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On Copyright Utilitarianism

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On Copyright Utilitarianism

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Patrick R. Goold & David A. Simon*

Abstract

Utilitarians typically argue that the state should grant copyright to authors only when doing so promotes utility. In recent years, however, this argument has faced three criticisms. As a normative matter, critics argue that a utilitarian copyright system is neither just nor attractive. As an epistemological matter, critics argue that society cannot ever know whether copyright promotes utility. And as an interpretive matter, critics argue that utilitarianism fails to appreciate what copyright is really all about: progress of the sciences and useful arts. And so, an increasing number of scholars conclude that copyright should be awarded, not when doing so aids utility, but when doing so secures natural rights or promotes democratic norms.

This Article refines and defends the utilitarian argument for copyright law. The Article departs the company of prior utilitarians, however, in its conceptualization of "utility." Taking inspiration from John Stuart Mill's defense of utilitarianism, the Article argues that utility in copyright cannot be understood in purely quantitative terms. Of course, the overall amount of creative work that the copyright system generates matters a great deal; but it is not the only thing that matters. The type *of creative work incentivized by the system also matters: creative work that feeds the mind, sparks feelings and imagination, and promotes moral sentiments provide copyright's "higher pleasures." A truly utilitarian copyright system is, therefore, one that produces more* and better *creative work. A utilitarian copyright of this kind is normatively attractive, epistemologically realistic, and interpretively consistent with the constitutional structure of American copyright law.*

Keywords: Copyright, utilitarianism

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Introduction

When should the state grant copyright to authors? For the better part of the twentieth century,[1] American lawyers, scholars, and judges answered this question in utilitarian terms.[2] The Copyright Clause in the United States Constitution states that copyright should be awarded if – and only if – doing so achieves a good, albeit somewhat mysterious, consequence: "the progress of Science and the Useful Arts."[3] Progress of Science and the Useful Arts is necessary, it is thought, if citizens are to lead happy lives. As Founders like Thomas Jefferson asserted, copyright is not a "natural" right, but it is a helpful tool to encourage authors to "pursue ideas which may produce utility."[4] As modern economists explain, creative works are public goods that may be undersupplied by the free market.[5] Copyright, according to the Supreme Court, is therefore "intended to motivate the creative activity of authors" and to "allow the public access to the products of their genius."[6] And so, with all that history, it is surprising that today copyright utilitarianism is on the retreat.

Recent decades have witnessed a pushback against the idea that copyright exists to promote utility. On one hand, deontologists argue that copyright ought to be awarded, not only when doing so brings about good consequences, but when it conforms with some moral or political duty. Drawing on the philosophies of Locke,[7] Kant,[8] and Hegel,[9] such scholars argue that creators should own their works, even if doing so does not produce utility. Copyright scholars of this vintage are untroubled by the overall decrease in the amount of creative work produced by society if ownership secures natural property rights, treats authors fairly, or protects the author's personality. On the other hand, an emerging group of (loosely-termed)

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[1] At other points in history natural rights rhetoric dominated. OREN BRACHA, OWNING IDEAS: THE INTELLECTUAL ORIGINS OF AMERICAN INTELLECTUAL PROPERTY, 1790–1909 54–187 (1 ed. 2016).

[2] *See infra* Part I.A.

[3] U.S. CONST. ART. I, § 8, cl. 8; BRACHA, *supra* note 1 at 47–53; L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC'Y U.S.A. 365 (2000); Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771 (2005).

[4] THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON (Andrew A. Lipscomb & Bergh Albert eds., 1905). (13 Aug. 1813, Writings 13:333—35)

[5] The "problem" here is caused primarily by the non-excludability of public goods. Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229 (2014).

[6] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984). Although the language of the Copyright Clause is merely instrumentalist, and not necessarily utilitarian, copyright lawyers have routinely understood it in utilitarian terms since the twentieth century. *See also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."); Sara K. Stadler, *Forging a Truly Utilitarian Copyright*, 91 IOWA L. REV. 609 (2005).

[7] *See, e.g.*, Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 THE YALE LAW JOURNAL 1533 (1993); Mala Chatterjee, *Lockean Copyright versus Lockean Property*, 12 JOURNAL OF LEGAL ANALYSIS 136 (2020).

[8] *See generally* ABRAHAM DRASSINOWER, WHAT'S WRONG WITH COPYING? (2015); David A. Simon, *Moral Rights in Copyright Law: Personality, the Self, & the Author-Work Relation*, 2019, https://www.repository.cam.ac.uk/handle/1810/298861 (last visited Sep 2, 2022) (citing scholars who draw on Kant).

[9] Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L. J. 287 (1988); Simon, *supra* note 10 (discussing scholars who draw on Hegel in the context of moral rights).

democratic theorists argue that copyright should not simply seek to maximize utility, but should instead aspire to something grander.[10] Copyright, they claim, should be awarded when doing so promotes self-determination or human flourishing, or enhances our society's cultural or political democracy.[11] And, as Oren Bracha and Talha Syed summarize, the new democratic approaches have "gathered force, likely surpassing natural rights theories in influence and perhaps even challenging the previously unrivaled preeminence of economics."[12]

In their attack on utilitarianism, deontologists and democratic theorists have advanced three primary criticisms. First, the "normative" criticism asserts that a copyright system focused only on utility is neither just nor attractive. At bottom, these critics ask rhetorically: Is there really nothing more important to our creative lives than "utility"?[13] Second, the "epistemological" criticism asserts that there is no way of knowing whether copyright really does increase utility. Claiming that copyright should exist only when doing so promotes utility seems nonsensical if we have no way of assessing whether copyright actually achieves that goal.[14] And finally, the "interpretive" criticism: utility is simply not what copyright is *really* about.[15] Behind the judicial rhetoric and handwaving about incentives, doctrinal details reveal the true purpose of copyright. Perhaps the real purpose is to protect the authorial act of communication.[16] Or perhaps it is to "progress" the arts in some aesthetic manner.[17] Whatever the reason for copyright, the doctrinal rules teach us copyright is not about utility. And so, armed with these three criticisms, scholars are increasingly abandoning utilitarianism in favor of its alternatives.

In response to the criticisms, this Article refines and defends the utilitarian theory of copyright.[18] Critics of copyright utilitarianism often focus their arguments on the least interesting and least plausible type of copyright utilitarianism – a type heavily associated with the philosophy of Jeremey Bentham. And while these criticisms are important, they do not require desertion. Instead, a better response is to develop and improve the utilitarian understanding of copyright.

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[10] Not all of the theorists we discuss fall neatly into the colloquial (or technical) meaning of "democratic." Some are more accurately "liberal" while other theorists may describe themselves as working within the "human flourishing" approach. While the label is imperfect, it is useful to describe the group of theorists characterized by a common dissatisfaction with utilitarianism's definition of the good and a desire to affirmatively conceptualize the good to include explicit normative judgments about what role copyright ought to play in society. *See also* Bracha and Syed, *supra* note 5 at 232 (also using 'democratic' theory as a label of convenience).

[11] *See infra* Part I.B.1.

[12] Bracha and Syed, *supra* note 5 at 232.

[13] *See infra* Part I.B.1.

[14] *See infra* Part I.B.2

[15] *See infra* Part I.B.2

[16] *E.g.*, DRASSINOWER, *supra* note 8.

[17] *See* infra Part I.B.3. *See, e.g.*, Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319 (2017).

[18] One other paper has attempted to defend the Millian conception of copyright, but with an emphasis on how creative works further audience self-development. Michael Falgoust, *The Incentives Argument Revisited: A Millean Account of Copyright*, 52 THE SOUTHERN JOURNAL OF PHILOSOPHY 163 (2014).

Such a defensive development is important because utilitarianism occupies a central place in American copyright ideology and doctrine. A copyright theory that gives insufficient weight to the importance of consequences misses something that is central to the American copyright experience. In mustering this defense, this Article shows copyright utilitarianism in its best light.[19]

Copyright exists to promote the progress of science and the useful arts. Promoting progress is valuable, not because it secures natural rights, nor because doing so aids democracy *per se*, but because promoting progress in turn promotes utility. While this idea is already familiar to copyright utilitarians, this Article departs their company by introducing a new understanding of "utility." Inspired by John Stuart Mill's defense of utilitarianism, the Article argues that utility is not merely the satisfaction of preferences but is the ability of people to live truly happy lives.[20] Living truly happy lives requires not just a certain *quantity* of creative works to enjoy, but also a certain *type* of creative work.[21] In particular, creative work that feeds the mind, sparks feelings and imagination, and promotes moral sentiments provide, what the Article calls, copyright's "higher pleasures."[22] As an interpretive matter, this Article argues that the Constitution empowers Congress to "promote Progress of Science and the Useful Arts" because such progress is an important source of higher pleasure, without which truly happy life would be impossible.[23] Copyright exists therefore, as Mill would say, to promote "utility in the largest sense, grounded on the permanent interests of a man as a progressive being."[24]

Properly understood, a copyright system based on utilitarianism is normatively, epistemologically, and interpretatively more attractive than is commonly appreciated. A truly utilitarian copyright would be one that would favor independent and documentary films over Hollywood blockbuster sequels – even if those latter movies make more money at the box office; would support poetry more than machine-readable computer code – even if they are both technically types of literature; and would give users a broad ability to engage in transformative, critical, educational, and disability-related uses – even if those works undercut some market for the original work. A utilitarian copyright is, in other words, a liberal copyright.

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[19] RONALD DWORKIN, LAW'S EMPIRE (1986).

[20] JOHN STUART MILL, UTILITARIANISM (Batoche Books 2001 ed. 1863); JOHN STUART MILL, ON LIBERTY (Batoche Books 2001 ed. 1859). *See infra* Part II.A.

[21] As we note below, by "creative work" we do not mean only the copyrightable work but also the process of creating the copyrightable work. This is both a new and old idea. *See* BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE 1760-1911 (1999); DRASSINOWER, *supra* note 8 at 85–111.

[22] *See infra* Part II.B.

[23] We do not argue that this is the right interpretation as a strict historical matter. We argue instead that this is normatively the most desirable one and the best interpretation of the Copyright Clause in today's world. DWORKIN, *supra* note 21. For an historical analysis of the Clause, see EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 81–82 (2002).

[24] MILL, *supra* note 20 at 14.

Not only is copyright utilitarianism normatively attractive in its own right,[25] but it also has a firmer epistemological grounding than its forebears: due to the qualitative component of utility, the theory explains why evaluation of the system remains stubbornly resistant to pure quantitative analysis.[26] And interpretively, a utilitarian copyright is also coherent because it makes sense of the mysterious "Progress" directive contained in the Copyright Clause.[27]

In making this argument, the Article gives a normative, epistemological, and interpretive account of what progress of the sciences and useful arts means and should mean. The Article does not claim empirically, however, that the existing copyright system does in fact promote utility.[28] It remains entirely possible that the best way for Congress to promote progress and thereby utility is by not exercising its Constitutional powers and simply abandoning the copyright system altogether.[29] As a result, the Article does not seek to "justify" copyright's existence, but to instead define the relevant justificatory criterion.[30] Similarly, the Article (mostly) brackets the question of how the benefits of progress ought to be distributed.[31] The reasoning is simple. Any consequentialist copyright theory must define "the good" before it defines the "right": the theory must specify *what* the law seeks to produce (i.e. copyright's summum bonum) before arguing about *the distribution* of it.[32] While not forgetting or completely ignoring that latter issue,[33] this Article's central focus is on defending utility as the good that the copyright system ought to produce.

Finally, we make this argument not because we have some strange veneration for dead 19th century philosophers, but because it speaks to an important feature of modern copyright discourse. Democratic theorists, in particular, have framed their arguments as a challenge to copyright utilitarianism. Utilitarians have responded dismissively to that challenge by, for example, claiming that democratic theories merely restate the utilitarian argument using

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[25] *See infra* Part I.A.1.

[26] *See infra* Part I.A.2.

[27] *See infra* Part I.A.3.

[28] For empirical assessments, see Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970); Paul J. Heald, *How Copyright Keeps Works Disappeared*, 11 JOURNAL OF EMPIRICAL LEGAL STUDIES 829 (2014); Christopher Buccafusco & Paul J. Heald, *Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension*, 28 BERKELEY TECHNOLOGY LAW JOURNAL 1 (2013).

[29] On an appropriate response to empirical findings, see Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328 (2016).

[30] *Cf.* ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY (2011); Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHILOSOPHY & PUBLIC AFFAIRS 31 (1989).

[31] *Cf.* Bracha and Syed, *supra* note 5 at 287–313; Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX L. REV. 1535 (2004); Margaret Chon, *Intellectual Property from Below: Copyright and Capability for Education Symposium: Intellectual Property and Social Justice: Distributive Justice and Intellectual Property*, 40 U.C. DAVIS L. REV. 803 (2006); Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development) Symposium: Intellectual Property and Social Justice: Distributive Justice and Intellectual Property*, 40 U.C. DAVIS L. REV. 717 (2006); Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821 (2005); Amy Kapczynski, *The Cost of Price: Why and How to Get beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970 (2011).

[32] Christopher Buccafusco & Jonathan S Masur, *Intellectual Property Law and the Promotion of Welfare*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW 98 (2019) (outlining three possible conceptions of the good).

[33] *See infra* Part III.B.

weaker analytical tools.[34] Instead of throwing stones in either direction, this Article highlights the grain of truth in both theoretical camps while arguing that the torn seam between them can be partly patched. While the democratic challenge is a serious one, it is not necessarily a reason for giving up on utilitarianism. On the other hand, while the standard utilitarian response is not adequate, the reluctance to abandon utilitarianism is understandable given the philosophy's undeniable role in shaping the copyright system.

The argument follows in three parts. Part I summarizes the orthodox utilitarian understanding of copyright and the criticisms thereof. In response to those criticisms, Part II refines the theory of copyright utilitarianism. As demonstrated, scholars and commentators have promoted a version of utilitarianism that pays attention to Bentham but ignores the ideas of one of utilitarianism's staunchest defenders: Mill. This Part shows how the conception of utility elaborated in Mill's most famous works – *Utilitarianism* and *On Liberty* – resonates deeply within the law, and proves illuminating for a range of contemporary copyright debates: from the meaning of "Writings of Authors" to the proper scope of fair use. Part III defends copyright utilitarianism against its normative, epistemological, and interpretive criticisms. A better utilitarian copyright is not merely about net social welfare in the narrow sense, and the value of creative work ought not to be reduced to consumers' mere preferences or, worse, their willingness to pay. Copyright utilitarianism, therefore, is neither an "utterly mean and grovelling [*sic*]"[35] theory nor a doctrine "worthy only of swine."[36] Rather, copyright, in this account, is recast as a means for achieving life's higher pleasures, and through that, true happiness.

I. Copyright Utilitarianism

The "traditional justification for IP rights has been utilitarian," write Mark Lemley, Stephanie Bair, and Laura Pedraza-Farina.[37] The "essence of copyright," according to Pamela Samuelson, is to stimulate creation of aesthetic and informational goods by rewarding

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[34] *See* Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 Wm. & Mary L. Rev. 33 (2004) (arguing that "the democratic and economic interests underlying copyright are, for the most part, likely to be aligned on issues of copyright policy"). Indeed, one colleague in response to our article claimed that democratic theorists are actually utilitarians, they "just don't know it yet." For a different sort of response to these theories, see Brett Frischmann, *Capabilities, Spillovers, and Intellectual Progress: Toward a Human Flourishing Theory of Intellectual Property*, 14 Rev. of Econ. Researh on Copyright Issues 1 (2017).

[35] Mill, *supra* note 20 at 10.

[36] *Id.* at 10.

[37] Lemley, *supra* note 29; Stephanie Plamondon Bair & Laura G. Pedraza-Farina, *Anti-Innovation Norms*, 112 Nw. U. L. Rev. 1069, 1080 (2017) ("The traditional justification for IP rights is utilitarian."). We note, of course, that this is not historically accurate.

creators.[38] Unsurprisingly, references to utilitarianism "riddle American law."[39] And yet the idea that copyright should be awarded only when doing so promotes utility is under attack. This Part explains this critical assault. Section A summarizes copyright's utilitarian argument in its classical Benthamite and modern welfare-preferentist forms. Section B then unpacks the normative, epistemological, and interpretive counterarguments which have developed in approximately the past thirty years.[40]

A. *Consequentialism & Utility Maximization in Copyright*

How should people and governments act? To this question, consequentialist philosophers provide a very simple answer: look to the consequences, and only the consequences, of the action.[41] Only good consequences make an action right; only bad consequences make an action wrong. But which consequences are "good" and which ones are "bad"?[42] Two ethical and political philosophy theories have helped conceptualize consequentialism within copyright law and beyond: Jeremy Bentham's quantitative hedonism and its modern successor, welfare-preferentism.

1. Quantitative Hedonism

Modern consequentialist philosophy invariably begins with utilitarianism and Jeremy Bentham.[43] Like all consequentialists, Bentham argued that the only relevant consideration for assessing the rightness or wrongness of an action are the consequences that result from taking it. Bentham's first task was to define "the Good" in "good consequences."[44] For him, the answer

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[38] Pamela Samuelson, *CONTU Revisited: The Case against Copyright Protection for Computer Programs in Machine-Readable Form*, 1984 DUKE L.J. 663, 749–51 (1984).

[39] William Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 173 (Stephen R. Munzer ed., 2001).

[40] These arguments are not new to utilitarianism. But they are new to IP utilitarianism.

[41] Note variations of consequentialism, motive consequentialism, act consequentialism, rule etc. *See* Walter Sinnott-Armstrong, *Consequentialism*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2015 ed. 2015), https://plato.stanford.edu/archives/win2015/entries/consequentialism/ (last visited Mar 2, 2018).

[42] We put aside the prior question of what are "consequences." *See, e.g.*, Christopher P. Taggart, *Fairness versus Welfare: The Limits of Kaplow and Shavell's Pareto Argument*, 99 MARQ. L. REV. 661 (2015).

[43] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 17 (Batoche Books 2000 ed. 1781).The tradition, however, goes back further. FRANCIS HUTCHESON, AN INQUIRY INTO THE ORIGINAL OF OUR IDEAS OF BEAUTY AND VIRTUE 125 (1726), https://oll.libertyfund.org/title/leidhold-an-inquiry-into-the-original-of-our-ideas-of-beauty-and-virtue-1726-2004 (last visited Jan 17, 2023) ("[T]hat Action is best, which procures the greatest Happiness for the greatest Numbers; and that, worst, which, in like manner, occasions Misery.").

[44] Also known as the *summum bonum*, i.e., the ultimate or highest good. BENTHAM, *supra* note 43 at 14–19.

was rather self-evident: happiness; or what he referred to as "utility."[45] After all, who does not want to be happy? Who desires to be starved, cold, or sick? (No one!) And who longs for satiety, warmth, and health? (Everyone!). And what makes us happy? Once again, the answer was self-evident: happiness is to be found in the experience of pleasure and the avoidance of pain; pleasure and pain are, in other words, our "sovereign masters."[46] From this starting point, Bentham marked out his Principle of Utility: both actions and laws are right insofar as they produce more pleasure than pain.[47]

Bentham's utilitarianism has several fundamental characteristics. First, the theory is a *quantitative hedonistic* account of the good.[48] It is "hedonistic" because what matters is happiness; and it is "quantitative" because the amount of happiness an action produces determines how to evaluate the action against other potential actions. Beyond that, the theory is *empirical*, *methodological*, *egalitarian*, and *other-regarding*.[49] It is empirical because (in principle) the amount of pleasure or happiness produced by an act could be measured scientifically and through observation. It is methodological because Bentham supplied a procedure for determining how to assess which actions would maximize total utility: both pleasure and pain could be measured along the metrics of intensity, duration, probability, along with other factors.[50] The theory is egalitarian because everyone's utility counts equally and should be considered when we make decisions about how to act. And while Bentham was a psychological hedonist – meaning he believed that the pursuit of one's individual pleasure was what motivates people – his theory was other-regarding because what mattered was not an individual's happiness, but the happiness of everyone in society.[51]

To illustrate Bentham's utilitarianism, consider a thought experiment involving two people: Jack and Zeke. Jack likes to spend his Fridays drinking enough alcohol to black out. Zeke on the other hand likes playing music. Assume that Jack and Zeke receive precisely the same amount of utility from their chosen activities. For the purposes of illustration, assume that if we calculate the amount of pleasure and pain produced of all relevant moral agents in this world, the two produce the same quantity of happiness. From a Benthamite perspective, therefore, the two actions are ethically identical. It does not matter if we think Jack's preferences are offensive for some non-consequentialist reason and Zeke's are not; nor does it matter if Jack is a prince

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[45] *Id.*

[46] *Id.* at 14.

[47] *Id.* at 16.

[48] We use "quantitative hedonism" and "Benthamite utilitarianism" interchangeably.

[49] For a comparative perspective on Bentham's utilitarianism and Mill's utilitarianism, see UTILITARIANISM AND OTHER ESSAYS, (1987).

[50] BENTHAM, *supra* note 43 at 31–41.

[51] Andrew Moore, *Hedonism*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2019 ed. 2019), https://plato.stanford.edu/archives/win2019/entries/hedonism/ (last visited Aug 5, 2022).

and Zeke a pauper. Both individuals and acts should be treated the same. As Bentham wrote, if the "game of push pin" (a game like snooker) produces the same amount of pleasure as the "arts and sciences of music and poetry" then the two are of equal value.[52]

We can apply this reasoning to copyright quite easily.[53] Under Benthamite utilitarianism, the state ought to grant copyright protection when doing so contributes positively to the quantity of happiness in society. Since creative works are a potential source of pleasure, copyright protection increases pleasure by incentivizing the creation of works that would not be created without it. Without protection for creative works (which are public goods), the free market might systematically underproduce them, depriving consumers of pleasurable experiences.[54] Copyright creates legal exclusivity over the work, transforming a purely public good into a partially private one.[55] The ability to exclude others enables the creator to charge a supracompetitive price for access to the good. In turn, the super-normal profits that creators earn spur new entrants to the market and start producing new works.[56]

The cost, however, is that the monopoly is also a source of *unhappiness* (pain or disutility). The copyright holder enjoys market power which can be used to restrict the number of copies of the work and raise their price.[57] The result is that some consumers can no longer access the work even if they would like to (deadweight loss).[58] The scope of copyright protection may also impede or prevent follow-on creative work or its dissemination, producing further unhappiness.[59] Meanwhile, the resources spent on administration and enforcement of the copyright system cannot be spent on other important aspects of governance, causing a further source of displeasure.[60] Nevertheless, those who believe that the Benthamite version of the utilitarian argument justifies copyright claim that there is an optimal degree or balance of copyright at which it produces more pleasure than pain.

Today, some contemporary authors continue to support a Benthamite approach to copyright. A leading example is the work of Christopher Buccafusco and Jonathan Masur.[61] They argue that quantitative hedonism provides the most normatively attractive conceptualization of utility in copyright and in law generally.[62] Buccafusco and Masur argue that hedonism provides a

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[52] JEREMY BENTHAM, THE RATIONALE OF REWARD 206 (1830).

[53] Bentham himself offered a version of this argument albeit for patents, not copyright. Jeremy Bentham, *A Manual of Political Economy*, *in* THE WORKS OF JEREMY BENTHAM, PART 3 , 73 (John Bowring ed., 1843).

[54] Bracha and Syed, *supra* note 5 at 237–40.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] Christopher Buccafusco and Jonathan S Masur, *supra* note 32.

[62] *Id.*

more intuitive and helpful understanding of utility than some of its alternatives, namely, welfare-preferentist theories (explored in subsection 2) and objectivist theories (of the type explored in Part II).[63] In copyright, their support for quantitative hedonism points lawmakers towards several policy recommendations. For example, the authors question whether a society that produces more creative works leads to more happiness.[64] While they agree as a quantitative matter that more happiness is a good thing, they argue that the current "accumulative" approach to copyright policy – under which more creative works are thought to necessarily lead to more happiness – is misguided.[65] A copyright system that increases the amount of creativity may create happiness through improving consumer choice, but also makes society less happy because it leads to less shared cultural experiences.[66]

However, most copyright utilitarians today are not Benthamites, primarily because of two perceived weaknesses in Bentham's conceptualization of utility. First, to many, pleasure is not the only good that matters; other things would seem to matter in life too. For example, eating chocolate cake may bring us great pleasure—indeed, perhaps we would be happiest eating only chocolate cake and devoting our waking hours to seeking money to fund the achievement of our desire.[67] But our lives would seem quite shallow and perverse if we made eating cake our *raison d'etre*. Yet hedonism requires people to act in ways that fulfill their own desires, even if those desires do not actually benefit—or in some cases actively work to harm—the individual or society at large. In sum, hedonism seems to commit a Euthyphrian mistake by placing the good before the right: actions are good because they are desired and not desired because they are good.[68]

Second, Benthamite utilitarianism requires almost impossibly difficult inter-personal utility comparisons.[69] To illustrate, suppose that Jack and Zeke are spending the evening together and must decide whether to spend their time either drinking or playing music (assume they cannot do both). Now relax the prior assumption that they enjoy equal utility from their preferred activity. How should they spend their evening? Benthamite utilitarianism would suggest if Jack enjoys drinking more than Zeke enjoys playing music, then the two men ought to spend their

[63] *Id.* at 109–112.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] To be sure, pleasure and pain have instrumental value as well. A hedonist may argue that someone who loves chocolate cake should only eat it sparingly because doing so prolongs and sustains a healthy life, leading to a greater quantity of happiness in the long term. But such an argument, leads to a paradox for quantitative hedonists wherein the best way to maximize one's happiness is through acting in ways which, prima facie, do not seem particularly pleasurable. Henry Sidgwick, The Method of Ethics 113 (Macmillan 1874) (discussing the 'Fundamental Paradox of Hedonism').

[68] This criticism applies to any consequentialist theory. *See* DAVID ROSS, THE RIGHT AND THE GOOD CH. 1(1930).

[69] R. M. HARE ET AL., MORAL THINKING: ITS LEVELS, METHOD, AND POINT (1981); see also LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (1st ed. 2006).

evening drinking (and vice versa). But how can we measure the pleasure that Jack enjoys from drinking and that Zeke derives from playing music? What are the units of measurement (hedons? willingness to pay? utils?[70])? Without a unit of measurement, we cannot perform the measurements on which Bentham's quantitative hedonism rests. Despite the theory's moral attractiveness, and despite recent attempts to quantify happiness, it is often thought to be rather unhelpful in practice.[71] Because of these two problems, most modern utilitarians are not Benthamites but instead welfarists.

2. Welfare-Preferentism

Like Benthamite utilitarians, welfarists are consequentialists.[72] But unlike Benthamites, welfarists do not understand utility in hedonistic terms, but rather in terms of *welfare* or *well-being*.[73]

Most contemporary welfarists, particularly in IP law, ascribe to a "preferentist" understanding of welfare.[74] A person's welfare or well-being increases when their preferences in life are satisfied. For example, consider Jack and Zeke once again. Both Jack and Zeke have certain preferences: Jack prefers to spend his free time drinking alcohol, Zeke prefers to play guitar. When the two individuals engage in their chosen activity, they satisfy their preferences.

[70] Utils are not a real unit—but rather a joke to illustrate that utility functions are dependent upon preferences satisfied under certain constraints.

[71] *See* Legal Theory Lexicon: Efficiency, Pareto, and Kaldor-Hicks, LEGAL THEORY BLOG, https://lsolum.typepad.com/legaltheory/2022/03/legal-theory-lexicon-efficiency-pareto-and-kaldor-hicks.html (last visited Sep 1, 2022); KAPLOW AND SHAVELL, *supra* note 71; VILFREDO PARETO, MANUAL OF POLITICAL ECONOMY (Ann S. Schwier tran., Reprint ed. 1971).

[72] HARE ET AL., *supra* note 69; PETER SINGER, PRACTICAL ETHICS (2011); KAPLOW AND SHAVELL, *supra* note 69 at 3–86.

[73] Terminology in this area is notoriously unsettled. On some accounts, hedonism, preferntism and objectivism are all "welfarist" accounts. This is the tripartite division adopted in Buccafusco and Masur, reflecting how these terms are most commonly used in IP studies at the moment, and the dominance of preferentism in welfare economics, we choose here to distinguish hedonism from welfare-preferentism.

[74] KAPLOW AND SHAVELL, *supra* note 69.

According to welfare-preferentists, what matters in life is not making the two people happier; what matters is satisfying their preferences.[75]

Welfare-preferentism holds that actions are right to the extent they increase the total amount of preferences satisfied in the world.[76] While this distinguishes welfarism from Benthamite utilitarianism, the theories are similar in other major respects. The theory remains quantitative (what matters is the amount of satisfied preferences), empirical (the amount of preference satisfaction can be measured); egalitarian (all preferences are treated as equally worthy of satisfaction), and methodological (individuals make decisions according to their own preferences and legislators according to the preferences of the community). For a welfare-preferentist to evaluate a law or action, they merely need to sum the satisfied preferences in each state of affairs and compare them; the higher total wins out.[77]

Despite the similarities between the two theories, welfare-preferentism enjoys a perceived strength over hedonism. The broader notion of welfare seems to capture some consequences which feel intuitively valuable, but which are not obviously "pleasurable."[78] Eating chocolate cake might be a pleasurable experience, but a preferentist would argue that one should nevertheless refrain from eating cake and instead eat more vegetables if one prefers to lead a long and healthy life. While it has its own problems – particularly the problem of "rogue preferences" explored in section III.A.1 – the welfare-preferentist theory's rank-ordering of preferences provides a reason to act in ways which, on a purely hedonistic theory, do not promote pleasure.[79]

While the move from hedonism to preferentism better explained why people seek out unpleasurable experiences, it did little to solve the measurability problem. Preferences are no easier to measure than happiness. To crack that particular nut, Paul Samuelson suggested a theoretical proxy for actual preferences that is still common in the law and economics literature: willingness and ability to pay.[80] Although this metric captures a particular type of revealed

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[75] To be more nuanced, the prefrentists might say that satisfying preferences is the best way to make people happy. *Supra* note 54.

[76] Most welfarist approaches are actual consequentialist approaches that consider whether a particular action compared to another. Thus, an action is not evaluated in a vacuum: whether a particular action is welfare maximizing depends on the *choices* available to the actor. The fact that I went to the movies instead of reading a book should be evaluated relative to those choices and any other available choices. But they should not be compared to my failing to cure cancer.

Just how the consequences of actions are evaluated is a matter of some debate. For example, *expected* consequentialist approaches consider only what one might expect to be the consequences of an action. *Actual* consequentialism, however, considers only what consequences actually happen. Sinnott-Armstrong, *supra* note 41.

[77] Taggart, *supra* note 42 at 713. In this respect, welfarism is concerned not with actions as such but with *states of affairs*. The only thing that matters to the welfarists is the utility information—preferences satisfaction—in a state of affairs. Amartya Sen, *Utilitarianism and Welfarism*, 76 THE JOURNAL OF PHILOSOPHY 463 (1979).

[78] Thomas Scanlon, *Value, Desire, and Quality of Life*, *in* THE QUALITY OF LIFE (Amartya Sen & Martha C. Nussbaum eds., 1993).

[79] HARE ET AL., *supra* note69; SINGER, *supra* note72.

[80] Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 THE REVIEW OF ECONOMICS AND STATISTICS 387 (1954).

preferences (rather than actual preferences), it nevertheless provides highly tractable tool that can be used (in theory) to mathematically model the costs and benefits of legal rules.[81]

As welfare-preferentism and modern economics became increasingly intertwined, maximization of preference-satisfaction gave way to a new metric: pareto efficiency.[82] According to that new criterion, a situation is optimal if no alternative situation exists in which one person can be made better off and no one worse off.[83] For example, suppose, having initially decided to spend the evening drinking together, Zeke calls the evening off to go home and play music. Zeke prefers this option, while Jack does not mind one way or another: he still gets to spend his evening drinking. The fact that one person – Zeke – is made subjectively *better off* while no one is made *worse off*, must mean that the changed state of affairs is better; a change referred to as a "Pareto Improvement."[84] By seeking out such improvements, policymakers can identify what type of world is likely to optimize preference satisfaction. Due to the complexity of the modern economy, however, today economists may instead search for "Kaldor-Hicks improvements" – i.e., changes in states of affairs wherein one person is made better off, and the amount by which they are made better off can be used to hypothetically compensate anyone made worse off – to guide their policy prescriptions.[85]

In contemporary copyright law, the welfare-preferentist version of the utilitarian argument claims that the state should grant copyright when doing so leads to Kaldor-Hick improvement – in effect, whenever granting copyright protection enables the satisfaction of a greater quantity of preferences than not granting it.[86] The structure of this approach is highly similar to the standard Benthamite version of copyright. Due to the public goods nature of creative works, the free market will undersupply them, leading to a suboptimal state of affairs where many preferences remain unsatisfied.[87] Copyright is necessary to correct that market failure.[88] To be sure, the copyright monopoly also restricts access by increasing prices and reducing the

[81] E.g., C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHILOSOPHY & PUBLIC AFFAIRS 3 (1975); Ronald Dworkin, *Is Wealth a Value Change in the Common Law: Legal and Economic Perspectives*, 9 J. LEGAL STUD. 191 (1980); Lucian A. Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 671 (1979); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1980); Richard A. Posner, *The Problematics of Moral and Legal Theory 1997 Oliver Wendell Holmes Lectures*, 111 HARV. L. REV. 1637, 1669–70 (1997); RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999).

[82] Harold M. Hochman & James D. Rodgers, *Pareto Optimal Redistribution*, 59 AMERICAN ECONOMIC REVIEW 542 (1969); Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 THE YALE LAW JOURNAL 173 (2000).

[83] Note, however, that under a purely welfarist conception, interpersonal comparisons are just as difficult to make because one must know the preferences of each individual. Posner, at one point at least, thought he could solve this problem by replacing utility with price. Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

[84] ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 42–43 (5th ed. 2008).

[85] Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 THE ECONOMIC JOURNAL 549 (1939); J. R. Hicks, *The Foundations of Welfare Economics*, 49 THE ECONOMIC JOURNAL 696 (1939).

[86] WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 37–85 (2003).

[87] *Id.*

[88] *Id.*

quantity of copies of works sold, resulting in some unsatisfied preferences.[89] Nevertheless, those welfare-preferentists who support copyright argue that a world with a copyright system is a Kaldor-Hicks improvement over a world without such a system: several people will be better off in welfare terms and by such a margin that they could (theoretically) compensate those who are made worse off by such a system.

The welfarist version of the argument is not only the most dominant consequentialist argument in copyright,[90] but is the most dominant argument for copyright, period. William Fisher calls the argument that copyright ought to be constructed only to promote net social welfare the "most popular" theoretical argument in contemporary IP.[91]

This is not to say the welfare-preferentist approach to copyright is without its critics. The theory's detractors fall into two main camps. The first camp agrees that the state ought to grant copyright only when doing so promote welfare but disagrees about when and how copyright achieves that goal. Under the traditional welfare-preferentist theory, copyright's welfare effects are a balance between the new works generated and the reduced access caused by the copyright monopoly. In recent years, however, several scholars have argued that copyright does not produce a purely monopolistic industrial structure; instead, copyright protection is more accurately understood as enabling a form of monopolistic competition.[92] Using a monopolistic competition model, scholars in this camp put forward a different vision of when and how copyright is likely to promote welfare. The second camp, by contrast, disagrees that promoting utility is what copyright ought to do. It is this second set of arguments with which this Article is concerned.

B. *Critiques of Copyright Utilitarianism*

Although the utilitarian argument is the most common justification for American copyright, it suffers from a range of criticisms. The critiques fall into roughly three categories: normative,

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[89] *Id.*

[90] Christopher Buccafusco and Jonathan S Masur, *supra* note 32 at 103 ("The conception of welfare as preferences the dominant view within intellectual property . . . .").

[91] Fisher, *supra* note 39 at 169.

[92] Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212 (2004); Abramowicz, *supra* note 36; Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317 (2005). *Cf.* Oren Bracha & Talha Syed, *Beyond the Incentive-Access Paradigm - Product Differentiation & Copyright Revisited Symposium: Steps Toward Evidence-Based IP*, 92 TEX. L. REV. 1841 (2013). Any market-power that enables the owner to raise prices above marginal cost will result in some amount of unsatisfied preferences.

epistemological, and interpretive. The result of these criticisms is that, in recent decades, several scholars have moved away from copyright utilitarianism and embraced alternatives.[93]

1. Normative

Not everyone agrees with Bentham's principle of utility. In copyright, a growing body of scholars argue that maximizing utility will not lead to a sufficiently "just and attractive culture."[94] While this criticism is also posed by some natural rights theorists,[95] of more direct interest here is an emerging group of – loosely-labelled – "democratic" theorists.[96] Scholars in this camp argue that rather than promote utility, copyright should instead enable individuals to lead self-determined and fulfilling lives, or aid our collective decision making in cultural or political spaces. From this perspective, utility provides an unrealistically "thin" understanding of the good – the totality of the human condition and what it means to lead a good life. Copyright, it is claimed, should have grander aspirations than increasing pleasure or preference satisfaction; and it certainly should abandon its shortsighted and market-driven accumulative approach to creativity.

The list of democratic theorists in copyright is far too long to recount in full here. But helpful illustrations can be found in the work of, among others,[97] Robert Merges,[98] Rosemary Coombe,[99] Neil Netanel,[100] and Madhavi Sunder.[101] For example, Merges argues that through establishing ownership rules, copyright aids self-determination (or positive liberty).[102] By

[93] As noted in the Introduction, there are a range of other deontological approaches to copyright law, especially for doctrines like moral rights. *See* David A. Simon, *Personality-Based Justifications for Moral Rights* (working paper 2022). But we confine our analysis to only the main arguments against utilitarianism and not alternative justifications or theories.

[94] Fisher, *supra* note 39 at 172.

[95] Some might argue that a "just and attractive culture" is one where individuals enjoy the fruits of their labor. *See, e.g.*, Gordon, *supra* note 7. For example, some think that a "just and attractive culture" is one where individuals are entitled to the fruits of their labor. Of course, natural rights theorists may also object to utilitarianism on other grounds, too. On a most basic level, they may object that utilitarianism is just the *wrong normative theory* (the right one being some version of natural rights theory).

[96] See *supra* note10.

[97] *See, e.g.*, Brett Frischmann & Mark P. McKenna, *Intergenerational Equity and Intellectual Property*, 2011 WIS. L. REV. 123 (2011).

[98] MERGES, *supra* note 30 at 68–102; Robert P. Merges, *Autonomy and Independence: The Normative Face of Transaction Costs Symposium: Tragedies of the Gridlock Economy: How Mis-Configuring Property Rights Stymies Social Efficiency*, 53 ARIZ. L. REV. 145, 162–63 (2011).

[99] *E.g.*, Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue Colloquy*, 69 TEX. L. REV. 1853 (1990). ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW (1998).

[100] Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996); NEIL NETANEL, COPYRIGHT'S PARADOX (2008).

[101] *E.g.*, Madhavi Sunder, *IP³*, 59 STANFORD LAW REVIEW 257 (2006); MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 23–44 (2012).

[102] Robert P. Merges, *Against Utilitarian Fundamentalism*, 90 ST. JOHN'S L. REV. 681 (2016).

enabling creators to make a livelihood as a creator, copyright enables individuals to not only set their own life goals, but to act on those goals.[103]

Scholars such as Netanel and Coombe, by contrast, argue that copyright is not merely is a tool for facilitating self-determination but one that supports society's collective political or cultural decision-making. Focusing primarily on political decision-making, Netanel argues that copyright provides incentives for "creative expression on a wide array of political, social, and aesthetic issues."[104] Furthermore, by facilitating creative autonomy without reliance on systems of patronage, advertising, or government funding, copyright supports "a sector of communicative activity that is relatively free from reliance on state subsidy, elite patronage, and cultural hierarchy."[105] Focusing primarily on cultural decision-making, Coombe considers the implications of copyright on cultural formation and, in turn, its role in forming and shaping the individual or subject through culture.[106] Copyright on this account allows organizations to exert private ownership over important aspects of our shared culture.[107] The phrase "winter is coming"[108] is part of shared cultural lives in the twenty-first century, but copyright law enables some people to control how the phrase is used. A better copyright would encourage a more democratic participation in shaping our cultural existence.

Some, like Madhavi Sunder and Betsy Rosenblatt, explore the outer-edges of democratic copyright by introducing substantive theories of the good life. [109] According to this view, not only is democratic cultural production important for the sake of our collective culture; it is also necessary for individuals to lead flourishing human lives.[110] A truly human life would involve meaningful, self-determined, and sociable expressive activity.[111] Copyright on this account should help individuals realize this good life. In a related vein, Betsy Rosenblatt has argued that creation is important to developing a sense of belonging to a community, which provides

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[103] Even on this constrained explanation of their arguments, we omit important contributions relating to self-determination distinct from democratic and flourishing approaches, including those who are more critical of the copyright system, see e.g. YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006); Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23 (2001). As a general point, we are unable to provide a better overview of these theories than the one provided by Bracha and Syed. Bracha and Syed, *supra* note 5 at 248–58.

[104] Fisher, *supra* note 39 at 172; Netanel, *supra* note 100 at 347.

[105] Netanel, *supra* note 100 at 288.

[106] Coombe, *supra* note 99 at 1864 ("What I'm suggesting here is that intellectual property laws may deprive us of the optimal cultural conditions for dialogic practice.").

[107] *See also* Jack M Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 NEW YORK UNIVERSITY LAW REVIEW 1, 35 (2004).

[108] GAME OF THRONES, HBO (2011).

[109] *See also* William W. III Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1746–51 (1987) (utopian analysis and the good life); William W. III Fisher, *The Implications for Law of User Innovation Symposium: Cyberspace & the Law: Privacy, Property, and Crime in the Virtual Frontier*, 94 MINN. L. REV. 1417, 1458–59 (2009).

[110] Sunder, *supra* note 101 at 312–331.

[111] *Id.*

creators with an "enhanced sense of self."[112] While still democratic theories of copyright, the human flourishing accounts are less normatively impartial than the self-determination, cultural or political democracy approaches: it not only claims there is a good life at which you should aim, but also claims to tell you, if not what that good life is, at least the conditions necessary to achieve it.[113]

As scholars have become increasingly attuned to the democratic attributes of copyright, some have sought to clarify the ontological nature of the emerging theories. In 2001, William Fisher argued that democratic theories of copyright are "similar to utilitarianism" in that they contend copyrights are justified only to the extent they bring about certain consequences, but are dissimilar to utilitarianism in their willingness to "deploy visions of a desirable society richer than the conceptions of "social welfare."[114]

Oren Bracha and Talha Syed have demonstrated that such theories are not "full-blown consequentialist" theories, but are better understood as "consequence-sensitive" theories.[115] Like utilitarianism, theorists in this vein care deeply about the consequences of copyright protection. Unlike utilitarians, however, they refuse to evaluate copyright's consequences by one single metric (e.g., happiness or subjective preferences).[116] Consider for example, whether individual users should be allowed to engage in critical fair uses.[117] Just like utilitarians, democratic theorists care deeply about the effects of this decision on both creative incentives and access; after all, to the extent broad fair use rights may undercut creative incentives, then allowing such use may do more harm than good to democracy. But unlike standard utilitarians, this is not *all* that matters.[118] Within the incentive-access framework, democratic theorists may place "normative premiums" on certain types of consequences, such as the ability of third parties to engage in critical fair use, which due to the theory's underlying values ("prized desideratum"), have "higher order" importance.[119]

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[112] Betsy Rosenblatt, *Belonging as Intellectual Creation*, 82 MO. L. REV. 91, 95, 126 (2017) ("It may be difficult to incorporate considerations of human flourishing into typical intellectual property analyses, but I contend that difficulty makes the endeavor all the more important.").

[113] These concerns are a recognized starting point for the modern capabilities approach. *See*, *e.g.*, Martha Nussbaum, *Aristotelian Social Democracy*, 20 *in* LIBERALISM AND THE GOOD 203 (1 ed. 1990) (describing her position as a "thick vague theory of the good"); Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 POLITICAL THEORY 202 (1992); MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000).

[114] Fisher, *supra* note 39 at 172.

[115] Bracha and Syed, *supra* note 5.

[116] *Id.* at 249–58.

[117] *Id.*

[118] *Id.*

[119] *Id.*

Although previously unacknowledged, the normative criticism of copyright utilitarianism closely echoes an older criticism of Benthamite utilitarianism. Bentham's quantitative hedonism was likewise criticized as a normatively unattractive ethical and political doctrine.[120] To many, the idea that pleasure and pain are humanity's "sovereign masters" and that there is nothing more important in life than simply satisfying ourselves seems grossly misguided. Animal life may consist merely in pursuit of pleasure may be true of animals, but as applied to human life this account misses something important.[121] Gross physical indulgence, like drinking to excess in our thought experiment with Jack and Zeke, seems to be a poor way to live, even if it hypothetically produces the same amount of pleasure as other pursuits, like playing music. And as such, Bentham's utilitarianism was decried by critics as a morality "fit for swine."[122] Like critics of classical utilitarians, modern democratic theorists, particularly those that emphasize the importance of human flourishing, ask: Is promoting utility really all there is to our cultural life?

2. Epistemological

The problems associated with copyright utilitarianism do not end at the normative level. There is also an epistemological problem facing copyright utilitarianism. Assuming that promoting utility is a good value for the system to pursue, can we ever know whether copyright truly achieves this aim? The welfare-preferentist version of the utilitarian argument claims that enacting a carefully balanced system of copyright protections is a Kaldor-Hicks improvement over a world without such a system.[123] But what evidence do we have to support that claim?

The epistemological criticism of utilitarianism is best expressed by Robert Merges.[124] In theory, the process of testing whether copyright maximizes the greatest good is simple. We first calculate the amount of happiness or preferences satisfied through the generation of new works which would not have been created in the absence of copyright protection. We then calculate the amount of unhappiness or preferences unsatisfied caused by the increased prices and lost access, and the opportunity costs associated with increased administrative and

[120] *Id.* at 258–66; MILL, *supra* note 20 at 10.

[121] We think this is not even true of all animals.

[122] MILL, *supra* note 20 at 10.

[123] LANDES AND POSNER, *supra* note 86.

[124] Merges, *supra* note 30 at 697–700; MERGES, *supra* note 30 at 2–3; Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES IN LAW 29 (2011). *See also* Chon, *supra* 31 note at 2825–26 (noting empirical justifications of IP based on innovation and economic growth "has been characterized in the past more by conjecture than hard data."). *See also* JESSICA SILBEY, AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE (2022).

enforcement costs. Finally, we compare the two numbers. If the former number is bigger than the latter number, then *et voila* the copyright system satisfies the principle of utility. Simple indeed!

But as Merges explained, while theoretically simple, it is in practice "impossibly complex."[125] "Estimating costs and benefits, modeling them over time, projecting what would happen under counterfactuals" are, according to Merges, "all overwhelmingly complicated tasks."[126] This is a fundamental problem for copyright utilitarianism when interpreted either in the Benthamite or welfare-preferentist sense: both say that copyright is only justified if and only if it achieves a given outcome, but our ability to assess whether copyright achieves that outcome is inadequate.[127]

The empirical objection causes some to reject utilitarianism and embrace deontological arguments for copyright, such as those grounded in natural rights. For Merges, "all the doubts over empirical proof" clarified to him why copyright is necessary.[128] The fact that states around the world continue to grant copyright, absent an evidential basis needed to make a watertight case for their utility-enhancing qualities, suggests to Merges and others that the utilitarian argument is unconvincing.[129] Partly in response to the epistemic problems facing the utilitarian argument, scholars like Merges instead conclude that copyright must be justified by some alternative non-consequentialist rationale (while accepting there is room for reasonable disagreement).[130]

Here, too, we find similarities with a classical criticism of utilitarianism. Bentham attempted to create a scheme in which moral and political questions could be reduced to mathematical calculations. But to many, such questions do not yield determinate answers and, even if they could, to reduce moral questions to numbers would miss something important about the human condition. When Mill later sought to defend utilitarianism, he had to do so against Bentham's critics who claimed there was simply not enough time in the world to complete his impossibly complex calculations.[131] One of those critics was William Hazlitt, who witheringly depicted Jeremy Bentham as a man who "lived for the last forty years in a house in Westminster . . . like an anchoret in his cell, reducing law to a system, and the mind of man

[125] MERGES, *supra* note 30 at 2.

[126] *Id.* This is, in fact, the same critique leveled at utilitarianism's "felicific calculus" more generally—one which Posner thinks economics can overcome. Posner, *supra* note 83 at 114–15.

[127] *See* Wendy Gordon, *The Grokster Case*, *in* M.J. VAN DEN HOVEN & JOHN WECKERT, INFORMATION TECHNOLOGY AND MORAL PHILOSOPHY 277–279 (2009) (noting empirical challenges).

[128] Merges, *supra* note 102.

[129] *Id.*

[130] *Id.*

[131] MILL, *supra* note 20 at 25.

to a machine. He [has] reduced the theory and practice of human life to … dull, plodding, technical calculation."[132] In both morals and law, and in the specific case of copyright, there are some foundational questions – such as whether the system is justifiable – that seem to simply be beyond the reach of mathematical calculation.

3. Interpretive

Finally, scholars doubt whether promoting utility is really what the existing American copyright system is all about. If the utilitarian argument for copyright is a persuasive one, then it might be reasonable to assume that the existing copyright system broadly reflects that theory. Yet, in important respects, the copyright system does not seem to look like one inspired by Bentham.[133] Non-consequentialists, of course, have pointed this out too;[134] but recently even the consequence-minded have echoed this criticism.[135]

The central problem for utilitarians is that many of copyright's foundational texts say nothing about "utility"[136] and instead reveal a very different concern. The Statute of Anne, the first modern copyright statute in England, suggests in title—"An Act For the Encouragement of Learning"—that it was designed for more than mere pleasure. Similar sentiments can be found in the Intellectual Property Clause of the U.S. Constitution (Section 8, Clause 8), which provides the federal government the power to grant copyrights and patents to "promote the Progress of Science and the Useful Arts." Consistent with the drafters' enlightenment ideals, these words might speak to concerns other than happiness or utility.

What those concerns are, however, is a matter of debate. Michael Birnhack contends as an historical matter that the framers were primarily concerned with "political-intellectual progress" and wished to advance the state of society's knowledge[137] while Margaret Chon's

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[132] Hazlitt, W., 1826, *The New School of Reform: A Dialogue between a Rationalist and a Sentimentalist*, in THE COMPLETE WORKS OF WILLIAM HAZLITT, 21 VOLS., 179–95, vol. 12 (P. P. Howe ed. 1930–4).

[133] E.g., DRASSINOWER, *supra* note 8.

[134] E.g., *Id.*; MERGES, *supra* note 30 at 3 ("Countless judges begin their IP decisions with one or another familiar 'stage setter' about how IP protection exists to serve the public interest, often intoning one of a few stock passages penned in a spare moment by Thomas Jefferson. But these utilitarian platitudes quickly give way to doctrinal details, which often show the unmistakable imprint of something more fundamental, something beyond utility— revealing, at the end of the exercise, its real purpose and justification.").

[135] Bracha and Syed, *supra* note 5 at 231 ("The recent decision of a New York federal district court in Authors Guild v. HathiTrust is a powerful reminder that copyright law is about more than just efficiency").

[136] E.g., Christopher Buccafusco and Jonathan S Masur, *supra* note 32 at 101–02; Frischmann and McKenna, *supra* note 97 at 320; Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L.J. 3, 321–22 (2001).

[137] Birnhack argues that the clause is best understood as requiring "intellectual" progress. Birnhack, *supra* note 137.

postmodernist reading highlights the importance of access to it.[138] Barton Beebe, by contrast, focuses on the Copyright Clause as a means of advancing aesthetic progress: the clause on this account seeks to promote progress by widely distributing opportunities for aesthetic participation.[139] More recently, and as related to the broader move towards democratic theories, Jessica Silbey has argued that the idea of progress "evolves over time."[140] Today the best interpretation of such progress is one that gives weight to the values of "dignity, equality, privacy, and community welfare" among others. [141]

While the nature of progress remains contested, various sources decry utilitarianism for promoting an accumulative vision of progress.[142] This criticism is leveled against welfarist versions of utilitarianism in particular.[143] As summarized earlier, welfarism values the satisfaction of preferences and treats preference satisfaction as a form of progress. Because an individual's preferences are revealed by their willingness and ability to pay for a good in the market, it follows that progress advances anytime a seller of a good finds someone to buy it. While predating modern welfarism, Beebe explains how market-oriented accumulativism made its way into copyright through Oliver Wendell Holmes Jr.'s famous decision in Bleistein v. Donaldson Lithographing Company[144] – a decision he calls a "disaster for American copyright law."[145]

* * *

Despite the criticisms, we are not ready to abandon utilitarianism just yet. The pretenders to utilitarianism's crown all have their own problems, which are already well-established in the literature. Natural rights arguments based on labor struggle to explain how it is "natural" to privately own a public good,[146] draw the invalid inference that one's ownership of labor

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[138] Margaret Chon, *Postmodern Progress: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993). (critiquing the value and nature of "progress," including its vagueness, the accumulative approach present in some copyright decisions, and asking "But is this "growth in creative expression" to be valued simply for its own sake?")

[139] Beebe, *supra* note 17.

[140] SILBEY, *supra* note 124.

[141] Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1808 (2000) (asking how price discrimination may affect the type of good produced rather than just the total quantities of goods); Ned Snow, *The Regressing Progress Clause: Rethinking Constitutional Indifference to Harmful Content in Copyright*, 47 U.C.D. L. REV. 1 (2013).

[142] *See supra* note 138; *infra* notes 144-145.

[143] Christopher Buccafusco and Jonathan S Masur, *supra* note 32 (explaining why the link between more and more happiness is not so clear under a hedonic approach).

[144] 188 U.S. 239 (1903).

[145] Beebe, *supra* note 17 at 328.

[146] *See* JEFFERSON, *supra* note 6. *Cf.* Kenneth Einar Himma, *Toward a Lockean Moral Justification of Legal Protection of Intellectual Property 2012 Editor's Symposium*, 49 SAN DIEGO L. REV. 1105 (2012). There are several versions of natural rights theories, but most argue that rights are the product of reason. How to apply that reason – whether to use it to identify a relationship that exists in virtue of facts about the world or to understand how rights form prior to organized society – is beyond the scope of this Article.

transfers to the commons upon mixing,[147] and interpret of Locke's philosophy of property rights in a questionable manner.[148] Personality based theories face problems of depth and coherence.[149] Democratic theories struggle to explain how their argument differs in substance to utilitarianism, and to the extent there is a difference, to justify that difference.[150] While not all of these problems are insurmountable,[151] we prefer to back the existing potentate.

II. COPYRIGHT UTILITARIANISM REFINED

Inspired by the work of John Stuart Mill, this Part refines copyright utilitarianism. Section A provides an interpretation of Mill's qualitative hedonism as found in his two most famous works: *Utilitarianism* (1861) and *On Liberty* (1859). Section B turns to copyright, arguing that promoting the progress of science and useful arts is valuable not for reasons of natural rights or democracy, but because such progress is a necessary element of truly happy human life. As Section B shows, understanding copyright as a means to utility illuminates a range of issues in copyright doctrine and policy, from the meaning of "Writings of Authors" and the originality doctrine, to the appropriate scope of copyright exceptions.

A. *Mill's Qualitative Hedonism*

As a successor to Jeremy Bentham, Mill was a leading exponent of utilitarianism.[152] Yet Mill was deeply troubled by some aspects of Bentham's quantitative hedonism. As highlighted in Part I, Bentham's utilitarianism seemed to advocate gross physical indulgence, such as drinking to excess. And to the extent that pleasure and pain were held out as humanity's "sovereign masters," the theory gave no moral weight to the difference between humans and mere animals. In *Utilitarianism*, Mill sought to refine and defend utilitarianism from the criticism

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[147] ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 175 (1974).

[148] Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138 (2001).

[149] Simon, *supra* note 8.

[150] Bracha and Syed, *supra* note 5 at 244–48.

[151] Bracha and Syed, *supra* note 5.

[152] UTILITARIANISM AND OTHER ESSAYS, *supra* note 49.

that such a philosophy was “utterly mean and grovelling [*sic*].”[153] This section provides an overview of his revised conception of hedonism and our interpretation of it.

1. Qualitative Hedonism

Unlike Bentham’s account of utility, Mill’s account was *qualitatively hedonistic*.[154] Like Bentham, Mill argued that the morality of an action depended on the amount of happiness produced, where happiness is understood as pleasure minus pain.[155] But unlike Bentham, Mill argued that the overall *quantity* of pleasure (including, intensity, duration, or follow-on pleasures) was not the only thing that mattered to that calculation; the *quality* of the pleasure mattered as well.[156] While all pleasure contributed towards happiness, some kinds of pleasure contributed more than others.[157]

To illustrate, consider once more Jack and Zeke. Under the assumption that Jack’s drinking creates the same amount of pleasure as Zeke’s music playing, Benthamites claim that the two activities are of exactly equal worth. Mill found this conclusion simplistic. In his view, Jack and Zeke’s activities are not equivalents because the *kind* of pleasure created by playing the guitar is qualitatively better than that produced by drinking. Even if drinking satisfies our base animalistic desires, spending one’s time playing music is more likely to make one a truly happier person. Or, as Mill wrote, when it comes to leading a happy life, “it is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied.”[158]

2. Higher and Lower Pleasures

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[153] MILL, *supra* note 20 at 10.

[154] *Id.* at 13.

[155] *Id.* at 13, 74–75.

[156] *Id.* at 11 (“It is quite compatible with the principle of utility to recognise the fact, that some kinds of pleasure are more desirable and more valuable than others. It would be absurd that while, in estimating all other things, quality is considered as well as quantity, the estimation of pleasures should be supposed to depend on quantity alone.”).

[157] *See* GEORGE EDWARD MOORE, PRINCIPIA ETHICA 79–80 (Repr ed. 1989).

[158] *Compare* MILL, *supra* note at 13. *with* Posner, *supra* note 83 at 117 (arguing that that the happiness of A, who spends his time and derives immense pleasure pulling wings off flies, may be greater than B, who spends his time and derives less pleasure from feeding pigeons, and mistakenly concluding that A is a better man than B as a result).

Why then are some pleasures more important than others? Mill answered this question by dividing pleasures into two categories: "higher" and "lower" pleasures.[159] Consider, Mill asked, the difference between humans and animals.[160] Animals are capable only of "lower pleasures," or pleasures of the body such as gorging on food, becoming intoxicated, and sexual gratification.[161] But in addition to the lower pleasures, humans are capable of something more: "higher pleasures" or pleasures of the mind, emotion, and intellect, such as acquiring knowledge, enjoying the arts, or playing chess.[162] According to Mill, therefore, it is not utilitarianism that debases human nature by viewing pleasure and pain as our sovereign masters, but its critics for supposing that humans are capable of no more "nobler" pleasures than mere animals. A utilitarianism properly grounded in the inherent value of the human condition recognizes the normative priority of some types of pleasure over others.[163]

While Mill sometimes put forward a categorical distinction between higher and lower pleasures,[164] many contemporary philosophers see the distinction as one of degree rather than kind.[165] Even within the Millian category of higher pleasures, for example, some pleasures are higher than others. Conceding, for example, that the game of push pin enjoys some aspect of higher pleasure (e.g., the skill involved, the tactics of strategy), the game may offer less potential for the experience of higher pleasure than the "arts and sciences of music and poetry."[166]

The higher-lower pleasure distinction does not mean that lower pleasures are unimportant. Clearly, lower pleasures are vital to human life: one cannot hope to live a truly happy life without food, clothing, or shelter. In this regard, lower pleasures are not only important in their own right, but are necessary conditions to experiencing some higher pleasures: one must be fed and clothed before one can hope to read.[167] Furthermore, as we see higher and lower pleasures as a spectrum, there are instances of cross-overs where lower pleasures are felt

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[159] *Id.*

[160] MILL, *supra* note 20 at 12–13.

[161] *Id.* at 10–11.

[162] *Id.*

[163] Unlike some interpretations of Mill's qualitative hedonism, which view the higher/lower pleasure distinction as simply a manifestation of competent judge preferences, we treat the distinction as at least partially normative in character. *See generally* Ben Saunders, *Reinterpreting the Qualitative Hedonism Advanced by J.S. Mill*, 45 J VALUE INQUIRY 187 (2011). Mill's appeal to competent judges, see *infra* Part _, is best interpreted as Mill's attempt to prove "empirically" and operationalize a fundamentally normative distinction.

[164] MILL, *supra* note 20 at 11 (finding "superiority in quality, so far outweighing quantity as to render it, in comparison, of small account.").

[165] C. Schmidt–Petri, *Mill on Quality and Quantity*, 53 THE PHILOSOPHICAL QUARTERLY 102 (2003); Jonathan Riley, *What Are Millian Qualitative Superiorities?* (2008). We think of the distinction as "one between poles of a spectrum with a great deal of overlap, rather than mutually exclusive categories." HENRY R. WEST, AN INTRODUCTION TO MILL'S UTILITARIAN ETHICS 53 (2004).

[166] BENTHAM, *supra* note 43.

[167] In some sense they are given a type of "lexical priority." JOHN RAWLS, A THEORY OF JUSTICE 37–38 (Rev. ed. 1999). Notably however, the kind of lexical priority we allude to is not exactly the same as the one Rawls described.

when we experience higher pleasures.[168] But simply for humans – a "progressive being" – to be truly happy, they cannot survive on a diet of lower pleasure alone.[169]

Finally, we note that the normative value of pleasures—whether they are higher or lower— is not well captured by price signals (albeit for different reasons from those described above).[170] Even if Jack would pay more to drink alcohol than Zeke would to play guitar, that mere fact says very little about whether drinking alcohol or playing guitar produces a higher form of pleasure: it is perfectly possible for people to want things that are not in their best interests. This is particularly relevant, as we will see later, in the realm of copyright. The fact that the market is willing to pay more form Hollywood blockbusters than educational materials, for example, says little about which would produce more happiness.

3. Qualified Judges

How then can we distinguish between "higher" and "lower" pleasures? For any serious ethical theory, the difference cannot be like the differences between chocolate and vanilla ice cream, Coke and Pepsi, or fish and steak – it is not, in other words, a case of *de gustibus non est disputandum* (in matters of taste there can be no dispute)! Mill's answer remains one of the more controversial ideas of modern philosophy: we should defer to the preferences of "competent judges." When it comes to deciding how important any given pleasure is to true happiness relative to other pleasures, we should ask someone who has experienced that pleasure and can compare it to other pleasures in life. After all, if we wanted a dinner recommendation, we would be wise to ask someone who has tried all the potential restaurants we could patronize.

At the outset, we note that our approach outlined here (hopefully) strikes a different tone to that originally struck by Mill, whose conception of competent judges can sound elitist, perhaps even snobbish. Indeed, this is a common criticism of qualitative hedonism: it creates a weak normative "proof" (and hence justification) that privileges the views of the few—typically

[168] Schmidt–Petri, *supra* note 165.

[169] MILL, *supra* note 20.

[170] *See supra* note 32.

conceived of as those occupying high art or inaccessible elite interests—above the many or the interests of society writ large.[171]

While retaining many of the good features of the competent judge analysis, our approach is more explicitly inclusive of *all* people.[172] The crux of the higher/lower pleasure distinction is the realization that some pleasures are of a kind that is more conducive to true human happiness. Knowledge of what pleasures are more uniquely human is not the divine preserve of an exalted few; rather it is something that we all can come to acquire through our lived experiences.[173] This Article uses the term "qualified judges" to refer to our more inclusive approach. The following section explains what qualifies people to make this type of judgment.

a. Qualification. Imagine that we are debating and comparing the pleasure of reading mathematics textbooks to that of watching TV sitcoms. Who, if anyone, has the right to label one or the other the higher pleasure? Mill answered that such a person must satisfy two conditions. First, one must have the capacity to "appreciate[e] and enjoy" both pleasures.[174] Second, the judge must be "competently acquainted" with both. Together, these requirements mean that to qualify, the judge must not only be capable of experiencing both pleasures, but also have fully experienced both pleasures before.

To illustrate, consider three individuals: Ludwig, Ringo, and Cori. Ludwig, for societal and cultural reasons, was denied the ability to attend school and has very little knowledge of math; but does enjoy watching TV sitcoms after work. When asked: "what do you prefer to do with your time, read math books or listen to watch TV sitcoms?" he indicates the latter. Meanwhile, Ringo did attend school and can appreciate mathematics, but when it came to TV sitcoms he proclaims with an air of cultural superiority that "they're not for people like me." Finally, Cori can appreciate both and, in addition to becoming an engineer later in life, she also enjoys TV sitcoms. On our Millian view, only Cori has the qualifications to cast a judgment. We should not defer to Ludwig's preference for TV sitcoms because he has not had the opportunity to form a preference to which we might reasonably defer. Similarly, we should discount Ringo's preference because of his lack of genuine engagement with TV sitcoms. But it is not a bad

[171] See Steven D Hales, *Mill v Miller, or Higher and Lower Pleasures*, in BEER AND PHILOSOPHY (Hales ed, 2007) 101 ("one suspects that behind talk of "higher pleasures" there lurks an upper-class Victorian snobbery")

[172] This is consistent with Mill's capacity-building approach to utility, see *infra* Part III.B.1.

[173] Rex Martin, *A Defence of Mill's Qualitative Hedonism*, 47 PHILOSOPHY 140, 145 (1972).

[174] MILL, *supra* note 20 at 11–12 (the competent judge must be "equally capable of appreciating and enjoying, both, do give a most marked preference to the manner of existence which employs their higher faculties"). See also the fool and pig comparison, *Id.* at 13.

idea to defer to Cori's preferences – whatever they may be – as a measure of which is more important to true human happiness.

b. Preferences. We should not defer to every preference of our qualified judges. For a judge's preference to be worthy of our trust, they must satisfy two epistemic conditions.[175]

First, the pleasure must be preferred "irrespective of any feeling of moral obligation."[176] This means that the preference must be genuine rather than normative. [177] A genuine preference is a preference an individual holds because they would actually prefer to experience it regardless of whether they feel an independent moral obligation to prefer it.[178] A normative preference, however, is a preference one has *because of* an independent moral judgment about the worth of the activity in question.

Consider Cori once more. Cori has recently converted to a fundamentalist religion that views TV as a sinful waste of time. She is still capable of enjoying both math and TV, but whatever preference she might express for math should now be discounted. Cori's preference no longer flows from a genuine preference, but from what s*he has been told she ought to prefer*. And while we cannot expurgate all such normative judgments from our choices, such obviously morally infused judgments must be discounted.[179]

Second, the preference must be sufficiently strong. Mill adopted a rather firm stance on this point, noting that a preference must reflect an "infinite superiority" of pleasure[180]—i.e., that any amount of a higher pleasure is always preferred more than *any* amount of a lower pleasure. For example, suppose that prior to her conversion, Cori would prefer *any* quantity of reading math (e.g., 1 hour) to *any* quantity of watching TV (e.g., 100 hours). Only then would Mill follow Cori's preferences because she has such a strong preference for math over TV.

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[175] Welfarists also require preferences to be formed under particular epistemic conditions, such as freedom from duress, proper cognition. E.g., KAPLOW AND SHAVELL, *supra* note 69. See *infra* Part III.A.1.

[176] MILL, *supra* note 20 at 11.

[177] Mill's views on the legitimacy of the state's prohibition or requirement of actions based on religious beliefs is described in other work. MILL, *supra* note 20 at 78–81.

[178] For a welfare-preferentist take, see e.g., KAPLOW AND SHAVELL, *supra* note 69; John C. Harsanyi, *Morality and the Theory of Rational Behavior*, 44 SOCIAL RESEARCH 623 (1977); Rebecca Stone, *Legal Design for the Good Man*, 102 VA. L. REV. [i] (2016).

[179] We acknowledge that this is a "difficult question." WEST, *supra* note 164 at 63. West, for example, claims that the competent judges must be good at analyzing the desirability of an activity or experience into its component values, separating the instrumental from the intrinsic and feelings of moral obligation from feelings of nonmoral gratification." *Id.*

[180] *Cf* Saunders, *supra* note 163. (arguing the distinction is based on properties of higher and lower pleasure). But see Jonathan Riley, *On Quantities and Qualities of Pleasure**, 5 UTILITAS 291 (1993) (arguing this view is incoherent).

But not all Mill-inspired utilitarians have such a dogmatic view.[181] We find a requirement of "weak" or "finite" superiority of pleasure more plausible: when comparing two pleasures, a sufficient amount of higher pleasure is preferred over any amount of a lower pleasure. In other words, pleasure A is higher than pleasure B if and only if qualified judges prefer a sufficient, albeit lower, amount of pleasure A to any amount of pleasure B.[182] Cori, for example, does not need to prefer a trivial quantity of math over any quantity of TV for the former to be a higher pleasure. If given a choice between enjoying 100 hours of TV sitcoms or 1 hour reading math, Cori may prefer to watch 100 hours of TV. That fact does not, however, mean that math is a lower pleasure: it simply means she is willing to trade off a high quantity of low pleasure against a small quantity of high pleasure. Reading math may still be a higher pleasure because there is some quantum of it that is better than any number of movies. For example, math might be a higher pleasure on our view if Cori would prefer 10 hours reading math to any amount of watching TV (100 or 1,000,000) even though watching an unlimited number of TV sitcoms produces more aggregate pleasure than reading math for 10 hours.

Lastly, note that this conclusion is not merely the result of diminishing marginal utility. A quantitative hedonist may also agree that spending the 10th hour reading math produces more marginal utility than watching the 100th hour of TV because in both cases the marginal utility of each activity declines over quantity. The point is that even when diminishing marginal utility has been accounted for, one might have a qualitative reason for preferring the activity which, on strictly quantitative grounds, might seem to produce less aggregate pleasure.

c. How many judges? Lastly, there must be something approaching a consensus among qualified judges for their preferences to count in favor of one pleasure over another. On this score, most philosophers interpret Mill as requiring simple majority, though he also can be interpreted to mandate near unanimity, requiring agreement amongst by "all or almost all who have experience of both."[183] But we find these views both too broad and too narrow. For one thing, the requirement fails to account for the number of individuals judging the pleasure. The smaller the sample of judges, the more likely they are to get things wrong.[184] If only 6 out of 10 judges prefer one pleasure to another, that strikes us as an insufficiently strong preference to

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[181] If the dogmatic view is true, then *no amount* of lower pleasure is ever "worth more" than a higher pleasure. Jonathan Riley, *Millian Qualitative Superiorities and Utilitarianism, Part I**, 20 UTILITAS 257 (2008).

MILL, *supra* note 20 at 11.

[182] Gustaf Arrhenius & Wlodek Rabinowicz, *Millian Superiorities*, 17 UTILITAS 127, 129 (2005). The infinite superiority approach does not solve the problem of trading off pleasures, see infra Part II.A.4.

[183] MILL, *supra* note 20 at 13–14. (the verdict "of the majority among them[] must be admitted as final."). See also., Jonathan Riley, *Interpreting Mill's Qualitative Hedonism*, 53 THE PHILOSOPHICAL QUARTERLY 410, 412 (2003).

[184] "Wrong" here does not mean morally wrong—only that the controlling preference is not the same preference had a larger sample been used.

warrant deference. Conversely, the larger the sample the more difficult it will be to reach near unanimous agreement. With nearly 1,000,000 judges, requiring “all or almost all” of them to agree would be pointless.

Thus, we prefer a contextual decision operating on a sliding scale according to the number of judges and the pleasures at issue. In relatively simple cases, such as whether a run-of-the-mill stick figure provides higher pleasure than *Guernica*, then we might expect near unanimity. On harder cases, less unanimity may be required.

Additionally, on our reading, qualified judges must be real rather than imagined. Mill was an empiricist and valued the actual preferences of actual people over hypothetical preferences of hypothetical people.[185] Hypothetically, if only one judge exists, then that judge’s preference ought to be valued more highly than any number of individuals who have not experienced both pleasures.

4. <u>Tradeoffs</u>

On Mill’s view, higher pleasures are better than lower pleasures. But how much better? Suppose again that Cori must choose between watching 100 hours of TV sitcoms (a lower pleasure) or reading to math for 1 hour (a higher pleasure). A literal reading of Mill suggests a rather strong “infinite superiority” claim that any amount of higher pleasure is better than any amount of lower pleasure. This perspective makes decision-making in simple. To be happy, Cori would be better off spending 1 hour reading math rather than watching 100 hours of TV sitcoms.

Nevertheless, our weak or finite superiority approach does not treat higher and lower pleasures so discontinuously. We agree that Cori’s individual happiness might be greater if she consumes 100 low-pleasure hours of TV watching rather than just 1 high-pleasure hour of reading math. But we also note that, at some point, a lower quantity of higher pleasure is better than a higher quantity of lower pleasure. What should Cori do when the choice is 100 hours of TV versus 2 hours of math? What about 5? 30? Theoretically, we could devise a system of multipliers and discounts: we could decide the value of some quantity a higher pleasure is multiplied – or the value of some quantity of lower amount of pleasure is discounted - by some number. But this seems even less realistic. To us, the most realistic answer is that we expect qualified judges

[185] MILL, *supra* note 20, at 25.

to make such decisions. Cori, as a qualified judge, is able to say at what point more lower-pleasure is preferable to less higher pleasure.

5. The Utility of Liberalism

Mill's concept of higher pleasures links his work on ethics (*Utilitarianism*) to his other equally renowned philosophical contribution: *On Liberty*. In this work of political philosophy, Mill argues that the "tyranny of the majority" within a democracy may be just as oppressive as the tyranny imposed by a dictator.[186] To guard against that tyranny, Mill argues in favor of certain basic liberties: the freedom of speech, the freedom to pursue tastes, even if they are deemed "immoral," and the freedom of association.[187] Equally important for our concerns is his argument that cultivating one's individuality is a pre-requisite to enjoying the higher pleasures in life.

Although some have questioned the relationship between the two works, Mill's support for liberalism was grounded on the concept of utility rather than rights.[188] Unlike other liberals (e.g., John Locke), Mill's support for liberalism did not grow out of a faith in natural rights, but from his belief that utility is the highest possible good.[189] In order to experience higher pleasure, one must be free to cultivate one's own thoughts and opinions without unnecessary interference from the majority. For this, a liberal society is needed: where individuals are free to cultivate their own individuality is one where the "greatest number" can develop the capacities necessary for truly human happiness.[190]

B. *Copyright's Qualitative Hedonism*

[186] To guard against majoritarian tyranny, Mill articulates his famous "harm principle"; that is, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." MILL, *supra* note 20 at 13.

[187] *Id.*

[188] MILL, *supra* note 20 at 14 ("It is proper to state that I forego any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of a man as a progressive being.").

[189] *Id. Cf* JOHN LOCKE, TWO TREATIES OF GOVERNMENT (1823 edn) 106.

[190] *Id.* at 52–69; Martin, *supra* note173 at 146 ("He is not saying that mental pleasures per se are more pleasant than bodily ones; rather, it is the life in which they predominate that is more pleasant than the one in which sensual pleasures do.").

The Constitution empowers Congress to "promote the Progress of Science and the Useful Arts" because, in our interpretation, scientific and artistic progress is an important source of higher pleasure, without which a truly happy life would be impossible. Congress might decide to grant copyright to authors, therefore, not because copyright is a natural right, nor because it aids democracy, but because doing so might aid utility. As we unpack here, the structure of American copyright embodies a set of values that Mill later became famous for articulating. Section 1 explains our understanding of the Constitutional Copyright Clause. Section 2 demonstrates how and when granting copyright to authors achieves the goal of progress. Section 3 illustrates how and when the same goals are achieved through exceptions to copyright.

1. Progress of Sciences and the Useful Arts

Our central claim is that the sciences and useful arts provide an archetypal source of higher pleasure.[191] To illustrate the difference between this view and the quantitative hedonistic account, compare Bentham to Mill. For Bentham, who did not see any qualitative difference in pleasures, "the game of push-pin is of equal value with arts and sciences of music and poetry. If the game of push-pin furnish[es] more pleasure, it is more valuable than either."[192] Yet it was precisely this view that Mill rejected. Mill's used examples from the arts and sciences to argue that "mental" pleasures (those pleasures of the "intellect, of the feelings and imagination, and of the moral sentiments") are in fact higher pleasures.[193] For him, a truly happy person "finds sources of inexhaustible interest in all that surrounds it; in the objects of nature, the achievements of art, the imaginations of poetry, the incidents of history."[194] He elaborated on this point by repeatedly appealing to the pleasure of music.[195] If Bentham's view permitted the possibility of happiness without the mental pleasures (presuming one *really* enjoys lower pleasures in life), then Mill's forbade it. We argue that qualified judges would still agree with this conclusion today.

How then are we to "promote the progress" of science and the useful arts? On our interpretation, promoting progress requires maximizing along two dimensions: quantity and quality. That is, utility is produced by producing and consuming *more* of the things that provide

[191] We note that the terms "Science" and "Useful Arts" have been interpreted to mean copyrightable works and patents, respectively—though the reverse interpretation is sometimes given. E.g., WALTERSCHEID, *supra* note 23; Beebe, *supra* note 17.

[192] BENTHAM, *supra* note 43.

[193] MILL, *supra* note 20 at 10–11.

[194] MILL, *supra* note 20 at 16.

[195] E.g., MILL, *supra* note 20 at 18–38.

higher pleasure. To be sure, maximization across two variables is a complicated task that will, as noted in Part II.A.4, require trading them off against one another when tensions between them arise. For example, watching Sesame Street might produce higher pleasure than drinking alcohol, but it also might produce lower pleasure than the works of Dostoyevsky. Nevertheless, it would be an unhappy world with all Dostoyevsky and no Sesame Street. It may well be the case that the sciences and arts are progressed by having more Sesame Street (enabling more people to enjoy the likes of higher pleasure works) at the cost of having less Dostoyevksy. Promoting utility requires neither simply seeking out the highest possible form of pleasure, whatever the cost, or gobbling up as many pleasurable works as possible. It does require an element of quantification, though it also requires more than a purely quantitative analysis.[196]

Furthermore, when measuring the pleasure produced by a law, one must account for the pleasures produced in consuming *and* producing sciences and the arts. In this regard, creative production is likely to afford opportunities for very high types of pleasure. Writing a poem, for example, may well produce a higher order of pleasure than simply reading a poem. Ultimately, therefore, when one factors in both the quantity and quality of pleasure, produced through both production and consumption of work, the requirements of progress become an even more complicated task than copyright utilitarians have previously assumed.

Like all utilitarians, we agree that whether copyright aids or hinders that goal is an empirical question. It is entirely plausible that a system of no copyright at all is the best way to promote the progress of art and science. For example, law review articles may produce higher pleasure than circus posters. But if such articles will be created absent the copyright monopoly, then there is no reason to subject them to copyright.[197] To do so would stymie progress by limiting their use. By contrast, giving circus posters protection may be justifiable on the grounds that doing so might lead to more experience of higher pleasure; even if their pleasure is lower than that of law articles, copyright may be more necessary to bring that pleasure about.[198] In other words, qualitative hedonism does not provide a definitive answer on whether providing copyright protection *writ large* is necessarily and in all cases a good idea. Instead, it provides a decision metric for making such decisions – a decision that courts and Congress will ultimately be called on to make.

[196] As described in Part II.A.2, the right balance requires one to follow a *sufficiency* principle as to lower pleasures and a *maximization* principle as to higher pleasures. This is different from a Rawlsian framework, which sought *maximization* of principles with lexical priority. And, in some sense, this is precisely the opposite of how some interpret Mill. *See* Part II.A.2 – II.A.4.

[197] Indeed, many have argued that the chief failing of welfarism is that it may undermine rather than aid production of new works. E.g., David A. Simon, *Culture, Creativity & Copyright*, 29 CARDOZO ARTS & ENT. L.J. 279 (2011); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumption*, 51 WM. & MARY L. REV. 513 (2009).

[198] Posters, one may argue, may advertise events that *themselves* are activities that generate higher pleasures. But this kind of connection, as we described above, is too indirect to merit copyright protection.

2. The Rights of Authors

Assuming that some system of copyright does "promote Progress of Science and the Useful Arts" and therefore ought to be adopted, what rights should be granted to authors? This section argues that granting copyright to original writings of authors is the means by which progress is achieved.

i. Writings of Authors

What type of things should potentially receive copyright protection? The constitution makes it clear: the "Writings" of "Authors." But what are the "Writings" of "Authors"? Should photographs qualify? What about machine-readable object code? These questions posed some of the most serious copyright controversies of the 19th and 20th centuries. Our approach shows why the Supreme Court made the right decision in relation to photographs in the nineteenth century, but the Congressional commission made the wrong choice in relation to object code in the twentieth century.

In the nineteenth century case of *Burrow-Giles Lithograpic Co. v. Sarony*,[199] the US Supreme Court began a process that would later culminate in the recognition of copyright in photographs. The case in question concerned a photograph of Oscar Wilde by photographer Napoleon Sarony (Figure 1). In 1865, Congress had explicitly extended copyright to protect photographs.[200] This decision was challenged by the Burrow-Giles Lithographic Company, which wished to make unauthorized lithographs of the photographs. To that end, Burrow-Giles contended that the Congressional extension of copyright to photographs was unconstitutional because photographs were not, as the Constitution says, "writings" of authors. But their challenge was denied by a unanimous Supreme Court. Pointing to prior decisions, Justice Miller agreed that "ordinary production of a photograph" is "merely mechanical, with no place for novelty, invention, or originality;" but Sarony's photograph was different, displaying various authorial qualities: "graceful outlines," the selection of Wilde's "costume and draperies," the

[199] 111 U.S. 53 (1884). For a history of this case in context, see BRACHA, *supra* note 3 at 88–93; JANE GINSBURG, BURROW-GILES V. SARONY (US 1884): COPYRIGHT PROTECTION FOR PHOTOGRAPHS, AND CONCEPTS OF AUTHORSHIP IN AN AGE OF MACHINES (2020). *See also* William Allen, *Legal Tests of Photography-as-Art: Sarony and Others*, 10 HISTORY OF PHOTOGRAPHY 221 (1986).

[200] 111 U.S. at 53-55.

use of light and shade.[201] They were, in sum, original writings of authors.[202] In time, the exception made for Sarony's photograph would become the rule.

Figure 1. Sarony's Oscar Wilde No. 18.

Fast forward to one of the twentieth centuries greatest copyright debates: the protection of software. Software is a set of instructions which direct computer hardware to perform tasks. Broadly, software can be separated into human-readable source code, and machine-readable object code. Source code is written by humans in various "plain text" languages, such as C, C++, Java, or Python (see Figure 2). Once the source code is complete, a language translator converts the code into machine-readable object code. Object code is written in binary (see Figure 3). The hardware's central processing unit understands object code and executes the instructions contained therein.

Figure 2. Plaint text code written in C programming language.

[201] *Id.* at 60 (quoting trial court opinion).

[202] *Id.* at 60. Justice Miller also quoted Lord Justices Cotton and Bowen in Nottage v. Jackson, 11 Q. B. Div. 627, August, 1883, who noted in opinion that under the British statute, an "author" is someone who takes a photograph using creative faculties. *Id.* at 61.

```
main( ) {
        printf("hello, world");
}
```

Figure 3. Object code written in binary.

```
0000000 0000 0001 0001 1010 0010 0001 0004 0128
0000010 0000 0016 0000 0028 0000 0010 0000 0020
0000020 0000 0001 0004 0000 0000 0000 0000 0000
0000030 0000 0000 0000 0010 0000 0000 0000 0204
0000040 0004 8384 0084 c7c8 00c8 4748 0048 e8e9
0000050 00e9 6a69 0069 a8a9 00a9 2828 0028 fdfc
0000060 00fc 1819 0019 9898 0098 d9d8 00d8 5857
0000070 0057 7b7a 007a bab9 00b9 3a3c 003c 8888
0000080 8888 8888 8888 8888 288e be88 8888 8888
0000090 3b83 5788 8888 8888 7667 778e 8828 8888
00000a0 d61f 7abd 8818 8888 467c 585f 8814 8188
00000b0 8b06 e8f7 88aa 8388 8b3b 88f3 88bd e988
00000c0 8a18 880c e841 c988 b328 6871 688e 958b
00000d0 a948 5862 5884 7e81 3788 1ab4 5a84 3eec
00000e0 3d86 dcb8 5cbb 8888 8888 8888 8888 8888
00000f0 8888 8888 8888 8888 8888 8888 8888 0000
0000100 0000 0000 0000 0000 0000 0000 0000 0000
*
0000130 0000 0000 0000 0000 0000 0000 0000
000013e
```

Since 1980, the worldwide trend has been to protect all types of code via copyright law. In 1974, the Commission on New Technological Uses of Copyrighted Works was established by Congress ("CONTU").[203] CONTU recommended that not only source code, but also object code, receive copyright protection as forms of "literary works."[204] As recorded by Pamela Samuelson, CONTU's desire to protect software from piracy, combined with questionable narratives about copyright's historical development, motivated the commission to protect object code via copyright.[205] Subsequently, the recommendations were adopted and implemented in the Computer Software Copyright Act of 1980.[206] Other countries started to follow suit. In 1994, the World Trade Organization's TRIPS Agreement mandated that object code be protected as a form of literary work under the Berne Convention.[207] Despite this trend, courts have struggled to accommodate software within the doctrinal rules and principles of copyright. In 1995, for example, the First Circuit wrote that "applying copyright law to computer programs is like assembling a jigsaw puzzle whose pieces do not quite fit."[208] And more recently, in *Oracle v Google*, the Supreme Court wrote that "computer programs differ from

[203] UNITED STATES NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, JULY 31, 1978 (1979).

[204] *Id.*

[205] Samuelson, *supra* note 38.

[206] Computer Software Copyright Act of 1980, Pub. L. No. 96-517, 94 Stat. 3015, 3028 (1980)

[207] Trade Related Aspects of Intellectual Property, Part II, Sect. 1 Art. 10.

[208] Lotus Dev. Corp. v. Borland Int'l, 49 F.3d 807, 820 (1st Cir.1995).

books, films, and many other 'literary works'" and, accordingly, the fair use doctrine takes on new meaning in relation to uses of such work.[209]

While the protection of photographs by copyright received some criticism, it pales into comparison of the criticism attached to CONTU's decision on software. According to some, protecting machine-readable code simply does not fit with the "essence" of copyright. To paraphrase Pamela Samuelson: copyright concerns information, aesthetics, or entertainment, not function; and computer object code concerns function, not information, aesthetics, or entertainment.[210] Samuelson was not alone. Melville Nimmer, one of CONTU's commissioners and author of the leading copyright treatise, also voiced the concern in a slightly different way: providing copyright protection to object code, as an interpretive matter, stretched the meaning "authors" and "writings" beyond all reasonable bounds of exegetic elasticity.[211] Put simply, copyright is and should be a regime that protects "nonfunctional aesthetic, informational, or entertaining" works. Machine-readable code is not that.[212]

Our utilitarian understanding of copyright law explains why the Supreme Court got *Burrow-Giles* "right" and why CONTU got object code "wrong." Unlike object code, photography and source code are both sources of higher pleasure. Taking a good photograph or writing an elegant line of source-code, stimulates the mind; so too does appreciating the photographer's or coder's work. The same, however, cannot be said of machine-readable object code. Barring the development of sentient AI, unintelligible binary files provide no direct source of intellectual pleasure for any person. Therefore, unlike machine-readable object-code, photographs and source code should be understood as "Writings" because more and better photography and coding aids "progress of Science and Useful Arts." Of course, we do not mean that machine-readable code deserves no IP protection at all, and we also agree that the outputs of machine-readable code (e.g., visual displays on screens etc.) may also be writings. We simply agree, as an interpretive matter, with Samuelson that such protection should not be copyright because they do not have any "aesthetic, informational, or entertaining qualities which are communicated to a human audience."

ii. Originality

[209] Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1198 (2021).

[210] Samuelson, *supra* note 38 at 753. *See also* Peter S. Menell, *Tailoring Legal Protection for Computer Software*, 39 STAN. L. REV. 1329 (1986).

[211] CONCURRING OPINION OF COMMISSIONER NIMMER, *supra* note 203 (CONTU final report).

[212] Samuelson, *supra* note 38 at 749.

What writings of authors should receive protection? Should all works automatically receive protection? Or should only writings be protected only under certain conditions? And what should be the scope of that copyright? Since the twentieth century behemoth Supreme Court cases of *Bleistein* and *Feist*, courts have answered these questions through the rubric of "originality": only works which are original receive copyright, and the more original they are, the more copyright protection they get. But in forging the originality doctrine, these cases have infused copyright with unhelpful elements of personality theory and have shortsightedly hampered copyright with a principle of aesthetic neutrality.

The 1903 case of *Bleistein v Donaldson Lithographing Company*, concerned circus posters.[213] The plaintiff, George Bleistein created several chromolithographs depicting circus images (see Figure 4). The creative works were commissioned by Benjamin Wallace – the owner of a traveling circus. But when Wallace ran out of the posters supplied to him by Bleistein, he hired the Donaldson Lithographing Company to make copies. Bleistein sued Donaldson for copyright infringement. Donaldson countered that such works were of too little artistic merit to warrant copyright protection. Famously, Oliver Wendell Holmes Jr. dismissed Donaldson's claim. His judgment is based on a principle of aesthetic neutrality that continues to today: it would be a "dangerous undertaking" for lawyers to pass judgment on artistic worth.[214] And so, instead, any work that has commercial value ought to receive copyright. Furthermore, Holmes defined originality in terms of personality. Even something as simple as handwriting, Holmes argued, has in it "something irreducible which is one man's alone," i.e., his "personal reaction of an individual upon nature."[215] That personal reaction was, in Holmes's view, sufficient to make the writing "original."

[213] 188 U.S. 239 (1903). See Diane Zimmerman, *The Story of Bleistein v. Donaldson Lithographing Company: Originality as a Vehicle for Copyright Inclusivity*, *in* INTELLECTUAL PROPERTY STORIES (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006).

[214] 188 U.S. at 251.

[215] *Id.* at 250.

Figure 4. *Bleistein* Circus Posters

In the late twentieth century, the Supreme Court doubled down on the originality doctrine in *Feist Publications v Rural Telephone Service*.[216] That case concerned the copyrightability of telephone directories.[217] The court held that while mere facts, like telephone numbers, cannot be protected, the compilation of such facts can be protected providing that such writings are "original."[218] Dismissing the "sweat of the brow" standard of originality, the court concluded that if a writing is not copied and contains a "modicum of creativity," then that copyrightable subject matter will be protected by copyright.[219] Somewhat unhelpfully, the Supreme Court did not clarify their understanding of "creativity". This contrasts with European jurisprudence which understands creativity, much like Holmes did, in terms of personality.[220] What makes a work creative and thus original? The "free and creative choices" of the author through which the author's personality is stamped on the page.[221]

To the extent that *Bleistein* and *Feist* do incorporate some element of personality theory into originality doctrine, this was a mistake. When deciding what "writings" should benefit from copyright, and how thick such protection should be, what matters is not how personally creative they are, but whether granting copyright will contribute to, or hinder, progress. There are plenty of writings (charts and maps being historical examples) which, while not particularly creative

[216] 499 U.S. 340 (1991).

[217] *Id.*

[218] *Id.*

[219] *Id.* at 346.

[220] Infopaq Int. v. Danske Dagblades Forening , Case C-302/10, EU:C:2012:16 (EU).

[221] Football Dataco v. Yahoo! UK, Case C-604/10 [2012] 2 CMLR (24) 703 (EU). Eva-Maria Painer v. Standard VerlagsGmbH, Case C-145/10 [2012] ECDR (6) 89, [87]–[93] (EU).

in Holmes's sense, still contribute to progress of science and the useful arts. To illustrate, consider a helpful example from British law: mathematics exam papers.[222] To be sure, the works of van Gogh, they are not. Nevertheless, the amount of higher pleasure that such mathematics papers produce can be large. What matters in relation to phone books, circus posters, and mathematics papers is not how personally creative they are, nor even how much "sweat" went into producing them, but a policy judgment about whether granting a given class of works copyright will do more to aid, or harm, human happiness.

Similarly, the Supreme Court's commitment to aesthetic neutrality is equally misguided. While all writings have a claim to being a higher pleasure (including circus posters) some writings are higher than others. The world may well be a happier place with a handful of works of Manet and Goya than thousands of circus posters. Of course, we do not mean that judges, as Holmes put it, trained only in law, should be *whimsically* rendering aesthetic judgments. Judges and, perhaps even more importantly, legislators must have adequate training and experience to render them qualified to make these judgments. If a policymaker, for example, is considering whether documentary films should enjoy a broader scope of protection than, say, Hollywood blockbusters, then not only does the individual need the quantitative skills to assess whether expanding the scope of copyright will increase or decrease the supply of documentary films, but they also require the ability to make a qualitative judgment about the type of pleasure such films produce vis-à-vis alternative creative endeavors. In some sense, this is an aspirational goal under which copyright policymakers ought to strive to better appreciate the world of creativity and thus be able to render better decisions.[223] Failing that, they ought to consult those who have the necessary qualifications.

3. Copyright Exceptions

Congress should grant copyrights to authors when doing so promotes progress. But equally important in this regard is the role of copyright exceptions, and particularly the fair use doctrine.

i. Fair Use: Critical Secondary Uses

[222] University of London Press v. University Tutorial Press [1916] 2 Ch 601 (UK).

[223] We agree with the criticisms of those like Yen who note that, without trying, judges already engage in this kind of aesthetic judgment. Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1997).

When should individuals be permitted to make “fair uses” of copyrighted works? In particular, when should individuals be permitted to re-use copyrighted material to criticize the original author or aspects of society?[224] Proponents of democratic values often claim superiority over utilitarians on the grounds that their values would give users much broader fair use rights.[225] But we are not so certain that democratic values are clearly superior to qualitative hedonism in this regard.

To illustrate, consider three classic cases from copyright’s archives.[226] First, consider the case of the *Air Pirate Funnies*.[227] The Air Pirates were a group of cartoonists. In 1971, the group released two issues of a comic called *Air Pirate Funnies*.[228] The comic depicted classic Walt Disney characters in a range of unflattering situations involving drug use and sexual activities (see Figure 5).

Figure 5. *Air Pirate Funnies*

Walt Disney sued the Air Pirates for copyright infringement. The Air Pirates responded that their comic was a criticism of American culture.

[224] For helpful background, see Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARVARD LAW REVIEW 1105 (1990).

[225] Bracha and Syed, *supra* note 5 at 258–66.

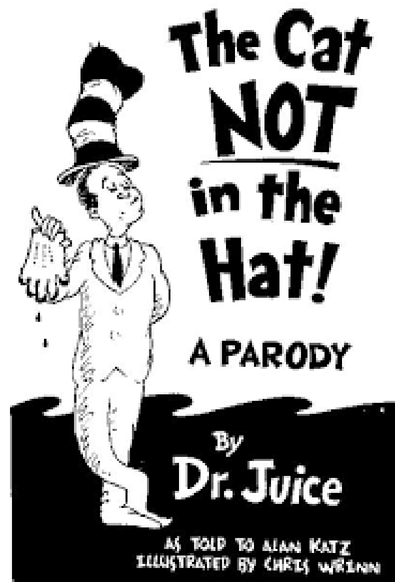
[226] For further consideration, see. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001); Campbell v. AcuffRose Music, Inc., 510 U.S. 569, 579 (1994).

[227] Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 760 (9th Cir. 1978).

[228] BOB LEVIN, THE PIRATES AND THE MOUSE: DISNEY’S WAR AGAINST THE COUNTERCULTURE (2003).

Second, consider the case of the *Cat Not in the Hat* (Figure 6). In 1957, Theodor Geisel, under the penname Dr. Suess, released the famous children's book "The Cat in the Hat." In 1997, Alan Katz, writing under the penname Dr. Juice, released "The Cat Not in the Hat: A Parody."[229]

Figure 6. Katz, *The Cat Not in the Hat* (1997)



Katz's book emulated the style of Dr Suess's works to criticize the handling of the 1994 O.J. Simpson Murder Trial. Mimicking famous phrases from Dr. Suess's writing (e.g., "one fish, two fish, red fish, blue fish" became "one knife, two knife, red wife, dead wife"), Katz sought to highlight the (in his view) absurdity of the not-guilty verdict delivered in that case.

And finally, consider the case of Tom Forsythe's *Food Chain Barbies*.[230] In the 1990s, American artist Tom Forsythe became known for his "Food Chain Barbies" series. In this series, Forsythe captured images of unclothed Barbie dolls in a range of dangerous situations involving domestic appliances, e.g., in food blenders or ovens (Figure 7).

[229] Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 924 F. Supp. 1559 (S.D. Cal. 1996), aff'd, 109 F.3d 1394 (9th Cir. 1997).

[230] Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003).

Figure 7. Food Chain Barbies

Forsythe argued that the series critiques the idea of "perfection" and how women are supposed to look and act. Mattel Inc., the producers of Barbie dolls, sued Forsythe for both copyright and trademark infringement.

Courts have struggled to articulate a coherent framework for deciding when uses are fair and when they are infringing. In all three of the above cases, the defendants based their defense on fair use. But the results are hard to reconcile.[231] In the first two cases the defense failed, while it succeeded in the third. In the *Air Pirates* case, the Ninth Circuit found that the defendant had gone beyond what was necessary to "conjure up" the work being parodied, i.e., Walt Disney's characters. Later, in the *Cat Not in the Hat* case, the Ninth Circuit again refused the fair use defense, citing among other reasons, the fact that the defendant's use was not sufficiently transformative and, as a commercial use, was more likely to harm the market for the original work. Yet in the Food Chain Barbie case, the Ninth Circuit changed course. In upholding the fair use claim, the court found that the use exhibited a "extremely transformative nature and parodic quality" which made the commercial nature of Forsythe's work "less important."[232]

Here the epistemological critique looms large since whether these uses ought to be allowed is, from the perspective of quantitative hedonism or welfare-preferentism, "highly uncertain."[233] Categorizing such uses as fair use will reduce the licensing opportunities for the original creators and plausibly will reduce incentives for creativity in the future at the margin.[234] If we freely permit uses such as that in the *Air Pirate Funnies*, plausibly Walt Disney Co will be less likely to create new characters – like Mighty Mouse – going forward.[235] On the other hand, labelling these uses as fair uses reduces the barriers to creativity for the likes of Air Pirates, Katz, and Forsythe. On balance, it is difficult to say whether labelling these types of critical secondary uses as fair uses will result in more or less creative work, and more or less preference satisfaction, in the future. The analysis is further complicated by a range of additional considerations (e.g., transactional cost of licensing, the type of market failure, the possibility for beneficial product differentiation etc.).[236]

One advantage of emerging democratic theories of copyright is their ability to justify finding fair use in cases such as these, not by answering the epistemological question but by avoiding it through a normative response. Recall that consequence-sensitive theorists, like utilitarian, share a concern with the incentive-access framework. Thus, someone who thinks copyright

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[231] For a discussion of parody in copyright, see David A. Simon, *Reasonable Perception and Parody in Copyright Law*, 2010 UTAH L. REV. 779 (2010).

[232] Mattel., 353 F.3d at 803.

[233] Bracha and Syed, *supra* note 5 at 260.

[234] *Id.*; LANDES AND POSNER, *supra* note 86 at 147.

[235] Bracha and Syed, *supra* note 5.

[236] *See*, *e.g.*, Richard A. Posner, *When Is Parody Fair Use?*, 21 THE JOURNAL OF LEGAL STUDIES 67 (1992); Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1997); Wendy J. Gordon, *Market Failure and Intellectual Property: A Response to Professor Lunney*, 82 B.U. L. REV. 1031 (2002); Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1 (1997).

should promote democracy face a similar problem similar to the one encountered by utilitarians: fair use may or may not lead to more democracy-enhancing creative works. Yet, while acknowledging the fundamental tradeoff, a democratic theorist may place a "normative premium" on critical secondary uses that have particularly important democracy-enhancing qualities. Why? Because as Bracha and Syed explain, critical secondary uses play an important role in "encourage critical reflection" and "cultivate faculties needed to make meaningful reflective choice."[237] Encouraging such self-reflection is more important than mere preference-satisfaction (i.e. it is of a "higher order" importance) because self-determination is a condition of rational preference formation.[238] In the judgment of many democratic theorists, the democracy-enhancing quality of critical secondary uses tip the scales in favor of finding fair use, even if the utilitarian consequences are finely balanced. Perhaps it is better to live "in a world with the *Air Pirates* and no Mighty Mouse than a world with Mighty Mouse but no *Air Pirates*, even if consumers are willing to pay more for Mighty Mouse."[239]

Qualitative hedonism seems just as likely to support broader fair use rights for critical secondary users as democratic theories. Recall that qualitative hedonism defines progress along two dimensions: its quantity and its quality. From a purely quantitative perspective, it is (as explained above) "highly uncertain" whether fair use would produce more creative works and more happiness. Yet, the qualitative dimension of utility almost certainly tips the balance in favor of a finding of fair use in each of the three cases above. The *Air Pirate Funnies*, the *Cat Not in the Hat*, and *Food Chain Barbies*, all produce a highly intellectual form of pleasure for the reasons identified by Bracha and Syed: they encourage critical reflection and cultivate faculties required for reflective (and clearly human) choice. From our standpoint, if qualified judges would – as we think likely – find *Air Pirates* to produce a type of pleasure that is higher than Mighty Mouse, then certainly it would be better to permit the Air Pirates' use of Micky Mouse, even if that means forgoing some marginal works in the future. It seems very likely to us that Mill would agree with Bracha and Syed when they say it is better to live in a world with the *Air Pirates* and no Mighty Mouse than vice versa.

Of course, the answer would be different if the quantitative dimension of the analysis was clearer. Suppose, for example, that permitting the *Air Pirates* funnies would not only mean one fewer Mighty Mouse in the world, but also means no Wil-E-Coyote, no Road Runner, and many more lost works.[240] If we adopted, as Mill did, an infinite superiority approach, wherein even a small quantity of higher pleasure is superior to any quantity of lower pleasure, then the answer

[237] Bracha and Syed, *supra* note 5 at 262.

[238] Coombe, *supra* note 99.

[239] Bracha and Syed, *supra* note 5 at 262.

[240] Bracha and Syed, *supra* note 5.

would be simple: we ought to permit the *Air Pirate Funnies* regardless of the cost to works of lower pleasure. But under our finite superiority approach, then qualified judges are called upon to cast their votes.[241] Here our qualified judges would have a difficult judgment call to make. Such decisions necessarily need to be made contextually with consideration of factors such as the strength and veracity of the quantitative evidence, and the strength of preferences expressed by competent judges for critical secondary uses. We note here, however, that qualitative hedonism is not alone: democratic theories have a similarly hard decision to make in such cases about what route will best fulfill their values.

ii. Fair Use: Fan Creativity

Should fans be allowed to freely create their own fiction?[242] Should we, for example, be allowed to write and publish our own – arguably better – endings to the *Game of Thrones* series?[243] George RR Martin famously objects, stating that "art is not a democracy" and people "don't get to vote on how it ends."[244]

As a legal matter, is Martin correct to say people do not get a vote on how the story ends? The answer is unclear. Once again, the question is whether the uses in question should be deemed fair. Without protection of the fair use doctrine, the copyright owner's control of reproductions and derivative works would almost certainly require the user to negotiate for permission. There are good arguments, of course, to believe that such uses are already permitted fair uses: they are frequently transformative and non-commercial in nature, and they are unlikely to have a direct substitutionary effect on the original works.[245] However, countervailing factors cut the other way: in many cases the copyrighted works in question are fictional in nature and enjoy thicker copyright protection, and such uses *might* deprive authors of licensing revenue in new

[241] *See supra* Part II.A.3.

[242] For a discussion of fan fiction and copyright, see, e.g., Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law Symposium - Using Law and Identity to Script Cultural Production*, 17 LOY. L.A. ENT. L.J. 651 (1996); Jacqueline D. Lipton, *Copyright and the Commercialization of Fanfiction Recalibrating Copyright: Continuity, Contemporary Culture, and Change: Institute for Intellectual Property & Information Law Symposium*, 52 HOUS. L. REV. 425 (2014); Aaron Schwabach, *The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright*, 70 U. PITT. L. REV. 387 (2008); Leanne Stendell, *Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction Comment*, 58 S.M.U. L. REV. 1551 (2005).

[243] We here assume non-commercial fan fiction. Cf Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

[244] Comments of George RR Martin, Tiff Interview, https://www.youtube.com/watch?v=Upka7Kc-Dpw (last accessed Jan. 18, 2023).

[245] *See* Part I.A.

markets (such as the short lived Kindle Worlds venture); and in some cases, the user may use quite a substantial amount of the underlying copyrighted work.[246]

Proponents of democratic theories of copyright often claim that their approach is superior to that of utilitarianism on this score.[247] Standard copyright utilitarian theories do not unequivocally support the user's ability to create fan fiction or engage in personal uses.[248] Instead, they become bogged down in the impossible calculations required by the incentive-access framework. Will allowing such uses deprive the copyright owner of revenue and thereby result in copyright owners producing fewer new works at the margin? Or will the newfound freedoms release the creative potential of fans and individuals? While the existing empirical evidence is on the side of the user within a utilitarian framework, the case is less water-tight than it is under alternative approaches.[249] Particularly, democratic theorists argue, *contra* Martin, that art is a democracy for the purposes of copyright. Those who emphasize human flourishing place a normative premium on meaningful human activity that, they argue, tilts the legal balance in favor of fans.[250] According to this theoretical framework, fan creativity is of "intrinsic, and potentially invaluable, worth to those who engage in it."[251] Better, democratic theorists might argue, to live in a world with possibly fewer works, but with fans engaging in more creative reuses with them.

The proclaimed superiority of democratic theories over qualitative hedonism is, however, less clear. As articulated throughout this Article, creativity is one of the highest possible human pleasures. As a purely quantitative matter, we can already say that permitting fan creativity under the fair use doctrine seems likely, although not certainly, to lead to greater pleasure as a quantitative matter. To this, the qualitative dimension of utility, once again, tilts the balance *a fortiori*, in favor of permitting fan fiction. As a source of meaningful human activity, engaging in such creative practices produces a high degree of intellectual pleasure. And because our theory accounts for both pleasurable product as well as consumption, it must account for the highly pleasurable nature of the activity involved both in creating and enjoying fan fiction. Accordingly, democratic theories and qualitative hedonism seem quite well matched here: if

[246] Bracha and Syed, *supra* note 5 at 275–76.

[247] *Id.* at 274–81.

[248] *Id.* at 275 (noting such theories are "somewhat inconclusive").

[249] There are good reasons to believe that fan-created work is not monetizable, as demonstrated by the collapse of Kindle Worlds. If that is the case, then even under a standard utilitarian framework will not deprive copyright owners of any possible revenue. See generally Rebecca Tushnet, *All of This Has Happened Before and All of This Will Happen Again: Innovation in Copyright Licensing*, 29 BERKELEY TECHNOLOGY LAW JOURNAL 1447 (2015). To the extent that this is the case, our qualitative hedonism provides an *a fortiori* argument in favor of fair use.

[250] *See supra* note 242.

[251] Bracha and Syed, *supra* note 5 at 277.

the quantitative incentive-access framework is ambiguous, not only democratic theory, but also qualitative hedonism, supply reasons to place a thumb on the scale of fair use.

iii. Fair Use: Educational Course Packs

Should it be permissible for individuals to make fair use copies of extracts of educational materials for purposes of study? Illustrative of this problem is the Indian case of *University of Oxford v Ramewshwari Photocopying Service*.[252] Teachers at the University of Delhi created "course packs" for their students, i.e., documents containing lengthy extracts taken from other academic texts. Rameshwari Photocopy Service, run by Dharmampal Signh, was tasked with photocopying and binding the course packs together. Students could then buy the packs from Singh at a price equivalent of $0.01 per page. Subsequently, a group of academic text publishers, including Oxford University Press and Cambridge University Press, sued the university and Ramewshari Photocopying Service, arguing that the course packs reproduced significant portions of their copyrighted works. The plaintiff organizations pointed out that they have well-established procedures for the licensing of their materials by educational providers,[253] which the defendants were obligated to adopt once they existed. Ultimately, the High Court of Delhi held that the actions of the university and Rameshwari Photocopying were protected "fair dealing" under the Indian Copyright Act. But was that the right outcome?[254]

Whether the free photocopying of educational course packs should be permitted is, from the standpoint of standard utilitarianism, uncertain. From a welfare-preferentist perspective, whether the copying should be freely permitted depends on the existence of a licensing market failure.[255] Under normal conditions, the users ought to negotiate for a license to reproduce the material.[256] The supracompetitive price charged for such licenses will necessarily price some customers out of the market and result in static deadweight loss.[257] But at the same time, the profits earned by publishers is what generates the dynamic incentive for others to enter the market and produce more new works. Under these conditions, and in absence of perfect price discrimination, welfare-preferentism assumes that the interaction of market demand and

[252] Delhi High Court, Sept. 16, 2016. For American cases along the same lines, see Princeton Univ. v. Michigan Document Servs., 99 F.3d 1381 (6th Cir. 1996); Basic Books Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D. N.Y. 1991).

[253] See generally Rights & Permissions, OUP ACADEMIC, https://global.oup.com/academic/rights/ (last visited Oct 1, 2022).

[254] Similar issues were posed by the US case of Cambridge University Press v Albert*,* 906 F.3d 1290 (11th Cir. 2018)

[255] LANDES AND POSNER, *supra* note 86 at 147; Gordon, *supra* note 237; PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM THE PRINTING PRESS TO THE CLOUD (2019).

[256] *Id.*

[257] *Supra* Part I.A.2.

supply will effectively balance static inefficiency against dynamic incentives, resulting in a Kaldor-Hicks optimal state.[258]

However, even standard welfare-preferentism accepts that licensing systems may break down leading to situations that are not Kaldor-Hicks optimal.[259] Firstly, if the transaction cost of negotiating the licenses is sufficiently high, then the users may not license the material even though doing so would increase welfare or utility. Such a market failure, however, is decreasingly likely to occur in practice due to digital technologies where publishers offer relatively low-cost online licensing mechanisms.[260]

Secondly, if the copying produces large positive externalities, the social benefit associated with the copying may far exceed the private benefit received by the individual student or educational provider.[261] This gap may result in user unwillingness to engage in licensing even when doing so would result in a Kaldor-Hicks optimal state. For example, even if the primary beneficiary of such copying is the student, society more broadly may benefit if the student is better educated. If those external benefits are not reflected in students' willingness to pay, then it may result in students' consuming the materials in sub-optimal amounts. However, it is at least plausible that such external benefits will be reflected in student willingness to pay because much of that public benefit will be captured by the student later in life (for example, because law students will expect to capture much of the benefit of their education in legal fees). Thus, from the standpoint of standard utilitarianism, it is unclear whether we should subject course packs to voluntary licensing requirements or not. There is a decent, but not water-tight, case under standard utilitarianism that supports fair use in such cases.

What does qualitative hedonism add to this analysis? In short, it provides further reasons to be skeptical of reliance on voluntary licensing to produce a utility-promoting outcome. The consumption of educational materials produces higher pleasures. Yet, as explained above, that high quality of pleasure does not necessarily translate into a correspondingly high willingness to pay. Students may be systematically willing to pay equal (or even more) amounts to obtain upgrades in video games, even when consuming educational materials will be more likely to enhance their happiness. The result is that subjecting course packs to voluntary licensing requirements will result in a situation that does not promote the greatest happiness.[262]

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[258] *Supra* Part I.A.2.

[259] LANDES AND POSNER, *supra* note 86 at 147; Gordon, *supra* note 236; GOLDSTEIN, *supra* note 255.

[260] GOLDSTEIN, *supra* note 255 (arguing the digital age enables copyright to extend into "every corner in which people derive enjoyment and value from literary and artistic works").

[261] Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257 (2007).

[262] Standard economic analysis may argue that an exception should apply because the producer will in any case cover the production costs, and consequently there is no reason to bear the resulting deadweight loss without an exception.

This does not mean that all educational materials should be freely copied in any amount and in any instance. Allowing wholescale copying of academic texts is likely to significantly undercut incentives to create them. Facts and circumstances may counsel in favor of a certain "sufficient" amount of educational materials being subject to copyright to enable the satisfaction of "necessary" lower pleasures. But the calculation under a Millian approach is quite different in the case of extracted academic texts used in course packs. On a purely quantitative incentive-access analysis, subjecting such course packs to fair use has uncertain utilitarian consequences. But when factoring in the insights of Mill's qualitative hedonism—along with the particular attributes of educational materials used in higher education—we have even more reasons to conclude that such uses ought to be considered fair.

III. Copyright Utilitarianism Defended

This Part defends our refined utilitarianism. Section A argues that, far from being a doctrine "fit for swine," qualitative hedonism is normatively attractive, on more realistic epistemological grounds, and provides a better interpretation today's copyright system, than critics often suggest. Section B then turns to the question of the social function of utility. Thus far, we have made the simplifying assumption that utility ought to be maximized, without reference to the role of capacity-building within the maximization process. Section B explores how Mill's concept of utility maximization accounts for the role of capacity-building and, as such, makes the theory even more attractive.

A. *Defending Utilitarianism*

To those who argue that copyright utilitarianism unjust and normatively unattractive, epistemologically unrealistic, or interpretively unsound, our basic response is simple: while these criticisms apply to Benthamite and welfare-preferentist versions of utilitarianism, they stick far less well to qualitative hedonism.

1. Normative

As demonstrated in Part II.B., far from pursuing an unjust and unattractive culture, utility – in the form of scientific and artistic progress – is an attractive value for copyright law to promote. The idea that copyright should produce more and higher pleasure is not as normatively unappealing as some of its critics make out. To see why, we compare our theory to both democratic and preferentist theories.

Consider democratic theories, which often claim normative superiority over qualitative hedonism. Two reasons call this superiority into doubt. First, there is a structural similarity between democratic theories and qualitative hedonism. Both theories impute normative priority to certain creative activity over others; in neither case is normative value purely subjective.[263] Second, the activities on which qualitative hedonists and democratic theorists place normative priority are similar. As demonstrated particularly in Part II.B.3., both democratic theorists and qualitative hedonists place normative priority on a certain type of political, cultural, social expression. Take, for example, the claim that copyright ought to incentivize expression on political matters – the kind necessary to achieve a robust and pluralistic political democracy. A qualitative utilitarian could scarcely disagree. The pleasure produced by engaging with political expression is almost certainly of the higher type, and ought to be highly weighted under a qualitative hedonistic calculus. It is of little wonder, therefore, that qualitative hedonists and democratic theorists come to very similar conclusions, particularly in relation to the fair use doctrine.

This does not mean, however, that the theories completely collapse into one another. While qualitative hedonism may normatively prioritize similar creative activities, it does so for a different reason. While qualitative hedonism sees these activities as of normatively higher priority, the basis of that priority is still different from that of democratic theories. The basis is hedonism rather than self-determination, democratic norms, or human flourishing. Furthermore, qualitative hedonism differs in the extent or nature of this commitment. Mill, like other democratic theorists, suggests that the normatively prioritized activities are of a discontinuously higher-order. But we do not go so far. Instead, we see some continuity of higher and lower pleasure and commit to a more limited sufficiency principle rather than infinite superiority. As a result, we are willing to trade off appropriately weighted higher and lower pleasures within the utility calculation.

Next, consider welfare-preferentism.[264] Welfare-preferentists criticize both the human flourishing theories and our qualitative hedonist account as paternalistic: in each, what one

[263] See *supra* Part I.B.1.

[264] See *supra* Part I.A.2.

ought to enjoy is decided by someone else.[265] If X wants Hollywood Blockbusters, preferentists asks, why should someone else get decide for X that she will instead get independent films? Likewise, if consumers prefer Mickey Mouse, why should producers supply Air Pirate Funnies? In this regard, welfare-preferentists claim their approach values individual choice.

We think this argument is disingenuous. Contemporary preferentism also shows symptoms of paternalism. Consider, for example, the problem of preferences that seem to be obviously harmful to both those who hold them – illustrated by the case of Armin Meiweis: a German man who in 2002 was arrested for murdering and eating a willing victim met online and is now serving a murder sentence.[266] Or, to use a copyright example, consider individuals who have preferences for videos of brutal animal mutilation.[267] Or consider preferences formed under conditions of imperfect information or through errors in logical reasoning:[268] I may prefer to shave with benzene because it gives my face a nice shine – but I may not understand that it's carcinogenic. Very few contemporary preferentists support satisfaction of these preferences. Instead, they impose various criteria for preferences to "count," thereby "filtering" out certain "manifest" preferences, maximizing only "true" preferences.[269] Not only is such a filtering process paternalistic, but it is also wrong-headed. If we are to override individuals' subjective preferences in copyright, we would be better doing so on the grounds that it allows people to lead substantively happier lives.[270] While qualitative hedonists can debate what that good life is, welfare-preferentists cannot pretend their approach elides such choices, claiming they respect the ones made by individuals.

2. Epistemological

Does our current inability to measure copyright's utility effects supply a good reason to give up on copyright utilitarianism? We think not. Even if we cannot precisely estimate the various costs and benefits of the system, we still ought to use utility as the benchmark by which we evaluate copyright.

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[265] Bracha and Syed, *supra* note 5, at 236.

[266] German cannibal guilty of murder, *BBC News* (May 9, 2006) http://news.bbc.co.uk/1/hi/world/europe/4752797.stm.

[267] United States v. Stevens, 559 U.S. 460 (2010).

[268] Harsanyi, *supra* note 178 (stating that manifest preferences are "actual preferences as manifested by [her] observed behavior, including preferences possibly based on erroneous factual beliefs, on careless logical analysis, or on strong emotions that at the moment greatly hinder rational choice."). Indeed this was one of the reasons why Nussbaum adopted a capabilities approach as a half way house between preferentism and flourishing. Nussbaum, *supra* note 114.

[269] Harsanyi, *supra* note 178. *See also* Harry G Frankfurt, *Freedom of the will and the concept of a person*, 68 Journal of Philosophy 5 (1971)..

[270] Bracha and Syed, *supra* note 5 at 257.

Utility cannot be reduced to numbers alone. In qualitative hedonism, there will always be an aspect of utility that defies quantitative calculation. Even assuming that we could theoretically tot up the overall amount of pleasure produced by the copyright system, and then compare that number to the amount of pleasure produced in the counter-factual world without such rights, we would still have little information about the quality of the pleasure produced. It is entirely possible that a copyright system might encourage the production of many new works, and thereby produces a high quantity of pleasure, and yet on qualitative grounds, that pleasure might be deemed insufficiently low. A copyright system might, for example, produce thousands of Hollywood blockbusters, but relatively few independent films or documentaries. In this case, even if as a quantitative matter we have no reason to change the system, as a qualitative matter, we may believe there is reason to intervene. The practical consequence is that one can never expect quantitative methods alone to determinatively tell us whether copyright truly does bring about the greatest happiness for the greatest number.

At the same time, qualitative hedonism remains empirical. Like Mill, we believe that humanity learns through experience.[271] Since the Statute of Anne in 1709, the world has had ample time to observe the institution of copyright and form reflective judgments as to its utility. But, important as they are, those observations cannot solely be limited to mathematical estimates on such things as the number of new works produced, consumer surplus, and deadweight loss. Further to those quantitative observations, we also need to make observations as to the quality of creative work produced.

Therefore, the fact that the utilitarian effects of copyright cannot be proven completely by quantitative methods is not a compelling reason, by itself, to sacrifice the theory for another less, compelling one. It is a non-sequitur to conclude that the true purpose of copyright, as well as its normative metric, is the protection of natural rights simply because the calculations of utilitarianism are too complicated to perform completely and in every case. If as a normative matter that utility is the highest good, then a practical conception of utility must remain the yardstick by which we evaluate the system.

With that in mind, do we believe as an empirical matter that our current copyright system does indeed maximize happiness? Given the partially quantitative, partially qualitative, nature of this question, we are not well-equipped to answer this question determinatively on our own. Provisionally, however, we think that while some form of copyright system is a necessary aid to utility, the existing system is suboptimal. As a quantitative matter, whether copyright does promote or impede utility is highly uncertain. As Breyer wrote fifty years ago, the quantitative

[271] MILL, *supra* note 20, at 25.

case for copyright (even before its 1976 expansion) was quite uneasy.[272] Recent empirical studies seem consistent with that finding.[273] Moreover, when we move to a qualitative analysis, we note that many of the creative endeavors that produce the highest forms of pleasure are the least promoted under the existing system. Take, for example, the situation facing documentary and independent film makers. Researchers have highlighted how the rights-clearance culture can dramatically consume the budget of a filmmaker leading to many marginal works not being produced, despite the very considerable quality of pleasure they produce.[274] Likewise, the European Union recently sought to fix the "newspaper crises" (that is, the declining revenues or print journalism outlets) by granting press publishers new rights.[275] While we question whether granting more rights will improve the situation, the example suggests something uncomfortable about how well high-pleasure creative work is faring under the existing system of copyright law.

3. Interpretive

Finally, qualitative hedonism provides a better interpretation of the existing American copyright system. In particular, our qualitative hedonistic approach provides a better constructive interpretation than other theories of the Copyright Clause and associated case law. In Dworkinian terms, the idea that copyright exists to promote more higher pleasure "fits" and "justifies" copyright doctrine.[276] As a result, qualitative hedonism shows copyright law in its best light. Given that we explained in Part III.A.1 why qualitative hedonism provides a normatively attractive justification for the system, we now move onto the question of "fit."

Consider again the statements that opened this article – the instrumentalism of the Constitution's "means-ends" Copyright Clause, the views of Jefferson, the repeated refrains from the Supreme Court about incentives.[277] Far from being mere "surface froth,"[278] these

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[272] Breyer, *supra* note 28.

[273] See Heald, *supra* note 28. GLYNN LUNNEY JR, COPYRIGHT'S EXCESS (CUP 2018). *See also* Lemley, *supra* note 29.

[274] Center for Social Media, American University, ***Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers***, https://dra.american.edu/islandora/object/socialmediapubs%3A34 (last visited Oct 2, 2022).

[275] Directive on the Digital Single Market, art 15. For background, see Stavroula Karapapa, *The press publishers' right in the European Union: an overreaching proposal and the future of news online*, in NON-CONVENTIONAL COPYRIGHT (Bonadio, ed, 2018) 316.

[276] DWORKIN *supra* note 19.

[277] *Supra* notes 1-8.

[278] RICHARD A POSNER, ECONOMIC ANALYSIS OF LAW (5th edn, 1998) 27. William Lucy, *Method and Fit: Two Problems for Contemporary Philosophies of Tort Law*, 52 MCGILL L.J. 605, 610 (2007) (discussing the "surface-froth" claim by Posner that legal decisions hide the true reasons for decisions, which are primarily economic).

consequentialist ideals are central to what American copyright is. Giving up on consequentialism, therefore, seems to miss something central about the ideology and practice of American copyright law. Further, utilitarianism is entirely consistent with the progress clause. It is, perhaps, no wonder that democratic theories – however normatively attractive – are relatively late comers on the scene of copyright.

Nor do utilitarianism's critics provide a clearly better interpretation of the "progress" clause. Reconsider the work of Birnhack,[279] Chon,[280] and Beebe.[281] The former two scholars argue that progress is best understood as a requirement that copyright develop and fosters access to knowledge; the latter argues that progress mandates some form of aesthetic development. But on our account, both camps are only partially correct. Copyright should seek to foster intellectual progress of knowledge *and* an artistic concern with the aesthetic because *both* are necessary aspects of utility in the largest sense. Likewise, many of the values that Silbey argues ought to be read into the progress clause are consistent with our view of copyright utilitarianism.[282] Far from being incommensurable, the value of privacy is a central tenet of Mill's liberalism which both he, and we, defend on utilitarian grounds.

B. Towards a Social Utility Function

Switching our normative lens from quantitative hedonism or welfare-preferentism to qualitative hedonism allows utilitarian copyright theorists to respond to many contemporary criticisms. Yet clarifying what counts as "the good" that copyright ought to promote is only half the equation. The other half consists of defining "the right." If we agree copyright should promote utility, one still must ask what: what makes *maximizing* utility right? Why maximize utility instead of, for example, distributing utility throughout society according to some principle of equality?[283] What, in other words, is qualitative hedonism's social function?

So far, we have assumed for simplicity that a relatively narrow view of maximization is right. This Section relaxes that basic assumption by demonstrating how Mill's utilitarianism explicitly includes capacity-building as a part of the maximization process. While we do not argue that Mill's approach to the social utility function is better to the exclusion of all other social functions, we highlight that Mill's capacity-sensitive approach to maximization is more normatively

[279] *Supra* note 136.
[280] *Supra* note 138.
[281] *Supra* note 17.
[282] *Supra* note 124.
[283] *Supra* note 31.

attractive than supposed. We illustrate the point using the example of copyright exceptions for individuals living with disabilities.

1. Capacity-Sensitive Maximization

For many, the fact that Mill believed in "the greatest happiness for the greatest number" made him a dyed-in-the-wool utilitarian with all the maximization that came with it.[284] We have already demonstrated that Mill's qualitative view of "happiness" altered elements of Benthamite utilitarianism. But additionally, and even less widely recognized, he also provided a more refined account of what it meant to produce the "greatest" amount of happiness. To Mill, maximization of utility is dynamic process, rather than a purely static calculation. Maximizing society's happiness did not mean simply increasing today's pleasures and minimizing today's pains. Instead, policy makers were called upon to improve citizens capacities to appreciate higher-pleasure through, for example, access to education. The point, Mill argued, is that through improving capacities today will lead to more experience of pleasure, and thus more utility, tomorrow. "Utilitarianism could only achieve its ends," Mill argued, "through the general cultivation of nobleness of character" – Mill's rather stiff nineteenth century way of referring to the capacity to enjoy higher pleasure.[285] Mill's view of maximization, then, is more complex than that found in traditional utilitarianism or even by many who assume Mill to be a utilitarian of a different stripe.

For copyright, capacity-sensitive maximization has two implications. First, in some cases, it reinforces the conclusions derived in Part II.B. For example, critical secondary uses should be fair use, not only because today's world would be better with more critical expression at the expense of more mainstream and hegemonic expression, but also because through engaging with such expression develops one's critical thinking capacities. Educational course packs likewise should be fair use not only because a student's engagement with educational materials is a higher pleasure, but also because it furthers her capacity to enjoy higher pleasure tomorrow.[286]

Second, capacity-sensitive maximization itself works to brings the policy recommendations of utilitarianism further into line moral intuition. For example, the kind of expressive conditions

[284] *Cf* Christopher Miles Coope, *Was Mill a Utilitarian?*, 10 UTILITAS 33 (1998) (highlighting that Mill was receptive to a range of ideas [equality, liberalism] which were not necessarily consistent with his professed faith in utilitarianism). Riley, *supra* note 183 at 270 (by disregarding quantity in favor of quality, and by not having a hedonistic definition of quality, "then it becomes obvious that the reference to qualitative superiority is merely a way to smuggle in some intrinsic value other than pleasure so as to modify hedonistic assessments based on quantities of pleasure.").

[285] MILL, *supra* note 20 at 14.

[286] *See supra* Part II.B.3.

that democratic theorists value are also the kind of conditions necessary for individuals to appreciate life's higher pleasures. Human flourishing accounts of copyright state that truly good human lives involve meaningful, self-determined, and sociable expressive activity. Once again, qualitative hedonists like Mill would agree. Recall that Mill views happiness dynamically, and understands the development of certain capabilities – such as one's individuality of thought – to be entirely consistent with a society that is progressing towards the greatest happiness. Engaging in creativity is, from this perspective, not only a highly pleasurable experience in its own right, but helps develop the intellectual faculties that are necessary for experiencing higher pleasure. A copyright system that truly seeks to promote the greatest good would accordingly foster the conditions that allow individuals to lead a meaningful expressive life.

Folding in the capacity-sensitive approach to the maximization calculation may avoid some of the distributionally unpalatable accounts of standard maximization. We illustrate this by considering copyright exceptions for people living with disabilities.

2. Access & Exceptions for People Living with Disabilities

Not everyone has the physical ability to access a work or enjoy the pleasure it produces. For example, those who are visually impaired do not have access to the pleasure of reading a print novel. Because copyright protects works by restricting access, some individuals with disabilities may be unable to access copyrighted works without infringing. For example, individuals with visual or auditory impaired may require software to read works aloud, convert text to braille, or display closed captioning to enjoy a copyrighted work, but doing either may infringe the copyright holder's exclusive rights. For this reason (and potentially others), copyright has built in safeguards that protect these means of access to ensure individuals disabilities have equal access as those who are not disabled. [287]

A range of scholars have sought to justify such exceptions. Bracha and Syed justify the exception on the grounds of distributive equity.[288] Similarly, capacity-based scholars, like Margaret Chon contends that protection of copyrightable works sometimes conflicts with

[287] 17 U.S.C. § 121 (limiting right of reproduction as against individuals with certain disabilities); 17 U.S.C. § 121A. *See also* 42 U.S.C. § 12182(a) (ADA requiring accessibility in places of public accommodation).

[288] Bracha and Syed, *supra* note 5, at 301-305.

"basic, first-order human needs,"[289] such as "basic educational materials."[290] In such cases, she contends, copyright's concern for total preference satisfaction ought to yield to a concern for individual access and education: user's interests in access and education should trump copyright owner's interest in payment. Others take a less consequence-sensitive approach to reach the same conclusion. [291] These scholars all make the case that such exceptions are necessary on non-utilitarian grounds. Indeed, a primary reason for resorting to non-utilitarian theories is that they offer a more convincing rationale than utilitarianism to justify such exceptions. But are they right? Or are these exceptions also necessary on a utilitarian approach?

We argue that such exceptions are equally justified on utilitarian grounds. The quantitative case for this exception already seems reasonably strong. Consider that a purely quantitative analysis requires consideration of the incentive-access framework: will allowing special access to works to those who cannot enjoy the market's offerings undercut incentives, leading to fewer preference-satisfying works in the future? Or will the broader access yield such additional preference satisfaction among a group of individuals that it is worth the cost? Here the dynamic effect on incentives is very likely negligible, while the benefit the disabled individuals derive is likely very high.[292] In short, quantitative hedonists and welfare-preferentists already offer a reasonably case strong justification for disability related copyright exceptions.

But qualitative hedonism offers even stronger support for the interests of the disabled than purely quantitative hedonism or welfare-preferentism. The greatest good for the greatest number requires, in Mill's theory, not simply maximizing today's pleasure, but progressing society towards one in which more people have the capabilities for enjoying higher pleasure. Copyright, without exceptions, can prevent such capacity building by denying access to individuals living with disabilities. But if the quantitative incentive-access framework is indeterminate, and granting exceptions can create opportunities for capacity-building without radically undercutting future creative incentives, then the qualitative dimension of happiness tilts the scales in favor of granting broader access to those living with disability to facilitate capacity building and thus utility maximization. In practice, this yields another thumb on the scale in favor of copyright exceptions.

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[289] Chon, *supra* note 33 at 2284–2285, 2288.

[290] *Id.* at 2893–2900. *See also* Ruth L. Okediji, *Sustainable Access to Copyrighted Digital Information Works in Developing Countries*, *in* INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 142 (2005).

[291] Blake E. Reid, *Copyright and Disability*, 109 CAL. L. REV. 2173 (2021); Eric E. Johnson, *Intellectual Property's Need for a Disability Perspective*, 20 GEO. MASON U. CIV. RTS. L.J. 181 (2009). *See also* Caterina Sganga, *Disability, Right to Culture and Copyright: Which Regulatory Option?*, 29 INTERNATIONAL REVIEW OF LAW, COMPUTERS & TECHNOLOGY 88 (2015); Corinne Tan & Perry Bing Xian Peh, *Improving Accessibility to Copyright Works for Persons with Print Disabilities in Australia and Singapore*, 52 IIC 1020 (2021).

[292] Bracha and Syed, *supra* note 5, at 301 (noting the "negligible" effect on the copyright owner's market).

The conclusion may, however, be different if the quantitative incentive-access analysis is less ambivalent. For example, imagine that granting special access to the disabled overall would more clearly reduce the total amount of works produced in the future. Then qualified judges would need to make a tradeoff: is it better to deny access on the ground that this results in the most amount of pleasure or most amount of preferences satisfied? Or is it better to forgo some of such pleasure on the grounds of that it may result in the capacity for more utility tomorrow? But, in our existing world, it is highly likely that qualitative hedonism supports such exceptions.

CONCLUSION

Recently, the simple idea, dominant throughout much of the American copyright experience, that copyright exists to promote utility has come under heavy attack. Critics have expressed deep skepticism about the theory's inability to account for important values, produce simple answers, and or capture the spirit of progress. We find these criticisms important and significant—but also too narrow. Benthamite utilitarianism and welfare-preferentism are not the only consequentialist understandings of today's copyright system, though they are the options most frequently criticized.

A better utilitarianism – of the type articulated by John Stuart Mill – goes a significant way to answering contemporary criticisms of copyright utilitarianism. A copyright system that aims not only to produce more pleasure, but also stimulates the kind of pleasures needed to live truly happy lives, is more normatively attractive, epistemologically realistic, and interpretively sound, than the picture of utilitarianism that is sometimes presented by critics. Utility is and ought to be copyright's *sine qua non*. But, as Mill would say, it must be utility in its "largest sense."[293]

[293] *Supra* note 24.