Is Efficient Copyright a Reasonable Goal?

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Introduction

If we could create an economically efficient copyright law, would we want to do so? That is the question I attempt to answer in this Essay.[1] Even though economists typically argue in favor of efficiency—and I am as guilty of this as most—my answer here is that society should not favor an economically efficient copyright law. Efficiency would lead to disparate and inferior treatment for the creators of copyrighted works compared to workers in other types of industries. My concern is rooted in the very basic concept of "fairness" that arises when, in the name of economic efficiency or social welfare maximization, a particular market would need to treat its labor component differently than other markets treat their labor components.[2] At my peril, my purpose here is to discuss issues that do not relate solely to economic efficiency.[3]

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* Professor of Economics, University of Texas at Dallas. Thanks to Robert Brauneis, the participants at the Symposium, and Justice Breyer for an inspiring lunchtime talk.

1 Note that Justice Stephen Breyer argues that economic justifications of copyright are more important than noneconomic justifications. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281, 291 (1970) ("If we are to justify copyright protection, we must turn to its economic objectives."). I am suggesting here something not quite the opposite but certainly not the same. This is somewhat ironic given that he was a law professor arguing for the importance of economic analysis in copyright and I am an economist arguing that blindly following economic analysis in copyright issues can lead us astray.

2 An analogy may make my concern more concrete. If policymakers look at market *A* (a typical market with no unusual characteristics), and try to determine whether we should allow workers to unionize in this market, economic efficiency criteria might well lead us to conclude that we should forbid unionization in market *A* because it hurts social welfare with its monopoly wages (assume that it is efficient to prevent unionization in this market regardless of whether other markets are unionized or not). But if we are then told that workers in every other market are now, and will in the future, be allowed to unionize (even though it is socially inefficient to do so), then the decision to follow the logic of economic efficiency in market *A* might seem "unfair" to the workers in market *A*. One response might be that policymakers should deunionize workers in all other industries. But this may not be an option available to the policymakers who control market *A*. In this case, it seems to me, it would make sense to allow the workers to organize market *A*, independent of economic efficiency, to promote a basic sense of fairness.

3 Professor Epstein discusses the philosophical basis for copyright, but he does not examine the point that is the central focus of the present Essay. *See* Richard A. Epstein, *Liberty*

As this Essay describes below, a social welfare-maximizing copyright law amounts to an attempt to restrict the economic profit (rents) going to creators to no more than the amount which is required to induce the creator to produce the work. A perfectly ideal and flexible copyright law would remove all rents going to all creators. Elsewhere in the economy, we do not find government policies attempting to remove rents from labor. It does not, therefore, seem "right" or "fair" or "just" to remove the rents for just one category of labor—workers in what are sometimes termed the "creative" industries, comprising music, the arts, movies, and so forth. Maximizing social welfare in copyright amounts to a government intrusion into labor incomes, an outcome considered unacceptable in other parts of the economy. Because this intrusion is generally obscured from view in discussions of copyright, however, its unacceptability is not readily apparent.

This Essay examines some implications of a recent claim that creators do not need to be paid to be induced to create. I show that if creators did not need to be rewarded, the logic of welfare maximization would imply not just the dismantling of copyright but an outright ban on payments to creators. Further, if creators produced more when they were paid less, as has been implied in some recent discussions,[4] then social efficiency would require a tax on creators. Social welfare maximization would lead, under these circumstances, to what I believe would be generally considered unacceptable and, indeed, would be a draconian government intrusion into markets. Nevertheless, this concern is merely of academic interest and an illustration of the potential dangers of hewing too closely to economically efficient copyright. A closer look at the claims that creators do not require payments to produce indicates that they are largely unfounded.

This Essay begins with a brief review of the economic argument for ideal copyright duration.

I. The Economics of Copyright and the Social Welfare

In idealized markets, each unit of a particular product that has a value to consumers that is greater than its cost of production should be produced and sold to a consumer. This is normally referred to as producing up to the point where the marginal cost of an additional

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Versus Property? Cracks in the Foundations of Copyright Law 1–5 (John M. Olin Law & Econ. Working Paper No. 204, 2004), *available at* http://ssrn.com/abstract=529943.

4 *See* Felix Oberholzer-Gee & Koleman Strumpf, *File-Sharing and Copyright* 25 (Harvard Bus. Sch., Working Paper No. 09-132, 2009), *available at* http://www.hbs.edu/research/pdf/09-132.pdf.

unit is equal to the value placed on the unit by consumers.[5] On the other hand, if an additional unit costs more to produce than the value that it can generate to consumers, society would be better off if that unit is not produced.

The difference between the marginal cost of producing a unit of output and that unit's value to a consumer is known as the surplus from that unit, and the surplus is usually shared between the consumer and producer. It is this surplus that measures the gains to society from the market for any product, and if no surplus is generated, then there is no economic value in producing that product. The achievement of markets is the generation of surplus.

Under conditions typically assumed, competitive markets produce the quantity of output that maximizes total surplus. A monopolist is able to increase its surplus relative to a producer in a competitive industry by raising the price of the product and lowering the quantity consumed. In doing so, the monopolist appropriates some of the consumers' surplus but leaves as a byproduct some lost surplus known as deadweight loss. The problem with monopoly, at least from an economic vantage point, is this diminished production and diminished total surplus, not the higher profit (or surplus) of the monopolist or the higher price paid by consumers.

The Figure below shows a fairly typical representation of the difference between monopoly and competition, with the simplifying assumption that the marginal production cost of additional units is constant. The Figure can also be taken to represent the market for reproductions of a creative work already in existence. Under a regime of competitive production of reproductions (no copyright), the equilibrium price of a reproduction is P_c (equal to marginal cost, *MC*) and the quantity of reproductions purchased is Q_c. There is no profit earned in the market for reproductions since the market is assumed to be competitive.

A monopolistic producer of reproductions, as we would find under copyright, maximizes profits by equating marginal revenue (*MR*) with marginal cost and produces Q_m units sold at a price of P_m per unit. This reduction in output (from Q_c to Q_m), and the attendant loss of surplus (region 5) is the social loss imposed by monopoly.[6] The

5 Marginal costs are usually assumed to be rising with the number of units produced, and the values to consumers (known as demand) are assumed to be falling with the number of units consumed. The ideal result of the maximum joint surplus to consumers and producers occurs at the output level where the marginal cost and demand meet.

6 Regions 3 and 4, which were part of the surplus to consumers under competition, are

Figure. The Market for Reproductions of a Creative Work

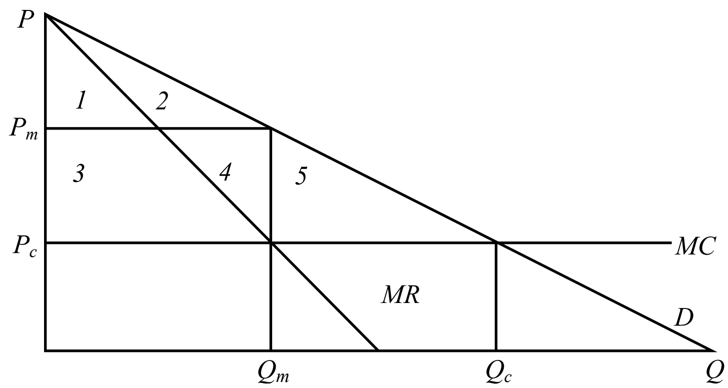

figure is a static analysis for a particular period of time. When the copyright expires, the price falls to P_c and greater total surplus occurs in this market for reproductions.

If the creator of the title (i.e., the creative work) represented in the figure requires a payment or the anticipation of a payment to be induced to create the work, such payment can only be realized when the market for reproductions enjoys a monopoly for some period of time.[7] In that case, for that period of monopoly, the putative welfare loss of region 5 would not really be a welfare loss.[8] This is for the simple reason that region 5 cannot exist unless the title is produced, and the title can only be produced if the price is P_m for some period of time.[9]

The economic analysis of copyright must include an evaluation of how the payments in the market for reproductions influence the production of creative works. Although the total surplus in the Figure is obviously greater without copyright than with copyright (region 5 is then part of the surplus without copyright), there would be no surplus at all if the creative work did not exist, because one cannot have reproductions of nonexistent works. A more complete analysis would posit that there are two stages of production for any given artistic

transferred from consumers to the producer under monopoly. A transfer such as this does not lower the overall social welfare. Regions 1 and 2 remain part of the consumer surplus after copyright.

7 For a discussion of the traditional monopoly approach to copyright, see Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 228–30 (2004).

8 *See* 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, 442 (2005).

9 *See id.* at 440–43 (explaining "productive" and "unproductive" deadweight loss).

work. First the work is created, and then reproductions of the work are made. Yet these are two very different production processes.

There is a separate reproduction market for each individual title, as represented in the Figure.[10] The market for titles (the creative works), unlike that for reproductions, is not easy to fit into standard economic analysis because each creative work is different from every other creative work, and simple models of markets assume that the units of analysis are identical to one another. It is possible, however, to ignore the differences between works and treat these works as if they are homogeneous (as we might do when we discuss, for example, the market for automobiles). Alternatively, there are models (e.g., differentiated products and monopolistic competition[11]) that usually assume a particular form of dispersion of the heterogeneous product characteristics (e.g., various characteristics of products are evenly dispersed across "product space," as are consumer tastes), and these models sometimes reach somewhat different conclusions than the simpler model, which ignores the differentiation.

One key aspect of the market for titles is the nature of supply. The assumption underlying copyright and virtually every other market is that the quantity supplied increases as payments increase. There is a tremendous amount of evidence to support the general view that products that require time and energy to create are produced in greater numbers when payments are increased.[12] Nevertheless, various commentators have asserted that reward is less important (or perhaps of no importance) to creators because creators may create just for the sake of creating.[13] We will return to this question in Part III, but for the moment will continue to assume that greater payment to creators leads to more creations.

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[10] The demand for any individual title depends on which other titles are available and their prices. Trying to take all the possible interactions into account between the various titles is virtually impossible, which is why economic models either ignore these interactions or make restrictive assumptions about the nature of the interactions.

[11] *See* Yoo, *supra* note 7, at 236–76.

[12] This topic is somewhat more subtle than it first appears because the form of payment does not need to be exclusively pecuniary. Workers, for example, do not only respond to their nominal wages, but also to working conditions and employment benefits. Similarly, creators respond not just to the nominal payment they receive for the sale of the creative work but also to the impact of publication on the pecuniary value of future works, the pecuniary value of ancillary markets created by the publicity surrounding publication of the creative work, and nonpecuniary benefits (or costs) such as fame.

[13] *See, e.g.*, Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 539 (2009).

The paradigmatic analysis of copyright proposes a tradeoff between allowing greater returns to producers of copies—by granting a copyright monopoly and having some or all of those returns pass on to the creators, leading to a greater number of creations—and the price consumers pay. The tradeoff is supposed to be the short-term harm to consumers from facing monopoly prices in the market for titles during the life of copyright (because during copyright, the price is P_m, but after the expiration of copyright, the price for the same work drops to P_c) versus the gain to society, including consumers of creative works, from the greater production of creative works brought about by copyright.[14] This of course presupposes that the price is actually higher under copyright, that copyright provides greater payments to authors, and that greater payments induce more production from authors. Although these suppositions seem reasonable, any of them might not hold.

There are strands of the literature that have questioned some of these suppositions. There have been recent suggestions (echoing some prior claims) that authors of creative works might not respond to greater payments.[15] There have also been recent suggestions that the greater revenues generated by copyright do not flow to the creators.[16] On the other side of the issue, there have been some claims that copyright does not actually raise the price of the product, although it does increase the profits to those selling creative works.[17]

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14 The completely ideal market production of creative works can only occur under an idealized case of perfect price discrimination on the part of the creators, meaning that creators can charge each consumer the maximum that the consumer would be willing to pay. In that case, no potential consumers are excluded from consumption due to prices being too high, and each and every work that has a value greater than its cost is produced. Ruling out this type of price discrimination gives the version in the text as a next best alternative, which is functionally equivalent to monopsonistic perfect price discrimination on the part of a collective of consumers. *See infra* Part II. The version of copyright where all works have the same copyright length is one step further away from the economic ideal.

15 *See, e.g.*, Tushnet, *supra* note 13.

16 *See, e.g.*, Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 306–07 (2002).

17 The concept that monopoly produces a smaller amount at a higher price is one of the most basic findings in economics. But there is also a class of models that suggest that if large firms have lower costs than small firms, then the lower cost of a monopoly might lead to lower prices than would be the case for a competitive industry composed of many small firms. This is important in the instant case because there are usually setup costs involved with making reproductions (after the work itself is created). For books, these might include setting up plates, creating a table of contents, creating cover art, and so forth. It is possible that these setup costs may give a copyright "monopolist" lower costs per unit than would be the case for multiple firms engaged in competitive reproduction of the work and multiple duplications of these setup costs, so that prices under copyright might not be higher than in a world with no copyright. This is not

These are all interesting questions worthy of further analysis, and I examine the first of these questions below. But the main focus of this Essay is on a question that is rarely, if ever, asked: is it reasonable to use economic efficiency (social welfare) as the basis for determining the duration, or very existence, of copyright?

II. Efficient Copyright Is Similar to Controls on Income

We need to be very specific about the nature of the efficiency that an economically ideal copyright law tries to promote. Efficient copyright for a single work would limit the duration of copyright to not a moment more than what is required to provide sufficient revenue to induce the creator to produce the work.[18] In terms of the Figure above, optimal copyright would allow the deadweight loss found in region 5 to last for just long enough that the profits being earned in the publishing market would be exactly sufficient to cover the cost of creation,[19] whereupon the copyright would be removed, the price would drop to P_c, and region 5 would become part of the consumer surplus for all future sales of this creative work. This prescription can then be applied to each creative work to arrive at an ideally efficient copyright law. Note that copyright duration is set separately for each creative work.[20] Obviously, this degree of precision, where every work has its own copyright duration, is not realistic and so an analysis

just a theoretical possibility; I have found that books that have lost their copyright protection do not appear to have lower prices than books still under copyright when other factors that might influence price are taken into account. *See* Stan J. Liebowitz, Is the Copyright Monopoly a Best-Selling Fiction? 12–13 (Sept. 11, 2008) (unpublished manuscript), *available at* http://ssrn.com/abstract=1266486.

18 *See, e.g.*, Stan J. Liebowitz, *Copyright Law, Photocopying and Price Discrimination*, 8 Res. L. & Econ. 181, 188 (1986).

19 Regions 3 and 4 make up the profit to the "reproducer" (publisher) as long as there are no other fixed setup costs involved with making reproductions. If there are setup costs, they would need to be subtracted from the sum of regions 3 and 4 to arrive at the profits earned in the publishing market. This is true for each period, and the periods would need to be summed to get the total profit (interest rates are assumed to be zero). This is the profit to the publisher *before* the payments made by the publisher to the author (for the rights to the work) have been paid. The net profit to publishers, if the market to purchase creations were competitive, would be zero and all the economic profit would go to the creator. If this profit were merely sufficient to cover the costs of the creator's efforts, as envisioned in ideal copyright, there would be no economic profit in the combined publishing and creating endeavor.

20 Efficient copyright amounts to perfect price discrimination on the part of the buyers, or perfect monopsonistic discrimination (to be more precise in the terminology). This is inferior, in principle, to perfect price discrimination on the part of copyright owners, which would lead not only to the ideal consumption of copyrighted works but also the ideal production of copyrighted works. Efficient copyright is still an improvement over ordinary copyright, from the perspective of social welfare.

of actual copyright law is based on aggregate market impacts instead of the impact for each individual work. Copyright is expected to balance the benefits from inducing additional creations with the harm caused by higher prices in the market for reproductions.[21] Still, the economic logic in discussing optimal duration is the same in the two cases—in the aggregate, we do not want to allow the "profits" earned by creators to be any larger than necessary to achieve the production of works deemed optimal.

The point I wish to highlight concerns the nature of the economic profit going to the creator of the work. Efficient copyright proceeds by adjusting the duration to eliminate, as much as possible, this economic profit (known as economic rent when we discuss payments to factors of production). Although the goal of copyright might be to maximize social welfare, such a goal is achieved by eliminating as completely as possible the economic rents going to creators.

To put this in perspective, it is important to understand that there is only a small share of creators who generate the economic profits that would be eliminated by efficient copyright law. Although it is frequently claimed that copyright provides a monopoly to all copyrighted works, this is incorrect; copyright merely provides the copyright owner a monopoly on making copies of a particular work. If the work in question has many similar competitors, copyright will provide a monopoly in name only. To understand this point, it helps to note that all property rights provide a monopoly of sorts. More precisely, each person has a "monopoly" on their individual efforts and talents in the same sense that copyright provides a monopoly to creators. No one can exactly duplicate anyone else. Nevertheless, the "monopoly" that each person has on his or her own self does not translate into an economic monopoly and attendant economic rents, because there is nothing unique or superior about the efforts and talents of most individuals.[22]

When there are monopoly returns to individual efforts they are due, in almost all cases, to particular, hard-to-imitate "talents" (or circumstances) found embodied in the individual. For someone who can hit a tennis ball with inordinate skill, or make a large number of peo-

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21 *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 341 (1989).

22 I am not implying that economic monopolies must earn monopoly profits. There are some products that might be monopolized but for which the monopoly profits are zero. Those products would not exist in competition. In general, an economic monopoly will have monopoly profit defined as an above-normal return on investment.

ple laugh, or pick winners with great precision at the race track, monopoly profit is likely to be a result. Although there are many tennis players, many comedians and many horseplayers, most of them are incapable of competing away the profits of those with highly unusual skills. It is the uniqueness of talent that allows individuals to earn economic rents, whether with copyright or in other endeavors.[23]

Copyright allows those few creators with unusual and hard-to-imitate talents to generate rents on their unique works which have few close competitors.[24] By contrast, most copyrighted works fail to earn a profit and most do not generate any economic rents for their creators.[25] For these works, the most disaggregated and efficient copyright regime would not limit the duration of copyright, because the additional revenues generated by copyright are unlikely to ever exceed the cost of creation.

An important characteristic of economic rent, which is central to understanding the true nature of efficient copyright, is that it can be taxed with no ill effect to efficiency. The reason for this is simple. Economic rent, by definition, is a payment made to a factor of production that is higher than what would be required to induce performance. Because it is an excess payment, removing the excess has no effect on behavior.

If, for example, a top IPO lawyer earns $9,000,000, but in his next best career (which has no nonmonetary advantages or disadvantages)

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23 When there is a unique monopoly talent, the question has sometimes been asked whether the creator—the source of the monopoly—gets any of that profit or whether it all goes to the publisher. *See* Ku, *supra* note 16, at 305–11. If the publishing market is competitive, then there is little reason to believe that creators do not receive a large portion of the monopoly gains since competition would be expected to lead to that result. In book publishing, where there are thousands of publishers, and where contracts are fairly standardized, there is little reason to think that the author does not get a large share of any monopoly surplus. Because royalties normally are a percentage of sales, with the royalty rate tending to increase when sales increase, successful (superstar) authors can make a great deal of money. Once the reputation of the author is established, she can play off one publisher against another to get larger portions of the surplus. Although record labels are considerably more concentrated than are book publishers, there are still many small independent labels that can offer higher royalty rates if the major labels fail to compete effectively. Further, this industry also tends to have standard contracts with the creators (assuming for simplicity that the composition creator is also the performance creator), who are also able to earn very large incomes if they are successful. It is clear from the enormous incomes earned by some creators that they at least share in any monopoly profit. Whether they gain most of the monopoly profit is a more open question that seems likely to be very difficult to answer empirically with any precision.

24 The literal creator of the work may not be the scarce talent, as when a ghost-written book by a famous individual sells millions of copies.

25 *See* Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VAND. L. REV. 1727, 1729–38 (2000).

he could have only earned $250,000, then $8,750,000 would be known as economic rent, and it could be taxed with no ill effect on social welfare because the lawyer would remain a lawyer even at a salary of $250,000.[26] In looking for tax targets that will not distort economic behavior, economic rent has always been at the top of the textbook list.[27] Nevertheless, promoting economic efficiency by taxing the rents of individuals with a very scarce skill is not an activity that is actually undertaken by government in free societies.[28] Nor is it even seriously promoted by anyone except, perhaps, by the Fabian Socialists of a long-gone era and some current academics.

Continuing with the example above, we can presume that the IPO lawyer works for an investment bank. The prices set by the bank are influenced by the costs of the bank, which include payments to the IPO lawyer and others of his ilk. If economic rents to employees are removed from the marginal costs of the bank, then the bank services will go down in price.[29] These lower prices will increase consumption of the bank's IPO services. Total surplus will increase as output increases. The new output will better reflect social costs and benefits, since the previous costs included rents that did not properly reflect opportunity cost.

This is where the disparate treatment arises. Society does not attempt to bring about extra efficiency by limiting the payments to talented individuals. There are no government limits on the "purses" available to winning golf or tennis players. There are no government limits on the maximum that can be paid to individuals in virtually any

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26 The lawyer is worse off by $8,750,000, but this is just a transfer to the government. Transfers are not treated as a change in social welfare.

27 Henry George and his land tax are most famously associated with these ideas. *See generally* HENRY GEORGE, PROGRESS AND POVERTY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS AND OF INCREASE OF WANT WITH INCREASE OF WEALTH: THE REMEDY (Robert Schalkenbach Found. 1955) (1879). George's analysis neglected the fact that although land is in fixed supply, quality differences in land were not. Much of the value of land was based on improvements to the land, and these improvements would be discouraged if a tax were based on land value.

28 Income taxes may be heavily skewed towards more wealthy individuals, but this is quite different than attempting to tax economic rents. Rents are a function of the earnings in the next best alternative, and for some wealthy individuals rents may be a high proportion of income whereas for others rents may be a low proportion of income.

29 This assumes that the cost of the IPO lawyer is a variable and not a fixed cost, which would be the case if, say, the IPO lawyer were paid by billable hours of work. It also assumes that the government removes the rent by forcing down payments to these individuals (e.g., a price control on salaries), not by taxing the rents away.

occupation.[30] This is so even though, in principle, a correctly instituted "economic-rent control" policy might improve overall welfare.[31] If the payments to top surgeons were lowered, more individuals could afford surgery; if payments to top scholars were lowered, more individuals could afford college tuition. The benefits in these cases seem similar or identical to those that arise from the removal of copyright, i.e., allowing more individuals to consume the good that was formerly priced too high due to economic rents.

I am unaware of any serious proposals to remove rents in the overall economy. Yet, making this very proposal in the case of copyright does not seem to raise any eyebrows. It appears that copyright policy provides a sui generis instance where apparent social welfare maximization can be undertaken without the appearance of draconian government intervention in the economy. This lack of concern about the inferior treatment given to talented creators under theoretically ideal copyright might be because copyright is framed as the government *helping* creators by providing any property right to creators at all, albeit incomplete and temporary rights. If the government, in noncopyright activities, were to try to limit the rents of certain individuals below what employers or markets were willing to pay, that would be seen as the government *hindering* those individuals in their attempt to make a living, and tampering with the market since it is presumed that individual workers are entitled to the fruits of their labor. I believe that if creators were considered to be as entitled to ownership of their works as are the owners of other more typical properties (which are also "legal" though not necessarily economic monopolies), the limited nature of copyright would been seen as an excessive excursion into the workings of the market. The key difference is that it is taken for granted that government will uphold property rights for physical items but such an assumption is not made for intellectual creations.

Not only are there few or no instances of the government attempting to eliminate economic rents to individuals in the noncopyright component of the economy, there are few examples of the government trying to eliminate monopoly profit at all. First, government efforts are often devoted to promoting monopoly: restricting

30 The recent restrictions on pay of government-rescued banks being an exception that helps to prove the rule.

31 I am not arguing that such a policy should be adopted. In fact, I do not believe such a policy would enhance efficiency since I do not believe the government has sufficient information to measure "economic rent." I also expect that the theory is providing misleading implications in the same way that Henry George's conclusions were wrong. Further, it would be an excessive intrusion of the government into the economy and into private contracts.

taxicab licenses, restricting the output of numerous agricultural products, enforcing many licensing requirements desired by current licensees, supporting the creation of labor unions, and so forth. These are all activities that promote monopoly, reduce competition, and lower social welfare from its economic maximum. Economic analysis is generally critical of these activities from an efficiency point of view, but that has not stopped the government from continually promulgating such activities.

In general, even the clear existence of a monopoly, if it was fairly earned, is not necessarily considered grounds for antitrust prosecution.[32] The fruits of monopoly, earned fair and square, are not proscribed by antitrust law.[33] It is anticompetitive behavior with the intent to gain or protect a monopoly that provides the grounds for antitrust, not the existence of monopoly power itself.[34]

It is very peculiar, therefore, that producers of copyrighted works are treated differently than are producers of virtually any other goods.[35] It is apparently fine for everyone else to earn rents on their superior talent. But in our attempts to create an efficient copyright

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32 *See, e.g.*, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system."); United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) (stating that monopolization under section two of the Sherman Act requires "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident").

33 *Id.* The logic for this is simple and compelling. If competitors are allowed to compete but are unable to dislodge an incumbent "monopolist," then there is little the government can do that would improve welfare. If a firm garners a very large market share that we would associate with being a monopolist, but it does so fairly, it means that the firm's products are better than those of its competitors. Any above-normal profits earned by the firm are attributed to its superior capabilities. Textbook price controls could be used to increase output and reduce the deadweight loss, but these would likely do more harm than good because the government does not really know what the competitive price should be. Moreover, such a policy removes any incentive for the incumbent, and potential incumbents, to try to be the best. If the monopolist were to disappear, social welfare would be lower because consumers already had faced the products and prices of the replacement firms and found them to be inferior to that of the incumbent. Thus, it makes sense to let a winner keep winning as long as the rules are clear and the game is played fairly.

34 *Id.*

35 In fact, some critics of copyright suggest that a world without entertainment superstars would be a better world. *See*, *e.g.*, WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 79 (2004). But I have not seen these writers suggesting that all rents based on individual talent be removed from everyone in society and that all superstars disappear. Perhaps they would do so, but I am doubtful they would want to take positions so close to those advocated by political systems and dictatorships that caused so much human misery and suffering during the twentieth century.

law we would eliminate those rents for creators of artistic works if we could. I am not aware of any rationale for this disparate treatment.[36]

III. Does the Production of Creative Works Respond to Payments?

There is a fascinating history of articles claiming that creators might not need financial rewards to induce their creations.[37] There is even a hint of a claim that financial rewards might decrease the value of creative works that are created.[38]

Arnold Plant appears to make some of these claims. In his classic 1934 article on book publishing, Plant divides authors into three categories: (1) authors such as "scholars as well as poets who are prepared to pay good money to have their books published,"[39] (2) authors such as scientists and scholars who might not pay but who do not require payment to create their works,[40] and (3) "professional scribes . . . who write for their living."[41]

It is somewhat difficult to tell the difference in composition between Plant's first two sets of authors. Included in the first group is a set of authors who want to influence the world and will pay to do so; individuals who perhaps use what are now often called vanity publishers.[42] It is probably safe to ignore this group since it is unlikely that their creations provide much economic value. Left are the scholarly types, plentiful in number, who gain prestige, achieve tenure, and get grants if they publish often. It is not surprising that these latter authors do not require payment *from their publishers*, but that does not mean that they do not require payment to create their works.[43]

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36 One argument that is often brought up is the fact that copyrightable goods tend to be nonrivalrous in consumption. That hardly affects the argument presented above, however. At best it indicates that markets will not produce the ideal quantities of a copyrighted good since that is an implication of markets with nonrivalrous goods. But nonrivalrousness is not a reason for weakening property rights for creative works. Markets are generally thought to *underproduce* nonrivalrous goods (the titles, or creations) because market prices do not reflect the full value of those goods to consumers (except in the theoretical case of perfect price discrimination on the part of the copyright owner). This suggests that there will be too few works created, even under perpetual copyright.

37 *See supra* text accompanying notes 15–16.

38 *See* Oberholzer-Gee & Strumpf, *supra* note 4.

39 Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 Economica 167, 168 (1934).

40 *Id.* at 169.

41 *Id.*

42 *See id.* at 168–69.

43 *See id.* at 169.

If all the scholars in the world were to lose their academic positions and take nonacademic jobs, is there any doubt that the very great majority of academic journals would disappear due to a lack of articles? How many scholarly articles or books are now written by authors who are not working for an employer that values such publications? I would hazard the percentage is quite low. I believe, therefore, that it is fair to say that virtually all these authors are writing, at least in part, for money.[44] Plant is merely suggesting that copyright is not required to pay these authors and is not suggesting that these authors do not require payment. Their payment may not come from publishers, but it does come from someone and does play an important role in the authors' decisions to create works.

Authors in Plant's third classification—the scribes writing for a living—do require payment from publishers (or from direct sales) in order to be induced to create their works. But Plant is critical of copyright even for these authors:

> The belief has been widely held that professional authorship depends for its continued existence upon this copyright monopoly; or upon an alternative which is considered worse, viz. patronage. Even if that were true, it would still be necessary to show beyond reasonable doubt that professional authors were worth retaining at such a price as copyright. . . . Patronage has in the past provided us with some magnificent literature, music, pictures, buildings, and furniture.[45]

Plant's claim that the monopoly from copyright is so harmful that we might be better off with no copyright (for these authors requiring payment!) is difficult to understand. Plant seems to be arguing that it might be better to eliminate these works altogether than to allow them to be "monopolized" through copyright, although this might be too strong a reading.[46] Since monopolies provide a surplus to society (even if not as large as the surplus from competition), retaining the works from these authors should be worthwhile even if done so under a copyright monopoly. Plant, however, seems to view patronage as the main alternative to copyright and seems to believe that patronage is superior to copyright, a judgment that is difficult to accept.[47]

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44 *See id.*

45 *Id.* at 170.

46 *See id.* at 170–71. It is possible that Plant intends to include the harms from copyright for the first two groups of authors as well as the professional scribes to achieve his conclusions, in which case he would not be clearly incorrect. That is not my understanding of his article, however. *See id.* at 168–69.

47 *See id.* at 170–71. Just because a system can lead to the production of great works, it

One of Plant's main contributions was his discussion of how some English authors belonging to his third group of professional scribes were able to generate more revenue in the United States than in Great Britain even though the United States had no copyright protection for English authors.[48] Plant describes the method used by English authors in the nineteenth century to get their work published in the United States before any pirates could make copies available for sale.[49] Because it took considerable time to make the plates that were needed for printing, a clever British publisher or author could contract with American printers to produce copies of the book under lock and key and have them ready to be shipped to retailers at the same time as, or shortly after, they were available in England.[50] In this way, customers in the United States would have access to the official copies of the book months before any competitors were able to make copies.[51] For bestselling books, a large portion of sales takes place in a relatively short time so the American publisher could generate sufficient revenues to allow payment to the English author.[52] This concept can be thought of as a form of "self-help copyright."

This economic history is interesting, but it hardly sustains a claim that some form of protection is not useful. Plant's argument is mainly that there was an inherent monopoly in being first in the market, and this lead time provided enough revenue such that "English authors sometimes received more from the sale of their books by American publishers, where they had no copyright, than from their royalties in [England]."[53] The fact that self-help copyright can generate some above-competitive profits in the reproduction market does not demonstrate that statutory copyright is unnecessary or not welfare enhancing, however. That English authors might have sometimes received more money from American publishers than from English publishers may seem to imply that self-help copyright can generate as much or more revenue than statutory copyright, but this is not a correct implication. Plant fails to mention that the population in the United States during the latter half of the nineteenth century was be-

hardly makes that system worthy of our admiration. For example, there have been great works (e.g., pyramids) that were created under a system of slavery, but their greatness hardly demonstrates the virtue of such a system.

48 *See id.* at 172.

49 *See id.* at 173.

50 *See id.*

51 *See id.*

52 *See id.* at 172–73.

53 *Id.* at 172.

tween 50% and 100% larger than England's population, which should have led to considerably larger revenues from the United States market.[54] This comparison is further distorted in favor of the United States because United States publishers could pick already successful English authors, and free ride off the English publishers who were expending resources to find new, successful authors and books in an otherwise risky hit-or-miss (mainly miss) business where losses from the misses were subsidized by the winners, as is always the case in these types of industries.[55]

Another problem with relying on self-help copyright is that technology changes the speed with which copies can be made. One can make copies today far faster than was possible in the mid-to-late 1800s, the period covered by Plant's narrative. Thus the length of time that the private self-help "monopoly" would last is much shorter now than it was then.

But Plant's claim that creators do not need statutory copyright protection is very different from a claim that creators do not require payment to produce their works. The self-help "copyright" discussed in a seemingly positive tone by Plant would be socially harmful if authors did not require some payment to create their works. That is because a self-help copyright creates a temporary monopoly which, for its admittedly short duration, "suffers" from the same economic attributes as the monopoly created by copyright, and this monopoly would harm social welfare if authors did not need the extra profits generated.

Nevertheless, the claim that creators as a group do not need rewards has appeared recently. For example, Felix Oberholzer-Gee and Koleman Strumpf have suggested that reward plays little or no role in the production of creative works.[56] Unlike Plant, they treat creators as a homogenous group. Here is what they have to say: "A key question is whether financial incentives are needed to encourage artistic

54 *Compare* DONALD B. DODD, HISTORICAL STATISTICS OF THE STATES OF THE UNITED STATES: TWO CENTURIES OF THE CENSUS, 1790–1990, at 103–04 (1993) (showing that the total population in the United States in 1870 was 38,558,371), *with* B.R. MITCHELL, INTERNATIONAL HISTORICAL STATISTICS: EUROPE, 1750–1988, at 8 (3d ed. 1992) (showing that the total population in England and Wales in 1871 was approximately 22,712,000).

55 *See* Plant, *supra* note 39, at 184. Plant seems to believe that it is socially wasteful to use resources to discover which new creators have the most market potential. He approvingly quotes T.H. Farrer: "What we want, I believe, is more good books and cheaper good books; but we do not want more books; we have too many books at present." *Id.* He goes on to criticize publishers for not making authors share a larger portion of the cost of failed books. *Id.*

56 Oberholzer-Gee & Strumpf, *supra* note 4.

output. While this is in large part an open question, several indirect pieces of evidence suggest that financial incentives play a smaller role in the creative industries than elsewhere in the economy."[57] They further note that "[i]n this respect, the arts are similar to the production of open source software where many programmers appear to work for little monetary gain."[58] Admittedly, Oberholzer-Gee and Strumpf are not exactly saying that musicians or artists require no payment, but instead that they will work for "little monetary gain."[59] They go on:

> [W]hy are there so many musicians? One explanation is that musicians enjoy their profession. Under this view, musicians take pleasure from creating and performing music, as well as aspects of the lifestyle such as flexible hours and the lack of an immediate boss. If this theory is correct, the economic impact of file sharing [reduced revenue] is not likely to have a major impact on music creation.[60]

Oberholzer-Gee and Strumpf wish to draw a distinction between creative artists, who presumably require little remuneration, and workers in most other parts of the economy, who require greater remuneration.[61] Yet many respected professions, say, professors who enjoy research and teaching, doctors and nurses who enjoy helping the sick, athletes who enjoy playing their sport, architects who enjoy creating new structures, and so forth, would also seem capable of being described in a manner similar to musicians. How can Oberholzer-Gee and Strumpf distinguish between these professions and those dependent on copyright without classifying almost all occupations other than cleaners of elephant excrement as not requiring much compensation? It is not clear that they can.

Further, the lifestyle that Oberholzer-Gee and Strumpf believe is so attractive to musicians is not really viable if musicians receive little or no payment.[62] In order to live a lifestyle where you have flexible hours, no boss, and low income,[63] one must be independently wealthy or otherwise be consigned to a life of poverty. It is unclear how "pleasurable" the poverty component of that lifestyle would be. Otherwise,

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57 *Id.* at 21–22.

58 *Id.* at 21 n.20.

59 *Id.*

60 *Id.* at 22.

61 *See id.* at 21–22.

62 *See id.* at 22.

63 *Id.*

one gets a second job—an apparently common occurrence for musicians—which would seem to gainsay these lifestyle benefits.[64]

If creators do not require any rewards to induce their efforts, then social welfare maximization would have some interesting implications regarding the self-help copyright that Plant discussed. If creators do not need to be paid, then attempts to create a self-help "monopoly" would be harmful to social welfare. In that case, creators should not be allowed to engage in activities that would provide any sort of temporary monopoly as a result of being first. Authors and other creators, therefore, should be prevented from exclusive contracting with publishers, because this would give publishers an ability to engage in some form of self-help copyright, which would reduce social welfare. One solution would be a law preventing creators from entering into any exclusive contracts where they are paid for their creative efforts.

Maximizing social welfare would lead to other seemingly absurd results. Obviously, musicians could be paid as "performers" but not as composers, because allowing the latter would lower social welfare. Therefore, a careful monitoring of contracts would be required to make sure that payments were for performing only and not for the creation of new compositions. Further, paid improvisations of all kinds, whether it is music or comedy, would need to be banned since improvisation is the creation of a new work, and social welfare would be reduced if consumers gave up their resources in the act of needlessly paying for creation.

Oberholzer-Gee and Strumpf go somewhat further than Plant in suggesting that authors do not need financial rewards, at least in the particular case of musical compositions and lyrics:

> Overall production figures for the creative industries appear to be consistent with this view that file sharing [reduced revenues] has not discouraged artists and publishers. While album sales have generally fallen since 2000, the number of albums being created has exploded. In 2000, 35,516 albums were released. Seven years later, 79,695 albums (including 25,159 digital albums) were published. . . . Similar trends can be seen in other creative industries.[65]

Oberholzer-Gee and Strumpf's implicit claim in the above quote is that there is an *inverse* relationship between payment and creation. Although it is true that Oberholzer-Gee and Strumpf's literal words

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64 *Id.* at 23.

65 *See id.* at 23–24.

merely state that artists have not been "discouraged" by reduced revenue,[66] the evidence they put forward, if it is to be believed, clearly indicates that the decreased revenues from music albums (which have fallen by nearly 40%)[67] are associated with a more than doubling of the number of albums created. Oberholzer-Gee and Strumpf must not think that there are other tenable explanations for this increase in albums because if there were, it would make their conclusion invalid.

If you believe their data, the implication would seem clear: lower the payments to creators and in return many more creative works are produced. Oberholzer-Gee and Strumpf walk the reader up to the edge of making this claim and invite the reader to jump in, although they do not take the plunge themselves.

One reason not to take the plunge is that concluding that there is an inverse relationship between payment and production leads to implications even more bizarre than does the assumption of no relationship. If lowering the payments to creators increases their production, then eliminating copyright would be insufficient to maximize welfare. Instead, we would have to seriously consider penalizing (taxing) creators in the expectation that this will induce them to produce more works. Did not Bela Bartok and Dylan Thomas reach their most productive periods while they were almost starving? Intentionally impoverishing artists, even those who might otherwise have been independently wealthy, would appear to be the welfare maximizing policy.

The other, more compelling, reason not to take the plunge is that the numbers in the Oberholzer-Gee and Strumpf quote are very misleading. The reported number of albums from the year 2000 represents albums mainly released by record companies. The latter number of albums is dominated by self-produced albums that use middlemen such as CD Baby or TuneCore who, for about $35.00, will release a self-produced album onto all leading digital stores such as iTunes and Amazon.com. Comparing the two types of albums is essentially like comparing apples and oranges. Oberholzer-Gee and Strumpf appear to be aware of this problem and try, indirectly, to cover themselves by stating: "Obviously, it would be nice to adjust output for differences in quality, but we are not aware of any research that has tackled this

66 *Id.*

67 *See* Stan Liebowitz, How Reliable Is the Oberholzer-Gee and Strumpf Paper on File-Sharing? 3 (Sept. 2007) (unpublished manuscript), *available at* http://ssrn.com/abstract=1014399.

question."[68] But they leave the reader in the dark about why there might be important quality differences between 2000 and 2007.

Thus, despite recent claims to the contrary in the literature, it is far from clear that that creators do not need financial rewards to induce creations, nor is it clear that that financial rewards might actually decrease the value of creative works that are created. In fact, if creators do not need to be rewarded, the logic of welfare maximization would imply not just that copyright is not needed, but that creators should not be paid. Social welfare maximization would lead to unfair and unacceptable markets.

Conclusion

Economic analysis can tell us what would happen if we make certain policy decisions. It cannot tell us what policy decisions we should make. This distinction has often been labeled as the difference between positive economics and normative economics. The analysis of copyright, in which tradeoffs and economic efficiency are discussed, is a positive analysis.

The claim that we should maximize social welfare when setting copyright is a normative decision. My contention in this Essay is to suggest that applying welfare maximization criteria to copyright policy is a poor normative choice. It treats creators and their ability to earn rents differently from other individuals, even though the justification for removing rents in copyright-based industries does not seem any different than it would be for removing rents in other aspects of the economy.

How, then, should copyright duration be determined if we are to abandon, or at least limit, welfare analysis? Copyright duration is currently at its historic peak, although the current length has been under sustained academic attack. Much of this critique has drawn strength from the economic, social welfare analysis discussed above. I have suggested that these critiques suffer from a form of myopia and disparate treatment. My own view on copyright duration is simple: I would be happy to treat copyright, narrowly defined, the same as real property. Because there are costs of keeping track of intellectual property that seem particularly high, because permissions are often difficult to come by, and because the value of most intellectual property drops to de minimis levels after a short time, I would favor an approach that puts largely unused copyrighted works in the public domain but allows other works to be indefinitely renewable.

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[68] *Id.* at 24.