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## COPYRIGHT IS NOT ABOUT COPYING

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### INTRODUCTION

Generally speaking, copyright theory and practice can be characterized as divided into two broad copyright cultures. On the one hand, in common law jurisdictions, copyright is regarded as a policy instrument designed to serve the public interest in the production and dissemination of works of authorship. Not the author's right, but the public interest that both generates and justifies that right is the central animating concern of copyright law. On the other hand, in civil law jurisdictions, authorial entitlement is conceived not instrumentally but as a juridical recognition of rights inherent in the act of authorship as such. Not the public interest, but the inherent dignity of authorship is the axis around which copyright revolves. Terminologically speaking, these distinctions recall for us that what the common law world regards as *copyright* is rather known as *author's right* (*droit d'auteur*, *derecho de autor*, *diritto de autore*, *urheberrecht*, for example) in the civil law world.<sup>1</sup>

Professor Shyamkrishna Balganesh's paper is a welcome addition to a developing literature in the common law world insisting on the shortcomings or insufficiencies of the instrumentalist paradigm as an account of copyright law.<sup>2</sup> In this vein, the paper starts with the ob-

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<sup>1</sup> See Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, in OF AUTHORS AND ORIGINS 131, 131 (Brad Sherman & Alain Strowel eds., 1994).

<sup>2</sup> See e.g., Anne Barron, *Kant, Copyright and Communicative Freedom*, 31 LAW & PHIL. 1 (2012); Maurizio Borghi, *Copyright and Truth*, 12 THEORETICAL INQUIRIES IN LAW 1 (2011); Maurizio Borghi & Stavroula Karapapa, *Non-Display Uses of Copyright Works: Google Books and Beyond*, 1 QUEEN MARY J. INTELL. PROP. 21 (2011); Hugh Breakey, *Natural Intellectual Property Rights and the Public Domain*, 73 MOD. L. REV. 208 (2010); Abraham Drassinower, *Authorship as Public Address: On the Specificity of Copyright Vis-à-vis Patent and Trade-Mark*, 2008 MICH. ST. L. REV. 199 [hereinafter Drassinower, *Public Address*]; Abraham Drassinower, *Copyright Infringement as Compelled Speech*, in NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY (Annabelle Lever ed., forthcoming 2012) [hereinafter Drassinower, *Compelled Speech*]; Abraham Drassinower, *A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law*, 16 CANADIAN J.L. & JURISPRUDENCE 3 (2003) [hereinafter Drassinower, *Rights-Based View*]; Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1548–49 (1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 303–04 (1988); Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 CARDOZO ARTS & ENT.

ervation that the reduction of copyright law to a series of incentives and limitations to be economically understood loses sight of the specifically legal meaning of copyright law. On that basis, the paper sets out to formulate the juridical normativity of copyright from a private law perspective.

Three interrelated claims are proposed: (1) copyright law has a bilateral structure mirroring the correlativity of a private law action;<sup>3</sup> (2) the bilateral structure of copyright law is organized around the centrality in copyright law of the defendant's obligation not to copy (that is, of the wrong of copying);<sup>4</sup> (3) the internal structure of copyright law can accommodate external plural values, such that attentiveness to this internal structure is in the final analysis compatible with instrumentalist construals of copyright law.<sup>5</sup>

My purpose in this comment is to develop a single point: because it misunderstands the bilateral structure it seeks to identify (Part I — “*Bilaterality*”), Balganesch's paper misconstrues both the mischief or “wrong” that copyright law targets (Part II — “*Wrong*”), and the way in which the relation between copyright and other “values” is to be juridically understood (Part III — “*Plurality*”). I will conclude with some remarks on the theory of the public domain in copyright, and on the role of copyright theory in the critique of existing copyright law (Part IV — “*Private Law as Critical Theory*”).

## I. BILATERALITY

The concept of bilaterality denotes the relation between plaintiff and defendant as participants in a private law action.<sup>6</sup> Bilaterality is thus neither about plaintiff, nor about defendant, but about plaintiff and defendant held together as aspects of the private law action grasped as a unity. The point is not to juxtapose plaintiff and defendant as merely co-existing in the same place, so to speak, but rather to elucidate the larger whole of which each and both are but constituent and mutually constitutive dimensions. It is important to number things accurately here. Bilaterality is not about two. It is about the third, conceived as a single object, in and through which each of the

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L.J. 1059 (2008); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 520–21 (1990).

<sup>3</sup> See Shyamkrishna Balganesch, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664, 1667 (2012).

<sup>4</sup> See *id.* at 1667, 1670.

<sup>5</sup> See *id.* at 1665.

<sup>6</sup> On bilaterality, see ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 114–44 (1995); see also ALAN BRUDNER, *THE UNITY OF THE COMMON LAW* (1995); ARTHUR RIPSTEIN, *FORCE AND FREEDOM* (2009).

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two are what they are. This third is the togetherness of plaintiff and defendant as participants in a private law action.

Neither side of this bilaterality exists independently of the other. The correlativity at issue is radical. It goes to the root of the very significance of each of its poles. Just as a duty is unintelligible in the absence of the right of which it is a correlate, so is a right unintelligible in the absence of the duty of which it, too, is a correlate. The idea of correlativity is in this sense a methodological refusal to tear the relation of the correlates asunder by positing the primacy of either. The relation between plaintiff and defendant, right and duty, is the final, irreducible datum. The concept of bilaterality admits no further analysis. Neither side can claim priority over the other. Neither side can posit itself as the origin out of which the other is in any sense derived. To find one's starting point in either side, as Balganesch does by asserting the priority of the defendant's obligation not to copy, is already to misunderstand the object that the analysis seeks to elucidate. It is to seek to generate bilaterality out of only one of its poles.

## II. WRONG

An inquiry into copyright as a bilateral structure is thus neither an inquiry into the plaintiff's exclusive right to copy nor an inquiry into the defendant's duty not to copy. It is an inquiry into how copyright law structures their relation. A bilaterally grounded analysis does not ask "What is the plaintiff's right?" or "What is the defendant's duty?" It asks, rather, "In what way do the operations of the fundamental doctrines of copyright law affirm and sustain the bilateral relation between plaintiff and defendant as aspects of a copyright action?" Posed in this way, the starting point of the analysis avoids any semblance of either plaintiff-driven or defendant-driven unilaterality.

Thus, analysis of the bare concept of bilaterality already entails that, contrary to Balganesch's view, the defendant's duty not to copy is by no means the unilateral anchor or centre of the copyright system. Attention to copyright doctrine confirms that conclusion. Examples abound.

Copyright law posits the formation of the right it grants through the doctrine of originality. Originality is a fundamental condition of copyright protection.<sup>7</sup> Because it presides over the formation of the right, originality cannot help but demarcate the limits of the right. The doctrine of originality is thus inseparable from a distinction between copying and actionable copying. "Not all copying . . . is copy-

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<sup>7</sup> See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991); *CCH Canadian Ltd. v. Law Soc'y of Upper Can.*, [2004] 1 S.C.R. 339, 351 (Can.).

right infringement.”<sup>8</sup> Only copying of the plaintiff’s originality is actionable. Because the defendant’s duty not to copy is more specifically a duty not to copy the plaintiff’s *originality*, the duty not to copy arises only on the basis of distinctions between copyrightable and uncopyrightable subject matter. The defendant’s duty not to copy is thus neither the starting point nor the center of the copyright system. It is always already posited on the basis of distinctions made elsewhere.

Doctrinally speaking, this is but a way of saying that subject matter problems precede infringement problems. A defendant need not allege that she did not copy where she can allege that what she copied is not subject to copyright protection.<sup>9</sup> To put it otherwise, the plaintiff’s allegation that the defendant copied has copyright significance only to the extent that the plaintiff can show that what the defendant copied is a poem (that is, a work subject to copyright), not a mousetrap (that is, an invention not subject to copyright). It is not helpful to assert that infringement issues (that is, questions about copying) are in any sense prior. Asserting the priority of infringement by asserting the priority of the defendant’s duty not to copy risks leaving undertheorized the entire field of copyright subject matter, the very terrain over which the duty hovers.

The idea/expression dichotomy, yet another fundamental copyright doctrine, provides that copying the plaintiff’s ideas, even if original, is not actionable.<sup>10</sup> The dichotomy is a dichotomy of protection. Not idea but expression is subject to copyright. If the doctrine of originality provides that only copying of the plaintiff’s originality is actionable, the idea/expression dichotomy makes it explicit that it is not the plaintiff’s originality as such, but only the plaintiff’s original *expression* that is the subject matter of the defendant’s duty not to copy. Once again, the defendant’s duty not to copy is not elementary. It arises on the basis of distinctions made elsewhere.

The defense of fair use for the purpose of criticism, to give one more example, makes it clear that the duty not to copy original expression is not itself elementary. Where copying is for the purpose of criticism, and where copying is reasonably necessary for such a purpose, there the defendant is within his rights in copying the plaintiff’s original expression.<sup>11</sup> If the doctrine of originality and the idea/expression dichotomy tell us that only copying of original expression is actionable,

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<sup>8</sup> *Feist*, 499 U.S. at 361.

<sup>9</sup> *See id.* at 364; *Baker v. Selden*, 101 U.S. 99, 104 (1879).

<sup>10</sup> *See Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d. Cir. 1930); *Moreau v. St. Vincent*, [1950] 3 D.L.R. 713, 717 (Can.).

<sup>11</sup> *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575–77 (1994); *Hubbard v. Vosper*, [1972] 2 Q.B. 84 (Eng.).

the defense of fair use for the purpose of criticism tells us that not all copying of original expression is wrongful. The defendant's duty not to copy original expression is far from irreducible.

To be sure, it is true that to the extent that fair use for the purpose of criticism is construed as an 'exception' to copyright infringement, it follows that copying original expression does indeed give rise to a *prima facie* finding of wrongfulness — a finding that awaits considerations external to the core of copyright to be reversed. But this construal is by no means self-evident. Fair use is not an add-on to the copyright system, a super-added condition grafted onto an otherwise fully constituted order. On the contrary, the fact that, procedurally, fair use arises as a defense should not mislead us into positing that, substantively, fair use is anything less than integral to the copyright system as such.<sup>12</sup> It does not interrupt but rather continues and deepens the distinctions between copying and actionable copying that the doctrine of originality and the idea/expression dichotomy animate.

A brief perusal of copyright fundamentals reveals that copyright law is less a prohibition on copying, or an obligation not to copy, than an institutionalized distinction between permissible and impermissible copying. Copying *per se* is a merely physical act, devoid of juridical import. The wrong embedded in the act is not to be found in the bare act as such. Because copyright law is but a distinguishing between mere copying and wrongful copying, between copying and copyright infringement, the duty not to copy cannot be the axis around which copyright law revolves. The very thought of 'wrongful copying' already entails the proposition that the wrong is not in the copying. Only a certain kind of copying is wrongful. Simply put, this is why no theory of copyright law can position itself as a matter of the defendant's duty not to copy. Any theory of copyright law is and must be a theory of the distinction between mere copying and wrongful copying.

Instrumentalist theories, for example, understand the distinction between mere copying and wrongful copying through concepts such as efficiency or the public interest in the production and dissemination of works of authorship.<sup>13</sup> On this view, wrongful copying is inefficient copying, or copying contrary to the public interest. The idea/expression dichotomy provides an easily accessible illustration. On the one hand, the protection of expression offers an incentive to produce works of authorship, an incentive in the absence of which such production is at best precarious. On the other, the simultaneous

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<sup>12</sup> *CCH Canadian*, [2004] 1 S.C.R. at 364–65.

<sup>13</sup> See, e.g., William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 169–73 (Stephen R. Munzer ed., 2001); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 167 (2003).

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refusal to grant protection to ideas aspires to ensure that the protection of expression remains consistent with the dissemination requirement that ideas, as the building blocks of expression, be free for the taking. Generally speaking, the operations of copyright doctrine thus mediate a tension between incentive and dissemination, seeking to implement a balance granting each aspect of the copyright whole its proper share. This balance, operationalized through doctrinal distinctions between mere copying and wrongful copying, is the object that instrumentalist theories posit as copyright law. The idea/expression dichotomy is as much about the defendant's freedom to use ideas as it is about the defendant's duty not to copy expression. A theory of the latter, or of the priority of the latter, is just not a theory of the idea/expression dichotomy.

The bilaterality of copyright as a private law action also posits the idea/expression dichotomy as a particular instance of the distinction between mere copying and wrongful copying. Unsurprisingly, the logic of bilaterality finds the grounds of the distinction not in efficiency but in the relation between plaintiff and defendant as participants in a copyright action. The idea/expression dichotomy can once again serve as illustration. Consider the matter as follows. Were I to use in my work as an author ideas drawn from someone else's work, yet without copying that other person's expression, I would be exercising my own expressive capacities. Ideas per se cannot be copied; they can only be expressed anew. As copyright subject matter, my work as an author is by definition my own original expression regardless of the source of its ideas. Thus, to preclude me from discussing or adopting ideas in my work is to interfere with my original expression. To permit the plaintiff to copyright ideas would amount to an assertion that the plaintiff, yet not the defendant, has rights in her expression. In a word, copyrighting ideas is inconsistent with the defendant's authorship. The idea/expression dichotomy is an affirmation of both plaintiff and defendant as equally entitled to original expression. The defendant's duty not to copy expression is in fact unintelligible in the absence of the defendant's freedom to use ideas. The idea/expression dichotomy posits and sustains the bilaterality of the copyright action as the equality of the parties as authors. It is neither about plaintiff nor about defendant but about their equality as authors.<sup>14</sup>

Fundamental aspects of the fair use defense provide even clearer illustrations of the bilaterality of the copyright action. What I have in mind are those instances of the fair use defense that permit otherwise infringing reproduction of the plaintiff's work in the defendant's work

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<sup>14</sup> See Drassinower, *Rights-Based View*, *supra* note 2, at 9–10.

when the latter's use is "transformative."<sup>15</sup> Transformative use of this kind is permissible because it evidences that the defendant is not parrotting the plaintiff's work parasitically but rather responding to the plaintiff's work in her own, addressing it as the subject matter of her own authorial engagement.

Thus, as with the idea/expression dichotomy, the plaintiff cannot consistently deny the legitimacy of the defendant's work any more than he can deny that his, too, is but an authorship claim. Transformative use thus affirms and sustains, albeit in respect to original expression itself, the principle of authorship which both parties invoke and to which both are and must be subject. The centrality of authorship once again defines, limits, and supersedes the role of the defendant's duty not to copy in the copyright system. Copying is not per se wrongful. Not the physical act of copying, but its impingement upon the structure of bilaterality generates its wrongfulness or lack thereof.<sup>16</sup>

### III. PLURALITY

The private law correlativity of the copyright action suggests an understanding of the fundamentals of copyright doctrine from a single point of view. Not only originality and the idea/expression dichotomy, but also paradigmatic instances of fair use are, generally speaking, affirmations of the copyright concern with authorship. The bilaterality analysis reveals the structural continuity, rather than the rupture, between fair use and the rest of the edifice of copyright doctrine.

If only in order to ensure that issues of plurality do not arise prematurely, and therefore mistakenly, in the analysis of copyright law, this continuity is well worth emphasizing. Because copyright law is infused with concern over the defendant's freedom as an author, the lawfulness of the defendant's transformative use of another's work in her own flows from the very same considerations that underlie the plaintiff's copyright. Fair use is not, as Balganesch suggests, a mechanism for the defendant to introduce new considerations to avoid liability.<sup>17</sup> To put it otherwise, fair use is not about *excused* infringement but about the *absence* of infringement. At stake is not a search for considerations that would undo the plaintiff's otherwise complete cause of action. At stake is rather the insight that the plaintiff's cause of action cannot mature into a finding of infringement where the claim is inconsistent with the defendant's authorship. The plaintiff must make out his cause of action within the structure of bilaterality. He

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<sup>15</sup> *Campbell*, 510 U.S. at 579.

<sup>16</sup> See Abraham Drassinower, *Taking User Rights Seriously*, in *IN THE PUBLIC INTEREST* 462, 475 (Michael Geist ed., 2005).

<sup>17</sup> See Balganesch, *supra* note 3, at 1684-85.

fails to do so in situations involving transformative use, not because of new considerations invoked by the defendant, but because his claim is not cognizable within that structure.

The view that fair use is about wrongful yet harmless<sup>18</sup> copying similarly distracts from the fundamental concerns of copyright law. It is true, of course, that fair use analysis incorporates harm to the market for the original work as a factor. But harm is not determinative. Wrongful copying by the defendant remains wrongful even if it turns out to be utterly harmless to the market for the original. An entirely unsuccessful pirate edition is not any less wrongful because no one buys a single volume. By the same token, transformative copying by the defendant for the purpose of biting criticism is lawful even if it is harmful or utterly devastating to the market for the original.<sup>19</sup> Fair use is not about excusing the defendant's wrong because it was harmless. Fair use is not harmless use.

As I have noted, in the paradigmatic instance of transformative use, fair use is about determining whether the plaintiff's allegation, if left to stand, would be wrongful *to the defendant* in that it would deny her own standing as an author. Precluding a person's publication of her work because she copies the work of another in order to discuss it is as wrongful as producing a pirate edition of that other's work. Fair use safeguards the bilaterality of the action. A bilaterally focused theoretical account of copyright need not — and should not — reach for “new” considerations to explain the lawfulness of transformative use of an author's work in another's.

This does not mean, however, that fair use requires the defendant's authorship more generally, or that there can be no finding of fair use in the absence of the defendant's authorship. I have elsewhere formulated an authorship-centered account of the lawfulness of certain unauthorized uses even in the absence of the defendant's authorship.<sup>20</sup> Nonetheless, it would be by no means unreasonable to observe that considerations external to authorship, even if widely and bilaterally conceived, may in many instances sound as a matter fair use in copyright law. Because the questions that these instances would raise are about the relation between copyright and other juridically recognized interests, they would indeed call forth analyses involving new considerations.

Yet we need do little more than state the problem to see that the issues involved are not adequately framed as issues about the relation between copyright and market harm. For example, consider a case

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<sup>18</sup> *Id.* at 1685.

<sup>19</sup> See *Campbell*, 510 U.S. at 591–92.

<sup>20</sup> See generally Drassinower, *Compelled Speech*, *supra* note 2; Drassinower, *Public Address*, *supra* note 2.

where the defendant asserts the legitimacy of her copying not as matter of her own equal authorship but rather as a matter of her freedom of expression even in the absence of her own authorship. “It is not as author but rather as citizen,” she might say, “that I assert the legitimacy of my act.” What her assertion poses is a question not about the extent to which the defendant’s speech claim harms the market for the plaintiff’s work, but rather about the relation between authorship and speech in a juridical system that recognizes both.<sup>21</sup> The question points toward modes of juridical analysis that are able to articulate, elaborate, and resolve encounters between heterogeneous claims of right.<sup>22</sup>

There can be no doubt that the complexities involved in encounters of that kind are legion, yet even evoking them briefly is sufficient to ascertain that (1) paradigmatic instances of fair use, such as unauthorized transformative use of an author’s work in another’s, do not require invocations of external considerations or plural values; (2) where external considerations are indeed required, they do not arise under the rubric of harm; and (3) in any case, engagement with external considerations or heterogeneous claims dislodges even more forcefully the view that the defendant’s duty not to copy is the fulcrum of the juridical analysis. The undeniable procedural significance of copying in copyright law cannot be confused with its normative or analytical centrality any more than the procedural location of fair use as a defense in copyright law is an argument to relegate it normatively or analytically to the periphery of the juridical order. In a word, copying is defined by rather than defines copyright.<sup>23</sup>

#### IV. PRIVATE LAW AS CRITICAL THEORY

Centering the copyright system on the obligation not to copy relegates the public domain in copyright law to the periphery of the copyright system. The view that the defendant’s duty not to copy is the

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<sup>21</sup> See generally Michael D. Birnhack, *Copyrighting Speech: A Trans-Atlantic View*, in *COPYRIGHT AND HUMAN RIGHTS* 37 (Paul L.C. Torremans ed., 2004); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Speech and How Copying Serves It*, 114 *YALE L.J.* 535 (2004).

<sup>22</sup> See generally Abraham Drassinower, *Exceptions Properly So-Called*, in *LANGUAGE AND COPYRIGHT* 205 (Ysolde Gendreau & Abraham Drassinower eds., 2009).

<sup>23</sup> On the distinction between reproduction and infringement, see JESSICA LITMAN, *DIGITAL COPYRIGHT* 171–91 (2001); Borghi, *supra* note 2; Drassinower, *Public Address*, *supra* note 2; Abraham Drassinower, *Taking User Rights Seriously*, in *IN THE PUBLIC INTEREST* 462 (Michael Geist ed., 2005); Paul Edward Geller, *Beyond the Copyright Crisis: Principles for Change*, 55 *J. COPYRIGHT SOC’Y U.S.A.* 165 (2008); Jessica Litman, *Lawful Personal Use*, 85 *TEX. L. REV.* 1871, 1882 (2007); Ernest Miller & Joan Feigenbaum, *Taking the Copy Out of Copyright*, in *SECURITY AND PRIVACY IN DIGITAL RIGHTS MANAGEMENT* 233 (Tomas Sander ed., 2002); Sarah K. Stadler, *Copyright as Trade Regulation*, 155 *U. PA. L. REV.* 899 (2007).

core of copyright law misses the richness and fruitfulness of copyright law as an institutionalized distinction between mere copying and wrongful copying. Fundamentally, what turns on this distinction is the possibility of broaching the sphere of permissible copying not merely as an empty field devoid of core juridical import, but rather as an irreducible indication of the genuinely constitutive depth at which copyright law captures not only the wrongfulness but *also the lawfulness of copying*. Just as the idea/expression dichotomy is as much about the free availability of ideas as it is about the duty not to copy expression, so is copyright law generally as much about the defendant's as it is about the plaintiff's authorship. The bilaterality-focused inquiry neither does nor can construe things otherwise.

The upshot of the bilaterality-focused account is an integral and integrative conception of the public domain in copyright law. Lawful copying is as fundamental to copyright as wrongful copying. Lawful copying is more than what emerges once the duty not to copy has been circumscribed, or once so-called external considerations have come to constrain an otherwise fully constituted prohibition on copying. The public domain in copyright law is not what is left over once copyright has done its core job of prohibiting copying.<sup>24</sup> It's not just that the public domain is necessarily part and parcel of copyright law; the point is that affirming lawful copying — the public domain — is a condition for the very possibility of imposing the obligation not to copy. Because it grasps plaintiff and defendant as aspects of a unity that transcends each and both of them, the bilaterality standpoint cannot posit the plaintiff's entitlement to her original work without immediately positing, *inter alia*, the defendant's right to use it fairly. Originality and fair use, author rights and user rights, are but inextricable aspects of a manifold whole. Copyright law is thus unintelligible in the absence of an entrenched sphere of unauthorized lawful copying. The problem with starting with the defendant's duty not to copy is that, when posed unilaterally, it simply cannot generate the public domain as an internal condition of its own intelligibility.

This, then, is the point. The fundamental contribution of private law correlativity to the analysis of copyright law is not to affirm the analytical, juridical, or normative priority of the defendant's duty not to copy. By no means: *the whole point is that the very justifiability of the defendant's obligation not to copy literally turns on the affirmation of the public domain*.

It is in this respect that the bilaterality standpoint differs most deeply from the instrumentalist account. It is true that both share a constitutive focus on the distinction between lawful copying and

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<sup>24</sup> See generally Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990).

wrongful copying. But because the instrumentalist account posits the distinction as a matter of efficiency, it can provide only a contingent, as distinct from an integral or necessary, conception of the public domain. Unauthorized lawful copying is required only to the extent that it is deemed to be efficient. Thus, for example, if the affirmation of the free availability of ideas stems not from the defendant's freedom as an author but rather from an assessment that the transaction costs involved in protecting ideas are too high relative to the benefits such protection would secure, it follows that development of frictionless modes of demarcating ideas and licensing their use would at the very least suggest reevaluation — if not abandonment — of the idea/expression dichotomy as a doctrine fundamental to copyright.

This is not at all surprising, of course. Because instrumentalism construes copyright doctrine as an instrument of the public interest, demonstrable inconsistencies between copyright doctrine and the public interest must be resolved in favor of the latter. From an instrumentalist point, this is entirely obvious. To be sure, the suggestion that ideas may be somehow subject to copyright is bound to seem counter-intuitive, and for at least two reasons. One is that ideas are by nature quite unruly, hardly capable of distinct segregation and demarcation, so that even the hypothetical suggestion that they may be subject to protection cannot help but fill one's head with heavy thoughts about the dead weight of transactions costs. The other reason is that we are so accustomed to construe the idea/expression dichotomy as irreducible and fundamental to copyright that the suggestion that it may be abandoned seems irremediably foreign. Yet that is precisely the point. Instrumentalist theories both tolerate and generate foreign suggestions of that kind because they are not theories of copyright doctrine. They are theories of the public interest in the production and dissemination of information commodities otherwise known as works of authorship. Thus, conceived as an aspect of copyright doctrine, even the public domain is not necessary but contingent upon a calculation of its efficiency. Instrumentalist theory is a theory of the public *interest*, not the public *domain*. Once we have agreed that the reason we have a public domain is that it would be too inefficient to charge for it, we have also agreed that we can — and perhaps should — get rid of the public domain as soon as we find more and more efficient ways of charging for it. One-click licensing can liberate us from the public domain.<sup>25</sup>

Nothing of the kind is remotely conceivable under the logic of bilaterality. Nor can this be at all surprising. Because it is as con-

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<sup>25</sup> See generally Abraham Drassinower, *A Note on Incentives, Rights, and the Public Domain in Copyright Law*, 86 NOTRE DAME L. REV. 1869 (2011); see also Anne Barron, *Copyright Infringement, 'Free-Riding' and the Lifeworld*, in COPYRIGHT AND PIRACY 93 (Lionel Bently et al. eds., 2010).

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cerned with the defendant's authorship as it is with the plaintiff's, the logic of bilaterality cannot posit the duty not to copy expression in the absence of the free availability of ideas, nor can it posit the plaintiff's exclusive right to her original expression in the absence of the defendant's option to use it fairly. Not efficiency but the correlative equality of the parties as authors presides over the analysis. This is why instrumentalist and bilaterality-focused approaches are incompatible: whereas instrumentalism can dispense with the bilaterality of the parties, the bilaterality-focused analysis regards bilaterality as part and parcel of the very object to be analyzed. It cannot give up the constitutive correlativity of the private law action in the name of the public interest.

The irony worth pondering is that, precisely because of this insistence on the correlativity of the private law action, the bilaterality analysis generates the public domain not as a contingent feature but as a necessary condition of the possibility of copyright law. The radical correlativity of the private law action means that the public domain is radically nonnegotiable. In a word, the public domain is immanent in copyright.

Current copyright discussion is to a large extent a debate about copyright expansion. The so-called copyright wars stage an encounter between copyright maximalists and copyright minimalists, pro- and anti-expansionist views of the purpose and meaning of the copyright system. On the whole, this discussion takes place entirely within the instrumentalist paradigm, as a debate about the merits or lack thereof of particular levels of copyright protection from the standpoint of the public interest in the efficient production and dissemination of works subject to copyright.

In this context, the contribution of private law correlativity is to posit and elaborate an immanent concept of the public domain in and through an account of the internal structure of copyright law as a private law action. The norms invoked against existing expansionist copyright practices are in this way derived from copyright itself; that is, from the requirements of an elucidation of the copyright system as a coherent whole informed by the bilaterality of the action. The result is a critique of existing copyright in its own terms — not merely a critical theory, but more specifically a critical theory of *copyright*.

Balganesh is to be congratulated for examining the defendant's obligation not to copy in copyright law from a private law standpoint. All the more so in a discursive context in which instrumentalism is clearly dominant as a theoretical model. In my view, however, the analytical fruitfulness of private law correlativity for our understanding of copyright law admits and demands a different formulation. Nonetheless, there can be no doubt that contributions seeking to develop it are both needful and important.