# CENTERING CREATORS: THE NEW ECONOMICS OF COPYRIGHT AND ALTERNATIVE POLICIES FOR CREATIVE LABOR

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*Not long after digital media and the Internet took hold a generation ago, technology companies became entertainment companies, too. Alphabet, Amazon, Apple, Meta, Microsoft, Netflix, Spotify, and a few others now mediate the relationship that consumers have with creative works. The increased power of these technological intermediaries puts copyright aggregators—traditional entertainment companies like book publishers, television and movie studios, and record labels—in a different economic position. Before, they could largely set prices, shape product offerings, and dictate what would be available to consumers. Now, they must negotiate over those things. Meanwhile, the individual creators whose works are being delivered to consumers face a more dire problem. The copyright aggregators they contract with to secure royalties and artistic control no longer have such a free hand—and the creators end up with less of everything. The well-known and growing concerns about creators' plight in the contemporary economy have their roots in this new economic dynamic.*

*Previous accounts of how copyright works were valid for their time, but the digital era presents a fundamentally different situation that requires new thinking to inform law and policy. The new economic and cultural conditions leave copyright more constrained in its attempt to deliver some measure of incentives, rewards, and artistic control to creators. Some of the traditional policy goals that justify copyright are being well served for some groups: consumers, technology companies, and even the traditional entertainment companies, which own valuable catalogs of works and franchise-worthy intellectual property. But policy goals that society should hold for creators are not being met. This is the case for the traditional goals associated with copyright as well as a broader set of goals that attend to*

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*the other diverse needs of creators. While still important and worthwhile, copyright is limited in its effectiveness for creators, and expanding or reforming copyright will solve little. I propose that several alternative policies hold more promise, including health care, labor law, anti-concentration law, data access, and state and local arts policy.*

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## I. INTRODUCTION

Creators—the people who make books, movies, television, theater, music, video games, visual art, and other creative works—provide immeasurable value to society. Whatever your favorite artistic media are to read, watch, listen to, play, or look at, you would miss them dearly if you lost access to them. But it can be rough for creators to make a living.[1] Everyone knows the difficulties of becoming a professional, full-time creator; in fact, most people who try to make a living from creative work probably know the challenges they are facing.

1. *See* Elizabeth L. Lingo & Steven J. Tepper, *Looking Back, Looking Forward: Arts-Based Careers and Creative Work*, 40 WORK & OCCUPATIONS 337, 338 (2013); Pierre-Michel Menger, *Artistic Labor Markets and Careers*, 25 ANN. REV. SOCIO. 541, 561 (1999).

There's a small chance of making it; there's an even smaller chance of making it big; and earning a living through creative labor will require hard work, ingenuity, and compromise.[2] Creators often hold multiple jobs and generate income from multiple sources.[3] One part of that mix might be selling copies of creative work. Another part might be live performance. Still other parts might involve teaching or arts administration. It has always been a hustle for most creative professionals.[4]

Today, however, there are new and worrying signs about the effects of new technology on creators. In the music industry, for example, the revenue from streaming services is paltry for most musicians;[5] meanwhile, revenue from concert tours is endangered.[6] Actors chase fewer gigs as the streaming television boom wanes.[7] Game developers face layoffs.[8] Writers see declining revenues.[9] I am talking here about the hardships faced by *most* creators: the vast majority,

2. *See* Menger, *supra* note 1, at 554.

3. *See* NEIL O. ALPER & GREGORY H. WASSALL, MORE THAN ONCE IN A BLUE MOON: MULTIPLE JOBHOLDINGS BY AMERICAN ARTISTS 5 (2000). For studies from other countries, see, for example, Sofia Lindström, *Artists and Multiple Job Holding—Breadwinning Work as Mediating Between Bohemian and Entrepreneurial Identities and Behavior*, 6 NORDIC J. WORKING LIFE STUDIES 43, 43–45 (2016) (using data from Sweden); David Throsby & Anita Zednik, *Multiple Job-Holding and Artistic Careers: Some Empirical Evidence*, 20 CULTURAL TRENDS 9, 9 (2011) (using data from Australia).

4. *See, e.g.*, Kristin Thomson, *Roles, Revenue, and Responsibilities: The Changing Nature of Being a Working Musician*, 40 WORK & OCCUPATIONS 514, 515–16 (2013); Peter DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 ARIZ. L. REV. 301, 336 (2013).

5. *See, e.g.*, Jenny Toomey, *What the Digital Streaming Revolution of the 2000s Can Teach Us About the AI Revolution Today, According to a Former Musician*, FAST CO. (Mar. 4, 2024), https://www.fastcompany.com/91040797/what-the-digital-streaming-revolution-of-the-2000s-can-teach-us-about-the-ai-revolution-today-according-to-a-former-musician [https://perma.cc/N93H-TBGE] ("[A] band that sold 10,000 copies of an album in the '90s could expect to earn around $50,000 in revenue. Today, that band's entire album would have to be streamed a million times for the same financial return."); Travis M. Andrews, *In the Spotify Era, Many Musicians Struggle to Make a Living*, WASH. POST (Feb. 4, 2023, 6:00 AM), https://www.washingtonpost.com/arts-entertainment/2023/02/04/spotify-grammys-songwriters-payment-musicians/ [https://perma.cc/2FGE-3PZQ] (profiling a Grammy-nominated, working songwriter who must also work as a realtor).

6. *See, e.g.*, Daniel Dylan Wray, *'The Working Class Can't Afford It': The Shocking Truth About the Money Bands Make on Tour*, GUARDIAN (Apr. 25, 2024, 5:39 AM), https://www.theguardian.com/music/2024/apr/25/shocking-truth-money-bands-make-on-tour-taylor-swift [https://perma.cc/B65V-7EPV] ("[T]he Guardian has seen 12 tour budget sheets for various bands and artists varying from up-and-comers to firmly established and successful acts, all of whom regularly undertake headline tours across the U.K.UK in venues ranging from 150 to 2,500 capacity. Almost all of these result in losses."); *see also* Andrews, *supra* note 5 (listing several prominent recording artists who have limited touring for financial reasons).

7. *See* Nellie Andreeva, *Hollywood Contraction: Actors Struggle to Find Jobs as TV Castings Dry Up*, DEADLINE (Feb. 21, 2024, 7:30 AM), https://deadline.com/2024/02/hollywood-contraction-actors-jobs-tv-castings-1235829094/ [https://perma.cc/Z7Y5-ENEA] ("With the focus now shifting to profitability, the market is undergoing what many describe a correction.").

8. *See* Megan Farokhmanesh, *Mass Layoffs Are Causing Big Problems in the Video Games Industry*, WIRED (Jan. 18, 2024, 12:01 PM), https://www.wired.com/story/the-video-game-industry-is-just-starting-to-feel-the-impacts-of-2023s-layoffs/ [https://perma.cc/E9RP-HNNX] ("Roughly one-third of developers were affected either directly or indirectly by job losses in 2023").

9. *See* Press Release, The Authors Guild, Key Takeaways from the Authors Guild's 2023 Author Income Survey (Oct. 25, 2023), https://authorsguild.org/news/key-takeaways-from-2023-author-income-survey/ [https://perma.cc/B2SW-KZ4T] ("[H]alf of all full-time authors continue to earn below minimum wage in many states from *all* their writing related work, and well below the federal minimum wage of just $7.25/hour from their books.").

those in the middle, not the outliers who have made it big. The exponentially greater popularity of superstars—and the sometimes breathless media coverage of their exploits—can obscure the reality of most creators.[10] But these recent stories about creators' financial challenges, taken together, reveal an emerging theme. New technology and the new business models of the streaming era seem to endanger creators' ability to make a living. Undoubtedly, creators have long reacted to technological change when it suggested a threat to their livelihood.[11] But the contemporary moment presents new and vexing problems for professional creators. In this Article, I argue that for creators to thrive, we need new policies beyond copyright law, including health insurance, labor law, anti-concentration law, access to data, and state and local arts policy.

Digital, internet-based, and mobile distribution have transformed the way that people consume art and entertainment over the last two decades.[12] Technology companies now wield enormous influence—they completely own the relationship with consumers. Readers interact with the Kindle store, not a book publisher. Music fans tap on the Spotify app, they don't seek out a record label. Viewers go to YouTube, seldom knowing or caring what studio produced the clips they're watching. Technology companies like Alphabet (through Google and YouTube), Apple, Amazon, Meta (through Facebook and Instagram), Microsoft, and a few others have seized the opportunity to distribute all kinds of digitized content to consumers over the internet wherever they are. As the internet age developed, tech companies stepped into a business void left by the large companies that produce copyrighted works for the mass market.[13] They also rode a preexisting trend away from small retailers and toward consolidation in big-box stores.[14] I call these companies "technological intermediaries" because they use new technology to reach consumers and because they mediate the relationship that consumers have with creative works.[15] The term covers any firm that sells copies of or access to books, news, television, movies, music, and video games.[16] Standard accounts of copyright's policy purposes do not account for the role that technological intermediaries play; my recent work has sought to update copyright theory by doing so.[17]

10. Beyond that, it is difficult to document that reality in a comprehensive way, at least in the U.S., where the government has largely abdicated its former role in collecting meaningful, standardized statistics to monitor what is happening to the creative workforce. *See infra* text accompanying notes 369–71.

11. *See* Mark Katz, *Making America More Musical Through the Phonograph*, 1900–1930, 16 AM. MUSIC 448, 467–69 (1998) (describing musicians' advocacy against the phonograph and radio).

12. *See, e.g.*, Joel Waldfogel, *How Digitization Has Created a Golden Age of Music, Movies, Books, and Television*, 31 J. ECON. PERSPS. 195, 199–201 (2017).

13. *See, e.g.*, Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891, 930–36 (discussing record labels' missed business opportunity in the late 1990s and providing several possible explanations).

14. *See infra* text accompanying note 138.

15. Peter DiCola, *A Practical Model of Copyright Economics with Intermediaries*, 19 REV. ECON. RSCH. ON COPYRIGHT ISSUES 1, 1–2 (2022).

16. *See id.* at 2–3.

17. *See id*. at 48 ("[T]he basic model of copyright economics should reflect the role of intermediaries.").

The starting point for my argument is that companies like Amazon, Apple, Google, Netflix, Spotify, and TikTok exist—and exert meaningful economic and cultural power.[18] The legacy copyright-owning companies—print publishers, television and movie studios, record labels, music publishers, and video game developers—mostly missed the boat on successful internet business models.[19] But they have by no means gone away.[20] These "copyright aggregators," as I will call them, still have a central role in arts and entertainment.[21] They select creators and projects to invest in.[22] They both produce new works and manage valuable back catalogs of existing works.[23] They draw much of their power from the scale of their marketing and advertising efforts.[24] But now they are not alone in wielding influence.

Today, the technological intermediaries have a central role in the arts and entertainment industries along with the copyright aggregators. Two types of powerful corporations now stand between creators and consumers, not just one.[25] Technological intermediaries have, in some cases, already reduced creators' ability to earn income from selling copies of or providing access to creative works.[26] They have also limited creators' power to shape how their works are consumed. Many creators lack a direct contractual relationship with the technological intermediaries.[27] But the intermediaries' sheer size and scale make it unlikely that even a creator with direct access could alter or tailor a platform's interface. Modern means for consuming creative works are one-size-fits-all and designed to maximize the intermediary's profits.[28] In these ways—in terms of both earning

18. *See* Lyle Daly, *The Largest Companies by Market Cap in 2024*, MOTLEY FOOL, https://www.fool.com/research/largest-companies-by-market-cap/ (Sep. 3, 2024, 10:54 AM) [https://perma.cc/4WHM-NYJW].

19. *See, e.g.*, Carrier, *supra* note 13, at 927 (discussing firms' reluctance to adopt internet distribution technologies).

20. *See, e.g.*, Peter DiCola & David Touve, *Licensing in the Shadow of Copyright*, 17 STAN. TECH. L. REV. 397, 408–12 (2014) (highlighting record labels as one of the key institutions in the music industry).

21. *See* DiCola, *supra* note 15, at 42.

22. *See* Waldfogel, *supra* note 12, at 207.

23. *See, e.g.*, Tony Maglio, *Hollywood's Fuzzy Math: Lionsgate the Company Is Worth $4.8 Billion, but the Parts Are Worth $8.7 Billion*, INDIEWIRE (May 26, 2023, 7:00 PM), https://www.indiewire.com/news/analysis/lionsgate-starz-spinoff-sale-analysis-1234868096/ [https://perma.cc/R3L9-RYGC].

24. Marketing a hit song, for example, cost about $1 million over a decade ago. *See* Zoe Chace, *How Much Does It Cost to Make a Hit Song?*, NPR PLANET MONEY (Jun. 30, 2011, 3:58 PM), https://www.npr.org/sections/money/2011/07/05/137530847/how-much-does-it-cost-to-make-a-hit-song [https://perma.cc/BTK8-2QSH].

25. A third type of corporation—the communications utilities like the cable internet and wireless providers—could also be said to stand between creators and consumers. Sometimes the communications utilities are commonly owned with a copyright aggregator (like Comcast owning NBC); sometimes they act as a technological intermediary (like Comcast offering cable music channels); and sometimes they act like a conduit rather than earning or paying a copyright royalty (like Comcast delivering Netflix content in which a Hollywood studio owns the copyright). *See* Waldfogel, *supra* note 12, at 207. For simplicity, in this Article I am going to focus on the dynamic between copyright aggregators and technological intermediaries.

26. *See, e.g.*, *id.* at 195 (describing "the sharp revenue reductions for recorded music, as well as threats to revenue in some other traditional media industries").

27. In any situation in which the creator works with a copyright aggregator, the direct contractual relationship will exist between the copyright aggregator (like a book publisher) and the technological intermediary (like Amazon). *See* DiCola, *supra* note 15, at 19.

28. *Id.* at 37.

money and exercising control—what has always been difficult for creators seems more challenging than ever.

Alongside the challenges, technology has provided several benefits to creators as well.[29] Most prominently, digitization, internet, and mobile-phone technology have allowed more creators to reach an audience by opening up the ways entertainment products are distributed and unseating previous gatekeepers.[30] In doing so, these technologies have even created new artistic possibilities, such as mash-up videos and multimedia texts.[31] Meanwhile, creators have not necessarily had an ideal work experience with copyright aggregators over the many years that those firms had sole dominance.[32] Because the new technological possibilities of the streaming era brought new opportunities to reach and interact with audiences, and because the existing copyright aggregators have not always acted fairly toward creators, one can reasonably question whether the contemporary era is better, rather than worse, for creators.

Neither this Article nor any one study can definitively establish that creators are better or worse off today compared to, say, two decades ago. Given both its empirical and philosophical aspects, it is probably too broad and complex a question to answer. Most likely, some creators are better off in the streaming era than they would have been without recent technological changes, while other creators are worse off. Similarly, some people have chosen to be creators in the first place that would not have done so under a different technological regime, but for some people the reverse is true. One probably cannot resolve which of these groups is larger.

We do know, however, that the complaints have been rolling in from creators in disparate industries. The sources for that conclusion range from creators' detailed accounts to company policies to (rough) characterizations of market royalty rates.[33] We also know that the economic structure of the arts and entertainment industries has changed in ways that could negatively affect creators. This Article will present a new economic model that explains why the rise of technological intermediaries presents that threat.[34] For these reasons, the working life of creators in the wake of technological change presents a legitimate issue of concern for law and policy. Society should ensure that we will all continue enjoying and benefiting from creative works. Fairness sometimes calls for

29. *See, e.g.*, Waldfogel, *supra* note 12, at 196.

30. *See id.* at 206–08 (discussing products no longer thwarted by gatekeepers).

31. *See, e.g.*, M. Margaret McKeown, *Art, Music, & Mashups: A View from the Bench on Creativity and Copyright*, 46 COLUM. J.L. & ARTS 109, 124 (2022) ("It has become increasingly common for artists, across media, to draw from a medley of preexisting works in shaping their own."); Press Release, Penguin Random House, Grammy-Winning Singer/Songwriter Brandi Carlile Narrates Audiobook of Her Memoir *Broken Horses* (Apr. 20, 2021), https://global.penguinrandomhouse.com/announcements/grammy-winning-singer-songwriter-brandi-carlile-narrates-audiobook-of-her-memoir-broken-horses/ [https://perma.cc/8GDB-ACU7] ("Carlile also sings more than 30 songs, recorded exclusively for the audiobook . . . .").

32. *See e.g.*, DAVID HESMONDHALGH & SARAH BAKER, CREATIVE LABOUR: MEDIA WORK IN THREE CULTURAL INDUSTRIES 20 (2011) (evaluating whether creative work is "good work" or "bad work" and reaching ambivalent, mixed conclusions).

33. *See supra* notes 5–9.

34. For the peer-reviewed version of this economic model, see DiCola, *supra* note 15, at 12–31.

rewarding creators who have provided value. And creative works contribute vital speech to public debate.[35]

Creators deserve our regard for their own sake as well as for what they do for society, but they are not the only interest group in the arts and entertainment industries. Members of the public—as citizens; as consumers; and as readers, viewers, listeners, and gamers—are the most important focus of arts and entertainment policy. Copyright aggregators, technological intermediaries, and their employees all deserve consideration, too. That said, creators need special policy focus today because they are uniquely challenged by the current moment while the other groups are thriving. Consumers have more choice and access than ever.[36] Technological intermediaries like Alphabet, Amazon, and Apple are among the very largest and most powerful companies in the world.[37] Copyright aggregators, with some exceptions, are generally doing well based on their massive catalogs of existing creative works, ample resources to market and promote their current rosters of creators, and vast stores of intellectual property ripe for franchising.[38] It is writers, actors, musicians, game developers, and other creators for whom the digital era is really a mixed bag.[39] Whatever new opportunities technology has afforded creators, those opportunities have been accompanied by declining financial rewards and artistic control.[40] Centering creators is the appropriate guiding principle for law and policy under current economic, technological, and cultural conditions.

Starting from the premise that creators' current plight requires policy attention, the next question is what area or areas of law should tackle the problem. Most scholars, policymakers, industry executives, and especially creators tend to assume the answer is copyright law.[41] Copyright has long been the legal locus where society debates how to protect creators' ability to earn income from and exercise some degree of artistic control over their published works.[42] At the beginning of the internet era, for example, courts took the lead in regulating companies, software applications, and other technologies that sought to distribute creative works.[43] Those legal sanctions helped steer the next wave of technology companies toward licensing,[44] ushering in a new era. The internet platforms of

35. NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 38 (2008).

36. *See* Waldfogel, *supra* note 12, at 201.

37. Daly, *supra* note 18.

38. *See supra* text accompanying notes 20–24.

39. Keith Negus, *From Creator to Data: The Post-Record Music Industry and the Digital Conglomerates*, 41 MEDIA, CULTURE & SOC'Y 367, 368 (2019); Jules Roscoe, *Video Game Workers Are Now Voting Whether to Strike over AI, Wages*, VICE (Sept. 5, 2023, 1:54 PM), https://www.vice.com/en/article/dy34zq/video-game-workers-are-now-voting-whether-to-strike-over-ai-wages [https://perma.cc/2E5Z-FD9X].

40. These difficulties for creators are not new. *See* Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 9–10 (2010). But the rise of powerful technological intermediaries in the streaming era has exacerbated these challenges.

41. Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 275–79 (1989) (documenting the creative industries' focus on copyright legislation in response to technological change).

42. *Cf.* NETANEL, *supra* note 35, at 5–7 (providing a historical overview of copyright debate and rhetoric).

43. *See, e.g.*, Jessica Litman, *Antibiotic Resistance*, 30 CARDOZO ARTS & ENT. L.J. 53, 53–57 (2012) (surveying the wave of litigation against file sharing services).

44. *See* DiCola & Touve, *supra* note 20, at 414.

today, like Amazon, Apple, Netflix, Spotify, and YouTube, all enjoy licenses from copyright owners.[45] It is a more mature, legitimate marketplace. In this stable business environment, copyright has been respected. And yet, creators do not appear to be well-served. How can that be?

Part of the answer is that legislators have always geared copyright toward copyright aggregators like publishers rather than creators.[46] It was this way with the first modern copyright statute in England,[47] and has continued through the digital era.[48] But another reason that copyright isn't addressing creators' legitimate policy concerns is because it cannot do so given the economic strength of technological intermediaries.

Copyright, as a legal mechanism, only has so much power to deliver financial rewards and artistic control to creators. Copyright aggregators have long constrained creators' ability to achieve their desired outcomes,[49] and still do. Copyright's provisions must now operate within an economic marketplace in which technological intermediaries have vast resources, durable relationships with customers, and powerful business models.[50] Of course, law and the economic environment cause, constitute, and constrain each other—copyright and other laws helped create today's corporations, just as the corporations' lobbying has influenced the laws. But this is a case where the economic environment offers the technological intermediaries enough bargaining leverage to cut into the economic profits of copyright aggregators, which in turn reduces creators' royalties.[51] Creators' connection to consumers is now *twice* mediated by corporations with considerable economic power.[52] The negotiations between technological intermediaries and copyright aggregators are the central economic action in the entertainment industries today.[53] There just aren't enough rewards or enough decision-making authority to go around once the big players on both sides are done harvesting their shares.

Focusing solely on copyright is a mistake because of the increased economic power of technological intermediaries. Previous understandings of how copyright works—which continue to inform legislators, judges, regulators, and private-sector advocates—are based on a world of weak, dispersed retailers who sell copies or access to creative works at the behest of powerful copyright

45. *See* Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 499 (2017).

46. Litman *supra* note 41, at 314.

47. MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993) (describing the history of the Statute of Anne).

48. *See* JESSICA LITMAN, DIGITAL COPYRIGHT (2d ed. 2006) (describing the history of the Digital Millennium Copyright Act of 1998).

49. Litman, *supra* note 40, at 9–10.

50. DiCola, *supra* note 15, at 2–3, 48.

51. *See id.* at 5–6, 49.

52. *See id.* at 16.

53. *Id.* at 20.

owners.[54] That was a reasonable way to think of the marketplace through the 1980s or so. But it misses the most important economic forces in the arts and entertainment industries of today. Given the economic power of technological intermediaries, it makes much more sense to understand them as meaningful players in arts and entertainment. In a recent article, I developed an economic model to capture the new dynamics of the entertainment industries.[55] Drawing on that study, in this Article I work out what the new economics of copyright mean for policy. My argument here is that copyright is a weaker policy instrument than it was in previous eras. As a result, copyright is unlikely to deliver what creators need.

My arguments up to this point have been descriptive: my claim is that the dials on the copyright machine, if you will, only go so high; the levers can only be pushed so far. The financial rewards and artistic control that creators enjoyed in, say, the 1990s, are unattainable under current conditions and have been so for almost a generation now.[56] Strengthening or expanding copyright law will not change this situation much. This is not an argument for removing or limiting any capabilities of current technology; nor is it an argument for deeming new uses or activities to be copyright infringement. My point is not to advocate against technological intermediaries. Nor am I suggesting copyright is useless for creators. It has an important regulatory function over the negotiations between technological intermediaries and copyright aggregators.[57] And the royalty payments that are tiny for most creators are still better than nothing. Thus, this is not an argument against copyright's existence. Rather, my point is that policymakers, judges, and all interested parties should accept that copyright isn't as strong a policy instrument as it used to be. It is one useful tool, but not so strong as to overcome current economic conditions on its own. Several copyright reforms might make sense for other reasons, but they won't address creators' central problems. This is the proper foundation for addressing ongoing technological change like the challenges for creators that AI technology is already presenting.[58]

From that new starting point of how copyright factually operates in the world, we can turn to normative questions about what policy toward creators should seek to accomplish. Many of the policy goals of copyright are worthy goals for the arts and entertainment sector; society just needs to consider different ways of achieving them. Copyright has a large set of possible justifications.[59] From these theories, we can identify several possible benefits of copyright

54. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 37–41 (2003) (describing a model of copyright with consumers, authors, authorized publishers, and unauthorized publishers).

55. DiCola, *supra* note 15, at 4.

56. Admittedly, those levels of control and compensation might have been a historical anomaly. And whether such levels (or greater-than-current levels) would be normatively desirable is a separate question.

57. *See* DiCola, *supra* note 15, at 5.

58. *See, e.g.*, Authors Guild v. Open AI, Inc., 345 F.R.D. 585 (S.D.N.Y. 2024) (describing several lawsuits against Open AI for using copyrighted works to train large language models and violating exclusive rights copyrighted works with the models' output).

59. *See infra* Part V.

protection, such as: providing incentives to create works in the first place; providing incentives to distribute those works; rewarding creators' labor; respecting creators' personal connections to their works; and encouraging public discourse.[60] Also from copyright theory, we know the importance of limits and exceptions that give the public (including creators) important rights: to read, watch, listen, or play; to learn from; to employ abstract ideas embodied in existing creative works; to make certain uses of works for educational or other socially beneficial purposes; to quote and borrow from other people in order to better participate in public discourse; to create technologies for distributing and experiencing creative works; and to eventually access works without any limits at all as part of the public domain.[61] Beyond this, the arts and entertainment industries would benefit from policies that come from the neighboring areas of law like antitrust and communications: competition, innovation, and localism.[62] Many of these values relate to copyright law, but together this pluralistic set of goals invites us to think more broadly about creative labor and what creative works can do for society.

To achieve these policy goals for creators, the best approach would be to address the needs of creators through multiple areas of law and policy at multiple levels of government. With a more accurate description of economic realities and a pluralistic set of normative goals in mind, I identify several areas of law that would be more effective ways to help creators.[63] Any of these would be a better approach than looking solely to copyright reforms. Some of these policy alternatives are broad-based policies like ensuring access to health insurance.[64] Others would seek to counterbalance the power of copyright aggregators and technological intermediaries by facilitating collective bargaining for more creators, regulating concentration more tightly, or mandating access to consumer data for creators (while still respecting consumers' privacy).[65] Finally, and perhaps most promisingly, some policies depart entirely from the federal level and operate on the state and local level instead. Comprehensive arts policy means expanding grant funding, yes, but it also means addressing physical infrastructure, regulatory infrastructure, tax incentives, and arts education.[66] Society could do so much better for creators while supporting small businesses and enriching the public.

This Article proceeds from descriptive arguments to a normative framework to its policy prescriptions. Part II describes the standard accounts of how copyright works to deliver policy benefits. Part III presents the new economics of the entertainment industry, which complicates the standard account. Part IV explains why copyright, as a descriptive matter, has less impact than it did before the rise of powerful technological intermediaries. Part V evaluates copyright's performance relative to its usual policy goals, shows that creators are the group

60. *Id.*
61. *See infra* text accompanying notes 420–426.
62. *See infra* Section V.B.
63. *See infra* Part VI.
64. *See infra* Section VI.A.
65. *See infra* Sections VI.B–VI.D.
66. *See infra* Section VI.E.

most in need of policy attention, and outlines a broader set of normative goals for policy toward creative labor. Part VI suggests several areas of law with new legal and policy prescriptions that address the broader normative goals for arts and entertainment. The bottom line is that copyright cannot do the work alone; a much wider range of non-intellectual-property laws and policies is needed. These new approaches would fulfill society's policy goals for the arts and entertainment sector better than copyright alone can do. And they would more directly address the legitimate interests of creators.

## II. STANDARD ACCOUNTS OF HOW COPYRIGHT WORKS

In this Part, I present the standard accounts of how copyright works—the usual ways to describe how copyright, as a legal mechanism, accomplishes its policy goals. The standard descriptive accounts overlook what might be the most important and powerful actors in the copyright system: technological intermediaries. Online platforms, retail giants (whether online or brick-and-mortar), and streaming services lack agency in the standard conceptual frameworks. Technological intermediaries are mere objects rather than full subjects of copyright law—when the standard accounts acknowledge their existence at all.

My central argument in this paper is that the latest wave of technological intermediaries has altered copyright's ability to deliver its promised benefits. Copyright's central legal mechanism is granting exclusive rights.[67] Indeed, exclusive rights are the one mechanism that the Constitution explicitly authorizes Congress to utilize when it comes to intellectual property law.[68] Because exclusive rights are a flexible policy tool, many different accounts of why we have copyright law can fit that tool to their desired purposes.[69] In this Part, I will focus on the accounts of copyright's benefits contained in incentive theories, property-rights theories, labor theories, and personality theories. I will address economic accounts in Section II.A and rights-based accounts in Section II.B. These theories most strongly emphasize creators in their accounts of how copyright will deliver social benefits. Reviewing these standard accounts of how exclusive rights for creators are supposed to accomplish the desired benefits of copyright will reveal that the accounts omit technological intermediaries and fail to address technological intermediaries' ability to affect whether copyright's benefits are ever achieved.

67. 17 U.S.C. § 106.

68. U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .").

69. *See, e.g.*, Annabelle Lever, *Introduction: Philosophy of Intellectual Property – Incentives, Rights and Duties*, *in* NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY (Annabelle Lever ed., 2012).

### *A. Economic Accounts of How Copyright Works*

Economic accounts of how copyright is supposed to work are known as incentive theories.[70] Incentive theories are prominent, but that doesn't mean that they correctly describe or predict the workings of the copyright system.[71] Nor does it mean that incentive theories are normatively convincing or complete, even from the perspective of the copyright owners who are supposed to benefit from it.[72] I start with a characterization of incentive theories' account of how copyright works because of their dominance in copyright discourse, which matters in and of itself. Incentive theories provide what is probably the primary narrative with which statutes, regulations, and judicial decisions are advocated for and justified.[73] Personally, I like to think of incentives in a broader context. Ultimately they lie within a large set of rationales that motivate actors within the copyright system.[74] But incentive theories offer a highly structured account of how copyright is supposed to work, which exposes the way they gloss over the role of technological intermediaries.

A preliminary issue is that creators often partner with a business entity like a publisher, studio, record label, or software company, which might acquire all or part of a copyright.[75] A business entity might even be considered the creator, not the human individual or team who did the work.[76] Thus, the pricing decision at the center of incentive theories might lie with a business entity rather than the human creator. But the usual account offered by an incentive theory leaves this complication out.[77] Typically, incentive theories do not explicitly model the possible divergence of interests between human creators and these business entities, which I will call "copyright aggregators."[78] Instead, incentive theories emphasize creators' and copyright aggregators' alignment toward the general goal of profiting from the sale of copies by generating revenue in excess of up-front and continuing costs.[79] For simplicity (and following convention), in this Section I will refer to "creators," even though it might be more accurate to say "the creator-copyright aggregator partnership." Later in the article I will distinguish between creators and copyright aggregators.

70. *See, e.g.*, DiCola, *supra* note 4, at 303.

71. *See, e.g.*, Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 521 (2009).

72. *Id.* at 517–18, 522–27.

73. *See, e.g.*, Patrick R. Goold & David A. Simon, *On Copyright Utilitarianism*, 99 IND. L.J. 721, 722 (2024).

74. Tushnet, *supra* note 71, at 515; *see also infra* Section II.B.

75. 17 U.S.C. § 201(a) (granting initial ownership of copyright to the author); *id.* § 201(d)(1) (allowing for transfer).

76. 17 U.S.C. § 101 (defining "work made for hire").

77. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431–32 (1984).

78. Divergence could arise through the structure of the licensing or assignment contract, see Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167, 185–88 (1934), or through legal opportunities, see Evynne Grover, *Copyright § 203 Termination of Transfers and Licenses: Could More Blockbusters Get Busted?*, COMM. LAWYER, Winter 2020, at 23.

79. DiCola, *supra* note 15, at 14.

The incentive theories' usual account of how copyright works goes like this: Creative works are intangible. As a result, they are what economists call public goods, meaning that one person's possession, enjoyment, or ability to make physical use of a creative work doesn't conflict with others' capacity to do those things with that very same work.[80] Most creative works, once released into the public sphere, have become easier and cheaper to copy as time passes.[81] Technologies like the printing press, the camera, the tape recorder, the photocopier, and the personal computer have made this so.[82] Creators face a practical challenge if they wish to earn money from being the sole source of copies for sale. Developing a creative work often costs meaningful money, time, and effort; these are up-front costs or "first-copy costs."[83] The latter term highlights the minimal cost of the second copy of, say, a novel compared to the costs of writing the novel in the first place and making sure it exists at all.[84] Creators must bear or finance these costs.[85] They will factor in those costs when setting the price of consumer copies. Creators would like to choose a price that covers both the first-copy costs and the (often much smaller) costs of manufacturing subsequent copies for sale.[86] If they could remain the sole source of copies, they could charge a monopoly price, which maximizes their profits.[87] The economic hope for creators under a typical incentive theory, then, is that monopoly profits are enough to cover their first-copy costs and then some.

Unauthorized copyists,[88] on the other hand, need not spend the same kind of first-copy costs. They only need to buy or finance a press, camera, recorder, copier, computer, or other copying machine.[89] And they might be able to spread the costs of their copying machine of choice across many copied works. A copyist book printer, for example, could copy hundreds of novels without authorization, not limit themselves to just one.[90] For these reasons, the unauthorized copyists seem very likely to have lower average costs per copy. With lower average costs, they can charge a lower price than the original creators and still make

80. *See* JEAN-JACQUES LAFFONT, FUNDAMENTALS OF PUBLIC ECONOMICS 33 (John P. Bonin & Hélène Bonin trans., 2008) (defining a public good). An absence of conflict in physical use does not mean there is no conflict in value.

81. *See* Joel Waldfogel, *Copyright Protection, Technological Change, and the Quality of New Products: Evidence from Recorded Music Since Napster*, 55 J.L. & ECON. 715, 716 (2012).

82. *See* JAMES BOYLE, THE PUBLIC DOMAIN 60 (2008).

83. William Mock, *On the Centrality of Information Law: A Rational Choice Discussion of Information Law and Transparency*, 17 J. MARSHALL J. COMPUT. & INFO. L. 1069, 1082 (1999).

84. *Id.* at 1082–83.

85. DiCola, *supra* note 15, at 1.

86. *Id.* at 7–9.

87. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 295–305 (5th ed. 1998) (presenting the economics of monopoly). I set aside issues of product differentiation, monopolistic competition, and price discrimination for now.

88. Unauthorized copyists are distinguished from authorized, licensed copyists who are helping the creators execute their business plan. 17 U.S.C. § 501; H.R. REP. NO. 94–1476, at 167.

89. NIVA ELKIN-KOREN & ELI M. SALZBERGER, THE LAW AND ECONOMICS OF INTELLECTUAL PROPERTY IN THE DIGITAL AGE: THE LIMITS OF ANALYSIS 188 (2013).

90. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 294–99 (1970).

a profit.[91] Thus, the unauthorized copyists, if allowed to operate freely, would undercut the price that the creator had wanted to charge. Moreover, there could be many unauthorized copyists selling copies of the same works; in that event, the unauthorized copyists would compete with each other, too, and undercut each other's prices. Taken to an extreme, unauthorized copyists could collectively push the price of a creative work all the way down to its manufacturing cost.[92] An e-book version of a novel, for example, costs almost nothing to make.[93] Thus, if society allows unauthorized copying, standard incentive theories predict that the price of e-books should approach $0.[94] Creators cannot cover their first-copy costs at all. Looking ahead to that grim reality, the prediction goes, creators will not make their creative works at all.[95]

And that's where copyright comes in to prevent such a sorry outcome. By making unauthorized copying a violation of federal law, copyright is meant to short-circuit the copyists' process of undercutting the creator's price.[96] The deterrence may be imperfect; it depends, for instance, on perceptions of the law and the effectiveness of enforcement. But copyright is meant to maintain the creator's power to set their own price, earn monopoly profits, and cover their first-copy costs.[97] To foreshadow the next Part, this assumption of unilateral pricing power does not fit with current real-world conditions in which technological intermediaries at least share (if not enjoy more) power over the price of entertainment goods.[98]

Any number of variations on this account could be posited (which is why I have used the plural "incentive theories"). The story can be complicated by recognizing that creative works compete with each other for consumers' attention and spending,[99] or by accommodating more complex pricing strategies.[100] Such models are more realistic and important, but they don't actually alter the basic account of how copyright works or the central rationale for having it.[101] Incentive

91. Profit ultimately depends on the difference between price (revenue per unit sold) and average costs (total costs divided by the number of units sold). *See* POSNER, *supra* note 87, at 295.

92. LANDES & POSNER, *supra* note 54, at 40.

93. *See* AARON PERZANOWSKI & JASON SCHULTZ, THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY 190 (2016).

94. *See* ELKIN-KOREN & SALZBERGER, *supra* note 89, at 57.

95. This might be quite wrong as a prediction. *See, e.g.*, Christopher Jon Sprigman, *Copyright and Creative Incentives: What We Know (and Don't)*, 55 HOUS. L. REV. 451 (2017); Tushnet, *supra* note 71, at 522 (critiquing the utilitarian account of creativity).

96. *See, e.g.*, LANDES & POSNER, *supra* note 54, at 40–41.

97. DiCola, *supra* note 15, at 1.

98. *See infra* Section III.C.

99. For discussion of product differentiation and the resulting market structure called "monopolistic competition," see Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 236 (2004); Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 WM. & MARY L. REV. 33, 69–70 (2004).

100. *See, e.g.*, POSNER, *supra* note 87, at 305–06 (discussing price discrimination).

101. Thinking about product differentiation does suggest a theory that copyright might benefit society by pushing works to be different. *See* Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1339 (2015). *But see* Rebecca Tushnet, *Free to Be You and Me? Copyright and Constraint*, 128 HARV. L. REV. F. 125, 130 (2015) (critiquing the prediction and the distributive implications of the theory).

theories are fundamentally theories of price, specifically monopoly pricing. They can be specified in a mathematically precise way. But focusing on price is not the only way to construct an economic theory.[102] One can soften the quantitative edges of the theory while retaining the focus on financial considerations and economic decision-making. This brings us to what I call property-rights theories.

Instead of focusing solely on the sale of copies of a creative work to individual consumers, property-rights theories also emphasize the possibility of licensing various uses of the work to businesses and other creators, in addition to consumers.[103] For example, the novel could be licensed for purposes of adapting it into a movie in addition to being sold in hardcover, paperback, and e-book formats.[104] Licenses and sales each carry different prices and occur within different types of institutional contexts.[105] Granting property rights in an intangible good to its creator allows the creator to decide which uses to allow.[106] Looking ahead to the financial rewards from exercising control over uses might encourage the creation of the work, just as in the monopoly-pricing version of the incentive theory.[107] But the property-rights viewpoint also offers a reason that recognizing a single owner can be economically beneficial even after the work is already created. Giving the creator control over uses—the power to say yes or no to each would-be licensee that approaches them—allows the creator to maximize the value of the creative work considering the entire portfolio of possible uses and its development over time.[108] For example, the creator of a novel can, in theory, reject one movie studio's offer to adapt their book and later accept a different studio's offer than seems more suitable. The property-rights theories leave out the possibility that technological intermediaries will have the power to shape the market opportunities that creators will choose from.

102. *See, e.g.*, LANDES & POSNER, *supra* note 54, at 11–36; ELKIN-KOREN & SALZBERGER, *supra* note 89, at 115–33.

103. *See* ELKIN-KOREN & SALZBERGER, *supra* note 89, at 116.

104. PERZANOWSKI & SCHULTZ, *supra* note 93, at 73.

105. *See, e.g.*, DiCola & Touve, *supra* note 20, at 452.

106. One of the best illustrations of a property-rights theory in practice is Castle Rock Ent. Inc. v. Carol Publ'g Grp., 150 F.3d 132, 135 (2d Cir. 1998), in which the court held that the owners of the television show *Seinfeld* had the right to block publication of an unauthorized trivia book—even though they had no plans to offer a trivia book of their own.

107. DiCola, *supra* note 4, at 303–06.

108. POSNER, *supra* note 87, at 36–37.

### *B. Rights-Based Accounts of How Copyright Works*

The control aspect of property-rights theory suggests how economic theories and non-economic theories of copyright might align.[109] Certainly rights-based theories and economic theories can clash when it comes to philosophy or legal doctrine. For example, thinking of freedom of speech as a right differs profoundly from thinking of it as efficient, and each respective philosophy suggests distinct constitutional doctrines.[110] When it comes to copyright, however, rights-based theories and economic theories have compatible accounts of how copyright will work to achieve policy goals. Both support exclusive rights for creators (even though the theories may diverge in terms of the details of specific statutes or judicial doctrines).[111] But rights-based theories call for creators to control uses of their creative works for distinct reasons. Throughout what follows, the rights-based theories I will discuss concern actual human creators, not business entities that acquired copyright.[112]

One set of rights-based theories aims to give creators the proper rewards for their labor. Labor theories are backward-looking in this way: they seek to allocate prerogatives based on what has already transpired.[113] Scholars have debated whether and how John Locke's philosophy of physical property should apply to intangible goods.[114] For my purposes here, I don't need to detail this debate. Suffice it to say that many scholars, creators, and potential jurors think creative labor necessitates a reward and act accordingly.[115] This is enough for labor theories to matter. Much scholarship about labor theories of copyright addresses the legal doctrine of what works should receive copyright protection at all, what aspects of those works should be protected, and who the law should recognize as the author and initial owner.[116] Here I want to focus instead on how

109. *See* ELKIN-KOREN & SALZBERGER, *supra* note 89, at 128–31 (explaining the shift in thinking among law and economics scholars from incentive theory to rationales rooted in creators' natural rights to control); *see also* Breyer, *supra* note 90, at 289–90 (explicating rights-based theories alongside incentive theories).

110. *See* Anne Barron, *Kant, Copyright, and Communicative Freedom*, 31 LAW & PHIL. 1, 4–5 (2012).

111. *See* DiCola, *supra* note 4, at 303 (discussing incentives and control).

112. This stands in contrast to incentive theories and property rights theories, which accommodate copyright acquisition by a corporation. *Id.*

113. *See* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 305 (1988).

114. *Compare id.* at 296–305 (arguing that Locke's writings support IP rights) *and* Adam D. Moore, *A Lockean Theory of Intellectual Property Revisited*, 49 SAN DIEGO L. REV. 1069, 1071–73 (2012) (arguing that Locke's writings support IP rights), *with* Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138, 141 (Stephen R. Munzer ed., 2001) (doubting that Locke's writings support IP rights) *and* Seana Valentine Shiffrin, *Intellectual Property*, *in* A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 653, 658–60 (Robert Goodin et al. eds., 2007) (same).

115. *See* Shyamkrishna Balganesh, Irina D. Manta, & Tess Wilkinson-Ryan, *Judging Similarity*, 100 IOWA L. REV. 267, 284 (2014) (presenting experimental evidence that being told the plaintiffs' amount of effort influences jurors' decisions).

116. *See, e.g.*, sources cited *supra* note 114.

labor theories understand copyright to structure the relationships among creators and others to achieve just rewards as a policy.[117]

Labor or reward theories of copyright seek to vindicate creators' right to non-interference with their works.[118] This is the intellectual property version of the leaving-alone aspect of real property, which ties into respect for landowners' autonomy. But instead of prohibiting trespass to land, copyright under a labor-theory interpretation is prohibiting others from making certain decisions about how the work will be used.[119] Regardless of any societal benefits that come from leaving creators' works to their direction alone, the creators' sphere of control must be honored. The basis for this respect is labor. But what about creative labor mandates the right of non-interference? It can come from a recognition of the unpleasantness of work or the joy of work.[120] It can stem from regard for the merit of the work—copyright as *a*ward as well as *re*ward—or it can ignore the quality of the creator's output entirely.[121] Under either justification, copyright operates to ensure that the right person—the creator—is the one calling the shots about the creative work and enjoying the appropriate financial rewards.[122] This account of how copyright will work, like the other standard accounts, does not address the possibility of powerful technological intermediaries. Creators have the right to opt in or opt out, but copyright cannot give them the bargaining leverage necessary to exert the kind of control the labor theories describe.

Personality theories of copyright are compatible with property-rights theories and labor theories in that they ultimately call for creators to enjoy some measure of control over their works.[123] But they have a distinct emphasis that comes from their philosophical roots, primarily G.W.F. Hegel.[124] According to personality theories, creative works are an extension of their creators' personalities because the creators have exerted their individual wills upon them.[125] Both tangible and intangible property can be seen as the raw materials with which individuals achieve self-actualization—the fullest and freest expression of their emotions and intentions.[126] Personality theories justify copyright protection based on the deeply personal connection between creator and work.[127]

117. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 958 (1982) (distinguishing between the "general justification" of property rights and the "delineation" of them). In those terms, what I am focusing on in this article is general justification.

118. *See* Moore, *supra* note 114, at 1072.

119. I say "certain decisions" because even under a labor theory, some uses of creative works by others do not infringe, e.g., because they are fair use. Hughes, *supra* note 113, at 295.

120. *Id.* at 302–05.

121. *See* Moore, *supra* note 114, at 1071–78.

122. *Cf.* ELKIN-KOREN & SALZBERGER, *supra* note 89, at 128–31.

123. *See* Hughes, *supra* note 113, at 330 ("According to this personality theory, the kind of control needed is best fulfilled by the set of rights we call property rights.").

124. G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 67–103 (Allen W. Wood ed., H. B. Nisbet trans., Cambridge University Press 1991) (1821).

125. Hughes, *supra* note 113, at 330–31.

126. *See id.* at 331.

127. *Id.* at 330.

Personality theories suggest that creators must be the ones making choices, for instance, about whether to publish a work commercially.[128] That much is similar to what labor theories call for. But personality theories go beyond protecting the physical and financial rewards to emphasize the need for creative works to exist as their creators envisioned them.[129] As a result, personality theories seek to prevent others from altering, defacing, or destroying creative works.[130] And they seek to prevent others from removing a creator's indication of authorship or falsely claiming credit for the creator's work.[131] Personality theories aim to prevent these types of interference with individuals' self-actualization that occurs through creative activity.[132] They support a set of exclusive rights—a broader set that appears in some European nations' copyright law but that the U.S. only grants to certain visual artists.[133] Personality theories advocate for creator control in this way, but the standard accounts do not explain how such control will withstand the existence of powerful technological intermediaries.

Each set of the standard theories of copyright tells a story about how copyright functions to effectuate a desired purpose, which purpose will vary depending on the theory. Although the theories differ in important ways, each supports creators having some type of control, making exclusive rights a felicitous mechanism.[134] In incentive theories, the crux is for creators to choose the price; in property-rights theories, to choose the terms of licensing opportunities, including but not limited to price. In labor theories, creators rightly make decisions to reap financial rewards from creative works; in personality theories, creators control not just whether, but also how, their works will be presented to public.

The main actors in all these stories are creators; other, subsequent creators; and the consuming public. As described above, the human creators are quite regularly not the actual copyright owners;[135] the theories elide the copyright aggregators (the publishers, studios, record labels, et al.). It is problematic that they do so. Some but not all the standard justifications of copyright described above go through if control over pricing, licensing, and artistic presentation is not in the hands of humans.[136] For the sake of argument, however, suppose that creators and copyright aggregators form contracts that vindicate or are at least compatible with the rationales for copyright described in this Section. There's still a crucial set of actors missing from all these stories: the technological intermediaries.

128. *See* Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 362–63 (2006) (discussing the right of disclosure, also known as divulgation).

129. Radin, *supra* note 117, at 1014 n.202.

130. *Id.*

131. *See* Rigamonti, *supra* note 128, 363–64 (discussing the right of attribution).

132. Hughes, *supra* note 113, at 333–34.

133. Rigamonti, *supra* note 128, at 363–64; 17 U.S.C. § 106A (2024) (granting rights to qualifying visual artists).

134. *See supra* text accompanying notes 67–69.

135. *See supra* text accompanying notes 75–79.

136. The incentive theories might still work if the creator trades copyright for a royalty. But the personality theories run into difficulties when the initial author, under the work made for hire doctrine, is a corporation. *Cf.* Hughes, *supra* note 113, at 344–50 (critiquing personality theories' handling of alienation).

## III. THE ROLE OF TECHNOLOGICAL INTERMEDIARIES

Technological intermediaries' exercise of agency—of economic and cultural power—has reshaped the entertainment industries. These firms influence prices, affect product offerings, and shape the customer experience. Once one includes the technological intermediaries in the story, one sees that copyright works differently than previously understood. In fact, copyright might work so differently under current conditions that it fails to deliver the benefits to creators and society it aims for. I argue that we should bring technological intermediaries into the standard accounts of how copyright works.

### *A. Technological Intermediaries Exist and Have Agency*

What is a technological intermediary, in my usage?[137] I intend for the adjective "technological" to have the broadest possible meaning. It is not restricted to digital, networked technologies that are prevalent today. It encompasses any combination of machines, business methods, and organizational structures that are used to deliver creative works to consumers. Amazon's online retail store is certainly a technological intermediary. But so are Wal-Mart's brick-and-mortar stores. By the 1990s, they were an important and powerful technological intermediary: a nationwide network of big-box stores, managed with various supply-chain innovations, which facilitated a particular method of delivering copies of creative works to consumers (alongside countless other products).[138] The noun "intermediary" is meant to reflect an entity that mediates the relationship between the copyright owner and the end consumer.[139] In many cases today, the mediation is total and immersive, because the user experience is delivered and controlled by an entity like Apple, Amazon, Spotify, Netflix, Google (think of YouTube), or Microsoft (think of the Xbox). But an intermediary could also be a small, relatively powerless conduit for carrying out sales, such as an independent bookstore, video rental business, or record shop.

Technological intermediaries are absent from the standard accounts of how copyright works described in Part II. This is the case for the accounts contained within both economic and non-economic theories. In the standard accounts, creators—often in partnership with copyright aggregators—sell copies of their work to readers, listeners, viewers, or gamers. The standard accounts envision the copyright-owning side of that interaction setting the price, choosing the form of the product, and making all marketing decisions. To the extent the standard accounts allow for the existence of technological intermediaries at all, such intermediaries

137. *Cf.* Litman, *supra* note 40, at 18–24 (defining two categories of intermediaries "distributors" and "makers," categories roughly similar to my copyright aggregators and technological intermediaries).

138. *See* Neil Strauss, *Wal-Mart's CD Standards Are Changing Pop Music*, N.Y. TIMES (Nov. 12, 1996), https://www.nytimes.com/1996/11/12/arts/wal-mart-s-cd-standards-are-changing-pop-music.html [https://perma.cc/6XAN-XD9P].

139. DiCola, *supra* note 15, at 2.

have no agency.[140] They are just invisible delivery mechanisms that accept the wholesale price, the product characteristics, and the marketing and advertising choices of the creators or copyright aggregators. Put another way, the standard accounts treat technology companies as *objects* of the law (that is, when they infringe and fail to obtain licenses),[141] but not as *subjects* within the law who make key decisions.

The starting point for my own theory of copyright economics is that *Amazon, Apple, Google, Microsoft, Netflix, Spotify, TikTok, and other technological intermediaries exist.* I think this should be uncontroversial. Furthermore, *these companies have agency*. They participate in and have an important role in the entertainment industries. They offer the interfaces through which the vast majority of consumers experience creative works. Amazon's bookstore and Kindle app, Apple's iTunes store and app, Google's YouTube platform, or Netflix and Spotify's streaming services, for example, have enjoyed a prominent position for more than a decade, and in some cases more than two decades.[142] From these basic facts, I merely notice that these technology companies' interventions in the entertainment industries *are active rather than passive*. They make strategic decisions to maximize their profits and to exercise control over the economy and society in ways that suit the decision-makers at those firms.[143] This, also, should be uncontroversial, given that some of the technological intermediaries I have mentioned are the largest firms, by market value, in the world.[144] They overtook most of the energy and financial companies several years ago,[145] but in some ways society has been slow to realize and adjust to this new reality.

Now, the standard accounts are offering a model of how copyright works, and every model oversimplifies reality. That is the point of a model: to strip away various details to analyze a core dynamic. Incentive theories date back to the Enlightenment period, when the technologies of distributing, selling, and delivering copyrighted works were much simpler.[146] Even in the entertainment economy of the 1970s and 1980s—when law-and-economics scholars formalized their version of the incentive theory in mathematical terms—it made sense to focus the modeling effort only on copyright owners and consumers.[147] Technological intermediaries of that time, such as bookstores, video rental places, and record shops, were typically small, dispersed, and relatively limited in their

140. *See id.* at 7–9 (presenting a formal model of the standard accounts in which technological intermediaries do not have economic agency).

141. *See* Litman, *supra* note 40, at 23 ("In the ensuing years, statutory and regulatory provisions reaching makers, and suits to hold them liable as contributory infringers, have become familiar.").

142. *See* DiCola, *supra* note 15, at 2–3.

143. *See generally* Negus, *supra* note 39, at 375.

144. As of June 2024, the seven largest corporations in the world: (1) Microsoft, (2) Apple, (3) Nvidia, (4) Alphabet, (5) Saudi Aramco, (6) Amazon, and (7) Meta. Copyright aggregators like Warner and Disney were not in the top 20. Daly, *supra* note 18.

145. *See id.*

146. *See* BOYLE, *supra* note 82, at 17–27 (discussing Thomas Jefferson and Thomas Babington Macaulay's views on intellectual property).

147. *See, e.g.*, Breyer, *supra* note 90, at 281; LANDES & POSNER, *supra* note 54, at 71–84.

strategic options.[148] For the time, the modeling simplifications made sense and the algebraic conclusions remain valid. I am not arguing that prior authors were wrong. I am arguing that we need to augment their accounts of how copyright works by changing the focus to the main dynamic of today's entertainment economy. I think the increased economic and cultural power of technological intermediaries is more than a passing fad; it has already lasted more than a generation.

### *B. Economic and Cultural Power*

To discuss the entertainment industries of the 21st century, we need to put the interaction between copyright owners (*i.e.*, usually copyright aggregators) and technological intermediaries at the center of our modeling efforts. What that means is focusing on the licensing negotiations that transpire between copyright owners and technological intermediaries. These negotiations are not specific to the last few decades, of course. Just over a century ago, a long conflict between music publishers and radio companies over royalty payments began, ebbing and flowing and ultimately lasting until World War II.[149] Television networks and cable companies have periodically disputed over carriage fees.[150] Internet radio, also known as webcasting, had its royalty structure regulated even before it really came to exist in the marketplace.[151] In all these examples, some part of the government had to intervene to resolve the failed negotiation between copyright owners and technological intermediaries.[152] This is what Tim Wu called "copyright's communication policy" and it explains what the long, regulatory passages in the copyright statute are for.[153] The type of conflict isn't new. But it has become central to copyright's operation with the digitization and internet distribution of creative works; with increased concentration in ownership over entertainment-industry retail stores, first in physical distribution and then online; with the rise of online search, social media platforms, and user-generated content; and with streaming services taking over market share.[154] Rather than affecting just one additional or ancillary revenue stream for copyright owners, technological

148. *See* Ellis Stewart, *What Happened to Blockbuster? How Streaming Killed the Video Store*, EM360 (Jan. 8, 2024), https://em360tech.com/tech-article/what-happened-to-blockbuster [https://perma.cc/XH58-3DMF].

149. Peter DiCola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 CARDOZO L. REV. 173, 203–07 (2012).

150. Jacob Noti-Victor, *Copyright's Law of Dissemination*, 44 CARDOZO L. REV. 1769, 1794 (2023).

151. *See* LITMAN, *supra* note 48, at 161.

152. Noti-Victor, *supra* note 150, at 1776–79 (providing a comprehensive survey of copyright's regulatory mechanisms for technological intermediaries); Kristelia A. García, *Facilitating Competition by Remedial Regulation*, 31 BERKELEY TECH. L.J. 183, 242–55 (2016) (explaining the economic theory behind regulating bargaining between music copyright owners and technological intermediaries); DiCola & Sag, *supra* note 149, at 177–81 (describing the nature of disputes between copyright aggregators and technological intermediaries).

153. Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 288–97 (2004); *see generally* Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87 (2004). Sections 111, 114, and 119, for example, describe complicated statutory licenses, the conditions on those licenses, and the circumstances when a technological intermediary fails to qualify for the statutory license and instead is classified as an infringer. *See* 17 U.S.C. §§ 111, 114 & 119.

154. *See* DiCola, *supra* note 15, at 20.

intermediaries now mediate the most important revenue streams of copyright owners.[155]

The music industry provides one example of this. Music copyright has two sides, the music publishing side that owns or administers musical work copyrights and the record label side that owns sound recording copyrights.[156] Music publishers' original, core business model was selling copies of sheet music.[157] They next obtained the right to receive payment for "mechanical copies," meaning phonograph records and automatic piano rolls.[158] Then they secured performance royalties for live performances, later extending that to broadcast performances, as mentioned above.[159] Only in the case of radio did the music publishers face a truly concentrated technological intermediary, and never anything near a monopoly or oligopoly until the 1990s.[160] Meanwhile, on the record label side, the record labels totally controlled the sale of copies as well as licensing to TV and movies until the 1990s.[161] Once music retail consolidated (in the compact-disc format), Wal-Mart began to exercise control over price and product characteristics.[162]

The internet age soon followed, in which a technology called "file-sharing" profoundly disrupted the way listeners obtained and experienced sound recordings, and did so at a price of zero.[163] By 2003, Steve Jobs was jointly setting the price of licensed music downloads in Apple's iTunes store.[164] By 2011, the record labels reluctantly accepted a shockingly low share of YouTube's advertising revenue and, after years of foot-dragging, allowed on-demand streaming services to offer access to giant catalogs of recordings for $5 or $10 a month.[165] For both music publishers and record labels, the technological intermediaries—particularly Apple, Amazon, Google, and Spotify—now mediate their access to consumers, negotiate over price, and shape the listener experience.[166] The latest

155. *See, e.g.*, García, *supra* note 152, at 197.

156. *Compare* 17 U.S.C. § 102(a)(2) (defining "musical works" as copyrightable subject matter), *with id.* § 102(a)(7) (defining "sound recordings" as a distinct category of copyrightable subject matter).

157. *See* DiCola & Sag, *supra* note 149, at 198.

158. *Id.* at 198–99.

159. *See supra* text accompanying note 149.

160. The Telecommunications Act of 1996 § 202(a), Pub. L. No. 104-104, 110 Stat. 56, 98 (1996) changed the national structure of radio such that just two firms totaled 42% in market share by 2001. *See* PETER DICOLA & KRISTIN THOMSON, RADIO DEREGULATION: HAS IT SERVED CITIZENS AND MUSICIANS? 24 (2002), https://search.issuelab.org/resource/radio-deregulation-has-it-served-citizens-and-musicians.html [https://perma.cc/4ENY-992P].

161. Negus, *supra* note 39, at 367–68.

162. *See supra* note 138 and accompanying text; Mark A. Fox, *Market Power in Music Retailing: The Case of Wal-Mart*, 28 ROUTLEDGE J. POPULAR MUSIC & SOC. 501, 501–19 (2005).

163. *See* Mark Poepsel, *1.6: Music Recording, "Sharing" and the Information Economy*, SOC. SCI. LIBRETEXTS (Apr. 2, 2019), https://socialsci.libretexts.org [https://perma.cc/9VVK-RPCY]; *see also*, DiCola & Touve, *supra* note 20, at 437–42.

164. STEVE KNOPPER, APPETITE FOR SELF-DESTRUCTION: THE SPECTACULAR CRASH OF THE RECORD INDUSTRY IN THE DIGITAL AGE 157–82 (2009) (describing how Jobs and Warner Music concurred on a 99-cent price, Sony Music resisted, and Jobs insisted on what became the ultimate 99-cent price).

165. Charlie Sorrel, *Spotify Launches in the U.S. at Last*, WIRED (Jul. 14, 2011), https://www.wired.com/2011/07/spotify-launches-in-the-u-s-at-last/ [https://perma.cc/BPJ3-EUSM]; DiCola, *supra* note 15, at 2–3.

166. *See* Negus, *supra* note 39, at 377–78.

controversy over TikTok's licensing fees further demonstrates the point.[167] The economic action in the music industry often lies in the negotiation between copyright aggregators and technological intermediaries.

One answer to this push-and-pull dynamic is vertical integration. When the copyright aggregator serves customers directly or purchases a technological intermediary that does so, the firms avoid the transaction costs of negotiating over price and product features.[168] Ideally from the firms' perspective, they also eliminate various points of strategic conflict.[169] One way to think of incentive theories' omission of technological intermediaries is that the theories *assume* vertical integration in all cases.[170] In other words, every entertainment company is the Disney of the 2020s, armed with Disney Plus. But using an example from the movie and television industries demonstrates the problem with that rigid assumption. Netflix and Amazon were initially not vertically integrated and offered mostly licensed IP.[171] But they each shifted strategy, built in-house studios to create their own content, and now offer a mix of owned IP and licensed IP; they are partially vertically integrated.[172] The music, book, and video-game industries similarly contain a mix of non-integrated, partially integrated, and fully integrated technological intermediaries.[173] The shifting dynamics of that vertical ownership structure is central to both the supply and demand sides of the entertainment industries. A useful and pertinent description of how copyright works should recognize that the copyrighted work might be sold through all these different structures.

Technological intermediaries mediating copyright owners' revenue streams does not necessarily mean that they call all the shots or even reap the lion's share from entertainment products. The point is that there's a back-and-forth, not that one side always wins. The standard accounts elide the role of technological intermediaries, but one shouldn't make the opposite mistake and minimize the role of copyright owners, especially large copyright aggregators. Sometimes in history, one side is more powerful, sometimes the reverse. Economic power ebbs, flows, and changes. But we need a descriptive framework for how copyright operates that can accommodate the potential for technological intermediaries to wield substantial power.

167. *See* Ben Sisario, *Universal Strips Its Songs from TikTok as Licensing Talks Break Down*, N.Y. TIMES (Feb. 1, 2024), https://www.nytimes.com/2024/02/01/arts/music/universal-group-tiktok-music.html [https://perma.cc/5A24-VQKT].

168. *See* DiCola, *supra* note 15, at 17

169. DiCola & Touve, *supra* note 20, at 425.

170. *See* DiCola, *supra* note 15, at 6.

171. *See, e.g.*, *Case Studies: Successful Companies that Have Implemented Vertical Integration*, DEVENSOFT (June 8, 2023), https://www.devensoft.com/articles/vertically-integrated-companies-case-studies/ [https://perma.cc/MG32-QXXK].

172. *See id*.

173. *See, e.g.*, DiCola & Touve, *supra* note 20, at 409.

### *C. A New Theory of How Copyright Works*

In a previous article in a peer-reviewed economics journal focusing on copyright economics, I described how a basic economic model that incorporates technological intermediaries could work.[174] What copyright law currently does for copyright owners—rather than giving them unilateral pricing power and control over product attributes, as the standard models say—is give them the power to negotiate with the technological intermediaries.[175] Amazon, Apple, Google, and the rest all require licenses to operate as they do.[176] The technological intermediaries find this advantageous because unlicensed versions of their entertainment interfaces would have fewer features.[177] In this way, copyright protection gives copyright owners (usually copyright aggregators) the power to demand some amount of payment. But the technological intermediaries have leverage, too—they own the interfaces that consumers are now used to using, to put it mildly, or are even addicted to, to put it more dramatically. The low per-stream royalties that Spotify offers musicians, for instance, are evidence that the technology side has had more leverage in the negotiations of the 2010s and now 2020s.[178]

My proposed model of copyright economics in the contemporary era—after consolidation, internet distribution, and streaming—is intended as a more accurate, up-to-date description of what's happening. My argument is that it is an important fact, relevant to any theory of what copyright's policy goals should be, that copyright aggregators and technological intermediaries now negotiate over price, meaning both the wholesale price and the ultimate retail price.[179] At stake is whether the copyright owner's works will be available to the public and through which intermediaries. Moreover, copyright aggregators and technological intermediaries negotiate over product characteristics, features and capabilities of user interfaces, and marketing and advertising.[180] The end result is that a substantial portion of the revenue and profit from selling entertainment products can and currently does to technological intermediaries.[181] In previous work, I argue that copyright scholars and policymakers should put these copyright–technology negotiation dynamics at the center of their mental model of how copyright works.[182] But there is even more we can say about the new economics of the entertainment industries.

Conglomeration is another key feature of today's technological intermediaries. What I mean by conglomeration is that technological intermediaries span

174. DiCola, *supra* note 15, at 12–43 (describing various versions of the new model).

175. *See* DiCola & Touve, *supra* note 20, at 442–56 (describing such negotiations in the music industry).

176. *See* DiCola, *supra* note 15, at 25.

177. *See, e.g.*, DiCola & Touve, *supra* note 20, at 429–32.

178. *See* Andrews, *supra* note 5.

179. *See* DiCola, *supra* note 15, at 12–16 (describing a model of this price negotiation).

180. *See, e.g.*, DiCola & Touve, *supra* note 20, at 429–32.

181. *See* DiCola, *supra* note 15, at 43–47 (providing visualizations that show how the copyright owners and technological intermediaries might divide profits).

182. *Id.* at 9–12.

across multiple industries, multiple types of media, and multiple fields of endeavor. Think of the smaller, economically weaker, lower-tech intermediaries of yesteryear. A bookstore sold books and developed expertise in books—and it usually focused solely on books. There were even chains of book retailers like Borders, Barnes and Noble, B. Dalton, Crown Books, and Books-a-Million. But then large department stores and big boxes like Wal-Mart and Target came to sell books alongside many other product categories. This wasn't the first time in history that department stores sold books—for example, by 1895 the department store Woolworth's sold novels[183]—but it gave us some of today's important conglomerates. Meanwhile, starting in the late 1990s, Amazon sold books and also developed its own kind of data-driven expertise about books.[184] But it didn't focus solely on books for long. Soon it came to sell virtually every single kind of product in every kind of market, including other entertainment products like TV, movies, music, and video games.[185]

These moves toward conglomeration in recent decades have had culturally and economically profound effects. They put many small bookstores, and some of the book-focused chains, out of business.[186] They transformed the consumer's experience from an expertly curated one to a more impersonal mass-market one under fluorescent lights.[187] They led the way to today's e-book market, where book transactions take place without a human face. And most importantly, they opened up the possibility that the technological intermediaries might sell books at a loss if it has a positive effect on revenue in other ways, such as enhancing consumer loyalty or providing consumer data.[188] In my previous work, I have shown how a *conglomerate* technological intermediary could have ample incentive to charge a lower retail price for entertainment goods.[189] That downward pricing pressure, in turn, shrinks the total available profits that the copyright owner and the technological intermediary split.[190] My primary real-world example of "downward price pressure" is Amazon Music (Amazon's on-demand streaming service), which is for customers who subscribe to Prime: $0.[191] On the margin, licensed music finally hit the zero price point that unlicensed file-sharing services had teased many years earlier.[192] Amazon still paid small royalties for

183. *On Paper: A Century of Stationery, Cards and Books at Woolworth's*, WOOLWORTHS MUSEUM, https://www.woolworthsmuseum.co.uk/stat-overview.html (last visited Sept. 16, 2024) [https://perma.cc/TW45-SM9G].

184. Neil Stern, *Amazon at 25: A Fascinating Journey Through Retail History*, FORBES (July 11, 2019), https://www.forbes.com/sites/neilstern/2019/07/11/amazon-at-25-a-fascinating-journey-through-retail-history/ [https://perma.cc/QA85-LGMA].

185. *Id.*

186. *See* KRISTI COULTER, EXIT INTERVIEW: THE LIFE AND DEATH OF MY AMBITIOUS CAREER 59 (2023).

187. *See id.* at 60.

188. *See* DiCola, *supra* note 15, at 10.

189. *Id.* at 21–31 (describing models in which the technological intermediaries are conglomerates).

190. *Id.* at 22, 24.

191. *See* Bobby Owsinski, *Get Ready for the Amazon Streaming Music Disruption*, FORBES (Jun. 9, 2016), https://www.forbes.com/sites/bobbyowsinski/2016/06/09/amazon-streaming-music-disruption/ [https://perma.cc/TA2L-FBJT].

192. *See id.*; Waldfogel, *supra* note 12, at 197.

streaming.[193] But the new reality I am describing in this Part raises the question of how copyright operates and what it is able to accomplish.

Now, it is important to point out that most copyright aggregators are now conglomerates as well—they exist across entertainment fields but also might be a French water company.[194] The copyright aggregators, too, have incentives that diverge from those of creators that come from conglomeration and not just from being on the other side of contracts with creators.[195] But this only makes the descriptions offered by the standard models of copyright more inapt. We now must ask, what does it mean when the dominant owners of copyrights *and* the leading consumer-facing purveyors of entertainment stop caring about books as books, about movies as movies, or about music as music?[196]

The other crucial difference between the standard model's portrayal of how copyright works and contemporary reality is the shift from selling copies to selling subscription access to streams.[197] A per-copy price has important differences from a catalog-access price.[198] The cost structure on the copyright aggregators' side becomes untethered from the cost structure on the technological intermediaries' side.[199] Copyright aggregators are experiencing the costs of producing creative works, whereas technological intermediaries are experiencing the costs of building technical infrastructure, maintaining consumer loyalty for their apps, and developing other revenue streams like advertising.[200] Flowing from that, the complementarity between the technological intermediary's other revenue sources and the number of subscriptions sold is greater than it is based on conglomeration alone. In one implementation of such a model of streaming, the more complementarity there is between the technological intermediaries' *other* ways of making money and the sale of subscriptions, the more downward pressure there is on price.[201] This provides one more illustration of how the interests of the different kinds of firms can diverge from each other. Those competing interests of copyright aggregators and technological intermediaries are the tectonic plates that shift around underneath creators and consumers. Again, we need the

193. *See* Cathy Applefeld Olson, *Are Music Streaming Companies Finally Ready to Change the Way They Pay Artists?*, FORBES (Mar. 3, 2021), https://www.forbes.com/sites/cathyolson/2021/03/03/are-music-streaming-companies-finally-ready-to-change-the-way-they-pay-artists/ [https://perma.cc/J9FJ-H8V4]; *see also* PERZANOWSKI & SCHULTZ, *supra* note 93, at 62.

194. *See, e.g.*, Nikhil Deogun, Martin Peers & Amy Barrett, *Vivendi Seals Pact to Buy Seagram, Will Also Buy Remainder of Canal Plus*, WALL ST. J. (June 20, 2000), at A3, https://www.wsj.com/articles/SB961427849414762073 [https://perma.cc/WKW4-CJWZ] (reporting transaction in which Vivendi acquired Universal Music and Universal Studios).

195. DiCola, *supra* note 15, at 23 (demonstrating that, under the assumptions of one model, a conglomerate prefers a lower retail price than the copyright aggregator).

196. *See* COULTER, *supra* note 186, at 45–66 (comparing Amazon, the author's former employer, to independent bookstores).

197. *Cf.* PERZANOWSKI & SCHULTZ, *supra* note 93, at 36–55 (addressing the implications of the shift to streaming).

198. *Id.* at 51.

199. *Id.* at 51–52.

200. *See* DiCola, *supra* note 15, at 28 (discussing an economic model in which copyright aggregators and technological intermediaries have different cost functions).

201. *Id.* at 29–31.

technology companies to be part of our description and explanation of what is happening.

All these changes toward technology companies playing a huge role in the entertainment industries matter for copyright law matter for descriptive accuracy, whether one is talking about the incentive theory of copyright or about the standard non-economic theories like labor theories or personality theories. Economic models should of course focus on the true pricing dynamics and the ultimate financial rewards earned by creators and copyright aggregators, on one side of the negotiation, and technological intermediaries on the other.[202] But labor theories and personality theories are affected by technological change too. As I argued above, each of these rights-based theories also relies on a story of how copyright operates.[203] Any labor theory envisions creators exerting control to ensure that the financial rewards that rightfully belong to them do in fact head their way. Any personality theory conceives of creators exerting control over how their work is used. The rise of strong technological intermediaries destabilizes these non-economic stories too.

Let me summarize the descriptive argument I have made in this Part. Copyright owners mostly *negotiate* prices with a technological intermediary now, rather than *set* them. Copyright owners *accept* many features of the customer experience, rather than *choose* them on their own. But technological intermediaries do much more than negotiate prices. They affect each party's economic returns from creative works. They constrain, shape, or at least co-determine what products are offered. And perhaps most importantly, technological intermediaries *exert control over how readers, viewers, listeners, and gamers encounter and experience creative works.* The technology company's power gets to the heart of labor theories and personality theories. This does not mean the copyright aggregators have no power. On the contrary, copyright aggregators and technological intermediaries are on either side of very pitched negotiations, each having some power. (There are also important examples of vertical integration that unite the two sides under one corporate roof.)[204] But technological intermediaries' significant role in the entertainment industries does mean that the standard accounts of how copyright works must change. Any useful account of the entertainment industries and copyright's operation within them must include technological intermediaries playing a prominent role.

202. *See id.* at 1–6, 9–12.
203. *See supra* Section II.B.
204. *See supra* text accompanying notes 168–173.

## IV. COPYRIGHT'S REDUCED ABILITY TO ACHIEVE POLICY GOALS

This Part explores the implications of updating the model of entertainment industry economics for assessments of copyright law's effectiveness as a social policy. I argue that the rise in scale, concentration, conglomeration, and customer attachment to technological intermediaries reduces copyright law's ability to deliver rewards and prerogatives. Technological intermediaries have become powerful enough, both economically and culturally, to alter the very functions of copyright. Furthermore, when technological intermediaries transformed the entertainment industry, they changed copyright's ability to achieve its goals.[205] But before explaining copyright's policy weakness, it is important to explain what substantive copyright law already does to regulate the interaction between copyright aggregators and technological intermediaries.

### *A. Regulating Technological Intermediaries*

Even though the standard accounts of how copyright works omit or deny agency to technological intermediaries, the substantive law of copyright—legislation, judicial decisions, agency actions, and so on—has long addressed copyright controversies that involve them. In fact, they have lobbied, litigated, and sometimes invited the government to deal with such disputes.[206] Regardless of who seeks out government intervention first, the bottom line is that copyright law does regulate technological intermediaries. For example, Congress anticipated the arrival of digital, networked technology, however imperfectly, and sought to protect the copyright aggregators' interests.[207] And courts have responded, as always,[208] to the new copyright problems that new technology has brought, sometimes siding with copyright aggregators,[209] and sometimes not.[210] The recent lawsuits against companies deploying AI may bring a new wave of changes to or at least new specifications of copyright law.[211] These legal

205. *See supra* Part II (discussing economic and rights-based theories of copyright's benefits); *see also infra* Part V (discussing a wider array of theories of copyright law).

206. *See supra* text accompanying notes 149–162.

207. *See* Peter S. Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPYRIGHT SOC'Y U.S.A. 1, 31–33 (2011) (describing hearings starting in the 1950s for what would become the Copyright Act); LITMAN, *supra* note 48, at 22–32, 89–96 (summarizing the history of copyright legislation and lobbying efforts of the copyright aggregators during the 1990s and the government's responsiveness to those efforts).

208. White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 323 (1908) (resolving a dispute over whether player pianos infringe musical composition copyrights).

209. *See, e.g.*, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 933 (2005) (holding file-sharing software liable for infringement); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1022 (9th Cir. 2001) (same).

210. *See, e.g.*, Viacom Int'l Inc. v. YouTube, Inc. 676 F.3d 19, 31–42 (2d Cir. 2012) (interpreting Section 512 of the Copyright Act in a way favorable to internet platforms).

211. *See, e.g.*, Michael M. Grynbaum & Ryan Mac, *The Times Sues OpenAI and Microsoft*, N.Y. TIMES (Dec. 27, 2023), at B1, https://www.nytimes.com/2023/12/27/business/media/new-york-times-open-ai-microsoft-lawsuit.html [https://perma.cc/WKW4-CJWZ].

developments are important, but what underlies them is the continually evolving role of technological intermediaries.

Meanwhile, the multifarious and competing policy goals of copyright are also evolving.[212] There's a lot to change because there's a lot going on. Jessica Silbey's foundational empirical work,[213] some of which I had the privilege to participate in,[214] has demonstrated that intellectual property means different things and has different purposes for creators and other participants in the creative industries.[215] Copyright could serve as an incentive to create, sure.[216] But it could also serve as a thing to hang onto just in case, a tool to exert artistic control, a means to protect the creator's reputation, or a mark of professional norms.[217] This illustrates a general point about law in action as opposed to law on the books.[218] Any of the various actors in the copyright system—not just creators, but also copyright aggregators, technological intermediaries, and consumers—have the agency to respond to copyright's statutory provisions, decided cases, and regulations. They can take part of the law that Congress, the courts, or the Copyright Office designed and intended for one set of purposes, and use it for totally different purposes. The result is a complex reality in which copyright law has multifarious functions, each function with its own underlying motivation that may differ from the government's initial conception. For example, there is no evidence that Congress intended the copyright statute to promote professional norms, but photographers use the law for that purpose regardless.[219]

Congress has designed copyright to tackle multiple types of disputes. The first type of dispute—and perhaps the type most commonly thought of—is a dispute among creators (or the owners of their copyrights), which occurs when the creator of an earlier work argues that the creator of a later work has infringed. The basic provisions of copyright law specify what creative works receive protection, what rights the owners of those works receive, how long those rights last, and the remedies a rightsholder might receive.[220] These are limited by fair use, which codifies a longstanding, flexible, case-by-case exception.[221] Together, these basic provisions effectuate copyright's private law function. They are the doctrines that allow copyright to handle disputes among the creators of intangible

212. *See* JESSICA SILBEY, AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE 220 (2022).

213. *See generally id.* at 311–18 (describing multiple empirical studies).

214. Jessica Silbey, Eva E. Subotnik & Peter DiCola, *Existential Copyright and Professional Photography*, 95 NOTRE DAME L. REV. 263, 324–25 (2019).

215. *See generally* SILBEY, *supra* note 212, at 229–30.

216. *See* Silbey et al., *supra* note 214, at 279–83.

217. *See id.* at 284–86 (discussing retaining copyright for possible reuse and artistic control); *id.* at 305–17 (discussing reputation and professional norms).

218. For a discussion of this philosophical distinction, see Jean-Louis Halpérin, *Law in Books and Law in Action: The Problem of Legal Change*, 64 ME. L. REV. 45, 46–47 (2011).

219. *See id.* at 312–17.

220. *See* 17 U.S.C. §§ 102–103 (governing what is protected); *id.* §§ 106(1)–106(2) (governing rights of reproduction and derivative works); *id.* §§ 302–305 (governing duration); *id.* §§ 501–505 (governing remedies).

221. *See id.* § 107. There are many other limiting provisions that are specific to particular industries, which I address below.

works—analogous to the way trespass, nuisance, and other doctrines of real property law handle disputes among landowners.[222] Congress delegated the interpretation of the private law doctrines to the federal courts, who have developed them through a common law process.[223]

But, as discussed above, Congress uses copyright law to do much more than resolve infringement disputes among creators.[224] Copyright has a regulatory function that highlights its public law character. The reproduction right, together with the distribution right, deters copyists in the way that the standard theories suggest.[225] In other words, the statutory existence of those rights is supposed to maintain incentives, control, or both. The public performance and public display rights protect creators' or copyright aggregators' business model from new technologies that deliver creative works to consumers in forms other than copies, such as radio, television, or streaming.[226] The point of such regulatory efforts are to allow copyright owners—whether they are creators or copyright aggregators—to charge a price of their choosing, exert control over the market, and reap the financial rewards.[227] But this is just the baseline; all these exclusive rights are subject to crucial limits.

Copyright law's many statutory exceptions seek to serve other policy goals of copyright, like promoting public access.[228] Thus, in addition to delivering the benefits discussed in Part II by granting exclusive rights to creators, copyright law also aims for other benefits and to limit the social costs of protection.[229] There is certainly a tug-of-war between exclusive rights and exceptions, which can be reflected in lengthy statutory provisions defining the exceptions. Section 108, for example, gives libraries the right to make copies of books.[230] But that same section puts constraints on those rights at the behest of book publishers ostensibly worried about photocopying by or for library users and about libraries making copies for themselves instead of purchasing more copies.[231] Section 109 allows for sales of used copies, to some extent.[232] It also allows for rental shops—but not in the music or software industries.[233] Section 110(5) delineates which restaurants are small enough to avoid paying the owners of musical

222. *See, e.g.*, Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 485 (2010); 17 U.S.C. § 501(b).

223. The infringement standard, for instance, does not appear in the Copyright Act and is entirely judge-made. *See* WILLIAM F. PATRY, 3 PATRY ON COPYRIGHT § 9:3 (2023).

224. *See supra* notes 149–155 and accompanying text.

225. *See* Menell, *supra* note 207, at 39–40.

226. 17 U.S.C. §§ 106(4), (6).

227. *See* Silbey et al., *supra* note 214, at 280–81.

228. On the importance of public access to creative works, see, for example, SILBEY, *supra* note 212, at 232–36.

229. *See, e.g.*, Barron, *supra* note 110, at 2.

230. 17 U.S.C. § 108.

231. *See* Litman, *supra* note 41, at 325–26 (discussing this push and pull in the legislative history).

232. 17 U.S.C. § 109(a).

233. *Id.* § 109(b).

works.[234] Section 111 regulates the licensing negotiations between television networks and cable companies;[235] Section 119 does the same with respect to satellite companies.[236] Section 114 regulates the interaction between record labels and webcasters.[237]

Taking a tour through the industry-specific provisions of copyright statutory exceptions allows us to see something important. Copyright law already reflects the existence of technological intermediaries. The intermediaries' economic interests are being respected to some extent, balanced against the interests of copyright owners.[238] Copyright also acknowledges the interests of the consumers who use libraries, secondhand stores, restaurants, cable and satellite television services, and internet radio.[239] Thus, Congress has always legislated with an implicit theory that for copyright to work, technological intermediaries and consumers must be subject to limits but must also have certain rights and privileges. Many times, it has legislated by encouraging copyright aggregators and technological intermediaries to work out their own compromise, which Congress (for better or worse) will bless by enacting.[240] So the technological intermediaries' (and their customers') imprint is on the law, even if their own welfare was not always the driving motivation.

Yet the standard theories and justifications of copyright law have not recognized the technological intermediaries as subjects of copyright law.[241] Moreover, the standard theories have not recognized strategic agency of the technological intermediaries to the same extent that the law has done. Sections 111, 114, 115, 116, and 119, for instance, explicitly recognize that a licensing negotiation is going to take place between copyright aggregators and technological intermediaries.[242] But the incentive, labor, and personality theories remain stuck on a narrative of creator (really copyright aggregator) control over price, use, and reward.[243]

234. *Id.* § 110(5). *But see* World Trade Org., *United States—Section 110(5) of US Copyright Act*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm (last visited Sept. 13, 2024) [https://perma.cc/4Z7P-JP8N] (describing an arbitration between the European Union and the U.S., which found that this exception violates treaty obligations and resulted in fines and continued "status reports" from the U.S.).

235. 17 U.S.C. § 111.

236. *Id.* § 119.

237. *Id.* § 114.

238. *See* DiCola, *supra* note 15, at 48.

239. *See* 17 U.S.C. §§ 101, 108–111, 114, 119; *supra* notes 232–39 and accompanying text.

240. LITMAN, *supra* note 48, at 144 (describing copyright legislation as "written by multiparty negotiation").

241. *See supra* Part II.

242. 17 U.S.C. §§ 111, 114–16, 119.

243. *See supra* text accompanying note 134.

### *B. The Business Environment Constraints Copyright*

We know, then, that many copyright rules govern the technological exploitation of creative works. This makes sense because creators and copyright aggregators only sometimes interact directly with consumers.[244] The video industries rely on movie theaters, broadcast, cable, and over-the-top streaming services. In the book industry, libraries, physical bookstores, and virtual interfaces mediate the interaction. Most sales are mediated to varying degrees. Consider an example from the music industry. Musicians do sell T-shirts in person fairly commonly.[245] But sales through a record label's website or a recording artist's own website must be mediated (albeit relatively passively in the background) by an ISP and a payment services company. Meanwhile, selling streamed music is mediated heavily through Spotify's, Apple's, Amazon's, or some other service's user interface and subscription fee structure.[246] Or consider the gaming industry. There are intermediaries to offer indie games.[247] There are games that establish their own PC- or mobile phone-based connections to users.[248] But there are also the large, market-share dominant platforms like Microsoft and Nintendo. Thus, there is a range from lightly to heavily mediated. But the technological intermediation is happening.

When creative works are delivered to consumers, they are not delivered into a vacuum. Instead, creative works are delivered into a particular environment that has certain technological affordances, economic constraints, and social expectations built in. Think of the way builders or developers encounter a physical landscape with particular contours, geographical features, atmospheric conditions, and autonomous institutions that might affect their projects. Copyright owners similarly confront a business and technological landscape with many and ever-changing ways of experiencing creative works.[249] Nowadays, consumers' experiences depend heavily on the technological intermediaries.[250]

Putting all this together, when technological intermediaries grow in power and influence, it changes how copyright law works. Copyright's regulatory aspects achieve their ends, in part, by restricting what the technological intermediaries can do.[251] Meanwhile, technological intermediaries have gained prominence in terms of facilitating, shaping, or even owning outright the economic and

244. LITMAN, *supra* note 48, at 15–17; *see* DiCola, *supra* note 15, at 12–20.

245. *See* Thomson, *supra* note 4, at 514.

246. *See* DiCola, *supra* note 15, at 2–3.

247. *Top Indie Video Game Digital Distribution Platforms*, YELLOWBRICK (Jul. 24, 2024), https://www.yellowbrick.co/blog/animation/top-indie-video-game-digital-distribution-platforms# [https://perma.cc/4C4S-SKJZ].

248. *See* Sarah Perez, *Apple's App Store Now Permits Streaming Game Stores, Adds In-App Purchase for Mini-Apps, Games, and AI Chatbots*, TECHCRUNCH (Jan. 25, 2024, 10:12 AM), https://techcrunch.com/2024/01/25/apples-app-store-now-permits-streaming-game-stores-adds-in-app-purchase-for-mini-apps-games-or-ai-chatbots/ [https://perma.cc/5CAW-YY37].

249. *See* Waldfogel, *supra* note 12, at 210–11.

250. *See supra* Part III.

251. *See supra* Section IV.A.

cultural relationship with the end consumer.[252] But it's not just that copyright law has technological intermediaries as an object. We must also turn this around to see that technological intermediaries *constrain copyright law*.[253] They do this through the services they offer, what those services let consumers do, and the retail and wholesale prices they negotiate. When Apple changes the rules for gaming apps,[254] when Netflix raises the price of a monthly subscription,[255] or when Kindle sets the price of an e-book $8 lower than hardcover on average,[256] it alters the business and technological landscape that copyright owners operate within. Such actions might grow or shrink the customer base for and the revenue available from a particular mode of selling creative works.[257] Other actions of technology companies might shift the share of financial rewards as between them and the copyright owners.[258] Still other actions might constitute an exertion of control by the technology company or might give end users control or flexibility in their use of creative works that they did not previously enjoy.[259] Some actions might do all three of these things.

Copyright gives copyright owners the right to say no to these uses.[260] A record label can pull their works from Spotify; a movie studio can pull their works from Netflix; a gaming app can leave the Apple App Store. My point is not that copyright has no force. Rather, my point is that copyright owner's options are affected, at least, if not shaped by a powerful set of technological intermediaries. When copyright law gives copyright owners the power to say yes or no to a licensing deal—that is, when copyright's regulatory face specifies that a new or altered technological use is within the scope of the copyright owner's rights—*it can only give them that choice over the business and technological options that exist at that time*.[261] If the highest-revenue option shrinks, for instance, then copyright owners will either make less money by saying yes or will make no money for a while by saying no and waiting for a new, better licensing opportunity.[262]

This is just a generalization of something that has implicitly been well-understood by copyright scholars. From the perspective of a single copyright

252. *See supra* Part III.

253. *See* DiCola, *supra* note 15, at 48–49.

254. Perez, *supra* note 248.

255. Emma Roth, *Here Comes Another Netflix Price Hike*, VERGE (Oct. 18, 2023, 3:12 PM), https://www.theverge.com/2023/10/18/23922319/netflix-q3-earnings-2023-price-hike-increase-basic-premium [https://perma.cc/CD79-T33Y].

256. *See* Rob Errera, *Printed Books vs eBooks Statistics, Trends, and Facts*, TONER BUZZ (May 31, 2023), https://www.tonerbuzz.com/blog/paper-books-vs-ebooks-statistics/ [https://perma.cc/WW32-82FW] ("[N]ew hardcover bestsellers sell for an average price of $19.80 in 2023 while their eBook counterparts sell for around $12.").

257. *See* POSNER, *supra* note 87, at 298.

258. *See* DiCola, *supra* note 15, at 5.

259. *See id.* at 17.

260. *See, e.g.*, DiCola & Touve, *supra* note 20, at 425 (explaining the need for licenses for on demand streaming services in the music industry).

261. *See id.* at 3.

262. This on/off view of the economic analysis of distribution opportunities is analogous to the economic analysis of creating the work in the first place in LANDES & POSNER, *supra* note 54, at 39.

owner's work, everyone knows that copyright will only let that copyright owner make as much money as market demand allows.[263] In other words, writing a book doesn't guarantee a single sale. It just attempts to offer the creator or copyright owner the right to control pricing decisions, product features, and allowable uses.[264] The elaboration I'm adding here is to say that every creative work's market demand is determined in part by technological intermediaries—their scale, their user interfaces, their business models, their back-end delivery technology.

An analogous point can be made about control, rather than financial rewards. Suppose a technological intermediary creates a new feature in its user interface to give end users more freedom, say, to remix the copyright owner's works. If the copyright owner agrees to license this feature, they are exercising control—in one important sense. But in another sense, by opting in, the copyright owner has deliberately chosen to experience a loss of control.[265] Users may come up with unpredictable ways of remixing that go beyond what anyone initially contemplated.[266] And the technological intermediary might not offer copyright owners the technical ability to pick and choose which remixes are permitted; it could be all or nothing. In that kind of scenario, copyright plays out not so much as it exists on the page, but in terms of what technology companies offer to consumers and how that technology evolves.

Copyright law, being structured as a system of exclusive rights, must take the business and technological landscape as given. It offers financial rewards and control, but only to the extent the environment allows copyright owners to realize those potentialities.

### *C. Copyright Has Less Impact on Its Policy Goals*

Suppose the government sought to effectuate a copyright policy goal—say, "incentivize more creative works"—by expanding the scope of an exclusive right or eliminating some copyright exception. My argument is that in the presence of strong technological intermediaries, that policy will achieve less than it would have otherwise, for two reasons. One reason is that only a fraction of the monopoly profits will go to the copyright-owning side of the equation.[267] Technological intermediaries now take their own profits from the total pie.[268] Being larger, being concentrated, and being in a powerful position in consumers' minds allow them to do so. The second reason is that copyright might offer control on paper (*e.g.* in the pages of the U.S. code), but that may not translate into greater control in reality.[269] The technological intermediaries largely design the consumer environment and specify what can be done with creative works.[270] Therefore, with

263. *See id.* at 39–41, 71–79 (discussing and modeling the demand for copies).
264. *See supra* text accompanying notes 103–108.
265. *See* DiCola, *supra* note 15, at 10.
266. *See* Fishman, *supra* note 101, at 1397–98.
267. DiCola, *supra* note 15, at 16–19.
268. *Id.*
269. *See id.* at 2–3.
270. *See supra* Sections II.B–II.C.

less compensation and less control being changed in the wake of any legal change, copyright has less leverage.

*New York Times v. Tasini* illustrates these two reasons that copyright law cannot achieve its policy goals.[271] The *Times* hoped to license its back catalog to services like LexisNexis without obtaining new licenses from freelance journalists, who retained ownership of the copyright in their articles.[272] The Supreme Court held instead that freelance journalists' had the right to license their works to electronic databases.[273] As Jessica Silbey explains, "*Tasini's* majority opinion failed to strengthen authors' rights or enlarge their purses in the long run because the future became what the dissent predicted. . . . Publishing contracts demanded more rights for the same price from freelancers, including rights to include freelancers' work in electronic databases."[274] Copyright was arguably expanded by the majority's interpretation.[275] Technological intermediaries continued to respect the freelancers' copyrights.[276] But none of that could overcome the economic and cultural conditions in which LexisNexis and the New York Times together had much more bargaining power than freelance journalists.[277]

Expanding copyright to accomplish the goals of the standard theories described above will have less positive impact than it might have before.[278] Consider a stylized, hypothetical, and numerical example. Start with the standard incentive theory of copyright.[279] Suppose that copies of a creative work cost $2 to manufacture and that 900 consumers would like to buy the work if it were priced at cost or even higher. Specifically, consumers would pay anywhere from $2 to $20 for a copy, uniformly distributed.[280] The standard account contained in incentive theories, recall, implicitly assumes away technological intermediation and has the copyright owner selling directly.[281] The monopoly price in this example is $11; this will maximize the copyright owner's profits from the sale of the work. Half the potentially willing consumers, i.e., 450 of them, will find that the offer price is less than or equal to their willingness to pay, and will make the purchase.[282] The copyright owner will earn $4,050 in operating profits. As long as their first-copy costs—the costs of creating the work in the first place—

271. New York Times Co. v. Tasini, 533 U.S. 483 (2001).

272. *Id.* at 483.

273. *Id.* at 506.

274. SILBEY, *supra* note 212, at 147.

275. *See id.* at 142; *see generally Tasini*, 533 U.S. at 483–506.

276. *Cf.* DiCola, *supra* note 15, at 49 (noting that today's powerful technological intermediaries are licensed services that observe copyright law in that way).

277. Normally the *Times* is in the copyright aggregator role, but in this particular scenario, with respect to freelancers who retain copyright ownership, they acted as a technological intermediary jointly with LexisNexis. *See* SILBEY, *supra* note 212, at 141–48.

278. See *supra* Part II (summarizing the policy benefits copyright aims for under the standard accounts of its purpose).

279. For an informal statement, see, for example, DiCola, *supra* note 4, at 301. For a formal statement, see, for example, DiCola, *supra* note 15, at 7–9.

280. This just means that the demand curve is a continuous, straight line.

281. *See supra* Part II.

282. *See* Chris B. Murphy, *Consumer Surplus: Definition, Measurement, and Example* (June 21, 2024), https://www.investopedia.com/terms/c/consumer_surplus.asp [https://perma.cc/6TLZ-CKXX].

are less than those operating profits, then the work will be created and published.[283]

Next, we can augment the standard model to incorporate a technological intermediary with economic influence. I will illustrate a couple of different ways to do this here. One simple way is to say that the copyright owner and the technological intermediary are each monopolists—they are only dealing with each other, and together they are the only pathway for consumers to obtain copies of the work. In that event, they can maintain the previous monopoly profit (of $4,050 in our stylized example) and simply bargain over how to split it. Depending on the relative bargaining power, copyright owners and technological intermediaries could split 50/50, 60/40, 40/60, 75/25, 25/75, and so on. In any event, the profit going to the copyright-owning side of the negotiation will be less—possibly most of what it was before, possibly just a fraction.[284] In this augmented, slightly more realistic model of entertainment economics, the copyright owner's profit depends on this sliding scale of the technological intermediary's bargaining power, i.e., how big a share the technological intermediary can demand for carrying out the delivery of the creative work to the consumer.[285] Think of it as the economic reward for building the app, designing the interface, and streaming the work to the user's phone. The reward could be substantial because we are thinking of the technological intermediary as (a) existing and (b) being a monopolist in the "delivery to consumers" market, rather than competing with others, since competition in the delivery market would drive those profits down to zero.[286] One can see how it's all a matter of degree. But one can see that it is, under current economic conditions, rather extreme to assume that technology companies take none of this profit. Much better to account for the possibility that they will take some.

A second way to think about an intermediated market for creative works is to assume, by contrast to the first method, that the copyright owner and the technological intermediary cannot bargain or collude with each other. This inability may be a result of high transaction costs.[287] Each firm acts like a separate toll collector along a river. They each take a markup from the manufacturing cost of a copy, but by assumption they must do this separately.[288] The copyright owner comes first and chooses a price of $11 again. But when the technological intermediary takes its markup, that pushes the price to $15.50. Only half as many consumers (225 instead of 450, in our example) purchase the creative work, as compared to the number who purchased when the technological intermediary had no economic power and could be ignored.[289] This double markup is known as

283. *See* DiCola, *supra* note 15, at 9.
284. *See id.* at 6.
285. *See id.* at 12–14.
286. *See id.* at 7.
287. *See* Matthew J. Sag, *Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency*, 81 TUL. L. REV. 187, 212 (2006).
288. *See* DiCola, *supra* note 15, at 16.
289. For the earlier calculation, see *supra* note 282 and accompanying text.

"double marginalization" in the economics literature.[290] This shrinks the copyright owner's profits by half, to $2,025,[291] while the technological intermediary earns $1,012.50 in profit for themselves.[292] It is known as an even more inefficient situation than a monopoly.[293] But for copyright policy, this is an important possibility to consider, because it reduces the copyright owner's share of profits while preventing many more consumers from enjoying the creative work at all.

In either of these two ways of incorporating technological intermediaries into the model, we observe that the copyright owner's profits are reduced. Copyright law's provisions are just the same as they are in the standard model. But the same law delivers a fraction of the financial rewards to copyright owners. Instead of applying $4,050 worth of economic force, copyright might apply, say, $3,000 worth of force (if the technological intermediary bargains for about 25% of the profits), $2,025 worth of force (in the double-marginalization example), or only $1,000 worth of force (if the technological intermediary has great power and bargains for about 75% of the profits). It's as if the copyright machine is wearing out, suffering from more friction, or operating in a gear with less mechanical advantage. What's more, if the financial rewards going to the copyright owners are less than the costs of creating the work in the first place, then the work will not come to exist at all under the assumptions of the incentive theory.[294] And if the existence of the work is not imperiled, then the social costs of copyright could be even greater than usually understood, as in the double marginalization example, where half as many consumers enjoy the work as in a monopoly, which itself was already a restricted amount.[295] This is what I mean by copyright law having less ability to achieve its policy aims.

Of course, many scholars and commentators have long predicted that copyright expansion would have a small effect (if any) on the purported goals of providing financial incentives, dictating product offerings, or maintaining artistic control.[296] In response to that established critique, my argument would simply mean that any positive effect is even smaller than before. Copyright law has become a less useful tool for achieving policy outcomes.[297]

Meanwhile, the costs of copyright expansion under current conditions are harder to predict. The costs of copyright on innovation might be dampened to some extent, since technological intermediaries now wield more control and certainly seem to hold their own in negotiations with the copyright aggregators.[298]

290. *See* DiCola, *supra* note 15, at 16–17.

291. 225 customers times $9 per copy, which is the wholesale price of $11 minus the per-unit cost of $2, produces $2,025 in profits.

292. 225 customers times $4.50 per copy, which is the retail price of $15.50 minus the wholesale price of $11, produces $1,012.50 in profits.

293. *See* DiCola, *supra* note 15, at 16.

294. *See* DiCola, *supra* note 15, at 7.

295. If the existence of the work is assured, then the socially optimal number of consumers enjoying it are all those who value it above the manufacturing cost. In our example, this would be all 900 consumers willing to pay more than $2 for the work. *See id.* at 16.

296. *See, e.g.*, Sprigman, *supra* note 95, at 455; DiCola, *supra* note 4, at 339–41.

297. *See* DiCola, *supra* note 15, at 49.

298. *See supra* notes 142–145 and accompanying text.

But any costs of expanded copyright on downstream creators might be even greater in this environment. For example, ceding control to technological intermediaries can mean that standard contract terms and automated processes govern sensitive issues like remix, synchronization, and advertising.[299] The interaction between that shift, on the one hand, and stronger copyrights on the other could reduce the prospects for new creators making use of preexisting works. Overall, the larger role of technological intermediaries dampens copyright expansion's intended benefits while having an ambiguous effect on copyright expansion's costs, whether those costs are intended or unintended.[300]

Here I am discussing the hypothetical prospect of strengthening copyright's protections, not the issue of whether copyright should exist at all. I assume copyright should exist in some form and must exist under international treaties. Throughout this Article I have been assuming that technological intermediaries who distribute creative works for commercial exploitation must obtain licenses and will probably pay some royalty. Now, given the copyright aggregators' weakening leverage, the royalty payments for streaming are quite small, and the shares going to creators are a mere fraction of that.[301] One pithy way to put my argument in this Article is that nothing Congress does to expand copyright is going to increase those royalty payments. The system of exclusive rights already gives copyright owners the right to bargain; they do bargain; and the results are not much money for any non-superstar creators.

One possible rebuttal to my claims is that technological intermediaries have increased consumers' demand for creative works.[302] More creators than ever before can tap into a global market for entertainment goods.[303] Even if technological intermediaries are newly powerful in a way that allows them to capture a share of the profits from creative works,[304] the base of revenue has arguably expanded. And to the extent creators do not control various aspects of the consumer experience, that is mostly because the range of possibilities for consumer uses has expanded.[305] In a comparison between a world with weak technological intermediaries and a world with strong ones, this rebuttal would contend, all else is *not* equal. Shifting to a world of conglomerates offering streaming and other forms of digital access has changed the nature of what consumers want. I think these are plausible claims. But they are not actually an argument for *copyright's* continued impact. Instead, they constitute an argument in favor of innovation in

299. *See, e.g.*, Sag, *supra* note 45, at 543–44 (discussing automated enforcement systems in the context of YouTube).

300. The intended costs of copyright law are to make copying more costly. Unintended costs would be any other distortion of behavior. *See id.* at 246–47 ("[F]inding the optimum trade-off between increasing incentives and reducing the cost of expression for a particular genre of novels might distort the downstream market for screenplays in the same genre, some of which are derived from novels and some of which are not.").

301. *See* Olson, *supra* note 193.

302. *See* Enrico Bonadio, Nicola Lucchi, & Giuseppe Mazziotti, *Will Technology-Aided Creativity Force Us to Rethink Copyright's Fundamentals*? *Highlights from the Platform Economy and Artificial Intelligence*, 53 INT'L REV. INDUS. PROP. COMP. L. 1174, 1179 (2022).

303. *See* Sag, *supra* note 287, at 188–89.

304. *See* DiCola, *supra* note 15, at 19.

305. *See id.* at 25–26.

the distribution and delivery of creative works. If copyright is not delivering to copyright owners the power to set prices, to claim financial rewards, and to control commercially relevant uses, then copyright is weaker than the standard accounts predict.

Another possible rebuttal is that copyright law can and in several cases does set prices through a statutory license.[306] If the problem is wholesale prices that are too low, why not require higher ones? Part of the problem with this solution is that the revenue base may be shrunken or nonexistent.[307] If a technological intermediary offers creative works at a price of zero as a loss leader for other products within its conglomerate structure, then a percentage royalty offers no help.[308] Another reason this solution doesn't fit is that copyright law's history of statutory licenses often comes from an impulse to punish and constrain bad behavior on the part of copyright owners—where bad behavior means limiting access.[309] Shifting from the exclusive-rights mechanism to a price-setting mechanism is generally putting copyright aggregators in a worse situation, with less control and less revenue.[310] It is possible to set the statutory licensing fee higher than the market rates copyright aggregators have been obtaining.[311] But that becomes more like a government grant than anything in existing copyright law.

Let me add a few caveats before closing this Part. By portraying copyright law's power as limited by technological intermediaries, I do not mean to suggest anything normative yet. Nor do I mean to minimize the power of the copyright aggregators with respect to creators; that issue has been with us for all of copyright's existence, with ebbs and flows, but is hugely important (and will be part of the normative discussion in Part V). Moreover, I do not mean that the transition to a world of powerful technological intermediaries has been sudden or uniform. Under my theory, copyright has always been limited by technology and by the economic power of distributors, retailers, and other intermediaries. It's just that today's technological intermediaries are substantially, perhaps qualitatively, more powerful than before.[312] Digitization and the internet aren't the only causes of this; as I said above, economic concentration and supply-chain technologies have also caused this.[313] Finally, I do not mean to suggest that copyright law could not be designed differently and that it has no role in the current economy. The most significant copyright legislation since 1998 was the Music Modernization Act of 2018, which among other things attempted to address several longstanding issues with who gets paid for streaming music.[314] There could still

306. *See* Noti-Victor, *supra* note 150, at 1789–98.

307. *See, e.g.*, DiCola & Sag, *supra* note 149, at 189–91.

308. *See supra* text accompanying notes 188–193.

309. *See* DiCola & Sag, *supra* note 149, at 197–202.

310. *See, e.g.*, *id.* at 189–91, 197–202.

311. *Cf. id.* at 224–33 (acknowledging the possibility of above-market rates in rate-setting for webcasting).

312. DiCola, *supra* note 20, at 2–4.

313. *See supra* Sections III.A–B.

314. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115–264, 132 Stat. 3676 (2018) (codified in scattered sections of 17 U.S.C.).

be a role for copyright to play in regulating fraud and artistic identity theft on the streaming services.[315]

The descriptive point I do want to put forward is that copyright is offering less to individual, human creators than previously. Before, copyright aggregators exerted power through contracts with creators.[316] Now, because of copyright's exclusive-rights approach, the benefits creators enjoy are further subject to the constraints of the technological landscape.[317] That landscape, after the last three decades of business, cultural, economic, social, and technological change, is now one in which technological intermediaries also have significant bargaining power. Our descriptive model of copyright must incorporate them as strategic actors. And we should understand that if copyright is like a machine, say, a lever that delivers financial rewards and artistic control to creators, it cannot do as much as it used to. The fulcrum of the lever has moved away from creators, reducing their power to move objects their way—in this case, in the form of compensation and control.

## V. NORMATIVE GOALS FOR POLICY TOWARD CREATORS

Each theory of copyright contains an idealized account of how copyright will accomplish its goals. For example, incentive theories rely on a narrative about law deterring copyists and thus protecting creators' or copyright owners' ability to earn profits.[318] But each of the standard accounts of copyright's operation leaves technological intermediaries out.[319] This omission is important because intermediaries with economic and cultural power will constrain the impact of copyright law as a social policy.[320] The predictions of the standard theories will not pan out. And their explanations of what transpires in the entertainment industries fall short of convincing.

The argument I have made about the relevance of technological intermediaries has not yet included an evaluation of whether copyright is accomplishing its policy goals. I will start with the end goals of the economic and rights-based theories discussed in Part II. To be clear, copyright's goals are many and should be understood pluralistically. The benefits of protection exist alongside the benefits of the public domain; creators are one constituency, but the public is a larger and more important one.[321] But there is a reason to focus on the standard economic and rights-based theories first. If even the strongest justifications for copyright suggest that copyright can't do its work once one includes the technological intermediaries in the story, then we have stronger reason to conclude that, regrettably, copyright cannot deliver for creators.

315. *See* David Segal, *Their Songs Were Stolen by Phantom Artists. They Couldn't Get Them Back.*, N.Y. TIMES (Jan. 15, 2024), https://www.nytimes.com/2024/01/13/business/music-streaming-fraud-spotify.html.

316. *See supra* text accompanying notes 75–79.

317. *See supra* Section IV.B.

318. *See supra* Section II.A.

319. *See supra* Part II.

320. *See supra* Part III.

321. *See supra* notes 224–31 and accompanying text.

Next, I will bring in a wider range of policy goals, beyond those of the standard theories. As we recognize the constraints on copyright as a policy, we have an opportunity to explicitly pursue the full range of policy values that evidently matter to participants in the entertainment industries and to society at large with respect to those industries. Rather than zeroing in on copyright as the main tool (or even the only tool) for regulating creative activity, we can consider a flexible set of policies that we can better tailor to the current range of social problems that the entertainment industries pose.

### *A. Goals from Economic and Rights-Based Theories*

In the analysis so far, I have tried to keep normative assessments out of the discussion. Of course, any description of the world reflects value judgments about what is important to notice.[322] But I have avoided statements about whether copyright's reduced leverage is a good thing or a bad thing. In fact, my goal for this article is to sidestep the usual normative debate about the strength of copyright protections.[323] My focus here is not about moving in either direction with copyright doctrine, neither expansion nor contraction. I have taken it as given that the most commercially relevant examples of technological intermediaries delivering creative works to consumers must be licensed.[324] Beyond that, I am arguing specifics about the substantive content of copyright law. Instead, I want to explore what it means for policy evaluation that copyright law has less capacity to achieve its goals, whatever those goals are.

In this Section, I want to identify the end goals of the economic and rights-based theories justifying copyright, and then ask how well they are served under the economic conditions I have described. I have argued that copyright does not do as much policy work—it reallocates a smaller share of money and control to creators—when technological intermediaries negotiate price, dictate product features, and possess the customer base.[325] But does the rise of strong technological intermediaries mean that all the purposes and aims of the economic and rights-based theories have been thwarted? The short answer, as I will argue in this Part, is not necessarily, and certainly not all of them. Some goals of the standard theories are being met in spades.

I will start with incentive theories. These theories usually frame their goals in terms of seeking to encourage the production and dissemination of creative

322. *See* DEIRDRE MCCLOSKEY, *Missing Ethics in Economics*, *in* THE VALUE OF CULTURE: ON THE RELATIONSHIPS BETWEEN ECONOMICS AND THE ARTS 190–91 (Arjo Klamer ed., 1996) ("The first point . . . is that economists have ethics, perforce.").

323. *Cf.* Jessica Litman, *The Politics of Intellectual Property*, 27 CARDOZO ARTS & ENT. L.J. 313, 315–17 (2009) (describing the "copyright wars" of the 1990s and 2000s and lamenting the many harms that came from them).

324. *See, e.g.*, DiCola & Touve, *supra* note 20, at 425 (explaining the need for licenses for on demand streaming services in the music industry).

325. *See supra* Part III.

works.[326] Implicitly, this calls for a tradeoff of sending financial rewards to creators to induce them to create their works in the first place and release them for public enjoyment.[327] For economic theories, the benefits experienced by creators and copyright owners make up one part of total social value. But the other part of social value, perhaps much larger, is the instrumental value of unlocking the benefits that consumers experience. That latter portion of social value is about regarding creators as a means to an end.[328]

How one actually measures social value gets tricky. The ultimate goal of any economic theory of copyright is maximizing utility.[329] One conceives of a quantitative measure of well-being and then aims to push it as far as it can go under a given set of conditions.[330] Utility contains ambiguity that render the normative aims of copyright law from an economic perspective somewhat unclear.[331] Many authors speak about maximizing the number of creative works,[332] but simply having more works might not result in the most utility.[333] Would a copyright law that facilitated the production of 1 million haikus and nothing else be superior to a copyright law that led to 999 thousand novels and 999 feature films? The length, nature, quality, and diversity of works produced all ought to matter. Policymakers should aim to encourage the production of *the set of creative works* that would have the most utility.

Economic theories contain another ambiguity in terms of whose experience of utility matters. In most economic models of copyright, one portion of social utility comes from consumers' enjoyment of creative works.[334] Another portion comes from profits.[335] This includes both technological intermediaries' profits attributable to entertainment and copyright owners' profits, which are shared between copyright aggregators and creators.[336] Finally, there is one more portion of social utility that is sometimes overlooked. The creators themselves might get

326. *See, e.g.*, ELKIN-KOREN & SALZBERGER, *supra* note 89, at 57–62 (describing standard incentive theory); LANDES & POSNER, *supra* note 54, at 37–41 (presenting standard incentive theory); RONALD A. CASS & KEITH N. HYLTON, LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS 97–99 (2013) (defending standard incentive theory).

327. *See* ELKIN-KOREN & SALZBERGER, *supra* note 89, at 61 ("[E]ven limited property rights on information come at a cost.").

328. "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.' . . . To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.").

329. *See* Goold & Simon, *supra* note 73, at 728–35.

330. This is philosophically controversial because it requires one to trade off all goods against each other to construct a one-dimensional scale of value. *See* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 1–90 (1995).

331. *See* Goold & Simon, *supra* note 73, at 735–38.

332. LANDES & POSNER, *supra* note 54, at 70–84 (presenting a model in which society aims to maximize "N," the number of works).

333. *See* Goold & Simon, *supra* note 73, at 725.

334. *See* LAFFONT, *supra* note 80, at 153–65.

335. *See id.*

336. *See* DiCola, *supra* note 15, at 17–19.

positive value, negative value, or both from their creative labor.[337] Reading, viewing, listening, and gaming are all important experiences of entertainment goods. But so are writing, acting, filming, recording, and coding.[338] Thus, a more complete economic theory of copyright law would account for the utility and disutility of a creator's time spent making creative works.[339]

With these broad understandings of economic value in mind, we can consider what it means to introduce powerful technological intermediaries into the story. Recall that any theory provides an account of how copyright will deliver on the theoretical goals.[340] Incentive theories want copyright to encourage the production of the set of works that generates the highest utility in consuming and producing them.[341] One fact jumps out immediately: consumers experience enormous value from the 21st-century entertainment industry compared to previous economic eras.[342] For low monthly subscription fees, consumers have access to vast libraries of books, music, movies, and television.[343] Meanwhile, the video game industry has become the largest of the entertainment industries in revenue and seems to deliver plenty of value to consumers even without switching to a subscription model.[344] Compare this to the prior world (a world that most people under 40 would not recognize) of scarce access, most works going out of print, and relatively high prices to buy one work at a time.[345]

One might wonder about whether the incentives for creative production have diminished in recent decades. Consumers might be reaping lots of utility from existing works in the short term, while failing to transfer enough financial resources to creators for the sake of the long term. For example, the revenue going to copyright owners in the music industry has declined in real terms, before and even after the success of streaming.[346] And yet the number of albums produced has tripled during that same time period.[347] Although the sheer number of works isn't the right measure, with consumer prices so low, we have no reason

337. *See* Kurt Lavetti, *Compensating Wage Differentials in Labor Markets: Empirical Challenges and Applications*, 37 J. ECON. PERSP. 189, 189–96 (2023) (analyzing the economics of job amenities and undesirable characteristics).

338. *See* Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 389–91 (2017) (discussing Dewey's pragmatic philosophy of the value of creative activity).

339. To be truly complete in our picture of social welfare, there is also utility and disutility from work for anyone working in the entertainment industry: executives, lawyers, accountants, UI engineers, and so on. Policies to benefit them are outside the scope of this article.

340. *See supra* Part II.

341. *See supra* Section II.A.

342. *See* Waldfogel, *supra* note 12, at 195; Chris Anderson, *The Long Tail*, WIRED (Oct. 1, 2004, 12:00 PM), http://www.wired.com/2004/10/tail/ [https://perma.cc/6K3B-QTAF].

343. The entertainment industries vary in industry structure and in terms of the predominance of the subscription model.

344. Krishan Arora, *The Gaming Industry: A Behemoth with Unprecedented Global Reach*, FORBES (Nov. 17, 2023, 8:00 AM), https://www.forbes.com/councils/forbesagencycouncil/2023/11/17/the-gaming-industry-a-behemoth-with-unprecedented-global-reach/ [https://perma.cc/E4UC-UNQ3].

345. *See* Waldfogel, *supra* note 12, at 209–10; Anderson, *supra* note 342.

346. *See* Ward M. Reesman, *Music in the Digital Age: An Analysis of Declining Revenue in the U.S. Recorded Music Industry*, UNIV. S.D. HONOR'S THESIS (2019).

347. Waldfogel, *supra* note 12, at 202, 207.

to believe that production is suffering.[348] The likelihood is that consumers are enjoying as much or more value from their music-listening experiences today.[349] Similarly, there are more books, television shows, movies, and video games produced than ever, increasing throughout the era of strong technological intermediaries.[350] To be fair, Hollywood movie production has declined since the pandemic; it remains to be seen whether it will bounce back.[351] But whatever role copyright plays in encouraging continued production of creative works, there are no indications of a shortage.

With consumers doing great in terms of enjoyment and in terms of availability of works, a large portion of any incentive theory's aims are being satisfied by the current state of the entertainment industry. Next we turn to corporate profits. It is hard to generalize about technological intermediaries' profits, because the profits attributable to entertainment goods and services can be hard to measure.[352] For example, parent company Alphabet discloses that YouTube ads generated about $9 billion in revenue in the fourth quarter of 2023, while the "subscriptions, platforms, and devices" generated $10 billion in "other" revenue that isn't broken down.[353] Most crucially, outside observers have no way to figure out the costs that should be deducted from those revenue sources to calculate profits.[354] Given limited information, however, it seems safe to assume that shrinking profits for technological intermediaries is not a policy problem. On the copyright aggregator side, there are ups and downs, but profits also do not appear to be a pressing social issue.[355] Universal Music Group's operating profit appears steady, for example, at around $1.5 billion in the last two years.[356] Penguin

348. *See* Joel Waldfogel, *supra* note 81, at 715 (using critical top-albums lists to measure quality of music over time and finding no decline).

349. *Id.* at 718.

350. *See* Waldfogel, *supra* note 12, at 195; *see, e.g.*, Centuriosa, *How Book Publishing Has Changed*, MEDIUM (June 23, 2023), https://medium.com/@centuriosa/how-book-publishing-has-changed-fc0011e7af16# [https://perma.cc/5AJ4-735V].

351. Christi Carras, *U.S. Film and TV Production Down 40% from Peak TV Levels, Report Says*, L.A. TIMES (July 11, 2024, 4:00 AM), https://www.latimes.com/entertainment-arts/business/story/2024-07-11/production-activity-report-hollywood [https://perma.cc/JQ6N-M8V6].

352. *See* Negus, *supra* note 39, at 368–69; *see generally* Adriann Johansen, *How to Measure a Film's Success*, RAINDANCE (Jan. 25, 2022), https://raindance.org/how-to-measure-a-films-success/ [https://perma.cc/2NLR-NWV7].

353. Press Release, Alphabet, Alphabet Announces Fourth Quarter and Fiscal Year 2023 Results (Jan. 30, 2024), https://abc.xyz/assets/95/eb/9cef90184e09bac553796896c633/2023q4-alphabet-earnings-release.pdf [https://perma.cc/N7DM-XT83]. One might even want to attribute some small portion of Google's $48 billion in search advertising revenue to entertainment. *Id.*

354. *See* Negus, *supra* note 39, at 376–77; *How to Calculate Feature Film Profitability?*, ENT. STRATEGY GUY (Nov. 20, 2019), https://entertainmentstrategyguy.com/2019/11/20/the-great-irishman-challenge-how-to-calculate-the-feature-film-profitability-part-i/ [https://perma.cc/VUJ7-BD3Y].

355. *See, e.g.*, Ben Sisario, *Musicians Say Streaming Doesn't Pay. Can the Industry Change?*, N.Y. TIMES (May 10, 2021), https://www.nytimes.com/2021/05/07/arts/music/streaming-music-payments.html [https://perma.cc/8XJL-G5CN].

356. *See Universal Music Group N.V. (UMG.AS)*, YAHOO! FINANCE https://finance.yahoo.com/quote/UMG.AS/financials (last visited Feb. FINANCE, https://finance.yahoo.com/quote/UMG.AS/financials (last visited Feb. 23, 2024) [https://perma.cc/42GG-XZ27].

Random House is a private company; it conducted high-profile layoffs during 2023 but also reported increased sales and revenue.[357]

What is not reported or measured at all are creator's net financial rewards, that is, their revenues and the costs they incur personally to earn those revenues.[358] The National Endowment for the Arts tracks public participation in the arts,[359] but mostly stopped tracking creators' earnings in the 1990s after budget cuts.[360] There are some interesting and detailed data on artists' economic situations, but they stop in 2011 and thus do not cover much of the streaming era in the entertainment industries.[361] We also do not have quantitative measures of creators' utility and disutility from their creative labor—the enjoyment and the frustrations they experience.

What we do have are lots of anecdotal accounts of economic challenges and distress. Examples of musicians and songwriters criticizing the paltriness of streaming revenue abound.[362] Book authors have expressed concerns about Kindle's practices as a publisher,[363] as well as traditional publishers' e-book access policies and payment of e-book royalties.[364] The twin Writers Guild of America and SAG-AFTRA strikes in 2023 were successful on many issues, but the dramatic nature of the labor strife highlights ongoing concerns about working conditions, royalties, and job protections from AI usage.[365] The Animators Guild pushed on similar provisions.[366] Labor strife is also increasing in the video game industry.[367] All these issues, perennial but perhaps increasing in intensity in the

357. Jim Milliot, *Sales Rose at PRH During a Difficult Year, Says CEO Nihar Malaviya*, PUBLISHERS WKLY. (Dec. 14, 2023), https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/93946-sales-rose-at-prh-during-a-difficult-year-says-ceo-nihar-malaviya.html [https://perma.cc/NJ4G-6SPF].

358. *See How to Calculate Feature Film Profitability?*, *supra* note 354; *see, e.g.*, Wray, *supra* note 6.

359. *See* NAT'L ENDOWMENT FOR THE ARTS, U.S. PATTERNS OF ARTS PARTICIPATION: A FULL REPORT FROM THE 2017 SURVEY OF PUBLIC PARTICIPATION IN THE ARTS 1, 3 (2019), https://www.arts.gov/sites/default/files/US_Patterns_of_Arts_ParticipationRevised.pdf [https://perma.cc/4H77-9SKS].

360. *See* DiCola, *supra* note 4, at 310.

361. *See* JOAN JEFFRI, INFORMATION ON ARTISTS [1989, 1997, 2004, 2007, 2008, 2011] (2015), https://doi.org/10.3886/ICPSR35585.v1 [https://perma.cc/8EYQ-QARE].

362. *See* Sisario, *supra* note 355; Alyssa Meyers, *A Music Artist Breaks Down Exactly How Much Money Spotify, Apple Music, Pandora, and More Paid Her in 2019*, BUS. INSIDER (Jan. 9, 2020, 7:46 AM), https://www.businessinsider.com/music-royalties-artist-revenue-compared-spotify-apple-music-pandora-2019-12 [https://perma.cc/55PZ-QNJ3].

363. *See* Angela Hoy, *More Amazon KDP Complaints! Why Complain When You Can Do Something About It?*, WRITERSWEEKLY.COM (Apr. 6, 2023), https://writersweekly.com/angela-desk/more-complaints-why-do-these-authors-keep-signing-up-for-amazon-kdp [https://perma.cc/UBP2-7JXF].

364. *See* Martin Adams, *Authors Speak Out: An Update on the Wiley eBook Situation*, AUTHORS ALL. (Oct. 14, 2022), https://www.authorsalliance.org/2022/10/14/authors-speak-out-an-update-on-the-wiley-ebook-situation/ [https://perma.cc/W7TV-EKTQ].

365. *See* Alissa Wilkinson & Emily Stewart, *The Hollywood Writers Strike Is Over—and They Won Big*, VOX (Sept. 28, 2023, 8:45 AM), https://www.vox.com/culture/2023/9/24/23888673/wga-strike-end-sag-aftra-contract [https://perma.cc/VD98-4DV3]; Josh Rosenberg & Bria McNeal, *The SAG-AFTRA Strike Is Finally Over. Here's What Happened*, ESQUIRE (Nov. 9, 2023, 10:17 AM), https://www.esquire.com/entertainment/a44544249/sag-aftra-actors-strike-consequences-explained/ [https://perma.cc/U8KB-BLCX].

366. *See* Jamie Lang, *Animation Guild Members Have Ratified a New 3-Year Contract*, CARTOON BREW (July 5, 2022, 4:04 PM), https://www.cartoonbrew.com/artist-rights/animation-guild-contract-ratified-iatse-839-218553.html [https://perma.cc/KLV5-JTT4].

367. *See* Roscoe, *supra* note 39.

wake of technological and economic change, concern the plight of creators. By the lights of the incentive theory, this is the one part of social utility where we cannot be sure that policy goals are being met. And based on the analysis in Part IV of this article, copyright law is not a strong enough tool to answer the challenge. Creators' welfare is the biggest policy challenge, and society must consider a much broader set of tools to address it.

Labor theories of copyright, like incentive theories, are also concerned with financial rewards for creators, just for different reasons.[368] The main focus is on backward-looking fairness, ensuring that society rewards creators' hard work.[369] There can also be some concern about the process of determining and insisting upon a fair share of rewards.[370] On both counts, recent developments in the entertainment industries are keenly relevant to evaluating whether the policy goals of the labor theory are being satisfied. The labor strife, in particular, suggests that consumers' and corporations' needs are being met while creators' needs are not.[371] In the streaming era, the dominant technological intermediaries respect copyright by obtaining licenses, in contrast to the dawn of the file-sharing era twenty-five years ago.[372] And yet, royalty rates for creators can nonetheless seem meager.[373] Both the technological intermediaries and the copyright aggregators take a cut of revenue before the creators see any.[374] Creators are signing contracts with copyright aggregators but face standardized terms.[375] Meanwhile, the copyright aggregators have had to make more and more concessions in their negotiations, undertaken partly on behalf of creators, with the newly powerful technological intermediaries.[376] That control over *remitting* payment and handling the accounting can mean that money legally owed to creators does not actually reach them.[377] In sum, the entertainment industry of today largely observes copyright but fails to deliver on the policy goals of the labor theories.

Although both incentive theories and labor theories support financial rewards to creators, they do so for different reasons and would evaluate current

368. *See supra* Section II.B.

369. *See* Hughes, *supra* note 113, at 302–05.

370. *See id.* at 309.

371. *See* Wilkinson & Stewart, *supra* note 365; Rosenberg & McNeal, *supra* note 365; Lang, *supra* note 365; Roscoe, *supra* note 39; DiCola, *supra* note 4, at 337–38.

372. David Bushell, *Understanding the Copyright License*, SMASHING MAG. (June 14, 2011), https://www.smashingmagazine.com/2011/06/understanding-copyright-and-licenses/ [https://perma.cc/EJN4-GBHL]; *see also* DiCola, *supra* note 15, at 35, 46.

373. *See* Zoe Stern, *The Inequalities of Digital Music Streaming*, REGUL. REV. (May 30, 2024), https://www.theregreview.org/2024/05/30/stern-the-inequalities-of-digital-music-streaming/ [https://perma.cc/C4HX-7F6G]; Olson, *supra* note 193, Sisario, *supra* note 355.

374. *See* DiCola, *supra* note 15, at 6.

375. *See, e.g.*, Sisario, *supra* note 355; *cf.* DiCola & Touve, *supra* note 20, at 456–57 (discussing standardization of privately negotiated contract terms across streaming services).

376. *See* Rachel Konrad, *Music Labels Negotiate with YouTube*, SAN MATEO DAILY J. (Sep. 19. 2006) https://www.smdailyjournal.com/news/world/music-labels-negotiate-with-youtube/article_abf3bd3f-c031-53a5-a606-50d26436a56b.html [https://perma.cc/7XMR-ZWNT].

377. *See* Matt Stahl & Olufunmilayo B. Arewa, *Accounting for Injustice: AFTRA, Work and Singers' Royalties*, OXFORD HANDBOOK OF MUSIC L. AND POL'YS (2021), https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1377&context=fimspub [https://perma.cc/9BC4-28NB].

conditions differently—things are even more dire by the lights of any labor theory of copyright. The economic perspective on policy accommodates tradeoffs easily. To the extent that consumers, technological intermediaries, and copyright aggregators are well-served in the current entertainment era, that might well outweigh the difficulties that creators face.[378] Labor theories, on the other hand, would not accept such a tradeoff, unless perhaps it were necessary to support creators earning any rewards at all.[379] Economic theory might apply supply and demand theory to suggest one of the causes of creators' low and declining leverage: there are simply too many people who want to become professional creators, pushing the "wage" (really royalties and other financial rewards) downward in each creative field.[380] Alternatively, the theory of "superstar" or "winner-take-all" markets would explain the decreasing rewards received by most creators by pointing to the increasing reach and surging fortunes of the top-earning creators.[381] But labor theory would respond that whatever the economic cause of declining rewards and lessening control over those rewards, the ethics of compensating creators is about more than just the instrumental goal of incentivizing creativity.[382] It is a backward-looking reward for those who did the labor, regardless of the pool of others who might have done the labor.

Both sides of the debate between the various incentive theories and labor theories have support in our society. Markets determine wages that society tacitly accepts. But people still have ethical views about whether some salaries are fair, such as those for teachers or nurses.[383] In the context of copyright law, the Supreme Court has emphasized the market perspective,[384] but lobbyists still invoke creators in their advocacy.[385] My approach here is pluralistic. We should take account of multiple policy goals, including the incentive and labor perspectives—both which suggest that creators are the interest group within the entertainment industries that require the most attention under current conditions.

Personality theories of copyright have a distinct set of goals.[386] They call for artistic control for creators over their reputations, their works, and how their works are used.[387] Evaluating the rise of technological intermediaries under personality theories means discerning what has been happening to creators' power

378. *See generally* Waldfogel, *supra* note 12.

379. *See* Moore, *supra* note 114, at 1071–76.

380. *Cf.* WALTER NICHOLSON, MICROECONOMIC THEORY: BASIC PRINCIPLES AND EXTENSIONS 681 (7th ed. 1998) (displaying a graph indicating a lower wage when labor supply is greater).

381. *See generally* ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL SOCIETY (1995); Sherwin Rosen, *The Economics of Superstars*, 71 AM. ECON. REV. 845 (1981).

382. *See* Hughes, *supra* note 113, at 305–10.

383. *See* Lingo & Tepper, *supra* note 1, at 339.

384. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 352–60 (1991) (rejecting the so-called "sweat of the brow" theory).

385. *See, e.g.*, Press Release, Rep. Hakeem Jeffries, Reps. Jeffries, Marino Lead Bipartisan Effort to Help Musicians and Artists Protect Their Creative Work (Oct. 4, 2017), https://jeffries.house.gov/2017/10/04/reps-jeffries-marino-lead-bipartisan-effort-to-help-musicians-and/ [https://perma.cc/8YG2-4Z4S] ("Rep. Jeffries said: 'The establishment of the Copyright Claims Board is critical for the creative middle class who deserve to benefit from the fruits of their labor.'").

386. *See supra* Section II.B.

387. *See* text accompanying notes 123–133.

to make such decisions. As in the discussion above about financial rewards, one simple way to see the decline in artistic control is to think about the number of decision makers. With weaker technological intermediaries, creators mostly faced a battle for artistic control with their publisher, studio, or record label.[388] Now, with stronger technological intermediaries, creators compete with both a copyright aggregator and, say, an internet platform or streaming service.[389] There is not as much space for creators to dictate the way their works will be experienced by readers, viewers, listeners, and gamers.[390] Nor can creators today do as much to shape or limit what consumers can do with their works in terms of storage, curation, remix, and other activities made more possible by digitization.[391] For consumers and technological intermediaries, and maybe even some of the more strategic copyright aggregators, this has been a boon.[392] But vis-à-vis creators, under any personality theory, there has been an overall loss of artistic control.

Once again, this loss of control is despite copyright being observed, broadly speaking.[393] The right to say yes or no to a publishing or recording contract is one thing; that's what copyright affords creators.[394] But copyright might not provide enough leverage to garner contractual provisions that give creators a say in the license that the copyright aggregator grants to the technological intermediary.[395] Moreover, the technological intermediary may well have more leverage against the copyright aggregator to dictate the terms.[396] As I have emphasized, these are often the largest corporations in the world, with vast resources at their disposal.[397] Moreover, because technological intermediaries design and own their user interfaces and the back-end technology supporting them, they have an inherent advantage in negotiating over what their services will be allowed to do. The wave of litigation about generative AI, much of which involves the largest technological intermediaries that have already taken hold of the entertainment industry, is a case in point.[398] In today's entertainment economy, this means that technological intermediaries have more of the prerogatives to choose product offerings and creators have fewer. The end goals of the personality theories of copyright are not being served, even though copyright is being respected for the most part. The broken link is that personality theories' account of how copyright

388. *See* DiCola & Touve, *supra* note 20, at 408–11 (surveying music industry institutions).

389. *See supra* Sections III.A–B.

390. *See supra* Section III.C.

391. *See* PERZANOWSKI & SCHULTZ, *supra* note 93, at 182–83.

392. *See* Waldfogel, *supra* note 81, at 197–202.

393. Creators do not, in general, enjoy moral rights like attribution and integrity under U.S. copyright law, only some visual artists. *See* 17 U.S.C. § 106A. But granting strong property rights gives creators some of the same rights, as under the derivative works right, *id.* § 106(2), or at least allows them to trade economic rights for moral ones.

394. *See, e.g.*, Sisario, *supra* note 355.

395. A famous example is the Monty Python comedy troupe's artistic control over licensing for television. *See* Gilliam v. Am. Broad. Cos., Inc., 538 F.2d 14, 17 (2d Cir. 1976) (describing the relevant contractual clause).

396. DiCola, *supra* note 15, at 31–49.

397. *See supra* Section III.A.

398. *See, e.g.*, Grynbaum & Mac, *supra* note 211, at B1.

works—just like incentive theories' and labor theories' accounts—leaves out the technological intermediaries.[399]

In sum, some of the standard economic and rights-based theories' policy goals are being served rather well. It just doesn't appear that copyright law is the driving cause of those results. Other goals—the ones associated with creators' well-being and artistic prerogatives—are not well served in the age of strong technological intermediaries. The inadequacy of the standard theories' descriptions of today's entertainment industries might be a reason why policymakers have failed to ensure that creators benefit from technological, economic, and cultural change in the way that other groups have.

### *B. Broader Policy Goals*

Creators have emerged more clearly than ever as the interest group most in need of policy attention within the entertainment industries. By putting our normative focus where it is most needed, we see that copyright reform is not a fruitful path forward. Leaving aside debate about whether copyright has ever been designed for or effective in promoting the interests of creators, the rise of technological intermediaries should lead anyone to conclude that copyright is not the right policy tool to help creators much under current social and economic conditions. Given copyright's reduced leverage and copyright's mismatch with creators' full and diverse set of interests as an empirical observation, supporting creators requires that we look to areas of law and policy other than copyright law.[400] The previous Section argued that this is true even in light of the theories that are traditionally most sanguine about copyright protection.[401] But the policy goals that would address the needs of creators (and also benefit the general public) have always gone beyond what economic and rights-based theories of copyright try to achieve anyway.[402] Many of these goals, as I will explain, have roots in copyright law. Some come from other fields of law. They all have continued relevance to improving conditions for creators.

The Constitution explicitly sets a goal for copyright and patent policy: "to promote the Progress of Science and useful Arts."[403] One way to evaluate copyright would be to ask whether copyright is serving its *constitutional* purpose under today's conditions. There's awkwardness about this inquiry rooted in our legal history. In the late 19th century, the Supreme Court declined to closely interpret the phrase "Science and useful Arts," basically ignoring a litigant's (highly plausible) contention that the phrase explicitly excludes the *fine* arts.[404] During the 19th century, Congress had added musical compositions, plays, and

399. *See supra* Part II.

400. *See* DiCola, *supra* note 15, at 49.

401. *See supra* Section V.A.

402. *See, e.g.*, SILBEY, *supra* note 212, at 6–7.

403. U.S. CONST. art. I, § 8, cl. 8.

404. *Id.*; *see* Beebe, *supra* note 338, at 361–64; Sean M. O'Connor, *The Overlooked French Influence on the Intellectual Property Clause*, 82 U. CHI. L. REV. 733, 811–13 (2015).

visual art to the subject matter of copyright;[405] the Court declined to disallow or even rein in this practice.[406] One need not take a position on the rightness of originalist interpretive methods to discern a problem that results from the broadening of copyright's subject matter to include fine art. What does "Progress" in the fine arts even mean? Or in more modern terms, how do we evaluate "Progress" in the production of works of entertainment?

One common approach is to think about progress in terms of innovation and emphasizing the root concept of novelty or newness.[407] Artistic creation is sometimes discussed under the innovation umbrella.[408] Sometimes an approach to creativity seems entirely new and opens up new artistic possibilities.[409] But innovation might also mean simply that people continue to produce new creative works. New works can speak to current topics, issues, and social conditions. And new works represent the opportunity that the current generation has to continue various conversations started by previous generations. Even more often, however, innovation is the watchword of the technology sector.[410] Applied to the entertainment industry, this means new means of producing creative works and new ways of delivering creative works to consumers.[411] That type of innovation can benefit creators, technology companies, consumers, and even the copyright aggregators.[412] The latter group might benefit notwithstanding its loud protests.[413] But it's also true that the values of incentive theories, labor theories, or personalities theories of copyright have been pitted against the value of innovation.[414] In this way, innovation becomes a distinct and competing value in making policies for the entertainment industry. And using innovation as a proxy for progress does not resolve the inherent ambiguity in the constitutional language.

Recent intellectual property theorists have put this discussion on a more promising track. Barton Beebe has argued for a different understanding of progress, advocating a pragmatist approach that supports the creatorship of the many.[415] Jessica Silbey has argued that we should understand progress in relation to a set of broader constitutional values like dignity, equality, and privacy.[416] I find these discussions extremely fruitful in terms of identifying the full set of policy goals that society has for the entertainment sector. For my purposes here,

405. JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, COPYRIGHT LAW: CASES AND MATERIALS 8 (5th ed. 2023) (describing the subject matter additions in the 1831, 1856, 1865, and 1870 Copyright Acts).

406. *See, e.g.*, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) (holding that photographs are copyrightable subject matter).

407. *See* Beebe, *supra* note 338, at 378–79.

408. *See, e.g.*, Carrier, *supra* note 13, at 893–98.

409. *See* Fishman, *supra* note 101, at 1336.

410. *See* Carrier, *supra* note 13, at 924–26.

411. *See id.* at 924–26.

412. *See, e.g.*, Waldfogel, *supra* note 12, at 196.

413. *See* DiCola & Sag, *supra* note 149, at 215–16 (recounting the movie industry's dire and incorrect predictions about the VCR's impact).

414. *See, e.g.*, Mark A. Lemley & Pamela Samuelson, *Interfaces and Interoperability After* Google v. Oracle, 100 TEX. L. REV. 1 (2021) (analyzing the history of software-copyright disputes and discussing whether copyright protected necessary incentives to create or stifled innovation).

415. Beebe, *supra* note 338, at 385–95.

416. SILBEY, *supra* note 212, at 10–12.

focusing on policies for the sake of addressing creators' challenges in the streaming age, I won't only discuss connections to the word "Progress," although many fundamental values can connect to that term in some way. I want to avoid restricting the inquiry to the constitutional language for the following reason. The rest of the Intellectual Property Clause following the phrase about "Progress" limits copyright law to a system of granting exclusive rights.[417] In other words, the policy-values language about progress is tied to a particular policy mechanism. As I have argued in this Article, exclusive rights now have less power as an arts policy than they once did.[418] So we need a broader set of policy goals, but we should also resort to a broader set of legal mechanisms for governing the entertainment industries.

One broader policy goal is the protection of user's rights.[419] Users' rights traditionally justify the essential *limits* on copyright protection but also reverberate much more broadly.[420] These include structural protections like the prevention of government-sanctioned monopolies in publishing and the prevention of censorship.[421] But they also include individual protections that involve personal uses of creative works.[422] These include activities such as the right to read, which are completely outside the exclusive rights of copyright owners.[423] They also include activities that fit into statutory exceptions, like the right to borrow from libraries is protected by the first sale doctrine,[424] or the right to record a TV show and watch it later falls under the fair use doctrine.[425] There are many specific statutory exceptions, but it is really the breadth and flexibility of fair use that makes it impossible to list all the rights users retain despite copyright law's existence.[426]

Why would these users' prerogatives matter as we attend to creators' needs? One reason is that creators want and need readers, viewers, listeners, and gamers.[427] This is certainly true when creators have commercial motives. But even putting commercial motives aside, most (though not all) creators hope to have an audience. The other reason that users' rights matter to creators is that all creators are readers, viewers, listeners, or gamers themselves. Creative works build on existing works, sometimes in literal ways (as with a collage) but

417. Here is the language: "by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

418. *See supra* Section IV.C.

419. *See generally* L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 2 (1991).

420. Standard theories can support limits on copyright as well. For example, there is an economic argument for keeping the copyright term limited. *See* Eldred v. Ashcroft, 537 U.S. 186, 254–57 (2003) (Breyer, J., dissenting).

421. PATTERSON & LINDBERG, *supra* note 419, at 61–69.

422. *See* Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1882–84 (2007).

423. *Id.*

424. 17 U.S.C. § 109.

425. 17 U.S.C. § 107; Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 447–55 (1984).

426. *See* FROMER & SPRIGMAN, *supra* note 405, at 391 (describing fair use as "wide-ranging" and "case-by-case").

427. *See* Litman, *supra* note 40, at 13.

sometimes in more abstract ways (as when an idea from one work inspires a later work).[428] The term "users" is apt because it includes but goes beyond the term "consumers" to include those consumers who are going to turn around and produce new creative works.[429] Any policy reforms undertaken on behalf of creators must recognize the balance among rewarding the creators of yesterday, encouraging the creators of today, and maintaining access for the creators of tomorrow.

Many of these same protections for users' rights come within the ambit of free speech values under the First Amendment.[430] As the Supreme Court has acknowledged,[431] the Intellectual Property Clause should be interpreted in a way that is consistent with the First Amendment. Copyright's encouragement of creation and dissemination under the incentive theory can also promote free speech values, because copyright would be adding contributions to public debate and public knowledge to the extent that the incentive theory works.[432] But copyright must come with limitations and exceptions, especially the fair use doctrine and the idea-expression distinction to avoid stifling speech as well.[433] There are many examples of copyright cases that stifled or attempted to stifle dissent, unpopular perspectives, or critical views.[434] It is important to recognize that there are creators on both sides of the "v." in such cases.

Another reason to go beyond copyright law to identify policy goals is that the copyright portion of the Intellectual Property Clause and the First Amendment are part of a larger group of constitutional provisions.[435] Copyright, free speech, the U.S. Postal Service, and the Fourth Amendment right against unreasonable searches and seizures all work together to promote freedom in public discourse.[436] Public debate requires more than just financial incentive and the absence of censorship.[437] It also requires communications infrastructure—at the time of the founding, this meant universal postal delivery—that was not subject to the kind surveillance then common in other western nations.[438] Seeing copyright in its proper context becomes crucial to making it work for all the interest groups it affects. Creators cannot thrive without a proper information environment.

Moreover, the limited scope of Congress's authority under the IP Clause suggests a role for policies beyond copyright and, indeed, beyond federal law

428. *See* Fishman, *supra* note 101, at 1336.

429. *See id.* at 1348 n.75.

430. *See generally* NETANEL, *supra* note 35.

431. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219 ("[C]opyright law contains built-in First Amendment accommodations.").

432. *See* Netanel, *supra* note 35, at 3.

433. *See, e.g.*, Golan v. Holder, 565 U.S. 302, 327–29 (2012) (describing the idea-expression distinction and fair use as First Amendment protections).

434. *See, e.g.*, Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (holding that a critical retelling of *Gone with the Wind* was fair use).

435. PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 115 (2004).

436. *See generally id.*

437. *See id.* at 83–99.

438. *Id.* at 94.

entirely. Supposing that the Constitution's language was meant to exclude the fine arts, then responsibility for lawmaking with respect to the fine arts would have rested with the states.[439] Given the importance of localism and community in the arts,[440] federalism in arts policy makes a good deal of sense. And indeed, state laws and municipal ordinances undoubtedly exist and affect the livelihoods of creators and the enjoyment of consumers. The movie industry, for instance, regularly makes decisions about filming locations based on state and local subsidies and tax incentives.[441] In the music industry, to take a less prominent example, municipal regulation of concert venues affects a major revenue stream for performing musicians.[442] Localism should be another policy value that guides our approach to supporting creators.[443]

We can look to the founding era once again to find a principle of preservation or, as some have described it, a principle of stewardship over creative works. Maintaining meaningful access requires proper storage and curation.[444] In one important way, copyright has always promoted these policy values. The very first Copyright Act of 1790 called for authors to submit copies to the Secretary of State.[445] Over the course of the 19th century, the deposit requirement shifted to the Library of Congress.[446] Libraries in general are institutions for preservation, curation, and the provision of access. Accordingly, librarians have historically played a role in copyright policy, advocating for the long-term interests of the public sphere.[447] But copyright law does not always promote preservation and stewardship. When copyright delegates power to a single copyright owner, society is implicitly counting on that owner to be a good steward.[448] And yet many copyright owners fail on this score. Too many headlines report master copies of movies or music being physically destroyed.[449] Creators' works deserve better,

439. *See* O'Connor, *supra* note 404, at 819–20 ("[T]his is a *federalist* system that allows for concurrent federal-state rights.").

440. *See, e.g.*, Nat'l Endowment for the Arts, Our Town: Grant Program Summary, https://www.arts.gov/grants/our-town (last visited Sept. 19, 2024) [https://perma.cc/VP7E-8DRT].

441. *See, e.g.*, Film Industry Tax Incentives: State by State (2024), WRAPBOOK (Feb. 1, 2022), https://www.wrapbook.com/blog/film-industry-tax-incentives [https://perma.cc/SC6J-V578].

442. *See* Quinn Myers, *'Merch Cuts' in Chicago? Outcry Sparks Closer Look into Venues Taking a Cut of a Band's Merchandise Sales*, BLOCK CLUB CHI. (Sep. 26, 2023), https://blockclubchicago.org/2023/09/26/merch-cuts-in-chicago-outcry-sparks-closer-look-into-venues-taking-a-cut-of-a-bands-merchandise-sales/ [https://perma.cc/T4LL-GX38].

443. *Cf.* Fed. Commc'ns Comm'n, Media Bureau Opens Docket and Seeks Comment for 2022 Quadrennial Review of Media Ownership Rules, 88 Fed. Reg. 2595, 2596 (Jan. 17, 2023) (mentioning the FCC's "longstanding policy goals of competition, localism, and diversity").

444. *See* Eva E. Subotnik, *Artistic Control After Death*, 92 WASH. L. REV. 253, 255–56, 256 n.11 (2017).

445. Act of May 31, 1790, ch. 15, § 4, 1 Stat. 125.

446. John Y. Cole, *Of Copyright, Men & a National Library*, LIBR. CONG., https://www.loc.gov/collections/early-copyright-materials-of-the-united-states/articles-and-essays/copyright-history/ (last visited Sept. 19, 2024) [https://perma.cc/2U5E-56EE].

447. Sometimes librarians' role has been unfortunately limited by the power of corporate lobbyists. *See* LITMAN, *supra* note 48, at 126–27.

448. *Cf.* Subotnik, *supra* note 444, at 266–67 (discussing examples of libraries as stewards).

449. *See, e.g.*, John Horn & Susan King, *Prints of Classic Films Lost in Blaze*, L.A. TIMES (Jun. 4, 2008, 2:51 AM), https://www.latimes.com/archives/la-xpm-2008-jun-04-fi-universal4-story.html [https://perma.cc/NA4H-SR2W].

especially in an age when it has become possible to inexpensively preserve countless high-fidelity copies of each work. Cases in which a work might cease to exist in the world are the most dire. But another part of preservation is the degree of public access. This includes keeping works in print—and we know that copyright law can actually be a hindrance to that effort.[450] In ways related to the standard personality theories, but also bringing in the interests of the broader public, preservation and stewardship of creative works should be guiding values in a broader arts policy.

The value of competition and its flip side, anti-monopoly, also has some roots in the founding era. It explains the stricter limits on early U.S. (and U.K.) copyright law, for example.[451] Today's entertainment industry, however, features entities on both sides—copyright aggregators and technological intermediaries—that have a very different type of monopoly power than the law gives a single copyright or patent holder.[452] A large enough entity like Disney or Apple has market power as economists define it—the power to charge a price above marginal cost.[453] Cabining this power is an important value to protect creators from excessive control by gatekeepers.[454] And to the extent the sheer size of copyright aggregators and technological intermediaries thwarts copyright's ability to direct money and secure control to creators, that is a problem beyond copyright's scope. It is fundamentally a problem about maintaining competition, which in its proper economic sense means that no firm is large enough to affect prices on its own.[455]

Of course, some broad values that must shape policy going forward only emerged fully after the founding era. Most important are principles of anti-discrimination.[456] Each of the entertainment industries, like any institution in U.S. society, has a history of bias along the lines of race, gender, sexuality, religion, national origin, and ethnicity.[457] In the music industry, the history of discrimination is tragically long and pervasive.[458] Publishing companies and record labels acted in sync with Jim Crow laws during the early decades of the 20th century to build a color line—despite the on-the-ground truth of creative exchange among all musicians.[459] Recording contracts and record labels' accounting practices

450. *See* Paul Heald, *How Copyright Keeps Works Disappeared*, 11 J. EMPIRICAL LEGAL STUD. 829 (2014) (estimating econometrically the negative effect of works staying under copyright protection).

451. *See* BOYLE, *supra* note 82, at 17–27.

452. An owner of one copyright or patent is often said to have a monopoly over that specific IP, but any creative work or invention will compete with other nearby products in the marketplace. *See* Yoo, *supra* note 99, at 217–18; Abramowicz, *supra* note 99, at 36 n.8.

453. *See* Noti-Victor, *supra* note 150, at 1825–28.

454. *See* García, *supra* note 152, at 255–56.

455. Nicholson, *supra* note 380, at 545.

456. *See* K.J. Greene, *Copyright, Culture, & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 345–46 (1999) ("Significantly, at the time of the enactment of the first intellectual property statutes, most Blacks in America remained in slavery, unable to own any type of property.").

457. *See id.* at 367 n.132.

458. *See id.* at 368.

459. *See* KARL HAGSTROM MILLER, SEGREGATING SOUND: INVENTING FOLK AND POP MUSIC IN THE AGE OF JIM CROW 216–17 (2010).

have discriminated against Black recording artists.[460] Federal courts' initial reactions to digital sampling within the hip-hop genre were dismissive and fundamentally disrespectful to predominantly Black art forms.[461] Meanwhile, important promotional channels like country radio are predominantly white and male.[462] These are just a few examples from one industry that I happen to know best. In book publishing,[463] television,[464] movies,[465] and video games,[466] discrimination harms creators—and, ultimately, consumers, too—in ways that have similarities but are also unique to each time and industry context. When moving beyond the standard theories of copyright to build policies that creators need, the values of opposing and rooting out discrimination are essential.

Along the lines of recent developments in intellectual property theory, I am advocating a pluralistic approach to setting the normative goals for policy toward the arts and entertainment sector. Under current conditions, creators are the group most in need of policy interventions. Those reforms or new laws should be guided in part by incentives to create, rewards for labor, and respect for personality rights. But the values of innovation, users' rights, free-speech values, localism, preservation and stewardship, competition, and anti-discrimination should also guide policy. Undoubtedly this pluralism makes for a messier approach than, say, the utilitarian calculus of incentive theories. Many times the various normative goals will conflict. But any kind of policymaking is complex, and creators are a diverse group with interests that conflict among them but also within them. In the next Part, I will endeavor to acknowledge that reality as I suggest policy areas and specific policies that would benefit creators and society more broadly.

## VI. ALTERNATIVE POLICIES FOR CREATIVE LABOR

Although economic and cultural conditions brought on by the rise of technological intermediaries have constrained what copyright can accomplish, policymakers at several levels of government can still improve the situation of

460. *See* Greene, *supra* note 456, at 367–73.

461. *See* Vincent R. Johnson, II, *Sampling as Transformation: Re-Evaluating Copyright's Treatment of Sampling to End Its Disproportionate Harm on Black Artists*, 70 AM. U. L. REV. F. 227, 251–52 (2021).

462. *See* Nadine Hubbs & Francesca T. Royster, *Introduction: Uncharted Country: New Voices and Perspectives in Country Music Studies*, J. POPULAR MUSIC STUD., June 2020, at 1.

463. *See* Concepción de León, Alexandra Alter, Elizabeth A. Harris & Joumana Khatib, *'A Conflicted Cultural Force': What It's Like to Be Black in Publishing*, N.Y. TIMES, https://www.nytimes.com/2020/07/01/books/book-publishing-black.html (last updated June 3, 2021) [https://perma.cc/YS6U-H5CE].

464. *See* James Sterngold, *A Racial Divide Widens on Network TV*, N.Y. TIMES (Dec. 29, 1998), https://www.nytimes.com/1998/12/29/us/a-racial-divide-widens-on-network-tv.html [https://perma.cc/9KSN-6ZFF] (reporting enormous racial disparities in popular television shows).

465. *See* Manohla Dargis & A.O. Scott, *Hollywood, Separate and Unequal*, N.Y. TIMES (Sept. 16, 2016), https://www.nytimes.com/2016/09/18/movies/hollywood-separate-and-unequal.html [https://perma.cc/23WP-GEM8].

466. *See* Jamal Michel, *Black Game Developers: Diversity Push Is Lots of Talk, Little Progress*, WASH. POST (Jan. 31, 2022, 3:05 PM), https://www.washingtonpost.com/video-games/2022/01/31/black-game-developers-diversity-push-is-lots-talk-little-progress/ [https://perma.cc/DLH8-7FMC]; Aja Romano, *What We Still Haven't Learned from Gamergate*, VOX, https://www.vox.com/culture/2020/1/20/20808875/gamergate-lessons-cultural-impact-changes-harassment-laws (Jan. 7, 2021, 10:43 AM) [https://perma.cc/7HVB-3JVH].

creators. In this part, I will outline what I think of as the most relevant policies to address creators' most pressing needs. They range from federal to state to municipal policies, and they span fields of law that lie adjacent to copyright and fields of law that are usually seen as unrelated to arts and entertainment law. Each policy responds to some of the normative goals for entertainment-industry policy described in Part V. I am not purporting to provide an exhaustive policy agenda here, and it is beyond the scope of this Article to offer detailed legislative language or guidance for implementation. Instead, the goal is to get the policy discussion unstuck from copyright reforms that won't really help creators. I think the policies discussed here would be of more use.

### *A. Social Safety Net*

I will start with an area of policy that could apply across industries but would benefit workers in the creative industries in particular: expanding and universalizing the social safety net, especially health insurance. Although many creators work as employees with benefits inside corporations, many do not.[467] For example, according to a study by the National Endowment for the Arts ("NEA"), 34% of artists were self-employed (compared to 9% of other workers).[468] The same NEA study found that some entertainment professions—like writers and directors—had health insurance coverage at higher rates than average, while other entertainment professions—like dancers—had much lower rates.[469] Musicians face particular healthcare challenges because they are more likely to hold multiple jobs and have multiple sources of income.[470] Actors are regularly unemployed for irregular stretches of time.[471] Because neither copyright aggregators nor technological intermediaries treat creators as employees entitled to benefits, health care must come from elsewhere.[472]

467. *See, e.g.*, Drew Harwell & Taylor Lorenz, *Millions Work as Content Creators. In Official Records, They Barely Exist.*, WASH. POST (Oct. 26, 2023, 6:00 AM), https://www.washingtonpost.com/technology/2023/10/26/creator-economy-influencers-youtubers-social-media/ [https://perma.cc/L5QA-KQVF] (describing the precarious situation facing the "[m]illions [who] have ditched traditional career paths to work as online creators").

468. NAT'L ENDOWMENT FOR THE ARTS, ARTISTS AND OTHER CULTURAL WORKERS: A STATISTICAL PORTRAIT 21 (2019), https://www.arts.gov/sites/default/files/Artists_and_Other_Cultural_Workers.pdf [https://perma.cc/7ZJ3-QHM9].

469. *Id.* at 19.

470. *Good News for Musicians' Healthcare*, FUTURE OF MUSIC COAL. (Dec. 14, 2022), https://www.futureofmusic.org/news/2022/12/22/good-news-for-musicians-healthcare [https://perma.cc/F7KM-SCZ4]; *see also* Thomson, *supra* note 4, at 517; DiCola, *supra* note 4, at 342.

471. Artist's Strategy, *What Do Actors Do in Between Jobs?*, STAGELYNC (June 4, 2024), https://stagelync.com/news/what-do-actors-do-in-between-jobs [https://perma.cc/HK5D-R9BY] ("The actor's business model, even for the highly successful, is to be constantly unemployed. You get a gig, the gig ends. You get another gig, that gig ends.").

472. *See* Harwell & Lorenz, *supra* note 467 (describing the precarious situation facing the "[m]illions [who] have ditched traditional career paths to work as online creators").

Some creators can obtain access to health care through a union,[473] or even through a non-profit organization.[474] But there are gaps; for instance, the American Federation of Musicians focuses on classical, orchestral jazz, and theater musicians, leaving out musicians in other genres like rock or hip-hop.[475] Self-employed and freelance workers can obtain health care, for instance under the Affordable Care Act, but accessibility and affordability present special challenges.[476] Decoupling health insurance from employment is a longstanding policy goal for progressives, liberals, and even some conservatives.[477] My point here is simply that such a shift, while obviously complicated, would benefit creators disproportionately. They could respond to their complex mix of employers and revenue sources without risking health outcomes and well-being.

Securing health insurance for all creators would support many policy goals described earlier in this article. It furthers the goal of providing incentives to create by removing an impediment for many.[478] It could support broader participation in arts and entertainment.[479] On the margin, it might even allow more risk-taking in creative endeavors. This would facilitate freer self-expression, an aspect of personality theories and free speech theories, by having less at stake in the remunerative aspect of participation in the arts.[480] It would also reduce the impact of structural inequality, a key aspect of anti-discrimination, by reducing the degree to which participation in creative endeavors depends on family wealth.[481]

473. *See* Jackie Fortier, *Hollywood Union Health Insurance Is Particularly Good. And It's Jeopardized by Strike*, NPR (Aug. 31, 2023, 11:58 AM), https://www.npr.org/sections/health-shots/2023/08/30/1196652142/hollywood-union-health-insurance-sag-aftra-wga [https://perma.cc/LS6Z-CFX9]. Relevant unions include the National Writers Union, the Writers Guild of America, SAG-AFTRA, the American Federation of Musicians, the Animators Guild. Anna Keizer, *Film Unions and Guilds: The Complete List*, WRAPBOOK (July 1, 2021), https://www.wrapbook.com/blog/film-unions [https://perma.cc/KB3X-ADWL]; *Writers' Organizations*, WRITERS WRITE, https://www.writerswrite.com/resources/org/ (last visited Sept. 17, 2024) [https://perma.cc/JYH7-4WRZ].

474. The Freelancers Union, which despite the name is not a union and cannot engage in collective bargaining, offers health insurance. *See* Linnea Gradin, *Should You Join Freelancers Union? Pros and Cons*, REEDSYBLOG (May 15, 2023), https://blog.reedsy.com/freelancer/freelancers-union/ [https://perma.cc/SPY4-HVPZ].

475. *See About AFM*, AM. FED'N MUSICIANS, https://www.afm.org/about/about-afm/ (last visited Feb. 25, 2024) [https://perma.cc/D92C-3MGJ].

476. *See* John Boitnott, *New Study: Health Care Is Freelancers' Biggest Concern*, ENTREPRENEUR (Nov. 6, 2018), https://www.entrepreneur.com/money-finance/new-study-health-care-is-freelancers-biggest-concern/322786 [https://perma.cc/E95H-ETWE].

477. *See* Aaron E. Carroll, *The Real Reason the U.S. Has Employer-Sponsored Health Insurance*, N.Y. TIMES (Sept. 5, 2017), https://www.nytimes.com/2017/09/05/upshot/the-real-reason-the-us-has-employer-sponsored-health-insurance.html [https://perma.cc/4SY7-K9J8] ("There are almost no economists I can think of who wouldn't favor decoupling insurance from employment.").

478. *See* Lingo & Tepper, *supra* note 1, at 339.

479. *See id.*

480. *See* Orian Brook, Dave O'Brien & Mark Taylor, *"There's No Way That You Get Paid to Do the Arts": Unpaid Labour Across the Cultural and Creative Life Course*, SOCIO. RSCH. ONLINE, Dec. 2020, at 571, 572.

481. *See id.*

### *B. Labor Law*

The previous Section about health care also touched on the important role of labor unions for many creators. The recent success of the simultaneous WGA and SAG-AFTRA strikes in the movie and television industries demonstrates the usefulness of organized labor in articulating and achieving creators' workplace needs.[482] Collective bargaining for creators also makes sense in light of the consolidation among copyright aggregators and technological intermediaries.[483] To bargain fairly over the economic surplus generated by creative works, creators need to consolidate in their own way.[484] Bargaining can also transpire over important issues beyond wages or royalty payments, such as workplace conditions and attribution.[485] All this is to say that creators' unions play a positive role for their members.

But, as the previous Section also mentioned, there are large gaps in union coverage in some of the entertainment industries.[486] Sectoral bargaining, in which workers within an industry bargain with multiple employers at once, possibly facilitated by a government agency, might address the difficulties that creators face as independent contractors or freelancers.[487] Although the policy is controversial,[488] even within the labor movement,[489] and would require legislation to occur at the federal level, sectoral bargaining is already possible at the state and local level.[490] But other, less ambitious labor policies could also help creators. Laws providing freelance worker protections might also address the gaps in union coverage.[491] Other potential policies include job-training programs with the specific aim of instructing creators about how to apply their creative skills in other jobs.[492] These policies would, of course, further the goals behind labor theories of copyright, but also might incentivize creativity and institute more protections against discrimination for creative workers.

482. *See* Natalie Jarvey & Joy Press, *Labor Pains and Gains: The Winners and Losers of the Hollywood Strikes*, VANITY FAIR (Nov. 16, 2023), https://www.vanityfair.com/hollywood/2023/10/writers-strike-winners-and-losers [https://perma.cc/T6H7-ZYUD].

483. *See* García, *supra* note 152, at 197.

484. *See id.* at 227.

485. *See* CATHERINE L. FISK, WRITING FOR HIRE: UNIONS, HOLLYWOOD, AND MADISON AVENUE 78–79 (2016) (describing the WGA-managed process for arbitrating screen credit).

486. *See supra* notes 473–476 and accompanying text.

487. *See* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 81–92 (2016) (discussing sectoral bargaining).

488. *See* Veena Dubal, *Sectoral Bargaining Reforms: Proceed with Caution*, NEW LAB. F., Winter 2022, at 11, 12–13.

489. *See* Andrias, *supra* note 487, at 70–76.

490. Dubal, *supra* note 488, at 13; David Madland, *Sectoral Bargaining Can Support High Union Membership*, CAP (May 30, 2024), https://www.americanprogress.org/article/sectoral-bargaining-can-support-high-union-membership/ [https://perma.cc/LC4R-XUNF].

491. *See* Freelance Worker Protection Act, 820 ILCS § 193 (2024).

492. Rinaily Bonifacio, *How Off-the-Job Training Enhances Employee Skills and Business Growth*, SHIFTBASE (Sept. 10, 2024), https://www.shiftbase.com/glossary/off-the-job-training [https://perma.cc/5X8N-DHLH]; *see also* Throsby & Zednick, *supra* note 3, at 10.

### *C. Anti-Concentration Law*

The root problem for creators is that the companies on both sides of the crucial negotiations—copyright aggregators and technological intermediaries—are so big. Copyright can't make them less big. Doctrines like fair use can be pro-competition,[493] but only if there's more than one fair user who can take advantage. Copyright's regulatory function can address the symptoms of concentration,[494] but it would be better to target the underlying disease. For example, government price-setting might in principle seem like a way to ensure greater compensation for creators, but in practice it ends up looking more like a drawn-out private negotiation.[495]

Perhaps the policies most directly responsive to the economic conditions described in Part II would be laws limiting economic concentration. This includes antitrust law most prominently, but can also include other laws and regulations that aim to promote competition, such as the Federal Communications Commission's historical limits on media ownership.[496] As I have argued in this Article, the real impediment to creators receiving a greater share of the rewards from their creative works and exercising more discretion over how their works are consumed is the concentration among both copyright aggregators and technological intermediaries.[497] Many creators deal with twin oligopolies.[498] This presents fundamental financial and artistic constraints.[499] Reducing those constraints would generally improve creators' situation by providing them with more leverage in negotiations.[500] It is worth mentioning that reducing concentration in the media and entertainment industries has long been a truly bipartisan goal.[501] Everyone but the large shareholders and managers of these companies would benefit from more competition, diversity, and localism in ownership of copyright catalogs and distribution technologies.[502]

Many specific anti-concentration policies are worth exploring, both for the sake of the entertainment industry in particular as well as in conjunction with economy-wide efforts. Breaking up large companies through antitrust enforcement is only one drastic possibility. More targeted efforts are possible. For instance, rules against acquiring smaller companies only to suppress their technology might have benefited creators who fear losing access to technologies and to

493. *See* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1518 (9th Cir. 1992) (holding that reverse engineering of a Sega video game to allow interoperability with a Sega console was fair use).

494. *See supra* text accompanying notes 56–57.

495. *See* DiCola & Touve, *supra* note 20, at 454.

496. These limits were severely weakened by the Telecommunications Act of 1996. *See supra* note 160.

497. *See supra* Part III.

498. *See* DICOLA & THOMSON, *supra* note 160, at 3–4.

499. *See id.* at 26, 36.

500. *See id.* at 18, 26–27.

501. *See* Press Release, Bipartisan Effort to Help Musicians and Artists Protect Their Creative Work, *supra* note 385.

502. *See* DICOLA & THOMSON, *supra* note 160, at 14.

sets of corporate policies that they were comfortable with.[503] Another possibility would be rules requiring more disclosure about the workings of conglomerate business models.[504] This might allow creators to better understand the various ways in which their works are facilitating copyright aggregators' and technological intermediaries' profits. Still another possibility would be federal standard-setting to promote interoperability across platforms.[505] Technological intermediaries often seek to lock consumers in by preventing features like playlists from being portable.[506] Such efforts might violate antitrust law in some situations, but it might be more proactive to identify what sorts of consumer and creator data must be portable across companies. [507]

More robust anti-concentration law would aim directly at achieving the normative goal of greater economic competition. But greater competition would have follow-on benefits for other normative goals, including free speech values and innovation. With fewer gatekeepers, it is possible that more unusual and dissenting creative voices could reach the public. And more diffuse industries of copyright aggregators and technological intermediaries might be more innovative.[508]

### *D. Creator Access to Consumer Data*

Another response to the rise of technological intermediaries, and in particular their business models based on collecting and owning data on consumers, would be to create a right of data access for creators. The large internet platforms, for example, collect data on consumers' experience of creative works among the many types of consumer data they harvest.[509] Part of the logic of the platforms' conglomerate business models and their forays into the entertainment industries is to exploit these unique vectors of information about buying habits.[510] Data is its own form of currency in the digitized, streaming-based landscape.[511] Technological intermediaries may already or someday view these data as more valuable

503. *See* Philip Sherburne, *Is Bandcamp as We Know It Over?*, PITCHFORK (Oct. 17. 2023), https://pitchfork.com/thepitch/is-bandcamp-as-we-know-it-over/ [https://perma.cc/6ZV9-YRXS].

504. *See, e.g.*, Arshia Farzamfar, Pouyan Foroughi, Hosein Hamisheh Bahar & Lilian Ng, *Illuminating the Murk: The Effect of Business Complexity on Voluntary Disclosure*, 87 J. CORP. FIN 1, 1, 3 (2024).

505. Lemley & Samuelson, *supra* note 414, at 2, 5, 45; Zander Arnao, *Why Social Media Needs Mandatory Interoperability*, TECH POLICY (Mar. 7, 2022), https://www.techpolicy.press/why-social-media-needs-mandatory-interoperability/ [https://perma.cc/6DWR-GDVA].

506. *See, e.g.*, Arnao, *supra* note 505.

507. *See* Negus, *supra* note 39, at 379.

508. Whether large companies or small ones are more innovative is a longstanding and unresolved debate in economics. *See generally* Kenneth J. Arrow, *Innovation in Large and Small Firms*, 2 J. ENTREPRENEURIAL FIN. 111 (1993).

509. Devansh, *Is Big Tech Using Data Laundering to Cheat Artists?*, MEDIUM (Nov. 14, 2022), https://medium.com/discourse/is-big-tech-using-data-laundering-to-cheat-artists-ccf1a8c87b91 [https://perma.cc/36TB-SP7Y]; *see* DiCola, *supra* note 15, at 10.

510. *See* DiCola, *supra* note 15, at 10, 21.

511. Negus, *supra* note 39, at 379; Max Freedman, *How Businesses Are Collecting Data (And What They're Doing with It)*, BUS. NEWS DAILY (Oct. 20, 2023), https://www.businessnewsdaily.com/10625-businesses-collecting-data.html [https://perma.cc/GJL9-WTAK].

than subscription or advertising revenue.[512] As such, perhaps creators should participate in the data economy based on observing and tracking how consumers experience their creative works.

A right to data access would supersede whatever ad hoc agreements exist currently for creators to access these data.[513] It might give creators an opportunity to learn about their customers and guide efforts to exploit related revenue sources.[514] For example, a musician with access to data about listenership by city might be able to plan a more efficient and lucrative touring schedule. To address privacy concerns, this proposed right to data access could be subject to flexible, state-of-the-art protections of consumers' identities. Allowing creators to share in the valuable currency of data would provide additional incentives for creation, constitute appropriate labor rewards, and possibly allow innovation as creators develop ways to take advantage of new information.

### *E. Arts Policy*

Many distinct policies and initiatives fall under the broad heading of arts policy, especially at the state and local levels. These include grants to creators; physical infrastructure like libraries, cultural centers, and concert venues; regulatory infrastructure like tax incentives or landlord-tenant laws that encourage use of space; and arts education.[515] Creators need places to train, places to interact with other creators, and places to perform their works. These activities that happen in physical space tend to call for state and especially municipal governments to act, given where the police power resides in our federal system. Although it is difficult to use policy to create an arts scene from scratch,[516] it is nonetheless essential for good policies to support working creators. This is especially true coming out of the COVID-19 pandemic, when so many theaters and concert venues suffered.[517] Moreover, it is an appropriate response in the wake of the shift toward technological intermediaries, which has in some cases harmed local business and reduced public revenue. Arts policy can support both private and public institutions to benefit creators and, ultimately, the general public.[518]

In my home state, Arts Alliance Illinois has developed a comprehensive agenda for the arts sector featuring these ideas and more.[519] This kind of broad

512. Negus, *supra* note 39, at 378; Freedman, *supra* note 511.

513. *See* Negus, *supra* note 39, at 378

514. *See id.* at 379.

515. Jean Johnstone & Michael O'Hare, *Art for Policy and Policy for Art*, 30 J. PUB, AFFS. EDUC. 256, 256 (2023).

516. *See* Paul Maliszewski, *Flexibility and Its Discontents*, 16 BAFFLER 69, 71 (2003) (critiquing the theories of economic geographer Richard Florida).

517. *Theaters and a Case of 'Long Covid'*, GREEN STREET, https://www.greenstreet.com/insights/blog/us-theater-covid-recoveries (last visited Jan. 19, 2025) [https://perma.cc/AAH2-FBCS].

518. *What Is Arts Policy?*, AMERICANS FOR THE ARTS, https://www.americansforthearts.org/by-program/reports-and-data/legislation-policy/what-is-arts-policy [https://perma.cc/57H2-4HK8]; *see generally* Johnstone & O'Hare, *supra* note 515.

519. Arts Alliance Illinois, *2023–2025 Agenda* (April 2023), https://artsalliance.org/advocacy/agenda/ [https://perma.cc/BK7A-MNLB].

perspective is exactly where I think it is more productive for the policy discussion to center itself than copyright law. A comprehensive arts policy will attend to many of the normative goals discussed in this Article, including incentives to create, allowing artists to actualize their personalities as creators, and free-speech value.[520] Arts policy can promote preservation and stewardship through physical infrastructure like performance venues, respect users' rights through support for libraries and arts education, and support anti-discrimination principles through the inclusiveness of the agenda-setting process.[521]

## VII. CONCLUSION

Creators have been told, and have told themselves, that copyright is the area of law *for them*. Industry lobbyists have long focused their rhetoric on copyright, both for its economic importance and its symbolic importance as confirmation of respect for art. I suspect that lawyers, policymakers, and scholars have promulgated this view as well. Copyright has been seen as the place to make policy for creators, whether that means stronger or weaker copyright. One of my goals in this Article has been to question and ultimately reject this singular focus. Copyright at some level of strength has ample normative support, and I am not suggesting that it is not important or that it should go away. But I am suspicious of any claim that strengthening copyright would help creators much at all. Copyright law already intervenes in economy and society to afford creators exclusive rights. And yet, based on the frequent discontent among creators, it does not seem to serve their interests all that well.

If my description of the economic and social power of the technological intermediaries in this Article is accurate, then—regardless of one's belief about how strong copyright law should be—the business, cultural, and technological environment limits the policy results that copyright can deliver. During the last fifteeen to twenty years or so, the limits of copyright's effectiveness have been a tighter constraint on policymakers. During that time, technological intermediaries have reaped a greater share of the economic surplus generated by the entertainment industries. The internet platforms *are* entertainment companies now and have been for a while. Copyright aggregators have always taken most of the profits from the copyright owners' side of the negotiation, leaving creators a small percentage royalty. Consumers have access to more creative works and in more ways than ever before. Meanwhile, creators are mostly just buffeted by the forces of concentration, conglomeration, and technological change. They have less control over the use of their creative works, especially if they seek to participate in the mainstream market and try to make a living as creators. Of all the

520. *See id.*; *supra* Part V.

521. World Conference on Culture & Arts Education, UNESCO Framework for Culture and Arts Education, U.N. Doc. CLT-ED/WCCAE2024/1 (Feb. 15, 2024); *see* United Nations Human Rights, UN Staff, Including Eight OHCHR Colleagues, Detained in Yemen, https://www.ohchr.org/en/special-procedures/sr-cultural-rights/artistic-freedom [https://perma.cc/A4SQ-CV79].

groups interested in the entertainment industries, creators are the group most in need of policy attention.

Creators' intensifying needs and their staggering diversity as a group both invite us to look at a wider set of normative goals that should guide policy toward the entertainment industries. Many of the goals have some tie to copyright law or to fundamental constitutional values. But ultimately they lead us to look beyond copyright law. Health care, labor law, anti-concentration law, data access rights, and state and local arts policy are the five areas where I have suggested we might start. I think these policies, especially considered in relation to one another and to existing copyright law, would further the interests of creators and society at large. Our collective regard, concern, and value for creators in all fields should implore us to look beyond copyright for a more comprehensive arts and entertainment policy.