

2018

## Copyright as Market Prospect

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# Copyright as Market Prospect

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## ARTICLE

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### COPYRIGHT AS MARKET PROSPECT

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SHYAMKRISHNA BALGANESH<sup>†</sup>

*For many decades now, copyright jurisprudence and scholarship have looked to the common law of torts—principally trespass and negligence—in order to understand copyright’s structure of entitlement and liability. This focus on property—and harm-based torts—has altogether ignored an area of tort law with significant import for our understanding of copyright law: tortious interference with a prospective economic advantage. This Article develops an understanding of copyright law using tortious interference with a prospect as a homology. Tortious interference with a prospect allows a plaintiff to recover when a defendant’s volitional actions interfere with a potential economic benefit that was likely to accrue to the plaintiff prior to the defendant’s intervention. Premised on the idea of a probabilistic harm and driven by instrumental considerations, the tort works by treating a possible market benefit as the basis of an interest that is worthy of protection against specific behavior. As a supposed incentive for creativity, copyright law operates in ways that are strikingly similar to tortious interference with a prospect. Much like tortious interference with a prospect, it functions by first identifying a zone of probabilistic market benefits, and then protecting that zone against specific volitional interferences through a framework of liability. This Article unpacks the strong analytical and normative parallels between the two, and argues that their similarity sheds new and important light on several persistent puzzles within current copyright jurisprudence.*

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<sup>†</sup> Professor of Law, University of Pennsylvania Law School. Many thanks to Avi Bell, John Goldberg, Justin Hughes, Umberto Izzo, Gideon Parchomovsky, Zahr Said, and participants at the 2017 NYU Tri-State IP Workshop, the 2017 IP Speaker Workshop at Loyola Law School Los Angeles, the 2017 Private Law Consortium in Trento, and a faculty workshop at the University of Washington for helpful comments and suggestions. All errors are mine.

INTRODUCTION .....	444
I. THE FORGOTTEN TORT ACTION: INTERFERENCE	
WITH A PROSPECT .....	451
A. <i>Tortious Interference in General</i> .....	452
B. <i>The Distinctiveness of the Action for a “Prospect”</i> .....	458
1. Identifying a Protectable Opportunity .....	462
2. Interference as Wrongdoing .....	465
C. <i>Underlying Rationale(s)</i> .....	468
1. Economic Justifications: Incentives and Deterrents .....	468
2. Commercial Morality .....	470
3. Actual/Ostensible Ownership .....	471
II. COPYRIGHT LAW AS TORTIOUS INTERFERENCE	
WITH A PROSPECT .....	474
A. <i>Homology as Interpretive Legal Theory</i> .....	474
B. <i>Incentives, Property, and Market Morality: Common Goals</i> .....	478
C. <i>The Homology</i> .....	482
1. The Market (for the Work) as Prospective Economic Advantage .....	484
2. Copying as Interference and Improper Means .....	488
3. Volition, Subconscious Copying, and Intention .....	492
4. Fair Use as Privileged Interference .....	497
III. IMPLICATIONS AND LESSONS .....	503
A. <i>From Incentive-Creation to Incentive-Protection</i> .....	503
B. <i>The Relationality of Right and Liability</i> .....	507
C. <i>Trusting Courts</i> .....	509
CONCLUSION .....	512

## INTRODUCTION

Ever since its origins in the eighteenth-century, Anglo-American copyright law has attempted to understand its entitlement structure through the idea of property. Originally described as a form of “literary property,”<sup>1</sup>

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<sup>1</sup> See, e.g., MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 1-8 (1993) (discussing the history of the concept of copyright as “literary property,” and describing how the 1710 Statute of Anne established the author as a “legally empowered figure in the marketplace”); see also JODY GREENE, *THE TROUBLE WITH OWNERSHIP: LITERARY PROPERTY AND AUTHORIAL LIABILITY IN ENGLAND, 1660-1730* 4 (2005) (“Insofar as the Act of Anne constituted a method for keeping track of those responsible for literary works, it also put into effect a system for recording liability for them.”); Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 *TUL. L. REV.* 991, 991-92 (1990) (“[O]ne of the ‘fundamental ideas’ of the revolutionary copyright laws is the principle that ‘an exclusive right is conferred on authors because their property is the most justified because it flows from their intellectual creation.’” (quoting CLAUDE COLUMBET, *PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE* 8 (4th ed. 1988)));

courts and scholars today continue to analyze copyright's grant of exclusivity through various doctrines from the common law of property.<sup>2</sup> Ideas and concepts deriving from trespass to land and chattels,<sup>3</sup> the law of licenses,<sup>4</sup> first possession,<sup>5</sup> choses in action,<sup>6</sup> adverse possession,<sup>7</sup> and more recently the law of theft,<sup>8</sup> feature rather routinely in copyright jurisprudence and scholarship. Indeed, so pervasive is the influence of property thinking that the copyright statute's refusal to cover certain categories of works at one time even raised concerns to some about "private property" being "taken" under the Fifth Amendment.<sup>9</sup> More recently, scholars have shifted their emphasis from the

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Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 LAW & CONTEMP. PROBS. 75, 75 (2003) ("Embedded in this metaphor is an implicit narrative about the origin of copyright, a version of the familiar Enlightenment narrative about the origin of landed property in general.").

<sup>2</sup> For general criticisms of this trend, see generally Shyamkrishna Balganesh, *Debunking Blackstonian Copyright*, 118 YALE L.J. 1126 (2009); Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WISC. L. REV. 141 (2011); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873 (1996).

<sup>3</sup> See *Dowling v. United States*, 473 U.S. 207, 217 (1985) ("It follows that interference with copyright does not easily equate with theft, conversion, or fraud."); PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 5 (2003) ("An author's right to ward off unauthorized copying of his work is much like a homeowner's right to keep trespassers off his land."); Wendy J. Gordon, *Trespass—Copyright Parallels and the Harm—Benefit Distinction*, 122 HARV. L. REV. F. 62 (2009) ("[T]he cause of action known as 'copyright infringement' possesses much the same structure as does trespass to land . . .").

<sup>4</sup> See generally Christopher M. Newman, *A License Is Not a "Contract Not To Sue": Disentangling Property and Contract in the Law of Copyright Licenses*, 98 IOWA L. REV. 1101, 1105 (2013) (explaining that federal courts "have not hesitated to develop and apply principles of license construction derived from federal copyright policy").

<sup>5</sup> See Richard Epstein, *Liberty Versus Property? Cracks in the Foundation of Copyright Law*, 42 SAN DIEGO L. REV. 1, 20-21 (2005) ("To be sure, Locke did not offer any explicit treatment one way or the other of intellectual property rights, which adds to his charm. But it hardly follows that his theory has no implications for the area.").

<sup>6</sup> See Spencer Brodhurst, *Is Copyright a Chose in Action?*, 11 LAW Q. REV. 64 (1895) ("[I]t is very doubtful whether rights, or in fact anything incorporeal, can properly be included [as a chose in action] . . ."); T.T. Cyprian Williams, *Property, Things in Action, and Copyright*, 11 LAW Q. REV. 223, 223 (1895) ("[C]opyrights and similar rights are more analogous to choses in action than choses in possession . . .").

<sup>7</sup> For a judicial opinion finding copyright title based on adverse possession, see *O'Neill v. Gen. Film Co.*, 152 N.Y.S. 599, 603 (Sup. Ct. 1915), *aff'd as modified*, 171 A.D. 854 (App. Div. 1916). *But see* Matthew Daus, *Adverse Possession of Copyright*, 13 LOY. L.A. ENT. L.J. 45, 57 (1992) ("The traditional elements of adverse possession cannot successfully be applied to the acquisition of a copyright because it is intangible property.").

<sup>8</sup> See, e.g., Irina D. Manta & Robert E. Wagner, *Intellectual Property Infringement as Vandalism*, 18 STAN. TECH. L. REV. 331, 337-38 (2015) ("The IP owner, just like the property owner, generally mixes her labor with pre-existing materials to provide society with goods and help it flourish . . . . The more rivalrous intellectual property turns out to be in a given case, the more it resembles property and the more its infringement parallels theft.").

<sup>9</sup> See JULIE E. COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 162 (3d ed. 2010) ("Some commentators [to the 1976 Copyright Act] expressed concern about . . . the potential 'takings' arguments that might be raised.").

law of property to tort law to understand copyright.<sup>10</sup> The move in this direction was initially prompted by a focus on property torts—i.e., tort doctrines that protect private property such as trespass—since courts sporadically described copyright infringement actions in these terms.<sup>11</sup> In due course, the comparisons expanded to tort doctrines that were less about property protection and more about balancing the plaintiff and defendant, such as the doctrines of negligence and nuisance.<sup>12</sup> This latter move was underwritten by the increasingly instrumentalist and utilitarian orientation that American copyright thinking has taken on in the last few decades, which emphasizes the need to balance copyright protection against ease of access.<sup>13</sup> The common law has thus proven to be a fertile source of conceptual guidance for copyright jurisprudence.

All the same, copyright thinking has unduly limited itself in focusing principally on property-based or balance-driven aspects of the common law of torts. The focus on trespass, negligence, and nuisance—all mainstream and well-understood doctrines—has certainly meant that copyright law has never had to independently establish the legitimacy of the common law doctrines to which it is looking; it has also limited such reliance almost entirely to the structural realm. In other words, the common law has thus far proven to be helpful in shedding light on *how* copyright law might develop mechanisms to realize its underlying objectives that are predetermined. Yet the connection has almost never been used to say anything of significance about the very rationality, normative desirability, and construction of those objectives. This is for an obvious reason: each of the common law areas hitherto used to analyze copyright jurisprudence seeks to realize objectives that are ill-suited—without significant adaptation—to those of copyright law.

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<sup>10</sup> See, e.g., Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1573 (2009) (“[T]he common law has come to recognize that there are limits to human predictive capacities . . . Its principal device to that end is the concept of *foreseeability*.”); Oren Bracha & Patrick Goold, *Copyright Accidents*, 96 B.U. L. REV. 1025, 1041 (2016) (“[C]opyright accidents should be governed by a negligence rule.”); Patrick R. Goold, *Unbundling the “Tort” of Copyright Infringement*, 102 VA. L. REV. 1833, 1888 (2016) (“[C]opyright infringement is composed of five different torts, and this explains why infringement analysis is so changeable.”); Wendy J. Gordon, *Copyright as Tort Law’s Mirror Image: “Harms,” “Benefits,” and the Uses and Limits of Analogy*, 34 MCGEORGE L. REV. 533, 535 (2003).

<sup>11</sup> See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) (describing an infringer as “anyone who trespasses into [the copyright owner’s] exclusive domain by using or authorizing the use of the copyrighted work”); *Coquico, Inc. v. Rodriguez-Miranda*, 562 F.3d 62, 66 (1st Cir. 2009) (using the term “trespasses” to describe the action of infringing a copyright).

<sup>12</sup> See generally Patrick R. Goold, *Is Copyright Infringement a Strict Liability Tort?*, 30 BERKELEY TECH. L.J. 301 (2015); Steven Hetcher, *The Fault Liability Standard in Copyright*, in INTELLECTUAL PROPERTY AND THE COMMON LAW 431 (Shyamkrishna Balganesh ed. 2013).

<sup>13</sup> For a good summary of this utilitarian orientation and its effects, see ABRAHAM DRASSINOWER, *WHAT’S WRONG WITH COPYING?* 17–53 (2015).

Consider efforts to understand aspects of copyright law through negligence doctrine. Negligence law is seen to be about deterring harmful behavior,<sup>14</sup> spreading the costs of harms once they occur,<sup>15</sup> or realizing corrective justice between the wrongdoer and the victim through a regime of liability.<sup>16</sup> Extended to copyright, each of these ideals proves to be grossly incomplete. Unlike the tangible harm with which negligence commonly concerns itself, the harm that copyright seeks to prevent is a contested and multifaceted issue.<sup>17</sup> Similarly, cost-spreading in copyright requires an account of when and how something is a cost to begin with (rather than a benefit or an accepted reality of human interaction) since the harm at issue in copyright is either notional or predictive. Further, the ideal of corrective justice is itself dependent on an underlying normative equilibrium that must be justified by an altogether independent set of principles about rights and wrongs.<sup>18</sup> Consequently, to the extent that concepts from negligence law are of utility to copyright, their contribution lies primarily in their ability to *structure* copyright doctrine and thinking. This is seen to allow copyright to further its values that are in turn derived from other (i.e., non-common law) sources.

Copyright's use of the common law has been principally in the form of a structural analogy so far. Yet closely connected to, but nonetheless distinct from an analogy, is the concept of a *homology*. An analogy focuses on a resemblance between two or more concepts or ideas, but makes no claim as to the relationship between the objects of the comparison.<sup>19</sup> The similarity

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14 See Guido Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656, 657-58 (1975) ("In terms of the goal of 'optimal deterrence' . . . [t]he injurer should avoid the accident whenever . . . the accident prevention by him is socially more desirable."); see also Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 1 (1980).

15 See GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 39 (1970) ("The justification found most often among legal writers today for allocation of accident losses on a nonfault basis is that accident losses will be least burdensome if they are spread broadly among people and over time.")

16 See JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 58 (2003) (arguing that the principle of corrective justice "best explains tort law"); see also ERNEST WEINRIB, *CORRECTIVE JUSTICE* (2012).

17 For an elaboration, see Wendy J. Gordon, *The Concept of "Harm" in Copyright*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW*, *supra* note 10, at 452, 466 ("Harm is usually considered a shortfall from some baseline . . . there are potentially an infinite number of possible baselines.")

18 See, e.g., Shyamkrishna Balganesh, *The Normative Structure of Copyright Law*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW*, *supra* note 10, at 313, 315 ("As an institution that is just over three hundred years old, copyright has its own unique normative structure."); Patrick R. Goold, *Corrective Justice and Copyright Infringement*, 16 VAND. J. ENT. & TECH. L. 251, 266-67 (2014) ("Corrective justice theory views tort law as a system for correcting . . . wrongful losses and wrongful gains."); Gordon, *supra* note 10, at 535 ("As tort law . . . make[s] an actor reduce or stop his harm-causing activity, copyright law . . . make[s] an actor increase or continue his beneficial activity.")

19 For the seminal work on analogy, see DOUGLAS HOFSTADTER & EMMANUEL SANDERS, *SURFACES AND ESSENCES: ANALOGY AS THE FUEL AND FIRE OF THINKING* (2013). For work on analogical reasoning in the law, see EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 1-28 (rev. ed. 2013); see also Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L.

may be attributable—in its entirety—to coincidence. Consequently, the process of analogizing one concept or doctrine to another requires no account of why the comparison is independently justified, beyond the obvious existence of the similarities at issue. Drawn from evolutionary thinking, a homology on the other hand focuses on a resemblance between two or more ideas but in addition makes an implicit claim about the common origins of those ideas.<sup>20</sup> It claims that the similarity under scrutiny is apparent because of a commonality in source. That common source may be a shared institutional origin or a shared set of motivating goals and ideals. As such, the explanatory burden of a homology is significantly higher than that of a mere analogy.

In this Article, I argue that the common law can be more than a structural analogy for copyright thinking; it can also provide a useful homology for copyright law. The basis for such a common law homology is to be found, not in the well-worn doctrines of property and tort law, but instead in an under-analyzed common law doctrine: tortious interference with a prospective economic advantage. This doctrine is a close sibling of a claim known as tortious interference with contract or “inducement to breach,” which allows recovery when a third party defendant intentionally interferes with a contract between two others and procures a breach.<sup>21</sup> While inducement to breach is premised on the existence of a valid contractual relationship between two parties,<sup>22</sup> tortious interference with a prospective economic advantage—or “tortious interference with a prospect” for short—allows a claim when the economic benefit that was interfered with by the defendant was itself entirely probabilistic.<sup>23</sup>

While initially developed to render the defendant’s liability independent of the formal validity of an underlying contract, tortious interference with a

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REV. 1179, 1186 (1999) (“[T]he virtue of analogical reasoning lies in a variety of indirect benefits that are likely to result when judges adopt it as a practice and consider themselves obliged to explain new decisions in terms of their relation to past cases.”); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (2013) (“[F]our different but overlapping features . . . produce both the virtues and the vices of analogical reasoning in the law.”).

<sup>20</sup> See, e.g., STANLEY SHOSTAK, *EVOLUTION OF SAMENESS AND DIFFERENCE* 83 (1999) (“[H]omologies connote similar molecules allegedly descendant from hypothetical ancestors . . . .”); see also, e.g., MARY JANE WEST-EBERHARD, *DEVELOPMENTAL PLASTICITY AND EVOLUTION* 485-97 (2003) (“Homology-similarity due to common descent is the cornerstone of comparative evolutionary research.”).

<sup>21</sup> For early work on the scope and history of the doctrine, see generally Charles E. Carpenter, *Interference with Contract Relations*, 41 HARV. L. REV. 728 (1928); Fowler V. Harper, *Interference with Contractual Relations*, 47 NW. U. L. REV. 873 (1952).

<sup>22</sup> See RESTATEMENT (SECOND) OF TORTS § 766 cmt. f (AM. LAW INST. 1979) (“The particular agreement must be in force and effect at the time of the breach that the actor has caused; and if for any reason it is entirely void, there is no liability for causing its breach.”).

<sup>23</sup> See DAN B. DOBBS, PAUL T. HAYDEN AND ELLEN M. BUBLICK, *THE LAW OF TORTS* § 638 (2d ed. 2011).



prospect has since expanded to cover a variety of other prospective situations.<sup>24</sup> In each of these situations, the law attempts to balance a defendant's behavior that caused the economic loss against a putative zone of probable benefits that the plaintiff is seen as entitled to.<sup>25</sup> Such balancing, in turn, engages a variety of important considerations such as the bad faith of the defendant, concerns about freeriding, the incentive effects of protection (and non-protection), its effect on the general public interest and social welfare, and concerns about the types and norms of competition in the market at issue.<sup>26</sup> In order to realize these goals contextually, tortious interference with a prospect has come to develop a nuanced doctrinal structure that is uniquely adapted to the probabilistic nature of the benefit and the balancing exercise involved. Owing to the entirely probabilistic nature of the prospect that is being protected, the tort identifies the boundaries of that prospect *ex post*, in an effort to produce an extremely nascent form of a property-like interest (in the prospect).<sup>27</sup> It then protects this interest with due caution against overreach by focusing primarily on the defendant's behavior and its actual and potential effects on the prospect through the highly tailored individual elements of the action.<sup>28</sup>

Reduced to its core, copyright law operates in an almost identical fashion, and for similar reasons. Like tortious interference with a prospect, it protects a zone of probabilistic benefits—the market for a work of expression—by assigning it to the author/plaintiff. Instead of just treating the work as the object of a property interest, copyright law focuses on protecting the prospect through an elaborate focus on the nature of the defendant's actions that interfere with the realization of the prospect. Copyright law has thus never treated all uses of the protected work as actionable.<sup>29</sup> This focus on the prospective benefit (rather than the work as property) is captured in the highly specified forms of behavior (i.e., reproduction, distribution, performance, etc.) that define the extent of each of copyright law's rights, the elaborate apparatus that constitutes its infringement analysis, and the

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<sup>24</sup> *Id.* § 641 (“The Restatement, with explicit agreement of some courts, protects any kind of reasonable economic expectancy against intentional and improper interference, so long as the plaintiff can prove a reasonable probability that the opportunity would have been realized but for the defendant's intentional and improper interference . . .”).

<sup>25</sup> *Id.* § 640.

<sup>26</sup> *Id.*

<sup>27</sup> For discussions of this property interest, see generally Benjamin L. Fine, Comment, *An Analysis of the Formation of Property Rights Underlying Tortious Interference with Contracts and Other Economic Relations*, 50 U. CHI. L. REV. 1116 (1983); Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510 (1980) [hereinafter Note, *Tortious Interference*].

<sup>28</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 767 (AM. LAW INST. 1979).

<sup>29</sup> Indeed, this is a bedrock principle of copyright law that was confirmed by the Supreme Court in the nineteenth century. See, e.g., *Baker v. Selden*, 101 U.S. 99, 102 (1879).

considerations that motivate its balancing exercise under the rubric of fair use. In short, each of the common law's analytical components that are seen in tortious interference with a prospect finds strong correspondence in accepted copyright doctrine.

Perhaps most importantly though, the similarity is more than just of pure analytical value. It contains lessons for several of copyright's enduring doctrinal puzzles, which it recasts as embodiments of tortious interference with a prospect, and offers lessons for their resolution. First, it suggests that the true object of protection for modern copyright law—at least in the U.S.—is neither the “work” nor the “author,” as has been commonly assumed. It is instead the prospective market for the work, a probabilistic entitlement that the system should be more willing to contextually tailor and define. Second, it reveals that copyright law's bifurcation of “copying” into factual and normative components can be streamlined once the overall basis of liability is rationalized through the idea of copying. Third, it shows that “copying,” central to copyright's liability calculus, does indeed embody an element of advertence/volition, which does not detract from the structure of copyright infringement as a strict liability tort. And fourth, it identifies how copyright law can avoid the needless redundancy between fair use and elements of the infringement analysis.

The homological account of copyright and tortious interference with a prospect developed in this Article is both descriptive and normative. On the one hand, the strong symmetry between the conceptual structure of copyright and tortious interference with a prospect suggests underappreciated insights into the working of copyright doctrine. At the same time, it also highlights how those very mechanisms might themselves be reshaped to give effect to ideals and values that are common to both. The theory offered herein is therefore interpretive.<sup>30</sup>

Besides suggesting modifications to copyright doctrine, the homology between copyright and tortious interference with a prospect also brings out important lessons for copyright theorizing and lawmaking. It helps make sense of copyright's dominant theory of creator incentives, according to which copyright's primary purpose is to “supply” creators with an incentive to create.<sup>31</sup> The homology reveals this to be only partially true, and that copyright's real function lies in *protecting* rather than *supplying* creators' market incentives. The homology also pushes in the direction of thinking about copyright as a framework of liability, rather than entitlement, which is more than just of semantic significance. Lastly, it strongly recommends a more

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<sup>30</sup> For a general account of interpretive theory, see RONALD DWORKIN, *LAW'S EMPIRE* 464 (1986).

<sup>31</sup> See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (noting that “copyright *supplies* the economic incentive to create and disseminate ideas” (emphasis added)).

active role for courts in shaping the copyright entitlement, thereby contributing to copyright law and policy by engaging the discourse of copyright's normative goals more directly.

Part I of the Article begins with an analytical overview of tortious interference with a prospective economic advantage. It traces the general development of the action as a subsidiary to the inducement of breach action (I.A.); describes the manner in which it has evolved as a distinctive action (I.B.); and then sets out some of the normative criteria that motivate courts' application and development of the tort (I.C.). Part II highlights the homology between copyright and tortious interference and unpacks the content of copyright's entitlement and liability structures through the action of tortious interference with a prospect. It develops the idea of a homological theory as an interpretive exercise and sets out its core tenets (II.A); argues that copyright and tortious interference deserve to be understood as a homology owing to a common plurality of normative motivations underlying both regimes (II.B); and shows how copyright's fundamental doctrinal puzzles may be fruitfully understood through the working of tortious interference doctrine (II.C). Part III examines the broader implications that flow from the homology and focuses on three: justificatory (III.A); analytical (III.B); and institutional (III.C).

#### I. THE FORGOTTEN TORT ACTION: INTERFERENCE WITH A PROSPECT

Despite having a long pedigree of their own, intentional torts—wrongs committed through a defendant's intentional actions—have come to receive significantly less scholarly attention than have their fault-based counterparts (i.e., negligence).<sup>32</sup> Even within the category of intentional torts, those focusing on harms to person and property, such as assault and trespass, tend to dominate the discussion. Given this landscape, tortious interference with a prospective economic advantage is all but ignored in any serious discussion about tort law and comparisons thereto. In addition to this benign neglect, tortious interference with a prospect also suffers from the problem of being overshadowed by its sister action of intentional interference with a contract (also known as inducement to breach a

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<sup>32</sup> See, e.g., David Howarth, *Is There a Future for Intentional Torts?*, in *THE CLASSIFICATION OF OBLIGATIONS* 233, 266 (Peter Birks ed. 1997); see also William M. Landes & Richard A. Posner, *An Economic Theory of Intentional Torts*, 1 *INT'L REV. L. & ECON.* 127, 127 (1981) ("Intent' is not a normal part of the economist's vocabulary . . . . [P]erhaps this is why there is so little writing on intentional torts as such."); Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 *ARIZ. L. REV.* 1061, 1062 (2006) (noting how there is "much more complexity to the structure of intentional tort doctrine than we typically assume").

contract), which has received significantly more attention over the years. While similar in their broad structure, the two actions are distinct in many important analytical and normative respects.<sup>33</sup> This Part provides an overview of tortious interference with a prospect. Section I.A describes the origins and development of tortious interference with a contract, the original tortious interference claim; Section I.B. then focuses on the distinctiveness of interference with a prospect from a doctrinal perspective; and Section I.C examines the theoretical considerations motivating the construction and application of tortious interference with a prospect.

### A. *Tortious Interference in General*

Of the various torts that fall under the generic category of “tortious interference,” tortious interference with a contract, otherwise known as intentional inducement of breach, remains the best known and most commonly invoked. Its prominence within the broader category is also reflective of the manner in which the category evolved as a whole. Some scholars trace the roots of the claim back to Roman law, which allowed a master to recover from a third party for behavior that interfered with the ability of a servant to perform his duties to the master.<sup>34</sup> Early English law adopted the Roman law claim into the common law, and in addition came to introduce an independent statutory claim for “procurement” or “enticement.”<sup>35</sup> These were distinct situations where a third party had succeeded in luring a servant away from his or her master.<sup>36</sup> This position continued until the mid-nineteenth century, when the tortious interference action received its clearest common law formulation in the now-celebrated case of *Lumley v. Gye*.<sup>37</sup>

The case arose out of a situation where a prominent opera singer, Johanna Wagner, had contracted to sing exclusively at the plaintiff’s theatre for three months.<sup>38</sup> The defendant, who operated a competing theatre, persuaded Wagner to break her contract with the plaintiff and to perform at his theatre

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<sup>33</sup> See DOBBS ET AL., *supra* note 23, §638.

<sup>34</sup> See Francis Bowes Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 663-66 (1923) (describing the tradition of the *paterfamilias* bringing on action when a servant is injured and loss of services is suffered).

<sup>35</sup> *Id.* at 664-65; see also Note, *Tortious Interference*, *supra* note 27, at 1514-15 (1980) (“The law strengthened a master’s control over his servants by preventing others from interfering with the relationship during the term of service.”).

<sup>36</sup> See Sayre, *supra* note 34, at 665-66 (“This enactment did not wipe away the preexisting common law action for injuring another’s servants through violence; it created an additional statutory remedy for enticing another’s servants with features quite distinct from those of the common law action.”).

<sup>37</sup> *Lumley v. Gye*, (1853) 118 Eng. Rep. 749 (Q.B.).

<sup>38</sup> *Id.* at 752.

instead.<sup>39</sup> While the plaintiff commenced an action against Wagner for breach of contract, he independently brought an action against the defendant for inducing the breach of his contract with Wagner.<sup>40</sup> In addressing this claim, the court chose to expand the action for enticement into a more general principle and ultimately found for the plaintiff, noting that it was “clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master’s service . . . commits a wrongful act for which he is responsible at law.”<sup>41</sup> The formal structure of a master–servant relationship was hardly essential to the court’s formulation, and it went on to conclude that there was “no reason for confining the case to services or engagements under contracts for services of any particular description” and that it “may well apply to all cases where there is an unlawful and malicious enticing away of any person employed to give his personal labour or service for a given time under the direction of a master or employer who is injured by the wrongful act.”<sup>42</sup>

In the end, the court based its decision on the fact that the plaintiff had acted “maliciously” under the facts of the case.<sup>43</sup> Yet, in principle some of the judges in the case appeared perfectly willing to equate malice with actual notice of the underlying contract. Thus emerged the action of tortious interference with a contract as a formal and independent claim at common law. A few decades later, the case of *Bowen v. Hall* affirmed the principle developed in *Lumley*, converting it into a recognized doctrine of the common law.<sup>44</sup> Adding content to the elements, the court in *Bowen* further noted that not all attempts to persuade a party to breach its contract were actionable as such. “[I]f the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff,” only then is it “a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it.”<sup>45</sup> Shortly thereafter, the case of *Temperton v. Russell* expanded the reach of the action to encompass any type or category of contract, while affirming the prior courts’ conception of malice.<sup>46</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> This action became a celebrated contract law case in its own right. *Lumley v. Wagner* (1852) 64 Eng. Rep. 1209 (Ch. Div.).

<sup>41</sup> *Gye*, 118 Eng. Rep. at 752–53.

<sup>42</sup> *Id.* at 753.

<sup>43</sup> *Id.* at 755.

<sup>44</sup> *Bowen v. Hall*, (1881) 6 QBD 333, 339 (Eng.).

<sup>45</sup> *Id.* at 337.

<sup>46</sup> *Temperton v. Russell* (No. 2), (1893) 1 Q.B. 715, 727–28 (Eng.) (finding the limitation of the principle to personal service contracts to be untenable).

It wasn't long before the case and its progeny received significant attention among American courts and scholars.<sup>47</sup> The U.S. Supreme Court endorsed the doctrine in 1894, with a majority of states doing the same shortly before.<sup>48</sup> As this occurred, however, courts applying the doctrine came to imbue it with an important modification. The element of "malicious" behavior came to be stripped of its independent analytical significance. As long as a defendant was shown to have known of the preexisting contract and to have acted in an intentional manner thereafter to procure its breach, the action was deemed satisfied.<sup>49</sup> Additionally, the defendant's market-driven motivations underlying the inducement were also treated as largely irrelevant.<sup>50</sup>

These developments caused one early commentator to lament that American courts had converted the doctrine "into a sweeping generalization, applicable to every case where a third party through his conduct causes the breach of a known contract."<sup>51</sup> Yet, in some ways this was hardly a mere

47 For early scholarly attention, see James Barr Ames, *Purchaser for Value Without Notice*, 1 HARV. L. REV. 1, 10 (1887) (citing *Lumley* to explain the tort of destroying the property for an obligee); Ernst Freund, *Malicious and Unlawful Interference*, 11 HARV. L. REV. 449, 451 (1898) (explaining how *Lumley* applies the theory of the right to employ labor "free from undue interference"); Oliver Wendell Holmes, Jr., *Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 11 (1894) (explaining that *Lumley* and its progeny "simply establish the principle that a contractual obligation operates not merely upon the person bound to performance, but upon every one else, insofar as he must not procure a breach of that obligation . . ."); Christopher Columbus Langdell, *A Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 55, 57 (1887) (discussing the idea that "a right created by a personal obligation can be violated by an act which constitutes a tort"); William Schofield, *The Principle of Lumley v. Gye, and Its Application*, 2 HARV. L. REV. 19, 23 (1888). *Lumley* was cited for the first time in an argument before the Supreme Judicial Court of Massachusetts in 1855. See *Ela v. Smith*, 71 Mass. 121, 129 (1855) (discussing the liability of defendants if they had aided others in unlawful acts). For the earliest American case law taking notice of the development, see *Chambers & Marshall v. Baldwin*, 1889 WL 1256, at \*1 (Ky. Super. May 8, 1889), arguing the dictum of *Lumley* extended the case's principles. See also *Walker v. Cronin*, 107 Mass. 555, 565 (1871) (expressing some doubt about the doctrine); *Heywood v. Tillson*, 75 Me. 225, 240 (1883) (discussing limitations in the doctrine's application); *Johnston Harvester Co. v. Meinhardt*, 1880 WL 10954, at \*3 (N.Y. Sup. Ct. 1880) (showing that enticement action is not strictly based on a master-servant relationship); *Duffies v. Duffies*, 45 N.W. 522, 523 (Wis. 1890) (using *Lumley* as an example of the many relationships to which the doctrine applies).

48 See *Angle v. Chicago, St. Paul, Minneapolis, & Omaha Ry. Co.*, 151 U.S. 1, 13-15 (1894) ("It has been repeatedly held that, if one maliciously interferes in a contract between two parties, and induced one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer . . ."); see also Note, *Lumley v. Gye in the Supreme Court*, 7 HARV. L. REV. 425, 428 (1894) (noting that "Mr. Justice Brewer . . . adopts the principle of *Lumley v. Gye*").

49 See, e.g., *Beekman v. Marsters*, 80 N.E. 817, 819 (Mass. 1907) ("[If] the defendant [knew] of the contract between the plaintiff and the hotel corporation [and] intentionally and without justification induced the hotel corporation to break [the contract] . . . [t]hat is proof of malice . . ."). For a criticism of the case, see Sayre, *supra* note 34, at 676-77.

50 See, e.g., *Beekman*, 80 N.E. at 818 ("No case has been cited which holds that a right to compete justifies a defendant in intentionally inducing a third person to take away from the plaintiff his contractual rights.").

51 Sayre, *supra* note 34, at 677.

product of American lawmaking. As previously discussed, the court in *Lumley* had itself equated malice with notice of the contract.<sup>52</sup> Later courts signed on to the idea that a benefit (to the defendant) coupled with a detriment (to the plaintiff) also evidenced such malice, a structure that was common to just about any knowing breach.<sup>53</sup> Rhetoric aside, malice therefore does not appear to have been a consciously designed constraint during the early framing of the doctrine. American courts and scholars interpreting the malice requirement came to understand it as connoting the absence of a justification or privilege for the defendant's behavior and nothing more.<sup>54</sup> The idea of malice as ill will or bad motive never quite took off. As long as a defendant knew that the act was likely to result in a breach, and did in fact produce such a breach, the element was deemed satisfied.

As should be apparent, the gradual crystallization of the doctrine around an identifiable interest of the plaintiff (contractual performance), and a concurrent expansion of the defendant's behavior that might trigger liability, in effect created a property-like interest in the claimant.<sup>55</sup> In other words, the tort had the direct effect of converting an *in personam* contractual relationship (that existed between the parties to the contract) into a broader *in rem* obligation against anyone with knowledge of the contract. That obligation was of course—unlike regular property—limited to not inducing a breach of the contract. Yet, it crystallized the propertization of the contractual obligation. Indeed, this point was brought home most forcefully in one court's explicit observation that the doctrine allowed a contract to

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<sup>52</sup> *Lumley v. Gye*, (1853) 118 Eng. Rep. 749, 752-53 (Q.B.).

<sup>53</sup> See, e.g., *Bowen v. Hall*, (1881) 6 QBD 333, 338 (Eng.); see also Note, *Tortious Interference*, *supra* note 27, at 1527 (“Since virtually all interference works to the benefit of the third party and the detriment of the plaintiff, this definition of malice enabled courts to impose liability in almost any case of inducement.”).

<sup>54</sup> See Carpenter, *supra* note 21, at 735 (1928) (“Malice in the sense of bad motive is not a requisite of the *prima facie* tort.”); see also *Cumberland Glass Mfg. Co. v. De Witt*, 87 A. 927, 931 (Md. 1913), *aff'd*, 237 U.S. 447 (1915) (“Malice in this form of action does not mean actual malice, or ill will, but consists in the intentional doing of a wrongful act without legal justification or excuse.”). *But see* Sayre, *supra* note 34, at 675 (“‘Malice’ connotes a mental element.”).

<sup>55</sup> See Carpenter, *supra* note 21, at 732 (“The promisee’s interest . . . is to have performance of the contract. He has also an interest as respects third persons in having the contract right which he has against the promisor free from invasions by third persons which may either prevent, retard, or lessen the value of its performance.”); Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 351 (1980) (“[T]he interference torts courts have recognized a kind of property right in contracts, because the contract, which begins as an agreement between two persons has somehow come to bind persons who were not parties to it and do not benefit from it.”); Fine, *supra* note 27, at 1118 (“[A] party expecting to enter into a contract has a property right . . .”); Note, *Tortious Interference*, *supra* note 27, at 1524 (noting that under the doctrine, “breach of a contractual promise is a violation of property rights”). Even some early courts characterized it as such. See, e.g., *Jersey City Printing Co. v. Cassidy*, 53 A. 230, 232 (N.J. Ch. 1902) (“That the interest of an employer or an employ[ee] in a contract for services is property is conceded.”).

“impose[] on all the world the duty of respecting that contractual obligation.”<sup>56</sup> Tortious interference with a contract thus created a framework of exclusion—from the underlying contractual obligation—through a regime of liability—an analytical structure that has been described elsewhere as a form of “quasi-property.”<sup>57</sup>

In the tort’s development during the first quarter of the twentieth century, primary reliance on the formal elements of the claim proved to be inadequate, as courts and scholars became increasingly aware that doctrinal rules themselves were indeterminate and driven by normative criteria.<sup>58</sup> What soon emerged in place of a mechanistic application of the elements was recognition that a claimant’s property (or property-like) interest needed to be balanced against the market-driven interests of defendants, and of society (in free competition) more generally.<sup>59</sup> This, in turn, produced an emphasis on “balancing” competing considerations. One leading commentator thus proposed a general approach in the following terms:

Whether a privilege of invasion exists depends on whether it is of greater moment to society to protect the defendant in the invading activities than it is to protect and guard the plaintiff’s interest from such invasions. An evaluation and balancing of the social import of the conflicting interests of the respective parties and of the social interests *per se* are involved. The defendant may be privileged to invade an interest of the plaintiff although it is not for the protection or furtherance . . . of a social interest of greater public import than is the social interest involved in the protection of the plaintiff’s individual interest.<sup>60</sup>

Balancing entailed examining both social and individual interests on both sides of the claim. In due course, courts developed a fairly rich jurisprudence of privileges and defenses that justified defendants’ actions and exempted them from a claim of tortious interference.<sup>61</sup>

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<sup>56</sup> *Temperton v Russell* (No.2), (1893) 1 Q.B. 715, 730 (Eng.).

<sup>57</sup> See Shyamkrishna Balganesh, *Quasi-Property: Like, But Not Quite Property*, 160 U. PA. L. REV. 1889, 1889-93 (2012) (discussing the contours of quasi-property and its reliance on relational liability); Dobbs, *supra* note 55, at 373.

<sup>58</sup> See Note, *Tortious Interference*, *supra* note 27, at 1537 (“Formal reasoning could not resolve the dilemma, nor could blind appeal to conclusory doctrines such as malice.”). For an overview of this general current in legal thinking, manifested in the idea of Legal Realism, see generally BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2009).

<sup>59</sup> See Note, *Tortious Interference*, *supra* note 27, at 1537-38 (describing the two strategies that emerged to resolve this problem: new rules that “qualified both parties’ rights and privileges” and new attempts to balance competing interests).

<sup>60</sup> Carpenter, *supra* note 21, at 745.

<sup>61</sup> For a useful summary of this jurisprudence, see *id.* at 745-62.



This general approach—of balancing competing considerations—continued through the 1970s, and culminated in a specific provision in the Second Restatement of Torts, which set out the various considerations that courts had come to employ as part of this process.<sup>62</sup> The commentary accompanying the provision highlights the ambiguity accompanying the exercise and notes the reality that the ultimate decision “depends upon a judgment and choice of values in each situation.”<sup>63</sup> The Restatement suggested liability only when the interference was both intentional and improper, with the impropriety in turn depending on balancing competing considerations.<sup>64</sup> The interference with contract tort is intriguing because it enables courts to examine and balance competing normative considerations directly, and on an individual case-by-case basis. Rather than require that the balancing take place behind an abstract conceptual device, the mid-twentieth century evolution of the doctrine enabled the idea of the parties’ interests to be laid out directly during the litigation. This in turn required courts to confront their own roles as adjudicators not just of formal claims/criteria, but of the relative and situational importance of the competing considerations at stake. This approach continues to this day. A leading treatise on American tort law describes the balancing approach that courts developed as the “good sense” approach.<sup>65</sup>

As understood today, tortious interference with a contract embodies six key elements:<sup>66</sup>

*First*, there must be a valid contract in existence.

*Second*, the defendant must have known of the contract’s existence before its breach, since without which the intentionality question becomes moot. The defendant need not have known the specifics of the contract (i.e., its individual provisions). Therefore, circumstantial evidence of knowledge is usually sufficient.<sup>67</sup>

*Third*, the interference must be intentional. Courts have interpreted this requirement to mean either the existence of a specific purpose—to interfere—on the part of the defendant, or instead the defendant’s knowledge that the

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<sup>62</sup> RESTATEMENT (SECOND) OF TORTS § 767 (AM. LAW INST. 1979).

<sup>63</sup> *Id.* at § 767 cmt. b.

<sup>64</sup> *See id.* at § 766 (“One who intentionally and *improperly* interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.” (emphasis added)).

<sup>65</sup> *See DOBBS ET AL.*, *supra* note 23, § 618 (“Most courts still decide what is an improper means or improper purpose in the way English courts did in the 19th century—by simply applying what the judge thinks is ‘good sense.’”).

<sup>66</sup> *Id.* § 619.

<sup>67</sup> *See id.* § 621 (detailing how intent and knowledge are to be proven).

interference was a “substantial certainty.”<sup>68</sup> In practice, the intentionality requirement is hardly an onerous one.

*Fourth*, the defendant must have had an “improper motive” or used “improper means.”<sup>69</sup> In recent years, courts appear to be moving to the latter of these alternatives, and abandoning the former, which relies on an earlier conception of malice.<sup>70</sup>

*Fifth*, the defendant’s interference must have caused the breach; it should not have occurred for reasons unconnected to the interference.<sup>71</sup>

And *sixth*, the breach must cause the plaintiff some harm or detriment.<sup>72</sup>

Of the six elements seen in the modern formulation of the tort, the element of “improper means” is perhaps the hardest to satisfy in practice, given its slipperiness. Acts that are independently criminal or tortious form only one part of the category of improper means.<sup>73</sup> Beyond crimes and actionable wrongs, breaches of accepted ethical and professional standards and other forms of behavior that independently (of the interference claim) invite an element of disapprobation seem to qualify as well.<sup>74</sup> Despite the claim having expanded to now cover a variety of different contractual situations and a diverse set of defendant behaviors, it is crucial to emphasize that it has yet to simplistically treat the act of “interference” as independently wrongful.<sup>75</sup> Only when the interference is shown to be wrongful as an independent matter—either owing to the interests/rights involved, the defendant’s motives, or the independent impropriety of the actions as such—does liability attach. Thus, while liability under the tort has grown, it has done so with close consideration of the normative issues at stake, a lesson that is important for copyright law.

### B. *The Distinctiveness of the Action for a “Prospect”*

As the previous discussion reveals, tortious interference with a contract effectively generates a property-like entitlement around the contractual benefit that is meant to accrue to the contracting parties as a legal matter.

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* §§ 622-629.

<sup>70</sup> *See id.* § 623 (describing a third—and most recent—stage in the development of this prong among courts wherein liability is based on the defendant’s “use of tortious or otherwise improper means of interference”).

<sup>71</sup> *Id.* § 619.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* §§ 627-29.

<sup>74</sup> *Id.* § 627.

<sup>75</sup> *See Dobbs, supra* note 55, at 344 (observing that “[t]o find a wrong in interference we shall have to add some factor besides the act of interfering by persuasion or honest representation” and arguing that “[we] should therefore put aside any notion that interference is in its nature ‘wrong’”).

Given that the law guarantees either contractual performance or its monetary equivalent to the contracting parties, tortious interference with a contract treats the de jure guarantee of an economically valuable benefit as worthy of independent protection through a regime of liability.

The basis of the entitlement in tortious interference with a contract therefore originates in the central premise of contract law, according to which a legally enforceable agreement guarantees the contracting party some measure of benefit.<sup>76</sup> Conversely, when a contract does not exist between the parties, the law obviously can no longer guarantee the accrual of some benefit. Nonetheless, there are numerous situations where a similar economic benefit is seen as probabilistically very likely, and therefore worthy of similar protection against improper interferences, even if not certain. It is to protect such situations, i.e., where the economic benefit is less than certain but nevertheless highly likely to accrue to a party, that tortious interference with a prospect developed as a distinctive claim.

The origins of tortious interference with a prospect can be traced back to the case of *Temperton v. Russell*,<sup>77</sup> an English case decided shortly after *Lumley*, wherein the court confirmed the logic of tortious interference but appeared willing to extend it further. The court there observed:

The next point is, whether the distinction taken for the defendants between the claim for inducing persons to break contracts already entered into with the plaintiff and that for inducing persons not to enter into contracts with the plaintiff can be sustained, and whether the latter claim is maintainable in law. I do not think that distinction can prevail. There was the same wrongful intent in both cases, wrongful because malicious. There was the same kind of injury to the plaintiff. It seems rather a fine distinction to say that, where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff, which he would otherwise have entered into, it is not actionable.<sup>78</sup>

In short, the court in *Temperton* saw (a) an interference with a valid contractual benefit, and (b) an interference with a benefit that was likely to culminate in a contractual arrangement, as largely equivalent. In one respect, the court's logic is persuasive: the mere formalization of a benefit through a contract

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<sup>76</sup> Indeed, the very definition of a contract says as much, in understanding a contract as an agreement enforceable at law. See RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.").

<sup>77</sup> [1893] 1 Q.B. 715 (Eng.).

<sup>78</sup> *Id.* at 728.

does little to transform its substantive basis. Preventing a contract from being formed and preventing a contractual performance from happening once the contract is indeed formed, both produce identical harm to the claimant. Yet from another perspective, the distinction is analytically significant.

Whereas in the one (i.e. the contract), contract law's guarantee of a benefit to the claimant underwrites the basis for the entitlement that tort law then protects through a property-like regime; in the latter, that guarantee must be derived independently from the facts surrounding the parties' interactions. In other words, determining whether the plaintiff had an interest that was itself worthy of protection from an interference—however improper or intentional the interference might have been—emerges as an important first step in the inquiry. This is unlike in the contractual setting, where the claim effectively outsources this step to contract law.

While the action for tortious interference with a prospect is today commonly thought of as a derivative of tortious interference with a contract, some trace its origins back to the fifteenth century, and the common law's development of actions for threatening a business's profits with "mayhem and vex."<sup>79</sup> In its origins, the tort action therefore developed as a claim for unfair competition, designed to police the line between permissible and impermissible market-behavior.<sup>80</sup> The action was in turn built on the recognition that in a competitive setting, one party always loses regardless of the legality of the other's behavior. Mere harm/loss was therefore insufficient to trigger liability; something more was always needed. With the decision in *Lumley* and its expansion in *Temperton*, courts appear to have infused the common law's understanding of tortious interference with considerations drawn from the early cases on unfair competition.<sup>81</sup>

Tortious interference with a prospect does not appear to have gained much acceptance in the United States until the middle of the twentieth century, when a few state courts began recognizing the action.<sup>82</sup> It was not until the 1970s that courts across the country began grappling with the contours of the tort, with some jurisdictions (e.g., California) adopting a more liberal approach to the tort, while others (e.g., New York) continuing to limit its scope and reach for fear of expanding liability to cover otherwise

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<sup>79</sup> RESTATEMENT (SECOND) OF TORTS § 766B cmt. b. (AM. LAW INST. 1979).

<sup>80</sup> Some see this line of reasoning to correspond to some of the early landmark unfair competition cases. *See id.* ("In all of these cases liability was imposed for interference with business expectancies . . . but in all of them the actor's conduct was characterized by violence, fraud, or defamation, and was tortious in character.")

<sup>81</sup> *Id.*

<sup>82</sup> *See, e.g.,* *Masoni v. Bd. of Trade of San Francisco*, 260 P.2d 205, 207 (Cal. Dist. Ct. App. 1953) ("Actionable interference of this kind is not limited to inducing breach of an existing contract or other wrongful conduct but comprises also unjustifiably inducing a third person not to enter into or continue a business relation with another.").

legitimate behavior.<sup>83</sup> During this development, the action also took on different names—“interference with a business relation,” “interference with an economic opportunity,” or “interference with a prospective advantage”—within different jurisdictions even though they encompassed the same claim.<sup>84</sup> As applied today, the action has four elements: (i) the defendant must have known of the plaintiff’s economic prospect and intended to interfere with it; (ii) the prospect must have been reasonably likely to be realized and not merely speculative; (iii) the interference must have been by improper means or with an improper motive; and (iv) the interference must have caused some harm to the plaintiff.<sup>85</sup>

The first and fourth elements of the action are largely similar to tortious interference with a contract. Knowledge of a prospect, coupled with the substantial certainty that it will be interfered with, is sufficient to satisfy the elements of knowledge and intention. Additionally, the harm at issue is clearly economic harm. The real divergence arises in the second and third elements (i.e., in defining the prospect), and in characterizing the defendant’s behavior as wrongful. As should be apparent, these questions are not wholly unconnected to the first and fourth elements and exert a good deal of influence over them.

On the question of a qualifying “prospect” and defendant wrongdoing, case law appears to reveal an inverse correlation.<sup>86</sup> The more certain a prospect is, the lesser is the proof of defendant wrongdoing that the law insists on. An actual contract is thus the most certain of all prospects, an executory contract or invalid agreement slightly less certain, and so on. As the certainty of the prospect diminishes, courts demand heightened proof of actual defendant wrongdoing for liability to attach. Or, as one treatise puts it, the defendant has far greater privilege to interfere with opportunities than it would with an “existing and enforceable contract.”<sup>87</sup>

This inverse correlation is important to appreciate, because it gives the “right” underlying the working of the tort a distinctively *relational*

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<sup>83</sup> See, e.g., *Buckaloo v. Johnson*, 537 P.2d 865, 871 (Cal. 1975) (“First of all, the tort is considerably more inclusive than actions based on contract or interference with contract, and thus is not dependent on the existence of a valid contract.”); *Gold v. L.A. Democratic League*, 122 Cal. Rptr. 732, 739 (Cal. Dist. Ct. App. 1975) (“An action lies for intentional interference with advantages which are merely prospective; such an action is governed by the principles applicable to the tort of inducing a breach of contract intentionally and without justification.”); *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 406 N.E.2d 445, 449 (N.Y. 1980) (“[G]reater protection is accorded an interest in an existing contract . . . than to the less substantive, more speculative interests in a prospective relationship . . .”).

<sup>84</sup> DOBBS ET AL., *supra* note 23, § 638.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

dimension.<sup>88</sup> Determining whether an action is potentially proscribed is dependent on the very nature of the interest involved and vice versa, requiring an understanding of the probabilistic and contingent nature of both ideas. To the extent that the tort recognizes a right in an economic prospect or opportunity, the nature of that right (and its violation) is itself dependent on the defendant's actions and consequences.

### 1. Identifying a Protectable Opportunity

The first, and perhaps most important, step in establishing a claim for tortious interference with a prospect lies in identifying a protectable opportunity that qualifies as a prospect which the plaintiff is entitled to. Not surprisingly, courts have spent much time and effort trying to delineate a protectable opportunity for the tort.

As a preliminary, courts insist that the prospect must be something more than a "mere hope."<sup>89</sup> It must instead be a "reasonable" as opposed to merely "subjective" expectancy.<sup>90</sup> This distinction is hard to capture in the abstract, but appears to eliminate situations where the underlying facts, which form the basis of the expectation, are legally or factually incompatible with the expectancy. Thus, an at-will employee's hope of long-term employment when the existing employment contract clearly suggests otherwise, would remain a subjective—and unreasonable—expectancy.<sup>91</sup> Similarly, courts also insist that the prospect be one that was likely to have accrued to the plaintiff "but for" the defendant's intervention.<sup>92</sup> This conception appears more stringent than the reasonable–subjective distinction insofar as it demands proof of an actual benefit likely to accrue. It would therefore exclude situations where a plaintiff was precluded from placing a bid, and yet the bid—even if placed—would have likely lost out to other offers.<sup>93</sup> In all of these situations, courts place

<sup>88</sup> For an elaborate theoretical account of this relational idea, see generally Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313 (2012).

<sup>89</sup> *Glenn v. Point Park Coll.*, 272 A.2d 895, 899 (Pa. 1971); see also *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 815 (Fla. 1994) ("The mere hope that some of its past customers may choose to buy again cannot be basis for a tortious interference claim."); *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 222 (Minn. 2014) ("This must be something more than a mere hope or innate optimism of the salesman."); *United Educ. Distribs., LLC v. Educ. Testing Serv.*, 564 S.E.2d 324, 329 (S.C. Ct. App. 2002).

<sup>90</sup> *Stehno v. Spring Spectrum*, 186 S.W.3d 247, 250 (Mo. 2006).

<sup>91</sup> *Id.*

<sup>92</sup> See, e.g., *Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 140 (3d Cir. 2005) (discussing plaintiff's argument that plaintiff "would have obtained the contract but for the defendant's marketing campaign"); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1015 (3d Cir. 1994) (failing to show that plaintiffs would have entered into the contracts but for defendants' interference).

<sup>93</sup> *Santana*, 401 F.3d at 140-41 ("However, even if [plaintiff] had had the opportunity to bid, one of the other two suppliers . . . could still have obtained the contract.").

great emphasis on the background and surrounding factual circumstances before presuming the existence of a prospect.

Despite these somewhat stringent tests, in practice courts appear quite willing to find the existence of a prospect in a variety of situations. Indeed, one treatise notes the existence of a disconnect between courts' abstract rhetoric about the identification of a prospect and their actual use of the factual record to then find a prospect in ways that contradict their abstract statements.<sup>94</sup> While some courts therefore appear to insist (in the abstract) that the action is only available against specific or identifiable "relationships", these restrictive interpretations might be interpreted as little more than "overstatements" of courts' search for a causal connection between the interference and the lost opportunity.<sup>95</sup>

Of the various jurisdictions that continue to endorse the tort, California appears to have the most advanced jurisprudence. California courts have developed a process for identifying a protectable prospect that balances both analytical and pragmatic considerations. They insist on the plaintiff establishing a "reasonable probability" and a counterfactual causal relationship between the interference and the benefit to the plaintiff.<sup>96</sup> All the same, to identify a reasonable probability, they look to how much "chance" is involved in the actual accrual of the benefit. In making this assessment, they rely on William Prosser's admonition that the prospect usually reflects a "background of business experience on the basis of which it is possible to estimate with some fair amount of success both the value of what has been lost and the likelihood that the plaintiff would have received it if the defendant had not interfered."<sup>97</sup>

The case of *Youst v. Longo*,<sup>98</sup> decided by the Supreme Court of California, is a good example of courts' approach to identifying a protectable prospect. The plaintiff was a racehorse owner who brought an action for intentional interference with a prospective economic advantage against the defendant, the rider of a competing racehorse.<sup>99</sup> The plaintiff alleged that as a result of the defendant's actions during the race (of striking the plaintiff's horse), he

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<sup>94</sup> DOBBS ET AL., *supra* note 23, § 641 ("[C]ourts sometimes state the constraining rule and then later in the same opinion re-state it to eliminate its bite, undermining any confidence that the original statement was purposeful and exclusive.").

<sup>95</sup> *Id.* § 641 & nn. 7-9 (making this point and citing to cases from different jurisdictions). In an alternative reading, these restrictions in courts' rhetoric may be seen as meaningful.

<sup>96</sup> James V. Telfer, Comment, *Interference with Prospective Gain: Must there be a Contract?*, 22 SAN DIEGO L. REV. 401, 408 (1985).

<sup>97</sup> W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 1006 (W. Page Keeton et al. eds., 5th ed. 1984).

<sup>98</sup> 729 P.2d 728 (Cal. 1987).

<sup>99</sup> *Id.* at 730-31.

was prevented from winning a larger cash prize than he actually did.<sup>100</sup> The cash prize was thus the prospect that the plaintiff claimed an entitlement to; the defendant's intentional actions were alleged to have improperly interfered with this prospect. Central to the court's analysis was its recognition that the prize at issue was a mere contest, a "speculative expectanc[y]."<sup>101</sup> The Court went on to observe:

Determining the probable expectancy of winning a *sporting* contest but for the defendant's interference seems impossible in most if not all cases, including the instant case. Sports generally involve the application of various unique or unpredictable skills and techniques, together with instances of luck or chance occurring at different times during the event, any one of which factors can drastically change the event's outcome. In fact, certain intentional acts of interference by various potential "defendant" players may, through imposition of penalties or increased motivation, actually allow the "victim" player or team to prevail. Usually, it is impossible to predict the outcome of most sporting events without awaiting the actual conclusion.<sup>102</sup>

A sporting contest was thus held to be of too low probability to merit protection.

Equally important in the Court's conclusion was its recognition that unlike in some other speculative situations, there was also no independent public policy reason to allow protection for probable expectancies in sporting contests. The Court thus left in place protection under the tort for other kinds of chance-based expectancies, such as a recovery against a defendant who lost (or destroyed) the evidence that a plaintiff needed in order to bring a personal injury claim for an accident.<sup>103</sup> The interest in a "prospective civil action" was thought to overcome the lack of certainty underlying the entitlement (to actual damages in the litigation).<sup>104</sup> Similarly, it also left undisturbed a prior case that allowed recovery from a defendant who had caused the plaintiff to lose an election by sending out false information about the latter.<sup>105</sup> Even though the plaintiff lost the election by a large margin, the court in the case had held that the recovery was permitted since the uncertainty in the entitlement (to the office) was overcome by the importance of communicating accurate information to the public during an election.<sup>106</sup>

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<sup>100</sup> *Id.* at 731.

<sup>101</sup> *Id.* at 735.

<sup>102</sup> *Id.* at 736.

<sup>103</sup> *Id.* at 735. The case was *Smith v. Superior Court*, 198 Cal. Rptr. 829 (Cal. Ct. App. 1984).

<sup>104</sup> *Smith*, 198 Cal. Rptr. at 837.

<sup>105</sup> *Youst*, 729 P.2d at 734. The case was *Gold v. L.A. Democratic League*, 122 Cal. Rptr. 732 (Cal. Ct. App. 1975).

<sup>106</sup> *Youst*, 729 P.2d at 734.



All of this points to three general rules that seem to be at play in courts' approach to identifying a protectable entitlement under the tort. First, and unequivocally, uncertain expectancies are treated as unprotectable. These are typically situations where the element of chance or luck is central to the very realization of the benefit, or where the benefit is heavily dependent on the actions of other participants, which are in turn unpredictable. A gamble, lottery, or sporting chance represents just this kind of uncertainty, where the realization of the prize is far too probabilistic. To speak of an *actual* expectancy here—as opposed to a *mere hope* of a windfall—is seen as illogical. Second, while chance recoveries are excluded, the benefit does not need to be absolutely certain. Courts allow for probabilistic recoveries to be included under the idea of a benefit, as long as the probabilities are either under the control of the claimant, or discernible as a regular occurrence based on business experience. Third, and most importantly, courts appear willing to tolerate lower probabilities in the entitlement when accompanied by an identifiable public policy supporting the entitlement. In these situations, the low-probability entitlement is seen as incentivizing socially beneficial behavior by the plaintiff, rendering it worthy of independent protection under the tort. The plaintiff's ability to commence a personal injury lawsuit represents one such situation.

In summary then, the common law has over the years come to develop a fairly coherent set of principles with which to distinguish between speculative chances and probable expectancies. The distinction embodies both analytical and evaluative components, a duality that is of relevance when we move to copyright law.

## 2. Interference as Wrongdoing

Perhaps even more so than with tortious interference with a contract, claims of tortious interference with a prospect involve the complex balancing of a defendant's legitimate interests against the harm sustained by a plaintiff. The primary area where this nuance manifests itself is in courts' marked reluctance to treat all loss-producing interferences with a prospect as per se actionable.<sup>107</sup> The law instead pays close attention to differentiating between the mere *result* of the defendant's conduct on the one hand—i.e., the plaintiff's harm—and the *means* employed in such conduct on the other.

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<sup>107</sup> Indeed, when viewed in the abstract some have noted that the rules seem to suggest that “the whole competitive order of American industry is prima facie illegal.” *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 902 P.2d 740, 745 (Cal. 1995) (quoting Professor Carl Auerbach at the ALI Proceedings leading to the passage of the Restatement).

Some early courts emphasized the element of motive in their analysis of the defendant's wrongdoing.<sup>108</sup> An "improper motive" was thus taken to be sufficient to find liability.<sup>109</sup> In due course, this came to be abandoned, as courts came to appreciate the difficulty inherent in policing the boundary between a bad motive (one directed exclusively at harming the plaintiff, with no corresponding benefit) and a mixed one (one where the harm to a plaintiff is itself the basis for the defendant's benefit).<sup>110</sup> Consequently, the modern trend in cases of tortious interference with a prospect is a rejection of liability based exclusively on the defendant's motive.<sup>111</sup>

Courts instead focus on the means employed by a defendant in interfering with the identified prospective economic advantage. The jurisprudence on this topic reveals four principal categories of activities that qualify as actionable under the tort.<sup>112</sup>

The first is *independently unlawful means*, which includes behavior that, on its own—i.e., independent of tortious interference with a prospect—is actively proscribed by the law's directives. These directives encompass not just criminal law prohibitions, but also relational directives that emanate from tort law.<sup>113</sup> Included in this category are "violence, threats or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of insider or confidential information, [and] . . . breach of a fiduciary relationship."<sup>114</sup> Given that in these situations, a plaintiff ordinarily has recourse to an alternative claim for the defendant's actions; courts often try to ensure that the tortious interference with a prospect claim is not redundant before allowing the action to proceed.<sup>115</sup>

The second category encompasses *conditionally unlawful means*. It covers behavior by the defendant that is unlawful in the abstract, but is nonetheless

<sup>108</sup> See DOBBS ET AL., *supra* note 23, § 639 ("At one time judges stood ready to impose tort liability for ordinary business decisions . . . if a bad motive was perceived.").

<sup>109</sup> *Id.*

<sup>110</sup> For a discussion of this distinction, see *id.* § 625.

<sup>111</sup> See, e.g., *Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862, 867 (7th Cir. 1999) ("[T]he tort of interference with business relationships should be confined to cases in which the defendant employed unlawful means to stiff a competitor."); *Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532, 543 (7th Cir. 1986) (requiring that the means used rise to the level of "wrongfulness"); *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 713 (Tex. 2001) (requiring that the means be "independently tortious or unlawful").

<sup>112</sup> See DOBBS ET AL., *supra* note 23, §§ 627–29.

<sup>113</sup> See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 945–46 (2010) ("[T]orts are a special kind of legal wrong not only because they are injury-inclusive or realized wrongs but also because they are *relational wrongs*.").

<sup>114</sup> *Duggin v. Adams*, 360 S.E.2d 832, 836 (Va. 1987).

<sup>115</sup> DOBBS ET AL., *supra* note 23, § 627 ("Where the plaintiff's claim falls within the realm of a specific tort, however, the rules of that tort should ordinarily control and the overlapping claim for interference with contract should be disregarded as surplusage.").

not actionable by the plaintiff. This nonactionability must however be a consequence of a defect unrelated to the defendant's conduct (e.g., standing or the statute of limitations) rather than one going directly to such conduct.<sup>116</sup> Thus, a defendant's fraudulent behavior toward a third party, which interferes with a plaintiff's prospect, might be actionable by the third party—but not the plaintiff—rendering it conditionally unlawful.<sup>117</sup> On the other hand, when the claim is defeated because a constitutive element of the tort is not satisfied, this affects the plaintiff's claim as well. The same is true of defenses that the defendant could raise to defeat the claim to a third party.<sup>118</sup> Since such a defense eliminates wrongdoing altogether, the plaintiff cannot continue to claim that the defendant's behavior was unlawful.

It is not only unlawful behavior of the defendant that qualifies as actionable wrongdoing for tortious interference with a prospect. Lawful behavior too, behavior that the law does not directly proscribe, can qualify under certain circumstances. The third and fourth categories represent this reality. The third category is therefore behavior that is *lawful but legally discouraged*. It covers behavior that does not give rise to an independent cause of action but nonetheless is discouraged by the spirit of the law, or through the law's additional requirements.<sup>119</sup> Making intentionally false statements represents an example. While a fraudulent misrepresentation ordinarily vitiates a contract, it is hardly independently actionable when made to a stranger.<sup>120</sup> All the same, few would disagree that it is actively discouraged by the law.

The fourth category moves farther away from the law and represents situations that are *lawful but unethical*. This category is the most nebulous to police, and usually covers behavior that is inappropriate owing to the existence of a strong norm or custom to the contrary.<sup>121</sup> The source of that norm then becomes an independent variable that the plaintiff must prove, something that courts approach with varying degrees of comfort.<sup>122</sup>

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<sup>116</sup> See *Kraemer v. Harding*, 976 P.2d 1160, 1170 (Or. Ct. App. 1999) (barring plaintiff's claim because of the statute of limitations). For a clear statement, see *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 582 P.2d 1365, 1371 n.11 (Or. 1978) (“[I]n a claim of improper interference with plaintiff's contractual relations, it is not necessary to prove all the elements of liability for another tort if those elements that pertain to the defendant's conduct are present.”).

<sup>117</sup> See *Top Serv. Body Shop, Inc.*, 582 P.2d at 1371 n.11.

<sup>118</sup> *DOBBS ET AL.*, *supra* note 23, § 628.

<sup>119</sup> *Id.* § 629 (putting “economic duress,” “undue influence,” and claims for “restitution” in this category).

<sup>120</sup> *Id.*

<sup>121</sup> See, e.g., *RTL Distrib., Inc. v. Double S Batteries, Inc.*, 545 N.W.2d 587, 591 (Iowa Ct. App. 1996) (noting how liability can be “premised on a violation of recognized ethical rules or established customs or practices in the business community”).

<sup>122</sup> For a reluctance to accept this category, see *Speakers of Sport, Inc.* 178 F.3d at 867 (“[T]he established standards of a trade or profession in regard to competition, and its ideas of unethical

In summary then, the element of wrongful “interference” encompasses a wide range of defendant behavior, beginning with overtly criminal actions to those that violate various ethical/customary norms. Much of the reason for this variation derives from the inverse correlation that the law recognizes, between the certainty underlying the prospective economic opportunity and the amount of wrongdoing required.

### C. Underlying Rationale(s)

Tortious interference with a prospect has received somewhat scarce normative analysis from scholars ever since its origins. Scholarly analyses have instead focused principally on inducement of breach (i.e., tortious interference with a contract), with several of the arguments therein carrying over well to tortious interference with a prospect.<sup>123</sup> A review of this limited literature as well as courts’ jurisprudence applying the tort, reveals three interrelated justifications for the action.

#### 1. Economic Justifications: Incentives and Deterrents

One justification attempts to understand tortious interference in principally economic terms, despite its conflict with the ideal of efficient breach.<sup>124</sup> The best known account of this justification is seen in the work of Lillian BeVier.<sup>125</sup> In her account, the tort functions as a deterrent against free riding in cases that involve the acquisition or production of contract- (or prospect-) specific information by a promisee (i.e., the potential plaintiff).<sup>126</sup> In numerous commercial situations, one party—the promisee, or the one with

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competitive conduct, are likely to reflect a desire to limit competition for reasons related to the self-interest of the trade or profession rather than to the welfare of its customers or clients.”).

<sup>123</sup> See, e.g., Dobbs, *supra* note 23, §§ 638–42; Mark P. Gergen, *Tortious Interference: How It Is Engulfing Commercial Law, Why This Is Not Entirely Bad, and a Prudential Response*, 38 ARIZ. L. REV. 1175, 1177 (1996) (“One of two strands of scholarship on the tort . . . focuses on the case where a stranger induces someone to breach a clear cut contract obligation.”); Fred S. McChesney, *Tortious Interference with Contract Versus “Efficient” Breach: Theory and Empirical Evidence*, 28 J. LEGAL STUD. 131, 132 (1999) (“[T]he interference tort is an affront to the efficient-breach model.”); Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 64 (1982) (describing how the tort of intentional interference was applied “to a variety of contracts and . . . to prospective relationships not yet formalized into contract”).

<sup>124</sup> For more on this conflict, see Perlman, *supra* note 123; see also Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 FORDHAM L. REV. 1085, 1100 (2000) (noting that “[e]ven if the theory [of efficient breach] were sound, it is clearly wrong to say that the law does not want to deter efficient breaches”).

<sup>125</sup> Lillian R. BeVier, *Reconsidering Inducement*, 76 VA. L. REV. 877, 886 (1990) (“A second reason to focus attention on inducement is that the inducement facts starkly pose the apparent conflict between tort rules that impose liability for contractual interference and contract norms that celebrate the movement of resources to higher valuing users.”).

<sup>126</sup> *Id.* at 899.

the potential prospect—invests significantly in the acquisition of information that is highly specific to that prospect/contract and therefore without acceptable substitutes.<sup>127</sup> As an example of such a scenario, BeVier identifies “a contract to purchase controlling shares in a corporation.”<sup>128</sup> The process involves the collection and analysis of information specific to that particular corporation.

In such “returns-to-information” cases, liability for intentional interference with a prospect functions as an *ex ante* incentive for the information-gathering party to invest into the collection and production of information.<sup>129</sup> A third party that now seeks to intentionally interfere with the contract/prospect is in an important sense freeriding on the information procured by the promisee. BeVier underscores this last point by highlighting the tort’s emphasis on a defendant’s knowledge of the contract/prospect. If the third party values the prospect more highly than the investing promisee, the third party can initiate a transaction with the promisee or invest into the production of information on its own.<sup>130</sup> Yet, by interfering with the promisee’s prospect, with knowledge of its existence and likely realization, the third party is clearly seeking to reduce its own costs to realize the same market outcome as the promisee.<sup>131</sup> Tortious liability in these circumstances discourages freeriding by third parties, renders the information produced appropriable by the investor, and supports the overall incentive to invest in the production of information.

This account of tortious interference mimics the logic of some unfair competition claims, where the *unfairness* of a defendant’s actions is seen to lie in its reliance on the prior efforts of a plaintiff–competitor, principally to lower its own costs.<sup>132</sup> The problem with the freeriding in these scenarios is less about the circumvention of a potential market transaction, and more with the defendant’s ability to compete on more favorable terms by avoiding the costly investment made by the plaintiff. It is thus analytically independent of any need to treat the investment/information as an independent asset (i.e., as an object of ownership).

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<sup>127</sup> *Id.* at 899–900.

<sup>128</sup> *Id.* at 899.

<sup>129</sup> *Id.* at 916.

<sup>130</sup> *Id.* at 919–20.

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

<sup>132</sup> As an instance of such an argument, see *Cable Vision, Inc. v. KUTV, Inc.*, 211 F. Supp. 47, 52 (D. Idaho 1962), where the plaintiff claimed that the defendant’s retransmission of a broadcaster’s signals was an interference with its own exclusive contract with the broadcaster. The essence of the plaintiff’s argument was that the defendant—by avoiding the payment of a license fee to the broadcaster—was competing unfairly owing to its own lower costs. The district court allowed the tortious interference claim, and expressly equated it with an unfair competition cause. *Id.* at 58 (“[T]he same result has been accomplished upon grounds of unfair competition in cases dealing with radio and television programs.”). On appeal, the Ninth Circuit reversed, principally on grounds of federal preemption. *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348, 351–52 (9th Cir. 1964).

What is also important to appreciate in this account is that it quite accurately recognizes the incentive—to collect and produce prospect-specific information—as originating in the promisee’s own assessments of the market and its value. Protection against freeriding by a third party merely protects (or “increase[es]”)<sup>133</sup> the incentive, and is hardly the origin/source of it. Independent of the promisee’s own belief (rational or otherwise) of the information being economically valuable, the mere existence of potential liability is quite incapable of incentivizing the production and collection of information.

## 2. Commercial Morality

A second rationale derives from the logic of early unfair competition claims, and focuses on the tort’s requirement that the defendant’s actions be independently improper/wrongful. In its focus on the *means* employed by the defendant in bringing about the interference, tortious interference with a prospect is seen as a mechanism of enforcing the prevailing norms of acceptable interaction among competitors in the market.

This rationale tracks the role of the “improper means” requirement in the law of trade secrets, which similarly focuses on the propriety of a defendant’s behavior in acquiring the trade secret in question.<sup>134</sup> And within that setting, courts have attempted to understand the requirement as enabling the law to convert the customary norms of commercial morality into legally enforceable standards.<sup>135</sup> Indeed, the Restatement defines “improper means” as those that “fall below the generally accepted standards of commercial morality.”<sup>136</sup> Maintaining the standards of “commercial ethics” is therefore seen as an independently defensible goal for the law’s focus on the propriety of a commercial defendant’s market actions, both within the law of trade secrets and the tortious interference.<sup>137</sup> In one well-known trade secret case where a defendant had obtained information about a competitor’s industrial plant through surreptitious aerial photography, the court had the following to say about the means employed by the defendant and the law’s commitment to commercial morality:

We introduce here no new or radical ethic since our ethos has never given moral sanction to piracy. The market place must not deviate far from our mores. We should not require a person or corporation to take unreasonable

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<sup>133</sup> BeVier, *supra* note 125, at 920.

<sup>134</sup> See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 43 (1995).

<sup>135</sup> See, e.g., *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974) (“The maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law.”).

<sup>136</sup> RESTATEMENT (FIRST) OF TORTS § 757 cmt. f. (1939).

<sup>137</sup> *Kewanee*, 416 U.S. at 481.

precautions to prevent another from doing that which he ought not do in the first place . . . . “Improper” will always be a word of many nuances, determined by time, place, and circumstances. We therefore need not proclaim a catalogue of commercial improprieties. Clearly, however, one of its commandments does say “thou shall not appropriate a trade secret through deviousness under circumstances in which countervailing defenses are not reasonably available.”<sup>138</sup>

The reference to morality here certainly does not suggest that the rationale is imbued with a deontic character. It is instead deeply instrumental in orientation, and related to the recognition that industry norms and customs present an effective (and occasionally, efficient) method of rule development and coordination.<sup>139</sup>

The commercial morality rationale embodies its own set of deep-seated problems. Scholars have criticized the ideal as being too vague and amorphous, and therefore unpredictable and ill-defined.<sup>140</sup> Additionally, to the extent that it seeks to build on existing custom and convert those norms into legally enforceable standards, it partakes of the myriad problems and concerns that accompany the production and policing of customary law in different settings.<sup>141</sup> Perhaps most importantly though, when treated as a freestanding rationale for tortious interference with a prospect, the commercial morality argument effectively collapses the tort into just another claim for unfair competition, with little regard for the tort’s emphasis on policing the boundaries of a protectable prospect. To the extent that it is capable of functioning as a justification then, it must do so in conjunction with other, more far-reaching, accounts.

### 3. Actual/Ostensible Ownership

A third plausible justification for tortious interference with a prospect attempts to convert its analytical basis into a normative theory. Recall that

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<sup>138</sup> E. I. duPont deNemours & Co. v. Christopher, 431 F.2d 1012, 1016-17 (5th Cir. 1970).

<sup>139</sup> See Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CALIF. L. REV. 241, 294 (1998) (noting that “norms that survive the test of time are likely to be efficient”).

<sup>140</sup> See Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets As IP Rights*, 61 STAN. L. REV. 311, 322 (2008) (describing the tort theory as flawed because courts would be “unable to resolve those challenges on any principled basis, instead making ad hoc judgments based on perceptions of the defendant’s intent”); Bone, *supra* note 139, at 295-96 (finding that “the argument for trade secret law based on industry norms is weak” because “the argument only works for norms that are actually accepted” and because “[f]or an industry norm to exist, it must be part of a relatively stable industry-wide equilibrium”).

<sup>141</sup> See Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1909 (2007) (“[T]here has been little acknowledgement of the breadth of the customary practices and norms involved in IP and the vast influence that they wield.”).

courts developing the tort in its early stages openly acknowledged that its effect was to convert a contractual entitlement into an in rem obligation against third parties.<sup>142</sup> The normative variant of this description would argue that tortious interference identifies a prospect as an appropriable/ownable asset, which it then protects with a tailored exclusionary framework. In other words, the rationale for the exclusionary regime created by the tort is the ownership of the underlying prospect by the plaintiff.

A version of this justification is seen in the work of Richard Epstein, on the inducement of breach.<sup>143</sup> Justifying tortious interference with a contract as an effort to solve the problem of ostensible ownership, Epstein argues that the action exists to “fill the void that the more traditional notions of property may not reach.”<sup>144</sup> The root of his argument derives from the recognition that ownership of labor is just as defensible and unproblematic as ownership of physical resources.<sup>145</sup> From that basic idea, Epstein’s account then finds it straightforward to show that tortious interference works in identical manner as tort claims designed to protect against interferences with physical property.<sup>146</sup>

In his analysis however, Epstein distinguishes between interference with a contract and interference with a prospect, suggesting that the latter is fundamentally different as a normative matter, and interestingly enough, easier to justify in property terms.<sup>147</sup> His reasoning for this is that “one tort falls squarely within the traditional prohibition against force and fraud while the other does not.”<sup>148</sup> Since interferences with a contract are often treated as cases of “inducement,” Epstein seems to be suggesting that tortious interference with a prospect—rather than a contract—is indeed more straightforward, insofar as it purports to set up a standard form of protection against force and fraud. *Actual* rather than *ostensible* ownership is thus at the heart of tortious interference with a prospect, in Epstein’s propertarian account. While inducement of breach derives from gap-filling in the skein of

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<sup>142</sup> *Temperton v. Russell* (No.2), (1893) 1 Q.B. 715, 730 (Eng.).

<sup>143</sup> Richard A. Epstein, *Inducement of Breach of Contract as a Problem of Ostensible Ownership*, 16 J. LEGAL STUD. 1, 2 (1987) (determining that “[t]he tort of inducement of breach of contract is best understood as an unsuspected manifestation of the problem of ostensible ownership”). For a different version of the property argument, premised on first possession instead of self-ownership, see Fine, *supra* note 27, at 1139-42. Fine provides a more direct defense using property terms, especially as it relates to prospects rather than contracts, by treating prospects as an interest in a pursuit, which the rules of first acquisition seem to protect. Fine’s underlying normative logic however appears to be the equivalence in economic value being protected in both situations. Unlike Epstein, Fine does not go beneath the rules of pursuit to discern an underlying justification for them in the way in which Epstein does with ownership, albeit through Locke.

<sup>144</sup> Epstein, *supra* note 143, at 19-20.

<sup>145</sup> *Id.* at 20.

<sup>146</sup> *Id.* at 21-29.

<sup>147</sup> *Id.* at 21.

<sup>148</sup> *Id.*



standard property entitlements, tortious interference with a prospect appears as a straightforward instantiation of ownership principles.<sup>149</sup> Epstein makes this abundantly clear when he concedes that in contrast to inducement of breach, which cannot be fitted into the standard mode, “the basic justification of the tort [of interference with a prospect] remains clear precisely because of the close connection between this class of economic losses and ordinary physical damages cases.”<sup>150</sup> A protectable prospect is therefore just like any other ownable *res*.

But why? The argument appears to place primary reliance on the conceptual structure of the interference tort and its resemblance to traditional property torts. Indeed, Epstein has adopted the same argument to suggest that “intangible” forms of property such as patent and copyright are property rights analogous to tangible property owing to a common conceptual structure.<sup>151</sup> The justification for treating a prospect as a *res* is therefore rooted in the analytical structure of the doctrine, and not vice versa. A similar move is to be seen in work by another scholar, who also seeks to offer a property-based justification for tortious interference based on an analogy to property law’s rules of first possession and the pursuit of animals.<sup>152</sup> The conceptual similarities in the doctrinal regimes (notice, privilege of pursuit, motive, etc.) are treated as generating a normative claim for treating tortious interference as a property tort.

The shortcomings of this approach are but obvious. The conceptual and analytical similarity (of tortious interference) to property sheds important light on the working of the tort doctrine and suggests that it might well be less of anomaly than some others have made it out to be. Yet, the idea of property as such (or of other economic interests such as a “right to trade”<sup>153</sup>) are hardly justifications on their own right, and require the elucidation of additional normative criteria underlying their working.<sup>154</sup> “Property” is itself a thick

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 425 (1975) (arguing that patents and copyrights “create property rights” and “share the essential features of tangible property”); Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 458 (2010) (“[H]uge returns lie from systematizing intellectual property by analogy and extension to successful legal regimes elsewhere.”).

<sup>152</sup> See Fine, *supra* note 27, at 1135-39.

<sup>153</sup> Epstein, *Intentional Harms*, *supra* note 151, at 425 (“Bowen’s version of the prima facie tort also requires us to give an accurate account of the interest in trade to be equated with an interest in property.”).

<sup>154</sup> For an early recognition of the idea that property is a concept in need of justification, see DAVID HUME, A TREATISE OF HUMAN NATURE 491 (L.A. Selby-Bigge and P. H. Nidditch eds. 1978) (1739) (describing the relationship between an individual and his property as “not natural, but moral, and founded on justice”).

analytic concept,<sup>155</sup> embodying myriad normative goals within its working, many of which are both incommensurable and conflicting.<sup>156</sup> As such then, it has little to offer as a justification for tortious interference. In addition, the account cannot capture the nuance underlying the law's policing of the prospect and the emphasis that it places on the relationship between prospect and wrongdoing; nuances and distinctions that Epstein is perfectly willing to ignore.<sup>157</sup> At its root then, the property-based account simplistically converts an analogy into a normative justification, without any additional groundwork.

One important observation about this account is in order before moving on. Unlike the two prior justifications for tortious interference with a prospect, the ownership rationale embodies a strong non-consequentialist component, especially insofar as it takes shape from within the idea of the independent morality and defensibility of ownership, which are seen as requiring no further normative defense. As we move to copyright, it is not altogether uncommon to see similar arguments at work in explanations of different parts of the system.

## II. COPYRIGHT LAW AS TORTIOUS INTERFERENCE WITH A PROSPECT

Having examined the basic underpinnings of tortious interference with a prospect, this Part moves to explicating the homology between the action and copyright law. Section II.A begins with an overview of what a "homology" entails in legal theory and why it differs from an ordinary comparison. II.B then analyzes the commonality of pluralist normative considerations that coexist within both institutions and routinely motivate their functioning. II.C then provides a brief overview of copyright's basic structure of rights, liability, and privileges, and develops the homology more fully by analyzing copyright's most salient doctrinal elements through tortious interference with a prospect.

### A. *Homology as Interpretive Legal Theory*

As noted previously, the distinction between an analogy and a homology is subtle yet distinct. An analogy is a mere explanatory comparison between two ideas or concepts; while a homology does more. A homology compares

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<sup>155</sup> Thick concepts are generally understood as those that embody an evaluative content, and require further normative criteria for their working. See generally Simon Kirchin, *Introduction: Thick and Thin Concepts*, in THICK CONCEPTS 1 (Simon Kirchin ed., 2013).

<sup>156</sup> See generally J.W. HARRIS, PROPERTY AND JUSTICE (1996).

<sup>157</sup> See Epstein, *supra* note 143, at 21 n.60 ("The Restatement's total lack of form is attributable in large measure to its effort to sweep too many disparate cases into a single rule.").

two ideas or concepts, but in addition purports to identify a “fundamental truth” about their commonality that connects them in a way that is significantly stronger than a superficial structural resemblance.<sup>158</sup> A commonality in origin/evolution is usually the basis of a homology.<sup>159</sup> Such commonality in origin need not, however, relate merely to source. It can instead be a *shared normative basis* that influences the construction of the two ideas or concepts under study, which is of special applicability in legal comparisons. When a shared set of normative values accounts for a commonality in the analytical structure of legal rules or principles, the resemblance between the rules or principles may be appropriately characterized as a homology rather than an analogy.

In this understanding then, good swaths of what is often described as analogical reasoning in the law may indeed partake of a homology, insofar as it is driven by a purported identification of a common causal story or origin that is distinctively normative in orientation.<sup>160</sup> As an example, consider the manner in which the “implied warranty of habitability” evolved.<sup>161</sup> In a well-known case, *Javins v. First National Realty Corp.*,<sup>162</sup> Judge Skelly Wright of the D.C. Circuit developed the idea through a comparison with the “implied warranty of merchantability,” in turn a staple doctrine in the law of contracts.<sup>163</sup> Clearly to him, the structure of both warranties had to be similar, i.e., they both had to be implied in every contract and nonwaivable. The decision to model one on the other—i.e., to render them structurally similar—was driven by a common set of normative considerations, despite the differing contexts. And these were the obvious information asymmetry

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<sup>158</sup> See 5 CONG. OF ARTS AND SCI., UNIVERSAL EXPOSITION 350 (Howard J. Rogers ed. 1906).

<sup>159</sup> *Id.* at 350-51.

<sup>160</sup> See EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 1-6 (1949) (describing the centrality of analogical reasoning to legal argument because it “accepts the differences of view and ambiguities of words”); LLOYD L. WEINREB, LEGAL REASON 19-27 (2d ed. 2016) (summarizing cases where the court drew on analogy to interpret a statute and finding no evidence of “any general rule from which the controlling analogies can be derived”); Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 962-66 (1996) (“[A]rgument by analogy works by comparing two items and by inferring from the fact that these items share some properties that they share some further property . . . .”); Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1179-83 (1999) (describing a judge’s application of analogical reasoning as “survey[ing] past decisions, identify[ing] ways in which these decisions are similar to or different from each other . . . and develop[ing] a principle that captures the similarities and differences”); Cass R. Sunstein, *Commentary, On Analogical Reasoning*, 106 HARV. L. REV. 741, 743-49 (1993) (stating that analogical reasoning requires “some principle, harmonizing seemingly disparate outcomes” in order to produce consistency within the law).

<sup>161</sup> See Myron Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444, 1445-46 (1974).

<sup>162</sup> 428 F.2d 1071 (D.C. Cir. 1970).

<sup>163</sup> *Id.* at 1075-77.

between the contracting parties and the gross disparity in bargaining position during their market interaction. The similarity was thus more than just structural and may be explained by a common evolutionary account grounded in the goals that motivated both doctrines.

As an example from within copyright jurisprudence, consider the Supreme Court's development of "vicarious liability" for copyright infringement in the case of *Sony v. Universal City Studios*.<sup>164</sup> Recognizing it to be a case of first impression, the Court referenced the "historic kinship" between patent and copyright law to justify its reliance on patent law jurisprudence to develop a structurally similar doctrine for copyright law.<sup>165</sup> The Court's logic here quite clearly had more to it than just the fact that copyright and patent were both forms of intellectual property. It was instead steeped in the recognition that both emanated from the same constitutional source, which in turn specified a common normative goal for both institutions: "promoting the Progress," a goal that needed to produce similar outcomes in both regimes through the use of similar principles.<sup>166</sup>

The distinction between a homology and an analogy may be better understood through an idea made famous by the philosopher Ludwig Wittgenstein: "family resemblances."<sup>167</sup> Wittgenstein identified a network of similarities in sets of ideas—concepts, and argued that instead of abstracting to a set of common or universal characters that are used to define the set, one should better understand its constituent elements as embodying a sequential chain of commonalities.<sup>168</sup> In this construction, not every member of the set would embody all the common characteristics, but each would instead be directly related to another and the set as a whole would thus compose of individual units that are *all* so directly related in some way. He called this the idea of "family resemblance" and it has since spawned an immense amount of secondary literature.<sup>169</sup>

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<sup>164</sup> 464 U.S. 417, 434-39 (1984).

<sup>165</sup> *Id.* at 439. For a critique of the Court's approach, claiming that the argument was poorly reasoned and researched, see Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 CALIF. L. REV. 941 (2007). By pointing to the Court's use of the argument here, I am certainly not suggesting that it was correctly applied; merely that it represents an instance of a homology rather than a pure analogy.

<sup>166</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>167</sup> LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §67 (G.E.M. Anscombe trans., 1st ed. 1953).

<sup>168</sup> *Id.* § 65-66.

<sup>169</sup> See, e.g., Michael Forster, *Wittgenstein on Family Resemblance Concepts*, in WITTGENSTEIN'S PHILOSOPHICAL INVESTIGATIONS: A CRITICAL GUIDE 66 (Arif Ahmed ed., 2010) (clarifying common misconceptions about the concept of family resemblance); Renford Bambrough, *Universals and Family Resemblances*, Meeting of the Aristotelian Society (May 8, 1961), 61 PROC. ARISTOTELIAN SOC'Y 207, 207-22 (1960) (arguing that family resemblance solved "the problem of universals"); Keith Campbell, *Family Resemblance Predicates*, 2 AM. PHIL. Q. 238, 238 (1965) (refusing Wittgenstein's theory to eliminate contradictions and errors as applied to predicates);

Of importance to us though is the reality that Wittgenstein's idea of family resemblance quite consciously conflates two core elements, both of which set a homology apart from an analogy. The philosopher Hans Sluga has identified this conflation most concretely in recent work, in the process shedding important light indirectly on the homology–analogy distinction.<sup>170</sup> Sluga points out that the idea of family resemblance confuses two analytically distinct ideas. The first is what he calls the “similarity concept,” and represents the epistemically verifiable similarity, correspondence, or identity between the subjects under study.<sup>171</sup> This is a structural reality, so to speak. The second is what he calls a “kinship concept,” or the existence of some “appropriate causal connection” between the subjects.<sup>172</sup> Kinship concepts, to Sluga, are important insofar as they are critical to establishing “direct and real connections, causal links, dependencies and ‘influences’” between subjects of study.<sup>173</sup>

Homologies actively embody this idea of a kinship conception between structurally similar objects. They combine in no small measure both elements, since the object of the comparison is driven by a desire to establish *some* relationship between the subjects being studied. Sluga's use of the idea of a “causal” connection identifies such a relationship rather broadly. Indeed, a common normative consideration or motivation is analytically sufficient to establish a common cause, i.e., that both ideas were caused by—or, brought into existence because of—the same goals at issue. Mere analogies thus focus principally on the similarity concept and less on the causal dimension, while homologies embody both.

In his elucidation of this distinction, Sluga also makes an additional observation of relevance. He notes that the relationship between the similarity and kinship concepts is oftentimes reflexive.<sup>174</sup> In other words, a comparison that begins using a similarity concept will sometimes assume a kinship dimension and vice versa. Indeed, this has been shown to be true as an

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Heather J. Gert, *Family Resemblances and Criteria*, 105 *SYNTHESE* 177, 177 (1995) (arguing against an interpretation of family resemblance and proposing an alternate understanding); Nicholas Griffin, *Wittgenstein, Universals and Family Resemblances*, 3 *CAN. J. PHIL.* 635, 635-36 (1974) (discussing whether Wittgenstein's family resemblance solves the problem of universals); Pamela Huby, *Family Resemblance*, 18 *PHIL. Q.* 66, 66 (1968) (arguing that family resemblance is not a theory, but a repudiation of other theories); J.E. Llewelyn, *Discussions, Family Resemblance*, 18 *PHIL. Q.* 344, 344 (1968) (discussing family resemblance in regard to the function and use of “general words”); Anthony Manser, *Games and Family Resemblances*, 42 *PHIL.* 210, 224 (1967) (finding family resemblance of “little assistance in dealing with . . . ‘the problem of universals’”).

<sup>170</sup> See Hans Sluga, *Family Resemblance*, 71 *GRAZER PHILOSOPHISCHE STUDIEN* 1, 14 (2006) (“It is problematic in that [family resemblance's] characterization draws on two quite different sets of ideas, two different vocabularies but treats them as if they were one and the same.”).

<sup>171</sup> *Id.* at 15.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 19.

<sup>174</sup> *Id.* at 19-20.

empirical matter as well.<sup>175</sup> When two things are revealed to have a common source/motivation, they begin to appear more similar to otherwise neutral observers. Homologies are therefore by definition *interpretive* in character.

As Dworkin famously pointed out, legal reasoning—as interpretive reasoning—involves more than just an attempt to neutrally understand a concept. Theorizing about the law additionally embodies an effort to make sense of a legal doctrine, rule or institution by “see[ing] it in its best light.”<sup>176</sup> This derives from the recognition that the doctrine or institution is not a mere artifact, but is instead motivated by some principle or purpose and sensitive to that principle or purpose.<sup>177</sup> Owing to this motivation/sensitivity combination, theorizing about a legal institution becomes a value laden enterprise, wherein the reasons for an institution or doctrine influence an appreciation of its salient features.<sup>178</sup> Going back to Sluga, this implies that homological reasoning in the law will to some degree allow the kinship concept to influence its construction of the similarity concept, a reality that should be acknowledged. The identification of a normative goal or underlying principle will cause some similarities or dissimilarities to be emphasized over others, with the recognition that this is inevitable (since otherwise, the two subjects under comparison would be identical).

This Part offers such a homological account. The account begins with an identification of normative commonality between tortious interference with a prospect and copyright law to show that the two are routinely justified by reference to a common set of principles, even in the face of deep contestation over the relative importance of these principles within that set. It then proceeds to show how, once these principles are accepted as common, several of copyright’s salient—and functionally significant—attributes might be better (or best) understood through the lens of tortious interference with a prospect to “see it in its best light.”

### B. *Incentives, Property, and Market Morality: Common Goals*

As discussed previously, tortious interference with a prospect is justified by reference to three different normative ideals.<sup>179</sup> The *ex ante* economic

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<sup>175</sup> See, e.g., Shyamkrishna Balganesh, Irina D. Manta & Tess Wilkinson-Ryan, *Judging Similarity*, 100 IOWA L. REV. 267, 279-81 (2014) (finding that lay subjects observe greater similarity between objects when told that one was copied from the other).

<sup>176</sup> RONALD DWORKIN, *LAW’S EMPIRE* 47 (1986).

<sup>177</sup> *Id.* at 46-48 (explaining the two components of the “interpretive attitude,” which are (i) that a legal rule serves a purpose and is intended to achieve that purpose, and (ii) that the rules that embody a legal doctrine can evolve in order to serve that purpose).

<sup>178</sup> *Id.* at 90 (“General theories of law . . . must be abstract because they aim to interpret the main point and structure of legal practice.”).

<sup>179</sup> See *supra* Section I.C.

explanation sees it as essential to allowing a market participant (i.e., a prospective contracting party) to invest into the collection of prospect-specific information by deterring freeriding by a competitor;<sup>180</sup> the moral explanation treats it as affirming a set of market norms and customs that are required by a well-functioning market;<sup>181</sup> and the property explanation treats the prospect as akin to a property interest and therefore deserving of exclusionary protection in its own right.<sup>182</sup> The crucial point to remember about these various justifications for the tort is that, despite their divergence and varied normative inclinations, they each continue to subsist in the working of the doctrine, and find validation in one or more elements of the action. The ex ante perspective focuses on the intentional (or notice-driven) aspects of the tort, the moral one on the tort's focus on improper behavior, and the propertarian one on the in rem nature of the action. Each of the three explanations is therefore, in a sense, incapable of complete invalidation as long as the tort retains its basic structure.

With copyright, we see something very similar. On the one hand, we encounter nearly identical normative justifications for the institution. On the other, we find all of them continuing to thrive and find partial validation in some part of the system. In both, we therefore encounter a parallel normative pluralism that has failed to ever impede the actual functioning (and application) of the legal regime.

Copyright's ex ante justification is also incentives-driven, and is today the institution's principal justification.<sup>183</sup> Beginning with the premise that copyright exists in order to "promote the progress" of the sciences and useful arts—an avowedly utilitarian goal—the incentives account posits that copyright law is designed to realize this goal—and therefore enhance overall social welfare—by inducing creators to produce creative work through the promise of temporally limited and narrowly tailored market exclusivity.<sup>184</sup> The regime's guarantee of a private action for an interference with such exclusivity is believed to contribute to the very production and dissemination

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<sup>180</sup> See *supra* subsection I.C.1.

<sup>181</sup> See *supra* subsection I.C.2.

<sup>182</sup> See *supra* subsection I.C.3.

<sup>183</sup> See Balganes, *Foreseeability*, *supra* note 10, at 1576-77 ("Copyright law is thus thought to exist primarily to give authors (that is, creators) an incentive to create and thereafter disseminate their works publicly."); Sara K. Stadler, *Forging a Truly Utilitarian Copyright*, 91 IOWA L. REV. 609, 658 (2006) ("[T]he first orthodoxy of modern copyright [is that] [b]y granting more rights to authors, copyright law provides them with more incentive to create . . .").

<sup>184</sup> See Jeanne C. Fromer, *An Information Theory of Copyright Law*, 64 EMORY L.J. 71, 71-73 (2014) ("The dominant American theory of copyright law is utilitarian, in offering the incentive of limited copyright protection to creators to generate material that is valuable to society."); Christopher Sprigman, *Copyright and the Rule of Reason*, 7 J. TELECOMM. & HIGH TECH. L. 317, 317 (2009) ("[T]he dominant justification for copyright, at least in the United States, is explicitly utilitarian.").

of creative expression.<sup>185</sup> This incentives argument dominates courts' rhetoric about the reasons for the copyright system, and is often touted as a reason for individual decisionmaking as well, within the functioning of copyright.<sup>186</sup> Much like with tortious interference, a good part of copyright's incentive is seen as connected to the deterrent effect that the regime has on freeriding (which it renders actionable).<sup>187</sup>

The market morality explanation within copyright, while infrequently advanced, nonetheless informs certain parts of the system.<sup>188</sup> In this conception, aspects of the copyright system operate as rules of "trade regulation" by proscribing specific forms of actionable copying, which is seen as anti-competitive or contrary to accepted market practices.<sup>189</sup> Much as with tortious interference, this explanation has had fairly limited traction as a stand-alone explanation for the entire regime and has been relegated to specific domains of copyright's doctrinal structure.<sup>190</sup> Nonetheless, it maintains a role within a part of the overall system.

The property-based explanation on the other hand, is probably second only to the incentives argument in its influence on copyright thinking.<sup>191</sup> In this argument, copyright law creates a property interest in the work that it then envelopes in a regime of exclusivity. The basis—and rationale—for that property interest are either secondary or irrelevant once brought into existence, much as the property arguments for tortious interference assume. The property justification for copyright dates back to the very origins of copyright and the idea that the system is designed to protect an ownership interest in the same way that regular property law protects similar interests

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<sup>185</sup> Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664, 1666-67 (2012).

<sup>186</sup> See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("[T]he limited [monopoly] grant . . . is intended to motivate the creative activity of authors . . .").

<sup>187</sup> Balganesh, *supra* note 185, at 1679.

<sup>188</sup> For a good overview, see James Grimmelmann, *The Ethical Visions of Copyright Law*, 77 FORDHAM L. REV. 2005, 2014-31 (2009) (documenting some of these moral norms as constitutive of copyright's modern ethical vision).

<sup>189</sup> See *id.* at 2009 (noting that "[c]ourts look to commercial customs to learn what practices are considered unethical"); see also Sara K. Stadler, *Copyright as Trade Regulation*, 155 U. PA. L. REV. 899, 927-42 (2007).

<sup>190</sup> One such area, for instance, is the analysis of potential market harm under the fourth fair use factor. 17 U.S.C. §107(4) (2012). For a general discussion of courts' proscription of practices that violate customary industry practice, see Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1937-41 (2007).

<sup>191</sup> For a discussion of historical notions of property rights and creation incentives within copyright law, see NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX* 55 (2008).



in tangible assets.<sup>192</sup> This vision of copyright is best characterized as “Blackstonian copyright” in that it looks no further than (or beneath) the owner’s despotic dominion to control access to the resource under protection, once brought into existence.<sup>193</sup> While capable of coexisting with an economic argument, the two are nonetheless analytically distinct. Indeed, some scholars purport to defend the property justification as capable of existing independent of an economic rationale, in the recognition of the author’s inherent dignitary/personality interest that is being protected through the regime’s set of exclusive rights.<sup>194</sup>

Each of the rationales offered for tortious interference with a prospect thus finds a strong parallel in copyright, both individually and as a collective. The foundational values that underlie them—efficiency, fairness, and ownership—each has an unmistakable parallel in the copyright setting. This is hardly to suggest that one evolved from the other or indeed was self-consciously modelled on the other. Instead, it provides evidence of the kind of “kinship” relationship that renders the similarity more than just of epistemic significance and suggests that the two might have useful lessons to learn from each other.

It should therefore come as no surprise that some scholars writing about tortious interference have attempted to use the tort’s similarity to intellectual property in their arguments attempting to legitimize or undermine the continued expansion of tortious interference. Richard Epstein was the earliest to do so, in arguing that intellectual property provided the “prima facie tort” with a justification.<sup>195</sup> A few years later, Dan Dobbs examined the same analogy as a potential justification for tortious interference (with an expectancy) and found it to be lacking, insofar as it was the basis for a simple property-driven justification for tortious interference.<sup>196</sup> Very importantly

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<sup>192</sup> See, e.g., Epstein, *Disintegration*, *supra* note 151, at 457 (noting how, with unauthorized copying on the rise, “[legal systems start[ed] to develop forms of copyright protection that echo[ed] . . . the constellation of property rights over tangible objects”).

<sup>193</sup> See NETANEL, *supra* note 191, at 8. See also Balganes, *supra* note 2, at 1129-30 (crediting Blackstonian normative attitudes of property as helpful in the copyright context “to conjure up images of an owner’s absolute and unconditional right to exclude others from a resource”).

<sup>194</sup> See, e.g., Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1997 (2006) (arguing for protection of moral rights “aimed at preserving an author’s dignity” in addition to copyright’s traditional exclusive rights, which “afford economic protection”).

<sup>195</sup> See Epstein, *Intentional Harms*, *supra* note 151, at 425 (analogizing the creation of property rights for intangible assets through copyright or patent to protection of trade). Much like Epstein, one other writer has drawn on intellectual property to explain tortious interference by suggesting that the analogy justifies the law’s willingness to recognize a property interest even without a heightened notice requirement. Fine, *supra* note 27, at 1133-34.

<sup>196</sup> Dobbs, *supra* note 55, at 352-55. Dobbs’ simplistic treatment of intellectual property as just another form of property does little justice to the complex normative goals underlying different

though, all of these accounts use intellectual property to try and justify tortious interference, and never the other way around.

Both tortious interference and copyright law therefore remain motivated by the same confluence of complex normative goals. These goals may of course point in different directions, assume different color, and suggest different analytical devices when rendered operational. Yet they do suggest—at the very least—a plausible normative “kinship” between the two regimes. Even if Dobbs is correct that the similarity is not strong enough to independently *justify* the very existence of one by relying on the other, the normative kinship nonetheless points to lessons that they each might learn from similarity to the other, once both are presumptively justified (in their very existence).

### C. *The Homology*

While the copyright statute is today characterized by multiple layers of regulatory complexity, the institution’s core apparatus remains fairly straightforward.<sup>197</sup> Indeed, much of it has stayed constant ever since the origins of the institution in the eighteenth century.

Stripped down to its essentials, copyright law protects original expression that qualifies as a work of authorship by creating a cause of action for a defined set of acts when not authorized by the copyright owner. Copyright realizes this structure through the creation of a set of “exclusive rights” to conduct or authorize certain activities using the protected work.<sup>198</sup> When another person performs those acts without the authorization of the copyright owner, those actions qualify as an “[i]nfringement” of the owner’s exclusive rights, i.e., of the copyright entitlement.<sup>199</sup> Most importantly, as a regime of private law, merely because something qualifies as an infringement does not mean that it will be penalized.<sup>200</sup> It is only when the copyright owner chooses to commence an action that the infringement becomes enforceable.

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intellectual property regimes. Indeed, from his description, one suspects that he sees little justification for the expansion of intellectual property, causing him to see its extension to tortious interference as doubly problematic. *See id.* at 354 (noting that the evolution of tortious interference has not proceeded with the same caution as patent law in granting monopolies or property rights).

<sup>197</sup> *See, e.g.*, Joseph Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 94-100 (2004) (discussing the complexification of copyright’s regulatory structure compared to the previously simple common law framework, but noting that the changing law “retained, at its core, many aspects of the property rights model . . . underlying the early copyright acts”).

<sup>198</sup> 17 U.S.C. § 106 (2012).

<sup>199</sup> *Id.* §501(a) (2012).

<sup>200</sup> For a fuller account of this, see Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664, 1666-76 (2012); *see also* Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 771 (2013) (“[C]opyright law depends entirely on private enforcement via infringement suits.”).

Not every unauthorized act involving the protected work, however, need qualify as an infringement. Copyright law has multiple safety valves built into its entitlement delineation strategy. First, as part of the *prima facie* case, copyright usually requires establishing that the defendant engaged in the act of “copying.”<sup>201</sup> Unsurprisingly, copying is more than just a factual question of appropriation<sup>202</sup>—it also embodies a normative dimension. Thus, even when a plaintiff establishes that the defendant appropriated content from the protected expression, the court must determine whether the copying was “wrongful” or “improper” as such for it to be actionable.<sup>203</sup> This is a heavily evaluative inquiry involving a variety of factors.<sup>204</sup> Second, copyright law also insists that wrongful actions of the defendant embody a “volitional” element, where the human agency involved can be discerned.<sup>205</sup> With developments in technology, disaggregating the volition and automated parts of wrongful conduct has emerged as an important part of the inquiry, not just for the act of copying but for all putatively wrongful behavior that might qualify as infringement.<sup>206</sup> Third, and perhaps most saliently, wrongful conduct does not qualify as infringement at all when the behavior is seen by the system as normatively privileged under the “fair use” doctrine.<sup>207</sup> Even when protected, a defendant’s use of the work is on occasion seen as socially beneficial and therefore exempted from the gamut of infringement altogether. The behavior is in an important sense “privileged.”<sup>208</sup>

Exclusivity, copying, volitional conduct, and contextually privileged behavior thus form the four basic conceptual cornerstones of the copyright system. Each of these elements may however be understood and interpreted through the lens of tortious interference with a prospect, which sheds light on the important principles seen in their functioning, and in turn allows them to be infused with additional analytical content.

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<sup>201</sup> *Mazer v. Stein*, 347 U.S. 201, 218 (1954) (“Absent copying there can be no infringement of copyright.”).

<sup>202</sup> Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203, 215 (2012) (explaining that copying is “both *factual* and *normative*,” and requires not only “the existence of actual copying” but also that the copying be “improper”).

<sup>203</sup> See *Arnstein v. Porter*, 154 F.2d 464, 468-69 (2d Cir. 1946).

<sup>204</sup> Balganesh, *supra* note 2022, at 242-61 (discussing in depth the variables considered in the two step inquiry for substantial similarity).

<sup>205</sup> For an excellent recent discussion of the existing legal position and the conceptual confusion underlying the idea in copyright jurisprudence, see Robert C. Denicola, *Volition and Copyright Infringement*, 37 CARDOZO L. REV. 1259, 1270-84 (2016).

<sup>206</sup> *Id.* at 1284. See also *id.* at 1283-84 (discussing “the possibility of secondary liability for copyright infringement” based on factors like “knowledge, inducement, and financial gain” even if a court concluded that the defendant had a “lack of volition”).

<sup>207</sup> 17 U.S.C. § 107 (2012).

<sup>208</sup> See generally WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (1985).

### 1. The Market (for the Work) as Prospective Economic Advantage

For quite some time now, copyright law has been deeply conflicted about the appropriate *target* of its protection. One conception, usually traced back to the very origins of the institution, focuses on the protection of the author and on the practice of “authorship” as central to copyright’s functioning.<sup>209</sup> This is believed to have manifested itself in the author-focused debates that eventually led to the passage of the first copyright statute in the English-speaking world, the Statute of Anne.<sup>210</sup> A second conception, which is believed to have gained prominence in the last few decades, instead focuses on the work, rather than the human agency which produces it.<sup>211</sup> Authorship here becomes important only insofar as it is responsible for the production of the work, and not independently. The work in turn assumes a life of its own once brought into existence.<sup>212</sup> Peter Jaszi argues that the focus on the work emerged in the mid-eighteenth century, when the “commercialization and commodification of print culture” grew.<sup>213</sup>

Regardless of when the shift to a thing-like conception of the work emerged, it today continues to confound copyright reasoning.<sup>214</sup> The doctrine of originality is a good example of an area where this problem persists. Originality is meant to operate as an assessment of the work’s *creativity* as well as a verification of the *source* of such creativity. A work is original if it exhibits a “modicum of creativity” and/that “owe[s] its origin” to the author claiming copyright.<sup>215</sup> As is obvious, this construction conflates the precise target of the originality assessment. On the one hand, it appears to be the work, insofar

<sup>209</sup> See MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 3-4 (1993).

<sup>210</sup> *Id.* at 31-48; see also Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of Authorship*, 1991 DUKE L.J. 455, 468-71 (outlining the debates surrounding and theory underlying the Statute of Anne).

<sup>211</sup> See Jaszi, *supra* note 210, at 472-80 (“[A doctrinal reversal] followed from the emergence of the ‘work’ concept as a new source of guidance and constraint in copyright, called forth by the inherent instability of the ‘authorship’ construct itself.”); see also MARK ROSE, *AUTHORS IN COURT: SCENES FROM THE THEATER OF COPYRIGHT* 182-85 (2016) (“[B]oth the Statute of Anne and the U.S. Copyright Act of 1790 place authors and their works at the heart of copyright doctrine.”).

<sup>212</sup> See Jaszi, *supra* note 210, at 477-80 (“[U]nfurling the banner of ‘authorship’ was completed through the legal objectification of the fruits of creative labor.”).

<sup>213</sup> *Id.* at 473.

<sup>214</sup> For a useful account, see Michael J. Madison, *The End of the Work as We Know It*, 19 J. INTELL. PROP. 325, 332 (2012) (“At times the work is what the author says it is, or what we understand the author to have intended; at times the work is what is original, or what is fixed in some tangible object . . . .”); see also Shyamkrishna Balganesh, *Causing Copyright*, 117 COLUM. L. REV. 1, 35 (2017) (“The tasks of independently determining whether something was a ‘work of authorship’ and whether an actor was an ‘author’ began to recede in importance . . . .”).

<sup>215</sup> *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346-47, 363 (1991).

as any originality is meant to be assessed from the face of the work.<sup>216</sup> On the other hand, it extends to the author, who must have some connection to the work and its original components for the originality to be authorial. The conflation is today crystallized in the Copyright Act, which defines its object of protection as a “work of authorship,” seemingly incorporating both the work and the author as the targets of protection.<sup>217</sup>

Approaching the issue through tortious interference with a prospect produces an additional, and far more plausible, idea: modern copyright law’s real object of protection is neither the work (*qua* property), nor the author (*qua* actor). Instead, and to the extent that a utilitarian argument holds sway over American copyright thinking, the object of protection might be understood as the economic benefits offered by the potential market for the work at issue. This refocusing of emphasis is at once simple and of some significance.

To begin with, it helps account for the reality that copyright has never in its history attempted to graft an exclusionary regime simply around the work, in the way that property law does for a tangible object.<sup>218</sup> At the same time, neither has copyright law really ever engaged the idea of authorship or the construction of the author as a doctrinal matter.<sup>219</sup> And yet, during the infringement analysis, in the fair use doctrine, and in its computation of damages, the prospective market for the work emerges as a functionally significant construct. The infringement analysis purports to examine the substitutionary effect of the defendant’s copying on the plaintiff’s work,<sup>220</sup> while a central part of the four-factor fair use doctrine examines the effect of a defendant’s copying on the “potential market” for the work.<sup>221</sup> Similarly, in

<sup>216</sup> See 1 MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 2.01 (2015) (“Originality in the copyright sense means only that the work owes its origin to the author . . .”).

<sup>217</sup> 17 U.S.C. § 102 (2012).

<sup>218</sup> See BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 4 (1967).

<sup>219</sup> See Balganes, *supra* note 2144, at 11-34; Jaszi, *supra* note 210, at 481-85 (“The objective test of copyrightability for derivative works proposed here—that they contain ‘distinguishable variations’ from the underlying works on which they are based—is one that focuses attention on the work, rather than its ‘author.’”); see also Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1066 (2003) (“[I]f authors are as central to copyright as I claim, I must also acknowledge that copyright doctrine on authorship, both here and abroad, is surprisingly sparse.”).

<sup>220</sup> The focus on the ordinary observer during the infringement analysis has been commonly understood as assessing whether the “intended audience”—representing the market for the work—would find the two works at issue to be substitutes in their similarity to each other. For a judicial articulation, see *Dawson v. Hinshaw Music, Inc.*, 905 F.2d 731, 734 (4th Cir. 1990) (justifying the intended audience approach “[i]n light of the copyright law’s purpose of protecting a creator’s market”); see also ROBERT C. OSTERBERG & ERIC C. OSTERBERG, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW § 3.2.2 (2014) (“Under the intended audience test, the court determines the subjective similarity between two works . . . from the perspective of the group that is the market for the work, that is, the work’s intended audience.”).

<sup>221</sup> 17 U.S.C. § 107(4) (2012).

computing actual damages, copyright law allows a plaintiff to claim lost profits (from a market) as a measure of damage.<sup>222</sup> Each of these doctrines therefore hints at a prospective market (for the work) being the true basis of protection. The idea also fits well with copyright's modern focus on market incentives as its principal justification.

Much like a prospective advantage that is protected against interference, the market for a protected work of expression remains a probabilistic entitlement. Its actual realization is far from certain; yet at the same time its occurrence evinces a degree of plausibility that the legal regime treats as sufficient to warrant protection. Recall that in the tortious interference context, courts have adopted the general position that the expectancy/prospect needs to be more than just a subjective speculation, but must instead have a reasonable possibility of being realized—both causally and contextually.<sup>223</sup> To be sure, courts have generally disfavored mere “lost opportunit[ies]” as protectable prospects, especially when they are largely speculative and show no proof of a specific relationship.<sup>224</sup> All the same, they have been willing to countenance lower probability expectancies when a compelling public policy reason required such encouragement.<sup>225</sup> Transposing these to the market for a work suggests that parallels might be easy to locate.

The very protectability of the work—in terms of the subject matter and the myriad criteria for copyrightability—implicate the system's legitimate belief that the work embodies some market potential. Indeed, the very market-based rationale of the copyright system, i.e., the idea that the logic of the market induces creative production, would be amiss if protectability did not correspond to a reasonable belief that the copyright system wants actors to rely on.<sup>226</sup> It is of course another matter that the system's criteria for protectability do not reflect an abiding concern with such market potential.<sup>227</sup> Additionally, the whole premise of copyright—traceable back to the Constitution—is that the inducement of creative works inures to the public good as a whole and “promot[es] the [p]rogress” of society.<sup>228</sup> At its roots, a

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<sup>222</sup> *Id.* § 504(b).

<sup>223</sup> See *supra* text accompanying notes 94–105.

<sup>224</sup> See, e.g., *Blank v. Kirwan*, 703 P.2d 58, 70 (Cal. 1985); *Westside Ctr. Assocs. v. Safeway Stores 23, Inc.*, 49 Cal. Rptr. 2d 793, 803 (Ct. App. 1996); *Asia Inv. Co. v. Borowski*, 184 Cal. Rptr. 317, 323 (Ct. App. 1982).

<sup>225</sup> See *Youst v. Longo*, 729 P.2d 728, 735 (Cal. 1987) (indicating that protection of “the integrity of civil litigation” is one such compelling public policy reason).

<sup>226</sup> See Balganes, *Foreseeability and Copyright Incentives*, *supra* note 10, at 1573 (“[C]opyright exists primarily (if not entirely) to provide creators with an incentive to produce creative expression through the promise of limited exclusionary control over their creative work.”).

<sup>227</sup> *Id.* at 1581–89. (“Despite copyright being premised entirely on the idea of incentives, courts never look to its theory of incentives in delineating the scope and extent of a creator's entitlement in individual cases.”).

<sup>228</sup> U.S. CONST. art. I, § 8, cl. 8.

strong public interest pervades the very existence of copyright protection. The system is therefore set up with the idea that people should rely on it to realize this public purpose. This reality should then allow for significant leeway in the level of certainty demanded by the law for the protection of a prospect and should readily accommodate the idea of protectability being a useful proxy.

Even if one accepts protectability as a good proxy for the prospect, the precise boundaries of that prospect will require some delineation since in theory the market for a work is boundless. Especially given that the copyright system is not trying to preclude all uses of the work (as patent law purports to), the market for the work—actual and prospective—will require independent specification even when reframed as a prospect. This might be achieved through the use of objective expectations (e.g., reasonable foreseeability<sup>229</sup>) or through a mechanism that is roughly similar to antitrust law’s “relevant market” determination.<sup>230</sup> In either structuring, the device would seek to ensure that the market for the work—the protected prospect—tracks the objectively reasonable expectations that a creator might have, rather than a purely subjective desire for a windfall. In crucial ways, such a process of delineation would represent a significant improvement over the current system, which delegates the determination of what the protected work is to the individual plaintiff instead of adopting an objective standard.<sup>231</sup>

The recasting suggested here would enter the fray as a mechanism for tailoring the plaintiff’s claim during an infringement action, rather than as a facet of copyrightability since it relates primarily to infringement rather than validity.<sup>232</sup> The plaintiff’s action—both by claim and remedy—would then be limited to unlawful interferences with the market that the court/law identifies as a reasonable expectation for the work at issue. The court would now have to examine whether the plaintiff’s infringement claim pertains to a market benefit that constitutes a reasonable expectancy, i.e., whether it would have likely been realized/realizable by the plaintiff absent the defendant’s

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<sup>229</sup> See Balganes, *Foreseeability and Copyright Incentives*, *supra* note 10, at 1603-25 (advancing a proposal that copyright infringement be limited to “foreseeable copying” in order to limit the scope of exclusive rights to the expected market).

<sup>230</sup> For the relevant market determination, see Robert G. Harris & Thomas M. Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 CALIF. L. REV. 1, 64 (1984) (“Courts should apply the protected interest, market transaction, burden-shifting orientation consistently in all cases involving relevant market definition.”); William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 960-63 (1981); Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1813 (1990).

<sup>231</sup> See Paul Goldstein, *What is a Copyrighted Work? Why Does it Matter?*, 58 UCLA L. REV. 1175, 1176-77 (2011) (“[A copyrighted] work is whatever the author says it is . . . . In the overwhelming majority of cases under the 1976 Act in which the copyrighted work determined, or at least influenced, the legal outcome, the court . . . simply rubber-stamped the author’s identification of his work.”).

<sup>232</sup> For a fuller discussion of the difference, see Mark A. Lemley & Mark P. McKenna, *Scope*, 57 WM. & MARY L. REV. 2197, 2204-14 (2016).

interference, similar to the inquiry in tortious interference with a prospect.<sup>233</sup> Its most direct application would likely be in relation to the reproduction and derivative works rights, where the boundaries of the market remain uncertain in practice.<sup>234</sup> Thus an author of a computer software program would, for example, ordinarily be unable to claim infringement when an aesthetically pleasing part of that code is reproduced in an art work and framed as such, unless the author can prove that such an aesthetically-focused reproduction or derivative use of the work is a “reasonable” expectancy for literary works based on evidence of a licensing market/practice related to such uses.

In addition to taking shape from the context of the work and associated market variables, the reasonableness of the expectancy would also be influenced by the overarching public policy motivating the regime, echoing the Court’s own “recognition that some works are closer to the core of intended copyright protection than others.”<sup>235</sup> Purely factual, or minimally original works would thus have a narrower market domain, and conversely highly original works would obtain a broader scope of protection. In the abstract, this might seem like a complex task for courts to undertake; yet in practice, it has worked rather well in tortious interference and allowed courts to eliminate purely speculative claims from the system.

## 2. Copying as Interference and Improper Means

Not all uses of a protected work, however monetizable, amount to copyright infringement. Ever since its origins in the eighteenth century, copyright law has consciously chosen to avoid crafting its bundle of owners’ privileges in property-like terms. Some property scholars have described this as the copyright’s choice of a governance-based liability regime over a purely exclusion-driven one.<sup>236</sup> As Ben Kaplan put it many decades ago, copyright’s set of exclusive rights focus on describing exclusive rights in “way[s] to replicate the work.”<sup>237</sup> Copying therefore forms the principal form of action that copyright law treats as an actionable infringement. The Supreme Court put the point most profoundly and directly, when it emphasized that “[a]bsent

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<sup>233</sup> DOBBS, *supra* note 23, § 638 (“The plaintiff’s prospect or economic opportunity must be one that the plaintiff would likely have captured but for the defendant’s interference.”).

<sup>234</sup> See Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC’Y U.S.A. 209, 212-18 (1983) (“Having determined that a derivative right is in issue, it is far more difficult and consequential to draw the line that separates infringing from non-infringing derivative uses . . . . Judicial guidance has been uncertain at best.”).

<sup>235</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

<sup>236</sup> See Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1799 (2007) (noting that “[e]xclusion and governance can be contrasted” as ideas when thinking about property rights).

<sup>237</sup> KAPLAN, *supra* note 218, at 40 (emphasis added).



copying there can be no infringement of copyright.”<sup>238</sup> With the development of new technologies, this has of course changed somewhat, such that today some forms of infringement—such as a public performance or public display—do not require copying in the strictest sense.<sup>239</sup> Nonetheless, for the most part, copying is essential for infringement.

Despite the centrality of copying to infringement, “[n]ot all copying, however, is copyright infringement.”<sup>240</sup> This obviously complicates things further. To qualify as infringement, the copying certainly must involve an act of appropriation—i.e., of accessing a protected work and replicating its expression in whole or in part without authorization.<sup>241</sup> Yet, it must do more than just be an instance of unauthorized appropriation. It needs to be “improper” or “wrongful,” something that copyright jurisprudence has struggled to make complete sense of for over five decades now.<sup>242</sup> In addition to involving an act of appropriation and crossing a quantitative threshold (i.e., not be *de minimis*), the copying must also be qualitatively significant for it to be actionable. Ordinarily a question for the jury, this evaluative dimension of copying has proven to be difficult to distill down using specific normative criteria, with the result that courts (and juries) adopt a range of approaches and criteria during the determination.<sup>243</sup>

In tortious interference with a prospect, the “interference” refers to more than just the defendant’s actions that produce a particular result, namely the nonrealization of the economic prospect. It instead entails a close scrutiny of the particular means employed by the defendant, which must in addition evince components that are illegal, unlawful, or unethical.<sup>244</sup> In focusing on the propriety of the means employed for the interference, the tort can be seen as doing two things simultaneously. First, it takes attention away from a simplistic focus on *result* for actionability.<sup>245</sup> Second, it then examines—on an individual basis—whether the defendant’s behavior should be objectively understood as

<sup>238</sup> *Mazer v. Stein*, 347 U.S. 201, 218 (1954).

<sup>239</sup> See 17 U.S.C. §§ 106(4)–(5) (2012).

<sup>240</sup> *Feist v. Rural*, 499 U.S. 340, 361 (1991).

<sup>241</sup> See Alan Latman, “Probative Similarity” as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1188–89 (1990) (“The defendant must have seen or heard the plaintiff’s work at some time prior to creating his or her own work *and* have used plaintiff’s work in some fashion as a model. Thus, ‘copying’ . . . is the obverse of independent creation.”).

<sup>242</sup> See *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (noting that, once copying is established, the plaintiff bears the additional burden of showing that the copying was illicit). For a fuller discussion, see Balganes, *Normativity of Copying*, *supra* note 202, at 214–33.

<sup>243</sup> Balganes, *Normativity of Copying*, *supra* note 202, at 230–33.

<sup>244</sup> See *supra* subsection I.B.2.

<sup>245</sup> This is a corollary of the basic rule that bringing about an interference is not actionable as such, unless accompanied by improper means and the appropriate intention. See Restatement (First) of Torts § 766 cmt. d (1939) (noting that liability for tortious interference requires purpose by the tortfeasor to bring about the harm).

normatively problematic in the eyes of the action at issue (i.e., tortious interference), not just in the abstract. Consider a situation where a defendant willfully misrepresents information to a party, which in turn produces the nonrealization of the prospect. In a claim for tortious interference with a prospect, the law takes attention away from the mere nonrealization of the prospect and instead focuses on whether the misrepresentation—even if/when not actionable as an independent wrong—is of the kind that tortious interference with a prospect should consider problematic. The tort thus emphasizes a *means–ends* convergence for actionability.

The focus on improper means—for the interference—can therefore be understood as the tort’s effort to draw attention to the relationship between four components in an analytical sequence: normative defect, action, outcome and consequence. Unless all four are aligned, the interference is not actionable. A tangible economic loss (consequence) from the plaintiff’s non-realization (outcome) of the probable prospect is necessary, which should be the result of the defendant’s act of interference (action), in turn carried out in a manner that displays behavior which the tort deems inappropriate as a normative matter (defect). Looking to copyright’s analysis of copying reveals a symmetrical structure.

Even when shown to exist as a factual matter, a defendant’s copying must be “improper” to be actionable.<sup>246</sup> While it is true that the analysis of impropriety does not scrutinize the process of copying in the way that tortious interference does, a closer examination reveals that it does purport to examine the existence of a means–ends alignment within the act of copying. What ultimately makes an act of appropriation wrongful is the assessment that it amounts to a form of freeriding on the parts of a work that produce a copy with substitutionary potential in the marketplace.<sup>247</sup> In other words, the law’s use of the word “substantial” is a stand-in for whether the substitutionary potential of the copy was real, rendering the freeriding wrongful. Mere

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<sup>246</sup> *Arnstein*, 154 F.2d at 468.

<sup>247</sup> This is also accounted for by the focus on the ordinary observer to assess the similarity between the works, which is meant to serve as a proxy for an assessment of the substitutionary potential. The court in *Arnstein* observed:

The plaintiff’s legally protected interest is . . . his interest in the potential financial returns from his compositions which derive from the lay public’s approbation of his efforts. The question, therefore, 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.

*Id.* at 473. (internal footnote omitted); see also *Dawson v. Hinshaw Music, Inc.*, 905 F.2d 731, 734 (4th Cir. 1990) (“In light of the copyright law’s purpose of protecting the creator’s market, we think it sensible to embrace *Arnstein*’s command that the ultimate comparison of the works at issue be oriented toward the works’ intended audience.”).

substitutive similarity without such freeriding is insufficient, as is the mere act of freeriding without the production of a substantially similar copy. True, the evaluation of the means here is not one of examining the precise mechanism/method employed by the defendant during the copying, or of its ethics as such (e.g., bad faith, or use of a purloined copy). It is nevertheless a means-assessment in that it scrutinizes *how* the substitutive significance was realized during the appropriation, so as to warrant characterization as a wrongful act when the act is of the kind that copyright law should consider problematic in light of its normative goals. We then see an analytical pattern emerge here that is largely identical to that of tortious interference with a prospect. Copyright law treats an actual or imputed economic loss (consequence) from the creation of a substantially similar copy (outcome) as an actionable wrong when the result of a defendant's appropriation of expression (action) that is seen as an evaluatively undesirable instance of freeriding on the plaintiff's work (defect).

The normative defect attaches to the action, and taints it, which in turn extends to both the outcome and its eventual consequence. Both tortious interference and copyright law exhibit an interesting parallel in this sequence.

Table 1: Analytical Parallels in Behavior under Scrutiny

Tortious Interference	Sequence	Copyright Infringement
Economic Loss	CONSEQUENCE	Actual or Imputed Loss
Nonrealization of Prospect	OUTCOME	Substitutive Copy
Interference with Realization	ACTION	Appropriation of Expression
Ethically Suspect Behavior	DEFECT	Substantial Freeriding

The parallelism revealed by the homology also sheds light on how copyright's analysis of wrongful copying might be recast to better realize its purported means–ends alignment. To the extent that the wrongful copying analysis examines whether the defendant's actions are improper—as a form of appropriative behavior—copyright law would do well to set out the normative variables that it uses to judge such behavior. While the delineation may be difficult to achieve in abstract, it may well be realized through specific behavioral proscriptions that guide future defendants and aid courts (and juries) in their decisionmaking. In other words, the wrongful copying test

might be better served by breaking it down into specific process-based components that are used to judge a defendant's actions.<sup>248</sup> Examples might include: the extent to which the defendant's copying attempts to actively conceal its appropriation, whether it copies elements other than the plaintiff's work, the ease/difficulty involved in the appropriation at issue, and whether such appropriative behavior is commonplace in the creative sector under consideration. Considerations such as these would most overtly convert the inquiry into a means-based scrutiny. In the end, what the parallelism reveals then is that "copying" in copyright law encompasses not just the interference (action), but also the very impropriety of that action, which renders it a wrong.

### 3. Volition, Subconscious Copying, and Intention

For quite some time now, copyright jurisprudence has remained unclear on whether copyright infringement embodies an implicit requirement of volitional conduct, for liability to attach.<sup>249</sup> In other words, must a defendant's actions have been volitional, in the sense of being under the willing control of the defendant? Much of this debate arises from the fact that copyright infringement has often been characterized as a "strict liability tort," implying that neither intention nor negligence were prerequisites for the imposition of liability.<sup>250</sup>

Despite this, a few courts that have considered the issue have concluded that an infringement nonetheless requires an element of "volition[al]" conduct on the part of the defendant, before liability can attach.<sup>251</sup> Thus, one court held that the operator of a Bulletin Board Service (BBS) could not be liable for infringing content uploaded by a user without some volitional conduct on the part of the operator.<sup>252</sup> Another court put the point event

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<sup>248</sup> For a recent effort in this direction, see Patrick Goold, *Unbundling the "Tort" of Copyright Infringement*, 102 VA. L. REV. 1833 (2016). Goold proposes recasting the infringement analysis into five separate categories based on the particular normative goal at stake. *See id.* at 1838 (outlining "five distinct 'copy-torts'" that protect different interests). Yet Goold's framework does little by way of suggesting specific criteria that the analysis needs to focus on to connect the defendant's actions to the notion of wrongdoing for which the law is attempting to impose liability.

<sup>249</sup> *See* Denicola, *supra* note 205, at 1260 ("Several federal court decisions have expressed uncertainty about the existence of a volition requirement." (internal citations omitted)).

<sup>250</sup> *See, e.g.,* *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."); *see also* *Educ. Testing Serv. v. Simon*, 95 F. Supp. 2d 1081, 1087 (C.D. Cal. 1999) (describing copyright infringement as a "strict liability tort"). *But see* Patrick R. Goold, *Is Copyright Infringement a Strict Liability Tort?*, 30 BERKELEY TECH. L.J. 305, 310 (2015) ("[D]espite the widespread and orthodox belief [to the contrary] . . . copyright infringement is not a strict liability tort because it does not hold the defendant liable simply [because] he infringed a right of the plaintiff. In addition, it must be shown that the defendant's copying was wrongful.").

<sup>251</sup> *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995).

<sup>252</sup> *Id.* at 1372-73.

more directly, noting that while an infringement “does not require that the infringer know that he is infringing or that his conduct amounts to a willful violation of the copyright owner’s rights, it nonetheless requires *conduct* by a person who causes in some meaningful way an infringement.”<sup>253</sup> And this requirement of conduct, in turn, must exhibit “a nexus sufficiently close and causal to the illegal copying that one could” impute the illegality to the conduct (i.e., classify it as an infringement).<sup>254</sup>

These observations seem to confirm that the act of infringement embodies an element of voluntary conduct on the part of the defendant.<sup>255</sup> They imply that (i) an act, as opposed to a mere omission, is crucial for conduct to be infringing; (ii) such act must be voluntary, in the sense of being under the willing control of the defendant; and (iii) no independent *scienter* requirement attaches to the idea of a volitional act. “Copying,” as the term is understood in copyright law, must therefore embody an element of volition. On closer reflection however, the idea is more complicated than it first seems.

The paradigmatic act of copying—in its most basic sense—involves the process of appropriating expressive content from some source. It is true that copyright law does not care one bit whether that act was accompanied by a determinate knowledge as to the owner of the content being appropriated, an intent to so appropriate it, or indeed some negligence or recklessness on the part of the copier. At the same time however, the act of appropriation is not a simple physical act that is capable of being context-insensitive in the way that an act like speaking is. It involves a level of contextual advertence that a simple physical act (e.g., running) does not, since it always needs an object, being intransitive in construction. Put simply, copying requires advertence to the original—whatever is *copied from*. Copying therefore involves four elements: (i) prior expression in existence, (ii) knowledge of the existence of such expression, (iii) actual access to such expression, and (iv) a taking of such expression in the copier’s own use. For the copier to take expression, the copier must know of the existence of such expression and have access to it. Absent the copier’s knowledge of the expression being copied, it is

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<sup>253</sup> CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544, 549 (4th Cir. 2004).

<sup>254</sup> *Id.* at 550.

<sup>255</sup> In its decision in *American Broadcasting Companies, Inc. v. Aereo, Inc.*, the Supreme Court appeared to eliminate the requirement of volition altogether in relation to the public performance right, which as noted previously, does not embody the requirement of copying. 134 S.Ct. 2498 (2014). The dissent, in particular, took exception to this seeming omission by the majority. *Id.* at 2512-14 (Scalia, J. dissenting). Yet, a more plausible reading of *Aereo* is that the majority was adopting a presumptive approach to the question of causation, based on legislative history, which treated the broadcaster as having performed the broadcast, even when the viewing was under the immediate control of the end-user. *Id.* at 2506. *See also* Denicola, *supra* note 205, at 1293-95 (“The majority [in *Aereo*] did not specifically mention ‘volition.’ . . . The court’s analysis was cut short [by its application of] the Copyright Act. Since cable companies clearly perform under the Copyright Act, so did *Aereo*.”).

meaningless to allege copying. Without such minimal advertence, copyright's core idea of independent creation would prove meaningless;<sup>256</sup> mere similarity would form the basis of liability, without any concession for the possibility that such similarity was realized through means other than copying. The requirement of volition underlying copyright law therefore flows analytically from the type of action at issue, i.e., copying, and its simple pre-requisite of some minimal advertence.

While copyright infringement has thus come to be understood as requiring an element of volition, copyright law has over the years also developed a rule that copying can be both conscious and *subconscious*.<sup>257</sup> On the face of things, subconscious copying appears to contradict the advertent component of copying, and with it the understanding of copying needing to be a volitional act. Copyright jurisprudence allows a defendant to be held liable for infringement even when shown to have copied the protected work without actual knowledge of such copying when it occurs.<sup>258</sup> A defendant's good faith claim to have forgotten about the work that is copied from is therefore treated as irrelevant to infringement.<sup>259</sup> On the face of things, this appears to contradict the volitional nature of copyright infringement. Yet, acknowledging liability for subconscious copying does not deny the requirement of volition for copying. Here again, looking to tortious interference with a prospect sheds light on how the facial contradiction between these two propositions in copyright law (i.e., volition and subconscious copying) might be reconciled.

As an intentional tort, tortious interference insists that for liability to attach, a defendant (i) must actually know about the plaintiff's prospect, *and* (ii) intentionally interfere with that prospect.<sup>260</sup> As noted previously, a defining feature of a prospect—in contrast with a contract—is the probabilistic nature of the plaintiff's benefit. This difference influences courts' understanding of knowledge. The knowledge (of the prospect) that courts look for in a defendant is therefore of a lower magnitude than it is for a contract. One important respect in which this difference manifests itself is in the specificity of the prospect. To establish knowledge of a protected prospect, courts generally take the position that the prospect must merely be identifiable, and that the "specific identity or name" of the party/entity

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<sup>256</sup> For an account of independent creation and its centrality in copyright law, see ABRAHAM DRASSINOWER, *WHAT'S WRONG WITH COPYING?* 85-110 (2015).

<sup>257</sup> For further discussion of this topic, see 4 NIMMER, *supra* note 216, §13.08.

<sup>258</sup> *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 998 (2d Cir. 1983) (“[I]nnocent’ copying can nevertheless constitute an infringement.”).

<sup>259</sup> *Id.*

<sup>260</sup> DOBBS, *supra* note 23, § 638.

comprising the prospect is unnecessary.<sup>261</sup> This is in contrast to the requirement of intention, which they hold to a much more stringent standard. A defendant must have acted with the purpose of interfering with the prospect, or with the substantial certainty that the actions will result in such an interference.<sup>262</sup> A mere intentional act that incidentally results in an interference is insufficient to meet the requirement.<sup>263</sup>

What explains the variation in courts' treatment of the knowledge and intention requirements of tortious interference with a prospect is the distinctive analytical role that each plays within the tort. The knowledge requirement is constitutive of an interference—as an act, rather than an omission or a result. To therefore engage in the act of interfering with a prospect, at a minimum an actor must know of its plain existence. To “interfere” with something implies a conscious act that inhibits an outcome, rather than just the result of the outcome not being realized.<sup>264</sup> As with copying, much of this flows from the fact that an act of interference demands an object for its reference owing to its intransitive construction. The intention requirement on the other hand is not constitutive of the behavior being described, which can be fully described without such intention (i.e., a simple interference, or a negligent interference). The intention therefore *accompanies* the behavior (interference) at issue, whereas the knowledge (of the object) is treated as *constitutive* of it. The distinction between a constitutive state of mind and an accompanying one also explains how copyright law can embody a volition requirement, while simultaneously adopting an account of subconscious copying.

The idea of subconscious copying confirms the idea that copying—for infringement purposes—need not be conscious, in the sense of embodying a *scienter* requirement. It therefore reiterates the idea that liability for copyright infringement is strict. On the issue of copying, it also supports courts drawing an inference that copying did in fact occur, from the circumstantial elements

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<sup>261</sup> See, e.g., *Ramona Manor Convalescent Hosp. v. Care Enterprises*, 225 Cal. Rptr. 120, 126 (Ct. App. 1986), as modified on denial of reh'g (Mar. 5, 1986). (“The rule does not require, however, that the person who loses the performance of the contract as a result of the conduct of the actor should be specifically mentioned by name. It is sufficient that he is identified in some manner . . . .” (quoting RESTATEMENT (SECOND) OF TORTS § 766 cmt. p (1979))).

<sup>262</sup> DOBBS, *supra* note 23, § 621; see also RESTATEMENT (SECOND) OF TORTS § 8A (1965) (“The word ‘intent’ is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”).

<sup>263</sup> *Imperial Ice Co. v. Rossier*, 112 P.2d 631, 633 (Cal. 1941) (“If the actor had no knowledge of the existence of the contract or his actions were not intended to induce a breach, he cannot be held liable though an actual breach results from his lawful and proper acts.”).

<sup>264</sup> See *Interference*, OXFORD ENGLISH DICTIONARY (17th ed. 2016) (defining an “interference” as the act of “meddl[ing] with” something “without having the right to do so”).

of access and similarity even when a defendant quite credibly denies having engaged in a conscious taking of expression.<sup>265</sup> In other words, subconscious copying does not negate the reality that the putative copier had some knowledge about the expression that was eventually copied, which is a constitutive dimension of the very idea of copying, when stripped down to its fundamentals.

Thus, an individual who heard some popular music in his childhood, and many years later produced his own music incorporating into it elements of what he heard in his childhood might be said to have engaged in subconscious copying, insofar as he was unaware of his use of the prior expression in his own music and was not consciously deploying that knowledge.<sup>266</sup> Yet, even here we do not deny (a) the existence of knowledge (about the protected music) in the copier at some *point in time*,<sup>267</sup> or that (b) the copier deployed this knowledge in his own use. Subconscious copying is therefore perfectly compatible with a volition requirement underlying copying and its core idea of advertence to the protected original. Indeed, another way to understand their compatibility—drawing on tortious interference—is in the recognition that the advertence demanded by volition is internal to the very idea of copying, whereas the consciousness or subconsciousness that the jurisprudence on that question discusses goes to the defendant’s particular state of mind accompanying the copying, i.e., it is superimposed on the constitutive advertence. Volition is constitutive of the very act of copying, whereas the question of consciousness (or lack thereof) is about the defendant’s state of mind accompanying the act. Copying can therefore be both subconscious and volitional at the same time.

Examining copyright’s volitional act requirement (for infringement) through tortious interference and its understanding of an interference thus reveals two important insights about copyright law. First, that the act of copying does indeed embody such a requirement, flowing as it does from the minimal advertence that the very act of copying/appropriation demands. Second, that such volition does little harm to the basic conception of copyright infringement as a “strict liability tort,” whether or not one considers it worthwhile retaining that oft-stated understanding of infringement.

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<sup>265</sup> *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (“If there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying.”).

<sup>266</sup> *See, e.g., Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 483-85 (9th Cir. 2000).

<sup>267</sup> *Id.* Indeed, in the case, the court looked at the defendant’s actions and admissions to effectively infer such knowledge circumstantially, since there was no direct evidence of such prior knowledge. The defendant himself “believed he may have been copying someone else’s song” even though he didn’t remember precisely which one it was. *Id.* at 484. Nonetheless, the court’s reasoning was clearly premised on the fact that such knowledge did exist at a prior point in time, however remote.



#### 4. Fair Use as Privileged Interference

A plaintiff's entitlement in copyright law is subject to several important limitations and exceptions, of which the privilege of fair use is perhaps the best known.<sup>268</sup> Originally a creation of courts in the nineteenth century and today codified in the statute,<sup>269</sup> the doctrine of fair use exempts an act of infringement from liability if it complies with a set of four factors, each of which is to be weighed and considered using the facts of an individual case. These factors focus on the nature and purpose of the defendant's use of the work, the amount and substantiality of the defendant's copying, the nature of the protected work, and the effect of the defendant's use on the market for the protected work.<sup>270</sup>

A major unresolved controversy of some significance in copyright jurisprudence is whether fair use should be a part of the plaintiff's prima facie case, or instead an affirmative defense.<sup>271</sup> The characterization determines which party bears the burden of proof for the issue, and the stage at which the issue is introduced during the proceeding. While this controversy is seen to have a largely procedural and evidentiary aspect to it, it masks a deeper confusion—namely, the substantive overlap between the established elements of the plaintiff's prima facie case and the fair use doctrine.

As is well known, a central element of the plaintiff's prima facie case of infringement is that the defendant copied the plaintiff's work, which in turn requires proof that the defendant actually appropriated content and that the appropriation was quantitatively and qualitatively "substantial" so as to be actionable.<sup>272</sup> This latter inquiry, the substantial similarity analysis, thus probes the magnitude and significance of the copying at issue,<sup>273</sup> which is almost identical to the "amount and substantiality" of the defendant's use, which fair use considers as an important factor in its analysis.<sup>274</sup> It therefore appears redundant to undertake this inquiry twice.

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<sup>268</sup> See 17 U.S.C. §§ 107–122 (2012).

<sup>269</sup> *Id.* For an overview of the origins of the doctrine, see generally Matthew Sag, *The Pre-History of Fair Use*, 76 BROOKLYN L. REV. 1371 (2011).

<sup>270</sup> 17 U.S.C. § 107.

<sup>271</sup> For an examination of the origins of these divergent views, see Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 685–710 (2015).

<sup>272</sup> See Latman, *supra* note 241, at 1188–89. ("[C]opying, in order to be prima facie actionable, must include three elements: (1) The defendant must have . . . used plaintiff's work in some fashion as a model . . . (2) The material copied . . . must be such as enjoys protection under copyright, [and] (3) [S]uch protected material must be 'substantial.'").

<sup>273</sup> See *Arnstein v. Porter*, 154 F.2d 464, 473 (2d. Cir. 1946) ("The question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners . . . that defendant wrongfully appropriated something which belongs to the plaintiff.").

<sup>274</sup> See 17 U.S.C. §107(3).

A large part of the confusion for this redundancy appears to be a result of the origins of fair use. When it emerged in the nineteenth century, its core tenets came to be expounded as part of the infringement analysis—i.e., on the issue of actionable copying—rather than as an independent doctrine.<sup>275</sup> This accounts for why—even through much of the twentieth century—courts treated precedent on fair use and actionable copying as interchangeable in their logic.<sup>276</sup> Congress then for the first time codified the fair use doctrine in 1976, but in doing so said nothing at all about the infringement analysis, thereby seemingly acquiescing to its existing structure.<sup>277</sup> This triggered the need to identify a separate domain for the fair use doctrine.

To avoid *some* of this redundancy, some courts came to treat fair use as an “affirmative defense,” meaning that the defendant alone bore the burdens of persuasion and proof on the question.<sup>278</sup> Neither the plaintiff nor the court were under any obligation to consider it if the defendant did not bring it up. As early as 1985, the Supreme Court confirmed the idea that fair use was an affirmative defense,<sup>279</sup> and a decade later affirmed the idea most concretely by noting that this meant that the defendant bore the “burden of demonstrating fair use.”<sup>280</sup> This position has persisted ever since.

Yet, it sits somewhat oddly with the plain language of the copyright statute, which defines a copyright owner’s exclusive rights with the opening observation that the exclusive rights are “[s]ubject to section[] 107,” the fair

<sup>275</sup> The origins of the doctrine are traced back to the opinion of Justice Story in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841). *Folsom* developed the central tenets of fair use as part of the question whether the defendant’s copying was exempt from liability for copyright infringement, rather than as a defense. *Id.* at 348. For an account of the case and its influence since, see L. Ray Patterson, *Folsom v. Marsh and its Legacy*, 5 J. INTELL. PROP. L. 431 (1998).

<sup>276</sup> See Shyamkrishna Balganes, *The Questionable Origins of the Copyright Infringement Analysis*, 68 STAN. L. REV. 791, 842-44 (2016) (“[In *Arnstein*], Judge Frank’s citation to cases of ‘abridgement,’ ‘compilations,’ and ‘quotations of works of criticism’—three forms of copying that offer the copier a defense to an infringement claim—suggest that he conflated the standard for infringement with defenses to infringement.”).

<sup>277</sup> The infringement analysis finds no mention whatsoever in the copyright statute, or in the legislative history accompanying its enactment. *Id.* at 862-63.

<sup>278</sup> See, e.g., *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 719 (9th Cir. 1976) (“[The defendant] asserted, as [an] affirmative defense . . . the defense of fair use”); *Ass’n of Am. Med. Colleges v. Mikaelian*, 571 F. Supp. 144, 151 (E.D. Pa. 1983), *aff’d*, 734 F.2d 3 (3d Cir.), and *aff’d sub nom.* *Appeal of Mikaelian*, 734 F.2d 6 (3d Cir. 1984) (“[T]he fair use exception to the Copyright Act is an affirmative defense”); *Roy Exp. Co. Establishment of Vaduz, Liecht., Black Inc., A. G. v. Columbia Broad. Sys., Inc.*, 503 F. Supp. 1137, 1152 (S.D.N.Y. 1980), *aff’d sub nom.* *Roy Exp. Co. Establishment of Vaduz, Liechtenstein v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095 (2d Cir. 1982) (“[T]he fair use defense is an affirmative defense”).

<sup>279</sup> See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561 (1985) (“The drafters resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis.”).

<sup>280</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

use provision.<sup>281</sup> This has caused several academic commentators to forcefully argue that fair use was intended—and had always been—a part of the plaintiff’s prima facie case rather than an affirmative defense, especially given its close connection to the elements of the infringement analysis.<sup>282</sup> Somewhat more recently, this argument has begun to receive limited judicial validation. In one case, the Eleventh Circuit rejected the characterization of fair use as an affirmative defense, and emphasized that it should be understood as a “right,” but nonetheless retained placing the burden for it on the defendant.<sup>283</sup> The Ninth Circuit, however, took this logic one step further in a case involving a notice and takedown provision of the Digital Millennium Copyright Act (DMCA).<sup>284</sup>

The provision in question, § 512, enables a copyright owner to require a service provider to take down from its servers any content that infringes its copyrights.<sup>285</sup> To enforce this request, the copyright owner sends the provider a “takedown notification,” with which the provider complies in order to avoid liability.<sup>286</sup> In its decision, the Ninth Circuit concluded that regardless of how one characterizes fair use—i.e., as a right or as an affirmative defense—in a takedown notification, the plaintiff–copyright owner should bear the burden of addressing it.<sup>287</sup> Unlike the Eleventh Circuit, the Ninth Circuit emphasized the consequences of the classification over nomenclature. For now, the court’s logic is of course limited to § 512. Yet, as an analytical matter it applies with equal force to the standard infringement case as well. And this in turn brings us back to square one: if fair use is indeed a part of the plaintiff’s prima facie case, how should the law account for the obvious substantive redundancy in the two?

In tortious interference with a prospect (and contract), the jurisprudence has similarly oscillated between identifying aspects of the defendant’s behavior as components of the prima facie case and as better suited to an

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<sup>281</sup> 17 U.S.C. § 106 (2012).

<sup>282</sup> See, e.g., Loren, *supra* note 271, at 710 (“Campbell’s embrace of the notion that fair use is an affirmative defense . . . was an error of statutory interpretation with seriously problematic First Amendment consequences.”); Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RES. L. REV. 135, 155–69 (2011) (“The placement of the fair-use provision in Chapter 1 suggests a presumption of fair use.”); Haochen Sun, *Fair Use As A Collective User Right*, 90 N.C. L. REV. 125, 136 (2011) (“The broad language used in section 107 of the Copyright Act . . . does not, however, clear away all the uncertainty . . . . Despite the persistent uncertainty lingering around the fair use doctrine, fair use has uniformly been treated as an affirmative defense.”); see also, e.g., Ned Snow, *Proving Fair Use: Burden of Proof As Burden of Speech*, 31 CARDOZO L. REV. 1781, 1788 (2010) (“Tellingly, the Copyright Act never labels fair use an affirmative defense.”).

<sup>283</sup> *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 (11th Cir. 1996).

<sup>284</sup> *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1152 (9th Cir. 2016).

<sup>285</sup> 17 U.S.C. § 512(c) (2012).

<sup>286</sup> *Id.* §§ 512(c)(1)(C) & (c)(3).

<sup>287</sup> *Lenz*, 815 F.3d at 1153–54.

independent privilege or justification, burden for which is placed on the defendant.<sup>288</sup> One early commentator on tortious interference thus drew a distinction between the “*prima facie* tort” and the question whether the invasion was “privileged or justified.”<sup>289</sup> In this dichotomy, the rationale for the division appears to lie in its allowing the court to better realize the balancing exercise involved. Historically, the distinction came about owing to the tort’s relatively insignificant focus on the improper or wrongful nature of the defendant’s behavior, in comparison to its effect, i.e., the interference.<sup>290</sup> The plaintiff therefore merely had to show an intentional interference, and the defendant then could prove that the interference was justified or privileged.<sup>291</sup> Today, with the law having moved to incorporating an “improper means” element in its understanding, the division makes little analytical sense. Indeed, some cases even go so far as equating improper means with “unjustified” and placing the burden for it on the plaintiff, so as to eliminate all doubt.<sup>292</sup>

The modern trend in tortious interference cases is therefore to treat what used to be the defendant’s privileges as a part of the *prima facie* case.<sup>293</sup> All the same, this does not mean that the law has come to eliminate all use of affirmative defenses. As the leading treatise notes, in the modern understanding affirmative defenses in tortious interference actions represent situations where the defendant raises a claim unrelated to the culpability of its actions under the tort.<sup>294</sup> In other words, when the defendant introduces a new consideration into the equation, that was not directly related to the action (as a substantive component), it rightly remains an affirmative defense. The Texas Supreme Court’s decision in

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<sup>288</sup> See DOBBS, *supra* note 23, § 620 (noting how under the traditional rule “the defendant could escape liability only by showing a privilege and shouldering the burden of justifying the interference”).

<sup>289</sup> Carpenter, *supra* note 21, at 745.

<sup>290</sup> See DOBBS, *supra* note 23, § 620.

<sup>291</sup> *Id.*

<sup>292</sup> As Dobbs observes:

Many of cases that place the burden of proof upon the plaintiff do so by saying that the plaintiff must prove that the defendant’s interference was “unjustified.” That might sound as if the plaintiff is required to prove a negative—the total absence of justification. However, the statement probably only means that the plaintiff must present evidence and persuade the jury that the defendant’s conduct was improper because of the means used to interfere, or, perhaps, because of a wrongful purpose.

*Id.*

<sup>293</sup> See, e.g., *Advance Sign Grp., LLC v. Optec Displays, Inc.*, 722 F.3d 778, 786 (6th Cir. 2013); *Wagenseller v. Scottsdale Mem’l Hosp.*, 710 P.2d 1025, 1042 (Ariz. 1985); *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 305 (Utah 1982).

<sup>294</sup> DOBBS, *supra* note 23, § 620 n.6.

*Wal-Mart Stores v. Sturges* is illustrative.<sup>295</sup> In *Sturges*, the court concluded that it made little sense to speak of an independent defense or justification if it was merely a denial of some part of the plaintiff's case.<sup>296</sup> On the other hand, when it involved something completely unrelated, such as a claim of "complete or qualified privilege," it rightly remained a defense.<sup>297</sup> Since Texas law requires the defendant's means under tortious interference with a prospect to be independently actionable but not recoverable, the court specifically held that exemptions from such actionability that arise from independent considerations remain defenses that are to be raised by the defendant.<sup>298</sup>

The core distinction therefore appears to be the extent to which the defense introduces altogether *new* normative considerations into the equation. These considerations are new only in the sense that they are not a direct part of the prima facie case for the tort, nor subsumed under its elements. An "absolute judicial privilege" is an example in situations where the plaintiff claims an interference with a prospect based on false testimony.<sup>299</sup>

Tortious interference provides us with a way to think about the right-versus-affirmative defense debate in fair use and potentially address the redundancy concern noted earlier. To the extent that the fair use inquiry deals with considerations that are more germane to the infringement analysis, they are better dealt with in the latter. Thus, questions about the quantum and significance of the defendant's copying—relative to the plaintiff's work, or the originality of the plaintiff's work, are better dealt with in the plaintiff's prima facie case. All the same, there remain additional considerations relating to liability (for copyright infringement) that are (i) specific to the defendant, and (ii) about which the defendant is obviously best positioned to introduce evidence and information. Introducing these considerations into the equation does more than just negate/deny the plaintiff's case, it raises a new claim. It mimics what theorists of the common law refer to as a "plea in avoidance" or of "confession and avoidance."<sup>300</sup> It operates as an affirmative plea, in that by introducing new considerations into the liability determination, the plaintiff must now be given an opportunity to respond to it.<sup>301</sup>

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<sup>295</sup> 52 S.W.3d 711 (Tex. 2001).

<sup>296</sup> *Id.* at 726-27.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> See DOBBS, *supra* note 23, § 620 n.6 ("For example, the absolute judicial privilege may be an affirmative defense available even when the plaintiff has proved wrongdoing, say by a witness' false testimony that leads others to breach contracts with the plaintiff.").

<sup>300</sup> Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556, 566-68 (1973).

<sup>301</sup> *Id.* at 567. For an application to copyright law, see generally Shyamkrishna Balganes, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664 (2012).

In this reformulation, the problem becomes less about mere nomenclature, but instead about differentiating between the myriad categories of claims that are today collectively described as “fair use” claims, based on the underlying normative considerations at work.<sup>302</sup> Claims that focus entirely on the amount and significance of the use, as well as the purpose (commercial or noncommercial) to which the use is put are likely better dealt with as part of the prima facie case.<sup>303</sup> On the other hand, when the defendant’s use involves a narrative about types and forms of art and the introduction of new meaning from a new context so as to claim a transformation, it directly implicates free speech and First Amendment considerations, which are better balanced against copyright’s utilitarian goals independent of the prima facie case.<sup>304</sup> Along the spectrum will obviously arise a variety of different situations, which courts should be willing to wrestle with as a normative matter to determine whether they are better dealt with under the prima facie case or as a defense—taking a cue from how tortious interference has arrived at a workable equilibrium on the very same question. While there may be no easy (or one-size-fits-all) answers to the problem, looking to tortious interference suggests a pragmatic method for arriving at them.

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The homology between copyright and tortious interference with a prospect suggests new ways of constructing and interpreting the regime’s various core tenets. Each of copyright’s central premises—the protectable interest, copying, volitional conduct, and fair use—has an important parallel in the different elements of tortious interference with a prospect. Table 2 summarizes the homology described and the interpretive insights that flow from it.

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<sup>302</sup> See generally Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537 (2009) (providing a comprehensive review of the categories of fair use claims).

<sup>303</sup> E.g., *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014) (addressing whether a university’s electronic course materials copied too much from copyrighted works or whether it was a fair use).

<sup>304</sup> E.g., *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (addressing appropriation art as fair use); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (considering whether a parody is fair use).

Table 2: Interpretive Parallels and Reform Insights from the Homology

Tortious Interference Element	Copyright Element	Tentative Reform Suggestion from Homology
Prospective Economic Advantage	Actual/Potential Market for the Protected Work	Determining the scope and boundaries of the market based on a “reasonable expectancy”
Interference—Actual and Improper	Copying—Actual and Wrongful	Directly addressing the normative criteria which make copying “wrongful” or “improper”
Knowledge of Prospect	Advertence to Protected Expression (Volition)	Confirmation of a volitional element in the idea of copying and its compatibility with strict liability
Privileged/Justified Interference	Fair Use	Differentiating the infringement analysis and fair use based on considerations underlying the claim

### III. IMPLICATIONS AND LESSONS

Beyond the immediate doctrinal ramifications just discussed, the homology between copyright and tortious interference also embodies broader lessons for copyright jurisprudence and thinking. This Part considers three such implications. The first is justificatory, relating to copyright’s theory of incentives; the second conceptual, pertaining to how copyright is thought of by courts and scholars as an analytical matter; and the third is institutional, suggesting that the copyright system should place greater faith than it currently does in the ability of courts to tailor the entitlement.

#### A. *From Incentive-Creation to Incentive-Protection*

As noted previously, the most commonly advanced justification for modern copyright law today is the utilitarian theory of creator incentives.<sup>305</sup>

<sup>305</sup> See Balganes, *supra* note 10, at 1577 (“Central to all of copyright law is the idea of incentives.”); Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 797 (2003) (“[I]t is through incentive language that judges are most empowered to make copyright law work as it should.”); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1198-1204 (1996). (“[The expansion of] copyright protection . . . has been accompanied by rhetoric championing the needs of the deserving author, emphasizing the need to induce creative activity, or both.”).

According to this account, copyright operates by inducing creators to produce creative expression through the promise of limited market exclusivity—i.e., a set of exclusive rights—in the work so created.<sup>306</sup> The very rationale for copyright is seen as emanating from the regime’s ability to thus induce creators into producing work, which eventually inures to the benefit of the public by enhancing social welfare.<sup>307</sup>

Characterizations of the incentives account do more, however. Not only do they portray the logic of incentives as the *only* rationale for copyright law and suggest that creators have no other reasons to create their works, but they also all too readily conflate the incentive produced by copyright (law) with those generated independently by the market. Consider the following statements about copyright’s theory of incentives, all drawn from Supreme Court opinions:

- “By establishing a marketable right to the use of one’s expression, copyright *supplies* the economic incentive to create and disseminate ideas.”<sup>308</sup>
- “The purpose of copyright is to *create* incentives for creative effort.”<sup>309</sup>
- “The *provision* of incentives for the creation of new works is surely an essential means to advance the spread of knowledge and learning.”<sup>310</sup>

Each of these statements assumes that copyright law *originates* the incentive for creation that influences creators to produce. By “suppl[ying],” “creat[ing],” and “provi[ding],” the incentive to create, copyright is believed to function as an inducement for creativity.<sup>311</sup>

Even assuming the account to be true as regards creators’ motivations, the characterization is grossly misleading. As a structural matter, it altogether disregards the role of the market in generating the incentive, which copyright is necessarily parasitic on. Without a plausible market for a work, no amount of copyright protection can induce creative production. All that copyright does is inject the element of exclusivity over an identified terrain of the

306 See *id.* at 1203 (“[T]he limited grant [of rights] is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward.”).

307 See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 13 (2003) (“The dynamic benefit of a property right is the incentive that possession of such a right imparts to invest in the creation or improvement of a resource in [a] period . . .”).

308 *Harper & Row Publ’rs. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (emphasis added).

309 *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984) (emphasis added).

310 *Golan v. Holder*, 132 S. Ct. 873, 889 (2012).

311 *Harper & Row*, 471 U.S. at 558; *Sony*, 464 U.S. at 450; *Golan*, 132 S. Ct. at 889.



market, rendering the exploitation of the market easier. When that terrain is nonexistent, the exclusivity is superfluous.

Thus, a novelist who believes that her book is likely to sell several copies on the market, which she can rely (with some confidence) as accruing to her because of copyright, might indeed be induced to write the novel. But if she knows that there is *no* market for the book to begin with—for whatever reason—under the incentives logic (assuming a basic level of rationality) she will have no reason to write the novel in the expectation of thereby accruing profits. Without a realizable market potential, copyright's ability to induce creative expression is a simple nonstarter. When the novelist assesses the demand for the potential novel to be nonexistent, copyright cannot artificially and independently create a market for the work.<sup>312</sup>

What this suggests then is not that copyright has no role to play in the incentives account, or that the incentives account is untrue. It suggests simply that the incentives account entails a symbiotic relationship between copyright's promise of exclusivity and a realizable market for the work, which copyright law has no independent say in. Copyright shapes a putative market potential through its set of exclusive rights, by raising the prospect of its realization. But that is a far cry from *creating* or *supplying* the incentive on its own, in the way that courts caricature the justification.

Rebecca Tushnet has made a similar point in prior work, calling into question the presumptive analytical independence of copyright and market incentives. While characterizing it as a "failure of incentive," she notes that "regardless of the strength of protection, it is the likelihood of success in the market—a highly unpredictable variable, and one that [copyright] law can do little if anything to affect—that is key to whether new authors reap rewards from creating works."<sup>313</sup> Of course, an unpredictable incentive can be an incentive nonetheless, especially when actors are overconfident.<sup>314</sup> While the connection between copyright law and market incentives may not point to the

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<sup>312</sup> Another way of putting the point is to note that if copyright is about curing a market failure, a market failure presumptively requires the existence of a market to begin with, which must then fail. See, e.g., Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 991-96 (2002) ("[E]xisting economic analysis suggests no reason to presume, as a market failure approach necessarily does, that private markets will necessarily . . . prove efficient at ensuring adequate supply and dissemination of copyrighted works.").

<sup>313</sup> Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 517-18 (2009).

<sup>314</sup> See generally F.M. Scherer, *The Innovation Lottery*, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 3, 20 (Rochelle Dreyfuss et al. eds., 2001) ("To the extent that investments in technological and artistic creation are motivated by the longshot hope of a very large reward, intellectual property policies should sustain and reinforce that incentive system, not undermine it.").

failure of the incentive theory, it reinforces the idea that copyright's account of incentive creation is dependent on the market (i.e., market demand).

Empirical proof aside, copyright's theory of creator incentives therefore requires some readjustment, so as to acknowledge its dependence on the market (and on market demand). Without such an acknowledgment, its causal role risks being overstated. Tortious interference with a prospect provides the theory with a perfect mechanism for this readjustment—one that allows the incentives account to continue as a theoretical model, while readily confirming its dependence on the market. The answer thus lies in recognizing that copyright does not *create* the incentive to produce work, instead it *protects* that incentive when generated by the market.

The incentive, if any, lies in the market prospect that a creator sees as a potential source of returns when the work is created and marketable. Copyright recognizes that this incentive is a low-probability one if unfettered freeriding (copying) is allowed, and therefore generates a structure of rights/liability to render the prospect easier to realize, i.e., it raises the probability of its realization by the creator. It thus takes a major component of the uncertainty surrounding the market prospect—relating to its appropriability, based on freeriding—altogether out of the equation. This readjustment also confirms an insight, made famous by Ed Kitch many decades ago within the patent context, about the ability of market prospects to act as incentives for risky activity.<sup>315</sup>

The tortious interference homology therefore compels an important modification to copyright's dominant justificatory theory, introducing a nuance into its formulation that takes it away from the realm of pure rhetoric and caricature that seems facially implausible (e.g., absent copyright, there would be *no incentive* to create). In so doing, the justification says nothing about the empirical basis for the theory and the assumptions that it relies on<sup>316</sup> but suggests spending more attention on the details of the underlying market for the work and its construction of demand when speaking of copyright's function as an inducement for creativity.

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<sup>315</sup> See Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265, 266 (1977) (presenting a view of "technological innovation as one in which resources are brought to bear upon an array of prospects, each with its own associated sets of probabilities of costs and returns"). For a recent elaboration, see John F. Duffy, *Rethinking the Prospect Theory of Patents*, 71 U. CHI. L. REV. 439, 443 (2004) ("[T]he prospect features of the patent system . . . are important because they determine not whether rents will be dissipated, but how they will be dissipated.").

<sup>316</sup> See Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES IN L. 29, 32 (2011) ("[T]here has been relatively little critical evaluation of the empirical legitimacy of the theoretical assumptions about copyright as an incentive.").

### B. *The Relationality of Right and Liability*

Ever since its origins, copyright's dominant conceptual discourse has framed the institution as granting authors a set of marketable exclusive *rights*.<sup>317</sup> These rights are, in turn, deemed capable of independent analytical delineation.<sup>318</sup> This trend has continued even after copyright's domain has expanded to cover new subject matter and novel forms of creativity.

Yet, the reality remains that each of copyright's basic rights relates to potential behavior (on the part of a potential defendant) that requires elucidation on its own. In other words, each of the rights works by rendering such behavior within the exclusive domain of the author to engage in or authorize. The exclusive right to reproduce, copyright's most fundamental right, is contingent on an understanding of *reproduction*. It grants the author the exclusive right to engage in such behavior. However, without a clear understanding of what exactly such behavior entails, it remains impossible to know what the author has an exclusive right to. And for this, copyright looks to its understanding of "copying," developed as part of the standard infringement analysis.<sup>319</sup> So it is with the exclusive right to publicly perform the work too.<sup>320</sup> Absent an understanding of a public performance that is unauthorized and potentially infringing, it is impossible to know what goes into the author's exclusive right to publicly perform the work, or to authorize such a performance.

In a sense then, rights under copyright are each little more than exclusive rights to engage in behavior that defendants cannot. But what that behavior is is hardly self-evident or obvious. This is vastly different from other rights, such as property's right to exclude, where the directive is both self-evident and clear, owing to the existence of an identifiable *res*.<sup>321</sup>

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<sup>317</sup> The origins of this can be traced back to the Statute of Anne, which spoke of the "sole right and liberty" of printing being granted to authors. 8 Anne c. 19, § 2 (1710) (Gr. Brit.) (emphasis added). This has continued for nearly two centuries now. Both the 1909 and 1976 copyright statutes in the U.S. phrased their grant in terms of "exclusive rights." Copyright Act of 1909, Pub. L. No. 60-349, § 1, 35 Stat. 1075 (1909) ("[A]ny person entitled [to copyright] . . . shall have the exclusive right . . ."); 17 U.S.C. § 106 (2012) ("[T]he owner of copyright . . . has [] exclusive rights . . .").

<sup>318</sup> See 17 U.S.C. § 106 (2012) (delineating each of the author's individual rights); Copyright Act of 1909, Pub. L. No. 60-349, § 1, 35 Stat. 1075 (1909) (also delineating these rights).

<sup>319</sup> OSTERBERG, *supra* note 220, §1:1. For a detailed discussion of this origins of this analysis, see Balganes, *Questionable Origins*, *supra* note 276.

<sup>320</sup> 17 U.S.C. §106(4).

<sup>321</sup> See JAMES E. PENNER, *The Duty of Non-Interference and Ownership, in THE IDEA OF PROPERTY IN LAW* 128, 128-29 (1997); see also Shyamkrishna Balganes, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593, 612 (2008) ("The claim-right to exclude is understood through the correlative duty it imposes on others (*in rem*) to 'exclude themselves' from an identifiable resource.").

In Hohfeldian terms, copyright's exclusive rights are in reality *privileges* rather than rights.<sup>322</sup> As distinguished from a right, a privilege entitles its holder to engage in an action without anyone else having legal recourse to prevent such action.<sup>323</sup> Its correlative is a "no-right" in that no one has a legal claim to prevent its exercise.<sup>324</sup> Most importantly, though, the opposite of a privilege is a "duty," and, as Hohfeld emphasizes, the duty takes the "same content or tenor" as the privilege.<sup>325</sup> Thus, a privilege to enter is the negation of the duty to stay off. The exclusive privilege to copy is therefore the opposite of the duty to not engage in such copying, though both take common color from the idea of copying, i.e., the behavior that is both privileged and proscribed by the directive.

Tortious interference with a prospect very much captures this idea of the relationship between privilege and duty (or, in non-Hohfeldian imprecise terms, right and liability). The prospective economic advantage is but a privilege, rather than a physically identifiable asset. The copyright infringement plaintiff's exclusive privilege (of realizing the prospect) takes color and tenor from the restriction on the defendant's behavior relating to that prospect. Right and liability are thus relationally connected, with each incapable of being understood without the other.<sup>326</sup> The plaintiff has no abstract entitlement/claim to the prospect as such, other than a privilege which corresponds to the defendant's obligation to not interfere with the plaintiff's attempt to realize it. The plaintiff's right is dependent on the defendant's wrongful act, without which the right is substantively indeterminate.

Copyright law would do well to acknowledge and admit the existence of a similar relationality between its conceptions of right and liability (or entitlement and wrongdoing). As noted previously, in tortious interference this relationality produces an inverse correlation in the plaintiff's case: the greater the wrongdoing, the more willing are courts to find a protectable prospect and vice-versa.<sup>327</sup> Something similar already exists within copyright jurisprudence as well, which is rarely acknowledged. Works accorded weak—or "thin"—protection, owing to their minimal originality, are saddled with a higher threshold of copying to establish actionable wrongdoing.<sup>328</sup> Conversely, highly original works obtain thick protection, and courts require

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322 See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32 (1913) ("The privilege of entering is the negation of a duty to stay off.").

323 *Id.* at 32-33.

324 *Id.* at 33.

325 *Id.*

326 DOBBS ET AL., *supra* note 23, § 638.

327 See *supra* discussion accompanying notes 86-88.

328 See, e.g., *Feist Publ'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) ("[C]opyright in a factual compilation is thin."); *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003) ("Satava possesses a thin copyright that protects against only virtually identical copying.").

a lower standard to establish infringement.<sup>329</sup> In this variation, we have what is in effect a relational structure between the author's "right" and the law's measure of wrongdoing.

Embracing the relationality of right and liability in copyright law is much more than just an academic exercise. It entails recognizing that, fundamentally, not all copyright protection is the same, and that protection means different things for different works and different contexts.<sup>330</sup> This, in turn, would move copyright jurisprudence away from its banal use of property metaphors and ideas to understand the institution. At the same time, it would acknowledge the reality that different forms of creativity and creative processes are underserved by a simplistic one-size-fits-all approach to the copyright entitlement.

### C. *Trusting Courts*

For the last several decades, copyright jurisprudence has come to place increasingly less reliance on courts. Whereas courts were considered active participants in copyright lawmaking under prior statutes, the 1976 Copyright Act minimizes their role and sees them as faithful enforcers of statutorily created directives.<sup>331</sup> This mistrust, however, goes well beyond judicial lawmaking. It extends to courts' role in shaping and delineating the copyright entitlement contextually in individual cases. Not only did earlier copyright jurisprudence look to courts to formulate copyright rules and principles in individual cases, it also relied on them to tailor parties' entitlements in individual cases so as to give effect to those rules and principles.

Courts therefore unhesitatingly engaged copyright policy at the *retail* level—as opposed to the wholesale/systemic level—asking whether particular goals were being furthered in individual cases and shaping the parties' entitlements accordingly. The mid-twentieth century opinions of Judge Learned Hand represent a perfect example of this phenomenon at work. Working through copyright's competing considerations and ideals, he developed nuanced techniques for delineating entitlements in different

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<sup>329</sup> See, e.g., *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 617 (7th Cir. 1982) ("At the opposite end of the spectrum lie the 'strongest' works in which fairly complex or fanciful artistic expressions predominate over relatively simplistic themes and which are almost entirely products of the author's creativity rather than concomitants of those themes.").

<sup>330</sup> For an early identification of this concern, see Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 518 (1945) ("The author's monopoly or his remedy sometimes ought to be specially shaped to suit the particular form of his creation or the particular type of reproduction.").

<sup>331</sup> See Pierre N. Leval, *An Assembly of Idiots?*, 34 CONN. L. REV. 1049, 1061-62 (2002) ("Courts are regarded with suspicion when they interpret statutes, as if they were out to thwart the intentions of the legislatures.").

categories of copyrighted works. Only some of these have obtained the level of notoriety and admiration that they deserve, such as the abstractions formula of *Nichols*.<sup>332</sup> Others, such as his idea of relying on the melody of musical works to identify their originality for infringement purposes—a method he called the comparative method<sup>333</sup>—or his idea of the “embellishments” approach to delineating the scope of protection in a derivative work vis-à-vis the material that it is based on,<sup>334</sup> are less well-known and rarely discussed.

Contrastingly, in recent times this form of *retail-level entitlement delineation* has become a rare occurrence. Two factors have contributed to this reality simultaneously. The first is the insistence—seen in the 1976 Act and afterwards—to comprehensively codify and define critical aspects of the copyright entitlement such that courts were meant to be faithful interpreters of a congressionally predetermined logic.<sup>335</sup> Consequently, any purpose driven shaping of the entitlement became difficult to realize in the face of the statute’s overt one-size-for-all approach and the law’s efforts to cloak its purposes behind the veneer of neutral textual directives.<sup>336</sup> The second is the growing emphasis on lay juries in copyright adjudication. Today, several crucial elements of copyright adjudication require the empaneling of a jury.<sup>337</sup> The infringement analysis is but one obvious area.<sup>338</sup> As more and more circuits have moved to treating what were initially questions of entitlement delineation in copyright—such as the idea-expression dichotomy,<sup>339</sup>

332 *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (“Upon any work . . . a great number of patterns of increasing generality will fit equally well . . . . [B]ut there is a point in this series of abstractions where they are no longer protected . . .”).

333 *See* *Hein v. Harris*, 175 F. 875, 875-76 (C.C.S.D.N.Y. 1910), *aff’d*, 183 F. 107 (2d Cir. 1910) (“If the melody of the defendant’s chorus be transposed into the key of three flats, it exhibits an almost exact reproduction of the complainant’s melody.”).

334 *Stodart v. Mut. Film Corp.*, 249 F. 507, 510 (S.D.N.Y. 1917), *aff’d*, 244 F. 513 (2d Cir. 1918) (“[I]t is a good copyright in so far as the embellishments and additions to the plot are new and have been contributed by the copyright.”).

335 *See* *Leval*, *supra* note 331, at 1062 (“Rather than passing brief statutes and relying on courts to find sensible solutions to emerging problems of interpretation, legislatures now write statutes hundreds of pages long, which seek to answer from the outset every problem that can conceivably arise”).

336 *See id.* (“Interpretation must hew as closely as possible to a statute’s most literal terms, no matter how senseless such a reading may be.”).

337 For a useful discussion, see 3 NIMMER, *supra* note 216, § 12.10. Nimmer notes that even when there are obvious areas that a judge—as opposed to a jury—is better positioned to decide, to the extent that the determination involves disputed facts, a jury needs to be empaneled. *Id.* § 12.10[B].

338 *See* *Arnstein v. Porter*, 154 F.2d 464, 472-73 (2d Cir. 1946) (discussing the favorability of utilizing a jury in the context of factual similarities in infringement cases).

339 *See* 4 NIMMER, *supra* note 216, § 13.03[B][2][a] (“Where only the plaintiff’s idea has been appropriated, protection must be found, if at all, on a theory other than copyright infringement.”); *see also* *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910, 917 (7th Cir. 2007) (“It is not the idea of a farting, crude man that is protected, but this particular embodiment of this concept.”); *NEC Corp. v. Intel Corp.*, No. C-84-20799-WPG, 1989 WL 67434, at \*3 (N.D. Cal. Feb. 6, 1989) (concluding that question of idea-expression distinction goes to infringement, not copyrightability).

merger,<sup>340</sup> and originality<sup>341</sup>—as more appropriately dealt with as part of the infringement analysis, these questions have ceased to be immune too from the jury. This growing insistence on juries for core copyright questions has quite understandably produced a good degree of reluctance among district courts to deal with complicated entitlement-delineation questions in copyright on their own, for obvious fear of reversal on appeal. In the end, the real loser has been copyright jurisprudence.

Tortious interference with a prospect has had a long pedigree of success with such retail level delineation of the entitlement. Its very construction of the plaintiff's protectable economic prospect (prospective economic advantage) involves mapping broader considerations about the market and party behavior therein, on to individual claims in a contextual manner. And in that task, it has routinely trusted courts to work the system's goals pure over time. This has in turn produced important—and workable—variations in rules between different contexts and facilitated an evolution of standards over time.

An important systemic lesson that copyright reform efforts should learn from tortious interference lies in the utility of judicial entitlement tailoring at the retail level, as an effective supplement to the system's realization of its goals and purposes in the aggregate. To the extent that copyright law has certain identifiable goals underlying its very existence (e.g., inducing creativity, or promoting free speech), it would do well to instantiate those goals doctrinally on an individual basis. Here, courts will have to play a crucial role.

To be sure, scholars have previously proposed such retail level tailoring in different contexts,<sup>342</sup> and a few courts have even attempted to instantiate such mechanisms in individual cases.<sup>343</sup> These proposals have for the most part fallen on deaf ears, with recent discussions of copyright reform largely

<sup>340</sup> See 4 NIMMER, *supra* note 216, §13.03[B][3] (discussing the move towards treating merger as a part of the infringement analysis and describing it as the “better view”); see also *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1081-82 (9th Cir. 2000); *Kregos v. Associated Press*, 937 F.2d 700, 705 (2d Cir. 1991).

<sup>341</sup> See 4 NIMMER, *supra* note 216, §13.03[B][2][b] (“[I]f the work . . . is not the product of his original authorship . . . then only a very close similarity, verging on the identical, will suffice to constitute an infringing copy.”).

<sup>342</sup> See, e.g., *Stadler*, *supra* note 189, at 942 (“In providing creators with exclusive public distribution rights, Congress would enable copyright owners to capture the value . . . without forcing the public to sacrifice other interests that copyright law was meant to promote.”); see also, e.g., *Balganesh, Foreseeability*, *supra* note 10, at 1604-05 (“The requirement of ‘foreseeable copyright’ would ask *whether the defendant’s use . . . was foreseeable to the plaintiff—in form and purpose—when the work was created.*”); *Chafee*, *supra* note 330, at 510 (“The scope of protection for each kind of property . . . should be shaped to do the most good.”).

<sup>343</sup> The idea of “thin” protection for works that embody significant unprotected content is one relevant example. This was entirely a creation of the courts, with no guidance from the statute. The Supreme Court eventually affirmed the idea, too. See *Balganesh, Normativity*, *supra* note 202, at 221-26 (discussing the idea of copyright entitlement “thickness”).

limiting themselves to the role of Congress.<sup>344</sup> The solution may therefore well require a more overt statutory affirmation of the legitimacy, utility, and effectiveness of such judicial tailoring by courts (within the copyright statute), relying on the historical successes of the common law in this endeavor. Until this occurs, one suspects that the reform—if any—will have to occur incrementally.

### CONCLUSION

Ever since its origins, copyright law has relied on metaphors and analogies to explain its functioning and to justify its very existence. In so doing it has striven to *simplify* and *disaggregate* its analytical and substantive complexity through comparisons to other areas. Over the years, these comparisons have served to solidify the status of copyright as an easily understandable subject area, one that generalist judges can interpret and apply with ease. At the same time however, these comparisons have underplayed the significance of copyright law's own normative goals and structural nuances, about which they have contributed very little. The comparisons have for the most part been functional unidirectional.

Homological comparisons—between copyright and other areas—serve to remedy this unidirectionality by allowing copyright to better reflect on its own internal structure owing to the commonality of normative goals. In so doing, they reveal underappreciated nuances within the conceptual structure of the copyright system and the ease with which these nuances might be rendered into reality in the actual functioning of the institution. The homological account offered here, between copyright and tortious interference with a prospect, represents precisely such an effort.

While tortious interference with a prospect has been in existence for quite some time now, it has received surprisingly little scholarly analysis. All the same, it remains a fairly robust stand-alone cause of action within the common law. Its fairly unique doctrinal and conceptual structure, and the plurality of goals that it embodies, make it well-suited as a lens through which to analyze different aspects of copyright law. Viewing copyright through tortious interference with a prospect sheds important light on a variety of problems within copyright jurisprudence and suggests easy fixes to them. It allows copyright's entitlement structure to more fully capture its probabilistic nature and focus on the centrality of the potential market for the work, injects some analytical sense into the infringement analysis, enables the notion of

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<sup>344</sup> See, e.g., Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 322-24 (2013) (suggesting that courts are “reflecting the wear and tear of the [copyright] statute” and proposing a comprehensive revision).



volition to have a firmer grounding in determining liability for infringement, and suggests a workable means of differentiating between the plaintiff's prima facie and a defendant's fair use defense. Beyond these doctrinal lessons, it also recommends important theoretical and institutional implications for our thinking about the copyright entitlement and courts' approach to it.

Perhaps more so than anything else though, the homology showcases the perils of *copyright exceptionalism*, the belief that copyright law is best understood as distinct from other areas of the law. While copyright law has been—and can be—fruitfully understood through the use of cognate disciplines in the social sciences and the humanities, it is only rarely that courts and policy-makers look to other areas of law for insights, both analytical and normative. The homology to tortious interference with a prospect shows us that copyright law can indeed glean invaluable and underappreciated operational insights from such interdoctrinal comparisons, in the recognition that the law is indeed a “seamless web.”<sup>345</sup>

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<sup>345</sup> Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1093-94 (1975).

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