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# VIRGINIA LAW REVIEW

## *IN BRIEF*

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### ***RESPONSE***

#### TIERED ORIGINALITY AND THE DUALISM OF COPYRIGHT INCENTIVES

*Shyamkrishna Balganesh*\*

IN a well argued and thought-provoking new article, Gideon Parchomovsky and Alex Stein attempt to give copyright's requirement of originality real meaning, by connecting it to the system's avowed institutional goals.<sup>1</sup> To this end, they focus on disaggregating originality into three tiers and providing creative works within each tier with a different set of rights and liabilities. Parchomovsky and Stein are indeed correct to lament the meaninglessness of originality under current copyright doctrine. Yet their proposal does not quite fully explore the incentive effects of differentiated originality, especially as between upstream and downstream creators. Nor does it tell us why some of copyright's more recent innovations are not the right place to give effect to their ideas and principles. In this Response, I examine how their refashioned originality doctrine might fit within copyright's incentive structure, and in the process ask whether there might be better ways of integrating it into the institution's existing common law structure.

#### I. ORIGINALITY AND THE INCENTIVE TO BE CREATIVE

Copyright's principal normative justification today is utilitarian. Deriving from the Constitution's emphasis on "Progress" and the

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\* Assistant Professor of Law, University of Pennsylvania Law School. Many thanks to Gideon Parchomovsky for comments and helpful discussions.

<sup>1</sup> Gideon Parchomovsky & Alex Stein, *Originality*, 95 Va. L. Rev. 1505 (2009).

promotion of “Science and useful Arts,”<sup>2</sup> courts, scholars, and policymakers today contend that copyright exists primarily as an incentive for authors to produce and disseminate their creations to the public.<sup>3</sup> Through the promise of limited exclusionary control over their expressive creations, the system induces the very production of such expression. Or so the theory tells us.

Parchomovsky and Stein seem to accept copyright’s utilitarian substructure, and their originality proposal attempts to situate itself within this framework.<sup>4</sup> A differentiated originality regime, they contend, will encourage creators to generate more creative (that is, more original) works, thereby producing greater net social welfare.<sup>5</sup> In so arguing, they take as a given a direct relationship between originality and aggregate social benefit.

Parchomovsky and Stein focus their attention on one of several costs normally associated with the copyright system: the cost to future creators who seek to make use of prior creations—also referred to as copyright’s dynamic inefficiency.<sup>6</sup> And it is here that the Parchomovsky-Stein model makes a very important contribution to copyright theory. In its traditional formulation, copyright’s theory of incentives focuses entirely on providing creators with an incentive to create, measured in terms of the scope and extent of its grant of exclusivity. Propertarian tendencies that today dominate the field tend to view it as analogous to a standard property interest (excepting of course the deadweight losses that come as a consequence of the nonrival nature of its subject matter) that operates against the world at large, that is, *in rem*. This tends to neglect the reality that copyright, unlike standard property interests, and in contrast to its closest cousin, patent law, is a bipolar entitlement—where the plaintiff’s entitlement is defined entirely by reference to a defendant’s actions. In other words, the existence and scope of the entitlement are always determined in a bilateral setting, during a trial for infringement. It is a defendant’s (potential freerider’s) actions that necessitate legal validation and enforcement of the

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<sup>2</sup> See U.S. Const., art. I, § 8, cl. 8.

<sup>3</sup> For an overview of copyright’s incentives in theory and as applied, see Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 Harv. L. Rev. 1569, 1577–81 (2009).

<sup>4</sup> See Parchomovsky & Stein, *supra* note 1, at 1508, 1517.

<sup>5</sup> *Id.* at 1517 (“[O]nly original works promote social welfare . . .”).

<sup>6</sup> See *id.* at 1515. For an overview of this phenomenon, see Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* 36–37 (2006).

entitlement through the system of copyright. In this sense then, copyright law tends to resemble traditional common law entitlements (such as those in tort and unjust enrichment), rather than property rights that derive from tangible resources.<sup>7</sup>

Note that the traditional theory of copyright incentives focuses entirely on the incentive effects on one side of the bilateral equation in which the interest fructifies. In other words, copyright's incentive framework is thought to relate exclusively to a plaintiff-creator via the exclusionary rights that it grants him or her. This ignores the reality that copyright's incentive effects can and do affect actual and potential defendants, that is, copyists. Given the reality that most creativity today is sequential and builds on work from the past, copyright law's commitment to inducing creativity necessitates examining its effects on creative borrowing as well.<sup>8</sup> Today's plaintiff-creators are thus very likely tomorrow's defendant-copyists and vice-versa, a reality that the traditional theory of incentives is hard-placed to accommodate.<sup>9</sup> Copyright therefore creates two separate inducements, one upstream and the other downstream. The former consists of its promise of limited market exclusivity, or "rights-incentive," while the latter consists primarily of its reduction or elimination of liability for infringement for certain kinds of copying, best described as its "immunity-incentive." Thus if copyright is to concern itself with creativity of both kinds—upstream creativity and downstream (sequential) creativity—it needs to strike the right balance between both kinds of incentives, for a reduction in one operates as an expansion of the other.

The Parchomovsky-Stein model of differentiated originality is then best understood as an attempt to balance copyright's upstream incentive with its downstream incentive. Their focus on the importance of the latter category is well borne out by recent studies that seem to indicate that downstream creators are risk-averse and tend to be deterred from creative borrowing, even when such borrowing may be legitimate as a matter of law.<sup>10</sup>

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<sup>7</sup> I have elaborated on this argument in previous work. See Shyamkrishna Balganesh, *Debunking Blackstonian Copyright*, 118 *Yale L.J.* 1126, 1162 (2009).

<sup>8</sup> See Pierre N. Leval, *Toward a Fair Use Standard*, 103 *Harv. L. Rev.* 1105, 1109 (1990) (noting how all creativity is, in part, derivative).

<sup>9</sup> See Benkler, *supra* note 6, at 37–38.

<sup>10</sup> See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 *Yale L.J.* 882, 887–906 (2007).

Their model proposes three tiers of originality under which a defendant's liability for copying is assessed.<sup>11</sup> The first tier, the "doctrine of inequivalents," is restricted to situations where a copier borrows from a protected work, but in the process injects a high level of originality and creativity into the final product.<sup>12</sup> In this situation, the model immunizes the copier from suits for copyright infringement altogether.<sup>13</sup> To be entitled to this immunity though, it appears that the copyist's work needs to be significantly more than just minimally original. Yet Parchomovsky and Stein nowhere tell us how this threshold is to be assessed, beyond describing it as "exceptional."<sup>14</sup> Furthermore, even assuming that courts will be able to work this standard pure, as they have others, it is not clear why the authors apply it exclusively to the downstream incentive side of the copyright equation, and not the upstream side. A core intuition underlying their proposal is that copyright law treats works of differential creativity similarly, which is both inefficient and unfair.<sup>15</sup> If their proposal is directed at remedying this unfairness, shouldn't it apply to *both* upstream and downstream creativity? More specifically, why shouldn't an independent (as opposed to borrowing) creator whose creativity is deemed exceptional by the same standards that they propose be entitled to something more than a creator whose work does not meet such standards? Or put another way, shouldn't a less creative work get less exclusionary protection than an exceptionally creative one?

Consider the following example involving two artists, *A* and *B*. *A*'s work is path-breaking, does not involve *any* borrowing at all from previous works, and is exceptionally creative; while *B*'s work does not meet the same creativity standard. A decade after *A* and *B* create their works, there come along two new artists, *Y* and *Z*. Here, while *Y*'s work borrows from *A*'s and *B*'s works very heavily, it is nonetheless very creative and introduces new techniques. *Z*'s work borrows from *A* and *B* similarly, but does so with significantly less creativity than *Y*'s work. (Let us also assume that *Z*'s work is less original than is *B*'s). Now consider the working of the doctrine of inequivalents as between these four artists. Against *Z*, *A* and *B* have similar (if not identical) rights: *A*'s

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<sup>11</sup> Parchomovsky & Stein, *supra* note 1, at 1507–08.

<sup>12</sup> *Id.* at 1525–26.

<sup>13</sup> *Id.* at 1525.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1506.

additional creativity has no place here. Against *Y*, neither *A* nor *B* has any claim, as a consequence of the doctrine of inequivalents. In sum, *A* and *B* come to be treated exactly the same, even though one is exceptionally creative and the other is not, even as against a defendant who is entitled to no immunity under the doctrine. What incentive, then, would *A* have to be any more creative than *B*? If the idea behind the proposal was to generate an incentive to be creative, on the assumption that creativity corresponds linearly to social welfare, the proposal here appears incomplete.<sup>16</sup>

The added-value doctrine, the model's second tier of originality, compares the creativity of the parties when the defendant's work does not qualify for the doctrine of inequivalents.<sup>17</sup> In situations where the original work is more creative, the plaintiff is entitled to seek injunctive relief. If not, she must be satisfied with damages.<sup>18</sup> In our hypothetical, both *A* and *B* can seek injunctive relief against *Z*. The fact that *A*'s creativity exceeded *B*'s—or that the difference between *A*'s originality and *Z*'s was vastly in excess of the difference between *B*'s originality and *Z*'s—is of little consequence. Again, the model's focus on the downstream incentive comports well with its premise on the connection between creativity and social welfare, but its failure to differentiate between levels of creativity on the rights-incentive side remains conspicuous.

The model's third tier of originality, the sameness doctrine, attempts to focus on the upstream incentive side of the balance by deterring copiers who borrow from protected works with little to no originality of their own.<sup>19</sup> It builds on copyright's striking similarity rule and presumes the existence of infringement, which the defendant is then called upon to rebut. While this rule may have been intended to compensate for the defendant focus of the other two rules,<sup>20</sup> in reality it is likely to do no more than deter low-originality copying by a defendant. To a creator, it has little independent effect on the ex ante incentive to create a work of high creativity. In other words, while it

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<sup>16</sup> Id. at 1508 (“[O]ur framework will encourage creators to focus on the original content of their works and thereby enhance their contributions to society.”).

<sup>17</sup> Id. at 1533.

<sup>18</sup> Id. at 1533–34.

<sup>19</sup> Id. at 1542.

<sup>20</sup> Id. at 1542–43 (“The rule’s secondary purpose is to strengthen the copyright protection of original creators . . .”).

may serve to reduce less socially beneficial (that is, low-originality) creations, it does little to actually induce the production of work likely to generate greater social welfare (that is, high-originality).

The net incentive effects of the three tiers of the Parchomovsky-Stein model are best illustrated in the table below.

<b>Level of Originality</b>	<b>Rule</b>	<b>Upstream Incentive</b>	<b>Downstream Incentive</b>
Exceptional	Doctrine of Inequivalents	None	Positive
Relative	Added-Value Doctrine	Positive	Positive
Low	Doctrine of Sameness	None	Negative

As should be apparent, the model's primary focus remains on downstream creativity. This focus will affect copyright's immunity incentive, thereby promoting certain kinds of socially beneficial copying (or borrowing) and deter others when socially suboptimal. Yet it does little by way of affecting copyright's ex ante incentive to create on the traditional rights side, through copyright's grant of exclusivity. By failing to calibrate an independent creator's entitlement to the extent of the creative contribution in any meaningful way, the model opens itself to objections of incompleteness and the likelihood of generating a distortionary effect on copyright's current (even if incomplete) balance between upstream and downstream creativity.

It may well be that Parchomovsky and Stein believe that copyright's current overbreadth provides upstream, independent creators with sufficient protection so as to not warrant any further modifications to copyright's upstream incentive. Alternatively, they may believe that copyright's other rules—such as the second fair use factor<sup>21</sup>—do enough already to disaggregate upstream works based on their creativity, or indeed that all upstream creativity involves some amount of borrowing, such that the downstream incentive suffices as an inducement in the aggregate. If any of these options is indeed the case, the model would benefit from elaborating on these assumptions.

<sup>21</sup> See 17 U.S.C. § 107(2) (2006) (requiring courts to look to “the nature of the copyrighted work” as part of the fair use analysis).

## II. TRANSFORMATIVE USE AND THIN COPYRIGHT

Parchomovsky and Stein are no doubt correct that copyright's originality requirement, insofar as it is intended to operate as a filter, is somewhat vacuous. Yet their model seems to pay insufficient attention to the two areas where courts have, over the last two decades, come to use creativity as a basis by which to modulate copyright's entitlement and liability structure. These are the doctrines of transformative use and thin copyright protection. Might a refinement and combination of these two doctrines achieve the same result as the authors' proposals?

### *A. Transformative Use*

Adopted by the Supreme Court in 1994, the transformative-use variant of the fair use doctrine immunizes a defendant from liability for infringement if the defendant's work "adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message."<sup>22</sup> In the years since its adoption, the doctrine has come to be applied with great frequency by courts at different levels. And in almost all instances, the principal focus of the inquiry remains the defendant's creative contribution to his or her use of the work.<sup>23</sup>

Thus, in situations where the defendant uses the work by modifying it significantly, alters its presentation and content, develops it for an altogether different market, or parodies it, courts have been ready to exempt the defendant from a finding of infringement altogether. Indeed, recent interpretations of the doctrine even seem to go so far as to conclude that a defendant need not actually alter the underlying expression in a work to make a transformative use of it.<sup>24</sup>

To be sure, there exists a good deal of vagueness underlying the very idea of "transformative"—a vagueness that courts have from time to time struggled to make sense of in individual cases. Yet few seem to

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<sup>22</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>23</sup> See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1164–65 (9th Cir. 2007); *Blanch v. Koons*, 467 F.3d 244, 251–53 (2d Cir. 2006); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269–71 (11th Cir. 2001); *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 22–23 (1st Cir. 2000).

<sup>24</sup> See, e.g., *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 638–40 (4th Cir. 2009).



believe that the doctrine ought to be abolished altogether. Indeed, many consider the doctrine to be copyright's most important safety valve for downstream creativity.<sup>25</sup>

Parchomovsky and Stein acknowledge that courts currently use the idea of "transformativeness" to examine the originality and creativity of a work.<sup>26</sup> Yet, in their actual model, they say little about how their new doctrines will interface with the functioning of transformative use. Since they do not seem to advocate its retrenchment, they would leave courts to undertake a similar analysis as part of two different doctrines, which would surely be inefficient and redundant. Additionally, some of what their model proposes is currently, or has been proposed to be, part of the transformative use analysis.<sup>27</sup>

Recasting transformative use as a doctrine of comparative creativity—involving a comparison of a plaintiff's and a defendant's works through the lens of their respective creative contributions—may achieve several of the goals underlying the Parchomovsky-Stein model. In situations where a defendant borrows from a plaintiff's work, but in the process adds significantly to it in terms of creativity, the current version of transformative use exempts the defendant altogether from liability for infringement. If this binary transformative/non-transformative classification were modified, and replaced in large part by a system of mandatory compensation for transformative uses under which a defendant were made to pay the original author for the creative content borrowed (rather than exempted altogether), it would begin to resemble the model's "added-value doctrine." Indeed, one might further tweak the transformative use regime by requiring that courts refrain from granting injunctive relief whenever a "reasonable contention" of transformative use is made, as others—most recently Neil Netanel—have advocated.<sup>28</sup> Under this regime, an injunction would be an option

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<sup>25</sup> See Pierre N. Leval, *Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use*, 13 *Cardozo Arts & Ent. L.J.* 19 (1994) (arguing that in *Campbell* the Court effectively rescued the fair use doctrine).

<sup>26</sup> Parchomovsky & Stein, *supra* note 1, at 1523.

<sup>27</sup> See, e.g., Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 *Yale L.J.* 1, 55–58 (2002) (advocating a "profit allocation" remedy for uses that build on prior works).

<sup>28</sup> See Neil Weinstock Netanel, *Copyright's Paradox* 190–93 (2008). The "reasonable contention" idea derives from the Court's description of the transformative use doctrine in *Campbell*. *Campbell*, 510 U.S. at 578 n.10. *Campbell* in turn relied on Judge Leval's article for the point. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 *Harv. L. Rev.* 1105, 1132, 1134 (1990).

*only* when the defendant's claim of transformative use is plainly unreasonable, that is, in situations where the defendant's own creative contribution to the final work is negligible.

This leaves us with the model's attempt to "immunize" exceptional creativity from all suits for infringement through the doctrine of inequivalents.<sup>29</sup> Parchomovsky and Stein are not very clear on how this immunity would operate, especially in contrast to the fair use doctrine. As noted earlier, liability for copyright infringement and the very subsistence of copyright in a given work are only ever determined bilaterally, in the context of a suit. If by "immunity" they mean a finding of no infringement, this begins to resemble precisely what fair use purports to do, even though courts often describe it as a "defense" to infringement. The Copyright Act explicitly notes that a fair use is not an instance of infringement at all,<sup>30</sup> thus distinguishing it from other exceptions such as the "de minimis" rule. If the transformative use doctrine's original binary formula were retained for a narrow set of creative works—such as those that "ha[ve] an obvious claim to transformative value," to use the Supreme Court's language<sup>31</sup>—and upon such a finding, courts were to exempt the work from infringement altogether, the result would be a rule analogous to the doctrine of inequivalents.

### *B. Thin and Thick Copyright Protection*

A modified transformative use regime such as the one described above, however, still does not solve the problem identified earlier, namely, the Parchomovsky-Stein model's failure to disaggregate copyright's upstream and downstream incentives. If, as they describe, social welfare is indeed maximized by works of greater creativity (rather than mere numerosity), the system ought to provide a greater inducement for such works. An option might lie in expanding copyright's rule of "thin" protection.

The doctrine of thin protection requires that for works with an extremely low level of originality—such as those that borrow extensively from the public domain—protection remain "thin," and that

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<sup>29</sup> Parchomovsky & Stein, *supra* note 1, at 1525.

<sup>30</sup> 17 U.S.C. § 107 (2006) ("[T]he fair use of a copyrighted work . . . is not an infringement of copyright.") (emphasis added).

<sup>31</sup> *Campbell*, 510 U.S. at 579 (noting how a parody fits this category).

an action for infringement be permitted only if a plaintiff can establish “virtually identical copying.”<sup>32</sup> This is, of course, different from the doctrine of striking similarity that the authors build upon in their sameness rule. In the two decades since its origins, the doctrine has grown a fair bit, with courts today extending it to works other than mere compilations or collections.<sup>33</sup> Could this perhaps be used to disaggregate copyright’s upstream incentive further, to maximize social welfare originating in creativity?

One could imagine a sliding scale of creativity—along the lines that Parchomovsky and Stein propose—coupled with a rule that alters what is considered “copying” based on where on the spectrum a particular work’s creative contribution lies. Works of exceptional creativity would have a broader entitlement, perhaps extending to the “total concept and feel” test for substantial similarity,<sup>34</sup> while those of average creativity would have a shorter leash, and those of very low originality would be relegated to having to show “virtually identical copying” for infringement to lie.

While this approach resembles the sameness rule, it also differs from it significantly. For one, it does more than just deter low-originality copying by introducing an evidentiary presumption of prima facie infringement. It signals to upstream creators that the extent of creativity reflected in their work will influence the scope of their rights bundle, in much the same way as the modified transformative use doctrine would signal a potential variation in their immunity from liability to downstream creators. The net result would be that creators know *ex ante* that differing levels of creativity (measured perhaps by the extensiveness and nature of their borrowing) will influence the scope of their rights bundle, ideally encouraging the production of more works of high-originality, and fewer ones of medium- to low-originality.

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<sup>32</sup> See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (establishing the idea of “thin” copyright); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994) (describing the idea of “virtually identical copying”); *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003) (applying the rule).

<sup>33</sup> See, e.g., *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003) (extending doctrine to sculptures).

<sup>34</sup> See 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §13.03[A][1][c] (2009) (describing and critiquing expansiveness of the test).

## CONCLUSION

In attempting to show that the ideas central to the Parchomovsky-Stein proposal can perhaps be accommodated under current copyright doctrine, my claim certainly is not that current copyright law *already* does what the authors claim their model will. I merely suggest that there might be good reason to introduce these ideas from within the system if possible, rather than from outside. In previous work, I have argued that copyright ought to be conceptualized as a common law entitlement and that courts should take their job as copyright rulemakers seriously.<sup>35</sup> The two devices that I identify as possible avenues here, via which the idea of tiered originality can be effectuated, represent perhaps two of copyright's most notable judicial innovations in recent times. They lend themselves well to the classical common law method of incrementalism and to the pragmatic rule development that copyright law ought to adopt. Integrating these ideas into the system, rather than overwhelming it with a new set of concepts and devices, might thus serve to further this process and perhaps reintroduce some semblance of coherence to a normatively fragmented institution.

The idea of downstream incentives is certainly one to which copyright law and theory ought to pay closer attention, and Parchomovsky and Stein are right to focus their attention on the general neglect of this phenomenon. Whether it merits a wholesale overhaul of the entire system—including an unclear role for the fair use doctrine—I remain unsure.

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<sup>35</sup> See Balganes, *supra* note 7, at 1162.