

**Disintermediation in Copyright Law**  
**- A Skeptical View**

*Jessica Litman – “Real Copyright Reform”*: “Distributors’ current control of the copyright system is itself a major copyright ill. It derives from an era when distribution was much more expensive than it can be today. It continues in the twenty-first century because of the political power of copyright lobbies, aided by members of Congress eager to be glamoured by famous entertainers and willing to be persuaded that the only fundamental problem with the United States economy is widespread piracy of American creations”.

Enter a World without Distributors – YouTube’s Monetization and Partner Program:

- 144 Billion views per year of clips participating in monetization programs.
- Estimated 144 million dollars – world wide – payments to the entire range of creative contributors (producers, authors, performers).
- YouTube's estimated revenues for 2012 – 3.5 billion dollars.
- The entire creative industries share – approximately 4%.
- Hardly any investment of YouTube in content production. No Risk. No commitment.
- No upfront payments to authors. No advances. No payment for content other than based on revenues from advertisements.

## **Disintermediation in Copyright Law – What Does it Mean?**

- A significant reduction in distributors' and producers' copyright protection.
- Locating more powers and rights in the hands of originating creators (in manners that will promote further distribution and utilization of their works, as well as more revenues to originating creators).
- Supporting additional channels of distribution, which are not dominated by corporate media and their bias toward particular types of content.

### **How:**

- Reducing distributors' rights under copyright law.
- Adjusting a copyright regime that supports additional channels of distribution, which are not dominated by corporate media (e.g. through broad safe-harbors for content sharing platforms).

## Disintermediation in Copyright Law – Why?

The ill-reputed legacy of intertwining copyright protection & corporate media:

- Undermines cultural diversity and favors only certain types of media products.
- Disrupts active participation of amateurs, civic-engaged activity and end-users who face difficulties and barriers in accessing and utilizing copyrighted cultural materials.
- Destabilizes authors' and creators' ability to get a fair share of returns on their investment.
- Utilizes copyright protection to control distribution channels and then utilizes control over distribution channels to promote corporate media's own content.

## Disintermediation in Copyright Law – Why Now?

- Digitization and networked communication technologies significantly reduce the costs of producing, storing and distributing content and cultural products.
- The fact that authors' and creators' incentives diversify and far range from copyright's direct economic incentive.

Disintermediation in copyright law will:

- Decrease corporate media's economic incentive to engage in disruptive practices.
- Make it easier for creators to reach audiences, as well as more easy for readers, listeners, and viewers to enjoy a diversified range of creative works.
- Improve authors' welfare.

**But is it really so ?**

## **Configuring and Further Imagining Disintermediation in Copyright: # Concentration, # Diversity, # Authors' Welfare**

- Intermediaries are here to stay.
- The scarcity and concentration of audience attention only increases.
- Network economics and power distribution laws stimulate market structures which are extremely concentrated.
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- Authors' and creators' bargaining position, as well as their financial reward, are worse off.
- Excessive reliance on advertisements, as a source of income, may impact: (a) cultural diversity; (b) authors' welfare; (c) financing cultural production.
- From the "agency problem" of traditional corporate media (e.g. record companies) to the disappearance of agents.

**< The political economy of disintermediation in commercial spheres >**

## **Reconsidering the Role of Traditional Corporate Media:**

- Balancing and mitigating the economic and communicative powers of mega networked intermediaries.
- Increasing competition, reducing concentrated market power and improving bargaining positions of creative industries.
- Structural and institutional diversity.
- Ex-ante Investment in a diverse range of cultural production.
- Reducing reliance on advertisements as a source of revenues.
- Filtering biases of individual creators.



The officious bystander:

**“beware of over romanticization”**

## Step Two: A Complex Model

- Concurrent support of not-for-profit, amateur, collaborative and civic-engaged activities.
- Concurrent caution and suspicion toward corporate media practices.
- The balancing of excessive media power is a dynamic and multi-layered process.

(Past) -: Creators → Distributors → Users.

(The Disintermediation Scenario) -: Creators → Networked Intermediaries → Users.

(The Optional Scenario) -: Creators → Distributors ↔ [Networked Intermediaries] → Users.

## Interfacing with Copyright Law

- Copyright Law as a form of media regulation – both content and structural regulation.
- Proposals for Disintermediation in Copyright Law have direct media regulatory goals.
- But what are the outcomes?

## Interfacing with Copyright Law - Disintermediation and Safe-Harbors for Content-Sharing Platforms:

- The DMCA & Section 512(c) as the engine of market concentration in networked media markets: **(a)** strengthening networked intermediaries; **(b)** disempowering small and medium-sized corporate media.
- The thin line between hosting/sharing and commercial distribution.
- A back door to the traditional political economy of corporate media.
- Alternative solutions: **(a)** distinguishing between technologies and platforms; **(b)** expanding and enforcing the distinction between commercial and non-commercial activities.

## **Section 512(c) - The Digital Millennium Copyright Act (DMCA)**

- Section 512(c) applies to services which store data at the direction of a user, such as sites which store users' websites.
- It deals with “[i]nformation residing on systems or networks at direction of users.”
- It limits service providers' liability for content posted or hosted at the direction of end users.
- The provision protects service providers that receive no “financial benefit directly attributable to the infringing activity,” where the provider has neither the right nor ability to control the activity and where, if properly notified, the service provider suppresses access to the infringing content.
- Section 512(c) does not protect service providers with actual or constructive knowledge of infringing content who do not, on their own initiative, move quickly to disable access.

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

- Content sharing platforms fall within the definition of “service provider” in section 512(c).
- Knowledge or awareness of facts or circumstances that indicate *specific and identifiable* instances of infringement are a prerequisite for the obligation to remove and take down infringing materials.
- “The right and ability to control” infringing activity does not require “item-specific” knowledge of infringement, yet it does not suffice with a general ability to remove or block access to materials posted on a service provider's website. What is required is some type of “substantial influence on the activities of users,” without necessarily acquiring knowledge of specific infringing activity.
- Software functions of replication, playback, and the related videos feature--occur "by reason of the storage at the direction of a user" within the meaning of 17 U.S.C. § 512(c)(1).

## **Interfacing with Copyright Law - First Ownership Rules:**

- Vesting first ownership in the hands of creators does not necessarily promote authors' welfare and cultural diversity.
- Developing schemes that secure equitable remuneration for authors along with the sustainment of small and medium-sized corporate media (that produces, manages and owns "copyright portfolios").

## Counter Arguments:

- The benefits of copyright disintermediation (in terms of diminishing barriers of entry, democratization and decentralization of cultural production) outweigh the costs and disadvantages of copyright disintermediation.
- Copyright disintermediation and safe-harbors are essential for robust preservation and public access to cultural materials.
- Distrust of corporate media.
- Alternative and more balanced schemes: collecting societies, compulsory licensing schemes.



## **Partial and Preliminary Conclusions:**

- Capitalism and the new political economy of networked media markets.
- The social costs and price of free (yet, commercial) content.
- Copyrightless systems may be no less disruptive in terms of their potential harm to cultural diversity, readers' rights and authors' welfare.
- It is all about power relationships and regulating extreme concentration of media power.
- Extreme concentration of media power can derive from both excessive copyright protection and excessive ability to freely utilize content.
- Thinking about copyright law as dynamic regulation of power relationships.