Is Efficient Copyright a Reasonable Goal?

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If we could create an economically efficient copyright law, would we want to do so? That is the question I attempt to answer in this paper.\footnote{Note that Breyer (1970) argues that economic justifications of copyright are more important than non-economic justifications ("If we are to justify copyright protection, we must turn to its economic objectives" p. 291). I am suggesting here something not quite the opposite but certainly not the same. This is somewhat ironic since he was a lawyer arguing for the importance of economic analysis in copyright and I am an economist arguing that blindly following economic analysis in copyright issues can lead us astray.} Even though economists typically argue in favor of efficiency and I am as guilty of this as most, my answer here is that I think we should not favor an economically efficient copyright law because efficiency would lead to disparate and inferior treatment for the creators of copyrighted works compared to other workers in other types of industries. My concern is rooted in the very basic concept of ‘fairness’ that arises when, in the name of economic efficiency or social welfare maximization, a particular market would need to treat its labor component differently than other markets treat their labor component.\footnote{An analogy may make my concern more concrete. If policy makers look at market A, assumed to be a typical market with no unusual characteristics, and try to determine whether we should allow workers to unionize in this market, economic efficiency criteria might well lead us to conclude that we should forbid unionization in market A because it hurts social welfare with its monopoly wages (assume that it is efficient to prevent unionization in this market regardless of whether other markets are unionized or not). But if we are then told that workers in every other market are now and will in the future be allowed to unionize (even though it is socially inefficient to do so), then the decision to follow the logic of economic efficiency in market A might seem ‘unfair’ to the workers in market A. One response might be that policy makers should de-unionize workers in all other industries. But this may not be an option available to the policy makers who control market A. In this case, it seems to me, it would make sense to allow the workers to organize market A, independent of economic efficiency, to promote a basic sense of fairness.} At my peril, it is my purpose in this paper to discuss issues that do not relate solely to economic efficiency.\footnote{Epstein (2004) discusses the philosophical basis for copyright but he does not examine the point that is the central focus of the present paper.}

As I describe below, a social welfare maximizing copyright law amounts to trying to restrict the economic profit (rents) going to creators to no more than the amount which is required to induce the creator to produce the work. A perfectly ideal and flexible copyright law would remove all rents going to all creators. I suggest that elsewhere in the economy we do not find government policies attempting to remove rents from labor. It does not, therefore, seem ‘right’ or ‘fair’ or ‘just’ to be trying to remove the rents for just one category of labor—workers in what are sometimes terms the ‘creative’ industries such as music, the arts, movies and so forth. Maximizing social welfare under copyright amounts to a government intrusion into labor incomes that apparently is not considered acceptable in other parts of the economy. Since this intrusion is generally obscured from view in discussions of copyright, however, its unacceptability is not readily apparent.
I then examine some implications of a recent claim that creators do not need to be paid to induce them to create. I show that if creators did not need to be rewarded, the logic of welfare maximization would imply not just the dismantling of copyright but an outright ban on payments to creators. Further, if creators produced more when they were paid less, as has been implied in some recent discussions, then social efficiency would require a tax on creators. Social welfare maximization would lead, under these circumstances, to what I believe would be generally considered unacceptable and indeed draconian government intrusion into markets. Nevertheless, this concern is merely of academic interest and an illustration of the potential dangers of hewing too closely to economically efficient copyright because a closer look at the source of claims that creators do not require payments to produce indicates that they are largely unfounded.

I begin with a brief review of the economic argument for ideal copyright duration.

I. The Economics of Copyright and the Social Welfare

I hope the reader will be willing to put up with a little refresher in the economics of copyright to help keep terminology and ideas clear.

In idealized markets, each unit of a particular product that has a value to consumers greater than its cost of production should be produced and sold to a consumer. This is normally referred to as producing up to the point where the marginal cost of an additional unit is equal to the value placed on the unit by consumers. Obviously, if an additional unit costs more to produce than the value that it can generate to consumers, society would be better off if that unit is not produced.

The difference between the marginal cost of producing a unit of output and that unit’s value to a consumer is known as the surplus from that unit, and the surplus is usually shared between the consumer and producer. It is this surplus that measures the gains to society from the market for any product and if no surplus is generated then there is no economic value in producing that product. The achievement of markets is the generation of surplus.

Under conditions typically assumed, competitive markets produce the quantity of output that maximizes total surplus. Monopolists are able to increase their surplus relative to the producers in a competitive industry by raising the price of the product and lowering the quantity

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4 Marginal costs are usually assumed to be rising with the number of units produced and the values to consumers (known as demand) are assumed to be falling with the number of units consumed. The ideal result of the maximum joint surplus to consumers and producers occurs at the output level where the marginal cost and demand meet.
consumed. In doing so, the monopolist appropriates some of the consumers’ surplus but leaves as a byproduct some lost surplus known as deadweight loss. The problem with monopoly, from an economic vantage at least, is this diminished production and diminished total surplus, not the higher profit (or surplus) of the monopolist or the higher price paid by consumers.

Figure 1 is a fairly typical representation of the difference between monopoly and competition with the simplifying assumption that the marginal production cost of additional units is constant. Figure 1 can also be taken to represent the market for reproductions of a creative work already in existence. Under a regime of competitive production of reproductions (no copyright), the equilibrium price of a reproduction is Pc (equal to marginal cost, MC) and the quantity of reproductions purchased is Qc. There is no profit earned in the market for reproductions since the price is equal to the marginal cost of every unit.\(^5\)

A monopolistic producer of reproductions, as we would find under copyright, maximizes profits by equating marginal revenue (MR) with marginal cost and produces Qm units sold at a price of Pm per unit. This reduction in output (from Qc to Qm), and the attendant loss of surplus (area 5) is the social loss imposed by monopoly.\(^6\) Figure 1 is a static analysis is for a particular period of time although the creative work is likely to last for many periods of time. When copyright expires, the price falls to Pc and greater total surplus occurs in this market for reproductions.

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\(^5\) The definition of profit used is “economic profit” meaning a return above normal. Zero economic profit means the producer is covering costs and earning a positive accounting return on investment that is equal to the return of the typical investment with a similar level of risk.

\(^6\) Areas 3 and 4, which were part of the surplus to consumers under competition, are transferred from consumers to the producer under monopoly. A transfer such as this does not lower the overall social welfare. Areas 1 and 2 remain part of the consumer surplus after copyright.
If the creator of the work (title) represented in Figure 1 requires a payment or the anticipation of a payment to be induced to create the work, such monies can only be realized when the market for reproductions enjoys a monopoly for some number of periods. In that case, for those periods of monopoly, the putative welfare loss of area 5 during those periods would not really be a welfare loss. This is for the simple reason that area 5 cannot exist unless the title is produced and the title can only be produced if the price is \( P_m \) for some number of periods.\(^7\)

The economic analysis of copyright must include an evaluation of how the payments in the market for reproductions influence the production of creative works. Although the total surplus in Figure 1 is obviously greater without copyright than with copyright (area 5 is then part of the surplus without copyright), there would be no surplus at all if the creative work did not exist since you cannot have reproductions of nonexistent works. More complete analyses posit that there are two stages of production for any given artistic work. First, the work is created, and then reproductions of the work are made. Yet these are two very different production processes.

There is a separate reproduction market for each individual title, as represented in Figure 1.\(^8\) The market for titles (the creative works), unlike that for reproductions, is not easy to fit into standard economic analysis because each creative work is different from every other creative work and simple models of markets assume that the units of analysis are identical to one another. It is possible, however, to ignore the differences between works and treat these works as if they are homogeneous (as we might do when we discuss, for example, the market for automobiles). Alternatively, there are models (differentiated products, monopolistic competition) that usually assume a particular form of dispersion of the heterogeneous product characteristics (e.g., various characteristics of products are evenly dispersed across ‘product space’, as are consumer tastes) and these models sometimes reach somewhat different conclusions than the simpler model that ignores the differentiation.

One key aspect of the market for titles is the nature of supply. The assumption underlying copyright and virtually every other market is that the quantity supplied increases as payments increase. There is a tremendous amount of evidence to support the general view that products that require time and energy to create are produced in greater numbers when payments are increased.\(^9\) Nevertheless, various commentators have asserted that reward is less important to

\(^7\) See Liebowitz and Margolis (2005) for an explication of “productive” and “unproductive” deadweight loss although these terms are not standard in economic welfare analysis.

\(^8\) The demand for any individual title depends on which other titles are available and their prices. Trying to take all the possible interactions into account between the various titles is virtually impossible, which is why economic models either ignore these interactions or make restrictive assumptions about the nature of the interactions.

\(^9\) This topic is somewhat more subtle than it first appears because the form of payment does not need to be exclusively pecuniary. Workers, for example, do not respond only to their nominal wages, but also to working
creators or perhaps of no importance since creators may create just for the sake of creating. We will return to this question in Section III but for the moment will continue to assume that greater payment to creators leads to more creations.

The paradigmatic analysis of copyright proposes a tradeoff between allowing greater returns to producers of copies by granting a copyright monopoly (with the attendant monopoly harms) and then having some or all of those returns pass on to the creators, leading to a greater number of creations. The tradeoff is supposed to be the short term harm to consumers from facing monopoly prices in the market for titles during the life of copyright (during copyright the price is \( P_m \) but after the expiration of copyright the price for the same work drops down to \( P_c \)) versus the gain to society, including consumers of creative works, from the greater production of creative works brought about by copyright.\(^{10}\) This of course presupposes that the price is actually higher under copyright than not, that copyright provides greater payments to authors, and that greater payments induce more production from authors. Although these suppositions seem reasonable, any of them might not hold.

There are strands of the literature that have questioned some of these suppositions. There have been recent suggestions (echoing some prior claims) that authors of creative works might not respond to greater payments. There have been recent suggestions that the greater revenues generated by copyright do not flow to the creators (e.g., Ku 2002). On the other side of the issue, there have been some claims that copyright does not actually raise the price of the product although it does increase the profits to those selling creative works.\(^{11}\)

\(^{10}\) The completely ideal market production of creative works can only occur under an idealized case of perfect price discrimination on the part of the creators meaning that creators can charge each consumer the maximum the consumer would be willing to pay. In that case no potential consumers are excluded from consumption due to prices being too high and each and every work which has a value greater than its cost is produced. Ruling out this type of price discrimination gives the version in the text as a next best alternative, which is functionally equivalent to perfect price discrimination on the part of a collective of consumers. The version of copyright where all works have the same copyright length is one step further away from the economic ideal.

\(^{11}\) That monopoly produces a smaller amount at a higher price is one of the most basic findings in economics. But there is also a class of models that suggest that if large firms have lower costs than small firms then the lower cost of a monopoly might lead to lower prices than would be the case for a competitive industry composed of many small firms. This is important in the instant case because there is usually setup costs involved with making reproductions (after the work itself is created). For books, these might include setting up plates, creating a table of contents, creating cover art, and so forth. It is possible that these set-up costs may give a copyright 'monopolist' lower costs per unit than would be the case for multiple firms engaged in competitive reproduction of the work and multiple duplication of these setup costs, so that prices under copyright might not be higher than in a world with no copyright. This is not just a theoretical possibility since Liebowitz (2008) finds that books that have lost
These are all interesting questions worthy of further analysis and I examine the first of these questions in a later section. But the main focus of this paper is a discussion of a question that is rarely, if ever, asked: Is it reasonable to use economic efficiency (social welfare) as the basis for determining the duration, or very existence, of copyright?

II. Efficient Copyright is similar to Controls on Income

We need to be very specific about the nature of the efficiency that an economically ideal copyright law tries to promote. Efficient copyright for a single work would limit the duration of copyright to not a moment more than what is required to provide sufficient revenue to induce the creator to produce the work. In terms of Figure 1, optimal copyright would allow the deadweight loss found in area 5 to last for just long enough that the profits being earned in the publishing market would be exactly sufficient to cover the cost of creation\(^\text{12}\) whereupon the copyright would be removed, the price would drop to \(P_c\), and area 5 would become part of the consumer surplus for all future sales of this creative work. This prescription can then be applied to each creative work to arrive at an ideally efficient copyright law. Note that copyright duration is set separately for each creative work.\(^\text{13}\) Obviously, this degree of precision, where every work has its own copyright duration, is not realistic and so an analysis of actual copyright law is based on aggregate market impacts instead of the impact for each individual work.

Copyright is expected to balance the benefits from inducing additional creations with the harm caused by higher prices in the market for reproductions. Still, the economic logic in discussing optimal duration is the same in the two cases—in the aggregate, we do not want to allow the ‘profits’ earned by creators to be any larger than necessary to achieve the production of works deemed optimal.

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\(^\text{12}\) Area 3 and 4 make up the profit to the ‘reproducer’ (publisher) as long as there are no other fixed setup costs involved with making reproductions. If there are setup costs they would need to be subtracted from the sum of areas 3 and 4 to arrive at the profits earned in the publishing market. This is for each period and would need to be summed to get total profit (interest rates are assumed to be zero). This is profit to the publisher before the payments made by the publisher to the author (for the rights to the work) have been paid. The net profit to publishers, if the market to purchase creations were competitive, would be zero and all the economic profit would go to the creator. If this profit were merely sufficient to cover the costs of the creator’s efforts, as envisioned in ideal copyright, there would be no economic profit in the combined publishing/creating endeavor.

\(^\text{13}\) Efficient copyright amounts to perfect price discrimination on the part of the buyers, or perfect monopsonistic discrimination to be more precise in the terminology. This is inferior, in principle, to perfect price discrimination on the part of copyright owners which would lead not only to the ideal consumption of copyrighted works but also the ideal production of copyrighted works. Efficient copyright is still an improvement over ordinary copyright, from the perspective of social welfare.
The point I wish to highlight concerns the nature of the economic profit going to the creator of the work. Efficient copyright proceeds by adjusting the duration to eliminate, as much as possible, this economic profit (known as economic rent when we discuss payments to factors of production). Although the goal of copyright might be to maximize social welfare, such a goal is achieved by eliminating as completely as possible the economic rents going to creators.

To put this in perspective, it is important to understand that there is only a small share of creators who generate economic profits that would be eliminated by efficient copyright law. While it is frequently claimed that copyright provides a monopoly to all copyrighted works, this in incorrect—copyright merely provides the copyright owner a monopoly on making copies of a particular work. If the work in question has many similar competitors, copyright will provide a monopoly in name only. To understand this point it helps to note that all property rights provide a monopoly of sorts. More precisely, each person has a ‘monopoly’ on their individual efforts and talents in the same sense that copyright provides a monopoly to creators. No one can exactly duplicate anyone else. Nevertheless, the ‘monopoly’ that each person has on their own self does not translate into an economic monopoly and attendant economic rents because there is nothing unique or superior about the efforts and talents of most individuals.¹⁴

When there are monopoly returns to individual efforts they are due, in almost all cases, to particular, hard to imitate ‘talent’ (or circumstances) found embodied in the individual. For someone who can hit a tennis ball with inordinate skill, or make a large number of people laugh, or pick winners with great precision at the race track, monopoly profit is likely to be a result. Although there are many tennis players, many comedians and many horseplayers most of them are incapable of competing away the profits of those with highly unusual skills. It is the uniqueness of talent that allows individuals to earn economic rents whether with copyright or in other endeavors.¹⁵

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¹⁴ I am not saying that economic monopolies must earn monopoly profits. There are some products which might be monopolized but where the monopoly profits are zero. Those products would not exist in competition. In general, an economic monopoly will have monopoly profit defined as an above normal return on investment.

¹⁵ When there is a unique monopoly talent the question has sometimes been asked whether the creator, the source of the monopoly, gets any of that profit or whether it all goes to the publisher (Ku 2002). If the publishing market is competitive there is little reason to believe that creators do not get a large portion of the monopoly gains since competition would be expected to lead to that result. In book publishing, where there are thousands of publishers, and where contracts are fairly standardized, there is little reason to think that the author does not get a large share of any monopoly surplus. Since royalties normally are a percentage of sales, with the royalty rate tending to increase when sales increase, successful (superstar) authors can make a great deal of money. Once the reputation of the author is established they can play off one publisher against another to get larger portions of the surplus. Although record labels are considerably more concentrated than are book publishers, there are still many small independent labels that can offer higher royalty rates if the majors fail to compete effectively. Further, this industry also tends to have standard contracts with the creators (assuming for simplicity that the composition creator is also the performance creator) also able to earn very large incomes if they are successful. It is clear from
Copyright allows those few creators with unusual and hard to imitate talents to generate rents on their unique works which have few close competitors.\textsuperscript{16} By contrast, most copyrighted works fail to earn a profit and most do not generate any economic rents for their creators. For these works the most disaggregated and efficient copyright regime would not limit the duration of copyright because for these works the cost of creation is unlikely to ever be exceeded by the additional revenues generated by copyright.

An important characteristic of economic rent which is central to understanding the true nature of efficient copyright is that economic rent can be taxed with no ill effect to efficiency. The reason for this is simple. Economic rent, by definition, is a payment made to a factor of production that is higher than what would be required to induce performance. Since it is an excess payment, removing the excess has no effect on behavior.

If, for example, a top IPO lawyer earns $9,000,000, but in his next best career (which has no non-monetary advantages or disadvantages) he could have only earned $250,000, then $8,750,000 would be known as economic rent, and it could be taxed with no ill effect on social welfare since the lawyer would remain a lawyer even at a salary of $250,000.\textsuperscript{17} In looking for tax targets that will not distort economic behavior, economic rent has always been at the top of the textbook list.\textsuperscript{18} Nevertheless, promoting economic efficiency by taxing the rents of individuals with a very scarce skill is not an activity that is actually undertaken by government in free societies.\textsuperscript{19} Nor is it even seriously promoted by anyone except perhaps for the Fabian Socialists of a long gone era and some current academics.

Continuing with the previous example, we can presume that the IPO specialist works for an investment bank. The prices set by the bank are influenced by the costs of the bank which include payments to the IPO specialist and others of his ilk. If economic rents to employees are

\begin{enumerate}
\item The literal creator of the work may not be the scarce talent as when a ghost written book by a famous individual sells millions of copies.
\item The lawyer is worse off by $8.75 million but this is just a transfer to the government. Transfers are not treated as a change in social welfare.
\item Henry George and his land tax is most famously associated with these ideas. His analysis neglected the fact that although land is in fixed supply, quality differences in land were not in fixed supply. Much of the value of land was based on improvements to the land and these improvements would be discouraged if a tax were based on land value.
\item Income taxes may be heavily skewed toward the more wealthy individuals but this is quite different than attempting to tax economic rents since rents are a function of the earnings in the next best alternative and for some wealthy individuals rents may be a high proportion of income whereas for others rents may be a low proportion of income.
\end{enumerate
removed from the marginal costs of the bank then the bank services will go down in price.\textsuperscript{20} These lower prices will increase consumption of the bank’s IPO services. Total surplus will increase as output increases. The new output will better reflect social costs and benefits since the previous costs included rents that did not properly reflect opportunity cost.

This is where the disparate treatment arises. Society does not attempt to bring about extra efficiency by limiting the payments to talented individuals. There are no government limits on the ‘purses’ available to winning golf or tennis players. There are usually no government limits on the maximum that can be paid to individuals in virtually any occupation.\textsuperscript{21} This is so even though, in principle, a correctly instituted ‘economic-rent control’ policy might improve overall welfare.\textsuperscript{22} If the payments to top surgeons were lowered, more individuals could afford surgery; if payments to top scholars were lowered, more individuals could afford college tuition. The benefits in these cases seem similar or identical to those that arise from the removal of copyright, i.e., allowing more individuals to consume the good that was formerly priced too high due to economic rents.

I am unaware of any serious proposals to remove rents in the overall economy. Yet, making this very proposal in the case of copyright does not seem to raise any eyebrows. It appears that copyright policy provides a \textit{sui generis} instance where apparent social welfare maximization can be can be undertaken without the appearance of draconian government intervention in the economy. This lack of concern about the inferior treatment given to talented creators under theoretically ideal copyright might be because copyright is framed as the government helping creators by providing any property right to creators at all, albeit incomplete and temporary rights though they may be. If the government, in non-copyright activities, were to try to limit the rents of certain individuals below what employers or markets were willing to pay, that would be seen as the government hindering those individuals in their attempt to make a living, and tampering with the market since it is presumed that individual workers are entitled to the fruits of their labor. I believe that if creators were considered to be as entitled to ownership of their works as are the owners of other more typical properties (which is also a ‘legal’ though not necessarily an economic monopoly) the limited nature of copyright would been seen as an excessive excursion into the workings of the market. The key difference is that it is taken for

\textsuperscript{20} This assumes that the cost of the IPO specialist is a variable and not a fixed cost, which would be the case if, say, the IPO specialist were paid by billable hours of work. It also assumes that the government removes the rent by forcing down payments to these individuals (e.g., a price control on salaries), not by taxing the rents away.

\textsuperscript{21} The recent restrictions on pay of government rescued banks being an exception that helps to prove the rule.

\textsuperscript{22} I am not arguing that such a policy should be adopted. In fact, I do not believe such a policy would enhance efficiency since I do not believe the government has sufficient information to measure ‘economic rent.’ I also expect that the theory is providing misleading implications in the same way that Henry George’s conclusions were wrong. Further, it would be an excessive intrusion of the government into the economy and into private contracts.
granted that government will uphold property rights for physical items but such an assumption is not made for intellectual creations.

Not only are there few or no instances of the government attempting to eliminate economic rents to individuals in the non-copyright component of the economy, there are few examples of the government trying to eliminate monopoly profit at all. First, government efforts are often devoted to promoting monopoly: restricting taxi-cab licenses, restricting the output of numerous agricultural products, enforcing many licensing requirements desired by current licensees, supporting the creation of labor unions, and so forth. These are all activities that promote monopoly, reduce competition, and lower social welfare from its economic maximum. Economic analysis is generally critical of these activities from an efficiency point of view but that has not stopped the government from continually promulgating more of them.

Even the clear existence of a monopoly, if it was fairly earned, is not considered grounds for antitrust prosecution. The fruits of monopoly, earned fair and square, are not attacked by antitrust. It is anticompetitive behavior with the intent to gain or protect a monopoly that provides the grounds for antitrust, not the existence of monopoly power itself.

It is very peculiar, therefore, that producers of copyrighted works are treated differently than are producers of virtually any other goods. It is apparently fine for everyone else to earn rents on their superior talent. But in our attempts to create an efficient copyright law we would eliminate those rents for creators of artistic works if we could. I am not aware of any rationale for this disparate treatment.

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23 The logic for this is simple and compelling. If competitors are allowed to compete but are unable to dislodge an incumbent ‘monopolist’ then there is little the government can do that would improve welfare. If a firm garners a very large market share that we would associate with being a monopolist, but it does so fair and square, it means that the firm’s products are better than those of its competitors. Any above normal profits earned by the firm are attributed to the superior capabilities of the firm. Textbook price controls could be put on to increase output and reduce the deadweight loss, but these would likely do more harm than good since the government doesn’t really know what the competitive price would be and such a policy removes any incentive for the incumbent, and potential incumbents, to try to be the best. If the monopolist were to disappear, social welfare would be lower because consumers already had faced the products and prices of the replacement firms and found them to be inferior to that of the incumbent. Thus it makes sense to let a winner keep winning as long as the rules are clear and the game is played fairly.

24 In fact, some critics of copyright (e.g., Fisher, 2004) suggest that a world without entertainment superstars would be a better world. But I have not seen these writers suggesting that all rents based on individual talent be removed from everyone in society and that all superstars disappear. Perhaps they would do so, but I am doubtful they would want to take positions so close to those advocated by political systems and dictatorships that caused so much human misery and suffering during the twentieth century.

25 One argument that is often brought up is the fact that copyrightable goods tend to be nonrivalrous in consumption. That hardly affects the argument presented above, however. At best it indicates that markets will not produce the ideal quantities of a copyrighted good since that is an implication of markets with nonrivalrous goods. But nonrivalrousness is not a reason for weakening property rights for creative works. Markets are
III. Does the production of creative works respond to payments?

There is a fascinating history of articles claiming that creators might not need financial rewards to induce their creations. There is even a hint of a claim that financial rewards might decrease the value of creative works that are created.

Arnold Plant appears to make some of these claims. In his classic 1934 article on book publishing Plant divides authors into three categories: (1) authors, such as “scholars as well as poets—who are prepared to pay good money to have their books published”; (2) authors such as scientists and scholars who might not pay but neither do they require payment to create their works; (3) “professional scribes who write for a living.”

It is somewhat difficult to tell the difference in composition between Plant’s first two sets of authors. There is included in the first group a set of authors who want to influence the world and will pay to do so, individuals perhaps who use what are now often called vanity publishers. It is probably safe to ignore this group. Left are the scholarly types, plentiful in number, who gain prestige, achieve tenure, and get grants if they publish well. It is not surprising that these authors do not require payment from the publishers for their publications, but that does not mean that they do not require payment at all.

If all the scholars in the world were to lose their academic positions and take non-academic jobs, is there any doubt that the very great majority of academic journals would disappear? How many scholarly articles or books are now written by authors who are not working for an employer that values such publications? I would hazard the percentage is quite close to zero. I believe, therefore, that it is fair to say that virtually all these authors are writing for money. Plant is merely suggesting that copyright is not required to pay these authors and is not suggesting that these authors do not require payment. Their payment may not come from publishers, but it does come from someone and does play an important role in the authors’ decision to create works.

Authors in Plant’s third classification, the scribes writing for a living, do require payment from publishers in order to be induced to create their works. But Plant is critical of copyright even for these authors:

The belief has been widely held that professional authorship depends for its continued existence upon this copyright monopoly; or upon an alternative which generally thought to underproduce nonrivalrous goods (the titles, or creations) since markets prices do not reflect the full value of those goods to consumers (except in the theoretical case of perfect price discrimination on the part of the copyright owner). This suggests that there will be too few works created, even under perpetual copyright.
is considered worse, viz. patronage. Even if that were true, it would still be necessary to show beyond reasonable doubt that professional authors were worth retaining at such a price as copyright... Patronage has in the past provided us with some magnificent literature, music, pictures, buildings, and furniture. [p. 170]

Plant’s claim that the monopoly from copyright is so harmful that we might be better off with no copyright seems difficult to understand. Plant seems to be arguing that it might be better to eliminate these works altogether than to allow them to be ‘monopolized’ through copyright, although this might be too strong a reading. Since monopolies provide a surplus to society (even if not as large as the surplus from competition) “retaining” the works from these authors should be worthwhile even if done so under a copyright monopoly. Plant, however, seems to view patronage as the main alternative to copyright and seems to believe that patronage is superior to copyright, a judgment that seems difficult to accept.

One of Plant’s main contributions was his discussion of how some English authors belonging to his third group of professional scribes were able to generate more revenue in the US than in Britain even though the US had no copyright protection for English authors. Plant describes the method used by English authors in those days to get their work published in the US before any pirates could make copies available for sale. Because it took considerable time to make the plates that were needed for printing, a clever British publishers or author could contract with American printers to produce copies of the book under lock and key and have them ready to be shipped at the same time or shortly after they were being made available in England. In this way, customers in the United States would have access to the official copies of the book months before any competitors were able to make competing copies. For best-selling books, a large portion of sales takes place in a relatively short time so that the American publisher could generate sufficient revenues as to allow payment to the English author. This can be thought of as a form of self-help copyright.

This is interesting economic history but it hardly sustains a claim that some form of protection is not useful. Plant’s argument is mainly that there was some inherent monopoly involved with being first in the market and that this lead time provided enough revenue so that “English authors sometimes received more from the sale of their books by American publishers, where

26 It is possible that Plant intends to include the harms from copyright for the first two groups of authors as well as the professional scribes to achieve his conclusions in which case he would not be clearly incorrect. That is not my understanding of his paper, however.

27 Just because a system can lead to the production of great works hardly makes the case that a system is worthy of our admiration. For example, there have been great works (e.g., pyramids) that were created under a system of slavery—that hardly demonstrates the virtue of such a system.
they had no copyright, than from their royalties in this country [England].” The fact that self help copyright can generate some supra competitive profits in the reproduction market hardly demonstrates that statutory copyright is unnecessary or not welfare enhancing, however. The fact that English authors might have sometimes received more money from American publishers than from English publishers may seem to imply that self help copyright can generate as much or more revenue than statutory copyright, but this is not a correct implication. Plant fails to mention that the population in the US during the latter half of the 19th century was between 50% and 100% larger than England’s population, a fact that should have led to considerably larger revenues from the US market. This comparison is further distorted in favor of the US because US publishers could pick already successful English authors and free-ride off the English publishers who were expending resources to finding new authors in the otherwise risky hit-or-miss (mainly miss) business of finding successful authors and books where losses from the misses were subsidized by the winners, as is always the case in these types of industries.

Another problem with relying on self help copyright is that technology changes the speed with which copies can be made. One can make copies today far faster than was possible in the mid to late 1800s which was the period covered by Plant’s narrative. Thus the length of time that the private self help “monopoly” would last is much shorter now than it was then.

But Plant’s claim that creators do not need statutory copyright protection is very different from a claim that creators do not require payment to produce their works. The self-help ‘copyright’ discussed in a seemingly positive tone by Plant would be socially harmful if authors did not require some payment to create their works. That is because a self help copyright creates a temporary monopoly which, for its admittedly short duration, ‘suffers’ from the same economic attributes as the monopoly created by copyright and this monopoly would harm social welfare if authors did not need the extra profits generated.

Nevertheless, the claim that creators as a group do not need rewards has appeared recently. For example, Felix Oberholzer-Gee and Koleman Strumpf (2009) have suggested that reward plays little or no role in the production of creative works. Unlike Plant, they treat creators as a homogenous group. Here is what they have to say:

[A] key question is whether financial incentives are needed to encourage artistic output. While this is in large part an open question, several indirect pieces of

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28 Found on page 172.
29 Plant seems to believe that it is socially wasteful to use resources to discover which new creators have the most market potential. He approvingly quotes (p 184) T. H. Farrer: “What we want, I believe, is more good books and cheaper good books; but we do not want more books; we have too many books at present.” He goes on to criticize publishers for not making authors share a larger portion of the cost of failed books.
evidence suggest that financial incentives play a smaller role in the creative industries than elsewhere in the economy. [FN] In this respect, the arts are similar to the production of open source software where many programmers appear to work for little monetary gain (Lerner and Tirole, 2005). [p. 21]

Admittedly, Oberholzer-Gee and Strumpf (henceforth O/S) are not exactly saying that musicians or artists require no payment, but instead that they will work for “little monetary gain”.

They go on:

[W]hy are there so many musicians? One explanation is that musicians enjoy their profession. Under this view, musicians take pleasure from creating and performing music, as well as aspects of the lifestyle such as flexible hours and the lack of an immediate boss. If this theory is correct, the economic impact of file sharing [reduced revenue] is not likely to have a major impact on music creation. [p. 22]

O/S wish to draw a distinction between creative artists, who presumably require little remuneration and workers in most other parts of the economy who require greater remuneration. Yet many respected professions, say, professors who enjoy research and teaching, doctors and nurses who enjoy helping the sick, athletes who enjoy playing their sport, architects who enjoy creating new structures, and so forth, would also seem capable of being described in a manner similar to musicians. How can Oberholzer-Gee and Strumpf distinguish between these professions and those dependent on copyright so as to not classify almost all occupations other than cleaners of elephant excrement as not requiring much compensation? It isn’t clear that they can.

Further, the lifestyle that O/S believe is so attractive to musicians is not really viable if musicians receive little or no payment. In order to live a lifestyle where you have flexible hours, no boss, and low income, one must be independently wealthy or be consigned to a life of poverty. It is unclear how “pleasurable” the poverty component of that lifestyle would be. Otherwise, one gets a second job—an apparently common outcome for musicians—which would seem to gainsay these lifestyle benefits.

If creators do not require any rewards to induce their efforts then social welfare maximization would have some interesting implications regarding the self help copyright that Plant discussed. If creators do not need to be paid, then attempts to create a self-help ‘monopoly’ would be harmful to social welfare. In that case creators should not be allowed to engage in activities that would provide any sort of temporary monopoly from being first. Authors and other creators, therefore, should be prevented from exclusive contracting with publishers since this would give publishers an ability to engage in some form of self-help copyright which would
reduce social welfare. One solution would be a law preventing creators from entering into any exclusive contracts where they are paid for their creative efforts.

Maximizing social welfare would lead to other seemingly absurd results. Obviously, musicians could be paid as “performers” but not as composers, since allowing the latter would lower social welfare. Therefore, a careful monitoring of contracts would be required to make sure that payments were for performing only and not for the creation of new compositions. Further, paid improvisations of all kinds, whether it is music or comedy, would need to be banned since improvisation is the creation of a new work and social welfare would be reduced if consumers gave up their resources in the act of needlessly paying for creation.

Oberholzer-Gee and Strumpf go somewhat further than Plant in suggesting that authors do not need financial rewards, at least in the particular case of musical compositions and lyrics:

> Overall production figures for the creative industries appear to be consistent with this view that file sharing [reduced revenues] has not discouraged artists and publishers. While album sales have generally fallen since 2000, the number of albums being created has exploded. In 2000, 35,516 albums were released. Seven years later, 79,695 albums (including 25,159 digital albums) were published...Similar trends can be seen in other creative industries. [p. 23, 24]

The implicit claim of O/S in the above quote is actually stronger than one of zero relationship between payment and creation. Although it is true that their literal words merely state that artists have not been “discouraged” by reduced revenue, the evidence they put forward, if it were to be believed, clearly indicates that the decreased revenues from music albums (which have fallen by approximately 50%, see Liebowitz 2007) are associated with a more than doubling of the number of albums created. Oberholzer-Gee and Strumpf must not think that there are other tenable explanations for this increase in albums since if there were it would make their conclusion invalid.

If you believe their data, the implication would seem clear: lower the payments to creators and in return many more creative works are produced O/S walk up to the edge of making this claim, invite the reader to jump in, although they do not take the plunge themselves.

One reason not to take the plunge is that the conclusion of an inverse relationship between payment and production leads to implications even more bizarre than does the assumption of no relationship. If lowering the payments to creators increases their production, then eliminating copyright would be insufficient to maximize welfare. Instead, we would have to seriously consider penalizing (taxing) creators in the expectation that this will induce them to produce more works. Didn’t Bela Bartok and Dylan Thomas reach their most productive periods while they were almost starving? Intentionally impoverishing artists, even those who might
otherwise have been independently wealthy, would appear to be the welfare maximizing policy.

The other, more compelling, reason not to take the plunge is that the numbers in the O/S quote are very misleading. The reported number of albums from the year 2000 represents albums mainly put out by record companies. The later number of albums is dominated by self-produced albums that use middlemen such as CD Baby or TuneCore who, for about $35, will release a self-produced album onto all leading digital stores such as iTunes and Amazon. Comparing the two types of albums is essentially comparing apples and oranges and it makes a comparison meaningless. O/S appear to be aware of this problem and try, indirectly, to cover themselves by stating: “Obviously, it would be nice to adjust output for differences in quality, but we are not aware of any research that has tackled this question” although they leave the reader in the dark about why it is likely that there are important quality differences between 2000 and 2007.

IV. Conclusions

Economic analysis can tell us what would happen if we make certain policy decisions. It cannot tell us what policy decisions we should make. This distinction has often been labeled as the difference between positive economics versus normative economics. The analysis of copyright, discussing the tradeoffs and economic efficiency, is a positive analysis.

The claim that we should maximize social welfare when setting copyright is a normative decision. My contention in this paper was to suggest that applying welfare maximization criteria to copyright policy is a poor normative choice because it treats creators and their ability to earn rents differently than other individuals are treated in the economy in terms of their ability to earn rents even though the justification for removing rents in copyright-based industries seems hardly any different than it would be for removing rents in other aspects of the economy.

How then should copyright duration be determined if we were to abandon, or at least limit, welfare analysis? Copyright duration is currently at its historic peak although the current length has been under sustained academic attack. Much of this critique has drawn strength from the economic social welfare analysis discussed above. I have suggested that these critiques suffered from a form of myopia and disparate treatment. My own view on copyright duration is simple. I would be happy treating copyright, narrowly defined, the same as real property. Because there are costs of keeping track of intellectual property that seem particularly high, because permissions are often difficult to come by, and because the value of most intellectual property drops to de minimus levels after a short time, I would favor an approach that put largely
unused copyrighted works in the public domain but allowed other works to be indefinitely renewable as suggested by Landes and Posner (2003).
References


