

COPYRIGHT PATERNALISM

Kevin J. Hickey

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 existing copyright scheme 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 their works. The law limits how copyrights can be transferred and which works can be designated as “made for hire” by contract. Thus, while the basic model of copyright presumes that authors are rational actors, many of its actual provisions suppose that authors are not capable of understanding or protecting their own best interests. This Article highlights and seeks to understand the tension between these two different conceptions of the author.

Building on recent critiques of copyright’s incentive model and on the insights of behavioral law and economics, this Article envisions what a more unabashedly paternalistic copyright regime might look like. Such a view accepts that authors are not rational actors able to respond to distant and uncertain copyright incentives. It thus sees little value in increasing marginal incentives like the duration or scope of copyright, which has been the dominant mode of copyright lawmaking over the past forty years. 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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INTRODUCTION

The dominant justification for copyright is based upon the notion that authors respond rationally to economic incentives.¹ This familiar incentive story posits that without copyright, authors would not create new works because others could freely pirate their creations.² Copyright solves this public good problem by giving authors a limited property right in their works, permitting them to recoup the investment in time and effort necessary to create—and thereby providing the appropriate incentive to create new works.³ Though there have long been competing theories, this elegant, simple model has always dominated the discourse in American copyright law.⁴ The incentive model has been endorsed by the Supreme Court and Congress, and is even purportedly enshrined in the U.S. Constitution.⁵

Recently, however, many scholars have challenged the empirical assumptions of the incentive model. These commentators argue that the available evidence shows that a variety of intrinsic motivations often drive creativity—not the external economic incentive of copyright. Social science and psychological research suggest

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¹ See, e.g., Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQ. L. 29, 30 (2011) (“[T]he standard American story about why we have copyright is that it provides the economic incentive that is essential to the creation of new works.”); Shyamkrishna Balganes, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1571–73 (2009) (Copyright law’s “principal justification today is the economic theory of creator incentives” wherein “[c]reators are presumed to be rational utility maximizers”).

² See generally Jeanne Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1751 (2012) (“Without [the copyright] incentive, the theory goes, authors might not invest the time, energy, and money necessary to create these works because they might be copied cheaply and easily by free riders, eliminating authors’ ability to profit from their works.”).

³ See generally Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. L. REV. 623, 229–32 (2012) (reviewing the traditional economic logic of copyright as a solution to “public good” nature of intellectual creations); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J.L. STUD. 325, 326, 333–44 (1989) (describing the nature of intellectual property as a public good and providing a formal economic model of the effect of copyright protection on the creation of new works).

⁴ See Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 517–19 (2009) (describing copyright’s dominant incentive story as “elegant and simple,” albeit problematic); William Fisher, *Theories of Intellectual Property*, BERKMAN CENTER FOR INTERNET & SOCIETY, <http://cyber.law.harvard.edu/people/tfisher/iptheory.pdf>, at 1–12 (reviewing non-incentive based theories of IP).

⁵ Fromer, *supra* note 2, at 1750 (“The Supreme Court, Congress, and many legal scholars consider utilitarianism the dominant purpose of American copyright and patent law”); Johnson, *supra* note 3, at 634 (describing the incentive-based theory of copyright as “enshrined” in the Constitution’s IP clause).

that creativity is usually driven by urges for self-development, personal satisfaction, and a desire to challenge oneself.⁶ Personal accounts of creators ranging from famous authors to uncompensated writers of fan fiction assert that passion, desire, or reputation motivate them to create new works.⁷ Insights from cultural theory emphasize the role of creative play and the surrounding cultural environment.⁸ Digital projects such as Wikipedia and open source software provide concrete examples of important and valuable creation that occurs with no expectation of remuneration, via copyright or otherwise.⁹ Of course, economic incentives are clearly important to some types of creativity, and some observers believe that the case in favor of intrinsic motivation has been overstated.¹⁰ Nonetheless, there is significant evidence that authors do not respond to economic incentives in the straightforward way that the incentive model predicts.

This critique of a neoclassical economic view of human behavior is hardly unique to copyright. The insights of behavioral economics have profoundly challenged the notion that humans behave like rational economic actors as a general matter.¹¹ Take the changes in economic thinking on retirement savings as an example. Income tax deductions or employer matching for retirement accounts are meant to encourage people to save for retirement by providing the right incentives to presumed rational actors.¹² Empirically, however, we find that few people actually

⁶ Zimmerman, *supra* note 1, at 42–48 (reviewing psychological and behavioral economics studies showing that “human creativity is primarily driven by intrinsic factors” rather than the “promise of monetary or other extrinsic rewards”); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1947, 1970 (2006) (“[C]reativity is spurred largely by incentives that are noneconomic in nature,” including inherent motivations such as “challenge, personal satisfaction, or the creation of works with particular meaning or significance for the author.”).

⁷ Tushnet, *supra* note 4, at 522–36 (describing these narratives).

⁸ See Julie Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1178–79 (2007) (drawing on social and cultural theory to offer a “decentered” account of creativity wherein “situated users appropriate cultural goods for purposes of creative play”).

⁹ See, e.g., Johnson, *supra* note 3, at 647–52 (discussing the flourishing of intrinsically motivated creative production on the Internet).

¹⁰ See Christopher Buccafusco et al., *Experimental Tests of Intellectual Property Laws’ Creativity Thresholds*, 92 TEX. L. REV. 1921, 1932–43 (2014) (reviewing psychological literature and concluding that although “[some] studies find that intrinsic motivation is more conducive to creativity than extrinsic motivation,” “there are other studies that suggest that extrinsic rewards do not always undermine creativity”); Johnathan M. Barnett, *Copyright Without Creators*, 9 REV. L. & ECON. 389, 394 (2013) (arguing that the evidence for intrinsic motivation is “far from fully persuasive” and that “artists are motivated by a mix of profit and non-profit-based objectives”).

¹¹ See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (surveying evidence detailing behavioral departures from the neoclassical model of the rational economic actor); Matthew Rabin, *Psychology and Economics*, 36 J. ECON. LITERATURE 11 (1998) (same).

¹² See 26 U.S.C. § 219 (2012) (providing tax deduction for “qualified retirement contributions”).

save enough despite these significant incentives.¹³ The “soft” behavioral economics response is to manipulate the default rules in addition to traditional incentives, by including employees in employer retirement programs by default in an opt-out as opposed to opt-in system.¹⁴ But we often still see underinvestment despite the additional nudge.¹⁵ A “hard” behavioral economic response moves toward a paternalistic approach, urging a retirement program that operates by a direct mandate, like Social Security.¹⁶

American copyright law, to some degree, has experienced analogous shifts. The 1909 Copyright Act and the laws preceding it provided incentives to authors, but only on an opt-in basis—certain formalities had to be complied with before a work received copyright protection.¹⁷ In practice, few authors took advantage of this incentive: most authors did not bother to assert any copyright in their eligible works, and even those who did rarely bothered to renew their copyright.¹⁸ The 1976 Copyright Act moved toward an opt-out system—copyright was granted to authors by default the moment that the work was written down.¹⁹ Recent scholarly critiques

¹³ See Ryan Bubb & Richard H. Pildes, *How Behavioral Economic Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1630–32 (2014) (describing the “failure of tax subsidies for retirement savings” because “most individuals are passive savers who do not respond to tax incentives to save. For the 17% who do, it turns out that these government subsidies do not change their overall savings rate because they offset contributions to subsidized accounts by reducing their savings in other forms.”).

¹⁴ See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 105–20 (2008) (urging changes in default rules to encourage greater retirement saving); Bubb & Pildes, *supra* note 13, at 1604–05, 1608–09 (describing this policy as “soft paternalism”). The usage of soft and hard paternalism in behavioral law and economics should not be confused with the slightly different philosophical usage, which hinges on whether the choice being restricted is not truly voluntary. See generally Thaddeus Mason Pope, *Counting the Dragon's Teeth and Claws: The Definition of Hard Paternalism*, 20 GA. ST. U. L. REV. 659, 662, 667–69 (2004).

¹⁵ Bubb & Pildes, *supra* note 13, at 1609 (“[T]he much-heralded automatic enrollment approach appears not only to have failed to address meaningfully the retirement savings problem but also to have exacerbated it. Perversely, in practice these programs appear to reduce overall retirement savings, even as they raise the rates of participation.”).

¹⁶ *Id.* at 1625–37 (arguing that the “hard paternalistic policy of an explicitly *mandatory* savings program” may be a more effective way to encourage retirement savings).

¹⁷ See generally Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 491–94 (2004) (reviewing the formalities required by early American copyright law).

¹⁸ Sprigman, *supra* note 17, at 503–13 (reviewing studies estimating that between 5–50% of published works were registered); Johnson, *supra* note 3, at 658–59 (same); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 234–37 (finding renewal rates from 1910–1991 ranged between approximately 5–20% of registered works).

¹⁹ 17 U.S.C. § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . .”) (2012); Sprigman, *supra* note 17, at 487–88. This shift away from required formalities became complete with the United States’ adoption of the Berne Convention Implementation Act in 1988. See Pub. L. No. 100-568, 102 Stat. 2853 (1988).

have called into question whether even this incentive matters to most authors.²⁰ However, there has not yet been a corresponding push toward an paternalistic copyright system.

This Article has two principal aims. The first is to highlight and understand existing areas of copyright law that are naturally justified on paternalistic grounds. Despite the dominance of the incentive model, many aspects of American copyright law are in fact best understood as motivated by paternalism. For example, termination rights give authors the option to undo certain past transfers of their copyright—allowing, say, a singer-songwriter to void an ill-considered record company deal.²¹ In a similar vein, current law provides that only certain types of works can be designed as “works made for hire” through contract.²² By eliminating the formalities previously required to assert a copyright, the law protects a careless author from forfeitures of copyright even if she fails to register her copyright or place appropriate notice on the work.²³ The Visual Artists Rights Act allows artists to prevent “modifications” to copies of their work even though they have already sold the copy without any express restriction.²⁴

Paternalism is the most natural way to understand these aspects of copyright.²⁵ By “paternalism,” I mean the state limiting the choices of individuals in order to protect them from the consequences of their own decisions.²⁶ Though the purpose of provisions like termination rights is contested, they are principally motivated by a perception that authors systematically lack bargaining power in their dealings with intermediaries such as publishers. The source of this imbalance, however, is debatable. Congress and the courts frequently cite a romantic conception of the author as short-sighted, impecunious, or irresponsible: thus, the law should protect him, even from himself if need be.²⁷ This conception of the author finds support in behavioral economics, which has shown that human beings exhibit

²⁰ See *infra* Part I.B. Of course, the analogy is imperfect in that, in the case of retirement savings, people do not save *enough* despite the incentive, whereas in copyright the evidence suggests that creators will create *anyway*, regardless of the incentive. In both cases, there is a non-response to incentives, albeit in opposite directions.

²¹ 17 U.S.C. § 203 (2012) (providing that an author or her heirs may terminate a grant of copyright between 35 and 40 years after the original transfer of rights, with all rights reverting back to the author).

²² See 17 U.S.C. §§ 101, 201(b); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 738 (1989).

²³ See *supra* note 19 and accompanying text.

²⁴ 17 U.S.C. § 106A (2012).

²⁵ See *infra* Part III (arguing that these provisions can be understood as motivated by paternalism).

²⁶ See *infra* note 124 (discussing definition of paternalism).

²⁷ See *infra* notes 166–168, 180–182, 204–207, 220–221, 230–232, 250 and accompanying text.

bounded willpower and rationality.²⁸ Other accounts emphasize structural factors, such as publishers' dominant market position or uncertainty in valuing artistic works.²⁹ Either way, these provisions *operate* in a paternalistic fashion, in that they limit the contractual freedom of authors for their own benefit.

They also give rise to an important tension between the incentive model's conception of the author, and that of copyright's paternalistic provisions. Copyright's incentive model envisions authors as hyper-rational economic actors, who will only create new works if, say, their copyright lasts 70 years after their death as opposed to 50. Many actual copyright provisions, however, 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 very different conceptions of the author. On the one hand, the basic premise of copyright relies upon the notion that authors respond to incentives as a rational, calculating economic actor. On the other hand, many of the actual provisions in copyright law are best understood by appealing to notions of paternalism—specifically, that authors are unable to effectively look out for their own interests and need protection from the law. Because this tension speaks to the internal logic of copyright, it exists regardless of whether one accepts the recent critiques of the incentive model.

The second aim of this Article is to explore the normative and policy implications of copyright law's different visions of author rationality. If we take the strictly rational author of the dominant incentive model seriously, it is difficult to justify copyright's paternalistic aspects. In particular, on this view, it is imperative to reinstate copyright formalities to ensure that copyrights are awarded only to those who were actually motivated by the extrinsic incentive to create. The evidence in favor of intrinsic motivation is clear for at least some significant subset of authors. Grating copyright to these creators, on the incentive model's account, would seem only to create social costs.

If we instead adopt the more realistic model of the author as merely boundedly rational like the rest of us, the implications become more complicated as there are multiple behavioral failures in play.³⁰ Though critiques of copyright's incentive model are pervasive, much of this work implicitly presumes that, if authors are not actually motivated by copyright's economic incentive, the optimal response

²⁸ See *infra* Part II.A (reviewing human deviations from the rational actor model).

²⁹ See *infra* notes 186–188, 219 and accompanying text.

³⁰ See *infra* Part II.C (discussing potential behavioral failures in copyright creation and assignment.)

is for the government to cease granting copyrights altogether.³¹ But this conclusion is certainly premature, and hardly the only response to the empirical evidence. 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 at best weakly respond to distant and uncertain economic incentives. On this view, if the government wishes to encourage greater creation, it would be more effective to do so by direct means. Similarly, if we take seriously the goal of author protection that justifies copyright's paternalistic provisions, we would likely want stronger medicine than the current law's relatively weak protections.

The legal structure of more unabashedly paternalistic copyright regime might take many different forms. On the author-protection side, a paternalistic view would likely expand termination rights, more sharply restrict the alienability of copyright or even guarantee authors some minimum royalty. It could expand statutory licenses in lieu of expanded copyright entitlements. On the incentives side, a paternalistic copyright regime might move away from uncertain *ex post* property rights entirely, spurring intellectual creation *ex ante* through direct funding. Such means might be government-driven, as in the example of NEA grants, or decentralized, as in the case of Kickstarter campaigns. Either way, they endeavor to motivate creation through direct, certain, and present-time methods.

This vision of a paternalistic copyright regime is intended only as an exploration, and not a normative endorsement, of any particular reform. It is merely to observe that our current hybrid model risks incurring the costs of a moral-rights-style regime (expansive copyright granted by default) without the corresponding benefits (ensuring that authors actually see a piece of the profits from their work). The optimal policy to encourage creation of new works of course depends on many normative assumptions and complicated empirical realities that are well beyond the scope of this Article—most critically, the relative costs of various means of encouraging creation.³² Nonetheless, it is worthwhile to consider what a paternalistic regime would look like, both as a thought experiment and an examination of oft-overlooked policy tools.

³¹ See, e.g., Johnson, *supra* note 3, at 675–76 (arguing that the flaws in the incentive model mean that copyright should be “phased out entirely” and replaced with “very targeted, industry-sector-specific, application-specific rights”). Most commentators do not go so far and propose instead a narrowing of the scope of copyright. See, e.g., Cohen, *supra* note 8, at 1204 (advocating “to replace broad, all-encompassing statutory provisions . . . with narrower, more clearly delimited” rights).

³² At the least, it also requires a normative view on what the *desired level* of creation is, both in amount and in kind.

It is equally interesting to consider the policy levers that a paternalistic copyright regime would seek to *avoid*. In particular, accepting that human beings are not rational actors counsels against reforms that rely on increasing marginal incentives. There would seem to be little value in, for example, increasing the length of the copyright term by an additional 20 years, expanding the scope of copyright to derivative works, or providing legal support for measures like digital rights management.³³ Such incentives-premised reforms seem at best useless, and very likely counterproductive given the real costs of copyright.³⁴ Of course, such reforms have been precisely the approach of copyright lawmaking from the 1976 Copyright Act until the present. Recognizing the drawbacks of the marginal incentives approach is especially pressing given the recent push by the Register of Copyrights for a full-scale revision of American copyright law.³⁵

The remainder of this Article will proceed as follows. Part I provides background on the traditional justification for copyright based on economic incentives, as well as competing theories. It then surveys the recent debates over the empirical basis of the incentive model. Part II reviews the parallel shift in thinking that has been spurred by the field of behavioral economics, and draws some analogies between this field and copyright law. Part III examines the tension in copyright between the incentive story that underpins its foundation, and the many specific doctrinal provisions that envision a creator who is hardly the rational actor supposed by the incentive model. Part IV builds on the critiques of the incentive model to envision the legal structure that a paternalistic copyright law might take.

I. COPYRIGHT THEORY

American copyright law is principally justified by a theory of creator incentives. This Part first reviews the traditional incentive model that remains the dominant justification for copyright law. Next, it surveys the growing body of empirical evidence that raises serious questions about the incentive story. Studies in fields as diverse as economics, psychology, cultural theory—as well as firsthand accounts of creators themselves—suggest that intrinsic motivations drive much

³³ See 17 U.S.C. § 106(2) (2012) (granting authors the exclusive right “to prepare derivative works based upon the copyrighted work”); Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 111 Stat. 2827 (1998) (extending copyright duration an additional twenty years); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (penalizing the circumvention of digital rights management protecting copyrighted works).

³⁴ See, e.g., Stephen Breyer, *The Uneasy Case for Copyright*, 84 HARV. L. REV. 281, 313-21 (1970) (describing benefits to readers of lower prices, wider distribution, and expanded access were copyright in books abolished); LAWRENCE LESSIG, *FREE CULTURE* (2003) (describing harms to creativity and culture flowing from the expansion of copyright).

³⁵ Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013) (urging comprehensive copyright law revision).

artistic creation. This Part concludes by briefly overviewing alternative theories to justify copyright. While the critiques of the incentive model do not directly impact these competing theories, they have had secondary and limited influence in American copyright law.

Several caveats are in order. Most obviously, the overview presented here is necessarily brief and cannot give full due to either the dominant incentive theory of copyright or its many competitors, some of which have received book-length treatment.³⁶ Second, this Article does not intend to endorse any particular theory of copyright; it focuses on the incentive model simply because it is the dominant one in American legal discourse. Finally, it is not the purpose of this Article to reach an ultimate conclusion as to whether the incentive model is supported by the available evidence. Although there is substantial commentary questioning the incentive model, significant arguments and evidence exist for both sides.³⁷ Regardless of the incentive model's tension with the external empirical evidence, more critical to this Article's argument is the incentive model's *internal* tension with many actual provisions of copyright law. That incongruity is explored in depth in later sections.

A. *The Incentive Model*

American copyright is primarily justified by a simple, utilitarian, and economic argument, which asserts that copyright is necessary to encourage the creation of new works. The traditional logic goes as follows: In a world without copyright, once an artistic work is written and published, free riders could make and sell copies of that work cheaply (merely the cost to make a copy), denying authors the ability to profit from their work.³⁸ In particular, authors would not be able to recoup the investments in time and effort necessary to create the work; as a result, authors would not bother to create new works.³⁹ As Samuel Johnson famously put it, “no man but a blockhead ever wrote but for money.”⁴⁰ Copyright provides a monetary reward by legally prohibiting the copying and sale of works without permission from the author.⁴¹ This exclusivity permits authors to sell their work at a

³⁶ See, e.g., ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY (2011) (providing a normative theory of intellectual property relying on the foundational philosophy of Locke, Kant, and Rawls); LANDES & POSNER, *supra* note 18 (providing detailed economic theory and model of intellectual property); NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX (2008) (offering a vision of copyright animated by First Amendment and democratic values). For a more comprehensive overview and taxonomy of intellectual property theories, see Fisher, *supra* note 4.

³⁷ See *infra* notes 83–90 and accompanying text.

³⁸ See LANDES & POSNER, *supra* note 18, at 40–41.

³⁹ Fromer, *supra* note 2, at 1750–51.

⁴⁰ JAMES BOSWELL, 3 BOSWELL'S LIFE OF JOHNSON 19 (G. Hill ed. 1934), *quoted in* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994).

⁴¹ 17 U.S.C. § 106 (2012).

higher price and thereby recover the costs of creation, providing the necessary incentive to create in the first instance.

In the language of neoclassical economics, copyright is said to solve a public goods problem. Public goods are (i) non-rivalrous, in the sense that one person's enjoyment of the good does not negatively impact another's enjoyment; and (ii) non-excludable, in the sense that (absent legal rights) it is difficult to limit access to the good.⁴² Intellectual creations have a strongly public good character because they can be replicated cheaply and easily.⁴³ Absent legal intervention, economic theory predicts that public goods will tend to be under-produced because of the problem of free riders, who can undercut the original author by selling copies at marginal cost.⁴⁴ Importantly, however, the traditional law and economics account also recognizes the *costs* of the copyright protection, which include decreased consumption of works by the public because of higher cost, as well as fewer works created because of limited access to creative raw materials.⁴⁵ Accordingly, the protection afforded by copyright should be limited in time and scope to, ideally, provide just enough incentive to create without unduly limiting access.

This incentive model is, far and away, the dominant theory of American copyright law. It is said to be found in the U.S. Constitution's intellectual property (IP) clause, which provides that Congress has power to grant copyrights and patents "[t]o promote the Progress of Science and useful Arts."⁴⁶ The Supreme Court has expressly endorsed it on several occasions.⁴⁷ So has Congress.⁴⁸

⁴² Johnson, *supra* note 3, at 628–29.

⁴³ See Landes & Posner, *supra* note 3, at 326.

⁴⁴ LANDES & POSNER, *supra* note 18, at 40 (“In the absence of copyright protection the market price of a book or other expressive work will eventually be bid down to the marginal cost of copying, with the result that the work may not be produced in the first place . . .”).

⁴⁵ See *id.* at 22–24 (costs in reduced access to works), 66–70 (costs to subsequent producers of intellectual creation).

⁴⁶ U.S. CONST. art. I, § 8, cl. 8.

⁴⁷ See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[Copyright] is intended to motivate the creative activity of authors and inventors by the provision of a special reward . . .”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind [IP] is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors . . .”).

⁴⁸ See generally Fromer, *supra* note 2, at 1750 n.22 (collecting sources); H.R. REP. 60-2222, at 7 (1909) (“The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will promoted by securing to authors for limited periods the exclusive rights to their writings.”).

Despite its dominance, scholars have raised important objections to the incentive model on its own terms. The most obvious is that copyright does not actually guarantee authors any economic benefit. Rights are not the same as compensation, and the reward promised by copyright is dependent upon success in the market—which is usually both unlikely and unpredictable.⁴⁹ Moreover, the current scope of copyright gives creators such expansive rights that it can seem implausible that those rights motivated the original creation.⁵⁰ Jonathan Barnett makes this point vividly: “did J.K. Rowling really write the original Harry Potter novel because she foresaw the ability to license the Harry Potter property to Warner Bros. for a film, to Disney for a Harry Potter amusement park ride, and to Mattel for Harry Potter-themed toys? No, she almost certainly did not.”⁵¹ Finally, it is questionable whether the incentive story—as invoked by Congress and others to support expansions of copyright—is sincere. On a more cynical view, the incentive model is merely rhetoric used to invoke the sympathetic figure of the author in order to mask the special interests that truly benefit from expansions of copyright.⁵²

B. *Critiques of the Incentive Model*

Whatever the flaws of the incentive model, it does generate testable predictions. It is, after all, a theory of how people behave. This Part surveys a growing body of scholarship that challenges the empirical foundations of copyright’s incentive model. A repeated theme in this literature is the notion that intrinsic motivation—and not the extrinsic economic incentive of copyright—underlies much artistic creation. Intrinsic motivation refers to an individual’s desire to do something because it is inherently interesting or enjoyable; extrinsic motivation relies on incentives external to the individual, such as a payment of money.⁵³ To be sure, the evidence in favor of intrinsic motivation is not conclusive, and a careful analysis of

⁴⁹ See Tushnet, *supra* note 4, at 517 (“[R]ights don’t mean payment”); Barnett, *supra* note 10, at 398–491 (reviewing the “high costs and risks of creative production” and characterizing creative goods as a “hits market”).

⁵⁰ See generally Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1571–76 (2009) (articulating this problem and arguing that the scope of copyright should be limited to uses that the “copyright owner (that is, the plaintiff) could have reasonably foreseen at the time that the work was created”).

⁵¹ Barnett, *supra* note 10, at 409.

⁵² See generally JESSICA LITMAN, *DIGITAL COPYRIGHT* 22–63 (2d ed. 2006) (describing copyright law-making process as driven by concentrated groups of industry stakeholders); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996) (arguing copyright’s author-centered rhetoric cannot fully account for its expansion and suggesting that it has been employed to benefit copyright industry groups); Cohen, *supra* note 8, at 1192 (“Lobbyists for the copyright industries are in the habit of asserting that copyright is the single most critical prerequisite for a vibrant artistic and intellectual culture. Some of this is theater driven by political expediency.”).

⁵³ See generally Richard M. Ryan & Edward L. Deci, *Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions*, 25 CONTEMP. EDUC. PSYCHOL. 54, 55 (2000).

the social science reveals that the degree of responsiveness to external incentives may depend on the individuals involved, the type of work at issue, the threshold for creativity, and other factors.⁵⁴ Nonetheless, there is significant evidence that many creators do not respond to economic incentives in the straightforward way envisioned by the incentive model.

Perhaps the most forceful cases against the incentive model were recently put forth by Diane Zimmerman and Eric Johnson. Professor Zimmerman relies on a number of studies in psychology and behavioral economics to conclude that copyright's incentive story is "based on partially or even wholly mistaken beliefs about human behavior."⁵⁵ Her first insight points to the extremely uncertain nature of economic returns from creative activity. Because the average writer can expect to earn less than the minimum wage for her work, "it is more credible to understand their devotion to the production of expressive works more as a product of love than as a response to the promise of money."⁵⁶ This intuition is bolstered by a raft of studies from psychology and social science tending to show that human creativity is driven mainly by intrinsic motivations such as self-actualization or the simple love of the creative endeavor.⁵⁷ Even more provocatively, research from scholars such as Edward Deci, Richard Ryan, and Teresa Amabile suggests that offering economic incentives can actually be *detrimental* to creativity in some circumstances.⁵⁸ On the policy side, Zimmerman urges that "skepticism about the market incentive story can be a useful antidote to copyright's excess[es]."⁵⁹

Professor Johnson goes even further than Zimmerman to flatly reject what he calls the "incentive fallacy" in copyright.⁶⁰ Like Zimmerman, Johnson relies extensively on studies of intrinsic motivation in psychology and behavioral economics to conclude that, by and large, people are "intrinsically motivated to undertake novel and challenging intellectual tasks" like artistic creation.⁶¹ Johnson broadens his case, however, looking to case studies of the flourishing world of user-

⁵⁴ See Buccafusco et al., *supra* note 10, at 1932–43 (reviewing social science literature and concluding that while some studies find that creativity is more conducive to intrinsic motivation, other studies show that extrinsic motivation can enhance creativity under some circumstances).

⁵⁵ Zimmerman, *supra* note 1, at 34.

⁵⁶ *Id.* at 38–40. Zimmerman acknowledges that there are clever ways to account for such behavior on a neoclassical economic model, such as "a lottery theory," but finds it difficult to "squeeze the starving artist into that familiar storyline." *Id.* 41–42.

⁵⁷ See *id.* at 43–48 (reviewing the psychological and behavioral economics accounts of intrinsic motivation).

⁵⁸ See *id.* at 50–54.

⁵⁹ *Id.* at 54–55.

⁶⁰ Johnson, *supra* note 3, at 623.

⁶¹ See *id.* at 640–46 (citing studies by Teresa Amabile and Edward Deci, among others).

generated digital content, which is typically created by “legions of everyday nonprofessionals” with “zero expectation of getting paid.”⁶² Wikipedia, YouTube, blogs, and the open source software movement are cited as familiar examples.⁶³ Johnson also questions the historical basis of the incentive model’s promise of rewards for creators, in that early forms of IP granted monopolies to *publishers*, not to writers.⁶⁴ Johnson is perhaps most bold in his policy recommendations, urging that existing IP rights be eliminated in favor of narrow, industry-specific rights for the limited areas (such as Hollywood movies) where they are truly needed to incent artistic creation.⁶⁵

Rebecca Tushnet takes a different tack in her critique of the incentive model, focusing on the firsthand accounts and lived experiences of authors.⁶⁶ Professor Tushnet concludes that “[m]any standard experiences of creativity simply do not fit into the incentive model.”⁶⁷ Those experiences are of course varied, but by their own accounts, authors are driven more by passion than economic reward: they write because they enjoy doing so, to make a mark, or because they feel a compulsion to do so.⁶⁸ Critically, Tushnet finds a surprising degree of similarity between the accounts of prominent writers working in traditional markets and creators of “fanworks” who typically publish their work online for free.⁶⁹ Tushnet is careful not to conclude from her analysis that economic incentives are necessarily “irrelevant or disresponsible,” but nonetheless urges recognition that the reality of creation is richer and messier than the incentive model supposes.⁷⁰

Julie Cohen’s scholarship questions the incentive model from yet another perspective—that of postmodern social and cultural theory.⁷¹ Drawing on this body

⁶² *Id.* at 647–48.

⁶³ *See id.* at 650–52 (reviewing examples of digital creativity).

⁶⁴ *See id.* at 635–40 (questioning consistency of early history of IP and the incentive model).

⁶⁵ *Id.* at 675–76 (arguing that the flaws in the incentive model mean that copyright should be “phased out entirely” and replaced with “very targeted, industry-sector-specific, application-specific rights”).

⁶⁶ Tushnet, *supra* note 4, at 515–16. In some ways, Tushnet’s work builds upon the tradition of Mihaly Csikszentmihalyi, whose psychological research relied extensively on firsthand interviews with creators. MIHALY CSIKSZENTMIHALYI, *CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INNOVATION* (2d ed. 2013). Csikszentmihalyi reaches similar conclusions about intrinsic motivation. *See id.* at 107 (“It is not the hope of achieving fame or making money that drives [creative persons]; rather, it is the opportunity to do the work that they enjoy doing.”).

⁶⁷ Tushnet, *supra* note 4, at 522.

⁶⁸ *See id.* at 522–36 (reviewing accounts of writers who cite these motivations).

⁶⁹ *See id.* at 546 (“[C]reators’ passions are strikingly similar across the boundary between ‘original’/authorized and unauthorized derivative works.”).

⁷⁰ *Id.* at 516.

⁷¹ *See generally* Cohen, *supra* note 8; Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 142–149.

of thinking, as well as insights from psychology and the narratives of creators, Professor Cohen denies the descriptive truth of the “incentives-for-authors” story.⁷² Instead, she relies on cultural theory to develop a complex account of creativity that emphasizes the dynamic interactions between creators and the surrounding cultural context, wherein situated users engage in creative play within a particular socio-cultural environment.⁷³ Copyright plays, at best, a “modest” role in stimulating such creative practice.⁷⁴ To similar effect, albeit distinct in methodological approach, is the work of Roberta Kwall. Professor Kwall relies on theological and secular narratives of creation to emphasize the inspirational or religious aspect common to many accounts of creativity.⁷⁵

A team of researchers led by Raymond Ku took a more data-oriented approach to testing the incentive model, examining whether changes in copyright protections correlate with an increase in the number of new works created.⁷⁶ In other words, do expansions of copyright (e.g., increased duration, subject matter, or scope of protection) actually correspond to increased artistic creation, as measured by the number of works registered with the Copyright Office?⁷⁷ Professor Ku et al. found that although changes in copyright law sometimes lead to increases in the number of works registered, this correlation was weak and unpredictable.⁷⁸ At best, it was “slightly better than a coin toss whether a legal change will have any effect,” and increases in the number of new works were largely a function of population growth.⁷⁹ Their conclusion is that “the data do not support” the incentive model.⁸⁰

To similar effect is the work of Christopher Sprigman, William Landes, and Richard Posner concerning the rate at which eligible copyrighted works were

⁷² Cohen, *supra* note 71, at 143 (“Everything we know about creativity and creative processes suggests that copyright plays very little role in motivating creative work.”).

⁷³ See Cohen, *supra* note 8, at 1177–92 (providing a “decentered” account of creativity based on the insights of “social and cultural theory”).

⁷⁴ *Id.* at 1193 (“[Cultural theory] suggest[s] a much more modest conception of the role that copyright plays in stimulating creative processes and practices.”).

⁷⁵ See generally Kwall, *supra* note 6, at 1951–70 (drawing on historical and theological accounts of creativity to conclude that “creativity is spurred by incentives that are noneconomic in nature”).

⁷⁶ See Raymond Shih Ray Ku et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright’s Bounty*, 62 VAND. L. REV. 1669 (2009)

⁷⁷ See *id.* at 1689–95 (outlining the methodology of the study).

⁷⁸ *Id.* at 1673 (“[T]here is no uniform or fully predictable statistical relationship between laws that increase copyright term, subject matter, rights, or criminal penalties and the number of new works registered in general. Overall, the most one can expect is a 38 percent chance that a law increasing copyright protection will lead to an increase in the number of new registrations.”).

⁷⁹ *Id.* at 1708, 1672.

⁸⁰ See *id.* at 1672 (“Despite the logic of the theory that increasing copyright protection will increase the number of copyrighted works, the data do not support it.”).

registered and renewed under the former system of copyright formalities.⁸¹ Even though creators would forfeit their copyright if they failed to take these steps, most did not bother to register a copyright when their work was published, and even fewer took the opportunity to renew the copyright.⁸² This suggests both that the incentive of copyright was unimportant to these authors, and that the expected value of the work was so low that it was not worthwhile to assert copyright.

Despite this diverse body of scholarship questioning the incentive model, there is by no means a consensus on the issue. First, there is room to debate how broadly to understand the experimental results from psychology and behavioral economics, which usually rely on artificial experimental environments. For example, a team of legal scholars lead by Christopher Buccafusco analyze much of the same social science literature as Zimmerman and Johnson, but are more circumspect about how far to read the results. They acknowledge some evidence that intrinsic motivations are more conducive to creativity, but point to “other studies that suggest that extrinsic rewards do not always undermine creativity and can, in fact, enhance it.”⁸³ In their view, the results are best reconciled as revealing that the efficacy of extrinsic incentives depends on the task at issue, how the subjects are instructed, how performance is measured, and the level of reward.⁸⁴ Their own experimental work finds that the threshold by which creativity is measured can affect responsiveness to external incentives.⁸⁵ Nonetheless, they agree that individuals respond to incentives in a much more complex way than the incentive model suggests.⁸⁶

In a similar vein, the firsthand accounts of creators themselves can be questioned as unrepresentative of their “true” motivations, or simply beside the point. Certainly no one denies that artists must find a way to support themselves in order to engage in their craft full-time. Jonathan Barnett, for example, notes that the “romantic” behavior of artists can be explained by “a chronic overestimate of, rather than indifference to, commercial success.”⁸⁷ Finally, it is also almost certainly true that the degree of intrinsic motivation depends upon the type of artistic work at

⁸¹ See *infra* Part III.C (discussing copyright formalities).

⁸² See Sprigman, *supra* note 17, at 503–13 (reviewing studies estimating that between 5–50% of published works were registered); Johnson, *supra* note 3, at 658–59 (same). LANDES & POSNER, *supra* note 18, at 234–37 (finding renewal rates from 1910–1991 ranged between approximately 5–20% of registered works).

⁸³ Buccafusco et al., *supra* note 10, at 1737–38.

⁸⁴ See *id.* at 1939–43 (engaging in “meta-analysis” of the social science research on creativity and incentives).

⁸⁵ *Id.* at 1972–73.

⁸⁶ *Id.* at 1939 (“Ultimately, however, one cannot simply assume that the addition of an incentive to an already motivated person will always yield more or better creative production.”).

⁸⁷ Barnett, *supra* note 10, at 394.

issue.⁸⁸ Context matters: academics and creators of fanworks, for example, are driven by a different mix of incentives than, say, popular music artists.⁸⁹ Indeed, even the most strident critics of the incentive model acknowledge that copyright matters for large-scale, capital-intensive productions like Hollywood movies where the intrinsic motivation story is not a persuasive account.⁹⁰

In sum, although many scholars have raised serious questions about the incentive model, there are reasons to be skeptical that extrinsic motivations do not play any role *at all* in motivating creativity. Intrinsic motivation may be the primary driving force behind much artistic creation, but extrinsic incentives may have some role depending on upon context, the type of work at issue, the nature of the incentive, and other factors. In other words, the reality of motivation is complicated and contextual, like creators themselves. However, it seems fair to conclude that the simple “the more external motivation the better” story of the incentive model is not supported by the available evidence. Whether and how authors respond to extrinsic incentives to create depends on the circumstances, and intrinsic motivation plays a much greater role in creativity than is often appreciated.

C. *Alternatives to Traditional Incentive Theory*

Although the incentive model is the dominant justification for copyright in American law, it is not the only theoretical basis for copyright.⁹¹ This Section briefly reviews some competing models of copyright, which are not directly impacted by the empirical evidence that intrinsic motivation often drives artistic creation. These theories should give pause to those who would jump from critiques of the incentive model to the policy conclusion that there is no need for copyright.⁹² It must be noted, however, that these theories have had limited influence on American copyright.

⁸⁸ See, e.g., Lydia Pallas Loren, *The Pope’s Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1, 4 (2008) (observing that copyrightable works like “email and other personal communications, model legal codes, standard portrait photography, amateur/home photography, architectural works, advertising artwork and advertising copy, scholarly articles, and legal documents” are created without regard to the incentive of copyright).

⁸⁹ Cf. *id.* at 34–40 (proposing to limit scope of copyright protection for works that are primarily driven by non-copyright motivations).

⁹⁰ See, e.g., Johnson, *supra* note 3, at 672–73 (acknowledging that a strong case for copyright incentives can be made in the case of “large-budget major motion pictures”).

⁹¹ See generally Fisher, *supra* note 4 (surveying theories of IP); Fromer, *supra* note 2, at 1749–56 (same).

⁹² See, e.g., Johnson, *supra* note 3, at 675–76 (urging sunset of IP rights); Zimmerman, *supra* note 1, at 54 (suggesting that elimination of copyright, although impractical, might be ideal).

Most alternative theories of copyright are grounded upon deontological or rights-based notions, in contrast to the utilitarian focus of the incentive model. For example, notions of copyright as a just desert for an author's labor are prominent in the European copyright tradition. French *droit d'auteur*, which has been influential in civil law systems, is said to derive from John Locke's theory of labor as the foundation of property.⁹³ The essential idea is that authors deserve property rights in their work by virtue of the labor and effort that they apply to common resources in the process of intellectual creation.⁹⁴ Although this concept has its defenders, the Supreme Court has rejected labor as a basis for copyright.⁹⁵

Other rights theorists look to personhood theory, which derives from the philosophy of Kant and Hegel, as the foundation for copyright.⁹⁶ These theorists view property rights as essential to human freedom and self-development.⁹⁷ Personhood theorists argue that because an artistic work is an expression of the author's personality and autonomy, the law should afford it legal protections.⁹⁸ Appeals to personhood theory are frequently invoked to justify the expansion of "moral rights," which are historically quite limited in American copyright law.⁹⁹

⁹³ See Jean-Luc Piotraut, *An Authors' Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 554–55 (2006) (“[I]n civil law countries such as France, the more individual-centered *droit d'auteur* system gives special importance to the principles of natural justice”); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540–49 (1993) (applying Lockean labor theory to IP).

⁹⁴ See generally Gordon, *supra* note 93, at 1544–45 ; Justin Hughes, *The Philosophy of Intellectual Property*, 287 GEO. L.J. 287, 296–314 (providing Lockean justification for IP).

⁹⁵ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352–53 (1991) (rejecting notion the “sweat of the brow” as a valid basis for copyright protection). Despite the dominance of the incentive model, the language of labor-desert theory nonetheless frequently creeps into Supreme Court opinions. See, e.g., *Harper & Row, Publ'rs v. Nation Enters.*, 471 U.S. 539, 546 (1985) (“The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.”).

⁹⁶ Fisher, *supra* note 4, at 5–6. See generally Fromer, *supra* note 2, at 1753–54 (overviewing personhood theory of IP); Hughes, *supra* note 94, at 330–64 (providing Hegelian justification for IP).

⁹⁷ See, e.g. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 958 (1982) (“The premise underlying the personhood perspective is that to achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment.”).

⁹⁸ Hughes, *supra* note 94, at 330.

⁹⁹ See, e.g. Hughes, *supra* note 94, at 339–50 (deriving moral right protections against mutilation and misattribution from Hegelian personhood theory); accord Kwall, *supra* note 6, at 1975–77. For a forceful argument against moral rights protection, see Amy Adler, *Against Moral Rights*, 97 CAL. L. REV. 263 (2009). The limited moral rights protections offered in the United States are discussed *infra* in Part III.D (discussing the Visual Artists Rights Act).

Several scholars of copyright have invoked democratic theory or social planning as a basis for copyright.¹⁰⁰ Neil Netanel, for example, advances a view of copyright designed to promote democratic and First Amendment values.¹⁰¹ Other theorists invoke broader visions of the good life and a just society as underlying copyright. William Fisher, for example, relies on notions of a “just and attractive intellectual culture” designed to promote human flourishing in determining the proper scope of copyright.¹⁰² Still others rely upon notions of distributive justice to inform their views of IP.¹⁰³

Not all alternative theories of copyright are rights-based. Jonathan Barnett’s recent scholarship, for example, rejects the incentive model but still relies primarily on economic analysis. In Barnett’s view, the evidence that creators are motivated by intrinsic desires, even if correct, is simply beside the point.¹⁰⁴ Copyright is not intended to provide an incentive for *authors* to create, but as an incentive for *intermediaries* to distribute, market, and disseminate artistic works.¹⁰⁵ There is an interesting convergence between Barnett’s views and those of more radical critics of the incentive model, who agree that copyright is primarily valuable to intermediaries like movie studios and record companies.¹⁰⁶ Whatever explanatory power the incentives-for-intermediaries story may have, Barnett’s account is in some tension with the constitutional basis for copyright, which grants rights “to Authors.”¹⁰⁷

Finally, some scholars reject the divisions between these various theories to advance a vision of copyright that relies upon both rights-based and utilitarian

¹⁰⁰ See generally Oren Bracha & Tallha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, BERKELEY TECH. L.J. 219, 248–58 (2014) (surveying theories of IP based on democratic, distribution, and utopian values); Fisher, *supra* note 4, at 6–7 (same).

¹⁰¹ See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 341–64 (1996) (outlining a conceptual framework for copyright that enhances free speech and democratic values).

¹⁰² William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1774–83 (1988) (arguing that fair use should operate to promote a “just and attractive intellectual culture”).

¹⁰³ See generally Bracha & Syed, *supra* note 100, at 287–96 (surveying distributive justice concerns in IP theory); Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970 (2012); Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821 (2006); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1538 (2005).

¹⁰⁴ See Barnett, *supra* note 10, at 404 (“Assuming for the sake of argument that artists require no significant monetary inducement to invest in creative production, it still is the case that copyright supports investment by intermediaries . . .”).

¹⁰⁵ *Id.* at 390 (“Copyright . . . is best conceived as a system for incentivizing investment by the intermediaries responsible for undertaking the capital-intensive tasks required to deliver a creative work from an individual artist to a mass audience.”).

¹⁰⁶ See, e.g. Cohen, *supra* note 71, at 142–43 (arguing for recognition that copyright is not about protecting authors but instead the “corporate welfare” of intermediaries).

¹⁰⁷ U.S. CONST. art. I, § 8, cl. 8.

notions. In a recent book, Rob Merges presents a rich and nuanced account of intellectual property. In Professor Merges’ theory, although the normative foundations of IP lie in the philosophy of Locke, Kant, and Rawls, those deep theoretical foundations yield to practical, mid-level principles—including efficiency—that guide IP law on the operational level.¹⁰⁸ Along similar lines, Jeanne Fromer argues that there is less of a practical divide between utilitarian and rights-based theories than is usually appreciated, because moral rights concerns frequently align with social utility.¹⁰⁹

II. PATERNALISM IN BEHAVIORAL LAW AND ECONOMICS

Many critiques of copyright’s incentive model have relied on or been inspired by the insights of behavioral law and economics (BLE). Both groups of scholars share a skepticism of the concept of a rational economic actor. This Part reviews how legal scholars have used the insights of behavioral economics to inform traditional economic analysis of the law, focusing on the policy response to the limits on human beings’ rationality. In particular, although early forms of BLE emphasized the use of tools such as increased information disclosure or changes to default choices, there has been a recent push toward acceptance of paternalistic tools such as government mandates. This Part concludes by applying this theory to copyright, introducing several behavioral market failures that might justify regulatory intervention.

A. *Deviations from the Rational Actor Model*

Traditional economic models presume an individual with stable and coherent preferences, who rationally makes choices to maximize those preferences.¹¹⁰ This is the type of rational author, for example, envisioned in copyright’s incentive model.¹¹¹ Results from several decades of psychological research have given rise to a more nuanced view of human behavior—that of behavioral economics—which undermine the assumption that humans act like rational economic actors. This view

¹⁰⁸ MERGES, *supra* note 36, at 5–15.

¹⁰⁹ Fromer, *supra* note 2, at 1746.

¹¹⁰ See Rabin, *supra* note 11, at 11 (“Economics has conventionally assumed that each individual has stable and coherent preferences, and that she rationally maximizes those preferences. Given a set of options and probabilistic beliefs, a person is assumed to maximize the expected value of a utility function, $U(x)$.”); RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (5th ed. 2007) (“The task of economics, so defined, is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions—what we shall call his ‘self-interest.’”); GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (1976) (“[H]uman behavior can be viewed as involving participants who maximize their utility from a stable set of preferences . . .”).

¹¹¹ See, e.g., Landes & Posner, *supra* note 6, at 333–44 (presenting formal economic model of copyright); see *supra* Part I.A (reviewing the incentive model of copyright).

of human behavior asserts that human rationality, self-interest and willpower is bounded in important and systematic ways.¹¹²

It should surprise no one that humans are fallible beings. First, evidence shows that humans are only *boundedly rational*, with limited cognitive abilities. As a result, we often make decisions using shortcuts—called “heuristics”—leading to mistakes and biases in judgment.¹¹³ We have a bias for the status quo, overvalue good initially allocated to us, and excessively dislike losses.¹¹⁴ We are particularly bad at judgments under uncertainty, i.e., making decisions involving probabilistic outcomes. For such decisions, we rely on heuristics that deeply misunderstand the laws of probability.¹¹⁵ Second, humans have only *bounded willpower*, often acting in impulsive ways that are inconsistent with our expressed long-run preferences.¹¹⁶ The familiar examples of overeating, procrastination, and addictive behavior suffice to illustrate this phenomenon.¹¹⁷ Finally, we have *bounded self-interest*: our preferences are not only guided by our own welfare, as some traditional economic models suppose. Rather, humans are will sacrifice their own self-interest to act altruistically

¹¹² See Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476–79 (1998) (reviewing evidence of bounded rationality, willpower, and self-interest); Sendhil Mallainathan & Richard Thaler, *Behavioral Economics*, Massachusetts Institute of Technology Department of Economics, Working Paper 00-27, at 5–7, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=245828 (2000) (same). This Article will provide only a brief overview of the principal results from behavioral economics and applied psychological research. For a good introduction aimed at a generalist audience, see generally KAHNEMAN, *supra* note 11. For a brief and effective review of the underlying economic studies, see generally Rabin, *supra* note 11.

¹¹³ See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1976) (“[P]eople rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations.”).

¹¹⁴ See Rabin, *supra* note 11, at 13–14 (reviewing loss aversion, the status quo bias, and the endowment effect). In the IP context, Christopher Buccafusco and Christopher Sprigman have performed a number of experiments on the endowment effect for creators of new works, tending to show that creators value their own creations more than potential purchasers. Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31 (2011); Christopher Buccafusco & Christopher Sprigman, *Valuing Intellectual Property: An Experiment*, 96 CORN. L. REV. 1 (2010).

¹¹⁵ Tversky & Kahneman, *supra* note 113, at 1124–29 (presenting evidence of availability, representativeness, and anchoring heuristics); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1084–1102 (2000) (same).

¹¹⁶ Rabin, *supra* note 11, at 12, 38–40 (“[P]eople have a short-run propensity to pursue immediate gratification that is inconsistent with their long-run preferences.”); Jolls et al., *supra* note 112, at 1545 (“People also have bounded willpower; they can be tempted and are sometimes myopic.”).

¹¹⁷ See Allesandro Bucciol, Daniel Houser, Marco Piovesan, *Willpower in Children and Adults: A Survey of Result and Economic Implications*, 57 INT’L REV. ECON. 259, 260–63 (2010) (reviewing studies of bounded willpower and citing overeating, smoking and procrastination as examples).

when they believe others are cooperating, and spitefully if others are not.¹¹⁸ Furthermore, we have a preference for “fair” allocations of resources, choosing to equalize welfare gains rather than maximize total social welfare.¹¹⁹

A few behavioral findings are most relevant for present purposes. First, as already discussed, humans are intrinsically motivated to perform certain tasks. They engage in some work for the joy of doing it or a drive to excel, and economic motivation can actually diminish or crowd out intrinsic motivation.¹²⁰ Second, because of bounded willpower, humans can act in ways that are short-sighted, pursuing immediate gratification to their own long-term detriment.¹²¹ Third, because of our bias for the status quo, the choice of default option and whether a system is structured on an opt-out or opt-in basis has a big impact on the choices people actually make.¹²² Finally, because of our social preferences and bounded self-interest, people disfavor some socially “efficient” outcomes if they seem to give one party the short end of the deal.¹²³

These human limitations can create behavioral market failures and therefore, arguably, a need for government regulation to solve them. This gives rise to the policy question of the best way to regulate in light of this richer conception of human behavior. This is the principal challenge of the BLE movement.

B. *Soft and Hard Behavioral Law and Economics*

Behavioral market failures raise obvious questions about the propriety of paternalism as a regulatory tool.¹²⁴ If individuals act in ways that are irrational or

¹¹⁸ See Rabin, *supra* note 11, at 21–24 (reviewing behavioral evidence of altruism, reciprocity, and acrimony); Jolls et al., *supra* note 112, at 1489–97 (same).

¹¹⁹ Rabin, *supra* note 11, at 17–20.

¹²⁰ See *supra* notes 53–75 and accompanying text (discussing evidence that intrinsic motivation drives artistic creation).

¹²¹ See *supra* note 116.

¹²² See Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism”*, 151 U. PA. L. REV. 1211, 1224–30 (2003); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1171–82 (2003).

¹²³ See *supra* notes 118–119.

¹²⁴ I will use “paternalism” to mean governmental or other actors limiting the choices of individuals in order to protect them from the consequences of their own decisions. See Gerald Dworkin, *Paternalism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed., Summer 2014 edition), <http://plato.stanford.edu/archives/sum2014/entries/paternalism/>; accord Pope, *supra* note 14, at 683–84 (defining paternalism as when an agent limits a subject’s liberty, for the subject’s own benefit, independent of the subject’s own preferences); Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 236 (1998) (“Paternalism is intervention in a person’s freedom aimed at furthering her own good.”); see also JOHN STUART MILL, ON LIBERTY 51–52 (Edward Alexander ed., 1999)

against their own self-interest, does this furnish a basis for the state to directly protect them from their own “bad” decisions? Many prominent proponents of BLE assiduously resisted this impulse, advocating only “soft” paternalistic tools, such as information disclosure or manipulation of default rules.¹²⁵ More recently, several scholars have questioned whether this limitation is principled, and embraced the possibility that direct mandates may in some cases be the optimal policy, even if they are paternalistic.¹²⁶

Two influential law review articles, both published in 2003, epitomize the soft paternalism approach.¹²⁷ The work of Cass Sunstein and Richard Thaler proposed “libertarian paternalism” as a response to behavioral market failures. Libertarian paternalism urges manipulation of choice architecture—e.g., default rules, framing, information disclosure—in order to nudge people into better choices.¹²⁸ Although it recognizes that human behavioral failures may require regulation, it defends only a “weak and nonintrusive” paternalism and expressly disclaims any means that would completely block individual choice.¹²⁹ A team of scholars led by Colin Camerer embrace a similar but distinct approach, termed “asymmetric paternalism,” which strives to regulate only when it “creates large benefits for those who make errors, while imposing little or no harm on those who are fully rational.”¹³⁰ Asymmetric paternalism is explicitly motivated by a concern

(“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”). I have attempted to use a minimal definition as there is much debate as to how best to define paternalism. See Wendy Mariner, *Paternalism, Public Health, and Behavioral Economics: A Problematic Combination*, 46 CONN. L. REV. 1817, 1820 n.2 (2014) (collecting sources); Zamir, *supra*, at 236 n.3 (same). I do not mean the word to carry any inherently negative connotation. Cf. Sunstein & Thaler, *supra* note 122, at 1166 (“The thrust of our argument is that the term ‘paternalistic’ should not be considered pejorative, just descriptive.”).

¹²⁵ See Sunstein & Thaler, *supra* note 122, at 1661–62 (urging “libertarian paternalism,” in which default rules, starting points, and decision framing are changed to help people make better decisions while preserving individual choice); Camerer et al., *supra* note 122, at 1212, 1224–47 (focusing on regulations such as default rules, information disclosure, and “cooling off period” that “impose[] little or no harm on those who are fully rational”). Other early BLE advocates, even if they did not foreclose direct paternalist mandates as an option, approached this possibility warily and tentatively. See Jolls et al., *supra* note 112, at 1541 (“[B]ounded rationality pushes toward a sort of anti-antipaternalism—a skepticism about antipaternalism, but not an affirmative defense of paternalism.”).

¹²⁶ Bubb & Pildes, *supra* note 13, at 1605–06.

¹²⁷ See Sunstein & Thaler, *supra* note 122; Camerer et al., *supra* note 122; Bubb & Pildes, *supra* note 13, at 1604–05 (describing the approach of Sunstein, Thaler, and Camerer as “soft paternalism”).

¹²⁸ Sunstein & Thaler, *supra* note 122, at 1160–66; see also SUNSTEIN & THALER, *supra* note 14, at 1–8 (defining “libertarian paternalism”).

¹²⁹ Sunstein & Thaler, *supra* note 122, at 1162.

¹³⁰ Camerer et al., *supra* note 122, at 1212.

that “paternalistic policies may impose undue burdens on those people who are behaving rationally.”¹³¹ Traditional tools like direct mandates or taxes are thus disfavored because of their potential negative effects on rational actors. Accordingly, asymmetric paternalism’s proposed regulatory policies are primarily changes to default rules, increased information disclosure, or “cooling off” periods.¹³²

Recently, Ryan Bubb and Richard Pildes have critiqued BLE’s exclusive emphasis on soft paternalism to the exclusion of traditional regulatory tools.¹³³ Taking BLE on its own terms, they observe that the “hard paternalism” of direct bans or mandates may be the optimal policy response to some behavioral market failures. In particular, the soft paternalism of changes to defaults rules or information are, in important cases, less likely to be effective than an outright mandate.¹³⁴ Information disclosure is frequently ineffective because of the same behavioral failures that motivated the increased disclosure in the first place—individual’s bounded rationality and willpower.¹³⁵ Changes to default rules—such as a move to an opt-out system—can end up as simply poorly designed *de facto* mandates.¹³⁶ At the least, a full analysis should consider the costs and benefits of regulatory tools such as mandates, bans, and taxes, in addition to the preferred tools of soft BLE.¹³⁷

Retirement savings policy illustrates this debate between soft and hard BLE, and suggests that directly paternalistic policy tools can sometimes be optimal responses to human beings’ boundedly rational behavior. Traditional retirement programs like Social Security and defined-benefit pensions were largely choice-limiting and paternalistic.¹³⁸ Beginning in the 1970s, there was a move toward defined contribution plans (e.g., individual retirement accounts and 401(k) programs), and a series of incentives—tax deductions, employer matching—designed to encourage individuals to save.¹³⁹ Consistent with the humans short-

¹³¹ *Id.* at 1214.

¹³² *See id.* at 1224–47.

¹³³ Bubb & Pildes, *supra* note 13, at 1595–1600.

¹³⁴ *See id.* at 1607–77 (reviewing examples of retirement savings, consume credit, and fuel economy).

¹³⁵ *Id.* at 1598 (“Fuller, simpler, and more effective disclosure, one of the main options in BLE’s arsenal, is often not a realistic way to adequately rectify individual incapacity to make accurate, informed judgments based on the appropriate time horizons.”).

¹³⁶ *Id.* at 1616–30 (showing that switch to opt-out retirement savings program actually reduced total savings for many employees).

¹³⁷ *See id.* at 1601 (“We are arguing for a full comparison of the advantages and disadvantages of different regulatory instruments. In particular, from a welfarist perspective, there should be no presumption or precommitment in favor of choice-preserving regulatory options over others.”).

¹³⁸ *Id.* at 1607; Korobkin & Ulen, *supra* note 115, at 1121

¹³⁹ James J. Choi et al., *Defined Contribution Pensions: Plan Rules, Participant Choices, and the Path of Least Resistance*, in 16 TAX POLICY AND THE ECONOMY 67, 68 (James M. Poterba, ed. 2002);

sighted and boundedly rational nature, there was a limited response to these incentives and under-investment in retirement.¹⁴⁰ Soft BLE scholars advocated reforming the choice architecture such that individuals were enrolled in employer retirement programs by default.¹⁴¹ As expected, the switch to an opt out system significantly increased the participation rate in retirement programs.¹⁴² Perversely, however, the switch actually *decreased* the total amount of money saved by many employees.¹⁴³ Most individuals participated but did so only at the low default rate (often 3 or 4%); under the old opt-in system, fewer people participated, but when they did so they tended to choose a much higher savings rate (7.5% on average).¹⁴⁴

The soft BLE approach to retirement savings is thus revealed as a disappointment from both the libertarian and paternalist perspective. For libertarians, opt-out systems preserve the illusion of choice; for the vast majority who just go along with the default, it functions as a *de facto* mandate. It is far from clear why this should satisfy those philosophically committed to individual freedom.¹⁴⁵ For paternalists, the policy failed because it was an poorly-designed mandate. Many of those who went along with the default likely presumed that they were “covered” by the program, when in reality their savings rate was far too low for many workers. Worse, there is every reason to believe that many of those who did opt out so for the very short-sighted reasons that the policy was intended to ameliorate. A well-

Korobkin & Ulen, *supra* note 115, at 1121 (“[T]he government provides billions of dollars of tax incentives each year to encourage individuals to invest even more of their incomes in retirement savings accounts, such as IRAs”); Bubb & Pildes, *supra* note 13, at 1607.

¹⁴⁰ See Bubb & Pildes, *supra* note 13, at 1610 (“[T]he best evidence indicates, stunningly, that every dollar of tax expenditure on retirement savings increases total savings by only one cent.”); Choi et al., *supra* note 139, at 72 (survey results showing that most people believe their own retirement savings to be inadequate).

¹⁴¹ SUNSTEIN & THALER, *supra* note 14, at 105–114.

¹⁴² See, e.g., Choi et al., *supra* note 139, at 74–78 (finding that automatic enrollment increases participation rates in employer retirement programs by approximately 50 percentage points); Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q.J. ECON. 1149, 1159–60 (2001) (automatic enrollment increased participation rates from 37% to 86%).

¹⁴³ See Bubb & Pildes, *supra* note 13, at 1618–19.

¹⁴⁴ See *id.* at 1622–24.

¹⁴⁵ Indeed, committed libertarians have developed critiques of libertarian paternalism along these lines. See generally Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. L. REV. 1033, 1068–69 (2012) (arguing that libertarian paternalism neglects the process value of liberty); Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245, 1247 (2005) (arguing that libertarian paternalism fails to justify its choice of welfare over liberty); Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. L. REV. 1165, 1166 (2003) (arguing that libertarian paternalism fails to account for the full costs of constraining choice).

designed direct mandate would, in theory, more effectively encourage retirement savings with fewer social costs.¹⁴⁶

C. *Analogies to Copyright Law*

The account of human behavior presented by BLE raises provocative questions about copyright law. Though the analogy is imperfect, there are notable comparisons between the historical experience in American copyright law and retirement savings. Both are premised on the idea of the government encouraging a particular socially-desired behavior (artistic creation; saving money for the future). Both relied primarily on traditional economic incentives (a limited property right; tax deductions) to encourage this behavior. Empirically, both saw a lackluster response to those economic incentives, at least in part as a result of behavioral failures. Both recently switched from a primarily opt-in system to an opt-out system, with the goal of encouraging greater response to the incentives.

While this comparison is intriguing, we need to dig a bit deeper to understand the relevance that behavioral economics might have for copyright.¹⁴⁷ As will become clear, there are many behavioral phenomena that may affect artistic creation and dissemination. Because these effects do not always cut in the same direction, it is difficult to make predict their significance *a priori*. Like human behavior itself, the reality is complicated and will certainly depend on context. Nonetheless, it is helpful to understand these failings in order to understand the role that paternalism does, and could, play in American copyright law.

What are the specific behavioral failures that might apply to artistic creation and dissemination? Broadly speaking, such behavioral failures come into play during (at least) two separate stages in the life of a copyrighted work. The first stage relates to *creation* of the work. How do humans respond to copyright and other incentives to create? The second stage relates to the potential *assignment* of the work. It is very common for authors to license or assign their rights to intermediaries such as

¹⁴⁶ Bubb & Pildes, *supra* note 13, at 1625–27, 1632–33.

¹⁴⁷ Some important work has been done on this applying BLE to copyright, though it is also fair to say the application of behavioral economics of copyright is in its early stages. *See, e.g.*, Buccafusco & Sprigman, *supra* note 114 (experimental evidence showing significant endowment effect for creators); Jeanne C. Fromer, A *Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441 (2010) (concluding that protectability standards in patent and copyright law primarily accord with psychological findings on creativity); Avishalom Tor & Dotan Oliar, *Incentives to Create Under A "Lifetime-Plus-Years" Copyright Duration: Lessons from A Behavioral Economic Analysis for Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 437 (2002) (arguing that bounded rationality accounts for copyright's life-based duration scheme).

publishers, and there are sound reasons to do so.¹⁴⁸ Are authors acting rationally in their assignments, and are we satisfied with the distributive consequences of these transfers?

Creation. The creation stage relates to copyright's efficacy as an incentive. The most important (if controversial) effect here is the phenomenon of intrinsic motivation. As we have seen, many individuals engage in acts of creation for reasons of challenge, impulse, self-actualization, or simply its own enjoyment—regardless of the extrinsic incentive.¹⁴⁹ Moreover, there is evidence suggesting that offering economic incentives can sometimes “crowd out” intrinsic motivation and thus be detrimental to creativity.¹⁵⁰ It is therefore a serious concern that copyrights are being granted to many individuals who did not need it as an incentive to create.

There is also the problem of how human difficulty with judgments under uncertainty affects creation incentives. Copyright does not directly guarantee authors any economic reward; instead, the return is dependent on success in the marketplace.¹⁵¹ Furthermore, artistic creation is a “hits market”: Most creation is of limited commercial value, but some is extremely valuable, and the value of artistic work prior to exploitation is usually unpredictable.¹⁵² The behavioral effect here point in opposite directions. On the one hand, consistent with the notion of bounded willpower, we might expect authors to discount the mere possibility of an uncertain future reward, which tends to undermine the efficacy of copyright as an incentive.¹⁵³ On the other hand, humans can systematically overestimate small probabilities. There is thus a potential “lottery effect” whereby the low-probability possibility of big reward induces *over*-investment in creation.¹⁵⁴

Assignment. There are also several behavioral effects in play at the time of copyright assignment. This stage relates to an author's decision to license or transfer the copyright in her artistic work to an intermediary, such as a publisher or record

¹⁴⁸ Barnett, *supra* note 10, at 401–02.

¹⁴⁹ See *supra* Part I.B.

¹⁵⁰ See *supra* notes 57–61 and accompanying text; see also Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity*, 86 NOTRE DAME L. REV. 1999, 2000 (2011) (“Experimental cognitive research also reveals that intrinsic motivation is highly conducive to creative productivity, while purely extrinsic motivation tends to decrease creative function.”).

¹⁵¹ See *supra* note 49 and accompanying text.

¹⁵² See Barnett, *supra* note 10, at 398–99.

¹⁵³ See *supra* notes 116–117 and accompanying text.

¹⁵⁴ Cf. Dennis Crouch, *The Patent Lottery: Exploiting Behavioral Economics for the Common Good*, 16 GEO. MASON L. REV. 141, 141–45 (2008) (observing, in patent context, evidence that creators overestimate the chance that their inventions will be successful).

company. As we shall see, many of the paternalistic interventions in copyright are motivated by a perception that authors lack bargaining power in this negotiation.¹⁵⁵ Behavioral failures offer several possible reasons for this imbalance. The most prominent effect is the issue of bounded willpower. Humans tend to be very present-biased and short-sighted, and will sometimes pursue immediate gratification at the expense of long-term interests.¹⁵⁶ There is therefore a concern that authors will discount the possibility of future revenue to sell their rights for a minimal upfront payment.¹⁵⁷ Second, even if the initial assignment was a result of equal bargaining, people also have social preferences. They prefer allocation of goods that tend to equal welfare gains as opposed to maximize total social welfare.¹⁵⁸ This provides an additional motivation to protect authors from one-sided assignments of copyright.

III. PATERNALISM IN COPYRIGHT LAW

What lessons does the increasing embrace of paternalism by BLE scholars have for copyright law? As an initial matter, it is important to observe that, in practice, American copyright law is not consistent in its view of authors as rational actors. Despite the dominance of the incentive model—which envisions authors as neoclassical economic actors able to respond to copyright’s incentive to create—many specific aspects of American copyright law are best understood as motivated by paternalism. To a surprising degree, the law provides protection for authors who, it supposes, are not fully capable of protecting their own interests. These provisions include authors’ right to terminate transfers, limitations on copyright alienability, the elimination of formalities, and moral rights. This Part explains these aspects of copyright law and argues that paternalism is a natural way to understand these provisions.

To be sure, many of the provisions described in this Part have competing explanations. The congressional intent behind these laws is often contested or unreliable, as copyright lawmaking is characterized by messy—some would say unprincipled—compromises among interest groups.¹⁵⁹ Whether motivated by a

¹⁵⁵ See *infra* Part III.

¹⁵⁶ See *supra* notes 116–117 and accompanying text.

¹⁵⁷ Interestingly, there is a behavioral effect—the endowment effect—cutting in the opposite direction: People tend to overvalue goods that are initially allocated to them; they value it more just because they happen to own it. See Rabin, *supra* note 11, at 14. In the IP context, because copyrights are initially awarded to creators, this means that authors may value their own works more than potential purchasers. See Buccafusco & Sprigman, *supra* note 114 (providing experimental evidence in support of the endowment effect for intellectual creators).

¹⁵⁸ See *supra* note 119 and accompanying text.

¹⁵⁹ See generally Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 860–61 (1987) (reviewing the “troubling” legislative history of the 1976 Copyright Act and

perception of authors as short-sighted or simply lacking bargaining power, the overall effect of these provisions is to protect authors from the consequences of their actions by limiting their choices, and therefore these laws fit the definition of paternalism as used herein.¹⁶⁰ Such copyright-specific protections go far beyond the usual contractual protections such as duress or unconscionability, and their benefits flow to authors whether or not there was any actual bargaining imbalance. These provisions are thus in tension with the strictly rational author supposed by the incentive model.

A. *Termination of Transfers*

The right to terminate copyright transfers is one of the more complex features of American copyright law, and some history is necessary to understand its design. Since the earliest American copyright law, the author has retained a reversionary interest in her copyright.¹⁶¹ Historically, this reversionary interest was structured as a renewal term. For example, under the 1909 Copyright Act, an author was entitled to an initial 28-year term of copyright, followed by an additional 28-year term should she choose to renew the copyright.¹⁶² Because the renewal term was considered a “new estate,” the rights vested in the author even if she had transferred the original copyright.¹⁶³ Congress reasoned that renewal rights were necessary because “[i]t 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 . . . [the Committee] felt that it should be the exclusive right of the author to take the renewal term.”¹⁶⁴

A 1943 Supreme Court ruling significantly altered this structure. In *Fred Fisher Music Co. v. M. Witmark & Sons*, the Court held that authors were free to

concluding it represents not congressional deliberation but a “complicated and delicate compromise” among industry representatives).

¹⁶⁰ See *supra* Part II.B and note 124 (defining paternalism in the context of soft and hard behavioral law and economics).

¹⁶¹ The reversionary interest can be traced back to the original copyright statute, the British Statute of Anne, 8 Ann. ch. 19 (1710) (“[T]he sole Right of Printing or Disposing of Copies *shall Return to the Authors* thereof, if they are then Living, for another Term of Fourteen Years.”) (emphasis added). See generally R. Anthony Reese, *Reflections on the Intellectual Commons: Two Perspectives on Copyright Duration and Reversion*, 47 STAN. L. REV. 707, 727 n.91 (1995) (reviewing early history of reversion rights).

¹⁶² Copyright Act of 1909, Pub. L. No. 60-349, §§ 23–24, 35 Stat. 1075, 1080–81 [hereinafter “1909 Act”]. If the copyright was not renewed, the work would fall into the public domain. See Sprigman, *supra* note 17, at 493.

¹⁶³ See Reese, *supra* note 161, at 727 (“[R]ather than merely extending the duration of the original copyright, [renewal] granted a ‘new estate,’ in the terminology of some courts, to the author or her designated successors.”).

¹⁶⁴ H.R. REP. No. 60-2222, at 14 (1909).

assign away their future renewal rights during the initial copyright term.¹⁶⁵ Justice Frankfurter’s majority opinion invoked the freedom of contract and mocked the claim that Congress intended renewal to protect authors:

The policy of the copyright law, we are told, is to protect the author—if need be, from himself—and a construction under which the author is powerless to assign his renewal interest furthers this policy. We are asked to recognize that authors are congenitally irresponsible, that frequently they are so sorely pressed for funds that they are willing to sell their work for a mere pittance, and therefore assignments made by them should not be upheld. . . .

If an author cannot make an effective assignment of his renewal, it may be worthless to him when he is most in need. Nobody would pay an author for something he cannot sell. We cannot draw a principle of law from the familiar stories of garret-poverty of some men of literary genius.¹⁶⁶

The *Fred Fisher* holding undermined the practical effectiveness of the renewal term as a benefit for authors, as it became common practice for publishers to demand that authors assign the future renewal rights in any deal.¹⁶⁷

Despite Frankfurter’s dismissal of a congressional intent to protect “irresponsible” authors, Congress clarified in the 1976 Copyright Act that this was more or less what it had in mind.¹⁶⁸ In 1976, Congress replaced the renewal system with a unitary copyright term.¹⁶⁹ In place of renewal, the 1976 Act granted authors or their heirs an “inalienable” right to terminate (i.e., to rescind) prior agreements

¹⁶⁵ 318 U.S. 643, 657 (1943).

¹⁶⁶ *Id.* at 656–57.

¹⁶⁷ See *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 185 (1985) (White, J., dissenting) (“This right of renewal was intended to allow an author who had underestimated the value of his creation at the outset to reap some of the rewards of its eventual success. That purpose, however, was substantially thwarted by this Court’s decision in *Fred Fisher Music Co. v. M. Witmark & Sons.*”); STAFF OF H.R. COMM. ON THE JUDICIARY, 87TH CONG., REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 53 (Comm. Print 1961) (“It has become a common practice for publishers and others to take advance assignments of future renewal rights.”).

¹⁶⁸ See Peter S. Menell & David Nimmer, *Pooh-poohing Copyright Law’s “Inalienable” Termination Rights*, 57 J. COPYRIGHT SOC’Y USA 799, 805 (2010) (describing the 1976 revision as a congressional “override” of *Fred Fisher*); *Mills Music*, 469 U.S. at 172–73 (“[T]he termination right [of the 1976 Act] was expressly intended to relieve authors of the consequences of ill-advised and unremunerative grants . . .”).

¹⁶⁹ Copyright Act of 1976, Pub. L. No. 94-553, § 302, 90 Stat. 2541, 2572–73 (codified as amended at 17 U.S.C. § 302 (2012)).

transferring the copyright in their works.¹⁷⁰ The specific statutory provisions are rather complicated, and depend upon when the work was created and when the original transfer of copyright was made. But in short, the 1976 Act provides authors with the right to revoke an initial transfer or license of copyright, decades after that contract was made, “notwithstanding any agreement to contrary.”¹⁷¹ In plain language, an author who signed away his rights to a publisher, record company, or the like, can sometimes get his copyright back.

To be more precise, § 203 of the 1976 Act permits an author to terminate a contract transferring or licensing his copyright when the initial transfer was made after 1978, the effective date of the Act.¹⁷² The termination must be made within a five-year window beginning 35 years after the date of the original agreement.¹⁷³ Section 304 applies to grants of renewal rights executed prior to 1978.¹⁷⁴ In that case, the termination must be effectuated in a five-year window beginning 56 years from the date that the copyright was initially secured.¹⁷⁵ Under both provisions, works made for hire and grants made via will are not terminable.¹⁷⁶ Procedurally, an author must serve a written advance notice upon the original grantee asserting their termination right.¹⁷⁷ If the author has died, the termination rights pass to a series of statutorily designated heirs (e.g., the author’s surviving spouse or children).¹⁷⁸

The rationale behind the termination right is disputed.¹⁷⁹ The main account asserts that termination is necessary because of authors’ generally weak bargaining

¹⁷⁰ See 17 U.S.C. §§ 203, 304(c); *Stewart v. Abend*, 495 U.S. 207, 230 (1990) (“The 1976 Copyright Act provides a single, fixed term, but provides an inalienable termination right.”).

¹⁷¹ 17 U.S.C. §§ 203(a)(5), 304(c)(5).

¹⁷² *Id.* § 203(a)–(b).

¹⁷³ *Id.* §203(a)(3). In the case of a grant covering the publication of the work, the period begins 35 years from the date of publication. *Id.*

¹⁷⁴ *Id.* § 304(c).

¹⁷⁵ *Id.* § 304(c)(3).

¹⁷⁶ *Id.* §§ 203(a), 304(c).

¹⁷⁷ *Id.* §§ 203(a)(4), 304(c)(4).

¹⁷⁸ *Id.* §§ 203(a)(2), 304(c)(2).

¹⁷⁹ Compare, e.g., James Grimmelmann, *The Worst Part of Copyright: Termination of Transfers*, PRAWFSBLAWG (Feb. 14, 2012), <http://prawfsblawg.blogs.com/prawfsblawg/2012/02/the-worst-part-of-copyright-termination-of-transfers.html> (“Termination of transfers rests instead on a view that authors are ‘congenitally irresponsible’ to the point that they can’t be trusted to make licensing decisions for themselves.”) with Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the “Inalienable” Right to Terminate*, 62 FLA. L. REV. 1329, 1329 (2010) (“Many believe that Congress based the [termination] policy on a paternalistic desire to protect creative individuals lacking business acumen. This Article demonstrates that Congress was much more concerned with the valuation problem inherent in creative works.”). The rationale is also slightly different for § 304 terminations as opposed to § 203 terminations. Section 304 covers rights—an *ex post* copyright term extension—that neither the original author or the grantee would have anticipated in the original contract. For these rights, Congress decided that the term extension “windfall” ought to go to authors.

power in the initial transfer, either because of a lack of business savvy, the market power of publishers, or short-sightedness.¹⁸⁰ This was the account invoked rhetorically by Justice Frankfurter in *Fred Fisher*, and it is still often cited.¹⁸¹ However, the bargaining power account suffers from a few weaknesses. First, it is only weakly supported by the legislative history.¹⁸² Second, it rests on questionable factual presumptions of authors as romantic “starving artists.”¹⁸³ Most fundamentally, termination rights as structured in the 1976 Act do not actually do anything to improve the bargaining position of most authors.¹⁸⁴ Instead, termination actually weakens the initial bargaining position for the majority of authors, for the benefit of the tiny minority who create works that are still valuable 35 years (or more) down the road.¹⁸⁵

A second rationale for termination, more firmly grounded in the legislative history, relies on the uncertainty in determining the value of a copyrighted work

See H.R. REP. No. 94-1476, at 140 (1976) (“The arguments for granting rights of termination are even more persuasive under § 304 than they are under § 203; the extended term represents a completely new property right, and there are strong reasons for giving the author, who is the fundamental beneficiary of copyright under the Constitution, an opportunity to share in it.”).

¹⁸⁰ *See* Guy A. Rub, *Stronger than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49, 79 (2013) (“The main historical justification for inalienable profit-sharing arrangements is heavily rooted in a romantic notion of the starving artist. The argument is that artists are so poor, weak, unsophisticated, and stressed, and thus in such a ‘poor bargaining position’ [vis-à-vis publishers].”)

¹⁸¹ *See supra* notes 165–167 and accompanying text; Loren, *supra* note 179, at 1346 (2010) (“The image of authors as poor businessmen continues to affect courts’ understanding of the termination rights.”) (citing cases).

¹⁸² *See* Reese, *supra* note 161, at 733 (“Thus, the 1976 Act’s drafters [explained that termination] was premised not on a perception of authors as poor businesspeople, but on a perception of creative works as inherently difficult to value before exploitation in the market.”); *accord* Loren, *supra* note 179, at 329. *But see* STAFF OF H.R. COMM. ON THE JUDICIARY, 87TH CONG., REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 54 (Comm. Print 1961) (citing that “most authors are not represented by protective organizations and are in a relatively poor bargaining position” as a reason for termination provisions).

¹⁸³ *See* Rub, *supra* note 180, at 81–87 (arguing that the “starving artist myth” lacks factual support).

¹⁸⁴ *See id.* at 83–84 (“Termination rights and *droit de suite* do not seem to effectively address the poverty of artists); *id.* at 86 (“[E]ven if the concern of unequal sophistication and experience level requires legal intervention, solutions should focus on the time of negotiation.”).

¹⁸⁵ *See* Kate Darling, *Occupy Copyright: A Law & Economic Analysis of U.S. Author Termination Rights*, 63 BUFF. L. REV. 147, 150 (2015) (“[I]ntroducing a termination right will effect price changes and risk allocation, essentially creating a lottery that rewards a small subset of authors, but reducing individual gains for the majority.”); Loren, *supra* note 179, at 1352–53 (“[T]ermination rights will be exercised only for very successful works with commercial staying power,” and “[i]f the bargained for price for the transfers includes a discount for the possibility of termination, then unsuccessful authors may be suffering at the cost of extremely successful ones.”); Grimmelmann, *supra* note 179 (“[Termination] bestows large windfalls on a very small number of [authors], at immense administrative cost.”).

before it is exploited.¹⁸⁶ As the 1976 House committee report stated, termination “is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.”¹⁸⁷ But this reason, too, is not a fully persuasive account of the termination right. To be sure, there is great unpredictability as to the value of an artistic work before it is exploited.¹⁸⁸ But this uncertainty is shared equally by authors and publishers.¹⁸⁹ Moreover, a rational author would *want* to transfer this risk to the publisher, who—as a holder of a diverse portfolio of works—is much better suited to bear it.¹⁹⁰ All termination accomplishes, on this account, is to reallocate some of the risk back to the author and make the initial assignment of copyright less valuable when authors sell it to publishers.¹⁹¹ Finally, if an author instead wishes to share the risk presented by uncertain valuation with the publisher, royalty arrangements are an easy way to accomplish this by contract.¹⁹²

Regardless of which rationale one accepts, termination rights are paternalistic because they operate to protect the author from the consequences of his own contracting decisions. The two accounts merely differ in the *reason* that the state offers this protection. On the weak bargaining power account, paternalism is perhaps more obvious: this rationale presumes a short-sighted, unsophisticated, or ill-advised

¹⁸⁶ Although less frequently cited, early legislative history of renewal offers a third rationale: support for the author’s family after his death. *See* 7 REG. DEB. app. at cxix (1831) (“[Should author die,] his family stand in more need of the only means of subsistence ordinarily left to them.”). This intent is clearly present in the current termination law’s mandatory statutory beneficiaries, which override any heirs that the author specifies by will. *See* 17 U.S.C. §§ 203(a)(2), 304(c)(2) (2012). The family support rationale tends to be invoked only rarely today, perhaps given its origin in discarded gender roles.

¹⁸⁷ H.R. REP. NO. 94-1476, at 124 (1976).

¹⁸⁸ *See generally* Barnett, *supra* note 10, 398–44 (arguing that creative markets characterized by a high risk of commercial failure).

¹⁸⁹ *See* Rub, *supra* note 180, at 87–88 (“[I]t is unclear why [valuation problems] should justify a termination mechanism, especially an inalienable one. From an economic perspective, prior to commercialization the work might be a risky investment. It is risky for the seller, but it is similarly risky for the buyer.”).

¹⁹⁰ *See* Darling, *supra* note 185, at 202 (“[T]he uncertain future value of artistic works makes it in the author’s interest to allocate the risk of success or failure to the publisher. It is one of the reasons why publishers exist in the first place.”); Rub, *supra* note 180, at 87–88 (arguing that it is “socially efficient” to transfer the risk to the publisher because the “intermediary’s portfolio typically includes many artists, and thus the aggregate risk it faces is considerably smaller”)

¹⁹¹ *See* Darling, *supra* note 185, at 165–66 (“[Termination] makes the initial assignment of a copyright less valuable to publishers, decreasing the price they are willing to pay to authors upfront” and “reallocates some of the risk of future success or failure back to the author”).

¹⁹² *See* Grimmelmann, *supra* note 179 (“The uncertain valuation problem can be addressed with better contract drafting.”); Melville B. Nimmer, *Termination of Transfers under the Copyright Act of 1976*, 125 U. PA. L. REV. 947, 950 (1977) (“[The uncertain valuation account of termination] is somewhat less persuasive when the original sale is on a percentage royalty basis so that the author automatically shares in whatever returns his or her work may bring.”).

author that must be protected from foolishly signing away his rights for a pittance. But paternalism of a different sort is present on the uncertain valuation account. If we presume that the author is rational and facing uncertainty as to whether his creation will be a valuable “hit” or a flop, there are great reasons why he would *want* to transfer this risk to the publisher in return for other compensation. The publisher, is much better suited to handle the risk—indeed, this is an important reason that publishers exist in the first place.¹⁹³ Termination, by mandating that the author cannot transfer *all* of this risk, thus overrides the preferences of some authors in a paternalistic fashion.¹⁹⁴

There is also a tension with the incentive model’s vision of the author on either account of termination. Again, this tension is clear on the weak bargaining power rationale. If authors are so short-sighted that they cannot effectively bargain in the highly economic context of a negotiation, it is fair to question how responsive they are to copyright’s incentive to create. In other words, if authors make bad deals because they neglect the possible future revenue from their work, it seems unlikely that future revenue was the reason for creation.¹⁹⁵ A parallel conflict arises on the uncertain valuation rationale. If authors are unable to effectively value their own works, this same unpredictability would seem to undermine the original copyright incentive. How powerful is the incentive to create if it can only give an author a ticket to a lottery with rather unfavorable odds?¹⁹⁶ It is quite difficult to justify how termination rights could in themselves provide any additional incentive to create. Termination will only benefit the very few authors whose work remains successful 35 years after creation. If valuation is uncertain, these authors have no clear idea *ex ante* whether they will be one of the lucky few. Termination could thus offer only a very weak and oddly-structured incentive.¹⁹⁷

¹⁹³ See *supra* note 190.

¹⁹⁴ See Reese, *supra* note 161, at 736 (“The rationale offered for reversion in both 1909 and 1976 was the perceived need to protect authors from their disadvantageous bargaining position relative to copyright purchasers. [A libertarian] should view this rationale for reversion as wholly illegitimate, for he clearly rejects such paternalism.”).

¹⁹⁵ Grimmelmann, *supra* note 179 (“As an incentive for authorship, [termination is] a terrible one. If authors make bad up-front deals because they’re unmindful of future revenues, it follows that those same future revenues won’t operate as an *ex ante* incentive for creativity.”).

¹⁹⁶ Cf. Zimmerman, *supra* note 1, at 38 (“[R]ecent studies make it quite clear that modern creators generally have little more realistic hope than Victorian poets of earning much in the way of remuneration for their acts of creation.”).

¹⁹⁷ Darling, *supra* note 185, at 150 (“[U]ncertainty, the length of copyright terms, and the long time period between right assignments and the termination possibility may mitigate the potential for positive effects on creation incentives.”).

B. *Limitations on Alienability*

Copyright law limits authors' ability to transfer their copyright in a number of ways beyond the termination right. For example, assignments of exclusive rights cannot be made orally or implied through conduct. For purposes of whether a work can be treated as "made for hire" (and therefore belonging to an employer), the law imposes limits on who can be deemed an employee, and which types of commissioned works can be designated as made for hire by contract. Finally, some courts take a restrictive view as to whether an author can transfer rights in media not yet developed at the time of the initial transfer of copyright. This Section reviews these subtler, but nonetheless important and paternalistic limitations on the alienability of copyright.

The Writing Requirement for Copyright Transfers. Section 204(a) of the Copyright Act provides that any transfer of ownership of copyright must be "in writing and signed by the owner of the rights."¹⁹⁸ Although this is sometimes described as a "statute of frauds" for copyright, its language and effect is broader.¹⁹⁹ Rather than merely requiring a writing as evidence of an agreement, unwritten copyright assignments are simply "not valid."²⁰⁰ Copyright's requirement of signed writing has therefore been characterized as an "absolute" or "super" statute of frauds.²⁰¹ The traditional exceptions to the statute of frauds, such as estoppel, do not apply.²⁰² Some courts go so far as to reject an *ex post* writing confirming a transfer of copyright if that writing was not "contemporaneous" with the transfer.²⁰³

The purpose of § 204(a) is also broader than that of a typical statute of frauds. Section 204(a) is designed to "provide protection for the author" from fraudulent claims of transfer and to promote predictability and certainty in copyright

¹⁹⁸ 17 U.S.C. § 204(a) (2012). The definition section makes clear that the writing requirement includes any whole or partial "transfer" of exclusive rights, but does not apply to a "nonexclusive license," which can be made orally. *Id.* § 101; *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 556 n.2 (9th Cir. 1990) (Kozinski, J.).

¹⁹⁹ *Pamfiloff v. Giant Records*, 794 F. Supp. 933, 936 (N.D. Cal. 1992) ("Section 204(a) is analogous to a statute of frauds . . .").

²⁰⁰ 17 U.S.C. § 204(a).

²⁰¹ WILLIAM F. PATRY, 2 PATRY ON COPYRIGHT § 5:106 (2010) ("The writing requirement is absolute, admitting of no exception"); Victor H. Polk, Jr. & Joshua M. Dalton, *Equitable Defenses to the Invocation of the Copyright Act's Statute of Frauds Provision*, 46 J. COPYRIGHT SOC'Y USA 603, 608 (1998) (noting that "the courts . . . have turned Section 204(a) into a 'super' statute of frauds," but criticizing this interpretation).

²⁰² *Pamfiloff*, 794 F. Supp. at 937 (holding that equitable estoppel does not apply to § 204(a)).

²⁰³ *See Konigsberg Int'l Inc. v. Rice*, 16 F.3d 355, 357 (9th Cir. 1994) (Kozinski, J.) (holding that to satisfy § 204(a) a writing must be "executed more or less contemporaneously with the agreement"); *but see Barefoot Architect, Inc. v. Bunge*, 632 F.3d 822, 828–30 (3rd Cir. 2011) (rejecting the "contemporaneous" requirement).

ownership.²⁰⁴ But it is also designed to prevent inadvertent transfers of the copyright by the author, whether fraudulent or not.²⁰⁵ In other words, the “purpose of the writing requirement is thus to effectuate a congressional policy of protecting authors, even from themselves if need be.”²⁰⁶ This has the effect of tipping the analysis “somewhat in favor of the original holder of the copyrighted material.”²⁰⁷

Limitations on “Works Made for Hire.” Congress also attempted to protect authors from the inadvertent or unwanted loss of rights in the Copyright Act’s “work made for hire” provisions. The usual rule for copyright ownership is that, upon creation, the copyright vests in the author; however, when a work is “made for hire” the copyright vests initially in the “employer or other person for whom the work was prepared.”²⁰⁸ The Act specifies “two mutually exclusive means” by which a work can be designated as made for hire—one for employees and one for independent contractors.²⁰⁹ For employees, the person creating the work must be an actual “employee” under agency law, and the work must be “within the scope of his or her employment.”²¹⁰ For independent contractors, as we will see, the rules are much stricter.²¹¹

Those strict provisions were a response to some courts’ broad interpretation of the 1909 Copyright Act, which presumptively granted the copyright to the hiring party whenever a work was created at her “instance and expense.”²¹² That test applied to employees and freelance artists alike, and required only that the hiring party “induces the creation of the work and has the right to direct and supervise the manner in which the work is carried out.”²¹³ This rule threatened to presumptively

²⁰⁴ *Pamfiloff*, 794 F. Supp. at 937 (“[W]e interpret Section 204(a) to provide protection for the author and creator of copyrighted material against fraudulent claims of transfer.”); *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990) (“[S]ection 204 enhances predictability and certainty of copyright ownership.”)

²⁰⁵ *Effects Assocs.*, 908 F.2d at 557 (“Section 204 ensures that the creator of a work will not give away his copyright inadvertently . . .”).

²⁰⁶ PATRY, *supra* note 201, at § 5:106.

²⁰⁷ *Pamfiloff*, 794 F. Supp. at 937.

²⁰⁸ 17 U.S.C. § 201(a)–(b) (2012).

²⁰⁹ *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 743 (1989) [hereinafter “*CCNV*”].

²¹⁰ 17 U.S.C. § 101(1); *CCNV*, 490 U.S. at 740–41 (holding that the term “employee” in the work made for hire provisions is defined by the common law of agency).

²¹¹ *See infra* notes 216–218 and accompanying text.

²¹² *Brattleboro Publ’g Co. v. Winmill Publ’g Corp.*, 369 F.2d 565, 567 (2d Cir. 1966); *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965).

²¹³ *Martha Graham Sch. & Dance Found. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 635 (2004) (Newman, J.). The history of the “instance and expense” test reveals that it lacked much basis in law when it was created, *see id.* at 634–35 n.17, and it has been much criticized. *See Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 139 n.8 (2d Cir. 2013) (acknowledging criticism).

transfer copyright to the hiring party for almost all specially commissioned works, as these features are present in most hiring relationships.²¹⁴

The 1976 Act’s “made for hire” provisions put in place specific requirements and restored some protection to freelance authors. The new rule draws a sharp line between employees and independent contractors and protects authors in two ways. First, it requires that authors actually *be* “employees”—not just so designated by contract—for the first prong of the “made for hire” definition to apply.²¹⁵ Second, for commissioned works, it allows works to be designated as made for hire by contract only in a very narrow set of circumstances: (i) the work must be “specially ordered or commissioned”;²¹⁶ (ii) it must be one of nine specified types of works;²¹⁷ and (iii) there must be a signed written agreement designating it as “made for hire.”²¹⁸

The legislative history reveals this provision was motivated by a concern that “freelance authors lacked the bargaining power to reject contractual clauses designating works as made for hire.”²¹⁹ For some categories of works—including, for example, most sound recordings and literary works—the law simply does not allow freelance creators to sign away their authorship rights. While this does not prevent freelancers from transferring their copyright to the hiring party, they remain the legal author of the work and thus retain the termination right, at least.²²⁰ The

²¹⁴ See PATRY, *supra* note 201, at § 5:48 (“[The instance-and-expense test] decisions were on a fast track into turning all specially ordered or commissioned works presumptively into works made for hire, and without any agreement between the parties, oral or written.”).

²¹⁵ See *CCNV*, 490 U.S. at 742–43.

²¹⁶ See *Playboy v. Dumas*, 55 F.3d 549, 561–62 (2d Cir. 1995).

²¹⁷ The statute lists the types as “[1] a contribution to a collective work, [2] as a part of a motion picture or other audiovisual work, [3] as a translation, [4] as a supplementary work, [5] as a compilation, [6] as an instructional text, [7] as a test, [8] as answer material for a test, or [9] as an atlas.” 17 U.S.C. § 101(2) (numbering added). “The unifying feature of these works is that they are usually prepared at the instance, direction, and risk of a publisher or producer.” *CCNV*, 490 U.S. at 741.

²¹⁸ 17 U.S.C. § 101(2). This writing requirement serves similarly author-protective functions as the general provision, § 204(a). See PATRY, *supra* note 201, at § 5:48 (“The principal purpose of the writing requirement for specially ordered or commissioned works is to protect non-work-for-hire authors”); see *supra* notes 204–207 and accompanying text.

²¹⁹ Litman, *supra* note 159, at 890; see also Marci Hamilton, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. PA. L. REV. 1281, 1311 (1987) (“The unequal bargaining position of the parties . . . and the commissioning party’s ability to dictate if and when work-made-for-hire contracts will be imposed on the artist all combine to deprive freelance artists of fair compensation for their works.”).

²²⁰ Even if they cannot use a contract to designate themselves as the author, the hiring party can of course demand that the artist transfer his copyright interest, so long as it is via a signed written agreement. 17 U.S.C. § 204(a). However, unlike a true “work made for hire,” the creator will remain the original legal author, and therefore be entitled to termination rights. *Id.* §§ 209(a), 304(c). The duration of the copyright will also be measured by different rules. *Id.* § 302(a), (c).

work made for hire provisions are thus designed to protect authors from the expansive 1909 Act rule and serve “a pro-actively paternalistic function.”²²¹

Limitations on Transfers in “New Media.” A final area in which some courts limit alienability to protect the author relates to whether an author can assign rights to technologies not yet in existence when the transfer is made. The issue is often called the “new-media problem” or “new-use problem.”²²² Despite the name, it is actually a very old problem: past courts struggled, for example, to determine whether a grant of rights in a silent film extended to “talkies,” or whether rights to distribute a motion picture extended to video cassettes and VCRs.²²³ Most courts agree that unequivocal language granting rights to “all technologies now known or later developed” will be enforced.²²⁴ But there is considerable conflict when the new medium of distributing a work is only ambiguously covered by the contractual language, and the newness of the technology makes it likely that neither party had it in mind at the time of the original contract. Thus the Second Circuit was recently called upon to address whether a license to distribute a literary work “in book form” also granted rights to eBooks.²²⁵

In the United States, there are two competing approaches to the new media problem.²²⁶ Some courts, such as the Second Circuit, treat the issue as purely “neutral” contract interpretation and will find a grant of rights in new technologies whenever that is the more reasonable reading of the contractual language.²²⁷ Other

²²¹ Corey Field, *Their Master’s Voice? Recording Artists, Bright Lines, and Bowie Bonds: The Debate over Sound Recordings as Works Made for Hire*, 48 J. COPYRIGHT SOC’Y USA 145, 147 (2000).

²²² See, e.g., PATRY, *supra* note 201, at § 5:115 (reviewing case law of the “new-media problem”); *Boosey & Hawkes Music Publishers v. Walt Disney Co.*, 145 F.3d 481, 486 (2d Cir. 1998) (Leval, J.) (“Disputes about whether licensees may exploit licensed works through new marketing channels made possible by technologies developed after the licensing contract — often called ‘new-use’ problems — have vexed courts . . .”).

²²³ See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.10[B] nn. 2–6 (reviewing history of new-use cases).

²²⁴ See, e.g., *Reinhart v. Wal-Mart Stores, Inc.*, 547 F. Supp. 2d 346, 354–55 (S.D.N.Y. 2008) (agreement to distribute records “by any method now or hereafter known” includes digital music rights); accord PATRY, *supra* note 201, at § 5:115; Kate Darling, *Contracting About the Future: Copyright and New Media*, 10 NW. J. TECH. & INTELL. PROP. 485, 491 (2012) (“[In contrast to Europe,] the voluntary transfer of new use rights is neither forbidden nor prohibitively restricted in the United States.”).

²²⁵ *Random House v. Rosetta Books LLC*, 283 F.3d 490, 491 (2d Cir. 2002).

²²⁶ See *Boosey*, 145 F.3d at 486–87 (reviewing “two principal approaches” to new-use issues); Darling, *supra* note 224, at 490–91 (same).

²²⁷ *Boosey*, 145 F.3d at 487 (“In our view, new-use analysis should rely on neutral principles of contract interpretation rather than solicitude for either party. . . . What governs under *Bartsch* is the

courts—including the Ninth Circuit, historically—employ a pro-author presumption and will only divest authors of rights in new media if the contract contains the “clearest language.”²²⁸ These courts follow, albeit in a weaker form, the general rule in continental Europe, where many countries categorically prohibit transfers of rights in future media or impose strict requirements on such assignments.²²⁹

The U.S. courts that apply a pro-author presumption often invoke the weak bargaining position of “impecunious” authors as the rationale.²³⁰ In *Cohen v. Paramount Pictures*, for example, the Ninth Circuit reasoned that license agreements should be interpreted “in accordance with the purposes underlying federal copyright law,” which it understood as “enacted for the benefit of the composer.”²³¹ Given this purpose, and that neither party knew of the new technology, the publisher “should not now ‘reap the entire windfall’ associated with the new medium.”²³² In Europe, as well, notions of fairness and the bargaining weakness of authors motivate author-protective new media rules.²³³

In summary, copyright law limits alienability in number of ways. For reasons analogous to the termination right, these rules can be understood as a variety of author-protective paternalism. These provisions are justified by the weak bargaining position of authors, either because of structural factors, or authors’ short-sightedness,

language of the contract. If the contract is more reasonably read to convey one meaning, [that meaning controls].”).

²²⁸ *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 949 (9th Cir. 1954) (“Such doubt as there is should be resolved in favor of the composer. The clearest language is necessary to divest the author from the fruit of his labor.”); *see also* *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851, 854 (9th Cir. 1988). Recently, the Ninth Circuit has walked back its pro-author rule somewhat. *Welles v. Turner Entm’t Co.*, 505 F.3d 728, 735 n.3 (9th Cir. 2007) (stating that there is no “presumption against applying a grant of right in ‘motion pictures’ to new technologies.”).

²²⁹ *See generally* *Darling*, *supra* note 224, at 488–89 (overviewing European law on this issue and observing that Germany (prior to 2008), Spain, Belgium, Greece, Poland, Hungary, and the Czech Republic prohibit all transfers in future media and that France permits it only when the contractual language is express, specific and provides for author royalties).

²³⁰ *See Boosey*, 145 F.3d at 487 (“Because licensors are often authors—whose creativity the copyright laws intend to nurture—and are often impecunious . . . there is sometimes a tendency in copyright scholarship and adjudication to seek solutions that favor licensors over licensees.”).

²³¹ *Cohen*, 845 F.2d at 854 (quoting *Jondora Music Publ’g Co. v. Melody Recordings, Inc.*, 506 F.2d 392, 395 (3d Cir. 1975)).

²³² *Id.* (quoting Comment, *Past Copyright Licenses and the New Video Software Medium*, 29 UCLA L. REV. 1160, 1184 (1982)).

²³³ *See Darling*, *supra* note 224, at 497 (“[A]ccording to lawmakers in countries that prohibit the grant of new use rights, the main goal is to allocate to authors the financial returns of their artistic works. . . . [S]ome fear that creators might transfer their rights to new uses to publishers because creators face a variety of bargaining disadvantages . . .”).

poverty, and/or romantic nature. If motivated by a vision of the author as short-sighted, impecunious, and romantic, they raise the question of such an author is actually responsive to copyright's extrinsic incentive to create. If motivated instead by authors' lack of market power, they may be less paternalistic in motivation but remain paternalistic in operation. These provisions limit the contractual freedom of authors for their own supposed best interest—limitations that at least some authors may not want. For example, in return for other compensation, some authors may wish to transfer rights in new media, or forfeit termination rights by designating a commissioned work as made for hire. Either way, they are in tension with the strictly rational economic actor presumed by the incentive model.

C. *The Elimination of Formalities*

For most of its history (1790 to 1976), American copyright law has required particular procedures—collectively called “formalities”—in order to assert and maintain a copyright.²³⁴ First, in order to claim copyright in the first instance, the author was required to register the work with the federal government and send a copy of the work to the Register of Copyright.²³⁵ Second, upon publication, the author was required to place appropriate notice of copyright on the work, such as the familiar © symbol.²³⁶ Third, at the end of a relatively brief initial term (14 or 28 years), the author had to renew her copyright if she wished to claim an additional term.²³⁷ The result of noncompliance with these formalities was often harsh: the author would effectively lose her copyright, either because the right would fail to arise, the copyright would become unenforceable, or the work would fall into the public domain.²³⁸

From an international law perspective, these formalities were an anomalous feature of American law.²³⁹ Beginning in the 1976 Act and culminating in the 1989 Berne Convention Implementation Act (the BCIA), Congress eliminated mandatory

²³⁴ See generally Sprigman, *supra* note 17, at 490–94 (reviewing history of formalities); Golan v. Holder, 123 S. Ct. 873, 882 n.11 (2012) (“From the first Copyright Act until late in the 20th century, Congress conditioned copyright protection on compliance with certain statutory formalities. The most notable required an author to register her work, renew that registration, and affix to published copies notice of copyrighted status”).

²³⁵ See, e.g., 1909 Act at §§ 1, 10, 12, 53–55.

²³⁶ *Id.* §§ 9–11.

²³⁷ *Id.* §§ 23–24; see also *supra* notes 161–163 and accompanying text (discussing copyright renewal).

²³⁸ Sprigman, *supra* note 17, at 493.

²³⁹ NIMMER & NIMMER, *supra* note 223, at § 7.01[A] (“For decades, the outstanding feature distinguishing United States copyright law from that of the rest of the world has been its emphasis on formalities.”).

copyright formalities to conform to international standards.²⁴⁰ Renewal was eliminated entirely in favor of a unitary copyright term with a termination right.²⁴¹ Although current law provides some incentives to encourage registration, deposit, and notice, failure to comply no longer causes a loss of copyright protection.²⁴² The practical impact was the loss of the “filtering” function that mandatory formalities had previously served.²⁴³ From the perspective of the incentive model, formalities make a good deal of sense because they ensure that copyright is given only to those works for which copyright mattered, as evinced by the affirmative steps the authors took to claim copyright.²⁴⁴ If the author did not bother to assert a copyright, it seems likely that copyright was not the impetus for its creation (or, at least, that the work was of minimal commercial value). The data on registration and renewals show that, in practice, the majority of published authors did not bother to register their works, and few registered works were renewed.²⁴⁵

The elimination of formalities was driven by several different justifications. Congress’s primary purpose in the BCIA was practical: it wanted to comply with the main international IP treaty to ensure reciprocal protection of U.S. copyrights abroad, and thus gain considerable economic and trade benefits.²⁴⁶ It is thus more relevant to know what motivated the creation of the Berne Convention’s article 5(2), the international anti-formality provision.²⁴⁷ Some claim that formalities are simply inconsistent with the “natural rights” conception of copyright predominant in continental Europe.²⁴⁸ Others argue that the Berne approach was principally

²⁴⁰ See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853. See also Copyright Amendments Act of 1992, Pub. L. No. 102-307, §§ 101–102, 106 Stat. 264, 264–66.

²⁴¹ See *supra* notes 169–173 (explaining termination of transfers right).

²⁴² 17 U.S.C. §§ 102(1), 401(d), 402(d), 407(a), 408(a) (2012). *Golan v. Holder*, 123 S. Ct. 873, 878 (2012) (“Congress no longer requires [formalities] as prerequisites to copyright protection.”).

²⁴³ Sprigman, *supra* note 17, at 502–03 (explaining the filtering function of mandatory formalities).

²⁴⁴ See *id.* at 514 (“In sum, this initial filter separating commercially valuable works from commercially valueless works helped focus the pre-1976 copyright regime in a way that maximized the incentive value of copyright while reducing the social costs.”).

²⁴⁵ See *supra* notes 18, 81–82 and accompanying text.

²⁴⁶ Orrin G. Hatch, *Better Late Than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT’L L.J. 171, 171–72 (1989) (emphasizing the economic benefits of international conformity and reciprocal treatment for American intellectual property).

²⁴⁷ Berne Convention for the Protection of Literary and Artistic Works art. 5(2), Sept. 9, 1886, 1161 U.N.T.S. 3 (most recently amended Sept. 28, 1979), available at World Intellectual Property Organization, WIPO-Administered Treaties, http://www.wipo.int/treaties/en/text.jsp?file_id=283698.

²⁴⁸ See Daniel Gervais & Dashiell Renaud, *The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How to Do It*, 28 BERKELEY TECH. L.J. 1459, 1470–71 (2013) (“Many Berne signatories took a *droit d’auteur* approach Under such a “natural” or “human rights” regime, requiring compliance with a set of state-prescribed formalities as a precondition to the

motivated by administrative difficulties for authors who had to comply with multiple, cumbersome formalities in different nations in order to reach an international market.²⁴⁹ Finally, there was concern that formalities had become a “trap for the unwary,” resulting in unfair forfeitures of copyright when a careless author failed to comply or made a mistake in attempted compliance.²⁵⁰

Especially on this final rationale, the elimination of the formalities can be understood as a paternalistic aspect of copyright. Although they are technical, the former provisions requiring notice and registration were neither very expensive nor difficult to comply with. Yet, historically, the majority of authors chose not to comply. The reasons for noncompliance were no doubt varied: some were unaware of the obligation, some did not think their work valuable enough, some neglected it, some “lost track”²⁵¹—and some simply did not wish to claim copyright. The elimination of formalities protects authors from the consequence of their own noncompliance, whether willing or merely careless. It thus prevents unwanted forfeitures at the significant social cost of awarding copyright by default to all authors—whether they want it or not.

The elimination of formalities is also in stark tension with the incentive model, regardless of which concern motivated Berne article 5(2). If copyright was the primary motivation for an author’s creation—as the incentive model supposes—such an author would likely take the time to comply with registration and notice requirements. The fact that, historically, many authors did not, suggests that copyright was not a primary factor motivating their creativity. It follows that our current no-formality system is awarding copyrights by default to many authors that did not need the copyright incentive to create.

exercise of rights is difficult to justify.”); *supra* notes 93–99 (overviewing natural rights theories of copyright).

²⁴⁹ See, e.g., Michael W. Carroll, *A Realist Approach to Copyright Law’s Formalities*, 28 BERKELEY TECH. L.J. 1511, 1518–19 (2013) (rejecting the moral rights account and noting that “authors and publishers faced overly cumbersome copyright formalities, operating in an increasingly international market”); accord Sprigman, *supra* note 17, at 539–44.

²⁵⁰ *Golan v. Holder*, 123 S. Ct. 873, 882 n.11 (2012) (“[American copyright] formalities drew criticism as a trap for the unwary.”); accord Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311, 342–43 (2010); H.R. REP. NO. 94-1476, at 143 (1976) (“One of the strongest arguments for revision of the present statute has been the need to avoid the arbitrary and unjust forfeitures now resulting from unintentional or relatively unimportant omissions or errors in the copyright notice.”)

²⁵¹ See Ginsburg, *supra* note 250, at 342 (“[N]ot all those who fail to [comply] do so because they do not care about their works. Some lose track; some are ignorant of the obligation, particularly if they reside in foreign countries which do not impose formalities; some may find the fees prohibitive.”)

D. *Moral Rights and VARA*

{in progress: This section will review the paternalistic aspects of the moral rights provisions of the Visual Artists Rights Act and explain their tension with the incentive model, in a similar fashion to Parts III.A–C.}

IV. PATERNALISTIC COPYRIGHT

{in progress: I have several different directions that I may go in this section. Please keep in mind these thoughts are quite tentative and by no means fully considered.

This Part will consider what copyright law would look like if we take seriously the critiques of the incentive model and the vision of the author supposed by copyright’s paternalistic provisions. Most critiques of the incentive model presume that if authors are not actually motivated by the copyright incentive, then the government should simply cease granting copyrights. An equally natural move, however, is toward a paternalistic copyright regime. This view accepts that authors, like all of us, may be short-sighted, lack bargaining power, and thus may not effectively look out for their own interests. If this is the case, then they are likely in need of greater protection than the relatively weak provisions overviewed in Part III.

In other words, if one is serious about the incentive model and its vision of an economically rational author, it is difficult to justify the paternalistic provisions of Part III. It would seem logical to—at a minimum—reinstate formalities and renewal to ensure that copyright actually only goes to those who were motivated by its extrinsic incentive to create. The evidence for intrinsic motivation is clear at least with respect to a significant number of creators. On the incentive model’s account, granting copyright by default to this group would seem to only create social costs.

If one instead takes the more realistic view of authors as only boundedly rational like the rest of us, there is significant work to do on both the incentive and author-protective fronts. As to author protection, we would probably want stronger medicine than the provisions of current law. The most prominent of these, termination, is virtually meaningless to the vast majority of authors, benefiting (the heirs of) a tiny minority and arguably reducing the bargaining power of most authors. To be effective, termination would need to operate on a much shorter time scale. But there may be more direct ways to effectuate the ultimate end—the perceived unfairness when an author has a big “hit” but got only a pittance for it—without a cumbersome termination process. We could, for example, mandate a minimum royalty rate, or mandate a maximum number of years for an assignment, or (as is the case in parts of Europe) provide that assignments are voidable by the author

if the terms are unreasonably onerous or disproportionate. (Though of course these regulations have their own significant costs.)

The limitations on alienation are not much better at actually protecting authors. They do not do anything to directly solve the problem that supposedly motivates them—the weak bargaining position of authors. Writing requirements and the like may help a bit, but they do not address any of the underlying structural problems (publishers’ oligopoly market power, uncertain valuation, authors as short-sighted, impecunious, ill-advised, etc.). In most cases, they simply mean that author will sign away his rights for a pittance, as opposed to doing so orally. Like soft BLE interventions, they tend to fail for the very same reasons that motivated the regulation. The work made for hire provisions operate mainly to preserve termination rights, which are not very valuable when the majority of works have only a few years of commercial value.

On the incentive side, if we accept the critique that many authors are intrinsically motivated or imperfectly rational, our current means of encouraging creativity seem rather ill-designed. This does not mean we should eliminate copyright, the rather drastic conclusion reached by some commentators. But it may mean that relying on a lottery-like system of uncertain economic incentives is not the most effective way to encourage creation. Authors may not need incentives to create, but they do need support to engage in their livelihood. We might consider, then, directly funding artistic creation—a certain and present-time incentive that even us boundedly rational humans can respond to.

These thoughts are not intended to be purely normative. It is merely to observe that copyright law ought to be consistent with its own rationales and in its view of the author. By partially incorporating aspects of different systems we risk getting the costs (but not the benefits) of both. That is, we have the costs to the public and to new creators of a paternalistic, moral rights-style copyright (expansive rights granted by default) but without its purported benefit (actual securing fair compensation for authors). If, instead, the paternalistic provisions of copyright are mere lip service to author protection, it only lends support to the cynical view that the law is principally designed to benefit intermediaries and merely invokes the author to justify its excesses.}