67.

52. Instagram, "How do I report a claim of copyright infringement?", online: <www.help.instagram.com/277982542336146?ref=related> (Instagram also claims to function as a content-sharing platform, which shelters it under section 512(c) of the DMCA).

53. *The Authors Guild Inc v Google Inc*, 804 F 3d 202 (2015).

54. Last.fm, "Hello & Welcome to Last.fm.", online: <www.last.fm>.

55. See *Perfect 10 Inc v Amazon.com Inc*, 508 F 3d 1146, 1154 (9th Cir 2007); *Perfect 10, Inc v Google Inc*, No CV 04-9484, 2010 WL 9479060 at 1 (CD Cal 2010), 653 F 3d 976 (9th Cir 2011) (in which it was determined that the embedding of content from other websites through techniques such as framing and inline linking does not amount to copyright infringement).

56. See *supra* note 41 and accompanying text.

57. Kodi, <www.kodi.tv/download>. Kodi, formerly known as XBMC, is an open source (GPL) software media center for playing videos, music, pictures, games, and more. As a technology which is capable of substantial non-infringing uses, the distribution of Kodi is not exposed to indirect liability for copyright infringement. Kodi, however, works on "AddOns," which utilize Kodi's interface to provide access to a variety of content, including copyright-protected materials.

58. *Supra* note 41; *supra* note 42; *supra* note 43.

The traditional corporate media model was based on a producer-consumer relationship and the copyrighting of culture—that is, the commodification of content—through proprietary protection.⁵⁹ Extracting direct revenue from the distribution of, and provision of access to, content was the crux of the traditional economic model.⁶⁰ This traditional model is now being partially replaced by a new business model that relies upon free access and free distribution of content. This new business model is based mostly on revenue extracted from the sale of advertisements and users' personal data.⁶¹ The strategic business goal of maximizing clicks, repeat visits, and time spent visiting particular websites is intertwined with the goal of maximizing the effectiveness of advertising, including sponsored content and stealth marketing.⁶² Optimized commercialization and utilization of mass-aggregated personal information is another fundamental building block of the networked economy.⁶³

Communicative spheres of free content thus represent a social contradiction between their empowering functions and their vulnerability to exploitation and commodification. Free flow and distribution of content undoubtedly stimulate social conditions that empower individuals, promote innovation and cultural democracy, while simultaneously failing to provide safeguards against patterns that imitate the logic and driving forces of proprietary cultural industries.⁶⁴ In fact, such social conditions simultaneously create new opportunities for profits and property accumulation that are achieved mostly through the commodification and commercialization of users' attention and personal information.

59. See Benkler, "From Consumers to Users", *supra* note 4; Pessach, "Copyright as a Silencing Restriction", *supra* note 2 at 1076-1081, 1087-1092; see also *supra* note 41-43 and accompanying text.

60. See sources cited *supra* note 7.

61. See Menell, *supra* note 19 at 805; Cohen, *supra* note 19 at 1915; Morozov, *supra* note 18 at 153-54, 161-63, 258-59, 249-50; Taylor, *supra* note 18 at 191-213; Curran, Fenton & Freedman, *supra* note 18 at 82-84.

62. *Ibid*; See also Ellen Goodman, "Stealth Marketing and Editorial Integrity" (2006) 85 Texas L Rev 83; Eli Pariser, *The Filter Bubble: What the Internet is Hiding From You* (New York: The Penguin Press Group, 2001) at 60; Joseph Turow, *The Daily You: How the New Advertising Industry is Defining Your Identity and Your Worth* (New Haven: Yale University Press, 2011) at 88; Ira S Rubinstein, Ronald D Lee & Paul M Schwartz, "Data Mining and Internet Profiling: Emerging Regulatory and Technological Approaches" (2008) 75 U Chicago Law Rev 261; Ryan Calo, "Digital Market Manipulation" (2014) 82:4 Geo Wash L Rev 995.

63. See Cohen, *supra* note 19; Pasquale, *supra* note 22; Strandburg, *supra* note 23 at 122-32.

64. See *supra* note 11; *supra* note 13 and the accompanying text.

The partial creative destruction⁶⁵ of traditional corporate media models is therefore more complex and challenging than scholarship and public advocacy has presumed.⁶⁶ Contemporary networked media environments are at least to some degree a postmodern version of the “Culture Industry” originally analyzed by Theodor Adorno and Max Horkheimer with regard to the emergence of traditional mass media.⁶⁷ Adorno and Horkheimer described the emergence of industrialized production and distribution of standardized cultural goods by mass communications media. According to their analysis, products of the culture economy take the appearance of artwork but are in fact dependent on industry and economy, meaning they are subjected to the interests of money and power and are designed for profit.⁶⁸ Adorno and Horkheimer further described the manner in which the culture industry manipulates mass society by cultivating false psychological needs that can only be met and satisfied by the products of corporate mass media capitalism while driving people into passivity due to the false illusion of democratic cultural participation.⁶⁹

Networked cultural environments based on free distribution of content tend to follow similar patterns. Structures of media dominance established through centralized regulatory and proprietary control are now being replaced by elements of openness, interactivity and participation.⁷⁰ This transformation is not just a shift in the structure and economy of creative industries. It is also a symbolic ideological process that confronts the perils of the old corporate media model with

65. Joseph A Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper & Row Publishers, Inc, 1942) at 81-85 (arguing that ordinary competition between similar competitors with slightly differentiated products is not the source of much consumer benefit. 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.” This process, which Schumpeter calls “creative destruction,” “expands output and brings down prices”).

66. See *supra* notes 1-4, 7-8, and 10, and the accompanying text.

67. Theodor W Adorno & Max Horkheimer, *The Dialectic of Enlightenment*, translated by Edmund Jephcott (New Haven: Yale University Press, 2002) at 94.

68. *Ibid.*

69. *Ibid.*; See also Bill Ryan, *Making Capital From Culture: The Corporate Form of Capitalist Cultural Production* (Berlin: Walter de Gruyter, 1991) at 184; Iain Chambers, *Popular Culture: The Metropolitan Experience* (New York: Routledge, 1986); John Fiske, *Reading the Popular* (New York: Routledge, 2010); John Fiske, *Television Culture* (New York: Routledge, 2010); Andrew Ross, *No Respect for Intellectuals* (New York: Routledge, 1989) (developing Adorno & Horkheimer’s approach).

70. See *e.g.* Balkin, *supra* note 11; Benkler, “The Wealth of Networks”, *supra* note 11.

the prospects of digitization and networked communication platforms.⁷¹ At the same time, however, the open, accessible, interactive and participatory Internet is a platform for industrialized production and distribution of standardized informational goods capable of generating and commercializing traffic, users' attention, and personal information. Such informational goods appear to be the products of a free digital culture, but many of them are in fact subjected to the interests of money and power.⁷²

Like the cultural industry, networked informational capitalism also generates false illusions of democratic cultural participation. Behind the veil of free flow are categorical limits to the capacities of content and information as shared resources, even for those who contribute to their production. Individuals' content and information may be "free as the air" to common use,⁷³ but as Jeron Lanier demonstrates, the proceeds of aggregating and analyzing peoples' interactions with such content and information are *de facto* propertized without transparency.⁷⁴ In many circumstances, individuals who create free content lack access to the data essential to reach tailored audiences, distribute their content effectively, determine pricing schemes, or even identify the recipients of their speech activities. In Lanier's language, these are all privileges to which only a handful of siren servers' operators are entitled.⁷⁵

The resemblance between Adorno and Horkheimer's framing of "the culture industry as mass deception"⁷⁶ and contemporary networked media environments has two elements: (a) the prominence of industrialized production and distribution platforms; and (b) false illusions regarding people's cultural capacities as both creators and recipients. By making this argument, I do not attempt to undermine the fundamental positive transformation that the Internet and digital technologies have brought in terms of empowering people's capacities as creators and recipients of creative content. I do argue, however, that many of these individual, autonomous engagements are simultaneously exploited

71. See *e.g.* McChesney, *supra* note 18 at 109; Matteo Pasquinelli, "The Ideology of Free Culture and the Grammar of Sabotage" in Daniel Araya & Michael A Peters, eds, *Education in the Creative Economy: Knowledge and Learning in the Age of Innovation* (New York: Peter Lang, 2010) 285; Christian Fuchs, "Information and Communication Technologies and Society: A Contribution to the Critique of the Political Economy of the Internet" (2009) 24:1 Eur J Comm 69.

72. See Lanier, *supra* note 18; Morozov, *supra* note 18 at 63; Taylor, *supra* note 18 at 197, 217.

73. Benkler, *supra* note 1.

74. *Supra* note 18 at 48, 113.

75. *Ibid* at 63.

76. Adorno & Horkheimer, *supra* note 67 at 94.

by large-scale, profit-motivated corporate networked industries that leverage free content environments as opportunities for profit and as their means of production.⁷⁷ These industries also use frames and concepts of “free culture” and “openness” in order to disguise both their goals and the consequences of their activities.⁷⁸

One method of further understanding the effects of contemporary networked media environments is by evaluating them according to the same parameters under which the political economy of traditional corporate media has been critically examined,⁷⁹ including media concentration and barriers to entry; content diversity and the nature and characteristics of the media products being produced; and such basic values as privacy, personal autonomy, free speech and distributive values.

A critical evaluation of networked free content distribution platforms reveals that these platforms overcome some of the shortcomings of the traditional corporate media model in a variety of ways. Amateur and user-generated content,⁸⁰ collaborative media, and commons-based peer production⁸¹ are just a few examples of the manner in which networked free information and content platforms diversify cultural production and empower bottom-up individual and civically-engaged creative engagements.⁸² At the same time, however, the drawbacks associated with contemporary networked media environments parallel, and to some degree even exceed, those associated with the traditional corporate media model.

In terms of media concentration and barriers of entry, the networked environment is highly concentrated: Google controls around 70 per cent of search services,⁸³ YouTube controls around 70 per cent of online video clips & music video services,⁸⁴ and Facebook accounts for more than 50 per cent of social

77. See also Jason Lanier, *You Are Not A Gadget* (New York: Vintage Books, 2011) at 76.

78. See *supra* note 71; *supra* note 72.

79. See generally Baker, “Media, Markets, and Democracy”, *supra* note 8; Guy Pessach, “Media, Markets, and Democracy: Revisiting an Eternal Triangle, Critical Notice: Media, Markets and Democracy” (2004) *Can JL & Jur* 209 at 210-15 [Pessach, “Media, Markets and Democracy, Critical Notice”].

80. See *e.g.* Chander & Sunder, *supra* note 15; Hunter & Lastowka, *supra* note 15.

81. See *e.g.* Benkler, “Coase’s Penguin”, *supra* note 15.

82. See also Lessig, “Remix”, *supra* note 11 at 177-224; See also Lessig, “Remix”, *supra* note 11 at 177-224; Benkler, “The Wealth of Networks”, *supra* note 11 at 116-27, 212-32, 273-300.

83. See Curran, Fenton & Freedman, *supra* note 18 at 89. See also Eli M Noam, *Media Ownership and Concentration in America* (New York: Oxford University Press, 2009) at 273-94, 424-25.

84. *Ibid.*

networking traffic.⁸⁵ This highly concentrated environment is partially explained by network effects that give an advantage to large-scale intermediaries.⁸⁶ It also results from the centrality of advertisement revenue as a source of income in a networked environment. The bigger the platform, the better it is for generating advertising revenue. Advertisers looking for content, data brokers looking for information, content distributors looking for audiences, and audiences looking for content are driven back to familiar platforms, which thus procure, maintain, and increase market dominance.⁸⁷

A second parameter under which the political economy of the traditional corporate media model has been critically examined is content diversity and the characteristics of the media products being produced.⁸⁸ Here also, a close inspection reveals that contemporary networked media environments might also undermine content diversity under certain conditions. Market economy settings structured around free content incentivize what seems to be an extreme version of the traditional “market for eyeballs” and advertisement-supported

85. *Ibid.*

86. Albert-laszlo Barabasi, *Linked: The New Science of Networks* (Cambridge, MA: Perseus Publishing, 2002) at 73-77; Bernardo A Huberman & Lada A Adamic, “Growth Dynamics of the World-Wide Web” (1999) 401 *Nature* 131; Lada A Adamic & Bernardo A Huberman, “Power-Law Distribution of the World Wide Web” (2000) 287:5461 *Science* 2115; Albert-Laszlo Barabasi & Reka Albert, “Emerging of Scaling in Random Networks” (1999) 286:5439 *Science* at 509-12; Neil Weinstock Netanel, *Copyright’s Paradox* (Oxford: Oxford University Press, 2010) at 132-33 (arguing that 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” (1998) 86:3 *Cal L Rev* 479 (arguing that in the context of information and content intermediaries, the more popular the platform is, the more valuable and usable it is to both content providers and content consumers).

87. See generally Florence Thepot, “Market Power in Online Search and Social Networking: A Matter of Two-Sided Markets” (2013) 36:2 *Kluwer L Intl* 195.

88. See Noam, *supra* note 83 at 273-94, 424-25; C Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters* (New York: Cambridge University Press, 2007) at 93-113 (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?” (2005) 29 *J Comm Inquiry* 160 (describing the colonization and concentration of audience attention in a networked environment). See also Anita Elberse, “Should You Invest in the Long Tail?” (2008) 86 *Harv Bus Rev* 88 (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” (2006) NET Institute Working Paper No 06-19, online: <<http://ssrn.com/abstract=941200>> (arguing that the internet is skewed towards popular content in terms of search costs).

content distribution platforms.⁸⁹ The reason is straightforward: if advertisements and user traffic are becoming the sole source of revenue, then information and content production must follow a formula that maximizes user traffic and audience exposure to advertisements. This, in turn, causes wasteful investment in duplicative, homogenous content that is likely to achieve this result. Additionally, contemporary networked media environments also impose pressures that weaken other competing models of content production and content distribution, particularly models based on extracting direct revenue from the sale of content. After all, competition against “zero pricing” models is all but impossible. “Free,” as a predatory pricing mechanism, leaves limited market share for creative and informational works that extract direct revenue from selling content.

The political economy of contemporary networked media environments also raises concerns about informational privacy and content diversity. To reiterate, contemporary networked media environments are substantially structured around industrially commodified utilization of personal information.⁹⁰ Networked corporate media entities utilize and trade packets of information about consumers for purposes such as targeted advertising, price discrimination, and risk management templates that maximize the extraction of surplus from consumers.⁹¹ This reality, which is usually discussed through the prism of privacy concerns,⁹² also implicates the characteristics and attributes of the media products being produced.

The economy of monetizing personal information and predictive big data businesses requires communicative and informational products that are suitable for and that maximize the collection and utilization of large quantities of valuable information, including social networks, content sharing platforms, photo sharing applications, and other forms of online engagement. Along with their speech and communicative functions, such platforms also function as informational

89. For an analysis of the traditional corporate media market for consumer attention see Baker, “Media Markets and Democracy”, *supra* note 8 at 24-30, 182-83; Edwin C Baker, “Advertising and a Democratic Press” (1992) 140:6 U Pa L Rev 2097 (providing factual evidence and analyzing the prominent influence that advertisers have on the content of media products within advertisement-supported media entities); Robert McChesney, *The Political Economy of Global Communication*, (London: Pluto Press, 1998) at 19.

90. See Menell, *supra* note 19 at 805; Cohen, *supra* note 19 at 1915; Morozov, *supra* note 18 at 153-54, 161-63, 258-59, 349-50; Taylor, *supra* note 18 at 191-213; Curran, Fenton & Freedman, *supra* note 18 at 82-84; Pasquale, *supra* note 22; Strandburg, *supra* note 23 at 122-32; *supra* note 60.

91. See also Lior Strahilevitz, “Toward a Positive Theory of Privacy Law” (2013) 126:7 Harv L Rev 2011; Cohen, *supra* note 19.

92. *Ibid.*

ecosystems with relatively narrow and repetitive content offerings. People are being channelled toward and accustomed to communicative spheres in which tracking, analysis, prediction, and marketing are highly efficient and effective.⁹³

Firms are thus disincentivized to invest in content production because they are instead able to extract significant revenue from the monetization of users' personal information.⁹⁴ Incentives to invest in diverse content and cultural products are likewise being partially replaced by incentives to invest in virtual environments and utilities that attract users' traffic and personalized information.

The growing centrality of the collection of personalized information as a means of production also has a distributive dimension. Free content platforms are indeed effective at making information and content shared resources.⁹⁵ Networked platforms are also largely based on an end-to-end design that decentralizes and democratizes cultural production and cultural distribution.⁹⁶ At the same time, however, users, content creators, and individuals do not have access to the data that are gathered, processed, utilized and commercialized by networked platforms, social networks, and search utilities operators even though such data are essential in order to reach tailored audiences, effectively distribute content, determine pricing schemes, and identify the recipients of speech activities.⁹⁷ Content and information may indeed be free to use.⁹⁸ Yet the outcomes of aggregating and analyzing peoples' interactions with such content and information are *de facto* propertized by networked corporate entities without transparency as to what data are gathered, processed, utilized, and commercialized, and how. This, in turn, causes distributive disparities between the effective capacities of networked corporate platforms and the effective capacities of individuals to capture audience attention.

To summarize my argument so far: contemporary networked media environments are increasingly structured around free distribution of content.

93. Turow, *supra* note 62; Pariser, *supra* note 62.

94. See *e.g.* Cohen, *supra* note 19 at 1912-1917; Strahilevitz, *supra* note 91 at 2022-2024; Omer Tene and Jules Polonetsky, "Big Data for All: Privacy and User Control in the Age of Analytics" (2013) 11 Nw J Tech & Intell Prop 239.

95. See Benkler, "The Wealth of Networks" *supra* note 11; Brett M Frischmann, "Peer-to-Peer Technology as Infrastructure: An Economic Argument for Retaining Sony's Safe Harbor for Technologies Capable of Substantial Non-infringing Uses" (2005) 52 J Copyright Soc'y USA 329.

96. See Mark A Lemley & Lawrence Lessig, "The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era" (2000) 48 UCLA L Rev 925; Barbara van Schewick, *Internet Architecture and Innovation* (Cambridge, MA: The MIT Press, 2010).

97. See Tene & Polonetsky *supra* note 94 at 254-55.

98. Benkler, "Free as the Air", *supra* note 1.

In a close inspection, such environments suffer from drawbacks similar to the drawbacks of the traditional corporate media proprietary model. Along with the costs of intellectual property production, the production and distribution of market-based free content might also create a host of disadvantages. Free content, therefore, may not be as desirable as the critical copyright scholarship had presumed. With these concerns in mind, Part II examines the implications of this argument for copyright law policy.

II. IMPLICATIONS FOR COPYRIGHT LAW POLICY

Socio-economic conditions of networked communication platforms catalyzed the emergence of free content market-based networked environments.⁹⁹ Reduced costs of producing, distributing, and accessing content and information made intellectual property proprietary schemes less dominant.¹⁰⁰ At the same time, copyright law policy stimulated the emergence and growth of the corporate free content model. My purpose in this Part is to examine the role of copyright law policy in that regard by using the example of the approach of United States copyright law to the liability of content-sharing platforms (*e.g.*, YouTube) for copyright infringement.

The US *Digital Millennium Copyright Act* (DMCA), enacted in 1998 and codified in Title 17, § 512 of the United States Code, includes four main safe harbours for Internet service providers.¹⁰¹ Section 512(c) provides a safe harbour for network hosts that store “[i]nformation residing on systems or networks at [the] direction of users,” including, for example, servers that host users’ websites. In this respect, § 512(c) limits service providers’ liability for copyright-infringing content posted or hosted at the direction of end users.¹⁰²

This provision protects those service providers that receive no “financial benefit directly attributable to ... infringing activity,” where the provider has neither the right nor the ability to control the infringing activity and where, if properly notified, the service provider suppresses access to the infringing content.¹⁰³ It does not protect service providers with actual or constructive knowledge of infringing content who fail to move quickly on their own initiative

99. See *supra* note 11, 13-15, 39 and the accompanying text.

100. See Benkler, “The Wealth of Networks”, *supra* note 11 at 59-127; *supra* 13-15, 39 and the accompanying text.

101. See DMCA, *supra* note 41.

102. *Ibid.*

103. *Ibid.*

to disable access.¹⁰⁴ The legislative history of § 512(c) lists as an example of the applicability of the safe harbour “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.”¹⁰⁵ Material not covered under § 512(c), on the other hand, includes material “that resides on the system or network operated by or for the service provider through its own acts or decisions and not at the direction of a user.”¹⁰⁶

A central question arose with the emergence of Web 2.0 and content sharing platforms: whether and under what conditions content sharing platforms may be sheltered under the safe harbour of § 512(c). Several scholars, including Timothy Wu and Lawrence Lessig, argued that § 512(c)’s safe harbour also applies to the activity of content sharing platforms and other types of Web 2.0 applications.¹⁰⁷ Lessig pointed out that with the enactment of the DMCA, the safe harbours for Internet service providers were part of a *quid pro quo* for the enactment of anti-circumvention prohibitions.¹⁰⁸ 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 opt-in strict liability regime to an opt-out “notice and take down” regime.¹⁰⁹

Overall, US courts have followed Lessig’s interpretation. Court rulings vary in their nuances, but at the end of the day, the general direction of US courts is to confer upon content sharing platforms the benefit of § 512(c)’s safe harbour

104. *Ibid.*

105. HR Rep No 105-551(II) (1998) at 53 [House Report 105-551(II)].

106. *Ibid.*

107. See Lawrence Lessig, “Make Way for Copyright Chaos” *The New York Times* (18 March 2007), online <www.nytimes.com/2007/03/18/opinion/18lessig.html>; Tim Wu, “Does YouTube Really Have Legal Problems?” *Slate* (26 October 2006), online: <www.slate.com/articles/news_and_politics/jurisprudence/2006/10/does_youtube_really_have_legal_problems.html> (reporting that “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’”).

108. Lessig, *supra* note 104.

109. House Report 105-551(II), *supra* note 102 at 54.

for hosting services providers.¹¹⁰ This legal regime is indeed beneficial if one considers the value of the safe harbour in supporting user-generated content, amateur content and new channels of distribution.¹¹¹ Concurrently, however, this legal regime has had other consequences:¹¹² it has effectively immunized the costless provision of large repertoires of copyright-protected works in a way that has channelled audience attention to a handful of global entities that have now obtained a dominant bottleneck market position.¹¹³

YouTube is a paradigmatic example in this regard. The unprecedented market position that YouTube has managed to obtain is mostly due to § 512(c)'s safe harbour regime, which enabled YouTube to host endless amounts of popular copyright-protected cultural materials and thus establish market dominance.¹¹⁴ The growing popularity of the platform was largely based on its ability to host entire portfolios of copyright-protected works. These network economic realities—specifically the ability to host content without any need to obtain *ex ante* authorization from copyright owners due to the safe harbour's limited legal risk—facilitated the economic and cultural conditions for the current market domination of YouTube.¹¹⁵

110. See *UMG*, *supra* note 41; *Capitol*, *supra* note 41; *Io Group*, *supra* note 41; *Rasenberger & Pepe*, *supra* note 41; *Viacom*, *supra* note 41. *Viacom* is the most prominent case in this regard. In it, 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); (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, but a general ability to remove or block access to materials posted on a service provider's website does not suffice. What is required is some type of "substantial influence on the activities of users," without necessarily acquiring knowledge of specific infringing activity; and (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 USC § 512(c)(1).

111. *Supra* note 15.

112. *Supra* note 83; *supra* note 83; *supra* note 87.

113. See also Pessach, "Deconstructing Disintermediation", *supra* note 14 at 862-67.

114. YouTube, "Statistics", online <www.youtube.com/yt/press/en-GB/statistics.html>; Alexa, "youtube.com Traffic Statistics" (October 2016), online <<http://www.alexa.com/siteinfo/youtube.com>>. YouTube is the second most popular website. There are more than one billion unique users visiting YouTube every month—almost a third of the people on the Internet. YouTube is in seventy countries and seventy six languages. Approximately eighty percent of users' traffic is outside the US.

115. *Supra* note 86.

Practically, § 512(c)'s safe harbour regime, which only obliges YouTube to remove infringing materials *ex post facto* in response to takedown notices from copyright owners, was a protective shield in establishing YouTube's market dominance. It supported rapid growth in the platform's popularity and the immense portfolio of popular copyright-protected content that it hosted. Furthermore, legal policy under which the embedding of YouTube's content in third party websites does not amount to copyright infringement further enhanced the platform's popularity and dominant position as a global content repository.¹¹⁶

With YouTube's procurement of its dominant market position came an increase in bargaining power to leverage a move toward business models based on collaboration and revenue sharing with creators and rights holders. Authors, creators and rights holders are thus faced with a dominant and highly popular intermediary that attracts a significant portion of audience attention and is already partially shielded from legal liability for hosting their materials. Under such conditions, YouTube has considerable ability to legitimize its content activities on its own terms.¹¹⁷ Authors, creators, and performers have very few options other than to agree to YouTube's terms and conditions or risk vanishing from audiences' awareness. These terms and conditions tend to be fixed, non-negotiable for most contributors, and based on one unilateral business model of free content and monetization only through advertising revenue.¹¹⁸

YouTube is a good example of a free content corporate market model. Formally, it operates within the boundaries of copyright law. Practically, however, with the backing of § 512(c)'s safe harbour regime, it establishes market mechanisms based upon monetization through free distribution of copyright-protected content. The entire playing field of free content distribution is built upon this premise, which also influences the conduct, expectations, and preferences of its repeat participants, including the platform itself, content contributors, users, ancillary intermediaries (through content embedding), advertisers, data brokers, and marketers.

The YouTube model also demonstrates the complex and contradictory nature of free content market mechanisms. There are many positive spillovers in such an environment, which functions as a commons infrastructure affecting peoples' capacities, both as speakers and as recipients, to access, distribute, and utilize creative and informational content. The YouTube model also demonstrates the negative dynamics of contemporary networked media environments,

116. *Supra* note 42; *supra* note 55.

117. See Pessach, "Deconstructing Disintermediation", *supra* note 14 at 844-54, 862-67.

118. *Ibid.*

including: unilaterally-coded boilerplate compensation schemes that undermine contributors' welfare while relying solely on advertising revenue;¹¹⁹ pressure toward ruinous competition to manufacture blockbuster hits that generate popularity and audience attention;¹²⁰ an extremely concentrated distribution layer;¹²¹ intense convergence between product placement, brand marketing, stealth advertisement and creative content;¹²² and limited investment in content production along with targeted delivery of content based on personal data collection.¹²³

Given the immeasurable amount of content freely available through YouTube, it may seem counterintuitive to question the platform's vitality and social contribution. Yet, upon closer inspection, there is a distinction between YouTube's function as a repository for past materials¹²⁴ and its *ex ante* content production and distribution functions. Along with its contribution to bottom-up, decentralized cultural exchange, there are limits to YouTube's cultural production function. YouTube demonstrates that contemporary networked media environments, which are based on limited exposure to copyright liability, provide no guarantee against restrictive contractual and technological terms imposed on the platform's users and contributors, including restrictions that override copyright exemptions.¹²⁵

Altogether, this amounts to a cycle in which a content-sharing platform such as YouTube advocates and advances limited copyright liability while at the same time utilizing its leveraged centrality and market power to impose rules and practices that limit the powers and capacities of third party contributors and users. A copyright law policy that supports a broad safe harbour for content sharing platforms results, therefore, in mixed outcomes. It induces bottom-up decentralized users' contribution. Yet, it also supports and advances the interests of networked corporate media entities that rely upon a business model of free content distribution.

119. *Ibid* at 844-54.

120. *Ibid*.

121. See Curran, Fenton & Freedman, *supra* note 18 at 89. See also Noam, *supra* note 83 at 273-94, 424-25.

122. See Menell, *supra* note 19 at 798-808.

123. See Pariser, *supra* note 62; Turow, *supra* note 62.

124. For an explanation of YouTube's functions as a repository, see Guy Pessach, "[Networked] Memory Institutions: Social Remembering, Privatization and its Discontents" (2008) 71 *Cardozo Arts & Ent LJ* 85-91.

125. Guy Pessach, "Reciprocal Share-Alike Exemptions in Copyright Law" (2008) 30:3 *Cardozo Arts & Ent LJ* 1245 at 1264-1267; Maayan Perel & Niva Elkin-Koren, "Accountability in Algorithmic Enforcement: Lessons from Copyright Enforcement" (2015) *Stanford Tech L Rev* 41-48.

III. CONCLUSION

Critical copyright scholarship over the past two decades has largely focused on the social costs of proprietary copyright protection and of the legal ordering of cultural production through intellectual property regimes. Along with its criticism of intellectual property protection, critical copyright scholarship has also celebrated the virtues of free content and free access, particularly in digital domains. My purpose in this article was to question this conventional wisdom, which tends to pair proprietary intellectual property protection with informational capitalism and the commodification of culture. Similar drawbacks are apparent also in the context of market-oriented realms based on free distribution of content. Media environments that are based on free distribution of content are no less vulnerable to corporate market powers. This analysis bears significant normative implications on the desirability of contemporary approaches, which support mobilization toward non-proprietary legal regimes beyond IP.

