

*forthcoming in the *Southern Journal of Philosophy*

The Incentives Argument Revisited: A Millian Account of Copyright

1 Introduction

Framing copyright as an incentive to create is admittedly a utilitarian argument.¹ The view is surprisingly simple: authors are given a limited right to own their works in order to convince them to publish those works. After a defined term in which public access is limited by the creator's ownership rights, the works enter the public domain and the author's monopoly ends. The U.S. Constitution utilizes exactly this view in authorizing Congress to establish patents and copyrights: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."² Let us refer to this way of justifying copyright as the *Incentives Argument*, or more extensively, the *Incentives Argument for Intellectual Property Rights*. The Incentives Argument outlines a bargain between creators and the public, each receiving a desired benefit. Creators can use the temporary monopoly to secure a living from their works, and the public agrees to enforce the monopoly in the interest of motivating creators to release their works, hopefully promoting innovation. This conception of copyright, along with its emphasis on the public good at stake in intellectual property law, has been defended by Lawrence Lessig, James Boyle, and Yohkai

1 "Utilitarianism" broadly refers to consequentialist schools of thoughts which prioritize the pursuit of overall good. For the purposes of this argument, there should be no need to specify whether "pursuit of good" refers to base preference satisfaction or some list of key goods. Nevertheless, some of my key points will rely on the version of utilitarianism developed by John Stuart Mill. For Mill, especially as his view is articulated in *On Liberty*, the goods we pursue must be understood in terms of individuals and their self-development, the process of a person exploring and developing his own character and personality, forming a plan of life out of those explorations, and ultimately acting on it, insofar as one's actions do not directly harm others without their consent. More extensive discussions of Mill's view will appear in relevant sections.

2 U.S. Constitution, Article 1, Section 8, Clause 8

Benkler in their criticisms of the increasing strength of copyright.

While seemingly straightforward, the Incentives Argument has been widely criticized in philosophical literature on copyright. In a recent book, noted intellectual property scholar Robert Merges joins with skeptics of utilitarian justifications of intellectual property. Like other scholars, Merges prefers Neo-Lockean labor-desert accounts, grounding intellectual property rights in the author's natural ownership claims over his creations, mediated by a Kantian emphasis on property rights as a means of providing individuals with an autonomous domain (Merges 2011, 13). Natural rights accounts are thought to avoid some of the problems classically associated with utilitarian arguments, such as vulnerability to empirical evidence and an inability to make sense of rights or duties morally prior to consequential considerations. In line with these criticism, Merges argues that a utilitarian about intellectual property simply cannot establish a sufficiently solid case that intellectual property rights provide enough aggregate benefit to justify their existence. Instead, Merges contends that one must look to the natural right to autonomy (and therefore property) as well as the invested labor of creators and innovators to justify intellectual property ownership (Merges 2011, 15).

Fortunately, many criticisms articulated by Merges and other opponents of the Incentives Argument can be answered by a strategic retreat to the version of utilitarianism found in the work of John Stuart Mill. I will argue that not only does a Millian account of the Incentives Argument prove less vulnerable to oft-cited criticisms, but also allows for a more robust account of how the audience benefits from a proliferation of creative works. With this more robust theoretical structure of the Incentives Argument in place, the criticisms of stronger copyright protection as articulated by Lessig and others can be grounded on the very foundation of

copyright. Mill's emphasis on the welfare of individuals rather than aggregates, as well as his assertion that all individuals need a private sphere, establishes what Merges relies on Kant and Locke to establish: that some private property rights will be part of any free society. Furthermore, Mill's focus on the importance of critical self-development allows for a deeper and richer analysis of how creative works benefit members of the audience as individuals and as a community, demonstrating sufficient reason to include intellectual property in any Mill-utilitarian political structure. Within a Millian framework, viewing the audience as mere *passive consumers* of media fails to take into account the impact of expressive acts on an individual's critical self-development. Instead, one must see members of the audience as *active participants* in the creation of meaning and the common culture. Construing the community that receives creative works as an *Active Audience* alters the landscape of copyright, and the Incentives Argument, making balancing the desires of creators and the desires of audience members a key priority.

A full account of intellectual property rights must describe the scope of the property rights based on balancing the interests of both sides. To make the argument clear, I will focus exclusively on the Incentives Argument as it applies to copyright, balancing the desires of the audience for unrestricted access to works with the desire of authors to profit from their creative labor. Some restrictions on access are necessary for the author to profit, but overly heavy restrictions inhibit the distribution of works and the audience's ability to realize desired benefits. A successful account of copyright must be able to address this *Author-Audience Balance*, explaining the grounds of the author's monopoly as well as the public's acceptance of that monopoly. I begin by offering a detailed account of the Incentives Argument, framed against Mill's utilitarianism. Criticisms commonly leveled against utilitarian justifications for copyright

are explained and answered in Section 3, following by some concluding remarks.

2 The Incentives-Based Model

Before considering common objections to utilitarian justifications for copyright, a more complete account of the Incentives Argument and an outline of an Incentives-Based Model should be considered. As a utilitarian system, grounded in consequentialism, specific features of a system may ultimately stand or fall on pragmatic considerations. While sensitivity to empirical data limits the specificity of this account of copyright, the Incentives Argument, combined with Millian utilitarianism, can provide a general outline of acceptable copyright policy. By making clear why the public has an interest in the proliferation of creative works, the Author-Audience Balance can be fully addressed. An audience will not (or at least should not) bestow intellectual property rights that might undermine the desired benefits of works. Likewise, creators will not be motivated by a system that bestows overly weak rights.

Creators seek to support themselves through their creative labor. Artists want to be paid for their art, authors for their writing, and inventors for their inventions. No utilitarian copyright system should prevent creators from securing their livelihood in this way. On the other hand, the audience's reasons for having an interest in the proliferation of works must not be thwarted by the system designed to stimulate production of those works. Outlining the audience's reasons and accounting for their importance within a Millian framework will occupy the following sections.

2.1 What the audience wants

To outline an Incentives-Based Model for copyright, the desired benefits of creative and innovative works must be explained. While there is certainly an audience for creative works,

sales figures for novels and a thriving community of literary critics do not lie, the public does not gain some obvious material benefit from such works beyond leisure. Nevertheless, when considered against the background of a Millian account of liberty and autonomy, certain key goods emerge from the interaction of author, audience and creative works. To understand these goods, one must first consider the components of liberty and the importance of individuality as articulated in Mill's *On Liberty*.

2.2 The Millian Background

In *On Liberty*, Mill provides a basic account of the liberty of citizens with respect to their fellows and the state. Generally, Mill supports liberty within the private sphere, including liberty of thought, speech, and self-regarding action. What is of most concern for describing the desired benefits of creative works for the audience is Mill's account of self-development, or the cultivation of the individual character. For Mill "it is the privilege and proper condition of a human being, arrived at the maturity of his faculties, to use and interpret experience in his own way" (Mill 2008, 74). Humans possess the faculties of individual reason and judgment, and Mill sees the use and development of those faculties as an important part of the human experience and as necessary for individual well-being. Mill is concerned that individuals be able to learn and discover which patterns are right for them and not slavishly follow the dictates of custom or society. No lifestyle choice, occupation, or hobby is ideal for all persons, so individuals must seek out what is best for themselves. Mill identifies a universal interest in the development of an individual into his or her own person, the creation of an autonomous agent. Otherwise, the person loses his chance at attaining happiness and satisfaction, and wastes his natural abilities. A person who allows others to determine his course of life "has no need of any other faculty than the

ape-like one of imitation” (Mill 2008, 75).

While the development of the individual character may be clearly beneficial for the individual, Mill also maintains that society as a whole benefits from the cultivation of strong characters. The proliferation of such characters in turn promotes diversity, “furnishing more abundant aliment to high thoughts and elevating feelings” (Mill 2008, 80-81). Mill emphasizes the role of such characters in bringing about the heights of civilization and leaving to the world enduring works of art, literature, and philosophy, as well as technological innovation (Mill 2008, 86). Even though Mill admits that truly exceptional individuals may always be a minority, they elevate their entire culture, benefiting others by showing them that a fully cultivated character is possible and demonstrating its desirability (Mill 2008, 84). Self-development is an individual pursuit, but one that produces remarkable benefits for the entire group. For these reasons, Mill argues that a liberal society should allow individuals the freedom to pursue their own self-development insofar as such pursuits do not interfere with or cause harm to others.

2.3 Creative Works and Self-Development

Regardless of the creator’s intentions with respect to the work, the audience members use creative works to further their self-development. To outline the Incentives-Based Model, one must account for how creative works contribute to self-development since the audience should not authorize intellectual property rights which block the expected benefits. The desired benefits can be understood as both social and personal. Creative works provide a means for communication in the social context and reflection in the personal context.

Creative works provide a means of communication between members of the audience by providing a shared language of symbols, narratives, and themes. To put it simply, “Capturing

and sharing content, of course, is what humans have done since the dawn of man. It is how we learn and communicate” (Lessig 2004, 184). Individuals can draw upon this shared language to communicate their own experiences and understand the experience of others. By putting one’s own experience into this shared language, one can also refer, implicitly or explicitly, to other creative works and the themes and values expressed in those works.

Perhaps more importantly, the enjoyment of creative works affords an individual ample opportunities for critical self-reflection, an important part of self-development. One cannot fully endorse oneself, one’s beliefs, motivations, or actions, without honest critical introspection, including comparison of one’s own experiences with those of others. Of course, one can also compare one’s own life experiences to those expressed in a creative work in order to evaluate one’s own experiences. For example, the novel *Infinite Jest* by the late David Foster Wallace depicts many characters in addiction recovery programs. Don Gately has been sober for nine months and works as a resident staffer in a halfway house at the beginning of the novel. Joelle Van Dyne is shown attempting to commit suicide by overdosing on freebase cocaine and is admitted to the same halfway house as a result. High school tennis player Hal Incadenza gives up cannabis due to an upcoming drug test and is shown struggling with his forced hiatus. The reader is implicitly invited to reflect on his own vices and habits and their place in his life. He or she can observe emotional reactions to the content of the work, sympathetic joy (at Gately’s success in overcoming his addiction), compassion (at Joelle Van Dyne’s suicide attempt), or disgust (at various graphic depictions of the miseries of addiction). Investigating the roots of these feelings can provide insights into the individual’s prejudices and biases.

A reader might also evaluate his intellectual reactions to a work, the underlying

assumptions made by the author or the anthropological, sociological, or psychological claims at stake in the work. While a minor character in *Infinite Jest*, Geoffrey Day, an academic admitted to the halfway house due to his own substance abuse, acts as a mouthpiece for criticism of the rationale and methodology employed by Alcoholics Anonymous and other twelve step programs. Geoffrey Day's outspoken ridicule of AA is in turn criticized by Don Gately who has been in the program longer than Day and has formed his own beliefs about why the program works. Finally, one might observe evaluative responses, seeing how the work interacts with ingrained moral intuitions and sensibilities. Creative works allow audience members to actively imagine *themselves* in the situations described by the work, to understand how they might react and how they value their imagined reactions. These opportunities for reflection afford a wealth of opportunities for facilitating self-understanding and self-development, allowing individuals the chance to better understand themselves and potentially to alter their course of life in response to those insights.

2.4 Implications for Copyright

With an understanding of the benefits the audience seeks from creative works, a basic outline of the Incentives Based Model can be provided. The following section will attempt to circumscribe a copyright policy informed by the attempt to maintain the Author-Audience Balance, accommodating both the author's desire to secure a living through creative labor, and the Active Audience's desires to creatively engage with the works of others. Given that copyright law's ability to satisfy some conditions may hinge on empirical proof, I will not give overly specific recommendations. What follows is merely an attempt to outline limit conditions whereby one can judge an intellectual property regime.

Beginning with the need to give creators incentives, copyright must make some allowance for creators to secure a living through their creative labor. In the current system, authors can contract with publishers to sell their works in exchange for royalties.³ Copyright law must recognize copyright on the part of the author such that the author, and the author alone, must authorize publication of the work. The author's exclusive ownership of the work is necessary because it makes the author the only source of authorized publication, meaning that authors can request payment in exchange for authorization.

Given the need for some basic sense of the author's ownership of his work, one might wonder, as some Neo-Lockeans do, whether copyright should be perpetual. After all, perpetual ownership of copyright, creating copyright family heirlooms, would be a substantial incentive for creators. An author's work might not simply secure his own living, but those of future generations of his family. In simple economic terms, the pay-off for the author seems greater than it would be in a system of limited copyright terms. On the other hand, current practice in the publishing industry leaves the majority of books entirely out of print within 28 years of publication (Boyle 2008, 9). Given that authors expect to profit for only five or ten years, current copyright terms may in fact be too long (Boyle 2008, 11). From these arguments, it might be best to leave the question of term limits for copyright an empirical matter, requiring a study of which system in fact results in more available creative works.

Nevertheless, some theoretical analysis can be brought to bear on the issue. There are two compatible ways of viewing the issue of limited terms for copyright. In the first place, perpetual copyrights undermine the function of copyrights as an incentive to produce creative

³ Much of the following discussion will be couched in terms of authors publishing novels, but these points should apply, *mutatis mutandis* to other media.

works. Copyright, understood according to the Incentives Argument, is not simply a *reward* for having produced works; it should also serve as an *incentive* to produce creative works. In the language of taxation theory, one could say that limited copyright terms have an income effect; limited terms make the author more likely to produce and publish further works (Murphy and Nagel 2002, 22). The economic success of a work informs the author about potential demand for future work. For the bestselling novel, the author has reason to believe that his future work will be successful, so investing his time writing another novel would be worthwhile with respect to securing his living in the future. While copyright does in fact reward an author for past works, the reward is not the sole intended effect. If copyright were perpetual, one would observe a contrary substitution effect in which the authors were less likely to invest in future work than to concentrate on marketing (and reaping the rewards of) a successful work (Murphy and Nagel 2002, 22). A bestselling author may decide to write more, or may not; in either case, he can rely on receiving revenue from the one work, so he has no reason to prefer writing to leisure. Perpetual copyright serves as no more than a reward; the audience's purchases would be a mere "thank you" addressed to their benefactor, perhaps with a request to produce more, but offering no concrete reason to do so. Limited copyright terms preserves the sense of providing an incentive to produce more works, a sense that would be lost under a system of perpetual copyrights.

In addition to preserving copyright as an incentive, one should consider the ways in which the audience benefits from limited copyright terms. Works that have entered the public domain become less expensive because there is no need to pay the author royalties. If someone cannot afford to own work when it is newly published, he is likely to be able to afford a copy

once it enters the public domain. Organizations like Project Gutenberg⁴ attempt to make digital copies of public domain works available online at no cost, further widening distribution. While a limited monopoly may be necessary to provide creators with incentives, a perpetual monopoly maintains a narrow distribution of works to the audience.

In general, egalitarian access to creative works, or at least as close to egalitarian as possible, should be another priority for an intellectual property system. As discussed above, members of the audience benefit from creative works because creative works assist critical self-development. If access to creative works is a means to happiness, agents have a right to it according to Mill's argument in *Utilitarianism*. "The equal claim of everybody to happiness...involves an equal claim to all the means of happiness," (Mill 1998, 105). The liberty to form one's own views and express one's own opinions must be distributed to all citizens in a Millian liberal democracy in the interest of creating opportunities for critical self-development. After describing the liberties associated with self-regarding action, including self-development, Mill claims "no society in which these liberties are not, on the whole respected, is free...and none is completely free in which they do not exist absolute and unqualified" (Mill 2008, 17). If opportunities for self-development are poorly distributed, the benefits of that critical self-development, for the individual and for society at large, will be stifled. Mill is well-aware that truly original, innovative characters are rare, but "it is necessary to preserve the soil in which they grow. Genius can only breathe freely in an *atmosphere* of freedom" (Mill 2008, 83). Restricting access to creative works to only an elite few, whether by government mandate or economics, is not an acceptable consequence for Mill. All individuals should have the chance to

4 See http://www.gutenberg.org/wiki/Main_Page

engage in critical self-development because the development of a strong, autonomous, rational agent is a universal, vital interest for all individuals.

In the current intellectual property system, the doctrine of first sale facilitates a wide distribution of creative works. First sale allows the resale, loan, or gift of a copy of a work, a novel for example, after the original sale. The existence of used book stores and lending libraries rely on first sale. Secondhand retailers and libraries both serve to distribute creative works to the economically less well-off, secondhand retailers by offering their wares for a lower price and libraries by lending works at no charge. Without first sale, these institutions might be eliminated, limiting the audience's access to creative works. Even current practices in releasing electronic versions of books has undermined first sale through technology. Electronic books ("ebooks") are sold with Digital Rights Management software, often preventing users from lending their ebooks as they do with physical books.⁵ The same DRM software also completely circumvents the secondhand book market by preventing the transfer of the ebook from one user to another. Many software licenses circumvent first sale by redefining the economic transaction. Instead of purchasing software on CD, consumers purchase single-user licenses for the software, legally preventing consumers from reselling or even giving away the software to others. These attempts to circumvent first sale inhibit audience access to works and may endanger the preservation or archiving of creative works.

There is an understandable fear that the free redistribution of digital files may

5 Users of the "nook," an ebook reader released by Barnes and Noble, do enjoy the "LendMe" feature which allows a user to send a ebook to another user. The loaned book becomes unavailable to the original user for the duration of the loan, set at two weeks by the software. While the "LendMe" feature mirrors almost precisely lending a physical book, some publishers surprisingly refuse to license their works to accommodate this feature, potentially indicating a discomfort with first sale in the publishing industry.

substantially harm commercial sales. Before the rise of digital distribution, first sale-type redistributions were always limited to copies that had been sold. Digital files, on the other hand, can be copied without loss, so redistribution is potentially unlimited. On the other hand, digital distribution of works has the potential to eliminate many traditional intermediaries between author and audience. One would expect that the ease of creating and releasing a finished product without printing copies, transporting them to “brick-and-mortar” locations, and publicizing their availability to lower the cost of producing a work, and thereby lower the price for the audience. It may be the case that the lowered price point itself replaces the secondary market in delivering goods to the less socio-economically advantaged. As such, there would be less incentive on the part of the audience to seek out digital redistributions, as long as content providers make securing digital works more simple and less expensive than redistributed works. In that environment, digital first sale may become an irrelevant issue, as anyone who wants a work can afford access to it, or non-commercial redistributions may be tolerated because there would be no significant market impact. The audience simply cannot realize the benefits of creative works without access to them, so copyright law grounded in Millian concerns about critical self-development should support first sale as a scheme to facilitate the wide distribution of creative works, including distribution to the economically disadvantaged.

Finally, the ways in which the audience benefits from proliferation of creative works require creative engagement with the works. Consuming a work is necessary to enjoying it, but so is discussion among members of the audience, reference to influential works in new works, and even parody. A novel which is merely read has no benefit to the reader; the reader must at least reflect on the novel, its themes, characters, and events. Without the ability to creatively

interact with a work, the Active Audience cannot employ the shared language of mutually understood symbols, themes, and narratives. In copyright law, fair use is supposed to preserve public access to this shared language. Creative works play a unique role; by forming the basis of (and expanding) the shared language, creative works transform a culture, providing new ways of addressing common concerns. Creative works have always served this function; Greek drama and epic poetry draw heavily on mythological figures in order to tell or retell stories, highlighting themes held to be important by the author. A copyright system that prevents the Active Audience from interacting with creative works, creating remixes and parodies and referencing works considered seminal effectively handicaps the audience in using creative works to further their self-development.

In the current intellectual property regime, many of the outlined uses fall under fair use rules that govern exceptions to copyright for the purposes of education, commentary, or review. In particular, fair use protects the reproduction or distribution of a copyrighted work for the purpose of preserving freedom of expression (Merges 2006, 506). Without fair use, a book reviewer would need the copyright holders' permission to quote reviewed books, scholars would need copyright holders' permission to quote source material, and parodists would need copyright holders' permission to criticize a work. All of these forms of creative engagement are made possible by fair use. Nevertheless, some copyright holders have sought to diminish the domain of fair use. Lawrence Lessig describes three such cases. An artist sued the makers of the film *12 Monkeys* because a chair used in the movie was similar to his own design. Release of *The Devil's Advocate* was held up due to a rights claim on a sculpture used in the film. The architect who designed a courtyard sued the makers of *Batman Forever* because of a chase scene filmed in the

courtyard (Lessig 2001, 4). Each case was settled by paying the plaintiff, and in the case of *The Devil's Advocate* editing the film itself. Current practices in intellectual property demand extensive clearing of rights before even a single character can be depicted in a derivative work. *The League of Extraordinary Gentlemen* comic book series (and film adaptation of the same name) brings together a group of heroes from 19th Century adventure novels to comprise a team of secret government operatives. If the relevant novels were not in the public domain, the authors may not have been able to reflect on how these characters might have been affected by their well-known adventures. If such a trend continues, the audience may find itself with works that are legally isolated from contributing to the ongoing cultural dialogue. Within the framework outlined here, some standards of fair use must prevail.

2.5 A Closer Look at Fair Use

Fair use is key to maintaining the value of creative works for the audience. Robert Merges argues that the many critics of strong intellectual property rights advocate a system too heavily balanced on the side of the audience or the public (Merges 2011, 25). Nevertheless, many Neo-Lockean scholars, reliant on a labor-desert account of property rights *simpliciter*, tend to focus too heavily on the creator, his rights, and avoiding harm to those rights. For instance, Adam Moore argues “that fair use should be contractual between the buyers and sellers of intellectual property and that there should be no mandatory government legislated policy of fair use,” (Moore 2004, 161). Moore construes fair use as a violation of the author's natural property right as it is a loss of the authors control over his work. As such, many critics of the current intellectual property system in fact advocate a *more balanced* approach, one that respects both creators and audience. Some Neo-Lockean intellectual property scholars, notably Herman Tavani, Hugh

Breakey, and Robert Merges among others, agree that positions like that of Moore push the limits of copyright too far. What unites these scholars, and separates them from Moore, is a strong reading of Locke's Proviso. Locke's account of property emphasizes the individual's natural right of self-ownership. When a self-owning agent labors to create something new, the product is naturally owned by the creator because the creator has vested something of himself (namely his labor) into the product. This natural principle of appropriation is limited in two ways; an agent may not claim more than he can use (the proviso against spoilage), and his claims must not make it impossible for other agents to engage in the same labor-appropriation activity (Locke Ch 5, Sec. 27). Lockean moderates about copyright read the Proviso as a strict requirement, such that fair use and sunsets on copyright terms must be maintained to uphold the Proviso.⁶ Adam Moore, and other strong-copyright advocates like James Child, instead take a much weaker reading of Locke's Proviso, typically inspired by Nozick's libertarian interpretation of Locke. According to weaker readings of the Proviso, the limits Locke places on appropriation are more easily met in civil society (as opposed to the state of nature where Locke originally contextualizes his theory). Child in particular argues that the intangible and infinite field of potential ideas ensures that Locke's Proviso will always be satisfied in intellectual property cases (Child 1990, 588). In complex economies, property ownership may become concentrated, but that concentration allows for more sophisticated institutions that create opportunities to offset the difficulty (or impossibility) of original appropriation (Moore 2004, 110). On these weak readings of the Proviso, the rights of owners are cardinal because property owners serve as lynchpins to the rest

6 See Herman Tavani, 2005 "Locke, Intellectual Property Rights and the Information Commons" in *Ethics and Information Technology* 7, pp 87-97, as well as Hugh Breakey's extended discussion in "Natural Intellectual Property Rights and the Public Domain," *The Modern Law Review* 73, no. 2: 208-39.

of the economy. For copyright, the libertarian reading of the Proviso diminishes the concerns of the audience because the audience's benefit relies directly on protecting the ownership rights of creators. In particular, Neo-Lockeans tend to address the audience as mere consumers of goods, failing to consider the role of the Active Audience as receivers and creators of media.

Unfortunately, too much focus on the author's rights often neglects the role of the audience, the audience's desires for innovation and creativity, and the social benefits provided by the proliferation of the creative and technological innovation, especially those that can be inhibited by overly strong ownership rights. As such, Neo-Lockeans miss something crucial about the nature of fair use and the ways in which fair use protects the audience's interests.

Fair use creates a domain of free access to otherwise protected works. It allows the audience to reproduce a work for various purposes, such as education, review, commentary, or even parody. These allowances are restricted to non-commercial purposes, small portions of the original text, or uses which will not directly dilute the market value of the original work. Fair use is structured to allow for what would otherwise be infringements of copyright, as long as the use is justified on the right grounds or so inconsequential as to not harm the author's ability to profit from his work. Within these limits, fair use allows for a degree of public access to the work. Avoiding harm to the author's rights is an important limitation of fair use, the negative justification, but fair use also accommodates the Active Audience's desire to creatively engage with works. Beyond merely consuming a work, readers need to be free to discuss the work, read and write reviews and commentaries to disseminate analyses and discussions of the work, and even parody the work, humorously commenting on the work, author, and cultural context. All of these activities are protected under fair use; more than that, they are the *reasons* for fair use.

Without the ability to engage actively with creative works, the works themselves have less value to the audience. Reflection on and discussion of creative works is simply a large portion of what makes creative works valuable and desirable. The audience wants to hear various commentaries on their shared culture, foreign cultures, and particular situations which may be either familiar or alien to the reader. If the Active Audience were reduced to a mere consuming audience, not allowed to creatively engage with works, audience members would have no way of comparing their own experience of the work to that of others, and many of those opportunities for reflection and understanding would be lost. As social creatures, we create our culture and society through our interactions with one another. Creative works serve as a medium for interaction, allowing an author to connect with an audience, and members of the audience to connect with one another. Fair use allows extended engagement and interaction with a work without depriving the author of the incentive to release the work to the public. Consider the case of *Walt Disney Productions vs Air Pirates* in which Disney sued the creators of a comic strip depicting Mickey and Minnie Mouse using illegal drugs. The Ninth Circuit court ruled that the real target of the parody was society, so the Air Pirates could not invoke fair use to defend their parody. Nevertheless, as Jeremy Waldron observes, the use of Disney characters brought the comic into special focus because Mickey and Minnie Mouse are well-recognized cultural symbols of cleanliness and innocence (Waldron 1992-1993, 886). Without the allowances created by fair use, the value of works for the audience decreases, removing the public incentive to establish a protected domain of intellectual property rights. These reasons form a positive justification for fair use, a reason to provide the Active Audience with rights to access and reproduce the work in limited ways to facilitate further enjoyment of and sophisticated engagement with a work without

harming the author's ability to secure a living from his creative labor.

3 Review of Proposed Problems

The strength of the Incentives Argument when grounded in Mill's more sophisticated utilitarianism can be easily seen in responses to common criticisms. The following sections will address issues that have been presented as problems for utilitarian justifications for copyright. Insufficient reason to think that private intellectual property systems are the most effective way to provide incentives for creators is cited as especially fatal to the Incentives Argument (Moore 2011). In particular, Abraham Drassinower argues that utilitarian justifications do not provide any robust justification for the public domain. More subtly problematic is the charge that utilitarian justifications establish property rights in the author as a matter of utility, not as resulting from the author's natural right in his creation. These criticisms will be addressed from standpoint of the Millian Incentives-Based model outlined above.

3.1 Skepticism about Utilitarian Accounts of Property

Critics of utilitarianism often argue that individual interests are inadequately protected by utilitarian accounts of property. Property interests are often highlighted specifically because an individual's property claims may be mitigated or abridged if the utilitarian calculus determines that more net benefit would be gained through seizure and redistribution of an agent's property. As such, utilitarianism is not understood to protect the autonomy of individual agents and their holdings because the agent's interest is secondary to the aggregated sum of utility. Even worse, utilitarianism is not understood to provide strong justification for property, or any institution, beyond social utility. An entire property system could fall if that system were found to diminish overall utility rather than increase it. Merges echoes this argument in his rejection of

utilitarian justifications of intellectual property. His central worry is that there is no way to determine the optimal amount of social progress as represented by a quantity of intellectual works. As such, there is no way to determine whether intellectual property law is accomplishing its utilitarian goal (Merges 2011, 6). Furthermore, Merges emphasizes the importance of autonomy in the Kantian tradition and argues that Lockean accounts of property, focusing on self-ownership, do a much better job of respecting the autonomy of individual agents. Unfortunately, Merges does not consider Mill's utilitarianism in particular.

Mill departs from classical utilitarianism in that he rejects a simple aggregating hedonic calculus. More specifically, Mill argues for an understanding of rights justified by an appeal to general utility (Mill 1998, 98). Mill identifies security in one's person and possessions as a vital interest "since nothing but the gratification of the instant could be of any worth to us, if we could be deprived of everything the next instant by whoever was momentarily stronger than ourselves," (Mill 1998, 98). Security is impossible with existing social institutions that function to preserve the security of each individual. A system of rights that clearly defines the domain of individual freedoms and corollary obligations, along with a supporting system of just institutions, satisfies that requirement. As such, a robust system of rights is necessary for the maximization of utility. Furthermore, the interests of one individual cannot be sacrificed for the benefit of another agent because any society that did so would fail to provide its members with security in their persons or possessions. As such, recognizing the existence of just institutions is itself a source of pleasure in that agents know they live in a society where they can enjoy security in what they have (Riley 2010, 117).

Likewise, Mill identifies liberty in the private sphere as a vital interest, one that

cannot be sacrificed or traded off between agents in a liberal society (Mill 2008, 15). For Mill, the private sphere is the domain of self-regarding action, acts that affect only the agent and those who consent to be affected by the agent directly (Mill 2008, 17). If there is a system or an institution of private ownership, the agent knows that as long as his actions take place within his property or only affects objects/property he owns, he is within the self-regarding sphere. As such, property rights serve as an expedient means to clarify the boundaries of the private sphere. While Mill's arguments do not establish a natural right to property, they do establish that some kind of private property system will be included in a liberal society because all members have the same interest in a private sphere, and that interest can be well-served by a system of private property. Finally, private property systems, including intellectual property systems, assist in securing a vital interest universal to humankind, the need to secure a living. The promotion of social progress is at least in part accomplished by creating the means for creative individuals to make a living through their creative work. The main benefit, however, is the provision of an opportunity to live as a professional creator, author, inventor, or musician. Despite his emphasis on autonomy, Merges does not address the importance of that benefit in his account.

3.2 Right to Credit

Lawrence Becker argues that an author deserves to own his creations because they are a product of his labor. The author's creative contribution produces a unique work, something that could not have been conceived by anyone else, so it would seem bizarre if the author were not assumed to be the owner and rights-holder of her own creative products (Becker 1992-1993, 614). Lockean or Neo-Lockean justifications for intellectual property need to invoke little else than the author's creative labor to ground intellectual property right. One obvious appeal of these

justifications is that recognition of an intuitive fact, the author's ownership of his work. For utilitarian justifications, one might expect the author's causal connection with his work to justify the author's ownership of his creative products. Nevertheless, D.B. Resnick wonders how the utilitarian can provide robust justification for preserving the author's credit. Resnick notes that in current systems, when an author transfers his copyright to a publisher, he still retains the right to be credited as the author of the work (Resnick 2003, 325). One might imagine a copyright system where the author can contract away his right to intellectual credit, and it may be the case that "utility is best served by allowing those who purchase copyrights from authors to negotiate for rights to intellectual credit" (Resnick 2003, 325). A simple preference-satisfaction utilitarian may not have a reply that does not rest on some empirically defeasible premise, but Mill has a scheme of more sophisticated replies to such issues. Resnick himself notes that Mill distinguishes between rules of expediency and rules of justice, the latter being more absolute. (Resnick 2003, 324). For Mill, rules of justice are ultimately grounded in seeking security because without security, the benefits of any other pursuit are too ephemeral (Mill 1998, 98). Property rights are connected to security, and therefore justice, for the same reasons; property rules provide security in an agent's knowing what rightfully belongs to him and what he can rightfully employ for his own purposes.

While none of these considerations aim directly at preserving an author's right to receive credit for his works, sacrificing the author's right to credit can be understood as matter of security, and therefore not revisable for reasons of utility alone. Imagine the counterfactual situation, in which an author contracted away his right to be credited for a work. Assume that the author still receives royalties paid by his publisher, but the publisher lists the work as that of an

established author. The original author's royalties may be greater in such a case because the audience is more likely to buy a book by a known name, but the original author loses the public recognition he would otherwise gain. He will not be able to rely on his reputation as an author to secure speaking engagements, teaching positions, or even better publishing deals. To these material consequences, one could add the damage to the author's self-esteem at not being the object of public recognition. Enjoying the status of celebrated author is impossible if no one knows whom to celebrate.⁷ The same could be said if the credited author is no more than pen name, perhaps one of a small number used by the publisher to differentiate between genres.⁸ Sacrificing one's right to receive credit for one's work erodes the security one might have in one's reputation or the possibility of achieving notoriety. As such, the Millian utilitarian would be committed to maintaining the natural connection between an author and his work. Very similar reasons ground maintaining the natural connection between a craftsman and his products. If a silversmith's teapots became public domain as soon as he finished them, he would not be able to secure his living through his labor. Perhaps it would maximize utility in some sense if all handmade products immediately went up for sale, the proceeds to enter a public fund, but the security of all agents in their labor and possessions would be eroded.

For Mill, all of these consequences are unacceptable, and Resnick fails to appreciate

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- 7 Some might argue that some authors may prefer to sidestep the limelight. If such a preference is found to dominate, then forfeiting the right to receive credit may not be a significant sacrifice. Noted reclusive authors like Thomas Pynchon and J.D. Salinger are ironically visible examples of those who prefer to remain out of the public eye. Such examples show that receiving credit for works may be a mixed blessing for some authors. When compared with authors who seek out acclaim and seem to enjoy the spotlight, one can see the concerns over fame and public recognition are complex and not readily written off as a good or bad.
- 8 Of course, an author may elect to use a pen in the current system, but he does so by choice and maintains the right to expose himself as author whenever he chooses if he wants the benefits of recognition.

the importance of rules of justice for Mill, despite having himself noted that “rules of justice are more absolute than mere rules of expediency because they protect individual liberties and interests” (Resnick 2003, 324). While he may be correct that a pure utility-maximizing utilitarian might have difficulty making sense of an author’s right to credit for his work, Resnick fails to apply Mill’s more sophisticated theoretical apparatus. Ultimately, for Mill, these rights do maximize utility, but one cannot understand utility as a pure aggregate. Mill is clear to maintain that individuals must be secure in their persons and possessions, and as such, a harm to one agent cannot be justified by a benefit to another (Mill 1998, 98) The author’s right to credit must be preserved because receiving credit for his work is necessary to secure all the benefits, both material and social, of releasing his work to the public.

3.3 The Public Domain as Market Failure

Given the Incentives-Based Model presented here, one might be surprised at Abraham Drassinower's argument that utilitarian justifications for copyright fails to provide any robust justification for the public domain. Drassinower identifies a problem with the view of copyright as a balance between authors and audience. If a work is “an instance of commodified value,” the public domain must be seen as “a decrease in the price that the public must pay for the production of works of authorship,” (Drassinower 2011, 1879). As such, Drassinower construes the utilitarian public domain as little more than “an entitlement to values for which payment is minimized,” (Drassinower 2011, 1879). The problem as Drassinower sees it lies in the very notion that copyright law should balance the interests of the author in profiting from creative works with the interests of the audience in accessing those works. Drassinower argues that if this balance is taken seriously, the public domain is nothing other than a way to distribute works to

more people without compensating the author for his labor. Interestingly, Drassinower's argument does not appear to be motivated by desiring more robust ability for authors to profit, but by a respect for the inherent value of the public domain. To be exact, Drassinower claims that “instrumentalism can offer no concept of the necessary role of the public domain in copyright law,” (Drassinower 2011, 1880). In other words, for the utilitarian the public domain does nothing more or less than solve a distributive problem, the public interest in access to works regardless of socio-economic standing. There is no commitment to the public domain itself, so if that distributive justice problem could be solved in a more efficient manner, the public domain would be unimportant to the utilitarian. “The point to grasp is that the instrumentalist commitment to the *public interest* is not a commitment to the *public domain*,” (Drassinower 2011, 1881 emphasis in original).

Drassinower's arguments are especially striking in that he reduces the role of the public domain to a distributive function. The Incentives-Based Model presented here identifies a wealth of value in the public domain in addition to distributive justice. As argued above, limited terms for copyright preserves the sense of copyright as an incentive rather than a reward. Otherwise, copyright terms would have no significant income effect, and the audience risks losing potential future works from extremely popular creators. Furthermore, all of the freedoms that are protected by fair use are expanded for public domain works. When a work lapses into the public domain, the audience gains far greater latitude in creating derivative works, parodies, and satires. As such, the public interest in fair use applies *a fortiori* to the public domain, and there is sufficient reason to think that those interests would remain tied just because the domain of freedom granted by fair use will remain more restricted than that granted by the public domain.

3.4 Can We Do Better?

Utilitarianism is a form of consequentialist thought. As such, utilitarians claim that we must look to the results or outcomes of moral or political views to evaluate them. As such, utilitarian proposals are often vulnerable to empirical refutation. If the utilitarian justification for copyright relies on those rights actually promoting innovation and progress in the arts and sciences, then one must know whether copyright law actually achieve this goal. Furthermore, if a given system works, but not as well as another system, the utilitarian justification for the given system weakens to the degree that it is less successful. The utilitarian must seemingly respond to such critiques by agreement. Individual intellectual property rights may not be an ideal system with respect to spurring on innovation. More efficient systems may be possible though currently unrealized or untested. Of course, the utilitarian must be prepared to revise or alter the preferred system in light of evidence in service to a commitment to actually maximizing utility.

Responsiveness to empirical data is a virtue of utilitarian thought. Adherence to a view which flies in the face of evidence is irrational, and political and social organizations should not be irrational. Pragmatic problems, such as providing incentives for innovation and promoting the proliferation of new technological and artistic works, should be approached with an eye toward achieving desired ends. New technologies and changing socio-cultural trends may significantly alter the ability of a given system to fulfill its intended function, and our guiding rationale should be flexible enough to accommodate such changes. Our systems should be open to revision as required. Otherwise, one runs the risk of holding on to values or systems that are simply no longer relevant.

Edwin Hettinger proposes just such a problem for the Incentives Argument. Perhaps

it is the case, Hettinger proposes, that government grants may provide better incentives for research and innovation than the patent system (Hettinger 1989, 49). Under such a system, the government would fund all research, possibly through research institutions like universities, and the results of all research would be public domain. While Hettinger's argument focuses on patent, a similar case could be made for copyright. It might be the case that state-sponsored artists and authors who release their work directly to the public domain would provide more creative works for public consumption and creative engagement. Even if Hettinger's proposal is not entirely ideal, one can still ask whether a different system might more efficiently stimulate creativity than the current copyright system.

There are two main concerns with the modified Hettinger proposal. In the first place, one should not discount the value of maintaining multiple systems, perhaps a mixture of public and private institutions and incentives, for promoting creativity in the arts would best benefit creators and audience alike. Federally funded institutions such as the National Endowment for the Arts exists alongside a copyright system that serves individual innovators and creators. There may be aspects of both systems which are not ideal, and the utilitarian would (or at least should) prefer to adjust the system in favor of more efficient operation or more robust respect for individual liberties or just to correct unforeseen problems. Finally, reserving creativity to only government-funded artists (and perhaps the independently wealthy) would have the undesirable effect of limiting the scope of creative expression. Free expression and discussion would be severely diminished, a result that Yochai Benkler sees as entirely antithetical to the purpose of copyright (Benkler 1999, 395). Even the current copyright system that favors strong owners' rights has this effect, as evidenced in the discussion of fair use above.

4 Concluding Remarks

A considered review of the Incentives Argument for Intellectual Property rights shows that utilitarian justifications are more fruitful than one might expect given recent scholarship. A survey of key writing against utilitarian arguments finds no convincing reasons to abandon the Incentives Argument in favor of other justificatory accounts. A Millian utilitarian argument that frames copyright and patent as incentives to spur on innovation in the arts and sciences allows for a robust account of intellectual property rights. Intellectual property rights must be sufficiently strong to motivate creators and innovators to release their work, but weak enough to allow the Active Audience to enjoy the expected benefits of those works. A detailed examination of creative works shows that the audience benefits from these works in the course of realizing their self-development and the cultivation of their individual characters, key Millian values. While the Incentives-Based Model for copyrights and patents must pay attention to empirical outcomes to determine the effectiveness of the system, one can enumerate key features, the creator's ownership of his work, egalitarian access to works, and ability to creatively incorporate works into personal projects, which an intellectual property regime must uphold to remain in line with the Millian account. These key features outline a very general notion of a Millian-ideal copyright/patent system suitable to form the groundwork of future intellectual property scholarship within philosophy of law and jurisprudence.

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