

## SOME REALISM ABOUT COPYRIGHT SKEPTICISM

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### ABSTRACT

*The frame “Beyond IP” is gradually becoming a key term in the political economy of intellectual property. It captures the social costs of legal ordering through intellectual property and offers alternative institutions and regulatory options. “Beyond IP” is not just a frame for mobilization but also a descriptive term that summarizes a growing number of contemporary information and cultural institutions, which rest upon concepts of free content and free access as their building blocks. The purpose of this essay is to question the conventional wisdom of critical copyright scholarship which tends to pair proprietary intellectual property protection with informational capitalism and the commodification of culture. I argue that tensions and dichotomies that we are accustomed to attribute to “IP-centric” regimes are tensions and dichotomies which may appear, or even be stimulated, also by copyright’s negative spaces and certain beyond IP legal regimes. Beyond IP market realms tend to conflict with the values of cultural democracy, informational privacy and creative diversity. This essay offers the first novel critical examination of the political economy of information markets*

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*that operate beyond the boundaries of IP. This analysis bears significant normative implications on the desirability of contemporary approaches, which support mobilization towards beyond IP legal regimes.*

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I. INTRODUCTION

The term “Beyond IP” is gradually becoming a key term in the political economy of intellectual property.<sup>1</sup> It

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<sup>1</sup> See Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. Rev. 970 (2012) [hereinafter Kapczynski, *The Cost of Price*] (discussing the limits and shortcomings of intellectual property as the governing paradigm for organizing and regulating knowledge and cultural production, while offering alternative mechanisms and institutions beyond IP). “Beyond IP” was also the theme of two recent academic conferences at Yale Law School (organized by the Information Society Project at Yale) dedicated to the examination of “how do forms of law and governance beyond IP promote innovation, as well as values such as equality, privacy, and democracy,” <http://isp.yale.edu/event/innovation-law-beyond-ip> [<https://perma.cc/R9TL-VKMP>] (March 30, 2014) (presenting the theme and the program of the “Innovation Law Beyond IP” conference); and <http://isp.yale.edu/event/innovation-law-beyond-ip-2/beyond-ip-2-agenda> [<https://perma.cc/N94Z-KAGQ>] (March 28, 2015) (presenting the theme and the program of the second “Innovation Law Beyond IP 2”

summarizes two key complementary insights in contemporary (new) politics of intellectual property. The first insight touches upon the limits, shortcomings and social costs that are associated with legal ordering of cultural production through intellectual property (IP) regimes.<sup>2</sup> The second insight lists alternative structures, institutions and regulatory options for the promotion of innovation and ubiquitous cultural flourishing.<sup>3</sup>

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conference).

<sup>2</sup> See, e.g., Yochai Benkler, *Intellectual Property and the Organization of Information Production*, 22 INT'L REV. L. & ECON. 81 (2002) [hereinafter, *Intellectual Property and the Organization of Information Production*] (arguing that the legal ordering of cultural production through intellectual property regimes tend to enclose and narrow cultural production to homogenous commercially viable creative works); Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2906–07 (2006) (discussing the conflict between IP law and distributive justice); Brett M. Frischmann, *Evaluating the Demsetzian Trend in Copyright Law*, 3 REV. L. & ECON. 649 (2007) (questioning the efficiency of IP and copyright law in particular, as a mechanism for regulating cultural production); Kapczynski, *The Cost of Price*, *supra* note 1, at 1004–05 (arguing that IP regimes bear costs not only in terms of efficiency, but also in terms of distributive justice and informational privacy); Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879 (2000) [hereinafter Netanel, *Market Hierarchy*] (discussing the linkage between IP regimes and media market concentration).

<sup>3</sup> See, e.g., YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM*, (2006) [hereinafter BENKLER, *THE WEALTH OF NETWORKS*] (exploring the phenomenon of common-based peer production as an alternative to legal ordering through IP); WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* (2004) (offering rewards schemes in the area of digital private consumption/distribution of creative works as an alternative to proprietary copyright protection); LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2008) [hereinafter, Lessig, *Remix*] (alluding to the virtues of free culture which is not based upon proprietary protection of creative works); Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing*

Both insights reside upon concrete and persuasive arguments. The “Beyond IP” discourse rightfully questions the all-inclusive linkage between IP protection and incentives to engage in innovation, knowledge, and cultural production.<sup>4</sup> Well established arguments were made also

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*Commons in the Cultural Environment*, 95 CORNELL L. REV. 657 (2010) (discussing the advantages of constructed commons of information and cultural activities as an alternative to IP regimes); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003) (similarly, promoting a variant of a prize proposal in the context of peer-to-peer file sharing); Steven Shavell & Tanguy van Ypersele, *Rewards versus Intellectual Property Rights*, 44 J L & ECON 525 (2001) (discussing the potential advantages of rewards and prize systems over intellectual property rights).

<sup>4</sup> See BENKLER, THE WEALTH OF NETWORKS, *supra* note 3 (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); KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION (2012) (discussing the empirical question of whether IP incentives matter for innovation); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 523–27 (2009); Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQ. L. 29 (2011) (presenting findings and arguments that authors’ and creators’ incentives diversify and are a far range from copyright’s direct economic incentive).

with regard to the distributive,<sup>5</sup> creative<sup>6</sup> and democratic<sup>7</sup> disadvantages that come together with IP regimes.

As for the alternatives, at least to some degree, the shift from an IP centric approach to alternate methodologies that go beyond IP was stimulated by the emergence of digitization and networked communications platforms. New methods and reduced costs of producing, storing and distributing information and content provide fertile grounds and constant demonstration that there are enhanced schemes, beyond IP, for cultural and knowledge sustainability.<sup>8</sup>

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<sup>5</sup> See, e.g., Margaret Chon, *Intellectual Property from Below: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803 (2007) (discussing copyright's burdens on distributive values and human capacities particularly in the context of the right to education); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1562–1566 (2005) (describing the manners in which current copyright schemes conflict with distributive values).

<sup>6</sup> See Julie Cohen, *Creativity and Culture in Copyright Theory* 40 U.C. DAVIS L. REV. 1151 (2007) (questioning whether copyright policy and law making truly inquire and understand the nature of creativity and the conditions for its flourishing); Julie Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347 (2005) (arguing that current doctrines and concepts of copyright law are characterized by the absence of a user as a subject of copyright law, which, in turn, screens on copyright law's failure to fully correspond to creative dimensions); Madhavi Sunder, *IP<sup>3</sup>*, 59 STAN. L. REV. 257 (2006) (explaining and demonstrating the limits of current copyright schemes in supporting and enhancing individual creativity).

<sup>7</sup> See also 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 (1999) [hereinafter, Benkler, *Free as the Air*] (explaining copyright's constraints on free speech and democratic public discourse); Neil Weinstock Netanel, *Market Hierarchy*, *supra* note 2 (demonstrating how copyright law establishes "speech hierarchies" between, on one hand, individuals and non-commercialized entities and, on the other hand, media conglomerate while inflicting unequal capacities to participate in speech activities and the democratic discourse).

<sup>8</sup> See 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) (arguing that digital technologies alter the social

“Beyond IP” is not just a frame for mobilization but also a descriptive term that captures and summarizes contemporary information, and creative and cultural activities, which rest upon concepts of free content, free access, and openness as their building blocks.<sup>9</sup>

Yet, it is at this juncture that another, less noticed, aspect of beyond IP domains is being revealed. The political economy of certain beyond IP realms, and particularly

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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.); Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 12, 28, 30, 35 (2010) (discussing the manner in which digitization and networked communication technologies significantly reduce the costs of producing, storing, and distributing content and cultural products).

<sup>9</sup> See CHRIS ANDERSON, *FREE: THE FUTURE OF A RADICAL PRICE* (2009) [hereinafter, 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); LESSIG, *REMIX*, *supra* note 3 (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 with no 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); Yochai Benkler, *Coase’s Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002) [hereinafter, Benkler, *Coase’s Penguin*] (exploring and demonstrating the virtues of common 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*, 95 CAL. L. REV. 597 (2007); Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951 (2004) (elaborating on the rising role of amateur culture in networked environments).

market-oriented beyond IP realms, may be counterintuitive to the above-mentioned premises.

Free content and departures from traditional proprietary IP regimes do not necessarily derive true effective freedom for individuals. The networked environment and its strong lean toward selling “eyeballs” (audience attention) to advertisers,<sup>10</sup> big data utilization,<sup>11</sup> the use of information flows about consumer behavior to target advertisements, search results and other content,<sup>12</sup> stealth advertisement, sophisticated systems of predictive analytics,<sup>13</sup> consumers’ data commodification<sup>14</sup> and free utilization of content<sup>15</sup> represent a brave new world which is

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<sup>10</sup> See *infra* parts II and III(B).

<sup>11</sup> See *infra* parts II and III(B); see also JARON LANIER, WHO OWNS THE FUTURE? (2013) (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; thus while 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 (2015) (critically describing and analyzing big data practices and their utilization for leveraging price discrimination practices, profits and power).

<sup>12</sup> Katherine J. Strandburg, *Free Fall: The Online Market's Consumer Preference Disconnect*, 2013 U. CHI. LEGAL F. 95, 122–132 (2013) (surveying different online business models of behavioral and contextual advertising that are based on users’ data collection, including their online activities, engagements and searches).

<sup>13</sup> See PASQUALE, *supra* note 11 (critically surveying a variety of areas in which predictive analytics are being utilized for marketing, price discrimination and financial gains practices).

<sup>14</sup> See Adam Thierer & Berin Szoka, *Targeted Online Advertising: What's the Harm & Where Are We Heading*, 16 THE PROGRESS & FREEDOM FOUNDATION, PROGRESS ON POINT 1, 5–6 (2009); Omer Tene & Jules Polonetsky, *To Track or "Do Not Track": Advancing Transparency and Individual Control in Online Behavioral Advertising*, 13 MINN J. L. SCI & TECH 281, 335 (2012); see also Giacomo Luchetta, *Is the Google Platform a Two-Sided Market?*, 19 J. COMPETITION L. & ECON. 185 (2013).

<sup>15</sup> See *infra* parts II and III(B).

nothing but the opposite of what one anticipates when looking beyond the shoulders of IP. In such beyond IP realms, power hierarchies, industrialized corporate structures, media concentration, content biases, abridged creative diversity, and deflated authors' welfare may even outweigh the disruptions of traditional corporate media realms.<sup>16</sup>

Informational capitalism, that is the use of data, information and content—as means of production and circulation—for profit motivated goals and wealth accumulation<sup>17</sup>—is linked and connected not only to elements of proprietary control, but also to elements of free flow and non-proprietary modes of content circulation. In fact, as I shall argue in this essay, in free market settings, realms beyond IP may function as stimulators of informational capitalism.

Although the emergence of networked informational capitalism is well addressed,<sup>18</sup> there is hardly any reference to the linkage between networked informational capitalism and components—both legal and ideological—which are derived from and are associated with beyond IP cultural and informational zones.

The purpose of this essay is to unveil some of the social contradictions and complexities that market-oriented beyond IP realms tend to generate. This dimension, thus far neglected, attempts to question the conventional wisdom of critical copyright scholarship which tends to pair mostly (if not only) proprietary protection with corporate media social

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<sup>16</sup> For further elaboration and discussion, *see infra* part II.

<sup>17</sup> *See* CHRISTIAN FUCHS, INTERNET AND SOCIETY: SOCIAL THEORY IN THE INFORMATION AGE, 82 (2008) (defining informational capitalism and discussing different approaches to informational capitalism).

<sup>18</sup> *See, e.g.*, MANUEL CASTELLS, THE INFORMATION AGE: THE RISE OF THE NETWORK SOCIETY, 14–18 (1996); Julie E. Cohen, *What is Privacy For?*, 126 HARV. L. REV. 1904, 1915–1917 (2013) [hereinafter Cohen, *What is privacy for?*].



structures, media capitalism, and the commodification of culture.<sup>19</sup>

I argue that the tensions and dichotomies, which we are accustomed to attributing to “IP-centric” regimes, are tensions and dichotomies which may appear, or even be stimulated, by certain beyond IP regimes. As a consequence, for those who cherish cultural environmentalism,<sup>20</sup> cultural

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<sup>19</sup> For this conventional approach see, e.g., Niva Elkin-Koren, *It's All About Control: Rethinking Copyright in the New Information Landscape*, in THE COMMODIFICATION OF INFORMATION 79, 105–06 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002); see also Benkler, *Free as the Air*, *supra* note 7; Benkler, *supra* note 2; Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785 (2004); Netanel, *Market Hierarchy*, *supra* note 2.

<sup>20</sup> See also James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87 (1997) (coining, presenting and developing the term “cultural environmentalism” as a metaphor for organizing society’s cultural, intellectual and knowledge systems in manners that advance the public interest and avoid harms that derive from rent seeking by particular interest group, specifically such groups that rely on IP legislation as means of advancing private proprietary interests). Molly Shaffer Van Houweling, *Cultural Environmentalism and the Constructed Commons*, 70 LAW & CONTEMP. PROBS. 23 (2007); Julie E. Cohen, *Network Stories*, L & CONTEMP. PROBS. 91, 94–95 (2007).

democracy<sup>21</sup> and public-regarding media realms,<sup>22</sup> the political economy of information and content markets that operate beyond the boundaries of IP may be no less challenging than old school corporate media.

By making this claim, I am not arguing that an IP centric approach and IP expansionism should be restored. I do argue, however, that certain segments of realms beyond IP stimulate pressures, tensions and disruptions, which go against the values of a democratic culture.<sup>23</sup> Moreover, frames such as free culture<sup>24</sup> may have masked our ability to fully comprehend and respond to the challenges that are

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<sup>21</sup> See Balkin, *supra* note 8, at 61 (presenting the notion of a democratic culture as a "culture in which individuals have a fair opportunity to participate in the forms of meaning making that constitute them as individuals. Democratic culture is about individual liberty as well as collective self-governance; it is about each individual's ability to participate in the production and distribution of culture . . . . A democratic culture is democratic in the sense that everyone—not just political, economic, or cultural elites—has a fair chance to participate in the production of culture, and in the development of the ideas and meanings that constitute them and the communities and sub-communities to which they belong. People have a say in the development of these ideas and meanings because they are able to participate in their creation, growth, and spread. Like democracy itself, democratic culture exists in different societies in varying degrees; it is also an ideal toward which a society might strive.”).

<sup>22</sup> See James Curran, *Mass Media and Democracy Revisited*, in *MASS MEDIA AND SOCIETY* 81 (James Curran & Michael Gurevitch, eds., 2nd ed., 1996); see also C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* (W. Lance Bennett & Robert M. Entman eds., 2001) [hereinafter, Baker, *Media, Markets and Democracy*] (discussing the democratic and public regarding functions of the media and the press).

<sup>23</sup> See Balkin, *supra* note 8, at 1, 3, 5 (presenting and elaborating on the characteristics of a democratic culture).

<sup>24</sup> See also LAWRENCE LESSIG, *FREE CULTURE—HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004) (popularizing the term “free culture” as a contra to the common proprietary model of corporate media and cultural production).

imposed by contemporary industrial information economics of freely distributed content.

These general observations may derive two fundamental policy implications. The first implication touches upon privacy protection and the inadequate manners in which the interface between privacy and informational capitalism is currently framed. The second policy implication calls for a more nuanced approach regarding the role of IP. As I shall argue, paradoxically, IP may have a role in culminating and mitigating informational capitalism.

As for privacy protection, the centrality of privacy protection in a networked environment is well addressed,<sup>25</sup> yet it tends to neglect two elements. To begin with, the fact that beyond IP free markets are in direct tension with the value of informational privacy, because such markets rely upon and extract revenues from trading and commercializing personal information.<sup>26</sup> Moreover, the economics of monetizing personal information also reinforces itself back on content and media spheres. It requires communicative and informational engagements that are suitable for and that maximize commodification of personal information.<sup>27</sup>

The second element deals with the emerging role of privacy protection as means of regulating cultural production, particularly in spheres which are beyond IP.<sup>28</sup> Different degrees of restrictions and limitations on personal data collection, its trading and utilization for targeted advertisements, sponsored content and product placement may derive different degrees of incentives to strategically

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<sup>25</sup> The literature in this regard is vast, *but see, e.g.*, HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY AND THE INTEGRITY OF SOCIAL LIFE* (2010); DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* (2008); Cohen, *What Privacy is For?*, *supra* note 18; Lior Strahilevitz, *Toward a Positive Theory of Privacy Law*, 126 *HARV. L. REV.* 2010 (2013).

<sup>26</sup> *See infra* parts II and III(B).

<sup>27</sup> *Id.*

<sup>28</sup> *See infra* part III(B).

concentrate on content that serves such purposes.<sup>29</sup> Additionally, among other aspects, predictive data mining is a powerful tool for efficient investment in information and content production.<sup>30</sup> Such practices, however, also shape, rather than just reflect peoples' preferences and desires.<sup>31</sup> This in turn impacts content and information production. Informational privacy protection, therefore, may function as a form of media regulation. The communicative functions<sup>32</sup> of privacy protection may bear significance importance in networked media environments, which are practically absent of direct forms of media regulation.<sup>33</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See *infra* part III(B); see also BAKER, MEDIA, MARKETS, AND DEMOCRACY, *supra* note 22, (describing how people's preferences are determined by, rather than being exogenous to, any current realm of media products they are effectively exposed to); Nadel, *supra* note 19, at 789 (demonstrating how copyright's revenues are practically utilized for shaping people's cultural preferences and tastes).

<sup>32</sup> For a similar analogy, see Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278 (2004) (discussing copyright law's function as a form of media regulation). In a similar manner, the novel notion that I aim at developing in this essay is that privacy protection and, particularly informational privacy protection also function as a form of media regulation that implicates on the structure and outputs of cultural production, media markets, and communicative activities.

<sup>33</sup> As a general matter, as opposed to traditional telecommunication platforms, such as television, multichannel television, and radio, the internet and other networked communication platforms are not directly regulated in terms of requiring a governmental license for their operation. This state of affairs, which has ground justifications in terms of First Amendment considerations, still leaves unattended a variety of aspects which were dealt and regulated within traditional media realms, such as media concentration, content diversity, access to media platforms and effective exposure to audience attention. See Balkin, *supra* note 8, at 17–22 (surveying the traditional structural regulation of mass media and its lack of applicability in the context of the Internet and networked communication platforms); see generally JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, *DIGITAL CROSSROADS: AMERICAN TELECOMM. POLICY IN THE INTERNET AGE* (2nd ed., 2013).

The second policy implication calls for a more nuanced approach regarding the role of IP.<sup>34</sup> Paradoxically, IP may have a role in culminating and mitigating informational capitalism. IP's role in this regard may cover three layers: (a) shifting sources of revenues and incentives back to the creative content itself (rather than revenues from advertisements and the commercialization of users' personal data<sup>35</sup>; (b) decentralizing power hierarchies among more groups, layers and institutions,<sup>36</sup> and (c) a fairer distribution of information and creative wealth.<sup>37</sup>

Indeed, there is a contradiction between the manners in which IP's control and commodification functions nourish corporate media, on one hand,<sup>38</sup> and the manners in which IP may counterbalance informational capitalism on the other hand.<sup>39</sup> The regulatory challenge, therefore, is to adjust schemes that prevent extreme disparities in power allocation and power hierarchies, be it as a consequence of overbroad IP protection or because of the dynamics of beyond IP market realms.

The novel contribution of this essay is in unbundling the seemingly Gordian knot between proprietary IP and capitalist structures of corporate media. Media environments that are based on free distribution of content

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<sup>34</sup> See *infra* part III(A).

<sup>35</sup> See *infra* part III(B).

<sup>36</sup> See also Guy Pessach, *Deconstructing Disintermediation: A Skeptical Copyright Perspective*, 33 *CARDOZO ARTS & ENT. L.J.* 833, 856–868 (2013) [hereinafter Pessach, *Deconstructing Disintermediation*].

<sup>37</sup> *Id.* at 867.

<sup>38</sup> See, e.g., 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, 1077–81, 1092–97 (2003) [hereinafter, Pessach, *Copyright as a Silencing Restriction*] (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 19.

<sup>39</sup> See *infra* part III(A).

are no less vulnerable to corporate power hierarchies and their deficiencies in terms of diversity, autonomy and democratic values.<sup>40</sup> This observation bears significant normative implications because it emphasizes the limits and fickleness of copyright deregulation as means of advancing the public interest.

The purpose of this essay is to explore some of the complexities that informational capitalism raises in realms beyond traditional proprietary IP schemes. Part II describes the political economy of contemporary information and content engagements in institutional structures which are beyond IP. Part III examines the interface between such realities and legal ordering in the areas of copyright law and privacy protection. Part IV concludes.

## II. INFORMATIONAL CAPITALISM BEYOND IP

Critical communications and legal studies have dealt extensively with the political economy of corporate media, including the manners in which copyright protection and proprietary control negatively affect goals and values such as autonomy, self-fulfillment, creative freedom, political capabilities, and cultural diversity.<sup>41</sup> Control over means of production and distribution is gained through a mixture of governmental entitlements in creative resources (e.g. copyright) and distribution platforms (e.g. telecom licenses).<sup>42</sup> The traditional political economy of

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<sup>40</sup> See *infra* Part II.

<sup>41</sup> See *supra* notes 2, 5–7; see also Pessach, *Copyright as a Silencing Restriction*, *supra* note 38 at 1077–81, 1092–97; Elkin-Koren, *supra* note 19; Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 L. & CONTEMP. PROBS. 173 (2003).

<sup>42</sup> See Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 562 (2000) [hereinafter Benkler, *From Consumers to Users*] (describing the manners in which

informational capitalism, so to speak, was largely based upon the properitization of communicative and speech resources both as inputs and as outputs. These private entitlements were utilized by their owners in manners that maximized profits, but at the same time, also abridged the public interest and democratic values that are attached to speech, communicative and cultural activities.<sup>43</sup> This is why the commodification of culture, through proprietary entitlements and private control, raised sincere concerns from a democratic point of view.<sup>44</sup>

The emergence of the Internet and networked communication platforms were perceived by many of us as a unique opportunity to significantly improve society's informational and cultural ecology, if only the right regulatory and legal choices would be taken.<sup>45</sup> In broad

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telecommunications law and IP law allocate entitlements in creative resources and physical distribution platforms).

<sup>43</sup> *Id.* See also Pessach, *Copyright as a Silencing Restriction*, *supra* note 38, at 1076–81, 1087–92, 1096.

<sup>44</sup> See generally BAKER, MEDIA, MARKETS, AND DEMOCRACY, *supra* note 22; RONALD V. BETTIG, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY 79–81 (1996); ROBERT W. MCCHESENEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES 29–48 (1999); ROBERT W. MCCHESENEY, THE POLITICAL ECONOMY OF GLOBAL COMMUNICATION, IN CAPITALISM AND THE INFORMATION AGE 1, 14–15, 19 (Robert W. McChesney, Ellen Meiksins Wood & John Bellamy Foster eds., 1998) [hereinafter MCCHESENEY, THE POLITICAL ECONOMY OF GLOBAL COMMUNICATION]; C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097 (1992).

<sup>45</sup> See generally BENKLER, THE WEALTH OF NETWORKS, *supra* note 3 (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); FISHER, *supra* note 3, ch. 6 (offering compulsory licensing schemes that legalize online content engagements, including

paintbrush lines, the argument was 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 and content entities.<sup>46</sup>

From this perspective, the traditional distributor-centric, proprietary-based cultural and informational industries seemed 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 civic-engaged cultural spheres is feasible, if only one can disembark the strong attachment of cultural production to IP as one of its governing institutions.<sup>47</sup> There is much to be looked for

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file-sharing, among other purposes, in order to realize the prospects of digitization while mitigating content owners' dominance and control over distribution channels); LESSIG, REMIX, *supra* note 3 (describing the prospects and creative potential of network communication platforms as well as the constraints that are imposed by IP laws); Balkin, *supra* note 8, at 6–13 (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; (b) copyright law and telecommunications law impose both restrictions and private ordering regimes of exclusivity that conflict with and restrict the prospects of digitization); Litman, *supra* note 8, 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 ill-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.

<sup>46</sup> See *supra* note 45.

<sup>47</sup> For a survey of such approaches see also Pessach, *Deconstructing*



beyond the shoulders of IP, particularly given findings and persuasive arguments that authors' and creators' incentives diversify and are a far range from IP's direct economic incentive.<sup>48</sup>

In a retrospect of two decades, creative and informational zones beyond IP occupy prominent segments of the Internet and networked communication platforms. Much of people's informational engagements, both as speakers and as recipients, are conducted through frameworks and platforms that rely upon open access and free flow of content.<sup>49</sup> Many of such activities are stripped of IP's regulation, if not as a formal legal matter, then as a practical matter, in terms of the communicative and business model that is being applied.<sup>50</sup>

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. Content, information and other types of

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*Disintermediation*, *supra* note 36, at 835–38.

<sup>48</sup> See *See, e.g.*, Tushnet, *supra* note 4, 523–527; see also Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623 (2012); Zimmerman, *supra* note 4.

<sup>49</sup> See also ANDERSON, FREE, *supra* note 9; BENKLER, THE WEALTH OF NETWORKS, *supra* note 3; LESSIG, REMIX, *supra* note 3; see also major online platforms such as YOUTUBE, <https://www.youtube.com/> [<https://perma.cc/C8CU-FEH4>]; INSTAGRAM, <https://www.instagram.com/> [<https://perma.cc/D9QT-Z6CX>]; and a huge variety of other free online applications and content offerings.

<sup>50</sup> Otherwise phrased, even if formally, IP laws, including copyright protection, apply with regard to the content activity, the communicative and business models that are being applied are based on free distribution of content. Such schemes represent a negative space in which IP laws do not apply, not because of [lack of] legal regulation, but because of market practices. As I further demonstrate in Part II, *infra*, such practices and schemes are supported by background legal rules which are based on a beyond IP policy.

creative outputs are being distributed for free. Resources, such as photographs, video clips, visual images, game applications, music and textual materials may be formally protected by copyright protection and other types of IP rights,<sup>51</sup> yet the economic and communicative schemes, through which such materials are being produced and exchanged, are in many instances beyond IP. As a matter of law in action, these are negative spaces in which IP rights do not function as the mechanism that governs the production, exchange and distribution of such creative outputs.<sup>52</sup>

At least to some degree, this shift was less a consequence of well-planned, *ex ante* legal reforms, in the area of IP, are more of a consequence of the internet's technological and communicative conditions.<sup>53</sup> At the same

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<sup>51</sup> Copyright's subject matter covers, among other works, literary works, musical works, dramatic works, pictorial, graphic, and sculptural works, motion pictures and, other audiovisual works, and sound recordings. See 17 U.S.C. § 102 (2012).

<sup>52</sup> The term "IP's negative space" was coined by Raustiala and Sprigman as a term that describes instances and fields in which creation and innovation thrive in the absence of intellectual property protection. See Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1764 (2006). My analysis in the above-mentioned text, as well as in the forthcoming parts of this essay, adopts a broader view under which IP's negative spaces may cover also instances and fields in which the formal applicability of IP laws are being substituted by norms and practices which route around IP as the governing regime.

<sup>53</sup> See ANDERSON, FREE, *supra* note 9; BENKLER, THE WEALTH OF NETWORKS, *supra* note 3 (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 8 (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;

time, legal policy also partially supported the creation and expansion of zones beyond IP—negative spaces that are not governed by IP proprietary protection. Among the prominent examples are: (a) broad interpretation and application of the fair use defense, including in the context of search engines’ activities;<sup>54</sup> (b) law’s limited and narrow approach regarding third parties’ liability for contributory copyright infringement;<sup>55</sup> (c) the legislation and interpretation of safe harbors, for content-sharing platforms,

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and (3) lowered the costs of transmission, distribution, appropriation, and alteration of content while commenting and building upon it. *Id.*

<sup>54</sup> See *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (determining that Google's scanning of millions of books for its Google Book Search Project and indexing their contents to serve up some snippets in response to user search queries is a transformative fair-use); *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 copyright protected, from 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); *Perfect 10, 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); *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 from websites within the result pages of a search engine are considered fair-use).

<sup>55</sup> See *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 935 (2005); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). 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 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 a technology that is capable of substantial non-infringing uses, unless there is inducement to infringe copyright.

through the constructions of notice and takedown procedures;<sup>56</sup> and (d) narrow interpretation of the distribution right in digital domains.<sup>57</sup> These are all examples of legal policy that facilitated and legitimized large scale networked activities beyond the hand reach of IP's proprietary control; thus, even with regard to profit-motivated corporate activities aiming for power, control, and market dominance.<sup>58</sup>

Together, with the attributes of networked communication platforms,<sup>59</sup> such legal policies inflated the centrality, scope, and scale of free distribution within

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<sup>56</sup> See 17 U.S.C. § 512(c) (2012); *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012); *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). 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. Section 512(c) provides a safe harbor 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 the § 512(c) safe harbor.

<sup>57</sup> See Peter S. Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPYRIGHT SOC'Y. 1 (2011) (surveying and critically analyzing the interpretation of the exclusive right of distribution (17 U.S.C.S. § 106(3)) in digital contexts. As Menell demonstrates, overall, the courts' inclinations were 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, 1213 (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).

<sup>58</sup> See *supra* notes 54–56. In most of the cases cited, the cases involved large-scale profit motivated corporate entities such as Google, YouTube (owned by Google), and Amazon, which have successfully claimed to shelter under IP's negative spaces.

<sup>59</sup> See *supra* notes 8–9.

creative and information industries: YouTube, as a main platform for audio-visual and musical content, free of charge, distribution, was established, based upon and still relies on the Digital Millennium Copyright Act section 512(c) safe-harbor for content sharing platforms;<sup>60</sup> so is Instagram's centrality as a platform of photographs and visual images,<sup>61</sup> the Google Book Library Project's legality is entirely based on the fair use defense;<sup>62</sup> online music services such as Last.fm<sup>63</sup> are able to provide free access to music through technological design that relies on the legality of embedding content from other platforms' content;<sup>64</sup> and a variety of content exchange and distribution platforms are based on copyright law's narrow approach towards third parties' liability, including the rule that technological devices, which are capable of substantial non-infringing uses, are not subjected to contributory liability.<sup>65</sup> Software and technological devices such as Kodi/XBMC,<sup>66</sup> which

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<sup>60</sup> See *Viacom Int'l, Inc.*, 676 F.3d 19; see also Pessach, *Deconstructing Disintermediation*, supra note 36, at 863–67.

<sup>61</sup> See How do I report a claim of copyright infringement?, INSTAGRAM, <https://help.instagram.com/277982542336146?ref=related> [<https://perma.cc/6YWV-7NRD>]. Instagram also claims to function as a content-sharing platform, which shelters under section 512(c) of the DMCA.

<sup>62</sup> See *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

<sup>63</sup> See LAST.FM, <http://www.last.fm/> [<https://perma.cc/W5E2-M4L5>].

<sup>64</sup> 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 (C.D. Cal. July 30, 2010) aff'd, 653 F.3d 976 (9th Cir. 2011) (determining that the embedding of content, from other web-sites, through techniques such as framing and inline linking, does not amount to a copyright infringement).

<sup>65</sup> See supra note 55.

<sup>66</sup> See KODI, <https://kodi.tv/download/> [<https://perma.cc/43LG-H57J>]. (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 provide

facilitate free distribution of content, including copyrighted content, are, therefore, immune from copyright infringement liability, a fact which makes their distribution widespread.

By making these observations, I am not arguing that such legal policies may not be justified, each one upon its particular merits.<sup>67</sup> I do argue, however, that altogether, these legal policies contributed to the emergence of a new cultural ecosystem, in which commercial and profit-motivated corporate entities cluster around and build upon free distribution of content. Accumulatively, islands of negative spaces, in which copyright protection is absent, created a new geography of cultural production and cultural distribution.

The traditional corporate media model was based on a producer–consumer relationship and copyrighting culture, that is the commodification of content, through proprietary protection.<sup>68</sup> Within the traditional model, extracting direct revenues from distribution and access provision to content was a pivot of the economic model.<sup>69</sup> This traditional model is now partially being replaced by new hybrids that rely upon and leverage free access and distribution of content as their prominent business model.

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utilized Kodi's interface to provide access to a variety of content, including copyrighted materials.

<sup>67</sup> See *supra* notes 54–56.

<sup>68</sup> See Benkler, *From Consumers to Users*, *supra* note 42; Pessach, *Copyright as a Silencing Restriction*, *supra* note 38, at 1076–81, 1087–92; *supra* notes 41–44.

<sup>69</sup> See generally HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS (8th ed., 2010); BETTIG, *supra* note 44; Pessach, *Copyright as a Silencing Restriction*, *supra* note 38. Indeed, the traditional corporate media model is also highly dependent upon advertising revenues. See *supra* note 44 *infra* note 109. Nevertheless, at the same time, extracting direct revenues from distributing and selling content was and still is a pivotal source of income for traditional corporate media.

Recent scholarship in the areas of communications studies and critical internet studies examine the emergence of a new political economy in which networked information industries built upon free flow of information and content.<sup>70</sup> It 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.<sup>71</sup> Clicks, repeat visits, and internet spent-time (on a website) are one strategic business goal intertwined with the goal of effective advertising, including sponsored content and stealth marketing.<sup>72</sup> Optimized commercialization and utilization of mass aggregated personal information is

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<sup>70</sup> See generally ASTRA TAYLOR, *THE PEOPLE'S PLATFORM: TAKING BACK POWER AND CULTURE IN THE DIGITAL AGE* (2014); JERON LANIER, *WHO OWNS THE FUTURE* (2013); ROBERT MCCHESENEY, *DIGITAL DISCONNECT: HOW CAPITALISM IS TURNING THE INTERNET AGAINST DEMOCRACY* (2013) [hereinafter MCCHESENEY, *DIGITAL DISCONNECT*]; EVGENY MOROZOV, *TO SAVE EVERYTHING CLICK HERE* (2013); JAMES CURRAN, NATALIE FENTON & DES FREEDMAN, *MISUNDERSTANDING THE INTERNET* (2012); CHRISTIAN FUCHS, *INTERNET AND SOCIETY: SOCIAL THEORY IN THE INFORMATION AGE* (2008).

<sup>71</sup> See TAYLOR, *supra* note 70, at 191–213; MOROZOV, *supra* note 70, at 153–54, 161–63, 258–59, 349–50; CURRAN, FENTON & FREEDMAN, *supra* note 70, at 82–84; Cohen, *What is privacy for*, *supra* note 18, at 1915–17; Peter Menell, *Brand Totalitarianism*, 47 U.C. DAVIS L. REV. 787, 798–808 (2014).

<sup>72</sup> See *supra* note 71; see also ELI PARISER, *THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU* 60–62 (2011); JOSEPH TUROW, *THE DAILY YOU: HOW THE NEW ADVERTISING INDUSTRY IS DEFINING YOUR IDENTITY AND YOUR WORTH* 88 (2011); Ira S. Rubinstein, Ronald D. Lee & Paul M. Schwartz, *Data Mining and Internet Profiling: Emerging Regulatory and Technological Approaches*, 75 U. CHI. L. REV. 261, 271 (2008); Ellen Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83 (2006); Ryan Calo, *Digital Market Manipulation* 5 (U. Wash. Sch. of L., Legal Stud. Res. Paper No. 2013–27, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2309703](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309703) [<https://perma.cc/KF79-A59C>].

another fundamental building block of the networked economy.<sup>73</sup>

Networked informational capitalism is distinguished from traditional corporate media in two aspects: the first aspect refers to the polarized chain through which audience attention is being monetized. In the past, there was usually one media entity through which particular instances of audience attention were monetized, for example, a television network, or a newspaper, selling advertisements' space. In a networked environment, a large number of beneficiaries may be involved in every micropayment for selling audience attention.<sup>74</sup> This in turn raises pressures to increase networked audience attention in manners that will feed the entire monetizing value chain. A second related aspect is the growing dependence of informational capitalism on free content and free information as elementary means of production. In a political economy which does not extract revenues through direct commercialization and selling of content, but rather from commercializing personal information and users' attention, free content and free information are a main baiting mechanism for obtaining and monetizing both audience attention and users' personal information.

Spheres beyond IP, thus, represent a social contradiction between their empowering functions and their vulnerability to extreme exploitation and commodification. Free flow and distribution of content undoubtedly stimulate social conditions that empower individuals, promote innovation, and cultural democracy.<sup>75</sup> Yet, at the same time, they provide no safeguards from patterns that imitate the

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<sup>73</sup> See PASQUALE, *supra* note 11; Cohen, *What is privacy for*, *supra* note 18; Strandburg, *supra* note 12, at 122–32.

<sup>74</sup> See generally Eric Clemons, *Business Models for Monetizing Internet Applications and Web Sites: Experience, Theory, and Predictions*, 26 J. MGMT. INFO. SYS., 15–41 (2009).

<sup>75</sup> See *supra* notes 45–47.



logic and driving forces of proprietary, cultural industries. 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.

The partial creative destruction<sup>76</sup> of traditional corporate media models is therefore more complex and challenging than scholarship and public advocacy had presumed.<sup>77</sup> At least to some degree, beyond IP spheres are a postmodern version of the "Culture Industry" as framed and analyzed by Theodor Adorno and Max Horkheimer with regard to the emergence of traditional mass media.<sup>78</sup> In their book chapter, *The Culture Industry – Enlightenment as Mass Deception*, 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.<sup>79</sup> All products of the culture industry are designed for profit. Adorno and Horkheimer

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<sup>76</sup> 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.

<sup>77</sup> See *supra* notes 45–47 and accompanying text.

<sup>78</sup> *Id.*; see Max Horkheimer & Theodor W. Adorno, *The Culture Industry: Enlightenment as Mass Deception*, in DIALECTICS OF ENLIGHTENMENT: PHILOSOPHICAL FRAGMENTS 94 (Edmund Jephcott trans., 2002).

<sup>79</sup> *Id.*

further described the manner in which the culture industry manipulate mass society by cultivating false psychological needs that can only be met and satisfied by the products of corporate mass media capitalism; thus while driving people into passivity due to the false illusion of democratic cultural participation.<sup>80</sup>

Networked, beyond IP cultural environments partially operate on similar patterns. At the outset, structures of media dominance, through centralized regulatory and proprietary control, are now being replaced by elements of openness, interactivity and participation.<sup>81</sup> This transformation is not just a shift in the structure and economy of the creative industries, but also a symbolic ideological process that confronts the perils of the old corporate media model with the prospects of digitization and networked communication platforms.<sup>82</sup> At the same time, however, the open, accessible, interactive and participatory internet is also a construction for industrialized production and distribution of standardized informational goods that are capable of generating traffic, users' attention, as well as commercialization and utilization of personal information. Informational products of beyond IP spheres take the appearance of the people's platform's free culture, but in

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<sup>80</sup> *Id.*; see generally JOHN FISKE, *READING THE POPULAR* (1989); JOHN FISKE, *UNDERSTANDING POPULAR CULTURE* (1989); ANDREW ROSS, *NO RESPECT: INTELLECTUALS AND POPULAR CULTURE* (1989); JOHN FISKE, *TELEVISION CULTURE* (1987); IAIN CHAMBERS, *POPULAR CULTURE: THE METROPOLITAN EXPERIENCE* (1986).

<sup>81</sup> See, e.g., BENKLER, *THE WEALTH OF NETWORKS*, *supra* note 3; Balkin, *supra* note 8.

<sup>82</sup> See, e.g., Matteo Pasquinelli, *The Ideology of Free Culture and the Grammar of Sabotage*, in *EDUCATION IN THE CREATIVE ECONOMY: KNOWLEDGE AND LEARNING IN THE AGE OF INNOVATION* (Daniel Araya & Michael Peters eds., 2010); McChesney, *Digital Disconnect*, *supra* note 70, at 109; Christian Fuchs, *Information and Communication Technologies and Society.: A Contribution to the Critique of the Political Economy of the Internet*, 24 *EURO. J. COMM.* 69 (2009).

fact, many of them are also subjected to the interests of money and power.<sup>83</sup>

Moreover, similarly to the manner in which the culture industry generated false illusions of democratic cultural participation, so does networked information capitalism. Behind the veil of free flow, there are categorical limits to the capacities of content and information as shared resources, even by those who contributed to the production of such resources. Individuals' content and information may be free as the air to common use. Yet, at the same time as Jeron Lanier demonstrates,<sup>84</sup> the proceeds of aggregating and analyzing peoples' interactions with such content and information are de facto propertized without being transparent. In many circumstances, individuals who create free content have no access to the data which is essential in order to reach tailored audiences, effectively distribute their content, determine pricing schemes, or even identify the recipients of their speech activities. In Lanier's language, these are all privileges that only a handful of siren servers' operators are entitled to.<sup>85</sup>

The resemblance between Adorno's & Horkheimer's framing of "the culture industry as mass deception,"<sup>86</sup> and beyond IP networked spaces touches upon two elements: (a) the prominence of industrialized production and distribution platforms; (b) false illusions regarding people's cultural capacities both as creators and as recipients. By making this argument, I am not attempting to undervalue the fundamental transformation that the internet and digital technologies have brought in terms of people's capacities as creators and recipients of creative content. I do argue, however, that at the same time, many of such individual

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<sup>83</sup> See LANIER, *supra* note 70; MOROZOV, *supra* note 70, at 63–99; TAYLOR, *supra* note 70, at 197, 217–18.

<sup>84</sup> See LANIER, *supra* note 70, at 48–57.

<sup>85</sup> *Id.*

<sup>86</sup> See *supra* note 78.

autonomous engagements are also exploited by large-scale profit-motivated corporate networked industries that leverage beyond IP environments as opportunities for profit and as their means of production.<sup>87</sup> These industries also use frames and concepts of free culture and openness in order to discreet both their goals and the consequences of their activities.<sup>88</sup>

These observations do not aim at neglecting the disadvantages of proprietary IP regimes<sup>89</sup> or the positive spillover values of open access and free content environments.<sup>90</sup> Rather, my argument is that tensions and dichotomies that we are accustomed to portrait between “IP-centric” and “Beyond IP” environments<sup>91</sup> are tensions and dichotomies which are also internal to each type of such environments. One method of further supporting this argument is by examining beyond IP networked information environments according to the same parameters under which the political economy of traditional corporate media was critically examined,<sup>92</sup> including the parameters of: (a) the nature and characteristics of the media products that are being produced; (b) the related parameter of cultural

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<sup>87</sup> See also JARON LANIER, YOU ARE NOT A GADGET, 76–85 (2010) (criticizing ideals of “open” or “free” culture as favoring aggregators and amateur remixers over professional authors).

<sup>88</sup> See *supra* notes 82–83.

<sup>89</sup> See *supra* notes 2, 4–7.

<sup>90</sup> See *supra* 8–9.

<sup>91</sup> See, e.g., MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE (2012); Balkin, *supra* note 8, at 15–17; Benkler, *From Consumers to Users*, *supra* note 42; Balkin, *supra* note 8 at 15–17; Kapczynski, *The Cost of Price*, *supra* note 1.

<sup>92</sup> See generally BAKER, MEDIA, MARKETS, AND DEMOCRACY, *supra* note 22; Guy Pessach, Critical Notice, *Media, Markets, and Democracy: Revisiting an Eternal Triangle*, 17 Can. J. L. and Juris., 209, 210–15 (2004) (reviewing EDWIN C. BAKER, MEDIA, MARKETS AND DEMOCRACY (2002)) [hereinafter *Pessach, Media, Markets and Democracy, Critical Notice*].

diversity; (c) media concentration and barriers of entry; (d) basic values such as privacy, personal autonomy, free speech, and distributive values. If one conducts such an examination, the following findings arise:

Critical approaches to the political economy of traditional corporate media emphasize the special nature of media products as public goods and, hence, the embodied failure of a market oriented media system to provide the public with the whole array of media products which are socially desired.<sup>93</sup> The argument is that markets predictably provide inadequate amounts and inadequate diversity of media products, thus producing a wasteful abundance of content responding to mainstream tastes and neglecting civically, educationally, and multicultural pluralistic content.<sup>94</sup>

More specifically, there are four inconclusive elements that together lead to such results: (a) externalities, both positive and negative, of media contents, which are not properly or adequately brought to bear by the market on the decision making of either audiences or media enterprises.<sup>95</sup> (b) The nature of advertising-supported media as a “market for eyeballs,” which sells audiences to advertisers and consequently leans toward media products that have a relatively wide appeal and gloss over. Media products that follow the segments of audiences and the environment, which is suitable for selling the advertised products, rather than tend to the diversity of actual interests and needs of people.<sup>96</sup> (c) The nature of monopolistic competition in media products (due to their public good nature) as a consideration for favoring “blockbuster” products over more diverse media products which are targeted to smaller and

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<sup>93</sup> See BAKER, MEDIA, MARKETS, AND DEMOCRACY, *supra* note 22, at 1–96.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 41–62.

<sup>96</sup> *Id.* at 24–30, 182–83.

unique audiences.<sup>97</sup> (d) The failure of a market oriented media system to have any natural or logical priority as a method of identifying and satisfying people's preferences and desires; and furthermore, the distortions that market-generated preferences produce due to the inherent bias of markets toward commodified media products, and the fact that people's preferences are determined by, rather than being exogenous to, any current realm of media products they are effectively exposed to.<sup>98</sup>

Beyond IP, networked environments do not follow exact similar patterns. In a variety of life dimensions, beyond IP networked environments mitigate and bypass the above-mentioned shortcomings of traditional corporate media: amateurs' and user-generated content,<sup>99</sup> collaborative media and commons-based peer production<sup>100</sup> are just a few examples for the manners in which spaces beyond IP, or spaces with reduced appearance of IP as a governance regime, diversify cultural production and empower bottom-up individual and civic-engaged creative engagements.<sup>101</sup> At the same time, however, beyond IP networked environments also parallel and to some degree even escalate failures and disruptions that are associated with traditional corporate media's political economy.

To begin, in terms of media concentration and barriers of entry, the networked environment is highly concentrated: Google controls around seventy percent of search services;<sup>102</sup> YouTube controls around seventy percent

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<sup>97</sup> *Id.* at 3–40.

<sup>98</sup> *Id.* at 63–95.

<sup>99</sup> See, e.g., Chander & Sunder, *supra* note 9; Hunter & Lastowka, *supra* note 9.

<sup>100</sup> See, e.g., Benkler, *Coase's Penguin*, *supra* note 9.

<sup>101</sup> See also BENKLER, *THE WEALTH OF NETWORKS*, *supra* note 3, at 116–127, 212–232, 273–300; LESSIG, *REMIX*, *supra* note 3, at 177–224.

<sup>102</sup> See CURRAN, FENTON & FREEDMAN, *supra* note 70, at 89; see also ELI M. NOAM, *MEDIA OWNERSHIP AND CONCENTRATION IN AMERICA*, 273–294, 424–425 (2009).

of online video clips and music video services;<sup>103</sup> and Facebook accounts for more than fifty percent of social networking traffic.<sup>104</sup> This highly concentrated environment is partially explained by network effects and power law distribution that give an advantage to large scale intermediaries.<sup>105</sup> Additionally, however, this tendency is further stimulated by the main sources from which revenues are extracted in a networked environment: advertising revenues and the commodification of information. Regarding such revenue sources: the bigger the platform is—the better it serves for generating revenues. This in turn generates a cycle under which advertisers (looking for content), data brokers (looking for information), speakers/creators/content distributors (looking for audiences) and audiences (looking for content/information) are driven back to the same platforms which thus regain their dominance and market share.<sup>106</sup>

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<sup>103</sup> See *supra* note 102.

<sup>104</sup> *Id.*

<sup>105</sup> 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 NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 132–33 (2008); ALBERT-LÁSZLÓ BARABÁSI, LINKED: THE NEW SCIENCE OF NETWORKS 73–77 (2002); Lada A. Adamic & Bernardo A. Huberman, *Power-Law Distribution of the World Wide Web*, 287 SCI. 2115 (2000); Albert-László Barabási & Réka Albert, *Emergence of Scaling in Random Networks*, 286 SCI. 509 (1999); Bernardo A. Huberman & Lada A. Adamic, *Growth Dynamics of the World-Wide Web*, 401 NATURE 131 (1999). Network effects, or network externalities, are “markets in which the value that consumers place on a good increases as others use the good.” See Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CALIF. L. REV. 479, 481 (1998). 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.

<sup>106</sup> See generally Florence Thépot, *Market Power in Online Search and Social-Networking: A Matter of Two-Sided Markets*, 36 WORLD COMPETITION 195 (2013).

There are also findings that while there is indeed an extremely “long tail” consisting of thousands of individual points of access to content and information, and at the end of the day, traffic is concentrated amongst the top few sites.<sup>107</sup> The economics of beyond IP market environments may also have a tendency to undermine the potential of long tail economics, because beyond IP market environments do not extract direct revenues from distributing and selling creative works. Long tail economics maintain that the ease of access and search provided by the Internet, combined with the lack of physical constraints, allows the distribution and selling of cultural products to a long tail of “niche” diverse tastes. The long tail model, however, relies on extracting direct revenues from content provision and this is exactly the missing element in beyond IP market realms.

A second parameter under which the political economy of traditional corporate media has been critically examined is content diversity and the characteristics of the media products that are being produced.<sup>108</sup> Here also, a close

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<sup>107</sup> 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. See CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* (2006).

<sup>108</sup> See C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS*, 93–113 (describing and explaining the tendency toward media concentration in networked communication platforms); NOAM, *supra* note 102, at 273–94, 424–25; 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); see also Anita Elberse, *Should You Invest in the Long Tail?*, 86 HARV. BUS. REV. 88 (2008) (arguing,



inspection reveals that under certain conditions, beyond IP environments might also undermine content diversity. Market economy settings that are structured around free content incentivize what seems as an extreme version of the traditional “market for eyeballs” and advertising-supported content distribution platforms.<sup>109</sup> The reason is straightforward: If advertisements and users’ traffic are becoming the sole source of revenues, information and content production must follow a formula that maximizes users’ traffic and audience attention to advertisements. This, in turn, causes wasteful investment in duplicated homogenous specific types of contents that are likely to maximize users’ traffic and audience attention. Additionally, beyond IP, networked environments also impose pressures that weaken other competing models of content production and content distribution; particularly, models that are based on selling content, because competition versus zero pricing models is fierce, if not impossible. “Free”, as a predatory pricing mechanism, leaves limited market share for creative and informational works, which do aim at extracting revenues from selling content.

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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), <http://ssrn.com/abstract=941200> [<https://perma.cc/364H-Y94G>] (arguing that the internet is skewed towards popular content in terms of search costs).

<sup>109</sup> For an analysis of the traditional corporate media “market for eyeball,” see BAKER, MEDIA, MARKETS, AND DEMOCRACY, *supra* note 22, at 24–30, 182–83; (analyzing the traditional corporate media “market for eyeball”); ROBERT MCCHESENEY, THE POLITICAL ECONOMY OF GLOBAL COMMUNICATION, 19 (1998); LEO BOGART, COMMERCIAL CULTURE: THE MEDIA SYSTEM AND THE PUBLIC INTEREST 65 (1995); EDWIN C. BAKER, ADVERTISING AND A DEMOCRATIC PRESS (1994) (providing factual evidence and analyzing the prominent influence that advertisers have on the content of media products within advertisement-supported media entities).

The political economy of beyond IP markets also conflates informational privacy and content concerns. As already mentioned, beyond IP market economies are substantially structured around industrial commodified utilization of personal information.<sup>110</sup> Networked corporate media entities utilize and trade flows of information about consumers for purposes, such as targeted advertisements, price discrimination, marketing, and risk management templates that maximize the extraction of surplus from consumers.<sup>111</sup> This dimension, which is usually discussed through the prism of privacy concerns,<sup>112</sup> also implicates on the types, characteristics, and attributes of the media products that are being produced.

The economy of monetizing personal information and predictive big data businesses require communicative and informational products that are suitable for and that maximize the gathering and utilization of large-scale quantities of valuable information including: social networks, search utilities, photo sharing applications, and other forms of online engagements that along with speech and communicative dimension also functions as facilitators of informational capitalism. We tend to perceive such services and utilities as enablers of personal and individual capacities, but at the end of the day the ecosystem of free information and content flow is relatively narrow and repetitive in terms of its coverage. We are channeled, tempted and accustomed to communicative spheres in which tracking, analysis, prediction, and then marketing are highly efficient and effective.<sup>113</sup>

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<sup>110</sup> See *supra* notes 10–16; *infra* Part II(B).

<sup>111</sup> *Id.*; see also Strahilevitz, *supra* note 25; Cohen, *What Privacy is For?*, *supra* note 18.

<sup>112</sup> *Id.*

<sup>113</sup> See PARISER, *supra* note 72; TUROW, *supra* note 72.

The ability of firms to extract revenues and rents from such activities,<sup>114</sup> which do not require substantial investment in content production, impacts incentives and priorities to invest in content production. Incentives to invest in diverse content and cultural production are partially replaced by incentives to invest in zones, environments, and utilities that are magnets for users' traffic and personalized information.

The growing centrality of big data and personalized information, as means of production, also has an allocative–distributive implication on cultural production. Indeed, beyond IP markets are effective in making information and content shared resources.<sup>115</sup> Networked communication platforms are also largely based on an end-to-end design which decentralizes and democratizes cultural production and cultural distribution.<sup>116</sup> At the same time, however, users, content creators, and individuals do not have access to the data which is gathered, processed, utilized, and commercialized by platforms, social networks, and search utilities operators.<sup>117</sup> Though, such data is essential in order to reach tailored audiences, effectively distribute content, determine pricing schemes, and identify the recipients of speech activities. Again, in Jaron Lanier's language, these

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<sup>114</sup> See, e.g., Cohen, *What Privacy is For?*, *supra* note 18, at 1912–17; Strahilevitz, *supra* note 25, at 2022–24; Omer Tene & Jules Polonetsky, *Big Data for All: Privacy and User Control in the Age of Analytics*, 11 NW. J. TECH. & INTELL. PROP. 239 (2013).

<sup>115</sup> See generally BENKLER, *THE WEALTH OF NETWORKS*, *supra* note 3; Brett M. Frischmann, *Peer-to-Peer Technology as Infrastructure: An Economic Argument for Retaining Sony's Safe Harbor for Technologies Capable of Substantial Noninfringing Uses*, 52 J. COPYRIGHT SOC'Y 329 (2005).

<sup>116</sup> See BARBARA VAN SCHEWICK, *INTERNET ARCHITECTURE AND INNOVATION* (2010); Mark Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 92 (2001).

<sup>117</sup> See Tene & Polonetsky, *supra* note 114, at 254–55.

are all privileges that only a handful of siren servers' operators are entitled to.<sup>118</sup>

Consequently, in terms of personal capacities, autonomy, and distributive concerns, beyond IP markets raise speech-related allocative concerns. Individuals' content and information may indeed be free as the air to common use. Yet, at the same time, the proceeds of aggregating and analyzing peoples' interactions with such content and information are de facto propertized by networked corporate entities without being transparent. This, in turn, causes distributive disparities between the effective capacities of networked corporate platforms and the effective capacities of individuals in reaching audience attention.

To summarize my argument so far, contemporary networked media environments are increasingly structured around the skein of beyond IP corporate market settings. In a close inspection, beyond IP, networked environments replicate tensions, dichotomies, market structures, power hierarchies, and content biases, which are similar to the political economy of traditional proprietary corporate media. My purpose in the next part is to take a closer inspection at the interface between industrial organization and legal regulation, while focusing on two dimensions, copyright law policy and informational privacy protection.

### III. THE LEGAL INTERFACE

As already stated, the emergence of Beyond IP, market economies stems from sources that are much broader than mere legal policy. The socioeconomic conditions of networked communication platforms provided the basis and catalysis for the emergence of such economies by significantly the costs of producing, distributing, and

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<sup>118</sup> See LANIER, *supra* note 70, at 48–57.

accessing informational content.<sup>119</sup> It is this reality, which triggered excess capacity and made IP-centric, proprietary schemes less efficient and less attractive.<sup>120</sup> At the same time, legal policy, particularly in the areas of copyright and privacy, was also a stimulator for the emergence and growth of networked capitalism. My purpose in this part is to describe the manners in which informational capitalism utilizes, frames, and construct “Beyond IP” legal policies in the areas of copyright and informational privacy.

#### A. *Copyright Policy*

Copyright policy is the first juncture where one meets the paradoxes of networked informational capitalism. The common critical approach pairs corporate media interests with an IP-centric approach.<sup>121</sup> This may have been the case up until the emergence of networked communication platforms. In contemporary realms, however, the interface of copyright protection and informational capitalism seems more complex.

Several scholars have made a strong case regarding the weak correlation between copyright protection and incentives for networked content production and content distribution.<sup>122</sup> In fact, copyright protection may even

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<sup>119</sup> See *supra* notes 45–49 and accompanying text.

<sup>120</sup> See BENKLER, *THE WEALTH OF NETWORKS*, *supra* note 3, at 59–127; *supra* notes 47–48 and accompanying text.

<sup>121</sup> See *supra* notes 2–7.

<sup>122</sup> See BENKLER, *THE WEALTH OF NETWORKS*, *supra* note 3 (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); KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* (2012) (discussing the empirical question of whether IP incentives matter for innovation); Kapeczynski, *The Cost of Price*, *supra* note 1, at 970, 975–77 (discussing and critiquing “IP internalism:” the notion that property-like systems are necessary or optimal ways to motivate creative production); Tushnet, *supra* note 4, at

disincentivize engagement in socially benefiting activities—activities that would have covered the costs of production if only their inputs were not copyrighted.<sup>123</sup> The irony, however, is that as described in Part II *supra*, IP’s negative spaces also incentivize and are practically the engine of an informational ecosystem, which may not be socially desirable in all of its aspects. The problem, in such instances, therefore, is not a problem of free riding and lack of incentives, absent of copyright protection. Rather, it is a problem of positive incentives, absent of copyright protection, to concentrate on discourse, culture, and information patterns which may be profit maximizers, but at the same time may also be culturally reductionists.

In a similar manner, there may be parallels between hierarchies of powers that result from extensive copyright protection<sup>124</sup> and hierarchies of power that result from beyond IP, “free content” markets. Both settings are susceptible in their tendency to concentrate significant media power and control a handful of media and information entities. One type of information empire utilizes broad corporate proprietary protection to leverage its power and another type of information empires relies on free access and utilization of content to leverage its power.

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523–27; Zimmerman, *supra* note 4 (presenting findings and arguments that authors’ and creators’ incentives diversify and range far from copyright’s direct economic incentive).

<sup>123</sup> See generally Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009); Christina Bohannon, *Copyright Harm, Foreseeability and Fair Use*, 85 WASH. U. L. REV. 969 (2007); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUDIES 325, 332–41 (1989); Glynn S. Lunney, Jr., *Reexamining Copyright’s Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 496–97 (1996).

<sup>124</sup> See Netanel, *Market Hierarchy*, *supra* note 2 (discussing the linkage between extensive copyright protection and market hierarchies in cultural and creative environments).

Positive copyright law provides some indications for such tendencies. Consider, for example, the DMCA § 512(c)—copyright’s safe harbors for content sharing platforms.<sup>125</sup> Court rulings 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 harbor for hosting services providers.<sup>126</sup> This legal regime is indeed highly plausible, if one considers the value of the safe harbor

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<sup>125</sup> See 17 U.S.C. § 512 (2012) (detailing safe harbors for internet service providers). The first harbor, 17 U.S.C. § 512(a), protects services which are mere conduits for digital transmissions. The second, 17 U.S.C. § 512(b), 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.

<sup>126</sup> 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, 661–92 (2012). The most prominent case in this regard is *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012). In this case, 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, 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).

in supporting user-generated content, amateur content, and new channels of distribution.<sup>127</sup> Concurrently, however, in a networked economy of power, law distribution, and network effects,<sup>128</sup> this legal regime had other consequences as well; it effectively immunized costless provision of large repertoires of copyrighted works in a manner that channeled audience attention to a handful of global entities, which now obtains a dominant bottleneck market position.<sup>129</sup>

YouTube is a paradigmatic example in this regard. The dominant and unprecedented market and power position that YouTube has managed to obtain<sup>130</sup> is mostly due to § 512(c)'s safe harbor regime. It is this 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 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)

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<sup>127</sup> See, e.g., 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=a376e7886d4bcf62&ei=5088&partner=rssnyt> [<https://perma.cc/HDD5-QJPZ>]; Tim Wu, *Does YouTube Really Have Legal Problems?*, SLATE (Oct. 26, 2006, 4:28 PM), <http://slate.com/id/2152264> [<https://perma.cc/6V7B-AMJD>] (“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.’”).

<sup>128</sup> See *supra* note 105.

<sup>129</sup> See also Pessach, *Deconstructing Disintermediation*, *supra* note 36, at 862–67.

<sup>130</sup> See *Statistics*, YOUTUBE, <https://www.youtube.com/yt/press/en-GB/statistics.html> [<https://perma.cc/7TWK-EJD8>]; *youtube.com Traffic Statistics*, ALEXA, <http://www.alexa.com/siteinfo/youtube.com> [<https://perma.cc/W2ZU-MZZJ>]. YouTube is the third 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 adjusted to seventy countries, seventy-six languages, and approximately eighty percent of users’ traffic is outside the U.S.



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.<sup>131</sup>

Practically, § 512(c)'s safe harbor regime, which obliges YouTube to remove (*ex post*) infringing materials, based on a takedown notice by copyright owners, was a shield rather than a real obstacle in establishing the platform's dominance. It supported the rapid growth in the platform's popularity and the immense portfolio of popular copyrighted content that it hosted. Furthermore, the legal policy under which the embedding of YouTube's content in third parties' websites did not amount to a copyright infringement.<sup>132</sup> Instead, this further enhanced the platform's popularity and dominant position as a global repository of content.

Once this dominant market position was achieved, however, it was 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 attracted 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 legitimize its content activities under its own terms was considerable.<sup>133</sup> Authors, creators, and performers have very few options other than agreeing to YouTube's terms and conditions or vanishing

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<sup>131</sup> See *supra* notes 57, 64.

<sup>132</sup> See *supra* note 105.

<sup>133</sup> See Pessach, *Deconstructing Disintermediation*, *supra* note 36, at 844–54, 862–67.

from audiences' awareness. These terms and conditions tend to be fixed and non-negotiable for most contributors, and based on one unilateral business model of free content and monetization only through advertisements' revenues.<sup>134</sup>

The YouTube model sets a good example for a beyond IP market. Formally, it operates within the boundaries of copyright law. Practically, however, with the backing of § 512(c)'s safe harbor regime, it establishes market mechanisms, which are based upon monetization through free distribution of content. The entire playing field is built upon this premise, which also guides the conducts, expectations, and preferences of its repeat participants: the platform, content contributors, users, ancillary intermediaries (through content embedding), advertisers, data brokers, and marketers.

The YouTube model also demonstrates the complex and contradictory nature of beyond IP market mechanisms. There are many positive spillovers in such an environment, which functions as a common infrastructure in terms of peoples' capacities, both as speakers and as recipients, to access, distribute, and utilize creative and informational content. At the same time, the YouTube, beyond IP model also demonstrates counter dynamics, including unilateral coded boilerplate compensation schemes that undermine contributors' welfare while relying solely on advertisements' revenues;<sup>135</sup> pressures toward ruinous competition in manufacturing blockbuster hits that generate popularity and audience attention;<sup>136</sup> an extremely concentrated distribution layer;<sup>137</sup> intense convergence between product placement, brand marketing, stealth

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<sup>134</sup> *Id.* at 846–47, 851–52.

<sup>135</sup> *Id.* at 845–49.

<sup>136</sup> *Id.* at 855.

<sup>137</sup> See CURRAN, FENTON & FREEDMAN, *supra* note 70, at 89; see also NOAM, *supra* note 102, at 273–94, 424–25.

advertisement, and creative content;<sup>138</sup> and a limited investment in content production along with targeted delivery of content based on personal data collection.<sup>139</sup>

On the face of it, if one encounters the immeasurable amount of content, which is freely available through YouTube, it seems counterintuitive to question the vitality and social contribution of YouTube. Yet, upon closer inspection, there is a distinction between YouTube's function as a repository for past's materials<sup>140</sup> and its *ex ante* content production and distribution functions. Regarding prospective cultural production, along with its contribution to bottom-up, decentralized, cultural exchange, there are limits and biases to YouTube's cultural production function. Also, YouTube demonstrates that a beyond IP realm, which is based on limited exposure to copyright liability, provides no guaranty against restrictive contractual and technological terms, which are imposed on the platform's users and contributors, including restrictions that override copyright exemptions.<sup>141</sup>

Altogether, this means that there is a cycle of power dialectics under which a content sharing platform, such as YouTube, advocates and advances spaces, which are beyond IP liability, while at the same time it utilizes its (beyond IP) leveraged centrality and market power to impose rules and practices that limit the powers and capacities of third parties—both contributors and users.

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<sup>138</sup> See Menell, *supra* note 71, at 798–808.

<sup>139</sup> See PARISER, *supra* note 72; TUROW, *supra* note 72.

<sup>140</sup> For YouTube's functions as a repository for past's materials, see Guy Pessach, *[Networked] Memory Institutions: Social Remembering, Privatization and its Discontents*, 26 CARDOZO ARTS & ENT. L.J. 71, 78, 85–91 (2008).

<sup>141</sup> See Guy Pessach, *Reciprocal Share-Alike Exemptions in Copyright Law*, 30 CARDOZO L. REV., 1245, 1264–67 (2008); Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. (forthcoming 2016), manuscript at 41–48, <http://ssrn.com/abstract=2607910> [<https://perma.cc/CL7Q-DD5L>].

Another demonstrative example is the Google Book Library Project.<sup>142</sup> In this project, Google scanned public domain and copyrighted collections of books from several major academic and public libraries into its database.<sup>143</sup> In response to search queries, users would be able to browse the full text of public domain materials but not the full text of copyrighted materials, from which only snippet quotations were presented.<sup>144</sup> Google successfully relied on the fair use defense<sup>145</sup> for the reproduction of copyrighted works for archival and retrieval purposes, as long as only snippet quotations from the copyrighted works were presented and made available to the public.

This successful legal strategy is also a beyond IP legal strategy. Together with public domain works, the skein of the Google Books Library Project is beyond the boundaries of IP, in terms of the fact that its operation does not require authorization from copyright owners. At the same time, however, as several scholars have demonstrated,<sup>146</sup> along with its fundamental social contribution, some elements, operational terms, contractual terms, and technological characteristics, the Google Books

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<sup>142</sup> See *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d. Cir. 2015).

<sup>143</sup> *Id.* at 208.

<sup>144</sup> *Id.* at 209–10.

<sup>145</sup> *Id.* at 212–29.

<sup>146</sup> See JEAN-NOEL JEANNENEY, *GOOGLE AND THE MYTH OF UNIVERSAL KNOWLEDGE*, 82 (Teresa Lavender Fagan trans., 2007); Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 MINN. L. REV. 1308 (2010); James Grimmelmann, *How to Fix the Google Book Search Settlement*, 12 J. INTERNET L. 10, 1, 11 (2009); James Grimmelmann, *The Amended Google Books Settlement Is Still Exclusive*, COMPETITION POL'Y INT'L ANTITRUST J., Jan. 2010, at 2. See generally Randal C. Picker, *Antitrust and Innovation: Framing Baselines in the Google Book Search Settlement*, 10 GLOBAL COMPETITION POL'Y INT'L: THE ANTITRUST CHRON. 2 (Autumn Oct. 2009); Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, 5 J. COMPETITION L. & ECON. 383 (2009).

Library Project might go against the public interest.<sup>147</sup> The point is that just like the project's social values, these less desirable aspects, as well, derive from Google's reliance on a successful beyond IP legal strategy. Here also, reliance upon a beyond IP legal strategy leverages centrality and market power, which are then utilized to impose rules and practices that are proprietary in terms of the limitations that they impose on powers and capacities of third parties.

A beyond IP copyright policy, therefore, results in mixed heterogenic outcomes. Also, it supports and advances networked corporate media interests similar to the ones that a proprietary IP centric approach advances. As set forth in the next part, similar observations are also apparent in the context of informational privacy.

### *B. Informational Privacy*

Informational privacy touches upon one's right to control the collection, exchange, and processing of information about oneself.<sup>148</sup> Informational privacy also has a collective, public-regarding dimension in terms of the fact that it is essential in order to protect and promote social and political values, such as robust public debate and free speech.<sup>149</sup>

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<sup>147</sup> *Id.*

<sup>148</sup> See, e.g., Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119 (2004); Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393 (2001); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1203 (1998).

<sup>149</sup> See Nissenbaum, *supra* note 148, at 150; Cohen, *supra* note 148, at 1426–27; Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1607, 1664–66 (1999); Robert C. Post, *The Social Foundations of Property: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 959 (1989); Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 423 (1980).

Informational Privacy is in direct conflict with informational capitalism because of the manners in which informational capitalism perceives data and personal information as imminent means of production in a networked environment.<sup>150</sup> Champions of privacy protection are well aware of this tension.<sup>151</sup> Different legal regimes, such as the European Community Laws, attempt to regulate this tension and limit commercial exploitation of personal information.<sup>152</sup> Contemporary approaches to privacy regulation, however, tend to ignore the interface and linkage between beyond IP market settings and informational privacy concerns.

Beyond IP information and content markets rely upon and extract revenues from trading and commercializing personal information, as well as from targeted advertisements, which also rely upon personal information. In such a market economy, informational privacy concerns become an IP matter as well. In order to comprehend this argument, one needs to retrieve to the basics of a regulatory approach to copyright law.

A public-regarding regulatory approach to copyright law is very much about regulating incentives to engage in different types of information and cultural production activities.<sup>153</sup> To a large degree, a scrutinized, narrow scope

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<sup>150</sup> See Cohen, *What is privacy for?*, supra note 18, at 1915–17.

<sup>151</sup> *Id.* at 1916; see also supra note 25.

<sup>152</sup> See Steven Bellman et al., *International Differences in Information Privacy Concerns: A Global Survey of Consumers*, 20 INFO. SOC'Y 313, 320 (2004); Paul M. Schwartz, *European Data Protection Law and Restrictions on International Data Flows*, 80 IOWA L. REV. 471 (1995); Strahilevitz, supra note 25, at 2033–37.

<sup>153</sup> See, e.g., Wendy J. Gordon, *Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property*, 17 U. DAYTON L. REV. 853, 855 (1992) (analyzing the incentive argument as a prisoner's dilemma in which players simultaneously have to choose between creating a work of their own and copying the work of another. For a plausible payoff structure, copying strictly dominates creation and the

of copyright protection is justified because it is essential to avoid unnecessary burdens and restrictions on secondary socially desirable (yet not commercially profitable) activities.<sup>154</sup> The same public-regarding regulatory approach also supports a scrutinized narrow scope of copyright protection because of the disrupted incentives regime that extensive copyright protection tends to generate. Broad copyright protection is perceived as an undesirable receipt towards a relatively narrow range of creative works that appeal to large audiences and can be utilized in as many ancillary and derivative markets as possible.<sup>155</sup> More generally, one main goal of copyright law as a regulatory tool is the goal of maximizing the internalization of positive externalities and minimizing negative externalities.<sup>156</sup>

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result is the Pareto-dominated equilibrium that is associated with prisoner's dilemma games. In this case, both players choose to copy and nothing is created. Copyright solves this non-excludability problem and escapes the prisoner's dilemma by giving authors legally enforceable property rights to exclude others from using their works without consent (or at least without paying). *See generally* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUDIES 325 (1989) (having been regarded as the first comprehensive economic analysis of copyright law); Robert Hurt & Robert Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421 (1966); Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167 (1934) (providing early thought on the subject).

<sup>154</sup> *See, e.g.*, WILLIAM M. Landes & RICHARD A. Posner, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW, 91–108, 332–41; (2003); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 496–97 (1996); *see also* Jeffrey L. Harrison, *A Positive Externalities Approach to Copyright Law: Theory and Application*, 13 J. INTELL. PROP. L. 1, 5–6 (2005); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax case and Its Predecessor*, 82 COLUM. L. REV 1600 (1982).

<sup>155</sup> *See supra* note 2; Pessach, *Copyright as a Silencing Restriction*, *supra* note 38.

<sup>156</sup> *See* Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM.

As part of this general framework, informational privacy concerns should also be taken into account. My discussion thus far demonstrated the direct linkage between beyond IP market settings and the abridgment of informational privacy. If beyond IP profit-motivated market settings tend to raise informational privacy concerns, then this is a parameter that should be taken into account within copyright policy and law making. More specifically, the construction of copyright’s negative spaces requires careful consideration of its impact on informational privacy concerns.

Consider, for example, the statutory requirement, within the DMCA’s safe harbor for hosting services providers (§ 512(c)),<sup>157</sup> which also applies on content-sharing platforms, that the platform should not obtain financial benefit directly attributable to the infringing activity. Thus far, this element, within § 512(c), has not received much judicial discussion. Nevertheless, courts’ general approach has been to narrowly interpret and apply the element of “financial benefit directly attributable to the infringing activity.”<sup>158</sup> Informational privacy concerns may support a different approach according to only non-commercial platforms or individuals who should benefit from a safe harbor for content-sharing platforms. This would mean a broad interpretation of the term “financial benefit directly attributable to the infringing activity” that

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L. REV. 257 (2007); Brett M. Frischmann, *Evaluating the Demsetzian Trend in Copyright Law*, 3 REV. L. & ECON. 649 (2007); Mark A. Lemley, *Property, Intellectual Property, and Free Riding* 83 TEX. L. REV. 1031 (2005).

<sup>157</sup> See 17 U.S.C. § 512(c) (2012); see also *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012) (confirming the applicability of § 512(c) safe harbor on content-sharing platforms).

<sup>158</sup> See *Rasenberger & Pepe*, *supra* note 56, at 685–86; 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 627, 645 (S.D.N.Y. 2011).



also covers revenues from advertisements and commercial utilization of personal data.

The purported goal of such an approach is to disincentivize market settings of informational capitalism, which build upon optimized commercialization and utilization of mass-aggregated personal information, including thorough targeted marketing and advertising schemes. Another byproduct of such an approach would be fewer incentives to concentrate on content and information that are magnets for advertisements' supported eyeballs and personal data collection. At the same time, not-for-profit, amateur, and civic-engaged content engagements would still benefit from the § 512(c) safe harbor, because their conducts bear social value without raising significant informational privacy concerns.

More generally, from an informational privacy perspective with regard to profit-motivated market realms, there may be an advantage to realms in which revenues—and incentives—derive directly from selling content and not from commercializing its surrounding data, personal information, and advertising revenues. Maintaining culture and creative industries that rely upon revenues, which are extracted directly from media products, reduce the pressures that beyond IP market realms impose on both informational privacy and cultural diversity.

Put together, this means that from an informational privacy perspective, copyright law should support negative spaces, beyond IP, and broad copyright exemptions, more prominently with regard to not-for-profit activities. At the same time, profit motivated corporate media should be channeled to paths that focus on direct economic exploitation of content and media products. Informational privacy is impacted by copyright policy leaning towards beyond IP market structures. Therefore, within the design of copyright's incentives regime, privacy concerns should be taken into account. If different types of content production

institutions raise different levels of privacy concerns, then this is one parameter, among others, to be considered within the design of copyright law.

Nothing in the above-mentioned ignores the fact that as Amy Kapczynski has demonstrated,<sup>159</sup> concurrently, IP's pricing mechanisms also impose costs and harms to informational privacy. They do so because reliance on pricing mechanisms of intangible goods protected by IP induces data collection and data retrieval for price discrimination and profit maximization purposes.<sup>160</sup> Here, again, one witnesses how disruptions and failures of IP-centric regimes may also appear, or even be stimulated, by profit-motivated, beyond IP regimes. The response, therefore, cannot be in advocating for a single, unilateral, institutional choice between IP-centric regimes and beyond IP regimes. Rather, each of the two regimes should be shaped in manners that consider and respond to the impact of market mechanisms, which may appear in both regimes.

Against this approach, one could argue that the appropriate track to confront informational privacy concerns is through direct top-down legal ordering, which sets limitations on the collection, aggregation, retrieval, utilization, and trading of personal data.<sup>161</sup> Important as this legal dimension may be, it cannot fully respond to the challenges that informational capitalism raises in the context of informational privacy. To begin with, there is a scale of activities that may raise different degrees of informational privacy concerns. Some of these activities do not give rise to harms that justify their entire prohibition by law. At the same time, copyright law as a “soft” mechanism of regulation, in the above-mentioned manners, may have a role in disincentivizing such less socially desired activities. A

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<sup>159</sup> See Kapczynski, *The Cost of Price*, *supra* note 1, at 1006–18.

<sup>160</sup> See *id.*

<sup>161</sup> See *supra* note 150 (regarding the regulation of data privacy in European countries).

second related point is that the introduction of informational privacy concerns, into the IP matrix, also has an expressive role in unveiling less desired consequences of beyond IP market settings. If there is a linkage between beyond IP market settings and informational privacy concerns, then this tension also needs to be addressed from the perspective of IP as a regulatory tool.

Concurrently, but from a reverse dimension, informational capitalism also informs us about the potential role of privacy protection in regulating cultural production. Thus far, I have focused on the linkage between copyright law and informational privacy. Additionally, privacy protection may also have a role in regulating cultural production. Different degrees of restrictions and limitations on personal data collection, trading and utilization for targeted advertisements, and sponsored content and product placement may derive different degrees of corporate media's economic incentive to strategically invest in content that serves such purposes.

Consider, for example, the activities of companies, such as Outbrain<sup>162</sup> and Taboola,<sup>163</sup> which combine content recommendations with stealth content marketing. The economic effectiveness of such platforms, which embed content in third parties' ("publishers'") websites, is largely

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<sup>162</sup> See OUTBRAIN, <http://www.outbrain.com> [<https://perma.cc/M652-V6WZ>].

<sup>163</sup> See TABOOLA, <https://www.taboola.com> [<https://perma.cc/UBQ9-PKB3>]. Outbrain and Taboola are advertising-focused content discovery platforms whose content marketing module is designed to help Internet publishers increase web traffic by presenting sponsored website links, with the goal of inducing visitors to make impulse purchases. They provide recommendations for several media types, including online, news, video, and mobile. Taboola and Outbrain use behavioral targeting to recommend articles, slideshows, blog posts, photos or videos to a reader, rather than relying on a more basic "related items" widget. The sites with the recommended articles pay for this service, and the platforms pay the site on which the links appear.

based on tracking and surveillance mechanisms. The economic success of such platforms impacts cultural production and cultural diversity because such platforms require both content that attracts users and direct users to certain specific types of content.

Regulating such platforms' tracking and surveillance mechanisms may impact their effectiveness and consequently also their incentive to produce content that complies with their basic business model. Predictive data mining is a powerful tool not only for price discrimination<sup>164</sup> but also for optimizing investment in information and content production. Such optimization, however, shapes rather than just reflects people's preferences and desires.<sup>165</sup> Regulating data mining and private surveillance practices, therefore, is a mechanism that among other dimensions may mitigate adverse effects of such practices on cultural production.

The above-mentioned observations are not unique for beyond IP market settings. They may be similarly relevant to proprietary cultural production environments. Nevertheless, the role of privacy protection in regulating media environments seems to gain increasing importance in the context of beyond IP markets settings. In such instances, the means, inputs, and outputs of production—as well as the sources of revenues and incentives—are bundled with personal data. Informational privacy regulation, therefore, has a direct impact on the operation and products of such

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<sup>164</sup> See, e.g., Kapczynski, *The Cost of Price*, *supra* note 1, at 1006–18; Strahilevitz, *supra* note 25, at 2021–33.

<sup>165</sup> See Kapczynski, *The Cost of Price*, *supra* note 1, at 1008; Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1424 (2001); Oscar H. Gandy, Jr., *Exploring Identity and Identification in Cyberspace*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1085, 1100–01 (2000); Kenneth L. Karst, "The Files": *Legal Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 LAW & CONTEMP. PROBS. 342, 361 (1966).

media environments. Additionally, in such instances, IP has a very limited role, if at all, as means of regulation because revenues and incentives do not rely upon IP. By their very basic nature, beyond IP market settings require a beyond IP form of regulation. Privacy protection may have a role in this regard.

#### IV. CONCLUSION – FROM BEYOND IP TO BEYOND INFORMATIONAL CAPITALISM

The mobilization of society's cultural ecosystem towards negative spaces beyond IP bears more than meets the eye at first sight. Aiming beyond IP may be highly contributive in unveiling the limits and cons of an IP-centric approach, as well as in developing alternate, more socially desirable, institutions and schemes for cultural production. At the same time, there is something inconclusive in the conventional wisdom of critical copyright scholarship, which tends to pair solely proprietary intellectual property protection with informational capitalism and the commodification of culture.

Tensions and dichotomies that we are accustomed to attribute to "IP-centric" regimes are tensions and dichotomies which may appear, or even be stimulated, by copyright's negative spaces and certain beyond IP legal regimes. There is a linkage between networked informational capitalism and components—both legal and ideological—which are derived from and are associated with beyond IP realms. Power hierarchies, industrialized corporate structures, media concentration, content biases, abridged creative diversity, and harms to informational privacy appear in beyond IP market settings no less than their appearance in IP centric regimes.

The novel contribution of this essay is in unbundling the seemingly Gordian knot between proprietary IP and capitalist structures of corporate media. Media

environments that are based on free distribution of content are no less vulnerable to corporate power hierarchies and their deficiencies in terms of diversity, autonomy, and democratic values. This argument folds significant normative implications because it questions the desirability of contemporary approaches, which support legal reforms towards beyond IP legal regimes. Additionally, unveiling the full consequences of beyond IP market realms also emphasizes the emerging role of privacy protection as means of regulating cultural production, particularly in spheres which are beyond IP.