

Aligning Incentives with Reality: Using Motivation for Creation to Shape the Scope of Copyright Protection

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Current U.S. copyright law, while based on a utilitarian theory, does not consider creative motivation in determining protection afforded to copyright owners. Indeed, when looking solely at U.S. copyright law, it appears that the U.S. adheres completely to the notion that "no man but a blockhead ever wrote, except for money." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994)(quoting 3 *Boswell's Life of Johnson* 19 (G. Hill ed. 1934)). This essay argues that while the grant of copyright protection without reference to motivational factors is appropriate, the law should take into account the primary creative motivation for types of creative works in determining how robust the copyright protection afforded should be. This can be done in two ways. First, courts should consider motivation in non-exact reproduction cases in determining how similar an alleged infringing work needs to be to violate the copyright owner's rights. Second, to fulfill the purpose of fair use as the "breathing space within the confines of copyright", *Campbell*, 510 U.S. at 579, courts should explicitly evaluate the effect that allowing the defendant's use would have on the motivational incentives that the copyright system is designed to provide. This inquiry not should examine the motivations of the particular author of the copyrighted work at issue, instead the court should explore the motivations for creators of the type of work at issue. If the court determines that the motivations would not be significantly undermined by permitting the use at issue, that finding should weigh heavily in favor of a finding of fair use. The approach argued for in this essay will result in less robust, or "thin", copyright protection for those types of works that do not require the incentive of the copyright to be created and distributed. However, this approach is entirely consistent with the utilitarian underpinnings of U.S. copyright law. If copyright law is designed to guard against underproduction of intangibles assets that, without the legal rights afforded by copyright, would be a public good, then it should not be problematic to provide less protection for those types of works that appear to not risk underproduction absent legal protection. Providing less protection to certain categories of works, however, may do harm to an authors' rights view of copyright law. This harm could be counterbalanced by a stronger right of attribution than is currently provided to authors of creative works.