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TUSHNET REVIEW

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In her article, *Economies of Desire: Fair Use and Marketplace Assumptions*, Rebecca Tushnet rejects the economic approach to copyright because it relies exclusively on “incentives” to explain the emergence of creative works.<sup>1</sup> She argues that, to the contrary, much creation is the result of internally-driven forces that do not square with the economic approach, which relies on external, typically monetary rewards.<sup>2</sup> In this brief Comment, I will evaluate the article’s central claim that the economic approach to creativity is fundamentally misguided in its exclusive reliance on an incentives model.

I also consider an important question not taken up in Tushnet’s article, which is whether the force of her argument applies to an economic approach across the board or is instead limited to the conventional account accurately set out in the article. This question is worth asking because, in other areas of scholarly inquiry, the conventional economic approach—which elsewhere I have labeled the “first-generation approach”—has been substantially replaced by a more sophisticated model that incorporates social scientists’

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1. Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009).

2. *Id.* at 516 (“Desire, love, pleasure: these are concepts we need to theorize creatively, even if the law has difficulty accommodating them.”).

findings that human motivation has both moral and irrational elements that cannot be explained under the first-generation's assumption of human motivation as fundamentally and narrowly self-interested.<sup>3</sup> While Tushnet's criticisms are well taken regarding the first-generation economic approach, I argue that this "second-generation economic approach" is not similarly vulnerable.<sup>4</sup> To the contrary, the second-generation approach welcomes and seeks to incorporate some of her key insights.

### INDUCED CREATIVITY: THE ROLE OF ECONOMIC INCENTIVES

Tushnet quotes a number of sources to substantiate her argument. Her most poignant language comes from the Supreme Court in *Mazer v. Stein*: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"<sup>5</sup> It is unusual for the Supreme Court to so explicitly read a particular philosophical approach into the U.S. Constitution. Tushnet also

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3. STEVEN HETCHER, NORMS IN A WIRED WORLD 100 (2004) ("The assumption that people are narrowly self interested must be distinguished from the assumption that people are instrumentally rational, which is a weaker assumption.... [Some] rational choice theorists ... are willing to grant the real though nevertheless limited existence of genuinely moral motivation.") (distinguishing "first-generation" or "Hobbesian" from "second-generation" or "Humean" approaches to rational choice theory); see also ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 6-8 (1991) (rejecting the conventional economic approach for failing to account for the central causal role of informal norms). This question is also significant because the economic approach arguably has a special role in copyright law due to the status conferred on this approach in light of Article I, Section 8 of the Constitution. More than in other areas of the law, it matters that copyright works with the most defensible economic approach, given that copyright law may be saddled with this approach for constitutional perpetuity.

4. Note that establishing this conclusion does not establish the broader claim that the second-generation approach is therefore preferable across the board—say in comparison to a noneconomic approach or an approach that combines consequentialist and nonconsequentialist components—but only that this approach is preferable to the first-generation approach for the unassailable reason that it is open to one less set of objections than its forerunner.

5. Tushnet, *supra* note 1, at 515 (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)); see also *Harper & Row Pubs., Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

quotes from the Court's assertion in *Campbell v. Acuff-Rose* that "[n]o man but a blockhead ever wrote, except for money."<sup>6</sup>

To examine the issue in a scholarly context, Tushnet discusses Ninth Circuit Judge Alex Kozinski's statement that, "the best way to encourage the creation of valuable works is to let authors capture the market value of those works."<sup>7</sup> Tushnet also identifies Robert Merges as supporting the view that the current availability of free web content would be more effectively incentivized if methods of creating ownership in this content were made available.<sup>8</sup>

Tushnet argues persuasively that the economic assumption is so firmly ingrained that even scholars who explicitly discuss contexts in which motivation is nonmonetary nevertheless conceptualize the content production in terms of incentives.<sup>9</sup> As she aptly notes, incentives are still the name of the game.<sup>10</sup> Further showing that those who hold the conventional incentives-based view represent varying viewpoints in the high-protectionist/low-protectionist debate, she cites well-known low-protectionist James Boyle.<sup>11</sup> I would add the following quotation from *Remix*, Larry Lessig's recent

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6. Tushnet, *supra* note 1, at 517 (quoting *Campbell v. Acuff-Rose*, 510 U.S. 569, 584 (1994)). As further evidence that the Supreme Court is in the grips of the conventional economic account, Tushnet quotes the Court in *Eldred v. Ashcroft*: "[C]opyright law serves public ends by providing individuals with an incentive to pursue private ones." *Id.* (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003)).

7. *Id.* (quoting Alex Kozinski & Christopher Newman, *What's So Fair about Fair Use?*, 46 J. COPYRIGHT SOC'Y USA 513, 524 (1999)). Tushnet also points to William Landes and Richard Posner as the scholars who introduced the conventional approach. *Id.* n.7 (citing William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 331-32 (1989)). It is a flagrant anachronism for Landes and Posner to read a Chicago School law and economics approach into the Constitution, as *Mazer v. Stein* was decided nearly a quarter century before their seminal work on copyright, and the words of the Founders, of course, were penned long before that.

8. Merges states that there is no reason to think that motivations for amateurs' creation of potentially copyrightable online content differ from those in a more typical situation where property ownership serves as the best means for the creator to capture the value of his or her work. *Id.* at 518-19. (citing Robert P. Merges, *Locke for the Masses: Property Rights and the Products of Collective Creativity*, 36 HOFSTRA L. REV. 1179, 1880, 1882 (2008)).

9. Tushnet quotes Tom Bell explaining the production of user-generated content as resulting from "nonmonetary incentives." *Id.* at 520 (citing Tom W. Bell, *The Specter of Copyism v. Blockhead Authors: How User-Generated Content Affects Copyright Policy*, 10 VAND. J. ENT. & TECH. L. 841, 851 (2008)).

10. *Id.*

11. *Id.* (citing JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 189 (2008)).

book: “Artists and authors need incentives to create.”<sup>12</sup> We see that, while Bell is generally a firmer believer in strong IP rights than is Lessig,<sup>13</sup> they agree in espousing the conventional incentive-based model for explaining the production of creative works.

#### TUSHNET’S CRITIQUE

A key element of Tushnet’s argument against the economic account is that it fails to explain or even acknowledge the existence of motivations for creativity that are not formed in response to economic incentives. Tushnet reaches a contrary conclusion about what motivates creativity by looking at what creative people say about their motives. The important consideration she explores is that people are, in important part, intrinsically creative; they create out of desires and motives that are internal to them, because of the sort of people they are, rather than in response to external incentives. She argues, for example, that the economic account cannot explain why creators of classical music do not all switch over to producing the sorts of works in greatest popular demand.<sup>14</sup> After all, on the economic account, preferences to create a certain form of music are an exogenous variable.<sup>15</sup> Presumably her point is that if

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12. See LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY, at xix (2008).

13. In common parlance, Bell is a high-protectionist while Lessig is a low-protectionist. Compare LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 8-9 (2004), and Lawrence Lessig, “Protectionism Will Kill Recovery!”, WIRED, May 2004, available at [http://www.wired.com/wired/archive/12.05/view.html?pg=5?tw=wn\\_tophead\\_7](http://www.wired.com/wired/archive/12.05/view.html?pg=5?tw=wn_tophead_7), with TOM W. BELL, INTELLECTUAL PRIVILEGE: A LIBERTARIAN VIEW OF COPYRIGHT 17-20 (forthcoming 2009).

14. Tushnet, *supra* note 1, at 521 n.21 (“[T]he fame-seeking story has difficulty explaining why classical composers don’t all switch over to rap or country music.”).

15. *Id.* at 520 n.17. Tushnet notes that “[t]he conventional theory treats capacities and motivations to create as exogenous variables—tastes of preferences, which affect individual responsiveness to copyright’s incentives, but are otherwise not amenable to analysis.” *Id.* at 520. Tushnet notes that the economic approach does not try to explain preference formation. She writes, “One reason that economic narratives are so limited is that they cannot tell us how preferences to create are shaped, nourished, or crushed.” *Id.* at 516. Tushnet also does not seek to explain how desires to create are shaped or nourished other than to note that they result from the internal motivations of the creators. Elsewhere, I have argued that one way to nourish desirable preference formation in this regard is through norm entrepreneurship, in particular, through the promotion of the virtues and legality, via fair use, of amateur remix. See generally Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix*

all these creators cared about was fame or financial remuneration, they simply would gravitate toward the most lucrative and publically accessible forms of music. Tushnet takes the fact that they do not do so as evidence that these artists are motivated by their attachment to, love of, and desire to do their art and to share and contribute, not to choose to create in response to the best economic option available.

Building on her previous important work on the topic, Tushnet discusses fan fiction in this light.<sup>16</sup> Fan fiction is a particularly compelling example of her thesis because amateurs overwhelmingly are creating outside of a commercial context and thus clearly are not creating in response to financial incentives.<sup>17</sup> Moreover, they create in a context in which norms exist against seeking financial gain.<sup>18</sup>

Tushnet supports her arguments about the diverse motives of creators with an informal study of what creators themselves say about the reasons they create. The study ranges in its coverage from creators of works of amateur fan fiction to creators of more conventional commercial works of the Stephen King variety. One of Tushnet's most interesting findings is that the wide range of creators' motives are surprisingly similar—similar in “motivation and inspiration,” and similarly dissimilar from their characterization by the conventional economic account.<sup>19</sup> Speaking of the pleasures of creativity, Tushnet says, “This experience goes from high culture to low, from famous authors to unsung artists.”<sup>20</sup> She quotes Stephen King as follows: “The writer who is serious and committed is incapable of sizing up story material the way an

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*Culture*, 157 U. PA. L. REV. 1869 (2009).

16. See, for example, Tushnet's ovular work on the topic, Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 655 (1997).

17. Tushnet, *supra* note 1, at 527 (“With limited exceptions, they circulate outside the money economy, shared freely with other fans.”).

18. Hetcher, *supra* note 15 (noting a growing norm among commercial owners to tolerate amateur remix that makes unauthorized uses of their works when the uses do not create market harm and are not pornographic or otherwise objectionable); Casey Fiesler, Note, *Everything I Need To Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content*, 10 VAND. J. ENT. & TECH. L. 729, 746 (2008) (discussing noncommercial norms instantiated in the fan fiction community). For the foundational work incorporating norms theory into the law, see ELLICKSON, *supra* note 3, at 240-41.

19. Tushnet, *supra* note 1, at 515.

20. *Id.* at 526 n.45.

investor might size up stock offerings, picking out the ones which seem likely to provide a good return.”<sup>21</sup>

This purported parallel between the motives of amateurs and major commercial successes is important to Tushnet’s overall argument because otherwise she is open to the rejoinder by the economist that fan fiction is the exception that proves the rule. But, to the contrary, if the Stephen Kings of the world are as ill-explained in terms of their creative behavior by the incentive account as are the creators of user-generated content, then the force of Tushnet’s critique of the economic account extends beyond its treatment of fan fiction.

A related element of her account is that creativity is not the rational process of a utility-maximizing calculation as assumed by the economic account. Citing Roberta Kwall’s account, Tushnet argues that creativity often is experienced as inspiration.<sup>22</sup> Similarly, Tushnet notes that creativity often is experienced as an automatic function “like making antibodies.”<sup>23</sup> Overall, Tushnet refers to these features as part of the broader “nonrationality of creation” that is at odds with the economic model of people as rational calculators performing cost/benefit analyses in order to maximize their personal utility functions.<sup>24</sup>

Tushnet’s critique of the failings of the economic approach to go beyond financial incentives in its model of creativity is of interest in its own terms, but it is particularly of interest in that it is very foreseeable that such a misconception could lead to misguided policy choices. Economists will be inclined to make policy prescriptions solely in light of the incentive model, failing to take account of other sources of creativity. Tushnet writes, “Once we recognize that copyright’s abstract incentive story bears little relationship to the reality of much creative practice, we can better appreciate what copyright can, and cannot, do for authors.”<sup>25</sup> Most distressingly, as she notes, there is the danger that “a copyright law that treats

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21. *Id.* at 525.

22. *Id.* at 526 (citing Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1995-98 (2006)).

23. *Id.*

24. *Id.* at 525. Tushnet appears to think the economic model is committed to a consciously rationalist mode. *Id.* at 524.

25. *Id.* at 516.

creativity as a product of economic incentives can miss the mark and harm what it aims to promote.”<sup>26</sup> In other words, there is a danger that some particular policy proposal may in fact be perverse in its consequences in that, although it may have the desired impact on economic incentives to create, it also may have an unintended consequence of negatively impacting some non-incentive-based source of creativity, such that when the two influences are balanced against one another, the net impact is actually to harm the output of creative works. At the very least, in the abstract, this concern is surely legitimate, for if the economic approach focuses exclusively on incentives, it would seem to follow directly that it is not placing proper attention on the impact that any proposed policy changes would have on motivations to create that do not result from the existence of financial incentives.

As the title to the article indicates, the policy issue that Tushnet thinks is most salient concerns the doctrine of fair use. In general, Tushnet proposes to loosen the requirements for fair use.<sup>27</sup> As she recognizes, her argument is strongest in the context of fan fiction. She believes that, because fan fiction is created for noneconomic reasons, it has an especially strong claim to fair use on grounds not recognized by the conventional economic account. Tushnet notes that “[f]anworks, distilling all the reasons for creating that copyright’s incentive theory ignores, foreground desire: desire for

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26. *Id.* at 515. This problem has been noted by others as well, particularly in the context of user-generated content. See John Quiggin & Dan Hunter, *Money Ruins Everything*, 30 HASTINGS COMM. & ENT. L.J. 203, 214-15 (2008) (“[A]mateur creators do not have commercial interest as their primary motivating force, and so propertization of their work is irrelevant to their production of innovative material. But more than this, propertization may be inconsistent with their continued creativity and so may not just be irrelevant but actively inimical to the development of this modality of production.”).

27. Tushnet, *supra* note 1, at 543 (citing Lydia Pallas Loren, *The Pope’s Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Protection*, 69 LA. L. REV. 1, 38-39 (2008) (arguing that works created without an economic incentive “should” have a greater scope for fair use)). Tushnet distinguishes her account from Loren’s as follows:

My argument looks at a different side of the equation: when copyright’s incentive story breaks down and people create works that they do not intend to circulate in the money economy, then claims that such works make fair uses of existing works should be assessed differently, because fair use’s economic model fails.

*Id.* This sentence comes at the end of a section, leaving it open what specifically she has in mind when Tushnet speaks of assessing fair uses of existing works differently.

particular characters, desire for certain storylines, desire for reciprocal gift relationships between authors and audiences.”<sup>28</sup> On Tushnet’s account, there is a tight connection between creating out of desire and receiving pleasure from one’s acts of creation. She writes that “fan fiction, especially slash, persists as a marquee fair use for deeper reasons. Slash works as a metonym for transformative fair use because it is about nonrivalrous pleasures.”<sup>29</sup> To Tushnet, it matters that the works are created for pleasure’s sake, not for the sake of utility.<sup>30</sup>

#### A SECOND-GENERATION ECONOMIC APPROACH TO CREATIVITY

A possible rejoinder by the economic account that is important to consider is that Tushnet fails to discuss the positive role that financial incentives *do* play in incentivizing the creation of copyrightable content. All the *New York Times* has to do if it wants to double the amount of creative content that it produces is to hire twice the staff. All a theater company, movie studio, or television production company has to do if it wants to replace an actor is to provide sufficient funds to hire another. All a law school has to do if it wants to ensure some desired level of faculty output is to give summer grants contingent on production of publishable work. We see then that money can indeed incentivize creativity.<sup>31</sup>

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28. *Id.* at 546.

29. *Id.* at 529. “Slash fiction” is a genre of fan fiction that focuses on the depiction of sexual or romantic relationships between two or more characters of the same sex. See TheFreeEncyclopedia, [http://encyclopedia.thefreedictionary.com/Slash+\(fiction\)](http://encyclopedia.thefreedictionary.com/Slash+(fiction)) (last visited Nov. 4, 2009).

30. Tushnet, *supra* note 1, at 526-27 (“When we talk about pleasure (and agony) instead of utility, we get closer to the lived experience of creativity, and are in a better position to understand exactly how resistant or compliant creative practices are likely to be in response to the constraints and possibilities of copyright law.” (citation omitted)).

31. And a lack of money can have the reverse effect, as evidenced by the Writers Guild of America’s strike in 2007-08. Michael Cieply & Brook Barnes, *Writers Say Strike to Start Monday*, N.Y. TIMES, Nov. 2, 2007, <http://www.nytimes.com/2007/11/02/business/media/02cnd-hollywood.html> (“Ultimately, the two sides gridlocked over the writers’ insistence on a sharp increase in their residuals payments for the re-use of movies and shows on DVDs and on new payments for the distribution of such works on the Internet, over cell phones and elsewhere. Producers refused to boost the DVD payments and rebuffed demands related to electronic distribution, arguing that industry economics and still-shifting technology made accommodation impossible.”); Brian Stelter, *TV Writers Edging Toward a Strike*, N.Y. TIMES, Oct. 22, 2007, <http://mediadecoder.blogs.nytimes.com/2007/10/22/tv-writers-edging-toward-a>

It is not that Tushnet would deny this claim, stated in these bald terms; it is rather that she fails to acknowledge the existence of, or the consequences that may follow from, financial incentives that may motivate people to undertake creative efforts. Indeed, at the outset, Tushnet suggests in passing that there is a role for an explanation that draws on economic incentives, particularly with regard to “intermediaries.”<sup>32</sup> Elsewhere, I have discussed sites such as Facebook in terms of the role played by copyright law in their business models. With Facebook, even though its millions of users/creators do not need the incentive of financial gain as a motive for the creation of copyrightable content, Facebook does.<sup>33</sup> In the present context, this dynamic is best seen as an instance of an intermediary responding to the prospect of financial gain. The causal connection, however, is indirect. This is of interest to note because of the implication that it can both be true that the creators themselves are not motivated by financial gain and yet the larger system of production is driven by the pursuit of financial gain. Here we see that financial incentives play an essential role in the production of this culturally important new form of creative content. Indeed, for a publicly traded intermediary such as YouTube’s parent, Google, responding to financial incentives in seeking to monetize the amateur videos its users upload to the site would seem to be required by its fiduciary duties to its shareholders.<sup>34</sup>

The types of situations in which financial incentives play a role go beyond those involving intermediaries however. Tushnet’s examples are of writers, but she implicitly generalizes her claims to

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strike/ (“What we must have is a contract that gives us the ability to keep up with the financial success of this ever-expanding global industry.”).

32. Tushnet, *supra* note 1, at 516 (“Incentives do matter, especially for intermediaries ... and even if they didn’t, the availability of rewards, some of which are generated by copyright, would still affect the extent to which some creators could afford to satisfy their preferences to create.”). In the last section, Tushnet briefly raises the topic of intermediaries but restricts the discussion to fairness issues that may arise between intermediaries and creators and does not address the core causal connection, or lack thereof, between incentives and creativity. *Id.* at 543-46.

33. Steven A. Hetcher, *Hume’s Penguin, or, Yochai Benkler and the Nature of Peer Production*, 11 VAND. J. ENT. & TECH. L. 963, 965 (2009).

34. Remus D. Valsan & Moin A. Yahya, *Shareholders, Creditors, and Directors’ Fiduciary Duties: A Law and Finance Approach*, 2 VA. L. & BUS. REV. 1, 18-19 (2007) (“[T]he long-established American corporate-law tradition imposed on directors the obligation to maximize shareholder wealth.”).

apply to all creators.<sup>35</sup> Yet focusing exclusively on writing is problematic. The costs of being a writer are trivial, opportunity costs aside, and thus writers are free to write at will about whatever interests them.<sup>36</sup> For example, consider the creative people hired to work on a major motion picture pursuant to work-for-hire agreements.<sup>37</sup> A Hollywood camera person does not have the sort of freedom to create that is possessed by writers. The camera person's form of creativity can only be expressed concretely in the context of the larger creative project, the contours of which are largely out of his or her control. There can be no creative camera work with Brad and Angelina as the focus unless one is hired to work on a Brad and Angelina project. Work-for-hire of this sort, then, is as much a refutation of the extreme claim that financial incentives never matter as the example of fan fiction is a refutation of the extreme claim that all that matters are financial incentives. As the above examples indicate, financial incentives do play an important role in the production of significant amounts and types of creative content,

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35. Tushnet provides the following anecdotes to characterize the sorts of nonfinancial motives she thinks are characteristically operative: “[T]he artist often feels compelled, feels the *desire*, to make the work and offer it to an audience.” Tushnet, *supra* note 1, at 524 n.31 (quoting LEWIS HYDE, *THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY* 146 (1983)). Tushnet also quotes well-known writer Ann Lamott as follows:

Interviewers ask famous writers why they write, and it was ... the poet John Ashbury who answered, “Because I want to.” Flannery O’Connor answered, “Because I’m good at it,” and when the occasional interviewer asks me, I quote them both. Then I add that other than writing, I am completely unemployable. But really, secretly, when I’m not being smart-alecky, it’s because I want to and I’m good at it.

*Id.* at 524 (quoting ANN LAMOTT, *BIRD BY BIRD, SOME INSTRUCTIONS ON WRITING AND ON LIFE*, at xiv (1994)). In addition to quoting from writers of text, she quotes from a writer of software: “Creation is unbelievably addictive. And programming, at least for skilled programmers is highly creative. So good programmers are compelled to program to feed the addiction.” *Id.* at 535 (quoting ERIK VON HIPPEL, *DEMOCRATIZING INNOVATION* 124 (2005), available at <http://web.mit.edu/evhippel/www/democ1.htm>).

36. Here I do not mean legally free but physically free—free as in free will, not free beer or free speech. *Cf.* GNU Project, *The Free Software Definition*, <http://www.gnu.org/philosophy/free-sw.html> (last visited Nov. 4, 2009) (“Free software is a matter of liberty, not price. To understand the concept, you should think of free as in free speech, not as in free beer.”). This oft-quoted distinction fails to draw this distinction with regard to the issue of legality.

37. See 17 U.S.C. § 201(b) (2006) (“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”).

whether this be major forms of traditional content such as major motion pictures or major forms of new content such as Facebook pages or YouTube videos created by amateurs.

Yet I do not view this objection as dispositive against Tushnet's basic argument. Tushnet's positive account of the importance of creativity as a result of direct preference and motivation does not logically preclude a distinct account of creative work product that is the result of responses to financial inducement. Tushnet's argument is important even if applicable only to some subset of all creative output as long as that subset is material, substantial, or of practical significance. The inclusion of fan works in the category of works not directly motivated by financial inducement is enough to show that the ambit of works of the sort Tushnet discusses is important. If the flourishing of these works is hampered because they are unaccounted for by the traditional economic account, evading consideration when making policy decisions driven solely by the financial incentives model, then this would be a significant sort of harm given the importance of fan works in serving the ultimate goals of copyright.<sup>38</sup>

The best reply is for the traditional economic account to concede defeat—acknowledge that its approach is bankrupt for purposes of explaining, at the very least, the sort of creativity involved in fan fiction. If one steps outside of legal scholarship, however, this should come as no surprise, as a persuasive post-first-generation account, with the potential to replace the older model within the law, has been developing for a quarter century outside of legal scholarship. Rational choice theorists and rational choice philosophers reject the very thing Tushnet rejects—the notion that peoples' preferences are only for narrowly rational outcomes. Rational choice theorists consider this post-first-generation account to have been refuted long ago.<sup>39</sup>

The *locus classicus* of the relevant distinctions is Mill's seminal *On Liberty*.<sup>40</sup> The central concern of Mill's work is the compatibility

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38. For an account of the social benefits of fan works and fan culture generally, see HENRY JENKINS, *CONVERGENCE CULTURE: WHERE OLD MEDIA AND NEW MEDIA COLLIDE* (2006).

39. See, e.g., JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* (1983); RUSSELL HARDIN, *COLLECTIVE ACTION* (1982); GREGORY KAVKA, *HOBBSIAN MORAL AND POLITICAL THEORY* (1986).

40. JOHN STUART MILL, *ON LIBERTY* 9 (Elizabeth Rapaport ed., 1978) (“[T]he only purpose

of liberty, understood as a core political value, with a utilitarian approach to social policy. The desire to act freely need not be reduced to utility as understood in the conventional economic literature, and yet we can ask from a utilitarian perspective what utilitarian purposes are served by this preference and its satisfaction. Mill, of course, was a great proponent of the value of personal freedom or autonomy and fully appreciated the benefits from its satisfaction in a community and society. This model can be applied as well to the desire to autonomously create and be expressive. A utilitarian would have no desire to deny the great utilitarian value that may be served by the satisfaction of such preferences as the desire to create and express oneself. In other words, a second-generation economic account need not deny Tushnet's claims about the intrinsic motivation provided by desire, love, passion, and the like. Tushnet argues that we should treat creativity as a desire rather than a preference.<sup>41</sup> But second-generation economics in its most plausible utilitarian version can accept intrinsic desires of this sort as long as they are not circular.<sup>42</sup> In fact, a utilitarian approach not only can tolerate such acts but is in favor of them. Utilitarians are all about satisfying desires and seeking pleasure and happiness.<sup>43</sup> Bentham's was the pleasure principle.<sup>44</sup> This would be the philosophical account of Tushnet's praise of creativity as "part of a good life"<sup>45</sup> and part of "human

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for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”).

41. Tushnet, *supra* note 1, at 515 (“At the moment that ‘incentives’ for creation meet ‘preferences’ for the same, the economic account of copyright loses its explanatory power. This piece explores the ways in which the desire to create can be excessive, beyond rationality, and free from the need for economic incentive.”).

42. HETCHER, *supra* note 3.

43. John Lawrence Hill, *A Utilitarian Theory of Duress*, 84 IOWA L. REV. 275, 311 n.136 (1999) (“Freedom, friendship, love, fulfillment, passion—each have moral relevance for the utilitarian only insofar as they embody, or conduce to happiness.”).

44. Fred Bosselman, *Four Land Ethics: Order, Reform, Responsibility, Opportunity*, 24 ENVTL. L. 1439, 1486 n.214 (1994) (“The simple core of all Benthamism consisted of just this series of propositions: (1) all that human beings, universally, want from life can be summed up as the greatest obtainable amount of happiness, or sum of pleasures, and avoidance, as fully as possible, of unhappiness, pains, or displeasures; (2) the good or right or ideal conduct of life is simply its intelligent conduct, to maximize the pleasure and minimize the pain experienced in or from all the results of all one's actions, choices, or decisions.”).

45. Tushnet, *supra* note 1, at 538.

flourishing.”<sup>46</sup> She emphasizes that such creativity “should be valued for itself, not tolerated.”<sup>47</sup> Once again, satisfying this requirement is no obstacle for utilitarian value theory, which would place intrinsic value on the personal utility gained by both the creators of and the consumers of creative works, whether the works are produced by amateurs or professionals.

The success of the second-generation approach in this regard goes to show that Tushnet’s main point is an important one. Although a utilitarian account will embrace these sorts of desires and their satisfaction, doing so requires rejecting the first-generation account which relies on a narrow conception of the scope of the utility function.

#### IMPLICATIONS OF A UTILITARIAN APPROACH

Tushnet implicitly holds that the conventional economic model implicates a policy maximizing copyright protection. This follows from the logic of thinking that incentives motivate creators. Thus, the greater the incentive, the greater the amount of creation.<sup>48</sup> One of the most important upshots of the second-generation economic view, at least in its utilitarian version, is that it differs from the first-generation view by not implying or requiring that a maximal copyright regime be in place. In fact, I argue that a utilitarian approach appears to have implications for copyright maximization that are much more dramatic than those mentioned by Tushnet, but in the opposite direction.

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46. *Id.* n.87 (citing Barton Beebe, *Does Judicial Ideology Affect Copyright Fair Use Outcomes?: Evidence from the Fair Use Case Law*, 31 COLUM. J.L. & ARTS 517, 522 (2008) (observing that fair use should in part be judged by its “impact [on] our capability for human flourishing”)).

47. *Id.* at 538.

48. Tushnet cites the following text approvingly for this proposition:

“[Copyright’s] purpose lies solely in encouraging creativity ... [T]he incentive provided by copyright’s promise of exclusivity is also thought to correlate directly with the overall production of creative expression.... The linear conception thus implies that there exists ‘no good reason’ *within the very ideal of incentives* (the model’s only frame of reference) for ‘why copyrights should not cover everything and last forever.’”

*Id.* at 517 n.8 (quoting Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1579 (2009)) (brackets in original).

From a Millian starting point, the essential question is not why copyrighted works should receive greater fair use protection but instead why such works should receive legal protection at all. There is a presumption in favor of liberty unless harm can be shown.<sup>49</sup> This applies the lesson of *On Liberty* to the context of the freedom to create versus the right to stop others from creating (with the use of one's copyrighted content). In the case of U.S. copyright generally, the relevant sort of harm is economic as opposed to the more diverse sorts of harms protected under European copyright law, such as harm to reputation or the integrity of the work.<sup>50</sup> The presumption should be in favor of freedom to create fan fiction, remix, and so on, unless a cognizable type of harm can be shown. It is my claim that, predominantly speaking, such harm cannot be shown for works of these sorts.<sup>51</sup>

One of the cornerstones of the economic approach is the incentive/access tradeoff.<sup>52</sup> To the extent that people are intrinsically motivated to create, other things equal, there is no reason to give copyright protection as there is no tradeoff between access and anything. People create and others get access or could get access. This raises the issue of why copyright exists at all.<sup>53</sup> In

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49. JOEL FEINBERG, 1 THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 9 (1984) ("[M]ost writers on our subject have endorsed a kind of 'presumption in favor of liberty' requiring that whenever a legislator is faced with a choice between imposing a legal duty on citizens or leaving them at liberty, other things being equal, he should leave individuals free to make their own choices. Liberty should be the norm; coercion always needs some special justification.").

50. *But see* 17 U.S.C. § 106A (2006) (recognizing moral rights in limited circumstances).

51. *See* Hetcher, *supra* note 15.

52. *See* Kenneth J. 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). For a general overview of the idea of an incentive/access tradeoff in the copyright context, see WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 20-21 (2003) ("Unless there is power to exclude, the incentive to create intellectual property [that is, creative expression] in the first place may be impaired.... [T]he result is the 'access versus incentives' tradeoff: charging a price for a public good reduces access to it (a social cost), making it artificially scarce ... but increases the incentive to create it in the first place, which is a possibly offsetting social benefit."); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483 (1996).

53. *See* Steven Hetcher, *User-Generated Content and the Future of Copyright: Part Two—Agreements Between Users and Mega-Sites*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 829, 830-32 (2008).

other words, the second-generation economic approach has the implication that whole categories of works should potentially be legal *per se* rather than legal as fair uses. Most importantly, there is a compelling utilitarian argument that amateur remix should be legal.<sup>54</sup> Ironically, while the policy conclusion is that amateur remix should be legal *per se*, the argument relies on the pervasive fair use of fan fiction.<sup>55</sup> If fan fiction and amateur remix are fair uses and fair uses are legal, then fan fiction and amateur remix are legal. If legal, then it would reduce transaction costs to simply make these categories of works legal *per se*. Thus, for the utilitarian, the default should favor the freedom to create fan fiction and remix works. This is simply an application of the Millean harm principle to these types of works.

#### CONCLUSION

In a nutshell, Tushnet's article makes a valuable contribution by persuasively arguing that the conventional economic view—what I call the first-generation view—is fatally flawed for failing to account for intrinsic creative motivation of a sort not contemplated by the dominant economic conception of creativity in copyright law. We saw, however, that the problems with the first-generation account are not shared by the second-generation account. Nevertheless, Tushnet's critical examination of the economic approach to copyright is welcome. The economic approach has especially strong sway in copyright law due to its supposed constitutional imprimatur, and thus deserves close scrutiny—indeed, greater scrutiny—of this sort.

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54. Hetcher, *supra* note 15, at 1912.

55. *See generally* Hetcher, *supra* note 15.