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## Facilitating Welfare Rights Class Action Litigation: Putting Damages and Attorney's Fees to Work

Randal S. Jeffrey

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# Authors' Welfare:

## COPYRIGHT AS A STATUTORY MECHANISM FOR REDISTRIBUTING RIGHTS\*

*Tom W. Bell\**

### ABSTRACT

Copyright exhibits means and ends remarkably similar to those of social welfare programs. Yet discussions about copyright do not tend to echo discussions about welfare. This paper examines that interesting contrast. It begins by comparing social welfare policy to copyright policy, uncovering several material parallels. Both welfare and copyright primarily aim to correct the market's failure to sufficiently support a particular class of beneficiaries. Both encourage rights-based claims to the entitlements that they create, too. The welfare system and the copyright system each uses statutory mechanisms to redistribute rights – rights to wealth in the first instance, rights to chattels and persons in the second – from the general public to particular beneficiary classes – the poor and authors, respectively. Each also includes special exceptions designed to avoid inefficient or inequitable redistributions. The charitable gift deduction and other tax code provisions limit the welfare system's scope, whereas copyright law offers fair use and other defenses to infringement claims. Perhaps those and other similarities between welfare and copyright mean little. After considering various critiques, however, the paper concludes that we can learn important lessons from understanding copyright as a statutory mechanism for redistributing rights. Most notably, understanding copyright as a form of authors' welfare suggests the need for, and potential shape of, reforms to end copyright as we know it.

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## I. INTRODUCTION

Social welfare<sup>1</sup> and copyright<sup>2</sup> bear striking similarities. Both programs aspire to correct the failings of their non-political, civil, and private alternatives. Both favor limited classes of direct beneficiaries: poor people in the first instance and authors in the second. Both social welfare and copyright function by trumping common law rights with statutory ones, whether by redistributing rights to fiat money or by redistributing rights to chattels and persons. Still other illuminating similarities exist. This paper discusses the material similarities between social welfare and copyright, as well as the dissimilarities between them, in greater detail. This comparative exercise inspires several hypotheses about copyright. Most notably, the comparison suggests that lawmakers should apply to the "authors' welfare" program embodied in U.S. copyright law reforms like those recently applied to U.S. social welfare programs.<sup>3</sup> Lawmakers should, in brief, consider ending copyright as we know it.<sup>4</sup>

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<sup>1</sup> Unless otherwise indicated, "social welfare" and "welfare" refer hereinafter to U.S. political programs that aim to alleviate poverty by taking wealth from some taxpayers and redistributing it, in the form of money or less liquid assets such as food stamps, to a defined class of beneficiaries. That accords with common usage. See MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* ix (rev. ed., 1996) ("Public assistance is means-tested relief. It is what we usually think of as welfare."); THEDA SKOCPOL, *SOCIAL POLICY IN THE UNITED STATES* 211 (1995) (contrasting "welfare" and "social security" in American usage); EDWARD D. BERKOWITZ, *AMERICA'S WELFARE STATE* xiii (1991) ("[M]ost people understand *welfare* to mean a form of government handout."). For an apt example of welfare, see Aid for Families with Dependent Children (AFDC), a program effectively abolished by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of U.S.C.). Other programs falling within the scope of "social welfare" and "welfare" as used herein include those created by the Food Stamp Act, 7 U.S.C.A. § 2011-2036 (West Supp. 2003) (creating program to improve diets of members of low-income households) and by the California Work Opportunity and Responsibility to Kids Act (CalWORKS program), CAL. WELF. & INST. CODE § 11200-11215 (West 2001) (creating program to give cash aid and services to eligible needy California families).

<sup>2</sup> Unless otherwise indicated, "copyright" refers hereinafter to U.S. copyright law as expressed in the 1976 Copyright Act, 17 U.S.C.A. §§ 101-118 (West Supp. 2003), as amended, and related case law.

<sup>3</sup> PRWORA, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of U.S.C.) (repealing the federal AFDC program and replacing it with Temporary Aid to Needy Families (TANF)).

<sup>4</sup> By comparison, in 1992, presidential candidate Bill Clinton pledged to "end welfare as we know it." See Gwen Ifill, *Clinton Presses Welfare Overhaul, Stressing Job Training and Work*, N.Y. TIMES, Sept. 10, 1992, at A1 (quoting Sept. 9, 1992, speech by Clinton to the National Baptist Convention); CBS *This Morning: Governor Clinton Discusses His Presidential Candidacy* (CBS television broadcast, November 14, 1991) (statement by Clinton during on-air interview by Paula Zahn).

Notably, this paper does not try to establish the authors' welfare model as the only legitimate one for copyright policy. The prevailing models, based on social utility and property, retain unique merits. They will undoubtedly retain many followers, too. Just as comparing flat maps based on different projections can help us to better understand our globular Earth, so too can we benefit from comparing different views of copyright's manifold dimensions. This paper offers a new view of copyright, one seen from the vantage of social welfare policy. Although the authors' welfare model has admitted limits, the unique insights that it affords make it a useful addition to copyright commentary.

In assessing the claims here made on behalf of the authors' welfare model, or indeed any academic's claims, readers might find helpful guidance in the standards applied to U.S. utility patents. Such patents must evince novelty,<sup>5</sup> non-obviousness,<sup>6</sup> and usefulness,<sup>7</sup> among other things.<sup>8</sup> If given fair consideration, the authors' welfare model will meet analogous standards. Existing commentary has not presented the same view of copyright, leastwise not in terms that render the present argument wholly derivative.<sup>9</sup> Admittedly, extant law and scholarship<sup>10</sup> provide many of the ideas that this paper

<sup>5</sup> 35 U.S.C.A. § 102 (West Supp. 2003).

<sup>6</sup> *Id.* § 103.

<sup>7</sup> *Id.* § 101.

<sup>8</sup> A patent must also describe the claimed invention, and the manner of practicing it, "in such full, clear, concise, and exact terms" as to allow others to understand and benefit from it. *Id.* § 112. Although I've certainly aspired to that standard, too, I forbear arguing that I've met it. The proof of a writing comes in its reading.

<sup>9</sup> See, e.g., Shubha Ghosh, *The Merits of Ownership; or, How I Learned to Stop Worrying and Love Intellectual Property*, 15 HARV. J.L. & TECH. 453, 475-82 (2002) (arguing that intellectual property policies must, as tax policy already does, address questions of distributive justice); Larry Urbanski & Dennis S. Karjala, *Corporate Welfare via Copyright Welfare*, in THE PROGRESS REPORT: GUEST EDITORIAL (condemning as "copyright welfare" proposal to extend copyright term), at <http://www.progress.org/archive/copy.htm> (last visited Aug. 8, 2003); Dennis S. Karjala, *Congress Moves To Extend Copyright Welfare*, in OPPOSING COPYRIGHT EXTENSION (June 1996) (unpublished op-ed submission) (condemning as "copyright welfare" proposal to extend copyright term), at <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/commentary/opedharm.html> (last visited on Aug. 8, 2003). See also Tom W. Bell, *Indelicate Imbalancing in Copyright and Patent Law*, in COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE 1, 6-7 (Adam Thierer & Clyde Wayne Crews eds., 2002) (suggesting a parallel between corporate welfare or social welfare, on the one hand, and copyrights or patents on the other).

<sup>10</sup> In patent parlance, "prior art." See, e.g., 35 U.S.C.A. § 103(a) (West Supp. 2003).

expands upon and synthesizes." Scholars and inventors alike necessarily build on others' work, however. It should thus suffice if, as seems plausible, the whole of the authors' welfare model is not obvious to people well-versed in copyright commentary.<sup>12</sup>

As for usefulness, well, it takes a bold academic to make broad claims on that front. In patent law, however, the usefulness standard requires little more than that an invention have some function,<sup>13</sup> from the important and beneficial<sup>14</sup> to the minor and harmful.<sup>15</sup> On that forgiving measure, the authors' welfare model ought to pass muster.<sup>16</sup> While acknowledging that commentators who dislike metaphorical or analogical legal reasoning may prejudice this project, I do not feel compelled to defend my methodology.<sup>17</sup> Many – perhaps most – commentators and courts find it useful to understand one concept by contrasting and comparing it to another.<sup>18</sup> On some

<sup>11</sup> A very early formulation of the fundamental idea, for instance, appears in Lord Macaulay's characterization of copyright as a "tax on readers for the purpose of giving a bounty to writers." Lord Thomas B. Macaulay, 56 Parl. Deb. 341, 350 (3d Ser.) (1841) (Speech Delivered in the House of Commons on Feb. 5, 1841). I thank Prof. Peter D. Junger for reminding me of that copyright chestnut.

<sup>12</sup> Or, to borrow the language of the Patent Act, it suffices "if the differences between the . . . [authors' welfare argument] and the prior art are such that the . . . matter as a whole would [not] have been obvious at the time the [argument] was made to a person having ordinary skill in the art to which said . . . matter pertains." 35 U.S.C.A. § 103(a) (West Supp. 2003).

<sup>13</sup> See Utility Examination Guidelines, 66 Fed. Reg. 1092 § II.B.2(a), 1098 (2001) ("If the applicant has asserted that the claimed invention is useful for any particular practical purpose . . . and the assertion would be considered credible by a person of ordinary skill in the art," examiners should not reject the application for lack of utility.).

<sup>14</sup> See, e.g., Thomas Edison's patent for an electric lamp, U.S. Patent No. 223,898 (issued Jan. 27, 1880).

<sup>15</sup> See, e.g., *Juicy Whip, Inc. v. Orange Bang, Inc.*, 185 F.3d 1364 (Fed. Cir. 1999) (overturning decision that because patent aimed to increase sales by deception, it failed the usefulness standard).

<sup>16</sup> Perhaps something like patent law's operability test offers a more telling measure of an academic argument. On that test, an argument would have to function as claimed. Compare *McKenzie v. Cummings*, 24 App. D.C. 137 (D.C. Cir. 1904) (holding that a voting machine only 99% accurate failed to operate as claimed) with *Coffee v. Guerrant*, 3 App. D.C. 497 (D.C. Cir. 1894) (holding a tobacco-stemming device operable despite its 30% failure rate). I would wager that the authors' welfare model of copyright can meet that standard too, though it will take others' critical review to truly test this paper's arguments.

<sup>17</sup> For those who take particular offense at the use of metaphors in legal reasoning, however, I observe that I do not equate social welfare to copyright. Indeed, my conclusion that we ought to make copyright policy more closely resemble welfare policy of necessity admits that the two differ in at least that regard. See *infra* Part V. I detail other differences, too. See *infra* Part III.

<sup>18</sup> This probably holds especially true with regard to copyright policy, which has always developed under the sway of metaphorical reasoning. See Mark Rose,

accounts, we cannot help but reason in that way.<sup>19</sup> At the least, then, a few readers ought to find the form of argument used here congenial.

So goes a brief account of this paper's thesis and methodology. What does the paper contain? Part II explores the parallels between welfare and copyright. It finds material similarities between the justifications upon which they rely, the beneficiaries they target, and the redistributions they effectuate. Part III counters with a review of the dissimilarities between welfare and copyright. Although those prove noteworthy, they do not render the authors' welfare model materially deficient. Part IV considers and rebuts objections that the comparison between welfare and copyright is irrelevant. As an applied proof of the comparison's relevance, Part V explores some of the ramifications of understanding copyright as authors' welfare. That exploration leads, among other things, to the conclusion that lawmakers should consider reforming copyright policy in a manner analogous to recent welfare reforms.

What does this paper *not* say? It does not contrast the constitutionality of U.S. social welfare programs with that of U.S. copyright policy. True, some commentators have argued that the former has only shaky constitutional foundations,<sup>20</sup> whereas no one doubts that federal lawmakers have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . . ."<sup>21</sup> I assume, however, that U.S. courts

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*Copyright and Its Metaphors*, 50 UCLA L. REV. 1, 15 (2002) ("[M]etaphors have contributed to the tendency to think about copyrights as permanent and absolute property rights."). See also A. Michael Froomkin, *The Metaphor is the Key: Cryptography, the Clipper Chip, and the Constitution*, 143 U. PA. L. REV. 709, 860 (1995) ("It is old news that common-law legal reasoning is both analogical and taxonomical, and that metaphor is a powerful tool for both.") (footnotes omitted).

<sup>19</sup> Rose, *supra* note 18, at 3 ("Metaphors are not just ornamental; they structure the way we think about matters and they have consequences."). See generally Dan Hunter, *Reason is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197 (2001); GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980).

<sup>20</sup> See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 306-08, 314-24 (1985) (arguing that the Takings Clause in principle forbids almost all federal welfare programs).

<sup>21</sup> U.S. CONST. art. I, § 1, cl. 8. That is not to say that everyone agrees on the constitutional scope of the power thereby granted to lawmakers. See, e.g., *Eldred v. Ashcroft*, 123 S. Ct. 769, 783-90 (2003) (relating – and disposing of – petitioners' arguments against constitutionality of copyright term extension).

will not soon, if ever, find federal welfare programs unconstitutional.<sup>22</sup>

Nor does this paper say a great deal about the parallels between welfare and patents. Anyone familiar with both copyright and patent policy will find it easy – indeed, almost irresistible – to extend an “authors’ welfare” analysis to an “inventors’ welfare” one. And, indeed, the obvious similarities between copyright and patent suggest that a general analysis of “creators’ welfare” might prove fruitful.<sup>23</sup> I save that for another day or another scholar, however, and here make only occasional references to patent policy.

## II. PARALLELS BETWEEN WELFARE AND COPYRIGHT

Welfare and copyright share a number of material similarities, summed up in Table 1, below. This Part discusses each in order. Subpart II.A compares the primary and secondary justifications of welfare and copyright, finding striking parallels between the two. Subpart II.B gives the direct and indirect beneficiaries of welfare and copyright like treatment, to like effect. Subpart II.C relates the rights redistributed by welfare to those redistributed by copyright, while subpart II.D discovers parallels in how those two statutory programs effectuate their redistributions. Subpart II.E discusses some exceptions to the redistributions of welfare and copyright, and subpart II.F discusses the protective features of welfare and copyright. Each subpart finds notable similarities between the two.

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<sup>22</sup> In other words, I assume that they will tend to continue regarding the General Welfare Clause, U.S. CONST. pmbl., the Commerce Clause, *id.* art. I, § 3, and the Necessary and Proper Clause, *id.* art. I, § 8, cl. 18, as sufficient constitutional authority for those programs.

<sup>23</sup> For some preliminary comments in that vein, see Bell, *supra* note 9, at 6-7.



**Table 1: Notable Similarities Between Welfare and Copyright**

<i>Subject of Comparison</i>	<i>Welfare's Version</i>	<i>Copyright's Version</i>
<b>Primary justification</b>	Personal and civil failure	Market failure
<b>Secondary justification</b>	Equitable entitlement	Natural right
<b>Direct beneficiaries</b>	The poor	Authors
<b>Indirect beneficiaries</b>	Welfare service providers	Owners and distributors
<b>Redistributed rights</b>	To taxable wealth	To chattels and persons
<b>Source of rights</b>	Taxpayers	Property owners
<b>Rights granted</b>	Money and vouchers	Copyrights
<b>Redistribution mechanism</b>	Tax and welfare system	Civil and criminal suits
<b>Protective alienation limits</b>	Food stamps, etc.	Termination and moral rights
<b>Exceptions</b>	Exemptions, deductions, etc.	Fair use, first sale, etc.

### A. *Justifications of Welfare and Copyright*

Welfare and copyright share both primary and secondary justifications. As subsection II.A.1 explains, each of their primary justifications relies on utilitarian, instrumentalist reasoning. Welfare aims to improve social well-being by helping the poor, whereas copyright aims to improve social well-being by helping those who create expressive works. Subsection II.A.2 discusses how welfare and copyright also rely on similar secondary justifications based on deontological, rights-based claims to certain benefits. Welfare protects the human rights of the poor, on that minority view, whereas copyright protects authors' natural rights. Although both welfare and copyright enjoy some of the same procedural protections afforded to natural or human rights, as section II.A.3 explains, that procedural similarity speaks to administration rather than justification.

The relationship between their leading and minority justifications shows yet another parallel between welfare and copyright: With regard to each, the United States stands nearly

alone in favoring utilitarian over deontological justifications.<sup>24</sup> Other countries tend to reverse that order, favoring rights-based claims to both welfare and copyright over utility-based claims.<sup>25</sup> Here as elsewhere, however, the analysis focuses on U.S. law and policy.

### 1. Primary Justifications

In U.S. law and policy, welfare and copyright both rely primarily on utilitarian justifications. Welfare in the United States has never been granted as a matter of right.<sup>26</sup> To the contrary, and in sharp contrast with the welfare policies of most other countries, U.S. welfare policy has required that recipients demonstrate their need for public assistance.<sup>27</sup> Welfare, in that view, serves as an exception to the rule that adults should take care of themselves, that families should take care of their children, that voluntary communities should take care of their members, and that public assistance should offer no more than a bare safety net for the grievously fallen.<sup>28</sup> Welfare thus represents a political mechanism for maximizing social utility by correcting failures in personal lives and non-political institutions.<sup>29</sup>

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<sup>24</sup> With regard to both, however, the U.S. can count other Anglo-Saxon countries as fellow travelers in utilitarianism. See GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 22-23, 26-27 (1990) (categorizing the U.S., Canada, and Australia together with regard to welfare). With regard to copyright, see, PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY* 26 (1994) (grouping the U.S., Britain, and former British colonies together with regard to copyright).

<sup>25</sup> See ESPING-ANDERSEN, *supra* note 24 (contrasting the Anglo-Saxon approach to welfare with two other general approaches, seen in other countries); GOLDSTEIN, *supra* note 24, at 26 ("European, Asian, and Latin American nations have copyright laws that . . . rest squarely on the natural rights philosophy . . .").

<sup>26</sup> Indeed, welfare in the U.S. has by definition come to signify means-tested public assistance. KATZ, *supra* note 1, at ix-x.

<sup>27</sup> See SKOCPOL, *supra* note 1, at 223-24 (discussing rationale for New Deal social programs); *id.* at 209-210 (discussing rationale for "War on Poverty" launched during Johnson administration); ESPING-ANDERSEN, *supra* note 24 (contrasting the welfare policies of the U.S. and other Anglo-Saxon countries with the welfare policies of other countries); *id.* at 70 (showing the U.S. to have the highest ratio of means-tested poor/general relief, the highest ratio of private/public health care spending, and the lowest average benefit quality of all countries studied).

<sup>28</sup> See KATZ, *supra* note 1, at x ("Social welfare expenses [in the U.S.] consume a much smaller share of the Gross National Product than in other wealthy nations, and ideological resistance to social welfare remains far more virulent."); ESPING-ANDERSEN, *supra* note 24, at 42 ("The general assumption in liberalism is that the market is emancipatory . . . and poverty or helplessness is . . . solely a consequence of an individual's lack of foresight and thrift.").

<sup>29</sup> *Id.* at 43 ("A means-tested assistance system is, in a sense, a way of ensuring that non-market income is reserved for those who are unable to participate in

Case law<sup>30</sup> and commentary<sup>31</sup> likewise uniformly describe copyright as a utilitarian device for maximizing social utility.<sup>32</sup> As the Supreme Court most recently put it, “[C]opyright law serves public ends by providing individuals with an incentive to pursue private ones.”<sup>33</sup> Specifically, copyright aims to alleviate the market’s failure to give adequate incentives for producing expressive works.<sup>34</sup> Absent that pressing need, copyright would

the market anyhow . . . [P]ublic obligation enters only where the market fails.”).

<sup>30</sup> See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.”); *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 . . . public good.”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights 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 in ‘Science and useful Arts.’”) (quoting U.S. CONST. art. I, § 8, cl. 8).

<sup>31</sup> See 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* §1.03[A] (2002) (discussing the purpose of copyright); I PAUL GOLDSTEIN, *COPYRIGHT* § 1.13.2 (2d ed. Supp. 2003) (“utilitarianism [is] American copyright law’s founding premise . . .”).

<sup>32</sup> Thomas B. Nachbar, *Constructing Copyright’s Mythology*, 6 GREEN BAG 2D 37, 42 (2002) (describing as having become “dominant over the last half of the 20th Century” the theory “that the primary purpose of copyright is not to enrich authors but rather to give them an incentive to create works of authorship, which in turn increases society’s well-being.”) (footnote omitted).

Nachbar goes on to argue that because the *state* copyright acts predating the Constitution dated their protections from a work’s publication rather than its creation, they aimed not at encouraging authorship itself but rather at encouraging “an independent American culture . . . by the widest dissemination of American books . . .” *Id.* at 44. The first copyright act passed under the Constitution did not reflect that philosophy, however, for the act extended protection to works “made and composed, and not printed or published . . .” Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (1790) (current version at 17 U.S.C. § 101 (2000)). The 1790 Act did not condition protection on the deposit of those works, *id.* § 3 (requiring deposit only of works “already printed and published . . .”), but rather only of their titles, *id.* § 1. In that respect, the 1790 Act demanded even less dissemination than the current Copyright Act. See Copyright Act of 1976, 17 U.S.C.A. § 102(a) (West Supp. 2003) (conditioning copyright protection not on dissemination but rather on fixation). Nachbar thus perhaps goes too far in claiming, “[T]he central place that creativity occupies in copyright is a feature of modern copyright law.” Nachbar, *supra*, at 44.

<sup>33</sup> *Eldred v. Ashcroft*, 123 S. Ct. 769, 785 n.18 (2003).

<sup>34</sup> 1 NIMMER & NIMMER, *supra* note 31, at § 1.03[A] (“[T]he authorization to grant to individual authors the limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors, and that the copyright monopoly is a necessary condition to the full realization of such creative activities.”) (footnotes omitted); I GOLDSTEIN, *supra* note 31, at § 1.14, at 1:40 (“Copyright law presupposes that . . . authors and publishers will invest sufficient resources in producing and distributing original works only if they are promised property rights that will enable them to control and profit from their works’ dissemination in the marketplace.”).

have no justification at all,<sup>35</sup> a view supported by the history of U.S. copyright law<sup>36</sup> and modern economic theory.<sup>37</sup>

## 2. Secondary Justifications

Welfare and copyright alike sometimes win support from appeals to natural law or human rights. That deontological justification, though disfavored in U.S. law and policy,<sup>38</sup> still finds occasional use among theorists, lobbyists, and lay people. Some philosophers, for instance, have defended welfare as necessary to correct unchosen inequalities, such as those arising solely from accidents of birth.<sup>39</sup> Others, in turn, have defended copyright as necessary to secure authors' natural rights.<sup>40</sup> Lobbyists have employed deontological arguments, albeit in less exalted phraseology, on behalf of welfare<sup>41</sup> and copyright<sup>42</sup> alike. Regardless, however, both

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<sup>35</sup> 1 NIMMER & NIMMER, *supra* note 31, at § 1.03[A] ("[I]n the absence of such public benefit, the grant of a copyright monopoly to individuals would be unjustified.") (footnote omitted).

<sup>36</sup> See Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 762-74 (2001). But see Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 529-39 (1990) (arguing that development of copyright law in the U.S. reflects influence of natural rights).

<sup>37</sup> See I GOLDSTEIN, *supra* note 31, at § 1.14.1; William Landes & Richard Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

<sup>38</sup> Cf. *supra* Part II.A.1 (describing primary justification).

<sup>39</sup> See generally Daniel Shapiro, *Egalitarianism and Welfare-State Redistribution*, 19 SOC. PHIL. & POL'Y 1 (2002) (surveying justifications employed by contemporary philosophical egalitarians).

<sup>40</sup> 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 (1993); Yen, *supra* note 36, at 517; Ayn Rand, *Patents and Copyrights*, in CAPITALISM: THE UNKNOWN IDEAL 130 (1966). See also Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L. J. 287, 296-331 (1988) (exploring the uses and limits of the Lockean justification of intellectual property).

<sup>41</sup> See Hearing on Welfare Reform Reauthorization Proposals: Testimony Before the Subcommittee on Human Resources of the House Committee on Ways and Means, 107th Cong., 2nd Sess. (2002), available at 2002 WL 820644 (F.D.C.H.) (testimony of Pat Albright, member of Every Mother is a Working Mother) ("Under welfare reform, mothers are not allowed at all to pursue a four-year college education. This is a violation of our human rights.").

<sup>42</sup> See Hearing on Online Entertainment and Copyright Law: Testimony Before the Senate Judiciary Committee to Protect Copyright Industries in the U.S., 107th Cong., 1st Sess., available at 2001 WL 323737 (F.D.C.H.) (testimony of Jack Valenti, Chairman and CEO of Motion Picture Association) ("Creative property is private property. To take it without permission and without payment collides with the core values of this society.").

welfare and copyright continue to rely predominately on utilitarian justifications.<sup>43</sup>

### 3. Theory vs. Practice

Subsections II.A.1 and II.A.2, above, speak only to the common theoretical foundations of welfare and copyright – not to how welfare and copyright work in practice. Granted, both welfare and copyright incorporate procedural features reminiscent of those used to protect human rights, corporeal property, and other claims based on deontological justifications. As a brief survey of the relevant law will illustrate, however, that parallel speaks more to the administration of the welfare and copyright systems than it does their theoretical foundations.

The Supreme Court did not establish a fundamental right to welfare when it mused, in *Goldberg v. Kelly*, “It may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity.’”<sup>44</sup> Rather, the Court held only that welfare recipients had a due process right to receive evidentiary hearings before their benefits were terminated.<sup>45</sup> *Goldberg* thus at most indicates that welfare benefits, like copyrights, may share some of property’s procedural features.<sup>46</sup> Because recent reforms to federal welfare law have specified that it “shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part,”<sup>47</sup> welfare benefits arguably no longer enjoy even those due process protections that *Goldberg* found attached to entitlements.<sup>48</sup>

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<sup>43</sup> See *supra* Part II.A.1.

<sup>44</sup> 397 U.S. 254, 262 & n.8 (1970).

<sup>45</sup> *Id.* See also *Atkins v. Parker*, 472 U.S. 115, 128 (1985) (stating in dictum that hearings determining eligibility for food stamps must meet same standard); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 578 (1972) (conjecturing that employee of public university could have “property” interest in his employment sufficient to give him due process rights, but holding that he had not shown that he was deprived of liberty or property protected by the Fourteenth Amendment).

<sup>46</sup> Welfare has never shared as many as copyright, however. See *infra* Part III.A.

<sup>47</sup> 42 U.S.C.A. § 601(b) (West Supp. 2003).

<sup>48</sup> See Sylvia A. Law, *Ending Welfare as We Know It*, 49 STAN. L. REV. 471, 487 (1997) (review essay) (reviewing five texts) (“While Congress has abolished the concept of ‘entitlement’ at the federal level, it is not yet clear what this will mean in terms of poor people’s ability to obtain due process when their benefits are terminated.”) (footnotes omitted); but see Carolyn Goodwin, Comment, “Welfare Reform” and Procedural Due Process Protections: The Massachusetts Example, 48

Regardless of how courts interpret the abolition of federal entitlements, welfare will continue to fall far short of a natural right. Procedural due process merely regulates access to whatever benefits lawmakers choose to bestow; it does not guarantee the benefits themselves.<sup>49</sup> As recent reforms demonstrate, lawmakers can cut welfare benefits without triggering the kind of legal claims that would follow a comparable attack on real or personal property rights.<sup>50</sup> Welfare benefits thus exist not as a matter of right, but rather of discretion.

As discussed below, copyright likewise shares many functional traits with corporeal property.<sup>51</sup> Even so, there remain theoretical differences between copyright and conventional types of property – differences that can have a very practical impact.<sup>52</sup> Copyright's utilitarian foundations thus mark it, like welfare, as both theoretically and practically different from corporeal property.

## B. *Beneficiaries of Welfare and Copyright*

### 1. Direct Beneficiaries

It would belabor the obvious to claim that social welfare aims to directly benefit the deserving poor. Granted, skeptics might object that in practice welfare harms the poor,<sup>53</sup> or that indirect beneficiaries have wormed their way into the welfare system.<sup>54</sup> Even if true, however, those objections would not change the fact that justifications of welfare rely on its

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BUFF. L. REV. 565, 572-74 (2000) (arguing that due process protections continue to apply at the state level).

<sup>49</sup> See *Richardson v. Belcher*, 404 U.S. 78, 81 (1971) ("[T]he analogy drawn in *Goldberg* between social welfare and 'property,' cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.") (citation omitted); Law, *supra* note 48, at 483 ("[E]ntitlement signifies that individual poor people have a legal right to whatever benefits Congress chooses to guarantee them.").

<sup>50</sup> See Richard A. Epstein, *No New Property*, 56 BROOK. L. REV. 747, 762 (1990) ("Welfare benefits are precarious and may be terminable by the state without the consent of the recipient.") (footnote omitted).

<sup>51</sup> See *infra* Part III.A.

<sup>52</sup> See *infra* text accompanying notes 168-81.

<sup>53</sup> See, e.g., DAVID KELLY, *A LIFE OF ONE'S OWN: INDIVIDUAL RIGHTS AND THE WELFARE STATE* 5-10 (1998) (describing perverse incentive effects of welfare). See also, generally, CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* (2nd ed., 1985).

<sup>54</sup> See *infra* Part II.B.2.

intention to distribute aid to the deserving poor,<sup>55</sup> and that lawmakers have expressly adopted that distribution as one of welfare's purposes.<sup>56</sup>

Lawmakers,<sup>57</sup> courts,<sup>58</sup> and commentators have likewise described authors as the direct beneficiaries of copyright. The plain language of the Constitution fairly demands such solicitude for authors.<sup>59</sup> The Copyright Act effectuates that demand by initially vesting the rights to a work in its author,<sup>60</sup> who thereafter benefits from either exercising the rights afforded by the Act<sup>61</sup> or transferring them to another party.<sup>62</sup> As with regard to welfare, none of this shows that copyright always benefits authors in practice,<sup>63</sup> or that copyright benefits no one other than authors. It shows only that copyright, like welfare, targets a particular class of direct beneficiaries.

## 2. Indirect Beneficiaries

Welfare and copyright both have indirect beneficiaries. These help themselves even as they help – or on some accounts, hurt – the direct beneficiaries of those redistributive programs. The indirect beneficiaries of the welfare system include members of public<sup>64</sup> and private<sup>65</sup> organizations in the “poverty

<sup>55</sup> See *supra* Part II.A.1-2.

<sup>56</sup> See, e.g., 42 U.S.C.A. § 601(a)(2) (West Supp. 2003) (defining federal welfare to have as one purpose to “provide assistance to needy families”).

<sup>57</sup> See HOUSE COMMITTEE ON THE JUDICIARY, NOTES ON 1976 COPYRIGHT ACT, H.R. REP. NO. 94-1476, at 140 (1976) (describing the author as “the fundamental beneficiary of copyright”).

<sup>58</sup> See, e.g., *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 26 (S.D.N.Y. 1992) (describing authors as “the intended beneficiaries of the copyright law”).

<sup>59</sup> U.S. CONST. art. I, § 1, cl. 8 (empowering congress to “secur[e] for limited Times to Authors . . . the exclusive Right to their . . . writings”).

<sup>60</sup> See 17 U.S.C.A. § 201(a) (West Supp. 2003).

<sup>61</sup> See, e.g., *id.* §§ 106, 106A.

<sup>62</sup> See *id.* § 201(d).

<sup>63</sup> See Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 Tex. L. Rev. 873, 884 (1997) (arguing that because courts routinely uphold employment agreements that require employees to assign to their employers all works of authorship made within the scope of employ, “the corporate employer (or publisher or producer), not the . . . author, is the primary beneficiary of copyright . . . in most instances”).

<sup>64</sup> See Robert L. Woodson, *Race and Economic Opportunity*, 42 VAND. L. REV. 1017, 1025-27 (1989) (criticizing the broad scope and large scale of government services designed to help the poor).

<sup>65</sup> See Stacey Y. Abrams, Note, *Devolution's Discord: Resolving Operational Dissonance with the UBIT*, 17 YALE L. & POL'Y REV. 877, 883-85 (1999) (comparing the size and role of private poverty services with government ones).

services"<sup>66</sup> industry, such as administrators and social workers in governmental or charitable organizations. The indirect beneficiaries of welfare also include more obviously self-interested parties, such as check cashing services, rent-to-own stores,<sup>67</sup> and inner-city bodegas<sup>68</sup> that rely on their customers' access to welfare services.

The copyright system likewise supports indirect beneficiaries: publishers and distributors. As with welfare's indirect beneficiaries, moreover, accounts vary as to whether copyright's indirect beneficiaries help or hinder its ultimate goal of promoting the public good. Courts<sup>69</sup> and commentators<sup>70</sup> generally portray publishers and distributors as deserving recipients of copyright's benefits because those indirect beneficiaries would, absent the incentives provided by copyright, decline to provide crucial links between authors and audiences. On a more skeptical view, publishers and

<sup>66</sup> See Robert C. Ellickson, *Monitoring the Mayor: Will the New Information Technologies Make Local Officials More Responsible?*, 32 URB. LAW. 391, 396 (2000) (applying term to "specialists flush with good intentions" who "survive by obtaining grants and contracts from a welter of government and foundation services," and observing that they "would detest the label I just have pinned on them.").

<sup>67</sup> See David Dante Troutt, *Ghettos Revisited: Antimarkets, Consumption, and Empowerment*, 66 BROOK. L. REV. 1, 4 n.8, 17 (2000) (characterizing check cashing services and rent-to-own stores as reflective of "the marginalized commercial environment and the profits available" in "ghetto antimarkets"); Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463, 1510 (1994) (characterizing them as "profitable but marginal, under-regulated, and exploitative institutions").

<sup>68</sup> See David Dante Troutt, *Ghettos Made Easy: The Metamarket / Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427, 473 (2000) (condemning "small neighborhood markets or bodegas, where quality and selection are limited and prices are high") (footnote omitted).

<sup>69</sup> See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (stating that copyright law was "intended . . . to grant a valuable, enforceable right to authors, publishers, etc., 'to afford greater encouragement to the production of literary . . . works of lasting benefit to the world'" (quoting *Washingtonian Co. v. Pearson*, 396 U.S. 30, 36 (1939)); Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1391 (6th Cir. 1996), ("[P]ublishers obviously need economic incentives to publish scholarly works, even if the scholars do not need direct economic incentives to write such works.").

<sup>70</sup> See Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 279 (2002) ("Copyright . . . is designed not only to protect the author, but also to protect the incentives of the publisher."); L. Ray Patterson, *Nimmer's Copyright in the Dead Sea Scrolls: A Comment*, 38 HOUS. L. REV. 431, 441 (2001) ("[C]opyright is a monopoly that encourages publishers to distribute works."); Jessica Litman, *The Public Domain*, 39 EMORY L. J. 963, 970 (1990) ("According to a currently popular mode of analysis . . . the copyright system encourages authors to create and encourages distributors to purchase rights in authors' creations so that the distributors may sell those creations to the rest of us.").



distributors have co-opted copyright policy and rigged the system to receive more than their due.<sup>71</sup> This is not the place to debate the merits of contrasting accounts, however. Here, it suffices to emphasize the parallels between the roles ascribed to indirect beneficiaries in welfare policy and the roles ascribed to indirect beneficiaries in copyright policy.

### C. *Rights Redistributed by Welfare and Copyright*

The welfare and copyright systems both operate by redistributing rights. More specifically, both use statutory mechanisms to redistribute personal property rights<sup>72</sup> from members of the general public to particular beneficiaries. Everyone knows that the welfare system works by taking fiat money<sup>73</sup> from taxpayers, transferring it to political authorities, and doling it out in the form of cash payments, food stamps, housing vouchers, and so forth<sup>74</sup> – hence welfare's common description as a "wealth redistribution"<sup>75</sup> or "transfer payments"<sup>76</sup> program. The claim that copyright likewise relies

<sup>71</sup> See Ku, *supra* note 70, at 305 ("[T]he artificial scarcity and exclusive rights created by copyright are not needed to encourage distribution."); Patterson, *supra* note 70, at 441 ("[P]ublishers find it very convenient to use the author as the reason for persuading Congress to continually enlarge and enhance the copyright monopoly."); William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 909 (1997) ("United States copyright law has failed of its essential purpose – to benefit authors – and is being shaped largely by powerful distributors and their lobbyists . . ."); Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, 47 U. PITT. L. REV. 1185, 1227 n. 165 (1986) ("Although the stated purpose of copyright is the compensation of authors, the reality is often that the publishers reap the lion's share of the rewards.").

<sup>72</sup> "Personal property" here, as usual, means all property other than real estate. BLACK'S LAW DICTIONARY 1217 (6th ed., 1990). All personal property is either incorporeal or corporeal. *Id.*

<sup>73</sup> So-called because it is not backed by gold or silver, but rather by State's power. See *id.* at 623 (defining "fiat money").

<sup>74</sup> See Peter Flora & Arnold J. Heidenheimer, *The Historical Core and Changing Boundaries of the Welfare State*, in THE DEVELOPMENT OF WELFARE STATES IN EUROPE AND AMERICA 17, 25-26 (Peter Flora & Arnold J. Heidenheimer eds., 1981) (describing basic means by which welfare states pursue their goals).

You might say, given the changes wrought by such redistributions, that the welfare system converts one type of incorporeal personal property into other types of incorporeal property. See BLACK'S LAW DICTIONARY, *supra* note 72, at 1271 (defining "incorporeal personal property").

<sup>75</sup> See, e.g., Epstein, *supra* note 50, at 760 ("[W]elfare benefits . . . arise out of a conscious scheme of income support and wealth distribution . . .").

<sup>76</sup> See, e.g., *id.* at 760-61 ("Welfare benefits are transfer payments that rely on the taxes imposed upon some in order to provide the benefits that are received by others.").

on the redistribution of rights requires some explanation, however.

The Copyright Act grants to the owner of each copyrighted work the exclusive right to reproduce the work,<sup>77</sup> prepare derivative works based on it,<sup>78</sup> and distribute copies of the work to the public.<sup>79</sup> In addition, the owner of a particular type of work may win the exclusive right to publicly perform<sup>80</sup> or display it.<sup>81</sup> The Act limits those rights through various ways,<sup>82</sup> most notably through the fair use<sup>83</sup> and first sale<sup>84</sup> doctrines. Nonetheless, the Act gives a copyright owner very broad rights – and very broad power to enforce those rights.<sup>85</sup>

A copyright owner's rights do not come out of thin air. They come only at the expense of someone else's common law rights.<sup>86</sup> When, for instance, a novelist wields his copyright to forbid the unauthorized reproduction of his book, he necessarily limits the right of a printer to quietly enjoy her ink, press, and paper.<sup>87</sup> Copyright interferes not only with such

<sup>77</sup> 17 U.S.C.A. § 106(1) (West Supp. 2003).

<sup>78</sup> *Id.* § 106(2).

<sup>79</sup> *Id.* § 106(3).

<sup>80</sup> *Id.* § 106(4) (pertaining to public performance of literary, musical, dramatic and choreographic works, pantomimes, and motion pictures or other audiovisual works); *id.* § 106(6) (pertaining to public performance of sound recordings by means of digital audio transmissions).

<sup>81</sup> *Id.* § 106(5) (pertaining to public display of literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including individual images of a motion picture or other audiovisual work). *See also id.* § 106A (providing attribution and integrity rights to the authors of works of visual art).

<sup>82</sup> 17 U.S.C.A. §§ 107-122 (West Supp. 2003).

<sup>83</sup> *Id.* § 107.

<sup>84</sup> *Id.* § 109.

<sup>85</sup> *See infra* Part II.D.

<sup>86</sup> *See* Randy E. Barnett, *Reds in Suits*, REGULATION, Oct. 1, 2002, at 64-65 (reviewing LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001)) (explaining that because of copyright, "the property owner cannot fully use what he reasonably thought was his"); Bell *supra* note 36, at 763 ("[B]y invoking government power a copyright owner can impose prior restraint, fines, imprisonment, and confiscation on those engaged in peaceful expression and the quiet enjoyment of physical property.") (footnote omitted).

<sup>87</sup> Professor John Cahir of the Queen Mary Intellectual Property Research Institute, University of London, has objected that simply because copyright imposes such limits on the use of corporeal property does not mean that copyright redistributes rights. Email from John Cahir to Tom W. Bell (July 25, 2003) (on file with the author). As Professor Cahir correctly observed, a copyright owner cannot force others to reproduce her works; she can only stop them from using their corporeal property in copyright-infringing ways. Instead of proving that copyright redistributes *no* rights, however, that observation proves that copyright redistributes *partial* rights. A copyright owner wins something like joint ownership in one of the many rights enjoyed by owners of corporeal property – namely, the right to use corporeal property in certain copyright-controlled ways. Neither the owner of the copyright nor the owner of the

chattel property rights, but also with corporeal personal property rights<sup>88</sup> in general and with the rights each person has over herself<sup>89</sup> in particular. When a composer asserts her copyright to bar the unauthorized public performance of her song, for instance, she necessarily limits the rights of a singer to use his vocal chords, to express himself, and to peaceably associate with others.<sup>90</sup>

Granted, the redistributions effectuated by the welfare and copyright systems do not always raise the ire, or even attract the attention of those from whom they take property. Most taxpayers and property owners have grown accustomed to the costs imposed by welfare and copyright, and thus take

corporeal property has the right to unilaterally appropriate that jointly owned right. See, e.g., 20 AM. JUR. 2D *Cotenancy and Joint Ownership* §§ 42, 45 (2003). Copyright splits that right, formerly possessed solely by each owner of corporeal property, and redistributes part of it to copyright owners.

A similar analysis applies to the redistributions effectuated by the social welfare system. As discussed *infra* at Part II.D, the exactions that support welfare, like those that support copyright, take effect only conditionally. Just as welfare relies on someone to engage in a taxable transaction, in other words, copyright relies on someone to engage in a potentially infringing act. And just as we might say that copyright's redistributions create joint ownership in the right to use corporeal property in certain ways, we might say that welfare's redistributions create joint ownership in the right to earn income or engage in certain other transactions. One might object that once social welfare system's redistributive mechanism takes effect, it obtains absolute rights to the fiat money formerly owned by a subject taxpayer. But, again, the same in general holds true of the licenses obtained by copyright owners. By default, the owner of corporeal property constrained by a copyright license has no right to control subsequent assignment of that license. In sum, then, the parallels between copyright and welfare remain even if we focus on the partial nature of their redistributions.

<sup>88</sup> Corporeal personal property includes moveable and tangible things such as chattel property, see BLACK'S LAW DICTIONARY, *supra* note 72, at 1217, and, presumably, property in persons.

<sup>89</sup> Modern legal commentators do not tend to discuss persons as subject to property claims, no doubt for the salubrious reason that the Thirteenth Amendment of the U.S. Constitution forbids private parties from practicing slavery and involuntary servitude. It does not, however, forbid anyone from claiming a property right in him- or herself. Indeed, the liberty rights protected by the U.S. Constitution and other laws serve to ensure that each of us enjoys a variety of rights to dispose of our persons as we each, respectively, see fit. We thus have property rights over our persons. See RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY* 64 (1998) ("[R]ights that concern jurisdiction over physical resources are called property rights. Since our bodies are physical entities or resources they are included in the term."); John Locke, *The Second Treatise of Government*, in JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* ch. v, para. 27 (P. Laslett ed., Cambridge Univ. Press, 2d ed., 1960) (1689) ("[E]very Man has a Property in his own Person.") (emphasis in the original).

<sup>90</sup> See Tom W. Bell, *The Common Law in Cyberspace*, 97 Mich. L. Rev. 1746, 1763 (1999) (arguing that "[c]opyright undeniably limits our rights to use our printing presses or voices in echo of others' or to contract toward similar ends.") (footnote omitted); Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 HAMLINE L. REV. 261, 281 (1989) ("[A] system of intellectual property rights is not compossible with a system of property rights to tangible objects, especially one's own body, the foundation of the right to property in alienable objects.").

offense only when taxes rise or copyrights expand. Automatic withholding ensures that many taxpayers fail to consider the entirety of their paychecks as their own, furthermore, just as many who own property never consider using it to violate copyrights.<sup>91</sup> But those caveats speak to the practical and ethical limits of redistribution, not to its operative mechanisms. It remains true that, functionally speaking, both welfare and copyright rely on the statutory redistribution of rights to property.<sup>92</sup>

#### D. *Redistributive Mechanisms of Welfare and Copyright*

Both welfare and copyright have mechanisms for redistributing rights from one group to another. For welfare, the U.S. tax system redistributes wealth from taxpayers to the federal government<sup>93</sup> by forcing those within its scope<sup>94</sup> to liquidate some of the value of their taxable assets and transfer it to the U.S. treasury.<sup>95</sup> The federal income tax<sup>96</sup> accounts for the bulk of such transfers;<sup>97</sup> excise taxes<sup>98</sup> together with gift and estate<sup>99</sup> taxes contribute only a fraction as much. Through all

<sup>91</sup> See Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 U. CHI. L. REV. 181, 190-93 (2003) (applying a similar analysis to explain the interest group asymmetries that affect the definition of property rights).

<sup>92</sup> We might even, per Lord Macaulay's famous characterization of copyright as a "tax on readers for the purpose of giving a bounty to writers," Macaulay, *supra* note 11, say that both welfare and copyright rely on taxes, albeit of different types.

<sup>93</sup> See generally, Internal Revenue Code, 26 U.S.C.A. §§ 1-9833 (West Supp. 2002); Treasury Regulations for I.R.C., 26 C.F.R. §§ 1.0-1 to 801.6 (2003).

<sup>94</sup> See Richard Lavoie, *A World of Taxpayers? It's Not a Small World After All*, 70 UMKC L. REV. 545 (2002) (describing extraterritorial reach of U.S. tax law); Kenneth D. Heath, *The Symmetries of Citizenship: Welfare, Expatriate Taxation, and Stakeholding*, 13 GEO. IMMIGR. L.J. 533, 545 (1999) (discussing reach of U.S. taxes with regard to U.S. citizens, resident aliens, expatriated U.S. citizens, and nonresident aliens).

<sup>95</sup> See Internal Revenue Code, 26 U.S.C.A. §§ 1-1564 (West Supp. 2003) (income taxes); *id.* §§ 2001-2704 (2002) (estate and gift taxes); *id.* §§ 4001-5000 (miscellaneous excise taxes); *id.* §§ 5001-5881 (alcohol, tobacco, and certain other excise taxes).

<sup>96</sup> See OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT FOR FISCAL YEAR 2004, Historical Table 2.2 (Feb. 3, 2003) (documenting that receipts from individual income taxes constituted 46.3%, and corporate income taxes 8.0%, of federal receipts in 2002, the most recent year for which firm figures were available).

<sup>97</sup> By "such transfers" I mean to exclude federal receipts from social insurance and retirement payments, because the federal government in theory (if not practice) dedicates those payments to those programs alone.

<sup>98</sup> See OFFICE OF MANAGEMENT AND BUDGET, *supra* note 96, at Historical Table 2.2. (documenting that excise taxes constituted 3.6% of federal receipts in 2002).

<sup>99</sup> See *id.* at Historical Table 2.1, 2.5 (documenting that excise taxes

those means, and subject to a bewildering variety of conditions, private parties' taxable assets thus become the State's fiat money.<sup>100</sup> Some of that money, together with money from states' tax systems, thereafter funds social welfare programs and benefits.<sup>101</sup>

Likewise, the U.S. copyright system redistributes rights from owners of corporeal personal property – which is to say, everyone<sup>102</sup> – to owners of copyrights. The copyright system does so by empowering copyright owners, through civil lawsuits, to force others to respect their statutory rights.<sup>103</sup> Copyright owners enjoy broad remedies of those rights, including injunctions,<sup>104</sup> the impounding of infringing articles and devices used in infringement,<sup>105</sup> statutory damages or actual damages and profits,<sup>106</sup> costs and attorneys fees,<sup>107</sup> and bars on the importation of infringing articles.<sup>108</sup> They also enjoy having prosecutors combat infringement through criminal suits.<sup>109</sup> Through all these means, copyright owners effectively arrogate to themselves rights that would otherwise remain the province of others. As Justice Oliver Wendell Holmes put it, copyright “restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit.”<sup>110</sup>

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contributed \$28,400 million in receipts to the federal government in 2002, which works out to 1.4% of the total receipts of 1,853,173 million).

<sup>100</sup> See generally Sheldon D. Pollack, *Tax Complexity, Reform, and the Illusions of Tax Simplification*, 2 GEO. MASON IND. L. REV. 319 (1994); James S. Eustice, *Tax Complexity and the Tax Practitioner*, 45 TAX L. REV. 7 (1989).

<sup>101</sup> See PRWORA, Pub. L. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of U.S.C.) (authorizing, subject to a variety of conditions, block grants of federal funds to states' welfare programs).

<sup>102</sup> Because, at a minimum, each person owns his or her self. See *supra* note 89.

<sup>103</sup> See 17 U.S.C.A. § 501(a) (West Supp. 2003) (“Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer . . .”); *id.* § 501(b) (“The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right . . .”).

<sup>104</sup> *Id.* § 502.

<sup>105</sup> *Id.* § 503. See also *id.* § 506(b) (providing similar remedies in criminal cases).

<sup>106</sup> *Id.* § 504.

<sup>107</sup> *Id.* § 505.

<sup>108</sup> 17 U.S.C.A. §§ 601-03 (West Supp. 2003).

<sup>109</sup> See *id.* §§ 506, 509; 18 U.S.C.A. § 2319 (West Supp. 2003).

<sup>110</sup> *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 19 (1908) (Holmes, J., concurring).

*E. Exceptions to Redistribution by Welfare and Copyright*

The welfare system and the copyright system each include exceptions designed to avoid inefficient or inequitable redistributions of rights. When those exceptions apply, they spare taxpayers from having their wealth transferred to welfare recipients, and they spare owners of corporeal property from having their rights transferred to copyright owners. This subpart compares how such exceptions function in the welfare system with how they function in the copyright system, revealing telling similarities between the two.

Because by far the bulk of federal receipts supporting welfare comes from income taxes,<sup>111</sup> the various tax exemptions, deductions, and credits of the U.S. income tax code offer especially apt examples of exceptions to the welfare system's redistributive effects. The tax code exempts from income taxes a broad range of charitable, educational, mutual benefit, and religious institutions.<sup>112</sup> Lawmakers have never plainly expressed their reasons for granting tax-exempt status to such organizations, however.<sup>113</sup> Commentators have consequently filled that vacuum with various explanations, all of which rely in some form or another on the claim that through tax exemption the federal government subsidizes private institutions that advance worthy social policy goals, especially those policy goals that might otherwise go unfulfilled.<sup>114</sup> Relatedly, taxpayers may deduct from their reported income gifts they make to certain tax-exempt organizations.<sup>115</sup> Legislative history justifies those deductions on the grounds that such contributions promote ends that the government would otherwise have to promote at its own expense.<sup>116</sup>

Additionally, the income tax system allows personal and dependent exemptions<sup>117</sup> that, commentators agree, help to ensure that all but the wealthiest households will be allowed to retain a certain amount of income to meet such basic needs as

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<sup>111</sup> See *supra* Part II.D.

<sup>112</sup> See 26 U.S.C.A. §§ 501-30 (West Supp. 2003).

<sup>113</sup> Kevin M. Yamamoto, *Taxing Income from the Mailing List and Affinity Card Arrangements: A Proposal*, 38 SAN DIEGO L. REV. 221, 231 (2001).

<sup>114</sup> See *id.* at 231-46 (classing extant theories into three general groups and offering summaries of their tenets).

<sup>115</sup> 26 U.S.C.A. § 170 (West Supp. 2003).

<sup>116</sup> H.R. Rep. No. 75-1860, at 19 (1938), *reprinted in* 1939-1 C.B. 728.

<sup>117</sup> 26 U.S.C.A. § 151 (West Supp. 2003).

food, shelter, and housing.<sup>118</sup> Many tax credits – most notably, the earned income credit<sup>119</sup> – likewise serve to guarantee that income taxes do not take away what the welfare system would have to replace.<sup>120</sup>

Just as exceptions to the income tax aim at increasing the equity and efficiency of the social welfare system, exceptions to the scope of infringement aim at fine-tuning the copyright system. The most notable of copyright's broad exceptions, the fair use defense, satisfies both basic notions of fairness<sup>121</sup> and theoretical principles of efficiency.<sup>122</sup> The first sale doctrine, another prominent and general exception to copyright's scope, likewise bars otherwise unjust or wasteful infringement claims.<sup>123</sup> The Copyright Act also includes a variety of exceptions specifically designed to help the same sorts of parties favored by exceptions to the income tax.<sup>124</sup> Parties sheltered from the full brunt of copyright include: blind, handicapped, or disabled persons;<sup>125</sup> nonprofit educational institutions;<sup>126</sup> religious organizations;<sup>127</sup> and other nonprofit groups.<sup>128</sup>

<sup>118</sup> See BORIS I. BITTKER & MARTIN J. MCMAHON, *FEDERAL INCOME TAXATION OF INDIVIDUALS* ¶ 21-1 (2nd ed., 1995 & 2002 Supp.).

<sup>119</sup> See 26 U.S.C.A. § 32 (West Supp. 2003).

<sup>120</sup> See generally *id.* §§ 21-26 (defining a variety of nonrefundable personal credits); JAMES E. MAULE, ET AL., *TAX CREDITS: CONCEPTS AND CALCULATION* A-11 (2002) (describing credits not based on expenditures or outlays, such as earned income credit and the elderly or disabled credit, as “devices to affect the computation of tax liability in situations in which changes in the rate structures would not accomplish . . . policy goals”).

<sup>121</sup> See HOUSE COMMITTEE ON THE JUDICIARY, *supra* note 57, at 124 (1976) (explaining that “the doctrine is an equitable rule of reason”).

<sup>122</sup> See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982) (“[C]ourts and Congress have employed fair use to permit uncompensated transfers that are socially desirable but not capable of effectuation through the market.”).

<sup>123</sup> See *Parfums Givenchy, Inc. v. C & C Beauty Sales, Inc.*, 832 F. Supp. 1378, 1388 (C.D. Cal. 1993) (explaining that the first sale doctrine arises out of “policies disfavoring restraints of trade and limitations on the alienation of personal property”).

<sup>124</sup> For analogous provisions in the income tax code, see, e.g., 26 U.S.C.A. § 22 (West Supp. 2003) (providing tax credits for permanently and totally disabled persons); *id.* §§ 501-39 (providing tax exemption for certain organizations).

<sup>125</sup> See 17 U.S.C.A. § 106(8)-(9) (excusing certain performances specifically designed for and directed to blind or other handicapped persons); *id.* § 121 (excusing certain reproductions or distributions of nondramatic literary works for use by blind or other disabled persons).

<sup>126</sup> See *id.* § 110(1) (West Supp. 2003) (excusing certain performances or displays by nonprofit educational institutions). See also *id.* § 107(1) (referring to “nonprofit educational purposes” in defining the scope of the fair use defense); *id.* § 108 (excusing certain reproductions by libraries or archives).

In sum, then, welfare and copyright show a sensitivity to the potentially harmful effects of indiscriminately redistributing rights. With the apparent aim of promoting efficiency and equity, the welfare and copyright systems both include exceptions to the redistributions they normally exact. Those exceptions work to the benefit of taxpayers and owners of corporeal property, respectively, protecting them in certain cases from having their rights redistributed away.

#### F. *Protective Features of Welfare and Copyright*

Welfare policy obviously exhibits many paternalistic features, such as programs designed to encourage job training or employment,<sup>127</sup> and vouchers good only for housing or food.<sup>130</sup> Copyright policy exhibits several such features, too. Like welfare, copyright thereby aims to protect its beneficiaries from childishly succumbing to adult temptations. Because they are not so obvious as welfare's, however, copyright's protective features merit some description.

Most notably, § 203, § 304(c), and § 304(d) of the Copyright Act allow authors<sup>131</sup> to terminate copyright rights they have granted to others. Those termination rights come with strings attached, however.<sup>132</sup> The rights last for only five

<sup>127</sup> See *id.* § 110(3) (excusing certain performances or displays "in the course of services at a place of worship or other religious assembly").

<sup>128</sup> See *id.* § 110(6) (excusing certain performances by nonprofit agricultural groups); *id.* § 110(10) (excusing certain performances by nonprofit veterans' or fraternal organizations).

<sup>129</sup> See 42 U.S.C.A. § 601(a)(2) (West Supp. 2003) (defining federal welfare to have as one purpose to "end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage").

<sup>130</sup> See *infra* text accompanying note 156 (discussing limited alienability of welfare benefits).

<sup>131</sup> They also allow certain members of dead authors' estates to exercise termination rights. See 17 U.S.C.A. §§ 203(a)(1)-(2); *id.* § 304(c)-(d) (referencing parties defined in § 304(a)(1)(C)).

<sup>132</sup> See generally Kenneth D. Crews, *Looking Ahead and Shaping the Future: Provoking Change in Copyright Law*, 49 J. COPYRIGHT SOC'Y 549, 578-79 (2001) (describing scope and limits of reversionary right). Crews explains some aspects of the reversionary right as a "response to a public policy of favoring family members and heirs over an author's freedom of contract." *Id.* at 579. He does not claim that as the sole justification for the termination right, however, most aspects of which living authors can enjoy. See 17 U.S.C.A. § 203(a)(1) (West Supp. 2003) ("[T]ermination . . . may be effected by [the] author . . ."); *id.* § 203(b)(1) ("Upon the effective date of termination, all rights under this title that were covered by the terminated grants revert to the author, authors, or other persons owning termination interests . . ."); *id.* § 304(c)-(d) (granting right to parties defined in § 304(a)(1)(C), including, *inter alia*, "the author").



years,<sup>133</sup> do not arise before thirty-five years after the grant,<sup>134</sup> and require the reclaiming owner or owners to give prior notice.<sup>135</sup> Nonetheless, termination rights remain powerful and, compared to the law's typical respect for voluntary transfers of rights,<sup>136</sup> somewhat exceptional. Sections 203, 304(c), and 304(d) neither respect any agreement to the contrary<sup>137</sup> nor require terminators to compensate losing grantees.<sup>138</sup>

What justifies the Act's disregard for authors' initial grants over thirty-five years old? Legislative history<sup>139</sup> and commentary<sup>140</sup> answer that the termination rights aim to

<sup>133</sup> See 17 U.S.C.A. §§ 203(a)(3), 304(c)(3), 304(d)(2) (West Supp. 2003).

<sup>134</sup> *Id.* § 203(a)(3) (providing that termination may take effect between 35 to 40 years after the grant); *id.* § 304(c)(1), (3) (providing that termination rights apply only to grants made before January 1, 1978 and that termination can take effect only after the later of that date or 56 years from when the copyright was originally secured, thus setting a lower bound of 56 years on the length of the pre-termination grant). The termination rights afforded by § 304(d), because they arise only if the rights under § 304(c) have expired, necessarily allow an even longer pre-termination grant.

<sup>135</sup> *Id.* §§ 203(a)(4), 304(c)(4) (describing form and timing of notice of termination); § 304(d)(1) (incorporating the conditions of § 304(c)(4) by reference).

<sup>136</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979) (describing comparatively narrow conditions under which a court might refuse to enforce a contract on grounds of unconscionability and relatively constrained termination of rights effectuated in such cases).

<sup>137</sup> 17 U.S.C.A. §§ 203(a)(5), 304(c)(5) (West Supp. 2003) ("Termination . . . may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant."); *id.* § 304(d)(1) (incorporating the conditions of § 304(c)(5) by reference). *But see id.* §§ 203(b)(4), § 304(c)(6)(D), 304(d)(1) (allowing for enforceability of post-termination grant or of agreement to make such a grant if such grant or agreement occurs between certain parties and after proper notice of termination has been given).

<sup>138</sup> Sections 203, 304(c), and 304(d) do not speak to the requirement to make compensation, pro or con. No authority has found such a requirement, however, and those provisions of the Act apparently assume that terminating owners take nothing because, as the Act defines copyright, they give nothing. Query, though, whether a terminatee might on the proper facts have a claim for promissory estoppel, mistake, or fraud against a terminator.

<sup>139</sup> See HOUSE COMMITTEE ON THE JUDICIARY, NOTES ON 1976 COPYRIGHT ACT, *supra* note 57, at 124 (1976) ("A provision of this sort [i.e., § 203] 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."). The same justification clearly applies to §§ 304(c) and 304(d), which Congress enacted in order to ensure that copyright extensions would retroactively benefit extant owners of copyrights. *See id.* at 140 (justifying § 304's provision of termination rights on grounds that "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").

<sup>140</sup> Robert A. Kreiss, *Abandoning Copyrights to Try to Cut Off Termination Rights*, 58 MO. L. REV. 85, 109 (1993) (explaining that termination rights "are designed to redress the likely imbalance in bargaining strength between copyright authors and publishers or other copyright grantees"); J. H. Reichman, *Goldstein on Copyright Law: A Realist's Approach to a Technological Age*, 43 STAN. L. REV. 943, 947 (1991) (reviewing PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE (1989))

correct the sorts of bad bargains that struggling authors make in desperation and, after later success, come to regret. Termination rights reflect, in other words, a paternalistic view of authors. Authors need termination rights so they can second-guess their choices, thus correcting the market's failure to foresee and fairly price the future value of long-term grants. The now-famous Stephen King, for instance, can thereby renegotiate a publishing contract he rashly accepted as a credulous and eager novice.<sup>141</sup>

Copyright policy reveals a similar protective strategy in two other areas, albeit via mechanisms that also serve significant non-paternalist ends. First, § 204(a) of the Act renders invalid any voluntary transfer of copyright unless the copyright owner or agent signs a writing memorializing the transfer.<sup>142</sup> Because ownership in a copyright by default inheres in its author,<sup>143</sup> that provision protects authors from casually giving away their copyrights.<sup>144</sup> Because granting an exclusive license to any right created by the Act qualifies as a transfer of ownership,<sup>145</sup> moreover, § 204(a)'s demand for a signed writing extends even to a transfer as narrow as, say, the sole right to publicly display a sculpture in San Clemente, California, from dawn to dusk on February 3, 2003.<sup>146</sup> This, the Act's counterpart

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(describing right to terminate transfers as "paternalistic"); Wendy J. Gordon, *Fair Use as Market Failure: A Structural And Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1619, n.113 (1982) (arguing that in its provision of termination rights "Congress has shown special solicitude for the welfare of individual authors, even as opposed to publishers and other potential owners of copyright").

<sup>141</sup> We might well question whether termination rights in fact help an author. In fact, they probably harm most authors and help only those who least need help. See Bell, *supra* note 36, at 794-95, n. 273. We might likewise question the practical impact of some of welfare's paternalistic features. Regardless of whether those good intentions pave roads to ruin, however, copyright and welfare each try to protect their beneficiaries by limiting how freely they can dispose of their benefits.

<sup>142</sup> 17 U.S.C.A. § 204(a) (West Supp. 2003) (invalidating any transfer, other than by law, absent a memorial "in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent").

<sup>143</sup> *Id.* § 201(a) (West Supp. 2003) ("Copyright . . . vests initially in the author or authors of the work.").

<sup>144</sup> It protects subsequent, non-author owners, too, of course.

<sup>145</sup> 17 U.S.C.A. §§ 201(d)(1), (2) (West Supp. 2003).

<sup>146</sup> See, e.g., *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 36-37 (2d Cir. 1982) (holding that licensee holding exclusive right to reproduce and publicly distribute copyrighted images on adult clothing, for a specified time, in North America, may have standing to sue for infringement of that right); *Swarovski America Ltd. v. Silver Deer Ltd.*, 537 F. Supp. 1201, 1205-06 (D. Colo. 1982) (declining to dismiss copyright infringement claim by party claiming exclusive license to reproduce and publicly distribute copyrighted work in a particular area for a particular time).

to the statute of frauds, protects authors from all manner of misjudgments and swindles, from the gross to the trifling.<sup>147</sup>

Second, § 106A of the Act offers special protections to any author of a "work of visual art."<sup>148</sup> The Act defines that term, in essence, as a painting, drawing, print, sculpture, or exhibition photograph existing in a single copy or a limited edition of two hundred or fewer copies<sup>149</sup> – the *fine* visual arts, in other words. Section 106A not only gives the authors of such works special rights,<sup>150</sup> it gives those authors special protections from losing their § 106A rights in the marketplace. True, the author of a work of visual art can *waive* his § 106A rights (albeit even then only by expressly agreeing to do so in a written instrument he has signed).<sup>151</sup> Notably, however, he cannot *transfer* his § 106A rights.<sup>152</sup> However much a starving artist might like to trade his § 106A rights for cash, in other words, the Act will forbid the exchange as short sighted, denigrating, and ultimately not in the artist's best interests.<sup>153</sup>

Through a variety of mechanisms, therefore, copyright law protects its beneficiaries from the harsh realities of the real world. Perhaps those mechanisms – termination rights, requirements for written transfers of exclusive rights, and limits on the alienability of rights to works of visual art – do not imbue copyright policy with the same depth of paternalism that marks welfare policy. Nonetheless, copyright's tender concern for authors shows that it, like welfare, aims to not only redistribute rights, but to make them stick.

<sup>147</sup> Like the statute of frauds, § 204(a) serves other goals too, such as the assurance that courts will have quality evidence to adjudicate disputed agreements.

<sup>148</sup> 17 U.S.C.A. § 106A (West Supp. 2003).

<sup>149</sup> *Id.* § 101. A few other qualifications apply, such as the requirement that any limited edition work be signed and consecutively numbered by the author, and several exclusions, such as those applicable to posters, maps, merchandising items, works made for hire, or works not subject to copyright protection. *Id.*

<sup>150</sup> Such as, for instance, the right to claim authorship in the work, *id.* § 106A(a)(1)(A), and prevent any intentional modification of the work that would be prejudicial to his or her reputation, *id.* § 106A(a)(3)(A).

<sup>151</sup> *Id.* § 106A(e)(1).

<sup>152</sup> *Id.*

<sup>153</sup> See H.R. Rep. No. 101-514 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6928 (stating that "these rights are personal to the author and that, because of a relatively weak economic position, the author may be required to bargain away those rights"); Russ VerSteeg, *Federal Moral Rights for Visual Artists: Contract Theory and Analysis*, 67 WASH. L. REV. 827, 848 (1992) ("[T]he inevitable conclusion to be drawn from the Act's prohibition on the transfer of section 106A rights is that Congress sought to protect artists. Apparently, Congress was trying to rectify an imbalance of bargaining power between artists and buyers.").

### III. DISTINCTIONS BETWEEN WELFARE AND COPYRIGHT

Welfare and copyright differ, of course. Indeed, every parallel that Part II plotted between the two also revealed divergences. Even granting that both welfare and copyright redistribute rights, for instance, they still redistribute different kinds of rights.<sup>154</sup> Some of the distinctions between welfare and copyright merit more attention than others, however. This Part discusses the most important distinctions, those that either argue against the authors' welfare analogy or that reveal interesting things about copyright. Table 2 below sums them up.

**Table 2: Material Dissimilarities Between Welfare and Copyright**

<i>Subject of Comparison</i>	<i>Welfare's Version</i>	<i>Copyright's Version</i>
<b>Property-like features</b>	Due process rights only	Several
<b>Claimant's status</b>	Deserving poor	Starving artists
<b>Externalities targeted</b>	Negative and positive	Positive only
<b>Curing growth</b>	Wealth (and population)	Population (and wealth)

Of all the distinctions between welfare and copyright, the former's relative lack of property-like features argues most strongly against the claim that welfare and copyright share illuminating similarities. Copyright, in brief, looks a lot more like property than welfare does. Subpart III.A addresses that distinction, observing that neither welfare nor copyright equates to property and, thus, that their many striking parallels remain instructive. Subpart III.B analyzes another dissimilarity that threatens to undermine the authors' welfare analogy: the difference between the most sympathetic recipients of welfare, the deserving poor, and the most sympathetic recipients of copyright, starving artists. Although both types of beneficiaries can make convincing appeals to public assistance, the latter, on most views, makes a stronger claim of right. As subpart III.B argues, however, that stronger

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<sup>154</sup> See *supra* Part II.C (explaining that whereas welfare redistributes rights to money, copyright redistributes rights to chattels and persons).

claim of right does not necessarily give copyright a stronger claim on our consciences.

The remaining two dissimilarities between welfare and copyright discussed in this Part do not so much speak against the authors' welfare model as they say interesting things about copyright. Subpart III.C compares the particular sorts of failures that welfare and copyright aim to remedy, finding that although both aim to generate positive externalities, only welfare focuses on decreasing negative externalities. Subpart III.D contrasts how we might outgrow the need for welfare with how we might outgrow the need for copyright. All else being equal, economic growth tends to mitigate poverty, whereas population growth tends to render copyright superfluous.

### A. *Property-like Features*

As discussed above, welfare benefits have been awarded the same due process protections awarded to property in general.<sup>155</sup> Beyond that, however, welfare possesses few property-like features. Would-be welfare recipients cannot homestead their rights, but rather must apply for them. Nor does the law allow welfare benefits to be divided, transferred, mortgaged, or bequeathed.<sup>156</sup>

Copyright, in contrast, bears many marks of property. Owners of copyright rights can homestead them,<sup>157</sup> record them,<sup>158</sup> transfer them,<sup>159</sup> bequeath them,<sup>160</sup> subdivide them,<sup>161</sup>

<sup>155</sup> See *supra* Part II.A.3.

<sup>156</sup> See Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1752 (1997) (describing right to continued welfare payments as a "not-freely-alienable"); Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 286 (1995) ("[T]he welfare state restricts the alienation of welfare benefits – in effect, by making them illiquid, discouraging their use for idiosyncratic purposes."). Just as states generally disburse welfare benefits, so too do they regulate the alienability of those benefits. See, e.g., CAL. WELF. & INST. CODE § 11002 (West 2001) ("All aid given under a public assistance program shall be absolutely inalienable by any assignment, sale, or otherwise.").

<sup>157</sup> In other words, they can create copyright rights by mixing their authorship with a tangible medium of expression. See U.S. CONST. art. I, § 1, cl. 8 (empowering Congress to secure for authors temporary exclusive rights to their expressions); 17 U.S.C.A. § 120(a) (West Supp. 2003) (giving copyright protections to "original works of authorship fixed in any tangible medium of expression . . ."); 17 U.S.C.A. § 201(a) (West Supp. 2003) (providing that copyright "vests initially in the author or authors of a work").

<sup>158</sup> See 17 U.S.C.A. § 205 (West Supp. 2003) (providing for recordation of "[a]ny transfer of copyright ownership or other document pertaining to a copyright");

mortgage them,<sup>162</sup> and abandon them.<sup>163</sup> The Copyright Act makes infringement a strict liability offense,<sup>164</sup> moreover, and regulates transfers of rights with something quite like the Statute of Frauds rule applicable to real property transfers.<sup>165</sup> It looks increasingly likely that copyright even qualifies as "property" covered by the Fourteenth Amendment's due process clause.<sup>166</sup> Lawyers thus classify copyright as a type of intellectual property for good reason.<sup>167</sup>

Nonetheless, copyright does not bear all the marks of corporeal property. Copyright possesses certain characteristics, such as duration caps,<sup>168</sup> limited alienability,<sup>169</sup> and reliance on administrative formalities,<sup>170</sup> that the common law generally

*id.* § 408(a) (providing for registration of copyrights).

<sup>159</sup> *Id.* § 201(d)(1) ("The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law . . .").

<sup>160</sup> *Id.* ("The ownership of a copyright . . . may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.").

<sup>161</sup> *Id.* § 201(d)(2) ("Any of the exclusive rights comprised in a copyright, including any subdivision of any rights . . . may be . . . owned separately.").

<sup>162</sup> See *id.* § 101 (defining "transfer of copyright ownership" to include a mortgage); *id.* § 201(d)(1)-(2).

<sup>163</sup> Although there exists no plain statutory allowance for the abandonment of a copyright, commentators agree it is possible even as they disagree about its operation. Compare Bell, *supra* note 36, at 793-95 (arguing that Copyright Act's termination provisions should not limit effectiveness of copyright abandonment) with Kreiss, *supra* note 140, at 111-23 (arguing that they should).

<sup>164</sup> See 17 U.S.C.A. § 501(a) ("Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer . . ."); *id.* § 504(c)(2) (providing that where the copyright owner elects for statutory damages and the court finds the infringer acted innocently, "the court in its discretion may reduced the award of statutory damages to a sum of not less than \$200"); *id.* § 405(b) (denying actual or statutory damages for infringement of work publicly distributed before the effective date of the Berne Convention Implementation Act of 1988 without a copyright notice if the infringer can prove he or she was thereby misled as to the work's ownership).

<sup>165</sup> See *id.* § 204(a) (invalidating most transfers of copyright ownership "unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed").

<sup>166</sup> See Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) (holding that patents qualify as property under the 14th Amendment's Due Process Clause, rendering them protectable against states notwithstanding states' sovereign immunity); Chavez v. Arte Publico Press, 204 F.3d 601, 605 n.6 (5th Cir. 2000) (extending the reasoning of *Florida Prepaid* to copyrights). I thank Richard H. Stern for a stirring discussion of this issue.

<sup>167</sup> See GOLDSTEIN, *supra* note 24, at 8-9 (discussing the merits to and limits of the "intellectual property" label).

<sup>168</sup> 17 U.S.C.A. §§ 302-05 (West Supp. 2003).

<sup>169</sup> *Id.* § 203(a)(5) (denying enforceability of any agreement to limit the termination rights described in § 203); *id.* § 106A(e)(1) (denying transferability of rights described in § 106A(a)).

<sup>170</sup> *Id.* § 412(a) (requiring registration prior to legal action for copyright infringement); *id.* § 413 (denying certain remedies for pre-registration infringements of a copyright).

does not impose on the property rights that it respects.<sup>171</sup> Despite rhetoric to the contrary,<sup>172</sup> moreover, unauthorized use of a copyrighted work does not equate to infringement,<sup>173</sup> and infringement does not equate to theft.<sup>174</sup> As the Supreme Court said, in excusing the transport of bootleg records from criminal sanctions applicable to traffic in stolen or converted goods, "The copyright owner . . . holds no ordinary chattel . . . for the copyright holder's dominion is subjected to precisely defined limits. It follows that interference with copyright does not easily equate with theft, conversion, or fraud."<sup>175</sup> Copyright thus does not function in quite the way that corporeal property does.

More to the point, copyright differs theoretically from property as we generally understand it. Copyright rights have no foundation in common law.<sup>176</sup> To the contrary, copyright rights arise solely by modifying or negating pre-existing, customary rights to persons and chattel property.<sup>177</sup> Furthermore, copyright affects that redistribution through statutory mechanisms, making it subject to public choice distortions.<sup>178</sup> The scope and duration of copyright has thus expanded relatively rapidly under U.S. law,<sup>179</sup> in sharp contrast

<sup>171</sup> See also, 1 NIMMER & NIMMER, *supra* note 31, at §4.03, at 4-18 to 4-19 (discussing the rationale for the doctrine that publication divests common law rights in expressive works).

<sup>172</sup> Lemley, *supra* note 63, at 895 ("[T]he rhetoric and economic theory of *real* property are increasingly dominating the discourse and conclusions of the very different world of *intellectual* property.").

<sup>173</sup> See 17 U.S.C.A. §§ 107-122 (West Supp. 2003) (describing a wide variety of limits on the exclusive rights afforded under the Copyright Act).

<sup>174</sup> See *Dowling v. United States*, 473 U.S. 207, 218 (1985) ("While one may colloquially liken infringement with some general notion of wrongful appropriation, infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud."); Lemley, *supra* note 63, at 896 ("Intellectual property cases and arguments are replete with references to infringement as 'theft,' which it assuredly is not, at least in the traditional meaning of that word.") (footnote omitted). I thank Prof. Howard P. Knopf for reminding me of this particular limitation on copyright-as-property rhetoric.

<sup>175</sup> *Dowling*, 473 U.S. at 216-17 (1985) (finding interstate transport of bootleg records not subject to criminal sanctions under law forbidding interstate commerce in stolen goods).

<sup>176</sup> See *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 19 (1908) (Holmes, J., concurring) (contrasting common law rights with copyright and describing it as "a right which could not be recognized or endured for more than a limited time, and therefore . . . one which hardly can be conceived except as a product of statute, as the authorities now agree").

<sup>177</sup> See L. Ray Patterson, *Copyright and the "Exclusive Right" of Authors*, 1 J. INTELL. PROP. L. 1, 22 (1993) ("Copyright is an intrusion upon the common-law public domain."). See also *supra* Part II.C.

<sup>178</sup> See Bell, *supra* note 36, at 786-87.

<sup>179</sup> *Id.* at 780-86.

to our relatively stable, customary, and intuitive rights to persons and property.<sup>180</sup> Most fundamentally, the nonrivalrous nature of copyright's intangible subject matter – expressive works – renders it a wholly different beast from the corporeal subjects protected by common law property rights.<sup>181</sup> In sum, welfare and copyright both differ from corporeal property in practical, theoretical, and materially significant ways.

### B. *Deserving Poor vs. Starving Artists*

U.S. social welfare policy has generally aimed at helping the plight of the deserving poor. In this the United States differs markedly from many other countries, which have instead tended to redistribute wealth on grounds that citizens have rights to a certain level of wealth.<sup>182</sup> Although some commentators would have the United States likewise ignore the causes of an applicant's poverty and the incentive effects of public benefits,<sup>183</sup> that view has evidently not prevailed. To the contrary, recent reforms<sup>184</sup> reinforce the traditional U.S. approach to social welfare,<sup>185</sup> demonstrating that federal lawmakers strongly favor limiting welfare to people who cannot reasonably lift themselves out of dire poverty.<sup>186</sup> In that, the law

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<sup>180</sup> Granted, the rights afforded by common law have of necessity changed in response to copyright's rapid mutations. Copyright and common law make conflicting claims to regulate social behavior, after all, and the former consistently trumps the latter. See U.S. CONST. art. VI, cl. 2 (making the Constitution and laws made in pursuance of it "the supreme Law of the Land . . ."); 17 U.S.C.A. § 301(a) (West Supp. 2003) (generally preempting any common law rights equivalent to and within the subject matter of copyright). Nonetheless, those concomitant changes to our common law rights come by dint only of the changes effectuated by copyright itself, as lists of exceptions tacked onto our extant rights to person and property, rather than as fundamental and intentional modifications of them.

<sup>181</sup> See LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 19-22 (2001) (discussing why nonrivalrous goods merit different treatment from rivalrous ones); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L. J. 147, 184 (1998) ("[T]he nonrivalrous aspect of intellectual property infringement weakens the property rights argument").

<sup>182</sup> See ESPING-ANDERSEN, *supra* note 24.

<sup>183</sup> See *supra* Part II.A.2 (discussing secondary justification of social welfare).

<sup>184</sup> See PRWORA, H.R. 3734, 104th Cong. (1996) (replacing Aid for Families with Dependent Children with TANF).

<sup>185</sup> See 42 U.S.C.A. 601(b) (West Supp. 2003) (providing that the PRWORA "shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part").

<sup>186</sup> See, e.g., *id.* § 601(a)(2) (describing as a goal for TANF, to "end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage").



reflects long-held<sup>187</sup> and prevailing<sup>188</sup> domestic opinions about social welfare.

The way in which U.S. welfare policy regards its beneficiaries differs markedly from how U.S. copyright policy regards its beneficiaries. Far from characterizing authors as pitiable souls in desperate need of a helping hand, copyright commentary tends to characterize them as hardworking creators who risk suffering the depredations of unfair copying.<sup>189</sup> True, we sometimes talk of how copyright helps “starving artists.” But we sympathize with those peculiar geniuses because we respect their willingness to express themselves at high personal cost – not because we deign to pity them.

Query, though, whether those different characterizations lead to different perceptions of merit. Do most people regard welfare recipients as less deserving than copyright’s beneficiaries? If so, they surely should not do so as a general matter. Compare a widowed mother struggling after a long illness to find a job and feed her toddler, on the one hand, with a feckless cad coasting on royalties earned by his deceased father’s obnoxious Christmas tune,<sup>190</sup> on the other. The former demands more sympathy than the latter demands admiration.

Perhaps no one should disfavor welfare recipients as a general matter, either. Suppose, for instance, that we could not continue bearing the combined social costs of both welfare and copyright and that, for various reasons, we had to choose between continuing one or the other. Would we clearly err in favoring aid to the poor over aid to authors? Surely not. Aid to the poor has at least a *prima facie* appeal, one that authors’ advocates would, if we had to choose between welfare and copyright, have a hard time rebutting. Notwithstanding the

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<sup>187</sup> See SKOCPOL, *supra* note 1, at 234-37 (surveying American views on social welfare from the nineteenth century to the late 1970s).

<sup>188</sup> See, e.g., R. KENT WEAVER, *ENDING WELFARE AS WE KNOW IT* 174-77 (2000) (reviewing public assessments of the welfare system). Weaver summarizes the prevailing public opinion of welfare prior to the reforms of the late 1990s: “Welfare, in short, was perceived as being at odds with the widely shared American belief in individualism and the work ethic.” *Id.* at 174.

<sup>189</sup> See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (noting approvingly that copyright term extension “protects authors’ original expression from unrestricted exploitation”); *supra* Part II.A.1 (discussing primary justification for copyright protection).

<sup>190</sup> See, for instance, *Will Freeman*, a similar character played by Hugh Grant in *ABOUT A BOY* (Universal Studios 2002) – but for the sake of the exercise please try to imagine a copyright beneficiary with somewhat less rakish charm.

contrast between how we tend to regard the beneficiaries of welfare and how we tend to regard the beneficiaries of copyright, therefore, the latter cannot necessarily boast greater moral worth.

### C. *Targeting Externalities*

We care about the poor, among other reasons, because we sympathize with their plight, because we hope to gain from their improvement, and because we fear their discontent. Each of those three reasons targets externalities, whether in an effort to avoid negative externalities or to encourage positive ones. Copyright targets externalities, too, but in a more monomaniacal fashion. This subpart discusses how welfare's approach to externalities differs from copyright's<sup>191</sup> and why those differences, although interesting, do not appear to significantly detract from the utility of the "author's welfare" model of copyright.

#### 1. Welfare's Concern for Negative and Positive Externalities

We care about the poor for many reasons. Some of those reasons have little to do with externalities, while other reasons do. Most notably, we care about the poor simply because we include them in our calculations of how best to promote aggregate social utility. We regard the poor as members of our society, or in other words, deserving of our concern.<sup>192</sup> When we regard welfare policy at that general a level, it differs very little from copyright. Welfare demonstrates that we include the poor in calculating social utility; copyright demonstrates that we include authors. Instructive differences appear, however, in the contrast between welfare's and copyright's concern for externalities.<sup>193</sup>

We care about the poor in part because we sympathize with them. Moralists have long regarded that sort of sympathy

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<sup>191</sup> I thank Professor Gene Quinn for bringing to my attention that welfare and copyright target different sorts of externalities.

<sup>192</sup> I do not here attempt to delineate or justify that concern; I mean only to duly note that some explanations of welfare do not speak in terms of externalities.

<sup>193</sup> Readers who want to make more out of that broad similarity between welfare and copyright will probably find themselves less convinced by the present section's construction of a counter-argument to the paper's overall thesis. In other words, the more you disagree with me here, the more you will agree with me generally.

as a natural and attractive human trait.<sup>194</sup> The very first line of Adam Smith's *The Theory of Moral Sentiments* observes, for instance, "How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it, except the pleasure of seeing it."<sup>195</sup> Even if unavoidable and salutary, however, our powers of sympathy give us discomfort. We reflect on others' poverty, imagine their stunted lives, and suffer by proxy.<sup>196</sup> That self-imposed moral lashing encourages a number of responses. Most notably, it encourages us to try to alleviate poverty. We might thus fairly regard state efforts to alleviate poverty as a response to the failure of non-state mechanisms, such as churches, private charities, and employers, to relieve us of the negative externalities created by our sympathy with the poor.

Granted, that is neither a conventional nor a particularly uplifting account. It risks encouraging not only charity, but also some unseemly alternative responses to the negative externalities that we suffer by dint of our natural sympathies: ignore or chastise the poor.<sup>197</sup> But who can deny that many people, especially the relatively rich, pursue exactly those strategies? Viewing welfare as in part a response to our

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<sup>194</sup> See, e.g., JOHN STUART MILL, *UTILITARIANISM* (Roger Crisp ed., Oxford Univ. Press 1998) (1861); DAVID HUME, *ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS* (Tom L. Beauchamp ed., Oxford Univ. Press 3d ed. 1998) (1777); ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (D.D. Raphael & A.L. Macfie eds., Liberty Classics 1982) (1759). I thank Professor Jacob T. Levy for directing me to Smith's argument.

<sup>195</sup> SMITH, *supra* note 194, pt. I.I.I.1, at 9. See also MILL, *supra* note 194, at 30-31 ("[S]ocial feelings of mankind . . . [are] already a powerful principle in human nature . . ."); HUME, *supra* note 194, at 221 ("[W]herever we go, whatever we reflect on or converse about, everything still presents us with the view of human happiness or misery, and excites in our breast a sympathetic movement of pleasure or uneasiness."). See generally Hume, *supra* note 194, at 218-26.

<sup>196</sup> For recognition of that effect in a different context, see Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967) (defining the "demoralization costs" of uncompensated takings to include "disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered"). I thank Professor Nicole Garnett of Notre Dame School of Law for bringing Michelman's analysis to my attention.

<sup>197</sup> I thank Professor Chris Wonnell of the University of San Diego School of Law for the cautionary observation that social policy might err, so far as actually helping the poor goes, if it focuses unduly on alleviating the pains of sympathy. It might, for instance, focus more on visible and easy problems rather than low-level, difficult, and chronic ones. See E-mail from Chris Wonnell to Tom W. Bell (Nov. 14, 2002) (on file with the author).

uncomfortable sympathies explains beneficence, willful ignorance, and resentment alike, a range of responses that Adam Smith ably documented.<sup>198</sup> Later commentators have said much the same thing,<sup>199</sup> albeit in more modern and technical terms.<sup>200</sup> Readers who find that account too coldly positivist should not give up, though; there remain two other more conventional and perhaps comforting ways in which social welfare represents a response to externalities.

We also care about the poor because we seek better futures for them and, not inconsequentially, for all of us.<sup>201</sup> To the extent that their poverty prevents them from fulfilling their potential – to the extent it leaves them ill, ignorant, and uncivil – it robs the poor of more prosperous and peaceful lives. Though the benefits of becoming more healthy, informed, and civil accrue in the main to those who adopt them, especially those who start in an especially debased condition, we all benefit from living among such people. We thus care about the

<sup>198</sup> Smith began by noting that we feel others' joys more vividly than we do their troubles: "[W]e often struggle to keep down our sympathy with the sorrow of others." SMITH, *supra* note 194, pt. I.III.I.4, at 44. What accounts for that difference? Smith explained that "it is painful to go along with grief, and we always enter into it with reluctance." *Id.* pt. I.III.I.9, at 46 (footnote omitted). Then, consonant with the present claim about negative externalities, Smith observed that the well-to-do sometimes resent or try to ignore the poor:

The poor man goes out and comes in unheeded, and when in the midst of a crowd is in the same obscurity as if shut up in his own hovel . . . . [T]he dissipated and the gay . . . turn away their eyes from him, or if the extremity of his distress forces them to look at him, it is only to spurn so disagreeable an object from among them. The fortunate and the proud wonder at the insolence of human wretchedness, that it should dare to present itself before them, and with the loathsome aspect of its misery presume to disturb the serenity of their happiness.

*Id.* pt. I.III.II.1, at 51.

<sup>199</sup> See, e.g., Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1186-88 (1996) (distinguishing the negative externalities created by the mere appearance of poor people in public places from the negative externalities created by their chosen behaviors); Lester C. Thurow, *The Income Distribution as a Pure Public Good*, 85 Q.J. ECON. 327, 331 (1971) (arguing that redistribution of income is a "pure public good"). I thank Professor Lawrence H. White for bringing Thurow's classic paper to my attention.

<sup>200</sup> Having only the terminology of pre-classical economics at hand, of course, Adam Smith did not describe the effects of sympathy with the poor as a "negative externality."

<sup>201</sup> Communitarians embrace a particularly strong view of that sentiment. See, e.g., MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 150 (2d ed. 1982) (describing a view in which membership in a community manifests itself not only in "fraternal sentiments and fellow-feeling" but also in "a mode of self-understanding constitutive of the agent's identity"). Even a person who does not especially identify with those less well off may, however, have an interest in helping them to lead more productive lives.

poor, and *for* the poor, in part because we aim to enjoy more positive externalities.

Less charitably, we also care about the poor because we fear them. We fear that they will, if driven to desperation or if schooled in envy, strike out against us. In part, then, welfare policy reflects the aim of preventing negative externalities.<sup>202</sup> I do not argue that this is a heroic motivation. Neither do I argue on behalf of a cowardly social welfare policy. The Roman Empire's experience with bread and circuses alone suggests that rewarding social extortion proves both expensive and ultimately futile.<sup>203</sup> I argue merely that welfare policy reflects some concern for minimizing the negative externalities of social unrest. Readers who disagree will thus find this section's arguments, which tend to show how welfare and copyright treat externalities differently, that much less threatening to the paper's overall thesis.

## 2. Copyright's Focus on Positive Externalities

By most accounts, copyright focuses on generating positive externalities.<sup>204</sup> Even the minority account, under which copyright guards property rights in fixed expressive works, speaks far more of rendering justice to robbed copyright owners than it does of combating negative externalities.<sup>205</sup> In that regard, copyright policy differs from welfare policy, as discussed in the preceding section, because welfare policy targets at least two types of negative externalities (sympathetic suffering and social unrest) and one positive one (increased social well-being).

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<sup>202</sup> See FRANCES F. PIVEN & RICHARD CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* (2d ed. 1993) (arguing that U.S. welfare policies expand during times of civil instability so as to pacify social unrest); EPSTEIN, *supra* note 20, at 315-16 (considering welfare transfer payments as a defense against violence by welfare recipients).

<sup>203</sup> See I EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* 1101-10 (Modern Library 1932) (1776) (describing how freely available public entitlements corrupted the ancient Romans, eventually contributing to their downfall).

<sup>204</sup> See *supra* Part II.A.

<sup>205</sup> Perhaps the minority view's bias for claims of right represents a mere chance of phrasing or an argument in the alternative. Perhaps we can rightly recast it to express a concern for the negative externalities embodied in violations of copyright owners' rights. If so, the present subpart's counter-argument to this paper's overall thesis would thereby suffer a blow. If both welfare and copyright policy target both negative and positive externalities, they share that much more in common. Content to grapple with a stronger counter-argument, I will not press the claim that copyright policy targets negative externalities.

In contrast to welfare's diverse concerns, therefore, copyright concentrates on increasing the public good afforded by expressive works. That distinction hardly renders the authors' welfare model worthless, however. Welfare and copyright still share an interest in promoting positive externalities, after all, and more generally a common interest in shaping externalities so as to benefit the public. Whether those externalities qualify as negative or positive, while an interesting question, should have no more bearing on the fundamental similarities between welfare and copyright than does the distinction between increasing revenues and decreasing costs. Ultimately, it all goes to social utility's bottom line.

#### *D. Outgrowing Failure*

Growth may render both welfare and copyright unnecessary and, thus, unwanted. Importantly, however, the two systems respond to different types of growth. As subsection III.D.1 explains, economic growth offers the greatest prospect of ameliorating the need for social welfare. As a secondary and somewhat surprising consideration, that subsection also observes that population growth may encourage the same result. Subsection III.D.2, in contrast, offers population growth as a primary means of ameliorating the need for copyright. As a secondary consideration, that subsection adds that growth in wealth – both financial and cultural – promises to have a similar effect. Those interesting distinctions between welfare and copyright, however, do not render the authors' welfare model materially deficient.

##### 1. Economic (and Population) Growth Makes Welfare Less Necessary

All else being equal, economic growth ameliorates the ills that social welfare programs aim to remedy.<sup>206</sup> Assuming that poor and rich alike benefit from increases in social wealth, even if not to the same degree, at some point the poor should find it possible to escape the woes of material deficiency.

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<sup>206</sup> See Frank B. Cross, *Law and Economic Growth*, 80 TEX. L. REV. 1737, 1737 n.3 (2002) (collecting authorities in support of the claim: "Overall economic growth is instrumental to the more general well-being of a society, including the welfare of disadvantaged groups.").

Welfare's intended beneficiaries should thus find, more and more, that they can afford the market price for such basic needs as food, shelter, and clothing. Available evidence suggests that economic growth has just that effect.<sup>207</sup>

As aggregate wealth has grown, even less essential goods, such as color televisions and washing machines, have come within the reach of most welfare recipients.<sup>208</sup> Whereas poverty once posed a dire risk of death, in brief, it now tends to cause disease, discomfort, and disadvantage.<sup>209</sup> Those woes cry out for relief, of course; I do not intend to wish away the suffering they cause. I mean only to observe that they demonstrate how poverty poses less severe a market failure than it once did. Will the poor, in growing richer, face down the failures of markets, of civil institutions, and of political redistributions to cure poverty? That remains an attractive but uncertain vision of the future. For present purposes it suffices to conclude that, at least in theory, the effects of economic growth may obviate the need for social welfare programs.

Where does economic growth come from? In part, apparently, it comes from increases in population. That surprising claim has the backing of some surprising data.<sup>210</sup> That wealth and population covary makes perfect sense, though, if you understand humans as the "ultimate resource."<sup>211</sup> Not everyone does, of course, but this is no place to press the

<sup>207</sup> See Carles Boix, *Democracy, Development, and the Public Sector*, 45 AM. J. POL. SCI. 1 (2001) (reporting empirical evidence that economic growth increases the amount of wealth redistributed for purposes of promoting social welfare).

<sup>208</sup> See MAYA FEDERMAN ET. AL., LIVING CONDITIONS OF INDIVIDUALS IN POOR AND NON-POOR FAMILIES (1996), available at <http://www.iir.berkeley.edu/publications/livingfam.html#consumer> (reporting that of families receiving welfare in 1992, 92.2% had a working color television in their household and 66.3% had a working washing machine therein).

<sup>209</sup> Consider, for example, the sorts of woes that the federal administrators cite as justification for their welfare services: "[P]overty is significantly correlated with bad results for families: poor nutrition and health, unsafe housing, dangerous neighborhoods, and inadequate cognitive development of children." DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, OFFICE OF FAMILY ASSISTANCE, HELPING FAMILIES ACHIEVE SELF-SUFFICIENCY: A GUIDE ON FUNDING SERVICES FOR CHILDREN AND FAMILIES THROUGH THE TANF PROGRAM 5 (1999), available at <http://www.acf.hhs.gov/programs/ofa/funds2.pdf>.

<sup>210</sup> See JULIAN L. SIMON, THE ULTIMATE RESOURCE 2, at pt. 2 (rev. ed., 1996).

<sup>211</sup> As did, of course, the late Dr. Simon; see *id.* See also BJØRN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD (2001) (collecting data that environmental conditions and human welfare have improved with increases in population). The parallels between the arguments of Simon and Lomborg arise, in part, because Lomborg converted from a mainstream, alarmist environmentalist when he tried, unsuccessfully to refute many of Simon's claims. See *id.* at xix.

point. I offer it only as an interesting link between welfare and copyright, one that partially counterbalances this subpart's argument that the woes of poverty and unoriginality demand different cures.

This subsection's argument – that increases in wealth mitigate the need for social welfare – remains sound even if one thinks wealth unlikely to increase or if one thinks increased population destroys wealth. One may go so far as to assume that humankind will soon perish under its own weight. The present argument asks only that one grant the logic behind the claim that *if* wealth increases, all else being equal, the poor will benefit.

## 2. Population (and Wealth) Growth Makes Copyright Less Necessary

All else being equal, population growth should ameliorate the ills that copyright protection aims to remedy. Why? Because, in brief, population growth will increase the ratio between the revenues generated by authorship and the costs of creating, reproducing, and distributing expressive works. In other words, population growth will increase authors' profits, thus eventually rendering copyright's incentives inefficiently overcompensatory. This subsection spells out that argument in a bit more detail.<sup>212</sup>

Two features distinguish copyrighted works from corporeal types of property: non-rivalry in consumption together with low marginal costs of reproduction and distribution. But many types of copyrighted works – including notably valuable ones like movies, books, and software – cost a good deal to initially produce. Authors thus rightly fear that they will not recoup their production costs without a statutory right to limit the unauthorized reproduction and distribution of their works; hence, the utilitarian justification for granting copyright protection to expressive works.<sup>213</sup>

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<sup>212</sup> To some degree, the analysis parallels that standardly used to describe the economies of scale enjoyed by natural monopolies. See, e.g., Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CALIF. L. REV. 479, 595-97 (1998) (distinguishing natural monopolies from network effects). The crucial difference, however, arises in that *anyone* can enjoy the low marginal costs of reproducing an expressive work – not just the party who incurred fixed costs by producing the work. The economies of scale in producing expressive works thus do not accrue solely to the benefit of any would-be natural monopolist.

<sup>213</sup> See Landes & Posner, *supra* note 37, at 326-29.



There exist other mechanisms for encouraging the production of expressive works, including tips, patronage, automated rights management, and contract law.<sup>214</sup> To the extent that those alternatives allow more unauthorized uses than copyright law does, however, they give a potential author less incentive to become an actual author. Such “leaky” alternatives to copyright thus threaten to under-stimulate the production of expressive works.<sup>215</sup> Nevertheless, population growth promises to redeem those alternatives to copyright by increasing authors’ profits.

Holding all else equal, an increase in the number of people who access an expressive work ought to increase the net revenues generated by controlling access to that work. That remains true regardless of whether copyright or other, non-statutory mechanisms impose tolls for accessing the work. At the same time, the relatively low cost of jointly consuming expressive works – their non-rivalry – should hold steady as population increases. The marginal costs of reproducing and distributing copyrighted works looks likely to hold steady, too. Perhaps, thanks to technological improvements or network effects, those “retail” costs of selling access to expressive works will even drop. However, population increases appear unlikely to affect the “wholesale” costs of initially creating expressive works. Holding all else equal,<sup>216</sup> therefore, the profits afforded by creating, distributing, and selling access to expressive works should increase as population increases.<sup>217</sup>

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<sup>214</sup> See Eric Schlachter, *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet*, 12 BERKELEY TECH. L.J. 15, 38-44 (1997) (describing a variety of technologies for protecting expressive works).

<sup>215</sup> Cf. James Boyle, *Cruel, Mean, or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property*, 53 VAND. L. REV. 2007, 2029-30 (2000) (observing that policymakers concerned solely about economic effects might approve of a “leaky” copyright system so long as it provides “adequate incentives to the producer of the information good”).

<sup>216</sup> In practice, of course, it is not likely that all else will hold equal. Professor Tim Wu has suggested that alternatives to copyright may distort the market for expressive works in unfortunate ways or drive wasteful “arms races” of protection and counter-protection. Email from Tim Wu to Tom W. Bell (Sept. 23, 2002) (on file with the author). Professor Glynn S. Lunney has argued that the tendency of spending on luxury goods – including, notably, access to expressive works – to increase with per capita income threatens to affect the economics of expressive works in unpredictable ways. Email from Glynn S. Lunney to Tom W. Bell (Sept. 19, 2002) (on file with the author). I regard those objections as sufficiently speculative to leave the present argument plausible, however, and defer to another day a fuller treatment of those and related questions about the future of copyright.

<sup>217</sup> That is not to say, however, that in practice each author’s profits would increase. If we relax the assumption that they will hold equal, we should expect

Perhaps a lightly populated, large, and semi-agricultural country with slow and costly communications requires copyright law to encourage optimal production of expressive works. It seems that those who wrote and ratified the U.S. Constitution thought as much. But however well that justification for copyright worked in years past, it works decreasingly well now. As population grows larger, and authorship grows more profitable, copyright grows inefficiently overprotective. Looking forward, we cannot only imagine a world where generosity, technology, and common law rights supplant copyright law, we can anticipate it.

Growth in wealth also promises to help ameliorate the need for copyright's special statutory protections. In part, it will do so for the same reasons that growth in wealth promises to help ameliorate the need for welfare. As with regard to markets for food and shelter, increased wealth should, all else being equal, make it easier both for people to buy access to copyrighted works and for authors to fund their creative efforts. More particularly, growth in the wealth of expressive works to which we have access will also help to ameliorate the need for copyright. As time passes, we enjoy larger and larger stockpiles of expressive works. Additionally, the digital intermedia make works old and new more readily available than ever before. Even if copyright were necessary in the late 1700s – when books were relatively expensive, authors really did risk starvation, and even the best libraries had scant pickings – copyright has gotten less and less necessary as material and cultural wealth has increased.

#### IV. AGAINST THE RELEVANCE OF THE AUTHORS' WELFARE MODEL

In contrast to the prior Part, which aired arguments that dissimilarities between welfare and copyright render the authors' welfare model uninformative, the present Part airs two arguments that the model says nothing interesting. Both arguments issue from the point of view of legal positivism.<sup>218</sup>

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competition from extant owners of expressive works and entry by would-be authors to move the market to a new equilibrium reflecting some mixture of increased supply and decreased prices. Again, though, I defer a full analysis of those effects, reasoning it would exceed the bounds of the present paper and not fundamentally change the conclusion that population growth tends to render copyright inefficiently overprotective.

<sup>218</sup> More precisely, they issue from the point of view of statist legal positivism.

Under the first argument, the authors' welfare model offers merely another of many possible proofs that legal rights rely on state power. Subpart IV.A. considers that argument and condemns it for trying to prove far more than we can reasonably accept. Under the second and related argument, the authors' welfare model errs in characterizing copyright as a mechanism for redistributing rights, which instead state authorities define *ab initio*. Subpart IV.B considers that argument and dismisses it as equally applicable to welfare, thus leaving the authors' welfare model unimpeached.

In addition, either of the legal positivist arguments looks suspect insofar as it relies on a claim that rights derive solely from the exercise of state power. Such a claim would contradict the foundations of U.S. law,<sup>219</sup> overwhelming evidence that rights to person and property arose prior to and exist independently of the state,<sup>220</sup> and even the dictates of logic.<sup>221</sup> Regardless of their sufficiency, however, those counterarguments are not necessary to reject the legal positivist arguments reviewed in the following subparts, which instead prove susceptible to more particular critiques.

#### A. *Banality of the Authors' Welfare Model*

A legal positivist might critique the authors' welfare model of copyright as merely another example of the universal principle that state authorities define legal rights.<sup>222</sup> As such,

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See BARNETT, *supra* note 89, at 18-22 (explaining the difference between statist legal positivism and natural legal positivism). Because natural legal positivism almost certainly supports rather than undermines the claim that both welfare and copyright redistribute rights, *see* Barnett, *supra* note 86, this Part's discussion of arguments from legal positivism concerns only those arising from the statist variety.

<sup>219</sup> Both the Declaration of Independence and the U.S. Constitution plainly reflect the view, as does social contract theory in general, that those who enter into governments bring pre-existing rights with them. *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[A]ll men . . . are endowed by their creator with certain inalienable rights . . ."); U.S. CONST. amend. IX (referring to rights retained by the people).

<sup>220</sup> *See, e.g.*, BRUCE BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE* (1990).

<sup>221</sup> *See* Tom G. Palmer, *Saving Rights Theory from Its Friends*, in *INDIVIDUAL RIGHTS RECONSIDERED* 35, 40-52 (Tibor Machan ed., 2001) (criticizing statist legal positivism for infinite regress, circularity, and incoherence).

<sup>222</sup> *See, e.g.*, STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 19 (1999) ("Statelessness spells rightslessness."); JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 212 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832) ("[E]very law simply and strictly so called . . . is set directly or circuitously, by a monarch or sovereign number, to a person or persons in a state of subjection to its author.").

the model would fail to illustrate anything very fundamental or interesting. On that view, one might just as well analogize copyrights to broadcast licenses, lottery tickets, taxicab medallions, or any other right enforced by state coercion, because they all reveal the same banal truth.<sup>223</sup>

That argument fails because it tries to prove too much. Regardless of whether they have similar traits in a very general and fundamental sense, different legal rights have materially different details. At the least, a legal positivist (of all people) ought to take heed of the fact that U.S. courts favor common law rights over statutory rights. The Supreme Court has long held that "statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."<sup>224</sup> As a practical matter, therefore, the rights created by welfare and copyright legislation share the same inferior status relative to the common law rights that they contradict.

More generally, why would a legal positivist deny that courts and commentators can find instructive parallels between rights, such as welfare rights and copyright rights, that share a great deal in common? An overzealous positivist might just as well argue that we should abandon arguments from legal precedent because, in a very general and fundamental sense, all judicial decisions represent determinations of legal rights. Courts and commentators rightly resist so corrosive an effect of pure theory,<sup>225</sup> continuing instead to rely on the case-by-case reasoning that has served the law so long and so well.<sup>226</sup>

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<sup>223</sup> I thank Professors Eugene Volokh and Justin Hughes for independently offering this critique of the authors' welfare model.

<sup>224</sup> *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)) (omission in original). *See also* *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (stating that Congress legislates against a backdrop of common law principles); *Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983) (quoting *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch.) 603 (1813) (explaining that common law principles "ought not be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose")).

<sup>225</sup> *See* OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Little, Brown & Co. 1944) (1881) ("The life of the law has not been logic: it has been experience.").

<sup>226</sup> *See* ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTY* 303 (1988) (contrasting the prevailing theoretical bent of moral philosophy with legal reasoning and observing: "If we go back even to Coke or Clarendon, the history of Anglo-American common law has never despised 'case studies.'").

B. *Copyright's Definition, Rather than Redistribution, of Rights*

Relatedly, a legal positivist might argue that because all rights derive from the exercise of sovereign authority, the authors' welfare model errs in describing copyright as a statutory mechanism for *redistributing* rights. To call copyright "redistributive," the positivist might object, wrongly presumes that rights exist prior to the state.<sup>227</sup> The critique would conclude with the claim that copyright merely serves as one of the many tools, like tort or criminal law, through which state authorities *define* rights to tangible property.<sup>228</sup>

Because that argument applies just as well to welfare<sup>229</sup> as to copyright, however, it does nothing to diminish the authors' welfare model. If copyright does not redistribute rights, then neither does welfare. In that event, both systems would define rights in the first instance. Even generously granting the legal positivist argument against the whole notion of redistribution, the analogy between welfare and copyright remains unblemished.

V. RAMIFICATIONS OF UNDERSTANDING COPYRIGHT AS AUTHORS' WELFARE

Understanding copyright as akin to welfare suggests at least two conclusions: We should reconsider how we speak (and thus think) about copyright, and we should consider changing the laws that create and sustain it. Subpart V.A takes up the former topic, discussing how the authors' welfare model might improve rhetoric about copyright. Subpart V.B takes up the latter, discussing what the authors' welfare model suggests about reforming copyright policy.

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<sup>227</sup> See, e.g., HOLMES & SUNSTEIN, *supra* note 222, at 17 ("Under American law, rights are powers granted by the political community.").

<sup>228</sup> I thank Professors Tony Arnold and Kurt Eggert for independently offering this critique of the authors' welfare model.

<sup>229</sup> Relatedly, commentators have argued that welfare rights are no different in principle from other rights, as enforcement of any right gives rise to social costs. See, e.g., HOLMES & SUNSTEIN, *supra* note 222, at 219 ("[A]pparently nonwelfare rights are welfare rights, too.").

## A. Copyright Rhetoric

Rhetoric matters. Far from mere word play, it changes minds<sup>230</sup> and, thus, actions.<sup>231</sup> Misleading rhetoric<sup>232</sup> can therefore lead to unfortunate choices, actions, or habits.<sup>233</sup> Conversely, better rhetoric – rhetoric that gives us useful handles for the world<sup>234</sup> – can remedy the ills caused by wrong words, encouraging us to act more efficiently and equitably.

What does the above catalog of similarities, dissimilarities, and ramifications thereof suggest about how we might improve the rhetoric of copyright? In brief, it suggests that we should question how well the language of property applies to copyright and that we should experiment with the “authors’ welfare” analogy. The following two subsections respectively expand on those points.

### 1. Copyrights as Entitlements

The material similarities between welfare and copyright suggest that we should not wholeheartedly characterize copyright as a form of property. Granted, as discussed above, welfare rights have fewer property-like features than copyright rights do.<sup>235</sup> As also discussed above, however, welfare and copyright continue to share material dissimilarities with corporeal property.<sup>236</sup> The authors’ welfare model thus suggests

<sup>230</sup> See ARISTOTLE, RHETORIC, bk. I, ch. 2, at 1355b27-28 (W. Rhys Roberts trans.) (c. 335-20 B.C.), in II THE COMPLETE WORKS OF ARISTOTLE 2155 (Jonathan Barnes ed., 1984) (“Rhetoric may be defined as the faculty of observing in any given case the available means of persuasion.”).

<sup>231</sup> See ARISTOTLE, NICOMACHEAN ETHICS, bk. VI, ch. 2, at 1139a32-3 (W.D. Ross, trans., rev. by J.O. Urmson) (c. 335-20 B.C.), in II THE COMPLETE WORKS OF ARISTOTLE 1798 (Jonathan Barnes ed., 1984) (“The origin of action . . . is choice, and that of choice, and that of choice is desire and reasoning with a view to an end.”).

<sup>232</sup> See ARISTOTLE, RHETORIC, bk. I, ch. 1, at 1355b18 (W. Rhys Roberts trans.) (c. 335-20 B.C.), in II THE COMPLETE WORKS OF ARISTOTLE 2155 (Jonathan Barnes ed., 1984) (“What makes a man a sophist is not his abilities but his choices.”).

<sup>233</sup> In other words, unfortunate words can encourage vice. See generally ARISTOTLE, RHETORIC, bk. II, ch. 1-4 (W. Rhys Roberts trans.) (c. 335-20 B.C.), in II THE COMPLETE WORKS OF ARISTOTLE 2154 (Jonathan Barnes ed., 1984) (characterizing virtue and vice in terms of good and bad habits).

<sup>234</sup> See ARISTOTLE, NICOMACHEAN ETHICS, bk. III, ch. 2, at 1405a10-11 (W.D. Ross, trans., rev. by J.O. Urmson) (c. 335-20 B.C.), in II THE COMPLETE WORKS OF ARISTOTLE 1729 (Jonathan Barnes ed., 1984) (“Metaphors . . . must be fitting, which means that they must fairly correspond to the thing signified.”). See also *id.* bk. III, ch. 4, at 1406b26 (explaining that similes “are to be employed just as metaphors are employed . . .”).

<sup>235</sup> See *supra* Part III.A.

<sup>236</sup> See *id.*

viewing copyright not as a property right but rather as a statutory entitlement.

I compare the role of property in copyright rhetoric to the alternative offered by welfare both because the former proves so popular and because the latter offers such an original and revealing view of copyright. The authors' welfare model encourages us to ask questions different from those triggered by the property model and to explore interesting answers to those questions.<sup>237</sup> There remain other ways of viewing copyright, however. I here briefly touch on two of them,<sup>238</sup> albeit solely to explain why I do not contrast them with the authors' welfare model.

Although the leading justification of copyright clearly frames it in terms of social utility,<sup>239</sup> it tends to treat copyright as a singular and unique instrument of public policy. It does not, in other words, rely on an analogy between copyright and any other particular program or institution. Many or most public policies aim at social utility; few if any expressly admit to harming the public in the name of some overriding goal.<sup>240</sup> Most commentators who take the social utility view analyze copyright in the same generic terms employed by all policy wonks.<sup>241</sup> Such commentators would probably not feel compelled to choose between the property and welfare models of copyright discussed here.

Notwithstanding the "non-model" stance of that school of copyright, some of its adherents<sup>242</sup> arguably view copyright as akin to a particular type of quasi-public institution: the

<sup>237</sup> By way of example, the authors' welfare model encouraged me to ask first myself, and then my peers, whether it would constitute a taking under the Fifth Amendment were lawmakers to reduce the scope or term of copyright. See Tom W. Bell, *Could Amending the (C) Act Constitute a Taking?*, Email from Tom W. Bell to CyberProf listserve (March 3, 2003) (copy on file with the author). I might not have thought to ask that question if I had not had welfare reform in mind. A lively discussion followed, demonstrating how the authors' welfare model can help even experts in copyright law to discover new legal issues.

<sup>238</sup> For discussion of yet another copyright metaphor, one based on paternity, see Rose, *supra* note 18. I do not treat the metaphor separately, however, as it appears so closely linked to the property metaphor.

<sup>239</sup> See *supra* Part II.A.1.

<sup>240</sup> Even politicians who enslave and kill their subjects tend to tout larger, long-term utility gains, if only for particular constituents.

<sup>241</sup> See, e.g., Landes & Posner, *supra* note 37.

<sup>242</sup> See, e.g., Julie E. Cohen, Lochner in Cyberspace: *The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462 (1998); Dennis S. Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, 22 U. DAYTON L. REV. 511(1997); Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

common carrier.<sup>243</sup> On that view, lawmakers loan private parties the state's power to seize property – real property in the case of common carriers exercising the power of eminent domain,<sup>244</sup> and rights to chattels and persons in the case of authors exercising copyrights.<sup>245</sup> Lawmakers condition that statutory monopoly, however, on giving the public nondiscriminatory access to the resulting benefits – carriage in the case of transportation and telecommunications networks,<sup>246</sup> and fair use<sup>247</sup> in the case of copyrighted works.<sup>248</sup> That common carrier analogy to copyright remains at best implicit. I will thus not press the point here. It seems more prudent to forestall comparing the welfare model of copyright to the common carrier model unless and until commentators expressly embrace the latter view.

We already have good reasons to regard copyright as a form of entitlement, however. At the least, we ought to do so as a judicious counterbalance to the rise of rhetoric that inaccurately equates copyright to corporeal property. Even apart from its use as a palliative, moreover, the authors' welfare model offers us a fresh perspective on copyright's old problems.

## 2. Metaphorically Experimenting with "Authors' Welfare"

Comparing the limitations of the property metaphor with the advantages of the welfare metaphor suggests that we might benefit from considering copyright in light of the latter. It does not give us cause to wholly abandon the copyright-as-property model, of course. It simply gives us cause to experiment with the authors' welfare model. One might say

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<sup>243</sup> For a characterization of that as a "circuit switched" model of copyright, see Bell, *supra* note 36, at 804.

<sup>244</sup> See James H. Lister, *The Rights of Common Carriers and the Decision Whether to be a Common Carrier or a Non-Regulated Communications Provider*, 53 FED. COMM. L.J. 91, 103 (2000) (describing how federal and state laws allow delegation of power of eminent domain to common carriers).

<sup>245</sup> See *supra* Part II.D.

<sup>246</sup> See EPSTEIN, *supra* note 20, at 168-69 (describing obligations that common carriers must bear in return for enjoying the benefits of eminent domain).

<sup>247</sup> See 17 U.S.C.A. § 107 (West Supp. 2003).

<sup>248</sup> The common carrier model of copyright arguably suggests compulsory licensing rather than fair use as the way to provide the public with discriminatory access to copyrighted works, however, because those who avail themselves of fair use resemble free riders more than they do paying passengers.



that property and welfare offer us different maps of copyright's sphere, generated by different projections. Because neither map equals the territory,<sup>249</sup> and each has its uses, it behooves us to understand copyright as like both property *and* welfare.

I do not mean to equate those two views of copyright, however. Some metaphors have more use than others have. A poor metaphor might illustrate only relatively few or unimportant things about copyright, perhaps even misleading us in harmful ways. Contrariwise, a better metaphor for copyright might enrich the coherence, power, and accuracy of our thinking. We thus can and should eventually evaluate the relative virtues of the property and welfare models of copyright. But that should come later, after we have had time to put the welfare model to more use. The arguments set forth here against the property analogy and for the welfare analogy thus aim merely to encourage metaphorical experimentation.<sup>250</sup>

In the spirit of encouraging such experimentation, Table 3 below displays some parallels between the extant terminology of welfare and the suggested terminology of copyright. Readers will find the reasons for most of those pairings obvious by this point, as I have employed "authors' welfare," "copyright system," and "redistribution of rights" throughout this paper. What about the parallel between "AFDC" and "ACPE"? The former, of course, stood for "Aid for Families with Dependent Children," a federal program effectively abolished in 1996.<sup>251</sup> The latter, fictional acronym stands for "Aid for Creators with Positive Externalities."<sup>252</sup> Though admittedly a bit of a jape, the term both accurately reflects the primary justification for copyright<sup>253</sup> and suggests that, like AFDC, copyright represents yet another welfare program ripe for reform.

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<sup>249</sup> See ALFRED KORZYBSKI, *SCIENCE AND SANITY* 58 (1958) ("A map is not the territory . . .").

<sup>250</sup> So-called both because it would test the welfare metaphor in actual use and because any such rhetorical science, far from employing lab-coats and beakers, must embrace a good deal of art.

<sup>251</sup> See PROWORA, Pub. L. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of U.S.C.) (repealing AFDC and replacing it with TANF).

<sup>252</sup> I borrow it from Bell, *supra* note 9, at 6.

<sup>253</sup> See *supra* Part II.A.1.

**Table 3: Terminological Parallels Between Welfare and Copyright**

<i>Term</i>	<i>Welfare's Version</i>	<i>Copyright's Version</i>
<b>Policy</b>	Social welfare	Authors' welfare
<b>Institution</b>	Welfare system	Copyright system
<b>Mechanism</b>	Redistribution of wealth	Redistribution of rights
<b>Acronym</b>	AFDC	ACPE

### *B. Copyright Policy*

The material similarities between welfare and copyright suggest that U.S. lawmakers should consider reforming copyright for the reasons and in the ways that they recently reformed welfare. Because both welfare and copyright represent exceptional responses to market failure,<sup>254</sup> the policies supporting them derive their justifications only contingently, based on the continued existence of problems sufficient to necessitate the statutory redistributions of rights that alone give rise to welfare and copyright.<sup>255</sup> Both welfare and copyright should thus change in scope as the world around them changes.<sup>256</sup> For various reasons,<sup>257</sup> however, we cannot expect lawmakers to fine-tune any entitlement program in exact step with its beneficiaries' needs. Indeed, we might well prefer that lawmakers not even attempt such micromanagement. Welfare reform wisely sidestepped that problem by building responsiveness into the program, restructuring benefits so as to encourage recipients to wean themselves off of public assistance.<sup>258</sup> Copyright reformers would do well to adopt a similar approach.

Why should reform aim at weaning copyright owners from their reliance on statutory rights? Much of the argument for that policy follows as a matter of course from the analogy between welfare and copyright. In brief, both represent necessary evils that, as such, should shrink as they become redundant.<sup>259</sup> Because the social costs of welfare – coercively

<sup>254</sup> See *supra* Part II.A.

<sup>255</sup> See *supra* Part II.C, D.

<sup>256</sup> See *supra* Part III.D.

<sup>257</sup> Among such reasons: public choice problems, institutional inertia, and limits on information available to lawmakers.

<sup>258</sup> See generally WEAVER, *supra* note 188, at 328-35.

<sup>259</sup> Regarding that view of copyright, see generally Bell, *supra* note 36.

redistributing wealth and encouraging sloth – may appear more salient than those of copyright, it bears emphasizing that copyright's benefits do not come for free. As already noted, copyright relies on forcibly redistributing rights no less than welfare does.<sup>260</sup> By dint of the artificial monopoly it creates, moreover, copyright imposes deadweight social losses.<sup>261</sup>

The entitlements afforded by the copyright system, like those afforded by the welfare system, also have untoward effects. Stories about “welfare queens” and concern about the incentive effects of public assistance helped to generate widespread support for welfare reform.<sup>262</sup> We might likewise speak of “copyright kings” who abuse their statutory rights by making bogus legal threats or who, thanks to lawmakers’ liberal extensions of copyright terms, grow increasingly dependent on the royalties earned on old works.

None of this goes to show that either welfare or copyright imposes a net social loss. Rather, it goes to show that both welfare and copyright impose gross social costs and, crucially, that each policy merits reforms ensuring that its costs do not exceed its benefits. Recent welfare reforms implemented mechanisms that, however imperfect, at least aspire to that goal. Copyright policy, in contrast, thus far reflects almost no awareness of the concomitant need to ensure that authors do not over-rely on their statutory rights.<sup>263</sup>

Copyright commentators have only just begun to recognize the need for such reforms. Professor Lawrence Lessig, for instance, recently called for requiring that copyright protection of a work be conditioned on its owner paying a small fee fifty years after the work’s publication.<sup>264</sup> That would at least have the salutary effect of removing clearly unwanted statutory protections. Copyright owners would have little incentive to actually forego their statutory protections, however, unless such fees came more rapidly and at steeply

<sup>260</sup> See *supra* Part II.C.

<sup>261</sup> See Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 995-96 (2002) (explaining that the economic rents afforded by copyright, because they allow a copyright owner price use of a work above the owner’s marginal costs, creates deadweight social losses); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 293 (1996) (same).

<sup>262</sup> See WEAVER, *supra* note 188, at 171-72.

<sup>263</sup> But see Bell, *supra* note 36, at 798-801 (arguing that copyright the misuse doctrine reflects a concern about abuse of statutory rights).

<sup>264</sup> Lawrence Lessig, *Protecting Mickey Mouse at Art’s Expense*, N.Y. TIMES, Jan. 18, 2003, at A17 (op-ed).

increasing rates, in a manner akin to patent fees.<sup>265</sup> I, too, have elsewhere suggested reforms designed to open exit options from copyright's statutory scheme.<sup>266</sup> To judge from welfare reform, ending copyright as we know it will require much more detailed policy proposals than commentators have yet to muster. The authors' welfare model offers few particulars in that regard. But it does suggest broad outlines for copyright reform. It also makes the appeal of such reforms more readily apparent. As the next and concluding Part explains, that should prove an increasingly useful service.

## VI. CONCLUSION: ENDING COPYRIGHT AS WE KNOW IT

This Article's introduction suggested that readers might fruitfully hold the authors' welfare model to something like the novelty, non-obviousness, and usefulness standards applied to U.S. utility patents.<sup>267</sup> I think it meets that test, naturally, even as I realize that some readers might disagree. Trusting that at least some readers will find that the authors' welfare model offers a new and helpful advance in copyright commentary, I will not repeat the arguments on its behalf. Instead, I here close by discussing the advantages of employing the model. To recur to the patent analogy, in other words, I turn from defending the idea's validity to encouraging its use.<sup>268</sup>

Copyright policy has, in recent years, become a matter of heated public debate.<sup>269</sup> While that fresh burst of attention may give copyright commentators cause to celebrate, it also indicates that copyright policy has encountered more difficult problems than it has ever encountered before. Evidently, no old solution has yet to solve them. The authors' welfare model thus merits consideration if only because it offers a new approach and possibly some new solutions to the new problems of copyright policy.

Additionally, the authors' welfare model should prove especially useful in the sort of deliberations that will

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<sup>265</sup> See 37 C.F.R. § 1.16-28 (2001) (describing various patent fees).

<sup>266</sup> See Bell, *supra* note 36, at 793-803.

<sup>267</sup> See *supra* Part I.

<sup>268</sup> Unlike the typical patentee, however, I do not aim to license my arguments.

<sup>269</sup> See Siva Vaidhyanathan, *After the Copyright Smackdown: What Next*, SALON, Jan. 17, 2003, at <http://archive.salon.com/tech/feature/2003/01/17/copyright/> (last visited on June 12, 2003) (claiming "public awareness of copyright has blossomed.").

increasingly shape copyright policy. As Professor Shubha Ghosh has suggested, the recent Supreme Court case of *Eldred v. Reno*<sup>270</sup> stands to “deconstitutionalize” copyright policy, making it less a matter for judges and lawyers to shape than for legislators, lobbyists, commentators, voters, and consumers.<sup>271</sup> To them, for whom the rhetoric of property has so often proved influential, the authors’ welfare model offers a particularly accessible and usefully fresh view of copyright policy.

The authors’ welfare model certainly does not offer the one true view of copyright; no mere analogy could. It probably does not offer the best view of copyright for all purposes, either. Because different tasks call for different tools, other models of copyright may prove more useful in particular cases. Perhaps the authors’ welfare model does not even offer a better view of copyright, all told, than older, more established views. Even so, it would still offer a novel view of copyright, one that merits further experimental use.

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<sup>270</sup> 537 U.S. 186 (2003).

<sup>271</sup> See Siva Vaidhyanathan, *supra* note 269 (quoting Shubha Ghosh).