

THE CASE FOR COPYRIGHT

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INTRODUCTION

There are numerous possible ways in which society, through government, can set the rules under which artistic works are produced. In most countries, governments have provided a property right to the producer of the creative work, with that property right being known as copyright. Copyright regulation by a government is generally acknowledged to have first originated with the Statue of Anne in 1710.¹ The U.S. Constitution contains a clause that provides for ownership, for a limited time, to artists.² I have elsewhere written negatively about criticisms of copyright.³ Here I wish to discuss the affirmative case for copyright, which I believe to be a strong one.

The case for copyright is strong, due in part to the limited nature of what is granted by copyright. Contrary to what is claimed by many analysts, copyright provides only a property right over a creative work. As this Article will show, it does not provide a monopoly in the economic sense of indicating the presence of market power. The frequent claim that copyright provides a monopoly conflates the nominal monopoly over an item that all ownership, by definition, provides, with an actual economic monopoly.

By providing a property right, copyright allows the market to determine which creative items will be rewarded (through paid consumption) and, therefore, allows the market to influence which creative works are produced. There is no way, other than with a property right, to let the market determine the prices and quantities of creative works consumed and produced—in spite of various proposals that attempt to use several types of information to “mimic” the behavior of markets. Simply put, there is no way to determine the amount of money that should be spent on creative works other than by using the market, and the workings of markets require a property right, such as copyright.⁴

The only economic distinction between artistic works and other more typical economic goods is that creative works have the property of being non-

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¹ See Howard B. Abrams, *The Historic Foundation of America Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1139 (1983).

² U.S. CONST. art. I, § 8, cl. 8.

³ See generally Stan J. Liebowitz, *A Critique of Copyright Criticisms*, 22 GEO. MASON L. REV. 943 (2015) (undermining assumptions and claims made by critics of copyright).

⁴ See, e.g., Stan J. Liebowitz, *MP3s and Copyright Collectives: A Cure Worse Than the Disease?*, in DEVELOPMENTS IN THE ECONOMICS OF COPYRIGHT: RESEARCH AND ANALYSIS 38–39 (Wendy Gordo et al. eds., 2005).

rivalrous. Non-rivalry implies that the market will not produce the “ideal” number of copies for any given work, opening the door to the possibility that some method of production, other than the market, might lead to a superior result. It is quite clear, however, that no practical system will lead to the ideal consumption or production of non-rivalrous goods. And just because the market is imperfect is no reason to believe that non-market alternatives will be any better.

Not only does the property right bestowed upon creators have economically valuable attributes, but it also provides a strong dose of what are often called “moral rights,” which are often thought to trump economic efficiency.⁵ Copyright allows the producers of creative works to reap the rewards that come from their own efforts, providing a basis for ownership rights that seems stronger than that for other forms of property.

Copyright, therefore, has characteristics that tend to enhance economic efficiency as well as establish a strong moral basis for the ownership it provides. It is thus something of a mystery why copyright has had such a hostile reception among academic analysts.

I. COPYRIGHT, OWNERSHIP, AND MONOPOLY

Everyone that enjoys private property rights over any item of property has a nominal monopoly over that item. For example, to the extent that property rights are respected and enforced, I have monopoly control of the automobile that I own, over the smartphone that I own, and over my person. Ownership allows me and only me (subject to legal limitations) to determine how the item in question is used. In other words, I have monopoly control over the item in question. This aspect of property can be thought of as a nominal monopoly, and it exists for all private property.⁶

However, this nominal monopoly does not, in general, provide an economic monopoly.⁷ Much to my chagrin, my auto does not provide me an economic monopoly in transportation, nor does my cell phone provide me an economic monopoly in telecommunications.

That is not to say that ownership plays no role in the exercise of monopoly power. Obviously, in a world where property rights are enforced, legal ownership or authority is a necessary condition for the sale of any and all products, monopolized or not. Thus a monopolist must have a property right over the product being sold. What makes a monopolist different than other

⁵ See RICHARD S. MARKOVITS, MATTERS OF PRINCIPLE: LEGITIMATE LEGAL ARGUMENTS AND CONSTITUTIONAL INTERPRETATION 21 (1998); see generally Richard S. Markovits, *On the Relevance of Economic Efficiency Conclusions*, 29 FLA. ST. U. L. REV. 1 (2001).

⁶ See Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VAND. L. REV. 1727, 1729–30 (2000) (discussing exclusive rights of property owners).

⁷ See *id.* at 1729–30, 1734–35.

sellers, however, is that the monopolist happens to sell products without the hindrance of competitors.

If I own the property rights to all of the world's oil, then my ownership of the oil allows the exercise of monopoly power in the oil market. My ownership of the oil is a requirement for this monopoly, but it is not the key ingredient establishing an economic monopoly. Owning *all* of the oil is the required condition for an economic monopoly over oil.

This distinction between the nominal monopoly brought about by ownership, and an economic monopoly requiring a lack of competitors, is one that has been made by proponents of copyright many times over many generations. An early mention comes from Thomas Huxley ("Darwin's bulldog"), in 1877:

[S]o that in my apprehension the application of the word "monopoly" to persons who possess rights under the copyright law is an entire mistake; it is merely a contrivance arising out of the peculiar nature of book property, to put that property upon the same footing as other kinds of property.⁸

But in many discussions of copyright, there is no such understanding. The contrasting claim is repeatedly made, and often by learned individuals, that copyright is a monopoly. Even defenders of copyright often fall into the trap of referring to it as the "copyright monopoly."⁹ For example, Thomas Babington Macaulay, famous, among other reasons, for his parliamentary speeches on copyright, was a supporter of copyright, although he did not want it to last longer than the life of the author.¹⁰ Nevertheless, he seemed to believe that copyright was a monopoly.¹¹ In 1841 he said "[c]opyright is monopoly, and produces all the effects which the general voice of mankind attributes to monopoly."¹² This view has been embraced by numerous individuals, including politicians and economists, particularly those with views antithetical to copyright. The copyright critic and economist Arnold Plant favorably quotes Macaulay in his own criticism of copyright.¹³ A recent example of the conflation between copyright and monopoly is the 2008 book *Against Intellectual Monopoly* by Boldrin and Levine, referring to copyright (and patent).¹⁴ There are numerous other cases where copyright is proclaimed to be equivalent to a monopoly.

⁸ Copyright Commission, *The Royal Commissions and the Report of the Commissioners*, 1878, at 304 (UK).

⁹ See Abrams, *supra* note 1, at 1120–21.

¹⁰ 56 Parl Deb HC (3d ser.) (1841) col. 341–60 (UK).

¹¹ *Id.*

¹² *Id.*

¹³ See Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 *Economica* 167, 170–71 (1934).

¹⁴ Michele Boldrin & David K. Levine, *Against Intellectual Monopoly* 3, 7 (2008).

This view of copyright as monopoly exists in spite of the fact that copyright does not limit the number of competing works, or the degree to which the competing works can be similar to the copyrighted work. In the language of economics, ‘free entry’ is allowed, under copyright. The only restriction imposed by copyright is that the competing works cannot have been copied from the copyrighted work.¹⁵ All other independent creation is allowed, even if it leads to the exact same work being created.¹⁶ Because copyright does not restrict in any way, the production and sale of other similar, independent creations, it provides no monopoly power, but only ownership. Free entry is the condition in competitive markets that allows profits to be brought to competitive levels and markets to achieve their optimum theoretical qualities.¹⁷ Free entry is the condition of competition that removes monopoly.

A critic of this analysis might say that copyright allows free entry to exist *de jure*, but not *de facto*. It could be argued that in the instance of the monopoly over oil, anyone is free to drill for oil on any land whatsoever, but that this is only a mirage of free entry that does not make the oil market competitive, if the only oil is found under the land of but a single individual.

Such a criticism gets to the nub of the reason that so many analysts insist that copyright is a monopoly in spite of the fact that free entry exists, in principle. Like the oil, which is not uniformly spread around underground, not every potential creator has the same abilities to create the same quality work. As much as we might want it to not be the case, no one in the last handful of centuries has had the ability to create plays of the same quality as William Shakespeare, although many have tried. There exist numerous examples where chimerical free entry does not seem to lead to the actual entry of competing works, nor to the removal of all monopoly profits in such markets.

Analysts rightly believe that monopolies exist in copyright industries, and they ascribe those monopolies to copyright—for without copyright, those monopolies would not exist. But it is incorrect to ascribe those monopolies to copyright. It is not the property right that creates monopolies, although a property right is indeed required. In the case of physical products, we would not argue that all property rights should be eliminated simply because *some* property rights are used in the creation of monopolies. Similarly, we should not argue for the elimination of property rights over creative works—copyright—just because some copyrighted works are monopolies. That would be throwing out the baby with the bathwater.

Individuals with an unusual level of talent might earn monopoly rents,¹⁸ but others can nonetheless freely attempt to produce similar products. This is true throughout the economy. Apple and Google earn unusually high returns

¹⁵ See Kitch, *supra* note 6, at 1730.

¹⁶ See *id.*

¹⁷ See PAUL KRUGMAN & ROBIN WELLS, *ECONOMICS* 365 (3d ed. 2013).

¹⁸ A definition of monopoly rent: “When the availability of a good is artificially restricted (for example by laws limiting entry), then the increased earnings of the remaining suppliers are termed monopoly rents.” *Rent*, OECD, <https://stats.oecd.org/glossary/detail.asp?ID=3296> (last visited Mar. 19, 2017).

because other firms were not able to produce equivalently desired products. Great athletes, successful businessmen, famous actors, and even leading academics, earn monopoly rents. But society does not seem to worry about removing their monopolies; instead, we celebrate these individuals for the unusual talents that they have, which also benefit society even as they benefit the talented individuals. Although we might have expected the same respect to be given to successful authors and composers, at least in the academic literature where these topics are discussed, the rents earned by successful artists are generally abhorred.¹⁹ Of course, in the academic realm, it is possible that a “social justice” mentality dictates that we should be against any extra payment for any extra talent possessed by anyone (except, perhaps, for said individual). I have discussed this topic, in more detail, in an earlier paper.²⁰ Nevertheless, whatever stance one takes regarding whether monopoly rents should be removed from individuals with unusual talent, this source of monopoly (the talent) should not be confused with the ownership (copyright) that allows these talents to be commercialized.

Edmund Kitch rightly complained in 2000 that economists and lawyers were still failing to make the elementary and fundamental distinction between ownership and monopoly in the case of intellectual property, exhibiting one of what he called “elementary” and “persistent” errors.²¹ This distinction between monopoly and ownership continues to be misunderstood by many.

II. PROPERTY RIGHTS ARE REQUIRED FOR MARKETS TO ARISE

Copyright provides a property right to the creators of new works. The existence of tradeable property rights over goods allows the use of markets, which is an extremely advantageous feature that is often underrated because those in the West take the workings of markets for granted. The alternatives to markets are not pretty—autarky production,²² communal production,²³ or

¹⁹ See Stan J. Liebowitz, *Is Efficient Copyright A Reasonable Goal?*, 79 GEO. WASH. L. REV. 1692, 1703–04 (2011).

²⁰ *Id.* at 1692–93.

²¹ Kitch, *supra* note 6, at 1729.

²² See Jim Chen, *Epiphytic Economics and the Politics of Place*, 10 MINN. J. GLOBAL TRADE 1, 23 (2001) (arguing that this strategy has been eliminated “from the arsenal of the rational nation-state”).

²³ See Tat-Lin Lay Angus, *China’s Greatest Leap Forward and the Ones Left Behind—The Twofold Problem Causing the Rise in Land Disputes: Land Reclamation and Environmental Degradation*, 21 TUL. ENVTL. L.J. 341, 343 (2008) (discussing how China’s 20th Century attempt at communal farming resulted in famine).

government production.²⁴ The twentieth century's trash bin of history is littered with the relics of governments (and the broken dreams of their populations) that tried to suppress or replace the workings of markets. Direct government control of the means of production was tried in numerous countries.²⁵ The results were nothing short of dreadful, from a productivity vantage, even ignoring the restrictions on freedom that were generally a by-product of this form of production.²⁶ Economic regulation, which usually suppresses some aspect of the market, is not as harmful as direct government production, but it is generally understood that regulation is often undertaken for political purposes, and often imposes large costs on the economy, frequently with little or no offsetting social gain.²⁷

As a general rule, reliance on markets tends to lead to production of products that consumers wish to consume, at a low production cost. That is because markets reward producers who can produce products enjoyed by consumers, while keeping costs down. Countries that have relied upon markets, or have switched from other forms of production to markets, have achieved far greater levels of overall wealth than countries that have not. China's move toward markets in the 1990s, which led to sustained levels of very high economic growth after decades of stagnation, is one but the most obvious case.²⁸ Venezuela's abandonment of markets under Hugo Chavez and Nicolas Maduro has led to a recent economic catastrophe in a country that had previously been prosperous,²⁹ to say nothing of the economic basket cases of Cuba or North Korea.³⁰

²⁴ See Patricia A. McCoy, *Levers of Law Reform: Public Goods and Russian Banking*, 30 CORNELL INT'L L.J. 45, 58 (1997) (analyzing government ownership of banking and its consequences in the Soviet Union).

²⁵ See, e.g., Mark Harrison, *Coercion, Compliance, and the Collapse of the Soviet Command Economy*, 3 ECON. HIST. REV. 397, 397–98 (2002) (analyzing the failure of the Soviet economy); Jim Wyss, *Venezuelan Government Controls More Than 500 Businesses—and Most Are Losing Money*, MIAMI HERALD, Mar. 14, 2017, <http://www.miamiherald.com/news/nation-world/world/americas/venezuela/article138402248.html> (discussing how 70% of companies owned by the Venezuelan government are losing money).

²⁶ See David M. Kemme, *The Chronic Shortage Model of Centrally Planned Economies*, 41 SOVIET STUDS. 345, 358 (1989) (discussing the empirical evidence of chronic inefficiencies of centrally planned economies).

²⁷ See generally Charlotte Twight, *Dodd-Frank: Accretion of Power, Illusion of Reform*, 20 INDEP. REV. 197 (2015) (arguing that the passage of the Dodd-Frank Act of 2010 in the aftermath of the 2008 financial crisis had more to do with the incentive to accumulate political power than with social benefit of the law).

²⁸ DWIGHT H. PERKINS, *EAST ASIAN DEVELOPMENT: FOUNDATION AND STRATEGIES* 131–32 (2013).

²⁹ Justin Fox, *How Hugo Chavez Trashed Latin America's Richest Economy*, BLOOMBERG (Aug. 27, 2015), <https://www.bloomberg.com/view/articles/2015-08-27/how-hugo-chavez-trashed-latin-america-s-richest-economy>.

³⁰ See RICHARD E. FEINBERG, *OPEN FOR BUSINESS: BUILDING THE NEW CUBAN ECONOMY* 23 (2016) (discussing the dreadful state of the Cuban economy); Nam Sung-wook, *Chronic Food Shortages*

Markets, and the price and quantity information that they provide, sort through the competing plans of producers and consumers in a way that provides incentives for producers to increase or decrease production in a manner which, under fairly general conditions, leads to an improvement in resource allocation. There is no substitute for markets when it comes to divining whether output should increase or decrease. Similarly, markets are the mechanisms through which consumers reveal which products they want, voting with their dollars to select those products that they are most interested in purchasing. And this is all done with decentralized decision makers. No one person determines or calculates the prices that are derived in markets. Nor can the prices and quantities that are determined in market be predicted with any precision, as revealed in futures markets since those markets consist of individuals betting against one another about the size and direction of the price of a product sometime in the future.

It should be noted that many of the benefits of markets accrue whether those markets are competitive or not. A monopolist might not produce the ideal level of output, but it still has an incentive to be efficient in keeping production costs low and to produce what consumers desire, in order to maximize profits. If the monopolist is not protected by government, the monopolist has an incentive to keep competitors at bay, which not only implies efficiency in terms of production costs, but also some level of pricing that would be lower than what a protected (full) monopolist would charge.³¹

The difference in efficiency between monopoly and competition, in terms of price and quantity, is likely to be miniscule compared to the difference between market and non-market production. And regarding innovation, the most important component of economic growth, it is not even entirely clear that competition leads to greater innovation than monopoly, although intuition tends to imply that it would.³²

Innovation, the most important ingredient for progress, is more likely to occur under market control than under government control. How many new products, new medicines, or new technologies came from the old Soviet Union, or the old China, or the current Cuba or North Korea, abjuring, as they

and the Collective Farm System in North Korea, 7 J. E. ASIAN STUDS. 93, 94 (2007) (discussing how the North Korean system led to famine and arguing that any potential increase in agricultural production is dependent upon movement away from community farming).

³¹ See RICHARD B. MCKENZIE & DWIGHT R. LEE, IN DEFENSE OF MONOPOLY: HOW MARKET POWER FOSTERS CREATIVE PRODUCTION 7 (2008) (discussing how even Adam Smith had little concern that unprotected monopolies and cartels could subvert markets in the long-term, unlike government backed mercantilist of his age).

³² See JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 101–02 (2003); see, e.g., Peter Thiel, Opinion, *Competition is for Losers*, WALL STREET J., Sept. 13, 2014 (arguing that monopolists are in fact in a better position than businesses in competitive industries to drive innovation).

did, any reliance on markets for most production? The answer is self-evident.³³ Contrast that with South Korea, Taiwan, or Singapore, all countries equally poor at the end of the Second World War.³⁴

The above paragraphs are obviously making a general point about how markets improve the functioning of economies. Does the fact that markets enhance economic welfare relative to alternatives mean that we should want a market for creative works? If the answer is yes, then the works need to have property rights (copyrights) so that markets can be enabled to determine which works are produced and consumed. Although it cannot be said definitively that creative works are best produced in markets, the burden of proof should be on those claiming that removing ownership would enhance economic efficiency.

III. THE IMPACT OF NON-RIVALRY

The only important economic distinction between creative works and other economic goods is that creative works have the property of being non-rivalrous—meaning that the work doesn't get “used up” when it is consumed.³⁵ Because it does not get used up, the same “unit” of a good (say, a particular song) can, in principle, be consumed by anyone, whereas more

³³ For an indication of lack of innovation in Cuba and North Korea, see the inconspicuous absence of these countries from THE GLOBAL INNOVATION INDEX 2016: WINNING GLOBAL INNOVATION 173 (Soumitra Dutta et al. eds., 2016) [hereinafter GII 2016] (the closed nature of the regimes, which makes data collection difficult, may have also contributed to these countries being absent from the report); see also Chi Ling Chan, *Fallen Behind: Science, Technology, and Soviet Statism*, 8 INTERSECT 1, 1–2 (2015).

³⁴ See GII 2016 *supra* note 33, at 236, 278 (portraying South Korea and Singapore as ranked 11th and 6th, respectively, among more than 120 countries covered by the report); Michelle Greenwald, *Opinion, How Taiwan is Reinventing Its National Culture From Manufacturing Efficiency to Innovation & IP*, FORBES (Feb. 7, 2017), <https://www.forbes.com/sites/michellegreenwald/2017/02/07/how-taiwan-is-reinventing-its-national-culture-from-manufacturing-efficiency-to-innovation-ip/#38a573546650> (discussing Taiwan's stride on transforming a manufacturing based economy into an innovation hub).

³⁵ RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS 8–10 (2d ed. 1996). Many analysts unfortunately and incorrectly refer to intellectual products as “public goods,” defined as having the property of non-rivalrous consumption and also the market defeating property non-excludability, meaning that individuals cannot be prevented from consuming the product. See, e.g., JOSEPH E. STIGLITZ & BRUCE C. GREENWALD, CREATING A LEARNING SOCIETY: A NEW APPROACH TO GROWTH, DEVELOPMENT, AND SOCIAL PROGRESS 431 (2014). There are very few items that are inherently non-excludable, whereas any item can be made non-excludable under the law by removing the right to exclude anyone from using it. If an apple orchard is declared public property, the apples are non-excludable. Providing ownership rights and enforcement mechanisms to creative works eliminates non-excludability (to the extent that these rights can be enforced). Whereas non-rivalrous consumption is an inherent feature of creative works, non-excludability is not, and thus the concept of public goods should not be applied to creative works.

typical rivalrous goods where any “unit” that is consumed means that other consumers do not have access to that particular unit.³⁶

The attribute of non-rivalry implies that market prices, which normally serve the useful function of rationing scarce goods among many potential customers in favor of those willing to pay the most,³⁷ no longer exist once the creative work is produced. The characteristic of scarcity for copies of the non-corporeal artistic work no longer applies. Nor is the typical demand curve, representing the (horizontal addition of) values that consumers have for copies of the creative works, the correct analytical apparatus to use when analyzing supply and demand in the markets for creative works (titles).

Instead, the demand for a specific creative work is just a single point representing one unit (the creation) of the product, with the height of the demand being the (vertical) summation of the values of all the potential users of that work. In other words, if the aggregate social value of all potential users for that work is greater than the cost of creating the work, then it is economically efficient to produce the work. For non-rivalrous goods, ideal consumption requires that all potential consumers actually consume the item, since extra units or copies are not scarce (at least once the original unit is created). Of course, any marginal costs of distribution or printing, which were unavoidable prior to digitization and the Internet, would have been needed to be paid in some fashion, normally by the consumer. Furthermore, it was expected that at least some authors would need to be compensated to induce them to create the work in the first place.

These various conditions for efficient production and consumption are generally inconsistent with one another. For efficient production, creators must be paid the opportunity cost required for them to create the work, as long as the value created by consumption of the work is greater than this cost. Efficient consumption requires that no potential consumers are priced out of the market.³⁸ Thus, the only theoretical market that can meet both conditions is one where a different price is charged to each customer, and where those prices are the highest prices that the consumers are willing to pay to purchase copies of the artistic work. A market with these characteristics is described as one of perfect price discrimination.³⁹ This is the only idealized market that would achieve the efficient production and consumption of non-rivalrous

³⁶ See CORNES & SANDLER *supra* note 35, at 8. When we discuss markets for creative works we need to understand that there is a market for titles, or the number creative works produced and there is also a market for each creative work determining the number of copies of each work and the price of each copy. The discussion in this article is mainly about the market for titles although that market is influenced by the markets for individual titles.

³⁷ See PAUL KRUGMAN & ROBIN WELLS, *ECONOMICS* 102 (3d ed. 2013) (providing a basic explanation as to how the demand curve works to favor those with higher willingness to pay).

³⁸ See *id.* at 482–83 (explaining the marginal utility function of non-rivalrous goods).

³⁹ *Id.* at 397.

goods. But such a market is impractical because no seller has the means or capability to be a perfect price discriminator.⁴⁰

In markets without the possibility of price discrimination, the only single price that allows all potential consumers to consume the product is zero (plus whatever other costs might be required to have copies of the work delivered to consumers).⁴¹ A price of zero for the work itself, however, does not provide any revenue with which to pay the author. We are led to the inevitable conclusion that markets cannot achieve the ideal solution for the production of non-rivalrous goods. Therefore copyright, which relies on markets, cannot achieve the ideal result for the works that it protects. It is imperfect.

A second-best situation is often mentioned when price discrimination is not possible. That would be the implementation of a copyright duration—different for each artistic work—that allows the author to just cover his opportunity cost, after which the copyright expires and the title would enter the public domain.⁴² If demands and costs in these markets could be predicted, only those book titles, for example, that could generate revenues (net of marginal production costs) sufficient to cover the authors' opportunity costs would be produced. This is a "second best" because there are still inefficiencies. The price for copies of any book whose author required remuneration would be above the average cost of copying and distribution, and some consumers with positive values for copies of the title would be priced out of the market (until the item enters the public domain). Similarly, some titles whose value is potentially greater than the opportunity cost of the creator will not be written because the revenues (net of production costs) in the market for copies of a title would be less than the potential value to readers. This is because some readers are 'priced out' of the market, and because the single profit maximizing price in the market allows non-priced-out readers to retain "consumer surplus" that otherwise would have flowed to the author if the publishers were perfectly discriminating monopolists.

But even this second-best solution is not achievable since we do not know the opportunity cost of every creator and thus cannot have a different copyright length for each work.

However, it has been suggested that alternatives to markets that could provide superior results might exist. Many alternatives have been proposed. One such possibility would be to have the government pay creators to create

⁴⁰ See A.C. PIGOU, *THE ECONOMICS OF WELFARE* 279–81 (4th ed. 1932); Matthew A. Edwards, *Price and Prejudice: The Case Against Consumer Equality in the Information Age*, 10 *LEWIS & CLARK L. REV.* 559, 567 n.32 (2006); Hayne E. Leland & Robert A. Meyer, *Monopoly Pricing Structures with Imperfect Discrimination*, 7 *BELL J. ECON.* 449, 450 (1976).

⁴¹ See John P. Conley & Christopher S. Yoo, *Nonrivalry and Price Discrimination in Copyright Economics*, 157 *U. PA. L. REV.* 1801, 1807 (2009).

⁴² See Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 *VA. L. REV.* 1745, 1798–99 (2012). See generally Stan J. Liebowitz & Stephen E. Margolis, *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects*, 18 *HARV. J.L. & TECH.* 435, 444–46 (2005) (describing a model of efficient copyright protection of artistic works).

works and then provide those works to the public free of charge.⁴³ This would seem to avoid the problem of inefficient consumption, but other problems remain.⁴⁴

Specifically, there are three problems with having the government in charge of determining the amount of payments for individual creative works as well as the total amount of overall payment.⁴⁵

First, if the last hundred years of replacing markets with government is any indication, we cannot be sanguine about the government even attempting to pursue an efficient choice of payments. Governments generally make choices for political reasons. The government will most likely have a set of favorite creators, as well as disfavored creators, and it will try to move payments from the latter to the former. It seems naïve to expect otherwise. Some analysts have tried to suggest the creation of “systems,” where a set of rules prevent governments from making choices based on political tastes.⁴⁶ But it is impossible to shackle politicians, since they always have the power to change government. So even if it were possible with the right managers to have a system that could lead to better results than the imperfect market, the reality is likely to be far worse because the managers cannot be independent of the politicians, which would be akin to the capture theory of regulatory control.

Second, even if we could have angelic individuals running the government, it is not clear how a government run system would go about trying to determine the overall amount of payment. Although the revenue stream in markets occurs naturally (without any intervention), there is no way to accurately predict how a market will change over time as conditions elsewhere in the economy, including potential changing tastes on the part of consumers, occur. As more time passes from the initial appointment of the government to fund creators, the total amount of payment is likely to move further away from an “efficient” payment amount since the efficient payment amount is likely to change from its initial level and the government is likely to have little knowledge about how much payments would change—or even know the direction of the change. Thus, it is unlikely that even a well-intentioned

⁴³ See Steven Shavell & Tanguy van Ypersele, *Rewards Versus Intellectual Property Rights*, 44 J.L. & ECON. 525, 525–28 (2001).

⁴⁴ See *id.* at 541–44; WILLIAM W. FISHER, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 241–46 (2004).

⁴⁵ See generally Liebowitz, *supra* note 4, at 46–48 (discussing the problems of trying to replace the market).

⁴⁶ WW Fisher, among others, has proposed that music be funded by the government with the proceeds being distributed based on estimates of usage by the public. See FISHER, *supra* note 44, at 200–03. At the time, downloads from servers would have been the method to determine which songs deserved most payment. These days the number of listens on streaming services might be the choice used to determine the payout. *But see* Liebowitz, *supra* note 4, at 46–48 (pointing out that even if an efficient distribution of the money can be approximated, which only works when the unobserved market price of the individual items are not too different from one another, there is no good mechanism to determine the overall size of the pot of money to be distributed to producers of creative works).

government could come remotely close in relating its total payments to an efficient level, over a long period of time.

Third, there is no way for the government to allow some books to have higher payments per unit (awarded to the author/publisher, since the point of the government takeover is to reduce the price that consumers pay to zero) than others, short of a simple rule of thumb related perhaps to the subject matter or the length of the book. Markets let publishers pay differential prices so that some authors get a much higher payout per page than others.

Therefore, even though the market will not produce the optimal level of non-rivalrous good, that is in part because there is no feasible way to produce the optimal level of such goods. Although the government might improve on one aspect of the product (consumption of those works that are created), the particular choice of works created, the payments to authors, and the total number of works created are likely to be very far from optimal. Unlike a market, which would likely track the direction of the “efficient” result over time, even if not ideal itself, the government payments would not track the market and almost certainly would lead to a less efficient solution as time passed.

IV. THE MORAL RIGHTS OF CREATORS

Moral rights do not play much of a role in economic analysis, although they often play a large role in the way that society judges particular economic transactions.⁴⁷ Thus, there are many potential transactions (markets) that clearly fit the economic classification of welfare enhancing—due to voluntary nature of transactions—but where society has tried to prevent such transactions. The selling of body parts (e.g., kidneys), allowing payments to influence the adoption of children, and vices such as gambling, drugs, prostitution, and so forth, are the types of transaction to which I refer. Government restrictions on these potential markets are not universally agreed upon, however.⁴⁸ Libertarians, among others, would disagree with all the restrictions just mentioned.⁴⁹

On the other hand, some market restrictions currently enjoy near universal agreement—although even this has not always been true. Slavery, for example, is a potential market that is universally frowned upon. And although economists played a role in helping to bring about the demise of slavery as a

⁴⁷ See Alvin E. Roth, *Repugnance as a Constraint on Markets*, 21 J. ECON. PERSPS. 37, 39–40 (2007).

⁴⁸ See Herbert Hovenkamp, *Law and Morals in Classical Legal Thought*, 82 IOWA L. REV. 1427, 1427–29 (1997).

⁴⁹ See *id.* at 1433–34.

system,⁵⁰ it was not due to economic analysis showing that slavery was inefficient, but instead, to moral factors. After all, who now would argue for a return to slavery, even if it were somehow demonstrated that the overall wealth of society would be increased by reinstating slavery? Even indentured servitude, which was a voluntary contract, is no longer allowed in most countries, in spite of the fact that both parties to the contract expected to benefit from it.⁵¹

Moral “justice” often outweighs economic benefits, at least as far as our professed preferences are concerned, when the two are in conflict.⁵² Economic efficiency plays a secondary role when there are other, supposedly more important precepts, in opposition to it.

One precept that carries force with many analysts, particularly those following in the Lockean tradition, is that people should own the fruits of their labor.⁵³ In the instance of creative works, the intellectual case for ownership rights belonging to the creator are extremely strong. In most occurrences, creative works are produced by individuals or small groups, where the individual contributions are relatively easy to disentangle. And in many instances, the capital used to help create the work is owned or rented by the creator(s), thus making it easy to award the entire return to the creator(s). The paradigmatic example is the author with a pen, typewriter, or keyboard, working alone, on his manuscript.

Compare this to owners of a property such as land. The land owner certainly did not create the land. At best, the owner combines his efforts with the attributes of the land to improve the land. And oftentimes, the owner of land purchased it already relatively improved. The same is true for many other forms of property. Ownership of physical goods is supported and taken for granted, even when the individuals treat the ownership as a mere fiduciary activity, far removed from the fruits of any labors.

Looked at in this way, the case for awarding ownership for artistic works to their creators is stronger than the case for most physical objects to be treated as property. Yet ownership rights over artistic properties, known as copyright, are often treated, by copyright analysts hostile to copyright, as “gifts” from the government to the producers of creative works, with the focus being solely on whether ownership is required to induce creation of the

⁵⁰ See Thomas Carlyle, *Occasional Discourse on the Negro Question*, FRASER’S MAG. FOR TOWN & COUNTRY, Feb. 1849, at 527, 530–31 (coining the term “dismal science” in his initially anonymous work critical of economics, of supply and demand, and of the anti-slavery writings of many prominent economists).

⁵¹ See Roth, *supra* note 47, at 39.

⁵² See *id.* at 40.

⁵³ See JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 111–12 (Ian Shapiro ed., 2003) (1690); Bryan Cwik, *Labor as the Basis for Intellectual Property Rights*, 17 ETHICAL THEORY & MORAL PRAC. 681, 681–82 (2014); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1544–45 (1993).

work or not.⁵⁴ But this represents the logic of economic efficiency only, and ignores the moral right to ownership over artistic works.

The discussion of a real-world case illustrates the difference between moral rights and efficiency. Mike Scherer (2008) reports that the great opera composer, Verdi, considered the writing of operas to be “drudgery,” and that he reduced his writing of operas after a change in copyright law greatly magnified his income from his already written operas.⁵⁵ The decrease in later drudgery would be viewed as his just desert for writing the large number of popular operas earlier in his career, by those who believe in Verdi’s moral rights to own his works. But the fact that the creative works are the fruit of his labor is entirely irrelevant to efficiency theories.

Instead, the focal point of efficiency theorists is the decrease in his output as his income from old works increases. If copyright does not induce new creative works from Verdi, analysts such as Boldrin and Levine apparently think it a good idea to deny him ownership of the operas, because doing otherwise allowed Verdi to escape the drudgery of writing more operas, a drudgery Boldrin and Levine apparently believe that Verdi should have continued to bear so that that opera fans would benefit from his greater output.⁵⁶ It is true that in the counterfactual continuation of his opera composing, assuming that copyright did not exist, no one would be forcing Verdi to write operas, unlike conscription or slavery. But would conscripting him to write operas under penalty of jail be very different than inducing him to write operas by removing his ownership of past operas? Should not Verdi have been allowed the choice to take it easy, as a well-earned reward for his previous efforts?

Some other hypothetical examples may prove instructive. Let us say that empirical analyses were to show that artists of various types produced much better works when they were impoverished, as in the instance of the archetypical “starving artist.” Would we, as a society, approve a law removing all forms of unearned wealth (inheritance, gifts) from these artists, so as to increase the output of their creative works, benefitting society as a whole, even if these artists were barely subsisting? Admittedly, these actions directly harm the artist, and treat the artist differently than other individuals—but taking an inheritance, say, from the artist and distributing it to the rest of the population is categorized in economic efficiency parlance as merely a “transfer,” so the artist’s loss is an equivalent gain to someone else; at the same time, the artist presumably continues to produce more works of social value. Efficiency theory would seem to indicate that such a law was worthwhile. Similarly, would society approve a special confiscatory income tax for artists, to keep them poor and productive?

⁵⁴ See MICHELE BOLDRIN & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY 7–9 (2008); Plant, *supra* note 13, at 170–75.

⁵⁵ See F.M. Scherer, *The Emergence of Musical Copyright in Europe from 1709 to 1850*, 5 REV. ECON. RES. ON COPYRIGHT ISSUES 3, 11 (2008).

⁵⁶ See BOLDRIN & LEVINE, *supra* note 54, at 124–27.

Finally, would we deprive psychiatric drugs from a Van Gogh, if the drugs would improve his emotional outlook but also stop him from creating works like “Starry Night”? Would not economic efficiency require such behavior? These illustrations are meant to demonstrate possible conflicts between economic efficiency and morality.

Opponents of copyright often act as if the public, represented by the “public domain,” has a moral right to the works of artists—in other words, that the public has a right to remove the works from private ownership.⁵⁷ But the public has no such moral justification—it is merely the public’s acquisitiveness that provides the impetus to increase the public domain. Yet there are limits beyond which copyright critics have yet to tread. For example, there does not appear to be a clear articulation by copyright critics arguing for forcibly removing unpublished (perhaps unfinished) works from an author’s private possession, but those same critics seem to feel no compunction in removing such works once they have been published.⁵⁸ In truth, there is virtually no difference between the two cases except that in the latter case the author would be allowed to earn some revenues for a short time prior to having his work removed from his control. Somehow, the act of making the work public by trying to sell copies of it, is treated as an invitation to remove ownership, whereas keeping the work to oneself is thought to be an action that should not be violated by removing the work from the artist’s control. Perhaps it is the lack of commercialization that causes the removal of ownership rights in the latter case to be considered beyond the pale, but there seems little reason to treat the two differently.

It is also worth repeating that the argument against copyright is usually premised on the claim that weakening or removing copyright would enhance efficiency. This presumed increase in efficiency has not been and probably cannot be empirically demonstrated, however.

CONCLUSION

By providing a property right, copyright allows the market to determine which creative works will be rewarded through paid consumption and, therefore, allows the market to influence which creative works are produced. History has taught that it is much better to use unregulated markets than to rely upon non-market alternatives, if we are interested in achieving economic efficiency.

The only economic distinction between creative works and other, more typical economic goods, is that creative works have the property of being

⁵⁷ See Michele Boldrin & David K. Levine, *Intellectual Property and the Efficient Allocation of Social Surplus from Creation*, in 2 REV. ECON. RES. ON COPYRIGHT ISSUES 45, 65 (2005) (characterizing the assertion that leaving ideas in the public domain is socially inefficient, leading to a “tragedy of the commons” for creative activity, as a common fallacy).

⁵⁸ See *id.*

non-rivalrous. This property implies that the market will not produce the “ideal” number of copies for any given work, opening the door to the possibility that some method of production, other than the market, might lead to a superior result. But just because the market is imperfect is no reason to believe that non-market alternatives will be any better.

The producers of artistic works have strong “moral rights” for the ownership of their works. The creator of a work seems more deserving of ownership rights than the owners of almost any other form of property.

Given that there are both efficiency arguments in favor of private ownership of creative works, and a compelling moral case in favor of private ownership of creative works, it becomes clear that allowing ownership over these works, which takes the form of copyright in modern economies, should be the default position for a society to take. Therefore, it should require very strong evidence of inefficiencies in copyright industries before we should consider claims that copyright should be overturned or abolished. Such evidence has certainly not, at this juncture, been presented by critics of copyright.