

Winter 2004

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### Recommended Citation

David McGowan, *Copyright Nonconsequentialism*, 69 Mo. L. REV. (2004)

Available at: <https://scholarship.law.missouri.edu/mlr/vol69/iss1/6>

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# MISSOURI LAW REVIEW

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VOLUME 69

WINTER 2004

NUMBER 1

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## Copyright Nonconsequentialism

*David McGowan\**

### I. INTRODUCTION

This Article explores the foundations of copyright law. It tries to explain why those who debate copyright often seem to talk past each other. I contend the problem is that copyright scholars pay too much attention to instrumental arguments, which are often indeterminate, and too little to the first principles that affect how one approaches copyright law.

Most arguments about copyright law use instrumental language to make consequentialist arguments. It is common for scholars to contend one or another rule will advance or impede innovation, the efficient allocation and production of expression, personal autonomy, consumer welfare, the “robustness” of public debate, and so on.<sup>1</sup> Most of these instrumental arguments, though not quite all of them, reduce to propositions that cannot be tested or rejected empirically. Such propositions therefore cannot explain existing doctrine or the positions taken in debate.

These positions vary widely. Consumer advocates favor broad fair use rights and narrow liability standards for contributory infringement; producer advocates favor the reverse.<sup>2</sup> Most of the arguments for both consumers and producers prove too much. It is easy to say that the right to exclude is needed to provide incentives for authors. It is hard to show that any particular rules provide optimal incentives. It is easy to point to deviations from the model of perfect competition. It is hard to show why these deviations imply particular rules.

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\* Associate Professor of Law, University of Minnesota Law School. My thanks to Larry Alexander, Dan Farber, Dan Gifford, Mark Lemley, Ruth Okediji, and Tim Wu for comments and criticisms. Remaining mistakes or omissions are my fault.

1. “Robustness” is an imprecise term I interpret as a proxy for the variance of the distribution of publicly available expression.

2. See *infra* Part III.B.

These examples represent a general truth. It is easy for each side to poke holes in the other side's positions. It is hard for either side to make an affirmative, instrumental case for their views. For this reason, and because scholars favor consequentialist rhetoric, the debate often consists of competing narratives that use hunches and conjectures to link the result an author desires to the policy the author favors. Because the evidence in such arguments is so weak, the legal endgame is to place the burden of proof on the other side. Whoever has to prove the unprovable facts is likely to lose.

All this explains why brilliant individual works can combine to make a dreary debate. It does not explain why the same incomplete data produce widely varying positions on legal issues. Scholars may concede the narratives they advance are hunches, but qualifying the propositions that way does not explain why different persons come up with different hunches, or find different inferences plausible or implausible.

I believe the explanation for these differences lies in different ethical orientations toward property rights, individual freedom, and social welfare. Different ethical orientations represent different starting points for analyzing legal problems. Where one starts analysis determines where one ends when the data run out and instrumental analysis becomes too indeterminate.<sup>3</sup> Doctrinally, different starting points imply different burdens of proof and different presumptions, which tend ultimately to decide actual cases.

For this reason, one cannot justify one or another copyright policy solely with consequentialist arguments. We do not even know such basic facts as how many people use the DeCSS program to make unauthorized copies of movies,<sup>4</sup> or how much people who use file "sharing" software to copy music would pay for that music if they had to. Worse yet, without some consensus on normative principles we could not make sense of the data even if we had them. If people who would not pay the lowest price a record company would accept for music copy the music on their own, is this bad or good? Should policy encourage or discourage it?

Consequentialist rhetoric obscures discussion of the ethical considerations that best explain the positions taken in the face of indeterminate consequentialist

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3. Professor Litman makes a similar point in discussing the degree to which authors should be considered imaginative creators rather than synthesizers of cultural influences. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 997-98 (1990) (noting how different analytical orientations affect acceptance of different economic arguments). For a contrary view, see Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411 (1983) (arguing that first principles are relatively unimportant to copyright because "in practice relatively little turns on the choice of an underlying theory").

4. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 457 (2d Cir. 2001) (affirming finding that Digital Millennium Copyright Act prohibited website's posting of DeCSS program).

analysis. If the debate is going to improve, participants need to spend less time swapping consequentialist narratives and more time exploring the normative premises that explain where those narratives come from. This Article tries to take a step in that direction by making clear what norms are at stake and how they relate to legal doctrine. It describes four normative approaches that explain some of the major positions in current debates.

The first of these theories is a nonconsequentialist position resting on a secularized version of Locke's theory of property. Under that view, persons have property rights in themselves, thus in their labor, and thus in the products of their labor, at least so long as their production does not diminish the quality or quantity of resources available to others.<sup>5</sup> I call this the property libertarian view. It is the starting point I find most persuasive. I do not claim it is the only coherent view, or that it should be adopted as law in its pure form. I claim only that it is coherent, consistent with important aspects of copyright policy and practice, and a legitimate starting point for congressional action.

Unfortunately, the property libertarian view is appealing in large part because it makes no predictions about how adopting it as law would affect the real world. It is therefore relatively immune from the criticism that plagues consequentialist reasoning—that there is no evidence to prove whatever relation between policy and result is asserted, and that the relation itself cannot be established through a priori reasoning. That sort of relative benefit is not much of a recommendation, however. Any realistic legal policy has to take probable consequences into account, and therefore must rest on premises that allow for that kind of analysis.

The second approach emphasizes the importance of free speech, and the right of individuals to express their views and contribute to public debate free from coercion or restraint. I call this the speech libertarian view. It is an interesting blend of the nonconsequentialist view that persons should be free to

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5. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 27, at 287-88 (Peter Laslett ed., 1988). For discussions of this theory in the context of intellectual property, see Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533 (1993), and Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 *CHI.-KENT L. REV.* 841, 849-50 (1993). Secularization represents an important departure from Locke. See Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 139 (Steven R. Munzer ed., 2000). Professor Shiffrin emphasizes the first step in Locke's reasoning, which is that God gave the earth's resources to persons collectively, and that departures from collective entitlements must be justified with adequate reasons. I omit the theological considerations here because I do not see how adding them would improve the debate. As a consequence, this Article does not explore Locke's view as such (a topic I am not qualified to address anyway), but only the variation on Locke's view that seems to me most relevant to current legal debates.

use expression without governmental restraint, including restraint exercised on behalf of private rights-holders, and the consequentialist view that an expansive public domain and broad fair use rights will benefit society by facilitating a more robust public discourse than we would have under other policies.<sup>6</sup> Because this brand of speech libertarianism stresses the freedom to use work created by others, rather than freedom from purely governmental restraint, it is constrained by the practical need for the law to provide enough incentives for others to create content in the first place.<sup>7</sup>

The third approach emphasizes autonomy. Under this view, the law considers authors as engaged in instrumental rather than autonomous activity. They therefore do not enjoy legally cognizable autonomy interests in (or relative to) their works. This is particularly true for rights-holding firms, which lack the individuality commonly associated with theories of personal autonomy. When rights-holders exercise their rights, they interfere with the autonomy of persons who wish to use expression. Because rights-holders have no legally cognizable autonomy interests in their works, net gains in autonomy can be achieved by reducing those rights, which does not reduce the autonomy of authors but increases the autonomy of users.

The fourth approach is utilitarianism. Here I follow Bernard Williams and Amartya Sen in defining utilitarianism as welfare consequentialism.<sup>8</sup> Copyright does not seek to maximize social welfare. It seeks to maximize the production of expression, which is not necessarily the same thing. Copyright is therefore not inherently utilitarian. Some doctrines are better explained by utilitarianism than other theories, however, and there may be substantial overlap between a hypothetical utilitarian copyright law and the law we actually have.

6. Important works include Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996) [hereinafter Netanel, *Democratic Civil Society*]; Neil Weinstock Netanel, *Locating Copyright in the First Amendment Skein*, 54 STAN. L. REV. 1, 16 (2001) [hereinafter Netanel, *Skein*]; Neil Weinstock Netanel, *Market Hierarchy and Copyright in our System of Free Expression*, 53 VAND. L. REV. 1879 (2000) [hereinafter Netanel, *Market Hierarchy*]; and Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002).

7. On the distinction with respect to government action, see ISALAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969). The distinction between property and speech libertarianism is, of course, very similar to that between negative and positive liberty. The relevant legal issue is how property rights should be defined, however, which means we cannot take for granted any particular baseline for judging whether a rights-holder's actions should be considered private or coercive. I describe the debate as involving competing libertarian visions in order to describe each side's argument in its strongest form.

8. Amartya Sen & Bernard Williams, *Introduction: Utilitarianism and Beyond*, in *UTILITARIANISM AND BEYOND* 1, 3-4 (Amartya Sen & Bernard Williams eds., 1982).

Part II of this Article explains that because much content is distributed in digital form these days, there is little room for a compromise copyright policy that chooses a middle ground between consumer and producer interests. The elimination of the middle ground pushes each side back toward their core ideological and ethical commitments. Part III discusses utilitarianism and explains why copyright is not inherently utilitarian. It also shows that some copyright doctrines are best explained by consequentialist arguments while others are explained at least as well by a Lockean theory. Part IV analyzes the different ethical approaches outlined above. Part V offers recommendations for improving debates over the regulation of digital content.

## II. WHY NORMATIVE ANALYSIS IS NEEDED

Traditional copyright analysis was supposed to embody a “balance” between the interests of authors and users.<sup>9</sup> To the extent it implied a stable or precise equilibration of interests, the notion of a balance was misleading.<sup>10</sup> Copyright rules did not create a precise fulcrum on which producer and consumer interests tottered; they created a continuum. Basic rights of authors were reasonably well specified at one end,<sup>11</sup> and some fairly secure user rights were reasonably well specified at the other.<sup>12</sup> In between was a significant though ill-defined middle ground in which author and consumer interests were reconciled on an ad hoc basis, often by judges interpreting the fair use doctrine.<sup>13</sup>

Insofar as digital content is concerned, technology has eliminated the middle ground.<sup>14</sup> Computers and computer networks make copying and distributing digital content very cheap—too cheap to rely on costs to constrain unlicensed copying. Low copying costs make it possible for many consumers to copy content. These consumers may be poor and have copied little, so it may not be

9. *E.g.*, Jane C. Ginsburg, *Essay—How Copyright Got a Bad Name for Itself*, 26 COLUM.-VLA J.L. & ARTS 61, 66 (2002) (discussing excessive claims of rights-holders); Netanel, *Democratic Civil Society*, *supra* note 6, at 285 (discussing expansion in legal protections of rights-holders and corresponding reduction in user rights).

10. Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1614 (2001) (noting shifting of balance to users with distribution of copying technology).

11. *E.g.*, 17 U.S.C. § 106(1) (2000) (reproduction right); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 567 (1984) (right of first publication).

12. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) (home taping of broadcast television).

13. Dan Burk describes this aspect of copyright as a “muddy” property rule. Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121, 140 (1999).

14. Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 820, 909-10 (2001).

cost-effective for rights-holders to rely on suits against individual infringers to cut down on piracy.<sup>15</sup> Low copying costs and low yields in litigation against actual infringers present Congress and the courts with an all-or-nothing choice: give authors virtually complete control of their works or allow virtually limitless consumer copying.<sup>16</sup>

Because compromise may be impossible, it would be nice to have reliable information about the likely consequences of different policy choices. We don't. Neither Congress nor the courts nor scholars can make very good predictions about the marginal effects of different rules in the real world. Even assuming copyright's purpose is to advance welfare, or either the amount or variance of expression, no one knows what scope and term of rights would best advance any one of these goals, much less each of them.<sup>17</sup>

Even the facts necessary for an educated guess on the precise relationship between rights and output are sparse. Different sets of rights would be optimal for the different industries to which copyright law applies. Indeed, different authors would earn different wages in whatever they did if they did not produce copyrighted works. Foregone wages are an element of the cost of any activity, so the cost of producing works varies by author, implying that optimal incentives might vary by author, too.

It would be impractical to set different rights for each author, of course, but we do not know at what point gains (however counted) from tailored rights would exceed increased administrative costs from tailoring. So even if we had consensus on a single purpose of copyright law, which we don't, we would not know how wide the rights should be, how long they should last, or how far they should be tailored to different types of works. Apart from that, all is well.

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15. *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) (referring to "the impracticability or futility of a copyright owner's suing a multitude of individual infringers"); Mark A. Lemley & Anthony R. Reese, *Stopping Digital Copyright Infringement Without Stopping Innovation*, 56 STAN. L. REV. (forthcoming 2004); Lunney, *supra* note 14, at 826, 851.

16. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 331 (S.D.N.Y. 2000), *aff'd sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); Lunney, *supra* note 14, at 909-10.

17. *See, e.g.*, Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 [hereinafter Easterbrook, *Law of the Horse*]; Frank H. Easterbrook, *Cyberspace Versus Property Law?*, 4 TEX. REV. L. & POL. 103, 105 (1999) [hereinafter Easterbrook, *Cyberspace*]; Mark A. Lemley, *Reconceiving Patents in the Age of Venture Capital*, 4 J. SMALL & EMERGING BUS. L. 137, 139 (2000); David McGowan, *Innovation, Uncertainty, and Stability in Antitrust Law*, 16 BERKELEY TECH. L.J. 729 (2001).

### III. WHY COPYRIGHT IS NOT INHERENTLY UTILITARIAN

Like most laws, copyright embodies different normative principles. These principles interact differently from case to case.<sup>18</sup> Like many laws, copyright is in this respect a Rorschach blot of a law. Descriptions of what it is and how it works often say as much (if not more) about the analyst as they do about the law. I am not immune from this Rorschach aspect of copyright, of course—my bias is toward the property libertarianism I described earlier. Nevertheless, in this Part I do my best to relate significant copyright doctrines to the norms that best explain them, and to show why neither producer advocates nor consumer advocates are reliable utilitarians. This Part is mostly descriptive; I return to normative analysis in Part IV.

#### A. Consequentialism, Utilitarianism, Copyright

It is often said that copyright law is predominantly utilitarian. One thing such statements mean is that copyright does not embody nonconsequentialist theories of property, such as those based on the author's labor or personality.<sup>19</sup> Language in some opinions can be read to support this view.<sup>20</sup> Such statements

18. In this regard, I agree with Justin Hughes that “existing law supports, to varying degrees, the credibility of different theories of property and that these theories support, to varying degrees, the validity of existing laws.” Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 289 (1988).

19. E.g., PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 168-69 (1994); C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311, 323 (1997); Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 59 (2001) (“[T]he basic ideological commitment of American intellectual property is actually heavily utilitarian, not Lockean or Hegelian.”) [hereinafter Benkler, *Siren Songs*]; Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 176 (2003) (“Ours is a self-consciously utilitarian, not moral, theory of [intellectual property] rights . . . .”) [hereinafter Benkler, *Constitutional Foundations*]; Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 279-80 (2002); Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1074-76 (1997); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1130 (1990) (criticizing use of copyright to protect privacy as antithetical to the utilitarian purpose of Copyright Act); Miranda Oshige McGowan, *Property's Portrait of a Lady*, 85 MINN. L. REV. 1037, 1112 (2000) (copyrights “are founded primarily on consequentialist, utilitarian principles”); Deborah Tussey, *From Fan Sites to File Sharing: Personal Use in Cyberspace*, 35 GA. L. REV. 1129, 1171 (2001) (noting that copyright and patent law are founded on “utilitarian model”).

20. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)



sometimes use “utilitarianism” as shorthand for consequentialism generally, but utilitarianism is only one form of consequentialist reasoning. More precise analysis of the relationship between copyright doctrine and utilitarian analysis helps reveal important differences among consequentialist justifications for copyright.

## 1. Copyright Law and Utilitarianism

Utilitarianism is welfare consequentialism. This means utilitarian ethics evaluates acts, rules, or states of affairs by their consequences, and evaluates consequences using welfare as a measure.<sup>21</sup> In this context, welfare is an umbrella term encompassing the likes and dislikes of individuals. “Happiness” is a rough proxy for welfare and thus for utility; “unhappiness” serves for disutility. (I will deal with hedonic and ideal utilitarianism in a moment.)

“Happiness” and “unhappiness” are so general it would be easy to discard them as unhelpful to practical legal analysis. That would be unfair, however, because they may be defined (though utilitarianism does not require this) in terms of demand and price. On this view, utility may be measured by demand, meaning the social welfare function is the sum of individual demands. Demand is measured by willingness to pay.<sup>22</sup> Competition drives prices to marginal cost, and in this way prices efficiently allocate resources relative to the costs and benefits of production.

Two distinctions, yielding four variations of utilitarianism, are relevant here. The first is between act and rule utilitarianism.<sup>23</sup> Act utilitarianism holds an act

(“[T]he limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”); *see also* U.S. CONST. art. I, § 8, cl. 8 (giving Congress the power to grant authors limited rights in order to “promote the Progress of Science and useful Arts”); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (government interests in copyright grants “lie in the general benefits derived by the public from the labors of authors”).

21. Sen & Williams, *supra* note 8, at 3-4.

22. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 12 (5th ed. 1998). For criticism of this measure, see Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974). There are many obvious and well-known difficulties with the system these definitions describe. I use it here only because this version of utilitarianism yields relatively stronger practical conclusions than versions that rely on broader measures. It would be unfair to criticize utilitarianism for being inconclusive without employing a relatively concrete version of utilitarianism, to show the theory to its best advantage.

23. The distinction can be traced at least to R. F. Harrod, *Utilitarianism Revised*, 45 MIND 137-38 (1936).

to be ethical when it yields net gains in expected utility in a particular case.<sup>24</sup> For example, Brandt suggests that the poor son of a suffering but rich father might not only be justified in killing his father to gain an inheritance but might even have a *duty* to do so.<sup>25</sup> Act utilitarianism has been criticized as antisocial, narrow-minded, and selfish.<sup>26</sup> It does not deal satisfactorily with incentive effects, collective action problems, or externalities.

Rule utilitarianism holds an act to be ethical when it conforms to a rule that maximizes utility when applied to all persons acting in all cases of a particular type.<sup>27</sup> This formulation retains the comparative aspect of act utilitarianism—the best rule is the one that yields the greatest utility—but by focusing on generally applicable rules it takes into account both collective action problems and externalities. Rule utilitarianism can be criticized as trivially different from other ethical approaches such as the “Golden Rule,” or Kant’s categorical imperative.<sup>28</sup>

It is hard to apply rule utilitarianism to practical problems. It is hard to find concrete data on utility and disutility. The theory says nothing about the domain of rules—whether analysis is national or local, or among particular subgroups in either geographic region, or even whether analysis is limited to persons.<sup>29</sup> This is a problem because increasing the number of interests makes utilitarian analysis relatively more appealing (by reducing consensus on nonutilitarian principles) but much harder, because reduced consensus implies an increase in the number and degree of trade-offs involved.<sup>30</sup>

24. One version of the theory holds it to be a person’s duty to take the action that creates the largest achievable net gain in expected utility. This approach has the virtue of providing a criterion for comparing acts with positive expected outcomes rather than treating all such acts equally. RICHARD B. BRANDT, *ETHICAL THEORY: THE PROBLEMS OF NORMATIVE AND CRITICAL ETHICS* 380 (1959).

25. *Id.* at 387-91; see also J. J. C. Smart, *Extreme and Restricted Utilitarianism*, 6 *PHIL. Q.* 344 (1956) (discussing limitations of act utilitarianism and distinguishing rule-based utilitarianism).

26. See Harrod, *supra* note 23, at 153.

27. BRANDT, *supra* note 24, at 396; see also John C. Harsanyi, *Morality and the Theory of Rational Behavior*, in *UTILITARIANISM AND BEYOND*, *supra* note 8, at 39, 41.

28. Harsanyi, *supra* note 27, at 39-42. Indeed, Mill insisted that “the happiness which forms the utilitarian standard of what is right in conduct, is not the agent’s own happiness, but that of all concerned . . . . In the golden rule of Jesus of Nazareth, we read the complete spirit of the ethics of utility.” John Stuart Mill, *Utilitarianism*, in *UTILITARIANISM AND OTHER ESSAYS* 272 (Alan Ryan ed., 1987).

29. For example, do we count the disutility of cows slaughtered to satisfy demand for beef spurred by copyrighted content praising beef-eating?

30. Similarly, the theory says nothing about the specificity of rules. It may be that optimal rules are truisms ordinary people can understand; it may be that optimal rules read like SEC accounting rules.

The second distinction is between hedonic and ideal utilitarianism. The former is Bentham's brand, in which happiness is happiness and all happiness is summed.<sup>31</sup> The latter is Mill's brand, in which relatively more "desirable" forms of happiness count for more than other forms.<sup>32</sup>

Hedonic utilitarianism says nothing about the morality of preferences that are summed in the welfare function. For example, it counts the harm speech causes listeners as well as the benefit to speakers. The disutility of persons offended by Cohen's jacket,<sup>33</sup> or Larry Flynt's attack on Jerry Falwell,<sup>34</sup> or Dan O'Neill's lurid spoofing of Disney characters,<sup>35</sup> is summed with, and therefore offsets at least some of, the utility others derive from such content. This approach therefore conflicts with nonconsequentialist justifications for free expression.<sup>36</sup> Ideal utilitarianism might not count such disutility, but it might

31. On the distinction, see LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 18-19 n.7 (2002). For Bentham's description of utility, see Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in *UTILITARIANISM AND OTHER ESSAYS*, *supra* note 28, at 65, 65-66.

32. For Mill's original distinction, see Mill, *supra* note 28, at 259.

33. *Cohen v. California*, 403 U.S. 15 (1971) (holding that the wearing of a jacket stating "fuck the draft" was constitutionally protected from indictment for disturbing the peace).

34. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (holding advertising parody of public figure was constitutionally protected from civil liability for intentional infliction of emotional distress).

35. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978). I have not read the comics, I have only seen the covers posted on the Internet. See *The Hippie Years*, at [http://www.mogozuzu.com/comix\\_2b.htm](http://www.mogozuzu.com/comix_2b.htm) (last visited Jan. 23, 2004). Professor Gordon describes them as follows: "Mickey and Minnie had sex with each other; Mickey and Daisy Duck had sex with each other; and Goofy was shown lifting his leg like a normal dog." Gordon, *supra* note 5, at 1603.

It is perhaps a sign of the times that in *Air Pirates* comics even inter-species sex had to be straight sex. It is perhaps a sign of uneasiness with utilitarian analysis that most discussions of the *Air Pirates* case consider the utility of persons wishing to piggyback on Disney's investment in its characters to amplify their own cultural points, and the utility of consumers who might get a chuckle out of Mickey having sex with a duck, but do not mention the possibility of disutility to those (there must be at least some) who cherish Disney's vision. *E.g., id.*; Netanel, *Democratic Civil Society*, *supra* note 6, at 363; Netanel, *Market Hierarchy*, *supra* note 6, at 1910-11; Waldron, *supra* note 5, at 883. Professor Waldron does consider the effects on Disney of works that try to counter the image Disney tries to create, however. Waldron, *supra* note 5, at 877. Justin Hughes does consider audience effects. Justin Hughes, "Recoding" *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 985 (1999).

36. Amartya Sen, *Personal Utilities and Public Judgments: Or What's Wrong with Welfare Economics?*, 89 ECON. J. 537 (1979); Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970).

equally well refuse to count (or at least discount) the utility of “degrading” or “offensive” expression, creating a different conflict with free speech theory.

Weighting some utilities more than others introduces a top-down subjectivity that makes ideal utilitarian analysis less determinate and more authoritarian than hedonic. In addition, some persons will have the favored utility function (however that gets decided) and some will not. Ideal utilitarianism is therefore at odds with Bentham’s egalitarian premise that in utilitarianism all persons count for one, and none for more than one. It is very hard to see how utilitarianism could be even remotely rigorous if “bad” preferences are excluded or discounted.<sup>37</sup> For these reasons, I use hedonic utilitarianism as the default and note specifically when ideal utilitarianism is relevant.

However one defines utilitarianism, copyright is not inherently utilitarian because it is directed to promoting expression rather than welfare. Expressive works contribute to welfare but, as Professor Glynn Lunney has emphasized, other things contribute to welfare, too.<sup>38</sup> For works the public demands, and for which there are imperfect substitutes, copyright offers authors a chance at some degree of market power. There may be very few such works,<sup>39</sup> so the discounted value of that power might be very modest. It is still possible, though, that the lure of market power causes authors to invest too many resources in prospecting for copyright riches.<sup>40</sup>

If the law did not hold out the promise of such riches, authors might devote their resources to a more socially valuable use, increasing net social welfare. Copyright laws therefore might limit or reduce welfare even if they encourage the production of expression. Current doctrine might overlap significantly with a hypothetical purely utilitarian doctrine, but it also might not.

The Supreme Court’s comments are consistent with the view that copyright law is ambiguously utilitarian, though they do not support it directly. The Court consistently links copyright to the production and distribution of expression rather than to some broader conception of welfare. Language in some opinions

37. For one thing, it is hard to see how one could do the math after excluding antisocial preferences, because preferences are based on rank-ordering. For another, there is no utilitarian method for condemning as antisocial any particular preference, meaning this argument employs nonutilitarian reasoning that could easily swallow the whole of utilitarian analysis. See Sen & Williams, *supra* note 8, at 9.

38. See Glynn S. Lunney, Jr., *Reexamining Copyright’s Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 520-21 (1996).

39. Most copyrighted works are worth little or nothing. See Easterbrook, *Cyberspace*, *supra* note 17, at 106 (“Most inventions receive no royalties; about ten percent earn significant returns, and a very few have huge payoffs. Most books have few sales. Most songs are never sung in public.”).

40. This argument has a long history. See Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167, 177 (1934).

supports an inference that the Court would accept copyright laws that reduce net welfare so long as they plausibly increase the production of expression.<sup>41</sup> The Court has not distinguished among consequentialist maximands for copyright, however, and the justices may simply assume that there is no conflict between social welfare and the production of expression. The opinions offer no guidance on trade-offs between the amount and distribution of expression, or between either of those variables and the variance of expression.<sup>42</sup> I return to this point in Part IV.

## 2. Expression-Maximizing Copyright Doctrines

Because the instrumental aspect of copyright is better read as promoting production of expression rather than welfare as such, I will group the most common consequentialist arguments for copyright under the heading of expression maximization. There is a difference between maximizing the output of expression and maximizing the variance of expression; I ignore it for now and analyze it in Part IV.

In its pure form, the expression maximization view recognizes no greater relationship among an author, his rights, and his work than exists among a dog, a treat, and a trick. On this view, the best copyright regime would grant rights only broad enough and long enough to allow authors to recover the economic cost they incurred in producing a work. Once that cost was recouped, the work would enter the public domain to be used freely by anyone for any purpose. As noted in Part II, that regime cannot be achieved. Production costs vary too much and we have too little information about them.

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41. In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), for example, the Court referred to the “important public purpose” of giving consumers access to authors’ works. In *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985), the Court said the Founders thought copyright would be “the engine of free expression.”

42. In comments on an earlier draft of this paper, Professor Tim Wu pointed out that many laws might be justified in utilitarian terms even though they do not expressly seek to maximize utility. Pointing out that copyright does not aim explicitly at maximizing welfare therefore does not distinguish it from other laws. There is something to this point. Nevertheless, there is a difference between general laws judges may interpret to promote welfare, such as contract or antitrust law, or the law of real property, and a law that tries to promote production in industries comprising only one part of the welfare function. Contract facilitates exchange generally; antitrust tries to ensure that markets work well, rather than to entice them to produce particular results. Copyright tries to induce persons to produce expression. And, as I discuss below, important aspects of copyright law have at best a remote connection to utilitarian analysis.

Nevertheless, expression maximization provides a plausible explanation for some fundamental copyright doctrines. The copyright term is one example.<sup>43</sup> Limiting the term of the rights is consistent with expression maximization, and probably with utilitarianism. It is not consistent with theories based on the author's labor in creating the work.<sup>44</sup>

Perhaps that is why the limited term is not very limited. *Eldred v. Ashcroft*<sup>45</sup> affirmed Congress's ability to extend copyright protection to a period running from the creation of the work through the life of the author, plus seventy years, and to apply this extension retroactively to works already created. Justice Ginsburg's majority opinion accepts as precedent for this extension a congressional history of taking into account concerns of "justice" and "equity" for authors, meaning that Congress has the power to treat authors of existing works "fairly" relative to authors who create works after the extension takes effect.<sup>46</sup>

In contrast, Justice Breyer's dissent rests on the premise that Congress only has the power to pass copyright laws to induce the production of new expression.<sup>47</sup> He thought the extension created diminishing and perhaps negative returns and was "not limited, but virtually perpetual" because it captured 99.8 percent of the value of rights in perpetuity.<sup>48</sup> If he is right, then the term is more consistent with nonconsequentialist justifications for copyright than the nominal limitation would suggest. The difference in the opinions in part reflects a disagreement about what norms Congress may employ when dealing with the Copyright Act.

Expression maximization may also be the best justification for the rules governing contributory infringement. Borrowing from the Patent Act, in *Sony Corp. of America v. Universal City Studios, Inc.* the Supreme Court created a cause of action for contributory copyright infringement.<sup>49</sup> In *Sony*, firms holding rights in television programs sued firms that made and sold video cassette recorders. The rights-holders claimed that consumers used VCRs to record copyrighted works, thus infringing the plaintiffs' rights, and that the defendants contributed to this infringement by manufacturing the means of infringement.<sup>50</sup> The *Sony* Court held that a person distributing a copying device cannot be held

43. The current basic term is life plus seventy years for an individual author, up from life plus fifty years under the Copyright Act of 1976. 17 U.S.C. § 302(a) (2000); *Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003).

44. *E.g.*, Benkler, *Siren Songs*, *supra* note 19, at 59-61.

45. 537 U.S. 186 (2003).

46. *Id.* at 204.

47. *Id.* at 242-46 (Breyer, J., dissenting) (reviewing copyright policy objectives).

48. *Id.* at 243 (Breyer, J., dissenting) ("virtually perpetual"); *id.* at 255-56 (Breyer, J., dissenting) (percentage estimate).

49. 464 U.S. 417, 442 (1984).

50. *Id.* at 420-23.

liable for contributing to the infringing acts of others so long as the device is at least capable of “substantial noninfringing uses.”<sup>51</sup> The Court concluded the defendants had met this standard by showing that recorders could be used for (in fact were most often used for) “private, noncommercial time-shifting in the home,”<sup>52</sup> time-shifting being the practice of recording a program and watching it later.<sup>53</sup>

The *Sony* standard does not compel inquiry into all the costs and benefits of a use.<sup>54</sup> Nor does it ask courts to analyze costs and benefits to the point where the costs of inquiry match the benefits of additional information. The Court justified its test by reference to “the public interest in access to” devices that might be used to infringe,<sup>55</sup> but it simply treated this interest as decisive. It did not suggest this interest was simply one more to weigh in consequentialist analysis. For these reasons, the *Sony* standard is incompatible with serious utilitarian analysis.<sup>56</sup> Utilitarian analysis would sum the gains and losses from all uses of VCRs. It would not stop after concluding only that a substantial number of actual uses were not infringing uses, unless there were reason to believe that the costs of further inquiry were not worth the gains.<sup>57</sup> Nor would it be satisfied with concluding only that the machines were *capable* of a substantial number of lawful uses.<sup>58</sup>

51. *Id.* at 442.

52. *Id.* The Court presumed that noncommercial uses are fair uses. That presumption effectively shifted to the plaintiffs the burden of proof on fair use. The Court held the plaintiffs did not meet that burden. *Id.* at 451 (“respondents failed to carry their burden with regard to home time-shifting”).

53. Both parties conducted studies that found most owners used VCRs primarily for time-shifting. *Id.* at 423. The studies found over eighty percent of owners watched as much or more television after buying a VCR as they had before. *Id.* at 424 n.5.

54. See Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J.L. & TECH. 395, 400-01 (2003).

55. *Sony*, 464 U.S. at 440-41.

56. For an attempt to interpret the standard on more rigorously utilitarian lines, see *In re Aimster Copyright Litigation*, 334 F.3d 643, 651 (7th Cir. 2003), holding that theoretical non-infringing uses could not defeat finding that rights-holders were likely to succeed on contributory infringement claim against firms whose software facilitated copying of songs.

57. As Professor Lunney notes, under the *Sony* standard “the fact that the technology was, in fact, used almost exclusively for infringement was not sufficient to establish liability.” Lunney, *supra* note 14, at 833.

58. Justice Blackmun raised a similar point in his dissent. *Sony*, 464 U.S. at 498 (Blackmun, J., dissenting). The Court was worried that holding the manufacturers liable for contributory infringement would deny the public use of innovations such as VCRs, *id.* at 440-42, and a utilitarian analysis might conclude that the Court’s standard enhanced welfare by encouraging innovation or the distribution of innovative goods, but any such conclusion would have to be based on a fuller analysis in the first instance.

Expression maximization might endorse the *Sony* approach, but only in cases where a court could be confident that ignoring the most common uses of a device would not reduce producer revenues to the point where the production of expression declined. Though the *Sony* standard is stated generally, and has been applied to content for which rights-holders charge a fee,<sup>59</sup> the standard originated in a case involving free content and needs either additional justification or modification in cases where copying is more likely to reduce a rights-holder's revenues.<sup>60</sup>

In a recent article, Professors Mark Lemley and Anthony Reese have defended the *Sony* test, and expressed skepticism about applying conventional cost-benefit analysis to vicarious liability cases.<sup>61</sup> They worry that ordinary cost-benefit analysis might under-value the welfare effects of innovation. They are right that it is hard to measure such effects, so under-valuation is a risk, especially because (as they point out) it is easier to conceive of present costs than future (and thus unknowable) benefits.<sup>62</sup>

Nevertheless, the premise that it is hard to measure welfare effects contradicts rather than supports any conclusion or presumption about the size of those effects. The expected value of innovation is what it is, and that value counts in cost-benefit analysis. There is no basis in utilitarian theory for rigging the balance in advance based on a hunch. Though it is tempting to use hunches to fill gaps in our empirical knowledge of welfare effects, the simple fact that the hunch is used to fill such a gap means that the hunch has to be rooted in something other than a measurement of welfare. Most likely, such hunches, and the presumptions that express them, are rooted in the sort of normative first principles I discuss here.

Finally, expression maximization also best explains Congress's enactment of various compulsory licenses,<sup>63</sup> the rule that copyright only applies to works of

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59. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013-14 (9th Cir. 2001).

60. Television programs were free to viewers, so a viewer who taped a program to watch later was not dodging a fee she otherwise would have had to pay. *Sony*, 464 U.S. at 446 n.28.

61. *See supra* note 56.

62. *See Lemley & Reese, supra* note 15.

63. *See, e.g.*, 17 U.S.C. § 115(a) (2000) (compulsory license for cover recordings); 17 U.S.C. § 110 (2000) (codifying various rent-sought limitations on exclusive rights).



at least modest originality,<sup>64</sup> and the rule that only expression may be copyrighted, not the idea that is expressed.<sup>65</sup>

### 3. Doubtfully Consequentialist Doctrines

Some important copyright doctrines seem inconsistent with utilitarian reasoning. At a minimum, some doctrines can be explained and justified equally well by nonconsequentialist reasoning, again raising the question of what it means to say copyright is mostly utilitarian, or even mostly consequentialist.

#### a. The Prohibition on Copying

The reproduction right itself may be inconsistent with either utilitarianism or expression maximization. Justice Breyer famously argued that the utilitarian case for copyright was quite weak, for example.<sup>66</sup> Professor Lunney has advanced powerful arguments that a regime of free consumer copying would produce a more tailored copyright law that more closely embodies utilitarian principles than the system we have now.<sup>67</sup> He may well be right.

The core prohibition on copying almost certainly reduces welfare in some cases. *A&M Records, Inc. v. Napster, Inc.*<sup>68</sup> illustrates the point. The case involved a central registry of songs maintained by Napster, which individuals used to locate songs on each other's computers. They would then copy the songs, using Napster-provided software, but not using Napster's computers. Some Napster copying probably produced net gains in welfare. Suppose a Napster user values a work at five dollars but a rights-holder would take no less than six dollars. In that case, if the user copies the work on Napster they are better off and the rights-holder is no worse off than if no copying had occurred.

64. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991); *see also* Gordon, *supra* note 5, at 1598 (“[T]he Lockean approach does not demand that labor be creative or imaginative. The labor need only be purposeful and achieve some beneficial result.”). Professor Yen has argued that the originality requirement is consistent with a labor-based theory of copyright, Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 537-38 (1990), though Professor Yen wrote before the Supreme Court's discussion of originality in *Feist*.

65. 17 U.S.C. § 102(b) (2000).

66. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 294-96 (1970).

67. *See* Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 976 (2002); Lunney, *supra* note 14, at 820, 909-10. Professor Lunney's *Death of Copyright* article includes constitutional analysis as well as his economic analysis of copyright. I intend no comment on the former, which is beyond the scope of my argument here.

68. 239 F.3d 1004 (9th Cir. 2001).

The copying is Pareto superior, and utilitarianism demands that the law allow it.<sup>69</sup>

This example employs act utilitarian analysis, of course, and one might oppose it by pointing to externalities and incentive effects.<sup>70</sup> Any sensible ethical system must consider the risk that copiers will substitute free copying for paid purchases, which implies the more general risk that free copying will perpetuate itself and erode over time the social norms that sustain markets for paid work, thus reducing the production of expression. These are serious risks, which deserve serious consideration under any consequentialist analysis.<sup>71</sup>

Rule utilitarianism might condemn Napster notwithstanding the set of individual cases in which copying was Pareto superior. We do not have the data, so we cannot do the math, so we cannot say for sure. The administrative costs of recognizing a reservation-price defense might be so high that litigating the defense would eat up all the gains from copying. We do not have the data, so we cannot do the math, so we cannot say for sure.<sup>72</sup>

The main point here is that copyright does not recognize such a defense. It does not analyze in a serious way the consequences of non-transformative consumer copying of positively priced works the consumer does not own. Ordinary consumers who copy a work just to use it for free break the law, period. Both the district court and the Ninth Circuit condemned consumer copying of complete songs as an easy case of infringement of the exclusive rights of reproduction and distribution. The district court said Napster essentially acknowledged that its users were infringers,<sup>73</sup> and Napster did not even appeal the district court's finding that record companies presented a prima facie case of direct infringement.

69. To be confident in this conclusion we would need to be sure of the copier's reservation price, but I am willing to assume that at least *some* Napster users valued the songs they copied at less than the lowest price a record company would accept. An action is Pareto superior if it makes at least one person in society better off and leaves no one worse off than they were before the action.

70. See *supra* text accompanying note 26.

71. The high risk that free copying will erode the norms that lead people to pay for content, thus eroding the market institutions that sustain the production of content, also undermines a very thoughtful student note arguing that Locke's theory of property compels relatively broader user rights and narrower producer rights than current law provides. See Benjamin G. Damstedt, Note, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine*, 112 YALE L.J. 1179 (2003).

72. My guess is that such a defense would not eat up the gains from copying because the defense would never be used; the stakes in cases where individuals copy for personal use rather than resale or distribution are not worth the cost to pursue them. Lunney, *supra* note 14, at 819. For a proposal to make it easier for rights-holders to sue copiers, see Lemley & Reese, *supra* note 15.

73. *Napster*, 239 F.3d at 1014.

One might disagree with the result in *Napster* (I like it fine), and argue for changing the law. But if the law must be changed to reflect utilitarian principles, then in what sense is it accurate to say the law as it now stands is utilitarian? In what sense is that an analytical rather than a rhetorical proposition?

### b. Injunctive Relief

That question is even more important in considering copyright's tendency to grant injunctive relief for infringement, and to grant preliminary injunctions for probable infringement. Section 502 of the Copyright Act authorizes a court to "grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."<sup>74</sup> Indeed, because the current copyright term is so long, and because the present value of revenues declines rather quickly over time,<sup>75</sup> as a practical matter the presumption of injunctive relief deserves more weight in evaluating the theoretical foundation of copyright law than does the limited term.

Injunctions are the favored remedy for infringement, and preliminary injunctions are the favored remedy for probable infringement.<sup>76</sup> Most courts presume irreparable harm from infringement,<sup>77</sup> and enjoin infringing conduct permanently. Courts issue preliminary injunctions where a plaintiff shows that a defendant is probably infringing.<sup>78</sup> The Second and Ninth Circuits (the two most important copyright circuits) take this presumption very seriously,<sup>79</sup> and both preliminary and permanent injunctions have long been part of copyright law.<sup>80</sup>

74. 17 U.S.C. § 502(a) (2000).

75. See *supra* text accompanying notes 47-48.

76. Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 160-64 (1998).

77. The Ninth Circuit has stated that only the Fifth Circuit does not employ such a presumption. *Cadence Design Sys., Inc. v. Avant! Corp.*, 125 F.3d 824, 827 n.4 (9th Cir. 1997) (citing *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 612 n.12 (1st Cir. 1988)).

78. E.g., *id.* at 827; Lemley & Volokh, *supra* note 76, at 157-58. Defendants of course have a chance to rebut the presumption in favor of preliminary injunctive relief.

79. The Second Circuit has said that "[n]ormally, when a copyright is infringed, irreparable harm is presumed; this is because the confusion created in the marketplace will damage the copyright holder in incalculable and incurable ways." *Fisher-Price, Inc. v. Well-Made Toy Mfg. Corp.*, 25 F.3d 119, 124 (2d Cir. 1994).

80. Lemley & Volokh, *supra* note 76, at 151-54. Professors Lemley and Volokh do note that injunctions were harder to obtain in early American practice than in England. The situation changed, and courts became more willing to enjoin infringement, in the early twentieth century. *Id.* at 157-58.

This presumption is not absolute. The Ninth Circuit once made an exception to this presumption because of what it called “special circumstances,”<sup>81</sup> the Supreme Court has hinted that compromises resembling judicially proclaimed compulsory licenses might be appropriate where the social costs of injunctions are high,<sup>82</sup> and thoughtful judicial commentators have argued that injunctive relief should not be the default rule for all cases.<sup>83</sup>

Nevertheless, what Judge Leval calls the “venerable maxim” that irreparable injury is presumed from infringement persists.<sup>84</sup> Courts in cases such as *Napster* reject claims of “special circumstances” out of hand,<sup>85</sup> and the presumption is not even controversial in run-of-the-mill piracy cases.<sup>86</sup> Indeed, the Ninth Circuit has gone so far as to hold that a defendant does not rebut the presumption of irreparable harm by showing that a plaintiff’s damages could be quantified, and thus presumably remedied through payment of damages.<sup>87</sup> For a law that began by ordering the destruction of plates used to make infringing copies,<sup>88</sup> this is perhaps not much of a surprise.

81. The exception was *Abend v. MCA*, 863 F.2d 1465 (9th Cir. 1988), *aff’d sub nom. Stewart v. Abend*, 495 U.S. 207 (1990). The characterization is from *Cadence*, 125 F.3d at 829.

82. *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 505 (2001) (noting that injunctive relief is not automatic and suggesting that contributors to collective work and publisher of work had many licensing models to choose from); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994) (footnote dicta in context of parody, which is both transformative and perhaps unlikely to be licensed due to the risk that it might reduce demand for the parodied work).

83. *E.g.*, Leval, *supra* note 19, at 1131-32; James L. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 18 HOFSTRA L. REV. 983, 993-96 (1990).

84. Leval, *supra* note 19, at 1132; *see also* Lemley & Volokh, *supra* note 76, at 150 (“In copyright cases . . . preliminary injunctions are granted pretty much as a matter of course, even when the defendant has engaged in creative adaptation, not just literal copying.”).

85. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001).

86. Neither Judge Leval nor Judge Oakes complains of the rule’s application in ordinary piracy cases. Leval, *supra* note 19, at 1132 (“In the vast majority of cases, [injunctive relief] is justified because most infringements are simple piracy.”); Oakes, *supra* note 83, at 992 (The work in easy cases of piracy “needs more than the protection of a suit for damages; it cries out for an injunction.”). I here limit the term “piracy” to cases involving large amounts of for-profit reproduction and distribution of protected works.

87. *Cadence Design Sys., Inc. v. Avant! Corp.*, 125 F.3d 824, 828-29 (9th Cir. 1997).

88. The original copyright statute, passed by men who drafted and debated the Constitution, provided that infringers pay a per-page fine and forfeit their copies to authors or publishers, who “shall forthwith destroy the same.” Law of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 125 (repealed 1802).

Injunctions are consistent with the proposition that authors have rights in their work because they have produced it, and that consumers have no legitimate claim to use the work without the author's consent.<sup>89</sup> Injunctions do not necessarily vindicate authorial rights, however. There are good consequentialist arguments for them, too.

The most prominent of these arguments is that injunctions force bargaining and thereby allocate efficiently resources related to expression. Following the argument of Professors Calabresi and Melamed, modern law and economics analysis defines property rights as those rights protected by injunctive relief.<sup>90</sup> Injunctions allow owners to set prices through market transactions, avoiding the costs, relatively poor information, and uncertainty of administrative or judicial valuation.<sup>91</sup> Markets operating through price signals almost certainly facilitate the efficient creation and distribution of demand-satisfying content better than any alternative regime.<sup>92</sup> It is unfortunately much more common to see hand-wringing over injunctions as "censorship" than it is to see analysis of the differential effects on welfare of property rules or liability rules.

For this reason, copyright injunctions may maximize either welfare or expression. (They do at least as well at vindicating an author's interest in

89. Moreover, some cases use moral or rights-oriented language to describe a rights-holder's presumptive right to an injunction. Notable among these is the Second Circuit's comment in *Salinger v. Random House, Inc.*, 811 F.2d 90, 96 (2d Cir. 1987), that a biographer who "copies more than minimal amounts of (unpublished) expressive content . . . deserves to be enjoined." For a criticism of this language, see Oakes, *supra* note 83, at 999. See also *Napster*, 239 F.3d at 1028 ("Uses of copyrighted material that are not fair uses are rightfully enjoined.").

90. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) ("An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller."). Professor Merges has emphasized this argument in his work. See, e.g., Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2655 (1994) (arguing the proponents of liability rules in IP "carry a heavy burden").

91. Bargaining in the form of settlement probably would survive under most any legal rule. When parties bargain over settlement, however, they consider how the judge or other decision-maker would view the costs and benefits of conduct. When judges simply enjoin use to which an author does not consent, bargaining can occur based solely on the parties' relative estimates of these costs and benefits. Because the parties have better information than judges or administrators, bargaining that considers only the parties' valuations will more closely approximate net social welfare than would bargaining that has to guess at third-party valuations, which may well be driven by interests other than welfare. See David McGowan, *Website Access: The Case for Consent*, 35 LOY. U. CHI. L.J. 341 (2003).

92. Merges, *supra* note 90, at 2664-65.

controlling her work.) Objections to injunctions are common, however, and they raise some serious points.<sup>93</sup> An expression-maximizing analysis probably would be more flexible than copyright law in choosing between injunctive relief and damages, would not grant injunctions where damages could be shown to be adequate compensation,<sup>94</sup> and probably would reverse the presumption to mirror the ordinary case, in which injunctive relief is extraordinary and damages are presumptively adequate.<sup>95</sup> The judicial preference for injunctive relief therefore suggests less that copyright is designed to maximize expression than that it is designed to maximize welfare, or to embody a Locke-like view of authors rights, or that there is no difference between these two options.

### c. The Right of First Publication

Consequentialism does an uneven job of explaining an author's right of first publication. Historically, authors have had the right to introduce their works to the market.<sup>96</sup> That right implied the power to keep others from doing so first, which meant authors could suppress publication of works they did not want published.<sup>97</sup> *Salinger v. Random House, Inc.*<sup>98</sup> was such a case, in which famous

93. *E.g.*, Lemley & Volokh, *supra* note 76, at 169 n.106 (collecting criticisms of copyright injunctions).

94. *Cf.* Cadence Design Sys., Inc. v. Avant! Corp., 125 F.3d 824, 828-29 (9th Cir. 1997).

95. *See* Lemley & Volokh, *supra* note 76, at 150 (noting judicial reluctance to restrain or enjoin conduct in ordinary cases).

96. The right of first publication was central to common law copyright. *See, e.g.*, *Bobbs-Merrill Co. v. Straus*, 147 F. 15 (2d Cir. 1906) (discussing common law right of first publication); *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250 (N.Y. 1968) (same). It formed a key part of Warren and Brandeis's famous defense of individual privacy interests. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Professor Goldstein discusses the role of copyright in protecting privacy in Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1003 (1970), and Professor Hughes discusses it in Hughes, *supra* note 18, at 355-58.

Professor Netanel discusses *Salinger* and other (less sympathetic) cases involving copyright suppression, casting these cases as examples of how a "bloated copyright frustrates copyright's democracy-enhancing goals." Netanel, *Democratic Civil Society*, *supra* note 6, at 294-95.

97. Dicta in *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932), is to similar effect: "The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property." The original copyright statute also protected authors of unpublished works. Law of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1802). Congress amended 17 U.S.C. Section 107 to state that a violation of the first publication right did not automatically defeat a claim of fair use, which makes this less of a deviation from

and famously reclusive author J.D. Salinger successfully enjoined a biographer's planned quotation of Salinger's private letters. In *Harper & Row Publishers, Inc. v. Nation Enterprises*<sup>99</sup> the Supreme Court endorsed a strong right of first publication as well, though that case involved only the question of how a work would be introduced to the market. *Salinger*-style suppression was not at issue.<sup>100</sup> Economic analysis suggests that authors who intend to market works are in the best position to equilibrate costs and benefits of different strategies and therefore should control the way the works hit the market.<sup>101</sup> The right of first publication is consistent with this view, which implies that *Harper & Row* was right. Economic analysis implies minimal legal protection, if any, for works an author does not intend to exploit, however. On this view, *Salinger* was wrong.

Copyright historically protected works not meant for the market, however, which means economic analysis cannot fully explain the historical doctrine.<sup>102</sup> At least until it was amended in 1992, the right of first publication has to be explained in part through nonconsequentialist theories such as the author's labor or, more plausibly, her privacy or personality.<sup>103</sup> Judge Newman argues such protection can be explained and partially justified as protecting the privacy of authors, and his analysis deserves attention.<sup>104</sup>

The first publication doctrine's ability to protect privacy raises a familiar conflict between libertarian and consequentialist analysis, which may be stated

utilitarianism, but it left the first publication right intact.

98. 811 F.2d 90 (2d Cir. 1987).

99. 471 U.S. 539 (1985).

100. From an economic point of view, the distinction between unpublished works slated for publication and unpublished works the author does not want published is extremely important to legal analysis. William M. Landes, *Copyright Protection of Letters, Diaries, and Other Unpublished Works: An Economic Approach*, 21 J. LEGAL STUD. 79 (1992).

101. *Id.*

102. Professor Weinreb makes this point well, discussing "utilitarian" justifications for copyright. Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1140-41 (1990).

103. Following *Salinger*, Congress amended the fair use provision of the Copyright Act to provide that "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration" of the fair use factors specified in the statute. 17 U.S.C. § 107 (2000). Hegel's theory of property emphasized that people base aspects of their personality on property, which is to that extent constitutive of the self. For a more general description of Hegel's theory, see McGowan, *supra* note 19. Even Professor Jeremy Waldron, who is skeptical of claims that copying infringes on an author's freedom, recognizes that the right of first publication protects a liberty interest. Waldron, *supra* note 5, at 874.

104. For a quasi-instrumental defense of the use of copyright to protect an author's privacy, see Jon O. Newman, *Copyright Law and the Protection of Privacy*, 12 COLUM.-VLA J.L. & ARTS 459 (1988).

in general terms. Cases where a rights-holder seeks to suppress work present the question whether the utility community members derive from an author's work gives them an ethical claim to take and use that work.<sup>105</sup> The right of first publication expresses the values copyright brings to bear on that question.

Allocating private facts to the "common" is a very intrusive and potentially illiberal policy choice. Consider the case of Shania Twain, a singer whose work sells millions of records.<sup>106</sup> In a wine cave at her home, she performs songs she describes as "crazy things . . . vulnerable things I wouldn't want to play for anybody."<sup>107</sup> She records them on a handheld cassette machine and plays them for her husband.<sup>108</sup> Do the tens of millions of Shania Twain fans have an ethical claim to these tapes?

If the ethical default rule is that copyrighted works belong to the community, with authors having only limited, utilitarian rights to exclude the community from their works, it is hard to see why Ms. Twain should be able to suppress the tapes. She may suffer embarrassment when they are played, but she is only one person. The utility her tens of millions of fans would derive from the tapes is probably greater than any disutility to her. At least act utilitarian analysis would seem to compel her to release the tapes. At a minimum, it would prevent a judge from enjoining copying and distribution of the tapes if someone found them lying on a table in a coffee shop.

One could of course again respond by criticizing act utilitarian analysis. One could say rule utilitarianism would not compel Ms. Twain to produce the tapes because no one would record such personal, private works if the public had a right to them. One could say that, but there is no way of knowing whether it is true. Anecdotal evidence suggests it may be false. The 1992 amendments to Section 107 provide that unpublished works may be used without permission if the other fair use factors are satisfied. If utilitarianism or expression maximization is all that matters to fair use, and if we stipulate that Ms. Twain would never market the works, and thus loses no revenues if others play them for free, it is hard to see how the other factors would not be satisfied in the event she lost the tapes, or a faithless agent stole them and sold them to a hacker. Nevertheless, even in the face of this risk famous persons continue to make compromising tapes,<sup>109</sup> suggesting the expected cost of humiliation is low enough

105. *See supra* note 36.

106. She has the sixth largest-selling record of all time, which is the largest-selling record by a female artist. Josh Tyrangiel, *Shania Reigns*, *TIME*, Dec. 9, 2002, at 80.

107. *Id.*

108. *Id.*

109. *See, e.g., Lee v. Internet Entm't Group, Inc.*, No. 99-55205, 2002 WL 661708 (9th Cir. Apr. 22, 2002) (dealing with Internet posting of homemade videotape of famous musician and actress having sex). Perhaps they would stop if they knew the tapes could be copied and distributed without injunction if someone got hold of them, but that is not obviously the case. The probability of inadvertent disclosure might be so low that a



that granting the community a right to use such material will not deter production.

Alternatively, one might follow Judge Leval and argue that, because copyright is a utilitarian law, privacy should be protected through real property or other doctrines and not copyright. On this view, if Ms. Twain does not want her tapes published, she should keep them at home.<sup>110</sup> If someone steals them, or they fall from her purse in a coffee shop, she should sue under a theory of invasion of privacy or for conversion.<sup>111</sup>

This argument has merit, but it avoids more of the opposing view than it rebuts. The proposition that copyright is fully instrumental cannot be used as a premise to decide such cases, because whether that proposition is true is one of the issues in the case. Pointing out that other theories are available does not itself justify denying recovery under copyright any more than saying “if they don’t like it, they can move” justifies an objectionable local law. And if copyright policy really would be furthered by publication, why should state law theories of conversion or privacy be allowed to frustrate that policy? To deliver the contents of the tape to Ms. Twain’s millions of fans requires reproduction or performance. Copyright is the theory that aims most directly at the acts that cause (or at least magnify) the harm. If courts deny recovery under copyright, independent reasons for doing so must be given.<sup>112</sup>

The point is not to quibble over act and rule utilitarian analysis, or over whether conversion or privacy theories might be equivalent to copyright. If one starts from the proposition that Ms. Twain’s tapes are hers because she made them, and no one else has any ethical claim to them, then one would resolve any ambiguity in instrumental analysis in favor of injunctions prohibiting copying and distribution of the tapes. If, however, one starts from the proposition that expressive works belong to the community, and authors have only such power to control the works as the community cedes to them, one would resolve ambiguity in instrumental analysis the other way.

The point I wish to emphasize is that the core question in such suppression cases is in fact a key question in every case: What are the relative rights of society and of individual authors (or those to whom they transfer their rights) with regard to a work society, or at least some of its members, desires to use?<sup>113</sup>

rational home-taper would discount it substantially and tape away. After all, taping itself presumably gives them some utility.

110. See Leval, *supra* note 19, at 1119 n.67.

111. See *id.*

112. As noted above, one could easily make instrumental arguments justifying strong rights of first publication. These would apply with particular force to rough drafts, and the like.

113. Professor Patterson captures this aspect of the policy questions when he says “The problem with the common law/natural law copyright is that it is a primitive concept, because it is comprised of rights for the creator to the exclusion of any duties.” L. Ray

Liberal theory of any stripe should be skeptical of a holding that gives society in general a claim to copy and distribute an individual's private comments and facts regarding their private life. Utilitarianism provides little if any basis for rejecting the community's claims, however.

#### d. Derivative Works

The right to create derivative works is probably better explained by something other than expression maximization.<sup>114</sup> Professor Gordon argues that not even Lockean theory can justify more than a minimal derivative right.<sup>115</sup> The structure of the right is arguably Lockean, however. Authors who make unlicensed derivative works have no right to the copied work but, if their own contributions can be separated from what they have copied, they own the work they have done.<sup>116</sup>

Lastly, expression maximization cannot explain the Visual Artists Rights Act of 1990, which grants certain rights of attribution and integrity of works to limited-production works such as paintings, drawings, or sculpture.<sup>117</sup> Given these aspects of the doctrine, it is no surprise that non-instrumental ideas and language are a part of copyright debates and have been for a long time.<sup>118</sup>

Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC'Y U.S.A. 365, 389 (2000).

114. See 17 U.S.C. § 106(2) (2000). For the argument that vesting original authors with the right to control derivative works is inconsistent with optimal improvement of works, see Lemley, *supra* note 19, at 1074-7, and Netanel, *Democratic Civil Society*, *supra* note 6, at 302-03. For a defense of the derivative right as necessary for artists to capture the value their works to contribute to subsequent works, see William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 353-57 (1989).

115. Gordon, *supra* note 5, at 1608.

116. 17 U.S.C. § 103 (2000). In some cases, the derivative author's work is so intertwined with copied work that he will have no rights to any of it. See *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at \*8-11 (C.D. Cal. Apr. 25, 1989) (author of script for *Rocky IV* had no rights in script in which original material could not be separated from copied material). For a discussion of this issue, see Lemley, *supra* note 19, at 1022 (discussing rights of original and derivative authors).

117. 17 U.S.C. § 101 (2000) (definition of work of visual art); 17 U.S.C. § 106A (2000) (rights of attribution and integrity); 17 U.S.C. § 113(d) (2000) (scope of rights in case of site-specific art). In *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14, 24 (2d Cir. 1976), the court linked moral and economic rights, saying "the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law, cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent." (citations omitted).

118. See, e.g., Waldron, *supra* note 5, at 849-50.

## e. Fair Use

The fair use doctrine deviates from the principle that authors own their works because they labored to create them. The only real questions are how far the doctrine deviates from this principle and what alternative norm it embodies.

Because its purpose is to allow recipients to use expression, the fair use doctrine is probably best explained by expression maximization. This explanation is incomplete, however. In fair use cases, both the plaintiff and defendant produce expression. Expression maximization alone cannot say whether we should favor initial producers, who might use licensing revenues to make additional works of their own, or downstream producers, who might increase production with money saved by not paying royalties. A mandate to favor maximum production of expression therefore does not systematically favor initial producers or downstream users.<sup>119</sup>

Doctrinally, fair use offers ambiguous clues about the principles it expresses. The Supreme Court has said “undoubtedly the single most important element of fair use” is how a use affects the market for the work used.<sup>120</sup> That weighting of the factors emphasizes the importance of the author’s revenues rather than the cost to users of licensing. That emphasis mitigates somewhat the degree to which fair use deviates from a labor-based theory of rights. On the other hand, the doctrine favors transformative over non-transformative uses,<sup>121</sup> a preference best explained either by expression maximization or by some undefended preference for the labor interests of downstream users over those of initial authors.

In addition, expression maximization cannot explain why the right of first publication may trump fair use. In *Harper & Row Publishers, Inc. v. Nation*

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119. On the balance question, see Lunney, *supra* note 67, at 976. Professor Lunney would not agree with the proposition that fair use does not favor either side, however. He errs on the side of users. *Id.* at 1030. If capital markets worked perfectly, then the difference would not matter for profit-maximizing content. But capital markets do not work perfectly, and some content is not designed to maximize profit. We do not know how imperfect capital markets are, nor how many producers maximize something other than profits.

120. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574 (1994) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985)); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 477 (1984) (Blackmun, J., dissenting); see also *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1385 (6th Cir. 1996).

121. *Campbell*, 510 U.S. at 579 (“[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright . . .”).

*Enterprises*,<sup>122</sup> for example, the Court rejected a fair use challenge while affirming the importance of the right of first publication, a result the Second Circuit reached in *Salinger v. Random House, Inc.*<sup>123</sup>

*Harper & Row* might be reconciled with expression maximization on the ground that allowing an author to orchestrate the introduction of a work to a market is crucial to maximizing the author's revenues.<sup>124</sup> *Salinger* is much harder to reconcile on grounds other than libertarian concepts of privacy. Both cases suggest fair use may be subordinated to the right of an author to control introduction of her work or suppress discussion of that work as a means of protecting privacy, though the 1992 amendments to Section 107 diminished the force of *Salinger* to some extent.<sup>125</sup> Whatever their current scope, at least *Salinger* is more consistent with a libertarian conception of rights in authors than with utilitarian or expression-maximizing arguments that would subject authors to the claims of society.

Lastly, there is a rough justice idea in some fair use cases that defies easy categorization except to say it is not utilitarian. For example, when *Hustler Magazine* savaged Jerry Falwell with an ad parody suggesting Falwell had his first sexual encounter with his mother in an outhouse, Falwell copied and distributed the entire parody (with some words blacked out) to raise money to sue *Flynt*. When he did, *Hustler* brought a separate suit for infringement. The Ninth Circuit held that Falwell's copying and distribution were fair uses. Its reasoning is best captured by the idea that fair use allowed Falwell to fight fire with fire.<sup>126</sup> As Professor Gordon points out, "[n]othing in the judge's discussion of the dispute between *Hustler* and Falwell's Moral Majority attempts to balance the harms and benefits."<sup>127</sup>

122. 471 U.S. 539 (1985).

123. 811 F.2d 90, 96 (2d Cir. 1987).

124. See Landes, *supra* note 100, at 111.

125. 17 U.S.C. § 107 (2000) (stating "that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of" the fair use factors).

126. *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1153 (9th Cir. 1986).

127. Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives*, in *THE COMMODIFICATION OF INFORMATION* 149, 172 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002) [hereinafter Gordon, *Excuse and Justification*]; see also Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149, 249-51 (1992) [hereinafter Gordon, *Restitutory Impulse*].

### B. *Why No One Is Satisfied with Consequentialist Analysis*

Both utilitarian and expression-maximizing analysis imply conclusions both consumer advocates and producer advocates dislike. Neither group takes a wholly consequentialist approach, much less a wholly utilitarian one.

#### 1. Content Producers

Content producers have some sound expression-maximizing arguments. Particularly with respect to digital content, the cost of consumer copying is so low that the ratio of the producer's costs to copiers' costs is greater than it has been in the past, though there has long been a trend in that direction.<sup>128</sup> Networks such as the Internet, and the low cost of storing digital content, imply a high risk of widespread, high-volume copying.<sup>129</sup> All this means lost revenues, lower expected returns *ex ante* and, at some level, reduced production of copyrighted works. Even under expression maximization, these facts justify strong anti-copying measures.

Moreover, much copyrighted work is essentially fungible. Professors Carl Shapiro and Hal Varian describe Reuters' News Service as "pretty much a commodity business," and they are right.<sup>130</sup> The point applies to a lot of software, boy bands, bodice-ripping romance novels, pornography, action thrillers, and most law review articles. Fungible work implies robust competition, which implies relatively low prices, low margins and high consumer surplus. For many types of works, copyright is not the oppressive regime of censorship it is sometimes made out to be.<sup>131</sup> To the extent legal protection of works is needed to cover authors' costs, expression-maximizing analysis and utilitarian analysis coincide.

On the other hand, both utilitarianism and expression maximization imply conclusions producers would like to avoid. There is no reason to believe there is a linear relationship between the creation of new works and the scope and length of rights, or even that the relationship is always positive.<sup>132</sup> For many classes of works, such as software and news, the term could probably be reduced

128. For an analysis of the significance of this ratio regarding books, see Breyer, *supra* note 66, at 293-97. On the trend toward lower copier costs, see Easterbrook, *Law of the Horse*, *supra* note 17, at 208.

129. See, e.g., *Universal City Studios, Inc. v. Corley*, 273 F.2d 429, 457 (2d Cir. 2001) (noting risk of copying presented by internet distribution of circumvention software); Lunney, *supra* note 14, at 820, 909-10.

130. CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES* 28 (1999).

131. Lunney, *supra* note 14, at 841 (describing DMCA as embodying guild production ideal).

132. See McGowan, *supra* note 17, at 731-33.

to a small fraction of what it is without affecting production one whit. If increases in protection yield marginal decreases in production then, at that point (which we cannot identify, if it exists) expression maximization ceases to justify copyright protection and instead demands that protection itself cease.<sup>133</sup>

Lastly, as Professor Lunney recently stressed, if copyright allows authors to earn returns greater than the economic costs of production, then copyright might induce inefficient entry into copyright industries, reducing social welfare relative to a regime in which authors earned only enough returns to cover their costs.<sup>134</sup> Utilitarian analysis, which demands that welfare be maximized, would condemn the regime to the extent of such misallocation. Expression maximization would not, of course, so long as net production of expression increased while welfare fell.

For these reasons, content producers and those sympathetic to them find liberal, Locke-like theories of property more congenial than either expression-maximizing or utilitarian arguments. Producer representatives often cast copyrighted works in the same terms as other property, as demonstrated in the comment of the MPAA's Jack Valenti that "[c]reative property is private property. To take it without permission, without payment to its owners, collides with the core values of this society."<sup>135</sup> Scholars who point to the advantages of treating copyrights (and other intellectual property) as property advance arguments consistent with labor-based theories.<sup>136</sup>

## 2. Consumer Advocates

Utilitarian or expression-maximizing analysis has two unwelcome implications for consumer advocates, who would like fair use to stand firm to protect user rights against the expansion of producer rights.<sup>137</sup> First, if copyright law is instrumental to advancing either welfare or the amount or variance of expression, and if fair use is part of copyright law, then fair use is at least presumptively instrumental to advancing those goals.<sup>138</sup>

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133. See Breyer, *supra* note 66, at 288-89.

134. Lunney, *supra* note 67, at 1029.

135. Jack Valenti, *Online Entertainment and Copyright Law*, Testimony Before the Senate Judiciary Committee, Apr. 3, 2001, available at 2001 WL 2006825.

136. See, e.g., Easterbrook, *Cyberspace*, *supra* note 17, at 113.

137. I do not mean to imply by this reference that an expansion in producer rights is equivalent to an expansion in the economic power of rights-holders. Because that power must be viewed relative to the risk of unlawful copying, and because digital technology increases that risk, rights may easily expand while leaving economic power the same as it was before the expansion.

138. See Leval, *supra* note 19, at 1110 ("The doctrine of fair use limits the scope of the copyright monopoly in furtherance of its utilitarian objective.") (Judge Leval here uses "utilitarian" in a more general sense than I do in this Article); Waldron, *supra* note

To the extent fair use rights are instrumental, they apply only where they create net gains in welfare or the amount or variance of expression. Suppose it is easy to copy and distribute digital content. Suppose this fact implies widespread unlicensed copying and distribution, which in turn increases the risk associated with returns to investment in expressive work. Increased risk lowers the expected value of such investment, implying the loss of marginal production. Suppose finally that the losses from such reductions exceed gains from free copying.

If and to the extent these assumptions are sound, utilitarianism requires that fair use be cut back to the point where the doctrine yields positive net utility. Expression maximization emphasizing output requires that fair use rights be cut back if they reduce the total output of expression. Expression maximization emphasizing variance requires that such rights be cut back if they reduce the total variance of expression. We do not know whether these assumptions are right, though I feel pretty safe on all but the last, as to which I have no idea. For this reason, and because as a matter of positive law the user bears the burden of persuasion on the defense,<sup>139</sup> instrumental approaches to fair use yield a

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5, at 860 (noting that fair use is treated as “part and parcel of a whole package every bit of which must be articulated and justified on social policy grounds”). Logically, of course, copyright as a whole could be instrumental in some sense even if fair use was not. Weinreb, *supra* note 102, at 1140 (“Rather than being a provision intended solely to fulfill the copyright scheme in special circumstances, fair use has a more multifunction function, which may justify a limited exception to copyright considered by itself.”).

139. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1998). For this proposition, the *Campbell* Court cited a House of Representatives Report discussing 1992 amendments to 17 U.S.C. Section 107. *Id.* at 591 n.20 (citing H.R. REP. NO. 102-836 (1992), reprinted in 1992 U.S.C.C.A.N. 2553). That report said categorically “the burden of proving fair use is always on the party asserting the defense, regardless of the type of relief sought by the copyright owner.” H.R. REP. NO. 102-836, at 11 (1992), reprinted in 1992 U.S.C.C.A.N. 2553, 2563 n.3; see also *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 107 (2d Cir. 1998); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 918 (2d Cir. 1994); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (2002). The report in turn cited *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 567 (1985), where in dealing with the market-effect aspect of fair use the Court said that “once a copyright holder establishes with reasonable probability the existence of a causal connection between the infringement and a loss of revenue, the burden properly shifts to the infringer to show that this damage would have occurred had there been no taking of copyrighted expression.” There is some authority that a plaintiff seeking preliminary relief bears the burden of proving it is likely to prevail over affirmative defenses on which the defendant would bear the burden of proof at trial. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 n.3 (9th Cir. 2001) (discussing division of authority on the issue but not resolving it on the ground that the plaintiff prevailed in that case however the burden was placed). This point was addressed explicitly in H.R. REP. NO. 102-836, which rejected any such distinction.

malleable and relatively weak right, which is not what consumer advocates are looking for.<sup>140</sup>

Consumer advocates also face a more specific and topical utilitarian limitation on fair use. It can be traced to an important article on fair use, which Professor Wendy Gordon wrote several years ago. She identified market failures as a “useful starting place” for fair use analysis, reasoning that when markets break down judges might provide socially desirable results.<sup>141</sup> One part of her argument was that the doctrine could be employed to permit unlicensed uses where licensing costs exceed the value of the use.<sup>142</sup> The Supreme Court commented favorably on this idea in *Harper & Row Publishers, Inc. v. Nation Enterprises*.<sup>143</sup>

The Internet has reduced significantly the transaction costs of acquiring digital content. The logic of this aspect of Professor Gordon’s original argument implies that fair use rights should diminish with transaction costs.<sup>144</sup> That implication is consistent with utilitarianism and, probably, the branch of expression maximization that focuses on total output. It is anathema to many analysts who view fair use as a vital tool to defend user rights and the public domain, and who are suspicious of things such as digital rights management devices.<sup>145</sup>

Professor Gordon recently refined her original argument to place greater emphasis on cases in which she believes market norms should not control analysis.<sup>146</sup> Professor Gordon distinguishes two sets of cases. The first set is called “market malfunction.” It includes expression and desired uses that are fair game for market norms. Within that set, when parties would like to transact but

140. One could of course argue for shifting the burden on the defense to the rights-holder. Because utilitarian analysis is indeterminate, however, the burden-shifting argument would have to be made on some other grounds.

141. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1614 (1982).

142. *Id.* at 1628-29. Another part of the argument noted that “[d]istrust of the market may also be triggered when defendant’s activities involve social values that are not easily monetized.” *Id.* at 1631.

143. 471 U.S. 539, 567 n.9 (1985).

144. As Glynn Lunney has said, referring to the Supreme Court’s decision in *Sony*, “If the inability to develop an effective licensing scheme justified the *Sony* outcome, then so long as a licensing scheme is or could be made practicable, the doctrine of fair use should presumably not apply.” Lunney, *supra* note 67, at 976; see also Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 44 (2001). Professor Gordon acknowledges this implication and defends it for cases in which market norms should govern analysis, though not for cases where they should not. See Gordon, *Excuse and Justification*, *supra* note 127, at 185.

145. See Burk & Cohen, *supra* note 144, at 51.

146. Gordon, *Excuse and Justification*, *supra* note 127, at 152-53.



cannot because of some barrier or flaw in the market, then unlicensed uses are excused because the presumption that market ordering will produce an efficient result no longer applies. The fair use doctrine provides a legal hook for the excuse to hang on.

That the market cannot be relied on to produce an efficient result does not imply that a judge could do better, so the utilitarian case for this idea is not conclusive. More importantly for our purposes, however, this argument implies a relatively weak and changeable fair use right. Because it concedes that when market ordering is possible it more closely approximates social welfare than does judicial or administrative allocation, when impediments to market ordering are eliminated fair use rights must narrow.<sup>147</sup>

Professor Gordon calls her second set of cases “inherent market limitation” cases. This set includes cases in which “market norms themselves fail to provide fully suitable criteria for resolving a dispute.”<sup>148</sup> Within this set, efficiency is not the primary goal of the law, and copyright therefore should not try to force contracting through infringement actions or injunctions. In these cases, the fair use doctrine protects unlicensed uses because they are justified by noneconomic norms. The doctrine therefore does not vary with market efficiency.

Because the concept of utility encompasses more than economics,<sup>149</sup> it is possible that recognizing fair use in this second set of cases enhances welfare. Such all-in utility analysis is even less determinate than the somewhat artificial price-driven analysis, however, so there is no way to know. More to the point, because utilitarian analysis is so indeterminate, it cannot justify recognizing such a set, which seems by definition at least partially indifferent to utilitarian concerns. Decisions about content and uses within the set are more likely to rest on nonutilitarian or nonconsequentialist reasoning than on utilitarianism.

The genre of parody exemplifies the tension between the market limitation idea and at least the price-measuring version of utilitarianism. Profit-maximizing rights-holders presumably would license uses, including parody, when the license fee exceeds the costs of licensing. A rights-holder would count as cost the risk that a parody would tarnish the public image of the original work and therefore reduce demand for it. (Recall the saucy Snow White who danced around the Academy Awards several years ago.) A profit-maximizing rights-holder who refuses to license a parody presumably would do so only if it estimated that no license fee could cover its costs from the use in question.

Rights-holders who license content for a living have better information than either judges or copyright scholars about how uses are likely to affect the rights-

147. *Id.* at 184-85.

148. *Id.* at 150.

149. See KAPLOW & SHAVELL, *supra* note 31, at 18-19; Gordon, *Excuse and Justification*, *supra* note 127, at 155-56; *supra* note 22 and accompanying text.

holder's utility.<sup>150</sup> The licensing decisions of a profit-maximizing rights-holder are therefore a better proxy for welfare analysis than the conjectures of judges or scholars. If and to the extent these propositions are correct, a strictly utilitarian analysis would not employ the fair use doctrine to allow unlicensed uses in cases where a profit-maximizing rights-holder refused to license a parody. On this account, fair use is needed most precisely where it is least likely to produce net gains in welfare, at least insofar as welfare is measured by demand.<sup>151</sup>

So what? Even if this argument is correct, it suggests only that in cases involving profit-maximizing rights-holders, fair use must be defended on nonutilitarian grounds. That conclusion reinforces the point that user advocates have good reasons to oppose a fair use doctrine grounded in utilitarianism. One can easily concede that judges and scholars have relatively poor information about utility and still defend broad fair use rights on the ground that those rights are not about utility, or at least not about utility as measured by prices.<sup>152</sup>

Rights-holders who maximize something other than profits present an even harder case for utilitarian fair use analysis. If a rights-holder refuses a profitable license because the proposed use conflicts with their vision of a work, then its decision is no longer a reliable proxy for price-measured welfare. Such non-profit maximands may well explain the licensing refusal in *Campbell v. Acuff-*

150. Professor Gordon argues that various circumstances might prevent licensing even where both parties could gain from a transaction. It is quite true that any of a variety of deviations from the rational actor assumptions or the conditions of perfect competition might produce such a result, as might any number of agency problems. I doubt that judges and scholars can identify deviations very well, however. They (we) are every bit as susceptible to cognitive bias as market participants, and our incentives correctly to estimate costs and benefits are not as good. We have no money on the line, and we have less information. Thus, though it is true that parties might fail to enter into bilaterally profitable bargains, I doubt this risk justifies legal recognition of broad use rights or weak producer rights (damages rather than injunctions) in such cases. The notion that rational, profit-maximizing actors will try to suppress criticism of works to which they hold the rights because they will suffer net utility losses seems more plausible to me.

151. It is true that rights-holders could not capture all the benefits a parody would generate because information is a public good and the parody would generate positive externalities. That means the rights-holder's incentives are not perfectly aligned with the public's incentives. That is also true of judges, who also do not bear any of the cost to rights-holders and their information is worse. Judicial incentives are an interesting question, but there is no reason to suppose they favor any particular maximand or mode of reasoning.

152. Courts employ a similar approach already, as evidenced by the Ninth Circuit's holding in *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986), that in considering the economic effects of a use, harm a rights-holder suffers from lower demand for a product does not count; only harm from usurpation of demand is relevant.

*Rose Music, Inc.*,<sup>153</sup> and the aggressive posture of the rights-holders in attacking a recent parody of *Gone with the Wind*.<sup>154</sup> Positing alternative maximands only severs the connections among private decisions, prices, and social welfare, however. It does not establish such connections between judicial decisions and social welfare, and, in any event, a utilitarian coin flip is not what user advocates are looking for. They would like strong, secure fair use rights. This discussion suggests that such rights need an independent, nonutilitarian foundation.

As soon as that point is acknowledged, however, a host of questions has to be answered—a point Professor Gordon acknowledges with great candor. What norms define the set of justified uses, and who chooses them?<sup>155</sup> How do they differ from utilitarian analysis? Are they consequentialist or not? If so, what purposes do they advance, and how do we know whether they succeed in advancing them? No rights are absolute, including free speech rights.<sup>156</sup> That means we must ask what level of costs such norms justify. In considering these questions, one must bear in mind that any nonconsequentialist justification for fair uses must be constrained at some point by instrumental considerations. Whatever justification for fair use rights is chosen, it will be self-defeating if it undermines *ex ante* incentives to produce works to which use rights might be applied.<sup>157</sup>

Some consumer advocates abandon utilitarianism in two other respects. First, many scholars have given up on Congress as a source of desirable copyright law.<sup>158</sup> Believing the representative branches have been captured by

153. 510 U.S. 569 (1994).

154. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

155. Professor Gordon appears to believe that judges will do the deciding in the near future. See Gordon, *Excuse and Justification*, *supra* note 127, at 187-88.

156. *E.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (establishing test for incitement liability and reversing conviction under Ohio criminal syndicalism statute for speech given to members of Ku Klux Klan); *People v. Upshaw*, 741 N.Y.S.2d 664 (N.Y. City Crim. Ct. 2002) (refusing to dismiss criminal charges for inciting a riot against three men who, shortly after September 11, 2001, aggressively praised the terrorist attacks of September 11th, while standing on 42nd Street near Times Square).

157. Professor Goldstein said in an earlier generation of debates over these questions that one's results:

must be drawn from a basically circuitous proposition: the first amendment encourages free public participation in a wide range of expression; a wide range of expression will be accumulated and marketed only if the effort is made profitable; the effort will be unprofitable if the public is permitted to participate in the fruits of the endeavor free of cost and immune to any legal or equitable sanctions.

Goldstein, *supra* note 96, at 998.

158. Benkler, *Constitutional Foundations*, *supra* note 19, at 196; Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law 1900-2000*, 88 CAL. L. REV. 2187 (2000).

rich content providers, they look to courts and the Constitution for a non-representative defense against this public choice nightmare. Thus we see a revival of the idea that the First Amendment limits Congress's power to expand and extend copyright law.<sup>159</sup>

The First Amendment is at best only partly utilitarian. It is in many respects deliberately nonutilitarian.<sup>160</sup> For example, it ignores harm caused by offensive expressions within public discourse,<sup>161</sup> it allows regulation of incitement only where harm is "imminent," without regard to the severity (and therefore expected cost) of the harm,<sup>162</sup> and it requires that public funds be expended to protect public expression by groups without regard to costs that vary with the group's message.<sup>163</sup> Quasi-utilitarian free speech doctrines, such as the actual malice rule of *New York Times v. Sullivan*,<sup>164</sup> provide weak support for user rights and may cut against them.<sup>165</sup> In general, though, to the extent copyright incorporates First Amendment rules, it departs from utilitarian and perhaps even expression-maximizing analysis.<sup>166</sup>

159. Important works include Netanel, *Democratic Civil Society*, *supra* note 6; Netanel, *Market Hierarchy*, *supra* note 6; Netanel, *Skein*, *supra* note 6; and Rubinfeld, *supra* note 6. For my view, see David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. (forthcoming 2004).

160. Rubinfeld, *supra* note 6, at 22.

161. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Cohen v. California*, 403 U.S. 15 (1971).

162. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

163. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992) (invalidating rule allowing government to take content of expression into account to set fee for parade permit based on expected cost of maintaining order).

164. 376 U.S. 254 (1964). I say the *Sullivan* doctrine is quasi-utilitarian because its point is to induce the production of more speech by lowering the expected cost of marginal (critical or controversial) speech. Professor Schauer makes the case that it does so inefficiently. See Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1329 (1992).

165. Such doctrines lower the expected cost of producing expression. The decision to produce involves comparing expected revenues to those costs, however, and broad use rights lower the expected revenues. If there is some sort of constitutional equilibrium analysis, it is at best ambiguous as between initial producers and downstream users. For more on this point, see McGowan, *supra* note 159.

166. For example, the right to use speech to offend others might actually produce a net loss in expression. The First Amendment seems to resemble a bet that it will not, but there is no way of knowing the answer to that question and the Court does not care. I happen to agree with this approach, but I cannot pretend it is the product of serious expression-maximizing analysis. It is a bet. See David F. McGowan & Ragesh K. Tangri, *A Libertarian Critique of University Restrictions of Offensive Speech*, 79 CAL. L. REV. 825 (1991).

Second, some consumer advocates oppose practices, such as price discrimination, that reduce consumer surplus.<sup>167</sup> If such practices increase total surplus, and if welfare is measured by surplus, then such arguments are not utilitarian. These arguments might be reconciled with utilitarianism if they were combined with an argument about the declining marginal utility of income to firms. Because firms are made up of stakeholders, however, and because many stakeholders are individual shareholders and employees, such arguments are hard to make with regard to production of content rather than to taxation of incomes.<sup>168</sup> In fact, consumer surplus arguments may cut against both utilitarianism and at least some brands of expression maximization. Rich people may spend money to buy expression, so even declining marginal utility arguments have at best ambiguous implications for demand, and thus for the production of demand-responsive content.<sup>169</sup>

#### IV. FOUR NORMATIVE BASES FOR COPYRIGHT POLICY

The discussion to this point shows that copyright is a blend of theories and values, some of which are instrumental to the production of expression. It also

167. See, e.g., Benkler, *Siren Songs*, *supra* note 19, at 67; Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1803-07 (2000); Netanel, *Democratic Civil Society*, *supra* note 6, at 373.

168. Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821 (2000); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994). But see Chris William Sanchirico, *Exchange: Should Legal Rules Be Used to Distribute Wealth? Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797 (2000).

169. Suppose maximizing total surplus benefits rich people more than poor people. Suppose further that income correlates with education, and educated people demand more unusual content (content farther from an imaginary mean of content) than relatively uneducated and relatively poorer people demand. (In other words, assume rich people are more likely than average to see *Jerry Springer* as an opera and less likely to see the television show.) On those assumptions, reducing consumer surplus to increase total surplus might increase variance in the production of expression, even if poor people had less money than they would under a more consumer-friendly regime. Because my guess is that income increases with education, and the demand for high-variance expression increases with education as well, I disagree with Professor Cohen's linking of high-variance expression and consumer surplus. See Cohen, *supra* note 167, at 1807. My analysis has problems of its own, of course, even beyond the number of assumptions it makes. To take only one, production of expression does not mean display of expression. All that high-variance speech might be unavailable to the public. On the other hand, in a consumer-friendly regime it might not exist at all. I do not claim to know which is more likely.

shows that instrumental analysis is often inconclusive, implying that policy decisions often must rest on something else. This Part discusses four different approaches to what that something else might be.

Each approach rests to a great extent on the fact that consumption of existing works is nonrivalrous. A consumer who copies or otherwise uses a work does not reduce the supply of that work available for others to use. The same is true of an author who draws on a work in the public domain to create a new work in which the author holds the copyright.<sup>170</sup> Nonrivalrous consumption means that copying a work does not harm authors in the same way that stealing a car harms the car's owner.<sup>171</sup> If one believes rights to exclude are only justified to protect owners from deprivation of work (the car-stealing sort of harm), then copyright law is at best questionable and probably should be radically curtailed.

Nonrivalrous consumption of works is the most important fact in debates over digital content. Virtually every significant argument on each side may be traced back to it. Precisely because it justifies each position, however, the fact of nonrivalrous consumption cannot distinguish among them. Nor can it explain why different analysts use the fact differently. Self-interest might explain some of the differences, but I doubt it explains very much. Both analysts favoring broad rights to exclude and those favoring narrow rights do so in good faith. The different perspectives of commercial producers and academics no doubt make different facts more or less salient to members of each group, but there are differences within groups as well as between them, so I doubt either self-interest or perspective explains everything.

I believe most of the difference is explained by varying ideological orientations, which constitute different viewpoints and starting points for analysis. Different starting points imply different end points when consequentialist analysis becomes indeterminate. In other words, to be taken seriously any copyright policy proposal must have a plausible consequentialist story to tell. There is a range of such stories, however, implying a range of plausible policies. Where you fall within that range, and which policy you prefer, depends on where you were coming from when you hit the boundary of the range.

To take just one policy issue, an analyst beginning from a Lockean starting point might recognize that some level of fair use rights is necessary because total denial of such rights would reduce welfare too much. That analyst would favor narrow fair use rights, however. A strong consumer advocate might acknowledge that some level of copy protection is necessary because total denial of protection would reduce welfare too much. That analyst would favor broad fair use rights.

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170. *E.g.*, Gordon, *supra* note 141, at 1611.

171. See Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1346 (1989) (discussing relationship between nonrivalrous consumption and perceptions of harm).

Each analyst would retreat from the policy implied by the pure version of their starting point and stop once within the range of plausible consequentialist arguments. Neither analyst could locate themselves within the set of plausible consequentialist arguments based solely on utilitarian analysis of options within that set. They would have neither the data nor the normative basis to interpret them.<sup>172</sup>

Determining why different people have different orientations that lead them to start in different places is ultimately more a psychological than logical matter.<sup>173</sup> I do believe, however, that one's choice may be influenced through reasoning about the foundational principles each side represents. This Part discusses four such principles.

### A. Property Libertarianism

As noted above, secularizing Locke's theory of property produces the argument that people have property rights in themselves, thus in their labor, and thus in the products of their labor. Locke famously qualified this argument by saying persons have property rights to the products of their labor "at least where there is enough, and as good left in common for others."<sup>174</sup>

So qualified, Locke's justification for property rights seems quite narrow. In economic terms, it justifies only Pareto superior rights, which improve the lot of the rights-holder without making anyone else worse off. It is hard to object to such rights, as it is hard to object to any Pareto superior move.<sup>175</sup> Most property rights will be costly for someone, though, and it follows that most property rights will satisfy neither the Pareto criterion nor Locke's proviso. There is, however, a strong argument that copyright satisfies Locke's proviso. Because consumption of works is nonrivalrous, an author who draws on ideas and expression in the public domain does not diminish that domain but leaves "enough and as good"

172. On the need for a normative foundation to interpret utilitarian data, see generally JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* (1983).

173. Professor Weinreb makes this point as well, in his thoughtful discussion of the fairness of fair use. See Weinreb, *supra* note 102, at 1138-39.

174. LOCKE, *supra* note 5, § 27, at 288. For a discussion of the proviso, see ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 178-82 (1974). Professor Waldron has argued this proviso does not state a necessary condition for appropriation from the common. He points out that Locke would not have everyone stand around and starve just because cultivation might not leave "enough and as good" for everyone else. He interprets that language as stating a condition in which property rights had to be recognized; they might still be recognized in cases where the proviso was not met. Jeremy Waldron, *Enough and As Good Left for Others*, 29 *PHIL. Q.* 319 (1979).

175. KAPLOW & SHAVELL, *supra* note 31, at 56. For an example of a case that is hard to justify though Pareto superior, see Sen, *Impossibility*, *supra* note 36.

for others to use. Similar reasoning persuaded Mill, who took a more utilitarian view of real property than of manufactures,<sup>176</sup> and the general argument remains powerful today.

It is hard to argue with the initial steps in the argument, which hold that persons have property rights (the right to exclude others from use) in themselves and their labor. Denying those propositions opens up the prospect of having to pay off persons who would like to batter you, or having to buy your way out of slavery. For these reasons, the argument as a whole gives copyright a very strong philosophical basis without regard to consequentialist concerns.<sup>177</sup>

In what follows, I survey various objections to this argument, most of which I conclude are unpersuasive. There are some telling utilitarian points against the argument, however, and in the last section I offer an example of how the need to maintain a credible utilitarian narrative may force an analyst (me) to deviate from the legal rules their normative starting-point implies.

### 1. Objections on Lockean Grounds

In separate articles, Professor Gordon and Professor Jeremy Waldron have each challenged the proposition that Locke's labor-based theory justifies giving authors the right to exclude others from their work.<sup>178</sup> They each contend that, even if an author does not diminish the public domain by borrowing from it, the author might harm consumers by excluding them from the author's work.

It is true that works protected by copyright might cause harm. Professor Gordon points out that a work might affect users so strongly (they might rely on it, for example) that users would be harmed if a rights-holder denied them access to a work. Logically, one could expand Professor Gordon's insight to encompass more subjective perceptions of harm, such as exclusion from works that insult people, as in Larry Flynt's attack on Jerry Falwell, or as in Professor Waldron's example of a person who needs a life-saving drug to which a rights-holder denies access because he dislikes the person's politics.<sup>179</sup> Such arguments do show that expression is significant, and that exclusion from expression may cause harm. I do not believe they refute Locke's labor-based justification for granting authors the right to exclude others from their work, however.

176. 2 J.S. MILL, *PRINCIPLES OF POLITICAL ECONOMY* ch. 2, § 6 (1872) ("When private property in land is not expedient, it is unjust. It is no hardship to any one, to be excluded from what others have produced: they were not bound to produce it for his use, and he loses nothing by not sharing in what otherwise would not have existed at all."), available at <http://socserv.mcmaster.ca/econ/ugcm/3113/mill/prin/book2/bk2ch02>.

177. See, e.g., Hughes, *supra* note 18, at 315, 329.

178. Gordon, *supra* note 5, at 1582-86; Waldron, *supra* note 5, at 867.

179. Waldron, *supra* note 5, at 866. Some might say of this example that the right to exclude caused death. Strictly speaking the disease would have done that, though by denying a cure the right to exclude might be considered a joint cause.



The argument Professors Gordon and Waldron advance deals with two different periods of time. In the first, an author creates a work, borrowing whatever he needs from the public domain. The second period is a later time, when the author has introduced the work to the market either by releasing the work under a naked license or, more likely, by transacting (directly or through firms) with consumers. Locke's proviso constrains only the first state of affairs. Under his argument, property rights either should or should not be recognized when the author has taken from the common and either has or has not left "enough and as good" for others. The author's borrowing in the first period did not diminish the ideas and expression in the public domain, and that is all Locke required to recognize property in the product of one's labor.<sup>180</sup>

Professor Gordon and, to a lesser extent, Professor Waldron both derive their theory of harm from the second period, when they believe consumers might suffer if an author excluded them from access to an existing work. This harm may be real, but under Locke's approach it would justify denying property rights only if the author's work were part of the common and the author's exclusion therefore violated Locke's proviso. Locke did not treat the product of labor as part of the common, however. The product of the author's labor belonged to the author.<sup>181</sup> These second-period arguments therefore do not refute the Lockean justification for assigning to an author the right to exclude others from her work.<sup>182</sup>

In fact, many of the examples Professors Gordon and Waldron advance rest on consumer demand and consumption externalities rather than on the author's borrowing.<sup>183</sup> It is easy to see this point if we consider failed works.<sup>184</sup> Assume two authors, A and B. A writes *The Lion King*. B writes *Mollusks of the Upper*

180. See Hughes, *supra* note 18, at 315 (stating that "the common is a concept discussed only in connection with the creation of property").

181. See LOCKE, *supra* note 5, § 34, at 291 ("He that had as good left for his Improvement, as was already taken up, needed not complain, ought not to meddle with what was already improved by another's Labour: If he did, 'tis plain he desired the benefit of another's Pains, which he had no right to, and not the Ground which God had given him in common with others to labour on, and whereof there was as good left, as that already possessed, and more than he knew what to do with, or his Industry could reach to."); see also NOZICK, *supra* note 174, at 181-82.

182. If Locke's proviso applies both when an author borrows from the common to create a work and when the author's work enters the market, then licensing imposes costs that should count as harm. The result is an argument for doing away with copyright altogether rather than an argument for weaker protection, which is the argument Professor Gordon advances.

183. Professor Waldron's drug example is not reliance-based, but his ultimate conclusion rests on reliance. See Waldron, *supra* note 5, at 866-67.

184. Most copyrighted works are failures and would not generate consumer reliance interests. See Easterbrook, *Cyberspace*, *supra* note 17, at 106 ("Most inventions receive no royalties; about ten percent earn significant returns, and a very few have huge payoffs. Most books have few sales. Most songs are never sung in public.").

*Mississippi*. When they create their works, both borrow from the common and leave it undiminished. At this point, they have the same Lockean claim (or lack thereof) to property in their work.<sup>185</sup>

Suppose consumers demand A's work, and that demand is so high her work becomes a ubiquitous cultural icon. Suppose consumers have no interest in B's work. Widespread demand generates high levels of use, which make reliance arguments plausible. A might harm others if she pulled her work from the market.<sup>186</sup> B would not. Under the (somewhat different) arguments of Professors Gordon and Waldron, B has a Lockean property right in his work because consumers do not like it. A has no such right because consumers like her work so much (derive so much utility from it) that they come to rely on it.

On this account, the strength of the case for property rights varies inversely with the utility of a work, at least if utility is measured by demand. The better your work is, the less it is yours. This is so even though A and B took equivalent amounts from the common and contributed protected works to the market. I do not find this implication normatively appealing. More to the point, it suggests that, with regard to their respective definitions of harm, Professor Gordon's and Professor Waldron's arguments demonstrate the risk that property will cause harm once recognized without refuting Locke's justification for recognizing property in the first instance.

In addition, there are several reasons to believe the harm from exclusion that drives these arguments is probably not very severe or very common. For one thing, some of the examples Professor Gordon and Professor Waldron use do not represent typical copyright disputes. Both arguments use drugs as an example, which makes a reliance claim plausible but which puts a case more appropriate to a debate over patent law than copyright. Because it sanctions only copying, not independent creation, copyright simply does not preclude as much creative activity as patent.<sup>187</sup>

A related point is that, apart from some forms of software, most people and firms do not have significant reliance interests in continued access to most copyrighted works.<sup>188</sup> Copyright's most significant application is to movies,

185. See Hughes, *supra* note 18, at 309 ("For copyrighted works, no statutory provision demands 'value.' Indeed, thousands of worthless works are probably copyrighted every month. Bad poetry, box office failures, and redundant scholarly articles are not denied copyright protection because they are worthless or, arguably, a net loss to society.").

186. Disappointed children would miss the one-hundredth viewing, and so on.

187. This is a point the Court rightly stressed in *Eldred v. Ashcroft*, 537 U.S. 186, 216-17 (2003) (distinguishing scope of copyright and patents). For an argument that independent creation may not be much of a defense, see Litman, *supra* note 3, at 1004-05.

188. There are exceptions to this general statement of course. My guess is they would cluster around the more utilitarian branches of copyright, as with operating system

records, books, magazines, newspapers, and software.<sup>189</sup> No one is going to die if Disney suppresses comic books showing Mickey and Daisy Duck having sex, or if it decides to pull *The Lion King* from distribution, which it has no incentive to do anyway.<sup>190</sup> Such interests as people do have count in utilitarian analysis, of course, and there are free speech externalities to consider—the First Amendment does not ask whether people will die if speech is suppressed; quite the opposite. Nevertheless, with regard to reliance interests the stakes in most cases are probably not very high.

In addition, bargaining might ameliorate much of the harm about which Professors Gordon and Waldron are concerned. Contracting mediates between first-period production and second-period consumption.<sup>191</sup> If persons wanted a guaranteed supply of works, they could bargain for it. If they could not secure a guarantee, they would rationally adjust their expectations accordingly, implying that they would not have a reliance interest the law should recognize.<sup>192</sup>

software.

189. The modal copyrighted work is probably an e-mail (a point for which I am indebted to Gene Volokh), a type of work more likely to raise privacy than reliance concerns.

190. Which raises the point that both Professor Gordon's example and Professor Waldron's examples implicitly work from either an irrational actor model or a model in which rights-holders maximize something other than profits. Professor Gordon does not suggest a maximand for her enzyme rights-holder; Professor Waldron suggests spite. But why would the desire to withhold a work motivate someone to create it? In the long run, unless the spiteful rights-holder is indifferent to money, a more profit-oriented firm should be able to buy the rights (since they will make larger profits by selling to everyone who can pay), thus eliminating the spite problem. The patient may die in the interim, of course—a version of Keynes's objection to long-run equilibria—but the notion of the patient whose politics destroy the value of his money is improbable in the first place.

191. Bargaining also answers a second condition Locke places on recognition of property rights—that rights not be recognized in wasteful amounts of goods, wasteful being defined as more than the laborer can consume. LOCKE, *supra* note 5, § 46, at 300.

192. For this reason, both bargaining and standard-setting procedures might ameliorate the harms Professors Gordon and Waldron mention. Bargaining is discussed in the text. On standard-setting, to take Professor Gordon's mathematician as an example, Gordon, *supra* note 5, at 1568, it is not clear why persons considering adoption of a standard would ignore the risk that a single person would retain a right to exclude others from using the standard once it was adopted. Fights over precisely that issue are what doomed Java as a de jure ISO standard. See Mark A. Lemley & David McGowan, *Could Java Change Everything? The Competitive Propriety of a Proprietary Standard*, 43 ANTITRUST BULL. 715 (1998); David McGowan, *The Problems of the Third Way: A Java Case Study*, in REGULATING THE GLOBAL INFORMATION SOCIETY 243 (Christopher T. Marsden ed., 2000) (noting possibility of contractual enforcement of author promises made to induce adoption of a good in markets likely to converge on de facto standards). In any event the mathematician relies on Arabic numerals only because they are a standard, which is to say because of consumption externalities generated by demand. His

Lastly, the reliance argument casts consumers as relatively passive persons who depend on others for their ideas. Professor Waldron makes this point with his statement that copyrighted works are integral to our expressive environment, and “this environment, having been thrust upon us by those in whose interests cultural commodities circulate, is now the only one we have, so that it is now in a sense unfair to deny us the liberty to make of it what we will.”<sup>193</sup>

Modeling information consumers as passive dependents creates a tension with the classic First Amendment view of autonomous citizens deliberating over ideas in the active practice of self-governance. Even where there is no question that plaintiffs justifiably rely on expression, as when they use a mushroom guide to pick, cook, and eat poisonous mushrooms, courts are reluctant to recognize that reliance interest for purposes of tort law.<sup>194</sup> This is partly because allowing consumers to sue publishers raises the expected cost of publishing, implying marginal reductions in expression.

Another part of the answer is that, for content within the realm of public discourse, courts do not give legal weight to consumer reliance on expression. In such cases, courts instead employ a stylized vision of expressive interaction in which listeners are treated as autonomous agents responsible for their engagement with speech. If they truly are passive dependents, as the copyright reliance notion implies, it is not clear why they should be prevented from suing broadcasters whose violent programs they mimic, rock stars whose songs goad them to suicide, or video games that prompt antisocial behavior.<sup>195</sup> (Such suits get past the pleading stage sometimes, but only when the court reads the expression at issue

reliance is not based on the commons having been deprived of the stuff of which numeric systems are made.

193. Waldron, *supra* note 5, at 885; *see also* Gordon, *supra* note 5, at 1582 (“Once put into the cultural stream by an initial creative person, intellectual products may be impossible for others not to use. Consider someone trying independently to invent a paper clip after having seen one. Some inventions ‘infect’ one immediately with knowledge of their workings.”).

194. *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033 (9th Cir. 1991).

195. Cases dismissing such claims as a matter of law include *Waller v. Osbourne*, 763 F. Supp. 1144, 1151 (M.D. Ga. 1991), *aff’d*, 958 F.2d 1084 (11th Cir. 1992) (sustaining demurrer against complaint alleging songs of Ozzie Osbourne caused plaintiff’s son to shoot himself); *McCullum v. Columbia Broadcast Systems, Inc.*, 202 Cal. App. 3d 989 (Cal. Ct. App. 1988) (same); *Olivia N. v. National Broadcasting Cos.*, 126 Cal. App. 3d 488, 495 (Cal. Ct. App. 1981) (“[T]he television broadcast which is the subject of this action concededly did not fulfill the incitement requirements of *Brandenburg*. Thus it is constitutionally protected.”); and *DeFillipo v. National Broadcasting Cos.*, 446 A.2d 1036, 1041 (R.I. 1982) (holding that, as a matter of law, stunt performed on the Johnny Carson show did not incite imitation by plaintiff’s son, in which he hanged himself). On video games, *see American Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

as not implicating free speech values or where a plaintiff alleges facts satisfying an exception to free speech protection.<sup>196</sup>)

Whatever one thinks of the rulings in such cases, the view of citizens as passive persons who consume and copy but cannot produce their own expression is at odds with arguments that seek to adapt free speech principles to limit the strength of copyright. Perhaps equally important, citizen passivity is not a constant. It presumably will be affected by how easy (cheap) copyright law makes it to copy an existing work rather than by trying to create a non-infringing work of one's own. Presumptions regarding citizen passivity or engagement may be partially self-fulfilling prophecies. I return to this point in Part IV.B.

Professor Seana Shiffrin offers different arguments to show that Locke's theory does not justify strong natural rights in authors.<sup>197</sup> One of these deals mostly with the proviso, which I have discussed already and will skip over here. The other maintains that Locke's theory only justifies recognizing property rights in certain sorts of things, and intellectual property is not one of those things. The first premise of the argument sets a default rule: all property is held in common unless privatization can be justified.<sup>198</sup> The second premise sets the standard of justification: property may be privatized only where, "because of the nature of the property," privatization is "necessary to make effective use of the grant of resources and to fulfill the right of self-preservation," which is what Locke used to justify taking anything from the common in the first place.<sup>199</sup> Where "fully effective use" of a thing may be achieved without allocating rights in that thing, no allocation of rights is justified.<sup>200</sup>

Professor Shiffrin concludes this standard cannot be met with regard to intellectual property. She believes that "intellectual products are put to their best use through common use and contemplation" so "there is no reason emanating

196. An unusual recent case in which the defendant stipulated to facts supporting an inference that they intended their book (which the Fourth Circuit called a manual) to aid and abet murder has unsettled things a bit. *Rice v. Paladin Enters.*, 128 F.3d 233 (4th Cir. 1997); see also *Wilson v. Paladin Enters.*, 186 F. Supp. 2d 1140 (D. Or. 2000); *Byers v. Edmondson*, 712 So. 2d 681, 690 (La. Ct. App. 1998) (allowing plaintiffs to proceed on claim alleging that producers of the movie *Natural Born Killers* intended it to incite mass murder).

197. By which she means rights that give authors the power to exclude others from copying and distributing their works or from making derivative works. She agrees that authors should be paid, but proposes administrative schemes such as compulsory licensing rather than market transactions driven by bargaining under the shadow of injunctions against unlicensed uses. Shiffrin, *supra* note 5, at 142.

198. Professor Shiffrin links this premise to Locke's view that God gave resources to all persons in common, though she believes common ownership can be justified on its own terms, without the theological connection. *Id.* at 144 n.19.

199. *Id.* at 149; see LOCKE, *supra* note 5, § 25, at 285-86.

200. Shiffrin, *supra* note 5, at 152.

from the nature of the property itself and the conditions of its full, effective use for departing from the common property presumption."<sup>201</sup>

One could debate whether common ownership is a defensible default rule absent Locke's premise that God gave the world to all persons in common. Even taking common ownership as a default, however, I disagree with this analysis on three grounds. First, it is not clear what fully effective use means, and therefore it is not clear that rights are unnecessary to achieve it. If fully effective use is a maximization concept, a maximand must be chosen. That means a host of familiar questions must be answered. Do we maximize welfare or something else, short-term or long-term, and how do we measure progress toward the goal, especially if we must choose between judicial or agency regulation and bargaining? Most importantly, how do we deal with tradeoffs, such as the familiar one between allocative efficiency (which I believe is what Professor Shiffrin has in mind, at least as to the work if not its inputs) and dynamic efficiency?<sup>202</sup>

Second, the answer to that question is relevant to the proposition that intellectual property has a "nature" that may be related to effectiveness. I concede it is in the nature of copyrighted works that their consumption is nonrivalrous. (As I mentioned earlier, however, that does not mean that all consumption is costless, much less that it creates net benefits.<sup>203</sup>) Copyright covers many different kinds of works, however, so it is risky to generalize beyond nonrivalrous consumption. Professor Shiffrin recognizes this point when she says authors might need to control some works (such as diaries or letters)<sup>204</sup> but it is not clear what distinguishes these works from others (perhaps a Hegelian attachment to the work) and the point is actually a general one. Once one

201. *Id.* at 162; *id.* at 156 ("[B]y its nature," the "fully effective use of an idea, proposition, concept, expression, method, invention, melody, picture, or sculpture generally does not require . . . prolonged exclusive use or control."); *id.* at 162 ("[T]he ownership of the expression is not necessary to make full, effective use of the idea or its expression."); *id.* ("[T]he products of intellectual labor need not be exclusively owned for proper use of either these products themselves or of the underlying common."). I tend to agree with Professor Shiffrin with regard to property rights in ideas, but copyright protection extends only to expression, not the ideas expressed. 17 U.S.C. § 102(b) (2000). Acknowledging that this is not the clearest distinction, I limit my discussion in the text to expression and not ideas.

202. See Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1026 (1987). This is just a variation on the debate between Schumpeterian and Arrowian innovation. See David McGowan, *Innovation, Uncertainty, and Stability in Antitrust Law*, 16 BERKELEY TECH. L.J. 729, 732 (2001).

203. See *supra* text accompanying note 150.

204. Shiffrin, *supra* note 5, at 157.

recognizes that some uses of works create social costs,<sup>205</sup> and perhaps net social losses,<sup>206</sup> then there is no basis to say that nonrivalrous consumption implies anything about the nature of copyrighted works relative to any particular maximand constituting fully effective use.<sup>207</sup>

Third, however “fully effective use” is defined, the question whether copyrighted works must be owned to achieve such use would seem to be an empirical one. Commercial rights-holders spend a lot of money managing intellectual property. Software firms control the evolution and maintenance of their products to make them work with complementary products and to maintain compatibility across product generations.<sup>208</sup> For products that serve as de facto standards, such as Windows, that management may create much of the value of the product. Even open-source software production is characterized by hierarchical management of large projects.<sup>209</sup> Less utilitarian works are heavily managed, too. Publishers manage the introduction of books to the market in order to maximize interest in the book and thus maximize revenue.<sup>210</sup> Record companies may actually do more to create music “stars” than the stars themselves do.<sup>211</sup> The derivative right (which Professor Shiffrin does not like) may be needed to provide adequate returns for costly transformative projects, such as turning a novel into a movie.<sup>212</sup>

205. Consider a hypothetical Mickeyporn movie, or the all-too-real William Shatner cover of *Lucy in the Sky with Diamonds* (by no means listen at <http://www.pathcom.com/~boby/lsd.htm>).

206. The courts in the Microsoft antitrust litigation seemed to believe this had been the case with respect to Microsoft’s treatment of Sun’s Java technologies. See David McGowan, *Has Java Changed Anything? The Sound and Fury of Innovation Litigation*, 87 MINN. L. REV. 2039 (2003).

207. Unless fully effective use is defined to mean whatever use any person desires, without regard to how that use affects others. It is not clear to me, however, how one could justify a definition of “fully effective” that did not take costs into account.

208. See, e.g., Lemley & McGowan, *supra* note 192.

209. See David McGowan, *Legal Implications of Open-Source Software*, 2001 U. ILL. L. REV. 241, 269.

210. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 509 (1945). It is possible that revenue has not much to do with fully effective use, which brings us back to my first point, but since money is simply a ratio among social resources, it presumably has something to do with effective use.

211. For an interesting anecdote, see John Seabrook, *The Money Note; Can the Record Business Survive?*, THE NEW YORKER, July 7, 2003, at 42.

212. See Netanel, *Democratic Civil Society*, *supra* note 6, at 378; see also Glenn C. Loury, *Market Structure and Innovation*, 93 Q. J. ECON. 395 (1979) (developing model in which excessive competition diminishes investment in research and development).

In other words, industry practice suggests that before a work may be the subject of common use and contemplation, it must be produced and consumers must learn about it and separate it from the many alternative subjects available to them. These facts give reason to believe intellectual property is in fact the sort of thing that may have to be managed to be used effectively. That firms across so many copyright industries actually do manage their rights extensively is significant evidence in support of this view.<sup>213</sup> This point is even stronger if the risk (expected cost) of tarnishment is taken into account, or if effective use refers to the yield a work provides, net of search costs.<sup>214</sup> Even on Professor Shiffrin's account, it is proper to grant exclusive rights in things that need to be managed to be used effectively.

Finally, in a very thoughtful student note Benjamin Damstedt argues that Locke's theory does not justify strong intellectual property rights because such rights lead to waste, which Locke condemned.<sup>215</sup> Locke maintained that no one could take from the commons more than they could use. If a man did, he "invaded his Neighbour's share, for he had *no Right, farther than his Use . . .*"<sup>216</sup> Locke justified accumulation of producer surplus on the ground that producers could sell or give away what they did not need. Market transactions and gifts dispersed surplus to society, eliminating waste and justifying property rights in both what the producer needed for personal use and in the surplus. If a producer maintained a surplus and let it rot, however, "he took more than his share, and robb'd others."<sup>217</sup>

Damstedt argues that unsatisfied consumer demand amounts to waste. The basic idea is that because consumption of works is nonrivalrous, there is no excuse for not providing copies of a work to consumers who want it but cannot

213. It may be that firms that sell rights for a living over-invest in rights management, though because rights management is costly one would expect competing firms to equilibrate that cost with the value it produces.

214. Professor Yochai Benkler refers to the filtering idea as the "Babel objection" to weak intellectual property rights. Benkler, *Siren Songs*, *supra* note 19, at 105-06. He agrees that filtering and vouching for content are important functions necessary for a robust information environment, but argues that these functions could be achieved equally well without the rights-intensive production structure we have now. *Id.* at 108. Maybe, though if filtration and accreditation are costly, those costs have to be covered somehow, and it is not clear that Professor Benkler's filtration alternatives account for the costs needed to create a bandwagon effect that turns a demo tape or book by an unknown author into a subject of common deliberation. He may be right, but the need for such functions and the cost of performing them call into question the notion that intellectual property is by its nature free from the need for management. For more on this point, see Netanel, *Market Hierarchy*, *supra* note 6, at 1920-22.

215. See Damstedt, *supra* note 71.

216. LOCKE, *supra* note 5, § 37, at 295.

217. *Id.* § 46, at 300.



afford to pay the rights-holder's price. The rights-holder therefore loses the right to exclude such consumers from making copies of the work.

There are three problems with this analysis. First, because consumption is nonrivalrous, the producer of a work has not deprived consumers of anything in the common. In contrast, Locke's producer deprived consumers of acorns they might have gathered themselves if the producer had left them on the ground. Unmade copies of a work do not rob anyone of anything. Second, as Damstedt acknowledges, consumer reservation prices cannot be tested without an initial assignment of rights. That means the right to exclude has to be assigned before one decides whether there is unmet demand; consumers who could obtain the right to copy a work by understating their reservation price would have every incentive to do so, and the entire market for the work, which Locke used to justify rights in surplus, would unravel.

Third, there is something distinctly odd about saying copies that have not been made are "wasted." Locke's acorns were wasted because resources were consumed in their creation but they were left to rot on the ground, dissipating the resources without any productive use. That is not true with copies that have not been made. If Harper & Row only prints ten thousand copies of a book for which there is a notional demand (however that is calculated) for fifteen thousand, nothing is gained by saying the non-existent copies go to waste. Because allowing free copying would unravel the market institutions Locke described as the answer to the waste problem, the argument does little to refute the Lockean justification for copyright.

## 2. Objections to Individual Authorship

Lockean theory presumes an author who deserves the right to exclude others from the work because she created the work through her labor. This presumption is vulnerable to two arguments. The first deals with the author. Some scholars deny that individual authors actually produce works through their own labor. The premise of the argument is that authors are influenced and in some sense constituted by their environment. They are more conduits for translating or compiling cultural inputs than heroically imaginative originalists.<sup>218</sup> This view suggests it is arbitrary to award property rights to those who merely capture the cultural influences that give a work such substance as it actually has.

The second argument deals with the work. The idea is that works do not exist in the abstract but are the product of creative interactions among a text, a community of readers, and a context. *Hamlet* means one thing to one person, another thing to another. These meanings are not inherent in the text (if they were, how could they vary?) but are negotiated and understood among persons

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218. For a thoughtful version of this argument, see Litman, *supra* note 3, at 966, 1011 (discussing the relevance of cultural influences on authorship).

sharing interests and concerns that allow them to communicate with each other about the text and, through their own communication, to arrive at understandings of the text. When interests and concerns vary, meaning may vary, too: a text such as Auden's *September 1, 1939* may mean one thing to a reader before a cataclysmic event such as the terrorist attacks of September 11, 2001, and another thing (or at least other, additional things) after those attacks.<sup>219</sup>

If and to the extent this argument is right, then in an important sense it is not the author's efforts (or at least not solely those efforts) that express ideas and create understandings. On this account, ideas and understandings are owed to the different backgrounds, orientations, creative impulses, and so on, which a community of readers brings to the text.<sup>220</sup> All works are joint works, or perhaps derivative works, to which readers contribute as much as authors. By parity of reasoning, one could argue that readers are entitled to rights as co-creators of the works they read, and authors are not entitled to exclusive rights.

Each objection is partially true. Neither objection justifies rejecting the Lockean theory of copyright, however. The conduit argument does not deny that authors labor to create works. The argument says only that authors have something to labor on, which must necessarily come at least in part from outside themselves. That is true enough, but it is little more than a variation on the commons theme. And even if it is true that all authors may be conduits for social influences, they are not all the same conduit. Different authors are exposed to different aspects of society, and different authors exposed to the same aspects of society view them differently. All authors who work to express what they perceive have Lockean claims to the product of this labor. So long as copyright protects only that aspect of an author's synthesis of cultural forces that expresses the author's own perception, it is no objection to copyright that the author is influenced by society.<sup>221</sup>

Regarding works, it is true that different readers interpret works differently, as does even the same reader in different contexts. It is not clear why that matters in deciding whether to assign exclusive rights in the works they interpret. Even if the meaning of *Hamlet* is produced and reproduced by different communities of readers, it does not follow that there is nothing to which a right to exclude may attach. Each reading draws upon the author's text. Reading may be a negotiation over the shape of the table, in other words, but the author builds the table. The

219. For a concise summary of this point, see STANLEY FISH, *Is There a Text in this Class?*, in *THE STANLEY FISH READER* 41 (H. Aram Veesser ed., 1999).

220. See Rubinfeld, *supra* note 6, at 37-38.

221. I must add that I find it odd that this "death of the author" argument is so popular in academe, where tenure and promotion are based on one's marginal contributions to a body of work and in which plagiarism is considered professional misconduct. If the notion of a marginal contribution attributable to an author is a myth, and if all works are just alternative compilations of social data sets, it is hard to justify either standard, which is to say it is hard to justify what it is that we say we do.

text's invariance to those interpretations is in fact precisely what justifies granting the author rather than any or all communities of readers rights in the work itself. The author contributes to all readings; no individual reader nor even a particular community does that.

Lastly, it is worth noting that the strong collectivization inherent in the first objection undermines two free speech defenses of user rights. The first defense rests on different theories of how speech relates to individual autonomy and imagination.<sup>222</sup> If authors are merely conduits for social forces, it is hard to see why an author has an autonomy interest in performing the conduit function (i.e., speaking and writing). The author-based argument is also at odds with the idea that public discourse is more robust if a wide array of speakers contribute differing opinions.<sup>223</sup> If we are all just conduits there is no particular reason to expect differing opinions, the presence of which suggest there is something wrong with the "death of the author" argument as applied to legal problems.

### 3. Objections Based on Use of the Market

A final objection to Lockean theory would distinguish between works an author wished to keep from the market and works the author sought to profit from by trading in the market. Shania Twain's cave tapes and J.D. Salinger's letters would be in the former category; their published songs and books would be in the latter. The argument would be that an author may retain complete control of unpublished works but, if they choose to enter the market, they effectively consent to rules such as fair use, first sale, and so on. This constructive consent notion distinguishes this argument from the reliance arguments we saw in the last section.<sup>224</sup>

This argument has some appeal. Presumably neither producers nor consumers will engage in market transacting unless doing so makes them better off than not doing so. It follows that engaging in market transactions may imply consent to background legal rules, at least in the sense that such rules at least do not destroy the whole value of the transaction.

The argument does not undercut the Lockean case for intellectual property, however, because it provides no basis for distinguishing among possible sets of market rules. One could say that by entering the market authors consent to consumer rights; one could equally say that by entering the market consumers

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222. See, e.g., Benkler, *Siren Songs*, *supra* note 19, at 67; Rubenfeld, *supra* note 6, at 37.

223. See *infra* Part IV.B.2.

224. For a thoughtful argument along the lines discussed in this paragraph, though emphasizing the idea of quid pro quo more than the idea of constructive consent, see Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. REV. 1, 5 (1995).

consent to Lockean rights. By itself, the constructive consent notion offers no basis for choosing among alternative regimes. It therefore does not provide a basis for criticizing any regime. The only set of rules this argument would rule out is the set (if one exists) that destroys all market transacting.

#### 4. Utilitarian Objections

If I am right to say that Lockean theory justifies granting authors the right to exclude others from their works, then there are serious utilitarian objections to my position. For example, it is very hard to square existing fair use rights, or any other set of fair use rights, with Lockean theory. That is troubling, because my hunch is that some level of fair use rights increases welfare, meaning that a pure Lockean copyright would impose welfare losses. It is also hard to see why Lockean theory does not justify rights in ideas, assuming for the moment that they could be made concrete enough to protect. Abolishing the rule that copyright extends only to expression and not ideas would be a very risky move, to say the least.<sup>225</sup>

As I said earlier, however, the available normative positions are only starting points for analysis. One could preserve the Lockean foundations of copyright while blunting much of the force of utilitarian objections by maintaining the idea/expression dichotomy and allowing fair use only in circumstances in which a rational, profit-maximizing rights-holder would be unlikely to license a use that would be likely to increase welfare.<sup>226</sup>

In practical terms, this would mean that works that attack existing works, as in *Campbell*, should be presumed fair. This presumption is justified on the ground that at least some rights-holders will maximize noneconomic values and their licensing decisions will therefore be unreliable proxies for welfare.<sup>227</sup> The same presumption should extend to commentary and reviews, which contribute

225. 17 U.S.C. § 102(b) (2000).

226. Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67 (1992) (suggesting narrow scope for fair use that attacks a work, though not for use that uses a work to attack something else).

227. It is worth noting that the examples scholars use to demonstrate why strong copyrights threaten society often involve rights-holders who maximize something other than profit. Five of the six cases Professor Netanel cites at the beginning of his First Amendment analysis of copyright, for example, involve authors who appear to maximize something other than profits. They include Adolf Hitler, two churches, the Minneapolis police department, and J.D. Salinger. The sixth author is Larry Flynt, who arguably had a political axe to grind in his dispute with Jerry Falwell. See Netanel, *Skein, supra* note 6, at 15. The estate of Margaret Mitchell, author of *Gone with the Wind*, might be added to this list. See *supra* note 154. These examples are significant, and they raise important concerns. They are probably not typical, however, and it is fair to ask how far they should guide regulation of market-driven profit-maximizing activity.

to discourse and save consumers from buying works they will not like. A consent requirement would destroy the independence of comment necessary to make commentary and reviews useful.<sup>228</sup> Copying to reverse-engineer a work and comment on it should be presumed fair on similar grounds.

On this view, noncommercial uses should enjoy no special privileges, and non-transformative uses should rarely if ever be tolerated. Personal copying for home use, as in *Sony*, causes essentially no disutility, while creating some utility for individuals, so it should be tolerated. (Transaction cost analysis supports this conclusion as well.) Uses that respond to personal attacks, as in *Hustler*, should be presumed fair on self-defense grounds, though that presumption should not extend to group-based claims of harm.<sup>229</sup>

The upshot of all this is that in cases where authors are willing to license, licensing is preferred and Congress has a sound normative basis for demanding that users obtain consent for their uses. When authors are not willing to license, and there are reasons to believe social benefits from transformative use are high, the law should allow such uses to proceed without the author's consent. It is certainly possible to qualify the Lockean case in other ways, but this is the one that makes most sense to me.

### B. *Speech Libertarianism*

I will call the second normative approach to copyright policy speech libertarianism. Unlike property libertarianism, which in its pure form is nonconsequentialist (though consequentialist claims for it are often made), speech libertarianism is an interesting blend of nonconsequentialist assertions and instrumental predictions.

Speech libertarians point out that consumers may use copyrighted works to create expression of their own. Consumers have an autonomy interest in expressing their views, which free speech jurisprudence presumes to be important to individual intellectual development, social progress, democratic self-governance, and the other ends commonly said to be advanced by free expression.<sup>230</sup> Speech libertarians emphasize that when an author seeks to enjoin infringement she may also seek to suppress expression. Protests against

228. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 118 (2003).

229. Public distribution of decryption devices should not be presumed fair. Such distribution should be subjected to thorough utilitarian analysis. That analysis will likely be indeterminate. In that case the issue will be decided by allocating the burden of proof. Lockean theory and some utilitarian conjectures justify allocating that burden to the defendants, as is done now. Congress may be persuaded to alter that judgment, but there is no analytical basis for a court to overturn it.

230. For a review of such theories see FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982).

“copyright censorship” nicely capture this aspect of the speech-libertarian position.<sup>231</sup>

For speech libertarians, nonrivalrous consumption implies that a consumer’s use of a copyrighted work to produce additional expression, such as parody, does not prevent anyone else from consuming the work. To this extent, consumer use does not harm producers, and therefore satisfies a possible conception of the harm principle. Drawing an analogy to cases such as *Cohen v. California*<sup>232</sup> and *Hustler Magazine v. Falwell*,<sup>233</sup> which establish a constitutional right to offend others, speech libertarians insist that offense to an author or devotees of a work does not count as harm. If consumers do not like a parody or criticism, they do not have to read it, but no one should be able to deny the parody to those who would like to read it.<sup>234</sup>

Allowing unlicensed uses may reduce an author’s income, of course. That suggests a limit to speech libertarianism: its reach may not be so broad that it destroys incentives to create the works speech libertarians would like to use. For this reason, speech libertarianism depends for its appeal on the proposition, more or less explicit in different statements of the argument, that existing copyright laws give authors too much economic power, or at least enough economic power that broad fair use rights will not reduce the production of expression too much. If and to the extent that proposition is wrong, the speech-utilitarian view is self-defeating.

I will explore two particular aspects of speech libertarian thought as it relates to copyright policy. The first is the notion that some speech is too important to leave to the mercies of private actors wielding copyrights; the second is that copyright must be limited to make public discourse more robust.

## 1. Distinguishing Special Speech from Ordinary Expression

The first argument distinguishes two sets of expression. One is “ordinary” expression. Normal copyright doctrine applies to expression in that set, including preliminary injunctions where infringement is likely and permanent injunctions where infringement is proved. The other set is special speech, for which the First Amendment or the fair use doctrine provides a defense against copyright suppression.

Several scholars have endorsed the special speech idea to one degree or another. A distinction between ordinary and extraordinary expression was at the

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231. See, e.g., Lemley & Volokh, *supra* note 76; Patterson, *supra* note 113, at 366.

232. 403 U.S. 15 (1971).

233. 485 U.S. 46 (1988).

234. For an excellent example of speech libertarianism in practice, see *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001), holding a parody of *Gone with the Wind* to be protected by the fair use doctrine.

heart of Professor Nimmer's famous article on copyright and the First Amendment.<sup>235</sup> At least part of Professor Gordon's non-commodification thesis might be applied in a similar way, though her examples deal more with allowing persons attacked by expression to defend themselves than with the social significance of expression.<sup>236</sup>

A distinction between ordinary and special speech is intuitive and in some ways appealing, but it encounters serious difficulties as a basis for policy. Most importantly, any argument that the First Amendment should protect special speech against copyright must explain how to designate which speech is special. Consider four paradigm examples of expression many would consider too important to leave to private ordering: Abraham Zapruder's film of President Kennedy's assassination;<sup>237</sup> Ronald Haebler's photographs of the My Lai massacre;<sup>238</sup> George Holliday's videotape of police officers beating Rodney King;<sup>239</sup> and the Los Angeles News Service's videotape of rioters beating Reginald Denny after the officers were acquitted by a Simi Valley jury.<sup>240</sup>

Which of these examples amounts to "special" speech? If the decision turns on the social importance of the expression, each example probably qualifies.<sup>241</sup> If speech is special only when the rights-holder refuses to license a work, however, these four would again be treated alike but none would receive special

235. Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1181 (1970). For a related argument drawing on Nimmer, see Netanel, *Skein*, *supra* note 6, at 4-14.

236. Gordon, *Excuse and Justification*, *supra* note 127, at 171-72.

237. Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968). The United States government took the film in 1998, see Terry Frieden, *Ownership of Zapruder Film Passes to Government: Stalemate on Compensation for Family Continues*, CNN, Jul. 31, 1998, at <http://www.cnn.com/ALLPOLITICS/1998/07/31/zapruder>, and judicial arbitration later awarded the Zapruder family sixteen million dollars for the rights. See *Zapruder Heirs to Get \$16 Million for JFK Assassination Film*, CNN, Aug. 3, 1999, at <http://www.cnn.com/US/9908/03/zapruder/>.

238. NIMMER & NIMMER, *supra* note 139, at 119; see <http://www.asiapac.org.fj/cafeapacific/resources/aspac/viet.html>.

239. See George Holliday's Rodney King Beating Video: Official Web Site, at <http://www.multishow.com.ar/rodneyking> (last visited Jan. 23, 2004).

240. Los Angeles News Serv. v. Reuters Tel. Int'l, Ltd., 149 F.3d 987 (9th Cir. 1998) (rejecting fair use defense and affirming award of statutory damages for foreign use of tape); Los Angeles News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119 (9th Cir. 1997) (reversing summary judgment holding that unlicensed uses were protected fair use; remanding for trial).

241. A conclusion implied by Neil Netanel's comment that insofar as public discourse is concerned it does not matter whether a potential transformative user faces prohibitive licensing costs, transaction costs, or a simple refusal to license. Netanel, *Democratic Civil Society*, *supra* note 6, at 296.

treatment because each rights-holder was willing to license the work. None of them preferred suppression to licensing.<sup>242</sup>

The distinctions cannot be based solely on the social importance of content, however, because some socially important content is costly to produce. The Zapruder and Holliday films have similar production costs—essentially zero. They are both products of amateur bystanders, employing equipment purchased for personal use, who happened to be in the right place at the right time.<sup>243</sup> Denying them copyright returns would not diminish their incentive to produce future works because they never had such incentives in mind. That is not true of the My Lai photographs and Reginald Denny videotape. Wartime pictures do not get taken without war photographers, whose costs of equipment, transportation, food, clothing, and so on must be covered.<sup>244</sup> Aerial pictures of riots do not get taken without helicopters equipped with cameras and professional journalists, whose costs must be covered as well.

If the definition of special speech takes production costs into account, the Zapruder and Holliday films would be treated as special speech because the rights-holder incurred no costs that needed to be amortized by licensing; the My Lai and Reginald Denny examples would be treated as ordinary expression. As this analysis suggests, the special speech idea deals poorly with classes of cases rather than with particular examples of important expression. In this respect, its defects resemble the defects of act utilitarianism.<sup>245</sup> Ultimately, this sort of ad hoc approach is of little help in formulating copyright policy.

More fundamentally, even if the special speech idea could justify public access to a work, it does not justify free access. The government took and paid

242. Actually, this point needs to be qualified a bit. Zapruder sold the rights in his film to *Life* magazine, which ran a famous story using the film and then decided it was unseemly to license the film. Zapruder argued that this decision breached the revenue-sharing portion of his agreement with *Life*, which decided to get rid of the issue by selling the rights back to Zapruder for one dollar. Zapruder then was willing to license the film for uses such as in Oliver Stone's movie *JFK*. As noted above, the government took the film and paid the Zapruder family for it in 1998, following price arbitration.

243. See *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 131 (S.D.N.Y. 1968) ("When President Kennedy was killed in Dallas on November 22, 1963, Abraham Zapruder, a Dallas dress manufacturer, was by sheer happenstance at the scene taking home movie pictures with his camera."). George Holliday was an Argentine immigrant who managed a plumbing store. He had just bought his camera and was learning how to use it. See <http://www.citivu.com/kla/sc-ch1b.html>.

244. The My Lai photographs are actually an exception to this statement, however. The photographs, which famously appeared in *Life* magazine, were taken by Ronald Haerberle, an Army photographer who had one Army camera and two of his own. The photographs whose rights he sold to *Life* came from his own; presumably the taxpayers covered his expenses.

245. See *supra* note 26.



for the rights to the Zapruder film.<sup>246</sup> Nothing stops the government from doing the same with other works it deems significant enough to justify public rather than private control. The proposition that important works should be available to the public does not entail the proposition that they should be available for free. That point requires justifications of its own.

I am more sympathetic to Professor Gordon's self-defense argument. At least my sense of rough justice favors allowing targets of copyrighted expression to use works that attack them when they are fighting back.<sup>247</sup> The case for fighting back requires only that we recognize that expression does things, including cause harm to others.<sup>248</sup> In a sense this is at odds with Lockean theory, but in another sense it goes no farther than saying that A's property right in a club he has fashioned does not preclude B from grabbing and swinging it when A has swung first.

Harder issues arise when a plaintiff alleges that a work harms all the members of a group to which she belongs. The basic idea is group libel in reverse, with fair use as the doctrinal hook. Suppose a black author such as Alice Randall feels *Gone with the Wind* denigrates blacks. Setting aside the limitations period, may she sue Margaret Mitchell for libel? No.<sup>249</sup> May she nevertheless employ group libel reasoning to defend her parody of *Gone with the Wind*?<sup>250</sup>

One could justify both the copying and the fair use defense in such a case on the ground that, as applied, each rule maximized expression. If those arguments are correct, however, then what does the notion of harm add? If the copying

246. It paid the family sixteen million dollars, an amount set by an arbitration panel. See *supra* note 237.

247. See *supra* text accompanying note 126.

248. For a more general discussion, see David McGowan, *From Social Friction to Social Meaning: What Expressive Uses of Code Tell Us About Free Speech*, 64 OHIO ST. L.J. 1515 (2003).

249. Plaintiffs alleging defamation claims must show the expression at issue was "of and concerning" the plaintiff, rather than some other or larger group of persons. *Rosenblatt v. Baer*, 383 U.S. 75, 82 (1966); *Blatty v. New York Times Co.*, 728 P.2d 1177, 1182 (Cal. 1986) (dismissing claim of author complaining that he was omitted from publisher's list of best-selling books). In *Beauharnais v. Illinois*, 343 U.S. 250, 251 (1952), the Supreme Court did uphold a statute authorizing suits against persons who distributed content demeaning a "class of citizens." Subsequent cases eroded the support *Beauharnais* offers group libel claims, however. See *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1200 (9th Cir. 1989) (discussing cases undercutting *Beauharnais*); *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 332 n.3 (7th Cir. 1985) (same). In *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 383 (1992), the Court did cite *Beauharnais* to show that it had in the past held some speech outside the protection of the First Amendment, but that case had nothing to do with group libel, and there is no reason to believe the citation signified a revival of the theory.

250. See Gordon, *Excuse and Justification*, *supra* note 127, at 171. Conventional fair use reasoning might be sufficient to protect the parody, of course.

causes harm relevant to conventional fair use analysis, such as lost revenue, why does the relatively diffuse harm to group members justify the relatively concrete (if possibly small) harm to an author?

If the testimony of a parodist is enough to bolster the fair use defense, one could logically extend such reasoning to say that religious groups should be able to distribute salacious content to raise money by showing the depravity of our culture, as the Reverend Falwell did, to sanitize such movies by removing nudity or cursing, or to remake movies or rewrite books to exemplify Christian principles, all on the ground that such expression assaults them as believers. Beyond cases such as the Reverend Falwell and *Hustler*, it will be difficult to apply the self-defense idea in a principled way.<sup>251</sup>

## 2. Maximizing the Variance of Expression

Another strand of speech libertarian theory advances the consequentialist claim that narrow authorial rights and broad user rights will lead to more robust public discourse. It is hard to measure the robustness of public debate; I use variance in a notional distribution of publicly available expression as a proxy for robustness.<sup>252</sup>

Contrary to the notion that authors are passive conduits for social influences, the gist of this argument is that broad user rights imply more speakers, which implies a greater variety of expression and thus more robust public discourse. Professor Netanel believes robustness of expression is inversely related to media concentration,<sup>253</sup> though he agrees the relationship is not linear.<sup>254</sup> On that point, Professor Benkler concurs.<sup>255</sup> Others are more skeptical, wondering whether the relationship exists at all, or whether it might be inverse.<sup>256</sup> Surveys of studies on the subject offer few concrete conclusions.<sup>257</sup>

251. See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

252. The argument of this section is elaborated in detail in McGowan, *supra* note 159.

253. Netanel, *Market Hierarchy*, *supra* note 6, at 1895.

254. As Professor Netanel recognizes, “the number of media owners and outlets need not necessarily correlate with diversity of expressive product.” *Id.* at 1894.

255. Benkler, *Siren Songs*, *supra* note 19, at 96-97. He cites the experience with the FCC’s financial interest and syndication rules as showing that “small variations in the number of outlets or their ownership do not translate into content diversity.” *Id.* at 96. For the uneven history of these rules, see *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992).

256. Christopher S. Yoo, *Copyright and Democracy: A Cautionary Note*, 53 VAND. L. REV. 1933 (2001).

257. Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 310-11 (1991).

One of the main problems in this area is that there are large economies of scale in the production of information. A single newspaper operating at minimum efficient size may serve a town at a lower average cost than two or three papers. Assuming for the moment that more speakers implies more variance in expression, then judges and legislators may have to choose between maximizing the output and distribution of expression and maximizing variance. Reasons must be given for preferring one result over the other.

*Associated Press v. United States*<sup>258</sup> exemplifies this trade-off. *Associated Press* was an antitrust case about a joint venture bylaw that allowed members of the Associated Press to oppose membership applications from competitors. Member opposition made it harder and more expensive for competitor papers to join the AP than for new papers that did not compete with members.<sup>259</sup> The Supreme Court affirmed a three-judge trial court order granting summary judgment for the government.<sup>260</sup> Justice Black justified the ruling in part by saying the First Amendment rests “on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”<sup>261</sup>

The Court thought it would increase the number of speakers by making it cheaper for papers to join the Associated Press. It was wrong. The decision actually made it cheaper for papers to tap into a stream of relatively homogenous content and, to add insult to injury, it wound up killing the United Press without slowing the consolidation of local newspapers.<sup>262</sup> Though the case is often cited for the proposition that the First Amendment values expression from diverse and antagonistic sources,<sup>263</sup> it is better read as a caution that this value trades off with the other value the Court mentioned—the widespread dissemination of information.<sup>264</sup>

258. 326 U.S. 1 (1945).

259. For a description of the bylaw and how it operated, see *United States v. Associated Press*, 52 F. Supp. 362, 366-67 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

260. *Associated Press*, 326 U.S. at 11-13.

261. *Id.* at 20. The decision may be defended from an antitrust point of view on the ground that reporting of spontaneous news is a natural monopoly, see HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 230 (1999), though that rationale contradicts Justice Black’s rhetoric.

262. On UPI, see GREGORY GORDON & RONALD E. COHEN, *DOWN TO THE WIRE: UPI’S FIGHT FOR SURVIVAL* 17 (1990).

263. It is cited in, among other works, Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 366-67 (1999); Benkler, *Siren Songs*, *supra* note 19, at 55; Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 57 n.185 (2000).

264. *Cf.* C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J.

Propositions regarding the relationship between copyright and public discourse present empirical questions that must be proved or falsified to the extent the data allow. No proposition on either side of the debate can be proved through a priori reasoning. And when there are speech interests on both sides of a case, as with parody or transformative use, one cannot decide cases by saying the law should maximize expression.

In addition, there is a distributional aspect to this argument that may dominate the claim that broad user rights enhance discourse. We can see this point by again thinking about demand. There is no dialogue without listeners and readers. Actual consumption therefore limits claims about the robustness of public discourse.<sup>265</sup> If rights-holders do a good job of providing content that responds to listener demand, which is their business, then it is not clear why increasing the number of speakers will increase the variance of expression actually consumed. Even if large media firms produce homogenous content, and even if broad user rights would promote the production of demand-indifferent expression, why should we expect consumers to listen to or read such content?

Maybe weak producer and broad user rights will produce dialogue. If so, and if weak author rights and broad user rights increase the variance of expression, then that combination of rights would enhance public discourse. If not, however, adopting broad user rights and weak producer rights will do no more than benefit speakers by allowing them to use for free content they did not create. That is a distributional effect. It makes users better off and authors worse off than each would be under a different regime. The probability that such distributional effects will be realized is very high. It is much higher than the probability that high variance expression will be produced and command enough of an audience to enhance discourse.

Distributional benefits must be justified on their own, without resort to instrumental claims regarding public discourse. Such benefits require independent justification not only because claims about public discourse are tentative and probably not verifiable, but because not even the First Amendment entitles speakers to exemptions from generally applicable laws,<sup>266</sup> or to cheap inputs for expressive activity.<sup>267</sup> And if the most concrete policy effects on the

311, 343 (1997) (describing relative efficiency of one newspaper rather than two in certain markets).

265. It does not limit claims about the autonomy of speakers, which I discuss in the next section.

266. *E.g.*, *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (order closing bookstore where prostitution and other sexual activity occurred under an anti-bordello statute did not require First Amendment review).

267. Perhaps the closest analogous cases are *Arkansas Educational Television Communication Foundation v. Forbes*, 523 U.S. 666 (1998) (public television station did not violate constitution in excluding third party candidate from televised debate); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (newspaper's refusal to print

table are distributional, there must be an answer to the classic takings question: why should individual authors—even those who assign rights to firms—bear the cost of increasing user well-being? If society benefits, why does it not pay?<sup>268</sup>

Lastly, copyright forbids the copying, performance, or distribution of the work of others. It does not touch original authorship.<sup>269</sup> If Alice Randall parodies *Gone with the Wind* without ever having read Margaret Mitchell, she has not infringed.<sup>270</sup> People may speak their minds; it is when they speak the minds of others that there is a problem.<sup>271</sup>

### C. Promoting Autonomy

Professor Yochai Benkler has employed a different consequentialist argument to justify strong user rights, an expansive public domain, and relatively

letter to the editor did not violate First Amendment); and *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966) (civil rights protestors did not have right to protest on prison property). See also *Leathers v. Medlock*, 499 U.S. 439 (1991) (cable television operator had no right to complain of print media tax exemption that did not apply to cable); *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) (tax exemption that discriminates among speakers constitutional so long as it does not discriminate based on content); *Cammarano v. United States*, 358 U.S. 498 (1959) (upholding rule denying tax exemption for lobbying expenses); *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186 (1946) (same); *Mabee v. White Plains Publ'g Co.*, 327 U.S. 178 (1946) (rejecting claim based on differential treatment under Fair Labor Standards Act); Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 938 (1993).

268. NOZICK, *supra* note 174, at 32-33.

269. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936), *aff'd*, 309 U.S. 390 (1940) (noting that an author who reproduced a work she had never seen would not be an infringer). For criticism of the idea that copyright does not impair original creation, see Litman, *supra* note 3, at 1000 (describing Judge Hand's hypothetical author as a "mythical fellow").

270. The Court gets this right in *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) ("The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches."). See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (regarding parody of *Gone with the Wind*).

271. If their minds are so dominated by the content of others that they cannot help copying, it is hard to see why making it easier for them to do so makes them more autonomous. Against this it may be said that it is hard to forget content one consumes. In some cases, that might make copying hard to avoid. See, e.g., Gordon, *supra* note 5, at 1567. There is some truth to this, though I doubt there are many copyrighted works that so overpower the mind of a consumer that they make it impossible for the individual to express thoughts of their own, even if these are influenced (as we all are) by what the individual sees and hears.

weak producer rights. He argues that this combination of rules enhances the sum of individual autonomy in society.<sup>272</sup>

Professor Benkler defines autonomy to mean the ability of individuals to form preferences and make choices on their own, rather than subject to the control of others.<sup>273</sup> He believes autonomy correlates with the amount and variety of information available to persons. The more information people can consume, the more life possibilities they can see, and the more autonomous they will be.<sup>274</sup> Copyrighted works may reveal such possibilities to consumers. Giving authors rights to exclude others from the author's work allows authors to constrain the choices of others and to influence "the range and variety of options open to people in society generally."<sup>275</sup> Both effects lessen the autonomy of persons other than authors.

Professor Benkler contends that losses in consumer autonomy are by definition net losses in social autonomy. This conclusion rests on the premise that authors have no legally cognizable autonomy interests in their work. As to works produced by individuals, rather than by individuals acting together through firms, Professor Benkler says "property that is owned by individuals—intellectual property owned by artists—is designed institutionally in a way that serves utilitarian goals, not autonomy. Hence the property rights that are in fact recognized in the United States do not significantly serve the autonomy of the owners."<sup>276</sup>

272. Professor Netanel also emphasizes autonomy as a value. See Netanel, *Skein*, *supra* note 6, at 62-63. Professor Benkler does not defend autonomy as such. He believes that focusing on autonomy allows information policy to bridge the gap between government policies that affect the set of available expression and the requirement that government respect the autonomy of persons who demand and consume expression. Benkler, *Siren Songs*, *supra* note 19, at 28-29. Professor Benkler's theory responds to the criticism that any effort by government to dictate the content of public discourse is at odds with the idea that public discourse is what allows citizens to form ideas to make demands on government. On this view, individual autonomy from government influences is a precondition to democratic self-governance; allowing government to shape the demand to which it responds undermines basic democratic principles. For different conceptions of the relationship between democracy and autonomy, see OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 37-38 (1996); Robert C. Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517 (1997) (reviewing FISS, *supra*).

273. Benkler, *Siren Songs*, *supra* note 19, at 34-35 ("A person is autonomous to the extent that her actions accord with her preferences and to the extent that those preferences can be said to be the product of her own choice. Failures in autonomy—both as a condition and as a capacity—can occur either in the disconnection between actions and preferences, or in the disconnection between preferences and self.").

274. *Id.* at 52.

275. *Id.*

276. *Id.* at 61.

If one accepts the premise that authors have no autonomy interest in their works, it follows that “pervasive recognition of property rights in the information environment imposes an overall cost on autonomy.”<sup>277</sup> In other words, so long as the value of autonomy on the author’s side of the equation is set to zero, any gains on the consumer side are net gains.

There are both descriptive and analytical reasons to reject this thesis. First, as we saw in Part III, it is too strong to say that copyright is purely utilitarian. The important initial move of denying authors autonomy interests in their works is therefore descriptively flawed, even as a strictly doctrinal matter. Second, part of the autonomy thesis is similar to the variance argument we examined in the last section. As Professor Benkler recognizes, limiting property rights in works will enhance the autonomy of consumers only if they actually consume information.<sup>278</sup> This aspect of the argument is subject to the critique of the last section.

More fundamentally, the argument does not provide persuasive reasons for concluding that the law should not recognize any autonomy interests an author might claim in a work. Law expresses values, and Professor Benkler rightly says elsewhere that the values have to be debated on their own terms.<sup>279</sup> One may stipulate that authors have no autonomy interest in their works, but the stipulation itself imposes a particular vision of a legal structure on the choice of other rational beings. No one is stopping any author from contributing a work to the common if they wish. Their choice not to do so, and to charge for their work instead, is as much a choice as those that make consumers more autonomous. By refusing to recognize such choices as choices, Professor Benkler’s stipulation contradicts the concept of autonomy it is designed to specify.<sup>280</sup>

Professor Benkler does argue that some authors—firms—are not rational beings. This point is true in one sense, but it does not justify the stipulation, either. There is nothing *inherent* in the corporate form that justifies such a conclusion. An artist may form an individual corporation for tax and employment purposes but retain full control over her work. Why should her interests be

277. *Id.*

278. Which means search costs have to be taken into account, a point Professor Benkler also recognizes. *Id.* at 105-06.

279. Yochai Benkler, *Intellectual Property and the Organization of Information Production*, 22 INT’L REV. L. & ECON. 81, 99 (2002) (describing policy choices in this area as “irreducibly normative, or political”).

280. Denying that authors have any autonomy interest in their work produces curious and counterintuitive results, too. Under this model, insofar as persons produce expression they are utilitarian instruments and their work does not enhance autonomy. They gain autonomy when they consume the work of others. It follows that the more people engage in expression, the less autonomous society is. If broad user rights increase the amount of time persons spend producing works (because copying is cheaper than relatively new production), under this model such rights would actually lower social autonomy.

discounted if she arranges her affairs and rights ownership to reduce her taxes or hedge liability risks?

In the more typical case, an author might convey some or all of her rights in a license agreement or employment contract with a firm. Firms may be analyzed (as Professor Benkler does) as networks of agreements among persons. Participation in such a network is simply one form of social interaction—the product of one type of choice by rational persons. There is no reason to assume persons act irrationally or un-autonomously if they choose to add a contract to the network rather than self-publishing.

The contracting analysis suggests that discounting rights held by firms would harm both individual authors and the production and distribution of expression. If an author's rights weaken when held by a firm, then firms will pay authors less for the rights. If the value of the right depended on whether the holder was a person or a firm, markets in rights would not work as well and inefficient ownership structures would be encouraged. The larger point, however, is that authors express their autonomy interests in different ways, including by assignment to large media firms whose low production costs imply higher gains from trade, which may or may not be divided with the author. Either way, the fact of employment or assignment should not undercut the author's personal interest in her expression.

Hierarchy does not justify rejecting authorial autonomy interests, either. Again, it is easy to see that there is nothing inherent in hierarchy that negates a right of autonomy. Do stage or film actors have no autonomy interest in their performances because they obey directors? Suppose a singer dictates the choice of songs for her accompanist. Why should it follow that his choice to agree to obey her instruction negates any autonomy interest he has in his playing? Are players in a symphony stripped of autonomy interests because they follow a conductor? Does it matter if they elected the conductor? All these examples are forms of hierarchies. They represent individual choices to express one's art jointly with others, subject to authoritative decisions by a leader. There is no reason the law should treat that choice as anything other than an individual's autonomous act.

These considerations suggest that authors do have autonomy interests in their works, which the law should recognize. Recognizing such interests requires that the author's side of the autonomy equation not be set to zero, which means there is no *a priori* basis to conclude that moving rights between authors and users has any particular effect on social autonomy generally. We are again left with an argument whose most probable concrete effects are distributional.<sup>281</sup>

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281. Benkler, *Siren Songs*, *supra* note 19, at 67. For example, regarding the division of surplus Professor Benkler is clear:

Moreover, when we focus on a welfare calculus of control over information flows in the vendor-consumer relationship, we have good normative reasons



### D. Utilitarian Egalitarianism

Professor Glynn Lunney has combined welfarist economic analysis and an egalitarian ethical orientation to develop a distinctive and in many ways compelling critique of copyright. Professor Lunney's main premise is that the Constitution only gives Congress the power to establish copyright protection that produces net public benefits.<sup>282</sup> As a practical matter, this means Congress may not give rights-holders greater economic power than is necessary to produce marginal works.<sup>283</sup> Professor Lunney believes the Digital Millennium Copyright Act,<sup>284</sup> and existing copyright law more generally, give rights-holders too much economic power. He concludes that those laws are either unconstitutional or at least rest on shaky constitutional ground.<sup>285</sup>

Why has Congress gone off the constitutional rails? Professor Lunney believes Congress and the courts have been seduced if not captured entirely by the incessant rent-seeking and consumer-begging strategies of rich media firms.<sup>286</sup> The result is that producers have too many rights and too much money, while consumers have too few and too little. Professor Lunney has a remedy for this situation. He argues that, as a form of civil disobedience, consumers should (or at least may) copy content they desire without paying for it.<sup>287</sup>

to prefer maximization not of total welfare but rather of what in this calculus would count as consumer surplus. For, insofar as control over one's information environment is a problem of autonomy, it is only the "consumer surplus" side that counts as autonomy enhancing. Producer surplus, measured in the successful imposition of influence on others as a condition of service, on the other hand, translates simply into control exerted by some people (providers) over others (consumers).

*Id.*

282. Lunney, *supra* note 14, at 817 ("Congress may enact a copyright statute, but only if, and to the extent that, it serves the public, and not merely a private, interest."); *id.* at 870 ("Copyright may not serve solely or primarily to enrich copyright owners. The public must receive something in return.").

283. *Id.* at 886-87 ("If private copying does not reduce the incentives for creating additional works at the margins, but merely reduces the excess incentives available for the non-marginal works, then that fact alone is sufficient to place private copying beyond Congress's reach under the Patent and Copyright Clause.").

284. 17 U.S.C. §§ 1201(a)(2)-1201(b) (2000).

285. Lunney, *supra* note 14, at 882. In his view, looseness in the fit between the copyright laws and the economic costs of production can only be justified on the ground that uniform laws are easier and cheaper to administer.

286. *Id.* at 895-906.

287. *Id.* at 907-08 ("In the face of unjust laws, which copyright laws have increasingly become, an individual has no choice but to withhold her consent and force government to confront squarely the injustice it seeks to impose.").

Professor Lunney makes a plausible case that a truly utilitarian copyright law might well allow consumers vastly greater rights than it does now. In particular, a utilitarian copyright law might allow consumers to copy for free content they do not own, even if they have no transformative purpose. As noted in Part II, he is right to say that some copying (by consumers with reservation prices below the lowest price a rights-holder would accept) would be Pareto superior.

Professor Lunney's utilitarianism is consistent. He is willing to sacrifice marginal expression to achieve net gains in utility. Though he argues that consumer copying might not reduce output,<sup>288</sup> in a later work he says:

Perhaps . . . a few albums at the margins are not too high a price for doubling access to the most popular, existing works. Certainly, in any utilitarian balancing of what society has to gain and what it has to lose from prohibiting private sharing through a service like Napster, the trade-off must be considered.<sup>289</sup>

Professor Lunney's analysis raises three points. The first applies to those, like me, who get by pretending that libertarian and utilitarian theories are essentially harmonious. Insofar as copyright is concerned, we are probably wrong.<sup>290</sup> Professor Lunney offers a rigorous case that legalizing hog-wild consumer copying would be truer to utilitarian principles than the laws we now have. His case would be plausible as a policy matter, too, if we could identify reservation prices and if they remained invariant to free copying over time. As it is, however, his analysis is vulnerable to the objection (which we first saw in connection with Damstedt's waste argument) that, over time, free copying would erode the norms that sustain market transactions, causing markets in expression to unravel, seriously reducing the creation of expressive works.<sup>291</sup>

Professor Lunney's civil disobedience recommendation rejects property libertarianism completely. It is the economic equivalent of encouraging protestors to loot stores, except that copying works is nonrivalrous, so, unlike the stores, the owner is not deprived of the copied goods, which of course is Professor Lunney's main point. And that is not all. Since we are being rigorously utilitarian we have to recognize that an author's disutility counts at most for one, while the community is comprised of many. Even slight utility

288. Professor Lunney asserts that only popular works would be copied widely, and that popular works are precisely the ones that earn producers profits greater than economic cost. He contends widespread copying probably would not lower returns enough to reduce future production. *Id.* at 821.

289. Lunney, *supra* note 67, at 1029.

290. See Larry Alexander & Maimon Schwarzschild, *The Uncertain Relationship Between Libertarianism and Utilitarianism*, 19 QUINNIPIAC L. REV. 657 (2000).

291. See *supra* text accompanying notes 215-17.

gains in tens of millions of persons probably sum to more than one. Ms. Twain, hand over the tapes. Recognizing such strong community claims against individual authors is not good liberalism, but Professor Lunney makes a persuasive case that it is good utilitarianism.

Second, by showing that a truly utilitarian copyright policy might tolerate reductions in marginal production to achieve wider distribution of existing works, Professor Lunney's recommendation is at odds with expression maximization. Most consumers do not use content to create publicly available transformative works. On average, free copying transfers wealth away from those who create expressive works to those who consume them. In static analysis, this transfer is just a transfer. Over time, however, transferring money from producers to consumers might reduce the creation of future works.<sup>292</sup>

Third, Professor Lunney raises the question whether rent-seeking destroys the legitimacy of a law. Suppose there is a public choice ratchet to copyright law. Benefits to authors are concentrated; costs to consumers are diffuse. Rights get longer and broader, never shorter or narrower. Suppose things have been this way for a long time, and will continue this way.<sup>293</sup> What follows from these facts?

Not very much. One cannot criticize laws as unjust without at least some sense of a normative baseline defining what is just.<sup>294</sup> For example, publishers and authors lobbied Congress for the 1992 amendment clarifying that fair use applies to unpublished works,<sup>295</sup> but no one who criticizes the Digital Millennium Copyright Act or the Copyright Term Extension Act decries those amendments as unjust. That is true even though publishers and authors who use unpublished works enjoy concentrated benefits from access to such works while authors such as Salinger, who want to keep work private, are few in number and bear only diffuse ex ante costs from such legislation.<sup>296</sup> The combination of concentrated costs and diffuse benefits is too common and too inoffensive on its own to justify the conclusion that laws produced by that combination are unjust. Public choice is a way of life in lawmaking; it is a constant. It therefore cannot distinguish good laws from bad. Laws must be judged on their substance and the values they express.

292. Consumers' extra wealth might create demand for other works, but if they can copy them for free it is not clear why that should be the case.

293. JESSICA LITMAN, DIGITAL COPYRIGHT 23-26, 36-63 (2001).

294. See, e.g., Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 34 (1991) ("[A]ny defects in the political process identified by interest group theory depend on implicit normative baselines and thus do not stand independent of substantive conclusions about the merits of particular political outcomes.").

295. See S. REP. NO. 102-141, at 4-5 (1991) (recounting testimony from publishers and biographers).

296. They do bear concentrated ex post costs in particular cases.

If copyright may embody Lockean principles, then it is hard to criticize existing laws as unjust. If it may not embody those principles, then one must say what it must embody. If the end is utility, it is hard to see how that constrains Congress, because information about marginal effects of different laws is so poor. Because utility (welfare) and the production of copyrighted works may trade off, it is hard to see how utility could be a legitimate copyright maximand in the first place.

If copyright must maximize expression, then the argument that rent-seeking renders existing law unjust must show that existing law does not maximize expression. But what kind of expression? If I am right to say that the output of expression is likely to trade off with the number of speakers and the variance of expression, then one of these maximands must be selected. Reasons must be given why Congress's choice is limited, which means reasons must be given for deliberately seeking to boost some speakers over others. The First Amendment does not supply such arguments.<sup>297</sup> In many fair use conflicts both plaintiffs and defendants are speakers. (Where the defendant is not a speaker free speech arguments tilt the plaintiff's way.) First Amendment doctrine offers no premise for favoring one type of speaker over another, or for favoring variance over output.<sup>298</sup>

For these reasons, I disagree with Professor Netanel's claim that the public choice argument justifies intrusive judicial review of copyright. Professor Netanel believes the claim "has greater purchase when government action distorts public discourse because speech is itself the essence of an open and effective democratic process."<sup>299</sup> The problem is that there is no neutral ground from which "distortion" may be judged. The premise that property rights affect discourse applies to all variations of such rights, including one which provides for an expansive public domain. Where neutrality is impossible, the absence of neutrality is no objection to any particular policy. Ultimately, because producers are speakers, too, the idea that copyright tilts too far toward producer interests does not justify the conclusion that it is unjust.

## V. RECOMMENDATIONS FOR FURTHER ANALYSIS OF THE REGULATION OF DIGITAL CONTENT

As I said in the Introduction, this Article aims to improve scholarly debate regarding copyright policy. The argument to this point shows that we do not have the data needed to measure the marginal effects of different policies, so

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297. For the reasons given in the text, I disagree with Professor Netanel's view that the Court would have little trouble using free speech values to scrutinize closely Congress's decisions about copyright. See Netanel, *Skein*, *supra* note 6, at 66 n.278.

298. For more on this point, see McGowan, *supra* note 159.

299. Netanel, *Skein*, *supra* note 6, at 66 n.278.

consequentialist arguments, and especially utilitarian arguments, are indeterminate. For this reason, measurements of utility cannot explain the different positions taken in copyright policy debates. Those positions can only be explained by the normative first principles different analysts bring to bear on the indeterminate evidence of likely policy effects. The last Part surveyed four such first principles and defended my own Lockean starting-point. This Part suggests more concrete steps that might help copyright scholars talk to each other rather than past each other.

### *A. Defend the Ethics of Free Riding*

Lockean theory looks good compared to consequentialist theories because it cannot be criticized for making predictions that might not be true. It avoids the problem by making no predictions at all. It is more than a little disturbing that the theory's relative appeal rests largely on its indifference to practical effects, which is why I have suggested a set of qualifications to the pure Lockean view. That indifference is not such a problem as it might be, because our knowledge of practical effects is so poor. It does make for an awkward debate, however.

The current debate would be better if there were a more direct conflict of first principles. If we secularize Locke, we have on one side the notion that one owns one's body, and thus one's labor, and thus the products of one's labor. This side of the argument is fairly well understood and widely accepted in American society. What we need is for scholars to develop an equally well-reasoned nonconsequentialist defense of the ethics of uncompensated, unlicensed, copying. Some scholars have addressed the fundamental ethics of this side of the debate. The Free Software Foundation has made important contributions as well.<sup>300</sup> But much work needs to be done.

For example, insofar as I can tell, the fundamental premise of this side of the debate (the equivalent to the first two premises of the Lockean argument), is that persons have a right to do whatever they want so long as they do not harm others, and that everyone owns everything in common unless privatization can be justified. Because consumption of works is nonrivalrous, the argument would go, copying causes no harm, and privatization cannot be justified.

This argument raises questions familiar to harm principle advocates. What is the domain of this principle? Is it limitless, so that it reaches into Shania Twain's cave? If not, what are its limits and what justifies them?<sup>301</sup> What counts as harm? Conventional wisdom holds that harm cannot be described without a

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300. See generally *Philosophy of the GNU Project*, at <http://www.gnu.org/philosophy/philosophy.html> (last visited Dec. 28, 2003).

301. As noted in Part IV.A.3, the notion of consent to market transactions cannot justify any particular rule, and therefore cannot by itself establish the domain.

prior allocation of rights, the violation of which is what constitutes harm.<sup>302</sup> Does offense to Shania Twain from broadcasting her cave tapes count as harm? If not, why not? If so, does the same principle protect her from parodies of her work? The First Amendment forces subjects of expressive assaults to bear the cost of harm (offense), but it does not deny that harm has occurred. There is no reason to question Jerry Falwell's claim that he felt outraged by Larry Flynt's attack.<sup>303</sup>

More fundamentally, does using work without the consent of the author count as harm? If so, then copyright policy should recognize any conditions an author places on use of the work so long as the requirements of contract and antitrust law are met. Consumer advocates would not be pleased. If not, however, we need reasons why rejecting the author's claims to the work (or her conditions on use) do not count as harm to her. As the discussion of Professor Benkler's autonomy thesis suggests, I doubt there is an *a priori* basis to do so.

We know users are better off if they get something for nothing. We know that this fact is relevant to one side of a utilitarian calculus (and we can quibble about the net result until the cows come home, which they never do). More is needed. Producers are better off if they get rights, and without some reason to prefer consumers getting their way to producers getting theirs, it has even less force.

Or at least little force than I can see. But my instincts lean against default claims of common ownership and toward contracting and consent as the dominant mode of social interaction. Some extremely thoughtful analysts disagree. They find tort models more appealing. They find in free riding not only an economic benefit to the free rider, which is easy to see, but a benefit with ethical force, of which I am skeptical.<sup>304</sup> Policy debate would be better if that value were defined more clearly and put on the table for head-to-head debate.

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302. See McGowan, *supra* note 91.

303. See, e.g., STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO 108-09, 114-17 (1994) (discussing harm in the case); see also *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

304. See Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOY. L.A. L. REV. 159, 175 (2002); Gordon, *Restitutionary Impulse*, *supra* note 127, at 167. In the latter work, Professor Gordon argues that free riding is a necessary manifestation of the need for persons to rely on one another in social and cultural life. Her reference to communitarian thinking about markets, *id.* at 168 n.69, marks an important difference in approaches to intellectual property. If Hollywood is able to sell rugged individualism to Congress as well as culture, then a straightforward defense of a communitarian copyright regime is necessary. For those, like me, who are instinctively wary of communities and their claims, the need is greater still.

### *B. Less Volume, More Data*

Industry representatives make personal digital copying sound like Armageddon. User advocates make Congress and the industry sound like fascists or Javert-like monomaniacs. Both positions are exaggerated. The data do not justify the claim that consumer copying will kill content. At the same time, the DMCA's effort to preserve a regime of contract and consent has a coherent ethical and economic foundation, if a debatable one. Its contours may well need adjusting. No law is perfect. Next to rent control or cotton subsidies, the DMCA beams the light of pure reason.

All the consequentialist predictions on both sides have to be studied. No position on either side can be proved a priori. The debate will go nowhere on volume or alarmist rhetoric. It does no good to accuse user advocates of closet socialism, or to accuse Judge Easterbrook of Lochnerism (an odd charge for a field in which it is user advocates who seek to short-circuit the legislative process). Here are some factual questions to which answers would be welcome. Have discount rates for investment in music, movies, or software gone up as digital technology and networks have made widespread copying easier? Higher discount rates imply greater risks, which suggest that rights-holders' economic power might not have increased even as Congress gave them greater formal rights to control their work.

How many works make a profit? How much work is funded from retained earnings of media firms? Both of these questions are relevant to the claim that revenues on popular content must be protected to underwrite other work. The latter question is relevant to increases in producer surplus. They are neither burned nor stuffed into a mattress, but what does happen to them? How elastic is demand for particular content? What reservation prices do consumers hold for different works? These questions are relevant to making concrete the notion that some unlicensed copying is Pareto superior, and to gauging how that copying affects demand for positively priced copies.

### *C. Don't Constitutionalize the Issue*

It is natural for those dissatisfied with Congress's work to try their luck in another forum. User advocates find the Supreme Court appealing, mostly because they seem to feel (with some justification) that things could not get worse in the legislature than they are right now. That is an understandable reason, but it does not justify any particular constitutional decision.

Ideally, regulation of digital content should be based on such empirical evidence as we can get. Congress is better suited than the Court to gather that information and assess social interests in light of it. The Constitution provides few concrete premises that could decide challenges to even such absurd laws as the Copyright Term Extension Act. As noted in Part IV.B.2, the First Amendment will be of little help. Its current doctrine deals poorly with disputes

between speakers, as opposed to disputes matching speech against some other value, such as equality. That doctrine is not likely to get better.

Imperfect as they are, legislatures are better than courts at dealing with rapidly changing, fact-intensive social policy choices. *Eldred v. Ashcroft* embodies roughly this view, with a bit of ambiguity on the free speech analysis.<sup>305</sup> It is right to do so.

#### *D. Recognize that We Are All Interested Parties*

On average, law professors produce copyrighted works they cannot sell (most of us work hard to give them away); we consume copyrighted works sold by others. We have a greater taste for high-variance expression than ordinary Americans, most of whom have not graduated college. Few law professors sell or license rights for a living, or have ever done so. For law professors, rights to use the content of others present more salient issues than losses from unpaid copying. (It would be fashionable to list a number of cognitive biases here, but I will trust that the point is self-evident.)

Most legal commentary on copyright argues for broad use rights and narrow producer rights; much legal commentary argues that one benefit to such a policy would be an increase in the production of high-variance expression. These positions conform with the issues most salient to law professors, just as the anti-copying clamoring of industry participants conforms to the issues most salient to them.

It would be better to acknowledge that none of us sees these disputes from a purely neutral or disinterested point of view. There is no objective “public interest” that can be identified by neutral means. There are no neutral policies to advance this mythical interest. There are only interests, and we all have them. It would help if each side tried harder to understand better the pressures the other side faces in dealing with real-world copyright issues. It is understandable for each side to think they need to counterbalance the other’s rhetoric, producing in the aggregate a more balanced debate. I fear, however, that this impulse leads more to talking past each other than balancing each other out.

## VI. CONCLUSION

Copyright law, like all law, is a social construct animated by some conception of the good. That conception is at best partly utilitarian. Because true utilitarian analysis is too hard to perform rigorously, construction of the law begins with nonconsequentialist first principles, whose sails are trimmed until they can sustain a plausible consequentialist story.

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305. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (saying Copyright Act has “built-in” free speech safeguards).



Falling copying costs erode the middle ground in which the law previously struck loose compromises between producer and user interests. Copyright debates are therefore being pushed back from the notionally utilitarian middle, toward the first principles where construction began. The debate would be clearer if we spent less time swapping utilitarian narratives that cannot be falsified and more time acknowledging the first principles that drive the narratives, and debating those principles on their own terms.