CREATIVE LABOR AND PLATFORM CAPITALISM

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The conventional account of creativity and cultural production is one of passion, free expression, and self-fulfillment, a process whereby individuals can assert their autonomy and individuality in the world. This conventional account of creativity underlies prominent theories of First Amendment and intellectual property law, including the influential "semiotic democracy" literature, which posits that new digital technologies, by providing everyday individuals the tools to create and disseminate content, results in a better and more representative democracy. In this view, digital content creation is largely (1) done by amateurs; (2) done for free; and (3) conducive of greater freedom.

This Essay argues that the conventional story of creativity, honed in the early days of the Internet, fails to account for significant shifts in how creative work is extracted, monetized, and exploited in the new platform economy. Increasingly, digital creation is done neither by amateurs, nor is it done for free. Instead, and as this Essay discusses, fundamental shifts in the business models of the largest Internet platforms, led by YouTube, paved a path for the class of largely professionalized creators who increasingly rely on digital platforms to make a living today. In the new digital economy, monetization—in which users of digital platforms sell their content, and themselves, for a portion of the platform's advertising revenues—not free sharing, reigns. And far from promoting freedom, such increased reliance on large platforms brings creators closer to gig workers—the Uber drivers, DoorDash delivery workers, and millions of other part-time laborers who increasingly find themselves at the mercy of the opaque algorithms of the new platform capitalism.

This reframing—of creation not as self-realization but as work that is both precarious and exploited, most notably as surplus data value—has significant implications for intellectual property, First Amendment, and Internet law. For First Amendment theories, it demands conceiving of a compensation structure under which these democracy-enhancing acts of creation occur. For intellectual property and Internet law, this reframing demonstrates that creative works and user data are not as far apart as the two disparate strands of literature would suggest—and that an approach to regulating informational capitalism is incomplete without considering how creative work is extracted and datafied in the

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digital platform economy.

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INTRODUCTION

The conventional account of creativity and cultural production is one of passion, free expression, and self-fulfillment, a process whereby individuals can assert their autonomy—their individuality—in the world.[1] This conventional account of creativity underlies prominent theories of First Amendment and intellectual property law, the latter of which makes promoting that creativity its central animating goal.[2] In an influential line of scholarship developed at the dawn of the Internet, First Amendment and intellectual property theorists posited that the type of creative activity individuals engaged in on the Internet contributed to a vibrant "semiotic democracy," one in which anyone with access to a digital platform could take an active role in shaping culture, leading to a more participatory and representative democracy.[3] In this view, creative activity carried out online is largely (1) done by amateurs;[4] (2) done for free;[5] and (3) conducive of greater freedom.[6]

While much about the Internet—including cultural participation on the Internet—has changed in the intervening two decades, the conventional account of creativity, including digital creativity, has, stubbornly, stayed the same.[7] Creators continue to be viewed as somehow outside the system of

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[1] *See, e.g.*, Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1, 11 (2008); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1947 (2006); Rosemary Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 Tex. L. Rev. 1853, 1863 (1991).

[2] *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431, (1984); Warner Bros. Inc. v. Am. Broad. Cos., 720 F.2d 231, 240 (2d Cir. 1983).

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

[4] *See, e.g.*, LAWRENCE LESSIG, REMIX 254-260 (2008) [hereinafter LESSIG, REMIX] (on amateur creativity in the digital era).

[5] *See, e.g.*, Mark A. Lemley, *IP in A World Without Scarcity*, 90 N.Y.U. L. Rev. 460, 487 (2015); Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VANDERBILT J. OF ENT. AND TECH. LAW 921,924 (2008); Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1502 (2008).

[6] *See* Balkin, *supra* note 3, at 35.

[7] *See, e.g.*, Eric Priest, *An Entrepreneurship Theory of Copyright*, 36 BERKELEY TECH. L.J. 737, 743 (2021) (on artists "[c]hasing their passion"); Peter K. Yu, *Moral Rights*

capital accumulation and labor extraction, rather than within it. Online creation is described, variously, in the legal scholarship as "empowering,"[8] as "play,"[9] as labors of love,[10] not work. Meanwhile, semiotic democracy theories have taken on new life in contemporary debates surrounding artificial intelligence, as tools like ChatGPT and Midjourney might ostensibly allow Internet users more perfected and realistic modes of self expression, giving full realization to their creative visions.[11]

This Essay argues that the conventional story of creativity, honed and hewed in the early days of Internet creation, fails to account for significant—dramatic, even—shifts in how creative work is extracted, monetized, and exploited in the new platform economy. Increasingly, digital creation is done neither by amateurs, nor is it done for free. Instead, and as this Essay discusses, fundamental shifts in the business models of the largest Internet platforms, led by YouTube, paved a path for the class of largely professionalized creators who increasingly rely on digital platforms to make a living today. In this new creative economy, monetization—in which users of digital platforms vie for a portion of the platform's advertising revenues—not free sharing, reigns. And far from promoting freedom, such increased reliance on large platforms brings creators closer to gig workers—the Uber drivers, DoorDash delivery workers, and millions of other part-time laborers who increasingly find themselves at the mercy of the opaque algorithms of the new platform capitalism.[12]

2.0, 1 TEX. A&M L. REV. 873, 883 (2014); Oren Bracha, *Standing Copyright on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799, 1842-1866 (2007); Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 AM. U. J. GENDER SOC. POL'Y & L. 207, 231–32 (2007).

[8] Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 243 (1996).

[9] *See* Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 349 (2005) [hereinafter Cohen, *Place of the User*]; JOHN FISKE, TELEVISION CULTURE 232 (1987).

[10] The use of this turn of phrase, and its analogy to child-rearing, is used intentionally. Indeed, many have compared the creative process to the process of giving birth to a child. *See infra* Part III.B for a discussion of that literature.

[11] *See* Katrina Geddes, *How Art Became Posthuman: Copyright, AI, and Synthetic Media*, working paper at 42-44, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4865510; *see also* Benjamin L. W. Sobel, *Artificial Intelligence's Fair Use Crisis*, 41 COLUM. J.L. & ARTS 45, 86 (2017) ("Undergirding the familiar narrative of digital copyright is the gospel (or dogma) that digital media fosters participatory culture.").

[12] *See infra* Part II.B.

The shift described in this Essay merely makes salient what has always been true about creativity but which the conventional account has largely failed to theorize as such: that creative work is labor. Indeed, this Essay situates digital creators within a broader ecosystem of creators, such as television writers subject to dwindling compensation as a result of changes brought about by streaming, or the millions of creatives who exchange work for wages in the work for hire system. In doing so, I build a new framework for thinking about creativity as labor, and theorize why the conventional account has persisted despite long-standing real-world evidence to the contrary.

The implications of this reframing for intellectual property, First Amendment, and Internet law theory and policy are myriad. Most significantly, this reframing allows us to see that creative workers—Internet creators, Hollywood guild writers, comic book illustrators, studio musicians—are part and parcel of the new labor exploitation that Internet law scholars are increasingly referring to as "platform capitalism," that is, the use of digital processes "to extract substantial profit."[13] Locating creative workers within the emerging platform capitalism scholarship allows us to begin exploring the parallels between expressive works and raw consumer data, demanding new ways of conceiving of copyright laws to protect the ruthless extraction of copyrighted content *not for its* artistic value but, instead, in service of the platform capitalism enterprise.[14] Moreover, this reframing demands a rethinking of the semiotic democracy theories that have pervaded First Amendment and Internet law scholarship, which have argued forcefully for the democratic value in creative activity, while notably failing to address the economic framework under which these enormously important acts of creation occur—or whether such valuable creative acts should be compensated, at all. Indeed, as I argue herein, this reframing of semiotic democracy theory provides support for an argument that preserving steady, reliable creative jobs is critical to a true "semiotic democracy."

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[13] Philip Mirowski, *The Evolution of Platform Science*, 90(4) SOCIAL RESEARCH: INT'L Q. 725, 736 (2023); *see* K. Sabeel Rahman & Kathleen Thelen, *The Rise of the Platform Business Model and the Transformation of Twenty-First-Century Capitalism*, 47(2) POL. & SOC. 177, 181 (2019); Salomé Viljoen, Jake Goldenfein & Lee McGuigan, *Design Choices: Mechanism Design and Platform Capitalism*, BIG DATA & SOC'Y, July-Dec. 2021, at 1.

[14] *See Copyright as Data and the IP-Privacy Interface* (working paper on file with author) [hereinafter *Copyright as Data?*]; *see also* Kate Crawford, ATLAS OF AI 120-21 (Yale UP, 2021) (discussing the data extraction and training of copyrighted works together with the training of AI systems with user data).

This Essay takes up that work in four parts. Part I describes the conventional account of creativity, surveying its deep influence in prominent theories underlying First Amendment, intellectual property, and the emerging Internet law literature on artificial intelligence. Part II identifies what I'll call the missing pay gap—how existing theories emphasizing the importance of creative activity to democratic governance have also concomitantly assumed, without further interrogation, that these enormously important acts of cultural creation are done for free. In Part II, I argue that the existing theories are in need of an update, because the nature of creation on the Internet has changed, away from the free and amateur framework that first arose with the advent of the Internet towards monetized content and the professional Creator. Notably, I argue that the existing literature has lacked the appropriate language for grappling with the fact that increasingly large swaths of creation—not by large content firms, but by individuals broadcasting from their living rooms—are done not for free, but for pay. Creators on the Internet today monetize through ad share revenue; through Substack subscriptions; through TikTok creator payouts and content created directly for brands, leading to what I call in that Part a *professionalization* of content creation. Yet monetization has created a class of professional creators more reliant than ever on digital platforms, bringing them closer to other gig workers—DoorDash delivery workers, Uber and Lyft drivers—who find themselves increasingly at the mercy of opaque algorithms and the ruthless extraction of personal data in service of the new platform economy.

This shift in digital creation merely makes salient long-standing features of the creative ecosystem, which, far from a world in which autonomous and free *petit-bourgeoise* write novels or songs in a bohemian world largely divorced from the capitalist enterprise, is instead both no different from traditional labor markets and perhaps even more notable in its persistence of the "passion project" myth. Part III situates Internet creators within a broader class of creators, such as Hollywood guild members and comic book illustrators, all of whom exemplify and personify the very notion of *work*—of the exchange of labor for wages, of the handing over of all ownership in creative work, which has long been theorized as somehow indelibly linked to the author, in exchange for payment in kind. Part III then offers some tentative theories as to why, despite long-standing evidence to the contrary, the myth has persisted for so long, hypothesizing that the creative industries, that creative *capital*, *needs* the myth of the petit-bourgeoise creator to sustain and justify its very wage and work structure.

Finally, Part IV looks to the implications of this reframing for intellectual property, First Amendment, and Internet law theory, especially

in light of artificial intelligence's oncoming incursions into the domain of creative labor.

I. THE CONVENTIONAL ACCOUNT OF CREATIVITY

The conventional account of creativity and cultural production is one of passion, free expression, and self-fulfillment.[15] Creators—artists—have long been assumed to stand outside the system of capital accumulation that undergirds the rest of commodity production, rather than within it; as Henning Grosse Ruse-Khan and Zoe Adams put it, creative work is "[o]ften presented as an anti-thesis of capitalist work—as a form of social, or collaborative, work that allows for genuine self-expression and autonomy."[16] This conventional account permeates not only scholarly fields ranging from legal to media studies, but also basic lay conceptions of the creative and cultural industries.[17] This Part briefly explains the vast influence of the conventional account on the law, setting forth how it forms the basis of dueling and heated debates about the optimal way to structure intellectual property law, as well as how it gave rise to an influential body of First Amendment scholarship advocating for the importance of a "semiotic democracy."

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[15] For a brief sampling of that literature, *see supra* note 1; see also *infra* Subparts I.A & I.B.

[16] Zoe Adams & Henning Grosse Ruse-Khan, *Work and works on digital platforms in capitalism: conceptual and regulatory challenges for labour and copyright* law, 28 INT'L J. LAW & INF. TECH. 329, 330 (2020).

[17] Hence the popular view that writing and other creative jobs such as screenwriting, art-making, songwriting, or journalism as professions that only the privileged few—those who already possess a wealth of capital and thus can afford to create for free—can enjoy. *See, e.g.*, WHAT I'M HEARING, PUCK NEWS, https://puck.news/newsletter_content/what-im-hearing-galloway-vs-hollywood/ (last visited Oct. 24, 2024) (marketing professor Scott Galloway speaking out against Hollywood strikes by noting, "Too many people go into the vanity industries: 87 percent of the people in SAG-AFTRA didn't have health insurance last year because they didn't make more than $23,000. It is a vanity industry."). Thus we have the seemingly ever-expanding class of "nepo babies," in which screenwriters or musicians (among other illuminati) are revealed to have had wealthy and famous parents. *See* Nate Jones, *How a Nepo Baby Is Born*, VULTURE.COM (Dec. 19, 2022), https://www.vulture.com/article/what-is-a-nepotism-baby.html. On the other side of the ideological divide, conservatives highlight how "Hollywood…academia and the news media" are comprised of "cultural elites who supposedly cluster on the coasts and conspire to impose their values on an unsuspecting public." A.O. Scott, *Are the Movies Liberal?*, N.Y. TIMES (June 2, 2023), https://www.nytimes.com/2022/06/02/movies/liberal-hollywood-dog.html.

A. The Conventional Account and Intellectual Property's Incentives Theory

Copyright law makes incentivizing creative activity its central animating goal—that much is seldom disputed.[18] And while it *is* disputed whether more or less copyright can promote that end goal, the conventional account of creativity seems, curiously, to underlie both the more "maximalist" theories of copyright and the more "minimalist" ones.[19] Those who argue that greater copyright protections will ultimately promote creativity do so by emphasizing that human beings are "intrinsically motivated" to create.[20] Roberta Kwall, who has advanced perhaps the most well-known version of this argument, notes that "[t]he innate nature of the urge to create" can be seen in everything from "the cave drawings of prehistoric man" to the "artistic creations of deathrow inmates" to the scribblings of toddlers.[21] Kwall calls these, appropriately, "noneconomic motivations,"[22] reflecting the "spiritual or inspirational motivations that are inherent in the creative task itself."[23] Kwall's application of the conventional account (of creativity as passion project) leads to the conclusion that greater intellectual property protections than those currently available are necessary, such as through the enactment of an expanded moral right for copyrighted works.[24]

On the other hand, those who view the expansion of copyright law more critically also rely heavily on the conventional account. Since individuals create largely out of passion, the thinking goes, they will continue to do so, with or without the protections of copyright.[25] The rise of the Internet seemed to epitomize this point; as Mark Lemley described it in 2015:

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[18] *See* Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1151 (2007); Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1335 (2014).

[19] Copyright "maximalists" generally support the expansion of copyright protection, while copyright "minimalists" oppose it. *See* Abraham Drassinower, *A Note on Incentives, Rights, and the Public Domain in Copyright Law*, 86 NOTRE DAME L. REV. 1869, 1870 (2011).

[20] *See* Kwall, *supra* note 1, at 1958.

[21] *Id.* at 1950.

[22] *Id.* at 1948.

[23] *Id.* at 1947.

[24] *Id.* at 1949.

[25] *See* Priest, *supra* note 7, at 743; Lemley, *supra* note 5, at 464.

> Early on, scholars worried that no one would create content for the Internet because they couldn't see a way to get paid, but it is hard to think of a prediction in all of history that has been more dramatically wrong. People spend hundreds of millions—or even billions—of hours a year creating content online for no reason other than to share it with the world. They create and edit Wikipedia pages, post favorite recipes, create guides to TV shows and video games, review stores and restaurants, and post information on any subject you can imagine. If, as Doctor Johnson famously suggested, "[n]o man but a blockhead ever wrote except for money," we are a world of blockheads, gleefully creating and sharing all sorts of content with the world.[26]

But the conventional account of creativity as one of passion, free expression, and self-fulfillment does not *just* pervade the all-important question of how to set optimal levels of copyright protection.[27] In newer, more contemporary debates surrounding, for example, whether AI-generated works should be protected by copyright, scholars have also turned to the conventional account, noting, for example, that the act of creating is fundamentally about "the cultivation of selfhood and social relations"[28]—this is, according to some scholars, the "*entire point* of the practice."[29]

This notion—that to engage in creative acts is fundamentally to cultivate selfhood—is also paramount to a related, influential thread of scholarship developed by First Amendment scholars, as I now discuss below.

B. The Conventional Account and First Amendment's Semiotic Democracy Theories

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[26] *Id.* at 487.

[27] This essay does not take a position on whether more or less copyright is better policy—the point of this Part is to show why the conventional account of creativity has mattered, and mattered very much, for purposes of both sides of the legal debate, so that we can begin to understand why challenging that conventional notion may, likewise, matter as we begin thinking about calibrating copyright policies for the age of platform capitalism.

[28] Carys Craig & Ian Kerr, *The Death of the AI Author*, 52 OTTAWA L. REV. 31, 44 (2021).

[29] *Id.* at 44 (emphasis added).

First Amendment law has traditionally privileged political speech—what Jack Balkin calls the "republican" or "progressivist" approach.[30] This theory owes much to the philosopher and educator Alexander Meiklejohn, who believed that a robust press was foundational to democratic self-governance.[31] In this view, political speech is more valuable than other types of speech, at least for First Amendment purposes, because it most explicitly allows for public deliberation about public policy.[32] As Balkin notes, "the paradigm case that motivates the progressivist agenda" is the case of a "few speakers broadcasting to a largely inactive mass audience."[33]

But, with the rise of the Internet, that paradigm case changed. The core insight of the influential line of scholarship called semiotic democracy theory was to both shift the *nature* of speech—from one to many to one to one[34]—as well as to shift the *content* of speech, away from core political speech towards speech that "reflects popular tastes, popular culture, and popular enthusiasms."[35] Theorists adhering to this view were largely indebted to media scholar John Fiske's idea of a semiotic democracy, one in which the "author" role of large content creators becomes "delegated to, or at least shared with, its viewers."[36] Lawrence Lessig, in a well-known gloss on this idea, referred to a "read/write culture," as ordinary citizens "add to the culture they read by creating and re-creating the culture around them."[37] Likewise, Madhavi Sunder harnessed Fiske's semiotic democracy ideal in arguing for the right to "rip, mix, and burn,"[38] in which "disempowered individuals," through their acts of creation, seek visibility and recognition in spaces where they have been historically muted.[39]

Here, too, the conventional account of creation as meaning-making and freedom-inducing is harnessed, but in support of broader, democratic governance goals, one in in which "all persons would be able to participate in the process of meaning-making."[40] As William Fisher put it in an early

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[30] Balkin, *supra* note 3, at 29.
[31] *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).
[32] *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).
[33] Balkin, *supra* note 3, at 33.
[34] *Id.* at 38-41; *see also* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 276 (2006).
[35] Balkin, *supra* note 3, at 33.
[36] *See* FISKE, *supra* note 36, at 239.
[37] LESSIG, REMIX, *supra* note 4, at 29.
[38] Madhavi Sunder, *IP^3*, 59 STAN. L. REV. 257, 277 (2006).
[39] *Id.* at 264.
[40] William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1217 (1998).

articulation of semiotic democracy theory, "Instead of being merely passive consumers of cultural artifacts produced by others, [all persons] would be producers, helping to shape the world of ideas and symbols in which they live. Active engagement of this sort would help both to sustain several of the features of the good life—e.g., meaningful work and self-determination."[41] And far from receding from relevance, semiotic democracy literature has taken on new life in contemporary debates surrounding artificial intelligence, as some point to how new image generation tools "provide amateur creators with unprecedented tools for creative expression," since users no longer need to be "proficient in Photoshop or other digital tools" to give full realization to their creative visions.[42]

It is important to emphasize here that the democratic culture model is not predicated *upon* the made-for-free nature of creation.[43] But, nor should it be surprising that talk of wages is *absent* from such discussions emphasizing the value of the act of creation to the democratic project. After all, the core change on the ground that semiotic democracy theories were responding to was the rise in digital creation in the early days of the Internet, before the (perhaps inevitable) commercialization and professionalization of digital content creation.[44] But this essay argues that, just as First Amendment scholars had previously argued that "the paradigm case that

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[41] *Id.*

[42] Geddes, *supra* note 11, at 32-33.

[43] Balkin describes the central features of the shift from the republican or progressivist approach to a democratic culture model as rooted in three facets, none of which center around payment: (1) a shift from political speech to other types of artistic, nonpolitical speech; (2) valuing "lowly" speech just as much as highbrow speech; and (3) a shift away from a few institutional speakers to many individual speakers. Balkin, *supra* note 3, at 38-41.

[44] Balkin gives the "standard example" that motivates his described paradigm shift towards semiotic democracy values in *The Phantom Edit*, which was an unauthorized remix of *Star Wars* that, per the creator, was never intended to reach a large audience, and which was made with no expectation of profit. *See id.* at 8-9 ("The *Phantom Edit* exemplifies what the digital age makes possible."); Richard Fausset, *A Phantom Menace?*, L.A. TIMES (June 1, 2002), https://www.latimes.com/archives/la-xpm-2002-jun-01-et-fausset1-story.html ("Nichols [the creator of *The Phantom Edit*] says his version of [Star Wars]' *Menace* was never supposed to get beyond his circle of movie industry friends, and he has never made a cent on it."). *See also* LESSIG, REMIX, *supra* note 4, at 225-226 (differentiating explicitly between the "commercial economy," for which creators would "associate[] with the traditional representatives" such as a large record label, and a "sharing economy," with "[t]ools such as the Creative Commons 'Noncommercial' license [that] enable[s] an artist to say 'take and share my work freely.").

motivates the progressivist agenda—the case of few speakers broadcasting to a largely inactive mass audience—no longer describes the world we live in," the paradigm case that motivates the semiotic democracy theories, that of free sharing, likewise cannot describe the world we live in today.[45] The following Part fills in what I call the missing pay gap in the democratic culture model, and argues that an updated conception of the economics of cultural creation is required in the new digital landscape of monetized content.

II. THE CONVENTIONAL ACCOUNT'S MISSING WAGE GAP

> "Networked technologies do not resolve the contradictions between art and commerce, but rather make commercialism less visible and more pervasive." – Astra Taylor[46]

As noted above, the conventional account of creativity on the Internet envisions digital creation as one of "play."[47] In invoking the word "play," the conventional account suggests that even as Internet users become creators, those acts of creation are necessarily liminal, provisional, and, most importantly, activities of leisurely pursuit.[48] Larry Lessig, in his manifesto on digital creation on the Internet, explicitly demarcated the line between what he called the digital "sharing economy," in which creators make content available online for free, and the traditional "commercial economy" comprised of analog record labels and film and television studios.[49] And perhaps this may have been true, at the dawn of the Internet, at the time that these foundational models of creation as democratic participation were formed. But one need only look around at the digital world we live in today to put the lie to the idea that most online creation is done for free. Creators are not creators, but Creators: professions with a capital C. "Monetization" is the buzz word that anyone who makes content

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[45] Balkin, *supra* note 3, at 33.

[46] ASTRA TAYLOR, THE PEOPLE'S PLATFORM (2016) (challenging the narrative that the rise of the Internet will democratize cultural production and distribution, predicting instead that the so-called decentralized modes of digital production will trend towards consolidation and commercialism).

[47] FISKE, *supra* note 36, at 232.

[48] *See, e.g.*, *id.* at 232-23241; Cohen, *Place of the User*, *supra* note 9, at 349 (2005).

[49] LESSIG, REMIX, *supra* note 4, at 225-226. Note that Lessig acknowledges that a creator might "cross over" from the sharing economy into the commercial economy. *See id.* at 227. But he nonetheless envisions that the artist who posts something online does so for free, and with no restrictions on its use. *See id.* at 227-229.

for the Internet understands as the terminology du jour.[50] The Creator monetizes through ad share revenue;[51] through Substack subscriptions;[52] through TikTok flat-fee payments[53] and content created directly for brands.[54]

This Part begins with the descriptive account of how creativity on the Internet became *work* for so many, before situating that creative work within the broader developing theoretical framework referred to as platform or informational capitalism.

A. The Professionalization of Content Creation

How did we shift from the radical free culture Internet that the democratic culture model has largely assumed to a creation-as-commodity world? To understand that buzz word du jour, "monetization," one must understand the history and business trajectory of one of the largest Internet platforms for creator content, YouTube.

1. The Invention of Monetization

Founded in February 2005 by three former Paypal employees, YouTube's initial format was simple: users could upload, and/or view, video clips for free.[55] Its famous motto, an almost uncanny embodiment of the Internet's blurring between creator and viewer, was, simply, "Broadcast yourself."[56] In fact, YouTube's sudden ascent seemed to bring to life the very semiotic democracy that Fiske had written about in 1987, that world where "[t]he author role is delegated to, or at least shared with, its viewers."[57] Indeed, an early press review praised YouTube as the "next-generation Internet where people contribute as easily as they consume."[58] But notwithstanding its meteoric ascent—by the spring of 2006, the site was

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[50] *See infra* Subpart II.B.1.
[51] *See id.*
[52] *See* Kyle Chayka, *What the "Creator Economy" Promises—and What It Actually Does*, NEW YORKER (July 17, 2021), https://www.newyorker.com/culture/infinite-scroll/what-the-creator-economy-promises-and-what-it-actually-does.
[53] *See id.*
[54] *See* John Seabrook, *So You Want To Be a TikTok Star*, NEW YORKER (Dec. 5, 2022), https://www.newyorker.com/magazine/2022/12/12/so-you-want-to-be-a-tiktok-star.
[55] Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 28 (2d Cir. 2012).
[56] *Id.*
[57] FISKE, *supra* note 36, at 239; *see also* Part I.B.
[58] *See* MARK BERGEN, LIKE, COMMENT, SUBSCRIBE: INSIDE YOUTUBE'S CHAOTIC RISE TO WORLD DOMINATION 49 (2022) 50 (2022).

bringing in forty million video views a day, and growing[59]—it was also losing money at a precipitous rate, to the tune of $1 million a month (in 2006 dollars).[60] But that did not stop Google from proceeding to acquire the cash-negative company in November of 2006.[61]

Chroniclers of YouTube's growth from its early, scrappy days to the behemoth it is today like to point out that the founders had initially opposed paying YouTube's creators, quoting Chad Hurley, one of its founders, as saying: "We didn't want to build a system that was motivated by monetary reward."[62] Here, one can see the ethos of the early Internet—radically free and open, at play.[63] But, now that YouTube was owned by Google, the latter tasked its own employee—someone who had formerly worked on developing Google's own video service—with making YouTube profitable.[64] That employee, George Strompolos, decided to test a new advertising system with a few of Google's most popular amateur creators (with names like "loneleygirl15 and "sxephil"), which, as Mark Bergen describes in his detailed history of YouTube's rise, was proposed as "a simple ad split…[f]or every dollar of advertising that ran with the videos, Google would take forty-five cents and give the balance to the YouTuber."[65] And thus the concept of "monetization" was born.[66]

As cultural reporter Taylor Lorenz writes, it was YouTube that first came up with the term "creators" in 2011,[67] several years after Hurley, one of its co-founders, first confirmed the nascent monetization model at a conference.[68] Since that time, an entire so-called "creator economy" has emerged, with the term defined by most as those who earn income through online influence, presence, and content creation.[69] While the term would seem to be almost ancient by Internet standards, it is important to note here that interest in Creators (and here I'll use the capital C, to differentiate it from other ways that the term may be used in the scholarship, but more on

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[59] *Id.*
[60] *Id.* at 52.
[61] *See id.* at 53-58.
[62] *Id.* at 69.
[63] *See infra* Section II.B.2.
[64] *Id.* at 71.
[65] *Id.* at 71-72.
[66] *Id.* at 72.
[67] Taylor Lorenz, *The Real Difference Between Creators and Influencers*, THE ATLANTIC (May 31, 2019), https://www.theatlantic.com/technology/archive/2019/05/how-creators-became-influencers/590725/.
[68] BERGEN, *supra* note 58, at 72.
[69] Chayka, *supra* note 52.

that later[70]) has never been greater. As *The New Yorker* reports, in the first half of 2021 alone, investors have poured $1.3 billion into the so-called Creator economy—"nearly three times the funding it received in all of 2020."[71] In fact, the early half of the pandemic—March 2020—is cited by some to be a "key inflection point" for the Creator economy, perhaps owing to job losses in other shuttered industries.[72]

A decade after YouTube first developed the concept of "monetization" as sharing advertising revenue with creators, other forms of making money from content creation has developed. Some Creators are paid outright in flat fees—a model followed by platforms like TikTok and Snapchat.[73] Other Creators receive income directly from fans—what some platforms have taken to calling "direct monetization"—in the form of subscription fees (see: Patreon, Substack), tips, or crowdfunding.[74] But however the digital Creator is paid, one thing is clear: the digital Creator of today *is* paid. Digital content creation, which in the early days of the Internet was largely (though implicitly) assumed to be done for free, has been monetized.

2. From Rightsholder Antagonism to Rightsholder Synergy

As the previous Part had noted, it is not that the democratic theories of cultural participation were *dependent* upon the made-for-free nature of creation.[75] Perhaps, as discussed above, it is just that the democratic culture model, itself an update of the older, outdated progressive model, was simply a product of the early days of Internet creation in which most, if not all, of content was created for free, both the radicality and the simple unsustainability of it reflected in YouTube's precariously red balance sheets at the time that Google acquired it.[76] Yet another reason might be that the democratic participation model had been advanced largely (though not solely) as a rebuke to another type of economic power: that wielded by intellectual property owners, who increasingly used expanding intellectual property rights as a means of tamping down on follow-on speech by

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[70] *Infra* Subpart II.B.2.
[71] Chayka, *supra* note 52.
[72] *Id.*
[73] *See id.*
[74] *Id.*
[75] *See supra* note 43 and accompanying text.
[76] *See supra* note 60 and accompanying text.

others.[77] It is no accident that the way in which theories of democratic participation appeared in the case law was through First Amendment defenses to claims made by intellectual property owners for infringement.[78] The right to monetize copyright and its closely-adjacent rights, such as the right of publicity, were viewed as fundamentally in tension with Fiske's semiotic democracy, as a censorious encroachment on the right of others to speak.[79]

But this, too, is changing, and for reasons that relate back to the monetization story told in the previous section.[80] In this vein, a further, important detail to YouTube's trajectory must be added. Recall that YouTube had pioneered the process of splitting advertising revenue with creators, thus giving birth to the now well-known digital platform term "monetization."[81] But, in order to engage in such ad revenue sharing in the first place, YouTube had to actually, well, run advertisements against its user-generated content. While advertisements on YouTube today seem as commonplace and inevitable as advertisements on your local broadcast television station, YouTube's founders had, in fact, initially resisted inserting advertisements into its videos.[82] It was only upon YouTube's acquisition by Google—for whom, of course, ads were its "bailiwick"—that Google began pushing the digital video platform to generate revenue through ad placement.[83] This decision by YouTube's new owner did not just change the economic fortunes of YouTube, from a loss leader to a revenue generator[84]—but it also deeply altered the legal trajectory of the company, and its formerly antagonistic relationship with copyright holders.

As other scholars have documented, YouTube in its early days was not just a wellspring of amateur video-making—it was also a fount of

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[77] *See, e.g.*, Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 142 (1993); LESSIG, REMIX, *supra* note 4, at 108.

[78] *See, e.g.*, Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 397, 21 P.3d 797, 803 (2001); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 972-73 (10th Cir. 1996); ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915, 935 (6th Cir. 2003); Mattel, Inc. v. MCA Recs., Inc., 296 F.3d 894, 900 (9th Cir. 2002).

[79] *See, e.g.*, David Lange, *Reimagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 475-83 (2003); Madow, *supra* note 77, at 145-46.

[80] *Supra* Section II.A.1.

[81] *See id.*

[82] *See* BERGEN, *supra* note 58, at 70.

[83] *Id.*

[84] For the history of YouTube's path to profitability, see *id.* at 108 – 125.

copyright infringement.[85] As plaintiffs in a sprawling copyright litigation against the company alleged just a few years after the service was launched, tens of thousands of clips on the website—a wide margin, at the time the case had been filed—were infringing.[86] YouTube, however, had previously attempted to rely on copyright law's safe harbor defense, which shields digital platforms from the infringing activities of its users so long as it satisfies certain statutory conditions, including that the platform not have "direct knowledge" of the infringement, and that it not receive a "financial benefit" attributable to the infringement.[87] Thus, until and unless YouTube could figure out a way to legally stream copyrighted content on its site, the amount of revenue it could generate from placing ads in those videos would be severely limited. As Bergen, YouTube's chronicler, puts it, YouTube had been "nervous about running ads widely for fear of copyright missteps….By 2009 less than 5 percent of videos were eligible for ads."[88]

The desire to run more ads against content led YouTube to enter into licensing negotiations with large content companies, including record labels and music publishers whose music was often uploaded to the site without their authorization.[89] Certainly, and as has been discussed elsewhere, this decision effected a legal change for YouTube, away from reliance on the statutory law, and towards a regime in which user-generated content would be governed by private law contracting.[90] But this change also did something else—it created a world in which copyright law no longer created seemed to *restrict* user speech, at least for users on the largest digital platforms like YouTube, Instagram, Facebook, and TikTok, all of which now have licensing agreements in place with large copyright holders like Warner, Universal, and Sony.[91] Through such licensing agreements,

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[85] *See* Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 518-519 (2017).
[86] Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 29 (2d Cir. 2012).
[87] 17 U.S.C. § 512(c)(1)(A).
[88] BERGEN, *supra* note 58, at 108.
[89] For a history of how YouTube moved from reliance on the statutory safe harbors to a licensing model, see Sag, *supra* note 85.
[90] *See, e.g.*, Sag, *supra* note 85; Xiyin Tang, *Privatizing Copyright*, 121 MICH. L. REV. 753 (2023). I acknowledge, of course, that many smaller digital platforms still rely on the notice-and-takedown system. *See* Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown in Everyday Practice*, *in* UC BERKELEY, PUBLIC LAW AND LEGAL THEORY RESEARCH PAPER SERIES 1, 98-110 (2017).
[91] *See* Tang, *supra* note 90, at 759-776. I say "seemed to" because, as that Article discusses, the digital platform's licensing agreements impose their own set of restrictions on user speech—but, unlike with the statutory copyright law, these

YouTube, TikTok, or Instagram Creators now have the ability to pair their videos with their favorite artists' songs without fear of the video being taken down[92]—a sea change from the old notice-and-takedown regime in which users' videos were constantly subject to removal upon complaint by copyright owners.[93]

This sea change, I argue, creates a *synergistic*, rather than the old antagonistic, relationship between user-creators and copyright owners. In the old, pre-licensing regime, users who wished to utilize others' copyrighted content in connection with their own had to rely on arguments like fair use in order to do so,[94] which is a defense to copyright infringement that has been widely criticized for its unpredictability and preference in favor of copyright owners, not users.[95] As a result, most user videos that incorporated others' copyrighted works were removed, unless and until the user submits a so-called "counter-notification" (which could argue, for example, that the user believes its video makes "fair use" of the copyrighted work).[96] Thus the pre-licensing, safe harbor regime pitted users and rightsholders against each other through the adversarial copyright notice and counter-notice system, with the end result that users often felt chafed by the restrictions copyright law created.[97]

However, in the new licensing system, the digital platforms' agreements with large rightsholders explicitly provide users with the ability to incorporate copyrighted content into their videos.[98] Large platforms pay

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restrictions are made opaque to the user, owing to the agreements' confidentiality provisions.

[92] *See id.*

[93] Emblematic of the old regime is the case *Lenz v. Universal Music Corp*., 815 F.3d 1145, 1148 (9th Cir. 2016), which not only involved an individual user suing the record label over the right to use one of its songs, but in which it was also revealed that the labels used to employ assistants in the legal department whose jobs largely consisted of "monitor[ing] YouTube on a daily basis" for purposes of sending takedown notices. *Id.* at 1149.

[94] *See, e.g.*, *id.* at 1150.

[95] *See, e.g.*, Ned Snow, *Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*, 44 U.C. DAVIS L. REV. 483, 497 (2010). Larry Lessig had famously referred to fair use as nothing more than "the right to hire a lawyer," by which he meant that the price of proving that one's use constitutes a "fair" one in court may prove to be prohibitively high in most cases involving individual user defendants as against large, well-resourced plaintiffs. LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 12 (2004) [hereinafter LESSIG, FREE CULTURE].

[96] *See Lenz* at 1149.

[97] *See supra* note 93.

[98] *See* Tang, *supra* note 90, at 765-769.

rightsholders handsomely for the right of its users to do so, either through a flat fee or through a revenue share model.[99] But all of this is, largely, invisible to the user-creator.[100] Instead, all that the user-creator sees is unlocked potential, a world in which others' copyrighted works are ripe for commingling with their own creative labor: an amateur creator can open up TikTok, find another's copyrighted song, and create their own dance to it.[101] If the dance is good, and the video goes viral, both parties benefit: the original artist benefits, through increased streams of their song, and the TikTok or YouTube user benefits, by being cemented as a Creator—a Creator who might then themselves turn to copyright to protect their original dance moves.[102] As *New Yorker* reporter John Seabrook put it, "with the rise of platforms like…TikTok, the century-old consumption-based model of royalty payments has been replaced by a collaborative model, in which rights holders and online creators are partners in the chancy enterprise of virality."[103] (What Seabrook *doesn't* mention, of course, is what this Section has detailed: that the platforms' decision to enter into licensing agreements with rightsholders is what proved decisive to the fall of the old antagonistic relationship and gave rise to the new synergistic relationship.)

B. Creative Labor and Platform Capitalism

The professionalization of creative work detailed in the previous subpart presents certain tantalizing promises for the new creative class. Whereas previously, aspiring creatives were reliant on catching the attention of a record label executive or the illusive book deal, today, anyone with access to a digital platform can become a Creator, with access to the millions of users that a TikTok, an Instagram, or a YouTube promises. Internet law scholars have largely celebrated this sea change as vastly democratizing and empowering, lauding how everyday creators could bypass traditional intermediaries like large record labels or book publishers yet still find a large audience—and, concomitantly, acclaim and fame.[104]

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[99] *See id.*
[100] *See* Tang, *supra* note 90, at 800-801.
[101] *See* John Seabrook, *So You Want To Be a TikTok Star*, NEW YORKER, Dec. 5, 2022, https://www.newyorker.com/magazine/2022/12/12/so-you-want-to-be-a-tiktok-star.
[102] *See infra* Part IV.A (on the lawsuits filed by TikTok creators, seeking copyright protection over their dance moves).
[103] Seabrook, *supra* note 101.
[104] *See* Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 551 (2010).

But in lieu of the traditional intermediaries—large record labels, traditional book publishers, a traditional movie studio—new ones have sprung up in its place. Creators today find themselves ever-more reliant on just a handful of large digital platforms—TikTok, Instagram, and YouTube—in which their very livelihoods depend on a web of mercurial and opaque algorithms and hidden rules.[105] For example, recent attempts to unionize YouTube creators in Europe and elsewhere have surfaced countless instances of demonetization, in which YouTube decides, in its sole discretion, that a creator's content is no longer eligible to share in YouTube's advertising revenue—based upon violations of unpublished rules that creators themselves do not have access to and thus could not possibly follow.[106] Reporting on YouTuber unionization efforts highlight how once a bot—or the "10,000 or so" human reviewers of those bots—determines that a YouTuber has broken one of these hidden rules, the subsequent notification of demonetization makes "no mention of the rule broken, no time code for the violation," and, "if you care to appeal, no opportunity to explain why your video was within bounds."[107] YouTubers refer to the system as a "black box," echoing the phrase that labor advocates and scholars have used to describe the "algorithmic wage setting and labor controls" of other gig economy platforms like Uber.[108] What demonetization amounts to, ultimately, is "creators being paid less for doing more work."[109]

In this way, YouTube, TikTok, and Instagram function much like other platform-based business models like Uber, Lyft, or Doordash, epitomizing the defining characteristics—and the concomitant exploitation—of what a small but growing body of literature calls informational or platform capitalism.[110] K. Sabeel Rahman and Kathleen Thelen outline three key hallmarks of the new platform capitalism, which can be summed up as (1) a non-traditional employment structure; (2) platform dominance; and (3) data extraction. First, "platform firms such as Uber…avoid[] standard employment contracts (and associated social contributions) in favor of indirect employment and 'atypical' work

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[105] *See* Emma Grey Ellis, *YouTubers Must Unionize, No Matter What Google Says*, WIRED.COM (Oct. 24, 2019), https://www.wired.com/story/youtube-union/.
[106] *See id.*
[107] Ellis, *supra* note 105.
[108] *See* Veena Dubal, *On Algorithmic Wage Discrimination*, 123 COLUM. L. REV. 1929, 1979 (2023) [hereinafter Dubal, *Algorithmic Discrimination*].
[109] Ellis, *supra* note 105.
[110] *See* Mirowski, *supra* note 13, at 736; Rahman & Thelen, *supra* note 13, at 181.

arrangements."[111] Second, platform firms rely on network effects, whereby the "central goal is to secure a level of market dominance and concentration"[112] such that it enjoys "tremendous first-mover advantages over would-be challengers."[113] And perhaps most importantly, platform capitalism is premised upon data—the ability of the platform to extract enormous amounts of value from the personal information, social interactions, and, most saliently in the creative works context, the content willingly provided by its millions of users.[114]

First, and paradoxically, it is the very notion that creators need no longer *rely* on a traditional publisher for employment—and thus can strike out on their own—that gave birth to the new creative precarity, in which workers give up their content, and their personal data, to large platforms who do not provide any of the traditional markers of employment security.[115] Instead, digital creative workers are "precarious workers, relying on the whims of corporations for their livelihoods."[116] As the reporter Kyle Chayka, who has spent much of his career reporting on digital creator culture, writes: "Much like an Uber driver…the creator is responsible for her own marketing, health care, and tax contributions. She makes money for the platform that hosts her without receiving the legal and financial protections of employee status, or the stock options typically given to the platform's engineers, designers, and managers."[117] Creators, in other words, are members of the growing class of what social scientists call the *precariat*, or, as labor law scholar Veena Dubal explains it, "a class of workers whose relationship to employment is precarious or risky because it

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[111] *Id.*; Mirowski, *supra* note 13, at 730-31.
[112] *Id.* at 730; Rahman & Thelen, *supra* note 13, at 181.
[113] *Id.* at 184.
[114] Rahman & Thelen, *supra* note 13, at 181; Mirowski, *supra* note 13, at 730; *see also* SHOSHANNA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE FRONTIER OF POWER 15 (2019).
[115] *See* Nicole S. Cohen, *Cultural Works as a Site of Struggle: Freelancers and Exploitation*, 10 TRIPLEC: COMMUNICATION, CAPITALISM & CRITIQUE 141 (2012) [hereinafter Cohen, *Cultural Works*]; *see also* LIZ PELLY, MOOD MACHINE: THE RISE OF SPOTIFY AND THE COSTS OF THE PERFECT PLAYLIST 165 (2025) (describing studio musicians and types of digital creators as gig workers, noting that "the image of the free-agent musicians who loves what they do, and trade job security for passion projects, is often deployed to soften the image of so-called gig work and its egregious labor model").
[116] *Supra* Section II.A.2.
[117] Chayka, *supra* note 52.

lacks stability and the benefits of regulation."[118]

Second, the move from a statutory safe harbor to licensing model described in the previous section created tremendous network effects for YouTube, Meta, and TikTok, which together dominate the creator economy through its ability to command the attention economy.[119] With regard to TikTok, as creators argued in briefing opposing a ban of the app in the United States, other digital platforms have tried—but failed—to recreate TikTok's "secret sauce".[120] "It thus comes as no surprise," they write, "that [creators] have been far more successful sharing their ideas and views on TikTok than anywhere else. Despite efforts to grow their presence on other platforms, all of [the petitioner-creators] have far fewer followers on those other [social media] apps."[121] With regard to YouTube and Meta, both companies' decision to shift from a notice-and-takedown strategy to a licensing strategy *is* what enabled platforms to monetize content through ad revenue and share that revenue with creators, leading to the professionalized class of digital creators we have today.[122] Yet few upstarts today have the financial means to engage in the type of multibillion licensing transactions—and digitally identifying that content through in-house, proprietary content management tools like Content ID or Rights Manager—that these three dominant platforms have.[123] Indeed, scholars have long noted that regulatory attempts to move away from the statutory safe harbor towards a content identification and licensing model would serve only to entrench the largest digital platforms while disadvantaging

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[118] Veena Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L .REV. 65, 67 (2017) [hereinafter Dubal, *Wage Slave/Entrepreneur*]; *see* Cohen, *Cultural Works*, *supra* note 115, at 152.

[119] *See* Kirsten Eddy, *6 Facts About Americans and TikTok*, PEW RSCH. CTR., https://www.pewresearch.org/short-reads/2024/04/03/6-facts-about-americans-and-tiktok/ (Apr. 3, 2024) (62% of U.S. adults say they use TikTok); Jeffrey Gottfried, *Americans' Social Media Use*, PEW RSCH. CTR., https://www.pewresearch.org/internet/2024/01/31/americans-social-media-use/ (Jan. 31, 2024); *see also* Sobel, *supra* note 11, at 87.

[120] Opening Brief for Creator Petitioners at 23, TikTok Inc. and ByteDance Ltd. v. Merrick B. Garland, Case No. 24-11340 (June 20, 2024).

[121] *Id.*

[122] *See supra* Section II.A.2.

[123] Content ID is YouTube's proprietary content management system, which it built as part of its decision to enter into licenses with large content holders. *See* Tang, *supra* note 90, at 765-766. Rights Manager is Meta's proprietary content management system, which it likewise built as part of its decision to enter into licenses with large content holders. *See id.* at 766-769.

smaller challengers.[124]

Finally, every piece of content that a creator uploads onto a digital platform provides value to the platform far beyond its expressive function, operating instead as critical data points in the training of the company's generative artificial intelligence ("AI") models.[125] Thus are users urged to share more, to "like" more, to post more, in turn providing countless bits of data for digital platforms under the guise that with each like, post, or meme, we become better, more fully realized, versions of ourselves.[126] And thus it should not be surprising that millions of users willingly hand platforms royalty-free licenses to all their content as part of the terms of conditions of signing up for the service.[127] In case there were any doubt over whether and how these millions of pieces of freely shared content were going to be commercialized, the recent flash points over the training of generative AI models using that user content merely makes public the private, behind-the-scenes way in which platforms harness that user content for profit.[128]

III. THE PERSISTENCE OF THE CONVENTIONAL ACCOUNT

The shift towards monetization just described above merely makes salient a trend across creative industries that has only intensified in the past decade: the shift away from traditional employee-employer structures

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[124] *See* Letter to Antonio Tajani MEP, President of the European Parliament (June 12, 2018), https://www.eff.org/files/2018/06/13/article13letter.pdf [https://perma.cc/ES8Z-AL29], at 1 (letter signed by a number of leading academics, noting that requiring Internet platforms to employ content identification tools will most heavily affect smaller startups, while large Internet platforms can afford the cost of compliance).

[125] *See* META, PRIVACY MATTERS: META'S GENERATIVE AI FEATURES, Sept. 27, 2023, https://about.fb.com/news/2023/09/privacy-matters-metas-generative-ai-features/.

[126] Recall that creative activity as self-realization was the very *crux* of the semiotic democracy arguments. *See supra* Part I.B. *See also* ZUBOFF, *supra* note 114, at 457-460.

[127] *See, e.g.*, TERMS OF USE, INSTAGRAM, https://help.instagram.com/581066165581870/ (last visited Oct. 22, 2024); TERMS OF SERVICE, FACEBOOK, https://www.facebook.com/terms.php?_rdr (last visited Oct. 22, 2024); TERMS OF SERVICE, TIKTOK, https://www.tiktok.com/legal/page/us/terms-of-service/en (last visited Oct. 22, 2024).

[128] *See supra* note 125. Notably, the data extraction performed by digital platforms may, in some cases, be fed back to the Creator in the hopes of extracting creative output that the platform deems more profitable for its service. *See* PELLY, *supra* note 115, at 78-80 (describing Spotify's "How to Read Your Data" videos for artists, which "subtly nudg[ed] musicians in directions more profitable for Spotify").

towards more precarious forms of employment (what some cultural theorists have called the "casualization" of creative work[129]).[130] This Part begins by surveying changes across the creative industry, from the move towards freelance in journalism and illustration to streaming business models that have resulted in a newly-precarious writer class. This Part then theorizes that creative workers have been willing to accept greater precarity in part because of the persistent myth of the autonomous artist: of someone who stands above and apart from the system of labor exploitation that is characteristic of the typical capitalist work framework in which bosses extract surplus value from workers. In this telling, creative workers are autonomous artists, who form indelible, inextricable bonds with their works—unlike in the typical capitalist work arrangement in which the worker exchanges labor for wages. However, as this Part discusses, this romanticized conventional account of creativity is rebuked by a long-standing feature of the U.S. creative ecosystem: which is that the majority of creative works are registered as works for hire—a system whereby authors agree to sever any artistic link between themselves and their creative output in exchange for payment.

Why, then, despite all evidence to the contrary, does the myth of the autonomous, *bourgeoise* artist persist? This Part concludes with some thoughts on why capital—and, in particular, the new platform capitalism—requires the sustained prevalence of the conventional account in order to sustain its very enterprise and empire.

A. The Casualization of Creative Work

Paradoxically, a factor that might fuel the prevailing view that creation is an activity for the privileged few is that there has never been much money to be made from creating for a living.[131] The Authors Guild, a trade organization that represents working writers, found in its 2023 study of U.S. writers that the median annual income for full-time authors is just

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[129] Cohen, *Cultural Works*, *supra* note 115, at 148; Andrew Beck, *Introduction*, *in* CULTURAL WORK: UNDERSTANDING THE CULTURAL INDUSTRIES 6 (Andrew Beck ed. 2003).

[130] Note that this is distinct from other scholarship that has focused more generally on exploitation of artists in the creative industries, including through the use of onerous contracts. *See, e.g.*, K.J. Greene, *Intellectual Property Expansion: The Good, the Bad, and the Right of Publicity*, 11 CHAP. L. REV. 521, 534 (2008).

[131] *See supra* note 17 and accompanying text.

$20,000[132]—far below the $90,000 per year threshold for middle-class incomes.[133] Likewise, another qualitative study conducted of 200 freelance writers in Canada found that the average pre-tax income was $24,000—and that freelance writing was the main job for 71 percent of the writers surveyed.[134]

That the majority of writers surveyed described their work as freelance is indicative of a greater trend towards casualization of creative work.[135] Numerous studies have documented how, over the course of the past two decades, the "cultural industries have moved from production based on full-time, steady employment to more precarious forms: part-time, temporary, casual, contract, and freelance."[136] New platform businesses like Upwork connect freelance illustrators and writers with employers, not unlike other platform economy companies such as Handy, TaskRabbit, or DoorDash.[137] As Rahman and Thelen put it, platform-based businesses like Upwork "represent a new way to create and capture value," by "extract[ing] and harness[ing] immense amounts of data in ways that allow them to

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[132] Authors Guild, *Top Takeaways from the 2023 Author Income Survey* (2023), https://authorsguild.org/news/key-takeaways-from-2023-author-income-survey (last accessed Oct. 29, 2024).

[133] *See* Rakesh Kochhar & Stella Sechopoulos, *How the American middle class has changed in the past five decades*, PEW RESEARCH CENTER, https://www.pewresearch.org/short-reads/2022/04/20/how-the-american-middle-class-has-changed-in-the-past-five-decades/.

[134] Cohen, *Cultural Works*, *supra* note 115, at 147.

[135] *See supra* note 129 and accompanying text.

[136] Cohen, *Cultural Works*, *supra* note 115, at 148 (citing Graham Murdock, *Back To Work: Cultural Labor in Altered Times*, *in* CULTURAL WORK: UNDERSTANDING THE CULTURAL INDUSTRIES (Andrew Beck ed. 2003); Gerd Nies & Roberto Pedersini, *Freelance Journalists in the European Media Industry*, European Federation of Journalists (2003); Emma Walters et al., *The Changing Nature of Work: A Global Survey and Case Study of Atypical Work in the Media Industry*, *available at* https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_dialogue/%40sector/documents/publication/wcms_161547.pdf (2006); Chris Smith & Alan McKinlay, *Creative Labour: Content, Contract and Control*, *in* CREATIVE LABOUR: WORKING IN THE CREATIVE INDUSTRIES (Alan McKinlay & Chris Smith eds. 2009)).

[137] *See* Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 480 (2016). Note that I, like other scholars, use the term "employer" to describe the buyer of labor—Upwork—even as the platform itself would likely resist such a description. *See* Xiang Hui et al., The Short-Term Effects of Generative Artificial Intelligence on Employment: Evidence from an Online Labor Market, New York University Stern School of Business Research Paper Series, 5 (2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4527336; *see also* Rogers at 480.

operate as critical intermediaries and market makers."[138] Just as labor law scholars have described how the increasing casualization of other types of work have led to a precarious system in which workers find themselves dependent on digital platforms and opaque algorithms for their livelihoods—even as those very same platforms gather valuable data for the express purpose of *replacing* those very human workers—so, too, have creatives relying on platforms like Upwork found highly variable reductions in pay and work.[139] This trend is likely to accelerate even further in the coming years, as generative AI reshapes the market for creative labor.[140] Indeed, one recently-released study focusing on the effects of generative AI on the creative labor market found that freelancers on Upwork "experienced a decrease of 2% in the number of monthly jobs and a decrease of 5.2% in monthly earnings on the platform, following the release of ChatGPT, "an economically meaningful and statistically significant…reduction in employment on the platform."[141]

In her path-breaking 2019 work on the new platform capitalism economy, Julie Cohen had already warned that "[a]s the movement to informational capitalism gains in velocity, creative work is also in the process of being reconfigured for optimal human capital extraction."[142] While Cohen was focused on issues such as work for hire arrangements[143]—a subject the next subpart discusses—less scholarly attention has been paid to how other changes in technology have also contributed to the casualization of creative work. Yet the issue was front and center during the writer's guild strikes of 2023,[144] which focused not just on the threat of AI, but also on how other technological shifts within

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[138] Rahman and Thelen, *supra* note 13, at 178.

[139] *See* Xiang Hui et al., *supra* note 137, at 2-3 (noting that the introduction of ChatGPT in November 2022 resulted in a 2% decrease in the number of monthly jobs available on Upwork and a decrease of 5.2% in monthly earnings on the same platform).

[140] Dreamworks cofounder Jeff Katzenberg has predicted that in several years, animation companies can reduce their workforce of artists by over 90%. Bloomberg Television, *Jeff Katzenberg Says AI Will Cut Cost of Animated Films by 90%*, YOUTUBE (Nov. 8, 2023), https://youtu.be/fkJlwjKdxnI.

[141] Xiang Hui et al., *supra* note 137, at 3.

[142] JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 32 (2019) [hereinafter COHEN, TRUTH AND POWER].

[143] *Id.* at 32.

[144] See WGA Negotiating Comm., *WGA on Strike*, WGA CONTRACT 2023 (May 1, 2023), https://www.wgacontract2023.org/announcements/wga-on-strike [https://perma.cc/L4Z7-7ZXV].

the creative industry has increased instability and precarity for writers.[145]

First, the rise of streaming has led to a rise in so-called writers' "mini rooms."[146] Under the old broadcast model, studios used to employ seven or eight writers to develop an entire 22-episode season—providing a predictable, steady span of employment for writers.[147] But as streaming companies like Netflix changed the way that television shows were made, gutting the old twenty-two episode broadcast model into a maximum of ten episodes per season, both new streaming companies and older, more traditional studios began to innovate around the costly broadcast model into newer, leaner, and more precarious models.[148] A "mini room" might consist of far fewer writers—often just two or three—or else only two or three weeks of employment, or both.[149] This means that the number of writers being employed in the industry are reduced overall—and that, even if employed, the amount of time writers are employed for is week-to-week, with newer writers willing to take mini room gigs that pay either "scale" (meaning the minimum rates set by the writers' guild's collective bargaining agreement[150]) or, worse yet, no pay at all.[151] In the studios' telling,

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[145] See *also Food Insecurity Survey Results*, HUMANITAS, https://www.humanitasprize.org/food-insecurity-survey-results (2023) (finding food insecurity is a prevalent issue amongst screenwriters and creates related mental health challenges); Elsa Vivant, *Creatives in the City: Urban Contrads. of the Creative City*, 4 CITY CULTURE AND SOC'Y 57 (Jun. 2013); Roberta Comunian, Alessandra Faggian & Sarah Jewell, *Winning and Losing in the Creative Indus.: An Analysis of Creative Grads.' Career Opp'ys Across Creative Discips.,* 20 CULTURAL TRENDS 291, 305 (Nov. 2, 2011); Jon Healey, *Striking Hollywood Writers Start Looking for New Gigs. Here are Some Ideas,* L.A. TIMES (May 2, 2023), https://www.latimes.com/entertainment-arts/business/story/2023-05-02/writers-strike-ideas-for-new-temporary-gigs (television writers deal with decreasing reliable work opportunities).

[146] *See* Joe Otterson, *Mini Rooms Drive Major Controversy as Creative Community Feels Strain of TV's Vast Expansion*, VARIETY.COM (Sept. 14, 2021, 11:00 AM).

[147] *See* Joy Press, *How Peak TV Created the Mini*-Room, VANITY FAIR (2018), *available at* https://archive.vanityfair.com/article/2018/8/how-peak-tv-created-the-miniroom.

[148] *See* Otterson, *supra* note 146.

[149] *See* Press, *supra* note 147.

[150] *See* SCHEDULE OF MINIMUMS, WRITERS GUILD OF AM. 2023 THEATRICAL AND TELEVISION BASIC AGREEMENT, https://www.wga.org/uploadedFiles/contracts/2023_Schedule_of_Minimums.pdf [hereinafter WGA MINIMUM BARGAINING AGREEMENT RATES].

[151] Jennifer Maas, Joe Otterson & Michael Schneider, *One of the Writers Guild's Biggest Contract Negotiation Issues Is the "Mini Room" Boom*, VARIETY.COM (Mar.

employing just a few writers for just a few weeks at a time allows them to "test" ideas, rather than commit to employing writers for an entire 22-episode season.[152] But to its critics, the rise in popularity of mini rooms is just one of several changes in content production that "threatens to turn a profession that was reasonably stable and lucrative into yet another poorly paid spoke of the gig economy."[153]

Second, the rise of streaming has changed the way that royalties—called "residuals" by the entertainment unions—are paid to writers.[154] Residuals are paid every time a work that a writer is credited on is re-aired, which encompasses "everything from cable and syndicated reruns of old television episodes to airlines licensing movies for in-flight viewing."[155] Historically, residuals were considered "one of the biggest buffers against…volatility," in which a writer can expect to receive a decent-sized check every month every time her work is rerun on broadcast or cable television.[156] Moreover, residuals under the traditional broadcast and cable model are paid out on a per-rerun basis.[157] However, streaming companies pay residuals at far lower rates, and they do so only after the first 26 weeks that a television show has been made available on the streaming platform.[158]

Labor scholars have consistently shown that one of the advantages

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29, 2023, 1:01 PM); Anne Branigin & Samantha Chery, *Writing for TV Is Nothing Like You (Probably) Thought,* THE WASH. POST (May 29, 2023), https://www.washingtonpost.com/arts-entertainment/2023/05/29/writers-strike-myth-facts/.

[152] See Press, *supra* note 147.

[153] Press, *supra* note 147; *see also* Maas et al., *supra* note 151; Alissa Wilkinson, *Hollywood's writers are on strike. Here's why that matters.*, VOX.COM (Jul. 13, 2023, 1:16 PM), https://www.vox.com/culture/23696617/writers-strike-wga-2023-explained-residuals-streaming-ai.

[154] *See* Zack Stentz, *The Hollywood Writers' Strike Isn't About Money. It's About Survival*, N.Y. TIMES (Apr. 30, 2023), https://www.nytimes.com/2023/04/30/opinion/hollywood-writers-guild-strike.html.

[155] *Id.* Note that residuals are distinct from the salary that writers would be paid for their time spent in the writers' room, actually developing and working on the show. *Cf.* WGA MINIMUM BARGAINING AGREEMENT RATES, *supra* note 150, at 29-33 (residual payment schedule); *id.* at 6-8 (salary payment schedule).

[156] Stentz, *supra* note 154.

[157] *See, e.g.*, WGA MINIMUM BARGAINING AGREEMENT RATES, *supra* note 150, at 29 (residual payment for the first rerun of a show on the broadcast networks ABC, CBS, FBC, and NBC for an hour-long show set at $24,558 for writers credited on both story and teleplay, with a percentage of that for subsequent runs).

[158] *See id.* at 35-36 (hour-long show with a budget of $3.8 million or more on a platform like Netflix, Hulu, or Amazon Prime is $18,115 for an entire year spanning May 2024 to May 2025, and then $18,749 for the year following).

that "gig economy" platforms like Task Rabbit and Uber tout when faced with critiques of this precarity is flexibility—that the very unpredictability of the enterprise turns each and every worker into their own entrepreneur, fraught with all the same risks that a boss, not a mere employee, would take on.[159] In content creation, however, that seeming entrepreneurial status is complicated by a unique doctrine called work for hire, in which even freelancers agree to transfer ownership of their creative work to entities that refuse to assume employer status.

B. The Conventional Account and the Myth of the Autonomous Artist

Just as gig workers are encouraged by gig economy platforms to think of themselves as entrepreneurs—and thus to accept the economic risks that come with running one's own business in exchange for the greater autonomy it supposedly provides[160]—the precarity that attends creative work, too, has traditionally been justified by encouraging creators to think of themselves as artists in charge of their own destiny, free from the system of capital and its attendant labor exploitation.

Nowhere is this more evident than in the personhood justification for intellectual property rights, which posits that creators infuse parts of their being into their work, and thus the end work product becomes almost like an extension of the creator—becoming nothing less than her "spiritual child."[161] If the Marxian analysis of wage labor posits that capitalism alienates the work product from the worker, the creator as espoused by personhood theorists simply cannot be engaged in "work."[162] Indeed, in the personhood rhetoric, artistic pursuits are "bourgeois,"[163] "[W]estern,"[164] the lone artist "defining and pursuing truth beyond oneself."[165]

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[159] *See* Rogers, *supra* note 137, at 480; Dubal, *Wage Slave/Entrepreneur, supra* note 118, at 102.
[160] *See id.*
[161] Mira T. SUNDARA RAJAN, MORAL RIGHTS: PRINCIPLES, PRACTICE AND NEW TECHNOLOGY 9 (2011). *See also* Kwall, *supra* note 1, at 2012 n. 34; *see generally* Amy M. Adler, *Against Moral Rights,* 97 CAL. L. REV. 263, 269 (2009) (summing up and critiquing the paternalist strain in moral rights scholarship).
[162] *See* Cohen, *Cultural Works*, *supra* note 115, at 142.
[163] John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1043 (1976).
[164] *Id.*
[165] Kwall uses this language in describing the relationship between an artist and her work, which she describes as "spiritual." Kwall, *supra* note 1, at 1948 & 1948 n. 8

Yet scholars applying economic justifications for intellectual property, too, rely on the myth of the autonomous artist. Like the rhetoric applied to other gig workers, authors are encouraged to think of themselves as "speculators akin to entrepreneurs."[166] As Eric Priest puts it, "Chasing their passion, authors routinely sink large amounts of time (often months or years), effort, and capital into works they know are commercially risky."[167] Thus the grant of copyright protection over creative products are necessary because authors rely on those rights "in lieu of dependable salaries or wages."[168]

But the work for hire doctrine, in which authors willingly sign away any and all copyright and authorship claims in their work to a corporate entity, complicates these theories.[169] A "work made for hire" is a legal fiction, because, notwithstanding the fact that a human author may have spent precisely those "months or years," effort, and capital,[170] into the work, the law—including the copyright registration that accompanies the work—recognizes only a corporation, not any individual, as the author.[171] The existence of the doctrine for creative works is even more peculiar when one considers that inventions, which are governed by patent law, must designate an individual inventor (or inventors) on the patent application, even if that invention is ultimately assigned to a corporate entity.[172]

It should not be surprising, then, that works made for hire figure very little under these justificatory frameworks.[173] For personhood theorists in particular, the doctrine presents a (self-admittedly) "difficult problem."[174] But the footnote treatment of work for hire in the personhood scholarship obscures the dominance of the category in practice, or the

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(citing Lucia Ann Silecchia, *Integrating Spiritual Perspectives with the Law School Experience: An Essay and an Invitation*, 37 SAN DIEGO L. REV. 167, 179 (2000)).

[166] Priest, *supra* note 7, at 737.

[167] *Id.* at 744.

[168] *Id.* at 737.

[169] *See* U.S. COPYRIGHT OFFICE, CIRCULAR 30, *available at* https://www.copyright.gov/circs/circ30.pdf, at 1 [hereinafter U.S. COPYRIGHT OFFICE CIRCULAR].

[170] *See supra* note 167 and accompanying text.

[171] *See supra* note 169.

[172] *Cf.* 35 U.S.C. § 100(f) (defining the "inventor" of a patented invention as either an individual or multiple individuals, in the case of a joint invention); 17 U.S.C. § 201(b) (defining "the employer" as the author of a copyrighted work "[i]n the case of . . . work[s] made for hire").

[173] Kwall, in her field-defining work on moral rights and personhood theory, considers work for hire in a footnote. Kwall, *supra* note 1, at 2012 n. 352.

[174] *Id.*

pervasive reach of the category in the creative industries.[175] Nor, contrary to some non-personhood, economic analyses of the doctrine, is work for hire's inexorable reach limited to traditional employee-employment relationships.[176] On the contrary, litigation that has been generated on this issue show that contractual provisions transferring ownership of the creative work from the creator to the corporation is boilerplate, present in standard form agreements between freelance creators and the large intermediary publishers that dominate the entertainment landscape.[177]

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[175] While the Copyright Office does not release information on the percentage of copyrighted works registered as works for hire, one can get a sense of the number of corporate-owned as opposed to author-owned works by looking to corollary statistics for patented inventions. For example, in the year 2020, over ninety percent of patents issued went to corporations. 2020 USPTO PAT. TECH. MONITORING TEAM REP.: TOP ORGS. pt. A1, at tbl.A1-1b, tbl.A1-1a, https://www.uspto.gov/web/offices/ac/ido/oeip/taf/topo_20.htm#PartA1_1b [https://perma.cc/GD8F-BMBL]; *see also* U.S. PAT. & TRADEMARK OFF., ALL TECHNOLOGIES REPORT: JANUARY 1, 1991 – DECEMBER 31, 2015 A2– 1, https://www.uspto.gov/web/offices/ac/ido/oeip/taf/all_tech.pdf [https://perma.cc/7B33-WE8J] (2014) (demonstrating a similar trend in earlier time period).

[176] *See* Priest, *supra* note 7, at 817 ("By working for a company in the creative industries rather than 'superintend[ing] the creation of [their] own creative program,' such employees have traded the risks and higher upside of potential [copyright] income for the relative dependability but limited upside of a salary or wage."). The Copyright Office is explicit that corporations can deem works as "work for hire," absent any employment-employee relationship, through contractual fiat. *See* U.S. COPYRIGHT OFFICE CIRCULAR, *supra* note 169, at 1 (noting that a work made for hire can be "created as a result of an express written agreement").

[177] *See, e.g.*, Gary Friedrich Enterprises, LLC v. Marvel Characters, Inc., 716 F.3d 302, 309 (2d Cir. 2013) (noting that the publisher of Marvel comics required the plaintiff "and all of its other freelance artists to sign a form work-for-hire agreement," in which the freelancer "expressly grants to MARVEL forever all rights of any kind and nature in and to the Work"); Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 143 (2d Cir. 2013) (noting that Marvel had asked one of its freelancers who was paid per assignment to sign a work for hire agreement, and holding, in any event, that freelancer's work constituted a work for hire even in the absence of an agreement, under a doctrinal analysis of the instance and expense test that courts developed to determine whether a work constitutes work for hire). Nor do such cases explicitly turn on which party—the freelancer or the corporation—took on more risk. *See id.* ("In the final analysis, then, the record suggests that both parties took on risks with respect to the works' success—[the freelancer] that he might occasionally not be paid for the labor and materials for certain pages, and [the corporation] that the pages it did pay for might not result in a successful comic book."). Note that, even in the absence of contractual language, courts have found works to be works for hire even where the

That millions of creators sign away ownership and authorship in their works in exchange for a paycheck embodies the very alienation of the work from the worker that Marxian theory has posited is the hallmark of wage labor.[178] Further, the pervasiveness of work for hire suggests that the very precarity highlighted in the previous subpart—of working writers and freelance journalists—cannot be justified by reference to the same entrepreneurial rhetoric that has been used to discount worker concerns about such precarity in the gig economy space. Why, then, despite all evidence to the contrary, does the myth of the autonomous, *bourgeoise* artist persist? This Part concludes with some thoughts on why capital—and, in particular, the new platform capitalism—requires the sustained prevalence of the conventional account in order to sustain its very enterprise and empire.

C. Platform Capitalism Depends on the Persistence of the Conventional Account

While the above detailed "work" in the more conventional sense—in which a creator is paid wages, whether as an employee or as a freelancer—other forms of "work" on the Internet are less obviously demarcated as such. As the historian and philosopher Philip Mirowski points out, a hallmark of platform capitalism is in the offering of a "nominally 'free' service[] to all comers, only to get them to engage in subsequent commercial activities on the platform" and to "provide free labor."[179]

How, one might ask, could a platform possibly expect one to engage in *free* work? Here is where the persistence of the conventional account proves handy. Recall that the conventional account of creativity tells us that creative production will set us free.[180] Indeed, one can see this playing out to literal extremes in creator content today, with the production of an entirely new genre of "trauma culture," in which private suffering is publicized, platformed, monetized, and, in turn, seemingly transformed into

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artist worked autonomously, on their own schedule and in their own studios. *See* Playboy Enterprises, Inc. v. Dumas, 53 F.3d 549, 555-56 (2d Cir. 1995) (holding that illustrations were works for hire even where artist "provided his own tools, worked his own hours, hired his own assistants, and paid his own taxes and benefits").

[178] *See* Cohen, *Cultural Works*, *supra* note 115, at 141-42.

[179] Mirowski, *supra* note 13, at 730.

[180] *See supra* Part I.A.

cathartic, healing release.[181] By perpetuating the notion that engaging in creative production benefits the *user* rather than the platform, platform capitalism perfects the capitalist work framework. As Henning Grosse Ruse-Khan and Zoe Adams conceptualize it, the capitalist work framework is an ongoing attempt by the capitalist to increase the ratio of unpaid to paid labor time, extracting more labor from the worker "than is represented in the wage."[182] Ruse-Khan and Adams aptly point out that capitalist work relations need not be found solely in the traditional employee-employer relationship; for a "'self-employed' freelancer, for example, unpaid labour is extracted not by intensifying the work process and extending the working day through centralized management, as with traditional employees, but through the payment of piece-wages, paying per word, per article, per song or per minute of film," and, "as is the case on digital platforms, per hits, clicks, or view time."[183]

Of course, the culture industry has always relied on the passion project myth to extract more work than is reflected in wages paid.[184] Indeed, if the entire promise of the type of gig economy industries labor law scholars have focused on[185]—Uber, TaskRabbit, Postmates—was to emphasize how nonconventional employment structures can free one up to "engage in creative pursuits and nonmarket production,"[186] then the digital creators discussed in the previous Part would seem to be the *ur* nonmarket participant, the leisurely bohemian in that utopian ideal of a "world without work."[187]

> The perpetuation of the notion that creative work is reserved for the leisure class therefore works a two-fold seeming magic: it both depresses the amount paid for creative labor (recall that the majority of unionized creative workers in Hollywood make below minimum

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[181] *See* Catherine Liu, *The Problem With Trauma Culture*, NOEMA (Feb. 16, 2023), https://www.noemamag.com/the-problem-with-trauma-culture/ ("Now, in the 21st century, the trauma narrative has been instrumentalized to commodify mental health as a realm of experience that can be shared and processed collectively online.").
[182] Adams & Ruse-Khan, *supra* note 16, at 333.
[183] *Id.* at 334.
[184] *See* Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 545 (2009).
[185] *See, e.g.*, Rogers, *supra* note 137, at 480; Niels van Doorn, *At What Price? Labour Politics and Calculative Power Struggles in On-Demand Food Delivery*, 14 WORK ORG. LAB. & GLOBALISATION, no. 1, 2020 (on Deliveroo workers); Dubal, *Algorithmic Discrimination*, supra note 108 (on Uber drivers).
136, 138.
[186] COHEN, TRUTH AND POWER, *supra* note 142, at 32.
[187] *Id.*

wage[188]) through the notion that creative work *was never about wages*, and it reduces any political will to increase those wages by painting the creative class as ruling elites rather than workers.[189] And for the rise of the *precariat* on digital platforms,[190] it is by seamlessly blending the line between work and play, between labor and love, between, to borrow Dubal's terminology, the "wage slave" and the "entrepreneur," that platform capitalism perfects its extraction of surplus labor.[191]

IV. CREATIVITY AS LABOR: IMPLICATIONS

What does it mean to destroy the myth of the autonomous, bourgeoise artist once and for all? It might mean, for example, that calls for greater collective bargaining rights among creators are taken more seriously.[192] It would cast a new, and vastly different, light on the constant exhortations to "broadcast yourself," on the notion that it is by expressing ourselves on the Internet that we become more free, to share and share more on the very same platforms that have *relied* on the intrinsic urge to create to generate untold surplus value.[193] It would, as the previous Part has already suggested, force those who advocate for a personhood-based conception of intellectual property to rethink how the theory might be retooled in a world in which most distributed creative works are created pursuant to a work for hire model of corporate ownership, in which a conglomerate, not an artistic individual, is the one attached to the work.[194] In this final Part, I consider the implications of putting digital creative activity, which had previously been extolled as meaning-making and autonomy-inducing, in conversation with more critical discussions in the platform capitalism space—and why it matters both for democratic governance as it does for fresh debates on how intellectual property law should respond to artificial intelligence.

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[188] *See supra* note 132 and accompanying text.
[189] Years ago, Rebecca Tushnet likened the compensation structure for creative work—and the exploitation of what she called "psychic benefits from producing"—to other areas that have been the subject of Marxist critique, such as childrearing. Tushnet, *supra* note 184, at 545. Compare this with Silvia Federici's work, which, since the 1970s, has demanded payment for domestic labor in a critique of the capitalist structure that enables the exploitation of women's work in the home. *See* Silvia Federici, *Patriarchy of the Wage: Notes of Marx, Gender, and Feminism* (2021).
[190] *See supra* note 118 and accompanying text.
[191] Dubal, *Wage Slave/Entrepreneur, supra* note 118.
[192] *See infra* Subpart IV.A.
[193] "Broadcast yourself" was the early slogan of YouTube. *See supra* note 94.
[194] *Supra* Subpart III.B.

A. For the Semiotic Democracy

As discussed above, YouTube's profound shift from its early days of amateur video-making to its contemporary embodiment as Creator culture is important, because it symbolizes the potentially outdated nature of the old user/rightsholder or infringer/rightsholder divide that has so permeated the First Amendment, internet law, and intellectual property literature.[195] That is, the previous literature largely assumed that copyright owners were one distinct group—those who would invoke their exclusive rights to prevent copying and distribution—and Internet user-creators, another.[196] The previous literature not only assumed that these two distinct groups were fundamentally at odds with one another[197]—but also that the user-creator would, presumably, want as much content on the Internet to be free and open-access as possible, and, concomitantly, would oppose proprietary rights (such as copyright or rights of publicity) in their works.[198]

The past decade has seen some distinct fissures in this story. High-profile lawsuits filed by prominent TikTok creators against the video game company Epic, for example, alleged that Epic violated the creators' copyrights and rights of publicity.[199] Other TikTok creators, meanwhile, proactively sought copyright protection for choreography that had been incorporated into their viral videos.[200] Many of these creators, in turn, pointed out that narratives celebrating the free and unfettered propagation—copying—of content, systematically disadvantaged creators of color.[201] As the art curator and writer Legacy Russell, in a new work that looks critically at the copying of black imagery through meme culture, writes: "What the Black meme shows us as it unfolds is that being seen and consumed does

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[195] *See* Cohen, *supra* note 48, at 348; LAWRENCE LESSIG, FREE Culture, *supra* note 95, at 184-188; Balkin, *supra* note 3, at 48; Madow, *supra* note 77, at 173 n. 231.

[196] For a classic articulation of the problem, see Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y U.S.A. 1 (1997).

[197] *See id.*

[198] *See, e.g.*, Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 568 (2000); Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 Wm. & Mary L. Rev. 951, 1025-26 (2004).

[199] *See* Complaint, *Ferguson v. Epic Games, Inc.,* 2:18-cv-10110 (C.D. Cal. Dec. 17, 2018); Complaint, *Redd v. Epic Games, Inc.,* 2:18-cv-10444 (C.D. Cal. Dec. 17, 2018).

[200] *See* Ali Johnson, Comment, *Copyrighting Tiktok Dances: Choreography in the Internet Age*, 96 WASH. L. REV. 1225, 1236 (2021).

[201] *See id.*; LEGACY RUSSELL, BLACK MEME: A HISTORY OF THE IMAGES THAT MAKE US 93-94 (2024).

not correlate with being compensated."[202] Russell concludes her exhaustive history of the memeification of black culture with a demand that countless copyright holders have made before: "*Give Black memes their royalties*."[203]

Likewise, a series of lawsuits filed by creators who had posted their works to Instagram against the artist Richard Prince challenge the very notion that Internet denizens, by being active participants (users!) on user-generated sites like Instagram, would similarly welcome any follow-on appropriations and re-appropriations of their works, spurning the formal protections of laws like intellectual property in the process.[204] Indeed, as Amy Adler and Jeanne Fromer have documented, Internet users today may, in fact, be *more* protective than even intellectual property laws would permit, turning to the mass shaming made possible by social media as an extra-legal means of engaging in self help against copiers.[205]

Finally, just look at the reactions to A.I. from those in the open-source communities themselves. Consider, for example, how programmers and developers on the popular Q&A website Stack Overflow, who had long operated under a Creative Commons license,[206] rebelled en masse upon hearing that their content would be used to train ChatGPT.[207] Historian Philip Mirowski describes the harnessing of language such as "open" (it's there, after all, in OpenAI's name itself) by technology platforms as providing ideological cover for the ruthless aggregation, extraction, and monetization of content for corporate profit, "serv[ing] as a Trojan horse for

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[202] *Id.* at 11.
[203] *Id.* at 157.
[204] *See* Complaint, McNatt v. Prince, No. 1:16-cv-08896 (S.D.N.Y. Nov. 16, 2016); Complaint, Graham v. Prince, No. 1:15-cv-10160-SAS (S.D.N.Y. Dec. 30, 2015); Complaint, Salazar v. Prince, No. 2:16-cv-04282 (C.D. Cal. Aug. 12, 2016); Complaint, Dennis Morris, LLC v. Prince, No. 2:16-cv-03924 (C.D. Cal. Aug. 12, 2016).
[205] Amy Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 CAL. L. REV. 1455 (2019).
[206] *See Public Network Terms of Service*, STACK OVERFLOW, https://stackoverflow.com/legal/terms-of-service/public#licensing (last visited May 20, 2024).
[207] *See* Dallin Grimm, *Stack Overflow bans users en masse for rebelling against OpenAI partnership—users banned for deleting answers to prevent them being used to train ChatGPT*, TOM'S HARDWARE (May 8, 2024), https://www.tomshardware.com/tech-industry/artificial-intelligence/stack-overflow-bans-users-en-masse-for-rebelling-against-openai-partnership-users-banned-for-deleting-answers-to-prevent-them-being-used-to-train-chatgpt.

the incursions of platform capitalism into scientific research."[208] And years before companies like Microsoft and Google began mining code freely shared on the Internet for the express purposes of replacing those very same coders through generative AI,[209] prominent legal scholars working at the interstices of Internet law and intellectual property had already begun expressing skepticism that the free software movement led to anything other than a "broader apparatus of control"—as Amy Kapczynski so clearly put it, "The dream that open software could free us all and that one could 'hack' the broader sociopolitical system by demanding openness at a certain technological layer, now seems painfully, obviously wrong."[210]

In more recent writing, the art historian Legacy Russell points out the obvious: that "open source" was never meant to be equated with "free" (as in costless)—that information that is shared, even virally, still has "value"—"culturally, socially, economically, politically."[211] Thus what does it mean for the utopian ideologies of the Creative Commons movement—which were, after all, predicated upon *attribution* first and foremost[212]—that content "found on the Internet" (as OpenAI's defense goes[213]) would be ruthlessly divorced from their creators, stripped of royalties, and spit out on the backend as some hodgepodge word salad, some worst-case anesthetized, decontextualized object that Russell had

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[208] Philip Mirowski, *The Evolution of Platform Science*, 90(4) SOCIAL RESEARCH: INT'L Q. 725, 736 (2023). On "platform capitalism," see *id.* at 730; *see also* Rahman & Thelen, *supra* note 13, at 181 (noting that consumers are enlisted in the platform capitalism enterprise through platform dominance that purports to serve the consumer interest).

[209] *See* Katherine Bindley, *Tech Jobs Have Dried Up—and Aren't Coming Back Soon*, WALL ST. J. (Sept. 19, 2024), https://www.wsj.com/tech/tech-jobs-artificial-intelligence-cce22393.

[210] Amy Kapczynski, *The Law of Informational Capitalism*, 129 YALE L.J. 1276, 1493 (2020); *see also* COHEN, *supra* note 142, at 50.

[211] RUSSELL, *supra* note 201, at 92 (noting that the term "open source," which rose to prominence with the free software movement, "la[id] the groundwork for both a utopian ideal and a new application of strategic dispossession").

[212] Creative Commons offers some licenses that allow for commercial use, and others that allow only for noncommercial use, but in both cases, attribution is required. *See* ABOUT CC LICENSES, CREATIVE COMMONS, https://creativecommons.org/share-your-work/cclicenses/ (last visited May 20, 2024). Note that Creative Commons also offers one public domain license, in which creators give up all rights to their content, and thus does not require attribution. *See id.*

[213] *We Support Journalism, Partner with News Organizations, and Believe the New York Times Lawsuit Is Without Merit,* OPENAI & JOURNALISM (Jan. 8, 2024), https://openai.com/index/openai-and-journalism/.

fretted about in the black meme context?[214] As Russell concludes, aptly for a generation raised at the intersection of social media overload and tech-sector profits, "Though the viral copies of copies seem to keep accelerating, the strategies of dissemination need to be renegotiated and regulated: the old formulas that have long been broken will not work for this internet."[215]

Which is all to say: A realignment of values is afoot. No longer should theorists assume that the best way to promote a cultural democracy is to make as much culture as free as possible.[216] Instead, if we are to continue recognizing the right to create as a fundamental *good* that's worth protecting, then the old semiotic democracy theories need to be reworked to address the missing pay gap. As Rebecca Tushnet noted years ago, "respect for creativity, and for the possibility that every person has new meaning to contribute, should be at the core of our copyright policy….we should aim for policies that maximize participation—even when that changes the mix of economic winners and losers."[217] While Tushnet was focused primarily on copyright's incentives structure, those interested more broadly in democratic governance might, too, think through what we lose when we lose the compensated creative class. If semiotic democracy theorists are correct that a robust democracy is one in which "all persons would be able to participate in the process of meaning-making,"[218] a system in which which creators either gamble their livelihoods on the algorithms and whims of a few large platforms or else are simply too well-off to think about monetary rewards cannot be that robust democracy the semiotic theorists envisioned.

One can already see the move towards conceiving of digital creation like any other job through recent attempts to unionize digital creators, which efforts explicitly bring the once-assumed selfless sharing economy explicitly into the labor space.[219] While certain industries, such as the Hollywood film and television industry, have long been union towns, the collectivization sweep is also gaining steam in new spaces, such as in the digital effects and illustration professions.[220] Both cultural norms and laws

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[214] RUSSELL, *supra* note 201, at 155.
[215] *Id.* at 155.
[216] *See supra* notes 77-79 and accompanying text.
[217] Tushnet, *supra* note 184, at 539.
[218] *See supra* note 40.
[219] *See* Ellis, *supra* note 105 (on YouTube creator unionization efforts, including efforts in connection with traditional trade unions in Europe).
[220] *See, e.g.*, Jordan Moreau, *Marvel VFX Workers Unanimously Vote to Unionize With IATSE*, VARIETY.COM (Sept. 13, 2023 8:10 AM), https://variety.com/2023/artisans/news/marvel-union-special-effects-iatse-1235722298/.

should develop to favor and empower collective bargaining in spaces long thought to be more "creative" than "labor."[221]

Meanwhile, lawmakers already actively considering or passing legislation aimed at regulating AI should also include bills aimed at job creation and preservation in creative industries to protect workers explicitly. Notably, lawmakers have justified a raft of proposed and passed legislation that drastically expand property rights, such as intellectual property and right of publicity, with labor-based language.[222] But the best way to ensure that very future, one where anyone—not just those who already possess the economic means to do so—can create is not through property-based rights that do not guarantee, and may often times replace, creative jobs, but through rights that preserve the ability of creators to do what semiotic democracy theory has long posited is vital to a democratic society.[223] Other

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[221] Consider, for example, the norm amongst unionization that had pervaded a storied magazine like *The New Yorker*. *See* Ben Smith, *Why The New Yorker's Stars Didn't Join Its Union*, N.Y. TIMES, June 13, 2021, https://www.nytimes.com/2021/06/13/business/media/new-yorker-union.html.

[222] GOV. LEE SIGNS ELVIS ACT INTO LAW, TENNESSEE OFFICE OF THE GOVERNOR (Mar. 21, 2024 3:08 PM), https://www.tn.gov/governor/news/2024/3/21/photos--gov--lee-signs-elvis-act-into-law.html (announcing the passage of a greatly expanded Tennessee right of publicity law by pointing to how "[a]rtists and musicians at all levels are facing exploitation" that "threatens the future of Tennessee's creators, [and] the jobs that they support across the state and country"); *see also* No AI FRAUD Act, H.R. 6943, 118th Cong. § 3 (2024) (pending U.S. legislation that would bolster existing right of publicity law with additional protections that guard against unauthorized, simulated use of voice and likeness in commerce, but allowing for free transfer of the right, and providing for postmortem protection); CA. CIV. CODE § 3344.1 (2025) (establishing a postmortem cause of action for a celebrity's heir to recover damages for the unauthorized use of an AI-generated digital replica).

[223] Jennifer Rothman has already extensively critiqued legislation that provides for postmortem rights and free transferability of image-based rights, on the basis that it inures to the benefit of everyone *but* the very individuals the laws are ostensibly intended to protect. *See* Jennifer E. Rothman, *Draft Digital Replica Bill Risks Living Performers' Rights over AI-Generated Replacements*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (Oct. 20, 2023), https://rightofpublicityroadmap.com/news_commentary/draft-digital-replica-bill-risks-living-performers-rights-over-ai-generated-replacements/ (noting that postmortem rights "encourage and incentivize a market in digital replicas of the dead that can displace work for the living" and that providing for freely-assignable or transferable rights, while "ostensibly seek[ing] to protect individual (living) performers from the harms that flow from substitutionary performances made possible by ever-improving AI technology," ends up "leav[ing] performers potentially worse off by empowering record labels, movie studios, managers, agents, and others to control a person's performance rights").

recently-enacted state laws, such as California's Assembly Bill 2602, that prohibit the use of digital replicas in lieu of "work the individual would otherwise have performed in person," as well as laws that empower collective bargaining through voiding terms that were negotiated without the use of a union (or other fair representation), provide better models for expanding worker power rather than property rights.[224]

B. For the Law of Informational Capitalism

To date, data privacy theories have focused on the extraction and aggregation of individual user data, often in the platform or informational capitalism context.[225] Since copyright protection does not extend to factual information such as names, browsing histories, addresses, and the like, copyrighted works seemed to have little in common with the type of data that Internet law scholars writing on informational capitalism were concerned with—indeed, copyrighted works were seldom considered "data" at all.[226]

The recent spate of lawsuits centered on the ingestion of copyrighted works by large language models ("LLMs") should force us to reassess this earlier assumption.[227] Like earlier informational capitalism models that relied on millions of pieces of user data to discern patterns *among*

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[224] Assem. B. 2602, 2023-24 Leg. Sess. (Cal. 2024).

[225] *See, e.g.*, Zuboff, *supra* note 114, COHEN, TRUTH AND POWER, *supra* note 142, at 48-74.

[226] *See* Kapczynski, *supra* note 210, at 1501 ("Data is the other central resource in the age of algorithms and machine learning, and it is famously unowned in intellectual-property terms."); Pamela Samuelson, *Privacy as Intellectual Property*?, 52 STAN. L. REV. 1125, 1129 (2000) ("Deep differences in the purposes and mechanisms of traditional intellectual property rights regimes and the proposed property rights regime in personal data raise serious doubts about the viability of a property rights approach and about its prospects of achieving information privacy goals.").

[227] *See, e.g.*, *See* Class Action Complaint at 7, 12, Authors Guild v. OpenAI Inc., 345 F.R.D. 585 (S.D.N.Y. 2024) (No. 1:23-cv-8292); Chabon v. Meta Platforms, Inc., No. 3:23-cv-04663 (N.D. Cal. filed Sept. 12, 2023); Class Action Complaint, J.L. v. Alphabet Inc., No. 3:23-cv-03440 (N.D. Cal. filed July 11, 2023); Silverman v. OpenAI, Inc., No. 3:23-cv-03416-AMO (N.D. Cal. filed July 7, 2023). For a full list of all copyright class actions that have been filed against LLMs to date, see *Master List of Lawsuits v. AI, ChatGPT, OpenAI, Microsoft, Meta, Midjourney & Other AI Cos.*, CHAT GPT IS EATING THE WORLD, https://chatgptiseatingtheworld.com/2023/12/27/master-list-of-lawsuits-v-ai-chatgpt-openai-microsoft-meta-midjourney-other-ai-cos/ (last updated Aug. 30, 2024).

users[228]—what does information collected about 500,000 women in their 30s say, for example, that might help Google better target advertising towards a single user identified as a woman in her mid-30s?—new artificial intelligence models rely on the ingestion of millions of copyrighted works to discern patterns *among* works. Thomas Haley calls this "second-order value," in which any given piece of information takes on "a second life, one that furnishes the real value and power that drives firms' decision-making—as assets."[229]

One of the emerging arguments as to why there should be no infringement in the ingestion of copyrighted works by LLMs is that copyright is fundamentally concerned with creative, expressive works, while LLMs are not interested in the expressive value of the copyrighted works at all.[230] Instead, the very usefulness of a copyrighted work to an LLM lies in both the aggregation of hundreds of thousands of copyrighted works as well as in what those works can teach the LLMs about "patterns common to many individual expressive works."[231] In the view of those copyright scholars who have made this argument, this makes the ingestion of copyrighted works, fundamentally, a non-copyright problem.[232]

Here, too, building a theoretical framework in which we understand the platform capitalist enterprise as not *just* about the extraction of data in the traditional sense (*e.g.*, individual names, shopping habits, browsing patterns), but *also of* copyrighted, creative work, helps build parallels between more established—and ongoing—debates in privacy law, and newer, emergent threads in the copyright literature. Privacy law scholars have long been concerned by the ingestion of mass amounts of user data by machines, in which said machines would be able to locate "patterns"

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[228] *See* Salomé Viljoen, *A Relational Theory of Data Governance*, 131 YALE L.J. 573, 573 (2021) ("[T]he point of data production in a digital economy" is "to put people into population-based relations with one another.").

[229] Thomas Haley, *The Second Life of Information*, __ FLA. L. REV. __ (forthcoming 2025) (manuscript on file with author).

[230] *See, e.g.*, Oren Bracha, *The Work of Copyright in the Age of Machine Production* (working draft Jan. 2024), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4581738.

[231] *Id.* at 43.

[232] *See id.* at 43; Carys Craig, *The AI-Copyright Trap* (working draft 2024) at 4, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4905118. *But see* Andersen v. Stability AI Ltd., No. 23-CV-00201-WHO, 2024 WL 3823234, at *11 (N.D. Cal. Aug. 12, 2024) ("That these works may be contained in [the LLM] Stable Diffusion as algorithmic or mathematical representations—and are therefore fixed in a different medium than they may have originally been produced in—is not an impediment to the claim at this juncture.").

common to user habits.[233] There, too, the conventional understanding of what privacy is *for*—to protect the dignitary autonomy of a single individual—makes little sense as applied to the "tokenized" bits of user data consumed by the platform capitalism enterprise.[234] Indeed, the bulk of the value of user data to the platform is not in any one individual user's personal information.[235] Instead, key to the informational capitalism enterprise is in the *aggregation* of enormous amounts of personal data—a fact that has become ever more clear in the age of artificial intelligence.[236]

Yet to privacy law scholars, the mere fact that the contemporary data collection enterprise bears little resemblance to traditional notions of what privacy is for—that is, protecting the autonomy and dignity of *that* particular individual—does not mean that contemporary data collection ceases being a privacy *problem*. Nor, in the privacy law space, was it any satisfactory answer to suggest that because the value of user data collected is very *different* to the user as it is to the platform (what Viljoen calls a "structural mismatch in vertical relations between data subjects and data collectors"[237]), or because the type of privacy violation engendered by informational capitalism differs greatly from the traditional atomistic, dignitarian understanding of privacy, that the harms engendered by the new informational capitalism should fall outside of some static conception of privacy laws. Instead, most privacy law scholars have been focused on how evolving modes of data collection in the new informational capitalism demands new ways of conceiving of what privacy law is, and who it is for.[238]

Thus the challenge, for intellectual property law scholars as we head into the next era of machine learning and artificial intelligence will be *how*

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[233] *See* Viljoen, *supra* note 228, at 610 (noting that the process of gathering user data is to "recast[] people as assemblages of their social relations and group behaviors and apprehends data subjects as patterns of behavior derived from group-based insights").
[234] *See id.* at 584 (critiquing privacy reforms rooted solely in "dignitarian" concerns—or "how excessive data extraction can erode individual autonomy," on grounds that individualist rights simply do not reflect nor address the population-level effects that data harvesting presents); *cf.* Craig, *supra* note 232, at 4.
[235] *See* Viljoen, *supra* note 228, at 610-611.
[236] *See id.* (noting that the value of any one user's data for machine learning or artificial intelligence is not that it helps the machine learn things about *that* user, but make predictions or change the behaviors of *other* users"); *cf.* Bracha, *supra* note 230, at 43.
[237] Viljoen, supra note 228, at 613.
[238] *See, e.g.*, Julie E. Cohen, *What Privacy is For*, 126 HARV. L. REV. 1904, 1927-28 (2013); Ari Ezra Waldman, *Privacy, Practice, and Performance*, 110 CAL. L. REV. 1221, 1254 (2022).

to conceive of new ways to regulate the datafication of creative content.[239] As we saw with the great "public domain" experiment of the past few decades, it will simply no longer do to fall back on old tools and facile divides between open and free, on the one hand, and corporatized and propertized, on the other.[240] As Anupam Chander and Madhavi Sunder wrote at the height of the free culture movement, with regard to the commercialization of traditional knowledge by large biotechnology companies, creating "commons in information works to the systematic advantage of a few identifiable constituencies."[241] What is needed now—as information capitalists work to commercialize all the free, creative content that users shared in the name of that false semiotic democratic ideal—are new tools in the intellectual property toolkit that learn from previous, and ongoing, conversations in the privacy domain.

CONCLUSION

It is worth pointing out here that much of the older theories of democratic culture carried within them, too, an Internet libertarian's suspicion of government regulation.[242] Larry Lessig's tome of democratic participation on the Internet might be famously remembered for the concept of the "remix culture"; less cited, however, are the book's frequent asides in favor of the free market—"governments," he writes, are both more likely to be "inherently corrupted" as they "are unlikely to have the talent of the geniuses at the likes of a Google."[243] The neoliberal ideal that government intervention is unwarranted in any given area because consumers can simply vote with their wallets—suggesting, in the AI context, perhaps, a new aesthetics of choice in which human-authored works become the next "shop small" or "shop local" quirk—has already been extensively critiqued in light of the past few decades' growing social and economic

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[239] I take this subject on in another work, *Copyright as Data?*, *supra* note 14.
[240] *See* Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 Cal. L. Rev. 1331 (2004).
[241] *Id.* at 1337.
[242] Other scholars made this point earlier. See *id.* at 1334 ("[C]yberlaw scholars have embraced, perhaps inadvertently, a kind of libertarianism for the Information Age."). Of course, John Perry Barlow's famous declaration, authored as Internet companies like Google and Amazon were still viewed as upstart disruptors rather than emblematic of a new Gilded Age, was an unequivocally libertarian text. *See* John Perry Barlow, *A Declaration of the Independence of Cyberspace*, 18 DUKE L. & TECH. REV. 5 (2019).
[243] LESSIG, REMIX, *supra* note 4, at 142.

inequalities.[244]

That optimistic world that was first envisioned by earlier Internet scholars, a world of seemingly boundless, plentiful, *free* (in all senses of the world) content, is not, of course, completely gone. But the past decade's monetization story which this Essay has detailed is also not surprising, but merely emblematic: systems of capital trend towards propertization, after all. Even as scholars writing in those first heady days of the World Wide Web romanced the digital commons, perhaps the only question that should have been asked all along was *who*, not *if: who* was going to propertize all that information, which the early creators on the Internet had so naively, and optimistically, shared?[245] While the answer to that question is just now becoming clear, how we respond to that growing knowledge in the next decade to come will prove pivotal in the fight for a more democratic future.

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[244] *See* Kapczynski, *supra* note 210, at 1493; *see generally* David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW AND CONTEMP. PROBS. 1, 13 (2014).

[245] *See* Chander & Sunder, *supra* note 240 (critiquing the romanticization of the public domain).