
RATIONAL FAITH: THE UTILITY OF FAIRNESS IN COPYRIGHT

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*The biggest debate in copyright law is also the most fundamental: For what purpose does copyright exist? There are two schools of thought about the appropriate answer to this key question. The first, dominant school focuses on economic efficiency, while the second emphasizes fairness and other moral concerns. As evidenced by scholarly response to the *Blurred Lines* litigation and Mark Lemley's recent piece, "Faith-Based Intellectual Property," proponents of each school are often at odds with each other. There is little middle ground.*

This "either/or" view of efficiency and moral rights is detrimental to a productive scholarly debate about the value of copyright. More importantly, it is wrong. Scholars like Jeanne Fromer, Christopher Buccafusco, and David Fagundes have recently pointed out that moral concerns are not necessarily inconsistent with, and could in some circumstances even promote, utilitarian ends.

Here, I reframe the debate by suggesting that the dichotomy between moral rights and utility should be abolished altogether. Drawing on insights from neuroscience, psychology, and organizational behavior, I demonstrate that when it comes to creation, fairness—a moral rights concern—often is utility in a very real sense. The evidence suggests that treating creators fairly acts as a powerful motivator for creative work, results in objectively more creative output, and aligns well with public and legal decision makers' moral intuitions. In other words, the most efficient copyright system is a fair one.

This conclusion has implications for both copyright scholarship and policy. On the scholarship side, it builds a tangible bridge between utilitarian and moral rights camps. Moral rights advocates previously accused of blind faith in the value of fairly administered rights can now respond that their faith is rational. On the policy side, I explain how novel fairness-enhancing mechanisms like individualized permissive use and an increased focus on distributive concerns in applying the fair use doctrine can increase the overall efficiency of the copyright system—a proposition that should appeal to scholars on both sides of the debate.

INTRODUCTION

In copyright scholarship, the values of fairness and utility are often at odds—and utility is almost always the winner. Scholars do not hesitate to sacrifice authors' interests if doing so will promote creativity and its attendant social benefits.

This dynamic was immediately apparent after the recent *Blurred Lines* litigation. The day after a jury held that Robin Thicke and Pharrell Williams's hit song infringed the late Marvin Gaye's copyright in his 1977 track *Got to Give*

It Up and awarded Gaye's family \$7.4 million in damages,¹ commentators pronounced their own verdicts. In an opinion piece titled "Squelching Creativity," Kal Raustiala and Christopher Sprigman lamented that the decision "cast[] a huge shadow over musical creativity."² Noah Feldman's piece, with the similarly definitive title "'Blurred Lines' and Bad Law," warned that the finding would "inhibit future artists" and "be a cost to artistic creation."³

Both editorials offered the same account of the jury's error. According to Feldman, the factfinder focused inappropriately on Gaye's fairness interests or "moral rights" in his creation.⁴ In the process, it ignored copyright's true purpose—the "maximiz[ation of] socially valuable artistic production."⁵ Feldman declared that "the jury should've overcome its legitimate moral outrage" and found in favor of Thicke and Williams in order to promote this true purpose.⁶ In a similar vein, Raustiala and Sprigman bluntly proclaimed that "[b]asic fairness [to creators] is not the goal of our copyright system."⁷ They explained that, instead, the goal "is to adequately incentivize artists to produce new creative works."⁸

The opinions expressed by Feldman, Raustiala, and Sprigman represent the dominant view in copyright and intellectual property scholarship today.⁹ Those adopting this view embrace an economic utilitarian account of intellectual property that seeks to advance the public interest by providing creators with adequate incentives to innovate.¹⁰ They reject a moral rights account of intellectual property that concerns itself with (among other things) issues of fairness to creators.¹¹

¹ *Pharrell Williams and Robin Thicke to Pay \$7.4m to Marvin Gaye's Family over Blurred Lines*, GUARDIAN (Mar. 11, 2015), <https://www.theguardian.com/music/2015/mar/10/blurred-lines-pharrell-robin-thicke-copied-marvin-gaye> [<https://perma.cc/8RFZ-E874>].

² Kal Raustiala & Christopher Jon Sprigman, *Squelching Creativity*, SLATE (Mar. 12, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/03/_blurred_lines_verdict_is_wrong_williams_and_thicke_did_not_infringe_on.html [<https://perma.cc/64DD-9GM2>]; Comments at <https://perma.cc/984X-NCGM>.

³ Noah Feldman, *'Blurred Lines' and Bad Law*, BLOOMBERG VIEW (Mar. 12, 2015), <https://www.bloomberg.com/view/articles/2015-03-12/blurred-lines-and-bad-law> [<https://perma.cc/X7RF-FMRQ>].

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Raustiala & Sprigman, *supra* note 2.

⁸ *Id.*

⁹ See William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 169 (Stephen R. Munzer ed., 2001).

¹⁰ *Id.*

¹¹ See, e.g., Mark A. Lemley, *Faith-Based Intellectual Property*, 62 *UCLA L. REV.* 1328, 1338-44 (2015) (rejecting a deontological approach).

In a recent article, Mark Lemley, a strong proponent of the dominant utilitarian approach, characterized the moral rights account as “Faith-Based Intellectual Property.”¹² Lemley’s terminology suggests that anyone who cares about fairness in intellectual property (“IP”) is ignoring empirical evidence about its economic value.¹³

It turns out, however, that the dominant view’s charge that moral rights scholars ignore empirical evidence is more than a little ironic, given the fact that utilitarians have themselves largely overlooked an entire body of relevant empirical literature. Neuroscientists and psychologists have long known that preferences for fairness are a part of our biological makeup,¹⁴ and that this has consequences for creativity and innovation. Treating creators fairly not only acts as a powerful motivator for creative work, but also results in objectively more creative output.¹⁵ Conversely, creators lose motivation and creativity suffers when innovators operate in an environment they perceive to be unfair.¹⁶ If consideration of fairness is faith based, then, it is a rational faith, because empirical evidence shows that fairness promotes utilitarian ends.

This insight redefines the traditional scholarly debate between moral rights and utility proponents in IP. For moral rights advocates, it means the ability to openly express their intuitions about the “necessity and importance of”¹⁷ fairly administered IP rights without being accused of evidence-denying blind faith. And for utilitarians, it means a call to rethink their absolutist position that “basic fairness [to creators] is not the goal of our copyright system.”¹⁸ Though it might not be the ultimate goal, as far as they are concerned, it deserves consideration as an instrumental goal in achieving the ultimate end of promoting creation.

The instrumental, hitherto overlooked importance of fairness also has implications for copyright policy. But here, again, we must go beyond the typical high-level discussions of philosophical fairness. Instead, I propose we approach the problem empirically. What does fairness mean to real-world creators? What

¹² *Id.* at 1337.

¹³ *Id.* at 1337-38.

¹⁴ See, e.g., Monica P. Burns & Jessica A. Sommerville, “I Pick You”: *The Impact of Fairness and Race on Infants’ Selection of Social Partners*, 5 FRONTIERS PSYCHOL. 1, 6 (2014) (finding that fifteen-month-old infants preferred researchers who distributed toys fairly over those who did not); Patricia Kanngiesser & Felix Warneken, *Young Children Consider Merit When Sharing Resources with Others*, 7 PLOS ONE 1, 3 (2012) (finding that three-year-old children attempt to distribute stickers in a fair manner that takes merit into consideration). See generally L. SUN, THE FAIRNESS INSTINCT: THE ROBIN HOOD MENTALITY AND OUR BIOLOGICAL NATURE (2013) (arguing based on psychology and social science research that fairness is an evolutionarily favored trait).

¹⁵ Stephanie Plamondon Bair, *The Psychology of Patent Protection*, 48 CONN. L. REV. 297, 339 (2015) (describing a study which found that employees were more innovative when the rewards were perceived as fair).

¹⁶ *Id.*

¹⁷ ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 3 (2011).

¹⁸ Raustiala & Sprigman, *supra* note 2.

does this mean for copyright doctrine? My approach leads to several novel insights. In some cases, it suggests that policy prescriptions previously classified as either efficiency promoting or moral rights promoting can achieve both ends simultaneously. In other cases, it leads to innovative policy recommendations, including: (1) my call for the copyright system to better facilitate individualized, permissive use; (2) my proposal that the fair use doctrine account for distributive issues; and (3) my suggestion that we adopt more personalized procedures in handling copyright disputes.

The rest of this Article proceeds as follows. Part I fleshes out the debate between utilitarian scholars like Lemley, Raustiala, and Sprigman, and those who, like Robert Merges, see room for fairness. Part II turns the efficiency view's criticisms of fairness back on utilitarianism by amassing empirical evidence showing that fairness serves utilitarian ends. Drawing from this evidence, I propose that having a copyright system widely perceived as fair supplies *ex ante* incentives to engage in creative work, results in enhanced creative output, and takes advantage of efficiencies arising from increased alignment with public intuitions. As a result, the faith in fairness demonstrated by moral rights scholars is rational.

The insight that when it comes to creation, fairness often is utility should reframe the traditional moral rights versus efficiency debate. In subsequent Parts, I explore what this might mean for copyright law and policy. Part III begins this journey by again turning to the empirical literature, the goal being an understanding of what "fairness" means from a psychological perspective in the creative context. The empirical evidence suggests that while unauthorized copying of creative work is widely perceived as unfair, respecting a creator's dignity, giving creators credit for their work and a voice in how their works are used, and distributing rewards in ways that avoid undue variance can all contribute to perceptions of fairness. Part IV takes the empirical insights about what constitutes fairness from a creator's perspective to suggest specific changes to copyright law. In this Part, I propose that exclusive rights play an important role in promoting fairness, and should be maintained in some form for this reason. But I also suggest that the social costs associated with exclusive rights could be minimized by implementing mechanisms that easily allow parties to request and grant royalty-free licenses and that give creators credit for their work. These latter suggestions diverge from traditional utilitarian prescriptions that have heretofore focused on giving creators financial incentives to innovate. In Part V, I return to the *Blurred Lines* litigation, offering some thoughts on how the findings of this Article might be relevant to that case.

I. THE MORAL RIGHTS/UTILITY DEBATE

Intellectual property law in the United States provides time-limited monopolies to creators and inventors for the fruits of their innovative endeavors. Specifically, copyright law focuses on expressive works, and grants a creator (or her assignee) the exclusive right to reproduce, perform or display publicly,

distribute copies of, and prepare derivative works based on her creation.¹⁹ Patent law protects inventions that have been deemed to be new, nonobvious, and useful, and grants inventors the exclusive right to make, use, or sell the invention.²⁰

Because intellectual property rights interfere with free markets,²¹ scholars have offered various rationales to explain why we have them. Most of these accounts can be categorized as either utilitarian or moral rights rationales. The debate between efficiency proponents and moral rights advocates has its roots in these divergent theoretical justifications for intellectual property rights.

A. *Utilitarian Theories*

The chief utilitarian rationale for intellectual property tells a story about creation incentives. Intellectual products, in contrast to physical property, are “public goods” that can be easily copied and appropriated by others.²² According to the incentive story, this ease of copying makes it difficult for original creators to make money from their creations, reducing economic incentives to create.²³ The thought is that creators will not want to invest the effort and money in creating something when their finished product can be easily appropriated by others, thereby driving the economic value of their work down to zero.²⁴

The theory goes that intellectual property fixes this incentive problem by granting creators the time-limited exclusive right to profit from their creations.²⁵ This allows creators to charge a premium for their works, recoup expenses, and make a profit.²⁶ Creators who can now hope to make some money from their efforts will be more motivated to put in the investments required. Society benefits through more creation, which is thought to stimulate economic growth.²⁷

¹⁹ 17 U.S.C. § 106 (2012).

²⁰ 35 U.S.C. §§ 101-03, 154(a) (2012).

²¹ Lemley, *supra* note 11, at 1330.

²² See ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 10-18 (3d ed. 2003); Fisher, *supra* note 9, at 169; Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 628-32 (2012).

²³ Fisher, *supra* note 9, at 169.

²⁴ See David S. Olson, *Taking the Utilitarian Basis for Patent Law Seriously: The Case for Restricting Patentable Subject Matter*, 82 TEMP. L. REV. 181, 182-83 (2009); Elizabeth L. Rosenblatt, *Intellectual Property's Negative Space: Beyond the Utilitarian*, 40 FLA. ST. U. L. REV. 441, 453-54 (2013).

²⁵ See Fisher, *supra* note 9, at 169.

²⁶ See *id.*

²⁷ E.g., Benjamin N. Roin, *The Case for Tailoring Patent Awards Based on Time-to-Market*, 61 UCLA L. REV. 672, 690 & n.73 (2014) (asserting that innovation enhances social welfare). *But see* Estelle Derclaye, *Eudemonic Intellectual Property: Patents and Related Rights as Engines of Happiness, Peace, and Sustainability*, 14 VAND. J. ENT. & TECH. L. 495, 498 (2012) (questioning the assumption that increased innovation is good for society); Ofer

Although the utilitarian story about creation incentives is the most popular,²⁸ other scholars have proposed variations on the theme. For example, some have argued that the primary function of the exclusive right is the incentive it provides creators to publicly disclose their creations rather than keep them secret.²⁹ Others assert that the most important role of intellectual property is the motivation it offers creators to commercialize and bring their creations to market.³⁰

Whatever the permutation, because these accounts are all utilitarian, they are all concerned with balancing costs and benefits.³¹ Exclusive rights are thus only justified under these accounts to the extent that the benefits we expect to reap from granting the rights outweigh the costs.³² On the cost side of the ledger, intellectual property rights impose deadweight losses on society resulting from decreased competition and public access.³³ Thus, utilitarians maintain that intellectual property rights should be granted only when whatever social benefit we are expecting to gain—whether through more creation, more disclosure, more commercialization, or a combination of these—exceeds these deadweight losses.³⁴ For proponents of the dominant, creation-incentive utilitarian account, this means granting exclusive rights only in those cases where we think that granting rights is necessary to motivate creation.³⁵ Otherwise, society incurs the deadweight losses without any corresponding gain. As an extension of this

Tur-Sinai, *Technological Progress and Well-Being*, 48 LOY. U. CHI. L.J. 145, 147 (2016).

²⁸ Fisher, *supra* note 9, at 169.

²⁹ Roberto Mazzoleni & Richard R. Nelson, *Economic Theories About the Benefits and Costs of Patents*, 32 J. ECON. ISSUES 1031, 1038 (1998). Disclosure incentives are also sometimes framed as being complementary to creation incentives. According to this view, public disclosure is an incidental benefit that grows out of granting exclusive rights for the purposes of promoting creation. See Jeanne C. Fromer, *Patent Disclosure*, 94 IOWA L. REV. 539, 548-50 (2009); Mark Lemley, *The Myth of the Sole Inventor*, 110 MICH. L. REV. 709, 745 (2012).

³⁰ See, e.g., Michael Abramowicz, *The Dangers of Underdeveloped Patent Prospects*, 92 CORNELL L. REV. 1065, 1073-76 (2007); Christopher A. Cotropia & Mark A. Lemley, *Copying in Patent Law*, 87 N.C. L. REV. 1421, 1439 (2009) (arguing that patent owners need rights to exclude so that they may cover the costs of developing and marketing their inventions). Commercialization theory itself also comes in two flavors. In one strain of the account, scholars seek to justify our current intellectual property regime based on the incentives it provides creators to commercialize their products. F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697, 707-08 (2001). In another strain, scholars have proposed changes to our current intellectual property regime to better provide these incentives. Ted Sichelman, *Commercializing Patents*, 62 STAN. L. REV. 341, 347-53 (2010).

³¹ See Fisher, *supra* note 9, at 169; Lemley, *supra* note 11, at 1330-31.

³² Lemley, *supra* note 11, at 1330-31; Olson, *supra* note 24, at 193-94.

³³ See T. Randolph Beard et al., *Quantifying the Cost of Substandard Patents: Some Preliminary Evidence*, 12 YALE J.L. & TECH. 240, 241 (2010); Olson, *supra* note 24, at 197.

³⁴ Olson, *supra* note 24, at 195.

³⁵ See Lemley, *supra* note 29, at 710.

reasoning, it also means granting the appropriate scope and duration of exclusive rights—rights that are just broad enough and last just long enough to incentivize creation, but no more.³⁶

The utilitarian concern about incurring deadweight losses without reaping any corresponding gain is evident in Feldman, Raustiala, and Sprigman's commentaries on the *Blurred Lines* litigation. In Feldman's piece, he asks the key utilitarian question: "Would Gaye have written 'Got to Give It Up' in 1977 even knowing that its bass line might be ripped off in 2013?"³⁷ He answers in the affirmative.³⁸ Similarly, Raustiala and Sprigman stress that copyright is supposed to "adequately incentivize artists to produce new creative works."³⁹ "Adequately" suggests no more and no less. In Raustiala and Sprigman's opinion, the *Blurred Lines* verdict gives too much to original creators by privatizing elements of a musical creation they believe should be available to all.⁴⁰

American legislators and courts, like IP scholars, are also quite comfortable citing utilitarian rationales for their intellectual property pronouncements and adjudications.⁴¹ This might stem in part from the fact that the Patent and Copyright Clause of the Constitution, which gives Congress the power to grant intellectual property rights, does so for the ostensibly utilitarian purpose of "promot[ing] the Progress of Science and useful Arts."⁴²

³⁶ See Olson, *supra* note 24, at 193-94. In a similar vein, Eric Johnson points out that under the incentive theory, intellectual property rights must not only incentivize creation, but also the optimal amount of creation. Johnson, *supra* note 22, at 632.

³⁷ Feldman, *supra* note 3.

³⁸ *Id.* ("Of course he would have. He and his heirs have had 38 years of opportunity to profit from the song's proceeds.").

³⁹ Raustiala & Sprigman, *supra* note 2 (emphasis added).

⁴⁰ *Id.*

⁴¹ See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 216 (2003) (characterizing an intellectual property right as an incentive given in exchange for creator disclosure); *Fresenius USA, Inc. v. Baxter Int'l, Inc.*, 733 F.3d 1369, 1382 (Fed. Cir. 2013) ("The system of patents is founded on providing an incentive for the creation, development, and commercialization of new technology . . ."). Supporters of the Copyright Term Extension Act, 17 U.S.C. §§ 108, 203(a)(2), 301(c), 302, 303, 304(c)(2) (2012), which provided for longer copyright terms, argued that the legislation would give copyright owners incentives to preserve and distribute their works. See S. REP. NO. 104-315, at 3 (2012). The Bayh-Dole Act, 35 U.S.C. §§ 200-12 (2012), which allows creators of federally funded inventions to patent their work, explicitly states in § 200 that "[i]t is the policy and objective of the Congress to use the patent system to promote the utilization of inventions arising from federally supported research or development . . . [and] the commercialization and public availability of inventions made in the United States by United States industry and labor."

⁴² U.S. CONST. art. I, § 8, cl. 8.

B. *Moral Rights Theories*

In contrast to utilitarian theories, moral rights theories do not depend on an accounting of the costs and benefits of intellectual property.⁴³ Instead, these are deontological accounts that justify granting intellectual property because it is the right thing to do.⁴⁴

Why is intellectual property the right thing to do? Moral rights theorists use various lines of reasoning in this respect. Some, relying on Locke's theory of common property,⁴⁵ focus on the "natural rights" that creators have in their creations.⁴⁶ Under this account, intellectual property rights are a fair, deserved reward for the labor a creator has put into the creative process.⁴⁷ Others, looking to the writings of Hegel and Kant, argue that creators have an ongoing personality interest in their creations and should therefore be entitled to rights that allow them to protect that interest.⁴⁸

Because moral rights theorists justify intellectual property on very different grounds than utilitarians, they generally tend to favor a broader grant of rights.⁴⁹ Gone from the moral rights calculation, for example, is Raustiala and Sprigman's concern that copyright be just broad enough to adequately incentivize creators, but no broader.⁵⁰ Also irrelevant is Feldman's question of whether "Gaye [would] have written 'Got to Give It Up' in 1977 even knowing that its bass line might be ripped off in 2013."⁵¹ These considerations are irrelevant because moral rights advocates do not speak the language of incentives. Instead they are concerned with granting rights that properly give effect to creators' labor and personality interests in their works.⁵²

⁴³ See Bair, *supra* note 15, at 310-11.

⁴⁴ See Matthew Finn, In Defence of Deontological Justifications of Intellectual Property 1 (Dec. 26, 2016) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2690947 [https://perma.cc/TP3K-SDY7].

⁴⁵ See JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 25 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

⁴⁶ See Fisher, *supra* note 9, at 170 (articulating Locke's theory on property rights); Rosenblatt, *supra* note 24, at 444-46.

⁴⁷ E.g., MERGES, *supra* note 17, at 32-33 (arguing that Locke's theory of common property is a "good fit" for IP rights); Bair, *supra* note 15, at 309; Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1753 (2012).

⁴⁸ E.g., MERGES, *supra* note 17, at 68-100; Fromer, *supra* note 47, at 1753-54; Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330-39 (1988) (explaining the "Hegelian Justification" for intellectual property); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 971-78 (1982); Rosenblatt, *supra* note 24, at 457.

⁴⁹ Fromer, *supra* note 47, at 1753, 1755.

⁵⁰ Raustiala & Sprigman, *supra* note 2.

⁵¹ Feldman, *supra* note 3.

⁵² Fromer, *supra* note 47, at 1753 (discussing different moral rights theories that focus on labor and personality as potential justifications for IP rights).

Just because moral rights theorists do not take a strict cost-benefit approach to intellectual property does not mean that they necessarily believe in unlimited rights, however. Proponents of the labor theory, for example, ascribe to Locke's provisos that rights should be granted only if there remains "enough and as good left in common for others"⁵³ and property is not wasted.⁵⁴ In the intellectual property context, many scholars have interpreted these provisos to mean that rights should not be granted when doing so limits the public domain in a way that stifles downstream creativity and causes a net harm to society.⁵⁵ Personality theorists tend to favor broader intellectual property rights than either Lockeans or utilitarians.⁵⁶ But Merges has proposed that rights should not be granted even under a personality theory when doing so interferes with the autonomy of others.⁵⁷

In contrast to utilitarian justifications, moral rights theories are less likely to be explicitly invoked in judicial decisions and legislative pronouncements here in the United States.⁵⁸ But, as I will explain in Part II, this does not necessarily mean that American legal decision makers are not swayed by moral considerations.⁵⁹ In fact, quite the opposite might be true.⁶⁰

C. *The Debate*

The story of utilitarianism and moral rights is largely one of "either/or" rhetoric.⁶¹ Scholars tend to assume these two theories have little in common and are incompatible with each other.⁶² They also presume that adherence to one or the other theory will almost always lead to divergent doctrinal prescriptions.⁶³

⁵³ Fisher, *supra* note 9, at 170 (quoting LOCKE, *supra* note 45, § 27); *see also* Rosenblatt, *supra* note 24, at 455-56 (discussing Locke's provisos as they apply to theories of intellectual property); Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY*, *supra* note 9, at 138, 146-47 (same).

⁵⁴ Hughes, *supra* note 48, at 297-98; Rosenblatt, *supra* note 24, at 455-56.

⁵⁵ *E.g.*, Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 *HAMLIN L. REV.* 65, 78-79 (1997); *see also* Fisher, *supra* note 9, at 170; Rosenblatt, *supra* note 24, at 455-56.

⁵⁶ Fromer, *supra* note 47, at 1755; Radin, *supra* note 48, at 960.

⁵⁷ MERGES, *supra* note 17, at 89-91.

⁵⁸ Fromer, *supra* note 47, at 1756. This is not the case in European countries, many of which explicitly provide for creator entitlements sounding in moral rights. *E.g.*, *id.*; Hughes, *supra* note 48, at 350.

⁵⁹ *See infra* Section II.C.

⁶⁰ *See infra* Section II.C.

⁶¹ Fromer, *supra* note 47, at 1759.

⁶² *Id.*

⁶³ *See id.*; Harry First, *Controlling the Intellectual Property Grab: Protect Innovation, Not Innovators*, 38 *RUTGERS L.J.* 365, 372 (2007).

1. The Moral Rights Perspective

Moral rights advocates tend to define their stance by contrasting it with the more prevalent utilitarian approach.⁶⁴ Some moral rights scholars have gone further and argued that utilitarian arguments are flawed, or otherwise less desirable than moral rights theories, for a variety of reasons.

Adam Moore, for example, critiques the utilitarian approach from both internal and external perspectives.⁶⁵ In an internal analysis, Moore argues that utilitarianism fails because it rests on the premise that exclusive rights actually motivate creative labor—a premise that is subject to serious challenge.⁶⁶ Externally, Moore points to problems with describing desirable actions, adopting appropriate rules, and adhering to these rules.⁶⁷

Merges, formerly a strong proponent of efficiency analyses of intellectual property, now also sees a problem with utilitarianism's premise that exclusive rights incentivize creative labor.⁶⁸ According to Merges, the empirical data collected to date do not support that premise.⁶⁹ Though he does not advocate

⁶⁴ See, e.g., Kenneth Einar Himma, *Toward a Lockean Moral Justification of Legal Protection of Intellectual Property*, 49 SAN DIEGO L. REV. 1105, 1109-11 (2012) (contrasting moral rights theories with consequentialist theories); Hughes, *supra* note 48, at 303 (contrasting the utilitarian argument with the normative Lockean argument); Adam D. Moore, *A Lockean Theory of Intellectual Property Revisited*, 49 SAN DIEGO L. REV. 1069, 1071 (2012) (introducing the theory by contrasting it with "utility maximization arguments"). *But see* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1544, 1607-08 (1993) (pointing out that some strands of Locke's property theory are utilitarian and leaving as an open question the relationship between natural rights theories and utilitarianism).

⁶⁵ Adam D. Moore, *Intellectual Property, Innovation, and Social Progress: The Case Against Incentive Based Arguments*, 26 HAMLINE L. REV. 601, 603-04 (2003).

⁶⁶ *Id.* at 613-14.

⁶⁷ *Id.* at 622-28.

⁶⁸ MERGES, *supra* note 17, at 3.

⁶⁹ *Id.* Scholars have raised similar concerns when looking not at empirical work focused specifically on intellectual property, but instead at findings from the psychology literature that suggest that extrinsic rewards of the type offered by our intellectual property system do not motivate creative labor. *E.g.*, Bair, *supra* note 15, at 314-16; Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 143; Johnson, *supra* note 22, at 624-27; Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity*, 86 NOTRE DAME L. REV. 1999, 2010-11 (2011); Jessica Silbey, *Harvesting Intellectual Property: Inspired Beginnings and "Work-Makes-Work," Two Stages in the Creative Processes of Artists and Innovators*, 86 NOTRE DAME L. REV. 2091, 2123 (2011); Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29, 42-54 (2011).

jettisoning efficiency considerations altogether,⁷⁰ Merges concludes as a result that intellectual property should be justified primarily on moral rights grounds.⁷¹

2. The Utilitarian Perspective

Though moral rights advocates sometimes express skepticism with the theoretical or empirical underpinnings of utilitarian approaches, it is the efficiency scholars who seem to be the most outspokenly opposed to any importation of ideas from the other side of the aisle.⁷² Harry First, for example, in a symposium piece descriptively subtitled “Protect Innovation, Not Innovators,” asserts that the rights of creators have no place in a proper analysis of intellectual property doctrines.⁷³ He argues instead for a “firmly utilitarian approach” that would adopt “rules that . . . maximize innovation, however harshly they might deal with the . . . invention being considered.”⁷⁴ Feldman, Raustiala, and Sprigman’s responses to the *Blurred Lines* litigation evince a similar opposition to any consideration of creators’ moral rights.⁷⁵ And in a recent, controversial piece, Lemley alleges that those who support intellectual property on moral rights grounds are guilty of an irrational faith, akin to religious belief, in the value of IP.⁷⁶ According to Lemley:

⁷⁰ MERGES, *supra* note 17, at 6, 13-16 (arguing that economic efficiency should be considered a “midlevel principle” in answering questions about how and whether intellectual property entitlements should be offered).

⁷¹ *Id.* at 3-4. Lemley offers another possible response to the inconclusive empirical data: maintain an instrumentalist focus, but go where the data lead you. Lemley, *supra* note 11, at 1335-38. According to Lemley, if the empirical data suggest that intellectual property entitlements do not actually incentivize creation as the dominant utilitarian theory presumes, then we should eliminate or modify the entitlements in a way that does maximize utility, rather than merely searching for alternate justifications for our current system. *Id.* at 1343-44. The approach I offer here is consistent with Lemley’s intuitions about the importance of empirical evidence.

⁷² *Cf.* MERGES, *supra* note 17, at 6, 13-16 (offering a moral account of intellectual property, but arguing that economic efficiency should be considered as a “midlevel principle”). Efficiency scholars’ strong stance in this respect might stem in part from the worry that scholars, judges, and juries are often swayed in their thinking by—what efficiency scholars deem to be—inappropriate moral considerations. This worry, far from being paranoid, is almost certainly grounded in reality. Indeed, as I argue *infra* Section II.C, the fact that it is almost impossible to divorce moral considerations from legal decision makers’ intuitions about intellectual property is one reason why a system that explicitly accounts for these intuitions would be more efficient.

⁷³ First, *supra* note 63, at 372.

⁷⁴ *Id.*

⁷⁵ Feldman, *supra* note 3 (“[T]he jury should’ve overcome its legitimate moral outrage [in favor of the creator] . . .”); Raustiala & Sprigman, *supra* note 2 (“Basic fairness [to creators] is not the goal of our copyright system.”).

⁷⁶ Lemley, *supra* note 11, at 1337-38.

The adherents of this new religion believe in IP. They don't believe it is better for the world than other systems, or that it encourages more innovation. Rather, they believe in IP as an end in itself—that IP is some kind of prepolitical right to which inventors and creators are entitled.⁷⁷

Lemley argues that this kind of moral-rights-based faith in intellectual property is dangerous because it is impervious to challenge on empirical grounds.⁷⁸ While acknowledging that current evidence about the utilitarian value of intellectual property is inconclusive at best,⁷⁹ Lemley is nevertheless concerned about a possible future scenario: one where the empirical evidence clearly indicates that intellectual property does not promote innovation, yet moral rights advocates still cling to a belief in its necessity.⁸⁰ This hypothetical scenario presents a huge problem for utilitarians generally because intellectual property interferes with free markets at great social cost.⁸¹ If empirical evidence shows that there is no corresponding benefit in the form of increased innovation, intellectual property cannot be justified by utilitarianism.⁸² Utilitarians are thus strongly opposed to any consideration of creators' moral rights that may throw off the all-important cost-benefit analysis.

3. The Middle Ground

Against this backdrop of insistence that moral rights play no legitimate role in decisions about intellectual property has emerged a small subset of scholars, generally welfarist in bent, who would pursue a middle road.

Jeanne Fromer, for example, cites to evidence that creators care deeply about their labor and personhood interests in their creations.⁸³ She suggests that an enhanced respect for moral rights could encourage creators to create more often—serving as what she terms “expressive incentives.”⁸⁴ Fromer envisions moral-rights-based expressive incentives as supplementing, rather than replacing, the traditional financial incentives offered by our intellectual property

⁷⁷ *Id.*

⁷⁸ *Id.* at 1338.

⁷⁹ *Id.* at 1334.

⁸⁰ *See id.* at 1337-38.

⁸¹ *Id.* at 1339.

⁸² *See id.* at 1339-44. Of course, this view reflects a narrow conception of social benefit—one that is defined entirely by the quantity of innovative output and ignores any psychic value that might accrue to creators and society generally by giving creators rights in their work. Lemley acknowledges this point, but maintains that the costs of exclusivity outweigh the benefits. *Id.* at 1340-41.

⁸³ Fromer, *supra* note 47, at 1760, 1764-81; *see also* JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* 26-29 (2015) (reporting the results of an extensive empirical project which suggest that creators are motivated by moral-rights-type factors such as autonomy and credit).

⁸⁴ Fromer, *supra* note 47, at 1777-78.

system.⁸⁵ Taking a primarily utilitarian approach, she argues that these expressive incentives should not be offered if the costs of doing so outweigh the benefits.⁸⁶

In a similar vein, John Newman argues that the changing landscape of production and distribution of creative works—in particular the fact that expressive works can now be distributed at low cost by individual creators, primarily through social markets—has altered the utilitarian calculus with respect to creative incentives.⁸⁷ According to Newman, a creator’s right to attribution (i.e., credit) and her right to integrity (i.e., ongoing control over how her works are used)—entitlements typically associated with the moral rights movement—assume much greater importance in social markets.⁸⁸ For example, attribution might increase the social status of a creator, thereby enhancing her potential for success in a market driven primarily by social connections.⁸⁹ Due to the growing prevalence of social markets for creative works (and the corresponding decline of traditional markets), Newman argues that entitlements sounding in moral rights may increasingly provide salient creation incentives, in contrast to the economic entitlements our intellectual property system currently offers.⁹⁰

Focusing on infringement rather than entitlements, Christopher Buccafusco and David Fagundes point out that copyright owners often sue for moral, rather than economic reasons.⁹¹ They argue that an understanding of copyright owners’ noneconomic motivations can lead to doctrinal prescriptions that better realize copyright’s utilitarian goals.⁹² For example, they suggest that the infringement standard be modified to require a showing of nonpecuniary or pecuniary harm to the copyright owner.⁹³ They also propose that the fair use defense analysis be tweaked so that a negligible showing of market harm does not defeat the defense.⁹⁴ In these and other ways, Buccafusco and Fagundes aim to develop “a behaviorally realistic version of copyright consequentialism.”⁹⁵

4. Reframing the Debate

Fromer, Newman, Buccafusco, and Fagundes have demonstrated that moral rights considerations are not necessarily incompatible with, and could even

⁸⁵ *Id.* at 1781.

⁸⁶ *Id.* at 1760.

⁸⁷ John M. Newman, *Copyright Freeconomics*, 66 VAND. L. REV. 1409, 1463-64 (2013).

⁸⁸ *Id.* at 1463.

⁸⁹ *See id.*

⁹⁰ *Id.* at 1463-64.

⁹¹ Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433, 2453-54 (2016).

⁹² *Id.* at 2480, 2483-84.

⁹³ *Id.* at 2487-88.

⁹⁴ *Id.* at 2490-92.

⁹⁵ *Id.* at 2483 (footnote omitted).

promote, utilitarian goals. Here, I reframe the debate by suggesting that the dichotomy between moral rights and utility is a false one. Using insights from neuroscience, psychology, and organizational behavior, I show that when it comes to creation, the moral rights concern of fairness often is utility in a very real sense.

II. FAIRNESS AS UTILITY IN COPYRIGHT

Fairness is a concept that is strongly engrained in both our culture and biology.⁹⁶ Preferences for fair treatment and tendencies toward fair behavior are reliably observed in very young children.⁹⁷ As adults, we feel happy when we receive a reward we consider to be fair, and less happy when we receive the same reward, but consider it to be unfair.⁹⁸

Fairness considerations also figure prominently in moral rights conceptions of intellectual property. The Lockean view in particular, which posits that creators acquire “natural rights” in their works by dint of the intellectual and physical labor they invest in the creative process,⁹⁹ is strongly grounded in notions of desert.¹⁰⁰ This account suggests that intellectual property rights are granted because this is what a creator deserves for her creative labor.¹⁰¹ Philosophical definitions of fairness and justice often incorporate a similar concept of desert.¹⁰² The Lockean labor-desert theory, then, is fundamentally a theory about fairness.

The Kantian personhood view is also grounded in fairness in the sense that the concept of rights more generally implicates desert.¹⁰³ If we say that a person

⁹⁶ A preference for fairness may in fact be an instinctual, evolutionarily favored trait. *See* Bair, *supra* note 15, at 338-40 (discussing fairness research in the context of the labor-desert theory of patent protection). *See generally* SUN, *supra* note 14, at 49-66 (presenting the notion that a preference for fairness is deeply ingrained in our DNA).

⁹⁷ *See supra* note 14.

⁹⁸ Golnaz Tabibnia, Ajay B. Satpute & Matthew D. Lieberman, *The Sunny Side of Fairness: Preference for Fairness Activates Reward Circuitry (and Disregarding Unfairness Activates Self-Control Circuitry)*, 19 *PSYCHOL. SCI.* 339, 345 (2008) (reporting a neural basis for this result). While “fair” rewards activate reward circuitry in the brain, “unfair” rewards activate self-control centers, suggesting that rewardees do not feel rewarded and, in fact, may have to overcome feelings of anger or reluctance to accept the reward. *See id.* at 346 (“People may prefer fair outcomes at the cost of material utility in part because they hedonically value fairness itself.”).

⁹⁹ Fisher, *supra* note 9, at 170.

¹⁰⁰ Indeed, it is often referred to as the labor-desert theory for this reason. *See* Rosenblatt, *supra* note 24, at 455-56.

¹⁰¹ *E.g.*, MERGES, *supra* note 17, at 32-33; Bair, *supra* note 15, at 309-10; Fromer, *supra* note 47, at 1753.

¹⁰² *See, e.g.*, Manuel Velasquez et al., *Justice and Fairness*, in *ISSUES IN FAIRNESS*, at V3 (1990) (“Justice means giving each person what he or she deserves [A] notion of desert is crucial to both justice and fairness.”).

¹⁰³ *See* Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 *YALE L.J.* 1277, 1278

has a right to something, we are making an implicit judgment that he deserves that thing.¹⁰⁴ Under the Kantian account, we say that creators have rights—*deserve* rights—in their creations because of the personhood interest they hold in their works.¹⁰⁵

Despite its importance in other domains, however, fairness does not figure into consequentialists' calculations of copyright utility. In fact, as explained, many utilitarians are adamantly opposed to any consideration of fairness in decisions about copyright entitlements. I explain in this Part why this is a mistake. I show how the moral rights concern of fairness is inextricably intertwined with utility in the creative context. Drawing on empirical evidence from a number of fields, I show that treating creators fairly acts as a powerful motivator for creative work, results in objectively more creative output, and aligns well with legal decision makers' moral intuitions. In other words, treating creators fairly results in efficient outcomes. This suggests that the most efficient copyright system is a fair one.

A. *Fairness Motivates Creative Action*

Studies of fairness in the organizational behavior context suggest that people feel more satisfied in their jobs when they perceive their work environments to be fair.¹⁰⁶ They also feel more motivation to engage in positive, discretionary, organization-focused behaviors known as “organizational citizenship behaviors.”¹⁰⁷ Individuals who believe that they are being treated fairly engage in these types of behaviors more frequently, to the benefit of their organizations.¹⁰⁸

Perceptions of fairness in the workplace also lead to enhanced creativity. Creativity that results in measurable innovation can be subdivided into three distinct behaviors. The first behavior is idea generation—producing new and useful ideas.¹⁰⁹ The second behavior, idea promotion, involves finding

(1989) (“Rights . . . reflect a notion of individual desert . . .”).

¹⁰⁴ *See id.*

¹⁰⁵ *See* MERGES, *supra* note 17, at 68-100; Fromer, *supra* note 47, at 1753; Hughes, *supra* note 48, at 330-31; Radin, *supra* note 48, at 971-78; Rosenblatt, *supra* note 24, at 457.

¹⁰⁶ *E.g.*, Robert H. Moorman, *Relationship Between Organizational Justice and Organizational Citizenship Behaviors: Do Fairness Perceptions Influence Employee Citizenship?*, 76 J. APPLIED PSYCHOL. 845, 851 (1991); Dennis W. Organ & Robert H. Moorman, *Fairness and Organizational Citizenship Behavior: What Are the Connections?*, 6 SOC. JUST. RES. 5, 6 (1993).

¹⁰⁷ *See* Moorman, *supra* note 106, at 845.

¹⁰⁸ *E.g.*, *id.* at 854 (“[F]airness perceptions . . . are instrumental in predicting the occurrence of citizenship.”). Organizational citizenship behaviors include altruism, civic virtue, conscientiousness, courtesy, and sportsmanship. *Id.* at 845. By definition, these behaviors are not a part of an organization's formal reward system. However, these behaviors, on the whole, promote efficiency within organizations. *See generally* DENNIS W. ORGAN, ORGANIZATIONAL CITIZENSHIP BEHAVIOR: THE GOOD SOLDIER SYNDROME (1988).

¹⁰⁹ Teresa M. Amabile et al., *Assessing the Work Environment for Creativity*, 39 ACAD.

supporters and backers who can help bring an idea to fruition.¹¹⁰ The final behavior, idea realization, results in a useful implementation of the idea.¹¹¹ When organization members perceive their environment to be fair, they voluntarily respond to higher levels of job demands by engaging more frequently in the three dimensions of creative behavior—generating, promoting, and realizing new ideas.¹¹²

Conversely, though people generally enjoy being creative and will voluntarily engage in innovative behaviors, an unfair environment leads to a shift in the way they perceive these behaviors. Specifically, when individuals operate in an environment they believe to be unfair, they begin to see creativity as stress inducing.¹¹³ And in fact, in these situations, engaging in innovative behaviors does appear to be stressful. When people act creatively in environments they perceive to be unfair, they experience greater work-related anxiety and burnout than those who choose not to be creative.¹¹⁴ Because creativity is largely discretionary,¹¹⁵ a perception that innovation is stressful may lead to decreased motivation for this type of behavior and decreased creative output.¹¹⁶

MGMT. J. 1154, 1154, 1158-60 (1996); Onne Janssen, *Job Demands, Perceptions of Effort-Reward Fairness and Innovative Work Behaviour*, 73 J. OCCUPATIONAL & ORG. PSYCHOL. 287, 288 (2000); Rosabeth Moss Kanter, *When a Thousand Flowers Bloom: Structural, Collective, and Social Conditions for Innovation in Organization*, 10 RES. ORG. BEHAV. 169, 169-70 (1988); Richard W. Woodman, John E. Sawyer & Ricky W. Griffin, *Toward a Theory of Organizational Creativity*, 18 ACAD. MGMT. REV. 293, 293 (1993). This stage of creativity often occurs in response to new trends or organizational problems. Janssen, *supra*, at 288 (“Perceived work-related problems, incongruities, discontinuities, and emerging trends are often instigators of the generation of novel ideas.” (citation omitted)); *see also* Bair, *supra* note 15, at 337 (discussing this result in the context of the labor-desert theory of patent protection).

¹¹⁰ Janssen, *supra* note 109, at 288; Kanter, *supra* note 109, at 184 (describing the second step of the process, where one gains allies for an idea, as “coalition building”); *see also* Jay R. Galbraith, *Designing the Innovating Organization*, 10 ORG. DYNAMICS 5, 10 (1982) (stating that “[e]very idea needs at least one sponsor to promote it”). Supporters might include those who lend financial backing and those who have the organizational power to make the idea become a reality. *See id.* at 10-11.

¹¹¹ Janssen, *supra* note 109, at 288; Kanter, *supra* note 109, at 190-91. Idea realization could be an individual task, or it could involve a number of individuals or groups, depending on the complexity of the project. Janssen, *supra* note 109, at 288.

¹¹² Janssen, *supra* note 109, at 289.

¹¹³ Onne Janssen, *How Fairness Perceptions Make Innovative Behavior More or Less Stressful*, 25 J. ORG. BEHAV. 201, 209 (2004); *see also* Bair, *supra* note 15, at 339-40 (discussing this result in the context of the labor-desert theory of patent protection).

¹¹⁴ Janssen, *supra* note 113, at 209. This finding held true only when perceived procedural fairness and perceived distributive fairness were both low. *Id.* I discuss the differences between procedural and distributive fairness and some of the implications of these differences *infra* Sections III.D-E.

¹¹⁵ Janssen, *supra* note 109, at 290.

¹¹⁶ *See, e.g.*, Kristin Byron, Shalini Khazanichi & Deborah Nazarian, *The Relationship*

Most of the findings just discussed came from studies examining motivations of creators operating within organizations. Though the standard caveats apply when extrapolating empirical results from one context (here, the organizational setting) to another (here, the broader copyright setting), these findings are still instructive for several reasons. First, the studies specifically examined what motivates *creators*—the party of interest here. There is no reason to believe that the subset of creators who belong to organizations have markedly different motivations from the larger set of all creators.¹¹⁷ Second, though there are obvious differences between a creator's employing organization and the larger and perhaps more impersonal copyright system, these two bodies share many similarities. For example, both employing organizations and the copyright system have an interest in encouraging creative activity among their participants, and both offer rewards to encourage participants to engage in these activities. It is thus reasonable to assume that individual creators will respond to actions taken by these bodies in similar ways.¹¹⁸

If we extrapolate from these organizational studies to the larger creative milieu fashioned and maintained by the copyright system, we may conclude that a copyright regime that is fair in the eyes of creators will enhance motivation for creative work and lead to more efforts to engage in these activities. Conversely, a system that is widely viewed as unfair to creators, or that sends a message that creativity is inadequately valued by society, may result in decreased motivation for creative work.

B. *Fairness Leads to Better and More Creative Results*

Beyond simply motivating people to be creative and prompting them to engage in innovative behaviors more often, the insights of psychology suggest that perceived fairness can actually lead to better performance outcomes and more creative output.

Fair treatment in the workplace is positively related to a number of productivity measures, including enhanced task performance, greater organizational commitment, and increased compliance with organizational

Between Stressors and Creativity: A Meta-Analysis Examining Competing Theoretical Models, 95 J. APPLIED PSYCHOL. 201, 207 (2010) (describing on the basis of a meta-analysis the relationship between stress and creativity, which is often, but not always, an inverse one). See generally STRESS AND HUMAN PERFORMANCE (James E. Driskell & Eduardo Salas eds., 1996).

¹¹⁷ In fact, findings from studies specifically focused on examining what motivates creators in the intellectual property context are largely consistent with findings from studies examining creators in organizational or other contexts. See, e.g., Silbey, *supra* note 69, at 2098, 2113-23.

¹¹⁸ I hope to address more comprehensively in a subsequent work whether the benefits of fair treatment observed in organizational environments easily translate to legal regimes.

procedures.¹¹⁹ Conversely, perceived unfairness is associated with negative emotions and counterproductive work behaviors.¹²⁰

The link between productive behaviors and fairness is mediated by motivation. When people perceive their work environments to be fair, they are more likely to feel a quality of motivation known to psychologists as intrinsic motivation.¹²¹ Intrinsic motivation describes the drive an individual experiences when she performs a task for its own sake rather than for an external reward.¹²² Researchers theorize that a fair environment leads to higher intrinsic motivation because it frees people from negative emotions of anger, resentment, and blame that result from unfair treatment, allowing them to more fully enjoy the tasks in which they are engaged.¹²³

The association between fairness and motivation is of particular significance in the copyright context because it is well known that intrinsic motivation leads to more creative thinking and performance.¹²⁴ This suggests that an innovative

¹¹⁹ See, e.g., Yochi Cohen-Charash & Paul E. Spector, *The Role of Justice in Organizations: A Meta-Analysis*, 86 *ORG. BEHAV. & HUM. DECISION PROCESSES* 278, 304-05 (2001); Jason A. Colquitt et al., *Justice at the Millennium: A Meta-Analytic Review of 25 Years of Organizational Justice Research*, 86 *J. APPLIED PSYCHOL.* 425, 429 (2001); Donald E. Conlon, Christopher J. Meyer & Jaelyn M. Nowakowski, *How Does Organizational Justice Affect Performance, Withdrawal, and Counterproductive Behavior?*, in *HANDBOOK OF ORGANIZATIONAL JUSTICE* 301, 301-09 (Jerald Greenberg & Jason A. Colquitt eds., 2005).

¹²⁰ Cohen-Charash & Spector, *supra* note 119, at 296-97, 307; see also Suzy Fox, Paul E. Spector & Don Miles, *Counterproductive Work Behavior (CWB) in Response to Job Stressors and Organizational Justice: Some Mediator and Moderator Tests for Autonomy and Emotions*, 59 *J. VOCATIONAL BEHAV.* 291, 302 (2001).

¹²¹ Cindy P. Zapata-Phelan et al., *Procedural Justice, Interactional Justice, and Task Performance: The Mediating Role of Intrinsic Motivation*, 108 *ORG. BEHAV. & HUM. DECISION PROCESSES* 93, 94 (2009).

¹²² Hsiu-Fen Lin, *Effects of Extrinsic and Intrinsic Motivation on Employee Knowledge Sharing Intentions*, 33 *J. INFO. SCI.* 135, 137 (2007); see also Bair, *supra* note 15, at 314-16 (discussing intrinsic motivation in the intellectual property context); Johnson, *supra* note 22, at 640-43 (same); Mandel, *supra* note 69, at 2007-13 (same); Zimmerman, *supra* note 69, at 42-54 (same).

¹²³ See Zapata-Phelan et al., *supra* note 121, at 94.

¹²⁴ E.g., TERESA M. AMABILE, *CREATIVITY IN CONTEXT* 107-10 (1996) (“[T]he intrinsically motivated state is conducive to creativity, whereas the extrinsically motivated state is detrimental.” (emphasis omitted)); Teresa M. Amabile, *The Motivation to Be Creative*, in *FRONTIERS OF CREATIVITY RESEARCH: BEYOND THE BASICS* 223, 225 (Scott G. Isaksen ed., 1987). Examples of empirical studies specifically testing the link between intrinsic motivation and creativity include Todd Dewett, *Linking Intrinsic Motivation, Risk Taking, and Employee Creativity in an R&D Environment*, 37 *R&D MGMT.* 197, 202-05 (2007) (presenting results of a study examining “intrinsic motivation and employee creativity” and discussing its implications); Shung Jae Shin & Jing Zhou, *Transformational Leadership, Conservation, and Creativity: Evidence from Korea*, 46 *ACAD. MGMT. J.* 703, 707-12 (2003) (“[I]n this study we contributed to the creativity literature by formulating and empirically testing an intrinsic motivation perspective explaining the relationship between transformational leadership and

milieu perceived to be fair will inspire intrinsically motivated creators to generate more creative ideas and products.

C. *Fairness Aligns with Public Perceptions of Copyright Law's Purpose*

A recent empirical study by Gregory Mandel examined public perceptions of intellectual property law's purpose. He found that the majority of those surveyed—sixty percent of respondents—believes that intellectual property entitlements exist to give creators the rights they have earned in their creations.¹²⁵ This understanding arguably reflects fairness concerns.¹²⁶ In contrast, only a minority—twenty-three percent of respondents—believes what most intellectual property scholars accept as a given¹²⁷: that these rights exist to provide utilitarian incentives to create.¹²⁸

employee creativity.”); Pamela Tierney, Steven M. Farmer & George B. Graen, *An Examination of Leadership and Employee Creativity: The Relevance of Traits and Relationships*, 52 PERSONNEL PSYCHOL. 591, 603-17 (1999) (“Consistent with previous theory, our results indicate that when employees enjoy creativity-related tasks, their level of creative output is high. It also appears that when employees work with supervisors who possess a similar intrinsic motivational orientation, creative performance is enhanced.”).

¹²⁵ Gregory N. Mandel, *The Public Perception of Intellectual Property*, 66 FLA. L. REV. 261, 287 (2014).

¹²⁶ In the legal and broader philosophical literature, the terms “rights” and “fairness” are often used interchangeably. According to this line of thinking, certain rights do or should exist because notions of fairness would be offended otherwise. *See, e.g.*, Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1279 (1989) (“Rights analysis . . . establishes . . . principled limits, based on fairness, on what the state may do.”); Larry Temkin, *Justice, Equality, Fairness, Desert, Rights, Free Will, Responsibility, and Luck*, in RESPONSIBILITY AND DISTRIBUTIVE JUSTICE 51, 57 (Carl Knight & Zofia Stemplowska ed., 2011) (discussing the relationship between rights and fairness); *supra* notes 108-12 and accompanying text.

A second, more recent empirical study by Mandel and colleagues Anne Fast and Kristina Olson found that a majority of respondents thought that preventing plagiarism of others' creative works was the most important justification for intellectual property laws. Gregory N. Mandel, Anne A. Fast & Kristina R. Olson, *Intellectual Property Law's Plagiarism Fallacy*, BYU L. REV. 915, 931 (2015). Although Mandel and colleagues distinguished between plagiarism and rights-based concerns in the study, an anti-plagiarism conception, like a natural rights conception, implicates fairness concerns. As I discuss in more detail in Part III below, empirical work suggests that individuals, from a young age and across cultures, view plagiarism of another's creative work as highly unfair.

¹²⁷ Mandel, *supra* note 125, at 287 (“Overall, respondents were substantially more likely to identify a natural rights entitlement basis for intellectual property rights (60%) than either an incentive (23%) or expressive (17%) basis.”).

¹²⁸ The economic utilitarian justification is by far the most popular conception of intellectual property law among intellectual property scholars. *See* Bair, *supra* note 15, at 303-05; Fisher, *supra* note 9, at 169.

These findings reveal a substantial disconnect between scholarly and public perceptions of intellectual property's goal.¹²⁹ While a majority of IP scholars are busy making plans and devising doctrines based on the theoretical, utilitarian perspective (a perspective that has yet to be validated empirically), these scholars are ignoring a highly relevant consideration: what the public thinks.

And it may not be only the general public that is influenced by fairness notions in their thinking about intellectual property. Although fairness considerations are rarely made explicit by the judges and legislators who structure intellectual property entitlements in the United States, a number of commentators have noted that these considerations often seem to lurk just below the surface.¹³⁰

As Mandel and others have argued, legal systems are most effective when actors respond to the system's incentives and goals as anticipated.¹³¹ Legal systems are human systems,¹³² and if we want them to function effectively they cannot be developed and maintained in a theoretical vacuum.¹³³ Given the widespread belief that fairness plays a role in intellectual property law, we may add efficiency to our system by openly acknowledging this role.

For example, commentators can speak all day about what a jury *should* do,¹³⁴ but if their conclusions do not align with widespread public sentiment, they may be wasting their breath. It may be more efficient to adjust legal doctrines so that they accord with public sentiment than to attempt to convince legal decision makers to decide cases in ways that conflict with deep-seated (and perhaps

¹²⁹ Mandel, *supra* note 125, at 299.

¹³⁰ See, e.g., Adam Mossoff, *Exclusion and Exclusive Use in Patent Law*, 22 HARV. J.L. & TECH. 321, 351 (2009) (arguing that the creation of new intellectual property entitlements, like trade secrets and trademarks, was justified on fairness grounds); Mathias Strasser, *A New Paradigm in Intellectual Property Law? The Case Against Open Sources*, 2001 STAN. TECH. L. REV. 4, 64-65 (arguing that the concept of desert strongly influences intellectual property law). *But see* Mandel, *supra* note 125, at 301-02 (finding that people with more intellectual property experience are more likely to cite an incentive basis for the system). This does not necessarily mean that this group is not unconsciously motivated by fairness concerns, however. It simply demonstrates that this group is more familiar with the dominant scholarly rationale for intellectual property rights.

¹³¹ Mandel, *supra* note 125, at 299-300; see also Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1821-26 (2015) (arguing that "efficiency" does not equate with "cheap," and that other costs are incurred when legal systems operate in ways that undermine public trust); John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 543 (arguing that copyright law cannot function effectively when it diverges significantly from social norms).

¹³² Michael D. Guttentag, *Is There a Law Instinct?*, 87 WASH. U. L. REV. 269, 271 (2009) (arguing "that the use of legal systems to organize social behavior is an integral part of human nature").

¹³³ Lemley, *supra* note 11, at 1337-39 (arguing that intellectual property theory should respond to relevant empirical findings).

¹³⁴ See Feldman, *supra* note 3.

unchangeable¹³⁵) moral beliefs.¹³⁶ Rather than spending time and energy criticizing the public for failing to get on board with the utilitarian framework, IP scholars might have more success in asking how the law can get on board with the public's moral intuitions.

III. WHAT IS FAIR?

If we are convinced by the argument that fairness promotes the utilitarian goals of copyright through creation incentives, more creative results, and greater alignment with popular opinion, we may then ask: What does it mean to be “fair” or to have a “fair” system? Unsurprisingly, this is a complex question that does not lend itself to simple answers, but we can look to the psychology literature for clues.

A. *Philosophical or Subjective Fairness?*

Before embarking on this inquiry, I note that the choice to adopt a conception of fairness informed by empirical psychological research is a choice to focus on perceived or subjective fairness—what individuals, in the aggregate, subjectively experience as fair. This understanding of fairness stands in contrast to an objective, philosophical understanding of fairness, a concept that has spawned an extensive philosophical literature.

Perhaps most prominent in this latter, philosophical vein is John Rawls's political theory of justice as fairness. Rawls argued that a society can be just only if it treats its members fairly.¹³⁷ He conceived of a “fair” society as one that distributes all goods equally, unless every member of society would be better off with an unequal distribution of goods.¹³⁸ Other philosophers dispute this egalitarian notion of fairness, arguing that strict egalitarianism can lead to unfairness in many situations.¹³⁹ The egalitarian debate provides a single example of some of the fairness-related issues deliberated by philosophers attempting to achieve an objective definition of the concept.

¹³⁵ See *supra* note 108 and accompanying text (discussing how a preference for fair outcomes may be an instinctive, evolutionarily favored trait).

¹³⁶ See Robert P. Merges, *Against Utilitarian Fundamentalism*, 90 ST. JOHN'S L. REV. 681, 692-96 (2016) (responding to Lemley by citing to empirical evidence showing that people have strong moral beliefs about the nature of intellectual property).

¹³⁷ JOHN RAWLS, A THEORY OF JUSTICE 60 (1971).

¹³⁸ *Id.* at 14-15 (“I shall maintain instead that the persons in the initial situation would choose two rather different principles: the first requires equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society.”); see also Leif Wenar, *John Rawls*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2017), <https://plato.stanford.edu/entries/rawls/> [<https://perma.cc/38V4-N8YB>].

¹³⁹ See, e.g., Jonathan Wolff, *Fairness, Respect, and the Egalitarian Ethos*, 27 PHIL. & PUB. AFF. 97, 98-107 (1998) (explaining and proposing a modification to this view).

Though the philosophical fairness debate raises many fascinating questions, the motivation to focus here instead on subjective fairness is twofold. First, subjective fairness is an empirically tractable problem. Researchers can easily ascertain, simply by asking, a subject's perception of fairness under specific experimental conditions.¹⁴⁰ This empirical tractability leads to analytic tractability—it allows one to make use of significant real-world insights into fairness while obviating the need either to choose among or accommodate competing philosophical views of what fairness entails.

More importantly, perceived fairness is more relevant to creator incentives than a philosophical conception of fairness for two reasons. The first is that much of the philosophical literature is concerned with generalized and overarching philosophical definitions of fairness. Though helpful when thinking about broader problems, such as how to structure a fair political system, these definitions may be of limited use when thinking in specific terms about how to treat individuals engaged in creative endeavors fairly in ways that promote creativity. In contrast, there is a wealth of empirical research examining subjective perceptions of fairness in our specific context of interest—creative work environments.

Second, the psychology literature suggests that creators will be incentivized to engage in creative efforts depending on their *perceptions* of fair treatment, regardless of whether the treatment may be considered objectively fair to an outsider. To achieve the benefits for creativity and productivity outlined above, then, it is a creator's subjective experience of fairness that is the variable of interest.

Focusing on perceived rather than philosophical measures of fairness also has its drawbacks, however. In particular, there might be some conditions that relevant groups subjectively perceive to be fair, but that we nevertheless as a society may wish to reject as undesirable. The well-studied in-group bias, for instance, leads individuals to view members of different categorical groups, such as those of another race or gender, with suspicion.¹⁴¹ One can imagine a situation, in a mostly male workplace for example, where a majority of workers perceive a set of workplace policies to be fair despite these policies being objectively unfair to women. In a case like this, we might be uncomfortable relying completely on aggregated subjective perceptions of fairness when deciding what policies to promote. At least for purposes of this Article, however,

¹⁴⁰ In contrast, it is more difficult to imagine how one could gain empirical insights into objective notions of fairness. Of course, one could test whether a specific environment or process conforms to a particular objective view of fairness. For example, if an objective definition of a "fair" test is one that is free from bias, empirical means could be devised to determine whether the test is in fact unbiased. One could also test whether people experience a specific objective view of fairness as fair—but this falls back into subjective territory, and proponents of an objective definition may have reasons why (some of which I discuss here) they do not want to rely on subjective measures.

¹⁴¹ See generally Pascal Molenberghs, *The Neuroscience of In-Group Bias*, 37 NEUROSCIENCE & BEHAV. REVS. 1530 (2013).

this drawback is not of immediate relevance, because none of the broad, subjective-fairness-enhancing principles I discuss here implicate these or similar concerns.

A second challenge posed by subjective perceptions of fairness is the fact that these perceptions may vary, both among individuals and within an individual over time. The first source of variation (inter-individual) can be addressed by keying policy decisions to statistically significant trends in perceived fairness. This is the approach that this Article advocates, by relying on empirical literature that reports these statistical trends.¹⁴² The second source of variation (intra-individual) potentially poses a more formidable challenge. If this variation indeed exists and is significant, legal institutions built on the premise of particular subjective notions of fairness would need to change to accommodate evolving views. Even if this were practically possible, there are significant transition costs associated with legal change.¹⁴³ Depending on how often changes would need to be made to keep pace with evolving views, these costs might be prohibitive.

Further empirical research is needed to determine whether subjective notions of what is fair do in fact change over time and, if so, how often significant shifts in these views take place. In the meantime, however, and in the absence of any evidence that subjective perceptions of fairness are highly unstable,¹⁴⁴ the broad principles discussed in this Part can help us understand the factors that currently contribute to creators' perceptions of fairness, thereby promoting creative output. Keeping the benefits and drawbacks of a subjective approach in mind, I now discuss some of these broad principles.

B. *Copying Is Unfair*

There is evidence suggesting that people see copying of another's creative work as unfair and morally reprehensible. Social norms in adult communities

¹⁴² This approach poses its own challenges. An obvious problem is that while this approach hopefully will provide appropriate incentives to the majority of creators, it may not reach any given individual. Because creative ability varies among individuals, this approach may thus fail to provide appropriate incentives to a creator of exceptional ability. Indeed, creators of exceptional ability may form a minority group with notions of fairness that vary greatly from those of the majority group.

¹⁴³ See, e.g., Liza Vertinsky, *Comparing Alternative Institutional Paths to Patent Reform*, 61 ALA. L. REV. 501, 549-52 (2010).

¹⁴⁴ At least with respect to one of the fairness-promoting principles discussed later in this Part, the fear of variation over time is likely largely unfounded. This is the finding that people view copying of another's artistic work without permission as highly unfair. Studies show that children hold this view from a very young age, and do so regardless of whether they were raised in a culture that values independent creative work or one where independent artistic ability is less valued and the concept of intellectual property is not emphasized. See *infra* Section III.B. This suggests that this perspective on copying may be an innate rather than a learned attitude.

promise censure and contempt for those who copy another's work.¹⁴⁵ Adults place less value on copied works than original works, and often consider plagiarism to be an immoral act.¹⁴⁶ Empirical work suggests that children as young as five view negatively those who intentionally produce drawings identical or similar to another's.¹⁴⁷ This finding holds true even in cultures that place less value on individual creativity and intellectual property.¹⁴⁸ In a recent study, over three-quarters of adults asked generally whether they thought it was acceptable to copy another's creative work replied that it was not.¹⁴⁹ Many of these respondents cited a moral, rather than a legal, basis for their concerns.¹⁵⁰

C. *Respect and Dignity Are Fair*

Empirical studies from the organizational behavior literature also provide insight into what constitutes a "fair"—and therefore creation-promoting—creative milieu. These studies suggest that creative employees are more likely to perceive their environments as fair when their individual preferences, interests, and special needs are respected.¹⁵¹ Perceived fairness also grows when creators feel that they have a voice in decision-making and are treated considerately and with dignity.¹⁵² Finally, providing appropriate credit for creative contributions

¹⁴⁵ Kristina R. Olson & Alex Shaw, 'No Fair, Copycat!': What Children's Response to Plagiarism Tells Us About Their Understanding of Ideas, 14 DEV. SCI. 431, 432 (2011).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 438; see also Merges, *supra* note 136, at 692-96 (discussing, in the IP context, psychology research addressing moral intuitions about copying and ownership).

¹⁴⁸ F. Yang et al., *No One Likes a Copycat: A Cross-Cultural Investigation of Children's Response to Plagiarism*, 121 J. EXPERIMENTAL CHILD PSYCHOL. 111, 116 (2014); see also Shyamkrishna Balganes, Irina D. Manta & Tess Wilkinson-Ryan, *Judging Similarity*, 100 IOWA L. REV. 267, 284 (2014) (finding that subjects judged two works to be more similar when they were informed that one person had copied from the other); Buccafusco & Fagundes, *supra* note 91, at 2451-52 (discussing creators' fairness-based opposition to the copying of their works); Olson & Shaw, *supra* note 145, at 432.

¹⁴⁹ Mandel, Fast & Olson, *supra* note 126, at 920-23. Twenty percent of respondents thought that copying another's creative work was acceptable only in specific situations. *Id.* at 923. In particular, the study found that many people's negative views of copying disappear when either the original creator gives her permission to the copier or the copier gives credit to the original creator. *Id.* at 946. This finding has implications for copyright law, as I discuss in the following Part.

¹⁵⁰ *Id.* at 923 ("A striking 78% of respondents identified a moral or ethical basis for their response concerning whether copying someone else's creative product is acceptable.").

¹⁵¹ Organ & Moorman, *supra* note 106, at 7.

¹⁵² Moorman, *supra* note 106, at 847, 851-53; Organ & Moorman, *supra* note 106, at 13-14. See generally E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 176 (1988) ("[O]ne of the most potent determinants of the procedural fairness of a social decision-making procedure is the extent to which those affected by the decision are allowed to participate in the decision-making process through the exercise of process control or voice.").

is crucial both for maintaining a creator's perception of fairness and for promoting productivity.¹⁵³ Consequently, organizational behaviorists and motivational consultants often recommend attribution as a primary means of motivating employees.¹⁵⁴

The studies reporting these findings were conducted in organizational environments (i.e., the workplace) and not every finding is directly salient to copyright policy. But the discoveries about dignity, voice, and credit in particular have implications for the law that I discuss in the next Part.

D. *Money Can Promote—Or Undermine—Fairness*

Psychologists have long been interested in the question of whether monetary rewards are an effective means of promoting creativity. The general consensus is that pecuniary rewards are less effective than other types of rewards in promoting creativity, and that, in many cases, monetary rewards can detract from, rather than promote, innovative behavior.¹⁵⁵ As legal scholars have

¹⁵³ Janssen, *supra* note 109, at 295.

¹⁵⁴ See Derek Irvine, *The Keys to Becoming a Manager that Employees Never Want to Leave*, TLNT (May 8, 2013), <https://www.eremedia.com/tlnt/the-keys-to-becoming-a-manager-that-employees-never-want-to-leave/> [<https://perma.cc/9VYE-9VUS>] (discussing research by organizational behaviorist Teresa Amabile supporting the claim that giving credit motivates employees to work harder); Gwen Moran, *3 Secrets of Happy Employees*, ENTREPRENEUR (Oct. 4, 2012), <https://www.entrepreneur.com/article/224569> [<https://perma.cc/24JE-K55T>] (interviewing Jill Geisler, a professor of leadership and management, about the role of giving credit in employee productivity). See generally JILL GEISLER, *WORK HAPPY: WHAT GREAT BOSSES KNOW* (2012); ERIC MOSLEY & DEREK IRVINE, *WINNING WITH A CULTURE OF RECOGNITION: RECOGNITION STRATEGIES AT THE WORLD'S MOST ADMIRED COMPANIES* (2010).

¹⁵⁵ E.g., JEROEN P.J. DE JONG, *SCALES, THE DECISION TO INNOVATE: LITERATURE AND PROPOSITIONS* 29 (2006) (proposing that extrinsic motivators, including monetary rewards, “discourage[] one’s willingness to proceed with ideas”); Teresa M. Amabile, *How to Kill Creativity*, HARV. BUS. REV., Sept.–Oct. 1998, at 77, 79. The idea here is that monetary rewards inappropriately shift creators’ interest in doing creative work for its own sake to doing it for money. See *id.* When creators do creative work for its own sake, they experience intrinsic motivation. When they do it for money, they do not experience this intrinsic motivation, and their desire to engage in the work and their creative output suffer. *Id.* Creators may also interpret monetary rewards as controlling (a message that they *must* perform the work or risk losing out on money), and controlling behaviors towards creators are well known to adversely affect creativity. See, e.g., Bair, *supra* note 15, at 335-36 (discussing how controlling behaviors harm creativity); Johnmarshall Reeve & Edward L. Deci, *Elements of the Competitive Situation that Affect Intrinsic Motivation*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 24, 30-31 (1996) (finding that a controlling environment in which participants felt pressured to win decreased intrinsic motivation). But see Robert Eisenberger & Linda Shanock, *Rewards, Intrinsic Motivation, and Creativity: A Case Study of Conceptual and Methodological Isolation*, 15 CREATIVITY RES. J. 121, 121 (2003) (finding that rewards offered based on creative performance can actually enhance creativity).

previously pointed out, these findings have important implications for copyright and patent policy.¹⁵⁶

At least for the present, however, our innovation system is largely built on a model of economic exchange. Employers pay employees, through salary and bonuses, to be creative.¹⁵⁷ Similarly, copyrights and patents offer creators, through exclusive rights, a primarily financial incentive. Given this reality, it is worth exploring how distributions of monetary awards influence creator perceptions of fairness and, consequently, their motivation to engage in voluntary creative work.

In the organizational context at least, the way money is distributed plays a role in creator conceptions of fairness. Notably, creator compensation schemes are perceived to be fair when they “provide[] at least some minimal returns to every individual [contributing to the creative process].”¹⁵⁸ They are perceived to

¹⁵⁶ Christopher Buccafusco et al., *Experimental Tests of Intellectual Property Laws’ Creativity Thresholds*, 92 TEX. L. REV. 1921, 1937-39 (2014); Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 143; Johnson, *supra* note 22, at 624-28; Mandel, *supra* note 69, at 2010-11; Zimmerman, *supra* note 69, at 47-48.

¹⁵⁷ The literature examining salaries and bonuses is an interesting one. In my experience, people sometimes object to the finding that monetary rewards are detrimental to creativity and intrinsic motivation because they believe it justifies not paying creators for their output. But this is not the case. In fact, the literature suggests that it is not *whether* but *how* monetary rewards are offered that is critical for intrinsic motivation. So-called contingent monetary rewards are rewards that are offered only when a creator completes a certain task, or completes it in a specific way or by a specific deadline. See Edward L. Deci, Richard Koestner & Richard M. Ryan, *A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation*, 125 PSYCHOL. BULL. 627, 628 (1999). These rewards have been shown to be detrimental to intrinsic motivation and creativity because they are perceived by creators as being controlling, i.e., the creator feels that she has to complete the task (or complete it in a certain way or by a certain deadline) or risk losing out on the financial reward. See *id.* In contrast, monetary payouts that are noncontingent in the sense that they essentially compensate creators just for showing up have been shown to have no effect, either positive or negative, on intrinsic motivation and creativity. *Id.*; see also Stephanie Plamondon Bair, *Innovation Inc.*, 32 BERKELEY TECH. L.J. (forthcoming 2017) (manuscript at 23-28); Buccafusco et al., *supra* note 156, at 1938-40 (discussing some of the relevant literature). This all suggests that financial bonuses that are contingent on performance are likely not the best way to motivate creative behaviors. But it also suggests that we can compensate creators through regular, noncontingent awards and not expect to trigger any harm to creativity and motivation. In further support of the noncontingent model is evidence that stress interferes with intrinsic motivation. We know that people feel stress when they are not compensated adequately and cannot take care of basic needs. See generally STRESS AND HUMAN PERFORMANCE, *supra* note 116. Therefore, contrary to scholars’ fears, the empirical literature suggests that to optimize creativity, creators *should* be compensated well, but that it should be done in a noncontingent way. One of the most common examples of a noncontingent reward is a salary. Of course, the copyright system does not reward creators through salary, but through contingent payouts. This is a problem that I hope to address in subsequent work.

¹⁵⁸ Organ & Moorman, *supra* note 106, at 14-15.

be unfair if not all contributors are rewarded.¹⁵⁹ Creators also view compensation schemes as unfair when they result in “outrageous variance” in levels of compensation among individuals or groups in the organization.¹⁶⁰

E. *Procedures Matter*

The psychology literature distinguishes among different flavors of fairness. Procedural fairness in particular has been singled out by psychologists and organizational behaviorists as a distinct form of fairness, separate from distributive fairness, that influences workplace behaviors.¹⁶¹

The difference between distributive and procedural fairness can be loosely analogized to the distinction between substantive and procedural due process. Like substantive due process, distributive fairness is concerned with specific outcomes—in particular, whether these outcomes (which often, in the organizational behavior context, consist of specific distributions of rewards), are perceived as fair.¹⁶² Procedural fairness, in contrast, like procedural due process, is concerned with the procedures used to reach these outcomes.¹⁶³ It asks whether people perceive these procedures as fair, regardless of the distribution attained.

Perceptions of both distributive and procedural fairness have an important influence on innovative behavior. On the negative side, for instance, people who act creatively in environments they perceive as unfair experience greater stress than their noncreative counterparts—which reduces motivation for future creativity—but only when both perceived distributive and procedural fairness

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *E.g.*, Sheldon Alexander & Marian Ruderman, *The Role of Procedural and Distributive Justice in Organizational Behavior*, 1 SOC. JUST. RES. 177, 186-94 (1987). A third major form of justice that has received increasing attention is interactional fairness. This type of fairness concerns itself with the degree to which employees' interactions with their superiors are characterized by dignity and respect. Robert J. Bies & Debra L. Shapiro, *Interactional Fairness Judgments: The Influence of Causal Accounts*, 1 SOC. JUST. RES. 199, 200-01 (1987). Interactional justice has been the focus of some controversy, as researchers debate whether it is conceptually distinct from procedural justice or merely a subset of this older category. Robert J. Bies, *Are Procedural Justice and Interactional Justice Conceptually Distinct?*, in HANDBOOK OF ORGANIZATIONAL JUSTICE, *supra* note 119, at 85, 106 (concluding, based on a review of the empirical literature, that interactional justice is a distinct concept). The findings I discuss in Section II.C about respect and dignity are directly relevant to the concept of interactional justice. For purposes of this Article, however, I do not give interactional fairness independent treatment.

¹⁶² Fox, Spector & Miles, *supra* note 120, at 294; Katherine A. McComas, Joseph Arvai & John C. Besley, *Linking Public Participation and Decision Making Through Risk Communication*, in HANDBOOK OF RISK AND CRISIS COMMUNICATION 364, 374 (Robert L. Heath & H. Dan O'Hair eds., 2009).

¹⁶³ Fox, Spector & Miles, *supra* note 120, at 294; McComas, Arvai & Besley, *supra* note 162, at 374.

are low.¹⁶⁴ And organization members engage in more counterproductive work behaviors when either perceived distributive or procedural fairness is low.¹⁶⁵ On the positive side, perceived procedural and distributive fairness are both related to employees' work satisfaction and their intentions to stay with the company, two factors that contribute to organizational efficiency.¹⁶⁶

Overall, however, the empirical research reveals a particularly significant role for procedural fairness in promoting innovation. A meta-analysis concluded that task performance in particular is primarily related to perceptions of procedural justice.¹⁶⁷

What are some factors that influence perceptions of procedural fairness? Psychologist Gerald Leventhal has identified six empirically supported "rules." These include the consistency of procedures; representativeness, or the degree to which the concerns and values of those being judged are represented by procedures; lack of bias in procedures; accuracy of information used in procedures; correctability, or the ability to appeal a negative outcome; and ethicality.¹⁶⁸ More recent empirical work suggests that centralization and organization size have a negative impact on perceptions of procedural fairness, while formalized procedures neither enhance nor detract from perceptions of fairness.¹⁶⁹

¹⁶⁴ See Janssen, *supra* note 109, at 297 ("Employees may perform innovative work activities in order to cope with higher levels of job demands, but innovation self-evidently creates new workloads. . . . [I]nnovative activities confront the *status quo* and therefore provide intra- or interpersonal conflict leading to increased levels of stress which may well be experienced as intensified job demands.").

¹⁶⁵ Fox, Spector & Miles, *supra* note 120, at 300, 305.

¹⁶⁶ Alexander & Ruderman, *supra* note 161, at 192.

¹⁶⁷ Cohen-Charash & Spector, *supra* note 119, at 304.

¹⁶⁸ Russell S. Cropanzano, K. Michele Kacmar & Dennis P. Bozeman, *The Social Setting of Work Organizations: Politics, Justice, and Support*, in ORGANIZATIONAL POLITICS, JUSTICE, AND SUPPORT: MANAGING THE SOCIAL CLIMATE OF THE WORKPLACE 1, 12 (Russell S. Cropanzano & K. Michele Kacmar eds., 1995); Gerald S. Leventhal, *What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships*, in SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH 27, 40-46 (Kenneth J. Gergen, Martin S. Greenberg & Richard H. Willis eds., 1980); Marshall Schminke, Maureen L. Ambrose & Russell S. Cropanzano, *The Effect of Organizational Structure on Perceptions of Procedural Fairness*, 85 J. APPLIED PSYCHOL. 294, 295 (2000). Empirical support for these rules has been offered by ROBERT FOLGER & RUSSELL CROPANZANO, ORGANIZATIONAL JUSTICE AND HUMAN RESOURCE MANAGEMENT 47 (Peter J. Frost et al. eds, 1998); Robert L. Dipboye & Rene de Pontbriand, *Correlates of Employee Reactions to Performance Appraisals and Appraisal Systems*, 66 J. APPLIED PSYCHOL. 248, 251 (1981); Jerald Greenberg, *Determinants of Perceived Fairness of Performance Evaluations*, 71 J. APPLIED PSYCHOL. 340, 341 (1986); Ming Singer, *Determinants of Perceived Fairness in Selection Practices: An Organizational Justice Perspective*, 116 GENETIC SOC. & GEN. PSYCHOL. MONOGRAPHS 477, 480 (1990); Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCHOL. 830, 837 (1989).

¹⁶⁹ Schminke, Ambrose & Cropanzano, *supra* note 168, at 299-300 (finding that

IV. CONFIGURING A FAIRER, MORE EFFICIENT COPYRIGHT SYSTEM

In the preceding Parts, I demonstrated how a copyright system perceived by creators to be fair confers utility. This suggests that the traditional “either/or” dichotomy advanced by moral rights advocates and efficiency scholars is a false one.

I also explained what perceived fairness means, and some general ways in which this perception can be promoted. Here, I apply these general insights in the copyright context. How can we use these insights to create a fairer, and thus more efficient, copyright system? I offer just a few suggestions. Some of these suggestions (including the idea that we should grant exclusive rights to incentivize creators) may be favored primarily by utilitarians. Others (including the proposal that we offer creators more robust attributional rights) are mainstays of the moral rights literature. My contribution with respect to these is to show that they simultaneously can achieve both efficiency and deontological ends. Additional suggestions (including the proposed mechanism for permissive use, and the suggestion that we increase our focus on procedural fairness), have, to my knowledge, not previously received much attention in copyright scholarship. I argue that these interventions can satisfy moral rights as well as utilitarian concerns.

A. *Rights Matter*

The psychology literature on copying suggests that preventing unauthorized copying of creative works serves an important role in maintaining perceptions of fairness.¹⁷⁰ In turn, a creative environment that is perceived as fair can enhance creative motivation and creative output.¹⁷¹ Limited exclusive rights, then, may help promote creation by reassuring creators that they will be treated fairly.

This argument, uniting as it does efficiency and moral rights considerations, differs from both traditional moral rights and utilitarian justifications for exclusive rights. The traditional Lockean argument is that exclusive rights are a just desert for creative labor.¹⁷² The traditional utilitarian argument posits that exclusive rights provide creation incentives because they allow the creator to

centralization is “significantly related to perceptions of procedural justice,” formalization has no relationship to procedural fairness, and organizational size is not related to perceptions of procedural fairness, “[a]lthough larger organizations were perceived to be less interactionally fair than smaller ones”).

¹⁷⁰ See *supra* Section III.B. Of course, not everyone subscribes to the idea that intellectual property rights motivate creative work. In fact, there is growing evidence that creators create because they are intrinsically motivated to do so, and not out of a desire for a reward. See, e.g., Zimmerman, *supra* note 69, at 43. See generally SILBEY, *supra* note 83, at 26-27 (suggesting that rewards, like money, do not factor into innovation as much as other motivations like emotional pleasure).

¹⁷¹ See *supra* Part II.

¹⁷² See *supra* note 45 and accompanying text.

make money from her creative work.¹⁷³ In contrast, the moral rights/efficiency argument I make here suggests that exclusive rights are important because creators perceive copying to be unfair (a moral rights concern). By granting exclusive rights, and thereby preventing unauthorized copying, we shore up the perceived fairness of the system, which gives creators *ex ante* incentives to create again (an efficiency concern).

Unlike the traditional utilitarian account of exclusive rights, the moral rights/efficiency justification I propose here suggests that exclusive rights provide creation incentives independent of whether the creator ever makes a dime. *Ex ante* incentives are provided to creators who perceive that the system—which allows creators to prevent unauthorized copying—is fair. This distinction may gain particular significance in light of the fact that many have begun to question whether the traditional utilitarian story of creators creating in response to financial incentives is factually correct.¹⁷⁴ Unlike that story, which has yet to be empirically validated, the efficiency story I tell here is supported by empirical evidence.¹⁷⁵ It thus may provide an independent—and factually sound—utilitarian justification for exclusive rights.

B. *Asking for Permission and Giving Credit*

1. Asking for Permission

Though granting exclusive rights is one way to enhance the perceived fairness of the copyright system, it is not necessarily the only way. One underexplored mechanism for improving the perceived fairness of copyright is the role of individualized permissive use.

The copying studies discussed above examined psychological reactions to copying *without* permission.¹⁷⁶ Copying without permission leads to negative moral judgments and perceptions of unfairness.¹⁷⁷ *With* permission, however, copying is magically transformed from plagiarism into something different—homage to the artist that came before. As such it adopts a completely different

¹⁷³ See, e.g., Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 129-30 (2004).

¹⁷⁴ See, e.g., MERGES, *supra* note 17, at 3; Lemley, *supra* note 11, at 1334; Moore, *supra* note 65, at 611-14; *supra* note 69 and accompanying text.

¹⁷⁵ See *supra* Section III.B.

¹⁷⁶ E.g., Olson & Shaw, *supra* note 145, at 431-32.

¹⁷⁷ The empirical literature suggests that negative moral judgments arise when individuals produce creative works that are either identical or similar to another's. See, e.g., *id.* The literature does not address uses of another's work that might be considered transformative. If perceptions of unfairness and negative moral judgments are lessened when the borrower transforms the original work through her own creative labor, then exclusive rights have a correspondingly lesser role to play in maintaining perceptions of fairness. Ideally, moral judgments of transformative use would align with judicial judgments of transformative use under a fair use analysis.

moral valence.¹⁷⁸ Asking for permission also satisfies the conditions of respecting creator dignity and granting the creator a voice in how her creations are used—conditions found to be important for the perceived fairness of a creative environment.¹⁷⁹

Given that financial considerations are often secondary for creators,¹⁸⁰ we might be pleasantly surprised at the number of creators who are happy to allow copying when asked—not for a license, which entails financial negotiations and potentially high transaction costs—but simply for *permission*.¹⁸¹ This intuition is reflected in the following comment to Raustiala and Sprigman’s piece in *Slate*: “Song is a rip off. Pharrell should have at minimum asked for permission.”¹⁸²

To be clear, when I speak of permissive use here I mean to distinguish it from *licensed* use, which often involves financial negotiation.¹⁸³ I also distinguish it from the type of nonfinancial licenses offered under the Creative Commons, which broadly grant permission (often conditional) to anyone who may want to use a work.¹⁸⁴ Although these latter licenses may be an efficient mechanism for

¹⁷⁸ An empirical study by Mandel and colleagues supports this proposition. Mandel, Fast & Olson, *supra* note 126, at 947 (“A majority of the population . . . believes that providing proper attribution to creators should enable the free copying of their intellectual property works and inventions.”). The study found that most participants thought that copying of another’s creative work was acceptable when the copier had the creator’s permission. *Id.*

¹⁷⁹ See *supra* Section III.C.

¹⁸⁰ See, e.g., SILBEY, *supra* note 83, at 149; Bair, *supra* note 15, at 315; Zimmerman, *supra* note 69, at 43 (“What these scholars posit instead is that the expression of human creativity is primarily driven by intrinsic rather than extrinsic factors.”).

¹⁸¹ The concept of permission is closely related to the concept of attribution, which I address immediately below.

¹⁸² Mockyeabirdyea, Comment to Raustiala & Sprigman, *supra* note 2. Other comments to the *Slate* article, as well as the *Bloomberg* article by Feldman, reflect the same sentiment. E.g., 1Brotherlove, Comment to Feldman, *supra* note 3 (opining that “[t]he Gaye Estate sues and wins as well as they should have” because “they [did not] g[et] permission from the Gaye Estate to sample Got to [G]ive [I]t [U]p”); In Like Flynn, Comment to Raustiala & Sprigman, *supra* note 2 (“The reason this lawsuit happened is because this was a massive hit and because neither Williams/Thicke nor their representatives reached out with that olive branch of cutting in the Gaye camp on the song copyright and instead preemptively sued the Gayes.”); Kate the Cursed, Comment to Raustiala & Sprigman, *supra* note 2 (opining that the verdict was correct because while “[m]ost artists try to create their own sound[,] THESE artists, by their own statement, tried to recreate someone else’s sound . . . [without] feel[ing] legally or morally compelled to get any permission to do so,” and that “[t]he argument that you shouldn’t be able to [include deliberate similarities to another’s work in your own work] without permission and/or credit has its merits”).

¹⁸³ See generally Ronald A. Cass, *Copyright, Licensing, and the “First Screen,”* 5 MICH. TELECOMM. & TECH. L. REV. 35, 44-52 (1999).

¹⁸⁴ See generally Niva Elkin-Koren, *Exploring Creative Commons: A Skeptical View of a Worthy Pursuit*, in THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 325, 326 (Lucie Giubault & P. Bernt Hugenholtz eds., 2006). Briefly, the Creative Commons is a public licensing scheme that allows creators to freely distribute their

encouraging downstream creation in many circumstances, they lack the psychological power of an individualized request for permission. A mechanism that facilitates individualized permissive use might reach those creators who are not willing to offer blanket licenses under a Creative Commons scheme, but who would be open to hearing and perhaps granting individual requests to use their creations royalty-free.

2. Giving Credit

Closely related to, but distinct from, the concept of asking for permission is the concept of giving credit. As Eric Johnson has pointed out, many copyright holders are more than willing to share their creations through the Creative Commons on condition that they receive credit for their work.¹⁸⁵ Jessica Silbey, in extensive interviews with creators, found that credit and reputational benefits provide a primary motivation for creative work.¹⁸⁶ Appropriate credit is also a theme that runs through the psychology literature on copying.¹⁸⁷ And in the organizational behavior literature, credit has been found by researchers to be one of the elements that contributes to a creative environment that is perceived as fair.¹⁸⁸

Statements made by Marvin Gaye's son in an interview about the *Blurred Lines* controversy highlight how giving credit can influence the perceived fairness of a later creator's use of an original work. Gaye explains that he is trying, through the litigation,

to uphold my father's legacy and the work that he's put in, his blood sweat and tears . . . you always have to give credit for that, you know? Just like Robin Thicke is an artist, [and] he'd want to get credit for [his work]. I'm an artist myself, you know, I would not think that somebody would do something like that and not give me credit at least.¹⁸⁹

copyrighted works. *Id.* at 326-27. Although no licensing fees are required to use a work licensed through the Commons, creators may set certain conditions for the use of their work, the most common of which is an attribution requirement. *Id.* at 330 (describing the types of standardized licenses from which creators can choose).

¹⁸⁵ See Eric E. Johnson, *The Economics and Sociality of Sharing Intellectual Property Rights*, 94 B.U. L. REV. 1935, 1978-80 (2014) (explaining that users of Creative Commons "respond[] to a perceived desire . . . to undo at least some of the effects of the currently prevailing copyright-by-default system").

¹⁸⁶ SILBEY, *supra* note 83, at 149.

¹⁸⁷ See *supra* Section III.B.

¹⁸⁸ See discussion and sources cited *supra* Section II.B. On the other side of the equation, an empirical study by Mandel, Fast, and Olson found that sixty-two percent of questioned subjects thought that copying another's creative work was permissible if the copier gave attribution. Mandel, Fast & Olson, *supra* note 126, at 947.

¹⁸⁹ Interview by TMZ with Marvin Gaye III (Aug. 22, 2013), <http://www.tMZ.com/2013/08/22/marvin-gaye-son-robin-thicke-lawsuit/> [<https://perma.cc/R3MV-9J5X>]. Comments to Sprigman and Raustiala's *Slate* piece reflect

3. Implementing Permission and Credit

There is psychological heft to the simple and intuitive behaviors of asking for permission and giving credit. Widespread adoption of these behaviors could allow for greater use of exclusive materials than is achieved under our current regime, thereby lowering the social costs associated with exclusive rights. Mechanisms that encourage attribution and permissive use might also add to the perceived fairness of the copyright system, thus providing *ex ante* incentives for creators and contributing to higher quality creative outcomes.

Given this, it is worth thinking about how our system could facilitate these behaviors. One simple idea involves adding functionality to the Copyright Office's website. The site already provides a search function that allows members of the public to find information on registered copyrights.¹⁹⁰ This function could be modified to provide information about whether a copyright holder is open to individualized requests for permissive use, and could even allow an individual to contact a copyright holder that is open to such requests directly through submission of a web form. The form could include a segment meant to discern whether the requester plans to give credit to the original creator, and if so, how he intends to do so.

Of course, this mechanism would only be effective to the extent that copyright holders are known and would be unhelpful in the case of orphan works.¹⁹¹ Further, many prospective borrowers might be reluctant to request permission for fear of identifying themselves in the case that they are denied permission and decide to use the work anyway. But at the very least, this provides a low-cost mechanism for connecting users who are willing to request permission (and abide by the copyright holder's response) and known holders who are willing to consider these requests in good faith.

the same sentiment. *See, e.g.*, Mamichaeldb, Comment to Raustiala & Sprigman, *supra* note 2 ("It would have saved a lot of time and money, had [Thicke and Williams] just admitted that there were some similarities amongst themselves, and given Gaye a small writers credit."); Timike77, Comment to Raustiala & Sprigman, *supra* note 2 ("This verdict . . . will simply prevent future copying without due credit.").

¹⁹⁰ U.S. Copyright Office, *Public Catalog*, COPYRIGHT CATALOG, <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First> [<https://perma.cc/SPD3-38EC>] (last visited Mar. 15, 2017).

¹⁹¹ An "orphan work" is a work that is copyrighted, but the copyright owner of the work is unknown or otherwise unreachable. Olive Huang, *U.S. Copyright Office Orphan Works Inquiry: Finding Homes for the Orphans*, 21 BERKELEY TECH. L.J. 265, 265 (2006). Congress has twice attempted to pass legislation addressing the problems arising from orphan works, but both times has failed to do so. *See* Orphan Works Act, H.R. 5889, 110th Cong. (2008); Orphan Works Act, H.R. 5439, 109th Cong. (2006).

C. Promoting Distributive Fairness

The psychology literature suggests that though money may not be a primary motivator of creative work,¹⁹² financial rewards can promote creativity indirectly by contributing to the perception that the copyright system treats participants fairly.¹⁹³ Conversely, if the copyright regime results in distributions of rewards that are perceived as unfair, it may stifle the system's utilitarian goals.¹⁹⁴ Perhaps unsurprisingly, people perceive distributions that violate moral intuitions, that fail to reward all contributors, or that result in outrageous variance among contributors as unfair.¹⁹⁵

Another online comment to Raustiala and Sprigman's piece illustrates this sentiment. In response to the statement that "[t]he key issue" in the *Blurred Lines* case was whether Thicke and Williams "crossed the line into copyright infringement—and where exactly that line is,"¹⁹⁶ one commenter answered: "The line is when you begin to make tens of millions of dollars from someone else's inspiration and creativity and refuse to acknowledge them or . . . their heirs."¹⁹⁷

The comment ("when you begin") suggests that while Thicke and Williams's initial use of Gaye's ideas may or may not have crossed a moral line, the line was definitely crossed—at least according to the commenter—once they began to make "tens of millions of dollars" from this use without crediting the source.

¹⁹² This is true at least on the individual level. See *supra* note 69. This might not be true for corporate entities. Further, though money may not be required to motivate an individual to engage in creative labor, the labor itself might demand financial outlays that need recouping. But these production costs may become less relevant as technologies that allow for low-cost production continue to advance. See Johnson, *supra* note 22, at 672-75.

¹⁹³ See *supra* Section III.D.

¹⁹⁴ See *supra* Section III.D.

¹⁹⁵ See *supra* Section III.D. Although "undue variance" is not defined in the psychology literature and will likely vary from situation to situation, many people "know it when they see it." For instance, the comment discussed later in this Part reflects one commenter's sentiment that undue variance was at play when Robin Thicke made "tens of millions of dollars" from his use of Gaye's ideas and Gaye received nothing. Cdunlea, Comment to Raustiala & Sprigman, *supra* note 2.

¹⁹⁶ Raustiala & Sprigman, *supra* note 2.

¹⁹⁷ Cdunlea, *supra* note 195; see also Rmj, Comment to Raustiala & Sprigman, *supra* note 2 (opining that suits like these occur only when a "song makes enough money"); Guest, Comment to Feldman, *supra* note 3 (opining sarcastically that "they stole something from the guy's song and made millions, no biggie, what?"); Woody_Brown, Comment to Raustiala & Sprigman, *supra* note 2 (opining that "no you don't get to be a slacker . . . punk who makes money off of my creations"). A somewhat different, but related, distributive fairness concern was articulated by another commenter, who opined that "[i]f people had . . . been allowed to sue for sound a like [sic] in the 50s 60s and 70s it sure would have gone a long way to help the [A]frican [A]mericans who created the dominant pop music styles of the time but saw white counterparts make most of the money." Amorousmoose, Comment to Raustiala & Sprigman, *supra* note 2.

One policy lever for taking account of distributive fairness in copyright is the damages determination.¹⁹⁸ The current damages scheme already reflects fairness considerations to some extent through the availability of enhanced statutory damages for willful infringement and lowered statutory damages for innocent infringement¹⁹⁹—though whether the administration of these damages in practice can be considered “fair” is up for debate.²⁰⁰ Buccafusco and Fagundes have also proposed a number of ways in which the copyright remedies determination could be modified to better align with both moral and efficiency considerations.²⁰¹ Their suggestions include limiting the availability of injunctive relief, offering attribution as a form of relief, and awarding damages and attorney’s fees only when the copyright owner is trying to vindicate, through litigation, an economic rather than a moral harm.²⁰²

Additionally, if we develop schemes that make royalty-free permissive use easier, as I suggest above, these schemes could, for example, include a clause triggering royalties or royalty negotiations if and only if the user makes a threshold amount of money from the use. Such a scheme would help protect against the perceived unfairness arising from undue variance in compensation among contributors, something that might occur, for example, if a creator grants royalty-free permissive use to a follow-on creator who then unexpectedly makes millions of dollars from the use. It might also make original creators more willing to grant royalty-free licenses in the first instance, confident that they will be protected from exactly this situation. After all, no one wants, out of the goodness of their heart, to allow someone to make use of their work, only to later discover that the borrower made millions of dollars for the use and left the generous creator out in the cold.²⁰³ At the same time, by triggering royalties only

¹⁹⁸ See Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1569 (2005).

¹⁹⁹ Patrick R. Goold, *Corrective Justice and Copyright Infringement*, 16 VAND. J. ENT. & TECH. L. 251, 287-89 (2014); see also 2 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION § 7.1(2), at 262 (2d ed. 1993).

²⁰⁰ See, e.g., Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 455 (2009). The perceived unfairness of a damages determination can work in both directions—either by under- or over-compensating original creators. See *id.* at 457-64. Although I do not address the issue here, fairness could also be implicated in the decision to award an injunction versus damages for infringement. See generally Andrew Gilden, *Copyright Essentialism and the Performativity of Remedies*, 54 WM. & MARY L. REV. 1123 (2013).

²⁰¹ Buccafusco & Fagundes, *supra* note 91, at 2491-93.

²⁰² *Id.* at 2495-98.

²⁰³ Johnson, *supra* note 185, at 1974-75 (referring to this practice on the part of the borrower as “cadgery”). The fear of cadgery may be one reason why the noncommercial limitation (preventing use of a work if it is for commercial purposes) is one of the standard, and standardly invoked, license restrictions creators select when making their works available through the Creative Commons. See *id.* at 1978-79, 1982. It is also one of the more problematic restrictions. Many creators who want to borrow materials may not know, in the

when notions of fairness are threatened by a royalty-free scheme, the proposed approach keeps transaction costs low because it avoids unnecessary bargaining in those cases where the borrower does not realize substantial profits from her use of the copyrighted work.

D. Promoting Procedural Fairness

Perceptions of fairness that ultimately influence creative motivation and output depend not only on outcomes, but also on the procedures used to reach those outcomes.²⁰⁴ There is thus a utilitarian interest in configuring a copyright system that is fair in procedure as well as in substance.

Insights from psychology suggest that people perceive procedures to be fair when they are consistently applied.²⁰⁵ In this particular respect, copyright law has a long way to go. As many commentators have noted, the perceived indeterminacy in application of the fair use doctrine in particular often leads to a sense among rights holders and downstream creators that the results of this doctrine are unpredictable and inconsistent.²⁰⁶ Adding consistency to this system promises efficiency returns, not only because fewer risk-averse downstream creators will be chilled from using original works in acceptable ways,²⁰⁷ but also because creators will experience enhanced creative motivation arising from a greater perception of fairness.

As far as other procedural fairness factors are concerned, copyright is potentially on more solid ground. In particular, the appeals process that is a feature of our litigation system meets the fairness-enhancing criterion of correctability.²⁰⁸ Although appeals can be costly for litigants and for society,

early stages of their project, whether the project will be strictly commercial. They may thus be chilled from using works in ways that would lead to no objection from the copyright owner because they want to leave the door for commercialization open. *Id.* at 1982. My proposal solves that problem.

²⁰⁴ See *supra* Section III.E.

²⁰⁵ Leventhal, *supra* note 168, at 40 (“An individual’s judgments of procedural fairness may be based on a consistency rule which dictates that allocative procedures should be consistent across persons and over time.”).

²⁰⁶ See, e.g., Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 551 (2008); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1092-122 (2007); Fromer, *supra* note 47, at 1819-20; Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1666-67 (2004); Zahr K. Said, *Reforming Copyright Interpretation*, 28 HARV. J.L. & TECH. 469, 511 (2015). *But see* Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2540-42 (2009) (arguing that the application of the fair use doctrine is more predictable than commonly believed).

²⁰⁷ See Carroll, *supra* note 206, at 1113-14.

²⁰⁸ See Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC’Y REV. 103, 125-27 (1988) (finding that in the legal context, correctability plays an important role in people’s judgments of the fairness of their courtroom experiences).

part of this cost may be offset by the utilitarian gains arising from creators' perception that they can correct a bad decision.

Other factors shown to influence procedural fairness merit further investigation in the copyright context. For example, perceptions of procedural fairness are lower when a system increases in centralization.²⁰⁹ Empirical research could reveal whether litigants experience district courts as part of a centralized federal court system or instead as a more individualized procedure. Whatever the results of this investigation, efforts to make rights determinations more personalized could help improve copyright's image as a fair system.²¹⁰ In this respect, the suggestions about asking for permission discussed above are relevant. If we encourage creators and downstream users to sort out rights individually rather than relying on an impersonal, centralized system to do so, actors will be more likely to perceive their experiences with the system as fair.

E. *Fair Use*

Any examination of fairness in copyright would be incomplete without a discussion of fair use. A statutory defense to copyright infringement,²¹¹ the fair use doctrine is one means of balancing the rights of original creators with downstream creators who would build off the original creator's work.²¹² Fair use determinations are made by courts on a case-by-case basis upon an evaluation of four statutorily defined fair use factors.²¹³

1. Upstream and Downstream Creators

The "fair" in fair use refers not to original creators and rights holders, but to those downstream creators who would borrow some or all of an upstream creator's work in their own expression. The name implies that in some cases it is fair to allow downstream creators to use a rights holder's work in this way—and conversely that it would be unfair to downstream creators not to allow this use.

This reference to downstream creators raises an important point about the realities of creation. To this point, I have assumed that the beneficiaries of the

²⁰⁹ Schminke, Ambrose & Cropanzano, *supra* note 168, at 299.

²¹⁰ *Id.* at 296 (discussing how decreased centralization "allows individuals greater input . . . into policies and procedures" and increases "individuals' ability to make decisions about their tasks," both of which "lead to increased perceptions of procedural fairness").

²¹¹ 17 U.S.C. § 107 (2012) ("[T]he fair use of a copyrighted work . . . is not an infringement of copyright.").

²¹² *See* Carroll, *supra* note 206, at 1092 ("The fair use doctrine is rooted in the truth that we sometimes must use the expression of another to express ourselves effectively.").

²¹³ 17 U.S.C. § 107 (listing as fair use factors: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work").

copyright system are creators of wholly original works—works that do not build on, borrow from, or otherwise rely on previously copyrighted materials. But in many cases, creators have built on, borrowed from, or relied on the works of others in developing their own, independently copyrightable works.²¹⁴ Further, most repeat players in the copyright system eventually find themselves, at some time, on each side of this equation. Sometimes they are upstream creators, from whom others may wish to borrow, and sometimes they are downstream creators, wishing to borrow from others.²¹⁵

The concept is illustrated by the *Blurred Lines* litigation. In writing *Blurred Lines*—an independently copyrightable work—Thicke and Williams borrowed elements from Gaye’s previously copyrighted song *Got to Give It Up*.²¹⁶ In this litigation, Gaye was the upstream creator and Thicke and Williams were the downstream creators. But Thicke and Williams have also written a number of other copyrighted songs, many of which do not explicitly borrow from others’ works.²¹⁷ In this sense, they are upstream creators, with an interest in preventing unauthorized copying of their works by potential downstream creators.

Given this dynamic, to optimally reap the utilitarian gains of fairness the copyright system must be perceived as fair by all creators—whether upstream, downstream, or some combination of the two. The question, then, is how do we create this perception?

One approach is to bring the fair use doctrine—the policy lever traditionally used to effect this balancing—more in line with the psychological insights about fairness discussed here. Two suggestions about how to do this follow.

2. Enhancing Perceived Certainty

First, though the fair use inquiry was explicitly designed to be a flexible, factor-based standard rather than a bright-line rule, in practice this flexibility is often perceived as manifesting itself through indeterminacy.²¹⁸ The perception exists among rights holders and prospective downstream borrowers that it is

²¹⁴ See Shyamkrishna Balganesh, *Tiered Originality and the Dualism of Copyright Incentives*, 95 VA. L. REV. BRIEF 67, 69 (2009) (“[M]ost creativity today is sequential and builds on work from the past.”).

²¹⁵ *Id.* (“Today’s plaintiff-creators are . . . very likely tomorrow’s defendant-copyists and vice-versa.”).

²¹⁶ See Raustiala & Sprigman, *supra* note 2.

²¹⁷ See Ed Christman, *‘Blurred Lines’ Verdict: How It Started, Why It Backfired on Robin Thicke and Why Songwriters Should Be Nervous*, BILLBOARD (Mar. 13, 2015), <http://www.billboard.com/articles/business/6502023/blurred-lines-verdict-how-it-started-why-it-backfired-on-robin-thicke-and> [https://perma.cc/QM85-MKZT] (quoting an industry executive for the proposition that “Pharrell is a very accomplished songwriter producer and he doesn’t want his reputation tarnished as an infringer”).

²¹⁸ See, e.g., Carroll, *supra* note 206, at 1090 (“While the doctrine’s attention to context has many salutary attributes, it is so case-specific that it offers precious little guidance about its scope . . .”).

impossible to know in advance whether a particular use will be judged as “fair” by a court.²¹⁹

Scholars have pointed out that this perceived indeterminacy may in fact be unwarranted. Matthew Sag, for example, conducted an empirical study demonstrating that fair use outcomes are actually more predictable than is commonly assumed.²²⁰ But for our purposes, it is the *perception* of indeterminacy that counts. This perception may lead to the notion, on the part of both upstream and downstream creators, that the system is unfair.²²¹ Consistency of procedures and outcomes plays an important role in perceptions of fairness:²²² without perceived consistency, participants may come to believe that outcomes are arbitrary, and arbitrary outcomes, by definition, cannot be fair.²²³

Other scholars have thought, in other contexts, about what might be done to address whatever indefiniteness exists within the fair use system. Michael Carroll, for example, has argued for the establishment of an administrative Fair Use Board that would advise prospective downstream users on the strengths of their fair use positions.²²⁴ Upstream creators would then have the chance to contest the Board’s ruling.²²⁵ In a similar vein, Fagundes has proposed that the Copyright Office issue advisory letters weighing in on various downstream uses.²²⁶ These proposals, though designed to enhance the consistency of the fair use doctrine itself, also promise to enhance the *perceived* consistency, and thus the perceived fairness, of the fair use regime. Being able to look to an advisory letter or an administrative board to gain insight into whether a particular use is fair, for instance, will likely contribute to both upstream and downstream creators’ senses that the system offers a baseline of predictability to all involved. To the extent these proposals, if effectuated, would actually succeed in enhancing perceived consistency and fairness for upstream and downstream creators, they would also serve to provide utilitarian creation incentives for these parties.²²⁷

²¹⁹ See *id.* at 1094.

²²⁰ Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 49 (2012) (“[T]he uncertainty critique is somewhat overblown . . . while there are many shades of gray in fair use litigation, there are also consistent patterns that can assist individuals, businesses, and lawyers in assessing the merits of particular claims to fair use protection.”).

²²¹ See Leventhal, *supra* note 168, at 40; *supra* Sections III.E, IV.D.

²²² See Leventhal, *supra* note 168, at 40.

²²³ Arbitrary outcomes cannot be fair because fairness depends on allocating rights and resources according to desert. If desert is not considered (i.e., if rights are arbitrarily assigned), the allocations are, by definition, unfair. Velasquez et al., *supra* note 102 (“Justice means giving each person what he or she deserves [A] notion of desert is crucial to both justice and fairness.”).

²²⁴ Carroll, *supra* note 206, at 1090.

²²⁵ *Id.* at 1091.

²²⁶ David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 182-88 (2009).

²²⁷ See *supra* Part II (describing relationship between perceptions of fairness and utilitarian goals).

3. Encouraging Distributive Fairness

Earlier, this Article discussed the role that the distribution of entitlements plays in creator perceptions of fairness.²²⁸ I suggested that this insight could be implemented in ways that enhance fairness and utility through the damages determination, or through a permissive use scheme wherein royalties are triggered only if the user makes a threshold amount of money from the use.²²⁹ Here, I propose that distributive fairness might also be advanced through the fair use doctrine.

The four statutory factors judges consider when making a fair use determination are: (1) “the purpose and character of the use”; (2) “the nature of the copyrighted work”; (3) the amount of the work an alleged infringer borrows as compared to the entirety of the original work; and (4) the potential the allegedly infringing use has to harm the market for the original use.²³⁰ Under current judicial interpretation of the factors, courts do not explicitly consider questions of distributive fairness.²³¹

These considerations are implicit to some degree in courts’ fair use analyses, however. Under the first fair use factor, for example, one of the questions a judge asks is whether the use is noncommercial.²³² The commerciality inquiry aligns well with psychological notions of distributive justice. People are more inclined to think of a use as unfair when all contributors are not appropriately rewarded for the use.²³³ If a use makes no money, there can be no corresponding sense that the original creator was inappropriately deprived of any profits resulting from the use.

But courts could do more to explicitly consider distributional issues in their fair use determinations. For example, the insights of psychology suggest that creators are more likely to view distributions of rewards as unfair when there is greater variance in allocations among contributors.²³⁴ Courts could thus consider

²²⁸ See *supra* Section III.D.

²²⁹ See *supra* Section IV.C.

²³⁰ 17 U.S.C. § 107(1)-(4) (2012).

²³¹ See, e.g., Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110-25 (1990) (describing the fair use factors and how they are interpreted by courts).

²³² 17 U.S.C. § 107(1) (requiring a court to consider “the purpose and character of the [allegedly infringing] use, including whether such use is of a commercial nature or is for nonprofit educational purposes”); see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448-49 (1984) (stating that the noncommercial nature of a use is relevant to the fair use determination under the first fair use factor). In *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), the Supreme Court clarified that a use need not be noncommercial for the first factor to weigh in the defendant’s favor, and that the transformative nature of the work should also be considered. *Id.* at 579 (“[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”).

²³³ Organ & Moorman, *supra* note 106, at 14-15.

²³⁴ See *id.*

not only *whether* an allegedly infringing use is commercial or noncommercial, but *how much* money the alleged infringer has made or expects to make from the use. In cases where the financial returns for the infringer are minimal, this would weigh in favor of a finding of fair use; conversely, where the infringer has achieved significant returns, this would weigh against a finding of fair use.

The advantage of such an approach is that it is more finely tuned to creators' perceptions of fairness, and thus to the utility we hope to gain by enhancing these perceptions. Currently, courts consider economic harms both under the first fair use factor's commercial/noncommercial inquiry and under the fourth fair use factor, which asks whether the allegedly infringing use affects the "market for or value of the copyrighted work."²³⁵ But the noncommercial inquiry is an "either/or" question, and thus lacks the precision of a quantitative approach. A finding that a use is commercial, for example, might weigh against a downstream user even when that user makes very little money from the use and notions of fairness are not violated. And the market inquiry of the fourth factor, as applied by the courts, tends to focus on theoretical, rather than actual, harms to the inventor.²³⁶ To the extent that it is actual rather than theoretical distributional insults that influence notions of fairness, this inquiry unnecessarily compensates upstream creators (in situations where their notions of fairness should not be offended)²³⁷ at the expense of downstream creators, thereby offending downstream creators' notions of fairness.²³⁸ The approach advocated here, in contrast, is more likely to maximize perceived fairness among upstream and downstream creators because it focuses on actual harms to copyright holders.

²³⁵ 17 U.S.C. § 107(4).

²³⁶ See Buccafusco & Fagundes, *supra* note 91, at 2491-92.

²³⁷ Of course, it could be argued that copyright holders would not be suing if the allegedly infringing use did not actually violate their notions of fairness, in which case any finding of fair use might contribute to a sense among litigants that the system is unfair. But it is important to distinguish among reasons why individuals sue. *Id.* at 2457-58 (observing "that owners frequently file copyright suits for motives unrelated to monetary loss" and discussing other commentators who have made the same observation). In cases where principles of distributional justice have not been violated, it is likely that copyright holders are suing simply because they have a moral intuition that any unattributed copying of their work is unfair. See *supra* Section III.B. In these cases, it is likely more beneficial, as Buccafusco and Fagundes have suggested, to fit the remedy to the offense. For example, the system could allow the infringer to continue use but could require the infringer to provide attribution. Buccafusco & Fagundes, *supra* note 91, at 2495 ("[W]hen the nature of the harm comes from diminished creative incentives associated with the failure to provide attribution to the author, courts could impose injunctive relief mandating that all subsequent copies of a work include appropriate attribution. Ideally, this could occur in lieu of both injunctive relief that would prevent any copies of a new work from being produced and substantial damages." (footnote omitted)).

²³⁸ See Buccafusco & Fagundes, *supra* note 91, at 2458 (describing "[o]verreaching owners suing or threatening to sue users for reasons unrelated to their monetary interests in their works of authorship, thereby undermining copyright law's aim of optimizing creative production").

The statutory language of the fair use provision is broad enough to allow for an explicit consideration of distributional concerns. Though the first statutory factor refers explicitly to “commercial”²³⁹ uses and does not seem to allow for an inquiry into degree, the fourth factor is more broad and allows for consideration of anything that may affect the “market for or value of the copyrighted work.”²⁴⁰ An inquiry into how much money the alleged infringer made or expects to make from her use would be entirely appropriate under the latter provision.

F. *When Creators Are Not Holders*

The fairness story told here is further complicated by the fact that many copyrights are held not by creators but by corporate entities or successors in interest. Creators who own the copyrights in their works may want exclusive rights primarily for the fairness benefits that arise from preventing unauthorized copying and may be open to waiving these rights when asked for permission and given credit. But corporate copyright holders may be more likely to adhere to the traditional rational actor incentive model and less likely to be swayed by psychological considerations.²⁴¹

However, the fact that individual-level psychological incentives may be overshadowed by corporate incentives in some cases is no reason to ignore the important utilitarian role that fairness plays in innovation. First, although many copyrighted works are held by corporate entities, many are owned by creators.²⁴² The suggestions for reform advanced here are directly relevant in these situations.²⁴³ Second, to the extent we hope to obtain high quality creative work

²³⁹ 17 U.S.C. § 107(1).

²⁴⁰ *Id.* § 107(4).

²⁴¹ See Johnson, *supra* note 22, at 661 (“[C]orporations clearly act much more like the hypothetical *Homo economicus* than individuals do. . . . We can stipulate also that firms, as such, do not have intrinsic motivation. They do not feel love, passion, or the triumph of spirit that comes from contributing to society.” (footnote omitted)).

²⁴² See Rich Stim, *Copyright Ownership: Who Owns What?*, STAN. U. LIBR., <http://fairuse.stanford.edu/overview/faqs/copyright-ownership/> [https://perma.cc/R4GU-N8NV] (last visited Mar. 13, 2017) (“Copyrights are generally owned by the people who create the works of expression, with some important exceptions . . .”).

²⁴³ An interesting question, and one that I do not address here, is whether family members of creators who own copyrights behave more like creators or more like corporate entities when it comes to their litigation behavior. On the one hand, family members presumably have a close connection to the creator and may be emotionally invested in the copyrighted work. To the extent that this is true, family members may be more likely to be swayed by, and open to, the proposals I make here. On the other hand, it is entirely possible that family members who did not participate in the creative process are primarily motivated by the financial gains they can achieve through the rights they hold in a loved one’s work. Some commentators have suggested that this may have been what was going on in the *Blurred Lines* litigation. See, e.g., Bryan Miller, Comment to Feldman, *supra* note 3 (opining that the case was “a pointless money grab” on the part of Gaye’s estate). In this vein, Andrew Gilden has recently provided

from artists who do not own the copyrights in their works, it is worth thinking about how copyright and other legal institutions could promote a fair and creative environment. For instance, providing attribution to creators could promote a creator's sense of fairness and provide creation incentives regardless of whether the creator holds the copyright in her work.²⁴⁴

V. BLURRED LINES

This Article began with reference to the *Blurred Lines* litigation, and will conclude with some thoughts about how the insights discussed here might inform our understanding of the case.

To be clear, the Article does not attempt to address the merits of the case—the question of whether Thicke and Williams actually “copied” from Gaye in a legal sense.²⁴⁵ Rather, it takes issue with the claim by commentators that fairness is an inappropriate consideration in copyright law—one that does not promote the utilitarian goal of promoting creation. As discussed in the Introduction, commentators lamented the jury's supposedly fairness-motivated verdict that inappropriately broadened the scope of copyright protection for original creators at the expense of future creation.

But what these commentaries overlook—if they are correct that the jury took fairness considerations into account—is the fact that there is utilitarian value to a copyright regime that seeks to achieve fair outcomes. From the traditional utilitarian perspective, the verdict might appear to grant overbroad exclusive rights to Gaye. But when utilitarian gains of a verdict that is widely perceived as fair—including *ex ante* incentives to create and higher quality creative products—are considered, the return to Gaye might not be excessive at all. Then again, it might be. But the instrumental benefits that accrue from achieving a fair outcome should at least be considered when performing the utilitarian calculus.

Further, the fact that Gaye himself has passed away is of relatively minor significance to the fairness piece of this calculus.²⁴⁶ Admittedly Gaye, as the

a thoughtful article exploring in detail the diverse motivations of family members who inherit intellectual property rights. *See generally* Andrew Gilden, *IP, R.I.P.*, 94 WASH. U. L. REV. (forthcoming 2017).

²⁴⁴ *See, e.g.*, Fromer, *supra* note 47, at 1790-98 (arguing that “[a]n attribution right” could act as an “expressive incentive” for creators).

²⁴⁵ On this question, I tend to agree with Raustiala and Sprigman that the verdict was incorrect, as a legal matter, because it wrongly suggests that “the broad style and feel of a song” is copyrightable subject matter. *See* Raustiala & Sprigman, *supra* note 2.

²⁴⁶ In this respect the utilitarian benefits of fairness differ somewhat from the traditional pecuniary *incentives* of exclusive rights, which are creator specific and thus die with the creator (though the pecuniary *benefits* continue to accrue to the copyright holder for seventy years after the life of the creator and might encourage the holder to invest in creative work by others). *See* 17 U.S.C. § 302(a) (2012) (“Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.”). In recognition of this point, the top comment to Raustiala and Sprigman's piece lamented

original creator, was an important potential beneficiary of the utilitarian gains to be reaped from a fair system: after being treated fairly in this case, Gaye, if he were alive, may have had fairness-mediated incentives to create again, and to create well. But the most significant utilitarian benefit of a fair outcome in any given case is not in the incentives it generates for the creator in that case, but in the incentives it generates for *all* future creators. If the outcomes in high-profile cases like the *Blurred Lines* litigation are widely perceived as fair, this perception will contribute to the impression that the copyright system itself is fair. This perception in turn creates an environment conducive to high-quality creative work.²⁴⁷

My suggestions about creating mechanisms that make it easier for follow-on creators to ask for permission and give credit also have possible relevance to the *Blurred Lines* litigation. Although these mechanisms do not formally exist as a part of our current copyright system and played no part in the case, it is possible—especially given the statements of Marvin Gaye’s son discussed above²⁴⁸—that the controversy may have unfolded quite differently if Thicke and Williams had simply approached the family, told them what fans they were of Gaye’s work, and asked for permission to borrow the work’s stylistic elements, perhaps on condition that they acknowledge Gaye’s influence in all media interviews.²⁴⁹ Of course, there was nothing to stop Thicke and Williams from asking for permission here, even without a formal process for doing so. But by formalizing mechanisms for permission and attribution within the copyright system, the hope is that these behaviors will become more widespread and thus more likely to take place.

CONCLUSION

This Article turns the debate about efficiency versus fairness in copyright on its head by arguing that they are often one and the same. Applying previously neglected insights from neuroscience, psychology, and organizational behavior, the Article shows that treating creators fairly results in real efficiency gains by motivating creative behaviors, enhancing the quality of creative output, and bringing copyright policy in line with the moral intuitions of legal decision makers and the general public. This conclusion should take the scholarly discussion about utility and moral rights in intellectual property in a new direction. It also has important implications for copyright policy, suggesting that

sarcastically: “If Thicke doesn’t pay Gaye’s estate for the song, what incentive does Marvin Gaye have to make more music?” Velcro Gibbon, Comment to Raustiala & Sprigman, *supra* note 2.

²⁴⁷ See *supra* Section II.B (describing how perceived fairness can lead to higher quality work).

²⁴⁸ See *supra* note 189 and accompanying text.

²⁴⁹ Even if the family members were interested solely in the financial gains to be had from their copyrights, such an arrangement would have stood to benefit them financially by introducing a new generation of fans to Gaye’s work.

an increased focus on procedural and distributive fairness through the fair use doctrine, and better mechanisms for facilitating individualized permissive use, could lead to important efficiency gains.