COPYRIGHT and TORT as MIRROR IMAGES:
On not mistaking for the right hand what the left hand is doing

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American law schools in their Torts courses routinely teach first year students that a key to understanding the law of personal injury and nuisance is “internalizing externalities.” That is, tort law identifies actors whose behavior is unnecessarily harmful to others, and discourages such behavior by making the actors pay for some or all of the harm they cause. Without tort law, much harm would be “external” to the actors’ decision-making. Once the law “internalizes” to the actor the prospect of having to pay for harm he or she might cause, the actor is induced to be more careful.

What is less commonly taught is the way that copyright law also depends for much of its crucial logic on “internalizing externalities.” And when a scholar indeed looks at copyright through the lens of internalization, it leads sometimes to unfortunate recommendations that all effects be internalized. Yet copyright law like tort law is

1 Copyright 2011 Wendy J Gordon. Photocopies for class use and personal study are permitted. Wendy Gordon is the Philip S. Beck Professor of Law at Boston University School of Law. I thank the law school communities of BU, Fordham, and McGeorge for stimulating discussion; Bob Bone, Julie Cohen, Stacey Dogan, Peter Goldberger, Alon Harel, Brandy Karl, Michael Meurer, Fred Moses, and David Nimmer for their particular comments; and Matthew Shayefar for his research assistance.


2 The same is not true for patent law: causation is usually thought essential to the notion of externality, and US patent law often imposes liability even where the defendant’s invention came about independently of the plaintiff’s invention. By contrast, US copyright law requires proof of a causal connection—often called “copying”—as a prerequisite for liability, and thus copyright maps better than patent onto the notion of liability as a mode of capturing externalities.

3 Mark A. Lemley, Property, Intellectual Property, and Free Riding, 83 Tex. L. Rev 1031 (2005) (criticizing “the effort to permit inventors to capture the full social value of their invention” and
largely about internalization. As this essay will suggest, there is potential for improving copyright law’s operation by explicitly recognizing the parallels between the negligence branch of tort law\(^4\) on the one hand, and copyright law on the other.

First, both negligence law and copyright law are areas where we are uncertain about the proper mix of liability and liberty.\(^5\) Like the common activities (such as driving) that are governed by negligence law, and unlike the uncommon activities (like blasting and other ultrahazardous activities) governed by strict liability, when it comes to the creation of original works of authorship we often do not know a priori the identity of the best mix of activities, and thus do not know the party to whom the internalization should primarily occur.\(^6\) At least since Lord Macaulay and Justice Breyer, and continuing through modern critics like Professors Boldrin and Levine, scholars have questioned whether copyright protection is too strong and lasts too long. Negligence law with its various limits is a good model for reminding us that internalization must have limits.\(^7\)

To quote William Prosser, writing in the tort context, “[T]he mere fact of causation, as distinguished from the nature and degree of the causal connection, can provide no clue of any kind to singling out those which are to be held legally responsible.”\(^8\) The same point can be made about those who “cause” the benefits that pointing out, inter alia, that “In no other area of the economy do we permit the full internalization of social benefits.” Id. at 1032.

\(^4\) The article discusses primarily negligence law, with some brief treatment of ultrahazardous liability and trespass. As a formal matter, of course, the legal category of “torts” is much larger: for example, infringement of copyright is a tort.

\(^5\) [Discuss Hylton here]

\(^6\) The reader may agree with me that liability for ultrahazardous activities is a poor analogy for copyright, yet wonder if trespass might be the correct tort to be exploring for parallels to copyright law. In some ways, copyright law follows the structure of “trespass to land” more closely than it does negligence law. But, as I have argued elsewhere, copyright often errs when it follows the trespass model. The creative arena is rife with market failures that make the strict-liability approach of trespass the wrong model to follow. For further discussion see, e.g., Gordon, Foreseeability and the Harm/Benefit Distinction, supra. In addition, if copyright is about incentivizing creators, then copyright like accident law aims its incentives at decision making during a particular limited point in time. Trespass, by contrast, aims its incentives to affect an owner’s continual decisions over time about how to manage property.

\(^7\) This paragraph responds in part to Dorfman and Jacob’s apparent puzzlement at why I use “accidental personal injury law” rather than all torts as a model. Avihay Dorfman and Assaf Jacob, Copyright As Tort, 12 Theoretical Inquiries L. 59 at n 8 (2011).

Incidentally, the Dorfman and Jacob article suggests that in some cases at least, unintentional copying of copyrighted works should be forgiven if the defendant had acted reasonably. Id at 95. I do not take that step. Although I have elsewhere criticized copyright’s rule that imposes liability for “subconscious copying”, the merits of copyright’s strict liability approach are outside the scope of this article.

\(^8\) Prosser On Torts at 266.
flow from a copyrighted work. Causing an effect does not necessarily mean that one should be responsible for it, neither in the tort sense of being made to pay for all harms one has helped to cause, nor in the copyright sense of being rewarded for all beneficial spillovers one has helped to cause.

Second, there are several doctrinal questions in copyright that could profit from looking at negligence law…. but only if we also recognize that the parallels have a mirror quality: the images are reversed. Just as when you stand in front of a mirror and raise your right hand, in the mirror it looks like your left hand is rising. Failing to correct for the reversal can have unfortunate consequences.

This is part of what happened in the US Supreme Court’s treatment of the “work for hire” test in CCNV v Reid⁹ (discussed below). There the Court borrowed for copyright a tort-oriented test but forgot the need to reverse the direction of inquiry. The error of that case should not lead us to see torts and copyright as unrelated in their justification and operation; such an approach, though sometimes hinted at,¹⁰ would throw the proverbial baby out with the bath water. Rather, what is necessary is to recognize the necessary reversals in the direction of the doctrines’ concerns.

Reversals are virtually everywhere. Instead of internalizing harms as tort law does, copyright primarily aims to internalize benefits.¹¹ Instead of seeking to discourage risky behavior as tort law does, copyright seeks to encourage beneficial behavior. Instead of aiming its primary incentives at defendants the way tort law does, copyright aims its primary incentives at plaintiffs. The same principles that make tort law leave some harm on the plaintiff, makes copyright law leave some benefit with the defendant.

One of my additional goals is to help colleagues and students unfamiliar with copyright law to understand its underlying dynamics. Features of copyright law that may seem strange (such as term limits) actually implement goals whose operation we see every day in more familiar doctrines, such as the tort law of negligence. Therefore, I shall begin by employing the neoclassical economic understanding of negligence law¹² to explain why, from a functional perspective, a legislature might find it a good idea to give

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¹⁰ Thus, Assaf Jacob criticizes the Court for its approach to “work for hire” in part by emphasizing the supposed lack of links between torts and copyright. Assaf Jacob, Tort Made for Hire—Reconsidering the CCNV Case, 11 Yale J. Law & Technol. 96 (2008-2009). Thus he writes, “Tort law incentives focus on risk avoidance, not the creation of new works” (Id. at 100) and that “[C]opyright law… differs significantly from tort law in its underlying rationales.” (Id., abstract at 96). That Professor Jacob did not in fact mean to jettison tort law as a lens for examining copyright has been made clear by a new paper, Avihay Dorfman and Assaf Jacob, Copyright As Tort, 12 Theoretical Inquiries L. 59 (2011).


authors a right to recover against copiers. I then suggest the importance of the mirror effect by looking briefly at the CCNV case, and then suggest some ways in which the analogy of negligence may provide some assistance to copyright law’s development. The article concludes with a bullet list of the mirror relations.

I. The basics

Central to the economic analysis of law is the following notion: privately motivated decisions will also serve social ends if the decision-maker has sufficient reason to take social effects into account. As you might imagine, the interesting questions center not around this notion itself—it is virtually tautological, after all, to say that someone will take other people's interests into account if they have sufficient reason to do so. The interesting questions, rather, involve defining what those sufficient reasons might be.

Economics focuses on money as the incentive: neoclassical economics asks what goes into a decision-maker's calculus of self-interest. Will that calculus include an appropriate consideration of the costs and benefits that her decision will trigger for other persons, not just herself? If the prices the individual expects to pay (and the profits she expects to reap) are equal to society's costs (and benefits), then choices an individual makes to serve her own interest are likely to also serve society's interests.

However, as we know, private and social effects may diverge widely. Economists use the term “externality” to identify the divergence. Lawyers too have come to use the concept of externality to help describe why some privately motivated decisions fail to serve social ends.

An externality is basically an effect that a decision-maker is not taking into account. It refers to some gain or loss that her actions could bring into being—but to which she is indifferent because it does not affect her personally. A driver who speeds through an intersection presumably is treating the risk to the pedestrians as an externality.

Conversely, an effect is said to become “internal” to an actor when something brings the impact of what she does home to bear on her. When effects are internal, private and social costs come into alignment, and the private decision-maker will reach decisions that serve society as well as her own interests. Thus, for example, negligence law tells the driver that she will have to pay if her speeding causes injury to a pedestrian. It thus internalizes the risks that her speeding imposes, giving her a private incentive to balance those risks against the thrills and other benefits of arriving quickly at her destination. As a

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14 As is further discussed below, it is usually not necessary or desirable for all effects to be internalized to one actor.

15 I put aside here complications such as incommensurability, theory of the second best, and so on.
result, she may drive more carefully. A similar possibility of external costs arises as to a factory owner whose profitable activity causes pollution.

What tort and nuisance law are supposedly about is undoing the actor's indifference to such negative externalities- we conventionally say the law internalizes the externalities to the actor. Tort law can make the person who drives carelessly or the factory owner who pollutes take into account the costs she imposes on others. The internalization occurs because, if the actor drives too quickly or pollutes too much, those injured can sue, and the actor will have to pay to cover the injuries she has caused. The victim's injuries become the actor's losses. Tort law, of the familiar kind from first-year law classes, is about internalizing negative externalities.

What is copyright? It allows authors to control certain uses that other people make of their work.16 Through this device, copyright seeks to ensure that the benefits others reap from works of authorship will not be “external” to authors' decisions to invest in creativity. Copyright works to induce authors to want to serve public demand. In many ways, therefore, copyright is a mirror image of ordinary tort law. As tort law internalizes negative externalities to make an actor reduce or stop his harm-causing activity, copyright law internalizes positive externalities to make an actor increase or continue his beneficial activity.

II. The reversals
A. Harms and Benefits

Instead of worrying about people driving too fast or people pushing their factories beyond the capacity of filtration systems, the goal in copyright arises from a concern that people are not creating enough. Just as internalizing negative externalities can slow damaging behavior, internalizing positive externalities can increase productive behavior. Copyright law allows people to capture some of the benefits they generate. In copyright law, “carrots” are given to plaintiffs to make them produce more creative works. In tort law, “sticks” are imposed on defendants to make them engage less in destructive behavior. In this way, torts and copyright mirror each other, operating in ways that are parallel but reversed.

16 The core of copyright in the United States appears at 17 U.S.C.A. section 106. The section provides that:
   Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
   (1) to reproduce the copyrighted work in copies or phonorecords;
   (2) to prepare derivative works based upon the copyrighted work;
   (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
   (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
   (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
   (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

You may object to this notion of reversal on the ground that a copyright defendant, like a tort defendant, will feel the law as a “stick” rather than a “carrot”—after all, both defendants have to pay if successfully sued. But from an economic perspective, the focus in copyright policy is not on discouraging the defendant. A copyst who publishes a cheap but unauthorized version of a copyright owner's book is not necessarily imposing a social cost. In fact, the inexpensive version of the book reduces the public's cost of obtaining information, and thus speeds dissemination. Standing alone, copying is a social good—eliminating that copying is at best (economically speaking) a necessary evil on the road to inducing authors to create. What makes copying bad, from an allocative perspective, is its potential for interfering with the copyright owner's incentives, that is, its impact on the flow of rewards that would otherwise flow back to the author or her assignee, the prospect of which has induced the author to invest creative effort.

B. Caveats: Harm re-enters

The recognition that positive externalities lie at the core of copyright does not by any means lead to a mandate that all such externalities be captured. Quite the contrary is the case. An author who captured “all” externalities could stymie everyone else’s authorial and learning efforts in ways which retard the very progress that copyright law seeks to encourage. As discussed below, tort law certainly recognizes that not all injuries must be paid for by defendants, and copyright recognizes that not all benefits must accrue to plaintiffs.

Nor does recognizing the importance of positive externalities suggest that the notion of harm is unimportant. Put most simply, “harm” is a shortfall from a baseline. Conceptually, if we as a society could decide on the proportion or type of benefits that must be recaptured in order to call forth desired works, that would provide a partial guide for determining the baseline to which copyright owners could claim a basic entitlement.

Harm is an element that plaintiffs in a negligence action must prove. Ordinarily, copyright plaintiffs need make no showing of harm. However, requiring copyright plaintiffs to prove harm might be desirable. My reasoning is as follows.

In a world with perfect machinery of justice (including perfect knowledge), perhaps some estimate could be made of how many of what type of positive externalities need to

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17 See ___ infra (discussion of relative fault).
18 How to set the baseline is controversial. One can interpret Jeffrey Harrison to be arguing for the following as his baseline:

“[A]n economic approach to positive externalities would observe two rules:"

1. Internalization of positive externalities will be facilitated as long as the cost of the facilitation does not exceed the social benefits of the work.

2. No costs beyond the minimum necessary to bring copyright-worthy works into existence should be incurred.”

be captured to enable desirable incentives. Combined with other factors, \(^{19}\) this would provide the baseline of a copyright owner’s entitlement. Positive externalities beyond this point would be left where they lie, to fertilize follow-on innovators and the public domain. The externalities thus left uncaptured by plaintiffs could include externalities that could not induce creative behavior because they are too unexpected to be taken into account by creators, or that lie too far in the future to have significant present value, or that would be better used by third parties who cannot obtain licenses for use of the benefits because of market failures. Also left uncaptured would be the externalities that are simply in excess of what is needed for copyright owner incentives. \(^{20}\)

Of course a world such as ours is beset with imperfections. It may be impossible to determine the baseline with any clarity. How can we know which movies, software, books or songs need copyright to come into being? And in an imperfect world the copyright system itself is costly, enforcement is uncertain, and the distribution of follow-on innovators unknown, as are a multitude of other necessary but hidden facts. So we search for some indicators of where the boundaries of the baseline entitlement should lie.

Of the many potential boundary points along this complex border, one attractive criterion might be “foreseeability.” Foreseeability is a part of the “proximate cause” element in the negligence cause of action. It is often argued that the unforeseeable cannot function as an incentive; therefore, when seeking to identify some of the boundary segments where the copyright baseline entitlement should end, foreseeability is a tempting candidate. Thus, one stimulating scholar has suggested that foreseeability should be required in copyright, as it is in most negligence contexts, to be proven as an element in plaintiff’s case in chief. \(^{21}\)

But proving foreseeability or its absence may present significant problems in copyright. \(^{22}\) In searching for a measure to assist us in determining which positive externalities need to be captured and which do not, an alternative potential criterion might be whether the creative person is already guiding his behavior to capturing the externalities. Thus, as an alternative to limiting copyright liability to the ‘foreseeable’, it

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\(^{19}\) Other relevant factors would include, inter alia, the costs of administering the system, the certainty of enforcement, and the presence of network effects.

\(^{20}\) “Excess” can be assessed in either marginal or absolute terms. It is probably least controversial to use a marginal formulation, under which one might characterize as “excess” any marginal income whose capture imposes more costs (in terms of, e.g., transaction costs and disincentives to the public) than the benefits it yields (in terms of incentives to the copyright holder).

\(^{21}\) Shyam Balganesh, supra note __. Also see Bohannan (foreseeability in the fair use context). For criticisms of the foreseeability approach, see, e.g., Thomas F. Cotter, Transformative Use and Cognizable Harm, 12 VAND. J. ENT. & TECH. L. 701, 744-45 (2010).

might be better to limit liability to occasions where the defendant’s use substitutes for products in plaintiff’s current markets, or where plaintiff is willing “to supply the market served by the defendant’s use,”23 or where the plaintiff’s unwillingness to serve the market has good reasons that would be undermined by an inability to sue.

The discussion thus leads us ironically to suggest that copyright law be less afraid of requiring a plaintiff to prove harm: In order not to capture excessive positive externalities, which would waste both systemic expenses and public opportunities, it might be best to tailor a plaintiff’s opportunities in copyright to those cases where a plausible showing can be made of injury, particularly by substitution -- that a defendant’s copying affects markets that are already feeding, or are about to feed, the plaintiff’s incentives. 24

III. Effect of ignoring the mirror reversals: The CCNV Case

So far we have identified several mirror-like reversals. Most recently mentioned is that negligence law asks about the foreseeability of harm, while some scholars in copyright are asking about the foreseeability of benefits.

One case that ignored the importance of reversals when comparing copyright with tort was *CCNV v. Reid*.25 In that case the US Supreme Court was called on to decide whether a sculptor was an independent contractor or an employee. If an independent contractor, he would hold copyright in the sculpture he was commissioned to create. If an employee, copyright would inhere in the commissioning party as employer.

To decide how to characterize the relationship between the sculptor and the organization that asked him to create, the Court borrowed from an agency test defining “employee” that had been designed to guide decisions on imposing vicarious tort liability—that is, the borrowed test was originally designed to help determine when people who hire others should be liable for torts committed by the hired parties.

This is obviously a different question than whether a hiring party or a hired party should own a copyright. The Court’s use of the borrowed vicarious liability test for defining who might be an “employee” has therefore been criticized for placing too little emphasis on copyright policy.”26 In light of *CCNV*, one scholar even has hinted that copyright and tort have virtually nothing in common.27 But that would be the wrong lesson to learn. To the contrary, the Court might have been aided by recognizing common themes between copyright and tort, so long as it equally recognized the necessary reversals.

Let us take one example of an important theme: Spreading. Spreading is clearly relevant to the question of imposing liability in torts. The person forced to bear a

23 Gordon, *Restitutionary impulse*, at __.
24 Again, this suggestion is raised as a necessary but not sufficient condition for liability.
26 See Jacob, at __.
27 Id. at 96, 100. Though in this initial article Jacob seems to suggest a lack of relation between copyright and tort, in a later article he makes clear that he sees a deep relation between the two areas. See Dorfman & Jacob, supra note __.
massive calamity, either because she is an unreimbursed injured plaintiff\(^{28}\) or a defendant paying an immense judgment, may have to take her children from college, forego preventative or otherwise desirable medical care, reduce the nutrition of the family’s diet, etc., in ways that multiply the negative effects of the initial harm. (These domino-like harms are what Judge Calabresi called ‘secondary costs’.) One reason for imposing vicarious liability on employers is thus to help spread costs, on the assumption that employers are likely to be positioned to insure, or to have deep pockets, or to be able to pass on the costs to customers. The goal is to avoid imposing all the costs on a party who, having insufficient coping mechanisms, could not bear the costs without also bearing or imposing disastrous secondary effects such as familial dislocation.

Copyright’s concern with secondary effects is somewhat different. Certainly, as between a single claimant on the one hand and the general public on the other hand, sometimes a spreading of benefits to the public is highly desirable, fostering cultural and scientific growth. But when the question is not giving the public a liberty of use, but rather how to allocate ownership of copyright as between a creative party and a commissioning party, the law must focus on the issue that mirrors spreading, namely, \textit{concentration}. To which of the two parties should the law concentrate the benefits of ownership? Part of the answer to that question must logically lie with identifying the entity best able to respond to positive incentives.

Had the \textit{CCNV} Court thought about the comparative virtues of spreading and concentration, therefore, it might have built into its test a space for the so-called ‘teacher exception’, which in the US so far exists only in \textit{dicta}. The ‘teacher exception’ puts initial copyright ownership of scholarship in the hands of professorial authors, even if the professors are a school’s employees under usual standards.\(^{29}\) Because of academic freedom, schools (as employers) cannot change the content or conclusions of the scholarship, so that the only party able to improve the work is the creator. It thus makes sense to give the copyright ownership to that party.

IV. What else copyright might learn from negligence law

Enough of reversals; what of the underlying parallels between copyright and the negligence branch of tort law? How can they be useful? Among other things, using negligence law as an analogy can help clarify the basic copyright cause of action; a second potential lesson involves remedies; a third potential application involves “relative fault”; and a fourth involves duration, that is, the limited term of years for which a copyright endures and after which a work goes into the public domain.

A. “Copying,” “Causation” and the Cause of Action

\(^{28}\) Vicarious liability helps the plaintiff whose immediate injurer (say, a delivery-truck driver) is judgment-proof.

\(^{29}\) The professorial or “teacher exception” has so far been only recognized in \textit{dicta}: Hays v Sony Corp. Of America, 847 F 3d 412, 416 (7th Cir 1988); Weinstein v University of Illinois, 811 F 2d 1091, 1094 (7th Cir 1987). In both cases, the judges are former full-time law professors with prolific scholarly production.
An American negligence plaintiff must prove at least three things: that the defendant owed her a duty, that the defendant’s behavior factually affected her welfare, and that the causative behavior was wrongful in that it breached the defendant’s duty. Courts are often quite skilled in separating out these three queries. In cases where a copyright owner alleges that someone has improperly copied her copyrighted work, a similar set of three essential elements must be shown. But because of the language employed in copyright cases, the courts are often far less successful in properly separating out the elements.

A copyright claimant must also prove at least three things. When a defendant’s work looks or sounds suspiciously like the plaintiff’s work, the first element the copyright plaintiff must show is “ownership of a valid copyright.” For the second element, the copyright plaintiff must show “copying” or other use. As to the third element, the copyright plaintiff must show “wrongful appropriation,” often known as “substantial similarity.”

The three copyright elements are essentially the same as the tort elements just mentioned. First let us consider the presence of a duty. How is plaintiff’s “ownership of a copyright” equivalent to showing the defendant has a duty? The answer lies in the simple Hohfeldian correlation of right and duty. The copyright statute gives the owner exclusive rights that, by logical inference, impose correlative duties on the world to honor those rights. Therefore the first element of the copyright case, like the first element of the tort case, involves showing that defendant owes plaintiff a duty.

Second, the so-called “copying” element in the cause of action for copyright infringement, is essentially an inquiry into factual causation. Would the defendant’s output be the same (both in appearance and cost of production) even if its author never had contact with the plaintiff’s work? If so, there is no “copying”.

Recall how factual causation works in tort law. In personal injury law, the plaintiff must ordinarily prove that the defendant’s behavior in fact contributed to the harm the plaintiff suffered. Although there are various tests for factual causation, the one most commonly used is the “but for” test. The plaintiff will lose if the jury thinks that “but for” the defendant’s act, the harm would have occurred anyway; the plaintiff will win on causation if the jury thinks that “but for” the defendant’s act, the plaintiff would have escaped injury.

Consider this classic example: someone drowns by falling off a tour boat in a jurisdiction where it is ‘reasonable care’ for tour boats to provide well-inflated life preservers. The decedent’s estate sues on the basis that the boat’s life preservers had been negligently under-inflated. But did the lack of inflation make a difference? If no one saw

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30 Proximate cause and injury must also be shown, as is discussed infra. Copyright law does not require the proof of injury, but that may be unwise. See Gordon, supra note __.
31 WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 50-64 (Walter W. Cook, ed., 1923).
32 17 USC secs 106, 106A.
33 I follow Hohfeld’s logic here: for every claim right, there is a corresponding duty. Thus, as property creates “rights against the world”, it imposes “duties” on the world to respect those rights.
34 Different commentators may of course number the elements differently. My goal is simply to keep the discussion of copyright and tort causes of action clear by using the name numerical ordering for each.
the passenger fall off the boat—if there was no one to throw him a life preserver—then the lack of air in the life preservers is irrelevant. Poor maintenance of life preservers is also irrelevant if someone saw the passenger fall and threw him a life preserver, but the passenger had already sunk like a stone.\textsuperscript{35} In either case, the defendant tour-boat company will not be held liable for faulty maintenance of its safety equipment. In such cases, there is said to be no “cause-in-fact,” no “but-for” connection between the defendant’s behavior and the plaintiff’s harm.

The parallel to “but-for cause” in copyright law is the notion of “copying”: in a copyright infringement suit, the plaintiff author must prove that the defendant in fact made use of the plaintiff's work.\textsuperscript{36} Copying can be proved by direct evidence (such as an admission) or by circumstantial evidence, usually a combination of proving a possibility of access (how likely is it the defendant could have encountered the plaintiff’s work) and similarity (how likely is it that the similarity between plaintiff’s and defendant’s work would result from coincidence or from blameless factors like use of a common source.)

If the defendant had no access to the plaintiff's work, that would be like the negligence example where the under-inflated life preserver was never thrown: no factual connection is even possible. Similarly, if the copyright defendant had access to the plaintiff's work but did not use it, that roughly resembles an under-inflated preserver being thrown but arriving after the victim had sunk: again, the factual connection is lacking between the what one party did and what the other party produced or suffered.

Put somewhat differently, the plaintiff will lose if the jury thinks the defendant's work would have looked and sounded the same even had the plaintiff's work not existed. Without the factual contribution of the plaintiff's work to the defendant's benefit, the cause of action for copyright infringement fails.\textsuperscript{37}

Admittedly, it is harder to see the role of the “but for” test in copyright law, because we are not tracing the causation of something abnormal like an accident, but rather the causation of something that may seem desirable and delightful, namely, a defendant’s work of art. But in both cases, accident and art, we are asking about what made a difference, what was an essential factor in bringing the effect into the world. If the other party’s behavior or art made no difference, the lawsuit fails.

The third element of a copyright cause of action, wrongful appropriation or “substantial similarity”, has the same structural function as does the tort question of

\textsuperscript{35} For an analogous case involving absent life buoys, see New York Cen. R. Co. v. Grimstead, 264 F. 334 (2nd Cir 1920) at 335.

\textsuperscript{36} Note that the causation element is separate from the wrongfulness element. In negligence law, the plaintiff must both show causation and carelessness. In a copyright action, similarly, the plaintiff must show both copying and that enough expression was copied to constitute a wrongful appropriation. See Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946), cert. denied 330 U.S. 851 (1947) (stating that “[i]f copying is established, [in a copyright infringement action] then only does there arise the second issue, that of illicit copying (unlawful appropriation).”). Too often, students and even judges conflate the question of copying with the question of whether the defendant copied so much as to be wrongful.

\textsuperscript{37} Under patent law, even a coincidental replication by an independent inventor can infringe. Thus, unlike copyright law, patent law has no requirement of “cause-in-fact.” Nevertheless, patent like copyright seeks to encourage creative activity by assuring that some of an invention's proceeds will flow to someone who has invested in its creation.
wrongfulness: the third element makes clear that causation is not sufficient for liability, that the law does not condemn every injury or every piece of copying. The copying needs to be significant in quality and/or quantity. Admittedly, the nature of the wrong differs in negligence law and copyright. But the tort language makes the necessary issues clearer than does typical copyright language.

Copyright commentators have long recognized that the current language causes difficulties. The three-element copyright analysis is often conflated into two steps (ownership of a valid copyright and “copying”) even though it is clear that “copying” has two sub-elements, namely, factual causation (what Professor Nimmer calls “probative similarity”) and copying of protectable expression that is substantial enough to be wrongful. The collapse of causation and wrongfulness into one test risks conflation of the two elements, as does one sometimes-used test for wrongfulness, “Whether an average law observer would recognize the alleged copy as having been appropriated from the copyrighted work.” A work can be copied, and recognizably copied, without being an infringement.

B.

Personal injury law can also help us understand why copyright law has limits, such as the rule that only “expression” and not “ideas” can be controlled by the copyright owner. Tort law, too, does not order complete internalization. Just as “It takes two to

38. But we do know that much copying is not wrongful. In particular, copyright law permits, even encourages, the copying of ideas and facts. 17 USC section 102
39. The way the statute is written, 17 USC sec 107, the plaintiff should have to prove an “unfair use.” As the courts have interpreted the fair use doctrine, however, “fair use” is usually seen as an affirmative defense. The copyright plaintiff therefore has a lesser burden, on wrongfulness, needing to show what is sometimes called “substantial similarity”. Debate is rife on what constitutes “substantial similarity” in US law.
40. For economically-oriented torts scholars, the wrong of negligence is usually addressed through the Learned Hand calculus, assessing whether the defendant neglected to take a cost-justified precaution. Though the inquiry is plagued with difficulties, the negligence courts and juries have some handle on how to assess the monetary costs of a precaution, the probabilities of harm, and the magnitude of injury the precaution might avert. In addition, judges and juries can refer to daily experience and other cues in deciding whether a defendant was “careless” or not. The copyright inquiry is less clear. The ultimate question might be the same—was the defendant’s behavior (including his not obtaining plaintiff’s permission) socially desirable—but in copyright law the factual issue usually cannot be answered directly: usually no one knows if stopping a particular kind of creative nonconsensual copying will bring more harm than benefit to society over the long term.
41. Thus, the Nimmer treatise refers to “ambiguous usages of various key terms in infringement analysis”. 4-13 Nimmer on Copyright § 13.01 at fn. 26.3.
42. 4-13 Nimmer on Copyright § 13.01
43. See 4-13 Nimmer on Copyright § 13.03
tort" (victim and injurer), it also takes two to make a work of art valuable (author and reader). In fact, to maximize value from a creative work routinely requires even more participants, such as interpreters, critics, and follow-on innovators. Too much control by any one party (like putting all responsibility on one party) can mute the incentives that other parties need.

The reality of interconnection thus creates a central policy problem for both copyright and tort law. Consider the role of relative fault in tort law. If all damages are internalized to defendants, potential plaintiffs might grow careless. The law seeks to avoid such moral hazards by use of doctrines such as contributory negligence and, more recently, comparative negligence. These defenses, along with the requirement that plaintiffs be able to prove that the defendant was at fault, assure that significant incentives remain on the potential victims to take care of themselves.

Just as a plaintiff's fault can reduce or eliminate his ability to collect damages in personal injury cases, in copyright there can be allocation between the parties. An infringer need not pay to a plaintiff all the profits that the defendant has reaped by adapting the plaintiff's work and selling it to a new audience. The amount he must pay can be reduced by the extent to which the defendant's success can be attributed to his own creativity and investments (i.e., what he has not borrowed from the plaintiff).

Just as negligence law recognizes that both driver and pedestrian can contribute to a harm occurring, copyright law recognizes that beneficial contributions can be made by both an initial author and a second author who "stands on the shoulders" of the first. To internalize everything to one party creates a new set of externalities for the other party.

Let us consider one final parallel. According to the U.S. Constitution, Congress may only give authors rights that last a "limited [t]ime." Copyrights, therefore, have a limited duration. Some observers see this as an anomaly: they ask, why should an intellectual property right expire when a "fee simple absolute" in land can last forever? The tort doctrines of proximate cause and foreseeability can help us understand the answer.

I first heard this apt phrase from Dean Saul Levmore.

Also note that it is primarily in areas where plaintiffs cannot effectively guard themselves (such as product liability law) that plaintiffs do not have course to prove that a defendant was at fault.


The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

Id. As an alternative, the plaintiff has the option of claiming statutory damages. See id. § 504(c).

If the two can bargain, however, then costs and benefits have the potential of being internal to both parties. See Ronald H. Coase, The Problem of Social Cost, 3 J.L. & ECON. 1 (1960). Nevertheless, where transaction costs or other difficulties impede bargaining, a legal duty that puts all costs or benefits on one party leaves the other with inadequate incentives to engage in efforts that are socially desirable.

U.S. CONST. art. I, § 8, cl. 8.
Begin with the following negligence hypothetical. You are walking down a hallway when a friend negligently trips you. You fall, rise, brush yourself off, and graciously accept your friend's abject apology. Unhurt but delayed, you continue on your way. You reach your car five minutes later than you otherwise would have. As you begin to drive out of the parking space, a rotting tree falls on your car, breaking your arm. Had you arrived five minutes earlier, the tree would have missed you. Can you sue your friend for the broken arm, since her negligence is indeed a cause-in-fact of your injuries? You may sue your friend if you wish— but you cannot win. Coincidence is not a reliable basis for incentives.

The legal nomenclature describing the reasons why you would lose will vary. Some courts will say that your friend's tripping you was not a proximate cause of you falling victim to a tree. Other courts will say that, from the perspective of a reasonable person standing in your friend's shoes back in the hallway, the danger from the tree was not foreseeable. Yet other courts will say that your friend had no duty to protect you from falling trees. Whatever the language, the courts are saying the same thing: imposing a duty on individuals to be careful to avoid tripping each other will have no impact on reducing the number of people injured in cars by falling trees. Having the law force an internalization that has no impact is wasteful.

Now turn to copyright, and the constitutionally-mandated command that copyrights can only last for limited times. In roughly two hundred years, all of today's copyrights will have expired. That is, an heir of a copyright owner who sues for nonconsensual copying two hundred years from now will lose. Why? The logic is the same as in the tort case of no foreseeability. Imposing a duty on a copyist to pay royalties two hundred years after a book or movie is created will have no impact on an author's willingness to work hard today. Given discount rates and the difficulties of predicting that far in the future, the expectation of current benefit from such a far-distant right is minuscule, virtually unforeseeable. To impose liability would be to raise the price of books above the physical cost of manufacturing and distributing them for no incentive payoff. This not only wastes administrative costs (as imposing liability for unforeseeable harms also would do), but also imposes a deadweight loss on society. So plaintiff loses.

In the law of negligence, a defendant ordinarily need not pay for a harm unforeseeably (and thus not proximately) caused. This rule makes sense because, if this were not the rule, the court would be expending its resources to make the defendant pay when the obligation would have no incentive effect. In the law of copyright, copyright terms expire. If that were not the rule and copyrights were perpetual, copyright law would make defendants pay at times so far distant that the prospect of such payment would not

51 The current copyright term (which lasts generally for the life of the author plus seventy years) is already too long for appropriate incentives. See Wendy J. Gordon, Authors, Publishers, and Public Goods: Trading Gold for Dross, 36 LOYOLA L.A. L. REV. 159, 182-97 (2002), and sources cited therein. Nevertheless, the Supreme Court recently upheld the long term against Constitutional attack. Eldred v. Ashcroft, 537 U.S. 186, 123 S.Ct. 1505 (2003). In my view, the Court erred in part by not restricting its concern for incentives to those incentives needed for authorial creation; the Constitutional mandate of “limited times” implicitly directs its concern to ex ante incentives, and not to incentives for deploying an already-created copyrighted work over time. See, Gordon, Gold from Dross, supra note __.
add anything to the original author's incentives to create new works, but would decrease the dissemination of information.

I do not want to overstate the parallels between tort law and copyright. But the general outline is clear: tort law internalizes some bad effects to decrease carelessness, and copyright law internalizes some good effects to increase productivity.

V. Restitution

There is one last challenge to address. I have argued essentially that tort law expresses a sort of spirit of the common law, a spirit which says we want to internalize externalities. We want to internalize both good externalities, like the benefits of creating, and bad externalities like the costs of carelessness. If that is my thesis, you might object that the purported common-law preference for internalization does not square with the rule of law in restitution.

Restitution is the common law of benefits. In many US states, a basic rule of restitution is that, if someone provides a service for another without a prior arrangement, the benefactor cannot sue for payment after the fact. It is called the “officious intermeddler rule.” Assume you go away for vacation, and when you come home, you find that you have a beautiful new coat of paint on your house. You did not order it. Do you have to pay for it? No, says the law. It is true that an intermeddler gave you a benefit. Your house is now worth a little more than it was before. But you do not have to pay; the person who painted your house without a contract is an intermeddler without the right to sue.

Is there an inconsistency between copyright and this common law doctrine that cannot be explained? The challenge is that, in restitution law, people who volunteer to give other people benefits cannot use the law to force compensation after the fact. The painter must go to the homeowner and say, in advance, “Would you like your house painted, sir?” He needs a contract. Without a contract, the house painter or other intermeddler cannot require payment. Yet copyright law adopts an opposite approach.

In intellectual property law, if an author or inventor makes something that is beneficial and voluntarily sends it out into the stream of commerce, he is not considered an officious intermeddler. The author can use copyright law to stop people from making copies even though he has no contractual agreement with those whom he is stopping from making a productive use of the original work. The law gives him leverage to extract payment that it does not give to the house painter. This is one of the puzzles that Of Harms and Benefits sought to solve. The article suggested that the answer lies in encouraging markets to form. In the law of restitution, a rule that benefactors cannot sue encourages contracts. In copyright law, contracts are encouraged by a rule that benefactors can sue. In each instance, the law adopts the rule that encourages internalization by contract.

We see the difference in the example just canvassed. The burden on the house painter to make a contract is small. If he wants to be paid, he goes up to you and says, “Would you like your house painted?” By contrast, the burden on the author to obtain payment

without a legal right would be much higher. Too many potential customers may refuse to pay, free-riding in the hope that others will pay the author and that the material will become available for free. As a result, it may not become available at all. If, however, the author has a legal right to stop others from copying, an individual publisher can come to the copyright owner and, with efficacy, bargain for a right to print. Strategic behavior tends to be far less demanding and transaction costs much lower when an author has rights than when she does not.

In summary, I think we can learn a great deal from comparing copyright law and its common law brethren, torts and restitution. By comparing copyright with torts, we can see how the internalization process works, and some of its limits. By comparing copyright law with the law of restitution, we can see how differential behavioral patterns can give rise to different legal rules.

Nevertheless, the analogies have limits. Personal injury law and copyright law should not be perfectly symmetrical. A generation of behavioral research suggests that people care about context. Although the path-breaking work of Ronald Coase assumed that people respond to out-of-pocket costs the same as they do to foregone benefits, we know from everyday life that we react to the prospect of loss differently than we do to the prospect of gain, and a host of studies have documented the phenomenon. The obvious presence of risk aversion makes clear that many of us value harm-avoidance more than we do benefit-capture. In short, harms and benefits do not exist in the abstract as numbers differentiated only by a plus and minus sign.

Of course, there can be exceptions. Thus, while I have argued that giving authors rights makes it easier for an audience to be identified (since fear of liability will cause potential licensees to make themselves known), Dan Burk points out that, “[I]nnovators in markets where copying is inevitable and uncontrollable may ‘tie’ easily copied works to good or services that cannot be copied easily. . . . Significantly, this strategy distributes the primary good at marginal cost—for free—in order to map the extent of the market that desires the product, then sells related products to those who reveal their preference for the optimally priced primary good.” Dan L. Burk, Muddy Rules for Cyberspace, 21 Cardozo L. Rev. 121, 164-65 (1999).


Coase, A Theory of Social Cost, supra note _. The symmetry that Coase assumed existed between harm and benefit served his rhetorical purposes. In that seminal article he was trying to show the importance of transaction costs; by treating out-of-pocket costs (harm) the same as opportunity costs (foregone benefit), he could more easily show that it was only the presence of transaction costs that made law “matter”.

This is one of the reasons that conditional torts such as negligence and nuisance may provide better models for copyright law than does the unconditional tort of trespass to land. For further discussion, see Gordon, Harvard L.Rev. Forum, supra note __; Balganesh, supra note __; also see Christopher M. Newman, Infringement as Nuisance (draft available from cnewman2@gmu.edu) Restitution is another very conditional right of action; for exploration of restitution as a model, see Wendy J. Gordon, On Owning Information: Intellectual Property and the Restitutionary Impulse, 78 VA. L. REV. 149 (1992). For exploration of parallels with real property, a great many
Another limit on the analogy arises from the fact, this one emphasized by Ronald Coase, that legal duties are not the only way to achieve internalization.\textsuperscript{57} Morality, empathy, propinquity and payment all play important roles in creating human incentives, and they clearly will play differing roles in different circumstances. Even among copyright holders, motivations and industry patterns differ. It is hardly likely that authors and harm-causers need precisely the same kind of legal interventions. Perhaps most importantly, the exchange of non-compensated benefits breeds creative community\textsuperscript{58} in a way that the exchange of non-compensated harms might not: gratitude is often an easier emotion to achieve than forgiveness.\textsuperscript{59} In many ways, then, we need to be cautious about using the way the law internalizes harm as a precedent for using law to internalize benefit.

CONCLUSION

The following bullet list summarizes and extends the discussion of the mirror relationship.\textsuperscript{60} Because any mirror produces data points that are identical but reversed; it is sometimes difficult to keep the relationships between mirrored structures in mind. Here are the major mirrored structures:

- Torts is primarily concerned with internalizing harms, while copyright is primarily concerned with internalizing benefits.

recent articles are helpful; see, e.g., Henry Smith, Intellectual Property as Property: Delineating Entitlements in Information, \textit{116 YALE L.J. 1742} (2007).

Note that although the tort of trespass-to-land tort is usually too absolutist to provide a good model for copyright, at times the law of real property is more generous to the public than is copyright. Thus, for example, many states would give the public liberties to cross over privately owned land if necessary to reach publicly-owned resources such as beaches. By contrast, the Digital Millennium Copyright Act (DMCA), 17 USC sec. 1201 \textit{et seq}, gives the public no liberty to de-crypt a digital-management-device even for the purpose of reaching publicly-owned resources; if public-domain materials are mixed with privately owned copyrighted works behind a digital gate that blocks access, the public has no general privilege to reach them. Similarly, although the fair use doctrine of old-fashioned copyright law would allow a member of the public to reverse engineer a copyrighted computer-program work in order to reach public domain material within it, the DMCA has no general privilege of fair use. (However, the Copyright Office can issue a special, prospective ruling about limited categories of works.) It is ironic when real property law is more generous to non-owners than is the law of intangibles. For more on this issue, see Wendy J. Gordon, Keynote Address: Fair Use: Threat or Threatened, \textit{55 CASE WESTERN UNIVERSITY LAW REVIEW 903} (2005).

\textsuperscript{57} Coase, supra note 13.

\textsuperscript{58} See generally, Lewis Hyde, \textit{THE GIFT}.

\textsuperscript{59} For my preliminary observations on this topic, see Wendy J. Gordon, Intellectual Property, in \textit{OXFORD HANDBOOK OF LEGAL STUDIES 617}, at 643-45 (Peter Cane & Mark Tushnet, eds., Oxford U. Press 2003).

\textsuperscript{60} I also present Such a list in Gordon, Harmless Use of Copyrighted Works, Fordham L. Rev., supra note __, and Gordon, Foreseeability and the Harm/Benefit Distinction, \textit{Harvard L. Rev. Forum}, supra note __.
• The harms that negligence law seeks to discourage are those whose *avoidance* is cost-justified. The benefits that copyright law seeks to encourage are those whose *achievement* is cost-justified.

• Tort law seeks to *decrease* socially destructive behavior, while copyright seeks to *increase* socially productive behavior.

• Personal injury law focuses its incentives on changing the behavior of *defendants* (injurers) while copyright law focuses its incentives on changing the behavior of *plaintiffs* (copyright owners), while both limit liability because of a recognition that sometimes the behavior of the other party (the *plaintiff/victim* in torts, and the *defendant/user/follow-on creator* in copyright) need to be incentivized;

• Fear of liability discourages careless driving; hope of reward encourages productive authorship. Thus, personal injury law primarily uses *sticks* while copyright primarily uses *carrots*.

• The tort of negligence puts a burden on the plaintiff to prove the *harm* done was proximate and foreseeable to a reasonable person in the *defendant’s* position. Recent copyright scholarship—see Balganesh, supra note 61—suggests that copyright law should require the plaintiff to prove the *benefit* diverted to the defendant was foreseeable to a person in the *plaintiff’s* position.

• Most of torts law aims its primary incentives toward *defendants* and those upon whose behavior the defendants have some influence. Conversely, copyright aims most of its incentives toward *plaintiffs* and those over whose behavior the plaintiffs have some influence.

• Both copyright and tort law have some concern with the incentives of the other party as well.
  
  o Thus, the tort doctrines of *assumption of risk* and *contributory or comparative negligence* seek to minimize the so-called “moral hazard” that plaintiffs will take inadequate precautions to avoid injury; these tort doctrines, therefore, leave harm on some plaintiffs to encourage such people to take appropriate precautions.
  
  o As for copyright, the converse encouragement for defendants can be found in many doctrines including “*fair use*” (that shields many socially-desirable prima-facie infringements from liability), the “*idea/expression dichotomy*” (that makes ideas incapable of copyright ownership), the limitation of the right to control performance to only “*public*” performance, plus a host of specific exceptions and overall *durational limits*; all these consistently

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61 See Balganesh, supra note __: also see Bohannan, supra note __ (fair use).
leave some benefits with defendants to encourage them to build on predecessor works.