FAIRNESS TOWARDS AUTHORS: DOES IT NECESSARILY MEAN CARING FOR THE WEAK?

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Abstract: According to a common narrative in recent copyright scholarship, authors deserve fairness in their relationship with commercial entities, such as publishers and producers. This narrative is reflected most conspicuously in a growing trend all over the world to adopt mandatory rules designed to provide authors with a larger share of the profits generated by exploitation of their work.

The most common normative argument in favor of mandatory rules rests on considerations of distributive justice, according to which authors are poor and suffer from low bargaining power. Framing the issue as a conflict between weak, starving authors and large capitalist conglomerates has a broad intuitive appeal; in all likelihood explaining why the issue has been the subject of little critical discussion.

By contrast, this article offers a novel explanation for these mandatory rules in copyright law. Relying on empirical findings from the discipline of social psychology, concerning how individuals judge fairness in the allocation of resources, it argues that society disapproves of the typical transaction between authors and commercial entities not due to any desire to balance the power differences between the parties; rather this stems from our psychological aversion to certain patterns of profit division. Accordingly, it claims that mandatory rules in copyright law are arbitrary legislation which should not enjoy the normative importance attributed to caring for the weak.

I. INTRODUCTION

All over the globe, copyright laws contain a range of rules which preclude authors from waiving certain rights to their work or transferring those rights to others within a voluntary transaction. These rules vary significantly, sometimes due to the legal tradition in which they are implemented, yet in most cases they include a mandatory element limiting

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authors' freedom to act as they wish.[1] These rules therefore interfere with freedom of contract, preventing authors from transferring or waiving their rights.

Such mandatory rules seek to accord authors a larger share of any profits deriving from exploitation of their work, despite the fact that in free market conditions, these same profits would be divided differently along the commercialization chain of the work.[2] They aspire to leave in the author's hands various forms of future control over the work or an entitlement to royalties, with respect to the exploitation or sale of the work, notwithstanding any other agreement between the author and the various contractual parties.

The rules employ a variety means in order to accord authors a larger portion of profits. Some rules dictate the transfer of profits in a relatively direct manner. One example of such a rule, which originates among continental law countries, is the right to equitable remuneration,[3] a scheme which grants authors the right to receive equitable remuneration for commercial use of their work. This right, in most cases, cannot be transferred to others or waived.

Other rules accomplish this indirectly, leaving control over certain aspects of the work in the author's hands. This assumes that the value of the work will increase in the future and thus authors will receive profits by exercising this control. One example is the Termination of Transfer rules, the

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1 This article uses the term "mandatory rules" to denote any rules that cannot be waived or alienated. This use is consistent with definition of a mandatory rule in Black's Law Dictionary: "A legal rule that is not subject to a contrary agreement." *Rule*, BLACK'S LAW DICTIONARY (10th ed. 2014).

2 The family of rights discussed in this article differs to that of moral rights, which also tends to be characterized by non-waivability and inalienability. Moral rights are beyond the scope of this article because it is common to view the family of rights discussed herein as aimed to transfer profits, whereas moral rights are commonly perceived as protecting the author's personality and creative autonomy. Indeed, moral rights also possess economic aspects, which it is sometimes difficult to separate from those aspects concerning the protection of personality and autonomy. *See* Giorgio Resta, *The New Frontiers of Personality Rights and the Problem of Commodification: European and Comparative Perspectives*, 26 TUL. EUR. & CIV. L.F. 33, 61 (2011) ("Indeed, as is well illustrated by the case law related to . . . the long-lasting experience of the moral rights in copyright, the attempt to sharply separate economic and noneconomic aspects of the protection of personality has proven to be tricky."). However, a distinction is commonly made between the two families and therefore the present article adheres to it. In any case, the dichotomy between these two families of rights is certainly an interesting direction for future research.

3 A common example of an equitable remuneration right is Article 5 of the European Rental Directive (Council Directive 2006/115/EC, 2006 O.J. (L 376/28) of 12 December 2006 on rental right and lending right and on certain rights relating to copyright in the field of intellectual property), which provides authors and performers of phonograms or films with equitable remuneration for renting copies of a work to which they contributed. The term "equitable remuneration" is also found in international treaties, such as article 12(3) of the Beijing Treaty on Audiovisual Performances, June 26, 2012, AVP/DC/20, http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295838. *See generally* Guy Pessach, *The Beijing Treaty on Audiovisual Performances – The Return of the North?*, 55 IDEA 79 (2014) (discussing the equitable remuneration provisions of the Beijing Treaty).

origin of which is in United States copyright law.[4] Termination rights cannot be waived or, in ordinary cases, transferred to others. The main termination right allows authors or their heirs to terminate a transfer of copyright 35 years after it was concluded, thereby regaining ownership of the copyright and enjoying an opportunity to improve the terms of the contract vis-à-vis commercial entity.

Whether using direct or indirect means, most of these rules share a common feature – they deny authors the freedom to renounce all interest in a work they created, forbidding them to accept lump-sum payments in exchange for a complete transfer of rights. These rules specify mechanisms of remuneration which compel authors to retain a share in a work's commercial success (or failure). Many maintain that these remuneration mechanisms reflect fairness toward authors. There is a common trend all over the world to strengthen and expand such rules. While in the past France[5] and Germany[6] pioneered such rules, today they have also spread to other countries. For instance, local versions of a "bestseller" clause, granting authors the right to additional remuneration in the event of their work's unexpected success, today exist in many European countries.[7] Similarly, many European countries now grant rights for equitable remuneration regarding audiovisual works.[8]

An important milestone in the trend regarding these rules was the German reform of 2002, which regulates many aspects of the relations between copyright and contract law.[9] This reform serves as a model for other countries, as evidenced by the Dutch reform of 2015.[10] At the end of 2016,

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4 17 U.S.C. § 203 (2012); 17 U.S.C. §§ 304(c)-(d) (2012).

5 Article 131-4 of the Code de la Propriété Intellectuelle [Intellectual Property Code] (Fr.) provides authors with a non-waivable right to proportionate participation in profits.

6 Article 32 of the Urheberrechtsgesetz [UrhG] [Act on Copyright and Related Rights], Sept. 9, 1965, Bundesgesetzblatt [BGBI] (Ger.) is perceived as a groundbreaking clause, which grants a general and broad right for equitable remuneration. This article applies broadly to any transfer of a work, as opposed to other equitable remuneration rights that apply to narrow contexts and certain areas.

7 LUCIE GUIBALT ET AL., RENUMERATION OF AUTHORS AND PERFORMERS FOR THE USE OF THEIR WORKS AND THE FIXATIONS OF THEIR PERFORMANCES 41 (2015), https://www.ivir.nl /publicaties/download/1593.pdf; Martin Kretschmer, *Copyright and Contract Law: Regulating Creator Contracts: The State of the Art and a Research Agenda*, 18 J. INTELL. PROP. L. 141, 160 (2010).

8 *The Solution - A Global Law for Screenwriters and Directors*, AUDIOVISUAL CAMPAIGN (2016), http://www.theaudiovisualcampaign.org/a-global-law-for-screenwriters-and-directors/. An example of a particular equitable remuneration provision for audiovisual works is Article 46bis of the Italian copyright law. Legge 21 aprile 1941, n.633, G.U. JuL. 16, 1941, n.166 (It.).

9 *See generally* Adolf Dietz, *Amendment of German Copyright Law in Order to Strengthen the Contractual Position of Authors and Performers*, 33 INT'L REV. INDUS. PROP. & COPYRIGHT L. (IIC) 828 (2002).

10 *See generally*, P.B. Hugenholtz, *Towards Author's Paradise: The New Dutch Act on Authors' Contracts*, *in* LIBER AMICORUM JAN ROSÉN (Gunnar Karnell et al. eds., 2016).

additional legislation was enacted in Germany to further safeguard authors' contractual interests.[11]

At the European level, several directives include rules of this kind, such as Directive 2001/84/EC on the resale right (also known as Droit de Suite).[12] This grants artists the ability to demand royalties for any sale in the secondary market with respect to works of art they created; a typical feature of this right is that it cannot be waived. A recent development at the European level was the draft Directive of 2016 concerning the issue of the digital single market, including a proposal to enact an article similar to the "bestseller" clause for authors and performers.[13]

Such rules, and the trends influencing their enactment, are not confined to the boundaries of continental law countries but are also evident in common law countries, such as the United States. In addition to the Termination of Transfer rights, which was enacted as part of the US Copyright Act of 1976, from time to time interested parties in the US have proposed enacting the right of Droit de Suite described above, which originated in continental law.[14] Such proposals accord with the worldwide trend, which emerged over the past century, to adopt this right.[15]

The increasing tendency to enact such rules stresses the need to examine the justification for their existence. Although the existing literature examines the justifications for such rules, it does so only partially. Indeed, a review of existing academic literature reveals a dearth of critical discussion regarding these rules. Presumably this is due to the common intuitive tendency to sympathize with the arguments frequently used to justify such rules, which highlight motifs of inequality and the exploitation of weak, individual authors by giant capitalist corporations. Legal literature depicts the relationship between commercial entities and authors as a confrontation similar to that between David and Goliath,[16] employing the myth of the

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11 *Reform des Urhebervertragsrecht - Faire Vergütung für Kreative*, BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ (Dec. 16, 2016), http://www.bmjv.de/SharedDocs/Artikel/DE/2016/12162016_BT_Urhebervertragsrecht.html.

12 Directive 2001/84/EC, of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, 2001 O.J. (L 272).

13 Article 15 of the *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, COM (2016) 593 final (Sept. 14, 2016). It should be noted that the article does not state explicitly whether the right is non-waivable.

14 For a review of these proposals, *see* OFFICE OF THE REGISTER OF COPYRIGHTS, RESALE ROYALTIES: AN UPDATED ANALYSIS 6-10 (2013), http://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf.

15 Anna J. Mitran, *Royalties Too: Exploring Resale Royalties for New Media Art*, 101 CORNELL L. REV. 1349 (2016) (Reviewing the expansion of droit de suite across the world).

16 William Cornish, *The Author as Risk-Sharer*, 26 COLUM. J.L. & ARTS 1, 5 (2002).

"starving artist" to emphasize the extent of the authors' misfortune.[17] To justify mandatory rules, their advocates depend upon folkloristic depictions of artists, according to which their poverty is so great that they lack bread to eat, must take on a second job, or receive support from their families.[18] Alongside this reliance on folklore and myths, a vast body of empirical literature also seeks to provide evidence of the authors' difficult socio-economic situation.[19] This reflects the sentiment, evident in the copyright literature, of great hostility towards the corporations, which are perceived as preventing the authors from obtaining their proper share and, subsequently, responsible for their poverty.[20] Indeed, such claims wield an almost irresistible rhetorical power. Yet the clear inclination towards a certain side raises suspicions that other arguments have not received proper attention in the bounds of a balanced academic discussion.

This article seeks to contribute to existing literature by critically examining the mandatory rules in copyright law. It will do so by investigating the possible explanations for the existence of these rules, in order to determine whether it can be explained in a novel way. The second part of the article reviews the typical relationship between authors and commercial entities, providing background information necessary to understand why many legislators seek to regulate the distribution of profits between these parties. The third section then explores whether the common justifications for the mandatory rules can serve to explain their existence. It highlights the apparent difficulty in explaining the phenomenon of these rules on the basis of efficiency considerations. Indeed, distributive considerations seem to provide a better explanation. Corresponding with the conclusion that distributive considerations, which seek to distribute profits fairly between the parties, are the dominant motif for explaining mandatory rules, the fourth part of the article will offer a new explanation for these rules. Using empirical data from the field of social psychology concerning how individuals judge

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17 Guy A. Rub, *Stronger than Kryptonite: Inalienable Profit Sharing Schemes in Copyright Law*, 27 HARV. J. L. & TECH. 49, 79-81 (2013) (discussing how the "starving artist" myth is used to justify profit sharing schemes in copyright law).

18 *See* Martin Kretschmer, *Does Copyright Law Matter? An Empirical Analysis of Creators' Earnings* 6 (U. Glasgow, Working Paper, 2012), http://ssrn.com/abstract=2063735 (discussing artistic folklore).

19 Ruth Towse, *Copyright and Artists: A View from Cultural Economics*, 20 J. ECON. SURVS. 567, 578-580 (2006) (summarizing the effect of empirical research in the field of cultural economics on artists' labour markets).

20 *See* Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA. L. REV. 1329, 1350 (2010) ("[T]here has always been a general hostility in copyright law to big "fat cats" getting rich off of the creative labors of artists who are paid a mere "pittance" for their works."); *Cf.* NINA WHITE, HOW TO SLICE THE PIE: REGULATING THE DISTRIBUTION OF COPYRIGHT REVENUE IN THE MUSIC INDUSTRY 7 (2015), http://researcharchive.vuw.ac.nz/handle/10063/5105 ("This paper argues that the distribution of remuneration between music creators and music companies is imbalanced in favour of music companies . . .").

the fairness of resource allocation, this article proposes that we should view one-sided patterns of profit divisions — which are a result of the common business model for operating in creative markets — as the problematic factor which mandatory rules seek to address. The fifth and final section discusses the ramifications of this alternative explanation for mandatory rules in copyright law. The article concludes by arguing that these rules are arbitrary legislation which should not enjoy the normative importance attributed to caring for the weak.

II. TYPICAL INTERACTIONS BETWEEN AUTHORS AND COMMERCIAL ENTITIES

Authors are not usually able to earn an independent livelihood from their works. Indeed, to generate revenue they require an intermediary capable of commercializing their works, such as a producer or publisher.[21] As part of the transaction regarding the production and commercial distribution of a work, rights are transferred from authors to commercial entities.[22] In return for this transfer of rights, the author receives payment from the commercial entity, in accordance with the agreement reached: the amount and manner of payment are determined in negotiations.[23] The results of these negotiations are influenced by various market conditions throughout the chain of

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[21] Reto M. Hilty & Alexander Peukert, *"Equitable Remuneration" in Copyright Law: The Amended German Copyright Act as a Trap for the Entertainment Industry in the U.S.?*, 22 CARDOZO ARTS & ENT. L.J. 401, 402 (2004); Ruth Towse, *Copyright and Creativity: An Application of Cultural Economics*, 3 REV. ECON. RES. ON COPYRIGHT ISSUES 83, 86 (2006). The need for intermediaries to commercialize works is declining with the advent of the digital age. *See* Jane C. Ginsburg & Pierre Sirinelli, *Private International Law Aspects of Authors' Contracts: The Dutch and French Examples*, 39 COLUM. J.L. & ARTS 171, 173 (2015) ("[A]t least until recently, most authors have been ill equipped to commercialize and disseminate their works on their own, the author has granted rights to intermediaries to market her works."). Yet, it is still difficult to say that this is a suitable substitute for commercial entities. *See* Hilty & Peukert, *supra*, at 402-03 (stating in 2004 that "Although the Internet has introduced new ways to exploit works and performances, the traditional media or cultural industry will continue to play a vital role in the future dissemination of creative works."). One of the reasons for this may be the large financial investment involved in the commercialization of works. Yet in any case, matters must be examined at the present time in view of innovations and technological changes.

[22] For the sake of convenience, transfer of rights is used to describe all types of copyright-related transfers, whether this is a transfer of complete ownership of the entire copyright bundle, transfer of certain rights from that bundle or the grant of licenses.

[23] *See* Ruth Towse, *What We Know, What We Don't Know and What Policy-Makers Would Like Us to Know About the Economics of Copyright*, 8 REV. ECON. RES. ON COPYRIGHT ISSUES 101, 106 (2011) ("Copyright law only stipulates the copyright standard and the rights that protect authors, but authors almost always have to contract with an intermediary or distributor in order to market their work and it is the terms of the contract between them that determine the eventual financial reward to the author").

commercialization, from the author at its top to the final consumer at the bottom.[24]

Typically, authors benefit only indirectly from the commercial monopoly that is granted by copyright, namely from selling the rights to a commercial entity. Contracts are actually the means via which authors generate income, not the copyrights themselves.[25] Copyright does not guarantee income for authors, but rather determines the substantive rights granted to them, serving merely as a legal infrastructure.[26] Copyright, as an exclusive property right, gives authors an asset which they can sell to third parties.[27]

The authors' need for commercial entities and their inability to commercialize works alone stems from the typical economic characteristics that differentiate between the parties. These are consistent with the conventional assumptions regarding economic differences between individuals and firms. One central difference relates to how each party responds to risk. According to conventional economic assumptions, individuals are risk averse.[28] Authors are less wealthy than commercial entities and, therefore, every dollar is much more important to an author than it is to a commercial entity.[29] In contrast, commercial entities are more affluent, thus making them more neutral to risk than authors.[30] This is further accentuated by the ability of commercial entities to spread risks more effectively,[31] using a large portfolio of works and thus avoiding dependence

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24 Conditions along the commercialization chain that can affect the amount and form of payment to the author include, for example, market concentration and low consumer demand for the work.

25 Kretschmer, *supra* note 7, at 144 ("Income is then derived from the contract assigning or licensing the copyright, typically to a publisher or producer.").

26 *See* Towse, *supra* note 23, at 116-17 ("(p)olicy makers should stop making statements such as copyright 'ensures a fair return for creators and performers.' All it can do is lay the foundation for the ownership of rights, not the reward they gain."); Ruth Towse, *The Singer or the Song? Developments in Performers' Rights from the Perspective of a Cultural Economist*, 3 REV. L. & ECON. 745, 760 (2007) [Hereinafter Towse, *The Singer or the Song?*].

27 *See* Kretschmer, *supra* note 7, at 144 ("[A]uthors' livelihoods depend on copyright law in the following way: Copyright structured as an exclusive property right gives authors something to sell to a third party for exploitation."). As a rule, owners of property can do as they wish with the property they own. In relation to the legal right granted by copyright law, in principle, an author can allow others to make free use of it and waive payment.

28 Risk aversion means that authors would rather receive a payment of $50 than gamble between $0 and $100 with a 50% chance, even though on average the results are the same.

29 Authors' lack of wealth and assets to offer as collateral also make it difficult for them to raise funds. *See* Ruth Towse, *Copyright and Economic Incentives: An Application to Performers' Rights in the Music Industry*, 52 KYKLOS 369, 375 (1999) ("Authors have a restricted range of copyrights which may have little market value without a publisher's backing and so they have little collateral to offer banks other than their human capital").

30 *Id.* at 375 ("publishers can take bigger risks than authors; they have a range of assets to cushion failure and also better access to capital markets.); GUIBALT ET AL., *supra* note 7, at 106.

31 Kate Darling, *Occupy Copyright: A Law & Economic Analysis of U.S. Author Termination Rights*, 63 BUFF. L. REV. 147, 163 (2015).

on the success of a specific work.[32] One ramification of this disparity between authors and commercial entities is that authors tend to prefer to receive a lump-sum payment reflecting the expected value of the work, rather than taking the risk of commercializing the work themselves and reaping all the benefits, in the event of a commercial success.[33]

A second difference concerns the urgency of receiving money. In general authors favor receiving money quickly — in contrast to the commercial entities involved in the transaction —[34] preferring immediate payment over waiting for future commercial success. Similarly to the case of risk, the difference in these preferences is a result of commercial entities' affluence, which grants them greater breathing space.[35]

These characteristics lead the parties to agree on a certain division of roles: the author provides the work while the commercial entity is responsible for commercializing it. The process of taking a raw work and transforming it into a marketable commodity is an expensive and risky endeavor.[36] Commercializing is a complex process involving multiple stages, all of which require expertise and significant financial investment.[37] At the same time, ex-ante, neither side can be certain regarding the value of the work,[38] making commercialization a highly uncertain endeavor for both sides.[39]

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[32] *Id.* at 164. The ability to spread risks also applies to intermediaries such as art galleries, which can spread risks over a large number of art works.

[33] *See* GUIBALT ET AL., *supra* note 7, at 107 ("[a]uthors and performers would agree on lump sum remuneration at the expected value of the work under conditions of perfect information [i.e. if the true expected value of the work were known to both parties ex ante].").

[34] *See id.* at 106-07 ("Authors and performers are likely to have higher discount rates than are exploiters and hence would have a stronger preference for lump-sum payments.").

[35] For a more detailed analysis of this matter, *See* Towse, *supra* note 29, at 374-75 ("Author and publisher are likely for several reasons to have differing rates of time preference. Whereas publishers are usually firms with a portfolio of copyright assets of differing maturity, which together yield a regular flow of revenue, authors are mostly individuals with a limited production life who need a basic income. Authors depend on a few of their own copyrighted works to produce royalties but producers control an array of different authors' works. Individual authors cannot take the longer view that firms can.").

[36] With regard to music records, *see* Theo Papadopoulos, *Are Music Recording Contracts Equitable? An Economic Analysis of the Practice of Recoupment*, 4 MEIEA J. 83, 84 (2004). For an example of the costs, *see id.* at 87-91.

[37] With regard to books, for example, these stages will include text preparation, editing, proofreading, printing, binding, distribution and marketing. For plays, the necessary elements for a complete work include script, scenery and objects, actors, directing and rehearsals.

[38] Guy A. Rub, *Stronger than Kryptonite: Inalienable Profit Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49, 97 (2013) ("When the initial agreement is signed, it is very difficult for the author or the buyer to know whether the author will turn out to be an unusual commercial success."); Steven Bolanos, Note, *"Knock, Knock, Knockin' on [Congress's] Door": A Plea to Congress to Amend Section 203 of the Copyright Act of 1976*, 41 W. ST. U. L. REV. 391, 397 (2014) ("…record labels do not possess a crystal ball that can predict the future success, or lack thereof, of a particular work." [footnote omitted]); GUIBALT ET AL., *supra* note 7, at 105.

[39] Caves is usually cited for his "Nobody knows" principle. He claims that in the creative industries nobody knows whether a work will succeed on the market. Accordingly, both authors and

Although commercial entities invest resources in choosing a successful author, ultimately the majority of projects will not be commercially successful.[40] The distribution of profits in creative markets follows a pattern of "winner-takes-all", according to which a minority of authors reaps a considerable portion of the market value, while most authors must be satisfied with the small remaining portion. According to statistics commonly noted in this context, approximately 80%–90% of works fail commercially.[41]

Uncertainty regarding the commercial value of a work directly affects the value of the legal rights conferring the ability to use it. Copyright grants control over extensive uses of a work, not only in the primary market but also in secondary markets, and therefore can potentially reap significant profit from a successful work.[42] From an economic perspective, the meaning of copyright is the revenue stream resulting from the commercial use of the work. Naturally, a revenue stream that is subject to risk is worth less than a risk-free revenue stream, even if both are expected to yield the same amount. The value of the copyright agreed upon by the author and the commercial entity will incorporate the existence of risk and uncertainty regarding revenues.

The element of risk involved in commercial success must also be considered as a production cost when planning a business model. In a risky

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commercial entities lack information. Richard E. Caves, *Contracts Between Art and Commerce*, 17 J. ECON. PERSP. 73, 75 (2003) ("[c]ontract theory pays much attention to asymmetrical information, which usually involves a situation in which the seller knows key characteristics of the product not known to the buyer. However, in creative industries *nobody knows*, and the core problem is one of symmetrical ignorance."). *See also* Bolanos, *supra*, at 397 ("Record labels are in the same position as the artists at the time they agree to produce a song in exchange for an assignment of copyright interests."); Daniel Gould, Comment, *Times Up: Copyright Termination, Work-For-Hire and the Recording Industry*, 31 COLUM. J.L. & ARTS 91, 100 (2007) (" . . . with so many works in competition, few will prove to be of significant commercial value, and neither record labels nor artists can easily predict that value prior to making marketing investments."). *But see* Ruth Towse, *Copyright Policy and Creativity in the Cultural Industries*, 5 REV. CULTURAL ECON. 3, 7 (2002), http://www.kace.kr/include/download.asp?fname=Copyright%20Policy%20and%20Creativity %20in%20the%20Cultural%20Industries(Ruth%20Towse).pdf (Disagreeing with Caves, by claiming that firms know more than authors).

40 *See* Rub, *supra* note 38, at 96-97 ("Although the buyer spends resources trying to choose successful authors to sign, most chosen authors will fail commercially." (footnote omitted)).

41 *E.g.*, for music records, *see* Caves, *supra* note 39, at 79 ("[8]0 to 90 percent of recordings that lose money.); Theo Papadopoulos, supra note 36, at 85; Martin Kretschmer et al., *The Changing Location of Intellectual Property Rights in Music: A Study of Music Publishers, Collecting Societies and Media Conglomerates*, 17 PROMETHEUS 163, 166 (1999); Connie Chang, *Can't Record Labels and Recording Artists All Just Get Along?: The Debate over California Labor Code S 2855 and Its Impact on the Music Industry*, 12 DEPAUL-LCA J. ART & ENT. L. 13, 15 (2002) (referring to Chuck Philips, *Recording Stars Challenge Music Labels' Business Practices*, L.A. TIMES, Mar. 29, 2001, at A1, who reports that in 2001 the music industry was spending billions of dollars on untested artists, of which only 5% succeeded).

42 Primarily these uses are granted by the right to derivative works, which greatly expands the potential markets for commercial exploitation.

market, it is important to adopt business models that allow for profitable activity. The standard business model for creative markets is a model of risk diversification. Commercial entities operate with a large portfolio of works: thus, even if 90% of them result in losses, the remaining 10% will cover these losses and, in addition, yield a profit. In the framework of this business model, the method of payment to the author is of great importance as a tool influencing the distribution of risks and rewards between the contractual parties.

One method of payment common in contracts between authors and commercial entities is a fixed amount, given against a full transfer of rights that leaves the author with no rights in relation to the work.[43] This payment is given ex ante, prior to the commercial exploitation of the work. The complete transfer of rights to the work means the severance of any economic connection to it. Thus the author will not profit from a commercial success or sustain any loss in the case of a failure, remaining with the fixed amount stipulated by the contract. The amount of payment reflects the expected value of the work: successful authors will receive higher amounts of money than their less successful counterparts.

Yet another payment method is participation in profits, which depends directly on the results of commercialization: the author has the opportunity to earn income according to the commercial success of the work, but is also affected by losses in the case of failure. Sometimes the method of payment can be mixed, including a fixed amount alongside participation in the profits. In this case, the risk involved for authors is limited, according to their share in the profits. The risk assumed by the authors rises in accordance with the extent of the rights they retain.[44]

None of these forms of payment is negative by default. Furthermore, among the various forms of payment, in a lump-sum arrangement, each party gains optimal benefit:[45] authors receive payment quickly, transferring the risk

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[43] This type of contract is commonly called a buyout contract. Towse, *supra* note 29, at 374 ("A buyout is a flat fee (spot price) for the use of a bundle of rights. On payment of the fee, the publisher has no further obligation to obtain the author's consent to use her work."). Complete transfer of rights to commercial entities in return for lump-sum payments was a common practice from the early days of the music industry in England. Ruth Towse, *Copyright Auctions and the Asset Value of a Copyright Work*, 13 REV. ECON. RES. ON COPYRIGHT ISSUES 83, 86 (2016)

[44] MARTIN KRETSCHMER ET AL., THE RELATIONSHIP BETWEEN COPYRIGHT AND CONTRACT LAW: A REVIEW COMMISSIONED BY THE UK STRATEGIC ADVISORY BOARD FOR INTELLECTUAL PROPERTY POLICY (SABIP) 24 (2010), https://ssrn.com/abstract=2624945 ("(t)he greater the degree to which outright sale is avoided, for example, under a strict royalty agreement, the more the copyright holder retains post-contractual risk").

[45] *Id.* at 26 ("Since economic theory has proven that such a contract form is indeed optimal for risk-averse riskholders, up-front payments to creators are indeed an efficient inclusion in contracts between creators and users of intellectual property"); *See* GUIBALT ET AL., *supra* note 7, at 106-07 ("[r]isk-averse individuals would in general prefer lump-sum remuneration at the expected value of

to the commercial entity in a manner suited to the economic characteristics of both sides. As opposed to lump-sum payments, in a scenario of profit participation, the author will receive money sometime in the future, provided that the work is not a commercial failure.[46]

In order for the business endeavor to be profitable, it is important that the party assuming the risk also reaps the accompanying reward. Indeed, adopting a payment method that prevents this from happening may actually make the whole enterprise a losing one, consequently reducing incentives to operate in the market. In ordinary cases, considering the different economic characteristics of the parties, the division of risks and rewards between the author and the commercial entity allows the commercial entity to operate profitably.[47]

Thus the typical payment method used in the interaction between authors and commercial entities appears to be economically justified. Yet many legislators prevent authors from choosing the method of lump-sum payments, enacting various mandatory rules which prohibit it.[48] Copyright laws around the world contain many rules forcing authors to retain rights to a share of the profits generated by their works. These rules do not allow authors to stipulate otherwise, even if they are interested in doing so,[49] denying authors the right to select a transaction structure without a long-term economic connection.[50]

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their work to a risky option that has the same expected value."); *See* Darling, *supra* note 31, at 164 ("Publishers have an interest in purchasing the full transfer of copyright for an upfront fee.").

46 Even if the total amount is higher under profit participation, a reduction to the present value should be taken into account before comparing it to a lump-sum payment.

47 Allocation of risks is a major motivation for parties to enter into agreements. *See* Michael B. Kelly, *The Phantom Reliance Interest in Contract Damages*, 1992 WIS. L. REV. 1755, 1772 ("Contract law revolves around agreements among parties allocating the risks of a business transaction.").

48 The inability to transfer or to waive a right means that only the author can benefit from it.

49 Still, this does not mean that such a right will be enforced in any case. See Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 353 (1993). ("[N]o inalienable right is absolute in scope."). Even with respect to such a right, competing interests can be taken into account. *See id.* at 397 ("Even though the rights of Continental authors are generally inalienable, they are still subject to requirements of good faith and a certain accommodation to competing interests."). In any case, inalienability reinforces interests relating to the right. *See id.* at 353 ("But the recognition of an inalienable author right to continuing sovereignty over expression establishes a strong principle by which the interest in such continuing author sovereignty is given special weight in any such balancing.").

50 Producers do not offer short-term agreements due to the risk involved. *See* Caves, *supra* note 39, at 79 ("Why does not a kinder, gentler record label offer a short-term contract that lets the performer revel in the rents that come from a big, early success? The answer lies in the high "stiff ratio," the 80 to 90 percent of recordings that lose money. For the label to break even in the long run, it must mine enough profits from the successes to cover the stiffs' losses"). Potentially, an author may want to enter into a variety of different transactions. *See* RENUMERATION FOR THE USE OF WORKS: EXCLUSIVITY VS. OTHER APPROACHES #1.3 in Session 1 (Silke von Lewinski ed., 2016) ("(t)here is nothing to prevent authors from agreeing to receive non-monetary consideration in exchange for the authorisations granted by them").

The motivation behind this preclusion of the customary payment method must be understood on the backdrop of the conflict of interests between authors and commercial entities. Although authors and commercial entities have an interest in cooperating over the commercialization of the work, these interests conflict regarding the manner of cooperation; in particular, when negotiating the terms of payment.[51] When cooperation is beneficial to both sides, they will favor some kind of agreement, yet prefer that within the specific range of potential agreements, it tends in their favor.[52] In negotiations with commercial entities, authors bargain over the distribution of potential profits, with each side trying to secure a larger share.[53]

When transferring rights to another entity, authors forego the surplus of the transaction, should the work become a commercial success.[54] The author's share of potential profits decreases according to the amount of rights they will relinquish. The most extreme step is to transfer all rights or waive them in full; in such a scenario, they will not participate in the profits at all. By prohibiting lump-sum payments, and forcing participation in profits, policy makers endeavor to prevent large-scale transfers or waivers which are perceived as excessive and as preventing authors from reaping the benefits, should the work become commercially successful.

This is characteristic of the typical interaction between authors and commercial entities. In seeking to understand the motive behind the desire to change the method of payment and distribution of profits between the parties, we must return to the starting point and examine this question from its inception. The following discussion is based upon the assumption that the motive behind mandatory rules is not fully understood. The first step in addressing this question involves one of the common considerations in the evaluation of copyright law — efficiency considerations.

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51 *See* Abhinay Muthoo, *Bargaining Theory and Royalty Contract Negotiations*, 3 REV. ECON. RES. ON COPYRIGHT ISSUES 19, 20 (2006) ("The situation just described, in which a pair of players can engage in mutually beneficial trade but have conflicting interests over the terms of trade, is a bargaining situation. Stated in general terms, a bargaining situation is a situation in which two or more players have a common interest to co-operate, but have conflicting interests over exactly how to co-operate. The situation that confronts a copyright holder and potential user, in determining the terms of a royalty contract, is a bargaining situation."). *See also* Linda D. Molm et al., *Conflict and Fairness in Social Exchange*, 84 SOC. FORCES 2331, 2331 (2006) ("the process of negotiation can increase the salience of the conflictual, competitive face of exchange").

52 *Id*. at 2331 ("Both actors are better off with exchange than they would be without it, but at the same time, actors benefit in inverse proportion to what each gives the other").

53 Muthoo, *supra* note 51, at 22.

54 *See* Kurt E. Kruckeberg, *Copyright "Band-Aids" and the Future of Reform*, 34 SEATTLE U. L. REV. 1545, 1573 (2011) ("Because current contracting practices often involve the transfer of all copyrights to music corporations, a songwriter may be unable to enjoy revenue from newfound exploitation of her work.").

III. A CRITICAL EXAMINATION OF MANDATORY RULES IN COPYRIGHT LAW

A. The Irrelevance of Efficiency

1. Concentration in Creative Markets

Mandatory rules limit the ability to transfer or waive rights and therefore contradict principles of resource allocation through the free market. Free market resource allocation enables transacting parties to express their will and, as such, may lead to outcomes that contradict the dictates of a mandatory rule. It is important to consider the preferences of the contracting parties because this demonstrates that each side holds what they receive to be of greater value than what they give in fulfillment of the contract. The ability to realize personal will within the framework of free market transactions improves the welfare of each party; therefore, the free market leads to an efficient allocation. Inability to transfer or waive rights prevents market participants from expressing their preferences. This limitation precludes the transfer of resources to a party which values them more than the original holder. In economic terms, a contractual agreement resulting from free will leads to a Pareto efficient outcome, since the very fact that someone has agreed to a contract means that she gains from it, or at least does not lose. Thus determining that the content of a contract stemming from free will is flawed is a matter of perspective; indeed, such contracts are necessarily efficient.

The impairment of efficiency by restricting the transfers and waivers of rights also applies to the world of copyright.[55] If a commercial entity is better positioned to produce and distribute works, it is optimal that the copyright be transferred to it, or that the entity purchase its waiver. This will benefit the commercial entity, the author and the public, the last in terms of the range of works produced and sold on the market.

However, although limiting the transferability or waiver of rights is seemingly inefficient, in some circumstances the benefits derived from mandatory rules exceed the cost of the restrictions they impose on the commercialization of rights. The existence of market concentration is commonly perceived as an example of such circumstances in the context of mandatory rules. A central argument in the discourse concerning mandatory rules in copyright law claims that these rules help to tackle the inefficiency

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[55] *See* KRETSCHMER ET AL., *supra* note 44, at 14 (stating with regard to moral rights that "(s)uch an intervention could be seen as introducing inefficiencies similar to other limits on contractual freedom").

resulting from concentration among buyers of creative content operating in creative markets.[56]

Creative markets tend to be concentrated principally because most of the works sold in them are mass media products which possess the attributes of public goods. These market characteristics encourage commercial entities to become more efficient in using economies of scale and scope.[57]

Economies of scale means the ability to benefit from lower average costs as the volume of commercial activity increases. Creative markets give commercial entities an opportunity to enjoy economies of scale because the cost of commercializing a work is not affected by the amount of consumers who wish to purchase it.[58] Therefore, appealing to a larger consumer audience can increase the amount of profits without affecting the level of expenses.

Economies of scope are the benefits that arise from increasing the range of products available to consumers based on the same creative inputs.[59] The greater the range of products which consumers can purchase on the basis of the same inputs, the lower the average production cost of each product. Works of authorship are a type of input that can be repackaged in a variety of new products, thus reaching out to new audiences and increasing sales.

The ability to make efficient use of production inputs through economies of scale and scope leads to a strategy of mergers.[60] Commercial entities seek to grow and merge with their counterparts in order to exploit optimally the common basis of the content they produce. The desire to expand is a major reason for the concentration of media markets.[61]

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56 The existence of concentration in creative markets is an accepted assumption in the legal literature dealing with mandatory rules. *See, e.g.*, Kate Darling, *Contracting About the Future: Copyright and New Media*, 10 NW. J. TECH. & INTELL. PROP. 485, 510 (2012). The present article relies on this assumption. However, various comments in the literature cast doubt on it. *See, e.g.*, Hilty & Peukert, *supra* note 21, at 427 (in "[t]he history of the German motion picture industry, let alone the general entertainment industry, there has never been a conglomeration of companies comparable to Hollywood. Berlin, Munich, Cologne and Hamburg still today compete with each other for the leading rank in motion picture and television productions within Germany."); REPORT ON THE RESPONSES TO THE PUBLIC CONSULTATION ON THE REVIEW OF THE EU COPYRIGHT RULES 80 (2014) http://ec.europa.eu/internal_ market/consultations/2013/ copyright-rules/docs/contributions/consultation-report_en.pdf ("Music publishers advance the argument that the existing competition between them in the market is an important means to ensure the fair remuneration of authors.") [Hereinafter REVIEW OF THE EU COPYRIGHT RULES]. Therefore, an empirical inquiry investigating the verity of this assumption would constitute a significant contribution to the present discussion.

57 *See* STUART CUNNINGHAM ET AL., MEDIA ECONOMICS 21 (2015) (discussing how media industries are particularly prone to market concentration because of economies of scale and scope).

58 GILLIAN DOYLE, UNDERSTANDING MEDIA ECONOMICS 13-14 (2002).

59 *Id.* at 14-15.

60 GILLIAN DOYLE, MEDIA OWNERSHIP: THE ECONOMICS AND POLITICS OF CONVERGENCE AND CONCENTRATION IN THE UK AND EUROPEAN MEDIA 5 (2002).

61 DOYLE, *supra* note 58, at 9.

Authors transact with powerful parties which offer them a smaller remuneration than they would receive in a competitive market, because they operate in concentrated markets. Poor remuneration manifests in the lump-sum payments that authors receive, which do not include the right to participate in the commercial success of a work. If the market is concentrated and a small number of buyers offer authors lower remuneration, allegedly some authors will lack sufficient incentive to create. In order to maintain adequate incentives, the remuneration given to authors must be consistent with the true market value of the work.[62] Mandatory rules solve this problem, requiring commercial entities to offer authors what the power of concentration prevented them from receiving. These rules provide certain authors with the incentive they lack, facilitating efficient transactions and ensuring that there are no deadweight losses. Society at large benefits from books, films and a variety of other works that, without this incentive, would not have been created.

However, due to the unique characteristics of creative markets, concentration in these markets has a limited effect on incentives for authors. A recurring theme in the literature of cultural economics concerns the existence of an excess supply of authors in creative markets.[63] One reason for this is that authors are engaged in a special profession which offers significant non-economic rewards, such as self-satisfaction, fame and recognition.[64] In many cases, a person choses this profession due to internal motivation rather than striving for maximum monetary reward.[65]

Thus, research in the field of cultural economics suggests that economic incentives for individual authors are not as important as one might think. Non-economic rewards compensate for any inferior remuneration in this profession, providing an incentive to engage in creation. Moreover, this type of reward even incentivizes vast numbers of authors to operate in the

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62 *See* Towse, *The Singer or the Song?*, *supra* note 26, at 754 ("Performers' time has an alternative cost and unless they are rewarded accordingly, there is little (or less) incentive for performers to spend their time making recordings or other such work. Even if the performer were already on salary with an orchestra or chorus, economic efficiency requires that their pay reflect the revenues received by the organization employing them.").

63 On cultural economics, *see generally* RUTH TOWSE, ADVANCED INTRODUCTION TO CULTURAL EECONOMICS (2014).

64 HANS ABBING, WHY ARE ARTISTS POOR?: THE EXCEPTIONAL ECONOMY OF THE ARTS 148 (2002); *See* Ruth Towse, *Human Capital and Artists' Labour Markets*, *in* HANDBOOK OF THE ECONOMICS OF ART AND CULTURE 865, 869 (Victor A. Ginsburgh & David Throsby eds., 2006) ("(o)ccupational choice may not be determined solely by financial reward because people may choose an occupation for non-pecuniary motives such as a preferred lifestyle.")

65 Ruth Towse, *Creativity, Copyright and the Creative Industries Paradigm*, 63 KYKLOS 461, 466 (2010). An example of internal motivation in the digital age is User Generated Content ("UGC").

market.[66] Creative markets are not characterized by a shortage of authors, but rather by an excess, leading to significant unemployment.[67] The excess supply of authors driven to create by internal motivation appears to contradict the argument that there is a problem of deadweight loss in creative markets.

This analysis suggests that market concentration should not be viewed as a normative problem because of deadweight losses or incentives to create, but mainly due to the distribution of profits between the parties. Yet the distribution of profits is a consideration of indirect importance when examining the issue in the context of efficiency considerations.[68] By considering efficiency, we seek to maximize the welfare of society as a whole, even if, within it, the welfare of some will be negatively affected.[69] Therefore, the most important factor according to efficiency considerations is the very fact that the parties transact, so that society does not lose transactions which accord each party the least amount of welfare. Even transactions involving powerful entities which result from market concentration are efficient transactions that improve the welfare of the parties, although one party may gain much more than the other. Therefore, the demand to increase the authors' share of profits by means of mandatory rules does not stem from efficiency considerations, but must be motivated by other types of considerations.

2. Authors and Commercial Entities: How Their Economic Characteristics Differ

The differing economic characteristics of authors and commercial entities raise a further normative question concerning the distribution of profits between the two sides. As described above, the economic characteristics of each side are responsible for the typical structure of the transaction concluded between them. Differences in economic strength, which affect the ability to spread risks, and the urgency of the need for

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66 One reason for the excess supply is that this profession offers particular psychological satisfaction. Martin Kretschmer et al., *Increasing Returns and Social Contagion in Cultural Industries*, 10 BRIT. J. MGMT. 61, 62 (1999).

67 Excess supply of artists and performers is relevant to many different creative fields. *Id.*

68 The word "indirect" is used because the utility attributed to the distribution of profits does not derive directly from the parties' preferences. Regarding how distribution itself could serve efficiency, *see* F.H. Buckley, *Three Theories of Substantive Fairness*, 19 HOFSTRA L. REV. 33, 35 (1990) ("[A] norm which specifies how bargaining gains should be divided may increase the size of the gains. The imposition of substantive fairness norms may then be defended for the efficiencies they serve, with distributional justice merely an instrumental concern."). Such claims pave the way for a range of additional assumptions that may complicate the model. For example, it could be argued that if the distribution tilts in favor of commercial entities, eventually this will only benefit authors, creating more employment opportunities.

69 *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 3 (2004).

money, lead the parties to agree on the form of payment and distribution of profits characteristic of such transactions.

Some view entities exhibiting such characteristics, and exploit them in interactions with authors, as a problem which should be addressed through the enactment of mandatory rules. According to critics, the distribution of profits deriving from the exploitation of the work clearly favors commercial entities and therefore must be changed. In many cases, scholarly literature employs the expression "differences in bargaining power" to describe the normative problem caused by the disparate economic characteristics of authors and commercial entities. The conventional economic meaning of the term bargaining power is the ability to obtain a larger share of the surplus from the transaction. Yet if the parties have an incentive to maintain these transactions even under the criticized distribution, the very use of such a term emphasizes that ― with regard to the matter of economic characteristics, as in the previous paragraphs ― the normative problem does not concern efficiency. Resources in such transactions find their way to the party which values them most highly; therefore this kind of transactions does not raise any difficulties from the perspective of efficiency.

Yet even if there was no incentive for authors to transact with commercial entities, changing the structure of the typical transaction to that dictated by the mandatory rules raises difficulties in terms of their ability to provide the incentive which authors seemingly lack. Considering authors' economic characteristics, mandatory rules actually impose a less valued payment form: one given later and involving risk.[70] Since it is difficult to view this change in the structure of the transaction as an incentive for authors, in light of their economic characteristics, justifying it on the basis of efficiency appears questionable.

Furthermore, the fact that these characteristics are a necessary condition for efficient resource allocation casts doubt on whether the problem concerning them has any relation to efficiency. Any critique of these economic characteristics must contend with their very contribution to the formation of an efficient allocation in the long term.[71] From a long-term perspective, we must also consider the effect that any change to a certain allocation may have on incentives for its formation from the very the outset.

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[70] *See* Rub, *supra* note 38, at 88 (discussing the inefficient allocation of risk between authors and commercial entities); *See id.* at 98 ("termination of transfer is probably ex ante inefficient in competitive markets because it decreases total social utility by misallocating both risk and wealth.").

[71] With regard to the meaning of long term efficiency, *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and. Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1098 (1972) 1098 ("There are also preferences which are linked to dynamic efficiency concepts- producers ought to be rewarded since they will cause everyone to be better off in the end."); ALAIN ANDERTON, ECONOMICS 100 (3d ed., 2004) ("dynamic efficiency is concerned with how resources are allocated over a period of time.")

Commercial entities, as their name implies, are motivated by economic rather than philanthropic incentives. Therefore, long-term efficiency requires adequate compensation for the use of resources such as capital and time, otherwise the creative markets will be devoid of entrepreneurial activity.[72]

In order to earn adequate compensation from endeavors in creative markets, one must act according to a model centered around entities with controversial economic characteristics. It is necessary to depend on these entities because the market requires a large investment of funds and involves risk which, from a practical perspective, only they can handle. Thus, limiting the ability to use certain models will have a detrimental effect on the incentives for entrepreneurs to operate under market conditions requiring reliance on these models. Any venture using other models may not provide optimal compensation for investment or may even cause a loss. Denying entrepreneurs the ability to operate in such a way will reduce their activity in accordance with the constraints imposed on them.

Denying entrepreneurs the ability to develop expertise and professional knowledge, due to asymmetry of information between the parties, can also reduce incentives to operate in the market efficiently. One of the most common critiques in the discourse regarding economic characteristics concerns asymmetry of information between authors and commercial entities: although both parties are uncertain regarding the commercial success of the work, commercial entities know more, in relative terms, than authors. Typically, commercial entities are repeat players and have greater experience; therefore, it is reasonable to assume that they are better positioned to estimate the potential success of a work than its author. Authors do not know the value of the future revenue stream that can be generated based on their work, which reflects the maximum price commercial entities will be willing to pay. Therefore, commercial entities can utilize their superior knowledge and expertise to dictate a payment which is lower than the true commercial value of the work and the amount which would have been obtained with full information.[73]

When examining the distribution of profits resulting from asymmetry of information through a prism of efficiency, a normative problem does not necessarily arise. Asymmetry of information resulting from expertise is desirable in a market economy because it allows experts to offer higher-value services to non-experts.[74] Any difference in the distribution of profits

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[72] In such a case, the question of how to regulate the activity of entities with such economic characteristics would not be completely irrelevant because there would be no justification for the entities' very existence.

[73] Muthoo, *supra* note 51, at 21 (2006) (discussing how information asymmetry affects bargaining power)

[74] *Asymmetric Information*, INVESTOPEDIA, https://www.investopedia.com/terms/a/asymmetric information.asp (last updated Jan. 29, 2018) ("Growing asymmetrical information is a desirable

between the parties is the fee charged for developing this expertise. The information which commercial entities possess was not acquired incidentally, therefore a restriction on its free usage may reduce incentives to obtain it in the first place.[75] Asymmetry of information, similarly to the other economic characteristics, contributes to efficient allocation of resources and benefits society as a whole.

B. Distributive Considerations

1. The Distributive Implication of Mandatory Rules

The analysis in the previous section indicates that the motive for market intervention by means of mandatory rules does not necessarily stem from a lack of efficiency, but rather is a result of other considerations. The difficulty involved in using efficiency considerations to justify or explain mandatory rules emphasizes that efficiency is not the normative consideration according to which we should judge the allocation of resources between authors and commercial entities. The desire to deviate from economically efficient allocation and create a different allocation of resources suggests that the mandatory rules are motivated by distributive considerations. In this section we briefly review the implications of employing distributive considerations to justify mandatory rules in copyright law, and how this differs to the use of efficiency considerations.

Using distributive considerations to guide mandatory rules in copyright law is consistent with how such rules are perceived in a variety of other legal fields. One of the conventional policy objectives of mandatory rules in areas regulating contractual interaction is distributive.[76] A variety of rules exist in various fields. By intervening in the terms of the contract, and in accordance with principles of distributive justice, these rules seek to transfer wealth from certain groups — such as lenders, retailers, landlords and employers — to others, for example borrowers, consumers, tenants and employees.[77]

Distributive considerations emphasize not only the maximization of wealth in society but also how the wealth is divided. Even when efficient

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outcome of a market economy. As workers specialize and become more productive in their fields of expertise, they can provide greater levels of value to workers in other fields.").

75 *See* Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 489 (1980) (discussing how imposing disclosure of information obtained by deliberate search may reduce incentives to obtain it in the first place).

76 *See* Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 931 (1985). ("On inspection, however, inalienability turns out to be a very complex concept, and one whose legitimate uses can be clarified through economic analysis combined with a sensitivity to noneconomic ideas most notably ideals of citizenship and distributive justice.").

77 Kronman, *supra* note 75, at 473.

allocation exists, the distribution of wealth can be considered undesirable.[78] Distributive policy expresses the desire to promote the welfare of one group at the expense of another, by altering the balance of power between them.[79] Distributive policy can also be described as a justification for giving someone a thing which he never previously possessed.

Mandatory rules in copyright law implement such a distributive policy: they seek to transfer to authors a larger part of the profits, one which they would not receive without the existence of these rules.[80] The inability to change the allocation that the mandatory rules strive to create, implicitly reveals the normative stance concerning the allocation of resources between authors and commercial entities.

In many cases, the discourse on mandatory rules tends to combine efficiency arguments and distributive arguments, possibly because efficiency considerations in general are routinely used to camouflage the true distributive purpose of mandatory rules.[81] Sometimes it is impossible to discern with any certainty whether a particular rule is mandatory due to efficiency or distributive considerations.[82] Similarly, according to some arguments regarding antitrust and labor laws, the purpose of promoting economic efficiency is attributed to them only rhetorically, whereas their real purpose is distributive.[83] Likewise, in the field of copyright law, the correction of market failures is sometimes referred to as the realization of a distributive policy.[84] A possible explanation for the tendency to hide the true purpose of mandatory rules is that employing efficiency considerations is

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78 Darling, *supra* note 56, at 506.

79 *See* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 571-2 (1983) (Discussing how these distributive motives affect policy making).

80 *See* Ruth Towse, *Copyright Policy, Cultural Policy and Support for Artists*, *in* The Economics of Copyright: Developments in Research and Analysis 66, 71 (Wendy J. Gordon & Richard Watt eds., 2003) (Discussing how policy makers use non-waivability to tip the scales in favor of authors, enabling them to earn a larger share of the profits). Limitation of waivers and transfers of rights in order to carry out distributive policy in copyright law applies not only with regard to profit sharing, but also to other types of control over an author's work. *See* Netanel, *supra* note 49, at 409 ("They are designed to implement a social policy of fulfilling authors' desires by redistributing an entitlement-the control over expression-from transferees back to authors.").

81 Another type of consideration that is sometimes used to disguise distributive considerations is paternalism. Calabresi & Melamed, *supra* note 71, at 1115 ("[w]hat is justified on, for example, paternalism grounds is really a hidden way of accruing distributional benefits for a group whom we would not otherwise wish to benefit.")

82 Calabresi & Melamed, *supra* note 71, at note 50 ("As a practical matter, it is often impossible to tell whether an entitlement has been made partially inalienable for any of the several efficiency grounds mentioned or for distributional grounds.").

83 *See* Kennedy, *supra* note 69, at 580 ("Antitrust and labor laws are sometimes described today as motivated by the desire to improve efficiency, but at the time it was obvious to everyone that they represented attempts to change the balance of economic power among the constitutive groups of a modern industrial society.").

84 Netanel, *supra* note 49, at note 241.

more acceptable politically, because market failures relate to the public as a whole and not to a particular sector, as is true of distributive considerations.[85]

Despite political use of the various types of considerations, the distinction between them is not only of rhetorical significance. Utilizing distributive considerations to justify intervention in the relations between authors and commercial entities can lead to resource allocation other than under efficiency. If we understand mandatory rules as a tool with a distributive purpose, and not one intended to increase efficiency, one possible outcome of distribution is the transfer of resources to authors, even beyond the competitive equilibrium.

Although a competitive market may enhance the welfare of authors as a byproduct of promoting overall welfare, it may not improve authors' welfare sufficiently. Moreover, if the purpose of mandatory rules is distributive, then even in the absence of market failures — such as lack of competition — they can still be justified. Thus mandatory rules should be examined using criteria other than efficiency.

2. The Justification for Redistribution

As noted above, in the course of negotiations between authors and commercial entities, both sides attempt to obtain the largest possible share of potential profits from the exploitation of a work. The manner in which the distribution of profits between the parties will be decided depends on bargaining power, the relative ability of each party to divert the outcomes to its advantage.[86] The greater a particular party's bargaining power, the larger the share of the profits she can obtain.[87] The existence of disparities in bargaining power is one of the most common arguments employed to justify redistribution by means of mandatory rules.[88] Differences in bargaining

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85 *See* Kennedy, *supra* note 79, at 586 (discussing how efficiency rhetoric is more appealing because the goal of efficiency is to improve everyone's situation without taking the side of one specific social groups); *Id.* at 587 ("One can formulate efficiency as, say, "wealth maximization." This concept is so manipulable as to permit the analyst complete leeway to smuggle distributive and paternalist (or anti-paternalist) motives into the analysis without acknowledging them.").

86 Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 159-60 (2005).

87 *See* Eric van Dijk & Riël Vermunt, *Strategy and Fairness in Social Decision Making: Sometimes It Pays to Be Powerless*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 1, 21 (2000) (discussing the "(w)ell documented notion that power imbalances in social exchange relations result in unequal distributions of outcomes, with the more powerful actors obtaining higher outcomes" and referring to some examples of research); *Id.* at 21 ("(m)ore powerful actors obtain higher outcomes").

88 *See* Kennedy, *supra* note 79, at 614; *Id.* at 615 ("The rhetoric of unequal bargaining power is distributionist in that it asserts the desirability of intervention in favor of the weaker party in situations where there is nothing like common law fraud, duress or incapacity.").

power are also a common justification for various mandatory rules in copyright law.[89]

The economic characteristics of the market itself, as well as those of its participants, as discussed above, lead to disparities between the bargaining power of authors and commercial entities. In most cases authors are the weaker party, with the contract inclined towards the interests of the commercial entities.[90] Differences in power, wealth and expertise, enable commercial entities to obtain a greater share of profits at authors' expense, a situation which mandatory rules attempt to correct.[91]

Differences in bargaining power are also evident in the transactions of other individuals operating in creative markets. The use of power is not directed only at authors, but also at performers. Indeed, the contractual and economic relationship between record companies and performers is one of the most controversial issues in the music industry.[92] Performers are similarly subject to contractual pressure,[93] and in practice most must relinquish their rights, transferring them to commercial entities.[94]

Naturally, differences in bargaining power are a source of dissatisfaction for individuals in their interactions with commercial entities. The relationship between authors and publishers is so loaded that the former often feel hatred toward the latter.[95] Sometimes the treatment authors receive is compared to slavery.[96] Yet beyond the impact which bargaining power discrepancy has on satisfaction at the individual level, it also holds broader social significance. Differences in bargaining power justify redistribution because they constitute a symptom of social inequality. The a-priori allocation of resources, that is, the allocation against which the transaction is made, accords the stronger party the ability to dictate unfair and unbalanced

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89 Netanel, *supra* note 49, at 409. Mandatory rules are only one example of the synergy between intellectual property and the concept of differences in bargaining power. For example, differences in bargaining power may also affect the way ambiguity in intellectual property contracts should be treated. Michal Shur-Ofry & Ofer Tur-Sinai, *Constructive Ambiguity: IP Licenses as a Case Study*, 48 U. MICH. J.L. REFORM 391, 394-95 (2015). Differences in bargaining power may not only influence the doctrine of intellectual property, but can also be influenced by it. *See* Katya Assaf, *Of Patents and Cobras: Exposing the Problems of Asymmetry*, 35 CARDOZO ARTS & ENT. L.J. 1 (2016) (discussing how asymmetry of risk allocation in patent law grants patent holders greater bargaining power in comparison to alleged infringers).

90 Ginsburg & Sirinelli, *supra* note 21, at 173.

91 With regard to new-use right grants, *see* Darling, *supra* note 56, at 506

92 Papadopoulos, *supra* note 36, at 83.

93 ELS VANHEUSDEN, PERFORMERS' RIGHTS IN EUROPEAN LEGISLATION: SITUATION AND ELEMENTS FOR IMPROVEMENT 33 (2009), https://www.ipf.si/media/1078/aepo-artis-study-update_ 200912. pdf.

94 *Id.* at 7.

95 *See* William Cornish, *The Author as Risk-Sharer*, 26 COLUM. J.L. & ARTS 1, 2 (2002) ("Authors have long hated their publishers.").

96 *Id.* at 10.

contractual terms. Free market conditions enable the strong side to exploit its advantages and further intensify existing social inequalities.

IV. FAIRNESS IN DISTRIBUTION

The next step in trying to explain mandatory rules focuses on the outcomes of a typical interaction between authors and commercial entities. In light of the conclusion that distributive considerations are guiding the mandatory rules, we must ask what division they aspire to achieve. Whereas the previous section mainly concerned the motivation for distribution, the current section will examine the desired outcomes of this distribution: a fair distribution of profits.[97]

Typical contracts for commercialization of work are unfair towards authors due to one main (controversial) variable: payment in the form of a lump-sum against a full transfer of rights to commercial entities. The [98] perception that lump sum payments are unfair is very common, as is indicated by the fact that while mandatory rules dictate a variety of methods for participation in profits, most prohibit this controversial payment method. According to this perception, in order for the remuneration to be fair, the economic relationship between authors and the commercial use of their work cannot be severed.[99]

Efficiency considerations fail to convince those who believe that lump-sum payments are unfair. Despite the economic logic of the deal between commercial entities and authors, public opinion in most cases favors the authors.[100] There is a general feeling that commercial entities profit more from lump-sum payments.[101] Therefore, to the extent that fairness

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97 Fair distribution in this context means according authors a larger share of the profits.

98 *See* REVIEW OF THE EU COPYRIGHT RULES, *supra* note 56, at 79, ("[A]ny contract that involves the transfer of rights in exchange for a one-off payment (a 'buy-out' contract), by definition, prevents their adequate or fair remuneration as the payment does not relate to the use, and even less to the success, of their work or performance").

99 *See* Papadopoulos, *supra* note 36, at 98 ("While equity is subjective, an equitable contract is here defined as one in which both parties share in the profit generated from the commercial exploitation of the musical work beyond the breakeven point."); *See* Eva Van Passel, *Remuneration of Audiovisual Creators in a Digital Age: Methodologies for Quantifying Fairness*, *in* PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM ON THE MEASUREMENT OF DIGITAL CULTURAL PRODUCTS MONTREAL 325, 329 (2016) (suggesting that the proportionality of authors' remuneration to the remuneration received by other actors further along the value chain can serve as a guide to evaluate fairness).

100 Caves, *supra* note 39, at 79 (stating with regard to the economic logic of a deal: "Despite this logic, public sympathy flows to the young musician who seems so deprived of decision rights and locked into a one-sided relation").

101 Maureen A. O'Rourke, *A Brief History of Author-Publisher Relations and the Outlook for the 21st Century*, 50 J. COPYRIGHT SOC'Y U.S.A. 425, 439 (2003).

considerations guide copyright law, authors must receive their proper share, even if this contradicts the dictates of efficiency.[102]

This perception motivates a redistribution policy which seeks to change the outcome of the transaction between authors and commercial entities, replacing lump-sum payments with profit sharing. To further clarify the reasoning behind mandatory rules, this section will critically examine the question of what constitutes a fair distribution of profits. This question will be examined using different criteria for evaluating the fairness of resource allocation, drawing on social psychology literature.

A. The Social Psychology Framework

One of the topics studied in the field of social psychology is how individuals judge the fairness of resource allocation.[103] This field uses empirical research methods to detect recurring patterns of fairness judgments. Alongside normative theories concerning how fairness in distribution of resources should be conceived, such as Rawls's theory of justice, social psychology adopts a descriptive approach, emphasizing how individuals actually perceive fairness rather than how fairness should be.[104]

In contrast to other disciplines, such as sociology, which deal with the distribution of resources at the macro level, social psychology analyzes this topic at the micro level. This kind of resource distribution occurs in a variety of social contexts, within which people contribute to a joint initiative, dividing the output among them. For example, social psychology scholars commonly examine how employees judge distribution of salaries[105] or how married couples judge the distribution of household tasks.[106] Individuals' fairness judgments deriving from social psychology studies can shed light on

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102 *See* Ruth Towse, *Partly for the Money: Rewards and Incentives to Artists*, 54 KYKLOS 473, 478 (2001) ("An alternative legal doctrine stresses 'just deserts', that fairness requires an author to be rewarded for his creation; equity not efficiency is the rationale for copyright law.").

103 *See* Kjell Törnblom & Ali Kazemi, *Toward a Resource Production Theory of Distributive Justice*, *in* DISTRIBUTIVE AND PROCEDURAL JUSTICE: RESEARCH AND SOCIAL APPLICATIONS 39, 39 (Kjell Törnblom & Riël Vermunt eds., 2007) ("Social psychologists attempt to explain when, why and how individuals make justice judgments, how they react psychologically and behaviorally to the outcome of the judgment, and how reactions to (in)justice affect and are affected by the social context"). *See also* Norma Shepelak & Duane F. Alwin, *Beliefs About Inequality and Perceptions of Distributive Justice*, 51 AM. SOC. REV. 30, 30 (1986).

104 Jason A. Colquitt et al., *What Is Organizational Justice? A Historical Overview*, *in* HANDBOOK OF ORGANIZATIONAL JUSTICE 3, 4 (Jerald Greenberg & Jason A. Colquitt eds., 2005).

105 *Id.* at 5.

106 *See, e.g.*, Gerold Mikula et al., *Arrangements and Rules of Distribution of Burdens and Duties: The Case of Household Chores*, 27 EUR. J. SOC. PSYCHOL. 189 (1997).

the meaning of distributive justice in relation to the distribution of profits between authors and commercial entities. [107]

According to social psychology, individuals use a range of criteria to assess fairness. [108] This section will examine how individuals view the distribution of profits between authors and commercial entities by applying three different aspects of fairness judgments which emerge from empirical studies in the field of social psychology. These were selected because of their relevance to the manner in which resources are distributed by the mandatory rules in copyright law.

One aspect of how individuals judge fairness is a general cognitive aspect. It is sometimes difficult to assess whether a particular distribution is fair and, therefore, individuals use heuristics or cognitive "shortcuts" to resolve these dilemmas;[109] this makes decision-making easier and directs individuals' cognitive resources to other needs. The study of behavioral aspects of fairness judgments raises the question of whether such judgments truly result from a deliberate cognitive process.[110] As in other cases wherein cognitive bias affects the decision-making process, the resulting decision may be erroneous.[111] A decision reached under the influence of cognitive bias may differ from one arrived at following more deliberated thought and the processing of all relevant information.

A second aspect is social utility:[112] the benefit resulting from any outcome depends not only on the absolute value of the outcome, but also on its comparative value. In social psychology, social comparisons are of great importance.[113] When individuals assess outcomes in interpersonal relationships, they attribute significance to a comparison with the outcomes of others. Social psychology demonstrates that the comparative element of rewards affects individuals' welfare and behavior.[114] One behavioral pattern resulting from this tendency is the attempt to avoid unfavorable comparisons

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107 *Cf.* Molm et al., *supra* note 51, at 2332 ("Distributive justice refers to how people evaluate the fairness of the reward distributions that result from exchange or allocations.").

108 Shepelak & Alwin, *supra* note 103, at 30-31.

109 Russell Cropanzano et al., *Moral Virtues, Fairness Heuristics, Social Entities, and Other Denizens of Organizational Justice*, 58 J. VOCATIONAL BEHAV. 164, 170 (2001).

110 *Id*. at 198.

111 *Id*. at 170.

112 *See* Michel J. J. Handgraaf et al., *Social Utility in Ultimatum Bargaining*, 16 SOC. JUST. RES. 263, 266-67 (2003) (An overview of the social utility model).

113 George Loewenstein et al., *Social Utility and Decision Making in Interpersonal Contexts*, 57 J. PERSONALITY & SOC. PSYCHOL. 426, 426 (1989); Ernst Fehr & Klaus Schmidt, *A Theory of Fairness, Competition, And Cooperation*, 114 Q.J. ECON. 817, 821 (1999) ("In social psychology ... the relevance of social comparison processes has been emphasized for a long time."); *See generally* Leon Festinger, *A Theory of Social Comparison Processes*, 40 HUM. REL. 117 (1954).

114 Fehr & Schmidt, *supra* note 113, at 821 ("One key insight of this literature is that *relative* material payoffs affect people's well-being and behavior.").

because they evoke negative emotions.[115] This behavioral pattern can be explained by loss aversion, meaning that individuals attribute greater weight to negative comparisons than they do to positive comparisons.[116]

A third aspect is how individuals perceive inequality. A number of social psychology studies reveal that individuals often prefer to distribute resources equally.[117] This tendency is known as inequality aversion, according to which individuals prefer to avoid unequal allocations, regardless of whether they are in their favor or to their disadvantage. However, this tendency is especially evident in individuals when the inequality is to their disadvantage.[118] In such a situation, many are even willing to bear costs to reduce the benefits the other side receives in order to facilitate equal distribution.[119]

1. Social Psychology and the Distribution of Profits in Creative Markets

An examination of what constitutes a fair outcome in the type of transaction under discussion here leads to a novel explanation for the intervention in interactions between authors and commercial entities. This novel explanation differs from the accepted distributional explanation, which is based on differences in bargaining power between the parties. Individuals' fairness judgments regarding the allocation of resources, as they emerge from social psychology research, can explain why so many mandatory rules in copyright law impose participation in profits.

According to this explanation, transactions with a distributional outcome, wherein one party obtains most of the profits, contradict individuals' fairness judgements. What bothers us in the distributive outcome of typical transactions between authors and commercial entities is the very disparity between the parties' shares of the profit. According to individuals' fairness perceptions, how much authors will gain in absolute terms is not that important; rather, the more significant factor is how much they will gain in comparison to commercial entities. This perception of fairness will compare

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115 *See* Shoham Choshen-Hillel & Ilan Yaniv, *Agency and the Construction of Social Preference: Between Inequality Aversion and Prosocial Behavior*, 101 J. PERS. & SOC. PSYCHOL. 1253, 1253 (2011) ("(i)ndividuals tend to react negatively when confronted with unfavorable comparisons, because such comparisons invite negative inferences about the self and lead to devaluation of one's own outcomes.").

116 Fehr & Schmidt, *supra* note 113, at 824; *Cf.* Loewenstein et al., *supra* note 113, at 427 (While discussing prospect theory, stating: "(i)n interpersonal context the outcomes of another person may emerge as an alternative (or additional), potentially reference point.").

117 van Dijk & Vermunt, *supra* note 87, at 4 (stating that: "In general, research on distributive justice indicates that people often prefer to distribute outcomes equally" and then referring to several sources as examples for this proposition).

118 Choshen-Hillel & Yaniv, *supra* note 115, at 1253; Fehr & Schmidt, *supra* note 101, at 821.

119 Loewenstein et al., *supra* note 113, at 439.

the authors' part in the distribution of profits to that of the commercial entities' when determining whether the outcome is fair. If one party earns more than a certain portion of the profits, it may be perceived as unfair.[120]

Fairness is judged by formal elements, without examining what stands behind them. Such fairness judgments will examine the outcome of a transaction without considering additional data, such as the inputs which the parties invested in relation to the transaction. Certain ways of dividing a particular pie are not perceived as fair, without needing any external measure for the sake of comparison.[121] This perception of fairness concludes that what is important to individuals is the superficial outcome of a certain division rather than the reasoning behind it.

We are not interested in seeing such an outcome because the way the outcome itself is perceived, even if it does not stem from differences in bargaining power, contradicts how individuals judge fairness. This leads to legislation which is intended to display a more balanced outcome, one more acceptable according to individuals' perceptions of fairness.

Individuals' fairness judgments regarding the one-sided distribution of profits between authors and commercial entities stems from the tendency to compare rewards and to prefer equal distribution of resources. Due to the desire to avoid negative comparisons, authors tend to favor profit sharing so that the commercial entities' share will not be much greater than their own, should the work be commercially successful. When a work is successful and only the commercial entity benefits from the profits, the author finds herself in a state of negative comparison, left with only the lump-sum payment. Empirical research has revealed that interpersonal comparisons can be more important than the payment itself.[122] Likewise, inequality aversion leads to the desire for similarity between the portions received by both sides; therefore the participation component is common in all of these rules.

A well-known empirical experiment supporting this thesis is known as the ultimatum game,[123] originally developed by Güth, Schmittberger and Schwarze.[124] In the field of social psychology, this experiment is used to

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120 This perception is also manifested in contract law scholarship. *See* Kennedy, *supra* note 79, at 571 ("One might think it immoral for a person to reap more than a particular relative share of the benefits of a transaction…").

121 See Eyal Zamir & Ilana Ritov, *Notions of Fairness and Contingent Fees*, 74 L. & CONTEMP. PROBS. 1, 11 (2011) ("Division fairness, in contrast, does not rest on such external yardsticks. It may be assessed by comparing the shares each person gets of the entire pie, without resorting to any external reference.").

122 Loewenstein et al., *supra* note 113, at 438.

123 *See generally* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1489-97 (1998).

124 Werner Güth et al., *An Experimental Analysis of Ultimatum Games*, 3 J. ECON. BEHAV. & ORG. 367 (1982).

examine fairness judgments in negotiation and bargaining situations.[125] A typical ultimatum game involves two players: one (the proposer) must decide how to divide a pot of money between the two, while the other player (the responder) must either accept or reject this division. If the responder agrees to the offered division, the pot of money is divided as proposed. However, if the responder rejects the proposer's proposal, no one receives anything.

If individuals benefit from the absolute value of a reward, we expect the proposer to offer the lowest amount and the responder to accept it. However, in practice we see that this is not the case; indeed, the results of the experiment contradict this expectation. The average share offered by proposers in an ultimatum game experiments is 30%–40%, while 50% is also common, and divisions of 10%–20% are usually rejected by responders.[126] The ultimatum game reveals that individuals prefer to receive nothing over something, or in other words they ascribe importance to the comparative value of a reward.[127] It indicates that individuals are even willing to bear costs when the division of the pie is perceived as unfair.

In an ultimatum game, the proposer knows that social comparisons and inequality aversion affect how the responder will judge the fairness of the allocation. Therefore, due to social norms of distributive justice, the proposer offers less than what is rationally expected.[128] This experiment reveals that the percentage of division itself is a significant factor in evaluating fairness. In the case of the ultimatum game there is a paucity of background data that can affect the fairness of the division, yet a certain division is perceived as unfair. Fairness in the ultimatum game is judged without reference to external measures, comparing only the parts received by the parties.

Beyond social comparisons and inequality aversion, other more general cognitive aspects also influence how individuals judge the fairness of typical transaction outcomes between authors and commercial entities. In particular, cognitive aspects relating to information processing are highly relevant. The question of how individuals judge the fairness of any resource allocation depends on the information they consider.[129] Individuals often form their

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125 van Dijk & Vermunt, *supra* note 87, at 2; *See* Handgraaf et al., *supra* note 112, at 264 ("(t)he ultimatum game is an attractive tool to assess the relative importance of … fairness considerations in social decision making.").

126 Colin Camerer & Richard H Thaler, *Anomalies: Ultimatums, Dictators and Manners*, 9 J. ECON. PERSP. 209, 210 (1995); Handgraaf et al., *supra* note 112, at 265.

127 Ana M. Franco-Watkins et al., *Effort and Fairness in Bargaining Games*, 26 J. BEHAV. DECISION MAKING 79, 79 (2011).

128 *See* Elizabeth Hoffman et al., *Preferences, Property Rights, and Anonymity in Bargaining Games*, 7 GAMES & ECON. BEHAV. 346, 348 (1994) ("This tendency toward an equal split is described as being due to 'fairness' considerations or to 'social norms' of distributive justice.")

129 Kees van den Bos, *Fairness Heuristic Theory: Assessing the Information to Which People are Reacting has a Pivotal Role in Understanding Organizational Justice*, *in* THEORETICAL AND CULTURAL PERSPECTIVES ON ORGANIZATIONAL JUSTICE 63, 64 (S. W. Gilliland et al. eds., 2001).

opinions about fairness frivolously while relying on the information most accessible to them.[130] Moreover, studies indicate that individuals replace available information with unavailable information in order to establish fairness judgments.[131]

The distribution of profits in a typical transaction is an instance of available and accessible information from which one can draw conclusions concerning the fairness of the entire transaction. Yet the business model that serves as the basis for the typical transaction between authors and commercial entities can be complex; non-expert individuals will be unaware of its use. Moreover, even if they are aware that this is the common model for operating in creative markets, they may not fully understand its mechanism. Therefore, concepts such as risk diversification, risk versus reward and the value of the resources invested in commercialization may not be taken into account when assessing the fairness of the transaction. Thus, the distribution of profits itself constitutes a much more significant element than any other data when judging the fairness of a transaction's outcome.

Moreover, in light of individuals' cognitive limitations regarding information processing, the gap between the portions received by the parties can also be used as a proxy for the existence of power variances between them. The information most readily available, visible and comprehendible concerns the distribution of profits between the parties, thus influencing individuals' judgements and possibly leading to the conclusion that any disparity in distribution results from differences in bargaining power. However, in the case of the typical transaction between authors and commercial entities, the disparity in the distribution of profits is not a sufficient proxy for the existence of differences in bargaining power. This disparity is not a result of power inequality, since a disparity in the distribution of profits is an integral part of the business model. Rather it arises because the business model necessarily employed in creative markets is based on 90% losses, with exceptional profit in a minority of cases. Accordingly, the distribution must favor one side to compensate for the risk. The business model itself is the source of the controversy, because it contradicts individuals' judgments of fairness.

V. CONCLUSION

In recent years, mandatory rules have become increasingly common in copyright legislation around the world. Despite the differences between these rules, most preclude authors from accepting lump-sum payments in exchange

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130 Cropanzano et al., *supra* note 109, at 170.

131 van den Bos, *supra* note 129, at 64 (S. W. Gilliland et al. eds., 2001).

for a full transfer of rights. Rather, they compel authors to retain a right to participate in the profits generated by the commercial exploitation of the work, regardless of any other agreement between them and other contracting parties.

The article began by critically reviewing the various policy objectives that can be attributed to these rules, in an attempt to discover possible explanations for their existence. First, it examined how these rules seek to intervene in the typical transaction between authors and commercial entities through the prism of efficiency. This examination concluded that it is difficult to explain the attempt to change the default resource allocation created by this transaction on the basis efficiency considerations, because it is already efficient. The normative difficulty in the typical transaction between authors and commercial entities seems to concern how the profits are divided between the parties, even if this division has no implications for total welfare. This suggests that the desire to change the allocation by means of mandatory rules is motivated by other kinds of considerations.

Distributive considerations may offer a better explanation for the implementation of mandatory rules. According to the conventional distributive argument used to justify mandatory rules, the bargaining power of authors is inferior to that of commercial entities: therefore, it is appropriate to grant authors a greater share of the profits. This emphasizes the desire to create an outcome wherein distribution of profits between the parties is fair. Yet, this kind of outcome can be desirable for another reason. Whereas some argue that the conventional distributive justification motivates these rules, this article claims otherwise.

This article offers a novel critical explanation for the existence of mandatory rules in copyright law, elucidating why so many of them require profit sharing. Using empirical findings from the field of social psychology concerning how individuals judge fairness in the allocation of resources, it demonstrates that the problem these rules attempt to solve lies in the distribution of profits. Social comparisons of wages, inequality aversion and other general cognitive aspects lead individuals to perceive a situation wherein one side gains all the profits as unfair, even if this division does not result from differences of power. Consequently, rich, successful and famous authors, who do not suffer from low bargaining power — as the typical author does — also argue that the distribution of profits between them and commercial entities is unfair.

This explanation clarifies why there are so many profit sharing schemes in the field of copyright. The economic value of the work is not known ex ante, thus often making commercial exploitation a gamble. Under such conditions, it is necessary to employ a business model within which the party that assumes the risk is also entitled to appropriate reward. Thus, the distribution of profits tends to favor one side. In retrospect, this distribution

seems unfair according to human psychological tendencies, even though the nature of the business model demands it. Focusing on the division of profits precludes the possibility of using business models which are intended to deal with risk, even if both sides are perfectly equal. Sometimes we want to see a display of superficial fairness and do not really care about the considerations behind it.

This explanation likewise casts doubt on the justifications for mandatory rules in copyright law. It undermines the validity of the conventional argument which emphasizes disparities in bargaining power between the parties. In view of this alternative explanation for mandatory rules, it is possible that there may be no differences in bargaining power between the parties, or that these differences only affect the total value of the transaction and not the form of payment. Yet, moreover, while the justification of differences in bargaining power between the parties is normative, the explanation deriving from social psychology is descriptive. It is not a persuasive philosophical argument regarding how a particular interaction in society should appear, but rather a psychological tendency, a part of human nature. If this indeed explains the existence of mandatory rules in the world of copyright, then this arbitrary legislation should not enjoy the normative importance attributed to caring for the weak.