

**Controversy:**

**Would the Absence of Copyright Laws Significantly Affect  
the Quality and Quantity of Literary Output?  
A Response to Julio H. Cole**

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Professor Cole presumes that his original work was at least predominantly positive in nature, but this presumption is incorrect. Moreover, when Professor Cole does present positive analysis he fails to make his case. In his original argument, he appealed to David Hume who demonstrated that property rights are necessary when goods are scarce. Professor Cole evidently believes that copyrighted material is not scarce, but this defies reason. There is a definite limit to the number of books written, to the number of songs composed, to the number of computer programs developed, and to the number of all other copyrighted items. The reason that this is true is because each of these goods comes into existence as the result of employing scarce resources to produce something that is obviously scarce. This was the extent of the positive analysis that I provided in my initial response.

In his response, Professor Cole argues that creative acts do not automatically result in the ownership of ideas. He holds that people cannot own such things as “cooking recipes, math theorems, fashion designs,” and so forth. Of course, I do not disagree with him on this point. Viewing copyright protection as affording the same kind of right as that granted by a patent is, I believe, an error. In my previous response I argued the very same point. However, just because a mathematician, for example, cannot own specific math theorems, it does not mean that he cannot own the copyright of a math textbook aimed at teaching such theorems to a general audience. Likewise, just because a musician cannot own musical notes or chords, it does not mean that she cannot own the copyright to a particular musical composition. In short, discoveries cannot be owned because they are not scarce, but corollary products can be copyrighted because they are the essence of property.

In asserting that such material is not property, Professor Cole asks the following questions: “Has the creator lost anything to which he was *entitled* [if unauthorized copies of his work were made]? If copying by others results in his obtaining smaller revenues than he would have otherwise, then he *has* been dispossessed of a profit, which is true enough, but was he really *entitled* to it?” On the basis of these questions, Professor Cole concludes that owners of copyrighted materials are not entitled to the profits stemming from their work. However, we might just as easily have asked whether a retail store is entitled to the profits it would have earned on merchandise that was stolen by shoplifters. In my estimation, Professor Cole’s question is poorly constructed. On the one hand, we would say that no merchant is ever guaranteed of making a profit. Whether a supplier makes a profit, depends on whether there is a sufficient demand for the product relative to the costs incurred in providing it. However, assuming that the merchant would have sold the merchandise and made a profit on each stolen unit of the good, the answer to Professor Cole’s question is a resounding yes. A merchant certainly has the right to the profits that might have been made—if his property had not been stolen. To my line of reasoning, the same protection ought to be granted to the copyright owner.

By virtue of his convoluted set of questions, Professor Cole proceeds to describe the communal benefits that might be gained from eliminating the copyright as a positive externality, which, as I understand it, could not be the case. A positive externality arises from an exchange that would have taken place anyway. It is not clear that this is the case with copyrighted material. As I already pointed out, one strong motivation for creating copyrighted material is the desire to create a product that could be traded. Such intentions cannot be associated with people who are unconcerned about the spillover benefits that their actions happen to provide for others.

This brings me to the final point that I would like to make: Professor Cole has the false notion that utilitarianism is a kind of positive analysis. At the end of his response he writes, “This [a concern for the overall social welfare], of course, shifts the debate to a completely different plane, and the discussion becomes much less ‘normative’, if you will, and much more ‘utilitarian.’” It seems clear to me that Professor Cole does not understand that utilitarianism is a moral philosophy and, hence, is essentially normative. Bentham was a social reformer who aimed to displace traditional morality with his new ethical theory of human behavior. As such, he rejected the idea of natural human rights. In its place, he offered his hedonistic calculus as the basis on which ethical choices should be made. While the concepts of utility and hedonism extend back to classical times, the uniqueness of Bentham’s system was to

merge the two and create a new guideline for constructing society's legal code. Unfortunately for Bentham, and for anyone attempting to employ his method, significant structural and philosophical problems render it virtually useless as a practical moral tool.<sup>1</sup>

Professor Cole's view of copyright protection boils down to a question of whether it "ought" to be maintained as part of the legal code. Phrased this way, then, it seems obvious that the question has a normative cast. Professor Cole, however, believes that the question should be decided on the basis of a utilitarian calculus. I vigorously disagree with him. I do not find it reasonable to approach moral questions in this way because the underlying moral theory is irreparably flawed. In his response, Professor Cole slips a normative premise implicitly into his utilitarian line of argument, which is purportedly scientific or value-free. But that is simply not true. In the following citation, Gordon Clark addresses the reason that any syllogism with a normative premise requires a normative conclusion.

The empirical method in axiology can only begin with the discovery in experience of so-called values. Art and friendship, health and material comfort, are frequently identified. The precise identification, however, is not the crucial point. These so-called values are all descriptive facts. Burt discovers in his experience a preference for art and friendship. Someone else may not value art at all. Similarly, personal preference varies between monogamy and adultery. And Stalin shows a preference for murder. As Gardner Williams of the University of Toledo says, "Selfish ambition, or the will to power, when successful, is intrinsically satisfactory." Thus, murder, as much as friendship, is a value because it has been discovered as a value in experience. How then can a theory which restricts itself to descriptive facts provide ground for normative prescriptions? If the premise of an argument is the descriptive fact that someone likes something, by what logic could one arrive at the conclusion that other people ought to like the same thing? Any syllogism with a normative conclusion requires a normative premise.<sup>2</sup>

Given Clark's argument, I cannot understand how "normative" utilitarian arguments survive in our culture. If we view utilitarianism as value-free, it is the most immoral ethical philosophy ever devised since it will condone almost any human behavior as long as sufficient pleasure can be derived from it. But utilitarianism not only survives, it flourishes in many economics departments around the world. It does so, in my opinion, to the detriment of Western civilization. For how can a civilization survive without any sound moral basis for evaluating human conduct?

**Notes**

1. For a trenchant critique of utilitarianism, see Frederick Copleston, *A History of Philosophy*, vol. 8 (London: Burns and Oates, Ltd., 1966), 1–49.
2. Gordon Clark, “Can Moral Education Be Grounded on Naturalism?,” *Essays on Ethics and Politics* (Jefferson, Md.: The Trinity Foundation, 1992), 7–8.