

## **Copyright Distributive Injustice<sup>1</sup>**

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Essay

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## COPYRIGHT DISTRIBUTIVE INJUSTICE

### ABSTRACT

*By design, copyright is a legal field that is not distinctively designed for redistribution. And yet, numerous fairness scholars and other critics of the economics paradigm quite markedly argue that copyright law should be based upon some measure of distribution, not efficiency.*

*This essay argues that copyright law should not promote distributive justice concerns, subject to narrow exceptions and that other more efficient law such as taxation and welfare laws should do that instead. It does so in accordance to the prevailing welfare economics interpretative approach to copyright jurisprudence, with emphasis on the latest Peer-to-Peer (P2P) file sharing litigation.*

*It focuses on the leading classes of distributive injustice that have emerged in the present day Internet, referring to poor infringers, poor creators and wealthy copyright industries. At least in these classes of individuals, this essay argues, redistribution through copyright law, arguably, offers no advantage over redistribution through the income tax system and other transfer mechanisms and laws and typically is less efficient in doing so.*

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A. Introduction

Copyright law, like all so many normative theories concerning social arrangements, which stood the test of time, seems to finally have collapsed into egalitarian argumentation.<sup>3</sup> One cannot but be reminded of Will Kymlicka's fatalistic foretell about how, under the burden of time, this becomes the fate of all so many political theories of contemporary days.<sup>4</sup> Contemporary copyright scholars, particularly, arguing in favor of independent fairness concerns growingly seem to favor distributive justice within copyright jurisprudence while ultimately favoring the poor and penalizing the wealthy.<sup>5</sup> Distributive justice argumentation, remarkably, comes and is most commonly litigated also from the part of copyright

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<sup>3</sup> See, Will Kymlicka, *Contemporary Political Philosophy: An Introduction* 81-85 (1990); Amartya K. Sen, *Inequality Reexamined* 12 (1992) ("[E]very normative theory of social arrangement that has at all stood the test of time seems to demand equality of something....").

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., Thomas C. Grey, *Property and need: The welfare state and theories of distributive justice*, *Stan. L. Rev.*, Vol 28, No. 5 (May, 1976), 877-902. See, also, discussion herein.

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holders,<sup>6</sup> including motion picture studios, recording companies, songwriters, music publishers and even venture capitalists<sup>7</sup> who typically are accused of promoting profit self-maximization, or even efficiency at large on the expense of noticeably disadvantaged users, but also poor creators and amateurs. Thus, within the recent copyright file-sharing litigation, those who defend the latter copyright concerns, or seek to extend it, fairly often bemoan the decline in profits that record companies have suffered<sup>8</sup> and that Hollywood may face – wrongly using this same argumentation.<sup>9</sup> Like other social theories that ended up arguing for equality, different approaches to distributive justice within copyright jurisprudence seem to have gained themselves what already threatens to befall to an unmarked impetus.

Traditionally, copyright law was not seen as a vehicle for promoting distributive justice or 'individual well being'.<sup>10</sup> Copyright, thus, conventionally was not used as an instrument of redistribution from one

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<sup>6</sup> The studios and recording companies and the songwriters and music publishers filed separate suits against the defendants that were consolidated by the District Court. See, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, No. 04-480, slip op. (U.S. June 27, 2005), at 2771.

<sup>7</sup> See, the amicus curiae brief of the National Venture Capital Association in the United State Supreme Court *Grokster* case regarding venture capitalist liability. Brief of the National Venture Capital Association as Amicus Curiae in Support of Respondents, 2005 WL 497759, at \* 17 & n.14, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 1605 (2005) (No. 04-480) ("[T]he indeterminate reach of such secondary liability means that not merely start-up capital is at risk, but also the personal wealth of start-up's officers, directors, and investors...") (Herein, 'the *Grokster* case').

<sup>8</sup> See, e.g., Recording Indus. Ass'n of Am., *Recording Industry to Begin Collecting Evidence and Preparing Lawsuits Against File "Sharers" Who Illegally Offer Music Online*, at <http://www.riaa.com/news/newsletter/062503.asp> (June 25, 2003) (Last visited 1 December 2005) (quoting Recording Industry Association of America President Cary Sherman as saying, "we cannot stand by while piracy takes a devastating toll on artists, musicians, songwriters, retailers and everyone in the music industry"). For evidence that services like Napster have in fact hurt the profits of record companies, see Stan Liebowitz, *Will MP3 Downloads Annihilate the Record Industry? The Evidence so Far* (June 2003) (unpublished manuscript), at <http://www.utdallas.edu/~liebowit/intprop/records.pdf> (Last visited 1 December 2005).

<sup>9</sup> See, e.g., Ronald Grover & Heather Green, *The Digital Age Presents Hollywood Heist: Will Tinseltown Let Techies Steal the Show?*, *Bus. Wk.*, July 14, 2003, at 73, 76 (reporting that Hollywood executives are concerned that the movie industry may suffer the same loss of profits suffered by the music industry). See, also, A press release from defendant Bertelsmann AG said that the tertiary liability suit was a "groundless and cynical effort" to recover from Bertelsmann's "deep pockets," and that U.S. copyright law does not extend to third-party lenders. *Bertelsmann Seeks Dismissal of Copyright Infringement Lawsuits* (July 17, 2003), online at [http://www.bertelsmann.de/documents/en/Motion\\_to\\_dismiss.pdf](http://www.bertelsmann.de/documents/en/Motion_to_dismiss.pdf) (visited December 1, 2005).

<sup>10</sup> See 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* S1.03(A) (2002) (discussing the purpose of copyright); I Paul Goldstein, *Copyright* § 1.13.2 (2d ed. Supp. 2003).

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individual or group to another. Instead, copyright originally has been based in the United States on the concept of efficient ownership and uniformly has been interpreted as a utilitarian device for maximizing social utility.<sup>11</sup> The economic philosophy behind the clause 8 empowering Congress to grant patents and copyrights,<sup>12</sup> is the conviction that encouragement of individual effort by personal gain is the most effective way to advance public welfare through the talents of authors and inventors in science and useful arts.<sup>13</sup> Thus, courts traditionally upheld that when technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of its' constitutional incentives,<sup>14</sup> in reference to what is a tautological efficiency-based consideration of the common sense of the statute, to its purpose, and to the practical consequences of suggested interpretations.<sup>15</sup>

More broadly, the sole purpose of intellectual property largely ignores distributive justice questions and instead focuses solely in "incentivizing" creativity.<sup>16</sup> In balance, thus, lie the effect of copyright protection in encouraging the creation by reducing copying and its effect in discouraging

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<sup>11</sup> *Id.* But see, Congress's early characterization of copyright as tax, as it appeared, for example, in Lord Macaulay's statement that copyright is "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). Thomas Macaulay, Speech Before the House of Commons (Feb. 5, 1841), in 8 The works of Lord Macaulay 195, 199 (Lady Trevelyan ed. 1866), at 201. For modern day references to this particularly controversial, see, e.g., Dan Hunter and F. Gregory Lastowka, Amateur-to-amateur, 46 Wm. & Mary L. Rev. 951 (2004), at 953-954; Zechariah Chafee, Jr., Reflections on the Law of Copyright: I, 45 Colum. L. Rev. 503, 507 (1945).

<sup>12</sup> See, U.S. Const. art. I, § 8, cl. 8, *Id.*

<sup>13</sup> *Id.* See, also, Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Mazer v. Stein, 347 U.S. 201, 219 (1954) ("") (quoting U.S. Const. art. I, § 8, cl. 8).

<sup>14</sup> 17 U.S.C.A. § 1; U.S.C.A.Const. art. 1, § 8, cl. 8. (Twentieth Century Music Corp. v. Aiken, 95 S.Ct. 2040, U.S.Pa. 1975; Sony Corp. of America v. Universal City Studios, Inc. 104 S.Ct. 774, U.S.Cal.,1984, at 432; Alameda Films SA de CV v. Authors Rights Restoration Corp. Inc. 331 F.3d 472, C.A.5 (Tex.),2003, at 482; Princeton University Press v. Michigan Document Services, Inc. 99 F.3d 1381 C.A.6 (Mich.), 1996, at 1391); Creative Technology, Ltd. v. Aztech System Pte., Ltd. 61 F.3d 696, C.A.9 (Cal.),1995, at 707; Sega Enterprises Ltd. v. Accolade, Inc. 977 F.2d 1510 C.A.9 (Cal.), 1992, at 1527; Atari Games Corp. v. Nintendo of America Inc. 975 F.2d 832 C.A.Fed. (Cal.), 1992, at 843; Computer Associates Intern., Inc. v. Altai, Inc. 982 F.2d 693 A.2 (N.Y.), 1992, at 711; Hubbard Broadcasting, Inc. v. Southern Satellite Systems, Inc. 777 F.2d 393 A.8 (Minn.), 1985, at 398; Lewis Galoob Toys, Inc. v. Nintendo of America, Inc. 780 F.Supp. 1283 D.Cal., 1991. at 1291; Encyclopaedia Britannica Educational Corp. v. Crooks 542 F.Supp. 1156 C.N.Y., 1982, at 1167.

<sup>15</sup> See, U.S.--Hubbard Broadcasting, Inc. v. Southern Satellite Systems, Inc., C.A.8 (Minn.), 777 F.2d 393, certiorari denied 107 S.Ct. 643, 479 U.S. 1005, 93 L.Ed.2d 699, rehearing denied 107 S.Ct. 964, 479 U.S. 1070, 93 L.Ed.2d 1012, and 109 S.Ct. 406, 102 L.Ed.2d 393. see, also, 18 C.J.S. Copyrights § .5

<sup>16</sup> See, e.g., Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 Harv. L. Rev. 281, 291-321 (1970); Joseph P. Liu, Copyright and Time: A Proposal, 101 Mich. L. Rev. 409, 428 (2002).

the creation by raising the cost of their creation.<sup>17</sup> Until recently, likewise, copyright scholars have made no serious attempts to link copyright policy to broader theory of distributive justice.<sup>18</sup>

This paradigm is now continually challenged, as numerous ‘fairness scholars’ and other critics of the economics paradigm notably growingly argue that intellectual property and copyright law more specifically should be based upon some measure of distribution, not efficiency. This understanding of copyright, thus far, mostly gave rise to a plethora of side arguments, such as that copyright law, in fact, is remarkably similar to tax law, as intellectual property monopoly is in effect a negative tax intended to reward innovation,<sup>19</sup> or that copyright law should be analogized with corporate welfare<sup>20</sup> or social welfare,<sup>21</sup> or the constitutional "encouragement" theory<sup>22</sup>, etc.<sup>23</sup> Conceptually, that also means that distribution of wealth generated by limited creativity may be more important to public policy than encouraging overall growth in wealth,<sup>24</sup> or cultural

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<sup>17</sup> William M. Landes & Richard A. Posner, *The economic structure of intellectual property law* (2003), at 69.

<sup>18</sup> Michael Abramowicz, *An industrial approach to copyright law*, 46 *Wm. & Mary L. Rev.* 33 (2004), 104.

<sup>19</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 (2002), at 481, 482.

<sup>20</sup> See, Tom W. Bell, *Author’s welfare: Copyright as a statutory mechanism for redistributing rights*, 69 *Brook. L. Rev.* 229 (2003), at 229 (Hereinafter, ‘Bell, Author’s welfare’); 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) (hereinafter, ‘Bell, Indelicate Imbalancing’).

<sup>21</sup> See, Tom W. Bell, *Author’s welfare*, *Ibid.*, at 229; 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).

<sup>22</sup> See, Wendy J. Gordon, *An inquiry into the merits of copyright: The challenges of consistency, consent, and encouragement theory*, 41 *Stan. L. Rev.* 1343 (1989), at 1414, in reference to U.S. Const. art. I, § 8, cl. 8.

<sup>23</sup> See, e.g., Molly Shaffer Von Houweling, *Distributive values in copyright*, *Texas L. Rev.* (2005, forthcoming), at 31-34; Shubha Ghosh, *supra* note 19, at 475-82.; Tom W. Bell, *Author’s welfare*, *supra* note 20, at 229, 231; Tom W. Bell, *Indelicate Imbalancing*, *supra* note 23, at 6-7. See, also, *Eldred v. Ashcroft*, 537 U.S. 186, 223-226, 123 S.Ct. 769, 154 L.Ed.2d 683 (2003) (Stevens, J., dissenting). *But see*, e.g., Kennedy, *Distributive and Paternalist Motives*, *supra* note 63, at 613 (stating that inefficiencies from compulsory terms and from redistribution through taxation "*involve exactly the same kinds of waste*," leaving a difficult empirical question as to which is preferable); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 *Yale L.J.* 472, 508 (1980) (arguing that, because taxation as well as contractual regulation has efficiency costs, determining the preferable means of redistribution raises an empirical question that "*must be resolved on a case-by-case basis*"). Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 *Harv. L. Rev.* 961, at 994 and Fn. 65 & accompanying text (hereinafter, ‘Kaplow & Shavell, Fairness Versus Welfare’).

<sup>24</sup> Jeffrey L. Harrison, *Rationalizing the allocative/distributive relationship in copyright*, 32 *Hofstra L. Rev.* 853 (2004), at 854.

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well-being.<sup>25</sup> This present fairness sway, notably, expanded into copyright jurisprudence at large, ranging from the fair use doctrine<sup>26</sup> extension terms analysis,<sup>27</sup> or compulsory licensing<sup>28</sup> - all presumably insert distributive issues.<sup>29</sup> More specifically, on the Internet recent critics add, copyright should as well serve the purpose of transferring wealth from artists to distributors to the public at large.<sup>30</sup> To be sure, the limited work in legal academia directly addresses the possibility of redistribution through copyright law. That is, rather than by progressive taxation,<sup>31</sup> welfare law,<sup>32</sup> transfer payments such as regulation of broadcasters and telecommunications companies to increase access in poor neighborhoods,<sup>33</sup>

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<sup>25</sup> Daphna Lewinson-Zamir, *The objectivity of well-being and the objectives of property law*, 78 N.Y.U. L. Rev. 1669 (2003), at 1673. See, discussion at Part B.2, *Infra*.

<sup>26</sup> 17 U.S.C. §107 (2000) (fair use limitations on exclusive rights to copyright). See, e.g., 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 (1982). (arguing that as the costs of contracting and of verifying income may prevent copyright owners from giving price breaks to low income consumers - these contracting costs are a type of market failure). *Id.* at 1628-30.

<sup>27</sup> See Joseph A. Lavigne, *For limited times? Making rich kids richer via the copyright term extension act of 1996*, 73 U. Det. Mercy L. Rev. 311 (1996), at 351 (criticizing the Copyright Extension Act 1996 from on distributive justice grounds disfavoring wealthy artists).

<sup>28</sup> 17 U.S.C. §111(d) (requirement of compulsory license for secondary transmission of primary work); §115 (requirement of compulsory license for the making and distributing of phonorecords).

<sup>29</sup> See, e.g., Jeffrey L. Harrison, *supra* note 24, at 856.

<sup>30</sup> See, e.g., Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. Chi. L. Rev. 263, 305 (2002), at 305; Shubha Ghosh, *Ibid.*, at 481, 482. See, also, discussion at Part B.2, *infra*.

<sup>31</sup> But see, Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equality: A More Equitable View*, 29 J. Legal Stud. 797 (2000); Dagan, *supra* note 31, at 786 (focusing on takings doctrine). In the context of contract law, see also the seminal work of Anthony T. Kronman, *supra* note 23, at 475. It is yet important to distinguish between contractual-based redistribution like the one referred to by Kronman, and disputes between unfamiliar persons to the dispute, where parties are, in effect, 'strangers' prior to the dispute. The victims here are third parties. Next to copyright law disputes, other legal fields of analogy are nuisance law, automobile accident and pollution control. See, also, discussion in part D.1, *herein*.

<sup>32</sup> For example of welfare legislation, 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).

<sup>33</sup> Economists have long considered government expenditures together with taxation, recognizing government transfer payments as both increased income for individuals receiving them and also negative taxes from a fiscal perspective. See Richard A. Musgrave & Peggy B. Musgrave, *Public Finance in Theory and Practice* 216, 295 (5th ed. 1989). See, also, Abramowicz, *supra* note 18, at 106.

or even employment opportunity programs though labor law and tax law<sup>34</sup> - which all, by and large, echo a better perception that the generally greater efficiency of redistribution. Likewise, although the Supreme Court's analyses continue to treat the provision of economic incentives to produce new works as important, an "author's rights" or fairness-based strain of analysis, at times, has also emerged, such as in the Harper & Row, Publishers v. Nation Enters case<sup>35</sup>, and recently in Justice Souter's perplexing secondary yet surprising consideration of the latter approach in his famous Grokster case opinion.<sup>36</sup>

This essay argues that copyright law should not promote distributive justice concerns, subject to narrow exceptions and those other more efficient laws such as taxation and welfare laws should do that instead. It does so in accordance to the prevailing utilitarian interpretative approach to copyright jurisprudence, with emphasis on the latest Peer-to-Peer (P2P) file sharing litigation. Part B opens with three leading critiques and flawed rationalizations of distributive justice that can be traced to libertarianism, liberty and well-being theory and even some narrow forms of efficiency within the copyright discourse.<sup>37</sup> Focusing on a welfare economics approach, Part C critically depicts the three leading classes of distributive injustice that have emerged in the P2P tale of the present day Internet. It

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<sup>34</sup> The U.S. tax system redistributes wealth from taxpayers to the federal government. 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). Particularly 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). Many economists writing in the field of public economics study the distributive effects of taxation and other government policy. See, e.g., William Vickrey, *Agenda for Progressive Taxation* (1947); James A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 *Rev. Econ. Stud.* 175 (1971); Matti Tuomala, *Optimal Income Tax and Redistribution* (1990).

<sup>35</sup> See Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 546 (1985).

<sup>36</sup> See the Grokster case, at 2776 and Fn. 8 & accompanying text, referring to *Eldred v. Ashcroft*, 537 U.S. 186, 223-226, 123 S.Ct. 769, 154 L.Ed.2d 683 (2003) (Stevens, J., dissenting); Brief for Sovereign Artists et al. as *Amici Curiae* 11 and Molly Van Houweling, *Distributive Values in Copyright*, 83 *Texas L.Rev.* 1535, 1539-1540, 1562-1564 (2005). To be safe, all these three sources support a fairness approach to distributive justice, while arguing for the widespread distribution of creative works. Notably, the Grokster court considers the argument while ignoring its controversial rationale, as described, e.g., in Van Houweling's basic consideration of the poorly financed statutes of such emerging new creators. *Id.*

<sup>37</sup> Lewinsohn-Zamir and Dagan offer a fourth personality theory argument within the context of takings doctrine. This argument, however, is less relevant to American copyright jurisprudence that largely rejected this civil-law based personality theory. See, e.g., Rudolf Monta, *The Concept of Copyright Versus the Droit d'Auteur*, 32 *S. Cal. L. Rev.* 177 (1958-59). According to the latter, however, copyright owners would be more harmed when a certain work of art of theirs is unlawfully reallocated, than when a similar value is taken from their total wealth. Compare, Lewinsohn-Zamir, *supra* note 25, at 55; Dagan, *supra* note 31, at 787.

does so in three levels, referring to claims: 1) favoring the enriching of poor infringers, 2) poor creators and 3) the impoverishing of wealthy copyright industries. Part D then goes on arguing against copyright distributive justice, and does so fourfold, referring to: 1) the discriminatory tendency of distributive theory for both substantive copyright law and its remedial corollaries, due to a) long-term implications of progressive damages, b) the resulting disparity between litigating and non-litigating parties to disputes. Part D then continues on arguing against copyright distributive justice due to: 2) its over-expensive application within copyright law as a result of a) the adverse effects copyright-based redistribution has on work incentives, b) their diverse administrative costs, c) long run deriving consequences, and d) differences in the frequency of intervention they require; And due to 3) its imprecise consequences and 4) the social costs it inefficiently inflicts.

Part E concludes with a caveat. In this essay's view, it is undesirable to instill our egalitarian commitments into copyright law, in which redistribution paradigmatically should remain only a side effect, even if their proposed function in this context is, indeed, rather moderate. In practice, moreover, it is often impossible to redistribute income through the choice of copyright law and that, even when it is possible, redistribution through the government's tax, welfare and transfer system may be less discriminatory, cheaper and is likely to be more precise.

## B. Distributive Injustices: The Three Accounts

### *1. Libertarian argumentation: Beyond Pareto superiority*

The first to oppose to the use of private law and copyright herein, as a mechanism for redistribution are the libertarians whose opposition derives from their general belief that the compulsory transfer of wealth is theft, regardless of how it is accomplished.<sup>38</sup> When a private good is stolen, the theft necessarily deprives the original owner of possession. That has also been the view of the United States Department of Justice policy regarding

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<sup>38</sup> See e.g., R. Nozick, *Anarchy, State and Utopia* 149-53, 167-74 (1974); See, also, Buchanan, *Political Equality and Private Property: The Distributional Paradox*, In *Markets and Morals* 69-84 (G. Dworkin, G. Bennet, & P. Brown eds. 1977); Epstein, *Unconscionability: A Critical Reappraisal*, 18 *J.L. & Econ.* 293, 293-94 (1975). In the copyright context, See e.g., Raymond Shih Ray Ku, *supra* note 30, at 305 (In this case, the use of Napster is not theft-- copyright is theft."). See, also, John Perry Barlow, *Napster.com and the Death of the Music Industry*, at <http://www.sparklehouse.com/sparklehouse/mp3/barlow.html> (Last visited 1 December 2005).; see, also, Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 *J.L. & Com.* 509, 513 (1996), at 512.

unauthorized downloading,<sup>39</sup> or the Recording Industry Association of America (RIAA), and the trade association representing them, which unequivocally characterizing the free downloading of copyrighted material as an act of theft, arguing that those who download music online are "stealing" their intellectual property.<sup>40</sup> Legislators considering the 1997 No Electronic Theft (NET) Act,<sup>41</sup> a most recent draconian criminal copyright infringement law, equating copyright infringement with the theft of physical property.<sup>42</sup> And yet, making an unauthorized copy however does not infringe the nonrivalrous nature of digital music.<sup>43</sup>

This reference to distributive justice argumentations, theoretically, may be related to the tautological difficulty fairness scholars might have in dealing with Pareto-superiority. Whereby, if something is not Pareto efficient<sup>44</sup> – there is a need to advance a diverse approach, potentially distributive. In other words, unless a legal rule is Pareto-superior to all other feasible rules, in the sense that no one would object to the adoption of that rule - there is a convincing need to press forward one or another normative argument which seeks to put in plain words why one group should be made better off at the expense of another.<sup>45</sup> Because a public good such as a broadcast television program is characterized by nonrivalrous utilization, any number of individuals can copy an existing broadcast without in so doing depriving some other person of access.<sup>46</sup> Evidently, if someone shoplifted a CD of the latest music group, that would constitute theft of a tangible, private good and would be punishable under applicable state laws. Such conduct would not comprise copyright infringement, however. Moreover, under applicable

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<sup>39</sup> See, Eric H. Holder, Jr., Remarks at the Press Conference Announcing the Intellectual Property Rights Initiative (July 23, 1999), at <http://www.usdoj.gov/criminal/cybercrime/dagipini.htm> (Last visited 1 December 2005).

<sup>40</sup> See Recording Indus. Ass'n of Am., Issues: Anti-Piracy, at <http://www.riaa.com/issues/piracy> (Last visited 1 December 2005); Press Release, Motion Picture Ass'n of Am., Inc., Motion Picture and Music Industries File Suit Against Scour.com (July 20, 2000), available at <http://www.mpa.org/Press/ScourPressRelease.htm> (Last visited 1 December 2005).

<sup>41</sup> Pub. L. No. 105-147, 111 Stat. 2678 (1997) (codified as amended at 17 U.S.C. §§ 101, 506, 507; 18 U.S.C. § 2319, 2319A, 2320; 28 U.S.C. § 1498 (2000)); see also *infra* Part III.B.3 (discussing the NET Act).

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

<sup>43</sup> See, e.g., *Sony Corp.*, 464 U.S. at 450 n.33; see also *United States v. Smith*, 686 F.2d 234, 243 (5th Cir. 1982) (recognizing that taping a copyrighted broadcast "does not implicate a tangible item... [;] nothing was removed from someone's possession"). See, also, Glynn S. Lunney, Jr., Fair use and market failure: Sony Revisited, 82 B.U. L. Rev. 975 (2002), at 979.

<sup>44</sup> Whenever a resource distribution is Pareto optimal, no other allocation of resources would benefit at least one person without imposing a cost on someone else. See R. Leftwich, *The price system and resource allocation* 284-85, 298, 388-89 (5th ed. 1973).

<sup>45</sup> Bruce A. Ackerman, *Introduction to Economic foundations of property law*, (B. Ackerman ed. 1975), at xiii.

<sup>46</sup> See, Glynn S. Lunney, Jr., *supra* note 43, at 979, referring to Bruce Sterling, *The Hacker Crackdown: Law and Disorder on the Electronic Frontier* 250-81 (1992).

state laws, the theft of a CD would in all probability be valued at the market price for the CD, not at the worth of the intangible rights to reproduction that copyright protects.<sup>47</sup> As argued herein, it is however not the role of copyright law to make this normative choice whenever Pareto superiority is present. That does not mean that distribution is inefficient or that it is bad law – just that copyright is not the proper set of laws to promote distributive justice.<sup>48</sup>

Another explanation or at least manifestation against the libertarian taking on distributive justice in copyright law may be related to the intriguing change in American public opinion in favor of file sharing norm.<sup>49</sup> With members of the general public and the recording community upset with the RIAA's actions, public pressure largely views downloading as morally legitimate.<sup>50</sup> Thus, while the recording industry clearly perceives music downloading as illegal, "[s]ome do not even seem to see any real moral ... [or] ethical ... dilemma with media piracy over the Internet".<sup>51</sup> Instead, "the image is out there of the bully ganging up on people with the least amount of money, the rich taking from the poor."<sup>52</sup> Through the recognition of the potential of new technologies to facilitate inexpensive speech and the attendant danger of burdening those technologies with extra expenses, Courts may have been partly catalyzing this jurisprudential dangle even indirectly. Sympathy to the role of poorly-financed speakers can already be found in the constituting case of *Reno v. ACLU*, where the court noted "[The Internet] provides relatively unlimited, low-cost capacity for communication of all kinds...Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."<sup>53</sup> And yet, as this essay argues, copyright jurisprudence was

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<sup>47</sup> *Id.*

<sup>48</sup> See discussion at part B.3, *infra*.

<sup>49</sup> See, Stacey M. Lantagne, *The morality of MP3s: The failure of the recording industry's plan of attack*, 18 *Harv. J.L. & Tech.* 269 (2004). See, also, discussion herein.

<sup>50</sup> See, Amanda Lenhart & Susannah Fox, *Pew Internet & American life project, downloading free music: Internet music lovers don't think it's stealing 2* (Sept. 28, 2000), available at [http://www.pewinternet.org/pdfs/PIP\\_Online\\_Music\\_Report2.pdf](http://www.pewinternet.org/pdfs/PIP_Online_Music_Report2.pdf) (Last visited 1 December 2005) (observing that approximately 80% of music downloaders do not consider what they are doing to be a form of stealing). *Id.*

<sup>51</sup> See also John Hale, *Testimony Before the Subcommittee on Courts, the Internet, & Intellectual Property, Committee on House Judiciary*, Feb. 26, 2003 (testimony); See, also, e.g., Jon Healey & Jeff Leeds, *Tone Deaf to a Moral Dilemma? Millions Download Songs Illegally But Don't Feel Guilty*, *L.A. Times*, Sept. 2, 2003, at A1.

<sup>52</sup> See, Anthony Prapkanis, a University of California-Santa Cruz professor of social psychology, at Jefferson Graham, *RIAA Lawsuits Bring Consternation and Chaos*, *USATODAY.com*, Sept. 10, 2003, available at [http://www.usatoday.com/tech/news/techpolicy/2003-09-10-riaasuit-reax\\_x.htm](http://www.usatoday.com/tech/news/techpolicy/2003-09-10-riaasuit-reax_x.htm) (Last visited 1 December 2005).

<sup>53</sup> 521 U.S. 844, 870 (1997); see generally, Eugene Volokh, *Cheap Speech and What it will Do*, 104 *Yale L.J.* 1805 (1995).

not designed to succumb to the present sway of libertarian argumentation, as copyright law intrinsically was not designed and is inefficient in promoting distributive justice by favoring the poor and thus penalizing the wealthy.

*2. Well-being theory: Beyond basic needs*

A second claim on the account of distributive justice comes from the liberal approach, upholding that basic property rights, established by principles of acquisition and transfer, should be inviolate.<sup>54</sup> Inequalities in such basic goods such as health, nutrition, shelter and education, therefore, cannot be justified through efficiency.<sup>55</sup> In other words, inequalities in the latter type of goods cannot be justified as maximizing the total amount of welfare. In such cases alone, the concern for the well-being of other people based on their basic needs is the responsibility of the government, to be achieved via its tax and transfer payment mechanisms.<sup>56</sup> Disappointing to some, next to concerns about inequality as a moral adversity, welfare herein also has been perceived as a mean to curtail violence by welfare recipients.<sup>57</sup>

In contrast, individuals utilizing their private property are not required to treat others with care or concern.<sup>58</sup> Only such a "division of labor" can promote distributive justice without unduly undermining individual liberty.<sup>59</sup> In other words, well being theories of fairness morally uphold only

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<sup>54</sup> F. Hayek, *The Constitution of Liberty* 93-102, 133-61 (1961). Buchanan, *Political Equality and Private Property: The Distributional Paradox*, In *Markets and Morals* 69-84 (G. Dworkin, G. Bennet, & P. Brown eds. 1977); Epstein, *supra* note 38, 293-94 (1975).

<sup>55</sup> See David O. Brink, *Moral Realism and the Foundations of Ethics* 224 (1989), at 272; James Griffin, *Well-Being: Its Meaning, Measurement, and Moral Importance* 8 (1986), at 299-300. As Daphna Lewinson-Zamir in her seminal paper concludes, the necessity to protect property is, thus, most obvious with regard to the values of autonomy and liberty. Daphna Lewinson-Zamir, *supra* note 25, at 1715. But see, Daphna Lewinson-Zamir, at 1716, applying her objective well-being theory on property law, based on the Maslowian Pyramid of needs, expanding the scope of protection also to "the acquisition of knowledge necessary for appreciating the good things in life", "adopting worthwhile goals", or realizing one's potential. Daphna Lewinson-Zamir, *Id.*, referring also to Abraham H. Maslow, *Motivation and Personality* 35-58, 97-98 (2d ed. 1970).

<sup>56</sup> John Rawls, *a Theory of Justice* 87-88, 90-95, 274-70 (1971); Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 *Stan. L. Rev.* 877, 890 n.38 (1976); John Rawls, *Social Unity and Primary Goods*, in *Utilitarianism and Beyond*, at 159; John Rawls, *The Basic Structure as Subject*, In *Values and Morals* 47, 54-55 (A. Golman & J. Kim eds. 1987). *See also*, C. Fried, *Right and Wrong* 143-50 (1978).

<sup>57</sup> See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 306-08, 314-24 (1985), at 315-16; Frances F. Piven & Richard Cloward, *Regulating the Poor: The Functions of Public Welfare* (2d ed. 1993) (adding that U.S. welfare policies expand during times of civil instability so as to pacify social unrest).

<sup>58</sup> See Ronald Dworkin, *Law's Empire* ch. 8 (1986).

<sup>59</sup> *Id.*, ch. 8 (1986), at 299-301.

compulsory redistribution of 'primary goods' rather than vague 'individual well-being' attributed, such as enjoyment or pleasure per se. Such enjoyment also drives the vast majority of internet users who download copyrighted digital works of art. Such less-than-basic needs do not justify, thought, government intervention or the adoption of a new interpretative paradigm for digital copyright law. Liberal democratic societies, arguably, should be able to agree that the economic status of Internet users that download digital music, or that of potential artists and amateurs, by no means correspond with the basic needs that well being theories initially are said to augment.

To be sure, Common law is not unfamiliar with this liberal notion and in fact promoting ideals of distributive justice traditionally have been exclusively confined to those fields of law that are specifically designed for fostering these ideals, such as tax law, welfare law, but then also some more trivial segments of copyright law.

The Copyright Act of 1976 thus includes a variety of narrowly chosen exceptions specifically designed to help parties sheltered from the inclusive impact of copyright including the blind, handicapped, or disabled persons;<sup>60</sup> nonprofit educational institutions;<sup>61</sup> religious organizations;<sup>62</sup> and other nonprofit groups, such as “nonprofit agricultural or horticultural organization[s],” “nonprofit veterans’ organization[s],” or “nonprofit fraternal organization[s].”<sup>63</sup> And yet, these copyright’s burdens are strictly limited by various exceptions for specified classes of users who might not otherwise be able to bear copyright-related expenses. In these narrow categories copyright law indeed resembles exceptions favored by income tax legislation.<sup>64</sup> Even when the Copyright Act goes to include a provision that permits live performance of musical works and non-dramatic literary works, it does so narrowly, and as long as the performance does not have a commercial purpose, the performers are not paid, and no admission fee is

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<sup>60</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>61</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).

<sup>62</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>63</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>64</sup> See, the Income tax code 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).

charged.<sup>65</sup> Again, as the Copyrights Act's legislative history suggests, the latter provision, for example, was designed to benefit predominantly poor creators who could not otherwise afford to perform copyrighted works.<sup>66</sup> Patent law jurisprudence tells of a similar taking on distributive justice.<sup>67</sup> The market for pharmaceutical products particularly sets the proper analogy, where the availability of intellectual property is an issue of life and death, not merely of dollars and cents.<sup>68</sup> In accordance, the main critique against the pharmaceutical patents regime is that poor patients cannot equally afford pharmaceuticals that have already been developed and could be produced at low marginal cost.<sup>69</sup>

In that sense, copyright law considerations of narrowly defined generic components of distributive justice not only ought to be taken into account in designing rules for exchange, but must be taken into account if the law of copyright is to have the necessary degree of minimum moral acceptability. The scholarly incongruity about the interpretative recognition of distributive justice concerns should only begin where these narrowly chosen generic exemptions end to help consumers who are most in need of assistance.<sup>70</sup> Within the context of copyright, outside the narrow scope of listed exceptions, high entry barriers on access to copyright are marginal, as copyrighted works can be largely purchased in low prices and generally are subject to mass consumption.<sup>71</sup>

The necessity of property to the realization of well-being obviously creates a quantity requirement: A certain minimum amount of property is necessary for people to be able to fare even modestly well. Subject to carefully tailored exceptions, copyright law however, offers a higher monetary benchmark. Thus, rules that aim at insuring people a minimal amount of property presumably tend to increase basic well-being. And yet, simply put,

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<sup>65</sup> 17 U.S.C. §110(4). If there is an admission charge, such performances are still permitted so long as the proceeds above costs are only used for educational, religious, or charitable purposes, and so long as the copyright holder does not object via procedures specified in the statute. 17 U.S.C. § 110(4)(B).

<sup>66</sup> The exception was broader under the 1909 Copyright Act, which exempted all performances that were not "for profit". The 1976 House Report explains that the old exemption was too broad because "[m]any 'non-profit' organizations are highly subsidized and capable of paying royalties." H.R. Rep. No. 94-1476 (1976), at 62. Presumably, then, the narrow exemption is intended to allow performances by poorly-financed groups that would be unable to afford the fees required to perform the works of their choice.

<sup>67</sup> See Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 Mich. L. Rev. 1, 68 (2002); For the pharmaceutical context, see, also, Arti K. Rai, *The Information Revolution Reaches Pharmaceuticals: Balancing Innovation Incentives, Cost, and Access in the Post-Genomics Era*, 2001 U. Ill. L. Rev. 173 (2001)

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

<sup>69</sup> See, e.g., Abramowicz, *supra* note 18, at 105 & Fn. 233-235 and accompanying text.

<sup>70</sup> *Id.*, at 70.

<sup>71</sup> For further critique, see, also discussion in Part D.2, herein.

copyright law largely should not be interpreted in that rather fashionable manner, or at least mannered in that fashion.

3) *Welfare economics: Beyond Kaldor-Hicksian aptitude*

A third account against distributive justice within property law and more specifically copyright law emerged through the law-and-economics school of thought. This third approach is also the focal point of this essay. It argues that there are sound reasons for much normative economic analysis of law not to take explicit account of the distribution of earnings within copyright jurisprudence.<sup>72</sup> In copyright one can avoid the question of the fairness of the starting point simply by asserting that areas of law other than copyright are better designed to take care of distributive questions of fairness or justness.<sup>73</sup> As we have stressed, these reasons derive from judgments about the best ways to organize analysis and to accomplish distributive objectives, not from a belief that distributive concerns lack normative importance.<sup>74</sup> Within the economical discourse, it is widely agreed that redistribution goals can be accomplished better in modern states by tax law,<sup>75</sup> etc., and not the reshuffling of property rights.<sup>76</sup> Cost-benefit analysis aimed at maximizing welfare, therefore, does not contend against distributive *goals*.<sup>77</sup> However,

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<sup>72</sup> See, e.g., Louis Kaplow & Steven Shavell, Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income, 23(2) J. Legal Stud. 667 (supp. vol. 1994) (hereinafter, 'Kaplow & Shavell, Why the Legal System'); A. Mitchell Polinsky, An Introduction to Law and Economics (2d ed. 1989), at 124-27; Steven Shavell, A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?, 71 Am. Econ. Rev. 414 (1981).

<sup>73</sup> Cf. *Id.* But see, See, e.g., Jennifer H. Arlen, Should Defendants' Wealth Matter?, 21 J. Legal Stud. 413 (1992) (using law and economics analysis while implicitly assuming that taxes are not available for redistributive purposes).

<sup>74</sup> Kaplow and Shavell, Fairness versus welfare, at 995.

<sup>75</sup> The U.S. tax system redistributes wealth from taxpayers to the federal government. 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). Particularly 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). Many economists writing in the field of public economics study the distributive effects of taxation and other government policy. See, e.g., William Vickrey, Agenda for Progressive Taxation (1947); James A. Mirrlees, An Exploration in the Theory of Optimum Income Taxation, 38 Rev. Econ. Stud. 175 (1971); Matti Tuomala, Optimal Income Tax and Redistribution (1990). For the regulatory framework, see

<sup>76</sup> See, e.g., Arthur M. Okun, Equality and Efficiency: The Big Tradeoff ch. 4 (1975); R. Posner, Economics Analysis of Law 10 (2d ed. 1977).

<sup>77</sup> See, Jon D. Hanson & Melissa R. Hart, Law and Economics, in A Companion to Philosophy of Law and Legal Theory 311 (Dennis Patterson ed., 1996), at 330; Laurence H. Tribe, Constitutional Calculus: Equal Justice or Economic Efficiency?, 98 Harv. L. Rev. 592, 594 (1985). There are a number of explanations for the common

in compliance with the prevailing economics copyright paradigm, copyright should avoid promoting distributive *means*. To be sure, the term “distribution” herein refers to concerns about the overall allocation of income or wealth--that is, about economic equality and inequality.<sup>78</sup>

Thus, the alternative disregard of the distributional dimension of any given predicament is attributing of the entire law-and-economics school of thought and is conceptually flawed.<sup>79</sup> Welfare economics, as will be explained herein, is not concerned with distribution in this situational sense per se.<sup>80</sup> Changing how a loss is divided between the two parties, hence, is of no consequence under welfare economics.<sup>81</sup>

To be sure, the issue of the appropriate criterion of well-being of users of copyrighted works and their creators alike, used in evaluating welfare and in welfare maximization, is distinct from the "fairness" paradigm largely advocated by copyright fairness scholars, which concerns the appropriate distribution of well-being--be it measured by subjective<sup>82</sup> or objective<sup>83</sup> standards--among individuals. In other words, the economic notion of fairness is one that is concerned unequivocally with the distribution of income. Welfare economics thus accommodates all factors that are relevant to individuals' well-being and to its distribution.<sup>84</sup>

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belief that income distribution is unimportant in normative economic analysis of law. For further discussion, see D.1, *infra*.

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However, concerns regarding who is supposed to overcome in a particular legal dispute are also often described as distributive. In such contexts, the word "distributive" refers to the allocation of a particular loss linking the disputing parties (rather than to the degree of disproportion in the allotment of earnings in the general public), and the apposite distribution is understood to be determined by notions of fairness such as corrective justice (instead of by a conception of the appropriate allotment of earnings in the general public). *See*, Kaplow and Shavell, *Fairness versus welfare*, *supra* note 23, at 998.

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*Id.*

<sup>80</sup> Indirectly, however, changing the division of losses between parties to disputes may often affect individuals' well-being in a number of respects. Kaplow and Shavell, *Fairness versus welfare*, *supra* note 23, at 998. *See*, also, discussion herein.

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Kaplow and Shavell, *Fairness versus welfare*, *supra* note 23, at 998.

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Brink, David O. Brink, *supra* note 55, at 217; Kaplow and Shavell, *Fairness versus welfare*, *supra* note 23, at 1350.

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Kaplow & Shavell, *Fairness Versus Welfare*, *supra* note 23, at 980 n.35, 1353-54 (2001); Thomas Hurka, *Perfectionism* 23-24, 37-44 (1993), at 55-60.

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Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, *supra* note 23, at 968. On welfare economics, *see*, generally, Kenneth J. Arrow, *Social Choice and Individual Values* (1951); John C. Harsanyi, *Rational Behavior and Bargaining Equilibrium in Games and Social Situations* ch. 4 (1977). For references on applied welfare economics, *see* Robin Boadway & Neil Bruce, *Welfare Economics* (1984); I.M.D. Little & J.A. Mirrlees, *Project Appraisal and Planning for Developing Countries* (1974); Dennis C. Mueller, *Public Choice II* ch. 19 (1989).

With definite reference to copyright law, arguably, the appropriate analytical framework should comply with the latter, so that beyond generic redistribution of copyright to the needy, copyright law should then use the tax-and-transfer system to achieve distributive fairness or justice.<sup>85</sup> In economics terms, as Jehle provided, appropriate conditions hold, “Any Pareto optimal allocation can be supported by competitive markets and some distribution of initial endowments.”<sup>86</sup> To be sure, welfare economics, hence, does not support the Kaldor-Hicks framework.<sup>87</sup> One implication of the fact that welfare economics incorporates consideration of the distribution of income is that the well-known opposition regarding the looming conceptual indeterminacy of the Kaldor-Hicks efficiency test is badly chosen.<sup>88</sup> Under a common understanding of this latter normative paradigm, copyrights are assessed by reference to wealth maximization or efficiency, criteria that many take to mean as omitting imperative characteristics of individuals' well-being and as taking no notice of distributive concerns.<sup>89</sup>

A welfare economics understanding of copyright ultimately, arguably, will chill the tension between market-driven economies of equality and the assortment of forms of intervening with market outcomes through fairness.<sup>90</sup>

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<sup>85</sup> See e.g., Steven Shavell, A Note of efficiency v. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?, 71 Am. Econ. Rev. 414 (1981); and Kaplow & Shavell, Why the Legal System, *supra* note 72, at 667 (1994).

<sup>86</sup> G. A. Jehle, *Advanced microeconomics theory* (1991), at 232. See, also, G. Debreu, *Theory of value* (Yale University Press, 1959). For seminal work on welfare economics, see Kenneth J. Arrow, *supra* note 84; John C. Harsanyi, *Rational Behavior and Bargaining Equilibrium in Games and Social Situations* ch. 4 (1977). On applied welfare economics, see also, Robin Boadway & Neil Bruce, *Welfare Economics* (1984); Yew-Kwang Ng, *Efficiency, Equality and Public Policy: With a Case for Higher Public Spending* (2000); Yew-Kwang Ng, *Welfare Economics: Introduction and Development of Basic Concepts* (1979);

<sup>87</sup> Kaldor-Hicks efficiency is also called 'potential Pareto optimality' because it assumes that a move that is Kaldor-Hicks superior can be transformed into a Pareto superior move by forcing the gainers from the move to compensate the losers. See Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 *ECON. J.* 549, 549-50 (1939). For a discussion of Kaldor-Hicks efficiency as a tool of legal policymaking, see Coleman, *Efficiency, Utility*, *supra* note 16, at 513, 519- 20; Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 *Hofstra L. Rev.* 591, 594, 634-39 (1980).

<sup>88</sup> Kaplow and Shavell, *Fairness Versus Welfare*, at 995-996 and Fn. 53, referring to Jon D. Hanson & Melissa R. Hart, *supra* note 77, at 311, 330 (observing that “[p]erhaps the most common criticism of law and economics is that it overlooks or, worse, displaces questions of distribution or equity” and asserting that “[e]conomists respond in part by observing that distributional questions taken by themselves fall outside the reach of economic science”); Laurence H. Tribe, *supra* note 77, at 592, 594 (“This disregard of the distributional dimension of any given problem is characteristic of the entire law-and-economics school of thought ....”).

<sup>89</sup> Kaplow and Shavell, *Fairness Versus Welfare*, *supra* note 23, at 968.

<sup>90</sup> William D.A. Bryant, *Misinterpretations of the second fundamental theorem of welfare economics: Barriers to better economic education*, *The Journal of Economic Education*, Vol. 25, No. 1 (Winter, 1994), 75-80, at 75. See, also, discussion in Part D, *infra*.

In conclusion, it may be inefficient to choose an inefficient policy in order to promote the desired distribution of individual welfare. Copyright which is not specifically designed for redistribution, thus, should avoid promoting distributive means beyond trivial segments of copyright law.

### C. Classes of Copyright Distributive Injustice

#### 1. Overview

Whenever there is in fact a conflict depends on the specific distributional consequences of pursuing efficiency and on what constitutes an equitable distribution of income.<sup>91</sup> Present day P2P Internet public concern and litigation, in fact, sets aside what seem to be three leading classes of distributive injustice that have emerged, referring to claims favoring 1) the enriching of poor infringers, 2) the enriching of poor creators and 3) the impoverishing of wealthy copyright industries. It may be inefficient to choose an inefficient policy in order to promote the desired distribution of income. Nonetheless, this essay will try to argue why the choice of the three classes herein to promote redistribution should be based primarily on efficiency considerations. This is true, yet again, regardless of the specific distributional consequences of pursuing efficiency in these particular cases and regardless of what constitutes an equitable distribution of income. In these three contexts, as argued herein, it is detrimental to formally incorporate into copyright jurisprudence the nowadays rather schmaltzy egalitarian commitment, given that the constitutional taking on copyright-tailored redistribution is paradigmatically only an offshoot, albeit judicious.

#### 2. Enriching poor infringers

Arguments in favor of distributive justice within the P2P context already expands to financial, professional, social, and even marital statuses. Reference to age, sex or health conditions are also customarily mentioned. To illustrate, on behalf of copyright fairness, public opinion has been made informed that among the alleged unlawful copyright file-sharing copyright infringers aged as minors or as the elderly, such as a twelve-year-old girl,<sup>92</sup> a

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<sup>91</sup> A. Mitchell Polinsky, *supra* note 72, at 9.

<sup>92</sup> See, Downloading girls escapes Lawsuit, CBSNews.com (Sept. 9, 2003), at <http://www.cbsnews.com/stories/2003/08/28/tech/main570507.shtml> (Last visited 1 December 2005). See, also, Geoffrey Neri, Sticky fingers or sticky norms? Unauthorized music downloading and unsettled social norms, 3 *Geo. L. J.* 733, at 752; Jason Schultz, File Sharing Must Be Made Legal: Suing 12-year-olds and Grandmothers Isn't the Answer. There's Got To Be a Better Way, *Electronic Frontier*

sixty-six-year-old retired school teacher,<sup>93</sup> a seventy-year-old grandfather,<sup>94</sup> and an eighty-six-year-old grandmother.<sup>95</sup> The public further became informed of defendants' unfortunate health conditions describing some as dyslexic<sup>96</sup> or simply shocked<sup>97</sup> by the allegation.<sup>98</sup> By the same token, the public was made aware of the fact that a single mother had to bare the expenses of a settlement for her minor daughter's accusations.<sup>99</sup> With this egalitarian avalanche mounting, it was just a circumstantial matter until even an all-purpose self-employed businessman defendant in a copyright lawsuit stemming from an RIAA subpoena would be described as yet another 'social victim'.<sup>100</sup> Referring once again to copyright fairness rhetoric, describing him as financially vulnerable, the Electronic Frontier Foundation (EFF), a most influential American Non-Governmental Organization (NGO) who took on the case, stated "[i]t's not fair to hold people like Mr. Plank as collateral damage in the RIAA dragnet."<sup>101</sup>

### 3. *Enriching poor creators*

Poorly-financed creators serve as a second class of individuals who copyright fairness advocates argue, suffer from a heavier burden of copyright on creativity.<sup>102</sup> Digital music sampling, or shortly *sampling*, is a

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Foundation, at [http://www.eff.org/share/20030912\\_jason\\_salon.php](http://www.eff.org/share/20030912_jason_salon.php) (Sept. 12, 2003) (Last visited 1 December 2005).

<sup>93</sup> John Schwartz, *She Says She's No Music Pirate. No Snoop Fan, Either*, New York Times, Sept. 25, 2003, at C1, available at <http://www.nytimes.com/2003/09/25/business/media> (Last visited 1 December 2005).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* See, also, Chris Gaither, *Recording Industry Withdraws Suit Mistaken Identity Raises Questions on Legal Strategy*, Boston Globe, Sept. 24, 2003, at C1, available at <http://www.boston.com/business/articles/20032/09/24> (Last visited 1 December 2005). The case was finally dropped, but not with prejudice. *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Downloading girls escapes Lawsuit*, CBSNews.com (Sept. 9, 2003), at <http://www.cbsnews.com/stories/2003/08/28/tech/main570507.shtml> (Last visited 1 December 2005).

<sup>100</sup> Press Release, Electronic Frontier Foundation, *Electronic Frontier Foundation Defends Alleged Filesharer* (Oct. 14, 2003), at [www.eff.org/IP/P2P/20031014\\_eff\\_pr.php](http://www.eff.org/IP/P2P/20031014_eff_pr.php). (Last visited 1 December 2005). See generally *Complaint for Copyright Infringement at 2-3, Fanovisa, Inc. v. Ross Plank*, (No. CV03-6371 DT (FMOx)) (complaint filed by Fanovisa, BMG Music and Warner Bros. Records, Inc. alleging that Ross Plank has used, and continues to use, an online media distribution system to download, distribute, and/or make available copyrighted material(s) to others for distribution).

<sup>101</sup> *Id.* (quoting Wendy Seltzer, staff attorney with Electronic Frontier Foundation). Notwithstanding, the case was dropped.

<sup>102</sup> See, e.g., Jack M. Balkin, *Digital speech and democratic culture*, 79 N.Y.U L. Rev. 1, 6-13 (2004); Daniel A. Farber & Brett H. McDonnell, *Why (and how) fairness matters at the IP/Antitrust interface*, 87 Minn. L. Rev. 1817 (2003); See, also, *See A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912-17 (N.D. Cal. 2000)

new creature of technology in the music industry. As described in the Napster case, the use of sampling occurs when users download one of the plaintiffs' works to decide whether to purchase the audio CD.<sup>103</sup> This passive usage of music samples is different than one mostly used by a studio sound engineer at the direction of a studio producer or recording artist to recycle sound fragments originally recorded by other musicians.<sup>104</sup> To be sure, in the latter, a sampling artist will take a previously popular song, refine it with a more modern sound through sophisticated engineering, and repeat it throughout a new version of the song.<sup>105</sup>

The latter form of sampling has also been cautiously licensed in safeguard of creators' proprietary rights overcoming impending claims in favor of would-be poorly-financed creators. A user who desires to make a legalized sampled recording must get hold of the proper licenses and pay the original artist statutory fees for the recording. For the reason that this separate form of sampling involves the use of both an underlying music composition as well as the sound recording of it, there are two distinct licensing processes involved--one for music compositions and the other for sound recordings.<sup>106</sup> These licenses are typically negotiated for and in due course owned exclusively by an artist's record company. The appropriate procedure is for the sampling artist to seek licenses for the use of previously recorded copyrighted works prior to the release of any work in which the sampling technique is used.<sup>107</sup>

It took the former and second type of sampling practice used for sales promotional purposes, distinctive of file sharing technologies, to enhance distributive justice argumentation from anew. Court findings, however, show that the small portion of Napster use of new artists, based on what was named the 'New Artists program,' was merely used as a smokescreen. In fact, it was not central to defendant's business strategy until this action made it convenient. New or unsigned artists were said to promote their works and

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(summarizing defenses emphasizing use of Napster technology for "sampling" music files).

<sup>103</sup> See, *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000), at 1018.

<sup>104</sup> See Comment, *An Improved Framework for Music Plagiarism Litigation*, 76 California Law Review 421 (1988); 26 AMJUR POF 3d 537, § 2.

<sup>105</sup> Comment, *Look What They've Done to my Song Ma--Digital Sampling in the 90's: A Legal Challenge for the Music Industry*, 9 University of Miami Entertainment and Sports Law Review 179 (1992) citing Note, *You Can't Always Get What You Want but Digital Sampling Can Get What You Need!*, 22 Akron Law Review 691 (1989); see also Note, *A New Spin on Music Sampling: A Case for Fair Pay*, 105 Harvard Law Review 726 (1992); Comment, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 Columbia Law Review 1723 (1987).

<sup>106</sup> See Comment, *An Improved Framework for Music Plagiarism Litigation*, 76 California Law Review 421 (1988); 26 AMJUR POF 3d 537, § 2.

<sup>107</sup> *Id.*

distribute them in MP3 format via the Napster service.<sup>108</sup> Earlier on, Napster, Inc. indeed has sought business alliances and developed both Internet- and software-based technologies to support its New Artist Program.<sup>109</sup> Soon after, as was proven by the Napster court, Napster merely used those unknown artists that it used to seek, as a basis for protection against infringement of the famous artists whose music they were making available or providing access to.<sup>110</sup> Moreover, a sampling of 1,150 music files showed that only eleven were those of new artists.<sup>111</sup> The Napster court affirmed the district court's finding that sampling cannot constitute a fair use for several reasons all relating to the fact that sampling is commercial in nature.<sup>112</sup> Even though it increased CD sales, Court ultimately held that increased sales of copyrighted material attributable to unlawful use ought not to divest the copyright holder of the right to license the material.<sup>113</sup>

Support for poorly-financed creators came also in newly supported sub-class of communicators, in the face of unauthorized amateur authorship, who traditionally have not been spared copyright's burdens. P2P technology thus freely enables unknown and not sponsored amateurs to become large-scale producers and distributors of creative work. Amateurs and amateur creativity, copyright fairness advocates argue, are yet another sub-class of cases where distributive justice should benefit.<sup>114</sup> Before the information age, the technologies of publishing were expensive.<sup>115</sup> That meant the vast majority of publishing was commercial and commercial entities could bear the costs associated with copyright law.<sup>116</sup> The current system, instead, requires amateurs to bear the costs associated with finding the rights holder, negotiating, and making royalty payments. And yet, as copyright fairness

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<sup>108</sup> See Krause Dec. ¶¶ 8-15.

<sup>109</sup> See Parker Dec. ¶ 6.

<sup>110</sup> A & M Records, Inc. v. Napster, Inc., 2000 WL 1009483 at \*4 (N.D. Cal. July 26, 2000) (transcript of proceedings). See, also, an email indicating that defendant planned to solicit interest among unsigned artists, containing a cryptic statement regarding the creation of indexes listing available MP3s: "For now, we should do this for UNSIGNED artists only so the RIAA *thinks* we are not infringing on copyright." Parker Dec., Exh. B. Id, at 904 Fn. 8. An early version of the Napster website advertised the ease with which users could find their favorite popular music without "wading through page after page of unknown artists." 1 Frackman Dec., Exh. C (Parker Dep.) at 104:16-105:10, Exh. 235.

<sup>111</sup> See, A & M Records, Inc. v. Napster, Inc. 114 F.Supp.2d 896 N.D.Cal., 2000, at 904.

<sup>112</sup> See A&M Records, Inc. v. Napster, Inc., 239 F. 3d 1004, 1011 (9th Cir. 2001), at 1018.

<sup>113</sup> Id., at 1018.

<sup>114</sup> Hunter and Lastowka, *supra* note 11, at 988; See, also, Jessica Litman, Copyright Noncompliance (or Why We Can't "Just Say Yes" to Licensing), 29 N.Y.U. J. INT'L L. & POL. 237, 251 (1996). at 237; Shaffer Von Houweling, *supra* note 23, at 33; Rebecca Tushnet, Legal Fictions: Copyright, Fan Fiction, and a New Common Law, 17 Loy. L.A. Ent. L. Rev. 651 (1997), at 651.

<sup>115</sup> See, Free culture: How big media uses technology and the law to lock down and control creativity 85-94 (2004), available at [www.free.culture.cc/freeculture.pdf](http://www.free.culture.cc/freeculture.pdf), at 19. (Last visited 1 December 2005).

<sup>116</sup> Id.

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scholars advocate, amateurs are generally not voluntarily willing to bear these costs, and amateur creativity thus is often lost.<sup>117</sup> And yet, in the Internet P2P network environment, the amateur sphere arguably enjoys state of the art technology that only increases their traditional copyright law incentives; way more than the previously provided incentives protected by the mechanisms of copyright law that predate the information age.

To be sure, the Copyright Act's primary objective is to encourage the production of original literary, artistic, and musical expression for the public good. The fairness argument that the promotion of the public good per se best serves the Copyright Act's policy expresses a one-sided view of the Copyright Act's purposes. In *Wheaton v. Peters*,<sup>118</sup> a case involving a challenge to a secondary work as violative of an alleged common law copyright, the Supreme Court made it clear that copyright is strictly a creature of statute and is neither a common law property right nor a natural right of the author.<sup>119</sup> Copyright law, thus should not be adapted to better facilitate the particular benefits that amateur content production provides given that amateur incentives to create evidently increased. *Wheaton's* description of copyright protection as a monopoly in derogation of the rights of the public has become a basic reasoned premise of subsequent copyright legislation and decisions. Since *Wheaton*, the Supreme Court has time and again reaffirmed the standard that "[t]he copyright law...makes reward to the owner a secondary consideration."<sup>120</sup> Court accordingly has made it clear that it is peculiarly important that the law's boundaries be demarcated as clearly as possible.<sup>121</sup>

With the increase in dissemination technology that facilitates amateurs in becoming large-scale producers and distributors of their creative work - there seem to be no independent justification in support for poorly-financed amateurs or new artists per se, based on copyright-tailored distributive justice claims.

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<sup>117</sup> See, e.g., Lawrence Lessig, *Free culture: How big media uses technology and the law to lock down and control creativity* 85-94 (2004), available at [www.free.culture.cc/freeculture.pdf](http://www.free.culture.cc/freeculture.pdf), at 95-97 (Last visited 1 December 2005).; Hunter and Lastowka, *supra* note 11, at 958.

<sup>118</sup> 33 U.S. (8 Pet.) 591 (1834)

<sup>119</sup> *Globe Newspaper Co. v. Walker*, 210 U.S. 356, 362 (1908); *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 346 (1908) ("copyright property under the Federal law is wholly statutory, and depends upon the right created under the acts of Congress ...."); *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 291 (1907) ("In this country it is well settled that property in copyright is the creation of the Federal statute ...."); *Holmes v. Hurst*, 174 U.S. 82, 85-86 (1899); *Thompson v. Hubbard*, 131 U.S. 123, 151 (1889); *Banks v. Manchester*, 128 U.S. 244, 252 (1888);

<sup>120</sup> *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) (emphasis added).

<sup>121</sup> See, *Fogerty v. Fantasy, Inc.* 510 U.S. 517, 114 S.Ct. 1023, U.S. Cal., 1994, at 517-518.

4. *Impoverishing wealthy copyright industries*

Copyright fairness scholars traditionally advocate against the concentration of media ownership, as such that may lead to the disproportionate power of wealthy speakers and audiences.<sup>122</sup> These concentrations of power traditionally are said to have determined the mix of speech that comprises public discourse.<sup>123</sup> Public opinion as well, has largely supported the view that the copyright industries are largely monopolistic.<sup>124</sup> Anthony Prapkanis, a University of California-Santa Cruz professor of social psychology, summed this view, commenting that while people may be sympathetic to the music industry's plight, "the image is out there of the bully ganging up on people with the least amount of money, the rich taking from the poor."<sup>125</sup> Lately, within the P2P context, Napster, not surprisingly, used the same antitrust-like terminology, asserting that RIAA members had expanded their monopoly beyond the permissible scope under the law.<sup>126</sup>

The record industry indeed has constantly been concerned with problems of monopoly power and pricing, which are quintessentially economic problems. To be sure, the extent to which monopoly power is present in any particular case is an empirical question.<sup>127</sup> And yet, at no point, was the record industry lawfully found to be monopolistic within its meaning with the United States' antitrust laws.

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<sup>122</sup> See, e.g., Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 *Vand. L. Rev.* 1879, 1884 (2000); Dan Hunter and F. Gregory Lastowka, *Amateur-to-amateur*, 46 *Wm. & Mary L. Rev.* 951 (2004), at 1017-1018, referring to See, e.g., William Gibson, "Digital Day", Address to Directors Guild of America, Los Angeles (May 17, 2003), available at: [www.williamgibsonbooks.com/archive/2003\\_05\\_01\\_archive.asp#200322370](http://www.williamgibsonbooks.com/archive/2003_05_01_archive.asp#200322370) (Last visited 1 December 2005). But see, Christopher S. Yoo, *Copyright and Democracy: A Cautionary Note*, 53 *Vand. L. Rev.* 1933 (2000).

<sup>123</sup> Netanel, *supra* note 122, at 1884; Hunter and Lastowka, *supra* note 11, at 1017.

<sup>124</sup> Sam Diaz, *Labels' actions overshadow their message, observers say*. *San Jose Mercury News* (Sept. 15, 2003), available at <http://www.mercurynews.com/mld/mercurynews/business/6775671.htm> (Last visited 1 December 2005) ("And suddenly, the trade association [RIAA]--in its effort to squelch illegal music sharing over P2P networks such as Kazaa and Grokster--looked more like a schoolyard bully."); Jefferson Graham, *RIAA lawsuits bring consternation, chaos*. *USA Today* (Sep. 10, 2003), available at [http://www.usatoday.com/tech/news/techpolicy/2003-09-10-riaa-suit-reax\\_x.htm](http://www.usatoday.com/tech/news/techpolicy/2003-09-10-riaa-suit-reax_x.htm): (Last visited 1 December 2005).

<sup>125</sup> *Id.* See, also, "Are they taking a PR hit?" asks Lee Kovel, of L.A.-based Kovel/Fuller ad agency. "Of course. Massive. I think they asked, 'What's the pain vs. the reward?' They want to make a statement and strike fear. They don't care about PR." See generally <http://www.boycott-riaa.com/> (Last visited 1 December 2005).

<sup>126</sup> Napster, 114 F. Supp. 2d at 912, at 922.

<sup>127</sup> See Edmund Kitch, *The Nature and Function of the Patent System*, 20 *J.L. & Econ.* 265 (1977), at 31.

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What is more, is that even if copyright fairness advocates would assert that the antitrust track has not been exhausted, it would have been until that point, inefficient to adjust market dominance through 'non-economic' antitrust goals to reflect the concern for monopoly in less-than-a legal concern. The reason being it that overriding economic goal of the antitrust laws is strictly to maximize consumer welfare through the efficient allocation of resources.<sup>128</sup> In accordance, antitrust precedents generally prefer the economic goals and that accommodating non-economic goals generally confuses antitrust jurisprudence and subverts its basic purposes.<sup>129</sup> In other words, the use of antitrust laws provides the optimal degree of market performance, whenever in need in distinction from the resent state of affairs within copyright law.

Furthermore, imposition of redistributive methods through copyright law would necessitate to fully equaling efficient market reconstruction to the harm caused by anti-competitive practices that unmistakably did not led courts to formally proclaim the record industry as unlawfully monopolistic. Thus, any adjustment in copyright law due to parties' anti-competitive practices, as evidenced by their wealth, must be premised on a failure in applying antitrust laws to begin with. In any event, it is needless to say, the balance between incentive and restriction even while reviewing the record industry's commercial penchants should not be always considered evenly. Instead, any particular book, movie, or invention is likely to face competition from other books, movies, or inventions which are near but not necessarily perfect substitutes.<sup>130</sup>

Furthermore, such distributive battles arguably, should not be designed to promote the well-being of private parties or specific categories of people, in the first place. Neither should they be connected to ends that result in advancing a sectored societal goal or the creation of another market to explore. Thus, there may be, at times, a lack of understanding among fairness scholars of what, given the present constitutional copyright framework, distributive justice is most efficient in promoting. Distributive justice typically does not apply between markets but within market players. The constituting decision in the Sony case, particularly, was made according to this notion. Thus it is said to have permitted the company to continue making and selling the VCR and excluded the motion picture studios from exploiting the home use of its copyrighted material for time shifting purposes. And yet, as a matter of a fact, the Sony decision did not exclude the motion picture studios from the home videotaping market. The dissemination of the VCR that the case facilitated created another market for

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<sup>128</sup> 1 P. Areeda and D. Turner, *Antitrust law* (1978), at 103, 111-113; R. Posner, *The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925, 933-34 (1979).

<sup>129</sup> *Id.* p 104.

<sup>130</sup> See, e.g., Edmund Kitch, *supra* note 127, at 31.

the studios to exploit. The decision, finally, ensured that Sony could profit from its invention while providing minimum harm to the copyright owner and other sectorized markets at large. Any former application of distributive justice ultimately is done on the expense of a given public and diminishes its size,<sup>131</sup> without that being the purpose of the incentive paradigm of copyright law to begin with. Instead, an examination of the history of copyright and of the Copyright Clause of the Constitution clearly reveals that copyright ultimately exists for the benefit of the public welfare, by promoting individual creators.<sup>132</sup> Thus, its goal should not be in advancing sectorized societal goals or distinct markets unjustly.

#### D. Rationales against Copyright Distributive Justice

##### *1. Distribution discriminates*

The income tax and welfare system arguably can redistribute from the rich to the poor, whereas copyright law has substantively less redistributing potential. Any particularization of copyright rules based on the reliance on the fair use liability rules analysis,<sup>133</sup> but even a property rules analysis based on excludable rights on behalf of distributive justice claims would affect only relatively small fractions of the population and ordinarily constitute relatively crude means of redistribution.<sup>134</sup> An additional consideration is in deciding whether to use the copyright system to promote distributional justice to all copyright injurers on both the substantive rule of law and its remedial corollaries.

To begin with, substantive copyright law, it is argued, will not be able to redistribute the value of the proprietary rights it defends systematically unless the status of the parties in a certain type of dispute corresponds closely to the groups between which redistribution is desired.<sup>135</sup> To be sure, whenever the downloading of digital music involves Internet users and song owners, there probably is not an obvious correspondence between the income of a party and whether that party is an Internet user or a song owner. As a copyright interpretative rule of thumb, one must assume that it may be that higher income persons are more likely to be song owners and high-income internet users, but certainly there are many low-income Internet

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<sup>131</sup> See Ryan Littrell, Note, Toward a Stricter Originality Standard for Copyright Law, 43 B.C. L. Rev. 193, 225-26 (2001); see also Niels B. Schaumann, An Artist's Privilege, 15 Cardozo Arts & Ent. L. J. 249, 249-54 (1997).

<sup>132</sup> See, e.g., Hearings on H.R. 989, supra note 2, at 4 (statement of Marybeth Peters, Register of Copyrights) (quoting House Comm. on the Judiciary, Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess. 5-6 (Committee Print 1961) (Part 1)).

<sup>133</sup> A. Mitchell Polinsky, supra note 72, at 125.

<sup>134</sup> Kaplow and Shavell, Fairness versus welfare, supra note 23, at 994.

<sup>135</sup> Compare: A. Mitchell Polinsky, supra note 72, at 125.

users and high-income song owners. In copyright analysis, thus, there may be more remote correspondence between the income of a party and whether that party is a victim or an infringement.

Distributional justice also falls short when it applies to copyright law's remedial corollaries. By and large, it certainly may be efficient for damages, for example, to reflect the victim's income in some categories of legal disputes. That is whenever an injury involves lost future earnings, and the level of earnings indicates the extent of economic loss.<sup>136</sup> As Kaplow and Shavell further argue, this argument assumes that injurers have some advance knowledge of the economic loss they might cause. In nuisance and pollution control disputes, for comparison, there may be a closer correspondence between the income of a party and whether that party is a victim or an injurer. To illustrate, the consumers of the production of a quantity of polluting industry may be mainly superior income people, while the victims living in close proximity to the polluting factories may be primarily lower income persons.<sup>137</sup>

Thus, in some kinds of disputes, the choice of a proper rule might contribute towards the implementation of distributional goals dissimilarly from copyright law. In recent years, within intellectual property litigation certain courts choose to treat a financial disparity between the parties as a factor to be weighed in determining whether an award should issue rather than simply the magnitude of such an award.<sup>138</sup> Redistribution hence has been accomplished by setting damages higher when the injurer is wealthy and lower when the injurer is poor. Again, to illustrate, in an action for trademark and copyright infringement, unfair competition, and conspiracy, the court recited the rule that such awards are not excessive as long as they do not ruin the defendant financially.<sup>139</sup> Since the amounts awarded constituted 5% and 2.5%, respectively, of the defendants' net worth, the court concluded that financial ruin was unlikely to result from their imposition.<sup>140</sup>

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<sup>136</sup> See, Louis Kaplow & Steven Shavell, Accuracy in the Assessment of Damages (Working paper No. 4287, National Bureau of Economic Research 1993).

<sup>137</sup> A. Mitchell Polinsky, *supra* note 72, at 126.

<sup>138</sup> See *Video-Cinema Films, Inc. v. Cable News Network, Inc.*, Nos. 98 Civ. 7128(BSJ), 98 Civ. 7129(BSJ), & 98 Civ. 7130(BSJ), 2003 WL 1701904, at \*5 (S.D.N.Y. Mar. 31, 2003); *Liebovitz v. Paramount Pictures Corp.*, No. 94 Civ. 9144, 2000 WL 1010830, at \*5 (S.D.N.Y. July 21, 2000) (same).

<sup>139</sup> *In Transgo, Inc. v Ajac Transmission Parts Corp.* (1985, CA9 Cal) 768 F2d 1001, 227 USPQ 598, 82 ALR Fed 97, cert den 474 US 1059, 88 L Ed 2d 778, 106 S Ct 802, later proceeding on other grounds (CA9 Cal) 911 F2d 363, 15 USPQ2d 1907, 17 FR Serv 3d 924 (applying California law as to damages).

<sup>140</sup> *Id.* See, also, Punitive damages: Relationship to defendant's wealth as factor in determining propriety of award, 87 A.L.R.4th 141.

The latter conclusion, however, is not always true, as in the case of copyright law. Within the scope of copyright jurisprudence such progressive remedies, such as punitive damages, arguably, still seems to fall short of the critique to the distributive rule for three main rationales. These rationales relate to 1) long-term implications of progressive damages, and 2) the resulting disparity between litigating and non-litigating parties to disputes.

*i. Long-term implications of progressive damages*

The first is that, initially, it is questionable whether a progressive damage compensation regime will entail long-term egalitarian consequences, as the compensation regime will be reflected in the market price of subject-matter property at stake.<sup>141</sup> Moreover, such a redistributive rule may induce the wealthy to take more care and the poor to take less care than is efficient.<sup>142</sup> Within the scope of copyright jurisprudence, it is impractical to support a rule of law that would entail the ability of copyright infringers to have that knowledge in the first place. Internet users that download digital music, primarily, should reasonably be expected to know only about the average losses bestowed on their victims – the song owner community.<sup>143</sup> Similarly, works of art disseminated by amateurs or emerging artists should not be formally assimilated by law with poverty upon its social ramifications therein. The Copyright Act's primary objective is initially defined in average terms, to encourage the production of original literary, artistic, and musical expression for the public good at large stretching from corporate competitors to famished artists. Moreover, people are more sternly impaired when an unambiguous property or right of usage of theirs is denied of them, than when a comparable charge is taken from their total wealth. According to the personality argument, as Lewinsohn-Zamir indicates, "people are more severely hurt when a certain asset of theirs is taken, than when a similar value is taken from their total wealth."<sup>144</sup> A significant justification for why an injury to an explicit asset transcends the financial impediment involved derives from the distinctive function that resources play in people's lives, as a means of expressing their personalities.<sup>145</sup> A copyright legal regime that would be responsive to this constraint should prefer the method of taxes and transfer payments to other ways of redistribution access to copyright usage.

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<sup>141</sup> See R.H. Coase, *The Firm, the Market, and the Law* 170-74 (1988).

<sup>142</sup> Kaplow & Shavell, *Why the Legal System*, supra note 72, at 669.

<sup>143</sup> See, also, discussion in Part C.1, 3 infra.

<sup>144</sup> Lewinsohn-Zamir, supra note 25, at 55.

<sup>145</sup> *Id.*

*ii. Disparity between litigants and non-litigants*

The second critique against distributive remedies, even when there is a close correspondence between the status of the parties in a certain kind of dispute and the groups between which redistribution is desired, legal rules still might not be able to achieve redistribution as systematically as an income tax system. This is because redistribution through the legal system only may occur when a dispute arises, and not all members to a given income class will be involved in a dispute. For example, even if the output of a polluting industry were consumed exclusively by rich people, not every rich person necessarily purchases this commodity and not every poor person lives near a factory in this industry. Thus, the legal rule used to control the pollution dispute will, at best, redistribute income from a subset of one income class to a subset of another.<sup>146</sup> Moreover, even then, redistribution may be jumbled. A pro-plaintiff rule, such as one that supports internet users may be redistributive if plaintiffs, on average, are poorer than defendants, but unless this is unvaryingly true, the redistribution will flow in the incorrect course in a number of cases. The latter predicament can be avoided only if copyright law litigation depends in a straight line on parties' earnings, a policy that not many have proposed, as described.

It is thus imperative that the law's boundaries be demarcated as clearly as possible so that favoritism and sectorized exploitations are avoided.<sup>147</sup> The latter view, contentedly, has been independently promoted by courts such as in the *Fogerty v. Fantasy, Inc.* case, where court rightfully upheld that a defendant seeking to advance meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious infringement claims.<sup>148</sup> To conclude, a rule stating that remedies equal average harm would be equally efficient at least within the scope of copyright law.

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<sup>146</sup> A. Mitchell Polinsky, *supra* note 72, at 126.

<sup>147</sup> Compare: Lewinsohn-Zamir, *supra* note 25, at 54 (for the context of takings law); William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 *Hofstra L. Rev.* 1, 11 n.37 (1995) (same).

<sup>148</sup> See, e.g., *Fogerty v. Fantasy, Inc.* *supra* note 121, at 517-518. see, also, In any event, financial disparity does not provide a basis to award attorneys' fees under the Copyright Act in the circumstances of this action. See *Mitek Holdings*, 198 F.3d at 842 (for the context of attorney's fees under § 505 to the Copyright Act); see also *Harrison Music Corp. v. Tesfaye*, 293 F.Supp.2d 80, 85 (D.D.C.2003) (same); *Recording Industry Ass'n of America v. Copyright Royalty Tribunal*, 662 F.2d 1, C.A.D.C., 1981, at 165 (wealth was irrelevant to the royalty proceeding).

2. *Distribution is over-costly*

In a world with zero costs, excludable rights in copyright can be reshuffled to pursue distributive goals without any efficiency costs.<sup>149</sup> In reality, transaction costs are positive, and reshuffling excludable rights in copyright for the sake of redistribution has efficiency costs.<sup>150</sup> Thus, distribution arguably is a costly activity and its duplication through cumulative legal rules, such as copyright and tax or welfare laws is inefficient. As a result, next to the distortions caused by the redistribution itself, it also creates inefficiencies in the activities regulated by the rules that promote it.<sup>151</sup> In comparison, income tax or transfer programs tend to involve less distortion and inefficiency than does redistribution through the legal rules.<sup>152</sup> Such, hence, is the case with copyright law on several grounds, referring to 1) the adverse effects copyright-based redistribution has on work incentives, 2) their diverse administrative costs, 3) long run deriving consequences, and 4) differences in the frequency of intervention they require.

The income tax and transfer programs tend to involve less distortion and inefficiency than does redistribution through legal rules. The first reason is that redistribution through copyright law entails the inefficiency of redistribution due to adverse effects on work incentives.<sup>153</sup> As plenty of testimonies from within the songwriters tell, artists and songwriters, particularly will be severely handicap, and may even negate, the incentives intended by the Copyright Act and the Copyright Clause—incentives which, together with artistic passion, keep artists at work creating music and investing in that creation, for the benefit of the public.<sup>154</sup>

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<sup>149</sup> Robert Cooter and Thomas Ulen, *Law and economics* (third edition, 1999), at 111, 112 [Hereinafter, ‘Cooter & Ulen’].

<sup>150</sup> *Id.*

<sup>151</sup> Kaplow & Shavell, *Why the Legal System*, supra note 72, at 667-668.

<sup>152</sup> Kaplow and Shavell, *Fairness Versus Welfare*, at 994.

<sup>153</sup> See, e.g., Aanund Hylland & Richard Zeckhauser, *Distributional Objectives Should Affect Taxes but Not Program Choice or Design*, 81 *Scand. J. Econ.* 264 (1979); Steven Shavell, supra note 72, at 414; Yew-Kwang Ng, *Quasi-Pareto Social Improvements*, 74 *Am. Econ. Rev.* 1033 (1984);

<sup>154</sup> See Jane Ginsburg, *Copyright Use and Excuse on the Internet*, 24 *Colum.-VLA J.L. & ARTS* 1 (2001); *Copyright Law Revision: Hearings Before the Subcomm. On Patents, Trademarks, and Copyrights of the Comm. on the Judiciary on S. 1006, 89th Cong., 1st Sess.* 65 (1965) (testimony of Register of Copyrights Abraham Kaminstein); *Brief of the Progress and Freedom Foundation*, at: <[http://www.eff.org/IP/P2P/MGM\\_v\\_Grokster/050124-PFFgroksteramicus.pdf](http://www.eff.org/IP/P2P/MGM_v_Grokster/050124-PFFgroksteramicus.pdf)> (Last visited 1 December 2005), at 3, 4, 6, 8; See, also, legendary songwriter Mike Stoller and the composer “Jailhouse Rock,” Editorial, *Songs That Won’t Be Written*, *N.Y. Times*, Oct. 7, 2000, at A15. Mike Stoller testified similarly below. See Also Declaration of Mike Stoller in Support of Plaintiffs’ Motion for Summary Judgment, August 15, 2002, at J.A. 290, ¶¶ 11-13 (“ Today, I fear for the seventeen-year-old songwriter looking forward to a career in the music business. . . . If [Defendants] get away with their thievery, it will turn that teenager’s future livelihood into a mere

Moreover, taxation is more efficient than regulation through copyright should be understood as a claim about their comparative administrative costs, and notably litigation costs.<sup>155</sup> Even if taxation is for the most part equally preventive of individual freedom, and has equally adverse incentive effects, tax schemes are by their nature easier to administer and therefore less costly than regulatory arrangements designed to achieve the same end.<sup>156</sup> The third rationale why distribution arguably is a more costly activity whenever promoted through copyright law is that redistribution by copyright law distorts the economy more than progressive taxation in the long term.<sup>157</sup> For example, if copyright law disfavors music owners, some rich music may switch to different professions to gain valuable legal rights. In contrast, a comprehensive income tax precludes people from reducing their tax liability by changing the source of their income.<sup>158</sup> A fundamental principle of public finance is that taxes distort less when applied to a broad base rather than to a narrow base. Distortion drops off with the width of the base because demand becomes less elastic. To illustrate, the demand for food is less elastic than the demand for vegetables, and the demand for vegetables is less elastic than the demand for carrots. Income, indeed, is very broad based.<sup>159</sup>

Lastly, taxation and welfare laws are said to be less restraining of individual liberty. This may be understood as a claim about the frequency of intervention required by these substituting schemes of redistribution. While taxation requires only an intermittent obstruction in the lives of individuals, the direct regulation of transactions seems to require unremitting state involvement in individual affairs. An income tax is in any case less deeply intrusive even if the restrictions it imposes apply continuously. The reason for that being that taxation and welfare laws appear to be less intrusive because they only take money from people, leaving them free to arrange their affairs in the way that best realizes other, non-pecuniary ends. Copyright, by contrast, limits the sorts of transactions individuals, such as concerned song owners or even the record industry at large may arrange for themselves and thus seems more restrictive of personal liberty.<sup>160</sup> Since it is reasonable to have a preference for a lesser amount of repeated intrusions to

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hobby, and, in doing so, it will ensure that fewer and fewer talented individuals can afford to devote their efforts to expanding America's musical heritage."), *Id.*

<sup>155</sup> The enforcement of legal rights requires attorneys. A plaintiff's attorney in the United States routinely charges one third of the judgment. In contrast, the fee paid to an accountant who prepares someone's income tax return is a small fraction of the person's tax liability. *See* Cooter & Ulen, *supra* note 149, at 112.

<sup>156</sup> *Id.*, at 112.

<sup>157</sup> Compare: *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Rawls implicitly endorses this view of regulation. *See* Basic Structure, *supra* note 9, at 65.

more regular ones, this may seem a good incentive for preferring taxation and welfare laws as a means of redistribution.

### 3. *Distribution is imprecise*

It is difficult in most copyright contexts to determine just how copyright law could promote preferences for the poor.<sup>161</sup> This observation, in fact, derives from a larger one relating legal rules at large. Copyright law, like other legal rules as such, hence should be based primarily on efficiency considerations as it cannot redistribute wealth as systematically and precisely as tax and welfare systems.<sup>162</sup> The reason is that the income tax precisely targets inequality, whereas copyright law relies upon crude averages.<sup>163</sup>

Following Little's suggestion, since individuals, like internet copyright infringers have different tastes, the welfare they generate cannot always mean equal real incomes for both poor and rich infringers alike. For suppose that in an initial situation the equivalence did hold. Then certainly we can find a shift in relative prices which will make some infringers worse off and others better off, keeping money incomes and the general price level constant, so that in the second situation equal money incomes will no longer coincide with equal real incomes.<sup>164</sup> In other words, according to the present rule of law in the United States, copyright law defends "music owners' rights". Typically music owners are richer than infringers on average then changing the rule of "infringers' rights" would redistribute wealth towards greater equality. However, while music owners' are richer than infringers on average, some infringers are undoubtedly richer than some music owners. Changing the rights to favor infringers over music owners will amass the disparity between rich and poor music owners. In contrast, progressive taxation will restructure uneven incomes. Internet copyright infringers, primarily, should reasonably be expected to know only about the average losses bestowed on their victims – the song owners' community. Similarly, works of art disseminated by amateurs or emerging artists should not be formally assimilated by law with poverty upon its societal upshots.

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<sup>161</sup> Abramowicz, *supra* note 18, at 106.

<sup>162</sup> Compare: Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23(2) *J. Legal Stud.* 667 (supp. vol. 1994); A. Mitchell Polinsky, *supra* note 72, at 124-27; Steven Shavell, *supra* note 72, at 414 (1981).

<sup>163</sup> Compare: Cooter & Ulen, *supra* note 149, at 111.

<sup>164</sup> Kenneth J. Arrow, *Little's critique of welfare economics*, *The American Economic Review*, Vol. 41, No. 5 (Dec., 1951), 923-934, at 927, referring to I. M. D. Little, *A critique of welfare economics* (Oxford, 1950) (suggesting focusing on 'average man' distribution of welfare, so to overcome the imprecision policy recommendations based on welfare economics imply).

4. *Distribution bares inefficient social costs*

Reshuffling copyright may not really have the distributive effects anticipated. The wealth effects of reshuffling copyright excludable rights in a world with no or very little transactions costs, particularly, tend to fall upon the network service providers and the music industry, not its users. In practice, service providers, as deep pockets, are natural targets for copyright litigation,<sup>165</sup> much to their distributive justice-based dissatisfaction.<sup>166</sup> The explanation to this phenomenon is largely twofold. To begin with, suppose that both infringers and music owners rent their web access from absentee network service providers, such as Internet Service Providers (ISPs). If copyright law shifts the cost of preventing infringement from infringers to music owners, competition among ISPs may cause them to adjust rents to offset the change in costs. Specifically, network service providers such as file sharing software providers who own infringers' web access will increase the rent charged to infringers, and the network service providers who own web access to music owners will decrease the rent charged from music owners. Consequently, the reshuffling of copyright excludable rights will not and does not affect the distribution of wealth between infringers and music owners. Instead, the network service providers who own access to infringing access gain and network service providers who own web access to music loose. Any change in the value of web access gets "capitalized" into rent. Consequently, the wealth effects of reshuffling copyright excludable rights in a world with no or very little transactions costs tend to fall upon the network service providers, not its users.

Moreover, copyright law may affect distribution if digital music prices are also regulated, but then the price regulation itself may be used to accomplish redistribution among such parties. Also, there may be some incidental distributive effects of copyright rules, such as when copyright industries must expend resources to opt out of default rules that will not be suitable for them. For example, when corporations pay more for injuries to third parties, consumer prices and wages, typically, are affected.<sup>167</sup> Thus, distributive justice argumentation, remarkably, arrived also from the part of copyright

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<sup>165</sup> See Testimony to Congress about the bills that became the Digital Millennium Copyright Act is set forth in The WIPO Copyright Treaties Implementation Act, Hearing Before the Subcommittee on Telecommunications, Trade, and Consumer Protection, 105th Cong. (1998), at 41 (statement of Business Software Alliance); See, David Nimmer, *Appreciating Legislative History the Sweet And Sour Spots of the DMCA's Commentary*, 23 *Cardozo L. Rev.* 909, 917-18 (2002).

<sup>166</sup> See, Footnote 8 and accompanying text, *id.*

<sup>167</sup> Kaplow & Shavell, *Why the Legal System*, *supra* note 72, at 675 at Fn. 11.

holders,<sup>168</sup> including motion picture studios, recording companies, songwriters, music publishers and others, who typically are accused in promoting efficiency and distributive injustice on the expense of poor users and creators. In other words, unless the compensation regime interferes, there is the risk that the lobbying efforts of the strong copyright industry are probable to be much more effectual than those of the weaker internet users.<sup>169</sup> Thus, within the recent copyright file-sharing litigation, those who defend copyright or seek to extend it by now bemoan the decline in profits that record companies have suffered<sup>170</sup> and that Hollywood may face – wrongly using this same flawed redistributive argumentation.<sup>171</sup> This actuality, partly, also explains the copyright industries motivation to block the public's access to works of authorship disseminated by technologies, permitting them to control the terms and conditions of the access in both legislative and market-driven means. Beginning by means of legislation with the Audio Home Recording Act of 1992,<sup>172</sup> followed by the Digital Performance in Sound Recordings Act of 1994,<sup>173</sup> but then also by market efforts such as to encode digital video discs with mandatory Digital Rights Management (DRM) copy-blocking schemes.

#### E. Summary and Conclusions

Distributive concerns arise when individuals struggle over how a certain amount of wealth is to be divided up. Allocative matters, conversely, concern the progression of guiding resources into their most valued uses. The Copyright Clause of the Constitution clearly reveals that copyright ultimately is about allocation of resources to those who most value them, namely the authors. To date, the Information age and cyberspace network technology has not truly changed this undemanding rationale. It is thus, still often impossible to redistribute income through the choice of copyright and that, even when it is possible, redistribution through the government's tax and transfer system may be cheaper and is likely to be more precise.

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<sup>168</sup> The studios and recording companies and the songwriters and music publishers filed separate suits against the defendants that were consolidated by the District Court. See, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, supra note 6, at 2771.

<sup>169</sup> See, Dagan, supra note 31, at 755 and Fn. 38 & accompanying text.

<sup>170</sup> See, e.g., Recording Indus. Ass'n of Am., *Recording Industry to Begin Collecting Evidence and Preparing Lawsuits Against File "Sharers" Who Illegally Offer Music Online*, supra note 8. For evidence that services like Napster have in fact hurt the profits of record companies, see Stan Liebowitz, *Will MP3 Downloads Annihilate the Record Industry? The Evidence so Far* (June 2003) (unpublished manuscript), at <http://www.utdallas.edu/~liebowitz/intprop/records.pdf> (Last visited 1 December 2005).

<sup>171</sup> See, e.g., Ronald Grover & Heather Green, *The Digital Age Presents Hollywood Heist: Will Tinseltown Let Techies Steal the Show?*, *Bus. Wk.*, July 14, 2003, at 73, 76 (reporting that Hollywood executives are concerned that the movie industry may suffer the same loss of profits suffered by the music industry).

<sup>172</sup> Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237.

<sup>173</sup> Digital Performance in Sound Recordings Act of 1994, Pub. L. No. 104-39, 109 Stat. 336.

## *COPYRIGHT DISTRIBUTIVE INJUSTICE*

This essay hold the view that, it is, therefore, undesirable to instill our egalitarian commitments into copyright law, beyond the scope of concern for societal basic needs, in which the redistribution is paradigmatically only a side effect, even if their proposed purpose in this framework certainly is rather restrained. Cost-benefit analysis aimed at maximizing welfare, therefore, does not contend against distributive goals. However, in compliance with the prevailing utilitarian copyright paradigm, copyright should only avoid promoting distributive means.

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