INTELLECTUAL PROPERTY LAW AS LABOR POLICY

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Intellectual property law has long been the law of creation, not creators. The dominant utilitarian framework (and alternate ones like Lockean and personhood justifications) consider the creator almost exclusively by reference to their creative outputs. These innovation-first, output-maximization frameworks have increased concentration among IP firms and deepened inequality in how IP's economic rewards are distributed among creators. The existing frameworks simply do not have much to say about such pressing issues as authorial bargaining power, wage and economic inequality in the marketplace for creative works, and intensifying corporate concentration amongst dominant IP holders. Furthermore, the existing frameworks' almost single-minded focus on outputs no longer holds up in the age of artificial intelligence, which renders creative output instantaneous and near-infinite—while threatening to reshape the landscape of creative labor as we know it.

This Article advocates for a new, alternate framework, one that highlights how IP, much like labor law, has long acted as an allocator of rights in property and capital between individuals and firms. If IP, in practice, has acted like labor law in facilitating the transfer of work from creative laborers to dominant IP firms, then IP theory, too, should do more than focus singularly on outputs—it should also address these input-based, supply-side harms. To the extent that there have been strains of more creator-focused theories throughout the IP doctrine and literature, they have, variously, argued for creation as either a solitary act of genius or collective, democratic meaning-making. This Article purposefully uses the word "labor" in opposition to such romanticized notions: It argues instead for a framework of creation as wage labor, as both the means by which large IP firms extract their value and also, potentially, as capital's most potent resisting force.

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INTRODUCTION

Intellectual property ("IP") law has long been the law of creation, not creators. That is, its theory and justification is driven almost exclusively by consideration of *outputs*: the production, distribution, and availability of creative works[1] and inventions.[2] This is true not just of the dominant utilitarian framework of IP, which makes explicit that "reward to the owner [is] a secondary consideration";[3] alternate frameworks, including personhood and Lockean ones, also consider the author almost exclusively by reference to their creative output.[4]

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[1] This is the domain of copyright. *See* 17 U.S.C. § 102 (providing copyright protection to "original works of authorship fixed in any tangible medium of expression").

[2] This is the domain of patents. *See* 35 U.S.C. § 101 (providing that patent protection can be obtained for "new and useful process[es], machine[s], manufacture[s], or composition[s] of matter").

[3] United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948).

[4] *See infra* Part I.

To be sure, this innovation-first, output-maximization lens of IP has resulted in a wealth of inventions and creative works. But it has also increased corporate concentration in the marketplace of IP goods[5] and deepened inequality in the way that the spoils of intellectual labor are distributed.[6] On the ground, the resulting harms are everywhere, visible in myriad industry developments and trends: the 2023 writers' strike,[7] the breakneck pace of mergers and acquisitions that has successively dwindled the number of IP firms and diminished competition in the marketplace of creative works,[8] and the stark disparities in inventorship along race, gender, and income lines.[9]

This Article proposes a new, alternate framework; one that reveals how intellectual property has also functioned as labor policy—as a contested site through which creative laborers exchange work for wages and large IP firms amass power and capital, often at the expense of those laborers.[10] IP laws have facilitated the large-scale transfer of creative work from individuals to firms.[11] Certain doctrinal and statutory IP laws have created and sustained vast markets for creative labor.[12] IP theory and policy have justified the rise of large IP firms, for which scholars have almost uniformly focused on the firm's role in distributing creative output—while ignoring the supply-side implications, i.e., the role of the IP firm in employing, and potentially exploiting, hundreds of thousands of creative labor inputs.[13] IP has even, in certain instances, acted as an extracontractual constraint on employee mobility in the face of growing regulatory scrutiny of noncompete provisions.[14] So why don't we ever talk about IP as labor policy? This Article builds a framework for thinking of IP not just as a law governing creative outputs, but also as a law that regulates creative labor inputs.

My approach borrows from existing areas of the law, such as labor law, that both more directly intervene in employer-employee conflicts and are more explicit about the law's status as a mediating force in such

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5 *See infra* Section I.A.1.

6 *See infra* Section I.A.2.

7 *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] (announcing the Writers Guild of America's plan to strike).

8 *See infra* Section I.A.1.

9 *See infra* Section I.A.2.

10 This Article is not the first, nor will it be the last, to argue that IP laws do something other than incentivize the creation of new works. *See, e.g.*, Timothy Wu, *Copyright's Communications Policy*, 103 Mich. L. Rev. 278, 279 (2004) (arguing that copyright also "regulat[es] competition among rival disseminators").

11 *See infra* Section II.B.

12 *See infra* Section II.D.

13 *See infra* Section II.A.

14 *See infra* Section II.C.

conflicts. The existing IP frameworks, even those that are ostensibly author-driven,[15] have little to say about such pressing issues as authorial bargaining power, wage and economic inequality in the marketplace for creative works, and deepening corporate concentration amongst dominant IP holders. Moreover, the existing frameworks' almost single-minded focus on creative output is simply no longer satisfactory in the age of artificial intelligence ("AI"). By rendering creative output easy and almost infinite, AI threatens the very creative laborers that the existing frameworks have neglected. This Article shows how, by focusing on input-based (supply-side) harms, IP might begin to take up each of the foregoing issues by reducing corporate concentration, increasing creative laborer power, and ensuring a more even distribution of IP's economic rewards.

While past arguments that have considered the role of individual creators in the IP ecosystem have mostly made conclusions in favor of greater property rights[16] (and, concomitantly, arguments *against* the growing trend of concentrated, corporate-owned IP seemingly perennially against IP rights altogether[17]), the labor approach to IP that I propose here does not systematically come out either for or against propertization. Indeed, as this Article details, the very existence—and *value*—of IP rights creates and sustains vast systems for the supply and demand of human creative labor.[18] But it would be equally wrong to conflate IP firms with individuals who may hold valuable IP rights. To see why, one need only look at the current battles surrounding AI. Whereas individual creators have spearheaded numerous class actions alleging infringement by companies like OpenAI, and gone on strike because of the encroachment of AI, large IP firms such as movie studios—which typically approach each new technology as an existential threat—have instead lauded AI as enhancing creative production.[19] These opposing

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[15] *See infra* Part II. For a notable example of a creator-focused approach that ignores the oftentimes diametrically opposed interests of the creative laborer with their employer (the latter of which often is adjudicated to own actual IP rights in the output of that labor), see Robert P. Merges, Justifying Intellectual Property 203–36 (2011) (setting forth the argument that large firms provide crucial support to individual creators).

[16] *See* Merges, *supra* note 15, at 235 (advocating "that IP policy should [aim] to award individual property rights, while making it easy to transfer rights, so as to serve autonomy while reducing social costs, all with the goal of carrying out the normative imperative of rewarding creators that is at the heart of IP law").

[17] For a contemporary example that incorporates the AI debates, see David Bellos & Alexandre Montagu, Who Owns This Sentence?: A History of Copyrights and Wrongs 331–35 (2024) (discussing AI as "copyright's haziest frontier").

[18] *See infra* Part II.

[19] *See* Motion Picture Association, Inc., Comments on Artificial Intelligence and Copyright 5 (2023) [hereinafter MPA Comment] https://deadline.com/wp-content/uploads/2023/10/2023.10.30-MPA-Responses-to-CO-NOI_Redacted.pdf [https://perma.cc/M3E7-PJL2]

interests reveal what this Article seeks to tease out: Setting optimum IP policy is not just about choosing between *less* or *more* IP,[20] but also about recalibrating power and capital imbalances between individuals and firms within the IP ecosystem.[21]

To be clear, this Article does not argue that a worker-focused framework of IP should replace, or even predominate over, alternate justifications like utilitarian or personhood theories. Nor does it argue that IP should replace other legal doctrines, including employment and antitrust law,[22] in redressing labor market harms. It argues, instead, that IP has, for the most part, ignored supply-side harms, and that doing so has created reverberating effects that other areas of the law—including, notably, antitrust—are actively seeking to redress. This Article seeks to begin rectifying that oversight.

This reframing of modern-day IP as fundamentally *about* the coordination—and, concomitantly, exploitation—of labor inputs is necessary because, as Part I sets forth, the existing output-based frameworks are no longer fully satisfactory as a normative matter, nor are they complete as a descriptive matter. This is especially so in an age of advancing AI, corporate concentration, and rising inequality.

As Part I lays out, IP's dominant framework is a utilitarian one, which posits that IP rights exist solely to incentivize the creation of patentable inventions or copyrightable works. In this consequentialist view, authors and inventors are only relevant because they have been, up until very recently, the only entities capable of creating at all. While alternate theories of IP—ones that are more explicitly bound up in labor and personhood—seem to focus more on the creator, they, too, largely justify creator interests by reference to the creator's outputs.

But, as Part I discusses, these output-based frameworks have struggled to tackle increasing downstream consolidation in IP markets, even as scholars have lamented such developments. Further, IP's output-focused frameworks have little to say about supply-side harms, even

("Developments in AI, like preceding technological advancements, have a great potential to enhance, not replace, human creativity. MPA's members further believe these developments can, and should, co-exist with a copyright system that incentivizes the creation of original expression and protects the rights of copyright owners.").

20 The framing within IP scholarship as either being for or against IP, as being either for more rights or fewer rights, as being IP maximalist and IP minimalist, is so entrenched that it has spawned entire books describing the battle lines. *See* Peter Baldwin, The Copyright Wars: Three Centuries of Trans-Atlantic Battle (2014).

21 For an earlier, notable call to consider the power imbalances between individuals and firms within the IP ecosystem, see Jessica Litman, *Real Copyright Reform*, 96 Iowa L. Rev. 1, 9–10 (2010) (noting that in the U.S. copyright system, power is concentrated within intermediaries rather than the true authors of the works).

22 *See infra* Part III.

as some scholars have already begun pointing to inequalities in how the economic spoils of IP protection are distributed. And, finally, AI turns the incentives theory on its head, by making the creation of works near-instantaneous and near-infinite while simultaneously threatening to render the creative laborer obsolete. IP theorists, focused almost exclusively on outputs and innovation, have largely celebrated the rise of AI, even as creative workers themselves cry peril.

Part II argues that IP theory has, for the most part, failed to recognize its supply-side function—i.e., the way in which modern-day IP operates as labor policy, mediating between the rights of creative laborers and large firms. Modern-day IP functions like labor policy in four key ways. First, IP functions like labor policy because the conditions of contemporary creation itself have changed, moving away from the quaint image of the solitary tinkerer in their living room and towards creation as industrial organization—as the means by which creative activity is organized, extracted, and commoditized. Second, certain IP doctrines and statutes, such as work for hire and the termination right, explicitly mediate between the rights of individual creative workers and large firms, actively and consciously allocating rights in creative labor and capital. Third, IP functions as labor policy because IP has been used to restrict employee mobility and freedom where contractual remedies like enforcement of noncompete provisions have been invalidated by regulators. And finally, IP functions as labor policy because, in certain areas such as the heavily-unionized entertainment industry, the very *existence* of IP rights is what creates and sustains a vast marketplace for creative labor.

Part III argues that reframing IP as not just about creative *outputs*, but also about labor *inputs*, can prove consequential for problems that scholars have both long recognized (such as consolidation) and are just beginning to tackle (such as inequalities in inventorship, or whether AI-generated works are copyrightable). Whereas existing IP frameworks have struggled to address increasing corporate consolidation in IP markets, a theory of IP that recognizes supply-side harms would not singularly prioritize efficiency in distributing creative works[23] over other goals, such as harms to labor inputs. I show

[23] Note that the dominant theory's focus on efficiency is a different standard than the "consumer welfare" standard that predominates in antitrust law, though both IP's efficiency-based reasoning and antitrust's consumer welfare standard are what Professors Jedediah Britton-Purdy et al. call "market fundamentalist." Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 Yale L.J. 1784, 1801–02 (2020). This Article does not set out the normative critique of the wealth-maximization principle, because the work in that area is myriad, so much so that scholars have noted that "few today

how a recent antitrust victory in *United States v. Bertelsmann*,[24] which paused consolidation in the book publishing market, was predicated on the use of exactly that type of supply-side argument. In doing so, the case avoided the conflation between the IP intermediary—the book publisher—and the author, a conflation that so often happens in IP discourse. *Bertelsmann* dents the narrative that the interests of the author and the firm are always aligned, and that any gains internalized by IP firms automatically trickle down to the author. Instead, the case teaches that oftentimes, the interests of large intermediaries may be diametrically *opposed* to those of creative workers (such as authors). If IP theory can recognize how it mediates in these struggles between two long-assumed beneficiaries of the system, then it will better complement, rather than impede, other areas of the law actively seeking to tackle consolidation, like antitrust.

Further, a labor law theory of IP avoids romanticized notions of authorship that have, to date, undergirded discussions surrounding the copyrightability of AI-generated works. Most arguments against AI-authored works have attempted to isolate something uniquely human about creation—an argument that this Article casts into doubt given the nature of modern-day creation as corporate and collective.[25] Part III argues that a better justification in denying copyright protection to AI-generated content is to recognize that if IP has always mediated between the rights of individual workers in the creative ecosystem and large firms, then it too can justify *sui generis* rules prohibiting copyrighting AI works as a means of protecting those creative workers.

I conclude Part III by looking to a recent wave of IP scholarship focused *not* on distributional inequalities amongst those who *access* works protected under IP,[26] but instead amongst those who *create* the IP—and how a labor framework might better accommodate those strands. Indeed, to the extent that IP policy and theory have previously been marked by a social movement focused on expanding access to knowledge goods,[27] there may be the rumblings of a new movement

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in fact defend wealth maximization as a normative theory," notwithstanding its appeal "[i]n a folk sense." *Id.* at 1796–97, 1797 n.44. Needless to say, this Article takes the view that efficiency should not be the sole goal of IP—nor could it plausibly form the basis of any normative framework for IP, for reasons already exhaustively documented elsewhere. *See, e.g.*, *id.* at 1797 n.44 (collecting "formative critiques").

24 United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1 (D.D.C. 2022).

25 *See infra* Sections II.A, III.B.

26 For the existing frameworks that focus on inequality of access, see *infra* note 44.

27 *See* Madhavi Sunder, *IP³*, 59 Stan. L. Rev. 257, 263 (2006) ("[I]ntellectual property is spurring what 'could be the first new social movement of the century.'" (citations omitted)).

afoot, focused on protecting the laborers behind those goods: Patent law scholars have begun documenting the deep disparities in inventorship along class, race, and gender lines; copyright scholars are proposing IP-based reparations for Black artists historically disadvantaged by the IP system.[28] Scholars outside of the legal fields, too, are starting to take note. As the art historian and curator Legacy Russell puts it, "If physical property . . . is predicated on a model that is inherently extractive in its historic and legal frameworks, then a structure of ownership, as it entangles itself with the digital, requires a new imagination entirely."[29] This Article begins to excavate the spaces of IP's extractive legacy.

In researching for this Article, I spoke with a number of studio executives, talent agency executives, screenwriters, and lawyers who represent talent, including during the writers' strikes of 2023.[30] In completing the research, it became apparent to me that the labor issues those in the entertainment industries were focused on were at odds with the legal theories that have long framed debates about IP, the law that governs the creative products of that labor. This Article begins to bridge the gap. Indeed, to the extent that there have always been strains of more creator-focused theories throughout the IP doctrine and literature, they have, variously, argued for creation as either a solitary act of genius or collective, democratic meaning-making.[31] And previous creator-focused arguments have uncritically assumed a conflation of interests between large IP firms—who are so often the real beneficiaries of IP policy—and individual authors in the creative ecosystem.[32] This Article purposefully uses the word "labor" in opposition to both the Romantic[33] and romanticized[34] notions: It advocates, instead, for a view of creation as wage labor, as both a means by which large content conglomerates extract their value and also, potentially, as capital's most potent resisting force.

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[28] *See infra* Section I.A.2.

[29] Legacy Russell, Black Meme: A History of the Images that Make Us 158 (2024).

[30] *See* WGA Negotiating Comm., *supra* note 7; Gary Baum & Katie Kilkenny, *Unmasking the AMPTP: Hollywood Labor's Opaque Nemesis*, Hollywood Rep. (Sept. 15, 2023, 6:30 AM), https://www.hollywoodreporter.com/business/business-news/unmasking-the-amptp-1235591415 [https://perma.cc/WX23-SXVH] (referencing both the WGA and SAG-AFTRA strikes in 2023).

[31] *See infra* Part II.

[32] *See supra* note 15 and accompanying text.

[33] I use "Romantic" to refer to the notion of authorship as a solitary act of genius, which another scholar has referred to as the "Wordsworthian vision of the 'author-genius' with privileged access to the numinous." Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 Duke L.J. 455, 459.

[34] I use "romanticized" to refer to more contemporary interpretations of authorship that focus on its role in self-fulfillment and meaning-making. *See infra* Part II.

I
The Failure of Traditional IP Justifications

The principal justification for IP rights in the United States is the utilitarian framework.[35] This "dominant paradigm," as it is framed in most introductory IP textbooks, posits that the "principal objective of much of intellectual property law is the promotion of new and improved *works*—whether technological or expressive."[36] It is, therefore, a paradigm almost exclusively concerned with *outputs*—patentable inventions, copyrightable creative works, and innovations protectable by trade secrets.[37]

The utilitarian theory works like this: The invention and creation of patentable and copyrightable works require the significant investment of an inventor or author's resources—most obviously the time spent in developing the works (sometimes poetically referred to as "[s]acrificial days devoted to such creative activities"[38]), but also expenditures on equipment and facilities.[39] But "individuals will not invest in invention or creation unless the expected return from doing so exceeds the cost of doing so—that is, unless they can reasonably expect to make a profit from the endeavor."[40] Yet intellectual property, unlike real property, consists of quasi-public goods: They are cheap to produce and distribute once released. IP rights, by conferring a time-limited monopoly on

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35 Indeed, the utilitarian, incentives-based, law-and-economics framework of IP has become so dominant in the United States that some scholars have described the justifications for U.S. IP rights as being "almost exclusively . . . about incentives." Sunder, *supra* note 27, at 259 (emphasis omitted) (citations omitted).

36 1 Peter S. Menell, Mark A. Lemley, Robert P. Merges & Shyamkrishna Balganesh, Intellectual Property in the New Technological Age: 2020, at 16 (2020) (emphasis added) (citations omitted).

37 Trademark law has long relied on a different set of justifications, sometimes called the "twin goals" of protecting consumers from confusion while rewarding trademark owners for shoring up goodwill in their marks. *See, e.g.*, Jack Daniel's Props., Inc. v. VIP Prods. LLC, 599 U.S. 140, 147 (2023) ("Confusion as to source is the bête noire of trademark law—the thing that stands directly opposed to the law's twin goals of facilitating consumers' choice and protecting producers' good will."). Although these traditional twin goals are beyond the scope of this Article, note that antitrust and labor scholars have recently argued that trademark law and theory, too, have ignored worker harms. *See, e.g.*, Hiba Hafiz, *The Brand Defense*, 43 Berkeley J. Emp. & Lab. L. 1, 31 (2022) ("While trademark law scholars have concentrated less on—and even erased—workers' role in brand-value generation, labor scholars have traced declining worker entitlements to brand-value returns since the rise of English trademark law." (citation omitted)).

38 Mazer v. Stein, 347 U.S. 201, 219 (1954) ("Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.").

39 *See* 1 Menell et al., *supra* note 36, at 17 ("Invention and creation require the investment of resources—the time of an author or inventor, and often expenditures on facilities, prototypes, supplies, etc.").

40 *Id.*

subsequent copies of the invention or work, incentivizes individuals to undertake the enormously time-consuming prospect of creation in the first place, by ensuring that they have some control over its subsequent dissemination.[41]

Thus, under the dominant utilitarian theory, authors and inventors matter *only to the extent* that they—at least up until very recently—have been the only ones capable of creating and innovating at all.[42] While other justifications for IP, such as personhood[43] or Lockean[44] perspectives, seem to place the author (or labor) more fully front-and-center, they,

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[41] *See id.* at 17–18 (noting that "[t]o profit from a new idea or work of authorship, the creator must be able either to sell it to others or to put it to some use that provides her with a comparative advantage in a market" and describing how "ideas (and writings, for that matter) are notoriously hard to control"). Were it otherwise (i.e., if anyone could simply make copies and distribute the work at near-marginal cost once it is released to market), the economic theory warns that "authors may be expected to leave the profession in droves, since they cannot make any money at it." *Id.* at 18. But note here that the utilitarian theory is worried about authors leaving the profession because if they were to do so, there would "result . . . an underproduction of books and other works of invention and creation with similar public goods characteristics." *Id.*

[42] For some examples of this paradigmatic view, see Niva Elkin-Koren, *Making Room for Consumers Under the DMCA*, 22 Berkeley Tech. L.J. 1119, 1140 (2007) ("The Constitution mandates an instrumentalist approach that authorizes the grant of rights to authors only to the extent that it promotes public welfare."); Niels B. Schaumann, *An Artist's Privilege*, 15 Cardozo Arts & Ent. L.J. 249, 260–61 (1997) ("The emphasis is on promoting the progress of science and the useful arts, not on securing exclusive rights to authors and inventors. . . . [T]he reward reaped by copyright holders is constitutionally significant only to the extent it 'promote[s] the Progress of Science and useful Arts.'" (citations omitted)).

[43] Professor Margaret Jane Radin developed the leading argument for the personhood framework of IP. As she wrote, "[t]he premise underlying the personhood perspective is that to achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights." Margaret Jane Radin, *Property and Personhood*, 34 Stan. L. Rev. 957, 957 (1982). Personhood theories, in short, provide a justification for property rights and "serve as an explicit source of values for making moral distinctions in property disputes." *Id.* They are thus not intended to provide a justification for the protection of, or disputes surrounding, individuals and the exploitation of human labor.

[44] The so-called Lockean proviso, as put forth by the philosopher John Locke, states: "*Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others." John Locke, Two Treatises of Government § 27, at 306 (Peter Laslett ed., 2d ed. 1967). By joining the fruits of one's labor with the laborer themself, Lockean justifications, like personhood theories, are fundamentally justifications *for* property rights. Indeed, in arguing that "labor provides a foundation for property," Lockean theories proved enormously influential in justifying property rights surrounding IP. Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533, 1540 (1993) (citation omitted). For example, in a Supreme Court case establishing that intellectual property, just like real property, can be subject to governmental takings, the Supreme Court cited Locke in holding that property subject to the protection of the Takings Clause "extends beyond land and tangible goods and includes the products of an individual's 'labour and invention.'" Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1002–04 (1984) (citations omitted).

too, consider the individual almost exclusively by reference to their outputs.[45]

No doubt, the dominant utilitarian framework's innovation-first, output-maximization lens has resulted in a wealth of inventions and creative works. Yet, as the first section of this Part discusses, the output-maximization framework has also increased firm concentration in the downstream marketplace of IP goods and, upstream, deepened inequality in the way that the economic spoils of intellectual labor are distributed. Further, as Section I.B argues, the advent of AI has serious consequences for the utilitarian framework's almost single-minded focus on outputs and the incentives-based theory that views authors as consequential to the system only insofar as they are the ones who can be incentivized to create.

A. Resulting Harms from IP's Output-Focused Frameworks

This Section will detail how IP's dominant utilitarian framework allowed corporations, not individuals, to assume the mantle of innovation, as the incentives-for-authors framework flowed almost seamlessly into an incentives-for-intermediaries one. As this Section discusses, the result of the dominance of the output-maximization framework is, on the demand side, a shrinking number of IP firms that control a growing number of rights and, on the supply side, deep disparities in how the spoils of inventorship are distributed.

1. Downstream Consolidation

In May 2021, Amazon announced that it was buying MGM Studios for $8.45 billion—the "second-largest acquisition in [the company's] history," and a major foray into entertainment for the e-commerce giant.[46] The deal immediately prompted bipartisan calls for the Department of

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[45] More recent frameworks for IP, including those focused on distributive justice, focus on inequality of access *to* IP goods—not on inequalities associated with how IP protections are distributed amongst those who *produce* the IP goods. *See, e.g.*, Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. POCKET PART 262 (2008) (documenting the access to knowledge movement, which critiques how the propertization of inventions and creative works contributes to global inequality); Sunder, *supra* note 27, at 257–332 ("[F]rom . . . efforts to deliver medicines to the world's poor . . . to the nascent global movement for 'Access to Knowledge,' . . . traditional law and economics analysis fails to capture fully the struggles . . . of local and global intellectual property law conflicts."). These theories, as critiques of propertization, do not focus on how their framework relates specifically to the authors and inventors who rely on the monetization (indeed, the propertization) of their works to make a living, and how best to protect them.

[46] *See* Annie Palmer, *Amazon to Buy MGM Studios for $8.45 Billion*, CNBC, https://www.cnbc.com/2021/05/26/amazon-to-buy-mgm-studios-for-8point45-billion.html [https://perma.cc/PL2C-5XXV]. Amazon "paid $13.7 billion for Whole Foods in 2017." *Id.*

Justice and the Federal Trade Commission to scrutinize the proposed merger for antitrust concerns.[47] Yet industry watchers were skeptical that any challenge would be a success.[48] After all, as others quickly pointed out, the entertainment industry is rife with megamergers that make the tech behemoth's proposed purchase of MGM seem paltry in comparison.[49] In the prior three years alone, for example, Disney had purchased 21st Century Fox for a staggering $71.3 billion, and AT&T successfully acquired Time Warner for $85.4 billion.[50] The product of the latter merger, WarnerMedia, itself became the target of yet another massive acquisition in 2022, when Discovery announced that it would acquire WarnerMedia for $43 billion.[51] Meanwhile, the DOJ has already moved to block the publishing giant Penguin Random House

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[47] Senator Amy Klobuchar called on the DOJ to "conduct a thorough investigation to ensure that this deal won't risk harming competition." Makena Kelly, *Sen. Amy Klobuchar Calls on Justice Department to Probe Amazon-MGM Deal*, Verge (May 26, 2021, 4:12 PM) (quoting Press Release, Amy Klobuchar, U.S. Sen. for Minnesota, Klobuchar Statement on Amazon Proposed Purchase of MGM Studios (May 26, 2021), https://www.klobuchar.senate.gov/public/index.cfm/2021/5/klobuchar-statement-on-amazon-proposed-purchase-of-mgm-studios [https://perma.cc/SX64-6REW]), https://www.theverge.com/2021/5/26/22455449/amazon-mgm-klobuchar-buck-hawley-antitrust-investigation-probe [https://perma.cc/4VZP-M5WK]. From the other side of the aisle, Senator Josh Hawley agreed, tweeting that "Amazon is already a monopoly platform that owns e-commerce, shipping, groceries & the cloud. They shouldn't be permitted to buy anything else. Period." *Id.* (quoting Josh Hawley (@HawleyMO), X (May 26, 2021, 9:17 AM), https://x.com/HawleyMO/status/1397542482720735235?s=20 [https://perma.cc/7NXL-K9KJ]).

[48] Indeed, the FTC ultimately decided not to challenge the acquisition but maintained that it retains the right to challenge it later. *See* Todd Spangler, *Following Amazon's MGM Acquisition Close, FTC Warns It May 'Challenge a Deal at Any Time*,' Variety (Mar. 17, 2022, 11:07 AM), https://variety.com/2022/biz/news/ftc-may-challenge-amazon-mgm-deal-1235208241 [https://perma.cc/RW3S-FKAN].

[49] *See* Jaclyn Diaz, *What the Amazon-MGM Deal Means for the Streaming Business*, NPR (Mar. 17, 2022, 5:05 PM), https://www.npr.org/2022/03/17/1087268067/amazon-mgm-deal [https://perma.cc/55X4-9C24] (noting that the purchase of MGM by Amazon "is just the latest in big-name media and streaming-service mergers," citing AT&T's merger of "WarnerMedia with Discovery" and Disney's purchase of both LucasFilm and Marvel Studios).

[50] Erich Schwartzel & Joe Flint, *Disney Closes $71.3 Billion Deal for 21st Century Fox Assets*, Wall St. J. (Mar. 20, 2019, 5:30 AM), https://www.wsj.com/articles/disney-completes-buy-of-foxs-entertainment-assets-11553074200 [https://perma.cc/LD6L-8UGC]; Edmund Lee & Cecilia Kang, *AT&T Closes Acquisition of Time Warner*, N.Y. Times (June 14, 2018), https://www.nytimes.com/2018/06/14/business/media/att-time-warner-injunction.html [https://perma.cc/623G-BEPQ].

[51] Jennifer Maas, *Discovery Closes Acquisition of AT&T's WarnerMedia*, Variety (Apr. 8, 2022, 2:17 PM), https://variety.com/2022/tv/news/discovery-warnermedia-merger-close-warner-bros-discovery-1235200983 [https://perma.cc/J9SV-K2NN].

(itself, again, the product of a merger)[52] from acquiring rival Simon & Schuster.[53]

Copyright scholars have long documented the immense concentration of content markets. Writing over a decade ago, Professor Neil Weinstock Netanel warned that:

> The copyright industries that dominate public discourse have reached levels of concentration that are deleterious to both competition and expressive diversity. As of this writing, four major labels control some 85 percent of the U.S. record industry market . . . , six major studios consistently garner well over 80 percent of domestic box office market share, and ten publishing houses enjoy oligopoly domination of the trade and paperback book markets.[54]

Since then, the copyright industries have become even more concentrated. The four major labels are now three,[55] the six major studios are now five,[56] and the ten publishing houses have consolidated down to five.[57] Such concentration can in fact work counter to the very innovation that the traditional IP frameworks have prioritized: As Professor Peter Lee has documented, the "aggregation of intellectual property rights can confer cost advantages on incumbents (and cost disadvantages on potential entrants)."[58]

Likewise, in the patent context, Professor Lee has documented the tendency of commercial patent firms to consolidate. The year 2019 saw the "pharmaceutical giant Bristol-Myers Squib . . . acquir[e] [its]

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52 United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 12 (D.D.C. 2022) ("PRH itself was formed in 2013 when Random House acquired Penguin Books.").

53 Brent Kendall, *Penguin Random House, Simon & Schuster Fire Back at U.S. Antitrust Lawsuit*, Wall St. J. (Dec. 13, 2021, 2:48 PM), https://www.wsj.com/articles/penguin-random-house-simon-schuster-fire-back-at-u-s-antitrust-lawsuit-11639424927 [https://perma.cc/4A9B-CGR9].

54 Neil Weinstock Netanel, Copyright's Paradox 144–45 (2008).

55 Jacob Noti-Victor & Xiyin Tang, *Antitrust Regulation of Copyright Markets*, 101 Wash. U. L. Rev. 851, 860 (2024). In 2012, Universal Music Group purchased its competitor EMI Music for $1.9 billion. Georg Szalai, *Universal Music Completes $1.9 Billion EMI Recorded Music Acquisition*, Hollywood Rep. (Sept. 28, 2012, 4:47 AM), https://www.hollywoodreporter.com/news/general-news/universal-music-completes-19-billion-374965 [https://perma.cc/DK2J-2SAW].

56 Noti-Victor & Tang, *supra* note 55. In 2019, Disney purchased its rival, 21st Century Fox. Matthew S. Schwartz, *Disney Officially Owns 21st Century Fox*, NPR (Mar. 20, 2019, 6:17 AM), https://www.npr.org/2019/03/20/705009029/disney-officially-owns-21st-century-fox [https://perma.cc/N2L8-F2W5].

57 *See* Complaint at para. 4, United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1 (D.D.C. 2022) (No. 1:21-cv-02886) [hereinafter DOJ Complaint]; *supra* note 54 and accompanying text.

58 Peter Lee, *Reconceptualizing the Role of Intellectual Property Rights in Shaping Industry Structure*, 72 Vand. L. Rev. 1197, 1203 (2019).

rival Celgene for $74 billion, thus 'combining two of the world's largest cancer drug businesses in the biggest pharmaceutical deal ever.'"[59] As Lee puts it, "[t]he acquisition generated predictions of a new era of consolidation similar to one a decade ago featuring major acquisitions by Pfizer, Merck, and Roche."[60] The agricultural product industry, per Lee, "is even more consolidated than the biopharmaceutical industry," due to a series of mergers and acquisitions in the late 2010s that dwindled the number of dominant firms down to four.[61] The same applies to the software industry: "[T]he top ten global software companies account for almost half of all revenues, and 2018 experienced a five-year-high in software mergers and acquisitions . . . ."[62]

Yet the output-focused utilitarian framework would, at best, be agnostic regarding such consolidation, and, at worst, might see firm dominance as both inevitable and laudatory. That is, if what we care about is outputs first and foremost, then we might prioritize *firms*, and, even better, *large firms*, for managing the deeply risky endeavor of innovation and creative production.

The notion that authors risk much in creating a work was perhaps first borne out of IP's Enlightenment-era, nineteenth-century roots.[63] In this framework, the artist "bets" the most expensive thing of all—"his

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[59] Peter Lee, *Innovation Consolidation*, 54 U.C. Davis L. Rev. 967, 969 (2020) (quoting Michael Erman & Ankur Banerjee, *Bristol-Myers to Buy Celgene for $74 Billion in Largest Biopharma Deal*, Reuters, https://www.reuters.com/article/world/bristol-myers-to-buy-celgene-for-74-billion-in-largest-biopharma-deal-idUSKCN1OX0VM [https://perma.cc/83WG-M7JT].

[60] *Id.* (citing Erman & Banerjee, *supra* note 59).

[61] *See id.* at 969–70 (citations omitted).

[62] *Id.* at 970 (citations omitted). As Professor Lee notes, scholars have also argued that certain aspects of patent law also contribute to *fragmentation*. *See id.* at 976–80. Scholars have made similar points regarding copyright. *See, e.g.*, Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 Va. L. Rev. 549, 615–16 (2010) (noting that, as the cost of creation declines with the Internet, copyright ownership is spread out across myriad individual creators). However, as Lee concludes, "[t]hough . . . fragmentation drivers [in patents] are significant, the relative strength of concentration drivers frequently produces an equilibrium marked by substantial consolidation." Lee, *supra* note 59, at 972. Likewise, while Professor Van Houweling observes that lowering the costs of creation has resulted in numerous fragmented copyright owners, *see* Van Houweling, *supra*, the fact remains that content creation is mostly a winner-take-all market, with just a few firms responsible for the lion's share of revenue. *See supra* notes 54–57 and accompanying text.

[63] *See, e.g.*, Jaszi, *supra* note 33, at 455–56 ("Law's reception of 'authorship' began well before the heyday of Romanticism in the late eighteenth and early nineteenth centuries. But I try to show that it is not coincidental that precisely this period saw the articulation of many doctrinal structures that dominate copyright today."); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 Eighteenth-Century Stud. (Special Issue) 425, 426–27 (1984) ("The 'author' in its modern sense is a relatively recent invention. Specifically, it is the product of the rise in the eighteenth century of a new group of individuals: writers who sought to earn their livelihood from the sale of their writings to the new and rapidly expanding reading public.").

life"—in creating a work that may be a fantastic flop throughout his lifetime, only to gain recognition decades later.[64] The most famous iteration of this tale about creation and risk is, of course, the story of Van Gogh, who died rejected by his former town (with a "severed ear," no less)—only to find great posthumous success.[65]

But modern-day risk rhetoric sounds very different. In this version of the story, it is not individuals who risk their livelihoods, but large firms, which take on the massive risks associated with finding, nurturing, bringing to press, and marketing talent. Indeed, firms can do this through risk-spreading, of which a classic version might look something like the below:

> Publishing is a risky business. Only a fraction of books published become commercially successful. Publishers pay significant advances to authors whose books they expect will have commercial success. . . . One reason the Big Five [publishers] are able to offer authors higher advances than smaller publishers is because they can spread the costs—and risks—of their investment over a larger number of books and authors.[66]

The assumption that the best way to ensure the production of creative works is to *spread* that risk across multiple projects has grown so ingrained into broader assumptions about the production of knowledge goods that some have even suggested that IP protections can mainly be justified as protecting firms, because only firms, and not individuals, can "act as financing and insurance entities that spread the costs and risks of capital-intensive cultural production and distribution by funding a large portfolio of creative properties that generates cash flow to offset losses on failed projects."[67]

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64 *See* Adam Gopnik, *Van Gogh's Ear: The Christmas Eve that Changed Modern Art*, New Yorker (Dec. 27, 2009), https://www.newyorker.com/magazine/2010/01/04/van-goghs-ear [https://perma.cc/SU7X-A5MH] (discussing the crisis and personal despair associated with Van Gogh's most famous works produced in the last years of his life). Of course, even as subsequent movements have sought to deconstruct the romantic author ideal, a version of this story has endured through modern times. *See id.* ("We gawk and stare as the painters slice off their ears and down the booze and act like clowns. But we rely on them to make up for our own timidity, on their courage to dignify our caution.").

65 *See, e.g.*, *id.*

66 DOJ Complaint, *supra* note 57, at para. 5.

67 *See* Jonathan M. Barnett, *Copyright Without Creators*, 9 Rev. L. & Econ. 389, 391 (2013); *see also* Rochelle Cooper Dreyfuss, *Dethroning* Lear*: Licensee Estoppel and the Incentive to Innovate*, 72 Va. L. Rev. 677, 680 (1986) ("For large firms engaged in research and development as well as production, the uncertainties inherent in the innovative process are mitigated by the firms' ability to spread risks both horizontally—over their many business ventures—and vertically, by using their inventions themselves, perhaps in secret.").

Thus, large book publishers tell us that publishing is "a risky business; many books published do not earn a profit for the publisher" and that publishers take risky bets on authors by paying them "significant advance royalties" for "attractive book concept[s]."[68] Likewise, large music publishers take on the task of "identify[ing] and sign[ing] both novice and experienced songwriters, which requires them to make significant and often risky investments, including by providing advances and other financial support to songwriters."[69] Large record labels, too, emphasize the "large capital investments and . . . substantial risks" they take in the pursuit of "high quality, popular recorded music," from the "time-consuming and laborious 'research and development' process" of identifying and "develop[ing] talent," to honing each "artist['s] . . . branding and imaging," to "making a . . . recording" itself, and beyond.[70] Large pharmaceutical companies emphasize the large "investment-based risk[s]" they undertake in bringing each new drug to market.[71] Indeed, in the Federal Circuit's modern framing of what IP law is for, the encouragement of such investment-based risks *is* the *very* "*fundamental purpose of the patent grant*."[72]

Yet the empirical basis for IP's risk rhetoric has always been contested and, some have argued, thin. For example, Professors Mark A. Lemley and Mark P. McKenna note that while some IP rights "do in fact require a substantial investment of research and development money to generate[,] . . . others don't."[73] With regard to the music industry, for example, they note that "[s]ongs can be recorded cheaply and written

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[68] Answer at 7, para. 5, United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1 (D.D.C. 2022) (No. 1:21-cv-02886).

[69] Written Direct Testimony of Peter Brodsky, Written Direct Statement of Copyright Owners Volume III at para. 8, Determination of Rates and Terms for Making and Distrib. Phonorecords (Phonorecords IV), 87 Fed. Reg. 76937 (Copyright Royalty Bd. Dec. 16, 2022) (No. 21-CRB-0001-PR), https://app.crb.gov/document/download/25868 [https://perma.cc/ANY9-5VUG].

[70] Testimony of Dennis Kooker, Witness for SoundExchange, Inc., Written Direct Statement of SoundExchange, Inc., Volume 2 at 3–4, Determination of Royalty Rates and Terms for Ephemeral Recording and Digit. Performance of Sound Recordings (Web IV), 81 Fed. Reg. 26316 (Copyright Royalty Bd. May 2, 2016) (No. 14-CRB-0001-WR) [hereinafter Web IV], https://app.crb.gov/document/download/14340 [https://perma.cc/C82S-JERP].

[71] *See* Sanofi-Synthelabo v. Apotex, Inc., 470 F.3d 1368, 1383 (Fed. Cir. 2006) (quoting Patlex Corp. v. Mossinghoff, 758 F.2d 594, 599 (Fed. Cir. 1985)); *see also* Abbott Lab'ys v. Sandoz, Inc., 544 F.3d 1341, 1363 (Fed. Cir. 2008) ("The patent laws promote . . . progress by offering a right of exclusion for a limited period as an incentive to inventors to risk the often enormous costs in terms of time, research, and development." (quoting Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 480 (1974))).

[72] *See Sanofi-Synthelabo*, 470 F.3d at 1383 (emphasis added) (quoting *Patlex*, 758 F.2d at 599).

[73] Mark A. Lemley & Mark P. McKenna, *Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP*, 100 Geo. L.J. 2055, 2096 (2012).

even more cheaply and still make millions for their creators."[74] The record labels and music publishers' costs of finding and developing new talent, and the risk that they take on if the artist or songwriter does not end up generating hits, may also appear exaggerated amidst reports that artists are finding success first, and record label deals after.[75] The advent of low-cost technologies that allow amateurs to write and record music, and the explosion in popularity of websites that allow the same amateurs to directly distribute that music without a publishing or label middleman, mean that labels and publishers are signing talent with preexisting, established fanbases.[76]

And even in film, which most copyright scholars conceive of as one of the riskier of all the copyright industries,[77] a closer look suggests that film studios are consistently able to maintain sizable profits by pushing and subordinating risk onto outside financial investors at the investors' expense.[78] In this recoupment analysis, studios generate a steady stream of positive cash flow by taking their percentage of distribution and production costs off the top, leaving those further down the waterfall (outside investors) with the majority of the risk—and little

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[74] *Id.* at 2096–97.

[75] *See* Xiyin Tang, *Copyright's Techno-pessimist Creep*, 90 Fordham L. Rev. 1151, 1189–91 (2021) (describing the career trajectories of artists such as Billie Eilish and Lil Nas X, both of whom went viral on Internet platforms before landing record deals); Elias Leight, *Lil Nas X's 'Old Town Road' Was a Country Hit. Then Country Changed Its Mind*, Rolling Stone (Mar. 26, 2019), https://www.rollingstone.com/music/music-features/lil-nas-x-old-town-road-810844 [https://perma.cc/ACQ2-CRFJ] (detailing Lil Nas X's pre-label rise to fame).

[76] *See, e.g.*, Tang, *supra* note 75; Leight, *supra* note 75; Charlie Harding, *Billie Eilish, the Neo-Goth, Chart-Topping Teenage Pop Star, Explained*, Vox (Aug. 20, 2019, 12:34 AM), https://www.vox.com/culture/2019/4/18/18412282/who-is-billie-eilish-explained-coachella-2019 [https://perma.cc/DQR2-E9Q3] (describing how Eilish directly uploaded a song "recorded . . . in her bedroom" to SoundCloud and awoke to overnight fame—all before a record deal).

[77] *See, e.g.*, Lemley & McKenna, *supra* note 73, at 2096 ("Moviemaking is a high risk enterprise in which many movies lose money. In order to be profitable in any given year, a movie production company must have profits that exceed losses, and one profitable film may do no more than compensate for two others that lose money.").

[78] Studios do this through an industry practice known as the "cash flow 'waterfall,'" in which the film studios at the top of the waterfall ensure that they recoup their investment in each film made—even as the overall net profits for those films appear to be deeply negative. *See* Harold L. Vogel, *Financial Accounting in Movies and Television*, in Entertainment Industry Economics: A Guide for Financial Analysis 205, 217–39 (10th ed. 2020) ("Big-Picture Accounting"). For an introduction to the cash flow waterfall and how studios position themselves at the top of the chain of recoupment, see Harold L. Vogel, Entertainment Industry Economics: A Guide for Financial Analysis 145–47 (6th ed. 2004). The cash flow waterfall's determination of the order in which various parties involved in the making and distribution of a film are paid back (and the studio's positioning at the top of that chain, leaving what is left—if any—for outside investors) has been described as "form[ing] the basis for the entire system of motion-picture finance." *See* Terry B. Sanders, *The Financing of Independent Feature Films*, 9 Q. Film Radio & Television 380, 388 (1955).

remaining revenue.[79] To be clear, that film studios use different means of subordinating risk across different types of investors (or even different geographic regions) does not suggest that filmmaking is without cost or risk—or, indeed, even very high cost or very high risk. What it does tell us, however, is that film studios have ways of spreading risk *other than* across multiple film projects. In other words, content owners have relied on the risk rhetoric to grow bigger, because it enables more risk-spreading across projects.[80] But I suggest here that risk-spreading is not purely a horizontal endeavor (across in-house projects); instead, much of it occurs outside of the studio, through outside investments. Under this reframing, it does not necessarily follow that a bigger entity is better able to subordinate risk than a smaller entity. Indeed, independent filmmakers finance their films outside the studio system—and they do so successfully, relying on soft money, equity, and gap financing, an arrangement that can theoretically allow filmmakers to achieve profitability well before the film is ever distributed.[81]

Amongst patent firms, the story is much the same: The breakneck pace of mergers and acquisitions is often justified by reference to the same risk-spreading paradigm. Professor Barak Richman et al. noted that the importance of "effective[] . . . targeted marketing" in pharmaceuticals, which causes companies to "invest[] heavily in specialized sales forces" (the costs of which are often "treat[ed] . . . as fixed costs that cannot vary with the firm's research productivity"), "is one leading explanation for the steady frequency of acquisitions and the surge of megamergers."[82] But IP frameworks focused solely on outputs may have little, if anything, to say about such consolidation. Professor Richman et al. found that robust merger and acquisition activity in the

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[79] The old joke about "Hollywood accounting" practices that leave little profit participation for nonstudio parties was pithily summed up by the studio executive in David Mamet's play *Speed-the-Plow*: "[T]wo things I've learned, twenty five years in the entertainment industry. . . . The first one is: there is no net. . . . And I forget the second one." David Mamet, Speed-the-Plow 33 (1989). Famously, these "[c]reative[] [a]ccounting" practices mean that studios can define distribution and production costs to their own advantage. *See generally* Bill Daniels, David Leedy & Steven D. Sills, Movie Money: Understanding Hollywood's (Creative) Accounting Practices 15 (2d ed. 2006) ("Studios are acutely conscious about film-business risks, so they are ever on the prowl for ways to share risk. Profit participations are one way that studios can share the risk of failure with the most expensive elements that make up a motion picture—actors, writers, directors, and producers.").

[80] *See supra* notes 66–72 and accompanying text.

[81] *See* Adam P. Davies & Nicol Wistreich, The Film Finance Handbook: How to Fund Your Film 100–02 (2007) (describing the "[e]conomic [a]nomaly" of film where profits can be made "before sales . . . exceed the cost of production").

[82] *See* Barak Richman, Will Mitchell, Elena Vidal & Kevin Schulman, *Pharmaceutical M&A Activity: Effects on Prices, Innovation, and Competition*, 48 Loy. U. Chi. L.J. 787, 814–15 (2017).

pharmaceutical industry, for example, has "not present[ed] traditional competition concerns for pharmaceutical prices or output."[83]

2. *Upstream Harms*

Even if outputs remain as robust as ever, on the supply side, it has become increasingly clear that the gains meted out by the IP system are distributed unevenly. In the past few decades, "patent holdings [have] bec[o]me substantially more concentrated," according to an analysis performed by Professor Colleen Chien.[84] As she documents, while "precise numbers depend on the data source,"[85] "by 2020, more than half of newly granted patents went to the top 1% of patentees, and over three-quarters to the top 10%, up from 39% and 64%, respectively."[86] Yet not only are patent portfolios becoming more concentrated—but who gets to benefit from the spoils of the patent system is skewing in inequitable ways, as well.[87] Note that patents, unlike copyrights, cannot have a corporate inventor *a priori*[88]—the inventor must be a single individual or individuals, who may then assign a corporation the patent.[89] As Professor Chien notes, in 2019, "[w]omen accounted for only 12.8% of all inventors."[90] In a more recent study, Professor Chien finds that "[a]mong major patent filers, women are inventing at a fraction of the rate (in many cases less than 50 percent) at which they are employed in technical roles."[91]

Professor Chien's work is among the small but growing handful of IP scholarship that is focused on what I call supply-side distributional inequalities: inequalities amongst the creative workers who are supposed to be the beneficiaries of IP protection—a distinct line of inquiry from demand-side distributional inequalities that have been explored more thoroughly in the literature (i.e., looking at who is harmed through an inability to access the knowledge goods protected by IP).[92] Other

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[83] *See id.* at 814.

[84] Colleen V. Chien, *The Inequalities of Innovation*, 72 EMORY L.J. 1, 7–8 (2022) [hereinafter Chien, *The Inequalities of Innovation*].

[85] *Id.* at 8 n.21.

[86] *Id.* at 8.

[87] *See* Colleen Chien, *Redefining Progress: The Case for Diversity in Innovation and Inventing*, 71 UCLA L. REV. 540, 546 (2024) [hereinafter Chien, *Redefining Progress*] ("[M]en receive 87 percent of U.S. patents and 98 percent of VC funding. Children from high-income (top 1 percent) families are ten times as likely to become inventors . . . . Over 50 percent of new U.S. patents went to the top 1 percent of patentees . . . ." (citations omitted)).

[88] *See infra* notes 183–87 and accompanying text.

[89] *See* 35 U.S.C. § 100(f).

[90] *See* Chien, *The Inequalities of Innovation*, *supra* note 84, at 8.

[91] *See* Chien, *Redefining Progress*, *supra* note 87, at 578.

[92] *See supra* note 45 and accompanying text.

examples include Professor K.J. Greene's calls for IP-based reparations to Black artists, who have historically been disadvantaged by the IP system.[93]

Less thoroughly explored in the scholarly literature is how the development of artificial intelligence creates new, distinct supply-side harms. The following Section gathers examples, including from recent writers' strikes and pending class action lawsuits, to highlight the inadequacy of IP's output-based frameworks in addressing such harms.

B. Artificial Intelligence Renders the Existing Output-Based Theories Insufficient and Unsatisfactory

In just the past few years, breakneck developments in generative AI—spawning popular products like ChatGPT, DALL-E-2, Stable Diffusion, and Midjourney—have made the creation of works near-costless and near-infinite. With just a few text prompts, users of generative AI tools can create wholly new (and, some would say, quite good) images, poems, and writings.[94] And even before machines developed the ability to generate whole works with minimal human intervention, AI was being harnessed to guide the creation of new creative content, help concoct innovative pharmaceutical drugs, and improve industrial products and processes.[95]

The implications of AI for IP law (among other areas[96]) are tremendous, and there has certainly been no shortage of literature on

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[93] *See* K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 Hastings Commc'ns & Ent. L.J. 339 (1999) (describing the historical development of the modern copyright regime and detailing, through historical evidence rather than empirical data, how this regime harmed Black artists via the appropriation of jazz, blues, and rock); K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate Over African-American Reparations*, 25 Cardozo Arts & Ent. L.J. 1179, 1182, 1216–19 (2008) (proposing reparations to Black artists that the IP system discriminated against through the use of IP levies).

[94] *See generally* Matthew Sag, *Copyright Safety for Generative AI*, 61 Hous. L. Rev. 295, 299 (2023) (showcasing how "a few simple words typed into DALL-E-2 or Midjourney will produce an arresting image of 'a cup of coffee that is also a portal to another dimension' or a disturbing portrait of 'the future of drowned London'").

[95] *See* Dan L. Burk, *Cheap Creativity and What It Will Do*, 57 Ga. L. Rev. 1669, 1672 (2023) (citations omitted); Kal Raustiala & Christopher Jon Sprigman, *The Second Digital Disruption: Streaming and the Dawn of Data-Driven Creativity*, 94 N.Y.U. L. Rev. 1555, 1583–84 (2019) (describing the deployment of "algorithms, artificial intelligence, and machine learning" in content creation, sometimes "without, or with little, human intervention" (citations omitted)).

[96] For some recent works addressing how AI will disrupt and fundamentally change other areas like education and contract interpretation, see, respectively, Jonathan H. Choi, Kristin E. Hickman, Amy B. Monahan & Daniel Schwarcz, *ChatGPT Goes to Law School*, 71 J. Legal Educ. 387 (2022) (testing "ChatGPT's performance on law school examinations" and a finding that the study's results indicate that "language models" will likely "be very helpful to students using them (licitly or illicitly) on law school exams"), and Yonathan Arbel

the topic. Professor Mark A. Lemley writes that AI "turns copyright law upside down"—by "strain[ing] . . . two [of its] most fundamental legal doctrines: the idea-expression dichotomy and the substantial similarity test for infringement."[97] Professor Dan L. Burk argued that the rise in machine-created works will only drive consumers towards valuing human authenticity—human artistry and craft—more.[98]

Most importantly, numerous scholars have noted that, as the cost of developing works decreases, so, too, do the justifications for IP protection.[99] This is, of course, the natural conclusion that follows from the dominant utilitarian, incentives-based, output-focused framework: Professor Burk, in writing about generative AI and the advent of sophisticated tools like ChatGPT, noted that, "by lowering the cost of creation," AI "obviat[es] some of the need for the initial incentive. When the costs of initial creation are lowered, the need for an incentive to make the initial investment is lowered as well."[100] Or as Professor Lemley puts it: "[I]f the point of IP is to encourage either the creation or the distribution of that content, cost-reducing technologies may actually mean we have less, not more, need for IP."[101]

In the age of near-infinite outputs, then, the incentives-based framework—as well as other existing frameworks similarly focused on increasing *outputs* and *works*—can no longer provide either the animating normative or the descriptive justification for IP rights. On the other hand, never has there been greater strain in the system on the supply side, as workers across the creative industries are finding themselves displaced, and their bargaining power weakened, by AI—in ways that the traditional frameworks fail to address.[102]

& David A. Hoffman, *Generative Interpretation*, 99 N.Y.U. L. Rev. 451 (2024) (showing that "AI models can help factfinders" interpret contracts and analyzing "implications for legal practice and contract theory").

97 Mark A. Lemley, *How Generative AI Turns Copyright Upside Down*, 25 Colum. Sci. & Tech. L. Rev. 190, 190, 196 (2024) [hereinafter Lemley, *AI*].

98 *See* Burk, *supra* note 95, at 1670 (arguing that "cheap substitutes for human creativity will drive a shift toward forms of intellectual property that certify authenticity rather than those that incentivize production and distribution").

99 *See* Raustiala & Sprigman, *supra* note 95, at 1613–14 (arguing that lowering the costs of creation makes "copyright protection . . . far less central"); Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. Rev. 460, 463 (2015) [hereinafter Lemley, *Scarcity*] (arguing that "if the goal of IP is to encourage the creation of new works, the example of the Internet suggests that for an increasingly important range of creative works, radically reducing the cost of production decreases rather than increases the need for IP law").

100 Burk, *supra* note 95, at 1680.

101 Lemley, *Scarcity*, *supra* note 99, at 464.

102 In doing so, I do not mean to minimize the massive disruptions to other industries that will undoubtedly occur due to AI, just as other past technological disruptions have displaced other types of workers. I merely focus on creative workers because they are part and parcel of the IP system (indeed, the long-presumed beneficiaries of the IP system, see *supra* note 15)

1. Book Publishing and Literary Works

The development of large language models (LLMs)—algorithms that produce outputs in response to users' prompts—requires large swaths of training data, which are fed, or "ingested," into the LLMs.[103] In a series of class action lawsuits[104] filed against LLMs including OpenAI's ChatGPT, Meta's LLaMa, and Google's Bard, leading book authors argued that such training sets included massive amounts of copyrighted creative works, which were "copied . . . wholesale" when fed into the LLMs.[105] Writers—including the well-known authors Michael Chabon, Jonathan Franzen, George R.R. Martin, and the comedian/author Sarah Silverman—alleged, whether in the aforementioned litigation and/or in a number of separately filed class actions, that such actions constituted a violation of the Copyright Act.[106]

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in a way that other types of workers—for example, steel and auto—are not. Certainly, however, there is no shortage of writing that focuses on the acute labor harms wrought by technology in other areas like the gig economy. *See, e.g.*, Veena Dubal, *On Algorithmic Wage Discrimination*, 123 Colum. L. Rev. 1929 (2023) (on how digital platforms can exploit "Uber and Lyft drivers" through the use of "data collection," extraction, and algorithmic "wage calculation"); Niels van Doorn, *At What Price?: Labour Politics and Calculative Power Struggles in On-Demand Food Delivery*, 14 Work Org., Lab. & Globalisation 136 (2020) (arguing that digital platforms "enforc[e] the subordination . . . of gig workers" in the food delivery space).

103 *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) [hereinafter Authors Guild Complaint].

104 For an in-depth look at how class action litigation is used as gap-filling and blanket licensing where statutory copyright law may be slow to address new technologies, see Xiyin Tang, *The Class Action as Licensing and Reform Device*, 122 Colum. L. Rev. 1627, 1632 (2022) [hereinafter Tang, *Class Actions*] ("[A]ggregate litigation may fulfill . . . something much closer to an administrative copyright: administering millions of licenses for not merely past infringement but future uses and, in the process, filling in statutory gaps to address a rapidly shifting technological landscape."). The use of class actions is one answer to the scholarly concern that "AI companies can't simply license all the underlying photographs or texts for the new use." *See* Mark A. Lemley & Bryan Casey, *Fair Learning*, 99 Tex. L. Rev. 743, 770 (2021).

105 *See* Authors Guild Complaint, *supra* note 103, at 2; Class Action Complaint at 1, Chabon v. Meta Platforms, Inc., No. 3:23-cv-04663 (N.D. Cal. filed Sept. 12, 2023) [hereinafter Chabon Class Action Complaint]; Class Action Complaint, J.L. v. Alphabet Inc., No. 3:23-cv-03440 (N.D. Cal. filed July 11, 2023); *see also infra* note 106.

106 *See, e.g.*, Authors Guild Complaint, *supra* note 103, at 1–2; Chabon Class Action Complaint, *supra* note 105, at 1; Class Action Complaint at 1–2, Chabon v. OpenAI Inc., No. 3:23-cv-04625-PHK (N.D. Cal. filed Sept. 8, 2023); Complaint, Class Action, at 1–2, 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 [https://perma.cc/6RPT-6NG3]. That no fewer than *ten* copyright class actions have been filed in just a few months bears out the prediction that class actions are likely to increase as new technological innovations pick up pace. *See id.*; Tang, *Class Actions*, *supra* note 104, at 1689 ("[E]ven as this

In addition to the claim that the ingestion of mass quantities of copyrighted works constituted copyright infringement, the authors' claims centered on a second violation: that the AI-generated works the LLMs spit out on the backend *also* infringed the authors' copyright by creating works that are "based on"[107] the authors' copyrighted works, thus infringing the copyright holder's right "to prepare derivative works based upon" their protected work.[108] One illustrative allegation stated that "[w]hen prompted, ChatGPT generated an infringing, unauthorized, and detailed outline for the next purported installment of [writer George Saunders's copyrighted novel] *The Tenth of December* . . . and titled the infringing and unauthorized derivative 'The Eleventh of December: A Continuation,' using the same characters from Saunders's existing book."[109]

As the authors put it in one suit: "Unfairly, and perversely, without Plaintiffs' copyrighted works on which to 'train' their LLMs, Defendants would have no commercial product with which to damage—if not usurp—the market for these professional authors' works. Defendants' willful copying thus makes Plaintiffs' works into engines of their own destruction."[110] If the statement seems existential or hyperbolic, the complaint has other facts to support that sense of doom and dread: Writers have "reported losing 75 percent of their work" or half their income as a result of employers turning to AI; sixty-nine percent of the authors surveyed by (and who responded to) the Authors Guild "consider[ed] generative AI a threat to their profession"; and generative AI is estimated to "replace . . . one-fourth of the labor currently performed in the United States and in Europe."[111]

Article has identified a subtle trend with significant impact in copyright litigation, it would not be surprising to see the import of copyright class actions growing even greater in the coming years.").

107 Authors Guild Complaint, *supra* note 103, at 2.

108 17 U.S.C. § 106(2).

109 Authors Guild Complaint, *supra* note 103, at 38.

110 *Id.* at 2.

111 *See id.* at 15–16 (citation omitted). Note that the Authors Guild represents a wide variety of U.S.-based writers at different stages of their careers, "in all genres and categories," both "traditionally-published authors as well as self-published, independent authors." *See About the Guild*, The Authors Guild, https://authorsguild.org/about [https://perma.cc/32AG-HX76]. The named class action plaintiffs in the *Authors Guild* case span a wide variety of genres, influence, and types of writing, from early-to-mid-career writer Maya Lang, late-career National Book Award winner and novelist Jonathan Franzen, mid-career magazine nonfiction reporter Jia Tolentino, established fantasy writer George R.R. Martin, popular thriller writer Scott Turow, and winners of prestigious awards like the Man Booker Prize-winning George Saunders. *See* First Consolidated Class Action Complaint at 1, Authors Guild v. OpenAI Inc., No. 1:23-cv-08292-SHS (S.D.N.Y. filed Feb. 2, 2024) (listing plaintiffs). For the biographies of the plaintiffs discussed herein, see *Bio*, Maya Shanbhag Lang, https://www.mayalang.com/bio [https://perma.cc/2M35-HX9H]; *About*, Jonathan Franzen, https://

But those operating under traditional IP frameworks would likely respond and note that IP simply cannot be harnessed to protect against the types of harms the authors are concerned about. Many might note that IP is focused on *progress*—and thus, copyright should foster, not restrict, the transformative nature of generative AI systems.[112] Even the seemingly clear-cut case of infringement that the authors set forth in their complaints might fail under IP's traditional output-maximizing framework. For example, copyright's fair use doctrine, which allows certain uses of copyrighted works, might excuse such uses as the type of copying that ultimately results in newer, more creative, works.[113]

2. Television/Film and Audiovisual Works

Notwithstanding the spate of class action litigation brought by authors, perhaps no group of creative laborers has been as vocal—or as visible—about the encroachment of AI as the writers working in the film and television industries. In May 2023, the Writers' Guild of America went on strike after talks broke down with the Alliance of Motion Picture and Television Producers, which represents the major film and television studios like Paramount, Sony, Universal, and Disney, as well as new streaming services like Netflix, Apple, and Amazon.[114] When the strike began, the biggest issue on the table had been the royalties—"residuals"—that writers receive from streaming.[115] But as

jonathanfranzen.com/about [https://perma.cc/38VQ-J3CZ]; *Jia Tolentino*, New Yorker, https://www.newyorker.com/contributors/jia-tolentino [https://perma.cc/99F4-DUBW]; *Bibliography*, George R.R. Martin, https://georgerrmartin.com/bibliography [https://perma.cc/CVC2-5XNN]; *Biography*, Scott Turow, https://www.scottturow.com [https://perma.cc/H376-5BFY]; George Saunders, https://georgesaundersbooks.com/about-george-saunders [https://perma.cc/N3RK-A3JY].

112 This focus on progress is because IP rights flow from Article I, Section 8, Clause 8 of the Constitution, which grants Congress the power to "promote the Progress of Science and [the] useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8; *cf. supra* note 42 and accompanying text (discussing how the Progress clause, which empowers Congress to grant authors and inventors rights in their works, can be read through a utilitarian lens); *see also* Lemley & Casey, *Fair Learning*, *supra* note 104, at 774 (arguing for a fair use defense for training data, on the basis that copyright is intended to "promote the progress of science").

113 *See, e.g.*, Sega Enters. v. Accolade, Inc., 977 F.2d 1510, 1523 (9th Cir. 1992) (describing how defendant's infringement "has led to an increase in the number of independently designed video game programs offered for use," thereby reflecting the "growth in creative expression, based on the dissemination of other creative works and the unprotected ideas contained in those works, that the Copyright Act was intended to promote" (citation omitted)), *as amended*, No. 92-15655, 1993 U.S. App. LEXIS 78 (9th Cir. Jan. 6, 1993).

114 WGA Negotiating Comm., *supra* note 7; Baum & Kilkenny, *supra* note 30.

115 *See infra* Section II.D; *see also* Simmone Shah, *The Writers Strike Is Taking a Stand on AI*, Time (May 4, 2023, 2:44 PM), https://time.com/6277158/writers-strike-ai-wga-screenwriting [https://perma.cc/7MNX-CV37] ("The guild's top priorities are fighting for increased compensation and residuals.").

the strike wore on, the other issue on the table—the studios' use of AI—became, suddenly, the dominating fear and force of the strike.[116] Writers feared that studios would use generative AI tools like ChatGPT—which can be trained using material that writers themselves had previously generated—to eventually supplant them in the writing of scripts and other literary material.[117] There have been outward signs that replacing creative labor by cheap AI is precisely what the studios intend: As Dreamworks cofounder Jeff Katzenberg said recently, "[i]n the good old days, when I made an animated movie, it took 500 artists five years to make a world-class animated movie. I think it won't take ten percent of that, literally, . . . three years out from now."[118]

Notably, the studios' own lack of legal action against prominent LLMs like OpenAI's ChatGPT, much of which are trained on copyrighted content owned by the studios, seemed to speak volumes: Indeed, it is notable that, as earlier described, it is individual authors—not large content conglomerates—who have spearheaded the recent flood of class action litigation against LLMs.[119] Lest there be any confusion about which side the large studios are taking in the AI debate, one need only look to the Motion Picture Association's recent filing before the Copyright Office, the latter of which had asked a series of questions as to whether changes in the law were necessary to address the development of AI.[120] The studios—which have tended to approach every new technology as an existential threat that warrants new and stronger IP protections[121]—instead stated that while "[s]trong copyright

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116 *See e.g.*, Dani Anguiano & Lois Beckett, *How Hollywood Writers Triumphed over AI—and Why It Matters*, The Guardian (Oct. 1, 2023), https://www.theguardian.com/culture/2023/oct/01/hollywood-writers-strike-artificial-intelligence [https://perma.cc/Y2CZ-Y8V5] (describing AI as "[o]ne of the most closely watched aspects of negotiations"); Kate Sammer, *How A.I. Took Center Stage in the Hollywood Writers' Strike*, CNBC (July 5, 2023, 10:26 AM), https://www.cnbc.com/2023/07/05/how-ai-took-center-stage-in-the-hollywood-writers-strike.html [https://perma.cc/U73W-NJA5].

117 *See* Shah, *supra* note 115 ("The commercial adoption [of AI] is raising questions . . . about the potential for job cuts. . . . Many artificial intelligence systems use the work of creatives to teach the tools to generate something similar . . . .").

118 Bloomberg Television, *Jeff Katzenberg Says AI Will Cut Cost of Animated Films by 90%*, YouTube (Nov. 8, 2023), https://youtu.be/fkJlwjKdxnI [https://perma.cc/68HN-VX2H].

119 *See supra* note 19 and accompanying text; *supra* Section I.B.1. For a discussion of how copyright class action litigation differs from the traditional copyright infringement action in its vindication of the interests of individual creators rather than content conglomerates, see Tang, *Class Actions*, *supra* note 104, at 1688–89.

120 MPA Comment, *supra* note 19.

121 *See, e.g.*, Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012) (coalition of studios suing YouTube); Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (coalition of studios suing file sharing company); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (coalition of studios suing VHS tape manufacturer); *see also Copyright Law in Foreign Jurisdictions: How Are Other Countries Handling Digital Piracy?:*

protection is the backbone of [our] industry[,] . . . [the studios] have a strong interest in developing creator-driven tool[s], including AI technologies, to support the creation of world-class content."[122] The MPA went on: "Developments in AI, like preceding technological advancements, have a great potential to enhance, not replace, human creativity. MPA's members further believe these developments can, and should, co-exist with a copyright system that incentivizes the creation of original expression and protects the rights of copyright owners."[123]

Traditional IP theories might respond and say that creator concerns are purely ancillary to IP policy, which is focused on ensuring maximization of outputs. Indeed, traditional IP frameworks might applaud AI as *increasing* outputs—and those frameworks, while lamenting, perhaps, the elimination of creative jobs, would nonetheless contend that such concerns are outside the ambit of IP.[124] Yet the labor law theory of IP that I propose herein argues that how studios use AI now and in the future—and what role, if any, human writers will have in that equation—fundamentally boils down to IP policy. As Part III will discuss in more depth, current copyright doctrine has limited protection of creative works to those authored by humans.[125] Since IP protection does not currently apply to AI-authored works, at least for now, studios are less incentivized to release content that "would enter the public domain upon release"—content that the studios could not own as IP and thus could not be exploited as such.[126] Thus it was perhaps unsurprising

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Hearing Before the S. Comm. on the Judiciary, Subcomm. on Intell. Prop., 116th Cong. 1 (2020) (statement of film executive Jonathan Yunger) ("For the past two decades, the plague of digital piracy has been stealing jobs from hardworking Americans. . . . Anything that could be distributed digitally online was stolen and monetized by criminals, facilitated by some of the world's wealthiest internet companies . . . .").

122 MPA Comment, *supra* note 19, at 2.

123 *Id.* at 5.

124 *See, e.g.*, Ryan Abbott & Elizabeth Rothman, *Disrupting Creativity: Copyright Law in the Age of Generative Artificial Intelligence*, 75 Fla. L. Rev. 1141, 1183 (2023) (harnessing the consequentialist IP framework in arguing that failing to provide copyright protection to AI-generated works would require the "use [of] human authors even if they are less efficient. . . . [A] movie studio will need to employ a human artist to obtain copyright. That is a socially wasteful outcome if an AI can complete a task better, faster, and cheaper than a person"). Note that this Article does not take up the issue of whether IP is well situated to take up the broader issue of protecting noncreative jobs that may be displaced as the result of innovation, an argument that others have made. *See* Camilla A. Hrdy, *Intellectual Property and the End of Work*, 71 Fla. L. Rev. 303, 330 (2019) (discussing how historically, "inventions' impact on employment was a valid consideration within the U.S. patent system[] [and] that inventions were perceived to lead to technological *em*ployment as well as unemployment") (emphasis in original).

125 *Infra* Section III.B.

126 Winston Cho, *Studios' Offer to Writers May Lead to AI-Created Scripts That Are Copyrightable*, Hollywood Rep. (Aug. 23, 2023, 4:36 PM), https://www.hollywoodreporter.

that the ultimate deal negotiated between the studios and the Guild kept AI-generated content on the table, with an offer at one point that "[a] writer will not be disadvantaged if any part of the script is based on [generative AI]-produced material, so that the writer's compensation, credit and separated rights[127] will not be affected."[128] That is, "if writers are given an AI-created screenplay and asked to touch it up, they will 'receive the fee for a screenplay with no assigned material and not a rewrite.'"[129]

But what was left out of this deal—and what industry outlets immediately pointed out—was that the studios *needed* human authors to rewrite AI-produced scripts.[130] Only a script properly "authored" by a human would be subject to IP protection—and thus exploitable as such.[131] Thus, AI's encroachment on creative labor is not simply a matter of labor policy or industrial policy. It is, instead, fundamentally intertwined with IP policy. And, as the last Part of this Article will discuss, an input- and labor-focused theory of IP better enshrines and justifies IP's human authorship requirement.

3. Music

Just as with audiovisual content, algorithms and data harvesting lower the cost of creating audio content. Even without wholly autonomous AI creation of songs, a company might take an established formula and direct a human creator to produce a work that matches those parameters exactly.[132] Indeed, the streaming service Spotify made

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com/business/business-news/amptp-ai-writers-guild-strike-1235573351 [https://perma.cc/DMF2-XLRN].

127 On separated rights, see *infra* Section II.D; *see also* Writers Guild of Am. W., Understanding Separated Rights 7 [hereinafter WGA Separated Rights], https://www.wga.org/uploadedfiles/know_your_rights/SeparatedRights.pdf [https://perma.cc/42FP-D5HM] ("Separated Rights are a group of rights that the WGA Theatrical and Television Basic Agreement ('MBA') provides to writers of original material. . . . The WGA negotiated for certain of the copyright rights to be separated out and conveyed instead to the writer.").

128 Cho, *supra* note 126 (quoting one offer from studios to the WGA).

129 *Id.* (quoting the Alliance of Motion Picture and Television Producers' counteroffer). For a more detailed discussion on what the final agreement entailed regarding the use of AI in scriptwriting, see Writers Guild of America, *Summary of 2023 WGA MBA* (Aug. 18, 2024), https://www.wga.org/contracts/contracts/mba/summary-of-the-2023-wga-mba [https://perma.cc/Y9SA-CJMW] (stating, in section five, that AI cannot write or rewrite literary material, and AI-generated content cannot be used to undermine a writer's credit or rights under the MBA).

130 *See id.* (discussing "how the studios need writers to exploit any work created by AI under existing copyright laws").

131 *See id.* ("[W]orks solely created by AI are not copyrightable. To be granted protection, a human would need to rewrite any AI-produced script.").

132 Ben Sisario, *While Some Cry 'Fake,' Spotify Sees No Need to Apologize*, N.Y. Times (July 14, 2017), https://www.nytimes.com/2017/07/14/business/media/while-some-cry-fake-

headlines a few years ago when the news publicly broke that they had been doing just that for years, prompting an outcry that their popular playlists were "dotted with hundreds of supposedly 'fake' artists . . . who are racking up tens of millions of streams yet have no public profile."[133] While the artists were actual humans whom Spotify had commissioned works from, the types of tracks that Spotify commissioned—"atmospheric, wordless tracks on mood-focused playlists"—seemed especially primed for machine creation.[134] And, even as Spotify defended itself from accusations that the real human creators behind its ambient music were "fake artists,"[135] it soon hired an in-house artificial intelligence specialist who had previously developed AI technologies for computer-generated music at Sony.[136]

Generally, copyright scholars have celebrated what they call "data-driven creativity" as presenting both the future of content creation and a welcome antidote to the high cost of licensing traditional content.[137] But this so-called "data-driven creativity" harms individual sellers of copyrighted works. This is most obviously the case if machines have the ability to replace human authors completely. But even without replacing human laborers completely, firms can still use AI to significantly weaken individual authorial bargaining power. Content produced according to data-driven formulas may be subject to lower copyright royalties to the human authors of that content—or no royalties at all, in cases where the works are specifically commissioned by a company to adhere to a formula it has determined consumers enjoy.[138] Spotify, for example, even as it denied claims that Spotify owned songs produced by its "fake artists" outright, "did not deny that the songs may cost Spotify less to

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spotify-sees-no-need-to-apologize.html [https://perma.cc/VT8Y-2SBT] (discussing allegations that Spotify uses algorithms to produce "fake" content to compete with musical artists).

133 *Id.*

134 *Id.*

135 *Id.*

136 Tim Ingham, *Spotify's Scientist: Artificial Intelligence Should Be Embraced, Not Feared, by the Music Business*, Music Bus. Worldwide (Jan. 22, 2018), https://www.musicbusinessworldwide.com/spotifys-scientist-artificial-intelligence-should-be-embraced-not-feared-by-the-music-business [https://perma.cc/DG4W-4KMQ] (discussing Spotify's hiring of François Pachet, "the world's foremost scientist in the field of AI-assisted music creation," in 2017).

137 Raustiala & Sprigman, *supra* note 95, at 1560 n.14, 1585–86. The authors note that access to data may advantage some firms to the detriment of others—an argument that seems to address concerns about firm size rather than harm to labor markets. *See id.* at 1613 ("[W]e should see content increasingly produced and distributed by firms that offer products and services other than the content itself.").

138 *See* Sisario, *supra* note 132 (noting that while Spotify has not confirmed the contractual arrangement regarding the commissioned works, another company that commissions works "typically purchase[s] the rights to music from its composers for a flat fee" so that they would own the music outright rather than split ongoing royalties with composers).

play."[139] By driving down the value of a work, digital platforms, in turn, can potentially leverage those lower royalty numbers in negotiations with subsequent songwriters or music publishers.[140] Platforms may even attempt to use lower royalty numbers as marketplace benchmarks in royalty rate-setting proceedings before the Copyright Royalty Board ("CRB"), the administrative panel tasked with setting copyright royalty rates for compulsory licenses, to lower the overall royalties paid by digital streaming services for streaming.[141] The result is that songwriters may receive less for creative production, as those who agreed to produce ambient works for Spotify potentially may have.[142]

Notably, Spotify suggested a justification for its potentially lower-priced deals by arguing that "the placement of all songs on its playlists was determined only by their popularity among listeners."[143] As its global head of strategic initiatives, Jonathan Prince, put it: "This is a marketplace, and not all content is priced the same."[144] But in fact, what content a platform chooses to spotlight or steer consumers towards is not simply determined by consumer preference. Digital platforms instead may successfully influence what consumers may view or listen to—a practice known as "steering." Pandora, for example, uses the term "steering" to refer to a webcaster's "ability to control the mix of music that's played on the service *in response to differences in royalty rates charged by different record companies*."[145] The CRB, which also handles

139 *Id.*

140 *See id.* (noting that, in Spring 2017, "Spotify signed a new licensing deal with Universal Music, which agreed to a lower royalty rate in exchange for more control over how its music appears on the service").

141 *See* 17 U.S.C. § 801(b) ("[T]he functions of the Copyright Royalty Judges shall be as follows: (1) To make determinations and adjustments of reasonable terms and rates of royalty payments as provided in" certain statutorily-provided compulsory licenses under the Copyright Act.); *see also* Procedural Regulations for the Copyright Royalty Board, 70 Fed. Reg. 30901, 30901 (May 31, 2005) (to be codified at 37 C.F.R. ch. III) (describing legislation under which "three permanent Copyright Royalty Judges" took over responsibilities for "the administration of the various statutory copyright licenses" and defining "[s]tatutory licenses" as "sometimes referred to as 'compulsory' licenses" (citation omitted)). These judges "make up the . . . Copyright Royalty Board." *Copyright Royalty Judges*, FED. REG., https://www.federalregister.gov/agencies/copyright-royalty-judges [https://perma.cc/RX9T-QZMH]. Copyright Royalty Judges can use marketplace benchmarks—private agreements that parties have entered into—in setting royalty rates. *See, e.g.*, Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 1933 (Feb. 5, 2019) (to be codified at 37 C.F.R. pt. 385) ("The Judges agree that a strength of the Copyright Owners' benchmarking approach is that it allows for the identification of marketplace benchmarks, so that the Judges can ascertain whether there are analogous markets from which statutory rates can be derived.").

142 *See* Sisario, *supra* note 132; *see supra* note 138.

143 *Id.*

144 *Id.*

145 Web IV, *supra* note 70, at 26316, 26356 (emphasis added) (citation omitted).

setting royalties for certain uses of copyrighted works,[146] noted that, "[a]ccording to Pandora, . . . Pandora has now tested and proven its ability to modify its playlist-selecting algorithms to rely more or less heavily on the music of particular record companies so that it can steer its listeners toward or away from the music from any one record company."[147] Pandora has incentive to steer consumers towards certain music that, under Pandora's license agreements, has lower royalty-bearing plays, with the CRB concluding: "[t]he Judges were presented with hard and persuasive evidence that competitive steering has reduced royalty rates" in the marketplace for streaming.[148]

On the one hand, IP law should welcome steering—as the CRB did—because it weakens the oligopolistic power of highly concentrated record labels, permitting a more workably competitive market.[149] On the other hand, the proven ability of digital platforms to steer consumers toward or away from certain content, thereby responding not just to consumer preference but in fact shaping and influencing consumer demand, suggests that digital platforms can, and do, wield outsize influence over which artists are heard. Thus, the use of data-driven creativity in upstream inputs can drive digital platforms to prioritize these house-created, house-owned, non-royalty-generating works over other artists' works (which do generate royalties) downstream.

II
Intellectual Property Law as Labor Policy

Despite scattered acknowledgments of the overlap between IP and industrial policy in the literature, for the most part, IP's output-based frameworks have historically ignored the ways in which the law functions as a system of industrial organization, by which I mean how IP mediates between the rights of creative workers and the large firms that coordinate and exploit such labor.[150]

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146 *See supra* note 141 and accompanying text.

147 Web IV, *supra* note 70, at 26356 (emphasis omitted) (citation omitted).

148 *Id.* at 26343.

149 *Id.* at 26341. A workably or effectively competitive market is not a perfectly competitive market, the latter of which is often difficult to satisfy in real markets. Instead, workable competition looks to whether there is "regular, significant competition among suppliers for the patronage of buyers." *Id.* (citation omitted). On record label concentration, see *supra* Section I.A.1.

150 Professor Cohen made a similar point about copyright several decades ago, albeit more focused on the *outputs* of authorship, which she compared to corporate property (rather than the oft-conceptualized notion of intellectual property as real property). *See* Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 Wis. L. Rev. 141, 149–51. Others have focused not on laborer-employer relationships, but instead on the fact that IP frequently chooses between different types of firms and new technologies,

Note that the labor reframing of IP I propose herein is to be distinguished from existing author-focused theories in the IP scholarship. Whether as its Enlightenment-era construct—the Romantic author, creating alone in his garret—or a more decentralized vision of creation as democratic participation, such author-centric theories variously champion the act of creation as a radical act of agency and autonomy,[151] as "meaning making,"[152] "as a condition of life,"[153] as genius,[154] as beauty,[155] and as truth.[156] Rarely do such theories, however, view the act of creation as something more quotidian yet all the more critical in its banality: as wage labor, as the means by which individual work is extracted and, in turn, exploited by large IP firms.

This Part argues that much of contemporary IP in practice is far from the romanticized and solitary—or else decentralized, participatory, and open-source—notions of creativity that pepper the IP theory and scholarship.[157] Instead, it argues that modern-day IP functions in practice increasingly like a form of labor policy, operating as a contested site through which creative laborers exchange work for wages—and through which large firms amass power and capital, often at the expense of those laborers. This Part sets forth four key reasons why this is so. Section II.A explains that modern-day IP functions like

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in arguing that IP operates as a form of "industrial policy." *See, e.g.*, Robert M. Sherwood, *Human Creativity for Economic Development: Patents Propel Technology*, 33 AKRON L. REV. 351, 351 (2000) ("Intellectual property both leads and lags the development of new technology. . . . [A]n intellectual property system is, in effect, a passive industrial policy. The policy has served well to stimulate innovation without requiring affirmative government action or public funds."); *see also* Johnson & Johnston Assocs. v. R.E. Serv. Co., 285 F.3d 1046, 1071–72 (Fed. Cir. 2002) (Newman, J., dissenting) (discussing the process of invention in "provid[ing] the basis of industrial advance and economic growth" as well as "[t]he role of patent systems in the allocation of commercial resources" (citations omitted)).

151 *See* Daniel J. Gervais, *The Machine as Author*, 105 IOWA L. REV. 2053, 2084 (2020) (arguing that creation "*causes* (by its action in performing its task) a difference in the world").

152 *See* Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 537 (2009) (arguing that creation is a form of meaning-making that "contributes to human flourishing"); 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) (noting that creators are inextricably "engaged in their own act of meaning making" (citations omitted)).

153 Carys Craig & Ian Kerr, *The Death of the AI Author*, 52 OTTAWA L. REV. 31, 86 (2021).

154 *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (referring to "creative activity of authors and inventors" as "genius").

155 *See* Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1949–50 & 1950 n.9 (2006) (describing artistic works made by "prisoners about to be put to death" during the Holocaust as an example of how "even in the midst of tragedy, human beings can still find beauty" (citations omitted)).

156 *See* John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1041 (1976) (arguing that art holds a mirror to our "culture and our history," and thus, to "revise, censor, or improve the work of art is to falsify a piece of the culture").

157 *See supra* notes 151–56 and accompanying text.

labor policy because the conditions of creation itself have changed, moving away from the quaint image of the solitary tinkerer in their living room, towards creation as industrial organization, as the means by which creative activity is organized, extracted, and, ultimately, commoditized. Section II.B examines how IP functions like labor policy doctrinally and statutorily, as the work for hire and termination right explicitly mediate between the rights of individual creative workers and large firms, thereby allocating rights in creative work between the two parties. Section II.C discusses the use of IP as a means of restricting employee mobility where contractual remedies like enforcement of noncompete provisions have been invalidated by regulators. Finally, Section II.D highlights how, in certain areas, such as the heavily unionized entertainment industry, the very existence of IP rights *is* what creates and sustains a vast marketplace for creative labor, generating the conditions for creative work's supply and demand.

A. IP Coordinates Creative Labor

There is a reason why human authors and inventors have "at most a walk-on, . . . cameo appearance"[158] in modern-day IP discourse. And that is because the output-focused frameworks described in the previous Part are agnostic as to who—or what—is best suited for maximizing production. That is, there is no reason why traditional IP justifications would not prefer large firms, which have greater production capacity and larger budgets, over individuals for purposes of maximizing outputs. As this Section discusses, the incentives-for-creators framework that proved foundational to utilitarian theory has largely been supplanted by an incentives-for-intermediaries one, as the role of the individual author in IP rhetoric is displaced by large IP firms, who have increasingly assumed the mantle of innovation.

The singular image of whom and what IP rights are for might be Thomas Edison, toiling over a lightbulb over long nights in his own home laboratory.[159] Or perhaps Jack Kerouac, bent over a typewriter and composing all of *On the Road* on one reel of paper over the course of just three weeks.[160] But, as other IP scholars have pointed out,

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158 Jane C. Ginsburg, *The Author's Place in the Future of Copyright*, 45 WILLAMETTE L. REV. 381, 382 (2009); *see also* Mark A. Lemley, *The Myth of the Sole Inventor*, 110 MICH. L. REV. 709, 710–11 (2012) [hereinafter Lemley, *Myth*] (on the fact that few inventions are actually created by an individual inventor).

159 *See, e.g.*, Lemley, *Myth*, *supra* note 158, at 710 ("Thomas Edison invented the lightbulb from his famous home laboratory . . . . Patent law is built around [such] canonical tales . . . . [It] is based on the idea that a lone genius can solve problems that stump the experts . . . .").

160 *See, e.g.*, Andrea Shea, *Jack Kerouac's Famous Scroll, 'On the Road' Again*, NPR (July 5, 2007, 4:00 PM), https://www.npr.org/2007/07/05/11709924/jack-kerouacs-famous-

"[t]he canonical story of the lone genius inventor is largely a myth."[161] Invention and creation might occur in teams, often building off the works of others.[162] "[C]ontemporary polyvocal writing practice," as Professor Peter Jaszi put it, "increasingly is collective, *corporate*, and collaborative."[163]

That references to collective creativity might also include corporate creativity is no accident. A corporation, after all, is the chief means by which individual work can be pooled, organized, and made—in neoclassical terms—efficient.[164] In one copyright case that adjudicated dueling ownership claims in a comic book as made between the comic book illustrator Jack Kirby and the entertainment conglomerates Marvel and Disney, the court emphasized the role of the firm in the creative process—so much so that that form of organizational creativity begot its own corporate moniker, the "Marvel Method."[165] While the court even acknowledged that Kirby's "ongoing partnership with Marvel" was "unbalanced and under-remunerative to the artist," it was that very—potentially exploitative—working relationship that "induced Kirby's creation" of some of the greatest works in comic book history.[166] In the court's view, because Marvel, as a firm, "induced," "supervise[d]," made "creative contribution[s]," and "took on the risk of financial loss," so, too, should Marvel own the IP rights in Kirby's works.[167]

To the extent modern-day IP rights have been justified, then, they have been justified as incentivizing both the coordination of that creative labor and the means by which that work is done. The dominant utilitarian framework has often referred to this function of IP laws under a transaction costs framework, arguing that doctrines such as the work for hire doctrine—discussed in-depth below[168]—"solve[]

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scroll-on-the-road-again [https://perma.cc/R895-RDGX] ("Legend has it that Kerouac wrote *On the Road* in three weeks, typing it almost nonstop on a 120-foot roll of paper. The truth is that the book actually had a much longer, bumpier journey from inspiration to publication.").

161 Lemley, *Myth*, *supra* note 158, at 710.

162 *See id.* at 710–11 (discussing how the independent inventor is a myth in part because of concurrent (if independent) work in similar areas or further development of prior inventions, rendering "[i]nvention . . . in significant part . . . a social, not an individual, phenomenon"); Margaret Chon, *The Romantic Collective Author*, 14 VAND. J. ENT. & TECH. L. 829, 832 (2012) (noting the long-standing practice of "collective authorship" (citation omitted)).

163 Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 302 (1992) (emphasis added).

164 For the classic transaction costs justification for the firm, see generally R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

165 Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 124–26, 141–43 (2d Cir. 2013).

166 *Id.* at 141; *see also id.* at 124 ("Kirby is considered one of the most influential comic book artists of all time.").

167 *Id.* at 141–44.

168 *Infra* Section II.B.1.

a potentially large 'holdout' problem in compilations, multimedia, motion pictures, and other works involving numerous contributors."[169] The doctrine—which "preassigns" a copyrighted work to a single, corporate employer—is thus explained under the utilitarian framework as both a coordination *and* an allocation mechanism (discussed more below[170]), making efficient both the pooling and the vesting of creative labor.[171] Other doctrines also function concurrently as coordination and allocation mechanisms. For example, copyright's authorship requirement strips ownership claims in a work from everyone but those making the most "substantial creative contributions."[172] It does so to avoid the transaction costs problem that would arise from "[t]reating every acting performance as an independent work," which would, per the Ninth Circuit, be "a logistical and financial nightmare."[173]

And there may well be sound economic and logistical reasons for consolidating ownership claims in a single corporate employer. But it would be folly to ignore the hierarchical problem that arises from such doctrines,[174] which inevitably locate ownership claims in parties with the greatest resources and power. It is logical, in courts' views, to locate ownership claims in a "producer" or "director."[175] But the doctrines deem it illogical to vest any ownership claims in parties hierarchically further down the firm organizational structure: "costumer, hairstylist, and 'best boy.'"[176] As Professor Catherine Fisk notes, film theorists have documented how authorship doctrines that seek to centralize ownership within one or two parties, most often the producer or the director (or the studio), "obscures important information about the labor of production" and further "enhance[s] the power of directors at the expense of other talent, especially below-the-line talent" (in which

169 2 Peter S. Menell, Mark A. Lemley, Robert P. Merges & Shyamkrishna Balganesh, Intellectual Property in the New Technological Age: 2022, at 627 (2022). For a slightly different justification that works within the efficiency-based framework but provides an acknowledgment of the labor function of the doctrine, see Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, 47 U. Pitt. L. Rev. 1185, 1222 n.151 (1986) (noting that the work for hire doctrine "facilitates the employer's efforts to exploit the commercial value of the intellectual property so as to put the firm on a solid financial footing so that the employer can afford to continue to employ creative people").

170 *Infra* Section II.B.1.

171 2 Menell et al., *supra* note 169, at 627.

172 Aalmuhammed v. Lee, 202 F.3d 1227, 1233 (9th Cir. 2000) ("A creative contribution does not suffice to establish authorship of the movie.").

173 Garcia v. Google, Inc., 786 F.3d 733, 743 (9th Cir. 2015).

174 *Cf.* Sanjukta Paul, *On Firms*, 90 U. Chi. L. Rev. 579, 593–95 (2023) (making the case that the rise of the firm cannot be explained solely by, or even predominantly by, neutral principles of efficiency through minimizing transaction costs, but also must be understood through the lens of the consolidation and entrenchment of power).

175 *Aalmuhammed*, 202 F.3d at 1233.

176 *Id.*

costumers, hairstylists, and best boys—assistants to gaffers—would fall).[177]

IP scholars have been unabashed in touting this role of the IP firm as an efficient coordinator of creative work, going so far as to argue that to the extent IP rights continue to play any role in modern-day policy, it is in large part *because* of their function in protecting this type of "non-creative activit[y]."[178] Note that the IP firms I describe herein are sometimes referred to in the scholarly literature by another term: "intermediaries."[179] The use of that term belies the dominant framework's focus on demand-side dynamics, on the role of the intermediary in distributing that all-important thing: outputs. Intermediaries, in this view, are just that: middlemen between the author and the public, conveniently packaging up outputs for efficient distribution.[180] But I use the word "firm" purposefully, to highlight instead the supply-side function of what intermediaries do: order and organize labor *inputs*.

Once we see IP as having justified and fueled the growth of the IP firm as not just a neutral distributor for creative outputs but also coordinating and—indeed, as the next section discusses—*allocating* substantive rights in creative inputs, then questions of how IP might correct for input-side harms emerge naturally.[181] For example, answers to the efficiency-driven question of why we should address worker harms, even absent some reduction in innovation or output—or why we should not just provide subsidies to creative workers rather than make affirmative legislative commitments to creative worker welfare—could be answered by looking to similar debates occurring in labor and antitrust law.[182] As labor and antitrust scholar Sanjukta Paul put it in her work on firms:

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177 Catherine L. Fisk, *The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938–2000*, 32 Berkeley J. Emp. & Lab. L. 215, 276 (2011) (citing Derek Nystrom, *Hard Hats and Movie Brats: Auteurism and the Class Politics of the New Hollywood*, 43 Cinema J. 18 (2004)).

178 Barnett, *supra* note 67, at 390.

179 *Id.*

180 *See id.* (arguing that copyright is best understood as an incentive system for intermediaries "[t]o generate, package, market and deliver a creative good to a mass audience").

181 *See supra* note 174 and accompanying text.

182 *See* Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 Harv. L. & Pol'y Rev. 480, 500–01 (2016) (noting that protections like minimum wage laws can be justified through an "'anti-domination principle'—a good and just democratic society must protect all its members against domination" (citations omitted)); C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 Yale L.J. 2078, 2079–80 (2018) (noting that antitrust also addresses harms to labor inputs even where that monopsony power has no cognizable effect on outputs); Joseph Fishkin & William E. Forbath, *The*

> Economist Stephen Marglin's classic paper on the development of the putting-out and factory systems, *What Do Bosses Do?*, concluded that instead of technical efficiency gains, the best explanation for emergent hierarchy at the firm level was simply about interested parties seeking to entrench a distributional arrangement that benefitted them. In other words, some people sought to consolidate and entrench (for themselves and for those they viewed as their social successors) their relative gains (in both control and income) in durable ways, and they succeeded. Accepting this explanation does not mean waving away technical efficiency questions as unimportant, and it does not even mean that those questions were not important in shaping behavior at the time. It just means that hierarchy did not so *distinctively* solve technical efficiency problems across a variety of very different sectors around roughly the same time, that neutral solutions to operational problems—rather than the human urge to consolidate power in interaction with favorable existing legal and social tools—mainly explains its entrenchment.[183]

As I argue in a separate paper,[184] IP has lacked the tools or the language to grapple with how to apply its longstanding theories of creation (an activity that IP is uniquely concerned with, as opposed to other types of extra-IP labor, such as steelworking[185]), as a process *foundational* to democratic participation,[186] to any concomitant erosions in the ability to make a living by doing so. Reframing the act of creation as an act of work—and, with it, raising questions of creative worker subordination and firm domination—is critical in beginning to do so.

Anti-Oligarchy Constitution, 94 B.U. L. Rev. 669, 671–73, 684–85 (2014) (justifying collective bargaining laws and other employment laws that regulate unequal power distributions between employees and employers through what they call an "anti-oligarchy" principle prohibiting deep economic disparities between individuals); *see also* 15 U.S.C. § 17 ("The labor of a human being is not a commodity or article of commerce.").

183 Paul, *supra* note 174, at 595 (citations omitted).

184 Xiyin Tang, *The Coming Crisis of Creative Work* 26–40 (August 2024) (unpublished manuscript) (manuscript on file with the *New York University Law Review*).

185 Noncreative labor such as steelworking or driving for Uber is beyond the scope of this Article, but the protection of the right of individuals to make a living from those activities and avoid firm domination while doing so has been covered in-depth in the literature. *See supra* note 182 and accompanying text.

186 *See, e.g.*, Craig, *supra* note 152, at 230–32 (describing the collective, collaborative, democratic values animating the "cultural dialogue" of creativity, as evident through the "many forms of art, music, and intellectual endeavor that draw directly, consciously, and explicitly from pre-existing and protected works" (citations omitted)); 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, 3 (2004) ("Digital technologies highlight the cultural and participatory features of freedom of expression. . . . The purpose of freedom of speech . . . is to promote a democratic culture.").

B. IP Allocates Rights in Creative Work

IP also explicitly mediates between employee and employer relations. Nowhere is this more evident than in the rise, and now certainly the dominance, of corporate-owned IP, where, as discussed below, individual authors and inventors mostly negotiate away rights in their works to large IP firms in exchange for security of employment or wages.

1. Creation as Work, for Hire

The first U.S. copyright statute, the Copyright Act of 1790, granted copyright protection only to *authors* and not to publishers.[187] That is, under the statute, copyright vested initially in individual authors, who could then, if they wished, assign their works to a corporate copyright holder.[188] While two successive copyright acts provided for longer copyright terms, they likewise did not provide for a clear-cut way for corporations to own the fruits of an individual's work upfront.[189]

But the 1909 Copyright Act introduced a new concept: the corporate author. Codifying a simmering 19th century common law development that held that employers could own the copyright in their employee's work at the outset,[190] the 1909 Act, for the first time, referenced "an employer" as an entity capable of copyrighting a work without an assignment.[191] Seven decades later, the Copyright Act of 1976 elaborated upon the categories of works that constitute a work for hire, which include "a work prepared by an employee within the scope of his or her employment," *or* "a work specially ordered or commissioned" (such as "as a part of a motion picture or other audiovisual work").[192]

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187 *See* Copyright Act of 1790, Act of May 31, 1790, ch. 15, 1 Stat. 124 § 1; *see also* Van Houweling, *supra* note 62, at 585–86 ("The 1790 Act followed the Statute of Anne in bestowing its initial benefit on individual authors . . . .").

188 Act of May 31, 1790 § 1.

189 *See* Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 439; Act of July 8, 1870, ch. 230, §§ 86–88, 16 Stat. 198, 212–13 (repealed 1909).

190 *See, e.g.*, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 248 (1903) ("[T]he designs belonged to the plaintiffs [employers], they having been produced by persons employed and paid by the plaintiffs in their establishment to make those very things." (citations omitted)); *see also* Colliery Eng'r Co. v. United Correspondence Schs. Co., 94 F. 152, 153 (C.C.S.D.N.Y. 1899) (noting that a salaried employee's work "bec[o]me[s] the property of the" employer).

191 Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080 (repealed 1976); *see also* 2 Alexandra Darraby, Darraby on Art Law § 20:4 (July 2024 ed.) ("The Copyright Act of 1976 repealed the Copyright Act of 1909 . . . ." (citations omitted)).

192 17 U.S.C. § 101 (1976). By contrast, most other countries do not recognize the work-for-hire doctrine or the concept of corporate authorship at all. *See* 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 5.03[B][1][c] (Apr. 2024 ed.); Ralph Oman, *Berne Revision: The Continuing Drama*, 4 Fordham Intell. Prop. Media & Ent. L.J. 139, 143

While the Copyright Office does not release information as to what percentage of works are registered as works for hire, one might look to the prevalence of corporate-owned (versus individually owned) works in the patent context. Patents operate slightly differently, as rights in an invention initially belong to an individual inventor (or multiple inventors), who may then assign it to a corporation.[193] Because the Patent Act does not permit corporations to be the "inventor" of a patented invention from the first instance, one might expect there to be more individually owned works in the patent versus the copyright context, the latter of which makes it easy for corporations to own the works at the outset.[194] But the statistics provided by the USPTO on the percentage of corporate-owned patents, as opposed to patents owned by individuals, are astounding: In the year 2020, over *ninety percent* of patents issued went to corporations.[195] What this suggests is that most creators are not engaged in solitary, entrepreneurial activity: creation as bohemian calling or invention as entrepreneurism.[196] Instead, whether created as a work for hire or as an assigned invention, creation mostly occurs pursuant to employment arrangements, in which individuals agree to relinquish ownership over their work in exchange for wages.

(1993) (noting that corporations "enjoy" authorship rights only "in the United States and a few other countries"). Indeed, the United States has previously attempted to introduce a corporate authorship requirement into "the world copyright order"—and failed. *Id.* at 143–44.

193 Bd. Of Trs. of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 563 U.S. 776, 780 (2011).

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

195 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] (showing 330,528 inventions owned by either a foreign or U.S. corporation out of a total pool of 352,008 inventions for the year 2020). That number is even higher when one factors in the number of inventions owned by governments—which may be assignments made from government inventor-employees to the government entity. *See id.* (showing a total of 331,720 inventions out of a total pool of 352,008 inventions owned by either foreign or U.S. corporations or foreign or U.S. governments); *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).

196 To be sure, there is evidence that *some* amount of creation seems to reflect less an exchange of creative labor for capital and more of the spirit of bohemian creation or invention. *See* Jessica Silbey, *Harvesting Intellectual Property: Inspired Beginnings and "Work-Makes-Work," Two Stages in the Creative Processes of Artists and Innovators*, 86 Notre Dame L. Rev. 2091, 2116 (2011) (noting that, in interviews with creators, at least one creator "rarely talked about the need to work for money").

Indeed, work for hire provisions and assignment of patent provisions are almost par for the course in employment agreements.[197]

As with the other examples of IP law operating as labor policy provided herein,[198] one might be tempted to conceive of work for hire disputes as purely within the province of labor law, and thus not an issue that IP policy need concern itself with. But crucially, disputes as to who owns rights in a copyrighted work under the work for hire doctrine proceed under a test developed especially pursuant to the Copyright Act. That is, whether a work constitutes a work for hire under copyright law is an analysis distinct and separate from traditional employment law analysis of whether a work was properly assigned to a corporation by one's employment agreement.[199] In determinations of whether a work was made for hire pursuant to the 1976 Copyright Act, the test as established by the Supreme Court "relies on the general common law of agency, and not labor law."[200] Thus, even though "the Copyright Act's definition of 'employee' is identical to the definition used in the National Labor Relations Act (the 'NLRA')," one may be considered an "employee" under labor law and yet not an employee for purposes of copyright law.[201] As the Second Circuit put it in holding, whether one is an employee for purposes of the work for hire doctrine has no bearing on one's ability to unionize and collectively bargain under the NLRA:

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197 *See, e.g.*, Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789, 798 (2015) ("Pre-invention assignment clauses are pervasive and standard across many industries and jobs." (citation omitted)); Anne Marie Hill, *The "Work for Hire" Definition in the Copyright Act of 1976: Conflict Over Specially Ordered or Commissioned Works*, 74 CORNELL L. REV. 559, 569 (1989) ("In time, clauses expressly stating that the work was made for hire would become part of the standard form contract."); Joseph B. Anderson, *The Work Made for Hire Doctrine and California Recording Contracts: A Recipe for Disaster*, 17 HASTINGS COMMC'NS & ENT. L.J. 587, 588 (1995) ("Even a cursory review of recording and publishing contracts by both major and independent record labels and music publishers reveals that recording artists very frequently provide their recording and/or songwriting services pursuant to the 'work made for hire' doctrine in the United States Copyright Act." (citations omitted)).

198 *See supra* Section II.A; *infra* Sections II.B.2, II.C.

199 *See* Charles Tait Graves, *Is the Copyright Act Inconsistent with the Law of Employee Invention Assignment Contracts?*, 8 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 24 (2018) ("[W]hen the author of a copyrightable work is clearly an employee of the party claiming ownership under the work for hire doctrine, the sole question is whether the author created the work within the scope of his or her employment . . . ."). Graves argues that the employment law test for when an employee has assigned rights to the employer, versus the IP work for hire test, may point in the opposite direction of the IP test: "[T]he invention assignment analysis is *disjunctive*—the employer need only satisfy one of the conditions for ownership . . . . By contrast, the work for hire analysis is *conjunctive*—the employer must show all three factors, or at least . . . a [sufficiently] strong showing on the first and third . . . ." *Id.* at 36–37.

200 Horror Inc. v. Miller, 335 F. Supp. 3d 273, 296 (D. Conn. 2018) (citing Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989)), *aff'd*, 15 F.4th 232 (2d Cir. 2021).

201 *Id.* at 296.

"[S]ection 101 of the Copyright Act uses a more restrictive definition of employment, one aimed at limiting the contours of the work-for-hire determination and protecting authors—the individual creators of works whose foundational value the Constitution itself recognizes and Congress has expounded upon."[202]

Further still, for works created pursuant to the 1909 Copyright Act, courts have developed an entirely *sui generis* test that fails to reference *either* common law agency principles *or* labor law.[203] In the 1966 Second Circuit decision that developed this so-called "instance and expense" test, the court credited the test to the leading copyright treatise, *Nimmer on Copyright*, which purportedly stated that, "in the absence of an express contractual reservation to the contrary . . . the copyright shall be in the person at whose *instance and expense* the work is done."[204] But in a 2013 case, the Second Circuit noted that the cited phrase did not actually appear in the Nimmer Treatise and instead emerged from an earlier Ninth Circuit opinion regarding an independent contractor dispute.[205] Nonetheless, the test continues to be used today and bears little resemblance to what constitutes an employer-employee relationship under labor law.[206] Instead, the test only asks two questions: whether the "employer induces the creation of the work" and whether the employer "has the right to direct and supervise the manner in which the work is carried out."[207]

2. The Termination Right

In actuality, it is not surprising that copyright has developed its own set of tests for allocating ownership rights. Despite the incentives framework's tendency to blur the line between authors and intermediaries,[208] copyright has long recognized the distinction—and

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[202] Horror Inc. v. Miller, 15 F.4th 232, 244 (2d Cir. 2021) (first citing Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737–52; and then citing U.S. CONST. art. I, § 8, cl. 8).

[203] *See* Est. of Hogarth v. Edgar Rice Burroughs, Inc., 342 F.3d 149, 156–63 (2d Cir. 2003) (discussing the decades-long development of the common law work for hire test, which focuses on interpreting statutory language found in the Copyright Act).

[204] Brattleboro Publ'g Co. v. Winmill Publ'g Corp., 369 F.2d 565, 567 (2d Cir. 1966) (citing NIMMER ON COPYRIGHT 238 (1964) (emphasis added)).

[205] *See* Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 138 (2d Cir. 2013) ("Just as curious was the *Brattleboro* Court's attribution of the phrase 'instance and expense' to Professor Nimmer. . . . It seems instead to be drawn from a Ninth Circuit opinion in an independent contractor case published the year before." (citations omitted)).

[206] *Id.* at 140–43.

[207] *Id.* at 139 (citation omitted).

[208] *See* Eric Priest, *An Entrepreneurship Theory of Copyright*, 36 BERKELEY TECH. L.J. 737, 758–59 (2021) ("Intellectual property scholars have struggled with the extent to which copyright theory should include intermediary incentives because intermediaries are largely absent from the standard authorial incentive narrative.").

power imbalances—between one who *creates* the work (the author) versus one who may *own* the work (frequently, the intermediary). Nowhere is this more apparent than in copyright's termination right (sometimes referred to as a right of reversion[209]), which allows authors to terminate assignments they had previously made in a copyrighted work.[210]

The "right was expressly intended to relieve authors of the consequences of ill-advised and unremunerative grants that had been made before the author had a fair opportunity to appreciate the true value of his work product"[211] and, perhaps more so than any other doctrine in copyright, recognizes—and explicitly attempts to ameliorate—"the unequal bargaining position of authors."[212] As the legislative history makes clear, the existence of the right in turn directly calls into question the seemingly neutral, transaction-cost-based explanation for doctrines like work for hire.[213] As scholars have noted, "[t]he adoption of the [work for hire] doctrine appears to be a reward for the investment and political influence of established industries," rather than an attempt to codify an efficiency-based tool for solving coordination problems.[214] Recall that the transaction cost justification for work for hire is to "preassign[]" rights in a copyrighted "work to [an] employer" a priori, which "has the important effect of eliminating the costs of negotiating and executing assignment agreements."[215] Yet actual agreements executed in the marketplace, drafted long after the codification of the work for hire doctrine, continue to include assignments of copyright from artists to firms almost as boilerplate—and, as other scholars have documented, employment agreement boilerplate clauses that automatically assign all rights in both IP-protected and non-IP-protected works from the employee to the employer are commonplace.[216] As noted above, such power imbalances—in which an artist desperate for a commission will

209 *See* Larry Spier, Inc. v. Bourne Co., 953 F.2d 774, 779 (2d Cir. 1992) (referring to a copyright owner's termination right as a "right of reversion").

210 *Marvel*, 726 F.3d 119, 130, 136–37.

211 Mills Music, Inc. v. Snyder, 469 U.S. 153, 172–73 (1985) (citing H.R. Rep. No. 94-1476, at 124 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5740).

212 *Id.* at 73 n.39 (quoting H.R. Rep. No. 94-1476, at 124) (discussing the House Report's explanation of a "comparable termination provision").

213 *See supra* Section II.A.

214 Deborah Tussey, *What If Employees Owned Their Copyrights?*, 2008 Mich. St. L. Rev. 233, 236.

215 2 Menell et al., *supra* note 169, at 627.

216 *See* Tussey, *supra* note 214, at 238 (describing the "imbalance of power" between employee and employer regarding the automatic assignment of copyrighted works); *supra* note 197 and accompanying text.

simply agree to sign away rights in their work—are precisely what led to the enactment of the reversion right.[217]

C. IP Limits Employee Mobility in Lieu of Unenforceable Contractual Noncompetes

In recent years, noncompete provisions in employment contracts, which purport to prevent employees from starting work at a competitor firm for a certain period of time, have been the subject of intense regulatory and public scrutiny.[218] States like California have, for some time, outlawed the enforcement of such provisions.[219] And, in a highly publicized move, the Federal Trade Commission issued rulemaking in April 2024[220] that banned noncompete agreements at the federal level.[221]

Much ink has been spilled in the scholarship on how contractual noncompete provisions severely limit employee mobility and hinder innovation;[222] likewise, at least one IP scholar has highlighted how contractual provisions may be used in lieu of IP law, sweeping in "ideas, concepts, techniques" and other "know-how" that go beyond what IP laws traditionally protect.[223] But the problem runs in the reverse direction, as well: Employers may also use IP laws to protect what contract law cannot protect—specifically, in instances where state or federal laws have banned the enforcement of noncompetes.[224] Indeed,

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217 *See supra* notes 211–12 and accompanying text.

218 *See* Camilla A. Hrdy & Christopher B. Seaman, *Beyond Trade Secrecy: Confidentiality Agreements that Act Like Noncompetes*, 133 YALE L.J. 669, 673 (2024) ("In the employment context, the most controversial [trade secrecy-related] agreement is the noncompete. Noncompetes are contracts that prevent the recipient of information from competing following the exchange.").

219 CAL. BUS. & PROF. CODE § 16600 (West 2024).

220 *See* J. Edward Moreno, *F.T.C. Issues Ban on Worker Noncompete Clauses*, N.Y. TIMES (Apr. 23, 2024), https://www.nytimes.com/2024/04/23/business/noncompete-clause-ban.html [https://perma.cc/MXD8-LR63] ("The Federal Trade Commission on Tuesday said employers could no longer, in most cases, stop their employees from going to work for rival companies.").

221 Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912).

222 For a summary of the conventional view that noncompetes harm employees and are unhelpful to innovation—and for a counterargument to the conventional view—see Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. CHI. L. REV. 953 (2020) (examining arguments that nonenforcement of noncompetes stifles innovation and contending that a "'reasonableness' standard . . . to adjudge the enforceability of noncompetes" better "balance[es] the complex trade-offs . . . on the mobility of human capital" (citations omitted)).

223 Lobel, *supra* note 197, at 803 (citation omitted).

224 While there has been a resurgence of interest in noncompetes following the FTC's recent rulemaking, scholars have long warned that "trade secret law" could be weaponized "into the equivalent of a judicially imposed covenant not to compete." Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and*

the FTC specifically stated in its rulemaking that its ban of noncompetes does not affect litigation to protect a company's trade secrets, specifically finding "that trade secret law provides employers with a viable, well-established means of protecting investments . . . ."[225]

Since the passage of three separate laws prohibiting trade secret misappropriation, the Economic Espionage Act (which criminalizes trade secret theft), the Defend Trade Secrets Act (the "DTSA," which creates a federal civil cause of action for trade secret misappropriation),[226] and the Uniform Trade Secrets Act ("UTSA," which has been adopted by forty-seven states and Washington D.C.),[227] thousands of trade secret claims have been filed[228]—the majority "of them by large companies against employees who went to work for other American firms."[229] And it is not by happenstance that California, a state that has banned contractual noncompete provisions,[230] has a larger share of such cases than any other state.[231]

Consider the recent, high-profile case of Anthony Levandowski, who left Google to work for its competitor, Uber, in 2016.[232] Google's ill will against Levandowski ran deep; He was a talented but volatile employee who not only took himself to a competing company but also took a number of other Google employees with him.[233] As both Google and Uber were based in California, a state that has deemed

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Covenants Not to Compete, 74 N.Y.U. L. Rev. 575, 580 (1999); Hrdy & Seaman, *supra* note 218; Eushrah Hossain, Valencia Scott & Joshua Rosenthal, *Unconventional Tools for States and Cities to Build Worker Power: A Case Study on Noncompete Agreements*, 57 U.C. Davis L. Rev. 3063 (2024).

225 Non-Compete Clause Rule, 89 Fed. Reg. at 38425.

226 *Id.*; 18 U.S.C.A. § 1832 (West); 18 U.S.C.A. § 1836(b)(1) (West).

227 Unif. Trade Secrets Act § 1 (4)(i)–(ii) (amended 1985), 14 U.L.A. 628, 636–37 (2021); *see* Non-Compete Clause Rule, 89 Fed. Reg. at 38425 (noting the embrace of the UTSA by forty-seven states and D.C.).

228 *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38425 (finding that firms have a "viable" alternative to noncompetes in the form of a trade secret lawsuit and that filing numbers—such as the "1,156 trade secret lawsuits . . . filed in Federal court in 2022" alone—"suggest[] that many employers themselves view trade secrets as a viable means of obtaining redress for trade secret theft" (citation omitted)).

229 Charles Duhigg, *Did Uber Steal Google's Intellectual Property?*, New Yorker (Oct. 15, 2018), https://www.newyorker.com/magazine/2018/10/22/did-uber-steal-googles-intellectual-property [https://perma.cc/N5VT-HUUH] [hereinafter Duhigg, *Uber v. Google*].

230 *Id.* ("[I]n California non-compete agreements were illegal.").

231 *See id.* ("Since [the DTSA] was enacted, the number of federal trade-secret suits has skyrocketed . . . . There have been more cases in California than in any other state."); *see also* Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 Vand. L. Rev. 1, 41 (2015) (noting that "a state's trade secret laws" would be enforceable against a departing employee "even absent a contract clause" (citation omitted)).

232 Duhigg, *Uber v. Google*, *supra* note 229.

233 *Id.*

noncompete provisions per se illegal, Google had no contractual means of preventing Levandowski from working for its competitor.[234] Likewise, a subsequent IP lawsuit filed by Google against Uber, based on trade secret and patent infringement, seemed weak enough that Google decided to settle just a few days into the trial, before any verdict on infringement was rendered.[235] But Google had another tool in its arsenal: a claim for trade secret misappropriation not against Uber, but against Levandowski himself. In the eyes of the federal prosecutor who brought the thirty-three acts of trade secret theft against Levandowski, IP theft was unique, and different, from the employee mobility issue that the state had long been concerned about: "All of us have the right to change jobs. . . . None of us has the right to fill our pockets on the way out the door. . . . Theft is not innovation."[236]

If California, a state that has been very active in banning contractual noncompetes,[237] has also seen the largest share of trade secret misappropriation suits, there is reason to believe that even if the FTC's federal ban of noncompetes successfully withstands inevitable constitutional challenges,[238] more firms may simply use IP law to achieve the same goal of preventing employee mobility. In fact, the FTC's rulemaking practically *invites* it.[239] This threat is exacerbated by

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234 Charles Duhigg, *How the Anthony Levandowski Indictment Helps Big Tech Stifle Innovation in Silicon Valley*, New Yorker (Aug. 28, 2019), https://www.newyorker.com/tech/annals-of-technology/how-the-anthony-levandowski-indictment-helps-big-tech-stifle-innovation-in-silicon-valley [https://perma.cc/K7XR-GTSA].

235 *Id.*

236 *Id.*

237 *See* Duhigg, *Uber v. Google*, *supra* note 229 ("Massachusetts' laws made it difficult for employees to join rival companies or create new businesses. . . . But in California noncompete agreements were illegal. That prohibition had been inserted into the state's . . . code almost by accident . . . when California lawmakers . . . virtually copied a set of statutes [from] New York[] . . . .").

238 The first of these litigations challenging the authority of the FTC to enact a nationwide ban was filed fewer than twenty-four hours after the FTC issued its final rulemaking. *See* Ryan LLC v. FTC, No. 3:24-CV-00986-E, 2024 U.S. Dist. LEXIS 117418, at *2–3, *8, *11 (N.D. Tex. July 3, 2024) (noting that "the FTC adopted the final Non-Compete Rule," and that "Ryan initiated this lawsuit [challenging said Rule]," on April 23, 2024 (citations omitted)); *see also* Hrdy & Seaman, *supra* note 218, at 753 (noting the likelihood that the FTC's rulemaking will be mired in various "legal challenges" (citations omitted)). Further, the Trump administration's FTC is currently considering whether it would like to continue defending the rule before the appellate court, at all. See Ryan LLC v. FTC, Case No. 24-10951, Dkt No. 205, at 2 (5th Cir. Mar. 7, 2025) (stating that the current chair of the FTC, Andrew Ferguson, "has recently stated publicly that he believes the [FTC] should reconsider its defense of the challenged rule").

239 *See supra* notes 228–31 and accompanying text. The FTC's Final Rulemaking also emphasizes other areas of IP, such as patent law, as viable alternatives to noncompetes. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38426 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912) (naming "patent law and invention assignment agreements" as "a less restrictive alternative than non-competes" (citation omitted)).

the infamously murky definition of what constitutes a "trade secret," making it expensive and time-consuming for the departing employee to prove that they did not, in fact, misappropriate a trade secret.[240]

Further, as other scholars have pointed out, trade secret law has developed in a way that makes it easier for employers to sue departing employees even without a clear-cut case of misappropriation, through such doctrines as inevitable disclosure and negative know-how.[241] The former prevents an employee from moving to a competitor business on the basis that the employee will inevitably disclose, or use, information that they learned at their previous employer—*without any evidence that the employee has actually* disclosed any trade secret.[242] As leading labor law scholar Katherine Stone puts it, "[t]he doctrine of inevitable disclosure is a natural outgrowth of employers' aggressive efforts to restrict employees' use of knowledge."[243]

The doctrine of negative know-how, on the other hand, grants IP rights in knowledge that an employee obtains at their employer about what mistakes to *avoid*.[244] As Professor Charles Tait Graves points out, the doctrine, which is incorporated by commentary in the Uniform Trade Secrets Act, can scarcely be justified under IP's output-based

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240 *See* Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. Rev. 519, 592–93 (2001) (discussing the expansion of trade secret law to sweep in "all commercially valuable information" and that, "[b]y focusing on economic value rather than specific concrete technical innovations, the [Uniform Trade Secrets Act] approach makes the definition of trade secret almost infinitely expandable," resulting in "great uncertainty in practice" (citations omitted)); Sonia K. Katyal, *The Paradox of Source Code Secrecy*, 104 Cornell L. Rev. 1183, 1228–29 (2019) ("[M]ost entities simply assert trade secrecy even when the underlying information may not actually qualify as a trade secret."); Charles Tait Graves, *The Law of Negative Knowledge: A Critique*, 15 Tex. Intell. Prop. L.J. 387, 388–89 (2007) [hereinafter Graves, *Negative Knowledge*] (critiquing certain trade secret doctrines as "creat[ing] new restrictions on employee mobility" by "mak[ing] it all too easy for lawyers to sue a former employee over meaningless 'trade secret' accusations, without any need to show actual use of truly valuable information"); *see also* Duhigg, *Uber v. Google*, *supra* note 229 ("The fact that trade secrets are hard to define breeds paranoia. Do we own the knowledge inside our heads, or can previous employers lay claim to our memories?").

241 *See, e.g.*, Gilson, *supra* note 224, at 580; *see also* Stone, *supra* note 240, at 592–94; Graves, *Negative Knowledge*, *supra* note 240, at 388–89.

242 *See* PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1270 (7th Cir. 1995) ("PepsiCo has not contended that Quaker has stolen the All Sport formula or its list of distributors. Rather PepsiCo has asserted that Redmond *cannot help but* rely on PCNA trade secrets . . . [to Quaker's] substantial advantage . . . . This type of trade secret problem . . . falls within the realm of trade secret protection . . . ." (emphasis added) (internal citations omitted)).

243 Stone, *supra* note 240, at 594.

244 *See* Mycalex Corp. of Am. v. Pemco Corp., 64 F. Supp. 420, 426 (D. Md. 1946) ("It may well be that, under certain circumstances, knowledge acquired as to how to avoid mistakes is of a secret character."); On-Line Techs., Inc. v. Perkin-Elmer Corp., 253 F. Supp. 2d 313, 323 (D. Conn. 2003) (noting "[n]egative knowledge" as a type of trade secret protectable under the Connecticut UTSA).

framework: "[C]ompanies," he writes, "will continue to invent even if mistakes are not protected."[245] Instead, negative know-how, just like inevitable disclosure, is used by employers to limit "employee mobility," amounting to a trade secret-enabled "non-competition covenant[] against former employees."[246]

In sum, IP laws serve as a valuable substitute for governing the unruly workforce where employment and contractual law remedies are unavailable.[247] Indeed, as has been argued in IP scholarship, "the primary justification put forth in support of noncompetes *is* an IP justification," thus further cementing IP's role in adjudicating labor disputes.[248]

D. IP Creates Markets for Creative Labor

To the thousands of creators who call writing for television, motion pictures, and news programs a profession, how and on what terms they can profit off their labor are governed by the terms of a collective bargaining agreement that is negotiated every few years by the Writers Guild of America (WGA). Most content studios are signatories to the agreement, known as the Minimum Basic Agreement (MBA).[249] A tremendous amount of working writers are members of the WGA.[250] Thus, the WGA's collective bargaining agreement governs large swaths

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245 Graves, *Negative Knowledge*, *supra* note 240, at 388.

246 *Id.* at 389.

247 This Article is certainly not the first to make this point—the literature is abundant with these insights. *See, e.g.*, *id.* (arguing that "[b]road application of the negative know-how theory" would allow courts to effectively "create[] non-competition covenants"); Bishara et al., *supra* note 231, at 41 (observing that trade secret laws "supplement[]" restrictive covenants in employment agreements that do not contain noncompete clauses); Stone, *supra* note 240, at 592–94 (discussing the evolution of the doctrine of inevitable disclosure); Gilson, *supra* note 224, at 580 (same). This Article, however, ties these previous scholarly insights regarding one discrete area of IP law into a broader, novel framework that highlights how a number of IP doctrines and laws are used to regulate labor inputs, and, in turn, to argue that a new framework is needed for thinking about what IP does, above and beyond the dominant narrative that IP only regulates creative and innovative outputs. *See supra* notes 35–45 and accompanying text (discussing the existing IP frameworks, all of which are focused on creative and innovative outputs).

248 Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 Wm. & Mary L. Rev. 873, 873 (2010) (emphasis added).

249 *See Signatory Company Confirmation Lookup*, Writers Guild of Am. W., https://apps.wga.org/signatorycompanies [https://perma.cc/4J97-LSLL] (providing full CSV sheet of signatories); *2023 Writers Guild of America Theatrical And Television Basic Agreement*, Writers Guild of Am. W., https://www.wga.org/contracts/contracts/mba [https://perma.cc/XS5T-ZNNT]; Baum & Kilkenny, *supra* note 30 (providing some of the big content producer names behind the studio coalition that forms the counterparty in negotiations over renewal of the MBA).

250 If a content company is a signatory to the MBA, *see id.*, then every writer working on the show must be a member of the Writers Guild. *Member Eligibility*, Writers Guild of Am. E., https://www.wgaeast.org/eligibility [https://perma.cc/DVT2-8LMT].

of the creative industry and dictates how much of the copyrighted content we consume is actually created and distributed.

Much of the MBA is shaped by IP rights, as what writers are producing for the studios *is* copyrightable content that will eventually be packaged, distributed, and sold to the public. It is for this reason that Professor Fisk observes that "the Writers Guild has created a system of private intellectual property rights"—rights that are fundamentally constituted, shaped, and created by copyright law.[251] Or, in other words, much of the rights and privately-developed frameworks that writers operate under, including the so-called script registry,[252] the system of residual payments,[253] and the all-important concept known as "Separated Rights,"[254] are "derived from Copyright."[255]

As previously noted, in researching for this Article, I spoke with a number of writers, including those who picketed during the 2023 strikes, to try and understand how they thought about the role of IP laws in their lives.[256] What was striking to me about those conversations is that writers almost never thought about their work in IP terms. One writer on a hit television show flatly stated that he did not believe copyright was relevant at all to his work, because the studio owns everything.[257] (I noted to the writer that ownership rules were in fact mediated by copyright under the work for hire doctrine.[258]) Such statements comport with empirical scholarship that finds that when creators are employees, they "simply pay little or no attention to how IP works in their IP-rich field."[259]

The work for hire doctrine, described in depth in the previous section, vests ownership of writers' output in studios and other large IP firms.[260] However, pursuant to the MBA, and due to the hard work of the writers' union in negotiations with the MBA's signatories, guild members "share in some of the value of the copyright that the employer gains through the work for hire doctrine."[261] For example, residuals, an

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251 Fisk, *supra* note 177, at 276.

252 *Id.* at 268–69.

253 *Id.* at 262–64.

254 WGA Separated Rights, *supra* note 127, at 7 (defining such Rights as "copyright rights to be separated out and conveyed instead to the writer," with "specific rights differ[ing] for television and for theatrical motion pictures").

255 *Id.*

256 *See supra* note 30 and accompanying text.

257 Interview with James DeWille (May 16, 2023).

258 *See supra* Section II.B.1.

259 Jessica Silbey, The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property 97 (2015).

260 *See* Fisk, *supra* note 177, at 258.

261 *Id.*

industry term of art, provide writers royalties from subsequent *copyright exploitation* of their work—every time their show is performed on television or on a flight.[262] Likewise, "Separated Rights," another industry term of art, are akin to rights in the writers' copyrighted content that are reserved to the writer (rather than vested in the studios pursuant to standard work for hire doctrine).[263] Such rights allow the writer some ability to exploit story elements in a script even as the studio maintains the primary means of exploitation in film and television.[264] Separated rights are a prime illustration of the classic teaching that copyright, like other forms of property, can be thought of as—in the WGA's own telling—"a bundle of rights," which allows the WGA to "negotiate[] for certain of the copyright rights to be separated out and conveyed instead to the writer."[265]

As IP rights in a writer's output are what create market demand for a writer's labor—and have thus in turn shaped a vast marketplace for creative work—changes in IP doctrine will likewise dramatically affect the way that writers are employed. Nowhere is this more evident than in recent debates over the role of AI-generated works in the creative marketplace. As the following Part discusses, copyright laws—namely, whether or not an AI-generated work is protected under copyright—*are* what make the difference between a studio that still must employ writers if it wishes to maintain rights in the content it distributes, and a studio that need not.[266]

III
Putting Labor IP to Work

The previous Part's reframing of certain IP doctrines—previously explained through the seemingly neutral frame of transaction costs—as actively reallocating resources and rights between disparately situated

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262 *See Residuals Survival Guide*, Writers Guild of Am. W., https://www.wga.org/members/finances/residuals/residuals-survival-guide [https://perma.cc/3S66-UF3G] ("Residuals are compensation paid for the *reuse* of a credited writer's work. When you receive credit on produced Guild-covered material, you are entitled to compensation if the material is reused."); *see also id.* for the breakdown of fees paid to writers for reuse in, inter alia, pay television, theatrical, and in-flight distribution.

263 WGA Separated Rights, *supra* note 127, at 7.

264 *See id*. at 13, 30–31.

265 *Id.* For a recent iteration of the classic principle that copyright consists of "a bundle of rights," see Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1273 (2023) (citations omitted) ("The Copyright Act encourages creativity by granting to the author of an original work 'a bundle of exclusive rights[,]' . . . includ[ing] the rights to reproduce the copyrighted work[] [and] to prepare derivative works . . . ." (citations omitted)).

266 *See infra* Section III.B.

parties (individuals and firms) is not just some theoretical exercise.[267] It is, instead, by reframing IP *as* labor policy that one might begin addressing the harms highlighted in the first Part of this Article. In this last Part, I first explore how once-dusty areas of the law, such as antitrust, are being repurposed to protect laborers, including creative laborers—and how reframing IP to address supply-side harms better complements current antitrust attempts to address concentration in the content industries through monopsony theory. I then discuss why focusing on supply-side harms can reduce risks posed to human creators by AI, by more aptly justifying, and thus cementing, a human authorship/inventorship requirement. Finally, I conclude with some thoughts on how reorienting IP to focus on supply-side harms can provide the requisite theoretical framework for the emerging recent scholarship focused on inequalities amongst creators.

A. The IP Monopsonist

Americans' approval of labor unions is near a five-decade high—standing at almost seventy percent (up from fifty-three percent a decade ago).[268] President Biden's Executive Order 14036, signed to promote competition in the U.S. economy, echoed the renewed commitment to protecting "the welfare of workers."[269] The labor resurgence is by no means limited to blue-collar workers, as evidenced by the sweep of recent, successful unionization efforts in white-collar industries like entertainment, journalism, and academia.[270] While one might dismiss white-collar unions like the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) or the WGA as predominantly comprised of the rich and famous and thus simply not the type of labor with which organizers should be concerned,

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267 Part II formed the bulk of the theoretical, reframing project.

268 *Labor Unions*, Gallup, https://news.gallup.com/poll/12751/labor-unions.aspx [https://perma.cc/F228-TCWU].

269 Exec. Order No. 14036, 86 Fed. Reg. 36987, 36987–88 (July 14, 2021), https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-15069.pdf [https://perma.cc/7Y72-YNBA].

270 *See* Carolyn Giardina, *Marvel Visual Effects Workers Unanimously Vote "Yes" to Unionize*, Hollywood Rep. (Sept. 13, 2023, 8:20 AM), https://www.hollywoodreporter.com/business/business-news/marvel-visual-effects-workers-vote-unionize-1235587463 [https://perma.cc/SWK2-ZH7D] (announcing the unanimous vote of the visual effects workers at Marvel Studios to unionize); Ben Smith, *Why The New Yorker's Stars Didn't Join Its Union*, N.Y. Times, https://www.nytimes.com/2021/06/13/business/media/new-yorker-union.html [https://perma.cc/QN2Y-3WU2] (describing the storied magazine's "less heralded [workers]—fact checkers, copy editors, web producers, social media editors . . . forming a union"); Teresa Watanabe, *UC Strike Energizes Unprecedented National Surge of Union Organizing by Academic Workers*, L.A. Times (Jan. 2, 2023, 5:00 AM), https://www.latimes.com/california/story/2023-01-02/uc-strike-energizes-labor-surge [https://perma.cc/LW2T-PCBE] (explaining the causes and consequences of a strike of 48,000 University of California employees).

the reality is that "most of the people striking, including actors, make barely livable wages—a member of the SAG-AFTRA negotiating committee [reported] that eighty seven percent of the union's members earn less than $26,000 a year."[271] And if the success of organized labor depends on a "contest of ideas,"[272] on social movements, and on cultural understandings of unions, then white-collar unions like those that exist in Hollywood have, in some ways, always been at the forefront, not the margins, of the movement.[273] In line with the notable increase in public approval of unions, as one recent report on the autoworkers' strike notes, "[r]ecent walkouts by members of SAG-AFTRA . . . have enjoyed broad public approval."[274]

Perhaps nowhere is the labor resurgence playing out more vividly than in antitrust, a once-dusty area of the law previously focused (mostly) on consumer harm.[275] Traditionally, antitrust has centered on monopoly power—mergers of competing sellers that affect outputs, whether through an increase in prices or a reduction in the quantity of goods sold.[276] In recent years, however, antitrust scholars have begun focusing on a different type of market power: monopsony power, where mergers of competing buyers affect inputs, including by driving down the

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[271] Ko Bragg, *The Writers' Strike Over AI Is Bigger than Hollywood*, Markup (July 29, 2023, 8:00 AM), https://themarkup.org/hello-world/2023/07/29/the-writers-strike-over-ai-is-bigger-than-hollywood [https://perma.cc/M72D-77F5].

[272] Nelson Lichtenstein, A Contest of Ideas: Capital, Politics, and Labor 2–3 (2013).

[273] It was no accident, for example, that President Franklin Roosevelt, during the 1930s "surge in union membership," extended a Thanksgiving invitation to comedian Eddie Cantor, a major Hollywood star. David Leonhardt, *A New Interest in Unions*, N.Y. Times (July 18, 2023), https://www.nytimes.com/2023/07/18/briefing/hollywood-strikes.html [https://perma.cc/GCT9-5TZF]. The invitation, as recently noted in a *New York Times* piece on our contemporary era's increasing "interest in unions," "came with a political message" since "Cantor was one of the founders," and the president, of the newly-founded Screen Actors Guild. *Id.* Members of that guild, now called SAG-AFTRA after a merger over a decade ago, *see* Peter Labuza, *Ten Years After the SAG-AFTRA Merger: Lessons for the Union's Future*, Hollywood Rep. (Mar. 30, 2022, 7:25 AM), https://www.hollywoodreporter.com/business/business-news/ten-years-after-the-sag-aftra-merger-lessons-for-the-unions-future-1235121637 [https://perma.cc/JN6Y-N2JG], likewise went on strike recently (with AI also at the top of its concerns). Gene Maddaus, *SAG-AFTRA Strike: AI Fears Mount for Background Actors*, Variety (July 25, 2023, 9:44 AM), https://variety.com/2023/biz/news/sag-aftra-background-actors-artificial-intelligence-1235673432 [https://perma.cc/TT5Z-DEHA].

[274] Dan Kaufman, *Will the U.A.W. Strike Turn the Rust Belt Green?*, New Yorker (Oct. 28, 2023), https://www.newyorker.com/magazine/2023/11/06/will-the-uaw-strike-turn-the-rust-belt-green [https://perma.cc/GN44-QYUW].

[275] On this consumer welfare principle, see Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. Corp. L. 65, 65–67 (2019).

[276] *See* Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 Ind. L.J. 1031, 1031 (2019) (noting that in the typical antitrust case, the concern is "that the post-merger firm will reduce the volume of sales in the affected market and prices will rise").

price paid for labor.[277] As such scholars note, "[n]ew evidence suggests that many labor markets around the country are not competitive but instead exhibit considerable market power enjoyed by employers, who use their market power to suppress wages."[278]

The theory is playing out on the ground: Antitrust regulators in the current administration have made clear that they intend to police labor market power. As Acting Assistant Attorney General Richard Powers noted:

> [A]ntitrust enforcement has historically not focused much on labor markets. . . . Notwithstanding this history, the [Antitrust] Division has become increasingly alert to and concerned by business conduct and transactions that harm competition for working people. If it was important for enforcers to protect competition in labor markets decades ago . . . it is *essential* now.[279]

Thus, proponents argue that such monopsony power should represent a cognizable antitrust harm even if there is no demonstrable harm to downstream purchasers or end consumers.[280] But few actual cases have tested such buy-side concentration.[281] In fact, the most cognizable win for labor antitrust came in a case involving creative laborers, in which the court rejected a proposed merger between Penguin Random House and Simon & Schuster on the basis that it would drive down the price paid to top-selling authors.[282]

In that case, *U.S. v. Bertelsmann*, the Department of Justice relied on monopsony theory, or as the court put it, "a market condition where

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277 *See id.* at 1031–32 ("Some mergers may be unlawful because they injure competition in the labor market by enabling the post-merger firm anticompetitively to suppress wages or salaries. To the best of our knowledge no court has ever condemned a merger because of its anticompetitive effects in labor markets."); Hemphill & Rose, *supra* note 182, at 2083–86 (focusing on monopsony power in which firms can reduce the amount they pay for labor, such that "workers with a low enough reservation wage still accept a job offer; [and] workers with a higher reservation wage drop out"); Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 538–39 (2018) (noting that a market with a few, concentrated employers can "hold wages down below what the workers would be paid in a competitive labor market").

278 Naidu et al., *supra* note 277, at 537.

279 Richard A. Powers, Acting Assistant Att'y Gen., U.S. Dep't of Just., Remarks at Fordham's 48th Annual Conference on International Antitrust Law and Policy (Oct. 1, 2021), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-richard-powers-antitrust-division-delivers-remarks [https://perma.cc/7MT7-NVNY].

280 Hemphill & Rose, *supra* note 182, at 2079.

281 Marinescu & Hovenkamp, *supra* note 276, at 1031 ("Mergers can also injure competition in markets in which the firms purchase, however. Although that principle is widely recognized, very few litigated cases have applied the merger law to buyers." (citations omitted)).

282 United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 11–12 (D.D.C. 2022).

a buyer with too much market power can lower prices or otherwise harm sellers" of copyrighted works.[283] Siding with the government, the court blocked the merger on the basis that a larger, consolidated book publisher "would harm competition to acquire the publishing rights to 'anticipated top-selling books,' resulting in lower advances for the authors of such books."[284] Because the merged book publisher would further consolidate an already deeply consolidated publishing landscape,[285] the court found that publishers would enjoy increased bargaining leverage.[286] Notably, like those scholars who have recently argued that a successful monopsony case need not demonstrate output harms,[287] the court did not find that there would necessarily be evidence of increased consumer prices or even reduced output. The court did, however, reference in passing the fact that "defendants do not dispute that if advances are significantly decreased, some authors will not be able to write, resulting in fewer books being published, less variety in the marketplace of ideas, and an inevitable loss of intellectual and creative output."[288]

The decision was widely hailed as an exciting victory, a rare reversal of "consolidation in an industry that has been profoundly reshaped by mergers and acquisitions, with little regulatory intervention."[289] Perhaps more interesting is that such a victory was achieved in the deeply concentrated copyright industry. Indeed, as discussed previously, publishing is not alone amongst IP industries, nor notable, for its concentration. Like other content owners in the music and audiovisual spaces, a handful of publishing firms dominate.[290]

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283 *Id.* at 11.

284 *Id.* at 23, 56.

285 *See id.* at 56 ("The post-merger concentration . . . would be concerningly high: The merged entity would have a 49-percent market share, more than twice that of its closest competitor. Moreover, the top two competitors would hold 74 percent of the market; and the top four market participants would control 91 percent.").

286 *Id.* at 42.

287 *See supra* note 280 and accompanying text.

288 *Bertelsmann*, 646 F. Supp. 3d at 23 (citation omitted).

289 Elizabeth A. Harris, Alexandra Alter & Benjamin Mullin, *A Huge Merger's Collapse Breaks a Pattern of Consolidation in Publishing*, N.Y. Times (Nov. 21, 2022), https://www.nytimes.com/2022/11/21/books/penguin-random-house-simon-schuster-deal.html [https://perma.cc/8YL4-72YW]; *cf.* Alex Shephard, *The Penguin Random House–Simon & Schuster Merger Has Been Blocked. What Now?*, New Republic (Nov. 3, 2022), https://newrepublic.com/article/168444/penguin-random-house-merger-blocked [https://perma.cc/FS9M-PB2A] (characterizing the court's decision as a "big victory" for the Biden administration and quoting the leader of the Authors Guild's observation that "[t]his is the first time a court has recognized what authors and the Authors Guild have been arguing for decades—that a consolidation among publishers hurts authors").

290 *See supra* Section I.A.1.

The case thus provides a powerful roadmap for fighting the kind of industry concentration that IP scholars have long fretted about yet mostly resigned themselves to.[291] But to actually fight industry concentration, IP theory needs to disaggregate the creative laborer from large IP firms. Previous creator-focused theories that addressed creative workers have conflated creator interests with those of their employer-firm. For example, in *Justifying Intellectual Property*, Professor Robert P. Merges argued that large firms enhance the welfare of individual creators in "two ways":

> [F]irst, by buying the specialized products that small firms sell, in turn selling consumer products that require small company add-ons or extensions, and thus forming the backbone of the ecosystem in which small firms can often thrive; and second, by employing large numbers of creative professionals, making their careers viable and sometimes training them sufficiently to enable them to exit large companies and start up new companies of their own. When we look at the bigger picture, then, we see that large companies are hardly anathema to the care and feeding of the creative professions. They are instead indispensable.[292]

But in *Bertelsmann*, the court considered—and rejected—a similar argument made by defendant publishers that the merger would create "efficiencies [that] would limit the merger's anticipated competitive harm" for lack of verified evidence, noting that evidence of efficiencies alone may not suffice to rebut a prima facie case under the Clayton Act's anticompetitive merger provision.[293] Focusing on IP policy as labor policy forces us to question the assumption that even as IP has moved away from the sole creator,[294] any benefits internalized by large IP firms inevitably trickle down to individual creators—and the idea that as IP firms get bigger, IP creators inevitably reap the benefits of those efficiencies. (This is not a completely novel insight: At least one scholar has argued that the "trickle-down" theory has long ago been discredited.[295]) Instead, larger intermediaries may harm individual authors by reducing the amount that each firm is willing to pay for creative work.[296]

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291 *See supra* Section I.A.1.

292 MERGES, *supra* note 15, at 225.

293 *Bertelsmann*, 646 F. Supp. 3d at 55, 21–23 (citations omitted).

294 Lemley, *Myth*, *supra* note 158, at 711 (explaining that almost all new technologies "are invented simultaneously or nearly simultaneously" by multiple independent groups).

295 *See, e.g.*, SILBEY, *supra* note 259, at 79.

296 *See supra* note 284 and accompanying text. More than a decade ago, Professor Julie E. Cohen noted that "[c]opyright theory does not often interrogate th[e] relationship" of the intermediary and the author. *See* Cohen, *supra* note 150, at 160.

Likewise, those concerned about the sheer size and power of large IP firms insist again and again that it is IP protection itself that is to be blamed.[297] Such arguments see no distinction between the individual authors selling their copyrighted works to Penguin Random House and Penguin Random House itself, between the thousands of individual authors claiming infringement of their works in the AI class actions, and large IP studios—which have, as discussed, been notably vocal in *lauding* AI.[298] But to do so ignores the possibility that vesting individual authors with *greater* copyright protections may act as a salutary check on the problem of growing IP firms, by vesting individual creators with something to *sell* firms, thus turning each and every IP firm into a potential monopsonist. In fact, one of the sources of individual creators' power stems from an unlikely source: the human authorship and inventorship requirements, as discussed below.

B. The AI Encroachment on Creative Labor

As previously noted,[299] both copyright and patent authorship requirements stem from the Constitution's IP clause, which provides that Congress has the power to "promote the Progress of Science and useful Arts, by securing for limited Times *to Authors and Inventors* the exclusive Right to their respective Writings and Discoveries."[300] Yet, and unsurprisingly, neither the Copyright Act nor the Patent Act explicitly limits patent or copyright protection to human-authored works.[301] Instead, the most explicit authority limiting authorship and inventorship to humans has come from a hodgepodge of agency guidance and lower court decisions.[302] But such decisions rest on shaky foundations.

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297 For an AI-inflected gloss on this classic argument, see BELLOS & MONTAGU, *supra* note 17, at 331–35 (noting that AI could break copyright laws, which, the authors insist, are "either an irrelevance or just an irritation to the vast majority of creators").

298 In this view, wins for Meta, Google, and Microsoft—currently all defendants in the authors' ongoing infringement cases against the companies' LLMs—would be antimonopoly wins, an argument that seems to ignore the very nature of the fragmented, individual plaintiffs in the litigations. *See* First Consolidated Class Action Complaint, *supra* note 111, at 2; *supra* notes 103–11 and accompanying text; *cf.* BELLOS & MONTAGU, *supra* note 17, at 21 (noting that current litigation over AI "will have a huge impact on relations of power and money around the globe," suggesting it could end the reign of large IP firms).

299 *See supra* note 112 and accompanying text.

300 U.S. CONST., art. I, § 8, cl. 8 (emphasis added).

301 *See* Thaler v. Perlmutter, 687 F. Supp. 3d 140, 147 (D.D.C. 2023) (noting that the Copyright Act does not expressly define the "author" as being human); Thaler v. Vidal, 43 F.4th 1207, 1211 (Fed. Cir. 2022), cert. denied, 143 S. Ct. 1783, 215 L. Ed. 2d 671 (2023) (noting that the Patent Act does not expressly define whether the "individuals" eligible to be inventors must be human).

302 *See, e.g.*, COPYRIGHT OFF., COMPENDIUM OF COPYRIGHT OFFICE PRACTICES: 1973 REVISIONS § 2.8.3 (1973) (stating that works are not copyrightable if they do not "owe their origin

Consider a recent district court decision that denied copyright protection to an AI-generated work. That decision hinged its reasoning on the fact that the Copyright Act of 1909 "explicitly provided that only a 'person' could 'secure copyright for his work' under the Act."[303] "There is absolutely no indication that Congress intended to effect any change to this longstanding requirement with the modern incarnation of the copyright law," the court added.[304] But this purportedly textualist reading ignores the fact that the 1909 Act clearly states that such "person[s]" as defined in the Act include "corporate bod[ies]" and "an employer for whom such work is made for hire."[305] Indeed, the 1909 Act explicitly provides that "the word 'author' shall include an employer in the case of works made for hire."[306] As Professor Mark A. Lemley notes, "[i]f corporations can be not just owners but authors, it's not clear why other artificial entities couldn't be."[307] It is not surprising, then, that those who argue in favor of copyright protection for AI-generated works have looked to the work for hire provision as the natural place where such works might be protected.[308]

Yet despite the continued insistence by courts and agencies on the human authorship/inventorship requirements, IP's consequentialist frameworks do not provide a satisfactory answer as to why either the Copyright Act or the Patent Act should care about human authorship and inventorship at all. In fact, the utilitarian framework would likely argue that AI-authored works should be protectable, as a means of incentivizing firms to invest in such works.[309] That IP has gradually

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to a human agent"); *Perlmutter*, 687 F. Supp. 3d at 149–50 ("[T]his case presents only the question of whether a work generated autonomously by a computer system is eligible for copyright. In the absence of any human involvement in the creation of the work, the clear and straightforward answer is . . . [n]o."); *Vidal*, 43 F.4th at 1210 ("The sole issue on appeal is whether an AI software system can be an 'inventor' under the Patent Act. . . . [T]here is no ambiguity: the Patent Act requires that inventors must be natural persons; that is, human beings."), cert. denied, 143 S. Ct. 1783 (2023).

303 *Perlmutter*, 687 F. Supp. 3d at 147 (citing Act of Mar. 4, 1909, ch. 320, §§ 9–10, 35 Stat. 1075, 1077 (repealed 1976)).

304 *Id.*

305 Act of Mar. 4, 1909 §§ 1, 23.

306 *Id.* § 62.

307 Lemley, *AI*, *supra* note 97, at 193 n.10.

308 *See* Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author*, 2012 STAN. TECH. L. REV. 1, 26 (2012) (describing how AI-created works can be rolled into the work for hire framework).

309 *See* Abbott & Rothman, *supra* note 124, at 1183 ("Absent protection, certain AI-generated works will never be created or disseminated. That is because, just like human-generated works, the creation and dissemination of works, or at least certain works, require significant investments of time and money." (citation omitted)); Robert C. Denicola, *Ex Machina: Copyright Protection for Computer-Generated Works*, 69 RUTGERS U. L. REV. 251, 282–83 (2016) (noting that vesting ownership of computer-generated works in the user of the

moved away from the incentives-for-authors framework towards the incentives-for-intermediaries one[310] highlights the flimsiness of the other argument that is often used to justify the human authorship and inventorship requirements: Humans alone can be incentivized to create.[311] As Part I discussed, large firms have long argued that IP protects their investments (such as the massive costs of research and development, advertising and marketing, and recoupment against earlier failed projects) in bringing a product to market.[312] These costs, while perhaps lessened through AI, will not altogether just vanish when human inventors or authors are replaced by robots. Instead, large firms will simply argue that their investments in new technologies like AI—for example, the large, up-front costs associated with training LLMs, or else the costs associated with deciding which AI-generated work to package and market and distribute (picking "hits"[313])—must, too, be protected by IP.[314] Indeed, Professor Pamela Samuelson, who authored perhaps the most oft-cited retort to fears that the human authorship requirement will be jettisoned—"[o]nly those stuck in the doctrinal mud could even think that computers could be 'authors'"—nonetheless argues that copyright law should vest ownership of computer-generated works to those who "buy[] or license[] a generator program," because they "ha[ve] in some sense 'employed' the computer and its programs for [their] creative endeavors."[315] Professor Mark A. Lemley has even predicted that a system that refuses to grant any protection to AI-generated content is "unlikely to be politically sustainable."[316]

Against this onslaught, then, what arguments might be made in favor of the human authorship and inventorship requirements? Some scholarly defenses of the human authorship requirement have attempted to locate something innately human about creation, descending into

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system "aligns well with the incentive rationale for copyright protection," as such works "will not come into existence unless a user is motivated to engage the machinery of its creation," and, further, that "maintaining incentives for humans to *disseminate* works is also critical in insuring the ultimate public benefits sought by copyright" (citations omitted)).

310 *See supra* Section II.B.

311 *See* Thaler v. Perlmutter, 687 F. Supp. 3d 140, 147 (D.D.C. 2023) ("Non-human actors need no incentivization with the promise of exclusive rights under United States law, and copyright was therefore not designed to reach them.").

312 *Supra* Section I.A.1.

313 *See supra* Section I.A.1.

314 *See* Abbott & Rothman, *supra* note 124, at 1183 & n.302 (noting that the creation and dissemination of AI-generated works can "require significant investments of time and money" and that such "investment[s] often come[] from a publisher or producer rather than an author" (citation omitted)).

315 Samuelson, *supra* note 169, at 1200, 1203 (citations omitted).

316 Lemley, *AI*, *supra* note 97, at 197.

largely "ontological question[s]"[317] that remain open and contested, such as whether machines could ever possess "mental states," "free will,"[318] or engage in "relational . . . communicati[ons]."[319] Such arguments ignore the realities of modern-day creation, in which it is not individuals with autonomy or the need for "dialogic and communicative act[s]"[320] who author works, but rather large corporations, for which asking questions regarding mental states and "social"[321] capacity becomes somewhat absurd, if not outright antithetical.[322]

As discussed in Part I, it is not surprising that large intermediaries, who have previously been quick to describe every new technology as an existential threat to the content industry, have taken a different tack with AI, choosing instead to focus on its transformative potential.[323] When the Copyright Office asked if entering prompts into an LLM should result in copyrightable works, the MPA answered with a resounding yes.[324] Moreover, studios protested the Copyright Office's requirement that companies disclose if "more than *de minimis*" portions of the work are generated using AI.[325] A world with copyright protection for AI-generated works is the best of all possible worlds for large intermediaries: cheaper labor and potentially infinite works, all protectable under copyright and inuring to the benefit of firms. In this scenario, intermediaries grow in size by amassing immense copyright portfolios while damaging the bargaining power of individual workers.[326]

But if we recognize that IP has long functioned not *just* as a system of property rights but also as labor policy,[327] then the human authorship and inventorship requirements can be cemented instead as making a distinct choice *as between* intermediaries and individual creators—as mediating between the rights of large firms and individual creators in ways that IP policy has long been engaged.[328] As discussed in Part II, choosing to protect individual creators as a distinct set of rightsholders in the IP ecosystem mirrors existing statutory rights that make the

317 Craig & Kerr, *supra* note 153, at 44.

318 Gervais, *supra* note 151, at 2084 ("Asking if AI machines can create might be asking, in [some philosophers' and scholars'] view, whether AI machines have mental states or free will.").

319 *See, e.g.*, Craig & Kerr, *supra* note 153, at 44 (considering "claims of AI authorship" in the context of "what an author must *be*").

320 *Id.*

321 *Id.*

322 *See supra* Section II.B.1.

323 *See supra* Section I.B.2.

324 MPA Comment, *supra* note 19, at 37, 46–47.

325 *Id.* at 38, 52.

326 *See supra* Sections II.B, II.D.

327 *See supra* Part II.

328 *See supra* Part II.

protection of individual creators as against intermediaries an explicit concern of copyright policy; these include the termination right[329] or, even, the creation of a copyright small claims court[330]—policies aimed at protecting individual creators as a distinct set of interests in the IP value chain. As others have put it with regard to patent policy, in operating as "a kind of disguised industrial policy," the patent system often must make "decision[s] about the distribution of resources, [which] involves an essentially political judgment regarding competing values: the consideration and resolution of competitive conditions."[331]

C. Future Work for Work-as-IP

As discussed above, a recent wave of scholarship has focused on what this Article has called supply-side harms—inequalities in the way in which the spoils of IP protection are distributed amongst the very inventors and authors who have long been touted as the beneficiaries of the vast system of IP rights.[332] Such scholarship is unique, and distinct from, earlier focuses on demand-side distributional inequalities, in the way that IP limits access to the inventions and creative works under protection.[333] Such recent scholarship might also be said to stand in stark contradiction to earlier attempts in the literature to justify IP as a system that unerringly benefits creators. As Professor Robert P. Merges stated in the classic work on this point: "[T]here is a clear relationship between

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329 *See supra* Section II.B.2.

330 *See generally* 17 U.S.C. §§ 1501–11 (codifying the Act). The Copyright Alternative in Small-Claims Enforcement Act of 2020 established a specialized procedure for copyright claims totaling under $30,000, for those "small claimants" that lack the resources to file a copyright infringement claim in federal court. H.R. Rep. No. 116-252, at 25–26; *see id.* at 26 (noting that the Act was intended to help "smaller creators," including in addressing the problem that smaller creators "may not be able to afford either the relatively high fee to expedite registration or, if they produce numerous works, even the initial registration fee").

331 Michael H. Davis, *Patent Politics*, 56 S.C. L. Rev. 337, 339 (2004). While far beyond the scope of this Article, numerous laws have been passed throughout history that preserve U.S. jobs and certain threatened industries in the face of globalization and widescale technological change. This is, indeed, the point of most trade protection laws (of which IP rights are regularly bartered as part of trade deals). For a survey of protectionist policies and laws attempting to protect (among others) the steel, textile, and automobile industries, see Daniel P. Kaplan, Cong. of the U.S. Cong. Budget Off., Has Trade Protection Revitalized Domestic Industries? (1986), https://www.cbo.gov/sites/default/files/99th-congress-1985-1986/reports/doc25c-entire_0.pdf [https://perma.cc/R4W7-ERNS]. Some might note that our current era's turn against the 1990s and early 2000s great liberal promise—of free trade, globalization, and technological acceleration coupled with deindustrialization—is a direct reaction to the past few decades' more sanguine approach to free markets at the expense of individual laborers and domestic industries. *See generally* David Singh Grewal, *Three Theses on the Current Crisis of International Liberalism*, 25 Ind. J. Global Legal Stud. 595 (2018).

332 *See supra* notes 84–93 and accompanying text.

333 *See supra* notes 84–93 and accompanying text.

stronger, clearer IP rights and the viability of writing, composing, and the like as real professions."[334]

But recent scholarship—such as Professor Colleen V. Chien's work on the unequal distribution of patent protection or Professor K.J. Greene's work on the repeated and systemic under-protection of works created by Black artists—contests this notion, suggesting instead that the IP system has, in large parts of its operation, failed individual creators.[335] This should not be surprising if we view the history of intellectual property as one of a mediated relationship between large firms and individual laborers in which setting IP policy in particular ways may enrich the former's interests while damaging the latter's.[336] If IP policy can be cognizant of this fact—and recognize that it often acts not unlike labor law in mediating between two potentially diametrically opposed interests—then it can also set about repairing that damage, in ways that others like Greene have already proposed.[337]

Conclusion

One of the natural conclusions that consequentialists have drawn is that, with the advent of each new technology, IP, with its incentives-talk, will simply become less and less relevant.[338] Yet little real-world evidence bears out the theory. Over the previous four decades, the total number of patents granted by the U.S. Patent and Trademark Office has trended upward significantly;[339] within that same timeframe, copyright registrations (which are not a precondition to protection,

334 Merges, *supra* note 15, at 200.

335 *See supra* notes 84–93 and accompanying text.

336 The broader critique of the long-held assumption that IP rights invariably trickle down to individual creators has previously been made. *See, e.g.*, Litman, *supra* note 21, at 8–12 ("In most creative spheres, authors' control over their works is short-lived, and the earnings they collect from them are modest. The control of their works and the bulk of the proceeds they earn are held instead by copyright owners who serve as intermediaries between the authors and their audiences." (citations omitted)).

337 *See supra* notes 84–93 and accompanying text.

338 *See* Lemley, *Scarcity*, *supra* note 99, at 507 ("IP will continue to exist in a post-scarcity economy, but it is likely to recede in importance as a driver of creation."); Raustiala & Sprigman, *supra* note 95, at 1614 ("[I]n a world in which the risk, and therefore the cost, of producing creative works has fallen substantially[,] . . . in which maximum viewership, rather than maximum direct revenues, is the primary goal[,] . . . copyright protection is far less central.").

339 USPTO, U.S. Patent Statistics Chart: Calendar Years 1963–2020 (updated 2021), https://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm [https://perma.cc/MZ49-8WHL].

unlike patents[340]) have held at a roughly steady range.[341] Far from living in a world where IP has mattered less and less, intellectual property in the entertainment industries has gone from a two-word legal phrase to the be-all and end-all, a moniker known only by its initials: IP. "In the world we're living in," as one film executive put it recently, "I.P. is king."[342] Our contemporary era, according to one author, is "an I.P.-driven ecosystem."[343] For example, Disney's acquisition of Marvel, one of the mergers and acquisitions that this Article has documented and that have largely gone unchecked, has spawned an "I.P.-driven tentpole" known as the Marvel Cinematic Universe, so ubiquitous that it has its own three-letter moniker, the MCU.[344] Whereas screenwriters used to be able to sell a studio an original script, studios may now increasingly expect writers to first turn the script into a book or other form of preexisting IP, for the purposes of generating what the industry calls "pre-awareness."[345] Video game companies like Sony Interactive, which owns the PlayStation gaming console, have entire positions now dedicated to "I.P. expansion."[346] As one recent report sums up: We have entered "a franchise-drunk new era, in which intellectual property, more than star power or directorial vision, drives what gets made."[347]

If previous predictions of the diminishment of IP in the age of technological innovation have simply not been borne out,[348] there is similarly no reason to believe that the arrival of AI—and, with it, the arrival of a world of infinite works created with little human labor—will

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340 17 U.S.C. § 408(a); *see also* Miriam Marcowitz-Bitton & Emily Michiko Morris, *Unregistered Patents*, 95 Wash. L. Rev. 1835, 1837 (2020) (contrasting "[t]he patent system[,] [which] grants rights only through registration (application) and examination," with the copyright system, which allows for "unregistered . . . rights").

341 U.S. Copyright Off., Annual Report: FY 2022 25, https://copyright.gov/reports/annual/2022/ar2022.pdf [https://perma.cc/97J8-PFKD] (amended Apr. 2024).

342 Alex Barasch, *After "Barbie," Mattel Is Raiding Its Entire Toybox*, New Yorker (July 2, 2023), https://www.newyorker.com/magazine/2023/07/10/after-barbie-mattel-is-raiding-its-entire-toybox [https://perma.cc/HGT7-HE2U].

343 Michael Schulman, *How the Marvel Cinematic Universe Swallowed Hollywood*, New Yorker (June 5, 2023), https://www.newyorker.com/magazine/2023/06/12/how-the-marvel-cinematic-universe-swallowed-hollywood [https://perma.cc/Q7B7-9YP5].

344 *Id.*

345 *See* Barasch, *supra* note 342 (noting that, while the concept of pre-awareness is not new, "[t]he future of moviegoing now seems increasingly tenuous [post-pandemic], and studios have leaned on pre-awareness as a means of drawing people to theatres: a nostalgia play like 'Hot Wheels' is seen as a safer bet than an original concept"); *see also id.* (describing "pre-awareness" as "rul[ing] Hollywood").

346 Alex Barasch, *Can a Video Game Be Prestige TV?*, New Yorker (Dec. 26, 2022), https://www.newyorker.com/magazine/2023/01/02/can-the-last-of-us-break-the-curse-of-bad-video-game-adaptations [https://perma.cc/TR3W-FVF8].

347 Schulman, *supra* note 343.

348 *See supra* note 338 and accompanying text.

lessen the value that IP generates for the entertainment industries, which are now more concentrated than ever.

As this Article has argued, both IP's consequentialist and property-based frameworks are in need of an update, with the dominant framework—and its focus on wealth maximization as substitute for deeper, normative goals—due for a reckoning (for reasons that have been well-documented elsewhere in the literature[349]).[350] My approach builds off previous urges to rethink IP's framing, such as Professor Julie E. Cohen's suggestion to think of copyright as a form of "post-industrial property," one which "enable[s] the provision of capital and organization so that creative work may be exploited."[351] Or, as Professor Jessica Silbey concluded years ago after conducting extensive empirical research into how creators go about their daily work: "[I]f the IP incentive structure is worth maintaining, then intellectual property law should address the organization of work within firms (its conditions, relations, and means of production)."[352] Framing IP as mediating in the centuries-old struggle in labor bargaining between creators and firms—rather than being about pure output-maximization—is a small, but significant, shift.

To reiterate, this Article does not argue that a labor-focused framework of IP should supplant, or even predominate over, existing frameworks focused on creative outputs. It has argued, instead, that output-based frameworks fail to capture the full story of IP rights—for whom they exist, who they protect, who they've *failed*, and, ultimately, why we should care. If we understand modern-day IP to be *about* the exploitation of creative labor,[353] then we must also understand that the exploitation of creative labor is, fundamentally, an IP issue.

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349 *See supra* note 23.

350 Professor Merges famously referenced IP's utilitarian framework as a "midlevel principle"—one against which discussions surrounding IP's normative goals can ultimately play out. MERGES, *supra* note 15, at 10.

351 Cohen, *supra* note 150, at 150, 143.

352 SILBEY, *supra* note 259, at 287–92, 78.

353 *Cf. id.* at 78 ("[A]lthough individuals are at the foundation of our system of rights, it is at the firm level where intellectual property appears to do much of its work, when it works at all.").