

# **BEYOND IP – THE COST OF FREE PARADOXES OF INFORMATIONAL CAPITALISM**

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## **INTRODUCTION**

Among other aspects and dimensions, the frame “Beyond IP” summarizes two key complementary insights in contemporary (new) politics of intellectual property. The first insight touches upon the limits, shortcomings and social costs that are associated with legal ordering of cultural/information production through intellectual property (“IP”) regimes. The second insight lists alternative structures, institutions and regulatory options for the promotion of innovation and ubiquitous cultural flourishing. Both insights reside upon concrete and persuasive arguments. At least to some degree, the shift from an IP centric approach to alternate methodologies that go beyond IP was stimulated by the emergence of digitization and networked communications platforms. New methods and reduced costs of producing, storing and distributing content/information provide fertile grounds and constant demonstration that there are enhanced schemes, beyond IP, for cultural and knowledge sustainability. “Beyond IP” is not just a frame for mobilization but also a descriptive term that captures and summarizes contemporary information, creative and cultural activities, which rest upon concepts of free content, free access and openness as their building blocks.

Yet, it is at this juncture that another, less noticed, aspect of “Beyond IP” is being revealed: the political economy of certain “Beyond IP” realms, and particularly market-oriented realms, may be counterintuitive to the above-mentioned premises. Free content and “freedom” from proprietary regimes do not necessarily derive true effective freedom for individuals. The networked environment and its strong lean towards selling “eyeballs” (audience attention) to advertisers, big data utilization, the use of information flows about consumer behavior to target advertisements, search results, and other content, stealth advertisement, sophisticated systems of predictive analytics, consumers’ data commodification and free utilization of content represent a brave new world which is nothing but the opposite of what one anticipates when looking beyond the shoulders of IP. In such “Beyond IP” realms, power hierarchies, industrialized corporate structures, media concentration, content biases, abridged creative diversity and deflated authors’ welfare may even outweigh the disruptions of traditional corporate media realms.

Although the emergence of networked informational capitalism is well addressed, there is hardly any reference to the linkage between networked

informational capitalism and components - both legal and ideological - which are derived from and are associated with “Beyond IP” cultural and informational zones. The purpose of this essay is to unveil some of the social contradictions and complexities that market-oriented “Beyond IP” realms tend to generate. This dimension, thus far neglected, attempts to question the conventional wisdom of critical copyright scholarship which tends to pair mostly (if not only) proprietary protection with corporate media social structures, media capitalism and the commodification of culture.

I will argue that tensions and dichotomies that we are accustomed to attribute to “IP centric” regimes are tensions and dichotomies which may appear, or even be stimulated, also by certain Beyond IP regimes. As a consequence, for those who cherish cultural environmentalism, cultural democracy and public-regarding media realms, the political economy of information and content markets that operate beyond the boundaries of IP may be no less challenging than old school corporate media.

By making this claim, I am not arguing that an IP centric approach and IP expansionism should be restored. Nor do I argue that notions such as access to knowledge should be abandoned. I do argue, however, that certain segments of the world Beyond IP stimulate pressures, tensions, disruptions and mass deceptions which go against the values of a democratic culture. Moreover, frames such as free culture, openness and "IP's darker sides" may have masked our ability to fully comprehend and respond to the challenges that are imposed by contemporary industrial information economics of copyrightless markets.

This general argument may also inform us about three derivatives:

The first derivative touches upon the role of the state and regulatory involvement in informational spheres; not just because of the limits of IP regimes but also because of the limits of certain “Beyond IP” market-oriented networked realms. Scholarship and public advocacy rightfully emphasize the role of the state and regulatory involvement in cultural spheres as a complementary mechanism that supplements what market mechanisms tend to neglect. Public broadcasting, must carry rules, culture and art endowments, state subsidies and local content production requirements for broadcasters are some of the examples in this context. Such governmental involvement reflects an embedded contradiction and tension between its purported contribution to freedom of expression goals and its potential abridgment of freedom of speech. The justifications for state and regulatory partial involvement in information and culture spheres were largely based on the limits and bounded

creative hand reach of proprietary media markets; what Ronald Bettig described as “Copyrighting Culture”. Seemingly, the stripping of IP centralism from media markets lessens the justification for state and regulatory involvement, because now new non-proprietary forms of cultural engagements have more capacities and breathing space. Beyond IP market-oriented realms, however, may retrieve the role of the state and regulatory involvement. As outlined in Part \_\_ *infra*, the cultural coverage of such realms is also limited, bounded and to some degree, biased. This in turn, may lead back to complementary state mechanisms, now as checks and balances over networked industrial economy which operates beyond the boundaries of IP.

The second derivative concentrates on privacy protection and the inadequate manners in which the interface between privacy and informational capitalism is currently framed. The centrality of privacy protection in a networked environment is well featured, yet it tends to neglect three elements: to begin with, Beyond IP free markets are in direct tension with the value of informational privacy because such markets rely upon and extract revenues from trading and commercializing personal information. The economics of monetizing personal information also reinforces itself back on content and media spheres because it requires communicative and informational engagements that are suitable for (and that maximize) such information gathering. A second element is the manners in which ideologies of “freedom from IP” may spill and bias toward illusionary zones of freedom in which lack of involvement/regulation is sought for the entire informational activity, including in the context of privacy. A third related element deals with the emerging role of privacy protection in regulating cultural and information production, particularly in spheres which are “Beyond IP”. Not only because IP, as means of regulation, may become redundant, but also because the means, inputs and outputs of production (as well as the sources of revenues and incentives) are bundled with personal data and information.

Finally, the third derivative proposes a more nuanced approach regarding the role of IP. Paradoxically, IP may have a role in culminating and mitigating informational capitalism. IP’s role in this regard may cover three layers: (a) shifting sources of revenues and incentives back to the creative content itself (rather than revenues from advertisements and personal data); (b) decentralizing power hierarchies among more groups, layers and institutions; (c) a fairer distribution of information and creative wealth. Indeed there is a contradiction between the manners in which IP’s control and

commodification functions nourish corporate media, on one hand, and the manners in which IP may counterbalance informational capitalism on the other hand. The regulatory challenge, therefore, is to adjust schemes that prevent extreme disparities in power allocation and power hierarchies, be it from overbroad IP protection or from the lack of IP protection.

My purpose in this paper is to explore some of the complexities that informational capitalism raises in no man's land beyond IP. Part I describes the political economy of contemporary information and content engagements in structures which are beyond IP. Part II examines the interface between such realities and legal ordering in the areas of copyright law, privacy protection and telecommunications. Part III concludes by reconsidering the role of the state in a complex networked gilded age in which both proprietary control and free content raise similar concerns for cultural environmentalism and cultural democracy.

## **II – INFORMATIONAL CAPITALISM BEYOND IP**

Critical communications and legal studies have dealt extensively with the political economy of corporate media, including the manners in which copyright protection and proprietary control negatively affect goals and values such as autonomy, self-fulfillment, creative freedom, political capabilities and cultural diversity. Control over means of production and distribution is gained through a mixture of governmental entitlements in creative resources (e.g. copyright) and distribution platforms (e.g. telecom licenses). These private entitlements are then utilized by their owners in manners that are aimed to maximize profits, but at the same time, may go against the public interest and democratic values that are attached to speech, communicative and cultural activities. This is why the commodification of culture through proprietary entitlements and private control raises sincere concerns from a democratic point of view. The traditional political economy of informational capitalism, so to speak, was largely based upon the properitization of communicative and speech resources (both as inputs and as outputs).

The emergence the Internet and networked communication platforms was perceived by many of us as a unique opportunity to significantly improve society's informational and cultural ecology, if only the right regulatory and legal choices/measures would be taken. In broad paintbrush lines, the argument was that new information technologies make it easier for individuals, groups and communities to collaborate in producing and exchanging cultural content, knowledge and other information goods, without

requiring the involvement of commercial profit-motivated media and content entities.

From this perspective, the traditional distributor-centric proprietary-based cultural and informational industries seemed both unjustified and counterproductive in terms of the public interest in cultural diversity, decentralization of media spheres and individuals' self-fulfillment. It seemed only natural that a shift from producer-consumer cultural industries to civic-engaged cultural spheres is highly conditioned upon disembarking the traditional Gordian knot between IP and cultural production/(engagements). There was much to be looked for beyond the shoulders of IP, particularly given findings and persuasive arguments that authors' and creators' incentives diversify and far range from IP's direct economic incentive.

In a retrospect of two decades, creative and informational zones beyond IP occupy prominent segments of the Internet and networked communication platforms. Much of people's informational engagements, both as speakers and as recipients, are conducted through frameworks and platforms that rely upon open access and free flow of content. Such activities are stripped of IP's regulation, if not as a formal legal matter, then as a practical matter, in terms of the communicative and business model that is being applied.

Search engines' retrieval services, the blogosphere, content-sharing platforms, certain types of online music services, online newspapers, social networks, instant messaging, voice services and many other segments of our informational and cultural lives are now free as the air to common use. At least to some degree, this shift was less a consequence of well-planned ex-ante legal reforms in the area of IP and more a consequence of the internet's technological and communicative conditions. At the same time, legal policy also partially supported the creation and expansion of Beyond IP zones: the interpretation and application of the fair use defense in the context of search engines' activities; third parties' limited liability for contributory copyright infringement; notice and takedown procedures in the context of content-sharing platforms and the narrow interpretation of the distribution right in digital domains are all examples of legal policy that - for justified reasons - facilitated and legitimized large scale networked activities beyond the hand reach of IP's proprietary control; thus, even with regard to profit motivated corporate activities aiming for power, control and market dominance.

This partial creative destruction of traditional corporate media models and its replacement by new emerging networked corporate media entities was not just an economic process. It was also a symbolic ideological process that

confronted frames such as control<>power<>property<>cultural homogeneity, of traditional corporate media, with frames such as openness<>access<>interactivity<>participation, associated with the Beyond IP open internet. This contrast is seemingly well in place because the internet and networked communication platforms indeed enable and empower such capacities, at least in terms of formal (as opposed to effective) capacities. At the same time, however, the open, accessible, interactive and participatory Internet gradually emerges as a postmodern version of Adorno's and Horkheimer's "Culture Industry" ("Enlightenment as Mass Deception").

Recent scholarship mostly from the areas of communications studies and critical internet studies (e.g. Robert McChesney, Jeron Lanier, Evgeny Morozov and Astra Taylor) examines the political economy of networked information industries, which are built upon free flow of information and content. It describes what many of us experience on a daily basis: a highly concentrated industry in which revenues are extracted mostly from selling advertisements and users'/consumers' personal data. Clicks, repeat visits and internet spent time (in a website) are one business goal intertwined with the goal of effective advertising, including sponsored content and stealth marketing. Optimized commercialization and utilization of mass aggregated personal information is another fundamental building block of the networked economy.

Networked informational capitalism is distinguished from traditional corporate media in two aspects: the first aspect refers to the polarized chain through which audience attention is being monetized. If the past there was one media entity and one advertising broker through which audience attention was monetized (per one engagement/transaction), in a networked environment, every micropayment may be divided and fragmented to a large number of claimers/beneficiaries. This in turn raises pressures to increase networked audience attention and internet loyalty in manners that will feed the entire monetizing value chain.

The second aspect is the growing dependence of informational capitalism on free content and free information as elementary means of production. In a political economy which does not extract revenues through direct commercialization/selling of content, free content and free information are a main baiting mechanism for obtaining and monetizing both audience attention and users'/big data. Along with the empowerment of individuals and the promotion of innovation, openness and free access are also networked industrialized tools for (a) manufacturing attention; (b) influencing

preferences, opinions and consumption; (c) obtaining, aggregating and utilizing data.

Spheres beyond IP thus represent a social contradiction between their empowering functions and their vulnerability to extreme exploitation and commodification. By themselves social and economic conditions under which access and utilization of content are free, provide no safeguards from patterns that imitate the logic and driving forces of proprietary cultural industries.

Before commencing, one caveat needs to be emphasized: nothing in this argument attempts to undermine the disadvantages of proprietary IP regimes or the positive spillover values of open access and free content environments. Rather, my argument is that the tensions and dichotomies that we are accustomed to portrait between “IP centric” and “Beyond IP” environments are tensions and dichotomies which are also internal to each type of such environments. Hence, even if it is highly plausible that free open access infrastructures prevail in terms of their social contribution, one still needs to locate and regulate less desired internal patterns and tendencies of such environments.

A good starting point may be to examine Beyond IP market-oriented environments based on parameters similar to the ones under which traditional proprietary corporate media/information environments were critically examined. Parameters such as: the nature and characteristics of the media products that are being produced, cultural diversity, media concentration and barriers of entry, democratic and distributive values.

Critiques of traditional corporate media tend to concentrate on several aspects: the special nature of media products as public goods and, hence, the embodied failure of a market oriented media system to provide the public with the whole array of media products which are socially desired. The argument is that markets predictably provide inadequate amounts and inadequate diversity of media products, thus producing a wasteful abundance of content responding to mainstream tastes and neglecting civically, educationally, and multi-cultural pluralistic content. More specifically there are four inconclusive elements that together lead to such results: **(a)** externalities, both positive and negative, of media contents, which are not properly or adequately brought to bear by the market on the decision making of either audiences or media enterprises. **(b)** The nature of advertising-supported media as a “market for eyeballs”, which sells audiences to advertisers and consequently leans towards media products that have relatively a wide appeal and gloss over. Media products that follow the

segments of audiences and the environment, which is suitable for selling the advertised products, rather than tend to the diversity of actual interests and needs of people. **(c)** The nature of monopolistic competition in media products (due to their public good nature) as a consideration for favoring “blockbuster” products over more diverse media products which are targeted to smaller and unique audiences. **(d)** The failure of a market oriented media system to have any natural or logical priority as a method of identifying and satisfying people’s preferences and desires; and furthermore, the distortions that market-generated preferences produce due to the inherent bias of markets towards commodified media products, and the fact that people’s preferences are determined by, rather than being exogenous to, any current realm of media products they are effectively exposed to.

The internet and Beyond IP networked environments are different. They do not follow exact similar patterns. Moreover, in a variety of life dimensions, Beyond IP networked environments mitigate and bypass shortcomings of traditional corporate media: amateurs’ content, UGC, collaborative media, common based peer production and creative commons licenses are just a handful of examples for improvements in society’s cultural ecology. At the same time, however, Beyond IP networked environments also parallel and to some degree even escalate failures and disruptions that are associated with traditional corporate media’s political economy.

In terms of media concentration and barriers of entry, the networked environment is highly concentrated: Google controls around 70 per cent of search, YouTube around 70 per cent of online video/music and Facebook accounts for more than 50 per cent of social networking traffic. This highly concentrated environment is explained by network effects and power law distribution that give an advantage to large scale intermediaries. Additionally, however, this tendency is further stimulated by the fact that selling audiences’ eyeballs to advertisers and personal information commodification are now the main – if not the only - source of revenues. The bigger the platform is the better it serves for such purposes. This in turn generates a cycle under which advertisers (looking for content), data brokers (looking for information), speakers/creators/content distributors (looking for audiences) and audiences (looking for content/information) are driven back to the same platforms which thus regain their dominance and market share. There are also evidences that while there is indeed an extremely long tail consisting of thousands of individual points of access to content and information, traffic is concentrated amongst the top few sites. Beyond IP free market settings may have a



tendency to undermine the potential of long tail economics while retrieving to economic and consumer trends similar to those of traditional corporate media.

A second related issue is content diversity and the characteristics of the media products that are being produced. There seems to be good reasons to question the linkage between copyright protection and people's incentive to engage in creative activities. Likewise, there are good reasons to emphasize the burdens and costs that copyright protection imposes. At the same time, market economy settings that are structured around free content incentivize what seems as an extreme version of the traditional "market for eyeballs" and advertisements' supported content distribution platforms, as well as wasteful investment in generating traffic for specific types of contents that are likely to maximize audience attention. Additionally, Beyond IP networked environments may also impose pressures that weaken other competing models of content production and content distribution. One such type of pressures refers to the fact that even non-market players still depend upon major networked distribution platforms as their gateway for audience attention. A second type of pressures refers to the fact that "free" is becoming a predatory pricing mechanism that may leave little market share for creative substitutes which do aim at extracting revenues from selling content.

Beyond IP free markets are also structured around industrial commodified utilization of personal information. Networked corporate media entities use (and trade) flows of information about consumer behavior to target advertisements, search results, and other content. Such information is then used to construct pricing, marketing and risk management templates that maximize the extraction of surplus from consumers. This aspect is usually discussed through the prism of privacy concerns, but it is also highly acute for our discussion, because predictive big data business models both implicate on and are implicated by the characteristics of cultural and content spheres.

Beyond IP free markets are in direct tension with the value of information privacy because they rely upon and extract revenues from trading and commercializing personal information. The economy of monetizing personal information also influences content and media spheres because it requires communicative and informational engagements/products that are suitable for (and maximize) such information gathering: social networks such as Facebook or twitter, search utilities, mobile photo sharing applications such as Instagram and other forms of online content retailing. We tend to perceive many of these utilities as enablers of personal and individual capacities, but at the end of the day, the ecosystem of free content and free

information is rather narrow and repetitive in its range of creative, cultural and innovation coverage.

We are being channeled, tempted and accustomed to communicative spheres in which tracking, analysis, prediction and then marketing are highly efficient and effective; thus, whereas the ability of firms to extract revenues and rents from such activities (which do not require substantial investment in content) impacts on incentives and priorities of investment in innovation. Incentives to invest in (diverse) content and cultural production are partially being replaced by incentives to invest in zones, environments and utilities that are magnets for users' traffic and personalized information.

Finally, there is also something misleading in our intuition that Beyond IP free markets are effective in making information and content shared resources. This is indeed true regarding certain layers of content and information (e.g. content available through content sharing platforms), yet these are schemes that at the same time, conceal from users/third parties access to data and analytics on which the platforms operate. Users, content creators and individuals have no access to the data which is essential in order to reach tailored audiences, effectively distribute their content, determine pricing schemes, or even identify the recipients of their speech activities. In Jeron Lanier's language, these are all privileges that only a handful of server operators are entitled to. Hence, in terms of personal capacities, autonomy, distributive concerns, or even infrastructures' efficiency, Beyond IP free markets raise serious challenges to be addressed. Individuals' content and information are free as the air to common use. Yet, the proceeds of aggregating and analyzing peoples' interactions with such content and information are de facto proprietized without being transparent.

Nothing in this description aims at shallowing other dimensions and prospects of non-market Beyond IP realms, as well as empowering elements within market-oriented Beyond IP realms. More breathing space and cultural opportunities are being provided to individuals in their capacities both as speakers/creators and as users/recipients. I do argue, however, that contemporary networked media environments are increasingly structured around the skein of Beyond IP corporate market settings. Such an industrial organization raises concerns and challenges that need to be addressed through copyright, privacy and telecommunications laws, as well as through their interface and juncture points.

## II – THE LEGAL INTERFACE

The emergence of Beyond IP market economies stems from sources that are much broader than mere legal policy. The socio-economic conditions of the Internet provided the basis and push for such economies by: (a) reducing the cost of producing, distributing and accessing informational content effectively to zero; (b) disaggregating information/content production from information/content distribution; (c) creating efficient and low cost infrastructures for two-sided content and information markets.

It is this reality that triggered excess capacity which made IP centric proprietary schemes less efficient and less attractive. If one puts aside, for a minute, aspects of public good and political morality, the case for Beyond IP markets appears as a firm solid case of efficient market incentives. At the same time, legal policy in the areas of copyright, privacy and telecommunications law was also a stimulator for the emergence and growth of networked capitalism. My purpose in this part is to describe the manners in which informational capitalism utilizes frames and constructs of “Beyond IP” legal policies, in the areas of copyright, privacy and telecommunications law, as strategic tools. In part [infra](#), regarding each legal branch, I also offer an alternate approach more responsive to informational capitalism.

### A. COPYRIGHT POLICY

Copyright policy is the first juncture where one meets the paradoxes of networked informational capitalism. The common critical approach pairs corporate media interests with an IP centric approach. This may have been the case up until the emergence of networked communication platforms. In contemporary realms, however, the interface of copyright protection and informational capitalism seems more complex.

Several scholars have made a strong case regarding the weak correlation between copyright protection and incentives for networked content production and content distribution. In fact, copyright protection may even disincentivize engagement in socially benefiting activities; activities that would have covered their costs of production, if only their inputs were not copyrighted. The irony, however, is that as described in part I *infra*, lack of IP protection also incentivizes and is the engine of an informational ecosystem which may not be socially desirable in all its aspects. The problem therefore is not a problem of free riding and lack of incentives (absent of copyright protection) but rather a problem of positive incentives (absent of copyright protection) to concentrate on discourse, culture and information patterns

which may be profit maximizers, but at the same time may also be culturally reductionists.

In a similar manner, there may be parallels between hierarchies of powers that result from extensive copyright protection and hierarchies of power that result from Beyond IP “free” markets. Both settings are susceptible in terms of their tendency to concentrate significant media power and control in a handful of media and information entities. One type of information empires utilizes broad corporate proprietary protection to leverage their power and another type of information empires relies on free access and utilization of content/information to leverage their power.

Positive copyright law provides some indications for such tendencies. Consider, for example, copyright’s safe harbors for content sharing platforms. Court rulings may vary in their nuisances, but at the end of the day, the general direction of courts is that content sharing platforms also benefit from the DMCA’s § 512(c)’s safe harbor for hosting services providers. This legal regime is indeed highly plausible if one considers the value of the safe harbor in supporting user-generated content, amateur content and new channels of distribution. Concurrently, however, in a networked economy of power law distribution and network effects, this legal regime had other consequences as well: it effectively immunized, costless provision of large repertoires of copyrighted works, in a manner that channeled audience attention to a handful of global entities which obtain now a dominant bottleneck market position.

YouTube is a paradigmatic example in this regard. The dominant and unprecedented market and power position that YouTube has managed to obtain is mostly due to § 512(c)’s safe harbor regime. It is the safe harbor regime that enabled the hosting and public provision of endless amounts of popular copyrighted cultural materials, and it is this ability that made the platform so dominant in terms of its market share. The growing popularity of the platform was largely based on its ability to cover entire portfolios of content (“full repertoire”) under one umbrella and highly demanded (copyrighted) content. The ability to do so without any need to obtain *ex-ante* authorizations from copyright owners and with the safe harbor’s limited legal risk is what facilitated the economic and cultural conditions for the current market domination of YouTube, particularly due to elements of network economics. Practically, § 512(c)’s safe harbor regime, which obliges YouTube to remove (ex-post) infringing materials based on a takedown notice by copyright owners, was a shield rather than a real obstacle in establishing the platform’s dominance. It supported the rapid growth in the

platform's popularity and the immense portfolio of popular copyrighted content that it hosted. Furthermore, legal policy under which the embedding of YouTube's content in third parties' web-sites does not amount to a copyright infringement further enhanced the platform's popularity and dominant position as a global repository of content.

Once this dominant market position was achieved, however, it was also the stage to move toward business models, which are based on collaboration and revenue-sharing with creators and rights owners, only now from a completely different negotiation (or one may say, coercive) position. At this stage, authors, creators and rights owners were faced with a highly dominant and popular intermediary, which attracts a significant portion of audience attention and which is already partially shielded from legal liability for the hosting of their materials. Under such conditions, YouTube's ability to legitimize its content activities under its own terms was considerable. Authors, creators and performers have very few options other than agreeing to YouTube's terms and conditions or vanishing from audiences' awareness. These terms and conditions tend to be fixed, non-negotiable for most contributors and based on one unilateral business model of free content and monetization only through advertisements' revenues.

The YouTube model sets a good example for a Beyond IP market. Formally, it operates within the boundaries of copyright law. Practically, however, with the backing of § 512(c)'s safe harbor regime, it establishes market mechanisms which are based upon monetization through free distribution of content. The entire playing field is built upon this premise which also guides the conducts, expectations and preferences of its repeat participants: the platform, ancillary intermediaries (through content embedding), users, content contributors, advertisers, data brokers and marketers.

The YouTube model also demonstrates the complex and contradictory nature of Beyond IP market mechanisms. There are many positive spillovers in such an environment, which functions as a common infrastructure in terms of peoples' capacities, both as speakers and as recipients, to access, distribute and utilize creative and informational content. At the same time, the YouTube Beyond IP model also demonstrates counter dynamics including: unilateral coded boilerplate compensation schemes that undermine authors'/contributors' welfare and rely solely on advertisements' revenues; pressures toward ruinous competition in manufacturing blockbuster hits that generate popularity and audience attention; an extremely concentrated

distribution layer; intense convergence between product placement, brand marketing, stealth advertisement and creative content; limited investment in content production and targeted delivery of content based on personal data collection.

On the face of it, if one encounters the immeasurable amount of content which is freely available through YouTube, it seems counterintuitive to question the vitality and social contribution of YouTube. Yet, there is a distinction between YouTube's function as a repository for past's materials and its ex-ante content production and distribution functions. YouTube also demonstrates that a Beyond IP realm, which is based on limited exposure to copyright liability, provides no guaranty against restrictive contractual and technological terms which are then imposed on the platform's users and contributors, including restrictions that override copyright exemptions (self-help Content ID filtering mechanisms).

There is a cycle of power dialectics under which a content sharing platform, such as YouTube, advocates and advances zones which are beyond IP liability while at the same time it utilizes its (beyond IP) leveraged centrality and market power to impose rules and practices that limit the powers and capacities of third parties – both contributors and users. Additionally, concentrated dominant market power also means a more centralized and less diversified media environment with less institutional players that compete, check upon and complement each other.

Another demonstrative example is Google's Books library Project. The (so far) successful legal strategy of this project is a Beyond IP legal strategy. Google argues that the reproduction of entire copyrighted works for their inclusion in the Google Books Library Project is considered fair use as long as only snippet quotations from the copyrighted works are presented and made available to the public. Together with public domain works, the skein of Google's Books library Project is beyond the boundaries of IP, in terms of the fact that its operation does not require authorization from copyright owners. At the same time, however, as several scholars have demonstrated, along with its fundamental social contribution, some elements, operational terms, contractual terms and technological characteristics, of Google's Books library Project go against the public interest. The point is that just like the project's social value, these less desirable aspects, as well, derive from Google's reliance on a successful Beyond IP legal strategy. Here also, reliance upon a beyond IP legal strategy leverages centrality and market power which are

then utilized to impose rules and practices that are proprietary in terms of the limitations that they impose on powers and capacities of third parties.

A Beyond IP copyright policy, therefore, results in mixed heterogenic outcomes in terms of the fact that it also supports and advances networked corporate media interests. The playing field in this regard is not just a doctrinal playing field but also a field of frames, ideas, concepts and ideologies. Realms beyond IP are associated with public regarding concepts such as free culture, access to knowledge, the public domain and cultural environmentalism. These sought concepts tend to be adopted and advocated also in the service of information capitalism streams which rely upon Beyond IP market settings. Such framing maneuvers advance Beyond IP market settings while masking some of their less desired consequences behind a veil of public regarding consensual goals.

In this regard, copyright's policy interface with informational capitalism does more than mere provision of doctrinal positive law tools. A public regarding reductionist copyright policy also locates Beyond IP zones within narratives that tend to discreet adverse aspects of such settings and color them is a public regarding appearance. The true dual nature of Beyond IP zones is thus being reduced to a prism that focuses on its prospects rather than its complex nature. Such dynamics may also spill to dimensions that go beyond copyright policy, including informational privacy.

## **B. INFORMATIONAL PRIVACY**

Informational privacy is in direct conflict with informational capitalism because of the manners in which informational capitalism perceives data and personal information as imminent means of production in a networked environment. Champions of privacy protection are well aware of this tension. Different legal regimes such as the European Community Laws attempt to regulate this tension and limit commercial exploitation of personal information. Contemporary approaches to privacy regulation, however, tend to ignore the interface of informational privacy and Beyond IP market settings.

If Beyond IP free content markets rely upon and extract revenues from trading and commercializing personal information, then informational privacy concerns become an IP matter. In order to understand this argument, one needs to go back to the basics of a regulatory copyright approach:

A public-regarding regulatory approach to copyright is very much about regulating incentives to engage in different types of information and cultural production activities. To a large degree, a scrutinized narrow scope of copyright protection is justified because it is essential to avoid unnecessary burdens and restrictions on secondary socially desirable (yet not commercially profitable) activities. The same public regarding regulatory approach may also support a scrutinized narrow scope of copyright protection because of the disrupted incentives regime that extensive copyright protection may generate (towards a relatively narrow range of creative works that appeal to large audiences and can be utilized in as many ancillary and derivative markets as possible).

Maximizing internalization of positive externalities/spillovers and minimizing negative externalities, therefore, is a main goal of copyright law as a regulatory tool. Within this general framework, however, informational privacy concerns should also be taken into account. One may speak of “Copyright’s Informational Privacy Policy”. If Beyond IP profit-motivated market settings tend to raise informational privacy concerns, then this is a parameter that should be taken into account within copyright policy; thus whereas such a parameter may weight in favor of a more careful crafting of copyright protection/exemptions in order to disincentive activities that raise informational privacy concerns.

Consider, for example, the requirement that in order to benefit from § 512(c), safe harbor for hosting services providers (including content-sharing platforms), the platform should not obtain financial benefit directly attributable to the infringing activity. Thus far, this element, within § 512(c), has not received much judicial discussion, but courts’ general approach has been to narrowly interpret and apply the element of “financial benefit attributed to the infringing activity.”

Informational privacy concerns may support a different approach according to only non-commercial platforms, or individuals, should benefit from a safe harbor for content sharing platforms. This would mean a broad interpretation of the term “financial benefit directly attributable to the infringing activity.” Such a broad definition would also cover instances of financial benefit from attracting eyeballs, which in turn creates advertising revenue or increases the value of the company from subscriber fees or other payments. Such an approach would disincentivize market-settings which rely heavily upon targeted advertisements’ revenues. As a byproduct it would also reduce incentives to concentrate on content and information which are



magnets of advertisements' supported eyeballs. At the same time, not-for-profit and civic-engaged activities would still benefit from § 512(c), safe harbor because their conducts bear social value without raising significant informational privacy concerns.

More generally, from an informational privacy perspective, with regard to market profit-motivated realms, there may be an advantage if revenues (and incentives) would derive directly from the media product (as opposed to data, personal information and advertisement supported revenues). Maintaining culture and creative industries that rely upon revenues extracted directly from the media product reduces the pressures that free content market realms impose on informational privacy as well as on cultural diversity. Put together, this means that from an informational privacy perspective, copyright law should support Beyond IP free zones and broad copyright exemptions more prominently with regard to not-for-profit activities. At the same time, profit motivated corporate media should be channeled to paths that focus on direct economic exploitation of media products.

Needless to mention that just as any other instance, or type, of regulation in the fields of information, culture and speech activities, there are counter considerations, including free speech considerations and side effects on innovation spillovers. My only argument is that informational privacy is impacted by copyright policy leaning towards Beyond IP market structures. Therefore, within the design of copyright's incentives regime, regarding different types of content/information production activities/institutions, privacy concerns should be taken into account. If different types of content/information production activities/institutions raise different levels of privacy concerns, then this is one parameter, among many others, to be considered when structuring copyright law's support/or lack of support, regarding such activities/institutions.

Nothing in the above-mentioned ignores the concurrent fact that as Amy Kapczynski demonstrated, IP and pricing mechanisms also impose costs and harms to informational privacy. They do so because reliance on pricing mechanisms induces data collection and data retrieval for price discrimination and profit maximization purposes. Here, again, what we see is that disruptions and failures of "IP centric" regimes may also appear, or even be stimulated, by profit motivated Beyond IP zones. The response, therefore, cannot be in advocating for a signal unilateral institutional ordering but rather in an attempt to shape both zones in distance and proximity from pricing mechanisms, which may appear also in certain types of beyond IP realms.

Against this approach, one may argue that the appropriate track to confront informational privacy concerns is through direct top-down legal ordering that sets limitations on the collection, aggregation, retrieval, utilization and trading of personal data. Important as this legal dimension may be, it cannot fully respond to the challenges that informational capitalism raises in the context of informational privacy. To begin with, there is a scale of activities that may raise different degrees of informational privacy concerns. Some of these activities do not give rise to harms that justify their prohibition by law. At the same time, copyright law as a “soft” mechanism of regulation may have a role in either incentivizing or disincentivizing such less socially desired activities. A second related point is that the consideration and introduction of informational privacy concerns, into the IP/copyright matrix, has also an expressive role in highlighting less desired consequences of Beyond IP market settings and unveiling complex realities that may exist behind frames such as open access and free culture. If there is a linkage between informational privacy concerns and dominant Beyond IP market settings, then resolving this tension needs to be addressed also from the perspective of IP as a regulatory tool.

Concurrently, but from a reverse dimension, informational capitalism also informs us about the role of privacy protection in regulating cultural & information production. If so far I have mentioned the impact of cultural production regulation (e.g. copyright) on informational privacy, now the roles exchange: privacy protection implicates on cultural production and therefore it could and it should be utilized as a tool for regulating creative and cultural spheres.

Thus, for example, different degrees of restrictions and limitations on personal data collection, its trading and utilization for targeted advertisements, sponsored content and product placement may derive different degrees of corporate media’s economic incentives to strategically concentrate on content that serves such purposes. Consider, for example, activities of companies such as Outbrain and Taboola which combine content recommendations with stealth content marketing. The economic effectiveness of such platforms (always embedded in third parties (“publishers”) web-sites is largely based on tracking and surveillance mechanisms. The success of such platforms impacts cultural production by inducing content that attracts and retains visitors and by directing visitors to certain specific content (which in turn, undermines audience attention to other content). Regulating Outbrain’s and Taboola’s tracking and surveillance mechanisms may impact

the effectiveness of such platforms, as well as incentives to produce content that complies with such platforms' business model. More generally, predictive data mining is a powerful tool not only for price discrimination but also for optimizing investment in information and content production. Such optimization, however, shapes rather than reflects people's preferences and desires. Regulating data mining and private surveillance practices is a mechanism that among other dimensions mitigates adverse effects that such practices may have on cultural production.

The above-mentioned observations are not unique just for Beyond IP market settings. They may be likewise relevant to proprietary cultural production environments. However, the role of privacy protection in regulating media environments may gain increasing importance in the context of Beyond IP markets settings. In such settings, the means, inputs and outputs of production (as well as the sources of revenues and incentives) are bundled with personal data and information. Information privacy regulation, therefore, has a direct impact on the operation and products of such media environments. Additionally, in such settings, IP as means of regulation is practically a very limited tool, if at all. When revenues and incentives do not rely upon IP, the linkage between the particulars of an IP regime and cultural production becomes fragile if not redundant. Beyond IP market settings require a beyond IP form of regulation and privacy protection may have a role in this regard.

### **C. TELECOMMUNICATIONS LAW**

**TBA**

### **III – FROM BEYOND IP TO BEYOND IC (IC=INFORMATIONAL CAPITALISM)**

Retuning now to “Beyond IP” as a guiding frame, it seems that regarding cultural production, one may come to the following observations: Thinking “Beyond IP” is highly contributive in unveiling the limits and cons of an IP centric approach, as well as in developing alternate, more socially desirable institutions and schemes of legal ordering. At the same time, the framing of “Beyond IP” may not be attentive enough to the challenges that are raised by informational capitalism. The world “Beyond IP” is complex and multidimensional. In some of its parts it offers alternatives far more successful and socially desirable than traditional IP centric cultural realms. At

the same time, paradoxically, in some other of its segments, the freer the flow of information and content is, the more fragile cultural democracy might become in terms of power hierarchies and corporate capitalization processes that emerge.

This observation, however, does not entirely undermine the role and importance of zones which are Beyond IP. In fact, it endorses them, only with one caveat: instead of just thinking “Beyond IP”, we should also think “Beyond Informational Capitalism”, while bearing in mind the complex relationship between free (from IP) content and information markets. Just like IP, beyond IP realms tend to operate on large-scale proximity rules. IP realms do so in the course of acknowledging proprietary protection and defining its scope of applicability. Beyond IP realms do so in the course of defining objects and conducts beyond the hand reach of IP. The challenge ahead is to maintain and empower the prospects and promising parts of Beyond IP realms while responding to their interface with informational capitalism. From this perspective, the role of the state and regulatory involvement in informational/cultural spheres may even become more fundamental; not just because of IP’s shortcomings, but also because of the tendency for domination and the limits of “Beyond IP” market-oriented networked realms.

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