

COPYRIGHT PATERNALISM

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The dominant justification for copyright is based on the notion that authors respond rationally to economic incentives. Despite the dominance of this incentive model, however, many aspects of our copyright law are best understood as motivated by paternalism. Termination rights permit authors to rescind their own ill-considered contracts. The elimination of formalities protects careless authors from forfeitures of copyright if they fail to register the copyright or place appropriate notice on the work. The law limits how copyrights can be transferred and which works can be designated as “made for hire” by contract. All of these provisions can be understood as designed to protect authors from the consequences of their own decisions.

This Article has two aims. The first is to highlight and understand the tension between two very different conceptions of the author in copyright. The basic premise of copyright relies upon the notion that an author responds to incentives as a rational, calculating economic actor, who only creates new works because of the copyright incentive. On the other hand, many actual provisions in copyright law are best understood by appealing to notions of paternalism. These provisions suppose an unsophisticated, inept author who cannot look out for his own interests even in highly economic contexts such as the negotiation of a contract. Thus, taken on its own terms, copyright law supposes two inconsistent conceptions of the author. This raises problems for the incentive model: if authors make bad deals because they neglect future revenues, were those future revenues really the incentive that motivated creation?

The second goal is to envision what an unabashedly paternalistic copyright regime might look like. Critiques of the incentive model typically presume that if authors are not actually motivated by the copyright incentive, the optimal response is for the government to cease granting copyrights. An equally natural move is toward a paternalistic copyright regime. This view accepts that authors are not rational economic actors; they are short-sighted, lack bargaining power, and may not effectively look out for their own interests. It further accepts the evidence that authors respond weakly to distant and uncertain economic incentives. It thus sees little value in increasing marginal incentives like the duration or scope of copyright. Instead, a more paternalistic copyright regime might create greater protections for authors—such as meaningful termination rights or limitations on alienability—or rely on direct, present-time, and certain incentives for creation.

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