NEW TECHNOLOGY/NEW COPYRIGHT POLICY": THANKS TO THE "BALANCE" DISCOURSE?

By LOKESH VYAS*

Is copyright law a naked emperor whose garments are shed every few years or decades when a new technology comes into the market? From printing presses to generative AI, history reveals a recurring impulse to adjust copyright law with new technological advancements. Does technology strip copyright bare, or is this a result of a well-regulated discourse that makes it look so? Using Foucauldian ideas, this short essay problematizes this pervasive "new technology, new copyright policy" trend, arguing that it stems from the "balance" discourse – a pervasive mode of thinking that has become dominant in the last few recent decades that frames copyright as a zero-sum tool mediating between authors' rights and the public interest.

INTRODUCTION

Namaskar.

Does copyright law behave like a naked emperor whose garments are shed every few years or decades? –a question that popped up during a conversation with an Indian legal scholar (and a dear friend).[1] From printing —books, photography, player pianos, radio, cable TV, photocopying, software, video cassette recorders, and the internet— to generative AI, it appears that every time a new technology comes, there comes an irresistible urge to change the copyright law and "adjust" it (or give it "new clothes," if I may) accordingly.[2] Currently,

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[1] The legal scholar referred above is Aditya Gupta, a legal researcher at Institute of Management (IIM), Ahmedabad and Internet Archives https://unesdoc.unesco.org/ark:/48223/pf0000187683.

[2] *See generally*, *Copyright, When Old Technologies Were New in* COPYRIGHT AND THE CHALLENGE OF THE NEW CHALLENGE OF THE NEW (Brad Sherman and Leanne Wiseman eds., 2012); Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88(6) CAL. L. REV. (2001).

similar issues concerning artificial intelligence are being raised.[3] A similar sentiment can be found in the ongoing negotiations on the broadcasting treaty, where the treaty proponents have significantly transgressed from originally asked traditional "signal-based" broadcasting to a framework that includes the internet.[4]

It's worth asking what routinely strips this allegorical emperor of its clothes. More importantly, does the emperor "really" lose the clothes every time a new technology arrives, or does it just "appear" so? Or, more problematically, is it "made to" appear so? Undoubtedly, there is a *correlation* between the advent of technology and copyright law, as the changes in technology may affect how people engage with information and knowledge—not denied! However, it doesn't necessarily mean that there is an inevitable cause-effect relationship, for which copyright law always needs revision.

In this article, brooding over this issue, I claim that the current copyright law thinking seems to suffer from the "*new technology/new copyright policy*" trend, which stems from the much-naturalized "Balance" discourse. Reducing copyright history and policy to a simplistic discourse—where technology directly drives legal change—ignores the deeper forces that legitimize those changes and the power dynamics shaping how copyright adapts to technology.[5] Among other things, what lends legitimacy to this trend is the much-bandied "balance" discourse of copyright law, which presents copyright law as a zero-sum tool that "balances" authors' rights and the public interest.

Here, it's crucial to highlight and differentiate this article from similarly themed ideas. For instance, the "If Value, Then Right" notion—where IP rights expand to capture emerging value—shares some ground with what I have called the "New Technology/New Copyright law" trend. It's worth noting, however, that the "New Technology/New Copyright law" trend does not solely focus on the rights of IP holders;[6] instead, it speaks of any change in copyright policy (e.g., a

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[3] *See generally*, Micaela Mantegna, *ARTificial: Why Copyright Is Not the Right Policy Tool to Deal with Generative AI*, 133 YALE L. J. 1126 (2024).

[4] *See generally,* James Love, *The Trouble With the WIPO Broadcasting Treaty* Joint PIJIP/TLS RESEARCH PAPER SERIES 1 (2023).

[5] *See* Oren Bracha, *Copyright history as history of technology*, 5(1) THE WIPO JOURNAL, 45 (2013); Oren Bracha, *The History of Intellectual Property as The History of Capitalism*, 71 CASE W. RSRV. L. REV. 547 (2020); WILLIAM W. FISHER III, THE GROWTH OF INTELLECTUAL PROPERTY: A HISTORY OF THE OWNERSHIP OF IDEAS IN THE UNITED STATES (2005); Margaret Ann Wilkinson, *What is the role of new technologies in tensions in intellectual property?, in* INTELLECTUAL PROPERTY PERSPECTIVES ON THE REGULATION OF NEW TECHNOLOGIES (Tana Pistorius, ed., 2018).

[6] Alfred Chueh-Chin Yen, Brief Thoughts About If Value/Then Right 5230 (December 17, 2019) (forthcoming article) (on file with Boston University Law Review) (Quoting from an excerpt from Professor Gordon's email, "wherever value is received, a legal duty to pay arises, regardless of whether imposing that legal duty serves public welfare"); For the said principle, Yen cited other works: Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as* Language in the Pepsi Generation, 65 NOTRE DAME L. REV. 397, 405-06

new exception) in the wake of new technology. Similarly, Professor Carys Craig's idea of the "Copyright Trap" critiques the incessant demands of adapting copyright laws in the wake of new technology advancements like generative AI.[7] While this article builds on Prof. Craig's framework (and other similarly themed ideas), it pushes further, arguing that the trap isn't copyright itself but the pervasive "balance" discourse that dominates how copyright is framed and approached. This discourse, I suggest, conditions us to perceive copyright law as inherently reactive, thus reinforcing the so-called trap.

This essay is structured to raise questions rather than give concrete answers. After problematizing the issue in Part I, Part II defines the balance discourse in international copyright law, underscoring its polysemic nature. In Part III, I detail the evolution of the "discourse." I apply this to copyright law in Part IV, explaining its (approximate) origins and implications. In Part V, I discuss the implications of this.

I. FIRST THING FIRST — WHAT'S THE BALANCE "DISCOURSE"?

Today, it is largely agreed copyright is tasked to "incentivize" people to bring forth their work to the public sphere so that the public can "access" and enjoy it.[8]

(1990); Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 178-80, 244 (1992); Peter Lee & Madhavi Sunder, *Design Patents: Law Without Design*, 17 STAN. TECH. L. REV. 277, 285-88 (2013); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1065-69 (2005).

[7] Carys J. Craig, The AI-Copyright Trap (July 15, 2024) (unpublished comment) https://ssrn.com/abstract=4905118.

[8] For examples, *see* Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009); Mark A. Lemley, *Faith-Based Intellectual Property* 62 UCLA L. REV. 1328 (2015). It is notable that although I cited Tushnet and Lemley, I have some reservations. When asserting that "copyright's dominant understanding in the world is utilitarian," I wonder what kind of evidence I should provide. For, simply citing research papers from leading scholars may (/should?) not sufficiently establish what is globally dominant. These scholars often cite other papers, creating a cycle that may not reflect the broader reality. So, my next thought was that more compelling evidence would come from government reports and judicial rulings. However, this raised further questions about which countries' governments and cases to reference, as it is impractical to cover all 180+ nations. One might suggest citing U.S. reports, given its dominant global position, but I hesitate to rely solely on that. If it were about historical backing, I might argue that the system originated there, reflecting its legal tradition. However, proving what "is" dominant today is a tricky terrain, which I would prefer treading carefully, especially considering the self-explanatory nature of the term "knowledge governance" – something [that] composes the core of my project. Although my project is not an empirical study to determine if the dominant understanding of copyright is utilitarian, this point requires substantial emphasis and careful consideration. Nevertheless, all IP theories inherently involve a trade-off or compromise or public vs private/individual angle, which arguably lends legitimacy to the current zero-sum balance-

It is a difficult utilitarian task endowed with copyright — by granting exclusionary rights to authors, copyright limits the public's access to work – the same public for whom the very system is put into place. This phenomenon is dominantly described through the notion of "balance" between authors' rights and public interest, especially in international copyright law.[9] However, it is inherently polysemic and multifunctional, resisting a singular definition or interpretation.[10]

Arguably, two ways exist to understand balance discourse in copyright discussions, albeit slightly overlappingly. First, teleologically, where copyright law aims to achieve a predefined purpose or end goal of balance (regardless of what that means). An example is the WIPO Copyright Treaty (WCT), where balance is "recognized" as an external, pre-existing state to be attained.[11] Second, a methodological balance, which serves as a mechanism to mediate between conflicting interests. For instance, Article 7 of TRIPS prescribes a balance between the rights and obligations of IP holders. Here, the IP right granted comes with an obligation to "contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge."[12] There is more to it as two additional layers underlie these balance frameworks: internal and external. Internal Copyright balance, as a methodological framework, dictates how copyright is constructed, covering aspects such as the term of protection, scope of rights, and exceptions.[13] Conversely, external balance is about how copyright

based thinking. Thus, this will not impact my argument, especially not in any adverse manner. *See generally,* Talha Syed & Oren Bracha, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright* 29 Berkeley Tech. L. J. (2014).

[9] The WIPO Copyright Treaty, Dec. 20, 1996, preamble, TRT/WCT/00 ("Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention,"). *See also* Louise Goebel, *The Role of History in Copyright Dilemmas*, 9 J.L. & Inf. Sci. 22 (1998).

[10] *See generally,* J. Kaye A History of Balance, 1250–1375: The Emergence of a New Model of Equilibrium and Its Impact on Thought (2014).

[11] *See* Henning Grosse Ruse-Khan, *From TRIPS to FTAs and Back: Re-Conceptualising the Role of a Multilateral IP Framework in a TRIPS-Plus World,* 48 Netherlands Yearbook of Int'l L 57 (2018)

[12] *Id*.

[13] For a nice description of how complex reaching "balance" maybe, see this empirical chapter, *see* Hilty, Reto M; Nérisson, Sylvie *The balance of copyright in* General reports of the XVIIIth Congress of the International Academy of Comparative Law, 355, 355 (eds., Karen B. Brown, David V. Snyder Springer, (2012) ("The balance to be achieved in copyright law traditionally can be described as follows. Whose liberties should be given priority? Those of creators or those of the rest of society? In other words, how is the balance to be achieved between the interests of copyright holders and those of the users of works? The reality principle actually dictates a broadening of the circle of players, so as to refine the naming of stakeholders: creators and artistic performers, investors and professional users (employers, publishers and producers distributors), end-users, creative and amateur

interacts with broader social, political, and economic interests, such as the right to education, technological development, and cultural development.[14] Importantly, these balancing acts occur at national and international levels, shaping how copyright law is designed and implemented in diverse contexts.[15]

Herein lies the rub: what I have described above is not just about invoking a balance metaphor while discussing copyright law dichotomously. Instead, I posit it as "discourse" that comes with and corroborates a thinking pattern to approach copyright law.[16] I use it in the Foucauldian way, where a discourse shapes/nurtures an *epistemic* reality and functions as a control tool.[17] As Foucault writes, *"[i]n every society the production of discourse is simultaneously regulated, selected, organized, and redistributed by a certain number of procedures, whose role is to conjure away its power and its dangers, to master its chance events, to evade its heavy, formidable, materiality."*[18] In this way, discourse determines the meaning of the (con)text and sets out reasons or background rules for accepting statements as knowledge. Anything diverging from the "derived truth" of such discourse appears "deviant" (or theoretical, crazy, abstract, radical, etc.), placing it outside of accepted discourse and, consequently, outside the realms of society, sociality, or the "sociable." I repeat – anything that goes off this "discourse" appears radical, abstract, impractical, etc.

At a higher level of abstraction, discourse(s) serve the dominating *episteme* of the time, which is utilitarian for copyright law. Here, episteme refers to a general system of thought that defines the boundaries for the discourses of a particular period. This includes scientific disciplines and philosophical theories that delve into the nature of knowledge during that era.

Of course, this episteme doesn't come alone or is bulletproof. Still, it remains clothed and constantly corroborated by coinciding ideologies (and the dominant "*isms"*) of the time, say neoliberalism, (neo-)colonialism, capitalism, etc.).

Okay. That's all for the theory part; let's see how all this play(ed) out in copyright law.

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users, etc."); see generally, Balancing Copyright - A Survey of National Approaches (eds. Reto M. Hilty, Sylvie Nérisson, Springer, 2012).

[14] *See generally,* Ruth L. Okediji, *Copyright and Public Welfare in Global Perspective*, 7 Ind. J. Global Legal Stud. 117 (1999); Jerome H. Reichman, *The TRIPs Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?* 32 Case W. Res. J. Int'l L. 441 (2000); Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 Emory Int'l L. Rev. 819 (2003).

[15] *See* Andrea Wechsler, The Quest for Balance in Intellectual Property Law: An Emerging Paradigm or a Fad? (2009), 15.

[16] I have used this conceptualization in other essay, see, Lokesh Vyas, *Whither are Global South's Copyright Scholar(ship): Lost in Citation Game?* Int'l R. of Intellectual Property and Competition Law (forthcoming) (2025).

[17] Michael Foucault, *Orders of discourse,* 10(2) Social Science Information, 7-30 (1971).

[18] *Id* at 8.

II. EVOLUTION OF THE BALANCE DISCOURSE

For sure, the "balance" discourse in international copyright law didn't become dominant in a year or a decade. As several scholars have already hinted at the advent of the balancing age / modern legal thinking, it is an intellectual-political project of the century that arguably began in Germany around the 1880s in administrative law as a "proportionality" test.19 Upon a quick Manupatra research, an online database for legal research, it appears that after 1940, "balancing/balance" as an explicit concept/idea led to a surge in Indian legal thinking (not limited to copyright law). Interestingly, Google Ngram Viewer also reveals that the word "balance" gained traction after the 1940s.20

Coming back to its evolution, the balance discourse in international copyright law arguably developed in three stages, contrary to the prevalent historical view that traces its origins to the 18th century.21 First, it emerged as an implicit notion of compromise or weighing interests from the 1880s to 1945.[22] Second, it became a *metaphor* to describe copyright law, particularly in the post-WWII era, or as part of modern legal thought from 1945 to the 1980s. Finally, it became a dominant discourse underpinning copyright theory, justification, and broader legal thinking from the 1980s onwards. It's important to note that this periodization doesn't aim to reduce the entire history of copyright to a troika of timelines. Within these timelines, there are numerous currents and countercurrents that deserve more in-

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[19] *See* Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000* in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek & Alvaro Santos eds. 2006); Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins* 8(2) I-Con: INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 263 (2010).

[20]Balance, Books Ngram Viewer https://books.google.com/ngrams/graph?year_start=1800&year_end=2019&corpus=26&smoothing=7&case_insensitive=on&content=balance.

[21] *See* Isabella Alexander, *Sayer v. Moore (1785)* in LANDMARK CASES IN INTELLECTUAL PROPERTY LAW (Jose Bellido, Ed., Hart Publishing 2017); *see also* Kathy Bowrey, *On Clarifying the Role of Originality and Fair Use in 19th Century UK Jurisprudence: Appreciating 'The Humble Grey Which Emerges as the Result of Long Controversy* UNSW LAW RSCH. PAPER NO. 58 (2008).

[22]This timeline can be reexamined. Since the article focuses on international copyright law, the first stage ideally begins in the 1820s, with the rise of bilateral copyright treaties marking the early push toward internationalization. However, it's important to note that international copyright law built upon the earlier development of domestic copyright systems—copyright laws first emerged within individual countries and were later expanded internationally. I chose the 1880s as the starting point for this timeline because it marks the establishment of the Berne Convention, the first international copyright treaty. To fully capture this evolution, one could even trace back to earlier centuries when the first copyright laws or broader frameworks for regulating information began to take shape. See generally, Sam Ricketson & Jane C. Ginsburg, Origins of the Berne Convention, in INT'L COPYRIGHT, AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND 841 (2nd ed. 2006).

depth exploration. Given the scope of this essay, it's not practical to detail every decision or event that reflects the legal thinking shaping international copyright law. Instead, to support the hypothesis of this essay—that the current discourse of balance underlies several latent discontinuities and has gradually taken its current shape- I focus on key individuals, provisions, and structural readings of texts and negotiations to uncover the underlying legal and ideological influence.

Contrary to the 1996 WCT's claim of "reflecting" the "balance" spirit of the 1886 Berne Convention (a leap of over a century),[23] the original Berne Convention never explicitly mentioned "balance" in this context. The concept of the author—along with their evolving identity—and the contrasting notion of the public (another faceless entity that has shifted over time, especially with the expansion of authors' rights) have undergone significant transformations. Thus, what the WCT labels as an "author" in the 1990s is not the same as the author envisioned in the 1886 Berne Convention. Deep discontinuities are hidden beneath this seemingly simple author and public interest equation.

Interestingly, the Berne Convention never explicitly spoke about "balance" between the public and the author's interests. Unlike modern international IP treaties, its preamble and objectives focused on protecting authors, as reflected in its title, "Berne Convention *for the Protection of Literary and Artistic Works*." However, this doesn't mean public interests were ignored. From the outset, the Convention considered copyright a non-absolute right and included provisions allowing countries to adapt copyright laws for public benefit. Thus, the utilitarian understanding, as we call it today, has been there before. An easy reference to the same would be the focus of Victor Hugo, a key player in realizing the Berne Convention, on the public domain.[24] For a more nuanced understanding of how copyright was envisaged in its early years, take Article 10, drafted initially as Article 8 in the 1886 draft, which addressed "Certain Free Uses of Works," including quotations, teaching illustrations, and attribution requirements.[25] Its history reveals intriguing insights into early copyright thinking.

The provision originated from a German proposal in the first Berne meeting in 1884 advocating for "reciprocal rights" for the public, phrased as "la faculté réciproque" in the original French translation.[26] It emphasized the "*Lawful reproduction of protected works in scientific or educational works*." While

[23] *See supra* note 11.

[24] James Boyle, Victor Hugo: Guardian of the Public Domain, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND. See also Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 (1990).

[25] *See generally,* TANYA APLIN & LIONEL BENTLY, GLOBAL MANDATORY FAIR USE: THE NATURE AND SCOPE OF THE RIGHT TO QUOTE COPYRIGHT WORKS (CUP, 2020).

[26] Minutes of the Second Meeting of the Conference for the Protection of Authors' Rights (Sept. 9, 1884) in International Bureau of Intellectual Property, The Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986, Reports of the Various Diplomatic Conferences, WIPO Publication No. 877 at 90-91.

discussing this provision, Mr. Reichardt (Private Legation Counsellor, Reporting Counsellor to the Foreign Affairs Department of the German Empire), speaking on behalf of Germany, described this provision as one with "universal interest."[27] Reichardt remarked, "The inclusion of the above provision had been proposed by the German Delegation because there seemed to be a universal interest in certain borrowings from authors to be allowed, within reasonable limits, for educational purposes."[28] The committee recognized the universal interest behind the provision, stating that "the committee had acknowledged the existence of that [universal] interest. It had further considered it preferable to include the reproduction right in the General Convention rather than leave it to special conventions or the domestic legislation of each country."[29] Interestingly, the German delegate strongly defended the provision, asserting, "This way of thinking has its own justification in relation to every country unless there is a desire to hamper the free development of education."[30] He further emphasized, "This is, therefore, one of the most universal principles, and one whose inclusion in the General Convention Germany will never renounce. Deleting Article 8, which introduces a restriction on copyright, would nullify comparable provisions in existing conventions due to the application of the laws of the country of origin under Article 2 of the draft Convention."[31] Emphasizing the provision's importance, Mr. Lavollée (Consul General of France) remarked that "[A]rticle 8 should not be regarded as an exception to the rule of protection, but rather as a specific provision which, if it remained part of the specific conventions while being excluded from the General Convention, should be regarded not as contrary to the latter Convention, but as relating to matters other than those governed by it."[32]

With the passage of a century till 1971, the Convention underwent a substantial change with the expansion of overall rights of copyright holders and limited restriction on them; it's clear that the underlying thinking around the Berne Convention was not of simple balance as WCT proclaims.

This utilitarian thinking evolved, particularly after WWII, which many scholars identify as the period when "balance" emerged as a key concept in legal discourse.[33] However, even during this time, the balance idea was not strictly understood as a trade-off between authors and the public but rather as a way to

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[27] *Id* at 98.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] Duncan Kennedy, *Three Globalizations of Law and Legal Thought*: 1850–2000 *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL. 19-73 (Trubek DM, Santos A, eds., 2006); JACCO BOMHOFF, BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE 10 (2013); Jacob Bomhoff, *Genealogies of Balancing as Discourse* 4 L. AND ETHICS OF HUM. RTS. 1, 109-139 2010).

reconcile access to information with the protection of works, as clear from some of the scholarship from that time. At this stage, explicit references to balance were absent from international copyright law, which the Berne Convention still governed. However, the UCC Convention, introduced around this time, marked a shift by explicitly emphasizing the need to weigh interests, advocating for "the wider dissemination of works of the human mind and increased international understanding." WIPO's Model Laws began incorporating more explicitly balance-focused language into IP frameworks. For instance, its model patent laws reflected this balance-driven approach, laying the groundwork for a broader understanding of intellectual property regulation. By this time, we could also see the rise of balance-based framing in copyright law among scholars.[34]

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[34] REPORT OF THE COPYRIGHT COMMITTEE FRONT COVER GREAT BRITAIN: COPYRIGHT COMMITTEE 64 (H.M. Stationary Office, 1952), http://heinonline.org/HOL/P?h=hein.intprop/rcprcm0001&i=66 (Gregory Committee) ("Without a sufficient degree of protection the copyright owner will not produce his works, but experience shows that, without a sufficient degree of protection against the copyright owner, the general public lies in the grip of an unrestricted control, from which it cannot escape. We have tried in the recommendations contained in the following paragraphs to find what we hope is a reasonable balance between the two interests."); The first Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, in 1961 "Within limits, the author's interests coincide with those of the public. Where they conflict, the public interest must prevail. The ultimate task of the copyright law is to strike a fair balance. between the author's right to control the dissemination of his works and the public interest in fostering their widest dissemination."); BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT, (1967) (Willian C. Warren noted in the foreword: "Successive ages have drawn different balances among the interest of the writer in the control and exploitation of his intellectual property, the related interest of the publisher, and the competing interest of society in the untrammeled dissemination of ideas. It is this striking of balances in the law of copyright in the past, at present, and for the future, which constitutes the central theme of the James S. Carpentier Lectures delivered by Professor Benjamin Kaplan at the Columbia University School of Law in March 1966. His counsel that greater emphasis should be placed on the public's interest in the free accessibility of ideas is particularly appropriate in an era when freedom of expression is frequently under attack and when the means of dissemination of ideas are increasingly concentrated in fewer hands.") Copyright and designs law: report of the Committee to Consider the Law on Copyright and Designs, 1997; *see also The Whitford Committee Report on Copyright and Designs Law Gerald Dworkin,* THE MODERN LAW REVIEW, Vol. 40, No. 6 (Nov., 1977), pp. 685-700 (16 pages). In scholarship, its usage goes much before. Here are some examples: Leon R. Yankwich, *What Is Fair Use?* 22(1) THE U. OF CHICAGO L.R., Vol. 22, No. 1 (Autumn, 1954), pp. 203-215 (13 pages) ("They strike a scrupulous balance between the right of the author to the product of his creative intellect an imagination and the right of the public in the dissemination of knowledge and the promotion and progress of science and useful arts which is the institutional mandate[54] in which the American law of copy"); L. Quincy Mumford, *The History of Copyright,* 46 ALA BULLETIN (1952) ("The history of copyright in this country has been an attempt to balance what has sometimes seemed to be antithetical interests. On the one hand the author is interested that his writings be

In the third stage, arguably after the 1980s, with the rise of civil society in international law, the making of "balance" *discourse* began, shaping the very theory of copyright law and its legal reasoning, especially by the courts.[35] TRIPS' Article 7 may be the initial document outlining intellectual property rights, including copyright law. India proposed this framework in 1989.[36] Notably, I view this as the emergence of the *discourse* (from a mere weighing of interests or a metaphor used in some cases) that signals a shift in how copyright law is conceptualized. In other words, once primarily focused on protecting private rights, copyright was increasingly expected to accommodate public interest more *explicitly.* This was also where the public domain idea arose as a countervailing articulation to be pitted against expanding copyright law.[37] And the rise of relying

protected so that cheap piratical copies of foreign editions of those writings may not be circulated in this country, thereby greatly reducing his income from his literary labors; on the other hand some publishers have in the past desired to have access to works of foreign authors without payment of royalties, while the printing trades have an economic interest in protection from the competition of foreign labor, and the scholar has an interest in the freest possible access to all sources of information in his quest for knowledge."); Melville Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 944-45 (1968) (taking about definitional balance) and quoted by Alfred C. Yen in *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 EMORY L.J. 393, 396–97 (1989)" (In Nimmer's view, the idea/expression dichotomy represented an acceptable "definitional balance" between copyright and the first amendment. Granting copyright protection to an author's expression could be weighed against denying copyright protection to her ideas, thereby leading to a balance between the competing values of copyright and the first amendment.)

[35] *See* e.g., Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) ("As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly."); see generally, Carys Craig, Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks (2017) (Providing examples from various countries illustrates how the "balance" discourse, which Carys calls a metaphor, has increased in response to the growing emphasis on user rights discussions.).

[36] *See supra* note 13 citing "Multilateral Trade Negotiations the Uruguay Round, Communication from India: Applicability of the Basic Principles of the GATT and of Relevant International Intellectual Property Conventions, MTN.GNG/NG11/W/39, 5 September 1989, paras 13–14."

[37]There exists rich and diverse scholarship on this topic. Among the most frequently cited articles, see James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 Law and Contemporary Problems 33–74; Jessica Litman, *The Public Domain*, 29 EMORY L. J. 965-1023 (1990); David L. Lange, *Recognizing the Public Domain*, 44 LAW AND CONTEMPORARY PROBLEMS 147-178 (1981).

on fair use (as a concrete right to stand against copyright law) got traction.[38] At this stage—where we find ourselves—it has become a foundational framework/lens for policymakers, academics, and other stakeholders. Here, "balance" seems more legitimate and necessary for the regime shifting that happened at this time, creating a complex international IP regime linked to trade and other aspects of socio-political life (especially human rights).

III. WHAT'S WRONG WITH THE DISCOURSE?

From the standpoint of "balance" discourse, a new technology often appears (or can be easily argued to[39]) to disrupt an existing copyright system. Sample the "AI training with copyrighted works" problem, which is currently approached with two leading positions: public interest advocates demand new exceptions for new technology (e.g., TDM exception), thinking it will remove the hurdles to "access" creative corpus and enhance the creative corpus.[40] This way, they begin by applying the fair dealing/use tests to check if a concerned technology fits the current copyright statutory exceptions.[41] Au contraire, some demand a remunerative mechanism or ask to expand an existing right or read expansively, thinking it will keep the "incentive" aspect alive.[42]

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[38] This can be found in many leading cases involving fair use, see generally, CRAIG, CARYS, GLOBALIZING USER RIGHTS-TALK: ON COPYRIGHT LIMITS AND RHETORICAL RISKS (2017); see also Samuelson, Pamela, *Fair Use Defenses in Disruptive Technology Cases*, 71 UCLA L. REV. 1484 (2024).

[39] An interesting example here is the discussion on the copyright Term Extension Act of 1998, where both the majority and minority committee reports harp on the balance discourse to bring their point home. The point well-exemplified in I. Fred Koenigsberg, *The Fifth Annual Christopher A. Meyer Memorial Lecture: Humpty-Dumpty in Copyrightland*, 51 J. COPYRIGHT SOC'Y U.S.A. 677 (2004). The majority report supporting the extension noted that "In *balancing these competing interests*, Congress has sought to ensure that creators are afforded ample opportunity to exploit their works throughout the course of the works' marketable lives, thus maximizing the return on creative investment and strengthening incentives to creativity" Whereas the minority committee remarked "*The Constitution mandates that we consider balance when we consider copyrigh*t. We have a balanced copyright system that favors creators but that holds out a promise that sometime in the distant future the public will have unfettered access to creators' works. Extending the term another 20 years upsets that balance and threatens to dry up the public domain, which is a major source of creativity."

[40] Sean Fiil-Flynn et al, Legal reform to enhance global text and data mining research: Outdated copyright laws around the world hinder research Science, 378(6623), 951-53 (2022).

[41] I have explained the claim in detail here, Lokesh Vyas, *Faith-Based Fair Dealing: Beware, New Exceptions Ahead (?)*, Kluwer Copyright Blog, (Dec., 2023) https://copyrightblog.kluweriplaw.com/2023/12/18/faith-based-fair-dealing-beware-new-exceptions-ahead/

[42] See e.g., Martin Senftleben, *Generative AI and Author Remuneration,* 54 IIC 1535–1560 (2023); Christophe Geiger & Vincenzo Iaia, *The Forgotten Creator: Towards a Statutory*

Both can validly argue that it (i.e., whatever their solution/argument is) serves the purpose of copyright law. The discourse of "Balance" is spacious enough to accommodate both. Whoever can present (with more substantial lobbying power, of course!) more compelling arguments and interests, especially those coinciding with the dominant socio-economic-political consciousness of the time, will appear closer to balance. However, what remains missing/invisibilized is the scrutiny of questions such as whether the system was disrupted in the first place. "What" is construed as disruption in our current way of thinking, and "who" defines it? Is the said disruption universal or equally applicable to all the countries? Is the disruption, if any, desirable for the primary/end goal (that the copyright aims to achieve)? These questions will hardly appear (without being called "theoretical," "radical," etc., as they question the discourse), for there is no metric to gauge balance except the dominant political-economic thought of the time. (No doubt, "disruption" too can be a discourse on its own with its discursive effects, but in copyright law, it often remains tethered to "balance," which is my point here.)

In sum, we are (being) conditioned to see/understand/approach the copyright system in a certain manner, often overlooking the inherent ambiguity and unresolved aspects or perhaps even oversimplifying their resolution. With the balance-based mindset, one finds it normal/natural to invoke (or ask for) an exception, for s/he has to bring the lost balance back. Sometimes, it feels like we're just shoehorning things into copyright law because it's the easiest option, even if it doesn't fit.

CONCLUSION

Perhaps, at the cost of reiteration, its notable the essay does not provide an immaculate theory and history of copyright thinking. Instead, this essay aims to problematize the commonly asserted notion that technological progress inherently drives developments in copyright law. Indeed, this seems logical on the surface, as changes in the former may impact how people engage with information (regulated by copyright law). There is no denial or contestation of that. However, we can find some underlying and unasked tensions upon closer examination.

Firstly, technology is not an autonomous force; instead, it emerges from a complex interplay of socio-political factors, and when deployed, it brings a particular change within society.[43] As Langdon Winner said decades ago, artifacts do have politics.[44] For example, suppose printing was the "sole" reason that birthed copyright (i.e., a "property" right). Why did China or other countries (which witnessed printing-type invention earlier) not create the first copyright law

Remuneration Right for Machine Learning of Generative AI, 52 COMPUTER L. & SECURITY R. (2024).

[43] *See generally supra* note 6, especially *see* Oren Bracha's works.

[44] L. Winner, *Do Artifacts Have Politics?* 109(1) DAEDALUS 121-136 (1980).

– a "property" right on information?[45] While this essay doesn't aim to dig deeper into the terrain, I want to highlight that there are various factors beyond technology—what you might call "unknown knowns, known unknowns, and definitely, unknown unknowns"[46]—that influenced the development of copyright.

Second, as aptly, though not directly, underscored by Prof. Craig,[47] it is noteworthy and worth asking why certain countries in the Global North, with advanced knowledge economies, tend to pioneer new technologies.[48] Consequently, they initiate calls for copyright reforms, witness judicial engagements surrounding these technologies, propose policy changes domestically, and advocate for international reforms through treaties and agreements. Furthermore, their scholars (get to) extensively research and publish on these issues, proposing interpretations and resolutions, subsequently gaining recognition as most cited/relied "experts" on that issue. Over time, "their" solutions to cope with the new technology appear as the "viable" universal solution. Do you see any pattern here? Perhaps not, because the prevailing discourse of "balance" conceals these dynamics, leading us to assume that everything can be brought to balance with a change. You just do your task – bring the "balance" back. However, the reality is far from ideal.

So, the next question arises: what do we do to resist the discourse? While I don't have a clear answer on how to shift this mindset or what actions to take, a starting point could involve reclaiming our consciousness or recognizing our "IP-sciousness" embedded in our actions and thoughts. At the very least, this could help us disentangle nondecision-making from decision-making processes. As Bachrach and Baratz relevantly note (*please read it slowly*): "When the dominant values, the accepted rules of the game, the existing power relations among groups, and the instruments of force, singly or in combination, effectively prevent certain grievances from developing into full-fledged issues that call for decisions, it can be said that a nondecision-making situation exists."[49]

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[45] Jared Diamond, *Necessity's Mothe, in* GUNS, GERMS AND STEEL: A SHORT HISTORY OF EVERYBODY FOR THE LAST (1998)

[46]The concept, often attributed to Donald Rumsfeld, is commonly referred to as the "Rumsfeld Matrix." See generally, Paul Austin Murphy, *Rumsfeld's Logic of Known Knowns, Known Unknowns, and Unknown Unknowns,* Medium (Dec. 12, 2020), available at https://medium.com/paul-austin-murphys-essays-on-philosophy/rumsfelds-logic-of-known-knowns-known-unknowns-and-unknown-unknowns-f506db31ac74.

[47] *See generally* Craig, supra note 7.

[48] *See generally*, ANU BRADFORD, THE BRUSSELS EFFECT; HOW THE EUROPEAN UNION RULES THE WORLD (2020).

[49] Peter Bachrach & Morton S. Baratz, *Decisions and Nondecisions: An Analytical Framework,* 57 THE AMER. POL. SCI. REV. 632, 641 (1963).