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# COPYRIGHT DISTRIBUTIVE INJUSTICE

DANIEL BENOLIEL

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## COPYRIGHT DISTRIBUTIVE INJUSTICE

DANIEL BENOLIEL\*

10 YALE J. L. & TECH. 45 (2007)

### ABSTRACT

*Copyright law is not distinctively designed for redistribution. And yet, numerous fairness scholars and other critics of the economics paradigm claim that copyright law should be based upon redistribution, rather than efficiency. Redistributive justice goals intrinsically play a role in the design of the copyright commons, but whether copyright law should itself serve as the means of achieving such goals is truly questionable.*

*This Article argues instead that, subject to narrow exceptions, copyright law doctrine should not promote redistributive justice concerns and that other, more efficient areas of law such as taxation and welfare programs should do so. This argument accords with the prevailing welfare economics approach to copyright jurisprudence and emphasizes the latest Peer-to-Peer (P2P) file sharing litigation.*

*This Article focuses on the leading classes of individuals subject to the distributive injustice that has emerged on the internet: poor infringers, poor creators and wealthy copyright holders. This Article argues that, for at least these three classes of individuals, redistribution through copyright law offers no efficiency advantage over redistribution through the income tax system and other legal transfer mechanisms.*

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## COPYRIGHT DISTRIBUTIVE INJUSTICE

**A. INTRODUCTION**

Copyright law, like so many normative theories concerning social arrangements, seems to have bent into the dialectics of egalitarianism.<sup>1</sup> Copyright law is often perceived as a social arrangement, but it is primarily concerned with governing the processes of creation and invention and not simply the proprietary legal entitlements it bestows. However, copyright jurisprudence may have reached a point where it can no longer be said to merely preserve freedom of speech,<sup>2</sup> maintain the public sphere,<sup>3</sup> protect subsequent generations of authors,<sup>4</sup> promote liberty and freedom.<sup>5</sup> Instead, it now is said to support direct distributive justice ends through what is considered a fair distribution of proprietary legal entitlements.

Within copyright jurisprudence, distributive justice functions as a normative claim about the fair allocation of proprietary entitlements among original copyright owners and other individuals in society.<sup>6</sup> An

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<sup>1</sup> See, e.g., Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW* 121, 121-66 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006) (describing the relationship between the copyright holder and the public in copyright law as a social phenomenon manifested through creative practice, as distinguished from the allocation of legal entitlements); Shubha Ghosh, *The Fable of the Commons: Exclusivity and the Construction of Intellectual Property Markets*, 40 U.C. DAVIS L. REV. 855, 864 (2007) (“Distributive justice must be considered”).

<sup>2</sup> See Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2445 (1998).

<sup>3</sup> See, e.g., JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* 18-20 (1996); Yochai Benkler, *Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 360-64 (1999); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990).

<sup>4</sup> See, e.g., Dawn C. Nunziato, *Justice Between Authors*, 9 J. INTELL. PROP. L. 219, 287 (2002) (arguing that the rights of each generation of authors, including the rights that they might attempt to assert through private ordering measures, be limited for the benefit of subsequent generations of authors).

<sup>5</sup> See Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 27-28 (2001); Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of ‘Rights Management,’* 97 MICH. L. REV. 462, 481-95 (1998).

<sup>6</sup> LOUIS KAPLOW & STEPHEN SHAVELL, *FAIRNESS VERSUS WELFARE* 121 (2002); John E. ROEMER, *THEORIES OF DISTRIBUTIVE JUSTICE* 1-2 (1996); Kenneth J. Arrow, *Distributive*

examination of the academic literature and copyright litigation reveals that distributive justice arguments are appearing with greater frequency and receiving greater deference in copyright jurisprudence. When faced with this expansion of the importance of distributive justice in copyright doctrine, one is reminded of Will Kymlicka's fatalistic chronicle of how, under the burden of time, this becomes the fate of all too many contemporary political theories.<sup>7</sup> This Article argues against the prospect of increasing deference to distributive justice in copyright law.

Distributive justice arguments appear most prominently in litigation involving copyright holders, such as motion picture studios, recording companies, songwriters, music publishers and even venture capitalists.<sup>8</sup> These copyright holders are accused of trying to maximize their own profits, or even efficiency at large, at the expense of disadvantaged users, creators and amateurs. In recent copyright file-sharing litigation, those who have defended distributive concerns, or sought to extend copyright protection, have often bemoaned the alleged decline in profits that record companies have suffered<sup>9</sup>—and that Hollywood may face—thereby advancing distributive justice arguments.<sup>10</sup> Like other social theories

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*Justice and Desirable Ends of Economic Activity*, in ISSUES IN CONTEMPORARY MACROECONOMICS AND DISTRIBUTION 134, 135 (George R. Feiwel ed., 1985); Russell B. Korobkin & Thomas S. Ulen, *Efficiency and Equity: What Can Be Gained by Combining Coase and Rawls?*, 73 WASH. L. REV. 329, 332 (1998) (distinguishing between distributive justice and efficiency).

<sup>7</sup> See WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 53-96 (2d ed. 2002); see also AMARTYA K. SEN, INEQUALITY REEXAMINED 12 (1992) (“[E]very normative theory of social arrangement that has at all stood the test of time seems to demand equality of *something*.”).

<sup>8</sup> See Brief of the National Venture Capital Association as Amicus Curiae in Support of Respondents, 2005 WL 497759, at \*17 & n.14, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 1605 (2005) (No. 04-480) (“[T]he indeterminate reach of such secondary liability means that not merely start-up capital is at risk, but also the personal wealth of start-up’s officers, directors, and investors.”).

<sup>9</sup> See, e.g., *Recording Industry to Begin Collecting Evidence and Preparing Lawsuits Against File ‘Sharers’ Who Illegally Offer Music Online*, RIAA PRESS ROOM, June 25, 2003, <http://www.riaa.com/> (quoting Recording Industry Association of America President Cary Sherman as saying, “We cannot stand by while piracy takes a devastating toll on artists, musicians, songwriters, retailers and everyone in the music industry.”). For evidence that services like Napster have in fact hurt record company profits, see Stan Liebowitz, *Will MP3 Downloads Annihilate the Record Industry? The Evidence so Far* (June 2003) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=414162](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=414162) (last visited Nov. 14, 2007).

<sup>10</sup> See, e.g., Ronald Grover & Heather Green, *Hollywood Heist: Will Tinseltown Let Techies Steal the Show?*, BUS. WK., July 14, 2003, at 74, 76 (reporting that Hollywood executives are concerned that the movie industry may suffer the same loss of profits suffered by the music industry). The RIAA has admitted regarding its lawsuits against music downloaders, including minors, that, “[w]hen you fish with a net, you sometimes are going to catch a few dolphin.” Dennis Roddy, *The Song Remains the Same*,

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advancing equality concerns, distributive justice arguments seem to have gained jurisprudential imprimatur in copyright law despite the tension of such arguments with the existing copyright jurisprudence goal of economic efficiency.<sup>11</sup>

The economic efficiency paradigm of copyright law is challenged by numerous fairness scholars and other critics. These scholars and critics emphasize the importance of distributive justice within copyright jurisprudence. They are concerned with the distribution of funding, subsidies and other financial gains copyright may allocate to less deserving creators at the expense of original copyright owners.<sup>12</sup> They argue that intellectual property law, and, more specifically, copyright law, should emphasize fair distribution over efficiency. This distributive justice conception of copyright has given rise to a plethora of side arguments: that copyright law is remarkably similar to tax law, as intellectual property monopoly is, in effect, a negative tax intended to reward innovation;<sup>13</sup> that copyright law should be analogized to corporate welfare<sup>14</sup> or social welfare;<sup>15</sup> or that the constitutional “encouragement” theory should be

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PITTSBURGH POST-GAZETTE, Sept. 14, 2003, available at <http://www.post-gazette.com/columnists/20030914edroddy0914p1.asp> (last visited Nov. 14, 2007).

<sup>11</sup> Cf. Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877 (1976) (discussing different takes of distributive justice within private law).

<sup>12</sup> See, e.g., Shubha Ghosh, *supra* note 1; Shubha Ghosh, *The Merits of Ownership; or, How I Learned to Stop Worrying and Love Intellectual Property*, 15 HARV. J.L. & TECH. 453, 481, 482 (2002) (concerned with enabling content creation by poor creators); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1539-1540, 1562-1564 (2005) (concerned with the distributive effects of copyright law as they relate to poor creators). For less precise usage of copyright distributive arguments, see Tom W. Bell, *Author's Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229, 229 (2003) [hereinafter Bell, *Author's Welfare*]; Tom W. Bell, *Indelicate Imbalancing in Copyright and Patent Law*, in COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE 1, 6-7 (Adam Thierer & Clyde Wayne Crews Jr. eds., 2002) [hereinafter Bell, *Indelicate Imbalancing*] (analogizing welfare laws to copyright law to argue that extensive copyright protections are unfair and inefficient); Dan Hunter & F. Gregory Lastowka, *Amateur-To-Amateur*, 46 WM. & MARY L. REV. 951, 953-54 (2004) (discussing a concern for amateur and poor creators in the “marketplace of ideas”).

<sup>13</sup> See, e.g., Ghosh, *The Merits of Ownership*, *supra* note 12, at 482.

<sup>14</sup> See Bell, *Author's Welfare*, *supra* note 12, at 229; Bell, *Indelicate Imbalancing*, *supra* note 12, at 6-7.

<sup>15</sup> See Bell, *Author's Welfare*, *supra* note 12, at 229; Bell, *Indelicate Imbalancing*, *supra* note 12, at 6-7.

applied to copyright.<sup>16</sup> There are additional indirect takes on copyright distributive justice primarily within academic writings, notably within the work of Shaffer Von Houweling,<sup>17</sup> Ghosh<sup>18</sup> and Bell.<sup>19</sup> Such scholars assert that the distribution of wealth generated by limited creativity may be more important to public policy than encouraging efficiency<sup>20</sup> or cultural well-being.<sup>21</sup> Recently, this fairness analysis has begun appearing in areas of copyright jurisprudence including the fair use doctrine,<sup>22</sup> the extension terms analysis,<sup>23</sup> the substantial non-infringing use test for secondary liability,<sup>24</sup> and even in the application of antitrust laws to

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<sup>16</sup> See Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1414 (1989) (referencing U.S. CONST. art. I, § 8, cl. 8).

<sup>17</sup> Von Houweling, *supra* note 12, at 31-34.

<sup>18</sup> Ghosh, *supra* note 13, at 475-82.

<sup>19</sup> Bell, *Author's Welfare*, *supra* note 12, at 229, 231; Bell, *Indelicate Imbalancing*, *supra* note 12, at 6-7; see also Eldred v. Ashcroft, 537 U.S. 186, 223-26 (2003) (Stevens, J., dissenting). *But see, e.g.*, Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 994 n.65 (2001); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 613 (1982) (stating that inefficiencies from compulsory terms and from redistribution through taxation “involve exactly the same kinds of waste,” leaving a difficult empirical question as to which is preferable); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 508 (1980) (arguing that, because taxation as well as contractual regulation has efficiency costs, determining the preferable means of redistribution raises an empirical question that “must be resolved on a case-by-case basis”).

<sup>20</sup> Jeffrey L. Harrison, *Rationalizing the Allocative/Distributive Relationship in Copyright*, 32 HOFSTRA L. REV. 853, 854 (2004).

<sup>21</sup> Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669, 1673 (2003); see discussion *infra* Part B.3.

<sup>22</sup> 17 U.S.C. § 107 (2000) (fair use limitations on exclusive rights to copyright); see, e.g., Ghosh, *supra* note 1, at 882-883; Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387, 485-86 (2003); see also Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1628-30 (1982) (arguing that because the costs of contracting and of verifying end-users' income may prevent copyright owners from giving price breaks to low income consumers, such costs are a type of market failure).

<sup>23</sup> See Joseph A. Lavigne, *For Limited Times? Making Rich Kids Richer Via the Copyright Term Extension Act of 1996*, 73 U. DET. MERCY L. REV. 311, 351 (1996) (criticizing the Copyright Extension Act 1996 on distributive justice grounds for disfavoring wealthy artists).

<sup>24</sup> Ghosh, *supra* note 1, at 884-85 (“The doctrine of secondary liability attempts to accommodate the creation of new technologies that may undermine the economic return of existing technology and intellectual property holders. The task of balancing the old

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copyright law.<sup>25</sup> With regard to copyrighted material on the internet, critics have recently claimed that copyright law should serve the purpose of transferring segments of proprietary legal entitlements from artists and distributors to the public at large.<sup>26</sup> As will be described herein, work in legal academia already addresses the possibility of redistribution through copyright law, rather than by progressive taxation,<sup>27</sup> welfare law,<sup>28</sup> transfer payments such as regulation of broadcasters and telecommunications companies to increase access in poor neighborhoods,<sup>29</sup> or even employment opportunity programs through labor law.<sup>30</sup> Likewise, although the Supreme Court's analyses continue to emphasize the provision of economic incentives to produce new works, an "author's rights," or fairness-based strain of analysis has also emerged, such as in *Harper &*

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with the new necessarily requires consideration of how to divide resources between two competing groups.").

<sup>25</sup> *Id.* at 886-88 (arguing that antitrust law and intellectual property share the common goals of distributive justice by ensuring the proper distribution of resources among creators, between creators and users, and across generations).

<sup>26</sup> *See, e.g.,* Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 305 (2002); Ghosh, *supra* note 12, at 481-82; *see also* discussion *infra* Part B.3.

<sup>27</sup> *But see* Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equality: A More Equitable View*, 29 J. LEGAL STUD. 797 (2000) (arguing that legal rules should redistribute to the less well-off even if there is a redistributive tax system in place). In the context of contract law, see the seminal work of Anthony T. Kronman, *supra* note 19, at 475. It is important to distinguish between contractually-based redistribution like that referred to by Kronman, and disputes between unfamiliar persons, where parties are, in effect, strangers prior to the dispute. The victims in such cases are third parties.

<sup>28</sup> For an example of welfare legislation, see Aid for Families with Dependent Children (AFDC), a program effectively abolished by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C.). Other programs falling within the scope of "social welfare" and "welfare" as used herein include those created by the Food Stamp Act, 7 U.S.C. §§ 2011-36 (2006) (creating a program to improve diets of members of low-income households).

<sup>29</sup> Economists have long considered government expenditures together with taxation, recognizing government transfer payments as both increased income for the individuals receiving them and also negative taxes from a fiscal perspective. *See* RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 216, 295 (5th ed. 1989).

<sup>30</sup> *See, e.g.,* MATTI TUOMALA, *OPTIMAL INCOME TAX AND REDISTRIBUTION* (1990); WILLIAM VICKREY, *AGENDA FOR PROGRESSIVE TAXATION* (1972); James A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 REV. ECON. STUD. 175 (1971).



*Row, Publishers Inc. v. Nation Enterprises*,<sup>31</sup> or more recently in Justice Souter's famous *Grokster* file-sharing opinion.<sup>32</sup>

When referring to copyright distributive justice herein, one must distinguish between distribution among creators, which is non-rivalrous and stands outside the scope of the real property/intellectual property comparison, and distribution among a given creator and his or her product end-users, which is rivalrous in a manner similar to real property. Between creators and product end-users, the key issue is the allocation and distribution of final created products. Simply put, in the intellectual property commons, the distributional conflict between creators and users is similar to that between suppliers and demanders of resources in other arenas.<sup>33</sup>

Traditionally, copyright law was not seen as a vehicle for promoting distributive justice or "individual well being."<sup>34</sup> Instead, copyright in the United States originated from the concept of economic efficiency and has been largely interpreted as a device for maximizing social utility.<sup>35</sup> Three major economic approaches compete to define economic efficiency within copyright jurisprudence. The first approach, known as the "incentive theory," has been articulated by Landes and Posner as the maximization of incentives for creativity combined with the minimization of monopoly losses.<sup>36</sup> According to the incentive theory, the

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<sup>31</sup> 471 U.S. 539, 539-49 (1985). The Supreme Court, using a fairness-based analysis, found that there was no fair use of excerpts taken from President Ford's memoirs prior to their publication.

<sup>32</sup> *MGM Studios Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764, 2776 & n.8 (U.S. 2005) (referencing *Eldred v. Ashcroft*, 537 U.S. 186, 223-26 (2003) (Stevens, J., dissenting)); Brief for Sovereign Artists et al. as Amici Curiae Supporting Petitioners at 11, *Grokster*, 125 S. Ct. 2764 (No. 04-480); Van Houweling, *supra* note 12. *Grokster*, Sovereign Artists' Brief, and Van Houweling all support a fairness approach to distributive justice while arguing for the widespread distribution of creative works.

<sup>33</sup> See, e.g., MARGARET JANE RADIN, *CONTESTED COMMODITIES* 46-53 (1996); Jean-Pascal Benassy, *On Competitive Market Mechanisms*, 54 *ECONOMETRICA* 95 (1986).

<sup>34</sup> See 1 PAUL GOLDSTEIN, *COPYRIGHT* § 1.13.2 (2d ed. 2003) (discussing the purpose of copyright); 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.03(A) (2002) (same).

<sup>35</sup> See GOLDSTEIN, *supra* note 34. But see Congress's early characterization of copyright as tax, as it appeared in Lord Macaulay's statement that copyright is a "tax on readers for the purpose of giving a bounty to writers." 8 THOMAS MACAULAY, *THE WORKS OF LORD MACAULAY* 195, 201 (Lady Trevelyan ed. 1875). For modern day references to this particular controversy, see, for example, Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 *COLUM. L. REV.* 503, 507 (1945); and Hunter & Lastowka, *supra* note 12, at 953-54.

<sup>36</sup> WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 69 (2003).

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positive effects of copyright's encouragement of creativity by protection against copying balances outweigh the negative effects of discouraging creation by raising the initial cost of creation through restrictions on the use of existing copyrighted sources.<sup>37</sup>

The second definition of efficiency originates from Harold Demsetz's signaling effects theory.<sup>38</sup> Demsetz argues that the copyright (and patent) systems play the important role of optimizing patterns of productivity by letting potential producers of intellectual products know what consumers want and thus channeling productive efforts in directions most likely to enhance consumer welfare.<sup>39</sup> Demsetz's work suggests that copyright law, viewed as a set of clearly defined legal proprietary entitlements, lowers the transaction costs of agreements between copyright holders and end-users and thus increases efficiency.

The final and least relevant of the three definitions of efficiency is related to the second. Its objective is to eliminate or reduce the tendency of intellectual-property rights, with an emphasis on patent rights, to foster duplicative or uncoordinated inventive activity.<sup>40</sup> Presently, as Samuel Oddi points out, there is currently no general economic theory that integrates the three takes.<sup>41</sup> Until that challenge is successfully met, the power of the utilitarian approach to provide guidance to lawmakers will be sharply limited.<sup>42</sup> Nonetheless, courts have traditionally adopted the incentive theory approach within copyright jurisprudence.<sup>43</sup>

Thus, the economic rationale of copyright jurisprudence largely ignores independent distributive justice questions and instead focuses on

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<sup>37</sup> *Id.*

<sup>38</sup> Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969). In the past decade, theorists have argued that recognition of this function justifies expanding the copyright and patent systems. See, e.g., PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY* 178-79 (1994).

<sup>39</sup> See GOLDSTEIN, *supra* note 38.

<sup>40</sup> See Partha Dasgupta, *Patents, Priority and Imitation or, The Economics of Races and Waiting Games*, 98 ECON. J. 66, 74-78 (1988); Partha Dasgupta & Joseph Stiglitz, *Uncertainty, Industrial Structure and the Speed of R&D*, 11 BELL J. ECON. 1, 12-13 (1980); Mark F. Grady & J.I. Alexander, *Patent Law and Rent Dissipation*, 78 VA. L. REV. 305 (1992).

<sup>41</sup> See A. Samuel Oddi, *Un-Unified Economic Theories of Patents—The Not-Quite-Holy Grail*, 71 NOTRE DAME L. REV. 267, 270 (1996).

<sup>42</sup> See, e.g., William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1661, 1698-1744 (1988); Glenn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483 (1996).

<sup>43</sup> See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

incentivizing the end-results of creativity, namely, works of art.<sup>44</sup> Some scholars have reached this conclusion by arguing that intellectual property, like real property, is necessary because of prospecting.<sup>45</sup> As does real property, copyright law upholds a set of legal rights that determines what can or cannot be done with a given entitled resource, as opposed to protecting the liberal democratic process of the employment of that resource.<sup>46</sup>

Copyright scholars, until recently, have not attempted to link copyright policy to the broader theory of distributive justice.<sup>47</sup> Thus, the prevailing philosophy of the Copyright Clause<sup>48</sup> is that encouraging individual effort through the possibility of personal gain is the most effective way to advance public welfare. Courts have traditionally held that when technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of its constitutional incentives,<sup>49</sup> in reference to three main interpretative rules: consideration of the common sense of the statute,<sup>50</sup> its purpose,<sup>51</sup> and the practical consequences of suggested interpretations.<sup>52</sup>

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<sup>44</sup> See, e.g., *Aiken*, 422 U.S. at 156; Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 291-321 (1970); Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 428 (2002).

<sup>45</sup> See Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265, 267-69 (1977).

<sup>46</sup> *Id.*

<sup>47</sup> Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 WM. & MARY L. REV. 33, 104 (2004).

<sup>48</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>49</sup> U.S. CONST. art. I, § 8, cl. 8.; 17 U.S.C. § 1 (2006); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975); *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984); *Alameda Films SA De CV v. Authors Rights Restoration Corp. Inc.*, 331 F.3d 472, 482 (5th Cir. 2003); *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1391 (6th Cir. 1996); *Creative Technology, Ltd. v. Aztech Sys. PTE., Ltd.*, 61 F.3d 696, 707 (9th Cir. 1995); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527 (9th Cir. 1992); *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992); *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 711 (2d Cir. 1992); *Hubbard Broadcasting, Inc. v. Southern Satellite Sys., Inc.*, 77 F.2d 393, 398 (8th Cir. 1985); *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 780 F. Supp. 1283, 1291 (N.D. Cal. 1991); *Encyclopedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156, 1167 (W.D.N.Y. 1982).

<sup>50</sup> See *Hubbard Broadcasting*, 777 F.2d at 399; see also, 18 C.J.S. *Copyrights* § 4 (2007).

<sup>51</sup> 18 C.J.S. *Copyrights* § 4 (2007).

<sup>52</sup> *Id.*

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This Article argues that, subject to narrow exceptions, copyright law should not promote distributive justice concerns, and that other, more efficient, means of redistribution, such as taxation and welfare, should address them. It does so in accordance to the prevailing utilitarian interpretative approach to copyright jurisprudence, with emphasis on the latest Peer-to-Peer (P2P) file sharing litigation. Part B examines the three leading classes of distributive injustice: 1) enrichment of poor infringers, 2) enrichment of poor creators and 3) diminishment of the wealth of copyright industries. Part C discusses three leading critiques of rationalizations of distributive justice based on libertarianism, liberty and well-being theory, along with some narrow forms of efficiency analysis within the copyright discourse.<sup>53</sup> Part D offers the strongest specific criticism of copyright distributive justice based on welfare economics. The argument proceeds on four fronts, examining: 1) distributive justice's failure to promote egalitarian redistribution of proprietary legal entitlements between parties, resulting in a disparity between litigating and non-litigating parties; 2) distributive justice's expensive adverse effects; 3) the inability of distributive justice to produce precise consequences; and 4) the social costs distributive justice inefficiently imposes.

In Part E, I conclude that it is undesirable to build egalitarian commitments into copyright doctrine because it is often impossible to effectively redistribute income through copyright law and, even when it is possible, redistribution through the government's tax and transfer system is less discriminatory, cheaper and more precise.

## B. CLASSES OF COPYRIGHT DISTRIBUTIVE INJUSTICE

Three leading classes of distributive injustice are cited in the controversy over the latest P2P file sharing litigation: 1) enrichment of poor infringers; 2) enrichment of poor creators; and 3) diminishment of the wealth of copyright industries.

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<sup>53</sup> Lewinsohn-Zamir and Dagan offer a fourth personality theory argument within the context of takings doctrine. This argument, however, is less relevant to American copyright jurisprudence that largely rejected this civil-law based personality theory. Compare Daphna Lewinsohn-Zamir, *Compensation for Injuries to Land Caused by Planning Authorities: Towards a Comprehensive Theory*, 46 U. TORONTO L.J. 47, 55 (1996) with Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 787 (1999). According to the Lewinsohn-Zamir, however, copyright owners would be more harmed when a certain work of art of theirs is unlawfully reallocated, than when a similar value is taken from their total wealth. See Lewinsohn-Zamir, *supra*, at 55.

## 1. ENRICHMENT OF POOR INFRINGERS

Appeals to the unfortunate status of targeted copyright infringers are aimed at gaining public sympathy for the infringers. In reports on lawsuits against alleged infringers, the infringers' financial, professional, social and marital status, as well as age, sex and health conditions are frequently mentioned. For example, news accounts have pointed out that among file-sharing copyright violators are a twelve-year-old girl,<sup>54</sup> a sixty-six-year-old retired school teacher,<sup>55</sup> and a seventy-one-year-old grandfather.<sup>56</sup> Reports have also detailed alleged infringers' unfortunate health or emotional conditions, describing some as dyslexic or distressed by the allegations.<sup>57</sup> One report noted that a single mother had to bear the expenses of a settlement for her minor daughter's alleged infringements.<sup>58</sup> Even a self-employed businessman was described as yet another social victim.<sup>59</sup> The Electronic Frontier Foundation (EFF), an influential non-governmental organization (NGO) that served as defense counsel in the businessman's case, stated "[i]t's not fair to hold people like Mr. Plank [the alleged infringer] as collateral damage in the RIAA dragnet."<sup>60</sup> The EFF's rhetoric demonstrates the use of distributive injustice arguments to sway public opinion to the side of poor (alleged) infringers in the media.

Another typical example of an attempt to use distributive justice rhetoric as a tool to sway opinion to favor alleged poor infringers is

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<sup>54</sup> See *Downloading Girl Escapes Lawsuit*, CBSNEWS.COM (Sept. 9, 2003), <http://www.cbsnews.com/stories/2003/08/28/tech/main570507.shtml>; see also Jason Schultz, *File Sharing Must Be Made Legal: Suing 12-year-olds and Grandmothers Isn't the Answer. There's Got To Be a Better Way*, ELECTRONIC FRONTIER FOUNDATION (Sept. 12, 2003), [http://www.eff.org/share/20030912\\_jason\\_salon.php](http://www.eff.org/share/20030912_jason_salon.php).

<sup>55</sup> John Schwartz, *She Says She's No Music Pirate. No Snoop Fan, Either.*, N.Y. TIMES, Sept. 25, 2003, at C1.

<sup>56</sup> Schultz, *supra* note 54.

<sup>57</sup> See Chris Gaither, *Recording Industry Withdraws Suit Mistaken Identity Raises Questions on Legal Strategy*, BOSTON GLOBE, Sept. 24, 2003, at C1.

<sup>58</sup> *Downloading Girl Escapes Lawsuit*, *supra* note 54.

<sup>59</sup> See Complaint at 2-3, *Fonovisa, Inc. v. Ross Plank*, (No. CV03-6371 DT (FMOx)) (complaint filed by Fonovisa, BMG Music and Warner Bros. Records, Inc. alleging that Ross Plank had used, and continued to use, an online media distribution system to download, distribute, and/or make available copyrighted material(s) to others for distribution); see also Press Release, Electronic Frontier Foundation, *Electronic Frontier Foundation Defends Alleged Filesharer* (Oct. 14, 2003) *available at* [http://www.eff.org/IP/P2P/20031014\\_eff\\_pr.php](http://www.eff.org/IP/P2P/20031014_eff_pr.php).

<sup>60</sup> Press Release, Electronic Frontier Foundation, *supra* note 60 (quoting Wendy Seltzer, staff attorney with Electronic Frontier Foundation). Eventually, the case against Mr. Plank was dropped.

## COPYRIGHT DISTRIBUTIVE INJUSTICE

observable in *Lava v. Amurao*.<sup>61</sup> In *Lava v. Amurao*, the Recording Industry Association of America (RIAA) sued Amurao for copyright infringement. Alleged infringer Amurao counterclaimed against the record company for copyright misuse and sought a declaratory judgment of non-infringement. The (RIAA) moved to dismiss Amurao's counterclaims. The EFF filed an amicus curiae brief supporting the opposition papers filed by Amurao. The EFF asserted that

this lawsuit is but one skirmish in the broader war the Recording Industry Association of America (“RIAA”) is waging against unauthorized Internet copying. Using questionable methods and suspect evidence, the RIAA has targeted thousands of ordinary people around the country, including grandmothers, grandfathers, single mothers and teenagers.<sup>62</sup>

While the rhetoric in the news and in litigation may be powerful, there is no empirical proof that copyright law has produced distributional inequity. There is also little validity to the claim that transferring proprietary legal entitlements to accused infringers or poor creators by permitting them to copy files is most efficiently done through a more distributive justice-sensitive copyright regime.

## 2. ENRICHMENT OF POOR CREATORS

Poorly-financed creators serve as a second class of individuals who copyright fairness advocates argue suffer from a heavy burden under existing copyright law.<sup>63</sup> An example of the burden copyright law places on creators is the effect of copyright law on music sampling. As described in the *Napster* case,<sup>64</sup> music sampling occurs when a user downloads one

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<sup>61</sup> *Lava Records LLC, v. Amurao*, No. 7:07-cv-00321-CLB (S.D.N.Y.) (filed Apr. 10, 2007).

<sup>62</sup> Amicus Brief in Support of Defendant's Opposition to Motion to Dismiss Counterclaims, *Lava Records LLC, v. Amurao*, No. 7:07-cv-00321-CLB (S.D.N.Y.) (filed Apr. 10, 2007) (S.D.N.Y.) *available at* [http://www.ilrweb.com/viewILRPDF.asp?filename=lava\\_amurao\\_070410brief](http://www.ilrweb.com/viewILRPDF.asp?filename=lava_amurao_070410brief) (last visited Nov. 14, 2007).

<sup>63</sup> See, e.g., Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U L. REV. 1, 6-13 (2004); Daniel A. Farber & Brett H. McDonnell, *Why (and How) Fairness Matters at the IP/Antitrust Interface*, 87 MINN. L. REV. 1817 (2003); see also *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912-17 (N.D. Cal. 2000) (summarizing defenses emphasizing use of Napster technology for “sampling” music files).

<sup>64</sup> *Napster*, 114 F. Supp. 2d 896.

of the copyright holder's works to decide whether to purchase the audio CD.<sup>65</sup> Copyright fairness advocates argue that sampling is a beneficial use of technology and that allowing open use of P2P networks would enrich creators by increasing their fan base.

Court findings, however, show that the use of the Napster service to sample new artists, based on what Napster called the "New Artists Program," was not central to Napster's business strategy, and did not occur with great frequency.<sup>66</sup> Of 1150 music files on the Napster site, only eleven were by new artists.<sup>67</sup> The Ninth Circuit affirmed in a precedent-setting decision that sampling cannot constitute a fair use because sampling is commercial in nature.<sup>68</sup> It refused to reinterpret the existing law according to equitable principles, holding that increased sales of copyrighted material attributable to unlawful use ought not to divest the copyright holder of the right to license the material.<sup>69</sup> The *Napster* court's assertion that digital sampling is commercial has two main ramifications.

Firstly, sampling should not be perceived as a noninfringing de minimis or fair use.<sup>70</sup> Secondly, given the fact that much content was created and licensed prior to the advent of multimedia technology, it is inaccurate to assume that licensees have the right to sublicense multimedia uses.<sup>71</sup> This problem has been exacerbated by the reluctance of many

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<sup>65</sup> *Id.* at 1018.

<sup>66</sup> *A & M Records, Inc. v. Napster, Inc.*, 2000 WL 1009483, at \*4 (N.D. Cal. July 26, 2000) (transcript of proceedings); see also an email indicating that defendant planned to solicit interest among unsigned artists, containing a cryptic statement regarding the creation of indexes listing available MP3s: "For now, we should do this for UNSIGNED artists only so the RIAA *thinks* we are not infringing on copyright." Parker Dec., Exh. B; *Napster*, 114 F. Supp. 2d at 904 n.8. An early version of the Napster website advertised the ease with which users could find their favorite popular music without "wading through page after page of unknown artists." 1 Frackman Dec., Exh. C (Parker Dep.) at 104:16-105:10, Exh. 235.

<sup>67</sup> *Napster*, 114 F. Supp. 2d at 904.

<sup>68</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1018 (9th Cir. 2001).

<sup>69</sup> *Id.*

<sup>70</sup> *See, e.g.*, *Tin Pan Apple Inc. v. Miller Brewing Co.*, 30 U.S.P.Q.2d (BNA) 1791, (S.D.N.Y. 1994) (declining to hold, as matter of law, that defendant's digital sampling of words "Hugga-Hugga" and "Brr" from plaintiff's song constituted noninfringing copying of noncopyrightable material); *Jarvis v. A & M Records*, 27 U.S.P.Q.2d (BNA) 1812, 1817-19 (D.N.J. 1993) (denying defendant's motion for summary judgment on grounds that genuine issue of material fact existed as to whether the sounds and phrases "ooh," "moves," and "free your body" were significant to song from which they were digitally sampled). *But see* 1 NIMMER, *supra* note 34, § 2.01[B], at 2-17 to 2-18 (upholding that short phrases typically do not qualify for copyright protection unless they manifest minimal creativity).

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content owners to issue blanket licenses for transformative uses of their works. Also, it is manifested by the tendency of numerous would-be-licensees to insist on full per copy royalties even when the multimedia work incorporates only a minor excerpt of the licensed work.<sup>72</sup>

P2P technology freely enables unknown and amateur creators to become large-scale producers and distributors of creative work. Copyright fairness advocates argue that distributive justice should be a relevant consideration when considering whether amateur creators are liable for infringement.<sup>73</sup> Before the information age, however, publishing technologies were expensive.<sup>74</sup> That meant the vast majority of publishing was commercial, and large commercial entities had little trouble bearing the costs associated with copyright law.<sup>75</sup> While the cost of the publishing technologies has been greatly reduced, the current system still requires amateur creators who wish to incorporate existing copyrighted works into their creations to bear the costs associated with finding the rights holder, negotiating for a license, and making royalty payments. Amateurs are generally not willing or able to bear these costs, and amateur creativity is sometimes lost as a consequence.<sup>76</sup> But these costs must be set against the benefits of the internet to amateur creators. In the internet network environment, the amateur enjoys state-of-the-art technology that has reduced the costs and improved the effectiveness of information dissemination. Because of the internet, amateurs can become large-scale producers and distributors of their creative work over. Consequently, there seems to be no justification for providing legal support for poorly-financed amateurs or new artists per se based on copyright-tailored distributive justice claims concerning free access to copyrighted materials.

Furthermore, the Copyright Act's "primary objective is to encourage the production of original literary, artistic, and musical expression for the

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<sup>71</sup> See Jane C. Ginsburg, *Domestic and International Copyright Issues Implicated in the Compilation of a Multimedia Product*, 25 SETON HALL L. REV. 1397, 1409-11 (1995).

<sup>72</sup> See Kevin J. Harrang, *Licensing Issues in Creating and Publishing Multimedia Software Products*, in PRACTICING LAW INSTITUTE, DRAFTING LICENSING AGREEMENTS 289 (1995).

<sup>73</sup> Hunter & Lastowka, *supra* note 12, at 988; see also Jessica Litman, *Copyright Noncompliance (or Why We Can't 'Just Say Yes' to Licensing)*, 29 N.Y.U. J. INT'L L. & POL. 237, 251 (1996); Von Houweling, *supra* note 12, at 33; Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 651 (1997).

<sup>74</sup> See LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN AND CONTROL CREATIVITY 85-94 (2004), available at <http://www.free-culture.cc/freeculture.pdf>.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 95-97; see also Hunter & Lastowka, *supra* note 12, at 958.



public good.”<sup>77</sup> Any understanding of fairness claiming that the promotion of the public good per se best serves the Copyright Act’s policy expresses a one-sided view of the Copyright Act’s purposes. In fact, the rights of the secondary creator for free access to copyrighted materials must be balanced against the rights of the primary creator; the social benefits of secondary creation are traded against diminished incentives for primary creation. In *Wheaton v. Peters*,<sup>78</sup> a case involving a challenge to a secondary work as violating an alleged common law copyright, the Supreme Court made it clear that copyright is strictly a creature of statute and is neither a common law property right nor a natural right of the author.<sup>79</sup> *Wheaton*’s description of copyright protection as a monopoly in derogation of the rights of the public has become a basic premise of subsequent copyright legislation and court decisions. In fact, since *Wheaton*, the Supreme Court has reaffirmed the standard that “[t]he copyright law . . . makes reward to the owner a secondary consideration.”<sup>80</sup> The Court has made it clear that it is peculiarly important that the law’s boundaries be demarcated as clearly as possible.<sup>81</sup> It is hardly consistent with the purpose or judicial interpretations of the nature of copyright law to adapt it to better facilitate the particular benefits that amateur content protection promotes.

### 3. DIMINISHMENT OF THE WEALTH OF COPYRIGHT INDUSTRIES

Copyright fairness scholars often argue against the concentration of media ownership, suggesting that it will lead to disparities in the power balance between wealthy speakers and their audiences.<sup>82</sup> Concentrations

<sup>77</sup> *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 518 (1994).

<sup>78</sup> 33 U.S. (8 Pet.) 591 (1834).

<sup>79</sup> *Globe Newspaper Co. v. Walker*, 210 U.S. 356, 362 (1908); *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 346 (1908) (“Copyright property under the Federal law is wholly statutory and depends upon the right created under acts of Congress.”); *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 291 (1907) (“In this country it is well settled that property in copyright is the creation of the Federal statute.”); *Holmes v. Hurst*, 174 U.S. 82, 85-86 (1899); *Thompson v. Hubbard*, 131 U.S. 123, 151 (1889); *Banks v. Manchester*, 128 U.S. 244, 252 (1888).

<sup>80</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

<sup>81</sup> See *Fogerty*, 510 U.S. at 517-518.

<sup>82</sup> See, e.g., Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1884 (2000); Hunter & Lastowka, *supra* note 12, at 1017-1018; William Gibson, Address to Directors Guild of America on “Digital Day,” (May 17, 2003), available at [http://www.williamgibsonbooks.com/archive/2003\\_05\\_01\\_archive.asp#200322370](http://www.williamgibsonbooks.com/archive/2003_05_01_archive.asp#200322370). But

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of power are said to determine the mix of speech that comprises public discourse.<sup>83</sup> The media has also largely supported the view that the copyright industries are monopolistic.<sup>84</sup> Anthony Prapkanis, a University of California-Santa Cruz professor of social psychology, sums up this view, with his comment that, while the American public may be sympathetic to the music industry's plight, "the image is out there of the bully ganging up on people with the least amount of money, the rich taking from the poor."<sup>85</sup> Napster unsurprisingly used the same antitrust-like terminology, asserting that RIAA members had expanded their monopoly beyond the permissible scope under the law.<sup>86</sup>

Despite the concerns of scholars and the arguments of infringers, the extent to which monopoly power is present in any particular case is an empirical question.<sup>87</sup> However, at no point has the record industry been found to be monopolistic within its meaning in the United States' antitrust laws.

The overriding economic goal of the antitrust laws is to maximize consumer welfare through the efficient allocation of resources.<sup>88</sup> Accommodating non-economic goals into the analysis generally confuses antitrust jurisprudence and subverts its basic purposes.<sup>89</sup> The use of antitrust law is meant to enhance market efficiency, not to redistribute proprietary legal entitlements, and therefore using antitrust-style arguments to support copyright fairness is somewhat contradictory.

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*see* Christopher S. Yoo, *Copyright and Democracy: A Cautionary Note*, 53 VAND. L. REV. 1933 (2000).

<sup>83</sup> Netanel, *supra* note 82, at 1884; Hunter & Lastowka, *supra* note 12, at 1017.

<sup>84</sup> Sam Diaz, *Recording Industry in a Bind*, SAN JOSE MERCURY NEWS, Sept. 15, 2003, at 1E ("And suddenly, the trade association [RIAA]—in its effort to squelch illegal music sharing over peer-to-peer networks such as Kazaa and Grokster—looked more like a schoolyard bully."); Jefferson Graham, *RIAA Lawsuits Bring Consternation, Chaos*, USA TODAY, Sept. 10, 2003, at 4D.

<sup>85</sup> Graham, *supra* note 84 ("Are they taking a PR hit?" asks Lee Kovel, of L.A.-based Kovel/Fuller ad agency. "Of course. Massive. I think they asked, 'What's the pain vs. the reward?' They want to make a statement and strike fear. They don't care about PR."). *See generally* <http://www.boycott-riaa.com/> (last visited Nov. 14, 2007) (discussing the views of those opposed to the RIAA and its copyright protection actions).

<sup>86</sup> *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 922 (N.D. Cal. 2000).

<sup>87</sup> *See* Kitch, *supra* note 45.

<sup>88</sup> I PHILIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 103, 111-13 (1978); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 933-34 (1979).

<sup>89</sup> AREEDA & TURNER, *supra* note 88, at 104.

Furthermore, imposition of redistributive methods through copyright law would require perfectly balancing efficient market reconstruction against the harm caused by anti-competitive practices—practices which were not severe enough to lead courts to formally proclaim the record industry unlawfully monopolistic. Any adjustment to copyright law due to parties’ anti-competitive practices must be premised on a failure to apply antitrust laws. Beyond these considerations, the balance between incentive and restriction for what is overinclusively referred to as the “copyright industry” should not be considered evenly. Instead, any particular book, movie, or invention is likely to face competition from other books, movies, or inventions which are near but not necessarily perfect substitutes.<sup>90</sup>

Copyright law neither should be designed to promote the well-being of private parties or specific categories of people nor should it be connected to ends that advance a sectoral societal goal or the creation of another market to explore. At times there may be a lack of understanding among fairness scholars of what, given the present constitutional copyright framework, distributive justice is most efficient in promoting. Any application of distributive justice ultimately is done at the expense of a given sector of the public and diminishes the size of the general market,<sup>91</sup> against the purpose of copyright law. The general history of copyright law, and of the Copyright Clause of the Constitution in particular, clearly reveals that copyright exists for the benefit of the public welfare.<sup>92</sup> Thus, its goal should not be to advance specific sectors of society or distinct markets.

### C. DISTRIBUTIVE INJUSTICES: THE THREE ACCOUNTS

There are three leading critiques of distributive justice rationalizations. These first two critiques are based on libertarianism and liberty and well-being theory in combination with some narrow forms of efficiency analysis within the copyright discourse. The third account of distributive justice, which is also the focal point of this Article, originated in the law-and-economics movement. It argues that there are sound reasons for the copyright law not to take explicit account of distributional

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<sup>90</sup> See, e.g., Kitch, *supra* note 45.

<sup>91</sup> See Ryan Littrell, Note, *Toward a Stricter Originality Standard for Copyright Law*, 43 B.C. L. REV. 193, 225-26 (2001); Niels B. Schaumann, *An Artist’s Privilege*, 15 CARDOZO ARTS & ENT. L.J. 249, 249-54 (1997).

<sup>92</sup> See, e.g., *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: Hearing on H.R. 989 Before the House Comm. on the Judiciary, Copyright Law Revision*, 87th Cong., 1st Sess. 5-6 (Committee Print 1961) (Part 1).

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concerns. According to the law and economics view, one can avoid the question of fairness at the starting point simply by asserting that taxation law or welfare laws are better designed to take care of distributive questions of fairness or justness than copyright jurisprudence. In the context of copyright law, beyond generic redistribution of copyright to the needy, law should use the tax-and-transfer system to achieve distributive fairness or justice.

### 1. LIBERTARIAN ARGUMENTS: BEYOND PARETO SUPERIORITY

The first of the three primary critiques of distributive justice is based on libertarian principles. These principles argue against incorporating distributive justice concerns into copyright law. Libertarians' opposition to the use of private law and copyright as a mechanism for redistribution derives from the general belief that the compulsory transfer of proprietary legal entitlements is, to all accounts, one manifestation of theft, regardless of how it is accomplished.<sup>93</sup> When a private good is stolen, the theft necessarily deprives the original owner of possession. The question arises whether violation of copyright is sufficiently similar to theft of property to justify the extension of this line of argument to copyright law. The United States Department of Justice,<sup>94</sup> the RIAA, and the Motion Picture Association of America (MPAA) all unequivocally characterize the free downloading of copyrighted material as an act of theft, arguing that those who download music online are "stealing" intellectual property.<sup>95</sup> The 1997 No Electronic Theft (NET) Act,<sup>96</sup> a recent and rather draconian criminal copyright infringement law, also equates copyright infringement

<sup>93</sup> See, e.g., ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 149-53, 167-74 (1974); see also Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 293-94 (1975); James M. Buchanan, *Political Equality and Private Property: The Distributional Paradox*, in MARKETS AND MORALS 69, 69-84 (G. Dworkin, G. Bennet, & P. Brown eds., 1977). In the copyright context, see Ku, *supra* note 26, at 305 ("In this case, the use of Napster is not theft—copyright is theft."); see also Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 U. PITT. J.L. & COM. 509, 512-13 (1996); John Perry Barlow, *Napster.com and the Death of the Music Industry*, <http://www.sparklehouse.com/sparklehouse/mp3/barlow.html> (last visited Nov. 14, 2007).

<sup>94</sup> See Eric H. Holder, Jr., Remarks at the Press Conference Announcing the Intellectual Property Rights Initiative (July 23, 1999), *available at* <http://www.usdoj.gov/criminal/cybercrime/dagipini.htm>.

<sup>95</sup> See Recording Indus. Ass'n of Am., *Piracy: Online and On the Street*, <http://www.riaa.com/physicalpiracy.php> (last visited Nov. 14, 2007); Press Release, Motion Picture Ass'n of Am., Inc., Motion Picture and Music Industries File Suit Against Scour.com (July 20, 2000).

<sup>96</sup> Pub. L. No. 105-147, 111 Stat. 2678 (1997) (codified as amended at 17 U.S.C. §§ 101, 506, 507; 18 U.S.C. § 2319, 2319A, 2320; 28 U.S.C. § 1498 (2000)).

with theft of physical property.<sup>97</sup> According to industry groups and the NET Act, anything less than a complete preservation of copyright constitutes theft and is unjustifiable, even though making an unauthorized copy does not actually deprive the owner of the copyright of possession of their work, given the nonrivalrous nature of digital music.<sup>98</sup>

The rationalization of distributive justice from a libertarian point of view may be found within the conceptual difficulty fairness scholars should have in dealing with Pareto-superiority. If a system is not Pareto-efficient, there is value to be had in advancing a different approach; if a system is Pareto-efficient, no additional value can be gained by changing approaches.<sup>99</sup> Unless a legal rule is Pareto-superior to all other feasible rules, in the sense that no one would object to the adoption of that rule, an advocate for the rule must present a normative argument for why that rule should be adopted, given that it causes one group to be made better off at the expense of another.<sup>100</sup> In other words, one policy is said to be “Pareto superior” to another if it makes at least one person better off without making anyone else worse off; a policy is said to be “Pareto optimal” if there exist no Pareto superior policies. The Pareto principles are quite useful in basic market situations. For example, where two agents have explicitly agreed to an exchange, according to the Pareto principles it seems entirely reasonable to infer that the exchange was mutually beneficial. With what seems like only a minor philosophical concession, the Pareto principles can also be used to legitimate those exchanges (and legal rules) that everyone would have agreed to, had their consents been solicited. If a legal rule leaves everyone better off, the rule should be implemented; if not, it should be abandoned. To the libertarian, thus, there is no compelling normative rationale to use copyright law to enact a proprietary legal entitlement transfer.

One might argue, in contrast, that copyright law itself accomplishes that transfer while bearing little relation to the preservation of private property. Because a public good such as a broadcast television program is nonrivalrous, any number of individuals can copy an existing broadcast

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<sup>97</sup> *Id.*; see also discussion *infra* Part B.3.

<sup>98</sup> See, e.g., *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 450 n.33 (1984); *United States v. Smith*, 686 F.2d 234, 243 (5th Cir. 1982) (recognizing that taping a copyrighted broadcast “does not implicate a tangible item . . . nothing was removed from someone’s possession”); Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 979 (2002).

<sup>99</sup> Whenever a resource distribution is Pareto optimal, no other allocation of resources would benefit at least one person without imposing a cost on someone else. See RICHARD LEFTWICH, *THE PRICE SYSTEM AND RESOURCE ALLOCATION* 284-85, 298, 388-89 (5th ed. 1973).

<sup>100</sup> BRUCE A. ACKERMAN, *ECONOMIC FOUNDATIONS OF PROPERTY LAW* xiii (1975).

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without depriving some other person of access.<sup>101</sup> If someone shoplifted a CD of the latest music group, that would constitute theft of a tangible, private good and would be punishable under applicable state laws. Such conduct would not comprise copyright infringement, however, and under applicable state laws the theft of a CD would in all probability be valued at the market price for the CD, not at the worth of the intangible rights to reproduction that copyright protects.<sup>102</sup> But it is not the role of copyright law to make a normative choice concerning the scope of distribution created by copyright law whenever Pareto superiority is present. That does not mean that distribution is inefficient or that it is bad law – just that copyright is not the proper set of laws to promote distributive justice.<sup>103</sup>

Another argument against the libertarian critique of distributive justice in copyright law is based on American public opinion in favor of a file sharing norm.<sup>104</sup> With members of the general public and the recording community are upset with the RIAA's pursuit of copyright violators, it seems that the public views downloading as morally legitimate.<sup>105</sup> While the recording industry perceives music downloading as illegal, “[s]ome do not even seem to see any real moral, ethical, or even legal dilemma with media piracy over the Internet.”<sup>106</sup> Moreover, through recognition of the potential of new technologies to facilitate inexpensive speech, courts have been partly promoting copyright distributive justice arguments even indirectly. Judicial sympathy for poorly-financed speakers can be found in *Reno v. ACLU*, in which the court noted “[The internet] provides relatively unlimited, low-cost capacity for communication of all kinds. . . . Through the use of Web pages, mail exploders, and

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<sup>101</sup> BRUCE STERLING, *THE HACKER CRACKDOWN: LAW AND DISORDER ON THE ELECTRONIC FRONTIER* 250-81 (1992).

<sup>102</sup> *Id.*

<sup>103</sup> See discussion *infra* Part B.3.

<sup>104</sup> See Stacey M. Lantagne, *The Morality of MP3s: The Failure of the Recording Industry's Plan of Attack*, 18 HARV. J.L. & TECH. 269 (2004).

<sup>105</sup> See Amanda Lenhart & Susannah Fox, *Downloading Free Music: Internet Music Lovers Don't Think it's Stealing* 2 (Sept. 28, 2000), available at [http://www.pewinternet.org/pdfs/PIP\\_Online\\_Music\\_Report2.pdf](http://www.pewinternet.org/pdfs/PIP_Online_Music_Report2.pdf) (observing that approximately 80% of music downloaders do not consider what they are doing to be a form of stealing).

<sup>106</sup> *Oversight Hearing on 'Peer-To-Peer Privacy on University Campuses': Hearing Before the Subcomm. on the Courts, the Internet, and Intellectual Property*, 110th Cong. (2003) (statement of John Hale, Assistant Professor of Computer Science, University of Tulsa); see also, e.g., Jon Healey & Jeff Leeds, *Tone Deaf to a Moral Dilemma? Millions Download Songs Illegally But Don't Feel Guilty*, L.A. TIMES, Sept. 2, 2003, at A1.

newsgroups, the same individual can become a pamphleteer.”<sup>107</sup> And yet, copyright jurisprudence was not designed to overcome Pareto-superiority through compulsory transfer of proprietary legal entitlements, regardless of how the transfer is accomplished. Copyright law is inefficient in promoting distributive justice by favoring the poor and penalizing the wealthy within the copyright regime.

## 2. WELL-BEING THEORY: BEYOND BASIC NEEDS

A second account of distributive justice comes from the liberal approach, which balances protection of individual property with government support for basic needs. Beyond some narrow exceptions already protected by statute, the preservation of basic needs cannot justify the use of copyright law to advance principles of distributive justice.

The liberal approach holds that fundamental property rights, established by principles of acquisition and transfer, should be inviolate.<sup>108</sup> But inequalities in such basic goods as health, nutrition, shelter and education cannot be justified by efficiency and should be justifiably distributed.<sup>109</sup> Inequalities in basic goods cannot be justified by maximizing total social wealth, and filling the basic needs of individuals is the responsibility of the government, to be achieved via its tax and transfer mechanisms.<sup>110</sup> Along with concerns about inequality as a moral problem, welfare as a preservation of basic needs has also been characterized as a

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<sup>107</sup> 521 U.S. 844, 870 (1997); *see generally*, Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

<sup>108</sup> FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 93-102, 133-61 (1961); *see also* Buchanan, *supra* note 93, at 69-84; Epstein, *supra* note 93, at 293-94.

<sup>109</sup> *See* DAVID O. BRINK, *MORAL REALISM AND THE FOUNDATIONS OF ETHICS* 224, 272 (1989); JAMES GRIFFIN, *WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE* 8, 299-300 (1986). As Daphna Lewinson-Zamir concludes in a seminal paper, the need to protect property is most necessary with regard to autonomy and liberty. Lewinson-Zamir, *supra* note 21, at 1715. *But see id.* at 1716 (applying the objective well-being theory to property law, based on the Maslowian Pyramid of needs, expanding the scope of protection also to “the acquisition of knowledge necessary for appreciating the good things in life”, “adopting worthwhile goals”, or “realizing one’s potential”). *See also* ABRAHAM H. MASLOW, *MOTIVATION AND PERSONALITY* 35-58, 97-98 (2d ed. 1970).

<sup>110</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 87-88, 90-95, 274-70 (1971); Grey, *supra* note 11, 890 n.38 (1976) John Rawls, *Social Unity and Primary Goods*, in *UTILITARIANISM AND BEYOND* 159, 159 (Amartya Sen & Bernard Williams eds., 1982); John Rawls, *The Basic Structure as Subject*, in *VALUES AND MORALS* 47, 54-55 (Alvin Goldman & Jaegwon Kim eds., 1978) [hereinafter Rawls, *Basic Structure*]; *see also* CHARLES FRIED, *RIGHT AND WRONG* 143-50 (1978).

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means to curtail violence by welfare recipients.<sup>111</sup> For my purposes, depending on the breadth of “basic needs,” the characterization might trump the inviolate nature of property in copyright and might authorize the use of copyright law for redistributive ends.

But individuals utilizing their private property are not required to treat others with care or concern.<sup>112</sup> This “division of labor” promotes distributive justice without unduly undermining individual liberty.<sup>113</sup> Well-being theories of fairness argue for compulsory redistribution of only “primary goods,”<sup>114</sup> but the vast majority of copyrighted digital works would not fall into the category of “primary goods.” Such less-than-basic needs do not justify government intervention or the adoption of a new interpretative paradigm for digital copyright law. Liberal democratic societies should be able to agree that the economic status of internet users downloading digital music does not correspond with the basic needs that well being theories initially are said to augment.

Concern for ideals of distributive justice in our current legal regime has for the most part been confined to those fields of law that are specifically designed for fostering these ideals, such as tax law and welfare law. These concerns have been extended to copyright law in a very limited manner. The Copyright Act of 1976 includes a variety of narrowly chosen exceptions designed to help certain parties including the blind, handicapped, and disabled persons;<sup>115</sup> nonprofit educational institutions;<sup>116</sup> religious organizations;<sup>117</sup> and other nonprofit groups, such

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<sup>111</sup> See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 306-08, 314-24, 315-16 (1985); FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* (2d ed. 1993) 1-10 (adding that U.S. welfare policies expand during times of civil instability so as to pacify social unrest).

<sup>112</sup> See RONALD DWORKIN, *LAW’S EMPIRE* ch. 8 (1986).

<sup>113</sup> *Id.* at 299-301.

<sup>114</sup> Even Ghosh at one point admits, somewhat confusingly, that “distributive justice supports social arrangements that aid and distribute resources to those who are excluded from democratic and market arrangements.” Ghosh, *supra* note 1, at 859. Such an argument, however, does not often apply to illegal music downloading.

<sup>115</sup> See 17 U.S.C. § 110(8)-(9) (2006) (excusing certain performances specifically designed for and directed to blind or other handicapped persons); *id.* § 121 (excusing certain reproductions or distributions of nondramatic literary works for use by blind or other disabled persons).

<sup>116</sup> See *id.* §110(1) (excusing certain performances or displays by nonprofit educational institutions); see also *id.* § 107(1) (referring to “nonprofit educational purposes” in defining the scope of the fair use defense); *id.* § 108 (excusing certain reproductions by libraries or archives).

<sup>117</sup> See *id.* § 110(3) (excusing certain performances or displays “in the course of services at a place of worship or other religious assembly”).



as “nonprofit agricultural or horticultural organization[s],” “nonprofit veterans’ organization[s],” or “nonprofit fraternal organization[s].”<sup>118</sup> The Copyright Act also includes a provision that permits live performance of musical works and non-dramatic literary works, as long as the performance does not have a commercial purpose, the performers are not paid, and no admission fee is charged.<sup>119</sup> In these narrow categories copyright law indeed resembles exceptions favored by income tax legislation.<sup>120</sup> The latter provision, for example, was designed to benefit predominantly poor creators who could not otherwise afford to perform copyrighted works.<sup>121</sup>

Copyright law must include such narrowly defined components of distributive justice if the law of copyright is to have the necessary degree of minimum moral acceptability and to meet the liberal approach’s preservation of basic needs. The scholarly debate over the role of distributive justice in copyright law should begin where these narrowly chosen generic exemptions end.<sup>122</sup> Patent law jurisprudence tells a similar tale of distributive justice.<sup>123</sup> The market for pharmaceutical products sets the proper analogy—in the pharmaceutical products realm, the availability of intellectual property is often “an issue of life and death, not merely of dollars and cents.”<sup>124</sup> Accordingly, the main critique of the pharmaceutical

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<sup>118</sup> See *id.* § 110(6) (excusing certain performances by nonprofit agricultural groups); *id.* § 110(10) (excusing certain performances by nonprofit veterans’ or fraternal organizations).

<sup>119</sup> *Id.* § 110(4). If there is an admission charge, such performances are still permitted so long as the proceeds above costs are only used for educational, religious, or charitable purposes, and so long as the copyright holder does not object via procedures specified in the statute. *Id.* § 110(4)(B).

<sup>120</sup> See 26 U.S.C. § 22 (2006) (U.S. Income Tax Code provides tax credits for permanently and totally disabled persons); *id.* § 501-539 (providing tax exemptions for certain organizations).

<sup>121</sup> The exception was broader under the 1909 Copyright Act, which exempted all performances that were not for profit. 35 Stat. 1075 (1906) (codified as amended in 17 U.S.C. §§ 101-801). A 1976 House Report explains that the old exemption was too broad because “[m]any ‘non-profit’ organizations are highly subsidized and capable of paying royalties.” H.R. Rep. No. 94-1476, at 62 (1976). Presumably, then, the narrow exemption is intended to allow performances by poorly-financed groups that would be unable to afford the fees required to perform the works of their choice.

<sup>122</sup> See *id.* at 70.

<sup>123</sup> See Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1, 68 (2002); Arti K. Rai, *The Information Revolution Reaches Pharmaceuticals: Balancing Innovation Incentives, Cost, and Access in the Post-Genomics Era*, 2001 U. ILL. L. REV. 173.

<sup>124</sup> Abramowicz, *supra* note 47, at 105.

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patents regime is that poor “patients cannot afford pharmaceuticals that have already been developed and could be produced at low marginal cost.”<sup>125</sup> But within the context of copyright, outside the narrow scope of the aforementioned exceptions, entry barriers on access to copyright are small, as most copyrighted works can be purchased at low prices and are subject to mass consumption.<sup>126</sup> It is therefore not as essential to preserve a general right to access a broad swath of copyrighted material regardless of one’s ability to pay.

Acknowledging the existence of some “basic needs,” the necessity of a minimum threshold of property to well-being creates a quantity requirement: A certain amount of property is necessary for people to be able to fare even modestly well. But when subject to carefully tailored exceptions, copyright law only deals with goods that fall above this threshold, and thus does not need to be manipulated to alleviate distributive justice concerns. Whatever the legitimate role of rules ensuring people a minimal amount of property in order to achieve an increased basic well-being, copyright law should not be interpreted in that rather fashionable manner, or at least mannered in that fashion.

### 3. WELFARE ECONOMICS: BEYOND KALDOR-HICKSIAN APTITUDE

A third account of distributive justice originated in the law-and-economics movement. This approach is the focal point of this Article. According to this approach, there are sound reasons for the law not to take explicit account of the distributional concerns.<sup>127</sup> One can avoid the question of the fairness of the starting point simply by asserting that taxation law or welfare laws are better designed to take care of distributive questions of fairness or justness than copyright jurisprudence.<sup>128</sup> As I have stressed, this is an argument about the most effective way to accomplish distributive objectives and not the normative importance of distributive concerns.<sup>129</sup> It is widely agreed in the law and economics literature that

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<sup>125</sup> *Id.*

<sup>126</sup> For further critique, see discussion *infra* Part D.2.

<sup>127</sup> See, e.g., A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 124-27 (2d ed. 1989); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994); Steven Shavell, *A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?*, 71 AM. ECON. REV. 414 (1981).

<sup>128</sup> *But see*, e.g., Jennifer H. Arlen, *Should Defendants’ Wealth Matter?*, 21 J. LEGAL STUD. 413 (1992) (using law and economics analysis while implicitly assuming that taxes are not available for redistributive purposes).

<sup>129</sup> Kaplow & Shavell, *supra* note 19, at 995.

redistributive goals can be accomplished better through tax law<sup>130</sup> than through the reshuffling of property rights.<sup>131</sup> Cost-benefit analysis aimed at maximizing welfare, therefore, does not mitigate against distributive goals.<sup>132</sup> Rather, in compliance with the prevailing economic paradigm, copyright should avoid promoting distributive means.<sup>133</sup>

Welfare economics is not concerned with distribution in this situational sense.<sup>134</sup> Changing how a loss is divided between the two parties, hence, is of no consequence under welfare economics.<sup>135</sup> To be sure, the issue of the appropriate criterion of well-being of users of copyrighted works and their creators alike, used in evaluating welfare and in welfare maximization, is distinct from the “fairness” paradigm largely advocated by copyright fairness scholars, which concerns the appropriate distribution of well-being—be it measured by subjective<sup>136</sup> or objective<sup>137</sup>

<sup>130</sup> The U.S. tax system redistributes wealth from taxpayers to the federal government. See Internal Revenue Code, 26 U.S.C. §§ 1-1564 (2006) (income taxes); *id.* §§ 2001-2704 (estate and gift taxes); *id.* §§ 4001-5000 (miscellaneous excise taxes); *id.* §§ 5001-5881 (alcohol, tobacco, and certain other excise taxes); 26 C.F.R. §§ 1.0-1 to 801.6 (2003) (Treasury regulations concerning Internal Revenue Code). Many economists writing in the field of public economics study the distributive effects of taxation and other government policy. See, e.g., TUOMALA, *supra* note 30; VICKREY, *supra* note 30; Mirrlees, *supra* note 30.

<sup>131</sup> See, e.g., ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF ch. 4 (1975); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 10 (2d ed. 1977).

<sup>132</sup> See Jon D. Hanson & Melissa R. Hart, *Law and Economics*, in BLACKWELL'S COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 311, 330 (Dennis Patterson ed. 1996); Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 594 (1985). There are a number of explanations for the common belief that income distribution is unimportant in normative economic analysis of law. For further discussion, see *infra* Part D.1.

<sup>133</sup> To clarify, the term “distribution” herein refers to concerns about the “overall allocation of income or wealth”—that is, about economic equality and inequality. Kaplow & Shavell, *supra* note 19, at 998. However, concerns regarding who is supposed to overcome in a particular legal dispute are also often described as distributive. In such contexts, the word “distributive” refers to the allocation of a particular loss linking the disputing parties (rather than to the degree of disproportion in the allotment of earnings in the general public), and the apposite distribution is understood to be determined by notions of fairness such as corrective justice (instead of by a conception of the appropriate allotment of earnings in the general public). *Id.*

<sup>134</sup> Indirectly, however, changing the division of losses between parties to disputes may often affect individuals' well-being in a number of respects. See *id.*

<sup>135</sup> See *id.*

<sup>136</sup> See BRINK, *supra* note 109, at 217; Kaplow & Shavell, *supra* note 19, at 1350.

<sup>137</sup> See THOMAS HURKA, PERFECTIONISM 23-24, 37-44, 55-60 (1993); Kaplow & Shavell, *supra* note 19, at 980 n.35, 1353-54.

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standards—among individuals. In other words, the economic notion of fairness is one that is concerned unequivocally with the distribution of legal entitlements (and at times even income). By incorporating fairness, then, welfare economics accommodates all factors that are relevant to individuals' well-being and to its distribution.<sup>138</sup>

In economic terms, as Jehle provided, if appropriate conditions hold, “[a]ny Pareto optimal allocation can be supported by competitive markets and some distribution of initial endowments.”<sup>139</sup> To be sure, welfare economics does not support the Kaldor-Hicks framework.<sup>140</sup> Because welfare economics incorporates consideration of the distribution of income, the well-known opposition regarding the Kaldor-Hicks efficiency test is inapplicable to welfare economics.<sup>141</sup> Under a common understanding of this normative paradigm, copyrights are assessed by reference to wealth maximization or efficiency, criteria that many take to omit important characteristics of individuals' well-being and other distributive concerns.<sup>142</sup>

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<sup>138</sup> Kaplow & Shavell, *supra* note 19, at 968. On welfare economics, see generally KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951); JOHN C. HARSANYI, *RATIONAL BEHAVIOR AND BARGAINING EQUILIBRIUM IN GAMES AND SOCIAL SITUATIONS* ch. 4 (1977). For reference on applied welfare economics, see ROBIN W. BOADWAY & NEIL BRUCE, *WELFARE ECONOMICS* (1984); I.M.D. LITTLE & J.A. MIRRLEES, *PROJECT APPRAISAL AND PLANNING FOR DEVELOPING COUNTRIES* (1974); and DENNIS C. MUELLER, *PUBLIC CHOICE II: A REVISED EDITION OF PUBLIC CHOICE* ch. 19 (1989).

<sup>139</sup> GEOFFREY A. JEHL, *ADVANCED MICROECONOMIC THEORY* 232 (1991). For seminal work on welfare economics, see ARROW, *supra* note 138; and HARSANYI, *supra* note 138. On applied welfare economics, see BROADWAY & BRUCE, *supra* note 138; YEW-KWANG NG, *EFFICIENCY, EQUALITY AND PUBLIC POLICY: WITH A CASE FOR HIGHER PUBLIC SPENDING* (2000); and YEW-KWANG NG, *WELFARE ECONOMICS: INTRODUCTION AND DEVELOPMENT OF BASIC CONCEPTS* (1979).

<sup>140</sup> Kaldor-Hicks efficiency is also called “potential Pareto optimality” because it assumes that a move that is Kaldor-Hicks superior can be transformed into a Pareto superior move by forcing the gainers from the move to compensate the losers. See Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 *ECON. J.* 549, 549-50 (1939). For a discussion of Kaldor-Hicks efficiency as a tool of legal policymaking, see Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 68 *CAL. L. REV.* 221 (1980); Lewis A. Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 *HOFSTRA L. REV.* 591, 594, 634-39 (1980).

<sup>141</sup> See Hanson & Hart, *supra* note 132, at 330 (observing that “[p]erhaps the most common criticism of law and economics is that it overlooks or, worse, displaces questions of distribution or equity” and asserting that “[e]conomists respond in part by observing that distributional questions taken by themselves fall outside the reach of economic science”); Tribe, *supra* note 132, at 594 (“This disregard of the *distributional* dimension of any given problem is characteristic of the entire law-and-economics school of thought.”).

<sup>142</sup> See Kaplow & Shavell, *supra* note 19, at 968.

A welfare economics understanding of copyright entitlements will ultimately relieve the tension between market-driven economies and the assorted arguments for intervening with market outcomes on the basis of fairness.<sup>143</sup> In conclusion, it may be inefficient to choose an inappropriate policy in order to promote the desired distribution of individual welfare. Copyright that is not specifically designed for redistribution should therefore avoid distributive ends.

## D. RATIONALES AGAINST COPYRIGHT DISTRIBUTIVE JUSTICE

### 1. DISTRIBUTION DISCRIMINATES

The income tax and welfare system can redistribute relatively easily from the rich to the poor, while copyright law has substantially less redistributive potential. Any particularization of copyright rules based on a fair use liability rules analysis, where the law merely discourages copyright infringements by requiring infringers to pay victims for the harm they suffer *ex post*,<sup>144</sup> or even a property rules analysis,<sup>145</sup> based on excludable rights on behalf of distributive justice claims, would affect only relatively small fractions of the population.<sup>146</sup>

To begin with, substantive copyright law will not be able to redistribute the value of the proprietary rights it defends systematically unless the status of the parties in a dispute correspond closely to the groups between which redistribution is desired.<sup>147</sup> Whenever the downloading of digital music involves internet users and song owners, there is no obvious correlation between the commoditized information owned by a party and whether that party is an internet user or a song owner. Furthermore, there may be no correlation between the income of a party and whether that party is a victim or a transgressor.

Distributional justice also falls short when applied to copyright law's remedial corollaries, and in particular remedial damages. It may be efficient for damages to reflect the victim's income in some categories of

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<sup>143</sup> See William D.A. Bryant, *Misinterpretations of the Second Fundamental Theorem of Welfare Economics: Barriers to Better Economic Education*, 25 J. ECON. EDUC. 75, 75 (1994); see also discussion *infra* Part D.

<sup>144</sup> See POLINSKY, *supra* note 127, at 125.

<sup>145</sup> Property rules guarantee property right assignments through the threatened use of law *ex ante*.

<sup>146</sup> See Kaplow & Shavell, *supra* note 19, at 994.

<sup>147</sup> Cf. POLINSKY, *supra* note 127, at 125.

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legal disputes, such as in tort law when an injury involves lost future earnings. And in some contexts, whether one is an injured party or an injuring party might serve as a proxy for income. To illustrate, in nuisance and pollution control disputes there may be a close correlation between the income of a party and whether that party is a victim or an injurer.<sup>148</sup> Thus, in some kinds of disputes, the choice of a bright line rule favoring one of the parties might contribute towards the implementation of distributional goals. But this is not the case in copyright law.

In recent years, certain courts have chosen to treat a financial disparity between the parties as a factor to be weighed in determining whether an award should issue rather than simply the magnitude of such an award.<sup>149</sup> Hence, redistribution has been accomplished by setting damages higher when the injurer is wealthy and lower when the injurer is poor. Again, to illustrate, in an action for trademark and copyright infringement, unfair competition, and conspiracy, one court recited a rule that damages are not excessive as long as they do not ruin the defendant financially.<sup>150</sup> Since the amounts awarded constituted 5% and 2.5% of the defendants' net worth, respectively, the court concluded that financial ruin was unlikely to result from their imposition.<sup>151</sup>

Within the scope of copyright jurisprudence such progressive remedies, suffer, however, from two flaws: i) the long-term implications of progressive damages; and ii) the resulting disparity between litigating and non-litigating parties.

## I. LONG-TERM IMPLICATIONS OF PROGRESSIVE DAMAGES

It is questionable whether a progressive damage compensation regime will have long-term egalitarian consequences. To begin with, as Coase suggests, the compensation regime tends in practice to be reflected in the market price of a given infringed copyrighted work itself, rather than in the financial status of a given infringer.<sup>152</sup> Moreover, a progressive

<sup>148</sup> *Id.* at 126. The consumers of the production of a quantity of polluting industry may be mainly superior income people, while the victims living in close proximity to the polluting factories may be primarily lower income persons.

<sup>149</sup> *See, e.g.*, *Video-Cinema Films, Inc. v. CNN, Inc.*, 66 U.S.P.Q.2d 1473 (S.D.N.Y. Mar. 31, 2003); *Liebovitz v. Paramount Pictures Corp.*, 55 U.S.P.Q.2d 1598 (S.D.N.Y. July 21, 2000).

<sup>150</sup> *Transgo, Inc. v Ajac Transmission Parts Corp.*, 768 F.2d 1001 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986), *proceeding on other grounds*, 911 F.2d 363 (9th Cir. 1990) (applying California law as to damages).

<sup>151</sup> *Id.*; *see also* Annotation, *Punitive Damages: Relationship to Defendant's Wealth As Factor in Determining Propriety of Award*, 87 A.L.R.4TH 141 (1991).

<sup>152</sup> *See* R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 170-74 (1988).

damage compensation regime may induce the wealthy to take more care and the poor to take less care than is efficient.<sup>153</sup> Within the scope of copyright jurisprudence, it is impractical to support a rule of law that would require that copyright infringers have knowledge concerning subjective losses due to copyright infringement. Internet users that download digital music should reasonably be expected to know only about the average losses inflicted on the song owner.<sup>154</sup> Similarly, works of art disseminated by amateurs or emerging artists should not be formally connected by law to the amateur creators' relative poverty. The Copyright Act's primary objective is to encourage the production of original literary, artistic, and musical expression for the public good and this purpose reaches both corporate competitors and famished artists.

A less important argument for network-affected environment, is however, that like in the real property world, people are more severely impaired when an unambiguous property right of theirs is taken from them, such as when a copyright on a specific work of art is eliminated, than when a comparable charge is taken from their total proprietary legal entitlements. According to what Lewinsohn-Zamir refers as the personality argument, "people are more severely hurt when a certain asset of theirs is taken, than when a similar value is taken from their total wealth."<sup>155</sup> A significant justification for why an injury to an explicit asset transcends the financial impediment involved derives from the distinctive function that property plays in people's lives, as a means of expressing their personalities.<sup>156</sup> A copyright legal regime that would be responsive to this effect should prefer the method of taxes and transfer payments to other means of redistribution.

## II. DISPARITIES BETWEEN LITIGANTS AND NON-LITIGANTS

The second critique of distributive remedies is that, even when there is a close correlation between the status of the parties in a dispute and the groups between which redistribution is desired, legal rules still might not be able to achieve redistribution as systematically as an income tax system. This is because redistribution through the legal system may only occur when a dispute arises, and not all members to a given income class will be involved in a dispute. For example, even if the output of a

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<sup>153</sup> Kaplow & Shavell, *supra* note 127, at 669.

<sup>154</sup> See also discussion *infra* Part C.1.

<sup>155</sup> Lewinson-Zamir, *supra* note 53, at 55.

<sup>156</sup> *Id.*

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polluting industry were consumed exclusively by rich people, not every rich person necessarily purchases this commodity and not every poor person lives near a factory in this industry. Thus, the legal rule used to control the pollution dispute will, at best, redistribute income from a subset of one income class to a subset of another.<sup>157</sup> Moreover, even then, redistribution may be jumbled. A pro-plaintiff rule, such as one that supports internet users, may meet redistributive justice concerns if plaintiffs, on average, are poorer than defendants, but unless this is unvaryingly true, the redistribution will flow in the incorrect direction in a number of cases. The predicament can be avoided only if the correct outcomes in copyright litigation depend linearly on parties' earnings, a theory that no one has proposed.

It is imperative that the law's boundaries be demarcated as clearly as possible so that unfairness through favoritism is avoided.<sup>158</sup> Courts have promoted this view. For example, in *Fogerty v. Fantasy, Inc.*, the court held that a defendant seeking to advance meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious infringement claims.<sup>159</sup> In conclusion, a rule stating that copyright remedies should equal average harm would be efficient.

## 2. DISTRIBUTION IS OVER-COSTLY

In a world with zero transaction costs, excludable rights in copyright can be reshuffled as legal rules in order to pursue distributive goals without any transaction costs.<sup>160</sup> In reality, transaction costs are positive, and reshuffling excludable rights in copyright for the sake of redistribution has significant transaction costs.<sup>161</sup> Distribution through regulation, either by Congress but more feasibly by courts, is a costly activity, and its duplication through copyright law is inefficient. Redistribution also

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<sup>157</sup> See POLINSKY, *supra* note 127, at 126.

<sup>158</sup> Lewinson-Zamir, *supra* note 53, at 54 (for the context of takings law); William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 HOFSTRA L. REV. 1, 11 n.37 (1995) (same).

<sup>159</sup> 510 U.S. 517, 517-18 (1994). In any event, financial disparity does not provide a basis to award attorneys' fees under the Copyright Act. See *MiTek Holdings, Inc. v. Arce Eng'g Co.*, 198 F.3d 840, 842 (for the context of attorney's fees under 17 U.S.C. § 505); see also *Harrison Music Corp. v. Tesfaye*, 293 F. Supp. 2d 80, 84 (D.D.C. 2003) (same); *RIAA v. Copyright Royalty Tribunal*, 662 F.2d 1, 10 (D.C. Cir. 1981) (wealth irrelevant to royalty proceeding).

<sup>160</sup> ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 111-12 (3d ed. 2000).

<sup>161</sup> *Id.*



creates inefficiencies in the activities regulated by the preliminary rules that promote it.<sup>162</sup> In comparison, income tax or transfer programs tend to involve less distortion and inefficiency than does redistribution through the legal rules.<sup>163</sup> The same is true of copyright law because of (1) the adverse effects copyright-based redistribution has on work incentives; (2) the administrative costs of such redistribution; (3) the long run distortion of the economy caused by redistribution; and (4) the greater restriction of personal liberty entailed by the redistribution.

The first reason that income tax and transfer program tend to involve less distortion and inefficiency than redistribution through legal rules is that redistribution has adverse effects on work incentives.<sup>164</sup> Copyright law redistribution would likely have these same adverse effects on the work incentives of creators. As is manifested in the testimony of songwriters, artists expect to be particularly handicapped by changes to copyright law, and such changes may negate the incentives created by the Copyright Act and the Copyright Clause—incentives that, together with artistic passion, keep artists at work creating music and investing in that creation, for the benefit of the public.<sup>165</sup>

Moreover, taxation and welfare laws are more efficient than regulation through copyright law because of their comparatively low administrative costs, especially the absence of litigation costs.<sup>166</sup> Even if

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<sup>162</sup> See Kaplow & Shavell, *supra* note 127, at 667-68.

<sup>163</sup> See Kaplow & Shavell, *supra* note 19, at 994.

<sup>164</sup> See, e.g., Aanund Hylland & Richard Zeckhauser, *Distributional Objectives Should Affect Taxes but Not Program Choice or Design*, 81 SCAND. J. ECON. 264 (1979); Yew-Kwang Ng, *Quasi-Pareto Social Improvements*, 74 AM. ECON. REV. 1033 (1984); Shavell, *supra* note 127, at 414.

<sup>165</sup> See Jane C. Ginsburg, *Copyright Use and Excuse on the Internet*, 24 COLUM.-VLA J.L. & ARTS 1 (2001); *Copyright Law Revision: Hearings Before the Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary on S. 1006*, 89th Cong. 65 (1965) (statement of Abraham Kaminstein, Register of Copyrights); Brief of the Progress and Freedom Foundation as Amicus Curiae Supporting Respondents at 3-4, 6, 8, *Metro-Goldwyn-Mayer Studios Inc. v. Gorkster, Ltd.*, 545 U.S. 913 (2005) (No. 04-480), 2005 WL 176438; see also Mike Stoller, *Songs That Won't Be Written*, N.Y. TIMES, Oct. 7, 2000, at A15 (op-ed by composer of *Jailhouse Rock*); Declaration of Mike Stoller in Support of Plaintiffs' Motion for Summary Judgment, Aug. 15, 2000, at J.A. 290, ¶¶ 11-13 ("Today, I fear for the seventeen-year-old songwriter looking forward to a career in the music business. . . . If [Defendants] get away with their thievery, it will turn that teenager's future livelihood into a mere hobby, and, in doing so, it will ensure that fewer and fewer talented individuals can afford to devote their efforts to expanding America's musical heritage.").

<sup>166</sup> See COOTER & ULEN, *supra* note 160, at 112 ("The enforcement of legal rights requires attorneys. A plaintiff's attorney in the United States routinely charges one third of the judgment. In contrast, the fee paid to an accountant who prepares someone's income tax return is a small fraction of the person's tax liability.").

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taxation were equally disruptive of individual freedom, and had equally adverse incentive effects, tax schemes are, by their nature, easier to administer and therefore less costly than regulatory arrangements designed to achieve the same end.<sup>167</sup>

The third rationale for favoring tax and transfer schemes as more efficient is that redistribution by copyright law distorts the economy more than progressive taxation in the long run.<sup>168</sup> For example, if copyright law disfavors music owners, we should expect some rich music owners to switch to different professions to gain valuable legal rights, such as patent law tailor-made rights to prevent others from producing patent-protected invention. On the other hand, tax-based redistribution prevents parties from avoiding the redistribution by changing the source of their income.<sup>169</sup>

Lastly, taxation and welfare laws place fewer restraints on individual liberty. This may be understood as a claim about the frequency of intervention required by redistribution. While taxation requires only an intermittent intrusion into the lives of individuals, the direct regulation of transactions requires unremitting state involvement in individual affairs. An income tax is less deeply intrusive, even if the restrictions it imposes apply continuously. Taxation and welfare laws appear to be less intrusive because they only take money from people, leaving people free to arrange their affairs in the way that best realizes other, non-pecuniary ends. Regulation of copyright arrangements, by contrast, limits the sorts of transactions individuals such as concerned song owners or even the recording industry at large may arrange for themselves, thus placing greater restraints on contractual freedom.<sup>170</sup>

### 3. DISTRIBUTION IS IMPRECISE

It is difficult in most copyright contexts to determine just how copyright law could promote the interests of the poor.<sup>171</sup> Copyright law, like other laws, should be based primarily on efficiency considerations, as

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<sup>167</sup> *See id.*

<sup>168</sup> *See id.*

<sup>169</sup> *Id.* “A fundamental principle of public finance is that taxes distort less when applied to a broad base rather than to a narrow base. Distortion drop offs with the width of the base because demand becomes less elastic. To illustrate, the demand for food is less elastic than the demand for vegetables, and the demand for vegetables is less elastic than the demand for carrots. Income, indeed, is very broad based.” *Id.* at n.25

<sup>170</sup> Rawls implicitly endorses this view of regulation. *See Rawls, Basic Structure, supra* note 110, at 65.

<sup>171</sup> *See Abramowicz, supra* note 47, at 106.

it cannot redistribute proprietary legal entitlements as systematically and precisely as tax and welfare systems.<sup>172</sup> “[T]he income tax system precisely targets inequality, whereas [copyright] law relies upon crude averages.”<sup>173</sup>

Following Little’s suggestion,<sup>174</sup> because individuals (including copyright infringers) have different tastes, the wealth they generate cannot always mean equal real incomes for both poor and rich infringers.

[S]uppose that in an initial situation the equivalence did hold. Then certainly we can find a shift in relative prices which will make some infringers worse off and others better off, keeping money incomes and the general price level constant, so that in the second situation equal money incomes will no longer coincide with equal real incomes.<sup>175</sup>

In other words, copyright law defends “music owners’ rights.” If music owners are typically richer than infringers on average, then changing the rule to protect “infringers’ rights” would theoretically redistribute proprietary legal entitlements towards greater equality. However, while music owners are richer than infringers on average, some infringers are likely richer than some music owners; therefore, changing the rights to favor infringers over music owners will increase the disparity between rich infringers and poor music owners. In contrast, progressive taxation will directly restructure uneven incomes.

#### 4. DISTRIBUTION IMPOSES INEFFICIENT SOCIAL COSTS

Reshuffling copyright legal entitlements based on distributive justice motivations may not have the distributive effects anticipated. The wealth effects of reshuffling excludable rights in a world with no or very little transaction costs for the works of art themselves tend to fall upon the network service providers and the music industry, not its users. In practice, internet service providers, who have deep pockets, are natural targets for

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<sup>172</sup> See POLINSKY, *supra* note 127, at 124-27; Kaplow & Shavell, *supra* note 127; Shavell, *supra* note 118.

<sup>173</sup> COOTER & ULEN, *supra* note 160, at 111.

<sup>174</sup> See Kenneth J. Arrow, *Little’s Critique of Welfare Economics*, 41 AM. ECON. REV. 923 (1951).

<sup>175</sup> *Id.* at 927 (suggesting an “average man” distribution of welfare, so as to overcome the imprecision policy recommendations based on welfare economics imply).

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copyright litigation,<sup>176</sup> much to their distributive justice-based dissatisfaction. The explanation of this phenomenon is twofold. First, suppose that both infringers and music owners rent their web access from absentee network service providers, such as internet service providers (ISPs). If copyright law shifts the cost of preventing infringement from infringers to music owners, competition among ISPs may cause them to adjust rents to offset the change in costs. Specifically, network service providers such as file sharing software providers who provide infringers' web access will increase the rent charged to infringers, and over-increase usage fees for their services. In addition, the network service providers who provide web access to music owners will undercut the rent sought from music owners. Consequently, the reshuffling of copyright exclusion rights will not and does not affect the distribution of wealth between infringers and music owners, but only increases their mutual dependency in discriminatory rent seeking policies by network service providers. In conclusion, the network service providers who provide access to infringing access gain, thus inflicting moral hazard on the overall copyright proprietary legal regime, while network service providers who provide web access to copyrighted music lose. Change, in its cost-effective sense, in the value of web access gets "capitalized" into rent. Consequently, the proprietary legal entitlements effects of reshuffling copyright excludable rights in a world with no or very little transaction costs tend to fall upon the network service providers, not its users. The solution to such a predicament, as Coase explains, is that social externalities deriving from "unfairly" distributed copyrighted entitlements can and should be internalized through bargaining among the affected parties. Consequently, the individual creator would have to appropriate the full social benefit in order to ensure that the efficient level of creation would occur. Again, this is true regardless of who possesses the initial right to be compensated or the obligation to pay a fine.<sup>177</sup> In an environment of low transaction costs between the engaged parties, current efficiency-based approach should remain the law.

Moreover, copyright law may affect distribution if digital music prices are also regulated, but the price of regulation itself may be used to accomplish redistribution. There may be some incidental distributive effects of copyright rules, such as when copyright industries must expend resources to opt out of default rules that will not be suitable for them. For example, when corporations must pay more for injuries to third parties,

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<sup>176</sup> See the testimony to Congress about the bills that became the Digital Millennium Copyright Act, set forth in *The WIPO Copyright Treaties Implementation Act: Hearing on H.R. 2281 Before the Subcomm. on Telecommunications, Trade, and Consumer Protection*, 105th Cong. (1998), at 41 (statements of Members of Business Software Alliance); and David Nimmer, *Appreciating Legislative History the Sweet And Sour Spots of the DMCA's Commentary*, 23 CARDOZO L. REV. 909, 917-18 (2002).

<sup>177</sup> R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 8-9 (1960).

consumer prices are often affected.<sup>178</sup> Thus, distributive justice arguments have been made, remarkably enough by copyright holders.<sup>179</sup> Such copyright holders, including motion picture studios, recording companies, songwriters, music publishers and others, are more often accused of promoting efficiency and distributive injustice at the expense of poor users and creators. Unless the compensation regime interferes, there is the risk that the lobbying efforts of the strong copyright industry will be much more effective than those of the relatively weaker internet users.<sup>180</sup>

Thus, within the recent copyright file-sharing litigation, those who seek to extend its reach to less entitled individuals (poorer creators and less entitled infringers) or otherwise defend copyright (the record industry) bemoan the decline in profits that record companies have suffered<sup>181</sup> and that Hollywood may face – wrongly using the same flawed redistributive income-loss-based argument.<sup>182</sup> This actuality also explains the copyright industry's motivation to block the public's access to works of authorship widely disseminated by technologies. Such blockage permits the industry to control the terms and conditions of access by both legislative and market-driven means, including the Audio Home Recording Act of 1992,<sup>183</sup> the Digital Performance in Sound Recordings Act of 1994,<sup>184</sup> and market efforts such as encoding digital video discs with mandatory Digital Rights Management (DRM) copy-blocking schemes.

## E. CONCLUSION

Distributive justice concerns arise whenever individuals struggle over how proprietary legal entitlements are to be divided up fairly.

<sup>178</sup> See Kaplow & Shavell, *supra* note 127 at 675 n.11.

<sup>179</sup> See *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 914 n.2 (2005) (“The studios and recording companies and the songwriters and music publishers filed separate suits against the defendants that were consolidated by the District Court.”).

<sup>180</sup> See Dagan, *supra* note 53, at 755.

<sup>181</sup> See *supra* note 95 and accompanying text. For evidence that services like Napster have in fact hurt the profits of record companies, see Stan Liebowitz, *Will MP3 Downloads Annihilate the Record Industry? The Evidence so Far*, June 2003, <http://www.utdallas.edu/~liebowit/intprop/records.pdf> (last visited Nov. 14, 2007).

<sup>182</sup> See, e.g., Ronald Grover & Heather Green, *The Digital Age Presents Hollywood Heist: Will Tinseltown Let Techies Steal the Show?*, BUS. WK., July 14, 2003, at 74, 76 (reporting that Hollywood executives are concerned that the movie industry may suffer the same loss of profits suffered by the music industry).

<sup>183</sup> Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified as 17 U.S.C. §§ 1001-1010).

<sup>184</sup> Digital Performance in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified in scattered sections of 17 U.S.C.).

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Efficiency, conversely, concerns the guiding of resources to their most valued uses. The Copyright Clause of the Constitution concerns allocation of resources to those who most value them, namely the authors, for the benefit of society. The information age has not changed this underlying rationale within copyright jurisprudence. Even while it is possible to redistribute through copyright, the government's tax and transfer system is cheaper and is more likely to be precise. It is therefore undesirable to force our egalitarian commitments into copyright law, beyond those concerns for true basic needs such as the accommodation of disability (in which the redistribution is paradigmatically only a side effect), even if the effect of the distribution is modest.