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FITTING MARRAKESH INTO A CONSEQUENTIALIST
COPYRIGHT FRAMEWORK

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The Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities entered into force on September 30, 2016. The treaty aims to alleviate what has been described as the “book famine,” and has been lauded as a significant achievement in advancing the rights of and promoting equal opportunity for the visually disabled. Contracting states are required to implement copyright limitations and exceptions to facilitate access to copyrighted material for the global print-disabled community. This note will argue that, notwithstanding the treaty’s strong rights-based underpinnings, the treaty aligns comfortably with U.S. consequentialist copyright justifications. This note will also demonstrate the limitations of other copyright justificatory theories while discussing their incompatibility with the treaty’s philosophy.

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INTRODUCTION

The Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities¹ has been lauded as a significant achievement in advancing the rights of, and promoting equal opportunity for, the visually disabled.² The treaty aims to alleviate what has

¹ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, 52 I.L.M. 1312 (2013).

² See, e.g., Catherine Saez, *Vibrant Lauding of "Historic" Marrakesh Treaty For The*

been described as the “book famine”³ by requiring contracting states to implement copyright limitations and exceptions to facilitate access to copyrighted material for the global print-disabled community.⁴

Although the Marrakesh Treaty’s potential impact on the visually disabled is significant, one should not confuse this with having a significant impact on the U.S. copyright regime, were it to be implemented. Commentators have described the treaty as a paradigm shift in the international approach to copyright law, as it is the first instrument that harmonizes a minimum standard for copyright limitations and exceptions, focusing on users’ rights instead of authors’ rights as prior instruments have done.⁵ Nonetheless, the U.S. copyright system already substantially accounts for the importance of user access to works in the larger scheme of copyright’s consequentialist aim of promoting progress.⁶

This note argues that, in the United States, implementing the Marrakesh Treaty’s provisions will hardly alter the status quo of the copyright paradigm, as the treaty can be construed to be considerably consequentialist. In fact, the prominence of users’ rights in the treaty reinforces its compatibility with a consequentialist utilitarian model over other alternative theories, such as labor and personality justifications.⁷ The utilitarian model accounts for users’ rights better than alternative theories, which place more emphasis on the rights of the author or publisher.⁸

This note will not focus on analyzing the merits of the Marrakesh Treaty.⁹ Instead, this note seeks to demonstrate the compatibility of the treaty’s

Blind at WIPO, INTELLECTUAL PROPERTY WATCH (Oct. 6, 2016), <http://www.ip-watch.org/2016/10/06/vibrant-lauding-of-historic-marrakesh-treaty-for-the-blind-at-wipo/>.

³ *The Marrakesh Treaty in Action*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/pressroom/en/stories/marrakesh-treaty.html> (last visited Dec. 6, 2016).

⁴ See Marrakesh Treaty, *supra* note 1.

⁵ See, e.g., Danielle Conway, *The Miracle at Marrakesh: Doing Justice for the Blind and Visually Impaired While Changing the Culture of Norm Setting at WIPO*, in DIVERSITY IN INTELLECTUAL PROPERTY 35, 36 (Irene Calboli & Srividhya Ragavan eds., 2015); Paul Harpur & Nicolas Suzor, *Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm*, 36 UNSW L. J. 745, 746 (2013).

⁶ See U.S. CONST. art. I, § 8, cl. 8.

⁷ See generally Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (laying out theories justifying intellectual property law in the U.S., such as those based on Lockean labor theory and Hegelian personality theory).

⁸ See *infra* Part III.

⁹ As the Marrakesh Treaty is already in force, this note will not examine whether a treaty was the optimal way of bringing about the aims of Marrakesh. For an analysis of whether an international treaty was the best option, see Margot E. Kaminski & Dr. Schlomit Yanisky-Ravid, *The Marrakesh Treaty for Visually Impaired Persons: Why a Treaty was Preferable to Soft Law*, 75 U. PITT. L. REV. 255 (2014).

conception of copyright justifications with the current U.S. copyright framework on a philosophical level.¹⁰ Compatibility between the respective theoretical justifications of the Marrakesh Treaty and U.S. copyright law is pertinent because it provides a convincing case for its ratification beyond the more general moral appeal of equality for the disabled.

Part I begins by reiterating the conventional view that copyright in the U.S. is founded on primarily utilitarian consequentialist justifications, zooming in on the consequentialist rationales underpinning the doctrine of fair use in copyright. Alternative philosophical justifications for copyright in the U.S. will be briefly introduced. Subsequently, the legislative history of the Marrakesh Treaty will be recounted to analyze the underlying justifications of the treaty. Part I will then explain the legislative amendments required to implement the Marrakesh Treaty in the U.S.

Part II critically examines the impact of the Marrakesh Treaty on the U.S. copyright framework. Part II assesses the arguments that the treaty constitutes a paradigm shift in copyright law, and goes on to demonstrate that copyright and human rights are not strangers to one another. Despite its strong rights-based underpinnings, the Marrakesh Treaty's provisions still fit comfortably into the U.S. consequentialist copyright framework. First, the Marrakesh Treaty itself contains consequentialist provisions and has utilitarian aims overall. Second, even the human rights references in the treaty can be construed to be aligned with consequentialism.

Part III will argue that implementing the Marrakesh Treaty, notwithstanding its human rights emphasis, is best understood as being harmonious with a consequentialist copyright framework. The tension between rights and consequentialism will be explored but it will be shown that, in the context of the treaty, rights nomenclature does more to assist than hinder the existing utilitarian framework. Part III will finish by arguing that justifications for the Marrakesh Treaty's provisions are less suitably aligned with distributive justice, natural rights, or personality theories of copyright. In doing so, it will highlight some limitations of these theories, as well as the strengths of the consequentialist interpretation.

¹⁰ The focus will be on arguing the Marrakesh Treaty's compatibility with U.S. copyright law. For an analysis of the treaty's desirability in the context of the international regime, see, for example, Aaron Scheinwald, *Who Could Possibly be Against a Treaty for the Blind?*, 22 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 445 (2012).

I

COPYRIGHT JUSTIFICATIONS AND MARRAKESH IMPLEMENTATION

A. *Philosophical Justifications of Copyright in the U.S.*1. *The Dominance of Consequentialism*

The dominant position is that copyright in the U.S. is founded on utilitarian consequentialist justifications.¹¹ Support for this position comes directly from the U.S. Constitution. Article I, Section 8, Clause 8 gives Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹² The copyright system achieves “progress” by recognizing rights in works to incentivize creation.

In *Feist Publications, Inc., v. Rural Telephone Service Co.*,¹³ the Supreme Court held that to achieve copyright’s primary objective of promoting progress, “copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.”¹⁴ To effectuate the consequentialist outcome of progress, both the proprietary interests of authors and accessibility interests of users must be balanced carefully.¹⁵

The consequentialist model in America is often approached in economic terms,¹⁶ in part owing to the rise of the law and economics movement.¹⁷ Landes and Posner’s landmark work, *The Economic Structure of Intellectual Property Law*, prescribes the “efficient level of protection . . . at which the social benefits from further protection just equal the social costs.”¹⁸ They propose that a

¹¹ See, e.g., Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1750-52 (2012); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107-10 (1990); Pamela Samuelson, *Economic and Constitutional Influences on Copyright Law in the United States*, 23 EUR. INTELL. PROP. REV. 409, 422 (2001); Christopher Sprigman, *Copyright and the Rule of Reason*, 7 J. ON TELECOMM. & HIGH TECH. L. 317, 317-19 (2009).

¹² U.S. CONST. art. I, § 8, cl. 8.

¹³ 499 U.S. 340 (1991).

¹⁴ *Id.* at 349-50.

¹⁵ See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 479 (1984).

¹⁶ See Samuelson, *supra* note 11, at 410-11.

¹⁷ See Richard A. Posner, *Intellectual Property: The Law and Economics Approach*, 19 J. ECON. PERSP. 57, 57 (2005).

¹⁸ WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 66 (2003). Note, however, that Richard Posner sought to distinguish between utilitarianism and the economic theory of wealth maximization. See Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 103 (1979).

“fundamental task of copyright law viewed economically . . . is to strike the optimal balance between . . . encouraging the creation of new works by reducing copying and its effect in discouraging the creation of new works by raising the cost of creating them”.¹⁹ They pay particular attention to the dynamic costs and benefits of copyright,²⁰ determining the ideal balance that will ensure that the “public domain is nourished.”²¹ Evidently, their consequentialist approach to copyright is largely in accord with the Progress Clause.

2. *Consequentialism in Fair Use*

Consequentialist justifications do not only appear in the courts’ observations about the copyright system in general. They also ground specific doctrines in the copyright framework. The most relevant for the purposes of this note is that of fair use.

The fair use doctrine is codified in section 107 of the Copyright Act of 1976 as a four-factor test.²² Economic considerations such as those identified by Landes and Posner are pervasive. In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,²³ the Supreme Court noted that the fourth factor, the use’s impact on the work’s market, is the “single most important element of fair use.”²⁴ Jeanne Fromer proposes that reference to market harms and benefits in determining fair use helps to protect works and provide incentivization for the “overall benefit of society.”²⁵

The principle of transformativeness in determining fair use is also grounded in consequentialism. This concept used to guide fair use decisions stems from Judge Leval’s article, *Towards a Fair Use Standard*,²⁶ on which the Supreme Court heavily relied in *Campbell v. Acuff-Rose Music, Inc.*²⁷ Judge Leval’s and the Court’s reasoning is based on consequentialism. Judge Leval stresses the need to “focus on the utilitarian, public-enriching objectives of copyright” in addressing the fair use doctrine.²⁸ Transformativeness, he proposes, helps to determine whether the new use constitutes the “very type of activity that the fair use doctrine intends to protect for the enrichment of

¹⁹ LANDES & POSNER, *supra* note 18, at 69.

²⁰ *Id.* at 70.

²¹ *Id.* at 69.

²² See 17 U.S.C. §107 (2012).

²³ 471 U.S. 539 (1985).

²⁴ *Id.* at 566. *But see* Barton Beebe, *An Empirical Study on U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 617-20 (2008).

²⁵ Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615, 649 (2015).

²⁶ Leval, *supra* note 11.

²⁷ 510 U.S. 569 (1994).

²⁸ Leval, *supra* note 11, at 1135.

society.”²⁹ In *Campbell*, the Supreme Court noted that “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”³⁰ Fair use decisions such as *Campbell* and an earlier case, *Sony of America v. Universal City Studios*,³¹ have also been interpreted by commentators in economic terms, on the bases of market efficiency and avoiding market failure.³²

However, with regards to granting access to copyright works for the visually disabled, the role of consequentialism is not entirely clear. This right of access is found both in the §121 limitation of the Copyright Act and within the fair use doctrine itself.³³ The Supreme Court in *Sony* noted in passing that “[m]aking a copy of a copyrighted work for the convenience of a blind person is . . . an example of fair use.”³⁴ However, in *Authors Guild, Inc. v. Hathitrust*,³⁵ the Second Circuit noted that “providing access to the print disabled is not transformative.”³⁶ They did hold that the fourth factor weighed heavily in favor of finding fair use because “the present-day market for books accessible to the handicapped is so insignificant.”³⁷ But they ultimately noted that making accessible copies for the print disabled is a “special instance” of fair use, derived from Congress’s “commitment to ameliorating the hardships faced by the blind and the print disabled.”³⁸ To support this proposition, the Second Circuit cited the Chafee Amendment³⁹ and Congress’s declaration in the Americans with Disabilities Act, particularly their goal to “assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”⁴⁰ The Second Circuit decision seems to hint that there is possibly more at play than market efficiency.

3. Labor, Personality and Rawlsian Justifications

Despite the clear indication of the Constitution and authority of the courts recognizing consequentialism as the dominant justification for copyright

²⁹ *Id.* at 1111.

³⁰ *See Campbell*, 510 U.S. at 579.

³¹ 464 U.S. 417 (1984).

³² Samuelson, *supra* note 11, at 412-13.

³³ 17 U.S.C. §121(a) (2012) (“[I]t is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities.”).

³⁴ *Sony*, 464 U.S. at 455 n.40.

³⁵ 755 F.3d 87 (2d Cir. 2014).

³⁶ *Id.* at 101.

³⁷ *Id.* at 103.

³⁸ *Id.* at 102.

³⁹ 17 U.S.C. §121 (2012).

⁴⁰ *Authors Guild*, 755 F.3d at 102; 42 U.S.C. §12101 (1990).

protection, alternative justificatory theories exist in copyright discourse.

The first category consists of natural rights theories, the most prominent being Lockean labor theory.⁴¹ Notwithstanding the Supreme Court's position that the "primary objective of copyright is not to reward the labor of authors,"⁴² some commentators believe that labor theory justifies intellectual property rights,⁴³ or should at least play a bigger role in doing so in the U.S.⁴⁴ Locke's labor theory can be briefly summarized as follows. God gave the world to mankind "for the support and comfort of their being."⁴⁵ Man thus has property in his personhood and therefore in his labor.⁴⁶ When man mixes his labor with things in the commons, he acquires property rights in them.⁴⁷ This acquisition is provided that one does not take more than one can properly use (waste proviso), and that enough is left for the rest of humanity to enjoy the inherited world (enough and as good proviso).⁴⁸ Locke's theory has been adapted to explain desert in intellectual property, with the commons being ideas, and limitations such as the idea-expression dichotomy serving a similar function to the provisos.⁴⁹

Personality theories have also gained prominence due to the rise of moral rights in the U.S. copyright regime.⁵⁰ Moral rights are often attributed to continental philosophy,⁵¹ a fair characterization due to the fact that moral rights have been introduced into U.S. copyright law to comply with their obligations under the Berne Convention.⁵² These theories are often based on the philosophy of Immanuel Kant⁵³ and G.W.F. Hegel.⁵⁴ For Kant, the wrongness in unauthorized publishing stems from the lack of agency and consent by authors to speak in their name.⁵⁵ According to Hegel, property rights stem from an

⁴¹ See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 116 (1689).

⁴² See *Feist Publ'ns, Inc., v. Rural Telephone Serv. Co.*, 499 U.S. 340, 349 (1991).

⁴³ See, e.g., William Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1688 (1988); Hughes, *supra* note 7, at 287-366.

⁴⁴ See, e.g., Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1535 (1993).

⁴⁵ LOCKE, *supra* note 41, ch.5 §44.

⁴⁶ *Id.* ch.5 §27.

⁴⁷ *Id.*

⁴⁸ *Id.* ch.5 §33.

⁴⁹ See Hughes, *supra* note 7, at 298-329; Gordon, *supra* note 44, at 1581-82.

⁵⁰ See Lior Zemer, *Moral Rights: Limited Edition*, 91 B.U. L. REV. 1519, 1523-27 (2011).

⁵¹ See Hughes, *supra* note 7, at 330; Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 264 (2009).

⁵² See Zemer, *supra* note 50, at 1523-27; Adler, *supra* note 51, at 266-86.

⁵³ See generally IMMANUEL KANT, ON THE INJUSTICE OF REPRINTING BOOKS (1785).

⁵⁴ See generally G.W.F. HEGEL, PHILOSOPHY OF RIGHT (1820).

⁵⁵ Kant, *supra* note 53, at 30-33.

individual's personality and are acquired through the exercise of their free will.⁵⁶ Autonomy-based theories are also proposed by contemporary commentators. Abraham Drassinower theorizes that copyright is primarily about authorship and the right of authors to have control over their speech.⁵⁷ This view has some degree of resonance in the United States. Many see First Amendment concerns as being within the ambit of what copyright should, but does not adequately, address.⁵⁸

Academics have also explored the role of copyright law in upholding distributive justice,⁵⁹ in the spirit of John Rawls' seminal work, *A Theory of Justice*.⁶⁰ Generally speaking, Rawls believed that society should be arranged to ensure that the least-advantaged in society benefitted the greatest, and that there should be equality of opportunity.⁶¹ Justin Hughes and Robert Merges have explored the extent to which copyright law conforms with the Rawlsian standard of justice⁶² and whether copyright could be used as a tool for distributive justice.⁶³ However, they do not claim that Rawlsian justifications ground U.S. copyright law.⁶⁴ Furthermore, evidence of the correlation between distributive justice and U.S. copyright law is scant and selective.⁶⁵ However, Rawls proposed his version of justice as a better alternative to utilitarianism.⁶⁶ Accepting that the copyright regime is Rawlsian would implicitly mean rejecting much of the utilitarian foundations grounding existing copyright doctrine.⁶⁷

⁵⁶ Hegel, *supra* note 54.

⁵⁷ See ABRAHAM DRASSINOWER, WHAT'S WRONG WITH COPYING? (2015).

⁵⁸ See Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1181-82 (1970).

⁵⁹ See Margaret Chon, *Copyright's Other Functions*, 15 CHI. KENT J. INTELL. PROP. 101 (2016); Justin Hughes & Robert P. Merges, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV. 513 (2016).

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

⁶¹ See *id.*

⁶² Hughes & Merges, *supra* note 59, at 526-28.

⁶³ *Id.* at 573.

⁶⁴ *Id.* at 575-6.

⁶⁵ See *id.* at 552-53 (noting the importance of copyright to the success of many high-earning African Americans).

⁶⁶ See, e.g., RAWLS, *supra* note 60, at 52, 91, 181. See also David Lyons, *Rawls Versus Utilitarianism*, 69 J. PHIL. 535 (1972).

⁶⁷ See Lyons, *supra* note 66 (discussing the rivalry between utilitarianism and Rawls' theory of distributive justice).

B. From Marrakesh to America

1. History and Development of the Marrakesh Treaty

The Marrakesh Treaty's "main goal is to create a set of mandatory limitations and exceptions for the benefit of the blind, visually impaired and otherwise print disabled."⁶⁸ The origins of this instrument can be traced back to as early as 1981, when WIPO and UNESCO started a Working Group to examine access to copyrighted works for the visually and auditory handicapped.⁶⁹ More studies subsequently followed, including those by Sam Ricketson⁷⁰ and Judith Sullivan,⁷¹ which piqued the international community's interest in this issue.⁷² Coinciding with these developments, the United Nations adopted the Convention on the Rights of Persons with Disabilities.⁷³ It remained clear that market forces were insufficient to create accessible works for the disabled.⁷⁴

In 2008, the World Blind Union (WBU) and Knowledge Ecology International arranged for an expert group to propose a treaty to address access to copyrighted material for those with reading disabilities.⁷⁵ The proposal was presented to WIPO by Brazil, Ecuador, and Paraguay.⁷⁶ Their approach was to present the right to read as a fundamental human right, pushing for obligations to uphold user rights and equality in access to information.⁷⁷ They emphasized measures necessary for the publication and distribution of works in accessible formats, and stressed the need for international harmonization of copyright

⁶⁸ See WORLD INTELLECTUAL PROPERTY ORGANIZATION, *supra* note 3.

⁶⁹ Conway, *supra* note 5, at 41.

⁷⁰ Sam Ricketson, WIPO STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS, STUDY ON LIMITATIONS AND EXCEPTIONS OF COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL ENVIRONMENT (2003), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf.

⁷¹ Judith Sullivan, WIPO STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS, STUDY ON COPYRIGHT LIMITATIONS AND EXCEPTIONS FOR THE VISUALLY IMPAIRED (2007), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf.

⁷² Conway, *supra* note 5, at 41-42.

⁷³ United Nations Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3.

⁷⁴ LIONEL BENTLEY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW 250 (4th ed. 2014).

⁷⁵ Conway, *supra* note 5, at 42.

⁷⁶ *Standing Comm. on Copyright and Related Rights, Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations And Exceptions: Treaty Proposed by the World Blind Union (WBU)*, WIPO Doc. SCCR/18/5 (May 25, 2009), http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=122732.

⁷⁷ Conway, *supra* note 5, at 43.

limitations and exceptions.⁷⁸

Proposals by more WIPO member states followed. In 2010, the African Group proposed a draft treaty which intended to have a broader group of beneficiaries, including, for example, those with intellectual disabilities and even educational institutions and libraries.⁷⁹ The U.S. and European Union also simultaneously submitted proposals which required that the copyright exceptions complied with the Berne Convention's Three-Step-Test.⁸⁰ The U.S. Draft Consensus Instrument, "[r]ecognizing the public interest in maintaining a balance between the interests of authors and users, particularly the needs of those persons with print disabilities or impairment of their vision," took a soft law approach that focused on the import and export of accessible formats.⁸¹ The European Union similarly favored a non-binding approach in its Joint Recommendation.⁸² The European Union suggested that member states provide for such copyright exceptions in their national regimes, which would only apply when market solutions are inadequate.⁸³

Disagreements between developing countries and interest groups stalled negotiations.⁸⁴ Those acting on behalf of authors and publishers feared that the treaty could become "a Trojan horse for a future weakening of copyright protection through international treaties."⁸⁵ For instance, Allan Adler, counsel to the Association of American Publishers, noted that, up until the Marrakesh Treaty, international treaties had only been establishing the minimal rights of copyright *owners*.⁸⁶ The concern was that the treaty would establish a

⁷⁸ *Id.* at 44.

⁷⁹ *Standing Comm. on Copyright and Related Rights, Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives (Proposal by the African Group)*, WIPO Doc. SCCR/22/12 (June 3, 2011), http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=169397. See Conway, *supra* note 5, at 44.

⁸⁰ Lior Zemer & Aviv Gaon, *Copyright, Disability and Social Inclusion: The Marrakesh Treaty and the Role of Non-Signatories*, 10 J. INTELL. PROP. L. & PRAC. 836, 840 (2015).

⁸¹ *Standing Comm. on Copyright and Related Rights, Draft Consensus Instrument (Proposal by the Delegation of the United States of America)*, WIPO Doc. SCCR/20/10 (June 10, 2010), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_10.pdf. See Conway, *supra* note 5, at 45.

⁸² *Standing Comm. on Copyright and Related Rights, Draft Joint Recommendation Concerning the Improved Access to Works Protected by Copyright for Persons with a Print Disability (Proposal by the Delegation of the European Union)* WIPO Doc. SCCR/20/12 (June 17, 2010), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_12.pdf.

⁸³ Conway, *supra* note 5, at 46.

⁸⁴ Zemer & Gaon, *supra* note 80, at 840.

⁸⁵ Marketa Trimble, *The Multiplicity of Copyright Laws on the Internet*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 339, 354 (2015).

⁸⁶ KEIWashDC, Alan [sic] Adler on WIPO Negotiations on Copyright Exceptions,

“precedent of developing a series of treaties that specifically focus on trying to set forth minimal limitations and exceptions to the right of copyright owners.”⁸⁷ Adler supported a solution for the visually disabled, as it was an area where “there was no other way to accomplish the needs” that copyright exceptions and limitations aim to fulfill.⁸⁸ However, he cautioned that this treaty may become the “nose of the camel” for the international community to push for more treaties on exceptions and limitations for other users and beneficiaries.⁸⁹ Limitations and exceptions to serve the needs of educational institutions that should be adopted at the domestic level have not happened as many countries “don’t have adequate copyright laws to begin with.”⁹⁰ The problem was the infeasibility of “adopt[ing] appropriate limitations and exceptions on rights when [there is no] clear establishment of rights.”⁹¹ It took almost four years to reach a compromise.⁹²

The Marrakesh Treaty was finally adopted in June 2013, requiring twenty ratifications to become binding.⁹³ It entered into force on September 30, 2016, three months after Canada became the twentieth nation to accede to it.⁹⁴ The treaty currently has twenty-six contracting parties.⁹⁵ The U.S., despite being a signatory since October 2013, has yet to ratify the treaty as of February 2017.⁹⁶

2. *The Marrakesh Treaty’s Provisions*

The final product reflects elements raised by the different parties to the negotiation. The WBU got its wish of a binding treaty that obliged states to take active measures to facilitate the publication and distribution of works accessible to the print disabled.⁹⁷ The active measures required of states are mainly to be found in Articles 4, 5, 6 and 10. Article 4(1)(a) requires Contracting Parties to “provide in their national copyright laws for a limitation or exception to the

YOUTUBE (July 18, 2012), <https://www.youtube.com/watch?v=dxVcmOwBAsY> [hereinafter *Allan Adler Interview*].

⁸⁷ *Id.*

⁸⁸ Adler was also involved in drafting the Chafee amendment. *See id.*

⁸⁹ *See id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Zemer & Gaon, *supra* note 80, at 840.

⁹³ Marrakesh Treaty, *supra* note 1, art. 18.

⁹⁴ *See* Press Release, WIPO, WIPO Director General Hails a Success for Visually Impaired People and International Community as Marrakesh Treaty Enters Into Force (Sept. 20, 2016), http://www.wipo.int/pressroom/en/articles/2016/article_0009.html [hereinafter WIPO Press Release].

⁹⁵ *See* *WIPO-Administered Treaties*, WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=843 (last visited Feb. 22, 2016).

⁹⁶ *Id.*

⁹⁷ Marrakesh Treaty, *supra* note 1, art. 10.

right of reproduction, right of distribution, and the right of making available to the public . . . to facilitate the availability of works in accessible format copies for beneficiary persons.”⁹⁸ Article 4(2) provides an example of how that requirement may be fulfilled, by providing an exception or limitation that permits “authorized entities” to make or obtain an accessible format copy and supply them to beneficiaries “without the authorization of the copyright holder.”⁹⁹ Article 2 provides definitions of “works,” “accessible format copy,” and “authorized entity” for the purposes of the treaty.¹⁰⁰

Articles 5 and 6 contain provisions on the import and export of accessible formats, as put forward in the U.S. draft. Article 5 obliges states to allow these accessible format copies to be “distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party.”¹⁰¹ Article 6 mirrors that provision with respect to importing accessible format copies without the authorization of the right holder.¹⁰²

As strategized by the WBU, the treaty explicitly mentions fundamental human rights in its preamble, but only those of “non-discrimination, equal opportunity . . . and full and effective partition and inclusion in society.”¹⁰³ The right to education, as proposed by the WBU and pushed further by the African Group, is referred to in the preamble but not in relation to human rights obligations.¹⁰⁴ And it is specifically the right to education of “persons with visual impairments or with other print disabilities.”¹⁰⁵ The beneficiary group is thus strictly limited to what was originally proposed by the WBU, and not the broader scope the African Group had wanted. Indeed, the full title of the treaty itself is the most obvious evidence for this—the treaty is clearly for the benefit of “Visually Impaired Persons and Persons with Print Disabilities.”¹⁰⁶ Furthermore, Article 3 clearly and exhaustively defines the list of beneficiary persons under the treaty.¹⁰⁷

The rights of authors remain close to the status quo. As the U.S. and E.U. had proposed, the Berne Three-Step-Test was incorporated into the Marrakesh Treaty via Article 11(a), referring to Article 9(2) of the Berne Convention, that a reproduction under the Marrakesh Treaty may be permitted only if it “does not

⁹⁸ *Id.* art. 4(1)(a).

⁹⁹ *Id.* art. 4(2). Note this is very similar to the §121 limitation in the U.S. Copyright Act.

¹⁰⁰ *Id.* art. 2.

¹⁰¹ *Id.* art. 5(1).

¹⁰² *Id.* art. 6.

¹⁰³ *Id.* pmb1.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* art. 3.

conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”¹⁰⁸ This entire phrase is repeated verbatim at the end of subparagraphs 11(b), (c) and (d) in relation to Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Articles 10(1) and 10(2) of the WIPO Copyright Treaty.¹⁰⁹ The message could not be clearer: the interests of authors in their works still remain dominant. Article 11 also reiterates compliance to the obligations under Berne, TRIPS, and the WIPO Copyright Treaty when adopting measures to implement the Marrakesh Treaty.¹¹⁰ Subordination to other treaties is set out clearly under Article 1.¹¹¹

The Marrakesh Treaty recalls authors not only in substance but also in spirit. Authors’ rights, as found in the Berne Convention and more generally, are acknowledged in the preamble.¹¹² Nevertheless, the Marrakesh Treaty is predominantly focused on its beneficiaries. Most of the preamble spells out the plight of the visually impaired, especially in developing countries, and how the copyright system and technology have failed to grant them adequate access to information and societal inclusion.¹¹³ However, the treaty remains faithful to the fundamental goals of copyright as “an incentive and reward for literary and artistic creations and of enhancing opportunities for everyone,” by “maintain[ing] a balance between the effective protection of the rights of authors and the larger public interest.”¹¹⁴

3. *Implementation of Marrakesh in the U.S.*

In February 2016, President Obama sent the Marrakesh Treaty to Congress for ratification.¹¹⁵ The Department of Commerce provided the President with the draft legislation, the “Marrakesh Treaty Implementation Act of 2016.” In Secretary of State John Kerry’s Letter of Submittal to the White House, he described the provisions of the Marrakesh Treaty as “compatible with existing U.S. law,” requiring only “[n]arrow statutory changes” for

¹⁰⁸ *Id.* art. 11(a).

¹⁰⁹ *Id.* art. 11(b), (c), (d).

¹¹⁰ *Id.* art. 11.

¹¹¹ *Id.* art. 1.

¹¹² *Id.* pmbl.

¹¹³ *See id.*

¹¹⁴ *Id.*

¹¹⁵ Message from the President of the United States Transmitting the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, S. TREATY DOC. NO. 114-6 (2016) [hereinafter Message from the President], <https://www.gpo.gov/fdsys/pkg/CDOC-114tdoc6/pdf/CDOC-114tdoc6.pdf>.

implementation.¹¹⁶

Since the Chafee Amendment introduced the §121 limitation two decades ago, the U.S. already has a limitation to copyright permitting authorized entities to reproduce accessible copies of works for the benefit of the visually disabled. This is very similar to what is required under Article 4 of the Marrakesh Treaty. As such, implementation would only require tweaking of §121 and integrating the cross-border exchange provisions of the treaty into the limitation.

The textual amendments to the Copyright Act required to implement the Marrakesh Treaty are as follows. Firstly, the scope of works covered by the §121 exception have to be broadened to align with Article 2 of the treaty, which follows the meaning of “works” under Article 2(1) of the Berne Convention.¹¹⁷ The draft legislation removes the word “nondramatic” from §121(a) so as to include dramatic scripts, and will include musical works in textual or notation form such as sheet music.¹¹⁸ The second minor adjustment to §121 is to match the definition of beneficiaries to Article 3 of the treaty.¹¹⁹

Finally, to implement Article 5 of the treaty on the export of accessible copies, §121 must be amended to “specify that accessible-format copies may be distributed to Marrakesh Treaty parties and to eligible persons abroad who are citizens and domiciliaries of the United States.”¹²⁰

II

CONSEQUENCES FOR CONSEQUENTIALISM

A. *Is the Marrakesh Treaty a Copyright Game-Changer?*

1. *Paradigm Shift?*

Commentators have described the Marrakesh Treaty as representing “an important change in how lawmakers balance the demands of copyright owners against the interests of people with disabilities in particular.”¹²¹ Some regard the Marrakesh Treaty as “usher[ing] in a new way of thinking about the global IPR

¹¹⁶ Letter of Submittal from the Secretary of State to the President of the United States, reprinted in Message from the President, *supra* note 115, at V, VI.

¹¹⁷ Marrakesh Treaty, *supra* note 1, art. 2.

¹¹⁸ Marrakesh Treaty Implementation Act of 2016, S. 6, 114th Cong. (2016).

¹¹⁹ *Id.*

¹²⁰ DEPARTMENT OF COMMERCE, THE “MARRAKESH TREATY IMPLEMENTATION ACT OF 2016” STATEMENT OF PURPOSE AND NEED AND SECTIONAL ANALYSIS DRAFT 4 (Feb. 7, 2016), https://ogc.commerce.gov/sites/ogc.commerce.gov/files/media/files/2016/sopan_-_marrakesh_treaty_only_sopan_final_02-11-16_clean.pdf.

¹²¹ Harpur & Suzor, *supra* note 5, at 746.

regime,”¹²² and being “the first time WIPO has addressed the rights of users in the copyright regime.”¹²³ Zemer and Goan call it “an historic landmark” and “the first time a treaty has been exclusively directed to the creation of a minimum standard for copyright exceptions.”¹²⁴

However, other commentators point out that fifty-seven countries, including many developed countries, already have specific provisions on making copyright works more accessible for the visually impaired.¹²⁵ Thus, it seems that, with regard to implementing exceptions and limitations, the Marrakesh Treaty can be viewed as a paradigm shift only for countries who do not already have such measures in place. The newly-created international obligations, however, particularly the provisions on cross-border distribution of accessible format copies, represent a significant change for all the WIPO nations.

2. *Copyright and Human Rights*

Another prominent aspect about the Marrakesh Treaty is that, unlike previous intellectual property treaties, it expressly considers fundamental human rights.¹²⁶ However, the relationship between human rights and intellectual property is not novel.¹²⁷ Intellectual property rights are alluded to in several human rights instruments.¹²⁸ Article 27(2) of the Universal Declaration of Human Rights refers to an author’s right to “moral and material interests” in his “scientific, literary or artistic production,”¹²⁹ essentially what we see in copyright and patents. Article 27(1) of the Universal Declaration refers to the right to “participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits,”¹³⁰ which mirrors the importance of the public domain and the interests of the public and users to

¹²² Conway, *supra* note 5, at 57.

¹²³ *Id.*

¹²⁴ Zemer & Goan, *supra* note 80, at 838.

¹²⁵ Kaminski & Yanisky-Ravid, *supra* note 9, at 269.

¹²⁶ *See, e.g.*, Conway, *supra* note 5, at 57.

¹²⁷ *See, e.g.*, Saleh Al-Sharieh, *Toward a Human Rights Method for Measuring International Copyright Law’s Compliance with International Human Rights Law*, 32 UTRECHT J. INT’L & EUR. L. 5 (2016); Jingyi Li & Niloufer Selvadurai, *Reconciling the Enforcement of Copyright with the Upholding of Human Rights: A Consideration of the Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired and Print Disabled*, 36 EUR. INTELL. PROP. REV. 653 (2014).

¹²⁸ *See, e.g.*, International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), art. 15, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966) [hereinafter ICESCR]; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 27(2), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

¹²⁹ UDHR, *supra* note 128, art. 27(2).

¹³⁰ *Id.* art. 27(1).

fairly access works. Article 27(1) strikingly resembles the U.S. Constitution's Progress Clause, which is perhaps no coincidence given Eleanor Roosevelt's role in drafting the Universal Declaration. Furthermore, the United Nations High Commissioner for Human Rights remarked that the "balance between public and private interests found under" human rights instruments "is one familiar to intellectual property law."¹³¹

Human rights instruments also echo the consequentialist structure of the American copyright system, specifically how intellectual property is used as an instrument in achieving a defined end—cultural and scientific progress. For example, the "ends" are reflected in Article 15(1) of the International Covenant on Economic, Social and Cultural Rights, which recognizes the "right of everyone" to "take part in cultural life" and "enjoy the benefits of scientific progress and its applications."¹³² The consequentialist "means" are seen in Article 15(2), which provides that "[t]he steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture."¹³³

These examples serve to demonstrate that intellectual property is not a foreign concept when it comes to human rights or vice versa. Intellectual property and human rights are not the same thing, but they are surely more fraternal than adversarial. Likewise, the human rights references in the Marrakesh Treaty, which also cites the Universal Declaration, should not necessarily be seen as a deviation from consequentialism.

B. Consequences for U.S. Copyright Law

1. Minimal Consequences for Consequentialism

When the Marrakesh Treaty is holistically examined, it becomes apparent that there are strong consequentialist underpinnings. The treaty's emphasis on the importance of "copyright protection as an incentive and reward for literary and artistic creations and of enhancing opportunities for everyone . . . to participate in the cultural life of the community, to enjoy the arts and to share scientific progress and its benefits,"¹³⁴ mirrors the Progress Clause. One

¹³¹ High Comm'r for Human Rights, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*, ¶11, U.N. Doc. E/CN.4/Sub.2/2001/13 (June 27, 2001).

¹³² ICESCR, *supra* note 128, art. 15(1).

¹³³ *Id.* art. 15(2); David Vaver, *Copyright Defenses as User Rights*, 60 J. COPYRIGHT SOC'Y. U.S. 661, 671 (2013) (observing that IP is a lesser right than the rights to participate in culture and enjoy the benefits of scientific progress).

¹³⁴ Marrakesh Treaty, *supra* note 1, pmb1.¶ 3.

commentator has even suggested that the Marrakesh Treaty is an example of the American fair use doctrine being implemented at an international level.¹³⁵ The role reversal is no coincidence: the U.S. was one of the first nations to push for this treaty.¹³⁶ The affinity between the Marrakesh Treaty and consequentialist American copyright law both proves and explains the consequentialist principles of the treaty. However, two added aspects that appear on the return journey from Marrakesh are worth noting: the requirement of facilitating cross-border exchange of accessible copies,¹³⁷ and the reference to human rights.¹³⁸

2. *Empowerment, Output, Progress*

Inclusion and accessibility are not just about respecting rights. Equal participation is enriching to society as a whole. The WIPO Director General remarked that the Marrakesh Treaty is not just about literacy, but about what one can do with literacy, that is, to “become a fully empowered economic agent.”¹³⁹ Acknowledging equal opportunity is thus aimed at increasing overall societal output. This is in line with consequentialist aims of maximizing artistic and scientific contributions. Note that the human right stressed in the Marrakesh Treaty is equal opportunity, not the right to education as such.¹⁴⁰ It is in paying attention to substantive equality that we rectify the disparity in access to information affecting the print disabled. Their disabilities have hindered their enjoyment of works. But the market has also played a role. Copyright law can resolve the latter.¹⁴¹

The philosophy behind pushing for an international treaty is in line with consequentialist economic thinking such as that of Landes and Posner. The Marrakesh Treaty has been described as a solution to “market failure.”¹⁴² The

¹³⁵ Conway, *supra* note 5, at 57.

¹³⁶ See Shae Fitzpatrick, *Setting Its Sights on the Marrakesh Treaty: The U.S. Role in Alleviating the Book Famine for Persons with Print Disabilities*, 37 B.C. INT’L & COMP. L. REV. 139, 146-47 (2014) (describing U.S. involvement in the early negotiation stages of the Marrakesh Treaty).

¹³⁷ The cross-border provisions were actually proposed by the U.S. in the negotiations. See *supra* text accompanying note 79.

¹³⁸ See Marrakesh Treaty, *supra* note 1, pmbl.

¹³⁹ WIPO, *WIPO Director General Lauds the Entry into Force of the Marrakesh Treaty*, YOUTUBE (Sep. 22, 2016), <https://www.youtube.com/watch?v=ZNjPYx-U4h4>.

¹⁴⁰ Education is mentioned in the preamble but not as part of human rights instruments. The “right to education” is only mentioned in the subsequent clause that is not in reference to human rights instruments. Education is also subsequently referred to in the preamble as a type of public interest that has to be weighed against the rights of authors. See Marrakesh Treaty, *supra* note 1, pmbl. ¶¶2, 9.

¹⁴¹ Landes & Posner, *supra* note 18, at 56 (describing copyright as a tool to correct distortions in the market).

¹⁴² See Kaminski & Yanisky-Ravid, *supra* note 9, at 269, 272; Fitzpatrick, *supra* note

preamble of the treaty also stresses the “importance of appropriate exceptions and limitations to make works accessible ... particularly when the market is unable to provide such access.”¹⁴³ A commentator notes that, “[f]ew commercial entities seek to create accessible works because copyright holders or licensees do not perceive the accessible format market as economically viable.”¹⁴⁴ Thus, the treaty would be an example of tapering copyright law to address the social inefficiencies described by Landes and Posner.¹⁴⁵ In implementing the Marrakesh Treaty provisions, the social benefits of lessening protection (improved accessibility and cultural participation for the visually impaired) outweigh the social costs (the negligible deterrence of rights holders, who are reluctant to enter that market to begin with).¹⁴⁶

How does the cross-border element fit into consequentialist justifications? One line of argument proposes that opening up to international market creates economies of scale for accessible formats.¹⁴⁷ Additionally, legalizing the importation and exportation of these copies reduces “costly, duplicative efforts.”¹⁴⁸ This would reduce what Lander and Posner refer to as “socially wasteful expenditures on creating and producing such works,”¹⁴⁹ unnecessary costs that have minimal or no bearing on incentivizing creativity.

The import and export provisions raise another issue, namely, whether distributing accessible copies to non-U.S. beneficiaries falls in line with the Progress Clause. Is American copyright law meant to promote progress globally or just domestically?¹⁵⁰ The answer, however, has no bearing on whether the Marrakesh Treaty itself is consequentialist. At most, the consequentialist ends of the U.S. copyright system and the justifications of the Marrakesh Treaty would differ in scope, not philosophy. Nonetheless, it is best to agree with Justin Hughes’ view in his statement to the WIPO General Assembly on behalf of the U.S. on the importance of the “copyright system and the incentives it provides for the creation and dissemination of works *for all people*.”¹⁵¹

136, at 143, 157-58.

¹⁴³ Marrakesh Treaty, *supra* note 1, pmb1. ¶8.

¹⁴⁴ Fitzpatrick, *supra* note 136, at 156.

¹⁴⁵ See Landes & Posner, *supra* note 18, at 66.

¹⁴⁶ See *id.*

¹⁴⁷ Fitzpatrick, *supra* note 136, at 158-59.

¹⁴⁸ *Id.* at 167; see also WIPO Press Release, *supra* note 94 (“[S]haring of works in accessible formats should increase the overall number of works available because it will eliminate duplication and increase efficiency.”).

¹⁴⁹ Landes & Posner, *supra* note 18, at 56.

¹⁵⁰ This is assuming this is a dichotomy at all, given our globalized market and the international collaborative nature of scientific and creative industries.

¹⁵¹ Justin Hughes, *US Statement at the WIPO General Assembly*, U.S. MISSION GENEVA

Although only one part of its justifications, the human rights element has been a dominant source of attention for the Marrakesh Treaty.¹⁵² As such, the relationship between human rights and consequentialism will be analyzed in the following section.

III

CONSEQUENTIALISM IS MARRAKESH AT ITS BEST

A. *Consequentialism and Rights*

The language of rights can sound the alarm for consequentialists. Deontologists, such as Kant, consider rights to be ends in themselves, never a means to an end.¹⁵³ However, the view that rights are not absolute is trite.¹⁵⁴ There have been consequentialists who incorporate rights as secondary principles instrumental to achieving desired consequences.¹⁵⁵ Rights are treated by utilitarians as “solutions to problems of institutional design.”¹⁵⁶ John Stuart Mill famously incorporated rights into his model of utilitarianism.¹⁵⁷ He argued that although man’s “independence, is of right, absolute,” we are answerable for our actions to others in society.¹⁵⁸ Even in Mill’s utilitarian system, there are “certain social utilities which are vastly more important, and therefore more absolute and imperative, than any others are as a class.”¹⁵⁹ Samuel Freeman argues, however, that the question that “bedevils traditional consequentialist views” is how these rights ought to be “*equally* or fairly distributed.”¹⁶⁰ In relation to copyright, that question would be, for instance, how should the rights of copyright owners and users be distributed? The Marrakesh Treaty does attempt to address that question.

SWITZ., (Dec. 17, 2012), <http://geneva.usmission.gov/2012/12/17/wipo/> (emphasis added).

¹⁵² See, e.g., Zemer & Gaon, *supra* note 80, at 837; Li & Selvadurai, *supra* note 127.

¹⁵³ See generally IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* (1785).

¹⁵⁴ See e.g., John Finnis, *Absolute Rights: Some Problems Illustrated*, 61 AM. J. JURIS. 195 (2016).

¹⁵⁵ See Samuel Freeman, *Problems with Some Consequentialist Arguments for Basic Rights*, in *THE PHILOSOPHY OF HUMAN RIGHTS: CONTEMPORARY CONTROVERSIES* 107, 107 (Gerhard Ernts & Jan-Christoph Heilinger eds., 2012) (discussing how several consequentialists incorporate rights into their framework of morality).

¹⁵⁶ Allan Gibbard, *Utilitarianism and Human Rights*, 1 SOC. PHIL. & POL’Y. 92, 94 (1984).

¹⁵⁷ John Stuart Mill, *Utilitarianism*, in *UTILITARIANISM AND ON LIBERTY* 181 (Mary Warnock ed., 2008).

¹⁵⁸ John Stuart Mill, *On Liberty*, in *UTILITARIANISM AND ON LIBERTY* 88, 95 (Mary Warnock ed., 2008).

¹⁵⁹ Mill, *supra* note 157, at 235.

¹⁶⁰ Freeman, *supra* note 155, at 112.

There have been consequentialists who propose a stronger incorporation of rights into their model of justice.¹⁶¹ Amartya Sen rejected both traditional utilitarianism and constraint-based deontology, instead proposing a mathematical approach to a consequentialist system.¹⁶² Sen's model does not persuade Freeman, who remarks that to avoid circularity, "the broad consequentialist would seem to have to concede that respecting these principles of right is intrinsically good and hence the right thing to do for its own sake."¹⁶³

Others have taken a more pragmatic approach. For instance, Allan Gibbard contends that "[p]eople in general, utilitarians and non-utilitarians, can be strongly moved by a principle with a coherent rationale."¹⁶⁴ He explains that insofar as non-utilitarian rationales, such as rights, are used in a utilitarian argument for moral conviction, that conviction itself is of great utility.¹⁶⁵ Specifically regarding human rights, William Talbott proposes that "good consequences are not simply a fortunate by-product of the protection of human rights; they are, ultimately, the ground of their moral importance."¹⁶⁶

These arguments show that tensions between rights and consequentialism exist, but those tensions can be reconciled. The concepts are not mutually exclusive. The above scholarly debate attempts to tackle the arduous task of creating a general theory of morality. For American copyright law, the task is easier (if only slightly) in that we already have a consequentialist premise to work on and a more clearly defined end. We need not work on the absolute conception of rights as did Freeman and Sen do because American copyright law has explicitly rejected an absolute approach to rights.¹⁶⁷ The Marrakesh Treaty requires authors' rights to be balanced against those of other stakeholders.¹⁶⁸ We could settle for John Stuart Mill's approach to make sense of rights' role in copyright consequentialism.

B. The Utility of Rights Rhetoric

If the Marrakesh Treaty is primarily consequentialist, why does it focus on rights? Why not? Take the word "copyright." More than half of the word is "right," yet it remains predominantly utilitarian in the U.S. This statement illustrates the futility of suspicion based on semantics. Why not then, just do

¹⁶¹ See, e.g., WILLIAM J. TALBOTT, WHICH RIGHTS SHOULD BE UNIVERSAL? (2005).

¹⁶² See Amartya Sen, *Rights and Agency*, 11 PHIL. & PUB. AFF. 3 (1982).

¹⁶³ Freeman, *supra* note 155, at 124.

¹⁶⁴ Gibbard, *supra* note 156, at 100.

¹⁶⁵ *Id.*

¹⁶⁶ William J. Talbott, *Consequentialism and Human Rights*, 8 PHIL. COMPASS 1030, 1039 (2013).

¹⁶⁷ See, e.g., *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013).

¹⁶⁸ Marrakesh Treaty, *supra* note 1, pmb1. ¶9.

away with rights rhetoric altogether? An obvious answer is that rights terminology is already embedded in copyright law, used with respect to authors. An obvious example is found in 17 U.S.C. §106 on “exclusive rights” in works,¹⁶⁹ and §106A on “rights of certain authors.”¹⁷⁰ The Berne Convention, to which the United States is party, also clearly obligates States to respect authors’ rights.¹⁷¹ In fact, out of the troika of main IP rights, *copyright* is the only one with “right” in its name.¹⁷² The current copyright regime itself is thus evidence that a consequentialist system which acknowledges rights of individuals is clearly conceivable.

Beyond that, this discussion will show that the rights rhetoric, particularly with reference to those other than copyright holders, is compatible with and assistive to the current consequentialist regime.

1. *Sharpening the Fair Use Doctrine*

The utilitarian doctrine of transformativeness serves a primary role in determining fair use.¹⁷³ Nonetheless, “transformative use is not absolutely necessary for a finding of fair use.”¹⁷⁴ The market-based rationale behind the Marrakesh Treaty can aid in explaining the consequentialist justifications behind the Copyright Act’s §121 limitation and §107 non-transformative fair use provision, as they relate to accessible copies for the visually impaired, where the courts have not comprehensively done so.

In *Authors Guild, Inc. v. HathiTrust*, the Second Circuit addressed market factors in its analysis, finding that the fourth factor favored a finding of fair use because “the present day market for books accessible to the handicapped is so insignificant.”¹⁷⁵ However, there are shortcomings in their explanation. First, under that rationale, fair use defenses should be open to other minority stakeholder groups. Second, it implies that once that stakeholder group is enlarged to, for example, the *global* community of visually disabled, the fourth factor will start to tip against finding fair use. Third, they do not provide a nexus

¹⁶⁹ 17 U.S.C. § 106 (2012).

¹⁷⁰ *Id.* § 106A (2012).

¹⁷¹ See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised at Paris July 24, 1971, 1161 U.N.T.S 31, 31 [hereinafter Berne Convention].

¹⁷² Solely based on etymology, trademarks seem to indicate that their function is to serve an indicative function of trade origin, in line with the conventional understanding of trademark law. Patent, originating from the Latin term that means “to open/to spread” seems to be in line with its incentivization for inventors to disclose inventions in exchange for their monopolies. Copyright thus seems to be about the right to make copies/the right to copy.

¹⁷³ See Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1141-42 (1990) (critiquing the utilitarian approach to fair use).

¹⁷⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

¹⁷⁵ *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 103 (2d Cir. 2014).

between their market-based justifications and their “special instance” commitment to aiding the disabled.¹⁷⁶

The Marrakesh Treaty’s economic rationale and rights sensitivities can be used to address these gaps. The treaty combats market inefficiencies that apply to this particular group of treaty beneficiaries. It requires adjustments that will reduce publishers’ costs to cater to the visually disabled by increasing efficiency through means like incentivizing other players to fill gaps in the market.¹⁷⁷ Due to the agent-sensitivity of copyright rights, the target beneficiaries are succinctly defined so authorized entities may more effectively fill the demand gap by creating and distributing accessible format copies made under national copyright exceptions.¹⁷⁸ When authorized entities take on the distributive roles that the rights holders have failed to assume, the publishers’ costs are reduced for each beneficiary receiving an accessible copy. That way, as the number of beneficiaries increases to a global scale, the marginal costs to publishers do not increase. Hence, the fourth fair use factor on market effects will still favor a finding of fair use.

2. *Weighing Rights with Rights*

David Vaver points out that the language of user rights posits authors and users as equals.¹⁷⁹ Vaver’s observation happens to fit appropriately within the Marrakesh Treaty’s call for equality. It is also faithful to the consequentialist goal of scientific and cultural progress as it treats both authors and users as equally important parts of this goal. More emphasis on user rights helps to alleviate the criticisms against consequentialism for lacking a just distribution of rights.¹⁸⁰

Vaver discusses the Canadian Supreme Court decision of *CCH Canadian, Ltd. v. Law Society of Upper Canada*,¹⁸¹ which demonstrates Canada’s shift to a user-rights approach to copyright defenses.¹⁸² He acknowledges that while fair use has been accepted as affirming user rights in American courts,¹⁸³ it remains a “minority view in U.S. law.”¹⁸⁴ Thus he accepts

¹⁷⁶ See *supra* text accompanying note 36.

¹⁷⁷ See Fitzpatrick, *supra* note 136, at 166.

¹⁷⁸ See *id.* at 143, 158 (discussing how the Marrakesh Treaty’s cross-border provisions could stimulate an accessible-format copies market to meet the demand of those with print disabilities).

¹⁷⁹ See Vaver, *supra* note 133, at 669.

¹⁸⁰ See Freeman, *supra* note 155, at 109-18 (arguing that consequentialist theories do not adequately take distribution of rights into account).

¹⁸¹ [2004] 1 S.C.R. 339 (Can.).

¹⁸² Vaver, *supra* note 133, at 667.

¹⁸³ See *e.g.*, *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996).

that the conventional view still focuses on fair use as a defense to infringement of copyright owners' works rather than a positive exercise of rights by users. Nonetheless, he observes that "[t]hese decisions represent 'a move away from an earlier author-centric view' to one that emphasizes user rights as an important tool to balance 'protection and access' sensitively, so as to further the public interest in making culture widely available."¹⁸⁵ This demonstrates how reinforcing rights on the users' side can contribute to a consequentialist copyright framework. Moving away from author-centricity is not a betrayal of the utilitarian copyright system, but perfectly consistent with it. This is exactly what the Marrakesh Treaty is trying to do. Striving for equality is consistent with the goal of optimal societal progress. Rights language makes this clearer.

Drassinower notes the Canadian *CCH* position on user rights, but remains critical of the "hegemony of instrumentalist thinking in the United States."¹⁸⁶ He acknowledges that the American approach does strike a balance, but is one that is "entirely devoted to the public interest."¹⁸⁷ He is critical of this, and suggests it would be better to focus on the dignity of authors, and user rights as embedded in any description of the dignity of authorship.¹⁸⁸ Drassinower is right that one must not neglect the human dignity of authors and users. However, adopting a consequentialist approach does not necessarily forsake their dignity from not regarding their rights "as ends in themselves." Not treating authors' or users' rights as absolute ends by subjecting them to a public interest requirement is not the same as not treating human dignity as an absolute end. Drassinower wrongly equates rights being ends in themselves with *persons* being ends in themselves. He seems to overlook the proposition that the consequentialist goal of progress, after all, has the purpose of benefitting humanity. The Marrakesh Treaty is an example of how accepting equality as being in the public interest does not mean rejecting the dignity of individuals.

3. *Constitutional Compatibility*

Users' rights may also be useful in addressing the incongruence between copyright law and other rights prevalent in the American legal landscape, such as, most prominently, First Amendment rights.¹⁸⁹ As Pamela Samuelson notes, "one would think that just as speakers have First Amendment rights, they

¹⁸⁴ Vaver, *supra* note 133, at 668.

¹⁸⁵ *Id.* at 669 (citing *SOCAN v. Bell Canada*, [2012] 2 S.C.R. 326 ¶ 9-11 (Can.)).

¹⁸⁶ Abraham Drassinower, *Taking User Rights Seriously*, in *IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW* 462, 479 (Michael Geist ed. 2005).

¹⁸⁷ *Id.* at 478.

¹⁸⁸ *Id.* at 479.

¹⁸⁹ See, e.g., Rebecca Tushnet, *Copy this Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 *YALE L.J.* 535 (2004).

should have fair use rights.”¹⁹⁰ Melville Nimmer has discussed the importance of reconciling copyright and the First Amendment.¹⁹¹ However, Rebecca Tushnet maintains that modern copyright law is “incompatible with the First Amendment,” and does not believe that a solution to resolve the conflict between owners’ rights and free speech rights is possible.¹⁹² Yet if we were to try to tackle this formidable task, rights talk introduces consistency that would make reconciliation slightly less difficult.

The Supreme Court’s decision in *Harper & Row*¹⁹³ held that First Amendment interests were already embodied in the idea-expression distinction and fair use defense, rejecting an expansion of the fair use doctrine to create a new public interest exception based on First Amendment rights.¹⁹⁴ Tushnet warns that this causes litigants to use the fair use defense as a “back-door” to invoke the First Amendment, leading to worrisome outcomes.¹⁹⁵ One such outcome is that it “obscures the speech-enhancing role” of other copyright limitations, “allowing those limits to be dissolved in favor of copyright owners.”¹⁹⁶ Another is that it “distorts the communal, reciprocal nature of copyright’s theory of free speech.”¹⁹⁷ However, as the Marrakesh Treaty has shown, adding weight to user rights can help to explain fair use doctrine in a manner that is sensitive to users’ interests while remaining faithful to the communal interests of consequentialist copyright reasoning.¹⁹⁸ Yes, the treaty addresses the right of equal opportunity and social inclusion, not free speech. But the utility of its approach applies *mutatis mutandis*. If we wish to fruitfully address the First Amendment in the copyright realm, focusing on user rights in their relation to utilitarian copyright aims could be helpful in ironing out their disparities.

Ultimately, further incorporation of rights rhetoric unavoidably allows stronger claims for alternative copyright justifications. However, it will be shown that these justifications are incongruent with the objectives of the Marrakesh Treaty, and have inherent shortcomings.

¹⁹⁰ Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 857 (2015).

¹⁹¹ See Nimmer, *supra* note 58.

¹⁹² Tushnet, *supra* note 189, at 537-38.

¹⁹³ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

¹⁹⁴ *Id.* at 560.

¹⁹⁵ Tushnet, *supra* note 189, at 590.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See *supra* Part III.B.1.

C. Distributive Justice

The Marrakesh Treaty clearly has strong Rawlsian elements¹⁹⁹ because it is grounded on the principle of equal opportunity, and it clearly addresses social and economic equalities to the benefit of the least advantaged.²⁰⁰ The treaty notes the challenges “prejudicial to the complete development” of its beneficiaries.²⁰¹ It also pays particular attention to the print disabled who “live in developing and least-developed countries.”²⁰² This is clearly in the spirit of Rawls’ difference principle.²⁰³

Admittedly, the Marrakesh Treaty can be interpreted as having *both* utilitarianism and Rawlsian justice rationales, despite the rivalry of the theories. However, it just happens to work out on *this particular* permutation of interest groups. Still, siding with Mill over Rawls would be preferable. Accepting a Rawlsian justification to support users’ rights would certainly rain on the slippery slope which alarmed early opponents of the treaty.²⁰⁴ Accepting that the visually disabled are a possible class of the open subset of the “least advantaged” may allow others to start claiming that copyright should be limited in favor of other “less fortunate” stakeholders.²⁰⁵ Saying that this would necessarily result in market failure might be an exaggeration. But accepting the Marrakesh Treaty as Rawlsian would indeed destine it to be the “camel’s nose.”²⁰⁶ The Marrakesh Treaty was decidedly agreed on to benefit a specific community—the print-disabled.²⁰⁷ It would not be appropriate to interpret it as allowing anything more than that.

D. Natural Rights

1. Distinguishing Human Rights from Natural Rights

As there is no conclusive evidence of the Marrakesh Treaty taking an absolutist approach to rights,²⁰⁸ we must assess natural rights theory’s compatibility with the treaty as a legal *instrument* of human rights law. To dispel confusion, it must be clarified that natural law and human rights law are

¹⁹⁹ See *supra* Part I.A.3.

²⁰⁰ Marrakesh Treaty, *supra* note 1, pmb. ¶¶ 1, 4.

²⁰¹ *Id.*, pmb. ¶ 2.

²⁰² *Id.*, pmb. ¶ 5.

²⁰³ See *supra* text accompanying note 59.

²⁰⁴ See Allan Adler Interview, *supra* note 86.

²⁰⁵ See *supra* text accompanying note 79.

²⁰⁶ See Allan Adler Interview, *supra* note 86.

²⁰⁷ See *supra* text accompanying note 107.

²⁰⁸ See Marrakesh Treaty, *supra* note 1, pmb. ¶ 9 (noting “the need to maintain a balance between effective protection of the rights of authors and the larger public interest.”).

not the same.²⁰⁹ Natural law is concerned with “specifying the first and most general principle of morality . . . that one should choose and act in ways that are compatible with a will towards integral human fulfillment.”²¹⁰ International human rights law is about “obligations which States are bound to respect . . . to help ensure that international human rights standards are indeed respected, implemented, and enforced at the local level.”²¹¹

For this note’s purposes, the key difference is this—establishing a primordial standard of morality is not essential for the latter. It merely requires compliance with international law obligations, and ideally, normative acceptance of a particular international standard of rights.²¹² The justifications for those standards of rights need not be based on natural law parameters.²¹³ To implement the Marrakesh Treaty is to accept the standards set out in human rights instruments and the legal obligations required to uphold those standards. Implementation does not, however, require endorsing any particular interpretation of the moral bases on which those rights are founded.

The main natural rights theory that arises in justifying copyright is Lockean Labor theory, which functions on a primordial standard of morality.²¹⁴ Accepting its coherence in explaining (intellectual) property rights requires accepting the moral basis those rights arise out of, which raises doubts.

2. *Problems with Labor Theory*

The demise of natural law justifications in human rights law,²¹⁵ a field with it intuitively seems congruent, is telling. One reason for its demise was the growing opposition to absolutism over time.²¹⁶ The position of American law regarding the relationship between natural rights and copyright is very clear. In *Cariou v. Prince*,²¹⁷ the Second Circuit reiterated that copyright “is not an inevitable, divine, or natural right that confers on authors the absolute

²⁰⁹ *But cf.* JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (2d ed. 2011) (using the terms human rights and natural rights interchangeably).

²¹⁰ Robert P. George, *Natural Law*, 31 HARV. J. L. & PUB. POL’Y. 171, 172 (2008).

²¹¹ *International Human Rights Law*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (last visited Nov. 27, 2016).

²¹² *See generally* Makau Mutua, *Standard Setting in Human Rights: Critique and Prognosis*, 29 HUM. RTS. Q 547 (2007).

²¹³ *See* PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS LAW* 494 (2013) (describing how human rights law is no longer necessarily viewed as tied to natural law).

²¹⁴ *See supra* text accompanying note 43.

²¹⁵ *See, e.g.*, ALSTON & GOODMAN, *supra* note 213, at 490-94.

²¹⁶ *Id.* at 494.

²¹⁷ 714 F.3d 694 (2d. Cir. 2013).

ownership of their creations.”²¹⁸ Natural law justifications of Lockean labor theory are grounded precisely on such questionable absolutist premises.²¹⁹ Rights arise from annexing labor to objects.²²⁰ Therefore, Lockean labor is premised on self-ownership sanctioned by a divine creator.²²¹ The enough and as good proviso arises from a duty to comply with the wishes of that creator for man to equally enjoy the inherited world.²²² For agnostics and secularists,²²³ removing the creator from the equation causes the Lockean Jenga tower to collapse. Mark Lemley notes that “even the die-hard natural law theorists have mostly abandoned that way of thinking,”²²⁴ turning to some notion of “I made it and so I own it.”²²⁵ Without the God endorsement, one has to grasp at alternatives such as exalting the laboring itself. This approach however, is quickly vitiated when A. John Simmons asks “why we should be inclined to take *making itself* to be morally significant.”²²⁶

The absolutism of the premise clearly plagues the logic of the theory. But assuming we accept the premise, is it a useful justification for explaining fair use and the Marrakesh Treaty’s motives? A Lockean theory of copyright may still account for users. Wendy Gordon, one of the strongest proponents of Lockean justifications in copyright, argues that fair use can be justified based on the public’s right to the commons.²²⁷ In the context of copyright, the commons would include expired or abandoned works in the public domain and abstract ideas that are not protectable *ab initio*.²²⁸ As the proviso would prohibit ownership of abstract ideas,²²⁹ Gordon rationalizes fair use findings in noncommercial uses, such as scholarly or technical work, on the basis that they would be using the plaintiff’s work in its capacity as facts, which are part of the commons.²³⁰ She also explains fair use findings in parody cases based on the “needed access . . . to criticize” the work.²³¹ Both examples seem to be premised

²¹⁸ *Id.* at 705.

²¹⁹ *See supra* text accompanying note 43.

²²⁰ *See supra* text accompanying note 45.

²²¹ *See supra* text accompanying note 43.

²²² Locke, *supra* note 41, ch.5 §33.

²²³ *See* Gabe Bullard, *The World's Newest Major Religion: No Religion*, NATIONAL GEOGRAPHIC, Apr. 22, 2016 (on the growing secularism in the United States and across the globe).

²²⁴ Mark Lemley, *Faith-Based Intellectual Property*, 62 UCLA LAW. REV. 1328, 1338 (2015).

²²⁵ *Id.*

²²⁶ A. John Simmons, *Makers Rights*, 2 J. ETHICS 197, 217 (1998).

²²⁷ *See* Gordon, *supra* note 44.

²²⁸ *Id.* at 1559.

²²⁹ *Id.* at 1581182

²³⁰ *Id.* at 1593.

²³¹ *Id.* at 1605.

on the fair user handling the work with “different purposes” from the owner.²³² However, in the context of reproducing accessible copies for the print disabled, the proviso does not seem compatible. In *Hathitrust*, the Second Circuit clearly noted that when works are recast into accessible formats for the print disabled, “the underlying purpose of the [defendant’s] use is the same as the author’s original purpose.”²³³ Authorized entities, as defined by the Marrakesh Treaty, would thus be in violation of the proviso, handling these works in their capacity as the labor of rights holders rather than the commons.

3. *Means or End?*

Deontic theories also suffer from the identity crisis that Freeman accuses rights-sensitive consequentialist theories of having.²³⁴ Locke’s theory of natural rights is built on a deontic premise, but it seems to function on several consequentialist criteria.²³⁵ It has been shown how consequentialists purport to coherently incorporate rights as secondary rules.²³⁶ However, for deontic theories, in the case of Locke at least, the reverse cannot be said. Consequentialism can accommodate for a plurality of rules, but deontic theories struggle to accept the cohesiveness of various consequences.

Using the Marrakesh Treaty to substantiate the above point, a consequentialist approach allows that further rights be granted to a particular stakeholder group because the cost-savings to the owners and the increased benefits to the visually disabled, together with the dynamic benefits of cultural nourishment of a portion of society neglected by the market, justify it as the right move. However, a Lockean approach to the treaty struggles to explain why “enough and as good” warrants granting further access to the print disabled but not to other less fortunate individuals in developing countries whom a divine creator would deem equally deserving.

E. *Personality Theories*

1. *Users Missing*

A clear shortcoming of personality justifications is that they inadequately account for users. Justin Hughes refers to Margaret Radin’s personhood theory of property,²³⁷ identifying the “enough and as good” equivalent in personality

²³² *Id.* at 1604.

²³³ *Authors Guild, Inc. v. Hathitrust*, 755 F.3d 87, 101 (2d Cir. 2014).

²³⁴ *See supra* text accompanying note 164.

²³⁵ *See e.g.*, Hughes, *supra* note 7, at 301-08 (discussing Lockean labor theory in instrumentalist terms); Gordon, *supra* note 44, at 1544 (mentioning utilitarian strands of Locke’s theory of property).

²³⁶ *See supra* Part III.A.

²³⁷ Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

theory.²³⁸ The proposition is that since property rights perform a self-actualizing function,²³⁹ these rights should not be given to person X if doing so would deny person Y's self-actualization.²⁴⁰ Appropriation of property is conditional upon "whether it has deleterious effects on others."²⁴¹

This conditional limitation does sound similar to the Marrakesh Treaty's goal of limiting authorial rights in order to increase access for the disabled with the aim of allowing the latter to realize their full potential.²⁴² However, the deleterious effects proviso is unhelpfully broad and seems to neglect incentivization considerations. In the copyright context, what is deleterious enough to warrant restriction? On this interpretation, authors' rights could be, ironically, left overly limited. Adhering to it could lead to the overly-extensive right to education feared by parties in the treaty's negotiations.²⁴³ Restricting access to educational materials could be argued to be deleterious, restricting copyright.

The consequentialist view does better in identifying the harm that should be avoided in reference to the system as a whole, namely, harm that stifles overall net progress. The consequentialist approach is also more balanced than the personhood approach, as it adequately considers both authors' and users' interest by using a consequentialist standard as a reference point.

Furthermore, even Hegel acknowledges the instrumentalism of intellectual property law. He admits that protecting intellectual property rights is the primary "means of advancing the science and arts."²⁴⁴ Thus, for Hegel, to the extent that he considers users (limiting personality-based rights to make the "resource" available for others),²⁴⁵ it is underscored by a consequentialist end.

Furthermore, the Marrakesh Treaty's main objectives provide the antithesis to Kant's autonomy explanation and agency theory.²⁴⁶ The treaty requires bypassing the very premise Kant's explanation of author's rights is based on: the permission of the author.²⁴⁷ This discrepancy can be attributed to the fact that unlike the Marrakesh Treaty, the rights of users are outside the

²³⁸ Hughes, *supra* note 7, at 336.

²³⁹ See *Id.*; HEGEL, *supra* note 54, at 62; Radin, *supra* note 237.

²⁴⁰ Hughes, *supra* note 7, at 336.

²⁴¹ *Id.*

²⁴² See Marrakesh Treaty, *supra* note 1, pmb. ¶¶ 2-4.

²⁴³ See Allan Adler Interview, *supra* note 86.

²⁴⁴ HEGEL, *supra* note 54, at 81.

²⁴⁵ *Id.* at 80.

²⁴⁶ See *supra* text accompanying note 52.

²⁴⁷ See Marrakesh Treaty, *supra* note 1, arts. 4-6 (on not requiring authorization by the rights holder to make, import or export accessible format copies).

periphery of Kant's agency justification.

2. Author-Centrism

Drassinower provides a more modern theory of autonomy for copyright that is not explicitly based on Hegel or Kant's theories.²⁴⁸ His focus on authors' and users' rights provides helpful insight into how to strike a balance in a consequentialist system. But as seen, he remains skeptical of the American consequentialist approach to copyright.²⁴⁹ His theory rightfully considers the free speech interests of authors,²⁵⁰ and it accounts for users much more substantially than Hegel or Kant.²⁵¹ However, it appears slightly over-individualistic, for it neglects the contributory aspects of works to societal progress. The tendency to exalt the status of authors may unintentionally (or intentionally) tilt the scale too far out of users' reach. One commentator notes that even in human rights instruments, there is no reflection of a hierarchy between authors' rights and users' rights.²⁵²

Therefore, the author-centric approach of Drassinower is aligned with the spirit of the Marrakesh Treaty insofar as it supports empowering the neglected disabled to become authors in their own right.²⁵³ Where Drassinower and the Marrakesh Treaty lack harmony is in their placement of normative force. Drassinower's priority for copyright is protecting the interests of individuals in their *capacity* as authors.²⁵⁴ The normative force of the Marrakesh Treaty lies in unencumbering societal participation so as to achieve the outcome of optimal progress.²⁵⁵ Paving the way for the disabled to maximize their authorial capabilities is the means of getting there.²⁵⁶

CONCLUSION

This note does not claim that consequentialism should be the best way to justify copyright. It simply acknowledges that consequentialism is the theory that is supported in the United States by its Constitution, statutes, courts, and many academics, undoubtedly much more so than the alternative theories.²⁵⁷

²⁴⁸ See DRASSINOWER, *supra* note 57.

²⁴⁹ Drassinower, *supra* note 186, at 479.

²⁵⁰ See generally DRASSINOWER, *supra* note 57 (on copyright as protecting author's speech).

²⁵¹ See Drassinower, *supra* note 186 (emphasizing the importance of user rights).

²⁵² Al-Sharieh, *supra* note 127, at 13.

²⁵³ Drassinower, *supra* note 186, at 469.

²⁵⁴ See generally DRASSINOWER, *supra* note 57 (focusing on the importance of authorship in copyright).

²⁵⁵ See *supra* text accompanying note 138.

²⁵⁶ See *supra* text accompanying note 133.

²⁵⁷ It would be worth exploring whether utilitarianism is really the class of

What this note does argue is that the consequentialist thinking that underpins U.S. copyright law has a strong presence in the Marrakesh Treaty. This note also asserts that the alternative theories have clear weaknesses in themselves, in justifying and explaining copyright, and specifically in justifying the Marrakesh Treaty. Admittedly, their weaknesses have not been exhaustively covered in this note, nor have their roles in foreign copyright systems been addressed.

I do not doubt that analyzing the Marrakesh Treaty against a consequentialist framework may have swayed me to seek out the utilitarian aspects of the treaty. But that does not mean they were never there. In fact, I may have missed out on much of the treaty's consequentialist underpinnings if I had assessed its philosophical justifications in isolation, perhaps myopically focusing on its prominent human rights references, neglecting the careful balance it attempts to strike between different stakeholders. A question that remains open is whether the Marrakesh Treaty has shifted that balance toward users in general, for it has certainly shifted the balance in favor of its specific beneficiaries. However, this note is focused on *why* the balance is struck, and not *how* it has shifted. The note demonstrates that the Marrakesh Treaty is consequentialist, but what could be further explored is whether its implementation would move U.S. copyright law toward a brand of consequentialism that determines that progress is better fueled by broadening users' rights.

I recognize that some may find a consequentialist approach to the rights of the visually disabled too clinical. Perhaps outside the intellectual property realm, a deontic approach would sound kinder. But I believe that in order to uphold the durability and cohesiveness of the copyright system, the Marrakesh Treaty's evidently consequentialist purpose (in the United States at least) cannot be flouted. Accepting the Marrakesh Treaty's compatibility as such recognizes that the reasons the visually disabled should be granted more access to works can be primarily found within copyright law itself, and not just taken to be a benevolent act of charity. This approach upholds both the integrity of the copyright system and the disabled beneficiaries of the treaty.

Undoubtedly, one could look at the Marrakesh Treaty as advocating inclusion and equality for their own sake. Accepting its consequentialist connotations, however, allows us to see that assisting the visually disabled is for the benefit of society as a whole. Not only does it make society more inclusive and respectful of the rights of their fellow human beings, but it will hopefully, in time, reward its members with the future contributions of many individuals who have thus far been denied the means to flourish.

consequentialism that the American intellectual property system is, or should be, based on.