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## ARTICLES

### UNBUNDLING THE “TORT” OF COPYRIGHT INFRINGEMENT

*Patrick R. Goold\**

*Judges and jurists orthodoxly view copyright infringement as a singular legal wrong, a.k.a. the tort of copyright infringement. In recent years, commentators have expressed mounting concern about the judicial test for this tort. Courts have no unified method for determining whether two works are substantially similar. The fair use doctrine is so unpredictable that some find it nothing more than the “right to hire a lawyer.” And while some judges treat infringement as a property tort, like trespass or conversion, others think of it as an economic tort, like unfair competition. Scholars therefore find the test for infringement—copyright’s “infringement analysis”—to be inconsistent and incoherent.*

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\* Qualcomm Postdoctoral Fellow in Private Law and Intellectual Property, Harvard Law School. The author would like to thank Alex Boni-Saenz, Bruce Boyden, Oren Bracha, Christopher Buccafusco, Julie Cohen, David Fagundes, Janet Freilich, Shubha Ghosh, John Goldberg, Tomás Gómez-Arostigui, Sarah Harding, Dmitry Karshedt, Edward Lee, Mark Lemley, Jake Linford, Lydia Loren, Matthew Sag, Andres Sawicki, Christopher Schmidt, David Schwartz, Ted Sichelman, Henry Smith, Rebecca Tushnet, Ryan Vacca, Benjamin Zipursky, and many others for their comments and involvement in this project. The Article benefited from feedback at the 2015 Works in Progress in Intellectual Property Workshop hosted by George Washington Law School and the United States Patent and Trademark Office, the 2015 IP Scholars Roundtable hosted by Drake Law School, the 2015 Intellectual Property Scholars Conference hosted by DePaul Law School, the 2016 Junior Scholars in Intellectual Property Workshop hosted by Michigan State University College of Law, the IP in the Trees Speaker Series at Lewis & Clark Law School, and faculty workshops at IIT Chicago-Kent College of Law and the University of Akron Law School. The author would also like to thank the editors of the *Virginia Law Review* for their patient and thorough editorial work. All errors are the responsibility of the author.

*This Article provides a revised positive theory of copyright that clarifies the infringement test. The Article argues that copyright infringement is not one singular tort, but a group of torts. Using an analytic jurisprudential method, the Article “unbundles” infringement into five “copy-torts”: consumer copying, competitor copying, expressive privacy invasion, artistic reputation injury, and breach of creative control. Because copyright infringement is not one tort there cannot be one single infringement test. Instead, copyright’s basic infringement analysis mutates doctrinally and theoretically to provide a unique legal test for each of the copy-torts. The variation in the infringement analysis is not necessarily inconsistent or incoherent, but enables courts to test for the different copy-torts. Understanding the different copy-torts will therefore make the infringement analysis more predictable. Not only will practitioners better foresee how courts will apply the test to their cases, judges are also provided with a guide to applying the correct legal standards in infringement actions. To make the analysis even more predictable, the Article proposes a method of adjudicating hard cases that will help courts conceptually separate the copy-torts, thus ensuring they apply the correct legal tests in the future.*

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*It is not one tort, but a complex of four. . . . It should be obvious at once that these four types of invasion may be subject, in some respects at least, to different rules; and that when what is said as to any one of them is carried over to another, it may not be at all applicable, and confusion may follow.*

*William Prosser*<sup>1</sup>

#### INTRODUCTION

DOWNLOAD the latest episode of *Game of Thrones* from a peer-to-peer network;<sup>2</sup> operate an Internet TV streaming platform;<sup>3</sup> transfer eBook files from your computer to your smartphone; sing the latest hit single in a crowded restaurant; use Marvin Gaye's classic *Got to Give it Up* as inspiration for a modern funk-pop song,<sup>4</sup> and in each case you commit the ever-expanding tort of copyright infringement. Copyright law grants authors the right to copy their original creative works.<sup>5</sup> Copying a work without the owner's permission is tortious.<sup>6</sup> As society's ability to generate information increases, the scope of that tort widens like the falcon's gyre until it touches upon every life in a rapidly sprawling variety of circumstances.<sup>7</sup> Copyright now regulates such a vast amount

<sup>1</sup> William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 389 (1960).

<sup>2</sup> *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1011, 1013–19 (9th Cir. 2001) (holding that peer-to-peer users directly infringed copyright).

<sup>3</sup> *Am. Broad. Co. v. Aereo, Inc.*, 134 S. Ct. 2498, 2503 (2014).

<sup>4</sup> *Williams v. Bridgeport Music*, No. LA CV13-06004 JAK, 2015 WL 4479500, at \*1 (C.D. Cal. July 14, 2015).

<sup>5</sup> See 17 U.S.C. §§ 102, 106 (2012) (extending copyright protection to these kind of works and bestowing exclusive rights in copyrighted works to the owner of the copyright, respectively).

<sup>6</sup> See *infra* notes 48–66 and accompanying text.

<sup>7</sup> Ralph S. Brown, *The Widening Gyre: Are Derivative Works Getting out of Hand?*, 3 *Cardozo Arts & Ent. L.J.* 1, 1–2 (1984).

of activity that infringement is one of today's "most prevalent" forms of property tort.<sup>8</sup> And yet, despite the growing importance of this tort to the economy, the legal system, and our lives, the judicial test used to determine infringement is bemoaned for its inconsistency<sup>9</sup> and incoherence.<sup>10</sup> Copyright's infringement analysis is "a mess"<sup>11</sup> that makes "no sense,"<sup>12</sup> and is so "indelibl[y] complex[]"<sup>13</sup> that it is a "virtual black hole in copyright jurisprudence."<sup>14</sup>

The test for copyright infringement is theoretically straightforward, but in practice is beset with doctrinal instability. Technically, proving infringement requires the plaintiff to demonstrate two simple epistemic facts: that the defendant copied expression, and that such copying led to the creation of a "substantially similar" work.<sup>15</sup> Thereafter, the burden shifts to the defendant to prove that the copying was noninfringing because it was in the service of a "fair use."<sup>16</sup> However, the process of

<sup>8</sup> John C.P. Goldberg & Benjamin C. Zipursky, *The Oxford Introductions to U.S. Law: Torts* 251 (Dennis Patterson ed., 2010).

<sup>9</sup> See, e.g., Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 *Va. L. Rev.* 1483, 1496 (2007) (writing that judicial attempts to make sense of fair use have "failed unconditionally" resulting in "inconsistent opinions"); Zahr K. Said, *Reforming Copyright Interpretation*, 28 *Harv. J.L. & Tech.* 469, 473 (2015) (finding a "great divergence in outcomes and reasoning seen in infringement analysis"); *id.* at 524 (noting that the lack of "interpretive method selection" creates "inconsistency and unpredictability" in decision making).

<sup>10</sup> See, e.g., Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 *Duke L.J.* 203, 231 (2012) (noting that courts still have not developed a "unified, coherent framework for the substantial-similarity analysis"); Kevin J. Hickey, *Reframing Similarity Analysis in Copyright*, 93 *Wash. U. L. Rev.* (forthcoming 2016) (manuscript at 1), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2587289](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2587289) [<https://perma.cc/5Y4W-ZZP6>] ("It is not too much to ask that copyright law have a coherent approach to copyright infringement.").

<sup>11</sup> Hickey, *supra* note 10 (manuscript at 1).

<sup>12</sup> Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 *J. Copyright Soc'y U.S.A.* 719, 719 (2010).

<sup>13</sup> Shyamkrishna Balganesh, *The Questionable Origins of the Copyright Infringement Analysis*, 68 *Stan. L. Rev.* 791, 794 (2016).

<sup>14</sup> *Id.*

<sup>15</sup> See *infra* notes 67–73 and accompanying text.

<sup>16</sup> 17 U.S.C. § 107 (2012). This is referred to as the "four factor" test because the statutory language identifies four, numbered, factors required to determine "whether the use made of a work in any particular case is a fair use":

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

judging similarity has become “frustratingly obscure, ambiguous, and confusing,”<sup>17</sup> while the fair use doctrine is now so “exceedingly difficult to predict”<sup>18</sup> that some view it as nothing more than the “right to hire a lawyer.”<sup>19</sup> In particular, courts do not articulate one consistent “audience” for determining similarity, but instead bounce back and forth between the “intended audience or consumer” and the “ordinary observer” standards, while sometimes permitting expert testimony and sometimes excluding it.<sup>20</sup> Furthermore, the “single most important element”<sup>21</sup> of the fairness analysis—whether the copying “harmed” the market for the copyrighted work—has proved “practically impossible to . . . apply consistently and fairly.”<sup>22</sup> While some courts conceptualize harm as lost revenue from the defendant, others require proof of consumer demand diversion, and occasionally courts also find a cognizable nonfinancial injury to privacy, reputation, or creative control.<sup>23</sup> Finally, courts do not even agree on where they should turn for guidance on how to shape the infringement analysis. While some judges view infringement as a property tort, and search the law of trespass and conversion for guiding principles, others see infringement as a form of economic tort, and look to unfair competition as the appropriate model for designing the infringement test.<sup>24</sup>

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(4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

<sup>17</sup> Pamela Samuelson, Essay, A Fresh Look at Tests for Nonliteral Copyright Infringement, 107 Nw. U. L. Rev. 1821, 1821 (2013).

<sup>18</sup> Neil Weinstock Netanel, Copyright’s Paradox 66 (2008).

<sup>19</sup> Lawrence Lessig, Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity 187 (2004). But see Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005, 156 U. Pa. L. Rev. 549, 549 (2008); Neil Weinstock Netanel, Making Sense of Fair Use, 15 Lewis & Clark L. Rev. 715, 717–19 (2011); Matthew Sag, Predicting Fair Use, 73 Ohio St. L.J. 47, 51 (2012); Pamela Samuelson, Unbundling Fair Uses, 77 Fordham L. Rev. 2537, 2540–43 (2009).

<sup>20</sup> See *infra* Subsection I.B.1.

<sup>21</sup> Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 566 (1985). But see Netanel, *supra* note 19, at 743–46 (casting doubt on whether the fourth factor, the effect on the market, remains the most important element of fair use determinations).

<sup>22</sup> David Ladd, The Harm of the Concept of Harm in Copyright: The Thirteenth Donald C. Brace Memorial Lecture (Apr. 13, 1983), in 30 J. Copyright Soc’y U.S.A. 421, 422 (1983); see also William F. Patry, Patry on Fair Use § 6:1, at 427 (2009) (finding the fourth factor to be the “least understood” and “most misapplied” factor).

<sup>23</sup> See *infra* Subsection I.B.2.

<sup>24</sup> See *infra* Subsection I.B.3.

This Article provides a revised positive theory of copyright that clarifies the infringement analysis. The Article argues that infringement is not one singular tort, but a *group* of torts. There is no “tort of land infringement” but instead a group of real property torts; there is no “tort of chattel infringement” but instead a group of personal property torts;<sup>25</sup> and likewise it is better to think not of a “tort of copyright infringement” but instead a group of copyright-based torts. Applying an analytic jurisprudential method,<sup>26</sup> the Article “unbundles” copyright infringement into five distinct “copy-torts” called consumer copying, competitor copying, expressive privacy invasion, artistic reputation injury, and breach of creative control.<sup>27</sup> These torts are related in that each loosely involves “copying” and the owner’s “exclusive right to copy.” But the taxonomy reflects the different *interests* underlying that right and the different ways copying may *injure* those interests. The “consumer-copying” wrong holds liable consumers who access the work through copying rather than negotiating for access in the market;<sup>28</sup> the “competitor-copying” wrong is committed by rival producers who lure consumers away from the copyright owner;<sup>29</sup> the “expressive privacy invasion” tort makes liable those who publish expression the owner is trying to keep confidential;<sup>30</sup> while “artistic reputation injury” sanctions copying that results in deterioration of the owner’s professional reputation;<sup>31</sup> and “breach of creative control” holds as tortious acts of decision making that the law designates to the copyright owner.<sup>32</sup> The pluralistic nature of

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<sup>25</sup> See generally Goldberg & Zipursky, *supra* note 8, at 227–51 (overview of property torts).

<sup>26</sup> See generally Analytic Jurisprudence Anthology (Anthony D’Amato ed., 1996) (providing an overview of general analytic jurisprudence); Hans-Johann Glock, *What is Analytic Philosophy?*, at ix (2008) (providing an overview of analytic philosophy). For author’s views on analytic methods, see Patrick Goold, *The Analytic Jurisprudence of the New Private Law*, *New Priv. L.* (June 10, 2015), <https://blogs.harvard.edu/nplblog/2015/06/10/the-analytic-jurisprudence-of-the-new-private-law-patrick-goold/> [<https://perma.cc/VT5V-6NLS>]. Gratitude is expressed to Professor Steven Hetcher for coining the term “copytort.” See *infra* note 57 and accompanying text.

<sup>27</sup> See *infra* Section II.B.

<sup>28</sup> See *infra* Subsection II.B.1.

<sup>29</sup> See *infra* Subsection II.B.2.

<sup>30</sup> See *infra* Subsection II.B.3.

<sup>31</sup> See *infra* Subsection II.B.4.

<sup>32</sup> See *infra* Subsection II.B.5.

infringement is, in the parlance of tort theory, copyright's "gallery of wrongs."<sup>33</sup>

That copyright infringement is a group of torts explains why the infringement analysis is so unsettled.<sup>34</sup> There is no singular test for both trespass to land and nuisance, or for assault and battery, and commentators should not expect courts to create a uniform test for copyright infringement. A defendant's conduct is tortious only if it interferes with a legally protected interest.<sup>35</sup> Copyright's infringement analysis—including both the substantial similarity and fair use inquiries—is a judicial test to determine whether the defendant's copying injures the owner's legally protected interest.<sup>36</sup> But because copyright protects multiple interests from different types of injury, the infringement analysis simply cannot provide a one-size-fits-all tool. Instead, copyright's generic "infringement analysis" mutates doctrinally and theoretically to provide a unique legal test for each of the copy-torts.<sup>37</sup> For example, the "competitor-copying" wrong occurs when a rival producer's copying lures away the owner's consumers. In these cases, courts adopt the "intended audience or consumer" viewpoint to assess similarity—as diversion will only occur if this group perceives the works as substitutes—and find "market harm" when there is some evidence of market substitution.<sup>38</sup> But while the competitor-copying wrong is jurisprudentially similar to unfair competition law, the "consumer-copying" wrong is more akin to trespass to land. To prevent a market failure, consumers who use the work are expected to gain access through market transaction rather than copying. How much copying qualifies as accessing the work depends on the un-

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<sup>33</sup> See Goldberg & Zipursky, *supra* note 8, at 27–43; see also John C.P. Goldberg, Introduction: Pragmatism and Private Law, 125 *Harv. L. Rev.* 1640, 1654 (2012) (describing tort law as a "gallery of wrongs" (quoting Goldberg & Zipursky, *supra* note 8, at 27) (internal quotation marks omitted)); John C.P. Goldberg & Benjamin Zipursky, Torts as Wrongs, 88 *Tex. L. Rev.* 917, 937–41 (2010) (explaining tort law as the law of wrongs).

<sup>34</sup> This is not the exclusive explanation. Some of the variation is also due to the different types of subject matter copyright protects. See generally Michael W. Carroll, One for All: The Problem of Uniformity Cost in Intellectual Property Law, 55 *Am. U. L. Rev.* 845, 846–48 (2006). Other reasons include the different ways judges choose to interpret work, see Said, *supra* note 9, at 470, and different philosophical traditions underlying copyright, see William W. Fisher III, Reconstructing the Fair Use Doctrine, 101 *Harv. L. Rev.* 1659, 1686–92 (1988).

<sup>35</sup> See *infra* note 285 and accompanying text.

<sup>36</sup> See *infra* note 286 and accompanying text.

<sup>37</sup> See *infra* Section II.C.

<sup>38</sup> See *infra* Section II.C.

derlying policy of efficient incentives, and accordingly the “ordinary observer” fiction is used to determine how much copying is “too much,” while market harm is the money that the consumer would have paid had she bargained rather than copied.<sup>39</sup> The variability of the infringement analysis across these two, and the remaining three, torts is therefore not necessarily inconsistent nor incoherent, but enables courts to effectively test for the different wrongs.

Appreciating copyright infringement’s gallery of wrongs structure makes the infringement analysis easier to predict. Understanding the different copy-torts will not only enable practitioners to better foresee how courts will apply the infringement analysis, but also provide a guide to judges struggling to apply the correct legal standards in hard cases. Awareness of the taxonomy, however, also raises an important normative question: should Congress formally separate the copy-torts into distinct causes of action? In 1960, Professor William Prosser demonstrated that privacy invasion was not one tort, but a group of four torts.<sup>40</sup> Later, he formally separated the torts into distinct causes of action through the *Second Restatement of Torts*.<sup>41</sup> By doing so, he made privacy law far more predictable than it had previously been. Similar separation in copyright is equally likely to make the infringement analysis more predictable. This would also probably, and beneficially, increase the protections for defendants in litigation. Furthermore, if formal separation is desirable, then now is the time to act, given the Copyright Office’s desire for “[t]he next great copyright act.”<sup>42</sup> But sadly the history of Prosser’s privacy torts also demonstrates how formal separation may lead to undesirable inflexibility. Therefore, rather than formally separate the copy-torts into distinct causes of action, the Article proposes a method of adjudicating infringement claims that will further increase predictability while retaining the flexibility to accommodate future socioeconomic change. In hard cases, courts should clearly identify which copy-tort the defendant has performed, and explain how they shape the infringement analysis to test for that wrong.

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<sup>39</sup> See *infra* Subections II.C.1.a, II.C.2.a.

<sup>40</sup> Prosser, *supra* note 1, at 389.

<sup>41</sup> See Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 *Calif. L. Rev.* 1887, 1890 (2010).

<sup>42</sup> Maria A. Pallante, *The Next Great Copyright Act*, 36 *Colum. J.L. & Arts* 315, 319–23 (2013).



The Article unfolds in three Parts. Part I summarizes the orthodox view that copyright infringement is a tort and that copyright infringement law is confused. Part II presents the revised positive theory that infringement is a group of wrongs bearing a family resemblance. In *The Common Law*, Oliver Wendell Holmes, Jr. wrote that “[t]he business of the jurist is to make known the content of the law; that is, to work upon it from within, or logically, arranging and distributing it, in order, from its *summum genus* to its *infima species*.”<sup>43</sup> Adopting the same style and method here helps explain the doctrinal and theoretical variability of the infringement analysis. Finally, Part III proposes that courts conceptually separate the wrongs further by thinking less of the “tort of copyright infringement” and more in terms of “copy-torts.” The proposed method is applied to the much-maligned *Harper & Row, Publishers v. Nation Enterprises*<sup>44</sup> judgment to illustrate how courts should approach hard cases.<sup>45</sup>

## I. THE TORT OF COPYRIGHT INFRINGEMENT

Copyright infringement’s categorization as a tort is “orthodoxy”<sup>46</sup> and an “uncontroversial legal fact.”<sup>47</sup> But when infringement is conceptualized as one singular wrong, the infringement analysis appears inconsistent and incoherent.

### A. *The Orthodox Theory*

Courts have “long recognized that infringement of a copyright is a tort.”<sup>48</sup> Contemporary judges and scholars make frequent references to a “tort of copyright infringement,”<sup>49</sup> but arguably that view is as old as tort

<sup>43</sup> Oliver Wendell Holmes, Jr., *The Common Law* 219 (Boston, Little, Brown & Co. 1881).

<sup>44</sup> 471 U.S. 539 (1985).

<sup>45</sup> See *infra* Section III.C.

<sup>46</sup> Steven Hetcher, *The Fault Liability Standard in Copyright*, in *Intellectual Property and the Common Law* 431, 432 (Shyamkrishna Balganeshe ed., 2013) (footnote omitted).

<sup>47</sup> Steven Hetcher, *The Kids Are Alright: Applying a Fault Liability Standard to Amateur Digital Remix*, 62 Fla. L. Rev. 1275, 1283 (2010).

<sup>48</sup> *Ted Browne Music Co. v. Fowler*, 290 F. 751, 754 (2d Cir. 1923).

<sup>49</sup> See, e.g., *Bouchat v. Bon-Ton Dep’t Stores*, 506 F.3d 315, 329 (4th Cir. 2007) (quoting *Salton, Inc. v. Philips Domestic Appliances & Pers. Care B.V.*, 391 F.3d 871, 877 (7th Cir. 2004)); *Crow v. Wainwright*, 720 F.2d 1224, 1226 (11th Cir. 1983); 5 Patry, *supra* note 22, § 17:168; Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Part of the Story*, 50 J. Copyright Soc’y U.S.A. 149, 160 (2003);

law itself. In the mid-nineteenth century, while jurists were debating whether torts was “a proper subject for a law book,”<sup>50</sup> courts began conceptualizing the author’s right in his creative work as a property right that, if interfered with, would give rise to a tort claim.<sup>51</sup> In 1869, the court in *Lawrence v. Dana* found that “[r]ights secured by copyright are property within the meaning of the law of copyright, and whoever invades that property beyond the privilege conceded to subsequent authors commits a tort.”<sup>52</sup> Initial academic texts on torts treated the issue of copyright infringement extensively. Professor Francis Hilliard’s *The Law of Torts or Private Wrongs* included an entire chapter entitled “Patents, Copyrights, Etc.,”<sup>53</sup> which claimed that “[w]hoever, by his own skill, labor, and judgment, writes a new work, may have a copyright therein” and that copying such material “constitute[s] an infringement, for which an action at law would lie.”<sup>54</sup> Professor John Wigmore’s *Select Cases on the Law of Torts* included analysis of many Anglo-American copyright decisions.<sup>55</sup> By 1924, then-Judge Benjamin Cardozo could assuredly announce that “[t]he author who suffers infringement of his copyright . . . may count upon the infringement as a tort, and seek redress under the statute by action in the federal courts.”<sup>56</sup> Professor Steven Hetcher recently coined the term “copytort” to reflect infringement’s position as a tort.<sup>57</sup>

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Steven Hetcher, *The Immorality of Strict Liability in Copyright*, 17 *Marq. Intell. Prop. L. Rev.* 1, 4–5 (2013); see also *Milwaukee Concrete Studios, Ltd. v. Fjeld Mfg. Co.*, 8 F.3d 441, 447 (7th Cir. 1993) (“[C]opyright infringement is a tort . . . .”); *Educ. Testing Serv. v. Simon*, 95 F. Supp. 2d 1081, 1087 (C.D. Cal. 1999) (“[I]t is a strict liability tort.”); Yvette Joy Liebesman, *Downstream Copyright Infringers*, 60 *U. Kan. L. Rev.* 1, 13 (2011) (“[C]opyright infringement is a tort of strict liability . . . .”).

<sup>50</sup> Book Notices, 5 *Am. L. Rev.* 337, 340–41 (1871) (reviewing C.G. Addison, *The Law of Torts* (Boston, Little, Brown & Co. 1870)).

<sup>51</sup> See Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 *Yale L.J.* 186, 224–37 (2008) (explaining that copyright doctrine underwent a fundamental change in the second half of the nineteenth century from a privilege to print text to a right of ownership).

<sup>52</sup> 15 F. Cas. 26, 61 (C.C.D. Mass 1869) (No. 8136).

<sup>53</sup> 2 Francis Hilliard, *The Law of Torts or Private Wrongs* 161–213 (Boston, Little, Brown & Co. 1859).

<sup>54</sup> *Id.* at 191–93.

<sup>55</sup> 1 John Henry Wigmore, *Select Cases on the Law of Torts with Notes, and a Summary of Principles* 372–449 (1912).

<sup>56</sup> *Underhill v. Schenk*, 143 N.E. 773, 774–75 (N.Y. 1924).

<sup>57</sup> Hetcher, *supra* note 47, at 1283.

The tortious nature of infringement is, however, more than mere historical artifact, but rather rests upon an analytical foundation. Torts are “civil wrong[s] . . . for which [courts] will provide a remedy.”<sup>58</sup> Professors John Goldberg and Benjamin Zipursky have most fully articulated what it means to say torts are “wrongs.”<sup>59</sup> Sources of law create rights in some individuals and correlative duties in others. When an actor breaches a duty and correlatively invades a right, she commits a legal wrong—a tort—and will be required to pay the right holder a remedy.<sup>60</sup> Professor Shyamkrishna Balganesh has explicated how copyright infringement neatly fits this analytical framework.<sup>61</sup> The Copyright Act establishes the owner’s exclusive right to copy. While technically Section 106 creates a bundle of exclusive rights—to reproduce, prepare derivative works, perform, display, and distribute<sup>62</sup>—these rights are all “derivative of” the right to copy.<sup>63</sup> All others in society are under a corresponding “duty not to copy.”<sup>64</sup> By copying, the defendant commits a breach of duty that courts will remedy.<sup>65</sup> “All of these observations,” according to Balganesh, “indelibly point to copyright’s core normative structure mapping onto that of tort law, the law of civil wrongs, through its creation of a *wrong of copying*.”<sup>66</sup>

The elements of the tort are set by case law. While the right to copy is established by statute (consequently, infringement is usually termed a “statutory tort”<sup>67</sup>), copyright is a “mixed” system where courts play a vi-

<sup>58</sup> W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 1, at 2 (W. Page Keeton ed., 5th ed. 1984).

<sup>59</sup> Goldberg & Zipursky, *supra* note 8, at 1–5.

<sup>60</sup> *Id.* at 1.

<sup>61</sup> Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 *Harv. L. Rev.* 1664, 1664–66 (2012). But see Abraham Drassinower, *Copyright Is Not About Copying*, 125 *Harv. L. Rev. F.* 108, 109 (2012) (responding to Balganesh’s argument).

<sup>62</sup> 17 U.S.C. § 106 (2012). See generally Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)* (2004) (describing the historical evolution of the right to copy in eighteenth-century Britain).

<sup>63</sup> Balganesh, *supra* note 61, at 1669.

<sup>64</sup> *Id.* at 1674–76 (internal quotation marks omitted).

<sup>65</sup> *Id.*; see also *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 19 (1908) (Holmes, J., concurring specially) (noting that the owner need not be “aware of the wrong” for infringement to occur); *Faulkner v. Nat’l Geographic Soc’y*, 576 F. Supp. 2d 609, 613 (S.D.N.Y. 2008) (“Copyright infringement is a strict liability wrong . . .”).

<sup>66</sup> Balganesh, *supra* note 61, at 1675.

<sup>67</sup> *Salton, Inc. v. Philips Domestic Appliances & Pers. Care B.V.*, 391 F.3d 871, 877 (7th Cir. 2004) (noting “the federal statutory tort of copyright infringement”); 5 Patry, *supra* note 22, at § 17:167 (“[C]opyright infringement is a statutory tort and has existed since 1710.”).

tal role in “fleshing out” the contents of the right.<sup>68</sup> When doing so, judges look to “tort principles” to determine “the contours of copyright liability.”<sup>69</sup> In this manner, Judge Frank formulated the basic elements of the infringement test in *Arnstein v. Porter*.<sup>70</sup> To prove infringement, the owner must show (1) that the defendant factually copied protected expression (meaning the defendant must perform one of the actions listed in Section 106),<sup>71</sup> and (2) that the copying was qualitatively or quantitatively so extensive as to amount to an “improper appropriation.”<sup>72</sup> Factual copying becomes an improper appropriation if the defendant’s copied work is “substantially similar” to the plaintiff’s work.<sup>73</sup>

If the plaintiff makes out a prima facie case, the defendant has the opportunity to invoke affirmative defenses, the most important of which is the fair use defense.<sup>74</sup> The doctrine states that it is not an infringement to copy the work for “fair” uses. The doctrine was created during the nineteenth century by common law courts, and commentators have noted its

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<sup>68</sup> Peter S. Menell, The Mixed Heritage of Federal Intellectual Property Law and Ramifications for Statutory Interpretation, *in* Intellectual Property and the Common Law, supra note 46, at 63, 63–64; see also *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1284 (11th Cir. 2014) (Vinson, J., concurring specially) (“While copyright is a creature of statute, the doctrine of fair use has always been governed by judicially-created common law principles.”); Balganes, supra note 10, at 209 (“[C]ourts thus play a central role in framing and delineating the copyright entitlement.”); Hetcher, supra note 47, at 1284–85 (discussing that “copyright law has a longer, more diverse history as a common law phenomenon than is commonly noted”).

<sup>69</sup> Peter S. Menell & David Nimmer, Unwinding *Sony*, 95 Calif. L. Rev. 941, 994 (2007); see also A. Samuel Oddi, Contributory Copyright Infringement: The Tort and Technological Tensions, 64 Notre Dame L. Rev. 47, 51–54 (1989) (discussing the use of tort concepts in contributory copyright infringement cases).

<sup>70</sup> 154 F.2d 464, 468 (2d Cir. 1946). The Ninth Circuit follows a different approach, but adopts the basic two-part structure requiring factual copying and wrongfulness. See *Sid & Marty Krofft Television Prods. v. McDonald’s Corp.*, 562 F.2d 1157, 1162–65 (9th Cir. 1977).

<sup>71</sup> *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085 n.3 (9th Cir. 1989) (“The word ‘copying’ is shorthand for the infringing of any of the copyright owner’s five exclusive rights . . . .”); see also 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.02[A] (Matthew Bender ed., rev. ed. 2009) (noting that copying means that a person has performed an action found in § 106 of the Copyright Act); Balganes, supra note 10, at 205 (“[T]he scope of what copying entails and extends to—distribution, performance, adaptation, and the like—has no doubt expanded over time . . . .”).

<sup>72</sup> *Arnstein*, 154 F.2d at 468.

<sup>73</sup> See Robert C. Osterberg & Eric. C. Osterberg, *Practising Law Inst.*, Substantial Similarity in Copyright Law § 1.1 (2016).

<sup>74</sup> 17 U.S.C. § 107 (2012).

“historical roots as a tort doctrine.”<sup>75</sup> Like many tort doctrines, “fairness” is an open-ended standard and without precise definition. This flexibility was retained when the doctrine was codified in the Copyright Act,<sup>76</sup> although legislation provided examples of fair uses and a list of nonexhaustive factors to be considered in the fairness analysis. The doctrine is frequently understood as an “equitable rule of reason”<sup>77</sup> and has been applied in a great variety of circumstances, including time-shifting television programs,<sup>78</sup> reverse-engineering computer programs to access interface information,<sup>79</sup> caching copyrighted websites,<sup>80</sup> and creating digital libraries for limited public access,<sup>81</sup> to give a few examples.<sup>82</sup>

### *B. Three Doctrinal Problems*

This simple exposition of the tort of infringement hides a multitude of sins. The elements of the tort are superficially straightforward: copyright infringement occurs when the factual copying is extensive enough to be an improper appropriation and is not covered by the fair use doctrine. However, commentators find that courts often apply these elements inconsistently<sup>83</sup> and without any coherent underlying principle.<sup>84</sup> Three examples of this doctrinal and theoretical instability are the audience, harm, and analogy problems.

#### *1. The Audience Problem*

Determining whether two works are “substantially similar” for purposes of improper appropriation is “viscid”<sup>85</sup> in complexity and greatly

<sup>75</sup> Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 Wash. U. L. Rev. 969, 973, 975–76 (2007).

<sup>76</sup> The House Report accompanying the passage of the 1976 Act explains: “there is no disposition to freeze the doctrine in the statute,” and “the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.” H.R. Rep. No. 94-1476, at 66 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5680.

<sup>77</sup> *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 448 (1984) (quoting H.R. Rep. No. 94-1476, at 65) (internal quotation marks omitted).

<sup>78</sup> *Id.* at 421.

<sup>79</sup> *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1514 (9th Cir. 1992).

<sup>80</sup> *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1109 (D. Nev. 2006).

<sup>81</sup> *Authors Guild v. Google Inc.*, 954 F. Supp. 2d 282, 284 (S.D.N.Y. 2013).

<sup>82</sup> See generally Samuelson, *supra* note 19, at 2539 (demonstrating the breadth of the fair use doctrine).

<sup>83</sup> See *supra* note 9.

<sup>84</sup> See *supra* note 10.

<sup>85</sup> Benjamin Kaplan, *An Unhurried View of Copyright* 48 (1967).

“problematic.”<sup>86</sup> Within the morass of unresolved questions the doctrine presents, one of the most difficult is the audience question.<sup>87</sup> To whom must similarity appear substantial? Courts have developed three somewhat distinct answers to this question: (1) the intended audience or consumer; (2) the ordinary observer; and (3) the expert.

The intended audience or consumer approach is associated with *Arnstein*.<sup>88</sup> Songwriter Ira Arnstein alleged that several of Cole Porter’s musical compositions were copied from his work.<sup>89</sup> After formulating the basic test for infringement, Judge Frank found that the question at the heart of the improper appropriation inquiry is “whether defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the *audience* for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.”<sup>90</sup> Commentators have subsequently interpreted this as suggesting “that typical consumers of the work ought to be the audience.”<sup>91</sup> Frank then proceeded to exclude the opinion of musical experts, finding “the views of such persons are caviar to the general—and plaintiff’s and defendant’s compositions are not caviar.”<sup>92</sup> Rather, the question was one to be left to a jury.<sup>93</sup> To the extent that the jurors were not the intended audience, Frank explained they may need further testimony on how consumers would perceive the similarities.<sup>94</sup>

But frequently the intended audience formulation is dropped in favor of the “ordinary observer” (sometimes the “ordinary reasonable observer” or “ordinary lay observer”). The Ninth Circuit in *Sid & Marty Krofft Television Productions v. McDonald’s Corp.* held that the test to determine whether there is similarity of expression “depend[s] on the response of the ordinary reasonable person.”<sup>95</sup> Previously, Judge Learned Hand held that expression would be substantially similar if “the ordinary

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<sup>86</sup> Samuelson, *supra* note 17, at 1823 (arguing there are many tests for nonliteral infringement and little guidance on when they ought to be applied).

<sup>87</sup> See Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 Mich. L. Rev. 1251, 1253 (2014).

<sup>88</sup> 154 F.2d at 473.

<sup>89</sup> *Id.* at 467.

<sup>90</sup> *Id.* at 473 (emphasis added).

<sup>91</sup> Fromer & Lemley, *supra* note 87, at 1269.

<sup>92</sup> *Arnstein*, 154 F.2d at 473.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*; see also *Murray Hill Publ’ns v. Twentieth Century Fox*, 361 F.3d 312, 321 (6th Cir. 2004) (stating that the jury usually “serves as a proxy for the works’ intended audience”).

<sup>95</sup> 562 F.2d 1157, 1164 (9th Cir. 1977).

observer, unless he set out to detect the disparities, would be disposed to overlook [the differences], and regard their aesthetic appeal as the same.”<sup>96</sup> Clearly in some of these cases this standard is simply another formulation of the consumer viewpoint. For example, in *Arnstein* where the two pop songs were designed for general public appeal, the owner’s intended audience was the “ordinary lay hearer,” and Frank referred to the ordinary person as the intended audience.<sup>97</sup> In many cases, however, the “ordinary observer” viewpoint is a truly distinct standard. In these cases, courts hold the ordinary observer standard is “an attempt to apply the ‘reasonable person’ doctrine as found in other areas of the law.”<sup>98</sup> In *La Resolana Architects, PA v. Reno, Inc.*, the Tenth Circuit refused to admit evidence from a lay witness because “the ‘ordinary observer,’ like the ‘reasonable person’ in tort law, is a *legal fiction*.”<sup>99</sup> Unlike the intended audience standard that genuinely requires the court to consider the subjective viewpoint of a particular social group, there is no real “ordinary observer.” Like the reasonable person in tort law, the standard facilitates an objective rather than subjective analysis.<sup>100</sup>

Finally, while the unlawful appropriation question is generally a jury question, in some cases courts permit expert testimony to help assess similarity. Dissenting in *Arnstein*, Judge Clark found music to be “a matter of the intellect as well as the emotions” and noted that the majority’s failure to consider the views of “musical experts” was “anti-intellectual and book-burning” in character.<sup>101</sup> Subsequently, courts have occasionally permitted expert testimony to assess similarity. Particularly, in *Computer Associates International v. Altai, Inc.*, the Second Circuit found that expert testimony could be admitted in cases involving software and other “art forms [that are not] readily comprehensible and generally familiar to the average lay person.”<sup>102</sup> In cases where the trier

<sup>96</sup> *Peter Pan Fabrics, v. Martin Weiner Corp.*, 274 F.2d 487, 488–89 (2d Cir. 1960).

<sup>97</sup> *Arnstein*, 154 F.2d at 468, 473.

<sup>98</sup> *Comput. Assocs. Int’l, v. Altai, Inc.*, 982 F.2d 693, 713 (2d Cir. 1992) (emphasis added) (quoting what is now published as 4 *Nimmer & Nimmer*, supra note 71, at § 13.03[E][2]) (internal quotation marks omitted).

<sup>99</sup> *La Resolana Architects, PA v. Reno, Inc.*, 555 F.3d 1171, 1180–81 (10th Cir. 2009) (emphasis added); see Irina D. Manta, *Reasonable Copyright*, 53 B.C. L. Rev. 1303, 1304–05 (2012); see also Balganes, supra note 10, at 221 (“The ordinary-observer standard operates along the lines of tort law’s reasonable-person requirement, creating a legal fiction through which the wrongfulness of the action in question is assessed.”).

<sup>100</sup> See infra notes 295–301 and accompanying text.

<sup>101</sup> *Arnstein*, 154 F.2d at 476, 478 (Clark, J., dissenting).

<sup>102</sup> *Comput. Assocs. Int’l*, 982 F.2d at 713.

of fact is not equipped with the relevant knowledge to assess similarity, the court may call on an “expert’s assistance” to help make the comparison.<sup>103</sup>

Courts move back and forth on the relevant audience standard with little reasoning. Accordingly, Professors Jeanne Fromer and Mark Lemley call the issue “confused”<sup>104</sup> while Professor David Nimmer writes that the issue “remains clouded” and “must be placed into a type of mental ‘suspense account’” until such time as it is more coherently resolved.<sup>105</sup>

## 2. *The Harm Problem*

The fair use doctrine is the “most troublesome” doctrine in copyright.<sup>106</sup> The “single most important”<sup>107</sup> element of the fairness analysis is the fourth factor’s inquiry into “the effect of the [copyist’s] use upon the potential market for or value of the copyrighted work.”<sup>108</sup> This factor is often understood as an assessment of whether the copying caused the owner cognizable harm. But some find copyright’s theory of “harm” to be “so poorly defined that the concept has become circular.”<sup>109</sup> Once again, courts have developed competing harm constructs, including: (1) demand diversion, (2) lost defendant fees, and (3) nonfinancial injury.<sup>110</sup>

Demand diversion exists where the copying leads consumers, who otherwise would have bought the original work, to buy the defendant’s

<sup>103</sup> *Id.* at 713–14 (stating that the ordinary observer lacks sufficient understanding to compare “highly complicated and technical” software for similarity).

<sup>104</sup> Fromer & Lemley, *supra* note 87, at 1273.

<sup>105</sup> 4 Nimmer & Nimmer, *supra* note 71, § 13.03[E][1]; see also Pamela Samuelson & Members of the Copyright Principles Project, *The Copyright Principles Project: Directions for Reform*, 25 *Berkeley Tech. L.J.* 1175, 1191 (2010) (noting generally that infringement law is “confusing” and “incoherent” due to multiple tests for determining similarity).

<sup>106</sup> *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939). But see 2 Patry, *supra* note 22, § 3:46 (finding that “derivative works have replaced fair use as the ‘most troublesome’ doctrine”).

<sup>107</sup> See *supra* note 21.

<sup>108</sup> 17 U.S.C. § 107 (2012); see *supra* note 16 (laying out the four factor test).

<sup>109</sup> Christina Bohannon, *Copyright Infringement and Harmless Speech*, 61 *Hastings L.J.* 1083, 1085 (2010); see also Ladd, *supra* note 22 (rejecting that “harm” should be a condition for copyright liability).

<sup>110</sup> See Wendy J. Gordon, *The Concept of “Harm” in Copyright*, in *Intellectual Property and the Common Law*, *supra* note 46, at 452, 462–63 (describing the multiple possible conceptualizations of harm); see also Bohannon, *supra* note 75, at 989 (prescribing what ought to qualify as market harm).



work instead.<sup>111</sup> The most prominent discussion of this harm is found in *Campbell v. Acuff-Rose Music*<sup>112</sup> Acuff-Rose sued rap group 2 Live Crew for their explicit rap parody of Roy Orbison's "Oh, Pretty Woman."<sup>113</sup> The district court determined that 2 Live Crew's unflattering parody was a fair use that caused the owner no "cognizable harm."<sup>114</sup> Analyzing the argument, the U.S. Supreme Court began by defining harm as "market substitution"<sup>115</sup> and "market replacement."<sup>116</sup> Under this conceptualization of harm, the fourth factor would have favored Acuff-Rose, if the copying resulted in *third party consumers* no longer buying "Oh, Pretty Woman," but instead satisfying their demand by buying the parody. The district court found it "extremely unlikely" that the bawdy parody would serve as a market substitute for "Oh, Pretty Woman," and therefore it was very improbable that it would "adversely affect the market for the original."<sup>117</sup> As no evidence was submitted on the potential for substitution in derivative markets, the case was remanded to determine the extent of harm in the market for rap versions of the song.<sup>118</sup>

In other cases, harm is the defendant's own failure to pay a fee for using the work. In *A&M Records v. Napster, Inc.*, individuals who used the file-sharing network Napster to download songs harmed the market because downloading enabled them to "get for free something they would ordinarily have to buy."<sup>119</sup> Similarly, in *American Geophysical Union v. Texaco, Inc.*, the defendant harmed the market by failing to obtain a license for photocopying the plaintiff's copyrighted academic

<sup>111</sup> Gordon, *supra* note 110, at 462 (referring to this type of harm as "substitutionary rivalry").

<sup>112</sup> 510 U.S. 569, 590–94 (1994); see also Jeanne C. Fromer, Market Effects Bearing on Fair Use, 90 Wash. L. Rev. 615, 626–29 (2015) (discussing in detail the fair use analysis in *Campbell*).

<sup>113</sup> *Campbell*, 510 U.S. at 572–73.

<sup>114</sup> *Id.* at 573, 593 n.24.

<sup>115</sup> *Id.* at 580–81 n.14.

<sup>116</sup> *Id.* at 591; see also Pierre N. Leval, Comment, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1125 (1990) ("The fourth factor disfavors a finding of fair use only when the market is impaired because the quoted material serves the consumer as a substitute . . . ." (footnote omitted)).

<sup>117</sup> *Campbell*, 510 U.S. at 573 (quoting *Acuff-Rose Music, v. Campbell*, 754 F. Supp. 1150, 1158 (M.D. Tenn. 1991)) (internal quotation marks omitted).

<sup>118</sup> *Id.* at 593–94.

<sup>119</sup> 239 F.3d 1004, 1015 (9th Cir. 2001) (quoting *A&M Records, v. Napster, Inc.*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (2d Cir. 2001)) (internal quotation marks omitted).

journals.<sup>120</sup> Unlike *Napster*, *Texaco* involved lost license fees rather than lost sales, but in both cases the harm was the lost money from the defendant, rather than lost money from third-party consumers, as in *Campbell*. Crucially, if a court accepts the defendant's own failure to pay as cognizable harm, then the door is opened to finding harm even when copying *increases* third-party demand for the owner's work.<sup>121</sup> In both *Micro Star v. Formgen*<sup>122</sup> and *D.C. Comics v. Reel Fantasy*,<sup>123</sup> the defendant copied to produce complementary goods. The copying accordingly enhanced consumer demand for the plaintiff's work. Yet, the defendants were deemed to have harmed the market by not paying for their use.<sup>124</sup>

Finally, sometimes the fourth factor takes nonfinancial injury into account. In such cases, the "market harm" analysis contorts to uphold the plaintiff's privacy or reputational interests.<sup>125</sup> In *Salinger v. Random House*, the reclusive author J.D. Salinger sued to enjoin publication of a biography that contained "minimal" excerpts from his unpublished letters.<sup>126</sup> Salinger had disavowed any intention to ever publish the letters

<sup>120</sup> 60 F.3d 913, 914, 931 (2d Cir. 1994) ("Primarily because of lost licensing revenue . . . the publishers have demonstrated a substantial harm to the value of their copyrights . . . ." (quoting *Am. Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 21 (S.D.N.Y. 1992)); cf. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1359 (Ct. Cl. 1973) (finding the "record fail[ed] to show" that library photocopying caused market harm to the plaintiff).

<sup>121</sup> See generally Glynn S. Lunney, Jr., *Copyright, Derivative Works, and the Economics of Complements*, 12 *Vand. J. Ent. & Tech. L.* 779, 782–83 (2010) (discussing complementary works).

<sup>122</sup> *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1109, 1113 (9th Cir. 1998) (finding harm when the defendant copied from *Duke Nukem 3D* video game to create another game called *Nuke It*, even though *Nuke It* could only be played by those who had already bought *Duke Nukem 3D*).

<sup>123</sup> *D.C. Comics v. Reel Fantasy*, 696 F.2d 24, 28 (2d Cir. 1982) (finding harm when a comic book store copied D.C.'s superhero characters to advertise the comic books on sale in store).

<sup>124</sup> *Micro Star*, 154 F.3d at 1113–14; *D.C. Comics*, 696 F.2d at 28. The Seventh Circuit has tried to limit the application of copyright to complementary works. See *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 517 (7th Cir. 2002) ("[C]opying that is complementary to the copyrighted work . . . is fair use . . ."). But see *Authors Guild v. Google Inc.*, 804 F.3d 202, 216 n.18 (2d Cir. 2015) ("We do not find the term 'complementary' particularly helpful in explaining fair use. . . . When a novel is converted into film, for example, the original novel and the film ideally complement one another . . ."; yet, this is still an infringing derivative work).

<sup>125</sup> Gordon, *supra* note 110, at 462–63 ("subjective distress").

<sup>126</sup> *Salinger v. Random House*, 811 F.2d 90, 92–94 (2d Cir. 1987) (quoting *Salinger v. Random House*, 650 F. Supp. 413, 423 (S.D.N.Y. 1986)) (internal quotation marks omitted).

and initiated suit to prevent them from becoming public. Despite the fact that no market existed for the letters, or ever would exist given Salinger's desires, the Second Circuit held that the copying constituted market harm because it reduced the "opportunity" to market the letters in the future should Salinger change his mind.<sup>127</sup> Subsequent commentators have viewed this decision as an example of courts providing veiled protection to noneconomic privacy interests.<sup>128</sup>

Controversially, sometimes loss of creative control is considered to be cognizable nonfinancial harm. In *Sony Corp. of America v. Universal City Studios*, owners of television shows argued that consumer use of the Betamax VCR to "time-shift[]" shows for later viewing, was harmful because "the copyright owner ha[d] lost control over his program."<sup>129</sup> Dissenting from the majority, Justice Blackmun found time-shifting to infringe copyright in part because it was against the "nature of copyright" as a "right to control" the work.<sup>130</sup> Users unilaterally deciding whether to time-shift the work therefore risked "eroding the very basis of copyright law" in part "by depriving authors of control over their works."<sup>131</sup> To the extent courts do find lost control cognizable, they risk even further instability in the tort, where the idea of harm already traverses conceptually between demand diversion, lost defendant fees, and personal injury.

### 3. *The Analogy Problem*

Lastly, judges do not agree on what other areas of tort law serve as an appropriate "model" to help design the infringement analysis. In an area once referred to as "the metaphysics of the law,"<sup>132</sup> which suffers from a dearth of empirical evidence regarding the welfare effects of protec-

<sup>127</sup> *Id.* at 99.

<sup>128</sup> *New Era Publ'ns Int'l v. Henry Holt & Co.*, 873 F.2d 576, 585 (2d Cir. 1989) (Oakes, C.J., concurring) ("Salinger . . . involved underlying . . . privacy implications . . ."). See generally Benjamin Ely Marks, Note, Copyright Protection, Privacy Rights, and the Fair Use Doctrine: The Post-Salinger Decade Reconsidered, 72 N.Y.U. L. Rev. 1376, 1376 (1997) (discussing *Salinger* as case protecting a privacy interest).

<sup>129</sup> 464 U.S. 417, 451 (1984) (quoting *Universal City Studios, v. Sony Corp. of Am.*, 480 F. Supp. 429, 467 (C.D. Cal. 1979)) (internal quotation marks omitted).

<sup>130</sup> *Id.* at 480–81 (Blackmun, J., dissenting).

<sup>131</sup> *Id.* at 481.

<sup>132</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4609).

tion,<sup>133</sup> courts frequently turn to other areas of private law to uncover normatively desirable principles to help guide the infringement analysis. But whereas some courts view infringement as a property tort, and accordingly look to trespass and conversion for guidance, others look to unfair competition, or even unjust enrichment, to provide the appropriate inspiration.<sup>134</sup>

Often infringement is viewed as literary conversion. Judge Clark, in *De Acosta v. Brown*, adopted this analogy to justify infringement's strict liability rule.<sup>135</sup> According to Clark, copying converts expression into the property of the defendant, and, therefore, liability must be "complete to justify recovery as against even an innocent copier."<sup>136</sup> However, the Supreme Court has weakened this analogy. In *Dowling v. United States*, the Court found that conversion protected the owner's interest in possession, and this was not an interest protected by copyright given the public-goods nature of expression.<sup>137</sup> Infringement therefore "plainly implicates a more complex set of property interests than . . . conversion."<sup>138</sup>

Having rebuffed the conversion analogy, the *Dowling* Court intimated towards another potential analogy: trespass. The Court found that "anyone who trespasses into [the owner's] exclusive domain by using or authorizing the use of the copyrighted work . . . 'is an infringer.'"<sup>139</sup> Some commentators have equally viewed the owner's ability "to ward off unauthorized copying" as similar to "a homeowner's right to keep tres-

<sup>133</sup> George L. Priest, What Economists Can Tell Lawyers About Intellectual Property: Comment on Cheung, in 8 *Research in Law and Economics: The Economics of Patents and Copyrights* 19, 21 (John Palmer & Richard O. Zerbe, Jr. eds., 1986) ("[E]conomists know almost nothing about the effect on social welfare of the patent system or of other systems of intellectual property."). Although, empirical knowledge is undoubtedly increasing. See Christopher Buccafusco & Christopher Jon Sprigman, The Creativity Effect, 78 *U. Chi. L. Rev.* 31, 32, 52 (2011); David L. Schwartz & Jay P. Kesan, Essay, Analyzing the Role of Non-Practicing Entities in the Patent System, 99 *Cornell L. Rev.* 425 (2014).

<sup>134</sup> See Henry E. Smith, Intellectual Property as Property: Delineating Entitlements in Information, 116 *Yale L.J.* 1742, 1750 (2007) ("In the absence of good information we must make empirical rough guesses. It is the search for this type of empirical information that should drive our search for 'analogies' to the problem of rights in information.").

<sup>135</sup> 146 F.2d 408, 409, 412 (2d Cir. 1944).

<sup>136</sup> *Id.*

<sup>137</sup> 473 U.S. 207, 216–18 (1985).

<sup>138</sup> *Id.* at 218.

<sup>139</sup> *Id.* at 217 (quoting *Sony Corp. of Am.*, 464 U.S. at 433) (internal quotation marks omitted).

passers off his land.”<sup>140</sup> Nonetheless, others are not convinced by the analogy because of the highly limited nature of copyright interests.<sup>141</sup> Justice Holmes once explained that by calling something “property,” we “make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership.”<sup>142</sup> Yet various doctrines, including fair use, subject the scope of the owner’s right to an open-ended balancing test in a way that is rarely found in trespass.<sup>143</sup>

Alternatively, some view infringement as an economic tort. Professor L. Ray Patterson argued that “copyright can be viewed most usefully as statutory unfair competition” because the law protects owners from “predatory competitive practices.”<sup>144</sup> Others have recently argued very persuasively for this model of infringement.<sup>145</sup> Viewing infringement as a form of unfair competition, however, faces the problem that liability is frequently imposed on copyists not in a competitive relationship with the owner, as in the complementary-copying cases of *Micro Star* and *D.C. Comics*,<sup>146</sup> and where the direct infringer is an end consumer, as in *Napster*.<sup>147</sup>

Perhaps due to the failure to find a suitable tort analogy, some have instead viewed infringement as a type of unjust enrichment. In Professor Gordon’s terms, the “protection for intellectual products is based on the benefits the producers generate.”<sup>148</sup> Enjoying those products is arguably

<sup>140</sup> Paul Goldstein, *Copyright’s Highway: From Gutenberg to the Celestial Jukebox* 5 (2003).

<sup>141</sup> See Bohannon, *supra* note 75, at 983–84 (writing that the trespass analogy is “inapt and misleading”).

<sup>142</sup> *Traux v. Corrigan*, 257 U.S. 312, 342 (1921) (Holmes, J., dissenting).

<sup>143</sup> There is also a flourishing normative debate regarding the copyright-trespass parallels. Compare Lillian R. BeVier, *Copyright, Trespass, and the First Amendment: An Institutional Perspective*, 21 *Soc. Phil. & Pol’y* 104, 104 (2004) (arguing in favor of trespass analogies), with Gordon, *supra* note 110, at 452 (arguing against trespass analogies).

<sup>144</sup> L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 *Vand. L. Rev.* 1, 6 (1987).

<sup>145</sup> Sara K. Stadler, *Copyright as Trade Regulation*, 155 *U. Pa. L. Rev.* 899, 899 (2007); see also Shyamkrishna Balganesh, *Rethinking Copyright: Property Through the Lenses of Unjust Enrichment and Unfair Competition*, 156 *U. Pa. L. Rev. PENNumbra* 345, 345–46 (2008) (arguing for a “conception of unfair competition . . . premised on a restitutionary ideal”).

<sup>146</sup> *Supra* notes 122–23 and accompanying text.

<sup>147</sup> *Supra* notes 119–20 and accompanying text.

<sup>148</sup> Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 34 *McGeorge L. Rev.* 541, 541 (2003).

an “enrichment,” which, if unpaid for, is unjust.<sup>149</sup> Yet this analogy would potentially justify owners claiming reward every time the work is enjoyed,<sup>150</sup> whereas copyright law recognizes that much uncompensated benefit is a necessary and desirable part of the system.<sup>151</sup>

Viewing infringement as a singular wrong therefore renders not only the individual elements, but also the entire nature, of infringement unfathomable. If infringement is a tort, then it is not clearly similar enough to any other torts, such that analogical reasoning may be used to uncover principles to help shape the infringement analysis in the absence of data regarding welfare effects.<sup>152</sup>

## II. COPY-TORTS

The infringement analysis therefore appears unstable: the elements change from case to case and there is no clear model to guide doctrinal development. This Part, however, provides a revised positive theory of copyright that clarifies the infringement analysis. Copyright infringement is not one tort, but a group of torts. Copyright’s generic “infringement analysis” mutates in doctrine and theory to provide a unique legal test for each of the different copy-torts. This variation is not necessarily inconsistent or incoherent, but enables courts to effectively test for the different copy-torts. To illustrate, Section II.A introduces a concept familiar in tort theory: the “gallery of wrongs” structure. Section II.B argues that copyright equally contains a gallery of wrongs. Section II.C shows how the infringement analysis varies across the copy-torts.

### *A. Tort’s Gallery of Wrongs*

Conceptualizing copyright infringement as a singular legal wrong should immediately strike jurists as strange. There is no equivalent “tort

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<sup>149</sup> See Ward Farnsworth, *Restitution: Civil Liability for Unjust Enrichment* 61–74 (2014) (using intellectual property infringement as an example of the “taking” category of unjust enrichment).

<sup>150</sup> Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 Va. L. Rev. 149, 166–95 (1992) (considering principles that constrain the restitutory impulse); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 Tex. L. Rev. 1031, 1072 (2005) (voicing concern that unjust enrichment claims lead to over-protection).

<sup>151</sup> Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 Colum. L. Rev. 257, 257–58 (2007).

<sup>152</sup> *Supra* notes 133–34 and accompanying text.

of land infringement.” Instead, there is a group of real property torts including trespass, nuisance, ejectment, and removal of support.<sup>153</sup> Likewise, there is no “tort of chattel infringement” but a group of personal property torts, most prominently trespass to chattel and conversion.<sup>154</sup> This disaggregated structure exists outside of property torts. There is no “tort of physical integrity infringement” but a group of physical integrity torts such as battery, assault, and false imprisonment.<sup>155</sup> Nor is there a “tort of dignitary infringement,” a “tort of economic infringement”, or a “tort of privacy infringement” but rather sets of dignitary,<sup>156</sup> economic,<sup>157</sup> and privacy torts.<sup>158</sup> The contrast in organization between copyright and all these other fields is sharp and striking.

In tort theory, this arrangement of the law is known as the “gallery of wrongs” structure.<sup>159</sup> Common law tort systems identify an object—land, chattels, one’s person, etc.—and define the distinct “wrongs” that one can commit in relation to that object. A metaphor for this structure is that of an art gallery. A typical gallery is divided into different rooms. Each room displays a style or movement of art and the walls are adorned with multiple portraits related to that style or movement. Tort law is likewise “a gallery with many rooms, in each of which hang portraits of certain legal wrongs.”<sup>160</sup> There is a “real property room” with portraits of trespass, nuisance, and ejectment on the walls. There is a “personal property” room dealing with trespass to chattels and conversion, and so on. Analytically, each “wrong” refers to the law identifying the desires individuals have with respect to the object (Do they want to *possess* it? *Exclude* others from it? Maintain its *integrity*?);<sup>161</sup> that determines to what extent those interests should be legally protected;<sup>162</sup> and which de-

<sup>153</sup> Dan B. Dobbs et al., *The Law of Torts* §§ 49, 51, 53 n.1 (2d ed. 2011); 2 id. § 398.

<sup>154</sup> 2 id. §§ 59–74.

<sup>155</sup> Id. §§ 28–48.

<sup>156</sup> 3 id. §§ 516–77.

<sup>157</sup> Id. §§ 605–15.

<sup>158</sup> Id. §§ 578–84.

<sup>159</sup> Goldberg & Zipursky, *supra* note 8, at 28.

<sup>160</sup> Id.

<sup>161</sup> Restatement (Second) of Torts § 1 (Am. Law Inst. 1965) (“[I]nterest’ is used . . . to denote the object of any human desire.”).

<sup>162</sup> Id. § 1 cmt. a. (“[T]he word ‘interest’ . . . carries no implication that the interest is or is not given legal protection . . . .”); id. § 1 cmt. b (“In so far as an ‘interest,’ as defined in this Section, is protected against any form of invasion, the interest becomes the subject matter of a ‘right . . . .’”).

finer what actions interfere with that interest, as well as what legal consequences should attach to interference.<sup>163</sup>

Despite the fact that the gallery of wrongs structure is one of the “hallmarks” of Anglo-American tort systems,<sup>164</sup> there is no equivalent *de jure* structure to copyright. Copyright is formally organized around the protected subject matter: the creative work.<sup>165</sup> Thereafter, there is no conscious attempt to distinguish different wrongs individuals may commit with respect to the subject matter. All “copying” is either actionable infringement or not. As a factual matter, “copying” may occur in different ways (reproduction, distribution, performance, etc.),<sup>166</sup> just as “entry” in trespass may involve walking on, flying over, or burrowing underneath land,<sup>167</sup> or how unreasonable interference in nuisance may be occasioned by acts as varied as emitting smoke to maintaining an odorous pig sty.<sup>168</sup> But there is no attempt to recognize in black-letter law the different *interests* and *injuries* “the right to copy” may protect and prevent.

### *B. A Revised Positive Theory*

However, as a *de facto* matter, infringement is not one singular wrong, but a group of distinct wrongs bearing a family relationship. Copyright is better understood as another room in the tort law gallery.

<sup>163</sup> Id. § 1 cmt. d (“If society recognizes a desire as so far legitimate as to make one who interferes with its realization civilly liable, the interest is given legal protection, generally against all the world, so that everyone is under a duty not to invade the interest by interfering with the realization of the desire by certain forms of conduct.”).

<sup>164</sup> Eric Descheemaeker, *The Division of Wrongs: A Historical Comparative Study 1* (2009). The Roman civilian tradition has a very different approach. Those systems typically codify a single legal norm stating that one person is subject to liability to another for wrongfully injuring that person. See, e.g., Code Civil [C. civ.] [Civil Code] art. 1384 (Fr.); Bürgerliches Gesetzbuch [BGB] [Civil Code], § 823 translation at [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p3484](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3484) [<https://perma.cc/EG73-BSJH>] (Ger.).

<sup>165</sup> 17 U.S.C. § 102(a) (2012) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . .”).

<sup>166</sup> *Supra* note 71.

<sup>167</sup> Restatement (Second) of Torts § 158 cmt. h (Am. Law Inst. 1965) (listing walking across, flying over, pitching a tent, or erecting a building as examples of entry); see also Dobbs et al., *supra* note 153, § 53 (discussing “tangible entry”).

<sup>168</sup> Restatement (Second) of Torts § 821D reporter’s note (Am. Law Inst. 1982) (examples of the type of conduct necessary for liability in private nuisance); Dobbs et al., *supra* note 153, § 399 (listing the emission of dust, odors, chemicals, noise, light, and electromagnetic radiation as examples of interference).



This room deals with creative works and on the walls hang the distinct copy-torts. Each of the copy-torts involves factual copying and the owner's right to copy. But there are different *interests* underlying that right and different ways in which those interests may be *injured*. This Section analytically unbundles the distinct copy-torts.<sup>169</sup>

### *1. Consumer Copying*

The primary wrong is consumer copying. While a “blockhead” may write for free, many authors write to fill a market demand.<sup>170</sup> Producers create expressive goods knowing that some individuals—consumers—gain utility from the expression. Owners often desire that consumers pay for that use. By licensing the use, the owner captures that consumer utility and transforms consumer surplus into producer surplus. Copyright protects the owner's interest in the wealth transfer. The owner's “legally protected interest” is, according to *Arnstein v. Porter*, the “potential financial returns . . . which derive from the lay public's approbation of his efforts.”<sup>171</sup> Or as Justice Breyer restated, copyright is the right “to charge a fee to those who wish to use a copyrighted work.”<sup>172</sup> The exclusive “right to copy” protects this interest by ensuring those who would use the expression cannot gain access to it through copying, but must first gain access through a voluntary market transaction. Clearly, however, the protection offered to this interest is not absolute. Using law to mandate a mere redistribution of wealth is only justified to the extent that doing so ensures the optimal creation of new works. The scope of the author's right to charge for use and the consumer's correlative duty are defined by the policy of minimum incentives and the “incentive-access” paradigm.<sup>173</sup> But within the catalog of instances where the consumer is

<sup>169</sup> In “Privacy,” Prosser wrote that his attempt at distinguishing the privacy torts was not to articulate an “exact definition,” see Prosser, *supra* note 1, at 389. Likewise, the taxonomy presented here is likely imperfect. The categorization should be viewed as a first attempt to taxonomize infringement by interest and injuries. Future scholars are encouraged to build, and improve upon, this schema where necessary.

<sup>170</sup> 3 James Boswell, *Life of Johnson* 19 (George Birkbeck Hill ed., 1934).

<sup>171</sup> 154 F.2d 464, 473 (2d Cir. 1946).

<sup>172</sup> *Golan v. Holder*, 536 U.S. 302, 345 (2012) (Breyer, J., dissenting).

<sup>173</sup> See Oren Bracha & Talha Syed, *Beyond the Incentive-Access Paradigm? Product Differentiation & Copyright Revisited*, 92 *Tex. L. Rev.* 1841, 1843–44 (2014); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 *J. Legal Stud.* 325, 326 (1989); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 *Vand. L. Rev.* 483, 485–86 (1996) (labeling as the “incentives-access paradigm” the “enduring and widespread” reliance by “Congress, courts, and commentators . . . on [the]

duty-bound to negotiate and pay the market price for use, the consumer's failure to do so is a wrong. Such a breach of duty vests the owner with an in personam right against the consumer for a remedy. The consumer is then duty-bound to correct the wrong by paying compensation equal to the fee she would have paid if she negotiated for the use.

A paradigmatic case of consumer copying is *A&M Records v. Napster, Inc.*<sup>174</sup> Napster, an infamous peer-to-peer file sharing network, enabled individual users to download copyrighted works. Record companies and music producers sued Napster for indirect copyright infringement, alleging the individual downloaders were direct infringers. The Ninth Circuit found that individual users downloaded copyrighted material for a variety of uses—pure hedonistic use, sampling the work before purchase, space shifting—all of which were considered unfair and rendered the downloading tortious.<sup>175</sup> In the language of consumer copying, the copyright owners desired that the consumer surplus, which came with enjoying, sampling, or space shifting, be redistributed into producer surplus. Applying the basic incentive-access policy calculus led the court to conclude these specific uses were of the type where wealth redistribution was necessary to ensure optimal incentives. Accordingly, the individual users were under a duty to negotiate permission with the owner and pay the relevant market price for use. By copying, the individual downloaders were able to make use of the protected material while bypassing the market. The downloading enabled the consumers to “get for free something they would ordinarily have to buy.”<sup>176</sup>

The consumer-copying wrong arguably extends to include cases where the consumer has lawfully accessed the expression, but makes a use beyond the bounds of the initial license. In *American Geophysical Union v. Texaco, Inc.*, Texaco subscribed to academic journals, but the further use of making backup copies for commercial research purposes was subject to a duty to negotiate for permission.<sup>177</sup> By contrast, the case of *Sony Corp. of America v. Universal City Studios* held that time-

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incentives-access balance in defining some of copyright's most basic parameters, including the prerequisites for copyright protection, the general scope of protection, and specific limitations on protection” (footnotes omitted).

<sup>174</sup> 239 F.3d 1004, 1011 (9th Cir. 2001).

<sup>175</sup> Id. at 1014–15.

<sup>176</sup> Id. at 1015 (quoting *A&M Records v. Napster, Inc.*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000), aff'd in part, rev'd in part, 239 F.3d 1004 (2d Cir. 2001)) (internal quotation marks omitted).

<sup>177</sup> 60 F.3d 913, 915–16, 932 (2d Cir. 1994).

shifting for later viewing was a fair use because to hold otherwise “would merely inhibit access to ideas without any countervailing benefit,” and accordingly the defendants did not breach a duty by using the Betamax to copy the work.<sup>178</sup>

Consumer copying is the copy-tort most closely related to trespass to land. In the case of land, a property right enables the owner to exclude others, thus ensuring those who would use the land are required to negotiate for access. This internalizes the value of the land and incentivizes the owner to manage the subject matter efficiently and make necessary investments in the land.<sup>179</sup> Likewise, the owner’s right “to charge a fee to those who wish to use [the] copyrighted work” is provided to ensure positive utility is internalized to the owner, such that she has an incentive to create the work.<sup>180</sup> Like trespass, the ability to prevent copying means the consumer who wants to use the subject matter must gain access to it through a market transaction.<sup>181</sup> In both cases, how the asset is defined—the metes and bounds of the protected land, and what qualifies as expression—is determined by the policy underlying internalization.<sup>182</sup> Trespass to land and consumer copying differ in regard to what the rights prevent. In trespass to land, the owner has the ability to prevent access almost, but not entirely, regardless of the use the defendant wishes to perform with respect to the land.<sup>183</sup> In copyright, the owner can only prevent access for a restricted number of uses,<sup>184</sup> and far more uses are noninfringing, fair uses. This represents a shift from an “exclusion strategy” to a “governance” strategy in delineating the entitlement.<sup>185</sup>

<sup>178</sup> 464 U.S. 417, 450–51, 456 (1984).

<sup>179</sup> Harold Demsetz, *Toward a Theory of Property Rights*, 57 *Am. Econ. Rev.* 347, 356 (1967).

<sup>180</sup> *Supra* note 172 and accompanying text.

<sup>181</sup> See Demsetz, *supra* note 179, at 359.

<sup>182</sup> In relation to trespass, the famous illustration of this principle is *United States v. Causby*, 328 U.S. 256, 260–61 (1946) (abolishing the ancient doctrine of ownership extending to the heavens because “[c]ommon sense revolts at the idea” when modern realities of air travel are considered). In relation to copyright, see William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 92 (2003) (noting that ideas are not protected because monopoly is not required to “elicit an optimal supply” of ideas).

<sup>183</sup> Smith, *supra* note 134, at 1817–18.

<sup>184</sup> *Id.* at 1799–817.

<sup>185</sup> *Id.* at 1807 (“[C]opyright law enumerates various use rights, making it more of a governance regime from the outset.”).

## 2. Competitor Copying

The competitor-copying wrong occurs when a competitor copies a work to undercut the owner in the market and thus causes consumer demand diversion. Consumers who would have negotiated with the owner for use are now diverted to an alternative source: the defendant. Once again, the owner's legally protected interest in internalizing some protected consumer surplus is defeated, but the wrong is of a different character than the previous one. Whereas the consumer-copying problem is a variant on the classic lighthouse public goods market failure (the producer cannot exclude consumers and thus cannot internalize their utility),<sup>186</sup> the competitor-copying case is more analogous to the situation in which another lighthouse opens up to compete with the original.<sup>187</sup> Once again the owner's financial interest is defeated, but now the owner has an in personam right against the rival producer, not the end consumer.<sup>188</sup> Compensatory damages in these cases equal the total monetary amount the end consumers would have otherwise paid the owner in sales and license fees.<sup>189</sup>

Various cases exemplify the competitor-copying wrong. In *Peter Pan Fabrics v. Martin Weiner Corp.*, one textile converter alleged that another rival textile converter had copied its designs and was “underselling them” in the clothes market.<sup>190</sup> On appeal, Judge Learned Hand found the “aesthetic appeal” of the cloth was the same such that consumers—clothes manufacturers—might switch from consuming the plaintiff's

<sup>186</sup> See, e.g., Christopher S. Yoo, Copyright and Public Good Economics: A Misunderstood Relation, 155 U. Pa. L. Rev. 635, 644–45 (2007) (“[L]ighthouse services cannot be provided to ships that have paid for those services without simultaneously providing them to other ships in the area that have not paid for them. . . . Some commentators accept the notion that copyrightable works are nonexcludable, in that the ready availability of copying technologies keeps authors who have once sold their works from preventing nonpaying customers from obtaining access to those works.”).

<sup>187</sup> See Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 Harv. L. Rev. 281, 282 (1970) (“Without copyright protection a copying publisher could avoid many of the costs of the original publisher . . . . If competition then forced book prices down to the copier's cost, the first publisher and the author could not obtain adequate compensation.”).

<sup>188</sup> See 17 U.S.C. § 501 (2012).

<sup>189</sup> 2 Paul Goldstein, Goldstein on Copyright § 14.1.1.1 (3d ed. 2016) (“[C]ourts usually employ lost sales as the measure of damages on the assumption that every sale made by the defendant is one that the plaintiff otherwise could have made.”). It is, however, questionable that all sales made by the defendant are “lost” from the owner, as many would not have bought or licensed from the owner if copying had not occurred.

<sup>190</sup> 173 F. Supp. 292, 296 (S.D.N.Y. 1959), *aff'd*, 274 F.2d 487 (2d Cir. 1960).

work to the defendant's copied version.<sup>191</sup> Likewise, in *Country Kids 'N City Slicks v. Sheen*, plaintiff doll makers claimed the rival doll maker's copying enabled the defendant to sell the works at a cheaper price, thus luring away the plaintiff's sales representatives and creating competition that "would force both companies into bankruptcy."<sup>192</sup>

But perhaps even more illustrative are the cases where the wrong was alleged, but not proven. In *Campbell v. Acuff-Rose Music*, the Court found that there was no evidence that the creation of a parody caused consumers to switch, and on that basis, edged towards a finding of fair use.<sup>193</sup> A similar conclusion was reached in *Authors Guild v. Google Inc.*, which addressed the Google Books controversy.<sup>194</sup> The Google Books project digitizes books and allows Internet users limited public access through the "snippet view" function. This function enables end consumers to view small chunks of the copyrighted text for free.<sup>195</sup> Finding that the snippet view could increase consumer demand for the original works, the district court denied the infringement claims.<sup>196</sup> The conclusion was affirmed on appeal because snippet view did not produce an "effectively competing substitute[]." <sup>197</sup>

The difference between consumer copying and competitor copying is not normative, but empirical. In both cases, the owner's interest is in internalizing the consumer surplus associated with use. In both cases, that internalization is justified to the extent it is required to ensure optimal incentives for creation. Additionally, in both cases, the copyist will be liable for injuring that legally protected interest. Where the two diverge concerns what needs to be empirically proven by the plaintiff to demonstrate that the defendant's copying injured her legally protected interest. In the former case of the consumer's failure to negotiate for use, all the plaintiff need show is that the defendant's use of the expression is one that ought to come with a duty to pay according to the incentive-access

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<sup>191</sup> *Peter Pan Fabrics*, 274 F.2d at 488–89.

<sup>192</sup> 77 F.3d 1280, 1283 (10th Cir. 1996).

<sup>193</sup> 510 U.S. 569, 593–94 (1994).

<sup>194</sup> 804 F.3d 202 (2d Cir. 2015).

<sup>195</sup> *Authors Guild v. Google Inc.*, 954 F. Supp. 2d 282, 286–87 (S.D.N.Y. 2013), aff'd, 804 F.3d 202 (2d Cir. 2015).

<sup>196</sup> Id. at 292–94.

<sup>197</sup> *Authors Guild*, 804 F.3d at 208, 224 ("Snippet view, at best and after a large commitment of manpower, produces discontinuous, tiny fragments, amounting in the aggregate to no more than 16% of a book. This does not threaten the rights holders with any significant harm to the value of their copyrights or diminish their harvest of copyright revenue.").

paradigm. If so, the failure to negotiate is a wrong per se. It is therefore a “trespassory tort” in that the defendant is liable for copying, regardless of the outcome. The individual downloaders in *Napster* were liable because of the downloading itself. By contrast, competitor copying is “outcome responsibility.”<sup>198</sup> The rival producer’s copying only interferes with the owner’s interests if the copying leads to consumer demand being diverted away from the owner and towards the copyist. Without such a consequence, the plaintiff’s interests are not injured, and free competition principles apply.<sup>199</sup> Unlike the *Napster* scenario, the defendant’s liability in cases like *Campbell* and *Authors Guild* depends on how the copying affects third parties. As a result, the Supreme Court has sporadically required a “causal” relationship between copying and harm,<sup>200</sup> and *Campbell* required assessment of “the extent of market harm caused by the particular actions of the alleged infringer.”<sup>201</sup> As discussed later, this empirical difference transforms into doctrinal differences in the infringement analysis.

Nevertheless, there is clearly high potential for concurrent liability between consumer copying and competitor copying. Concurrent liability—where one group of facts gives rise to two or more wrongs<sup>202</sup>—is a common feature of tort law (assaults “often precede[] . . . battery,”<sup>203</sup> a statement may be a false light and a defamation, etc.). This is to be expected in a system where wrongs are distinguished on desires, and where one action may interfere with more than one desire at a time. In the context of copyright, where the dividing line between producer and consumer of expression often blurs,<sup>204</sup> infringement presents similar cases of concurrent liability. Three scenarios are particularly common:

<sup>198</sup> Tony Honoré, Responsibility and Fault 14–40 (1999); see also Richard A. Epstein, A Theory of Strict Liability, 2 J. Legal Stud. 151 (1973) (providing a corrective justice rationale for strict liability).

<sup>199</sup> See *Compeco Corp. v. Day-Brite Lightning*, 376 U.S. 234, 237 (1964) (reasoning that in a free market, the constitutionally authorized monopolies of patent and copyright must be strictly construed).

<sup>200</sup> *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 567 (1985) (requiring a “reasonable probability [of] the existence of a causal connection between the infringement and a loss of revenue”).

<sup>201</sup> *Campbell*, 501 U.S. at 590 (emphasis added).

<sup>202</sup> See, e.g., Restatement (Second) of Torts § 225 cmt. a (Am. Law Inst. 1965) (concurrent liability for either trespass to chattel or conversion).

<sup>203</sup> Dobbs et al., *supra* note 153, § 33 (noting that assault “often precedes . . . battery”).

<sup>204</sup> See generally Julie E. Cohen, The Place of the User in Copyright Law, 74 *Fordham L. Rev.* 347, 348–49 (2005) (discussing different characterizations of the user in copyright).

- A plaintiff may allege a defendant has committed two wrongs. In *Cambridge University Press v. Patton*, Cambridge University Press (“CUP”) alleged that Georgia State University committed copyright infringement by allowing portions of academic monographs to be posted online for student access.<sup>205</sup> CUP claimed: (1) it was in the business of licensing universities to excerpt works, and Georgia State as its target consumer had failed to negotiate the proper fee for such use;<sup>206</sup> and (2) that Georgia State was a rival producer whose copying diverted the demand of students—another consumer group.<sup>207</sup>
- A plaintiff may sue two joint defendants for two distinct wrongs. In *Folio Impressions v. Byer California*, Folio, a textile importer, brought a claim against a clothing manufacturer and a designer.<sup>208</sup> The plaintiff’s business model involved importing textiles to sell to clothing manufacturers. Byer, a clothing manufacturer, accessed a copy of the plaintiff’s copyrighted textile pattern. Finding the pattern attractive, they showed it to a rival “fabric converter,” Lida, who offered to make a similar design. Lida copied from the plaintiff’s work to create a similar design and then sold it to Byer. Byer printed the design onto fabric for garments.<sup>209</sup> Byer’s act of using the design without negotiating a license is an example of a potential consumer-copying wrong, while Lida’s actions, as a rival producer, exemplify a potential competitor-copying wrong.
- A plaintiff may allege one wrong where plausibly she may allege two. In *Campbell*, 2 Live Crew had previously approached Acuff-Rose and asked to negotiate a license for their

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<sup>205</sup> 769 F.3d 1232, 1237 (11th Cir. 2014).

<sup>206</sup> *Id.* at 1276.

<sup>207</sup> *Id.*

<sup>208</sup> 937 F.2d 759, 762 (2d Cir. 1991). Ultimately the designs were found not to be substantially similar, and thus, noninfringement; had the designs been substantially similar, Byer would have committed the consumer-copying wrong, and Lida the competitor-copying wrong. See *id.* at 766.

<sup>209</sup> *Id.* at 762.

parody.<sup>210</sup> Acuff-Rose refused. When Acuff-Rose sued 2 Live Crew for the parody, Acuff-Rose did not claim that 2 Live Crew was a consumer who should have paid a license fee for use; Acuff-Rose had indeed turned down the option to license the use.<sup>211</sup> Instead, the argument was that 2 Live Crew, as a rival producer, might cause demand diversion.<sup>212</sup> Had Acuff-Rose showed interest in licensing such uses in the past, however, they could plausibly have argued that 2 Live Crew was a consumer, and that the failure to pay a license fee was a consumer-copying wrong.

While concurrent liability is not necessarily problematic, it is imperative that courts are aware of the distinction between the wrongs and test for them separately.<sup>213</sup> As discussed in Part III, courts do not always perform the relevant conceptual separation.<sup>214</sup>

Unlike consumer copying, which is similar in interests and injuries to trespass, the competitor-copying wrong is most related to unfair competition. The *Restatement of Unfair Competition* embodies the general principle that “[o]ne who causes harm to the commercial relations of another by engaging in a business or trade is not subject to liability” unless that harm results from “acts or practices of the actor determined to be actionable as an unfair method of competition.”<sup>215</sup> The freedom of competition generally “implies a right to induce prospective customers to do business with the actor rather than with the actor’s competitors,” and naturally, rival producers are permitted “to divert business” away from competitors.<sup>216</sup> Only in a subset of cases will such competition be tortious. What qualifies as “unfair” competition is not defined, but must be judged “against generalized standards of fairness and social utility.”<sup>217</sup>

<sup>210</sup> *Campbell*, 510 U.S. at 572–73.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 590.

<sup>213</sup> While it is not necessarily a problem for judges, it is problematic for a “coherent classification” of wrongs. See English Private Law § 17.12 (Andrew Burrows ed., 3d ed. 2013) (finding private “law’s tolerance of concurrent liability” problematic for “coherent classification”).

<sup>214</sup> See *infra* notes 373–75 and accompanying text.

<sup>215</sup> Restatement (Third) of Unfair Competition § 1 (Am. Law Inst. 1995).

<sup>216</sup> *Id.* § 1 cmt. a (“[t]he freedom to compete”); see also *Keeble v. Hickeringill* (1707) 99 Eng. Rep. 659, 3 Salk. 10 (holding that firing guns to keep ducks away from a neighbor’s pond was wrongful but defendant could set up his own duck decoy pond to compete).

<sup>217</sup> Restatement (Third) of Unfair Competition § 1 cmt. g (Am. Law Inst. 1995).



The same applies with respect to producers of creative goods. Producers of creative works are allowed, and encouraged, to compete with one another for consumer surplus.<sup>218</sup> However, while diverting consumers away from the owner is not usually unlawful, it is when diversion is the result of copying.<sup>219</sup> “[G]eneralized standards of fairness and social utility,” in particular the danger of market failure, require liability and cost shifting in these cases.<sup>220</sup>

### 3. *Expressive Privacy Invasion*

Although *Arnstein* found the legally protected interest to be financial,<sup>221</sup> the Supreme Court has upheld the owner’s “interest in confidentiality.”<sup>222</sup> When an expressive work is unpublished, the author has the right to decide “whether it will be made public”<sup>223</sup> because doing so implicates “privacy” concerns.<sup>224</sup> This is important in relation to items such as private letters. Cases concerning this issue were cited in Louis Brandeis and Samuel Warren’s article *The Right to Privacy*.<sup>225</sup> But courts routinely extend the interest to cover any unpublished manuscript.<sup>226</sup> The wrong in such cases is publishing expression that the author wished to keep private.<sup>227</sup> Much like consumer copying, this is a conduct-based, not outcome-based, wrong. Publishing the private ex-

<sup>218</sup> Copyright therefore produces “monopolistic competition,” see Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 *Wm. & Mary L. Rev.* 33, 48 n.39 (2004); Christopher S. Yoo, *Copyright and Product Differentiation*, 79 *N.Y.U. L. Rev.* 212, 236 (2004).

<sup>219</sup> Restatement (Third) of Unfair Competition § 1 cmts. g, h (Am. Law Inst. 1995) (“[u]nfair methods of competition”).

<sup>220</sup> *Id.* cmt. g. See generally Shyamkrishna Balganesh & Gideon Parchomovsky, *The Role of Unfair Competition in the Common Law*, in *Intellectual Property and the Common Law*, supra note 46, at 484, 484 (assessing whether the unfair competition model presents a viable way of “thinking about . . . regulation of information”).

<sup>221</sup> 154 F.2d at 473.

<sup>222</sup> *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 564 (1985).

<sup>223</sup> *Id.* at 551.

<sup>224</sup> *Id.* at 554.

<sup>225</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *Harv. L. Rev.* 193, 211–12 (1890).

<sup>226</sup> See generally William M. Landes, *Copyright Protection of Letters, Diaries, and Other Unpublished Works: An Economic Approach*, 21 *J. Legal Stud.* 79, 79–81 (1992) (noting the distinction between unpublished letters, not intended to be published, and an unpublished manuscript, both of which were protected under copyright law).

<sup>227</sup> See generally *id.* at 91–92 (discussing the harm incurred when works not intended to be published are published by a third party).

pression is a wrong, regardless of the consequences caused by the publication.

This appears to be the wrong committed in *Salinger v. Random House*.<sup>228</sup> It is difficult to categorize Random House's actions as a consumer-copying wrong. Salinger's desire was not to internalize the positive utility Random House received from the expression. Rather, his interest was in keeping the work private, such that no one gained any positive utility from the work.<sup>229</sup> Similarly, while the Second Circuit used language reminiscent of the competitor-copying wrong—in particular when discussing Salinger's inability to market the works to consumers in the future—it is unlikely this was the plaintiff's real concern, given his express wish to keep the works away from the public.<sup>230</sup> It seems far more likely that by publishing the private expression, Random House had invaded Salinger's reasonable expectation of expressive privacy, and the court tried to fit the existing copyright apparatus to redress that injury.<sup>231</sup>

The wrong was also alleged, but arguably not made out, in *Harper & Row, Publishers v. Nation Enterprises*.<sup>232</sup> In 1977, former President Ford contracted with Harper & Row to publish his memoirs. Later, Harper & Row licensed *Time* magazine to publish prepublication excerpts regarding President Nixon's pardon. Before *Time* could publish, however, an unauthorized source provided *The Nation* magazine with a copy of the manuscript.<sup>233</sup> *The Nation* hurriedly created an article that contained

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<sup>228</sup> 811 F.2d 90, 97 (2d Cir. 1987). A more questionable application of the privacy interest can be found in the the Bavarian state government's attempt to use copyright to prevent the distribution of Adolf Hitler's *Mein Kampf* and the response of Ashley Madison after the Ashley Madison Data Hack. See Copyright of Adolf Hitler's Mein Kampf Expires, BBC News (Jan. 1, 2016), <http://www.bbc.com/news/world-europe-35209185> [<https://perma.cc/Y63N-F6KX>]; Alex Hern, Ashley Madison Using Copyright Law to Try to Limit Attack Leak, Guardian (Aug. 20, 2015), <http://www.theguardian.com/technology/2015/aug/20/ashley-madison-using-copyright-law-to-try-to-limit-attack-leak> [<https://perma.cc/LQ9L-W4LV>].

<sup>229</sup> *Salinger*, 811 F.2d at 92–94.

<sup>230</sup> *Id.* at 99.

<sup>231</sup> This interpretation has been acknowledged by subsequent cases and commentators, *supra* note 128. This is also a reasonable interpretation of *Lish v. Harper's Magazine Foundation*, 807 F. Supp. 1090, 1104–05 (S.D.N.Y. 1992) (finding publication of letters to be copyright infringement despite lack of market harm).

<sup>232</sup> 471 U.S. 539, 564 (1985) (discussing the confidentiality implications of the publication).

<sup>233</sup> *Id.* at 542–43.

300–400 words of the manuscript dealing with the Nixon pardon.<sup>234</sup> The piece went to press before the *Time* article was complete, and as a result, *Time* cancelled the contract.<sup>235</sup> The Supreme Court held *The Nation*'s "scooping" to be an unfair use.<sup>236</sup> In doing so, it articulated the owner's "interest[] in confidentiality."<sup>237</sup> Nevertheless, it is unlikely that the personal interest in confidentiality was particularly strong.<sup>238</sup> The publishers had very little interest in maintaining the confidentiality of the work; they planned to profit from the work and had made detailed commercial arrangements for the publication.<sup>239</sup> As a result, although *The Nation*'s copying was held to be an infringement,<sup>240</sup> it is probable that this was for reasons, to be discussed shortly, other than invasion of privacy.<sup>241</sup>

Expressive privacy invasion has much in common with other privacy torts. In particular, this copy-tort is conceptually related to the tort of "giv[ing] publicity to a matter concerning the private life of another,"<sup>242</sup> which protects "the interest in others not having certain information about oneself."<sup>243</sup> Both torts therefore uphold a confidentiality interest. While the former ensures the ability to keep people away from private *information*, this tort upholds the ability to keep others away from private *expression*.

#### 4. Artistic Reputation Injury

The penultimate wrong is harming the interest in maintaining an artistic reputation.<sup>244</sup> Although Judge Frank in *Arnstein* found the owner's

<sup>234</sup> *Id.* at 548.

<sup>235</sup> *Id.* at 543.

<sup>236</sup> *Id.* at 562–64.

<sup>237</sup> *Id.* at 564.

<sup>238</sup> See Marks, *supra* note 128, at 1392–94 (discussing the failure to distinguish between "Unpublished Materials En Route to Publication and Those Implicating Privacy Concerns").

<sup>239</sup> *Harper & Row*, 471 U.S. at 542–43. The majority addressed this argument poorly. The Court's response was that "[i]n its commercial guise," an author's interest in confidentiality extends to choosing when and how she will publish as well as whether to publish at all. *Id.* at 553–55. As later demonstrated, however, this is a different interest with a different policy analysis underlying protection, see *infra* notes 269–73 and accompanying text.

<sup>240</sup> *Harper & Row*, 471 U.S. at 569.

<sup>241</sup> See *infra* notes 269–73 and accompanying text.

<sup>242</sup> Restatement (Second) of Torts § 652D (Am. Law Inst. 1977).

<sup>243</sup> Goldberg & Zipursky, *supra* note 8, at 332.

<sup>244</sup> Copying causing reputational injury is not synonymous with a generalized right to control integrity regardless of reputational effects. The former seems to receive more protection in American law than the latter. But see *Mirage Editions v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1343–44 (9th Cir. 1988); *Nat'l Geographic Soc'y v. Classified Geographic*

“protected interest [was] not, as such, his reputation,”<sup>245</sup> commentators have pointed out how courts use “copyright law to vindicate reputational rights when certain uses or modifications of the author’s work are likely to cause audiences to form a particular judgment about the author.”<sup>246</sup> While this interest is provided limited statutory protection through the Visual Artists Rights Act (which provides authors of “visual art” the right to prevent “distortion, mutilation, or other modification of the work which would be prejudicial to [their] honor or reputation”),<sup>247</sup> it is also important in Section 106 litigation.<sup>248</sup>

An illustrative case is *Gilliam v. American Broadcasting Cos.*<sup>249</sup> British comedy group Monty Python assigned to Time-Life the exclusive right to distribute its *Flying Circus* show in the United States. Time-Life allowed American Broadcasting Companies (“ABC”) to air two ninety-minute specials of the show.<sup>250</sup> The comedians later viewed the shows and were “appalled” by the “mutilation” of their work.<sup>251</sup> ABC had inserted adverts and removed “offensive [and] obscene matter”<sup>252</sup> resulting in jokes missing punch lines and making no sense.<sup>253</sup> The Second Circuit was sympathetic to the Pythons’ claims and characterized the defendant’s conduct as an “actionable mutilation of plaintiffs’ work.”<sup>254</sup> In particular, the court focused on “[t]he subsequent injury to appellants’ theatrical reputation.”<sup>255</sup> The poor rendering of their works “would imperil their ability to attract the large audience necessary to the success of their

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Soc’y, 27 F. Supp. 655, 659–60 (D. Mass. 1939). Although, international law may require American law to protect both interests. See Justin Hughes, American Moral Rights and Fixing the *Dastar* “Gap,” 2007 Utah L. Rev. 659, 660–61.

<sup>245</sup> 154 F.2d at 468, 473.

<sup>246</sup> Laura A. Heymann, The Law of Reputation and the Interest of the Audience, 52 B.C. L. Rev. 1341, 1401 (2011); see Paul Goldstein, Adaptation Rights and Moral Rights in the United Kingdom, the United States and the Federal Republic of Germany, 14 Int’l Rev. Indus. Prop. & Copyright L. 43, 48 (1983).

<sup>247</sup> 17 U.S.C. § 106A (2012); Heymann, *supra* note 246, at 1404 (calling this protection for reputation in a “fairly minor respect”).

<sup>248</sup> See 17 U.S.C. § 106 (2012).

<sup>249</sup> 538 F.2d 14, 25 (2d Cir. 1976); see also *Engel v. Wild Oats*, 644 F. Supp. 1089, 1092 (S.D.N.Y. 1986) (finding fine art photographer’s copyright was infringed by defendants who copied photographs onto T-shirts, and finding “harm of the infringement to the . . . [plaintiff’s] artistic reputation, in the form of lost revenues from her works”).

<sup>250</sup> *Gilliam*, 538 F.2d at 17–18.

<sup>251</sup> *Id.* at 18.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 25.

<sup>254</sup> *Id.* at 14.

<sup>255</sup> *Id.* at 19.

venture,” and such “injury to professional reputation” required recompense.<sup>256</sup>

Artistic reputation injury presents commonalities with other dignitary torts such as defamation. The heart of defamation is protecting the individual’s reputation and preventing others from injuriously “altering the way in which third parties view the victim and interact with her.”<sup>257</sup> Cases such as *Gilliam* protect the same interest in the context of creative works. Like defamation, and to an extent false light, the wrong in the artistic reputation injury is causing third parties to view the artist less positively.

### 5. Breach of Creative Control

Finally, the Supreme Court has also upheld the owner’s interest in “creative control.”<sup>258</sup> In many instances the owner wishes to be the decision maker regarding how expression is used. Importantly, this desire is often separate from any of the other identifiable interests and, as a result, in *Sony Corp. of America*, the district court found that the “[p]laintiffs’ greatest concern about time-shifting is with ‘a point of important philosophy that transcends even commercial judgment.’ They fear that with any Betamax usage, ‘invisible boundaries’ are passed: ‘the copyright owner has lost control over his program.’”<sup>259</sup>

There are reasons to be skeptical of this interest in relation to intangible objects. With respect to tangible objects, the interest is routinely offered a high degree of protection.<sup>260</sup> Material goods are scarce resources, and as such, welfare requires they be managed efficiently; the resource must be put to the most productive uses before it is depleted. As a result, someone must be the delegated decision maker to prevent a tragedy of the commons.<sup>261</sup> The private individual is usually delegated this right

<sup>256</sup> Id. Professor Laura Heymann finds this concern to motivate authorial worries about fan fiction where “the nature of the narratives, such as a focus on gay and lesbian themes,” often concern the author. Heymann, *supra* note 246, at 1402.

<sup>257</sup> Goldberg & Zipursky, *supra* note 8, at 307 (emphasis omitted).

<sup>258</sup> *Harper & Row*, 471 U.S. at 564.

<sup>259</sup> 464 U.S. at 451 (quoting *Universal City Studios v. Sony Corp. of Am.*, 480 F. Supp. 429, 467 (C.D. Cal. 1979)).

<sup>260</sup> Such that William Blackstone spoke of the land owner’s “[s]ole and de[s]potic dominion which one man claims and exerci[s]es over the external things of the world, in total exclu[s]ion of the right of any other individual in the univer[s]e.” 2 William Blackstone, *Commentaries on the Laws of England* 2 (Oxford, Clarendon Press 1766).

<sup>261</sup> See Garrett Hardin, *The Tragedy of the Commons*, 162 *Science* 1243, 1244, 1247 (1968).

because she faces lower information costs regarding the most productive uses than government actors.<sup>262</sup> But expression is a public good and generally is not depleted when used.<sup>263</sup> There is accordingly not the same need to manage the good. Multiple uses of the work do not negatively affect welfare, and instead, are usually welfare enhancing.<sup>264</sup> In this case, assigning to one person the power to make decisions regarding the expression's use serves no rationale and, yet, it is a source of transaction costs as individuals who do wish to use the work are required to negotiate for use.<sup>265</sup>

However, this interest is provided with very qualified legal protection. In a few situations, there is policy sense in giving one person the right to coordinate usage. Expression is typically labeled a public good because it is "non-rival," that is, one person's use does not affect the use of another.<sup>266</sup> Most goods, however, fall somewhere on a spectrum of rivalrousness.<sup>267</sup> And although most uses of expression are nonrivalrous, this is not *always* the case. There are some uses of expression that are rivalrous. The most notable is the ability to publish the work. If one person publishes the work, then none can make the same use thereafter. And the amount of social welfare generated by publication may vary according to market conditions. For this reason, movie studios carefully plan release dates for blockbusters to coincide with periods of maximum demand.<sup>268</sup> Because there is only one shot at publication, it makes sense that one economic actor should have the ability to decide when to pub-

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<sup>262</sup> See generally Henry E. Smith, Exclusion and Property Rules in the Law of Nuisance, 90 Va. L. Rev. 965, 971 (2004) (observing that the costs of giving private owners the right to exclude are low); Henry E. Smith, Exclusion Versus Governance: Two Strategies for Delineating Property Rights, 31 J. Legal Stud. S453, S454 (2002) (discussing the role of information costs in shaping property rights).

<sup>263</sup> See Bracha & Syed, *supra* note 173, at 1848; Landes & Posner, *supra* note 173.

<sup>264</sup> See Bracha & Syed, *supra* note 173, at 1848; Landes & Posner, *supra* note 173, at 341–43.

<sup>265</sup> See Bracha & Syed, *supra* note 173, at 1850; Landes & Posner, *supra* note 173, at 357–58.

<sup>266</sup> Bracha & Syed, *supra* note 173, at 1848.

<sup>267</sup> See John Leach, A Course in Public Economics 155–56 (2004) ("Rivalry and non-rivalry are extremes, and there are many goods that lie somewhere between these extremes.").

<sup>268</sup> See generally Lesley Chiou, The Timing of Movie Releases: Evidence from the Home Video Industry, 26 Int'l J. Indus. Org. 1059, 1059 (2008) (examining the seasonal timing of blockbuster films, and describing the "[c]onventional wisdom" as studios releasing blockbusters in accordance with seasonal variations in demand).

lish and to internalize the marginal utility of doing so, thus ensuring the work is published at the point in time at which demand is highest.<sup>269</sup>

The breach of creative control wrong is making uses of the work that are delegated to the copyright owner. This was the root of the *Harper & Row* case.<sup>270</sup> Although the Court discussed the “interest in confidentiality,” it also referred to the interest in “creative control.”<sup>271</sup> As previously noted, the confidentiality interest was weak.<sup>272</sup> Having decided that the expression would be published, however, the owners still had a legitimate interest in deciding when and how the publication was to occur.<sup>273</sup> When *The Nation* scooped *Time*, it injured Harper & Row’s ability to decide when to publish. This also explains why the Court found the right of first publication to be “inherently different”<sup>274</sup> from the rest of copyright infringement. In this instance, the prohibition on the copying is plausibly justified by the static efficiency requirement that rivalrous goods be managed efficiently.

Of all the wrongs, this one is the most susceptible to misunderstanding. A common logical fallacy goes as follows: property rights in tangible objects strongly protect the owner’s control interests, and copyright establishes property rights in expression; therefore, property rights in expression must also strongly protect the owner’s control interest.<sup>275</sup> The fallacy is that “property rights” are merely rights that are alienable and enforceable against the world; there is no essential substantive content to

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<sup>269</sup> Another case where the owner’s interest in control perhaps ought to be upheld is where use of the work may cause “congestion externalities,” William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. Chi. L. Rev. 471, 475 (2003), but I doubt the congestion externalities are ever so serious as to require coordinated usage.

<sup>270</sup> 471 U.S. at 554–55.

<sup>271</sup> *Id.* at 564.

<sup>272</sup> *Supra* note 232 and accompanying text.

<sup>273</sup> *Harper & Row*, 471 U.S. at 564.

<sup>274</sup> *Id.* at 553 (“First publication is inherently different from other § 106 rights in that only one person can be the first publisher . . .”).

<sup>275</sup> Legal Realists argued that “property” (as well as many other legal concepts) has no essential content but is instead a bundle of legal relationships. Property rights, Realists argued, have no content other than the content society gives them. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 815–16 (1935); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710, 715–16 (1917). See generally Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 24 (1913) (describing fundamental legal relationships, on which Realists relied to deconstruct the concept of property).

such rights.<sup>276</sup> That property rights in tangible objects protect the control interest in no way suggests that property rights in creative works must equally protect control. Nevertheless, courts make this mistake occasionally.<sup>277</sup> The time-shifting use at issue in *Sony Corp. of America* was not a rivalrous use, and accordingly there was no policy rationale for protecting the owner's interest in coordinating time-shifting. To the extent the dissent justified infringement by reference to the "nature of copyright" as a right to "control," it arguably fell into this logical fallacy.<sup>278</sup>

Breach of creative control is the copy-tort most fitting the title of literary conversion. A conversion occurs when "a defendant intentionally exercises physical dominion over personal property owned by the plaintiff such that the plaintiff is entirely or almost entirely deprived of its use."<sup>279</sup> The sine qua non of this wrong is that one person's use of the good completely deprives another of his or her legally protected interest in making such use of the good. This rarely occurs in copyright infringement, where copying typically does not affect the owner's ability to use the protected subject matter, as the court in *Dowling v. United States* made clear.<sup>280</sup> Nevertheless, in some very particular instances, such as unauthorized publication, one individual's use of the work does deprive the owner of the same use. In *Harper & Row*, it may be said that the owner was "deprived" of one important use of the work: publication. As a result, the very few cases of breach of creative control may be viewed as analogous to conversion.

This final wrong may potentially be considered a residual category. If copying does not fall into one of the four previous wrongs, owners often fall back on the claim that the defendant's copying interferes with their creative control.<sup>281</sup> However, it is crucial to remember that many inter-

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<sup>276</sup> See Restatement (First) of Property § 5(d) (Am. Law. Inst. 1936) (describing an interest as "good against an indefinite number of persons" (emphasis omitted)); 1 English Private Law § 4.05, at 204–05 (Peter Birks ed., 2000) ("There are two hallmarks of a property right, alienability and exigibility against persons other than the grantor.").

<sup>277</sup> Commentators and nonlawyers are equally likely to make this mistake. See Oren Bracha, Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property, 85 Tex. L. Rev. 1799, 1805–12 (2007) (documenting claims that opt-out goes against the very "nature" of copyright entitlements and demonstrating the fallacy involved in this argument).

<sup>278</sup> *Sony Corp. of Am.*, 464 U.S. at 480–81.

<sup>279</sup> Goldberg & Zipursky, *supra* note 8, at 249.

<sup>280</sup> 473 U.S. 207, 217–18 (1985).

<sup>281</sup> See, e.g., *Kinsey v. Jambow, Ltd.*, 76 F. Supp. 3d 708, 711, 714 (N.D. Ill. 2014) (describing Chicago-based plaintiffs' allegations that defendants licensed works to which plain-



ests simply receive no protection at all, including the interest in being free from ridicule<sup>282</sup> and in monetizing ideas.<sup>283</sup> Failure to demonstrate injury to one of the previous four interests does not therefore mean that copying must be a breach of creative control; more likely the copying is simply not actionable. Table 1 summarizes the analytic features of the copy-torts.

**Table 1: Analytical Features of Copy-Torts**

	Consumer Copying	Competitor Copying	Expressive Privacy Invasion	Artistic Reputation Injury	Creative Control
Legally Protected Interest	Charging consumers a fee for some uses	Charging consumers a fee for some uses	Confidentiality	Artistic reputation	Control
Legal Wrong	Copying to make a protected use	Copying causing demand diversion	Publishing	Copying causing reputational injury	Making use without consent
Conduct or Outcome Responsibility (“CR” or “OR”)	CR: Copying for certain uses triggers liability	OR: Copying must <i>cause</i> diversion	CR: Publishing triggers liability	OR: Copying must <i>cause</i> reputational injury	CR: Decision making triggers liability
Appropriate Analogy	Trespass to Land	Unfair Competition	Publication of Private Facts	False Light /Defamation	Conversion

tiffs were copyright owners and granting plaintiffs an injunction because the defendants’ acts irreparably harmed them by “usurp[ing]” their right of “creative control” (quoting Plaintiffs’ Memorandum in Support of Its Proposed Final Judgment Order at 12, *Kinsey*, 76 F. Supp. 3d 708 (No. 14-cv-2236) (internal quotation marks omitted)); *Fox Broadcasting Co. v. Dish Network* L.C.C. 905 F. Supp. 2d 1088, 1093, 1110 (C.D. Cal. 2012) (describing plaintiff’s allegations of “loss of control over its copyrighted works” because of defendants retransmitting plaintiff’s broadcast television via satellite).

<sup>282</sup> *Campbell*, 510 U.S. at 592 (distinguishing “potentially remediable displacement and unremediable disparagement”).

<sup>283</sup> *Mazer v. Stein*, 347 U.S. 201, 217 (1954) (“Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself.”); *Baker v. Selden*, 101 U.S. 99, 102–03 (1879).

*C. Three Doctrinal Problems: Revisited*

Understanding infringement as a group of wrongs explains why the infringement analysis is doctrinally and theoretically varied.<sup>284</sup> Liability in tort law is imposed when the defendant's conduct injures a legally protected interest.<sup>285</sup> The copyright infringement analysis is a test to determine whether the defendant's copying cognizably injures the owner's protected interest.<sup>286</sup> But because "the right to copy" protects multiple interests from different types of injury, the test that courts apply to determine infringement simply cannot be a one-size-fits-all tool. There is no singular test to determine both assault and battery, or trespass and nuisance, and likewise the copyright infringement analysis changes across the various copy-torts. The variation in the infringement analysis is therefore not necessarily inconsistent and incoherent, but enables courts to effectively test for the different wrongs. As this Section demonstrates, the plural nature of copyright infringement is an important reason why courts have developed different audience standards, different concepts of harm, and different analogies for infringement.

*1. The Audience Problem*

Copying alone is not wrongful.<sup>287</sup> Factual copying only becomes a legal wrong when it is so qualitatively or quantitatively extensive as to threaten the realization of the owner's protected interests.<sup>288</sup> Because the copyright owner has multiple legally protected interests, the test used by courts to determine how much copying is "substantial" must vary. As a

<sup>284</sup> However, this is not the only explanation, see *supra* note 34.

<sup>285</sup> Restatement (Second) of Torts § 5 (Am. Law Inst. 1965) (providing that whether an actor's "subjection to liability will ripen into liability depends (1) upon whether *the invasion of the other's legally protected interest* results in a manner which makes the law regard it as just to hold the actor responsible for it and which, therefore, makes the actor's conduct the legal cause of the invasion, and (2) upon whether he has a defense which is applicable to the particular claim asserted by the other" (emphasis added)); see, e.g., *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928) ("Negligence is not actionable unless it involves the invasion of a legally protected interest . . .").

<sup>286</sup> As expressed in *Arnstein*, 154 F. 2d at 473, the defendant's factual copying becomes a "wrongful[]" appropriation when it interferes with the owner's "legally protected interest" in the potential financial returns from the work. On judicial tests, see Robert E. Keeton, *Keeton on Judging in the American Legal System* 55 (1999) (discussing legal tests that "define requirements a plaintiff must satisfy to establish a claim").

<sup>287</sup> *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) ("Not all copying, however, is copyright infringement."); see Drassinower, *supra* note 61, at 111–12.

<sup>288</sup> See, e.g., *Arnstein*, 154 F. 2d at 473.

result, courts have created different audience standards across the different copy-torts.

*a. Ordinary Observer*

In consumer-copying cases, whether the defendant's copy is "substantially similar" to the original depends on an objective-policy analysis.<sup>289</sup> The owner's interest in the "potential financial returns" from consumers is given a certain amount of legal protection in order to ensure authors receive optimal incentives to create new works.<sup>290</sup> Accordingly, trivial or de minimis copying, which would arguably not have an appreciable effect on authorial incentives, will not be found to be substantially similar, while copying which is qualitatively or quantitatively so extensive as to threaten a market failure is deemed "substantial similarity."<sup>291</sup> When assessing "similarity" in these cases, the trier of fact is best understood as performing a normative analysis to determine what level of copying should trigger a duty to negotiate for permission, and thereafter whether the defendant did in fact copy that much.

Balganesh has elsewhere described this analytical structure as involving two steps.<sup>292</sup> After finding copying as a factual matter, the trier of fact sets the "thickness" of the protection.<sup>293</sup> More original works—which the utilitarian system hopes to encourage—receive broader, or thicker, protection, whereas less original works receive narrower, or thinner, protection.<sup>294</sup> Once the breadth of protection is established, it remains for the court to determine whether the defendant took qualitatively or quantitatively more than the underlying policy analysis allows.

This objective analysis calls out for a "reasonable person" style doctrine. The reasonable person in tort law is a fiction.<sup>295</sup> The inquiry is not

<sup>289</sup> The use of "objective" and "subjective" tracks how these terms are used in negligence. See, e.g., Warren A. Seavey, *Negligence – Subjective or Objective?* 41 Harv. L. Rev. 1, 3–5 (1927).

<sup>290</sup> *Arnstein*, 154 F.2d at 473.

<sup>291</sup> See Landes & Posner, *supra* note 182, at 89.

<sup>292</sup> Balganesh, *supra* note 10, at 210–30. My account here differs slightly from Balganesh's theory. Balganesh sees the final step as involving a second normative judgment wherein the judge decides whether the defendant's taking is wrongful from a perspective of transactional norms. I do not disagree, but here portray a simpler theory in which the thickness standard provides a normative judgment and the next step is merely an empirical question.

<sup>293</sup> *Id.* at 221–26.

<sup>294</sup> *Id.* at 221–23.

<sup>295</sup> See, e.g., *Wisconsin v. Hogan*, 868 N.W.2d 124, 140 (Wis. 2015) ("[T]he 'reasonable person' here is a legal fiction." (quoting *Cty. of Grant v. Vogt*, 850 N.W. 2d 253, 262 n.14

an attempt to locate a real-world “reasonable” person and determine what he or she would do in the circumstances.<sup>296</sup> Rather, the doctrine allows the trier of fact to decide what conduct would be normatively undesirable in the circumstances (for example by using the Hand formula<sup>297</sup>), and thereafter hold undesirable conduct to be “unreasonable.”<sup>298</sup> For precisely the same reason, courts have created an “ordinary observer” standard in consumer-copying cases.<sup>299</sup> As explained in *La Resolona Architects, PA v. Reno, Inc.*, the ordinary observer is also a fiction.<sup>300</sup> There is no real-world “ordinary” person whose subjective views matter for assessing similarity. Instead, the doctrine enables the court to determine as a policy matter how much copying should be allowed, and then, if the defendant has copied more than that policy analysis would allow, to hold that an “ordinary” or “reasonable” person would find the two works “substantially” similar. Courts highlight ex post facto the similarities between the two works that most fit the policy conclusion.<sup>301</sup>

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(Wis. 2014))). See generally Restatement (Second) of Torts § 283 cmt. c (Am. Law. Inst. 1965) (“The chief advantage of this standard of the reasonable man is that it enables the triers of fact . . . to look to a community standard rather than an individual one . . .”).

<sup>296</sup> See Ezra Ripley Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317, 317 (1914) (“The ‘ordinary prudent man’ is a palpable fiction . . . . What this imaginary person would have done really means what the jury thinks was the proper thing to do . . . .” (footnote omitted)).

<sup>297</sup> *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947); see also Richard A. Posner, A Theory of Negligence, 1 J. Legal Stud. 29, 32 (1972) (describing the use of the Hand Formula). I do not, however, mean to say the only normative theory underlying the “reasonable” person is that of homo economicus. Alternative substantive theories of reasonableness are equally possible and perhaps even more normatively attractive. See generally Richard W. Wright, The Standards of Care in Negligence Law, in *Philosophical Foundations of Tort Law* 249, 274–75 (David G. Owen ed., 1995) (challenging the utilitarian interpretation of reasonable care).

<sup>298</sup> Naturally, this is a Realist interpretation of the doctrine. See Holmes, supra note 43, at 108 (“[W]hen men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare.”). But this is certainly not the only way the term “reasonableness” is used. See generally Benjamin C. Zipursky, Reasonableness In and Out of Negligence Law, 163 U. Pa. L. Rev. 2131, 2132 (2015) (describing other uses of “reasonableness”).

<sup>299</sup> Balganes, supra note 10, at 217–21.

<sup>300</sup> 555 F.3d 1171, 1180 (10th Cir. 2009).

<sup>301</sup> That “substantial similarity” is often a shell for policy considerations is hardly a new observation. See generally Amy B. Cohen, Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity, 20 U.C. Davis L. Rev. 719, 758 (1987) (proposing a new test for substantial similarity that requires explicit consideration of “copyright policy”).

As an illustration, consider *Sid & Marty Krofft Television Productions v. McDonald's Corp.*<sup>302</sup> Sid & Marty Krofft Television Productions, Inc. was the copyright owner of the TV show “H.R. Pufnstuf.” One source of revenue for the owners was “licens[ing] the use of H.R. Pufnstuf characters and elements to the manufacturers of toys, games, lunch boxes, and comic books” and for use in television commercials.<sup>303</sup> McDonald’s approached Krofft about using the characters in a proposed advertising campaign and acknowledged such use would require a fee payment to the Kroffts. The deal did not work out, but McDonald’s later hired former Krofft employees to create a new set of characters in a world called “McDonaldland.”<sup>304</sup> Illustration 1 displays two of the characters from the case.

**Illustration 1: McDonaldland Character (Left) and H.R. Pufnstuf Character (Right)**



Sid & Marty Krofft alleged McDonald’s committed the consumer-copying wrong.<sup>305</sup> McDonald’s was a consumer—an economic agent willing to pay for the expression (because it helped sell their own products). Sid & Marty Krofft believed their interest to charge McDonald’s a fee for using the work was protected, and thus McDonald’s had commit-

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<sup>302</sup> 562 F.2d 1157 (9th Cir. 1977).

<sup>303</sup> *Id.* at 1161–62.

<sup>304</sup> *Id.* at 1161.

<sup>305</sup> *Id.* at 1162.

ted a wrong in not negotiating for permission to use the expression in this way.<sup>306</sup> Accordingly, the question for the court was whether McDonald's had copied such an amount that the incentive-access paradigm required a redistribution of wealth. To assess similarity, the court therefore adopted the "ordinary reasonable person" standard.<sup>307</sup> The advantage of adopting this standard was that such a legal fiction allowed the court to make the policy determination, and then *ex post facto* highlight the facts of the case that fit the policy determination. The court lastly discussed the factual similarities (for example, the characters both wear accessories on which "Mayor" is written) as if such similarities were self-evidently "substantial."<sup>308</sup>

The objective-policy analysis of the ordinary observer standard used in consumer-copying cases also explains why, in *La Resolana*, the Tenth Circuit refused to find fault in the district court's exclusion of the evidence of a lay witness, Jeanette Jackson.<sup>309</sup> The plaintiffs asserted that Ms. Jackson was typical of the ordinary observer because she was a nonspecialist with "no personal knowledge . . . of [the] case."<sup>310</sup> But given that the similarity calculation is primarily an objective application of policy to facts, the subjective views of Ms. Jackson were simply irrelevant. Ms. Jackson's personal views of similarity did not matter; all that did matter was whether allowing housing developers to copy such an amount from an architectural blueprint would result in normatively undesirable consequences.

For the same reason, one expects to find the ordinary observer standard to dominate in expressive privacy cases. In *Salinger*, the district court characterized the defendant's copying as "minimal" excerpts of the creative work.<sup>311</sup> But once more, how much copying would count as "minimal" (or *de minimis*) and how much would be "substantial" depends on the underlying policy analysis. Although the policy analysis in these cases is different from the incentive-access tradeoff (focusing on the tradeoff between privacy and the social interest in free flow of in-

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<sup>306</sup> *Id.* at 1161.

<sup>307</sup> *Id.* at 1164.

<sup>308</sup> *Id.* at 1166–67; see Cohen, *supra* note 301, at 756–57 (finding the second step of the *Sid & Marty Krofft* analysis to be indeterminate).

<sup>309</sup> *La Resolana Architects*, 555 F.3d. at 1180–81.

<sup>310</sup> *Id.* at 1180.

<sup>311</sup> 811 F.2d at 94 (quoting *Salinger v. Random House*, 650 F. Supp. 413, 423 (S.D.N.Y. 1986) (internal quotation marks omitted), *rev'd*, 811 F.2d 90 (2d Cir. 1987)).

formation),<sup>312</sup> once again the ordinary observer fiction facilitates the objective analysis.

*b. Intended Audience/Consumer*

Whether a defendant's copying in a competitor-copying case is "substantial" depends on the subjective views of a real social group: the consumers. A rival producer interferes with the owner's ability to charge consumers a fee if consumers who otherwise would have accessed the work through market transaction with the owner, would now switch to the defendant's copied version.<sup>313</sup> Consumers will only make such a switch if they perceive the two works as substitutes satisfying the same demand.<sup>314</sup> If consumers do not perceive the goods as interchangeable, the copying fails to threaten the owner's protected interests. Accordingly, courts use the intended audience/consumer standard as a device to measure the cross elasticity of demand.

Good examples of competitor-copying cases that adopt the intended audience/consumer standard are *Arnstein*<sup>315</sup> and *Dawson v. Hinshaw Music*<sup>316</sup>. *Arnstein*'s claim was not that Porter used the work in a way that he typically tried to license, but that Porter's copying might impede *Arnstein*'s ability to sell the work to consumers. Judge Frank accordingly framed the question of whether Porter had copied substantially as depending on the subjective reactions of "the audience for whom such popular music is composed."<sup>317</sup> Similarly, *Dawson* involved two rival arrangements of the same religious worship song. The Fourth Circuit,

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<sup>312</sup> See generally Teresa De Turris, Copyright Protection of Privacy Interests in Unpublished Works, 1994 Ann. Surv. Am. L. 277, 277–78 (describing the tradeoff between privacy and the social interest in free flow of information).

<sup>313</sup> *Supra* notes 187–89 and accompanying text.

<sup>314</sup> See *Ticketmaster L.L.C. v. RMG Techs.*, 536 F. Supp. 2d 1191, 1195 (C.D. Cal. 2008) ("If consumers view the products as substitutes, the products are part of the same market." (quoting *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir. 1995) (internal quotation marks omitted))); *Balganesh*, *supra* note 10, at 219 ("The logic for using an intended-audience approach" is the "belief that copyright's primary purpose lies in preventing copying only when it results in the creation of close substitutes that are in turn likely to divert demand away from the original. The intended audience is thought to represent the threshold for such substitutability and diversion . . ." (footnote omitted)). For basic discussion of cross elasticity of demand, see William J. Baumol & Alan S. Blinder, *Economics: Principles and Policy* 104–06 (12th ed. 2012).

<sup>315</sup> 154 F.2d at 473.

<sup>316</sup> 905 F.2d 731, 733 (4th Cir. 1990).

<sup>317</sup> *Arnstein*, 154 F.2d at 473.

thinking in terms of competition, held that although it was “well aware of the existence” of the ordinary observer standard, “the policy underlying” that test required an “orientation of the ordinary observer test to the works’ intended audience” in this case.<sup>318</sup> It accordingly remanded the question to the district court to determine “whether the general, undifferentiated lay public fairly represents the intended audience of Dawson’s arrangement” in light of the fact that spiritual music may not be designed for mass public appeal.<sup>319</sup>

For the same reason, the intended audience/consumer standard can be expected to dominate in artistic reputation cases.<sup>320</sup> Whether copying affects the owner’s interest in maintaining an artistic reputation depends on whether consumers, having seen the copied version, would think less of the owner’s artistic abilities. In *Gilliam*, whether Monty Python’s interest in professional reputation was truly injured depends on whether consumers would think Monty Python’s creative choices lay behind ABC’s cut-up version.<sup>321</sup>

### c. *The Expert*

Finally, expert testimony is sometimes admitted to aid the trier of fact in making the relevant objective-policy determination underlying substantial similarity in cases of consumer copying.

Elsewhere in tort law, the trier of fact makes objective “reasonable person” judgments regarding the defendant’s conduct without the aid of experts. In some cases, however, the reasonable person standard is modified to take into account characteristics of the defendant.<sup>322</sup> Classically, medical professionals are held to a higher standard of care,<sup>323</sup> and the trier of fact must make determinations about what actions are reasonable

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<sup>318</sup> *Dawson*, 905 F.2d at 733.

<sup>319</sup> *Id.* at 737.

<sup>320</sup> See Heymann, *supra* note 246, at 1341, 1429, 1439 (finding that law’s protection for reputation is concerned with the bilateral relationship between the plaintiff and the audience, although a more complete conception would require community interests to be taken into account). As fewer cases of this copy-tort are reported, confident assertions as to the audience question are avoided. Nevertheless, see *Lyons Partnership v. Morris Costumes*, 243 F.3d 789, 801 (4th Cir. 2001), in which the court applied the intended audience standard to reputational concerns about unlicensed “Barney” dinosaur costumes.

<sup>321</sup> 538 F.2d at 19.

<sup>322</sup> Restatement (Second) of Torts § 283 (Am. Law Inst. 1965); Dobbs et al., *supra* note 153, § 128 (“[o]bjective and subjective features of the standard”).

<sup>323</sup> See Dobbs et al., *supra* note 153, § 292 (“traditional medical standard of care”).



for a medical professional in the circumstances. As the trier of fact generally is not familiar with the practices of medical professionals, she is ill equipped to determine what care would be “reasonable” for such defendants. Expert testimony is therefore permitted to help the trier of fact understand the factual situation better.<sup>324</sup> While the trier of fact remains the ultimate decision maker regarding reasonableness, experts aid the decision-making process by providing the necessary contextual information (for example, what care was available, at what cost, and what risks it presented) the decision maker relies upon in coming to a final determination.

A similar situation occurs in copyright. Typically under *Arnstein*, expert testimony is prohibited on the question of substantial similarity.<sup>325</sup> How much copying is too extensive depends on a policy calculation of how much internalization of positive value is required. The subjective views of experts are no more important in that determination than the views of Ms. Jackson in *La Resolana*.<sup>326</sup> However, in some cases, courts are required to make similarity judgments regarding works with which they have no familiarity. In cases of software and other complex or technical art forms, expert testimony is necessary to supply the decision maker with the relevant contextual information on which to base the policy determination.<sup>327</sup> Much in the same way experts in negligence cases are permitted to show how skid marks on a road demonstrate the driver was traveling above thirty miles per hour, but are not permitted to offer views on whether that counted as unreasonable care,<sup>328</sup> expert testimony in copyright cases provides important factual information about the nature of the two works without actually substituting for the policy determination that the trier of fact’s “ordinary observer” analysis facilitates.

*Computer Associates International v. Altai, Inc.* provides an illustration.<sup>329</sup> The case involved the owners of a “job scheduling” computer

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<sup>324</sup> Id. § 177 (“[e]xperts and the ultimate evaluation”).

<sup>325</sup> Supra note 92 and accompanying text.

<sup>326</sup> 555 F.3d at 1180–81.

<sup>327</sup> Balganesch already has documented how courts often modify the ordinary observer analysis to take on characteristics of the defendant in a way that “closely mirrors” the modification of the reasonable person standard. See Balganesch, supra note 10, at 229.

<sup>328</sup> Dobbs et al., supra note 153, § 177.

<sup>329</sup> 982 F.2d 693, 713 (2d Cir. 1992); see also *Atari Games Corp. v. Nintendo of Am.*, 975 F.2d 832, 844 (Fed. Cir. 1992) (finding that the “ordinary reasonable person” in the case of computer programs was the computer programmer).

program suing the producer of a competing program.<sup>330</sup> The plaintiffs alleged the defendants copied the structural elements (the flow charts, the intermodule relationships, the macro layout, etc.) of the protected code.<sup>331</sup> On the issue of similarity, the court began by holding the usual “ordinary observer” was copyright’s equivalent of the “‘reasonable person’ doctrine.”<sup>332</sup> However, the court then proceeded to find that software was not an art form “readily comprehensible and generally familiar to the average lay person.”<sup>333</sup> Finding computer programs “somewhat impenetrable by lay observers—whether they be judges or juries,” the court held that “expert[] assistance” could be called upon to enable the trier of fact to make the similarity determination.<sup>334</sup> In doing so, the court made it clear that the trier of fact—in this case the trial judge—made the final decision on similarity, and the expert testimony was admitted only to “shed valuable light on the subject matter.”<sup>335</sup> Therefore, expert testimony was allowed to explain how both programs were structured through systems of subprograms, and how the code functioned like text, but was not a substitute for the ordinary observer analysis.<sup>336</sup>

## 2. *The Harm Problem*

The plurality of copyright infringement also explains why courts have developed different “harm” concepts. A defendant’s copying is only tortious if it injures one of the plaintiff’s legally protected interests. In tort theory, “injury” occurs when there is an “invasion of [a] legally protect-

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<sup>330</sup> *Comput. Assocs. Int’l*, 982 F.2d at 698–99. Despite the competitive nature of the business relationship, I do not count this as a competitive copying case. While the two companies were rivals, there was no competition for expression, only competition for functionality, which copyright does not protect.

<sup>331</sup> *Id.* at 702.

<sup>332</sup> *Id.* at 713 (quoting 4 *Nimmer & Nimmer*, supra note 71, § 13.03[E][2], at 13-101) (internal quotation marks omitted).

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 713–14.

<sup>335</sup> *Id.* at 714.

<sup>336</sup> *Id.* at 713–14. Expert testimony may also possibly provide courts with evidence of consumer reaction. Judge Frank in *Arnstein* suggested that testimony may be required for jurors regarding consumer perception, and if the work is created for experts, then perhaps expert testimony is relevant evidence of consumer reaction. 154 F.2d at 473; see also *Kohus v. Mariol*, 328 F.3d 848, 857 (6th Cir. 2003) (“In cases where the target audience possesses specialized expertise . . . it is appropriate in such cases to consider similarity from the specialist’s perspective.”).

ed interest,”<sup>337</sup> whereas “harm” refers to a “loss or detriment in fact.”<sup>338</sup> Liability for all torts requires an injury, but not all torts require harm. For example, liability for trespass to land is conditioned upon injury—entry antithetical to the owner’s right to exclude—but there need not be factual harm.<sup>339</sup> Whereas in a tort like strict products liability, the defendant’s conduct (producing a faulty product) must cause a factual loss to the plaintiff (usually physical detriment) before the plaintiff is cognizably injured.<sup>340</sup> Imposing liability for any of the copy-torts requires the existence of injury. Primarily it is the fourth factor in fair use that enables courts to assess whether such injury has occurred.<sup>341</sup> But because the nature of the legally protected interest is diverse, then what qualifies as a cognizable injury also varies from financial detriment to loss of privacy, reputation, or control. Furthermore, while all copy-torts require injury, only some of the copy-torts require harm. In the conduct-based wrongs, the conduct alone is injurious; in the outcome-based wrongs, the copyist only injures the owner if the copying causes a harmful consequence.

#### *a. Lost Defendant Fees*

In consumer-copying cases, the cognizable effect on the “market for or value of”<sup>342</sup> the work is the fee the defendant would have paid for use if it were not for the copying. The owner has a legally protected interest in collecting a fee from consumers for certain uses of the work. If a consumer copies to make an infringing use, and in doing so avoids paying the fee the owner would otherwise charge, the cognizable injury is the lost fee. As a conduct-based wrong, injury flows from conduct alone; no

<sup>337</sup> Restatement (Second) of Torts § 7(1) (Am. Law Inst. 1965) (“The word ‘injury’ is used throughout the Restatement of this Subject to denote the invasion of any legally protected interest of another.”).

<sup>338</sup> Id. § 7(2) (“The word ‘harm’ is used throughout the Restatement of this Subject to denote the existence of loss or detriment in fact of any kind to a person resulting from any cause.”).

<sup>339</sup> Id. § 7 cmt. a (“[A]ny intrusion upon land in the possession of another is an injury . . .”).

<sup>340</sup> Restatement (Third) of Torts: Products Liability § 15 (Am. Law Inst. 1998) (“General Rule Governing Causal Connection Between Product Defect and Harm.”); see supra note 16.

<sup>341</sup> See *Campbell*, 510 U.S. at 591–92 (finding that some harms are cognizable under the fourth factor but others are not, such as demand suppressed by parody or scathing review); see also *On Davis v. The Gap*, 246 F.3d 152, 175–76 (2d Cir. 2001) (discussing the “source of the harm” under the fourth factor); see also supra note 16 (laying out the four factor test).

<sup>342</sup> 17 U.S.C. § 107 (2012) (factor four).

factual “harm” is required. As a result, the fourth factor in fair use is better referred to as a “market injury” inquiry rather than a “market harm” inquiry.<sup>343</sup>

Examples of this form of market injury in consumer-copying cases are found in *Napster*<sup>344</sup> and *Texaco*.<sup>345</sup> In *Napster*, the consumptive uses—hedonistic pleasure, sampling, space shifting—were deemed unfair. By copying and bypassing the market, the downloaders acquired “for free something they would ordinarily have to buy.”<sup>346</sup> The fourth factor injury was accordingly the money that would have gone to the owner if copying had not occurred. In particular, this focused on the CDs that college students would have bought were it not for the downloading.<sup>347</sup> Similarly, in *Texaco*, Texaco’s commercial research was deemed an unfair use, and photocopying enabled market bypass.<sup>348</sup> As a result, the injury was the lost license fee that Texaco failed to pay.

Clearly not every lost license fee is a cognizable injury.<sup>349</sup> The lost fee is only a cognizable injury if the owner has the right to charge the defendant for such use. The right is narrowly tailored to exist only in those cases where the incentive-access tradeoff suggests that protecting the author’s interest is efficient.<sup>350</sup> When it comes to uses that fall outside the scope of the owner’s right—time-shifting for example—the owner may claim that the failure to pay a fee is a “lost” fee, but it is not a *cognizable* injury. To accept every lost fee as a cognizable injury would, in a backhanded fashion, allow the scope of the right to expand such that it would no longer be constrained by the incentive-access calculation. Therefore, courts only count as cognizable the lost revenue from “traditional, rea-

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<sup>343</sup> Other copyright scholars have previously expressed concern about labeling lost license fees as a market “harm.” Wendy Gordon has accordingly elsewhere referred to this lost revenue as “foregone benefit” rather than harm suffered. See Gordon, *supra* note 110, at 460.

<sup>344</sup> 239 F.3d at 1016–17.

<sup>345</sup> 60 F.3d at 926–27.

<sup>346</sup> *Napster*, 239 F.3d at 1015 (quoting *A&M Records v. Napster*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000), *aff’d in part, rev’d in part*, 239 F.3d 1004 (2d Cir. 2001)).

<sup>347</sup> *Id.* at 1016–18.

<sup>348</sup> 60 F.3d at 926–31.

<sup>349</sup> To do so would lead to a circularity problem explored elsewhere. See Bohannon, *supra* note 75, at 971. Courts are routinely attentive to avoiding such reasoning. See, e.g., *Equals Three, LLC v. Jukin Media*, 139 F. Supp. 3d 1094, 1107 (C.D. Cal. 2015) (“[F]ocusing on harm from Equals Three’s failure to pay a license risks circular reasoning . . .”).

<sup>350</sup> *Supra* note 173 and accompanying text.

sonable, or likely to be developed markets.”<sup>351</sup> The term “reasonable” is once again important. As with the reasonable person analysis, this enables the court to determine what markets the owner should be entitled to from a policy perspective, and thereafter label such markets “reasonable” for the owner to monetize.

*b. Consumer Demand Diversion*

In competitor-copying cases, market harm is consumer demand diversion. The owner has a right to charge consumers a fee in certain situations. If the competitor’s copying undercuts the owner’s price, thus causing demand diversion, then the owner’s legally protected interest is defeated.<sup>352</sup> Without evidence of diversion, there is no reason to believe the defendant’s copying injures the plaintiff’s interest. With this in mind, the fourth factor in competitor-copying cases primarily assesses whether the defendant’s copying had the relevant empirical effects. In *Campbell* and *Authors Guild*, the lack of diversion—the failure to prove consumers substituted the parody for “Oh, Pretty Woman,” or snippet view for the original work—meant the owners were not cognizably injured.<sup>353</sup>

Although the inquiry in these cases is primarily empirical, there is an important underlying normative question. Only in *some* cases should consumer surplus be internalized to the owner. Outside the limited situations where consumer surplus is protected, consumer demand diversion is part of the normal free market. If an owner finds a way to charge consumers for uses that fall outside the scope of his right (for example, an owner who uses digital rights management technology to prevent fair uses),<sup>354</sup> then demand diversion does not interfere with a legally protected interest. Accordingly, there must be an *ex ante* normative determination about what consumer surplus is protected, before the court considers the empirical question of demand diversion. However, courts often presume the normative question with little explicit reasoning. In *Camp-*

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<sup>351</sup> *Texaco*, 60 F.3d at 929–30. In this instance, the court found the existence of a market through the Copyright Clearance Center was sufficient demonstration that a reasonable market existed for such licenses, and as such, the “vice of circular reasoning” was avoided. *Id.* at 930–31.

<sup>352</sup> *Supra* notes 186–89 and accompanying text.

<sup>353</sup> *Campbell*, 510 U.S. at 594; *Authors Guild*, 804 F.3d at 224.

<sup>354</sup> See, e.g., *MGE UPS Sys., v. GE Consumer & Indus.*, 622 F.3d 361, 364 (5th Cir. 2010); see also Timothy K. Armstrong, *Digital Rights Management and the Process of Fair Use*, 20 *Harv. J.L. & Tech.* 49, 60 (2006) (discussing digital rights management’s ability to interrupt fair uses).

*bell*, for example, the Supreme Court remanded the case to determine the substitutionary effect in the market for rap versions of the song.<sup>355</sup> But this implicitly, and questionably, assumed the owner had the right to internalize consumer utility from rap versions of the song in the first place. Accordingly, the remand should have first directed the lower court to determine whether rap versions of the song fell within the scope of the right, and thereafter, whether the parody would result in diversion in that market.

*c. Nonfinancial Injury*

As copyright protects some nonfinancial interests, the fourth factor is concerned with personal injuries. In *Salinger*, Salinger's interest was in confidentiality and keeping the expression out of the public sphere. The defendant's act of publishing the expression was injurious to that interest, regardless of any financial impact. Perceiving the copying as tortious, the court produced clumsy ex post facto reasoning to show how the defendant's copying constituted "market harm."<sup>356</sup> Similarly, in cases such as *Gilliam*, reputational loss was cognizable.<sup>357</sup> But unlike expressive privacy invasion, artistic reputational injury is outcome based: the copying is only injurious if it causes others to think less of the owner's artistic ability. Ideally, plaintiffs would be required to prove that such harm actually occurred.

Likewise, in breach of creative control cases, loss of control itself is the relevant injury. In the infrequent situations where it makes sense to delegate one person as the decision maker regarding use, then usurping that decision-making ability is per se injurious to the owner's interests. As a result, *The Nation's* scooping in *Harper & Row* was injurious regardless of any consequential financial harm.<sup>358</sup>

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<sup>355</sup> 510 U.S. at 593–94.

<sup>356</sup> *Salinger*, 811 F.2d at 99.

<sup>357</sup> 538 F.2d at 25; see also supra notes 249–56 and accompanying text (discussing the right of visual artists to prevent distortion of their work that might impact their professional reputation).

<sup>358</sup> The majority did find a financial impact caused by the copying. After being scooped, *Time* cancelled the contract with Harper & Row. The majority found that the canceled contract was "clear-cut evidence of actual damage." *Harper & Row*, 471 U.S. at 567. But as the dissent points out, while the scooping "indisputably precipitated" the contract's cancellation, this was not caused by copying of expression, but rather copying of factual information regarding Nixon's pardoning. *Id.* at 602 (Brennan, J., dissenting). My interpretation is that be-

### 3. *The Analogy Problem*

Understanding copyright infringement as a group of wrongs explains why courts and jurists have offered so many competing “analogies” or “models” for infringement. Infringement is not one wrong, but a group of wrongs, each occupying a different jurisprudential position in the private law system. While some infringement cases are concerned with the same interests and injuries as property torts—particularly in consumer copying and breach of creative control—in others, the law centers around interests in wealth, privacy, and reputation.<sup>359</sup> As a result, some cases—like *Napster*—do have a flavor of trespass and unauthorized access; while other cases—like *Authors Guild*—naturally elicit comparisons to unfair competition law. Furthermore, this explains why courts turn to different areas of private law in different cases in order to find principles to help guide the infringement analysis. Part III demonstrates how courts and scholars should take these analogies further when designing the infringement analysis.

Table 2 summarizes how the infringement analysis evolves to provide a unique test for each of the distinct wrongs.

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cause *The Nation* had breached *Time*'s legally protected interest in control, the court was willing to manipulate the concept of market harm in order to redress the control injury.

<sup>359</sup> Jurists' prior attempts to find one model for infringement are reminiscent of the parable of the blind men and the elephant. See Karen Backstein, *The Blind Men and the Elephant* (1992).

**Table 2: The Copyright Infringement Analysis Across the Copy-Torts**

	Consumer Copying	Competitor Copying	Expressive Privacy Invasion	Artistic Reputation Injury	Creative Control
Audience	Ordinary Observer (objective)	Intended Audience/ Consumer (subjective)	Ordinary Observer (objective)	Intended Audience/ Consumer (subjective)	Ordinary Observer (objective)
Injury	Lost Consumer Fee	Lost Consumer Fee	Privacy	Reputational Loss	Lost Control
Factual Harm	N/A	Demand Diversion	N/A	Demand Suppression	N/A
Analogies for guidance	Trespass to Land	Unfair Competition	Publication of Private Facts	False Light/ Defamation	Conversion

Before finishing this Part, two clarifications are in order. First, this Section claims that the plural nature of infringement explains why courts have developed very different audience standards, harm concepts, and analogies. This Section does not claim that courts uniformly apply the “right” standards all of the time. There are certainly many cases of consumer copying that apply, for example, the intended audience standard (some to be discussed shortly). The claim here is simply that we can understand *why* courts have created these different standards, even if they do not apply them with perfect consistency. By shedding light on the reasons behind the variability of the infringement analysis, we demonstrate that the variation is not necessarily symptomatic of underlying incoherence or inconsistency. Second, it is important to repeat that this theory is positive. The Article claims that “copyright infringement” is composed of five different torts, and this explains why the infringement analysis is so changeable, but it does not claim that copyright ought to protect all of these interests and prevent all of these injuries. As Prosser



previously wrote, it is merely “high time that we realize what we are doing, and give some consideration to the question of where, if anywhere, we are to call a halt.”<sup>360</sup>

### III. REFORM: FROM DE FACTO TO DE JURE COPY-TORTS?

Copyright infringement is a group of distinct wrongs. Understanding copyright infringement as a group of wrongs helpfully explains why copyright infringement law is so doctrinally and theoretically varied. Nevertheless, once we appreciate this feature of the law, an important normative question is raised: should the copy-torts be formally separated into distinct causes of action? This is the approach taken by the *Restatement of Torts* in other areas of tort law,<sup>361</sup> including the privacy torts that Prosser delineated.<sup>362</sup> By formally separating the privacy torts, Prosser made privacy law more predictable than it ever had been. Doing the same in copyright would likely have the same effect on the infringement analysis, as well as beneficially increase the protections on offer to defendants in litigation. Furthermore, as the Copyright Office has advocated for “the next great copyright act,”<sup>363</sup> there is a unique opportunity to make such a legislative scheme a reality. Nevertheless, the history of the privacy torts also exposes how formalization could lead to an undesirable inflexibility in copyright law. Therefore, the Article instead proposes a more modest, judicial solution. In hard cases, judges need only articulate what interests and injuries underlie the infringement action. To demonstrate, Section III.A explains the advantages of separation and Section III.B lists the disadvantages. Section III.C describes the proposed judicial method.

#### A. *Advantages of Formal Separation*

The most important advantages of formal separation would be: (1) enhancing predictability, (2) promoting greater consistency in the infringement analysis, and (3) highlighting normatively attractive principles of private law.

<sup>360</sup> Prosser, *supra* note 1, at 423.

<sup>361</sup> *Supra* notes 153–63 and accompanying text.

<sup>362</sup> Restatement (Second) of Torts § 652A (Am. Law Inst. 1965); see Richards & Solove, *supra* note 41, at 1888.

<sup>363</sup> Pallante, *supra* note 42 (capitalization omitted).

### 1. *Predictability*

“The object of our study, then, is prediction,” as Holmes wrote in *The Path of the Law*.<sup>364</sup> Understanding the copy-tort taxonomy will enable practitioners to make better predictions about how judges will apply the infringement analysis. While courts do not always apply the “right” standard in each of the copy-torts, litigators will be able to make better, more informed predictions about the infringement analysis if they consider what interests and injuries their case presents.

Using legislation to formally separate the copy-torts into distinct causes of action would likely enhance predictability. Such a legislative solution would involve amending the Copyright Act. In addition to Section 106, which lists what factual conduct may qualify as copying, there would need to be another section (for present purposes Section 106(B)) which would list the five copy-torts, including the interests each cause of action protects, the situations in which factual copying (reproduction, distribution, etc.) injures those interests, and the method of testing to determine whether factual copying actually does injure those interests. Procedurally, the formalization process would require the plaintiff’s complaint to specify which copy-tort the defendant has potentially committed.<sup>365</sup> The defendant’s answer would respond to those specific claims.<sup>366</sup> Judges would then be required to adjudicate the rights and liabilities of the parties that the tort creates.<sup>367</sup> The benefit is that, over time, a body of precedent would grow up around each tort, making it clearer for participants in the copyright system to predict how the infringement analysis would be applied to real-world cases.

### 2. *Consistency*

Furthermore, the formalization process would increase the probability that judges would apply the standards with even greater consistency. As noted, understanding the copy-tort structure explains why courts have created quite different audience, harm, and analogy standards. But this does not mean that courts apply those standards uniformly in every case. There are a number of situations where courts are very likely to apply

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<sup>364</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 457 (1897).

<sup>365</sup> See Fed. R. Civ. P. 8.

<sup>366</sup> See Fed. R. Civ. P. 12.

<sup>367</sup> See Fed. R. Civ. P. 54.

the “incorrect” standards. Two scenarios in which this occurs include: (1) application of precedent, and (2) cases of concurrent liability.

First, the application of precedent can result in lower courts applying conceptually ill-fitting tests. A good example is the Second Circuit’s choice of audience for assessing similarity. In *Arnstein v. Porter*, Judge Frank held that the audience should be the consumer.<sup>368</sup> Because consumers were average/lay people, however, the judgment referred to the “ordinary lay hearer.”<sup>369</sup> The Second Circuit has since followed this dictum and proclaimed that it applies the “ordinary observer” standard.<sup>370</sup> This leads to a twofold problem. First, in some cases the Second Circuit faithfully attempts to apply the objective ordinary observer standard even though the standard does not conceptually fit the wrong before it. In these cases, the chosen standard is a poor tool for determining whether the defendant’s conduct has really injured a protected interest.<sup>371</sup> On the other hand, there are also cases where the Second Circuit pays lip service to the “ordinary observer” but in reality applies a disguised intended audience/consumer standard.<sup>372</sup> Doing so enables the court to apply a conceptually fitting test but further obfuscates the meaning of the “ordinary observer.”

Second, in cases of concurrent liability, courts often fail to test separately for distinct wrongs. When an individual’s conduct potentially amounts to two or more wrongs, such as an assault and a battery, the desirable judicial method is to determine whether the defendant committed the first wrong, and thereafter, move onto the second plausible wrong.<sup>373</sup> Yet in copyright, the same judicial method is rarely followed. Rather than try to separate out the different wrongs the defendant has plausibly committed and test for each sequentially, infringement is conceptualized as one singular wrong and courts try to apply one singular body of doctrine to determine whether this wrong has occurred. The result is that

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<sup>368</sup> 154 F.2d 464, 473 (2d Cir. 1946); see also *supra* notes 88–93 and accompanying text (discussing the determination that the appeal to the intended audience is the correct test).

<sup>369</sup> *Arnstein*, 154 F.2d at 468.

<sup>370</sup> *Computer Assocs. Int’l, v. Altai, Inc.* 982 F.2d 693, 713 (2d Cir. 1992); *Walker v. Time Life Films*, 784 F.2d 44, 51 (2d Cir. 1986); see also *Fromer & Lemley*, *supra* note 87, at 1271.

<sup>371</sup> See, e.g., *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022–23 (2d Cir. 1966) (using ordinary observer test to determine similarity between two dolls produced by two rival doll-manufacturing companies).

<sup>372</sup> See, e.g., *Laureyssens v. Idea Group*, 964 F.2d 131, 141–42 (2d Cir. 1992).

<sup>373</sup> See, e.g., *Higgins v. Hamilton*, 749 N.Y.S.2d 421, 422 (N.Y. App. Div. 2005).

courts, at least superficially, try to apply conceptually ill-fitting standards to the facts before them. For example, in *Harper & Row, Publishers v. Nation Enterprises*, the Court indicated that the defendant had committed the expressive privacy invasion wrong.<sup>374</sup> But it then went on to require some proof of market harm.<sup>375</sup> But why require such a showing? If the Court was concerned primarily with confidentiality, why was financial harm relevant? Even if the publisher's revenue somehow increased, the privacy value could have been cognizably injured. Or alternatively, if the Court was concerned about the plaintiff's creative control, then why did the Court feel the need to look for any "harm" beyond the simple loss of control? Ultimately, this judgment demonstrates how failure to distinguish the copy-torts results in application of legal standards to facts when those legal standards are only conceptually relevant to other forms of interference.

Formalization of the copy-torts will make it easier for judges to apply the correct legal standards. The Copyright Act could distinguish the copy-torts and the tests to be used for each, thus guiding judges to apply the correct standards to the facts before them.

### 3. *Private Law Principles*

Finally, formally separating the copy-torts would likely help improve the infringement analyses across the copy-torts. Part II demonstrated how the different copy-torts have different private law "analogies." The benefit of such analogies is these areas of private law often contain doctrines, principles, and concepts, which, if applied in the relevant copy-tort, would lead to a better infringement analysis. Currently, however, many of these doctrines are obscured by the de jure "bundled" nature of copyright infringement. This is particularly noticeable in relation to protections for defendants, which often go overlooked in copyright. In 1960, Prosser wrote that one could not "fail to be aware, in reading privacy cases, of the extent to which defenses, limitations and safeguards established for the protection of the defendant in other tort fields have been jettisoned, disregarded, or ignored."<sup>376</sup> Failing to distinguish the copy-torts more consciously has caused this problem again. Formally separating the copy-torts may serve to highlight the relevant analogies,

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<sup>374</sup> 471 U.S. 539, 566 (1985).

<sup>375</sup> *Id.* at 567.

<sup>376</sup> Prosser, *supra* note 1, at 422.

and thus increase the likelihood that the defendant protections from other areas of private law make their way into the law of copyright infringement. Two examples will suffice.

First, the requirement in unfair competition cases that the plaintiff prove economic loss is currently absent from competitor-copying cases. In free markets, the default principle is that producers must compete with each other.<sup>377</sup> Derogation from that principle only occurs in a subset of cases where competition may be problematic. As regulation is exceptional, courts require plaintiffs in unfair competition cases to prove the defendant's competition produced economic loss.<sup>378</sup> As plaintiffs in competitor-copying cases also request derogation from free competition, they should equally be required to provide either empirical or strong theoretical evidence that copying actually caused diversion. Although sometimes this does partially occur, as in *Sony Corp. of America v. Universal City Studios*, where the majority held the fact that plaintiffs "offered no evidence" that Betamax use would lead to "decreased television viewing"<sup>379</sup> against them, the burden typically falls on the defendant to prove the absence of market harm.<sup>380</sup>

Second, the "intent to touch" requirement in trespass is missing in consumer-copying cases.<sup>381</sup> A defendant must deliberately make contact with the land before liability is imposed for trespass.<sup>382</sup> One who trips and falls, or is pushed, onto the land is not a trespasser.<sup>383</sup> This requirement makes sense in terms of policy as only defendants who act deliberately have the ability to alter their behavior. Individuals who know that

<sup>377</sup> Restatement (Third) of Unfair Competition § 1 cmt. a (Am. Law Inst. 1995) ("The freedom to engage in business and to compete for the patronage of prospective customers is a fundamental premise of the free enterprise system.").

<sup>378</sup> Id. § 1 cmt. g ("A person seeking relief under the residual rule stated in Subsection (a) bears the burden of establishing that the method of competition employed by the actor is unfair.").

<sup>379</sup> 464 U.S. 417, 424 (1984).

<sup>380</sup> *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 590 (1994); *Harper & Row*, 471 U.S. at 567. See also Balganesch & Parchomovsky, *supra* note 220, at 502 (discussing the cabining effect of the unfair competition paradigm on infringement). See generally Lydia Pallas Loren, *Fair Use: As an Affirmative Defense?*, 90 Wash. L. Rev. 685 (2015) (questioning whether fair use should be an affirmative defense).

<sup>381</sup> Restatement (Second) of Torts § 158 (Am. Law Inst. 1965) ("Liability for Intentional Intrusions on Land"); Goldberg & Zipursky, *supra* note 8, at 232 ("Intent to Touch").

<sup>382</sup> Goldberg & Zipursky, *supra* note 8, at 232. The intent requirement in trespass is intent to make contact with the land, not intent to commit trespass.

<sup>383</sup> Restatement (Second) of Torts § 158 (Am. Law Inst. 1965) ("Illustration[] 1. A, against B's will, forcibly carries B upon the land of C. A is a trespasser; B is not.").

they are about to step onto land may decide to walk around it or try to determine its ownership first. But if an individual does not realize she is about to make contact with land, then she has no reason to take such precautionary measures.<sup>384</sup> Liability in such instances does not change the individual's behavior and simply represents a costly wealth redistribution.<sup>385</sup> Sadly, there is no "intent to touch" requirement in copyright.<sup>386</sup> This was most famously demonstrated in *Bright Tunes Music v. Harri- songs Music, Ltd.*, where George Harrison infringed copyright by sub- consciously copying a previous song.<sup>387</sup> But just like the undeliberate trespasser, the threat of liability for copying was unlikely to change Har- rison's behavior as, unaware of copying, he had no reason to believe lia- bility was a possibility. Once again, this presents a costly redistribution of wealth with no beneficial incentive effect. Over a century ago, Holmes wrote that when "action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard" on the actor.<sup>388</sup> Copyright lawyers have forgotten this prescription.<sup>389</sup>

### *B. Disadvantages of Formal Separation*

There are, however, also disadvantages to separation. "[A] page of history is worth a volume of logic," and the history of Prosser's privacy torts provides a warning against formal separation.<sup>390</sup> Professors Neil Richards and Daniel Solove have explained how Prosser's taxonomy gave privacy law "an order and legitimacy that it had previously lacked."<sup>391</sup> However, the taxonomy also "stunted" the development of privacy law in ways that "have limited its ability to adapt to the prob- lems of the Information Age."<sup>392</sup> The torts that Prosser reified into law

<sup>384</sup> See Keith N. Hylton, 2009 Monsanto Lecture: Intent in Tort Law, 44 Val. U. L. Rev. 1217, 1230 n.28 (2010) (explaining consequentialist logic behind different intent require- ments).

<sup>385</sup> Id. at 1232–33.

<sup>386</sup> See, e.g., Dane S. Ciolino & Erin A. Donelon, Questioning Strict Liability in Copy- right, 54 Rutgers L. Rev. 351, 352 (2002).

<sup>387</sup> 420 F. Supp. 177, 180–81 (1976).

<sup>388</sup> Holmes, supra note 43, at 95.

<sup>389</sup> For reform proposals, see Carissa L. Alden, A Proposal to Replace the Subconscious Copying Doctrine, 29 Cardozo L. Rev. 1729, 1758–64 (2008); Christopher Jaeger, "Does That Sound Familiar?": Creators' Liability for Unconscious Copyright Infringement, 61 Vand. L. Rev. 1903, 1923–33 (2008).

<sup>390</sup> N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

<sup>391</sup> Richards & Solove, supra note 41, at 1888.

<sup>392</sup> Id. at 1890.

did not envision the “problems such as the extensive collection, use, and disclosure of personal information by businesses”<sup>393</sup> and revenge pornography.<sup>394</sup> The oversight means these new controversies are not easily identified as legally wrongful under the existing privacy tort system. This leaves individuals without redress in cases where a remedy would be normatively attractive. Thus, while the *de jure* formalization resulted in clearer, more predictable law, it also led to law that is quickly falling out of touch with reality.

The possibility of stagnation poses equal problems in relation to copyright. The economics of creating and distributing expressive works, and the overall importance of information to our global economy, are rapidly changing.<sup>395</sup> Because of the changing nature of the creative economy, Congress has always shied away from dictating how courts ought to determine infringement. Today, when it is questionable whether any copyright at all is normatively desirable, let alone whether the current scope of the copy-torts is justifiable from either deontic or consequentialist perspectives, this seems more important than ever.<sup>396</sup> This has two salient implications. First, there ought to be reluctance to reify causes of action into the law that society may later want to abolish. And second, rigid principles within the causes of action that are impervious to rapidly changing context should be avoided. Reifying the copy-torts in a manner similar to the privacy torts could lead to an undesirable inflexibility in copyright.

### *C. A Modest Proposal: Don't Be Formal, Just Be Clear*

Given the problems that formal separation may create, this Article instead proposes a method of adjudicating infringement claims that will increase predictability without leading to inflexibility. Formal separation

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<sup>393</sup> *Id.* at 1918.

<sup>394</sup> Taylor Linkous, *It's Time for Revenge Porn to Get a Taste of Its Own Medicine: An Argument for the Federal Criminalization of Revenge Porn*, 20 *Rich. J.L. & Tech.* 14, 16–22 (2014).

<sup>395</sup> See Mervi Taalas, *Costs of Production*, in *A Handbook of Cultural Economics* 113, 113–15 (Ruth Towse ed., 2d ed. 2011) (explaining changing production costs of cultural services); Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* 10–15 (2011) (U.K.), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32563/ipreview-finalreport.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf) [<https://perma.cc/W94M-52GJ>]; Austl. Law Reform Comm'n, *Copyright and the Digital Economy: Final Report* 57–61 (2013) (Austl.), <http://www.alrc.gov.au/publications/copyright-report-122> [<https://perma.cc/5N7N-4HHE>].

<sup>396</sup> Breyer, *supra* note 187, at 282 (recognizing that copyrights are not the only alternative).

is not necessary, provided that courts are clear about the interests and injuries at stake in infringement actions.<sup>397</sup> Plaintiffs should continue to state a “copyright infringement” claim. Of the cases that go to trial, the “easy” cases, which can be determined by prior precedent, require no change in judicial approach. In the cases where precedent does not determine a conclusion, however, then the court must consider what interests and injuries underlie the action. It is not sufficient to merely ask whether the “copying” invaded the “right to copy” because not all copying infringes upon a protected interest.<sup>398</sup> Instead, courts must identify what is the plaintiff’s interest, then whether that interest should be protected as a matter of policy (recognizing that many cases will involve low or no protection), and finally whether the defendant’s conduct actually injures that interest. When assessing whether the defendant’s conduct was wrongful, the court should test for each copy-tort separately and explain why the tests are conceptually appropriate. Over time, this will have a soft-precedential effect such that practitioners will be able to better predict how courts will apply the analysis, while not being so rigid as to be impervious to future socioeconomic change.

As an illustration, consider *Harper & Row*. After finding that *The Nation* copied 300–400 words of expression,<sup>399</sup> the Court should have identified the plaintiff’s interests. The plaintiff’s reputation was clearly not implicated by the scooping, nor did Harper & Row desire their confidentiality be maintained.<sup>400</sup> Furthermore, while Harper & Row was certainly interested in the wealth generated by the publication, they did not see *The Nation* as a consumer. It appears that Harper & Row’s interest was in preventing *The Nation* from publishing altogether, rather than allowing the publication to occur for a fee. Nevertheless, if this was the desire, it would fall to the Court to determine whether preventing the release of 300–400 words was necessary as a policy matter (would such copying, if widespread, intolerably damper incentives to create?). Conversely, Harper & Row was clearly interested in controlling when the work was published and internalizing the relevant marginal utility, as well as internalizing the value of *Time*, its consumer.<sup>401</sup> Having identified these

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<sup>397</sup> Clarity is “a sovereign virtue in jurisprudence.” See H.L.A. Hart, *Positivism and the Separation of Morals*, 71 *Harv. L. Rev.* 593, 593 (1958).

<sup>398</sup> *Supra* notes 281–83 and accompanying text.

<sup>399</sup> 471 U.S. at 548.

<sup>400</sup> *Supra* notes 270–74 and accompanying text.

<sup>401</sup> *Supra* notes 268–74 and accompanying text.



protected interests, the next task would be to determine whether *The Nation's* copying injured either of them.

It is improbable that *The Nation's* scooping was actionable competitor copying. Although the defendant copied Harper & Row's expression, the intended audience or consumers—in this case *Time*—would probably not view that as creating an economic substitute for the protected work. While *Time* may have seen the two works as informationally similar, it is unlikely it viewed the two as supplying the same demand for expression. Furthermore, on the question of market harm in fair use, it appears that the defendant's copying did not produce the relevant outcome. While *Time* cancelled the contract because *The Nation's* work published factual information, it clearly did not switch from the plaintiff's work to the defendant's copied version to satisfy its demand for the expression.

However, it is likely the copying was a breach of creative control. The interest in deciding when and how the expression first reaches the public is protected because of the need to efficiently coordinate use of the work. If the defendant published the work, then it cognizably injured this interest. The question was therefore whether publishing 300–400 words was sufficiently extensive enough to qualify as publishing “the work.” As the metes and bounds of the work are once more determined by application of the underlying policy—ensuring the most productive use—the ordinary observer analysis was the correct audience standard. A reasonable interpretation of the judgment is that the Court made this similarity determination, found the copying extensive enough as to hamper this interest and its underlying policy, and therefore did not need an extensive fair use inquiry. Instead, it found that fair use claims will often be outweighed in a case such as this, because the “nature of the interest at stake is highly relevant to whether a given use is fair,”<sup>402</sup> and here the interest was injured without the usual assessment of market harm.

This judicial method of separating the copy-torts will also be easier than legislative separation. The 1976 Copyright Act required approximately twenty years of drafting, and future copyright legislation—including any formal separation of wrongs it may adopt—will require similar effort.<sup>403</sup> By contrast, courts could accomplish informal separa-

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<sup>402</sup> *Harper & Row*, 471 U.S. at 553.

<sup>403</sup> Pallante, *supra* note 42, at 316 (noting that “the revision process began in the 1950s, during Arthur Fisher’s tenure as Register, and did not conclude until five years after Kaminstein’s departure,” in 1976). The Copyright Office began its revision process with a series of

tion immediately. Nothing in the existing Copyright Act dictates how courts ought to analyze infringement cases.<sup>404</sup> Courts are well within their jurisdiction to explicitly tailor the infringement analysis to fit the relevant copy-tort.

Some have found this proposal too modest. One reason behind previous judicial failure to separate the copy-torts is that the fundamental source of copyright law, the Copyright Act, treats infringement as one wrong.<sup>405</sup> If the Copyright Act does not distinguish the interests and injuries underlying Section 106, then will judges, with limited lawmaking abilities, be able to restructure copyright infringement doctrine around these concepts? But thankfully, jurists can help judges down this path. The American Law Institute is currently preparing the first Restatement of Copyright.<sup>406</sup> The Restatement could helpfully list the interests of copyright owners and the instances wherein those interests are to be protected, as well as what needs to be shown in order to prove the defendant's copying injured those interests. This will encourage courts to take these analytical features into account in hard cases, while not requiring that they be applied as rigidly as in the privacy context.

#### CONCLUSION

Copyright lawyers need a better jurisprudential theory of copyright infringement. The current orthodoxy of treating all instances of copying as one single legal wrong—"copyright infringement"—makes the infringement analysis appear doctrinally and theoretically confused. By contrast, this Article's revised positive theory of copyright clarifies that judicial test. Copyright infringement is not one tort, but a group of distinct legal wrongs bearing a familial resemblance. All of the "copy-torts" involve "the right to copy," much like all privacy torts loosely involve the "right to be let alone," but each deals with the different interests and injuries that the right to copy protects and prevents. "Unbun-

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internal studies. See, e.g., Staff of S. Subcomm. on Patents, Trademarks & Copyrights, 86th Cong., Study on Fair Use of Copyrighted Works 240 (Comm. Print 1960) (authored by Alan Latman). For revision process, see Jessica D. Litman, Copyright, Compromise, and Legislative History, 72 *Cornell L. Rev.* 857, 870–79 (1987).

<sup>404</sup> 17 U.S.C. § 501 (2012) (saying only that "violation" of right is infringement).

<sup>405</sup> *Supra* notes 62–63 and accompanying text.

<sup>406</sup> See Am. Law Inst., Current Projects, <https://www.ali.org/projects> [<https://perma.cc/D693-2D9C>]; see also Ann Bartow, A Restatement of Copyright Law as More Independent and Stable Treatise, 79 *Brook. L. Rev.* 457, 498–503 (2014) (proposing a Restatement on Copyright).

dling” infringement in this descriptive manner enables us to explain what has otherwise remained shrouded in darkness. Of course the infringement analysis is chimerical. There is no singular test for trespass and nuisance, or for assault and battery; nor is there a single test for all types of copyright infringement. Instead, the generic “infringement analysis” must mutate and evolve to provide a doctrinally and theoretically suitable test for the different “copy-torts” that copyright deters and corrects. By thinking less in terms of “the tort of copyright infringement” and more in terms of “copy-torts,” courts could make the gallery of wrongs structure of copyright infringement clearer and the infringement analysis more predictable. In doing so, they will not only be following my advice, but also the advice of our greatest tort scholar. It has been fifty-five years since Prosser demonstrated how failure to appreciate the analytic structure of privacy law would create confusion.<sup>407</sup> Half a century later, this insight is more important than ever in the context of today’s sprawling copyright law.

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<sup>407</sup> Prosser, *supra* note 1.