

# Autonomy, Copyright, and Structures of Creative Production

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*Whether and how copyright promotes creative expression is the central question of copyright law. The standard rationale—that copyright provides economic incentives to create—has attracted sustained critique. While copyright impacts creativity in myriad ways (both positively and negatively), this Article explores an underappreciated organizational mechanism by which copyright contributes to creative expression. Drawing on the theory of the firm, it argues that copyright supports a transactional model in which creative individuals and small entities can work independently from large intermediaries that commercialize their works. Such independence, moreover, affords creators meaningful organizational autonomy and contributes to working conditions particularly conducive to creative expression. In elaborating this theory, this Article examines three principal creative industries: film production, music recording, and book publishing. It makes two related descriptive claims. First, it argues that these industries feature significant (though varying) degrees of vertical disintegration in upstream content production. Second, it argues that copyright, while not strictly necessary or sufficient to sustain vertical disintegration, plays an important role in lowering the cost of this form of industrial organization. By conferring upon creators a low-cost, easily obtainable exclusive right to expressive works, copyright enhances the viability of a transactional model in which creative individuals and small entities can maintain some separation from large intermediaries. Additional elements of copyright law, notably the works-made-for-hire doctrine, help creators establish modular, project-specific social structures to complete particular projects.*

*These descriptive claims reveal an underappreciated mechanism by which copyright promotes creative expression. This Article argues that copyright indirectly promotes creative expression by expanding the*

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*range of viable organizational forms for producing creative content and supporting structures conferring greater autonomy to creators. This Article presents psychological and sociological evidence indicating that creators greatly value autonomy, which leads to more and better creative output. It cautions, however, that while copyright-mediated vertical disintegration may promote creativity, it leaves creators vulnerable to power imbalances vis-à-vis large intermediaries. Finally, this Article argues that copyright will continue to promote autonomy for creators within the current revolution in digital distribution. Ironically, it will do so not by facilitating more vertical disintegration, but by facilitating new forms of vertical integration in which creators bypass traditional intermediaries and distribute works directly to audiences.*

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*I find freedom sexy. I find freedom so sexy I can't even explain it to you. You wake up every day and feel like you can do anything.*<sup>1</sup>

## I. INTRODUCTION

The 2018 blockbuster movie *Crazy Rich Asians*<sup>2</sup> reveals important insights about the structure of modern creative production. In the early twentieth century, large, vertically integrated movie studios combined film production and distribution, relying on in-house directors, actors and actresses, and other creative talent to churn out movies.<sup>3</sup> By contrast, the development of *Crazy Rich Asians* arose from numerous transactions among specialized, independent parties.<sup>4</sup> The underlying source material—a key creative input—came not from a studio but from an external source: Kevin Kwan's 2013 book of the same name.<sup>5</sup> After an intense bidding war, Kwan assigned film adaptation rights—derived from the underlying copyright in his book—to a nine-person production company, Color Force.<sup>6</sup> To preserve the story's authenticity, Color Force

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<sup>1</sup> Thomas Smith, *Prince: His Best Quotes from His Final NME Interview*, NME (Apr. 21, 2017), <https://www.nme.com/blogs/nme-blogs/prince-his-best-lines-from-his-final-nme-interview-767567> [<https://perma.cc/C6HS-FUU9>] (quoting Prince).

<sup>2</sup> *CRAZY RICH ASIANS* (Warner Bros. Pictures 2018).

<sup>3</sup> See *infra* notes 134–42 and accompanying text.

<sup>4</sup> See Chris Lee, *The Long Crazy Road to Crazy Rich Asians*, VULTURE (Aug. 9, 2018), <https://www.vulture.com/2018/08/the-long-crazy-road-to-crazy-rich-asians.html> (on file with the *Ohio State Law Journal*) [hereinafter Lee, *Long*].

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*; Ryan Faughnder, *How Nina Jacobson's Team Behind 'Crazy Rich Asians' and 'Hunger Games' Became a Force in Hollywood*, L.A. TIMES (Oct. 2, 2018), <https://www.latimes.com/business/hollywood/la-fi-ct-nina-jacobson-color-force-20181002-story.html> [<https://perma.cc/LCW6-U2ZC>]; see also Rebecca Sun & Rebecca Ford, *The Stakes Are High for 'Crazy Rich Asians'—And That's the Point*, HOLLYWOOD REP. (Aug. 1, 2018), <https://www.hollywoodreporter.com/movies/movie-features/crazy-rich-asians-how-asian-rom-happened-netflix-1130965/> [<https://perma.cc/GY2U-WX22>] (describing the

produced the film independently of a major studio.<sup>7</sup> The producers assembled creative talent, which included signing director Jon M. Chu and scouring four continents for Asian actors.<sup>8</sup> The production team focused on creating the film, and it sought a distribution partner with the size, resources, and expertise to market the film and distribute it to audiences.<sup>9</sup> After a second bidding war, Kwan and Chu awarded distribution rights—based on the copyright in the film—to Warner Bros., a major Hollywood studio.<sup>10</sup> Numerous market exchanges by independent parties—rather than the work of a single, integrated firm—drove the production and distribution of *Crazy Rich Asians*. This Article explores the underappreciated benefits of this fragmented structure and the role of copyright in shaping it.

Whether and how copyright promotes creative expression is the central question of copyright law.<sup>11</sup> The standard explanation, which has become doctrinal canon, is that copyrights provide authors with economic incentives to create by conferring exclusive rights on expressive works.<sup>12</sup> This rationale has been subject to withering criticism.<sup>13</sup> Copyright provides meager royalties to the vast majority of artists, thus undercutting the incentives rationale for exclusive rights.<sup>14</sup> Furthermore, nonfinancial factors—including intrinsic motivations to create—appear in many contexts to be more important than financial incentives.<sup>15</sup> Some have posited that copyright serves not creators but intermediaries—the movie studios, record labels, and book publishers that invest enormous sums of money to bring copyrighted works to market.<sup>16</sup> While true to an extent, such an explanation discounts the tenacity with which independent creators (not just large intermediaries) value their copyrights. But if creators aren't making much money off of their copyrights, how, if at all, do these exclusive rights promote creative expression?

While copyright impacts creativity in myriad ways (both positively and negatively), this Article explores an underappreciated *organizational*

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production history of *Crazy Rich Asians*). Production company Ivanhoe Pictures provided co-financing. *Id.*

<sup>7</sup> Lee, Long, *supra* note 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Cf.* U.S. CONST. art. I, § 8, cl. 8 (authorizing Congress to grant exclusive rights to authors and inventors “To promote the Progress of Science and useful Arts”).

<sup>12</sup> *See, e.g.*, Jonathan M. Barnett, *Copyright Without Creators*, 9 REV. L. & ECON. 389, 390 (2013) [hereinafter Barnett, *Copyright*].

<sup>13</sup> *See infra* Part IV.

<sup>14</sup> Peter DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 ARIZ. L. REV. 301, 304–05, 339 (2013) (reporting that surveyed musicians derive on average twelve percent of their revenue from sources directly related to copyright, which suggests “that many musicians earn little money from activities directly subject to copyright protection”).

<sup>15</sup> *See infra* notes 332–36 and accompanying text.

<sup>16</sup> *See, e.g.*, Barnett, *Copyright*, *supra* note 12, at 390.

mechanism by which copyright contributes to creative expression. It argues that copyright indirectly promotes creativity by facilitating industry structures that are particularly conducive to creative expression, namely those where creators can work independently of large bureaucracies. Applying insights from the theory of the firm, this Article argues that copyrights lower transaction costs between creators and other parties in the value chain, notably large intermediaries that distribute content to mass audiences. By providing a low-cost, easily obtained property right in creative expression,<sup>17</sup> copyright facilitates a transactional model of creative production in which creators enjoy greater organizational autonomy. Put differently, copyright makes it easier for creators to work as freelancers, independent contractors, and in small groups rather than being vertically integrated into large movie studios, record labels, and book publishers. This is evident in the production and distribution of *Crazy Rich Asians*, where copyright lowered transaction costs between individual creators, a small production company, and a large studio that handled commercialization.<sup>18</sup> As legal scholar Tim Wu observes, “There is good reason to think that industry structure is at least as important for innovation as the intellectual property laws.”<sup>19</sup> While true, intellectual property rights can fundamentally shape industry structure itself, thus amplifying their impact on creativity and innovation.

In the language of the theory of the firm, copyright enhances the viability of vertical disintegration.<sup>20</sup> All industries feature a value chain in which parties transform upstream inputs (such as an author’s original story) into downstream outputs (such as a commercially distributed book).<sup>21</sup> One way of organizing these functions is vertical integration, in which “two or more successive stages of production and/or distribution of a product are combined under the same control.”<sup>22</sup> Alternatively, a value chain could be vertically disintegrated, in which separate upstream and downstream entities perform specialized functions and exchange intermediate goods between them.<sup>23</sup> Value chains can also adopt numerous intermediate and alternative organizational structures.<sup>24</sup> One intermediate form that is particularly relevant to this Article is semi-integration, which typically takes the form of an upstream entity being embedded within a downstream entity but maintaining a quasi-autonomous status within it.<sup>25</sup>

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<sup>17</sup> See *infra* notes 110–14 and accompanying text.

<sup>18</sup> See Lee, Long, *supra* note 4.

<sup>19</sup> Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement if Innovation Mattered Most*, 78 ANTITRUST L.J. 313, 315 (2012).

<sup>20</sup> See *infra* Part II.C.

<sup>21</sup> See Peter Lee, *Innovation and the Firm: A New Synthesis*, 70 STAN. L. REV. 1431, 1435 (2018) [hereinafter Lee, *Innovation*].

<sup>22</sup> Robert H. Cole, *General Discussion of Vertical Integration*, in VERTICAL INTEGRATION IN MARKETING 9, 9 (Nugent Wedding ed., 1952).

<sup>23</sup> See Lee, *Innovation*, *supra* note 21, at 1435.

<sup>24</sup> See *id.* at 1443–44.

<sup>25</sup> See *id.* at 1436.

Economist Ronald Coase famously argued that high transaction costs between separate parties in a value chain push in favor of vertical integration.<sup>26</sup> When it is costly to contract with an upstream or downstream party, it may be easier to just vertically integrate and become one organization.<sup>27</sup> Drawing on the theory of the firm, intellectual property scholars have extensively argued that one form of intellectual property rights—patents—lowers transaction costs between upstream and downstream companies in technology industries and facilitates vertical disintegration.<sup>28</sup> However, aside from a few exceptions, the ability of copyright to perform a similar function has been relatively overlooked.<sup>29</sup>

This Article argues that copyrights also lower transaction costs and enhance the viability of vertical disintegration, though with particular nuances in the context of creative works. In so doing, copyright helps facilitate a decentralized landscape in which creators enjoy greater organizational autonomy from large bureaucracies. Such autonomy, moreover, contributes to fertile ground for robust creative output.

In arguing that copyright supports vertical disintegration, it is important to clarify the scope and limitations of this Article's thesis. This Article does not argue that copyright, on its own, "causes" industries to vertically disintegrate. For example, the film industry has experienced periods of significant vertical integration even in the presence of copyrights.<sup>30</sup> This Article argues, however, that copyright lowers the cost of vertical disintegration, thus enhancing the viability of this organizational form and expanding the menu of organizational options for industry participants. Relatedly, this Article does not claim that copyright is strictly necessary to achieve vertical disintegration. However, it argues that copyright enjoys certain advantages relative to other mechanisms for achieving such a structure.<sup>31</sup> Finally, when this Article suggests that copyright

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<sup>26</sup> See R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 394–98 (1937).

<sup>27</sup> See *id.* at 396.

<sup>28</sup> See, e.g., Ashish Arora & Robert P. Merges, *Specialized Supply Firms, Property Rights and Firm Boundaries*, 13 *INDUS. & CORP. CHANGE* 451, 452–54 (2004).

<sup>29</sup> One notable exception is the work of Robert Merges, who has examined the contribution of copyright (and intellectual property rights more generally) to individual autonomy. See, e.g., ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* 228 (2011). His focus is slightly different, concentrating on property rights as a locus of individual control rather than on copyright's specific role in promoting vertical disintegration and semi-integration. See *id.*; see also Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 *VAND. L. REV.* 1879, 1916 (2000) (observing that copyrights promote entry by freelancers and vertical disintegration, though focusing primarily on informational media and free speech concerns); cf. Richard A. Posner, *Misappropriation: A Dirge*, 40 *HOUS. L. REV.* 621, 635 (2003) (noting that the absence of copyright on databases may encourage inefficient vertical integration).

<sup>30</sup> Rather, a variety of factors can lead an industry to embrace vertical disintegration. In the film industry, for instance, antitrust litigation and the emergence of television as a competitive threat played important roles in shifting movie production and distribution toward vertical disintegration. See *infra* notes 143–50 and accompanying text.

<sup>31</sup> See *infra* notes 104–07 and accompanying text.

facilitates vertical disintegration (which has positive effects on creativity), it is focusing on the availability of low-cost, easily obtainable exclusive right to creative expression. There are certainly other areas of copyright doctrine that may be inapposite or even detrimental to creative expression—the extremely long copyright term and the muddled standard for fair use come to mind.<sup>32</sup> This Article highlights the organizational benefits of copyright for creative expression, but these benefits must be balanced against the other costs of the copyright system.

To explore copyright's underappreciated impact on industry structure—and, by extension, creative expression—this Article examines three major content industries: film production, music recording, and book publishing. It makes two related descriptive claims. First, it argues that these industries feature significant (though varying) degrees of vertical disintegration in upstream content production. As a general matter, filmmakers, recording artists, and authors are not in-house employees of large studios, labels, and publishers. Rather, they enjoy varying degrees of independence from large intermediaries and transact with them to commercialize their works. Second, this Article argues that copyright plays an important role in supporting such vertical disintegration. By conferring upon creators a low-cost, easily obtainable exclusive right to expressive works, copyright enhances the viability of a transactional model in which creators and small entities can maintain some independence from large intermediaries. Rather than being embedded within these organizations, creative workers can engage in copyright-based contractual exchanges with them. Autonomy, however, consists of not only one's separation from unpreferred attachments, but also one's ability to establish preferred attachments. While copyright facilitates the separation of creators and intermediaries, it also facilitates aggregation of creators in useful ways. Mechanisms such as the works-made-for-hire doctrine allow creators to organize modular social structures to engage in project-specific team production, which further advances certain forms of creative autonomy.<sup>33</sup>

As this Article's descriptive account will show, the precise contours of copyright-mediated vertical disintegration vary by context. In the film industry, vertical disintegration occurs on two levels. First, as illustrated by *Crazy Rich Asians*, independent producers contract with upstream, freelance creative talent

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<sup>32</sup> See, e.g., Kristelia Garcia & Justin McCrary, *A Reconsideration of Copyright's Term*, 71 ALA. L. REV. 353, 357 (2019) (showing that most of the copyright term is inapposite for providing economic incentives to create); Niva Elkin-Koren & Orit Fischman-Afori, *Rulifying Fair Use*, 59 ARIZ. L. REV. 161, 190 (2017) (“The fair-use standard is rather vague and indeterminate, creating a high risk of liability.”).

<sup>33</sup> See *infra* text accompanying notes 172–78. Copyright's works-made-for-hire provision establishes that a hiring party is considered the legal author (and copyright owner) of works made by employees and of certain works made by independent contractors. 17 U.S.C. § 101; U.S. COPYRIGHT OFF., CIRCULAR 30, WORKS MADE FOR HIRE 1 (2021) [hereinafter CIRCULAR 30].

to produce films.<sup>34</sup> Copyright plays several useful organizational roles here. Producers can license copyrighted content from outside parties, such as when Color Force obtained film adaptation rights for Kevin Kwan's book.<sup>35</sup> Producers can also utilize copyright's works-made-for-hire doctrine to assemble and commission works by freelance creators.<sup>36</sup> Second, these independent producers contract with large, downstream studios for financing and distribution.<sup>37</sup> Here again, copyright-based transactions enable the separation of upstream production from downstream distribution.

In the music industry, copyright facilitates an intermediate separation of recording artists from record labels best characterized as semi-integration. Recording artists are formally independent contractors who assign copyrights to labels, which handle downstream distribution of recorded music.<sup>38</sup> As such, they often enjoy meaningful autonomy from labels, as illustrated by their ability to choose their own creative and technical assistants and record in independent studios.<sup>39</sup> However, recording artists are bound by long-term, exclusive contracts and submit to substantial control by large record labels.<sup>40</sup> Such an arrangement, in which creative entities enjoy a quasi-autonomous status within large intermediaries, reflects a structure best characterized as semi-integration.<sup>41</sup> Copyright helps recording artists maintain some separation from labels by conferring on artists an easily obtained, assignable right to their expressive works. Furthermore, copyright's termination of transfer provision, which allows recording artists to regain rights they have conveyed away after a statutorily prescribed period of time, further shores up the independence of recording artists from labels.<sup>42</sup> Focusing on the actual task of music production, several features of copyright law, including its easily assignable nature and the works-made-for-hire doctrine, help recording artists assemble freelance musicians to work on particular tracks.

The publishing industry features a more classically disintegrated structure in which authors work independently of publishers.<sup>43</sup> Such vertical disintegration is also mediated by copyright.<sup>44</sup> Authors typically obtain a book

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<sup>34</sup> See *infra* notes 160–66 and accompanying text.

<sup>35</sup> See Lee, Long, *supra* note 4.

<sup>36</sup> See CIRCULAR 30, *supra* note 33, at 2–3.

<sup>37</sup> See *infra* notes 182–87 and accompanying text.

<sup>38</sup> See *infra* notes 200–01, 237–40 and accompanying text.

<sup>39</sup> See *infra* notes 206–17 and accompanying text.

<sup>40</sup> See *infra* notes 218–29 and accompanying text.

<sup>41</sup> Lee, *Innovation*, *supra* note 21, at 1436.

<sup>42</sup> See 17 U.S.C. § 203(a)(3). Copyright's termination of transfer provision allows individual copyright holders to terminate grants of copyrights to other parties within a five-year window following thirty-five years after a grant. *Id.*; see also *infra* notes 248–54 and accompanying text.

<sup>43</sup> See *infra* notes 263–72 and accompanying text.

<sup>44</sup> See *infra* notes 276–82 and accompanying text.



contract in which they license their copyright to a publisher, thus allowing these parties to work separately.<sup>45</sup>

In sum, copyright helps support industry structures that confer meaningful autonomy to creative individuals and small entities. Because autonomy plays a central role in this narrative, it is helpful to clarify this Article's claims in this context. While copyright facilitates vertical disintegration, it is important to note that due to ongoing creative and business relationships, creators are rarely completely independent from the intermediaries that distribute their works. Additionally, although copyright lowers the cost of separating creators and intermediaries, at best it helps provide a measure of *organizational* autonomy rather than full creative autonomy to creators. As long as intermediaries are necessary to access audiences, they can still exert control over creators, whether by directly employing them or by leveraging contracts. Finally, this Article acknowledges that allowing creators to work independently may just be replacing one taskmaster (a large bureaucracy) for another (the market), both of which constrain creative autonomy. This Article's claims about autonomy are relative; it suggests that creators enjoy greater autonomy as freelancers and independent contractors rather than as in-house employees of large intermediaries, but all creators reliant on market returns experience some constraints on autonomy.

Having traced the twin descriptive claims that content production features significant vertical disintegration and that copyright helps support such disintegration, this Article turns to a normative reinterpretation of copyright's role in promoting creative expression. It argues that copyrights promote creative expression less through providing direct financial incentives and more by helping creators shape the organizational contexts in which they work. Copyrights promote organizational autonomy by both enabling creative workers to work separately from large bureaucracies and by helping them form modular social structures to complete creative projects. In so doing, copyright contributes to a more fertile organizational landscape for creative expression.

Copyright-mediated vertical disintegration promotes creative expression in several ways. It offers a host of benefits predicted by the theory of the firm, most importantly by allowing creative workers to specialize in their crafts. Additionally, this Article highlights an important benefit of disintegration that the theory of the firm overlooks—the psychological value of autonomy to creative expression. The psychological and sociological literatures reveal that creative workers greatly value autonomy and that such autonomy leads to more robust creative output.<sup>46</sup> This Article does not argue that copyright confers such creative autonomy directly; rather, by helping to foster *organizational* autonomy, copyright contributes to conditions that tend to increase creative autonomy. While vertically disintegrated structures pay substantial creativity dividends, they generate deep concerns over power imbalances between

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<sup>45</sup> See *infra* notes 265–68 and accompanying text.

<sup>46</sup> See *infra* Part IV.B.1.

intermediaries and independent creators, who often receive low compensation and experience significant work instability.<sup>47</sup> Ironically, copyright-mediated vertical disintegration may be good for creativity but not so good for creators.

Finally, this Article considers these structural dynamics in light of the revolution in digital distribution. It argues that low-cost, easily obtainable copyright will continue to play an important role in promoting creative autonomy.<sup>48</sup> Ironically, it will do so not by facilitating more vertical disintegration, but by facilitating greater top-down vertical integration wherein filmmakers, recording artists, and authors bypass traditional intermediaries and distribute their works directly to audiences. Such structures, however, may simply replicate power imbalances between creators and technological platforms that are gatekeepers to audiences and financial viability.

This Article proceeds in four Parts. Part II explores traditional accounts of industry structure from the theory of the firm, which draws upon transaction costs to explain why firms vertically integrate or disintegrate. It introduces three archetypes for the relationship of upstream and downstream entities in a value chain: vertical integration, vertical disintegration, and semi-integration. This Part also examines the role of patents in reducing transaction costs and promoting vertical disintegration in technology industries. It then applies this insight to copyright and creative industries as well, though with some context-specific adjustments. Part III turns to empirical evidence to investigate the structures of the film, music, and publishing industries. It advances two related descriptive claims: content production features significant (though varying) degrees of vertical disintegration, and copyright helps support such disintegration. It also articulates certain limitations and exceptions to these descriptive claims.

Part IV draws on these descriptive claims to reinterpret copyright's role in promoting creative expression. Moving beyond the (contested) notion that copyright provides creators with economic incentives to create, it argues that copyright indirectly promotes expression by helping creators shape the conditions in which they work. It explores recognized economic benefits of vertical disintegration from the theory of the firm. It then explores less appreciated benefits of vertical disintegration grounded in the psychological benefits of autonomy. Part V considers the implications of these findings for the recent revolution in digital distribution.

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<sup>47</sup> See *infra* Part IV.C.

<sup>48</sup> See Robert P. Merges, *The Concept of Property in the Digital Era*, 45 HOUS. L. REV. 1239, 1240 (2008) [hereinafter Merges, *Property*] (“[T]he traditional virtues of individual property ownership—autonomy, decentralization, flexibility—are in no way obsolete in the digital era; they are indeed just as important and useful as ever.”).

## II. VALUE CHAINS, THE THEORY OF THE FIRM, AND THE ROLE OF INTELLECTUAL PROPERTY RIGHTS IN SUPPORTING VERTICAL DISINTEGRATION

### A. *Value Chains in Creative Industries and Potential Structural Forms*

All industries feature a value chain spanning numerous functions to transform inputs into outputs. The value chain—in which parties add value with each link—exhibits a vertical relationship between “upstream” functions, such as creating an input, and “downstream” functions, such as assembling various inputs and marketing finished goods. For example, in the automotive industry, various entities manufacture steel, convert that steel into auto parts, assemble those parts into cars, and then market, advertise, and distribute cars to consumers.<sup>49</sup> A value chain can be vertically integrated, in which a single firm performs all (or a significant portion) of these functions in-house. Alternatively, it may be vertically *disintegrated*, in which separate entities along the value chain perform specialized functions and exchange intermediate goods via contracts.

In the early twentieth century, economist Ronald Coase shed significant light on the forces shaping industrial organization with his influential theory of the firm.<sup>50</sup> Coase’s central insight is that transaction costs determine the existence, size, and scope of firms.<sup>51</sup> In theory, parties could coordinate production of goods through market transactions between specialized entities along a value chain.<sup>52</sup> After all, within certain parameters, markets and prices are efficient mechanisms for allocating resources and organizing production.<sup>53</sup> At a certain point, however, the transaction costs of market exchanges—which include the costs of negotiating prices, delineating contractual obligations, and monitoring performance<sup>54</sup>—exceed the coordination and managerial costs of performing all stages of production within a single vertically integrated firm.<sup>55</sup> Ultimately, high transaction costs between separate entities lead to vertical integration.<sup>56</sup> On the other hand, low transaction costs render vertical disintegration—in which separate entities enjoy the benefits of specialization—more viable.<sup>57</sup>

Building on Coase’s work, commentators have elaborated on the factors that lead firms to pursue vertical integration or disintegration. Economist Oliver

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<sup>49</sup> See generally Benjamin Klein, *Vertical Integration as Organizational Ownership: The Fisher Body–General Motors Relationship Revisited*, 4 J.L. ECON. & ORG. 199 (1988).

<sup>50</sup> See Coase, *supra* note 26, at 390–98.

<sup>51</sup> See *id.*

<sup>52</sup> *Id.* at 388.

<sup>53</sup> See *id.* at 387 (discussing this view).

<sup>54</sup> *Id.* at 390–91.

<sup>55</sup> See *id.* at 392.

<sup>56</sup> *Id.*

<sup>57</sup> See Lee, *Innovation*, *supra* note 21, at 1435.

Williamson influentially argued that opportunistic behavior between contracting parties is a particularly salient transaction cost that leads to vertical integration.<sup>58</sup> For instance, if one contractual party makes “asset-specific” investments in reliance on a deal, the counterparty has the opportunity to demand greater payment or renege on its obligations.<sup>59</sup> To mitigate such opportunism, the parties may simply vertically integrate, becoming one organization.<sup>60</sup> Taking a slightly different approach, other economists have focused on the “incompleteness” of contracts—the difficulty of delineating obligations and accounting for all contingencies when negotiating contracts.<sup>61</sup> Given the incompleteness of contracts, “[w]hen it is too costly for one party to specify a long list of the particular rights it desires over another party’s assets, it may be optimal for that party to purchase all of the rights except those specifically mentioned in the contract.”<sup>62</sup> Rather than specifying a long list of rights, parties can transfer “residual rights of control” by transferring all property rights of one firm to another, thus achieving integration.<sup>63</sup>

Of course, a wide range of intermediate and alternative organizational forms exist other than contract- and firm-based production.<sup>64</sup> A value chain may be vertically integrated across certain functions while disintegrated for others. Additionally, long-term, relational contracts facilitate significant coordination between separate parties without formal integration.<sup>65</sup> Furthermore, iterative processes of codesign<sup>66</sup> and networks<sup>67</sup> fall somewhere between arm’s length contracting and vertical integration.

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<sup>58</sup> Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233, 234 (1979).

<sup>59</sup> See *id.* at 234 n.3; see also Harold Demsetz, *The Theory of the Firm Revisited*, 4 J.L. ECON. & ORG. 141, 149–50 (1988); Benjamin Klein, *Transaction Cost Determinants of “Unfair” Contractual Arrangements*, 70 AM. ECON. REV. (PAPERS & PROC.) 356, 356–57 (1980).

<sup>60</sup> Klein, *supra* note 59, at 357.

<sup>61</sup> See Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691, 692 (1986).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Some commentators reject a crisp distinction between contract- and firm-based production by conceptualizing the firm as a nexus of contracts. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Cost and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976).

<sup>65</sup> See Naomi R. Lamoreaux, Daniel M.G. Raff & Peter Temin, *Beyond Markets and Hierarchies: Toward a New Synthesis of American Business History*, 108 AM. HIST. REV. 404, 407 (2003).

<sup>66</sup> Charles F. Sabel & Jonathan Zeitlin, *Neither Modularity nor Relational Contracting: Inter-Firm Collaboration in the New Economy*, 5 ENTER. & SOC’Y 388, 395, 397 (2004).

<sup>67</sup> Walter W. Powell, Kenneth W. Koput & Laurel Smith-Doerr, *Interorganizational Collaboration and the Locus of Innovation: Networks of Learning in Biotechnology*, 41 ADMIN. SCI. Q. 116, 117 (1996).

One intermediate organizational form particularly relevant to this Article is semi-integration.<sup>68</sup> In semi-integration, an entity performing an upstream or downstream function maintains a quasi-autonomous existence within a larger entity in the same value chain.<sup>69</sup> A classic example of semi-integration arises in the biopharmaceutical industry. As a general division of labor, small, “upstream” biotechnology firms perform cutting-edge science to discover therapeutic compounds while large, “downstream” pharmaceutical companies have the resources and capability to translate promising compounds into commercial drugs.<sup>70</sup> Increasingly, large pharmaceutical companies are acquiring biotech firms rather than simply licensing their research outputs.<sup>71</sup> However, these large pharmaceutical companies often allow these formerly separate entities to maintain a significant degree of autonomy in their new corporate home.<sup>72</sup> Biotech firms are “semi-integrated” into large pharmaceutical companies, thus occupying an intermediate status between full integration and disintegration.

This Article examines the role of copyright in organizing content production in three principal creative industries: movie production, music recording, and book publishing. To illustrate the range of functions necessary to transform a creative work into a consumer good, consider a schematic example from the movie industry, reminiscent of the production and distribution of *Crazy Rich Asians*.<sup>73</sup> In early development, a producer purchases the option for a novel, play, or other source material and then hires a screenwriter to develop a script.<sup>74</sup> The producer obtains financing and a distribution deal from a movie studio.<sup>75</sup> The producer also hires a director and principal talent, including actors and actresses.<sup>76</sup> These creative individuals are largely responsible for the artistic character of the film, though the producer will coordinate production (with input from the studio).<sup>77</sup> The movie studio will take the lead in downstream commercialization of the film through marketing, advertising, and distribution through several channels, including theatrical exhibition, television, and

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<sup>68</sup> Lee, *Innovation*, *supra* note 21, at 1436.

<sup>69</sup> *Id.*

<sup>70</sup> *See id.* at 1456.

<sup>71</sup> *See id.* at 1456–60.

<sup>72</sup> *See id.* at 1463–65.

<sup>73</sup> *See* S. Mark Young, James J. Gong & Wim A. Van der Stede, *The Business of Making Movies*, STRATEGIC FIN., Feb. 2008, at 26, 29 (describing six stages in making a movie: development, pre-production, principal photography, post-production, marketing and distribution, and exhibition). The first four stages comprise production while the last two involve distribution. *See id.*

<sup>74</sup> *See* RICHARD E. CAVES, CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE 90–91 (2000); Young, Gong & Van der Stede, *supra* note 73, at 30.

<sup>75</sup> *See* Young, Gong & Van der Stede, *supra* note 73, at 30.

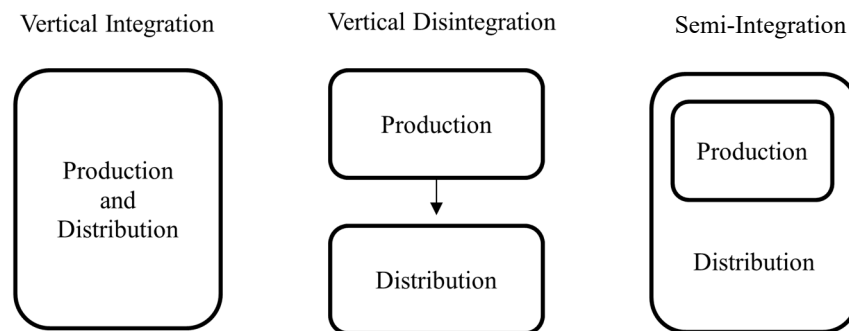
<sup>76</sup> Additional creative professionals involved in filmmaking include cinematographers, costumers, production designers, make-up specialists, special-effects experts, composers, editors, and others. *See* CAVES, *supra* note 74, at 87.

<sup>77</sup> *See* Young, Gong & Van der Stede, *supra* note 73, at 29.

streaming services. As a general convention, this Article will refer to upstream content creation as “production” and downstream commercialization functions as “distribution.”<sup>78</sup>

The theory of the firm suggests several archetypes for organizing these functions (see Figure 1). At one end of the spectrum, a single firm could vertically integrate all of these functions and perform them in-house. Thus, for instance, an integrated studio could employ screenwriters, directors, actors and actresses, and other creative and technical talent, produce movies, advertise and market them, and distribute them to consumers. At the other end of the spectrum, separate parties could perform these functions and transfer intermediate goods and services between them. For example, independent producers, directors, actors and actresses, post-production studios, financiers, marketing firms, theaters, and streaming services could each perform specialized functions and coordinate production and distribution of a motion picture through market transactions. In the parlance of industrial organization, this would represent vertical disintegration. As indicated above, semi-integration, in which an entity performing a specialized function maintains a quasi-autonomous existence within a larger corporate body, is also possible. For instance, a production company could have a long-term agreement that “anchors” it to a major studio, which has a “first look” agreement to distribute its films.<sup>79</sup>

Figure 1: *Schematic Organizational Structures in Creative Industries*<sup>80</sup>



<sup>78</sup> Cf. Ruth Towse, *Cultural Industries*, in A HANDBOOK OF CULTURAL ECONOMICS 170, 173 (Ruth Towse ed., 2003) (“It is useful to think of cultural production as consisting of two distinct aspects, content creation and its delivery.”).

<sup>79</sup> See, e.g., Borys Kit, *Zack Snyder’s Stone Quarry Productions Signs First-Look Film Deal with Netflix*, HOLLYWOOD REP. (July 21, 2021), <https://www.hollywoodreporter.com/movies/movie-news/zack-snyder-stone-quarry-productions-signs-first-look-film-deal-netflix-1234986047/> [<https://perma.cc/PQT2-GEX7>]; Zachary Pogue, *Netflix Signs First Look Movie Deal with Zack Snyder’s Stone Quarry Productions*, MOVIEWEB (July 23, 2021), <https://movieweb.com/zack-snyder-stone-quarry-productions-netflix-deal/> [<https://perma.cc/Q9QL-X3CH>].

<sup>80</sup> This is a schematic diagram that illustrates various high-level industry structures, such as vertical integration, disintegration, and semi-integration of production and

### B. *The Role of Patents in Supporting Vertical Disintegration*

Intellectual property scholars have drawn upon the theory of the firm to explore how one form of exclusive rights—patents—lowers transaction costs and facilitates vertical disintegration.<sup>81</sup> Among other costs, technology transactions are plagued by what economist Kenneth Arrow called an “information paradox”: the buyer of some technology will want to inspect it before purchase, but if she inspects it, she may appropriate it for free and have no incentive to pay for it.<sup>82</sup> Patents mitigate this transaction cost by establishing liability for uncompensated appropriation of an invention.<sup>83</sup> Armed with a patent, an inventor can disclose her wares to a prospective buyer without fear that the buyer will take them for free.<sup>84</sup> In this manner, patents reduce transaction costs and enhance the viability of vertical disintegration (and all of its associated benefits).<sup>85</sup>

Drawing on these insights, commentators have argued that patents facilitate vertical disintegration in technology industries.<sup>86</sup> Addressing the

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distribution. Both production and distribution, however, are comprised of many constituent activities, which may be further vertically integrated, disintegrated, or semi-integrated.

<sup>81</sup> See, e.g., Jonathan M. Barnett, *Intellectual Property as a Law of Organization*, 84 S. CAL. L. REV. 785, 787 (2011) [hereinafter Barnett, *Intellectual Property*]; Dan L. Burk & Brett H. McDonnell, *The Goldilocks Hypothesis: Balancing Intellectual Property Rights at the Boundary of the Firm*, 2007 U. ILL. L. REV. 575, 583–90; Dan L. Burk, *The Role of Patent Law in Knowledge Codification*, 23 BERKELEY TECH. L.J. 1009, 1011 (2008); Paul J. Heald, *A Transaction Costs Theory of Patent Law*, 66 OHIO ST. L.J. 473, 475–76 (2005); Robert P. Merges, *A Transactional View of Property Rights*, 20 BERKELEY TECH. L.J. 1477, 1486 (2005) [hereinafter Merges, *Transactional*]; cf. Tim Wu, *Intellectual Property, Innovation, and Decentralized Decisions*, 92 VA. L. REV. 123, 123 (2006) (“[A growing body of] scholarship suggests that the most important economic effects of intellectual property may not be effects on price, but rather on *industry structure*.”). This Part draws on Lee, *Innovation*, *supra* note 21, at 1439–42.

<sup>82</sup> See Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in NAT'L BUREAU OF ECON. RSCH., THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 615 (1962).

<sup>83</sup> Jonathan M. Barnett, *Cultivating the Genetic Commons: Imperfect Patent Protection and the Network Model of Innovation*, 37 SAN DIEGO L. REV. 987, 1013 (2000) [hereinafter Barnett, *Cultivating*]; Merges, *Transactional*, *supra* note 81, at 1485.

<sup>84</sup> But see Michael J. Burstein, *Exchanging Information Without Intellectual Property*, 91 TEX. L. REV. 227, 232–34 (2012) (describing alternate mechanisms beyond exclusive rights that can facilitate information exchange); *infra* notes 104–06 and accompanying text.

<sup>85</sup> Patents lower other transaction costs as well. They codify technical knowledge, which facilitates its externalization, commodification, and exchange. Robin Cowan & Dominique Foray, *The Economics of Codification and the Diffusion of Knowledge*, 6 INDUS. & CORP. CHANGE 595, 597–98 (1997). Furthermore, given that patents are publicly recorded and searchable, they provide a “beacon” that allows prospective technology sellers and buyers to find each other in the marketplace. F. Scott Kieff, *IP Transactions: On the Theory & Practice of Commercializing Innovation*, 42 HOUS. L. REV. 727, 735 (2005).

<sup>86</sup> See, e.g., Barnett, *Cultivating*, *supra* note 83, at 1009–14; Merges, *Transactional*, *supra* note 81, at 1485.

biopharmaceutical industry, Ashish Arora and Robert Merges argue that patents lower transaction costs between specialized entities and enable the formation of small, research-intensive biotechnology firms whose only output is patented compounds.<sup>87</sup> These firms lack the resources to perform clinical trials and manufacture and distribute drugs, and they license their patents to downstream pharmaceutical companies for commercialization.<sup>88</sup> In similar fashion, Jonathan Barnett argues that intellectual property rights have helped the semiconductor industry vertically disintegrate into upstream “fabless” design firms and downstream foundries that license and manufacture those designs.<sup>89</sup> Empirical research indicates that stronger patent rights encouraged the entry of fabless design firms, supporting the thesis that patents promote vertical disintegration.<sup>90</sup>

Such vertical disintegration, moreover, has distinct innovation benefits. Disintegration enables specialization where, for example, a small biotech firm can focus on cutting-edge science without having to perform clinical trials or manufacture and market drugs.<sup>91</sup> Furthermore, disintegrated value chains exploit the particularly innovative nature of small firms. A wide literature has shown that independent inventors and small firms tend to be disproportionately innovative relative to large technology companies.<sup>92</sup> Among other factors, small firms have greater incentive to pursue radical innovations, are nimbler and more flexible than large bureaucracies, and can cultivate entrepreneurial cultures that appeal to innovative workers.<sup>93</sup> Regarding this last point, vertical disintegration supports the “preference of many engineers and scientists to work in smaller and more intimate organizations.”<sup>94</sup>

### C. *The Role of Copyrights in Supporting Vertical Disintegration*

Drawing on these insights, this Article argues that copyrights lower transaction costs and facilitate vertical disintegration in creative industries.<sup>95</sup> In

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<sup>87</sup> Arora & Merges, *supra* note 28, at 455.

<sup>88</sup> See Ashish Arora, *Licensing Tacit Knowledge: Intellectual Property Rights and the Market for Know-How*, 4 *ECON. INNOVATION & NEW TECH.* 41, 54 (1995). *But see* Lee, *Innovation*, *supra* note 21, at 1436 (arguing that the need to exploit difficult-to-transfer tacit knowledge often leads parties to pursue semi-integration rather than full vertical disintegration).

<sup>89</sup> Barnett, *Intellectual Property*, *supra* note 81, at 838–53.

<sup>90</sup> Bronwyn H. Hall & Rosemarie Ham Ziedonis, *The Patent Paradox Revisited: An Empirical Study of Patenting in the U.S. Semiconductor Industry, 1979–1995*, 32 *RAND J. ECON.* 101, 119–21 (2001).

<sup>91</sup> See Peter Lee, *Churn*, 99 *WASH. U. L. REV.* 1, 18–19 (2021).

<sup>92</sup> *Id.* at 15–18.

<sup>93</sup> *Id.* at 14–19 (collecting sources).

<sup>94</sup> CHRIS FREEMAN & LUC SOETE, *THE ECONOMICS OF INDUSTRIAL INNOVATION* 239 (3d ed. 2000).

<sup>95</sup> In some ways, this is reminiscent of copyright’s historic role in promoting creative autonomy by allowing creators to break free from patrons and earn revenues in the market.



so doing, it fills a notable gap in the IP literature. Compared to the scholarly focus on patents as catalysts for vertical disintegration, the role of copyrights in supporting such industry structure has—with some exceptions—received much less attention.<sup>96</sup> In general, transaction costs for exchanging creative content are quite high, due in part to the easily appropriable nature of creative expression. However, copyright creates a low-cost, easily assignable, exclusive right that creative workers can exchange with intermediaries in market transactions.<sup>97</sup> In essence, the relationship between creators and large content intermediaries, on the one hand, parallels the relationship between small, R&D intensive firms and large technology companies, on the other. In both cases, intellectual property rights (copyrights in one context, patents in the other) facilitate separation of upstream creative entities from downstream commercial distributors.

Copyrights promote the separation of creative workers from large intermediaries in several ways. Copyrights help resolve Arrow's information paradox by allowing authors to market their creative works to downstream commercializers without fear of uncompensated appropriation.<sup>98</sup> Viewed from the opposite direction, copyright allows large intermediaries to outsource content production to upstream, independent individuals and small entities.<sup>99</sup> As we shall see, by lowering transaction costs between separate parties, copyright not only realizes efficiencies associated with the theory of the firm, it also enhances organizational autonomy for creative workers.<sup>100</sup> Other copyright

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See Clark D. Asay, *Copyright's Technological Interdependencies*, 18 STAN. TECH. L. REV. 189, 192–93, 195–97 (2015).

<sup>96</sup>For notable exceptions, see *supra* note 29. Tellingly, most commentators have instead argued that copyrights promote vertical *integration*, particularly when large media intermediaries amass substantial numbers of copyrights. See, e.g., Peter DiCola, *Copyright Equality: Free Speech, Efficiency, and Regulatory Parity in Distribution*, 93 B.U. L. REV. 1837, 1900 (2013); Kurt E. Kruckeberg, *Copyright "Band-Aids" and the Future of Reform*, 34 SEATTLE U. L. REV. 1545, 1546–47 (2011); Raymond Shih Ray Ku, *Grokking Grokster*, 2005 WIS. L. REV. 1217, 1264; Michael J. Meurer, *Inventors, Entrepreneurs, and Intellectual Property Law*, 45 HOUS. L. REV. 1201, 1214 (2008). Commentators are not wrong to assert that copyrights promote vertical integration, but this effect applies to downstream content distribution rather than upstream content production.

<sup>97</sup>Netanel, *supra* note 29, at 1916 (arguing that copyrights' statutorily determined parameters and ready enforcement reduce risks in exchanging expressive works between unrelated parties). In particular, the fact that copyright encompasses the exclusive right to prepare derivative works prevents the need for parties to renegotiate permissions if an entity obtains a particularly popular creative asset.

<sup>98</sup>*Cf.* Wendy J. Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 HOUS. L. REV. 613, 646–50 (2014) (addressing and critiquing the application of Arrow's information paradox to copyright).

<sup>99</sup>Netanel, *supra* note 29, at 1916.

<sup>100</sup>*Cf.* Robert P. Merges, *Autonomy and Independence: The Normative Face of Transaction Costs*, 53 ARIZ. L. REV. 145, 147 (2011) [hereinafter Merges, *Autonomy*] ("From the perspective of creative people, the key point—the major change—was this: property rights introduced a measure of *autonomy* that was absent in the age of patronage."); MERGES,

doctrines, such as termination of transfer rights, further shore up the separation of creators and intermediaries and promote such autonomy.<sup>101</sup>

Autonomy consists of not only freedom from unpreferred associations, but also the ability to establish preferred associations. While copyright facilitates the separation of creative workers from large bureaucracies, too much separation can result in unhelpful atomization. In many contexts, creators want to work in teams, and copyright can help facilitate such aggregation. Various elements of copyright law, including the works-made-for-hire doctrine and the ease of assigning exclusive rights, lower transaction costs and help creators form project-specific, collaborative structures.<sup>102</sup> By facilitating both separation from large bureaucracies and the ability to establish self-determined social structures, copyright promotes organizational autonomy for creators.<sup>103</sup>

It is important to reiterate that copyrights do not necessarily *cause* vertical disintegration in content industries. Participants in copyright-intensive industries may still vertically integrate for any number of reasons, including the classic efficiency benefits of integration predicted by the theory of the firm. However, copyright lowers the cost of vertical disintegration, thus enhancing the feasibility of this structure and expanding the range of viable organizational options available to industry participants.

Relatedly, copyrights are not strictly necessary to achieve vertical disintegration, though they enjoy certain advantages in doing so. For example, to mitigate Arrow's information paradox, creators could present snippets of content to distributors without giving away entire movies, recordings, or manuscripts; given the unique creative talent needed to actualize an expressive work, it is unlikely that an intermediary could produce an entire movie, recording, or manuscript based on such a snippet without the original creator. Alternatively, creators could rely on contracts (particularly nondisclosure agreements) or implied contract claims based on idea submissions to share content with prospective buyers while mitigating the risk of expropriation.<sup>104</sup> Additionally, reputational sanctions can prevent distributors from taking content without compensation; a studio, label, or publisher would quickly develop a bad reputation if it took content submitted by creators and commercialized it without authorization.<sup>105</sup> Indeed, empirical evidence suggests that many deals in the

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*supra* note 29, at 212 (distinguishing between the economic gains of specialization and the deeper value of autonomy).

<sup>101</sup> See *infra* Parts III.B., III.C.

<sup>102</sup> While copyright can help form a basic architecture for collaborative structures, informal rules related to reputation and trust play an important role in ensuring that collaborations run smoothly and that individual creators contribute their best effort. See generally Anthony J. Casey & Andres Sawicki, *The Problem of Creative Collaboration*, 58 WM. & MARY L. REV. 1793 (2017) [hereinafter Casey & Sawicki, *Collaboration*].

<sup>103</sup> In some contexts, however, enhancing one creator's autonomy may circumscribe that of another. See *infra* note 309 and accompanying text.

<sup>104</sup> See *Desny v. Wilder*, 299 P.2d 257, 266 (Cal. 1956).

<sup>105</sup> See Burstein, *supra* note 84, at 232–34 (noting that staged disclosure, contracts, and reputational sanctions can safeguard information disclosure in the absence of intellectual

entertainment industry are “soft contracts” that blend elements of reputational sanctions and legal enforceability.<sup>106</sup> While copyright may not be necessary to achieve vertical disintegration, this Article suggests that it can lower the cost of doing so relative to other mechanisms. After all, snippets may not be sufficient to justify investment, contracts are expensive to draft, monitor, and enforce, and reputational sanctions may not deter bad actors in one-off interactions.<sup>107</sup>

Furthermore, it bears emphasizing that copyright provides additional assurances to transacting parties compared to other mechanisms. From the intermediary’s perspective, obtaining exclusive rights through the works-made-for-hire doctrine, outright assignment, or licensing mitigates what could be understood as the inverse of Arrow’s information paradox: that a creator will sell an expressive work to a buyer and then sell it to others. More broadly, copyright provides rights that are “good against the world,” including parties not bound by NDAs; ownership of exclusive rights by a distributor provides safeguards against ex post expropriation of the content by any party (including third-party vendors and downstream entities) who encounter the work.<sup>108</sup> While the transactional benefits of copyrights must be weighed against their well-recognized costs, they facilitate exchanges between upstream and downstream parties and increase the viability of vertical disintegration.

Critical to this function is the ease with which creators can obtain copyrights. It is of limited analytical value to argue that copyright promotes more vertical disintegration in content industries relative to a world in which copyright does not exist. While this is formally true, it is also true that content industries would probably not exist in anything resembling their current form in the complete absence of copyright.<sup>109</sup> Given that some sort of exclusive right in

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property rights); *cf.* Casey & Sawicki, *Collaboration*, *supra* note 102, at 1818 (noting the importance of reputation to rewarding and punishing certain behaviors where formal legal rights are unable to do so); *id.* at 1837 (discussing specific application of these issues to pitches for proposed films).

<sup>106</sup> See generally Jonathan M. Barnett, *Hollywood Deals: Soft Contracts for Hard Markets*, 64 DUKE L.J. 605 (2015) [hereinafter Barnett, *Hollywood*].

<sup>107</sup> Even in the presence of copyright, disclosures are subject to partial expropriation due to, among other factors, the idea-expression dichotomy. For instance, a studio reviewing a copyrighted script for a disaster movie about a volcano would not be able to utilize that particularized expression without authorization, but it would be free to use the idea for such a movie. *Cf.* *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 120–22 (2d Cir. 1930) (noting that a movie that only took unprotectable ideas, themes, and scènes à faire from a play did not infringe the copyright in the play).

<sup>108</sup> See 17 U.S.C. § 106 (listing various “exclusive rights” conferred by copyright).

<sup>109</sup> Content industries could still persist in the absence of copyright, though in very different form. One option would be for industries to adopt much greater levels of vertical integration. In the absence of copyright, independent creators would find it difficult to market their works to publishers, thus creating an incentive for their vertical integration into publishers. In addition, publishers may also vertically integrate forward into downstream distribution and exhibition to prevent uncompensated appropriation. Another option would be for publishers to rely on technological protection measures such as digital-rights management to approximate the effects of copyright and prevent unauthorized copying. If

creative expression is likely to exist within the current political and economic landscape, the more salient question is how such a right is configured. This Article argues that the low-cost, easily obtainable nature of copyrights is key to facilitating vertical disintegration. Copyrights arise from merely fixing original expression in a tangible medium of expression.<sup>110</sup> Unlike patents, there are no cost or application requirements for obtaining a copyright.<sup>111</sup> Also unlike patents, the creativity threshold for obtaining a copyright is very low.<sup>112</sup> Furthermore, U.S. copyright law has eliminated formalities such as requirements to register, provide notice of, and renew copyrights.<sup>113</sup> As such, copyrights are easily obtained by freelancers and independent creative entities, which often lack significant financial resources and access to legal counsel.<sup>114</sup> The archetypal struggling screenwriter, musician, or author may not be able to afford rent, but as long as she fixes her expression in some tangible medium, she can afford copyrights.

Put differently, if it cost \$1,000 and took six months to get a copyright, creative industries would likely feature less freelancing and more vertical integration of creators and distributors—with a concomitant loss of autonomy. Of course, the sensitivity of independent creative entities to the cost of intellectual property protection depends on their resources and the nature of the works they seek to protect. Paying \$1,000 for copyright protection may not be burdensome for a small production company with a multi-million-dollar budget.

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so, it is likely that content industries would adopt greater vertical integration; in particular, many independent creators may not be able to afford such sophisticated encryption technology, which may push them to integrate with publishers.

<sup>110</sup> See 17 U.S.C. § 102 (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression.”); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) (stating that the requirement of originality means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity).

<sup>111</sup> *Copyright in General*, COPYRIGHT.GOV, <https://www.copyright.gov/help/faq/faq-general.html> [<https://perma.cc/B5AC-MEC9>].

<sup>112</sup> Compare 17 U.S.C. § 102, and *Feist*, 499 U.S. at 346 (describing the amount of creativity needed to obtain copyright protection as a “modicum”), with 35 U.S.C. § 103 (establishing the nonobviousness requirement wherein an invention must not have been obvious to a person of ordinary skill in a technical field in order to be patentable), and *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 427 (2007) (“We build and create by bringing to the tangible and palpable reality around us new works based on instinct, simple logic, ordinary inferences, extraordinary ideas, and sometimes even genius. These advances, once part of our shared knowledge, define a new threshold from which innovation starts once more. And as progress beginning from higher levels of achievement is expected in the normal course, the results of ordinary innovation are not the subject of exclusive rights under the patent laws.”).

<sup>113</sup> Christopher Sprigman, *Reform(alizing) Copyright*, 57 STAN. L. REV. 485, 487–88 (2004).

<sup>114</sup> See Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1540–42 (2005) [hereinafter Van Houweling, *Distributive*] (exploring several ways in which copyright subsidizes creators lacking financing).

However, at the margin, this may be a substantial sum for struggling, independent filmmakers. The low cost of copyright protection is particularly beneficial for creators who create a relatively large number of works in a short period of time, such as recording artists, and, to a lesser extent, screenwriters and authors. While other elements of copyright may be inapposite to or even averse to creative expression—such as the long term of protection or the vague standard for fair use<sup>115</sup>—this Article suggests that the low-cost, easily obtainable nature of copyright plays a salutatory role in enabling vertical disintegration for many creators.

While the theory of the firm is, in the abstract, agnostic toward integration or disintegration, the following Part will show that vertically disintegrated structures dominate upstream content creation. Furthermore, it argues that copyright plays a critical role in supporting this disintegrated model of creative production.

### III. COPYRIGHT-SUPPORTED VERTICAL DISINTEGRATION AND SEMI-INTEGRATION IN CREATIVE PRODUCTION

The previous Part introduced the value chain in creative industries and described the archetypes of vertical integration, disintegration, and semi-integration. It further suggested that copyrights play an important role in lowering the cost of a transactional model of creative production as opposed to full vertical integration. This Part shifts from theory to empirical accounts of the film, recording, and publishing industries, and it makes two descriptive claims. First, it argues that upstream content production in these industries features significant (though varying) degrees of vertical disintegration. Second, it argues that copyright plays an important role in supporting such vertical disintegration.

While these industries display notable differences, they all feature meaningful levels of vertical disintegration, including semi-integration, in content generation. The film industry features two levels of vertical disintegration. First, independent production companies typically contract with upstream freelance talent to produce a movie.<sup>116</sup> In so doing, copyright helps facilitate a transactional model in which producers can obtain contributions from independent creators—from screenwriters to visual effects shops—via market exchanges. Importantly, copyright doctrines such as the works-made-for-hire doctrine also allow for the aggregation of creative contributions by multiparty teams. Second, upstream production companies are vertically disintegrated from the downstream studios that commercialize their films.<sup>117</sup> Here again, copyright is useful in facilitating transactions where production companies can offer to sell films to distributors, which can essentially externalize film production to upstream entities.

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<sup>115</sup> See *supra* note 32.

<sup>116</sup> See *infra* Part III.A.1.

<sup>117</sup> See *infra* Part III.A.2.

In the music industry, recording artists are formally independent contractors who assign copyrights to record labels.<sup>118</sup> Additionally, they enjoy meaningful autonomy in actually coordinating music recording. However, recording artists are typically bound by long-term, exclusive contracts, resulting in an organizational structure best characterized as semi-integration. Copyright helps prevent full integration of recording artists into record labels by conferring on them a transactable exclusive right to their recordings. Furthermore, specialized copyright rules such as termination of transfer provisions<sup>119</sup> shore up this organizational autonomy. Focusing on the actual process of music production, several elements of copyright—including its easily assignable nature and the works-made-for hire doctrine<sup>120</sup>—allow recording artists (or producers) to assemble creative talent to produce particular tracks.

Publishing features a more classically vertically disintegrated structure in which authors work independently of publishers.<sup>121</sup> This relationship is mediated by copyright, which allows authors and publishers to work separately and focus on their respective areas of expertise. In sum, upstream creators generally contract with large intermediaries rather than work directly for them as in-house employees.<sup>122</sup> This Part provides a descriptive account of these vertically disintegrated structures and the role of copyright in supporting them.

In characterizing the structure of various creative industries, a few methodological notes are in order. First, in classifying industries as vertically integrated, disintegrated, or semi-integrated, this Article will consider the substantive degree to which intermediaries absorb creators into their operations. Here, the distinction between employees and independent contractors is useful but not dispositive. In general, an intermediary hiring a creative worker as an in-house employee suggests vertical integration while engaging her services as an independent contractor indicates vertical disintegration.<sup>123</sup> In the leading Supreme Court case—a copyright case, no less—the Court applied general principles of agency law to determine if a hired party is an employee or independent contractor.<sup>124</sup> This test includes numerous factors, including the skill required for the work, the source of instrumentalities to perform the work, the location of the work, and the duration of the relationship between the parties.<sup>125</sup> Though useful as a rough guide, the distinction between employees

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<sup>118</sup> See *infra* Part III.B.

<sup>119</sup> See 17 U.S.C. § 203.

<sup>120</sup> See 17 U.S.C. § 101.

<sup>121</sup> See *infra* Part III.C.

<sup>122</sup> See DAVID HESMONDHALGH, *THE CULTURAL INDUSTRIES* 70 (2d ed. 2007) (“Symbol creators and other cultural workers . . . are often rewarded by copyright payments, and make their living by contracting themselves to a number of different organisations in the course of their career.”).

<sup>123</sup> Cf. Grossman & Hart, *supra* note 61, at 710–16 (discussing the vertical integration of insurance agents into insurance companies).

<sup>124</sup> *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 731 (1989).

<sup>125</sup> *Id.* at 751–52; see Ryan Vacca, *Work Made for Hire – Analyzing the Multifactor Balancing Test*, 42 FLA. ST. L. REV. 197, 229 fig.1 (2014) (reporting empirical findings that

and independent contractors does not always parallel the distinction between vertical integration and disintegration.<sup>126</sup> Context is important. For instance, screenwriters are typically classified as employees in the film industry, even though they operate substantively like independent contractors.<sup>127</sup> Conversely, recording artists are technically independent contractors,<sup>128</sup> though they are often bound by long-term, exclusive contracts to record labels.<sup>129</sup> As such, they are better characterized as semi-integrated into those labels rather than fully independent from them.<sup>130</sup>

Second, this Article will also consider the degree to which creative workers can establish their own organizational structures separate from large studios, labels, and publishers. The more latitude creators have in this regard, the less integrated they are with large intermediaries. In the film industry, one example of a self-determined organizational structure is the independent production company, a small group of professionals that coordinates film production.<sup>131</sup> Another example is the cohort of creative and technical talent that a production company assembles to produce a particular movie.<sup>132</sup> In the recording industry, an example of a self-determined organizational structure is the team of musicians, backup singers, producers, and other talent that a recording artist assembles to produce a recording.<sup>133</sup> In the publishing industry, the preferred “organizational structure” is typically a solo author working independently on a manuscript. Autonomy entails not just the separation of creators from large intermediaries, but also the ability of creators to establish their own organizational structures apart from those intermediaries. Copyright helps facilitate both of these processes.

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tax treatment, employee benefits, and payment method are the most important factors in copyright works-made-for-hire cases).

<sup>126</sup> See, e.g., Matt Stahl, *From Seven Years to 360 Degrees: Primitive Accumulation, Recording Contracts, and the Means of Making a (Musical) Living*, 9 TRIPLEC 668, 681 (2011) (stating that recording artists are independent contractors under federal law but employees under state law). California recently enacted legislation that changes how workers are classified as independent contractors or employees. Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (enacted); Kate Conger & Noam Scheiber, *California Bill Makes App-Based Companies Treat Workers as Employees*, N.Y. TIMES (Sept. 11, 2019), <https://www.nytimes.com/2019/09/11/technology/california-gig-economy-bill.html> [<https://perma.cc/8BUR-33EA>].

<sup>127</sup> Catherine L. Fisk, *Hollywood Writers and the Gig Economy*, 2017 U. CHI. LEGAL F. 177, 178 (2017); see *Horror Inc. v. Miller*, 15 F.4th 232, 256 (2d Cir. 2021) (characterizing a screenwriter as an independent contractor despite his membership in a screenwriters guild).

<sup>128</sup> Vacca, *supra* note 125, at 252.

<sup>129</sup> See Tracy C. Gardner, *Expanding the Rights of Recording Artists: An Argument to Repeal Section 2855 (b) of the California Labor Code*, 72 BROOK. L. REV. 721, 734–37 (2007).

<sup>130</sup> See generally *id.*

<sup>131</sup> See *infra* text accompanying notes 151–55.

<sup>132</sup> See *infra* text accompanying notes 160–66.

<sup>133</sup> While in many cases the recording artist coordinates production, in other cases, a producer may coordinate production. See *infra* notes 210, 299 and accompanying text.

### A. Film Production: Two Levels of Vertical Disintegration

Over the past century, film production has experienced a dramatic shift from vertical integration to disintegration. During the so-called “studio system” of the 1920s to 1940s, the dominant Hollywood studios<sup>134</sup> largely vertically integrated movie production, distribution, and exhibition.<sup>135</sup> Studios directly employed in-house creative talent.<sup>136</sup> They hired directors as salaried employees and could bind them for up to seven years.<sup>137</sup> They also “maintained a roster of actors and actresses who agreed to perform exclusively” in their films.<sup>138</sup> Star actress Joan Crawford once observed, “[W]e have jobs the same as any girl in a ten cent store, and we do what we’re told.”<sup>139</sup> Studios exerted significant control over

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<sup>134</sup>The eight major studios included the Big Five (MGM, Warner Bros., 20th Century Fox, Paramount, and RKO) and the Little Three “majors” (Universal, Columbia, and United Artists). Tom Schatz, *The Studio System and Conglomerate Hollywood*, in *THE CONTEMPORARY HOLLYWOOD FILM INDUSTRY* 13, 15 (Paul McDonald & Janet Wasko eds., 2008); see also HESMONDHALGH, *supra* note 122, at 61–62; Joseph Lampel & Jamal Shamsie, *Capabilities in Motion: New Organizational Forms and the Reshaping of the Hollywood Movie Industry*, 40 *J. MGMT. STUD.* 2189, 2193 (2003). The Big Five studios vertically integrated production, distribution, and exhibition, while Universal and Columbia integrated production and distribution, and United Artists focused on distribution. Ronny Regev, *Hollywood Works: How Creativity Became Labor in the Studio System*, 17 *ENTER. & SOC’Y* 591, 595 (2016).

<sup>135</sup>CAVES, *supra* note 74, at 88; Schatz, *supra* note 134, at 14–15; James Talbott, *Will Mega-Media Mergers Destroy Hollywood and Democracy?*, 18 *ENT. & SPORTS L.* 9, 9 (2000); Darlene C. Chisholm, *Motion Pictures*, in *A HANDBOOK OF CULTURAL ECONOMICS*, *supra* note 78, at 306, 306; John M. Kernochan, *Ownership and Control of Intellectual Property Rights in Motion Pictures and Audiovisual Works: Contractual and Practical Aspects—Response of the United States to the ALAI Questionnaire*, 20 *COLUM.-VLA J.L. & ARTS* 379, 385 (1996).

<sup>136</sup>See, e.g., Regev, *supra* note 134, at 596 (“At any given moment, a studio like Paramount had under its employment an army of producers, actors, writers, directors, editors, cinematographers, and any other kind of personnel.”).

<sup>137</sup>*Id.* at 603. While successful directors enjoyed some autonomy, studios significantly integrated them into their operations. See *id.* at 597–600, 607–10; *id.* at 600 (“[T]he director was somewhere between a manager and a workman, a mixture of autonomous artist and employee.”).

<sup>138</sup>Chisholm, *supra* note 135, at 306; see CAVES, *supra* note 74, at 88.

<sup>139</sup>Regev, *supra* note 134, at 592 (quoting Letter from Joan Crawford to Katherine Albert (Nov. 14, 1941) (on file with Gladys Hall Papers, file 3.f-123, Margaret Herrick Library, Beverly Hills)); see also Towse, *supra* note 78, at 174. If a star refused to perform, he or she would be “suspend[ed],” and the studio would extend the contract to account for the missed time. John M. Broderick, *Warner Bros. v. Nelson: A Prelude to the De Havilland Law*, 31 *LOY. L.A. ENT. L. REV.* 111, 117 (2021); Jacqueline G.H. Kim, *Digital Media and Unionization in the “Guilded” Age: How Labor Organizations in the Entertainment Industry Are Swimming Against the Current of Streaming New Media and Technology* 12 (May 4, 2018) (unpublished student paper, University of Pennsylvania) (on file with the *Ohio State Law Journal*); Steven Greenfield & Guy Osborn, *Sympathy for the Devil? Contractual Constraint and Artistic Autonomy in the Entertainment Industry*, 15 *TOLLEY’S J. MEDIA L. & PRAC.* 117, 118 (1994). The difficult working conditions for creative workers led to the



actors and actresses, determining their roles, trade names, and public appearances.<sup>140</sup> Studios maintained a “feudal relation” with screenwriters and controlled what they wrote.<sup>141</sup> Further illustrating vertical integration, studios maintained vast production facilities, including elaborate sets, for producing movies in-house.<sup>142</sup>

Starting in the 1940s, the movie industry began to vertically disintegrate.<sup>143</sup> At the upstream end, creative workers started to separate from studios.<sup>144</sup> Directors became less bound to particular studios and could operate as independent producer-directors.<sup>145</sup> Courts ordered the end of long-term contracts that had “essentially turned stars into indentured servants” of particular studios.<sup>146</sup> The emergence of television hastened this shift toward vertical disintegration.<sup>147</sup> Studios sought to distinguish their content from television programs, which audiences could consume for free.<sup>148</sup> Consequently, they began producing fewer films of higher production value, which discouraged studios from maintaining costly, extensive production facilities.<sup>149</sup> Following and modifying the business model of United Artists, studios became financiers and distributors of movies produced by independent parties.<sup>150</sup>

Rather than in-house production by major studios, content generation vertically disintegrated into project-specific “spot production.”<sup>151</sup> Independent producers assembled talent to make films on a project-by-project basis.<sup>152</sup> Studios could “green light” movies, providing financing and access to limited production facilities in exchange for distribution rights.<sup>153</sup> Together, these

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foundation of Hollywood guilds that continue to play important roles today. David Ng, *Hollywood Guilds Flex Their Muscle as Union Influence Declines Nationwide*, L.A. TIMES (May 9, 2017), <https://www.latimes.com/business/hollywood/la-fi-ct-hollywood-unions-20170509-story.html> (on file with the *Ohio State Law Journal*).

<sup>140</sup> CAVES, *supra* note 74, at 88.

<sup>141</sup> See Fisk, *supra* note 127, at 183. Studios could renew contracts for up to seven years, but writers had no corresponding right to unilaterally renew. *Id.* at 182.

<sup>142</sup> CAVES, *supra* note 74, at 90.

<sup>143</sup> See *id.* at 92–93; Regev, *supra* note 134, at 611 n.79.

<sup>144</sup> See Regev, *supra* note 134, at 596.

<sup>145</sup> This development accelerated after the formation of the Screen Directors Guild in 1939. *Id.*

<sup>146</sup> Neal Gabler, Opinion, *Revenge of the Studio System*, N.Y. TIMES (Aug. 22, 1995), <https://www.nytimes.com/1995/08/22/opinion/revenge-of-the-studio-system.html> [<https://perma.cc/32GV-4VJM>]; see *De Haviland v. Warner Bros.*, 153 P.2d 983, 989 (Cal. Dist. Ct. App. 1944) (applying a statutory limit on personal services contracts to seven years to a contract between an actress and a producer).

<sup>147</sup> See CAVES, *supra* note 74, at 94.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 93–94; Chisholm, *supra* note 135, at 307; Barnett, *Hollywood*, *supra* note 106, at 652–53.

<sup>150</sup> See CAVES, *supra* note 74, at 92; Schatz, *supra* note 134, at 16.

<sup>151</sup> See Schatz, *supra* note 134, at 16.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*; see also HESMONDHALGH, *supra* note 122, at 151.

developments dramatically changed the structure of the movie industry: “In the 1940s and 1950s, this organization was comprehensively transformed into one of mainly casual short-term contracts, with films distributed by the studios largely as before but production taking place through one-shot deals.”<sup>154</sup> In essence, the studios outsourced film production to independent producers.<sup>155</sup>

Vertical disintegration in downstream movie distribution and exhibition accelerated vertical disintegration in upstream production. The Supreme Court’s 1948 decision in *United States v. Paramount* required the Big Five studios to sell their theater chains and change their marketing practices vis-à-vis exhibitors.<sup>156</sup> The separation of studios from exhibitors reflected vertical disintegration in downstream film commercialization.<sup>157</sup> This development also promoted vertical disintegration in upstream production. By forcing the major studios to divest their theater chains, the *Paramount* decision expanded the number of exhibition venues for new studios and independent producers, thus accelerating their entry into upstream film production.<sup>158</sup> The model of vertically disintegrated spot production grew steadily over the years, and the percentage of independently produced films grew from 28% in 1960 to 44% in 1970 and 58% in 1980.<sup>159</sup>

### 1. *Vertically Disintegrated Spot Production: Freelance Creators and Independent Producers*

Vertical disintegration in modern film production occurs on two levels. First, the actual making of a movie proceeds as vertically disintegrated spot production. Production companies—which are typically small, independent entities—coordinate film production with a wide array of “upstream” creative

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<sup>154</sup> CAVES, *supra* note 74, at 85.

<sup>155</sup> HESMONDHALGH, *supra* note 122, at 61 (“The studios increasingly subcontracted to independent film production companies . . . in an attempt to lower costs, and to control risk and outmanoeuvre television by producing new and spectacular genres.”).

<sup>156</sup> *United States v. Paramount*, 334 U.S. 131, 131 (1948); see Kraig G. Fox, Note, *Paramount Revisited: The Resurgence of Vertical Integration in the Motion Picture Industry*, 21 HOFSTRA L. REV. 505, 508–16 (1992).

<sup>157</sup> See *Paramount*, 334 U.S. at 175; CAVES, *supra* note 74, at 93; Dal Yong Jin, *Transforming the Global Film Industries: Horizontal Integration and Vertical Concentration amid Neoliberal Globalization*, 74 INT’L COMM. GAZETTE 405, 414 (2012); Talbott, *supra* note 135, at 9–10.

<sup>158</sup> CAVES, *supra* note 74, at 93.

<sup>159</sup> *Id.* at 96.

and technical professionals on a project-specific basis.<sup>160</sup> Screenwriters,<sup>161</sup> directors, actors and actresses, and other professionals “freelance on short-term contracts.”<sup>162</sup> Furthermore, most film projects are organized as independent corporate entities.<sup>163</sup> Producers also contract with specialized vendors, such as editing and lighting firms.<sup>164</sup> Downstream studios provide input into upstream creative and hiring decisions, particularly if the studio supplies up-front financing.<sup>165</sup> In general, however, instead of hierarchical coordination within an integrated firm, markets coordinate transactions among numerous parties to produce a movie.<sup>166</sup>

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<sup>160</sup> See Andrew W. Lo & Gary P. Pisano, *Lessons from Hollywood: A New Approach to Funding R&D*, MIT SLOAN MGMT. REV., Winter 2016, at 47, 51; Young, Gong & Van der Stede, *supra* note 73, at 31 (“[A] small army of technical people, such as those who are set designers, camera operators, lighting specialists, transportation personnel, etc., work on the motion picture.”); William T. Bielby & Denise D. Bielby, *Organizational Mediation of Project-Based Labor Markets: Talent Agencies and the Careers of Screenwriters*, 64 AM. SOC. REV. 64, 65–66 (1999) (noting that with vertical disintegration, most screenwriters are hired by “single project organizations”). There are, of course, exceptions. For instance, the two directors of the animated film *The Lion King* were studio employees of Disney. Kernochan, *supra* note 135, at 405.

<sup>161</sup> Classifying screenwriters as independent contractors or employees is controversial. See generally Fisk, *supra* note 127. Compare Kernochan, *supra* note 135, at 402 (noting that screenwriters are union members and regarded as employees), with Deborah Tussey, *What if Employees Owned Their Copyrights?*, 2008 MICH. ST. L. REV. 233, 234 (stating that screenwriters are independent contractors). Screenwriters often substantively operate as independent contractors, such as when freelancers sell scripts “on spec” to studios and producers. Kernochan, *supra* note 135, at 403; see Fisk, *supra* note 127, at 178. The Second Circuit recently held that a screenwriter was an independent contractor not subject to a works-made-for-hire agreement (and could exercise termination of transfer rights), even though he was a member of the Writer’s Guild of America East, Inc. See *Horror Inc. v. Miller*, 15 F.4th 232, 256 (2d Cir. 2021). See generally Kyle Jahner, *‘Friday the 13th’ Copyright Case Is Rare Termination Rights Guide*, BLOOMBERG L. (Oct. 7, 2021), <https://news.bloomberglaw.com/ip-law/friday-the-13th-copyright-case-is-rare-termination-rights-guide> [<https://perma.cc/B7JP-MEDX>].

<sup>162</sup> Towse, *supra* note 78, at 174.

<sup>163</sup> Lo & Pisano, *supra* note 160, at 50; see CAVES, *supra* note 74, at 106 (“Assembling the key creative inputs to a film amounts to forming a lateral coalition or joint venture.”).

<sup>164</sup> CAVES, *supra* note 74, at 96–97.

<sup>165</sup> See Lo & Pisano, *supra* note 160, at 50.

<sup>166</sup> Cf. Barnett, *Hollywood*, *supra* note 106, at 614 (“[E]xternal market-based sourcing predominates and is universally the case with respect to talent.”). Further reinforcing the independence of creative talent from production companies and studios are two important intermediaries: guilds and agents. Hollywood is very much a union town, and guilds play an important role in film production. Ng, *supra* note 139. See generally Kim, *supra* note 139. Several major guilds representing directors, actors and actresses, and screenwriters collectively bargain on behalf of their members with production companies and studios. See Anousha Sakoui & Wendy Lee, *WGA Wants Studios’ Support in Fight with Agencies. Will They Give It?*, L.A. TIMES (Jan. 29, 2020), <https://www.latimes.com/entertainment-arts/business/story/2020-01-29/wga-pattern-of-demands-negotiations-agencies> [<https://perma.cc/8DX9-BMCH>]; Anousha Sakoui, *Directors Guild Kicks Off Contract Negotiations with*

Various aspects of copyright facilitate such vertically disintegrated spot production. Exclusive rights support a transactional model of creative production in which producers can outsource certain aspects of film production to external creators. For instance, producers can obtain source material for a movie from independent screenwriters writing “on spec”<sup>167</sup> or, as with *Crazy Rich Asians*, from authors of existing books. In such cases, copyrights held by screenwriters and authors facilitate market transactions by resolving Arrow’s information paradox. Armed with a copyright (which includes the right to prepare derivative works<sup>168</sup>), writers can fully disclose their texts to producers without fear that the producers will simply take them for free.<sup>169</sup> Here, the costless, easily obtainable nature of copyrights facilitates freelancing by creative workers who may not have significant resources to pay for IP protection. Without such readily obtainable copyrights, the threat of expropriation may lead some writers to prefer vertical integration, working as in-house employees of producers. Copyright also lowers transaction costs by providing assurances to producers. By obtaining rights that are “good against the world” to produce a movie based on certain source material, copyright helps ensure that screenwriters, vendors, and downstream distributors will not exploit the film without a producer’s authorization.

In similar fashion, copyright protection of musical compositions and sound recordings enables markets in which producers can license copyrighted music from non-employee songwriters and recording artists (or the music publishers and record labels that control their copyrights).<sup>170</sup> Producers don’t have to compose and record music in-house; they can license it from outside copyright

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*Hollywood Studios*, L.A. TIMES (Feb. 4, 2020), <https://www.latimes.com/entertainment-arts/business/story/2020-02-04/directors-guild-kicks-off-contract-negotiations-with-hollywood-studios> [<https://perma.cc/ZG8Y-BR7T>]; Kernochan, *supra* note 135, at 443. Among other functions, guilds provide members with employment protections and benefits ordinarily associated with in-house employees. See Sakoui & Lee, *supra*. While membership in unions suggests that creative workers are employees—and thus integrated into production companies and studios—such classification does not necessarily reflect substantive reality. Screenwriters, for instance, would probably be considered independent contractors in other industries. Fisk, *supra* note 127, at 178. Agents also mediate relationships between creative workers and production companies and studios, Chisholm, *supra* note 135, at 308, further illustrating the organizational separation of upstream talent from downstream entities. Notably, however, agents have become more active in production themselves, “packaging” talent for various projects and even creating their own production companies. Todd S. Purdum, *Why Hollywood Writers Are Firing the Agents They Love*, ATLANTIC (Apr. 21, 2019), <https://www.theatlantic.com/entertainment/archive/2019/04/story-behind-hollywood-writers-vs-their-agents/587650/> [<https://perma.cc/PU38-LEBT>] (describing this controversial practice); Sakoui & Lee, *supra*.

<sup>167</sup> Kernochan, *supra* note 135, at 403.

<sup>168</sup> 17 U.S.C. § 101.

<sup>169</sup> Cf. Burstein, *supra* note 84, at 229 (describing copyright as a “conventional legal solution” to Arrow’s information paradox).

<sup>170</sup> See Young, Gong & Van der Stede, *supra* note 73, at 32 (reporting that producers pay millions to license songs for individual films).

holders. By facilitating outsourcing to creative professionals, copyright supports the vertically disintegrated spot production that dominates modern film production.<sup>171</sup>

While independence is one dimension of autonomy, another is the ability to establish preferred attachments. While copyright facilitates the separation of independent creative entities, it is also useful for assembling talent in order to complete creative projects. As scholars have noted, copyright's works-made-for-hire doctrine facilitates team production by multiple contributors to a motion picture.<sup>172</sup> Ordinarily, the individual who creates a copyrighted work is its legal author and owns the copyright.<sup>173</sup> Directors, actors and actresses,<sup>174</sup> cinematographers, composers,<sup>175</sup> and other professionals make numerous copyrightable contributions to a film. The need to aggregate these contributions gives rise to a potentially unwieldy proliferation of copyrights and creates opportunities for holdup.<sup>176</sup> Copyright's works-made-for-hire doctrine mitigates problems of team production by establishing a single party—such as a production company or studio—as the legal author of all contributions to a movie.<sup>177</sup> The doctrine thus reduces transaction costs and the threat of holdup by individual contributors.<sup>178</sup> In so doing, it allows producers to assemble their preferred cohort of talent to produce particular films.

In an underappreciated fashion, copyright's works-made-for-hire doctrine also facilitates vertical disintegration. Films are one of the statutorily

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<sup>171</sup> See CAVES, *supra* note 74, at 96.

<sup>172</sup> Parties typically stipulate in contract that all “creative contributions to a film are ‘works for hire,’” thus rendering the coordinating party—such as a studio, independent production company, or producer—the legal author of those copyrightable works. Kernochan, *supra* note 135, at 384; see Dan Burk, *Intellectual Property and the Firm*, 71 U. CHI. L. REV. 3, 12 (2004) [hereinafter Burk, *Firm*].

<sup>173</sup> Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989).

<sup>174</sup> Justin Hughes, *Actors as Authors in American Copyright Law*, 51 CONN. L. REV. 1, 3, 5 (2019).

<sup>175</sup> Music costs are a significant portion of a film's production budget. See Young, Gong & Van der Stede, *supra* note 73, at 32 (reporting that major composers can earn more than \$1 million for an original score).

<sup>176</sup> See Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 553 (2010) [hereinafter Van Houweling, *Atomism*] (describing several dimensions of “copyright atomism”).

<sup>177</sup> Burk, *Firm*, *supra* note 172, at 13; Peter Lee, *Reconceptualizing the Role of Intellectual Property Rights in Shaping Industry Structure*, 72 VAND. L. REV. 1197, 1240–41 (2019); see Merges, *Autonomy*, *supra* note 100, at 154–55; Van Houweling, *Atomism*, *supra* note 176, at 557–58. The joint authorship doctrine plays a similar role. By establishing a high threshold to be considered a coauthor of a joint work, the doctrine prevents splintering ownership of a film among numerous copyright holders. See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 2000); Jay Dougherty, *The Misapplication of “Mastermind”: A Mutant Species of Work for Hire and the Mystery of Disappearing Copyrights*, 39 COLUM. J.L. & ARTS 463, 464 (2016).

<sup>178</sup> Burk, *Firm*, *supra* note 172, at 13. The doctrine particularly lowers transaction costs by eliminating termination of transfer rights. See Tussey, *supra* note 161, at 240–41.

enumerated categories of works for which contributions by independent contractors can qualify as works made for hire.<sup>179</sup> The doctrine thus encourages producers and studios to look beyond in-house employees to outsource creative production to independent, upstream parties.<sup>180</sup> Producers and studios can hire such independent contractors with the assurance that they will retain copyright over all contributions, thus preventing fragmentation of ownership. In so doing, the works-made-for-hire doctrine makes working with freelancers more attractive, thus promoting vertical disintegration.

## 2. *Vertical Disintegration Between Independent Producers and Downstream Distributors*

Second, in addition to vertical disintegration between freelance creative workers and production companies, those production companies maintain a vertically disintegrated relationship with downstream studios that distribute films (see Figure 2). In the classic “studio system,” vertically integrated studios produced and distributed films in-house.<sup>181</sup> In the modern landscape, specialized production companies, such as Color Force, typically handle production.<sup>182</sup> Major studios, which still control access to audiences, focus on their core competencies in financing and distribution.<sup>183</sup> Markets mediate the interface of production and distribution. In some cases, a studio initiates a project and contracts with a production company to produce a film.<sup>184</sup> In other cases, as with *Crazy Rich Asians*, producers initiate a project and assign distribution rights to a studio sometime before production is complete.<sup>185</sup> In yet

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<sup>179</sup> 17 U.S.C. § 101 (establishing that “a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas” can comprise a work made for hire).

<sup>180</sup> Cf. Dougherty, *supra* note 177, at 466; Tussey, *supra* note 161, at 234 (noting that directors and screenwriters are independent contractors bound by works-made-for-hire agreements).

<sup>181</sup> Schatz, *supra* note 134, at 15.

<sup>182</sup> Cf. *supra* notes 7–8 and accompanying text (describing Color Force’s production of *Crazy Rich Asians*).

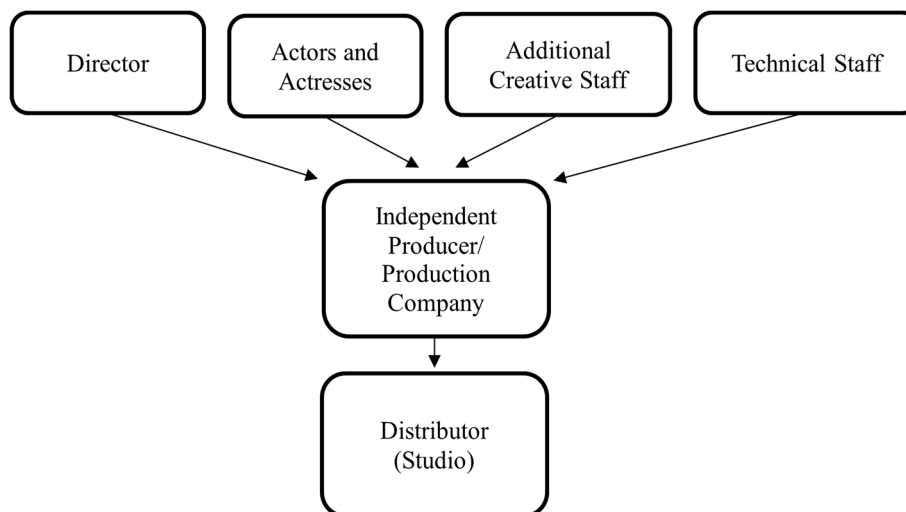
<sup>183</sup> CAVES, *supra* note 74, at 111; Kernochan, *supra* note 135, at 385; Mirva Peltoniemi, *Cultural Industries: Product-Market Characteristics, Management Challenges and Industry Dynamics*, 17 INT’L J. MGMT. REVS. 41, 52 (2015); Lo & Pisano, *supra* note 160, at 50 (characterizing studios as “specialized organizational structure[s] that exist[] to aid movie production companies in bringing their projects to fruition”). Sometimes, studios finance production and distribution on their own. At other times, studios partner with other studios in co-financing or co-production deals and split revenues. Hedge funds have become an important source of financing for studios. See Young, Gong & Van der Stede, *supra* note 73, at 30.

<sup>184</sup> Cf. HESMONDHALGH, *supra* note 122, at 61 (describing the rise of subcontracting since the 1950s).

<sup>185</sup> See *supra* notes 9–10 (describing Warner Brothers’ distribution of *Crazy Rich Asians*).

other cases, producers complete film production and then contract with a studio for distribution rights.<sup>186</sup> In this context, film festivals play prominent roles as markets in which independent film producers present their films to studio executives in the hopes of securing a distribution deal.<sup>187</sup>

Figure 2: *Two Levels of Vertical Disintegration in the Film Industry*



Similar to the role of patents in promoting vertical disintegration between small biotech firms and large pharmaceutical companies, copyrights facilitate vertical disintegration between small production companies and large studios.<sup>188</sup> In both contexts, exclusive rights facilitate transactions between separate production and distribution entities. Copyright's importance to vertical disintegration is most evident when independent producers seek to "sell" completed movies to large studios for distribution. In the absence of copyright, Arrow's information paradox suggests that studio executives would insist on obtaining and reviewing a film before purchasing it, but in so doing, they might commercialize it (or a substantially similar variation) for free.<sup>189</sup> Copyrights provide a low-cost option for resolving this paradox by allowing a producer to screen a film for studio executives while preventing unauthorized distribution. Furthermore, after the producer assigns exclusive rights to the studio, copyright provides assurance to the studio that the producer (or any other party with access to the film) will not distribute the movie without authorization.

<sup>186</sup> Cf. Young, Gong & Van der Stede, *supra* note 73, at 29–30.

<sup>187</sup> CAVES, *supra* note 74, at 100; Young, Gong & Van der Stede, *supra* note 73, at 28–30.

<sup>188</sup> See, e.g., Merges, *Property*, *supra* note 48, at 1251 (discussing Pixar's distribution deal with Disney prior to being acquired by it).

<sup>189</sup> Cf. Arrow, *supra* note 82, at 615.

Copyrights also promote vertical disintegration in the more common case where a production entity obtains a financing and distribution deal from a studio sometime during development or production.<sup>190</sup> In such a case, the studio can essentially outsource film production to the independent production company based on ownership of the film copyright either through assignment or the works-made-for-hire doctrine.<sup>191</sup> Ownership of the copyright allows the studio to “externalize” film production; it can rest assured that neither the production company nor any vendors exposed to the film can exploit it without the studio’s authorization.<sup>192</sup> In this sense, copyright bears distinct advantages over other mechanisms, such as staged disclosure, contracts, and reputational sanctions, which can prevent unauthorized expropriation of content by a prospective buyer but not necessarily by the seller or third parties after a deal.<sup>193</sup> In the absence of copyright, the industry would likely shift to greater vertical integration of production and distribution, reminiscent of Hollywood’s earlier studio system. Copyright helps maintain the independent existence (and autonomy) of upstream production entities relative to downstream intermediaries.

### *B. Music Recording: Semi-Integration of Recording Artists into Record Labels*

In the recording industry, the relationship between recording artists and labels is best described as formally vertically disintegrated and substantively semi-integrated. Producing and distributing recorded music involves a long value chain spanning songwriting, music publishing, recording, reproduction, and distribution.<sup>194</sup> In theory, this value chain could be fully vertically integrated: record labels could employ in-house songwriters, recording artists, musicians, backup singers, producers, and other creative and technical staff as full-time employees. In practice, however, independent freelancers largely perform these functions. This subpart focuses on the important relationship between recording artists and the record labels that commercialize their

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<sup>190</sup> In some arrangements, the production company and distributor jointly own copyright. *See, e.g.*, Walt Disney Pictures and Television and Pixar, Co-Production Agreement 21 (Feb. 24, 1997). In other arrangements, the studio financing and distributing the film is considered the legal author of the film based on the works-made-for-hire provision. Tussey, *supra* note 161, at 234.

<sup>191</sup> *See generally* 17 U.S.C. § 106 (enumerating exclusive rights conferred by copyright); 17 U.S.C. § 101 (defining “works made for hire”).

<sup>192</sup> *Cf.* Heald, *supra* note 81, at 487 (noting that patents prevent the need to fence off members of a team from exposure, thus facilitating team production).

<sup>193</sup> *See supra* notes 103–06 and accompanying text.

<sup>194</sup> *See* Joeri M. Mol, Nachoem M. Wijnberg & Charles Carroll, *Value Chain Envy: Explaining New Entry and Vertical Integration in Popular Music*, 42 J. MGMT. STUD. 251, 260 (2005) (describing the value chain in recorded music).



recordings.<sup>195</sup> This relationship is complex and admittedly difficult to characterize. Recording artists are not in-house employees of record labels, and they maintain a fair amount of creative autonomy in structuring music production. However, record labels typically bind recording artists to long-term, exclusive contracts, which suggests an organizational structure best characterized as semi-integrated. Copyright facilitates the partial autonomy of recording artists from record labels, particularly through technical doctrines such as terminations of transfers. Focusing on the actual task of producing music, other elements of copyright facilitate assembling various individuals to work on particular tracks, thus enhancing the organizational options available to recording artists.

As with film production, though not to the same extent, the music recording industry previously featured a more vertically integrated structure. Until the 1960s, large record companies routinely employed backup singers and sound engineers, which facilitated in-house music production.<sup>196</sup> Labels such as Stax and Motown employed “house bands” that accompanied recording artists and helped define their sound.<sup>197</sup> Since then, “producers went independent and groups who wrote their own songs achieved a certain amount of bargaining power” and thus autonomy from record labels.<sup>198</sup> Additionally, while record labels historically maintained their own recording studios, that function has become significantly externalized.<sup>199</sup> Following the trend of “flexible specialization,” by the 2000s, record labels began operating in a manner analogous to major movie studios: they provided front-end financing and back-end distribution, leaving actual music recording to specialized parties.<sup>200</sup>

At a schematic level, recording artists contractually assign copyrights to record labels, which compensate the artists and commercially distribute their recordings.<sup>201</sup> In this sense, copyright facilitates a formally vertically

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<sup>195</sup> Cf. Joel Waldfogel, *Digitization and the Quality of New Media Products: The Case of Music*, in *ECONOMIC ANALYSIS OF THE DIGITAL ECONOMY* 407, 408 (Avi Goldfarb, Shane M. Greenstein & Catherine E. Tucker eds., 2015).

<sup>196</sup> David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 *J. COPYRIGHT SOC'Y U.S.A.* 387, 393 (2001); cf. A.J. Scott, *The US Recorded Music Industry: On the Relations Between Organization, Location, and Creativity in the Cultural Economy*, 31 *ENV'T & PLAN. A* 1965, 1968 (1999) (“Full-blown functional integration . . . is less common today than it was in the past.”).

<sup>197</sup> 2 *CONTINUUM ENCYCLOPEDIA OF POPULAR MUSIC OF THE WORLD: PERFORMANCE AND PRODUCTION* 31 (John Shepherd, David Horn, Dave Laing, Paul Oliver & Peter Wicke eds., 2003).

<sup>198</sup> David Hesmondhalgh, *Flexibility, Post-Fordism and the Music Industries*, 18 *MEDIA, CULTURE & SOC'Y* 469, 479 (1996) [hereinafter Hesmondhalgh, *Flexibility*].

<sup>199</sup> *Id.*

<sup>200</sup> See Nimmer & Menell, *supra* note 196, at 393; cf. Scott, *supra* note 196, at 1968 (“The recording company itself operates basically as a central A&R (artist and repertoire) recruitment organization and as the publisher of finished recordings.”).

<sup>201</sup> See Warner Music Grp. Corp., Annual Report (Form 10-K), at 7 (Sept. 30, 2019) (“Our artists’ contracts define the commercial relationship between our recording artists and our record labels.”); cf. DiCola, *supra* note 14, at 306 (“Congress has designed the copyright

disintegrated structure in which recording artists are separate from labels. In most cases, a record label “discovers” an artist through the label’s artists and repertoire (“A&R”) division, professional referrals, or through the artist’s demo recording, live performances, or online sales.<sup>202</sup> Increasingly, labels scan the music landscape and wait to sign artists that have already established a sizable fan base.<sup>203</sup> Most recording artists are thus “externally sourced” rather than cultivated in-house by record labels. The recording artist and label then negotiate a contract in which the artist agrees to transfer sound recording copyrights to the label in exchange for an advance and royalties.<sup>204</sup> Further illustrating the separation of recording artists from labels, the former typically hire managers, lawyers, or agents to represent them in contract negotiations.<sup>205</sup>

Given their independent-contractor status, recording artists often enjoy meaningful autonomy from labels. On the business side, recording artists can generate income from sources outside of recording, such as live performances and merchandising.<sup>206</sup> Such financial autonomy further shores up the independence of recording artists vis-à-vis labels.<sup>207</sup> Most recording artists hire their own managers, and many form their own corporate entities.<sup>208</sup> For instance, Bruce Springsteen and Prince have registered recordings listing themselves as employers of musicians and other creative and technical staff.<sup>209</sup>

On the creative side, recording artists also maintain a fair degree of creative autonomy even while bound to record contracts. Recording artists typically select their own creative and technical staff, such as musicians, backup singers,

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system with the expectation that many creators will contract with intermediaries to distribute their works commercially.”). This Part focuses on a common scenario where a recording artist signs directly with a label. Another prevalent model involves an artist signing with a producer or production company, which enters into an agreement with a major label for distribution. See Richard Salmon, *A Guide to Contracts for Producers*, SOUND ON SOUND (July 2008), <https://www.soundonsound.com/music-business/guide-contracts-producers> [<https://perma.cc/9FTG-PLDV>].

<sup>202</sup> See generally Salmon, *supra* note 201; Tom Watson, *Do Music Producers Help Artists Get Signed to Major Labels in 2020?*, CURRENT SOUND (Aug. 12, 2019), <https://currentsound.com/general/do-music-producers-help-artists-get-signed-to-major-labels/> [<https://perma.cc/6KC6-GU5B>].

<sup>203</sup> Watson, *supra* note 202.

<sup>204</sup> DiCola, *supra* note 14, at 306; Peter Tschmuck, *Copyright, Contracts and Music Production*, 12 INFO. COMM’N & SOC’Y 251, 259 (2009) [hereinafter Tschmuck, *Copyright*] (listing specific provisions); see also Helienne Lindvall, *Why Artists Should Retain Ownership of Their Recordings*, GUARDIAN (Jan. 29, 2009), <https://www.theguardian.com/music/musicblog/2009/jan/29/recording-copyright-ownership> [<https://perma.cc/5HPJ-NY8D>].

<sup>205</sup> See DiCola, *supra* note 14, at 323.

<sup>206</sup> This landscape is shifting with the emergence of “360 contracts” in which labels can claim a portion of non-recording revenues from recording artists. Matt Stahl & Leslie M. Meier, *The Firm Foundation of Organizational Flexibility: The 360 Contract in the Digitalizing Music Industry*, 37 CANADIAN J. COMM’N 441, 445 (2012).

<sup>207</sup> Stahl, *supra* note 126, at 674, 684.

<sup>208</sup> CAVES, *supra* note 74, at 61.

<sup>209</sup> Nimmer & Menell, *supra* note 196, at 406.

producers, and sound engineers.<sup>210</sup> While record labels have in-house studios, many recording artists bypass them and record in independent studios.<sup>211</sup> In congressional testimony from 2000, Sheryl Crow stated that she did not work for record companies any more than novelists work for publishers.<sup>212</sup> She also noted that she paid for recording and production and stated, “I must also decide what musicians I want to perform on each song, given the desired sound I want to attain, what engineering staff to implement my sonic vision, what studio will be appropriate . . . and how much I want to spend.”<sup>213</sup> While record companies retain the contractual right to determine what an artist records, in practice artists contribute significantly to that decision.<sup>214</sup> Record labels have significant incentive to respect artistic autonomy given that “the market value of a popular musician can rest to an unusual degree in the public’s perception of the artist as autonomous.”<sup>215</sup> Tellingly, record labels have exercised less control over the process of music recording over time.<sup>216</sup> While some characterize recording artists as employees, “these artist-workers’ autonomy seems to call that status into question, making them appear more like independent contractors.”<sup>217</sup>

While formally reflecting vertical disintegration, recording artists are bound quite tightly to record labels via one-sided contracts. Such embeddedness suggests some elements of vertical integration.<sup>218</sup> Given uncertainty over a new artist’s commercial prospects, record labels require them to sign open-ended “option” contracts.<sup>219</sup> A single album deal may have five or six options—at the sole discretion of the label—for additional albums and effectively last over fifteen years.<sup>220</sup> Such contracts establish “employment at will” but only at the

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<sup>210</sup> Vacca, *supra* note 125, at 245, 247–48. A recording artist may hire a producer, either before or after getting a record contract. Watson, *supra* note 202. Alternatively, a producer may sign a production agreement with a recording artist, after which they both try to sign with a label. Additionally, a record label could sign a producer to work with a recording artist for a particular project. See Salmon, *supra* note 201.

<sup>211</sup> Vacca, *supra* note 125, at 245.

<sup>212</sup> Nimmer & Menell, *supra* note 196, at 399.

<sup>213</sup> *United States Copyright Office and Sound Recordings as Work Made for Hire: Hearing Before the Subcomm. on Cts. and Intell. Prop. of the H. Comm. on the Judiciary*, 106th Cong. 34, 73 (2000).

<sup>214</sup> Vacca, *supra* note 125, at 250.

<sup>215</sup> Stahl, *supra* note 126, at 674; see also HESMONDHALGH, *supra* note 122, at 151 (“Institutional autonomy means that not only do companies cede control of production to musicians (as in all cultural industries); there is also a tendency towards ‘spatially dispersed production in small units’ (rock groups, swing bands) . . .”).

<sup>216</sup> Vacca, *supra* note 125, at 240, 249.

<sup>217</sup> Stahl, *supra* note 126, at 674.

<sup>218</sup> *Cf. id.* at 685 (“[P]roblems of autonomy and control have been and remain central to the relationships of recording artists and their record companies.”).

<sup>219</sup> *Id.* at 669.

<sup>220</sup> Greenfield & Osborn, *supra* note 139, at 118; see also Gardner, *supra* note 129, at 723. While personal services contracts in California cannot generally extend beyond seven years, CAL. LAB. CODE § 2855 (West 2021), legislation enacted in 1987 allowed recording companies to sue artists for damages for any unfulfilled contractual obligations, thus

will of the employer.<sup>221</sup> In a traditional recording contract with a major label, the artist only gets paid after the label has recouped (from the artist's advance) expenses for recording and promotion, with profits split 90% to 10% in favor of the label.<sup>222</sup> The emergence of "360 contracts," in which record labels claim revenue from recording artists' non-recording-related activities (such as concerts and merchandise) furthers the "[c]ontractual subordination" of recording artists.<sup>223</sup> One-sided option contracts and 360 contracts are reminiscent of the onerous contracts that bound Hollywood stars to major studios during the vertically integrated studio system.<sup>224</sup>

In addition to insisting on long-term, exclusive contracts, record labels also exercise a certain degree of creative control over recording artists. Under typical terms, labels must declare a record to be satisfactory to fulfill a recording artist's contractual obligations.<sup>225</sup> George Michael criticized the "creative shackling" of his contract with Sony,<sup>226</sup> and Prince famously wrote the word "slave" on his cheek to protest his contract with Warner Bros.<sup>227</sup> Other high-profile disputes suggest that recording artists feel like they are the employees (or indentured servants) of record labels.<sup>228</sup> The duration, exclusivity, and control conferred by recording contracts have led some commentators to characterize music production as vertically integrated, with upstream recording artists absorbed into downstream labels.<sup>229</sup>

In sum, recording artists are best described as semi-integrated into record labels (see Figure 3).<sup>230</sup> As described in previous work, semi-integration arises

undermining the seven-year limitation. *See Stahl, supra* note 126, at 676; Warner Music Grp. Corp., *supra* note 201, at 24.

<sup>221</sup> Stahl & Meier, *supra* note 206, at 445. Upon losing his bid to void his contract with Sony, George Michael stated, "I have no right to resign. In fact there is no such thing as resignation for an artist in the music industry. Effectively, you sign a piece of paper at the beginning of your career and you are expected to live with that decision, good or bad, for the rest of your professional life." Greenfield & Osborn, *supra* note 139, at 117 (quoting Press Statement, George Michael (June 21, 1994)).

<sup>222</sup> GREG KOT, RIPPED: HOW THE WIRED GENERATION REVOLUTIONIZED MUSIC 14–15 (2010); HESMONDHALGH, *supra* note 122, at 168–69.

<sup>223</sup> Stahl & Meier, *supra* note 206, at 442. Such deals can even confer control over a recording artist's weight and hairstyle. *Id.* at 448.

<sup>224</sup> *See supra* notes 138–40 and accompanying text.

<sup>225</sup> Stahl & Meier, *supra* note 206, at 445.

<sup>226</sup> Greenfield & Osborn, *supra* note 139, at 125.

<sup>227</sup> KOT, *supra* note 222, at 59.

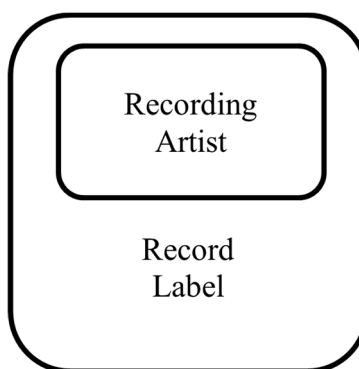
<sup>228</sup> *See, e.g.,* Courtney Love, *Courtney Love Does the Math*, SALON (June 14, 2000), [https://www.salon.com/2000/06/14/love\\_7/](https://www.salon.com/2000/06/14/love_7/) [<https://perma.cc/6XH6-VASS>]; *see also* HESMONDHALGH, *supra* note 122, at 169.

<sup>229</sup> *See* David Blackburn, On-line Piracy and Recorded Music Sales 7 (Dec. 2004) (unpublished manuscript) (on file with the *Ohio State Law Journal*); Lital Helman, *Fair Trade Copyright*, 36 COLUM. J.L. & ARTS 157, 171 (2013); HESMONDHALGH, *supra* note 122, at 145.

<sup>230</sup> *Cf.* Scott, *supra* note 196, at 1969 (describing a structure in which recording artists are contractually bound to record labels as "quasi-disintegrated").

when a quasi-autonomous entity serving a distinct function in a value chain operates within a broader organization at a different position in the value chain.<sup>231</sup> For example, semi-integration obtains when a small biotech firm is acquired by a large pharmaceutical company but continues to operate as a semi-autonomous research center within that large company.<sup>232</sup> Recording artists signed to record labels represent another example of semi-integration, one that is based more formally in contracts rather than outright integration. On the one hand, recording artists are independent contractors who retain some degree of autonomy, notably in being able to assemble their preferred team of creative and technical staff. On the other hand, artists are bound by long-term, exclusive contracts, and labels exert significant business and creative control over them.

Figure 3: *Semi-Integration of Recording Artists Within Record Labels*



While long-term, exclusive, one-sided contracts pull recording artists toward vertical integration into record labels, copyrights help ensure at least some degree of separation of artists from labels. Copyrights support a formally vertically disintegrated structure in which recording artists work independently of large record labels, assigning sound recording copyrights to the latter. The contribution of copyright to vertical disintegration is most evident when a recording artist has completed an album and seeks a studio to distribute it. As with the relationship between an independent production company and a film studio, Arrow's information paradox jeopardizes a potential deal.<sup>233</sup> The recording artist may submit a demo recording to an A&R rep, but in the absence of copyright, the record label could appropriate the recording for free.<sup>234</sup> Here again, copyright provides an effective mechanism for mitigating Arrow's information paradox, thus enhancing the viability of a transactional model between separate recording artists and labels. In the absence of low-cost, easily

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<sup>231</sup> See Lee, *Innovation*, *supra* note 21, at 1436.

<sup>232</sup> *Id.* at 1464.

<sup>233</sup> See *supra* note 82 and accompanying text (describing Arrow's information paradox).

<sup>234</sup> See *supra* notes 98–101 and accompanying text.

obtainable copyright, recording artists would have greater incentive to seek vertical integration with record labels.

The situation is more complex with respect to a signed recording artist under a long-term contract, but even here copyright facilitates formal vertical disintegration. Ownership of copyright (through assignment) allows labels to externalize music production to independent recording artists.<sup>235</sup> Large record labels need not maintain organizational mechanisms, such as directly supervising music recording or insisting that artists use in-house studios, to prevent illicit distribution of “their” music. Rather, labels can rely on copyright assignments to externalize music production on the assurance that they can deter any unauthorized distribution of music by recording artists, producers, recording engineers, backup musicians, or any other third parties.

In more subtle ways as well, copyright doctrine both reflects and reinforces the organizational separation of recording artists from record labels. As noted, the works-made-for-hire doctrine establishes a hiring party as the legal author of works made by employees and of certain specially commissioned works made by independent contractors.<sup>236</sup> From the perspective of vertical integration versus disintegration, the question then arises as to whether recording artists are employees or independent contractors of record labels. Professor Ryan Vacca’s examination of the multifactor standard for works made for hire concludes that recording artists are most likely independent contractors.<sup>237</sup> Among other considerations, recording artists often record in independent studios—including studios owned by outside producers or the artists themselves—rather than those affiliated with a record label, and they select their own assistants to work on recordings.<sup>238</sup> Professor Mary LaFrance has similarly argued that most contributors to sound recordings are independent contractors rather than employees.<sup>239</sup> Tellingly, major labels also regard recording artists as independent contractors rather than employees.<sup>240</sup>

However, copyright doctrine goes further to shore up the separation of recording artists from record labels. Given that recording artists are independent

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<sup>235</sup> See *supra* notes 201–05 and accompanying text. While this analysis focuses on the relationship between recording artists and labels, copyright also facilitates market exchanges between independent record producers and labels. See *Merges, Property, supra* note 48, at 1251; M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, *THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE BUSINESS AND LEGAL ISSUES OF THE MUSIC INDUSTRY* 64 (10th ed. 2007).

<sup>236</sup> See *supra* note 33 and accompanying text (defining a “work made for hire”).

<sup>237</sup> Vacca, *supra* note 125, at 252. Vacca acknowledges, however, that “record companies have a colorable argument that artists should be treated as employees.” *Id.* at 253.

<sup>238</sup> *Id.* at 245, 247–48.

<sup>239</sup> Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375, 379 (2002). Recording artists typically contract with session musicians, who are not employees of those artists. See DiCola, *supra* note 14, at 312.

<sup>240</sup> See, e.g., Warner Music Grp. Corp., *supra* note 201, at 24 (“[W]e believe that the recording artists and songwriters with which we partner are properly characterized as independent contractors . . .”).

contractors, the second issue is whether their works can still be considered works made for hire under the “independent contractor” prong of the works-made-for-hire doctrine.<sup>241</sup> Although almost all recording contracts state that sound recordings are works made for hire, these works rarely qualify for that status.<sup>242</sup> Sound recordings are not included among the nine statutorily enumerated categories of works that can qualify as works made for hire when made by an independent contractor.<sup>243</sup> Furthermore, the weight of authority indicates that sound recordings by independent contractors are not works made for hire.<sup>244</sup> Notably, in 1999 Congress briefly amended the Copyright Act to explicitly include sound recordings within the statutory categories of works made for hire.<sup>245</sup> However, upon vociferous opposition by musicians and scholars, Congress quickly repealed this amendment with retroactive effect.<sup>246</sup> The Songwriters Guild of America has also argued that sound recordings by independent contractors are not works made for hire.<sup>247</sup> The consensus view that recording artists are independent contractors whose recordings are not works made for hire further underscores their organizational separation from record labels. Among other implications, it means that recording artists are the legal authors of their works and thus own associated copyrights.

The legal characterization that sound recordings are not works made for hire triggers another copyright mechanism that further separates recording artists from record labels: termination of transfers.<sup>248</sup> At first glance, the fact that sound recordings are not works made for hire seems inconsequential given that record labels can still obtain copyrights from recording artists through outright assignments. However, the Copyright Act provides for the termination of copyright assignments or licenses during a five-year window starting thirty-five years after a transfer.<sup>249</sup> This “termination of transfer” right is inalienable and

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<sup>241</sup> See *supra* note 33 and accompanying text.

<sup>242</sup> Vacca, *supra* note 125, at 240–41; Stahl, *supra* note 126, at 681; Nimmer & Menell, *supra* note 196, at 396.

<sup>243</sup> 17 U.S.C. § 101.

<sup>244</sup> Corey Field, *Their Master's Voice? Recording Artists, Bright Lines, and Bowie Bonds: The Debate Over Sound Recordings as Works Made for Hire*, 48 J. COPYRIGHT SOC'Y U.S.A. 145, 174–76 (2000); Mark H. Jaffe, *Defusing the Time Bomb Once Again—Determining Authorship in a Sound Recording*, 53 J. COPYRIGHT SOC'Y U.S.A. 139, 166–69 (2005); Tussey, *supra* note 161, at 238. *But see* Nimmer & Menell, *supra* note 196, at 402 (arguing that it may be possible to shoehorn sound recordings into one of the enumerated categories of works made for hire).

<sup>245</sup> LaFrance, *supra* note 239, at 375.

<sup>246</sup> *Id.* at 375–76; Stahl, *supra* note 126, at 681; Nimmer & Menell, *supra* note 196, at 390–95.

<sup>247</sup> Rick Carnes, *Developing a Copyright System that Works for Songwriters*, 38 COLUM. J.L. & ARTS 309, 313 (2015).

<sup>248</sup> See Nimmer & Menell, *supra* note 196, at 387–88; Maureen A. O'Rourke, *A Brief History of Author-Publisher Relations and the Outlook for the 21st Century*, 50 J. COPYRIGHT SOC'Y U.S.A. 425, 440–43 (2003) [hereinafter O'Rourke, *Author-Publisher*].

<sup>249</sup> 17 U.S.C. § 203. Among the conditions, this provision only applies to transfers or licenses executed on or after January 1, 1978. *Id.*

only applies to individuals who are legal authors of their works (and thus does not apply to works made for hire).<sup>250</sup> This provision allows the original copyright holder (or his or her estate) to renegotiate an assignment or license after a significant period of time since the “value of copyrighted works cannot be adequately determined at the time of their creation.”<sup>251</sup> Because sound recordings are not works made for hire, recording artists initially own their own copyrights.<sup>252</sup> Therefore, when they assign these copyrights to record labels, the recording artists retain termination rights.<sup>253</sup> The ability to terminate an assignment after thirty-five years further underscores the independence of recording artists from record labels, even when otherwise bound by long-term, exclusive contracts.<sup>254</sup>

While this Part has focused on the relationship of recording artists to record labels, it is important to note that copyright also plays a significant role in structuring the actual process of music production. Analogous to “spot production” in the film industry, production of individual records proceeds as project-specific assemblages of inputs from multiple independent parties.<sup>255</sup> Importantly, recording artists need not write their own songs; they can essentially outsource that upstream function by licensing copyrighted musical compositions from independent songwriters (or their publishers).<sup>256</sup> Recording artists can also license “samples” of existing musical compositions and sound recordings, though they may avoid the need to do so based on varying de minimis exceptions to copyright infringement and, in the case of sound recordings, by recreating the sounds themselves.<sup>257</sup>

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<sup>250</sup> See LaFrance, *supra* note 239, at 377; Sean M. O’Connor, *Hired to Invent vs. Work Made for Hire: Resolving the Inconsistency Among Rights of Corporate Personhood, Authorship, and Inventorship*, 35 SEATTLE U. L. REV. 1227, 1234 (2012).

<sup>251</sup> Carnes, *supra* note 247, at 313.

<sup>252</sup> See *supra* notes 243–47 and accompanying text; LaFrance, *supra* note 239, at 377.

<sup>253</sup> LaFrance, *supra* note 239, at 377. One must acknowledge, however, that the complexity of the termination of transfer right renders it difficult to assert. Molly Van Houweling, *Authors Versus Owners*, 54 HOUS. L. REV. 371, 383–85 (2016) [hereinafter Van Houweling, *Authors*].

<sup>254</sup> Stahl, *supra* note 126, at 669 (“Copyright law . . . insofar as it construes performers as the authors of their sound recordings, appears as an obstacle to maximum exploitation.”); see also Warner Music Grp. Corp., *supra* note 201, at 24 (claiming that recordings are works made for hire but acknowledging that terminations of transfers could lead to a loss of catalog). Not surprisingly, labels have opposed the exercise of termination of transfer rights. See Larry Rohter, *Record Industry Braces for Artists’ Battles over Song Rights*, N.Y. TIMES (Aug. 15, 2011), <https://www.nytimes.com/2011/08/16/arts/music/springsteen-and-others-soon-eligible-to-recover-song-rights.html> [<https://perma.cc/F674-EY6L>].

<sup>255</sup> LaFrance, *supra* note 239, at 379.

<sup>256</sup> U.S. COPYRIGHT OFF., HOW SONGWRITERS, COMPOSERS, AND PERFORMERS GET PAID 4–5 (Apr. 2021), <https://www.copyright.gov/music-modernization/educational-materials/musicians-income.pdf> [<https://perma.cc/9AQ8-GGTS>].

<sup>257</sup> See *Newton v. Diamond*, 349 F.3d 591, 597–98 (9th Cir. 2003) (recognizing a de minimis exception to copyright infringement for sampling a six-second portion of a musical composition); *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801–02 (6th Cir.



Copyright is also useful in assembling the producers, musicians, backup singers, and engineers to produce individual tracks, though in different ways compared to film production. As with film production, assembling freelance talent to produce a record is useful but may give rise to the thorny problem of too many contributors claiming copyright over the finished work.<sup>258</sup> Unlike motion pictures, sound recordings are not a statutorily enumerated category of works for which the contributions of independent contractors generally qualify as works made for hire.<sup>259</sup> However, contributions to sound recordings can qualify as works made for hire if they arise from *employees* within the scope of employment.<sup>260</sup> As we have seen, major recording artists like Prince and Bruce Springsteen are employers who hire full-time musicians and singers.<sup>261</sup> In such cases, the employee (rather than independent contractor) prong of the works-made-for-hire doctrine resolves problems of team production by vesting authorship and ownership of copyrights in the hiring party. Outside of the works-made-for-hire doctrine, the easily assignable nature of copyright allows recording artists to simply contract for ownership of copyrights from contributing singers and musicians. It should be noted, however, that such assignments raise complications based on creators' retention of termination of transfer rights.<sup>262</sup>

In sum, various elements of copyright law provide some measure of organizational separation of recording artists from record labels. The availability of low-cost, easily obtainable exclusive rights supports a transactional relationship between upstream artists and downstream labels. The right to terminate transfers shores up this separation. Furthermore, copyright helps recording artists create modular social structures—all while being bound to record deals—to complete creative projects. Copyright supports a substantively semi-integrated relationship between recording artists and labels as opposed to full integration.

### *C. Book Publishing: Traditional Copyright-Mediated Vertical Disintegration*

Having explored vertical disintegration and semi-integration in the film and music industries, and the role of copyright in enabling such structures, this Part turns to book publishing. Book production reflects a more classic example of

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2005) (rejecting a de minimis exception to copyright infringement for unauthorized sampling of sound recordings); *VMG Salsoul v. Ciccone*, 824 F.3d 871, 874 (9th Cir. 2016) (recognizing a de minimis exception to copyright infringement for unauthorized sampling of sound recordings).

<sup>258</sup> See Nimmer & Menell, *supra* note 196, at 408.

<sup>259</sup> 17 U.S.C. § 101; *see also supra* notes 241–44 and accompanying text.

<sup>260</sup> 17 U.S.C. § 101; *see also* Vacca, *supra* note 125, at 209–18 (discussing various tests to determine whether a hired worker was an “employee” under the 1976 Copyright Act).

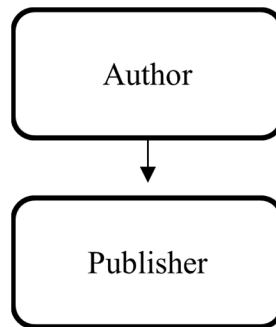
<sup>261</sup> See Nimmer & Menell, *supra* note 196, at 406.

<sup>262</sup> *See id.* at 404–05.

vertical disintegration, and this discussion will be relatively brief. In a typical value chain, upstream authors produce books, which downstream publishers then market and distribute.<sup>263</sup> Viewed from a different angle, publishers outsource book production to independent authors, and in fact one of their primary functions is to acquire content from external sources.<sup>264</sup>

Here again, contracts and copyrights mediate this vertically disintegrated relationship between authors and publishers (see Figure 4). Authors or their representatives negotiate contracts with publishers in which they assign copyright, sometimes based simply on a short prospectus for a book.<sup>265</sup> The contract governs numerous aspects of editing, printing, publication, and distribution.<sup>266</sup> In a typical publishing contract, the publisher obtains exclusive and immediate rights to publish a manuscript while retaining significant discretion in performing its obligations.<sup>267</sup> Publishers traditionally provide an advance to the author and handle editing, printing, promotion, and distribution.<sup>268</sup>

Figure 4: *Vertical Disintegration in the Publishing Industry*



The separation of authors from publishers is further reflected by the presence of agents that mediate interactions between them.<sup>269</sup> Agents act as gatekeepers and play a matchmaking function in placing manuscripts with

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<sup>263</sup> ALBERT N. GRECO, JIM MILLIOT & ROBERT M. WHARTON, *THE BOOK PUBLISHING INDUSTRY* 4–5 (3d ed. 2014).

<sup>264</sup> *Id.* at 5.

<sup>265</sup> CAVES, *supra* note 74, at 56–59.

<sup>266</sup> GRECO, MILLIOT & WHARTON, *supra* note 263, at 5.

<sup>267</sup> Melvin Simensky, *Redefining the Rights and Obligations of Publishers and Authors*, 5 *LOY. L.A. ENT. L.J.* 111, 111 (1985).

<sup>268</sup> Joel Waldfogel & Imke Reimers, *Storming the Gatekeepers: Digital Disintermediation in the Market for Books*, 31 *INFO. ECON. & POL'Y* 47, 51 (2015).

<sup>269</sup> See Rachel Kramer Bussel, *How Literary Agents Negotiate the Best Contract Terms for Their Authors*, *FORBES* (Mar. 2, 2020), <https://www.forbes.com/sites/rachelkramerbussel/2020/03/02/how-literary-agents-negotiate-the-best-contract-terms-for-their-authors/?sh=68b1ca713520> (on file with the *Ohio State Law Journal*).

publishers.<sup>270</sup> Agents, rather than unsolicited submissions or other sources, generate the most “usable trade and mass market manuscripts” for authors and publishers.<sup>271</sup> Additionally, given the complexity of publishing deals, authors often turn to agents to represent them in negotiations.<sup>272</sup>

While authors operate largely independently of publishers, the latter exercise some control over the former. As one commentator notes, “the publishing contract, which binds them together, can seem a clanking iron. Authors have long hated their publishers.”<sup>273</sup> Publishers can refuse a manuscript if deemed unpublishable, and authors are required to make all necessary, reasonable revisions upon request.<sup>274</sup> Deals are characterized by asymmetrical bargaining “where the publishing company is much more knowledgeable than the author, and relations between the parties may sometimes be strained.”<sup>275</sup>

Here again, copyright helps facilitate vertical disintegration by conferring on authors transactable rights that they can exchange with publishers. Shopping a manuscript to publishers is also potentially subject to Arrow’s information paradox; in the absence of copyright, an acquisition editor reviewing a manuscript would have much greater incentive to simply appropriate it or produce a substantially similar version for free.<sup>276</sup> Furthermore, receipt of an exclusive license assures publishers that no entity with access to the manuscript can distribute it without authorization. If copyright were expensive or difficult to obtain, authors would be more likely to vertically integrate with publishers, becoming in-house employees of the latter. Copyright also facilitates the separation of an author and publisher when the author obtains a publishing contract based on a proposal. Obtaining a copyright assignment or license allows the publisher to “externalize” drafting of the manuscript to an author; the publisher need not directly superintend development of the manuscript in-house.<sup>277</sup> In the absence of copyright, concerns about uncompensated expropriation of manuscripts would most likely motivate greater vertical integration between authors and publishers.

As with recording artists, copyright’s termination of transfer provision shores up the independence of authors from publishers. Given the lack of control that publishers exercise, authors are not employees under the prevailing

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<sup>270</sup> CAVES, *supra* note 74, at 54. Notably, “[t]he author-agent relationship does tend to destruct when the author succeeds and becomes well-known to publishers.” *Id.* at 55.

<sup>271</sup> GRECO, MILLIOT & WHARTON, *supra* note 263, at 185.

<sup>272</sup> Chr. Hjorth-Andersen, *Publishing*, in A HANDBOOK OF CULTURAL ECONOMICS, *supra* note 78, at 399, 401. In return, they receive a portion (fifteen percent is typical) of the author’s advance. GRECO, MILLIOT & WHARTON, *supra* note 263, at 185.

<sup>273</sup> William Cornish, *The Author as Risk-Share*, 26 COLUM. J.L. & ARTS 1, 2 (2002); O’Rourke, *Author-Publisher*, *supra* note 248, at 426.

<sup>274</sup> GRECO, MILLIOT & WHARTON, *supra* note 263, at 195.

<sup>275</sup> Hjorth-Andersen, *supra* note 272, at 401; O’Rourke, *Author-Publisher*, *supra* note 248, at 426–27.

<sup>276</sup> See *supra* note 82 and accompanying text (describing Arrow’s information paradox).

<sup>277</sup> See CAVES, *supra* note 74, at 56–59; GRECO, MILLIOT & WHARTON, *supra* note 263, at 195.

*Community for Creative Non-Violence v. Reid* test.<sup>278</sup> While authors are independent contractors, books—like sound recordings and unlike motion pictures—do not fall within the nine categories of specially commissioned works that qualify as works made for hire.<sup>279</sup> Thus for the vast majority of trade books, individual authors are the legal authors of their works, and they own their own copyrights.<sup>280</sup> Among other implications, ownership of copyright means that any transfers to publishers are subject to termination within the statutorily defined period.<sup>281</sup> While in theory publishers could demand that authors assign copyrights to them (as record labels do for recording artists), as per industry practice, authors generally retain ownership of copyrights and license various rights to publishers.<sup>282</sup> Original ownership and retention of copyrights, as well as the right to terminate transfers, also shore up the substantive and legal separation of authors from publishers.

#### D. Summary and Clarifications

Throughout the principal creative industries, upstream content production features significant (though varying) degrees of vertical disintegration. In general, filmmakers, recording artists, and authors are not fully vertically integrated into movie studios, record labels, and book publishers. Furthermore, copyright plays an important role in supporting these disintegrated industry structures. It does so primarily by conferring a low-cost, easily obtainable exclusive right to creators, which they can use to maintain transactional (rather than vertically integrated) relationships with downstream parties in the value chain. While conferring exclusive rights to creators is helpful, the challenges of aggregating exclusive rights can inhibit creative collaborations and group production. Other elements of copyright, such as the works-made-for-hire doctrine and its easily assignable nature, help lower transaction costs for aggregating creative works. In combination, copyright lowers the cost of a vertically disintegrated model of creative production in which creative individuals and small entities can enjoy greater autonomy from large organizations.<sup>283</sup>

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<sup>278</sup> See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989).

<sup>279</sup> 17 U.S.C. § 101.

<sup>280</sup> Other freelance writers who submit articles to newspapers and magazines, however, are often bound by works-made-for-hire agreements. Maureen A. O'Rourke, *Bargaining in the Shadow of Copyright Law After Tasini*, 53 CASE W. RESV. L. REV. 605, 605–06 (2003) [hereinafter O'Rourke, Tasini].

<sup>281</sup> See Van Houweling, *Authors*, *supra* note 253, at 382–83.

<sup>282</sup> See Love, *supra* note 228 (“Authors own their books and license them to publishers. When the contract runs out, writers get their books back. But record companies own our copyrights forever.”).

<sup>283</sup> This Article explores how copyright promotes organizational autonomy by helping creators work independently from large bureaucracies. As Robert Merges explores, copyrights also enhance autonomy in other ways. See MERGES, *supra* note 29, at 197 (noting that copyright enhances autonomy by enabling certain professionals to make a living as

Because autonomy is such a central concept to this Article, it is important to clarify this Article's claims in this context. First, although copyright helps support the separation of creative individuals and small entities from large intermediaries, in real-world contexts such separation is rarely complete. "Independent" creative entities are often enmeshed in dense webs of artistic and business relationships with the intermediaries that distribute their works; as such, creators and distributors may not be entirely organizationally distinct. This is particularly the case for the relationship between recording artists and record labels, which this Article characterizes as semi-integrated.<sup>284</sup> Copyright-mediated vertical disintegration does not suggest clean breaks between creators and distributors but a continuum of greater and lesser degrees of integration.

Second and relatedly, while copyright can help creators achieve a measure of *organizational* autonomy, it does not confer full creative and financial autonomy. For example, in the film industry, distribution deals vary considerably in terms of whether the production company or distributor exercises more creative control.<sup>285</sup> By providing up-front financing and thus assuming more risk, the studio can exert greater creative control over production.<sup>286</sup> Indeed, a major theme of this Article is that large studios, labels, and publishers, which invest significant money to distribute creative works, exert substantial influence over formally independent freelancers and small entities. Indeed, some distribution deals between intermediaries and creative workers are downright exploitative.<sup>287</sup> As long as creative workers depend on intermediaries to access audiences, their creative autonomy will be limited.

Third and finally, while copyright supports a transactional model in which creators enjoy greater organizational autonomy as direct market participants, the market can also significantly constrain autonomy. While "independent" creators may not have to answer to a direct boss, their creative choices are always constrained by market pressures and popular preferences. The market, after all, is "not notable for encouraging the variant and unpopular."<sup>288</sup> Creators seeking to contract with intermediaries to distribute their works are constrained to the extent that those intermediaries focus promotional efforts on works with mainstream appeal.<sup>289</sup> More broadly, the autonomy afforded to creators is

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creative workers); *id.* at 227–28 (observing that copyright facilitates autonomy by enabling creators to selectively assert or waive their right to exclude).

<sup>284</sup> See *supra* Part III.B.

<sup>285</sup> See Schuyler Moore, *The 9 Types of Film Distribution Agreements*, FORBES (July 19, 2019), <https://www.forbes.com/sites/schuylermoore/2019/07/19/types-of-film-distribution-agreements/?sh=349f94336253> [https://perma.cc/RHW8-7GEW].

<sup>286</sup> See *id.* Creative control is established in contract. See, e.g., Walt Disney Pictures and Television and Pixar, *supra* note 190, at 2 (establishing that Disney and Pixar "shall have mutual creative control" over five motions pictures to be produced and distributed in this agreement).

<sup>287</sup> See *infra* notes 430–40 and accompanying text.

<sup>288</sup> Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1234 (1998).

<sup>289</sup> Asay, *supra* note 95, at 197.

always constrained to the extent that they have limited outlets to distribute their works. That being said, this Article's claims are relative; it suggests that while freelancers and independent entities are subject to autonomy constraints from the market, they enjoy greater organizational autonomy than if they were vertically integrated into large intermediaries.

### E. *Qualifications and Additional Complexities*

This Part has argued that the principal content industries—movie production, music recording, and book publishing—exhibit significant vertical disintegration or semi-integration in which upstream creators enjoy varying degrees of independence from downstream intermediaries.<sup>290</sup> It has further argued that copyright plays an important role in supporting this structure, primarily by providing an exclusive right that upstream creators can exchange in market transactions with other parties in the value chain.<sup>291</sup> This descriptive account has necessarily focused on common, prominent organizational archetypes in these industries. Against objections that this is simply a “just so” story, it is important to point out qualifications to this descriptive account and additional complexities.

First, while this Part has focused on common archetypes, there is a wide diversity of organizational structures in content industries. While vertical disintegration dominates upstream film production, major studios still produce and distribute a small number of films in-house. For example, among the Hollywood majors, Disney stands out as producing and distributing a substantial share of its films in-house, which is reminiscent of earlier vertical integration.<sup>292</sup> However, Disney may be the exception that proves the rule; many of its in-house productions come from formerly independent production entities (e.g., Pixar Animation Studios, Marvel Studios, and Lucasfilm) that Disney acquired and which enjoy significant autonomy as semi-integrated entities within Disney.<sup>293</sup> More generally, “independent” producers run the gamut from operating wholly separately from studios to those who are “virtually studio employees.”<sup>294</sup> While directors, actors, and actresses are freelancers, they often sign contracts for multiple films with the same studio.<sup>295</sup> By binding creative talent in this manner,

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<sup>290</sup> See *supra* Parts III.A–C.

<sup>291</sup> See *supra* notes 167–71, 201–05, 276–77 and accompanying text.

<sup>292</sup> From 2013 to 2018, the percentage of distributed films that were wholly produced in-house was: 3% for Columbia, 37% for Disney, 0% for Paramount, 1% for Universal, and 4% for Warner Bros. Peter Lee, Spreadsheet Analyzing Films Produced from 2013 to 2018 (2022) (on file with author) (analyzing data culled from IMDBPro).

<sup>293</sup> Cynthia Littleton, *Inside Disney's Daring Dive into the Streaming World*, VARIETY (Jan. 29, 2019), <https://variety.com/2019/biz/features/disney-plus-streaming-plans-bob-iger-1203120734/> [<https://perma.cc/285F-A3D8>].

<sup>294</sup> Kernochan, *supra* note 135, at 390, 395 (describing “assisted” independent producers who work closely with studios).

<sup>295</sup> See, e.g., Graeme McMillan, *Sebastian Stan Reveals Nine-Picture Deal with Marvel*, HOLLYWOOD REP. (Mar. 13, 2014),

such long-term contracts approach some of the properties of vertical integration.<sup>296</sup> In the recording industry, this Part has explored the common model of a recording artist initiating and coordinating music production.<sup>297</sup> In some cases, however, record labels play a more proactive role in cultivating artists and directing music production, sometimes by assigning them a producer.<sup>298</sup> In other cases, independent producers “package” recording artists and then shop them to record labels.<sup>299</sup> Finally, this Part has focused on the dominant model of the independent author submitting manuscripts to publishers.<sup>300</sup> However, publishers have experimented with in-house book production by teams of internal author-employees.<sup>301</sup> Such diversity, however, underscores a benefit of copyright-mediated vertical disintegration: copyright expands the menu of viable organizational forms from which industry participants can select without compelling any particular structure.<sup>302</sup>

Second, while copyright enables vertical disintegration and autonomy for many creative workers in these industries, it does not do so for all, or at least in the same way. For instance, actors and actresses participate in vertically disintegrated spot production; they operate as freelancers, and they make copyrightable contributions to motion pictures.<sup>303</sup> However, copyright does not enable their freelance status in the same way, for instance, that it allows a freelance screenwriter to work independently from a production company or studio.<sup>304</sup> Rather, the freelance status of actors and actresses arises from personal services contracts with particular spot productions (or, as mentioned

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news/sebastian-stan-reveals-nine-picture-688393/ [https://perma.cc/J5DB-9UR3]. Additionally, some high-profile filmmakers have informal relationships with studios lasting decades. *See, e.g.,* Patrick Goldstein & James Rainey, *Could Chris Nolan Have Convinced Anyone but Warners to Make ‘Inception’?*, L.A. TIMES: THE BIG PICTURE (July 19, 2010), [https://latimesblogs.latimes.com/the\\_big\\_picture/2010/07/could-chris-nolan-have-convinced-anyone-but-warners-to-make-inception-.html](https://latimesblogs.latimes.com/the_big_picture/2010/07/could-chris-nolan-have-convinced-anyone-but-warners-to-make-inception-.html) [https://perma.cc/U9EP-QUSX]. Studios are particularly eager to maintain relationships with key stars given that they “are commonly regarded as ‘bankable’ by lenders.” CAVES, *supra* note 74, at 110.

<sup>296</sup> CAVES, *supra* note 74, at 101.

<sup>297</sup> *See supra* Part III.B.

<sup>298</sup> *See* Salmon, *supra* note 201.

<sup>299</sup> *See supra* note 210. Lou Pearlman, who created the Backstreet Boys and \*NSYNC, pioneered an “employment-type” agreement where group members receive annual salaries and assign a percentage of merchandising, acting, licensing, and sponsorship revenues to Pearlman’s firm. Stahl & Meier, *supra* note 206, at 448.

<sup>300</sup> *See supra* Part III.C.

<sup>301</sup> Anthony J. Casey & Andres Sawicki, *Copyright in Teams*, 80 U. CHI. L. REV. 1683, 1684–85 (2013).

<sup>302</sup> *Cf.* JONATHAN M. BARNETT, *INNOVATORS, FIRMS, AND MARKETS: THE ORGANIZATIONAL LOGIC OF INTELLECTUAL PROPERTY* 4–5 (2021) (arguing that strong intellectual property rights facilitate greater organizational diversity by enhancing the viability of small, unintegrated entities that lack non-IP mechanisms for appropriating returns from innovation).

<sup>303</sup> *See* Hughes, *supra* note 174, at 3.

<sup>304</sup> *Cf. supra* Part III.A.1.

above, longer term deals for multiple projects), as bolstered by union protections.<sup>305</sup> In the recording industry, session musicians are in a similar position. They also operate as freelancers in vertically disintegrated music production.<sup>306</sup> While they also wield copyrights on their contributions, they typically assign over their rights in misnamed “work-for-hire agreement[s].”<sup>307</sup> Here again, individual contracts, supported by a complicated schedule of union wages, help facilitate session musicians’ independent status.<sup>308</sup> It bears noting that in some contexts, elevating one creator’s autonomy can constrain the autonomy of other creators, such as when an independent filmmaker becomes the legal author of all copyrightable contributions to a film or a recording artist demands copyright assignments from session musicians.<sup>309</sup> To a certain extent, however, copyright can ameliorate such imbalances. For example, because session musicians have copyrights in their contributions, they are due a small portion of royalties based on digital performances of their songs.<sup>310</sup> Furthermore, session musicians may be able to assert termination of transfer rights protected under copyright.<sup>311</sup>

Third, this descriptive account has focused on three principal content industries—film production, music recording, and book publishing—and its applicability to other content industries remains to be explored. This Article has argued that the three industries examined here all feature significant vertical disintegration and semi-integration. It has further argued that low-cost, easily obtainable copyright plays an important role in supporting this structure. However, other copyright-intensive industries are more vertically integrated. For instance, the videogame industry, which bears some facial similarities to movie production, features greater vertical integration.<sup>312</sup> While the industry features some standalone, upstream developers (whose independent existence is no doubt aided by copyright), many developers are vertically integrated into videogame publishers; furthermore, some firms vertically integrate developers, publishers, and platforms (playing consoles).<sup>313</sup> The role of copyright in

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<sup>305</sup> See *supra* Part III.A. Interestingly, actors and actresses have asserted copyright to try to separate themselves from productions that they find distasteful. See, e.g., *Garcia v. Google, Inc.*, 786 F.3d 733, 737 (9th Cir. 2015).

<sup>306</sup> Alexandra El-Bayeh, Comment, *They Could Be Back: The Possibility of Termination Rights for Session Musicians*, 64 AM. U. L. REV. 285, 287–88 (2014).

<sup>307</sup> See *id.* at 288.

<sup>308</sup> See *id.* at 292.

<sup>309</sup> More generally, while this Article argues that small organizations generally afford more autonomy to employees than large bureaucracies, much depends on the context and personnel involved. An overbearing leader of a small organization can constrain autonomy, though the same holds true for an overbearing manager in a large bureaucracy.

<sup>310</sup> El-Bayeh, *supra* note 306, at 294.

<sup>311</sup> Cf. *id.* at 290 (arguing in favor of termination rights for session musicians).

<sup>312</sup> Ricard Gil & Frederic Warzynski, *Vertical Integration, Exclusivity, and Game Sales Performance in the US Video Game Industry*, 31 J.L. ECON. & ORG. (SUPP.) i143, i144 (2015).

<sup>313</sup> *Id.*



promoting vertical disintegration appears to have some purchase in the journalism industry. While many news organizations employ journalists, there is a robust landscape of freelance journalists who rely on copyright to convey their works to various publications.<sup>314</sup> Further work is necessary to elucidate the structures of other creative industries and the role of copyright in shaping them.

Fourth, it is important to acknowledge that creators can still enjoy autonomy and produce highly creative works in large organizations. Arguably, access to the significant resources of a major studio, record label, or publisher can in some ways enhance autonomy for in-house creative employees. Furthermore, even in vertically integrated content industries, successful creative workers can still enjoy significant autonomy. For example, in the classic Hollywood studio system, savvy directors could achieve creative independence in informal negotiations and power plays with studio heads.<sup>315</sup> At the other end of the spectrum, some have suggested that *constraints* on autonomy may actually induce greater creativity in certain contexts, though there is reason to believe this principle is less applicable to professional creative workers.<sup>316</sup> This Article claims not that autonomy and creativity are absent in large organizations. Rather, it makes a relative argument that, on balance, autonomy for creative workers is greater in vertically disintegrated and semi-integrated structures. The creativity benefits of such autonomy—and the preference for many creators to work in environments that confer it—are explored further below.<sup>317</sup>

Fifth, it is important to consider how the recent trend toward digital distribution is affecting the vertically disintegrated nature of content production and the role of copyright in shaping it. This Article has emphasized the common

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<sup>314</sup> See, e.g., *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 506 (2001) (holding that the *New York Times* could not license the works of freelance journalists to an electronic database without authorization). *But see* O'Rourke, *Tasini*, *supra* note 280, at 605–06 (characterizing *Tasini* as a moral victory and noting that publications are requiring freelance journalists to convey electronic rights for no more compensation than previously provided).

<sup>315</sup> See HESMONDHALGH, *supra* note 122, at 56; see Regev, *supra* note 134, at 594, 597–600, 607–10.

<sup>316</sup> Some commentators have suggested that limiting choice and freedom can, in some contexts, induce greater creativity. According to one application of the paradox of choice, significant options and flexibility can lead to information overload and ultimately inhibit creativity. See, e.g., Roy Yong-Joo Chua & Sheena S. Iyengar, *Empowerment Through Choice? A Critical Analysis of the Effects of Choice in Organizations*, 27 RSCH. ORGANIZATIONAL BEHAV. 41, 62 (2006) (reporting study findings that giving subjects more choices in a creative task led to less creative outputs); Roy Yong-Joo Chua & Sheena S. Iyengar, *Creativity as a Matter of Choice: Prior Experience and Task Instruction as Boundary Conditions for the Positive Effect of Choice on Creativity*, 42 J. CREATIVE BEHAV. 164, 167 (2008) (reporting similar findings). However, the relevance of these findings to the present Article's thesis is doubtful. These studies focused on the creativity-boosting effect of resource constraints rather than direct managerial control, and independent creators still face resource constraints. Furthermore, the authors suggest that greater choice and resources diminish creativity more for the "average person" rather than for professional creative workers, who welcome a larger set of combinatorial possibilities. *Id.* at 165.

<sup>317</sup> See *infra* Part IV.

model of separate upstream creators and downstream intermediaries engaging in copyright-mediated contractual exchanges. Increasingly, however, creators are bypassing traditional intermediaries by distributing their films, music, and books directly to audiences on platforms such as YouTube, Spotify, and Amazon's Kindle Direct Publishing.<sup>318</sup> As this Article will explore more fully below, these developments are creating new forms of vertical integration in content production and distribution, and copyright plays an important role in shoring up autonomy within them.<sup>319</sup>

#### IV. NORMATIVE IMPLICATIONS OF COPYRIGHT'S ORGANIZATIONAL EFFECTS: PROMOTING CREATIVE EXPRESSION THROUGH SUPPORTING ORGANIZATIONAL AUTONOMY

This Article has made two related descriptive claims: creative industries feature significant vertical disintegration in upstream content production, and copyright supports such disintegration. These descriptive claims, moreover, suggest a normative reinterpretation of copyright's role in promoting creative expression. Bedrock copyright theory and doctrine hold that copyright promotes expression by providing incentives to create.<sup>320</sup> This view has received considerable criticism,<sup>321</sup> and this Article adds its own critiques. More pertinently, this Article highlights a different, less appreciated function of copyright law. It argues that copyright indirectly promotes creative expression by expanding the range of organizational options available to participants in creative industries and lowering the cost of one industrial structure—vertical disintegration—that is particularly conducive to creative autonomy. In short, copyright facilitates vertically disintegrated and semi-integrated industry structures where creators can work substantially independently from large bureaucracies and form collaborative arrangements to actualize their projects. Such organizational autonomy, moreover, produces conditions that are particularly conducive to robust creative expression.

The constitutional objective of the copyright system is to promote progress in creative expression.<sup>322</sup> The dominant rationale underlying copyright law is that exclusive rights advance this goal by providing incentives to create.<sup>323</sup> Addressing both copyrights and patents, the Supreme Court observed that “the

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<sup>318</sup> See *infra* notes 460–72 and accompanying text.

<sup>319</sup> See *infra* Part V.

<sup>320</sup> See *infra* notes 322–28 and accompanying text.

<sup>321</sup> See *infra* text accompanying notes 329–36.

<sup>322</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>323</sup> Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 324–27 (2018); DiCola, *supra* note 14, at 337; Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1031 (2005) (“Intellectual property protection in the United States has always been about generating incentives to create.”); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 515 (2009) (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

limited grant . . . is intended to motivate the creative activity of authors and inventors by the provision of a special reward.”<sup>324</sup> This is a utilitarian and fundamentally economic conception of copyright: exclusive rights allow authors to exclude free riders and derive income from their works.<sup>325</sup> As the Court has elsewhere stated, “By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”<sup>326</sup> While moral rights, which justify copyright based on protecting an artist’s personhood or dignitary interests, find expression in limited areas of U.S. copyright law,<sup>327</sup> the overwhelming rationale for copyright protection is to provide economic incentives to create.<sup>328</sup>

This dominant utilitarian justification has attracted significant critique.<sup>329</sup> Empirically, copyright revenues received by most artists are rather meager, thus limiting their ability to incentivize creative activity.<sup>330</sup> Empirical research has also shown that most copyrighted works earn the majority of their revenues in the first five to ten years after release, thus rendering the vast majority of the copyright term (generally, the life of the author plus seventy years) inapposite for enhancing economic incentives in most cases.<sup>331</sup> More fundamentally, numerous scholars have argued that noneconomic incentives play a significant and oftentimes greater role than financial considerations in motivating creative expression. Professor Rebecca Tushnet has argued that the desire to create is often divorced from economic incentives, directly challenging economic justifications for copyright.<sup>332</sup> Professor Jeanne Fromer has documented the highly personal nature of creative expression and the compulsion to create based on one’s self-concept rather than financial motivations.<sup>333</sup> In similar fashion, legal scholar Roberta Kwall has explored the spiritual and inspirational motivations for creative expression.<sup>334</sup> Professor Amy Adler argues that the

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<sup>324</sup> Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

<sup>325</sup> See Adler, *supra* note 323, at 322; see Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use?*, 46 J. COPYRIGHT SOC’Y U.S.A. 513, 524 (1999).

<sup>326</sup> Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985); see also *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”).

<sup>327</sup> See Visual Artists Rights Act of 1990, Pub. L. No. 101-650, §§ 601–610, 104 Stat. 5128, 5128–33 (codified in scattered sections of 17 U.S.C.).

<sup>328</sup> See Lemley, *supra* note 323, at 1031.

<sup>329</sup> See, e.g., Adler, *supra* note 323, at 327–28.

<sup>330</sup> See, e.g., DiCola, *supra* note 14, at 304–05 (evaluating copyright revenues in the music industry).

<sup>331</sup> Garcia & McCrary, *supra* note 32, at 357.

<sup>332</sup> Tushnet, *supra* note 323, at 515–16.

<sup>333</sup> Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1765–71 (2012).

<sup>334</sup> See Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1947 (2006).

economic incentive justification is inapposite to visual art; in that field, copyright operates more like a “stealth system of ‘moral rights.’”<sup>335</sup> Scholars have also documented an enormous amount of creative activity proceeding outside of formal copyright enforcement, which further casts doubt on the economic justification for exclusive rights.<sup>336</sup>

While this suggests that copyright misses its mark, this Article argues that it serves another important and underappreciated function: copyright lowers the cost of creators working independently from large intermediaries in vertically disintegrated and semi-integrated industry structures. In doing so, it expands the menu of viable organizational forms available to industry participants. More pertinently, copyright facilitates a particular kind of industrial structure—vertical disintegration—that enhances organizational autonomy and is particularly conducive to creativity. Low-cost, easily obtainable copyright helps creators work as independent, autonomous agents, which entails both separation from large intermediaries and the freedom to organize their own social structures of creativity.<sup>337</sup> Put differently, if it cost \$1,000 and took six months to get a copyright, many filmmakers, recording artists, and authors would be more likely to vertically integrate with large intermediaries and experience a concomitant loss of autonomy. As Rebecca Tushnet observes, “[p]sychological and sociological concepts can do more to explain creative impulses than classical economics.”<sup>338</sup> Autonomy provides a fertile landscape for creativity, and copyright shores up autonomy.<sup>339</sup>

The remainder of this Part first explores several benefits of vertical disintegration recognized in the literature on the theory of the firm, most prominently the value of specialization. It then explores an additional benefit of vertical disintegration that this literature has largely overlooked, namely the contribution of organizational autonomy to creativity. It argues that the copyright-mediated separation of creators from large bureaucracies contributes to working conditions that are particularly conducive to producing more and better expressive content. It concludes by considering normative concerns raised by copyright-mediated vertical disintegration, including the vulnerability of independent creative workers and power imbalances between creators and intermediaries.

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<sup>335</sup> Adler, *supra* note 323, at 323.

<sup>336</sup> See, e.g., Kal Raustalia & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1689 (2006) (describing robust innovation in fashion, in which copyright enforcement plays a minimal role).

<sup>337</sup> See MERGES, *supra* note 29, at 219 (“IP rights support the viability of independent creators and small creative teams, and in so doing promote the autonomy of creative professionals.”).

<sup>338</sup> Tushnet, *supra* note 323, at 515.

<sup>339</sup> Cf. Mary Gani-Ikilama, *Copyright Theory and a Justificatory Framework for Creative Autonomy in Cultural Industries*, 6 QUEEN MARY J. INTELL. PROP. 154, 173–74 (2016) (arguing for including the concept of creative autonomy in consequentialist accounts of copyright law).

### A. Traditional Benefits of Vertical Disintegration

Copyright helps facilitate vertical disintegration, and such disintegration offers several benefits that the literature on the theory of the firm has long recognized. While this Article will complicate and refine these benefits later,<sup>340</sup> they provide a glimpse into how copyright promotes creative expression by impacting the organizational structure of creative production.

First, separating creators from intermediaries promotes specialization, which can clearly benefit creativity. Vertically disintegrated spot production in the film industry reflects “flexible specialization” in which independent entities—from directors to lighting and special effects firms—contribute their specialized competencies to film production.<sup>341</sup> For their part, studios specialize in their areas of comparative advantage, namely finance and distribution.<sup>342</sup> In similar fashion, in the recording industry, independent recording artists focus on producing music while labels leverage their “distinctive competence . . . in promotion and record distribution on a large—increasingly, international—scale.”<sup>343</sup> Likewise, in the publishing industry, writing is a very different activity from promoting and commercializing a book; separating authors from publishers allows each to specialize in their respective areas of comparative advantage. By supporting vertical disintegration, copyright enables individuals and small entities to specialize in their creative crafts.

Additionally, the theory of the firm suggests another potential benefit of vertical disintegration: the availability of “high-powered” incentives for market participants.<sup>344</sup> Applied in this context, this view holds that producers, directors, recording artists, authors, and other creative workers have greater economic incentive to perform more and better work as market participants rather than as in-house employees of a firm.<sup>345</sup> Conversely, incentives to perform may be muted when creative workers are vertically integrated into large bureaucracies.<sup>346</sup> In theory, the availability of high-powered market incentives may help explain why some creative workers favor independence from intermediaries.

While the theory of the firm predicts certain benefits from vertical disintegration for creators, it also predicts certain benefits for large

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<sup>340</sup> See *infra* Part IV.B.2.

<sup>341</sup> CAVES, *supra* note 74, at 95–97.

<sup>342</sup> *Id.* at 111; see also Kernochan, *supra* note 135, at 385.

<sup>343</sup> CAVES, *supra* note 74, at 158; Love, *supra* note 228 (“Somewhere along the way, record companies figured out that it’s a lot more profitable to control the distribution system than it is to nurture artists.”).

<sup>344</sup> See Arora & Merges, *supra* note 28, at 453.

<sup>345</sup> *Cf. id.* (noting that integration undermines the high-powered incentives of market-based contracting).

<sup>346</sup> See, e.g., OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 90 (1985); Oliver E. Williamson, *The Incentive Limits of Firms: A Comparative Institutional Assessment of Bureaucracy*, 120 WELTWIRTSCHAFTLICHES ARCHIV 736, 740 (1984) (noting that high-powered incentives apply to market transactions).

intermediaries. Related to specialization, vertical disintegration enables large intermediaries to reduce the cost and risk of content production.<sup>347</sup> Not having to maintain a permanent roster of in-house directors, recording artists, and authors (as well as related infrastructure) significantly reduces cost and risk for intermediaries and helps explain content industries' shift toward vertical disintegration.<sup>348</sup> Among other savings, relying on independent contractors allows intermediaries to avoid directly paying for employment benefits and protections.<sup>349</sup> Potential savings are particularly high in situations where intermediaries distribute content for which they provided little or no up-front financing. Predicting the commercial success of creative content is notoriously uncertain; ex ante, it is very difficult to tell what films, music, and books will be popular with audiences.<sup>350</sup> Intermediaries can reduce their risk by at least waiting to invest after independent creators have completed the content rather than during its development and production, when the ultimate form of the output is still uncertain. If the content seems promising, they can sign the creators to distribution deals; if not, the intermediaries can walk away with minimal losses.

### B. *Vertical Disintegration and the Value of Autonomy*

While the theory of the firm captures helpful insights, this Article argues that more is at stake in copyright-mediated vertical disintegration in content production. It further contends that the economic lens through which the theory of the firm views industrial organization overlooks deeper, more personal factors that help promote creative expression. This Article augments the theory of the firm by examining psychological factors that help explain how copyright-mediated vertical disintegration contributes to creative expression. Autonomy is critical to creativity, and many creators seek both separation from large, bureaucratic intermediaries and the freedom to establish their own collaborative

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<sup>347</sup> Cf. Hesmondhalgh, *Flexibility*, *supra* note 198, at 472 (“Externalizing means less control, but less risk. Conversely, internalizing production means more risk but also more control.”).

<sup>348</sup> See *id.* at 471 (discussing the relationship between product differentiation and vertical disintegration within the movie industry).

<sup>349</sup> See generally Thomas W. Joo & Leticia Saucedo, *A New Paradigm: Rideshare Drivers, Collective Labor Action, and Antitrust*, 69 BUFF. L. REV. 805, 806–07 (2021) (noting several protections that employees traditionally receive but that independent contractors do not). In some contexts, however, notably the film industry, freelancers receive benefits and protections from guilds and unions. See, e.g., Fisk, *supra* note 127, at 178.

<sup>350</sup> See Arthur S. De Vany & W. David Walls, *Motion Picture Profit, the Stable Paretian Hypothesis, and the Curse of the Superstar*, 28 J. ECON. DYNAMICS & CONTROL 1035, 1039–40 (2004) (showing that from 1984 to 1996, only 22% of feature films released in North America were profitable); Stan J. Liebowitz & Stephen Margolis, *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects*, 18 HARV. J.L. & TECH. 435, 454–55 (2005) (reporting data from 1986 indicating that 1% of trade books accounted for 60% of total sales).

structures.<sup>351</sup> By supporting the organizational separation of creators from intermediaries, copyright contributes to conditions that are particularly conducive to creativity.

### 1. *The Value of Autonomy to Creative Expression*

Autonomy is a central theme in studies of creativity.<sup>352</sup> In approaching their craft, creative workers prioritize originality, technical prowess, and “the resolution and harmony achieved in the creative act,”<sup>353</sup> all of which require substantial independence and self-direction. Research has shown that certain personality traits are heightened in creative workers, such as “independence of judgment; commitment to an idea; being unconventional; intolerance of authority, rules, and procedures; boredom with routine; a cosmopolitan orientation; a willingness to deal with uncertainty and complexity; a tendency to pace work erratically; self-motivation; and a need for autonomy.”<sup>354</sup> In one influential model of creative production, the degree of independence enjoyed by creative workers directly affected the innovativeness and diversity of their outputs.<sup>355</sup> An empirical study of students in a creative field found higher quality output from those who exercised more discretion and took more time to complete a task.<sup>356</sup>

Psychology theory underscores the importance of autonomy to creativity. Self-determination theory (SDT) is a broad theory of human motivation which, at its core, emphasizes the value of autonomous motivations (characterized by “willingness, volition, and choice”) over controlled motivations, which tend to

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<sup>351</sup> See Casey & Sawicki, *Collaboration*, *supra* note 102, at 1805 (“Virtually all creative work is collaborative or cumulative.”).

<sup>352</sup> See, e.g., Ellen Greenberg, *The Importance of Autonomy in Encouraging Creativity: Managerial Implications from a Study in Fashion Design*, 3 CREATIVITY & INNOVATION MGMT. 167, 168 (1994) (“The relationship between autonomy and creativity is critical.”); *see id.* (“[T]hose individuals who experience a great need for autonomy and low tolerance for some of the constraints of traditional bureaucracies will be less likely to commit themselves to long-term full-time organizational affiliation.”); Michael D. Mumford, *Situational Influences on Creative Achievement: Attributions or Interactions?*, 8 CREATIVITY RES. J. 405, 407 (1995) (“Creative people tend to be rather autonomous, focusing on task mastery rather than extrinsic outcomes.”); *see also* Lotte Bailyn, *Autonomy in the Industrial R&D Lab*, 24 HUM. RES. MGMT. 129, 134 (1985) (distinguishing between strategic and operational autonomy); James A. Breugh, *The Measurement of Work Autonomy*, 38 HUM. RELS. 551, 555–56 (1985) (distinguishing among autonomy in work methods, scheduling, and goals).

<sup>353</sup> CAVES, *supra* note 74, at 4.

<sup>354</sup> Greenberg, *supra* note 352, at 168.

<sup>355</sup> Paul DiMaggio, *Market Structure, the Creative Process, and Popular Culture: Toward an Organizational Reinterpretation of Mass-Culture Theory*, 11 J. POPULAR CULTURE 436, 438 (1977).

<sup>356</sup> Greenberg, *supra* note 352, at 170.

be more extrinsic in nature.<sup>357</sup> SDT dovetails with research in the social psychology of creativity finding that creativity is correlated with strong intrinsic motivations and can be diminished by extrinsic motivations such as deadlines and managerial evaluation.<sup>358</sup>

The importance of autonomy to creativity reflects the deeply personal nature of creative expression. As legal scholar Jeanne Fromer notes, creators frequently believe that their creations are linked to their self-concept.<sup>359</sup> A sensation of psychological ownership “helps people define themselves, express their self-identity to others, and maintain the continuity of the self across time.”<sup>360</sup> Artists feel strongly about controlling the contexts in which their works are used,<sup>361</sup> and it is no great leap to infer that they also care deeply about the contexts in which their works are made.

Underscoring the value of autonomy, many creative workers are willing to work long, difficult hours and sacrifice income and security for greater independence.<sup>362</sup> Creative workers tend not to be particularly responsive to traditional extrinsic rewards, such as income and promotions.<sup>363</sup> Average incomes in the arts are lower than in comparable professions, and such workers are more likely than other professionals to have second jobs, both of which suggest that artists have a relatively strong “inclination to exchange money for non-monetary rewards.”<sup>364</sup> Indeed, artists’ incomes are heavily influenced by creative workers’ willingness to sacrifice to pursue “art for art’s sake.”<sup>365</sup> In one study, brain imaging showed that artists’ brains have reduced reactions to

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<sup>357</sup> Edward L. Deci, Anja H. Olafsen & Richard M. Ryan, *Self-Determination Theory in Work Organizations: The State of a Science*, 4 ANN. REV. ORGANIZATIONAL PSYCH. & ORGANIZATIONAL BEHAV. 19, 20–21 (2017). As the authors note, extrinsic motivations can become autonomous to the degree that an individual internalizes and integrates those external motivations. *Id.* at 21.

<sup>358</sup> Teresa M. Amabile & Julianna Pillemer, *Perspectives on the Social Psychology of Creativity*, 46 J. CREATIVE BEHAV. 3, 7 (2012); *id.* at 8 (“[T]he weight of empirical evidence from a variety of domains confirms the importance of intrinsic motivation to creativity.”); see also Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity*, 86 NOTRE DAME L. REV. 1999, 2007–10 (2011).

<sup>359</sup> See Fromer, *supra* note 333, at 1766.

<sup>360</sup> Jon L. Pierce, Tatiana Kostova & Kurt T. Dirks, *The State of Psychological Ownership: Integrating and Extending a Century of Research*, 7 REV. GEN. PSYCH. 84, 89 (2003).

<sup>361</sup> Fromer, *supra* note 333, at 1768.

<sup>362</sup> HESMONDHALGH, *supra* note 122, at 167; see *id.* at 70 (“Great sacrifices have to be made to achieve even limited autonomy.”); see also Hans Abbing, *Support for Artists, in A HANDBOOK OF CULTURAL ECONOMICS*, *supra* note 78, at 437, 439.

<sup>363</sup> Greenberg, *supra* note 352, at 167; see BRUNO S. FREY, *ARTS & ECONOMICS: ANALYSIS & CULTURAL POLICY* 138–39 (2000); Mumford, *supra* note 352, at 407; Peltoniemi, *supra* note 183, at 49 (citing Richard E. Caves, *Contracts Between Arts and Commerce*, 17 J. ECON. PERSP. 73, 74 (2003)); cf. Tushnet, *supra* note 323, at 527.

<sup>364</sup> Abbing, *supra* note 362, at 438.

<sup>365</sup> CAVES, *supra* note 74, at 78.



monetary rewards and increased reactions to rejecting monetary rewards.<sup>366</sup> Psychological research even suggests that monetary rewards can inhibit creativity and self-expression.<sup>367</sup> Additionally, evidence suggests that while external rewards tend to enhance performance on more straightforward, “algorithmic” tasks, they tend to diminish performance on more creative “heuristic” tasks, which are characteristic of expressive activity.<sup>368</sup>

Many creative workers exhibit a particular aversion to commercial control of their work.<sup>369</sup> According to economist Richard Caves, artists are “disposed to forswear compromise and to resist making commitments about future acts of artistic creation or accepting limitations on them.”<sup>370</sup> Paraphrasing the views of one senior Hollywood screenwriter, “[I]t is nearly unbearable to be told how to write by someone who doesn’t write.”<sup>371</sup> In the music industry, record labels’ “commercial objectives clash[] with . . . artist[s’] sense of creative freedom.”<sup>372</sup> Numerous studies identify “endemic conflict between creators and their patrons over issues of creativity and control.”<sup>373</sup> The willingness to forgo money and the desire to avoid managerial involvement in their work illustrate the high value that creative workers place on autonomy.

This Article argues that the centrality of autonomy to creativity provides a significant avenue by which copyright promotes expressive activity. It is

<sup>366</sup> Roberto Goya-Maldonado, Maria Keil, Katja Brodmann & Oliver Gruber, *Reactivity of the Reward System in Artists During Acceptance and Rejection of Monetary Rewards*, 30 CREATIVITY RES. J. 172, 172 (2018); see also Rachel Corbett, *Why Are Artists Poor? New Research Suggests It Could Be Hardwired into Their Brain Chemistry*, ARTNET NEWS (July 2, 2018), <https://news.artnet.com/art-world/why-are-artists-poor-research-suggests-it-could-be-hardwired-1310147#:~:text=Are%20Artists%20Poor%3F-,New%20Research%20Suggests%20It%20Could%20Be%20Hardwired%20Into%20Their%20Brain,t%20react%20much%20to%20money.&text=Despite%20the%20precarious%20nature%20of,loftier%20reward%20of%20creative%20freedom> [<https://perma.cc/V2BF-EDEX>].

<sup>367</sup> See Goya-Maldonado, Keil, Brodmann & Gruber, *supra* note 366, at 172 (listing sources).

<sup>368</sup> See Kenneth O. McGraw, *The Detrimental Effects of Reward on Performance: A Literature Review and a Prediction Model*, in THE HIDDEN COSTS OF REWARD: A NEW PERSPECTIVE ON THE PSYCHOLOGY OF HUMAN MOTIVATION 33, 33–34 (Mark R. Lepper & David Greene eds., 1978); see TERESA M. AMABILE, CREATIVITY IN CONTEXT 35 (1996) (contrasting algorithmic tasks, where the “path to the solution [or goal] is clear and straightforward,” with heuristic tasks, which lack “a clear and readily identifiable path to a solution”).

<sup>369</sup> See *id.* at 16 (“[T]he inner and individualistic aspect of creative production mixes badly with the orderly, rule-driven routines of the large, bureaucratic firm.”); Judith R. Blau & William McKinley, *Ideas, Complexity, and Innovation*, 24 ADMIN. SCI. Q. 200, 210–11 (1979) (finding among architecture firms that creative performance decreased with greater structural complexity and organizational homogeneity).

<sup>370</sup> CAVES, *supra* note 74, at 4.

<sup>371</sup> Fisk, *supra* note 127, at 201; *id.* at 193 (“[Writers] position themselves as labor to maintain a sense of artistic integrity and autonomy and to distance themselves from the bad judgment made in corporate suites.”).

<sup>372</sup> Mol, Wijnberg & Carroll, *supra* note 194, at 264.

<sup>373</sup> DiMaggio, *supra* note 355, at 439; see also Scott, *supra* note 196, at 1973–74.

important to note that the autonomy that most psychological and theoretical accounts emphasize entails an individual's freedom from external control and constraint.<sup>374</sup> This Article claims not that copyrights confer such autonomy directly but that they can indirectly enhance such autonomy by increasing the *organizational* autonomy of creators. Copyright lowers the cost of vertically disintegrated structures in which creators can work independently of (and contract with) large intermediaries. As this Article has frequently acknowledged, such independence does not confer unfettered creative autonomy; a large studio, label, or publisher can exert significant control over "independent" creators via contract even without directly employing them. However, there is good reason to believe that such organizational autonomy contributes to the kind of creative autonomy that engenders robust creative expression. While an intermediary may occasionally monitor an independent contractor's work (and accept or refuse the final product), the organizational separation of that creator from the intermediary reduces the daily, onsite embeddedness and supervision characteristic of full vertical integration. More generally, while creators and intermediaries may squabble over *what* output is produced, almost by definition independent contractors enjoy greater discretion than in-house employees in determining *how* they produce it. Furthermore, large intermediaries often deliberately grant significant independence to creators precisely because doing so leads to better creative outputs, and conferring organizational autonomy to creators is an important element of such independence.<sup>375</sup>

Organizational autonomy can thus shore up creative autonomy, and copyright-mediated vertical disintegration increases organizational autonomy in several ways. First, it facilitates the separation of creative entities from large bureaucracies. In the film industry, copyright undergirds the disintegrated model of spot production in which screenwriters, composers, and special effects shops need not be in-house employees or divisions of production companies.<sup>376</sup> Independent production companies, moreover, rely on copyright-mediated transactions to maintain separation from large studios.<sup>377</sup> While recording artists in the music industry are bound to long-term contracts, they are formally separate from the record labels that distribute their music.<sup>378</sup> Authors are autonomous creative workers who operate independently from the publishers that commercialize their books.<sup>379</sup> In some ways, this industrial structure reflects a traditional split between creative and commercial spheres. As David

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<sup>374</sup> See, e.g., Gani-Ikilama, *supra* note 339, at 154 ("[T]he term 'creative autonomy' will refer to authors' absence of, or ability to grapple with, external pressure to alter their authorial direction in the context of industry interactions and contract negotiations.").

<sup>375</sup> See Stahl, *supra* note 126, at 674; Peltoniemi, *supra* note 183, at 48.

<sup>376</sup> See *supra* notes 167–71 and accompanying text.

<sup>377</sup> See *id.*

<sup>378</sup> See Scott, *supra* note 196, at 1968–69.

<sup>379</sup> Cf. Tim Wu, *On Copyright's Authorship Policy*, 2008 U. CHI. LEGAL F. 335, 335 (2008).

Hesmondhalgh observes, “one of the defining features of the complex professional era of cultural production is this unusual degree of autonomy, which is carried over from preceding eras where artists, authors and composers worked independently of businesses.”<sup>380</sup>

Second, copyright-mediated vertical disintegration and semi-integration also increase autonomy by allowing creators to form their own preferred social structures of creativity.<sup>381</sup> As Carol A. Mockros and Mihaly Csikszentmihalyi observe, creative individuals seek autonomy but also derive great value from engagement and collaboration with others.<sup>382</sup> Collaborations can facilitate synergies that enhance individual creative capacity.<sup>383</sup> In the film industry, the works-made-for-hire doctrine mitigates challenges of team production and enables producers to form preferred collaborative organizations by hiring a particular cast and crew for individual projects.<sup>384</sup> Furthermore, copyrights also enable the existence of small, independent film production companies, which represent another self-determined social structure of creativity.<sup>385</sup> In the music industry, copyright is helpful in allowing recording artists to assemble freelance musicians, backup singers, producers, and other creative and technical staff to work on their recordings.<sup>386</sup> As mentioned, the preferred organizational form for authors is often working solo, which copyright helps facilitate.

## 2. Revisiting Traditional Benefits of Vertical Disintegration in Light of Creative Autonomy

The value of copyright-mediated organizational autonomy adds a new gloss to traditional benefits of vertical disintegration recognized in the literature on the theory of the firm. While specialization no doubt represents a benefit of vertical disintegration, the concept of autonomy entails a broader concept than traditional specialization. The theory of the firm contemplates specialization in terms of economic efficiency, particularly the mastery of a limited set of tasks through repetition and focus.<sup>387</sup> Autonomy, however, entails deeper, psychic

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<sup>380</sup> HESMONDHALGH, *supra* note 122, at 55.

<sup>381</sup> See MERGES, *supra* note 29, at 203 (“[T]he abstract goal of individual autonomy translates into a practical preference for independent workers and ‘small creative teams,’ usually smaller companies.”).

<sup>382</sup> Carol A. Mockros & Mihaly Csikszentmihalyi, *The Social Construction of Creative Lives*, in THE SYSTEMS MODEL OF CREATIVITY: THE COLLECTED WORKS OF MIHALY CSIKSZENTMIHALYI 127, 151 (2014).

<sup>383</sup> Mandel, *supra* note 358, at 2015–16.

<sup>384</sup> See *supra* notes 172–78 and accompanying text.

<sup>385</sup> HESMONDHALGH, *supra* note 122, at 60 (“As small companies proliferated, more and more importance was attached to them as sites of creative independence, and this reflected anxieties about the negative effects of big, bureaucratic organisations on cultural production.”).

<sup>386</sup> See Scott, *supra* note 196, at 1968–69.

<sup>387</sup> See Merges, *Autonomy*, *supra* note 100, at 149.

values that drive creative expression.<sup>388</sup> Creative workers often value autonomy precisely because it enables wide-ranging experimentation and exploration of new artistic forms rather than rote repetition.<sup>389</sup> Working independently from large bureaucracies can support such experimentation, thus contributing to a fuller sense of autonomy.

According to the theory of the firm, another traditional benefit of vertical disintegration is the proximity of market participants to high-powered incentives.<sup>390</sup> While the ability to capture more financial upside from their work may motivate some entities to pursue independence, psychological accounts suggest that many creative workers are not particularly responsive to economic incentives.<sup>391</sup> However, studies indicate that creators generally highly value autonomy, which may play a greater role in their embrace of vertically disintegrated industry structures.<sup>392</sup>

The theory of the firm also suggests that cost and risk mitigation help explain why large intermediaries favor outsourcing production to independent creators. Vertical disintegration certainly allows intermediaries to reduce fixed costs, such as by eliminating the need to maintain elaborate production facilities. However, while cost and risk mitigation might explain why large intermediaries favor vertical disintegration, much of the impetus for disintegration comes from creative workers themselves. The value of organizational autonomy, which copyright renders more attainable, helps explain why creative workers themselves often push for vertical disintegration and greater independence.<sup>393</sup> In sum, the importance of copyright-mediated organizational autonomy casts new light on the traditional benefits of vertical disintegration.

### *3. Organizational Autonomy as a Facilitator of More Robust Creative Output*

The role of copyright in supporting vertical disintegration adds a new dimension to its contributions to creative expression. This Article argues that aside from its other effects on creativity, copyright indirectly promotes creative expression by lowering the cost of industrial structures that confer meaningful organizational autonomy to creators. In so doing, copyright contributes to

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<sup>388</sup> See Fromer, *supra* note 333, at 1766.

<sup>389</sup> Cf. Greenfield & Osborn, *supra* note 139, at 125 (“If George Michael wished to alter his musical style and branch out into new perhaps more eclectic areas as befitted his perception of himself as a ‘serious artiste,’ Sony would become concerned about the consequential effect on their sales and indeed their investment.”).

<sup>390</sup> Merges, *Autonomy*, *supra* note 100, at 150.

<sup>391</sup> See *supra* notes 362–65 and accompanying text.

<sup>392</sup> Cf. Merges, *Autonomy*, *supra* note 100, at 150 (“[I]ndependent [workers] will work harder and with greater focus.”).

<sup>393</sup> See Ashley Cullins, *Hollywood Faces “Devastating” Costs from California Bill Targeting Gig Economy*, HOLLYWOOD REP. (June 19, 2019), <https://www.hollywoodreporter.com/movies/movie-news/hollywood-faces-devastating-costs-state-bill-targeting-uber-1219575/> [<https://perma.cc/3KPS-E47C>].

working conditions most conducive to robust expression. It further argues that beyond establishing foundational conditions that foster creativity, greater autonomy leads to more and better creative content.

Psychological research suggests that work environments, by impacting worker autonomy, can enhance performance and creativity. SDT posits that work environments shape individual motivation through influencing people's "basic psychological needs for competence, relatedness, and autonomy."<sup>394</sup> Research shows that work environments satisfying these psychological needs facilitate enhanced performance, particularly on "heuristic" activities<sup>395</sup> such as highly creative work.<sup>396</sup> SDT predicts that more autonomous forms of motivation will lead to "greater persistence, performance quality, and well-being over time than will controlled forms."<sup>397</sup> Relatedly, the influential "componential theory of creativity" holds that creativity is impacted not only by individual-level components but also by social environments.<sup>398</sup> Indeed, one's social environment influences individual-level components, such as domain-relevant skills, creativity-relevant skills, and intrinsic task motivation.<sup>399</sup> Here again, one's work environment can play an important role in enhancing motivation and creativity.

It is important to note that these psychological findings only provide inferential support for the proposition that working independently or for a small entity improves creative output. Several of these studies focus on the impact of management style (e.g., supporting more intrinsic versus extrinsic kinds of motivation) on performance;<sup>400</sup> as this Article has noted, independent contractors and small-entity workers can have controlling, creativity-dampening bosses, just like workers in large bureaucracies.<sup>401</sup> However, it seems reasonable to posit that working independently or for a small entity would, in general, provide greater support for workers' competence, relatedness, and autonomy than working for a large bureaucracy. To the extent that such workers assume greater responsibility for organizing their tasks and more discretion in defining projects, such organizational autonomy would likely lead to higher motivation and better creative outputs.

Indeed, evidence suggests that vertically disintegrated and semi-integrated industry structures—which copyright helps facilitate—generate higher quality

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<sup>394</sup> Deci, Olafsen & Ryan, *supra* note 357, at 23.

<sup>395</sup> *Id.*

<sup>396</sup> See Rein De Cooman, Dave Stynen, Anja Van den Broeck, Luc Sels & Hans De Witte, *How Job Characteristics Relate to Need Satisfaction and Autonomous Motivation: Implications for Work Effort*, 43 J. APPLIED SOC. PSYCH. 1342, 1348 (2013) (finding that workers who experienced greater psychological need satisfaction on the job featured higher levels of autonomous motivation and effort).

<sup>397</sup> Deci, Olafsen & Ryan, *supra* note 357, at 22.

<sup>398</sup> Amabile & Pillemer, *supra* note 358, at 9–10.

<sup>399</sup> See *id.* at 10.

<sup>400</sup> See, e.g., Deci, Olafsen & Ryan, *supra* note 357, at 23–25.

<sup>401</sup> See generally *supra* Part III.

creative expression. Traditional utilitarian accounts of copyright focus on increasing the total amount of creative expression: this view is “primarily concerned with the size of the creative pie: bigger is better.”<sup>402</sup> Along these lines, copyright law is famously averse to judging the aesthetic quality of creative output, leaving such considerations to market preferences and individual taste.<sup>403</sup> While estimations of artistic merit must always be made with caution, commentators suggest that due to the more innovative nature of individuals and small firms relative to large bureaucracies, a creative ecosystem featuring independent production companies, screenwriters, directors, recording artists, and authors is likely to be more innovative than one in which these creative entities are vertically integrated into large intermediaries.

Across content industries, “many of the most important cultural innovations have come from small firms and independent producers.”<sup>404</sup> In the film industry, vertical disintegration led to the rise of independent films and “a broadening of films’ subject matter and style.”<sup>405</sup> Robert Merges observes that “films are much better when made” via vertically disintegrated spot production,<sup>406</sup> which copyright helps facilitate. Perhaps illustrating this insight, the producers of *Crazy Rich Asians* sought to retain the author’s original vision by producing the movie outside of the established studio system.<sup>407</sup> In the history of music, scholars suggest that the expansion of music copyright allowed independent composers to break away from patrons and produce more and better music.<sup>408</sup> Independent authors have long produced books, and it is difficult to see how the quality of books would increase if publishers directly employed authors as in-house employees.

In contradistinction to the highly innovative nature of individuals and small entities, the incentives and orientation of large intermediaries can temper creativity. Broadly speaking, “[g]atekeepers will strive to offer products that are as standardized and homogenized as possible. They succeed at this task especially when they manage to expand their control over the entire value-added chain.”<sup>409</sup> As a general matter, major studios, which still produce some movies

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<sup>402</sup> Van Houweling, *Distributive*, *supra* note 114, at 1539.

<sup>403</sup> See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455, 482–83.

<sup>404</sup> DiMaggio, *supra* note 355, at 440.

<sup>405</sup> CAVES, *supra* note 74, at 100.

<sup>406</sup> Merges, *Autonomy*, *supra* note 100, at 155.

<sup>407</sup> Faughnder, *supra* note 6.

<sup>408</sup> Michela Giorcelli & Petra Moser, *Copyrights and Creativity: Evidence from Italian Opera in the Napoleonic Age*, 128 J. POL. ECON. 4163, 4166, 4180 (2020) (finding that introducing copyrights in Italy led to a significant increase in the number of new operas and an increase in the quality of new operas). See generally F.M. SCHERER, QUARTER NOTES AND BANK NOTES: THE ECONOMICS OF MUSIC COMPOSITION IN THE EIGHTEENTH AND NINETEENTH CENTURIES (2004).

<sup>409</sup> Tschmuck, *Copyright*, *supra* note 204, at 253.

in-house, focus on high-concept films aimed at mass audiences.<sup>410</sup> At the extreme, large intermediaries have incentives to dampen innovative content to reduce competition with existing product offerings.<sup>411</sup>

Indeed, the creativity benefits of vertical disintegration and semi-integration are evident in large intermediaries' embrace of these structures. Large intermediaries frequently subcontract to small and medium-sized firms, which are "potentially more dynamic and able to innovate."<sup>412</sup> Intermediaries that obtain creative inputs from a wide array of outside sources tend to have greater expressive diversity in their offerings.<sup>413</sup> Indeed, intermediaries have significant financial incentive to encourage vertical disintegration. Vertically integrated, in-house production "is widely felt to be inimical to the kinds of creativity necessary to make profits."<sup>414</sup> In some contexts, audience perception of artists' authenticity and autonomy enhances their commercial appeal.<sup>415</sup> Given the need for originality and novelty, intermediaries afford creators significant autonomy.<sup>416</sup> This impulse can lead to outright vertical disintegration or granting greater autonomy to internal creative entities, thus reflecting semi-integration.<sup>417</sup> To foster better creative work, record labels effectively "cede control of production to musicians," a model that extends to other creative fields as well.<sup>418</sup>

In addition to facilitating more robust creativity, another benefit of vertical disintegration and semi-integration—which copyright helps support—is the psychic value of autonomy itself. Creators highly prize autonomy, and the ability to work as freelancers and self-organize into preferred social structures (or work solo) enhances their utility.<sup>419</sup> Historically, many creative workers were dependent on wealthy patrons and chafed at their control.<sup>420</sup> As Merges observes, the autonomy enjoyed by independent workers has value apart from its contribution to more or better content.<sup>421</sup>

As in other areas, it is important to qualify the argument that copyright promotes creative expression by enabling organizational structures most

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<sup>410</sup> CAVES, *supra* note 74, at 101.

<sup>411</sup> DiMaggio, *supra* note 355, at 441.

<sup>412</sup> HESMONDHALGH, *supra* note 122, at 151.

<sup>413</sup> See Netanel, *supra* note 29, at 1916.

<sup>414</sup> HESMONDHALGH, *supra* note 122, at 56.

<sup>415</sup> See Stahl, *supra* note 126, at 674; Peltoniemi, *supra* note 183, at 48.

<sup>416</sup> HESMONDHALGH, *supra* note 122, at 55; Peltoniemi, *supra* note 183, at 48.

<sup>417</sup> Cf. Greenberg, *supra* note 352, at 167 (noting that many corporate managers seek to grant more independence to creative workers).

<sup>418</sup> HESMONDHALGH, *supra* note 122, at 151.

<sup>419</sup> See Merges, *Autonomy*, *supra* note 100, at 149 ("Independent creative people, un beholden to politicized patrons or industrial bureaucracies, have more control over their work. This is generally thought to be a boon to many types of employment; it is easy to see why it might be especially true of creative types of work.").

<sup>420</sup> *Id.* at 146.

<sup>421</sup> *Id.* at 150–53; *id.* at 153 ("Increased autonomy and greater authorial dignity may provide some social value apart from whatever efficiency gains might result.").

conducive to autonomy. As noted, while copyright helps facilitate the separation of creators from large intermediaries, even “independent” creators and small entities often maintain organizational ties with distributors of their work. Additionally, copyrights can facilitate some measure of organizational autonomy—which aids creative efforts—but it does not guarantee full creative or financial autonomy. The contractual relationships between “independent” creative workers and downstream intermediaries can significantly curtail creative autonomy.<sup>422</sup> Additionally, while creators enjoy more organizational autonomy as market participants rather than in-house employees, the market also constrains creative autonomy. After all, the market may not provide substantial rewards for alternative, challenging, or underrepresented content.

That being said, the actual context and circumstances of creative production matter. Even when an intermediary exerts creative control over a project, there is a difference between exercising such control via contract and directly supervising daily work on that project in-house.<sup>423</sup> Furthermore, as indicated above, intermediaries themselves are often quite willing to afford greater autonomy to creative workers precisely to exploit the superior outputs such autonomy facilitates.<sup>424</sup>

### *C. Normative Concerns: Distributive Vulnerability and Power Asymmetries*

While conferring several benefits, the role of copyright in supporting vertical disintegration—and thereby enhancing creative expression—raises normative concerns as well. As noted, copyright-mediated vertical disintegration provides some measure of organizational autonomy to creative workers, but large, monied intermediaries can still constrain creative autonomy.<sup>425</sup> Furthermore, this Part explores how copyright-based independence and freelancing raise troubling distributive issues for creative workers. This is difficult terrain to navigate, for as just discussed, a copyright-mediated system of vertical disintegration also enhances autonomy, which creators value a great deal.<sup>426</sup> However, as this Article has frequently highlighted, the contracts that bind creators to intermediaries are often heavily skewed in favor of intermediaries.<sup>427</sup> There are pervasive themes of labor exploitation in creative industries. While such concerns may be mitigated in film production due to strong unions that collectively bargain on behalf of

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<sup>422</sup> See Peltoniemi, *supra* note 183, at 48.

<sup>423</sup> See, e.g., Walt Disney Pictures and Television and Pixar, *supra* note 190, at 2, 4 (stipulating that Disney and Pixar will share creative decision making in a co-production agreement but that Pixar will control production).

<sup>424</sup> See *supra* notes 412–18 and accompanying text.

<sup>425</sup> See *supra* notes 285–87 and accompanying text.

<sup>426</sup> See *supra* Part IV.B.2.

<sup>427</sup> See *supra* notes 218–24, 273–75 and accompanying text.



creators,<sup>428</sup> labor exploitation is particularly relevant to music<sup>429</sup> and publishing.<sup>430</sup>

For recording artists, the bargain appears particularly bad. Contracts in the recording industry are often heavily one-sided.<sup>431</sup> As noted above, this bargaining asymmetry can lead record labels to exert significant creative and financial control over recording artists, thus diminishing autonomy.<sup>432</sup> Stories of one-sided contracts pervade the industry. For instance, hit R&B group TLC received less than 2% of the \$175 million from sales of their CDs,<sup>433</sup> and Toni Braxton received less than \$0.35 per album from \$188 million in CD sales.<sup>434</sup> These are, of course, marquee artists whose returns vastly outstrip those of most recording artists. A wide literature has explored how copyright doctrine and related music-industry practices have particularly disadvantaged artists of color.<sup>435</sup> Additionally, unique features of the music landscape, including compulsory licenses for musical compositions and sound recordings, transfer power to intermediaries in ways that do not apply to other creative fields.<sup>436</sup> The imbalance of power between creators and intermediaries,<sup>437</sup> which can diminish economic returns and working conditions for the former, comprises an important element of any normative assessment of copyright-mediated vertical disintegration and semi-integration.

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<sup>428</sup> Peltoniemi, *supra* note 183, at 54.

<sup>429</sup> See, e.g., K.J. Greene, *Intellectual Property Expansion: The Good, the Bad, and the Right of Publicity*, 11 CHAP. L. REV. 521, 534–35 (2008). As in all contractual relationships, monitoring and enforcement costs may give parties more latitude than the text of an agreement provides. Cf. Kernochan, *supra* note 135, at 445–46 (noting that while film industry contracts typically grant significant creative control to studios or producers, creative contributors may in practice enjoy substantial autonomy).

<sup>430</sup> See Kernochan, *supra* note 135, at 448 (noting that book publishers leveraged their superior bargaining power and the naiveté of authors to obtain rights for electronic publication without royalties); see also O'Rourke, Tasini, *supra* note 280, at 605–06 (exploring themes of labor exploitation in journalism).

<sup>431</sup> See HESMONDHALGH, *supra* note 122, at 168; Tussey, *supra* note 161, at 238. See generally Love, *supra* note 228.

<sup>432</sup> Greenfield & Osborn, *supra* note 139, at 117–18.

<sup>433</sup> Love, *supra* note 228.

<sup>434</sup> *Id.*

<sup>435</sup> See, e.g., K.J. Greene, “Copynorms,” *Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1182 (2008); Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573, 598–99 (2010).

<sup>436</sup> Aloe Blacc, Irina D. Manta & David S. Olson, *A Sustainable Music Industry for the 21st Century*, 101 CORNELL L. REV. ONLINE 39, 39 (2016); cf. Merges, *Property*, *supra* note 48, at 1247 (associating property rights with “the right to say what happens to an asset: who gets to use it and on what terms”); see Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519, 2521–22 (2019) (critiquing the Music Modernization Act as reflecting rent-seeking by distributors that will not necessarily translate to more money for authors and artists).

<sup>437</sup> Tussey, *supra* note 161, at 238.

More generally, simply having a copyright does not mean that a creative worker will extract a significant proportion of revenue from his or her work. This is especially the case when a downstream intermediary wields market power or brings significant value to a deal.<sup>438</sup> Ironically, the high value that creative workers place on creative expression and autonomy leads them to subsidize large intermediaries: “Because creators desperately want to create, intermediaries can offer a lower price, and creators will accept a lower price, than they would if [economic] incentives mattered more.”<sup>439</sup> Although many creative workers prefer the autonomy of such contractual arrangements, their preferences may be informed by biases overestimating the commercial value of their works.<sup>440</sup>

Turning to prescriptive implications, while intervening in such private arrangements smacks of paternalism, Congress has done just that by establishing terminations of transfers to address inequitable bargains between authors and intermediaries.<sup>441</sup> Furthermore, California—a significant home to several creative industries—has recently enacted a “gig economy” law that reclassifies many independent contractors as employees, thus conferring on them significant benefits and protections.<sup>442</sup> The law has attracted criticism for raising labor costs and harming creative industries, which rely significantly on independent contractors.<sup>443</sup> Indeed, the California legislature has adopted carve-outs that allow most music professionals to utilize an older test to determine employment classifications.<sup>444</sup> This Article’s analysis suggests the merits of greater financial protections for independent creative workers who enjoy significant creative autonomy but who remain economically vulnerable.

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<sup>438</sup> See O’Rourke, Tasini, *supra* note 280, at 605–06.

<sup>439</sup> Tushnet, *supra* note 323, at 545.

<sup>440</sup> O’Rourke, *Author-Publisher*, *supra* note 248, at 437. Such biases may inform creative workers’ preference to share in the risk of commercialization by accepting royalties instead of taking a lump-sum payment for outright assignment of their work to an intermediary. See Cornish, *supra* note 273, at 4 (quoting RICHARD WATT, COPYRIGHT AND ECONOMIC THEORY: FRIENDS OR FOES? 88–89 (2000)).

<sup>441</sup> 17 U.S.C. § 203; H.R. REP. NO. 94-1476, at 124 (1976) (“A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.”).

<sup>442</sup> Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (enacted); Conger & Scheiber, *supra* note 126.

<sup>443</sup> Cullins, *supra* note 393; Bill Hochberg, *The Music Biz Will Split from California if the New ‘Gig Law’ Sticks, Warn Artist and Label Groups*, FORBES (Sept. 11, 2019), <https://www.forbes.com/sites/williamhochberg/2019/09/11/the-music-biz-will-flee-california-if-the-new-gig-economy-law-sticks-warn-artist-and-label-groups/#6bbd1a912cbe> (on file with the *Ohio State Law Journal*); Jason Boog, *Publishers Brace for California Labor Law Changes*, PUBLISHERS WEEKLY (Dec. 17, 2019), <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/81992-publishers-brace-for-california-labor-law-changes.html> [<https://perma.cc/2KC5-N78E>].

<sup>444</sup> Jem Aswad, *Musicians to Be Exempt from California ‘Gig Economy’ Assembly Bill 5*, VARIETY (Apr. 17, 2020), <https://variety.com/2020/music/news/california-gig-economy-assembly-bill-5-ab5-musicians-1234583320/> [<https://perma.cc/DG43-CU6S>].

These distributive considerations lead to a final reflection on the concept of autonomy. This Article has argued that copyright supports vertically disintegrated and semi-integrated value chains, which enhance artistic autonomy and promote creative expression. But while autonomy can entail independence and self-determination, it can also entail isolation and vulnerability. Although copyright-mediated, contract-based vertical disintegration may be good for creativity, it may not always be so good for creators.

## V. THE DIGITAL REVOLUTION: AUTONOMY, COPYRIGHT, AND NEW FORMS OF VERTICAL INTEGRATION

While this Article has examined the industrial organization of creative industries—and copyright’s influence on such organization—this landscape is undergoing significant change. This Article has referred at times to the revolution in digital technology—particularly digital distribution—sweeping creative industries, and this Part turns centrally to this development. It explores the implications of low-cost digitization and internet-based distribution for vertical disintegration, autonomy, and copyright. It observes that the current model of content production and distribution, which is based on large studios, labels, and publishers, is adapting to the digital environment and will continue to play a significant role for the foreseeable future. Nevertheless, the ground is shifting, and this Part focuses on what is to come. It argues that with the rise of digital distribution, low-cost, easily obtainable copyright will continue to play a significant role in promoting autonomy for creators.<sup>445</sup> Ironically, however, it will do so not by facilitating vertical disintegration, but by supporting top-down vertical integration in which upstream creators bypass traditional intermediaries and distribute creative works directly to audiences.

Before turning to digital distribution, it is worth noting that advances in digital *production* technology have contributed to vertical disintegration between creators and traditional intermediaries. Falling costs of digital production have freed creators from relying on studios and labels for expensive equipment and expertise. In the film industry, for example, advances in inexpensive recording and editing technology allowed Kevin Smith to make *Clerks* for \$27,000.<sup>446</sup> Similarly, “the costs of music production have decreased dramatically in the past few years. Thus, it has become possible to make a marketable music production literally in a living room.”<sup>447</sup> Writing books has always required very little equipment. Due to low-cost, digital production,

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<sup>445</sup> Cf. Merges, *Property*, *supra* note 48, at 1240 (noting that the “traditional virtues of individual property ownership—autonomy, decentralization, flexibility—are in no way obsolete in the digital era; they are indeed just as important and useful as ever”).

<sup>446</sup> Kernochan, *supra* note 135, at 388; *see also* Van Houweling, *Distributive*, *supra* note 114, at 1536 (discussing falling production costs due to digital technology).

<sup>447</sup> Tschmuck, *Copyright*, *supra* note 204, at 254; *see* Hesmondhalgh, *supra* note 198, at 477; Mol, Wijnberg & Carroll, *supra* note 194, at 265.

creators have less need for the resources, equipment, and infrastructure of major intermediaries, further facilitating their organizational separation from studios, labels, and publishers.

Along with digital production, the related rise of digital distribution has transformed creative industries. Numerous digital distributors across the film (e.g., Amazon, Apple, Google, Hulu, Netflix), music (e.g., Amazon, Apple, Google, Pandora, Spotify), and publishing (e.g., Amazon) industries have dramatically changed how consumers access content.<sup>448</sup> Although the emergence of internet distribution raised the promise of disintermediation (connecting artists directly to audiences), large intermediaries have adapted to the new digital environment and have in many ways benefited from digital distribution.<sup>449</sup> Major Hollywood studios have aggregated their content for distribution on online platforms,<sup>450</sup> large record labels have seen revenues surge from digital sales,<sup>451</sup> and leading publishers have deals with the likes of Amazon to distribute e-books.<sup>452</sup> To reduce their reliance on large intermediaries, digital distributors such as Netflix, Spotify, and Amazon have vertically integrated backward by amassing original content and becoming studios, labels, and publishers themselves.<sup>453</sup> In response, traditional intermediaries have vertically integrated forward to digitally distribute their own content, as seen, for example, in Disney's streaming platform, Disney+.<sup>454</sup> Apple has further advanced vertical

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<sup>448</sup> See, e.g., Roderik Smits, *Film Distribution: A Changing Business*, in DVD, BLU-RAY & BEYOND 115, 116 (Jonathan Wroot & Andy Willis eds., 2017) (noting predictions of significant growth in the online film market).

<sup>449</sup> See Asay, *supra* note 95, at 211; Lucas Shaw, *The Streaming Revolution*, BLOOMBERG QUINT (Mar. 6, 2018), <https://www.bloombergquint.com/quicktakes/the-streaming-revolution> [<https://perma.cc/GD5Q-QEYG>] (noting increasing revenues from streaming in the recorded music industry).

<sup>450</sup> Smits, *supra* note 448, at 121.

<sup>451</sup> Angelina Rascouet & Lucas Shaw, *The Internet Saved the Record Labels*, BLOOMBERG BUSINESSWEEK (Feb. 5, 2019), <https://www.bloomberg.com/news/articles/2019-02-05/vivendi-may-sell-universal-now-a-music-streaming-behemoth> [<https://perma.cc/7FAY-4CAP>]; see also Warner Music Grp. Corp., *supra* note 201, at 8 (indicating that Warner has deals with Amazon, Apple, Deezer, KKBox, Spotify, Telefonica, Tencent Music Entertainment Group, YouTube, and Google, among others).

<sup>452</sup> See, e.g., Jeffrey A. Trachtenberg, *Amazon, Penguin Random House Agree to New Deal on Book Sales*, WALL ST. J. (June 18, 2015), <https://www.wsj.com/articles/amazon-penguin-random-house-agree-to-new-deal-on-book-sales-1434644767> [<https://perma.cc/M57S-N4UA>]. Some digital distributors have resisted partnering with large intermediaries or driven hard bargains as a condition of access. See Asay, *supra* note 95, at 236–37 (describing Amazon's dispute with publisher Hachette).

<sup>453</sup> See Dan Kopf, *Why Spotify Wants to Be Like Netflix Now*, YAHOO! (Feb. 6, 2019), <https://www.yahoo.com/now/why-spotify-wants-netflix-now-224740587.html> [<https://perma.cc/W9FK-J29H>].

<sup>454</sup> See Tom Nunan, *5 Reasons Why Disney+ Is Breaking Records While Making History*, FORBES (Aug. 5, 2020), <https://www.forbes.com/sites/tomnunan/2020/08/05/5-reasons-why-disney-plus-is-breaking-records-while-making-history/?sh=34f3cb4c2935> (on file with the *Ohio State Law Journal*).

integration by amassing content, distributing it, and selling devices for playing it.<sup>455</sup>

Importantly, this downstream vertical integration has not materially altered vertical disintegration (and semi-integration) in upstream content production. Independent production companies, recording artists, and authors contract with downstream intermediaries, whether they are old-guard studios, labels, or publishers or new digital distributors like Netflix.<sup>456</sup> As such, the analysis developed in this Article tracing the copyright-mediated relationship between upstream creators and downstream intermediaries will continue to have purchase for quite some time.

The newest generation of digital distribution, however, involves a more fundamental change: self-distribution of content by creators to audiences.<sup>457</sup> This is a new form of vertical integration in upstream content generation. Instead of the “bottom-up” vertical integration where intermediaries employ in-house creative talent—as in the Hollywood studio system—this represents “top-down” integration in which creators are bypassing intermediaries and becoming distributors themselves.<sup>458</sup> Filmmakers have long posted movies on YouTube and Vimeo,<sup>459</sup> and they now utilize platforms catering to self-releases such as Amazon’s Prime Video Direct.<sup>460</sup> Self-releases have been more prevalent in the

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<sup>455</sup> See Ani Bundel, *Apple TV Plus Joins Disney+ in the Streaming Wars with Mediocre Shows and Lots to Prove*, NBC NEWS (Nov. 1, 2019), <https://www.nbcnews.com/think/opinion/apple-tv-plus-joins-disney-streaming-wars-mediocre-shows-lots-ncna1074946> [<https://perma.cc/6XGZ-BTGA>].

<sup>456</sup> See, e.g., Tim Dams, *‘Baby Driver’ Producer Nira Park, Director Edgar Wright Launch Complete Fiction with Netflix Projects*, VARIETY (May 19, 2020), <https://variety.com/2020/film/global/baby-driver-nira-park-wright-complete-fiction-1234610624/> [<https://perma.cc/9SWA-PEYA>] (reporting distribution deal between Netflix and a new production company involving Edgar Wright).

<sup>457</sup> Some commentators distinguish between direct distribution, in which producers work with distribution consultants and other gatekeepers but not traditional intermediaries, and self-distribution, in which producers forgo such gatekeepers and distribute directly to audiences, perhaps over technological platforms. See, e.g., Smits, *supra* note 448, at 124–25.

<sup>458</sup> Compare CAVES, *supra* note 74, at 88–90 (explaining how Hollywood studios historically employed their own talent), with Smits, *supra* note 448, at 125 (discussing the prominence of self-distribution due to technological innovation). Ironically, this development may parallel the evolution of one major Hollywood studio: Disney. The company originated as the Disney Brothers Cartoon Studio, which produced original content. Chris Mullen, *Mickey’s Follies: Walt’s Distribution Deals, Defeats, and Decisions*, WALT DISNEY FAM. MUSEUM BLOG (Feb. 19, 2017), <https://www.waltdisney.org/blog/mickeys-follies-walts-distribution-deals-defeats-and-decisions> [<https://perma.cc/544X-MWCC>]. Frustrated by one-sided distribution deals, the company eventually vertically integrated forward into distribution in the 1950s. *Id.*

<sup>459</sup> Smits, *supra* note 448, at 125.

<sup>460</sup> *Prime Video Direct*, AMAZON, <https://videodirect.amazon.com/home/landing> [<https://perma.cc/QDP8-CZRK>].

recording industry.<sup>461</sup> In some cases, artists are relying on established platforms like YouTube<sup>462</sup> and Spotify.<sup>463</sup> Furthermore “producer-oriented” services such as SoundCloud and Bandcamp allow recording artists to bypass traditional record labels and distribute music directly to audiences.<sup>464</sup> Jay-Z and other musicians purchased streaming service Tidal to directly control music distribution.<sup>465</sup> In other cases, artists are even self-releasing music on their own websites.<sup>466</sup> Additionally, independent labels are increasingly bypassing distribution by major labels and releasing music directly via the internet.<sup>467</sup> In publishing, the emergence of online services like Amazon’s Kindle Direct Publishing, Smashwords, and Lulu has driven a significant increase in self-publishing.<sup>468</sup> As of 2015, the number of new self-published books exceeded the number of traditional books released.<sup>469</sup>

Among other implications, top-down vertical integration of production and distribution promises greater autonomy for creators. In the film industry, “[t]he entrepreneurial logic behind this model is that producers acquire a high degree of autonomy over distribution and a bigger share of revenue flows back to producers if distributors are cut out of the distribution process.”<sup>470</sup> Over a decade ago in the music industry, spurred by low-cost internet distribution, marquee artists like Trent Reznor, the Beastie Boys, and Barenaked Ladies “created their own artist-run labels and reaped significant rewards by keeping a larger share of their revenue.”<sup>471</sup> Similarly, authors engaged in self-publishing are no longer beholden to the editorial strictures of traditional publishers.

Low-cost, easily obtained, assignable copyright will continue to play a crucial role in this new kind of top-down vertical integration. Freelance filmmakers, recording artists, and authors automatically obtain copyright

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<sup>461</sup> Waldfoegel, *supra* note 195, at 430 (reporting approximately 1,000 self-released recordings in 2010).

<sup>462</sup> Asay, *supra* note 95, at 202–03.

<sup>463</sup> Amy X. Wang, *Spotify Now Lets Artists Bypass Labels and Upload Their Own Music*, ROLLING STONE (Sept. 20, 2018), <https://www.rollingstone.com/music/music-news/spotify-artists-direct-music-upload-726352/> [<https://perma.cc/BSL6-2SQU>].

<sup>464</sup> David Hesmondhalgh, Ellis Jones & Andreas Rauh, *SoundCloud and Bandcamp as Alternative Music Platforms*, 5 SOC. MEDIA + SOC’Y 1, 2 (2019).

<sup>465</sup> Blacc, Manta & Olson, *supra* note 436, at 39.

<sup>466</sup> Waldfoegel, *supra* note 195, at 415 (quoting STEVE KNOPPER, APPETITE FOR SELF-DESTRUCTION: THE SPECTACULAR CRASH OF THE RECORD INDUSTRY IN THE DIGITAL AGE 246 (2009)). A prominent example is Radiohead’s distribution of an album online for a voluntary payment from users. *See id.*

<sup>467</sup> *See id.* at 410.

<sup>468</sup> Waldfoegel & Reimers, *supra* note 268, at 48; Asay, *supra* note 95, at 203 (addressing Amazon’s self-publishing services).

<sup>469</sup> *See* Waldfoegel & Reimers, *supra* note 268, at 48, 55 (noting that self-published books “have rapidly become a significant share of total sales”).

<sup>470</sup> Smits, *supra* note 451, at 127.

<sup>471</sup> Dealbook, *Artists Find Backers as Labels Wane*, N.Y. TIMES: DEALBOOK (July 22, 2009), <https://dealbook.nytimes.com/2009/07/22/artists-find-backers-as-labels-wane/> (on file with the *Ohio State Law Journal*).

protection upon fixing their works in a tangible medium of expression.<sup>472</sup> As such, creators easily acquire exclusive rights in their works, which allows them to control distribution.<sup>473</sup> From one perspective, this approach enhances organizational autonomy even more than the vertical disintegration of mainstream content industries. By integrating production and distribution, creators are less beholden to traditional intermediaries that can control their upstream activities. Furthermore, they retain more of the financial upside if their works are commercially successful.<sup>474</sup>

While copyright-mediated, top-down vertical integration has the potential to enhance autonomy for creator-distributors, it is far from guaranteed. Not all creators want to be distributors, and many will opt for the traditional division of labor between themselves and a large studio, label, or publisher.<sup>475</sup> Ironically, the difficulty of getting noticed amid a flood of digital content may render the marketing might of traditional intermediaries even more valuable.<sup>476</sup> More substantively, the vast majority of creators who want to bypass traditional distributors will still need to rely on some kind of intermediary, if only a technological platform like Amazon or SoundCloud.<sup>477</sup> These platforms enjoy significant leverage over creators, and they may offer relatively paltry royalties,<sup>478</sup> thus recreating the power asymmetries that creators have long experienced with traditional intermediaries. As scholars have noted, content industries are undergoing reintermediation rather than true disintermediation.<sup>479</sup> In a congested marketplace—made all the more congested because of self-releases—deriving meaningful income from one’s work is a significant challenge. Technological platforms may have relatively little incentive to market and promote individual works—particularly from new artists—given the abundance of content on their sites. Further enhancing the leverage of these new

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<sup>472</sup> 17 U.S.C. § 102(a).

<sup>473</sup> Cf. Asay, *supra* note 95, at 204 (discussing the intersection between copyright and commercial opportunities for creators).

<sup>474</sup> See Waldfogel & Reimers, *supra* note 268, at 49 (discussing the differences in profit margins for authors who choose self-publishing as opposed to traditional publishing).

<sup>475</sup> Cf. Van Houweling, *Authors*, *supra* note 253, at 380 (explaining the importance of protecting creators who utilize intermediaries).

<sup>476</sup> See, e.g., Warner Music Grp. Corp., *supra* note 201, at 1 (indicating that significant marketing resources are even more important given that “the volume of music being released on digital platforms is making it harder for recording artists and songwriters to get noticed”).

<sup>477</sup> Cf. Asay, *supra* note 95, at 193 (observing that creators have always had to rely on intermediaries to distribute their works).

<sup>478</sup> See, e.g., Victor Luckerson, *Is Spotify’s Model Wiping Out Music’s Middle Class?*, RINGER (Jan. 16, 2019), <https://www.theringer.com/tech/2019/1/16/18184314/spotify-music-streaming-service-royalty-payout-model> [<https://perma.cc/QTA4-A5P8>]; Tim Waterstone, *Amazon Is Discounting Us to Death*, GUARDIAN (Apr. 6, 2012), <https://www.theguardian.com/commentisfree/2012/apr/06/amazon-destroy-britain-book-industry> [<https://perma.cc/2F6B-SQ47>]; MERGES, *supra* note 29, at 233–34.

<sup>479</sup> Smits, *supra* note 448, at 116, 129 (noting this phenomenon in the film industry). In film distribution, content aggregators, which collect packages of films for distribution on video-on-demand (VOD) platforms have become important gatekeepers. *Id.* at 121.

intermediaries, their search, matching, and curatorial functions are critical for connecting consumers with particular creative works and generating revenues for creators. As in the traditional landscape, copyright will play an important role in promoting autonomy in the new digital revolution, but much depends on the broader institutional ecosystem and the bargaining power of creators and distributors in the marketplace.

## VI. CONCLUSION

This Article has explored copyright's underappreciated role in enhancing the organizational autonomy of creators and thereby promoting creative expression. In so doing, it has examined prevailing structures of creative production in three principal content industries: film production, music recording, and book publishing. It has argued that these industries are characterized by significant (though varying) degrees of vertical disintegration and semi-integration in upstream content production. In the film industry, independent producers contract with freelance talent to produce movies and then contract with studios to distribute movies to audiences. In the music industry, recording artists are semi-integrated into labels; they are independent contractors who maintain a fair degree of autonomy, but they are bound by long-term, exclusive contracts. The publishing industry features a more classically vertically disintegrated structure in which authors work largely independently of publishers.

This Article has also argued that copyright plays an important role in supporting such vertical disintegration and semi-integration. Copyrights do not necessarily *cause* vertical disintegration, and they are not strictly necessary for achieving it. However, they lower the cost of vertical disintegration, thus expanding the menu of organizational options available to industry participants. By conferring low-cost, easily obtained exclusive rights on creative expression, copyright enhances the feasibility of vertically disintegrated structures in which filmmakers, recording artists, and authors enjoy some measure of independence from large intermediaries. Furthermore, the works-made-for-hire doctrine and other elements of copyright law allow creators to hire, contract with, and otherwise assemble creative teams to complete particular projects.

These descriptive claims inform a novel reappraisal of copyright's role in fostering creative expression. This Article argues that, among its other functions, copyright promotes creative activity by supporting vertically disintegrated and semi-integrated industrial structures that enhance organizational autonomy. Such autonomy, moreover, provides fertile ground for robust creative output. While such industrial organization fosters significant creativity, it raises concerns about working conditions and remuneration for the many independent creators working within it. Turning to the important trend of digital distribution, this Article argues that copyright will continue to play an important role in promoting autonomy for creators. It will do so, however, not by facilitating vertical disintegration, but by facilitating new forms of top-down



vertical integration in which creators bypass traditional intermediaries and distribute content directly to audiences.