

**ORIGINALITY AS *SINE QUA NON*
FOR DERIVATIVE WORKS: THE BASIS
FOR COPYRIGHT PROTECTION &
AVOIDING INFRINGEMENT LIABILITY**

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TABLE OF CONTENTS

I.	INTRODUCTION	261
II.	ORIGINALITY TEST	264
	A. Originality—Background & Evolution	264
	B. Originality Test & Derivative Work	266
III.	ORIGINALITY IN COPYRIGHT INFRINGEMENT	268
	A. What Originality? First Come, Gets All	268
	B. Originality & Fair Use	269
	C. Originality & Transformation	271
IV.	THE ISSUE OF ONE-SIZE-FITS-ALL ORIGINALITY.....	273
	A. Overbroad Protection of the Copyright Owner.....	273
	B. A Balancing Approach Needed	276
V.	RECOMMENDING SOLUTIONS	277
	A. Redesigning the Originality Test-Step 1— Comparing the Works on Originality	277
	B. Redesigning the Originality Test-Step 2— Three Levels of Originality after the Comparison.....	279
	C. Redesigning the Originality Test-Step 3— the Future of Fair Use	280
VI.	CONCLUSION	281

I. INTRODUCTION

Copyright law is a form of intellectual property rights, which grants copyright owners certain exclusive rights in their work

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and is a relatively easy property right to acquire. Unlike patents, in which the patent office must examine novelty, utility, and obviousness from the perspective of a person having ordinary skill in the arts, copyright only requires the author to independently create the work and fix it on a tangible medium of expression.¹ The author is then able to enjoy a lifetime copyright plus an additional 70 years.² The Copyright Act also sets limitations on the owner; however, they are either narrow or vague, and complex. Copyright liability in the United States could arise even for subconscious copying, effectively making it into a strict liability rule.³ Why does a copyright offer such a low threshold of acquisition, a broad scope of protection, and ease of finding infringement compared to a patent? The major difference is because a copyright does not extend to ideas, facts, or functional elements of a work, but only to the author's original expression of those ideas, facts, or elements. A copyright also protects its owners against those taking their work. Hence, independent creation is a complete defense.⁴

Expression of an idea could come in numerous forms, depicting the author's unique expression based on that idea, which "display[s] the stamp of the author's originality."⁵ This is known as the "idea/expression or fact/expression dichotomy, [and] applies to all works of authorship."⁶ Anyone can use a basic idea to demonstrate their own version of expressing that idea, hence, copyrightability has a very low requirement compared to a patent.⁷ Because an idea cannot be monopolized, the public

¹ See 17 U.S.C. § 102(a) (1990) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device . . .").

² Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 101-102, 112 Stat. 2827 (1998) (amending Chapter 3, title 17, United States Code, to extend the term of copyright protection for most works to life plus 70 years).

³ Gideon Parchomovsky & Alex Stein, *Originality*, 95 VA. L. REV. 1505, 1514 (2009). See generally R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133, 133 (2007) (providing a detailed history of the evolution on the liability of innocent copying under U.S. Copyright Law).

⁴ See *Fisher, Inc. v. Dillingham*, 298 F.145, 147 (S.D.N.Y. 1924) ("[T]he law imposes no prohibition upon those who, without copying, independently arrive at the precise combination of words or notes which have been copyrighted.").

⁵ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991).

⁶ *Id.*

⁷ See *id.* at 345 ("[T]he requisite level of creativity is extremely low; even a

2014] DERIVATIVE WORK & COPYRIGHT PROTECTION 263

receives the benefit of new expressions by various authors while leaving ample resources for subsequent authors. Theoretically, an infinite number of approaches exist to change or vary a work that is fixed on a tangible medium.⁸ However, expression can be limited as illustrated in *Herbert Rosenthal Jewelry*, where the court recognized that “[w]hen the ‘idea’ and its ‘expression’ are . . . inseparable, copying the expression [is] not barred”⁹ In *Peter Pan Fabrics*, Judge Learned Hand stated that “no principle can be stated as to when an imitator has gone beyond copying the ‘idea’ and has borrowed its ‘expression’ . . . [and] [d]ecisions, [hence,] must . . . inevitably be *ad hoc*.”¹⁰

A question arises as to the legal consequences of someone using a copyright work to produce a new work. The new work is known in copyright law as a derivative work, which exists as a functional variation of a pre-existing work that is protected by copyright.¹¹ Two copyright issues arise from this scenario: (a) what is the level of originality required for a derivative work to merit its own copyrightability; and (b) can the new work use fair use as a defense and be exempted from infringement liability if it possesses a high level of originality?¹² To answer these questions, we argue that the solution lies in the originality of the new work. A high level of originality can act against the copyright work it borrowed from and allows the new work to receive its own copyright protection and avoid infringement liability.¹³

slight amount will suffice.”).

⁸ See Gregg Oppenheimer, *Originality in Art Reproductions: “Variations” in Search of a Theme*, in 27 COPYRIGHT L. SYMP. (ASCAP) 233–42 (1982) (illustrating various examples of changing the medium such as a mezzotint of an oil painting).

⁹ *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971).

¹⁰ *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (emphasis added).

¹¹ See generally 17 U.S.C. § 101 (indicating that “a ‘derivative work’ is a work based upon one or more pre-existing works, such as translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adopted. A work consisting of editorial revisions, annotations, elaboration, or other modifications, which, as a whole, represents an original work of authorship, is a ‘derivative work.’”).

¹² See *Feist*, 499 U.S. at 345 (“[T]he requisite level of creativity is extremely low; even a slight amount will suffice.”); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”).

¹³ *Campbell*, 510 U.S. at 579 (“[W]hether the new work merely ‘supersede[s]

II. ORIGINALITY TEST

A. *Originality—Background & Evolution*

The U.S. Constitution gives Congress the power to “promote the [p]rogress of [s]cience and useful [a]rts, by securing for limited [t]imes to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries[.]”¹⁴ Hence, copyright law is a positive law instead of a natural law right of the author. A copyright is a means to improve social utility, which can only be reached through protecting original works. Originality is both a statutory and constitutional prerequisite for copyright protection.¹⁵ The requirement for originality is stated in Section 102(a) of the Copyright Act: “[c]opyright protection subsists, [under Section 102(a)], in original works of authorship . . .”¹⁶ (i.e., a work independently created by the author and fixed in a tangible medium form which can be perceived).

Originality is a fluid concept, not an objective criterion, and has various interpretations.¹⁷ The originality requirement was first introduced in *The Trademark Cases*,¹⁸ in which the Supreme Court stated that “originality is required” for anything to be classified as the writing of an author.¹⁹ In *Alfred Bell & Co. v. Catalda Fine Arts*,²⁰ “the very language of the Constitution differentiates (a) ‘authors’ and their ‘writings’ from (b) ‘inventors’ and their ‘discoveries.’”²¹ The court explained that the term “inventor” carried “an implication which excludes the result of . . . ordinary skill,” and that “nothing in the Constitution

the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’”

¹⁴ U.S. CONST. art. I, § 8, cl. 8.

¹⁵ *Feist*, 499 U.S. at 346.

¹⁶ 17 U.S.C. § 102(a) (1990).

¹⁷ Courts have fashioned numerous definitions and legal tests for originality. The inconsistencies and impracticalities for those judge-made definitions render them virtually useless. See, e.g., Alan T. Dworkin, *Originality in the Law of Copyright*, 39 B.U. L. REV. 526, 526 (1959) (“[C]ourts have yet to agree upon a universal test of originality to apply in all cases.”).

¹⁸ *United States v. Steffens*, 100 U.S. 82 (1879) (*The Trademark Cases*).

¹⁹ *Id.* at 94.

²⁰ *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99 (2d Cir. 1951).

²¹ *Id.* at 100.

2014] DERIVATIVE WORK & COPYRIGHT PROTECTION 265

commands that copyright matter be strikingly unique or novel.”²² Therefore, having an independent creation that has not been copied from others satisfies the originality standard.²³ In *Feist Publications*, the court described originality as “the *sine qua non* of copyright”²⁴ and further required originality to include a *modicum of creativity*,²⁵ which is a constitutional requirement.²⁶ For the first time, the court clearly identified that creative choices are what gives a work its originality.²⁷ Through exercising creative choice akin to civil law jurisdictions,²⁸ *Feist* ruled out “the completely obvious and ‘practically inevitable’ arrangements of facts and public domain materials outside the reach of copyright.”²⁹ The *Feist* court effectively “reemphasized that the primary benefactor of copyright laws is the public and the benefits to the author are secondary.”³⁰

This position is akin to earlier cases such as Circuit Judge Eschbach, who clarified in *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, that “we shall use ‘originality’ to mean independent authorship and ‘creativity’ to denote intellectual labor.”³¹ Thus the *Feist* court not only requested that Rural’s work as a whole meet the originality plus creativity requirement,³² but infringement only applies if the “constituent

²² *Id.* at 102.

²³ *Id.* at 102–03.

²⁴ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

²⁵ *Id.* at 346 (emphasis added). However, the Court did not provide a definition for creativity. See Russ VerSteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801, 839 (1993) (suggesting that the creativity requirement requires that courts investigate the functioning of an author’s brain).

²⁶ *Feist*, 499 U.S. at 347–51.

²⁷ Daniel J. Gervais, *Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*, 49 J. COPYRIGHT SOC’Y. U.S.A 949, 952 n.16 (2002).

²⁸ *Id.* at 976–77 nn.182–188. Creative choice is made by the author that is not dictated by the function of the work, the method or technique used, or by applicable standards or relevant “good practice.”

²⁹ Howard B. Abrams, *Originality and Creativity in Copyright Law*, 55-SPG LAW & CONTEMP. PROBS. 3, 18 (1992).

³⁰ Tracy Lea Meade, Note, *Ex-Post Feist: Applications of a Landmark Copyright Decision*, 2 J. INTELL. PROP. L. 245, 268 (1994).

³¹ *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 668 n.6 (7th Cir. 1986).

³² The Supreme Court did not define what satisfies the creativity element; however, it hinted as to what it had in mind. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358–59 (1991) (“[T]he originality requirement is not particularly stringent. A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement

elements” that were copied were also “original.”³³ Since the famous pronouncement of Judge Learned Hand in *Nichols v. Universal Pictures Corp.*,³⁴ the vague line between expression and an un-protectable idea suggested that defendants were allowed to copy certain aspects of a copyrighted work, however, a defendant copying ideas rather than the expression, is not liable.³⁵ From the pronouncement of Judge Learned Hand to *Feist’s* creativity requirement, the requirement for originality has increased in the past 60 years from an independent creation to showing a modicum of creativity. In *American Dental Ass’n v. Delta Dental Plans Ass’n*, the court eloquently portrayed that “copyrightability depends on originality, originality on creativity, and creativity on imagination.”³⁶ Simply put, copyrightability of a work depends on human intellectual contribution.

B. Originality Test & Derivative Work

If an author has used a previous work, the derivative-work author could still create an original work after changing the pre-existing work in certain ways, such as by adding, subtracting, or altering materials in the pre-existing work.³⁷ However, what level of originality is required? The courts divided the originality requirement between public domain works and those protected under copyright.³⁸ For public domain works, the originality requirement for derivative works is not static, ranging from the result of certain minimal levels of creativity and originality in *Bleistein v. Donaldson Lithographing Co.*,³⁹ to the requirement that works should demonstrate more than trivial or insignificant

independently . . . and that it displays a certain minimum level of creativity. Presumably, the vast majority of compilations pass this test, but not all will. There remains a narrow category of work in which the creative spark is utterly lacking or so trivial as to be virtually non-existent. Such works are incapable of sustaining a valid copyright.”).

³³ *Id.* at 361.

³⁴ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

³⁵ *See id.* at 121 (describing the difference between copying ideas rather than expression in a Shakespeare example).

³⁶ *Am. Dental Ass’n v. Delta Dental Plans Ass’n*, No. 92 C 5909, 1996 WL 224494, at 8 (N.D. Ill. May 1, 1996).

³⁷ *See* Daniel Gervais, *The Derivative Right, or Why Copyright Law Protects Foxes Better Than Hedgehogs*, 15 VAND. J. ENT. & TECH. L. 785, 802–03, 806 (2013) (formulating the difference and significance between original and derivative work).

³⁸ *See Feist*, 499 U.S. at 347–48.

³⁹ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

2014] DERIVATIVE WORK & COPYRIGHT PROTECTION 267

efforts in *Alfred Bell & Co.*,⁴⁰ because trivial additions might sometimes result from unintentional actions.⁴¹ Hence, in *Alfred Bell*, decision makers must investigate at least two matters.⁴² First, identify the variations that the derivative-work author has made.⁴³ Second, determine whether those variations are trivial or distinguishable.⁴⁴ If they are distinguishable, then the work satisfies the originality test.⁴⁵ For a derivative work based on a copyright work, the originality required is higher as illustrated in *Durham Industries, Inc. vs. Tomy Corporation*.⁴⁶ Tomy sued Durham for infringing on its exclusive right to copy its own creations, because Durham manufactured and distributed virtually indistinguishable versions of three wind-up plastic Disney figures: Mickey Mouse, Donald Duck, and Pluto.⁴⁷

In *Tomy*, Judge Meskill explained two important limitations to derivative works:

First, to support a copyright, the original aspects of a derivative work must be more than trivial. Second, the scope of protection afforded to a derivative work must reflect the degree to which it relies on pre-existing material and must not in any way affect the scope of any copyright protection in that pre-existing material.⁴⁸

Judge Meskill used these two approaches to prevent any less of a standard, which “would simply put a weapon of harassment in the hands of mischievous copiers”⁴⁹ The first requirement requests that the derivative work contain certain originality, whereas the second requirement ensures that the derivative work does not have market impact on the copyright owner. The second requirement however, is questionable because it overlaps with the market impact factor in Section 107 for finding fair

⁴⁰ *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 104–05 (2d Cir. 1951).

⁴¹ *Id.* at 105 (noting a copyist’s bad eyesight or defective musculature, or a shock causing a clap of thunder, may yield sufficiently distinguishable variations).

⁴² *Id.* at 102–03.

⁴³ *Feist*, 499 U.S. at 345 (“Original . . . means only that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity”).

⁴⁴ *Alfred Bell*, 191 F.2d at 102–03.

⁴⁵ *Id.*

⁴⁶ *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980).

⁴⁷ *Id.* at 907–08.

⁴⁸ *Id.*

⁴⁹ *Id.* at 910 (citing *L. Batlin & Sons, Inc. v. Snyder*, 536 F.2d 486, 492 (2d Cir. 1976)).

use.⁵⁰ Was the court implying that when assessing the copyrightability of a derivative work, it should also examine whether the work will be a fair use of the copyright work? Using these standards, the court found *Tom's* copyright of these three Disney figures to be invalid because they are merely the reproduction of Disney's work of art in a different medium.⁵¹ This two-part test requires that the derivative work demonstrate that it is "more than trivial" from the underlying work, and allows copyrightability of the derivative work based on the protected work, but extends the copyright only to the original element.⁵² This allows societal enrichment "without burdening the rights enjoyed in underlying works."⁵³ Similarly, after *Feist*, originality cannot be found merely in time and expense. "*Feist* requires the contribution of an independent and original element to the finished work that makes the work more than a copy."⁵⁴

III. ORIGINALITY IN COPYRIGHT INFRINGEMENT

A. *What Originality? First Come, Gets All*

In *Feist*, the Supreme Court indicated that originality is the *sine qua non* of a copyright and that it has two components: independent creation and a modicum of creativity.⁵⁵ Independent creation allows the author to provide a unique expression onto a tangible medium without the fear of misappropriation; copyright restricts others reusing the same means of expressing the same ideas.⁵⁶ Unlike a patent where patentability assessment is done *ex ante*, before granting the property right, copyright assessment is done *ex post* during an infringement claim.⁵⁷ Despite that, a copyright protects the expression instead of the idea, something more is needed for granting the author a copyright without an assessment. The Supreme Court's answer is to add a modicum of

⁵⁰ See discussion *infra* Part III.B, III.C.

⁵¹ *Durham*, 630 F.2d at 910.

⁵² *Id.* at 909.

⁵³ Steven S. Boyd, *Deriving Originality in Derivative Works: Considering the Quantum of Originality Needed to Attain Copyright Protection in a Derivative Work*, 40 SANTA CLARA L. REV. 325, 377 (2000).

⁵⁴ *Abrams*, *supra* note 29, at 42.

⁵⁵ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 340 (1991).

⁵⁶ See generally Dennis S. Karjala, *Distinguishing Patent and Copyright Subject Matter*, 35 CONN. L. REV. 439, 441-42 (2003) (explaining the underlying purpose of copyrights).

⁵⁷ See *id.* (comparing differences between copyright and patent procedure).

2014] DERIVATIVE WORK & COPYRIGHT PROTECTION 269

creativity, which requires an intellectual contribution instead of the long-recognized “sweat of the brow.”⁵⁸

According to the Supreme Court in *Feist*, the requirements for copyright infringement are “(1) ownership of a valid copyright, and (2) copying constituent elements of the work that are original.”⁵⁹ “Thus, given ownership of a valid copyright, copying ‘constituent elements of a work that are original’ is both a necessary and sufficient condition for infringement of the work.”⁶⁰ Prior to *Feist*, an independently created work satisfied Section 102(a);⁶¹ however, the statute did not distinguish between highly original works or those of minimum originality.⁶² Furthermore, copyright provides less likelihood of avoiding copyright infringement for a highly original derivative work against a minimum original prior work.⁶³ Thus, copyright grants property rights only to works that meet the low originality threshold, but fails to protect derivative works that are highly original.⁶⁴ In contradiction to patent law, “[c]opyright . . . fails to . . . calibrate the scope of the copyright protection to the degree of the work’s originality.”⁶⁵ Allowing authors of minimally original works to block the creation of novel works, which are more original than theirs, is not only unjust, but fails to be justified under either utilitarian theories of copyright law or Locke’s desert-based justification.

B. Originality & Fair Use

Under the current rule, the derivative work author faces the issue of infringing on the copyright of a prior work it has borrowed from. Hence, assessing whether unauthorized

⁵⁸ See generally *Feist*, 499 U.S. at 353–54 (“The ‘sweat of the brow’ doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement—the compiler’s original contribution—to the facts themselves ‘Sweat of the brow’ courts thereby eschewed the most fundamental axiom of copyright law—that no one may copyright facts or ideas Without a doubt the ‘sweat of the brow’ doctrine flouted basic copyright principles.”).

⁵⁹ *Id.* at 361.

⁶⁰ Marc K. Temin, *The Irrelevance of Creativity: Feist’s Wrong Turn and the Scope of Copyright Protection for Factual Works*, 111 PENN ST. L. REV. 263, 264 (2006).

⁶¹ 17 U.S.C. § 102 (1990).

⁶² See *id.*

⁶³ Parchomovsky & Stein, *supra* note 3 at 1533.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1506.

borrowing is a fair use is necessary.⁶⁶ The statutory framework for fair use is Section 107 of the Copyright Act, which requires the court to consider a least four factors: (a) the purpose and character of unauthorized use; (b) the nature of the protected work; (c) the amount of the protected work used compared to the whole protected work; and (d) the impact of the use on the market of the protected work.⁶⁷ Professor Lunney indicated that the courts are only willing to grant fair use if the work “embod[ies] three characteristics.”⁶⁸ “First, the work must embody a desirable form of creativity”⁶⁹ “Second, the work must embody a form of creativity that requires the taking of expression from earlier works . . . to exist . . . ,”⁷⁰ and (c) “the work must embody a form of creativity that the typical author would be unwilling to authorize, or . . . unwilling to authorize at a less-than prohibitive price.”⁷¹

In 1994, the Supreme Court made its first decision in *Campbell vs. Acuff-Rose Music, Inc.*,⁷² as to whether and to what extent a parody could claim the fair use defense highlighted in the transformative use factor. The court stated that “[t]he central purpose” of the investigation under the first factor in Section 107 is to determine whether the use supersedes the original work or “instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’”⁷³ The court further stated that transformative uses “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against the finding of fair use.”⁷⁴ However, the court did not

⁶⁶ See generally William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1687 (1988) (explaining that, “fair use . . . enables the judiciary to permit authorized uses of copyright work . . . when doing so will result in wider dissemination of those works without seriously eroding the incentives for artistic and intellectual innovation.”).

⁶⁷ 17 U.S.C. § 107 (1992).

⁶⁸ Glynn S. Lunney, Jr., *Reexamining Copyright’s Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 549 (1996).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁷³ *Id.* at 579.

⁷⁴ *Id.* (internal citation omitted).

2014] DERIVATIVE WORK & COPYRIGHT PROTECTION 271

evaluate the quality of the parody to determine whether fair use should apply. The court instead decided that the derivative work is a parody because the song intended to ridicule the original, and the end product is transformative.⁷⁵ The *Campbell* court suggested that a derivative work could find fair use based on its purpose and transformativeness if it can be categorized as parody.⁷⁶ Furthermore, lower courts should not base their decisions on the commercial purpose alone to deny the fair use finding.⁷⁷ However, commentators have worried that the emphasis that *Campbell* placed on transformativeness in fair use analysis will affect the scope of the copyright owner's right to control derivative work, which transforms the author's work.⁷⁸ The "weighing transformation of a copyright work in favor of fair use could potentially mean that many ordinary derivative works, which would generally be within the copyright owner's exclusive right, will instead be judged as noninfringing fair uses."⁷⁹

C. Originality & Transformation

Campbell did not open the floodgate for finding fair use because transformation does not allow the finding of fair use by simply making certain changes to a prior work. For example, the deletion of "sex, nudity, profanity, and gory violence" in rented DVD copies of popular movies was not transformation in *Clean Flicks vs. Soderbergh*.⁸⁰ The rationale given by the court was because the defendant's editing of the plaintiff's films was not transformative for fair use analysis, the edited versions were therefore not derivative works.⁸¹ This approach corresponds to *Tomy's* reasoning illustrated earlier. Under this approach, the court concluded that the originality requirement is higher in

⁷⁵ *Id.* at 583.

⁷⁶ *Id.* at 580–81. The *Campbell* decision, however, set no clear meaning of parody. Although, the court did inform the lower courts that when the secondary work criticizes the original it is a parody, but if the second work criticizes the society in general, it is a satire. *Id.*

⁷⁷ *Id.* at 585.

⁷⁸ See, e.g., Laura G. Lape, *Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine*, 58 ALB. L. REV. 677, 701–21 (1995) (explaining how the *Campbell* court has expanded the fair use analysis).

⁷⁹ R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 468–69 (2008).

⁸⁰ *Clean Flicks of Colorado, LLC v. Soderbergh*, 433 F.Supp. 2d 1236, 1241 (D. Colo. 2006).

⁸¹ *Id.*; see also Reese, *supra* note 79, at 470.

assessing fair use, and if derivative work is not able to pass the fair use analysis, it is not a derivative work either.⁸² However, whether the originality standard required for transformation is necessarily higher than that required for the derived work is questionable. Judicial definitions have been imprecise. For example, in *Sony Corp. vs. Universal City Studios Inc.*, Justice Blackburn in his dissent wrote that transformative use is use “resulting in some added benefit to the public beyond that produced by the first author’s work.”⁸³ In *American Geophysical Union vs. Texaco Inc.*, Judge Level defined transformative use as a use that “produced a new purpose or result, different from the original.”⁸⁴ However, in *American Geophysical*, “photocopying an article onto a paper was not [transformative, but] photocopying onto a plastic paper might be.”⁸⁵ In this case, the originality requirements are lower than that required for derivative work.⁸⁶

Hence, this originality ambiguity leads the appellate courts to disregard transformative fair use. Professor Anthony Reese concluded that:

[A]ppellate courts do not view fair use transformativeness as connected with any transformation involved in preparing a derivative work, and that in evaluating transformativeness the courts focus more on the purpose of a defendant’s use than on any alteration the defendant has made to the content of the plaintiff’s work.⁸⁷

The focus on purpose rather than on content poses new questions such as, when to ascertain the purpose of the second author, and what happens if the work is transferred to the new owner for a different use?⁸⁸ The focus on the purpose of the use instead of the content has lessened the importance of transformation in the first factor of fair use criteria.⁸⁹ However,

⁸² *Clean Flicks of Colorado*, 433 F. Supp. 2d. at 1242.

⁸³ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 478 (1984) (Blackburn, J., dissenting).

⁸⁴ *Am. Geophysical Union v. Texaco Inc.*, 802 F.Supp.1, 11 (S.D.N.Y. 1992), *aff’d*, 37 F.3d 881 (2d Cir. 1994) *order amended and superseded*, 60 F.3d 913 (2d Cir. 1994), *aff’d*, 60 F.3d 913 (2d Cir. 1994).

⁸⁵ Lape, *supra* note 78, at 722 (footnote omitted).

⁸⁶ *Id.*

⁸⁷ Reese, *supra* note 79, at 467.

⁸⁸ *Id.* at 494–95.

⁸⁹ *See, e.g., Sega Enter. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1522–23 (9th Cir. 1992) (finding that a company’s copying of another company’s code was done for a nonexploitive purpose and attributing minimal significance to the commercial aspects of that copying); *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067,

2014] DERIVATIVE WORK & COPYRIGHT PROTECTION 273

the court has merely moved their focus from the first factor to the fourth factor, namely, the impact of the use on the market for the protected work.⁹⁰ This is exactly what the *Campbell* court wants the lower courts to avoid. Market impact, thus, remains “undoubtedly the single most important element of fair use[.]”⁹¹ which consists not only of potential lost sales of the original work, but also potential market losses for derivative works⁹² and licensing fees.⁹³ Allowing the unlicensed use of an author’s expression deprives the author of a potential source of licensing revenue, and any reuse of an author’s expression interferes with the author’s legally protected interest.⁹⁴ “[D]efin[ing] fair use simply as the legal use of another’s expression, and . . . assum[ing] that copyright presently protects every profitable use of a work’s expression, then that would leave an unprofitable use as the only legal, or fair, use of another’s expression today.”⁹⁵ However, this reasoning of favoring one factor of Section 107 over the others contradicts the long-standing statutory requirement that in determining fair use, “the factors to be considered shall include” factors one through four.⁹⁶

IV. THE ISSUE OF ONE-SIZE-FITS-ALL ORIGINALITY

A. *Overbroad Protection of the Copyright Owner*

Creation does not occur in a vacuum and knowledge is cumulative. “[N]ew creative works almost invariably borrow from old creative works, which raises the possibility of [borrower

1077–78 (2d Cir. 1992) (holding that purposes such as criticism, comment, scholarship and research will help the alleged infringer in a determination of whether or not the copying of a work was acceptable under the fair use doctrine).

⁹⁰ See, e.g., *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 568–69 (1985) (explaining that a finding of a negative impact on the potential market for a copyrighted work or derivative works based on that copyrighted work will preclude a finding of fair use).

⁹¹ *Id.* (footnote omitted). *Contra* *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 929–31 (2d Cir. 1994).

⁹² *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 593 (1994).

⁹³ See *Am. Geophysical Union*, 60 F.3d at 929–31 (holding that effects on potential licensing revenues can preclude a use from being considered fair use).

⁹⁴ See *id.* at 929.

⁹⁵ Lunney, *supra* note 68, at 548.

⁹⁶ 17 U.S.C. § 107 (1992); see also H.R. REP. NO. 102-836, at 9–10 (1992), reprinted in 1992 U.S.C.C.A.N. 2553, 2561–62 (legislative history concerning § 107).

infringement]”⁹⁷ However, if authors would be unable to use what has been previously introduced, the social cost would be enormous. This is the approach adopted by Section 103 of the Copyright Act,⁹⁸ which provides that original works of authorship contributed as part of the creation of a derivative work are copyrightable only by the original copyright owners or their licensee.⁹⁹ “Because Section 103 of the Act denies copyright only in the ‘part of the work’ that incorporates infringing material, some infringing derivative works may nonetheless be copyrightable in part” if the copied material is easily separated from the improver’s contribution, otherwise, “the improver loses the entire value of the contribution.”¹⁰⁰

The nondiscretionary approach of Section 103 to derivative works regardless of the level of originality allows the copyright work owner to capture the value of significant improvements made by others. Copyright’s approach echoes the prospect theory advocated by Edmund Kitch. Although the Kitch theory focuses on patent, it can be used to justify the current copyright system. The two most important aspects of the Kitch theory are first, a patent provides the holder an “incentive to make investments to maximize the value of the patent without fear that the fruits of the investment will produce unpatentable information appropriatable by competitors.”¹⁰¹ Second, Kitch argued that “[n]o one is likely to make significant investments searching for ways to increase the commercial value of a patent[,] unless he has made previous arrangements with the owner of the patent.”¹⁰² “This puts the patent owner in a position to coordinate the search for technological and market enhancement of the patent’s value so that duplicative investments are not made and so that information is exchanged among the [re]searchers.”¹⁰³ This is reflected in Section 106(2) of the Copyright Act and its provision

⁹⁷ James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887 (2007).

⁹⁸ 17 U.S.C. § 103(a) (1976) (providing that “[t]he subject matter of copyright as specified by section 102 includes compilations and derivative works . . .”).

⁹⁹ Richard A. Posner, *When is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 69 (1992).

¹⁰⁰ Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1022 (1997).

¹⁰¹ Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265, 276 (1977).

¹⁰² *Id.*

¹⁰³ *Id.*

2014] DERIVATIVE WORK & COPYRIGHT PROTECTION 275

that the copyright holder has the exclusive right to prepare and to authorize the preparation of derivative works.¹⁰⁴ Consequently, the right gives copyright holders tremendous control over those who use their works,¹⁰⁵ given that the copyright work holds the potential to enjoin the improver from offering the work to the public but also to enjoy the fruit of the improver's intellectual labor.

However, this is only justifiable if all works provide the same level of originality, where the derivative work has a minimum or similar level of originality as the copyright work. Under the current copyright act, originality is a mere threshold requirement and does not distinguish between minimally original work and highly original work.¹⁰⁶ Current copyright law has failed to provide a satisfactory answer in a case where the improver has used the copyright work but has contributed greatly toward the previous work. Under the current regime, the improver could not be certain of exemption from copyright infringement under fair use. Current case laws suggest that "where the copied material is easily separated from the improver's contribution," fair use might be more probable, whereas "where the material is inextricably intertwined, the improver loses the entire value of the contribution."¹⁰⁷ Under Section 106, the literal meaning suggests that unless the derivative work can transform, adapt, or recast the original work into a new and different work, it could not be an infringement of the firstcomer's exclusive right to prepare derivative works.¹⁰⁸ This suggests that less original derivative works are protected, but more original or transformative derivative works are not. If the purpose of copyright is to foster the creation

¹⁰⁴ 17 U.S.C. § 106(2) (2002).

¹⁰⁵ See Posner, *supra* note 99, at 69. ("Transaction costs are minimized when all rights over the copyrighted work are concentrated in a single pair of hands.")

¹⁰⁶ See Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 *FORD. L. REV.* 575, 578 ("Many very small expressions leap over the low threshold of originality we have established in copyright law. The real issue is not lack of originality; the real issue is size.")

¹⁰⁷ Lemley, *supra* note 100; see also *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *7-9 (C.D. Cal. Apr. 15, 1989) (finding that a scriptwriter's use of the characters from Rocky in an unauthorized sequel was a copyright infringement and invalidated his derivative work copyright).

¹⁰⁸ See Amy B. Cohen, *When Does A Work Infringe the Derivative Works Right of a Copyright Owner?*, 17 *CARDOZO ARTS & ENT. L.J.* 623, 632 (noting that the definition of derivative work applies to works that are "recast, transformed, or adapted.")

of arts and writing, over-protecting the rights of the first author contradicts this goal.

B. A Balancing Approach Needed

Copyright law should balance the copyright owner's right to derivative works against the improver with a higher level of originality to meet social utility. However, this is problematic if the same level of protection is given to minimally original works, which has the effect to act as a roadblock for the author of a highly original derivative work. If the derivative uses a prior work, but the result was highly original, then the law should provide protection for that derivative work. The focus of the originality requirement could strengthen the bargaining power of both the plaintiff and defendant. Hence, instead of focusing on how much the improver took from the previous copyright work, the assessment should instead examine the amount contributed and how much was transformed. By focusing on the originality and the actual content of the derivative work, a copyright should provide exemptions to infringement liability based on the actual contribution.

However, requiring the court to compare the content of a derivative work with a prior work invites courts to make originality comparisons and value judgments between two conflicting works.¹⁰⁹ Numerous courts and commentators have often cited Justice Holmes' famous 1903 admonition that strict "value neutrality" of aesthetic judgment is the rule.¹¹⁰ However, Justice Holmes was referring only to pictorial illustrations, and not all categories of copyright works. Judges are not the sole adjudicator on the merits of the work, and expert testimony is often called to assist the court.¹¹¹ Similarly, judges often must adjudicate on inventions of which they have no knowledge. Why

¹⁰⁹ Lape, *supra* note 78, at 722.

¹¹⁰ *Id.* at 718; *see also* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251–52 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations At one extreme, some works of genius would be sure to miss appreciation At the other end, a copyright would be denied to pictures which appealed to a public less educated than the judge.").

¹¹¹ *See, e.g.*, Bright Tunes Music Corp. v. Harrisongs Music Ltd., 420 F.Supp.177, 181 nn.6 & 10–11 (S.D.N.Y. 1976) *aff'd sub nom.* ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988 (2d Cir. 1983) (demonstrating the use of expert testimony in the judicial determination on the level of originality present in an allegedly derivative work).

2014] DERIVATIVE WORK & COPYRIGHT PROTECTION 277

judges are able to assess patent infringement litigations but not copyright cases lacks justification. Hence, courts should examine the originality of the derivative work, which has been independently created, against the prior copyrighted work. Under Section 107, courts use the four factors to assess whether the use of a derivative work is an infringement. This approach allows the court to disregard and assess the level of originality in the derivative work. The following section provides a case example to illustrate the defects in Section 107 and the limited choices the court faces in finding fair use. We also recommend solutions on how courts could avert this situation.

V. RECOMMENDING SOLUTIONS**A. *Redesigning the Originality Test-Step 1—
Comparing the Works on Originality***

Suntrust Bank vs. Houghton Mifflin,¹¹² is a case in which the level of originality can be used to defend the derivative author from liability. In that case, Alice Randall retold the story of “Gone with the Wind” by Margaret Mitchell with her “The Wind Done Gone” from the point of black characters.¹¹³ To do so, she borrowed from the previous work to a certain extent.¹¹⁴ The trustee of Mitchell’s estate sued Randall and her publisher for copyright infringement, seeking injunctive relief for both. In the district court,¹¹⁵ the court found that the second work was not a parody capable of finding fair use under *Campbell*¹¹⁶ but instead a sequel,¹¹⁷ because the first work was a highly original, creative, and imaginative work.¹¹⁸ The Eleventh Circuit vacated the case on the ground that Randall’s work was a parody of “Gone with the Wind.”¹¹⁹ The court’s reasoning of “parody” contradicted the ordinary meaning of a parody,¹²⁰ particularly when Randall’s

¹¹² *Suntrust Bank v. Houghton Mifflin Co. (Suntrust II)*, 268 F.3d 1257 (11th Cir. 2001).

¹¹³ *Id.* at 1259, 1270–71.

¹¹⁴ *Id.* at 1259.

¹¹⁵ *Suntrust Bank v. Houghton Mifflin Co. (Suntrust I)*, 136 F.Supp.2d 1357 (N.D. Ga. 2001).

¹¹⁶ *Id.* at 1377–78.

¹¹⁷ *Id.* at 1373–75.

¹¹⁸ *Id.* at 1381.

¹¹⁹ *Suntrust II*, 268 F.3d at 1259.

¹²⁰ *Id.* at 1268–69 (The court redefined parody by eliminating any requirement that parody include humor).

work was not a parody in a strict sense.¹²¹ The court sensed the need to allow the work under fair use, but instead of looking into the originality of the content, it emphasized Randall's intent.¹²² Randall's work passed the originality test as a derivative work because she offered a different portrayal of the South than the original book.¹²³ Aside from imitating or reproducing the previous work, she created her own version of the expression based on the concept of the American South during the Civil War period.¹²⁴ Her work fulfilled the requirements set out in *Campbell* to alter the first work with new expression, meaning, or message. By adopting *Campbell's* reasoning, the Eleventh Circuit sensed the need to protect Randall's work by categorizing her work as a parody by broadening the meaning of parody. However, is categorizing original derivative works as a parody the best way to find fair use?

In Section 107, four factors were presented to the court to assess whether unauthorized use can be exempted from liability. However, none of the four factors, which are directed to protect the financial interest of the copyright owner, required the need to assess the originality of the derivative work. Because originality is the *sine qua non* for copyrightability, it should be an essential factor in assessing whether derivative work meets fair use. Hence, in addition to the four statutory factors, courts should assess the level of originality within both the plaintiff and the defendant's work to strike a balance between protecting the copyright owner and the public's need for original works. Although *Feist* has re-emphasized the need for creativity, it remains at a low threshold and does not require the contribution to be "innovative"¹²⁵ or "surprising."¹²⁶ The originality requirement post-*Feist* could be broadened to reflect the level of originality. By using the originality factor, the court can make a fairer assessment of both the copyright work and the derivative work without unnecessarily favoring the

¹²¹ According to the Oxford Dictionary, parody means "[a]n imitation of the style of a particular writer, artist, or genre with deliberate exaggeration for comic effect." *Parody Definition*, OXFORD DICTIONARIES.COM, <http://www.oxforddictionaries.com/definition/english/parody> (last visited Oct. 31, 2013).

¹²² *Suntrust II*, 268 F.3d at 1270.

¹²³ *Id.* at 1270–71.

¹²⁴ *Id.* at 1269–71.

¹²⁵ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991).

¹²⁶ *Id.*

2014] DERIVATIVE WORK & COPYRIGHT PROTECTION 279

copyright owner. The current focus on the market impact of the copyright owner requires further scrutiny.¹²⁷ If the derived work impacts the market of the copyright work or acts as a substitute, can the court simply deny fair use without assessing the quality of the derived work?¹²⁸ Before moving directly to Section 107 assessments, the court should first compare the two works on a case-by-case basis based on their originality.

*B. Redesigning the Originality Test-Step 2—
Three Levels of Originality after the Comparison*

By directing attention on originality, not only will Randall's work be copyrightable, but also be exempted from infringement liability without being categorized as a parody. Instead of the either/or approach in the current fair use finding, courts should adopt a three-stage approach as advocated by Professors Parchomovsky and Stein in measuring the level of originality in exceptional originality, similar to the level of originality as a copyright work or a lower originality to the copyright work.¹²⁹ In the first stage, Professors Lemley (the radical improver doctrine),¹³⁰ Parchomovsky, and Stein (doctrine of inequivalents)¹³¹ advocated a similar approach by introducing a mechanism akin to the reverse doctrine of equivalents found in patent law to protect a derivative work with extraordinary originality. Similar to the Supreme Court case in *Graver Tanks vs. Linde Air Products*,

[W]here a device is so far changed in principle from a patented article that it performs the same or similar function in a substantially different way, but nevertheless falls within the literal words of the claim, the doctrine of equivalents may be used [in reverse] to restrict the claim and defeat the patentee's action for

¹²⁷ See *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 591–93 (discussing that when a work is transformative, market harms are not easily inferred and the court must distinguish between mere criticism and copyright infringement).

¹²⁸ See Parchomovsky & Stein, *supra* note 3, at 1527 (stating that “[h]ighly creative works are likely to enhance the value of the pre-existing works from which they borrow.”).

¹²⁹ See *id.* at 1507–08 (explaining Professors Parchomovsky and Stein's three-step approach).

¹³⁰ See Lemley, *supra* note 100, at 1023–29 (arguing that a copyright allows the copyright owner to obtain property rights over improvements made by others and advocates for changes in copyright to include similar doctrines such as a patent blocking patent and the reverse doctrine of equivalents to balance between the rights of the original and the improver).

¹³¹ Parchomovsky & Stein, *supra* note 3, at 1528.

infringement.¹³²

Using the same concept, if a derivative work has made a major contribution to social value, adds new materials which predominate over the previous work, and if the copied (or borrowed) portion has been transformed in a major way such that the value of the derivative work derives primarily from the improver's contribution of the original expression,¹³³ then the court should find no infringement for the improver. Apparently, Randall's work satisfies this scenario.

The second stage is where a similar level of originality is presented in the improver's work compared to the original. The author of the derivative work has borrowed from the original work, and has showed original expression. However, the value of the derivative work does not come predominately from the author's own expression. This situation matches the case in *Anderson vs. Stallone*, in which the two works are intertwined and not easily separated. In this situation, the improver can only copyright the improved contribution, not the original parts, a situation akin to blocking patents.¹³⁴ This is the situation that Section 107 (a) and (b) attempts to prevent.¹³⁵ Because the derivative work did not simply imitate or reproduce the original work, but contributed an original expression, the courts should not punish the improver through an injunction¹³⁶ to allow the author of the original work to appropriate the improver's contribution. The courts could allow fair use to the improver, but award damages to the original author. Hence, the two works are allowed to coexist for the social good. The last stage is where the work shows no originality and has simply imitated or reproduced the copyrighted work; under this scenario, infringement liability exists.

*C. Redesigning the Originality Test-Step 3—
the Future of Fair Use*

This new proposal raises the question as to the role of Section

¹³² *Graver Tank & Mfg. Co. vs. Linde Air Products Co.*, 339 U.S. 605, 608–09 (1950).

¹³³ Lemley, *supra* note 100, at 1074.

¹³⁴ *Id.* at 1020.

¹³⁵ *Id.* at 992.

¹³⁶ *Suntrust Bank v. Houghton Mifflin Co. (Suntrust D)*, 136 F.Supp.2d 1357, 1384 (N.D. Ga. 2001) (citing *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306–07 (11th Cir. 1998)).

2014] DERIVATIVE WORK & COPYRIGHT PROTECTION 281

107. The current fair use doctrine continues to have merit in deciding whether Stage two and three are allowed for fair use. Because a highly original derivative work in Stage one gains infringement protection, seeking fair use exemption is unnecessary. However, a derivative work with lower originality might still seek exemption under Section 107. However, although Section 107 does not examine the originality of a derivative work, the courts should strictly follow the assessment of factor one through four instead of favoring market impact over the others. The future of Section 107 will act to complement the proposed three-stage originality test. Thus, by adding originality in assessing the original contribution from the derivative work, the author allows the court to enact just rulings and competition between the copyright owner and the derivative author. This approach follows the reasoning of Judge Miller in the *Trade-Mark Cases*,¹³⁷ which Justice Miller re-emphasized in *Burrow-Giles*, that a copyright is limited to the “original intellectual conceptions of the author.”¹³⁸ The courts could further examine whether to consider a derivative work in the second or third stage a parody to suffice for fair use. Courts could also further explain whether transformative use could be developed to become the three-stage test advocated in this article. The court must make the next move to comply with *Feist’s* finding, that a copyright first aims to benefit the public, and awards the author second.

VI. CONCLUSION

The Supreme Court’s ruling in *Feist* has demanded that an original work must satisfy both independent creation and creativity to balance fair use of a derivative work and the right of a copyright author to control ordinary derivative works.¹³⁹ The expectation of Circuit Judge Frank of “more than merely trivial” “distinguishable variations” in *Alfred Bell & Co.* remains a tenable and useful standard to judge whether a derivative work, irrespective of the public domain or copyright-protected status of the underlying work, demonstrates sufficient originality to enjoy

¹³⁷ *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (“[I]t is only such as are *original*, and are founded in the creative powers of the mind. The writings which are to be protected are *the fruits of intellectual labor . . .*”).

¹³⁸ *Burrow-Giles Lithographic Co. v. Saronoy*, 111 U.S. 53, 58 (1884).

¹³⁹ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991).

copyright protection. Preparing a derivative work is not necessarily transformative because copyrightability of the derivative work and the fair use finding are two separate issues. However, the current law in this area has been imprecise, and the transformative rule under *Campbell* is too limited to find fair use, particularly because it requires a work to be a parody to qualify for fair use protection.

We show that current law favors the original work. Without *ex ante* assessment of the originality of the work, granting too much protection to the first work tends to deny the contribution of the derivative work if it has a significant degree of originality. This is not the optimal approach to encouraging authors; the three-step approach is a more balanced form of providing protection for a truly original derivative work, depending on its originality and contribution. Under this proposal, fair use is only assessed for stage two or three works. Under this dual-approach, the rights of both the first and the derivative author can be more equally distinguishable based on a single element, originality. Hence, courts should assess the content of the derivative work with confidence. Originality is thus not merely *sine qua non* for copyrightability, but also for finding non-infringement for derivative works.