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INTERESTS IN PRIVACY, REPUTATION,
AND CONTROL:
A REPLY TO GOOLD**

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Copyright owners' putative interests in privacy, reputation, and control:

A Reply to Goold

By Wendy J. Gordon*

This is a preliminary version of an essay that will appear in

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Patrick Goold's interesting new article, *Unbundling the "Tort" of Copyright Infringement*¹ ("*Unbundling*") centers on a key lack of clarity that Professor Goold perceives in the cause of action for copyright infringement. The lack of clarity, he argues, afflicts threshold definitions of what constitutes actionable copying.

Under federal copyright law, to prove infringement the plaintiff copyright owner usually must persuade the finder-of-fact that the plaintiff owns a valid copyright and that the defendant factually used the copyrighted work in one of the ways governed by statute. (Making use of the copyrighted work is usually known as "actual copying" or "copying in fact")² Then the plaintiff

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¹ Patrick R. Goold, *Unbundling the 'Tort' of Copyright Infringement*, 102 VA. L. REV. 1833, 1833–34 (2016) [hereinafter Goold, *Unbundling*].

² "Copying in fact" or "actual copying" are terms of art. They address whether someone has factually borrowed or used the copyrighted work in question. In this context, the opposite of "copying" is relying solely on other sources or on independent creation.

must prove something more.³ The copyright owner also bears what might be called a normative burden: the plaintiff must prove that the defendant has engaged in “improper appropriation”⁴ by using the plaintiff’s copyrighted work to produce something “substantially similar”⁵ to the plaintiff’s work of authorship.⁶ Later the copyright owner may also need to struggle with a normative claim by defendant that her use of the plaintiff’s expression, even if “substantial,” should be permitted as “fair”.⁷

(In this broad sense of “copying”, to read a copyrighted book chapter over the radio is to “copy” it. In some other contexts, however, to “copy” may literally mean “to reproduce”.)

Although to “copy” (in the context of the plaintiff’s case in chief) means essentially “to use”, not all unauthorized uses of copyrighted work are unlawful. For example, the Copyright Act gives everyone the liberty to copy ideas. 17 U.S.C. § 102(b). For another example, while the Act gives copyright owners some rights over public performance, 17 U.S.C. § 106(4), the Act does not reach private performance, *id.* Thus reading a copyrighted book aloud in one’s living room cannot violate the performance right. *Id.*; also see 17 U.S.C. § 101 (definition of “publicly”).

³ VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 877 (9th Cir. 2016) (“proof of actual copying is insufficient to establish copyright infringement”).

⁴ For courts using this terminology, see, e.g., Muller v. Anderson, 501 F. App’x. 81, 83 (2d Cir. 2012) (“[T]he plaintiff must prove . . . improper appropriation.”); Walker v. Time Life Films, Inc., 784 F.2d 44, 48 (2d Cir. 1986) (quoting Hoehling v. Universal City Studios, Inc., 618 F.2d 979, 977 (2d Cir.)) (“Walker must show . . . that his expression was ‘improperly appropriated’”); Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) (noting the plaintiff must show that “the copying . . . went so far as to constitute improper appropriation”).

⁵ For courts employing this terminology, see, e.g., Almeda Mall, L.P. v. Shoe Show, Inc., 649 F.3d 389, 391 (5th Cir. 2011) (concluding that “the trade name SHOE SHOW is not substantially similar to THE SHOE DEPT. . . .”); Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002) (“Copying may be established by showing that the infringer had access to plaintiff’s copyrighted work and that the works at issue are substantially similar in their protected elements.”); Warner Bros. v. Am. Broad. Cos., 720 F.2d 231, 239 (2d Cir. 1983) (“The basic issues concerning the copyright infringement claim are whether the *Hero* and *Superman* works are substantially similar so as to support an inference of copying . . .”).

⁶ Infringement can occur through producing an unauthorized physical reproduction, see 17 U.S.C. § 106(1), an unauthorized derivative work, see 17 U.S.C. § 106(2), or an unauthorized public performance, see sections 106(4) and 106(6). In addition, a defendant can infringe by distributing or publicly displaying an unlawfully made copy or even, under some circumstances, by distributing or publicly displaying a lawfully made copy the defendant does not own. See 17 U.S.C. § section 106(3) (distribution right) as modified by 17 U.S.C. §§ 109(a) (first sale doctrine); 17 U.S.C. § 106(5) (public display right) as modified by 17 U.S.C. § 109(c). Additional causes of action exist under the statute, but they are best seen as para-copyright and distinct from copyright infringement per se. See, e.g., 17 U.S.C. §§ 1201–04 (civil and criminal penalties applicable to, inter alia, unauthorized circumvention of physical copy-restraints such as encryption.)

⁷ 17 U.S.C. § 107 (2012) (“the fair use of a copyrighted work . . . is not an infringement of copyright.”) For a common-law flavored introduction to the complex “fair use” doctrine, see Wendy J. Gordon, Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Only *Part* of the Story, 50 J. Copyright Soc’y U.S.A. 149 (2003).

As Goold notes,⁸ courts do not reliably define the normative part of the plaintiff’s cause of action in the same way. The terms “substantially similar” or “improper appropriation” receive somewhat varying interpretations. A related difficulty that Goold identifies typically arises on the defense side: he perceives inconsistency in how courts distinguish “fair” from “unfair” uses.⁹ In *Unbundling*, Goold suggests that more clarity would result if the judiciary would follow his recommendations and identify, within copyright infringement, several individual, if currently inchoate, tort causes of action.¹⁰

Goold in previous work has made good use of tort doctrine to explore copyright law,¹¹ and his new project has intriguing possibilities. Today’s federal copyright statute runs for many pages that are often dense with complex language, yet its details nevertheless fail to resolve many cases. Sometimes fraying or uncertainty in core concepts is responsible for this failure. Similarly hoping to increase clarity, Pamela Samuelson is unpacking many of the ways that

⁸ Goold, *Unbundling*, supra note 1, at 1836–37.

⁹ *Id.* Fair use doctrine is a vehicle for evaluating whether a substantial borrowing might, in the particular context of a particular fact pattern, nevertheless be normatively entitled to go forward without permission and payment. The fair use doctrine can render even exact copies non-infringing. 17 U.S.C. §107 (listing “multiple copies for classroom use” as a possible focus for fair use); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449–51 (1984) (home videotaping of entire TV programs can be fair use when done for purposes of time-shifting).

Goold is quite right that ordinarily “fair use” arises in a defendant’s case, and that the defendant will usually bear some or all of the burden of persuasion. Goold, *Unbundling*, supra note 1, at 1836. However, the statute itself does not identify “fair use” as an affirmative defense. Rather, the Copyright Act’s key provision on fair use, 17 U.S.C. § 107 (2012), says only that fair uses are “not an infringement of copyright,” a phrase that could be legitimately interpreted to place a burden of proving *unfair use* on plaintiffs as part of their case in chief. In some cases, some portion of a burden to prove unfair use has indeed been placed on plaintiffs, whether implicitly or explicitly.

The right to make fair uses of others’ work is an important part of the public’s liberties to use others’ copyrighted expression. This set of liberties is sometimes identified with “users’ rights”. See *CCH Canadian Ltd. v. Law Soc’y of Upper Can.*, [2004] 1 S.C.R. 339, 364 (Can.) (“User rights are not just loopholes”, quoting with approval DAVID VAVER, *COPYRIGHT LAW* (2000) at 171).

¹⁰ Goold, *Unbundling*, supra note 1, at 1838, 1898.

¹¹ See, Oren Bracha & Patrick R. Goold, *Copyright Accidents*, 96 B.U. L. REV. 1025, 1027–1029 (2016) (. This article explores how copyright law should treat defendants who, after a good-faith but fruitless attempt to locate and pay any copyright holders, take the risk of publishing, and then learn they have copied a substantial amount of copyrighted material. One might say such defendants have “accidentally” copied a copyrighted work, a metaphor that Bracha and Goold take seriously and deploy to good effect.

courts employ copyright's "merger" doctrine.¹² She, along with other scholars, has begun unbundling and identifying several distinct defenses hiding behind the label "fair use."¹³ Given copyright's many unsolved puzzles, determining whether the 'substantial similarity' or 'improper appropriation' aspect of infringement can be unbundled is a route that certainly has promise.

Unbundling argues that copyright infringement appears to be a unitary tort but that it actually contains within itself five unarticulated sub-torts. Goold suggests that if in fact we could unpack copyright into its component concerns, a "gallery of wrongs"¹⁴ of the type other torts possess, there might well be a distinct infringement test for each type of infringement.¹⁵ Thus, he argues that discerning the different sub-torts within the copyright-infringement bundle could help

¹² Pamela Samuelson, *Reconceptualizing Copyright's Merger Doctrine*, 63 J. COPYRIGHT SOC'Y U.S.A. 417, 417–19 (2016).

¹³ See, e.g., Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2539–41 (2009) (arguing that the success of fair use defense falls into common patterns); Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 7–8, 16–18 (1997) (recognizing fair use rights as expansive and exploring how fair use doctrine impacted rights given to the copyright owner and user over time); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1627–35 (1982) (exploring fair use as a response to, inter alia, high transaction costs, external benefits, noncommercial uses, nonmonetizable values, and anti-dissemination motives).

¹⁴ Goold argues that copyright infringement is oddly "singular," as opposed to the multiple causes of action that characterize other areas of tort, Goold, *Unbundling*, supra note 1, at 1838–39, and he contends that copyright lacks the explicit "gallery of wrongs" structure found in many other areas of tort. *Id.* at 1855–56. These claims are puzzling.

First, much of the activity denominated copyright infringement is socially useful and not morally wrongful in itself; the 'wrong' lies in disobeying the law which requires the activity to purchase a license. To label every breach of law a 'wrong' is technically a correct usage, but the usage nevertheless dilutes the force of the word.

Second, copyright has a full (one might say over-full) gallery of distinct breaches, full of detailed differences. The Copyright Act sets out many subcategories of copyright infringement that it explicitly distinguishes, both in terms of types of works protected, 17 U.S.C. § 102(a), and in terms of the typology of rights that attach to owning a particular kind of work, 17 U.S.C. §§ 106 and 106A. The Act then makes each type of work and type of right subject to particularized exemptions and defenses. 17 U.S.C. §§ 108–122. A good illustration of the lines the statute draws can be seen by comparing the acts that can infringe copyright in a "sound recording" with the acts that can infringe copyright in a "musical work." 17 U.S.C. §§ 102(a), 106, 114 (2012). The copyright statute thus certainly seems to display a 'gallery' of causes of action.

Nevertheless, the importance of Goold's point depends neither on whether copyright infringement is a "wrong" in a meaningful sense, nor on the question of whether copyright infringement is unitary or internally diverse. All Goold needs to show is that making some *additional* distinctions among types of breach would be useful. That question his article skillfully raises.

¹⁵ Goold, *Unbundling*, supra note 1, at 1838–39.

judges choose, and lawyers anticipate, the appropriate test for identifying infringing uses. This is an advance, so far as I know, over prior applications of the unbundling method in copyright scholarship.

He suggests that the standard copyright owner interest in revenue be divided into two sub-torts: protection from unauthorized consumer copying and protection from competitors diverting one's potential customers. In addition, Goold suggests, that within copyright lie three additional causes of action geared to protect copyright owners' interests in privacy, in reputation, and in controlling 'rivalrous'¹⁶ uses.¹⁷

The five sub-torts that Goold offers are: (1) consumer copying, which he identifies as the primary 'wrong' with which copyright law is concerned,¹⁸ followed by (2) diversion of customers by competitors,¹⁹ (3) invasion of expressive privacy,²⁰ (4) injury to artistic reputation,²¹ and (5) breach of creative control (by which he means interference with a rivalrous use).²² For mainstream interpretations of copyright, Goold's first two initial categories—customer copying and competitor/publisher diversion—are the standard concerns that copyright courts address. The other three are more controversial than the article indicates.

¹⁶ Intangible patterns like works of authorship are usually considered non-rivalrous because, as Goold explains, "one person's use does not affect the use of another." Goold, *Unbundling*, supra note 1, at 1831. Despite the possibility of infinitely replicating a book or song, physical inexhaustibility does not guarantee that one person's use will not affect another person's profit. Goold essentially tries to identify occasions on which the rivalrous aspect predominates. For further discussion of what might constitute a 'rivalrous use', and of the category's ambiguities, see infra at _ {section on the 'right of creative control' } _.

¹⁷ I am glad Goold did not propose a sub-tort to vindicate publisher as distinct from authorship interests. In my view, publishers' claims under copyright should be related to the publishers' role in incentivizing creative expression, and no deference should be paid in copyright cases to supporting publishers' non-creative activities. Wendy J. Gordon, *Authors, Publishers and Public Goods: Trading Gold for Dross*, 36 *LOYOLA L.A. L. REV.* 159-97 (2002) (arguing that in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), the Supreme erred when it hinted that noncreative publisher activity constituted an interest capable of helping to justify federal copyright.)

¹⁸ *Id.* at 1857.

¹⁹ See *id.* at 1860.

²⁰ See *id.* at 1865.

²¹ See *id.* at 1867.

²² See *id.* at 1869.

Of those three, a right to control rivalrous uses probably has the strongest claim to being based in the caselaw. Unfortunately, that right has probably-inescapable definitional weaknesses that make it dangerously susceptible to expansion. The sub-tort to redress reputation injury flowing from misattribution of authorship has some intriguing possibilities, though its feasibility is also questionable (though for different reasons). As for the invasion of privacy sub-tort, it goes strongly against the grain of some recent copyright cases.

My own view is that Goold overstates the explanatory role of tort law.²³ But even were that not the case, the courts need to reach some kind of ‘settled’ understanding on these various interests before a cause of action is created or definitively rejected, and that no such consensus on the three matters mentioned yet exists, whether they are viewed as forms of ‘tort’ or otherwise. Goold’s work may nevertheless be an important step toward reaching closure on these and other open questions in copyright law.

Let us take the five categories of Goold’s sub-torts in order.

Consumer Copying.

Copyright’s familiar concerns lie with commercially significant copying by competitors and consumers. It is this commercial recompense that an author hopes for, and that serves as

²³ Copyright reflects the influence of a number of common-law doctrines to which Goold gives little or no serious attention. For example, unjust-enrichment law (also known as ‘restitution’) gives recovery occasionally to volunteers who confer benefits without contract. Such cases provide significant insight into when and why the common law might be unwilling to require beneficiaries to pay for benefits others create. Yet Goold dismisses the relevance of restitution law, largely on the ground that giving it analogic significance “would potentially justify [copyright] owners claiming reward every time the work is enjoyed,” *id.* at 1854. Goold’s position is deeply puzzling, given that unjust enrichment law gives recovery far more sparingly than does tort law. *See, e.g.,* Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 41 JOURNAL OF LEGAL STUDIES 449 (1992). Goold cites some of my work on this topic, *id.* at n. 150, but fails to explain adequately why he disagrees about the influence restitution law would have.

incentive for production. Goold takes an unconventional approach, though, dividing consumer from competitor copying.

Goold's first major innovation is to put consumer copying as the copyright's central tort-within-a-tort, and to designate publisher diversion of consumers as a secondary concern of copyright law. This elevation of consumers as copiers is profoundly ahistorical. The United States borrowed its initial copyright scheme largely from the English Statute of Anne, which in turn evolved out of battles among publishers.²⁴ In the United States, the first federal Copyright Act prohibited only the unauthorized "printing, reprinting, publishing and vending" of the copyrighted work.²⁵ As a physical matter in 1790, consumers could neither print nor reprint. Consumers might copy longhand, but that was unlikely to be commercially significant.

Copyright's focus on publisher behavior persisted well into the 20th century, even after the start of modern home copying technology. For example, when in 1972 sound recordings were made federally copyrightable, Congress went out of its way to explain that home copyists could continue to safely use their tape recorders to make permanent copies of their favorite songs because (says the legislative history) copyright law only addressed commercial copying.²⁶ At least in 1972, Congress seemed to envisage no possible liability for private behavior, whether the private behavior was copying a work or performing or adapting it.²⁷ Only when the home product was physically replicated and sold commercially would copyright law take action.

Goold's paper addresses a world greatly changed since 1972. The progress of home reprographic and distribution technology, in the form of computers, tape recorders, video

²⁴ See OREN BRACHA, *OWNING IDEAS: THE INTELLECTUAL ORIGINS OF AMERICAN INTELLECTUAL PROPERTY, 1790-1909*, 36-42 & 58 (2016).

²⁵ Copyright Act of 1790, 1 Stat. 124 (1790).

²⁶ 117 Cong. Rec. 34,748-49 (1971) ("Mr. KAZEN: Am I correct in assuming that the bill protects copyrighted material that is duplicated for commercial purposes only? Mr. KASTENMEIER: Yes.")

²⁷ Jessica Litman, *Campbell at 21/Sony* at 31, 90 WASH. L. REV. 651, 662 (2015).

recorders, internet linkages, and the rest, has been so rapid as to make a profound difference in consumer abilities to create, obtain, and transmit copyrighted material.

Goold implies the law has also greatly changed. Indeed, Congress has paid increasing attention to consumer copying and transmission. One example is copyright's criminal provisions. In 1978, private copying for noncommercial purposes was essentially free from criminal sanction.²⁸ In recent years, however, amendments to the criminal law provisions have largely eliminated noncommerciality as a safe haven.²⁹ Another change lies in Congress not only permitting copyright owners to physically encrypt their digital work, but also backing up the encryption with federal penalties for bypass.³⁰

Yet Goold overstates by placing consumer copying at the center of 2017 copyright law. Congress made its last major overhaul of federal copyright law in 1976, and the vast majority of the 1976 provisions remain intact. Admittedly, there have been several high-profile suits against peer-to-peer networks and their consumer users, and the district courts have seen a flood of "idiosyncratic" suits³¹ seeking to milk disproportionate statutory damages from downloaders.³²

²⁸ As initially enacted in 1976, section 506 provided, in pertinent part, that criminal penalties applied to someone who "infringes a copyright willfully and for purposes of commercial advantage or private financial gain." An Act for the General Revision of the Copyright Law, Pub. L. No. 94-553, § 506, 90 Stat. 2586 (1976).

²⁹ First, the original term, "private financial gain," has recently been redefined to expand the reach of the criminal provisions. Today, 17 U.S.C. § 101 (2012) states, "The term 'financial gain' includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works."

Second, criminal liability under the copyright statute has been expanded to include, inter alia, behavior such as bypassing encryption. See 17 U.S.C. § 1204 (2012). Third, section 506 itself covers additional activity that consumers might well engage in, including "the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000." 17 U.S.C § 506(a)(1)(B) (2012).

³⁰ See, e.g., 17 U.S.C. § 1204 (2012) (creating criminal penalties for violation).

³¹ Matthew Sag, IP Litigation in U.S. District Courts: 1994 to 2014, 101 IOWA L. REV. 1065, 1077 (2016).

³² Id. at 1075–80. The primary goal of these suits is "creating an independent litigation revenue stream that is unrelated to compensation for the harms of infringement and that is unconcerned with deterrence." Id. at 1075–76. There also had been a wave of suits against end-users "to 'educate' the public about filesharing and to reinforce that education with deterrence." Id. at 1075–76. Those suits essentially ended in 2008. Id. at 1075.

But the latter suits, though numerous, are not a reliable focus for assessing copyright policy.³³

Putting them aside, the vast majority of copyright litigation addresses copying and adaptation by commercial companies and re-publishers, not copying by consumers.

Goold's shift of focus to consumer copying might be justified given the drastic increase in potential commercial significance that consumer behaviors now have. However, Goold offers no sustained argument to that effect,³⁴ and no convincing evidence that consumer copying constitutes a more significant infringement than commercial copying does. If we are to ignore a doctrine's historical roots, we expect some exploration of the costs and benefits of doing so.

It is hard to see what Goold gains by prioritizing consumer copying. It helps him provide answers to some questions, but largely exchanges one set of puzzles for another. For example, consider the question of whether and under what conditions a consumer's failure to pay a license fee should weigh against the consumer's claim to "fair use" treatment.³⁵ As set forth in *Unbundling*, this new sub-tort requires, among other things, "[a]pplying the basic incentive-access policy calculus," under which a court decides whether "specific uses [are] of the type where wealth redistribution [is] necessary to ensure optimal incentives."³⁶

Competitor diversion of customers

For most of the copyright bar, Goold's second proposed category—publisher diversion of customers—is the core of copyright law. So identifying this category is useful primarily in the context of a panoply of other meaningful choices, and I will forego lengthy discussion of it here.

³³ Id. at 1077 ("policymakers should be cautious about extrapolating from current trends in this context"). In my view, Congress and the courts are more likely to pull back these suits, which essentially abuse the system, than to treat them as a model.

³⁴ Goold, *Unbundling*, supra note 1 at 1857–59.

³⁵ See, e.g., Wendy J. Gordon, *The Concept of "Harm" in Copyright*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* 452, 477–80 (Shyamkrishna Balganesh ed., 2013) (discussing whether failure to pay license fees constitutes a harm under various theories); Loren, supra note 10, at 6 (discussing rejection of fair use claims where the copyright owners established licensing systems).

³⁶ Goold, *Unbundling*, supra note 1, at 1858. Also, see id. *passim*.

Nevertheless, one correction is needed. In explaining ‘customer diversion by competitors,’ Goold gives an example of two lighthouses that take each other’s customers.³⁷ The example might easily be misunderstood to suggest that copyright makes actionable any kind of commercial harm that involves competitors selling similar products or services, regardless of the presence or absence of borrowing. Goold should be wary of using an example that may lead readers to overlook the particular kind of causation that is essential to copyright.

A copyright plaintiff must prove that a defendant has somehow *used* the plaintiff’s work in a way that *made a difference* to the defendant:³⁸ unless free riding on the plaintiff’s work was a “but-for cause” of what the defendant produced or did, no liability arises. In other words, this is a requirement that the defendant’s product *borrow* something from the plaintiff’s work.

This two-lighthouse example might be appropriate were Goold writing about patent law, which does empower suit against independent inventors who happen to provide a product identical to what is patented. By contrast, to make Goold’s example fit copyright law, one

³⁷ Goold, *Unbundling*, supra note 1, at 1860. Aside from the problem of identifying “customers” who would pay for a non-excludable good such as a shining light, the hypothetical does not involve any copying, borrowing, free-riding, or other use of the first lighthouse’s resources by the newcomer lighthouse. This cannot be a copyright example, then, for copyright suits cannot proceed without proof that the defendant has gained something from the plaintiff’s work. See, e.g., Wendy J. Gordon, *Copyright and Negligence as Mirror Models: On Not Mistaking for the Right Hand What the Left Hand is Doing*, in *COMPARATIVE LAW AND Economics* 311, 323–25 (Theodore Eisenberg & Giovanni B. Ramello eds., 2016) (discussing “copying” element in cause of action as requiring evidence that defendant gained output, defined broadly as appearance, quantity and cost of production, after coming into contact with plaintiffs work). Goold places little emphasis on the example; he is simply doing a rhetorical turn on a classic public-goods illustration. But just a sentence or two before the example, he commits real error, in stating that the reason why copyright law allows suit against publishers has nothing to do with a desire to allow authors to “internalize” some of the benefits their efforts give others. Goold reserves that concern with internalizing only for consumer copying. Goold, *Unbundling*, supra note 1, at 1859–60.

³⁸ See, *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 53 (2d Cir. 1936) (“[I]t makes no difference how far the play was anticipated by works in the public demesne [public domain] which the plaintiffs did not use”). In a now-classic formulation, the Second Circuit emphasized that the key factual question in copyright is “whether the defendants actually used” the copyrighted work. *Id.* at 53. The court notes that:

... [I]f by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an “author,” and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's. ... [J]ust as he is no less an ‘author’ because others have preceded him, so another who follows him, *is not a tort-feasor unless he pirates his work*....

Sheldon, at 54 (sources omitted; emphasis added). A plaintiff cannot complain of copying by the defendant, so long as the copying is not from the plaintiff’s work. *Id.* at 54.

lighthouse would have to be taking advantage of the other's efforts or resources in some way. But in Goold's actual example, one lighthouse makes no use of anything owned by or produced by the other. In his example as constituted, the only causal link is one of *harm*. Harm is neither necessary nor sufficient to meet copyright's causal link. What satisfies copyright's "copying" element is not harm done to a plaintiff's market, but rather some benefit the defendant has reaped that is causally due to his or her use of the plaintiff's work. There *is no free riding* between the two lighthouses. And while proof of free riding is far from sufficient to prove copyright infringement, it remains an essential component of the prima-facie case.

Redress of privacy invasions.

After consumer and competitor copying, Goold attributes to copyright a sub-tort that provides protection against privacy invasions.³⁹ Using federal copyright as a protector of copyright owners' privacy is particularly problematic.

Although some caselaw provides a bit of support for such a position, a myriad of cases reject privacy and other dignitary roles for federal copyright. Of particular relevance is the conclusion by the Ninth Circuit, writing *en banc*, that "the protection of privacy is not a function of the copyright law."⁴⁰ It is possible such cases are wrong as a normative matter, but Goold seeks to provide a *descriptive* account of copyright law.⁴¹

³⁹ Goold, *Unbundling*, *supra* note 1 at 1865.

⁴⁰ *Garcia v. Google, Inc.*, 786 F.3d 733, 745 (9th Cir. 2015) (*en banc*) (quoting *Bond v. Blum*, 317 F.3d 385, 395 (4th Cir. 2003)). This statement about privacy is arguably dicta, but was nevertheless a matter to which the opinion gave serious consideration. The *en banc* court continues:

'To the contrary, the copyright law offers a limited monopoly to encourage ultimate *public access* to the creative work of the author.' *Bond v. Blum*, 317 F.3d 385, 395 (4th Cir. 2003); see also *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1177 (9th Cir. 2012) (quoting *Bond* and 'pointedly' noting copyright cases are analyzed 'only under copyright principles, not privacy law') Likewise, authors cannot seek emotional distress damages under the Copyright Act, because such damages are unrelated to the value and marketability of their works.

Garcia, 786 F.3d at 745.

⁴¹ Goold, *Unbundling*, *supra* note 1, at 1898–99.

Until the 1976 Copyright Act became effective in 1978, private and otherwise unpublished manuscripts were largely handled by state rather than federal copyright. Only a few categories of unpublished material were even eligible for federal registration. Certainly, in 1978, federal copyright law expanded to embrace all unpublished works, so long as they were written down, tape-recorded, or otherwise “fixed.”⁴² But this expansion of federal reach did not change federal policy.

The key document, the House Report for the 1976 Copyright Act, gives a number of reasons for bringing unpublished works into federal copyright, having primarily to do with simplicity, administrability, and uniformity.⁴³ Nowhere is there a hint that federal copyright was meant to adopt any privacy or dignity concerns that states may have injected into their common-law or statutory protections for local authors.⁴⁴ Further, when post-1978 courts began giving too much deference to the desires of copyright owners to control quotations from unpublished manuscripts, Congress responded by dialing-down the deference such copyright owners received; the statute was amended to ensure that biographers and other members of the public could make “fair use” of unpublished works when otherwise appropriate.⁴⁵

Conceivably Goold can make privacy hay out of our country’s accession to the Berne Convention, which caused changes in federal copyright law⁴⁶ that arguably introduced personal and emotional concerns into certain subparts of federal law.⁴⁷ However, the Berne changes are in

⁴² See 17 U.S.C § 301 (2012) (pre-empting state copyright law); id. § 102 (conditions for federal copyright).

⁴³ See, H.R. Rep. No. 94-1476, at 129–31 (1976).

⁴⁴ Id.

⁴⁵ In 1992, the fair use provision was amended to decrease the negative impact of a work’s being unpublished; the statute now states, “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.” 17 U.S.C § 107.

⁴⁶ See, e.g., 17 U.S.C. §§ 101 & 106A. These sections comprise the key provisions of the Visual Artists Rights Act of 1990, [Pub. L. 101–650, title VI](#), § 603 (a), Dec. 1, 1990, [104 Stat. 5128](#), which was part of the US effort to implement its earlier accession to the Berne Convention.

⁴⁷ *But see*, 17 U.S.C § 104(c) (2012) (providing that rights “*shall not be expanded or reduced* by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto”) (emphasis

tension with America's iconoclastic free speech tradition, so trying to make them the foundation for a privacy cause of action within copyright will be (or at least should be) an uphill battle.

Goold is right that some federal copyright cases hint that privacy is a legitimate copyright concern. But doctrinal development, demands of internal consistency, and copyright policy lean predominantly the other way. For example, consider the difficulty of inserting privacy concerns into copyright law in light of the historic distinction between ownable expression and unprotectable ideas and facts.⁴⁸ The Supreme Court has indicated that this freedom to copy facts may be essential to copyright's constitutionality.⁴⁹ Therefore, no copyright cause of action would lie for uncomfortable facts gleaned from even the most private diary.

In addition, a host of differences between copyright law and privacy rights would make it difficult to know how to shape a privacy claim in copyright law. Common-law privacy rights are personal, so that, for example, they usually expire upon death,⁵⁰ whereas copyright not only survives an author's death, but can be owned by someone other than the creator.

Artistic reputational injury occasioned by misattribution of altered work

This misattribution sub-tort has difficulties, but also has promise. Before discussing it, some background will be helpful to appreciate the appropriately narrow ground upon which Goold puts his focus.

Non-lawyers sometimes equate copyright with plagiarism, ignoring the many differences between them. One of the distinctions between the two lies in the roles played by attribution.

added). Subsection (c) was added to Section 104 by § 4(a)(3) of the Berne Convention Implementation Act of 1988, Pub. L. 100-568, effective March 1, 1989.

⁴⁸ See 17 U.S.C. § 102(b) (2012); *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 356 (1991) (“Section 102(b) is universally understood to prohibit any copyright in facts.”)

⁴⁹ *Eldred v. Ashcroft*, 537 U.S. 186, 219-221 (2003).

⁵⁰ See, e.g., *Hendrickson v. Cal. Newspapers, Inc.*, 48 Cal.App.3d 59, 62 (Cal. Ct. App. 1975) (“It is well settled that the right of privacy is purely a personal one. . . the right does not survive but dies with the person”).

Plagiarism results from inaccurate attribution of authorship, usually by someone seeking an improper boost for his or her reputation (or grade) by making unacknowledged use of others' language. Lack of attribution is the core of the wrong in plagiarism, and proper attribution is its cure.

In copyright, attribution pushes in the opposite direction. Proper attribution tends to make copyright infringements *more* harmful rather than *less*, because identifying the true author of what an infringer is selling is likely simply to increase the infringer's profit.

Say, for example, that someone without authorization mass-produces and sells a best-selling Stephen King novel. Sales of the infringing version without King's name would be lower than the volume of sales that would result if the infringer accurately put King's name on the cover. Similarly, consider someone who without authorization translates King's novel into Spanish, making an infringing derivative work.⁵¹ Should the translator name herself as sole author of the Spanish-language novel, sales are likely to be modest, while sales would increase if she labelled the book a translation of a novel "by Stephen King".

Goold does not fall into the trap of equating copyright with plagiarism. Goold's article instead plays a valuable role by focusing on one narrow kind of reputational injury: that which flows from producing a degraded or distorted version of the plaintiff's work and attributing it to plaintiff. An example might be if the translator just mentioned made drastic changes to Stephen King's plot or dialogue; if she attributed the quite different work to King, his reputation as a skillful writer might suffer. The argument in *Unbundling* would suggest that the harm thereby done to King's reputation would (if King owned the copyright) play a proper role in any suit King might bring against the distorted translation.

⁵¹ The affected rights appear in 17 USC § 106(1) (reproduction); § 106 (2) (preparing derivative works); and § 106 (3) (distribution to the public). 17 USC § 106 (2012).

It is good that Goold cabins his reputational sub-tort to these instances where the defendant attributes poorly executed unauthorized versions to the copyright owner. But even as to that fact pattern, the article leaves many issues unaddressed. Perhaps most obvious is the danger that reputation inquiry will collapse into inquiries into whether the second work is of lesser quality than the copied work. Issues of judicial competency and of free speech would attend any attempt by judges to decide what counts as a ‘worthy’ or ‘unworthy’ adaptation of a work of art.⁵²

Admittedly, joining the Berne Convention required the US to adopt the so-called “moral rights” of attribution and integrity,⁵³ which involve reputation. But Congress has been leery of importing such inquiries into American law, dragging its feet on ‘moral rights’ for some time, and then adopting legislation, the Artists Visual Rights Act of 1990 (“VARA”),⁵⁴ which is quite narrow.

Among other limits, VARA does not give so-called rights of attribution or integrity to literary works, movies, music, or “any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper.”⁵⁵ In this and other ways, Congress cabined the reputation/integrity rights of VARA within limits so strongly fenced as to make the rights almost useless.⁵⁶ This narrowness should not surprise us. Fair use and the first amendment are about searching for truth, not securing reputations against

⁵² The canonical caution to judges on this topic belongs to Justice Holmes: “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.” *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903),

⁵³ Berne Convention, § 18.01 note 2, art. 6bis, ¶(1), available at http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P123_20726

⁵⁴ 17 U.S.C. §§101 & 106A (The Visual Artists Rights Act of 1990, Pub.L. 101–650, 104 Stat. 5089, 5123–33)..

⁵⁵ 17 U.S.C. § 101 (2012) (definition of “work of visual art”, part A(i) of the provision defining what “A work of visual art does not include”).

⁵⁶ See 17 U.S.C. § 106A (2012). Also see the remarkably narrow definition of the type of work covered by the attribution and integrity right, at 17 U.S.C. § 101 (2012) (definition of “work of visual art”).

attack. In fact, in a major copyright opinion, the Supreme Court held that the very human desire to avoid being ridiculed is a reason that *favors* giving parodists and other critics a somewhat free rein to quote and distort the copyrighted oeuvres they ridicule.⁵⁷

Copyright law may not be the proper venue for reputational inquiry. VARA is incorporated within the copyright statute, but the statute distinguishes ownership of ‘integrity and moral rights’ from ownership of copyright.⁵⁸ Moreover, as Judge Frank Easterbrook has argued, the narrowness of VARA suggests Congress does not want broad moral rights inserted into copyright law generally.⁵⁹ Explicit limits should not be casually contravened by inserting a reputation right into the general infringement action “through the back door.”⁶⁰

In addition, the feasibility of embracing Goold’s reputational sub-tort needs greater attention. One practical problem arises in regard to the different kinds of reputational harm that can arise. There is a thin line between using copyright to discourage misattribution of altered work (a use of copyright law which Goold seems to approve), and using copyright law to

⁵⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994).

⁵⁸ 17 U.S.C. § 106A(b) & §106A(e)(2). VARA rights cannot be transferred, and waivers must be in writing. *Id.* When the creator of a work of visual art assigns copyright to a purchaser, therefore, the transfer neither gives the new copyright owner any of the creator’s VARA rights nor automatically waives those rights. To shelter a purchaser from undue burdens in maintaining the “integrity” of a work of visual art, Congress provided some exceptions. See, e.g., 17 U.S.C. §106A (c)(2) (“The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification ...”)

⁵⁹ *Lee v. A.R.T. Company*, 125 F.3d 580, 582-583 (7th Cir. 1997) Judge Easterbrook writes: “It would not be sound to use § 106(2) [the exclusive right over derivative works] to provide artists with exclusive rights deliberately omitted from the Visual Artists Rights Act.” In my view it would be just as unsound to use any of the other § 106 rights, such as the exclusive right over reproduction in §106(1) or the exclusive right over public performance in §106 (4), to provide creators with those deliberately-omitted rights.

⁶⁰ *Id.* at 582 (Criticizing a broad theory “about what counts as a derivative work” under § 106(2) because adopting that theory would erroneously imply that “the United States has established through the back door an extraordinarily broad version of authors’ moral rights, under which artists may block any modification of their works of which they disapprove.”)

discourage ridicule *per se* (which Goold agrees is outside copyright's proper role.)⁶¹ It would be helpful if Goold addressed how to handle these close cousins.

Reading between the lines of *Unbundling*, the distinction between non-actionable and actionable reputational injury seems to lie in whether the audience knows who is authoring the distortions. When an audience encounters a parody of a well-known work, arguably it knows the copied work in sufficient detail to be able to attribute the absurd twists to the parodists. If any injury arises from loss of reputation in such a case, the loss occurs not because the audience attributes the parody (which might be clunky or silly or obscene) to the authors of the parodied work, but rather because the parody provided an insight that made the audience re-evaluate the copyrighted work (which *ex hypothesi* the audience continues to remember quite accurately) in a negative way.⁶²

By contrast, the reputational injury that concerns Goold arises when the audience is misinformed about what the copyright owner produced. His prime example is *Gilliam v. ABC*, where the television audience saw a set of dismally unfunny comedic skits under the Monty Python label, not knowing that the works' artistic failure was due not to the Monty Python troupe as author, but to a TV network having made many unauthorized and unfortunate cuts and changes.⁶³

Such distinctions between avenues of reputational harm makes sense as a conceptual matter. As a practical matter, however, the distinction rests on remarkably hard-to-prove facts. For example, some people in an audience will erroneously attribute a parodist's twists to the

⁶¹ Referring to *Campbell v. Acuff-Rose*, 510 U.S. 569, 592 (1994), Goold accurately states that a copyright owner's interest in being "free from ridicule" has "no protection under federal copyright." Goold, *Unbundling*, *supra* note 1 at 1872-73 & n. 282.

⁶² When demand decreases because consumer tastes change, it is appropriate that the incentive 'signal' should also reduce.

⁶³ This is roughly the pattern of *Gilliam v. American Broadcasting Co.*, 538 F.2d 14 (2d Cir. 1976), which Goold discusses in *Unbundling* at 1868-69.

copied author while others in the audience will not make the mistake; how should such questions be handled? One might ask whether introducing such a complex matter of proof into copyright is worth the candle.

Attribution of authorship raises additional feasibility issues. Thus, for example, identifying “serious practical problems,”⁶⁴ the U.S. Supreme Court barred issues of authorial attribution from being litigated under the Lanham Act, which is the repository of federal trademark law.⁶⁵ One of the Court’s primary concerns was that a legal requirement of accurate attribution might require litigants and judges to engage in a fruitless “search for the source of the Nile and all its tributaries.”⁶⁶ The Court took the issue authorial source off the Lanham Act agenda despite plausible support for attribution questions in the language of the applicable statute and despite the fact that giving consumers accurate information about source is a crucial concern of trademark law.

I do not mean to take this precedent too far. The Supreme Court’s trademark opinion does not compel the exclusion of attribution issues from copyright law. In fact, the trademark dispute had focused on the labeling of a work in the public domain, and the Court opined that public-domain works were likely to present more difficult authorship issues than works whose copyrights are still valid.⁶⁷ Nevertheless, given the accretive nature of culture, identifying the authors of works still in valid copyright can be also be immensely difficult. Consider a child’s copyrighted stuffed toy, based on a copyrighted animated movie, which was based on a

⁶⁴ *Dastar Corp. v. Twentieth Century Fox Film Corp*, 539 U.S. 23, 35 (2003).

⁶⁵ *Id.* at 36–7 (refusing to allow plaintiffs to use the Lanham Act to try questions regarding proper attribution of authorship).

⁶⁶ *Id.* at 36.

⁶⁷ *Id.* at 35. (“Without a copyrighted work as the basepoint, the word ‘origin’ has no discernable limits.”) Yet difficulties in determining authorial origin can arise regardless of a work’s legal status; even copyrighted works often contain multiple sources. Also, *Dastar* has been generally applied to bar trademark claims of false authorial attribution in cases involving copyrighted works *as well as* those involving public-domain works.

copyrighted story in English, which in turn was based on a copyrighted Russian-language version of a Ukrainian folk tale. “The Nile and its tributaries,” indeed.

Conceivably there are ways to make copyright litigation of reputation/attribution issues somewhat feasible for literary works and other works not eligible for VARA (though VARA’s own limits raise normative and positive doubts about doing so). For example, detailed rules might ameliorate some line-drawing problems, such as how to distinguish between authorial and non-authorial contributions to a work.⁶⁸ And Goold is correct that some copyright cases hint that courts will be particularly unsympathetic to defendants who not only make unauthorized changes to a work but also name the horrified copyright owner as its author. All told, if the feasibility issues can be resolved, courts might well be more willing to find ‘improper appropriation’, and to deny ‘fair use’, if a plaintiff can show reputational harm flowing from the defendant’s having put the copied author’s name on a significantly altered version of the work.

The right of creative control

This last sub-tort on Goold’s list, involving ‘creative control,’ has more promise than its name suggests. At first the reader thinks that ‘creative control’ constitutes kind of a “residual category”⁶⁹ or catch-all -- something that copyright owners might assert against any unauthorized use that neither causes harm nor interferes with any commercial plan or activity of the copyright owner.⁷⁰ Goold’s reliance on David Ladd’s well-known and controversial piece,

⁶⁸ For example, Congress or the courts might spell out how much ‘new matter’ must be added before a claim of attribution is warranted, for example, or how to treat a copyright owner’s claim that involves misattribution when the actual creator is not the person who owns the copyright. However, Goold’s advice against formal recognition of the sub-torts could make it difficult to specify such rules. Goold, *Unbundling*, *supra* note 1, at 1895-98 (recommending against statutory implementation).

⁶⁹ Goold refers to the right of creative control as a “residual category”, Goold, *Unbundling*, *supra* note 1 at 1872, but he quickly cautions that many copyright owner interests “simply receive no protection at all.” *Id.* at 1873.

⁷⁰ *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 451 (1984) (lack of commercial harm weighted heavily in giving fair use treatment to home copyists of television programs.)

“The Harm of the Concept of Harm”,⁷¹ reinforces that impression. Yet Goold has in mind something narrower, and far more justifiable: a concern with protecting those commercial interests or activities that are by their nature incapable of being shared.

The key notion here seems to be identifying activities which require ‘exclusivity’ to be profitable and socially useful—activities for which the usual IP assumptions of non-rivalry and inexhaustibility fail.⁷² The classic example, which Goold cites, is a copyright owner’s interest in being the first to give a work its full publication.⁷³ Only one publisher can be first.⁷⁴ Similarly, most studio executives will decline to pay for a novel’s movie rights unless the studio is assured of being the *sole* producer of such a movie. Such interests in exclusivity have the commercial resonance that can matter deeply for incentives.⁷⁵

To illustrate where his ‘control’ sub-tort would *not* apply, Goold points to the Supreme Court decision in *Sony v. Universal*.⁷⁶ The *Sony* majority held that it was “fair use” for consumers to make home copies of television programs for purposes of time-shifting. Of that case, Goold states, “The time shifting use at issue in *Sony*... was not a rivalrous use, and accordingly there was no policy rationale for protecting the owner’s interest in coordinating

⁷¹ David Ladd, *The Harm of the Concept of Harm in Copyright: The Thirteenth Donald C. Brace Memorial Lecture* (Apr. 13, 1983), in 30 J. Copyright Soc’y U.S.A. 421 (1983) (argues that causing “harm” should not be a pre-condition for copyright liability).

⁷² Goold, *Unbundling*, supra note 1 at 1871.

⁷³ *Harper & Row*, 471 U.S. at 564 (quotation from a manuscript about to be published was held not a “fair use” when the use was sufficiently extensive to cause an authorized publisher to cancel its contract to be the first to publish authorized excerpts). It is also from this case that Goold borrows the misleading term, “creative control.”

⁷⁴ Note, however, that Goold needs to explain how quoting from unpublished works can be distinguished from the right of first publication.

⁷⁵ The Constitution gives Congress power to grant to authors and inventors exclusive rights over their works in order to “promote the Progress of Science and useful Arts.” U.S. Const. Art. I, 8, 8. Whether the ultimate goal of federal copyright law is thought to be economic welfare-maximization, or production of a great quantity of authored works, or furthering one or another alternative conception of “Progress,” it is clear that the *method* envisaged by the Framers is economic incentive: harnessing demand to generate royalties and other payments so that authors can afford to spend time creating works of expression.

⁷⁶ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

time-shifting.”⁷⁷ Far from sharing the perspective of commentators such as Ladd, Goold does not see in *Sony* an appropriate occasion for exerting a right of control.

Such close attention to limiting the putative control right is to the good. It is unclear, however, what affirmative purpose would be served by recognizing such a right: copying that violates a commercially significant ‘exclusivity’ interest is already covered by standard copyright —because copying that wrecks a commercially-necessary exclusivity will, almost inevitably, overlap with copying that is harmful.

Further, a sub-tort in ‘controlling rivalrous uses’ is dangerously perched on a slippery slope. As Goold says, “Most goods ... fall somewhere on a spectrum of rivalrousness.” The article does not specify how to determine when the non-rivalrous aspects of an unauthorized use predominate strongly enough to warrant giving the copyright owner protection by Goold’s sub-tort.

Opening up a special sub-tort for ‘control’ thus presents the danger that of giving copyright owners the ability to restrain virtually any copying that fails to fit other categories.⁷⁸ Any interest in ‘control’ thus needs sharp definition along its boundaries. Goold intimates some potential boundaries, such as whether there exists a particular point in time when limiting exploitation to ‘one use’ will maximize utility.⁷⁹ Whether clear lines can be articulated remains to be seen.

Conclusion

⁷⁷ Goold, *Unbundling*, supra note 1 at 1872.

⁷⁸ At one point Goold seems to present his ‘control right’ as a residual category that has some exceptions; at those points he seems to have a fairly broad notion of the sub-tort. At most other times, however, he is careful to guard against the ‘control right’ being broadly interpreted. See Goold, *Unbundling*, supra note 1, at 1869-74.

⁷⁹ *Id.* at 1870-71.

The article clears some important territory. However, it is premature to make recommendations for judicial action, as the article does.

One can understand scholars feeling pressure to find and announce solutions. Copyright's lack of conceptual clarity has led to some jarring results.⁸⁰ And the field is so important economically that it seems bizarre to still be debating fundamental aspects of a key concept like "improper appropriation". By contrast, for example, over seventy years have passed since negligence law received from Judge Learned Hand a clear structure for its somewhat parallel category, "unreasonable behavior."⁸¹ (And maybe copyright will never catch up. About copyright, Learned Hand himself opined on a distinction crucial to many infringement cases that "[n]obody has ever been able to fix that boundary, and nobody ever can."⁸²)

It is important not to overstate the dangers posed by copyright's conceptual ambiguities. Courts sometimes make disturbing decisions, but most infringement litigation proceeds along unsurprising paths. As for "fair use," it has progressed since 2004 when Larry Lessig made his famous quip (quoted by Goold) that fair use amounts to a mere "right to hire a

⁸⁰ See, e.g., Wendy J. Gordon, *How the Jury in the 'Blurred Lines' Case was Misled*, <http://www.newsweek.com/jury-blurred-lines-case-was-misled-314856> (March 17, 2015) (exploring jury finding of infringement in blurred lines case). Goold cites to rulings in the Blurred Lines case, without discussion whether the case is atypical. Goold, *Unbundling*, supra note 1, at 1836 n.4 (citing *Williams v. Bridgeport Music*, No. LA CV13-06004 JAK, 2015 WL 4479500, at *1–2 (CD. Cal. July 14, 2015)) (determining, inter alia, that Defendants' motion for a new trial should be denied).

⁸¹ *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) ("[T]he owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that [a boat tethered at a mooring] will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions."). Judge Hand's BPL test (so named for his variables: burden, probability, and loss) may not answer all questions, but it has stayed at the center of negligence discussions for over a half-century.

⁸² *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930). The boundary in question divides ideas (which the law makes freely copyable) from expression (over which copyright owners have some legal rights of control). See 17 U.S.C. § 102(b) (2012). Part of the purpose of determining "substantial similarity" or "improper appropriation" is to decide if the defendant has copied only ideas (which is permitted and indeed encouraged) or if the defendant has also copied expression.

lawyer”⁸³. Some commentators argue that the fair use doctrine transitioned has “from weak reed to powerful shield in a decade’s time.”⁸⁴

Unbundling is a notable venture for a new scholar. It shows a range of knowledge and an independent cast of mind. Admittedly, I remain unpersuaded by its arguments for developing copyright sub-torts to protect reputation, privacy, and a right to control rivalrous uses— but no one article could be persuasive on three such large issues.

By disentangling various distinct interests that are often bundled together in a blurry and confusing way in copyright cases, Goold places an important set of questions on the agenda of copyright judges, legislators and commentators: Are these interests that copyright law does or should serve? If so, should that change the infringement inquiry and/or the application of the fair use doctrine? If not, how would unambiguously excluding a particular interest change current copyright practice? Goold’s article gives urgency and clarity to this important set of inquiries.

⁸³ Goold, *Unbundling*, supra note 1, at 1839 (quoting Lawrence Lessig, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 187 (2004)). Goold concedes in the footnotes that not all share this unhappy view of fair use.

⁸⁴ Rebecca Tushnet, *Content, Purpose, or Both?* 90 WASH. L. REV. 869, 872-73 (2015) (discussing doctrinal improvements in the strength of fair use since Lessig wrote).