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Copyright's Techno-Pessimist Creep

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Government investigations and public scrutiny of Big Tech are at an all-time high. While current legal scholarship and government focus have centered overwhelmingly on whether and how antitrust law and § 230 of the Communications Decency Act can be revised to address platform dominance, scant attention has been paid to another, almost unseen attempt to regulate Big Tech: copyright law. The recent adoption in Europe of Article 17 of the Copyright Directive, which holds internet platforms liable for user-generated creative content unless they obtain costly content licenses, is the most direct example of such regulation—and may serve as precedent for similar changes to U.S. law. Meanwhile, before the courts and in the executive branch, copyright holders are increasingly harnessing anti–Big Tech sentiment to advocate for everything from weakening fair use doctrine to terminating long-standing government oversight of certain concentrated content holders.

As recent scholarship laments the role that copyright minimalism played in the meteoric ascent of large technology platforms, this Article argues that increasing copyright protection will not combat monopolies. The seemingly compelling public narrative that laws must be rewritten to combat power by any means necessary ignores the uniqueness of copyright markets as ones dominated not by diffuse, weak licensors bargaining with technology giants, but instead by large, oligopolistic content conglomerates. Changes in copyright laws that increase the cost of content licenses fail to address, and indeed will only enrich, the long-standing dominance of traditional content licensors. They will also entrench and concentrate licensees, creating a bilateral oligopolistic market for copyrighted works. And such changes will, ultimately, hasten the obsolescence of the very content industries that advocated for these reforms, as today's licensees evolve to become tomorrow's licensors. This Article concludes that to fight monopoly, to be truly neo-Brandeisian, one must think beyond copyright law.

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INTRODUCTION

By many accounts, we are living in a new Gilded Age. Large technology platforms, perhaps touted a decade ago as agents of change and democratization,[1] have now found themselves increasingly under scrutiny,

1. *See generally* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006) (discussing the internet's potential to create new freedoms for making and exchanging "information, knowledge, and culture"). Importantly, the same champions for how the internet could democratize content distribution away from a handful of intermediaries for purposes of copyright law were notably less enthusiastic about the internet's overall liberating force for democracy. The same champions who extolled "remix culture" were the ones who were most skeptical of what James Boyle

both by governments around the world and in the court of public opinion.[2] As Senator Elizabeth Warren put it: "Today's big tech companies have too much power—too much power over our economy, our society and our democracy."[3] In this Article, I refer to this general sentiment—that Big Tech has become all-imposing, all-dominating, omnipotent, and omnipresent—as "techno-pessimism." Of course, the two most prominent legal areas in which this battle has played out are antitrust law[4] and § 230 of the Communications Decency Act of 1996,[5] the latter of which has repeatedly found itself in the national spotlight, especially after Twitter and Facebook permanently banned Donald Trump from their platforms following the Capitol riot.[6]

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calls "digital libertarianism"—letting the internet proceed apace without any government intervention. James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177 (1997) (arguing that digital libertarianism is inadequate because it enables private entities to engage in damaging acts of censorship and surveillance and because it allows states to do the same). Or, as Lawrence Lessig, whose name has become synonymous with "remix culture," put it: "How do we protect liberty when the architectures of control are managed as much by the government as by the private sector?" LAWRENCE LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE xv (2006).

2. By one account, "[n]early two-thirds of Americans would support breaking up tech firms by undoing recent mergers, such as Facebook's acquisition of Instagram . . . ." Emily Stewart, *Poll: Two-Thirds of Americans Want to Break Up Companies Like Amazon and Google*, VOX (Sept. 18, 2019, 10:50 AM), https://www.vox.com/policy-and-politics/2019/9/18/20870938/break-up-big-tech-google-facebook-amazon-poll [https://perma.cc/GMX3-76EB]. While I use the term "techno-pessimism," the swing toward tech-negativity also has been broadly referred to by the popular press, and adopted by technology law scholars, as a "techlash." *See* Mark A. Lemley & Bryan Casey, *Fair Learning*, 99 TEX. L. REV. 743, 747 n.24 (2021) (citing Rachel Botsman, *Dawn of the Techlash*, GUARDIAN (Feb. 10, 2018, 7:04 PM), https://www.theguardian.com/commentisfree/2018/feb/11/dawn-of-the-techlash [https://perma.cc/7PAA-NYYN] ("Once seen as saviours of democracy, tech giants are now viewed as threats to truth.")); Gregory Bobillot, *'Techlash'—How Big Tech Is Influencing Your Thinking*, FIN. TIMES (May 10, 2018), https://www.ft.com/video/3339f59e-f760-4bc7-b359-3899fabbd190 [https://perma.cc/G6PV-78DC] (describing how too much time spent on social media can wreak havoc on your mental state); Eve Smith, *The Techlash Against Amazon, Facebook and Google—And What They Can Do*, ECONOMIST (Jan. 20, 2018), https://www.economist.com/briefing/2018/01/20/the-techlash-against-amazon-facebook-and-google-and-what-they-can-do [https://perma.cc/HQF7-MVJ5] (describing a $2.7 billion fine from the European Commission against Google for privacy violations and how the 2020 U.S. presidential candidates were all running on anti-tech platforms); *The Techlash Has Just Begun*, AXIOS (Jan. 10, 2018), https://www.axios.com/the-techlash-1515609266-e27ca299-0031-460a-96f1-db842ec88121.html [https://perma.cc/PU53-5XTV] ("The high-profile fight against big tech companies is just beginning, and it's happening in response to crises over fake news, tech addiction and data security.").

3. Lauren Gambino, '*Too Much Power': It's Warren v Facebook in a Key 2020 Battle*, GUARDIAN (Oct. 20, 2019, 8:04 AM), https://www.theguardian.com/us-news/2019/oct/19/elizabeth-warren-facebook-break-up [https://perma.cc/F24N-BTV6].

4. *See generally* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018) (arguing that antitrust laws should return, or pivot, to a "Neo-Brandeisian Agenda," in turn subjecting tech companies like Amazon and Google to common carrier regulation).

5. 47 U.S.C. §§ 230, 560–561 (1996). Section 230 of the Communications Decency Act of 1996 immunizes internet platforms from liability resulting from the activities and speech of its users, so that a platform like Facebook will not be treated as the speaker for purposes of tort or criminal liability. *See id.* § 230.

6. *See* Vivek Ramaswamy & Jed Rubenfeld, Editorial, *Save the Constitution From Big Tech*, WALL ST. J. (Jan. 11, 2021, 12:45 PM), https://www.wsj.com/articles/save-the-constitution-from-big-tech-11610387105 [https://perma.cc/Y6TT-4A9F] (arguing that § 230

This Article focuses on a different, unexamined, and unexpected area in which the law is subtly shifting to regulate the dominance of Big Tech: copyright.

Of course, copyright law has long been an unanticipated nexus in which debates about technology, innovation, and disruption have played out.[7] The traditional content industries—Hollywood, record labels, and book publishers—have never liked new technological entrants, be it the printing press, the VCR, or YouTube, and they've frequently invoked copyright law to protect their interests.[8]

But while this fundamental antagonism and tension have stayed the same, the animating force behind it, the rhetoric, and the normative emphasis have changed. Traditional content industries are no longer confined to the typical argument that, if left unchecked, the printing press, the VCR, or streaming services pose an existential threat that will ultimately signal the death of creative production as we know it—an argument that has not borne out in history. Now, the new technology wars seem to signify something deeper, more ominous: if left unchecked, copyright minimalism—roughly corresponding to broader users' rights like fair use or broad liability shields like safe harbor laws—could threaten democracy as we know it, entrenching power, cementing inequality, and shielding market forces from the political process.[9] This line of thought has been helped along by law and political economy scholarship, which has pointed to "copyleft" arguments and "other progressives skeptical of strong intellectual-property law . . . [as] help[ing to] further" antiregulatory ideals cloaked behind the veil of innovation policy—ideals that led to Google's meteoric ascent.[10]

And thus, because copyright laws passed or developed at the infancy of the internet, such as § 512 of the Digital Millennium Copyright Act[11] (DMCA) or the fair use doctrine, have allowed companies like Google to flourish, perhaps it is time to peel back these laws.[12] Meanwhile, before the courts and the legislature, powerful, well-organized content holders, such as music publishing, record label, and software corporations, are harnessing just

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"not only permits tech companies to censor constitutionally protected speech but immunizes them from liability if they do so").

7. *See generally* Mark Lemley & Mark McKenna, *Unfair Disruption*, 100 B.U. L. REV. 71 (2020). As the U.S. Supreme Court put it in a case involving the novel (at the time) VHS player: "From its beginning, the law of copyright has developed in response to significant changes in technology." Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984).

8. *See* Lemley & McKenna, *supra* note 7, at 74–75.

9. *See* Amy Kapczynski, *The Law of Informational Capitalism*, 129 YALE L.J. 1460, 1493 (2020); *see also* Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1784, 1803 n.68, 1804 (2020) (noting that "Google was a great driver and recipient of" the expansion in fair use doctrine, which in turn "set the stage for today's extraordinary forms of platform power").

10. Kapczynski, *supra* note 9, at 1493; *see also id.* at 1494 (arguments for the value of user-generated content "proved perfectly compatible with the emergence of platforms, including those like Google that offer much for free").

11. 17 U.S.C. § 512; *see infra* Part I.A.

12. *See supra* notes 9–10 and accompanying text.

this type of argument to advocate for the weakening of the fair use doctrine, the termination of long-standing antitrust oversight of certain concentrated content holders, and an explicit license-or-staydown regime for technology platforms.[13]

This Article argues that reshaping copyright in the anti-monopoly spirit will in fact have the exact opposite effect. The seemingly compelling public narrative that laws must be rewritten to combat power by any means necessary ignores the uniqueness of copyright markets as one dominated not by diffuse, weak licensors bargaining with technology giants, but instead by large, oligopolistic content conglomerates. Changes in copyright laws that increase the cost of content licenses not only fail to address, and indeed will only enrich, the long-standing dominance of traditional content licensors. They will also entrench and concentrate licensees, creating a bilateral oligopolistic market for copyrighted works. And such changes will, ultimately, hasten the obsolescence of the very content industries that advocated for these reforms, as today's licensees evolve to become tomorrow's licensors.

This Article is divided into four parts. Part I provides a brief overview of the copyright laws, both statutory and common law, that proved deeply beneficial for growing internet companies, including the enactment of § 512 of the DMCA, the expansion of the fair use doctrine, and certain consent decrees governing the musical performing rights organizations, such as the American Society of Composers, Authors and Publishers (ASCAP) (a performing rights organization that administers licenses on behalf of its songwriter-members)[14] and Broadcast Music, Inc. (BMI).

Part II looks at how our present era's techno-pessimism has begun reshaping both the law and the rhetoric of our current copyright battles, beginning with the Directive on Copyright in the Digital Single Market in Europe, which could serve as precedent for the United States's own revisions of § 512, and the techno-pessimist rhetoric that is being harnessed by content holders in the courts and before the U.S. Department of Justice (DOJ) to fight continuing regulation of concentrated content industries.

Part III argues that, to the extent these new laws are rooted in antitrust-like arguments premised on Big Tech's market power, they obscure the history of copyright ownership as one dominated by a few oligopolistic content companies. Today, upstream competition amongst licensors has further decreased, as the large content conglomerates have become even more concentrated. Meanwhile, downstream competition is increasing, as the cost of distributing content decreases and traditional content creators are increasingly becoming distributors.

Part IV argues that using copyright law to address Big Tech dominance will have the opposite effect, creating a market dominated by a few entrenched, concentrated licensees negotiating with a few entrenched,

13. *See infra* Part II.

14. *See We Are ASCAP*, ASCAP, https://www.ascap.com/ [https://perma.cc/9234-FY32] (last visited Oct. 29, 2021).

concentrated licensors—a bilateral oligopoly. In the final analysis, the more difficult and costly licensing creative content becomes, the more likely that technology companies will innovate around the problem, ultimately rendering traditional content production companies obsolete. To fight monopoly, to be truly neo-Brandeisian, one must think beyond copyright law.[15]

I. THE COPYRIGHT LAWS THAT SHAPED TECH

The best-known contemporary example of the law that built the internet is most likely § 230 of the Communications Decency Act, which largely immunizes internet platforms from tort liability resulting from content posted by its users.[16] Indeed, in his book *The Twenty-Six Words That Created the Internet*, Jeff Kosseff argues that "[i]t is impossible to divorce the success of the U.S. technology sector from the significant benefits of Section 230."[17]

What § 230 does *not* address, however, are instances in which the content posted by a user results in copyright infringement liability.[18] But a law passed at the same time as § 230 did just that—serving as § 230's copyright corollary.[19] This part first discusses the so-called "safe harbor" provision in U.S. copyright law and then discusses several other laws that proved beneficial for the growth of new technologies.

A. Section 512 Safe Harbor

Congress passed the DMCA to implement the World Intellectual Property Organization (WIPO) Copyright Treaty.[20] Among the DMCA's provisions was § 512, often referred to as the "safe harbor."[21] Like § 230 did with user speech that may have resulted in tort liability, the § 512 safe harbor shields

15. While some scholars have linked earlier arguments for less intellectual property protection to the enablement of platform power, such accounts largely ignore the fact that copyright transactions necessarily will enrich one corporate power, whether it is a technology platform licensee (who may, through safe harbors, potentially be able to shield itself from copyright liability) or a content holder licensor (who may, through its own market power, demand supercompetitive license fees). *See infra* Part III. In so doing, these accounts refuse to take a broader view of corporate power, concentrating instead on a handful of large technology firms, while failing to explain how, and if, the alternative to less protection will somehow lessen sources of power rather than, as I argue here, simply further entrench it. These critiques at times lament the expansion of intellectual property rights as empowering corporate rightsholders and privileging neoliberalism's calls for greater internalization at the expense of consumers, while in other places arguing that a "minimalist" approach to intellectual property enabled "the development of troubling forms of private power." Kapczynski, *supra* note 9, at 1494.

16. 47 U.S.C. § 230.

17. JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 205 (2019).

18. *See* 47 U.S.C. § 230(e)(2).

19. *See* 17 U.S.C. § 512; *infra* Part I.A.

20. *See* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 26 (2d Cir. 2012) (quoting Universal City Studios, Inc. v. Corley, 273 F.3d 429, 440 (2d Cir. 2001)).

21. *Id.* at 27.

internet platforms from copyright liability as a result of infringing content uploaded by its users, provided certain conditions are met.[22]

Section 512's legislative history acknowledges both the importance of a safe harbor for user freedom of expression and the prevention of internet platforms from being exposed to crippling infringement liability for the enormous amounts of data being transmitted or posted on their sites on a daily basis. "In the ordinary course of their operations," Senator Orrin Hatch reasoned, "service providers must engage in all kinds of acts that expose them to potential copyright infringement liability."[23] Thus, Senator John Ashcroft stated, "The notion that service providers should not bear the responsibility for copyright infringements when they are solely transmitting the material is one key to the future growth of the Internet."[24] A safe harbor allows the internet to "flourish,"[25] while simultaneously ensuring that internet users' "freedom of expression" is not "impinged upon."[26] "In short, by limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand."[27]

Notably, in passing the DMCA, Congress had considered—and specifically rejected—the content industry's request that internet services instead go out and get licenses for the content its users made available on their sites. Performing rights organizations such as ASCAP, which controls a large portion of performance rights in copyrighted musical compositions, specifically advocated for a licensing regime instead of a safe harbor, proposing that licensing would provide a workable middle ground to the "[safe harbor] legislation or [copyright infringement] lawsuit[]" dilemma Congress intended to address with § 512.[28] But as congressional testimony by licensees demonstrated, licensing all the content made available on a service provider's platform was simply unworkable. Notably, while certain types of licenses were available on a "blanket" basis (for example, one

22. *See* 17 U.S.C. § 512(a) ("A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider . . . if . . . the transmission of the material was initiated by or at the direction of a person other than the service provider . . . .").

23. 144 CONG. REC. 9234–35 (1998) (statement of Sen. Orrin Hatch) (explaining the need for and negotiations surrounding limits on online service provider liability).

24. *Id.* at 9238 (statement of Sen. John Ashcroft) (explaining that he pushed to address service provider liability in order to allow the internet to grow).

25. *Id.* at 25,811–12 (statement of Rep. Bob Goodlatte) (expressing satisfaction that the current version of the bill achieves balance between copyright holders and service providers).

26. *Id.* at 18,771 (statement of Rep. Barney Frank) (noting that this solution helps balance the rights of copyright holders and service providers).

27. *See supra* note 23.

28. *WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Cts. and Intell. Prop. of the H. Comm. on the Judiciary, H. Reps.*, 105th Cong. 185–86 (1st Sess. 1997) (testimony of John Bettis, Songwriter, ASCAP Board of Directors) (debating whether a blanket license would be a workable alternative to judicial or legislative solutions to the problem of service provider liability).

license with ASCAP would grant a service provider all public performance rights for those musical works in ASCAP's repertoire), many other copyrighted works—or even specific types of rights, such as the right to synchronize a musical composition with a film—would need to be licensed on an individual, work-by-work basis.[29] Thus ultimately, and likely to the chagrin of the content industries, a licensing regime was rejected in favor of a safe harbor that exempts online service providers from infringement liability for the content made available by its users.

After its passage, § 512 proved vital in the fortunes of several technology platforms. Most notable among these is Google, which was sued by Viacom in 2007 for infringing content made available on YouTube (which Google had acquired) by YouTube users.[30] The copyright owners had demanded statutory damages for "approximately 79,000 audiovisual 'clips' that appeared on the YouTube website between 2005 and 2008."[31] Because a court may, in its discretion, award statutory damages of up to $150,000 per copyrighted work,[32] Viacom was, in theory, entitled to over ten billion dollars in damages.[33] At the time the lawsuit was brought, Google's profits across all its divisions (not just YouTube, which had been pulling in approximately fifteen million dollars in revenue, but not profits),[34] while quite high, had only been a little over one billion dollars.[35] A damages award that granted the copyright owners all that they were seeking would have potentially bankrupted Google alone, to say nothing of its one video-sharing division, YouTube.[36] The resulting litigation, which lasted for seven years, ended in the district court finding in favor of YouTube based on § 512.[37]

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29. *National Information Infrastructure Copyright Protection Act of 1995: Hearing on S. 1284 Before the S. Comm. on the Judiciary*, 104th Cong. 15–16 (2d Sess. 1996) (response of Creative Incentive Coalition) (explaining why a blanket license would be unworkable).

30. *See* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 28 (2d Cir. 2012).

31. *Id.* at 26.

32. 17 U.S.C. § 504(c)(2).

33. *See Viacom Int'l, Inc.*, 676 F.3d at 26; *see also* Second Amended Class Action Complaint ¶ 151, Football Ass'n Premier League v. YouTube, Inc., 633 F. Supp. 2d 159 (S.D.N.Y. 2009) (No. 07-cv-3582), 2008 WL 5596002 (seeking statutory damages "in the maximum amount permitted by law with respect to each work infringed").

34. *See* Michael Arrington, *YouTube Revenues: $15 Million Per Year, or Per Month?*, TECHCRUNCH (Mar. 6, 2007, 4:02 AM), https://techcrunch.com/2007/03/06/youtube-revenues-15-million-per-year-or-per-month/ [https://perma.cc/N5XC-E4PK].

35. *See* Miguel Helft, *Google Profit Up 46%, Exceeding Estimates*, N.Y. TIMES (Oct. 18, 2007), https://www.nytimes.com/2007/10/18/technology/18google-web.html [https://perma.cc/65F2-QQ76].

36. A copyright damages verdict in the billions is not simply farfetched conjecture, nor should we expect a jury or a judge to exercise restraint in such awards. For example, a jury recently awarded a coalition of Big Content music industry copyright owners one billion dollars in damages against the service provider Cox Communications—$99,830.29 for each work infringed, multiplied by a little over 10,000 works infringed—a paltry number compared to the number of works alleged in *Viacom Int'l, Inc*. *See* Sony Music Ent. v. Cox Commc'ns, No. 1:18-CV-00950, 2021 WL 1254683, at *1 (E.D. Va. Jan. 12, 2021).

37. *See* Viacom Int'l., Inc. v. YouTube, Inc., 940 F. Supp. 2d 110, 123 (S.D.N.Y. 2013). While § 512 undoubtedly provided a defense, and some bargaining leverage, to platforms hosting user-generated content, it is far from an absolute shield for copyright liability. As I discuss in Part IV, far from allowing technology platforms to act as havens for wanton piracy,

While the *Viacom Int'l, Inc. v. YouTube, Inc.* litigation is the most well-known example of how instrumental § 512 proved to be to internet platforms, it is certainly not the only one. Other popular internet video platforms, such as Veoh and Vimeo, were also able to rely, with varying degrees of success, on the § 512 safe harbor to defend against copyright infringement claims brought by content companies.[38] As Professor Matthew Sag wrote, "[t]he DMCA safe harbors have been a tremendous benefit to the U.S. copyright system and to the U.S. economy . . . . [T]he internet safe harbors have propelled the growth of social networking and other 'Web 2.0' businesses."[39]

Content holders, unsurprisingly, were vocal about their hatred of the safe harbor and issued existential warnings about the coming death of culture in the face of the internet. The president of then–Time Warner warned that the coming of the Internet Age would result in a "sort of cultural Dark Ages."[40] Of course, these dire predictions were the same type of apocalyptic proclamations that the content industry would issue with any new technology, including the advent of the videotape.[41] The debates surrounding the safe harbor and its importance to internet companies merely served as an exemplar for, and microcosm of, the content industries' long-standing antagonism to technological disruption.

Of course, just as content did not die with the videotape, it did not die with the growth of the internet. Not only did private bargaining for copyright licenses continue under the DMCA, but culture also thrived, rather than

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the reality is that technology platforms, including YouTube, have nonetheless chosen (or, more likely, as a result of the uncertainty of continued safe harbor litigation) to enter into negotiated license agreements with content holders in the shadow of the DMCA. *See infra* Part IV.

38. *See* Capitol Recs., LLC v. Vimeo, LLC, 826 F.3d 78, 99 (2d Cir. 2016) (holding that the video-sharing platform Vimeo is eligible for safe harbor protection and thus is not liable for copyright infringement committed by its users); UMG Recordings, Inc. v. Shelter Cap. Partners LLC, 718 F.3d 1006, 1013, 1036 (9th Cir. 2013) (holding that the video-sharing platform Veoh is entitled to rely on § 512's safe harbor and thus was not liable for copyright infringement of Universal Music Group's copyrighted sound recordings).

39. Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 504–05 (2017).

40. JESSICA LITMAN, DIGITAL COPYRIGHT 151 (2001) (noting that the president of Time Warner stated: "This is a very profound moment historically. This isn't just about a bunch of kids stealing music. It's about an assault on everything that constitutes the cultural expression of our society. If we fail to protect and preserve our intellectual property system, the culture will atrophy. And corporations won't be the only ones hurt. Artists will have no incentive to create. Worst-case scenario: The country will end up in a sort of cultural Dark Ages").

41. *See id.* at 106. As Jessica Litman details, the executive secretary of the American Federation of Television and Radio Artists had testified before a House subcommittee in 1982 on the perniciousness of the first sale doctrine, which shielded videotape rental businesses from copyright liability:

> Unless we do something to ensure that the creators of the material are not exploited by the electronics revolution, that same revolution which will make it possible for almost every household to have an audio and video recorder will surely undermine, cripple, and eventually wash away the very industries on which it feeds and which provide employment for thousands of our citizens.

Id. at 106–07.

receding into the predicted Dark Ages as a result of online piracy conducted under the cloak of safe harbor laws. Movie industry revenues rose.[42] Creative output increased: the number of films, books, and music available to U.S. consumers has grown exponentially, not decreased, since the enactment of the safe harbor.[43] And many of these changes were helped along in significant part by technology.[44] Sites like YouTube and Twitch are producing new revenue streams for audiovisual content. Empirical studies from the past decade show remarkable increases in not just industry revenue (as opposed to the precipitous declines and mass layoffs portrayed by content industries),[45] but also in the *quantity*, *quality*, and *diversity* of cultural output being produced (lest anyone believe that the growth of the internet has merely resulted in a world awash in mediocrity—or, as one commentator put it, "No more Hitchcocks, Bonos,[46] or Sebalds."[47]).[48]

B. ASCAP/BMI Consent Decrees

Whereas technology platforms governed by the § 512 safe harbor relied on user-generated content, other internet platforms—what I will call "mass

42. *See* JOEL WALDFOGEL, DIGITAL RENAISSANCE: WHAT DATA AND ECONOMICS TELL US ABOUT THE FUTURE OF POPULAR CULTURE 73–105 (2018).

43. *See The Digital Millennium Copyright Act at 22: Hearing Before the S. Comm. on the Judiciary, Subcomm. On Intell. Prop.*, 116th Cong. 1 (2020) (statement of Professor Rebecca Tushnet).

44. *See* Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 486–87 (2015) (providing evidence that content industries have seen increased revenues and that more content is being created in the new Internet Age).

45. *See Copyright Law in Foreign Jurisdictions: How Are Other Countries Handling Digital Piracy?: Hearing Before the S. Comm. on the Judiciary, Subcomm. on Intell. Prop.*, 116th Cong. 1 (2020) (statement of actor Jonathan Yunger) ("For the past two decades, the plague of digital piracy has been stealing jobs from hardworking Americans. The truth is that the battle against piracy has only intensified since the DMCA became law . . . . Anything that could be distributed digitally online was stolen and monetized by criminals, facilitated by some of the world's wealthiest Internet companies including Google, its now-sibling YouTube, and Facebook."); Andrew Keen, *Why We Must Resist the Temptation of Web 2.0*, *in* THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 51, 54 (Brian Szoka & Adam Marcus eds., 2011) ("Newspapers are in freefall . . . . Meanwhile, digital piracy, enabled by Silicon Valley hardware and justified by [Silicon Valley] intellectual property communists such as Larry Lessig, is draining revenue from established artists, movie studios, newspapers, record labels, and songwriters.").

46. It is not entirely clear to this author whether Bono belongs in the pantheon of great culture.

47. *See supra* note 46.

48. Keen, *supra* note 45, at 55; *see* WALDFOGEL, *supra* note 42, at 163 (concluding that we are experiencing a digital renaissance in books, film, music, and television) ("In music, the number of new songs released annually has tripled, and top-selling lists are made up increasingly of songs from artists on independent labels . . . . By some counts, the number of movies produced annually has increased by a factor of ten. The annual number of new releases that are commercially available has increased by a factor of roughly five. Independent movies make up a growing and large share of the critical darlings; and the number of critically acclaimed movies—for example, those scoring above 90 at Rotten Tomatoes—has grown from 10 to 100 per year."); *see also* GLYNN LUNNEY, COPYRIGHT'S EXCESS: MONEY AND MUSIC IN THE US RECORDING INDUSTRY 158 (2018) (finding that more revenue to the music industry in fact results in fewer and lower-quality hit songs).

aggregation" technologies—could not rely on the § 512 safe harbor because the platforms, not the users, controlled the content.[49] I refer to these as "mass aggregation" technologies because these innovations aggregate existing copyrighted content—text, images, music—to make the world's culture instantly and easily accessible. For example, Google Books does this with text. Google Image Search does this with images. And Pandora and Spotify do this with music. But the strength of these services—making available vast quantities of text, images, or music—is also its very weakness as far as copyright law is concerned.

A federal district court noted in a royalty rate dispute involving the digital radio service Pandora and copyright holder ASCAP that "the internet has enabled providers to present listeners with a vast library of radio programming, the likes of which has never been available before."[50] "With the internet, each listener's device gets its own data stream, in contrast to the broadcasting of a common signal across a geographic area," as would be the case with AM/FM radio.[51] Pandora's particular innovation in generating unique radio "stations" for each of its users was its Music Genome Project (MGP).[52] Pandora had substantially invested in the MGP, hiring "[t]rained music analysts, many of whom have music related degrees or are musicians, [to] listen to the compositions . . . and register the composition in reference to as many as 450 characteristics."[53] Thus, Pandora users "seed" a station with a song, artist, genre, or composer that they enjoy, and Pandora then "draws upon the MGP to locate other compositions that the listener is likely to enjoy."[54]

Just like traditional radio stations, Pandora needs a license in order to publicly perform copyrighted musical works. Due to the sheer number of songs that radio stations—to say nothing of digital radio stations like Pandora—have on rotation, performing rights organizations (PROs) like ASCAP offer "blanket licenses" that give licensees the right to perform all of the works in the PRO's repertoire.[55] As Judge Ralph K. Winter of the Second Circuit has noted, blanket licenses are efficient because they "reduce the costs of licensing copyrighted musical compositions. They eliminate costly, multiple negotiations of the various rights . . . . They also allow users

49. *See* 17 U.S.C. § 512. Section 512 only provides that "service provider[s] shall not be liable for monetary relief . . . for infringement of copyright" for material stored or routed through their servers if "the transmission of the material was initiated by or at the direction of a person other than the service provider." *Id.* § 512(a)(1).

50. *In re* Pandora Media, Inc., 6 F. Supp. 3d 317, 324 (S.D.N.Y. 2014), *aff'd sub nom.* Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 785 F.3d 73 (2d Cir. 2015).

51. *Id.*

52. *Id.* at 327.

53. *Id.*

54. *Id.*

55. *See id.* at 322.

of copyrighted music to avoid exposure to liability for copyright infringement."[56]

But for the same reasons that blanket licenses are efficient, the consolidation of so many musical works also presents serious anticompetitive concerns.[57] Thus in 1941, the DOJ brought antitrust suits against both ASCAP and the other largest PRO, BMI.[58] As a result of these lawsuits, BMI and ASCAP entered into consent decrees with the DOJ, which imposed certain limitations on both PROs.[59] For example, the ASCAP decree subjects the PRO to the jurisdiction of certain "rate courts" sitting in the Southern District of New York so that licensees may apply to the rate court to determine a reasonable fee in the event an agreement cannot be reached between the parties.[60] Likewise, and critically for companies like Pandora, the decree requires ASCAP to grant licenses on demand "to any music user making a written request therefor a non-exclusive license to perform all of the works in the ASCAP repertory."[61]

Perhaps unsurprisingly, the consent decrees were unpopular with licensors for the same reason they are popular with licensees. Music publishers, who are members of the PROs, had to grant licenses to anyone who requested one—and, in particular, they had to grant them to technology companies like streaming services. Thus, in 2010, ASCAP and its large music publisher members, like Sony Music Entertainment, began to pursue a strategy known as "partial withdrawal," where the publishers would withdraw from ASCAP the right to license works to so-called "new media" users.[62] This meant that "new media" services—and *only* new media services (like Pandora)—would no longer be able to take advantage of ASCAP's blanket license and would have to begin individually negotiating licenses with each copyright holder instead. In other words, the very efficiencies of blanket licensing that gave

56. Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers, 744 F.2d 917, 934 (2d Cir. 1984) (Winter, J., concurring).

57. *See* Am. Soc'y of Composers, Authors & Publishers v. MobiTV, Inc., 681 F.3d 76, 82 (2d Cir. 2012) (noting that "ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music").

58. *See* United States v. Am. Soc'y of Composers, Authors & Publishers, 1940–43 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941); United States v. Broad. Music, Inc., 1940–43 Trade Cas. (CCH) ¶ 56,098 (S.D.N.Y. 1941). The consent decrees have been modified throughout the years. The current governing versions of the consent decrees are Second Amended Final Judgment, United States v. Am. Soc'y of Composers, Authors & Publishers, No. 41-1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001) [hereinafter ASCAP Amended Judgment] and Amended Final Judgment, United States v. Broad. Music, Inc., No. 64 Civ. 3787, 2000 WL 280034 (S.D.N.Y. Mar. 15, 2000) [hereinafter BMI Amended Judgment].

59. *See* ASCAP Amended Judgment, *supra* note 58; BMI Amended Judgment, *supra* note 58.

60. *See* ASCAP Amended Judgment, *supra* note 58, at *6–8.

61. *Id.* at *4; *see also id.* at *7 (providing that, in the event the parties cannot agree upon a reasonable fee for the license, "the music user shall have the right to perform any, some or all of the works in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation" while pending rate court review).

62. *See In re* Pandora Media, Inc., 6 F. Supp. 3d 317, 333 (S.D.N.Y. 2014), *aff'd sub nom.* Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 785 F.3d 73 (2d Cir. 2015).

rise to licensing collectives like ASCAP in the first place would be unavailable to new technologies.[63]

Pandora sought relief in the rate court, arguing that the consent decrees prohibited partial withdrawal and seeking the determination of a reasonable royalty fee in lieu of what it argued was a far-above-market rate reached outside the protections of the consent decrees.[64] Judge Denise L. Cote held that the consent decrees prohibited publishers from "partially withdrawing" their works.[65] In other words, either publishers could engage in direct licensing negotiations with every licensee—whether that be a restaurant or Pandora—or, if publishers wished to take advantage of the collective efficiencies of ASCAP, then they needed to comply with the provisions of the consent decrees, including their all-comers provisions.[66]

The district court further found that the benchmark rates negotiated with Sony and Universal Music Group, which were negotiated outside of the protection of the consent decrees, were not competitive, fair market rates.[67] The district court had previously defined fair market value as a license fee arrived at in an arm's length transaction.[68] Both ASCAP and Pandora agreed on a definition of fair market value, defining it as the rate "at which a willing and unrelated buyer would agree to buy and a willing and unrelated seller would agree to sell . . . when neither party is compelled to act, and when both parties have reasonable knowledge of the relevant available information."[69] The reasonable fee that the district court itself set after extensive fact-finding, 1.85 percent of Pandora's revenue, was far lower than the market-negotiated rates of 3.42 percent (Universal) and 2.28 percent (Sony).[70] Describing the rate drop of over 50 percent from the rate Sony and Universal were able to obtain by partial withdrawal, the court noted: "ASCAP did not show that the upshot of the negotiations conducted by either Sony or [Universal's publishing arm] with Pandora was a competitive, fair market rate."[71] In other words, the court took seriously the music publishers' threat that they had the power to "shut down" Pandora[72]—and viewed this as evidence that so-called

63. *See* Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers, 744 F.2d 917, 934 (2d Cir. 1984) (Winter, J., concurring).

64. *In re* Pandora Media, Inc., No. 12 Civ. 8035, 2013 WL 5211927, at *1 (S.D.N.Y. Sept. 17, 2013), *aff'd sub nom.* Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 785 F.3d 73 (2d Cir. 2015).

65. *Id.* at *11.

66. *Id.* at *1.

67. *In re Pandora Media, Inc.*, 6 F. Supp. at 357–58.

68. *Id.* at 353 (citing Am. Soc'y of Composers, Authors & Publishers v. MobiTV, Inc., 681 F.3d 76, 82 (2d Cir. 2012)).

69. *Id.* at 354 (alteration in original) (citing ROBERT W. HOLTHAUSEN & MARK E. ZMIJEWSKI, CORPORATE VALUATION: THEORY, EVIDENCE & PRACTICE 4–5 (2d ed. 2014)).

70. *Id.* at 372. The court described the rate Universal had negotiated for itself as a "leap . . . so astounding that it drove Pandora to *buy a radio station* and to file a summary judgment motion challenging the legality of" partial withdrawal. *Id.* at 360–61 (emphasis added).

71. *Id.* at 372.

72. *Id.* at 359 (describing Pandora as having "three options: shut down its business, face crippling copyright infringement liability, or agree to Sony's terms" (citation omitted)).

"marketplace" negotiations conducted outside the protections of the consent decrees were anything but fair.

But with new changes brought about by the Orrin G. Hatch-Bob Goodlatte Music Modernization Act[73] (MMA), passed in 2018, as well as changes likely to come to the consent decrees, Judge Cote's opinion will likely be remembered as a vestige of a different era.[74] Whereas changes brought about by the MMA will almost certainly result in rate courts handing down higher royalties,[75] changes to the consent decrees, discussed in Part II, could mean that digital services no longer get the benefit of blanket licenses at all.

C. Fair Use

Perhaps the best known of all of copyright's defenses, fair use allows others to use copyrighted works—without payment to or permission from copyright holders—in certain instances, "such as criticism, comment, news reporting, teaching . . . , scholarship, or research."[76] As the doctrine developed in the common law, "courts consistently expressed preference for secondary uses that did not merely copy and offer themselves as substitutes for the original copyrighted text," but instead that used copyrighted works in the creation of *new* works—what Judge Pierre N. Leval called "productive" uses.[77] "[R]eproductive" uses, or ones where the copyrighted work was merely copied for some other purpose or in some other medium, were disfavored.[78]

Of course, most cases[79] in which new technologies reproduced copyrighted works were by nature ones where reproductive, rather than productive works, were at issue. New technologies, such as the VCR, the photocopier, the internet search engine, and the computer, may have changed the way that a copyrighted work was viewable, searchable, or transmitted, but they did not use copyrighted works in the creation of new, creative expression.

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73. Pub. L. No. 115-264, 132 Stat. 3676 (2018) (codified as amended in scattered sections of 17, 19, and 28 U.S.C.).

74. *See infra* Part II.B.

75. *See infra* Part II.B.

76. 17 U.S.C. § 107. As Neil Netanel pointed out to me in an email, language from the House report suggests that § 107 may have been contemplated to extend to new technologies like Google Books or Google Image Search. *See* H.R. REP. NO. 94-1476, at 66 (1976) ("The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.").

77. Am. Geophysical Union v. Texaco Inc., 802 F. Supp. 1, 11, 13 (S.D.N.Y. 1992) ("Texaco's copying is not of the transformative, nonsuperseding type that has historically been favored under the fair use doctrine.").

78. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1114–16 (1990).

79. But not all. Notably, new technologies also enabled users to cut, copy, and paste copyrighted works like digital bricolage, incorporating them into their own creative expression. *See* Lenz v. Universal Music Corp., 815 F.3d 1145 (9th Cir. 2016). Often, these cases were decided, at least in part, on the basis of the § 512 safe harbor.

But fair use proved to be an important nexus in which the age-old battle between content owners and new technologies played out. As Justice John Paul Stevens put it in *Sony Corp. of America v. Universal City Studios, Inc.*,[80] the first new technology case that put fair use to the test, "[f]rom its beginning, the law of copyright has developed in response to significant changes in technology."[81] But, as Justice Stevens pointed out, courts had historically been deferential to Congress when evaluating new technological innovations that fundamentally change how copyrighted materials are consumed, sold, or transmitted.[82] The subsequent decision in *Sony Corp. of America*, then, was remarkable in nonetheless applying the judicially developed fair use doctrine to hold that home taping of copyrighted materials on VCRs for purposes of "time shifting" (fast forwarding) constituted fair use.[83]

Sony Corp. of America may have been the first decision to apply fair use to a new technology's reproduction of a copyrighted work, but it was not the last. Two notable fair use decisions involving Google applied the doctrine to hold that both mass aggregation and mass digitization of copyrighted works—again, without payment and without a license—could be permissible under copyright law.[84] The first, a 2007 Ninth Circuit decision, involved Google Image Search.[85] Google's Image Search functionality returns thousands of thumbnail images from all over the web in response to user queries.[86] Many of these thumbnails may be of copyrighted images.[87] Notably, Google did not hold a license from any of the copyright owners who held rights in the images.

The Ninth Circuit determined that Google's Image Search functionality constituted a fair use.[88] "Google's use of thumbnails is highly transformative," the court held, noting that the functionality provided a great benefit to the public by creating an "electronic reference tool" for images.[89] Critically, the fact that Google also profited off Image Search through the use of targeted advertising did not outweigh the "significantly transformative nature of Google's search engine, particularly in light of its public benefit."[90]

The Ninth Circuit's fair use finding was in effect a zero-fee compulsory license to Google.[91] This finding was critical to Google Image Search's

80. 464 U.S. 417 (1984).
81. *Id.* at 430.
82. *Id.* at 431.
83. *Id.* at 454–55.
84. *See* Authors Guild v. Google, Inc., 804 F.3d 202, 229 (2d Cir. 2015); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).
85. *See Perfect 10, Inc.*, 508 F.3d at 1155 (explaining the mechanics of Google Image Search).
86. *See id.* at 1155.
87. *See id.* at 1157.
88. *Id.* at 1168.
89. *Id.* at 1165.
90. *Id.* at 1166.
91. *See* Jane C. Ginsburg, *Fair Use for Free, or Permitted-But-Paid?*, 29 BERKELEY TECH. L.J. 1383, 1385 (2014) (noting that in cases such as *Perfect 10, Inc.*, "the user is not only

continued viability, and not just because a finding of infringement would have entitled the rightsholder to seek injunctive relief.[92] Even if a court chose to deny injunctive relief, as it is permitted to do after the Supreme Court's ruling in *eBay Inc. v. MercExchange, L.L.C.*,[93] Google would be vulnerable to infringement lawsuits from every single rightsholder whose image appears in the Google Image Search functionality—which is to say, Google would have been subject to, quite literally, millions of infringement lawsuits.[94]

Several years after the Ninth Circuit issued its opinion in *Perfect 10, Inc. v. Amazon.com, Inc.*,[95] the Second Circuit issued its own fair use finding on another Google technology, Google Books.[96] Google Books was a mass book digitization project that Google launched in connection with several major research libraries.[97] In connection with the project, Google scanned over twenty million books in order to create its electronic database.[98] On top of that, Google made this database text-searchable.[99] Users of the tool can search the entire library and view excerpts, or snippets, from these books—including from books that had long gone out of print.[100]

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dispensed from obtaining permission, but also owes no compensation for the use"). And a compulsory license is just that: the rightsholder does not have the right to say "no."

92. For further reading about the problem of fair use as an "on/off switch" in which a finding that a use is not fair would entitle a "copyright owner [to] stop the use," see *id.* at 1385.

93. 547 U.S. 388 (2006). *eBay Inc.* held, in the patent context, that injunctions should not automatically be granted once infringement is found. *Id.* at 394. Courts have subsequently applied *eBay Inc.* to copyright infringement lawsuits, as well. *See, e.g.*, Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010).

94. *See* Mark A. Lemley, *Should a Licensing Market Require Licensing?*, 70 LAW & CONTEMP. PROBS. 185, 198 (2007) (noting that Google Books, if it lost the fair use defense, would be liable for up to 300 billion dollars in statutory damages). Note that Perfect 10 made its images available through a password-protected portal. *See Perfect 10, Inc.*, 508 F.3d at 1157. These images were *not* included in Google Image Search; rather, the images at issue were those made available by third-party websites that had republished Perfect 10's images without its authorization. *See Perfect 10, Inc.*, 508 F.3d at 1157. Perhaps this suggests that some sort of opt-in/opt-out system could be created in which copyright holders who do not want their content made available on Google Image Search could simply protect their content via password protection, as Perfect 10 had done. Those copyright holders who do not similarly lock down their content by password are, in effect, granting an implied license. However, courts have not been historically receptive to this argument—and for good reason, as use of password protection or other web protocols (for example, a web protocol excluding web crawlers) cannot distinguish between uses and access that a copyright holder may wish to permit (for example, indexing for purposes of search engine rankings) and those that it wishes to disallow (for example, copying of images). *See* Associated Press v. Meltwater U.S. Holdings, Inc., 931 F. Supp. 2d 537, 563 (S.D.N.Y. 2013) (finding no implied license where copyright holder failed to employ a web protocol that excludes web crawlers, because there is no "meeting of the minds between the copyright owner and the owner of the web crawler" as to what uses the copyright holder is granting access to). *Associated Press*, 931 F. Supp. at 563. In any event, because the images at issue here were made available by third parties, not Perfect 10, even this opt-in/opt-out system would not work. *See* Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 801 (2007).

95. 508 F.3d 1146 (9th Cir. 2007).

96. *See* Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).

97. *Id.* at 208.

98. *Id.*

99. *Id.*

100. *Id.* at 209–10.

In holding that Google's digitization and display of copyrighted material constituted fair use, the district court found that the "benefits of Google's book project are many."[101] The court noted: "Books will become more accessible. Libraries, schools, researchers, and disadvantaged populations will gain access to far more books."[102] "Digitization" would also "facilitate the conversion of books to Braille and audio formats, increasing access for individuals with disabilities."[103] Authors, too, would benefit, because "new audiences will be generated and new sources of income created. Older books—particularly out-of-print books, many of which are falling apart buried in library stacks—will be preserved and given new life."[104] The Second Circuit affirmed the district court's finding of fair use, finding both the search and snippet view functions "highly transformative."[105]

This part has detailed how a combination of legislation and common law fostered the growth and viability of services like YouTube, Vimeo, Google Images, and Google Books. These technology platforms offer users the ability to express themselves, to upload that self-expression, to watch others as they engaged in acts of identity and meaning-making, and to access the world's culture as if pulling books—or images, or music—off an infinite shelf. Law worked in tandem with technology to change the conditions of cultural production, in a way that copyright scholars argued was valuable—because digital technologies made "the values of a democratic culture salient to us," in that it "offers the technological possibility of widespread cultural participation," giving "ordinary people a say in the progress and development of the cultural forces that in turn *produce them*."[106] But perhaps it is now difficult to even speak of Google or YouTube in such positive terms. If legislation and common law had unwittingly helped Google along—by allowing it to take others' content without permission or payment under the auspices of fair use or by creating a statutory ceiling through the safe harbor that gives it unfair bargaining leverage as against copyright holders—might it be time we reformed our copyright laws to rein Google, Facebook, and Amazon back in? As Part II discusses, a number of changes or contemplated changes to copyright laws aim to do just that.

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101. *See* Authors Guild v. Google, Inc., 770 F. Supp. 2d 666, 670 (S.D.N.Y. 2011), *aff'd*, 804 F.3d 202 (2d Cir. 2015).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Authors Guild*, 804 F.3d at 229. For an argument that a class action settlement would be in fact a better remedy than fair use, as it would provide copyright holders who opt into digitization with compensation and an opt-out mechanism for copyright holders who do not wish for their books to be digitized, see Xiyin Tang, Copyright Class Actions and Blanket Licensing by Litigation (unpublished manuscript) (on file with author).

106. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 35, 37 (2004) (emphasis added).

II. COPYRIGHT'S TECHNO-PESSIMIST CREEP

If certain copyright statutes, doctrines, and blanket licenses promoted the development of internet platforms, recent changes in the laws are working to scale back the excesses of the internet companies that benefitted the most from these regimes. Like the conversations currently happening around § 230,[107] the most prominent copyright law to undergo scrutiny and reform in the past year is the § 512 safe harbor. This part first discusses how changes in European copyright laws that removed safe harbor protection for most technology platforms could serve as precedent for ongoing conversations surrounding safe harbor reform in U.S. copyright law, before discussing how techno-pessimist sentiment is shaping the rhetoric being wielded by rightsholders to their advantage.

A. Safe Harbor Reform and Closing the Technology "Value Gap"

On April 17, 2019, the European Parliament adopted a sweeping reform to EU copyright laws.[108] Titled the Directive on Copyright in the Digital Single Market Directive (DSM), the DSM drastically changed how technology companies like Google or Facebook do business. Specifically included in the DSM was Article 17,[109] which effectively gutted safe harbor protection for certain online platforms, requiring that services which make available a large amount of user-generated content—services like Google and Facebook—affirmatively go out and get licenses for all copyrighted content its users share on the platform before any such content may be posted.[110] The DSM is, essentially, the opposite of § 512, as it holds platforms responsible for the infringements of their users and the myriad content containing potentially copyrighted material posted by them.[111]

The motivation behind this inversion of traditional copyright liability rules was precisely the perceived market power of online platforms. According to European policy makers, copyright holders lacked bargaining leverage when negotiating with them. The DSM thus "gives publishers and authors the means to negotiate better with digital platforms," putting rightsholders "in a stronger and fairer position to negotiate and be paid when a platform puts their work online."[112] In many ways, this argument echoes the sentiment voiced by many outside the copyright space—for example, by retailers who

107. *See supra* note 6 and accompanying text.

108. *See* Council Directive 2019/790, 2019 O.J. (L 130) (EU) [hereinafter DSM].

109. Note that this Article omits discussions of Article 15, which requires technology platforms to pay news organizations for displaying snippets of their copyrighted articles, because it deserves its own robust scholarly analysis. My preliminary analysis, however, is that a service provider's conscious decision to display "snippets" of news articles (as opposed to just the link), which is almost always likely to be copyrighted by a third party, likely falls outside of the ambit of safe harbor protection and thus would require a license.

110. DSM, *supra* note 108, art. 17.

111. *Id.*

112. European Commission Press Release, SPEECH/18/3124, Speech by Vice-President Ansip on Copyright at the Charles Clark Memorial Lecture, London Book Fair (Apr. 10, 2018) [hereinafter Press Release].

have long complained that, because they are reliant on a platform like Amazon for their business, they lack any leverage against the technology giant.[113]

To further cement the idea that safe harbor laws unfairly create one-sided licensing negotiations in favor of digital platforms, rightsholders coined a term that quickly rose in favor among lawmakers and the general public: the "value gap."[114] While originally a term of art unique to the music industry, the term "value gap" came to symbolize everything and anything wrong with the perceived dominance of technology platforms against the powerlessness of rightsholders.

Originally a record industry term, the "value gap," strictly speaking, refers to the difference in rates by a service like YouTube,[115] which can rely on the safe harbor,[116] and a service like Spotify that cannot (because Spotify itself, rather than the users, posts the content).[117] The term, then, merely speaks to a fundamental truth about statutory rates—rates are always going to be lower when negotiated under the shadow of a statute, hence why the term "statutory ceiling" exists. For example, in the music publishing—as opposed to record label—context,[118] rightsholders have long complained of what they perceived as an unfair gap between music publishing revenues, which are regulated by both the § 115 mechanical license and the ASCAP/BMI consent decrees,[119] and record label revenues, which are unregulated (except for, of

113. *See* Charles Duhigg, *Is Amazon Unstoppable?*, NEW YORKER (Oct. 10, 2019), https://www.newyorker.com/magazine/2019/10/21/is-amazon-unstoppable [https://perma.cc/F4YR-7GYN]. One producer who has refused to sell his products on Amazon describes the platform as "own[ing] the marketplace." *Id.* That producer continued, "[t]hey can do whatever they want"—in a move that isn't even "capitalism" but, as he describes it, in the ultimate language of the IP maximalists, "piracy." *Id.*

114. *See* Annemarie Bridy, *The Price of Closing the "Value Gap": How the Music Industry Hacked EU Copyright Reform*, 22 VAND. J. ENT. & TECH. L. 323 (2020).

115. In 2019, Google merged its interactive streaming service, Google Play, into YouTube, under the confusing names YouTube Music and YouTube Premium. *See* Julian Chokkattu and Abigail Bassett, *YouTube Music Is Replacing Google Play Music: Here's Where, When and Why*, DIGITALTRENDS (Apr. 4, 2019), https://www.digitaltrends.com/music/what-happens-to-google-play-music-youtube-music/ [https://perma.cc/JS6S-H7FP]. Any discussion of "YouTube" in this Article *excludes* the interactive streaming component. But I note here that, while the exact license agreements are confidential, it has been publicly reported that YouTube's interactive streaming component pays in fact much higher per-stream rates than other interactive streaming services like Spotify.

116. Notably, however, YouTube has instead chosen to enter into content licenses with rightsholders. *See* Sag, *supra* note 39, at 541–42 (terming the agreements that YouTube has entered into with rightsholders in the shadow of the DMCA as "DMCA-plus" agreements).

117. *See* INT'L FED'N OF THE PHONOGRAPHIC INDUS., IFPI DIGITAL MUSIC REPORT 2015, at 23 (2015) ("The key to addressing the 'value gap' is to create a fair licensing environment. Currently, this does not exist. This is because certain content platforms (that is services such as YouTube and Dailymotion) claim that they are merely neutral hosting services entitled to benefit from exemptions to copyright law (akin to internet service providers), rather than digital distribution services akin to Deezer or Spotify, which do not benefit from such exemptions.").

118. There are two copyrights underlying every song: a musical composition copyright, which is usually owned by music publishers, and a sound recording copyright, which is usually owned by record labels. *See* 17 U.S.C. § 102(a)(2), (7).

119. *See supra* Part I.B.

course, by any applicable safe harbors).[120] In fact, in this context, rightsholders have *lauded* agreements negotiated with YouTube as "model agreements,"[121] while simultaneously deriding services like Spotify, which can take advantage of the statutory § 115 rate and thus, pay less.[122]

But of course, as the example above shows, a gap between statutory rates and rates negotiated outside of any applicable statutes have nothing to do with the market power of technology platforms. Spotify possesses considerably less market power than tech titan Google. But because, in the music publishing context, Spotify can take advantage of the § 115 license and YouTube's audiovisual content cannot,[123] rates negotiated with YouTube outside of the statutory shadow are higher. If the safe harbor creates lower rates, it does so for *any* platform eligible for the safe harbor—everything from lesser-known websites like Dailymotion to tech giants like Google.[124]

Soon enough, however, as the term "value gap" began to gather momentum with lawmakers and the public, earlier attacks on any platform that could avail itself of statutory rates—including websites like Dailymotion—fell away. Instead, the term "value gap" took on a new meaning: rather than refer to the difference between technology platforms that paid statutory rates and technology platforms that had to negotiate market rates, the term instead pitted the immense wealth of technology platforms against the content holders who had long suffered unfair returns.[125]

The United States is now actively reconsidering its own safe harbor laws. While the Copyright Office's recently concluded study of § 512 did not recommend any major changes to the statute, there is now a fervent and renewed legislative interest in reforming the statute.[126] In addition to holding a series of hearings on § 512,[127] members of the Senate Judiciary Committee Subcommittee on Intellectual Property have asked a series of follow-up questions to the Copyright Office about how § 512 can be reformed,

120. *See* Written Direct Statement of Copyright Owners at 21, Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1 (Oct. 28, 2016) (No. 16-CRB-0003-PR) ("[T]he statutory [§ 115 mechanical license] rate often acts as a ceiling on what can be achieved in direct negotiations undertaken in the shadow of the compulsory license.").

121. *Id.* at 5.

122. *Id.* at 27.

123. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 1941 (Copyright Royalty Bd. Feb. 5, 2019) (final rule and order) (content owners' expert selected a YouTube contract as a benchmark "because neither the musical works license nor the sound recording license is subject to the § 115 license").

124. *See id.*

125. *See* European Commission Press Release MEMO/19/1151, Questions & Answers: EU Negotiators Reach a Breakthrough to Modernise Copyright Rules (Feb. 13, 2019) (describing how Article 17 will close the "value gap" and enable creators to finally be remunerated fairly for their works).

126. *See* text accompanying *supra* note 13.

127. *See supra* notes 43, 45 and accompanying text.

including a specific inquiry into the workability of a "notice and staydown" regime[128]—the very same phrase that has been used to describe the DSM.[129]

As former European Parliament member and Harvard's Berkman Klein Center researcher Julia Reda notes, there is good reason to believe that similar changes could be coming to U.S. copyright law. "There is a tried-and-tested tradition of Hollywood companies lobbying for stricter copyright in Europe, just to turn around to US policy-makers to demand the same extensions be enacted in domestic law," Reda writes.[130] This was precisely what happened with one of the most controversial U.S. Copyright Act amendments, the Sonny Bono Copyright Term Extension Act,[131] which extended copyright terms by an additional twenty years.[132]

With interest coalescing around reforms to § 230, which, like § 512, treats service providers as neutral conduits, the continued viability of the safe harbor in its current form is very much in question. Indeed, just months after the Copyright Office concluded its § 512 study, Senator Thom Tillis released his own discussion draft for reforming the safe harbor in late December 2020.[133] Among the revisions Senator Tillis included in the draft was replacing the current notice-and-takedown system with a notice-and-staydown system.[134] Professor Rebecca Tushnet, at a hearing on § 512 reform, was quick to point out the natural corollary between the growing chorus of voices on both the left and the right that are calling for the reform of § 230 and the increased scrutiny on § 512: "The two issues are very much connected . . . . They're both under pressure, and opponents of

128. Letter from Senators Thom Tillis and Patrick Leahy, to Maria Strong, Acting Reg. of Copyrights and Dir. (May 29, 2020).

129. *See* Bridy, *supra* note 114, at 353–54.

130. Julia Reda, *Why Americans Should Worry About the New EU Copyright Rules*, BERKMAN KLEIN CTR. (Dec. 20, 2019), https://medium.com/berkman-klein-center/why-americans-should-worry-about-the-new-eu-copyright-rules-97800be3f8fc [https://perma.cc/7Q5Q-ECFZ].

131. Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.).

132. *Id.* The Senate report for the Sonny Bono Copyright Term Extension Act provides that it was meant to "harmoniz[e] U.S. copyright law to that of the European Union." S. REP. NO. 104-315, at 3 (1996). Almost as soon as the Act was passed, it was challenged in court (Larry Lessig represented the plaintiffs), a challenge that the Supreme Court ultimately rejected. *See* Eldred v. Ashcroft, 537 U.S. 186 (2003). For a discussion of how this term extension harms U.S. copyright law, see James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW AND CONTEMP. PROBS. 33, 40 (2003) (discussing how "lengthening the copyright term . . . can be understood as a vote of no-confidence in the productive powers of the commons").

133. *See* Press Release, Sen. Thom Tillis, Tillis Releases Landmark Discussion Draft to Reform the Digital Millennium (Dec. 22, 2020), https://www.tillis.senate.gov/2020/12/tillis-releases-landmark-discussion-draft-to-reform-the-digital-millennium-copyright-act [https://perma.cc/7PUS-UENQ].

134. *12/18 Discussion Draft For Stakeholder Comments Only*, THOM TILLIS (Dec. 22, 2020), https://www.tillis.senate.gov/services/files/97A73ED6-EBDF-4206-ADEB-6A745015C14B [https://perma.cc/C6EQ-CTAK].

both tend to lump a bunch of bad things together."[135] Practitioners, likewise, agreed that "[t]he DMCA discussion and the [Section] 230 discussion are related; there's no question about that."[136] And just as public sentiment swung from believing that § 230 provided much-needed immunity to the internet to a newfound conviction that it was the very law that helped Big Tech grow to unparalleled dominance, so too the public sentiment has shifted toward a deep antipathy toward safe harbor reform. As one lawyer who represented technology platforms in the original § 512 negotiations decades ago acknowledged bluntly, "the political terrain has changed."[137] Why else, then, would the Walt Disney Company and the Motion Picture Association focus on lobbying lawmakers to overhaul § 230, which has little to do with copyright? Again, as Professor Tushnet pointed out, "it's about messaging: By drumming up opposition against one of big tech's key legal shields, rival industries hope that momentum will bleed into a new fight targeting the tech industry's protections against copyright liability."[138]

Just like the Copyright Office study, which others, like Professor Pamela Samuelson, have critiqued as being almost single-handedly in favor of content owners,[139] Senator Tillis's proposed draft legislation makes no pretense of attempting to balance the rights of service providers against content owners. Instead, Senator Tillis has been clear that reforms to § 512 are necessary "to better encourage the creation of copyrightable works"—in other words, to better serve the needs of content owners.[140]

But when we remove safe harbors, we in fact skew licensing negotiations solely in favor of content holders, who have the power of copyright infringement suits—including injunctive relief and crippling statutory damages—as the ultimate leverage. Some, like Professor Mark Lemley, have called the arsenal of remedies that infringement suits afford copyright holders supracompensatory, because statutory damages can far exceed actual damages and a copyright user can be forced to completely cease all infringing activity, meaning that ultimately, infringement suits threaten users with remedies far above paying a market-rate license.[141] In part because of the uncertainty created by injunctive relief and supracompensatory damages, companies like YouTube may nonetheless choose to enter into agreements with content holders, even if they could technically choose to rely on the zero-price safe harbor instead. The threat of years-long, million-dollar copyright litigation—to say nothing of the possibility of billions of dollars in damages exposure—already severely curtails any bargaining leverage

135. Press Release, Sen. Thom Tillis, Copyright Liability Emerges as Latest Threat to Big Tech's Legal Shield (Feb. 13, 2020), https://www.tillis.senate.gov/2020/2/copyright-liability-emerges-as-latest-threat-to-big-tech-s-legal-shield [https://perma.cc/JW9C-AANJ].

136. *Id.*

137. *Id.*

138. *Id.*

139. *See generally* Pamela Samuelson, *Pushing Back on Stricter Copyright ISP Liability Rules*, 27 MICH. TECH. L. REV. 299 (2021).

140. *See* Press Release, *supra* note 133.

141. *See* Lemley, *supra* note 94, at 196–97.

created by the safe harbor.[142] Removing safe harbors entirely creates one-sided licensing negotiations—in favor of content owners.[143]

Finally, as Part I noted, there is little truth to the suggestion that the content industry is an industry hobbled by the growth of digital and reduced to receiving paltry sums for copyrighted works. Content industry revenues are in fact *up*.[144]

B. Reshaping the Law and Rhetoric of Copyright in Techno-Pessimism's Image

Just as "value gap" took on new power when retooled as a term about the inequalities engendered by Big Tech, so too did rightsholders begin to see the rhetorical power in reshaping other parts of copyright law as fundamentally about combatting platform dominance.

One such example manifested itself in public arguments and written submissions made by the National Music Publishers' Association (NMPA) (the main trade association for music publishers and songwriters) before the DOJ.[145] Unsurprisingly, following the court rulings prohibiting partial withdrawal under the consent decrees discussed in Part I, the NMPA began advocating to modify the consent decrees altogether—to allow precisely for partial withdrawal for digital platforms.[146] The NMPA's renewed focus on advocating for carving new media companies out of the consent decrees came at a time when Assistant Attorney General Makan Delrahim had already voiced hints at coming reforms to the decrees—in late 2019, the DOJ opened a new investigation into the continued need for the consent decrees and called for public comments.[147]

In response, the NMPA filed a response that, in its first introductory pages, seized upon the powerful narrative of unequal wealth that had dominated the debates surrounding Article 17. New media companies, the NMPA argued,

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142. *See* Sag, *supra* note 39, at 541 ("[A]lthough the safe harbors are working well for some platforms, others find that they are not as safe as they had hoped. To mitigate this uncertainty, a number of platforms that host large quantities of music and audio-visual works have agreed to go beyond the requirements of the DMCA and proactively filter user content in an effort to reduce infringement and to appease rightsholders. Most obviously, YouTube's development of Content ID appears to have been spurred by the Viacom litigation that began almost as soon as Google acquired the video-sharing company in 2006.").

143. The DSM's exemption of services with revenues of under ten million dollars per year does not ameliorate the problem, as copyright infringement exposure for relatively new upstarts, as YouTube had been when it was sued by Viacom, easily exceeds this threshold. *See infra* Part IV.A.

144. *See supra* notes 42–43 and accompanying text. While illegal digital platforms like Napster had decimated industry revenues back in the early aughts, these are not the types of platforms protected under the safe harbors that the DSM takes aim at. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1025 (9th Cir. 2001), *aff'd*, 284 F.3d 1091 (9th Cir. 2002).

145. NAT'L MUSIC PUBLISHERS' ASS'N, "SELECTIVE WITHDRAWAL" OF NEW MEDIA RIGHTS FROM ASCAP AND BMI (2019) [hereinafter NMPA Submission].

146. *Id.*

147. Antitrust Consent Decree Review—ASCAP and BMI 2019, DEP'T OF JUST. (Sept. 11, 2019), https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019 [https://perma.cc/9VM5-TY94].

"are much larger and more powerful than the music licensees who were the intended beneficiaries of the ASCAP and BMI consent decrees."[148] Harnessing the language of techno-pessimism and its rhetoric of platform dominance and monopoly power, the NMPA writes: "The music distribution market today is dominated by companies that are exponentially larger than the music publishing industry as a whole, including Google, Amazon, and Apple, each of which has the resources and the size to negotiate licenses directly with copyright owners and often does so."[149] (Never mind, of course, that one of the biggest beneficiaries of the consent decrees is Spotify, a company whose name is not (yet) synonymous with techno-pessimist antitrust regulation and, therefore, presumably, not cited in this discussion of market dominance.)[150]

The NMPA went on to cite the yearly revenue that Google, Amazon, and Apple bring in, noting that they make "hundreds of billions in yearly revenue and have a combined market capitalization that exceeds $2 trillion."[151] Never mind, of course, that this is across every single product line, from Google Maps to Amazon Web Services (which alone brings in over thirty-five billion dollars in revenue per year)[152]—product lines that have nothing to do with the streaming of music and thus are entirely severable from whether these companies want to continue with the business of music streaming as a viable business model, at all.

While the DOJ ultimately concluded that the consent decrees should not be modified, including to permit "partial withdrawal," for the current moment,[153] there is reason to believe that copyright law is headed increasingly toward carveouts for new technologies. Indeed, the recently passed MMA may well serve as precedent for partial withdrawal, as it requires only digital services like Spotify and Google to pay a different—almost in all likelihood higher—royalty rate for the public performance of sound recordings.[154] The resulting royalties under the MMA will be determined according to a "willing buyer/willing seller" standard, which scholars agree will almost certainly result in higher rates than the previous 801(b) policy-based standard, which permitted an adjustment downward of

148. NMPA Submission, *supra* note 145, at 3.

149. *Id.* at 4–5.

150. Spotify is a prominent member of the Digital Media Association, the trade group that submitted comments to the DOJ warning against partial withdrawal. *See* ASCAP/BMI CONSENT DECREE REVIEW, JOINT PUBLIC COMMENTS OF RADIO MUSIC LICENSE COMMITTEE AND DIGITAL MEDIA ASSOCIATION (2019), https://media.justice.gov/vod/atr/ascapbmi2019/pc-619.pdf [https://perma.cc/JD5E-6LRY].

151. NMPA Submission, *supra* note 145, at 16–17 (emphasis omitted).

152. *See* Amazon.com, Inc., Annual Form (Form 10-K), at 67 (Dec. 5, 2019).

153. *See* Makan Delrahim, Assistant Att'y Gen., Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees (Jan. 15, 2021), https://www.justice.gov/atr/page/file/1355391/download [https://perma.cc/4GCZ-LF49].

154. Pub. L. No. 115-264, 132 Stat. 3676 (2018) (codified as amended in scattered sections of 17, 19, and 28 U.S.C.); *see* Kristelia A. Garcia & Justin McCrary, *A Reconsideration of Copyright's Term*, 71 ALA. L. REV. 351, 404–405 (2019).

rates for a digital platform's technological contributions.[155] As compared to the previous 801(b) policy-based rate, a willing buyer/willing seller standard is closer to a market-based standard and makes no such accommodations for the benefits of new modes of distribution.[156] If anything, the rhetoric of the overwhelming power and wealth that technology companies hold will continue to be wielded, at times to availing effect, by rightsholders seeking increased payouts from an unsympathetic licensee.

Finally, the dissent in the recently issued Supreme Court decision *Google LLC v. Oracle America, Inc.*[157] gives a window into how techno-pessimism can reshape fair use doctrine, which has historically been the only common-law doctrine in copyright flexible enough to allow technologically transformative uses of copyrighted works. In this closely watched case, Oracle sued Google for copyright infringement of Oracle's API packages—prewritten source code programs that allow programmers to build certain functions into their own programs (rather than writing new code from scratch).[158] In reversing the Federal Circuit's decision that Google's use was not fair, the majority in *Oracle America, Inc.* focused on the functionality of Oracle's code, holding that the "code is, if copyrightable at all, further than are most computer programs . . . from the core of copyright" and thus entitled to only a thin scope of copyright protection.[159]

Thus, while the decision ultimately turned on the unique nature of the copyrighted work at issue—largely functional computer code—the dissent previews how a fair use case pitting a copyrighted work closer to the "core" of protection (books, films, music) against a major technology company could come out very differently. While the majority focuses in great detail on factor two of the fair use analysis, which looks to the nature of the copyrighted work (in this case, highly functional),[160] the dissent focused in on factor four—the market harm suffered by Oracle.[161] "By copying Oracle's work, Google decimated Oracle's market and created a mobile operating system now in over 2.5 billion actively used devices, earning tens of billions of dollars every year," wrote Justice Thomas.[162] "If these effects on Oracle's potential market *favor* Google, something is very wrong with our fair-use analysis," he concluded.[163]

Notably, while the Federal Circuit's decision below had likewise focused on the market harm factor in its holding that Google did not make fair use of

155. 17 U.S.C. § 801(b); *see* Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L. REV. 915, 961, 989 (2020).

156. 17 U.S.C. § 801(b); *see* Victor, *supra* note 155, at 976.

157. 141 S. Ct. 1183 (2021).

158. *Id.* at 1190.

159. *Id.* at 1202.

160. *Id.* at 1202–04.

161. *See id.* at 1215 n.5 (Thomas, J., dissenting) ("The fourth factor—the effect of Google's copying on the potential market for Oracle's work—is 'undoubtedly the single most important element of fair use.'" (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985))).

162. *Id.* at 1218.

163. *Id.*

Oracle's copyrighted work, the Federal Circuit was somewhat oblique in its reasoning on this factor, leading several IP scholars to comment that "the Federal Circuit ignored controlling Ninth Circuit law and found that Oracle suffered market harm in a market it was unlikely to enter and despite the fact that Google copied only a tiny fraction of Oracle's code."[164] Likewise, in reversing the Federal Circuit and holding that Oracle was unlikely to suffer market harm, the Court noted that the jury had found that the copyright holder itself was unlikely, and indeed poorly positioned, to enter the mobile phone market.[165]

By contrast, the dissenting members of the Court were far blunter in their reasoning as to why Google should be found to have caused Oracle to suffer market harm. "Google . . . recently was fined a record $5 billion for abusing Android to violate antitrust laws," wrote Justice Thomas, citing a European Commission finding.[166] "If the majority is worried about monopolization, it ought to consider whether Google is the greater threat."[167] In other words, if we want to combat the growing threat of tech monopolies, we cannot allow already enormously wealthy parties like Google to benefit further from the zero-fee defense of fair use. This simple and intuitive reductionism condenses the multi-factor fair use analysis to a single question: can the defendant afford to pay? But, in doing so, it poses enormous harm to all fair use cases, most of which do not involve an unsympathetic and wealthy defendant, because in *every* fair use case, the defendant could, theoretically, have gotten a license instead. The very reason fair use exists is precisely because *a use that is fair does not require a license*.[168] If rightsholders can reshape fair use reasoning in techno-pessimism's image, the doctrine risks falling into the dangerous circularity that copyright scholars have long warned of.[169]

Oracle America, Inc. was unique because it concerned a type of copyrighted work (software) long accorded a narrower scope of protection.[170] But in a typical fair use case, unlike in *Oracle America, Inc.*,

164. Lemley & McKenna, *supra* note 7, at 120.

165. *Oracle Am., Inc.*, 141 S. Ct. at 1206.

166. *Id.* at 1217–18 (Thomas, J., dissenting).

167. *Id.* at 1218.

168. *See* Lemley, *supra* note 94, at 191 (noting that the lost licensing theory of fair use, in which any use in which defendant can afford to pay is one that cannot be fair, threatens to "contract the doctrine of fair use to a few protected categories, with the baseline assumption being that any use requires permission and a licensing fee").

169. *See, e.g.*, *id.*; 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (Matthew Bender ed., 2020).

170. *See, e.g.*, Eng'g Dynamics, Inc. v. Structural Software, Inc., 26 F.3d 1335, 1348 (5th Cir. 1994) (explaining that the highly functional nature of computer user interfaces means that they "may lie very near the line of uncopyrightability"); Paul Goldstein, *Infringement of Copyright in Computer Programs*, 47 U. PITT. L. REV. 1119, 1125 (1986) (describing computer software as accorded a "very thin" level of protection); Pamela Samuelson et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308, 2351 (1994) (arguing that computer program behavior should not be accorded any copyright protection).

factor two is rarely dispositive.[171] Instead, factor four—the market harm factor—is often considered the most important fair use factor.[172] And if the dissent's honing in on the defendant's dominance in the market harm analysis is a harbinger of things to come, it suggests a powerful opening for copyright holders—who often wield vast monopoly power—to turn the lens away from their own dominance and toward the dominance of the defendant technology platform. They can point to ongoing antitrust investigations or concluded ones, as the dissent aptly did in *Oracle America, Inc.*, conveniently erasing the fact that copyright holders possess enormous market power. That power is often wielded to stop legitimate competition that threatens their very dominance—while reshaping the long history of content holders' antagonism to disruption and innovation, reframing it as, somehow, a heroic, public-minded stand against Big Tech.[173] Part III examines the long history of content holder market power and whether it has significantly weakened in the past decade with the rise of large technology platforms.

III. MARKET POWER, ANTITRUST, AND COPYRIGHT LAW

These days, "antitrust violation" and "Big Tech" are seen together so often in buzzy headlines that the two terms have become almost interchangeable, one simply synonymous and proof-positive of the other. But copyright law is unique and different from other types of market transactions, because those negotiating against powerful technology platforms are often *not* diffuse parties with little bargaining power.[174] Many are, instead, concentrated oligopolies that enjoy market dominance of their own. This part first summarizes the history of certain large content holders' market power in copyright transactions, before examining whether the rise of digital has significantly changed this traditional landscape.

171. *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 586 (2008) (explaining that in an empirical analysis of three-plus decades of fair use opinions, factor two was "shown to exert no significant effect" on the outcome of the fair use analysis).

172. *See id.* (describing empirical data showing that "the first and fourth factors are shown each to exert an enormous amount of influence on the outcome of the test, with the fourth very much in the driver's seat").

173. *See* Lemley & McKenna, *supra* note 7, at 119–20.

174. Of course, this statement cannot apply to each and every copyright industry. Certainly, many of them—photography, journalism, fine art—are, indeed, small and diffuse parties with weak bargaining power. That journalism, in particular, may face a threat from the dominance of technology platforms is significant. As I noted, this Article does not take up Article 15 of the Directive on Copyright in the Digital Single Market, which requires digital platforms to compensate news outlets for providing "snippets" of their articles. For a rich and thoughtful discussion of this topic, see Neil Weinstock Netanel, *Mandating Digital Platform Support for Quality Journalism*, 34 HARV. J.L. & TECH. 473 (2021). This Article merely focuses on large copyright industries that, unsurprisingly, drive much of the copyright policy in the United States—notably, the music and film industries.

A. A History of Content Holder Oligopolies

A significant portion of the copyright industry is controlled by a staggeringly small number of players. Much of rights ownership, far from a diffuse web of interests spread out amongst individual creators, artists, and authors, is instead concentrated in a handful of large corporations that, together, drive copyright policy in the United States.[175] While just a few copyright sectors—the motion picture, recorded music, publishing, and software industries[176]—dominate copyright policy internally, each of these sectors also "face the oligopolist dominance of a handful of firms."[177]

Of course, by its very nature, intellectual property rights create limited monopolies. Copyright holders, whether Universal Music Group or a hobbyist photographer, enjoy market power because they are able to charge higher than a competitive price for a given good or service.[178] Thus, where copyright holders enjoy monopoly pricing and do not own a copyright in their work, the relevant question is not whether the market is competitive (since it cannot be) but instead how *workably* competitive the market is.[179] "Workable competition" does not require marginal cost pricing—which is impossible because copyright rewards producers for the cost of creating the first, not subsequent, copy[180]—but requires that copyright holders merely compete with each other on pricing. If downstream licensees have the ability to choose between several works that, while not perfect substitutes, are approximate substitutes, then licensors could compete with each other over pricing to attract buyers or licensees. But if licensors do not have the ability to substitute because each copyrighted work is a "must have" work for purposes of the licensee's end product, then copyright holders enjoy market power and will charge supracompetitive prices for their works.[181]

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175. *See generally* LITMAN, *supra* note 40 (describing the various industries that got a seat at the bargaining table of major copyright legislation—notably, the recorded music, motion picture, and publishing industries).

176. *See id.* at 126 (the motion picture industry, the recorded music industry, book publishers, and software companies together represented all copyright content owners in legislative reform of the Copyright Act for the new digital age).

177. NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 132 (2008).

178. *See id.* at 128–29.

179. *See generally* J.M. Clark, *Toward a Concept of Workable Competition*, 30 AM. ECON. REV. 241 (1940).

180. *See* NETANEL, *supra* note 177, at 124 ("When the good is a book, the marginal cost would equal the cost of printing and distributing one more copy. In the case of text on a Web site, the marginal cost would be virtually nothing—only the negligible cost of transmitting the text over the Internet to one more user. In neither event would marginal cost reflect the author's 'first-copy' costs, the investment in creating the text that is to be distributed.").

181. Indeed, the copyright mechanical license, § 115, specifically regulates music publishers like public utilities. 17 U.S.C. § 115. In advocating that creative industries should not be subject to regulation like "railroad systems" or "streetcar lines," the NMPA had argued that "[m]onopoly and public utility aspects are just not prevalent in [the music publishing and songwriting] industry." *Hearings on S. 597 Before the Subcomm. on Patents, Trademarks and Copyrights of the S. Comm. on the Judiciary*, 90th Cong. 383 (1967) (statement of Robert R. Nathan, Robert R. Nathan Associates, Inc.). Yet, it was the opposing position of the licensees—that in fact music publishers *do* act like public utilities—that ultimately formed the basis for the mechanical license. *See* Victor, *supra* note 155, at 978.

Copyright scholars studying this issue a decade ago had concluded that the market for copyrighted works lacked approximate substitutes because consumer demand clustered around a small number of works[182]—think Top 40s hits, Hollywood blockbusters, books on the top of *The New York Times* Best Sellers lists. And indeed, because consumers "wish to convey, refer to, critique, learn from, or reformulate" a select number of "culturally seminal" works—and where using commonly understood signifiers as reference points, those shared points of knowledge bear more cultural force than referring to or reformulating obscure or unknown works—the market for expressive goods, these scholars posited, may in fact be less competitive than markets for many other products.[183]

That the market for copyrighted works is not workably competitive is further exacerbated by a second, related problem: concentration among sellers or copyright holders. Writing in 2008, Professor Neil Weinstock Netanel warned that:

> [The] copyright industries that dominate public discourse have reached levels of concentration that are deleterious to both competition and expressive diversity. As of this writing, four major labels control some 85 percent of the U.S. record industry market . . . six major studios consistently garner well over 80 percent of domestic box office market share, and ten publishing houses enjoy oligopoly domination of the trade and paperback book markets.[184]

These two issues—(1) consumer demand clustering around a small number of works and (2) concentration among copyright holders—are not a story unique to the twenty-first century. While the specific names may have changed, the story has remained much the same throughout the past century. Criminal antitrust prosecutions against NBC and CBS, along with musical works organizations ASCAP and BMI, created the consent decrees in the 1940s.[185] The original complaints filed against ASCAP and BMI centered around the fact that both musical works owners controlled the repertoires to an immense number of copyrighted works, requiring each licensee to either "accept a license from the [collective] upon any terms and conditions imposed by the Society or subject themselves to numerous infringement suits."[186]

B. The Digital Age: Some Things Change, but Much Stays the Same

The pertinent question, then, is whether the rise of Big Tech and the subsequent shift to digital modes of consumption have fundamentally shifted this long history of content holder market power in these dominant industries. It may be tempting, after all, to conclude that technology has fundamentally

182. *See* NETANEL, *supra* note 177, at 131.
183. *See id.*
184. *Id.* at 144.
185. Turner Catledge, *ASCAP, Radio Chains To Be Prosecuted as Music 'Trusts'*, N.Y. TIMES, Dec. 27, 1940, at 1, 12.
186. *Id.*

changed things. But not only does recent evidence from marketplace negotiations dispute this intuition,[187] other developments—the further consolidation of firms within the dominant copyright sectors, a shift in consumer demand toward greater interactivity and larger catalogs, and the decreased costs of distribution leading to vertical integration within content firms—all suggest that there has been no significant weakening of content holder market power.

1. The Marketplace for Copyrighted Goods Is Becoming More Concentrated

Since 2008, the music industry has further consolidated, resulting in only three major labels and publishers, with the merger of Universal and EMI on the record label side and Sony and EMI on the music publishing side. Notably, Universal, in connection with its proposed merger with EMI, specifically asserted to the Federal Trade Commission (FTC) that "the proposed merger would not lessen competition *because the market for interactive [streaming] services was already not competitive*."[188] In 2016, record label executives confirmed in testimony before the Copyright Royalty Board (an administrative panel tasked with setting rates for certain types of streaming services) that there was an effective lack of price competition in the market for their copyrighted works, stating that they had "never lowered a proposed [license] rate as a consequence of finding out that another Major [label] was offering a lower rate."[189]

In the motion picture industry, the six major Hollywood studios are now five, as the Walt Disney Company purchased Twentieth Century Fox, its smaller but still threatening rival, in a move that is not unlike the Big Tech acquisitions that antitrust regulators had vowed to undo around the exact same time that the FTC approved the merger.[190]

Across these dominant copyright industries, that an effective lack of price competition exists among copyright holders is both confirmed and exacerbated by the use of most-favored nation (MFN) clauses in content license agreements.[191] MFNs generally provide that if another, comparably

187. *See supra* Part II.B.

188. Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV), 81 Fed. Reg. 26,316, 26,342 (Copyright Royalty Bd. May 2, 2016) (final rule and order) [hereinafter *Web IV*]. Unfortunately, most of the documents submitted by Universal to the FTC in connection with its proposed, and later approved, merger are confidential. The *Web IV* opinion redacts large portions of these statements.

189. *Id.*

190. *See* Matthew S. Schwartz, *Disney Officially Owns 21st Century Fox*, NPR (Mar. 20, 2019, 6:17 AM), https://www.npr.org/2019/03/20/705009029/disney-officially-owns-21st-century-fox [https://perma.cc/ASQ7-8TMT].

191. *See* Micah Singleton, *This Was Sony Music's Contract with Spotify*, VERGE (May 19, 2015, 10:15 AM), https://www.theverge.com/2015/5/19/8621581/sony-music-spotify-contract [https://perma.cc/L7BZ-TUK8] ("Having an MFN clause in a contract is standard for music licensing contracts, according to multiple sources. MFNs have garnered

sized licensor receives more favorable terms, those terms must be matched across the board to all other comparably-sized licensors.[192] MFNs facilitate horizontal collusion by fixing prices for copyrighted works at the highest-negotiated price.[193] At least one large copyright industry—the book publishing industry—has been investigated for potential antitrust violations by the DOJ for the use of MFNs.[194]

2. Shifting Consumer Demand Means Less Upstream Competition

In some copyright industries, marketplace concentration among sellers (copyright holders) is further exacerbated in a digital age where the proliferation of user-generated content and on-demand, interactive streaming services require making available a large amount of content owned by a small number of firms as their value propositions. In music, the Copyright Royalty Board has recognized that the catalogs of major labels are "must haves," not substitutes, because licensees need the catalog of *each* copyright owner to run a viable interactive service.[195]

Indeed, even rights owners themselves have acknowledged that the more interactive a service is—the more control a consumer has, whether in the form of selecting something on-demand or choosing a song to incorporate into a video—the more likely it is that content becomes a "must have."[196] And this is because the very *point* of these technologies is to make the entire universe of content—or as close to an approximation thereof—available to users, either to use as building blocks (in the case of user-generated platforms) for speech or to dramatically increase the availability of, and access to, copyrighted works. To these aggregators of content, copyrighted works are complements, not approximate substitutes. And the easier it becomes for users to access works, the higher users' expectations are that, for example, a Google Image Search result will contain all the relevant images they need and that a Spotify subscription will get them access to almost all the music they want, and the more digital services must adapt to that consumer demand by offering as many copyrighted works as possible.

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scrutiny in the past, and as part of its merger with EMI in 2012, Universal Music Group had to stop using the clauses in Europe for 10 years. But they remain legal in the US.").

192. *See, e.g.*, *id.* (reporting that Sony's MFN clause in its license agreement with Spotify "essentially makes every major aspect of the contract amendable if any other label has a better deal or interpretation of that aspect than Sony Music").

193. *See* Jonathan B. Baker, *Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses*, 64 ANTITRUST L.J. 517, 525 (1996) (explaining how MFNs facilitate horizontal collusion); Donald S. Clark, *Price-Fixing Without Collusion: An Antitrust Analysis of Facilitating Practices After* Ethyl Corp., 1983 WIS. L. REV. 887, 901–02, 932–35 (explaining how MFNs enable coordination by penalizing discounting).

194. *See* Complaint, United States v. Apple, Inc., 952 F. Supp. 2d 638 (S.D.N.Y. 2012), *aff'd*, United States v. Apple, Inc. 791 F.3d 290 (2d Cir. 2015), *cert. denied*, 577 U.S. 1193 (2016).

195. *See Web IV*, *supra* note 188, at 26,373.

196. *Id.*

Take Pandora as an example. Pandora previously only offered a noninteractive radio service that made it somewhat (but not completely) easier for the platform to "steer" users toward content that Pandora wanted them to listen to—for example, Katy Perry instead of Taylor Swift, if they did not have rights to Taylor Swift's repertoire. Still, content owners have admitted that "the repertoire of each of the three Majors is a 'must have' in order for a noninteractive service [like Pandora] to be viable."[197] But just a few years ago, Pandora decided to introduce an interactive product.[198] Pandora justified its introduction of an interactive service on the basis that users were demanding interactive, on-demand functionality—functionality like the ability to pick any song they wanted on demand or the ability to replay a song.[199] Pandora's consumer research indicated that listeners likely left Pandora at the moment they experienced a feature limitation (what is called a "pain point").[200] Pandora concluded that:

> [T]he absence of these additional [interactive] features on Pandora's service was hurting our product and our ability to maximize our appeal to our listener base. This lack of functionality was inhibiting growth in listener hours, contributing to a decline in monthly users, and limiting our ability to attract new customers who wanted this additional functionality.[201]

3. Fragmentation in the Content Streaming Market Means Content Holders Can, and Do, Walk Away

In other dominant copyright industries, while upstream competition among licensors has decreased,[202] downstream competition among licensees has dramatically increased. Data shows that Netflix's market share for over-the-top video streaming, for example, has drastically dropped—from 91 percent in 2007 to only 19 percent in 2019.[203] Whereas content owners a decade ago balked at the notion of starting their own streaming services, choosing instead to rely on the traditional model of an intermediary distributor, advances in technology over the past decade have allowed for any

197. *Id.*

198. *See* Introductory Memorandum to the Written Statement of Pandora Media, Inc., *In re* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 1927 (Copyright Royalty Bd. Feb. 5, 2019).

199. *Id.*

200. *See* Witness Statement of Christopher Phillips ¶ 13, *In re* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. at 1927.

201. *Id.* ¶ 14.

202. *See supra* Part III.B.

203. *See* Travis Clark, *Netflix Is Still Growing Wildly, But Its Market Share Has Fallen to an Estimated 19% as New Competitors Emerge*, BUS. INSIDER (Jan. 24, 2020, 8:27 AM), https://www.businessinsider.com/netflix-market-share-of-global-streaming-subscribers-dropping-ampere-2020-1 [https://perma.cc/DF8S-JZGR] ("Netflix's global market share of over-the-top streaming video subscriptions has dropped from 91% in 2007 to 19% [in 2019].").

content owner to be able to also be a distributor.[204] These days, almost every producer of content—from Disney to HBO to Showtime to ESPN to CBS—has become a distributor through the creation of dedicated streaming channels. And this trend is not limited to the audiovisual space. Music streaming, too, has become increasingly more competitive, as the proliferation of new entrants result in an ever-more fragmented market.[205]

Robust downstream competition means licensors have greater walk-away power than ever before, as an increasingly fragmented market means no one single distributor dominates the market as one once may have back when streaming delivery mechanisms were in their infancy. Even YouTube is no longer the video streaming giant it once was, as internet users are gravitating toward other platforms like Twitch, TikTok, and Instagram.[206] Perhaps the testimony of a music industry executive before the Copyright Royalty Board put it best: "If a service were to say we're just not going to play your records because it costs too much, the reality is we can go—we have other choices."[207]

Content holders' increasing moves to make their content exclusively available on their own streaming platforms further evidences that technology companies are far from essential platforms for the distribution of creative content, both because of the proliferation of distributors (Spotify, YouTube Premium, Pandora Plus, Tidal, Apple Music, Rhapsody—just to name a few in the music streaming space) and because content holders can themselves become distributors.[208] Disney, for example, pulled content from its previous distribution deals with Netflix and Hulu to make that content exclusively available on its own streaming platform.[209]

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204. *See* Lucas Shaw, *Hollywood Studios Can't Quit Netflix—Even If They Want To*, L.A. TIMES (May 30, 2019, 2:00 PM), https://www.latimes.com/business/la-fi-netflix-hollywood-studios-programs-20190530-story.html [https://perma.cc/X4XT-F3V9] (describing how film companies such as Disney and NBCUniversal are increasingly creating their own streaming services but are still bound by prior deals with Netflix to offer their content on Netflix's platform for years to come).

205. *See* Mark Mulligan, *Music Subscriber Market Shares H1 2019*, MIDIA (Dec. 5, 2019), https://www.midiaresearch.com/blog/music-subscriber-market-shares-h1-2019 [https://perma.cc/DUD3-D9S9] ("In what is becoming an increasingly competitive market, Spotify has continued to grow at the same rate as the overall market.").

206. *See* Paige Leskin, *I Spent 3 Days with Teens' Favorite Social Media Stars and Now I'm Convinced That You Don't Need YouTube To Be Internet Famous*, BUS. INSIDER (July 17, 2019, 10:38 AM), https://www.businessinsider.com/vidcon-proves-tiktok-twitch-creators-find-fame-without-youtube-2019-7 [https://perma.cc/3V88-PQNA].

207. *Web IV*, *supra* note 188, at 26,364.

208. As noted in Part II, this Article does not take up Article 15 of the DSM, otherwise known as the "link tax," which requires services to compensate news outlets for providing "snippets" of their articles. DSM, *supra* note 108. Note that content holders, in advocating for Article 17, did not argue that the rates they received from companies like YouTube were too low because technology platforms acted as common-utility-type platforms, such that the content holders *must* be on those platforms in order to meaningfully distribute their content. Rather, their arguments were premised solely on the perceived gap created by the safe harbor, which acts as a statutory ceiling. For a rebuttal to this argument, see *supra* Part II.A.

209. *See* Julia Alexander, *Every Part of Disney Is Making Exclusive Content for the Disney+ Streaming Service*, VERGE (Feb. 5, 2019, 5:45 PM), https://www.theverge.com/2019/2/5/18212646/disney-streaming-service-price-release-date [https://perma.cc/2G5J-B95U].

In this story, "pain points" only run one way. A distributor needs as much content on its platform as possible, because every service limitation, whether in the form of limited interactivity, or limited catalog, creates a "pain point" for the service—consider Spotify's long, concerted campaign to woo Taylor Swift back onto its service, as the CEO himself repeatedly went to Nashville to cajole Swift's team.[210] But the fragmentation of streaming services means content creators have choices—other services and, in many instances, their own streaming platform. At least as far as cultural production and dissemination by users is concerned, the internet is a work in progress; today's YouTube is tomorrow's TikTok—at least, for now. But, as Part IV of this Article argues, if new entrants are no longer entitled to safe harbors, if they are forced to confront confusing and costly licensing laws, or if they are faced with enormous start-up costs even before they know exactly what their business model will look like, what kind of content their users wish to share, or what kind of content will prove valuable to the service, the future may look very different.

IV. THE MISGUIDED APPEAL OF REGULATING BIG TECH BY COPYRIGHT

As a handful of technology platforms have risen to unprecedented power, recent scholarship has lamented the unwitting role that copyright minimalism played in that ascent, citing some of the same laws—the safe harbor and fair use—that this Article describes in Part I.[211] Yet, if these laws "set the stage for today's extraordinary forms of platform power," then that same scholarship has stopped short of arguing that the solution is to pivot away from them—for example, shrinking the scope of fair use so defendants like Google can no longer rely on it.[212] And absent from these accounts is the inevitability that countering the previous decade's overly optimistic copyright minimalism by expanding rightsholders' protections enriches and empowers neither individuals nor consumers but large content holder conglomerates who have benefitted the most from expansive intellectual property laws. This part examines why recent efforts to scale back the same laws that enabled the growth of technology platforms will only intensify monopoly power, rather than lessen it. To combat the entrenchment of power and dominance, and to be truly neo-Brandeisian in an era where today's Big Tech licensee is tomorrow's copyright holder, one must think beyond copyright law.

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210. *See* Luke Morgan Britton, *Spotify Boss Explains How He Convinced Taylor Swift to Return to the Streaming Service*, NME (Apr. 3, 2018), https://www.nme.com/news/music/spotify-boss-daniel-ek-talks-taylor-swift-streaming-return-2280169 [https://perma.cc/AD6K-CYRK].

211. *See* Kapczynski, *supra* note 9, at 1493–94; *supra* Part I.

212. *See* Britton-Purdy et al., *supra* note 9, at 1794, 1803 n.68, 1804 (noting that "Google was a great driver and recipient of" the expansion in fair use doctrine which, in turn, "set the stage for today's extraordinary forms of platform power"). Of course, there is no such suggestion that curtailing doctrines like fair use is the solution—far from it. *See* Kapczynski, *supra* note 9, at 1496 (noting that perhaps there was no other alternative to the copyleft/free culture movement of the 1990s and 2000s that may have unwittingly enabled corporate powers, absent deeper changes to our market-based society).

A. Regulating Big Tech by Copyright Will Create a Bilateral Oligopoly

If, as the argument goes, licensees like Google benefitted from lenient safe harbor laws that allowed it to grow unchecked off the backs of free content, then turning these laws in the other direction to raise licensing costs will not have the opposite effect. Only dominant firms can use content as a loss leader, subsidizing the high cost of licenses with other product and business lines. And ultimately, those that cannot afford to do so—or even perhaps those that can—will find ways to innovate around the cost, rendering the traditional content license wholly obsolete.

1. Expensive Licenses Create Entrenched, Concentrated Licensee Markets

Requiring technology platforms to obtain expensive licenses for user-generated content or requiring technology platforms to pay more for licenses would further entrench, rather than enfeeble, dominant firms like Apple and Google.[213] These companies can, after all, use content as a loss leader, subsidizing the high cost of content licenses with their other business lines, so long as they decide there's a business justification for doing so. For example, copyright holders have argued previously that Amazon gives away music for free in order to lure more subscribers to its Prime service.[214] Likewise, copyright holders have also complained that Apple uses copyrighted music to sell more iPhones.[215] The net effect of using content as a loss leader is that comparatively smaller entrants are kept out of the market—even ones we think of as "large," like Spotify, which did not turn a profit for the first decade or so that it was in business.[216]

Recognizing that high content-licensing costs could keep smaller entrants out of the market, Article 17 was revised prior to its adoption to include a carveout for services that are less than three years old and that generate less than ten million euros in revenue per year.[217] Yet, the mere cost of putting in place a system to detect the posting of unauthorized content, such as Google's Content ID, exceeds that threshold by a factor of ten[218]—to say nothing of the cost of licensing content, which could cost a midsize company like Spotify three *billion* dollars in annual royalties.[219] A company that finds

213. *See* Letter to Antonio Tajani MEP, President of the European Parliament (June 12, 2018), https://www.eff.org/files/2018/06/13/article13letter.pdf [https://perma.cc/ES8Z-AL29]. Note that the letter references "Article 13," which became Article 17 once it passed into law. *Id.*; *see also* Michael Wolfe, *Movements, Moments, and the Eroding Antitrust Consensus*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1157, 1168–75 (2020).

214. *See Web IV*, *supra* note 188, at 1927.

215. *See id.* at 1921 (describing Amazon Music, Apple Music, and Google Play Music as "part of wider economic 'ecosystems,' in which a music service is one part of a multi-product, multi-service aggregation of activities").

216. *See id.*

217. DSM, *supra* note 108, art. 17.

218. *See* Bridy, *supra* note 114, at 350 (reporting that it cost YouTube one hundred million dollars to develop Content ID).

219. Spotify reported significant operating losses and negative cash flow as late as 2018. At that time, Spotify, a service that was over a *decade* old, had reported revenue of $4.1 *billion* but, because its royalty payments *alone* cost approximately three billion dollars, it reported an

itself making eleven million euros in revenue per year could suddenly be subjected to ten times that amount in copyright licensing and enforcement costs.

Only the technology firms that are too big to fail, and only the technology firms that can offset the high cost of copyright royalties with multiple other product lines or immensely profitable ecosystems, will take on the exorbitantly expensive, confusing, and time-consuming process of licensing content. As one commentator noted about Article 17, "rightsholders' concerns about YouTube's clout are almost single-handedly driving an effort to write into law a technical hurdle that would appear to make YouTube almost singularly competition proof."[220] The overall end result will be a market dominated by a select handful of firms, as upstarts who may otherwise have come up with a new way to deliver content are either shut out of the market, because it is simply too cost-prohibitive to enter, or are forced to sell a business that can never turn a profit, leading exactly to the type of acquisitions that neo-Brandeis-school antitrust scholars have criticized as harming overall consumer welfare.[221] If services like Spotify were previously able to operate even at heavy losses, it was because they were relying on venture capital cash.[222] But there is reason to believe that as investors become more wary of subsidizing unprofitable businesses, the new economic environment will no longer reward risky business propositions like Spotify.[223]

With further consolidation in the market due to higher licensing costs, licensors' fears that a handful of firms will be able to better dictate licensing negotiations will become a self-fulfilling prophecy. The current streaming market is already seeing a consolidation of services as continuously unprofitable ones exit or are acquired. Pandora was recently acquired by Sirius XM.[224] Live365, formerly a large internet webcaster, shut down its

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overall operating loss of $378 million. It specifically warned investors that, if it could not "successfully earn revenue at a rate that exceeds the operational costs, including royalty expenses, associated with [its] Service, [it] will not be able to achieve or sustain profitability or generate positive cash flow on a sustained basis." Spotify, Registration Statement (Form F-1), at 17 (Feb. 28, 2018).

220. *See* Wolfe, *supra* note 213, at 1173.

221. *See* WU, *supra* note 4, at 124.

222. *See, e.g.*, Mathew Ingram, *That Digital Music Service You Love Is a Terrible Business*, FORTUNE (July 1, 2016, 4:59 PM), http://fortune.com/2016/07/01/digital-music-business/ [https://perma.cc/F9SB-AX57].

223. *See How Covid-19 Could Impact Startup Funding*, CB INSIGHTS (Mar. 17, 2020), https://www.cbinsights.com/research/coronavirus-startup-funding/ [https://perma.cc/MGD7-7TZW] (projecting the decline in private market funding in the first quarter of 2020 to be the second steepest quarterly decline in the past ten years).

224. *See* Jem Aswad, *Sirius XM Completes Acquisition of Pandora*, VARIETY (Feb. 1, 2019, 9:43 AM), https://variety.com/2019/biz/news/sirius-xm-completes-acquisition-of-pandora-1203125882/ [https://perma.cc/TK5K-6KCB]. Notably, Pandora's royalty rates as a digital service far outpace that of Sirius XM as a satellite service—50 percent as compared to Sirius XM's 15.5 percent. *See* Bobby Owsinski, *Here's Why the SiriusXM-Pandora Deal Makes So Much Sense*, FORBES (Oct. 6, 2018, 2:21 PM), https://www.forbes.com/sites/bobbyowsinski/2018/10/06/heres-why-the-siriusxm-pandora-deal-makes-so-much-sense/#50f77b472d31 [https://perma.cc/T3ZW-9N9T].

service specifically due to increased sound recording royalties set by the Copyright Royalty Board.[225] Square, the mobile payment services company owned by billionaire Twitter founder Jack Dorsey, completed its acquisition of a majority stake in Tidal just earlier this year.[226] As one industry watcher put it, "[i]t would be a sign of an unhealthy market if the only remaining digital music services are those owned by larger companies content to subsidize their music subsidiaries while generating profit elsewhere in the businesses."[227]

2. Expensive Licenses Will Encourage Licensees to Innovate Around the Problem

If companies do not exit the market due to untenably high royalty costs, they will instead attempt to innovate around the problem—by reducing their reliance on content licenses. Professors Kal Raustiala and Christopher Sprigman, for example, have detailed how licensees have already begun to innovate around the problem of high licensing costs by creating their own content.[228] Netflix and Amazon are acting as movie and television production studios.[229] Spotify is acting as a quasi-record label, commissioning songs from unknown producers under fake names for a fraction of the cost of other licensed content.[230] If paying for content licenses becomes a losing business proposition, then perhaps the only way forward will be for licensees to head toward a future where no licenses are required at all. The licensees will become the licensor—the content creator and the distributor one and the same. By making content licenses more expensive, and by requiring licenses for user-generated content, content holders may enjoy greater profits in the short run—but at the risk of far fewer licenses in the long run.

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225. *See* Anna Washenko, *Live365 Announces Shut-Down at the End of January*, RADIO & INTERNET NEWS (Jan. 21, 2016), https://rainnews.com/breaking-live365-announces-shut-down-at-the-end-of-january/ [https://perma.cc/DWK8-3GK2].

226. *See* Katherine Rosman, *Square Acquires Majority of Tidal, Jay-Z's Streaming Service, in $297 Million Deal*, N.Y. TIMES (Mar. 4, 2021), https://www.nytimes.com/2021/03/04/business/media/tidal-square-jay-z-dorsey.html [https://perma.cc/H6XH-78AH].

227. Testimony of David B. Pakman ¶ 29, *In re* Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), No. 16-CRB-0003-PR (2018–2022).

228. *See* Kal Raustiala and Christopher Sprigman, *The Second Digital Disruption: Streaming and the Dawn of Data-Driven Creativity*, 94 N.Y.U. L. REV. 1555, 1585–87, 1597 (2020) (describing how Netflix struggled in the years before it began creating its own content, due to high licensing costs—but ultimately emerged triumphant once it began to create its own content, and describing how Spotify has every incentive to create its own content to reduce the cost of licensing content from others).

229. *See id.* at 1586–87; Jeffrey Dastin, *Amazon's Bet on Original Video Is Converting Viewers into Shoppers*, VENTUREBEAT (Mar. 15, 2018, 4:37 AM), https://venturebeat.com/2018/03/15/amazons-bet-on-original-video-is-converting-viewers-into-shoppers [https://perma.cc/3H3G-QRH3].

230. *See* Ben Sisario, *While Some Cry 'Fake,' Spotify Sees No Need to Apologize*, N.Y. TIMES (July 14, 2017), https://www.nytimes.com/2017/07/14/business/media/while-some-cry-fake-spotify-sees-no-need-to-apologize.html [https://perma.cc/D8HM-G9NF].

Throughout all of this consolidation in the market, consumers of culture will ultimately suffer. The dominant platforms in the space, YouTube and Facebook, will increasingly act as gatekeepers and censors instead, as they are required to under Article 17, using content identification systems to censor and filter out speech that may be identified by opaque computer algorithms as infringing—even where they may be protected fair uses.[231] Cultural production, increasingly controlled by a few consolidated players and driven by algorithmic identification, will be self-reinforcing. Copyright law, in its drive to punish big technology conglomerates, will simply create bigger, even more pernicious, technology conglomerates—Disney on streaming steroids.

It is noteworthy that, in justifying the decision to sell Fox's entertainment division to Disney, Fox explained that it was motivated by "fear, opportunity and pragmatism."[232] The fear comes from—what else but the "[f]ear of the seemingly bottomless wallets of Netflix, Amazon and possibly Apple to spend on new shows."[233] In other words, as "Big Content" has argued, the further consolidation of Big Content is necessary in order to fight Big Tech. Our creative universe may soon look like Goliath v. Goliath, a handful of large companies with infinite resources facing off against each other in some quest for cultural domination. Our copyright law, if it rises to the techno-pessimist challenge, will only further perpetuate this race to the bottom.

B. Correcting the Creep

These days, the early optimism of "commons-based production"—uploading GarageBand songs on YouTube and sharing mash-ups and memes on social media—has given way to the deep pessimism that such naive belief in the transformative power of what Professor Lawrence Lessig called "remix

231. *See* Sag, *supra* note 39, at 531 (noting that identifying protected speech such as parody or criticism "involves the kind of contextual decisionmaking that is easy for humans but difficult for algorithms"). That YouTube's Content ID seems to work very well for monetizing content doesn't necessarily suggest other platforms—even enormously sophisticated and wealthy ones—will be able to do the same. *See* NEIL WEINSTOCK NETANEL, COPYRIGHT (WHAT EVERYONE NEEDS TO KNOW) 66 (2018). For example, music labels have an incentive to keep content up on YouTube's platforms rather than block it because YouTube's deals with labels allow labels to monetize each use. Yet, it is unclear if other user-generated platforms like Facebook, for example, are even capable of paying based on usage. Indeed, Facebook's deals are rumored to be "flat fee" deals. This exacerbates the filtering concern, for if labels are paid a flat fee up front rather than per use, they will have no incentive to allow any individual use to stay up, rather than take it down. *See* Mark Mulligan, *Facebook Flat Fee Music Deals Have Future Implications*, HYPEBOT (Apr. 13, 2018), https://www.hypebot.com/hypebot/2018/04/facebook-flat-fee-music-deals-have-future-implications-mark-mulligan.html [https://perma.cc/S2J4-GWN2] (noting that Facebook's deals with the music industry are rumored to be, unlike YouTube's deals, "blind" checks, "advances that are not tied to any kind of usage reports from Facebook").

232. Schwartz, *supra* note 190.

233. *Id.*

culture"[234] "proved perfectly compatible with the emergence of platforms, including those like Google that offer much for free."[235]

On the other hand, there is reason to believe that technology platforms loosen corporate dominance over content creation, in turn allowing individual creation to flourish outside of both the incentives-based structures of copyright law and corporate architectures. Copyright scholars writing twenty years ago had made this optimistic argument, predicting that new technologies would create more diffuse networks of creation, shifting the model of content production from a one-to-many model to a one-to-one model.[236] And despite how the technological landscape has evolved since then—in many ways, for the worse, and in unforeseen ways—the prediction and theory that the networked landscape promotes myriad creativity and diversity of content has continued to prove true, over and over again. The deep implications of this for *copyright* law—what it means for the studio system and what it means for content holders' continued insistence that, due to corporations' risk-taking and initial investments, it should be corporations that are uniquely deserving of copyright's benefits[237]—are profound and meaningful independent of other socioeconomic and political critiques of the networked landscape.

Consider a recent example. In 2019, an artist by the name of Lil Nas X wrote a track under two minutes long titled "Old Town Road." The song, which defies genre categorization but which can perhaps best be described as country-rap, had been quietly removed from the *Billboard* country charts because it did not fit Billboard's (that old gatekeeper of the traditional music industry) definition of country music.[238] But in the twenty-first century world of streaming, industry support—in the form of advertising, or

234. LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 14 (2008).

235. Kapczynski, *supra* note 9, at 1494.

236. *See* BENKLER, *supra* note 1, at 212–17 (noting that the internet lowers the cost of becoming a speaker, or broadcaster, and lowers the cost of distribution, together "fundamentally alter[ing] the capacity of individuals, acting alone or with others, to be active participants in the public sphere as opposed to its passive readers, listeners, or viewers"); LESSIG, *supra* note 234, at 28 (describing the shift from "Read-Only" culture, or, "a culture less practiced in performance, or amateur creativity, and more comfortable (think: couch) with simple consumption," to "Read/Write" culture, where everyone is a creator); *see also* Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257, 262 (2006) (arguing that digital architectures "empower[] democratic cultural participation and usher[] in a 'semiotic democracy' in which all individuals can 'rip, mix, and burn' culture").

237. *See* Witness Statement of David Kokakis ¶ 12, *In re* Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), No. 16-CRB-0003-PR (2018–2022) [hereinafter Kokakis Witness Statement] ("The costs of the search for talented songwriters is high, both in dollars and time. As we often sign songwriters at the earliest stages in their careers, a significant percentage of the songwriters we sign have not yet appeared on a commercially successful recording at the time of signing. Of course, signing unproven talent carries substantial business risk, and some songwriters do not go on to generate hits or significant revenue in their careers.").

238. *See* Elias Leight, *Lil Nas X's 'Old Town Road' Was a Country Hit. Then Country Changed Its Mind*, ROLLING STONE (Mar. 26, 2019, 9:24 AM), https://www.rollingstone.com/music/music-features/lil-nas-x-old-town-road-810844/ [https://perma.cc/2A9X-6GFN].

concerted "pushes" to amplify a song—hardly mattered. The song was a viral sensation on the streaming platform TikTok, a neo-YouTube where users can post short video clips set to music. The song relied on the hashtag (that generator of virality) #yeehaw, which in turn launched thousands of user-generated videos incorporating the song, ultimately resulting in tens of millions of plays on TikTok, propelling the song to a record-breaking nineteen weeks atop the *Billboard* charts.[239] As industry magazine *Rolling Stone* puts it:

> That scene would be unimaginable 20 years ago, when radio and labels worked together to make hits. Since artists needed those institutions to become popular, it was easy to dictate certain paths to success—a country hit came from a country label and earned support from country radio. But now the music industry often scrambles to sign and endorse tracks like "Old Town Road," which have already erupted online. Hits are not initially dependent on industry support, which means that for a brief, giddy moment, some songs exist entirely outside of traditional commercial categorization.[240]

A loose coalition of internet users, not the industry machine, had propelled the song to success. Notably, Lil Nas X did not receive a record deal until *after* his hit went viral. Undoubtedly, in an age before TikTok, it may well be that industry executives would not have taken a chance on a young country-rap musician. Indeed, the very genre itself defies convention.

The story of Lil Nas X, and so many others who have come before and will undoubtedly come after him, leads to one of the most important points about what new technologies have done, and continue to do, for content: by substituting the judgment of the audience for the judgment of a professional gatekeeper, new technologies challenge one of the very core assumptions underlying copyright law. Artists who first strike it big on TikTok, Bandcamp, YouTube, SoundCloud, and other types of new technology platforms challenge—if not render completely obsolete—the very basic bargain and premise underlying copyright law in critical ways. For one, these artists often do not expect to be rewarded for their creations at all.[241] Consider another case: in this example, the most popular artist of the new decade, Billie Eilish.[242] Eilish had uploaded a song that she recorded in her

239. *See* Andrew R. Chow, *Lil Nas X Talks 'Old Town Road' and the Billboard Controversy*, TIME (Apr. 5, 2019, 9:42 AM), https://time.com/5561466/lil-nas-x-old-town-road-billboard/ [https://perma.cc/23VJ-3J8V].

240. Leight, *supra* note 238.

241. *See* NETANEL, *supra* note 177, at 86 ("The Internet and other digital technologies have drastically reduced the cost of disseminating and creating cultural works. As a result, they have spawned a vast sector of authors who do not rely on the copyright incentive (*and, equally important, do not rely on publishers who rely on the copyright incentive*) to create and disseminate original expression." (emphasis added)).

242. *See* Charlie Harding, *Billie Eilish, the Neo-Goth, Chart-Topping Teenage Pop Star, Explained*, VOX (Aug. 19, 2019, 6:34 PM), https://www.vox.com/culture/2019/4/18/18412282/who-is-billie-eilish-explained-coachella-2019 [https://perma.cc/R46F-JNN6] (describing Eilish as a "generational icon" and noting that her album was "one of 2019's most critically and commercially successful releases").

bedroom, "Ocean Eyes," to the popular music-sharing, one-to-one (as I use the term here, meaning an endless amount of content for an endless array of tastes) platform SoundCloud.[243] But she had only ever "intended for one person to listen to it: her dance teacher. When she woke up the next day, the song had gone viral."[244] There was no calculated quid-pro-quo under the traditional copyright reasoning: I expend effort and time to create content because I expect that the content will sell and I will, in turn, reap the rewards.[245] Eilish was simply just a teen, who, like so many teens, and like Lil Nas X, was just messing around.

And, just like Lil Nas X, it was only after Eilish's song became an internet sensation that the major label record deal followed. Yet, large corporate copyright holders justify the need for extended copyright protection by pointing to both the high costs of "R&D"—in this case, scouting out new artists and taking risks on unproven talent—and promotion after those new artists are signed.[246] In an age in which success comes first and the record deal comes later, however, this justification is upended.[247] Labels can sign sure bets, thus eviscerating the "risky investments" rationale; further, because the acts they sign are already well known with established fanbases, the marketing and promotion justification for labels is also significantly diminished.[248] In that sense, the content industry is looking less like other industries, such as venture capital or whaling, in which high returns are justified because no one would take on such risks without the promise of great rewards.[249] By lowering both the costs of production, so that more and more amateurs are creating viral hits, and the costs of distribution and advertising, so that gatekeepers become less and less relevant, new technologies, such as streaming, challenge the core assumptions underlying why we need copyright law.[250]

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243. *See id.*

244. *Id.*

245. Of course, the question of what incentivizes authors to create is one that has vexed copyright scholars since the beginning of copyright. For an interesting account of the complex and myriad reasons why individuals create, see JESSICA SIBLEY, THE EUREKA MYTH: CREATORS, INNOVATORS AND EVERYDAY INTELLECTUAL PROPERTY (2015).

246. *See supra* note 237 and accompanying text.

247. *See* NETANEL, *supra* note 177, at 86 ("[A]s we see on YouTube and other online sites, peer recommendations, lists of user favorites, and other such word-of-mouth equivalents can sometimes substitute for marketing, making amateur creations into popular hits with no advertising expenditure whatsoever.").

248. *See* Kokakis Witness Statement, *supra* note 237, ¶ 19 (describing how Universal Music A&R executives now discover new talent by monitoring "a host of websites" and that new talent is "frequently discover[ed]" on blogs).

249. *See* Nathan Heller, *Is Venture Capital Worth the Risk?*, NEW YORKER (Jan. 20, 2020), https://www.newyorker.com/magazine/2020/01/27/is-venture-capital-worth-the-risk [https://perma.cc/SJR3-9QR3].

250. This is even more true in a world in which firms that have access to data have better information about the likelihood of success of any given content. While this Article does not take on how data—and who owns it, or how it is used—can affect justifications for more or less copyright, my other work takes on the thorny question of whether the use of copyrighted content to generate valuable data in fact dictates increased royalties to content owners in the short run. *See* Xiyin Tang, Beyond Copyright (manuscript) (on file with author). Professors

First, if we are heading toward a future where the biggest platforms (Netflix, Amazon, Facebook), armed with artificial intelligence and algorithms, can innovate around the problem of high third-party content costs by creating their own content (Netflix Originals, Amazon Originals, Facebook Watch), then we do not need copyright law to grant these entities an even bigger reward in the form of a monopoly over that content. In adjusting the rules of copyright in laws like the DSM, the prevailing narrative has been one of "giv[ing] publishers and authors the means to negotiate better with digital platforms."[251] Yet, this sympathetic public narrative focused on remunerating individual authors and small publishers misses the big point: today's digital platform behemoths *will be tomorrow's publishers and authors*. In adjusting the rules to redistribute wealth today, we are only setting the stage for wealthier technology platforms tomorrow.

Second, copyright has long been justified by appealing to incentives—in the form of a monopoly over subsequent copies so the copyright owner can recoup those first copy costs.[252] But if we are to heed seriously concerns by the content industry that their copyrighted content is increasingly being used as a means to an end, as a way to lure users into their broader ecosystem—Amazon uses Amazon Originals content to lure consumers onto the broader Amazon platform, so they can sell more Prime subscriptions and in turn sell more products; Apple uses Apple Music to sell more iPhones[253]—then our new content creators (Apple, Amazon, Netflix) will not need the "carrots" (incentives) of copyright law to create content at all. These technology firms will create the content anyway because their business models are not reliant on copyright's system of rewards; the rewards come, rather, in the form of more sales of iPhones or greater sales on Amazon's consumer goods platform.[254] And in fact, if antitrust scholars are right, if some whittling away of tech wealth is needed,[255] copyright law can help—only by doing *away* with copyright monopolies for our new tech content creators.

Third, not only will the new content creators not need copyright's incentives system, our new content creators will also not need the sticks: the

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Raustiala and Sprigman have also recently published an excellent analysis on how data has been harnessed to create content in the adult video market, speculating more broadly that "[i]f those who can access the vast amounts of data streaming are better positioned to match the content they create to existing market demand, we need less copyright to provide the same level of creative incentive." *See* Raustiala & Sprigman, *supra* note 228, at 1605.

251. Press Release, *supra* note 112.

252. *See supra* note 180 and accompanying text.

253. *See* Expert Report of Marc Rysman, PhD., *In re* Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), No. 16-CRB-0003-PR (2018–2022).

254. *See* Raustiala & Sprigman, *supra* note 228, at 1614 ("What changes when content becomes no longer the product but a loss leader or selective benefit that is really aimed at securing the brand loyalty, patronage, and data of as many consumers as possible? In this world, copyright protection is far less central, because content is far less central.").

255. *See* WU, *supra* note 4, at 15 ("Most visible in our daily lives is the great power of the tech platforms, especially Google, Facebook, and Amazon, who have gained extraordinary power over our lives. With this centralization of private power has come a renewed concentration of wealth, and a wide gap between the rich and poor.").

ability to assert infringement to control unauthorized distribution. Because these creators are also the distributors, they can directly control how the content is viewed, copied, and distributed. Gone are the days of the middleman—Disney relying on movie theaters to distribute its content. The distributor-creator is best situated to ensure that unauthorized copying by third parties does not occur, through the implementation of rigorous access controls and digital rights management tools.

If we are in fact heading toward a future where traditional copyright law will matter less and less and other forms of governance—private ordering, normative values, and technological controls—will take precedence, we must also consider whether this evidences the insufficiency of traditional copyright law and calls for a vastly new regulatory regime governing creativity altogether. A world comprised mostly of private ordering is one potentially fraught with peril, as it lies largely obscured behind the opaque decision-making of powerful entities. Thinking "beyond copyright," then, ultimately means two dueling conceptions: one of the inadequacies of current laws and one militating for its continued relevance through rebirth.

Despite the dubious lineage of the term "value gap," the phrase has persisted precisely because it raises serious questions about power—who has it, how it can be wielded, and the deep inequalities created by the success of companies like Google, Facebook, and Amazon. By concluding that copyright law—a law premised in according broad, property-like, monopoly rights over a work—will only result in greater, not less, inequality in the long run, this Article does not mean to suggest that law itself is not up to the task.

One answer might simply be to look to other areas of the law to solve the problems that laws like the DSM attempt to address. For example, the EU already *has* an article in the Treaty of Rome prohibiting abuse of dominant position, that is, prohibiting anticompetitive conduct by dominant entities that cause harm to third parties that are economically dependent upon them.[256] The United States can look to this language in reshaping its own antitrust laws if it determines that, for example, newspapers are dependent on Google for the transmission of their stories and are suffering economic harm as a direct result of a platform's refusing to take out licenses. The doctrine of dominant position, by its very nature, targets specific entities and specific fact patterns—*not* all online platforms and general notions of "bigness."

Likewise, rather than reshaping the doctrine of fair use—to emphasize factors such as commerciality (Big Tech's excess profits) or lost licensing revenue (if anyone can take out a license, Big Tech can)—in a way that would adversely affect all users of copyrighted works, courts can instead create better solutions tailored to individual technology companies, in the form of

256. *See* Treaty Establishing the European Community, art. 82, Dec. 24, 2002, O.J. (C 325) ("Any abuse by one or more undertakings of a dominant position . . . shall be prohibited [including] . . . directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; . . . [and] limiting production, markets or technical development to the prejudice of consumers . . . .").

supervising fair and equitable class action settlements, perhaps reached in conjunction with legislative reform.[257] On the other hand, fair use decisions, even if the defendant beneficiary in that particular decision happens to be, say, Google, have enormous trickle-down effects that could benefit individual artists and individual creators in vastly different creative contexts.[258]

CONCLUSION

Almost two decades ago, Professor James Boyle referred to various developments in copyright laws—the lengthening of copyright's terms, the use of digital rights management tools—as a "second enclosure movement," an enclosure of the "intangible commons of the mind."[259] Yet, our new era's techno-pessimism, if left unchecked as it bleeds into our copyright laws, has perfectly coincided with yet another enclosure movement, driven by the neoclassicist belief that greater internalization by corporate entities who can best maximize profits is the most efficient means of rights allocation.[260] And that third enclosure movement will come if we do not recognize that the path we are on now—gutting safe harbor protection, removing fair and reasonable licensing rates, whether done in the name of redistributive justice, retribution, or punishment for the technology companies that have been labelled the new "robber barons"[261] of our digital age—leads inexorably to less cultural production and less availability of content and greater entrenchment of power in the same corporate conglomerates that have controlled the dissemination and access to copyrighted goods since the beginning of time.

The strength of the safe harbor laws, on the other hand, was to loosen the grip of the old gatekeepers and create more diffuse networks of creation.[262] And, as Professor Jack Balkin had argued back when the internet was a purer version of its current self, this form of cultural participation is democratic—not in the second order, not as somehow subordinate to or "less than" political speech or exercising the right to vote, but constitutes the very core of a fully participatory democracy because creating and recreating culture gets at the

257. *See* Xiyin Tang, A History and Theory of Copyright Class Actions and Licensing-by-Litigation (working draft) (on file with author).

258. For example, the recent decision in favor of Google in *Oracle America, Inc.*, has already been cited in an amicus brief before the Second Circuit in a case arguing for a rehearing of a recent case holding that the artist Andy Warhol did not make fair use of a photographer's work. *See* Brief of Amici Curiae 60 Intellectual Property Scholars in Support of Petition for Panel Rehearing and Rehearing En Banc 1, Andy Warhol Found. for the Visual Arts v. Goldsmith, 11 F. 4th 26 (2d Cir. 2021) (No. 19-CV-2420), 2021 WL 1737580 (arguing that the Second Circuit's denial of fair use conflicts with the Supreme Court's ruling in *Oracle America, Inc.*).

259. Boyle, *supra* note 132, at 37.

260. *See* Xiyin Tang, Privatizing Copyright (working draft) (on file with author).

261. WU, *supra* note 4.

262. Nor do I believe that this form of democratization merely shifted control from traditional media to a single new dominant platform, Google. As evidenced by the meteoric rise and incredible popularity of new sites like TikTok and Twitch, it would be folly to assume that the diffuse network of (mostly very young) creators today will be locked in to a single platform for time immemorial. *See supra* note 206 and accompanying text.

very root of who we are, by defining what it means to be human, as an expression of our truest selves.[263]

Of course, as with all things, the true nature of what the internet has evolved to become is much more complicated. Copyright law, in its current form, is unequipped to grapple with the immense challenges that the new platform dominance has wrought. Amidst all this, we would do well to remember, as technology reporter Rachel Botsman writes, that the "new digital world" is still "a work in progress . . . . Perhaps the present danger is that in our rush to condemn the corruption of digital technologies, we will unfairly condemn the technologies themselves."[264] And perhaps, in this rush, we will mistakenly drive cultural production back into the dark ages, back into the cave, unwittingly sending power back to the consolidated few, back to ever-looping Top 40s, back to films populated by nice attractive white folks, back to a world ruled over by Disney, Universal, Sony, Warner—because in this rush to condemn the internet, we have forgotten that, in the storybook of creativity and copyright, the narrative is altogether very, very different.

263. Balkin, *supra* note 106, at 33 ("[T]he forces of democratization operate not only through regular elections, but through changes in institutions, practices, customs, mannerisms, speech, and dress. A 'democratic' culture, then, means much more than democracy as a form of self-governance . . . . What makes a culture democratic, then, is not democratic *governance* but democratic *participation* . . . . A democratic culture is the culture of a democratized society; a democratic culture is a participatory culture.").

264. Rachel Botsman, *Dawn of the Techlash*, GUARDIAN (Feb. 10, 2018), https://www.theguardian.com/commentisfree/2018/feb/11/dawn-of-the-techlash [https://perma.cc/7PAA-NYYN].