

## A CRITIQUE OF COPYRIGHT CRITICISMS

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### INTRODUCTION

Copyright has been a controversial topic, perhaps since its introduction, but certainly for at least the last century and a half.<sup>1</sup> It is slightly jarring to realize that our current disputes, which often seem so novel and topical, are little more than rehashes of very old discussions. It is disheartening to note how few of these controversies seem to have been resolved over this lengthy period of time. It is also somewhat surprising the extent to which our current debates, even those appearing in academic journals and couched in academic jargon, often rely upon extreme assumptions in an attempt, apparently, to support a particular point of view as strongly as possible.

The purview of this Article is to examine some of these questionable assumptions and claims, theoretical and empirical, made by critics of copyright. These claims are part of the mainstream analysis within the academy.

This Article begins by discussing the overarching logic of copyright protection, which is usually based on a strong utilitarian or economic framework. In the United States, this approach is supported by the language of the Constitution, which states that ownership over a creative work is provided in order to induce the creation of those types of works.<sup>2</sup>

Next, the distinction between property rights and economic monopolies is examined. All property rights, by definition, provide literal monopolies on the usage of the owned item. Economic monopolies, by contrast, are based on a lack of substitute products in a market. The definitional monopoly provided by copyright is frequently conflated with an economic monopoly, to the detriment of analytical rigor.

This is followed by an examination of a claim that the production of creative works may not respond to the payments being made for those works. The frequency with which this claim is repeated as a criticism of

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<sup>1</sup> Virtually the entire modern discussion of the pros and cons of copyright can be found in the much earlier discussions and debates of the British Royal Commission on Copyright, conducted in the 1870s. *See THE ROYAL COMMISSION ON COPYRIGHT, ROYAL COMMISSIONS AND REPORT BY THE COMMISSIONERS (1878)* [hereinafter *ROYAL COMMISSIONS AND REPORT*]; *THE ROYAL COMMISSION ON COPYRIGHT, MINUTES OF THE EVIDENCE TAKEN BEFORE THE ROYAL COMMISSION ON COPYRIGHT, (1878)* [hereinafter *MINUTES OF THE EVIDENCE*].

<sup>2</sup> U.S. CONST. art. I, § 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]”).

copyright is odd given the infrequency with which such claims are thought to hold in other markets.

Finally, this Article examines a claim that copyright does not significantly increase payments to authors. The evidence used to support this claim is based upon supposedly large payments made by American publishers to British authors during the nineteenth century, when British authors did not have copyright protection in America. For over eighty years, critics of copyright have repeated this claim in support of the view that copyright is largely unnecessary. This Article's examination of the historical evidence that purportedly supports this claim reaches the opposite conclusion.

## I. THE BASIC ECONOMIC LOGIC OF COPYRIGHT

It is easy for those who have worked on these topics for decades to forget that not everyone has been immersed in this subject, and that explications of the nuances of an economically ideal intellectual property regime can still have value for individuals trying to understand what is at issue. But careful explications do not seem to resonate the way they once did, because recent disputes about copyright often seem have little to do with the nuances of economic analysis, and more to do with the rather overblown and fanciful claims that are the main focus of this Article. But nevertheless, here is a quick description of the economic tradeoff at the heart of copyright.<sup>3</sup>

In a world where the payments required to induce the creation of individual works are known, and where the value of these works to consumers is known, determining the optimal length (term) of copyright laws requires a balancing of costs and benefits. The benefits to society are the "surpluses"<sup>4</sup> generated by the creation of new works induced by the increased revenues to creators due to copyright. The costs of copyright are some of the surpluses foregone by the reduced consumption of creative works due to their higher, copyright-increased prices.<sup>5</sup> Note that the only foregone surpluses that should be counted as the costs of lengthening copyright are those that occur after the creator has been sufficiently

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<sup>3</sup> The discussion in the next few paragraphs is illustrated in much greater detail in section IV of *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects*. Stan J. Liebowitz & Stephen Margolis, *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects*, 18 HARV. J.L. & TECH. 435, 438-46 (2005).

<sup>4</sup> The "surplus" is defined, in traditional economic analysis, as the difference between the maximum price the consumer would pay for a unit of a good minus the minimum price a producer would require in order to produce that unit, summed over all units.

<sup>5</sup> This higher price is presumed to arise from copyright, although copyright could generate additional revenues to authors and publishers through having a larger (the entire) market for the work. Given that the price of books does not seem to vary with expected popularity, the possibility that copyright might not raise price is not as farfetched as it may seem.

compensated to induce creation of the work, since any hypothetical forgone surpluses for shorter copyright lengths are required to remain foregone in order to generate the funds with which to pay the author to create the work.<sup>6</sup>

If the legal term of protection is the same for all works, the social benefit from increasing the copyright term is the value of new works that are induced by the extra expected revenues to creators, caused by a marginal lengthening of the term of protection. The social harm that arises from a longer term arises only for works that would have been produced without the extra length of the copyright term, and which now have an unnecessarily longer period of time during which prices are kept high and consumer surpluses are unnecessarily diminished. The optimal copyright term is one that balances these costs and benefits so as to generate the greatest total net surplus, subtracting the costs from the benefits.

Correct understanding of these tradeoffs is helped by separating the market for creations from the market for copies of individual creations. The benefits of copyright occur in the market for creations, where the number of works created is expected to increase when copyright protection is strengthened.<sup>7</sup> The harms from copyright occur in the markets for copies of individual creative works (titles), where too few copies of any particular title are sold (relative to the ideal quantity) because a single seller is expected to charge a price higher than the price that would prevail if there were multiple sellers of a single title.<sup>8</sup>

Under certain circumstances, the optimal copyright length will have a finite, non-zero solution, whereas in other circumstances, the optimal life might be zero or infinity.<sup>9</sup> In truth, there is very little evidence to support either longer or shorter terms for copyright. Nor is there any reason to believe that the copyright terms are near their optimal economic length. It seems that politics tends to drive changes in copyright law more so than changes in the efficient term of copyright.<sup>10</sup>

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<sup>6</sup> An “ideal” copyright solution, where the analyst can assume perfection in every dimension, would keep the price of all units of a title at the competitive level, leaving no profit from the sale of the copies with which to pay the author (because under perfect competition in the production of copies, there are no profits from which the author can be paid). In that case, the author would be paid a lump sum from some other source, such as a government or patron. In an “efficient” copyright system, which does not assume perfection, the payment to the author is generated from the market where copies of a title are sold. In this case, which is the model assumed in this Article, the market uses copyright to allow profits to be earned in the sales of copies until sufficient profit is earned from which the author can be paid. At that time, copyright would be removed.

<sup>7</sup> See Stan J. Liebowitz, *Is Efficient Copyright a Reasonable Goal?*, 79 GEO. WASH. L. REV. 1692, 1695-97 (2011); Liebowitz & Margolis, *supra* note 3, at 452.

<sup>8</sup> Liebowitz, *supra* note 7, at 1697.

<sup>9</sup> See Liebowitz & Margolis, *supra* note 3, at 438 (“The optimal length for copyright is not something that anyone can define with certainty.”).

<sup>10</sup> See, e.g., Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 436 (2007) (“Lawmakers have presided over an increasingly broad copyright law because creators have succeeded

In general, disputes over copyright are not based on careful measurements of the costs and benefits.<sup>11</sup> Such measurements are difficult, if not impossible, to make. Instead, the differing views that exist tend to be based on gross generalizations about the nature of the relationship between copyright changes and the number and value of the new works produced.<sup>12</sup>

## II. DEFINITIONAL MONOPOLY VERSUS ECONOMIC MONOPOLY

Copyright provides ownership rights to the creators of works, preventing others, without permission, from making copies or products that employ the creations that those rights protect. Critics of copyright often refer these ownership rights as “monopolies,” but this is a misnomer.<sup>13</sup>

The key requirement for an economic monopoly is that there are no competing items that consumers consider to be good substitutes for the monopolized item *in a particular market*.<sup>14</sup> The existence of substitutes in a market implies that competition will drive prices below the level that would exist without the presence of competing substitute products.

A market dominated by a firm with monopoly power wastes society’s resources, according to economic theory, because the high price restricts consumption below the ideal level. This view is slightly different than the more common view, thought to be held by most non-economists, that monopoly is bad because it enriches the monopolist at the expense of the consumers, and because it reduces consumer choice in the sense that there is no other competing vendor with a similar product that consumers can turn to.

By ignoring the particular *markets* in which individual copyright owners compete, critics of copyright miss the forest for the trees. For example, a novel about detectives is not generally its own market, but instead competes with a large number of other detective stories in a market for detective stories. But each individual copyrighted work, by definition, has a monopoly *on itself* and it is this monopoly that copyright critics focus on.

This distinction can perhaps be better explained using an analogy. Say

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in defining the terms of the debate.”); June T. Tai, *History, Culture, and the Copyright Act*, 9 U. CHI. L. SCH. ROUNDTABLE 201, 214-15 (2002) (“Congress has, in all likelihood, expanded the copyright term of protection beyond the point economically required[.]”).

<sup>11</sup> See sources cited *supra* note 10.

<sup>12</sup> See Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 502 (2007) (“The common focus in copyright narratives on what constitutes impermissible copying and inappropriate uses of existing knowledge highlights the need for more finely tuned legal analyses about the ways in which both ideas and expression may be transmitted and used in the creation of new works.”).

<sup>13</sup> See e.g., Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167, 170-71 (1934).

<sup>14</sup> The technical definition of monopoly is a single seller in a market, although a market dominated by one or two sellers is often considered to be non-competitive.

that you own a house, 2811 Avenue X, in Brooklyn NY. It would be technically correct to say that you have a monopoly on that house. No one else has access (legally) to this house without your permission. No one else has the right to sell this house. Nevertheless, a more correct terminology would be to say that you have a property right over the house on Avenue X. By the definition of ownership, all property rights provide a literal monopoly over the property covered by the right.

But the house at 2811, which is well known to me, is a row house, attached to other houses on both sides. There are many close substitute houses. In fact, every house on that block of Avenue X is identical to the other houses, with each house sharing a driveway with one neighbor and a tiny garden with the neighbor on the other side. Each house also has a tenant's apartment on the street level, with the main entrance one floor up. There is no product differentiation between these houses except that the end units are attached to other houses only on one side.

Does your definitional monopoly over 2811 provide any economic monopoly if you try to sell or rent the house in the Brooklyn housing market? Not at all. Not only are all the other houses on that block very close substitutes, but there are also many other very similar houses on nearby blocks. It would be inane to call ownership of 2811 an economic monopoly, but that is essentially what the critics of copyright do all the time when they refer to the copyright "monopoly."

If, by your good luck, the land under 2811 contained the only oil in the world, you would have a real monopoly (assuming ownership of the house included the mineral rights), but the monopoly would be in the oil market, not the housing market. Thus, some property rights can lead to economic monopolies, if some aspect of the underlying property has monopoly characteristics. But we need to be careful when describing the market in which the monopoly occurs, which in this case is oil, not housing.

Similarly, we all have a definitional "monopoly" on ourselves. But most of us do not have monopoly power in the market for our employment. The same is true for authors and inventors.

As was the result in the hypothetical case, where 2811 contained the world's only oil, sometimes a definitional monopoly on oneself leads to an actual economic monopoly. Some individuals, LeBron James for example, do have monopoly power regarding their own talents. This allows Mr. James to earn a very large income. There are not very many close substitutes for Mr. James on the basketball court. He has real monopoly power, in a real market.

Stephen King and Bruce Springsteen also have monopoly power with regard to their talents. Copyright provides Mr. King with the ability to

access his innate monopoly power, otherwise known as talent, and to exercise that monopoly power in the market for horror books. He earns monopoly rents in the same way that basketball's LeBron James and golf's Rory McIlroy do. The monopoly power in Mr. King's case is due to his writing talent, not his athletic skills. Copyright unlocks that monopoly for creative individuals who have monopoly talent, just as ownership over 2811 unlocked the hypothesized monopoly in oil. Copyright does not, by itself, however, provide an economic monopoly, just as ownership over 2811 did not provide a monopoly in the housing market.

But most authors create works that have many close substitutes, in parallel with the level of their talent, and thus generate no monopoly power in the markets in which their works are sold. It is incorrect to refer to the property rights given to these authors, by copyright, as economic "monopolies."

It is true that any monopoly power unlocked by copyright would induce inefficiency. But these inefficiencies due to innate talent are not the target of antitrust activities elsewhere in the economy, and it is unclear why they should be disallowed for creators when they are allowed in virtually all other markets.<sup>15</sup>

Similarly, other economic monopolies earned from superior performance are not illegal under our antitrust laws.<sup>16</sup> That is because monopoly can be the result of meaningful competition for a market. If, for example, Apple dominates the market for tablets because it was first to the market, and because its products are thought to be superior to those produced by others, then its monopoly is legal. Apple's success, even if it allows Apple to charge prices close to the monopoly level, is not an antitrust issue. Apple, in this instance, *earned* its monopoly by producing a better product. Nor, in this case, are consumers harmed by Apple's monopoly, since consumers benefit from Apple's superior products relative to a world where Apple did not exist, *even if Apple acts monopolistically*.<sup>17</sup> Only compared to a counterfactual world where Apple existed but was forced to charge competitive prices would Apple's hypothetical monopoly be harmful. And fewer highly valued new products would come to exist in this counterfactual world because the rewards for producing superior

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<sup>15</sup> See Liebowitz, *supra* note 7, at 1699-1703.

<sup>16</sup> *Id.* at 1703.

<sup>17</sup> The definition of "harmful" depends on how the alternative is defined, particularly whether the alternative is thought to be the "ideal" or the "efficient." See Liebowitz & Margolis, *supra* note 3, at 438. See generally Harold Demsetz, *Two Systems of Belief About Monopoly*, in *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* 164 (Harvey J. Goldschmid, H. Michael Mann, & J. Fred Weston eds., 1974) (explaining that criticisms of market "failures" depend on which of two competing theories about efficiency are followed).

products would be eliminated.

Yet, the term “monopoly” is often used rather heedlessly by copyright critics.<sup>18</sup> Professors Michele Boldrin and David Levine, two of the most forceful and prominent critics of copyright, for example, title their book “Against Intellectual Monopoly” when they should have titled it “Against Intellectual Property,” because they are actually arguing against providing property rights for creative efforts.<sup>19</sup> They erroneously treat the definitional monopoly of a property right as being the same as an economic monopoly in a market, as described below.<sup>20</sup>

### III. AN EXAMPLE OF THESE CONFUSIONS

The underlying property protected by copyright is the non-corporeal expression of an idea (sometimes better referred to as a “title”).<sup>21</sup> The non-corporeal work can be separated, conceptually, from the copies (or physical manifestations, even if only bits held in a memory device) of the title. Allowing anyone other than the copyright owner to produce and sell copies effectively removes the property right from the work.

If a purchaser of a copy of a work decides to start producing his own copies of the work to sell, Boldrin and Levine wish to claim that the ownership over the work is not infringed.<sup>22</sup> But what is it that is being copied, if not the work, or title, itself? Boldrin and Levine are engaging in semantic legerdemain by claiming that using a purchased copy to produce new competing editions does not infringe the property right over the work held by the author.

Boldrin and Levine are likely to say that this mischaracterizes their work, since they specifically state that they are in favor of providing property rights to creators:

We do not know of any legitimate argument that producers of ideas should not be able to profit from their creations. While ideas could be sold in the absence of a legal right, markets function best in the presence of clearly defined property rights. *Not only should the property rights of innovators be protected but also the rights of those who have legitimately obtained a copy of the idea, directly or indirectly, from the original innovator. . . . Why, however, should creators have the right to control how purchasers make use of an idea or creation?* This gives creators a monopoly over the idea. We refer to this right as “intellectual monopoly,” to emphasize that it is this monopoly over all copies of an idea that is controversial, not the right to buy and sell copies.<sup>23</sup>

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<sup>18</sup> See generally MICHELE BOLDRIN & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY (2008).

<sup>19</sup> *Id.* at 6-7.

<sup>20</sup> See *id.* at 123.

<sup>21</sup> See, e.g., *Mazer v. Stein*, 347 U.S. 201, 217 (1954) (“[C]opyright . . . protection is given only to the expression of the idea—not the idea itself.”).

<sup>22</sup> BOLDRIN & LEVINE, *supra* note 18, at 125-28.

<sup>23</sup> *Id.* at 8-9 (emphasis added).

Boldrin and Levine argue that creators should not have the right to control how purchasers make use of the creators' ideas.<sup>24</sup> In Boldrin and Levine's world, the author's property right, as the term is commonly understood, lasts only until the first copy is sold, whereupon others (those who have purchased a copy of the work) are allowed to reproduce the work at will.<sup>25</sup>

This vanishing property right of Boldrin and Levine is not how property rights normally operate. Boldrin and Levine should make clear that they have redefined the term "property right" in a rather uncommon manner. Under the common meaning of "property right," owners with a property right that lasts for X years expect that for X years no one else will be able to legally use or profit from that property without their permission.

Allowing others to make copies of the work effectively destroys the creator's property right over his work. However, because Boldrin and Levine have redefined the term "property right" to mean something other than the ownership or control of the non-corporeal idea, they can insist that the author was given a property right.<sup>26</sup> After all, the author (or his agents) is still allowed to keep selling copies of his creation (but now in competition with his customers, who are also allowed to sell copies of the author's creation).

It is unclear whether their definition of "property right," and their use of the term "monopoly," without reference to the market in which the creative work competes, should be considered doublespeak of the Lewis Carroll or the George Orwell variety.

#### IV. DO CREATORS RESPOND TO PAYMENTS?

With the definitional issues resolved, this Part now turns to the tradeoff between creation and consumption that is so central to discussions of copyright. The harshest critics of copyright argue that there is no tradeoff at all—copyright is all costs with no benefits.<sup>27</sup> In this view, granting copyrights imposes monopoly penalties on consumption with no concurrent benefits in the creation of new works, either because inventive and creative activities are unrelated to rewards, or even worse, because the amount of creative activity is inversely proportional to the rewards granted.<sup>28</sup> Either version of this claim is contrary to standard economic analyses.

Normally, in economics, it is thought that increases in price bring forth

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<sup>24</sup> See *id.* at 128.

<sup>25</sup> *Id.* at 123-25.

<sup>26</sup> See discussion *supra* notes 20-22.

<sup>27</sup> See Liebowitz, *supra* note 7, at 1705.

<sup>28</sup> *Id.* at 1709.



increases in output. This idea is represented in economic analyses by an upward sloping supply curve. At one time, the upward sloping supply was known as the “law of supply,” and was thought to hold in just about all markets (although this expectation has lost the force of a law). For this reason, those who argue that the supply of creative works does not increase when the rewards to creative activity increase should bear the burden of providing considerable evidence to support their position.

Critics of copyright will point out the possibility of backward bending supply curves, meaning that creators slack off when their income becomes sufficiently large to induce a greater interest in leisure.<sup>29</sup> For example, a backward bending supply curve may have occurred in the case of composer Giuseppe Verdi, for whom, if Professor F.M. Scherer’s history is correct,<sup>30</sup> copyright provided sufficient funds that his musical compositions decreased in number after the introduction of copyright increased his income.<sup>31</sup> But backward bending curves are more likely to occur for older and richer creators than for the entire group of creators, since there are likely to be many young and hungry suppliers who will be drawn to the market and induced to create by the higher prices and seemingly rich future marked by leisure.

Some copyright critics have argued that creators do their best work while poor.<sup>32</sup> But to the extent this is true, it may have more to do with the age of the creator than with incentives. Critics such as Professors Felix Oberholzer and Koleman Strumpf have argued that artists like living a bohemian existence;<sup>33</sup> but we should note that being paid money does not prevent one from living as one wants and, if anything, it makes it easier to pursue different lifestyles.

Further, there is practically no evidence to support these claims. In the early 2000s, the increase in music CDs produced by amateur and professional music groups combined, as commercial recording revenues plummeted, is practically the sole evidence supplied in support of this thesis.<sup>34</sup> But the conflation of amateur and professional products is a fatal flaw in such measurements.<sup>35</sup>

In contrast to these claims, there are several important reasons to

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<sup>29</sup> Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 890-91 (2001).

<sup>30</sup> F.M. SCHERER, *QUARTER NOTES AND BANK NOTES: THE ECONOMICS OF MUSIC COMPOSITION IN THE EIGHTEENTH AND NINETEENTH CENTURIES* 179- 80 (2004).

<sup>31</sup> *Id.*

<sup>32</sup> See, e.g., Felix Oberholzer-Gee & Koleman Strumpf, *File Sharing and Copyright*, in 10 INNOVATION POLICY AND THE ECONOMY 19, 23 (Josh Lerner & Scott Stern eds., 2010), available at <http://www.nber.org/chapters/c11764.pdf>.

<sup>33</sup> See, e.g., *id.*

<sup>34</sup> See Liebowitz, *supra* note 7, at 1709-10.

<sup>35</sup> *Id.* at 1710.

believe that the supply of creative efforts is upward sloping, even excluding the fact that supply is almost always upward sloping. First, to the extent that for-profit commercial entities create these works, the supply is upward sloping almost by the definition of profit maximization. If prices rise, and everything else remains constant, profits for firms in the industry will increase, drawing new marginal firms into the market (while old firms increase their output), and more creation will occur. Second, to the extent that creative efforts are individual accomplishments, greater rewards will allow more creators to switch to full-time creation as opposed to part-time creation while holding other jobs. It is difficult to believe that working at a full-time job unrelated to the creative activity will not reduce the amount of works created.

#### V. IS COPYRIGHT NEEDED TO REWARD CREATORS?

Another argument made by critics of copyright is that creators are rewarded even without copyright, so there is no need to have it.<sup>36</sup> The supposed evidence for this assertion takes several forms.

First, it is pointed out that some creators become famous and their fame allows them to generate large incomes from endorsements and, presumably, their own reality television programs.<sup>37</sup> One problem with this claim is that only a very small number of creators can become famous, and if the only reward to creation were fame and the income that fame generates, the great majority of creators would get nothing for their efforts, and thus the number of creations would fall. Another problem is that fame coexists with copyright, and the removal of copyright could still lead to a large loss of income (and the likely attendant reduction in creation), even for well-paid individuals.

Why, for example, is there no concern that athletes and actors get paid by their team or producers, when they could survive solely on the money that their fame attracts? Can you imagine trying to fill out entire professional team rosters if the athletes were never paid and only earned money from their fame? Why does this apparent hostility to direct market payments exist for copyright-based creators alone?

Second, it is claimed that creators can sell complementary products.<sup>38</sup> Artists and inventors can sell t-shirts, backstage passes, dinners, lab tours, concert tickets, lap dances, and so forth, similar to some crowd-sourced products of recent years. But these sources of revenue seem quite limited and were always available, even under a copyright regime. Artists and inventors would appear likely to suffer a serious drop of income if they

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<sup>36</sup> BOLDWIN & LEVINE, *supra* note 18, at 15.

<sup>37</sup> *Id.* at 106.

<sup>38</sup> *Id.* at 142-43.

were forced to subsist only on the sale of complementary products. Again, since the same claim can be made of actors and athletes, who can also provide the same type of complementary products, why do we not have critics decrying the existence of direct payments to members of these professions?

Third, artists can work for tips or look for benefactors. Asking consumers to pay what they believe the artist deserves has been tried, and the revenues have been more than zero. Nevertheless, these experiments are not usually repeated, indicating, as was the case with Radiohead, that it does not provide anywhere near the level of revenue as does a property right in a market.<sup>39</sup> And it seems demeaning to ask artists to put themselves at the mercy of a “benefactor” or “patron,” and live in fear of angering the source of their income. This is a distant cousin of slavery.

Fourth, the government could pay creators.<sup>40</sup> But the government’s track record in producing economic items is very poor compared to the use of markets, and harnessing the market is the *modus operandi* of copyright.

Finally, we have the most famous purported evidence that copyright is not needed to reward creators. This evidence is supposedly based on the UK’s Royal Commission on Copyright Investigations during the 1870s.<sup>41</sup> In an interesting natural experiment, U.S. copyright law did not provide any copyright protection to UK authors at that time (although UK patent owners were protected).<sup>42</sup> The UK commission was examining various possible changes to the UK copyright law, and the treatment of UK authors by American publishers was a topic of considerable interest.<sup>43</sup>

A discussion that occurred throughout the proceedings was whether American publishers paid UK authors, even though they were not legally required by copyright to do so.<sup>44</sup> Of particular interest was the claim that British authors were sometimes paid more in the U.S. than in the UK.<sup>45</sup>

In the economics literature, this claim was first found in Sir Arnold Plant’s 1934 article on copyright,<sup>46</sup> and it has been repeated by other researchers, such as Boldrin and Levine.<sup>47</sup> These copyright critics then

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<sup>39</sup> See generally Jake Coyle, *Radiohead’s Experiment Rocks Music Industry*, NBC NEWS (Oct. 24, 2007), [http://www.nbcnews.com/id/21456074/ns/technology\\_and\\_science-internet/t/radioheads-experiment-rocks-music-industry/#.VOVODFN4rB4](http://www.nbcnews.com/id/21456074/ns/technology_and_science-internet/t/radioheads-experiment-rocks-music-industry/#.VOVODFN4rB4).

<sup>40</sup> See generally Steven Shavell & Tanguy Van Ypersele, *Rewards Versus Intellectual Property Rights*, 44 J.L. & ECON. 525 (2001).

<sup>41</sup> BOLDRIN & LEVINE, *supra* note 18, at 22-23.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Plant, *supra* note 13, at 172-73.

<sup>45</sup> *Id.*

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

<sup>47</sup> BOLDRIN & LEVINE, *supra* note 18, at 22-23.

argued that because authors get paid large amounts without copyright, copyright is unnecessary.<sup>48</sup>

Plant's evidence, in short, was that American publishers would pay British authors or publishers for the ability to print their books (using advance sheets, or stereotype plates, provided by the UK author or publisher prior to the book's publication in the UK).<sup>49</sup> The American publisher contracting with British producers would then have the ability to print the American edition before other American publishers could get copies of the book from England.<sup>50</sup> This gave the American publisher a significant head start of over competing American publishers, providing him a window of market control, as if copyright existed.

Below is the Boldrin and Levine text ("BL text") approvingly quoting Plant (in quotations), and then providing a summarizing sentence:

. . . "yet American publishers found it profitable to make arrangements with English authors. Evidence before the 1876-8 Commission shows that English authors *sometimes* received more from the sale of their books by American publishers, where they had no copyright, than from their royalties in [England]" where they did have copyright. In short without copyright, authors still got paid, *sometime* [sic] more without copyright than with it.<sup>51</sup>

Notice Plant's use of the word "sometimes," in reference to how frequently UK authors were paid a greater amount by American publishers than by UK publishers. "Sometimes" is italicized here in both the Plant quote and the BL text because Boldrin and Levine, in apparent over-exuberant enthusiasm, changed "sometimes" to "often" in their very next paragraph:

The amount of revenues British authors received up front from American publishers *often* exceeded the amount they were able to collect over a number of years from royalties in the UK.<sup>52</sup>

These claims lead to several questions. Was Plant's initial assertion correct? Are Boldrin and Levine justified in changing Plant's "sometimes" to "often"? Is their claim that American publishers paid lump sums, whereas British publishers paid recurring royalties to UK authors, correct?

Let's do a quick check of these claims by taking a brief look at the Royal Commission evidence.

## VI. THE EVIDENCE FROM THE ROYAL COMMISSION

There are several claims that copyright critics make about the Royal

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<sup>48</sup> *Id.* at 23.

<sup>49</sup> Plant, *supra* note 13, at 173.

<sup>50</sup> *Id.*

<sup>51</sup> BOLDRIN & LEVINE, *supra* note 18, at 22-23.(emphasis added) (internal footnote omitted).

<sup>52</sup> *Id.* at 23 (emphasis added).

Commission (“Commission”) findings, as previously noted.<sup>53</sup> First, that it was common for British authors to receive payment from American publishers.<sup>54</sup> Second, that British authors “often” or “sometimes” received more from American publishers than from British publishers.<sup>55</sup> Third, that the size of the book-reading markets in the two countries must have been similar, in order for these comparisons to be meaningful in the first place.<sup>56</sup>

Actual examination of the Commission report and the transcripts of its testimony, however, indicate that these claims are either wrong or greatly exaggerated.<sup>57</sup> It must be admitted, nevertheless, that there is some uncertainty regarding some of these facts, due to conflicting and inconsistent statements by different witnesses, and conflicting conclusions drawn by the commissioners.<sup>58</sup> Nevertheless, it appears that some inferences can be drawn.

On the first question, the answer appears to be that it was not typical for British authors to receive payments from American publishers. The Commission’s summary report (there were several members of the Commission who wrote dissenting reports) did acknowledge that sometimes, British authors were paid by American publishers, but claimed it was usually only the most well-known authors.<sup>59</sup> From the summary report:

Great Britain is the nation which naturally suffers the most from this policy [of Americans not giving copyright to British authors]. *The works of her authors and artists may be and generally are taken without leave by American publishers, sometimes mutilated, issued at cheap rates to a population of forty millions, perhaps the most active readers in the world, and not seldom in forms objectionable to the feelings of the original author or artist.*<sup>60</sup>

What of the second question—the amount that British authors received from American publishers when they were paid? Plant, and in their turn, Boldrin and Levine, claimed that British authors were sometimes, or often, paid more in the United States than in Britain.<sup>61</sup> But the conclusion of the Commission overseeing these hearings was quite different:

We are assured there are cases in which [British] authors reap substantial results from these arrangements [with American publishers], and instances are even known in which an English author’s returns from the United States exceed the profits of his British sale, *but in the case of a successful book by a new author it would appear that this understanding affords no protection.*

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<sup>53</sup> See *supra* notes 41-52.

<sup>54</sup> See *supra* notes 44-45 and accompanying text.

<sup>55</sup> See *supra* notes 51-52 and accompanying text.

<sup>56</sup> See *infra* note 66 and accompanying text.

<sup>57</sup> See, e.g., ROYAL COMMISSIONS AND REPORT, *supra* note 1, at xxxvii, ¶ 238.

<sup>58</sup> See generally *id.* at xlv, lix (Dissenting Reports).

<sup>59</sup> *Id.* at xxxvii, ¶ 238.

<sup>60</sup> *Id.* (emphasis added).

<sup>61</sup> See *supra* notes 46-48, 51-52 and accompanying text.

*Even in the case of eminent men, we have no reason to believe that the arrangements possible under the existing conditions are at all equivalent to the returns which they would secure under a copyright convention between Your Majesty and the United States.*<sup>62</sup>

Also, from the testimony of an American publisher somewhat hostile to the questioner (in question and answer form):

Q. Do you think that English authors get 100£ from American publishers for every 1,000£ that they get from English publishers?—Those authors who are paid for their advance sheets, I suppose, get a larger proportion than that.

Q. At any rate the proportion paid by American publishers is very much less than the proportion paid by English publishers?—I suppose so...<sup>63</sup>

It appears that the tone of the claim by Plant, with regard to the frequency with which American publishers paid *more* to British authors than did British publishers, was somewhat exaggerated, and Boldrin and Levine's claim that it happened "often" was extremely off the mark. The evidence from the report appears to be that there were a few exceptional cases where British authors might have actually been paid more by American publishers than by British publishers.<sup>64</sup> The word "sometimes" hardly seems appropriate to describe this apparently rare circumstance. As a general rule, it would seem more correct to say that *sometimes* British authors were *paid something* from American publishers, as opposed to *nothing*.

Another advantage held by American publishers over their British counterparts, made apparent by this evidence, is that American publishers did not have to cover the cost of discovering British "hits."<sup>65</sup> British publishers looking for new authors and new titles would undoubtedly be incorrect in many of their choices, as is the case in current-day book publishing, music, and movies. The mistakes, or "dry wells," would lose money for the British publisher, a cost that American publishers would often not need to bear since they could cherry pick among British authors and titles. Everything else equal, this factor would lower the cost and the price of British titles in America.

It is also important to put the relative size of the markets in perspective so that the relative size of the payments can be put in perspective. Although examination of population sizes and literacy rates can be somewhat revealing,<sup>66</sup> there are other differences between the two book markets that are important. For example, it appears that purchasing books was much

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<sup>62</sup> ROYAL COMMISSIONS AND REPORT, *supra* note 1, at xxxvii, ¶ 242 (emphasis added).

<sup>63</sup> MINUTES OF THE EVIDENCE, *supra* note 1, at 91, ¶¶ 1855, 1857.

<sup>64</sup> *Id.* ¶¶ 1856-57..

<sup>65</sup> *Id.* ¶ 1856.

<sup>66</sup> Boldrin and Levine point out these statistics (for 1850) concluding that the markets were similar in size (but tilted toward Britain). BOLDRIN & LEVINE, *supra* note 18, at 40 n.13. Liebowitz points out that, in 1870, the U.S. population was considerably larger than that of the UK. Liebowitz, *supra* note 7, at 1707 n.54.

more common among the citizenry in the United States than in Britain.<sup>67</sup> Although this fact appears at several locations in the testimony, the most succinct summary comes from the American publisher mentioned above:

Q. Your population [U.S.] is greater than ours [UK]?— I suppose our reading population certainly is.

Q. Therefore it is natural to suppose that popular English authors will find more readers with you [America] than with us [UK]?— Yes.<sup>68</sup>

There are various possible reasons for book purchasers to be more numerous in the United States than in Britain, including the fact that “travelling libraries” were much more common in Britain than in the United States.<sup>69</sup> Nevertheless, the conclusion seems to be that book sales (and revenues) in the United States might very well have been expected to be larger than in the UK.

There is much more that can be said on these issues, including the fact that competition between U.S. publishers for British books was not nearly as vibrant as presumed by copyright’s critics. Apparently, there was a cartel of sorts among American publishers that had come into being shortly before the Copyright Commission hearings.<sup>70</sup> This informal agreement among American publishers was claimed (by several witnesses) to have largely prevented duplicative American editions of British works.<sup>71</sup> This de facto copyright is one of the reasons used by the Commission to explain why some British authors received large payments from American publishers for access to “advance sheets” (edited manuscripts not yet typeset).<sup>72</sup>

It also appears that British publishers paid lump sums to British authors, whereas American publishers were more likely to pay royalties (contrary to the claims of Boldrin and Levine).<sup>73</sup> In such cases, where British authors or publishers underestimated the demand for a book, royalties would yield greater revenues than would lump sums, which could also explain the rare instances of English authors receiving greater payments from American publishers.

Overall, a reading of the testimony and report presents a considerably

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<sup>67</sup> MINUTES OF THE EVIDENCE, *supra* note 1, at 91, ¶¶ 1852-53.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 65-66, ¶¶ 1374-76. It could be claimed that high British prices were responsible for lower sales in Britain, but there was a great deal of price discrimination in Britain and the final, lower prices for books, after the high priced editions had run their course, appear similar to the prices in the U.S.

<sup>70</sup> ROYAL COMMISSIONS AND REPORT, *supra* note 1, at xxxvii, ¶ 241; MINUTES OF THE EVIDENCE, *supra* note 1, at 43, ¶¶ 902-06.

<sup>71</sup> MINUTES OF THE EVIDENCE, *supra* note 1, at 43, 63, ¶¶ 902-06, 1300-02.

<sup>72</sup> *Id.* at 91, ¶¶ 1855-57. Although it is less clear, if the cartel were actually functional, why American publishers would pay anything to British authors. The traditional story of wanting to be first to market loses much of its force if other publishers will not be printing up competing editions.

<sup>73</sup> *Id.* at 94, ¶ 1910.

different picture than that drawn by Plant and his followers, such as Boldrin and Levine. The Commission concluded that weakened, non-existent, or quasi de facto copyright provided considerably less revenue to authors than did actual copyright.<sup>74</sup> This judgment, comporting as it does with common sense, really should not be a surprise.

#### CONCLUSION

Critics of copyright have relied on several fanciful claims to make their case that copyright is unnecessary or harmful. Without these exaggerated claims, criticisms of copyright would be much weaker than they are portrayed to be. This Article has endeavored to explain the nature of some of these criticisms and expose the fallacies behind them.

This Article has demonstrated that applying a general label of “monopoly” to what are actually only property rights is a misleading (although rhetorically effective) tactic. Assertions claiming that creators of copyrighted works do not increase output in response to price increases were shown to be contrary to economic logic and *sui generis* when compared to our belief about other markets. A fascinating claim that American book producers in a highly competitive environment paid British authors amounts similar to what they could have earned with copyright was shown to be a largely whimsical story.

Copyright has always had its share of severe critics. But if we are to make reasonable judgments about it, the more extravagant claims examined and rejected here need to be removed from the analysis.

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<sup>74</sup> ROYAL COMMISSIONS AND REPORT, *supra* note 1, at xxxvii, ¶¶ 238, 241, 244.