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Copyright As Charity

Brian L. Frye*

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Abstract

Copyright and charity law are generally considered distinct and unrelated bodies of law. But they are actually quite similar and complement each other

KEYWORDS: economic, copyright, charity

COPYRIGHT AS CHARITY

BRIAN L. FRYE*

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I. ABSTRACT

Copyright and charity law are generally considered distinct and unrelated bodies of law. But they are actually quite similar and complement each other.¹ Both copyright and charity law are intended to increase social welfare by solving market and government failures in public goods caused by free riding.² Copyright solves market and government failures in works of authorship by providing an indirect subsidy to marginal authors, and charity law solves market and government failures in charitable goods by

* Assistant Professor of Law, University of Kentucky School of Law. J.D., New York University School of Law, 2005; M.F.A., San Francisco Art Institute, 1997; B.A., University of California, Berkeley, 1995. The author thanks Dean Jon Garon and the 2015 Nova Law Review Symposium, New Media and Old Metaphors. The author also thanks Johnny Schmidt for helpful observations on the relationship between copyright and charity.

1. *See infra* Part IV.

2. *See infra* Part IV.A–B.

providing an indirect subsidy to marginal donors.³ Copyright and charity law complement each other by solving market and government failures in works of authorship in different ways.⁴ Copyright solves market and government failures in works of authorship by reducing *ex ante* transaction costs, but it increases *ex post* transaction costs.⁵ Charity solves market and government failures in works of authorship by reducing both *ex ante* and *ex post* transaction costs.⁶ Accordingly, the efficient scope and duration of copyright should reflect *ex ante* transaction costs, because charity can more efficiently reduce *ex post* transaction costs.

II. INTRODUCTION

As George Lakoff and Mark Johnson observed, “[t]he essence of metaphor is understanding and experiencing one kind of thing in terms of another.”⁷ In other words, metaphors express analogies.⁸ For better or worse, legal reasoning depends on analogies.⁹ Lawyers argue cases by comparing them to other cases, and judges decide cases by comparing them to previously decided cases.¹⁰ Both assume that similar cases should generally produce similar results and dissimilar cases should generally produce dissimilar results.¹¹ If it was negligent for a defendant to perform a particular act in a particular circumstance, we assume that it is negligent to perform similar acts in similar circumstances, but do not assume that it is negligent to perform different acts in different circumstances.¹²

Analogical reasoning consists in determining when similarities and differences are relevant, and when they are not.¹³ Scholars disagree about

3. *See infra* Part IV.C.

4. *See infra* Part V.C.

5. *See infra* Part V.A.

6. *See infra* Part V.B.

7. GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 5 (1980) (emphasis omitted).

8. Dedre Gentner et al., *Metaphor is Like Analogy*, in THE ANALOGICAL MIND: PERSPECTIVES FROM COGNITIVE SCIENCE 199, 199 (Dedre Gentner et al., eds., 2001).

9. Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 741 (1993) (“Reasoning by analogy is the most familiar form of legal reasoning. It dominates the first year of law school; it is a characteristic part of brief-writing and opinion-writing as well.”).

10. *Id.* at 741, 745–48.

11. *Id.* at 745–46.

12. *See id.*

13. *Id.* at 745.

the merits of analogical reasoning in law.¹⁴ Critics argue that it obscures the general theories that should determine the outcome of cases.¹⁵ But advocates argue that it can reveal the weaknesses of general theories by recognizing the contingent and circumstantial values that they ignore.¹⁶

But what if analogical reasoning were used to compare general theories of law, rather than particular cases?¹⁷ Perhaps it could help identify relationships between theories that would otherwise be obscured, and thereby improve our understanding of those theories and how they apply in practice.¹⁸

This Article argues that comparing the prevailing theories of copyright and charity law reveals that they are strikingly similar and complementary bodies of law.¹⁹ Copyright and charity law are both intended to increase social welfare by solving market failures in public goods caused by free riding.²⁰ But they do so by reducing different kinds of transaction costs.²¹ It follows that each should be designed to focus on the transaction costs it is best suited to address.²²

III. WELFARE & COPYRIGHT

In his provocative article *Author's Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, Tom Bell argues that welfare and copyright are similar because both are statutory entitlements intended to increase social welfare by redistributing personal property rights from members of the general public to particular beneficiaries: "Welfare aims to improve social well-being by helping the poor, whereas copyright aims to improve social well-being by helping those who create expressive works."²³ Welfare redistributes wealth from taxpayers to the poor, and provides the benefit of reducing poverty, at the cost of discouraging work.²⁴ Copyright

14. LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* 67 (2005).

15. *E.g.*, Richard A. Posner, *Reasoning by Analogy*, 91 *CORNELL L. REV.* 761, 765 (2006) (book review).

16. *See, e.g.*, Sunstein, *supra* note 9, at 745.

17. *See id.* at 776–77.

18. *See* Posner, *supra* note 15, at 765.

19. *See infra* Part IV.

20. *See infra* Part IV.A–B.

21. *See infra* Part V.A–B.

22. *See infra* Part V.C.

23. Tom W. Bell, *Author's Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 *BROOK. L. REV.* 229, 236 (2003).

24. *See id.* at 231 n.1.

redistributes rights from the public to authors, and provides the benefit of increasing the supply of expressive works, at the cost of limiting their use.²⁵

More controversially, Bell argues that the success of welfare reform suggests the potential for successful copyright reform.²⁶ Welfare reform reduced the subsidy provided to the poor by limiting the availability of welfare, and Bell claims that it was successful because it encouraged work without increasing poverty.²⁷ Based on the success of welfare reform, Bell argues that copyright reform limiting the scope of copyright would increase the use of expressive works, without reducing their supply.²⁸

Of course, there are weaknesses in Bell's argument.²⁹ To begin with, many people disagree with his assertion that welfare reform was successful, or that it encouraged work without increasing poverty.³⁰ If welfare reform was not successful, perhaps copyright reform would also not be successful.

More fundamentally, Bell's comparison of welfare and copyright is strained, because they are not as similar as he suggests.³¹ Bell himself admits that the analogy is not perfect, because copyright "looks a lot more like property than welfare does."³² Specifically, copyright provides rights to exclude, but welfare only provides a right to due process.³³ He argues that his analogy still holds, because welfare and copyright are both statutory entitlements, not property rights.³⁴

But Bell ignores other differences between welfare and copyright which are fatal to his analogy. First, welfare provides a direct subsidy to the poor, but copyright provides an indirect subsidy to authors. As a result, the burden of welfare falls on the government, but the burden of copyright falls on consumers of works of authorship. Second, welfare is vulnerable to

25. *Id.* at 245.

26. *Id.* at 277.

27. *Id.* at 236; Peter Edelman, Professor of Law, Poverty & Welfare: Does Compassionate Conservatism Have a Heart?, Edward C. Sobota Memorial Lecture Series (2001), in 64 ALB. L. REV. 1073, 1075 (2001). Specifically, Bell refers to The Personal Responsibility and Work Opportunity Reconciliation Act. Bell, *supra* note 23, at 231 n.1.

28. *See* Bell, *supra* note 23, at 236; Tom. W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 744, 746 (2001).

29. *See* Edelman, *supra* note 27, at 1074–76, 1078–79.

30. *See, e.g., id.* at 1074–76, 1078–79.

31. *See id.* at 255.

32. *Id.*

33. *Compare* 17 U.S.C. § 106 (2012) (providing exclusive rights in copyrighted works), with *Goldberg v. Kelly*, 397 U.S. 254, 261–62 (1970) (holding that the Due Process Clause of the Fourteenth Amendment requires an evidentiary hearing before the termination of welfare benefits).

34. Bell, *supra* note 23, at 273–74.

government failures caused by majoritarian politics, but copyright is vulnerable to government failures caused by rent-seeking. Third, welfare is intended to increase static efficiency by improving the allocation of wealth, but copyright is intended to increase dynamic efficiency by encouraging the creation of works of authorship. And fourth, welfare is a common-pool resource because it is rivalrous, but works of authorship are public goods because they are non-rivalrous.

While the differences between welfare and copyright render Bell's conclusions unconvincing, the analogy that he draws between welfare and copyright still improved our understanding of copyright by showing that it is best understood as a form of statutory entitlement, rather than a form of physical property.³⁵ It follows that the scope and duration of copyright protection ought to be determined in relation to other statutory entitlements, rather than in relation to physical property.³⁶ Moreover, even the limited success of Bell's analogy suggests that alternative analogies may further improve our understanding of copyright.³⁷ Specifically, this Article argues that comparing copyright and charity law can improve our understanding of both areas of law, and show how they complement each other.

IV. COPYRIGHT & CHARITY LAW

The prevailing theories of both copyright and charity law are economic subsidy theories, which hold that copyright and charity law are justified because they increase social welfare by solving market and government failures caused by free riding.³⁸ This formal similarity of the respective theories of copyright and charity law is reinforced by a substantive similarity in their purpose.³⁹ The purpose of copyright is to increase public welfare by solving market failures in works of authorship, which are a particular form of public good, and the purpose of charity law is to increase public welfare by solving market failures in charitable goods, which include

35. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1032 (2005). "If we must fall back on a physical-world analogy for intellectual property protection—and I see no reason why we should—treating intellectual property as a form of government subsidy is more likely to get people to understand the tradeoffs involved than treating it as real property." *Id.* at 1032 n.2 (stating "Tom Bell is the first to draw this analogy, likening copyright specifically to a particular form of government subsidy: [W]elfare").

36. *See id.* at 1069–71.

37. *See id.* at 1032.

38. Brian L. Frye, *Solving Charity Failures*, 93 OR. L. REV. 155, 159–60 (2014).

39. *See id.* at 168.

a broad range of public and quasi-public goods, including works of authorship.⁴⁰ In other words, works of authorship are a category of charitable goods, and copyright is arguably a category of charity law, or rather, the continuation of charity by other means.⁴¹

A. *The Economic Subsidy Theory of Copyright*

The economic subsidy theory of copyright holds that it is justified because it solves market and government failures in works of authorship caused by free riding.⁴² Works of authorship are non-rivalrous—or *public* goods—because the consumption of a work of authorship does not affect the supply.⁴³ Classical economics predicts that free riding will cause market failures in public goods, because rational economic actors will consume the good without paying the marginal cost of production.⁴⁴

Copyright solves market failures in works of authorship by making them excludable and thereby enabling authors to recover their fixed costs and opportunity costs.⁴⁵ In other words, copyright indirectly subsidizes authors by giving them certain exclusive rights to use works of authorship for a certain period of time.⁴⁶ As a result, authors can internalize some of the positive externalities or *spillovers* generated by the creation of a work of authorship by charging consumers more than the marginal cost of production.⁴⁷ Essentially, copyright provides an incentive for marginal authors to invest in the production of works of authorship.⁴⁸

Of course, direct subsidies can also solve market failures in works of authorship caused by free riding.⁴⁹ For example, governments directly subsidize the production of works of authorship by distributing grants to authors.⁵⁰ But these direct subsidies are vulnerable to government failures caused by rent-seeking and transaction costs, especially information costs.⁵¹

40. *See id.* at 166.

41. *Cf.* CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard & Peter Paret eds., trans., 1976) (“War Is Merely the Continuation of [Politics] by Other Means”).

42. Frye, *supra* note 38, at 159–160; *see also* RONALD A. CASS & KEITH N. HYLTON, LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS 141 (2013).

43. *See* Frye, *supra* note 38, at 163; Lemley, *supra* note 35, at 1054.

44. Frye, *supra* note 38, at 164.

45. *See* Lemley, *supra* note 35, at 1054.

46. 17 U.S.C. §§ 106, 302 (2012).

47. Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 268 (2007).

48. *Id.* at 283–84.

49. *See* Frye, *supra* note 38, at 164.

50. *See* Lemley, *supra* note 35, at 1063.

51. *See id.*

Public choice theory predicts that rent-seeking will cause governments to distribute grants inefficiently, and classical economics predicts that information costs and other transaction costs will prevent governments from distributing grants efficiently.⁵² In others words, governments cannot know which authors to subsidize, and politics creates incentives to subsidize the wrong authors.⁵³

Copyright solves government failures in works of authorship by reducing certain forms of rent-seeking and transaction costs.⁵⁴ Copyright reduces *ex ante* rent-seeking by subsidizing all authors in relation to the economic value of their work of authorship.⁵⁵ Copyright also reduces *ex ante* transaction costs by enabling marginal authors to decide whether the private cost of investing in authorship is smaller than the private benefit provided by copyright.⁵⁶ Presumably, individual authors can gather and assess relevant information more efficiently than governments.⁵⁷

B. *The Economic Subsidy Theory of Charity*

The economic subsidy theory of charity law holds that it “is justified because it solves market . . . and government failures in charitable goods” caused by free riding.⁵⁸ Charitable goods resemble public goods because they are either actually or ideally non-rivalrous.⁵⁹ For example, religion is actually non-rivalrous because the consumption of religion does not affect the supply; food banks are ideally non-rivalrous because they are intended to provide food to all who require it.⁶⁰ Accordingly, “[c]lassical economics predicts that free riding will cause market failures in [charitable] goods.”⁶¹

Charity law solves market failures in charitable goods by enabling certain donors to deduct certain charitable contributions from their income tax base, thereby compensating for free riding on charitable contributions by indirectly subsidizing altruism.⁶² In other words, charity law indirectly subsidizes the production of charitable goods by reducing the cost of

52. See Frye, *supra* note 38, at 164–65; Lemley, *supra* note 35, at 1065.

53. See Frye, *supra* note 38, at 164–65.

54. See Lemley, *supra* note 35, at 1063–64.

55. See Frischmann & Lemley, *supra* note 47, at 268.

56. See *id.*; Frye, *supra* note 38, at 164.

57. See Frye, *supra* note 38, at 164.

58. *Id.* at 158–59; see also JOHN D. COLOMBO & MARK A. HALL, THE CHARITABLE TAX EXEMPTION 109, 113 (1995).

59. Frye, *supra* note 38, at 163, 165.

60. See *id.* at 163–65.

61. *Id.* at 163.

62. *Id.* at 166–67.

altruism.⁶³ Essentially, charity law provides an incentive for marginal donors to invest in the production of charitable goods, thereby generating positive externalities.⁶⁴

Of course, direct subsidies can also solve market failures in charitable goods caused by free riding.⁶⁵ Governments can and do directly subsidize the production of charitable goods by distributing grants to charities.⁶⁶ But these direct subsidies are vulnerable to market failures caused by rent-seeking and transaction costs.⁶⁷ Public choice theory predicts that rent-seeking will cause governments to distribute grants inefficiently, and classical economics predicts that information costs and other transaction costs will prevent governments from distributing grants efficiently.⁶⁸ In others words, governments cannot know which charities to subsidize, and politics creates incentives to subsidize the wrong charities.⁶⁹

Charity law solves government failures in charitable goods by reducing certain forms of rent-seeking and transaction costs.⁷⁰ Charity law reduces rent-seeking and transaction costs by subsidizing altruism, depending on donors to identify worthy charities.⁷¹ Presumably, individual donors can gather and assess relevant information more efficiently than governments.

C. *Comparing Copyright & Charity Law*

The structural similarity of the economic subsidy theories of copyright and charity law is obvious.⁷² Both hold that indirect subsidies are justified because they solve market and government failures in a public good and thereby increase social welfare.⁷³ Copyright is justified because it increases social welfare by providing an incentive to create works of authorship, and charity law is justified because it increases social welfare by providing an incentive to make charitable contributions.⁷⁴

63. *See id.*

64. *See Frye, supra* note 38, at 168, 171.

65. *Id.* at 167.

66. *Id.* at 177.

67. *Id.* at 177–78.

68. *See id.* at 164–65, 177–78.

69. *See Frye, supra* note 38, at 164–65, 177–78.

70. *Id.* at 166–67.

71. *Id.*

72. *Id.* at 166.

73. *Id.*

74. *Frye, supra* note 38, at 162.

The economic subsidy theories of copyright and charity law are welfarist theories, which hold that copyright and charity law are justified because they are efficient.⁷⁵ In other words, copyright and charity law are justified because their social benefit is larger than their social cost, so they actually increase social welfare.⁷⁶ It follows that the justification of both copyright and charity law depends on a testable hypothesis.⁷⁷ According to the economic subsidy theory, copyright is justified because the social benefit of increasing the production of works of authorship is actually larger than the social cost of increasing the scope or duration of copyright protection, and charity law is justified because the social benefit of increasing the production of charitable goods is larger than the social cost of reduced tax revenue.⁷⁸ Or rather, copyright and charity law are justified because they increase social welfare on the margins.⁷⁹ But that hypothesis is inconsistent with the doctrine and development of both copyright and charity law.⁸⁰

D. *The Justification for Copyright*

Copyright doctrine is inconsistent with its welfarist justification because the scope and duration of copyright protection is uniform for all works of authorship, even though the efficient scope and duration of copyright protection necessarily depend on the circumstances.⁸¹ Each work of authorship necessarily has unique fixed costs of production, and each author necessarily has unique opportunity costs.⁸² Moreover, some authors may choose to invest in the production of works of authorship even if they cannot recover their fixed and opportunity costs.⁸³ In theory, the scope and duration of copyright protection should vary from author to author and from work to work.

Of course, it is practically impossible to tailor the scope and duration of copyright protection to particular authors and works. But the scope and duration of copyright protection does not even vary among categories of works with manifestly different fixed and opportunity costs.⁸⁴ As Brad Greenberg has memorably observed, Copyright protection under the 1976

75. *Id.* at 168.

76. *Id.* at 162.

77. *Id.* at 158, 172.

78. *Id.* at 162.

79. Frye, *supra* note 38, at 166–67.

80. *Id.* at 168.

81. *See* 17 U.S.C. §§ 106, 302 (2012); Bell, *supra* note 23, at 277.

82. *See* Lemley, *supra* note 35, at 1032.

83. *See id.* at 1050.

84. *See* 17 U.S.C. §§ 106, 302.

Act is like an Oprah giveaway: Everybody gets one.⁸⁵ An email, a novel, a home video, and a feature film all receive copyright protection of the same scope and duration.⁸⁶

In addition, the actual scope and duration of copyright protection were not determined in relation to its ostensible welfarist justification.⁸⁷ Congress did not seriously consider marginal efficiency when it determined the scope and duration of copyright protection.⁸⁸ And courts explicitly refrain from considering the marginal efficiency of copyright protection when reviewing its legitimacy.⁸⁹

Moreover, the economic subsidy theory assumes that copyright is justified because authors are rational economic actors, and marginal authors will decide whether to invest in creating works of authorship based on whether they can expect to recover their costs.⁹⁰ But in practice, many authors are not exclusively rational economic actors, and choose to invest in the production of works of authorship even if they do not expect to recover their costs.⁹¹ In fact, because copyright automatically protects even the most trivial works of expression, copyright protection is not a salient incentive to the overwhelming majority of authors who receive copyright protection.⁹² For example, copyright protects emails and snapshots, but does not provide a salient incentive to produce those works of authorship.⁹³ The economic theory holds that copyright is justified because it increases social welfare; so to the extent that copyright protection is not a salient incentive, it is not justified.⁹⁴

85. Brad A. Greenberg, Copyright and Trademark Troll: Fable or Fact?, held by Chapman University School of Law, Law Review Symposium (Jan. 30, 2015) (Audio Recording 19:34–19:53), *available at* <http://ibc.chapman.edu/Mediasite/Play/5fee649a60414522a5a1c1627f222ff81d>.

86. *See* 17 U.S.C. §§ 106, 302.

87. *See id.* §§ 106, 302; Bell, *supra* note 23, at 277.

88. *See* 17 U.S.C. §§ 106, 302; Bell, *supra* note 23, at 277.

89. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 208 (2003) (“In sum, we find that the CTEA is a rational enactment; we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be.”).

90. *See* MICHELE BOLDRIN & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY 24–25 (2008).

91. *See id.*

92. *See* 17 U.S.C. § 106; Bell, *supra* note 23, at 242.

93. *See* 17 U.S.C. § 106.

94. BOLDRIN & LEVINE, *supra* note 90, at 5–6.

E. *The Justification for Charity Law*

Charity law doctrine is also inconsistent with its welfarist justification because the indirect subsidy provided by the charitable contribution deduction is unrelated to the market and government failures that it ostensibly solves.⁹⁵ The charitable contribution deduction indirectly subsidizes the production of charitable goods by allowing certain donors to deduct certain charitable contributions from their income tax base.⁹⁶ As a consequence, the higher the marginal income tax rate on the donor, the larger the subsidy, and the lower the marginal income tax rate on the donor, the smaller the subsidy.⁹⁷ But there is no relationship between a donor's marginal income tax rate and the market and government failures associated with the recipient of that donor's charitable contribution.⁹⁸ If anything, they may be negatively correlated.⁹⁹

In addition, the charitable contribution deduction is a salient incentive to only a small minority of donors. Taxpayers can claim charitable contribution deductions only if they itemize their deductions, but only about thirty percent of taxpayers itemize their deductions.¹⁰⁰ As a result, the charitable contribution deduction is not a salient incentive for the seventy percent of taxpayers who do not itemize their deductions, and is a considerably less salient incentive for low-income taxpayers than it is for high-income taxpayers.¹⁰¹

Moreover, the economic subsidy theory assumes that charity law is justified because donors are rational economic actors, and marginal donors will decide whether to make charitable contributions based on whether they will receive a deduction.¹⁰² But in practice, many donors are not exclusively rational economic actors, and choose to make charitable contributions even though they do not expect to receive a deduction.¹⁰³ The economic subsidy

95. Frye, *supra* note 38, at 159–60.

96. *Id.* at 159.

97. *Id.* at 169.

98. *See id.* at 168.

99. *See id.*

100. BENJAMIN H. HARRIS & DANIEL BANEMAN, TAX POLICY CTR., WHO ITEMIZES DEDUCTIONS? 345 (2011), available at <http://www.taxpolicycenter.org/UploadedPDF/1001486-Who-Itemizes-Deductions.pdf>.

101. *But see* Lilian V. Faulhaber, *The Hidden Limits of the Charitable Deduction: An Introduction to Hypersalience*, 92 B.U. L. REV. 1307, 1310, 1325–26, 1327 n.93 (2012) (arguing that the charitable contribution deduction may be “hypersalient” to certain taxpayers who mistakenly believe they can claim a deduction).

102. DAVID CHEAL, *THE GIFT ECONOMY* 15 (1988); Frye, *supra* note 38, at 158.

103. *See* Frye, *supra* note 38, at 166, 182.

theory holds that charity law is justified because it increases social welfare, so to the extent that the charitable contribution deduction is not a salient incentive to a particular donor, it is not justified.¹⁰⁴

V. COPYRIGHT AS CHARITY

While the premises of the economic subsidy theories of copyright and charity law are inconsistent with copyright and charity law doctrine, their structural similarities illuminate their complementary relationship.¹⁰⁵ The purpose of copyright is to increase public welfare by providing an incentive for marginal authors to invest in the production of works of authorship, and the purpose of charity law is to increase public welfare by providing an incentive for marginal donors to invest in the production of charitable goods.¹⁰⁶

Essentially, works of authorship are a category of charitable goods.¹⁰⁷ Works of authorship and charitable goods both increase public welfare by providing a public good.¹⁰⁸ In fact, charity law provides that subsidizing the production and distribution of works of authorship is a charitable purpose.¹⁰⁹

It follows that copyright and charity law ought to be evaluated in relation to one another. Under the economic subsidy theories of copyright and charity law, indirect subsidies are justified to the extent that they are efficient. If copyright is intended to increase public welfare by providing an incentive for marginal authors to invest in the production of works of authorship, copyright is justified only to the extent that it is more efficient than charity law at providing incentives for marginal authors to invest in charitable goods.

A. *Copyright & Efficiency*

Copyright efficiently reduces *ex ante* transaction costs that cause market failures in works of authorship by devolving the decision—whether to invest in the production of works of authorship—onto marginal authors, who are generally in the best position to determine whether investing in a

104. *See id.*
 105. *Id.* at 159.
 106. *See Bell, supra* note 23, at 236.
 107. *See id.*
 108. *See id.*
 109. *See id.*; Frye, *supra* note 38, at 168.

work of authorship is likely to increase social welfare.¹¹⁰ Moreover, copyright forces authors to assume the risk of their investment by providing a subsidy only if an author actually produces a work of authorship with social value. Accordingly, copyright is generally highly efficient to the extent that it enables authors to recover the fixed and opportunity costs of investing in the production of works of authorship.¹¹¹ While many authors would choose to invest in the production of works of authorship whether or not they received a subsidy, copyright presumably provides at least a marginal incentive to authors who contemplate investing more than a nominal amount of resources in producing a work of authorship.¹¹²

However, copyright is inefficient to the extent that it provides a subsidy in excess of the fixed and opportunity costs of investing in the production of works of authorship, not only because those subsidies do not provide a marginal incentive, but also because they increase transaction costs.¹¹³ To the extent that authors are rational economic actors, a subsidy that exceeds the fixed and opportunity costs of investing in works of authorship is inefficient; it provides an incentive to overinvest in the production of works of authorship. The purpose of copyright is to encourage authors to invest in the production of works of authorship that will increase social welfare.¹¹⁴ Increasing the subsidy to works of authorship provides an incentive to invest in the production of works of authorship even if they will not increase social welfare.

In addition, copyright increases *ex post* transaction costs by increasing the cost of consuming a work of authorship and increasing information costs relating to the use of that work of authorship.¹¹⁵ Transaction costs imposed by copyright protection are justified to the extent that they are offset by increases in public welfare. But copyright protection in excess of what is required to provide an efficient incentive to marginal authors is not justified because it creates transaction costs that are not offset by increases in public welfare.¹¹⁶ In other words, copyright protection that does not provide an efficient incentive to marginal authors provides a private

110. BOLDRIN & LEVINE, *supra* note 90, at 23–25; Bell, *supra* note 23, at 267, 267 n.212

111. See BOLDRIN & LEVINE, *supra* note 90, at 24–25; Bell, *supra* note 23, at 267 n.212, 267–68.

112. See Bell, *supra* note 23, at 236, 267 n.212, 267–68.

113. See Lemley, *supra* note 35, at 1032.

114. Bell, *supra* note 23, at 236, 238.

115. See *id.* at 277–78, 278 n.261.

116. See *id.*

benefit without generating a corresponding public benefit, and reduces public welfare.¹¹⁷

To make matters worse, public choice theory predicts that copyright is vulnerable to rent-seeking because authors have a strong incentive to lobby the government to increase the scope and duration of copyright protection, irrespective of its efficiency.¹¹⁸ In particular, owners of valuable copyrights have an incentive to invest in lobbying the government to increase the value of those copyrights.¹¹⁹

B. *Charity Law & Efficiency*

Charity law efficiently reduces transaction costs that cause market failures in charitable goods by devolving the decision—whether to invest in the production of charitable goods—onto marginal donors, who are often in good position to determine whether investing in the production of a charitable good is likely to increase social welfare.¹²⁰ Specifically, donors are reasonably well-positioned to determine whether investing in the production of a work of authorship is likely to increase public welfare.¹²¹ If altruism motivates a donor to make a charitable contribution to the production of a work of authorship, it is likely that the production of that work of authorship will increase social welfare, and is thereby likely that any indirect subsidy provided by the government will be efficient.¹²² In addition, if altruism motivates a donor to make a charitable contribution to the distribution of a work of authorship or the support of an author, it is likely that the contribution will increase social welfare by enabling that author to produce additional works of authorship, and is thereby likely that any indirect subsidy provided by the government will also be efficient.¹²³

C. *Comparing the Efficiency of Copyright & Charity Law*

While copyright efficiently reduces *ex ante* transaction costs relating to investments in the production of charitable goods, it increases *ex post*

117. *See id.*

118. *See* BOLDRIN & LEVINE, *supra* note 90, at 261, 264–65; Lemley, *supra* note 35, at 1063.

119. Lemley, *supra* note 35, at 1063–64.

120. *See* Frye, *supra* note 38, at 162, 167–68, 171.

121. *Id.* at 174.

122. *See id.* at 166, 171.

123. *See id.*

transaction costs.¹²⁴ By contrast, charity law reduces both *ex ante* and *ex post* costs.¹²⁵ Copyright reduces *ex ante* transaction costs more efficiently than charity law, because authors are generally in a better position than donors to determine whether investing in a work of authorship will increase social welfare.¹²⁶ But copyright increases *ex post* transaction costs by granting windfalls to authors and creating opportunities for rent-seeking, while charity law is associated with low *ex post* transaction costs, because it depends on altruism.¹²⁷

It follows that copyright should focus on providing *ex ante* incentives to marginal authors, and rely on charity law or its analogues to provide any additional subsidies to authors. Charity law is especially well-suited to this goal, because it relies on altruism, rather than self-interest.¹²⁸ Copyright assumes that authors invest in the production of works of authorship in order to benefit themselves.¹²⁹ By contrast, charity law assumes that donors invest in the production of works of authorship in order to benefit the public.¹³⁰ Charity law is likely to increase public welfare because it subsidizes donations intended to increase public welfare.¹³¹

But there are additional reasons to consider reducing the scope and duration of copyright and to consider relying on charity rather than copyright to increase investment in works of authorship. Historically, transaction costs made it difficult for donors to determine which marginal authors to subsidize.¹³² Donors did not know which authors to subsidize, and did not have a convenient way to make contributions.¹³³ Moreover, charity law created incentives for them to donate to charities rather than individual authors.¹³⁴

Accordingly, donors contributed to charitable organizations, which solved transaction costs by developing expertise in identifying which artists

124. See Bell, *supra* note 23, at 261, 264, 277–78; Frye, *supra* note 38, at 166–68.

125. See Frye, *supra* note 38, at 166–68.

126. See Bell, *supra* note 23, at 261, 264, 277–78; Frye, *supra* note 38, at 166–68, 182.

127. See Bell, *supra* note 23, at 261, 264, 277–78; Frye, *supra* note 38, at 166–68, 182.

128. Frye, *supra* note 38, at 168.

129. See Bell, *supra* note 23, at 238, 242.

130. See Frye, *supra* note 38, at 161.

131. See *id.* at 160–62.

132. *Id.* at 157, 182.

133. See *id.* at 157.

134. *Id.* at 187–88.

to subsidize and provided charitable contribution deductions.¹³⁵ But authors and donors also developed legal workarounds, which enabled them to steer charitable contributions to particular authors.¹³⁶ And more recently, social entrepreneurs have developed methods of using technology to solve charity failures, and more efficiently encourage and enable marginal donors to make donations in support of the production of works of authorship.¹³⁷

1. Fiscal Sponsorship

For example, in the arts sector, donors and authors use *fiscal sponsorship* in order to enable donors to both support particular authors or particular projects and claim a charitable contribution deduction.¹³⁸ In theory, charity law only permits taxpayers to claim charitable contribution deductions for donations to charitable organizations that are exempt under 26 I.R.C. § 501(c)(3).¹³⁹ As a consequence, it does not allow taxpayers to claim charitable contribution deductions for donations to individuals, which are generally treated as gifts for income tax purposes.¹⁴⁰

Donors and authors use *fiscal sponsors* in order to circumvent that restriction.¹⁴¹ A *fiscal sponsor* is a charitable organization that receives charitable contributions from donors on behalf of particular authors.¹⁴² The donor claims a charitable contribution deduction, the charity claims a fee, and the author receives the balance of the donation.¹⁴³ Essentially, fiscal sponsorship is a legal fiction that enables donors to claim a deduction for a contribution to an individual.¹⁴⁴ In theory, the charity receiving the contribution is not obligated to pass the donation on to its intended private recipient, and makes an independent determination that providing funds to that author is consistent with its charitable purpose.¹⁴⁵ But this obligation is observed almost entirely in the breach, and charities acting as fiscal sponsors

135. See Frye, *supra* note 38, at 183.

136. *Id.*

137. *Id.* at 159, 190–92.

138. *Id.* at 187–88.

139. See I.R.C. § 501(c)(3) (2012); PUB. COUNS. L. CTR., FISCAL SPONSORSHIP: AN ALTERNATIVE TO FORMING A NONPROFIT 501(C)(3) CORPORATION 2 (2009), available at <http://www.publiccounsel.org/tools/assets/files/0483.pdf>.

140. See I.R.C. § 501(c)(3).

141. PUB. COUNS. L. CTR., *supra* note 139, at 2; see also I.R.C. § 501(c)(3).

142. See PUB. COUNS. L. CTR., *supra* note 139, at 2.; *Ioby's Fiscal Sponsorship Service*, IOBY, <https://www.ioby.org/fiscal-sponsorship> (last visited Aug. 27, 2015).

143. Frye, *supra* note 38, at 187.

144. See *id.*

145. See PUB. COUNS. L. CTR., *supra* note 139, at 2; *Ioby's Fiscal Sponsorship Service*, *supra* note 142.

effectively function as conduits for donations that would otherwise be ineligible for charitable contribution deductions.¹⁴⁶

Interestingly, the IRS has tolerated the practice of fiscal sponsorship, despite its apparent inconsistency with federal tax law.¹⁴⁷ The best explanation for the IRS's forbearance is probably that while fiscal sponsorship may strain the letter of the law, it is generally consistent with its purpose.¹⁴⁸ Charities generally exercise at least some oversight over the authors and projects they agree to sponsor, and sponsoring works of authorship is generally a charitable activity.

In addition, fiscal sponsorship may help solve market failures associated with works of authorship by reducing transaction costs associated with determining which works to sponsor.¹⁴⁹ It is costly for charities to determine which authors and projects to sponsor, and it is difficult for charities to solicit funds to sponsor works of authorship in general, rather than specific projects.¹⁵⁰ Fiscal sponsorship reduces these transaction costs by enabling donors and authors to make a direct connection, without a mediating charity.¹⁵¹

In any case, the prevalence of fiscal sponsorship suggests that charity law provides a salient incentive to at least some marginal donors. In the absence of fiscal sponsorship, donors could still make gifts to individual authors.¹⁵² The primary purpose of fiscal sponsorship is to ensure that donors can claim a charitable contribution deduction for their donation.¹⁵³ Presumably, the ability to claim a charitable contribution deduction motivates at least some marginal donors to give.

However, fiscal sponsorship has a critical weakness, which is a function of its reliance on leveraging the charitable contribution deduction in the service of reducing transaction costs.¹⁵⁴ Because fiscal sponsorship depends on the salience of the charitable contribution deduction, it cannot provide a salient incentive to marginal donors who cannot claim the

146. See Frye, *supra* note 38, at 187; *Ioby's Fiscal Sponsorship Service*, *supra* note 142.

147. See *Ioby's Fiscal Sponsorship Service*, *supra* note 142.

148. See Frye, *supra* note 38, at 187–88; *Ioby's Fiscal Sponsorship Service*, *supra* note 142.

149. *Ioby's Fiscal Sponsorship Service*, *supra* note 142.

150. See *id.*

151. See *id.*

152. See, e.g., Faulhaber, *supra* note 101, at 1320.

153. *Id.* at 1318–19. In addition, fiscal sponsorships enable certain private foundations that are only permitted to make grants to public charities to effectively make grants to individual authors. See *Ioby's Fiscal Sponsorship Service*, *supra* note 142.

154. See PUB. COUNS. L. CTR., *supra* note 139, at 3.

deduction.¹⁵⁵ As a result, the overwhelming majority of taxpayers should be indifferent to fiscal sponsorship.

2. Crowdfunding

As I have previously shown, charity law is vulnerable to *charity failures*, or inefficiencies in its ability to solve market and government failures, caused by the inability of the charitable contribution deduction to provide a salient incentive to the overwhelming majority of taxpayers who do not itemize their deductions.¹⁵⁶ I argue that the remarkable success of crowdfunding—which already provides more arts funding than the federal government—is a function of its ability to solve some of those charity failures. First, crowdfunding reduces transaction costs associated with soliciting donations, by providing authors with low-cost platforms that make it easy to leverage the network effects of social media.¹⁵⁷ Second, crowdfunding reduces transactions associated with making donations, by reducing search and information costs on donors.¹⁵⁸ And third, reward-based crowdfunding enables authors to provide salient incentives to marginal donors who cannot claim charitable contribution deductions.¹⁵⁹

Essentially, crowdfunding is a way of using technology to solve charity failures.¹⁶⁰ Of course, crowdfunding works of authorship is generally not charitable in the strictest sense, as most donations are not charitable contributions under the Internal Revenue Code.¹⁶¹ However, it is often charitable in the broader sense that the contributions include a gratuitous element and are intended to support the creation of works of authorship that will increase public welfare.¹⁶²

155. *Fiscal Sponsorship for Nonprofits*, NAT'L COUNCIL OF NONPROFITS, <https://www.councilofnonprofits.org/tools-resources/fiscal-sponsorship-nonprofits> (last visited Aug. 27, 2015).

156. Frye, *supra* note 38, at 171, 173.

157. *Id.* at 178–79.

158. *Id.* at 182.

159. *Id.* at 183, 190–91.

160. *Id.* at 178.

161. *See* Frye, *supra* note 38, at 160–61, 180–81.

162. *Id.* at 179–81.

3. Open-Source

The open-source movement is another way of using technology to solve charity failures.¹⁶³ Open-source is a development model that provides universal access to works of authorship by providing a free license to use and distribute the work, and by requiring that authors of derivative works also provide a free license to use and distribute the derivative work.¹⁶⁴ The open-source movement initially focused on computer software, enabling authors to provide a free license for the public to use, distribute, and improve source code.¹⁶⁵ But the open-source movement has subsequently expanded to other forms of authorship and innovation, and has inspired many related open licensing schemes, like Creative Commons.¹⁶⁶ Open-source is especially prevalent in various scholarly fields, and there is an emerging norm among scholars in many fields to provide open access to all of their papers and research.¹⁶⁷

Essentially, open-source is a way of using the Internet and social media to reduce transaction costs associated with copyright and other forms of intellectual property.¹⁶⁸ Historically, works of authorship were distributed by commercial intermediaries, which reduced transaction costs by enabling authors to effectively distribute works of authorship to the public.¹⁶⁹ The Internet and social media have rendered many of those commercial distributors largely irrelevant by enabling authors to effectively distribute certain categories of works of authorship to the public at no cost.¹⁷⁰ Many authors do not need to recover the fixed and opportunity costs of authorship.¹⁷¹ For example, most scholars produce works of authorship as a function of their employment.¹⁷² As a consequence, open-source is attractive

163. See LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* 46 (2004).

164. See BOLDRIN & LEVINE, *supra* note 90, at 17–18; LESSIG, *supra* note 163, at 46; *About the Licenses*, CREATIVE COMMONS, <http://creativecommons.org/licenses> (last visited Aug. 27, 2015).

165. See LESSIG, *supra* note 163, at 46; *About the Licenses*, *supra* note 164.

166. See *About the Licenses*, *supra* note 164.

167. See *id.* But see ERIC S. RAYMOND, *THE CATHEDRAL AND THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY* 128 (rev. ed. 2001).

168. See LESSIG, *supra* note 163, at 46–47; *supra* Part V.A.

169. See Frischmann & Lemley, *supra* note 47, at 266–67 n.31.

170. See *id.*; Eric Schlacter, *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet*, 12 BERKELEY TECH. L.J. 15, 22 (1997).

171. See Schlacter, *supra* note 170, at 22.

172. LESSIG, *supra* note 163, at 46–47.

to scholars, as it enables them to distribute their works of authorship at no cost to the consumer, thereby increasing its distribution in the academic gift economy.¹⁷³

VI. CONCLUSION

Copyright and charity law are similar because they both use indirect subsidies to solve market and government failures in public goods caused by free riding. Copyright solves market and government failures in works of authorship, a particular category of public goods. Charity law solves market and government failures in charitable goods, which include a broad range of public and quasi-public goods, including works of authorship. Copyright solves market failures in works of authorship by making them partially excludable and thereby limiting free riding, and solves government failures by reducing information costs associated with determining which works to subsidize. Charity law solves market failures in charitable goods by making certain charitable contributions deductible, and thereby compensating for free riding, and solves government failures by reducing transaction costs associated with majoritarian politics. In other words, copyright and charity law are complements that use different means to pursue similar goals.

Notably, copyright and charity law are associated with different transaction costs. Copyright efficiently reduces *ex ante* transaction costs by delegating the decision whether to invest in works of authorship onto marginal authors and by forcing them to internalize the risk associated with investing in works of authorship. But copyright increases *ex post* transaction costs by making it more difficult and expensive for consumers to use works of authorship. Moreover, copyright encourages rent-seeking by the copyright owners of works with substantial social value.

By contrast, charity law moderately reduces both *ex ante* and *ex post* transaction costs by delegating the decision whether to invest in charitable goods onto marginal donors, and by providing a relatively modest and contingent subsidy. While copyright reduces *ex ante* transaction costs associated with investment charity law more efficiently than charity law, copyright increases *ex post* transaction costs, and charity law does not. In addition, new technologies like crowdfunding and the open-source movement enable authors and donors to solve certain market and government failures previously addressed by copyright and charity law without the need for the indirect subsidies that copyright and charity law use to provide incentive to marginal authors and donors.

173. *Id.*; see Frischmann & Lemley, *supra* note 47, at 266–67.

As a consequence, we should consider reducing the scope of copyright protection to focus on its ability to efficiently reduce *ex ante* transaction costs by enabling authors to recover their fixed and opportunities costs, and use charity law and related technologies to reduce *ex post* transaction costs associated with investment in the creation of works of authorship.