

# FORESEEABILITY AND COPYRIGHT INCENTIVES

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*Copyright law's principal justification has for long been the theory of creator incentives. Creators are presumed to be rational utility-maximizers and therefore induced to create by the mere prospect of controlling a future market for their yet-to-be-created works. Yet, current copyright doctrine does surprisingly little to give effect to this theory. None of its doctrines enable courts to circumscribe a creator's entitlement by reference to the idea of incentives and the limitations inherent therein. As a consequence, copyright's grant of exclusivity is presumed to extend to all markets and uses for a work, whether or not they were capable of forming any part of a creator's incentive. Limitless incentives thus translate into unbounded entitlements.*

*Through its allocation of costs and benefits, the common law too relies on providing actors with incentives to behave in certain ways. Unlike copyright law however, the common law recognizes the existence of a clear outer limit to its incentive structure and attempts to give effect to this limit through the concept of 'foreseeability'. Premised on the idea that individuals do not cognitively process consequences that are temporally or causally far removed from their actions, foreseeability requires courts to eliminate from the liability calculus certain low-probability occurrences when they are unlikely to have influenced an individual's decision at the time of action. Foreseeability thus represents a cognition-based doctrinal limit to the behavioral modification that the common law attempts to induce.*

*This Article argues that if copyright law is to remain true to its theory of incentives, it needs to pay closer attention to the way in which incentives actually influence creative decision-making and internalize the idea that creators, like actors elsewhere, are subject to cognitive imperfections that in turn limit the effectiveness of incentives. To this end, it proposes a test of 'foreseeable copying' to limit copyright's grant of exclusivity to situations where a copier's use was reasonably foreseeable to the creator at the time of creation —the point when the incentive is meant to operate. Adopting a test of foreseeability is thus likely to better align copyright law with its underlying purpose and provide courts with a mechanism by which to give effect to copyright's theory of incentives in individual cases —thereby according it more than just rhetorical significance.*