**Abstract**

The Chicago School of law and economics movement, on which the predominant justification for independent property rights is based in most countries, is flawed mainly because it takes economic wealth as the sole proxy for well-being. We suggest replacing it with a well-being approach, which, even if it is still based on utilitarianism, does not suffer from this defect. A theory-neutral approach to well-being for policy-making is achievable because there is a substantial area of common ground between rival theories on what we call the "markers" of well-being. We identify markers which we believe would be consistent with all mainstream theories of well-being and then verify whether the current intellectual property framework reflects the markers or not, and propose suggestions for change when it does not.

**Introduction**

Intellectual property is one of the most important assets a country can have. One need only quote a 2012 report from the US Patent and Trademark Office stating that intellectual property-intensive industries "support at least 40 million jobs and contribute more than $5 trillion dollars to, or 34.8 percent of, U.S. gross domestic product (GDP)".

In a previous article, we have shown that utilitarianism is the main justification for intellectual property rights in most countries. One of its derivatives, the Chicago School of law and economics (L & E), strongly dominates the current intellectual property legal framework, but it is both ideological and flawed. In the main, it takes economic wealth as the proxy for well-being, but research has shown that economic wealth is an inadequate proxy for general well-being. Therefore, it must be replaced. Strangely, policy-makers have only noted the importance of well-being in other fields of law and not (yet) in relation to intellectual property. We suggested replacing economic wealth with a well-being approach, which, while it is still based on utilitarianism, does not suffer from these defects. We argued that a theory-neutral approach to well-being for policy-making is achievable because there is a substantial area of common ground between rival theories on what we call the "markers" of well-being. In this article, we identify markers which we believe would be consistent with all mainstream theories of well-being (first section) and then verify whether the current intellectual property framework reflects the markers or not, and propose suggestions for change if it does not (second section).

In this article, we use the term "intellectual property rights" (IPR) to refer solely to patents and copyright. This is because the utilitarian justification is more suited to these two rights than to trade marks and related rights (such as geographical indications). By contrast with patents and copyright, trade mark rights apply to signs rather than products. They mainly serve as an indication of origin so as to avoid consumer confusion. The rationale for protecting them is therefore different from that justifying patents and copyright. We acknowledge that an investment function close to that of patents and copyright also exists for trade marks, but it is not the dominant one and is only really relevant to some trade marks, namely well-known ones. To the extent that designs are a hybrid between patent and
copyright and that other intellectual property rights related to patents and copyright, such as plant variety rights and neighbouring rights copyright, can also be justified by utilitarian concerns, the reasoning in this article can apply to them too. However, for reasons of space, we have conducted the analysis only in relation to patents and copyright proper, and further analysis is necessary to see whether our conclusions would hold for rights related to patents and copyright.

The theory-neutral approach to well-being
An approach to the justification of intellectual property rights based on well-being faces an obvious challenge. There are a number of rival theories of what well-being consists in, such as hedonism, desire- or preference-satisfaction theories, and objective-list theories. The debate between these competing accounts shows no sign of being resolved. Choosing one theory of well-being over the others as the basis for the justification of intellectual property rights invites challenge from the supporters of the rival theories.

We have argued elsewhere for a theory-neutral approach to well-being in the context of public policy. We contend that, contrary to initial appearances, there is likely to be a substantial area of common ground between rival theories of well-being. This is because something may be relevant to well-being in one of three different ways: it may be constitutive of well-being, or it may tend to produce well-being, or it may do neither of these things but nevertheless act as an indicator of well-being. Something which stands in any one of these relationships to well-being may be considered a "marker" of well-being. Markers of well-being, notwithstanding the different relationships in which they stand with respect to well-being itself, are all potentially relevant to its measurement. Data concerning a marker of well-being will facilitate the making of judgments about well-being itself.

Different explanatory theories of well-being disagree about what constitutes well-being. However, for each theory it will be the case that other things beyond what it regards as constitutive of well-being will be either productive or indicative of well-being. These are likely to include things that a different theory would regard as constitutive of well-being. When this is the case, although the two theories will remain in disagreement about whether the item in question is a constituent of well-being, they can both agree that it is a marker of well-being.

In order to identify the implications of basing intellectual property rights directly on well-being rather than on economic considerations, it is necessary to consider which markers of well-being are sufficiently widely shared between different theories that they can be treated as such for the purposes of our proposed theory-neutral approach.

Markers of well-being
We define a marker of well-being, for the purposes of our theory-neutral approach, as something which, according to all the mainstream theories (those which are well established and widely held), is either constitutive, productive or indicative of well-being. This definition provides a criterion against which candidate markers of well-being may be judged. Since markers of well-being chosen to fulfil a role in relation to intellectual property law or other areas of public policy must secure broad acceptance, they should also fit well with widely held folk assumptions about well-being. A third criterion by which the case of a candidate marker of well-being may be judged is the extent to which evidence from empirical research suggests that it correlates well with other markers. We suggest that the following markers of well-being would score well against these criteria:

Marker 1—Happiness
"Happiness" is sometimes used as a synonym for well-being, but here we use it in a slightly different sense—arguably its primary sense in English—to refer to what is sometimes called "positive affect": "feeling happy", having a positive emotional state or an overall positive balance of pleasure over pain in one's life.

For hedonist theories, happiness in this sense, or something like it, is wholly constitutive of well-being. And for many other theories it is one among several constituents of well-being. Even for those theories—such as certain objective-list theories—which do not regard it as constitutive of well-being, it is plausibly an indicator of well-being: people whose lives are going well will tend to be happy. It also has a good case to be considered productive of well-being: there is evidence, for example, that it has a positive effect on health. Happiness also fits well with common sense folk assumptions—it is likely to be one of the first words that will come to people's lips when they are asked to talk about well-being.
Marker 2—Health
Here we interpret "health" broadly to include all aspects of physical health: not only freedom from disease and injury, but also adequate nutrition. It would also include mental health. Like happiness, health fits well with common sense folk assumptions about well-being. We tend to assume that being in good health makes a difference to our quality of life.
Health is regarded as a constituent of well-being by many theories: in particular objective-list theories. For more subjective theories—hedonism and desire/preference satisfaction theories—it is not a constituent of well-being in its own right. However, such theories are likely to regard health as productive of well-being. Overall, good health correlates positively with happiness—and poor health negatively. Good health is an *I.P.Q. 4* enabler of, and poor health an impediment to, the achievement of central life goals. Good health is for these reasons a likely object of informed/rational desire (and much actual desire).
We regard health and happiness as perhaps the most secure markers of well-being: those which are likely to be most widely accepted. There are others which we also believe have a strong case:

Marker 3—Life-satisfaction
Life-satisfaction can be seen as a complementary notion to happiness: the two are combined in the construct of "subjective well-being". If happiness reflects a person's affective or emotional response to their life, life-satisfaction can be seen as reflecting their cognitive or judgmental evaluation of it. It is often the subject of empirical study, using methodologies such as the Satisfaction with Life Scale. We use the term broadly, to include methodologies which, like the Cantril Ladder scale used by the Gallop World Poll, ask subjects to rate their life on a scale rather than say how satisfied they are with it.
Life-satisfaction is constitutive of well-being according to certain theories. In other theories, it tends not to feature as a constituent of well-being. However, it is a good candidate as an indicator of well-being on all of the mainstream theories. A person's level of satisfaction with their life is, in effect, their own assessment of how well that life is going. It can therefore be regarded as equivalent to a first-person judgment of well-being. We are not infallible judges of our own well-being, and thus, at least for theories which do not regard life-satisfaction itself as constitutive of well-being, it is not guaranteed to provide an accurate picture.
Nevertheless, a person's own view of their well-being surely counts for something. Certainly, it has a strong common sense claim to do so.

Marker 4—Success in realising central life goals/values
This marker concerns the extent to which a person succeeds in securing the things they most care about, whether these be goals to which they aspire or aspects of their lives that matter to them. It is thus a form of desire/preference satisfaction, but one which reflects only those desires or preferences to which a person attributes central importance in their life. This marker is thus at least partially constitutive of well-being for desire/preference satisfactionist theories of well-being. The achievement of a person's goals is also partially constitutive of well-being on some objective-list theories. It will tend to be productive (and arguably partially constitutive) of well-being for life-satisfaction theories.
It is plausible that this marker is productive or indicative of well-being for other theories, at least to some extent. For example, all else being equal, the achievement of goals and realisation of values is likely to be something that tends to increase happiness. It also coheres well with common sense intuitions—surely success in our central life goals must make a difference to how well our lives go?

Marker 5—Supportive personal relationships
We interpret this term broadly, to include marriage, relationships with family members, friendships and even relationships with others such as neighbours and work colleagues, insofar as these can be regarded as supportive. By "supportive", we mean that the individual derives benefit from the relationship (in its own right, rather than indirectly, as in a purely business relationship). This might be in various ways: through emotional support in times of difficulty, providing companionship and (for some relationships, not others) intimacy. *I.P.Q. 5*
Close personal relationships are partially constitutive of well-being for many objective-list theories. For subjective theories, supportive personal relationships have a strong case to be regarded as productive of well-being, as a source of happiness and a buffer mitigating the effects of causes of unhappiness, and/or the subject of actual and informed desires and preferences. There is evidence that supportive relationships of various kinds correlate well
with other markers of well-being: for example, being married tends to have a positive effect on reported happiness and life-satisfaction, as well as on health.12

**Marker 6—Personal development**

By this we mean the development, improvement and exercise of various mental and physical aspects of our natures as human beings. It would include, therefore, the development of intellectual skills and the acquiring of knowledge, typically through education. This marker would also include the development of abilities associated with personality and emotion, such as leadership, courage and aesthetic appreciation; and of physical abilities, for example through sport.

Personal development—defined in various different ways, but broadly on the above lines—is constitutive of well-being for a family of theories influenced by Aristotle.13 Elements related to personal development, such as knowledge, are also partially constitutive of well-being for some objective-list theories.14 Personal development is plausibly productive of well-being for other theories. The development of our mental and physical abilities is likely to help us in achieving our desires, and in turn to be a source of satisfaction with our lives and of happiness.

**Marker 7—Leisure**

By this we mean the opportunity to spend time relaxing and to pursue interests and activities beyond those required by work, or by the need to secure the essentials for human existence. It is regarded as a constituent of well-being by many objective-list theories.15 As an obvious source of pleasure, it has a strong case for being productive of well-being for hedonist theories. Many of our desires (though not always our most central ones) are focused upon leisure activities, so it seems likely to be productive of well-being for desire/preference satisfactionism also. Leisure seems to correlate well with happiness16—active leisure activities more so than passive ones such as watching TV—and with subjective well-being more widely.17

**Marker 8—Adequate income/resources**

By "adequate" here, we mean sufficient resources to enable certain other markers of well-being, such as good health (which implies adequate nutrition) and achievement of personal goals, to be secured. Those resources, in most societies, will typically be in the form of income or wealth but need not necessarily be so in all circumstances. The focus on "adequate" income or resources reflects the fact that there is evidence that income has a much greater impact upon most other markers of well-being at low levels than at higher ones.*I.P.Q. 6 18

Adequate income is not constitutive of well-being under any widely accepted theory (though income has sometimes been treated as a proxy for well-being by classical economists). However, it is an essential enabler for certain other markers of well-being on any mainstream theory.

**Marker 9—Rewarding employment**

We use the term "rewarding employment" rather than simply "employment" in recognition of the fact that employment is not always rewarding for the employee, and may sometimes—for example, in conditions where employees are exploited by employers—have a negative rather than positive impact upon well-being. Where both job-satisfaction and life-satisfaction are measured, there seems to be a good correlation between the two.19

Rewarding employment is not constitutive of well-being under any mainstream theory. However, it is clearly an enabler of other markers. For most people, employment is their primary source of income and may also be productive of other markers of well-being. There seems to be a strong relationship between un employment and relatively low levels of happiness and life-satisfaction.20

**Further markers**

Our list is relatively conservative—it includes only those items which we believe can be regarded as meeting our criteria with a high degree of confidence. There are others, such as autonomy, for which a case could be made. We have not attempted to set out all the things which stand in one of the three relevant relations to well-being (i.e. are constitutive, productive or indicative of well-being): only those which might credibly be targeted by governmental intervention in general and/or intellectual property law in particular. It should also be noted that there are certain factors which appear to have an influence upon well-being (from the fact that they show correlations with subjective well-being measures) which
are not realistically subject to influence by government policy. These include age, relative social position and genetic predispositions.  

We can now examine whether the markers of well-being we identified are respected in the current intellectual property law framework.

**Markers of well-being and intellectual property law—do IPRs enable the markers common to all theories of well-being?**

There are two ways in which well-being might be relevant to policy on IPRs. It might be a point in favour of IPRs, where encouraging invention or creation in a particular field could be expected to increase general well-being in some way. But it could also be a constraint: if a creation or invention is likely to decrease well-being, that might be a point against it. 

At this juncture, it is useful to recall the utilitarian rationale for IPR, as interpreted by the law and economics movement under the Chicago School (L & E). IPRs are there to incentivise production of works and inventions and provide a means for creators and inventors to recoup their investment; L & E takes economic wealth as the proxy for utility. But if we take utilitarianism in its original philosophical form, it is there to foster overall utility in the sense of well-being and not just generating income for the inventors and creators. 

We will look at the markers identified in the previous section and see how current copyright and patent laws enable them. This will show whether the IPR framework is aligned with or favours human well-being. *I.P.Q. 7* The section examines both the viewpoint of inventors and creators and that of users to check whether overall well-being is achieved. 

A point needs to be made before starting the discussion: the markers happiness and life satisfaction would be difficult to target directly through IPRs since they depend upon other things, including the other markers. We will therefore not address them here. In a wider policy context, however, they should be useful when trying to measure well-being and thus in testing the impact of government interventions. Thus, after the tailoring of IPRs according to the other markers (if we find that the current legal framework needs to be modified), happiness and life satisfaction data could be used to see if the new IPR policy framework has achieved its goal, i.e. fostering (more) happiness and life satisfaction. Marker 2 (health) affects users far more than inventors, so it is considered under the section "From the users’ point of view” below. We therefore start with marker 4.

**From the creators and inventors’ point of view**

**Marker 4—Success in realising central life goals/values**

IPRs allow people to achieve success by realising their central life goal or value (in this case creating and inventing) in the sense that most countries allow anyone to create and invent and no one is discriminated against. Thus intellectual property laws adequately take care of the well-being of individuals for whom creating or inventing is a central life goal.  

Thus, as far as purely utilitarian considerations are concerned, IPRs seem likely to promote this marker of well-being. However, it should be noted that some deontological concerns may arise in this context—in particular about discrimination. National treatment applies virtually everywhere as international conventions, and especially the TRIPS Agreement, are pervasive, so this problem should not occur often. But, in the few countries which do not have national treatment then well-being in this respect will not be achieved. Whether a country has adhered or not to TRIPS or other international intellectual property conventions, they would be well advised to adopt the national treatment principle or at least not discriminate based on nationality. Additionally, there may be direct or indirect discrimination against minorities such as on the basis of gender or sexual orientation in some countries. This may be inside the intellectual property laws themselves or "unwritten", i.e. only as part of a custom or practice. A few examples will suffice to illustrate this point. South Korean nationals can file patent applications in North Korea. However, it is known that those applications are rejected. In the US, a trade mark right assumes that the President of the US is male. US copyright law has a provision only allowing surviving spouses of authors to terminate licences or transfers of copyright 35 years after they occur. Because in some US states "spouse" only includes opposite-sex spouses, the same-sex partners of gay or lesbian authors cannot exercise this termination right. 

A flipside of this is the wish of some authors to only have certain types of people (such as black people or men) depicted or play in their works (operas, plays). The question here is to balance the well-being of the authors against that of the performers and the spectators. When there are specific reasons for the works to be performed in this way then the "discrimination" may be justified. By way of example, a French court has respected the wish
of Samuel Beckett to have his play *Waiting for Godot* only played by men. The court held he was allowed to refuse changes made by the director to the characteristics of the characters of the play, i.e. make women play instead of men.*I.P.Q. 8* 23

**Marker 5—Supportive personal relationships**

IPRs may allow people to be employed and form supportive personal relationships in the workplace but this is not guaranteed. Some inventors may work for a company that does not support them and eventually leave. It seems unlikely that IPR could be specifically tailored to achieve supportive personal relationships for inventors/creators, although IPRs may have that effect sometimes.

**Marker 6—Personal development**

By personal development, we mean the development of intellectual skills and the acquiring of knowledge, the development of abilities associated with personality and emotion, such as leadership, courage and aesthetic appreciation; and of physical abilities, for example through sport. In modern societies, education is one of the means through which personal development is fostered. Copyright and patents laws incentivise inventors and creators to make and market educational works and inventions including toys that can be used at home or in the classroom. They thus allow the personal development of inventors and creators as well as that of the users (in relation to the latter, see section "From the users’ point of view" below).

**Marker 7—Leisure**

As far as inventors and creators are concerned, IPRs are not necessary for the enjoyment of leisure. People can create works or invent new products without needing to market them in order to enjoy this very leisure activity (e.g. painting recreationally or fiddling with computers in the garage). This is because there is nothing to incentivise; the creators and inventors do not intend to recoup their investment. So maybe copyright and patents should not subist in works created by individuals who do not wish to market them. There is the problem, though, that the creators and inventors may at some point want to do just that and the law should not take the marketing and enforcing possibility away as one of the other markers of well-being is adequate resources or income. The default position of IPRs applying to all creations and inventions is therefore probably adequate. An alternative would be for the law to provide that creations made for pleasure or play rather than for marketing have an automatic licence to use attached to them, which would be revocable at any time. However, as many creators and inventors would not be aware of this default position and would thus not mark their works with this licence, it would be hard for the public to know what is and is not a work created purely for recreational purposes. This sort of option is therefore not workable in practice, unless copyright registration were to be reinstated.24 For patents, the mere disclosure of the invention to the public takes the right away anyway.

**Marker 8—Adequate income/resources**

IPRs enable inventors and creators to recoup their investments. Of course, if consumers do not like some inventions or works, they will not buy them. But this is not specific to IPRs. This could be the case for any product. Some patent laws also have specific provisions to appropriately reward employees when the invention has been particularly beneficial to the employer (e.g. ss.40 –42 of the UK Patents Act 1977). Some copyright laws such as the German one have a provision which forces publishers to pay additional sums to authors *I.P.Q. 9* if the payment contractually agreed is "conspicuously disproportionate to the proceeds and benefits derived from the exploitation of the work" (art. 11, 32 and 32a of the German Copyright Act; see also in a similar vein art.L.131-4 of the French Intellectual Property Code). But some copyright laws such as that of the UK do not have such provisions and allow lump sums to be paid to authors which can be very low. There is some case law dealing with abuses in this respect which can have an effect similar to the provisions of the French and German copyright codes.25 However, whether laws should include such "appropriate reward" clauses is more of a fairness issue (a deontological consideration) than a utilitarian one. Nevertheless, these provisions certainly add to the well-being of authors.

**Marker 9—Rewarding employment**

This marker overlaps a little with markers 4–6 and 8. Thus to some extent the above comments made on these markers also hold for this one. But IPRs here do more than simply provide income to creators and inventors. They allow them to exercise the profession they want to embrace. In this respect, IPRs generally enable well-being.26
**From the users' point of view**

**Marker 2—Health (including nutrition)**

Clearly, IPRs foster inventions which improve health as they give the incentive to inventors to invent pharmaceutical compounds and medical devices to help treat ailments. IPRs do not foster innovation in the field of methods of treatment if they are excluded from protection (art.27(3)(a) TRIPs allows member countries to exclude “diagnostic, therapeutic and surgical methods for the treatment”). But the question is whether innovation in this respect does not occur anyway as doctors and surgeons are encouraged to develop such methods simply because the nature of their profession is helping patients and not making a profit. A doctor or surgeon embraces a liberal profession “where expectations of renown and reward have traditionally taken quite different forms from those which flow from exclusive rights over commercialisation”. There is also a moral issue here, namely that it is not ethical to grant monopolies to doctors as they allow them to deny treatments to other doctors and their patients. Nevertheless, in some countries (such as Australia), methods of treatment are patentable.

If we follow an L & E perspective, only drugs, medical devices (and treatments) for which people are able to pay will be incentivised so that the overall well-being of the population will by definition not be met. Only a fraction will be healthier as a result. From a well-being perspective, it may be that IPRs as such are not the best method to create overall well-being on balance, i.e. taking into account the well-being of the inventors and the users of the inventions. If nobody or very few people can pay for the medicine, treatment or device, intellectual property laws will not work as the inventor will not be incentivised to invent the relevant invention. In that case, the state should therefore intervene by way of prizes or publicly funded research so that overall well-being is by definition generated. Since the state-funded drugs, medical devices and treatments would not be protected by IPRs—the state pays the cost of invention ex ante (prior to the invention being made or shortly after invention and before marketing)—the inventor's investment is zero and his reward is financed by the state so that his/her well-being is enhanced. Likewise, the whole population can have access to the invention at cost (cost of production which is generally low like for generics) and the overall well-being of the users that need the invention is also taken care of.

A second possibility is a system where the state finances the cost of medicines, devices and drugs ex post (i.e. after they have been invented and patented) by setting a standard low cost price so that the entire population can have access to them and by paying the remainder of the price charged by the patentee. In this scenario, most inventors will want to invent all sorts of medical or pharmaceutical inventions. However, this is not guaranteed as it depends on individuals/private companies rather than on the state taking the initiative to fund the research and costs leading up to the invention. Under an L & E perspective, therefore, most companies will only invest in those drugs which will attract most profits such as, e.g., Viagra or drugs for diseases affecting a large number of people (e.g. cancer, Alzheimer's disease) and may neglect other important diseases.

A third possibility is a mixed system where there is some state-funded and some private R & D. So long as they are complementary, i.e. the state funds what private companies would not invest in, then the system is adequate from a well-being perspective. This mixed system is applied in the EU as both national and EU institutions fund (e.g. award prizes for) research for ailments which are not always the priority of private companies. Of course, this mixed system can also be complemented by charities funding and other initiatives such as the Health Impact Fund and WIPO Re:Search. States which do not have a mixed system may thus have to adjust their policies if their goal is to enhance overall well-being.

**Marker 5—Supportive personal relationships**

The question is, what kinds of inventions and creations favour supportive personal relationships? Information and communication technologies (ICT) i.e. the internet (including internet dating sites, Facebook), email and telephone enable colleagues, friends and family to keep in touch when separated. However, do we need more than what we already have, i.e. voice/video-over-IP and basic (mobile) phones, or, even, do we need what we already have? Maybe we need to use ICT less passively or more sparingly, i.e. not to replace physical contact but to complement it. Recent research suggests that heavy or passive use of ICT decreases happiness. If an L & E perspective is followed, companies will have a tendency to update their products in order to increase profits. But updating does not necessarily mean
improving. Even if patents are granted only for new and inventive inventions, they do not by definition result in an improvement. In a similar vein, copyright only requires originality which also does not necessarily mean improvement.

Meaningful supportive personal relationships generally involve physical contact, so IPRs do not seem to have much of a role to play here. One specific type of invention one could think of is a better way to communicate with severely disabled people. Probably improvements can be made to those which already exist (such as the system used by Stephen Hawking).

Another area where improvements could be made is transportation systems so as to enable quicker and more efficient transportation to enable physical contact between loved ones who are separated (including enabling those who cannot drive to do so, e.g. *I.P.Q. 11 via driverless cars*). So IPRs do enable supportive personal relationships in this respect. As for the health marker, it all depends whether the market will provide for the relevant technologies. If it does not, then the state has to step in.

**Marker 6—Personal development**

The ability to become educated, to research and criticise are crucial to personal development. Copyright laws generally have educational and research exceptions and patent laws often allow use for research, experimental and/or private purposes. Many countries also have an exception allowing use of a work for the purpose of criticism. 

If an L & E approach is taken, exceptions disappear if the market failure disappears too.

That said, these exceptions are not specifically stated in any intellectual property treaty (except to some extent criticism via art.10(1) of the Berne Convention, which provides a quotation exception†). In order to ensure that countries are actually obliged to include these exceptions in their law and also to prevent free trade agreements (FTAs) from dispensing with this exception, it would be good if at least TRIPS, and ideally all intellectual property conventions, included these exceptions as they are necessary for overall well-being. The exact extent of these exceptions may be left to national laws, but with the proviso that they should not be too narrow and that they respect the three-step test.

In addition, some intellectual property laws allow contracts to overturn all or some exceptions or are silent over this possibility, giving rise to uncertainty as to whether it is legal to overturn them. If an L & E perspective is followed to the letter, exceptions should be "bargainable". However, from a well-being perspective, this is not the case. Overriding exceptions relating to criticism, educational use and research annihilate at least partially the well-being of the users. Therefore, from a well-being perspective, such exceptions should be safeguarded. International conventions should make these exceptions imperative or, at the very least, overridable only under very specific justified conditions (while it is difficult to find an example where overriding the exception for the purposes of criticism would be beneficial, it may be justified that, in some circumstances, only non-commercial research be excluded from the scope of the exclusive rights).

Finally, having an exception in the legal framework does not mean that some remuneration is by definition not paid to the right holder. Here a balance has to be made in each case, weighing the well-being of the creator/inventor with that of the users. What is clear, though, is that only in exceptional cases can the right holder prevent use for criticism, educational or research purposes. The exclusive nature of the right is suspended for these particular uses.

**Marker 7—Leisure**

IPRs can benefit leisure, insofar as they incentivise people to create inventions and works that provide opportunities for leisure activities. These new works and inventions thus benefit users—simply think of new novels and films. Leisure includes not only consumption but active participation. As to consumption, if a user wants to watch a film, read a book or play with an invention, they can go to a library, watch television or else rent or buy the book, film, toy or other IP-protected product. Normally, competition exists in the market and it should be fine for most people to enjoy leisure activities. *Copyright or patents are not a hindrance.*

However, in terms of active participation, IPRs may pose problems. For instance, if a user wants to make a new work out of a work whose copyright is still in force, so-called user generated content (UGC), and share it online, this will in most cases infringe copyright. Arguably, people do not have to post the work publicly (i.e. unrestricted on YouTube or Facebook) and can share it privately (i.e. only among friends and family). Nevertheless, some copyright laws do not allow private copying (e.g. the UK, Ireland, New Zealand, Malaysia). In order to allow active leisure activities, private copying should arguably be allowed. As these activities remain private, there is no harm to the right holder especially if remuneration is
paid. The three-step test is therefore respected. The Infosoc Directive includes an exception for private copying, but some Member States have chosen not to implement it. Many non-European countries have such an exception and it is generally subject to a levy in order to compensate right holders. The parody exception exists in some countries and allows users to create new works parodying a previous work under certain conditions and make them public. But, arguably, it is not necessary to enable the marker of leisure since active leisure activities are generally private. Patents laws which have the exception for private use allow the pursuit of leisure activities.

**Marker 4—Success in realising central life goals/values**

This marker overlaps with markers 6 and 7. Users can usually use IPR-protected material to achieve their central life goals and values—working, playing sports, reading, educating oneself, going to the theatre, concert, cinema, etc. The exceptions in the legal framework also allow this, subject to the provisos discussed above in markers 6 and 7.

**Marker 8—Adequate income/resources**

It may be that some works and inventions are too expensive for some users. If the price can be said to be excessive or the IPR holder refuses access to their work or invention, competition law or sometimes even intellectual property laws have mechanisms to curb the abuse of the IPR holder (mainly compulsory licences). Generally, such abuse only occurs when the IPR holder has a dominant position or a monopoly on the market. This happens but is generally rare. Article 8(2) of the TRIPS Agreement has a specific provision to that effect. In this respect, the IPR framework is generally satisfactory. More could be done of course to refine the framework—e.g. inserting rules in statutory law detailing when a compulsory licence must be imposed to the IPR holder which abuses its monopoly or dominant position, rather than leave it to the courts such as is the case in the EU. This applies to users who also want to create or invent for professional purposes. Indeed, users are not only consumers of works and inventions but can also be follow-on creators and inventors themselves. In respect of markers 4 and 8, the term of protection of copyright may be an issue (the patent law term is only 20 years and is generally thought to be adequate overall, although it may be too long for some inventions and too short for others in some cases). On the other hand, the copyright term is extremely long: it is 50 years post mortem auctoris (p.m.a.) in most countries of the world because of TRIPS and the Berne Convention which impose this duration. In the EU and the US, it is 70 years p.m.a. The question is whether such duration does not unnecessarily hinder further creation. Even if the user can sue if the price is excessive or the right holder refuses a licence, it is generally costly and very lengthy to do so. The well-being of users is thus decreased as they prefer not to sue and thus cannot use the work. It is clear that the well-being of the authors who have created the works in question is a non-issue after their death and there is no more creation to incentivise from them. So if anything the term of protection should be the length of the author’s life at most. Right holders argue that the royalties collected after an author’s death allow them to invest in new creators. It may be so but there is no mechanism in place (except at the level of some collecting societies in some countries) to force right holders to invest excess royalties in new creators. Furthermore, a long term of protection is likely to favour already famous authors (because these are those whose music, books, etc. still sell years after their creation) who may have reached such a high income that still further income is likely to make little difference to their happiness.

**Marker 9—Rewarding employment**

This marker is related to/overlaps a little with markers 4–6 and 8. Users who need to use protected subject-matter in their profession can generally ask for a licence and if it is refused or the price is excessive, competition law is the usual recourse.

**Conclusion**

As stated in this article and our previous paper, we propose to reject GDP, economic wealth or income as the proxy of utility and replace it by well-being and adjust the IPR framework accordingly. Even if GDP or income was accepted as a marker of well-being, it is clearly a marker of limited reliability at best, and is certainly not the proxy for well-being that the L & E approach assumes it to be. Applying well-being rather than income as the basis for the justification of IPR to the intellectual property laws’ provisions is more inclusive, even if in some cases only marginally, than the current economic justification for IPRs. It includes things, such as health, which the L & E approach does not fully take into account, and it makes some exceptions mandatory and imperative.
Not surprisingly, from a creator’s and inventor’s perspective, the current intellectual property laws (based on the proxy of income) are generally adequate. However, there are still some laws which include unjustified discriminations and these diminish the well-being of authors and thus should be scrapped.

Intellectual property laws are also in the main adequate from a user’s perspective. However, some adjustments are necessary. A mixed system for pharmaceuticals is necessary. All countries should have exceptions for private copying, educational purposes, criticism and research. A way to ensure this to is to enshrine those exceptions specifically in the international treaties and ensure they cannot be overturned by contract both at national and international level, e.g. via free trade agreements. The term of protection of copyright should be reduced, and compulsory licences in the case of abuses and excessive prices along with a cost- and time-effective system could be introduced in the intellectual property laws and treaties rather than be left to competition law.

Another question is whether IPRs should not incentivise, or should incentivise less or more, certain inventions and creations. Most intellectual property laws already exclude inventions, and in some cases also creations, which are contrary to ordre public and morality. Under a well-being perspective, there are a great number of achievements which should not be protected and certainly those contrary to ordre public and morality would fall in this category. We leave the question whether more achievements could fall in this category for another paper.

As to the question whether certain inventions and creations which favour well-being should be more or less incentivised than others, it is arguable that certain technologies do not by definition enhance well-being, such as some ICT. Under a well-being perspective, whether an invention (e.g. a software update) is new and inventive or original is not the only relevant consideration. If it is not also an improvement, in that it is not likely to enhance well-being, it should arguably be less of a priority compared to other inventions and works which are. If it is likely to have a negative effect on well-being, perhaps it should not be patentable or copyrightable at all. The question will be how to establish the creation or invention’s likely positive or negative impact on well-being. Sometimes this may be apparent from its predictable effects on markers of well-being such as health. In other cases, evidence from unbiased, statistically significant surveys or trials may be useful (in the vein of trials made before a pharmaceutical is released for purchase on the market). One may object that consumers would abandon an ICT product if it does not enhance well-being and that competition eliminates new and inventive products which do not enhance well-being. In short, the current framework is adequate. But to some extent it is less true of ICT, because of its network and therefore lock-in effects. Also this does not take into account the generally poor judgment most people have of whether a certain technology will enhance their well-being or not. Therefore, the legal framework may have to add a condition for works and inventions, namely that they have no negative impact on well-being—patent applications would be rejected and copyright works would not be protected if there were good enough reasons for believing that the invention/work would have a negative impact on well-being. This would mean a dent into the current technology neutrality of intellectual property laws. More research needs to be done to uncover whether, and if so which, technologies should be subject to this additional hurdle and whether this hurdle should be part of the IPR legal framework or left outside it, e.g. to technology regulators or ethicists. In the meantime, national intellectual property offices and the relevant directorates general (DG) of the European Commission should launch a debate on this very issue.

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allowed to play the lead roles when his opera was performed in the US. See “Porgy and Bess”,


3. We did also acknowledge that deontological considerations (such as the labour and personality rights theories) still pervade intellectual property laws and that these can coexist with consequential ones.

4. DG Environment of the EU Commission issued in 2009 "GDP and Beyond", a roadmap of five key actions to improve the EU’s indicators of progress in ways more appropriate to citizens’ concerns than GDP alone, while DG Internal Market and DG Information Society, which deal with intellectual property, have not issued similar statements but still only stress the importance of IPR for economic growth. Arguably, all DGs should look into the issue of well-being as it pervades all aspects of our lives. The “GDP and Beyond” roadmap is available at http://ec.europa.eu/environment/beyond_gdp/EUroadmap_en.html [Accessed December 9, 2014]. In the UK, the Prime Minister, in a speech on November 25, 2010, declared his intention to measure national progress not merely by standard of living, but by quality of life. The UK’s Office of National Statistics subsequently instituted a programme entitled Measuring National Well-Being. See http://www.ons.gov.uk/ons/guide method/user-guidance/well being/index.html [Accessed December 9, 2014].


10. e.g. G. Fletcher, "A Fresh Start for the Objective-list Theory of Well-being" (2013) 25(2) Utilitas 206.


21. In a further paper, we will set out this list of markers, and the rationale for it, in more detail (Tim Taylor, "The Markers of Well-Being", forthcoming).

22. Note that although people are at liberty to create or invent even without IPRs, IPRs help by enabling them to be rewarded for, and perhaps make a living from, what they create or invent. This marker thus overlaps a little with markers 8 and 9 envisaged below.

23. TGI Paris, 3rd ch., October 15, 1992, RIDA, January 1993, n° 155, p.225. Whether this was truly justified in this case is an open question (the judge only said that one must respect the author’s will, adding that refusing to allow women to play was not an illegal sexist discrimination). Another example is Ira Gershwin’s wish that only black people be allowed to play the lead roles when his opera Porgy and Bess was performed in the US. See “Porgy and Bess”,

43. Being around the world but has diminishing marginal returns for those people who already have a lot of access to ICT).

See "From the users' point of view: Marker 5" above; and, e.g., C. Graham and M. Nikolova, "Does access to information technology make people happier? Insights from well-being surveys from around the world", Brookings Global Economy & Development Working Paper 53 (December 2012) (finding that access to ICT is positive for well-being around the world but has diminishing marginal returns for those people who already have a lot of access to ICT).
Other examples of products with lock-in effects include printers and cartridges, coffee machines and coffee pods, vacuum cleaners and bags, but often there is no update involved. Once the IPRs on the actual products expire, there is competition in the market (granted, often the IPRs last too long for these kind of products anyway—they become outdated before the IPRs expire). The same is not always true with ICT because of a lack of interoperability (incompatibility between different software or software and hardware).