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The Disappointments of Networks

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The Disappointments of Networks

Cover Page Footnote

Professor Graeme Dinwoodie, Professor Jonathan Griffiths, Professor Dev Gangjee, Professor Kimberlee Weatherall, Professor David Lindsay, Professor Graeme Greenleaf, Professor Jill McKeough, James Meese, Angus Lang, Professor Isabella Alexander, Professor Kathy Bowrey, and Genevieve Wikinson

THE DISAPPOINTMENTS OF NETWORKS

DR. HENRY FRASER*

ABSTRACT

The past 25 years have seen a ‘turn to culture’ in copyright scholarship. This cultural turn has produced an expansive account of copyright’s disadvantages with respect to qualitative cultural and political goals such as: promoting democracy, individual self-authorship, expressive diversity, and a more inclusive creative and discursive culture. A common view among proponents of the cultural turn is that copyright stands in the way of the democratization of creative and discursive spheres online. This article challenges that view.

Online ‘free’ content economies—characterized by peer production, decentralized selection, and peer to peer content sharing—have not lived up to the hopes of cultural turn thinkers. I focus on structural matters (structures of incentive and structures of power), critically applying descriptive and normative frameworks of the cultural turn.

Proponents of the cultural turn have been concerned about copyright’s role in concentrating cultural power. They should also be concerned about concentrations of cultural and communicative power in ‘free content’ economies. If they were concerned that commercial incentives under copyright regimes privileged bland and homogeneous content, they should also be concerned about the troubling incentives at play in online economies where free content is used to harvest user attention and sell advertisements.

This is not to say we should aim for maximalist copyright online. I show that both expansions of exceptions and limitations to copyright, and

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measures that strengthen copyright owners' exclusive rights, may entrench problematic incentives and power structures both online and off. We should therefore carefully assess how developments in law affect structures of power and incentive in the creative sphere as a whole, whether they formally 'weaken' copyright or 'strengthen' it.

2019

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INTRODUCTION

Copyright pessimism and internet optimism

Pessimism about copyright, and optimism about the potential of the internet to democratize cultural production, tend to go hand in hand. Over the past 25 years, copyright scholarship has taken a ‘cultural turn’.¹ Where traditional copyright scholarship focuses on balancing incentives for creativity against the need for access to works, the cultural turn is characterized by concern with copyright’s influence on the quality and character of culture. The cultural turn has produced an expansive account of copyright’s disadvantages with respect to qualitative cultural and political goals. These include the promotion of democracy, individual self-authorship, expressive diversity, and inclusiveness in the distribution of power to shape culture and discourse.²

The same body of literature has also produced a fairly rosy picture of internet culture, especially ‘free’ content economies characterized by peer production, creative remixing, decentralized selection, and peer to peer sharing of content.³ Professor Yochai Benkler was perhaps the leading

1. See Anupam Chander & Madhavi Sunder, *Copyright’s Cultural Turn*, 91 TEX. L. REV. 1397–1561 (2013).

2. See, e.g.: Anne Barron, *Kant, Copyright and Communicative Freedom*, 31 LAW AND PHILOSOPHY 1 (2012); Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319 (2017); YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006); Anupam Chander & Madhavi Sunder, *Copyright’s Cultural Turn*, 91 TEX. L. REV. 1397–1561 (2013); M. Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821 (2006); JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE (2012); ABRAHAM DRASSINOWER, WHAT’S WRONG WITH COPYING? (2015); C. J. CRAIG, COPYRIGHT, COMMUNICATION, AND CULTURE: RE-IMAGINING THE COPYRIGHT MODEL (2006).; Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375 (2005); Brett M. Frischmann, *Capabilities, Spillovers, and Intellectual Progress: Toward a Human Flourishing Theory for Intellectual Property*, 14 REVIEW OF ECONOMIC RESEARCH ON COPYRIGHT ISSUES 2 (2017); William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203 (1998); Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951 (2004); David Lange, *Reimagining the Public Domain*, 66 LAW AND CONTEMPORARY PROBLEMS 463–483 (2003); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004); Neil Natanel, *Copyright’s Paradox* (2008); Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, YALE L.J. 1–60 (2002); Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 101 (2008); M. Wong, *Toward an Alternative Normative Framework for Copyright: from Private Property to Human Rights*, 26 CARDOZO ARTS & ENT. L.J. 775 (2008).

3. Some proponents of the cultural turn, such as Professor Netanel, have been more skeptical of internet culture. See e.g. Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395–498 (2000). Netanel has also offered impressive, nuanced accounts of copyright’s role in promoting democratic civil society, even as it contributes to problematic market hierarchies which have negative effects on freedom of expression. See e.g. Neil Netanel, *Is the Commercial Mass Media Necessary, or Even Desirable, for Liberal Democracy?*,

exponent of this optimistic view (though his views have subsequently changed).⁴ He wrote, in his important and impressive book on *The Wealth of Networks*:

“By creating sources of information and communication facilities that no one owns or exclusively controls, the networked information economy removes some of the most basic opportunities for manipulation of those who depend on information and communication by the owners of the basic means of communications and the producers of the core cultural forms. It does not eliminate the possibility that one person will try to act upon another as object. But it removes the structural constraints that make it impossible to communicate at all without being subject to such action by others.”⁵

Benkler’s view (one shared by numerous cultural turn theorists of copyright) was that networked peer production, and de-propertyization of works online, promised a culture that is more inclusive and democratic; more expressively diverse; less susceptible to control and manipulation at a single source; and more affirming of free choice and expression, than mass media culture underwritten by proprietary copyright.⁶

Online free content economies have not, however, been living up to their promise. Every month seems to bring another government report, news story or book detailing the ills of the online world of information and discourse.⁷ The public, globally, is becoming more aware of:

WORKING PAPER TPRC CONFERENCE ON INFORMATION, COMMUNICATIONS, AND INTERNET POLICY (2001), <http://arxiv.org/abs/cs/0109092> (last visited Feb 24, 2014); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 THE YALE L.J. 283–387 (1996). As a general rule, however, culturally oriented theories of copyright have tended toward copyright pessimism and internet optimism.

4. Regarding these changes, *see below* note 31 and accompanying text.

5. BENKLER, *supra* note 2, at 465.

6. See e.g. Hunter and Lastowka, *supra* note 2, at 1018: “The destruction of copyright industries would be a terrible thing if, and only if, they represented the sole means that creative content could be generated. As we have seen, however, amateur-to-amateur functions now provide individuals with the opportunity to express themselves, and society has already benefited greatly from this expanded content generation. The next few years promise to provide even greater opportunities for this sort of content. As a result, society as a whole is likely to be better off if we allow for widespread decentralization of all content functions.” *See also*, e.g.: LESSIG, *supra* note 2; Giancarlo Frosio, *Re-Imagining Digital Copyright Through the Power of Imitation: Lessons from Confucius and Plato*, 5 PEKING UNIVERSITY TRANSNATIONAL LAW REVIEW 55–106 (2017); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263–324 (2002); Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: the Overloaded Impact of Marketing*, 19 BERKELEY TECH. L.J. 785–856 (2004).

7. See e.g. Frances Cairncross, *The Cairncross Review: a Sustainable Future for Journalism* (2019), <https://www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism> (last visited Feb 15, 2019); Department for Culture, Media and Sport, ONLINE HARMS WHITE PAPER (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf; RENEE DIRESTA ET AL., *The Tactics & Tropes of the Internet Research Agency: Independent Report to the US Senate Intelligence Committee*; Rosie Perper, *New*

- the extreme concentration of wealth and power in the hands of a few internet platforms;⁸
- exploitative and often unauthorized surveillance, harvesting, processing and disclosure of personal data;⁹
- mobbing, shaming and cyberbullying on social media;¹⁰
- polarization and incivility in online discourse;¹¹
- the proliferation of conspiracy theories and fake news;¹² and
- high profile ‘hacking’ of democratic process and public discourse through propaganda and provocation on social media, skillfully couched in the vocabulary of ‘meme’ and ‘remix’ culture.¹³

This article explores some of these problems in online free content economies, and the structural pressures underlying them.

In focusing on structural matters—structures of incentive, structures of power—I am adopting a descriptive framework that is firmly rooted in the cultural turn. That framework has a strong flavor of political economy. Proponents of the cultural turn – Benkler and Professor Neil Netanel foremost among them—have produced an impressive picture of copyright’s role in organizing the production, dissemination and use of works; and allocating wealth and cultural power as it does so.¹⁴ They have shown how

Zealand’s Privacy Commissioner Lashes Out at Facebook, Calling Those Behind the Company “Morally Bankrupt Pathological Liars”, BUSINESS INSIDER AUSTRALIA (2019), <https://www.businessinsider.com.au/new-zealand-privacy-commissioner-calls-facebook-morally-bankrupt-pathological-liars-2019-4> (last visited Apr 10, 2019).

8. See e.g. Chris Anderson & Michael Wolff, *The Web is Dead: Long Live the Internet*, WIRED (2010), http://www.wired.com/2010/08/ff_webrip/.

9. See e.g. Jaron Lanier, TEN ARGUMENTS FOR DELETING YOUR SOCIAL MEDIA ACCOUNTS RIGHT NOW (2018); Kevin, Granville, *Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens*, THE NEW YORK TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html>.

10. See e.g. Jon Ronson, *Jon Ronson: How the Online Hate Mob Set its Sights on Me*, THE GUARDIAN (Dec. 20, 2015), <http://www.theguardian.com/media/2015/dec/20/social-media-twitter-online-shame>.

11. See e.g. Farhad Manjoo, *Web Trolls Winning as Incivility Increases*, THE NEW YORK TIMES (Aug. 14, 2014), <https://www.nytimes.com/2014/08/15/technology/web-trolls-winning-as-incivility-increases.html>.

12. See e.g. Guardian Staff & Agencies, *Washington Gunman Motivated by Fake News “Pizzagate” Conspiracy*, THE GUARDIAN (Dec. 5, 2016), https://www.theguardian.com/us-news/2016/dec/05/gunman-detained-at-comet-pizza-restaurant-was-self-investigating-fake-news-reports?CMP=Share_iOSApp_Other.

13. DiRESTA ET AL., *supra* note 7.

14. See e.g. Y. 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); Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245–1276 (2003); Netanel, *supra* note 3; Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879 (2000); NETANEL, *supra* note 2; LESSIG, *supra* note 2.

strong copyright contributes to a troubling concentration of wealth and communicative power in the hands of large corporate copyright businesses—a *concentration / inclusiveness critique* of copyright.¹⁵ They also make a *blandness / diversity critique* of copyright, which boils down to the charge that copyright contributes to perverse commercial incentives which reward bland, lowest common denominator content at the expense of more diverse, controversial and creative fare.¹⁶

The more general insight here is that the political economy of copyright—what Netanel calls its ‘structural function’—exerts an influence on what works are created, what disseminated, by whom, for whom, and under what financial and material conditions. Copyright gives rise to the operation of a price mechanism. This, in turn, allows market forces and hierarchies to shape the way in which rights to use works, and wealth derived from the commercial exploitation of works, are allocated.¹⁷ As a consequence it creates a set of institutional and cultural constraints which shape the quality and the character of the creative sphere.¹⁸

But the same holds true for any system for organizing production, selection, dissemination, consumption, exploitation and use of creative material. However these activities are organized, a set of institutional and practical parameters will come into play. These will shape incentives, distribute wealth and power, create hierarchies of one kind or another, and ultimately influence creative activity. Freedom (or relative freedom) from the constraints of copyright is therefore not a sufficient condition for a culture of uncommodified creativity that enhances individual flourishing or effective, robust, respectful deliberation.

Indeed, disintermediation of content industries, and free circulation of works plays a key role in facilitating troubling structures of incentive and power online. Jaron Lanier sums up the structural conditions in the online

15. Copyright industries are characterized by supply side concentration and winner take all markets. Under the auspices of copyright a small, vertically integrated group of commercial intermediaries—publishers, record labels, film studios, and so on—has considerable power to mediate what comes before the public. e.g. LESSIG, *supra* note 2 at 10, 73; NETANEL, *supra* note 2, at 110; BENKLER, *supra* note 2, at 370-374.

16. See e.g. NETANEL, *supra* note 2, at 137; Ruth Towse, *Copyright and Artists: a View from Cultural Economics*, 20 JOURNAL OF ECONOMIC SURVEYS 567, 570 (2006); Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799 (2000), 9; L. P. Loren, *The Pope’s Copyright? Aligning Incentives With Reality by Using Creative Motivation to Shape Copyright Protection* (2008), http://works.bepress.com/lydia_loren/1/; Benkler, *Free as the Air to Common Use*, *supra* note 14, at 379-380; Tushnet, *supra* note 2, at 115.

17. See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the “Betamax” Case and its Predecessors*, COLUM. L. REV. 1600, 1613 (1982).

18. Julie E. Cohen, *Copyright, Commodification and Culture: Locating the Public Domain*, THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW (last visited Jan. 24, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=756484; COHEN, *supra* note 2, at 26.

world of free content with characteristic wryness: “Sometimes information is supposedly free but people are subject to weird surveillance and influence with insufficient commensurate rights.”¹⁹ Oligopolistic internet platforms such as social networks and search engines use free content to draw individuals onto their platforms and take advantage of powerful network effects.²⁰ These platforms then use data harvesting and surveillance to maximize the time that users spend on the platform; to sell advertising; and, in some cases, to sell personal data that permits third parties secretly to use powerful insights to influence individuals’ opinions, spending and political outlook.²¹

Algorithms designed to maximize user engagement do not prioritize diversity, individual self-authorship, inclusive distributions of communicative power, or open, productive discourse and deliberation. Rather, they have tended to produce ‘filter bubbles’, characterized by addictive interfaces, and content that drives impulsive clicks, sparks outrage, and corrals internet users into groups of like-minded interlocutors.²²

In short, online free content economies have produced many benefits, but they have also contributed to distributions of wealth and communicative power, and conditions in the marketplace of ideas, which seem little better than those for which scholars like Benkler criticized over-reaching copyright.²³

To say so, however, begs the question of how we are judging what is ‘better’. Here again, I wholeheartedly adopt the normative framework of the cultural turn: the same framework underlying the concentration and blandness critiques of copyright. Let me now set that framework out in a little more detail.

19. Jaron Lanier, *WHO OWNS THE FUTURE?* (2014), 246.

20. Jonathan Barnett, *The Costs of Free: Commodification, Bundling and Concentration* (2017), <https://papers.ssrn.com/abstract=2916859>.

21. See e.g. Carole Cadwalladr, *The Great British Brexit Robbery: How Our Democracy Was Hijacked*, *THE OBSERVER* (May 7, 2017), <http://www.theguardian.com/technology/2017/may/07/the-great-british-brexit-robbery-hijacked-democracy>. See also Julie Cohen, *Internet Utopianism and the Practical Inevitability of Law*, 18 *DUKE L. & TECH. REV.* 85–96 (2019).

22. Eli Pariser, *THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU* (2011), 37ff. See also Cohen, *supra* note 21 at 88.

23. Guy Pessach, *Beyond IP — The Cost of Free: Informational Capitalism in a Post-IP Era*, 54 *OSGOODE HALL LAW JOURNAL* 225 (2017); Guy Pessach, *Some Realism About Copyright Skepticism*, 57 *IDEA: THE IP LAW REVIEW* 227 (2017).

Critically applying the values of the cultural turn to online free content economies

Cultural turn scholars assess copyright by reference to its effects on culture, discourse, the information sphere and, ultimately, collective and individual choice-making. Proponents of this turn to culture espouse a set of goals that goes beyond copyright's traditional goal of incentivizing the production and dissemination of works of authorship, or maximizing utility in markets for those works.

They draw heavily on deliberative democratic theory, and the human capabilities school of development economics.²⁴ The high-level goals that emerge from these normative frameworks are *democracy* and *self-authorship*. That is to say, proponents of the cultural approach argue that the aim of any information policy measures, including copyright, is to facilitate conditions in the sphere of culture and public discourse which:

- are conducive to productive democratic deliberation;²⁵
- help individuals to cultivate their capabilities to the fullest, and to author their lives with real autonomy;²⁶
- or both.

Second order objectives follow fairly logically from these first order commitments. Key among these are *diversity* and *inclusiveness*.

Both effective democratic deliberation and meaningful self-authorship require *diversity* and *inclusiveness* in the information environment. Individuals will not flourish, and nor will democracy, unless members of the public are exposed to a diverse range of perspectives and aesthetics

24. The deliberative democratic paradigm characteristic of the cultural turn is rooted in what John Dryzek describes as a 'deliberative turn' in political philosophy. See JOHN S. DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS* (2002). The fundamental principle underlying the deliberative democratic paradigm is that democratic decision-making will not be optimal unless informed by robust, pluralistic, inclusive civil society and public discussion. See e.g. CASS R. SUNSTEIN, *#REPUBLIC: DIVIDED DEMOCRACY IN AN AGE OF SOCIAL MEDIA* (2017) at ix. Human capabilities analysis turns on the question: 'what are people able to do and be?' It is built on the work of Amartya Sen and Martha Nussbaum. According to Nussbaum, the extent to which an individual lives the good life is determined by the individual's opportunities to realise their human capabilities to the fullest. See e.g. MARTHA C. NUSSBAUM, *CREATING CAPABILITIES* (2011), 4; Martha Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 *FEMINIST ECONOMICS* 33–59 (2003).

25. In copyright theory, the deliberative paradigm is best exemplified in the work of Professor Neil Netanel who developed an impressive theory of copyright's relationship to democratic civil society over the course of a series of articles beginning in 1996, and culminating in a book on copyright and free expression in 2008. See e.g., Netanel, *supra* note 3 and NETANEL, *supra* note 2.

26. See e.g. COHEN, *supra* note 2 at 12; BENKLER, *supra* note 2 at 273; Lessig, *supra* note 2 at 21-24; Beebe, *supra* note 2 at 344; O. B. Arewa, *The Freedom to Copy: Copyright, Creation and Context*, 41 *UC DAVIS L. REV.* 477, 518 (2007); Margaret Chon, *Postmodern Progress: Reconsidering the Copyright and Patent Power*, 43 *DEPAUL L. REV.* 97 (1993).

(*diversity*).²⁷ By the same token, the distribution of power and opportunity to shape and participate in culture must be reasonably democratic to ensure that the public sphere is capable of capturing the perspectives and opinions of the public (*inclusiveness*).²⁸ The more open a decision or deliberation to multiple perspectives and possibilities, the better formulated and richer it is capable of being.²⁹ This is true as much for individual choices (*self-authorship*) as for collective (*democratic*) ones.

I have just given a snapshot of key normative concerns of the cultural turn in copyright theory: self-authorship and deliberative democracy as high order goals; diversity and inclusiveness as second-order means to these ends. In the first part of this article, I critically apply this normative framework to online free content economies in order to reconsider the copyright minimalist / internet optimist outlook that I described above. I focus in particular to the activity on dominant internet platforms such as Facebook, YouTube, Google and Twitter because the majority of individual internet users' online activity is mediated through such platforms.³⁰

I point out a number of ways in which structural conditions in this supposedly 'democratized' information environment produce serious problems for expressive diversity, the inclusiveness of culture and, consequently, individual self-authorship and democracy. I argue, for example, that:

- as in mass media settings, attention, communicative power, and the control over the means of selecting and filtering content, is highly concentrated on the internet, which is bad for inclusiveness; and
- online filtration tools like search engines and newsfeeds have in certain ways reduced, rather than expanded, the range and diversity of expression to which individuals are exposed online, by producing 'filter bubbles' and promoting 'group polarization'.

The cyber-utopian vision of a vibrantly democratic, inclusive, expressively diverse internet, delivering accurate information, high quality discourse, and

27. BENKLER, *supra* note 2 at 150-51.

28. *Id.* at 182. For more on the significance for individual capabilities of inclusiveness, 'semiotic democracy' and opportunities to 'play' with cultural artefacts, see e.g. Fisher III, *supra* note 2 at 1216; Beebe, *supra* note 2 at 245ff; Arewa, *supra* note 26 at 481, 505, 525; Cohen, *supra* note 18 at 143, 146; Elkin-Koren, *supra* note 2 at 378, 399; Craig, *supra* note 2 at 33-35; Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumption*, 51 WM. & MARY L. REV. 513, 539 (2009).

29. Robert B. Horwitz, *On Media Concentration and the Diversity Question*, 21 THE INFORMATION SOCIETY (2004).

30. Anderson and Wolff, *supra* note 8. For more data about the reach of these dominant applications, see *infra* note 85 and accompanying text.

rigorously and richly realized art, is inspiring. It even holds true in some quarters of the internet – for example the incredibly rich universe of podcasting. It does not, however, account for a raft of troubling dynamics plaguing online free content economies in recent years.

To make these observations is, of course, not to dismiss the virtues of the internet wholesale. On the contrary, the object of this article is to try to direct our aspirations productively, to realize the potential of the online content sphere to enhance democracy and self-authorship.

In any case, many cultural turn thinkers are by now well aware their hopes have not been fulfilled. Skepticism about internet utopianism has increased.³¹ Even so, it is worthwhile to assess critically the internet optimist / copyright pessimist view in its ‘pure’ form, as it found voice in the first decade of this century, in order clearly and systematically to work out what has gone awry. Benkler has recently observed that, rather than attaining the freedom-maximizing internet he hoped for, we are shifting to an internet that facilitates the accumulation and concentration of power in the hands of a few agents.³² “If we are to preserve the democratic and creative promise of the Internet”, he writes,

“we must continuously diagnose control points as they emerge and devise mechanisms of recreating diversity of constraint and degrees of freedom in the network to work around these forms of reconcentrated power.”³³

An important part of that process, painful though it may be, is to catalogue and analyze the disappointments of networks.

More to the point, I will argue that many of the problems online are connected with the structures of power and incentive that subsist in online

31. See e.g., Yochai Benkler, *Degrees of Freedom, Dimensions of Power*, 145 DAEDALUS 18–32 (2016). Benkler now acknowledges (at 20) that “Several developments suggest that we are shifting to an Internet that facilitates the accumulation of power by a relatively small set of influential state and nonstate actors.” See also, e.g., Jonathan Zittrain, *John Perry Barlow’s Call for Persuasion Over Power*, 18 DUKE LAW & TECHNOLOGY REVIEW 137–142 (2019); James Boyle, *The Past and Future of the Internet: A Symposium For John Perry Barlow*, 18 DUKE LAW & TECHNOLOGY REVIEW 1–4 (2019). See below note 46 and accompanying text for further discussion of Benkler’s gradually changing views. Perhaps the most impressive work on this subject is Professor Julie Cohen’s. Cohen has developed her thinking from emphasizing the need for free ‘play’ with creative content as paramount, to now observing that internet users’ creative engagements with content now serves as raw material for commercial exploitation by powerful online platforms. See, respectively, Cohen, *supra* note 2. and Julie E. Cohen, *The Biopolitical Public Domain: the Legal Construction of the Surveillance Economy*, 31 PHILOS. TECHNOL. 213–233 (2018).

32. Benkler, *supra* note 31.

33. *Id.*, 18.

free content economies - often characterized by the absence of strong copyright, or attenuation of its enforceability; by peer to peer content sharing; and distributed/decentralized methods of selecting and disseminating works. It is not just that internet utopia has failed to manifest: it is that the explosion of free content has been a big part of the problem; in many, overlapping ways. This theme needs more emphasis and elaboration in copyright scholarship.

Practical implications

The second part of this article sets out some practical implications of my analysis. One of the consequences of the cultural turn has been a tendency to focus on the need to expand copyright exceptions and limitations, and to avoid expansion of copyright's strength, scope and duration.³⁴ For example, the Australian Productivity Commission said in its 2016 report on copyright:

“Given the asymmetric nature of how [copyright] policy can be changed, the Commission considers it is appropriate to ‘err on the side of caution’ where there is imperfect information, and consciously set weaker parameters in the way that rights are assigned, used or enforced.”³⁵

This is a government agency, framing copyright minimalism as the sober and responsible outlook on copyright policy. The implication is that maintaining strong copyright that would be the riskier course.

The analysis in this article suggests that weakening copyright and expanding exceptions and limitations may also produce structural risks, along with troubling asymmetries of wealth and cultural power. The *concentration* and *blandness* critiques of copyright that I summarized above might just as readily be applied to online free content economies. This has something to do with the incentives that operate when works are distributed and shared relatively free of copyright constraints, with the aim of capturing user attention, harvesting data, and selling advertising.³⁶ In other words, the need for caution goes both ways.

Of course, drawing this conclusion does not mandate a knee-jerk re-commitment to maximalist copyright online. The concentration and

34. See e.g. James Boyle, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* (2009), http://works.bepress.com/james_boyle/26/ (last visited Oct 29, 2013); Giancarlo F. Frosio, *Resisting the Resistance: Resisting Copyright and Promoting Alternatives*, 25 4 (2017).

35. INTELLECTUAL PROPERTY ARRANGEMENTS - PRODUCTIVITY COMMISSION INQUIRY REPORT, (2016), <http://www.pc.gov.au/inquiries/completed/intellectual-property/report>.

36. For a sketch of this argument, see Pessach, *supra* note 23.

blandness critiques of maximalist copyright (described above) are well taken.

What we need is a unified picture of the structural and qualitative challenges that affect the marketplace of ideas and the cultural and creative spheres. Both copyright and non-copyright systems evince inclusiveness and diversity problems, just as each has some advantages for inclusiveness and diversity. In both copyright markets and online non-copyright systems, perverse incentives reward bland or sensationalist content. Both online and off, and in copyright and networked-peer-production systems, a small group of powerful platforms hold a disturbing amount of power of the contents and character of the marketplace of ideas.³⁷

This observation has many implications, but I will focus here on one. Developments to copyright law, whether they have the effect of formally ‘weakening’ or ‘strengthening’ the exclusive right, must be attuned to the structural parameters that ultimately determine their practical effect.

The second part of the article is therefore devoted to illustrating how such a mindset might inform our thinking about copyright policy. I will first reflect on how certain expansions of the fair use exception in the US may, perversely, compound existing concentrations of cultural and communicative power, rather than alleviating them. I suggest that the development of fair use doctrine needs to take into account the ways in which dominant online platforms use the free circulation of works to harvest user attention, and thereby increase their communicative power both with respect to copyright owners, and to users.

Then, for the sake of balance, I will consider the structural drawbacks of new developments in European copyright law. European Union legislators are perhaps the first to take seriously the negative structural consequences of ‘safe harbor’ exceptions and limitations to copyright online. Article 17 of the European Union’s new *Directive on Copyright in the Digital Single Market* (the ‘EU Copyright Directive’) purports to redress a ‘value gap’, whereby online content sharing platforms profit from copyright infringement without sufficient remuneration to copyright owners.³⁸ I suggest that, while it does focus on a structural power asymmetry, it risks compounding the communicative power of:

- dominant online platforms relative to copyright owners;

37. See below, part 1.2.

38. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market. The term ‘value gap’ was used in the initial *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market*—COM (2016) 593.

- dominant copyright businesses relative to users; and
- incumbent copyright businesses relative to newcomers, independent authors, and small-scale copyright businesses.

There are no easy answers when it comes to pursuing a copyright policy that promotes democracy and self-authorship to the fullest. There will always be trade-offs. What is clear, though, is that there is more to think about than the traditional concern of balancing incentives to create against the need for access to works: especially when we understand that free access to and sharing of works, and not only strong copyrights, may contribute to troubling incentives and hierarchies of wealth and communicative power.

1. STRUCTURAL PROBLEMS IN ONLINE FREE CONTENT ECONOMIES

1.1 Formal freedom is not enough

There has been a tendency to overstate the potential of a reduction in the strength of copyright, especially online, to generate a ‘robust’ public sphere, and to right the perceived wrongs of copyright-based, mass-mediated culture. But a recent run of bad news about online platforms—disinformation and misinformation, filter bubbles, echo chambers, invasion of privacy and behavior modification for rent, election hacking—calls into question the contention that online free content economies are better for democracy and individual self-authorship simply by virtue of being freer of the constraints of copyright.

Benkler, though very optimistic about the potential of networked information economies, was, open to the possibility that changes in the conditions and parameters characterizing our networked environment might require a change in assessment of the merits of that environment. With considerable foresight, he even contemplated the possibility of certain internet services like Google becoming so powerful as to raise the prospect of a new kind of mass media model. He was, however, fairly confident that the pattern of information flow in digital networks is more resistant to the application of centralized control or influence than was the traditional, copyright-based mass media model.³⁹ Unfortunately, his caveat about the contingency of his assessment of the networked environment has proven all too prophetic.⁴⁰

How could this be? How could a system with so few formal constraints on free expression and sharing of content fall short in meeting free speech goals such as diversity and inclusiveness? Andrew Keen, a longtime critic of cyber-utopianism, puts it this way: ‘distributed technology doesn’t necessarily lead to distributed economics and the cooperative nature of its technology isn’t reflected in its impact on the economy.’⁴¹ Freedom from the constraints of copyright is not a sufficient condition for a culture that enhances individual flourishing or effective, robust, respectful deliberation.

39. BENKLER, *supra* note 2 at 261.

40. See Benkler’s comments in Wil S. Hylton, *Down the Breitbart Hole*, THE NEW YORK TIMES (Aug. 16, 2017), <https://www.nytimes.com/2017/08/16/magazine/breitbart-alt-right-steve-bannon.html>).

41. ANDREW KEEN, *THE INTERNET IS NOT THE ANSWER* (Main edition ed. 2015), 33.

Individuals' and society's capacity to translate formal freedom into real self-authorship and democracy depends on contextual factors.⁴² Freedom is relative. The substantive distribution of power and privilege, especially the power to communicate and exert cultural influence, may constrain or enhance autonomy just as much as formal prohibitions on certain kinds of speech.⁴³

If copyright is not dictating the dynamics according to which power, resources and cultural influence are distributed, it is likely that some other structural constraints are. In this part of the article, I will explore those structural conditions and some of their consequences for democracy, self-authorship, diversity and inclusiveness.

Professors Jonathan Barnett and Guy Pesach have each made important contributions to the critique of online free content economies, and their effects on political economy of creative culture. Barnett argued that a zero priced content environment online produces winner-take-all outcomes. Rent extraction opportunities, he contends, are shifted from content production markets to curatorial platforms (such as search engines). Eroding copyright protection for online content may result in pricing and output distortions in markets for curatorial services (concentration problems) and, in the longer term, content markets.⁴⁴ The availability of free content is therefore not 'free' from a social point of view.

Pesach argued that the decentralization of cultural production and distribution online, despite numerous benefits, has not proved an entirely democratic development. He describes certain quarters of the online information sphere as operating "beyond IP", but suggests that these realms suffer problems similar to those which afflict copyright-mediated content industries. The means of deriving wealth and power from content (through harvesting and analyzing data) is highly concentrated, and there is a problem of content diversity.⁴⁵ He attributes these problems in part to weakening of copyright protection online.

42. BENKLER, *supra* note 2 at 141. Benkler is at his most impressive when dealing with the relationship between freedom, constraint and autonomy. He writes, "If we accept that all individuals are always constrained by personal circumstances both physical and social, then the way to think about autonomy of human agents is to inquire into the relative capacity of individuals to be the authors of their lives within the constraints of context. From this perspective, whether the sources of constraint are private actors or public law is irrelevant. What matters is the extent to which a particular configuration of material, social, and institutional conditions allows an individual to be the author of his or her life, and to what extent these conditions allow others to act upon the individual as an object of manipulation."

43. See e.g. Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 674 (2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=744533.

44. BARNETT, *supra* note 20 at 20.

45. Pessach, *Beyond IP*, *supra* note 23 at 2030, 2044.

Benkler has also revised his views on the ‘wealth of networks’. He now considers that the ‘commons’ of the internet have not, in many cases, produced more attractive forms of social relations.⁴⁶ He identifies a number of ‘points of control’ over online information sphere that have developed, which run against the hope that the internet would reduce opportunities for manipulation by one actor over another. Among these, he includes the development of ‘big data’ big data and its use in behavioral control; and the building in of digital rights management into internet standards. He says,

“Just as industrial manufacturers cheerfully emitted pollutants and effluents into the commons of the air and water to externalize some of their costs, so too are Facebook, Google, Amazon, and Apple finding ways of constructing new bottlenecks above and below the open layers, creating new toll booths and points of observation, and using the “free” nature of the open parts of the infrastructure as low cost input from which to then mine our “biopolitical public domain,” as Julie Cohen puts it.”⁴⁷

He still emphasizes the need to maintain decentralized, networked peer systems in order to resist centralization and the ordering of state or market. Indeed, he attributes responsibility for the woes of the internet in great part to the resilience of markets and states and their ability to ‘domesticate’ decentralized, networked, user creativity.⁴⁸

For the most part I agree with Benkler, but I think much more needs to be said about the role of free content in that ‘domestication’ process. Some commodification of creativity, in one form or other, seems to me inevitable because the public derives value from creative content; and enterprising businesses will naturally seek to leverage that value into profit, especially if they can obtain the source of value for free. What is crucial is, as Benkler says, is continually to assess how structures of power and incentive emerge in that process, and how these structures affect the public interest.

In this part of the article, I will therefore add substantially to Barnett and Pesach’s critiques, focusing in particular on the downsides for diversity and inclusiveness associated with economies of ‘free stuff’ on online platforms such as search engines and social media. I begin by considering concentrations of attention, wealth and power online. Then I turn to

⁴⁶ Yochai Benkler, *A Political Economy of Utopia?*, 18 DUKE L. AND TECH. REV. 78–84 (2019), at 82.

⁴⁷ Benkler, *supra* note 46 at 81–82.

⁴⁸ *Id.* at 83.

problematic incentive structures and the ways in which they vitiate diversity and inclusiveness in individuals' experience of the information environment.

1.2 Attention is highly concentrated on the internet

Digital technology has dramatically increased individuals' opportunities to create and share works. On the internet, active participation in culture is more achievable than ever before.⁴⁹ Professor Rebecca Tushnet, for example, is very enthusiastic about the democratizing influence of fan fiction on pop culture.⁵⁰ Fans of films, novels and TV produce countless derivative stories, exploring the fictional universes and characters that fascinate them, and inscribing them with their own meanings. That is a good in itself, and it clearly increases diversity and inclusiveness along one dimension.

That benefit does not, however, necessarily translate into an increase in the inclusiveness or diversity of the body of works that reaches most individuals. Nor does the high rate of participation necessarily mean that the power to exert a meaningful influence on culture and discourse is distributed broadly or inclusively. Almost anyone can publish an opinion or other kind of work without much difficulty, but these contributions will not carry much influence if the public sees only a tiny fraction of them.⁵¹

The very absence of the traditional gatekeepers, the very size of the internet, the very multitude of works disseminated digitally, necessitates new tools for finding and selecting works. It is necessary to use various forms of filtration to reduce the number of works to which an individual is exposed to a manageable level.

Copyright minimalists were optimistic about the potential of digital search and filtration tools to create a more dis-intermediated, decentralized, democratized marketplace of ideas. Rather than commercial copyright-based businesses (publishers, film and tv studios, record labels and so on) deciding what is published and brought to the attention of the public, search engines and social networks use algorithms to track user preferences and behavior, and deliver results based on the so-called 'wisdom of the crowd'. Search engines like Google's, for example, use an algorithm to rank web pages in their search results based on, among other things, the number of incoming

49. Lessig, *supra* note 2 at 47.

50. Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 *LOY. LA ENT. L.J.* 651 (1996); Tushnet, *supra* note 28.

51. Matthew Hindman, *THE MYTH OF DIGITAL DEMOCRACY* (2008), 56

links to that page.⁵² The algorithm is recursive, so that links from pages that have, themselves, a higher number of links, weigh more heavily in deciding the ranking of the linked page in search results.⁵³

As a consequence, the public would no longer need to rely on either the price system or a managerial structure for coordination in selecting works worthy of their attention.⁵⁴ This would supposedly democratize the selection of works, and the decisions about which works to give attention to. The combination of an increase in opportunities for individuals to create and publish content, and a decrease in the opportunities for commercial actors to intervene in the selection and dissemination of works would seem to be a boon for inclusiveness.

Unfortunately, the dramatic increase in the number of content creators coincides with a dramatic increase in the concentration of ownership of platforms for disseminating content, and a dynamic of exponential concentration of internet users' attention.⁵⁵ Both the distribution of user traffic (page views by users) and links follows a power law distribution.⁵⁶ The probability of having a large number of links is inversely and exponentially proportional to the number of links. In practical terms, on the internet, the power law distribution means a very small number of sites end up with an extremely high number of links and visits, and a very large number of sites end up with an extremely small number of links and visits.⁵⁷ The curve describing such distributions is said to have a 'long tail'.⁵⁸

The promise of the 'long tail' was that it would have something for everyone—this was the thesis of an influential cyber-utopian book by Chris Anderson.⁵⁹ Trends in the distribution of attention on the internet do not, however, seem to have borne out the initial optimism about the long tail. Even Anderson seems to have reconsidered the matter somewhat. In an article co-written with Wolff, published some time after his influential book, he cites statistics from Compete, showing that the top 10 Web sites

52. I will discuss below some other very material features of such algorithms, but for now let us stick with this simplified description.

53. Steven Levy, *IN THE PLEX: HOW GOOGLE THINKS, WORKS, AND SHAPES OUR LIVES* 22 (2011).

54. BENKLER, *supra* note 2 at 63, 74; Elkin-Koren, *supra* note 2 at 384.

55. See e.g. ELI M. NOAM, *WHO OWNS THE WORLD'S MEDIA?: MEDIA CONCENTRATION AND OWNERSHIP AROUND THE WORLD* (2016), 8.

56. This pattern was recognized fairly early, for example in the work of Bernardo A. Huberman et al., *Strong Regularities in World Wide Web Wurfing*, 280 *SCIENCE* 95–97 (1998).

57. Hindman, *supra* note 51 at 42; BENKLER, *supra* note 2 at 243.

58. Chris Anderson, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* (2006).

59. *Id.* See also BENKLER, *supra* note 2 at 242.

accounted for 31% of US page views in 2001, 40% in 2006, and about 75% in 2010.⁶⁰ In July 2017, according to one study, five websites—Google, Facebook, YouTube, Yahoo, and Amazon—owned 32.34% of website traffic.⁶¹

Benkler, drawing on studies by Pennock, Dresner and Farrell, and others, argued that attention and link distribution did not always follow an exponential curve. There were, he said, ‘clusters of moderately read sites’ providing ‘platforms for vastly greater numbers of speakers than were heard in the mass media environment’.⁶² Particularly salient to civil society—this was the distribution to be found among political blogs.⁶³

Professor Matthew Hindman’s more recent work contradicts this conclusion.⁶⁴ Having conducted his own study of the distribution of attention online, and reviewed the literature on the subject, Hindman reported in 2008 that the top ten political websites, in relation to any given political issue, amount for more than half the total links.⁶⁵ As for news, he found that audience share among online media sites is not more equal than in print media. The top twenty online news outlets, he found, had more of the online market than they did in print media. Particularly telling was the drop in audience share for media organizations in what he categorized as the ‘middle class’—outlets ranked 21-500 in terms of their readership:⁶⁶

“Outlets ranked from 101 to 500 account for 35 percent of print newspaper readership, but only 22 percent of readership for media sites. And while papers below the top 500 represent only 9 percent of the nation’s print circulation, 21 percent of media site visits go to outlets ranked 500 or below.”⁶⁷

Overall concentration, he found, was similar on the net and in traditional media. The difference was that online attention was more fragmented than it was among traditional media.⁶⁸

Recent studies of the UK news media markets show similar trends. While the number of national newspapers did not drop between 2007 and 2018, the number of local and regional newspapers has decreased by 25% in

60. Anderson and Wolff, *supra* note 8.

61. Alexandra Tachalova, *This Is What They Search For: The Most Popular US Industries & Traffic Shares*, MOZ, <https://moz.com/blog/most-popular-us-industries-traffic-shares> (last visited Apr 16, 2019).

62. BENKLER, *supra* note 2 at 242

63. *Id.* at 251.

64. Note also that Benkler’s recent comments in Hylton, *supra* note 40, suggest that he may also revise his views on this matter.

65. Hindman, *supra* note 51 at 49.

66. *Id.* at 94.

67. *Id.* at 92-93.

68. *Id.*

the same period from 1,303 in 2007 to 982 in 2018.⁶⁹ The increase in supply side concentration coincides with a dramatic increase in the proportion of UK adults for whom the internet is the main source of news from 4% in 2007 to 37% in 2018; and in the percentage of adults who read news on internet from 20% to 64% in the same period.⁷⁰ Correlation is not causation and there are multiple causes for the increase in concentration, but it is tolerably clear that both the free sharing of news stories online, and power law distributions of attention online, play a role.⁷¹

Fragmentation of attention into the long tail, as much as concentration in the ‘short head’, seems to exacerbate inclusiveness problems. Professor Anita Elberse’s book on blockbusters suggests that attention in the long tail is ever more diffuse, while blockbusters receive an ever more concentrated proportion of the public’s attention.⁷² For example, of 8 million digital music tracks sold in 2011, approximately 94% sold fewer than 100 copies, while 32% sold only one copy. Compare this to 2009, when 6.4 million tracks were sold, of which 93% sold fewer than 100 copies, and 27% sold only one copy; and again to 2007, where 3.9 million digital tracks were sold, with 91% selling fewer than 100 copies, and 24% selling only one copy.⁷³ Google’s CEO, Eric Schmidt, described the trend in this way:

“I would like to tell you that the internet has created such a level playing field that the long tail is absolutely the place to be, that there’s so much differentiation . . . Unfortunately, that is not the case . . . In fact, it is probable that the internet will lead to larger blockbusters and more concentration of brands.”⁷⁴

The short head is getting shorter and fatter and the long tail, longer and thinner.

It follows logically that the redistribution and fragmentation of attention into the long tail comes at the expense of ‘middle class’, moderately sized media producers.⁷⁵ The problem is not only that winners take all. It is that both the ‘losers’ (for want of a better word for members of the fragmented long tail) and ‘winners’ draw attention away from the class of professional

69. OVERVIEW OF RECENT DYNAMICS IN THE UK PRESS MARKET - A REPORT FOR DCMS (2018), <https://secure.toolkitfiles.co.uk/clients/19826/sitedata/Reports/Press-report-for-DCMS.pdf/>, 4.

70. *Id.* at 6.

71. CAIRNCROSS, *supra* note 7 at 17, 37.

72. ANITA ELBERSE, BLOCKBUSTERS: HIT-MAKING, RISK-TAKING, AND THE BIG BUSINESS OF ENTERTAINMENT (2013).

73. *Id.*

74. Eric Schmidt, quoted in James Manyika, *Google’s View on the Future of Business: An Interview with CEO Eric Schmidt*, 1 MCKINSEY QUARTERLY 136–38 (2008).

75. Matthew Hindman, *What is the Online Public Sphere Good For?* THE HYPERLINKED SOCIETY: QUESTIONING CONNECTIONS IN THE DIGITAL AGE, MICHIGAN: DIGITAL CULTURE BOOKS 268–88 (2008).

and competent, if not extravagantly successful, authors and publishers of works; and indeed the whole commercial infrastructure in which they are situated. This shrinking ‘middle class’ would include precisely the kind of independent denizens of the creative world on whom we might rely to sustain the diversity and inclusiveness of the public sphere.

1.3 *The dynamics of filtration concentrate attention*

The concentration of attention on the internet that I have been describing is closely connected to the dynamics of ‘dis-intermediated’ online filtration and selection. Three important features of these dynamics require special attention.

Firstly, the internet does not seem to have displaced the role of commercial media organizations in selecting and filtering content. As Netanel predicted in 2001, consumers still need assistance in evaluating the quality and credibility of information and its providers. They therefore rely on filtration and accreditation tools similar to those operating in the mass media.⁷⁶ Consequently, media sources that were dominant before the internet also tend to dominate on the internet.⁷⁷

Secondly, the dynamics of filtration themselves tend to compound existing concentrations of attention. Recursive filtration algorithms operating on search engines and social networks quickly generate a hierarchy of visibility on the internet. Heavily linked sites will appear higher in search results on search engines, will therefore attract more views and links, and (assuming a route to monetizing views such as advertising) will gain access to more resources.⁷⁸ The reason for this is that search rankings have considerable influence over the way in which internet users direct their attention. Search engine users rarely look beyond the first few results yielded by any given search, let alone the first page of results.⁷⁹ One review of literature on click-through rates on search engine results found that, on average, 29.6% of searchers select the first result displayed, 13.1%, the second result, 9.2%, the third, with a decreasing percentage down to the tenth

76. Netanel, *Cyberspace Self Governance*, *supra* note 3 at 477.

77. Hindman, *supra* note 51 at 62.

78. *Id.* at 55, 72, 93.

79. Numerous studies arrive at materially the same conclusion, using different methods. *See e.g.* Nadine Höchstötter & Dirk Lewandowski, *What Users See—Structures in Search Engine Results Pages*, 179 INFORMATION SCIENCES 1796–1812 (2009); Gord Hotchkiss, Marina Garrison & Steve Jensen, *Search Engine Usage in North America*, WHITE PAPER, ENQUIRO, KELOWNA, BC, CANADA (2005); Mark T. Keane, Maeve O’Brien & Barry Smyth, *Are People Biased in Their Use of Search Engines?*, 51 COMMUNICATIONS OF THE ACM 49–52 (2008); THE VALUE OF GOOGLE RESULT POSITIONING, 2015 (2013), <https://justmythinking.com/wp-content/uploads/2015/07/ChitikaInsights-ValueofGoogleResultsPositioning.pdf> (last visited Aug 21, 2017).

result.⁸⁰ In sum, sites that win attention will tend to increase the attention they gain, and sites which attract little attention will be ever less likely to attract more.

Thirdly, the means of filtration itself is highly concentrated. The trope of the liberated individual ‘surfing’ the web on her own terms is outdated. Most internet activity is mediated through key application which aggregate and distribute works in one way or another: most notably search engines and social networks.⁸¹ The ownership of these internet platforms is highly concentrated and vertically integrated.⁸² Likewise, supply in various key platform media niches (video on demand, audio streaming, news, etc.) is highly concentrated. Economies of scale, power law distributions of attention, and above all, network effects promote winner-takes-all outcomes among internet platforms.⁸³

Whatever its causes, the communicative and cultural power of dominant internet platforms is evident from figures on viewership, market share and reach, and advertising investment share on the internet. For the past ten years, Google’s share of the search engine market has hovered around 90%.⁸⁴ As at January 2017, one statistics analysis site had Facebook at 87% share of the UK social network market.⁸⁵ According to a different study, Facebook’s share of global social media market (as of April 2019), is slightly lower, at 61.55%.⁸⁶

Market reach figures are no less stunning. In 2016, Facebook was used by almost 78% of U.S. smartphone users.⁸⁷ In the same year, 63% of US

80. Michael Hodgdon, *Understanding the Value and Importance of Organic First-Page Results*, LINKEDIN (2015), <https://www.linkedin.com/pulse/understanding-value-importance-organic-first-page-michael-hodgdon/> (last visited Aug 8, 2019).

81. Anderson and Wolff, *supra* note 8.

82. Hindman, *supra* note 51 at 93.

83. Barnett, *supra* note 20 at 2. On the workings of network effects with regard to internet applications, see LANIER, *supra* note 19 at 161ff.

84. As of 10 July 2019, StatCounter had Google’s market share currently at 92.62%, while Statista had it at 88.47% as at April 2019. See Search Engine Market Share Worldwide, STATCOUNTER GLOBAL STATS, <http://gs.statcounter.com/search-engine-market-share> (last visited Jul 10, 2019); Search engine market share worldwide 2019, STATISTA, <https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/> (last visited Jul 10, 2019).

85. Facebook’s market share in the UK 2014-2017 | Statistic, STATISTA, <https://www.statista.com/statistics/280301/market-share-held-by-facebook-in-the-united-kingdom-uk/> (last visited Mar 18, 2017).

86. Social networks ranked by market share UK 2019, STATISTA, <https://www.statista.com/statistics/280295/market-share-held-by-the-leading-social-networks-in-the-united-kingdom-uk/> (last visited Jul 10, 2019).

87. comScore Releases February 2016 U.S. Desktop Search Engine Rankings, COMSCORE, INC, <http://www.comscore.com/Insights/Rankings/comScore-Releases-February-2016-US-Desktop-Search-Engine-Rankings> (last visited Mar 18, 2017).

smartphone users logged into Facebook an average of 8 times per day.⁸⁸ According to one study, this year Facebook had a market reach of 81%, and Google had a market reach of 71%, in the global mobile apps market of around 3 billion users, with Facebook the most downloaded mobile app in 2019.⁸⁹ 30% of internet users' time spent online, globally, was spent on social media.⁹⁰ And according to Statista, as at May 2019, Facebook had 2.32 billion users worldwide.⁹¹

A survey of the market reach of online video platforms from November 2018 found that 90 percent of internet users in the United States accessed YouTube (owned by Alphabet, which also owns Google) to watch online video. Facebook was ranked second with a 60 percent market reach.⁹² In the United States, 85 percent of online users watched video online on a weekly basis.⁹³ As at 10 July 2019, one statistics service estimated YouTube's share of the online video portal market at 74.75%.⁹⁴

What about web traffic? A study from 2015 by internet analysis website, Parse.ly, found that, between them, Facebook and Google accounted for 81% of traffic to the Parse.ly network of media sites, with 43% going through Facebook and 38% through Google.⁹⁵ In January 2017, Facebook provided nearly 40% of online publishers' traffic, but it ended the year at 26% after it changed its news feed algorithm to deprioritize news.⁹⁶ In the same year, Google started at 34% and ended at 44%.⁹⁷ It is also telling that Facebook and Google (taken together) accounted for 75% of new spending on online advertising in 2015. In the US, 85 cents of every dollar

88. Dave Chaffey, *Global Social Media Statistics Summary 2017*, SMART INSIGHTS (2017), <http://www.smartinsights.com/social-media-marketing/social-media-strategy/new-global-social-media-research/> (last visited Mar 18, 2017).

89. Nick G, *51 Jaw Dropping App Usage Statistics & Trends, 2019 [Infographic]*, TECH JURY (2019), <https://techjury.net/stats-about/app-usage/> (last visited Jul 10, 2019).

90. *Id.*

91. Global social media ranking 2019, STATISTA, <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (last visited Jul 10, 2019).

92. U.S. user reach of leading video platforms 2018, STATISTA, <https://www.statista.com/statistics/266201/us-market-share-of-leading-internet-video-portals/> (last visited Jul 10, 2019).

93. *Id.*

94. Datanyze, *Online Video Platforms Market Share Report | Competitor Analysis | YouTube, Vimeo, Wistia*, DATANYZE, <https://www.datanyze.com/market-share/online-video> (last visited Jul 10, 2019).

95. Using Tags at Digital Publishers | Parse.ly Data Studies, <https://www.parsely.com/resources/data-studies/authority-report-8/> (last visited Mar 19, 2017).

96. Rani Molla, *Google is Sending More Traffic Than Facebook to Publishers — Again*, VOX (2017), <https://www.vox.com/2017/12/11/16748026/google-facebook-publisher-traffic-2017-increase> (last visited Jul 10, 2019).

97. *Id.*

spent on digital marketing went to the two companies in the first quarter of 2016.⁹⁸ The willingness of advertisers to commit the overwhelming majority of their online budget to these two platforms is a striking indication of the extent to which Google and Facebook command internet users' attention.

Facebook and Alphabet's (Google's) incredible reach and dominance of the platform market, coupled with the dynamics of search and filtration described above, places an enormous wealth of communicative and cultural power into their hands. Facebook works on a business model where developers build applications *within* the Facebook platform, ultimately controlled by Facebook.⁹⁹ Google manages both traffic and advertising and has cemented its monopoly over internet search.¹⁰⁰ It uses this dominance to push other products and services within its portfolio.¹⁰¹ It is hard to imagine a scenario further from the cyber-utopian vision of decentralized digital democracy, characterized by self-actualized yeoman-publishers combining their communicative powers over open networks.

1.4 'Free' distribution of works contributes to concentration problems in online content economies

We have considered the distribution of communicative power as between dominant and less dominant websites and online platforms. What about the distribution of power as between dominant internet platforms, copyright owners, and users of works? In the networked environment both copyright owners and users tend to cede communicative power and resources to dominant internet platforms: especially search engines and social networks. To be sure, when an internet user gains a right or capacity to access or use content without the need to pay or ask copyright owners for permission, the individual generally gains in communicative power. Likewise, when ordinary individuals find themselves able to publish works easily and inexpensively, their capacity to participate in culture and discourse increases. But the very exercise of that capacity by individuals contributes to other asymmetries of communicative and cultural power.

98. Matthew Garrahan, *Advertising: Facebook and Google Build a Duopoly*, FINANCIAL TIMES, <https://www.ft.com/content/6c6b74a4-3920-11e6-9a05-82a9b15a8ee7> (last visited Mar 18, 2017).

99. Anderson and Wolff, *supra* note 8.

100. John Bellamy Foster & Robert W. McChesney, *The Internet's Unholy Marriage to Capitalism*, 62 MONTHLY REVIEW 1, 5 (2011).

101. In the EU, Google is currently facing a potential fine for using its dominance in the search market to build its Google Shopping service. See Rochelle Toplensky, *Google Faces Big Fine in First EU Case Against Search Practices*, FINANCIAL TIMES (2017), <https://www.ft.com/content/d365e730-5025-11e7-a1f2-db19572361bb> (last visited Jun 16, 2017).

As Lanier points out, the removal of barriers to copying leads to a proliferation of businesses online that profit from selling services about information, rather than producing and selling information itself. Third parties pay to manipulate the online options that appear in front of people from moment to moment.¹⁰² On the internet, ‘If you’re not paying for something, you’re not the customer; you’re the product being sold’.¹⁰³ Providing free (frictionless) access to works and engaging user attention allows internet platforms to profit from the user-as-product in two main ways.

Firstly, user attention is itself a valuable commodity. Platforms and websites can sell advertising on the basis of page ‘views’ or ‘eyeballs’. Works, on the internet, are used as vehicles for attracting user attention.¹⁰⁴ Internet intermediaries trade in that attention, and information about it. So, when an individual takes advantage of her power to access works freely while using an application on which those works are available, the intermediary that runs the application parlay this into profit. Any single view (access to a page or work by a user) is in this sense valuable for its own sake.

Secondly, a user’s engagement with a work, whether by clicking through to a link to see the work, a ‘share’, a ‘like’, or some other use is valuable as a ‘signal’. For search engines and social network application providers, “Every action a user performs is considered a signal to be analyzed and fed back into the system.”¹⁰⁵ By aggregating signals and using big data analysis tools, internet platforms can make predictions about users, which can then be used to target further content and advertising. This capacity to target content helps dominant internet platforms to keep user attention fixed in the network, which makes advertising space on the internet platform more valuable and gives it an advantage relative to competitors who do not have access to the same signals about users. In other words, free content helps to compound network effects.

By providing free access to works, the internet platform maximizes its user base, and its capacity to sell advertisements and valuable data.¹⁰⁶ Barnett

102. Lanier, *supra* note 19 at 199. See also Cohen, *supra* note 21 at 92: “Platform protocols invite commons-based production arrangements, and commons-based production arrangements in turn reinforce platform logics of data harvesting and proprietary, algorithmic knowledge production.”

103. Andrew Lewis, cited in PARISER, *supra* note 22 at 21.

104. See TIM WU, *THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS* (2016). See also Cohen, *supra* note 31, who describes the commercial exploitation of internet users’ personal data as a new ‘enclosure’ of a ‘biopolitical public domain’.

105. Viktor Mayer-Schönberger & Kenneth Cukier, *BIG DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LIVE, WORK, AND THINK* (2013), 113; See also KEEN, *supra* note 41 at 58.

106. See Julie E. Cohen, *Law for the Platform Economy*, 133 UC DAVIS L. REV. (2017). She writes (at 145), “Economically speaking, platforms represent both horizontal and vertical strategies for

describes Google's business model as follows. Google distributes 'informational assets'—content—to individual users at zero price. These information assets include search results and links on the search engine, news aggregations and snippets on Google news, user generated videos on YouTube, searchable snippets of books on Googlebooks, and so on. In distributing this content, it obtains data about individuals, which it sells to advertisers. It maximizes revenues by driving down its input costs (the cost of analyzing web pages and providing links to them). This in turn maximizes the Google user base, which enhances the power and value of Google's data set and data analysis. Internet platforms like Google have an interest in being able to copy works in the course of analyzing and ranking them, and in being permitted to provide links to works, without paying the copyright owners of those works. This is largely what allows them to run a profitable data-analysis and ad-selling business.¹⁰⁷

Not only is the provision of free access to works lucrative for dominant internet intermediaries; it also gives them a stunning amount of communicative and cultural power. That power is, in some ways, power *over* users. It is power that allows internet intermediaries and their customers (such as advertisers) to manipulate and target internet users in ways that the users are not aware of (although recent media attention is increasing public awareness).¹⁰⁸ It is hard to fully comprehend the extent of the power of data aggregation, but a few examples help to give a sense of it.

Signal analysis by internet intermediaries produces incredibly detailed information about individual users. For example, using only Facebook 'likes', researchers in one study were able fairly reliably to 'model' the latent traits of 58,000 volunteers, including traits such as sexual orientation, ethnicity, religious and political views, personality traits, intelligence, happiness, and substance addiction, among others.¹⁰⁹ Another study indicated that Facebook was able both to predict user emotions based on data

extracting the surplus value of user data. Because that goal requires large numbers of users generating large amounts of data, the platform provider's goal is to become and remain the indispensable point of intermediation for parties in its target markets."

107. Barnett, *supra* note 20 at 9. Barnett makes much of this interest, and argues that Google and other platforms have actively campaigned to reduce the strength, scope and duration of copyright in pursuit of it. See also COHEN, *supra* note 106 at 145-146 for an analysis of strategies used for leveraging the two sided market: free content to users, paid ad space for advertisers.

108. See LANIER, *supra* note 19. See also SIVA VAIDYANATHAN, THE GOOGLIZATION OF EVERYTHING (2011), 1219. On user lack of awareness of the way in which data analysis works, see Zeynep Tufekci, *Algorithmic Harms beyond Facebook and Google: Emergent Challenges of Computational Agency*, 13 J. ON TELECOMM. & HIGH TECH. L. 203 (2015), 209, 215.

109. M. Kosinski, D. Stillwell & T. Graepel, *Private Traits and Attributes are Predictable from Digital records of human behavior*, 110 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 5802-5805 (2013).

analysis, and manipulate emotions through the newsfeed.¹¹⁰ Worse, most users, even fairly sophisticated ones, have not generally been aware of the extent to which data is collected about them, and used to tailor information and advertisements that are presented to them, or to influence their behavior.¹¹¹ The cumulative gains in internet intermediary power offset, to a considerable degree, users' gains in communicative empowerment.

In short, the relationship between freer access to works online and self-authorship is not straightforward.

1.5 Concentration and blandness (again)

One might take the optimistic view that concentration of attention and power on online platforms is no cause for concern. One reason to take such a view is that, in spite of the dominance of players like Google and Facebook, alternatives exist. Users are free to seek out works elsewhere. Copyright owners are free not to publish their content for free on those dominant platforms, and to use other channels for dissemination.

Another reason is that dissemination of works through internet platforms is not, as Benkler points out, subject to selection and filtration of works at a single point of control. Network filtration is supposed to disintermediate the curation and selection of works. It is supposed to give effect to the preferences of individuals, and helpfully order information by aggregating such preferences. This would seem to be the epitome of inclusiveness, self-authorship and democracy: where the collective actions of unconstrained, autonomous individuals, rather than the self-interested curatorial decisions of commercially minded platforms, determine what works are visible to any given member of the public.

1.5.1 Network effects

There are good reasons to take a more pessimistic view, however. While both copyright owners and users are, in form, free to seek or publish works outside applications, in practice, network effects mitigate against this.

110. Munmun De Choudhury et al., *Characterizing and Predicting Postpartum Depression from Shared Facebook Data*, PROCEEDINGS OF THE 17TH ACM CONFERENCE ON COMPUTER SUPPORTED COOPERATIVE WORK & SOCIAL COMPUTING 626–638 (2014), <http://doi.acm.org/10.1145/2531602.2531675> (last visited Aug 8, 2019). See also Robert Booth, *Facebook Reveals News Feed Experiment to Control Emotions*, THE GUARDIAN (June 29, 2014), <https://www.theguardian.com/technology/2014/jun/29/facebook-users-emotions-news-feeds>

111. Tufekci, *supra* note 108 at 208–12. This may be changing, given recent news about the so called 'Mueller investigation' into Russian 'election hacking' and important journalistic efforts, such as Carole Cadwalladr's series of prize-winning articles about targeted political advertising on Facebook and the Cambridge Analytica scandal. See e.g. Cadwalladr, *supra* note 21.

Knowing that around half Americans get their news through Facebook, and a quarter of UK adults from Google, a publisher of news content would be ill advised to eschew the platforms.¹¹² Indeed, Facebook's recent reprioritization of news content in user feeds is a serious blow to news providers who had spent time and money optimizing content for Facebook, and come to rely on Facebook referrals and advertising eyeballs as a key source of revenue.¹¹³ By the same token, knowing she is likely to access a great deal of news content for free on Facebook, and having also come to rely heavily on Facebook to keep in touch with friends, even to the point of losing their other contact details, a user has little *prima facie* incentive to go elsewhere.¹¹⁴

Moreover, the logic of filtration on search engines and social networks is opaque. It is mostly concealed from the public. Individuals have little knowledge or control of the criteria by which applications like Facebook or Google filter, rank and present information to them.¹¹⁵ The example of the news publishers in the paragraph above has further import. Content businesses that increasingly rely on these applications to disseminate their content are also subject to the whims of these organizations. Business models built on optimizing content for search engines, news feeds and online advertising may be swept away from one day to the next.

1.5.2 Personalization and 'the filter bubble'

The most problematic pressure, however, has to do with the ways in which search engine and social network algorithms are calibrated to produce 'relevant' content for their users. The relevance of any given ranking in a news feed or search results page is not determined only objectively—by reference to aggregated preferences of the public as a whole. It is also determined by an approximation of the subjective preference of the user. Users' past viewing and search behavior is, as mentioned above, analyzed as a signal. Applications like search engines and social networking sites aggregate data about users with similar signal patterns and attempt to predict preferences based on that analysis.

112. NIC NEWMAN ET AL., *Digital News Report 2018* (2018), <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/digital-news-report-2018.pdf>, pp.10-11. On the mismatch in negotiating power between online platforms such as Google and Facebook, and news publishers, see CAIRNCROSS, *supra* note 7 at 57; OVERVIEW OF RECENT DYNAMICS IN THE UK PRESS MARKET - A REPORT FOR DCMS, *supra* note 69 at 35, 61.

113. CAIRNCROSS, *supra* note 7 at 70.

114. On 'punishing' network effects of this kind, see LANIER, *supra* note 19 at 161ff.

115. PARISER, *supra* note 22 at 10, 106.

In 2009 Google changed its search algorithm so that it now tailors search results based on signals and data gathered about the individual conducting the search. For example, a search for ‘proof of climate change’ might turn up different results for an environmental activist and an oil company executive.¹¹⁶ The oil executive might see results tending to play down climate change; the activist, results tending to assert its importance, and prove its existence. Different individuals, in other words, are presented with different information purporting to be factual and organically, neutrally derived from the ‘wisdom of crowds’.

Facebook’s algorithm for ranking content in user news feeds, Edgerank, also uses personalization.¹¹⁷ There are some differences between the way in which personalization is tailored on Facebook, Google and other intermediary platforms. The biggest platforms are, however, broadly similar in one important way. Results are tailored for ‘relevance’ to individual users, based on past signals such as views, ‘likes’, searches, buys, and language used on the platform and related applications.¹¹⁸

It is not clear to me that this kind of personalization is empowering to individuals. On the contrary, it seems to give internet platforms considerable power over individuals (a reduction in self-authorship). The author and businessman Eli Pariser popularized the term ‘filter bubble’ to describe the characteristic of the internet whereby search engines and social networks algorithmically tailor content to maximize each individual user’s attention.¹¹⁹ The filter bubble is a space in which individuals are cordoned off from whatever information is deemed irrelevant to them by the algorithm that is personalizing their information stream. Pariser writes,

“When you enter a filter bubble, you’re letting the companies that construct it choose what options you’re aware of. You may think you’re the captain of your own destiny, but personalization can lead you down a road to a kind of informational determinism in which what you’ve clicked in the past determines what you see next.”¹²⁰

More troubling still is the fact that individuals have, at least until recently, tended not even to be aware of the extent to which the information presented to them is personalized.¹²¹ This outcome is even less inclusive than the mass

116. *Id.* at 3.

117. For details on the differences between the ranking algorithms of Google and Facebook, *see Id.* at 37ff.

118. *Id.* at 2.

119. *Id.*

120. *Id.* at 16.

121. On this general lack of awareness, and the lack of transparency regarding the mechanics of filtration, *see e.g.* Will Oremus, *Who Controls Your Facebook Feed*, SLATE (Jan. 3, 2016), http://www.slate.com/articles/technology/cover_story/2016/01/how_facebook_s_news_feed_algorithm

media model, and liable to reduce the diversity of the range of works to which individuals are exposed.

Individuals' general lack of agency in the filtration process is not the only troubling feature of the 'filter bubble'. As I explained in the preceding part of this chapter, works are powerful tools for engaging the attention of the public, and data about that attention is packaged and used to sell advertising.¹²² Indeed, the key objective of internet applications such as Google and Facebook is to maximize user time on their apps. The lion's share of their other business objectives—collecting, analyzing and selling valuable data, selling advertising, and so on—are dependent on keeping the attention of as many users as possible, for as long as possible, on their application.¹²³ Lanier describes the dominant internet applications as “empires of behavior modification for rent”.¹²⁴ Their user interfaces and content presentation and prioritization strategies are consciously and carefully designed to cultivate compulsive engagement by users, even addiction.¹²⁵

Works and content displayed to users therefore become both vehicles for advertising, and for harvesting the attention and data used in targeting that advertising. This has significant repercussions for the parameters under which works are produced, funded, and displayed (ranked) in users' networked information streams. The kind of attention that is of interest to internet platforms and their customers (advertisers and sometimes political organizations) is not necessarily the kind of attention which promotes users' self-authorship, or productive participation in democratic deliberation. Nor does internet platforms' quest for attention through curation of filter bubbles seem optimal for cultivating diversity and inclusiveness.

In analyzing data about video views, Facebook counts the 'view' at the three second mark (whether or not the viewer has even turned on the

_works.html (last visited Aug 11, 2017); Frank A. Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, AVAILABLE AT SSRN 1686043 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1686043 (last visited Feb 15, 2015).

122. See KEEN, *supra* note 41 at 117.

123. See Bianca Bosker, *The Binge Breaker*, THE ATLANTIC, 2016, <https://www.theatlantic.com/magazine/archive/2016/11/the-binge-breaker/501122/>. (last visited May 6, 2017); Tristan Harris, *How Technology is Hijacking Your Mind — from a Former Insider*, THRIVE GLOBAL (May 18, 2016), <https://journal.thriveglobal.com/how-technology-hijacks-peoples-minds-from-a-magician-and-google-s-design-ethicist-56d62ef5edf3#.sgtkj5xjn>. (last visited May 9, 2017).

124. Lanier, *supra* note 9 at 10.

125. For a list of psychologically manipulative strategies used to maintain and direct user attention, see Harris, *supra* note 121; Lanier, *supra* note 9 at 10.

sound).¹²⁶ This bespeaks an intention to divert attention momentarily, either to register a ‘view’ that triggers payment by advertisers, or in fact to display an ad, rather than presenting something of enduring interest to a user. The signals that likely interest the profit-minded internet platform are signals about what will attract a click or a view from a user, not signals about the quality of the users’ experience once the click has been made. Internet platforms make money distracting and maintaining user attention long enough to elicit a datum about consumption preferences, or to present an advertisement, and then distracting attention again with some new stimulus.

Pariser points out that our responses to content presented in news feeds and other similar ranked presentations of works and information tend to be driven by impulse. We are, he points out, naturally predisposed to be attracted by certain stimuli. We are likely to read content about sex, power, gossip, violence, celebrity, or humor, first. This is the content that makes it most easily into the filter bubble.¹²⁷ Works which most readily featured in social networking news feeds are those which stimulate outrage.¹²⁸ The metric of what we read first, or click on most often, though, provides suppliers with a fairly skewed picture of our tastes.¹²⁹ Such content would seem as suitable a candidate for the Baywatch critique about the proliferation of lowest common denominator fare, as anything presented by mass media.

1.5.3 Group polarization

Another problem with the filter bubble is that it contributes to polarization in discourse and culture. Professor Cass Sunstein has explained that, where members of a group begin with broadly similar views, interaction within the group tends to galvanize members toward more extreme iterations of the view they initially took.¹³⁰ For example, a group of people who are opposed to the minimum wage are likely, after talking to each other (and not to others with whom they disagree) to be still more opposed. People who believe global warming is a serious problem are likely, after to discussion

126. Hank Green, *Theft, Lies, and Facebook Video*, MEDIUM (2015), <https://medium.com/@hankgreen/theft-lies-and-facebook-video-656b0ffed369>. (last visited Nov 12, 2015).

127. PARISER, *supra* note 22 at 18, 32, 127.

128. Sam Harris, *What is Technology Doing to Us?*, MAKING SENSE PODCAST (Apr. 14, 2017), <https://samharris.org/podcasts/what-is-technology-doing-to-us/>; See also Recode Staff, *Full Transcript: Time Well Spent Founder Tristan Harris on Recode Decode*, RECODE (Feb. 7, 2017), <https://www.recode.net/2017/2/7/14542504/recode-decode-transcript-time-well-spent-founder-tristan-harris>. (last visited May 6, 2017).

129. Harris, *supra* note 123.

130. See e.g. CASS R. SUNSTEIN, *GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE* 3-4 (1 edition ed. 2009).

with like-minded interlocutors, to insist on ever more severe measures to prevent global warming. People who take the opposite view, if they only talk to like-minded ‘climate change sceptics’, are likely to become more stridently opposed to measures taken to mitigate climate change.¹³¹ Sunstein charts out various psychological and sociological reasons for this shift toward extremes, but those details are beyond the scope of this article.¹³²

Here is an example of group polarization in action, even in that most promising system for organizing creativity—networked peer production. Early in the second Iraq war, the *Los Angeles Times* attempted to crowdsource an editorial—a ‘wikitorial’ on the conflict. Arguments between those with opposing viewpoints quickly descended into ‘flamewars’. Ultimately the publication forked the debate into two separate sides, each side deliberating only with its own members.¹³³ The result was, in effect, to polarize the two sides, excluding each from the perspective of the other—a total failure of inclusiveness and diversity. Polarization happened here merely because participants were allowed to split into separate deliberating groups, not because they were intentionally herded in any way.

When deliberation and discussion is purposefully nudged into groups of like-minded people via relevance filtration, chances of polarization are very high. Filtration algorithms on social networks such as Facebook tailor users’ newsfeeds based on their past behavior, and the past behavior of their ‘friends’, and tend to corral them into groups of like-minded people, who post and share content with which they tend already to agree.¹³⁴

Indeed, presenting users with increasingly extreme iterations of an argument or viewpoint that they have initially engaged (by viewing a video, say) has proven a highly effective strategy for maximizing user time on platforms. For example, YouTube has an ‘Up Next’ sidebar, and automatically starts the next video from this algorithmically generated

131. Cass R. Sunstein, *The Law of Group Polarization*, 10 JOURNAL OF POLITICAL PHILOSOPHY 175–95 (2002).

132. For more, see SUNSTEIN, *supra* note 24 at 71.

133. John Thornhill, *Wiki-Journalism May be Part of the Answer to Fake News*, FINANCIAL TIMES, <https://www.ft.com/content/bd8337a2-2bfd-11e7-bc4b-5528796fe35c>. (last visited May 26, 2017).

134. Facebook’s feed places more emphasis on the signals of the user’s ‘friends’, while Google is more targeted around the user’s own past signals. See Richard Waters, *Google Tries to Muscle in on Rivals with New Automated ‘Feed’*, FINANCIAL TIMES (2017), <https://www.ft.com/content/1c0e1a76-6beb-11e7-bfeb-33fe0c5b7eaa>. (last visited Jul 19, 2017); SUNSTEIN, *supra* note 130 at 24; Katharine Viner, *How Technology Disrupted the Truth*, THE GUARDIAN (July 12, 2016), <https://www.theguardian.com/media/2016/jul/12/how-technology-disrupted-the-truth>. (last visited Jul 15, 2016); But for an opposing view see Michael Conover et al., *Political Polarization on Twitter*, PROCEEDINGS OF THE FIFTH INTERNATIONAL AAAI CONFERENCE ON WEBLOGS AND SOCIAL MEDIA (The AAAI Press, Cali.), July 17–21, 2011, at 93.

sidebar as soon as the last one finishes. The ‘Up Next’ algorithm is responsible for more than 70 percent of user time on app.¹³⁵ Its purpose is to capture and keep user attention, and it turns out that taking users down a ‘rabbit hole’ of increasingly extreme and polarized content is a good way to do this. Without any intentional malice on the part of YouTube, relevance maximization produces this very troubling outcome, and it would seem that preventing it requires deliberate, active curation on the part of the platform.

In order for deliberative discourse to avoid the trap of polarization, deliberators need exposure to, and engagement with, others who do not share their views. De-centralized filtration and selection of works has not reliably provided this kind of exposure.

1.6 When ‘grass roots’ goes wrong

So much for algorithmic filtration. What about the differences in author motivation between copyright-based and online free content systems? A number of scholars make much of the fact that works produced through grass-roots engagement, without commercial motivation, tend to differ significantly (and for the better) from works produced under conventional commercial publishing arrangements.¹³⁶ Benkler points out that, in the case of amateur contributions to culture, decisions about what to publish do not start from a manager or editor’s judgment about what would be relevant and interesting to many people without alienating too many others. It starts with the question, ‘What do I care about most now?’¹³⁷ Tushnet makes a similar point, arguing that amateur creation and dissemination of works is driven by desire and passion, rather than commercial considerations.¹³⁸ The parameters and constraints that apply to commercial publication—such as the need to attract the largest possible paying audience (and therefore to aim for ‘lowest common denominator’ fare)—are less prominent; while intrinsic motivations and true political and civic concern have free reign.

With this difference in motivation, will tend to come different kinds of works. There is a gain in expressive variety that comes from an increase in the production and dissemination of non-commercially motivated creation of works (*diversity*). The inclusion of those impassioned ‘voices’ into culture

135. Kevin Roose, *The Making of a YouTube Radical*, THE NEW YORK TIMES (2019), <https://www.nytimes.com/interactive/2019/06/08/technology/youtube-radical.html> (last visited Jun 11, 2019).

136. Tushnet, *supra* note 2 at 511. See also Elkin-Koren, *supra* note 2 at 386. See also NETANEL, *supra* note 2 at 40-41, on the advantages of ‘non-market speech’.

137. BENKLER, *supra* note 2 at 260.

138. Tushnet, *supra* note 28 at 515.

and discourse (*inclusiveness*) is also generally a good thing. But it is not *always* a good thing, nor is it good in every way for self-authorship and democracy.

Let me give, here, a few examples of how online dynamics of desire—dissemination and publication according to what users care about most—may work against diversity and inclusiveness. These examples are rather dramatic, and of course, one might offer a number of examples of beneficial outcomes of desire-based amateur publication and dissemination online. For example, the ease of podcasting has led to an explosion of creativity and high quality audio content. Twitter has permitted new forms of political mobilization and information sharing, allowing coordinated challenges against powerful state actors. Blogs have helped to supplement the watchdog role of the media, making important scandals known to the public. Fan fiction has allowed ordinary individuals to challenge conventions of gender, sexuality and power by re-imagining works of pop culture.

If we are arguing by example and anecdote, though, (and this seems very common in arguments celebrating networked information economies) we ought to make sure we are as cognizant of the gloomy and discouraging examples as of the inspiring ones.

Ease of publication online is liable to amplify the voices of those who are most passionate, and most prolific in their output; but not necessarily the most truthful, or the most rigorous. In a 2016 article in *The Atlantic* about racist extremism on the internet, one interviewee pointed out,

Racist propagandists have motivation to put that stuff [white supremacist propaganda] out . . . The anti-Semites can flood an area and there's no contradictory evidence. There aren't people out there trying to prove that Jews aren't running the government."¹³⁹

Online forums tend to amplify the voice of the vociferous extremist (or propagandist) and conceal the opinion of the quiet moderate. This is obviously bad for diversity and inclusiveness.

The extent to which a person is motivated to create or disseminate or view a work absent commercial incentives (Benkler's 'what do I care most about now?' factor) is not itself a measure of the work's social or cultural value. One may be simultaneously passionate and ignorant, passionate and bigoted, passionate and manipulative. Or one might simply be motivated by mischievous or anarchic impulses—as, it seems, is the now infamous class

139. Olga Khazan, *The Tech White Power Used to Go Viral*, THE ATLANTIC, 2016, <https://www.theatlantic.com/technology/archive/2016/11/how-white-power-went-viral/507473/> (last visited Nov 15, 2016).

of amateur content creators, known as internet ‘trolls’.¹⁴⁰ As the ‘Russian election hacking’ and ‘fake news’ scandals have revealed, trolls may be very organized, able to intentionally and successfully stoke division and spread misinformation and propaganda, with all of the power of data analytics and network effects at their disposal.¹⁴¹ Falsehood, conspiracy, misinformation and disinformation spread very quickly online, especially if their dissemination is carefully targeted.¹⁴²

In one sense, the explosion of radical voices online is democratizing, because it suggests that marginal voices are finding a new platform.¹⁴³ But ultimately, if the aim is to foster *productive* democratic deliberation and individual self-authorship prioritizing marginal, extreme, and downright false content at the expense of more balanced, reasoned, tolerant, or simply more representative content, is unhelpful. In so far as individual users are led down partisan ‘rabbit holes’, the diversity of the content they experience is stifled. In so far as they are encouraged into passivity, and subject to powerful infrastructures designed to influence and modify their behavior, the consequent distribution of cultural and communicative power would seem to be far from inclusive.

1.7 Propaganda and manipulation

The concentration of attention on Google and Facebook, combined with the insights available from extensive analysis of users’ data, makes those platforms and their users particularly vulnerable to dissemination of falsehood.¹⁴⁴ Governments or political groups seeking to suppress or influence information flows find themselves in a game of ‘one stop shopping’: by targeting users through a handful of dominant internet platforms they can exert great reach and influence.¹⁴⁵

A series of important investigative articles documents the role played by social media propaganda campaigns, targeting users through big data

140. On the negative effects of trolling on diversity and inclusiveness—and especially on the participation of women in online fora—see Erin E. Buckels, Paul D. Trapnell & Delroy L. Paulhus, *Trolls Just Want to Have Fun*, 67 *PERSONALITY AND INDIVIDUAL DIFFERENCES* 97, 97 (2014); see generally Amanda Hess, *Why Women Aren’t Welcome on the Internet*, *PACIFIC STANDARD* (2014), <https://psmag.com/why-women-aren-t-welcome-on-the-internet-aa21fdb8d6> (last visited Mar 18, 2017); Manjoo, *supra* note 11.

141. See generally DiResta et al, *supra* note 7.

142. Sunstein, *supra* note 130 at 120.

143. See Benkler in Hylton, *supra* note 40.

144. However, regarding Facebook’s recent efforts to tackle fake news, see e.g. Madhumita Murgia & Mehreen Khan, *Facebook, Amazon and Google in Europe’s Crosshairs*, *FINANCIAL TIMES* (2019), <https://www.ft.com/content/bf9d355e-2a27-11e9-a5ab-ff8ef2b976c7> (last visited Feb 8, 2019).

145. PARISER, *supra* note 22 at 44.

analysis and the use of bots to artificially elevate content in news feeds, in both the recent US presidential election and the UK ‘Brexit’ referendum.¹⁴⁶ Renee DiResta has carefully documented the way in which Russian government operatives carefully spread disinformation and stoked division in US politics by targeting Facebook and Twitter campaigns.¹⁴⁷ And Carole Cadwalladr has produced superb investigative articles on the role of an organization called Cambridge Analytica in both the ‘leave’ campaign, and Donald Trump’s campaign for presidency. Cambridge Analytica analyzed data from social media profiles and helped to target campaign messages based on the results of its analysis.¹⁴⁸

Recall, Facebook could manipulate its users’ emotions through the news feed. It is therefore hardly surprising that Amy Wigmore, Leave.EU’s communications director, said that Facebook likes were the campaign’s most ‘potent weapon’,

“Because using artificial intelligence, as we did, tells you all sorts of things about that individual and how to convince them with what sort of advert. And you knew there would also be other people in their network who liked what they liked, so you could spread. And then you follow them. The computer never stops learning and it never stops monitoring.”¹⁴⁹

The particular political entities involved here are less relevant than the means of spreading their influence. Wigmore is describing the subjugation of individual self-authorship, the invisible manipulation of individuals’ information sphere, by powerful political actors who know much more about the individuals than the individuals know about them. It is hard to imagine a scenario in which communicative power was more asymmetrically distributed.

1.8 Direct intervention by platforms

What about the claim that networked filtration is more democratic the basis that it does not have a single point of curatorial control? Things are not quite so simple. As the examples above suggest, the prospect of direct interference, at a single point of control, with users’ information streams is

146. Carole Cadwalladr, *Robert Mercer: the big data billionaire waging war on mainstream media*, THE GUARDIAN, https://www.theguardian.com/politics/2017/feb/26/robert-mercer-breitbart-war-on-media-steve-bannon-donald-trump-nigel-farage?CMP=Share_iOSApp_Other. (last visited Feb 26, 2017); Cadwalladr, *supra* note 21.

147. DiResta et al., *supra* note 7; Renee DiResta, *Free Speech in the Age of Algorithmic Megaphones*, WIRED, 2018, <https://www.wired.com/story/facebook-domestic-disinformation-algorithmic-megaphones/> (last visited Nov 14, 2018).

148. Cadwalladr, *supra* note 21.

149. *Id.*

no longer as unlikely as it may once have seemed. Conventional wisdom depicts filtration algorithms as passive vehicles, simply giving effect to users' fully autonomous choices and preferences. As a matter of fact, however, the operations of algorithmic filtration are fairly opaque.¹⁵⁰ This makes sense, since a successful ranking algorithm is a valuable trade secret. The perception, however, that filtration on social networks or search engines is truly 'organic' can be misleading and extremely disempowering to users.

This is not only because information ranking algorithms are susceptible to manipulation, but also because platforms may exercise direct curatorial control of information flows. A scandal involving Facebook's 'trending' news stories application illustrates the point well. Facebook's trending news section was supposed merely to reflect organically whatever news stories users were sharing. In May 2016, however, it came to light that members of Facebook's news team were manipulating and partly curating the 'trending news' module.¹⁵¹ Facebook's curation involved injecting stories of its own news team's choosing, rather than stories that were organically trending. It also involved suppressing, or demoting, stories which were deemed to have too strong a conservative bias.¹⁵² In some cases, allegedly, after a topic was injected 'artificially' into the news feed by Facebook staff, it picked up 'organically' and became the number one trending news topic on Facebook.¹⁵³

Platforms may also intervene for less nefarious reasons. Various states are taking legislative measures to hold platforms accountable for harmful content posted by users.¹⁵⁴ Google, Facebook and Twitter have claimed they will do more to prevent the spread of disinformation, misinformation and other forms of harmful content online.¹⁵⁵ In order to reduce polarization and outrage, Facebook has also recently announced that it has adjusted its

150. *But see* CAIRNCROSS, *supra* note 7, chapter 4, for a helpful review of what is known about the mechanisms of the main internet search engines and feed ranking systems.

151. *See e.g.* Ben Hoyle, *Facebook in storm over political bias*, THE TIMES (May 10, 2016), <https://www.thetimes.co.uk/article/facebook-in-storm-over-political-bias-vkzrsr9ss>.

152. Michael Nunez, *Facebook Admits Its Trending Section Includes Topics Not Actually Trending on Facebook [Update: Zuck Speaks]*, GIZMODO, <http://gizmodo.com/facebook-admits-its-trending-section-includes-topics-no-1776319308> (last visited Sep 18, 2017); Michael Nunez, *Former Facebook Workers: We Routinely Suppressed Conservative News*, GIZMODO, <http://gizmodo.com/former-facebook-workers-we-routinely-suppressed-conser-1775461006> (last visited May 10, 2016).

153. *Id.*

154. *See e.g.* DEPARTMENT FOR CULTURE, *supra* note 7. For a helpful summary of related measures internationally, *see* Matthew Lesh, *The Moral Panic Behind Internet Regulation*, QUILLETTE (April 30, 2019), <https://quillette.com/2019/04/30/the-moral-panic-behind-internet-regulation/>.

155. *See e.g.* DISINFORMATION AND 'FAKE NEWS': FINAL REPORT (2019), <https://www.parliament.uk/business/committees/committees-a-z/commons-select/digital-culture-media-and-sport-committee/inquiries/parliament-2017/fake-news-17-19/> (last visited Feb 19, 2019).

newsfeed algorithm in order to de-prioritize news items in user feeds.¹⁵⁶ Notably, though, Facebook has been fairly obstructive when it comes to audits of their advertising practices, and efforts to try to understand how targeted advertising and propaganda campaigns worked.¹⁵⁷

Taken at face value, these appear to be promising developments, but their structural effects are not straightforward. Newspapers aligned their business models around optimizing for Facebook's algorithm (in so far as they could make educated guesses about what would be prioritized). The more prominent their content on online platforms, the more likely are readers to click through to their websites, and the more advertising revenue the papers are likely to derive.¹⁵⁸ Having adopted a 'free' dissemination model, and having come to rely on platforms such as Facebook as key points of dissemination, newspapers are left high and dry when their news content is suddenly down-shifted in news feeds. The unilateral change, with little warning, and no consultation, has adversely affected their revenues.¹⁵⁹ This is a dramatic example of the market power of dominant online platforms in the news market.

More broadly, the kinds of curation I have just described seem very similar to the kind of centralized selection and control supposed to pervade traditional copyright-based media. A select group of professionals, occupying a more or less unassailable point of control, exercise great power over the contents of culture and discourse. The difference is, traditional news media do not pretend merely to be presenting an organic report generated by users' search and viewing behavior; and few, if any, traditional news media outlets consistently reach billions of viewers or readers.

We seem faced with a choice between pure 'dis-intermediated' algorithmic filtering, with all of the troubling incentive structures that come with it; or more direct intervention and curation by platforms and ultimately the state. Both would seem to fall short of Benkler's hope of removing 'some

156. Adam Mosseri, *News Feed FYI: Bringing People Closer Together*, FACEBOOK BUSINESS, <https://en-gb.facebook.com/business/news/news-feed-fyi-bringing-people-closer-together> (last visited Aug 8, 2019).

157. See e.g. DISINFORMATION AND 'FAKE NEWS': FINAL REPORT, *supra* note 155 at 85 ("On the one hand, Facebook gives the impression of working towards transparency, with regard to the auditing of its news content; but on the other, there is considerable obfuscation concerning the auditing of its adverts, which provide Facebook with its ever-increasing revenue. To make informed judgments about the adverts presented to them on Facebook, users need to see the source and purpose behind the content.").

158. CAIRNCROSS, *supra* note 7 at 8-9.

159. NEWMAN ET AL., *supra* note 112 at 10-11. On the mismatch in negotiating power between online platforms such as Google and Facebook, and news publishers, see CAIRNCROSS, *supra* note 7 at 57; OVERVIEW OF RECENT DYNAMICS IN THE UK PRESS MARKET - A REPORT FOR DCMS, *supra* note 69 at 61.

of the most basic opportunities for manipulation of those who depend on information and communication by the owners of the basic means of communications and the produces of the core cultural forms.’¹⁶⁰

1.9 A more judicious view of ‘free culture’

Digital utopians imagined the online free content sphere, unencumbered by restrictions on copying and communicating works, as a highly inclusive digital democracy, characterized by a level communicative playing field, and populated by individuals whose consumption of works, and contributions to culture are autonomous and self-actualizing. Benkler advocated the cultivation of a cultural production and exchange system that is ‘as unconstraining and free from manipulation as possible’ and saw great promise in the ‘wealth of networks’.¹⁶¹ The networked information economy and online marketplace of ideas are not currently living up to that promise. The Centre For Humane Technology puts it this way:

“[S]eemingly separate problems – tech addiction, teen depression, shortening attention spans, political polarization, the breakdown of truth, outrage-ification of culture, and the rise of vanity/micro-celebrity culture – are actually not separate issues. They are all symptoms of one underlying problem: the race between tech giants to capture human attention, which becomes a race to overwhelm human weaknesses. Put together, that race creates ‘human downgrading.’”¹⁶²

Human downgrading would seem to be the opposite of the democratizing and self-authorship-enhancing internet that copyright minimalists hoped for.

160. *Supra*, note 2 and accompanying text.

161. BENKLER, *supra* note 2 at 299.

162. Centre for Humane Technology, Newsletter, May 2019.

2 PRACTICAL IMPLICATIONS

2.1 Both strengthening and weakening copyright may have troubling structural consequences

The implications of my analysis for the development of copyright law are many.

- Changes in copyright law and practice effect the political economy of creative activity, which affects the quality and character of works, culture and discourse.
- The political economy, both of traditional copyright media, and of online free content environments, seems to generate problematic incentives.
- Communicative and cultural power is not widely enough distributed: both large internet platforms, and copyright industry businesses have accrued too much of it.
- Free (or freer) access to content does not necessarily enhance individuals' substantive, positive freedom and self-authorship.
- The 'democratization' of content functions does not necessarily produce a more democratic landscape for information and creativity.

I will focus here, though, on one key imperative that emerges from my analysis.

Any efforts to develop copyright law must take into account existing structures of incentive, communicative power and opportunity, and the likely effects of the proposed intervention on those structures. The structural effects may not always follow the formal allocations of rights effectuated by the law. There may be unintended consequences, in terms of the allocation of wealth, power, influence and opportunity.

To illustrate my point, I will first consider the structural impacts of expanding fair use. I will look at a number of different recommendations for the expansion of that exception, as well as an expansion of the 'transformative use' doctrine which has in fact occurred.

I do not wish, however, to create the impression that copyright-maximizing doctrines are safe from the risk of producing structurally troubling outcomes. The structural impacts of developments in the law may be significant whether such developments or reforms are calculated to expand the strength and scope of copyright exceptions and increase users' rights and privileges with respect to works; or whether they are directed at shoring up and strengthening exclusive rights in copyright.

This is a point that needs special emphasis, since the bulk of this article has been focused on refuting the copyright minimalist / internet optimist binary so common in the cultural turn. The purpose of this refutation, I want to reaffirm, is not to make an apology for maximalist copyright. Rather, it is to balance the scales by showing some of the downsides of online free content economies; and by showing that the structural and institutional parameters in which creative activity take place exert meaningful, qualitative effects, regardless of whether they are instituted by law, day to day practice, or existing patterns of wealth and power.

After my analysis of fair use, I will therefore briefly consider the troubling structural implications of an intervention aimed at strengthening the rights of copyright owners. Article 17 of the European Union's *Directive on Copyright in the Digital Single Market* (hereafter the 'copyright directive') strengthens the formal rights of copyright owners with respect to online platforms. Its practical effect, however, may be to give dominant online platforms even more curatorial power over individuals' informational and cultural experience.

2.2 Fair use

Let us begin with expansions to the fair use exception to copyright. I will first review some of the proposed changes to fair use that emerged at the height of the cultural turn (in the first ten years of this century). Then I will consider the impacts of an actual change to the doctrine in recent years. Finally I will apply my insights about these actual changes to the proposals for further change.

One of the recommendations common to many proponents of the cultural turn is to expand fairness exceptions: in the case of fair dealing jurisdictions, by introducing fair use; and in fair use jurisdictions, by expanding the classes of use deemed fair. Expansion of fair use is generally justified on the basis that it would enhance freedom of expression, freedom of imagination, and a fair distribution of cultural power. Unsurprisingly, recommendations for expanding fairness exceptions were at their height at the same time as the cultural turn was at its strongest: in the first ten years of this century.

Recommendations to expand copyright exceptions seem to follow from the copyright minimalist / internet optimist framing that expects improvements in diversity and inclusiveness to follow from freer access to works online. Broadly, such an approach would prioritize individual and collective interests in a more robust public domain over copyright owners' interests (and perhaps also over democratic civil society interests of the kind

articulated by Netanel).¹⁶³ For example, the sense that inflexible copyright constrains expressive freedom played a part in the Australian Law Reform Commission's recommendation (approved by a more recent Productivity Commission report) to introduce a broad US style fair use in Australia, to replace a set of narrow fair dealing exceptions.¹⁶⁴

More radical proponents of the cultural turn recommended even more significant expansions. One recommendation is to invert of the onus of proof in relation to the fairness of uses of copyright material. Arewa argued that authors should have to prove uses to be unfair in order to demonstrate copyright infringement, instead of defendants being required to prove that the use falls under a fairness exception.¹⁶⁵ Bohannon and Hovencamp argued that the copyright owner should need to prove harm to her *ex ante* incentive in order for a use of a work to be held to infringe copyright.¹⁶⁶ Netanel offered a slightly less radical proposal. He contended that once a copyright defendant shows a 'colorable claim of fair use', the burden of proving that the use is unfair should pass to the copyright owner.¹⁶⁷ Each variant of this approach would (to differing degrees) discourage copyright owners from suing for licensing fees in relation to markets which they either did not contemplate when creating their works or have not exploited themselves.

Another similar approach, favored by scholars like Lange, and also Rubinfeld, adopted a different baseline: freedom of imagination. Lange and Rubinfeld, in separate articles, argued for the recognition of a positive user right of freedom of imagination.¹⁶⁸ Creative appropriation, Lange argued, should be presumptively privileged in every instance: rising to the level of an affirmative user right. A fair use defense to copyright infringement would be withheld only in cases where there was no creative exercise of imagination in the second work at all.¹⁶⁹

Lange, optimistic about the democratizing power of the internet, had no hang-ups in moving the whole apparatus of identifying or weighing commercial harm to the margins of his analysis. Copyright cases concerned with the use of existing works ought to turn primarily on questions of

163. See Lange, *supra* note 2 at 469.

164. AUSTRALIAN LAW REFORM COMMISSION, *Copyright and the Digital Economy: ALRC Report 122* (2013), 87ff; INTELLECTUAL PROPERTY ARRANGEMENTS - PRODUCTIVITY COMMISSION INQUIRY REPORT, *supra* note 35 at 123.

165. See Arewa, *supra* note 26 at 553-54.

166. Christina Bohannon & Herbert J. Hovencamp, *IP and Antitrust: Reformation and Harm*, 51 BOSTON COLLEGE LAW REVIEW 905, 979-82 (2010).

167. Netanel, *supra* note 2 at 192ff.

168. Rubinfeld, *supra* note 2 at 4-5; Lange, *supra* note 2 at 476.

169. Lange, *supra* note 2 at 479-80.

imaginative freedom. They should not, he argued, give primary concern to the negative effects on the economic value of an antecedent work, although in some cases, he concedes, ‘equitable provision for sharing the proceeds of such exploitations would follow’.¹⁷⁰

Proponents of these recommendations justify them on the basis that they would enhance freedom of expression, freedom of imagination, and a fair distribution of cultural power. Expanding fairness exceptions could serve to mitigate the causes of the concentration critique, by furnishing individuals and non-incumbents with greater cultural and communicative power relative to incumbent copyright industry players. These are, broadly speaking, inclusiveness goals, with follow on effects for diversity.

2.2.1 Actual expansions to the fair use exception

So much for proposed expansions of the fair use doctrine. What of actual ones? In the US, the home of fair use, the exception has indeed expanded in recent years. A series of cases, notably cases concerning the Google Books and Google Images services, have expanded the concept of ‘transformative use’ to encompass uses of works that do not produce new works, but rather new ways of distributing and accessing them. Professor Samuelson describes this new kind of transformative uses as ‘orthogonal’, and Professor Ginsburg as ‘redistribution’ fair use.¹⁷¹ I will adopt Samuelson’s ‘orthogonal use’ label.

The effectiveness of fair use exceptions in furthering goals such as diversity and inclusiveness is not necessarily straightforward. In expanding the transformative use doctrine, courts gave little attention to the structural landscape, and as a consequence have helped large online platforms such as Google to cement their dominance of the information environment. Let me briefly gloss the significance of ‘transformative’ use in the fair use calculus, before I explain the import of the expansion of the doctrine.

There are four ‘fair use’ factors considered in determining whether a use falls under the fair use exception:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

170. *Id.* at 479.

171. Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537 (2008), 2544; Jane C. Ginsburg, *Fair Use for Free, or Permitted-but-Paid*, 29 *BERKELEY TECH. L.J.* 1383, 1389-91 (2014).

(4) The effect of the use upon the potential market for or value of the copyrighted work.¹⁷²

If the use of an existing work has ‘a further purpose or different character, altering the first with new expression, meaning, or message’, and it does not ‘merely supersede the objects’ of the original, then it is likely to be considered transformative.¹⁷³ The transformativeness of a use bears on both the first and fourth factor.

Expanding the scope of what may be considered transformative therefore expands the scope of the fair use exception. What does the expansion entail? I will focus here on two cases: each concerning one of Google’s search services.

In *Perfect10 Inc. v Amazon.com Inc.*, the US 9th Circuit Court of Appeals held that the display on Google Images of thumbnail images, linking to pages on which those images were displayed, was a *transformative* use of the copyright works embodied in the images.¹⁷⁴ The court held the use was transformative because the purpose of the original photos was ‘aesthetic’, whereas the search engine used the image as a pointer directing a user to a source of information.¹⁷⁵ This was a departure from earlier authority which held that difference in purpose is not the same as transformation.¹⁷⁶ The fact that, in making the use, the Google’s image search engine reproduced the whole image did not prevent the use from being considered transformative.¹⁷⁷

Nor did the commercial profitability of the use lead the court to give particular weight to the fourth fair use factor: the market harm factor. Google’s use of the images directed users to websites which had purchased advertising space through Google’s AdSense offering. The websites displayed infringing images. Google’s AdSense program was, at the time of the first instance decision in *Perfect 10*, worth \$630 million: 46% of Google’s total revenues.¹⁷⁸ Strangely, the court described Google’s use of the images as having only a ‘minor commercial aspect’.¹⁷⁹ It went on to conclude that the mere commerciality of Google’s use could not be presumed to amount to market harm to the copyright owner, because market harm cannot be presumed in cases of transformative use. Insufficient evidence on

172. 17 USC §107.

173. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

174. 508 F.3d 1146, 1176 (9th Cir 2007).

175. *Id.* at 1165.

176. *Infinity Broadcast Corp.*, 150 F.3d at 104.

177. *Perfect 10*, 508 F.3d at 1165.

178. *Id.* at 1166.

179. *Id.* at 1167.

the question of whether users actually downloaded images from Google for which they would otherwise have had to pay led the court to hold that potential harm to Perfect 10's market 'remains hypothetical'; and the market harm factor therefore did not favor a finding of fair use.¹⁸⁰

In the *Googlebooks* case, Google's unauthorized mass reproduction and digitization of library books for the purposes of creating a searchable database, which produced text 'snippets' in response to user searches, was also held to be a fair use.¹⁸¹ The court held the use of the works for a new purpose—enabling text search—was transformative in the sense intended by the court in *Campbell*.¹⁸² In other words, the court drew an equivalence between transformation of purpose and transformation in aesthetics, meaning or message. The transformativeness was more or less dispositive of the fair use question, even though Google arguably had commercial motives.

The court noted that even if the purpose of copying is for a valuably transformative purpose, the product of the transformation might still be a market substitute for the copyright work. However, it emphasized the principle from *Campbell* that the more transformative the use, the less likely it is that the copies generated by way of the use will serve as a substitute for the copyright work, and the less likely will be a finding of market harm.¹⁸³ The *Googlebooks* court concluded that Google's use could not rightly be considered to produce true market substitutes for copyright works, *even if some sales would be lost* as a result of snippets being available.¹⁸⁴

These cases are significant in a number of ways. They establish a precedent for treating mass unauthorized copying to facilitate the searching and browsing of works as transformative uses, even when the copying does not result in the creation of a new work of authorship, or new meanings, insights or aesthetics.¹⁸⁵ Secondly, they established that courts' findings on the first fair use factor (the nature of the use) bear heavily on the analysis of the fourth fair use factor. The fourth fair use factor is 'the effect of the use upon the potential market for or value of the copyrighted work.'¹⁸⁶ They institute a loose rule of thumb that if a use is transformative, it probably does not supersede the objects of the original work, and therefore is very unlikely

180. *Id.* at 1168.

181. *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), cert. denied sub nom. *Authors Guild v. Google, Inc.*, 136 U.S. 1658 (2016), [hereinafter, '*Googlebooks*'].

182. *Googlebooks*, 804 F.3d at 216.

183. *Campbell*, 510 U.S. at 591; *Googlebooks*, 804 F.3d at 214.

184. *Googlebooks*, 804 F.3d at 223.

185. *Id.*

186. 17 USC, §107 (2012).

to operate as a market substitute for that work.¹⁸⁷ The more specific implication of the cases is that where works are reproduced, even in full, for the purposes of data analysis and search technologies, courts will not assume an effect on the potential market for or value of the copyright works unless copyright owners lead specific evidence of actual market harm.

The result is to establish an approach to the fourth fair use factor—the effect of a use on a copyright work’s potential market or value—in which the key issue is substitution on markets existing before the development of an attention-based economy online. Copyright owners are, in effect, deemed not to be entitled to profit from a search engine’s rendering their works more searchable, even when internet intermediaries profit directly or indirectly from the attention that they capture by making the works available in this way.

On the one hand, these developments are good for inclusiveness and diversity, at least along some dimensions. The public’s power and entitlements in relation to the use of works is increased, and this is autonomy enhancing. Individuals’ and deliberating bodies’ capacity to find the precise parts of cultural artefacts relevant to their day to day concerns has grown. The range and diversity of books and images available for the public to search and browse has also grown.

On the other hand, we should be careful not to lose sight of the broad, structural picture. If we confine our picture of copyright’s potential benefits to its supposed incentive effects, then there is little sense in extending copyright owners’ rights into markets which cannot reasonably be considered to have affected authors’ and publishers’ motivations in the first place, especially if the use in question provides a benefit to the public. Markets for searchable snippets of books, which did not exist at the time of creation or publishing, seem to fit this description.

But my approach does not confine copyright’s benefits to its incentive effects. I am interested in substantive, structural effects. A simple example illustrates the point. Libraries have to buy books in order to lend them to the public. Google, by contrast, is now not required to pay for their copying of books in order to render them searchable to the public.¹⁸⁸ The result is that Google is at a structural advantage to libraries (and everybody else), when it comes to copying works.

More broadly, the substantive, structural effect of the expansion of fair use in the orthogonal use cases is to allocate communicative power to

187. See Ginsburg, *supra* note 171.

188. Ginsburg, *supra* note 171 at 1411.

dominant internet intermediaries. Those best placed to take advantage of the developments in fair use brought about by cases like *Googlebooks* are, unsurprisingly, dominant internet intermediaries like Google. Concentrating user attention on free content is extremely profitable for businesses like Google; not least because it permits the gathering of valuable data about those individuals that can then be used to sell advertising.¹⁸⁹ It is businesses like Google, on that scale, which have the resources to conduct mass copying and data analysis exercises, extracting valuable data about the public in the process. It is businesses of that size that can be confident of having the resources to defend copyright suits and make a case for fair use. Smaller businesses are not on the same footing. We should not forget that the practical outcomes of *Googlebooks* was to furnish Google with a kind of monopoly; a first mover advantage against any potential competitors in the niche of online book search whose scruples or lack of resources prevented them from digitizing books without permission.

Indeed, in earlier proceedings, the risk of Google's obtaining a de facto monopoly over the digital market for millions of books was one of the grounds for rejecting a proposed settlement between Google and the plaintiffs.¹⁹⁰ Under the settlement, Google would have paid license fees to copyright owners. If market power was a problem under a settlement where Google would have been paying license fees for its use, it is surely an even greater concern in the fair use, zero price scenario.

My concerns about the networked information economy suggest we take care not to make cultural dominance too easy a feat for internet intermediaries. We should therefore resist treating orthogonal / redistribution uses of the kind in the *Googlebooks* and *Google Images* cases as transformative. In the US, this would mean returning to the position on transformative use set out in *Infinity v Kirkwood*. That is: copying works in such a way as to allow them to be used for a different purpose (such as research, or search), is not the same as transformation.¹⁹¹

Professor Ginsburg, who sounded the alarm over the expansion of transformative use, has noted some indications of a movement in the

189. See BARNETT, *supra* note 20 at 10. He writes: "The end-result of these actions is a substantial deproportionization of content assets in online environments, which has benefited search intermediaries by reducing input costs, reducing intermediaries' and users' liability exposure, and, for both reasons, increasing the size of the intermediaries' content portfolio, which in turn expands the user population (and associated data assets) available to be sold to advertisers."

190. *Googlebooks*, 804 F.3d at 682–83.

191. *Infinity Broadcast Corp.*, 150 F.3d at 108.

direction of *Kirkwood*, at least by the 2nd and 4th Circuit courts.¹⁹² Recent cases such as *TCA Corp. v. McCollum* and *Brammer v Violent Hues* show courts more willing to challenge and reject claims of orthogonal use transformativeness, especially when the purpose is clearly commercial.¹⁹³ This is a promising development, and courts should continue to subject claims of orthogonal transformativeness to heightened scrutiny.

We should also not allow transformative use to predominate too much in determining questions of fair use. A finding of transformation should not unduly prejudice findings regarding the fourth fair use factor: the effect on the potential market for or value of the original work.

Courts should also adopt a broader interpretation of that factor. A use can be transformative, but at the same time, treating it as fair might allocate power, wealth and resources away from copyright owners, or disproportionately toward internet intermediaries in comparison with copyright owners, and indeed the general public.

The fourth fair use factor requires courts to assess the effect of the use not only on the ‘potential market for’ the copyrighted work, but also the ‘value of’ that work. Ginsburg points out that ‘value of’ has a distinct meaning from ‘potential market for’ and warns against interpreting the two tautologically.¹⁹⁴ She explains that works may also serve as a ‘draw’ through which businesses might derive other forms of value.¹⁹⁵

There is at least one case, she observes, which adopts this approach to the fourth fair use factor: *Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*¹⁹⁶ There, the third circuit observed that, for the purposes of the fourth fair use factor, the ‘value of’ a film trailer need not only be understood in terms of direct income from the trailer. It could also encompass the value derived from advertising, cross-marketing and cross-selling other products, and obtaining valuable marketing information from visitors who view the trailer on webpages to which it was legitimately licensed.

This is a promising authority. Following this line of reasoning, I would argue that uncompensated use of copyright works for the purposes of creating searchable indices that themselves serve as a ‘draw’ for attention

192. See Jane Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed*, (November 11, 2019); Columbia Public Law Research Paper No. 14-639 at 18-20.

193. *TCA Corp. v. McCollum*, 839 F.3d 168, 179 (2d Cir. 2016); *Brammer v Violent Hues, Prods.*, 922 F.3d 255 (4th Cir. 2019), reversing *Brammer v. Violent Hues Prods., LLC*, 2018 U.S. Dist. LEXIS 98003 (E.D. Va., June 11, 2018).

194. See Ginsburg, *supra* note 192 at 37.

195. *Id.*

196. 342 F.3d 191 at 202 (3rd Cir. 2003), abrogated on other grounds by *TD Bank N.A. v. Hill*, 928 F.3d 259 (3d Cir. 2019).

harvesting deprives copyright owners of value that they might hope to derive from such activities themselves. Uses of the kind deemed to be fair in the orthogonal use cases may increase the amount of time users spend on internet intermediaries' platforms or applications, or provide valuable data about user preferences, or facilitate the sale of advertisements. Surely this is an 'effect on the value' of the work: an exploitation of the works capacity to serve as a 'draw' of the kind Ginsburg describes. Such uses should therefore not continue to be treated as fair in future.

In the case of such uses, value is allocated toward internet intermediaries (and arguably away from copyright owners). The European Commission described that flow of wealth and power as a 'value gap', whereby copyright owners do not obtain a 'fair share' of the value that other businesses, like internet intermediaries, derive from the use of their works online.¹⁹⁷ For my purposes, the broader question is not whether the distribution of value is fair in a deontological sense, but rather whether it fosters an inclusive distribution of communicative power and opportunity in the information environment. Still, the metaphor of a 'value gap' captures the inclusiveness problems associated with orthogonal uses rather well.

Given the immense commercial value of attention harvesting and data aggregation, the implication of the orthogonal use cases - that the copyright owners do not have a legitimate interest in the revenue derived from such activities, or that they would not expect to profit from their works in such a way - now seems premature. Having that value captured by dominant platforms, without having a say, seems a clear and negative effect on the value of copyright owners' works.

If we get beyond the incentive narrative, and think in broader, structural terms, there is more to consider than merely whether a copyright owner was motivated by the prospect of exploiting her work in a particular market. If we adopt the values of the cultural turn, we care less about optimizing incentives, and more about optimizing for inclusiveness and diversity.

This calls for a broader, more purposive, interpretation of the fourth fair use factor. That factor should not be addressed by reference to a narrow question, 'is the copyright owner's market harmed'? Instead, courts should ask the broader question, 'is the effect on the potential market for, or value of, the work *fair*.' A broad consideration of fairness would take into account

197. Directive of the European Parliament and of the Council on copyright in the Digital Single Market—COM (2016) 593. But see regarding the value gap, see Jessica Litman, *Imaginary Bottles*, 18 DUKE LAW & TECHNOLOGY REVIEW 127–136 (2019). She points out (at 129) how much copyright industries are to blame for their weak bargaining power vis a vis large platforms, due to their own lengthy delay in supplying works in convenient formats and attractive prices online.

existing constellations of power and privilege, and the likely effect of applying the exception, in deciding what is fair.

Where a use clearly contributes to the ‘value gap’ – a significant effect on the ‘value of’ the work - courts should be more cautious about treating it as fair. They should take care to include the work’s value as a ‘draw’ in their consideration of the fourth fair use factor (and copyright owners should take care to lead evidence as to this attention-harvesting value when litigating fair use issues). The commerciality or attention-harvesting character of the use, should not, of course, lead to a presumption of unfairness, but it should be given due attention in the application of the fair use factors.

2.2.2 Proposed further expansions of fair use

With a clearer sense now of the ways in which even relatively narrow expansions of fair use may amplify the power of dominant internet platforms, let us now turn to the more radical proposals described at the beginning of this section.

Let us start with the recommendation of including all imaginative uses within the purview of fair use. The benefit of extending fair use further, to encompass all imaginative uses of works is obviously that it would distribute the right to engage with works creatively in a far more inclusive way. But, like the expansion of transformative use doctrine to encompass orthogonal uses, this expansion of fair use would involve trade-offs.

As with orthogonal uses, internet platforms that profit from attracting ‘eyeballs’ and collecting data are well served by treating all imaginative uses as fair and non-infringing of copyright. Proliferation of non-commercial, imaginative uses of works would presumably drive traffic on internet intermediaries’ platforms, and traffic is their currency. Concentrating user attention on free content is extremely profitable for businesses like Google; not least because it permits the gathering of valuable data about those individuals that can then be used to sell advertising, or even for the purposes of propaganda. They profit and develop the information asymmetries described in the previous part, not only on the back of copyright works themselves, but also from the public’s creative engagements with copyright works.

It is businesses like Google, on that scale, which have the resources to conduct mass copying and data analysis exercises, extracting valuable data about the public in the process. It is businesses of that size that can be confident of having the resources to defend copyright suits and make a case for fair use. Smaller businesses are not on the same footing. Structural

asymmetries would compound. That would be an indirect structural consequence of treating all imaginative uses as fair.

What about the direct consequences? It is not clear, even where direct consequences are concerned, that a broad ‘imaginative use’ exception would in every case involve a redistribution of cultural power away from large commercial organizations and toward individual authors or non-commercial users of works.

It would not always be the ‘little man’ who would benefit from relying on the exceptions. Commercial businesses might, by applying a minimum of creative imagination to works created by amateurs or independent authors, find themselves in a position where they could profit without paying authors. There are already examples of successful commercial publications like BuzzFeed disregarding copyright and reproducing and publishing photographs and other works created by amateurs, in ‘listicles’ without attribution or authorization.¹⁹⁸ And Facebook already derives enormous profits from using all of the content, created by all of its users, without payment to them.

An ‘imaginative use’ exception therefore seems to me just as likely to produce a less inclusive distribution of communicative power as to produce a more inclusive one, even if on its face, it would give formal recognition to a universal right of free imagination.

As for the recommendation of an inverted burden of proof in fair use, this would at first glance appear to empower the public *vis-à-vis* copyright owners. The right to use works, especially for non-commercial purposes, would appear to be very inclusively distributed under such an arrangement. At a structural level, however, such a development would be liable to compound inequalities in communicative power and opportunity.

Fair use exceptions are already problematic in so far as their application is uncertain. In the face of uncertainty about whether any given use is fair, wealthy, established businesses can afford to pay for copyright advice, and even to risk copyright infringement. They can defend a suit or respond to a threat of litigation effectively. Moreover, risk-averse, established commercial copyright owners are better placed than independent authors or ordinary individuals to pay license fees. If they do not wish to take the risk that a use may be held not to be a fair use, they can simply price in copyright

198. Joe Veix, *BuzzFeed Stole My Article, So I'm Stealing it Back*, DEATH AND TAXES, <http://www.deathandtaxesmag.com/207291/buzzfeed-stole-my-article-so-im-stealing-it-back/>. (last visited Apr 30, 2014); Dan Catt, *10 Good Reasons BuzzFeed Is Going to Pay My Invoice for Copyright Theft*, SLATE, 2013, <http://www.slate.com/>. (last visited Apr 30, 2014).

license fees. Independent authors, smaller content businesses or ordinary members of the public do not have the same security.¹⁹⁹

Now, inverting the burden of proof in fair use does not remove the uncertainty. It does, however, increase copyright enforcement costs. Raising the marginal cost of copyright enforcement may reduce some enforcement action, and therefore decrease the risk of engaging creatively with copyright works – which is a structural gain for inclusiveness. But the effect of this increase in enforcement cost / decrease in risk for creative engagement with works is not flat. It is likely to impact copyright owners and users differently, and one key vector of difference will be the resources available to them.

All enforcement or defense costs will favor incumbents in creative industries over newcomers, powerful and wealthy operators over smaller ones. This is one of the key insights of the cultural turn, and the ‘concentration critique’ of copyright that I mentioned in the introduction to this article.

Wealthy commercial media businesses are at an advantage in obtaining and enforcing rights, over independent creators, smaller businesses, and non-commercial creator-users. Copyright industry incumbents can afford to enforce their copyrights through legal action; and can afford to pay license fees when they need to use others’ copyrights.

Moreover, highly integrated media conglomerates will already have a large body of material over which they have copyrights: and which they can therefore re-use without having to pay license fees. The more extensive their commercial infrastructure (of marketing and market intelligence, for example), the greater their advantage in exploiting digital technology to engage in price discrimination and strategic product bundling.²⁰⁰

The same may not be said for newer entrants to the market, for whom search and transaction costs of licensing (not to mention the actual license fees) may be prohibitive.²⁰¹ Copyright causes these costs, and in this respect may be said to discourage diverse and robust engagements with existing material.

Worse, the cost of enforcing copyright hits small-time authors and publishers the hardest—so their capacity to derive copyright revenue is

199. On the impact of this uncertainty with respect to visual arts, see Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. (2016).

200. Loren, *supra* note 16 at 384; Benkler, *Free as the Air to Common Use*, *supra* note 14 at 401-408; NEIL WEINSTOCK NETANEL, *Locating Copyright Within the First Amendment* Skein 28 (2001).

201. Benkler, *Free as the Air to Common Use*, *supra* note 14 at 410. See Elkin-Koren, *supra* note 2 at 384, where she observes that this distributive effect hinders individuals engaging in creative activity.

severely curtailed in comparison with larger businesses.²⁰²The asymmetry in enforcement power only compounds the advantage of larger, more established copyright businesses. Big commercial intermediaries are well positioned to ensure they make money from their copyright; independent authors and small copyright businesses are not. The upshot is that inclusiveness and diversity are likely to suffer, since one specific group (large scale media producers, ownership of which is highly concentrated) enjoys a substantial advantage over the rest of the potentially communicating public.²⁰³

These insights bear on the question of whether to raise copyright enforcement costs by inverting the onus of proof with respect to fair use. The higher the costs of enforcing copyright, the more incumbents and large businesses are at an advantage relative to independent authors and publishers. An inverted burden of proof may increase the security of creative re-users of works relative to copyright owners. However, as between incumbent, wealthy copyright owners, and smaller scale copyright owners (who are, incidentally, more likely to be independent authors, rather than intermediary businesses), it is likely to entrench their already existing disparity in communicative power.

For all these reasons, it is better not to treat all imaginative uses as fair, or to invert the burden of proof in fair use. The transformativeness of a use already weighs very significantly in the fair use calculus, and this gives imaginative uses of works considerable prospects of being fair. But the other fair use factors must also be given proper consideration, because otherwise, the distributive consequences of any given use fail to register. In other words, while the fair use exception in its current form does give rise to some uncertainty, it is preferable to a fair use doctrine that turned only on the question of the users' imaginative contribution, or in which there was an inverted burden of proof.

2.3 Platform liability and content filtering

So much for my analysis of the structural significance of expanding copyright exceptions and limitations. What about expanding copyright owners' rights?

Let me now turn to a controversial measure which is explicitly calculated to enhance copyright owners' rights with respect to dominant

202. NETANEL, *supra* note 2 at 119ff.

203. NETANEL, *supra* note 200 at 28.

online platforms, and to redress the ‘value gap’ described above.²⁰⁴ As I said, the purpose of doing so is to show that my structural approach does not necessarily mandate copyright ‘maximalism’. Efforts to ‘strengthen’ the position of copyright owners vis-a-vis online platforms, and to expand the scope of copyright owners’ exclusive rights, may, perversely, further cement the communicative and cultural power of dominant online platforms. They may also entrench existing market hierarchies that characterize copyright-based content economies.

The European Union’s *Directive on Copyright in the Digital Single Market* introduces a number of copyright reforms. Article 17 (Article 13 in earlier drafts of the directive) is one of the most controversial.²⁰⁵ Article 17 provides that member states of the European Union must legislate so that for-profit online content-sharing service providers (e.g. video sharing websites like YouTube) will be liable as publishers of the content posted by their users. They will now be required to obtain copyright licenses in order to continue to host copyright content posted by their users.

Safe harbor exceptions, which previously applied to online services which operated as a ‘mere conduit’ for the posting of copyright content will no longer apply in relation to these content-sharing platforms. An alternative, *sui generis* notice and takedown regime will, however, permit content-sharing platforms to avoid liability with respect to infringing content if they can show they have:

- made best efforts to secure a copyright license;
- made best efforts (in accordance with high industry standards) to ensure the unavailability of specific works and subject matter identified by copyright rightsholders;
- acted expeditiously to remove infringing content on receiving sufficiently substantiated notice from rightsholders; and
- made best efforts to prevent future uploads of such content.

There is certainly a *prima facie* structural case for making content sharing platforms liable for infringing content posted by their users. There is merit in trying to remediate the ‘value gap’. But the strength of the structural case for Article 17 will ultimately depend on how the process of licensing copyright content to platforms plays out.

I will reflect here on possible outcomes of this process. The object of doing so is not to attempt to predict exactly how Article 17 will affect the

204. See *supra* note 197 and accompanying text.

205. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market.

cultural landscape, nor to analyze exhaustively the precise doctrinal or practical details of regimes that might emerge under Article 17. Rather, it is to illustrate the structural issues at stake, and the ways in which they should inform our thinking about such measures.

2.3.1 The most hopeful possibility for the implementation of Article 17

Let us begin with the most hopeful possibility. One possible outcome of Article 17 is that most platforms conclude copyright licenses with most copyright owners, with respect to most or all of the content which users post to those platforms. If this comes about, then Article 17 would in some measure mitigate the problem of concentration of wealth and communicative power in the hands of dominant online platforms. Given the vast amount of material uploaded to platforms like YouTube, this would likely require some form of blanket or collective licensing (a point I will return to). A licensing regime that effectively covered all content posted on user generated platforms distribute communicative power and wealth more evenly between platforms, copyright owners, and end-users. Platforms would share some of their wealth with copyright owners, while end-users would still be free to participate in the marketplace of ideas and enjoy the experience of creative appropriation.

In this very positive scenario, there would also be improvements to the incentive structures that shape the investment of time and resources into creative content. Currently, there is no clear incentive for copyright businesses to distribute content in formats which facilitate non-commercial end-users to ‘remix’ it or otherwise creatively engage with it.²⁰⁶ Indeed, proponents of the cultural turn have worried a great deal about copyright owners using technological protection measures to *prevent* legitimate creative re-uses of works.²⁰⁷ If copyright owners could reliably expect to derive good licensing revenue from user generated content platforms, however, they would have an incentive to facilitate, rather than block creative uses.

Expected license revenue from user creativity might produce a more economically rational management of resources, which better aligned

206. *But see* David Lindsay, *Franchises, Imaginary Worlds, Authorship and Fandom*, LAW AND CREATIVITY IN THE AGE OF THE ENTERTAINMENT FRANCHISE, at 66, where he argues that copyright businesses have an interest in engaging fans in an ‘exchange of meanings’ and cultivating creative uses of copyright works by fans.

207. *See e.g.* Fisher III, *supra* note 2 at 1233; Lessig, *supra* note 2 at 62; Netanel, *supra* note 2 at 66-70.

copyright owner incentives with the value that end-users derive from engaging creatively with works.²⁰⁸ The benefits of this would go beyond the merely economic. If copyright businesses can make more money from providing content in formats that makes creative re-use easy, they would be more likely to supply works in those formats. This in turn would reduce existing friction for creative re-use of works: the friction generated by the inconvenience of formats that do not lend themselves to users' creative engagement.

For example, record labels do not tend to release the unmastered 'stems' making up sound recordings. Instead, they release fully mastered tracks in stereo. The casual remixer has two tracks to play with rather than then 8, 10, or 20 that have been mixed and mastered together to create the final mastered recording. This means that the casual, non-commercial remixer is not well positioned to extract single tracks—say a baseline or drumbeat—and do something creative with them. If record labels could reliably make licensing revenue from fan remixes and mashups posted on user generated platforms, they might be more open to releasing stems. There is, in other words, a potential for tremendous gains in inclusiveness.

2.3.2 A more pessimistic view of Article 17

Unfortunately, the prospect of all platforms achieving successful licensing deals with all copyright owners, with respect to all content uploaded by users, seems fairly remote—at least if the licensing process is left to private ordering. Platforms like YouTube and copyright owners have not hitherto managed comprehensive licensing deals. Merely increasing the leverage of copyright owners by holding platforms liable for infringing content posted by users is not a sure path to bringing about such deals.

What seems likely is that platforms and copyright owners will achieve some patchwork of licensing deals covering some but not all content posted by users. Various possible scenarios spring to mind.

In one scenario, online user generated content platforms such as YouTube might successfully conclude licenses with large multimedia large multimedia organizations, but not with smaller scale creators and content businesses. The latter will be lower in their list of priorities and dealing with each successively will at the very least take a very long time, and involve high transaction costs.

208. For a useful gloss of the theory that copyright's role is to facilitate, above all, economically rational management of creative resources, see e.g. A. Barron, *Copyright infringement, 'free-riding' and the lifeworld*, LSE LAW, SOCIETY AND ECONOMY WORKING PAPERS 17/2008 at 14 (2008).

In another scenario, platforms like YouTube might fail to secure licenses for a significant proportion of copyright material which their users tend to upload without authorization; or there might be a delay while licenses were negotiated; perhaps a delay of years. Much about these scenarios seem to me quite problematic from a structural point of view.

The first scenario would be a win of sorts for end users, because it would mean that their non-commercial creative engagements with a large body of content (the commercial catalogues of big content owners) could proceed without risk of blocking or takedown.

Smaller content providers and independent creators would seem, however, to be at a substantial disadvantage in the licensing of their material to online platforms. They would likely have less negotiating power, less know-how in the business of licensing, and less time and resources to devote to securing licenses with platforms than the larger players. Disparities in bargaining power translate into disparities in communicative power. Assuming success in licensing content to large online platforms correlates roughly to the size and bargaining power of content businesses, we could expect smaller players either not to make any money at all from user generated content (if they haven't concluded licenses) or making less money (assuming they conclude less favorable licenses than larger players). If they haven't concluded licenses, they will have costs that larger businesses do not, because they will need to spend time and money on copyright claims or takedown notices.

In other words, smaller businesses will likely derive less copyright income from licenses with user generated content platforms than larger business and have higher copyright enforcement costs. That means less money and time to spend on creating and disseminating content; which means less voice. In other words, we are likely to see existing cultural and communicative hierarchies continue in a scenario where platforms conclude licenses with large copyright businesses preferentially to small copyright businesses. The 'concentration problem' in the political economy of copyright, of which cultural turn theorists are so critical, would be likely to persist.

The second scenario is more worrying still. This is the scenario where platforms do not obtain suitable copyright licenses for a very large proportion of content, or at least experience a delay in obtaining licenses. In this scenario, platforms would be obliged to take down infringing material, upon receiving a proper notice from the copyright owner, and to use best efforts and 'industry standard' measure to remove and prevent new uploads of infringing content also concerning.

Earlier drafts of Art. 17 specifically suggested the use of content filters and blockers as a means of meeting the best efforts and industry standard requirements.²⁰⁹ It is not unreasonable to expect that this is what will be required to meet the ‘high industry standards’. Given the sheer amount of content posted by users, the most straightforward way for platforms to avoid liability for infringing content is to use upload filters to prevent the posting, especially with respect to content for which they have already received takedown notices.

Even if Art. 17 does not, in its final form, mandate the use of content blocking and upload filters, the imposition of liability on platforms creates a strong pressure to implement such measures. Essentially, Art. 17 creates a notice and takedown regime similar to existing regimes such as that applying under the US *Digital Millennium Copyright Act*, but with additional problems associated with content blocking, and a higher risk of liability for online platforms.

Let me first deal with the implications of making platforms responsible for active content blocking, before I turn to ways in which notice and takedown regimes tend to allocate power as between incumbent content businesses, and newcomers or smaller players.

By making platforms liable for infringing content posted by users, Article 17 makes them responsible for active content gatekeeping. It is not clear to me that this produces a net reduction in the structural asymmetries that exist between dominant content platforms, and everyone else, when it comes to cultural and communicative power. In the previous part, I showed that dominant online platforms already exercise a form of curatorial power over the contents of a very large portion of the marketplace of ideas. Placing direct responsibility for removing and blocking harmful content in their hands seems likely to further entrench them as gatekeepers and curators.

Platform gatekeeping, especially automated content blocking, tends to involve fairly arbitrary judgments about whether certain content is infringing (or harmful, or fake news, or whatever)—especially if blocking is automated. Dominant online platforms have no particular reason to exercise their enormous power in the public interest. They are, of course, not inherently malevolent, but they are beholden to shareholders and the businesses that buy data and ad space from them. Free expression, diversity and inclusiveness are not their priorities, and they are not the priorities of automate content filtering and blocking algorithms.

209. See e.g. *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market*—COM (2016)593, Art. 13.

There is another structural wrinkle, which complicates matters further. The current leaders in content identification, filtering and blocking technology happen to be Google, or rather, Alphabet, the company that owns Google. Alphabet owns YouTube, which implements a system called ContentID. ContentID identifies when video and audio content has been reproduced. Currently, copyright owners can choose what happens when a work uploaded to YouTube by another user triggers a ContentID match with their copyright work. They can either block matching content, share some of the advertising revenue with the uploader of the matching video, or simply monitor the video's viewership statistics.²¹⁰ Alphabet has invested more than \$100 million in the development of Content ID's and the technology is already used by more than 9,000 copyright owners and content businesses globally.²¹¹

So, while the introduction of various forms of content of blocking and upload filtering is likely to be disruptive to YouTube, they have a sufficient buffer to withstand the disruption, and already have the infrastructure to implement these measures. Not so, the smaller players in the online-content sharing universe, such as the artwork community DeviantArt or controversial social media sites such as 4Chan and VOAT.²¹² If they are to implement content blocking technology, they will probably have to pay already-dominant platforms for the privilege.²¹³ So money and power flows away from smaller sites toward the larger platforms.

There is already an oligopoly over the means of filtration for the purposes of finding and ordering content. It seems quite possible that implementing direct forms of content regulation which require or encourage content filtering would result in a monopoly or oligopoly over the means for filtration for the purposes of blocking content, as less-dominant platforms were forced to rely on filtering technologies developed by larger ones. This

210. How Content ID works - YouTube Help, <https://support.google.com/youtube/answer/2797370?hl=en>. (last visited Aug 8, 2019).

211. Gian Volpicelli, *Don't Believe the Hype: Article 13 is Great News for YouTube*, WIRED UK, 2019, <https://www.wired.co.uk/article/article-13-youtube-what-next>. (last visited May 2, 2019).

212. *Id.* See also Pamela Samuelson and Kathryn Hashimoto, *The Enigma of Digitized Property: A Tribute to John Perry Barlow*, 18 DUKE L. & TECH. REV. 103 (2019).

213. Article 17(5) does contain a 'proportionality principle', which brings into consideration matters such as the size of a content-sharing service, the availability and cost of suitable and effective means of taking down and preventing the upload of content. However, if Alphabet made software such as ContentID commercially available for a reasonable cost, smaller platforms might not be able to avoid content blocking obligations merely on the basis of their size and the relative cost of such measures. There would therefore be strong pressure on these platforms to pay Alphabet for a license to ContentID or some related software. In other words, if the effect of Article 17 is to pressure online content-sharing platforms into content blocking as a matter of standard practice, the result might be to further compound the structural advantages of dominant online platforms.

would be bad for inclusiveness and diversity of voices in the marketplace of ideas.

Let us turn now to the effect of content blocking and filtering on the distribution of communicative power as between copyright businesses and users (leaving aside, for a moment, the issue of concentration of cultural power in the hands of dominant platforms). A recent case study of contested takedown notices on YouTube, documented in a series of articles on the *IPKat* blog, illustrates some of these problems well.

A popular YouTuber, with the moniker MumboJumbo, received a torrent of automated takedown notices with respect to his videos, which contained 4 seconds of sampled music at the beginning and end. To complicate matters, the sample is not a sound recording owned by the claimant (Warner Chappell), but instead itself contains a sample from a recording in which the claimant own copyright. Claims arrived in Mumbo Jumbo's email inbox at a rate of 30 per minute, with a total of 400 claims.²¹⁴

Let us leave aside the legal merits of any of the notices and, instead, consider day to day practicalities. Let us assume that some or all of Mumbo Jumbo's videos do not in fact infringe copyright. Unfortunately for Mumbo Jumbo, he cannot defend or dispute the claims automatically, or deal with them at anything like the speed at which they arrived. Any effort to contest claims, or even remove the offending content in the interim, must on his part be manual. He describes the process of responding to claims as follows: "myself and my girlfriend, Vicky have been going through all of my videos on the YouTube Editor and manually removing all of the intros." Then he has to file individual disputes for each claim using YouTube's dispute resolution mechanism. According to him, each such effort takes one or two minutes. As a consequence, disputing all the claims could take him up to twelve hours: a full workday for his one-man content business.²¹⁵

The Mumbo Jumbo story illustrates, first of all, that the notice and take down procedure may be abused; or even used in good faith, but in such a way as to target uses that ought to be considered non-infringing. It is extremely difficult to calibrate filters in such a way as to prevent lawful content from being blocked along with unlawful content. For example, we cannot reliably expect an automated blocking filter to be able to recognize uses of copyright work that should properly be considered to be fair dealing or fair use—such as parody, satire or other transformative uses.

214. Thomas Key, *Sampling Mumbo Jumbo: Minecraft YouTuber Receives Copyright Claims on Hundreds of Videos in a Matter of Hours*, THE IPKAT, <http://ipkitten.blogspot.com/2019/06/sampling-mumbo-jumbo-minecraft-youtuber.html>. (last visited Jun 7, 2019).

215. *Id.*

The story also shows how small content businesses are at a disadvantage to larger ones when it comes to contesting take down notices, and otherwise dealing with situations where filters or content removal systems takedown or block content. Granted, both existing DMCA procedure, and the procedures that would be implemented by the EU directive, leave scope for appealing and reversing take downs on the basis that the content in question does not infringe copyright, or falls under an exception such as fair use or fair dealing.

But those without the wherewithal to understand their rights under such exceptions are liable simply to concede to a takedown notice, even where it pertains to a use that is not in fact infringing. The people likely to be in this situation are individual, independent authors and non-commercial users. It is likely, then, that the least profitable uses—by individual users—are the most readily subjected to enforcement. Even if they do contest notices, as Mumbo Jumbo did, the time cost of going through the procedure for doing so hits small operators the hardest.

Now, simply raising barriers to making copyright claims or issuing takedown notices does not necessarily resolve the problem satisfactorily. YouTube's copyright claims policy is not all calibrated in favor of copyright owners. The platform has recently revised its copyright system for manual copyright claims.²¹⁶ Claimants must now specify the portion of videos alleged to be infringing with a timestamp. The benefit of this requirement is that alleged infringers will be better placed to defend against spurious claims.

The problem is, the measure will increase copyright enforcement costs. Issuing a takedown notice or claim on a platform's claim system is, to be sure, cheaper than full-blown copyright litigation, even with the additional step of including a time stamp. But a less acute version of the enforcement cost and concentration problems (which I described in discussing fair use above) still persists under notice and take down regimes.

The structural consequences are predictable. Independent creators and small content businesses are the least well placed to submit a compliant notice in order to get genuinely infringing content taken down; while larger players have more resources to devote to the continuous work of finding infringing content and issuing takedown notices. At the same time, YouTube, is taking control of how copyright works (de facto if not de jure), thus arrogating another form of cultural power to itself, and away from policy-makers who are accountable to the public.

216. Thomas Key, *Guest Post: YouTube Shifts the Burden: Requires Manual Copyright Claimants to Timestamp the Allegedly Infringing Material; Simplifies the Rectification Process - The IPKat*, <http://ipkitten.blogspot.com/2019/07/guest-post-youtube-shifts-burden.html>. (last visited Aug 8, 2019).

2.3.3 The challenge for implementing Article 17

The challenge for EU members states in implementing Article 17 is to ensure that licensing of content plays out as closely to ‘the most hopeful possibility’ that I described above. The outcome to aim for is one in which as much content as possible—preferably all content—is licensed, on basically the same terms for all copyright owners.

Now, the copyright directive does leave the door open to such an outcome. Article 12 of the directive provides that EU member states may extend the operation of licensing agreements concluded by collective management organizations (on behalf of member copyright owners) to apply to copyright rightsholders who have not themselves authorized those organizations to act on their behalf. This extension of licensing agreements is only permissible when obtaining individual authorizations from rightsholders is so impractical and onerous as to make licensing by way of private ordering unlikely.²¹⁷ Another key condition is that all rightsholders should be guaranteed equal treatment, including in relation to the terms of the license.

It is beyond the scope of this article to consider the details of practically implementing such a licensing regime. What is of interest here are the broader structural issues at play. Let me briefly sketch them out.

The case of content uploaded on user generated content platforms would seem to fit squarely within the set of limited circumstances contemplated by Article 12. As I have been arguing, it would be very difficult for platforms to obtain licenses for every piece of content posted by users; and the difficulty would seem to be the most severe with respect to content owned by copyright owners with the fewest resources.²¹⁸

In effect, measures implemented by EU member states under article 12 would overcome this difficulty by putting in place a form of compulsory, blanket licensing, administered by collective rights management organizations. Extended or compulsory licenses of this kind seem to be a promising avenue for balancing the range of structural problems that I have been considering in this article.

A successful implementation of Article 12, with respect to rights on content posted on user generated platforms, has the potential to ameliorate, to some degree, some of the imbalance of wealth and power derived from the exploitation of content online. It has the potential to ameliorate the

217. Art 12(2).

218. See also Samuelson and Hashimoto, *supra* note 212 at 111.

concentration problem produced by both copyright and by free content economies online.

A licensing regime under Article 12 could operate to share with copyright owners some of the concentrated wealth and communicative power accrued by dominant internet platforms through the exploitation of copyright works. Such a licensing regime could disrupt, in some measure, the zero-price content model which helps to underwrite that dominance.²¹⁹ By guaranteeing remuneration for copyright owners, it would help to furnish them with the means to maintain some independence and voice in the broader cultural and discursive sphere, and help to ensure the persistence of multiple nodes of communicative power in the public sphere.²²⁰

Extended collective licensing under Article 12 might also go some way to remediating copyright's concentration problem, which arises in part as a result of the asymmetrical impact of the costs of licensing, enforcing copyright, and defending copyright claims. It could help to neutralize the relative advantage of incumbents over newcomers and smaller copyright owners, because receiving copyright income would no longer be dependent on having the wherewithal to conclude profitable licensing agreements or to take effective copyright enforcement action.

Likewise, the specter of automated content blocking, and all of its associated problems, could be avoided. As I have pointed out, the costs of automated content blocking are likely to be distributed asymmetrically. If all content posted on platforms would, as a matter of course, fall under an extended collective license, this asymmetry would become irrelevant, because there would be no need to block content. By the same token, the frictions standing in the way of users engaging creatively with copyright content would be reduced, which would be a win for inclusiveness.

I do not intend to suggest that Article 12, or compulsory licensing regimes for content on user generated content platforms, will solve all the structural problems appurtenant to copyright markets or online information economies. On brief consideration, however, such regimes do seem promising vehicles for dealing with some of the structural problems that I have been discussing. At the very least, there is a case for further consideration and analysis of such measures, applying a qualitative, structural approach of the kind that I have advocated in this article.

219. See above, part 1.4.

220. Netanel emphasizes the need for 'bubbles of varied wealth and power' to maintain robust public discourse, and to prevent a small group of dominant voices from drowning out the rest. See Netanel, *Market Hierarchy*, *supra* note 14 at 1919-1920.

CONCLUSION

Over the past 25 years, the cultural turn in copyright scholarship has amply demonstrated that there is more to copyright than merely balancing incentives to create against the need for access to works. The qualitative, cultural effects of the law matter. If we truly believe that copyright law should be calibrated to promote ‘progress’, then we should take into account its effects on the distribution of cultural and communicative power; on democratic discourse and individual self-authorship; and on the inclusiveness and diversity of the cultural milieu. The cultural turn has produced a rich and productive normative framework for evaluating the legal and institutional parameters that organize and shape creative activity.

If we take this framework seriously, however, we are compelled to reconsider the combination of copyright pessimism and internet optimism that has been characteristic of cultural turn thinking. Proponents of the cultural turn who were concerned about copyright’s role in concentrating cultural power should also be concerned about the concentration problems in online information economies in which copying and sharing proceeds more freely. If they were concerned that the commercial incentives under copyright regimes privileged bland and homogeneous content, they should also be concerned about the troubling incentives in play in online extractive attention economies.

It is not my intention, having described some of the more dystopian features of the networked communication environment, to write off its benefits entirely. Not everything about the internet is tarnished by the race to capture attention, and by the concentration of platform ownership. Clearly there are benefits to facilitating wide, low-cost participation in culture and discourse, and in disrupting existing mass market structures of communicative power. There are more works in circulation, and more people who can create, access them and use them, more easily (*more inclusiveness*). People are contributing to culture and discourse for more diverse audiences, and with a wider range of motivations (*more diversity*).

I can hardly imagine researching and writing this article without Google’s remarkable search engine, its Google Scholar application, and its Googlebooks collection. I also came across many helpful news articles that I would otherwise never have seen in my Facebook and Twitter news feeds. The dominant internet applications of which I have been so relentlessly critical have undoubtedly helped me in my research and writing, and in that respect have enhanced my authorship (and self-authorship).

But the point I want to make is that the benefits of the ‘free’ networked communication environment are (like the democracy-enhancing features of the copyright-mediated communication sphere identified by Netanel) qualified and contingent. They are not guaranteed and universal. Creating conditions in which copying and sharing proceeds more freely, does not by itself prevent concentration of communicative power and attendant qualitative problems; and seems, in certain cases, to worsen these problems. There are trade-offs involved. This has hitherto been insufficiently acknowledged in copyright literature and scholarship.

Both copyright and non-copyright systems produce inclusiveness and diversity problems, just as each has some advantages for inclusiveness and diversity. In both copyright markets and online non-copyright systems, perverse incentives reward bland or sensationalist content. Both online and off, and in copyright and networked-peer-production systems, a small group of powerful platforms hold a disturbing amount of power of the contents and character of the marketplace of ideas. Developments in the law effect the broader organization of expressive activity and have the potential to entrench existing hierarchies and incentives; or to change them for the better.

This may so whether they appear, on their face, to ‘weaken’ or to ‘expand’ the strength or scope of copyright. As I’ve shown, expanding exceptions such as fair use, which would seem to enhance the communicative and creative opportunities of ordinary individuals, may at the same time help to increase the power of dominant internet platforms. That power is, in some respects, power over the very individuals whose creative horizons have been expanded: they trade off one gain in self-authorship against another kind of loss. By the same token, strengthening copyright owners’ formal exclusive rights with respect to online platforms may fail to meaningfully change the power dynamics as between copyright owners and platforms; or between incumbents and newcomers in content businesses.

In assessing developments in copyright law, we should try to think afresh about existing structures of communicative power and opportunity across the whole cultural landscape, and the likely effects of regulatory intervention on those structures. Such an approach demands a unified picture of the structural and qualitative challenges that affect the marketplace of ideas and the cultural and creative spheres, whether under the auspices of copyright or in free content economies.

The challenge for future scholarship is to better our understanding of where copyright fits into a broader information and cultural policy. We should try to work out how to bring copyright law, media ownership law and content regulation, competition law, internet law, and (of course) day to day

practice in line, working together to try to address asymmetries of cultural power, and their distorting effects on self-authorship and democracy.

We may not be able to attain a ‘perfect’ cultural landscape (as if such a thing could exist). We should, however, build on the insights of the cultural turn: to work out where the public benefit lies; to understand it in rich qualitative terms; and to keep pursuing what improvements we can. We will need to remain open to continuous evaluation and adjustment of our expectations and about different systems for organizing creativity, even those which may once have seemed very promising, such as online free content economies.