

# A Framework for a Capabilities-Based Approach to Copyright

ENQUADRAMENTO DOS DIREITOS AUTORAIS A PARTIR DA ABORDAGEM BASEADA NA TEORIA DAS CAPACIDADES

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## Abstract

This article highlights the importance of an analysis of copyright law from a human development perspective. Drawing on Amartya Sen and Martha Nussbaum's Capabilities Approach, it outlines why copyright scholarship and policymaking should address human capabilities. It also explores several vital questions that a human development approach to copyright raises, including questions about the distributional effects of copyright law. It examines Mary Sue fan fiction through the lens of the Capabilities Approach to illustrate how the approach differs from the standard utilitarian approach to copyright. Furthermore, it argues that several factors associated with a country's level of development, particularly its social, economic, and institutional contexts, affect the relationship between copyright and human capabilities. Therefore, rather than making broad generalizations about whether or not copyright law is good or bad for human development, it concludes that aspects of copyright law can enhance human development in the presence of certain other factors (such as strong indigenous industries and institutions). Conversely, aspects of copyright law can have a significant negative impact on human capabilities in certain environments, such as a weak institutional environment, or a socio-economic environment that is fraught with inequality. To illustrate this point, the article examines the issue of piracy through the lens of the Capabilities Approach.

## Keywords

Copyright theory; capabilities approach; piracy; fair use; human development.

## Resumo

*Este artigo destaca a necessidade de uma análise da legislação de direitos autorais a partir da perspectiva do desenvolvimento humano. Com base na abordagem das capacidades de Amartya Sen e Martha Nussbaum, o artigo descreve por que os estudos acadêmicos e as políticas públicas sobre direitos autorais devem abordar as capacidades humanas. São exploradas também várias questões vitais que uma abordagem baseada no desenvolvimento humano para os direitos autorais suscita, incluindo aquelas sobre os efeitos distributivos da lei de direitos autorais. Examina-se a fanfiction de Mary Sue pelas lentes da abordagem das capacidades, para ilustrar como esta difere da abordagem utilitarista padrão dos direitos autorais. Além disso, argumenta-se que vários fatores associados ao nível de desenvolvimento de um país, particularmente seu contexto social, econômico e institucional, afetam a relação entre direitos autorais e capacidades humanas. Portanto, em vez de fazer amplas generalizações sobre se a lei de direitos autorais é boa ou ruim para o desenvolvimento humano, conclui-se que aspectos da legislação de direitos autorais podem melhorar o desenvolvimento humano na presença de certos fatores (como fortes indústrias e instituições locais). Por outro lado, certos aspectos das legislações de direitos autorais podem ter um impacto negativo significativo sobre as capacidades humanas em certos ambientes, como em um ambiente institucional fraco ou socioeconomicamente repleto de desigualdades. Para ilustrar esse ponto, o artigo examina a questão da pirataria pelas lentes da abordagem das capacidades.*

**Palavras-chave**

*Teoria do direito autoral; abordagem das capacidades; pirataria; uso justo; desenvolvimento humano.*

**INTRODUCTION**

This article aims to contribute to copyright law and development literature by advancing a normative account of copyright grounded in the Capabilities Approach. It highlights two broad critiques of the standard utilitarian approach to copyright: (a) that the approach is based on an impoverished understanding of culture and knowledge as mere commodities; and (b) that it does not adequately account for the ways in which social, political, and economic inequality and marginalization affect access to culture, knowledge, and participation, and therefore peoples' capabilities and freedoms.

In contrast, the Capabilities Approach provides a richer, more textured theoretical account of copyright that is centered on the relationship between copyright and human capabilities. It is founded on an appreciation of culture and knowledge not as commodities, but rather as vital aspects of human development. Therefore, it places the cultural, social, and political implications of access to culture, knowledge, and participation at the center of copyright law and policy. Moreover, because the Capabilities Approach adopts a substantive understanding of equality that contemplates entrenched social injustice and inequality (at both the local and global levels), a capabilities-based approach to copyright accounts for the effects of inequality and marginalization on people's access to content. Based on this alternative account of copyright, this article outlines a broad framework for a human development analysis of copyright law that is responsive to different developmental contexts.

In the following section, I briefly introduce the Capabilities Approach as developed by Amartya Sen and Martha Nussbaum. I argue, based on this approach, that promoting access to education, culture, and cultural participation are important human development goals. In Section 2, I identify key differences between the Capabilities Approach and utilitarianism. Section 3 outlines the broad contours of a capability-based approach to copyright. Such an approach involves shifting the focus of copyright law from promoting the production and distribution of content to promoting human development and capabilities. It also means emphasizing distributional concerns, both in critiquing the law and in prescribing reforms. Finally, I examine Mary Sue fan fiction (a sub-genre of fan fiction in which fans transform pre-existing works of fiction into new stories in which they themselves are characters) through the lens of both utilitarian copyright and a capabilities-based understanding of copyright, in order to

highlight the differences between the two approaches.<sup>1</sup> I conclude Section 3 by arguing that a capabilities-based approach to copyright is able to account for the value and significance of subversive and discursive engagement with culture (such as Mary Sue fan fiction represents) in a manner that is much more sensitive to the nuances and effects of inequality and marginalization than the utilitarian approach to copyright does.

In Section 4, I argue that an analysis of the relationship between copyright and human development ought to take into account socio-economic, socio-political, and institutional factors that potentially impact this relationship. A country's level of development (particularly the state of its indigenous content industries, its institutional capacity, the accessibility of new technologies, the availability of public funding for education and culture, and the levels of poverty and inequality in access to capabilities) can either exacerbate or ameliorate the potential negative effects of copyright. Similarly, the potential positive effects of copyright are contingent on the existence of several socio-economic, institutional, and technological factors. To illustrate this, I examine the phenomenon of piracy and explore how various developmental considerations may influence the impact piracy has on human capabilities. Finally, I conclude with some observations about future areas for copyright analysis and reform.

## I. AN OVERVIEW OF THE CAPABILITIES APPROACH

*Human development... is about creating an environment in which people can develop their full potential and lead productive, creative lives in accord with their needs and interests. (UNDP, 2001, p. 9)*

My understanding of human development is rooted in the Capabilities Approach developed by Amartya Sen and Martha Nussbaum.<sup>2</sup> Sen and Nussbaum articulate an alternative conception of development to replace the economic growth-focused model of development. In doing so, they take account of the complex social, political, and economic dimensions of development. Sen argues that the ends and means of development need to be re-examined in order to better appreciate the development process (SEN, 1999a, p. 14). In his view, “[i]t is simply not adequate to take as our basic objective just the maximization of income or wealth, which is, as Aristotle noted, ‘merely useful and for the sake of something else’” (SEN, 1999a, p. 14). Instead, the goal of development ought to be “enhancing the lives we lead and the freedoms we enjoy” (SEN, 1999a, p. 14). To put it simply, human

1 For an explanation of Mary Sue fan fiction, see Section 3.4.

2 While there are differences between Sen and Nussbaum's respective approaches, throughout this article I highlight dissimilarities only when they present differing implications for my copyright analysis.

development is the expansion of substantive human freedoms, not just economic growth or technological progress.

Similarly, according to Nussbaum, the Capabilities Approach “takes each person as an end” focusing not just on the total or average well-being in a society, but on the opportunities or substantial freedoms available to each person (NUSSBAUM, 2011, p. 18).

There are differences in the approaches that Nussbaum and Sen develop. In this section I provide a brief overview of both approaches and highlight relevant dissimilarities. I also show that while some of the ways in which the two approaches diverge are significant for my analysis, some of these differences are not as material as they might initially seem, at least in the context of my analysis.

### 1.1. WHAT ARE CAPABILITIES

In their work, Sen and Nussbaum refer to two related concepts: “functionings” and “capabilities.” “Functionings” are “the various things a person may value doing or being” (SEN, 1999a, p. 75). On the other hand, a person’s “capability” refers to various “combinations of functionings that are feasible for her to achieve” (SEN, 1999a, p. 75). Capability is, therefore, a kind of freedom: “the substantive freedom to achieve alternative functioning combinations” (SEN, 1999a, p. 75).

Nussbaum proposes an explicit list of ten broadly framed “central human capabilities” and maintains that it is the role of government to secure these central capabilities up to a threshold level (NUSSBAUM, 2011, p. 33-34). This list remains open-ended and subject to revision; Nussbaum directs us to understand the list as “a proposal put forward in a Socratic fashion” (NUSSBAUM, 2000, p. 77). She justifies the selection of these specific capabilities on the grounds that each of these capabilities is essential in order for a human life to be “not so impoverished that it is not worthy of the dignity of a human being” (NUSSBAUM, 2000, p. 72).

According to Nussbaum, these capabilities are the moral entitlements of every human being (NUSSBAUM, 2000, p. 72). In her view, this list of central capabilities is applicable across cultures and jurisdictions; that is, she believes all states should endorse these capabilities (NUSSBAUM, 2011, p. 32-33). Notwithstanding this, her approach allows for some variance in how these capabilities are specified and defined in different societies (NUSSBAUM, 2011, p. 108-109).

In contrast, while Sen makes references to “essential capabilities” and “freedoms” he does not endorse a specific list of capabilities (SEN, 1993, p. 46-48; NUSSBAUM, 2011, p. 19). Instead, he maintains that value selection and discrimination are an intrinsic part of the capability approach (SEN, 2004a, p. 77-80). According to him, societies ought to develop their own lists of capabilities through a process of public reasoning and debate (SEN, 2004a, p. 77-80). Sen does not, as he puts it, endorse “one pre-determined canonical list of capabilities, chosen by theorists without any general social discussion or public reasoning” (SEN, 2005, p. 158).



To be clear, Sen objects not to the practice of listing capabilities or identifying important capabilities, *per se*, but to the idea of theorists endorsing one specific set of capabilities (SEN, 2004a, p. 77). In his view, the selection and prioritization of capabilities must involve a democratic process and public reasoning. He seems to rely on the concept of agency to argue that each group should select, assign weight to, trade off, and prioritize capabilities through democratic deliberation. This means, for instance, that when policies are to be designed, it is the people who will be affected by the policies who are to determine which capabilities are important to them (SEN, 1999a, p. 30-31). Lastly, as Nussbaum notes, Sen does not explicitly reject cultural relativism (NUSSBAUM, 2000, p. 13).

While Sen does not enumerate or defend a specific list of capabilities and does not expressly eschew cultural relativism, he unequivocally endorses democracy as a universal value and recognizes “its *intrinsic importance* in human life, its *instrumental role* in generating political incentives, and its *constructive function* in the formation of values (and in understanding the force and feasibility of claims of needs, rights, and duties)” (SEN, 1999b, p. 16). In addition, he recognizes the importance of public participation and public deliberation for democracy (SEN, 1999b, p. 10). Therefore, the case can be made that Sen endorses the universal importance of democratic participation and public deliberation.

Despite their different approaches to the question of identifying and prioritizing capabilities, in the next sub-section I show how both Nussbaum and Sen have recognized the importance of education, culture, and cultural participation to human development.

## 1.2. ACCESS TO EDUCATION, CULTURE, AND CULTURAL PARTICIPATION AS HUMAN CAPABILITIES

A central tenet of the Capabilities Approach is that the goal of human development is promoting human capabilities. How important are access to education, culture, and cultural participation under the Capabilities Approach? Sen recognizes the importance of education and culture (SEN, 2003; SEN, 2004b). However, as noted, he maintains that the selection of capabilities must involve public reasoning and a democratic process. Under Sen’s approach, therefore, countries are to determine (through a democratic process) whether access to education, culture, and cultural participation are *important* capabilities that they wish to promote.

On the other hand, Nussbaum specifically recognizes access to education, culture, and cultural participation as *central* human capabilities that a government must secure (up to a threshold level) for its citizens. For instance, Nussbaum writes, “[a]t the heart of the Capabilities Approach since its inception has been the importance of education” (NUSSBAUM, 2011, p. 152). Similarly, Nussbaum’s articulation of the fourth *central* capability of “senses, imagination and thought” expressly references education:

Being able to use the senses, to imagine, think, and reason—and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, including,

but by no means limited to, literacy and basic mathematical and scientific training. (NUSSBAUM, 2011, p. 33)

She also implicitly suggests that being able to participate in culture is a part of the fourth central capability by recognizing the importance of “[b]eing able to use imagination and thought in connection with experiencing and producing works and events of one’s own choice, religious, literary, musical, and so forth” (NUSSBAUM, 2011, p. 33).

Undoubtedly, access to education, culture, and participation enhance the central capability of “senses, imagination, and thought.” It is unclear, however, *to what extent* they are necessary or essential, under her approach, in order for this central capability to exist. What sort of access and how much access to education, for instance, is essential for the fourth central capability to exist? Moreover, to what degree does each capability have to be enhanced and at what cost to other capabilities? For example, does providing primary and secondary education meet the requirement of providing the fourth central capability? Or is providing higher education (such as post-secondary education) to those who wish to pursue it a necessary element of the fourth central capability? Does access to education as a central capability extend only to formal education (within an educational institution) or does it also include access to knowledge and information (for instance, providing access to content in libraries)?

In order to address these questions, one must look to the process that Nussbaum prescribes for identifying, specifying, and prioritizing capabilities. Writing about her list of central capabilities, Nussbaum explains that she:

deliberately specifies the items on the list in a somewhat abstract and general way. This is so precisely to accommodate the specifying and deliberating by citizens, legislatures, and courts that would be required before any such abstract principles could be realized in a constitution or any other founding political document with any legitimacy. (NUSSBAUM, 2011, p. 108)

My reading of this and other extracts from Nussbaum’s work is that according to her the exact contents of each central capability are to be determined through some sort of democratic process and public reasoning.<sup>3</sup>

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3 Nussbaum (2006, p. 78) writes: “[t]hese ten capabilities are supposed to be general goals that can be further specified by the society in question as it works on the account of fundamental entitlements it wishes to endorse [...]. I also insist, second, that the items on the list ought to be specified in a somewhat abstract and general way, precisely in order to leave room for the activities of specifying and deliberating by citizens and their legislatures and courts”. She also observes that “part of the idea of the list is its *multiple real-*

To summarize, according to Nussbaum, in a broad sense, access to education, culture, and cultural participation are part of the fourth central capability. Notwithstanding this, the nature and extent of these capabilities is to be further specified by obtaining (or pointing to a pre-existing) public consensus on the issue.

Under both Sen and Nussbaum's approaches, therefore, it is through public deliberation and public consensus that policymakers are to determine the specific content of capabilities, as well as the extent to which these capabilities are to be secured and/or enhanced. It is beyond the scope of this article to determine the conditions under which such a consensus may be formed; my analysis proceeds on the assumption that at least some countries may decide to prioritize access to education, culture, and cultural participation as important human capabilities. Based on this, the remainder of this paper explores the contours of a capabilities-based approach to copyright that prioritizes promoting these capabilities.

### 1.3. A CAPABILITIES-BASED ACCOUNT OF COPYRIGHT

Overall, the Capabilities Approach provides a framework within which to evaluate laws and policies in terms of how they affect human capabilities. Nussbaum develops “a partial theory of social justice,” articulating key political principles that must be enshrined in every state's constitution if the state is to be considered even minimally just (NUSSBAUM, 2011, p. 40). She categorically states that the ten central capabilities are pre-political entitlements that the *state must secure* for all people.

Moreover, Nussbaum establishes a strong relationship between capabilities, on the one hand, and law and policy, on the other. Her approach allocates “an urgent *task to government and public policy* – namely, to improve the quality of life for all people, as defined by their capabilities” (NUSSBAUM, 2011, p. 19). In other words, it is not enough for governments to simply refrain from restricting access to capabilities. Rather, Nussbaum ascribes an affirmative task for the government to actively enhance human capabilities (NUSSBAUM, 2011, p. 65). She explicitly makes the connection between the importance of these capabilities, on the one hand, and the role of the state and the law, more specifically, in implementing or securing these capabilities, on the other. In other words, she provides a normative basis for the proposition that the law must ultimately secure a threshold level of these ten capabilities for all citizens.<sup>4</sup>

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*izability*: its members can be more concretely specified in accordance with local beliefs and circumstances. It is thus designed to leave room for a reasonable pluralism in specification. The threshold level of each of the central capabilities will need more precise determination, as citizens work toward a consensus for political purposes. This can be envisaged as taking place within each constitutional tradition, as it evolves through interpretation and deliberation” (NUSSBAUM, 2000, p. 77).

<sup>4</sup> Although she does not discuss it explicitly, I posit that her understanding of law encompasses copyright law.

In contrast, Sen's approach does not focus on the law's obligation to promote capabilities. Sen maintains that while his version of the Capabilities Approach can make a meaningful contribution to theories of justice, it does not, in itself, amount to a theory of justice (SEN, 1995, p. 268; SEN, 2009, p. 231-233). Instead, his approach focuses on offering a normative framework for evaluating individual wellbeing, social arrangements, policies, etc.

As Nussbaum observes, while Sen's work does suggest "some obvious directions for public policy," he seldom refers to "law and the institutional structures within democracy" in his work on the Capabilities Approach (NUSSBAUM, 2011, p. 166). My reading of his work suggests that he proposes an evaluative framework for assessing societies, institutions, policies, social arrangements, etc. According to him, "[t]he capability approach is a general approach, focusing on information on individual advantages, judged in terms of opportunity rather than a specific 'design' for how a society should be organized" (SEN, 2009, p. 232).

Thus, under Sen's approach, one could examine inequality of capabilities without asking how these inequalities can be remedied and without assuming that it is the responsibility of the government to do the remedying. On the other hand, law and political structure have always been central to Nussbaum's approach to capabilities (NUSSBAUM, 2011, p. 166). In addition to an analytical framework for assessing copyright, therefore, Nussbaum's Capabilities Approach also provides the basis for developing an alternative account of copyright that centers on human development and human capabilities. As a result, in the remainder of this article, while I will rely on the concept of capability as conceived by both Sen and Nussbaum to develop a framework for copyright analysis, I will draw more heavily on Nussbaum's scholarship to articulate a capabilities-centered account of copyright.

## 2. KEY DIFFERENCES BETWEEN THE CAPABILITIES APPROACH AND UTILITARIANISM

A capabilities-oriented analysis of copyright differs from a utilitarian analysis of copyright (the approach that currently dominates Anglo-American copyright analysis).<sup>5</sup> While the former focuses on examining the human development impact of copyright, the latter asks whether the public benefits or gains utility, on balance, as a result of the current regime (LANDES and POSNER, 2003, p. 11-165).

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<sup>5</sup> Fisher notes that utilitarianism is the most popular of various theories of intellectual property (FISHER, 2001, p. 169; see also KWALL, 2010, p. 23). Lemley observes that the primacy of the incentive theory of intellectual property is recognized in the United States Constitution, as well as case law (LEMLEY, 1997, p. 993-994). Barron also notes that "[i]n common law jurisdictions, the copyright system has on the whole tended to be justified in liberal-utilitarian terms, more particularly in terms of its contribution to achieving an efficient allocation of society's scarce resources" (BARRON, 2012, p. 2).



In general terms, utilitarianism measures quality of life by examining total or average utility, where “utility” is defined as the satisfaction of preferences (SINGER, 1993; NUSSBAUM, 2011, p. 50-51).<sup>6</sup> As Nussbaum notes, one positive aspect of the utilitarian approach is that it focuses on people: it assesses quality of life in terms of people’s reported sense of well-being (NUSSBAUM, 2011, p. 51). She also emphasizes the radically democratic roots of utilitarianism and its commitment to equality (NUSSBAUM, 2007, p. 17). Utilitarianism tells us that social decision-making should account for every person and assign equal weight to the satisfactions of each person.<sup>7</sup>

However, as Sen observes, it has certain important limitations, including its “distributional indifference” and its “neglect of rights, freedoms and other non-utility concerns” (SEN, 1999a, p. 62). Mark Stein notes that utilitarianism “is concerned with the distribution of wealth;” it “is not concerned with the distribution of welfare” (STEIN, 2009, p. 498).

Nussbaum identifies four problems with the utilitarian approach (NUSSBAUM, 2011, p. 51-56).<sup>8</sup> First, it aggregates people’s satisfaction (NUSSBAUM, 2011, p. 51). For instance, a nation in which a few people are suffering may nevertheless have a very high average utility, if a large number of people report satisfaction. As Nussbaum puts it, “the approach justifies the infliction of a very miserable life on an underclass, so long as the strategy raises the average satisfaction level” (NUSSBAUM, 2011, p. 51). Instead, Nussbaum’s Capabilities Approach is sensitive to distributional inequalities. It is deeply concerned with “*entrenched social injustice and inequality*” (NUSSBAUM, 2011, p. 19).

Second, the utilitarian approach also aggregates satisfaction across components of a person’s life (NUSSBAUM, 2011, p. 51-52). It does not distinguish, for instance, between the satisfaction derived from eating a delicious meal, on the one hand, and the satisfaction derived from being able to access healthcare, on the other. In contrast, Nussbaum’s approach treats each capability as unique. According to her, “the capabilities are radically nonfungible: lacks

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<sup>6</sup> Although recent utilitarian theorists define utility in terms of satisfaction of desires or preferences, Jeremy Bentham and Henry Sidgwick thought of utility in terms of pleasure (BENTHAM, 1996, p. 11; SIDGWICK, 1907, p. 411-413).

<sup>7</sup> Bentham writes that “[t]he happiness of the most helpless pauper constitutes as large a portion of the universal happiness, as does that of the most powerful, the most opulent member of the community. Therefore the happiness of the most helpless and indigent has as much title to regard at the hands of the legislator, as that of the most powerful and opulent” (BENTHAM, 1843, p. 107; see also HARSANYI, 1976, p. 72; SINGER, 1993, p. 21; STEIN, 2006, p. 33-35).

<sup>8</sup> Nussbaum concedes that there may be versions or interpretations of the utilitarian approach that respond to and address the first two criticisms. An in-depth discussion of the utilitarian approach is beyond the scope of this project. Here, I am merely presenting a very general overview of the utilitarian approach in order to contrast it with the Capabilities Approach.

in one area cannot be made up simply by giving people a larger amount of another capability” (NUSSBAUM, 2006, p. 166-167).

This “irreducible heterogeneity” of capabilities means that a government cannot compensate for not providing one central capability by providing a large amount of another capability (NUSSBAUM, 2011, p. 35; NUSSBAUM, 2007, p. 19). As discussed, Nussbaum’s articulation of the Capabilities Approach identifies certain central capabilities as more important or critical to human development than others. It is also “*pluralistic about value*,” recognizing that different capabilities have a different significance for different people (NUSSBAUM, 2011, p. 18-19).

Nussbaum’s third objection revolves around the concept of “preference.” She points out that preferences are not predetermined by our DNA; they are developed as a response to social conditions (NUSSBAUM, 2011, p. 54). For example, a member of a marginalized group may become socially conditioned to accept her second-class status, reporting satisfaction despite being denied access to certain capabilities because those capabilities have always been placed beyond her reach: i.e., she may develop adaptive preferences. In such a circumstance, the person may report satisfaction despite the fact that she has been denied access to education, for instance. That is, by measuring quality of life in terms of actual preferences, the utilitarian approach may reinforce existing inequalities and injustice.<sup>9</sup> Both Sen and Nussbaum criticize the utilitarian account for its stance on adaptive preferences (NUSSBAUM, 2000, p. 117-166; SEN, 1992, p. 6-7). The Capabilities Approach, on the other hand, asks which capabilities *are accessible* to people, regardless of whether or not people choose to exercise some or all of these capabilities.

Lastly, Nussbaum criticizes the utilitarian approach because it focuses on promoting satisfaction itself as a goal, rather than on promoting freedom. In order to highlight this, she contrasts a society that takes care of citizens as passive dependents, simply satisfying their needs, with one that enables citizens’ choices and freedoms. The Capabilities Approach is concerned with promoting “a set of opportunities, or substantial freedoms” with people choosing which of these options or freedoms they wish to exercise (NUSSBAUM, 2011, p. 18).

In the next section, I explore how the Capabilities Approach, in the specific context of copyright, provides the basis for a more textured and nuanced analysis that considers non-economic and distributional concerns and is based on a richer understanding of human development than the utilitarian approach.

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<sup>9</sup> However, Stein has pointed out that from an informed-preference utilitarian viewpoint, one might contend that adaptive preferences are not, in fact, informed, and therefore utilitarianism should not take them into account (STEIN, 2009, p. 522).

### 3. THE CONTOURS OF A CAPABILITIES-BASED ACCOUNT OF COPYRIGHT LAW

In this section, I outline the broad contours of an account of copyright that is grounded in the Capabilities Approach, highlighting the two principal ways in which the capabilities-oriented approach to copyright differs from the standard Anglo-American utilitarian model. First, it places enhancing human capabilities at its center and, second, it adopts a substantive approach to equality, accounting for social, economic, cultural, and other forms of marginalization. I explore each of these in greater detail in this section. In addition, I apply the account of copyright articulated here to a sub-genre of fan fiction, Mary Sue fan fiction, to demonstrate how this account brings the capability implications of copyright into sharper focus than the utilitarian approach does.

#### 3.1. SHIFTING THE FOCUS FROM CONTENT PRODUCTION TO CAPABILITY ENHANCEMENT

The standard utilitarian account of copyright prioritizes maximizing cultural production over the enhancement of human capabilities. According to this account, the classic problem that standard economic models of copyright law address is that of striking a balance between enhancing incentives to create works, on the one hand, and access to works, on the other (LANDES and POSNER, 2003, p. 71). This is because the standard utilitarian account is based on “a thin theory of culture as commodities” (SUNDER, 2012, p. 45) and narrowly focused on stimulating creative production (SUNDER, 2012, p. 83). It fails to take into consideration the complex relationships between intellectual property law, culture, social relations and economics (SUNDER, 2012, p. 83). As Rebecca Tushnet points out, while many artists care “about creation the verb rather than creation the noun,” the law focuses on creative output alone (TUSHNET, 2009, p. 527). Similarly, Niva Elkin-Koren observes that people create and engage with content for a multiplicity of reasons (ELKIN-KOREN, 2013, p. 57-112).

In contrast, a capabilities-based approach to copyright involves focusing on the social, cultural, and political implications of access to culture, knowledge and participation. Culture is not “just a set of goods” (SUNDER, 2012, p. 45) but rather “a fundamental component of a good life” (SUNDER, 2012, p. 45). As Elkin-Koren writes: “[o]ur ability to access, process, and share information with others is key to our freedom in the information ecosystem” (ELKIN-KOREN, 2017, p. 168). Therefore, limiting access to copyrighted materials not only has the potential to restrict users’ ability to create new content, it “may also affect users’ ability to actively participate as citizens in political discourse and shape culture” (ELKIN-KOREN, 2017, p. 168).

A capabilities-oriented approach to copyright is predicated on the intrinsic importance of access to culture, knowledge, and participation. It is concerned with enhancing the real freedom people have to learn about and understand the world in which they live and to contribute to the development of knowledge. Similarly, it recognizes that access to culture and the ability to participate in the creation of culture are essential aspects of human development; sharing

the stories of our lives and our ways of seeing the world is a vital aspect of human freedom. The *raison d'être* of a capabilities-oriented copyright regime, therefore, is enhancing the capabilities of individuals; it is not focused on increasing cultural production or educational access in order to increase countries' overall technological progress or GDP.

### 3.2. ACCOUNTING FOR INEQUALITIES

The Capabilities Approach focuses on “*each person as an end*;” it asks what opportunities are available to each person, rather than asking only what the total or average well-being under the regime is. Therefore, a capabilities-based critique of copyright requires us to explore not only whether copyright promotes human capabilities in society overall, but also to evaluate the current copyright regime in terms of its distributional effects. On the other hand, as Sunder argues, the utilitarian account fails to ask the crucial questions: “Who makes the goods? Who profits, and at whose expense?” (SUNDER, 2012, p. 84). Nor does it ask whether the goods are fairly distributed to all who need them (SUNDER, 2007, p. 122). Along the same lines, Margaret Chon has observed that “over reliance on utility-maximization ignores distributional consequences” (CHON, 2006, p. 2832).

For example, Peter Yu draws attention to the distributional effects of increasing intellectual property enforcement (YU, 2010, p. 6). He points out that countries tend to focus on net economic gains when deciding whether to sign multilateral or bilateral instruments that mandate higher levels of intellectual property protection and enforcement. Many of them do not consider that the gains from these treaties will not be justly distributed “unless a well-functioning transfer mechanism” is in place to ensure that the potential winners share these gains with the potential losers (YU, 2010, p. 6).

The Capabilities Approach also contemplates the broader socio-economic and socio-cultural context that people inhabit because it influences the real freedoms that they have. It requires us to ask: who benefits from copyright protection and who are the stakeholders marginalized by the regime? Is the current regime ultimately helping to enhance capabilities in a broad-based manner? As Chon puts it, “the perspectives and actions of the least empowered among us ought to be included in more than just a formal equality sense in shaping a normative legal agenda” (CHON, 2011, p. 222).

### 3.3. A FRAMEWORK OF QUESTIONS

Thus far, I have articulated two underlying principles of a capabilities-based analysis of copyright law: (i) focusing on capability enhancement; and (ii) accounting for inequalities in how the copyright system impacts capabilities.

Based on these two principles, a capabilities-based analysis of copyright asks three critical questions. First, *what types of works does copyright facilitate?* This means asking not only whether copyright incentivizes the production of works, but also investigating whether the current regime encourages the production of educational and cultural materials that meet



the needs of marginalized users. For instance, while currently copyright arguably incentivizes the translation of books into languages spoken by large populations, does it provide adequate incentives for the translation of textbooks into local languages spoken only by small communities which do not represent a sizeable market?

Second, while an analysis of copyright based on the standard utilitarian approach asks whether copyright is increasing the overall availability of works (by balancing access to works with providing incentives for creativity), *a human development approach would also prompt us to examine who has access to works under the regime and who doesn't*. As the United Nations Committee on Economic, Social and Cultural Rights observed in its general comments:

every person or group of persons is endowed with a cultural richness inherent in their humanity and therefore can make, and continues to make, a significant contribution to the development of culture. Nevertheless, it must be borne in mind that, in practice, poverty seriously restricts the ability of a person or a group of persons to exercise the right to take part in, gain access and contribute to, on equal terms, all spheres of cultural life, and more importantly, seriously affects their hopes for the future and their ability to enjoy effectively their own culture. (CESCR, 2009, para 38)

Third, a human development approach to copyright compels us to ask: *whom does the regime benefit by facilitating the creation of works?* Does the copyright system assist all creators equally in gaining control over their works and/or benefiting from their works economically, or does it privilege certain producers of content and marginalize others? *Conversely, does the regime burden all potential creators to the same extent by limiting the ways in which they can engage with pre-existing works to create downstream works?* It is not only passive access to knowledge and culture that is important for human development, but also people's ability to play a role in the creation of culture and knowledge.

Conducting a human development analysis of copyright involves examining provisions of copyright law, as well as key copyright policy issues, in the context of this framework of questions. In the following sub-section, I apply this framework to consider Mary Sue fan fiction from a capabilities perspective.

### 3.4. APPLYING THE CAPABILITIES APPROACH TO COPYRIGHT ISSUES: MARY SUE FAN FICTION

Fan fiction refers to a work “that extends and expands on the storyline of a mediated text such as a novel, film, or television show” (BONNSTETTER and OTT, 2011, p. 348). Mary Sue fan fiction describes fan fiction by means of which fans introduce idealized versions of themselves into their favourite stories (BACON-SMITH, 1992, p. 94-102). Several features distinguish Mary Sue fan fiction from other forms of fan fiction:

- (i) it inserts new characters into the text's canon universe;
- (ii) the Mary Sue character is a sort of author-proxy;
- (iii) the character is also a means of wish-fulfillment for the author as an idealized version of herself; and
- (iv) Mary Sue fan fiction shifts the narrative focus from the primary characters in the original text to the Mary Sue character (BONNSTETTER and OTT, 2011, p. 349).

In determining how a particular example of Mary Sue fan fiction should be treated, the utilitarian approach to copyright asks how fan fiction affects the copyright balance between access and incentives. In the United States, copyright protection extends not only to the literal copying of a copyright protected work, but also to the creation of derivative or adaptive works based on the protected work (US COPYRIGHT ACT, § 106). The doctrine of fair use is an important exception to copyright protection: it permits the uncompensated use of copyrighted materials, so long as such use is “fair” (US COPYRIGHT ACT, § 107). Courts must determine whether a particular unlicensed use of a copyrighted work amounts to fair use by applying a four-factor test, involving the following factors:

1. The purpose and character of the use, including whether such use is of commercial nature or is for non-profit 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 (US COPYRIGHT ACT, § 107).

In evaluating the “purpose and character of the use,” the transformativeness of the use is to be considered by the courts (LEVAL, 1990; *Campbell v Acuff-Rose Music, Inc*, 1994). However, transformativeness is evaluated by comparing the purpose and character of the new expression (in this case fan fiction) with that of the copyrighted work in terms of the benefits the new use offers to society or how it impacts the market for the copyrighted work (LEVAL, 1990; *Campbell v Acuff-Rose Music, Inc*, 1994). The analysis does not adequately take into consideration how the process of creating the expression affects the creator of the fan fiction.

In contrast, the Capabilities Approach asks us to consider what capabilities are implicated in the creation of the fan fiction: who benefits, and in what way, from being able to engage in fan fiction and who sees themselves and their preferences being reflected in the new cultural narratives generated as a result of it?

By appropriating pre-existing content, especially mainstream content that is symbolic, one is able to redefine that content in a way that reflects one's own identity, while at the same

time destabilizing stereotypes and cultural assumptions (CHANDER and SUNDER, 2007; TUSHNET, 2008, p. 109-110).<sup>10</sup> As Anupam Chander and Madhavi Sunder observe:

Contemporary cultural theorists recognize as an important discursive tactic the reworking of a discriminatory narrative to retell history and empower oneself. Rewriting the popular narrative becomes an act of not only trying to change popular understandings, but also an act of self-empowerment. (CHANDER and SUNDER, 2007, p. 619-620)

Mary Sue fan fiction is an example of such appropriation. Historically, fans and scholars alike have criticized Mary Sue fan fiction (BONNSTETTER and OTT, 2011, p. 350; BACON-SMITH, 1992, p. 94). For example, Bacon-Smith has argued that “Mary Sue is a fantasy of the perfect woman created within the masculine American culture. Men are served by Mary Sue, who ideally minimizes her own value while applying her skills, and even offering her life, for the continued safety and ease of men” (BACON-SMITH, 1992, p. 102). Similarly, Christine Scodari maintains that Mary Sue characters are constituted in relation to the narrative’s male protagonist, and therefore bolster his dominance (SCODARI, 2003, p. 113). These critiques notwithstanding, I agree with Chander and Sunder’s characterization of Mary Sue “as a figure of subaltern critique and, indeed, empowerment” (CHANDER and SUNDER, 2007, p. 599): encouraging dialogic and interpretive practices fosters a participatory culture wherein individuals are empowered through story-telling and self-expression, regardless of the quality of these stories, and even when such expression sometimes reflects aspects of the patriarchal context from which it emerges.

While the ability to participate in culture can be an important capability for all people, certain forms of dialogic engagement can be particularly meaningful for marginalized people. As Anupam Chander and Madhavi Sunder observe:

Mary Sue is in fact a figure of subaltern critique, challenging the stereotypes of the original... Mary Sues re-imagine our cultural landscape, granting agency to those denied it in the popular mythology. (CHANDER and SUNDER, 2007, p. 597)

Through this type of fan fiction, marginalized groups, such as women, LGBTQIA people, and racial and ethnic minorities, amongst others, may be able to subvert stereotypical depictions of members of their groups in mainstream media (CHANDER and SUNDER, 2007,

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<sup>10</sup> Along similar lines, Benkler observes that “[t]he networked information environment provides an outlet for contrary expression and medium for shaking what we accept as cultural baseline assumptions. Its radically decentralized production modes provide greater freedom to participate effectively in defining the cultural symbols of the day” (BENKLER, 2006, p. 277).

p. 599). By introducing idealized versions of themselves into their favourite works, women (and other marginalized people) are able to give their characters agency, turning them into actors with their own motivations, back stories and a broader story arc; these minority characters are no longer relegated to supporting roles, merely serving to propel the non-minority protagonist's plotline and character development.<sup>11</sup>

Fan fiction can also enable marginalized authors to confront and destabilize deeply entrenched narratives of masculinity, femininity, and sexuality. For instance, fan fiction in the “slash” genre focuses on non-canonical same-sex relationships between characters (these characters are not usually involved in same-sex relationships in the original work upon which the fan fiction is based) (KATYAL, 2006, p. 483). Through this form of fiction, people who are members of underrepresented groups in mainstream fiction are able to engage with culturally dominant and iconic stories, rewriting characters and relationships in ways that are profoundly symbolic and meaningful to them and to which they may feel an intensely personal and emotional connection (KATYAL, 2006).

Dialogic and interpretive forms of appropriation such as Mary Sue and slash fiction can represent particularly powerful ways for marginalized people to combat the invisibility and one-dimensional representation of their identities in mainstream cultural narratives. The capabilities-based account of copyright tells us that the capability enhancing potential of such practices should be weighed in the balance, where relevant, when attempting to resolve tensions and conflicts in copyright policy.

The value of this type of participation for marginalized people is both internal (people have more agency and control over their own voices and stories) and external (in terms of populating the cultural landscape with critiques and contributions from a diversity of perspectives). When copyright law encumbers the ability to engage with culture, it causes a special sort of harm to marginalized people: the deprivation of an important means of challenging inequality, the suppression of an already marginalized voice, and the potential loss of inspiration to other marginalized people.

A capabilities-based approach to copyright (with its focus on enhancing the real freedoms that individuals have, its recognition of the intrinsic value of cultural participation, and its sensitivity to inequalities) is able to account for the special value and significance of these forms of subversive and discursive engagement with culture in a much more nuanced and textured manner than the utilitarian account does.

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11 Bonnstetter and Ott (2011, p. 352) observe that “[f]or both Jenkins and Bacon-Smith, fan fiction is a means for marginalized groups and especially female fans to construct a discursive space within hegemonic culture to express themselves in meaningful and personally fulfilling ways. In the case of Mary Sue fan fiction, such discursive spaces also function to challenge the patriarchal economy of writing along three axes: desire, the Author-God, and poetic language”.



#### 4. THE INTERSECTION BETWEEN COPYRIGHT LAW, HUMAN CAPABILITIES, AND DEVELOPMENT

Thus far I have articulated the broad contours of a capabilities-oriented analysis of copyright. However, the relationship between a country's copyright regime and human capabilities cannot be studied in a vacuum. This is because, while copyright law has the potential to impact access to education and cultural participation in all countries, the extent and/or nature of this impact is dependent not only on the design and implementation of a country's copyright law, but also on various external factors.

As Chon observes, intellectual property policy “will appear disproportionately to affect states with smaller markets, less international negotiating power, smaller budgets for public research, and poorer and less empowered consumers” (CHON, 2007, p. 811). When it comes to the question of intellectual property enforcement, Yu notes that it is necessary to consider several issues: whether a particular country can bear the cost of enforcement; whether it can justify the compromise between intellectual property protection, on the one hand, and other competing policy goals, on the other; and whether it has introduced exceptions to intellectual property protection and complementary laws to balance the potential negative impact of intellectual property protection (such as anti-trust legislation, for instance) (YU, 2010, p. 6).

Zorina Khan adopts a similar position. Based on an economic history of intellectual property laws in the United States and Europe, she concludes that intellectual property rights are most effective at promoting the progress of science and useful arts when they are developed in tandem with other institutions and whilst taking into consideration the needs and interests of economic and social development (KHAN, 2005).

That is, an intellectual property regime's success is contingent not only on its internal design, but also on the “*external conditions*” within which it operates (YU, 2010, p. 6). As Yu writes:

Because many of these external conditions work in tandem with the intellectual property system to promote creativity and innovation and to provide an appealing investment climate for foreign firms, they are both interdependent and mutually reinforcing. (YU, 2010, p. 6)

Therefore, while exploring the intersections between copyright and human capabilities and evaluating proposals for reform, it is necessary to consider how various indices of development intersect with copyright and human capabilities.

Here, the phrase “development” refers not only to a country's overall level of economic development, but also other socio-economic, technological, and institutional factors or characteristics that are of particular significance to copyright-analysis. For instance, a set of policy-reforms designed to improve access to education and cultural participation may be effective

in one jurisdiction and not in another: copyright protection may stimulate local production of educational texts in countries with a relatively well-established publishing industry but may not be as effective in other countries with a weak or non-existent publishing industry, such as many countries in Africa.<sup>12</sup>

In particular, the following factors are likely to influence the ways in which copyright affects access to education and cultural participation in a country:

- : the presence or absence, and relative strength, of indigenous content industries;
- : the country's institutional capacity;
- : the amount of public funding available to enhance access to education, cultural content, and cultural participation;
- : income levels as well as the extent of income inequality prevalent in the country;
- : the extent of deprivation of important human freedoms and capabilities; and
- : technological capacity and the evenness of technological access.

Therefore, an analysis of a country's copyright regime should take into consideration local conditions, and in particular the factors enumerated above. Whilst resisting monolithic conceptions of both development and an ideal copyright regime, however, it may be helpful to embrace the possibility of mid-level generalization amongst countries and discuss copyright provisions and reform proposals in relation to groups or categories of countries.<sup>13</sup> For instance, in evaluating different approaches to copyright limitations and exceptions, it is helpful to group countries into categories based on their institutional capacity to design, administer, and adjudicate flexible or open-ended legal provisions, discussing the most appropriate approach for each group of countries in relatively broad terms (with the understanding, of course, that there may be exceptions and differences within each group of countries).

#### 4.1. PIRACY, CAPABILITIES, AND DEVELOPMENTAL FACTORS

I have argued that a human development-centered analysis of copyright ought to examine copyright issues within the developmental context in which they arise. In this section, I posit

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<sup>12</sup> Okediji (2004, p. 241) notes that “book publishing in Africa is negligible and the number of books in circulation and for sale in most African countries is abysmally low and unaffordable for the average African”.

<sup>13</sup> Mariana Mota Prado and Michael J Trebilcock argue against a one-size-fits-all approach to legal reform, but also acknowledge that many developing countries share useful commonalities such as historical experiences and institutional characteristics (PRADO and TREBILCOCK, 2009, p. 377; see also TREBILCOCK and PRADO, 2014, p. 40).

that this involves exploring “practices of everyday resistance, such as ‘piracy’ and appropriation, rather than automatically demonizing them” (CHON, 2011, p. 222). Chon urges us not to adopt a “top-down” perspective in examining this phenomenon (CHON, 2007, p. 827). Rather, she advocates a “from below understanding” of it (CHON, 2007, p. 827). Instead of viewing it as an attempt at free riding, or stealing someone else’s expression, we might ask whether rampant piracy in a particular jurisdiction is due to a lack of access to cultural, educational, or informational materials, combined with the existence of vibrant informal economies in developing countries, as well as other cultural factors (CHON, 2007, p. 827).

Similarly, Lawrence Liang calls upon us to consider a wider set of practices through which people, particularly those in poor countries, access knowledge and culture. As Brian Larkin notes, “[i]n many places, piracy is the only means by which certain media—usually foreign—are available” (LARKIN, 2004, p. 309). Therefore, Liang encourages us to focus not on the morality of piracy, but instead on what piracy does in the particular social context within which it operates (LIANG, 2011, p. 71). The public sphere is not necessarily a space of equal participation. Piracy opens up a gateway to the global information economy for people who may otherwise not be able to afford access. “For many people, finding their place within the global economy includes engaging with a world of counterfeit commodities, replicating the global economy’s output” (LIANG, 2014, p. 65-66). To the extent that copyright criminalizes piracy and closes off this avenue of access to the global cultural landscape, it has the potential to return and relegate these people to the fringes of cultural life.

As Liang notes, the ability to participate in the global information economy is contingent, in part, on the existence of “infrastructures of cultural production” that facilitate the creation and dissemination of content (LIANG, 2011, p. 56-57). These infrastructures include not only technologies, such as computers, cameras, audio-recording equipment, and telecommunications networks, but also a network of relationships for the dissemination of content. However, even in a country like India, which plays a relatively prominent role in the global trade in cultural content, for a large proportion of residents, access to both content and technology is elusive.<sup>14</sup>

Not only this, in countries with limited indigenous cultural industries, Liang and others have argued that piracy helps build an informal infrastructure, which subsequently facilitates the creation and dissemination of locally made “original” content (LIANG, 2011; LARKIN, 2004, p. 290). Piracy can play a vital role in the development of nascent local content industries. The birth and coming of age of Nollywood exemplifies this. As Larkin observes:

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14 Liang (2011, p. 57) observes that “even in countries like India that are linked to the global economy, only a very small section of the population finds itself ‘wired in,’ and for large sections of the population, access to information and technology is as distant as access to basic infrastructures of housing, water, and health care”.

[t]his new industry has pioneered new film genres and generated an entirely novel mode of reproduction and distribution that uses the capital, equipment, personnel, and distribution networks of pirate media. These Nigerian videos are a legitimate media form that could not exist without the infrastructure created by its illegitimate double, pirate media. (LARKIN, 2004, p. 290)

Arguably, piracy could hinder the growth of local content industries, once they have attained a certain level of success. However, the example of piracy shows us how a capabilities analysis taking into account local developmental considerations can paint a much more nuanced picture of copyright issues.<sup>15</sup> Rather than an example of stealing or free riding, in some jurisdictions this approach shows us that piracy may be a reflection of a severe lack of affordable access to content due to large income inequalities and/or public funding for social infrastructure such as schools and libraries, and limited technological access. Moreover, in some contexts, it might even contribute to the development of local industrial capacity, rather than undermining it.

## CONCLUSION

Building on the capabilities approach developed by Amartya Sen and Martha Nussbaum, this article argued that copyright law's *raison d'être* should be enhancing human capabilities, in particular recognizing the intrinsic value of accessing and participating in the creation of knowledge and culture. Moreover, it should take into account socio-economic, socio-cultural, gender-based, race-based, and other forms of inequalities. This view stands in stark contrast to the utilitarian conception of copyright law currently embraced in the United States and has important implications.

In addition, the framework proposed here eschews a standardized approach to formulating copyright law and policy. The relationship between copyright law and human development is mutually constitutive. While copyright influences human development, the human

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15 The need to account for developmental considerations is borne out even in the context of access to academic publications. One paper in *The Lancet* studied data on downloads of medical literature from Sci-Hub (a repository of academic publications that describes itself as a “pirate website”) and reported that the highest download densities in the sample studied were in middle-income countries. The authors of the paper argue that increased access to education and a growing medical industrial sector have contributed to the increased demand for medical literature. They argue that “[w]ith efforts undertaken by WHO focused on expanding access in the poorest countries, and with academic publishers focused on the sale of bundled journal packages to library consortia concentrated in high-income states, there appears to be a trough in access for middle-income countries” (TILL *et al.*, 2010).



development context of a country can also influence how copyright actually operates in that country. Taking this into account is important not only in order to deepen our understanding of copyright but also in order to develop copyright reforms that are tailored to local needs and realities.

Although the focus of this article has been on developing a framework for a capabilities-based critique and analysis of copyright law, this framework has the potential to provide insights for policymakers in the context of copyright law reform. When policymakers are considering copyright reform proposals, rather than simply adopting a one-size-fits-all approach that may have worked for other countries, they should first consider whether a particular reform proposal promotes human development and enhances human capabilities within their respective jurisdictions. For instance, in determining the scope of translation rights granted to a copyright holder, policymakers ought to consider how the protection of translation rights impacts the goals of human development in the context of the specific and particular developmental conditions in their respective jurisdictions.

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