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## **Who's Afraid of an Evidence-Based Copyright Law?**

By Bill Patry\*

The title of Edward Albee's play, *Who's Afraid of Virginia Woolf?*,<sup>1</sup> is a pun on the song "Who's Afraid of the Big Bad Wolf" from Walt Disney's 1933 cartoon *Three Little Pigs*.<sup>2</sup> At the end of the play, the lead female character, Martha, says to her husband George, "I . . . am . . . George. . . . I . . . am. . . ."<sup>3</sup> She is not saying she is afraid of wolves, pigs, Walt Disney, or the famous English novelist, but rather that she is afraid of living life honestly, without illusion.

We all have illusions; the longer we live, the greater the illusions as we simultaneously forget and recreate our past. We then use our new, illusory past to chart a different—and we hope, better—future. Is this realistic, though? Psychologist and Nobel Prize winner in economics Daniel Kahneman thinks not. To Dr. Kahneman, it is a pernicious illusion that we can accurately recall our own past, much less use that past as a guide for future action. For Kahneman:

A general limitation of the human mind is its imperfect ability to reconstruct past states of knowledge, or beliefs that have changed. Once you adopt a new view of the world (or of any part of it), you immediately lose much of your ability to recall what you used to believe before your mind changed.

. . . . . The tendency to revise the history of one's beliefs in light of what actually happened produces a robust cognitive illusion.<sup>4</sup>

There is a neurological basis for this simultaneous recreation of a false past as an unreliable aid to an unknowable future: "Brain-imaging studies show that the same brain structures that are engaged when we recollect our past are called upon when we think of the future."<sup>5</sup> From an evolutionary standpoint, the obvious question is: *Why this double duty for the brain?* A more painful question is: *Why would the human species evolve in a way that leads us to live*

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1. EDWARD ALBEE, WHO'S AFRAID OF VIRGINIA WOOLF? (Scribner ed. 2003) (1962).

2. THREE LITTLE PIGS (Walt Disney Productions 1933).

3. See ALBEE, *supra* note 1, at 243.

4. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 202-03 (2011).

5. TALI SHAROT, THE OPTIMISM BIAS: A TOUR OF THE IRRATIONALLY POSITIVE BRAIN, at x (2011).

*a lie?*

Last year, Tali Sharot published a book called *The Optimism Bias: A Tour of the Irrationally Positive Brain*, which attempts to answer these questions.<sup>6</sup> Her book, like many recent studies in a wide range of fields, makes use of advances in neurological imaging of the brain to study how the brain responds to various cognitive stimuli. Dr. Sharot sought to understand two phenomena. She calls the first the optimism bias, which consists of our tendency to overestimate the likelihood of positive things happening and to underestimate the likelihood of experiencing negative events. Voltaire made fun of this bias in his satire *Candide, or Optimism*, when he had Candide's mentor, Dr. Pangloss, constantly repeat Leibniz's statement that "in this best of all possible worlds . . . all is for the best."<sup>7</sup> Unlike Leibniz, Voltaire took an evidence-based approach, using the 1755 All Saints Day earthquake and the resultant tsunami and fires that all but leveled Lisbon, to question Leibniz's optimism.<sup>8</sup>

Dr. Sharot calls the second phenomenon the superiority bias: our tendency to believe we are better than others, seen in a study in which 93% of those answering said they were in the top fiftieth percentile for driving ability.<sup>9</sup> This is different from Garrison Keillor's Lake Wobegon, a place where "all the women are strong, all the men are good looking, and all the children are above average."<sup>10</sup> Unlike the Lake Wobegon effect, where everyone is exceptional, usually we see ourselves as better than others. We tend to think others have illusions, but that we do not.

There are obvious dangers in both the optimism and superiority biases: we misjudge our own abilities and others' abilities too; bad things can happen that might have been prevented if only we had been clear-eyed about what we faced and if we had been clear-eyed about others. Dr. Sharot's thesis is that both biases are adaptive and functional: they reduce the stress and anxiety that can prevent us from being able to improve ourselves, permitting us to overcome difficult obstacles or setbacks; and, they allow us to take entrepreneurial risks that we otherwise would not.<sup>11</sup> President Obama referred to this in his victory speech when, although encouraging his audience to keep their hope in our country's future, he added that "I'm not talking about blind optimism—the kind of hope that just ignores the enormity of the tasks ahead or the roadblocks that stand in our path."<sup>12</sup>

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6. See generally *id.*

7. See VOLTAIRE, *CANDIDE, OR OPTIMISM* 20 (John Butt trans., Penguin Books 1947) (1759).

8. John Butt, *Introduction* to VOLTAIRE, *supra* note 7, at 10.

9. See SHAROT, *supra* note 5, at 15.

10. See *A Prairie Home Companion with Garrison Keillor*, <http://prairiehome.publicradio.org/about/podcast/> (last visited Aug. 28, 2013).

11. See generally KAHNEMAN, *supra* note 4, at ch. 24 (aptly titled "The Engine of Capitalism").

12. See President Barack Obama, Remarks by the President on Election Night (Nov. 6, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/11/07/remarks-president-election-night>.

Dr. Kahneman has described the optimism bias as likely “the most significant of the cognitive biases.”<sup>13</sup> And it may be significant that it is a characteristic that distinguishes humans from other animals. Outside of short-term, seasonally occurring triggers such as squirrels saving for the winter,<sup>14</sup> Dr. Sharot argues that humans, unlike other animals, engage in mental projection into the future,<sup>15</sup> whether in the form of abstract strategic planning as when we play a game of chess, or out of the self-awareness that certain physical steps have to be taken now for the future, such as preparing for a hurricane. Dr. Sharot believes this ability is evolutionary, writing:

While the capacity for both awareness and prospection has clear survival advantages, conscious foresight also came at an enormous price—an understanding that somewhere in the future, death awaits us. This knowledge—that old age, sickness, decline of mental power, and oblivion are around the corner—is less than optimistic. It causes a great deal of anguish and fear. . . . [T]he awareness of mortality on its own would have led evolution to a dead end. The despair would have interfered with daily function, bringing the activities and cognitive functions needed for survival to a stop. Humans possess this awareness, and yet we survive. How?

The only way conscious mental time travel could have been selected for over the course of evolution is if it had emerged at the same time as false beliefs. In other words, an ability to imagine a future had to develop side by side with positive biases. The knowledge of death had to emerge at the same time as its irrational denial.<sup>16</sup>

Those of you still in law school may doubt this. Those of us nearer our end, do not. Regardless of where you fall on life’s spectrum, Dr. Sharot and others’ research points toward possible biological reasons for our tenuous relationship with reality, biological reasons that explain why the human species has evolved in a way that leads us to live a lie. If Dr. Sharot’s thesis is true,<sup>17</sup> those of us who advocate an objective, evidence-based approach to decision-making face an uphill battle. This is not news, of course, fancy neurological theories aside. Public choice theorists have long argued that special, monied interests exercise disproportionate influence over the political process, including the making of copyright laws.<sup>18</sup> Somewhat less cynical political theorists, like Mancur Olson,

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13. KAHNEMAN, *supra* note 4, at 255.

14. See SHAROT, *supra* note 5, at ch. 2 (titled “Are Animals Stuck in Time? The Evolution of Prospection”). I thank my colleague Oliver Metzger for the squirrel example. We both agree that squirrels are vexing animals with amazing adaptive skills, who can thwart even the best-designed bird feeder.

15. As contrasted with the instinctual projection found in animals.

16. SHAROT, *supra* note 5, at 38-39.

17. Importantly, there is no way to ever know if it is true.

18. See Jessica Litman, *The Politics of Intellectual Property*, 27 CARDozo ARTS & ENT. L.J. 313, 314 (2009). Larry Lessig, who dabbled in copyright for a while, has now turned his interest to this issue. See generally LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2011).

have explained the asymmetrical nature of such influence by reference to the nature of collective action, whereby a minority of concentrated interests can repeatedly triumph over a larger, but diffuse majority.<sup>19</sup> The defeat this year in the United States of the Stop Online Piracy Act (SOPA)<sup>20</sup> by a grassroots effort, and the rejection of the Anti-Counterfeiting Trade Agreement (ACTA)<sup>21</sup> by the European Parliament after a similar effort, are evidence that an organized majority *can* defeat a minority group consisting of concentrated and wealthy industry groups. Whether we should be optimistic about the future based on these successes is unknown, and likely of course to be biased.

Behavioral economists and psychologists have argued that our judgment and decision-making are a complex mix of rational and irrational factors, with irrational or at least subconscious factors often predominating, even among those who pride themselves on their rationality.<sup>22</sup> Here, for example, is a sentence from *The Economic Structure of Intellectual Property Law*, a book by University of Chicago economist William Landes and Seventh Circuit Judge Richard Posner: “Today it is acknowledged that analysis and evaluation of intellectual property law are appropriately conducted within an economic framework that seeks to align that law with the dictates of economic efficiency.”<sup>23</sup> Efficiency, for our purposes, is a rational wealth-maximizing copyright owner, acting in response to rational, incentive-based, but-for copyright laws. Indeed, Landes and Posner added that they are “skeptical that the *noneconomic* theories of intellectual property have much explanatory power or normative significance . . .”<sup>24</sup> Yet, only four pages later, they concede “neither economic theory nor empirical evidence enables a ringing endorsement of any complete body of intellectual property law . . .”<sup>25</sup>

If we cannot find support for all of the parts, can we find support for some of them? In deciding the economically efficient level for protection for the parts, Professor Landes and Judge Posner believe “one would want to classify different forms of intellectual property according to the output likely to be produced with and without the recognition of such a right and grant such recognition only to those forms in which output would be seriously suboptimal

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19. See generally MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (Schocken Books, 2d prtg. 1969) (1965).

20. H.R. 3261, 112th Cong. (1st Sess. 2011).

21. Oct. 1, 2011, 50 I.L.M. 2.

22. See generally KAHNEMAN, *supra* note 4.

23. WILLIAM M. LANDES AND RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 4 (2003).

24. See *id.* at 5 (emphasis added). Compare *id.*, with Pamela Samuelson, *Should Economics Play a Role in Copyright Law and Policy?*, 1 U. OTTAWA L. & TECH. J. 1, 3 (2004) (noting little influence of economic analysis upon intellectual property law).

25. See LANDES & POSNER, *supra* note 23, at 9. They note trademark law as a possible exception, but caution that trademarks are a form of property “in only an attenuated sense.” *See id.*

without it.”<sup>26</sup> In other words, we would have an evidence-based approach, by which we would tailor the amount of particular rights to the need for those rights. I agree completely. Professor Landes and Judge Posner acknowledge, though, that “the empirical studies required to make such a classification have never been undertaken . . .”<sup>27</sup> As I discuss below, since the time this was written, a number of such studies have been undertaken, including one by Professor Silbey.

But even if we had such studies, there is reason to believe they would be ignored in favor of theory. Here is what Professor Landes and Judge Posner say about derivative rights: “The case for giving the owner of a copyrighted work control over derivative works is a subtle one. It is not, as one might think, to enable the creator of the original to recoup his cost of expression.”<sup>28</sup> They offer a number of alternative reasons for supporting the grant of derivative rights, none compelling, some noneconomic in nature, until they finally settle on minimizing transaction costs.<sup>29</sup> This argument, though, commits the logical fallacy of assuming the answer, because it assumes that the copyright owner *should* have control in the first place. If the copyright owner did *not* have the right to prevent the creation of unauthorized derivative works, there would be no transaction costs, and thus no costs to minimize. I do not mean to suggest copyright owners should not have control over derivative uses, or at least some of them. I am only pointing out that Professor Landes and Judge Posner are unable to apply their neoclassical rational choice theories to the real world.<sup>30</sup> We are left with theories offered without the backing of any empirical evidence.

Professor Landes and Judge Posner’s shortcomings are not as uncommon as we would think, even for such brilliant thinkers. Their mistakes are “predictably irrational.”<sup>31</sup> They flow naturally from the way we all make sense of the world, which is through stories. “Thought flows in terms of stories . . . We learn in the form of stories . . . We cannot help thinking in terms of stories . . . [Stories are] the *only* way we can make sense of the world.”<sup>32</sup> Data are fit into preexisting stories we already believe. The data do not make up the stories, but rather are made to fit those stories. As the twentieth-century American Quaker Jessamyn West wrote: “We want the facts to fit the preconceptions. When they don’t, it is easier to ignore the facts than to change

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26. *See id.* at 24.

27. *See id.*

28. *Id.* at 109.

29. *See* LANDES & POSNER, *supra* note 23, at 110.

30. Cf. PIERRE BOUDIEU, THE SOCIAL STRUCTURES OF THE ECONOMY (Chris Turner trans., Polity Press 2005); Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. Bus. S251 (1986).

31. *See generally* DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (rev. & expanded ed. 2010).

32. FRANK SMITH, TO THINK 62, 64 (1990).

the preconceptions.”<sup>33</sup> This is not to argue for an absence of beliefs: beliefs, passionately held, are common; the danger comes when the facts belie our beliefs. At that point, we need to follow historian A.J.P. Taylor’s admonition to have “strong views, weakly held.”<sup>34</sup> In the debates about the proper level of copyright, beliefs are trumpeted as facts; they are not. And they are very strongly held, crowding out everything which conflicts with those beliefs.

Professor Landes and Judge Posner offer a story, and not a factual description of how either creators or the copyright laws actually function. Their story has two parts: first, that neoclassical economics by itself can explain marketplace behavior, and second, that such behavior is causally related to rational laws. They assert that our laws are a directly causal reason why copyrighted works are created, and why copyright owners and those who use copyrighted works act the way they do. According to this view, incentives in the form of exclusive rights are believed to be but-for reasons behind the creation of new works.<sup>35</sup> That Professor Landes and Judge Posner admitted they had no evidence to support their story was not apparently an impediment to them in explaining how, allegedly, copyright laws actually function in practice.

There is evidence to suggest that many works are created without the need for the super-sized incentives that our copyright laws currently provide. The scope of copyright today is vast; in addition to traditional forms of creativity, such as books, music, and motion pictures, our laws protect personal letters, diaries, emails, business works, and advertising, none of which have any need for the incentive of copyright. The explosion in video creativity, seen on YouTube, and in written creativity, seen in web writing, including blogs, has not been driven by the dramatic expansion of exclusive rights; quite the contrary. What was the cause of this new creativity, and what can policymakers do to further encourage and support it? These examples suggest that limitations and exceptions, such as fair use and the safe harbors in the Digital Millennium Copyright Act (DMCA)<sup>36</sup> can sometimes be at least as powerful an incentive as rights. New platforms for low-cost distribution are unlocking previously untapped creators. The DMCA safe harbors may turn out to be the most important thing we have done in the last fifteen years to encourage creativity. In any event, the alleged causal, *a priori* link between strong copyright laws and the creation of creative works is not close to being established, despite the religious fervor with which it is espoused.

In 1945, Belgian experimental psychologist Albert Michotte published his

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33. See Jessamyn West, *Introduction to THE QUAKER READER* 1, 2 (Jessamyn West ed., 1962).

34. See William Outhwaite, *From Switzerland to Sussex, in THE DISOBEDIENT GENERATION: SOCIAL THEORISTS IN THE SIXTIES* 205, 207 (Alan Sica & Stephen Turner eds., 2005) (quoting A.J.P. Taylor).

35. See WILLIAM PATRY, *HOW TO FIX COPYRIGHT* 164 (2011).

36. Pub. L. No. 105-304, 112 Stat. 2860, 2863-64 (1998) (codified as amended at 17 U.S.C. § 1201 (2006)).

classic book, *The Perception of Causality*,<sup>37</sup> which Amos Tversky and Daniel Kahneman have described as “a compelling demonstration of the irresistible tendency to perceive sequences of events in terms of causal relations, even when the perceiver is fully aware that the relation between the events is incidental and that the imputed causality is illusory.”<sup>38</sup>

[C]auses are a strange kind of knowledge. This was first pointed out by David Hume, the 18th-century Scottish philosopher. Hume realized that, although people talk about causes as if they are real facts—tangible things that can be discovered—they’re actually not at all factual. Instead, Hume said, every cause is just a slippery story, a catchy conjecture, a “lively conception produced by habit.” When an apple falls from a tree, the cause is obvious: gravity. Hume’s skeptical insight was that we don’t see gravity—we see only an object tugged toward the earth. We look at X and then at Y, and invent a story about what happened in between. We can measure facts, but a cause is not a fact—it’s a fiction that helps us make sense of facts.<sup>39</sup>

In the field of copyright, there are a number of stories, besides Professor Landes and Judge Posner’s. Here is one, expressed as a syllogism:

Copyright is the basis for creativity[.]  
Creativity is the basis for culture[.]  
Therefore, copyright is the basis for culture.<sup>40</sup>

Here is another, again expressed as a syllogism:

Copyright is the basis of a knowledge-based economy.  
The knowledge-based economy is the basis for competitiveness.  
Therefore copyright is the basis for competitiveness.<sup>41</sup>

Here is a third, and final story, expressed as a tautology: “[T]he creative industries are those industries dependent on copyright laws and therefore copyright laws are essential to their growth.”<sup>42</sup> These three stories set out a causal connection between law and positive consequences. Who would not want such wonderful things to come to pass? But believing in wonderful things is not the same as those wonderful things actually coming to pass, just as believing someone is your true love does not mean that she really is your one-and-only soulmate. Believing that copyright is the basis for culture and for

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37. A. MICHOTTE, THE PERCEPTION OF CAUSALITY (T.R. Miles & Elaine Miles trans., Basic Books 1963) (1946).

38. See Amos Tversky & Daniel Kahneman, *Causal Schemas in Judgments Under Uncertainty*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 117, 117 (Daniel Kahneman et al. eds., 1982) (discussing Michotte’s work).

39. Jonah Lehrer, *Trials and Errors: Why Science Is Failing Us*, WIRED (Dec. 16, 2011), [http://www.wired.com/magazine/2011/12/ff\\_causation/all/1](http://www.wired.com/magazine/2011/12/ff_causation/all/1) (explaining context of “classic experiments” designed by Michotte).

40. See PATRY, *supra* note 35, at 14.

41. See *id.* at 32.

42. See *id.* at 35.

competitiveness does not mean it is. Yet, copyright laws are constantly being passed on the basis that there is a direct, immediate causal relationship in the stories lobbyists and politicians tell, shown by the two syllogisms and the one tautology I just discussed.

How should we approach matters? How should we ensure that the noble goals of copyright laws can be fulfilled? One might use a bottoms-up approach, an approach that creates an empirical record through interviewing actual creators about why they create and how the existence of copyright fits into their creative actions, and centers on examining data about past changes in the law and how those changes correlate to actually achieving the goals of the legislation.

Professor Silbey has done excellent bottoms-up research. Her forthcoming book, *Harvesting Intellectual Property: IP Interventions and the Roles of Intellectual Property in Creative and Innovative Work*, will provide an extremely useful basis for evidence-based policymaking.<sup>43</sup> Lord knows it is long overdue.

In addition to lacking the type of research provided by Professor Silbey, the problems of evidence-based decision-making in drafting our copyright laws are twofold. First, does the decision-maker have the intelligence or expertise to evaluate whatever evidence there is? I am going to avoid landmines here by assuming the answer is yes, those members of Congress who make copyright policy have the necessary intelligence, but it is unlikely that they have the necessary expertise. This is not a criticism. Our legislators are, by design, generalists. They must vote on a vast array of issues, many of which are both politically charged and complex. In the greater scheme of Congress's work, copyright issues are small potatoes indeed, compared to the fiscal cliff and the war in Afghanistan, for example. Over time, through committee work, some members of Congress may develop a form of expertise, but in a fast-paced private sector, driven by rapid technological and market changes, past expertise can become quickly outdated. As a result, legislators and their staff must rely on lobbyists. This, of course, comes at considerable peril.

Whether as a result of lobbyists' partisan slanting or withholding of information, or because the future is always uncertain, legislators must act on incomplete information, under uncertainty. The second problem in evidence-based decision-making, is decision-makers' possession of limited data of limited validity. These real-world problems should be cause for concern.

There is a great deal of academic literature on decision-making in uncertain circumstances, and how those uncertain circumstances lead to the use of short-hand, intuitive judgments, or less charitably, guesses.<sup>44</sup> Reliance on intuition is

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43. See generally JESSICA SILBEY, HARVESTING INTELLECTUAL PROPERTY: IP CONVENTIONS AND THE ROLES OF INTELLECTUAL PROPERTIES IN CREATIVE AND INNOVATIVE WORK (forthcoming 2013).

44. See generally, e.g., CHOICES, VALUES, AND FRAMES (Daniel Kahneman & Amos Tversky eds.,

not, of course, inherently wrong. Where our intuitive judgments are based on a wealth of past experience and expertise, those judgments may be invaluable. But intuitive judgments can also lead to serious errors, especially where they are utilized to the exclusion of other facts, even objective ones. Moreover, where those judgments are not based on a wealth of past experience and expertise, we should not grace the decision made with the word *judgment*. *Guess* is more appropriate.

Daniel Kahneman and Gary Klein wrote a paper together about the different types of judgments, called *Conditions for Intuitive Expertise: A Failure to Disagree*.<sup>45</sup> Klein has written extensively and positively about the use of intuition in decision-making; Kahneman has written negatively about it. They collaborated on a joint study and found out they agreed more than they disagreed. They particularly agreed with the late polymath Herman Simon, who described intuition as bringing up memories of previously stored information or experience.<sup>46</sup> They rejected a conception of intuition as knowing without knowing. In short, they concluded, as should we, that intuition can form the basis for meaningful judgment only when it is based on solid expertise and solid information.

Now, to finally answer the question posed by the title of this talk: Why are we afraid of evidence-based copyright laws? In addition to the asymmetrical lobbying power of the copyright industries, a fact of political life in the United States for more than 100 years, I think the answer is that evidence is supplanted by stories. Supplanted may be too weak a word; rejected may be more accurate. We reject evidence that does not comport with our story, or as we saw with Professor Landes and Judge Posner, we proceed ahead full steam as if it the evidence were not there, or did not matter.

We cannot have evidence-based policymaking if policymakers refuse to change their minds when confronted with the actual facts, and instead cling to false stories. John Kenneth Galbraith observed that “[f]aced with the choice between changing one’s mind and proving that there is no need to do so, almost everyone gets busy” proving that there is no need to change.<sup>47</sup> Yet, as my friend, Second Circuit Judge Pierre Leval pointed out to me, “the best way to know you have a mind is to change it.” We *can* change our minds; we *can* work around our biases *if* we are aware of them and *if* we compensate for their influences on us.<sup>48</sup>

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2000); HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al. eds., 2002); JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982).

45. See generally Daniel Kahneman & Gary Klein, *Conditions for Intuitive Expertise: A Failure to Disagree*, 64 AM. PSYCHOLOGIST 515 (2009).

46. See KAHNEMAN, *supra* note 4, at 237.

47. See JOHN KENNETH GALBRAITH, ECONOMICS, PEACE AND LAUGHTER 50 (1971).

48. See generally DAN ARIELY, THE UPSIDE OF IRRATIONALITY: THE UNEXPECTED BENEFITS OF DEFYING LOGIC AT WORK AND AT HOME (2010).

Hopefully, our copyright laws will change too; not to become weaker or stronger, but rather to become effective, become evidence-based, become less an ideological or quasi-religious cause,<sup>49</sup> and become more of a tool for doing good and avoiding harm.

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49. See Ariel Katz, *The Orphans, the Market, and the Copyright Dogma: A Modest Solution for a Grand Problem*, 27 BERKELEY TECH. L.J. 1285 (2012).