BEYOND EFFICIENCY: CONSEQUENCE-SENSITIVE THEORIES OF COPYRIGHT

Oren Bracha[†] *& Talha Syed*[††]

ABSTRACT

A major development in the analysis of copyright in the last two decades has been the emergence of "democratic" theories of cultural expression, challenging the long-standing dominance in this field by normative theories of natural rights and economic efficiency. The central thrust of democratic theories is to emphasize the significance of the expressive activities regulated by copyright law not only for political life, but also for individual self-authorship and robust engagement by persons in their surrounding culture, to take an active part in social processes of meaning-making. However, a major stumbling block facing democratic theories has been a lack of understanding, by both advocates and skeptics, of how democratic theories relate to rival views in terms of concrete implications for specific questions of copyright law and policy. In particular, democratic (and, as we show, distributive-equity) theories seem to share with economic analysis an attractive attentiveness to the consequential effects of copyright, in contrast to so-called "deontological" natural-rights views. Yet, by that same token, it has been unclear precisely when—and on what grounds—democratic theories offer distinct prescriptions from the one commended by economic analysis, which is to achieve an optimal balance between the maximal production and wide dissemination of expressive works valued by consumers.

This Article contributes to the further development and reception of this emerging normative camp by clarifying its relationship to dominant rival views. Specifically, we seek to advance the sophistication and precision of democratic and distributive analyses of copyright in three respects. First, we offer a characterization of democratic and distributive theories as being, in their most attractive form, robustly "consequence-sensitive," and we bring out a crucial feature of these theories when conceived this way. So conceived, democratic and distributive theories share an important structural affinity with economic efficiency, which is that they must confront the possibility that an adjustment to copyright rules along one dimension may have countervailing repercussions along other dimensions.

As a result of this structural affinity, democratic and distributive theories—surprisingly, given their invocation of different values—seem at first blush to align closely with economic analysis and its familiar incentive-access tradeoff. This sharply poses the challenge of identifying the stakes in the choice between these alternative outlooks. Our second aim is to respond to this challenge by specifying with greater precision than has yet been done how

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† Howrey LLP and Arnold, White & Durkee Centennial Professor of Law, The University of Texas School of Law.

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democratic and distributive values make a concrete difference in the context of particular policy questions. Third and finally, with the normative differences with efficiency so clarified, we are then faced with two tasks: justifying such departures from efficiency's beacon of maximal satisfaction of existing preferences and specifying how a consequence-sensitive approach that adopts plural values is able to decide between conflicting values and outcomes, in the absence of reliance on the efficiency calculus. We explore these questions in the context of six concrete issues in copyright policy.

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I. INTRODUCTION

The recent decision of a New York federal district court in *Authors Guild v. HathiTrust*[1] is a powerful reminder that copyright law is about more than just efficiency. HathiTrust, a collaborative of major research institutions and libraries dedicated to preserving and providing access to printed knowledge, used digital copies of copyrighted books provided to its members by Google as part of Google's mass book digitization project.[2] In its opinion, the court firmly rejected the claim that HathiTrust, by using digital copies, infringed copyright.[3] Specifically, the court found that the use of the unauthorized digital copies for purposes of non-display full text searches, and access for people with print-disabilities, constituted fair use (with the latter use also being shielded by a specific statutory exemption).[4] To be sure, this outcome could be plausibly justified on efficiency grounds. The social value of the uses that, were they to be found infringing, may be frustrated by various "market failures" in licensing might well outweigh any cost in terms of undermining creative incentives.

Reading the opinion, however, clearly reveals a different tenor. The court's references to the "invaluable contribution to the progress of science and cultivation of the arts"[5] of the alleged infringing uses, and to the "ideals espoused by" the Americans with Disabilities Act of securing for those disadvantaged by disability "the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous,"[6] leave little room for doubt. Although not explicitly articulated, the decision is based on normative assumptions quite distinct from economic efficiency. Promoting "the progress" and fair opportunities seem clearly not reducible in the court's analysis to the maximization of the total dollar value of producer and consumer preferences.

On one level, there is nothing new about this normative pluralism beyond efficiency. The Constitution's original "promote the progress" mandate for the intellectual property power[7] was associated with Enlightenment ideas of human advancement that were by no means

1. Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445 (S.D.N.Y. 2012).
2. *Id.* at 448.
3. *Id.* at 464–65.
4. *Id.*
5. *Id.* at 464.
6. *Id.* at 465 (quoting 42 U.S.C. § 12101(a)(8)).
7. U.S. CONST. art. I, § 8, cl. 8.

reducible to economic development.[8] And in various subsequent periods, many Americans have read broad normative visions into the mandate and the copyright regimes instituted under its aegis.[9]

Yet, the modern era of American copyright, beginning in the late nineteenth century, has been dominated by utilitarian-economic ideas. To be sure, natural rights theories, based on the principle of just deserts for authors' intellectual labor, have also been present from the start. And continental notions of property rights as existing to protect an author's personality or will as embodied in his creation, did at some point percolate into American thinking on copyright, even if they have never gained much traction.[10] Nevertheless, the framework of economics has taken a front seat in American debates on copyright law and policy. Thus, in his seminal 1970 article *The Uneasy Case for Copyright*, Justice Breyer observed that "none of the noneconomic goals served by copyright law seems an adequate justification for a copyright system."[11] The trend intensified with the rise to preeminence of the law-and-economics school in American legal culture, especially in fields of private law. Economics, either in the form of formalized analyses of efficiency or in a looser guise under the notion of "innovation," became the predominant normative framework for American copyright.

But the preeminence of economic analysis has gradually begun to diminish over the past two decades. New contenders have appeared in the normative arena of copyright. An assortment of theories and ideas about free speech, democratic self-governance, human flourishing, and, to a lesser extent, distributive justice has emerged.[12] For purposes of convenience we loosely designate these theories "democratic and distributive theories." In academic writing these approaches have gathered force, likely surpassing natural rights theories in influence and perhaps even challenging the previously unrivaled preeminence of economics. A shift is also apparent in public discourse about copyright policy. The phrases "freedom of speech" and "access to knowledge" have become familiar sound bites in public debates. One rarely comes across a mission statement of any public-interest organization in the field without encountering some version of the

8. *See* Michael Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L. J. 3, 17–21 (2001).

9. *See generally* MEREDITH MCGILL, AMERICAN LITERATURE AND THE CULTURE OF REPRINTING, 1834–53 (2003).

10. *See* William Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 174 (Stephen R. Munzer ed., 2001).

11. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 291 (1970).

12. *See* discussion *infra* Parts III, IV.

commitment to defend the "public's access to knowledge."[13] And although the change is less apparent in litigation and judicial reasoning, we can discern some initial signs of it there as well, as evinced by *Authors Guild v. HathiTrust*.[14]

And so a question arises: what is the relationship between economic analysis and these new normative approaches? Unfortunately, exploration of that topic has thus far been plagued by considerable confusion and miscommunication. Many scholars working within the framework of economics simply adopt efficiency as the only plausible normative criterion for the field, remaining content to ignore any alternative. This attitude is buttressed by two widespread and related beliefs. The first is a belief in the inherent implausibility of any alternative criteria to the economists' one beacon of caring solely about the welfare effects of policy choices.[15] Second, and more specifically, the democratic and distributive normative theories of copyright are often believed to exhibit an unattractive "deontological" disinterest in the consequential effects of policy or absolutist disregard for other considerations.[16]

Occasionally, however, proponents of economics advance a very different critique of these alternative theories. They point out that many of the new democratic and distributive theories are actually quite interested in the various positive and negative ways that adjustments to copyright may affect different individuals' interests.[17] But in that case, then, these theories are seen basically to collapse into efficiency: their ultimate normative calculus dovetails with economic cost-benefit,[18] only doing so in a less explicit fashion and with less sophisticated tools.

From the other side of the debate, proponents of democratic and distributive approaches frequently tend to assume too quickly that simply adopting their alternative framework will lead to normative conclusions significantly different from those dictated by efficiency.[19] Too often, the mere

13. *See, e.g.*, *About Public Knowledge: Our Work*, PUBLIC KNOWLEDGE, http://www.publicknowledge.org/about (last visited Sept. 18, 2013).

14. Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445, 464–65 (S.D.N.Y. 2012).

15. *See generally* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002).

16. *See infra* text accompanying notes 45–47.

17. *See* Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 WM. & MARY L. REV. 33, 89 (2004).

18. *Id.* (positing that "the democratic and economic interests underlying copyright are, for the most part, likely to be aligned on issues of copyright policy").

19. This seems, for example, to be the premise of Madhavi Sunder's observation that increasingly "intellectual property laws come to bear on giant-sized values, from democracy and development to freedom and equality" in the opening chapter of her book entitled

invocation of "freedom of speech" or "distributive justice" in regards to a question of copyright law or policy, is thought to point toward a different result than the one commended by efficiency. Two reasons seem to lie behind this tendency. The first is that in some cases, an unduly thin or simplistic version of the efficiency analysis is assumed, which fails to see that efficiency can and should take into account many of the effects highlighted by competing normative frameworks. For example, copyright barriers to access for print-disabled readers have, alongside their distributive effects, negative efficiency implications as well. And it is hardly self-evident that efficiency's prescriptions for how to remedy these effects will differ significantly from a more distribution-sensitive analysis. A second and more important reason is that proponents of non-efficiency normative frameworks tend to miss the relevance of the tradeoffs highlighted by efficiency analysis for their own concerns. For example, it is often ignored that any reduction in creative incentives from reduced copyright protection is not just an efficiency cost, but also a potential negative effect from the point of view of democratic theory or even distributive justice. As a result, proponents of alternative theories seldom grapple with prioritizing between various countervailing effects similar to those traded off in an efficiency analysis.

The purpose of this Article is to begin transcending this state of affairs, in which economic analysis and democratic and distributive approaches talk past one another. The new theories that are the focus of our inquiry here are distinguished by the quality of being "consequence sensitive." As such, they differ both from traditional natural rights and personality theories of copyright on the one hand, and on the other, from utilitarian or welfarist theories (and their most common legal-policy variant of economic efficiency). Consequence-sensitive theories are distinct from traditional labor-desert and personality justifications of copyright, as well as any negative-liberty-based assertions of users' rights, because of their *comprehensive* interest in the full array of consequences attributable to a particular rule, including effects on individuals not privy to the regulated behavior, and the forward-looking effects of general incentives created by the rule. At the same time, unlike efficiency, which is a full-blown consequentialist theory, consequence-sensitive theories need not make effects in the world—conceived

Beyond Incentives. *See* MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 32 (2012). Similarly, Neil Netanel argues that "a copyright law driven by neoclassical economic property theory would give copyright owners such far-reaching control over productive uses of existing creative works that it would unduly constrain robust debate upon which democratic self-rule depends." Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996).

independently of the character of decisions or processes leading to them—as the sole element relevant to normative analysis.

The central analytic point we develop here follows from the consequence-sensitive character of the new theories we discuss. These consequence-sensitive normative views focus on values other than wealth maximization. As a result, they diverge from efficiency in how they evaluate the effects of copyright protection, for example, in terms of impacts on the creation of new works, access to existing works, or any other outcomes (such as rent dissipation or diversion of resources from other sectors). Nevertheless consequence-sensitive theories must attend, like efficiency analysis, to the *multiple* (and often countervailing) impacts that different legal rules will have. Just as efficiency analysis seeks to balance incentives with access or, more comprehensively, various, countervailing economic effects, so too must non-efficiency views also factor in the full range of effects. Once stated, the point may seem obvious. Too often, however, advocates of non-efficiency values have seemed satisfied simply to point out how their chosen value may weigh one particular outcome—typically increased access—differently from efficiency, without considering the other effects that also must be assessed in light of the deviation between efficiency and their value(s).[20]

This fundamental structural similarity between efficiency and its consequence-sensitive alternatives poses a three-part challenge to proponents of democratic and distributive theories of copyright. First, one must explain clearly the value or values that the theory seeks to promote and how they differ from the maximum satisfaction of individuals' revealed preferences (i.e., efficiency). Second, each theory must identify when and how it leads to results significantly different from those dictated by efficiency regarding specific copyright policy questions. The difference in values alone does not necessarily produce such a divergence. Given the consequence-sensitive nature of the theory, its prized value—say individual self-determination or distributive priority to a specific group—is likely to be subject to an incentive/access tradeoff that closely tracks the efficiency analysis.[21] Third, in

20. *See* Daniel A Farber, *Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the Digital Millennium* 89 MINN. L. REV. 1318, 1321 (2005) (describing advocates of non-efficiency values in copyright as "Jeffersonians" who seek to defend the public domain and fair use rights "against the incursion of stronger IP rights" and reject the "Hamiltonian" argument for stronger incentive).

21. If, for example, both efficiency and a particular brand of democratic theory care about the incentive-to-create and the impediment-to-access sides of the copyright tradeoff, would they reach different results on such issues as the proper treatment by copyright law of fan fiction or the application of fair use to critical uses of copyrighted materials? Simply

a case where a theory does support a result materially different from the efficiency balance, we need a convincing justification for not yielding to subjective individual preferences.[22] To put it bluntly, a consequence-sensitive theory that rejects the efficiency calculus overrides the satisfaction of subjective preferences in favor of some other value.[23] Such an outcome may be acceptable given the theory's values, but an explicit recognition of its prima facie troubling character, and some justification for it, are in order.

In this Article we respond to these three challenges and demonstrate how the positive-analytical tools of economics can be used heretically by those who do not accept efficiency as a normative criterion. Our goal is to make a case for these new normative perspectives that is both analytically precise and defensible in the face of the serious criticisms and challenges just adduced. By doing so, we seek to clarify the stakes in the choice between these theories and efficiency (as well as among the theories themselves). Part II lays the necessary foundation for the discussion by briefly explicating the positive-analytical framework of economic analysis of copyright and explaining the structural similarity between efficiency and many democratic and distributive theories. Part III focuses on our so-called "democratic theories" of copyright. We map the main variants of the different normative perspectives grouped together, somewhat imperfectly, under this title. We then proceed to demonstrate how, despite their structural similarity to efficiency, some of these theories yield significantly different conclusions with respect to some central issues of contemporary copyright law and policy, and we explain how these alternative outcomes may be justified. We also highlight how differences in normative commitment between the diverse

pointing out the high value that democratic theory places on diverse and critical expression is insufficient to tilt the balance in favor of access when such a rule could severely reduce the incentive to create, thereby ultimately reducing the supply of expressive works that provide opportunities for diverse and critical expression.

22. Democratic and distributive theories relate differently to this aspect. Democratic theories sometimes override subjective preferences for reasons other than the gap between preferences per se and efficiency's wealth-maximization metric of "effective preferences" (i.e., preferences as revealed by willingness and ability to pay). In other words, these theories may sometimes override not just effective preferences but subjective preferences per se. Distributive theories, by contrast, diverge from wealth maximization due, at least in part, precisely to the gap between effective preferences and preferences per se.

23. Consider a case where efficiency militates against exempting a particular use of a copyrighted work under the fair use doctrine because the social value of the works that would not be created due to the exemption clearly outweighs the social value of the increased access generated by exempting the use. A finding of fair use, in the name of say the value of self-determination, is tantamount to forcing upon the public (and possibly the individual user of the copyright work) a less preferable state of affairs by their own subjective lights.

variants of democratic theories can matter for resolving particular policy questions. Among the issues we take up are critical uses, transformative uses, derivative-work rights, fan fiction, and personal uses. Part IV is devoted to a similar analysis of distributive considerations in copyright. Following a brief sketch of distributive justice theory, we identify the main types of distributive concerns that are implicated by copyright law. We then canvass some central cases meriting distributive consideration (namely, priority to individuals with disabilities and at lower-income levels), specify how a distributively-informed analysis may diverge from efficiency, and evaluate the merits of different ways of factoring in such distributive concerns (ranging from precisely-targeted provisions to generally-applicable rules). Part V concludes.

II. ECONOMIC ANALYSIS AND ALTERNATIVE CONSEQUENCE-SENSITIVE THEORIES

In this Part, we lay the foundation for discussing democratic and distributive theories of copyright by summarizing the fundamentals of copyright's economic analysis and explaining the basic structural features that those theories share with efficiency. The individual elements in our summary of economic analysis of copyright should be familiar to those with a background in the field. Our account emphasizes, however, significant features that are often neglected in standard accounts, and we provide an integrated picture by bringing together several distinct levels of analysis.

A. ECONOMIC ANALYSIS OF COPYRIGHT: THE STATE OF THE ART

1. The Incentive-Access Framework

From an economic perspective, the policy effects of copyright, like those of some other intellectual property rights, are analyzed against the backdrop of the public-goods character of informational goods.[24] Works of authorship—the sort of informational works protected by copyright law—

24. On public goods, see Thomas E. Borcherding, *Competition, Exclusion, and the Optimal Supply of Public Goods*, 21 J.L. & ECON. 111, 111–12 (1978); J.G. Head, *Public Goods and Public Policy*, 17 PUB. FIN. 197 (1962); Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954). For examples of the analysis of informational works as public goods, see, for example, Kenneth Arrow, *Economic Welfare and the Allocation of Resources for Invention*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609 (Nat'l Bureau of Econ. Research ed., 1962); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1700–04 (1988); William R. Johnson, *The Economics of Copying*, 93 J. POL. ECON. 158, 161 (1985); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326–27 (1989); Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 994–95 (1997).

exhibit the two defining features of public goods. One, they are nonexcludable, in the sense that once created and published it is very difficult to prevent others from using and consuming them. Two, they are also nonrivalrous, meaning that the use and consumption of the work by one person does not reduce the ability of others to use and consume it. The source of the innovation policy problem is the nonexcludable character of the work, which allows others to reproduce and/or consume it for a fraction of the cost incurred by the creator. To the extent that such access by others does not allow the creator to appropriate enough of the social value of the work to cover its development cost, the work (or similar ones in the future) will not be created in the first place. The result: an insufficient or suboptimal level of compensation or incentives to produce and publish works of authorship.[25] Copyright solves this problem by conferring upon the creator a limited set of legal entitlements to exclude others from certain uses of the work.[26] Copyright converts, in other words, a nonexcludable resource into a partially excludable one in order to allow the copyright owner to internalize a substantial part of the social value of the work, thereby boosting the financial resources or incentives for creation and publication.

This solution results, however, in a new problem or cost stemming from the other public-goods aspect of informational works, their nonrivalrousness. As a result of copyright protection, some potential users will be excluded from using the work, which—because the work is nonrivalrous—is inefficient from a static point of view. Market transactions cannot fully

25. Breyer, *supra* note 11, at 294. There is an important strand of arguments in copyright scholarship that challenges the need for, or the efficacy of, copyright-generated incentives for creation. One set of arguments points out that under some circumstances alternative mechanisms such as first-mover advantages or contractual arrangements may guarantee sufficient incentives to create even in the absence of copyright. *See id.* at 299–306. A more fundamental critique questions the extent to which makers of creative works are motivated at all by extrinsic, monetary considerations and consequently the need for copyright or its ability to stimulate creation. *See* Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 UC DAVIS L. REV. 1151, 1192–93 (2007) (advocating a "much more modest conception of the role that copyright plays in stimulating creative processes and practices"). In our analysis here we bracket such considerations. To be sure, if it could be demonstrated that extrinsic incentives have, across the board, little or no effect on creativity, the analysis of all consequentialist and consequence-sensitive approaches would have to be amended to give little weight to considerations of creating incentives through exclusionary entitlements. To date, this strong proposition has not been established. A more nuanced version of the argument may try to assess and quantify the extent to which non-monetary intrinsic and social motivations play a role in specific contexts. Such assessment, if and when it becomes available, should be incorporated into the incentive/access analysis, presumably by adjusting the need for incentive side of the tradeoff downward in specific contexts.

26. *See* 17 U.S.C. § 106 (2012) (conferring upon the copyright owner the exclusive rights, inter alia, to reproduce and distribute copies of the copyrighted work).

remedy this allocative inefficiency. In the absence of the unrealistic possibility of costless and perfect price discrimination,[27] the copyright owner will use the pricing power conferred by his exclusive entitlement to charge a uniform price for the work that will exceed the marginal cost of its dissemination. Some consumers who are willing to pay more than this marginal cost but less than the copyright holder's price will be denied access to the work, an allocative inefficiency commonly referred to as deadweight loss.[28]

The incentive function of copyright and its access cost are correlatives. Providing incentives to create through copyright requires some pricing power conferred on the owner. Pricing power, in the absence of costless and perfect price discrimination, necessarily means some deadweight loss. The goal of copyright policy within this incentive-access framework is optimization—incurring only the minimal access cost necessary for incentivizing the creation of works. There are two ways in which copyright law can be optimized to achieve this goal. First, the exclusive entitlements should be so crafted that the pricing power conferred on the copyright owner is not stronger than necessary to incentivize the creation of the work.[29] Any pricing power beyond this level means additional access cost without the corresponding incentive benefit. Second and more subtly, in choosing between alternative ways to generate the necessary incentive, the method that generates the least access cost should be preferred. This reflects the point that sometimes, using various levers of copyright law, the same level of incentive may be secured by several distinct methods, each generating

27. Perfect price discrimination is the ability to charge each consumer exactly the price s/he is willing and able to pay for the relevant good. The economic and other social effects of various partial price discrimination schemes, their desirability as a matter of policy, and the extent to which legal doctrine should encourage them is the subject of continuing debate in legal scholarship. *See generally* Yochai Benkler, *An Unhurried View of Private Ordering in Information Transactions*, 53 VAND. L. REV. 2063 (2000); James Boyle, *Cruel, Mean, or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property*, 53 VAND. L. REV. 2007 (2000); Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799 (2000); William W. Fisher III, *When Should We Permit Differential Pricing of Information?*, 55 UCLA L. REV. 1 (2007); Wendy J. Gordon, *Intellectual Property as Price Discrimination: Implications for Contract*, 73 CHI.-KENT L. REV. 1367 (1998); Glynn S. Lunney Jr., *Copyright's Price Discrimination Panacea*, 21 HARV. J.L. & TECH. 387 (2008); Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55 (2001).

28. *See* Fisher, *supra* note 24, at 1702 (stating "consumers who value the work at more than its marginal cost but less than its monopoly price will not buy it," resulting in deadweight loss); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 497–98 (1996) (arguing that copyright imposes "deadweight loss, measured by the combined loss in consumer and producer surplus associated with the sales lost as a result of the higher more monopolistic price").

29. This means that the producer should expect, ex ante, to be able to recoup the capitalized costs of developing the work.

different amounts of access cost.[30] From the point of view of efficiency, each of the numerous details of copyright law should be assessed and adjusted within this framework so as to provide only the necessary amount of incentive and to do so at the minimal cost to access.

2. Supramarginal and Inframarginal Markets

Were the terms of copyright tailored for each work, determining their contours would be theoretically straightforward. Each work would receive only as much protection as necessary to incentivize its creation, and among alternative possible configurations of exclusive entitlements that generate this level of incentive, the one with the least access cost would be preferred. Weaker protection would fail to incentivize the creation of the work. Stronger protection would add access cost with no additional benefit.

In a copyright regime with at least some degree of uniformity—meaning a regime of rules that apply uniformly to entire categories of works, irrespective of different specific circumstances—things work differently.[31] In a uniform copyright regime there is an incentive/access tradeoff between different works. At any level of protection some works will be marginal in the sense that copyright suffices exactly to incentivize the creation of the work. Other works will be inframarginal: copyright protection will be stronger than necessary to incentivize the creation of these works. Others still will be supramarginal: copyright protection will provide insufficient incentive, and the work will not be created. The incentive/access tradeoff at the heart of copyright's economic policy is as between inframarginal works and supramarginal works. At any baseline level of copyright, any additional increment of copyright protection will add social value by incentivizing the creation of previously supramarginal works. At the same time, any such increment will further unnecessarily limit access in regard to inframarginal works, thereby adding deadweight loss.

Thus, in a modern copyright regime whose rules have some degree of uniformity, the basic policy analysis of any legal arrangement focuses on its

30. *See* Fisher, *supra* note 24, at 1703–17 (developing an "incentive/loss ratio" analysis for evaluating alternative packages of entitlements to confer on copyright owners); *cf.* Louis Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1813, 1829–34 (1984) (developing an "incentive/loss ratio" analysis in the patent context).

31. For a discussion of the policy tradeoffs involved in setting the level of the intellectual property regime uniformly, see, e.g., Dan L. Burk & Mark A. Lemley, *Is Patent Law Technology-Specific?*, 17 BERKELEY TECH. L.J. 1155, 1159 (2002). *See generally* Michael W. Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 AM. UNIV. L. REV. 845 (2006); Michael W. Carroll, *One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights*, 70 OHIO. ST. L.J. 1361 (2009).

countervailing effects on works in different markets. Strengthening copyright protection in some respect (say by lengthening its duration) may allow the copyright owner to appropriate a larger portion of the social value of the work, thereby incenting the creation of some previously supramarginal works. The social value of these new works must be compared, however, to the deadweight loss added to previously marginal and inframarginal works. Similarly, when considering the effects of a certain copyright exemption, the benefit of reducing deadweight loss in regard to marginal works must be assessed against the possible cost of causing some works to become supramarginal due to declining profits of the copyright owner.

3. Product Differentiation

The economic effects of copyright are traditionally analyzed under the assumption that copyright's exclusionary power creates a monopoly.[32] More recent scholarship, however, suggests the more plausible model of monopolistic competition between differentiated products.[33] The basic insight is that non-identical works can be partial market substitutes for each other. For example, while a copyright owner may hold the exclusive right of reproducing and selling music album A, consumers may see music albums B, C, and D as partial substitutes for A. It follows that the copyright owner does not enjoy a monopoly in regard to her copyrighted work, as it is subject to competitive pressures from partial substitute products. Contrary to perfect competition, however, each copyright owner still enjoys some pricing power over marginal cost for her work. Indeed, in the absence of such pricing

32. *See, e.g.*, Fisher, *supra* note 24, at 1700–03; Michael O'Hare, *Copyright: When Is Monopoly Efficient?*, 4 J. POL'Y ANALYSIS & MGMT. 407, 411 (1985); Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167 (1934) (referencing the "copyright monopoly"). It is a standard practice by many writers to concede that the extent to which a copyright owner enjoys market power varies according to the availability of substitutes of its product. *See, e.g.*, Fisher, *supra* note 24, at 1702–03; Gordon, *supra* note 27, at 1367 n.76; Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1041 (1997); Meurer, *supra* note 27, at 82–83. It is also a standard practice, however, to proceed to analyze the economic effects of copyright as monopoly pricing following this concession. At the other extreme one finds assertions that since copyrighted works usually have close substitutes and the owner enjoys no monopoly, copyright involves no pricing power and should be analyzed under a competitive market model. *See* Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VAND. L. REV. 1727, 1734–38 (2000).

33. *See generally* Michael Abramowicz, *A New Uneasy Case for Copyright*, 79 GEO. WASH. L. REV. 1644 (2011); Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317 (2005) [hereinafter Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*]; Abramowicz, *supra* note 17; Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212 (2004).

power, copyright would have no incentive function.[34] The number of differentiated products and the extent of competition in this mixed model of monopolistic competition depends mainly on the size of the market, meaning the size of consumer demand available to producers relative to the cost of developing the work.[35] The larger the demand available to producers, the more entrants with differentiated products will be able to recoup their development cost and will enter the market.

The implications of the differentiated product competition model for the economic analysis of copyright are complex, and the conclusions that should be drawn from it about the optimal shape of copyright law are fiercely debated.[36] A full survey of this debate is beyond the scope of this Article. Here we briefly distill its core analytic insights and central, countervailing policy implications.

First, the product differentiation framework highlights economic effects of copyright different from the incentive and access effects at the heart of the traditional model, and it identifies new ways that all these effects interact with each other.[37] To see this, assume that at a certain base level of copyright protection a particular work—a novel, for example—is marginal in the sense that the profit generated by the copyright owner suffices exactly for incentivizing the creation of the work. Now assume that copyright protection is increased significantly. Under the traditional framework the result is an increase in the copyright owner's returns who now will enjoy "rents," that is, profits beyond what is necessary for inducing the creation of the work, and an increase in the deadweight loss suffered by consumers in regard to the work. On balance, the change may or may not be desirable depending on its total effects on other supramarginal, inframarginal, and marginal works. Product differentiation theory, however, predicts a different result. To the extent that the additional profits or rents made available by the increase in copyright protection suffice to cover the development cost of rival works, new entrants will develop partial substitutes for the work—in our example, other novels targeting roughly the same audience—and will enter the market.[38]

34. *See* Oren Bracha & Talha Syed, *Beyond the Incentive-Access Paradigm? Product Differentiation and Copyright Revisited*, TEX. L. REV. (forthcoming 2014) (manuscript at 8–10) (on file with authors).

35. Yoo, *supra* note 33, at 239.

36. *See id.*; *see also* Abramowicz, *supra* note 17; Bracha & Syed, *supra* note 34.

37. *See* Bracha & Syed, *supra* note 34, at 15–20.

38. Yoo, *supra* note 33, at 238 ("[T]he presence of supracompetitive profits attracts other authors selling close substitutes.").

What will be the result of such differentiated product competition? One negative effect will be the new development cost incurred by each new entrant. To a large extent, this cost is duplicative and wasteful because it is incurred simply in order to divert consumer demand that was already being satisfied by the original novel. But it is not necessarily completely duplicative. To the extent that the different variants are better tailored for the tastes of some consumers, demand is better satisfied. Thus a possible, positive effect of differentiated product competition is better demand satisfaction by the new product variants. Finally, the competition triggered by the increase in copyright protection is likely to have an effect on price and deadweight loss. The competition from new variants will likely reduce the price compared to what the copyright owner in the original work could charge under the new level of protection were he a monopolist, as assumed in the traditional framework. Accordingly, the levels of deadweight loss in this market will be lower than predicted by traditional analysis. The effect on deadweight loss in this market compared to the prior lower level of copyright is a more debatable question.[39] Depending on circumstances and assumptions, the increase in protection may result in decreased, increased, or unchanged levels of deadweight loss.[40]

4. Global Distortions

Assume that through a Herculean effort we managed to obtain all the relevant information and optimized every detail of copyright law under the framework of incentive/access in inframarginal and supramarginal markets modified by insights from product differentiation theory. Unfortunately, a major efficiency concern remains. Production of copyrightable works takes place against the backdrop of other actual and potential economic activities. A general-equilibrium efficiency perspective requires shaping copyright law in a way that minimizes the distortions in the global patterns of economic activity. Specifically, the copyright regime must not generate a rate of return on investment for copyrightable works that is significantly different from the rate of return for alternative economic uses of the same resources.[41]

39. *Compare* Yoo, *supra* note 33, at 254 ("[A]ccess should be promoted indirectly by stimulating entry and allowing the ensuing competition to drive price closer towards marginal cost."), *with* Bracha & Syed, *supra* note 34, at 28 ("[T]he deadweight loss effect of increased entry through increased copyright protection is by no means necessarily positive.").

40. Bracha & Syed, *supra* note 34, at 49 ("Under conditions of differentiated competition, strengthening copyright has an indeterminate effect on overall deadweight loss . . . .").

41. Lunney, *supra* note 28, at 490.

Assuming limited available capital, a rate of return on investment that is systematically higher in one area of economic activity compared to others will inefficiently attract investment in that area at the expense of others. This would be an inefficient distortion since optimally resources should be invested according to the net total social value generated by the investment, not according to the private profits to the producer. Yet in many realms—ranging from education to infrastructure to pioneering new markets—economic actors internalize far less than the full social value of their activities or products.[42] If the rate of return created by copyright—even locally optimized copyright—is significantly higher than the rate of return in many of the alternative fields where producers of copyrighted works could have invested their energy and capital, the result will be a distortive over-production in the field of copyright at the expense of those other fields. There will be too many books produced and not enough teaching, or too much investment in producing entertaining films and not enough investment in other forms of recreational services.[43] It is not enough, then, to optimize the ratio between copyright's incentive benefit and access cost and to avoid inefficient, excessive duplicative creation of similar works. The copyright regime must also be crafted so it does not inefficiently attract investment away from other economic activities by creating a significantly higher rate of return in the field.

B. CONSEQUENCE-SENSITIVE THEORIES OF COPYRIGHT

At this point a skeptic may be tempted to question the usefulness of the entire economic analysis project. The intricacies of the theoretical apparatus, difficulties in reconciling different parts of it, debates about how it should be applied to concrete copyright questions, and, above all, the sheer amount of unavailable but necessary empirical data seem to make the generation of clear, determinate answers a staggeringly difficult task.[44] Meanwhile, when proponents of the economic method take notice of theoretical rivals, those

42. *See* Amy Kapczynski & Talha Syed, *The Continuum of Nonexcludability and the Limits of Patents*, 122 YALE L.J. 1900, 1923–43, 1945–46 (2013).

43. *See* Fisher, *supra* note 10.

44. ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 3 (2012) ("[T]he data are maddeningly inconclusive"); Fisher, *supra* note 10, at 180 ("With respect to incentive theory, the primary problem is lack of the information necessary to apply the analytic."). George Priest's pessimistic observation of almost three decades ago—"[I]n the current state of knowledge, economists know almost nothing about the effect on social welfare of the patent system or other systems of intellectual property"—only gathers force when we factor in the subsequent refinements of the basic incentive-access framework summarized here. George Priest, *What Economics Can Tell Lawyers About Intellectual Property*, 8 RES. L. & ECON. 19, 21 (1986).

rivals are often dismissed precisely because they both seem indifferent to empirical consequences and lack any theoretical apparatus for analyzing or predicting outcomes. Non-economic theories, that is, are frequently labeled "deontological" and correspondingly assumed to involve no consequential implications relevant to their normative dictates.[45]

Where are consequence-sensitive theories of copyright located in this divide? At a position closer to that of efficiency but not identical to it. Traditional rights-based justifications of copyright, such as labor-desert and personality theories, do not completely deserve the censure for being detached from consequences. Many variants of these theories actually incorporate elements that are consequential in nature at critical junctures.[46] The distinguishing feature of these traditional rights-based theories is not that they never care about consequences, but that their interest in consequences tends to be narrow and restricted. The range of consequences that are considered within these normative frameworks is limited by various stipulations, including: considering only consequences for the parties directly regulated by the rule; drawing categorical distinctions between actions (or "doing") and omissions ("allowing"); narrowly construing what counts as a "harm"; prescinding from forward-looking, or ex ante, effects of the rule; or similar devices.

By contrast, efficiency and the democratic and distributive theories with which we are concerned are *comprehensive* in their treatment of consequences.

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45. *See, e.g.*, John Duffy, *Merges and Descartes*, PRAWFSBLOG (Jan. 30, 2013, 3:09 PM), http://prawfsblawg.blogs.com/prawfsblawg/2013/01/merges-and-descartes.html ("[I]f we are frustrated with the complexities of economic theories and are searching for a more solid foundation for justifying the rules of intellectual property, is Kant (or Locke or Rawls or Nozick) really going to help lead us out of the wilderness?"); Jonathan Masur, *The New Institutional Philosophy of Rob Merges*, PRAWFSBLOG (Jan. 29, 2013, 12:53 PM), http://prawfsblawg.blogs.com/prawfsblawg/2013/01/the-new-institutional-philosophy-of-rob-merges.html ("What would it mean for IP doctrine in practice not to have properly advanced Lockean or Kantian ethics? How could anyone tell? The problem—or, more accurately, the advantage for Kant and Locke—is that those approaches are purely theoretical and do not generate testable predictions.").

46. A good example is the interpretation of Lockean labor-desert theory as applied to copyright as elaborated and popularized by Wendy Gordon. *See* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1544–45, 1561 (1993). Gordon construes both the principle of ownership by a person who exerted his labor on the commons and the most significant limitation on it, known as the sufficiency proviso, as directly based on the no-harm principle under which people should be free to act as they wish as long as they do not inflict unjustifiable harm on others. The question of inflicting harm, especially as it applies to the sufficiency proviso, under which a property right is justified only as long as it leaves as much and as good in the commons so others are not worse off, is an inherently empirical question about real-world consequences.

These theories consider and assess (each theory according to its own distinct normative criteria) the broad range of consequences generated by a specific rule, including effects on parties not privy to the regulated behavior and general incentive effects of the rule. Labor-desert theory, for instance, may ignore the fact that a particular feature of copyright generates restrictions on access whose negative aggregate social value is greater than the value of the works incentivized by that feature, as a "harm" irrelevant to the theory.[47] But that is an effect that any theory comprehensive in its regard of consequences would take into account.

Despite their shared comprehensive regard for consequences, however, we can still draw a crucial distinction between efficiency and the democratic and distributive theories. Efficiency is a consequentialist theory, meaning that consequences are all that matter for purposes of its normative analysis.[48] By contrast, democratic and distributive theories are "consequence sensitive."[49] This means that consequences, comprehensively considered, constitute an important element of the normative analysis of these theories, but they are

47. *See* Gordon, *supra* note 27, at 1549.

48. "Consequentialist" theories may be broadly identified as those for which consequences are all that matter for normative evaluation. Or, more restrictively, as those that prescribe maximization of net-beneficial consequences. "Welfarist" theories comprise a subset of consequentialist views, which define the relevant consequences only in terms of their impact on individuals' well-being, which in turn may be understood in terms of hedonic experiences, preference satisfaction, or other criteria. Welfarist theories that care about the distribution of welfare across individuals are not consequentialist in the restrictive sense, but remain so in the broader sense. Efficiency's directive to maximize wealth or effective preference satisfaction is hence a welfarist theory that qualifies as consequentialist in both senses.

49. Somewhat more precisely, by "consequence-sensitive" (or, more technically, "consequence-supervenient") we mean to denote theories for which, simultaneously, (a) "consequences always matter" (pace views for which a normative difference between two states of affairs can be present without any difference in the relevant consequences), yet (b) "consequences are not all that matters" (pace consequentialist theories), such that normative evaluation may not always be reducible to information about the relevant consequences. For an elaboration of these distinctions and their significance for normative legal theory more generally, see Talha Syed, Is Welfare the Only Value? (Nov. 14, 2013) (unpublished manuscript) (on file with author). We note that some of the democratic and distributive theories we take up here may in fact not only be consequence-sensitive but full-blown consequentialist theories, and thus share with efficiency/welfarist views the commitment not only of always caring about consequences but also of caring only about consequences, while still diverging from such views in sometimes caring about consequences in terms other than their impact on individuals' welfare (especially when that is understood in the common economic sense of revealed subjective preferences). But other variants of such theories will not be consequence-reductive in this stronger sense, and share with economic analysis only the weaker commitment to consequence-sensitivity.

not its exclusive element. From this perspective, consequences matter a great deal, but they are not all that matters.[50]

Because of their shared comprehensive interest in effects of rules, consequence-sensitive theories and the full-blooded consequentialist theory of efficiency bear a strong structural similarity. Although the theories may normatively evaluate these effects differently, each of them cares about the entire range of multiple, potentially countervailing, effects on all individuals and must trade them off, or otherwise make value judgments across them, in some way. It follows that the same incentive/access tradeoff at the heart of efficiency analysis is also highly relevant for the application of all the consequence-sensitive theories. To be sure, each theory seeks to promote different goods and notions of fairness than wealth maximization. But the various economic effects produced by copyright are likely to be as relevant to any of these alternative commitments. If, for example, a particular democratic theory prizes public access to various creative works (for whatever reason), it would be short-sighted to recommend lowering copyright barriers to access while ignoring any possible incentive effects of such a measure. If the likely result of such a recommendation is a sharp drop in the creation of new works, the resulting decline in overall access to works will make the policy undesirable from a normative perspective internal to the relevant democratic theory. Thus there seems to be no a priori reason to assume that the basic incentive/access tradeoff is different from that underlined by efficiency. And mere incantations of "free speech" or "democracy" cannot change that.

The Supreme Court expressed this logic decades ago when it responded to an argument that access privileges should be interpreted capaciously with regard to works involving strong public interest, with the observation that: "It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public. Such a notion ignores the major premise of copyright, and injures author and public alike."[51] How then, if at all, do any of the democratic and distributive theories differ from efficiency (or from each other) when applied to concrete questions of copyright law and policy? The remainder of this Article responds to this question.

50. *See supra* note 49.

51. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985).

III. SELF-DETERMINATION, DEMOCRACY, AND FLOURISHING THEORIES

The striking structural affinity just adduced between efficiency and consequence-sensitive democratic theories presents a challenge, then, for the various normative views often lumped together under the labels of "free speech" or "democracy." Interestingly, scholars hailing from very disparate normative orientations have voiced similar versions of this challenge. Speaking from the vantage of economic analysis, Michael Abramowicz argues that democratic theories are virtually indistinguishable from efficiency, suggesting that democratic proponents have not managed to show that in any particular case "the democratic balance would be any different from the economic one."[52] Jennifer Rothman deploys similar logic to advocate a very different cause: a shift from free speech copyright policy arguments to arguments based on users' individual rights grounded in liberty and due process.[53] Since most free speech theories of copyright are cast in a way that incorporates the incentive/access framework, she argues, commentators and courts are led to "engage in broad utilitarian calculations of the overall speech markets rather than considering the legitimacy of individual users' speech claims."[54] This reduces the analysis to the utilitarian framework and typically results in the rejection of claims for restricting copyright protection due to a belief in copyright's function as "an engine of free expression"[55] and in its internal built-in balancing mechanisms.[56]

Are democratic theories of copyright really no different from efficiency? Are their proponents faced with the inevitable dilemma of either embracing their true character and coming into the fold of efficiency or, realizing this character, disdainfully switching allegiances? Given the fundamental, structural similarity to efficiency, the onus indeed lies with proponents of any specific variant of these theories to show why the democratic balance would be different from the economic one.

52. Abramowicz, *supra* note 17, at 92. Abramowicz refers specifically to Neil Netanel's theory of copyright and a democratic civil society. *See* Netanel, *supra* note 19. The challenge applies, however, more broadly to most variants of democratic, self-determination, and flourishing theories.

53. Professor Rothman's argument is made mainly in the context of First Amendment-based constitutional arguments in copyright law, but it appears to apply more broadly to the use of free speech or democratic theory in copyright policy analysis. *See generally* Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463 (2010).

54. *Id.* at 485.

55. *Id.* at 484–85.

56. *Id.* at 481–84.

Three steps are necessary to demonstrate this difference. First, one must elaborate the specific ways in which democratic theories differ from efficiency and from each other in their normative commitments regarding crucial elements, such as the reason(s) why expressive activity is valuable and what kinds of expressive activities are valuable. Second, one has to explain why, in view of these different commitments, the same mechanisms that will maximize economic efficiency will not always also be the ones best suited to serve the different values or activities prized by a specific democratic theory. Put differently, each theory needs to explain why its prized desideratum requires an incentive/access tradeoff or prioritization different from the one mandated by efficiency. Third, each theory must justify this gap. It must explain why it is prepared to override, at least in some instances, individual subjective evaluations by preferring outcomes that do not maximize subjective preferences. It is only when elaborating these three elements and specifying how they apply to particular features of copyright that the stakes of the choice between efficiency and its democratic rivals, as well as of the choice among the rivals themselves, are made clear.

This Part responds to these three challenges in two moves. First, we provide a general taxonomy of the very different normative frameworks often lumped together under the banner of democratic or freedom-of-speech theories of copyright, isolating the key distinctive features that separate them. Second, we examine four copyright policy questions from the distinct perspectives of these theories, identifying how the various democratic frameworks support outcomes that diverge from efficiency in particular contexts, and how the divergence with maximizing satisfaction of subjective preferences may be justified.

A. MAPPING THE THEORIES

The various frameworks for normative analysis of copyright typically referred to together as "democratic" theories or under similar labels (such as "free speech") often differ significantly from one another in their core philosophical or normative tenets, as well as in their concrete policy prescriptions. Things are further complicated by the fact that the democratic theories circulating in existing scholarship frequently mix and match normative elements from different philosophical positions and sometimes remain unclear with respect to their central underlying commitments. What follows here is not a full survey of the various positions actually advanced in democratic copyright literature, or the way they map onto existing philosophical traditions. We provide, instead, an analytic taxonomy of the primary alternative normative views available regarding the role, in advancing

individual freedom and a desirable polity or society, of the expressive works and activities regulated by copyright.

A first possible approach would be to treat expression from the perspective of "negative liberty." Although a negative liberty view is sometimes implicitly assumed, it is rarely explicitly articulated in debates about copyright and free speech. From this standpoint, acts of expression—both in terms of accessing existing expressive materials and generating and disseminating new materials—have moral significance as fundamental acts of human individual liberty. As such, expression should be protected against coercive interference by others, whether private individuals or governments. Individuals, in other words, have the "negative" right to be left alone, free from any active, coercive interference by others that would limit their choices and actions with respect to expressive works or activity.[57] The hallmark of this position is an exclusive focus on coercive interference by others and a disregard for effective agency, meaning the endowment of individuals with the effective means and opportunities for actually engaging in the valued expressive activities. Whatever their merits, such positions are not consequence-sensitive in the sense we specify above and thus lie outside the scope of this Article. Leaving them aside, there remain four main normative frameworks with significant implications for the expressive works and activities regulated by copyright.

57. This is not a very pervasive position in copyright scholarship. For an early analysis of liberty claims for users' rights in copyright policy and some of their difficulties, see Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841, 868–75 (1993). Two examples of thoughtful positions that fit this mold in the copyright policy debate are Edwin Baker's analysis of free speech limitation on copyright and Jennifer Rothman's due process and liberty framework for rights claims against copyright protection. Professor Baker argues that self-expression liberties create absolute entitlements to individuals to express and copy copyrighted expression by others (but not to commercially benefit from it). Consistent with his general theory of the First Amendment, however, Professor Baker distinguishes between freedom of speech and freedom of the press. The former protects expression as an individual human liberty and the latter is based on a more institutional vision of the role of speech in democracy. *See* C. Edwin Baker, *First Amendment Limits on Copyright*, 55. VAND. L. REV. 891 (2002). Jennifer Rothman similarly advocates an individual liberty framework but calls for abandoning the framework of free speech altogether in favor of a theory of individual rights grounded in liberty and due process. *See* Rothman, *supra* note 53. Professor Rothman's account remains somewhat unclear whether it is based on a negative liberty conception or incorporates a broader idea of effective agency.

1. Self-Determination

A theory quite distinct from speech as negative liberty is the theory of expression as an important component of individual self-determination.[58] Self-determination here refers to the ability of individuals reflectively to form and revise their own conception of the good, and effectively to pursue a life plan for realizing it.[59] The ideal is sometimes described as self-authorship: being able freely to choose or affirm one's own ends in life and to work toward effectively achieving them.[60] Two elements are central to this conception. First, although it also values negative liberty as the "freedom from" coercive interference by others, it places equivalent importance on "freedom to" effectively pursue one's ends. This emphasis on freedom as effective agency means a commitment to ensuring individuals have equitable access to effective means and robust opportunities for pursuing and realizing their goals, rather than merely to abstaining from coercive restrictions.[61] Second, the ultimate value in self-determination resides in persons' ends being truly their own, meaning reflectively adopted, chosen, and refined by themselves, determining their projects and preferences free from both coercion and manipulation.[62] This entails taking seriously the idea of free choice and the conditions it requires. These conditions include a meaningful range of options from which to choose, the capacity to understand and evaluate the options, and the opportunity and means to critically reflect upon and possibly revise one's choices and sense of attractive alternatives.

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58. The most elaborate discussion of self-determination in the context of copyright is found in YOCHAI BENKLER, THE WEALTH OF NETWORKS 133–74 (2006) [hereinafter BENKLER, THE WEALTH OF NETWORKS]; *see also* Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23 (2001) [hereinafter Benkler, *Siren Songs*]. For an early application of self-determination to copyright, see Waldron, *supra* note 57, at 875–77.

59. On self-determination in this sense, *see* GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY (1988); JOEL FEINBERG, HARM TO SELF 33–35 (1986); JOSEPH RAZ, THE MORALITY OF FREEDOM 369 (1986); Benkler, *Siren Songs*, *supra* note 58, at 33–35; John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 525 (1980). For our purposes, "self-determination" so conceived is roughly synonymous with "autonomy," although to avoid confusion with a negative-liberty framework and some related difficulties associated with the term autonomy, we prefer self-determination. For a contrasting development of the implications of a somewhat different "Kantian" conception of autonomy for intellectual property rights, see MERGES, *supra* note 44, at 72–83.

60. RAZ, *supra* note 59, at 370. Note that choosing one's own ends in life does not mean creating ex nihilo values and conceptions of the goods but rather a reflective endorsement of largely predefined possibilities. *See* DWORKIN, *supra* note 59, at 20; FEINBERG, *supra* note 59, at 33–35 (discussing "self-creation").

61. *See* DWORKIN, *supra* note 59, at 18 (arguing that the idea of autonomy includes some ability to make one's preferences effective).

62. RAZ, *supra* note 59, at 377.

Within this framework, expression—meaning both access to speech and one's ability to speak—plays a critical role. Expressions of various kinds may simply be part of the preferences and goals individuals have, for whose realization they must be given meaningful opportunities. Expression, however, may also be constitutive of individual aims rather than simply instrumental to achieving them. As a communicative activity, expression is deeply entwined with the conditions for genuine free choice and formation of individuals' outlooks. Expression is the process through which individuals form their preferences. It exposes individuals to competing options, allows them to articulate their own views and subject them to critical evaluation by others. Expression supplies the process through which people compare, reflect upon, and revise their choices. Finally, systematic control over the expressive content that individuals can access and disseminate tramples on the autonomy of such individuals by constraining and manipulating the process through which they form their preferences.[63] Thus, expression is not just one among many individually valued goods whose realization should be effectively enabled.[64] A robust and diverse expressive environment, one that is relatively free from control and manipulation by others and offers many opportunities for critical reflection and revision of one's commitments, is a critical enabling condition for meaningful self-determination.

2. Political Democracy

The starting point for political democracy theories[65] is that certain decisions—those that happen in political space, as it is usually termed—are

63. DWORKIN, *supra* note 59, at 18 (discussing subverting "people's critical faculties"); RAZ, *supra* note 59, at 377–78; Benkler, *Siren Songs*, *supra* note 58, at 38.

64. The early analysis by Jeremy Waldron of autonomy as applied to copyright seems unduly focused on expression as the subject matter of some individual free choices and as the means for achieving them, while neglecting the role of the expressive environment in constituting the conditions for genuine self-determination. Arguably this is the reason why Waldron, at least as an initial matter, reaches the conclusion that "the value of autonomy settles nothing" as between conflicting autonomy claims of authors seeking to protect the integrity of their expression and copiers seeking to express themselves through secondary uses. *See* Waldron, *supra* note 57, at 877. Similarly Jed Rubenfeld argues that autonomy does not explain why freedom of speech protects "the reading of books by persons for whom such reading is not an act of self-expression or self-realization." Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 35 (2002). These arguments miss the fact that expressive activity is not just part of the content of individual free choice, but a crucial precondition for its exercise.

65. The main applications of this theory to the copyright context are in NEIL NETANEL, COPYRIGHT'S PARADOX 19 (2008); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 224–32 (1996); Netanel, *supra* note 19.

inherently collective or irreducibly social in nature. A commitment to individual self-determination requires procedures for making collective decisions that account for and enable the autonomy of all members of society in such contexts.[66] To achieve this aim, democratic processes must meet two requirements. First, they must give equivalent weight to the input of all individuals by affording each an effective opportunity to participate on equal terms in the collective decision-making process.[67] Second, democratic processes must reflect, with respect to collective decisions, the same regard for meaningful reflection and deliberation familiar from the context of individual choice.

Just as in the individual context, expression is a crucial element for collective self-determination, only now the focus is on the particular subset of expression that takes place in the realm relevant for public decision-making, the public sphere. Expressive activity supplies individuals with alternative views and choices, as well as information and tools for evaluating the competing options. Public expressive fora are where interests are defined and agendas are formed and subjected to critical review.[68] Participation in the public sphere is also where individuals develop the skills and habits of self-determination necessary for agency as a citizen, including the propensity to seek information, capacities of critical discernment and reflection, and the ability to articulate and communicate one's own views.[69] Thus, fostering an open, diverse, and active expressive public sphere as the locale of "collective will formation"[70] is as essential to collective self-determination as a vibrant expressive environment is for individual autonomy.

3. Cultural Democracy

How deeply into the realm of culture, beyond what is plausibly considered political expression in the narrow sense, does political democracy theory extend? One prevalent view seems to be: quite deeply. The cultural

66. *See* Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1524–25 (1997).

67. As Robert Post explains, an adequate democratic process that manages to create "a linkage of individual and collective autonomy" may require much more than nominally equal vote with regard to the collective decision. *See* Post, *supra* note 66, at 1526. It may require equal opportunity for robust participation in the political and discursive process by all individuals.

68. *See, e.g.*, NETANEL, *supra* note 65, at 38.

69. *See* Netanel, *supra* note 19, at 343–44.

70. JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1992); Jurgen Habermas, *Towards a Communication-Concept of Rational Collective Will-Formation: A Thought Experiment*, 2 RATIO JURIS 144 (1989).

sphere broadly defined, this argument goes, is highly relevant for the process of individual and collective self-determination.[71] It is where agendas are set through the articulation of various alternative options and views with regards to both individual life plans and collective decisions, even when no core political speech is involved.[72] As Neil Netanel puts it, "Homer Simpson and Mickey Mouse . . . may be used to subvert (or buttress) prevailing cultural values and assumptions, and with greater social impact than the most carefully considered Habermasian dialogue."[73] As a result, Netanel argues, a "vast swath of copyright-impacted expression fits well within the free speech domain" even when it is "creative expression that is neither overtly political nor rationally apprehensible."[74] This claim, however, seems to reach too far. One can recognize the importance of the cultural sphere for collective self-determination, and the consequent extension of political-democratic notions deep into this domain, yet still conclude that at some point the argument runs out of steam. At some point the connection between cultural expression and the subject matter of the formal political process seems too tenuous or intractable.[75]

Does it follow that at this point any concern about collective self-determination dissipates? Not necessarily. *Cultural*, as opposed to *political*, democracy extends a concern with collective self-determination into the cultural sphere that remains viable long after the plausible claims of political democracy run out. The starting point of this theory is the assumption of deeply socially situated selves, or socially constructed subjects.[76] On this

71. *See* NETANEL, *supra* note 65, at 32–33.

72. *See id.* at 33. This is a version of Meiklejohn's "art in the ballot booth" argument. *See* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255–57.

73. *See* NETANEL, *supra* note 65, at 33.

74. *Id.*

75. For a similar argument, see Rubenfeld, *supra* note 64, at 33 (stating that protecting art on the basis of its importance for forming political views is to exaggerate its "political significance while instrumentalizing it, making it carry democracy's water").

76. *See* BENKLER, THE WEALTH OF NETWORKS, *supra* note 58, at 274 (observing that "[a]s individuals and as political actors, we understand the world we occupy, evaluate it, and act in it from within a set of understandings and frames of meaning and reference that we share with others"); WILLIAM FISHER, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT 30 (2004) (referring to "[t]he increasingly dense cloud of images, sounds, and symbols through which we move"); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 35 (2004) (arguing that "democratic culture is valuable because it gives ordinary people a say in the progress and development of the cultural forces that in turn produce them"); Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1858 (1991) ("What we experience as social reality is a constellation of cultural structures that we ourselves construct and transform in ongoing practice."); Elkin-Koren, *supra* note 65, at 233 (arguing that "social agents are engaged in an

perspective, the identities, beliefs, and world-views of individuals are all deeply shaped by the social relations they are enmeshed in and the widespread meanings circulating around them. Culture here refers to the irreducibly interactive or social processes through which meanings are forged, communicated, enacted, interpreted, adapted, challenged, revised, recombined, and so forth. In a word, it is the "semiotic" realm of meaning-making, the "fog of symbols in which we move and with which we define ourselves,"[77] shaping the subjectivity of the individuals participating in or exposed to it.[78] At the same time, far from being passive receptacles for fixed and constant cultural forms, individuals have the capacity for actively interacting with culture—to develop, change, and subvert it.[79] On this view, culture—as the arena for the dialectic of constructing subjectivity, where individuals are shaped by a surrounding symbolic environment that in turn they may contribute to shaping—is crucial for preference formation in a deep sense.[80] Rather than being an important adjunct to the formal political realm by providing the input for the political process, culture simply *is* political in a broader sense, being a realm of irreducible social interactions having powerful impact on individuals' sense of themselves.[81]

So conceived, cultural democracy carries two distinct prescriptive implications. The first is a robust extension of the concern with individual self-determination into the cultural realm, ensuring that individuals have meaningful agency vis-à-vis the dense fog of symbolic materials suffusing their environment to enable *effective participation in the semiotic shaping of one's own*

on-going process of constructing the meaning of symbols" and thereby "give meaning to the objective world and define their own identity").

77. William W. Fisher, *The Implications for Law of User Innovation*, 94 MINN. L. REV. 1417, 1458–59 (2010).

78. Balkin, *supra* note 76, at 35 ("Culture is a source of the self.").

79. FISHER, *supra* note 76, at 30; Coombe, *supra* note 76, at 1863–64.

80. Balkin, *supra* note 76, at 35 (explaining that "[a] democratic culture is valuable because it gives ordinary people a fair opportunity to participate in the creation and evolution of the processes of meaning-making that shape them and become part of them"). *But cf.* Robert P. Merges, *Locke Remixed ;-)*, 40 UC DAVIS L. REV. 1259, 1265, 1267–68 (2007) (arguing that mass media "content is not strictly necessary for 'identity formation' ").

81. MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 64 (2012) (positing that "[d]emocratic culture may be even more important than democratic politics"); Balkin, *supra* note 76, at 35 ("A 'democratic' culture means . . . much more than democracy as a form of self-governance. It means democracy as a form of social life . . . in which ordinary people gain a greater say over the institutions and practices that shape them and their futures."); Elkin-Koren, *supra* note 65, at 231 ("[Democratic] participation is no longer confined to a narrowly defined political realm, but is instead perceived as an activity that can be realized in the social and cultural spheres as well. . . . [P]olitical will-formation . . . ought to be governed by democratic principles.").

subjectivity. Second, and what truly distinguishes cultural democracy from cultural self-determination, is a commitment to decentralizing meaning-making power on grounds of equalizing individuals' effective opportunity to participate in the semiotic shaping of *others'* subjectivity.

4. Human Flourishing

A final family of views moves beyond the foregoing theories' focus on enabling the conditions for robust individual and social self-determination, and advances a substantive conception of the good life or of human flourishing.[82] While not going so far as to dictate the details of individual or collective choices, theories of human flourishing insist that there are some ways of living one's life that are more fulfilling and allow for better realization of our "truly human" capacities and needs.[83] A just and attractive society, in turn, is one that fosters the social conditions conducive to flourishing lives, and equitably provides opportunities for all its members to realize their human capacities.

Not surprisingly, the alternative approaches in this family vary in their precise specification of the central features of the good life and the components essential to human flourishing. Nevertheless, most theories in this vein do tend to converge on a number of similar or common dimensions.[84] And for our purposes, it is possible to distill three central elements of convergence (without claiming to capture the entire range or nuances of the various alternative views). The first dimension, which largely incorporates the self-determination approach, emphasizes the importance of reflectively and deliberatively forming one's own conception of valuable aspirations, projects, and preferences, and of having the effective means for their pursuit and realization.[85] The second is "meaningful activity"—activity in which one's physical or cognitive capacities are highly engaged and developed in a manner involving challenge and discipline, an engagement valuable both for its own sake and for the realization of various intrinsic and

82. *See* Oren Bracha, *Standing Copyright on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799, 1842–49 (2007) (discussing human flourishing under the title of "cultural democracy"); Fisher, *supra* note 77, at 1463–72; Fisher, *supra* note 24, at 1744–66 (discussing a "[u]topian [a]nalysis" of copyright).

83. *See* MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 13 (2000) (anchoring the capabilities approach in "the Marxian/Aristotelian idea of truly human functioning"); Fisher, *supra* note 24, at 1746.

84. *See* Bracha, *supra* note 82, at 1844–48; Fisher, *supra* note 77, at 1468–71.

85. Bracha, *supra* note 82, at 1846–47; Fisher, *supra* note 77, at 1468; Fisher, *supra* note 24, at 1747–50.

social rewards "internal" to the activity.[86] The third is sociality, meaning involvement in relations and activities whose character and meaning is established communally through interaction with others—with such affiliations and collaborations being both intrinsically valuable and partially constitutive of one's sense of self.[87]

A question that may naturally arise is why, if the latter two goods are indeed valuable components of the good life, their pursuit cannot be left to individuals' private choices—which would allow policy decisions to remain neutral between competing individual visions of the good life?[88] The answer, in brief (with elaborations given below), is that—in certain contexts—sole reliance on individuals' free choice is, for various reasons, either insufficient or unpersuasive for resolving a policy question. In such cases, the best route is to forthrightly acknowledge and defend the adoption of some substantive conception of the good.

Expressive works and activities are significant on this flourishing view principally in two distinct ways. First, expressive works may be instrumental as means or preconditions for achieving many of the elements of human flourishing. Consider a familiar example, the relation between a vibrant and diverse sphere of expressive communication and self-determination. Second,

86. "Internal" rewards refer not only to the pleasures intrinsic to the process of undertaking an activity (such as the joys of physical exertion, mental stimulation, and collaborating with others), but also the satisfactions associated with realizing, and being recognized by others to realize, the activity's aspirational ends, those ends associated with the activity's particular value or "virtue" as a form of human undertaking (such virtues ranging from notions of performative or competitive excellence, to aesthetic and philosophical ideals of originality, knowledge, beauty/form, craftsmanship, and social contribution). For illuminating philosophical accounts of this Aristotelian-Marxian notion see ALASDAIR MACINTYRE, AFTER VIRTUE 181–204 (1981); Fisher, *supra* note 24, at 1747–50; Richard W. Miller, *Marx and Aristotle: A Kind of Consequentialism*, *in* MARX AND ARISTOTLE: NINETEENTH CENTURY GERMAN SOCIAL THEORY AND CLASSICAL ANTIQUITY 275–83 (George E. McCarthy ed., 1992).

87. *Cf.* Fisher, *supra* note 77, at 1470 (emphasizing the importance of "participation in freely chosen communities as crucial to human flourishing"); Fisher, *supra* note 24, at 1753 (identifying the importance for individuals to be grounded in "communities of memory" in order to possess the "secure sense of self" necessary for self-determination, as well as the importance of access to " 'constitutive' group affiliations" for persons to self-realize).

88. Such "neutrality about the good" is of course a hallmark of liberal theories, whether of welfarist or alternative stripe. *See, e.g.*, KAPLOW & SHAVELL, *supra* note 15, at 24–27 (arguing that judgments of social choice should be exclusively a function of individuals' well-being, understood in terms of subjective preference satisfaction); JOHN RAWLS, A THEORY OF JUSTICE § 60, at 347–50 (rev. ed. 1999) (stating that principles of liberal justice must rely on a "thin theory of the good"); RONALD DWORKIN, *Liberalism*, *in* A MATTER OF PRINCIPLE 181, 191 (1995) ("[P]olitical decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life.").

expressive activity will also often be intrinsically valuable as a particular realm of human activity where key components of human flourishing are directly realized. For instance, expressive activity will often—perhaps typically—comprise one important subset of human practices that constitute meaningful activity. Similarly, sociability often unfolds within and through expressive activities; not only when such activities are undertaken in collaborative ways but also, significantly, when interaction with expressive works—their consumption, interpretation, sharing, etc.—happens in group settings.

Each of the theories just distilled focuses on a different set of values, prizing expression for somewhat different reasons. Do these differences, however, have implications for purposes of copyright policy? The question is twofold. First, given the basic structural similarity between all of these consequence-sensitive theories and efficiency, is it not still the case that "democratic benefits are roughly proportional to economic benefits"?[89] One still needs to demonstrate how each theory may produce different results than efficiency in specific cases and how, in such cases, the fact that they may override subjective individual preferences can be justified. Second, does the choice among the theories matter? That is, when, if ever, do these theories point in divergent directions from one another, or offer different justifications for overriding preferences in ways that matter for copyright policy?

B. THE THEORIES IN ACTION

To illustrate how the foregoing abstract commitments of democratic theories bear on concrete policy questions, we discuss four familiar issues of copyright law: the appropriate treatment of critical uses of copyrighted works, the entitlement to make derivative works, the application of copyright to fan fiction, and the status of personal uses of copyrighted materials. Our discussion is not meant exhaustively to survey how all the foregoing theories apply to each of these four topics. Rather, we use the theories selectively to demonstrate how, in different contexts, the outcomes they mandate may diverge from efficiency, as well as, at times, each other.

1. Critical Secondary Uses

To what extent, if at all, should a copyright holder's entitlements apply to uses of his or her work that are critical in character, drawing heavily on the copyrighted work but in a manner that significantly transforms its overall meaning? Or, conversely, to what extent should such critical uses be immune

89. Abramowicz, *supra* note 17, at 94.

from liability under the fair use doctrine?[90] One classic and much discussed example is the comic strip *Air Pirates Funnies*.[91] The short-lived series (consisting of only two issues) involved close reproduction of Walt Disney characters, which were presented in bawdy adult contexts, such as drug use or sexual activities. The makers of the comics claimed to be engaged in criticism of an American culture that they regarded as unduly conformist and hypocritical.[92] Disney sued the makers, who based their defense on a fair use argument but eventually lost.[93] Another more recent example is the novel *The Wind Done Gone*.[94] According to its author Alice Randall, the novel is a critique of the romanticized portrayal of slavery and the Civil War era depicted in Margaret Mitchell's *Gone with the Wind*.[95] To achieve this effect, Randall drew heavily on the original novel, using many of its characters, plot lines, and other creative elements. Despite this heavy borrowing, however, *The Wind Done Gone* tells a very different story in a very different voice. And, stretching the meaning of the term, the Eleventh Circuit held that Randall's use was parodic.[96] Partly as a result of this holding, the court ruled that the

90. Fair use is simply the most readily available mechanism for immunizing critical works from copyright liability under existing doctrine. However it may not, at least in its current form, be the optimal means for doing so. This doubt is traceable to an ongoing debate about the efficacy of the fair use doctrine as copyright's main "safety valve." Views skeptical of the efficacy of fair use as a reliable ex ante assurance to users emphasize the flexible, ad hoc, and unpredictable nature of the doctrine that often makes reliance on it risky and unappealing, especially to parties who lack substantial financial backing. *See, e.g.*, Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007) (arguing that fair use "is so case-specific that it offers precious little guidance about its scope"); Fisher, *supra* note 24, at 1693–94 (discussing the harmful effects of uncertainty in the fair use doctrine); John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 BYU L. REV. 1201, 1215–16. Other scholars take the position that properly understood and applied fair use can yield a sufficient level of predictability and avoid chilling effects. *See, e.g.*, Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 718 (2011) (arguing that recent empirical studies have found "patterns in fair use case law that give the doctrine some measure of coherence, direction, and predictability"); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2541 (2009) (arguing that once common patterns are identified, fair use case law is "both more coherent and more predictable than many commentators have perceived").

91. *See, e.g.*, BOB LEVIN, THE PIRATES AND THE MOUSE: DISNEY'S WAR AGAINST THE COUNTERCULTURE (2003); NETANEL, *supra* note 65, at 19; Gordon, *supra* note 46, at 1601–05.

92. *See* LEVIN, *supra* note 91, at 78 (describing counterculture's "anti-Disney line").

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

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

95. *Id.* at 1259.

96. *See id.* at 1269.

use was allowed under the fair use doctrine as applied in light of First Amendment principles.[97]

Perhaps there are persuasive ways of distinguishing the two cases and reconciling their seemingly divergent results. And in any case, fair use doctrine did develop in the interim between them (and has continued to since).[98] Nevertheless, the basic policy question remains: how should copyright treat cases of close, extensive reproduction of copyrighted materials when said reproduction is done in the service of creating a new work that is materially different from the original and critical of it or of the views or values with which it is commonly associated?

From an efficiency perspective, the answer is highly uncertain. It depends on the net result of several distinct effects of treating critical uses as infringing. First, to the extent that unauthorized critical uses erode the incentive for producing originals, including them within the scope of copyright would provide the benefit of created works that otherwise would be supramarginal. An erosion of incentives may result from lost licensing fees, if there are any cases where a deal may have been struck, or, perhaps more plausibly, from any dampening of the demand for the original, resulting from its critical treatment by the secondary use. Of course, it seems very unlikely that being deprived of (the highly speculative) licensing revenue from critical uses or any tarnishing effect would make Mickey Mouse or *Gone with the Wind* unprofitable or prevent their creation. Nevertheless, it is possible that some other works, with lower profit margins, would be pushed from being marginal to supramarginal and hence, not be created. Perhaps there would be no Mighty Mouse, or perhaps some very expensive motion picture would not be produced. In addition, the inframarginal effects of possibly reduced profitability, even if by a small amount, should be considered. A lower surplus available to producers may result in fewer entries by producers of close substitutes for the original successful works. Perhaps there will be no Wile E. Coyote, or we will go without some other grand romantic novel set on a historical stage. The result would be that predicted by product differentiation theory: complex effects on duplicative cost,

97. *Id.* at 1268–70.

98. The most important developments are the rise in importance of transformative uses, and the especially favorable treatment accorded parodic uses. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) ("[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright . . . and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." (internal citation omitted)).

tailored demand satisfaction, and deadweight loss.[99] Finally, prohibiting critical uses would result in an inframarginal access cost regarding the secondary uses. Some efficient secondary uses may be frustrated by the transaction costs of obtaining a license or their inability to internalize positive externalities of the use, while for others, the added cost of the licensing fee may translate into a higher price and hence, an increased deadweight loss. The analysis is further complicated by competing arguments regarding likely levels of transaction costs and types of market failures relevant to the fair use analysis.[100]

Our present task is not to conclusively decide the efficiency debate; rather, it is to examine whether any of the democratic theories add something to the analysis. Recall that these theories should also be interested in the countervailing costs on expression with which the expressive benefit of an exemption to critical uses is bought. Should they not, then, apply the same calculus as efficiency to the tradeoffs among these effects to reach similar conclusions?

To see how, in fact, these theories might depart significantly from efficiency's prescriptions, consider self-determination. The emphasis here, again, is not only on individuals being free from coercive interference or possessing the means to effectively pursue their given projects and preferences, but also on ensuring sufficiently robust conditions for individuals to freely form and revise their outlooks. Self-determination emphasizes conditions that enable and foster the exercise of the capacities to evaluate, choose among, and reconsider a wide variety of projects and preferences, or distinct ways of living, thinking, feeling, etc. In this regard, a high normative premium is placed on critical expression due to its role in

99. *See supra* Section II.A.3.

100. *Compare* Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 69 (1992) ("A use is fair . . . when the costs of transacting with the copyright owner over permission to use the copyrighted work would exceed the benefits of transacting."), *with* 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, 581 (1998) ("[A]s a response to market failure, the fair use doctrine can and should give way in the face of the effective enforcement of authors' rights through automated rights management."), Wendy J. Gordon, *Market Failure and Intellectual Property: A Response to Professor Lunney*, 82 B.U. L. REV. 1031, 1034 (2002) ("Transaction cost barriers are neither the only kind of economic problem to which fair use responds, nor the only kind of problem to which fair use *should* respond."), *and* Lydia Pallas Loren, *Redefining The Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 6 (1997) ("A permission system only remedies the market failure that occurs because of high transaction costs. . . . [But it] does nothing to cure . . . the market failure that occurs when there are significant external benefits associated with a particular use that cannot be internalized in any bargained-for exchange.").

encouraging critical reflection on, and presenting alternatives to, existing options, especially those that are dominant or widely held. Moreover, ensuring steady exposure to such expression is also likely to cultivate the faculties needed to exercise meaningful reflective choice, since "[t]he mental and moral, like the muscular powers, are improved only by being used."[101] Thus, critical expression is particularly important to preserve because it is an essential component of the conditions conducive to individual self-determination.

To see the significance of this normative premium, consider the following hypothetical. Assume first that we could calculate, to the dollar, the various economic effects of exempting works such as *Air Pirates* or *The Wind Done Gone* from copyright liability. Further assume (perhaps implausibly) that total consumer demand for works not created because of the exemption significantly outweighs consumer demand for the critical works that, without the exemption, would either not be created or would be less accessible.[102] From an efficiency perspective this is a no-brainer: the exemption would clearly generate more cost than benefit and thus should be rejected. Not so for self-determination theory. From this perspective, the critical expression lost or to which access is curtailed is more valuable in comparison to other expression that enjoys higher consumer demand but does not offer the same benefits for ensuring conditions of genuine choice. Better 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.

This raises with force the issue of overriding or discounting subjective individual preferences. Michael Abramowicz puts the point sharply: "If . . . economists are correct in seeing property rights as 'putting existing works of authorship to their most socially valued uses,' " then insisting "that the works be placed in the public domain nonetheless is perverse."[103] In other words, why should we place greater value on critical uses than that indicated by actual individual preferences? The answer: because ensuring ample space for critical expression is crucial to nourishing the conditions of genuine free choice, and that, in turn, is a higher-order concern compared to satisfying existing preferences, being as it is a precondition for valuing or deferring to such preferences to begin with. Recall the grounding normative commitments of self-determination theory: the reason why this theory values

101. JOHN STUART MILL, ON LIBERTY 55 (Batoche Books 2001) (1859).

102. To simplify, ignore any effects of the exemption on inframarginal competition from substitutes, or assume they are insignificant by comparison to the effects on supramarginal and critical works.

103. Abramowicz, *supra* note 17, at 91.

individual preferences in the first place is to respect and enable individual autonomy, in the sense of persons authoring their own lives. And individual choices (along with the preferences revealed by them) are autonomous only to the extent that the conditions exist for reflective, discerning choice among a meaningful array of alternatives. Our interest, then, in the conditions for genuine free choice is a higher-order one than our interest in satisfying any given set of existing preferences, meaning that it is both qualitatively distinct from, and normatively prior to, the latter. The conditions that shape, and validate deference to, individual preferences cannot themselves be evaluated simply by a given set of existing preferences. Thus, when a specific feature of copyright has substantial effect on the higher-order conditions that validate individual preferences, there is nothing perverse in not subjecting this feature to the test of existing preferences.

To be sure, the conclusion would be different if it was plausibly predicted that exempting certain critical secondary uses would have devastating effects on expression. For example, if exempting the likes of *Air Pirates* would undermine the creation of a substantial share of those expressive works potentially subject to such critical uses (which is quite unlikely), then the self-determination evaluation might well shift. We would have to recalibrate our sense of the appropriate balance between protecting one of the conditions that validate deference to preferences (since availability of critical expression is not the only factor influencing whether free choice exists) and enabling the satisfaction of a given set of preferences. Striking that balance strictly in favor of protecting the preconditions might not only result in an unattractive mix of enabling sound formation versus effective satisfaction of preferences. Indeed, it may also be internally self-defeating: even from the sole point of view of improving the conditions of preference formation, it may be a net deficit to facilitate one set of critical uses at the cost of undermining a very large chunk of expressive output that may itself offer a variety of alternative perspectives (which, in turn, may subsequently serve as the foil for further secondary critical treatments).

There remains, however, a significant gap between a normative analysis under efficiency versus one under self-determination. In cases where self-determination plausibly predicts that a certain legal feature is likely to be significantly conducive to an environment closer to the ideal of free choice, it would support this feature even if a precise efficiency calculus is either unavailable or goes the other way. Moreover, even when the two normative perspectives point in the same direction there may be a difference in intensity. It is possible, for example, that in light of claims of new cost-

effective mechanisms for licensing transactions,[104] efficiency only supports the exemption by a small margin or simply lacks sufficient empirical data to make the close call. Nevertheless, self-determination theory will continue to weigh strongly and conclusively in favor of the exemption because of the large normative premium it places on critical uses.[105]

Consider now a related question: is there an additional normative value to enabling broader opportunity for all members of society to take part in critical uses of dominant cultural materials, distinct from the degree of critical output generated? Suppose for the sake of argument that, under certain conditions, facilitating creative opportunities only for a relatively narrow professional elite suffices for generating robust critical expression, and that extending such opportunities to the entire population, including poorly-financed amateurs, is unlikely to have additional significant effect on the variety and depth of critical output.[106] This assumption may have important doctrinal implications. Arguably, allowing critical opportunities for just a professional elite may require only a mild restriction of copyright, rather than a complete exemption. For this purpose, it may suffice to simply limit the remedy for infringement to actual damages, and thus remove the copyright holder's veto power by denying injunctions,[107] disgorgement of the user's

104. *See* Bell, *supra* note 100.

105. Rob Merges has recently suggested that autonomy considerations may play a tiebreaker role where efficiency is "blurry" or indeterminate, so as to put a "thumb on the scale" in tight cases. *See* Robert P. Merges, *Autonomy and Independence: The Normative Face of Transaction Costs*, 53 ARIZ. L. REV. 145, 162–63. By contrast, our argument for the higher-order status of certain interests in self-determination results in a considerably stronger departure from efficiency: not only may it provide firmer support for a rule when efficiency is uncertain, but it can continue that support even when efficiency points the other way, by virtue of the lexical priority it gives in certain circumstances to these higher-order interests, over and above efficiency's satisfaction of preferences.

106. To be sure, under actual economic and social realities of producing expressive works, broadening of expressive opportunities will tend to be structurally connected to the character of the expression produced. *See infra* Section III.B.2 (discussing "heterodox works"). We nevertheless make the stylized assumption that robust critical expression may be achieved absent wider opportunities, in order to pinpoint an important normative difference between theories of self-determination versus cultural democracy.

107. Under the Copyright Act, courts have a broad discretion with regard to injunctive relief. *See* 17 U.S.C. § 502(a) (2012). Following the Supreme Court patent decision in *eBay v. MercExchange*, courts have reversed a previous trend and started applying a more exacting and discretionary approach to the grant of injunctions in copyright cases in line with general injunctive relief principles. *See* eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006) (holding that courts may only grant injunctions in patent cases as discretionary equitable relief subject to the general four-factor test); Flava Works, Inc. v. Gunter, 689 F.3d 754, 755 (7th Cir. 2012) (applying *eBay* to copyright cases); Flexible Lifeline Sys. v. Precision Lift, Inc., 654 F.3d 989, 997–98 (9th Cir. 2011) (same); Salinger v. Colting, 607 F.3d 68, 77 (2d Cir. 2010) (same).

profits,[108] or the threat of excessive statutory damages.[109] Effectively opening up such opportunities for all individuals, however, would require considerably more. Individuals not backed by a commercial enterprise, or who do not expect substantial income from the use, would need to be free of both the prospect of substantial damages and the costly uncertainty created by fuzzy, hard-to-predict standards.[110] In other words, broadening opportunity for critical expression to all would require something approximating a complete exemption founded on a clear, predictable rule.

Self-determination as such provides little support for expanding opportunity for critical uses, independent from an increase in critical output. What is important on this view is the creation of an expressive environment conducive to reflective self-authorship, rather than the process of who contributes to it. Political democracy, by contrast, does require equal opportunity for critical uses, albeit only within a certain subdomain of expression. Recall political democracy's two distinguishing features: an extension of self-determination's ambit from individual to collective decision-making and, given the latter's inherently relational character, a concern with equalizing opportunities for participation in such decisions. From these two features follows the need to broaden opportunities for all individuals to engage in critical uses but only within the delimited domain of shaping the deliberative process relevant to political decisions. A clear case would be extensive citation from a political speech for purposes of a critical analysis. And, under a broad reading, the principle would also apply to uses such as *The Wind Done Gone* that, while not political tracts, have plausible bearing on the subject matter of politics. At some point, however, the connection between cultural works and the political process becomes too tenuous; it is doubtful, for example, that the political democracy rationale plausibly applies to the *Air Pirates*. It is at this point that the specific contribution of cultural democracy theory kicks in. Here too, the guiding principles are twofold: to extend the ambit of self-determination to the

108. Under existing law, a copyright owner is entitled as matter of right to recover both actual damages and any additional profits by the infringer. *See* 17 U.S.C. § 504(a)(1)–(2), (b).

109. *See* 17 U.S.C. § 504(c).

110. For similar reasons, Molly Van Houweling has suggested there be a presumption of fair use for noncommercial derivative uses. Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1547–49, 1565–68 (2005). Admittedly, Van Houweling offers her proposal as an administrable proxy for her actual underlying concern, which is to enable greater expressive opportunities for lower-income creators. However, although Van Houweling couches that latter concern in the language of "distributive values," the substance of her argument strikes us as straddling what we analyze in this Part under the rubric of "political democracy" and what we analyze in Part IV, *infra*, as "strictly distributive concerns."

cultural sphere (where a person's subjectivity is shaped) and, recognizing the irreducibly social character of meaning-making, to extend democratic concerns with equalizing collective power to the realm of shaping the subjectivity *of others*. Cultural democracy's commitment, then, to decentralizing meaning-making requires enabling all individuals to participate in shaping culture. Applied to critical uses this requires not just conditions conducive to ample critical materials, but also a broad opportunity for all individuals to engage in such uses. The doctrinal upshot: a strong, predictable rule that exempts critical uses from copyright liability.[111]

2. Derivative Works

Another fiercely debated topic in copyright policy is the entitlement to make derivative works.[112] Granting this exclusive entitlement to the copyright holder, alongside an expansive understanding of the reproduction requirement,[113] has the effect of bringing within the holder's control a broad

111. Interestingly, two developments in fair use case law in recent decades have brought copyright law closer to such a strong exemption for critical uses. The first is the heavy weight given to the transformative nature of the use under the fair use analysis. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) ("The more transformative the new work, the less will be the significance of other factors . . . ."). Not all transformative uses are critical, but most strongly critical uses are likely to be considered highly transformative when the concept is properly applied, and therefore are likely to be found non-infringing. Second, a rising, although not uniformly accepted, rule in the case law is that any negative effect of a highly transformative use on a possible licensing market for such use is to be ignored when inquiring into market harm under the fourth fair-use factor. *See* Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 614–15 (2d Cir. 2006) (refusing to consider the impact of defendant's transformative use on the licensing market under the fair use analysis). The practical effect of this rule is to buttress the certainty and predictability of the fair use safe haven for transformative and critical uses, by replacing the highly malleable and uncertain inquiry concerning market harm with a clear, irrebuttable presumption of no market harm whenever the use is strongly transformative. The net result is that the two most important of the four fair-use factors cut strongly and clearly in favor of non-infringement in regards to highly transformative and critical uses. Incomplete acceptance of the second rule mentioned, different standards applied in determining what is a highly transformative use, and the general malleability of the fair use analysis all cause the current situation to fall short of the clear and predictable full exemption to critical uses described in the text. Nevertheless the combined effect of the two rules brings the current fair use doctrine significantly closer to such an exemption.

112. *See* 17 U.S.C. § 106(2).

113. 17 U.S.C. § 106(1). The borderline between the derivative-works entitlement and other entitlements, especially a broadly defined reproduction right, is hard to pin down. This has led some commentators to conclude that the derivative-works right is superfluous because wherever it is implicated other entitlements would also be infringed. *See* Twin Peaks Prods. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1373 (2d Cir. 1993) ("[The] right to make derivative works is 'completely superfluous' . . . ." (quoting MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.09[A])); MELVILLE B. NIMMER & DAVID NIMMER,

array of secondary uses that go well beyond mere copying. Historically, copyright's scope was limited to verbatim reproduction with a narrow zone of minor variations.[114] Starting in the late nineteenth century, this scope was expanded through the addition of new entitlements and changes in the concept of, and legal tests for, infringement.[115] By the time of the 1976 Copyright Act,[116] the pendulum had swung to the opposite end. A copyright owner now holds exclusive control over any work based on hers, no matter how much the original is "recast, transformed or adapted."[117] This capacious control is almost unlimited by the terms of the derivative-works right itself[118]

NIMMER ON COPYRIGHT § 8.09[A] (2010) (explaining that any infringement of the derivative-works entitlement also infringes either the reproduction or public-performance entitlements). *But see* Daniel Gervais, *The Derivative Right: Or Why Copyright Law Protects Foxes Better than Hedgehogs*, 15 VAND. J. ENT. & TECH. L. 785, 800 (2013) ("[T]here are forms of derivation that copy and some that do not.").

114. *See* Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 224–26 (2008); Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 211–14 (1983); Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1233–34 (1997).

115. Bracha, *supra* note 114, at 226–33; Goldstein, *supra* note 114, at 214–15; Voegtli, *supra* note 114, at 1234–39.

116. Pub. L. No. 94-553, 90 Stat. 2541 (codified in various sections of 17 U.S.C.)

117. *See* 17 U.S.C. § 101 (defining a "derivative work"). Pam Samuelson has recently argued that a proper understanding of the legislative history, constitutional purpose and textual structure of the 1976 Act shows that the derivative-works right is not nearly so broad as many have thought and, in particular, that the open-ended clause at the end of the statutory definition, purporting to cover "any other form in which [a copyrighted] work is recast, transformed, or adapted" should be narrowly construed so as to limit it to cover only close analogues of the preceding nine "exemplary derivatives" listed in the statutory definition (namely "a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, [and] condensation"). *See* Pamela Samuelson, *The Quest for a Sound Conception of Copyright's Derivative Work Right*, 101 GEO. L.J. 1505, 1509, 1511 (2013) (quoting 17 U.S.C. § 101). However, Professor Samuelson also points out that a number of courts have nevertheless "interpreted broadly" this ending clause, leading to "highly problematic" decisions that have increased uncertainty about the scope of the clause. *Id.* at 1509–10. This resulted in substantively "unsound" outcomes. *Id.* at 1547. Moreover, even if Professor Samuelson's narrower construal of the right as currently enacted were to prevail, our normative analysis may have more far-reaching implications, prescribing a rolling back of the existing categories as well.

118. Some courts have tried to delimit the entitlement by pointing to internal constraints imposed by its definition. In some cases the result has been to adduce very minimal internal constraints, while in others it has resulted in a plainly confusing and unpersuasive understanding of the concept of derivative works. For an example of the former, see Micro Star v. FormGen Inc., 154 F.3d 1107, 1110 (9th Cir. 1998) ("[A] derivative work must exist in a 'concrete or permanent form' . . . and must substantially incorporate protected material from the preexisting work . . . ." (quoting Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 967 (9th Cir. 1992)). For an example of the latter, see Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (holding that a lexicon based on

and is only moderately limited by external checks, chief among which is the fair use doctrine.[119] Anything from a rap version of a pop song,[120] to a costume based on a cartoon character,[121] may be a derivative work that falls within the entitlement's scope.

Is such broad control by the copyright owner desirable? Under a standard efficiency analysis, the answer is probably no. The basic justification for the entitlement is that by including secondary markets, it allows the creator to internalize a larger share of the social value of her creation.[122] In many cases, however, the additional profit generated from licensing in secondary markets (or from development of those markets by the copyright owner) will be either unnecessary or inconsequential as an incentive. It will be unnecessary where exploitation of the work in its primary market is clearly sufficient to recoup development expenditures.[123] It will be inconsequential when the expected value of the secondary markets at the time of creating the original is so small relative to development costs that it is unlikely to make the difference between overall net loss and profit.[124] As a rule secondary markets tend to be significantly profitable when the original is very successful (think *Star Wars*)—in other words, in exactly the cases where the additional profit they yield is likely to be unnecessary.[125] Of course, these are rough generalizations. Sometimes the development of a work may be so costly that the pooling of profits from all markets, even in cases where secondary markets are small relative to the primary one, may be necessary to recoup

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the Harry Potter novels was both too transformative to be considered derivative of the original and yet that it was nevertheless a reproduction of it). For another attempt to infer the scope of the derivative works entitlement from the concept, see Gervais, *supra* note 113, at 846 ("Derivation is best seen as taking what makes a preexisting work (or more than one) original for the purpose of transforming it, but not to the point of a fundamental alteration of the message." (emphasis omitted)).

119. 17 U.S.C. § 107. For a discussion on the limited restrictions imposed by general copyright principles on the derivative works entitlement, see Voegtli, *supra* note 114, at 1217–32.

120. *See* Campbell v. Acuff-Rose Music Inc., 510 U.S. 569 (1994).

121. *See* Entm't Research Grp., Inc. v. Genesis Creative Grp., Inc., 122 F.3d 1211 (9th Cir. 1997).

122. Goldstein, *supra* note 114, at 216.

123. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 109–10 (2003); Landes & Posner, *supra* note 24, at 354; Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1216 (1996); Voegtli *supra* note 114, at 1241–42.

124. *See* Sterk, *supra* note 123, at 1216.

125. *See id.* (contrasting the first-time author who is unlikely to expect significant profits from secondary markets with the established author who is more likely to earn such profits but do not need them to recoup her investment); *see also* Abramowicz, *supra* note 17, at 68–77.

costs. At other times, a work may generate much more profit in secondary markets than in the primary one.[126] On balance, however, as long as it is plausible to expect the aforementioned generalizations to hold, the incentive value of the derivative work entitlement will be weak. On the other side of the copyright tradeoff, the entitlement is likely to create substantial access costs as a result of prohibitive transaction costs either barring efficient uses or driving up their price. The net result: a relatively low incentive benefit likely outweighed by access costs.

Factoring in product differentiation modifies the analysis somewhat, but the overall conclusion likely remains intact. The main element added by product differentiation is that the rents generated in inframarginal markets by the derivate-works entitlement are likely to attract new entrants with closely differentiated products. The picture is not limited to the one developer of the adventure movie of the season, enjoying large rents through control of both primary and secondary markets, along with correspondingly large deadweight losses. Rather, we are likely to see several adventure movies whose developers share the surplus in the primary and secondary markets, with correspondingly significant duplicative wastes and some degree of price competition and, somewhat less likely, perhaps some reduction in the wasteful and prohibitive effects associated with transacting over secondary uses. The net result is a similarly indeterminate conclusion as traditional economic analysis, albeit on somewhat different grounds.

On balance, then, both traditional and product-differentiation-based economic analyses tilt against a broad derivative-work right.[127] They favor either the abolition of the entitlement or its replacement with narrower rights over secondary markets, which target those contexts where efficiency may tilt in favor of such control, such as exclusive rights for translations or motion-picture adaptations.

Does the analysis change if we switch our normative lens to, say, self-determination? The starting point for the analysis is again the notion of a normative premium this view places on certain kinds of expressions. Specifically, a special value is imputed to what may be called "heterodox" works. Heterodox works challenge broadly held views, beliefs or tastes, and

126. *See* Derek E. Bambauer, *Faulty Math: The Economics of Legalizing* The Grey Album, 59 ALA. L. REV. 345, 381–82 (2008) (discussing the example of comic books but concentrating mainly on whether secondary markets' revenue is substantial rather than whether it is necessary); Sterk, *supra* note 123, at 1216 (giving the example of an "extraordinarily high-budget movie with the potential for sales of toys, t-shirts, and the like").

127. For additional considerations under efficiency analysis of the derivative work entitlement, see Landes & Posner, *supra* note 24, at 354–55; Voegtli, *supra* note 114, at 1241–47.

include content that is outside the mainstream, is avant-garde, or is aimed at preferences and tastes that are relatively marginal.[128] Self-determination theory places a normative premium on such content because it is essential for a distinct precondition of genuine free choice than opportunity for critical reflection and revision, namely, meaningful variety. As Joseph Raz explains, free choice requires a sufficient variety of options from which to choose, options that, unlike a group of identical cherries in a bowl, must be materially different from each other.[129] The choice between a hundred mainstream channels, each providing similar formulaic programing, does not constitute such meaningful variety.[130] The lack of challenge to entrenched and comfortable options also breeds attitudes of passivity and conformity—the antithesis of self-determination. In the words of Mill, "[p]recisely because the tyranny of opinion is such as to make eccentricity a reproach, it is desirable, in order to break through the tyranny, that people should be eccentric."[131] Heterodox works supply eccentricity and thereby a crucial part of the range of possibilities and alternatives that make individual choice meaningful. Such works provide real alternatives to dominant options and a foil against which to critically compare and assess those options. Heterodox works also create the potential for tomorrow's prevailing choices to be different from today's, and consciously or reflectively so rather than being determined by sheer inertia or drift. Yet by their very nature as relatively marginal and/or avant-garde, heterodox works run the risk of being in short supply if left to the forces of the market that reflect existing preferences. The conditions that allow heterodox expression to flourish are thus part of the preconditions for validating individual choices and their valuation cannot therefore be reduced to such choices.

Even with a normative premium placed upon heterodox works, however, the self-determination analysis of derivative works may seem to track that of efficiency. To the extent that heterodox expression is equally affected by the incentive and access sides of the entitlement's effects, the efficiency and autonomy tradeoffs will tend to converge. Upon closer reflection, however, possible distinctions emerge.

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128. *See, e.g.*, NETANEL, *supra* note 65, at 40 (explaining the similar concept of "oppositional expression"); STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 86–109 (1990) (discussing the value of dissent in free speech jurisprudence).

129. *See* RAZ, *supra* note 59, at 398.

130. On the difference between meaningful diversity of content and mere product differentiation, see NETANEL, *supra* note 65, at 39–40.

131. MILL, *supra* note 101, at 62.

Consider first the incentive effect of the derivative works entitlement on heterodox works. Control of secondary markets will tend to be much less consequential to the recoupment of investment in heterodox works. Licensing fees from the T-shirt or action-figure markets, or even a hope for a lucrative mainstream movie adaptation, are likely to represent a small portion of their expected value at the time of creating heterodox works. In many cases, non-trivial income from such secondary markets will only materialize exactly when the work ceases to be heterodox and shifts into the mainstream—an elusive and unpredictable process. As a result, relatively few heterodox works will be pushed from the supramarginal to creation as a result of the derivative works entitlement.

On the other side of the tradeoff, the access cost of the entitlement will take a disproportionately large toll on heterodox works. An important common strategy for creating heterodox works is what Neil Netanel calls "creative appropriation," meaning a use of dominant mainstream materials that is at once "highly derivative" and "powerfully subversive."[132] An example is Tom Forsythe's Food Chain Barbie—a series of photographs of Barbie dolls attacked, tortured, and mutilated by kitchen appliances.[133] Creative appropriation is not new. The digital age holds, however, the promise of a radical democratization and spread of this form of creation. A combination of pervasive, relatively affordable technology for creating and disseminating high quality digital content, alongside emerging social norms and practices, has produced a growing wave of bottom-up decentralized creativity. A very common element within this phenomenon is "remixing"[134] or "glomming on"[135]—the use of dominant mass media content while imbuing it with new, subversive meaning(s) or simply using content as the building blocks for new creativity.

The promise of this decentralized wave of user innovation in producing a vibrant and diverse expressive realm, with a steady supply of heterodox works in contrast to the tendency of mainstream mass media toward the

132. NETANEL, *supra* note 65, at 159; *see also* Voegtli, *supra* note 114, at 1221–26 (discussing "appropriative art").

133. The series is described by Tom Forsythe as a "pictorial antidote to the powerful cultural forces persuading us to buy the impossible beauty myth." *See Food Chain Barbie, R Prints, Edition of 450*, ARTSURDIST, http://www.tomforsythe.com/food-chain-barbie---r-prints.html (last visited Jan. 10, 2014). Forsythe endured a five-year legal battle after being sued by Mattel for copyright and trademark infringement, at the end of which he emerged victorious. *See* Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003).

134. *See generally* LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008).

135. *See* Balkin, *supra* note 76, at 10–12.

uniform and uncontroversial, is great.[136] Many commentators see it as the most important source of diversity, innovation, and challenge in an increasingly centralized cultural sphere.[137] But the vibrancy of this expressive source depends to a large extent on the ready availability of its raw materials, namely preexisting informational works, particularly culturally dominant materials of exactly the kind where the owner is likely to have an interest in aggressive enforcement of derivative works rights.[138] The most promising source of heterodox works, in other words, is disproportionately dependent upon access to copyrighted materials. Moreover, the creators of such works, who often serve only small niche demand or pursue non-profit-oriented strategies, are more frequently unable to recoup large development costs. As a result, these works are likely to be particularly adversely affected by the access barriers imposed by a derivative-work entitlement, in the form of either flat licensing fees or prohibitive transaction cost.

The net result is that heterodox works, and especialsly the most promising source for such works in the digital age, are disproportionately prejudiced by the access cost of derivative works protection, while benefiting relatively little from its incentive function. Compared, then, to standard efficiency analyses of the derivative-work rights, a self-determination perspective is more conclusively skeptical.

Recently, however, a new economic rationale for the entitlement has been advanced. On this view, the primary purpose of the derivative entitlement is not the dubious one of increasing incentives for creation, but rather of serving as a check on wasteful rent dissipation in secondary markets.[139] The derivative work entitlement centralizes the power to authorize and coordinate secondary innovation in the hands of the copyright

136. On the tendency of mass media to produce mainstream, bland content, see C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 115 (2002); BENKLER, THE WEALTH OF NETWORKS, *supra* note 58, at 196–211 (discussing basic critiques of mass media including the tendency toward "lowest common denominator programming"); NETANEL, *supra* note 65, at 39–40 (discussing conflicting arguments in the literature and concluding that studies praising the diversity of content generated by mass media are based on a narrow understanding of diversity detached from the expressive diversity relevant for free speech theory).

137. *See* BENKLER, THE WEALTH OF NETWORKS, *supra* note 58, at 276; NETANEL, *supra* note 65, at 44; SUNDER, *supra* note 81, at 105–14; Coombe, *supra* note 76, at 1864; Fisher, *supra* note 77, at 1460.

138. NETANEL, *supra* note 65, at 41 (arguing that oppositional speakers "are far less able to acquire copyright permissions").

139. *See* Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, *supra* note 33, at 358–59. Abramowicz is building here on Edmund Kitch's earlier work in the patent context. *See* Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265, 276 (1977).

owner of the primary work, thereby avoiding the wasteful overlapping activity associated with races to capture the rents from secondary uses of popular primary works.[140] This is the reason why we get just one computer game based on a successful movie rather than ten highly duplicative versions that mainly divert demand from each other. Like the traditional economic justification, this argument is far from establishing conclusive support for the entitlement. For one, preventing secondary-level rent dissipation by creating a highly valuable right to control secondary markets may simply push the rent dissipation back to the primary level, by igniting races to capture this right that are potential equally or even more wasteful.[141] It is far from clear that copyright doctrine has effective tools for applying the entitlement only when its benefits clearly outweigh this cost.[142] Moreover, centralized control is likely to have detrimental effect on the quality of innovation on the secondary level: in the highly uncertain and unpredictable area of creative innovation, the most effective way of finding out what works best is to let many minds try.[143] Thus, like the traditional efficiency analysis, this variant is somewhat inconclusive.

Once again, self-determination provides a more conclusively negative evaluation of the derivative-work right, now understood as a tool for centralized coordination. The analysis hinges once again on the right's disproportionate effect on heterodox works. For the reasons just explained, heterodox works are likely to be disproportionately represented on the side of derivative works (whose production is restricted by the centralized control of the copyright owner) and, conversely, more sparsely represented on the side of those primary works with a high probability of lucrative secondary development. Most importantly, heterodox secondary works are particularly likely to be susceptive to the pernicious tendencies of centralized control over secondary innovation. Compared to mainstream uses, heterodox works often promise a lower overall profit, higher risk, or both. The private profit-maximizing interest of coordinating copyright holders, and the known

140. Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, *supra* note 33, at 358 (explaining that the concern "is that derivative works will be redundant with one another").

141. *See* Bracha & Syed, *supra* note 34, at 34. For the original critique in the patent context, see Donald G. McFetridge & Douglas A. Smith, P*atents, Prospects, and Economic Surplus: A Comment*, 23 J.L. & ECON. 197 (1980).

142. Bracha & Syed, *supra* note 34, at 34.

143. *See* Lemley, *supra* note 24, at 1068–69; Robert P. Merges & Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839, 908 (1990) (making the argument in the patent context).

tendency of mainstream media firms to minimize risk,[144] will systemically prefer the creation of conventional secondary works over more heterodox ones. If there is to be only one computer game following a successful movie, we can safely predict that, in most cases, it will be the more conventional, mainstream version that is licensed rather than a subversive or experimental variant. Similarly, if *Pride and Prejudice* were under copyright, it would be one of the more standard motion-picture adaptations that is licensed rather than *Bride and Prejudice*.[145] Were Shakespeare's plays sheltered behind a derivative works entitlement, it is doubtful that *Lear's Daughters*, a loose adaptation, would be licensed.[146] Nor is it likely that Aime Cesaire's postcolonial play *A Tempest* would ever be authorized.[147] The private coordination power created by the entitlement is systemically biased against heterodox works. In sum, the special value given to heterodox works by self-determination theory leads again to a more clear and secure negative assessment of the derivative works, when compared to economic analysis.

3. Fan Fiction

Fan fiction has fast become the source of heated debate in copyright policy.[148] The genre is a form of secondary creation that builds on well-established—usually highly popular—cultural works, and is typically produced and consumed by fans of such works. The writings are typically located within the "universe" of the primary work, and employ and build upon much of the creative material of the original: its characters, relationships, themes, scenery and plot lines. The extent to which efforts in the genre add new creative content varies considerably, from new story lines

144. *See* NETANEL, *supra* note 65, at 136–37 (discussing strategies for reducing risk by mainstream media companies).

145. Bride and Prejudice, directed by Gurinder Chadha, is a 2004 Bollywood adaptation of the novel Pride and Prejudice. *See* BRIDE AND PREJUDICE (Pathé Pictures Int'l 2004). To be sure, the question of which derivative is subversive or experimental is debatable in general and in regard to Austen's adaptations in particular. *See* Julian North, *Conservative Austen, Radical Austen: Sense and Sensibility from Text to Screen*, *in* ADAPTATIONS: FROM TEXT TO SCREEN, SCREEN TO TEXT 38 (Deborah Cartmell & Imelda Whelehan eds., 2013).

146. The 1987 play has been described as "a 'landmark' in the feminist reinvention of Shakespeare." *See* LYNNE BRADLEY, ADAPTING KING LEAR FOR THE STAGE 218 (2010).

147. For background on the play, see GREGSON DAVIS, AIME CESAIRE 156–62 (1997).

148. *See, e.g.*, FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET: NEW ESSAYS (Karen Hellekson & Kristina Busse eds., 2006) [hereinafter FAN FICTION AND FAN COMMUNITIES]; Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 CALIF. L. REV. 597 (2007); Aaron Schwabach, *The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright*, 70 U. PITT. L. REV. 387 (2009); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651 (1997).

or characters folded within well-established patterns, to novel and sometimes radical or subversive transformations of meaning through changes in the creative elements of the work.[149] While fan fiction provokes a broad spectrum of reactions from copyright holders,[150] the central question in policy debates is whether, and to what extent, a copyright owner should have legal control over such amateur uses of her work. Should the copyright owner of *Star Trek*, for example, have the exclusive right to authorize or forbid fan-generated writings that explore new exploits of Captain Kirk and Mr. Spock, perhaps in ways that shed surprising light on the characters and the story?

The standard efficiency analysis of this question is somewhat inconclusive. Effects of fan fiction on supramarginal creation or inframarginal entry do not seem substantial. Other than in exceptional cases,[151] fan fiction does not form even a remote substitute for the original work or for any commercial follow-up projects in which the copyright holder may want to engage or for which she wishes to license her work. What about licensing fan fiction itself? The highly decentralized context and the difficulty in assessing a given user's usage and valuation may impose high transaction costs and impede licensing.[152] Thus it is unclear whether placing fan fiction beyond the reach of copyright is likely to substantially reduce revenue or degrade incentive. Some other factors, however, point in the opposite direction. The ordinarily low commercial value of fan fiction means that under the efficiency criterion of willingness and ability to pay, the cost of curtailed access from copyright restrictions may not be significant, and thus outweighed by whatever small incentive benefits are created. Moreover, copyright owners may derive benefits other than licensing revenue from a legal power to control and exclude certain kinds of fan fiction. For example, a copyright owner who plans future additions or extensions to the work may

149. *See* Chander & Sunder, *supra* note 148, at 598–601; Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 J. GENDER SOC. POL'Y & L. 461, 481–97 (2006).

150. *See* Fisher, *supra* note 77, at 1435–41 (describing the range of intellectual property owners' responses to user innovation including in the form of fan fiction).

151. Such exceptions are particularly likely in regard to future projects that are amenable to development by peer production, especially when the fan-project is susceptible to be converted or leveraged into a centralized commercial enterprise. The Harry Potter Lexicon may have been one of those cases. *See* Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

152. On the other hand, blanket licenses of a portfolio of works administered by an intermediary, either for a flat fee or on the basis of royalties from exploitation of the secondary works, may make licensing both feasible and worthwhile. *See infra* text accompanying notes 157–61 (describing Amazon's Kindle Worlds platform).

see herself as materially prejudiced by fan fiction that anticipates or preempts some of those plans. Alternatively, some authors may see themselves adversely affected by what is usually described as encroachment on their moral rights, meaning uses of their creative work that—from the point of view of the author—mutilate, distort, or subvert its content. To the extent that any such possibly prejudicial uses are anticipated at the time of the original work's creation and are likely to influence the incentive for its creation, they are relevant from the normative perspective of efficiency.[153]

Product differentiation adds a possible further dimension: unrestricted production of fan fiction is likely to create high amounts of wasteful duplicative activity. The argument here is not that fan fiction is likely to be a good substitute for the original or for any official follow up. Rather, it is that much of the fan fiction produced constitutes a close substitute for other fan fiction, from the point of view of consumers. To be sure, readers of the genre have their preferences among writers or stories, and different variants are better tailored to some subset of preferences. Nevertheless, in a corpus of thousands of stories in the *Star Wars* universe there is likely to be a high degree of overlapping demand satisfaction, and thus the real efficiency problem with fan fiction may not be a jeopardizing of incentives as much as the waste of so much effort and cost expended in creating a multitude of works that are mostly close substitutes of one another.

Would applying any of the democratic rivals of efficiency change the analysis? One natural candidate is flourishing theory. The fan fiction phenomenon maps closely onto some of the central elements of human flourishing distilled above. Most importantly, the creation of fan fiction is a prime example of meaningful human activity. Those who take part in it trade in a position as passive consumer of meanings created by others—over which they have little control—for a new role of active participation and engagement with dominant expressive materials. Such an active role requires agency, the stretching of one's mental muscles (of imagination, expression, etc.), and usually a high degree of identification.[154] Fan fiction production is also typically social in nature, often providing a fulcrum around which

153. *See* Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1817 (2012) (observing that "a robust right of integrity to authors might serve as a strong expressive incentive" but finding it to be inadvisable due to the cost associated with it).

154. Chander & Sunder, *supra* note 148, at 609 ("Mary Sues help the writer claim agency against a popular culture that repeatedly denies it."); Katyal, *supra* note 149, at 488 ("[S]lash . . . highlights the increasingly participatory culture of cyberspace and the audience's inherent challenge to the author's control over the creation of meaning and subtext.").

communities of shared interests and enterprises are built and developed.[155] This perspective thus sheds new light on fan fiction production. Instead of a wasteful, duplicative activity that produces little output value, it begins to seem as an activity of intrinsic, and potentially invaluable, worth to those who engage in it, whether as producers, members of communities, or both.

In one sense this shift in perspective is internal to efficiency analysis, rather than an indication of a difference between efficiency and flourishing. Put differently, the brief excursion into flourishing theory was simply a detour necessary for realigning the efficiency analysis. Standard efficiency analysis tends to see fan fiction in purely instrumental terms, as an activity aimed at an output, which activity is of little social value because (so it is assumed) the consumptive market value of its output is low. However, the picture changes once we realize that from the point of view of those engaged in it, the production of fan fiction is intrinsically valuable—not merely a cost, but rather a rewarding in itself. The aggregate value to producers of the activity, a previously ignored factor, becomes an important (possibly the most important) part of the social value of fan fiction. As a result, the assumption of wasteful duplication that downgrades the social value of fan fiction loses much of its force. The concern over duplicative production cost is moot when, in many cases, the productive activity is, in itself, a net benefit rather than a cost.

This still leaves open the question of divergence between the two theories. Now that we have established that efficiency needs to properly account for the value of fan fiction to its producers, does there remain any difference between its evaluation of the relevant effects and that of flourishing theory? Simply saying that the latter places a higher value on fan fiction is not enough. One needs to explain why we should place a higher value than those who engage in it, as either consumers or producers, as revealed through their preferences. The question may have considerable practical significance in view of the prospects for private mechanisms to reduce transaction costs in this domain. As explained, commercial licensing of copyrighted works is increasingly feasible, either through technology that allows finely-tailored licensing schemes or through intermediaries administering subscription and blanket-licensing schemes.[156] With Amazon's

155. *See* FAN FICTION AND FAN COMMUNITIES, *supra* note 148, at 7 ("[T]he community of fans creates a communal (albeit contentious and contradictory) interpretation."); HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE 45 (1992).

156. On private institutions for overcoming transaction cost problems in the context of intellectual property, see MERGES, *supra* note 44, at 230–34; Robert Merges, *Contracting into*

recent launch of its fan-fiction publishing platform Kindle Worlds, the prospect of licensing in this field has begun to materialize.[157] Kindle Worlds is a scheme for the commercial exploitation of fan fiction based on: blanket licenses issued to fan writers by rights-holders of the original works, a massive transfer of exclusive rights in the resultant fan fiction works to Amazon and a royalty-based arrangement for sharing the profits generated from consumers of these works between the three parties.[158] The likely proliferation of similar such schemes will enable copyright owners to capture the demand for fan fiction at relatively low transaction costs, while still allowing much of this demand (by both producers and consumers) to be satisfied. Under such circumstances, efficiency analysis may shift toward firmer support of copyright protection.[159]

Why might flourishing theory still insist on exempting fan fiction, and thus take the view that the opportunities to engage in the activity may be inadequate even when deemed sufficient by the lights of those who produce and consume it?[160] This difficulty facing flourishing theory—of justifying non-deference to subjective preferences—is not particular to the fan fiction context, but extends more generally, across a variety of copyright policy questions. The pervasiveness of the challenge is attributable to this theory's departure from one of liberalism's central tenets, namely neutrality in social choice toward individuals' subjective conceptions of the good.[161] And there exist a range of possible answers to that challenge, which can be arrayed along a continuum from greatest to least degree of departure from the liberal principle of neutrality.

One answer is forthright paternalism, namely the assumption that many people simply do not know what is good for them in this context.[162] To be sure, this is controversial. If, however, one is willing to affirm that commitments to human flourishing require placing a greater value on access

Liability Rules: Intellectual Property Rights and Collective Rights Organizations, 84 CALIF. L. REV. 1293 (1996).

157. *See* KINDLE WORLDS, https://kindleworlds.amazon.com (last visited Nov. 8, 2013).

158. *Kindle Worlds Publishing Agreement*, KINDLE WORLDS (June 27, 2013), https://kindleworlds.amazon.com/faqs?topicId=A1MMH2I71OJWTR.

159. Copyright protection accompanied by a finely tailored, low transaction cost licensing scheme allows most of those who sufficiently value the production of fan fiction to engage in it and allows producers of the originals to internalize much of this value thereby increasing incentive.

160. We bracket here the possibility that the producers and consumers of fan fiction are disproportionately those with lower income or who otherwise merit a purely distributive priority. For discussion, see *infra* Part IV.

161. *See* sources cited *supra* note 88.

162. *See* Fisher, *supra* note 77, at 1472; Fisher, *supra* note 24, at 1762–66.

to meaningful activities and social interaction than what many of the beneficiaries of that access may place on it, an obvious gap opens up vis-à-vis efficiency analysis. The policy implication of this affirmation is that copyright law should nourish the conditions for fan fiction, even when a market that adequately reflects current subjective preferences would not. In effect this is a form of a subsidy that, while not coercing anyone to do anything, does "nudge" people toward activities considered to be of higher substantive value. This channeling, achieved through keeping opportunities for the valued activity open and accessible, is bought by sacrificing some satisfaction of existing preferences that would occur under a solely efficiency-based legal framework.

An alternative (or perhaps supplementary) response would be to eschew paternalism while still departing from the neutrality principle. The core of this position is that in some cases, the subjective preferences of some individuals should be privileged over those of others because, according to substantive considerations external to the individuals' subjective evaluations, the privileged preferences are more valuable for realizing the good life. Applied here, this means that to some extent those persons seeking to satisfy their preferences for engaging with expressive works in more active and participatory ways should be empowered even if that comes at some cost to frustrating the more subjectively-valued preferences of others for consumptive interaction. Paternalism's possibly offensive element of telling people what is good for them is absent now. Copyright's aim here is not to nudge anyone into a choice that he does not currently realize is good for him. Rather, the purpose is to prioritize, in a situation of an inevitable clash between preferences, some peoples' ability to realize what they think is good for them over others' ability to do the same, on the non-neutral ground of substantively affirming one set of subjective desires as against another.[163]

Yet another answer to the challenge of illegitimately overriding individual preferences points to the endogenous nature of preferences. Rather than being completely exogenous to the social and legal environment, preferences about fan fiction are partly shaped by it. What people prefer and value depends on what possibilities they have been exposed to in the past and what

163. To put the point in terms of liberal theory, this departure from neutrality is not based on withholding "respect" for certain individuals' subjective conception of the good, by foisting upon them an alternative good in tension with their freedom, as does paternalism. Rather, it is based on not according "*equal* respect" toward different individuals' subjective conceptions, with the offense to liberalism residing not in governmental disregard for individual freedom but rather in governmental endorsement of some ways of life over others.

habits they have had opportunity to develop.[164] Habits of consumptive or passive interaction with creative materials, and lack of exposure to alternatives, skew preferences toward such interaction.[165] Legal background rules, including copyright, that erect or lower barriers for more active forms of interaction take part in this preference-formation process.[166] The upshot is that no legal regime is completely neutral or deferential with regard to individual preferences. The choice, then, is not between a neutral legal framework that completely defers to individual preferences and another that nudges preferences in a desirable direction. All frameworks nudge, and none are neutral. Accordingly, flourishing theory's support for exempting fan fiction does not override of individual preferences in the name of a more valuable good, but rather amounts to choosing, among legal regimes each of which unavoidably shapes preferences, the one whose preference-shaping effect is more consistent with the theory's notion of the good.

A last possible answer to the difficulty of diverging from individual preferences focuses on the character of the benefit derived by those who are engaged with fan fiction. Much of the value of some human activities depends on their non-commodified character.[167] As Yochai Benkler puts it, leaving a fifty-dollar check on the table at the end of a friendly meal at a friend's house is likely to reduce the value of the event for all its participants.[168] The category of activities whose value depends on their non-commodified character is elusive and culturally contingent, but there seems to be a fair preliminary argument that, for many, the value of fan fiction would be substantially reduced if the activities associated with it were conducted through commercial market interactions. The form of commodification may matter a great deal. Simply paying a subscription fee for a blanket license may erode the inherent motivation of some for participation in a fan fiction community, but the erosion may be mild. A more robust commodification, such as Amazon's Kindle Worlds platform, that subjects the consumption of fan fiction to use-based fees so that

164. *See* Cass Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1161–64 (1986) (discussing the role of habits in shaping preferences as a justification for "paternalistic" regulation). Ultimately Sunstein insists that the endogenous nature of preferences can justify non-neutral laws on welfare and autonomy grounds alone, while flourishing theory may also rely on direct appeals to a substantive conception of the good.

165. *See* MILL, *supra* note 101, at 65 ("The despotism of custom is everywhere the standing hindrance to human advancement, being in unceasing antagonism to that disposition to aim at something better than customary . . . .").

166. *See* Sunstein, *supra* note 164, at 1146–50 (discussing how adaptive preferences may be shaped by the legal rules).

167. *Id.*

168. BENKLER, THE WEALTH OF NETWORKS, *supra* note 58, at 96–97.

copyright owners can internalize a greater share of the secondary use of their works, is more likely to significantly erode the intrinsic value of the activity. It is quite possible that, for many, much of the inherent value of producing fan fiction, as part of a non-commercial community bound by shared interests, would evaporate with a shift to sales transactions between producer-sellers and consumers. To the extent that this assumption holds, commodification of fan fiction through copyright protection would defeat rather than serve the purpose of preference satisfaction.

Admittedly, the persuasiveness of each of these four justifications for departing from strict adherence to subjective preference satisfaction will vary according to context and one's normative commitments. In combination, however, they furnish flourishing theory's rejection of the liberal neutrality principle, and that theory's concomitant recommendations for copyright policy, significant support.

4. Personal Uses

Personal uses of copyrighted works by users—a topic that received little attention in the past—is attracting growing interest in recent copyright scholarship.[169] Personal uses are defined in the literature in varying and sometimes loose ways. Our focus here is on uses of copyrighted works that involve at least a modicum of expressive interaction but are not necessarily highly transformative of the original. An additional trait of these uses is that, while not necessarily free of any income-generating aspect (a personal blog may sell advertisement space), they do not primarily revolve around creating and selling an expressive commercial product designed to extract a market price from consumers. Within this universe there is much variation. Some personal uses are simply expressive acts, which often facilitate interaction with others: a home video of one's toddler dancing to the sounds of a copyrighted song posted on Facebook, an amateur "cover" video clip of the song posted on YouTube, or a wedding video playing the song in the background posted on a personal blog. Other uses are geared toward facilitating dialogic interaction with others: quotations from a literary work or video snippets out of a film in a blog post discussing those cultural artifacts. Still others involve using works in order to assert one's identity or share with others significant aspects of one's persona: a blog post about a personal

169. *See* Julie Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347 (2005); Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007); Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003); Rothman, *supra* note 53; Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 562–81 (2004).

aspect of one's life accompanied by a song that the writer strongly associates with that aspect, or publication of one's diary containing extensive quotations from a poem.

Historically, most personal uses of this nature would, as a practical matter, pass under the radar of copyright enforcement.[170] Even a zealous copyright owner would find it prohibitively expensive to detect an analog physical copy of his work exchanged interpersonally within a limited circle of acquaintances. Technological developments and associated social-cultural patterns have changed this situation. Digital technology now allows cost-effective detection of many personal uses that in the past were invisible, especially when the information is exchanged through the Internet.[171] So-called digital rights management technology, backed by legal sanctions, allows "self-enforcement," meaning technological restrictions that simply prevent users from engaging in certain uses.[172] And the digital environment is sprinkled with intermediaries whose control power, surpassing any equivalent in the analog world, can be leveraged through legal threats and commercial inducements to detect and restrict the activities of individuals that were once beyond the reach of the copyright owner.[173] Examples involving all three elements include the content filtering systems applied by various dominant intermediaries[174] and the recent proliferation of graduated response policies by Internet Service Providers.[175] These changes in the prospects of detection and enforcement forces us to confront an important policy question, one that in the past lay fallow due to technological constraints: to what extent should copyright's exclusive entitlements encompass personal uses?[176]

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170. Rothman, *supra* note 53, at 467.

171. Julie E. Cohen, *Comment: Copyright's Public-Private Distinction*, 55 CASE W. RES. L. REV. 963, 964–65 (2005); Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 U. DAYTON L. REV. 587, 606 (1997).

172. Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, 983–89 (1996). The main legal support for technological protection measures is provided by the anti-circumvention sections of the Digital Millennium Copyright Act. 17 U.S.C. § 1201 (2012). *See* Glynn S. Lunney Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813 (2001); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 534–37 (1999).

173. Litman, *supra* note 171, at 606.

174. *See* Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81, 103–06 (2010).

175. On graduated response, see *id.*; Mary LaFrance, *Graduated Response by Industry Compact: Piercing the Black Box*, 30 CARDOZO ARTS & ENT. L.J. 165, 171 (2012).

176. We bracket here an important related question about an affirmative user's right to access information. Unlike the issue we analyze in the text, this related question is not whether users should enjoy a privilege to engage in personal uses, in the sense of being free

From the vantage of efficiency, the answer depends mainly on a straightforward transaction-cost analysis, hinging on whether or not transaction-cost problems hinder smooth and relatively inexpensive licensing of rights for personal uses.[177] In the absence of significant transaction-cost impediments, personal uses (now subject to actual enforcement ability) provide a channel for copyright owners to internalize the social value of works, thereby increasing incentives for production of supramarginal works.[178] Under such conditions, there is also no reason to expect that the inframarginal social cost imposed by copyright on these uses will be unusually high compared to other entitlements.[179] The analysis may be complicated by other considerations such as the fact that the newfound enforcement power in regard to personal uses largely depends on technological means and actions by intermediaries, which may be over-inclusive in their sweep.[180] In light of this, it may be difficult to generate definite efficiency-based conclusions. Nevertheless, the analysis will likely be driven by the transaction-cost factor and decided by one's empirical conclusions about the nature of transacting over personal uses.

How does the analysis change under some of the democratic alternatives? Perhaps surprisingly, any divergence between self-determination and

from legal rights by another to prevent such uses or obtain remedies for them. It is, rather, whether users have any affirmative rights to compel those who own or control protected works to grant access to them. *See* Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Copyright Management Systems*, 15 HARV. J.L. & TECH. 41 (2001).

177. Note that transaction costs divide here into two main categories: impediments to transactions between the copyright owner and the user, and impediments to internalizing the positive effects of the use on other parties that may cause a failure of the bargaining process to reflect the true social value of the use. *See* Loren, *supra* note 100, at 1.

178. PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 23 (2003) (praising the technological promise of fine-grained ability "to compensate copyright owners each time their works are chosen").

179. To be sure, the more fundamental question is whether, given the current level of copyright protection, any social value derived from the increased incentive outweighs the access cost of extension of copyright to encompass private uses. To avoid path dependence, however, the rational way to conduct this inquiry is to ascertain the incentive/loss ratio of the personal uses entitlement and decide its desirability relative to the ratio of other entitlements. *See* Fisher, *supra* note 24, at 1707–17. The analysis in the text suggests that absent special transaction-cost problems, a personal use entitlement is not likely to generate a particularly low incentive/access ratio compared to other entitlements and therefore it is unlikely to be found inefficient.

180. Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1386 (2004); Lunney, *supra* note at 172, 830–44; Samuelson, *supra* note 172, at 535–37; Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 LAW & CONTEMP. PROBS. 147, 160–62 (2003); Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1886 (2000).

efficiency is not immediately apparent here. Unlike critical uses, personal uses as broadly described above do not strongly correspond with higher-order conditions for self-determination that may take precedence over satisfaction of existing preferences. The poster on YouTube of a video of a young child dancing to the sounds of a copyrighted song finds, no doubt, the act rewarding and valuable.[181] But the broad availability of materials of this kind is not a precondition for genuine self-authorship. The video and many personal uses like it hardly seem germane either for critical reflection and possible revision of one's choices, or for a meaningful variety of robustly different alternatives. The value for the user in exercising his free choice by posting the video should be counted, of course. But it does not enjoy any normative priority over other subjective preferences, such as those of other users who prefer more consumptive choices and fewer opportunities to engage in personal uses. The analysis seems to collapse into efficiency's aggregation of effects on subjective preferences.

A subset of personal uses, however, enjoys a different status. One category within this subset is strong identity-based uses. Consider Jennifer Rothman's example of the woman who accompanies a blog post about an assault she experienced with the song that played on the radio during that assault.[182] Is there anything about this use of a copyrighted song that gives it a normative priority over mere preference satisfaction? It is not the sort of use that is closely related to higher-order interests in self-determination. Yet it does have another normatively significant feature—the use involves an "urgent" interest, one going to the user's subjectively highly-valued or intense interest in publicly asserting her self-identity. Uses essential for such urgent interests form a distinct normatively privileged category.[183] They merit privileged treatment because they implicate core personal interests of users,

181. *Cf.* Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150 (N.D. Cal. 2008) (holding, in a case involving a twenty-nine-second clip posted on YouTube of children dancing to Prince's "Let's Go Crazy," that copyright owners must consider fair use before issuing takedown notices pursuant to the Digital Millennium Copyright Act).

182. Rothman, *supra* note 53, at 516.

183. Within self-determination, then, we can distinguish between three levels of interests and corresponding uses of copyrighted works: (1) those uses going to ordinary preference-satisfaction, which are to be analyzed as part and parcel of standard efficiency analysis (subject to any distributive considerations—see Part IV, *infra*); (2) those uses implicating the user's higher-order interests in reflectively forming her preferences, which are to be given lexical priority over the satisfaction of existing preferences of others or even of the user herself; and (3) those uses that pertain to a user's urgent interests (typically by strongly going to self-expression or self-identification), which merit some priority against the aggregation of others users' interests in preference satisfaction.

interests so important and intense that they should not be placed on the same scale as ordinary preference satisfaction.

More specifically, some cultural materials become closely entangled with people's identity or persona.[184] Publicly asserting such aspects of one persona requires resort to these cultural materials. Placing such high-intensity uses, which go to the core of one's ability to publicly realize aspects of one's personal identity, on the same scale of comparison with mere consumptive uses seems wrong. The tendency of market-based economics to reduce everything to fungible values located along a single-scale is inadequate here. In both private and public contexts we usually do not treat such goods as fully commensurable. We do not make marginal adjustment of two units of self-identity to gain five units of entertainment. The specter of fungibility is particularly troubling when aggregating effects over multiple individuals because of the prospect of numerous miniscule individual interests sweeping away very high-intensity interests of the few. To many, except those thoroughly immersed in the market's reduction of all interests to a single aggregative scale, sacrificing one person's ability to engage in uses that go to the core of her persona for the sake of satisfying a multitude of small consumptive interests by others would seem problematic. At the end, however, a consequence-sensitive theory, even one that denies universal fungibility, must allow for some tradeoffs. One way of dealing with this tension is to insist on minimal thresholds for certain high-intensity interests independent of other interests. In our context this translates into allowing strong-intensity, identity-based uses of copyrighted works without consideration of their effects on consumptive uses by others. This is about as close as a consequence-sensitive self-determination theory gets to according "absolute" rights-like protection to particular individual interests.

It follows that self-determination theory would shield the interest of users to engage in strong identity-based uses irrespective of effects on consumptive interests, which means an exemption from copyright liability. Note that the justification is only for a targeted norm that exempts users who can plausibly establish their need to use the material for purposes of an urgent personal interest, rather than all personal uses.[185] The category of

184. Gordon, *supra* note 46, at 1569; Rothman, *supra* note 53, at 496–500. For the persona argument in the context of real and personal property, see Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

185. This leaves open hard second-order questions about how to implement the exemption: through an open ended standard that relegates the identification of high-intensity interests uses to a case-by-case ex-post analysis or through rules that identify such uses ex ante on a more precise level.

publicly asserting one's identity is not exhaustive and other subsets of personal uses may enjoy a similarly favorable treatment.[186] Nevertheless self-determination provides only a limited ground for allowing personal uses beyond what is justified by efficiency. It extends a normatively preferred status only to that subset of personal uses that either are plausibly understood as implicating high-intensity interests not fungible with consumptive preferences or as falling within the categories of critical uses or heterodox works that go to higher-order conditions for self-determination.

Flourishing theory offers a more inclusive support for a favorable treatment of personal uses. The key element here is that personal uses constitute one of the main sites of actual opportunity for many to engage in a meaningful activity in the cultural sphere. Personal uses, even those that do not involve a high-intensity interest such as realization of one's persona, are meaningful expressive activities in the sense of active and somewhat creative interaction with cultural materials. To be sure, the bulk of these users are not "strong poets" who radically break with conventions and challenge existing meanings and norms.[187] Nonetheless, they interact with cultural materials in ways materially different from passive consumption. Sometimes, these are ways that "require skill and concentration," involving challenge and problems that can be overcome "only through the exercise of initiative and creativity."[188] Other times, however, the active engagement may be even more modest, involving simply the exercise of one's critical judgment—or, simply, cultural tastes—among different works to match a specific occasion or mood. This exercise, when repeated and, importantly, communicated to others, contributes not only to a further cultivation of one's critical-creative faculties, but also to a deeper sense of the pleasures associated with their

186. It is even possible to imagine a situation in which a user has a valid claim that a private consumption use implicates a privileged core personal interest and therefore should be exempted. (We thank Yochai Benkler for pointing this out.) Suppose, for example, that John regards listening to a large variety of classical music not as a merely entertaining activity but as a core, constitutive aspect of his identity. Further assume that John's ability to effectively realize this aspect of his identity would be materially constrained by copyright-priced access. John may have a valid claim that his unauthorized reproduction of copyrighted classical music should be exempted in order to protect his privileged personality-based interest. Verifying and enforcing this type of claims involve, however, obvious concerns of over-inclusiveness and administrability that cut against applying the exemption in circumstances of private, consumptive uses, or at least for stipulating a very high standard of proof in such cases.

187. The term "strong poet" is taken from HAROLD BLOOM, THE ANXIETY OF INFLUENCE: A THEORY OF POETRY (1973). For an interpretation of the strong poet as a normative ideal, see RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 28–29 (1989).

188. Fisher, *supra* note 24, at 1747.

exercise and to a richer, more solidified sense of self, through recognition by others of one's public, externalized and embodied, expressive acts. To limit a concern for such meaningful activity to avant-garde uses, excluding milder variants such as the family video clip or the amateur song cover, would be to ignore it exactly in the contexts where it is most likely to be currently available for large swaths of ordinary people.

Because of the special value that flourishing theory places on making widely available opportunities for meaningful activity in the cultural sphere, it would insist on a privileged status for the broad category of personal uses even when efficiency is ambivalent or even opposed. It would support exempting from copyright liability a broad swath of personal uses, both traditional ones which in the past fell under copyright's enforceability threshold and new ones enabled by new technologies.[189] Here again flourishing theory supports creating the conditions that would nudge people toward activities and choices that are considered significant for the good life, even at the cost of falling short of maximizing existing subjective preferences.[190]

IV. DISTRIBUTIVE EQUITY IN COPYRIGHT POLICY

The distributive analysis of copyright faces a challenge similar to the one confronting democratic theories. Any consequence-sensitive approach to distributive equity must also attend, like economic analysis, to the multiple effects that variations in copyright protection will produce, effects tending to point in countervailing directions. Simply advancing distinct criteria to those of efficiency for evaluating such countervailing effects does not suffice to alter our resolution of the tradeoffs they pose. For instance, it is sometimes suggested that placing greater weight on the interests of the poor should, on that ground alone, result in a stronger emphasis (than that placed by efficiency) on the access costs of IP rights as compared to their incentive

189. There are important doctrinal implications to such a favorable stance toward personal uses. These include: a concrete statutory exemption for non-commercial personal uses; a modification of the current importance of the transformative nature of the use under fair use to cover, in appropriate cases, even mildly transformative personal uses; narrow readings of certain entitlements such as the public performance entitlement in 17 U.S.C. § 106(4) (2012) to exclude personal uses; and restricting third party liability as well as extending safe havens to internet intermediaries in ways that avoid incentives for over-zealous filtering of personal secondary works.

190. The ways such a stance may or may not be paternalistic and how it may, in any case, be justified, are discussed above. *See supra* text accompanying notes 161–71.

benefits.[191] But heightened concern for the poor does not by itself lead to this conclusion; just as it leads us to place greater value on their burdens from curbed access, so it should also lead us to place greater value on the benefits they would have reaped from any new innovations now foregone.[192] In other words, there is again a structural affinity to economic analysis that offers an important opportunity: the strong prima facie overlap between the prescriptions of efficiency and those of distribution suggests that we need to specify with greater precision those circumstances where taking into account distributive concerns may actually make a significant policy difference. Moreover, sharpening our analysis in this respect not only clarifies the practical differences between efficiency and distributive equity; it also uncovers some telling points of divergence between distributive and democratic theories.

One further challenge for distributive analysis of copyright is the relative paucity of theoretical writing in this vein, especially when compared to other, more richly developed strands of IP theory. Consequently, we begin our analysis by situating copyright-specific distributive concerns within a broader frame of distributive justice theory. Next, we briefly isolate those positive parameters of copyright protection that are most germane to pursuing the relevant normative concerns. We then take up some specific considerations of distributive equity, specifying how their prescriptions for the level and type of copyright protection may differ from those of efficiency. Finally, we briefly respond to some objections generally advanced in the literature against the pursuit of distributive concerns in fields of private law such as copyright.

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191. *See, e.g.*, Abramowicz, *supra* note 17, at 105–06 (suggesting that a distributive concern for "low-income" individuals or communities justifies giving greater weight to access over incentive effects as compared to efficiency analysis); Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2891 (2006) (arguing that distributive "equality tilts the balance towards static efficiency and away from dynamic efficiency arguments, at least for resource-poor areas of the world").

192. *Cf.* Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970, 997 (2012). Kapczynski states:

> The problem with distributive justice arguments that favor IP exceptions is . . . the apparently self-defeating nature of these exceptions. Because IP both helps to create and constrains access to the goods that we want, we have the appearance of a paradox: If we make IP more flexible so that the poor have more access, the poor will also have less access—because the information that we want the poor to access is less likely to be created.

Id. Kapczynski goes on to state that "[t]here is in fact no true paradox here, because sometimes we can give the poor access to information goods without substantially undermining innovation." *Id.* Our focus here is on cases where a distributive justification for trimmed protection may remain strong even where incentives are reduced.

A. VARIETIES OF DISTRIBUTIVE CONCERNS

Theories of distributive justice are concerned with the fair distribution of goods across individuals or groups. The goods at issue in copyright are expressive activities, expressive works, and the surpluses associated with these. A full distributive theory of copyright would apply equitable principles of individual access to each and all of these, which is what we undertake to do here (with some limitations, identified below).

There is, however, a threshold objection to pursuing any distributive concerns in copyright that is worth attending to at the outset, since responding to it provides helpful guidance in delimiting and structuring our analysis. This is the view, as expressed by Jessica Litman, that copyright law should not attempt to address "distributional or equality issues" since these "stem from the outside, non-copyright world" and thus raise concerns that are "alien to copyright's rationale" or "purpose."[193] Further, distributive equity poses concerns that, in any case, copyright "would address . . . badly."[194] Similar arguments have been advanced in the more general law-and-economics literature against the pursuit of distributive equity within the confines of specific fields of private law, such as torts, contracts, and so forth. And, as with Litman's, such objections typically take two related forms. First, since distributive concerns stem from general, background inequities, it makes little sense to attempt to ameliorate them within the context of specific legal fields, each having their own particular, internal concerns (such as the regulation of risky activities in the law of accidents, or enforceable promises in contracts, and so forth). Second, the rules of private law typically furnish poor tools for achieving distributive aims. Regarding the first objection, our focus here is not on how copyright law might serve as a vehicle for correcting general distributive inequities at large, but rather on how we might attend to copyright's own distributive impacts. That is, if the subject of copyright is to regulate the production and dissemination of expressive works, there seems little reason in principle to bar taking into account how its rules might affect the distribution of benefits and burdens resulting from said production and dissemination. As for the objection that copyright law will tend, in practice, to be a poor tool for addressing any of the distributive concerns it implicates, this general worry can in fact be broken down to a number of distinct criticisms or obstacles, to which we attend implicitly throughout our analysis and address explicitly at the end of this Part.

193. Litman, *supra* note 171, at 617–18.
194. *Id.* at 618.

Distributive equity, in contrast to efficiency's aim of maximizing overall social benefits net of costs, is concerned with how such benefits and costs are spread across particular individuals or groups in society.[195] And a wide array of individuals or groups have been canvassed in the IP literature as possible candidates for special distributive concern, including: consumers as a group against producers;[196] poor consumers in particular;[197] resource-strapped follow-on users;[198] innovators as a group vis-à-vis society;[199] creators early in their careers;[200] and host of other discrete groups singled out by various provisions of the copyright statute, including schools, churches, veterans' groups and small businesses.[201] Less forthcoming, unfortunately, has been the supply of any normative criteria for determining which of these individuals or groups merit distributive priority, on what grounds, and by how much. Further, an additional ambiguity arises from the unclear boundary between strictly distributive concerns and values of the sort discussed above under the auspices of cultural democracy and flourishing

195. To be sure, this is a somewhat more restrictive sense of "distributive" considerations than has sometimes been deployed in the legal literature, where at times the term has been taken to refer to any value falling outside of efficiency and to cover a bewilderingly diverse array of concerns. Thus, it has been taken to refer, inter alia, to individual constitutional rights. *See generally* Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592 (1985). In the private law sphere, it has been taken as an umbrella term to cover concerns of corrective justice, substantive morality, and the protection of settled expectations. *See* Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465, 470 (Peter Newman ed., 1998). Kennedy, it should be noted, suggests that this broader usage is implied by legal economists' own arguments regarding non-efficiency concerns. *Id.* at 470, 472. Nevertheless, the most prominent legal economists writing on this issue have tended to advance a rather more clearly delimited notion of "distributive" considerations. *See, e.g.*, KAPLOW, *supra* note 15 (distinguishing a concern with the overall distribution of benefits and costs, which may fall within the purview of welfarist analysis, from various additional "fairness" considerations that remain outside welfarism); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7 (3d ed. 2003) (defining "equity," in contrast to "efficiency," as having to do with the general or overall distribution of benefits and costs, and excluding from its ambit case-specific conceptions of corrective justice or cognate notions of morality). Our reasons for adopting a more restrictive conception of distributive concerns, one closer to but still somewhat broader than that of the legal economists are given *infra*, text accompanying note 211.

196. *See, e.g.*, Daniel A. Farber & Brett H. McDonnell, *Why (and How) Fairness Matters at the IP/Antitrust Interface*, 87 MINN. L. REV. 1817 (2003); Yoo, *supra* note 33.

197. *See, e.g.*, Abramowicz, *supra* note 17, at 105; Daniel Benoliel, *Copyright Distributive Injustice*, 10 YALE J.L. & TECH. 45 (2007); Margaret Chon, *supra* note 191.

198. *See* Van Houweling, *supra* note 110, at 1547.

199. *See* Shubha Ghosh, *The Merits of Ownership*, 15 HARV. J.L. TECH. 453, 475 (2002).

200. *See* Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115, 134 (1997).

201. *See* Litman, *supra* note 171, at 617.

theories (such as aspirations to decentralize meaning-making power or to broaden opportunities for more individuals to engage in a more active and meaningful way with their cultural environment).[202] Thus, before examining the difference made in evaluating the positive effects of copyright protection by switching our normative lens from efficiency to distributive equity, we need first to sharpen the latter lens by refining our sense of the relevant distributive concerns. We do so here by briefly distilling some central features and principles of theories of distributive justice in general, after which we draw out their key implications for the specific distributive context of copyright law and policy.

Theories of distributive justice address the question of the fair distribution of the burdens and benefits of social life. In their essentials, such theories take up issues along two dimensions: what counts as a fair distribution of some good, and what good or goods should we be principally concerned with fairly distributing? Somewhat more formally, the debate between contending distributive justice views may be organized in terms of the answers to two questions: (1) What good(s) should be the appropriate *space(s)* of distributive concern?; and (2) What *distributive principle(s)* should apply to the chosen space(s)?[203] Needless to say, each of these in turn raises enormously complex and vexing controversies. Fortunately, we do not need to delve too deeply into these here. For our purposes, it will suffice to distill some core features of the leading positions along three central aspects.

First, the main candidates for the appropriate space(s) of distribution are: resources (primarily, income and wealth as general all-purpose means);[204] utility or welfare (as the satisfaction of subjective preferences or hedonic end-states of experiential well-being);[205] opportunity for welfare;[206] and capabilities

202. *See, e.g.*, Fisher, *supra* note 77, at 1458–60 (grouping under the aegis of "distributive justice" normative aspirations to decentralize semiotic power and to facilitate a more participatory engagement with one's cultural environment). Our reasons for drawing a sharper distinction between these values and strictly distributive considerations are given below. *See infra* text accompanying note 211.

203. Or alternatively: (1) what is the appropriate currency or metric for distribution?; and (2) what is the appropriate distributive function?

204. *See* ERIC RAKOWSKI, EQUAL JUSTICE (1991); JOHN RAWLS, *Social Unity and Primary Goods*, *in* UTILITARIANISM AND BEYOND 159 (Amartya Sen & Bernard Williams eds., 1982); Ronald Dworkin, *What is Equality, Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981), *reprinted in* RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 65–119 (2000).

205. *See* Kenneth Arrow, *Some Ordinalist-Utilitarian Notes on Rawls's Theory of Justice*, 70 J. PHIL. 245 (1973); John C. Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309 (1955); Louis Kaplow, *Primary Goods, Capabilities, . . . or Well-Being?*, 116 PHIL. REV. 603 (2007).

(understood as an irreducibly plural set of discrete capacities to realize various doings and beings considered essential to "truly human" functioning,[207] or a life of flourishing[208]). These candidates differ significantly in their foundational premises, as well as in their practical implications for a wide variety of policy contexts. Nevertheless, all the variants in these different camps would acknowledge, as a component of each of their chosen spaces, the distributive significance of the goods disposed of by copyright law, namely the benefits and burdens associated with the production and dissemination of expressive works and their resulting surpluses.

Second, turning to the appropriate distributive principles to apply to the chosen space(s) of the good, although again debate is fiercely contentious, we can nevertheless identify three broad principles that would garner wide if not universal assent. The first is a priority principle, of giving greater weight to a certain amount of benefits or burdens when it is borne by those especially badly or worse off through no fault of their own (where badly or worse off is understood in terms of whatever is the chosen space(s) of the good).[209] The second, which may be called a desert principle, accords due weight to considerations of individual responsibility in labor-leisure and related choices,

206. *See* Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD. 77 (1989).

207. *See* MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT (2000); AMARTYA SEN, INEQUALITY REEXAMINED (1989) [hereinafter SEN, INEQUALITY REEXAMINED]; Amartya Sen, The Tanner Lecture on Human Values: Equality of What? (May 22, 1979) [hereinafter Sen, Equality of What?].

208. G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906 (1989); Fisher, *supra* note 24, at 1755.

209. This principle is formulated broadly enough so as to encompass a variety of distinct views, which otherwise disagree, both on the normative basis for giving priority and on how much priority (or weight) should be given. For alternative normative premises, see, e.g., LARRY TEMKIN, INEQUALITY 245–82 (1993) (advancing the "telic equality" view that distributive inequality is in itself bad); Harry Frankfurt, *Equality as a Moral Ideal*, 98 ETHICS 21 (1987) (arguing that what matters is whether someone is "badly" off according to an absolute standard, rather than whether someone is "worse" off than others); Derek Parfit, Lindley Lecture at the University of Kansas: Equality or Priority? (Nov. 21, 1991); Talha Syed, *Equality, Priority & Justice in Needs* (2009) (unpublished manuscript) (on file with authors) (arguing that although distributive equality is not in itself valuable, comparative levels of well-being remain intrinsically significant on grounds of fairness, by contrast to considerations of either telic equality or non-comparative sufficiency). For discussion of alternative priority principles or weights, see *id.* (discussing, inter alia, absolute or lexical priority for the worst off; weighted priority for the worse off; absolute or lexical priority for the very badly off, up to a sufficiency threshold; and weighted priority for the very badly off, up to a sufficiency threshold). In addition to the preceding sources, others adopting some version of the principle in text include RAKOWSKI, *supra* note 204; RAWLS, *supra* note 88; Arneson, *supra* note 206; Cohen, *supra* note 208; Dworkin, *supra* note 204; Fisher, *supra* note 24; Sen, Equality of What?, *supra* note 207.

where these are deemed relevantly present and discernible.[210] And the third, which may be referred to as an efficiency principle, holds that everything else being equal, it is better to confer a greater added benefit on one person than a smaller one on another. We take up the implications of these principles for the copyright context momentarily.

Finally, a third central feature of distributive justice theories relates to how they delimit their domain, so as to mark a boundary between those spaces of concern to which their distributive principles apply, and other, distinct domains of political morality to be regulated by other considerations (such as "rights" or "democracy"). This of course pertains to the question raised above about how to distinguish between more or less strictly distributive values and those having to do, say, with cultural democracy. Two delimiting considerations are paramount in this respect. First, for many theorists, not all individual goods are properly conceived as susceptible to the sort of commensurable treatment involved in applying distributive principles to make tradeoffs across them within a single domain of "benefits and burdens" borne by individuals.[211] Thus, for resourcists like Rawls and Dworkin, considerations of individual "rights" (or "fair equality of opportunity") lie outside the domain of the distributive principles applicable to income, wealth, and similar goods, and should be governed by distinct internal considerations and enjoy special priority relations vis-à-vis economic interests.[212] In a related but distinct vein, capability theorists, whether or not they accord special priority to certain capacities above others, tend to demur from making straight tradeoffs between capacities, seeing them as qualitatively distinct and thus restricting the application of distributive principles to *within* rather than *across* various separate spheres (e.g., self-determination, preference-satisfaction, meaningful activity, health, and so forth).[213] A second consideration is that some interests or domains may best

210. *See, e.g.*, RAKOWSKI, *supra* note 204; SEN, INEQUALITY REEXAMINED, *supra* note 207; Arneson, *supra* note 206; Cohen, *supra* note 208; Dworkin, *supra* note 204; Fisher, *supra* note 24. *But cf.* RAWLS, *supra* note 88, §48 (rejecting any role in distributive justice for considerations of responsibility or desert).

211. Welfarists may be an exception here. To the extent that welfare is conceived in terms of being measurable along a single-scale metric, any categorical or qualitative boundaries will not be recognized and hence one set of distributive principles will be generically applicable across the entire gamut of "benefits and burdens."

212. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); RAWLS, *supra* note 88.

213. Amartya K. Sen, *Plural Utility*, 81 PROC. ARISTOTELIAN SOC'Y. 193 (1981); G.A. Cohen, *Equality of What? On Welfare, Goods and Capabilities*, *in* THE QUALITY OF LIFE 9 (Martha C. Nussbaum & Amartya Sen eds., 1993); Martha Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1199–1203 (1997).

be conceived as irreducibly relational rather than individuated, requiring the application of distinct principles to those of discrete equitable distribution across individuals. Values such as democracy or community membership are salient examples. Democracy, involving the exercise of collective agency for the carrying out of irreducibly social ends, poses questions about the appropriate shares of individuals in participation, influence, etc., questions that are best conceived not in terms of distributive tradeoffs but rather in terms of inherently relational principles of equal standing. The upshot of these delimitations is that strictly distributive considerations will be taken to apply only when the benefits from expressive works are understood primarily in terms of satisfying the subjective preferences of individual consumers and producers. Once such benefits implicate others' interests, say in meaningful activity or self-determination or democratic participation, we need to supplement our distributive analysis with other regulative criteria—meaning, at the least, additional priority principles and even, perhaps, distinct relational norms.

Against this theoretical backdrop, we can identify the following as key concerns of distributive equity in the context of copyright. First, with respect to fair access to expressive works, distributive concerns may modify or supplement those of efficiency in the following central ways. Efficiency values access to works solely in terms of preventing deadweight loss from priced-out transactions, and it measures the magnitude of such loss in terms of foregone consumer and producer surplus. Distributive equity, however, may modify efficiency's evaluation in both respects: first, by adjusting upwards the cost represented by deadweight loss, and second, by factoring in as a distinct added cost an effect toward which efficiency is indifferent, namely the fact that the copyright-protected prices paid by consumers who nevertheless do access the work represent a transfer of surplus from them to producers. Regarding the measure of deadweight loss, in efficiency terms its magnitude is understood in terms of foregone "effective" preferences, or preferences backed by willingness and ability to pay. As is widely recognized, however, ability to pay, and hence the intensity of effective preferences, are strongly shaped by the existing distribution of income, wealth, and legal entitlements, for which there is no compelling justification.[214] Consequently,

214. *See, e.g.*, C. Edwin Baker, *The Ideology of Economic Analysis of Law*, 5 PHIL. PUB. AFF. 3 (1975); Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); Lucian Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?*, 8 HOFSTRA L. REV. 671 (1980); Duncan Kennedy, *Cost-Benefit Analysis of Entitlements: A Critique*, 33 STAN. L. REV. 387 (1981); Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1669–70 & n.62 (1998).

from the point of view of distributive equity, application of the priority principle will tend to give greater weight to the unsatisfied preferences of individuals who are worse off through no fault of their own (such as those with disability or at lower income levels).

Next, turning to the incentive side, similar considerations apply regarding access to, and surplus from, any expressive works that are generated or foregone by changes in copyright protection. Perhaps more surprisingly, distributive values may also modify our assessment of the actual composition of the output of new or supramarginal works. The extent to which this may occur depends on the degree to which the subset of consumers with disability or lower incomes vary significantly, from the market at large, in their demand profile for expressive works. We canvass possible instances of such divergence below.

Finally, considerations of distributive equity may also, of course, influence what we regard as fair compensation for creators of expressive works. Three distinct issues may be singled out in this regard: (1) ensuring that creative workers receive fair compensation for their labors, both from employers and the consuming public; (2) ensuring an equitable division of the returns from follow-on or derivative works, between original creators and those building upon, adapting, or otherwise using the original work; and (3) ensuring that producer returns from expressive works are "reasonable" rather than excessive.[215] Unfortunately there exists, at present, a formidable barrier to directly pursuing these concerns through the vehicle of copyright: namely, the absence of any broadly accepted way of operationalizing plausible normative principles of equity-in-earnings (such as "to each according to effort and sacrifice")[216] and especially of doing so at the fine-grained level of copyright rules. We may observe, however, that to some extent efficiency's concern with ensuring the provision of necessary incentives for creative activity will tend to address (although crudely) the issues raised under the first two branches.[217] Similarly aspects of the third

215. *See, e.g.*, Ghosh, *supra* note 199, at 475–77.

216. For a review of the philosophical arguments and literature that converge on this as a rough principle of equity-in-earnings, see William W. Fisher & Talha Syed, *Global Justice in Healthcare: Developing Drugs for the Developing World*, 40 UC DAVIS L. REV 581, 670–72 (2007); see also RAKOWSKI, *supra* note 204; James Dick, *How to Justify a Distribution in Earnings*, 4 PHIL. & PUB. AFF. 248 (1975); Dworkin, *supra* note 204.

217. Efficiency calls for sufficient incentives to elicit from creative producers the effort and resources needed to generate those expressive works the value of which exceeds their costs of creation. In principle, such incentives need be just enough to ensure that the resources are deployed in this avenue rather than whatever is their owner's next-best alternative use. That is, efficient incentives are responsive to the bargaining power of market participants. And while equity may frown on some instances of paying producers only what

issue will be addressed, again only indirectly and partially, by attending to the above equitable concerns toward distributively prioritized subsets of consumers.[218] Thus, in what follows we do not give close attention to distributive aspects of innovator returns.

The foregoing previews the distributive issues raised by one half of the goods disposed of by copyright, namely access to expressive works (and their associated surpluses). What about the other half—access to expressive opportunities (or the ability of individuals directly to participate in expressive activity)? Where the barriers to such participation are on account of such individuals being worse off due to disability or lower-income levels, then distributive equity counsels prioritizing their access to such expressive opportunities in much the same way as for access to expressive works.[219] However, access to expressive activity may also merit special concern, on distinct grounds of the sort canvassed in Part III, such as cultural democracy's commitment to decentralizing of meaning-making power or flourishing's substantive emphasis on meaningful activity as valuable for its own sake. In such cases, how such opportunities should be valued in ways different from efficiency raises questions not so much of distributive priority within one space of the good, but of priority relations or tradeoffs between distinct spheres or spaces of the good.

B. KEY PARAMETERS OF POSITIVE ANALYSIS

In what circumstances might attention to the foregoing distinct concerns of distributive equity significantly alter our appraisal of the effects of copyright from those of efficiency? Recall that once we recognize that our alternate evaluative concerns must apply not only to one dimension of the analysis but, like efficiency, must assess the full range of relevant parameters, simply adopting alternative normative criteria to efficiency may often not

their bargaining power fetches on the market, the class of skilled producers that are involved at least in more traditional creative expressive work will tend not to prominently feature in that group. Of course some participants in a creative project—such as those on the "lower rung" of the creative hierarchy or those at more vulnerable stages of their career cycle—may be vulnerable to inequitably low payments; which is one reason why efficient incentives will only crudely address these concerns.

218. "Reasonable" rather than "excessive" producer returns would mean those returns deemed fair according to a general theory of the fair distribution of the social surplus, taking into account overall equity-in-earnings and equity-in-needs. Priority to individuals with disability and at lower incomes, while certainly not a comprehensive addressing of equity-in-earnings and -in-needs, is also not a negligible aspect thereof. Admittedly, the priority here is limited to access to expressive works and their associated surpluses, but so are the surpluses being disposed of.

219. We thank Terry Fisher for pushing us to clarify this point.

result in any appreciable policy difference. At the same time, however, *how* different positive effects are relevant may vary depending on the normative perspective adopted. Here, we briefly set out the distinct general parameters brought to light by a distributive as compared to efficiency analysis, before turning to specific circumstances in which these general differences may matter.

Adopting a standard incentive-access frame, assume we have at our disposal only crude levers of providing "more" or "less" copyright protection, generically applicable across all classes of expressive works. The efficiency analysis runs as follows: From a positive point of view, reducing protection will likely lower prices and hence increase access to inframarginal works, but also forego the generation of some supramarginal works. Normatively, this will only be worth it if the reduction in deadweight loss provides a greater benefit in terms of the satisfaction of effective preferences than the loss in producer and consumer surplus associated with the foregone supramarginal works. What do distributive considerations, specifically the placing of a priority weight on the preferences of worse-off consumers, add to this? A common supposition is that they may favor a reduction in protection even when efficiency does not, that is, when the efficiency loss in foregone innovations is greater than the efficiency gain from reduced deadweight loss. Why? Because we now give greater weight to the access gain, over and above its measure in terms of foregone surplus, by counting the interests of our distributively-prioritized group for more than what is reflected in efficiency's metric of effective preferences.[220] The trouble with this analysis, however, is that a similar distributive adjustment must also be made to the loss side of foregone innovations so that we place greater weight on the interests of our prioritized group's lost surplus from such ungenerated works, resulting in its amplification. Absent special reason to assume otherwise, a plausible default would seem to be that adjustments are symmetrical: as the access gain is enhanced over and above its efficiency measure, to that extent the loss from foregone works should also be adjusted upward. The result: a stalemate.

Upon closer analysis, however, crucial additional factors are disclosed, ones potentially obscured by an exclusive focus on the parameters relevant to efficiency. These factors increase the likelihood of a divergence between efficiency's prescriptions and those of distributive equity. Adopt, again, a standard incentive-access analysis with crude, generically applicable protection levers. Assume we are contemplating a move from protection

220. *See, e.g.*, Abramowicz, *supra* note 17; Chon, *supra* note 191.

level A to increased protection level B. Doing so will mean adding some protection over those works inframarginal to protection level A. This results in: (a) increased inframarginal deadweight loss, and (b) increased transfer of surplus from inframarginal works from consumers to producers. Both of these effects, while incentive-unjustified from the strict point of view of generating the inframarginal works, are incurred as an unavoidable byproduct (unavoidable if our tools are limited to crude, generic protection levers) of providing the added protection necessary to induce generation of those works supramarginal to protection level A. The benefits from such supramarginal works are: (c) the realized consumer surplus from the works, and (d) the realized producer surplus from them.

Efficiency cares about effects (a), (c), and (d), and is indifferent about (b). Distributive equity differs in two main respects. First, the distributive analysis may also care about (b), the incentive-unjustified transfer of surplus from consumers to producers. Second, distributive analysis may value the other three variables differently than efficiency. And these differences may matter *when the distributively-prioritized group is disproportionately affected by any of these effects*. The point is perhaps easiest to see with respect to factor (d)—the realized producer surplus from supramarginal works. To the extent that a distributively-prioritized population is significantly underrepresented within the group enjoying this benefit—i.e., producers—distributive analysis will downgrade its relative value compared to efficiency. The same principle applies, albeit likely less frequently, to (a) and (c). When a distributively-prioritized population is equally represented within the groups suffering from increased inframarginal deadweight loss and enjoying increased supramarginal consumer surplus, the significance of any different value placed by distributive equity on these two countervailing effects relative to efficiency will be nullified. However, the same does not hold when a distributively-prioritized group is disproportionately affected by either of these factors, as in a case where a disproportionate share of the increased deadweight loss falls on members of this group or when such individuals are unlikely to enjoy the increased supramarginal consumer surplus. In a nutshell, then, efficiency compares supramarginal benefits (c) and (d) against inframarginal cost (a) (all valued equivalently in terms of effective preferences); in contrast, distributive analysis potentially adds a further inframarginal cost (b) and may assign different values to (a), (c), and (d) without each of these adjustments offsetting each other.[221] Whether such

221. By contrast, it is unclear whether, at a general level, democratic theory would have any more grounds than efficiency for caring about (b)'s inframarginal transfer of surplus from consumers to producers. At the same, it would presumably share efficiency's concern

potential sources may plausibly become actual grounds of divergence depends on further normative and institutional considerations, including the identity of, and appropriate normative priority to be given to, different subgroups of consumers and producers, and the ability of copyright policy levers to tightly target specific subsets of such consumers or producers for distributive benefits or burdens.

C. APPLICATIONS

Which groups should merit distributive priority in copyright policy? We lay aside the possibility of giving such priority to the group of consumers as a bloc vis-à-vis producers as a bloc.[222] In the early days of the law-and-economics movement, regulatory policies based on such en masse favoring of consumers suffered sharp criticism due to their unclear normative basis, notwithstanding their significant roots in American political and legislative history.[223] In the absence of figures confirming substantial disparities between the average income/wealth profiles of the typical consumer and those to whom producer surpluses ultimately redound, the normative footing of any

for (a)'s inframarginal deadweight loss, (c)'s supramarginal consumer surplus, and (d)'s *supra*marginal producer surplus. This highlights, then, some important distinctions in the way that distributive and democratic theories relate to each other as well as to efficiency: For distributive theories, the prices of, and hence relative shares of surplus from, expressive works may matter a great deal (depending on the identity of the consumers and producers). On the other hand, all expressive works are valued equivalently, according to the subjective preferences of market actors (albeit suitably adjusted in magnitude, where priority principles demand it). For democratic theories, on the other hand, although a robust level of production and access to expressive works matters greatly for the sake of individual self-determination and social deliberation, who gets what share of the surplus from such works would not, in the first instance, be of much direct concern. At the same time, by contrast to a purely distributive focus, great emphasis may be placed on qualitative distinctions in the types of works and forms of engagement made available, such that even the satisfaction of existing preferences of distributively-prioritized groups, through the generation of further supramarginal works, may not be worth restrictions placed on critical uses of inframarginal works, even if those uses are engaged in by individuals or groups not meriting any distributive priority. One refinement of this important distinction is that democratic theories may care about the distribution of surplus from expressive works to the extent it influences effective access to particular, highly-valued, types of works.

222. *But cf.* Abramowicz, *supra* note 17, at 69 (treating consumers versus producers as a relevant group comparison for distributive analysis); Farber & McDonnell, *supra* note 196 (same); Yoo, *supra* note 33 (same).

223. For the criticism, see, e.g., RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976). For discussion of the role of pro-consumer, as well as pro-small business, distributive concerns in shaping early American antitrust law and policy, see HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 2.1 (4th ed. 2011); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

such distributive priority seems too unsure. Accordingly we focus on groups that more clearly merit distributive priority, namely individuals with disability or at lower-income levels. If these groups represent a non-negligible subset of the consumers for inframarginal works, there is a clear basis for divergence between efficiency and equity's appraisal of the value of lower protection and hence of increased and cheaper access (i.e., lower deadweight loss and smaller transfer of consumer surplus to producers). But the fact that a distributively-sensitive evaluation will tend to value an access gain from curbed protection more than efficiency does not mean that such gain is worth foregoing the benefits from stronger protection, when those benefits are also assessed from a distributive point of view. This is because the evaluation of the beneficial effects of stronger protection on the prioritized group must also be adjusted. This includes the supramarginal increase in consumer and producer surplus and the gain to producers from inframarginal transfer. The more evenly spread the distributively-prioritized group's share of the affected consumers and producers is on both sides of the infra-supramarginal tradeoff, the greater the chance of agreement between efficiency and distributive equity.[224]

If we wish, then, to pursue effectively distributive concerns in copyright, our focus should be on cases of significant asymmetry between our priority group's share of the inframarginal or supramarginal benefits of a measure vis-à-vis its share of the concomitant supramarginal or inframarginal costs. One implication of this is that, as a rule, sweeping or generic rules or policy levers—those ostensibly affecting the entire market in roughly similar ways, such as a shorter term or tighter enforcement—will tend not to be suitable candidates for pursuing specifically distributive considerations (put more precisely, their distributive evaluation is more likely to align with that of

224. Arguably the group of lower-income individuals is generally unevenly affected by the benefits and costs of protection. To the extent that lower-income individuals are significantly underrepresented within the group of producers, distributive analysis will downgrade the value of increased supramarginal producer surplus compared to efficiency. Similarly, the inframarginal transfer to producers will be of little countervailing value regarding the corresponding transfer from consumers. It follows that if this underrepresentation of lower-income individuals within the group of producers obtains systemically, distributive analysis will be systematically tilted in favor of weaker protection relative to efficiency. Difficulties in assessing the pervasiveness and magnitude of this effect, which is essentially a variant of the general argument for favoring consumers over producers, leads us to focus on other stronger cases of asymmetric effects on distributively-prioritized groups.

efficiency).[225] Rather, we need more targeted measures, those focused predominantly on benefiting our priority group(s), with the costs falling more evenly on between them and the rest of the market, thus creating the needed asymmetry.

1. Special-Needs Individuals

Section 121(a) of the Copyright Act provides an exception to copyright in nondramatic literary works, to allow "authorized entities" to make and distribute copies or phonorecords of such works in "specialized formats exclusively for use by blind or other persons with disabilities."[226] A similar, but somewhat distinct, provision is included in the Marrakesh Treaty recently adopted by the World Intellectual Property Organization.[227] The provision requires all member countries to provide in their national laws "a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public . . . to facilitate the availability of works in accessible format copies for beneficiary persons."[228]

To a considerable extent, both the existing domestic and the international provisions are precisely the sorts of targeted exemptions that the preceding analysis suggests are best suited for the effective pursuit of distributive aims. To be sure, each might also pass muster on efficiency grounds as well. The impact on incentives of such exemptions is likely negligible, while the gain in consumer surplus for the serviced population is likely high (even when measured in strictly effective preference terms). But suppose that this were not the case—say because somehow specialized formats for the blind were a reasonably lucrative domestic market or the international provisions were somehow broad or leaky enough to pose a non-trivial threat to dynamic incentives. The point is that, nevertheless, these provisions would remain

225. This is subject to our discussion below of how, under certain conditions, generally applicable measures may have asymmetric effect on lower-income individuals. *See infra* paragraph following note 250.

226. 17 U.S.C. § 121 (2012).

227. The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled was adopted on June 27, 2013. Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, *available at* http://www.wipo.int/edocs/mdocs/copyright/en/vip_dc/vip_dc_8_rev.pdf [hereinafter Marrakesh Treaty]. It will go into force after it is ratified by twenty member countries. *See Historic Treaty Adopted, Boosts Access to Books for Visually Impaired Persons Worldwide*, WORLD INTELL. PROP. ORG. (June 27, 2013), http://www.wipo.int/pressroom/en/articles/2013/article_0017.html.

228. *See* Marrakesh Treaty, *supra* note 219, art. 4(1)(a). Article 3 contains a lengthy definition of a "beneficiary person" that amounts to a person who is blind or suffers from other impairments detailed in the Article resulting in a reading disability. *Id.* art. 3.

firmly supported on distributive grounds. The reason for divergence with efficiency is the asymmetry of the measure's effects. Because the rule exclusively channels the access benefit to blind and print-disabled people, a clearly prioritized group reaps the lion's share of inframarginal benefits (which are thus highly magnified by our distributive criteria over and above their efficiency measure), while suffering only a proportionate share of supramarginal costs (which are correspondingly less divergent from their efficiency measure).[229] By contrast, the efficiency analysis would compare the same access benefit with the entire supramarginal cost without magnifying the cost and benefits effects on the prioritized group. As a result, distributive equity supports the exemption even when efficiency does not, and supplies a stronger justification for it even when efficiency points in the same direction.

The targeted exemption for reproduction in formats suited for the blind supplies a template for a legal lever that can create asymmetrical effects in the service of a distributive policy. Specifically, when a copyright exemption or limitation targets its access benefits exclusively or almost exclusively to a distributively-prioritized group (and there is no reason to assume that the prioritized group is similarly overrepresented among those incurring the supramarginal cost), it will confer disproportional benefits on that group, thereby increasing the likelihood of it being justified by the distributive policy.[230] There are two main doctrinal routes for achieving this effect: precise rules and case-specific applications of fuzzy standards.[231] The rule track embodied in section 121(a) targets the access benefits to the distributively-prioritized group through a precise definition of the realm of the exemption. The alternative route involves applying a general, open-ended standard such as "fair use" in a way that relies heavily on the existence in a specific case of access benefits narrowly targeting a favored group. In *Authors Guild v. Hathitrust* the court did just that when it held the unauthorized reproduction of copyrighted literary works, as part of a service supplying

229. As for the inframarginal transfer ignored by efficiency, it is unlikely to add negative drag to the distributive analysis and it probably pushes it further in the positive direction. This is so because the prioritized group enjoys the entire benefit of the transfer to consumers while suffering only a fraction of its negative effect on producers according to its relative share of its members among the group of producers.

230. To be sure, theoretically even a measure that disproportionately benefits a prioritized group may impose a large enough cost on that group (and others) that it may not be justified from the perspective of the distributive policy. The point is merely that the more disproportionate the benefit conferred on the group, the higher the likelihood it will be distributively-justified and the greater the divergence of the analysis from efficiency.

231. On the rule/standard distinction, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

access to blind and print-disabled individuals, did not infringe on a ground alternative to section 121(a). The court found that because of "the unprecedented ability of print-disabled individuals to have an equal opportunity to compete with their sighted peers," such a service constituted fair use.[232]

Having clarified the mechanism that facilitates effective distributive prioritization through structuring of copyright exemptions, a few additional observations that bear generally on using copyright to promote distributive equity ends are in order. First, what is the normative justification for giving priority to persons with disabilities? The basic grounds for such distributive priority are two-fold: (a) as a result of their disability, such individuals may have considerably less earning potential than average through no fault of their own; and (b) even if we took care of undeserved disparities in earnings, such individuals will tend to have "expensive needs," meaning conditions that make it comparatively more resource-costly to reach the same level of well-being (on any plausible candidate metric) as someone without disability, such that even with the same bundle of resources they will tend to be significantly worse off.[233] Even if we bracket here the first ground, the second by itself provides ample support for the subsidized production of disability-suitable formats of expressive works.[234]

It follows that the existing exemptions are likely too narrow. Both section 121 and the international provision are limited in regard to both the beneficiaries of the exemption[235] and the categories of works within its

232. Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445 (S.D.N.Y. 2012). Specifically the court found that the use was highly transformative and had no negative impact on relevant markets for the copyrighted work, two crucial factors in the fair use analysis. *Id.* at 463.

233. This way of framing the distributive justice issues raised by disability is developed in Syed, *supra* note 209.

234. This leaves open the thorny question of the extent of the justified priority accorded to those who are undeservedly badly-off, or worse-off than others, in the queue for social resources over those well- or better-off. We leave full treatment of this question, which is a matter of considerably greater controversy than the basic priority principle, for another day. One of us, however, has offered in other work the following as a benchmark ideal: we should aim to improve the access of those with disability up to the point that the next improvement per-unit resource that they will reap will be smaller as a ratio of their overall capacity/well-being than the foregone improvement of those without disability would be as a ratio of *their* overall capacity/well-being. *See* Syed, *supra* note 209.

235. While the international provision is clearly limited to the blind or otherwise visually impaired (see Article 3), section 121(a) uses the deceptively broad term "blind or other persons with disabilities." The term, however, is specifically defined in section 121(d) by reference to another statute. Examination of the referenced legislation and related regulations shows that the category is limited to various forms of reading disabilities. *See*

ambit.[236] The distributive equity rationale, however, furnishes no general reason for a different treatment on the basis of either the nature of the disability or the categories of the works involved. As long as the assumption of expensive needs applies, the justification for distributive priority holds. At the same time, whether the assumption of expensive needs applies in regard to a specific disability and a particular category of works is a function of the interaction between technological, social and economic contingencies.[237] These considerations open up fertile ground for further investigation of the proper scope of disability-based copyright exemptions domestically and internationally.

A further question is whether it is justified to give priority to disabled individuals through a form of cross subsidy internal to the copyright regime, rather than through a more general tax and transfer scheme. Recall that the basis for distributive priority here is two-fold: undeserved disparities in earnings and expensive needs. Even supposing that the question of equitable earnings is best handled through general redistributive tax and transfer, issues of expensive needs will still often be better addressed in context-specific settings. This is so for two distinct reasons. First, the relevant dimensions of well-being (or spaces of the good) to which we want to improve access for those with disabilities strike many as irreducibly plural or "sphere-specific," with improvements in, say, pain amelioration, physical sensorimotor abilities, mental capacity, health, education, cultural capabilities, etc., each involving qualitatively distinct spaces of valued "doings and beings," spaces that are implausible to treat as commensurately substitutable with one for the

JOANNE KARGER, NIMAS AND NIMAC: A DISCUSSION OF THE LEGAL ISSUES ASSOCIATED WITH THE PROVISION OF ACCESSIBLE INSTRUCTIONAL MATERIALS TO STUDENTS WITH PRINT DISABILITIES 3 (2010), *available at* http://www.madisoniep.com/AssistiveTechnology/NIMASIDEA2004.pdf.

236. Section 121(a) applies to reproduction or distribution of a "previously published, nondramatic literary work." Article 2(a) of the Marrakesh Treaty defines "works" to which the exemption applies as "literary and artistic works within the meaning of Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works, in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media." An official note clarifies that this definition "includes such works in audio form, such as audiobooks." Article 4.1(a) requires member states to limit "the right of reproduction, the right of distribution, and the right of making available to the public," and Article 4.1(b) makes it optional for member countries to limit the right of public performance.

237. For example, it is an open question whether under current technological and economic conditions subtitles in films can reasonably be seen as an expensive need of individuals with a hearing impairment, or whether the market already meets this need with little or no extra cost to such individuals.

other.[238] Second, on the most plausible views of the appropriate distributive principle, the extent of distributive priority to those worse off in any one domain will depend at least in part on how resource-costly specific improvements are, and that is something more easily ascertained in concrete local settings rather than through a single overall monetary transfer. These reasons combine to yield the following conclusions: there will be a variety of distinct, capacity-specific, policy domains or spheres where attention to disability-equity is warranted, and in each sphere the primary focus should be on equitably addressing the domain-specific need, through improving or ameliorating the relevant dimension or capacity, rather than attempting to "compensate" for any failures to achieve equity in some other distinct sphere/capacity.

This reasoning bears two implications for copyright policy. First, it supports addressing the equitable concern of ensuring that persons with disability are able to realize the valued capacity of engaging with their cultural environment directly through the sphere-specific mechanisms of copyright law, rather than a general tax and transfer scheme. And second, the primary focus in this respect should be on addressing their "expensive needs" in this domain—namely, the need for disability-suitable formats. Addressing any general background inequity in earnings, by subsidizing access to expressive works over and above alleviating copyright burdens on the creation of specialized formats, should be secondary. Thus the exclusive emphasis of the domestic and international provisions on exemptions limited to special formats that address specific needs of disabled individuals, rather than subsidizing general access to works by such individuals through broad exemptions, receives some support.

2. Lower-Income Individuals

Under copyright, both the production and dissemination of works follow the market logic for allocating resources, namely: to each according to willingness and ability to pay. In other words, the types of expressive works that are generated is a function of the price signals sent by effective market demand, and the dissemination of such works to particular individuals is a function both of taste (or willingness to pay for accessing the work) and budget (ability to pay). A distributive concern centered on lower-income individuals reflects, then, unease about the possible effects of asymmetrical purchasing power in shaping the generation of, and/or access to, cultural works.

238. *See supra* note 213 and accompanying text.

The source of that unease lies in something like the following mix of positive and normative premises: Even accepting that some disparities in individuals' income-wealth holdings may be plausibly traced to individual choices regarding work, consumption and related decisions for which persons are reasonably held responsible,[239] nevertheless numerous other factors are also present—ranging from the contingencies of history and birth to the highly morally arbitrary character of market returns[240]—such that real-world disparities fall considerably short of being so justified. This is especially so when the disparities are of the order of magnitude confronting us today, where ten percent of the world's residents own roughly eighty-five percent of its wealth,[241] and similarly so in the U.S., with the top ten percent accounting for roughly half of all annual income and eighty percent of total wealth.[242] Application, then, of the priority principle—i.e., that those who are undeservedly worse off should be given greater weight in the claim for social resources—seems clearly to require policies that would significantly reduce such disparities. Two such policies of general scope would be a highly redistributive tax and transfer scheme (subject, of course, to said scheme's potential for baneful incentive effects that reduce overall productivity), or so-called "predistribution" measures, aimed at earlier-stage interventions to restructure market arrangements so as to attenuate the resulting disparities generated.[243] Unfortunately, such policies are clearly not in place, either in the

239. The question of which disparities are so justified is the central concern taken up by the "luck egalitarian" strand of distributive justice theory. *See* RAKOWSKI, *supra* note 204; Arneson, *supra* note 206; Cohen, *supra* note 208; Dworkin, *supra* note 204.

240. For a review of these factors, and the associated philosophical and economic literature adumbrating and analyzing them, see Fisher & Syed, *supra* note 216, at 670–72. The phrase "morally arbitrary" comes, of course, from the work of Rawls. *See* RAWLS, *supra* note 88, at 284. The concept has since been picked up and developed by the luck-egalitarian line of distributive justice theorists. *See supra* note 239.

241. With 40.1% going to the top 1%. *See* James B. Davies et al., *The World Distribution of Household Wealth* 8 (United Nations Univ.-World Inst. for Dev. Econ. Research, Discussion Paper No. 2008/03, 2008), *available at* http://www.wider.unu.edu/publications/working-papers/discussion-papers/2008/en_GB/dp2008-03.

242. With roughly half of those figures going to the top 1%. *See* EMMANUEL SAEZ, STRIKING IT RICHER: THE EVOLUTION OF TOP INCOMES IN THE UNITED STATES (UPDATE WITH 2007 ESTIMATES) 6–7 (2009), *available at* http://elsa.berkeley.edu/~saez/saez-UStopincomes-2007.pdf; Edward N. Wolff, *The Asset Price Meltdown and the Wealth of the Middle Class* 50 (Nat'l Bureau of Econ. Research, Working Paper 18,559, 2012); *see also* Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913–1998*, 118 Q.J. ECON 1 (2003) (examining the trends of income inequality through the twentieth century).

243. The term "predistribution" was coined in Jacob S. Hacker, *The Institutional Foundations of Middle-Class Democracy*, *in* PRIORITIES FOR A NEW POLITICAL ECONOMY: MEMOS TO THE LEFT 33–37 (2011), *available at* http://www.policy-network.net/publications/4002/Priorities-for-a-new-political-economy-Memos-to-the-left. The underlying concept has

United States or worldwide, making existing distributions of purchasing power dramatically unjust.

Consequently, copyright's reliance on purchasing power, in principle one seemingly sensible way of translating people's preferences into signals of social value, can be troubling. This is not to say that copyright law should thus be harnessed as a vehicle for general distributive justice, in the service of ameliorating inequities in society at large. Doing so, by treating access to expressive works as a (highly imperfect) compensating currency for other inequities, would subvert copyright's aim of ensuring the robust and fair production and dissemination of expressive works. However, there is no reason in principle to reflect or reinforce background inequities here; rather, we should, to the extent possible, act to ameliorate undeserved disparities in access to expressive works.[244]

How to do so? Ideally we would try to distribute expressive works in accordance not with "willingness and current ability to pay," but with "willingness and justified ability to pay," with "justified" denoting the purchasing power that would be available to different individuals in a society where background distributive equity in earnings prevailed. In the absence of this fantastical ideal, we are left with using the imperfect proxy of giving some greater weight to benefits and burdens where they disproportionately fall on lower-income individuals. The aim is similar to that in the disability context: to identify circumstances where it is plausible to believe that a policy would produce an asymmetry between the benefits and costs experienced by

roots in two related strands of literature. One is the late Rawlsian development of James Meade's notion of "property-owning democracy." *See* JAMES MEADE, PROPERTY-OWNING DEMOCRACY (1964); MARTIN O'NEILL & THAD WILLIAMSON, PROPERTY-OWNING DEMOCRACY: RAWLS AND BEYOND (2011); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (2001); Martin O'Neill & Thad Williamson, *The Promise of Pre-Distribution*, POLICY NETWORK (Sept. 28, 2012), http://www.policy-network.net/pno_detail.aspx?ID=4262&title=The+promise+of+pre-distribution. The other strand is the parallel development of legal-realist insights into how markets are always already publicly constructed through law, into proposals for "democratizing the market" through "institutional experimentation." *See* ROBERTO UNGER, DEMOCRACY REALIZED (1998); ROBERTO UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996).

244. One obvious question that arises at this point is whether we should concern ourselves with domestic or global disparities, especially where attending to one may exacerbate the other. Our focus here will be primarily on the domestic front, not out of any normatively compelling reason to limit distributive concern to the nation-state, but rather the more practical one that our primary focus here is on U.S. copyright law which, to a large although far from complete extent, is territorially bound in its scope of application. One clear exception to this of course is how the rules pertaining to territorial exhaustion of the first-sale doctrine interact with global trade in expressive works—a topic we touch on briefly at the end.

priority groups in terms of, say, increased inframarginal access to existing works versus foregone creation of new supramarginal works. We discuss here three such cases.

The first and most straightforward is when, as with disability, our priority group can be directly targeted through tailored exemptions, enabling it to reap a disproportionate share of the inframarginal/access gains from the exemption, while suffering only a proportionate share of the supramarginal/incentive costs. In such cases the distributive justification for the exemption will be particularly strong and will tend to diverge significantly with efficiency.[245] Are there such realistic cases? One possibility here would be directly factoring in the defendant's income as relevant to fair-use analysis, not only for follow-on creative uses but also for purely private, consumptive copying.[246] Another option, probably more feasible, is to justify and expand existing privileges for intermediary institutions and activities that are strongly correlated with access to or uses of expressive works by lower-income individuals. The Copyright Act includes several exemptions that fit this mold,[247] with the strongest case being the limited exemption in section 108 for public libraries in regard to certain reproductions of copyrighted works.[248] The shortcoming of this strategy is obvious: to the extent that non-low-income individuals enjoy the services of the beneficiary institutions—say public libraries—the targeting of the access benefits to the distributively-prioritized group is imperfect. But this more veiled approach also has some advantages beyond securing it greater prima facie legal legitimacy. As the social-welfare literature on universal versus "means-tested" entitlements points out, broadly inclusive social benefits tend to have solidaristic and destigmatizing effects.[249] Consequently, even if the presence of some higher-income beneficiaries dilutes the fine-tailored character of an exemption targeting intermediaries, that loss in short-term distributive advantage may be worth it in terms of longer-term institutional legitimacy and sustainability.

245. *Cf.* Kapczynski, *supra* note 192, at 998 (discussing possible instances of "exceptions to IP law" that "will disproportionately benefit the poor" while having "potential dynamic effects").

246. *Cf.* Van Houweling, *supra* note 110, at 1568–69 (proposing to factor in defendant's "ability to pay" in the fair-use analysis for follow-on derivative uses, although not for purely consumptive ones).

247. *See, e.g.*, 17 U.S.C. § 110(1)–(2) (2012) (listing certain exempted performances and displays by non-profit educational institutions).

248. *See* 17 U.S.C. § 108; *see also* Kapczynski, *supra* note 192, at 998 & n.108.

249. *See* Gillian Lester, *Can Joe the Plumber Support Redistribution? Law, Social Preferences, and Sustainable Policy Design*, 64 TAX L. REV. 313 (2011).

By contrast to targeted exemptions, it would seem that more general, sweeping measures, such as an overall reduction in protection, would not be well-suited for pursuing distributive aims as distinct from those of efficiency, for the familiar reason that our priority group will tend to be similarly situated on both the inframarginal benefit and supramarginal costs sides of the equation. However two considerations present possible departures from this default presumption and give reasons why lower-income individuals may not benefit from the creation of new works in proportion to their share of benefits from increased access to existing works. Both considerations operate within a product differentiation framework. Recall that many of the supramarginal works attracted by copyright protection are imperfect substitutes for inframarginal works.[250] The higher the level of protection, the greater the share of new works which are substitutes for existing ones and the smaller are the differences between the substitutes. Both considerations pertain to the fact that lower-income individuals are likely to enjoy a disproportionately smaller share of the value of close substitute works.

The first reason why higher income individuals may derive a bigger benefit from supramarginal substitute works is that they can afford to consume a greater number of them. A lower-income individual who can afford to consume fifty films a year derives some benefit from the existence of one hundred films from which to choose. But a higher income individual who can afford to consume all one hundred films derives a bigger benefit from their existence. This effect is exacerbated by the intersection of the cultural life of works with the term of copyright protection. A contrast with the case of patents over drugs may help illustrate the point. One plausible objection to a distributively-based claim for general reduction in patent protection—i.e., a reduction motivated by improving access to inframarginal treatments for lower-income individuals—is that such individuals would also stand to gain from any new treatments incentivized by the existing, stronger levels of protection. Or, if not them, due to patent-protected prices over the new treatments, then the next generation of lower-income individuals once the drugs go off-patent. This objection is premised on the plausible assumption that the social utility of drugs exceeds the duration of the patent term—so that many will ultimately benefit from new treatments even if they can't afford them in the initial patent-protected period. However, the same may not hold to nearly the same extent in copyright. When we consider the cultural life-cycle of many expressive works (especially those belonging to "pop" rather than "high" culture) in tandem with the extremely long

250. *See supra* text accompanying notes 33–35.

duration of copyright protection, it does not seem implausible that for some subset of the population, there exist a subset of expressive works with a "cultural expiration" date such that where copyright protection makes them prohibitively priced, they are then never actually enjoyed. As a result, the creation of more such works is really of no benefit to them (or alternatively is only of the small benefit of having a greater variety out of which to choose), while greater access to existing or inframarginal works is of huge benefit. In such cases a sweeping or overall reduction in protection may find significant additional support in considerations of distributive equity over and above efficiency because lower-income individuals will systematically derive a disproportionately small share of the supramarginal benefits of stronger protection.

A final set of possible cases of asymmetry also relate to a disproportion in the benefits derived by lower- and higher-income individuals with respect to variants of cultural works. But the source now is not the lack of effective access for lower-income individuals but rather the differential tastes of the two groups. Purchasing power may not simply function as the servant of one's tastes; it may also be a driver. Having more disposable income may open one up to developing a range of cultural tastes less likely to be shared by one's poorer self. These range from the pursuit of positional goods, to an increased "connoisseur's" appreciation of subtle distinctions between works in a similar genre, to the desire for large collections of cultural works for the sake of conspicuity, connoisseurship, or simply because one can. What all these tastes have in common is that they will tend to give greater value to "variety" or "differentiated" additions to existing genres or product spaces than those without them. And such additional works will tend, as copyright protection increases, to be an increasingly larger share of new, supramarginal works enabled by such protection. The result: to the extent that cutbacks to protection mainly reduce the entry of highly differentiated variants, the supramarginal costs will be disproportionately experienced by high-income individuals, leaving our priority group to reap a disproportionately greater share of the benefits from the decrease. This will justify in turn weaker overall levels of protection on distributive grounds.

In sum, there are some reasons why distributive concerns regarding lower-income individuals may, at least in certain cases, justify copyright policy results different from those generated by efficiency. The strongest subset of cases are those where copyright rules can target the benefits of increased access to the group of lower-income individuals either directly or through intermediary beneficiary institutions such as public libraries. A somewhat less firm case may be made on distributive grounds for overall weaker copyright protection in those domains where it is plausible to assume

that lower-income individuals enjoy a disproportionately small share of the benefits of supramarginal works attracted by higher levels of protection.

D. OBJECTIONS

Is the game worth the candle? Numerous objections to the pursuit of distributive concerns in fields of private law have been voiced over the past few decades.[251] Above, we addressed one general theme common to many such objections—namely that the values of distributive equity are inapposite because they are somehow external or "alien" to the core purposes of fields like copyright. Our answer, again, is that our aim is not to graft onto copyright external agendas and to use the field as an engine for pursuing general distributive justice. Rather, it is to attend to equitable concerns where they arise organically, internal to the field itself. Nevertheless, there remain a series of more discrete variations on this general theme, each in their way suggesting that sensitivity to distributive equity is quixotic at best and distracting or even damaging at worst. The principal criticisms are four and, adapting Albert Hirschman's classic list, we can group them into two clusters: *futile/perverse* and *unwieldy/distortionary*.[252]

1. Futile/Perverse

One line of criticism, most commonly voiced in the contracts context, is that any ex post imposition of distributively-motivated terms in parties' agreement will be, ex ante, anticipated and corrected for by private ordering on the market, thus rendering such distributive efforts ineffectual or futile.[253]

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251. Our discussion here is focused on objections that accept, in principle, the normative legitimacy of distributive concerns and, further, the institutional legitimacy of attending to them in non-legislative arenas such as courts. *Cf.* FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 67–100 (1976); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 150–160 (1974); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEG. STUD. 103 (1979). In our view, criticisms on grounds of normative or institutional legitimacy have little force, a point conceded by one of their most forceful early advocates. *See* Posner, *supra* note 214. The objections we take up here query, rather, the instrumental competence or suitability of any institutional body or mechanism besides legislative tax and transfer to effectively address distributive concerns.

252. ALBERT HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY (1991).

253. *See, e.g.*, Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L. J. 1093 (1971); Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361 (1991); Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FL. ST. U. L. REV. 485 (1987); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special*

And if such terms are made compulsory or nonwaiveable, the response is that "you are hurting the people you are trying to help." In other words, to impose such terms upon private parties is to force upon them deals that they would not voluntarily negotiate, resulting either in the intended beneficiary paying more for the term than they subjectively valued it or in the intended provider supplying less of the good or simply refusing to contract with those likely to be the beneficiaries of ex post judicial solicitousness. Such results being, in a word, "perverse."

Hopefully, it is by now apparent that there is a structural affinity between these critical concerns and the challenge that we have been at pains to highlight and address in our analysis: namely, that the consequence-sensitive pursuit in copyright of any one set of goals must attend to the potentially countervailing effects that will result from the interaction of legal-policy decision and the responses of private market actors. Roughly speaking, what is called "ex post" in areas like contract is analogous to what we have termed the "inframarginal" access effects; while "ex ante" goes to incentive or "supramarginal" access effects. Our entire analysis, thus, has been aimed at articulating and operationalizing the parameters relevant to avoiding the sort of one-sided focus on access/inframarginal effects that risks either futility or perversity.

2. Unwieldy/Distortionary

A distinct line of criticism, one more closely associated with the torts context, highlights the incongruous fit between the ideal set of prioritized groups and desirable effects that might be specified by a plausible normative theory and the actual groups impacted by, and effects resulting from, private law rules, which are limited in their scope and flexibility to particular subject-matter domains and administration by courts through litigation.[254] This argument may be overstated in certain contexts such as ours, where the rules of copyright tend to have quite broad effects on the shape of, and access to, culture. Nevertheless, the general point is well taken: efforts to pursue distributive goals through specially-crafted categories do raise issues of leakage, imperfect reach, etc., and thus the question of whether we would do

Reference to Compulsory Terms and Unequal Bargaining Power, 41 MD. L. REV. 563 (1982); Anthony Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980); Anthony Kronman, *Paternalism and Contracts*, 92 YALE L.J. 763 (1983); Richard Markovits, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815 (1976).

254. POLINSKY, *supra* note 195; Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL. STUD. 667, 674–75 (1994).

better to pursue changes in more broadly-impacting institutional fora. As we reflect on that question, however, it is important not to commit the "Nirvana fallacy" of comparing a realistic variant of one institutional alternative with an idealized version of its competitor.[255] If a distributively equitable system of tax and transfer or more structural reforms is not presently on the cards, it hardly seems a compelling objection to the pursuit of justifiable aims in other venues that these are an institutional second-best. Moreover, the two points are not unrelated. Rather, it seems plausible that two important sources of inaction on the progressive taxation front are the political power of those whose material interests are threatened by such taxation and the discursive-framing effects associated with "taxes." On both fronts, copyright law and policy may play a significant role: a more equitable copyright regime is one that contributes less by way of rent distortions into the political arena and exceptions to exclusionary rights—taking the form of "liberty" privileges—are often more easily framed and accepted than taxes.

One distinct and influential variation of this "too costly" line of criticism is Louis Kaplow and Steven Shavell's "double-distortion" argument.[256] Kaplow and Shavell urge that the pursuit of distributive aims through private law and regulatory rules is always institutionally second-best to the use of redistributive income tax, since both tools have distortionary effects on labor-leisure incentives while the private-law/regulatory alternative also introduces an additional distortion on account of pursuing an aim besides efficiency.[257] This argument, however, does not apply to the sorts of distributive measures we contemplate above, since the only "distortion" involved in such measures—i.e., the decrease in efficiency—is precisely the same as would be incurred by a redistributive progressive tax, namely an effect on dynamic production incentives.

V. CONCLUSION

We have offered in this Article what we think is an attractive reading of two normative frameworks that recently have gained prominence in the field of copyright law and policy: democratic theories and considerations of

255. Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 3 (1969).

256. Kaplow & Shavell, *supra* note 254; *see also* Aanund Hylland & Richard Zeckhauser, *Distributional Objectives Should Affect Taxes but Not Program Choice or Design*, 81 SCAND. J. ECON. 264 (1979); Steven Shavell, *A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?*, 71 AMER. ECON. REV. 414 (1981).

257. Kaplow & Shavell, *supra* note 254, at 668.

distributive equity. Our construal of these theories as consequence-sensitive opens up a space between the utilitarian and natural-rights theories that traditionally have dominated the field. Like the consequentialist theory of efficiency and in contrast to natural-rights theories, consequence-sensitive theories factor into their normative analysis the full array of consequences attributable to a legal rule, including forward-looking incentive effects. The theories in our group diverge, however, from efficiency regarding both the values they seek to promote (and thus with which they identify, evaluate and prioritize the relevant consequences), and the role(s) they assign to expressive works and activities vis-à-vis these values. This combination of robust consequence-sensitivity with a nuanced, non-reductive, and (we think) attractive appraisal of the relevant consequences should serve to bolster the case for this family of normative views when compared to its long-standing rivals.

A major theme of the analysis has been the structural homology between efficiency and both democratic and distributive theories construed as consequence-sensitive. These theories, we have argued, face countervailing supramarginal and inframarginal effects of copyright that closely track familiar tradeoffs at the heart of copyright's economic analysis. Proponents of democratic and distributive theories are urged to take this structural homology seriously—it is no longer plausible simply to point at values different from efficiency and assume that this alone prescribes results materially different from those commended by economic analysis (typically on the side of greater access). This general homology does not mean, however, that democratic and distributive theories collapse into efficiency, leaving natural-rights and negative-liberty frameworks as the sole alternatives to it. Close examination reveals significant cases in which various democratic theories support copyright arrangements distinct from those mandated by efficiency, along with ways in which copyright legal levers can be tweaked to effectively pursue distributive equity goals in divergence with the scriptures of efficiency. Attention to the relevant values and the ways they interact with the actual effects produced by copyright rules in specific contexts reveals the stakes in the choice between efficiency and democratic or distributive theories. Similarly, the same analysis sharpens the differences between distributive considerations, centered on an equitable distribution of the surplus associated with creative works as subjectively evaluated by individuals, and democratic theories, for which the core values are centered around qualitative distinctions in the types of expressive works and activities differentially affected by copyright. Finally, our analysis clarifies the differences between the various outlooks we gather under the loose title of democratic theories.

Those distinctions are not merely scholastic. They make all the difference for purposes of normative justification and institutional design in regards to important contemporary copyright policy questions, such as the appropriate treatment of critical uses, personal uses, or attending to important concerns of distributive equity implicated by copyright rules. In terms of the long history of copyright theory and policy, democratic and distributive theories are still relative newcomers. Hopefully, our analysis has sharpened the analytical and normative toolkit with which the growing number of proponents of these outlooks are able to defend, elaborate, and pursue their normative commitments in copyright law and policy.