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Copyright Paternalism

Kevin J. Hickey*

ABSTRACT

The dominant justification for copyright is based on the notion that authors respond rationally to economic incentives. Despite the dominance of this incentive model, many aspects of existing copyright law are best understood as motivated by paternalism. Termination rights permit authors to rescind their own earlier assignments of copyright. The elimination of formalities protects careless authors from forfeitures of copyright if they fail to register the copyright or place appropriate notice on their works. The law limits how copyrights can be transferred, when rights in emerging media can be assigned, and which works can be designated as “made for hire” by contract. Thus, while the basic model of copyright presumes that authors are rational actors, many of its actual provisions suppose that authors are not capable of understanding or protecting their own economic interests. This Article highlights and seeks to understand the tension between these two different conceptions of the author.

Building on recent critiques of copyright’s incentive model and on the insights of behavioral law and economics, this Article envisions what a more unabashedly paternalistic copyright regime might look like. Such a view accepts that authors are not rational actors; they are shortsighted, lack bargaining power, and respond weakly to distant and uncertain economic incentives. If we take this account seriously,

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copyright's existing paternalistic provisions are inadequate solutions to the behavioral failures that they purport to remedy. Instead, a truly paternalistic copyright regime would provide meaningful protections for authors against one-sided copyright transfers and would rely on more tailored and direct incentives for artistic creation.

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I. INTRODUCTION

The dominant justification for copyright is based upon the notion that authors respond rationally to economic incentives.¹ This

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

familiar incentive story posits that, without copyright, authors would not create new works because others could freely pirate their creations.² Copyright solves this public goods problem by giving authors a limited property right in their works, permitting them to recoup the investment in time and effort necessary to create, thereby providing the appropriate incentive to create new works.³ Though there have long been competing theories, this simple model has always dominated the discourse in American copyright law.⁴

But copyright does not seem to believe its own story. Despite the dominance of the incentive model, many aspects of American copyright law are best understood as being motivated by paternalism. Most notably, termination rights give authors the option to undo certain past transfers of their copyright—allowing, for example, a singer-songwriter to void an ill-considered record company deal.⁵ In a similar vein, current law provides that only certain types of works can be designed as “works made for hire” through contract.⁶ The law limits how copyright can be assigned and whether authors can transfer rights in emerging media.⁷ By eliminating the formalities once required to assert a copyright, the law protects a careless author from forfeitures of copyright, even if she fails to register her copyright or place appropriate notice on the work.⁸

have copyright is that it provides the economic incentive that is essential to the creation of new works.”).

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

3. See generally Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. L. REV. 623, 629–32 (2012) (reviewing the traditional economic logic of copyright as a solution to the “public good” nature of intellectual creations); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J.L. STUD. 325, 326, 333–44 (1989) (describing the nature of intellectual property as a public good and providing a formal economic model of the effect of copyright protection on the creation of new works).

4. See William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 1–12 (2001) (reviewing non-incentive-based theories of intellectual property); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 517–19 (2009) (describing copyright’s dominant incentive story as “elegant and simple,” albeit problematic); *infra* notes 31–33 and accompanying text.

5. 17 U.S.C. § 203 (2012) (providing that an author or her heirs may terminate a grant of copyright between thirty-five and forty years after the original transfer of rights, with all rights reverting back to the author); see also Larry Rother, *Record Industry Braces for Artists’ Battles over Song Rights*, N.Y. TIMES, Aug. 16, 2011, at C1.

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

7. 17 U.S.C. § 204(a); *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851, 854 (9th Cir. 1988).

8. See *infra* notes 245–253 and accompanying text.

Paternalism is the most natural way to understand these aspects of copyright.⁹ “Paternalism,” as used in this Article, does not carry any inherently negative connotation. It simply means the state limiting the choices of individuals in order to protect them from the consequences of their own decisions.¹⁰ Copyright’s paternalism emerges from a different view of authors themselves. Provisions such as termination rights are principally motivated by the perception that authors systematically lack bargaining power in their dealings with intermediaries such as publishers. Congress and the courts frequently cite a romantic conception of the author as shortsighted, impecunious, or irresponsible; the law should thus protect him, even from himself, if need be.¹¹ This conception of the author finds support in behavioral economics, which has shown that humans exhibit bounded willpower and rationality.¹² Other accounts emphasize structural factors, such as publishers’ dominant market position or uncertainty in valuing artistic works.¹³ Either way, these copyright provisions operate in a paternalistic fashion in that they limit the freedom of authors for their own supposed benefit.

Copyright’s paternalistic provisions cast doubt on the incentive model’s conception of the author. The incentive model envisions authors as hyper-rational economic actors who will only create new works if, say, their copyright lasts seventy years after their death as opposed to fifty years.¹⁴ Many actual copyright provisions, however, suppose an unsophisticated, impulsive, or inept author who cannot look out for his own interests, even in highly economic contexts such as the negotiation of a contract. Taken on its own terms, copyright law supposes two contractionary conceptions of the author: one in its justifying model and another in its actual implementing provisions. This Article seeks to highlight and understand the tension between these two conflicting visions of author behavior in copyright.

This tension dovetails with recent empirical critiques of the incentive model. A growing body of evidence suggests that a variety of intrinsic motivations often drive creativity, not the external economic

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

10. See *infra* note 112 (discussing definition of paternalism).

11. See *infra* notes 176–178, 190–193, 215–217, 231–232, 241–243, 261 and accompanying text.

12. See *infra* Section III.A (reviewing behavioral deviations from the rational actor model).

13. See *infra* notes 197–199, 229 and accompanying text.

14. See *Eldred v. Ashcroft*, 537 U.S. 186, 206 (2003) (discussing how extending copyright term from life of the author plus fifty years to life plus seventy years “may also provide greater incentive for American and other authors to create and disseminate their work in the United States”).

incentive of copyright. Social science and psychological research suggests that creativity is usually driven by urges for self-development, personal satisfaction, and a desire to challenge oneself.¹⁵ Personal accounts of creators ranging from famous authors to uncompensated writers of fan fiction assert that passion, desire, or reputation motivate them to create new works.¹⁶ Insights from cultural theory emphasize the role of creative play and the surrounding cultural environment.¹⁷ Digital projects such as Wikipedia and open source software provide concrete examples of important and valuable creation that occurs with no expectation of remuneration via copyright or otherwise.¹⁸ Of course, economic incentives are clearly important to some types of creativity, and the significance of intrinsic motivation can be overstated.¹⁹ Nonetheless, there is abundant evidence that authors do not respond to economic incentives in the simple way that the incentive model predicts.

Using the lens of behavioral law and economics, this Article explores the normative and policy implications of copyright paternalism's conception of author rationality, which supposes that authors are not rational economic actors. Instead, this view sees authors as shortsighted actors that lack bargaining power and respond weakly to distant and uncertain economic incentives. If this view is an accurate depiction, the current law's relatively weak protections are ineffective at achieving their stated goals. Most of copyright's paternalistic provisions are relatively modest, principally formal procedural requirements or contractual defaults. Behavioral law and economics analysis reveals that such "soft" paternalistic

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

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

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

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

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

interventions tend to fail as a result of the very same behavioral failures that motivated the regulation in the first place. If copyright law truly wishes to protect authors, it should consider mandatory contractual interventions, such as guarantees of equitable compensation, and an incentive structure more closely tailored to imperfectly rational authors.

This Article is intended as an exploration, not a normative endorsement of any particular reform. The optimal policy to encourage creation and dissemination of new works, of course, depends on many normative assumptions and complicated empirical realities that are beyond the scope of this Article—most critically, the optimal level of creation and the costs of various means of encouraging creation. Nonetheless, it is worthwhile to consider what a truly paternalistic regime might look like, both as a thought experiment and as an examination of oft-overlooked policy tools. Full consideration of these policy levers is critical in light of the recent push by the Register of Copyrights for a complete revision of American copyright law.²⁰

The remainder of this Article will proceed as follows: Part II provides background on the economic incentives model for copyright as well as its competing theories, and surveys the recent debates over the empirical basis of those models. Part III reviews a similar shift in thinking spurred by the field of behavioral law and economics and identifies several behavioral market failures that impact artistic creation and dissemination. Part IV examines the motivations for copyright law's paternalistic provisions and argues that they are most naturally understood as a paternalistic response to authors' behavioral failings. This analysis reveals an important tension between the incentive model that underpins copyright's foundation, and many specific provisions of copyright law itself. Part V uses the tools of behavioral economics to critique copyright law's existing paternalistic provisions and envisions the legal structure that a truly paternalistic copyright law could take.

II. COPYRIGHT THEORY

American copyright law is principally justified by a theory of creator incentives. This Part first reviews the traditional incentive model that remains the dominant justification for copyright law. Next, it surveys the growing body of empirical evidence that raises serious questions about that model. Studies in fields as diverse as

20. Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 322 (2013) (urging comprehensive copyright law revision).

economics, psychology, and cultural theory, as well as first-hand accounts of creators themselves, suggest that intrinsic motivations drive much artistic creation. This Part concludes by briefly overviewing alternative theories to justify copyright. While the critiques of the incentive model do not directly impact these competing theories, they have had secondary and limited influence in American copyright law.

The overview presented here is necessarily brief and cannot give full due to either the dominant incentive theory of copyright or its many competitors, some of which have received book-length treatment.²¹ Moreover, this Article does not intend to endorse any particular theory of copyright; it focuses on the incentive model simply because it is the dominant one in American legal discourse. Finally, this Article does not purport to reach an ultimate conclusion as to whether the incentive model is supported by the available evidence. Although there is substantial commentary questioning the incentive model, significant arguments and evidence exist supporting the model.²² Putting aside this question, the crux of this Article's argument is the incentive model's *internal* tension with many actual provisions of copyright law. That incongruity is explored in depth in later sections.

A. *The Incentive Model*

American copyright is primarily justified by a simple, utilitarian, economic argument, which asserts that copyright is necessary to encourage the creation of new works. The traditional logic goes as follows: in a world without copyright, once an artistic work is written and published, free riders could cheaply make and sell copies of that work (merely the cost to make a copy), denying authors the ability to profit from their work.²³ In particular, authors would not be able to recoup their investments of time and effort necessary to create the work; as a result, authors would not bother to create new

21. See generally ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY* (2009) (developing a vision of copyright as grounded in moral rights and the intrinsic dimension of creativity); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2003) (providing detailed economic theory and model of intellectual property); ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011) (providing a normative theory of intellectual property relying on the foundational philosophy of Locke, Kant, and Rawls); NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX* (2008) (offering a vision of copyright animated by First Amendment and democratic values). For a more comprehensive overview and taxonomy of intellectual property theories, see Fisher, *supra* note 4.

22. See *infra* notes 68–75 and accompanying text.

23. See LANDES & POSNER, *supra* note 21, at 40–41.

works.²⁴ As Samuel Johnson famously put it, “no man but a blockhead ever wrote but for money.”²⁵ Copyright provides a monetary reward by legally prohibiting the copying and sale of works without permission from the copyright holder.²⁶ This exclusivity permits authors to sell their work at a higher price and to thereby recover the costs of creation, providing the necessary incentive to create in the first instance.

In the language of neoclassical economics, copyright solves a “public goods” problem. Public goods are defined as (i) non-rivalrous (one person’s enjoyment of the good does not negatively impact another’s enjoyment) and (ii) non-excludable (absent legal rights, it is difficult to limit access to the good).²⁷ Intellectual creations have a strong public good character because they can be replicated cheaply and easily.²⁸ Absent legal intervention, economic theory predicts that public goods will tend to be under-produced because of the problem of free riders, who can undercut the original author by selling copies at marginal cost.²⁹ Importantly, however, the traditional law and economics account also recognizes the *costs* of the copyright protection, which include decreased consumption of works by the public because of higher cost, as well as fewer works created because of limited access to creative raw materials.³⁰ Accordingly, the protection afforded by copyright should be limited in time and scope to ideally provide just enough incentive to create without unduly limiting access.

This incentive model is far and away the dominant theory of American copyright law. It is said to be found in the US Constitution’s intellectual property clause, which provides that Congress has power to grant copyrights and patents “[t]o promote the Progress of Science and useful Arts.”³¹ The Supreme Court has expressly endorsed it on several occasions.³² So has Congress.³³

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

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

26. 17 U.S.C. § 106 (2012).

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

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

29. LANDES & POSNER, *supra* note 21, at 40 (“In the absence of copyright protection the market price of a book or other expressive work will eventually be bid down to the marginal cost of copying, with the result that the work may not be produced in the first place . . .”).

30. See *id.* at 22–24 (costs in reduced access to works); *id.* at 66–70 (costs to subsequent intellectual creators).

31. U.S. CONST. art. I, § 8, cl. 8.

32. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[Copyright] is intended to motivate the creative activity of authors and inventors by the provision of a special reward”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the

Despite its dominance, scholars have raised important objections to the incentive model on its own terms. The most obvious is that copyright does not actually guarantee authors any economic benefit. Rights are not the same as compensation, and the reward promised by copyright is dependent upon success in the market, which is usually both unlikely and unpredictable.³⁴ Furthermore, the current scope of copyright gives creators such expansive rights that it can seem implausible that those rights actually motivated the original creation.³⁵ Copyright extends to new technologies and derivative works created decades later, even if these new uses were not foreseeable at the time of creation.³⁶ Finally, it is questionable whether the incentive story, as invoked by Congress and others to support expansions of copyright, is sincere. From a more cynical view, the incentive model is merely rhetoric used to invoke the sympathetic figure of the author in order to mask the primary beneficiaries of expansions of copyright: industry stakeholders such as movie studios, publishers, and record companies.³⁷

general public good.”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind [intellectual property] is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors . . .”).

33. See generally H.R. REP. NO. 60-2222, at 7 (1909) (“The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.”); Fromer, *supra* note 2, at 1750.

34. See Barnett, *supra* note 19, at 398 (reviewing the “high costs and risks of creative production” and characterizing creative goods as a “hits market”); Tushnet, *supra* note 4, at 517 (“[R]ights don’t mean payment.”).

35. See Brief for George A. Akerlof et al. as Amici Curiae Supporting Petitioners at 5–11, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041846 (arguing that copyright term is so long that an extension provides “essentially no incentive to create new works”); Balganes, *supra* note 1, at 1571–76 (articulating this problem and arguing that the scope of copyright should be limited to uses that the copyright owner “could have reasonably foreseen at the time that the work was created”).

36. 17 U.S.C. §§ 101, 106(1) (2012) (providing exclusive right “to reproduce the work in copies” by “any method now known or later developed”); see Balganes, *supra* note 1, at 1572–75.

37. See generally JESSICA LITMAN, *DIGITAL COPYRIGHT* 22–63 (2d ed. 2006) (describing copyright law-making process as driven by concentrated groups of industry stakeholders); Cohen, *supra* note 17, at 1192 (“Lobbyists for the copyright industries are in the habit of asserting that copyright is the single most critical prerequisite for a vibrant artistic and intellectual culture. Some of this is theater driven by political expediency.”); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1197 (1996) (arguing that copyright’s author-centered rhetoric has been employed to benefit copyright industry groups and cannot fully account for copyright’s expansion).

B. Critiques of the Incentive Model

Whatever the flaws of the incentive model, it does generate testable predictions. It is, after all, a theory of how people behave. This Section surveys a growing body of scholarship that challenges the empirical foundations of copyright's incentive model. A repeated theme in this literature is the notion that intrinsic motivation, not the extrinsic economic incentive of copyright, underlies much artistic creation. Intrinsic motivation refers to an individual's desire to do something because it is inherently interesting or enjoyable; extrinsic motivation relies on incentives external to the individual, such as a payment of money.³⁸ To be sure, the evidence in favor of intrinsic motivation is not conclusive, and a careful analysis of the social science reveals that the degree of responsiveness to external incentives may depend on the individuals involved, the type of work at issue, the threshold for creativity, and other factors.³⁹ Nonetheless, it seems clear that many creators do not respond to economic incentives in the straightforward way envisioned by the incentive model.

Perhaps the most forceful arguments against the incentive model are those recently put forth by Diane Zimmerman and Eric Johnson. Zimmerman relies on a number of studies in psychology and behavioral economics to conclude that copyright's incentive story is "based on partially or even wholly mistaken beliefs about human behavior."⁴⁰ Her first insight points to the extremely uncertain nature of economic returns from creative activity. Because average writers can only expect to earn less than the minimum wage for their work, "it is more credible to understand their devotion to the production of expressive works more as a product of love than as a response to the promise of money."⁴¹ This intuition is bolstered by a raft of studies from psychology and social science tending to show that human creativity is driven mainly by intrinsic motivations such as self-actualization or the simple love of the creative endeavor.⁴² Even more provocatively, research from the social sciences suggests that

38. Richard M. Ryan & Edward L. Deci, *Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions*, 25 CONTEMP. EDUC. PSYCHOL. 54, 55–60 (2000).

39. See Buccafusco et al., *supra* note 19, at 1932–43 (reviewing social science literature and concluding that while some studies find that creativity is more conducive to intrinsic motivation, other studies show that extrinsic motivation can enhance creativity under some circumstances).

40. Zimmerman, *supra* note 1, at 34.

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

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

offering economic incentives can actually be *detrimental* to creativity in some circumstances.⁴³ For this reason, Zimmerman urges that, in policymaking, “skepticism about the market incentive story can be a useful antidote to copyright’s excess[es].”⁴⁴

Johnson goes even further than Zimmerman to flatly reject what he calls the “incentive fallacy” in copyright.⁴⁵ Like Zimmerman, Johnson relies extensively on studies of intrinsic motivation in psychology and behavioral economics to conclude that, by and large, people are “intrinsically motivated to undertake novel and challenging intellectual tasks” like artistic creation.⁴⁶ Johnson broadens his case, however, by looking to the flourishing world of user-generated digital content, which is typically created by “legions of everyday nonprofessionals” with “zero expectation of getting paid.”⁴⁷ Wikipedia, YouTube, blogs, and the open source software movement are cited as familiar examples.⁴⁸ Johnson also questions the historical basis of the incentive model’s promise of rewards for creators, in that early forms of intellectual property granted monopolies to *publishers*, not to writers.⁴⁹ Johnson is perhaps most bold in his policy recommendations, urging that existing copyrights be eliminated in favor of narrow, industry-specific rights for the limited areas (such as Hollywood movies) where they are truly needed to incentivize artistic creation.⁵⁰

Rebecca Tushnet takes a different perspective in her critique of the incentive model, focusing on firsthand accounts and lived experiences of authors.⁵¹ Tushnet concludes that “[m]any standard experiences of creativity simply do not fit into the incentive model.”⁵²

43. See *id.* at 50–54.

44. *Id.* at 54–55.

45. Johnson, *supra* note 3, at 623.

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

47. *Id.* at 647–48.

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

49. See *id.* at 635–40 (questioning consistency of early history of intellectual property and the incentive model).

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

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

52. Tushnet, *supra* note 4, at 522.

Those experiences are of course varied, but, by their own accounts, authors are driven more by passion than economic reward: they write because they enjoy doing so, to make a mark, or because they feel a compulsion to do so.⁵³ Critically, Tushnet finds a surprising degree of similarity between the accounts of prominent writers working in traditional markets and creators of “fanworks” who typically publish their work online for free.⁵⁴ Tushnet is careful not to conclude from her analysis that economic incentives are necessarily “irrelevant or disrespectful,” but nonetheless urges recognition that the reality of creation is richer and messier than the incentive model supposes.⁵⁵

Julie Cohen’s scholarship questions the incentive model from yet another viewpoint—that of postmodern social and cultural theory.⁵⁶ Drawing on this body of thinking, as well as insights from psychology and the narratives of creators, Cohen denies the descriptive truth of the “incentives-for-authors” story.⁵⁷ Instead, she relies on cultural theory to develop a complex account of creativity that emphasizes the dynamic interactions between creators and the surrounding cultural context, wherein situated users engage in creative play within a particular socio-cultural environment.⁵⁸ Copyright plays, at best, a “modest” role in stimulating such creative practice.⁵⁹ To similar effect, albeit distinct in methodological approach, is the work of Roberta Kwall. Kwall relies on theological and secular narratives of creation to emphasize the inspirational or religious aspect common to many accounts of creativity.⁶⁰

A team of researchers led by Raymond Ku takes a more data-oriented approach to testing the incentive model, examining whether changes in copyright protections correlate with an increase in the number of new works created.⁶¹ In other words, do expansions of

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

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

55. *Id.* at 516.

56. See generally Cohen, *supra* note 17; Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 142–49 [hereinafter Cohen II].

57. Cohen II, *supra* note 56, at 143 (“Everything we know about creativity and creative processes suggests that copyright plays very little role in motivating creative work.”).

58. See Cohen, *supra* note 17, at 1177–92 (providing a “decentered” account of creativity based on the insights of “social and cultural theory”).

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

60. See generally Kwall, *supra* note 15, at 1951–70 (drawing on historical and theological accounts of creativity to conclude that “creativity is spurred by incentives that are noneconomic in nature”).

61. See Raymond Shih Ray Ku et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright’s Bounty*, 62 VAND. L. REV. 1669, 1671 (2009).

copyright (e.g., increased duration, subject matter, or scope of protection) actually correspond to increased artistic creation, measured by the number of works registered with the Copyright Office?⁶² Ku and his team found that, although changes in copyright law sometimes lead to increases in the number of works registered, the correlation was weak and unpredictable.⁶³ At best, it was “slightly better than a coin toss whether a legal change will have any effect,” and increases in the number of new works were largely a function of population growth.⁶⁴ The researchers concluded that “the data do not support” the incentive model.⁶⁵

To similar effect is the work of Christopher Sprigman, William Landes, and Richard Posner concerning the rate at which eligible copyrighted works were registered and renewed under the former system of copyright formalities.⁶⁶ Even though creators would forfeit their copyright if they failed to take these steps, most did not bother to register a copyright when their work was published, and even fewer took the opportunity to renew the copyright.⁶⁷ This suggests that the incentive of copyright was unimportant to these authors or that the expected value of the work was so low that it was not worthwhile to assert copyright.

Despite this diverse body of scholarship questioning the incentive model, there is by no means a consensus on the issue. First, there is room to debate how broadly to understand the experimental results from psychology and behavioral economics, which usually rely on artificial experimental environments. For example, a team of legal scholars lead by Christopher Buccafusco analyzes much of the same social science literature as Zimmerman and Johnson, but is more circumspect about how far to read the results. The scholars acknowledge some evidence that intrinsic motivations are more conducive to creativity, but point to “other studies that suggest that

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

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

64. *Id.* at 1672, 1708.

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

66. See *infra* Section IV.C (discussing copyright formalities).

67. See LANDES & POSNER, *supra* note 21, at 234–37 (finding renewal rates from 1910–1991 ranged between approximately 5 and 20 percent of registered works); Johnson, *supra* note 3, at 658–59 (reviewing studies estimating that between 5 and 50 percent of published works were registered); see also Christopher Sprigman, *Reform(alizing) Copyright*, 57 STAN. L. REV. 485, 503–13 (2004).

extrinsic rewards do not always undermine creativity and can, in fact, enhance it.”⁶⁸ In their view, the results are best reconciled as revealing that the efficacy of extrinsic incentives depends on the task at issue, how the subjects are instructed, how performance is measured, and the level of reward.⁶⁹ For example, Buccafusco’s own work finds that the threshold by which creativity is measured can affect responsiveness to external incentives.⁷⁰ Nonetheless, the scholars agree that individuals respond to incentives in a much more complex way than the incentive model suggests.⁷¹

In a similar vein, the first-hand accounts of creators themselves can be questioned as unrepresentative of their “true” motivations, or simply beside the point. Jonathan Barnett, for example, notes that the “romantic” behavior of artists can be explained by the authors’ “chronic overestimate of, rather than indifference to, commercial success.”⁷² Additionally, it is also almost certainly true that the degree of intrinsic motivation depends upon the type of artistic work at issue.⁷³ Context matters: academics and creators of fanworks, for example, are driven by a different mix of incentives than, say, popular music artists.⁷⁴ Indeed, even the most strident critics of the incentive model acknowledge that copyright matters for large-scale, capital-intensive productions like Hollywood movies where the intrinsic motivation story is not a persuasive account.⁷⁵ Certainly, no one denies that artists must find a way to support themselves in order to engage in their craft full time.

In sum, although many scholars have raised serious questions about the incentive model, there are reasons to be skeptical that extrinsic motivations do not play any role *at all* in motivating creativity. Intrinsic motivation may be the primary driving force behind much artistic creation, but extrinsic incentives may have some

68. Buccafusco et al., *supra* note 19, at 1937–38.

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

70. *Id.* at 1972–73.

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

72. Barnett, *supra* note 19, at 394.

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

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

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

role depending upon context, the type of work at issue, the nature of the incentive, and other factors. In other words, the reality of motivation is complicated and contextual, like creators themselves. It seems fair to conclude, however, that the simple “the more economic motivation the better” story of the incentive model is not supported by the available evidence. Whether and how authors respond to extrinsic incentives to create depends on the circumstances, and intrinsic motivation plays a much greater role in creativity than is usually appreciated.

C. Alternatives to Traditional Incentive Theory

Although the incentive model is the dominant justification for copyright in American law, it is not the only theoretical basis for copyright.⁷⁶ This Section briefly reviews some competing models of copyright, which are not directly impacted by the empirical evidence that intrinsic motivation often drives artistic creation. These theories may give pause to those who would jump from critiques of the incentive model to the policy conclusion that there is no need for copyright.⁷⁷ It should be noted, however, that these theories have had limited influence on American copyright law.

Most alternative theories of copyright are grounded in deontological or rights-based notions, in contrast to the utilitarian focus of the incentive model. For example, notions of copyright as a just desert for an author’s labor are prominent in the European copyright tradition. French *droit d’auteur*, which has been influential in civil law systems, is said to derive from John Locke’s theory of labor as the foundation of property.⁷⁸ The essential idea is that authors deserve property rights in their work by virtue of the labor and effort that they apply to common resources in the process of intellectual

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

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

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

creation.⁷⁹ Although this concept has its defenders, the Supreme Court has rejected labor as a basis for copyright.⁸⁰

Other rights theorists look to personhood theory, which derives from the philosophy of Kant and Hegel, as the foundation for copyright.⁸¹ These theorists view property rights as essential to human freedom and self-development.⁸² Personhood theorists argue that because an artistic work is an expression of the author's personality and autonomy, the law should afford it legal protections.⁸³ Appeals to personhood theory are frequently invoked to justify the expansion of "moral rights," such as attribution requirements, which are historically quite limited in American copyright law.⁸⁴

Several scholars of copyright have invoked democratic theory or social planning as a basis for copyright.⁸⁵ Neil Netanel, for example, advances a view of copyright designed to promote democratic and First Amendment values.⁸⁶ Other theorists invoke broader visions of the good life and a just society as underlying copyright. William Fisher, for example, relies on notions of a "just and attractive intellectual culture" designed to promote human flourishing in

79. See generally Gordon, *supra* note 78, at 1544–45; Justin Hughes, *The Philosophy of Intellectual Property*, 287 GEO. L.J. 287, 296–314 (providing a Lockean justification for intellectual property).

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

81. See generally Fisher, *supra* note 4, at 5–6 (overviewing personhood theory of intellectual property); Fromer, *supra* note 2, at 1753–54 (same); Hughes, *supra* note 79, at 330–64 (providing Hegelian justification for intellectual property).

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

83. Hughes, *supra* note 79, at 330.

84. See, e.g., *id.* at 339–50 (deriving moral right protections against mutilation and misattribution from Hegelian personhood theory); accord Kwall, *supra* note 15, at 1975–77. For a forceful argument against moral rights protection, see Amy Adler, *Against Moral Rights*, 97 CAL. L. REV. 263 (2009).

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

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

determining the proper scope of copyright.⁸⁷ Still others rely upon notions of distributive justice to inform their views of intellectual property.⁸⁸

However, not all alternative theories of copyright are rights-based. Jonathan Barnett's recent scholarship, for example, rejects the incentive model but still relies primarily on economic analysis. In Barnett's view, the evidence that creators are motivated by intrinsic desires, even if correct, is simply beside the point.⁸⁹ Copyright is not intended to provide an incentive for *authors* to create, but as an incentive for *intermediaries* to distribute, market, and disseminate artistic works.⁹⁰ There is an interesting convergence between Barnett's views and those of more radical critics of the incentive model, who agree that copyright is primarily valuable to intermediaries like movie studios and record companies.⁹¹ Whatever explanatory power the incentives-for-intermediaries story may have, Barnett's account is in some tension with the constitutional basis for copyright, which grants rights "to Authors."⁹²

Finally, some scholars reject the divisions between these various theories to advance a vision of copyright that relies upon both rights-based and utilitarian notions. In a recent book, Rob Merges presents a rich and nuanced account of intellectual property theory. In Merges' theory, although the normative foundations of intellectual property lie in the philosophy of Locke, Kant, and Rawls, those deep theoretical foundations yield to practical, mid-level principles—such as economic efficiency—that must guide the law on the operational level.⁹³ Along similar lines, Jeanne Fromer argues that there is less of a practical divide between utilitarian and rights-based theories than is

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

88. See generally Bracha & Syed, *supra* note 85, at 287–96 (surveying distributive justice concerns in intellectual property theory); Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2832 (2006); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1538 (2005); Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970, 993 (2012).

89. See Barnett, *supra* note 19, at 404 ("Assuming for the sake of argument that artists require no significant monetary inducement to invest in creative production, it still is the case that copyright supports investment by intermediaries . . .").

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

91. See, e.g., Cohen II, *supra* note 56, at 142–43 (arguing for recognition that copyright is not about protecting authors but instead the "corporate welfare" of intermediaries).

92. U.S. CONST. art. I, § 8, cl. 8.

93. MERGES, *supra* note 21, at 5–15.

often appreciated because moral rights concerns frequently align with social utility.⁹⁴

III. PATERNALISM IN BEHAVIORAL LAW AND ECONOMICS

Many critiques of copyright's incentive model have relied on or been inspired by the insights of behavioral law and economics ("BLE"). Both BLE scholars and critics of copyright's incentive model share a skepticism of the concept of a rational economic actor. This Part reviews how legal scholars have used the insights of behavioral economics to inform traditional economic analysis of the law and applies the BLE framework to copyright. It first briefly reviews the evidence of systematic deviations from the rational actor model, including limitations on human rationality, willpower, and self-interest. It next turns to the debate within BLE over the appropriate policy response to these limitations. Although early forms of BLE emphasized "soft" paternalistic tools such as increased information disclosure or changes to default choices, there has been a recent push toward acceptance of hard paternalism such as government mandates. This Part concludes by applying this framework to copyright, introducing several behavioral market failures that might justify such regulatory intervention.

A. Deviations from the Rational Actor Model

Traditional economic models presume an individual with stable and coherent preferences who rationally makes choices to maximize those preferences.⁹⁵ Copyright's incentive model, for example, envisions this type of rational author.⁹⁶ Results from several decades of psychological research have given rise to a more nuanced view of human behavior—that of behavioral economics—which profoundly challenges the notion that humans behave like rational economic

94. Fromer, *supra* note 2, at 1746.

95. See GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (1976) ("[H]uman behavior can be viewed as involving participants who maximize their utility from a stable set of preferences . . ."); RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (5th ed. 2007) ("The task of economics, so defined, is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions—what we shall call his 'self-interest.'"); Matthew Rabin, *Psychology and Economics*, 36 *J. ECON. LITERATURE* 11, 11 (1998) ("Economics has conventionally assumed that each individual has stable and coherent preferences, and that she rationally maximizes those preferences. Given a set of options and probabilistic beliefs, a person is assumed to maximize the expected value of a utility function, $U(x)$.").

96. See, e.g., Landes & Posner, *supra* note 3, at 333–44 (presenting a formal economic model of copyright); see *supra* Section II.A (reviewing the incentive model of copyright).

actors as a general matter.⁹⁷ This view of human behavior asserts that human rationality, self-interest, and willpower are limited in important and systematic ways.⁹⁸

It should surprise no one that humans are fallible beings. These deviations for the rational actor model—known as “behavioral failures” or “behavioral effects”—can be grouped into three major categories.

First, evidence suggests that humans are *boundedly rational*, with limited cognitive abilities. As a result, we often make decisions using mental shortcuts called “heuristics,” leading to mistakes and biases in judgment.⁹⁹ We have a bias for the status quo, overvalue goods initially allocated to us, and excessively dislike losses.¹⁰⁰ We are particularly bad at judgments under uncertainty, i.e., making decisions involving probabilistic outcomes. For such decisions, we rely on heuristics that deeply misunderstand the laws of probability.¹⁰¹

Second, humans have *bounded willpower*, often acting in impulsive ways that are inconsistent with our expressed long-run preferences.¹⁰² The familiar examples of overeating, procrastination, and addictive behavior suffice to illustrate this phenomenon.¹⁰³

97. See generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011) (surveying evidence detailing behavioral departures from the neoclassical model of the rational economic actor); Rabin, *supra* note 95 (same).

98. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476–79 (1998) (reviewing evidence of bounded rationality, willpower, and self-interest); Sendhil Mallainathan & Richard Thaler, *Behavioral Economics* 5–7 (Mass. Inst. of Tech. Dep’t of Econ., Working Paper No. 00-27, 2000), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=245828 [https://perma.cc/32UL-8LTL] (same). This Article will provide only a brief overview of the principal results from behavioral economics and applied psychological research. For a good introduction aimed at a generalist audience, see generally KAHNEMAN, *supra* note 97. For a brief and effective review of the underlying economic studies, see generally Rabin, *supra* note 95.

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

100. See Rabin, *supra* note 95, at 13–14 (reviewing loss aversion, the status quo bias, and the endowment effect).

101. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1084–102 (2000) (presenting evidence of availability, representativeness, and anchoring heuristics); Tversky & Kahneman, *supra* note 99, at 1124–29.

102. Jolls et al., *supra* note 98, at 1545 (“People also have bounded willpower; they can be tempted and are sometimes myopic.”); Rabin, *supra* note 95, at 12, 38–40 (“[P]eople have a short-run propensity to pursue immediate gratification that is inconsistent with their long-run preferences.”).

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

Finally, humans have *bounded self-interest*: our preferences are not guided only by our own welfare, as some traditional economic models suppose. Rather, humans are willing to sacrifice their own self-interest to act altruistically when they believe that others are cooperating and spitefully if others are not.¹⁰⁴ Furthermore, we have a preference for “fair” allocations of resources, choosing to equalize welfare gains rather than maximize total social welfare.¹⁰⁵

A few behavioral findings are most relevant for present purposes. First, as already discussed, humans are intrinsically motivated to perform certain tasks.¹⁰⁶ They engage in some work not for money but for the joy of doing it or due to a drive to excel; economic rewards can actually diminish these intrinsic motivations.¹⁰⁷ Second, because of bounded willpower, humans can act in ways that are shortsighted, pursuing immediate gratification to their own long-term detriment.¹⁰⁸ Third, because of our bias for the status quo, the default option and whether a system is structured on an opt-out or opt-in basis have a big impact on the choices people make.¹⁰⁹ How choices are framed can also make a big difference: people’s decisions are sensitive to context and they can fail to even notice incentives that are indirect or lack salience.¹¹⁰ Finally, because of social preferences, people disfavor some socially efficient outcomes if they seem to give one party the short end of the deal.¹¹¹

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

104. See Jolls et al., *supra* note 98, at 1489–97 (reviewing behavioral evidence of altruism, reciprocity, and acrimony); Rabin, *supra* note 95, at 21–24 (same).

105. Rabin, *supra* note 95, at 17–20.

106. See *supra* Section II.B.

107. See *supra* notes 38–60 and accompanying text (discussing evidence of intrinsic motivation).

108. See Jolls et al., *supra* note 98, at 1545 (“People also have bounded willpower; they can be tempted and are sometimes myopic.”); Rabin, *supra* note 95, at 12, 38–40 (“[P]eople have a short-run propensity to pursue immediate gratification that is inconsistent with their long-run preferences.”).

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

110. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 98–99 (2008); Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOL. 341, 346, 350 (1984); Rabin, *supra* note 95, at 36–38.

111. See Jolls et al., *supra* note 98, at 1489–97; Rabin, *supra* note 95, at 17–20, 21–24.

B. Soft and Hard Behavioral Law and Economics

Behavioral market failures raise obvious questions about the propriety of paternalism as a regulatory tool.¹¹² If individuals act in ways that are irrational or against self-interest, should the state protect them from their own “bad” decisions? Many prominent proponents of BLE assiduously resist this impulse, advocating only “soft” paternalistic tools, such as information disclosure or manipulation of default rules.¹¹³ Recently, however, several scholars have questioned whether this limitation is principled and embraced the possibility that the “hard paternalism” of direct mandates may in some cases be the optimal policy, even if they may be disparaged as paternalistic.¹¹⁴

Two influential law review articles, both published in 2003, epitomize the soft paternalism approach.¹¹⁵ The work of Cass Sunstein and Richard Thaler proposes “libertarian paternalism” as a

112. I use “paternalism” to mean governmental or other actors limiting the choices of individuals in order to protect them from the consequences of their own decisions. See Gerald Dworkin, *Paternalism*, STAN. ENCYCLOPEDIA PHIL. ARCHIVE, <http://plato.stanford.edu/archives/sum2014/entries/paternalism/> [<https://perma.cc/2SX4-AHNN>] (last updated June 4, 2014); accord Thaddeus Mason Pope, *Counting the Dragon’s Teeth and Claws: The Definition of Hard Paternalism*, 20 GA. ST. U. L. REV. 659, 683–84 (2004) (defining paternalism as when an agent limits a subject’s liberty for the subject’s own benefit, independent of the subject’s own preferences); Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 236 (1998) (“Paternalism is intervention in a person’s freedom aimed at furthering her own good.”); see also JOHN STUART MILL, ON LIBERTY 22 (Edward Alexander ed., 1999) (“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”). I have attempted to use a minimal definition, as there is much debate over how best to define paternalism. See Wendy Mariner, *Paternalism, Public Health, and Behavioral Economics: A Problematic Combination*, 46 CONN. L. REV. 1817, 1820 n.2 (2014) (collecting sources); Zamir, *supra*, at 236 n.3 (same). I do not mean the word to carry any inherently negative connotation. Cf. Sunstein & Thaler, *supra* note 109, at 1166 (“The thrust of our argument is that the term ‘paternalistic’ should not be considered pejorative, just descriptive.”).

113. See Camerer et al., *supra* note 109, at 1212, 1224–47 (focusing on regulations such as default rules, information disclosure, and “cooling off” periods that “impose[] little or no harm on those who are fully rational”); Jolls et al., *supra* note 98, at 1541 (“[B]ounded rationality pushes toward a sort of anti-antipaternalism—a skepticism about antipaternalism, but not an affirmative defense of paternalism.”); Sunstein & Thaler, *supra* note 109, at 1661–62 (urging “libertarian paternalism,” in which default rules, starting points, and decision framing are changed to help people make better decisions while preserving individual choice). Other early BLE advocates, even if they did not foreclose paternalist mandates as an option, approached this possibility warily and tentatively.

114. Ryan Bubb & Richard H. Pildes, *How Behavioral Economic Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1605–06 (2014).

115. See *id.* at 1604–05 (describing the approach of Sunstein and Thaler, and Camerer, as “soft paternalism”); Camerer et al., *supra* note 109; Sunstein & Thaler, *supra* note 109. The usage of soft and hard paternalism in behavioral law and economics should not be confused with the slightly different philosophical usage, which hinges on whether the choice being restricted is truly “voluntary.” See generally Pope, *supra* note 112, at 667–69.

response to behavioral market failures. Libertarian paternalism urges manipulation of choice architecture—via default rules, decisional framing, and information disclosure—in order to nudge people into better choices.¹¹⁶ Although it recognizes that human behavioral failures may require regulation, libertarian paternalism allows only “weak and nonintrusive” interventions and expressly disclaims any means that completely block individual choice.¹¹⁷

A team of scholars led by Colin Camerer embraces a similar but distinct approach, termed “asymmetric paternalism,” which strives to regulate only when it “creates large benefits for those who make errors, while imposing little or no harm on those who are fully rational.”¹¹⁸ Asymmetric paternalism is explicitly motivated by a concern that paternalistic policies “impose undue burdens on those people who are behaving rationally.”¹¹⁹ Policy tools like direct mandates are thus disfavored because of their potential negative effects on rational actors. Accordingly, asymmetric paternalism’s proposed regulatory policies are primarily changes to default rules, increased information disclosure, or “cooling off” periods.¹²⁰

Recently, Ryan Bubb and Richard Pildes have critiqued BLE’s exclusive emphasis on soft paternalism to the exclusion of traditional regulatory tools.¹²¹ Taking BLE on its own terms, they observe that the hard paternalism of direct bans or mandates may be the optimal policy response to some behavioral market failures. In particular, the soft paternalism of changes to default rules or information disclosure is, in important cases, less likely to be effective than an outright mandate.¹²² Information disclosure is frequently ineffective because of the same behavioral failures that motivated the rule in the first place: individuals’ bounded rationality and willpower.¹²³ Changes to default rules, such as a move to an opt-out system, can end up as poorly designed *de facto* mandates.¹²⁴ At the least, a full analysis should

116. Sunstein & Thaler, *supra* note 109, at 1160–66; see also THALER & SUNSTEIN, *supra* note 110, at 1–8 (defining “libertarian paternalism”).

117. Sunstein & Thaler, *supra* note 109, at 1162.

118. Camerer et al., *supra* note 109, at 1212.

119. *Id.* at 1214.

120. *See id.* at 1224–47.

121. Bubb & Pildes, *supra* note 114, at 1595–600.

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

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

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

consider the costs and benefits of regulatory tools such as mandates, bans, and taxes, in addition to the preferred tools of soft BLE.¹²⁵

Retirement savings policy illustrates this debate between soft and hard BLE and suggests that hard paternalistic policy tools can sometimes be optimal responses to humans' boundedly rational behavior. Traditional retirement programs like Social Security and defined-benefit pensions were largely choice-limiting and paternalistic.¹²⁶ Beginning in the 1970s, there was a move toward defined contribution plans such as individual retirement accounts and 401(k) programs.¹²⁷ The government offered a series of incentives—principally in the form of tax deductions—designed to encourage individuals to save.¹²⁸ Consistent with humans' shortsighted and boundedly rational nature, few people actually saved enough despite these significant incentives.¹²⁹

Soft BLE scholars advocated reforming the choice architecture such that individuals were enrolled in employer retirement programs by default.¹³⁰ As expected, the switch to an opt-out system significantly increased the rate of participation in retirement programs.¹³¹ Perversely, however, the switch actually *decreased* the total amount of money saved by many employees.¹³² More people

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

126. *Id.* at 1607; Korobkin & Ulen, *supra* note 101, at 1121.

127. Bubb & Pildes, *supra* note 114, at 1607.

128. 26 U.S.C. § 219 (2012) (providing tax deduction for “qualified retirement contributions”); Korobkin & Ulen, *supra* note 101, at 1121 (“[T]he government provides billions of dollars of tax incentives each year to encourage individuals to invest even more of their incomes in retirement savings accounts, such as IRAs . . .”).

129. See Bubb & Pildes, *supra* note 114, at 1630–32 (“[M]ost individuals are passive savers who do not respond to tax incentives to save. For the 17 [percent] who do, it turns out that these government subsidies do not change their overall savings rate because they offset contributions to subsidized accounts by reducing their savings in other forms.”); James J. Choi et al., *Defined Contribution Pensions: Plan Rules, Participant Choices, and the Path of Least Resistance*, in 16 TAX POLICY AND THE ECONOMY 67, 72 (James M. Poterba ed., 2002), <http://www.nber.org/chapters/c10863.pdf> [<https://perma.cc/3GGQ-W7V3>] (survey results showing that most people believe their own retirement savings to be inadequate).

130. THALER & SUNSTEIN, *supra* note 110, at 105–20 (urging changes in default rules to encourage greater retirement saving).

131. See, e.g., Choi et al., *supra* note 129, at 74–78 (finding that automatic enrollment increases participation rates in employer retirement programs by approximately fifty percentage points); Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q.J. ECON. 1149, 1159–60 (2001) (automatic enrollment increased participation rates from 37 percent to 86 percent).

132. See Bubb & Pildes, *supra* note 114, at 1609, 1618–19 (“[T]he much-heralded automatic enrollment approach appears not only to have failed to address meaningfully the retirement savings problem but also to have exacerbated it. Perversely, in practice these

participated, but they did so only at the low default rate (often 3 or 4 percent); under the old opt-in system, fewer employees participated, but when they did so, they tended to choose a much higher savings rate (7.5 percent on average).¹³³

The soft BLE approach to retirement savings is thus revealed as a disappointment from both the libertarian and paternalist perspectives. For libertarians, opt-out systems preserve only the illusion of choice. For the vast majority who simply go along with the default, it functions as a *de facto* mandate. It is far from clear why this should satisfy those philosophically committed to individual freedom.¹³⁴ For paternalists, the policy failed because it was a poorly designed mandate. Many of those who went along with the default likely presumed that they were “covered” by the program, when in reality the savings rate was far too low for most workers. Worse, there is every reason to believe that many of those who did opt out did so for the very shortsighted reasons that the policy was intended to ameliorate.¹³⁵ A well-designed direct mandate would, in theory, more effectively encourage retirement savings with fewer social costs.¹³⁶ This policy comes full circle to embrace a hard paternalistic approach, urging a retirement program that operates by a direct mandate, like Social Security.¹³⁷

C. Analogies to Copyright Law

The account of human behavior presented by BLE raises provocative questions about copyright law. There are notable comparisons between American copyright law and retirement savings policy. Both are premised on the idea of the government encouraging

programs appear to reduce overall retirement savings, even as they raise the rates of participation.”).

133. *Id.* at 1622–24.

134. Indeed, many committed libertarians have developed critiques of libertarian paternalism along these lines. See generally Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245, 1246–47 (2005) (arguing that libertarian paternalism fails to justify its choice of welfare over liberty); Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1166 (2003) (arguing that libertarian paternalism fails to account for the full costs of constraining choice); Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033, 1069–70 (2012) (arguing that libertarian paternalism neglects the process value of liberty).

135. Cf. Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155, 1181–85 (finding that, in credit overdraft context, the people who opt out are frequently those that would most benefit from the default rule).

136. Bubb & Pildes, *supra* note 114, at 1625–27, 1632–33.

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

a particular socially desirable behavior: artistic creation in the case of copyright and saving for the future in the case of retirement policy. Both relied primarily on traditional (if indirect) economic incentives to encourage this desired behavior. Empirically, both saw a lackluster response to those economic incentives, at least in part as a result of behavioral effects.¹³⁸

Like many retirement savings systems, copyright law has recently shifted from an opt-in to an opt-out approach. The 1909 Copyright Act and preceding laws provided copyright to authors only upon compliance with certain formalities, such as registering the work.¹³⁹ Though this system provided an economic incentive to authors to create, in practice, relatively few authors took advantage. In fact, most authors did not bother to assert copyright in their eligible works, and even those who did rarely bothered to renew their copyright.¹⁴⁰ A lack of salience may explain some of this phenomenon, or it may be simply that most artistic works were not valuable enough to make it worthwhile to claim copyright.¹⁴¹ However, beginning with the 1976 Act, copyright moved toward an opt-out system—copyright was granted to authors by default the moment that the work was written down.¹⁴²

The relevance of behavioral economics to copyright, however, goes well beyond the comparison between copyright and retirement policy.¹⁴³ As will become clear, there are many behavioral phenomena

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

139. See generally Sprigman, *supra* note 67, at 491–94 (reviewing history of formalities required by early American copyright law); *infra* Section IV.C.

140. See Sprigman, *supra* note 67, at 520 (citing studies showing only a minority of published works were registered and less than 20 percent renewed).

141. See *id.* at 514 (explaining that copyright owners would not comply with formalities “if the costs of protection exceeded the expected revenues from copyrighting”).

142. 17 U.S.C. § 102(a) (2012) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression”); Sprigman, *supra* note 67, at 487–88. This shift away from required formalities became complete with the United States’ adoption of the Berne Convention Implementation Act in 1988. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

143. Some important work has applied BLE to copyright, though it is fair to say the application of behavioral economics to copyright is in its early stages. See, e.g., Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31 (2011) (providing experimental evidence that endowment effect is exacerbated by the fact of creation in addition to ownership); Christopher Buccafusco & Christopher Sprigman, *Valuing Intellectual Property: An Experiment*, 96 CORNELL L. REV. 1 (2010) (providing experimental evidence in support of the endowment effect for intellectual creators); Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441 (2010) (concluding that protectability standards in patent and copyright law accord with psychological findings on creativity); Avishalom Tor & Dotan Oliar, *Incentives to Create Under a “Lifetime-Plus-Years” Copyright Duration: Lessons*

that may affect artistic creation and dissemination. Because these effects do not always cut in the same direction, it is difficult to predict their overall significance *a priori*. Like human behavior itself, the reality is complicated and will certainly depend on context. Nonetheless, it is necessary to understand these failings in order to understand the role that paternalism does—and could—play in American copyright law. As explained below, many paternalistic interventions in copyright appear to be motivated by these behavioral effects.

What are the specific behavioral failures that might apply to artistic creation and dissemination? Broadly speaking, behavioral failures come into play during two separate stages in the life of a copyrighted work. The first stage relates to creation of the work: how humans respond, if at all, to copyright and other incentives to create. The second stage relates to the potential assignment of the work. Authors commonly license or assign their rights to intermediaries such as publishers, and there are sound economic reasons to do so.¹⁴⁴ Here, the behavioral effects concern whether authors are acting rationally in their assignments and if society is satisfied with the distributive consequences of these transfers.

The creation stage relates to copyright's efficacy as an incentive. The most important behavioral effect is the phenomenon of intrinsic motivation. Many individuals engage in acts of creation for reasons of challenge, impulse, self-actualization, or simple enjoyment—regardless of the extrinsic incentive.¹⁴⁵ Moreover, there is evidence suggesting that offering economic incentives can sometimes “crowd out” intrinsic motivation and thus be detrimental to creativity.¹⁴⁶

If copyright did not carry significant social costs, granting copyright to intrinsically motivated individuals would not present any particular problem. However, granting copyright is costly. Most obviously, copyright makes artistic works more expensive, reducing consumption of artistic works and access to them.¹⁴⁷ Copyright can

from *A Behavioral Economic Analysis for Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 437 (2002) (arguing that bounded rationality accounts for copyright's life-based duration scheme).

144. Barnett, *supra* note 19, at 401–02.

145. See *supra* Section II.B.

146. See *supra* notes 42–46 and accompanying text; see also Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity*, 86 NOTRE DAME L. REV. 1999, 2000 (2011) (“Experimental cognitive research also reveals that intrinsic motivation is highly conducive to creative productivity, while purely extrinsic motivation tends to decrease creative function.”).

147. See generally, e.g., LANDES & POSNER, *supra* note 21, at 22–24; Stephen Breyer, *The Uneasy Case for Copyright*, 84 HARV. L. REV. 281, 313–21 (1970) (describing benefits to readers of lower prices, wider distribution, and expanded access were copyright in books abolished);

hinder creativity by reducing the public domain sources that later creators can draw upon or use as raw materials to create new works.¹⁴⁸ According to the incentive model's account, the reason that we impose these costs is the corresponding benefit of increased artistic creation as a result of the copyright incentive. This benefit is absent when copyright does not actually operate as an incentive. It is therefore a serious concern that copyrights are being granted to many individuals who did not need them as an incentive to create.

Another behavioral influence on incentives to create is the human difficulty with judgments under uncertainty. Copyright does not directly guarantee authors any economic return; instead, the reward is dependent on success in the marketplace.¹⁴⁹ Furthermore, artistic creation is a "hits market": most creation is of limited commercial value, but some is extremely valuable, and the value of artistic work prior to exploitation is usually unpredictable.¹⁵⁰ The behavioral effects here point in opposite directions. On the one hand, consistent with the notion of bounded willpower, authors may discount the mere possibility of an uncertain future reward, which would undermine the efficacy of copyright as an incentive.¹⁵¹ Moreover, individuals may respond weakly to *indirect* incentives like copyright, which are often ignored for lack of salience or because authors are simply unaware of them.¹⁵² On the other hand, humans can systematically overestimate small probabilities, creating a potential "lottery effect," whereby the low-probability possibility of a big reward induces *over*-investment in creation.¹⁵³ Thus, although the chance of commercial success is small for most artistic works, authors may overestimate the likelihood of a great reward from their work.¹⁵⁴

Behavioral effects are also in play at the time of copyright assignment. This stage relates to an author's decision to license or

Thomas B. Macaulay, Sec'y at War, *A Speech Delivered in the House of Commons* (Feb. 5, 1841), in MACAULAY: PROSE AND POETRY (1952), <http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/commentary/MacaulaySpeeches.html> [https://perma.cc/4UF3-8SPA] (noting that the effect of the copyright monopoly "is to make articles scarce, to make them dear, and to make them bad").

148. See generally, e.g., JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 123–59 (2008); LANDES & POSNER, *supra* note 21, at 66–70; LAWRENCE LESSIG, *FREE CULTURE* 21–47 (2003).

149. See *supra* note 34 and accompanying text.

150. See Barnett, *supra* note 19, at 398–99.

151. See *supra* notes 102–103 and accompanying text (explaining bounded willpower).

152. See *supra* notes 109–110 and accompanying text (explaining framing and salience effects).

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

154. See Barnett, *supra* note 19, at 398–99.

transfer the copyright in her artistic work—typically to an intermediary such as a publisher or record company. As explained in the next Part, many of the paternalistic interventions in copyright are motivated by a perception that authors lack bargaining power in this negotiation.¹⁵⁵

Behavioral theory offers several possible reasons for the perceived imbalance in bargaining power. The most prominent effect is bounded willpower. Humans tend to be very present-biased and shortsighted, pursuing immediate gratification at the expense of long-term interests.¹⁵⁶ Bounded willpower thus creates concern that authors will discount the possibility of future revenue, such as royalties, to sell their rights for a minimal upfront payment. This view accords with a popular perception that artists “are so sorely pressed for funds that they are willing to sell their work for a mere pittance.”¹⁵⁷ Indeed, copyright history abounds with anecdotes to this effect: for example, the creators of Superman sold away their rights in the character for \$130.¹⁵⁸ Such stories appear to be one motivation for copyright’s termination provisions.¹⁵⁹

Even if the initial copyright assignment was a result of fair and equal bargaining, however, it may offend people’s social preferences. Humans often prefer allocation of goods that equalize welfare gains as opposed to ones that maximize total social welfare.¹⁶⁰ These fairness preferences roughly accord with Rawlsian notions of distributive justice.¹⁶¹ Specifically, when dividing up goods, people tend to follow a so-called “maxmin” criterion, which maximizes the position of the least-advantaged individual.¹⁶² As applied to copyright assignments, people may object to the creators of Superman receiving only \$130, not because the bargaining was unequal, but simply because the *outcome*

155. See *infra* Part V.

156. See *supra* notes 102–103 and accompanying text.

157. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 657 (1943). *But see infra* note 194 and accompanying text (questioning this “starving artist” narrative). See generally Timothy K. Armstrong, *Shrinking the Commons: Termination of Copyright Licenses and Transfers for the Benefit of the Public*, 47 HARV. J. ON LEGIS. 359, 399–400 (2010) (describing termination rights as motivated by “a pattern” wherein “artists conveyed away their copyright interests in a work for a comparatively small sum and did not share in the resulting profits when the work later proved to be commercially valuable”).

158. *Siegel v. Warner Bros. Entm’t Inc.*, 542 F. Supp. 2d 1098, 1107 (C.D. Cal. 2008).

159. See *infra* Section IV.A (explaining termination of transfers and its paternalistic motivations).

160. See *supra* note 105 and accompanying text.

161. See, e.g., M.E. Yaari & M. Bar-Hillel, *On Dividing Justly*, 1 SOC. CHOICE & WELFARE 1, 6–10 (1984).

162. *Id.*; see also Rabin, *supra* note 95, at 18–19.

is unfair. Social preferences thus provide an additional motivation for protecting authors from one-sided assignments of copyright.

Cutting in the opposite direction is the endowment effect. People overvalue goods that are initially allocated to them.¹⁶³ In a series of famous experiments, researchers randomly gave coffee mugs to half of a group of students, who then participated in a market.¹⁶⁴ Those who did not receive a mug were asked how much they would be willing to pay to buy one; those receiving mugs were asked how much they would accept to sell, and trades were executed when the offers exceeded the asking price.¹⁶⁵ Although traditional economic theory would predict that about half of the mugs would change hands, in practice, few trades took place because the owners of the mugs systematically overvalued them relative to prospective “buyers.” In one study, for example, the average mug owner was unwilling to sell for less than \$7.12, whereas the average buyer offered only \$2.87.¹⁶⁶

In the intellectual property context, because copyright usually vests initially in a work’s creator, authors may value their own works more than potential purchasers because of the endowment effect. Indeed, recent studies by Christopher Buccafusco and Christopher Sprigman support the existence of a “creativity effect” whereby creators overvalue their work relative to potential purchasers.¹⁶⁷ The creativity effect means that authors may be less willing to sell their work than traditional economic analysis predicts.

Table 1. *Selected Behavioral Effects in Artistic Creation and Assignment*

STAGE	BEHAVIORAL EFFECT	POTENTIAL IMPACT
Creation	Intrinsic motivation	Fail to respond to economic incentives
	Saliency	Fail to respond to indirect incentives
	Lottery effect	Over-estimate probability of artistic work’s success

163. See Rabin, *supra* note 95, at 14.

164. Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 194–95 (1991).

165. *Id.* at 195–96.

166. See *id.* at 196.

167. See Buccafusco & Sprigman, *supra* note 143 (experimental evidence of endowment and creativity effects for creators of intellectual property).

Assignment	Bounded willpower	Assign away future revenue for (small) immediate payment
	Social preferences	Disfavor one-sided transfers
	Endowment effect	Overvalue own artistic creation

IV. PATERNALISM IN COPYRIGHT LAW

What lessons does the increasing embrace of paternalism by BLE scholars have for copyright law? As an initial matter, it is important to observe that American copyright law is not consistent in its view of authors as rational actors. Despite the dominance of the incentive model, many aspects of American copyright law are best understood as motivated by paternalism. To a surprising degree, the law provides protection for authors who, it supposes, are not fully capable of protecting their own interests. These provisions include authors' rights to terminate transfers, a number of limitations on copyright alienability, and the elimination of formalities.¹⁶⁸ This Part explains these aspects of copyright law and argues that paternalism is a natural way to understand these provisions.

To be sure, many of the provisions described in this Part are motivated by multiple factors. The congressional intent behind these laws is often contested or unreliable, as copyright lawmaking is characterized by messy—some would say unprincipled—compromises among interest groups.¹⁶⁹ Whether motivated by a perception of authors as shortsighted or simply lacking bargaining power, the overall effect of these provisions is to protect authors from the consequences of their actions by limiting their choices, and therefore

168. This list is by no means exclusive. Other important aspects of copyright that can be understood as paternalistic in operation include moral rights for visual artists, *see* 17 U.S.C. § 106A (2012), which grant visual artists protection against misattribution or modification of their work even if they have sold the work to another without any express restriction, and the many compulsory license provisions, *see, e.g., id.* §§ 111(d), 114(d)(2), 115, 118, which effectively dictate that an author must license certain uses and the terms at which they must do so, *see also infra* notes 311–314 and accompanying text (discussing compulsory licenses). A number of proposed copyright revisions have important paternalistic aspects as well, such as proposals for resale royalties. *See generally* American Royalties Too Act of 2014, H.R. 4103, 113th Cong. (2014); U.S. COPYRIGHT OFFICE, *RESALE ROYALTIES: AN UPDATED ANALYSIS* (2013), <http://copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf> [<https://perma.cc/SQB9-SVS3>].

169. *See generally* Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 860–61 (1987) (reviewing the “troubling” legislative history of the 1976 Copyright Act and concluding that it represents not congressional deliberation but a “complicated and delicate compromise” among industry representatives).

these laws fit the definition of paternalism as used herein.¹⁷⁰ Such copyright-specific protections go far beyond the usual contractual protections such as duress or unconscionability, and they apply regardless of whether there was any actual bargaining imbalance. These provisions are thus in tension with the strictly rational author supposed by the incentive model.

A. Termination of Transfers

The right to terminate copyright transfers is one of the more complex features of American copyright law, and some history is necessary to understand its design. Since the earliest American copyright law, the author has retained a reversionary interest in her copyright.¹⁷¹ Historically, this reversionary interest was structured as a renewal term: the 1909 Copyright Act, for example, granted to authors an initial twenty-eight-year term of copyright, followed by an additional twenty-eight-year term should she choose to renew the copyright.¹⁷² Because the renewal term was considered a “new estate,” the rights vested in the author even if she had transferred the original copyright.¹⁷³ Congress reasoned that renewal rights were necessary because “[i]t not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success . . . [the Committee] felt that it should be the exclusive right of the author to take the renewal term.”¹⁷⁴

A 1943 Supreme Court ruling significantly altered this structure. In *Fred Fisher Music Co. v. M. Witmark & Sons*, the Court held that authors were free to assign away their future renewal rights during the initial copyright term.¹⁷⁵ Justice Frankfurter’s majority

170. See *supra* note 112 (defining paternalism as governmental or other actors limiting the choices of individuals in order to protect them from the consequences of their own decisions).

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

172. Copyright Act of 1909, Pub. L. No. 60-349, §§ 23–24, 35 Stat. 1075, 1080–81. If the copyright was not renewed, the work would fall into the public domain. See Sprigman, *supra* note 67, at 493.

173. See Reese, *supra* note 171, at 727 (“[R]ather than merely extending the duration of the original copyright, [renewal] granted a ‘new estate,’ in the terminology of some courts, to the author or her designated successors.”).

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

175. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 657 (1943).

opinion invoked the freedom of contract and mocked the claim that Congress intended renewal to protect authors:

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

If an author cannot make an effective assignment of his renewal, it may be worthless to him when he is most in need. Nobody would pay an author for something he cannot sell. We cannot draw a principle of law from the familiar stories of garret-poverty of some men of literary genius.¹⁷⁶

The *Fred Fisher* holding undermined the practical effectiveness of the renewal term as a benefit for authors, as it became common practice for publishers to demand that authors assign the future renewal rights in any deal.¹⁷⁷

Despite Justice Frankfurter's dismissal of a congressional intent to protect "irresponsible" authors, Congress clarified in the 1976 Copyright Act that this was more or less what it had in mind.¹⁷⁸ In 1976, Congress replaced the renewal system with a unitary copyright term.¹⁷⁹ In place of renewal, the 1976 Act granted authors or their heirs an inalienable right to terminate (i.e., to rescind) prior agreements transferring the copyright in their works.¹⁸⁰

More specifically, section 203 of the 1976 Act permits an author to terminate a contract transferring or licensing his copyright when the initial transfer was made after 1978, the effective date of the Act.¹⁸¹ The termination must be made within a five-year window

176. *Id.* at 656–57.

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

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

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

180. *See* 17 U.S.C. §§ 203, 304(c) (2012); *Stewart v. Abend*, 495 U.S. 207, 230 (1990) ("The 1976 Copyright Act provides a single, fixed term, but provides an inalienable termination right.")

181. 17 U.S.C. § 203(a)–(b).

beginning thirty-five years after the date of the original agreement.¹⁸² Section 304 applies to grants of renewal rights executed prior to 1978.¹⁸³ In that case, the termination must be effectuated in a five-year window beginning fifty-six years from the date that the copyright was initially secured.¹⁸⁴ Under both provisions, works made for hire and grants made via will are not terminable.¹⁸⁵ Procedurally, an author must serve a written advance notice upon the original grantee asserting her termination right.¹⁸⁶ If the author died, the termination rights passed to a series of statutorily designated heirs (e.g., the author's surviving spouse or children).¹⁸⁷

In short, the 1976 Act provides authors with the right to revoke an initial transfer or license of copyright, decades after that contract was made, "notwithstanding any agreement to contrary."¹⁸⁸ In plain language, an author who signed away her rights to a publisher or record company can sometimes get her copyright back. The rationale behind the termination right is disputed.¹⁸⁹ The main account asserts

182. *Id.* § 203(a)(3). In the case of a grant covering the publication of the work, the period begins thirty-five years from the date of publication. *Id.*

183. *Id.* § 304(c).

184. *Id.* § 304(c)(3).

185. *Id.* §§ 203(a), 304(c).

186. *Id.* §§ 203(a)(4), 304(c)(4).

187. *Id.* §§ 203(a)(2), 304(c)(2). These statutory heirs represent a second way in which the termination of transfers provisions are paternalistic. Because the ownership of the termination right is dictated by the statute, authors are not free to alter this inheritance structure by will. See Brad Greenberg, *DOMA's Ghost and Copyright Reversionary Interests*, 108 NW. U. L. REV. 391, 396–97 (describing the designation of statutory heirs as a "restraint on testamentary freedom" that can "produce property dispositions contrary to an author's intent, even when the author executed a will"). Thus, for example, an author who wishes to bequeath termination rights to his brother or stepchild instead of his surviving spouse cannot do so. See *id.*; Melville B. Nimmer, *Termination of Transfers Under the Copyright Act of 1976*, 125 U. PA. L. REV. 947, 967–68 (1977). This inheritance structure favors the author's surviving spouse and children and likely derives from the historical motive for renewal rights as a means of subsistence for an author's surviving family. See *infra* note 197.

188. 17 U.S.C. §§ 203(a)(5), 304(c)(5).

189. Compare, e.g., James Grimmelman, *The Worst Part of Copyright: Termination of Transfers*, PRAWFSBLAWG (Feb. 14, 2012), <http://prawfsblawg.blogs.com/prawfsblawg/2012/02/theworst-part-of-copyright-termination-of-transfers.html> [<https://perma.cc/6W4Q-ENVZ>] ("Termination of transfers rests instead on a view that authors are 'congenitally irresponsible' to the point that they can't be trusted to make licensing decisions for themselves."), with Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA. L. REV. 1329, 1329 (2010) ("Many believe that Congress based the [termination] policy on a paternalistic desire to protect creative individuals lacking business acumen. This Article demonstrates that Congress was much more concerned with the valuation problem inherent in creative works."). The rationale is also slightly different for section 304 terminations as opposed to section 203 terminations. Section 304 covers rights—an *ex post* copyright term extension—that neither the original author or the grantee would have anticipated in the original contract. For these rights, Congress decided that the term extension "windfall" ought to go to authors. See H.R. REP. No. 94-1476, at 140 (1976) ("The arguments for granting rights of termination are even more persuasive under § 304 than they are under § 203;

that termination is necessary because of authors' generally weak bargaining power in the initial transfer, either because of a lack of business savvy, the market power of publishers, or shortsightedness.¹⁹⁰ Termination is thus "intended to relieve authors of the consequences of ill-advised and unremunerative grants."¹⁹¹ This account was invoked rhetorically by Justice Frankfurter in *Fred Fisher*, and it is still often cited.¹⁹²

However, the bargaining power account suffers from a few weaknesses. First, it is only partially supported by the legislative history, which also invokes the problem of uncertainty in the valuation of artistic works.¹⁹³ Second, it rests on questionable factual presumptions of authors as romantic "starving artists."¹⁹⁴ Finally and most fundamentally, termination rights as structured in the 1976 Act do not actually do anything to improve the bargaining position of most authors.¹⁹⁵ Instead, termination actually weakens the initial bargaining position for the majority of authors to the benefit of the tiny minority who create works that are still valuable thirty-five years (or more) down the road.¹⁹⁶

the extended term represents a completely new property right, and there are strong reasons for giving the author, who is the fundamental beneficiary of copyright under the Constitution, an opportunity to share in it.").

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

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

192. See Loren, *supra* note 189, at 1346 (2010) ("The image of authors as poor businessmen continues to affect courts' understanding of the termination rights."); *supra* notes 175–177 and accompanying text.

193. See Reese, *supra* note 171, at 733 ("Thus, the 1976 Act's drafters [explained that termination] was premised not on a perception of authors as poor businesspeople, but on a perception of creative works as inherently difficult to value before exploitation in the market."); accord Loren, *supra* note 189, at 329. *But see* COPYRIGHT LAW REVISION, *supra* note 177, at 54 (noting, as a reason for termination provisions, that "most authors are not represented by protective organizations and are in a relatively poor bargaining position").

194. See Rub, *supra* note 190, at 81–87 (arguing that the "starving artist myth" lacks factual support).

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

196. See Kate Darling, *Occupy Copyright: A Law & Economic Analysis of U.S. Author Termination Rights*, 63 BUFF. L. REV. 147, 150 (2015) ("[I]ntroducing a termination right will effect price changes and risk allocation, essentially creating a lottery that rewards a small subset of authors, but reducing individual gains for the majority."); Grimmelmann, *supra* note 189 ("[Termination] bestows large windfalls on a very small number of [authors], at immense administrative cost."); Loren, *supra* note 189, at 1352–53 ("[T]ermination rights will be exercised only for very successful works with commercial staying power," and "[i]f the bargained for price

A second rationale for termination, more firmly grounded in the legislative history, relies on the uncertainty in determining the value of an artistic work before it is exploited.¹⁹⁷ As the 1976 House committee report stated, termination “is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.”¹⁹⁸ This explanation, however, is not a fully persuasive account of the termination right. To be sure, there is great unpredictability in the value of artistic works,¹⁹⁹ but this uncertainty is shared by both authors and publishers.²⁰⁰ Moreover, a rational author would *want* to transfer this risk to the publisher, who, as a holder of a diverse portfolio of works, is much better suited to bear it.²⁰¹ All termination accomplishes, on this account, is to reallocate some of the risk back to the author and make the initial assignment of copyright less valuable when authors sell it to publishers.²⁰² Indeed, if an author wishes to share the risk presented by uncertain valuation with the publisher, royalty arrangements are an easy way to accomplish this by contract.²⁰³

Regardless of which rationale one accepts, termination rights are paternalistic because they operate to protect the author from the consequences of his own contracting decisions. The two accounts

for the transfers includes a discount for the possibility of termination, then unsuccessful authors may be suffering at the cost of extremely successful ones.”)

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

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

199. See generally Barnett, *supra* note 19, 398–44 (arguing that creative markets are characterized by a high risk of commercial failure).

200. See Rub, *supra* note 190, at 87–88 (“[I]t is unclear why [valuation problems] should justify a termination mechanism, especially an inalienable one. From an economic perspective, prior to commercialization the work might be a risky investment. It is risky for the seller, but it is similarly risky for the buyer.”).

201. See Darling, *supra* note 196, at 202 (“[T]he uncertain future value of artistic works makes it in the author’s interest to allocate the risk of success or failure to the publisher. It is one of the reasons why publishers exist in the first place.”); Rub, *supra* note 190, at 87–88 (arguing that it is “socially efficient” to transfer the risk to the publisher because the “intermediary’s portfolio typically includes many artists, and thus the aggregate risk it faces is considerably smaller”).

202. Darling, *supra* note 196, at 165–66.

203. See Grimmelmann, *supra* note 189 (“The uncertain valuation problem can be addressed with better contract drafting.”); Nimmer, *supra* note 187, at 950 (“[The uncertain valuation account] is somewhat less persuasive when the original sale is on a percentage royalty basis so that the author automatically shares in whatever returns his or her work may bring.”).

merely differ in the *reason* that the state offers this protection. On the weak bargaining power account, paternalism is perhaps more obvious: this rationale presumes a shortsighted, unsophisticated, or ill-advised author that must be protected from foolishly signing away his rights for a pittance. In the language of BLE, such an author suffers from bounded willpower and difficulties with probabilistic judgments. Paternalism of a different sort is present on the uncertain valuation account, however. If we presume that the author is rational and facing uncertainty as to whether his creation will be a valuable “hit” or a flop, there are strong reasons why he would *want* to transfer this risk to the publisher in return for other compensation.²⁰⁴ Termination, by mandating that the author cannot transfer *all* of the valuation risk, thus overrides the preferences of some authors in a paternalistic fashion.²⁰⁵

There is also a tension with the incentive model’s vision of the author on either account of termination. Again, this tension is clear on the weak bargaining power rationale. If authors are so shortsighted that they cannot effectively bargain in the highly economic context of a negotiation, it is fair to question how responsive they are to copyright’s incentive to create. In other words, if authors make bad deals because they discount the possible future revenue from their work, it seems unlikely that this same future revenue was the reason for the work’s creation.²⁰⁶ A parallel conflict arises on the uncertain valuation rationale. If authors are unable to effectively value their own works, this unpredictability undermines the original copyright incentive. How powerful is the incentive to create if it can only give an author a small chance of a highly uncertain future reward?²⁰⁷ It is thus rather implausible that termination rights could provide any additional incentive to create. Termination will only benefit the very few authors whose work remains successful thirty-five years after creation. If valuation is uncertain, these authors have no clear idea *ex ante* whether they will be one of the lucky few.

204. See Rub, *supra* note 190, at 63.

205. See Reese, *supra* note 171, at 736 (“The rationale offered for reversion in both 1909 and 1976 was the perceived need to protect authors from their disadvantageous bargaining position relative to copyright purchasers. [A libertarian] should view this rationale for reversion as wholly illegitimate, for he clearly rejects such paternalism.”).

206. Grimmelmann, *supra* note 189 (“As an incentive for authorship, [termination is] a terrible one. If authors make bad up-front deals because they’re unmindful of future revenues, it follows that those same future revenues won’t operate as an *ex ante* incentive for creativity.”).

207. Cf. Zimmerman, *supra* note 1, at 38 (“[R]ecent studies make it quite clear that modern creators generally have little more realistic hope than Victorian poets of earning much in the way of remuneration for their acts of creation.”). However, the behavioral lottery effect suggests that authors may over-estimate their chances of success. See *supra* notes 53–54 and accompanying text.

Termination rights, at best, only offer a highly uncertain and oddly structured incentive.²⁰⁸

B. Limitations on Alienability

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

1. The Writing Requirement for Copyright Transfers

Section 204(a) of the Copyright Act provides that any transfer of ownership of copyright must be "in writing and signed by the owner of the rights."²⁰⁹ Although this is sometimes described as a "statute of frauds" for copyright, its language and effect is broader.²¹⁰ Rather than merely requiring a writing as evidence of an agreement, unwritten copyright assignments are simply "not valid."²¹¹ Copyright's requirement of a signed writing has therefore been characterized as an "absolute" or "super" statute of frauds.²¹² Traditional exceptions to the statute of frauds, such as estoppel, do not

208. Darling, *supra* note 196, at 150 ("[U]ncertainty, the length of copyright terms, and the long time period between right assignments and the termination possibility may mitigate the potential for positive effects on creation incentives.")

209. 17 U.S.C. § 204(a) (2012). The statutory definition makes clear that the writing requirement includes any whole or partial "transfer" of exclusive rights, but does not apply to a "nonexclusive license," which can be made orally. 17 U.S.C. § 101 (2012); *Effects Assocs. v. Cohen*, 908 F.2d 555, 556 n.2 (9th Cir. 1990).

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

211. 17 U.S.C § 204(a).

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

apply.²¹³ Some courts go so far as to reject a writing confirming a transfer of copyright if that writing was not “contemporaneous” with the transfer.²¹⁴

The purpose of section 204(a) is also broader than that of a typical statute of frauds. Like a statute of frauds, section 204(a) is designed to provide protection for the author from fraudulent claims of transfer and to promote predictability and certainty in copyright ownership.²¹⁵ But section 204(a) is also designed to prevent inadvertent transfers of copyright by the author, whether fraudulent or not.²¹⁶ The statute is therefore not a neutral evidentiary requirement; it is designed to operate “in favor of the original holder of the copyrighted material.”²¹⁷ In other words, the “purpose of the writing requirement is thus to effectuate a congressional policy of protecting authors, even from themselves if need be.”²¹⁸

2. Limitations on “Works Made for Hire”

Congress also attempted to protect authors from inadvertent or unwanted loss of rights in the Copyright Act’s “work made for hire” provisions. The usual rule for copyright ownership is that, upon creation, the copyright vests in the author. However, when a work is “made for hire” the copyright vests initially in the “employer or other person for whom the work was prepared.”²¹⁹ The Act specifies “two mutually exclusive means” by which a work can be designated as made for hire: one for employees and one for independent contractors.²²⁰ For employees, the person creating the work must be a true employee under agency law, and the work must be “within the scope of his or her employment.”²²¹

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

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

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

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

217. *Pamfiloff*, 794 F. Supp. at 937.

218. PATRY, *supra* note 212, § 5:106.

219. 17 U.S.C. § 201(a)–(b) (2012).

220. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 743 (1989).

221. 17 U.S.C. § 101(1); *Reid*, 490 U.S. at 740–41 (holding that the term “employee” in the work made for hire provisions is defined by the common law of agency).

For independent contractors, the rules are much stricter. These rules emerged as a response to some courts' broad interpretation of the 1909 Copyright Act, which they read as presumptively granting the copyright to a hiring party whenever a work was created at his "instance and expense."²²² The courts applied that test to employees and freelance artists alike, and required only that the hiring party "induces the creation of the work and has the right to direct and supervise the manner in which the work is carried out."²²³ This rule threatened to presumptively transfer copyright to the hiring party for almost all commissioned works, as these features are present in most hiring relationships.²²⁴

As a result, the 1976 Act's "work made for hire" provisions put specific requirements in place and restored some protection to freelance authors. The new rule drew a sharp line between employees and independent contractors and protects authors in two ways. First, it requires that authors actually *be* "employees," not just so designated by contract, for the first prong of the definition to apply.²²⁵ Second, for commissioned works, it allows works to be designated as made for hire by contract only in a narrow set of circumstances: (i) the work must be "specially ordered or commissioned";²²⁶ (ii) it must be one of nine specified types of works;²²⁷ and (iii) there must be a signed, written agreement designating it as "made for hire."²²⁸

The legislative history reveals that this provision was motivated by a concern that "freelance authors lacked the bargaining power to reject contractual clauses designating works as made for

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

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

224. *See* PATRY, *supra* note 212, § 5:48 ("[The instance-and-expense test] decisions were on a fast track into turning all specially ordered or commissioned works presumptively into works made for hire, and without any agreement between the parties, oral or written.")

225. *See Reid*, 490 U.S. at 742–43.

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

227. The statute lists the types as "[1] a contribution to a collective work, [2] as a part of a motion picture or other audiovisual work, [3] as a translation, [4] as a supplementary work, [5] as a compilation, [6] as an instructional text, [7] as a test, [8] as answer material for a test, or [9] as an atlas." 17 U.S.C. § 101(2) (2012) (numbering added). "The unifying feature of these works is that they are usually prepared at the instance, direction, and risk of a publisher or producer." *Reid*, 490 U.S. at 741.

228. 17 U.S.C. § 101(2). This writing requirement serves similarly author-protective functions as the general provision, section 204(a). *See* PATRY, *supra* note 212, § 5:48 ("The principal purpose of the writing requirement for specially ordered or commissioned works is to protect non-work-for-hire authors . . ."); *supra* notes 215–217 and accompanying text.

hire.”²²⁹ For some categories of works, including most sound recordings and literary works, the law simply does not allow freelance creators to sign away their authorship rights.²³⁰ While this does not prevent freelancers from transferring their copyright to the hiring party, the creators remain the legal authors of the work and thus retain the termination right, at least.²³¹ The work made for hire provisions are thus designed to protect authors from the expansive 1909 Act rule and serve “a pro-actively paternalistic function.”²³²

3. Limitations on Transfers in New Media

A final limit on copyright alienability relates to whether an author can assign rights to technologies not yet in existence when the transfer is made. The issue is often called the “new-media problem” or the “new-use problem.”²³³ Despite the name, it is actually a very old problem: past courts struggled, for example, to determine whether a grant of rights in a silent film extended to “talkies,” or whether rights to distribute a motion picture extended to video cassettes and VCRs.²³⁴ Most American courts agree that unequivocal language granting rights to “all technologies now known or later developed” will be enforced.²³⁵ When the new medium of distributing a work is only

229. Litman, *supra* note 169, at 890; see also Marci Hamilton, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. PA. L. REV. 1281, 1311 (1987) (“The unequal bargaining position of the parties . . . and the commissioning party’s ability to dictate if and when work-made-for-hire contracts will be imposed on the artist all combine to deprive freelance artists of fair compensation for their works.”).

230. See 17 U.S.C. § 101(2).

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

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

233. See, e.g., *Boosey & Hawkes Music Publishers v. Walt Disney Co.*, 145 F.3d 481, 486 (2d Cir. 1998) (“Disputes about whether licensees may exploit licensed works through new marketing channels made possible by technologies developed after the licensing contract—often called ‘new-use’ problems—have vexed courts”); PATRY, *supra* note 212, § 5:115 (reviewing case law of the “new-media problem”).

234. See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.10[B] nn.02–6 (reviewing history of the new-use problem).

235. See, e.g., *Reinhart v. Wal-Mart Stores, Inc.*, 547 F. Supp. 2d 346, 354–55 (S.D.N.Y. 2008) (agreement to distribute records “by any method now or hereafter known” includes digital music rights); accord PATRY, *supra* note 212, § 5:115; Kate Darling, *Contracting About the Future: Copyright and New Media*, 10 NW. J. TECH. & INTELL. PROP. 485, 489–91 (2012) (“[In contrast to Europe,] the voluntary transfer of new use rights is neither forbidden nor prohibitively restricted in the United States.”).

ambiguously covered by the contractual language, however, the courts are in considerable conflict. For example, the Second Circuit was recently called upon to address whether a 1961 license to distribute a literary work “in book form” also granted rights to eBooks.²³⁶

In the United States, there are two competing approaches to the new media problem.²³⁷ Some courts, such as the Second Circuit, treat the issue as purely “neutral” contract interpretation and will find a grant of rights in new technologies whenever that is the more reasonable reading of the contractual language.²³⁸ Other courts such as the Ninth Circuit employ a pro-author presumption and will divest authors of rights in new media only if the contract contains the “clearest language.”²³⁹ These courts follow, albeit in a weaker form, the general rule in continental Europe, where many countries categorically prohibit transfers of rights in future media or impose strict requirements on such assignments.²⁴⁰

The courts that apply a pro-author presumption often invoke the weak bargaining position of “impecunious” authors as the rationale.²⁴¹ In *Cohen v. Paramount Pictures*, for example, the Ninth Circuit reasoned that license agreements should be interpreted “in accordance with the purposes underlying federal copyright law,” which it understood as “enacted for the benefit of the composer.”²⁴² Given this purpose, and the likelihood that neither party knew of the new technology at the time of the original contract, the publisher “should

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

237. *See Boosey*, 145 F.3d at 486–87 (reviewing “two principal approaches” to new-use issues); *Darling*, *supra* note 235, at 488–91 (same).

238. *Boosey*, 145 F.3d at 487 (“In our view, new-use analysis should rely on neutral principles of contract interpretation rather than solicitude for either party What governs under *Bartsch* is the language of the contract. If the contract is more reasonably read to convey one meaning, [that meaning controls].”).

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

240. *See generally Darling*, *supra* note 235, at 488–89 (overviewing European law on this issue and observing that Germany (prior to 2008), Spain, Belgium, Greece, Poland, Hungary, and the Czech Republic prohibit all transfers in future media and that France permits it only when the contractual language is express, specific, and provides for author royalties).

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

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

not now ‘reap the entire windfall’ associated with the new medium.”²⁴³ In Europe, as well, notions of fairness and the bargaining weakness of authors motivate author-protective new media rules.²⁴⁴ Limits on new media transfers thus serve as another example of how US copyright law seeks to protect authors from unknowing transfers of rights.

In summary, copyright law limits alienability in a number of ways. For reasons analogous to the termination right, these rules can be understood as a variety of author-protective paternalism. These provisions are justified by distributive goals and the weak bargaining position of authors, either because of structural factors or because of authors’ shortsightedness, poverty, or romantic nature. If motivated by a romantic conception of the author, they raise the question of whether such an author is actually responsive to copyright’s extrinsic incentive to create. If motivated instead by authors’ lack of market power, they may be less paternalistic in motivation but remain paternalistic in operation. These provisions limit the contractual freedom of authors for their own supposed best interest—limitations that at least some authors do not want. For example, in return for other compensation, some authors may wish to transfer rights in new media or forfeit termination rights by designating a commissioned work as made for hire. Either way, these provisions are in tension with the economically rational actor presumed by the incentive model.

C. The Elimination of Formalities

For most of its history (1790 to 1976), American copyright law required particular procedures—collectively called “formalities”—to assert and maintain a copyright.²⁴⁵ First, in order to claim copyright at all, the author was required to register the work with the federal government and send a copy of the work to the Register of Copyright.²⁴⁶ Second, upon publication, the author was required to place appropriate notice of copyright on the work, such as the familiar

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

244. *See Darling, supra* note 235, at 497 (“[A]ccording to lawmakers in countries that prohibit the grant of new use rights, the main goal is to allocate to authors the financial returns of their artistic works [S]ome fear that creators might transfer their rights to new uses to publishers because creators face a variety of bargaining disadvantages . . .”).

245. *See generally Golan v. Holder*, 565 U.S. 302, 314 n.11 (2012) (“From the first Copyright Act until late in the 20th century, Congress conditioned copyright protection on compliance with certain statutory formalities. The most notable required an author to register her work, renew that registration, and affix to published copies notice of copyrighted status.”); Sprigman, *supra* note 67, at 490–94 (reviewing history of formalities).

246. *See, e.g., Copyright Act of 1909*, Pub. L. No. 60-349, §§ 1, 10, 12, 53–55, 35 Stat. 1075, 1075–76, 1078, 1085–86.

© symbol.²⁴⁷ Third, at the end of a relatively brief initial term (fourteen or twenty-eight years), the author had to renew the copyright if she wished to claim an additional term.²⁴⁸ The result of noncompliance with these formalities was often harsh: the author would effectively lose the copyright, either because the right would fail to arise, the copyright would become unenforceable, or the work would fall into the public domain.²⁴⁹

From an international law perspective, these formalities were an anomalous feature of American law.²⁵⁰ Beginning in the 1976 Act and culminating in the 1989 Berne Convention Implementation Act (the BCIA), Congress eliminated mandatory copyright formalities to conform to international standards.²⁵¹ Renewal was eliminated entirely in favor of a unitary copyright term with a termination right.²⁵² Although current law provides some incentives to encourage registration, deposit, and notice, failure to comply no longer causes a loss of copyright protection.²⁵³ The practical impact was to eliminate the “filtering” function that mandatory formalities had previously served.²⁵⁴ From the perspective of the incentive model, formalities make a good deal of sense because they ensure that copyright is given only to those authors for whom copyright mattered, as evinced by the affirmative steps that the authors took to claim copyright.²⁵⁵ If the author did not bother to assert a copyright, it seems likely that copyright was not the impetus for the work’s creation (or, at least, that the work was of minimal commercial value). The data on registration and renewals show that, in practice, the majority of published authors did not bother to register their works, and few registered works were renewed.²⁵⁶

247. *Id.* §§ 9–11.

248. *Id.* §§ 23–24; *see also supra* notes 171–173 and accompanying text (discussing copyright renewal).

249. Sprigman, *supra* note 67, at 493.

250. NIMMER & NIMMER, *supra* note 234, § 7.01[A] (“For decades, the outstanding feature distinguishing United States copyright law from that of the rest of the world has been its emphasis on formalities.”).

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

252. *See supra* notes 179–188 (explaining termination of transfers right).

253. 17 U.S.C. §§ 102(1), 401(d), 402(d), 407(a), 408(a) (2012); *Golan v. Holder*, 565 U.S. 302, 307 (2012) (“Congress no longer requires [formalities] as prerequisites to copyright protection . . .”).

254. Sprigman, *supra* note 67, at 502–03 (explaining this function).

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

256. *See supra* notes 66–67 and accompanying text.

The elimination of formalities was driven by several different justifications. Congress's primary purpose in the BCIA was a practical one: it wanted to comply with the main international intellectual property treaty to ensure reciprocal protection of US copyrights abroad and thus gain considerable economic and trade benefits.²⁵⁷ It is thus more relevant to know what motivated the creation of the Berne Convention's Article 5(2), the international anti-formality provision.²⁵⁸ Some claim that formalities are simply inconsistent with the "natural rights" conception of copyright predominant in continental Europe.²⁵⁹ Others argue that the Berne approach was principally motivated by administrative difficulties for authors who had to comply with multiple cumbersome formalities in different nations in order to reach an international market.²⁶⁰ Finally, there was concern that formalities had become a "trap for the unwary," resulting in unfair forfeitures of copyright when a careless author failed to comply or made a mistake in attempted compliance.²⁶¹

Especially on this final rationale, the elimination of the formalities can be understood as a paternalistic aspect of copyright. Although they are technical, the former provisions requiring notice and registration were neither very expensive nor difficult to comply with. Yet, historically, the majority of authors chose not to comply. The reasons for noncompliance were no doubt varied: some were unaware of the obligation, some did not think their work valuable enough, some neglected it, some "lost track," and some simply did not

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

258. Berne Convention for the Protection of Literary and Artistic Works art. 5(2), Sept. 9, 1886, 12 Stat. 2853, 1161 U.N.T.S. 3, http://www.wipo.int/treaties/en/text.jsp?file_id=283698 [<https://perma.cc/HDQ7-BEYF>] (most recently amended Sept. 28, 1979).

259. See Daniel Gervais & Dashiell Renaud, *The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How to Do It*, 28 BERKELEY TECH. L.J. 1459, 1470–71 (2013) ("Many Berne signatories took a *droit d'auteur* approach Under such a "natural" or "human rights" regime, requiring compliance with a set of state-prescribed formalities as a precondition to the exercise of rights is difficult to justify."); *supra* notes 78–84 (overviewing natural rights theories of copyright).

260. See, e.g., Michael W. Carroll, *A Realist Approach to Copyright Law's Formalities*, 28 BERKELEY TECH. L.J. 1511, 1518–19 (2013) (rejecting the moral rights account and noting that "authors and publishers faced overly cumbersome copyright formalities, operating in an increasingly international market"); accord Sprigman, *supra* note 67, at 539–44.

261. *Golan v. Holder*, 565 U.S. 302, 314 n.11 (2012) ("[American copyright] formalities drew criticism as a trap for the unwary."); accord Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311, 342–43 (2010); H.R. REP. NO. 94-1476, at 143 (1976) ("One of the strongest arguments for revision of the present statute has been the need to avoid the arbitrary and unjust forfeitures now resulting from unintentional or relatively unimportant omissions or errors in the copyright notice.").

wish to claim copyright.²⁶² The elimination of formalities protects authors from the consequence of their own noncompliance, whether willful or merely careless. It thus prevents unwanted forfeitures at the significant social cost of awarding copyright by default to all authors—regardless of whether they need it as an incentive, and whether they want it or not.

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

D. Tensions with the Incentive Model

Copyright's paternalistic provisions create problems for the incentive model. In the United States, the importance of incentives for authors dominates the copyright discourse, both for those in favor of more limited copyright and those who defend copyright's expansion.²⁶³ Taken at face value, the incentive model assumes that authors respond rationally to economic incentives, an assumption that is at odds with copyright's paternalistic provisions.

The tension arises from two different understandings of author rationality in copyright. On the one hand, the basic premise of copyright relies upon the notion that authors respond to incentives as calculating economic actors. On the other hand, many of the actual provisions in copyright law are motivated by paternalism and suppose a shortsighted or unsophisticated author who is unable to effectively look out for his own economic interests and is in need of protection from the law. These two conflicting conceptions of the author complicate copyright's incentive story. If authors will make bad deals because they discount future revenue, was that future revenue really

262. See Ginsburg, *supra* note 261, at 342 (“[N]ot all those who fail to [comply] do so because they do not care about their works. Some lose track; some are ignorant of the obligation, particularly if they reside in foreign countries which do not impose formalities; some may find the fees prohibitive.”).

263. Compare, e.g., Balganes, *supra* note 1, at 1603–25 (using incentive theory to urge limitation on copyright infringement to foreseeable uses), with *Eldred v. Ashcroft*, 537 U.S. 186, 206 (2003) (upholding twenty-year copyright term extension because it may “provide greater incentive for American and other authors to create and disseminate their work in the United States”).

their primary motivation? If authors will neglect to comply with copyright formalities, was copyright the reason for their artistic creation? Because this tension speaks to the internal logic of copyright, it exists regardless of one's view of the empirical critiques of the incentive model.

In short, copyright does not fully believe its own creation story. This realization is important, both in itself and as a rhetorical counterweight to the incentive model. The incentives-for-authors story has been profoundly successful in securing expansions of copyright from Congress including repeated term increases,²⁶⁴ inclusion of new subject matter,²⁶⁵ and even the removal of works from the public domain.²⁶⁶ Many scholars have noted the rhetorical power of the incentive model and its tendency to operate as a one-way ratchet supporting continual, repeated expansions of copyright.²⁶⁷ Copyright's paternalistic provisions undermine the persuasiveness—and thus the power—of the incentive story.

Of course, it must be noted that this tension between the incentive model and copyright's paternalistic provisions is capable, conceptually, of multiple resolutions. For example, one could rely upon differences in timing to reconcile the incentive model and copyright paternalism. Perhaps the author behaves like a rational economic actor when he decides whether or not to engage in artistic creation, but then later acts more impulsively when negotiating a copyright assignment. While this resolution is logically possible, it is not particularly persuasive. A contract negotiation occurs in an economic context that specifically calls for weighing of costs and benefits.²⁶⁸ Artistic creation, by contrast, is typically motivated by a complex mix of intrinsic motivations as well as economic ones.²⁶⁹ If anything, we should expect authors to accord *more* closely with the rational actor model at the time of assignment versus the time of

264. See *Eldred*, 537 U.S. at 194–96 (reviewing history of copyright term extensions).

265. See, e.g., Act of October 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (creating limited copyright in sound recordings).

266. See *Golan*, 565 U.S. at 327–30 (upholding “restoration” of copyright for certain foreign works that were previously in the public domain in the United States).

267. See, e.g., Ku et al., *supra* note 61, at 1681–84 (describing the “rhetorical force” behind the incentive model and how it has been exploited to expand copyright); Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 344 (2002) (“Recently, copyright legislation has seemed to be a one-way ratchet, increasing the subject matter, scope, and duration of copyright with every amendment.”); Sterk, *supra* note 37, at 1197 (explaining how the rhetoric of providing incentives to deserving authors has fueled a continual expansion of copyright, despite the gap between the rhetoric and reality).

268. See KAHNEMAN, *supra* note 97, at 52–58 (reviewing effects of priming on encouraging or discouraging analytical decision making).

269. See *supra* Section II.B (reviewing evidence of intrinsic motivation).

creation—precisely the opposite of what existing copyright law supposes.

It is also possible to deny the tension by interpreting copyright's paternalistic provisions as motivated by differences in market power that are purely structural and economic in nature. On this view, the author acts rationally in both creation and assignment; it is merely that publishers have a dominant bargaining position due to overwhelming market power. Provisions like termination rights and alienability limits may be paternalistic in operation, but not in *motivation*. This argument suggests that the author is perfectly rational at all times, but is economically helpless when negotiating with intermediaries.

This account reduces the tension somewhat, but it raises a few critical questions. If copyright's paternalistic interventions are solely about market power, why do they function to undermine the bargaining position of most authors? A purely rational actor, even if economically weak, would not want these interventions; they only serve to reduce his bargaining power by limiting what he can sell.²⁷⁰ Rational authors would prefer to at least have the option of transferring termination rights or designating a work as made for hire in exchange for a better deal.²⁷¹ Moreover, if equalizing bargaining power was truly the aim, it would be more straightforward for the law to intervene in the actual negotiation, as opposed to merely providing some easily satisfied formal requirements and a distant termination right.²⁷² Finally, the empirical basis for this view has weakened in the digital age. Even if the market power of publishers and record companies was once fearsome, it has lately been undermined by alternative means of dissemination in the digital era.²⁷³

In sum, it is difficult to reconcile the vision of the author supposed by copyright's paternalistic provisions and that supposed by copyright's dominant incentive model. The next Part explores the potential policy consequences of this important tension within copyright law.

270. See *supra* note 202 and accompanying text.

271. See Darling, *supra* note 196, at 190–91.

272. Cf. Rub, *supra* note 190, at 86 (“Even if the concern of unequal sophistication and experience level [of authors] requires legal intervention, solutions should focus on the time of negotiation.”).

273. See generally, 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 (2002) (reviewing how the Internet has allowed “consumers themselves [to] build and fund the distribution channels for digital content”).

V. PATERNALISTIC COPYRIGHT

This Part will consider what copyright law would look like using the vision of the author supposed by copyright's paternalistic provisions. If authors are subject to behavioral effects, copyright's existing paternalistic provisions are an inadequate solution. Like many soft paternalistic interventions, they tend to fail for the same reasons that motivated their creation: because they primarily function only to shift contractual default rules, they are easily circumvented. Even worse, they have unfortunate side effects, leading to troubling distributional consequences and significant social costs. Our current hybrid system thus risks incurring the costs of a paternalistic regime without actually ensuring that authors see a piece of the profits from their creations.

If the goal is truly to protect authors, we would need stronger medicine than the provisions of current law. BLE scholarship has revealed that hard paternalism and direct mandates are sometimes necessary to effectively remedy behavioral failures.²⁷⁴ Building on this insight, a truly paternalistic copyright law would replace termination rights with more meaningful protections for authors against one-sided contracts. For example, the law might make copyright transfers voidable at the election of the author if their terms are unreasonably onerous or one-sided, or might guarantee authors a minimum compensation or royalty.

On the incentives side, evidence of intrinsic motivation should lead to a reevaluation of the incentive model. If many authors do not need or respond to economic incentives in their decision to create, our current means of encouraging creativity seem ill-designed, and we should consider means that are more closely tailored to actual human behavior. In an ideal world, for example, the law would vary the scope and strength of legal protection based on the significance of the copyright incentive.²⁷⁵ As the intrinsic motivation literature reveals, economic incentives matter more to some authors than to others—and more in some contexts than in others. Reinstating formalities offers one way to ensure that copyright only goes to those who were truly motivated by its extrinsic incentive.²⁷⁶ Finally, relying on an indirect

274. See *supra* notes 121–137 and accompanying text.

275. Cf., e.g., Loren, *supra* note 73, at 3 (arguing that copyright “should take creator and distributor motivation into account in determining how robust the copyright protection afforded should be”). See generally Michael W. Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 AM. U. L. REV. 845, 849 (2006) (arguing that one-size-fits-all intellectual property rights create costs and analyzing means to tailor copyrights and patents).

276. Cf. LESSIG, *supra* note 148, at 287–91; WILLIAM PATRY, HOW TO FIX COPYRIGHT 203–09 (2012); Sprigman, *supra* note 67, at 545–68 (urging re-introduction of copyright

system of uncertain economic incentives may not be the most effective way to encourage creation. We might consider directly funding some artistic creation in exchange for limitations or waivers of copyright.²⁷⁷ Although this creates obvious costs, it is a certain and present-time incentive to which humans are more likely to respond.

These ideas are intended as exploration of where the rationales of copyright paternalism lead, not as a firm normative endorsement of particular policies. There are, of course, many potential ways to reconcile the conflict between the incentive model and copyright's paternalistic provisions, depending on one's prior normative presumptions. Some scholars base copyright on deontological values and have no use for the incentive model to begin with.²⁷⁸ Some may see no particular unfairness when authors sell away their rights for a small payment and their works later become tremendously valuable.²⁷⁹ Some may find the costs of paternalistic interventions too great for their potential benefits.²⁸⁰ Nonetheless, analyzing the logic of copyright paternalism offers insights into the effectiveness of both copyright's existing paternalistic provisions and its incentive structure more generally.

A. Existing Paternalistic Provisions Are Ineffective

Copyright's current paternalistic provisions are an ineffective solution to the behavioral failures that they purport to remedy. These aspects of copyright are mainly formal requirements or changes to contractual defaults. In most cases, they simply mean that an author will assign away her rights by a different form (a written agreement) or in a different way (a copyright transfer, as opposed to a "work made for hire" designation)—*not* that she will get a better deal. With the

formalities). For a skeptical take on these proposals, see Brad A. Greenberg, *More than Just a Formality: Instant Authorship and Copyright's Opt-Out Future in the Digital Age*, 59 UCLA L. REV. 1028, 1028 (2012) (arguing that reintroduction of formalities suffers from problems of scale in the digital age due to the frequency of authorship).

277. Cf. Ku et al., *supra* note 61, at 1719–23 (suggesting increased direct funding of arts as a more effective means than copyright for encouraging creativity).

278. See *supra* notes 76–88 and accompanying text.

279. See, e.g., Siegel v. Warner Bros. Entm't Inc., 542 F. Supp. 2d 1098, 1107 (C.D. Cal. 2008) (creators of Superman sold away rights for \$130); see also H.R. REP. No. 94-1476, at 124 (1976) (stating that the goal of termination as "safeguarding authors against unremunerative transfers").

280. In particular, a direct funding approach suffers from the serious drawback that government, not the market, has power to select which projects to subsidize, and that costs of creation are borne directly by taxpayers (as opposed to indirectly by consumers of art). See generally Daniel J. Hemel & Lisa Larrimore Ouellette, *Beyond the Patents—Prizes Debate*, 92 TEX. L. REV. 303, 304 (2013) (providing an analytical framework for assessing costs and benefits of incentivizing creation via intellectual property rights, prizes, and subsidies).

exception of termination rights, copyright's paternalistic provisions do not actually prohibit anything, and none of them directly address underlying bargaining imbalances or behavioral effects. As a result, these soft paternalistic provisions tend to fail in achieving their stated goals: changing the supposedly poor decisions of authors or achieving a fairer distribution of the returns from artistic work.

The limitations on copyright alienability offer a prime example. Writing requirements such as section 204(a) merely dictate the form of a copyright transfer.²⁸¹ If authors are systematically disadvantaged in bargaining and subject to behavioral shortsightedness, this provision offers only illusory protection. Such authors will simply sign away their copyright for a relatively small sum as opposed to orally assigning it for that same small sum.

The restrictions on transfers of rights in new media similarly lack real bite. Even in relatively author-friendly jurisdictions like the Ninth Circuit, rights in new media can be transferred, so long as there is a clear statement to that effect.²⁸² Unlike comparable European rules, no American jurisdiction categorically prohibits assigning away rights in media that do not yet exist.²⁸³ The American requirements may shift the contractual default slightly in favor of the author, but in the end they only dictate the form of the transfer. If authors are chronically weak bargainers, and intermediaries are sophisticated repeat players, the same transfers will recur, albeit with slightly stronger contractual language. The situation is, of course, even worse in jurisdictions, like the Second Circuit, that do not even require a clear statement.²⁸⁴

Termination rights, formally the strongest and most prominent paternalistic provision, do not fare much better. Termination rights are meaningless to the vast majority of authors because of the simple fact that few works are still commercially valuable thirty-five years after their creation.²⁸⁵ Termination thus benefits only a tiny minority of authors or, commonly, their heirs.²⁸⁶ Worse, termination operates to *reduce* the bargaining power of most authors. Traditional economic

281. See *supra* notes 209–218 and accompanying text.

282. See *supra* notes 235–239 and accompanying text.

283. See Darling, *supra* note 235, at 488–89.

284. See *Boosey & Hawkes Music Publ'rs v. Walt Disney Co.*, 145 F.3d 481, 487 (2d Cir. 1998).

285. See Darling, *supra* note 196; William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 922 (1997) (calling the termination right “virtually meaningless”).

286. See, e.g., *Penguin Grp. (USA) Inc. v. Steinbeck*, 537 F.3d 193, 195–96 (2d Cir. 2008) (heirs of John Steinbeck seeking termination); see also *Milne ex rel. Coyne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1047–48 (9th Cir. 2005) (heirs of Winnie the Pooh's creator seeking termination).

analysis predicts that the authors will get a slightly worse deal from intermediaries as a result of termination rights because authors have fewer rights to sell.²⁸⁷ Authors simply cannot commit to an assignment of copyright for longer than thirty-five years, even if they wish to do so in exchange for other consideration. To be effective for the typical author, termination rights would need to operate on a much shorter time scale. However, it is probably wiser to alleviate the perceived unfairness of one-sided transfers through simpler mechanisms than the cumbersome termination process.²⁸⁸

Finally, the “work made for hire” restrictions offer weak protection, at best, for freelance authors. These limitations are important because they prohibit works being treated as “made for hire” by default except in one situation: when authors are truly employees of the hiring party.²⁸⁹ However, the restrictions do nothing to prevent the *transfer* of copyrights in commissioned works from freelance authors to the hiring party. Even for those types of works that cannot, as a matter of law, be designated as “made for hire,” authors remain free to assign away all their rights via contract.²⁹⁰ If freelance authors lack the bargaining power to reject contractual designations of their work as made for hire (the stated premise of the regulation),²⁹¹ then they likely also lack bargaining power to resist assignments of their copyrights. The work made for hire restrictions thus operate mainly to preserve termination rights, which are not valuable to most creators.

Like much soft paternalism, copyright’s existing paternalistic provisions tend to fail for the very reasons that motivated their creation. Moreover, these provisions are not only ineffective; they also have several unfortunate side effects. First, termination rights have troubling distributional consequences. Termination only benefits a small subset of commercially successful authors whose work is still valuable thirty-five years later. Its benefits flow to (the heirs of) those authors who need it least, at a time—decades after creation—when they are likely to need it least.²⁹² Moreover, these windfalls for a

287. See Darling, *supra* note 196, at 165–66.

288. See *infra* notes 305–309 and accompanying text (suggesting minimum royalties or rules against enforcement of onerous, one-sided contracts).

289. 17 U.S.C. § 101(1) (2012); *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740–41 (1989).

290. See § 101(1); *Reid*, 490 U.S. at 740–41.

291. See *supra* note 229 and accompanying text.

292. For example, many successful popular music artists—e.g., Bruce Springsteen, Bob Dylan, Tom Petty—have asserted termination rights in their recordings from the late 1970s. See Rother, *supra* note 5. While there is nothing inherently wrong with these artists re-negotiating their contracts to get a bigger share of the return from their works, it is striking that the benefits of a legal provision with redistributive purposes flow primarily to these well-off artists.

lucky few come at the expense of the majority of authors whose works lack lasting commercial viability. Second, requirements on the form of copyright assignment, such as section 204(a) or the clear statement rule for new media, will raise transaction costs. These costs might be worth it if copyright's paternalistic provisions effectively secured substantial benefits to authors, but they do not.

Furthermore, some of copyright's existing paternalistic provisions carry significant social costs for these comparatively small benefits. The elimination of formalities stands out in this dubious respect. Unlike copyright's other paternalistic interventions, granting copyright by default does seem to work. Formally, it is simply a change to a default rule: instead of having to expressly claim a copyright in your works, the copyright is granted automatically the instant that a work is written down.²⁹³ There is no simple or low-cost way to avoid default copyright, however: the law does not provide any mechanism for an author to dedicate his work to the public domain.²⁹⁴ To be sure, private contractual responses, such as Creative Commons licenses, can be used by authors to limit the scope of their copyright.²⁹⁵ But there is no true "anti-©" that an author can use to disclaim copyright, and Creative Commons licenses will not reach most works because of the stickiness of the default and the immense volume of copyrighted material.²⁹⁶ Automatic copyright means that every email, note, list, and scribbling is protected by copyright the moment it is written down.²⁹⁷ Granting copyright by default to this huge body of works and to many creators who did not need it as an incentive creates significant social costs to the public and future creators.²⁹⁸

B. Hard Paternalism and Tailoring Copyright Incentives

If they truly hope to address the behavioral phenomena motivating copyright paternalism, lawmakers should embrace hard

293. See 17 U.S.C. § 102(a) (2012).

294. Sprigman, *supra* note 67, at 518 ("[T]here is no provision in our current unconditional regime establishing rules for how dedication [to the public domain] may be accomplished, and it has never been conclusively determined under current law that one may irreversibly dedicate a work to the public domain.").

295. See generally Adrienne K. Goss, *Codifying A Commons: Copyright, Copyleft, and the Creative Commons Project*, 82 CHI.-KENT L. REV. 963, 977–82 (2007); *What We Do*, CREATIVE COMMONS, <http://creativecommons.org/about>, [<https://perma.cc/V54Q-A7KT>] (last visited Jan. 24, 2017) (describing purpose and uses of Creative Commons licenses).

296. See *supra* notes 100, 109 and accompanying text (describing status quo bias and effect of changes to default rules).

297. See generally LESSIG, *supra* note 148, at 137–39 (describing expansion in copyright to "every e-mail, every note to your spouse, every doodle" due to the elimination of formalities).

298. See *supra* notes 147–148 and accompanying text (discussing costs of copyright).

paternalistic tools for author protection. The experience of the BLE movement reveals that soft paternalistic interventions often fail to correct, and can even exacerbate, behavioral failures.²⁹⁹ As the last Section revealed, copyright's current half-hearted paternalism is ineffective and potentially harmful to its goals. If authors are truly incapable of protecting their own interests, shifts in contractual defaults or modest formal requirements will not help them. This Section offers some suggestions for how copyright might more effectively achieve the goals of copyright paternalism.

Much of copyright's existing paternalism appears to be motivated by a conception of authors as lacking bargaining power in their dealings with intermediaries—whether this is a result of behavioral failures such as bounded willpower and its attendant shortsightedness,³⁰⁰ a structural lack of market power,³⁰¹ or social preferences for a more equal allocation of resources.³⁰² Many people perceive an unfairness when an author creates a successful artistic work but gets only a pittance for it.³⁰³ If unequal bargaining is the problem, the use of termination rights, limitations on alienability, and default copyright do not effectively address it. Some commentators have proposed to intervene directly at the bargaining stage by increasing information disclosures, involving agents or counselors, or requiring cooling-off periods.³⁰⁴ These reforms might improve results somewhat, but they remain soft BLE tools and are subject to the same powerful critiques. Instead of trying to nudge authors into better decisions through more contractual procedures or information disclosure, it may be more effective simply to mandate the distributive results sought, such as guaranteeing authors a minimum royalty or equitable compensation.

This idea is not as radical as it might initially appear. Many European countries make guarantees to authors along these lines. German copyright law, for example, contains an inalienable right that authors receive “equitable remuneration” for their work, and the author can demand reformation of any agreement that fails to provide such compensation.³⁰⁵ Recent revisions to the copyright laws of the

299. See *supra* notes 121–137 and accompanying text.

300. See *supra* notes 102–103, 156–159 and accompanying text.

301. See *supra* notes 197–199, 229 and accompanying text.

302. See *supra* notes 105, 111, 160–162 and accompanying text.

303. See *supra* notes 104–105 and accompanying text.

304. Rub, *supra* note 190, at 85–86 (suggesting such reforms).

305. Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Copyright Act], Sept. 9, 1965, BGBI I at 1273 (Ger.), https://www.gesetze-im-internet.de/urhg/_32.html [<https://perma.cc/F3DF-79LT>]. See generally Karsten M. Gutsche,

Netherlands, intended to conform to continental European standards, provide similar author-protective guarantees.³⁰⁶ Fair compensation is mandated, contractual terms that are unreasonably onerous are voidable at the election of the author, and an author can seek additional compensation if the original contractual compensation is “seriously disproportionate” to the profit made from exploiting the work.³⁰⁷ These requirements accomplish the goals underlying American termination rights and limitations on copyright alienability but do so in a more direct way that embraces a hard paternalistic approach.

In theory, we could accomplish similar ends by modifying termination rights to operate on a much shorter time scale or premising them upon some showing of actual contractual inequity or bargaining failure. Termination rights are a relatively costly way to accomplish these ends, however, and not only because they are administratively cumbersome.³⁰⁸ Termination also creates inefficiencies in the exploitation of the work over time. For example, a publisher expecting that termination may soon occur, say, because the end of the maximum initial assignment period is near, will tend to under-invest in the exploitation of the work, since he will not see all the future profits from it.³⁰⁹ All other things being equal, the direct European approach seems a sounder course.

Of course, although European-style contractual mandates would effectively advance the stated goals of copyright paternalism, they have their own significant costs. The obvious concern is that they would cause intermediaries to exploit fewer works, or even drive them from the market, if they cannot effectively use all of the profits from successful “hit” works to subsidize commercial failures.³¹⁰ These costs can be reduced by carefully limiting the scope of when compensation is “inequitable” or “seriously disproportionate,” but it must be recognized that this is a serious concern. On the other hand, the sky has not fallen in Europe.

Equitable Remuneration for Authors in Germany—How the German Copyright Act Secures Their Rewards, 50 J. COPYRIGHT SOC'Y U.S.A. 257 (2003).

306. See generally Thomas Dysart, *Author-Protective Rules and Alternative Licences: A Review of the Dutch Copyright Contract Act*, EUR. INTEL. PROP. REV. (forthcoming 2015).

307. Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Copyright Act], Sept. 9, 1965, BGBl I at 1273 (Ger.), https://www.gesetze-im-internet.de/urhg/_32.html [<https://perma.cc/F3DF-79LT>]; Dysart, *supra* note 306, at 3–4.

308. See Grimmelman, *supra* note 189 (noting the “immense administrative cost” of termination rights).

309. See Darling, *supra* note 196, at 168–75 (analyzing how termination can distort publisher investment incentives).

310. See Barnett, *supra* note 19, at 390–404 (arguing that copyright is needed for this reason).

Compulsory licenses provide another policy lever that could be used to mandate adequate compensation for artists. Compulsory licenses replace the property rule of copyright with something closer to a liability rule.³¹¹ Instead of requiring permission from the copyright holder to use the work, the public is free to make particular uses so long as they pay the copyright holder a fee specified by law. The classic example is the so-called “cover license” for musical works.³¹² An artist who wants to record a different version of a previously published musical work does not need to get permission from the original author; instead, she simply has to pay the copyright holder a set statutory fee.³¹³ If structured to guarantee this reward to the author—as opposed to the copyright owner—then compulsory licenses could be another potential way to construct author-protective rules. Compulsory licenses have the benefit of lowering transaction costs, because prior permission need not be sought and negotiated. This comes at the expense, however, of reduced incentives for creation and dissemination, inflexibility, and the dangers of government-set prices.³¹⁴

As to creation incentives, the policy implications of copyright paternalism are somewhat more complicated. At the least, however, evidence of intrinsic motivation and other behavioral effects should cause some rethinking of copyright’s incentive structure. We should consider tailoring incentives for creation to more closely accord with what is known about human behavior. In particular, we should explore ways to ensure that copyright only goes to those actually motivated by its extrinsic incentive to create. Granting copyright by default to intrinsically motivated authors creates large social costs without any obvious benefit.³¹⁵ Reinstating some formalities, a reform advocated by many scholars, is one way to tailor copyright incentives.³¹⁶ However, recognition of the potential behavioral failures in authors’ awareness of copyright requirements may cause us to temper this reform somewhat. Because some people may be motivated

311. See generally Robert P. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1302–17 (1996).

312. See 17 U.S.C. § 115(c)(2)–(3)(A) (2012); Mark A. Lemley, *Contracting Around Liability Rules*, 100 CAL. L. REV. 463, 478–79 (2012). See generally Howard B. Abrams, *Copyright’s First Compulsory License*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 215 (2010) (reviewing history of cover license for musical works).

313. 17 U.S.C. § 115(c).

314. See generally Merges, *supra* note 311 (criticizing compulsory licenses for their inflexibility and for their susceptibility to political lobbying).

315. See *supra* Section II.B; *supra* notes 147–148 and accompanying text.

316. See *supra* note 276 (citing proposals to reinstate copyright formalities).

by copyright but misinformed about its requirements, the law should accommodate them with grace periods for claiming copyright and a liberal interpretation of the required formalities. Regardless of the details, the key is eliminating the default rule of automatic copyright.

Along similar lines, we might tailor the scope and strength of copyright protection based on the significance of the copyright incentive.³¹⁷ Academics, blog writers, and Wikipedia editors are motivated by quite a different mix of intrinsic and extrinsic incentives than motion picture studios or book publishers. It is difficult to justify granting an essentially one-size-fits-all copyright to all of these different types of creation. We should consider limiting the term and scope of copyright protection based on the kind of work at issue. Copyright's existing paternalism accommodates this tailoring concern in a limited way, in that works made for hire are not subject to termination.³¹⁸ If lawmakers adopt European-style author protections, those protections could be similarly limited to cases where authors are most likely to make behavioral mistakes. For example, the law might exclude works made for hire or works created by corporate entities from any equitable remuneration requirement.

Finally, in terms of timing, salience, and certainty, the current incentive structure seems ill-designed. Copyright does not guarantee authors any economic reward. Instead, it offers an uncertain possibility of a future reward in an indirect way. These features create behavioral effects that can undermine the effectiveness of the copyright incentive, and evidence of intrinsic motivation shows that many people do in fact discount it. If we are unsatisfied with the current level of creation, the use of direct, certain, and present-time incentives is more likely to have an impact on imperfectly rational actors. For example, increasing subsidies or direct funding for artistic creation in exchange for waivers of copyright could be employed. Of course, this costs taxpayer money and raises obvious problems of government influence over the arts. However, if we are serious about incentivizing creation, directly supporting authors gives them more opportunities to engage in their craft. Whatever its flaws, this system is more likely to be effective as an incentive than increasing copyright duration or scope of protection.

Indeed, it is equally important to consider the policy levers that a paternalistic copyright regime would seek to *avoid*. Accepting that humans are imperfectly rational actors strongly counsels against reforms that rely on increasing marginal incentives for creation. There would seem to be little incentive value in, for example,

317. See *supra* note 275 (citing proposals to tailor copyright).

318. 17 U.S.C. §§ 203(a), 304(c).

increasing the length of the copyright term by an additional twenty years or expanding the scope of copyright to all derivative works.³¹⁹ Such incentives-premised reforms seem at best useless and very likely counterproductive, given the real costs of copyright.³²⁰ Of course, such reforms have been precisely the approach of copyright lawmaking from the 1976 Copyright Act until the present. Given that a full-scale revision of American copyright law may be in the making, we should not repeat our mistakes on this front.³²¹

VI. CONCLUSION

Copyright law ought to be consistent with its own rationales and in its conception of the author. By incorporating aspects of both an incentive-based and paternalistic regime, we risk getting the costs, but not the benefits, of both systems. The public and future creators bear the costs of expansive copyrights granted by default. These costs are justified by a vision of author protectionism that eschews copyright forfeitures if an author fails to comply with formalities. However, copyright fails to follow through on this logic to obtain the purported benefit of its paternalistic provisions—actually securing fair compensation to authors. Copyright's current half-hearted paternalism is ineffective at securing its distributive and author-protective goals. If we are serious about these aims, mandatory protections for authors are more likely to achieve them.

319. See *id.* § 106(2) (granting authors the exclusive right “to prepare derivative works based upon the copyrighted work”); Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (extending copyright duration an additional twenty years).

320. See *supra* notes 147–148 and accompanying text.

321. See Pallante, *supra* note 20 and accompanying text. Of course, the desire to conform to international standards may complicate the practical viability of some proposals, such as decreased term length.

