ARTICLES

COPYRIGHT AND DISTRIBUTIVE JUSTICE

*Justin Hughes & Robert P. Merges**

* Justin Hughes is Honorable William Matthew Byrne Professor of Law, Loyola Law School, Los Angeles. Robert P. Merges is Wilson Sonsini Goodrich & Rosati Professor of Law, University of California, Berkeley Law School (Boalt Hall). Our thanks to Margo Bagley, Barton Beebe, Robert Brauneis, Robert Burrell, Anupam Chander, Brietta Clark, William Fisher, Eric Goldman, Ruth Okediji, Leif Wenar, and Kim West-Faulcon for helpful comments and suggestions on elements of this Article as well as to Julius Bodie, Jesse Fox, Marcus Hayes, Emile Nijmeh, Lauren Noriega, Brian H. O'Beirne, and Justin Thiele for research assistance. As to the remaining errors, we are, as Charles Dickens said, "hoping defects will find excuse." CHARLES DICKENS, *A Poor Man's Tale of a Patent*, *reprinted in* REPRINTED PIECES: THE LAMPLIGHTER, TO BE READ AT DUSK, AND SUNDAY UNDER THREE HEADS 113 (Andrew Lang ed., London, Chapman & Hall 1868).

Introduction

Is our copyright system basically fair? Does it exacerbate or ameliorate the skewed distribution of wealth in our society? Does it do anything at all for disempowered people, people at the bottom of the socio-economic hierarchy? In this Article we engage these questions. Our goal is to begin a more comprehensive discussion of the effect the copyright system has on the allocation of wealth in our society.

These questions of distributive justice are atypical in scholarship on copyright law.[1] To begin with, the dominant methodological approach in the field emphasizes incentives for aggregate production of information goods.[2] The primary aim of this utilitarian framework is to provide economic encouragement to creators while insuring maximum access to the works creators produce. Put differently, the traditional utilitarian theory sees copyright incentives as the mechanism through which society regulates the reward to creators. The goal is to set the incentives just right, so society receives the maximum number of works of the highest quality at the lowest possible overall social cost. A hefty chunk of this literature has sought to cast doubt on the

1 An exception is Tom W. Bell, *Authors' Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 Brook. L. Rev. 229, 229 (2003) (considering "copyright as a form of authors' welfare" and comparing government welfare support for the indigent to copyright protection for authors).

2 *See* Robert P. Merges, Justifying Intellectual Property (2011) (describing and critiquing the dominant utilitarian justification for IP rights).

need for copyright—or at least copyright in its present form and strength—to generate all the original expression we have (or want).[3]

More recently, academic commentators have started to focus on the "distributive" aspects of copyright and, not surprisingly, this work has shadowed the incentive-based analyses by focusing on *information distribution.* Commentators working this territory have raised concerns about the general diffusion of knowledge,[4] about availability of materials in minority languages,[5] and about the ability of subsequent creators to create new expression using existing, copyright-protected expression.[6]

How much wealth copyright incentives create—and who holds that wealth—are at best secondary concerns. The closest many scholars get to recognizing copyright's direct effect on income and wealth is to note that large corporate interests, and not individual creators, wind up enjoying copyright's bounty. Copyright scholarship is replete with what we call the "corporate copyright trope," i.e., that the "bulk of [copyright's] expansion has enriched copyright intermediaries, rather than creators and readers,"[7] that "increasingly intellectual properties underwrite the 'private' sovereignties of multinational corporations,"[8] and that "there is data aplenty to suggest that most creative people don't enjoy significant benefits from the operation of copyright—at least in comparison to those which accrue to firms that function as intermediaries between creators and audiences."[9]

---

3 *See, e.g.*, Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009) (proposing curbing exclusive rights over unforeseen uses of works as unnecessary for incentives); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970) (casting doubt on the conventional wisdom that copyright is either a necessary or efficient means of incentivizing creativity); Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 LAW & CONTEMP. PROBS. 89 (2003) (exploring reasons why the case for private property is weaker in the situation of intangible goods).

4 *See, e.g.*, Gaia Bernstein, *In the Shadow of Innovation*, 31 CARDOZO L. REV. 2257 (2010); Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1879–82 (2007); Lateef Mtima, *Copyright and Social Justice in the Digital Information Society: "Three Steps" Toward Intellectual Property Social Justice*, 53 HOUS. L. REV. 459 (2015) (proposing "social justice assessment" for copyright claims).

5 *See, e.g.*, Lea Shaver, *Copyright and Inequality*, 92 WASH. U. L. REV. 117, 122–23 (2014).

6 *See, e.g.*, Betsy Rosenblatt & Rebecca Tushnet, *Transformative Works: Young Women's Voices on Fandom and Fair Use*, *in* eGIRLS, eCITIZENS 385 (Jane Bailey & Valerie Steeves eds., 2015); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651 (1997).

7 Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 27–28 (2010).

8 Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1305 (1996).

9 Peter Jaszi, *If Locke Had Slept Late*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS (Ruth L. Okediji ed., forthcoming 2017) (quoted with permission of the author; Professor Jaszi has since revised the prose but our point is that this perspective has just become an assumption among copyright scholars); *see, e.g.*, RONALD V. BETTIG, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY 38 (1996) ("[S]ix

In fact, there is no such data. On most occasions when the corporate copyright trope appears, it is simply a rhetorical move in favor of diminished copyright protection.[10] In general, copyright scholarship sees the income of creative people—if it sees it at all—as a means to an end: the important job of copyright is to stimulate production of new works. The wealth of creators—its level and distribution—is of little interest.

Not so in this Article. The level and distribution of wealth flowing to creative individuals is our central concern. Because we care about copyright's impact on the distribution of wealth, we focus less on the creative works that copyright induces and more on the money earned as a result of these works. We inquire into whether the pattern of earnings from copyright can be called fair. In particular, we review copyright law against the framework for distributive justice established by John Rawls in his seminal *A Theory of Justice*.

To do this, in Part I we set out the basics of Rawlsian distributive justice and, in Part II, we apply Rawls's principles to the real world of copyright. We take a close look at the incomes of creative professionals, particularly in the music industry, and the crucial role copyright plays in helping them earn a living. In this Part we also consider the Rawlsian requirement that a society provide fair opportunities for everyone to aspire to any career. We show that copyright does quite well under this principle in one concrete way: copyright provides the basis for the income and wealth of most of the wealthiest African Americans in the United States. Part III continues the theme, looking at some detailed rules in copyright law that further the goal of distributive justice in ways that rules of real and chattel property do not. We reach two conclusions: first, that copyright in its current form is a powerful tool to empower creative individuals economically. And second, that further reforms could enhance copyright law's role in adding to the income of creative individuals. This has special relevance in a time of increasingly skewed

---

to ten . . . companies—will soon produce, own, and distribute the bulk of the culture and information circulating in the global marketplace."); TRAJCE CVETKOVSKI, COPYRIGHT AND POPULAR MEDIA: LIBERAL VILLAINS AND TECHNOLOGICAL CHANGE 100 (2013) ("Hollywood, the US music industry and gaming industry dominate world media . . . . In the 1800s, 14 years of temporary monopoly became 50, then in the 1900s, 70 years, and now it is potentially up to 120—but solely for corporate benefit."); WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 76 (2009) (copyright rights "are in truth owned by publishers and other corporations who regard authors as a negative item on balance sheets to be reduced as much as possible"); Shaver, *supra* note 5, at 141 ("The advantages of copyright protection are reaped primarily by those already privileged: affluent consumers, the most successful creators, and major publishing houses and other copyright holders located in industrialized countries."). *But see* Peter S. Menell, *Property, Intellectual Property, and Social Justice: Mapping the Next Frontier*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 147, 178 (2016) (recognizing, upon performing a general survey of issues, that copyright "also affects distributive values" including "providing economic security for authors").

10 *See, e.g.*, PATRY, *supra* note 9, at xv–xvi ("The argument of this book is that bad business models, failed economic ideologies, and the acceptance of inapposite metaphors have led to an unjustified expansion of our copyright laws. To rectify the current imbalance we must . . . have the courage to change our laws . . . .").

income distribution and a digital economy that concentrates wealth with information aggregators and "those who own the top machines."[11]

I. Rawlsian Justice, How Rawls Uses "Property," and the Propriety of Using Rawls

Before delving into a discussion of Rawls's vision of distributive justice, the practical realities of copyright law for creative professionals, and how those realities serve (and *could better serve*) distributive justice, we begin by considering an important criticism: How can we argue that Rawls's ideas apply to intellectual property when he did not touch on intellectual property in his writings? For example, concerning those in the IP field who develop theories based on "John Locke, or Hegel, or, more recently, Rawls," Mark Lemley has opined "those theories have more than their fair share of problems, starting with the fact that none of these latter-day prophets of IP actually included IP at all in their theories."[12]

---

11 Jaron Lanier, Who Owns the Future? 11 (2013).

12 Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. Rev. 1328, 1338–39 (2015). Professor Lemley adds that these three philosophers "spoke of real property and chattels, not ideas." *Id.* at 1339. Lemley is factually wrong about all three philosophers. *See* John Rawls, *Locke III: Property and the Class State*, *in* Lectures on the History of Political Philosophy 138, 143 (Samuel Freeman ed., 2007) ("For Locke, property—or 'propriety in' (as he often says)—is a right to do something, or a right to use something, under certain conditions, a right that cannot be taken from us without our consent . . . . [P]roperty does not mean land or resources, even if Locke sometimes seems to talk that way.").

Professor Lemley exacerbates the inaccuracies by writing "[W]hen John Locke wrote of IP, it was to condemn it, not to treat it as an inherent part of the natural order." Lemley, *supra*, at 1339 n.38. To support this, Lemley cites only one piece of secondary literature. *Id.* (citing Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, *in* New Essays in the Legal and Political Theory of Property 138–67 (Stephen R. Munzer ed., 2001)). While Locke was opposed to perpetual copyright, far from condemning copyright, in a 1694 memorandum Locke proposed that when a publisher purchases rights "from authors that now live and write, it may be reasonable to limit their property to a certain number of years after the death of the author, or the first printing of the book, as, suppose, fifty or seventy years." Justin Hughes, *Locke's 1694 Memorandum (and More Incomplete Copyright Historiographies)*, 27 Cardozo Arts & Ent. L.J. 555, 571 (2010) (quoting John Locke, *Memorandum* (1694), *in* 1 The Life of John Locke 375, 386–87 (Peter King ed., London, Henry Colburn & Richard Bentley 1830)). It is hard to see how Locke's words were "condemning" IP.

Lemley's description is an even worse mischaracterization of Hegel. In his 1820 *Elements of the Philosophy of Right*, Hegel writes expressly about the rights of an author or inventor to prevent others from reproducing a book or device and explains the difference between the rights in a chattel book/device and the creator's rights:

> Since the person who acquires such a product possesses its entire use and value if he owns a *single* copy of it, he is the complete and free owner of it as an individual item. But the author of the book or the inventor of the technical device remains the owner of the *universal* ways and means of reproducing such products and things [*Sachen*], for he has not immediately alienated these univer-

We consider this sort of critique to be antithetical to the scholarly tradition: a tradition of building on, elaborating, and *extending* the insights of thinkers who came before us. We agree that it would be problematic to speak of "Locke's theory of patents" or "Hegel's theory of trademarks,"[13] but it is completely legitimate to consider a *Lockean* theory of patents or a *Hegelian* analysis of trademark semiotics. The general principles these philosophers laid down are capable of application to all manner of problems, issues, and institutions that either did not exist when these theorists were writing or that they simply never considered. It is in this spirit that we speak here not of "Rawls's approach to copyright," but "*a* Rawlsian approach to copyright."

A. A Primer on Rawlsian Justice

Rawls's great life project was to figure out moral principles for structuring a fair and just society. His achievement was, in Kenneth Arrow's words, "[a] profound work [that] has caused us all to reconsider simple-minded utilitarianism."[14] Rawls's system of thought begins with a Kantian focus on the rights of each individual, but then integrates this with an emphasis on the fair distribution of resources. This confluence of Kantian individualism and collective concerns, together with a highly analytical way of thinking, marks Rawls's major contribution to the theory of social justice. The clearest statement of the twin considerations at the heart of Rawls's project appears in his two principles of justice, which he states as follows:

---

sal ways and means as such but may reserve them for himself as his distinctive mode of expression.

G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 69, at 99 (Allen W. Wood ed., H.B. Nisbet trans., 1991) (1820) (alteration in original). Hegel is very clear that "furthering the sciences and arts" is achieved by "protect[ing] those who work in them against *theft* and to provide them with security for their property." *Id.* at 99–100. In this same section, Hegel uses a phrase comfortably translated as "intellectual property" (*Geistiges Eigentum*), *id.*, and says "[t]hus laws against *breach of copyright* do attain their end of protecting the property rights of authors and publishers to the (albeit very limited) extent specified," *id.* at 100. In this last sentence the German phrase might be translated as "copyright" (as in the Nisbet 1991 translation) or as "[l]aws against reprinting" (as in Dyde's 1896 translation: G.W.F. HEGEL, HEGEL'S PHILOSOPHY OF RIGHT 75 (S.W. Dyde trans., London, George Bell & Sons 1896)) [hereinafter HEGEL, PHILOSOPHY OF RIGHT]. We deal with the mischaracterization of Rawls below.

13 That is, assuming Hegel did not write about trademarks *per se* or unfair competition —and to the best of our knowledge, he did not. Hegel did, however, write about "marking" objects as a sign of possession—in the sense of the origin of the word "branding," which is intimately related to the origins of trademarks. HEGEL, PHILOSOPHY OF RIGHT, *supra* note 12, at 64 ("Of all kinds of possession this by marking is the most complete . . . . When I seize or form an object, in each case the result is in the end a mark, indicating to others that I exclude them, and have set my will in the object.").

14 Kenneth J. Arrow, *Rawls's Principle of Just Savings*, 75 SWEDISH J. ECON. 323, 323 n.* (1973). Of course, utilitarianism, in different forms, retains its faithful. *See, e.g.*, Lemley, *supra* note 12.

> *First Principle*
>
> Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
>
> *Second Principle*
>
> Social and economic inequalities are to be arranged so that they are both:
>
> (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
>
> (b) attached to offices and positions open to all under conditions of fair equality of opportunity.[15]

The first of these is commonly called the "Equal Basic Liberties Principle"; the second principle is commonly called the "Difference Principle." By permitting "inequalities" in income and wealth, the second principle distinguishes a liberal system's distribution of wealth from a communist or egalitarian distribution of wealth.[16] But the second principle legitimates only those inequalities that "benefit . . . the least advantaged"; where "the expectation of the representative occupant of the least advantaged 'place in the distribution of income and wealth' [is] maximized."[17] Put differently, a society ought to tolerate "only those social and economic inequalities that work to the advantage of the least well off members of society."[18] The second part of the "Difference Principle" (2(b) above) is sometimes called the "Fair Equality of Opportunity Principle" and its meaning is straightforward: if society is to permit careers that provide above-average compensation, all members of society ought to have a fair shot at them.[19]

For our purposes, it is also important to point out that Rawls actually presents *two different versions* of the Difference Principle.[20] The version above is the more familiar, but Rawls also presents a more formal "lexical" version of the Difference Principle (which G.A. Cohen also calls the "canonical" version[21]):

> [I]n a basic structure with n relevant representatives, first maximize the welfare of the worst off representative man; second, for equal welfare of the

15 JOHN RAWLS, A THEORY OF JUSTICE 302 (1971).

16 Post-Mao Chinese communist doctrine excepted. As Deng Xiaoping famously said in 1975, "People's contributions do differ . . . . Shouldn't there, therefore, be differences in remuneration?" ORVILLE SCHELL & JOHN DELURY, WEALTH AND POWER: CHINA'S LONG MARCH TO THE TWENTY-FIRST CENTURY 274 (2013).

17 ROBERT PAUL WOLFF, UNDERSTANDING RAWLS: A RECONSTRUCTION AND CRITIQUE OF A THEORY OF JUSTICE 81 (1977) (quoting RAWLS, *supra* note 15, at 96).

18 MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 142 (2009) (describing Rawls's second principle).

19 *See, e.g.*, JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT § 13.6, at 47 (Erin Kelly ed., 2001); RAWLS, *supra* note 15; Richard J. Arneson, *What Sort of Sexual Equality Should Feminists Seek?*, 9 J. CONTEMP. LEGAL ISSUES 21, 22 (1998) (discussing "the Fair Equality of Opportunity (Fair Equality) principle espoused by John Rawls" (citing RAWLS, *supra* note 15)).

20 Indeed, the Difference Principle evolved over the course of Rawls's work. *See generally* WOLFF, *supra* note 17.

21 G.A. COHEN, RESCUING JUSTICE AND EQUALITY 17 (2008).

> worst-off representative, maximize the welfare of the second worst-off representative man, and so on until the last case which is, for equal welfare of all the preceding *n*—1 representatives, maximize the welfare of the best-off representative man.[22]

This version of the Difference Principle allows one to be concerned with improving the material conditions of groups other than the worst off—provided that the worst off are not made *even* worse off. Philosophers G.A. Cohen and Rodney Peffer have offered their own elaborations of the lexical Difference Principle.[23]

To understand the difference between these two versions of the Difference Principle, consider three societies with distribution of utiles per 10% of the population as shown in Table 1 below.

TABLE 1

	"A" default egalitarian position	"B"	"C"
Top 10%	2	10	12
80th	2	4	8
70th	2	4	8
60th	2	4	6
50th	2	4	6
40th	2	4	6
30th	2	4	6
20th	2	4	4
10th	2	4	4
Bottom 10%	2	4	4

In the egalitarian default position, the decile groups are merely place keepers as all individuals are receiving the same utiles. The simple version of the Difference Principle says that we are justified in moving from "A" to "B" because even though it imposes a stark inequality on the society—those in the top decile receive 2.5 times as many utiles as anyone below that decile—this inequality is justified if that is needed to motivate the uppermost decile

22 RAWLS, *supra* note 15, at 83 (emphasis added).

23 As Peffer describes the principle:

> [T]his principle is to be applied lexically to one major economically distinguishable group after another such that if it is not possible to make any more headway in maximally benefiting a less materially advantaged segment of the population (by altering background institutions, policies, and programs . . .) then the principle is to be applied to the next major economically distinguishable (poorest) group and so on.

Rodney G. Peffer, *A Modified Rawlsian Theory of Social Justice: "Justice as Fair Rights"*, XXII WORLD CONGRESS OF PHIL. PROC. 7 (2010).

to perform functions that effectively double the utiles for everyone else. The "least advantaged" (90% of the population in society "B") have been made significantly better off.

Now let us compare utile distributions "B" and "C." The simple version of the Difference Principle does not provide a justification for "C" because the "least advantaged"—still 30% of the society—are no better off than in "B" while the top decile has continued to become wealthier. But the lexical Difference Principle says we *should* move from "B" to "C" because we "first, maximize the welfare of the worst off representative man; second, for equal welfare of the worst-off representative, maximize the welfare of the second worst-off representative man, and so on . . . ." On that basis, "C" is preferable to "B" because it substantially increases the wealth of representative persons in the middle of the society, i.e., "C" is preferable to "B" because it has a better off middle class even if the position of the least advantaged class remains stuck.

Obviously, the lexical version of the Difference Principle does not resonate with pure altruism as strongly as the simple version that "inequalities are to be arranged . . . to the greatest benefit of the least advantaged"[24] but the lexical version (a) better jibes with Pareto optimality,[25] and (b) better resonates with our concerns about the middle class.

To these two framework principles Rawls added a "first priority rule" that addresses times when a "less extensive" or "less than equal" package of liberties might be acceptable (for example, to ensure the society survives an external threat).[26] Rawls also provided what he called the "second priority rule," viz., that the Difference Principle, including Principle 2(a), *takes priority over* any principles of efficiency or "maximizing the sum of advantages."[27] Of course, this distinguishes Rawlsian social justice from what would be understood as traditional utilitarianism.

Every critical piece of this Rawlsian machinery has been debated for decades. For example, Rawls described acceptable inequalities in terms of "primary goods," a concept that can be understood narrowly in the sense of consumptive goods and services or more broadly, in Amartya Sen's words, as "the general-purpose means for the pursuit of one's comprehensive goals."[28] Martha Nussbaum has expanded on this notion. She compiles a comprehensive list of human capabilities that an ideal society would inculcate. For Nussbaum, these capabilities enable each person to develop her or his unique

24 RAWLS, *supra* note 15, at 302.

25 In which the Difference Principle is rooted. *See* WOLFF, *supra* note 17, at 57 (describing Rawls's view in the late 1950s as being that a "society should choose as its baseline the equal distribution point closest to its production frontier, and should then deviate from that point only in order to move to some other point, Pareto-preferred to the baseline point").

26 RAWLS, *supra* note 15, at 302.

27 *Id.*

28 AMARTYA SEN, THE IDEA OF JUSTICE 64 (2009).

personal life.[29] They are important enough that a fair society would guarantee every citizen the right to develop all the capabilities. Distributive justice then becomes a matter of fairly distributing opportunities for each citizen to develop each capability.[30]

In addition to the two principles, Rawls established a "just savings principle" that extends notions of fairness over time. It embodies the idea that fairness *across generations* looks different from fairness at any moment in time; the difference comes from the asymmetrical relationship with other people living in different generations.[31] Whereas everyone living at the same moment can help or harm each other, previous generations can harm or help you, but you cannot harm or help them. On the other hand, you can harm or help future generations, but they cannot harm or help you.[32] As a consequence, Rawls's overall sense of justice over time has close affinities with the concept of "intergenerational equity."[33]

Rawls believed that as long as (or as soon as) one generation's just institutions are stable, that generation should do what is necessary to allow future people to continue to live under just institutions. He also believed that any one generation ought to leave its descendants at least the equivalent of what it received from the previous generation. Beyond these two 'firm' requirements, the principle of just savings is an equitable construct:

> Thus the correct principle is that which the members of any generation (and so all generations) would adopt as the one their generation is to follow and as the principle they would want preceding generations to have followed (and later generations to follow), no matter how far back (or forward) in time.[34]

In other words, as long as a generation's own institutions are stable, it should have the same, consistent "savings" rate as all prior generations—meaning not just capital accumulation, but cultural development and preservation, environment protection, etc.

Finally, in this overview we should provide some background on John Rawls's views on "property." At the outset, it is simply inaccurate to say that

---

29 *See generally* MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000).

30 *See, e.g.*, MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2006); NUSSBAUM, supra note 29; Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 FEMINIST ECON. 33 (2003).

31 RAWLS, *supra* note 15, at 290–91.

32 *Id.* at 291. It is reasonable to think that future generations "help" us simply by being alive and flourishing—in a sense, that is what families and societies are all about. Rawls adopts such a "motivational assumption" in *A Theory of Justice*, *see id.* at 128, but withdraws the assumption in *Political Liberalism*, believing that in a more rigorous ideal model generations are mutually disinterested. JOHN RAWLS, POLITICAL LIBERALISM 274 n.12 (2d ed. 2005).

33 *See, e.g.*, MERGES, *supra* note 2, at 64, 270–89 (discussing "life-saving drugs" and applying just savings and intergenerational equity to problems of fair access to patented, life-saving pharmaceuticals).

34 RAWLS, *supra* note 32, at 274; *see also* RAWLS, supra note 19, § 49.3, at 160.

Rawls wrote about "real property and chattels, not ideas."[35] Rawls wrote at a very high level of abstraction and actually said extremely little about property of any kind.[36] When he did discuss property he mainly drew a distinction between *personal* property and the *means of production*.[37] He recognized that capital accumulation included "knowledge and culture,"[38] and he was concerned (as we are) about the concentration of wealth and capital, whatever the form.[39]

Rawls included among the protected liberties of his first principle the right to hold at least some property, but this is limited to "personal property," and excludes all forms of "productive property."[40] In his later book, *Political Liberalism*, Rawls gave a somewhat more detailed account of "personal property":

> [A]mong the basic liberties of the person is the right to hold and to have the exclusive use of personal property. The role of this liberty is to allow a sufficient material basis for a sense of personal independence and self-respect,

35 Lemley, *supra* note 12, at 1339.

36 In *A Theory of Justice*, Rawls's discussion uses principally the concepts of "wealth" and "distributive shares." RAWLS, *supra* note 15, at 303 (describing "General Conception" as involving the distribution of "income and wealth"); *id.* at 304 (discussing "distributive shares"). Indeed, the index of the first edition of *Theory of Justice* does not even include "property" as a subject. *Id.* at xiii–xv. Rawls develops neither a theory nor a definition of property, but does discuss a "private property economy" as one means to establish a just society. *Id.* at 270–74.

37 *See id.* at 271 (exploring how "there is no essential tie between the use of free markets and private ownership of the instruments of production"); *see also* RAWLS, *supra* note 19, § 42.2, at 138 ("The first principle of justice includes a right to private personal property, but this is different from the right of private property in productive assets."); *id.* § 52.1(a), at 177 ("And while a right to property in productive assets is permitted, that right is not a basic right but subject to the requirement that, in existing conditions, it is the most effective way to meet the principles of justice.").

38 RAWLS, *supra* note 15, at 288 ("It should be kept in mind here that capital is not only factories and machines, and so on, but also the knowledge and culture, as well as the techniques and skills, that make possible just institutions and the fair value of liberty."); *id.* at 275 (describing institutions needed "in a properly organized democratic state that allows private ownership of capital and natural resources").

39 Rawls believed that "the wide dispersal of property . . . is a necessary condition, it seems, if the fair value of the equal liberties is to be maintained." *Id.* at 277; RAWLS, *supra* note 19, § 42.3, at 139 ("[T]he background institutions of property-owning democracy work to disperse the ownership of wealth and capital, and thus to prevent a small part of society from controlling the economy, and indirectly, political life as well. . . . Property-owning democracy avoids this [concentration] . . . by ensuring the widespread ownership of productive assets and human capital (that is, education and trained skills) at the beginning of each period, all this against a backdrop of fair equality of opportunity.").

40 *See* RAWLS, *supra* note 15, at 61, 66 (contrasting "freedom of the person along with the right to hold (personal) property" with an initial assumption that in the just society "the economy is roughly a free market system, although the means of production may or may not be privately owned"); *see also* RAWLS, *supra* note 19, § 42.2, at 138 (contrasting "private personal property" with the "right of private property in productive assets").

> both of which are essential for the development and exercise of the moral powers.[41]

Personal property appears to mean those belongings that are essential for an effective private, personal sphere—one's toothbrush and basic clothing, certainly—dishes, cookware, basic tools, and the like, almost for sure. How about a personal dwelling, means of transportation, and more elaborate possessions? This is unclear. Whatever the specific limits, a broad right to property is not among the essential liberties of a just society. It is not that Rawls believed property *should* be severely limited. To the contrary, he thought that a civil society founded on his two principles might well establish a wide range of property rights.[42] For Rawls, wide-ranging property can be consistent with his principles, but is not *required* by them.[43]

While Rawls did not believe that there was a *basic right* to own property in the means of production, many scholars view Rawls as having been favorable (possibly strongly favorable) to widespread ownership of the means of production by individuals.[44] He did not condemn individual ownership as sharply inconsistent with his vision of fairness, although in the social milieu in which *A Theory of Justice* was written (the 1960s) this was a fairly common trope. Our move here—consistent with a thick branch of Rawlsian scholarship—is to elevate the discussion of property, and place it on a primary plane in considerations of wealth distribution.

B. High Concepts, Practical Application

But this is an Article about a particular institution in present society—copyright—and it is fair to ask whether it is appropriate to use a highly abstract framework intended to elaborate the *entirety* of an *ideal just society* as a tool to evaluate the relative contribution to distributive justice of *one small social institution* sitting in a very *imperfect society*. This question applies not just to copyright (or intellectual property more broadly), but to any institution in present society. Stated simply, the question is this: Can we make "Rawlsian" judgments about reverse mortgages, student loans, Head Start, drone strikes, Social Security, zoning laws, charter schools, the bond market, or NSF grants?

While *A Theory of Justice* is concerned with the abstract framework for an ideal society built from the ground up (that is, from the "original position"),

---

41 RAWLS, *supra* note 32, at 298.

42 *See* RAWLS, *supra* note 15, at 270–74 (writing agnostically about the choice between socialist and capitalist production).

43 Rawls distinguishes between the use of markets—which he broadly endorses—and expansive notions of private property, on which he is agnostic: "It is evident, then, that there is no essential tie between the use of free markets and private ownership of the instruments of production." *Id.* at 271. The vast majority of economists today would disagree with this statement, most quite vehemently.

44 After describing how Rawls recognized "private ownership of the means of production" as a major social institution, Robert Paul Wolff noted Rawls "is not endorsing private ownership of the means of production or the monogamous family, although one gets the sense that he approves of both." WOLFF, *supra* note 17, at 81 n.24.

Rawls himself recognized that his principles of justice could and *should* be used in at least three different levels of judgment:

> [T]he point of view of the parties in the original position, the point of view of citizens in a well-ordered society, and the point of view of you and me who are setting up justice as fairness as a political conception *and trying to use it to organize into one coherent view our considered judgments at all levels of generality.*[45]

Looking *both* at how copyright law serves and could better serve distributive justice is appropriate because this is applying Rawlsian principles against what Rawls called "a rough continuum of practicable basic structures."[46] For Rawls, "[t]here is no question that the difference principle continues to guide our decisions at the 'legislative stage.'"[47] This comes after a fair society has been founded (out of deliberations in the original position), and when that society is deciding how to order things practically by adopting specific legislation.

To see this better, let us return to our comparative distributions of utiles, but start with some existing society where there is already disparity of income.

TABLE 2

	An Actual Society	B	C	D	B^{bis}
Top 10%	11	12	14	15	12
80th	10	10	10	10	10
70th	9	9	9	9	9
60th	8	8	8	8	8
50th	7	7	7	8	8
40th	6	6	6	8	7
30th	5	5	5	6	7
20th	4	4	4	4	5
10th	3	3	4	4	3
Bottom 10%	1	2	4	4	1

Let us stipulate that the existing inequalities at "actual" are either justified or *intractable*. The Difference Principle tells us that the move from actual to *B* is justified if giving the top decile an additional utile motivates them to work in a way that produces an additional utile for the bottom decile (and all other groups remain unchanged). The simple Difference Principle also justifies the move from *B* to *C* (or from actual to *C*) because in *C* substantial

45 RAWLS, *supra* note 19, § 13.4, at 45 n.8 (emphasis added).

46 *Id.* § 19.5, at 71.

47 *Id.* at 173; *see also id.* at 48 ("By contrast the second principle applies at the legislative stage and it bears on all kinds of social and economic legislation, and on the many kinds of issues arising at this point." (citing RAWLS, *supra* note 15, § 31, at 195–201)).

gains for the bottom 20% are achieved through additional reward to the top decile.

The problem for the simple Difference Principle comes with *D*. In *D*, the position of the bottom 30% remains unchanged from *C*, but a middle 30% in the society are substantially better off by giving the top decile slightly more rewards. The move from *C* to *D* is not justified on the simple Difference Principle, but it is justified by the lexical Difference Principle. Similarly, the move from actual to B^{bis} would not be justified by the simple Difference Principle, but it would be justified by the formal, lexical Difference Principle because B^{bis} produces a substantially enriched middle cohort (50% of the society) by giving the top decile additional utiles.

There is no question that this sort of "practical" analysis was considered appropriate by Rawls himself. Indeed, Rawls's writings are replete with places where practical details and historical contingencies are part of the analysis[48] and while his primary goal was to lay out a fully just society, Rawls also treated his principles as standards for assessing actual societies.[49] As G.A. Cohen characterized it, once the veil of ignorance is lifted, Rawls envisioned that the members of a society would continue to be engaged in a "justificatory dialogue."[50] In that spirit, we intend this discussion as a contribution to the ongoing conversation on the philosophical justifications of intellectual property.

II. Practical Rawlsian Justice, Distributive Realities of Copyright

The task of bringing a philosophical framework for distributive justice to bear on a complex, real world institution is not an easy one: in a real sense the rest of this Article will only flag certain points in the landscape and describe broad areas where better empirical data would be needed to study how copyright law advances Rawlsian distributive justice. Nonetheless, we believe that the available empirical evidence points toward copyright being an institution that *does* serve Rawlsian distributive justice. The case is not perfect, and there is, as we said, much room for improvement. But overall, we think when contemporary copyright is subjected to the thorough standard of Rawlsian fairness, it passes muster.

As to Rawls's First Principle, we believe that copyright has relatively little impact on Rawls's requirement that each citizen enjoy a bundle of "equal basic liberties" compatible with every other citizen having the same liberties.

---

48 In establishing an initial list of likely basic liberties, Rawls says we will refer to historically successful democratic regimes. He quips, "Of course, the veil of ignorance means that this kind of particular information is not available to the parties in the original position, but it is available to you and me in setting up justice as fairness." *Id.* at 45.

49 Rawls, *supra* note 15, at 15. Indeed, the jacket for his 2001 *Justice as Fairness: A Restatement* explains that "Rawls is well aware that since the publication of *A Theory of Justice* in 1971, American society has moved farther away from the idea of justice as fairness." Rawls, *supra* note 19.

50 G.A. Cohen, *Incentives, Inequality, and Community*, *in* 13 Tanner Lectures on Human Values 263, 282 (1992).

We acknowledge that some commentators believe that the exclusive rights conferred by copyright *do* adversely impact concerns that would be included in the First Principle. The division here may roughly fall between those who accept and those who reject the Supreme Court's view that copyright's basic policing mechanisms—non-protection of ideas, facts, processes; fair use; the de minimis doctrine; etc.—safeguard First Amendment liberties.[51] We acknowledge that property restrictions can impinge on the exercise of basic liberties but we believe that Rawls would have addressed these concerns via a general discussion of concentration of wealth and ownership of the means of production.

For example, the concentration of ownership in cable and telecommunication companies—and the varying rates they charge citizens for access to the internet—surely has a much greater impact on the exercise of basic communication liberties than does the existence of copyright. Though copyright does impact the cost of "high value" content—which effectively restricts access by those who can't pay[52]—internet access seems like the real "choke point" restricting people's ability to participate in the cultural and political life of society.

In any event, the charge that copyright is intrinsically at war with (or in great tension with) the First Amendment does seem overblown to us. Beyond copyright's *internal* doctrines designed to limit its effect when vital free expression interests are at stake, as a practical matter, so much expression in cyberspace is uncopyrightable, uncopyrighted, or effectively free that copyright does not appear to undermine people's ability to participate culturally or politically. It is the onramp to the internet that keeps people from exercising their First Amendment rights, not the scattered pay walls and pay-per-view websites that one encounters once online. Put differently, there are vast and mushrooming public domains[53] that more than offset the relatively few restricted regions made possible by copyright law. Indeed, copyright law increases the public domain in several ways before the expiration of protection, as with freely-available "ad supported" content in which copyright pro-

51 *See, e.g.*, Golan v. Holder, 132 S. Ct. 873, 878 (2012) (holding that fair use prevents conflict with First Amendment); Eldred v. Ashcroft, 537 U.S. 186, 219–21 (2003) (holding that fair use and idea/expression dichotomy as "traditional contours" of copyright prevent conflict with First Amendment); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) (holding that fair use helps ensure copyright does not conflict with First Amendment).

52 And are unwilling to infringe. Non-enforcement against some infringers, particularly those who cannot pay court judgments, also serves to increase access through a form of price discrimination. *See* Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models*, 22 CARDOZO ARTS & ENT. L.J. 725, 740–42 (2005); Michael J. Meurer, *Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works*, 45 BUFF. L. REV. 845 (1997).

53 For the different ways we can view what is in the public domain, see James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 68 (2003); Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783 (2006).

vides advertisers with exclusive access to an *audience* instead of providing exclusive access to *works*.

For these reasons we do not understand copyright to violate Rawls's Equal Basic Liberties Principle, that is, Rawls's *First Principle*.

Following the rough order of points in Rawls's Second Principle, let us next consider copyright law in relation to the canonical (or lexical) Difference Principle; in relation to the "just savings principle"; and in relation to the requirement that positions, particularly those with great wealth or income, be "open to all under conditions of fair equality of opportunity."

A. The Difference Principle and Jobs, Income, and Wealth from Copyright

Rawls's Difference Principle permits economic inequalities if giving more to the wealthiest cohorts improves the material situation of the "least advantaged" in income and wealth. In its canonical version, the Difference Principle also permits economic inequalities if giving more to the wealthiest cohorts will improve the material situation of representative persons in middle "advantaged" groups without making the worst off even worse off.

One can certainly make an argument that both patent and copyright laws meet the *simple* Difference Principle by improving the material situation of the least advantaged. If patents give incentives for the production of technological advances that improve living conditions for all or almost all (central heating, lighting, water purification, improved crop yields, etc.), then even if patent law causes some concentration of wealth among inventors and patent owners, this may be justified as inequality that makes better off the least advantaged citizens. While many technological innovations may address fundamental quality of life issues that go to the "basic liberties" of the First Principle (such as vaccines), many other technological innovations improve quality of life in ways that are best characterized as social and economic "primary goods" (for example, color television instead of black and white, improved wifi speeds, sturdier alloys for bicycles, cheaper lighting sources, and so on).

Similarly, if copyrights give incentives for the production of music, literature, and audiovisual works that improve the lives of all or almost all (free broadcast television entertainment, free broadcast radio entertainment, libraries, etc.), then even if the copyright law causes some concentration of income and wealth among creators and copyright owners, this may be justified as inequalities that make better off the least advantaged citizens. We should add that while innovations that are addressed by patent law may *often* be so central to baseline quality of life that they fall under the First Principle's "basic liberties," this will *infrequently* be the case with the original expression addressed by copyright law. When it comes to principles of distributive justice, access to medicine and access to Madonna are not the same thing.

But our focus is on confronting the corporate copyright trope identified earlier: the idea that copyright benefits large corporations, but not "real people." To that end, we are concerned with copyright's impact on the *income* of individual citizens. For purposes of the discussion, we stipulate that copy-

right has little positive impact on the income of the economically least advantaged (although we will argue later that it is a unique institution for talented people to escape from economically least advantaged communities). Nonetheless, we believe that copyright does have a positive impact on the income of individual citizens in middle income groups and, under the canonical Difference Principle, that may be enough to justify its distributive impact.

As far as we can tell, systematic statistical collections on national economic activity do not do a good job isolating occupations in which the exclusive rights of copyright are central to the economic viability of the occupation *or important to keeping that individual in that occupation at that income level.* The Department of Labor's Bureau of Labor Statistics (BLS) publishes data identifying a number of occupations that we would consider "copyright-related" and that have higher incomes than the median annual wage. But some of those occupational categories are simply too broad to draw any meaningful connection to copyright. For example, according to the BLS the 2014 annual median wage for all occupations in the United States was $35,540[54] while the 2014 median wage for computer programmers was $77,550[55] and for "software developers" was $97,990.[56] But the BLS categories of computer programmers and software developers almost certainly include, for example, the hundreds of programmers who work at Uber, a business model whose success principally depends on network effects from participants, not exclusive rights over code. Similarly, the category of "technical writers" ($69,030)[57] probably includes individuals whose jobs are highly dependent on copyright but also includes individuals working in-house writing instruction manuals for consumer goods (where copyright over the manual is not important, particularly relative to any intellectual property over the actual product).

Other BLS occupation categories may have a closer link to copyright protection: "writers and authors" ($58,850),[58] "editors" ($54,890),[59] "film

54 *Occupational Employment Statistics: OES Data*, BUREAU OF LAB. STAT. (Aug. 25, 2016), http://www.bls.gov/oes/tables.htm (follow the "All data" link under May 2014, and then see row 2, column Y for the median wage for all occupations).

55 *Occupational Employment Statistics: Occupational Employment and Wages, May 2014: 15-1131 Computer Programmers*, BUREAU OF LAB. STAT. (Mar. 25, 2015), http://www.bls.gov/oes/2014/may/oes151131.htm.

56 *Occupational Outlook Handbook: Computer and Information Technology Occupations*, BUREAU OF LAB. STAT. (Dec. 17, 2015), http://www.bls.gov/ooh/computer-and-information-technology/home.htm.

57 *Occupational Employment Statistics: Occupational Employment and Wages, May 2014: 27-3042 Technical Writers*, BUREAU OF LAB. STAT. (Mar. 25, 2015), http://www.bls.gov/oes/2014/may/oes273042.htm.

58 *Occupational Employment Statistics: Occupational Employment and Wages, May 2014: 27-3043 Writers and Authors*, BUREAU OF LAB. STAT. (Mar. 25, 2015).http://www.bls.gov/oes/2014/may/oes273043.htm.

and video editors and camera operators" ($52,470),[60] "broadcast and sound engineering technicians" ($41,780),[61] "reporters, and correspondents" ($36,000),[62] "music directors and composers" ($48,180),[63] and "producers and directors" ($69,100).[64] All of these positions have incomes above the median level, although at least one occupational category one might strongly link to copyright protection is below the median: "photographers" ($30,490).[65]

Perhaps most interesting is that the Bureau of Labor Statistics acknowledges that it cannot even *estimate* an annual wage for some of the categories one would most intuitively link to copyright protection: "actors," "dancers and choreographers," and "musicians and singers."[66] For academics and commentators who insist that copyright is "solely for corporate benefit"[67] and that the expansion of copyright "has enriched copyright intermediaries, rather than creators,"[68] there should be some reflection both about the BLS statistics and about the BLS's level-headed acknowledgement that for some creators' incomes, we simply do not have the sort of reliable data from which we expect national policies to be formulated. To consider what we know and do not know further, let's bear down on the income question for creative individuals in the music industry—musicians, singers, composers, and the like.

1. Income to Creative Professionals in the Music Industry

Teachers of intellectual property know the difficulty of inculcating law students with the music industry's basic distinction between—and separate

59 *Occupational Employment Statistics: Occupational Employment and Wages, May 2014: 27-3041 Editors*, BUREAU OF LAB. STAT. (Mar. 25, 2015), http://www.bls.gov/oes/2014/may/oes273041.htm.

60 *Occupational Outlook Handbook: Entertainment and Sports Occupations*, BUREAU OF LAB. STAT. (Dec. 17, 2015), http://www.bls.gov/ooh/entertainment-and-sports/home.htm.

61 *Occupational Outlook Handbook: Broadcast and Sound Engineering Technicians*, BUREAU OF LAB. STAT. (Dec. 17, 2015), http://www.bls.gov/ooh/Media-and-Communication/Broadcast-and-sound-engineering-technicians.htm.

62 *Occupational Employment Statistics: Occupational Employment and Wages, May 2014: 27-3022 Reporters and Correspondents*, BUREAU OF LAB. STAT. (Mar. 25, 2015), http://www.bls.gov/oes/2014/may/oes273022.htm.

63 *Occupational Employment Statistics: Occupational Employment and Wages, May 2014: 27-2041 Music Directors and Composers*, BUREAU OF LAB. STAT. (Mar. 25, 2015), http://www.bls.gov/oes/2014/may/oes272041.htm.

64 *Occupational Employment Statistics: Occupational Employment and Wages, May 2014: 27-2012 Producers and Directors*, BUREAU OF LAB. STAT. (Mar. 25, 2015., http://www.bls.gov/oes/2014/may/oes272012.htm.

65 *Occupational Outlook Handbook: Photographers*, BUREAU OF LAB. STAT. (Mar. 25, 2015), http://www.bls.gov/oes/2014/may/oes274021.htm.

66 *Occupational Outlook Handbook: Entertainment and Sports Occupations*, *supra* note 60 (for some of these BLS reports "[t]he annual wage is not available").

67 CVETKOVSKI, *supra* note 9, at 100.

68 Litman, *supra* note 7, at 28.

copyrights for—"musical works"[69] (musical compositions) and "[s]ound recordings."[70] And that is just the beginning of the labyrinth of the music industry, a labyrinth that includes complex customs and practices in the "music publishing" business, statutory compulsory licensing for musical compositions,[71] special rules for reproductions of and derivative works from sound recordings,[72] complex practices among the collecting societies in the licensing of public performance rights, and extremely complex statutory rules for digital audio transmission of sound recordings.[73]

The music industry is also the creative sector whose business models have been most subject to disruption from digital, networked technologies: first, from illegal reproduction and distribution through peer-to-peer ("P2P") systems;[74] then through iTunes downloads substituting for what physical unit sales had survived P2P; then from streaming services like Spotify and Apple Music replacing sale of downloads. Although a few voices continue to insist that digital piracy is not the culprit, between 1999 and 2012, inflation-adjusted sales of recorded music contracted by more than 50%.[75] On top of all this complexity, disruption, and contraction, there is also the common observation that creative individuals in the music industry have never been able to assert themselves against corporate interests in the same way that creative individuals in the audiovisual industry have organized into labor unions (artfully called "guilds"), thus forcing robust collective bargaining agreements on audiovisual producers.

---

69 17 U.S.C. § 102(a)(2) (2012) (providing copyright protection for "musical works, including any accompanying words").

70 *Id.* § 101 (defining "[s]ound recordings" as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied"); *id.* § 102(a)(7) (providing copyright protection for sound recordings).

71 *Id.* § 115.

72 *Id.* § 114(b).

73 *Id.* § 114(d).

74 Unauthorized distribution of copyrighted works through peer-to-peer systems has been judged infringement in almost all courts that have considered the question. *See, e.g.*, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 928–41 (2005); *In re* Aimster Copyright Litig., 334 F.3d 643 (7th Cir. 2003); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014–15 (9th Cir. 2001); *Universal Music Australia Pty Ltd. v Sharman License Holdings Ltd.*, [2005] 222 FCR 465 (Austl.); Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Jan. 29, 2013, Hei 14 (wa) no. 4249 (Japan); *Winny Creator Guilty in Copyright Violations*, JAPAN TIMES (Dec. 14, 2006), http://www.japantimes.co.jp/news/2006/12/14/national/winny-creator-guilty-in-copyright-violations/#.WAhDSuArKM8.

75 Stan Liebowitz, *Internet to Artists: Drop Dead*, WALL ST. J. (Jan. 24, 2012), http://www.wsj.com/articles/SB10001424052970204616504577171193402114300; *see also* Cary H. Sherman, *What Wikipedia Won't Tell You*, N.Y. TIMES (Feb. 7, 2012), http://www.nytimes.com/2012/02/08/opinion/what-wikipedia-wont-tell-you.html?_r=0 (claiming that "music sales in the United States are less than half of what they were in 1999, when the file-sharing site Napster emerged, and that direct employment in the industry had fallen by more than half since then, to less than 10,000").

In other words, if we were looking for an area of economic and creative activity where copyright should have failed creative individuals, it would be hard to find a better candidate than the music industry. And yet even in the music industry—and with access to very little empirical data—we can see the powerful role that copyright plays in securing incomes for creative individuals. Perhaps the easiest place to see this is in monies received by "collecting societies" that represent music composers in the licensing of the 17 U.S.C. § 106 right of public performance. In the United States, the dominant collecting societies are the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), both of which run as membership-based not-for-profit organizations. In addition, there is a third, smaller collecting organization, SESAC Holdings (SESAC), that is a private, for-profit entity.[76]

Based on public figures from the two dominant non-profits, ASCAP and BMI—and assuming a fifty-fifty split between songwriter/composer and (often corporate) music publisher—collective musical composition distributions to creative individuals looks like this (in $U.S. millions):[77]

TABLE 3

Fiscal Year Ending	2010	2011	2012	2013	2014
BMI	394.5	398+	374.9	407	420
ASCAP	422.5	412	413.5	425.6	441.5

This means that in the last five-year period for which we have publicly available data, the copyright-based licensing system for musical compositions collecting *only* for the public performance right distributed *at least U.S. $4.1*

76 *About Us*, SESAC, https://www.sesac.com/About/About.aspx (last visited Sept. 20, 2016).

77 The information here comes from annual reports issued by the relevant organizations. For ASCAP, see *ASCAP Is the First PRO in the World to Report $1 Billion in Revenues*, ASCAP (Mar. 3, 2015) [hereinafter *ASCAP Is the First*], http://www.ascap.com/press/2015/0302-ascap-hits-a-high-note-in-its-100th-year.aspx; *ASCAP Reports Strong Revenues in 2013*, ASCAP (Feb. 12, 2014), http://www.ascap.com/press/2014/0213-2013-financials.aspx; *ASCAP Reports 2012 Financials*, ASCAP (Mar. 4, 2013), http://www.ascap.com/press/2013/0304-ascap-reports-2012-financials.aspx; *ASCAP Reports Increased Revenues in 2011*, ASCAP (Mar. 8, 2012), http://www.ascap.com/press/2012/0308_ascap-reports.aspx; *ASCAP 2010 Financial Results Reflect the Challenging Music Licensing Environment*, ASCAP (Mar. 31, 2011), http://www.ascap.com/press/2011/0331_Financial_Results.aspx. For BMI, see BMI, 2013–2014 ANNUAL REVIEW (2014), http://www.bmi.com/pdfs/publications/2014/BMI_Annual_Review_2014.pdf; BMI, ANNUAL REVIEW 2012–2013 (2013), http://www.bmi.com/pdfs/publications/2013/BMI_Annual_Review_2013.pdf; BMI, ANNUAL REVIEW 2011–2012 (2012), http://www.bmi.com/images/news/2012/AnnualReview_2011_2012.pdf; BMI, ANNUAL REVIEW 2010–2011 (2011), http://www.bmi.com/pdfs/publications/2011/BMI_Annual_Review_2011.pdf; BMI, ANNUAL REVIEW 2009–2010 (2010), http://www.bmi.com/pdfs/publications/2010/annual_review_0910.pdf.

billion to American creative professionals. But this is a low-ball estimate for collective licensing distribution to creative professionals for a few reasons. First, a significant percentage of songwriters/composers have now become their own "publishers";[78] those that have get the other half of their royalty distributions, rather than splitting them with large corporate publishers. Second, being privately held, SESAC does not publish distribution figures, suggesting some underestimate.[79] Third, some music publishers engage in direct licensing for certain public performances and those revenues—again, typically a fifty-fifty split with creative individuals—are not being reported at all.

On the sound recording side of the industry, U.S. copyright law limits the right of public performance to "digital audio transmission[s]."[80] Crafted in 1995, this digital audio transmission right is further divided into three broad categories: (1) nonsubscription broadcast transmissions that are exempted from liability,[81] (2) noninteractive subscription digital audio transmissions (such as Pandora and SiriusXM) that are required to pay a statutory license fee set by the Copyright Board,[82] and (3) interactive digital transmission services (such as Spotify) that must privately negotiate license agreements with copyright holders.[83]

As to the privately negotiated agreements for interactive music services like Spotify and Apple Music, we do not have reliable figures on what individual musicians are making, but there has been substantial press criticizing Spotify for the low royalties being paid to composers and artists. This has resulted in some successful artist pushback against Spotify and Apple Music to increase those royalty payments, and lawsuits to enforce individual artists' rights against such streaming services.[84]

In contrast, we know a great deal about the monies collected under the statutory license fee under 17 U.S.C. § 114(d)(2). These cover noninterac-

78 *See, e.g.*, Jason Blume, *How to Start Your Own Music Publishing Company*, MUSICWORLD (Feb. 19, 2015), http://www.bmi.com/news/entry/How_To_Start_Your_Own_Music_Publishing_Company; Jon Ostrow, *Benefits of Owning Your Own Publishing*, SONGTRUST (Nov. 23, 2011), http://blog.songtrust.com/publishing-tips-2/benefits-of-owning-your-own-publishing/.

79 SESAC is about 1/20th the size of ASCAP. Whereas ASCAP represents "10 million works by more than 525,000 music creators," *ASCAP Is the First*, *supra* note 77, SESAC represents "more than 400,000 songs on behalf of its 30,000 affiliated songwriters, composers and music publishers," *About Us*, *supra* note 76. Nonetheless, the SESAC repertoire not represented in the $4.1 billion figure includes the musical compositions of, for example, Neil Diamond, Bob Dylan, RUSH, and many prominent film industry composers. *Id.*

80 17 U.S.C. § 114(d)(1) (2012).

81 *Id.* This exemption includes retransmissions of the broadcast transmissions.

82 *Id.* § 114(d)(2).

83 *Id.* § 114(d)(3).

84 Ryan Faughnder, *Meet the Music Entrepreneur Who's Taking on Spotify and Other Streaming Services*, L.A. TIMES (Jan. 19, 2016), http://www.latimes.com/entertainment/envelope/cotown/la-et-adv-ct-jeff-price-spotify-2-20160119-story.html; Justin Wm. Moyer, *Spotify Hit with $150 Million Class Action for Copyright Infringement*, WASH. POST (Dec. 30, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/12/30/spotify-hit-with-150-million-class-action-for-copyright-infringement/.

tive subscription digital audio transmissions, such as SiriusXM. Those monies are distributed by a non-profit collecting society called SoundExchange, whose board of directors includes representation from both musicians and record labels.[85] Under the statutory licensing scheme, the license fees collected by SoundExchange are divided fifty-fifty between the owners of rights in the sound recordings (typically the labels) and the artists whose performances were recorded (i.e., musicians and singers). On the performing artist side of the ledger, SoundExchange sends 45% of distributions to the "featured artists" and 5% to "non-featured artists, typically session musicians and background singers."[86] Starting out with modest collections and distributions of a few million dollars in 2004, SoundExchange has now distributed *$1.5 billion* in copyright-based income to individual performing artists, with $681.5 million of that in just 2013 and 2014.[87] Between the historic growth rates and a 2015 decision of the Copyright Board as to statutory rates going forward, it is reasonable to think that this income stream to performing artists will continue to grow.

While these total figures are impressive, there are other tools to get a sense of what copyright means to the income of individual creators in the music business. It is reasonable to expect that copyright will have a dramatically different impact on the living standard of different kinds of creative professionals. We can hypothesize that professional novelists and composers will be more dependent on copyright than professional sculptors and drummers. Even within "one" creative profession—acting—we can expect that those actors who do mainly stage work will be significantly less dependent on copyright than those actors who do mainly television and film work.

Peter DiCola's groundbreaking 2013 "Money from Music" survey of roughly 5300 musicians provides support for some of these intuitions, and gives important insights into clusters of creative professionals in the music industry. DiCola concluded that working musicians as a whole get between 12% and 22% of their income from copyright-based royalties, depending on whether and how you count payments from session playing.[88] If anything,

85 *Board of Directors*, SOUNDEXCHANGE, http://www.soundexchange.com/about/our-team/board-of-directors/ (last visited Sept. 21, 2016).

86 *About Digital Royalties*, SOUNDEXCHANGE, http://www.soundexchange.com/artist-copyright-owner/digital-royalties/ (last visited Sept. 21, 2016).

87 Glenn Peoples, *SoundExchange Hits $3 Billion Payout Milestone*, BILLBOARD (Aug. 5, 2015), http://www.billboard.com/articles/business/6655897/soundexchange-pays-out-3-billion ("SoundExchange . . . has distributed over $3 billion in digital performance royalties to record labels and performing artists since 2003. . . . Nearly half of these royalties have been paid in just the last two years. SoundExchange paid out $773 million—over 25% of the total—in 2014 and $590 million—about 20% of total distributions—in 2013."). Performing artists get half of these amounts; owners of the sound recordings get the other half.

88 Peter DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 ARIZ. L. REV. 301, 304–05 (2013) ("According to my classification of the eight revenue categories, the survey data show that, in aggregate, the musicians in our sample earned 12% of revenue from sources directly related to copyright, 10% from

the survey results may have undercounted copyright income as hundreds of respondents also identified income (presumably small amounts) that trace back to other copyright-protected activities.[89]

Some of the results of the 2013 survey are not surprising, including that composers earn a higher percentage of their income from copyright and that musicians are more likely to have multiple jobs than the average American worker[90]—something that emphasizes their economic vulnerability.[91] On this count, the survey estimated average working musician hourly income—for *salaried situations*—to be $28.91 per hour, with a median of $20.07, very similar to the U.S. Labor Department's own estimates at the time of $31.74 per hour, with a median of $22.99.[92] (As of 2015, those Labor Department figures had risen to $33.62 and $24.20, respectively.[93]) The survey was heavy on classical musicians (35% of respondents) as well as jazz artists (16%) and, according to DiCola, "the large proportion of classical musicians in the survey sample explains the 19% share [of overall revenue] for the salary category."[94]

The "Money from Music" survey also has some other interesting nuggets: that copyright-based income was more important for artists at the high *and* low ends of the income spectrum; that income from merchandise (e.g., sale of t-shirts at live appearances) was much, much smaller than copyright-based

---

sources with a mixed relationship to copyright, and 78% from sources indirectly related or unrelated to copyright." (footnote omitted)).

89 To reduce respondent survey fatigue (and attrition) the "Money from Music" survey's main income allocation question (question twelve) had only eight income categories, the eighth being "Other." *Id.* at 324. In two separate and later questions (fourteen and fifteen), many respondents checked specific sources of income identified by the survey, sources that are clearly related to copyright but which might not have been considered when a survey respondent answered question twelve. Those sources of income included "Sound Recording Special Payments Fund," "AFM & AFTRA," "Intellectual Property Rights Distribution Fund," "Litigation Settlements from Label or Publisher," "Sample Licensing," "Publishing Advance," and "YouTube Advertising Revenue Share." *Id.* at 367–68. There were additional income responses in question fifteen that could be copyright-related, i.e., "Acting," "ASCAPLUS," and "Film Musicians Secondary Markets Fund." *Id.* at 367. Since the revenue musicians attributed to "Other" in question twelve was only 7% of total income, *id.* at 324, we can assume that this would add only a couple percentage points at most. Our thanks to Peter DiCola for reviewing this point with us.

90 *Id.* at 322 ("The survey findings are consistent with earlier work on artistic labor markets. American artists—here referring to a broad category of architects and designers, performing artists (including musicians), visual artists, and authors—are known to work multiple jobs at a higher rate than those in other professions.").

91 *Id.* at 338 ("Making ends meet financially often leads musicians to take on multiple roles in the music industry.").

92 *Id.* at 318 (citing *Occupational Employment and Wages, May 2014: 27-2042 Musicians and Singers*, BUREAU OF LABOR STATISTICS (Mar. 30, 2016), http://www.bls.gov/oes/current/oes272042.htm).

93 *Occupational Employment and Wages, May 2014: 27-2042 Musicians and* Singers, *supra* note 92. Self-employed musicians are not included in these numbers.

94 DiCola, *supra* note 88, at 325.

income;[95] and that copyright-based income was more important for rock and roll artists[96] (who have fewer opportunities for teaching positions and long-term salaried work). The survey establishes that, in rough terms, working musicians would not be *penniless* without copyright—and would not disappear as a creative class, particularly those residing in the patronage model of classical orchestras. Yet as Jordan Weissmann noted, "consider how you'd react if your boss suddenly said you were getting a 10 percent pay cut tomorrow."[97] Since our concern is a *reasonable standard of living for creative professionals with positions being open to all*, a 12% to 22% reduction in income for these creative occupations would be quite significant.

The data DiCola gathered adds a crucial distributive component to the discussion over the plight of contemporary music professionals. Almost all of the literature that considers the sweeping changes affecting musicians, particularly the rise of online digital distribution of music, centers on whether *the public* is experiencing more or less access to music, and whether that music is of lower quality than in the preceding, pre-digital era.[98] As we noted in the Introduction, this is an example of emphasizing copyright-related distribu-

95 *Id.* at 338 ("[M]erchandising, branding, and licensing of one's persona make up only a tiny fraction of musicians' revenue, despite the increased prevalence of social networking. Merchandising revenue is a tiny sliver of musicians' revenue 'pie.' The average share of the merchandise revenue stream is just 2%.").

96 *Id.* at 354.

97 Jordan Weissmann, *Think Artists Don't Make Anything Off Music Sales? These Graphs Prove You Wrong*, ATLANTIC (Feb. 27, 2013), www.theatlantic.com/business/archive/2013/02/think-artists-don't-make-anything-off-music-sales-these-graphs-prove-you-wrong/273571/.

98 On this, there are differences of opinion. A serious empirical approach, based on scoring critics' reviews and measuring music sales and radio airplay, concluded that there has been no deterioration in the quality of music since Napster was established in 1999, ushering in the era of free online music. Joel Waldfogel, *Copyright Protection, Technological Change, and the Quality of New Products: Evidence from Recorded Music since Napster*, 55 J.L. & ECON. 715 (2012). *But see* Touré, *'The Song Machine,' by John Seabrook*, N.Y. TIMES (Oct. 16, 2015), http://www.nytimes.com/2015/10/18/books/review/the-song-machine-by-john-seabrook.html?_r=0 (book review) (noting that revenue for recorded music has dropped by more than 50% from its peak, and providing qualitative evidence that this translates into lower quality music today). Touré writes:

> [A]s record sales dropped and less money could be made from recording, artists began touring more relentlessly. But albums are still helpful for increasing ticket sales, so albums must still be recorded. That means lyrics are sometimes written on a tour bus as it moves from city to city, and vocals are recorded in makeshift studios in hotel rooms. This seems like a harder path to making meaningful music than settling into a beautiful studio in Los Angeles or Memphis or Kingston and staying until the spirits deliver a heavenly gift. And all of that is why over the last decade we have watched the music business slowly atrophy. It's withering away before our eyes. Not only are the people inside it no longer so arrogant; in some cases they're pretty anxious. They're watching the last gasps of a dying model. Or, as Thom Yorke called Spotify, "the last desperate fart of a dying corpse."

Id.

tion of information products, as opposed to the distribution of wealth and income from copyrighted goods. DiCola's survey reorients the discussion. Instead of seeing music professionals as mere instruments (so to speak), to be paid as little as possible for producing the music we want, DiCola brings attention to the practical and personal realities of the music-making class. This in a nutshell represents the shift from analyzing the distribution of *information* to analyzing the wealth-related effects of copyright. From this point of view, we get a much different perspective on copyright and distributive justice.

2. Copyright Interests of Individuals Through the Lens of Litigation

The study of copyright litigation from 2005–2008 by Christopher Cotropia and James Gibson[99] provides another perspective contrary to the corporate copyright trope. In their study, Cotropia and Gibson found 17,119 copyright cases filed in federal court during those four years; of those, they coded 957 randomly chosen cases.[100] Cotropia and Gibson concluded that the cases were best analyzed in three broad groups: Performance Rights cases (62 cases involving musical compositions), File Sharing cases (512 cases against P2P uploaders), and the remaining 383 "[c]ommonplace" cases.[101]

The fact that the file-sharing cases are the majority of the Cotropia/Gibson study (53.5%) arguably supports the corporate copyright trope, but we agree with Cotropia and Gibson that the file-sharing lawsuits are not a staple part of the copyright ecology.[102] They were an understandable response by copyright owners to an unprecedented spike in copyright infringement,[103] a response that appears to have ended as other enforcement mechanisms have come online. Now, there seems to be a new, emerging equilibrium of authorized supply, enforcement tools, and consumer response.

As to the Performance Rights cases, there are sixty-two lawsuits in the study.[104] Since these are ASCAP and BMI enforcement actions against businesses playing music, they are always brought on behalf of music publishers *and* individual composers. Many of the music publishers are subsidiaries of big media corporations, but many are not. Since half the proceeds of an ASCAP/BMI enforcement will go to the composer, these cases hardly support the corporate copyright trope. We have already discussed the financial

99 Christopher A. Cotropia & James Gibson, *Copyright's Topography: An Empirical Study of Copyright Litigation*, 92 TEX. L. REV. 1981 (2014).

100 *Id.* at 1986.

101 *Id.* at 1988–89, 1991, 2004.

102 *Id.* at 2013 (concluding that "[o]ne can therefore safely ignore" the File Sharing cases "when discussing today's litigation trends"). Of course, we do not deny that the 2005–2008 file-sharing cases show that "big media" can bring substantial legal rights to bear on individuals who violate copyright law—that is obviously true, but irrelevant to our point.

103 *See generally* Hughes, *supra* note 52.

104 *See id.*

structure of ASCAP/BMI and the billions of dollars they distribute to individual authors.[105]

Cotropia and Gibson focus most of their analysis on the 383 non-cookie cutter copyright lawsuits that are neither file-sharing nor performance rights enforcement actions. Of those actions, less than 15% were filed by Fortune 1000 companies—big media—while over 21% were filed by individuals.[106] The remainder of the lawsuits (64.23%) were filed by incorporated entities below the Fortune 1000.[107] That group could include some very large companies, but most appear to be independent producers, small animation houses, lesser known fashion designers, and lots of "SOHO"—small office/home office—operations.[108] Indeed, even in the Central District of California—the home of Hollywood—big television and motion picture companies were plaintiffs in only 28.16% of the cases filed.[109] As befits a data set of cases brought principally by individuals and small and medium-sized enterprises, instead of most cases being about infringement of multiple works in a big corporate library, 177 of the 383 cases alleged infringement of only one work and 226 of the 383 cases alleged infringement of only one or two works.[110]

Given the wide potential range of who makes up the 64.23% middle-sized plaintiffs in the Cotropia/Gibson study, what is important to us is principally that individuals outnumbered big media three to two as plaintiffs, a fact that is certainly contrary to the corporate copyright trope.

And, again, there is a connection between copyright protection (or perceived copyright protection) and employment—that is, livelihoods for creative professionals. Another finding of the Cotropia/Gibson study that is out of sorts with received wisdom in IP academia is the very large number of copyright suits on fashion designs. Cotropia and Gibson found that in their set of "commonplace" copyright litigation, in 2004–2008, 12.01% were disputes about fashion and clothing.[111] These disputes were concentrated in the Southern District of New York and the Central District of California

105 *See supra* subsection II.A.1.

106 Cotropia & Gibson, *supra* note 99, at 1992.

107 *Id.*

108 The authors report that companies in the Fortune 1000 had annual revenues just over a billion dollars, meaning that a company could have $800 million in revenue and count as "small" in the Cotropia/Gibson study, but the authors report that "anecdotally, most of these small firms are really small firms (small architectural firms, mom and pop shops, etc.)." E-mail from Chris Cotropia & James Gibson to Justin Hughes & Rob Merges (Sept. 30, 2014, 15:02) (on file with authors).

109 Cotropia & Gibson, *supra* note 99, at 2008.

110 These numbers come from the Cotropia/Gibson dataset available at *Copyright Data Project*, COPYRIGHT LAW DATA (last visited Nov. 25, 2016) (see "copyright litigation data"); *see* E-mail from Chris Cotropia to Justin Hughes & Rob Merges (Nov. 21, 2016, 05:01) (on file with authors).

111 Cotropia & Gibson, *supra* note 99, at 1996.

where—we think not coincidentally—75% of America's salaried fashion designers are employed.[112]

At the same time, the Cotropia/Gibson study could be taken for its *implicit* normative meaning as much as or more than a descriptive account of the current importance of copyright to creative professionals. The researchers found that when the primary plaintiff was an individual (presumably a creative professional), there was an increase in the likelihood in an adversarial ruling (rather than settlement);[113] that plaintiffs who were individuals lost more often;[114] and that when the copyright-protected work's author was one of the plaintiffs, this also increased the likelihood that the defendant would prevail.[115] Professor Gibson attributes some of this to individual plaintiffs being outgunned by corporate defendants,[116] but surely some of this is due to an "endowment" effect in which authors "may prove too romantic about their own creations."[117] But if the payoff of the corporate copyright trope is that copyright can be weakened or abandoned because it only benefits corporations, the Cotropia/Gibson study supports our view that to the degree copyright unduly benefits corporations, the right policy response in terms of distributive justice is to strengthen the propensity of copyright to increase the wealth and income of creative professionals, not to abandon copyright altogether.

112 *Spotlight on Statistics: Fashion*, BUREAU OF LAB. STAT., (June 2012), http://www.bls.gov/spotlight/2012/fashion/ (see slide 9) ("Within the United States, most fashion designers work in large cities, such as New York or Los Angeles. In May 2010, almost 75 percent of all salaried fashion designers worked in New York and California. California led the nation, with a total of 4,480 employed fashion designers."). The high incidence of lawsuits over fashion designs also undermines a popular theme in the recent intellectual property literature: that fields lacking in intellectual property protection can nevertheless become thriving centers of innovation. *See, e.g.*, KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION (2012). For a critique, emphasizing that the case studies supporting this theory (other than the fashion industry) involve small, marginal industries, and pointing out that fashion designers themselves appear not to subscribe to the theory, see Robert P. Merges, *Economics of Intellectual Property Law*, *in* THE OXFORD HANDBOOK OF LAW AND ECONOMICS (Francesco Parisi ed., forthcoming 2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412251.

113 *See* Cotropia & Gibson, *supra* note 99, at 2015.

114 *Id.*

115 *See* James Gibson, *Small Fry in Copyright Litigation*, THE MEDIA INST. (Jan. 29, 2014), http://www.mediainstitute.org/IPI/2014/012914.php.

116 *Id.* ("[I]ndividual plaintiffs are likely to be outgunned; when an individual filed a case, he or she was facing a bigger defendant (either a small firm or a Fortune 1000 company) about 85% of the time, and a disparity of resources would presumably follow.")

117 *Id.* This endowment effect for those who create copyrighted works is documented in Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31, 39–40 (2011).

B. What About Lost Utility Among Poorer Consumers from Above-Margin Prices and Deadweight Losses?

Although as we have said, our primary focus is on incomes, we must take a moment to address an obvious concern. The classic economic analysis of copyright is based on a tradeoff: the legal right gives market power (often short-handed as a "monopoly"), but this raises the marginal cost of copyright-protected works to consumers. When a consumer chooses to buy a copyright-protected work, it is possible to argue that by definition he or she loses nothing: the exchange of money for the work is at least an even trade. But when a consumer is "priced out" of the market for a work he or she wanted, and was willing to pay at a lower price, that is another story. Here the loss of value from a purchase that would have been made represents a real loss to a consumer. This is because by assumption a consumer who is willing to buy a product at a certain price desires that product (at that price) more than all alternative purchases. Demand curves, in other words, are constructed subject to the budget constraints of all consumers. Thus if the price for the product is *X*, those consumers who would have purchased at price *X-Y* suffer a real loss or harm. This is the dreaded "deadweight loss."

The classic response to this argument in the intellectual property context is to say that it suffers from a baseline problem.[118] It assumes the existence of a work, and goes on to show that pricing the work above marginal cost creates a deadweight loss. But assuming the existence of a work runs counter to the basic rationale for copyright—that without the incentive of market power, the work will never be created. To put it simply, the language of marginal cost and deadweight loss is about how best to allocate a pie; the language of copyright incentives is about how to get someone to bake a pie in the first place.

There is, in turn, a classic rebuttal. Many, maybe most, works are created without being induced by copyright incentives. The market power that copyright provides is an afterthought. We can, in other words, assume there is a pie and then decide whether to give the person who baked it market power in setting its price. This makes deadweight loss a real concern.

---

118 Paying more than marginal cost for a copyright-protected work arguably "harms" a consumer because the "extra" money spent (beyond marginal cost) could and would have been spent on something else. But this argument suffers from an obvious baseline problem. It assumes a world where the copyright-protected work exists; if this is not true—if the lack of copyright means that the work in question is never created—then it assumes a false baseline. And even if a work would be created without copyright so that selling it at its marginal cost is possible, calling the higher price occasioned by copyright (and the market power it confers) a "harm" to the consumer is no more natural than calling it a "windfall" when the consumer has extra money in his or her budget due to the lower (marginal) price of a work. *See generally* MERGES, *supra* note 2, at 56–58 (contesting the argument that frustrated consumers who want a product but are unwilling to pay market price have experienced "waste" in the sense used by philosopher John Locke); David McGowan, *Copyright Nonconsequentialism*, 69 MO. L. REV. 1 (2004) (arguing that who wins the consequentialist debate over copyright is determined by who is assigned the burden of proof as to whether works will be produced, indicating the need for some other rationale).

But this argument, response, and rebuttal are all framed in terms of utilitarianism and we must adjust the discussion if we are talking about distributive justice, particularly Rawlsian justice. Let us do this step-by-step. We will need to consider both (a) when transactions occur (at the price sought by the copyright holder) and (b) the deadweight loss problem where the transaction has been stymied by the price sought by the copyright holder.

First, we believe that the incentive structure made possible (or more easily possible) by copyright induces the creation and distribution of works that improve the position of all levels of the society. We recognize that there is a fundamental divide over this basic question of how many copyright-protected works are actually induced by the promise of copyright[119] (and at what level of quality[120]). Notice, however, that where exclusive rights are truly unneeded for creation and distribution—blogs unsupported by ads, user-generated content on YouTube, etc.—many works are freely distributed despite the existence of copyright law. The possibility of exclusive rights does not mean everyone exercises them.[121]

Second, we believe that individual decisions to purchase access to copyrighted works are market decisions that increase overall utility. That transactions occur means that both buyer and seller are better off.[122] And this is true wherever a buyer is in the distribution of wealth. A person in the ninth or tenth income decile who buys copyright-protected product *A* such that money is transferred from this person to a fourth or fifth decile person is at least as well off after the purchase as before. The same is true of a person in the first or second decile who buys product *A*, resulting in a wealth transfer to the fourth or fifth decile person. Rawls would agree with basic economics on this preliminary point,[123] even if the income deciles and the distribution of people within them do not meet the requirements of his definition of distributive justice.

---

119 *See, e.g.*, Raymond Shih Ray Ku et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 VAND. L. REV. 1669, 1672 (2009) (noting that growth in copyright registrations appears "a function of population" more than a function of "increasing copyright protection").

120 *See, e.g.*, Justin Hughes, *Motion Pictures, Markets, and Copylocks*, 23 GEO. MASON L. REV. 941 (2016) (describing Nigerian film industry's success but low quality in a commercial environment with minimal copyright protection).

121 Because it is easy to voluntarily eschew property rights (through failure to claim them, by waiving them, or by simply not enforcing them), but hard to create property-like structures without state-backed rights, property regimes are more flexible and permit greater individual choice as compared to regimes that prohibit individual property rights. *See* Robert P. Merges, *To Waive and Waive Not: Property and Flexibility in the Digital Era*, 34 COLUM. J.L. & ARTS 113, 113 (2011) ("[W]aiver contributes to the supple texture of property rights, making it easy for individuals to exercise choices after rights have been granted. This is, in my view, a cornerstone feature of property rights, and one of their chief advantages over other entitlements and incentive regimes.").

122 *See, e.g.*, Menell, *supra* note 9, at 188 ("No one is required to purchase IP-protected goods. Therefore, in an exchange economy, only those who value such goods more than their cost will purchase the goods.").

123 RAWLS, *supra* note 32.

To determine if a given transaction contributes to meeting those conditions, a Rawlsian asks whether after the transaction there is an increase in inequality.[124] This does *not* happen when the person in the first or second decile buys *A* and there is a transfer to a person in the fourth, fifth, or eighth decile. So, we can immediately eliminate those transfers from our concern *even if the price is higher than would be necessary to incentivize the creation of work A.*

Our concern is when the transaction to get *A* to the consumer in the eighth decile transfers wealth to someone in the second decile, when the purchase by the consumer in the fourth decile transfers wealth to someone in the first decile, or whenever wealth moves from "lower" to "higher" deciles after a purchase. In those situations, we ask whether the money transferred was more than needed for creation and distribution of the work. We recognize that there may well be some "superstars" of the entertainment business who are earning far more than is needed to induce their maximum productivity, just as there are many bankers, CEOs, physicians, and lawyers who are earning more than is needed to induce their maximum productivity. In all of these situations, Rawlsian justice might call for a diminution of the individual's income.[125] On the other hand, there is no evidence that the large cohorts of creative professionals in middle-income groups are earning more from copyright than is needed for creation and distribution of original expression. To us, the opposite might be inferred from the fact that musicians earn, on average, 10% of their income from copyright and have to cobble together the rest of their income, including from many non-performance activities (such as giving music lessons). A creative individual who works in other jobs—an actor who also sells real estate, a writer who drives a cab—does not appear to be earning more from the transactions based on copyright than would be appropriate under Rawlsian justice.[126]

That is our response to the concern that the transactions that do occur based on copyright are contrary to Rawlsian justice, but this still leaves the problem of deadweight loss from the transactions that do not occur. We *could* dismiss this problem with a simple argument: if the price premium has been brought down to the point where the Difference Principle is met (no inequality is being generated that is not needed for incentives), the deadweight loss from economic theory causes no inequality—because the work would be not be produced and distributed at all without the market power that causes the deadweight loss. But we think the copyright system has characteristics that additionally address the concern of deadweight loss: simply put, there are factors that mitigate consumer harm due to the market power conferred by copyright.

One is the availability of substitutes. The narrow scope of copyright protection and the structure of the copyright entitlement produce numerous often highly similar substitute works: these fairly close substitutes for any particular copyrighted work should drive down the market price of any particu-

124 RAWLS, *supra* note 15, at 83.

125 *See id.*

126 *See id.*

lar work. Beyond the copyrighted substitutes, the public domain offers a rich array of substitution possibilities. While, generally speaking, older pharmaceuticals may not be as effective as new generations of medical treatments that are still under patent protection, it is hard to claim that public domain expressive works—particularly in literature and fine arts—are not as good as works protected by copyright.

Another element constraining possible deadweight losses is the "versioning" of distribution of copyrighted works. Music is readily made available without out-of-pocket cost to the consumer in ad-supported formats (traditional radio, ad-supported Spotify, YouTube); books and e-books are made available without cost by public libraries; a substantial amount of audiovisual production is ultimately made available without cost through television and online venues. Finally, to the degree that the copyright system has "leakage" and poorer people are more likely to engage in unauthorized downloading and streaming, this also produces de facto price discrimination in which cohorts unwilling to pay have access to copyrighted works.[127] We believe that all of this, taken together, suggests deadweight loss may be quite limited.[128]

Finally—and most importantly—if one's concern is wealth distribution and all its complexities, that concern is not well-served by general theories that cut back copyright's exclusive rights, whether it is substantial expansion of fair use, sharply curtailing the copyright term, or eliminating the derivative work right. Thoughtful advocacy for public support of programs that help public libraries and independent artists, and that subsidize low-income purchasers of copyright-protected works, are all far more effective ways to address the needs of the poorest members of society. And they are much fairer than drastically cutting back on copyright. To aim targeted assistance

127 *See* Hughes, *supra* note 52, at 741–42 (viewing certain levels of unauthorized distribution as free distribution on a price discrimination model). Others have made the same observation that "leakage" through incomplete enforcement of copyright produces de facto price discrimination. *See* Wendy J. Gordon, *Intellectual Property as Price Discrimination: Implications for Contract*, 73 CHI.-KENT L. REV. 1367, 1369 (1998) (arguing that "all intellectual property law operates by fostering price discrimination"); Meurer, *supra* note 52; *see also* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988) (suggesting fair use as de facto price discrimination that diminishes the need for express price discrimination).

128 There is indirect support for this in some data showing that the poorest Americans (those in the bottom fifth of the income distribution) spend almost exactly the same percentage of their total expenditures on entertainment of various types as is spent by all other people, whatever their incomes. Ann C. Foster, *Movies, Music, and Sports: U.S. Entertainment Spending, 2008–2013*, 4 BLS: BEYOND THE NUMBERS, no. 6, Mar. 2015, at 1, 3 tbl.1, http://www.bls.gov/opub/btn/volume-4/pdf/movies-music-sports-entertainment-spending.pdf (revealing that entertainment spending, as percentage of total expenditures, by quintile, measured 4.9% for lowest fifth of earners; then 4.5, 4.3, 4.7, 4.9, and 5.2 for the next four fifths). This does not prove directly that they are not harmed by copyright, but it does show that there are entertainment products available in a price range that is within the means of the lowest earners. This is of course consistent with the idea that there are many mechanisms imposing price discipline and thereby limiting the harm caused by deadweight loss.

at the poorest consumers, while preserving the "middle-class" enhancing aspects of copyright, seems to us much more in the Rawlsian spirit.

C. Copyright and the Just Savings Principle

The engine of Rawls's Difference Principle is modulated by two additional elements; the first being the just savings principle discussed in Part II above. Copyright addresses this requirement of intergenerational equity through two primary mechanisms. First, we assume that copyright provides, at least in a meaningful swath of cultural and informational production, a genuine incentive structure, i.e., that more culture and information is produced than would be without copyright. As long as this culture and information is preserved—a complex issue in which both copyright and copyright exceptions have an important role—cultural "equity" is being accumulated across generations. On this point, it merits pointing out that Rawls's just savings principle does *not* require elimination of property (or exclusive) rights: just savings could occur in a society as wealth accretes and passes from private hands to private hands intergenerationally. At least, Rawls does not indicate otherwise.

But copyright further enhances intergenerational equity by being time-limited, which means that future generations will enjoy unfettered access to all copyrighted works after the copyrights lapse. As long as the promise of "Limited Times" is maintained, a boom in protected content today leads to a richer and broader public domain tomorrow.[129] Copyright's expiration provides an endpoint to private wealth concentration; in this respect, copyright (and patent) seem to "double down" on just savings: not only does the cultural stockpile accumulate at a consistent pace, but a growing stockpile is freely available to all.

We also believe that there is another, subtler mechanism at work in copyright industries for just savings across generations. Copyright is part of an institutional environment that strengthens classes of creative professionals over time and across generations with knowledge creation, preservation, and transmission. Of course, copyright's importance varies among different groups of creative professionals, but with groups for whom copyright contrib-

129 As several scholars have shown, intellectual property rights in year one increase the public domain in year one (and onward), and not just when those IP rights expire. This is because (1) unprotectable elements of an IP-protected work become available to the public immediately (the "idea" of a copyrighted work, as opposed to its expression, for example; or disclosed but unclaimed technology in an issued patent or published patent application); (2) the IP right might prove invalid or might not be enforced against some or all who use it; or (3) IP protection by one corporate rival may lead other rivals to invest in public domain information designed to offset the first rival's IP rights. *See* MERGES, *supra* note 2, at 147–49 (discussing enforcement levels and how they affect de facto levels of IP protection); Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183 (2004) (noting that competitor investments in IP-free content to offset proprietary strategies may enhance the public domain); R. Polk Wagner, *Information Wants to be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995 (2003).

utes to continuing viability or vitality, copyright helps ensure that the next generation receives at least as much in know-how as did the current generation. In other words, conservation of a creative ecosystem is not just about preserving vast repertoires of public domain materials; it is about maintaining and transmitting vital creative traditions.

Consider, for example, the many specialized skills needed to make a feature film.[130] Aside from the relatively glamorous jobs of scriptwriting and directing, there are dozens of niche functions to be performed: line producers (who keep track of major budget categories and coordinate production),[131] location managers,[132] set dressers,[133] prop specialists,[134] makeup artists, costume designers and makers, light and sound technicians, camera people, post-production effects specialists—it is a very long list. All of these specialized skills have been built up over many years. To recreate them would be expensive and difficult. We do not often think of this sort of infrastructure as an endowment bestowed on future generations, but it is.

Nor is it overblown to show concern about the hollowing out of this ecosystem. Sociologists and historians of technology have long noted the many subtle and interdependent skills required to produce complex, multidimensional products. A classic example is the attempt to move from technical information contained in German patents seized during World War I to the actual production of the commercial dyes covered by the patents.[135] These efforts failed miserably. There is a degree of know-how, sometimes called "tacit knowledge," in complex production processes. When this knowledge is no longer accessible—once there is a gap in the person-to-person transfer of this "knowledge in the bones"—it can be exceedingly difficult to recreate it. A similar story has been told with respect to NASA's Saturn V rocket—which was taken out of production and is now considered a "lost art."[136] Thus copyright, by maintaining the conditions for creative profes-

130 *See, e.g.*, BRYAN MICHAEL STOLLER, FILMMAKING FOR DUMMIES (2d ed. 2008).

131 *Id.* at 101 ("Line producing an independent . . . film is actually an art form; it requires great skill . . . .").

132 *See* LOCATION MANAGERS GUILD INT'L, http://locationmanagers.org (last visited Sept. 19, 2016).

133 *See About Us & Contact*, SET DECORATORS SOC'Y OF AM., http://www.setdecorators.org/?art=about (last visited Sept. 19, 2016).

134 *See* MOVIE PROP ASS'N, http://www.movieprop sassociation.org (last visited Sept. 28, 2016) (Movie Prop Association members are authorized dealers of movie props).

135 *See, e.g.*, Robert J. Baptista & Anthony S. Travis, *I.G. Farben in America: The Technologies of General Aniline & Film*, 22 HIST. & TECH. 187, 193 (2006) ("Thus the production of intermediates at [the U.S. company] in 1920, some 114,000 pounds, represented just five products, notwithstanding the fact that the company had obtained the rights to 1200 German patents on dyes, intermediates and related chemicals . . . . The German patents, however, did not provide sufficient details to enable replication of the inventions claimed. [The company] lacked the specialized knowledge to commercialize the dye patents and expand the product line beyond the staples that competitors were also making." (footnote omitted)).

136 *See* Amy Shira Teitel, *The Lost Art of the Saturn V*, VINTAGE SPACE (Apr. 3, 2011), https://vintagespace.wordpress.com/2011/04/03/the-lost-art-of-the-saturn-v/

sionals to practice their crafts, indirectly helps to preserve the skill base of these creative professions across generations.

Having made this claim, we want to recognize three things. First, we recognize that there are no historical examples of what has happened to knowledge accretion, preservation, and transmission in a creative professional class where copyright (or other IP) rights were suddenly eliminated. Second, we recognize that there may be—in a narrow framework—situations where *less* copyright would cause *more* literal knowledge *transmission* (as when creative professionals struggle to survive by teaching more).[137] Third, we recognize that with sufficient state support, patronage, or simple lead time, a class of creative professionals can *survive* without copyright and thereby pass on their know-how. As examples, there was a filmmaking industry under Mao, Eisenstein made his cinematic classics in the (copyright-less) early Soviet Union, and low-budget "Nollywood" survives largely on lead times (in a relatively low-tech distribution environment).[138] Some commentators would point to the fashion industry and open source software as models of creative classes flourishing over time without copyright.[139] We think these last two examples are more complex than usually presented,[140] but to the

("[B]uilding the [Saturn V] rocket at [the very rapid] rate [of the 1960s] and with so many subcontractors means the people who oversaw and understood the actual assembly and overall working of the Saturn V were few. Each contractor recorded the workings of their stage and records survive about the engines used, but only a handful of engineers . . . knew how Saturn V puzzle fit together. It is possible to work backwards to recreate individual aspects of the technology, but the men who knew how the whole vehicle worked are gone. No one alive today is able to recreate the Saturn V as it was.").

137 As F.M. Scherer notes in his seminal study of how composers earned their livings in the eighteenth and nineteenth centuries, "Economic incentives affect the specific challenges to which individuals, creative or not, allocate their time." F.M. SCHERER, QUARTER NOTES AND BANK NOTES: THE ECONOMICS OF MUSIC COMPOSITION IN THE EIGHTEENTH AND NINETEENTH CENTURIES 6 (2003); *see also id.* at 64 ("Twelve years later, however, when his finances were solid, [composer Carl] Czerny reported to Felix Mendelsohn that he was spending less time teaching and more composing, since the latter yielded a better financial return"); *see also* Michela Giorcelli & Petra Moser, Copyright and Creativity: Evidence from Italian Operas (Oct. 19, 2016) (unpublished manuscript), http://ssrn.com/abstract=2505776 (discussing how the adoption of copyright by successive states within Italy led to a significant increase in the number and quality of new operas introduced each year).

138 *Lights, Camera, Africa*, ECONOMIST (Dec. 16, 2010), http://www.economist.com/node/17723124/print.

139 A strong case that lead time, not exclusive IP rights, provides the basis for a substantial creative class in the fashion industry is made in RAUSTIALA & SPRIGMAN, *supra* note 112, at 52–56; *see also* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1718 (2006) (claiming that the relative lack of IP protections in the fashion industry has not stifled innovation and may in fact serve the industry's interests).

140 *See* Cotropia & Gibson, *supra* note 99, at 2016 (showing a very large number of copyright infringement cases where both the plaintiff and defendant were in the apparel/fashion/textile sector). And the society best known for its fashion industry creative professionals—France—has quite robust protection of fashion designs. Raustiala and Sprigman do not thoroughly evaluate the French fashion industry, *see supra* note 139, at 1736 n.96.

degree they are true, none detracts from copyright *enhancing* the continuation of a creative professional class and the knowledge accretion, preservation, and transmission that entails. One of the reasons indigenous peoples and developing countries have relentlessly pursued international protection of folklore or "traditional cultural expression" is the recognition that financial returns can keep cultural traditions alive.[141] This is no less true in Hollywood than it is for first peoples around the world.

D. Copyright and Conditions of Fair Equality of Opportunity—and the Hard-to-Miss Experience of African Americans

A final requirement built into the Second Principle is that even if the social and economic inequalities can be justified under the Difference Principle, being on the bountiful end of the inequalities—that is, being rich and/or powerful—must be "attached to offices and positions open to all under conditions of fair equality of opportunity."[142] In short, if there is not egalitarian equality of *outcomes*, there must nonetheless be equality of *opportunity*. For Rawls, equality of opportunity is much more than just *legal* equality of opportunity, a view that might be identified with libertarians.[143] Rawls is concerned with inequalities of opportunity rooted in natural and social contingencies,[144] and his just society is presumably one that gives all children equal access to pre-school, kindergarten, K-12 education, sports programs, summer camps, music lessons, university, and the like.[145] Beyond education, there must also be fair and equal opportunity in the job market, qualifying exams and benchmarks for various professions, capacities to start new businesses, ability to migrate across both professions and regions, access to venture capital, etc. In Brian Barry's apt description, there should be the "elimination of all [unequalizing] factors except that of genetic endowment."[146]

Obviously, American society still fails to meet this ideal. Despite progress against racial, ethnic, religious, and gender bias, American society still grapples with wildly unequal educational opportunities for children and

---

See generally Merges, *supra* note 112, for a critique of the fashion industry point, and the general "negative IP space" literature in which it appears.

141 *See generally* Justin Hughes, *Traditional Knowledge, Cultural Expression, and the Siren's Call of Property*, 49 SAN DIEGO L. REV. 1215 (2012); Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARDOZO ARTS & ENT. L.J. 37, 84 (2010).

142 RAWLS, *supra* note 15, at 83.

143 COHEN, *supra* note 21, at 91 (proposing "equality of opportunity as . . . understood by laissez-faire libertarians" to mean that "opportunity is . . . equal when there is no legal bar, such as exists under slavery or serfdom, to anyone's economic or social self-advancement"). Rawls is clear that "positions are to be not only open in a formal sense, but that all should have a fair chance to attain them." RAWLS, *supra* note 15, at 73.

144 RAWLS, *supra* note 15, at 72.

145 *Id.* at 73 ("Chances to acquire cultural knowledge and skills should not depend upon one's class position, and so the school system, whether public or private, should be designed to even out class barriers.").

146 1 BRIAN BARRY, THEORIES OF JUSTICE 222 (1989).

increasingly "sticky" income inequality: it is still true that your best chance to have wealth is to be born into (or close to) it. As the *Economist* observed as early as 2004, American society, which prides itself on meritocracy, is becoming "[m]ore dynastic than dynamic."[147] And while de jure bias has remained more virulent against the LGBT community than any other group, it is with the African-American community that American society has failed most systematically to provide practical "fair equality of opportunity."

We begin this discussion keenly aware that conversations of race issues can be fragile and difficult,[148] but also with the conviction that all of us need to confront the fact that in our country, "the concentration of poverty has been paired with a concentration of melanin."[149] For people born 1955–1970, if you were white, you had a 4% chance to grow up in a poor neighborhood; if you were black, the likelihood of growing up in a poor neighborhood was 62%.[150] And this disparity continues: in 2009—after the Great Recession that began in 2007—the median net worth of white American households was almost $98,000 while the median net worth of African-American households was $2170.[151] In other words, for every dollar held by the average white household, African-American families held two cents.[152]

In the words of sociologist Patrick Sharkey, "Blacks and whites inhabit such different neighborhoods . . . that it is not possible to compare the economic outcomes of black and white children."[153] Indeed, for half a century, those studying the situation have accepted that poverty among African-American citizens "is a special, and particularly destructive, form of American poverty."[154] And to the degree that political power—and the opportunity for

147 *Meritocracy in America: Ever Higher Society, Ever Harder to Ascend*, ECONOMIST (Dec. 29, 2004), http://www.economist.com/node/3518560.

148 In words both light and serious, the playwright David Mamet described the problem we face: "[T]here is nothing a white man can say about race that isn't either offensive or incorrect." Savannah L. Barker, *David Mamet's 'Race' Attempts to Tackle Complicated Issues*, NEON TOMMY (Sept. 8, 2014), http://www.neontommy.com/news/2014/09/david-mamets-race-attempts-tackle-complicated-issues.

149 Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/. Or, as South Carolina state Senator Vincent Sheheen (D) said in the summer of 2015, "There's a quiet bigotry that still exists, and if those of us who are white don't say anything . . . then we're part of the problem." Amber Phillips, *6 Key Moments from the South Carolina Senate's Strikingly Blunt Confederate Flag Debate*, WASH. POST (July 6, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/07/06/4-key-moments-from-the-south-carolina-senates-strikingly-blunt-confederate-flag-debate/.

150 Coates, *supra* note 149.

151 Jesse Washington, *Black Economic Gains Reversed in Great Recession*, ASSOCIATED PRESS (July 9, 2011), http://www.boston.com/news/education/higher/articles/2011/07/09/black_economic_gains_reversed_in_great_recession/.

152 *Id.*

153 Coates, *supra* note 149.

154 *Id.* Or, as President Lyndon Johnson said in a 1965 speech at Howard University:

> Negro poverty is not white poverty. . . . Many of its causes and many of its cures are the same. But there are differences—deep, corrosive, obstinate differences—

political office—correlates with wealth, this also means a structural underempowerment of African Americans politically.[155]

There is no need for us to explore the historical causes for this situation; we need only observe that this correlation between race and socio-economic disempowerment means our society is far *further* from the just society than it should be, particularly in its failure to ensure that "offices and positions [are] open to all under conditions of fair equality of opportunity."[156] Our question is whether the copyright regime is neutral in relation to that socio-economic disempowerment, possibly *exacerbates* that disempowerment, or possibly *ameliorates* that disempowerment. We make the strong claim that the copyright system as it presently functions, *warts and all*, arguably provides the most robust mechanism for disadvantaged groups, particularly African Americans, to accumulate wealth in American society. In this sense, copyright is a *modest* tool to enhance Rawlsian distributive justice in an imperfect society. Let us first consider other scholars' observations about copyright and race, and then elaborate on how copyright modestly helps ameliorate distributive injustice in American society vis-à-vis African Americans.

1. Observations to Date About Copyright and African Americans

A number of commentators have explored the intellectual property system in relation to the socio-economic situation of minority groups—with insights both broad and narrow.

In terms of observations about copyright law itself, one broad observation has been that intellectual property laws have not rewarded African Americans for the creation of styles of music and dance—ragtime, jazz,[157] blues, R&B, and many specific dances[158]—which were appropriated by white artists. As to such "mainstreaming" of cultural styles and genres created by African Americans, the only way to turn such appropriation into *misappropria-*

> radiating painful roots into the community and into the family, and the nature of the individual. These differences are not racial differences. They are solely and simply the consequence of ancient brutality, past injustice, and present prejudice.

Id.

155 *See, e.g.*, Spencer Overton, *Racial Disparities and the Political Function of Property*, 49 UCLA L. REV. 1553 (2002) (noting that the very reasoning of *Buckley v. Valeo* and its progeny establishes that groups with less property, i.e., African Americans, have less political voice).

156 RAWLS, *supra* note 15, at 83.

157 Jeffrey Melnick, *Tin Pan Alley and the Black-Jewish Nation*, *in* AMERICAN POPULAR MUSIC: NEW APPROACHES TO THE TWENTIETH CENTURY 29, 41 (Rachel Rubin & Jeffrey Melnick eds., 2001); K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1185 (2008) ("[T]hough African-Americans had certainly invented ragtime and jazz, these musical styles were being brought to their highest levels by [White] outsiders." (second alteration in original) (quoting Melnick, *supra*, at 30 (internal quotation marks omitted))).

158 *See, e.g.*, Dawn Lille, *The Charleston*, DANCE HERITAGE COALITION (2012), http://www.danceheritage.org/treasures/charleston_essay_lille.pdf (explaining the Charleston's origins among the descendants of African slaves in the American South).

tion would be to apply new forms of ownership to broad swaths of the cultural landscape. Not only would such ownership be at odds with free expression[159] and vibrant cultural development, but such a system would require daunting judgments of "source."[160] And much of what was appropriated *from* African Americans is culture that was developed by African Americans with elements from *mainstream culture*.[161] Only in a fixed snapshot of time can cultural appropriation look like a one-way street.[162]

More focused critiques of copyright law's potential disparate impact on minorities include that the fixation requirement handicaps protection of original expression from artistic and social communities that emphasize oral or impromptu creativity;[163] that musical notation's representation of musical

159 Specifically, the idea-expression dichotomy. *See* Greene, *supra* note 157, at 1200 ("The import of the idea-expression dichotomy is that copyright does not protect styles of performance pioneered by Black innovators."); K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 382–83 (1999) ("The idea-expression doctrine has also penalized the most innovative artists in blues, jazz, and rock, essentially denying protection of their signature styles and denying compensation for the creation of genres.").

160 *See, e.g.*, DAVID BYRNE, HOW MUSIC WORKS 95 (2012) ("Another loop of influence and inspiration occurred when African musicians imitated the imported Cuban recordings they heard—which were themselves a mutation of African music. The African guitar-based rhumba that resulted was something new and wonderful, and most folks hearing it wouldn't think it was a poor imitation of Cuban music at all. When I heard some of those African bands, I had no idea that Cuban music had been their inspiration. What they were doing sounded completely original to me, and I was naturally inspired, just as they had been.").

161 *See* JAMES HASKINS, SCOTT JOPLIN: THE MAN WHO MADE RAGTIME (1978). In *Copynorms*, Greene writes:

> One of the leading dances of the era, the Cakewalk, became incredibly popular in America. "Blacks . . . had subsequently adapted and amended the two-step [spawned by the marching music of John Philip Sousa] and created the 'cakewalk' . . . [a dance whose] primary characteristic was promenading in an exaggeratedly dignified manner. By the mid [1890s], [W]hites had in turn adopted the cakewalk and [W]hite composers would make a fortune selling cakewalk sheet music."

Greene, *supra* note 157, at 1192 n.71 (alterations in original) (quoting HASKINS, *supra*, at 74); *see also* PAUL OLIVER, SCREENING THE BLUES: ASPECTS OF THE BLUES TRADITION 202 (1968) (discussing how "in general the jazz-blues songs borrowed more from the folk idiom than they fed into it"); Greene, *supra* note 159, at 363 (noting that "[b]lack slaves in America passed down the African musical tradition, incorporating European music styles to create something totally new" (footnote omitted)).

162 Or, as David Byrne has said, "[I]t can be tricky to assign a value judgment based on a particular frozen moment in the never-ending cycle of change." BYRNE, *supra* note 160, at 113.

163 *See* Greene, *supra* note 159, at 378 ("Perhaps the most taxing structural element of the copyright regime vis-a-vis Black artists has been the requirement of reducing works to a tangible form."). To the degree that pre-1976 law required musical compositions to be in notation in order to be considered "fixed," this had a further discriminatory impact on musical forms like improvisational jazz that might be recorded without being reduced to musical notation. *Id.* at 380.

composition fails to capture the nuances of creativity in much African-American music;[164] and, as a historical criticism, that pre-1976 formalities and registration requirements handicapped protection of original expression of authors who lacked sophisticated knowledge of the law or access to legal representation.[165]

Recognizing elements of copyright that have had disparate impact on the African-American community does not imply that copyright laws were drafted with discriminatory purpose[166] or *even awareness of discriminatory impact*. For example, the compulsory license to "cover" musical compositions has been criticized for disparate impact on African Americans (who found their compositions re-recorded by white musicians),[167] although the compulsory license was originally put in place to address monopoly concerns related to player pianos. Contrast this with Social Security law, which, at its inception, excluded farmworkers and domestics:[168] that "neutral" limitation made 65% of working African Americans ineligible, a form of de facto discrimination to which the NAACP understandably objected.[169]

Copyright laws have not been attacked as racist or prejudicial in the way that Social Security and mortgage financing have.[170] As Keith Aoki concluded in his own work in this area, "[T]he relationships between black musicians, white musicians, publishers, and recording companies are more

164 *See generally* Olufunmilayo Arewa, *Writing Rights: Copyright's Visual Bias and African American Music* 25–26 (U.C. Irvine Sch. of Law, Legal Stud. Research Paper Series No. 2012-9, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2010024.

165 Our thanks to Ruth Okediji for emphasizing this point. *See also* Greene, *supra* note 159, at 353–54.

166 We interpret this to be Professor Greene's perspective. Greene, *supra* note 157, at 1203 ("Copyright law was not designed with interests of African-American authors in mind. However, copyright law was not intentionally designed to disadvantage Black cultural production.").

167 Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573, 600–01 (2010) ("[C]opyright law provisions that permit cover recordings have, particularly in the past, been used in a way that reinforces existing racial hierarchies."); Reebee Garofalo, *Crossing Over: From Black Rhythm and Blues to White Rock 'n' Roll*, *in* R&B, RHYTHM AND BUSINESS: THE POLITICAL ECONOMY OF BLACK MUSIC 112, 124–25 (Norman Kelley ed., 2005) (detailing African-American artists whose songs were re-recorded "by [a white] artist in a style thought to be more appropriate for the mainstream market").

168 Farmworkers and domestic workers were not covered in the original Social Security Act. Social Security Act, Pub. L. No. 74-721, 49 Stat. 620 (1935). However, both groups acquired coverage under the 1950 amendments. Social Security Act Amendments of 1950, Pub. L. No. 81-734, ch. 809, § 210, 64 Stat. 494 (current version at 42 U.S.C. § 410 (2006 & Supp. IV 2010)).

169 Coates, *supra* note 149.

170 For continued problems in how the mortgage finance system operates against African Americans, see Peter Eavis, *Race Strongly Influences Mortgage Lending in St. Louis, Study Finds*, N.Y. TIMES (July 19, 2016), http://www.nytimes.com/2016/07/19/business/dealbook/race-strongly-influences-mortgage-lending-in-st-louis-study-finds.html?_r=0 (discussing a new study finding that race remains an important factor regarding where banks provide mortgages in Milwaukee, Minneapolis, and St. Louis).

complex and textured than a one-size-fits-all narrative of 'rip-off' and unilateral theft would suggest."[171]

2. Copyright and Positions "Open to Everyone Under Conditions of Fair Equality of Opportunity"

John Rawls believed that his principles of justice should be brought to bear especially when "certain fixed natural characteristics are used as grounds for assigning unequal basic rights, or allowing some persons only lesser opportunities."[172] That, we think, too often describes the de facto situation of African Americans in American society. Our strong claim is that the copyright system as it presently functions arguably provides the *most robust mechanism* for African Americans to accumulate wealth in American society and, therefore, in Rawlsian terms, contributes substantially to the existence of a cluster of social "positions" that are truly "open to all under conditions of fair equality of opportunity."[173] We will support this claim with one data set and leave it to the reader to decide the probability of the claim.

While this is a strong claim,[174] its strength should not be misunderstood. Copyright would be a better tool with some of the policy alternatives we describe later in this Article. More importantly, copyright is a meager tool for distributive justice compared to basic social reforms that are possible—principally, a significant (multi-decade) strengthening and equalization of K-12 public education. Indeed, we believe that copyright would be a *better* distributive tool if coupled with a substantially strengthened educational system for minorities.

In 2009, *Forbes* magazine published a list of the wealthiest African Americans in the United States. It has not updated it since. Using its 2009 numbers as a base[175] and adding information from a number of sources, including other lists[176] subsequently released by *Forbes*, we can build a rough sketch compendium of the wealthiest African Americans:

1. Oprah Winfrey: $3 billion (television, multimedia, publishing)
2. Michael Jordan: $1 billion (athletics, endorsements)
3. Sean "Diddy" Combs: $735 million (music, apparel, beverage and liquor)
4. Andre "Dr. Dre" Young: $700 million (music, endorsements, investment)

---

171 Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, 755 (2007).

172 RAWLS, *supra* note 19, § 18.5, at 65.

173 RAWLS, *supra* note 15, at 83.

174 And, to the best of our knowledge, a claim that has never been made before. For the closest observation we have found, see Raymond Millien, *The Real McCoy: Should Intellectual Property Rights be the New Civil Rights in America?*, IPWATCHDOG (Nov. 11, 2012), http://www.ipwatchdog.com/2012/11/11/the-real-mccoy-should-intellectual-property-rights-be-the-new-civil-rights-in-america/id=29828/.

175 *See infra* note 182.

176 *See infra* note 182.

5. Sheila Johnson: $700 million (television)
6. Janice Bryant Howroyd: $610 million (staffing company)
7. Tiger Woods: $580 million (athletics, endorsement)
8. Robert Johnson: $550 million (television)
9. Shawn "Jay-Z" Carter: $550 million (music, apparel)
10. Mariah Carey: $520 million (music)
11. Ervin "Magic" Johnson: $500 million (athletics, business, endorsements)
12. Tyler Perry: $400 million (television, film)
13. Bill Cosby: $400 million (television)
14. Ulysses Bridgeman: $400 million (athletics, fast food)
15. Floyd Mayweather: $400 million (athletics, endorsements)
16. Donahue Peebles: $350 million (construction)
17. Shaquille O'Neal: $350 million (athletics)
18. Quincy Jones: $350 million (music)
19. Percy "Master P" Miller: $350 million (music)
20. Berry Gordy: $345 million (music)
21. Russell Simmons: $340 million (music, apparel)
22. Prince: $300 million (music)
23. Quinton Primo: $300 million (real estate)
24. Lebron James: $270 million (athletics, endorsements)
25. Beyonce Knowles: $250 million (music)

We are not financial journalists and make no claim that this list would be as accurate as an updated *Forbes* list. Our list assumes that no one on the 2009 *Forbes* list lost *substantial* wealth unless we found a press report to that effect, but we also did not adjust wealth for inflation. Additional individuals made our list from reports in specialized media[177] and from more narrowly focused *Forbes* stories.[178]

177 *See Top 12 Richest African Americans*, RICHEST LIFESTYLE (Jan. 1, 2016), http://www.richestlifestyle.com/richest-african-americans-of-2015/; *see also* Brent Kelley, *What Is Tiger Woods' Net Worth?*, ABOUT.COM (Nov. 23, 2015), http://golf.about.com/od/tigerwoods/f/tiger-woods-net-worth.htm; A. Mallo & Othelloucb, *The Blackbuzzworthy Annual List of the Richest Black (African American) People—2015*, BLACK BUZZ WORTHY (Jan. 2015), http://blackbuzzworthy.com/the-richest-african-americans-in-2015-up-to-date-list/; *Mariah Carey Net Worth: How Much Is Mariah Carey Worth?*, CELEBRITY NET WORTH, http://www.celebritynetworth.com/richest-celebrities/singers/mariah-carey-net-worth/ (last visited Nov. 26, 2016).

178 *See* Dan Alexander, *Record 290 Newcomers Join Forbes Billionaires List, Including Michael Jordan*, FORBES (Mar. 2, 2015), http://www.forbes.com/sites/danalexander/2015/03/02/record-290-newcomers-join-forbes-billionaires-list-including-michael-jordan/; Zach O'Malley Greenburg, *The Forbes Five: Hip-Hop's Wealthiest Artists 2015*, FORBES (May 5, 2015), http://www.forbes.com/sites/zackomalleygreenburg/2015/05/05/the-forbes-five-hip-hops-wealthiest-artists-2015/#6ef64e2d167e; Luisa Kroll, *Living the Dream: The Most Successful, Self-Made Women in the U.S.*, FORBES (May 27, 2015), http://www.forbes.com/sites/luisakroll/2015/05/27/forbes-first-ever-ranking-of-americas-richest-self-made-women/#555391344e36.

But exactitude is not needed for our point. It is abundantly clear that for all but a couple people on this list, what are traditionally identified as "copyright industries"—music, film, television, broadcast professional sports, and publishing—were the avenues for the accumulation of the most substantial African-American fortunes. Commensurately, this means the establishment of powerful voices for the African-American community in our country's civic life.[179] And as these are the *richest* African Americans, it merits pointing out that almost all of these individuals are self-made billionaires and millionaires; in contrast to the substantial presence of inherited wealth on more general lists, the richest African Americans made it on their own.

There are seven professional athletes on this list, and it might be objected that professional sports are not "copyright industries." Not so. National Basketball Association (NBA) teams derive approximately 20% of their overall revenues from television—and that $930 million in annual broadcast fees is expected to roughly treble in the new contract for *exclusive* broadcast rights between the NBA and ESPN.[180] In the case of the sole boxer on the list, Floyd Mayweather, one report placed his take from the May 2, 2015, Mayweather-Pacquiao fight at $72 million from ticket sales and $59 million from various broadcast rights.[181] So, we think it is fair to attribute a substantial amount of these seven individuals' wealth accumulation to copyright (the rest being rooted in real property control of sports venues, trademark, and right of publicity).

We now return to the question of "positions" that are truly "open to everyone under fair conditions of equality": looking across the rosters of the NBA, economist Seth Stephens-Davidowitz found in 2013 that forty-eight professional African-American players were produced per one million inhabitants in the United States versus two professional white players per one million inhabitants. One would be hard pressed to find another elevator for socio-economic advancement that advantages African Americans so starkly—

179 And we do not know how far *down* into the list of wealthy African Americans this would go. By our calculations, the next four people on the list would be Diana Ross ($250 million), John W. Thompson ($250 million), Will Smith ($220 million), and Curtis "50 Cent" Jackson ($155 million), with only Mr. Thompson building his wealth in a non-copyright industry. *See infra* note 182. However, in the summer of 2015 Mr. Jackson declared bankruptcy in the wake of a messy revenge porn lawsuit. Andrea Peterson, *50 Cent Filed for Bankruptcy Days After Losing a Revenge Porn Lawsuit*, WASH. POST (July 14, 2015), https://www.washingtonpost.com/blogs/the-switch/wp/2015/07/14/50-cent-filed-for-bankruptcy-days-after-losing-a-revenge-porn-lawsuit/?wpisrc=nl_tech&wpmm=1.

180 *NBA Extends Television Deals*, ESPN (Feb. 14, 2016), http://espn.go.com/nba/story/_/id/11652297/nba-extends-television-deals-espn-tnt.

181 Dan Rafael, *Mayweather-Pacquiao Eclipses 4.4 Million PPV Buys, $72M Gate*, ESPN (May 12, 2015), http://www.espn.com/boxing/story/_/id/12872711/floyd-mayweather-manny-pacquiao-fight-shatters-all-live-gate-record (estimating that "Mayweather could earn $250 million . . . [and that the] event will easily soar past $500 million in total revenue," based on multiple sources, such as approximately $72 million in ticket sales, $40 million from international television rights, $19 million in national closed circuit revenue, $6.9 million in closed circuit revenue, and $13.2 million in sponsorships).

and, again, the economics of professional sports *relies on copyright and trademark protection.*

We want to emphasize that in presenting these figures we are *not* saying that copyright is 'the' solution to black poverty, or to poverty generally. But as far as we can tell, this correlation between copyright-based industries and African-American wealth has been true for several years.[182] We have no doubt that this correlation is partly a function of racial barriers in other professions and business structures. Indeed, it is really no surprise that as early as the 1920s, one of the most successful African-American-owned businesses was in a copyright industry: the short-lived Black Swan Records, based in Harlem.[183]

We should also repeat that we are not proposing that copyright has wealth redistributive impact for African Americans as a whole, as would be needed in an argument about wealth distribution to meet Rawls's Difference Principle. Our argument is that on the Rawlsian question of "conditions of fair equality of opportunity" copyright is doing much good whereas many other social structures are not.[184] And, again, there is no doubt that among those other social structures our public schools at all levels have failed African-American children.[185]

---

182 In 2006, three years before the *Forbes* list, on *The Rich Register*'s list of wealthiest African Americans, the top five spots were held by people in copyright-related industries (Oprah Winfrey, Robert L. Johnson, Sheila C. Johnson, Berry Gordy, and Catherine L. Hughes). *See* THE RICH REGISTER, 2006, at xxii. That publication's top twenty-five had greater diversity of industries [including wealth accumulated from "healthcare services," Merrill Lynch, and American Express] but we are doubtful of its accuracy because it fails to include so many people who, by *Forbes*'s calculation in 2009, would have been in *The Rich Register*'s top ten. *The Forbes 400*, FORBES, (Matthew Miller & Duncan Greenberg eds., Sept. 30, 2009), http://www.forbes.com/2009/09/29/forbes-400-buffett-gates-ellison-rich-list-09-intro.html. Our assumption is that, even for self-made people, accumulated wealth does not change that quickly for that many people.

183 Ivo De Loo & David Davis, *Black Swan Records, 1921 to 1924: From a Swanky Swan to a Dead Duck*, 8 ACCT. HIST. 35 (2003). According to Davis and De Loo, "[A]t its peak, the company had a staff of 30 people with an anticipated weekly payroll of $1,200, and royalty payments amounting to $30,000 per annum." *Id.* at 49. De Loo and Davis calculate that the company's overheads were "excessive" and unsustainable. *Id.* at 51. For many facts De Loo and Davis cite Jitu K Weusi, The Rise and Fall of Black Swan Records (Spring 1996) (unpublished M.A. term paper, Brooklyn College), http://www.redhotjazz.com/blackswan.html.

184 RAWLS, *supra* note 15, at 302.

185 Trends in public education to prepare disadvantaged young people to exploit the copyright system are also not good. A study funded by the National Endowment for the Arts shows that the percentage of African-American and Hispanic high school students who have received some music education in childhood has declined precipitously over the past three decades. *See* NICK RABKIN & E.C. HEDBERG, NAT'L ENDOWMENT FOR THE ARTS, ARTS EDUCATION IN AMERICA: WHAT THE DECLINES MEAN FOR ARTS PARTICIPATION 15–16 (2011), https://www.arts.gov/sites/default/files/2008-SPPA-ArtsLearning.pdf.

3. Further Considerations on Copyright and "Conditions of Fair Equality of Opportunity"

One way to understand how copyright affords "fair equality of opportunity" for wealth creation is that copyright is often the propertization of what we call "talent." Copyright is the legal regime whereby an exclusively owned *res* consisting of original expression comes into existence where there was only public domain material before. Patent law shares this characteristic: patent law is the legal regime whereby an exclusively owned property consisting of a technological innovation comes into existence where the technology did not exist before. Viewed in isolation, each law can distribute wealth to individuals through fair equality of opportunity because each law gives property claims to individuals. But this positive impact on fair equality of opportunity is often muted by the other laws and social circumstances that interact with copyright and patent law.

We have already emphasized how copyright only works its equality of opportunity magic when there are sufficient educational opportunities. Indeed, we speculate that the level of positive opportunities created for African Americans by industries undergirded by copyright law does *not* have a strong parallel in industries undergirded by patent law largely because of the failure of our educational system to provide African-American children with fair conditions of equality of opportunity for advancement in "STEM" careers—science, technology, engineering, and mathematics.[186] Historically, both patent law and copyright law may have been essentially neutral laws[187] embedded in and interrelated to discriminatory laws and practices (such as the difficulty for black inventors of accessing [white] patent lawyers),[188] but

186 For example, in the United States in 2008, African Americans earned 41.5% of the *non*-science and engineering doctorate degrees awarded to minorities who were U.S. citizens or permanent residents while African Americans earned only 18.6% of the science and engineering PhDs. MARK K. FIEGENER, NAT'L SCI. FOUND., NUMBERS OF U.S. DOCTORATES AWARDED RISE FOR SIXTH YEAR, BUT GROWTH SLOWER 4 (2009), http://files.eric.ed.gov/fulltext/ED507250.pdf. According to one report, while African Americans are 12% of the U.S. population, "[i]n 2009, they received just 7 percent of all STEM bachelor's degrees, 4 percent of master's degrees, and 2 percent of PhDs." Jesse Washington, *Declining Numbers of Blacks Seen in Math, Science*, HUFFINGTON POST (Oct. 23, 2011), http://www.huffingtonpost.com/huff-wires/20111023/us-blacks-in-math-and-science-/; *see also Doctoral Degree Awards to African Americans Reach Another All-Time High*, 50 J. BLACKS IN HIGHER EDUC. 6, 6–10 (2005) (reporting that "[w]hites are far more likely than blacks to earn doctorates in the natural sciences" and that there is a "very large racial Ph.D. gap in the natural sciences").

187 For example, patent applications did not and do not tell the USPTO the race of the applicant, and Professor Lisa Cook writes that "a comparison of a sample of similar patents obtained by white and African-American inventors shows that the time between patent application and grant for the two groups was not significantly different, 1.4 years in each case." Lisa D. Cook, *Violence and Economic Activity: Evidence from African American Patents, 1870–1940*, 19 J. ECON. GROWTH 221, 226 n.15 (2014).

188 *See generally* ROSS THOMSON, STRUCTURES OF CHANGE IN THE MECHANICAL AGE: TECHNOLOGICAL INNOVATION IN THE UNITED STATES 1790–1865, at 311–18 (2009) (discussing the importance of social ties and networks for invention and patenting in the nineteenth cen-

as an avenue for present-day wealth accumulation something has happened to separate the two fields. The historical prominence of inventors like Elijah McCoy, George Washington Carver, and Lewis Latimer[189] cannot hide the fact that African Americans are substantially underrepresented today in research and development.

Separately, there is the problem of business practices. Much of the criticism that has been leveled against copyright on behalf of African Americans has really been about business practices or, at best, the interaction of copyright, contract law, and unscrupulous (and racist) business people. Specific claims for historical racial bias have pointed to low royalty payments to African-American artists,[190] unfair and often downright fraudulent contract practices to deprive African Americans of IP rights,[191] and music publishers frequently "claim[ing] co-authorship for famous blues songs, although the publishers themselves played no role in creating such songs."[192] These historical critiques of copyright have focused on the music industry and we think it would be difficult to disagree with Chris Ruen's observation that "there's been a lot of exploitation in music, particularly in this country with black musicians."[193]

Beyond the entrepreneurship of a Tyler Perry, a Prince, or an Oprah Winfrey, there is the question of "fair equality of opportunity" for minorities and women in the larger structure of intellectual property industries. We are past the days of "systematic exclusion of black personnel from positions of power within the [music] industry,"[194] but frankly neither Silicon Valley nor

---

tury); Cook, *supra* note 187, at 226 (analyzing how racial violence and discriminatory laws suppressed patenting by African Americans).

189 *See generally* THE BLACK INVENTOR ONLINE MUSEUM, http://www.blackinventor.com (last visited Oct. 21, 2016). For a database of African-American patent holders, see *African American Patent Holders Database*, KNOWLEDGE BANK, https://kb.osu.edu/dspace/handle/1811/5941 (last visited Oct. 21, 2016).

190 Greene, *supra* note 157, at 1193.

191 Arewa, *supra* note 167, at 603 ("Blues musicians were typically bound by 'race' recording contracts that were in many instances exploitative . . . ."); Stephen Calt, *The Anatomy of a "Race" Music Label: Mayo Williams and Paramount Records*, *in* R&B, RHYTHM AND BUSINESS: THE POLITICAL ECONOMY OF BLACK MUSIC 90, 102–03 (Norman Kelley ed., 2005) (describing how contracts with early 'race' record label Paramount "cheated" artists such that "[n]ine of out ten [African-American] Paramount artists . . . received no royalty, regardless of their record sales"); Greene, *supra* note 157, at 1194–96.

192 *See, e.g.* HOWARD REICH & WILLIAM GAINES, JELLY'S BLUES: THE LIFE, MUSIC, AND REDEMPTION OF JELLY ROLL MORTON 91–92 (2003). Reich and Gaines note that the practice allowed publishers such as Walter Melrose to "double-dip, collecting the publisher's traditional 50 percent of royalties, as well as an additional 50 percent of the songwriter royalties." *Id.* at 92; *see also* Calt, *supra* note 191, at 103 ("The chief means by which dishonest recording officials of the era cheated artists was by filching composer credits for their songs in order to draw a publishing royalty.").

193 CHRIS RUEN, FREE LOADING: HOW OUR INSATIABLE HUNGER FOR FREE CONTENT STARVES CREATIVITY 138 (2012).

194 Garofalo, *supra* note 167, at 112.

Hollywood is doing as well as they should in creating diverse workforces that empower women and minorities.

In the case of high technology, there have been regular allegations that the start-up investment world is "almost entirely male" (and white) and that among established tech giants there is a "paucity of women in senior positions."[195] According to Sue Gardner, former executive director of the Wikimedia Foundation, as of 2014, women held roughly 15% of the technical roles in Silicon Valley companies and this percentage *has been steadily dropping since the late 1980s*.[196] The statistics for African Americans and Latinos are no better. While African Americans represent 12% of the entire U.S. workforce,[197] at Google and Facebook, just 2% of U.S. employees are black;[198] at Intuit, that number rises to 4%.[199] At Apple, blacks are 7% and Latinos are 11% of the company's U.S. workforce.[200] As of 2015, Twitter is perhaps the worst offender on these metrics: African Americans account for more than 25% of Twitter users but only 2% of the Twitter domestic workforce.[201]

On the entertainment industry side, the complete lack of acting Oscar nominees of color—in 2015 and again in 2016—has become a *cause celebre* among celebrities. In 2014, not quite 2% of top-grossing films were directed by women and less than 5% were directed by African Americans.[202] The numbers of women in "power jobs in Hollywood . . . trail far behind the percentage of females in executive positions in other heavily male-dominated

195 Richard Waters, *Shaking the Silicon Valley Boys' Club*, FIN. TIMES (Mar. 13, 2015), https://www.ft.com/content/92d2e5f4-c960-11e4-b2ef-00144feab7de.

196 Sue Gardner, Opinion, *Why Women Are Leaving the Tech Industry in Droves*, L.A. TIMES (Dec. 5, 2014), http://www.latimes.com/opinion/op-ed/la-oe-gardner-women-in-tech-20141207-story.html ("Multiple studies have found that the proportion of women in the tech workforce peaked in about 1989 and has been steadily dropping ever since.").

197 Jefferson Graham, *Magic Johnson Can Solve the High-Tech Diversity Gap: Call Him*, USA TODAY (Oct. 23, 2014), http://www.usatoday.com/story/tech/columnist/talkingtech/2014/10/22/magic-johnson-silicon-valley-diversity-solution-call-him/17754133/.

198 *Id.*

199 *Id.*

200 Amit Chowdhry, *Apple CEO Tim Cook Is 'Not Satisfied' with Employee Diversity*, FORBES (Aug. 13, 2014), http://www.forbes.com/sites/amitchowdhry/2014/08/13/apple-ceo-tim-cook-is-not-satisfied-with-employee-diversity/#3bf14f504bd1; Sam Colt, *Apple Releases Disappointing Employee Diversity Numbers*, BUS. INSIDER (Aug. 12, 2014), http://finance.yahoo.com/news/apple-releases-disappointing-employee-diversity-162303728.html. However, this improved slightly in 2015. Hayley Tsukayama, *Apple Is Slightly More Diverse than It Was Last Year*, WASH. POST (Jan. 19, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/01/19/apple-is-slightly-more-diverse-than-it-was-last-year/.

201 Brian Fung, *Another Top Twitter Employee Is Slamming the Company's Lack of Diversity on His Way out the Door*, WASH. POST (Nov. 4, 2015), https://www.washingtonpost.com/news/the-switch/wp/2015/11/04/another-top-twitter-employee-quits-over-lack-of-diversity/ ("[B]lacks account for more than 25 percent of the [Twitter] user base but just two percent of its U.S. workforce.").

202 Jessica P. Ogilvie, *Whites, Camera, Action: How Can Hollywood Unions Promote Diversity?*, L.A. WKLY. (Feb. 4, 2016), http://www.laweekly.com/news/whites-camera-action-how-can-hollywood-unions-promote-diversity-6556106.

endeavors"[203] and there have been embarrassing differentials in what male and female actors of the same draw are paid, even in the same film.[204] Interestingly, women appear to have had a larger share of significant directorial and screenwriting positions in the film industry of the early twentieth century,[205] but according to journalist Jessica Ogilvie, "Hollywood's transition from silent films to talkies forced executives to deal with Wall Street for loans. Hollywood began answering to Wall Street, sidelining women because the financiers didn't back them."[206] To the degree that is true, it might also impact Silicon Valley: if the financing mechanisms for an industry remain "old school," then power and wealth stays concentrated with those who initially had the power and wealth. To us, all of this only confirms the value of copyright as a mechanism for "fair equality of opportunity" by giving *at least some people of talent* greater leverage.

The issue of "fair conditions of equality of opportunity" is not just an issue of public education, job markets, and access to venture capital. Even in the case of professional basketball players, economist Seth Stephens-Davidowitz found that coming from wealthier neighborhoods and more stable families remains a significant advantage—for both white and African-American players[207]—despite the perception that African-American players tend to

203 Jessica P. Ogilvie, *How Hollywood Keeps Out Women*, L.A. WKLY. (Apr. 29, 2015), http://www.laweekly.com/news/how-hollywood-keeps-out-women-5525034; *see also* Rebecca Keegan, *Gender Bias in Hollywood? U.S. Digs Deeper to Investigate the Industry's Hiring Practices*, L.A. TIMES (May 11, 2016), http://www.latimes.com/entertainment/movies/la-et-mn-0512-aclu-women-directors-update-20160509-snap-story.html (discussing the EEOC's expansion of its investigation into gender discrimination in Hollywood).

204 William Boot, *Exclusive: Sony Hack Reveals Jennifer Lawrence Is Paid Less than Her Male Co-Stars*, DAILY BEAST (Dec. 12, 2014), http://www.thedailybeast.com/articles/2014/12/12/exclusive-sony-hack-reveals-jennifer-lawrence-is-paid-less-than-her-male-co-stars.html; Ogilvie, *supra* note 203 ("Hacked Sony emails between Andrew Gumpert of Columbia Pictures, Doug Belgrad of Sony Motion Picture Group and Amy Pascal of Sony confirmed that superstar Lawrence got seven 'points' of back-end compensation, compared with Renner's nine.").

205 *See* Ogilvie, *supra* note 203. *See generally* CARI BEAUCHAMP, WITHOUT LYING DOWN: FRANCES MARION AND THE POWERFUL WOMEN OF EARLY HOLLYWOOD (1997); HILARY A. HALLETT, GO WEST, YOUNG WOMEN! THE RISE OF EARLY HOLLYWOOD (2013); KAREN WARD MAHAR, WOMEN FILMMAKERS IN EARLY HOLLYWOOD (2006).

206 Ogilvie, *supra* note 203.

207 Dr. Stephens-Davidowitz found that among African-American players in the NBA, the poorest 20% of counties in the United States produced 42 players per million inhabitants while the richest 20% of counties in the United States produced 67 players per million inhabitants. This difference is greater than first appears when one remembers that the richest counties will *tend* to have smaller percentages of African-American populations overall. However, his empirical work also showed the poorest 20% of U.S. counties produced *more* African-American players than the second 20% or the middle 20% of counties (42 players versus 31 and 37 players per million inhabitants, respectively). Seth Stephens-Davidowitz, *In the N.B.A., ZIP Code Matters*, N.Y. TIMES (Nov. 2, 2013), http://www.nytimes.com/2013/11/03/opinion/sunday/in-the-nba-zip-code-matters.html?_r=0. Among whites, the poorest counties produced only one-third the number of NBA players produced by the richest counties. *Id.*

come from poor neighborhoods.[208] Stephens-Davidowitz also found that African-American players were statistically more likely to have been born to married parents and to mothers over the age of twenty than the averages within the African-American male population.[209] A rich set of social conditions and policies are implicated in providing fair conditions of equality of opportunity, including popular beliefs that may perpetuate racial stereotypes;[210] copyright policy is only a very small piece of this picture—but it is a quite positive piece.

There is a final, interesting point we would like to make about "fair conditions of equality of opportunity": the actuality of such conditions depends, in part, on belief that there are such conditions. It is well-known that "demonstration effects" are important. For young minority children, just the *knowledge* that someone like them has amassed a vast fortune opens the door to greater possibilities in their own future.[211] Social psychologists have established the fact that people form their own self-image and personality in part by learning from their social environment.[212] They learn about their life prospects by observing the fate of others *like them.*[213] To take just one of many relevant studies, British researchers found convincing evidence of same-race role models increasing self-esteem and expanding career horizons for young people.[214] Most important, in this study the highest-impact role models were those that had achieved material success, as opposed to success in moral or general social spheres.[215]

Wealth, in other words, is a powerful symbol of life's possibilities—of the *offices and positions open to all.* Therefore, the large fortunes amassed by minority celebrities affect many people beyond their own immediate circle of family and friends. While a young person's immediate environment is, of course, paramount, knowledge that other people like themselves have "made

208 *Id.*

209 *Id.*

210 *See, e.g.*, Samuel R. Hodge et al., *Theorizing on the Stereotyping of Black Male Student-Athletes: Issues and Implications*, 2 J. FOR STUDY SPORTS & ATHLETES IN EDUC. 203 (2008), https://cnr.ncsu.edu/wp-content/uploads/2016/02/StereotypingAthletes.pdf (discussing how beliefs on racial stereotypes impose psychological barriers on academic performance, particularly for black males).

211 JAMES S. DUESENBERRY, INCOME, SAVING, AND THE THEORY OF CONSUMER BEHAVIOR (1949).

212 ALBERT BANDURA, SOCIAL FOUNDATIONS OF THOUGHT AND ACTION: A SOCIAL COGNITIVE THEORY 390–453 (1986) (describing how human behavior is affected by imitation and internalizing self-images, among other factors).

213 Henry P. Sims, Jr. & Charles C. Manz, *Social Learning Theory: The Role of Modeling in the Exercise of Leadership*, 3 J. ORGANIZATIONAL BEHAV. MGMT. 55, 55–63 (1982).

214 TIRZA LEADER ET AL., DEP'T FOR COMMUNITIES & LOCAL GOV'T, AN EXPERIMENTAL TEST OF THE IMPACT OF BLACK ROLE MODEL MESSAGES: RESEARCH TO INFORM THE REACH ROLE MODEL PROGRAMME (2009), http://dera.ioe.ac.uk/10518/1/1281347.pdf (finding, in a study of over 1200 minority youth in Britain, that the highest and longest-lasting effects from exposure to role models occur when role models have achieved material—as opposed to moral/social—success).

215 *Id.*

it" matters, too. The long-term impact of role models on the overall distribution of wealth is hard to measure, but it is surely there.[216]

III. Distributive Bells and Whistles of Copyright—Current and Prospective

Of course, the law vesting these exclusive rights in authors is only the first step. The rules that govern licensing and sale of copyrights matter too. One could have a system that vests exclusive rights in the author *inalienably*. This would cut down on coerced assignments and other contracts by which authors are dispossessed of most or all of the value of their works. But absent workarounds, even this would not necessarily help authors. For one thing, it would require every author to commercialize his or her work directly, reducing the benefit from more efficient agents that specialize in publishing, distribution, and the like. It would also make collaborative works difficult and would greatly limit works requiring substantial investments of capital. These usually require multiple creative "inputs" to be assigned to a single entity.[217]

On these grounds, a system that allows for the transfer of exclusive rights is much better for wealth distribution to authors; at the same time, it raises the possibility that authors will be underpaid, cheated, or otherwise unfairly divested of their exclusive rights. In this respect, copyright seems no different than real or chattel property law.

Except that there *are* striking differences. In fact, the American copyright system has a series of elements designed to strengthen the author's position, both procedurally and substantively. In this Part, we first review many of these (familiar) elements; we then turn to ways in which the copyright system could further strengthen wealth distribution to authors.

A. Procedural Protection of Authors

The Copyright Act offers some protection to authors by clarifying and cabining the conditions for the transfer of copyright. Section 202 clarifies

216 Another take on "demonstration effects" is the economic literature on "tournament theory." This body of work arose in an attempt to explain extremely high executive salaries, for example, those of Fortune 100 CEOs. The basic idea is that the wages paid to these executives serve as an inducement for lower-level employees to work hard in hopes that they too can "win the tournament." *See* Edward P. Lazear & Kathryn L. Shaw, *Personnel Economics: The Economist's View of Human Resources*, 21 J. Econ. Persp. 91, 94–95 (2007) (describing tournament theory); *see also* Charles M. Elson & Craig K. Ferrere, *Executive Superstars, Peer Groups, and Overcompensation: Cause, Effect, and Solution*, 38 J. Corp. L. 487, 523 (2013) (noting that "[t]he [ultra-high executive] wage derives its utility not from ensuring the retention of productive workers, but rather by eliciting the effort of other employees at lower levels of the organization" and that "the potential for pay raises within an organization provides a bounty or prize that incentivizes employee effort by inducing a competition to win the promotion").

217 For a good discussion of the economics of copyright in collective works, see Anthony J. Casey & Andres Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev. 1683, 1716–17 (2013).

that "[t]ransfer of ownership of any material object, including the copy . . . in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object."[218] This protection seems particularly important in the art world, but may also preempt contests over copyright ownership after the physical transfer of master tapes, unpublished manuscripts and papers, and the like. Indeed, section 202 reverses the common law copyright rule applied by some courts that unconditional sale of the physical object embodying an unpublished work implied conveyance of the copyright in the work.[219]

Section 204(a) of the Copyright Act provides one of those few places where federal law restricts state contract law, providing that any transfer of exclusive rights in a copyright "is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent."[220] The writing requirement precludes claims of oral transfer agreements. In addition, the "signed by the owner" requirement has been used to prevent assignees from attempting to use unilateral documentation to prove a transfer.[221]

This protection of the author/owner is stricter than the typical state statute of frauds.[222] It has also expanded over time: the 1909 Act had this signed writing requirement only for assignments, grants, or mortgages; the 1976 Act applies the requirement to all transfers of exclusive rights, including exclusive licenses.[223] Policymakers should ensure that this meaningful procedural safeguard is not undermined in the digital networked environment.[224]

---

218 17 U.S.C. § 202 (2012).

219 Pushman v. N.Y. Graphic Soc'y, Inc., 39 N.E. 2d 249 (N.Y. 1942); Otten v. Curtis Publ'g Co., 1951 WL 4651, at *1 (N.Y. Sup. Ct. Nov. 7, 1951) ("When a creative artist sells without reservation the product of his effort he effects a merger of the created work itself and the separable 'copyright,' i.e., the legal monopoly in publication."). In New York, this presumption was abrogated by statute in 1966. 1966 N.Y. Laws 1444, ch. 668, amending N.Y. GEN. BUS. LAW art. 12–E, §§ 223, 224; *see* 3–10 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.09(B)(2) (2008) [hereinafter NIMMER].

220 17 U.S.C. § 204(a).

221 Snook v. Blank, 92 F. Supp. 518 (D. Mont. 1948) (holding an affidavit signed by an alleged assignee to be insufficient under a parallel provision in the 1909 Act); PMC, Inc. v. Saban Entm't, Inc., 52 Cal. Rptr. 2d 877 (Cal. Ct. App. 1996) (holding an internal "deal memorandum" insufficient).

222 Konigsberg Int'l Inc. v. Rice, 16 F.3d 355, 356–57 (9th Cir. 1994).

223 NIMMER, *supra* note 219, § 10.03(A)(1)(a); *id.* § 10.03(B)(1) (describing how, under the 1909 Act, "[a] copyright license, as distinguished from an assignment, could be made orally, or could be implied from conduct," and that "[t]his was true under the 1909 Act of both exclusive and nonexclusive licenses" (footnotes omitted)).

224 In a 2013 decision, a Fourth Circuit panel concluded that clicking "yes" prior to uploading photos constituted a signed writing transferring exclusive rights when the clickwrap Terms of Use (TOU) language had included the statement: "By submitting an image, you hereby *irrevocably assign* . . . all of your rights, title and interest in and to the image submitted." Metro. Reg'l Info. Sys., Inc. v. Am. Home Realty Network, Inc., 722 F.3d 591, 593 (4th Cir. 2013) (emphasis added by the Court of Appeals). We agree with the Nimmer

B. Termination of Transfer in American Copyright Law

Beyond these procedural protections, the most extraordinary "pro-author" elements of U.S. copyright law are surely its substantive provisions on "termination of transfer," "reversionary rights," or "recapture" of copyright rights.[225]

Under the 1909 Act, American copyright had two terms (in the last form of the law, each term being twenty-eight years).[226] Copyright could be registered for the initial term by the author or the "proprietor" of the copyright. The statute, however, stated that the renewal term could be secured only by "the author . . . if still living, or the widow, widower, or children of the author, if the author be not living, or . . . the author's executors, or in the absence of a will, his next of kin."[227] The legislative history of this provision was clear: "[I]t should be the exclusive right of the author to take the renewal term," a right of which he should not be "deprived."[228]

The 1909 law gave authors some negotiating power, but publishers adapted by requiring authors to sign deals in which the author contractually committed to assign the renewal term to the publisher as soon as it came into existence. In its 1943 case *Fred Fisher Music Co. v. M. Witmark & Sons* the Supreme Court held that such a contract could be enforced against the author personally. The majority opinion was blunt in its rejection of Congress's apparent interference with freedom of contract, refusing to accept either that "authors are congenitally irresponsible"[229] or that the Court should "draw a principle of law from the familiar stories of garret-poverty of some men of literary genius."[230]

---

treatise that this was a troubling result. NIMMER, *supra* note 219, § 10.03(A)(1)(b); *see also* PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 1.09 (AM. LAW INST. 2010) ("A term of an [online, standard-form] agreement is unenforceable if it (a) conflicts with a mandatory rule of federal intellectual property law; or (b) conflicts impermissibly with the purposes and policies of federal intellectual property law . . . .").

225 These are the various terms used. *See generally* Peter S. Menell & David Nimmer, *Pooh-Poohing Copyright Law's "Inalienable" Termination Rights*, 57 J. COPYRIGHT SOC'Y U.S.A. 799 (2010); Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 36 (2010); Michael A. DeLisa, Note, *The Right of Termination in Copyright Law: The Second Circuit's Decision in* Penguin Books (USA) Inc. v. Steinbeck *Bodes Well for Authors*, 43 LOY. L.A. L. REV. 273 (2009).

226 Act of July 1, 1909, ch. 320, 35 Stat. 1075, 1080 (repealed 1976).

227 *Id.* ("[T]he author . . . if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin . . . ."). Exceptions to this rule included renewal for works published posthumously, composite works originally copyrighted by a proprietor, works copyrighted by corporate bodies, and works made for hire. *Id.*

228 H.R. REP. NO. 60-2222, at 14 (1909); S. REP. NO. 60–1108, at 14 (1909); *see also* Frank R. Curtis, *Protecting Authors in Copyright Transfers: Revision Bill § 203 and the Alternatives*, 72 COLUM. L. REV. 799, 805–06 (1972).

229 318 U.S. 643, 656 (1943).

230 *Id.* at 657.

Nonetheless, this system still had a great benefit for people on the author's side *when the author died*. Because the renewal period copyright did not *exist* until after the first term of the copyright (that is, after the twenty-eighth year), the author's contractual agreement was a commitment to transfer the renewal copyright *when it came into existence*. Once the author died, his family and heirs were typically free to renew the copyright without any obligation to transfer it.[231]

The 1976 Act extended the length of copyright protection and created a "unitary" term.[232] For works created after the effective date of the Act—January 1, 1978—the two-twenty-eight-year-terms system was replaced by a single copyright term running for the author's entire life plus fifty years. With no need to renew the copyright, the author's heirs would lose the negotiating power to extract additional payments for the renewal. So, to restore and strengthen the author's bargaining power, Congress created a new right of termination.

For a work created under the 1976 Copyright Act, section 203 gives the author—or her heirs—a right to terminate the grant of *any* copyright or right under a copyright "at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant."[233] In other words, if Sarah finished a book in early 2005 and transferred the copyright to Big Publisher on April 1, 2005, she or her family could reclaim the copyright anytime between April 1, 2040, and March 30, 2045. Once the author reclaims the copyright, she can keep the copyright until it expires or sell it to someone again (this time without any termination right).

The legislative history is very clear that this thirty-five-year mechanism to reclaim the copyright does not affect any contractual "right of cancelling or terminating the agreement," and does not change "the existing state of the law" on when an author otherwise "may cancel or terminate a license, transfer, or assignment."[234] It can only add to an author's rights, in other words; and never take away from them. There were also special termination of transfer provisions for works created before the 1976 Act came into effect. When Congress added twenty years to copyright terms in 1998, it again adopted a termination mechanism, section 304(c), allowing statutory heirs to reclaim the newly-extended copyrights if they had not yet exercised the termination rights already embedded in the statute.[235]

1. The Clear Intent of Termination Is Redistribution of Wealth

For all three of these federal termination rights, there are some provisions to safeguard the interests of the party that bought the copyrights, perhaps the most important being that "[a] derivative work prepared under

231 *See* Stewart v. Abend, 495 U.S. 207, 219–21 (1990).
232 H.R. REP. NO. 94-1476, at 2 (1976); S. REP. NO. 94-473, at 3 (1976).
233 17 U.S.C. § 203(a)(3) (2012).
234 H.R. REP. NO. 94–1476, at 128 (1976); S. REP. NO. 94–473, at 111 (1976).
235 17 U.S.C. § 304(c). *See generally* Menell & Nimmer, *supra* note 225.

authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination."[236] Many derivative works are developed by corporate interests, the canonical one being a feature film based on a novel, short story, or play. But these safeguards for the corporate side of the bargain should not mask the truly extraordinary idea of these termination provisions. To protect the author and her heirs, the Copyright Act is quite explicit that "[t]ermination of the grant may be effected *notwithstanding any agreement to the contrary*."[237] Remember that following a Supreme Court decision in 1943, authors could be forced to assign their renewal rights before the renewal term started. Congress was concerned that with a single copyright term, companies would try an end-run around the new system and force authors to sign an agreement that said "If you take back your copyright under section 203, you contractually promise to re-grant it to me." So, the 1976 Act forbids *that* too.[238] The Supreme Court was quite right when it noted that "[t]he 1976 Copyright Act provides a single, fixed term, but provides an *inalienable termination right*."[239]

An *inalienable* right is powerful stuff under American law,[240] but the real effect is to give authors and their heirs a chance to renegotiate the deal—a "second bite" of the apple. And that *is* strong redistributional medicine. What justifies this extraordinary market intervention? Congress has only given us two reasons. The first is simply, in the words of the 1976 Act's legislative history, that "[a] provision of this sort is needed because of the unequal bargaining position of authors."[241] The second reason is that when the author makes her first deal transferring the rights to her work, she is often in a poor position to estimate the work's value in the marketplace because of "the impossibility of determining a work's value until it has been exploited."[242] In 1985, the Supreme Court reasoned that the termination

236 *Id.* § 203(b)(1); *id.* § 304(c)(6)(A). This "Derivative Works Exception" does *not* include the right to prepare *further* derivative works and the terminated grantee must continue to pay royalties or other payments "under the terms of the grant" even after terminated. Mill Music, Inc. v. Snyder, 469 U.S. 153, 153 (1985). For ambiguities on this protection, see NIMMER, *supra* note 219, § 11.02(C)(1).

237 17 U.S.C. § 203(a)(5) (emphasis added); *id.* § 304(c)(5) (emphasis added).

238 *Id.* § 304(c)(6)(D) (providing that "a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination."); *see also* Classic Media, Inc. v. Mewborn, 532 F.3d 978 (9th Cir. 2008); NIMMER, *supra* note 219, § 11.01(A) ("The [*Fred Fisher*] effect is avoided by invalidating agreements for post-reversion grants until the reversion has occurred.").

239 Stewart v. Abend, 495 U.S. 207, 230 (1990) (emphasis added).

240 *See, e.g.*, Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1 (1994).

241 H.R. REP. NO. 94-1476, § 203, at 124 (1976).

242 *Id.*; *see also* H.R. REP. NO. 60-2222, at 14 (1909) ("It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right.").

right in the 1976 Act is "expressly intended to relieve authors of the consequences of ill-advised and unremunerative grants that had been made before the author had a fair opportunity to appreciate the true value of his work product."[243]

The termination provisions have rightly been criticized as complex[244] and some court decisions already arguably undermine Congress's intent,[245] but the bottom line is that *in this particular form of highly regulated property, we have chosen to enhance the likelihood that the author and her family will get a significant share of the proceeds by giving her an opportunity to demand re-negotiation of the deal—or the return of her property.*[246] We are not doing this for efficiency—there is no reason to think it helps either efficient creation of works or the efficient distribution of works already created.[247] If anything, it slows down business people because they have to deal with pesky authors and their families. How much the termination right disrupts the efficient distribution of works depends on its implementation, an issue on which Congress and the courts arguably do not see eye-to-eye.[248] American courts have varied interpretations of these statutory termination rights, sometimes clearly protecting authors and their families from "litigation-savvy publishers"[249] and sometimes seeming to side with the publishers.[250] This is not the place to sort

243 Mills Music, Inc. v. Snyder, 469 U.S. 153, 172–73 (1985).

244 For a detailed exposition of that complexity, see Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA L. REV. 1329 (2010).

245 *See, e,g., id.* at 1368–71 (criticizing, on these grounds, *Milne v. Slesinger, Inc.*, 430 F.3d 1036 (9th Cir. 2005), and *Penguin Group (USA) Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008)); *see also* Menell and Nimmer, *supra* note 225, at 808–12 (criticizing these same opinions).

246 H.R. REP NO. 94-1476, § 203, at 124 (1976) (explaining that termination of transfer is "a provision safeguarding authors against unremunerative transfers."); S. REP. NO. 94-473 (1975) (same); NIMMER, *supra* note 219, § 11.01(B) ("The entire thrust of the termination procedures under the current Act is to protect authors, given their unequal bargaining posture.")

247 Professor Guy Rub argues that it is inefficient. Guy A. Rub, *Stronger than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49 (2013). Much of Rub's analysis assumes that publishers, at the time of purchasing a work from an author, place a value on the work's income stream that extends beyond the thirty-five-year termination windows. We doubt that: we believe that the value of an asset from the thirty-sixth year onwards rarely enters into these sorts of business calculations.

248 *See generally* Robert P. Merges, *Autonomy and Independence: The Normative Face of Transaction Costs*, 53 ARIZ. L. REV. 145 (2011) (arguing that in some cases normative values outweigh transaction cost considerations in IP law).

249 Marvel Characters, Inc. v. Simon, 310 F.3d 280, 290 (2d Cir. 2002).

250 The Second and Ninth Circuits have failed to follow the statutory regime for termination, allowing new contractual arrangements made near the time of termination to extinguish the termination right. *Steinbeck*, 537 F.3d at 193, *cert. denied*, 129 S. Ct. 2383 (2009); *Milne*, 430 F.3d 1036, *cert. denied*, 548 U.S. 904 (2006). These two cases seem to ignore the statutory language that the termination right survives "notwithstanding any agreement to the contrary" on the rationale that Congress's purpose in giving authors a "second bite of the apple" was achieved as long as an author or her heirs enjoyed "the increased bargaining power conferred by the imminent threat of statutory termination to

through the modest caselaw on termination of transfer: our point is only that if the section 203 and 304(c) provisions work as intended, they are powerful redistributive tools for authors and their families.

Of course, there will be occasions when copyrights revert to wealthy individuals. Sometime before 2020, for example, Sir Paul McCartney—already a billionaire—will reclaim many of the Beatles songs he co-wrote with John Lennon.[251] There have also been some cases where descendants of an author make multiple, sometimes unseemly, attempts to retake copyrights.[252] We do not think these cases detract from the general redistributive effect of the termination of transfer system.

2. The Work-for-Hire Doctrine in Relation to Redistribution of Wealth

One cannot say that copyright's termination right favors the "little guy" without a meaningful discussion of the work-for-hire (or work made for hire) doctrine. Under the work-for-hire doctrine, when a work is prepared by an employee in the usual course of employment the law vests the U.S. copyright in that work in the employer *as the author of the work*. Section 201(b) of the Copyright Act is quite clear, "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title."[253]

---

enter into new, more advantageous grants." *Milne*, 430 F.3d at 1043, 1046. On the other hand, the Ninth Circuit has upheld termination despite an intermediary re-negotiation where the court felt that the author's side "did not intend to relinquish a known termination right," and the Second Circuit has concluded that a prior settlement agreement from a litigation between the author and the grantee was an "agreement to the contrary" that could not eliminate the right of termination. Classic Media, Inc. v. Mewborn, 532 F.3d 978, 989 (9th Cir. 2008); *Marvel Characters*, 310 F.3d at 290.

251 Emily Sheridan, *Get Back to Where You Once Belonged: Sir Paul McCartney Set to Regain Rights to Beatles Back Catalogue*, DAILY MAIL (Aug. 15, 2013), www.dailymail.co.uk/tvshowbiz/article-2394325/Sir-Paul-McCarthy-set-win-rights-Beatles-catalogue.html. Copyright in those songs had belonged to the Associated Television Corporation, which had sold them to Michael Jackson in 1985 for $47.5 million; in 2005, Jackson sold 50% of the rights to the catalog to Sony for $95 million. *Id.*

252 And some argue that the life-plus-seventy-year copyright term disproportionately benefits the distant heirs of long-deceased creators. *See, e.g.*, William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 908 (1997) ("Horror stories of famous musical compositions from the 1920s falling into the public domain, thereby impoverishing the trust funds of composers' grandchildren, were trotted out to great effect at star-spangled congressional hearings in 1995.").

253 17 U.S.C. § 201(b) (2012). This is an extraordinary (or extraordinarily-poorly worded) provision in a field where property rights are at times justified because protected works often embody an expression of their creators' personalities, as when Justice Holmes described copyright as protecting works embodying a "personal reaction of an individual upon nature. Personality always contains something unique. . . . [A]nd a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act." Bleistein v. Donaldson Lithographic Co.,188 U.S. 239, 250 (1903); *see also* MERGES, *supra* note 2, at 75 ("Kant thought reliable expectations about ongoing possession of objects [i.e., property] enables

The most important point about the work-for-hire mechanism is that it undercuts any possibility of termination of transfer under 17 U.S.C. §§ 203, 304. Corporate owners of intellectual property do not care who the "author" is, but they care very much whether their intangible assets are subject to authorial recapture. Because the statute establishes the employer as the "author," the true individual authors are not initially vested with any copyright rights that they can later reclaim under the termination of transfer provisions. Indeed, the section 203 and 304(c) termination of transfer provisions clarify that recapture of copyright does not apply to works-for-hire.

The work-for-hire doctrine was first codified in section 62 of the 1909 Copyright Act, which provided that "the word 'author' shall include an employer in case of works made for hire."[254] The concept of "employer" was broadly construed under that provision such that copyright ownership vested in any person at whose "instance and expense" the work was created.[255]

Fairly described, the 1976 Act clarified and narrowed the circumstances in which the doctrine applies. In the employment context, section 101 clarifies that works-for-hire are only those "prepared by an employee within the scope of his or her employment." In independent contractor situations—the "instance and expense" scenarios under the 1909 Act—the work-for-hire doctrine now applies only in nine specific business situations. The key earmarks are that a work be "specially ordered or commissioned" *and that* the "parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."[256]

These nine categories of independent contractor relationships as work-for-hire may be a reasonable reflection of practices in certain copyright sectors, but they were also clearly the result of industry lobbying. To some, this makes the work-for-hire doctrine look like a fairly naked grab by employers and other capitalists. Under this scenario, powerful interests make sure that the statute declares themselves to be the "authors" of creative works. In 1999,

---

something positive to take place. Stable possession permits the imprinting of some aspect of a person, what Kant called his will, onto objects so as to enable the person to more fully flourish."); Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT L.J. 81 (1998); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330–50 (1988) (applying Hegelian personality theory to intellectual property). Even patent law, often thought to be about a more instrumental form of property right, insists that all patents must name as inventors natural persons—a corporation cannot invent anything. *See* Paris Convention for the Protection of Industrial Property, art. 4, Mar. 20, 1883, 24 U.S.T. 2140, 828 U.N.T.S. 305, as last revised at Stockholm, July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 303 ("The inventor shall have the right to be mentioned as such in the patent."); *see also* Chou v. Univ. of Chicago, 254 F.3d 1347, 1359 (Fed. Cir. 2001) (holding that even where an employee inventor had assigned ownership rights to the employer, the employee had standing to bring an action to correct the patent and be listed as an inventor; reputational advantages of inventorship are enough of a concrete interest to provide standing to sue).

254 Act of July 1, 1909, ch. 320, § 62, 35 Stat. 1075, 1080 (repealed 1976).

255 *See* Brattleboro Publ'g Co. v. Winmill Publ'g Corp., 369 F.2d 565, 567–68 (2d Cir. 1966); Lin-Brook Builders Hardware v. Gertler, 352 F.2d 298, 300 (9th Cir. 1965).

256 17 U.S.C. § 101 (2012) (defining "work made for hire").

one or more record labels made an effort to have sound recordings added to the types of original expression giving rise to works-for-hire, which would have resulted in the record labels being considered the "authors" of these works. This effort—labeled "outrageous," "surreptitious," "unconscionable," and "sinister"—thoroughly backfired on the record companies.[257] Congress amended the law on the record labels' behalf without discussion, then amended it back after hearings and a hailstorm of criticism from musicians, adding a bizarre provision that courts should take no notice of the legislative volte-face.[258]

Given all this history—and the statute's strange form of declaring corporations to be "authors"—commentators defending the interests of authors have understandably criticized work-for-hire.[259] But for us the real question is whether work-for-hire's avoidance of the termination right is fair to the creative individuals involved. In the circumstances in which the employer provides the vast bulk of the capital investment for a work's creation and where many fragmented individual contributions must be assembled to make a marketable end product, it seems reasonable that the natural person authors would not be able to reclaim/claim the copyright after thirty-five years. The canonical instance is "a motion picture or other audiovisual work," which typically costs millions of dollars and incorporates creative contributions from dozens of contributors.[260] In the circumstances in which the corporate entity has designed the creative program already and the natural person is commissioned to prepare a "contribution to a collective work," or "a supplementary work," again, it seems reasonable to surmise that on both financial and personhood metrics, the case for a right to reclaim/claim the copyright after thirty-five years may be relatively weak. On the other hand, where the artist superintends the creation *of her own creative program*, and the corporate interest provides, at best, only funding for the work's completion

257 Eric Boehlert, *Four Little Words: How the Record Industry Used a Tiny Legislative Amendment to Try to Steal Recording Copyrights from Artists—Forever*, SALON (Aug. 28, 2000), http://www.salon.com/2000/08/28/work_for_hire/ (describing the record company action as a "seemingly surreptitious move," and noting how Don Henley described the attempt as "sinister at its root"; folk singer Dar Williams described it as "outrageous"; artist manager Ron Stone called it "unconscionable"); *see also* Bill Holland, *Acts' Reps Decry C'right Clause*, BILLBOARD, Jan. 15, 2000, at 75; Bill Holland, *Work-For-Hire Repeal Near?: RIAA's Involvement Goes Back 10 Years*, BILLBOARD, July 29, 2000, at 103; Don Waller, *Music Battle Moves to D.C.*, VARIETY, May 25, 2000. *See generally* Kathryn Starshak, Note, *It's the End of the World as Musicians Know It, Or Is It? Artists Battle the Record Industry and Congress to Restore Their Termination Rights in Sound Recordings*, 51 DEPAUL L. REV. 71 (2001).

258 17 U.S.C. § 101 (providing that neither the amendment to include sounds recordings as works-for-hire nor its prompt rescission "(A) shall be considered or otherwise given any legal significance, or (B) shall be interpreted to indicate congressional approval or disapproval of, or acquiescence in, any judicial determination").

259 *See, e.g.*, MARK HELPRIN, DIGITAL BARBARISM: A WRITER'S MANIFESTO 127 (2009) (in relation to author's writings, "nothing should or need be" a work-for-hire).

260 For a similar rationale regarding employer ownership of patents, see Robert P. Merges, *The Law and Economics of Employee Inventions*, 13 HARV. J.L. & TECH. 1 (1999).

(as is a good description of many sound recordings), "work for hire" status is inappropriate.

So, (1) if the principal "real world" effect of the work-for-hire doctrine is to annul the inalienable termination right in certain circumstances, and (2) those circumstances roughly track situations in which the natural person creator(s) have not made the principal financial investment and/or have substantially less "personhood" invested in a work, we are not troubled by the work-for-hire doctrine. Are there more elegant (and less offensive) ways to achieve this outcome other than calling corporations "authors"? Yes, there are—and comprehensive copyright reform should fix this. But for a national copyright law that has the extraordinary mechanism of termination of transfer, the basic division the law draws is defensible.

C. The Emerging Trend Toward Droit de Suite

While the United States is almost unique in its strong termination of transfer provision for authors, American copyright is becoming a laggard in another type of redistributive mechanism increasingly common in copyright and related rights laws: "*droit de suite*." *Droit de suite* or *resale royalty* now exists in over seventy countries as well as on the statute books of California and Puerto Rico.[261] Generally speaking, *droit de suite* laws provide that when a painting, sculpture, or other object of fine art is resold, a percentage of the sale price goes back to the artist. In some jurisdictions, the percentage is only of the increase in the work's value, not the overall sale price.

France promulgated the first *droit de suite* law in 1920,[262] but it was not until 2001 that the European Union mandated that all of its Member States establish an inalienable resale royalty right belonging to "the author of an original work of art."[263] The EU Directive applies to single works and limited edition lithographs, photographs, and works of applied art "provided they are made by the artist himself or are copies considered to be original works

261 *See generally* Monroe E. Price, *Government Policy and Economic Security for Artists: The Case of the* Droit de Suite, 77 YALE L.J. 1333 (1968); M. Elizabeth Petty, Note, *Rauschenberg, Royalties, and Artists' Rights: Potential* Droit de Suite *Legislation in the United States*, 22 WM. & MARY BILL RTS. J. 977 (2014). For problems and criticisms, see Alexander Bussey, Note, *The Incompatibility of Droit de Suite with Common Law Theories of Copyright*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1063 (2013); Nithin Kumar, Note, *Constitutional Hazard: The California Resale Royalty Act and the Futility of State-Level Implementation of* Droit de Suite *Legislation*, 37 COLUM. J.L. & ARTS 443 (2014).

262 *See* 33 LE DROIT D'AUTEUR, June 15, 1920, at 61, http://gallica.bnf.fr/ark:/12148/bpt6k5497736n/f1.item.

263 COUNCIL DIRECTIVE 2001/84 of SEPT. 27, 2001, ON THE RESALE RIGHT FOR THE BENEFIT OF THE AUTHOR OF AN ORIGINAL WORK OF ART, 2001 O.J. (L 272) 32 (EC) [hereinafter RESALE DIRECTIVE]. Article 1(1) of the directive provides:

> Member States shall provide, for the benefit of the author of an original work of art, a resale right, to be defined as an inalienable right, which cannot be waived, even in advance, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author.

Id. at 34.

of art."[264] The Directive sets a variable royalty rate, starting with 4% of the sale price up to €50,000 and four decreasing percentage tiers above that as the total sale price increases.[265]

In recent decades, many important jurisdictions outside the EU have adopted their own resale royalty laws, including Mexico (1996),[266] Brazil (1998),[267] India (1999),[268] Turkey (2008),[269] and Australia (2009).[270] As of 2013, both the U.S. Copyright Office and a private artists' rights group in Canada placed the number of jurisdictions with *droit de suite* laws at seventy or more.[271]

Since the resale royalty right concerns transfer of chattel property, it falls starkly outside the usual paradigm of intellectual property laws. On the other hand, since creators in the fine arts typically derive little income from exploitation of section 106 rights (reproduction, derivative works, etc.), the resale royalty right can be seen as a regulatory intervention to support the creative process *through the market*, in a way familiar from core copyright rights.[272] In circumstances in which the value of a piece of fine art increases dramatically, the resale royalty works much the same as the statutory termination right, giving the artist a "second bite at the apple," i.e., a chance to claim a meaningful portion of the increased value. Where the price of the piece of art has remained stagnant or even dropped, one may question the fairness of exacting a percentage of the sale for the artist. On the other hand, the resale royalty may not be that different from statutory provisions that require authors to receive a small payment for lending of books already sold (the "lending right" below), or that require classes of audiovisual creators to

264 *Id.* at 35.

265 *Id.*

266 Ley Federal de Derechos de Autor [LFDA] art. 92bis, Diario Oficial de la Federación [DOF] 1-1-2012, últimas reforma DOF 13-1-2016 (Mex.); Reglamento de la Ley Federal de Derecho de Autor art. 31bis, 31ter, 31quater, Diario Oficial de la Federación [DOF] 14-9-2005 (Mex.).

267 Decreto No. 9.610 art. 38, de 19 de Fevereiro de 1998, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20.2.1998) (Braz.).

268 Copyright (Amendment) Act art. 53A, 2012, No. 27, Acts of Parliament, 2012 (India); Copyright (Amendment) Act, 1999, No. 49, Acts of Parliament, 1999 (India).

269 Sayili Fikir ve Sanat Eserleri Kanunu [Law on Intellectual and Artistic Works], No. 5846 of 1951, last amended by No. 5728 of 2008 (Turkey).

270 *Resale Royalty Right for Visual Artists Act 2009* (Cth) (Austl.).

271 CANADIAN ARTISTS' REPRESENTATION/LE FRONT DES ARTISTES CANADIENS, RECOMMENDATIONS FOR AN ARTIST RESALE RIGHT IN CANADA 3 (2013), http://www.carfac.ca/carfacwp/wp-content/uploads/2011/11/Artists-Resale-Right-Proposal-CARFAC-Final-April-2013.pdf; U.S. COPYRIGHT OFFICE, OFFICE OF THE REGISTER OF COPYRIGHTS, RESALE ROYALTIES: AN UPDATED ANALYSIS 2 (2013), http://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf [hereinafter USCO 2013 STUDY].

272 *See* NIMMER, *supra* note 219, § 8C.04[A][1] (noting "[t]he *droit de suite* may be conceived of as an attempt to equalize the copyright status of fine artists with that of literary and other authors").

receive payments for exploitation of audiovisual works in particular windows.[273]

The State of California[274] and the Commonwealth of Puerto Rico[275] remain the only U.S. jurisdictions with resale royalty laws—and California's law has been subject to some adverse rulings.[276] But over the years a federal resale royalty has been proposed numerous times on Capitol Hill[277] and discussed intermittently in the press and legal academe.[278] In 2011, Senator Herbert Kohl and Representative Jerrold Nadler began a new effort to secure a federal resale royalty with the Equity for Visual Artists Act of 2011, a bill Congressman Nadler subsequently reintroduced in the 113th Congress in July 2014.[279] The most organized opposition to the proposal comes from auction houses Sotheby's and Christie's who "have spent about $1 million in

273 In that spirit, a 2014 U.N. report lumped *droit de suite* with other types of provisions where "[c]opyright laws may also establish a creator's right to share in the proceeds from future sales of their work, which may not be waived by contract." Farid Shaheed (Special Rapporteur in the Field of Cultural Rights), *Rep. on Copyright Policy and the Right to Science and Culture*, ¶ 45, at 10, U.N. Doc. A/HRC/28/57 (Dec. 24, 2014).

274 CAL. CIV. CODE § 986(a) (West 2012). The resale royalty applies to any "original painting, sculpture, or drawing, or an original work of art in glass," *id.* § 986(c)(2), and only to works by living artists or artists who died after 1982; it also exempts sales for less than $1000, *id.* § 986(b)(2).

275 P.R. LAWS ANN. tit. 31, § 1401h (West 2012) ("Any person who creates a work of art is entitled to receive five (5) percent of the increase in the value of said work at the moment it is resold. Said amount shall be deducted from the seller's earnings and his/her agent or proxy shall be jointly responsible for that amount. In those cases in which the whereabouts of the author are not known, the resulting amount shall be deposited in his/her name in a special account to be opened by Copyright Registrar.").

276 In a 2015 en banc decision, the Ninth Circuit concluded that the Act's application to sales outside California (of art owned by California residents) violated the dormant Commerce Clause and severed that aspect of the law. Sam Francis Found. v. Christies, Inc., 784 F.3d 1320 (9th Cir. 2015) (en banc). Subsequently, a district court found that the California law was preempted by federal copyright law's first sale doctrine. *In re* Estate of Graham v. Sotheby's, Inc., 178 F. Supp. 3d 974 (C.D. Cal. 2013).

277 Shira Perlmutter, *Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report*, 16 COLUM.-VLA J.L. & ARTS 395, 396 n.11 (1992) (noting that proposals to incorporate a resale right under federal law had been discussed by legislators as far back as the 1960s); *see* USCO 2013 STUDY, *supra* note 271, at 6–7. Often the proponents of a federal resale royalty have been distinguished members of Congress known for getting legislation passed, including Representative Henry Waxman (Visual Artists' Residual Rights Act of 1978); Senator Edward Kennedy (Visual Artists Rights Amendment of 1986); and Senator Kennedy and Representative Edward Markey (Visual Artists Rights Act of 1987). *Id.*

278 Marshall A. Leaffer, *Of Moral Rights and Resale Royalties: The Kennedy Bill*, 7 CARDOZO ARTS & ENT. L.J. 234 (1989); John Henry Merryman, Comment, *The Wrath of Robert Rauschenberg*, 41 AM. J. COMP. L. 103 (1993); Michael B. Reddy, *The* Droit de Suite*: Why American Fine Artists Should Have the Right to a Resale Royalty*, 15 LOY. L.A. ENT. L.J. 509 (1995); Robert Hughes, *A Modest Proposal: Royalties for Artists*, TIME (Mar. 11, 1974), http://www.time.com/time/printout/0,8816,943572,00.html.

279 *See Rep. Nadler on the ART Act, Hearing on Artists' Resale Rights*, ARTFIXDAILY (July 15, 2014), http://www.artfixdaily.com/artwire/release/2251-rep-nadler-welcomes-hearing-on-artists'-resale-rights.

the last couple of years to hire well-known legal and lobbying talent in Washington."[280]

To us, it speaks volumes that the major auction houses—gatekeepers of an "art market [that] has become a high-priced playground for billionaires and hedge-fund moguls"[281]—would so stridently oppose giving artists a small piece of the pie. In 2014, an internet trade association—with auction site eBay being a member—opposed the resale royalty "arguing it will constrict the free market."[282] If nothing else, such opposition shows that *droit de suite* is a true redistributive tool, albeit only in a narrow range of activity.

D. Other Redistributive Bells and Whistles—Real and Prospective

In reviewing these "pro-little guy" elements of copyright law we are not casting copyright law as an ideal property-creating, property-redistributing legal mechanism. Our point is only that compared to conventional property, American statutory copyright law includes some features designed to enhance creators' incomes. But there are plenty of other mechanisms that can be built into an intellectual property statute to orient wealth and income toward the individual creative or inventive person.

Almost all such mechanisms are, in effect, interventions in and regulation of the contractual environment by which creative individuals transfer rights to their original expression. Termination of transfer and *droit de suite* provisions are strong (some would say strong-arm) interventions in the market. They are, at least in part, *inalienable* endowments that others cannot extract via contract. They "stick to" creators in ways that directly help them make more money. Other interventions have a lighter touch. Some of these come under the broad umbrella of "equitable remuneration," but we must be cautious in the use of this concept. Often "equitable remuneration" refers to statutorily-mandated payments to the *copyright owner* for uses that have not been authorized ex ante. But here "equitable remuneration" means statutorily-mandated payments to the *author* or *performing artist*, as a distinct and separate matter from payments to the copyright *owner*.

A prime example of such equitable remuneration is the system established in the European Union's 2006 Rental Rights Directive.[283] The directive mandates an "exclusive right to authorise or prohibit rental and lending" of works that belong to, on the one hand, authors and performers and, on

280 Patricia Cohen, *Lobbyists Set to Fight Royalty Bill for Artists*, N.Y. TIMES (Mar. 23 2014), http://www.nytimes.com/2014/03/24/arts/design/auction-houses-taking-no-chances-on-american-royalties-too-act.html?_r=0.

281 *Id.*

282 *Id.* (describing the argument of Michael Beckerman, president and chief executive of "the Internet Association, the Washington-based trade group representing the biggest Internet companies").

283 COUNCIL DIRECTIVE 2006/115 OF DEC. 12, 2001, ON RENTAL RIGHT AND LENDING RIGHT AND ON CERTAIN RIGHTS RELATED TO COPYRIGHT IN THE FIELD OF INTELLECTUAL PROPERTY, 2006 O.J. (L 376) 28 (EC) [hereinafter 2006 RENTAL DIRECTIVE].

the other hand, producers of both phonograms and films.[284] It then sets up a mandatory right to equitable remuneration for rental of copies when the former creators have transferred their economic rights to the latter group:

> 1. Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the rental.
>
> 2. The right to obtain an equitable remuneration for rental cannot be waived by authors or performers.[285]

The directive further provides that in the case of "public lending" an EU country may decline to apply the general rental and lending right "provided that *at least authors* obtain a remuneration for such lending."[286]

In addition to EU-level requirements of equitable remuneration to individual creators, different EU countries provide for individual creators to receive equitable remuneration from a range of activities and via a range of mechanisms. French law requires equitable remuneration to be paid to *performers* for both the broadcasting of their recordings and for the private copying of their recordings. Both remunerations are distributed by collecting societies;[287] the latter is funded through a "levy" on all blank media.[288] In contrast, Germany and Spain impose such levies on both blank media and recording devices.[289]

---

284 *Id.* at 29.

285 *Id.* at 30. The Directive provides that administration of this inalienable right "may be entrusted to collecting societies representing authors or performers," leaving considerable discretion to the EU Member States. *Id.*

286 *Id.* (emphasis added). The 2006 Rental Directive also provides a separate right of equitable remuneration to performers for "broadcasting and communication to the public" including the provision that EU Member States:

> [S]hall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.

Id. at 31.

287 Two collecting societies work in tandem for musicians: one for featured artists, ADAMI (L'ADMINISTRATION DES DROITS DES ARTISTES ET MUSICIENS INTERPRÈTES), https://www.adami.fr/en/about-adami.html, and one for background artists, SPEDIDAM (SOCIÉTÉ DE PERCEPTION ET DE DISTRIBUTION DES DROITS DES ARTISTES-INTERPRÈTES), http://www.spedidam.fr/.

288 CODE DE LA PROPRIÉTÉ INTELLECTUELLE [IPC] [INTELLECTUAL PROPERTY CODE] Art. L. 311-4 (Fr.).

289 Urheberrechtsgesetz [UrhG] [Act on Copyright and Related Rights], Sept. 9, 1965, BGBL I at 1273, § 54, last amended by Gezetsez [G], Oct. 1, 2013 BGBL I at 3728 (Ger.); Royal Legislative Decree 1/1996 of 12 April, Approving the Revised Text of the Law on Intellectual Property art. 25 (B.O.E. 1996, 97) (Spain).

Separate from statutory remuneration, French law bars single, lump-sum payments to authors in publishing contracts, "requir[ing] instead that the author participate proportionally, through royalties, in the work's revenues."[290] Achieving the same thing—at least for surprisingly successful works—German law includes a "best seller" provision that allows an author to demand renegotiation of a contract for "more adequate participation" when payment to the author has been "strikingly disproportionate to the income and benefits from the use of the work."[291] Beyond all the specific elements of equitable remuneration required under its copyright law, in 2002 Germany added a general provision with three propositions, sometimes in tension: (a) that an author's remuneration should be contractually agreed, (b) that if the author's compensation is not contractually specified, "remuneration shall be at an equitable level," and (c) that "[i]f the agreed remuneration is not equitable, the author may require from his contracting partner assent to alter the contract so that the author is assured an equitable remuneration."[292] We are confident that the main effect of this last provision is not to trigger court cases demanding re-negotiations, but to make corporate interests dealing with individual authors keenly aware that it is best to be reasonable and equitable *ex ante* in their dealings with creators.

Conclusion

The dominant discourse in copyright scholarship has treated creative individuals only as a *means* to an end: generation of original expression. When scholars have expressed any concern at all about distributive justice, it has been only about fair access to information and material, in other words, as a bookend to the dominant utilitarian analysis. But when we turn our attention away from considerations of fair access to works, and toward considerations of a fair distribution of income and wealth, we come to see a

290 Paul Goldstein & Bernt Hugenholtz, International Copyright: Principles, Law, and Practice 270 (3d. ed. 2013). But French law does not dictate what the royalty rate should be. *Id.*

291 Urheberrechtsgesetz [UrhG] [Act on Copyright and Related Rights], BGBl I, § 32a (author's own translation of the phrases "*weitere angemessene Beteiligung,*" and "*auffälligen Missverhältnis zu den Erträgen und Vorteilen aus der Nutzung des Werkes,*" respectively). The provision dates back to a 1965 amendment of German law and has rarely been used successfully by authors. Reto M. Hilty & Alexander Peukert, "*Equitable Remuneration" in Copyright Law: The Amended German Copyright Act as a Trap for the Entertainment Industry in the U.S.?*, 22 Cardozo Arts & Ent. L.J. 401, 412–13 (2004).

292 Goldstein & Hugenholtz, *supra* note 290, at 271 (quoting Urheberrechtsgesetz [UrhG] [Act on Copyright and Related Rights], BGBl I, § 32a(1)); *see also* Hilty & Peukert, *supra* note 291, at 417. A number of countries require "equitable remuneration" or minimum participation rights for employed inventors whose inventions earn substantial revenue for an employer (so-called "service inventions"). The payments are required notwithstanding the fact that the inventors have assigned their patent rights to the employer (as is standard practice). *See, e.g.*, Alexander Harguth, *Patent Ownership in Germany: Employers vs. Employees*, 25 Intell. Prop. & Tech. L.J. 15, 17 (2013) (describing German "service invention" regulations).

neglected side of copyright. Our main point throughout has been this: from the limited evidence available, the copyright system appears to contribute positively and significantly to economic distributive justice in the U.S. economy.

Using the framework of John Rawls's principles of justice, we have explored how copyright increases the income of middle tier members of society who are trying to support themselves in creative professions, professions we all—everyone from politicians to law professors—laud as part of the desirable "information economy" future. We have also reviewed mechanisms in existing copyright law—from minor procedural speed bumps to termination of transfer —that show copyright's orientation to protecting the prospects of creative individuals. We further discussed other tools in the copyright toolbox to improve the distributive footprint left by copyright, including *droit de suite* for artists and equitable remuneration mechanisms used in other developed economies.

Another requirement of Rawlsian distributive justice is that all individuals have fair equality of opportunity for all "offices and positions." There is no question that American society as a whole has failed to provide such equality of opportunity for women and minorities, particularly for African Americans. In that context, copyright has been a rare if not unique institution providing opportunity for African Americans to achieve the greatest economic success: the list of the wealthiest black citizens of the United States is utterly dominated by people whose fortunes are rooted in the copyright industries: entertainment, music, sports, publishing, and the like. Given the massive economic barriers facing the African-American community generally, this is a striking realization. Not that copyright in itself is an effective anti-poverty program; not that it offsets structural racism in its myriad forms. Our point here is simply that copyright has been uniquely effective in permitting African Americans something closer to fair equality of opportunity to achieve the highest levels of wealth.

In the end, our argument is simple: copyright, though a form of property, does not only or disproportionately reward large corporate interests. Copyright is, and can be, an important tool to promote a just distribution of income and wealth in society.

This has political as well as economic ramifications. The historian and biographer A.N. Wilson wrote in the 1980s that "[p]roperty never has been abolished, and never will be abolished. It is simply a question of who has it. And the fairest system ever devised is one by which all, rather than none, [are] property owners."[293] That sentiment certainly comports with the vision of the framers of the American Republic. These were individuals who saw property ownership as a bulwark against tyranny and a mechanism to advance the individual. The little dollop of economic power copyright confers helps creative people support themselves. A thriving creative class feeds

293 A. N. WILSON, TOLSTOY 365 (1988).

our culture and ultimately our polity. In helping distribute income to creative individuals and supporting them as a professional class, copyright forms part of a thriving democratic republic and a just society.