
TRESPASS-COPYRIGHT PARALLELS AND THE HARM-BENEFIT DISTINCTION

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Responding to Shyamkrishna Balganes, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009).

Foreseeability and Copyright Incentives presents an impressive and well-developed argument for changing the current elements for proving copyright infringement.¹ Currently, the elements of the plaintiff's cause of action largely follow the tort of trespass to land: volitional entry (for land) or volitional copying (for copyright) gives rise to liability regardless of proof of harm and without any need for the plaintiff to prove the defendant acted unreasonably. Many scholars have criticized copyright law for following the strict liability model of real-property trespass,² and have suggested alternatives that would more resemble conditional causes of action³ such as unfair competition, nui-

* © 2009 by Wendy J. Gordon. Philip S. Beck Professor of Law, Boston University School of Law; Bacon-Kilkenny Distinguished Professor of Law (Visiting), Fordham University School of Law. This Essay is dedicated to Judge Guido Calabresi, whose notion of "secondary costs" helped me come to the argument I advance here. For stimulating comments and discussion, I thank Marsha Ackermann, Stacey Dogan, Brett Frischmann, Jeanne Fromer, James Grimmelman, Barbara Lauriat, Gregg Macey, Mike Meurer, Marc Poirier, Henry Smith, Chris Sprigman, Rebecca Tushnet, and Ben Zipursky, as well as the editors of this Review. Also helpful were Peter Menell and the other participants at the Boston University conference entitled, "What Does the Economics of Property Law Teach Patent, Copyright and Trademark Scholars?"

¹ Shyamkrishna Balganes, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009).

² See, e.g., Stanley F. Birch, Copyright Fair Use: A Constitutional Imperative, The 36th Annual Donald C. Brace Lecture (Nov. 1, 2006), in 54 J. COPYRIGHT SOC'Y U.S.A. 139, 147 n.22 (2007) (outlining three weaknesses of the property analogy); Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 974-76, 983-85 (2007) (criticizing the use of trespass-to-land models in copyright); see also Clarisa Long, *Information Costs in Patent and Copyright*, 90 VA. L. REV. 465, 469-89 (2004) (examining how the differing composition of intangible goods can affect information costs: for some things stricter liability can be "an information-cost reducing strategy," *id.* at 511, while for others, such liability can "impose information costs on individuals past the point of diminishing marginal returns," *id.* at 488).

³ One model of conditional rather than strict liability is nuisance law. See Christopher M. Newman, *Infringement As Nuisance* (George Mason Univ. Law & Econ. Research Paper No. 09-17, 2009), available at <http://ssrn.com/abstract=1354110>. Another alternative is to strengthen the fair use doctrine and require proof of "harm" before fair use would be denied. See Bohannon, *supra* note 2. Professor Christina Bohannon, like Balganes, has argued that "foreseeable harm" needs to play a much larger role in copyright law. However, unlike Balganes, Bohannon sees many courts as already using a harm-based model and focuses on the fair use doctrine rather than on reformulating the plaintiff's cause of action. Another such model is the law of unjust enrichment, also known as restitution. For an exploration of restitution as a model for regulating the

sance, or negligence.⁴ Professor Shyamkrishna Balganesh makes a strong contribution to this school of thought, arguing that copyright plaintiffs should be required to prove foreseeability. In this short Essay, I will suggest some new reasons why there might be good reasons why the tort of copyright infringement should indeed be reformulated to abandon the trespass-to-land model, and explore some of the merits and shortcomings of Balganesh's own version of the revised tort.

I. WHY COPYRIGHT IS DIFFERENT FROM LAND OWNERSHIP: INTRODUCING A HARM-BENEFIT HYPOTHESIS

As mentioned, the real-property tort known as trespass makes any volitional boundary crossing unlawful. Boundary crossings that have not been consented to are actionable even if the trespasser has a socially beneficial use in mind, and even if in good faith he reasonably believes he has permission to be on the land. Admittedly, trespass is subject to defenses such as necessity (such as docking at a stranger's island to save one's life when a storm suddenly threatens).⁵ Nevertheless, boundary crossings that are socially desirable are often not privi-

copying of intangibles, see Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149 (1992) [hereinafter Gordon, *Restitutory Impulse*]. For a recent thought experiment of my own on increasing the extent to which copyright follows a negligence model, see Wendy J. Gordon, Keynote Address, Harmless Use: Gleaning from Fields of Copyrighted Works (Oct. 31, 2008), in 77 FORDHAM L. REV. 2411, 2414-35 (2009) [hereinafter Gordon, Harmless Use]. I call the work a thought experiment because its recommendations are based on assumptions that would require empirical verification.

⁴ Copyright and negligence already serve as partial mirror images of each other: Copyright seeks to internalize benefits and incentivize plaintiffs toward socially desirable production. Negligence seeks to internalize harms and incentivize defendants away from undesirable behavior. Both fields also have concerns with the incentives of the "other" actors. Negligence law seeks to make plaintiffs more careful (reduce moral hazard) by making plaintiffs prove negligence and by giving defendants defenses such as assumption of risk and contributory or comparative negligence. Copyright law seeks to encourage defendants to build on predecessor works by both limiting the plaintiffs' rights and providing defenses.

Both bodies of law also embed foreseeability into their torts. The tort of negligence puts a burden on the plaintiff to prove that the harm done was foreseeable to a reasonable person in the defendant's position. The fair use doctrine within copyright encourages defendants to show that their use causes no significant harm to markets that the plaintiff expected to exploit. That is, the defendant might try to show that if his use has any negative impact, it affects only markets unforeseeable to plaintiffs. On the general question of negligence and copyright parallels, see generally Gordon, Harmless Use, *supra* note 3, at 2424 n.55 (OUTLINING THE MAJOR MIRROR-IMAGE RELATIONS); and Wendy J. Gordon, *Copyright As Tort Law's Mirror Image: "Harms," "Benefits," and the Uses and Limits of Analogy*, 34 MCGEORGE L. REV. 533 (2003).

⁵ *Ploof v. Putnam*, 71 A. 188 (Vt. 1908) (upholding the sufficiency of a complaint seeking damages against a landowner for injuries resulting when the defendant's servant unmoored the boat of a young family that had sought shelter from a storm on the defendant's island); see also *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910) (holding that staying attached to dock after permission is withdrawn may be permitted under the doctrine of necessity, but necessity does not excuse the boat owner from the obligation to pay for any harm caused).

leged; rather, they give rise to liability.⁶ Copyright law has a broader “necessity” privilege (we call it the doctrine of “fair use”⁷) and contains an extensive set of detailed exceptions and limits, including a durational term limit. But for subsisting copyrights, the cause of action known as “copyright infringement” possesses much the same structure as does trespass to land: any volitional copying of a substantial and copyrightable portion of another’s work is infringing, even if it is socially desirable.⁸ Reasonable mistake, or even the subconscious nature

⁶ This should not be overstated. “The law also allows non-owners to make more efficient uses of land over time through prescriptive easements, adverse possession, the establishment of hunting customs, etc., making clear that the delegation of land use decisions to individual owners comes with strings attached.” E-mail from Gregg Macey, Visiting Assistant Professor, Fordham Univ. Sch. of Law, to Wendy J. Gordon (Apr. 22, 2009) (on file with the Harvard Law School Library). The law of real property can also be more generous to the public than is copyright. *See, e.g.*, Wendy J. Gordon, Keynote Address, Fair Use: Threat or Threatened (Feb. 25, 2005), in 55 CASE W. RES. L. REV. 903, 907–08 (2005) (comparing copyright’s anticircumvention rules to state law governing private property that blocks access to public resources).

⁷ 17 U.S.C. § 107 (2006). “The privileges to trespass have evolved over the years into a discrete set of defined privileges. But copyright law is newer, and ‘fair use’ [is] one doctrine . . . doing the work of many” Wendy J. Gordon, *Inquiry Into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1391–92 (1989) (footnote omitted). The fair use defense cuts a swatch across several common law categories, embodying not only a version of the “necessity” privileges, but also privileges such as self-defense. *See* *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1153 (9th Cir. 1986) (holding that fair use treatment is warranted to allow “an individual to defend himself” against depictions in “a copyrighted work containing derogatory information” about him by allowing the individual to copy relevant parts of the work); *see also* Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009) (identifying several “policy clusters,” *id.* at 2546, representing separate fair use strands).

I am indebted to Professor Benjamin Zipursky for reminding me of this point and of the useful way that Professor Pamela Samuelson’s article addresses it.

⁸ As I have argued elsewhere, fair use should be favored for a socially desirable use that is unlikely to come into being through market purchase. For example, when a use generates positive externalities that the putative licensee cannot capture, perhaps making him unable to afford a license, fair use should apply. *See generally* Wendy J. Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982) [hereinafter Gordon, *Fair Use*]. It is a separate question whether in practice the combination of the market, statutory exemptions, and fair use actually facilitates all socially desirable uses. Many of us believe fair use needs to be more broadly interpreted than it is.

A note regarding my market failure model: Balganesch oddly asserts that, “[Gordon’s] model starts from the assumption that a creator’s incentive lies in unfettered control over *all possible* uses and that anything that detracts from such control is necessarily an interference with that incentive.” Balganesch, *supra* note 1, at 1587. It is true that my model starts with the statutory grants of control as a baseline, and that decision may be questionable. But the statute hardly gives control over “all possible uses.” The statute eliminates from authorial control all private performances, resale or rental of purchased copies, imitating the sound of a famous sound-recording, and a myriad of other uses — including, of course, public use of facts and ideas in the copyrighted work and all uses that occur after a copyright expires. Balganesch is hardly the only scholar to attack the notion that copyright gives owners rights to “all benefits,” but I do not know any judge or commentator who propounds the notion itself.

of the copying, is no excuse.⁹ A copyright or trespass plaintiff need not prove that the defendant's trespass was socially undesirable or that it caused any harm, unlike in negligence, where the plaintiff must prove that the defendant acted unreasonably, that these actions caused the plaintiff's harm, and that the harm was foreseeable.

Balganesh suggests that the elements of the tort of copyright infringement should change to require plaintiffs to prove foreseeability. But why? Balganesh does not fully tell us. His main point seems to be that, constitutionally and traditionally, incentives are key to copyright, and foreseeability tailors the cause of action to incentives. I agree with both observations, but they do not get us all the way home. Yes, incentives are particularly important to copyright, but from an economic perspective, land ownership and copyright ownership are both incentive-based institutions. Both land ownership and copyright can impose social costs when owners are enriched by surprising (unforeseeable) uses that they are ill-equipped to exploit. So what makes copyright special? Why diverge from the trespass-to-land model?¹⁰

Several answers are implicitly presented by Balganesh. His primary answer seems to be this: When copyright enables monopoly pricing, it imposes a deadweight loss that can be economically justified only when the deadweight loss is outweighed by positive incentive effects. Giving a copyright owner control over a market that was objectively unforeseeable to the author creates a windfall that is inefficient or unfair. Foreseeability allows a court to restrict copyright to those occasions when the plaintiff might plausibly have been incentivized by the prospect of legal recovery.¹¹ In his abstract, Balganesh writes that "creators... need to be given *just enough* incentive to create in order to balance the system's benefits against its costs."¹² This answer is good, but partial. Balganesh recommends a switch from a "rule utilitar-

⁹ Infringement also results if the defendant has copied unconsciously and in good faith believes her infringing production to be original with her. See, e.g., *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 181 (S.D.N.Y. 1976) ("[I]nfringement of copyright . . . is no less so even though subconsciously accomplished."). On the dangers of the "subconscious copying" rule, see, for example, Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009, 1028-32 (1990).

Some strict liability aspects of the copyright tort are more defensible. Under 17 U.S.C. § 106(1), (3) (2006), a publisher will be liable for printing and selling a plagiarized story even if the publisher had received persuasive written assurances of originality, much as a careful employer is vicariously liable for employees' carelessness. In my view, the copyright statute collapses the publisher's vicarious liability into the basic infringement tort, and I accept this as a desirable administrative convenience.

¹⁰ Thanks to Professor Keith Hylton for articulating a "market failure" formulation of the issue.

¹¹ Balganesh, *supra* note 1, at 1590.

¹² *Id.* at 1571 (emphasis added).

ian”¹³ approach to an “act utilitarian” approach, and any such switch has costs. It is possible that the administrative costs of individualized inquiry into foreseeability may be greater than the deadweight losses so avoided.¹⁴

So we do not really know, absent extensive empirical inquiry, if more or less social product would be obtained through Balganesh’s approach than through copyright’s current approach. And regarding the comparison with real property, land is notorious for generating income in excess of what is needed to bring forth and maintain the property (thus the notion of “rent”). Balganesh’s argument sometimes seems motivated by a suspicion of windfalls; real property owners are the *locus classicus* of windfalls.

But Balganesh is certainly headed in a fruitful direction, and no single article can do everything. This Essay will supplement the answers Balganesh supplies. In so doing, it will make use of existing literatures and contribute one potentially novel point — namely, that the harm-benefit distinction has an impact on how the law should treat tangible versus intangible resources.

First, let me remind the reader of a standard account of how tangible and intangible products differ. This account begins by positing that the common law trusts that landowners’ self-interest prods them into making publicly acceptable decisions because, via the “invisible hand,” their private costs and benefits are made to match social costs and benefits. That is, the law generally defers decisions about land use to individual landowners as mini-sovereigns, generally refusing to second-guess those private decisions and trusting that in following their self-interest the owners will unknowingly act as stewards of the public interest.¹⁵ Whether owners can indeed carry out this stewardship function in large part rests, of course, on whether their private incentives will mimic social costs and benefits.

So we can reframe our initial question as follows: is there any reason for the law to trust the “invisible hand” *less* when copyright owners rather than land owners are at issue? The literature suggests many such reasons. For example, intangibles like works of authorship can be extensively shared without damage to the owners, which is not as

¹³ *Id.* at 1582.

¹⁴ See, e.g., Henry E. Smith, *Intellectual Property As Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1748 (2007) (arguing that “more direct” and “costly” “tailored solutions” should be compared with “simple on/off signals” like the right to exclude).

¹⁵ See Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 984 (2004) (“[T]his strong form of delegation of the ‘gatekeeper’ right to owners . . . makes sense on an information-cost theory: Judges and juries need not individuate and evaluate the reasonableness or value of uses of the land.”). See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

true of tangibles. This nonrivalry means that, unlike land, a decentralized use of copyrighted work is unlikely to result in tragedy of the commons and more likely to suffer from tragedy of the *anticommons*.¹⁶ Further, use of a work by a myriad of different transformative artists will be (given the desirability of variation in new works¹⁷) highly beneficial. Moreover, a market can actually be destructive to certain pursuits. After-the-fact requests for permission are subject to notorious sunk-cost problems.¹⁸ And attempts to avoid these problems can be even more costly. Imagine that Bob Dylan's lawyers interrupt him in the midst of creating a new song, and tell him to stop composing until he asks permission for a set of quotations he is embedding in his lyrics. The interruption could be fatal to the musical project.¹⁹

Land and copyright invasions also differ in privacy costs. Physical intrusions can easily disturb private activities; by contrast, a copy can

¹⁶ The tragedy of the commons (a concept originating with Garrett Hardin) refers to the waste and loss that can result when too little ownership or regulation leaves a resource prone to overuse and spoilation. It is sometimes used as an argument to institute private ownership rights. The tragedy of the anticommons refers to the waste and loss that can result from *too much* ownership, and is sometimes used as an argument to limit private ownership rights. On ownership anticommons, see MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* 1–22 (2008); and Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 *SCIENCE* 698, 698 (1998). Intangibles are probably more likely to be afflicted with the anticommons problem due to two phenomena: the frequently encountered difficulty of locating copyright owners (as compared with the extensive use of title registries for land and Article 9 liens), and the numerous ways that a single use of an intangible might need to be licensed in order to be lawful. To illustrate the latter point: Assume a movie maker wants to license a particular singer's rendition of a popular song for use, with suitable modulation, as background music to a particularly dramatic moment in the story. This use of the sound recording may constitute a "reproduction" and the "making of a derivative work" and/or "compilation," and the movie when shown needs consent for the "public performance." In such a case, not only must the movie maker deal with two copyrights (one for the musical performance embodied in the sound recording and the other for the underlying musical composition), but each of the sub-rights (analog or digital performance, reproduction, and so on) within each copyright may also be owned by unrelated entities.

¹⁷ Paul Goldstein's copyright treatise sees the production of "variety" as a primary purpose of copyright. See PAUL GOLDSTEIN, 1 *GOLDSTEIN ON COPYRIGHT* § 1.14.2, at 1:57 (3d ed. 2006 & Supp. 2008) (noting copyright's "general object of encouraging the production and dissemination of the widest possible variety of literary and artistic works desired by consumers").

¹⁸ In copyright these are exacerbated by § 103(a), which provides that "protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully." 17 U.S.C. § 103(a) (2006). As expansively interpreted by some courts, notably Judge Posner's opinion in *Pickett v. Prince*, 207 F.3d 402 (7th Cir. 2000), § 103 can deprive a creative person who uses others' work of *any* copyright — even in portions of his work that do not employ anyone else's work — unless he obtains advance permission or has shelter in fair use.

¹⁹ It is partly for this reason that I have explored keeping copyright defendants free from liability unless a copyright plaintiff can prove, *inter alia*, either that the defendant caused harm, or that the defendant is engaged in making licensing and other bureaucratic arrangements prior to and during the production process. Gordon, *Harmless Use*, *supra* note 3, at 2414–35.

be made “a thousand miles from the owner and without his ever becoming aware of the wrong.”²⁰ Further, the privacy of the home usually cuts *against* strong copyright enforcement, for it is within homes — on home computers and tape recordings and DVRs — where much unlicensed copying occurs.²¹

Most importantly, when the owner of land is not managing it in a socially desirable way, that “error” often is corrected through the market: if someone other than the owner is capable of making a more beneficial use of the land, she can probably also make more profit from it and will purchase or lease it.²² It can be harder for a market to correct “errors” in the allocation of speech than in the allocation of tangibles. Most notably, the value of speech is rarely measurable in monetary terms.²³

For these and other reasons, copyright law’s fair use doctrine permits judges and juries to decide whether a use of a copyrighted work is socially desirable or not, and the inquiry into whether a defendant’s work is “substantially similar” leaves much scope for fact-finder discretion. In ways like this, the law delegates less authority to copyright

²⁰ *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 19 (1908) (Holmes, J., concurring specially). Justice Holmes also wrote, “[Copyright] restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right.” Justice Holmes argued further that because of this intangibility, copyright “could not be recognized or endured for more than a limited time” and is therefore uniquely a “product of statute.” *Id.*

²¹ Thus, the Supreme Court opinion in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), repeats the word “home” about three dozen times in the course of holding VCR time-shifting to be fair use. *See, e.g., id.* at 445; *see also id.* at 430 n.11.

²² Another reason for distrusting rules that centralize power in the copyright owner might be the difficulty of determining boundaries in ownership claims over intangibles. *See, e.g.,* Jeanne C. Fromer, *Claiming Intellectual Property*, 76 U. CHI. L. REV. (forthcoming 2009). *But see* Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265, 276 (1977) (“[A] patent ‘prospect’ increases the efficiency with which investment in innovation can be managed . . . [by] put[ting] 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 searchers.”). Balganesch nicely discusses the limitations of prospect theory. Balganesch, *supra* note 1, at 1621–24.

²³ In addition, many socially desirable uses of speech are critical of existing power holders, including copyright holders, and suffer from the welfare effect I’ve called “pricelessness.” Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Part of the Story*, 50 J. COPYRIGHT SOC’Y U.S.A. 149, 182–87 (2003); *see also* E. J. Mishan, *The Postwar Literature on Externalities: An Interpretative Essay*, 9 J. ECON. LIT. 1, 18–19 (1971) (illustrating welfare effects). The courts tend to speak of authorial reluctance to license parodies; “welfare effects” provide a formal way of describing why such refusals to license are more suspect than ordinary refusals. *See, e.g.,* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994); *see also* Gordon, *Fair Use*, *supra* note 8, at 1632–33 (describing antidissemation motives as a form of market failure).

owners than to real property owners.²⁴ But it is recognized that even this lesser delegation may be too much.

I'd like to add to the above-listed considerations an issue that I do not think the literature has previously addressed in a serious way — namely, the harm-benefit distinction. Consider the following hypothesis: People (including property owners) are less motivated to “capture benefits” than to avoid losing a possession. Similarly, losing an opportunity to profit does not motivate action as strongly as avoiding harm. Intangibles are more open to harmless²⁵ and beneficial use by strangers than are tangibles such as land. Therefore, owners of land and other tangibles are more reliable maximizers of the value of what they own than are owners of intangibles.

Let me unpack the assumptions and conclusion of this hypothesis. First, consider my factual claim that people are not as good at capturing benefits as they are at avoiding harms. Loss aversion leads to status quo bias and endowment effects, which are two phenomena commonly cited to show an “irrational” reluctance to sell the things one owns.²⁶ Experiments in many Western nations show that people often value the things they are given — university coffee mugs are typical examples — more than identical things they would need to purchase. Such phenomena are often considered irrational. Perhaps they arise out of our genetic heritage, perhaps out of a background set of beliefs about fate and the “hand one is dealt,” or perhaps out of a conditioned set of habits that serve us well in other circumstances.²⁷ But in many circumstances the endowment effect is both rational and legitimate. Each of us is a tiny entity with a unique history; our sense of having a legitimacy of self in the face of the world's immensity may depend in part on our keeping hold of some objects in our history.²⁸

²⁴ Sonia K. Katyal & Eduardo M. Peñalver, Property Outlaws II: The Anti-Delegation Architecture of Intellectual Property (Apr. 7, 2009) (unpublished manuscript, on file with the Harvard Law School Library).

²⁵ I am including in my implicit definition of “harmless” behavior any behavior by third parties that does not interfere with an owner's current and expected markets. I think that is how the typical owner would view (or “frame”) the issue. In contrast, an owner who conceptualized all potential licensing fees as already his might frame the lack of license fees as a harm. On framing in general, see Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 197–99 (1991).

I am indebted to Professor Gregg Macey for this point.

²⁶ *Id.* at 194.

²⁷ *Id.* at 194–95 (recounting experimental redesign to determine whether “the discrepancy between buying and selling prices might be produced by the thoughtless application of normally sensible bargaining habits, namely understating one's true willingness to pay (WTP) and overstating the minimum acceptable price at which one would sell (willingness to accept or WTA”).

²⁸ On the proposition that at least some “things” have special value, see Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987). See also ANNETTE B. WEINER, *INALIENABLE POSSESSIONS: THE PARADOX OF KEEPING-WHILE-GIVING* (1992) (emphasizing the importance of artifacts that played a role in the history of a family or tribe).

Non-cash gifts have a special role in our sense of self. If so, even a humble coffee mug with a school logo may possess more emotional weight as a souvenir if the mug is given rather than purchased. So it is not surprising that we fear losing “our” objects more than we value gaining similar objects we do not own. Similarly, I speculate, we will be more motivated to avoid harm to our objects than we will be to obtain good prices for selling or leasing our objects, and more motivated to avoid harm from licensing our copyrights than we are to garner license fees from new uses.

The biases documented by modern behavioral economics are not the whole story. Which is lucky, since we cannot be sure how endowment effects would play out when works of authorship are in question. On the one hand, endowment effects might be stronger for works of authorship than for other objects. Just as things we buy may have lesser significance than things we are given, things we are given may have lesser significance for us than things we create. That creative emotional stake might reinforce the endowment effect. But on the other hand, an author can license or even assign away her copyright and still retain copies for her private use. This retention of possession²⁹ could undermine the endowment effect.³⁰ How these two forces (and others) would play against each other is at this point unknown.³¹

Since the way in which endowment effects will affect the licensing of intangibles is very uncertain, let me add what should be an uncontroversially “non-irrational” observation: The loss of something already embedded in our lives brings with it a host of follow-on costs. And this is true whether or not we irrationally tend to hold on to our objects harder than we yearn for the objects we do not yet have. A rational actor knows that losses are likely to impose more dislocation costs than are gains.

Most of our preferences and activities are interdependent. If my apartment burns, my whole life changes — in addition to the trauma I might experience, consider how work and family life will be inter-

²⁹ A copyright seller’s retention of copies need not interfere with a purchaser’s plans to exploit the copyright; this is known as nonrivalry. In addition to physical nonrivalry, the structure of copyright law permits private retention of copies, as well as private display and private performance. 17 U.S.C. § 106 (2006).

³⁰ In the text, I am speaking of the copyright owner as a creative person. Separate examination would be needed for copyright intermediaries (such as publishing companies) and entities that own copyrights through work for hire arrangements. In fact, one of the reasons our copyright law allows assignments and work-for-hire ownership may be to minimize the effect of creators’ behavioral biases.

I am indebted to Professor Christopher Sprigman for this last point.

³¹ Chris Sprigman is currently engaged in experiments to test whether the endowment effect operates in “markets” for creative work. See, e.g., Christopher Sprigman & Christopher Buccafusco, Valuing Intellectual Property: An Experiment (June 3, 2009) (unpublished abstract, on file with the Harvard Law School Library).

rupted as I attend to tasks like finding new housing or supervising contractors at my old abode; if I have to move, consider the cost of seeking new social and economic networks. The loss of my home might alter my life in ways my life would not have been changed if the lottery gave me an apartment's-worth of money. The same is true even if the loss is voluntary. To give up one apartment for a more cheerful one across town may not be as traumatic as being burned out, but I still have to take into account the dislocation and relocation costs. Given the interrelated structure of our investments of emotion, effort, and physical resources, an injury or even mere disruption to one thing or person we value will have domino-like effects on many of our other interests, both compensable and noncompensable.

Judge Guido Calabresi identified follow-on effects in the accident context and named them "secondary costs."³² The "secondary cost" nomenclature, identifying costs that arise after and because of the immediate loss, can be usefully expanded to the instant context as well. In part because of secondary costs, it can be rational to fear loss of an object more than we would desire to obtain that object.³³ Therefore, whether copyright owners do or do not experience endowment effects,³⁴ I think they will rationally be less eager to garner licensing revenues (a benefit) than they will be to avoid harms (whether commercial harm such as loss of markets or emotional harm such as ridicule).

But this may not be the case. As Adam Smith famously noted, many humans are overly optimistic about their chances for success.³⁵

³² Guido Calabresi, *THE COSTS OF ACCIDENTS* 27–28 (1970). The "primary cost" of an accident includes immediate injuries such as the breaking of a leg; the "secondary cost" comes later — for example, that the leg might be lost if medical attention is not promptly sought.

³³ We could quibble over definitions here. If the danger being anticipated *does not include* the secondary costs of disruption, then it is rational to be more averse to the risk of loss than a mere numeric calculation would suggest. But if the cost of the danger being anticipated is set at an amount that *does include* the secondary effects, then it is arguably irrational to spend more on averting the risk than would be suggested by a numeric calculation of danger multiplied by probability. People and institutions sometimes do and sometimes do not include the kind of consequential economic and emotional damage that a loss imposes. Consider, for example, that the insurance on a condominium or house includes some significant disruption expenses (such as rent on alternative housing) but not others (such as disruption to work and school performance, or the trauma itself).

³⁴ Loss aversion and status quo bias, those supposed irrationalities, might be conditioned (inter alia) by continual exposure to the extra and often hidden costs imposed by change, particularly change in the form of loss.

³⁵ Adam Smith argued: "The chance of gain is by every man more or less over-valued, and the chance of loss is by most men under-valued, and by scarce any man, who is in tolerable health and spirits, valued more than it is worth." 1 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 124 (Edwin Cannan ed., Modern Library 1994) (1776). Nevertheless, loss aversion still seems to me the more prevalent. In any event, of course, this whole set of issues calls for more factual investigation.

Such an overconfidence bias could have a variety of effects. On the one hand, overconfidence could counteract both irrational loss aversion and rational assessment of secondary costs,³⁶ thus minimizing the differentiating effect that nonrivalry might otherwise have in making copyright owners less sensitive to licensing opportunities than landowners. On the other hand, overconfidence can lead to owners demanding excessively high prices. Such an effect could reinforce an undesirably low level of licensing for copyrights, particularly if authors are more prone to overconfidence than other owners because of their personal connection with the item being sold.³⁷

I raise the question of how the overconfidence bias interacts with other behavioral traits in part to illustrate that my judgments here really constitute a call for further empirical investigation. Not only are my judgments somewhat speculative when I compare how owners of tangibles and intangibles would react to licensing opportunities, but in addition my judgment that fear of loss predominates for copyright is open to factual dispute. Nevertheless, let me summarize.

If the non-Coasean³⁸ observation is accurate that people fear loss more than they desire gain, this gives us the first premise of a syllogism: an owner will respond less readily to opportunities to maximize the beneficial use of her property than she will to opportunities for avoiding harms to it. Although some tangible property can be harmlessly shared,³⁹ intangibles (such as the patterns that make up “works of authorship”) are much more likely than tangibles to be nonrival and inexhaustible. This leads us to a second premise: that copyright is more likely than real property to involve harmless but beneficial uses

I thank Shyamkrishna Balganesh for reminding me of the behavioral research pointing to overestimation of one’s likelihood of success and Gregg Macey for reminding me how overconfidence can derail negotiations.

³⁶ Conceivably, overoptimism could overcome loss aversion. For example, if a person hates out-of-pocket costs (losses) thirty percent more than he or she hates bearing opportunity costs (foregone gains) — but he or she underestimates the odds of loss occurring by 30 percent or overestimates the gain by 30 per cent — the result may be the same as if the person had no loss aversion.

³⁷ See Jeffrey L. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1193–95 (2003) (“Inventors arguably spend so much energy on their products and focus so intently on their benefits, that self-serving biases ensure that they overvalue their innovations. Consequently, inventors and designers might demand too much to license their inventions and defend their rights too vigorously.”).

³⁸ Nobel laureate Ronald Coase assumed symmetry between out-of-pocket cost and opportunity cost as part of his classic demonstration of the importance of transaction costs. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). For one critique of this assumption, see, for example, Gordon, *supra* note 23, at 178–87. I argue that welfare effects and endowment effects may be rare in most markets, but are much more common in markets for speech and expression.

³⁹ I am indebted to Professor Stan Liebowitz for showing how durable goods can exhibit some of the same nonrivalries that one sees in intangible goods.

by third parties. If the preceding two premises are accurate, then this conclusion may follow: since owners are likely to be more vigilant in avoiding harms than in pursuing benefits, and since nonharmful benefits are more likely to occur in the case of intangibles, copyright owners are less likely to maximize the social value of their property than are the owners of tangible property.

This quasi-syllogism suggests that it is far less clear that the market can “correct for” the misallocation of rights to control artistic works than the misallocation of rights to control real property. Without the prospect of a “harm” to call attention to a competing use, and without the definiteness of measurement that “harms” can provide to real property owners, copyright owners might be less prone than tangible property owners to engage in privately and socially valuable licensing. When this reluctance is coupled with the effects of nonrivalry, and with the probability that a larger range of potential uses exist for a valuable piece of copyrighted material than for a valuable piece of land, it seems likely that copyright owners, left to the private market, will license a narrower range of their property’s potential uses than will the owners of realty. Further, authors’ emotional investment in their work may make them (if they own the copyrights) prone to overestimating the value of their work, setting unrealistically high prices that derail bargaining.

There are yet additional reasons for doubting the propriety of relying on copyright owners to take the proper course in licensing and giving permissions.⁴⁰ Here I will turn from efficiency to fairness. Copyright owners have often created a *relationship* between their works and the defendant copyists. The copyright owners have affected how the public — including the copyists — conduct their lives.⁴¹ The resulting disparity can make us feel that the owners have forfeited some

⁴⁰ As already mentioned, copyright boundaries are less clearly marked than are land boundaries; owners of land are more easily found than owners of copyrighted works; and opportunity costs are often underestimated and risks overestimated. See Fromer, *supra* note 22; see also Smith, *supra* note 14.

⁴¹ At the extreme, this can be articulated as a form of addiction, to which the public should have a liberty of self-defense. See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1567–69 (1993) (using an addiction analogy in the context of Lockean analysis to show how inventions and works of authorship can affect their audiences). On a level less than addiction, use of others’ copyrighted works can become a form of self-realization. Consider, for example, that many couples adopt a popular piece of music as “their song.” Then imagine the reaction of one such couple if the owners of the copyright in the song demanded exorbitant sums from the couple for the liberty of having the song played at their wedding. Fairness reasons might partly explain current doctrine — such as fair use, or the rule that private performances are not subject to a copyright owner’s control — but if thoroughly embraced would result in more liberties for more users than copyright law currently recognizes. *Id.* at 1535–39, 1601–08.

of their rights of control.⁴² Even the Supreme Court has intimated that when copyrighted works are sent out to the public, some kind of estoppel might be applicable against copyright owners' attempts to control how the widely disseminated material is used.⁴³

II. EVALUATING THE BALGANESH PROPOSAL

So perhaps the reader is persuaded that the strict liability, trespass-type model is not as well adapted to copyright as it might be to land. The question still remains whether Balganesch's proposed solution is the best one. It is vibrantly argued and well-researched, but there are several problems with it.

First, of course, are problems of administrability. These issues are so salient that this brief Essay need only flag them for now.⁴⁴ Foreseeability is going to be difficult to prove.⁴⁵ As Professor Peter Menell

⁴² See, e.g., Wendy J. Gordon, *Render Copyright unto Caesar: On Taking Incentives Seriously*, 71 U. CHI. L. REV. 75, 82–83 (2004) (explaining that public reliance on widely disseminated cultural items may make it inequitable for copyright owners to have full unilateral freedom to withdraw items from use). For a similar argument in the land use context, see Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

⁴³ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449–50 (1984) (“[W]hen one considers the nature of a televised copyrighted audiovisual work and that time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced does not have its ordinary effect of militating against a finding of fair use.” (citations omitted)).

⁴⁴ Oddly, Balganesch claims I “reject[ed]” foreseeability in my own first try at drafting an unfair-competition tort. See Balganesch, *supra* note 1, at 1603 (commenting on Gordon, *Restitutionary Impulse*, *supra* note 3, at 238 & n.337). Balganesch is quite right that I thought foreseeability likely to present “intractable proof problems.” Balganesch, *supra* note 1, at 1603 (quoting Gordon, *Restitutionary Impulse*, *supra* note 3, at 238). But instead of rejecting foreseeability, I offered a proxy for it, namely, expected markets. See Gordon, *Restitutionary Impulse*, *supra* note 3, at 229–40 (discussing foreseeability at length and reasons for choosing a proxy); see also *id.* at 238–39 (“Though perhaps desirable in the abstract, the foreseeability approach might encounter intractable proof problems. In addition, a creator’s expectations in part may be a function of the law itself. As a proxy for this inquiry, the approach suggested here asks whether the plaintiff *now* stands ready and willing to supply the market served by the defendant’s use. If the plaintiff can show she is serving, or shortly will be serving, the defendant’s customers, she will have presented an acceptable proof of connection between the plaintiff and the contested use.” (footnote omitted)).

Thus, I use a proxy for foreseeability, and Balganesch in his turn does the converse: he says that “[f]oreseeable copying would thus function as an objective proxy for a creator’s anticipated markets.” Balganesch, *supra* note 1, at 1607. So I do not see us as very far apart — except regarding our degrees of certainty.

The article in which Balganesch claims that I reject foreseeability in copyright does not have copyright as its focus; instead, the topic is unjust enrichment and the common law tort of misappropriation. In copyright, the issues of institutional allocation (legislature versus judiciary), rules versus standards, and burden of proof (if social desirability is to be made a case-by-case criterion, should the law require the plaintiff to prove that the defendant’s copying is socially undesirable, or should the defendant have to prove the opposite?) have additional depths not addressed in that article.

⁴⁵ Balganesch examines this issue, noting among other things that trade journals and the like can assist in providing proof and that the person wanting copyright can establish a public record

has noted,⁴⁶ copyright and patent help create the infrastructure within which industries like publishing suspend themselves. Introduce enough uncertainty — such as keeping everyone in the dark on the question of whether copyright extends to a particular new technology until such time as the technology is well established (or until such time as some copyright owner proves foreseeability)⁴⁷ — and the result might erode the infrastructure more than the change is worth.⁴⁸

Second, there is Balganesch's unexplained departure from the negligence model in several respects. For example, he does not allow a plaintiff's special knowledge to count in assessing what is foreseeable. In determining negligence, by contrast, the defendant with more knowledge than the average person is held to "foresee" what a reasonable person *with that knowledge* could foresee. The Balganesch approach would mean that a creative person who takes the trouble of learning about technological trends unknown to the general public (or who has the happy accident of hearing about them) and who creates

(or perhaps a private record under a special administrative arrangement). Balganesch, *supra* note 1, at 1624–25. Yet the imputation of "objective" knowledge about technological change raises special problems in the copyright arena, given that (computer programs aside) we are asking what a nontechnical reasonable creative person would know about technological matters. I am indebted for this point to Gregg Macey, who uses Balganesch's own example to illustrate:

For example, JK writes a book in 1970 which is later used to produce a film and computer game. The movie infringes because motion picture technology was around in 1970. The video game version allegedly does not infringe because the technology was not anticipated: "the market for video gaming and the technology on which it relies were neither in existence nor anticipated in 1970, and a court is likely to conclude that G's actions were unforeseeable in form and purpose." How does the court actually get to that point? There was a patent filed for a video game in 1947. U.S. Patent No. 2,455,992 (filed Jan. 25, 1947). There were public disclosures of video games in the 1950s. And by the early 60's, MIT students had already created a space battle game involving two players and multiple tasks. What do we expect a Creative PHOSITA (person having ordinary skill in the art) to know? At what level of awareness, whether actual or imputed from the general state of knowledge, do we label the use of JK's novel as a video game foreseeable?

Email from Gregg Macey to Wendy J. Gordon, *supra* note 6 (referring to Balganesch, *supra* note 1, at 1614).

⁴⁶ Conversation with Peter Menell, Professor of Law, Univ. of Cal. Berkeley Sch. of Law, in Boston, Mass. (Apr. 4, 2009).

⁴⁷ In this regard, collusive suits might be a more salient danger than in other areas of litigation. Douglas Baird teaches us that in the classic case of *International News Service v. Associated Press*, 248 U.S. 215 (1918) — a set of Supreme Court opinions studied by all students of copyright or patent — *both* parties had an affirmative stake in establishing quasi-property rights in news. Douglas G. Baird, *The Story of INS v. AP: Property, Natural Monopoly, and the Uneasy Legacy of a Concocted Controversy*, in *INTELLECTUAL PROPERTY STORIES* 9, 9–35 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006).

⁴⁸ I am quite aware that my own thought experiment — requiring plaintiffs to prove either harm or a limited set of alternatives, *see* Gordon, Harmless Use, *supra* note 3 — runs into the same objection. In fact, Menell raised the point in the context of discussing my proposal. Conversation with Peter Menell, *supra* note 46. At least tentatively, however, I think the problems that a foreseeability test poses are even greater than those posed by a harm test.

works of authorship *for* the coming new market, will be barred from profiting from those works unless he (or someone) undertakes the additional task of publicizing the coming technology.⁴⁹

Third, if foreseeability is the measure, it is odd to choose as the *time* for assessing foreseeability the moment of a given work's creation. Incentives are most needed not then, but at the same time when the author is commencing her apprenticeship. That is when the heavy investment of time and money is made and when the big decision is made to step out of the normal path of commerce. Some artists are lucky enough to be trained creatively in college as we are in law schools. But for most, an inescapable price is years of writing discarded drafts or painting discarded pictures, perhaps coupled with an MFA program. When we audience members encounter finished works, their grace and apparent ease of expression makes us forget how difficult it is to make creative work look easy, and how long and onerous the apprenticeship can be. The point at which the authors and artists most need encouragement is when they are deciding to invest the preparatory time. And once that investment is made, they may have few choices *but* to pursue their craft.

Yet if foreseeability is measured from that crucial time when the decision is being made to invest in training one's self, that is an *early* point in time — a point at which the “reasonable artist” could foresee fewer markets and uses than will be foreseeable at the time of creating mature works. So the foreseeability test seems to be caught in a dilemma: either the point in time is too early to embrace as many future uses as it should, or the point in time is somewhat arbitrarily related to the real need for incentives.

That conundrum leads to my most substantive disagreement with Balganesch's position. In my view, the crucial thing to safeguard is the young artist's belief that if he works hard and perfects his craft, and if he produces something the public wants, he will have a decent standard of living. Accordingly, I would give priority to giving the author a way to share in the revenue from new technological uses that supplant the markets the author intended to reach. That is, authors need protection from new technologies that cannibalize their existing markets.

⁴⁹ Balganesch, *supra* note 1, at 1624–25 (arguing that special knowledge must be made public). It is not impossible that creative persons who work for large corporate employers will be made cognizant of new technologies, and that the employers will publicize the technologies. But of course, the employers may want instead to keep their “advantage” a secret. As Balganesch notes, and as the interrelated fields of patent and trade secrecy law demonstrate, it can be quite difficult to calibrate the legal and social institutions needed to encourage disclosure of difficult-to-obtain information. *Id.* at 1625 n.213. In any event, this task of publicizing a technological advance is one that most writers, composers and visual artists will be ill-equipped to undertake.

Balganesh, as I understand him, gives no independent weight to destruction of expected markets. He relies on an abstract argument that “markets for unforeseeable uses . . . are likely to derive largely from the creation of new demand rather than from cannibalizing existent demand.”⁵⁰ He refuses to give any independent weight to “concern with substitutability.”⁵¹ The importance of substitution to authorial incentives lies behind my own suggestion that copyright require copyright owners to prove harm (instead of foreseeability) as a prerequisite to recovery in many instances.⁵²

Now to a last point. In Balganesh’s view, copyright as it is practiced is “devoid of any connection to incentives and the probability distribution that is central to them.”⁵³ He maintains this position despite his own admission that fair use purports to be centrally concerned with incentives. Copyright has many problems (in particular its absurdly long duration), but I think Balganesh is depicting the current system as more inimical to cultural growth than it really is.

Balganesh’s attempt to prove the copyright system’s disdain for incentives takes many forms. One is his discussion of *Harper & Row, Publishers, Inc. v. Nation Enterprises*,⁵⁴ where a news magazine published a summary of President Ford’s memoirs (plus some direct quotations) immediately prior to the publication of authorized excerpts and shortly before the book itself was to be published. I remain mystified why Balganesh thinks the Court’s discussion of incentives in *Harper* is a mere “rhetorical framework.”⁵⁵ Rather, the Court gave a victory to President Ford’s publisher on grounds of “expectations” and “incentives” that sound sincere:

[The alleged infringers’] theory . . . would expand fair use to effectively destroy any expectation of copyright protection in the work of a public figure. Absent such protection, there would be little incentive to create or profit in financing such memoirs, and the public would be denied an important source of significant historical information. The promise of

⁵⁰ See Balganesh, *supra* note 1, at 1608–09. He continues to say that the above assumption “thereby allow[s] the concern with substitutability to be given some salience in the entitlement structuring process.” *Id.* at 1609. Lest the reader misunderstand, Balganesh goes on: “To give the concern with substitutability any more significance than this (for example, by attempting to control for all substitutes, not just foreseeable ones) would collapse the system back into its current state, devoid of any connection to incentives and the probability distribution that is central to them.” *Id.*

⁵¹ *Id.* at 1609.

⁵² See Gordon, Harmless Use, *supra* note 3. In instances where the suit is brought to clarify ownership issues, or to restrain a revenue-generating use of the plaintiff’s work in bureaucratic contexts, I suggest the plaintiff not be required to prove harm. *Id.* at 2432–33.

⁵³ Balganesh, *supra* note 1, at 1609. Versions of this assertion appear often in the piece.

⁵⁴ 471 U.S. 539 (1985).

⁵⁵ Balganesh, *supra* note 1, at 1580.

copyright would be an empty one if it could be avoided merely by dubbing the infringement a fair use “news report” of the book.⁵⁶

The language from the Supreme Court, with its focus on “expectation of copyright protection” and “incentive” could almost be quoting from Balganesch.

To determine whether this is mere rhetoric, let us examine the Court’s reasoning. The Court was rejecting the defendant’s theory that a quotation from a public figure could be fair use on the ground that the expression itself could count as “news.”⁵⁷ One can see why the defendant’s theory might frighten a Court concerned with incentives. Copyright law gives no protection to “facts,”⁵⁸ and when expression (whether verbal or visual) is repeated as *evidence* of what was said or done, the expression is serving as a “fact.” This could be taken to suggest that no factual use of expression should count as infringement. If such a broad rule were adopted, then arguably one could freely republish President Ford’s memoirs, or Stephen King’s latest novel, so long as the copyist wrote a “cover essay” to which the copied work served as an evidentiary appendix. So I can see how the Court might have jumped to copyright Armageddon from the notion of giving fair use deference to copying expression used as “news.”

However, there are limits possible even if one admits that “factual uses” deserve some deference — limits that the Court may not have seen. In essence, the Court seems to have perceived a bottomless crevasse where I see a slope that’s somewhat slippery but far from frictionless. The Court ironically seems to have ignored the interplay between different kinds of “fairness,” including fairness arising out of expectation and foreseeability.

To illustrate the way in which fairness and foreseeable incentives interplay, making “factual fair use” less dangerous, consider *Núñez v. Caribbean International News Corp.*⁵⁹ In that case a newspaper reprinted a copyrighted photograph of an unclothed Miss Puerto Rico supposedly to help the public make up its own mind about whether the photograph was so explicit that the young lady should be prohib-

⁵⁶ *Harper & Row*, 471 U.S. at 557 (citing *Wainwright Sec. Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977)).

⁵⁷ *See id.*

⁵⁸ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363–64 (1991). The distinction between “expressive use” of a creative work, and “factual use” of that same work, is similar to the difference between hearsay and nonhearsay: whether an expression repeated for the sake of its truth value versus one that is repeated merely to prove that the utterance had been said. It is not surprising that the Supreme Court has difficulty with the notion that expression can be factual, given its ontological “holding” in *Feist* that facts are only discovered and not “made.” *See* Wendy J. Gordon, *Reality As Artifact: From Feist to Fair Use*, LAW & CONTEMP. PROBS., Spring 1992, at 93, 100–04 [hereinafter Gordon, *Reality As Artifact*].

⁵⁹ 235 F.3d 18 (1st Cir. 2000).

ited from participating in beauty contests. Thus, the newspaper plausibly claimed that at least one of its purposes was to employ the photograph as a newsworthy fact.⁶⁰ But standing alone, the factual use might not have been sufficient to obtain fair use treatment for the newspaper. The court also found it highly relevant that the photographer Núñez had no expectation that he would be paid for copies of the photo. The photographer knew that the beauty contestant planned to distribute copies for free as part of her publicity.⁶¹ Thus, in practice, the court's use of what I call the "factual use" doctrine⁶² was informed by considerations of expectation and foreseeability.

Of the lower court cases, Núñez is the most colorful. On a more quotidian basis, courts regularly find that litigants have a fair use privilege to reproduce copyrighted works to use as exhibits in litigation.⁶³ Appending a copyrighted business letter to a complaint or requesting its production in litigation discovery will not impair the kinds of incentives that concern the federal Copyright Act. Accordingly, "fair use for factual use" need have few limits there. So in my view, fair use for factual uses is capable of being employed where appropriate and cabined when dangerous.⁶⁴ The *Harper & Row* Court seems to have made an honest error arising out of a sincere concern with incentives. Fair use's concern with incentives is not mere rhetoric.

⁶⁰ The Núñez court wrote:

Appellee [news corporation] reprinted the pictures not just to entice the buying public, but to place its news articles in context; as the district court pointed out, "the pictures were the story." It would have been much more difficult to explain the controversy without reproducing the photographs. And although such an explanatory need does not always result in a fair use finding, it weighs in the favor of appellee.

Id. at 22 (citation omitted).

⁶¹ *Id.* at 24. Moreover, the court noted that: "Núñez had not sought to control further dissemination during his limited distribution: he had not registered the copyright prior to publication in *El Vocero*, required recipients to sign non-disclosure or no-resale agreements, or even sought oral promises from recipients not to redistribute the photographs." *Id.*

⁶² I am not sure the practice of deferring to defendants' factual uses has ever been labeled as a "doctrine" before; if so let me christen it. One of the doctrine's origins can be found in Gordon, *Reality as Artifact*, *supra* note 58, in which I argue that the factual use of copyrighted works should be privileged under the fair use doctrine. See also 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[B][1] (2007) (arguing that changing the purpose of a copyrighted work should assist the defendant in fair use cases).

⁶³ See, e.g., *Tavory v. NTP, Inc.*, 495 F. Supp. 2d 531, 538–39 (E.D. Va. 2007); see also 4 NIMMER & NIMMER, *supra* note 62, at § 13.05[D][2].

⁶⁴ Doctrinally, factual fair use can be seen as falling within the first factor in the fair use inquiry under § 107, which considers the "purpose and character of the use." 17 U.S.C. § 107 (2006). See also *A.V. ex rel Vanderhye v. iParadigms, LLC*, Nos. 08-1424, 08-1480, 2009 WL 1015145, at *5–6 (4th Cir. Apr. 16, 2009) (describing how transformative factual use can qualify under the purpose and character factor). In my view, a defendant's factual use deserves far more fair use deference than it now receives. It may be that liability for factual uses should be imposed only very rarely, perhaps limited only to occasions where the "factual" nature of the use is merely a *pretext* to cover copying that seeks to capitalize on the original, expressive purposes of the work.

III. CONCLUSION

Young scholars are always caught between the conflicting demands of respecting tradition and forging their own course. Balganesch has traversed these conflicting emotional demands in an interesting way; he situates himself securely in tort and contract traditions of “foreseeability” in order to challenge copyright. Though he has not upended copyright’s strict liability approach — no one scholar standing alone could do so — he has given us a banquet for thought, and, along with others exploring the limits of the trespass-to-land model, has helped to place conditional models for copyright even more securely on the public agenda. I hope the urge to investigate conditional copyright will be further reinforced by this Essay’s contribution: introducing the possibility that the harm-benefit distinction will have differing behavioral implications for tangible as compared with intangible ownership.