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COPYRIGHT AND ITS REWARDS,  
FORESEEN AND UNFORESEEN

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

INTRODUCTION

The *Harvard Law Review* rarely publishes articles on copyright law, so there was considerable buzz among intellectual property academics when the *Review* accepted a piece from a young scholar who had not yet even joined a law school faculty. Shyam Balganesh's *Foreseeability and Copyright Incentives*<sup>1</sup> is an interesting, carefully reasoned piece of scholarship. Pursuing the dominant, instrumentalist justification of copyright, Professor Balganesh<sup>2</sup> makes a simple proposal: if the exclusive rights of copyright are justified because they create an ex ante incentive, then the exclusive rights — and the financial yields that follow — should be limited to the uses of the copyrighted work that were foreseen by the creator at the time of the work's creation.

This proposal is simple and elegant. If we accept that a copyrighted work, once extant, is a public good most efficiently distributed without restriction and that copyright law imposes restrictions, that is, gives exclusive rights, only in order to cause the copyrighted work to come into existence, then we should want copyright law restrictions to be as minimal as possible. But how do we calibrate that? Balganesh believes we have overlooked a principle that produces a better fit between copyright's incentive purpose and the exclusive rights it grants. The principle stems from the bounded rationality of the author: if the author cannot foresee certain future uses of her work, then the financial rewards of those uses cannot form part of the author's motivation to create her work. If the financial rewards cannot form part of the author's motivation to create her work, we should not give her an exclusive right to those rewards. Balganesh connects this idea to other

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<sup>1</sup> Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009).

<sup>2</sup> Mr. Balganesh was a Bigelow Fellow at the University of Chicago at the time he wrote the article but is to be congratulated on joining the faculty of the University of Pennsylvania Law School starting in fall 2009.

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uses of foreseeability in law, reasoning that “[i]f the law (in other contexts) readily presumes that actors can only ever factor foreseeable consequences into their decisionmaking process, then logically speaking, copyright law should see little need to give creators an entitlement to unforeseeable ones.”<sup>3</sup>

Initially, this sounds like a radical idea — more radical than it really is. After exploring the parameters of the Balganesh proposal, I will describe how, despite its appeal, it is incompatible with how Congress has expressly written the copyright grant; how nonetheless we might try to integrate the proposal into our fair use doctrine; and how, despite rationality being bounded, Balganesh is mistaken that authors cannot factor unforeseen consequences into their *ex ante* expectations of the rewards that copyright dangles in front of them. By itself, the Balganesh proposal is a valid, worthwhile contribution to the instrumentalist theory for copyright. At the same time, in the context of current copyright scholarship, the proposal is yet another clever strategy — albeit one that might be cumbersome and ineffectual — to produce what Congress and the Supreme Court have denied copyright minimalists: a shorter copyright term.

#### I. WHAT THE BALGANESH PROPOSAL IS AND IS NOT

If you took a sound bite version of his proposal, it would be easy to think that Professor Balganesh is proposing that windfall profits from unexpected hits be curtailed because such proceeds are reasonably unforeseen. That would be a very bad idea. Many sectors of intellectual property are, in effect, “gamble economies” in which investments are made in multiple projects with the expectation that occasional blockbuster successes within a portfolio of otherwise unprofitable or low-profit projects will produce average returns for the entire portfolio. This is true for pharmaceuticals, motion pictures, and video games (where no short-term change in the economics seems likely).<sup>4</sup>

But just because Hollywood “has no idea what the immediate future will look like,”<sup>5</sup> Professor Balganesh does not begrudge the next blockbuster movie producer his record-breaking profits from cinemas, DVDs, downloads, and all other known windows of distribution. This is because Balganesh defines financial returns as “unforeseen” not in quantum or magnitude, but in terms of purpose or technology. Exam-

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<sup>3</sup> Balganesh, *supra* note 1, at 1574.

<sup>4</sup> The “gamble” characterization is also traditionally true for the music industry and book publishing, although significant economic changes are already overtaking the former and probably threatening the status quo in the latter.

<sup>5</sup> Brooks Barnes, *Who Threw the DVD From the Train?*, N.Y. TIMES, Mar. 22, 2009, at BU4 (stating that “the movie capital is starting to acknowledge that it has no idea what the immediate future will look like” among DVD, Blu-Ray, video-on-demand, and cinema attendance markets).

ples would be the advent of the VCR (and its DVD and Blu-Ray descendants) in relation to old films, Google Books in relation to books published decades earlier, peer-to-peer distribution of mp3 files in relation to most of the world's catalog of commercial sound recordings, and search engines in relation to everything created before search engines seemed possible. New purposes are not necessarily linked to new technologies, but the only example we are given without such linkage is, well, a stretch: a programmer whose elegant lines of code unforeseeably become the motif for a new line of bed linen.<sup>6</sup> Most of what Balganesh envisions as unforeseen new purposes will be inextricably linked to unforeseen new technologies that cause disruptive events in the consumption of, and markets for, expressive works — something at the level equivalent to Kuhnian “paradigm shifts” in epistemology.<sup>7</sup> In other words, Professor Balganesh's proposal will rarely affect short-term or medium-term returns on investments in copyrighted works.

It is also important to understand that Balganesh has *not* proposed that returns be limited to what is *necessary* to serve the incentive function. Although there are one or two places where he slips into such language,<sup>8</sup> the Balganesh proposal is only about using foreseeability as the outer boundaries of what could serve as *ex ante* incentives. Trying to identify necessary and sufficient incentives from unnecessary monopoly rents is one of the holy grails of intellectual property scholarship. But that is not Balganesh's quest. Under his proposal, you would be entitled to the proceeds of your sound recording (made in 2009) even if the evidence conclusively showed that you had expected zero sales of your sound recording and that you had said “hell, I'm going to do the recording anyway.” If your recording becomes a hit, you are entitled to the proceeds because the distribution of CDs and digital phonorecord deliveries was objectively foreseen in 2009 — even though those proceeds were demonstrably not a necessary incentive.

Finally, it is important to recognize that as a theoretical exercise, the Balganesh proposal is not dependent on some of the more stylish statements that pepper the article. As Balganesh recognizes, almost all the intellectual property literature about incentives is about expanding or curtailing the exclusionary entitlements.<sup>9</sup> In response to the real-world expansion of copyright, the academic literature has — for years, if not decades — been almost exclusively about ways to curtail the

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<sup>6</sup> See Balganesh, *supra* note 1, at 1613–14.

<sup>7</sup> See, e.g., THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

<sup>8</sup> See, e.g., Balganesh, *supra* note 1, at 1607 (describing the project as seeking to eliminate markets “that were unlikely to have formed a *necessary* part of a creator's set of future markets that together constituted the incentive” (emphasis added)).

<sup>9</sup> See Balganesh, *supra* note 1, at 1578 n.27.

copyright entitlements.<sup>10</sup> At times, the literature has gotten too rhetorical — so much so that in 2006 a distinguished voice in the field, herself often critical of copyright’s expansion, got up in front of an AALS meeting and said she was tired of reading poorly reasoned law review articles in which the writers obviously “had settled on the answer before coming up with the question.”<sup>11</sup>

Balganesh’s work is anything but poorly reasoned. Still, there are telltale signs that he feels obliged to work within this school of criticism. For example, he begins the article by saying that courts “routinely assume that [copyright’s] property-like nature automatically entitles its holder to internalize *all* possible benefits associated with the work”<sup>12</sup> and later describes courts as “presum[ing] that . . . copyright’s ownership structure is independently limitless.”<sup>13</sup> These — and other comments — are just misstatements of the copyright jurisprudence; completely separate from a fair use inquiry, there are all kinds of benefits from copyrighted works that the law explicitly does not allow a copyright owner to internalize.<sup>14</sup>

Similarly, it is clear that Balganesh’s article is fueled by the usual, bald, and largely unproven assumption that copyright “stifl[es] innovation.”<sup>15</sup> For a lot of us, the hand-wringing about copyright stifling innovation remains unproven — and has gotten tiresome. No one

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<sup>10</sup> An exemplary list of proposals, general and specific, to curtail copyright protection might include William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661 (1988) (limiting copyright protection to encourage citizens to create transformative works contributes to a worthwhile life); Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575 (2005) (limiting copyright protection of smaller and smaller units of expression); Peter Jaszi, *Copyright, Fair Use and Motion Pictures*, 2007 UTAH L. REV. 715, 732–36 (proposing that filmmakers establish their own best practices on fair use to counteract “more owner-friendly copyright law”); Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409 (2002) (limiting copyright protection for older works); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996) (limiting copyright protection for the enhancement of discourse in a democratic society); Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW. U. L. REV. (forthcoming 2009) (limiting copyright protection for “non-expressive” uses of works); and Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection*, 85 TEX. L. REV. 1921 (2007) (limiting copyright protection of processes and systems).

<sup>11</sup> Jessica Litman, Professor of Law, University of Michigan Law School, Paper Presentation at the AALS Workshop on Intellectual Property (June 16, 2006), in Jessica Litman, *The Politics of Intellectual Property*, 27 CARDOZO ARTS & ENT. L.J. (forthcoming 2009).

<sup>12</sup> Balganesh, *supra* note 1, at 1572.

<sup>13</sup> *Id.* at 1581.

<sup>14</sup> Among them are public display of authorized copies, private performances, non-digital public performances of sound recordings, and an array of fairly bright-line exceptions ranging from library and teaching uses to the photographing of buildings with copyrighted architectural designs. And copyright’s fundamental limiting principles, including the idea/expression dichotomy, the non-copyrightability of facts, and the principle that only the *original* elements of a *copyrighted* work are protected from infringement, mean that the copyright owner cannot internalize a vast portion of the social benefits of a work.

<sup>15</sup> Balganesh, *supra* note 1, at 1591.

claims there is any stifling of technologies to conserve energy, improve transportation grids, cure malaria, grow pesticide-free rice, or even build a better spreadsheet. The technology worried about is a narrow slice of computer and information technologies, and, even among those, what copyright does is limit commercial development of business models based on intentional, large-scale, unauthorized uses of copyrighted works.

Still, such nods to the law professor zeitgeist should not detract from what is a straightforward argument: if the promise of exclusive rights to commercial markets at  $T_2$  serves as A's incentive to produce creative work at  $T_1$ , we need only promise exclusive rights to the  $T_2$  markets that A can foresee at  $T_1$ . And since that is all we need to promise, that is all we should promise; and since that is all we should promise, that is all we should deliver. Among the markets we grant to an author, Professor Balganesch simply "would eliminate those uses that are objectively unforeseeable at the time of creation from the scope of the entitlement."<sup>16</sup> Balganesch proposes that this foreseeability test be "dependent on the general state of knowledge at the time of creation, which is then imputed to the creator."<sup>17</sup> This is important not only because of evidentiary problems that would result from having to establish each author's actual thinking, but because otherwise the proposal would put individual creators under pressure to have technological and market awareness that we might not otherwise expect in some kinds of artistic creators. All this seems correct, neither detracting from nor adding greatly to the basic insight.

In fact, once Balganesch has stated the argument a couple times, you might think we would be finished. Not so. Although the students at *HLR* and other law reviews have had better sense than professors in struggling against the length of law review articles, it remains true in the law review genre that no pristine argument can be left unelaborated.

So moving beyond the immediate intuitive appeal of the idea, Balganesch develops his proposal by exploring how foreseeability is already deployed in the common law.<sup>18</sup> One obvious example is tort law, where negligence standards make one liable only for injuries that were reasonably foreseeable. Contract gives the article several examples: impossibility exculpating one from performance in truly unforeseen circumstances; consequential damages being limited to losses that could be foreseen by the defendant as a result of her breach; and pre-

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<sup>16</sup> *Id.* at 1614.

<sup>17</sup> *Id.* at 1624. Balganesch reasonably likens this standard to the construct used in patent law, the "person having ordinary skill in the art" (PHOSITA), against which we judge whether an invention was nonobvious at the time of invention. *Id.* at 1612.

<sup>18</sup> See Balganesch, *supra* note 1, at 1591–1600.

marital agreements being enforced if the situation upon divorce could have been reasonably foreseen by the parties. Property law and patent law provide other examples. Balganesh brings all of these examples together, saying that “liability and entitlement calculations” are “shaped” in the common law by recognition of the “limits to human predictive capacities”;<sup>19</sup> and that “[l]imiting a party’s liability or entitlement by reference to [the law’s] underlying purpose is hardly novel.”<sup>20</sup> Balganesh emphasizes that foreseeability is used to “induce loss-avoiding (or cost minimizing) behavior,”<sup>21</sup> and that “[t]he same holds true for benefits”<sup>22</sup> as well.

Although Balganesh is very careful in his examples and how he describes them, he wades into difficult issues. In the tort and contract examples, the common law uses foreseeability to limit the downside — the liability — of constructive, intentional human activity (building airplanes, running a convenience store, investing in the stock market, or breaching a contract to maximize one’s own personal utility). It is a debated issue whether systematically limiting the entitlement side is a goal of the system or just a side effect. More generally, when you buy real or chattel property, your entitlements are limited to foreseen outcomes neither as a matter of property law nor as a matter of contract law. If the stockpile of Buckminsterfullerene that you synthesized ten years previously becomes critical to the fight against climate change in ways no one foresaw a decade ago, you are not barred from the super profits because they result from an unforeseen purpose. If it turns out that the dull-glazed, obsidian-colored bird I bought in an antique store as a joke really is the Maltese Falcon, the store owner may or may not be able to rescind our contract,<sup>23</sup> but if obsidian turns out to be necessary to power warp engines, the bird is mine.

Indeed, the two examples Balganesh uses from intellectual property are ones in which the creator’s entitlement to unforeseen benefits is protected. This is true of patent “prosecution history estoppel,” a doctrine that can limit the breadth of a patentee’s exclusive rights except vis-à-vis subsequent technology that was unforeseeable.<sup>24</sup> Professor

<sup>19</sup> *Id.* at 1573.

<sup>20</sup> *Id.* at 1577.

<sup>21</sup> *Id.* at 1591–92.

<sup>22</sup> *Id.* at 1592.

<sup>23</sup> The answer to this depends, I think, on the interplay between sections 152 and 154(b) of the RESTATEMENT (SECOND) OF CONTRACTS (1981). Under section 154(b), the antique store owner could not recover the bird if the court concludes that “he [wa]s aware, at the time the contract [wa]s made, that he ha[d] only limited knowledge with respect to the facts to which the mistake relates but treat[ed] his limited knowledge as sufficient.”

<sup>24</sup> *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 740 (2002) (holding that the estoppel effect of the patent claim amendment should not hold in cases in which the “amendment cannot reasonably be viewed as surrendering a particular equivalent” — for example, where the “equivalent was unforeseeable at the time of the application”). The timing of the

Balganesh's other intellectual property example is licensing agreements for the exploitation of musical compositions or audiovisual works. In a series of cases, courts have addressed whether licenses granted decades ago cover new technologies and new forms of exploitation. Generally speaking, where the new technology was unknown and unforeseen, courts often conclude that there was no transfer of rights on the grounds that the "holder of the license should not now 'reap the entire windfall' associated with the new medium."<sup>25</sup> Balganesh is right that in both examples we assume that the creator would not be motivated to act by things she could not foresee. But in each case the deployment of foreseeability is in a context that protects the creator's ability to exploit unforeseen technological developments.

## II. BUT THE INITIAL GRANT OF COPYRIGHT EXPRESSLY COVERS UNFORESEEN MARKETS

While these license disputes support Professor Balganesh's general point about foreseeability, he recognizes that in these cases "[f]oreseeability is thus used to limit a licensee's copyright grant but not the licensor's [that is, the author's] original one."<sup>26</sup> To address this asymmetry — what he calls an "anomaly"<sup>27</sup> — Balganesh proposes that we think of the state, that is, the public, as being the initial grantor of copyright's exclusive rights.<sup>28</sup> Balganesh proposes that, just as in contract breach cases we would assume the copyright holder only grants a license to foreseen markets, we should assume in infringement cases that the public grants only foreseeable markets to the copyright holder at the time the copyright comes into existence. This is an elegant move, but given what the statute says, he just leads himself into an ambush.

Read by itself, the grant of exclusive rights — 17 U.S.C. § 106<sup>29</sup> — is amenable to Balganesh's interpretation (that acting on our behalf, Congress only grants copyright rights to foreseen markets). But things become more difficult when one starts to integrate the statutory definitions from 17 U.S.C. § 101.<sup>30</sup> Section 106 gives the author the exclu-

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"unforeseeability" — at the time of the application — has rightly been criticized. See R. Polk Wagner, *Reconsidering Estoppel: Patent Administration and the Failure of Festo*, 151 U. PA. L. REV. 159, 230 n.253 (2002).

<sup>25</sup> *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851, 854 (9th Cir. 1988) (quoting Comment, *Past Copyright Licenses and the New Video Software Medium*, 29 UCLA L. REV. 1160, 1184 (1982)).

<sup>26</sup> Balganesh, *supra* note 1, at 1610.

<sup>27</sup> *Id.* at 1610.

<sup>28</sup> *Id.* at 1611.

<sup>29</sup> 17 U.S.C. § 106 (2006).

<sup>30</sup> *Id.* § 101.

sive right “to reproduce the copyrighted work in copies”;<sup>31</sup> § 101 then defines “copies” as “material objects . . . in which a work is fixed by any method now known or later developed.”<sup>32</sup> Section 106 gives the author the exclusive right “to perform the copyrighted work publicly”;<sup>33</sup> § 101 defines “perform” as being by “means of any device or process” and expressly states that “[a] ‘device,’ ‘machine,’ or ‘process’ is one now known or later developed.”<sup>34</sup> The § 106 right of public display also links to the open-ended definitions meant to capture unforeseen technologies.<sup>35</sup> The legislative history makes it clear that Congress adopted this approach to cover unforeseen technologies (and recall that unforeseen technologies are foundational to Balganesch’s idea of unforeseen markets).<sup>36</sup>

In other words, we have to be cautious in discussing “the incentive structure on which the [copyright] institution is premised.”<sup>37</sup> Just as the three contract law examples can all be characterized as situations in which we acknowledge that one or both parties would not have entered the agreement if they had foreseen how things would turn out,<sup>38</sup> Balganesch wants to say that Congress, acting in our best, social-utility-maximizing interests, would not have granted such broad copyright rights to work A if it had known that new technology X or new purpose Y would be frustrated. For this idea to be credible within the present statutory framework,<sup>39</sup> it must depend on the fair use doctrine.

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<sup>31</sup> *Id.* § 106(1).

<sup>32</sup> *Id.* § 101.

<sup>33</sup> *Id.* § 106(4).

<sup>34</sup> *Id.* § 101.

<sup>35</sup> *Id.* § 101.

<sup>36</sup> It is strange that Balganesch did not see this problem because he even recognizes that Congress’ creation, incrementally, of “an extended period of protection might be taken as evidence of an intent to protect unforeseen uses as well.” Balganesch, *supra* note 1, at 1626. But we do not need this argument; Congress *expressly* protected unforeseen uses.

<sup>37</sup> Balganesch, *supra* note 1, at 1573.

<sup>38</sup> *See id.* at 1596–99.

<sup>39</sup> Professor Balganesch is also oddly silent on whether his proposal would be compatible with the obligations of the United States under intellectual property treaties. I think there is a good argument that his proposal is compatible with those obligations, but chiefly because Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights permits exceptions to copyright protection that “certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 1869 U.N.T.S. 299, available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf). The most difficult part would be saying that the Balganesch proposal curtails copyright rights only in “certain special cases” since he clearly envisions that whole slices of copyrighted works of particular time periods would be denied exclusive rights in certain new media and applications.



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### III. THE FORESEEABILITY TEST, BLURRY PSYCHICS, AND OUR EXISTING FAIR USE TOOLS

First, in addition to giving foreseeability an “objective” standard, we have to agree upon a specificity standard. Professor Balganesch recognizes that whether a use or market is foreseeable depends “on the specificity with which the form or mechanism of copying is described.”<sup>40</sup> If the psychic told you that “you will meet a tall, dark stranger,” did she foresee you encountering a black bear while hiking? Professor Balganesch would not want the Google search engine to be a “foreseen” use just because a photographer foresaw that people would try to distribute reduced versions of his photos; on the other hand, it should not matter whether the author foresaw a closed, subscription-based network or a public, ad-supported system.

Would awareness of the internet mean that peer-to-peer technology was a foreseen technology or purpose? Would awareness of cable transmissions and primitive interactive video-on-demand mean that the internet — distributing on demand through the same wire — was a foreseen technology or purpose? Professor Balganesch does not have an answer to the specificity-of-foresight problem, noting only that tort law handles it. This is true, but tort law has done so only after a long, robust development in jurisprudence.

But instead of flirting with tort law, consider one copyright case that Professor Balganesch cites, the Second Circuit’s 1998 *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.* decision.<sup>41</sup> The 1939 license Igor Stravinsky gave Walt Disney for the use of his “Rites of Spring” in the film *Fantasia* provided that “said musical composition may be used in one motion picture throughout the length thereof or through such portion or portions thereof as the Purchaser shall desire.”<sup>42</sup> The issue in the case was whether this 1939 license “include[d] a grant of rights to Disney to use the Stravinsky work in video format.”<sup>43</sup> Developing the foreseeability test that Judge Friendly had formulated thirty years earlier in *Bartsch v. Metro-Goldwyn-Mayer, Inc.*,<sup>44</sup> the court concluded that home video was foreseen in 1939:

If a new-use license hinges on the foreseeability of the new channels of distribution at the time of contracting — a question left open in *Bartsch* — Disney has proffered unrefuted evidence that a nascent market for home viewing of feature films existed by 1939. The *Bartsch* analysis thus com-

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<sup>40</sup> Balganesch, *supra* note 1, at 1627.

<sup>41</sup> 145 F.3d 481 (2d Cir. 1998).

<sup>42</sup> *Id.* at 484.

<sup>43</sup> *Id.* at 485.

<sup>44</sup> 391 F.2d 150 (2d Cir. 1968).

pels the conclusion that the license for motion picture rights extends to video format distribution.<sup>45</sup>

In 1939 the “nascent market for home viewing” was film on unwieldy reels, a technology that never took off. But the Second Circuit looked to a very general foreseen use, both contradicting one of Balganesch’s examples and reminding us that each notion of a new technology or market is itself a social construct.<sup>46</sup> For the Second Circuit, meeting a “tall, dark stranger” included a black bear on the hiking trail — and Balganesch’s proposal will have no traction at all unless he can force some greater specificity into the foreseeability test.

Once we get some specificity in the foreseeability test, Professor Balganesch is right that copyright’s “correlative limiting devices,” particularly the fair use doctrine, are “better placed to internalize” his proposal.<sup>47</sup> This takes us to the point about the Balganesch proposal where each reader will have to decide how radical it is.

The fourth statutory factor in the fair use analysis is “the effect of the use upon the potential market for or value of the copyrighted work.”<sup>48</sup> As Professor Balganesch acknowledges, for over a decade, important circuit court decisions have defined the “potential market” considered in the fair use test as “traditional, reasonable, or likely to be developed” markets.<sup>49</sup> Such a limitation of “potential market” is needed to avoid circularity in the fair use reasoning,<sup>50</sup> and saying that an author should be limited to markets that are “traditional, reasonable, or likely to be developed” is awfully similar to saying that an author should be limited to markets that were “foreseen.” Meanwhile, as Professor Balganesch also recognizes, “[q]uestions of purpose are ordinarily understood as being part of the fair use inquiry,”<sup>51</sup> and the Ninth Circuit has staked out a position quite kindred to Balganesch’s proposal. In separate 2003 and 2007 decisions, the Ninth Circuit has

<sup>45</sup> *Boosey & Hawkes*, 145 F.3d at 486.

<sup>46</sup> See, e.g., Robert Burrell, *The Information Society: Chances and Challenges*, in *INTELLECTUAL PROPERTY IN THE DIGITAL AGE: CHALLENGES FOR ASIA* 3–25 (Christopher Heath & Anselm Kamperman Sanders eds., 2001) (reasoning that belief in the transformative power of the internet and digital technologies is itself socially constructed).

<sup>47</sup> Balganesch, *supra* note 1, at 1582.

<sup>48</sup> 17 U.S.C. § 107(4) (2006).

<sup>49</sup> The first decision to announce this test was *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994). See also *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614 (2d Cir. 2006); *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 81 (2d Cir. 1997); *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1387 (6th Cir. 1996).

<sup>50</sup> 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.05[A][4] (2005) (recognizing “danger of circularity” where original copyright owner redefines “potential market” by developing or licensing others to develop that market); see also Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 *HASTINGS L. J.* 433 (2007) (arguing that as creators expect greater rewards, Congress feels compelled to grant greater incentives).

<sup>51</sup> Balganesch, *supra* note 1, at 1584 (emphasis omitted).

twice concluded that an image search engine's thumbnail non-transformative reproduction of photographs serves a transformative purpose that should be protected under the fair use doctrine.<sup>52</sup>

Professor Balganesh is right that this remains a doctrinal fault-line in copyright, and neither Ninth Circuit opinion expressly links excluding new *purposes* (under the fair use doctrine) to the question of what markets the author originally expected.<sup>53</sup> Still, if we combine the Second Circuit's requirement that the markets protected in the fair use analysis are those that are "traditional, reasonable, or likely to be developed" (related back to the point of creation)<sup>54</sup> with the Ninth Circuit's view that fair use, "transformative" activity occurs when a defendant uses a work "in a new context to serve a different purpose,"<sup>55</sup> we get much the same result as Professor Balganesh seeks.

Or do we? The chief difference concerns market substitution. While the Balganesh proposal would excuse technologies and purposes that are unforeseen even when they have an adverse impact on existing and foreseen markets, in the standard analysis a new technology's adverse impact on the existing and foreseen markets would weigh strongly against fair use.<sup>56</sup> The Balganesh proposal runs on the premise that "[i]ndividuals will not (and cannot) factor the unforeseeable consequences of their actions into their *ex ante* reasons for acting."<sup>57</sup> But they can — because they can foresee that unforeseeable events will disrupt existing markets.

Some unforeseen technologies create new uses that do not seem to cannibalize old markets (an internet image search engine); some unforeseen technologies clearly do seem to cannibalize old markets (mp3 music distribution through the internet); some unforeseen technologies create new uses to some degree *and* cannibalize old markets to some degree (internet delivery of television programs, such as Hulu.com). The Balganesh proposal tells an author that when one of these objectively unforeseen technologies arises, to the degree that the existing and foreseen markets are cannibalized, the author loses those benefits. Explaining this proposal to a creator born in 1970, we would review how established creators have already gone through several unforeseen shifts of technology or use (perhaps Balganesh's examples); that when

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<sup>52</sup> See *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 719–25 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817–22 (9th Cir. 2003).

<sup>53</sup> See *Perfect 10*, 487 F.3d at 720–23; *Kelly*, 336 F.3d at 818–20.

<sup>54</sup> See Balganesh, *supra* note 1, at 1589 & n.80.

<sup>55</sup> *Perfect 10*, 487 F.3d at 722.

<sup>56</sup> See Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1125 (1990) (noting that "[t]he fourth factor disfavors a finding of fair use only when the market is impaired because the . . . material serves the consumer as a substitute, or . . . 'supersede[s] the use of the original'" (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841)).

<sup>57</sup> Balganesh, *supra* note 1, at 1633.

the new technologies have cannibalized existing markets, the creators have lost benefits; and that the creator born in 1970 has to make her own estimation of future technological developments. Now, the creator can factor in the foreseeable consequences of the objectively unforeseeable technology.<sup>58</sup> To put it another way, an occurrence can be foreseen at a general level while being unforeseen at a more specific level. Professor Balganesh sees this objection coming and, in anticipation, tells us nothing more than that “[i]t is not readily apparent that copyright needs to validate every ex ante estimate or expectation of a creator.”<sup>59</sup> But isn’t that exactly what we’re debating?

#### IV. FORESEEING HOW THE COPYRIGHT ECONOMY ADAPTS

Another set of problems with the proposal is that there is little or no discussion of markets for copyrighted works, the formation or deployment of capital in copyright industries, or the possible response of private parties to the proposal. This is not particular to Professor Balganesh’s article: in fact, very few proposals for changing the contours of copyright law discuss anything beyond creation and initial dissemination — that is, the early phases of the lives of these intellectual properties. Patent scholarship has been better at this, but most of us working in the field need to pay more attention to “later life” issues of copyrights and patents.

First, Professor Balganesh acknowledges that under his proposal works created at different times will have different protected markets and asks “[d]oes this pose problems?”<sup>60</sup> This proposal might affect marketing efforts for individual artists with long-lived careers, but it will certainly affect corporate holders of intellectual property. When someone contemplates buying a library of copyrighted works (or a portfolio of patents), proper valuation already depends on a careful inventory of expiration dates. With the Balganesh proposal, there would be the added, but manageable task of auditing what markets were objectively foreseeable for the different groups of audiovisual works, based on their production years.

More troubling is that the Balganesh proposal disadvantages individual authors and owners more than corporate copyright interests; it does this while not truly relieving new technologies of having to deal with copyright owners. To see this, let’s return to some unforeseen new technologies — the VCR, the Google Books project, and Google

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<sup>58</sup> Professor Balganesh acknowledges the possibility of the “creator’s belief that her work will come to be used in association with some *wholly unforeseeable* medium, merely because such unforeseeable media emerged in the past.” *Id.* at 1615.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1628.

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Image Search. The successful dissemination of each of these technologies depends partly on it being comprehensive. This means that large, corporate copyright interests will be able to force the new, comprehensive technology into some kind of licensing arrangements. Why? Because the large-scale corporate copyright interests have renewing portfolios of copyrighted works, constantly adding new works to their libraries and vaults; the new works will have new, revised standards of foreseeable returns. Against the VCR, DVD, and Blue-Ray, the producers of *I Love Lucy* (if they retain any rights) will have no claim under Balganesch's proposal, but the people at Paramount will be able to say that for everything in their vaults created after some date, the VCR and its successors were foreseen. Random House and the Associated Press will be able to do the same thing to Google for their books and photos created after perhaps 2000, although John Updike is largely out of luck and the estates of James Baldwin and Ansel Adams are screwed. In each case, the new technology will have to deal with the corporate copyright interests to fulfill its appeal of comprehensiveness, but not with the individually owned "back catalog."

This outcome also should make us wonder if the proposal will be much of a friend to new technologies. Professor Balganesch believes that one of the virtues of the proposal is that it is a "fuzzy standard" that will have only "marginal" impact on authors' expectations.<sup>61</sup> I think he is correct. But the impact on new technologies that perceive copyright law as a barrier to their business models may also be marginal. Many internet successes have been about building traffic drawn to large libraries of other people's content, which is either impliedly licensed (Google regular search), volunteered (eBay, Flickr, and genuine user generated content on YouTube), or there without authorization (Napster, Aimster, much of early YouTube, and scores of "UGC" sites). If you want to draw traffic to a large library of content under the Balganesch proposal, you have the problem of figuring out the objectively foreseen markets for each chronological tranche of content; then, no later than the public launch date of your paradigm shifting technology, all subsequently created content you might want is protected from your business model. In short, Balganesch says he is concerned with the holdup costs that copyright imposes on new technologies, but his proposal tends to strip that power from individuals who were creators in the past (and their families), while leaving significant holdup power in the hands of long-term corporate players who are constantly augmenting their copyright libraries.

Another important consideration is the feedback loop of any reform proposals — the potential for private "gaming" of any new standard.

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<sup>61</sup> *Id.* at 1621.

Tax law experts know this very well; copyright experts less so. This goes to the kinship that Professor Balganesh rightly sees between his proposal and my own Fair Use Across Time idea.<sup>62</sup> My 2003 proposal would expand fair uses of older copyrighted works on the premise that the remaining market for a copyrighted work keeps shrinking as we approach the expiration date of the work's copyright.<sup>63</sup> As the remaining market shrinks, the adverse impact of any type of unauthorized use on the total market for the work also shrinks, making the unauthorized use more and more likely to be deemed "fair" (under the Court's existing doctrine).<sup>64</sup> Professor Balganesh notes that my Fair Use Across Time proposal does not truly align copyright rewards with needed incentives.<sup>65</sup> He is right. Although they overlap to some degree, his proposal might produce more alignment.

But once we are heading down that road, why not go all the way? Earlier, I said it was not Professor Balganesh's project to limit the scope of copyright's exclusive rights to *just* what is *necessary* to serve the incentive function. But if that is the truly perfect instrumentalist copyright law, why don't we just advocate that? The answer is that such a system is unworkable — broad categories of what incentive is needed for what kinds of works will never be accurate and will be constantly in need in revision. Ex ante cases-by-case analysis of the needed incentives for each creator with each work would be prohibitively expensive; ex post case-by-case analysis of the needed incentives for each creator with each work would be limited to litigated cases, but the evidence would be one hundred percent self-serving and completely unreliable. Private gaming would be rampant no matter how we tried to implement the theoretically perfect instrumentalist copyright law.

And how does Professor Balganesh's proposal fare on implementation and the problem of gaming? Professor Balganesh recognizes that his requirement that foreseen markets are "dependent on the general state of knowledge known at the time of creation" will push people into public disclosure of the markets they anticipate.<sup>66</sup> Using a software example, he posits that such disclosures "are likely to be of immense benefit socially."<sup>67</sup> But we can imagine lots of other private responses — and they would limit the proposal's effectiveness. If the Supreme Court were to adopt the Balganesh proposal in January, by March deal memos for films, books, and music would include "fore-

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<sup>62</sup> See Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775 (2003).

<sup>63</sup> See *id.* at 780–81.

<sup>64</sup> See *id.*

<sup>65</sup> See Balganesh, *supra* note 1, at 1588.

<sup>66</sup> Balganesh, *supra* note 1, at 1624.

<sup>67</sup> *Id.* at 1625.

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seen markets” statements; film producers and video game producers — coached by their lawyers — would write pieces in trade publications discussing foreseeable markets; conferences would be organized on foreseeable markets in every copyright industry. All of this might render the proposal ineffective except for the dramatic paradigm shift that the smart folks in the new cottage industry (foreseeability consultants) truly did not foresee. It is fair to ask whether the added costs on the system would be worth the positive impact on the paradigm-shifting technology — which is limited because the technologists who want comprehensiveness nonetheless have to deal with the long-term, corporate copyright interests.

The same gaming problem plagues neither patent law’s use of the “person having ordinary skill in the art” to determine non-obviousness nor my Fair Use Across Time proposal. For instance, because the latter proposal is premised on the remaining market for a copyrighted work shrinking as the work approaches its copyright expiration date, the expansion of fair use would hold true through deflation, hyperinflation, and stagnation; it would hold true whatever the copyright owner says about his or her intended exploitation; it would hold true even if copyright terms were extended again. But in both proposals — that of Professor Balganesch and mine — tighter alignment of rewards with needed incentives is compromised to make the system more workable.

## V. CONCLUSION

Of course, there is a solution that completely avoids the gaming problem: shorter copyright limits.<sup>68</sup> Putting aside Professor Balganesch’s example of computer code as a bedspread design, the only other two concrete examples he gives of his proposal having bite involve new technologies that arose thirty years or so after the creation of copyrighted work. (As discussed above, the Second Circuit has already disagreed with one of his examples.) Any economist or film producer or novelist would tell you that the effects on the copyright incentive for creating new works will be quite small for monies thirty years out — whether one curtailed unforeseen purposes or simply lopped off the copyright term. So Balganesch’s proposal could lead sympathetic readers to an unsurprising conclusion: instead of worrying about private gaming or litigating foreseeability in each case, we would be better off with a shorter copyright term. All this effort spent on explaining and bolstering a foreseeability limit turns out to be a clever strategy — yet one more clever strategy proposed by law professors — to find a way

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<sup>68</sup> I am so indebted to Professor Robert Brauneis for the thinking in this paragraph that were it not for this footnote, the sentences therein would likely be plagiarism.

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to limit indirectly what Congress and the Supreme Court have recognized as the copyright term. At one point in the article, Professor Balganesch tips his hand and acknowledges this: “It is precisely the existence of this abnormally long period of protection that justifies non-temporal limits on copyright.”<sup>69</sup>

Viewed by itself, on its own merits, the Balganesch proposal is a simple, elegant elaboration of how economic incentives work or should work in copyright. Like any theory, it has significant problems in specification and implementation, but that does not detract from its important contribution to the core literature on the instrumentalist theory of copyright. It may not define the proper “contours” of copyright law because there is more to copyright law than economic instrumentalism. But it is almost more interesting to view the article as part of that large body of “copyright minimalist” scholarship, which proposes, suggests, elaborates — indeed, often implores for — limits on what is perceived as a copyright law grown too powerful. To return to where we started, one wonders: is publication of the copyright critique genre in the *Harvard Law Review* a signal of its legitimization, its mainstreaming, or its exhaustion and decline?

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<sup>69</sup> Balganesch, *supra* note 1, at 1626. One might say I was doing the same thing in my 2003 article, except that its logic applies whether the copyright term is twenty-five years or ninety-five years.