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The full essay can be found in *INTELLECTUAL PROPERTY AND THE COMMON LAW* (Cambridge University Press, Shyamkrishna Balganesh, ed., forthcoming 2013)

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## The Concept of “Harm” in Copyright

Wendy J. Gordon\* [DRAFT]

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### ABSTRACT:

This essay examines the tort of copyright infringement. It argues that the ideas of “harm” and “fault” already play a role in the tort’s functioning, and that an ideally reformulated version of the tort should perhaps give a more significant role to “harm.” The essay therefore examines what “harm” can or should mean, reviewing four candidates for cognizable harm in copyright law (rivalry-based losses, foregone fees, loss of exclusivity, and subjective distress) and canvassing three philosophical conceptions of “harm” (counterfactual, historical-worsening, and noncomparative). The essay identifies the appropriateness vel non of employing, in the copyright context, each harm-candidate and each variant conception. While the essay argues that there remain many issues that need to be resolved before making “harm” a formal pre-requisite for liability in copyright, the essay takes steps toward resolving some of the open issues.

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\* Copyright 2013 Wendy J. Gordon, William Fairfield Warren Distinguished Professor, Boston University, and Professor of Law, Boston University School of Law. For illuminating discussions and suggestions, I thank Oren Bracha, Gary Lawson, David Lyons, Mike Meurer, Jessica Silbey, Ken Simons, Ben Zipursky, our editor Shyam Balganesh, and the (other) participants at the venues where early versions of this paper were presented: the Harvard Law Review’s “Symposium on the New Private Law,” The Institute for Law and Philosophy’s “Philosophical Foundations of Intellectual Property Conference” at the University of San Diego School of Law, and the Texas IP Law Journal’s “12th Annual Intellectual Property Law Symposium.” Able research assistance was provided by Josh Beldner, David Bachman, Matthew Shayefar and especially Adam Winokur. Responsibility for errors rests of course with me.

is complete upon proof that the defendant entered the land. This is almost always a purely binary (yes/no) question of fact.<sup>2</sup> Reasonable mistake is not a defense. Should the defendant be able to prove that he or she entered the land out of necessity, that *does* count as a defense, but the trespass defendant –while not technically a trespasser if he or she entered out of necessity-- is still responsible for paying for damage done.<sup>3</sup>

What would copyright look like if it followed this model? One could debate the precise contours such a parallel tort would take,<sup>4</sup> but I think the following the most plausible translation of the trespass model onto copyright.

The copyright plaintiff's prima facie case would be complete upon proof that the defendant copied. This would be a purely yes/no question of fact. Reasonable mistake would be (as now) no defense. Should the defendant be able to prove that his or her copying serves the public interest (because, for example, he or she copied only 'ideas' and diffused them effectively, or because his or her copying fell within the domain that current doctrine calls 'fair use'), the copyright

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<sup>2</sup> Occasionally, borderline questions of policy arise, such as whether the deposit of small particles of pollutant should constitute trespass, or whether entry into airspace far above the owned land should constitute trespass.

<sup>3</sup> The classic case is *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (1910) (defendant's employees reinforced his boat's ties to a dock, without the dock owner's permission, in the face of a major storm). The defendant's behavior was seen as reasonable, but the court nevertheless made the defendant pay for damage that resulted when storm waters slammed the defendant's boat against the plaintiff's dock

<sup>4</sup> Defining an IP parallel to the notion of bare "entry upon land" could go in two different directions. One would premise liability on copying without regard to recognizability or similarity. This I think matches what a copyright-as- trespass model would look like. The other would premise liability on a defendant's producing something recognizably similar to the plaintiff's work, without regard to whether the defendant had copied. The latter resembles the patent standard.

But one of these elements- copying or similarity- would seem to be necessary. In its real form (not twisted into a trespass analog), copyright has both.

The possibility of harm plays a significant role in copyright law, as does fault. Their roles are concealed or understated in part because of the rhetorical power of the often described parallels between the torts of copyright infringement on the one hand, and trespass to land on the other.

On the surface, copyright infringement indeed shares some structure with trespass to land. They appear to have parallel acts of breach: entry for trespass and copying for copyright infringement. Both torts are commonly termed strict liability, in that once volitional entry or volitional copying occurs, the defendant cannot use reasonable mistake as a defense. Further, both torts appear to allow plaintiffs to prevail without proving harm.

However, the differences between the two causes of action may be more important than the similarities.<sup>1</sup> This essay emphasizes the *disanalogies* between copyright and trespass as a device to interrogate the roles that harm and fault play in copyright.

What would copyright infringement look like if it were structured like trespass? In trespass, the landowner's prima facie case

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<sup>1</sup> I admit to having overstated the similarities in the past. *See, e.g.*, Wendy J. Gordon, *Trespass-Copyright Parallels and the Harm-Benefit Distinction*, 122 HARV. L. REV. FORUM 62 (2009), *available at* <http://www.harvardlawreview.org/media/pdf/gordon.pdf> (last visited May 13, 2013) (arguing that copyright should differ from trespass to land, but conceding existing similarity); also see Wendy J. Gordon, *An Inquiry Into the Merits of Copyright, The Challenges of Consistency, Consent and Encouragement Theory*, 41 STAN. L. REV. 1343-94 (1989) (arguing that copyright and conventional property share consistent forms).

defendant would nevertheless have to pay for any negative monetary impact.

What the tort of copyright infringement actually looks like is far different. The copyright plaintiff's *prima facie* case only *begins* with proof of factual copying; she must also prove that protected expression was copied and that 'substantial similarity in expression' resulted. The latter are nonbinary questions (standards rather than rules), largely normative in nature. Further, should the plaintiff prove no more than the copying of 'ideas', he or she collects nothing. Similarly, should the defendant prove that his or her use of the plaintiff's expression was a "fair use", the copyright plaintiff collects nothing.<sup>5</sup>

To summarize the differences, which are further detailed in Parts I and II below: trespass requires only proof of entry, while copyright requires more than proof of copying. The cause of action in trespass requires a binary inquiry into whether a rule ('do not enter') has been broken. The cause of action in copyright requires an application of normative judgment into whether complex standards ('substantial similarity', 'use of expression versus ideas') have been satisfied. Also, trespass imposes liability for harm done in pursuit of socially desirable ends while copyright does not.

It should be clear from this summary that owner interests are less important in copyright law than in trespass. (1) It is harder for a copyright plaintiff to make a *prima facie* showing than is for a trespass plaintiff and (2) liability is more easily defeated by social interests in copyright than in trespass.

Were copyright law to impose an explicit requirement that plaintiffs prove harm, or (relatedly) that plaintiffs prove foreseeability,

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<sup>5</sup> Moreover, in cases where the plaintiff fails to prevail, the defendant may be able to collect costs and attorney fees. 17 USC § 505 (2006). If the plaintiff prevails, his or her ability to collect costs and attorney fees depends on having registered the copyright in a timely fashion. 17 USC § 412.

such requirements would further limit the reach of owner interests. Such changes are attractive to many commentators, in part because of copyright's absurdly overlong duration. One rhetorical obstacle to making such changes is the trespass analogy, which this essay hopes to undermine by showing *inter alia* that copyright is already halfway to requiring proof of harm, and already requires far more than proof of entry. But this essay also cautions against rushing to impose a harm requirement before the conceptual and policy issues inherent in "harm" are fully fleshed out.

The essay describes some roles already played by harm and fault in copyright law. It argues that a role for harm is implicit in the copyright plaintiff's cause of action, and notes that a role for harm is explicit but much-disputed in the defense of "fair use". The essay also essays some tentative prescriptions about how copyright law should treat harm in the future. The essay borrows some of the tools that philosophers have offered to explicate the notion of harm in order to clarify some of the policy choices that Congress and courts would face -- or at least *should* face -- if "harm" is to be deployed in copyright law more explicitly and systematically than it is now. Among other things, the essay identifies some of the issues that need resolution before we can answer a perennial question of fair use doctrine, namely, whether a defendant's failure to pay license fees should count as a harm under the fourth fair use factor.<sup>6</sup>

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<sup>6</sup> Fair use is a defense that allows unconsented use of copyrighted works. The determination of what is "fair" is a multifactorial inquiry. Among the matters of importance are the question of whether the social benefit served by the defendant's use could or should come through market purchase and the question of whether the defendant's use is transformative. For the doctrine's statutory embodiment, see 17 U.S.C. § 107 (2006). The fourth fair use factor is "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4) (2006). Varying notions of harm play a strong role in courts' assessments of this fourth factor.

## A I. Strict Liability

Let us examine the first purported parallel between trespass to land and copyright infringement, namely, the supposed strict liability nature of each tort. It is true that, for both trespass and copyright, reasonable mistake is no excuse. A builder who erroneously but reasonably thinks his title extends further than it does is a trespasser when he innocently crosses another owner's boundary; a publisher who erroneously but reasonably believes she has purchased a license from a manuscript's copyright owner is an infringer when she innocently prints the plagiarized text. Neither the builder nor the publisher has a defense based on his or her reasonable mistake.

Yet "strict liability" connotes more than the absence of one particular defense. "Strict liability" means "liability without fault." In copyright law, fault of a particular kind is very relevant to liability. It appears most obviously in two substantive contexts:<sup>7</sup> fair use and substantial similarity.

Steven Hetcher in the previous chapter [in this book, *INTELLECTUAL PROPERTY AND THE COMMON LAW*,] uses fair use to argue that copyright is not a strict liability tort. He correctly emphasizes the "fault" inquiry inherent in the doctrine of fair use and goes so far as to suggest that proving lack of fair use be made part of the plaintiff's case in chief.<sup>8</sup> What should be added to Hetcher's analysis is the acknowledgment that fault (or its close cousin) is already part of the case in chief.

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<sup>7</sup> Fault is also relevant to remedies and of course to criminal copyright liability.

<sup>8</sup> Stephen Hetcher, *The Fault Liability Standard in Copyright* (in this volume).

It is sometimes said that copyright plaintiffs need prove only ownership and copying of protected elements.<sup>9</sup> However, mere copying is in fact insufficient for liability. In all but rare cases, the plaintiff cannot succeed unless he or she also proves that the defendant's product is "substantially similar" to the plaintiff's own work of authorship.<sup>10</sup> The test has many forms, all involving the ability of an observer (sometimes the ordinary person, sometimes the audience) to recognize the similarity.<sup>11</sup>

Although recognizing a similarity is necessary for liability, it cannot be sufficient, because similarities resulting from the copying of ideas violate no copyright.<sup>12</sup> Something more is needed. Most judicial uses of "substantial similarity" exhibit a normative, fault-like nature;<sup>13</sup> substantial similarity is even known as the test for "improper appropriation."<sup>14</sup> The Second Circuit's approach in *Arnstein v. Porter* is iconic:

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<sup>9</sup> ROBERT C. OSTERBERG AND ERIC C. OSTERBERG, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW § 1:1 (PLI 2011)

<sup>10</sup> *Id.* See also 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 9.3.1, at 9:34 (3d ed. 2012).

<sup>11</sup> "[T]he appropriate test for determining whether substantial similarity is present is whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." *Ideal Toy Corp. v. Fab-Lu Ltd. (Inc.)*, 360 F.2d 1021, 1022 (2d Cir. 1966).

<sup>12</sup> 17 U.S.C. § 102(b) (no copyright in ideas).

<sup>13</sup> Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 63 DUKE L. J. 203, 206 (2012).

<sup>14</sup> Sometimes the elements of a copyright cause of action are described as proof of valid copyright, copying in fact, and "improper appropriation," with substantial similarity being a sub-element of the latter. GOLDSTEIN, *supra* note 10, at § 9.3.1, at 9:34. As the cause of action is presented by Paul Goldstein, a plaintiff must prove "improper appropriation," and this in turn has two components: first, that the defendant has copied protected matter (e.g., expression rather than ideas) and second, that audiences will find the expression in the two works substantially similar.

Harm avoidance is not the only explanation for the substantial similarity requirement. Another might be the notion that a defendant infringes only when he or she "expresses" what plaintiff should have control over expressing. But here too is a notion of wrongfulness – and here too,



Assuming that adequate proof is made of copying, that is not enough; for there can be “permissible copying,” copying which is not *illicit*... The question... is whether defendant took from plaintiff’s works *so much* of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant *wrongfully* appropriated something which belongs to the plaintiff.<sup>15</sup>

Although the inquiry into “so much” sounds merely factual (a matter of quantity), the fault-like nature of words like “improper”, “illicit” and “wrongfully” is obvious.

Admittedly, improper appropriation is not equivalent to moral fault; it is an objective rather than subjective fault concept. But the law counts such concepts-- including the objective conception of ‘unreasonable’ behavior in negligence law—as a kind of fault and far from strict liability.

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recognizability is essential. Without similarity to what plaintiff said or sang there is no expression of what plaintiff said or sang. In addition, of course, one can conceptualize the loss of control over one’s expression as “subjective distress,” which might count as a harm. For discussion of copyright not as an economic device but as control over expressing one’s self publicly, see Abraham Drassinower, *Authorship as Public Address: On the Specificity of Copyright vis-à-vis Patent and Trade-Mark*, 2008 MICH. ST. L. REV. 199, 224 (2008) (“[T]he test for copyright infringement must be understood not as an inquiry into whether the defendant has reproduced the plaintiff’s work, but rather as an inquiry into whether, under the circumstances, such reproduction supports the inference that the defendant has abrogated the plaintiff’s authorship to himself – that is, whether the reproduction is in the service of public presentation.”). Cf. Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW. U. L. REV. 1607, 1627 (2009) (“[T]he guiding principle of copyright is that one should generally not be entitled to offer the author’s copyrighted expression to the public as a substitute for the work of the author.”).

<sup>15</sup> *Arnstein v. Porter*, 154 F.2d 464, 472–73 (2d Cir. 1946) (emphases added; footnotes omitted). What constitutes “so much” is of course much debated. But the controversies over the different versions of the substantial similarity test should not obscure what they all have in common: the ability of an observer to recognize plaintiff’s work within the defendant’s product.

Thus, the inquiry into substantial similarity is a matter for the fact-finder's normative judgment.<sup>16</sup> Substantial similarity "is a term to be used in a courtroom to strike a delicate balance between the protection to which authors are entitled under an act of Congress and the freedom that exists for all others to create their works outside the area protected by infringement."<sup>17</sup> It is very unlike the physical question of whether a defendant has crossed a land boundary.

Moreover, the substantial similarity requirement makes clear that copyright law requires something more than copying – "copying plus."<sup>18</sup> Trespass to land imposes no such additional element.

Admittedly, one case did abandon the requirement of "substantial similarity." For a subset of copyright disputes, those involving digital sampling, the Sixth Circuit Court of Appeals held that even an unrecognizable use of copyrighted expression would give rise to liability. The opinion, *Bridgeport Music, Inc. v. Dimension Films*,<sup>19</sup> has been much criticized.<sup>20</sup> Tellingly, the *Bridgeport* court in jettisoning "substantial similarity" was influenced by an erroneous

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<sup>16</sup> Balganes, *supra* note 13, at 256. To the extent that "substantial similarity" has objective components, that characteristic does not make it less fault-like than negligence law. Negligence law uses an objective standard of what counts as "reasonable" behavior, yet is known as a "fault"-based cause of action.

<sup>17</sup> *Steinberg v. Columbia Pictures Industries, Inc.*, 663 F. Supp. 706 at 711 (S.D.N.Y. 1987) (citation omitted).

<sup>18</sup> Whereas trespass imposes liability for the mere fact of volitional entry, copyright law imposes liability for copying-in-fact plus this extra element of "substantial similarity."

<sup>19</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

<sup>20</sup> *Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1339 (S.D. Fla. 2009), *aff'd*, 635 F.3d 1284 (11th Cir. 2011); *EMI Records Ltd. v. Premise Media Corp. L.P.*, 2008 WL 5027245 (N.Y. August 8, 2008); 3 PATRY ON COPYRIGHT § 9:61 (calling *Bridgeport* "disturbing"); David M. Morrison, *Bridgeport Redux: Digital Sampling and Audience Recoding*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 75, 141 (2008) ("Courts reviewing digital musical sampling cases ought to reject *Bridgeport* in favor of traditional substantial similarity and de minimis use principles.").

belief it was dealing with a *physical* borrowing.<sup>21</sup> Unlike *Bridgeport*, the ordinary case of copyright infringement requires a normative decision, based on recognizable similarity, which is lacking in trespass to land.

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<sup>21</sup> The *Bridgeport* lawsuit charged infringement because a movie soundtrack employed music that had sampled a couple of seconds from a George Clinton song recording. “Sampling” is a musical practice that involves the direct, mechanical, or electrical copying of sound. A “sound recording” is a copyrightable work of authorship whose artistry resides in the manner in which notes are sung or words are spoken.

In *Bridgeport*, a few seconds of sampled sound were looped and distorted in such a way that the court found “that no reasonable juror, even one familiar with the works of George Clinton, would recognize the source of the sample without having been told of its source.” Nevertheless, the Sixth Circuit rocked the copyright world by holding that infringement could nevertheless result. That is, a lack of recognizable similarity was not a barrier to recovery, and for “digital samples” there was no such thing as de minimis copying. 410 F.3d 792, 798, 801–802

The Sixth Circuit’s attempted justifications were many, including an egregiously expansive reading of a statutory provision that Congress had meant to narrow, not broaden, sound recording rights. One important key to the decision can be found in the court’s errors about the supposedly physical nature of sound recordings and sampling.

The court opined that the copying was “a physical taking rather than an intellectual one.” *Bridgeport* at 410 F.3d 802. But nothing physical was taken; a pattern of laser-read bumps or electrical signals was duplicated and recorded, the same way the pattern of curved and straight lines that comprise the alphabet can be photocopied. The *Bridgeport* court’s error probably began when the court treated a “sound recording” as if it were a physical medium, equivalent to a book. Recognizing that for books “it is not the book, i.e., the paper and binding, that is copyrightable, but its contents,” 410 F.3d 800, the court went on to imply that for sound recordings by contrast it is the physical that somehow partakes of copyright. Wrote the court, “[T]he decision was made by Congress to treat a sound recording differently from a book even though both are the medium in which an original work is fixed rather than the creation itself.”

It is incorrect to say that a sound recording is “the medium in which an original work is fixed rather than the creation itself.” Under the Act, a “sound recording” is indeed a creation in itself, 17 U.S.C. § 102(a)(7), an intangible pattern capable of being embodied. The physical media in which sound recordings are embodied are called phonorecords. 17 U.S.C. § 101 (definition of phonorecords).

## II. Whether the Plaintiff Must Prove Harm

On the surface, neither copyright law nor trespass to land requires proof of harm. However, in copyright, the “substantial similarity” analysis seems premised on at least the *possibility* of harm. That is, when a plaintiff proves “substantial similarity,” he or she has proved something that is essential to virtually any plausible conception of harm.<sup>22</sup>

To see this, note that “substantial similarity” is measured by whether the plaintiff can persuade the finder of fact (judge or jury) that an ordinary observer, or an ordinary audience member, would perceive enough similarity between the plaintiff’s and defendant’s work that the borrowing is wrongful.<sup>23</sup> An obvious preliminary piece of this similarity analysis is whether the fact-finder concludes that the ordinary observer or audience member could *recognize* the plaintiff’s work within the defendant’s work.<sup>24</sup> I argue later that, as a descriptive matter, the ability of the audience to perceive similarity – the requirement I call “recognizability” – is necessary (though not sufficient) for harm to arise.

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<sup>22</sup> The reader might object that entry, too, is essential to virtually any conception of harm. That is true. But copyright requires more than proof of an entry-equivalent, that is, it requires more than mere factual copying. Copyright requires something (recognizable expression) from which the possibility of harm flows more strongly than it would from mere proof of (unrecognizable or non-expression) copying.

<sup>23</sup> The courts tend to avoid the word “wrongful” – “illicit” and “improper” are more likely. Although I might agree that “wrongful copying” is at the core, *see* Balganesh, *supra* note 13, at 228, I bracket the question of whether wrongfulness is part of what plaintiff must prove. Whatever the definition of “substantial similarity,” it clearly requires some normative judgment coupled with recognizability. Beyond that lies ground not necessary for the contentions made in this essay.

<sup>24</sup> I place outside the scope of this essay those cases where a defendant engages in “intermediate copying” of expression—such as a computer programmer who makes exact copies of a copyrighted computer program in order to reverse engineer it, and whose final product contains no copied express. Such cases have their own intricacies.

The substantial similarity requirement is a judge-made rule that has remained consistent over time as a number of copyright statutes were amended and replaced.<sup>25</sup> It shows many ties to notions of harm in its history.<sup>26</sup> Moreover, I speculate that the importance of at least the potential for harm is part of what sustains the requirement's viability. That is because harm *matters* to most people on a moral level, and prohibitions against doing harm are deeply embedded in our legal and cultural fabric.

Harm has a special importance for the common law and for many ethical theories. Both libertarians<sup>27</sup> and liberals<sup>28</sup> place an emphasis on avoiding harm. The normative preference for harm

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<sup>25</sup> Congressional enactments that leave judge-made rules unaffected are often viewed as endorsing those rules. *See, e.g.*, *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) (Once “an agency’s statutory construction has been ‘fully brought to the attention of the public and the Congress,’ and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.”); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940) (“The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one.”).

<sup>26</sup> In explaining substantial similarity, which the Goldstein treatise calls the “audience test,” Goldstein uses as a touchstone this classic reference to the harmful potential for copying: “The audience test. . . resonates in Justice Story’s earlier observation in *Folsom v. Marsh* that improper appropriation will be established if ‘so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another.’” GOLDSTEIN, *supra* note 10, at § 9.3.1, at 9:34 (3d ed. 2012) (footnotes omitted). *See also* Sag, *supra* note 14, at 1607, arguing that “the tests of substantial similarity provide further evidence that copyright primarily protects the author against expressive substitution.” *Id.* at 1633. Sag’s focus is not on harm, but harm is inherent in the notion of substitution.

<sup>27</sup> ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974) at 28–35 & *passim* (on “side constraints”).

<sup>28</sup> JOHN STUART MILL, *ON LIBERTY* (1869), at ch. 1, Para. 9 (“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”), *available at* <http://www.bartleby.com/130/1.html> (last visited March 20, 2012).

avoidance is probably based on a combination of considerations, such as a respect for the separateness and autonomy of persons, a desire to prevent bad states of welfare, a preference for equality, and the suspicion that a person who causes harm is subordinating another person to his or her own ends.<sup>29</sup> It has strong historical and cultural roots: the Ten Commandments are primarily addressed to avoiding harm; Locke's theory of property was based in a biblically based injunction against causing harm;<sup>30</sup> and the common law has long been more willing to impose liability for harms done than it is to impose liability for benefits not paid for.<sup>31</sup>

In addition, this preference for avoiding harm expresses itself in an asymmetry: commonsense morality places more importance on

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<sup>29</sup> Different philosophers emphasize different aspects. For Nozick, the key is the separateness of persons. Nozick, *supra* note 27, at 28–35. In addition, the prohibition tends to be stronger against doing harm than against allowing harm to happen. *See, e.g.*, SHELLY KAGAN, *NORMATIVE ETHICS* (1998) at 94–100.

<sup>30</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, SECOND TREATISE (1690) at, e.g., §6 (“[N]o one ought to harm another in his Life, Health, Liberty, or Possessions”); also see §332 (“He that in obedience to this command of God, subdued, tilled and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him.”) *available at* <http://www.gutenberg.org/ebooks/7370> (last visited March 20, 2012)

For more detailed argument, see Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1544–49 (the harm-based structure of Locke's argument for property).

<sup>31</sup> Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65, 71 (1985) (“[T]he legal remedies available to victims of harms are far superior to those enjoyed by the analogous providers of nonbargained benefits.”). I have argued that the common law asymmetry can be explained by factors other than the asymmetry between harm and benefit themselves, Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. LEGAL STUD. 449 (1992), but I think in that article I understated the functional significance of the harm/benefit distinction.

For other explorations of the asymmetry with which the common law treats positive as compared with negative externalities, *see, e.g.*, Scott Hershovitz, *Two Models of Tort (and Takings)*, 92 VA. L. REV. 1147 (2006).

avoiding harm than it does on providing an equivalent amount of benefits. Under many deontological approaches, it is also thought wrong to impose harm to obtain a *greater* amount of benefit.<sup>32</sup>

Of course, many acts of harm are not actionable or wrongful in any way; the harm done by honest competition is the classic example. But as Shelly Kagan writes, “the significance of harm doing is so great – according to commonsense moral intuition – that all other things being equal, if an act involves doing harm, it is simply forbidden.”<sup>33</sup> Were copyright fully untethered from harm, I suspect copyright would be even less palatable to popular taste than it is.

Some might argue that because copyright is primarily instrumental and economic in its purposes, the distinction between harm and benefit has no relevance. In the consequentialist calculus of economics, “cost” is the usually the relevant variable, not “harm.” Neoclassical economic theories aim at value maximization and do not privilege harm avoidance.<sup>34</sup> Out-of-pocket costs (what a deontologist or ordinary language might call “harm”) are seen as largely symmetrical<sup>35</sup> in their effects with the “opportunity costs” of foregoing possible income. (A deontologist might call opportunity cost a “foregone benefit.”) An economic actor will weigh against a desired purchase both out of pocket cost and opportunity cost, giving no special weight to the

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<sup>32</sup> See KAGAN, *supra* note 29, at 72-79. This may be one reason why a finding of substantial injury is often sufficient to defeat fair use claims of even publicly-beneficial acts of copying.

<sup>33</sup> *Id.* at 72.

<sup>34</sup> At least, economics has different reasons for giving greater weight to harm than it does to foregone gains, namely, the growing experimental literature suggesting that people value what they have more than equivalent things they do not yet possess.

Although economics might weigh costs more heavily than opportunity costs (a position that has changed since Coase wrote), economists still do not give to costs anything like the strong force that typical deontologists give to “harm.”

<sup>35</sup> Research over the last several decades suggests that the symmetry is less than perfect. See the discussion *infra* at notes 47- 41.

findings that bring its assumptions closer to ordinary expectations about how the world works. In what is now called 'behavioral law and economics,' it is seen that gains and losses can play a special role in incentives, one that is stronger than or different from the role played by benefits and gains. Not only are people usually risk averse, as evidenced by the strength of the insurance industries, but in addition experimental evidence suggests that people put a higher price on losing what they own than they would spend to acquire something similar.<sup>40</sup>

This is not merely a matter of attitude or emotion. Loss tends to be more disruptive – more generative of what Guido Calabresi called

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inflicts a wound and 'loss' to the sufferer; at all events *when the suffering has been estimated, the one is called loss and the other gain*. Therefore the equal is intermediate between the greater and the less, but the gain and the loss are respectively greater and less in contrary ways; more of the good and less of the evil are gain, and the contrary is loss; intermediate between them is, as we saw, equal, which we say is just; therefore *corrective justice will be the intermediate between loss and gain*. This is why, when people dispute, they take refuge in the judge . . . *the judge restores equality*; it is as though there were a line divided into unequal parts, and he took away that by which the greater segment exceeds the half, and added it to the smaller segment. And when the whole has been equally divided, *then they say they have 'their own'* i.e. when they have got what is equal.

Aristotle, *Nicomachean Ethics* (W.D. Ross, trans.) Vol. 5 at 4b, available at <http://classics.mit.edu/Aristotle/nicomachean.5.v.html> (emphasis added and typographical error corrected ["woundand" to "wound and"]).

<sup>40</sup> A classic article is Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Basis*, 5 J. ECON. PERSPECTIVES 193, 194–97 (1991) (discussing experiments). For criticisms of this literature, see, e.g., Gregory Klass & Kathryn Zeiler, *Against Endowment Theory: Experimental Economics and Legal Scholarship*, working paper available at <http://scholarship.law.georgetown.edu/facpub/1181> and <http://ssrn.com/abstract=2224105>



“secondary costs”<sup>41</sup> – than either opportunity cost<sup>42</sup> or the loss of benefits tends to be.

Not only has economics opened to the possibility that loss might be asymmetric with foregone gain; in addition economics is not all of copyright law.<sup>43</sup> A prohibition against harm (whether absolute, conditional, or limited in various ways) is embedded in many deontological approaches, and deontological concerns (whether of “just deserts” or otherwise) are often either voiced<sup>44</sup> or silently honored<sup>45</sup> by

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<sup>41</sup> GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 27–28 (1970).

<sup>42</sup> An opportunity cost is the “cost” of not receiving a benefit that is otherwise available. For example, a student not only pays the out-of-pocket cost of tuition also bears the opportunity cost of the wages she could have earned had she not been involved in her schoolwork.

<sup>43</sup> There are echoes of moral entitlement even in the Federalist Papers, written to encourage adoption of the U.S. Constitution. In Number 43, James Madison defended the Constitution’s grant of copyright and patent powers to the federal government on the ground that “[t]he public good fully coincides in both cases [copyright and patent] with the claims of individuals. In modern terms, it sounds as if Madison is praising the government’s IP powers on the ground that they simultaneously serve consequentialist (e.g., economic) and non-consequentialist (e.g., deontological) ends.

Of course, it is possible that Madison was referring to legal claims rather than moral claims, because in the paragraph preceding the language just quoted, he (erroneously) wrote that “[t]he copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law.” But the respectful choice of words (“solemnly”) suggests that he was appealing to his audience on grounds that went beyond mere consistency with positive law. Similarly, when Madison continued that “[t]he right to useful inventions seems with equal reason to belong to the inventors”, the implication is that the reasons for giving such protection were good ones – again, a normative judgment. THE FEDERALIST NO. 43 (James Madison), available at [http://thomas.loc.gov/home/fedpapers/fed\\_43.html](http://thomas.loc.gov/home/fedpapers/fed_43.html) (last visited March 19, 2012).

<sup>44</sup> The high-water mark was probably the declaration in *Harper & Row* that “[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.” *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 546 (1985). In a later case, *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), the Court made clear that labor alone – uncreative labor – did not entitle one to copyright. Some might interpret *Feist* as a rejection of *Harper & Row*’s emphasis on “fair return.” But the Court in *Feist* did not

both judges and legislators in copyright.<sup>46</sup> This is another reason why it is not surprising that an element in the copyright cause of action has a connection with the possibility of harm.

So let us return to my descriptive claim that the recognizability of “substantial similarity” is a necessary prerequisite for harm to arise.

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repudiate the notion that creative labor might lead to a claim to deserve reward. So the possibility of our courts recognizing deontological morality as one of the grounds underlying copyright might remain open. *See generally* ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY*, (Harvard Univ. Press 2011) (exploring noneconomic bases for intellectual property); Gordon, *supra* note 1 at 1343, 1446–50. The Court usually takes care to accompany any allusion to notions of “just deserts” with an implicit acknowledgment of the primacy of incentives. Thus, the Court wrote in *Mazer v Stein*: “The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’ Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.” *Mazer v. Stein*, 347 U.S. 201, 219 (1954) *See also* *Whelan Assocs. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222, 1235 n.27 (3d Cir. 1986) (“just merits” and public benefit both a concern) at 546 (citation omitted).

<sup>45</sup> *See* Balganes, *supra* note 13, at 210 (ordering the different norms).

<sup>46</sup> There are echoes of moral entitlement even in the Federalist Papers, written to encourage adoption of the U.S. Constitution. In Number 43, James Madison defended the Constitution’s grant of copyright and patent powers to the federal government on the ground that “[t]he public good fully coincides in both cases [copyright and patent] with the claims of individuals.” In modern terms, it sounds as if Madison is praising the government’s IP powers on the ground that they simultaneously serve consequentialist (e.g., economic) and non-consequentialist (e.g., deontological) ends.

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To assess that claim, let us consider the primary possible sources of harm in copyright.

First, there is substitutionary harm resulting from rivalry with preexisting markets. Here the evidence is likely to consist in proof of the plaintiff losing current or potential customers to the defendant. This harm of diverting customers is probably the central kind of harm with which copyright is concerned. Let us call this “substitutionary rivalry.” The potential harm here is the loss of third-party revenues, rather than the loss of revenues from the defendant him- or herself.

A second candidate for copyright harm is the loss of revenues from the defendant: the empty cash drawer resulting from the failure of a defendant to obtain permission and pay negotiated fees for his or her use. Let us call this “foregone defendant license fees,” or “foregone fees” for short. For this category to be fully distinct from substitutionary rivalry, let us limit the term “foregone fees” to occasions when the defendant’s use is outside plaintiff’s expected stream of customer uses or licenses.

A third candidate for copyright harm is less easily measured monetarily and is likely to be the most controversial: the subjective experience of distress, frustration, discouragement, anger, or suffering that a copyright owner might feel from witnessing his or her work of authorship being copied by another. The Supreme Court has at least once said that a “*personal* interest in creative control” should matter.<sup>47</sup> Let us call this candidate “subjective distress.”<sup>48</sup> Again, whether it should count as “harm” is addressed later – Mill implicitly taught that

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<sup>47</sup> Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 555 (1985) (emphasis added).

<sup>48</sup> This form of harm fits ill with the largely corporate nature of the copyright industries, because how does one assess the state of mind of an abstract entity such as a corporation?

distress resulting from one's beliefs is a dangerous thing to call harm<sup>49</sup> – but for now please simply note that this subjective experience is a *candidate* for “harm.”

A fourth potential candidate might be “loss of exclusivity.” When another version of a copyrighted work appears, the authorized version might lose value. People in the media industries put a great value on exclusivity, and the possibility exists that the mere presence of a new and nonrivalrous version of the plaintiff's work might cause an economic injury of some kind (perhaps lowering the price at which plaintiff's copyright can be sold) that is not easily captured in the other categories. But it is hard to pin down what this loss consists of that would not be covered by the rivalrous substitution effect, the copyist's failure to pay license fees (since those fees could capture loss of exclusivity), and the category of “subjective distress.” The following analysis therefore does not treat the loss of exclusivity as a separate category.

Having canvassed the likely candidates for harm, we have found three: substitutionary rivalry, foregone fees, and subjective distress. The question now arises: what role do “substantial similarity” and its component, recognizability, play in all these forms of potential harm?

As to the first kind of two kinds of effect, substitutionary rivalry and foregone fees, recognizability plays a key role. Unless the plaintiff's work and the defendant's work are recognizably similar, the

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<sup>49</sup> See the discussion of belief-mediated distress in JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* (1990) at 251–60; Seana Shiffrin, in her recent publication, makes the proposition that some belief-mediated distresses may be harms, but recognizes issues inherent in making such categorizations. Shiffrin, *Harm and Its Moral Significance*, 37, 39 (2012) available at [http://journals.cambridge.org/repo\\_A862Ssc5](http://journals.cambridge.org/repo_A862Ssc5). This article has been published with different pagination in 18 J. LEG. THEORY 357. The pagination used in citations throughout this essay refers to the version posted at the referenced web address.

latter is highly unlikely to substitute for the former, and the defendant making a nonrival use is unlikely to see any purpose in copying that's unrecognizable.<sup>50</sup> There may be some cases where substitution could occur without a recognizable similarity between the defendant's product and the plaintiff's protected expression, but those will either be cases where the defendant has taken the plaintiff's idea or functional advance (which are not protected by copyright) or cases where the substitution is coincidental and not meaningfully related to any invisible copying of expression that might be embedded in it.<sup>51</sup> So recognizability seems to be a necessary component of the kind of harm (vel non) that results from substitutionary rivalry and foregone fees.

Recognizability also would seem to be a necessary component of the third harm candidate, what I have termed "subjective distress." It is hard to imagine authors caring deeply if their work is used unrecognizably. Much greater impact is likely to result from a stranger's using an author's ideas, and, as mentioned, the free use of other people's ideas is something copyright law explicitly privileges<sup>52</sup>

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<sup>50</sup> Please recall that cases of intermediate copying are outside the scope of this essay; see note 24 *supra*.

<sup>51</sup> To illustrate what I mean by coincidence, consider this far-fetched example provided by Nimmer: "[I]magine a defendant who buys plaintiff's poetry anthology to use as an inspiration, ultimately producing her own work by focusing on a poem written by plaintiff, crossing out every word except "The End," and producing a poem original in every other regard. It can hardly be doubted that defendant in this scenario has not infringed." 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[B][1][b], at 13–70 (Matthew Bender, Rev. Ed.) (footnotes omitted).

At the point where the two works are so different, the possibility of substitution seems unrelated to the fact of copying even should the defendant's poem happen to compete with the plaintiff's.

A more realistic example is provided by music sampling, where chunks of borrowed sound are routinely looped, stretched, and distorted in unrecognizable ways.

<sup>52</sup> 17 U.S.C. § 102(b) (2006) (no copyright in ideas).

and copyright policy encourages.<sup>53</sup> There might be some attenuated sense of injustice if they learn of the unrecognizable use, but without anyone, including the author, being able to perceive a similarity between the author's work and the defendant's, it is hard to see serious emotional impact.

So for these three categories of potential harm, "substantial similarity" and its recognizability component are likely essential to the possibility of harm arising. However, I must concede that under the Supreme Court's current view of the constitution, this need not be the case.

As the law stands now, a defendant owes no license fees for an unrecognizable use (except for digital sampling under the exceptional *Bridgeport* case mentioned earlier).<sup>54</sup> But the law can change. Given the extreme deference the Supreme Court showed to Congress in *Eldred*,<sup>55</sup> it would take something truly outrageous – perhaps giving copyright owners a right to royalties every time the weather turned cold – before a congressional grant of exclusive right would be found constitutionally invalid. So, under the Court's current approach, Congress probably *could*, if it wished, impose liability even for copying

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<sup>53</sup> Admittedly, copyright law's tolerance and encouragement for use of others' ideas does not "prove" a lack of emotional impact from either the nonrecognizable use of expression or the use of ideas. It may be that authors do suffer significant emotional harm from the use of their ideas by others, with the law making that harm non-actionable simply because the cost of doing otherwise (the cost of allowing suit for the use of ideas) is too high. Nevertheless, that copyright law regularly requires authors to tolerate whatever distress results from seeing their ideas used by others has three implications: first, that emotional harm from copying is not legally actionable without some further showing; second, that avoiding authors' emotional harm ranks below other goals of copyright; and third, that regular exposure to the practice of having their ideas copied may enable authors to develop habits of mind—coping mechanisms-- that reduce whatever emotional harm might otherwise have resulted from learning they have been copied.

<sup>54</sup> See notes 15–18 and accompanying text.

<sup>55</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 204–205 (2003)

of protected expression that was unrecognizable in the defendant's product.

Were Congress to choose such a course, lack of recognizability would be an *unnecessary* prerequisite to recovery. In such a case, I would see little connection between copyright and harm. To have any normative bite for legal policy, harm must mean more than 'a shortfall from a legal entitlement.' Thus, I disagree with the assumption of many writers<sup>56</sup> that any violation of a statute itself causes "harm."<sup>57</sup>

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<sup>56</sup> Copyright can be seen as a conceptual outgrowth of restitution, the branch of common law that sometimes requires payment for benefit received. *See generally*, Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149 (1992). Restitution law is sometimes said to order payment only when the defendant "has been unjustly enriched at the expense of another." RESTATEMENT OF RESTITUTION, QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 63 cmt. a (1937) (First Restatement), § 1; *see* 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS, § 19A, at 64 (Supp. 1991) ("detriment to plaintiff" said to be crucial to quasi-contract).

Some judges see the requirement of expense or detriment – what might be called *harm* – as capable of being satisfied by the plaintiff showing a nonharmful violation of a "legally protected interest." 1 GEORGE E. PALMER, THE LAW OF RESTITUTION § 2.10, at 133 (1978). There are two problems with this.

First, it is a conceptual error to equate a 'violation of right' (an abstraction) with 'detriment to plaintiff' (a real-world effect).

Second, the elimination of the 'detriment to plaintiff' requirement makes sense only in one context: when restitution is employed as a remedy for violation of an independently defined duty. In the latter context, the violation of the independent duty is a doctrinally sufficient basis on which to premise liability for profits made or costs saved.

Thus, someone who enters land without permission has violated the general duty not to trespass, a duty that arises independently of whether benefits are reaped. Such a trespasser will be required to pay for benefits reaped through the trespass, even if his activities have not so much as dislodged a single pebble on the ground.

By contrast, sometimes restitution is ordered not because of the violation of an independent duty, but on its own account, *because the law deems it beneficial to require the defendant to pay for benefits received*. I see *International News Service v. Associated Press*, 248 U.S. 215 (1918) (time-limited order issued against the taking of uncopyrightable news) as one such case. Whether or not the *INS v. AP* case was correctly decided should not obscure its restitutionary basis. As in some special circumstances

To sum up: I contend that recognizability as a necessary component of “substantial similarity” functions in part to bring considerations of potential harm into the copyright calculus.<sup>58</sup> If that is correct, then this aspect of substantial similarity is another ground for distinguishing copyright infringement from trespass to land.

#### A. What is Harm?

Harm is usually considered a shortfall from some baseline. This raises at least two questions: what baseline should be used and how should a shortfall be measured? Although there are potentially an infinite number of possible baselines, depending on one’s normative commitments,<sup>59</sup> we consider three here: a baseline of minimum incentives, a set of baselines that relate to the plaintiff’s actual status quo position prior to the defendant’s copying, and a baseline of welfare set without regard to the plaintiff’s actual pre-copying holdings. The

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restitution courts will declare a “quasi-contract” to exist, the Court in *INS v. AP* invented the parallel category of “quasi-property.”

Restitution in such a case is not remedial but the basis of the cause of action. In such a context, as I have argued elsewhere, the plaintiff should be required to show *inter alia* the prospect of harm. See Gordon, immediately *supra*, at 222-23 & 238-48.

<sup>57</sup> Defining harm in terms of legal entitlements leads to disabling “harm” as an independent criterion to use in deciding what legal entitlements to award. To define any shortfall from a statutory entitlement as a “harm” just leads to an unhelpful circularity. (Thanks to Oren Bracha for making me think more deeply about circularity issues.)

<sup>58</sup> Potential harm is admittedly not actual harm. It is nevertheless meaningful that the courts require plaintiffs to prove that defendants have done something that is a necessary if not sufficient element of harm. Among other things, the requirement that defendant made or distributed or performed something that was “substantially similar” to plaintiff’s work preserves the relation of correlativity between plaintiff and defendant that is necessary under the corrective justice model of common law adjudication. *Cf.*, the “likelihood of confusion” that is a prerequisite for relief under the federal trademark law, the Lanham Act, 5 U.S.C. § 1125(a) (2006) (setting out the likelihood of confusion standard for trademark infringement).

<sup>59</sup> An egoist might argue that his baseline is to be king of the world, and anything that kept him from that exalted position “harmed” him.



first (incentives) already plays some role in copyright, particularly in fair use cases; the second (reference to change in status quo) is the typical common law baseline for harm; and the third (general welfare level) is an unusual but philosophically respectable possibility. After examining those baseline options, we turn to the question of how to measure the shortfall.

Note that the question of how to measure the shortfall can be restated as a baseline question. Thus, people who measure the shortfall by asking how the plaintiff would have fared but for the interaction with the defendant are implicitly setting their baseline at the level the plaintiff would have achieved had there been no copying by the defendant. People who measure harm by historical worsening<sup>60</sup> are using a baseline consisting of the plaintiff's actual status quo position prior to the interaction with the defendant. People who measure harm noncomparatively (looking at levels of distress regardless of comparison) are employing a baseline of a given level of welfare<sup>61</sup> that is independent of any level of welfare that the affected person had attained or could have attained but for the defendant.

#### B. Baselines: Incentives versus the Plaintiff's Actual Position

In 1983, the then Register of Copyrights, David Ladd, presciently attacked the use of "harm" to limit the reach of copyright.<sup>62</sup> Since then, a growing number of commentators have indeed suggested limiting

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<sup>60</sup> Stephen Perry favors the historical-worsening test for an abstract definition of harm, but a different test for legal liability. Stephen Perry, *Harm, History, and Counterfactuals*, 40 SAN DIEGO L. REV. 1283 (2003). By contrast, the instant essay is looking for definitions of harm that suit the context of copyright law.

<sup>61</sup> I use "welfare" here in the broadest possible sense. Even philosophers who concur on a noncomparative approach can differ strongly on what should count as harm.

<sup>62</sup> David Ladd, *The Harm of the Concept of Harm in Copyright: The 13th Donald C Brace Memorial Lecture*, 30 J. COPYRIGHT SOC'Y USA 421 (1983).

copyright by reference to harm and related notions.<sup>63</sup> Interestingly, Register Ladd described the relevant concept of harm this way:

The Constitution authorizes copyright “To promote the Progress of Science.”<sup>64</sup> From that phrase, the exponents of harm declare

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<sup>63</sup> In 1982 I had argued that one basis for fair use could be the impossibility of a plaintiff collecting license fees: that is, that position might be restated as an argument that nonliability should flow from showing an absence of harm to plaintiff. 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 (1982). More recently I have explored the possibility that harm be made an explicit part of the plaintiff’s case. Wendy J. Gordon, *Harmless Use: Gleaning from Fields of Copyrighted Works*, 77 FORDHAM L. REV. 2411 209 (with introduction by Sonia Katyal). Stephen Hetcher, in his argument that fair use be made part of plaintiff’s case, similarly would make proof of no-harm part of plaintiff’s obligation. Shyam Balganesb in his article on foreseeability looks at something closely related to harm, namely, whether the plaintiff foresaw and was aiming at the market the defendant served, as a method of limiting copyright’s overreach. See Shyamkrishna Balganesb, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009). These are only some examples.

<sup>64</sup> The “progress” language comes from the constitutional clause that empowers Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their *respective* Writings and Discoveries.” U.S. CONST. Art. I, § 8, cl. 8 (emphasis added). By speaking only of the “Progress of Science” and not of the “Progress of Science and the useful Arts,” Register Ladd follows the usual interpretation of the constitutional language: Adopting a parallel construction for each of the three dual phrases in the Constitution, he is assuming that “Science” goes with “authors” and “writings,” whereas “useful Arts” goes with “inventors” and “discoveries.” Thus, when Ladd only of copyright furthering the “Progress of Science,” he is following a standard interpretation. But that standard interpretation may be incorrect.

The rhetorical device of “chiasmus” (a rhetorical pattern of ABBA instead of ABAB) is a standard alternative to parallelism, well-known to educated men (gender deliberate) of the eighteenth-century. The use of the word “respective” before “Writings and Discoveries” therefore makes a difference. In this one subclause employing “respective”, the authors of the constitution are making clear they do intend a construction of parallelism and not chiasmus: “authors” go with “writings,” and “inventors” with “discoveries.” But no signal such as “respective” applies to the “Science and useful Arts” language, throwing in doubt the usual interpretation that the drafters intended a parallel construction throughout.

that where the imperatives of maximum distribution clash with property rights, the latter must yield; and that copyright should extend no further than to what is financially indispensable to motivate creation and publication.<sup>65</sup>

Thus, Ladd accused copyright skeptics of misusing the Constitution's "Progress clause" to argue "that copyright should extend no further than to what is financially indispensable to motivate creation and publication."<sup>66</sup> In doing so, Ladd implicitly defines "harm" as any shortfall beneath what is financially indispensable to induce authorship and distribution.<sup>67</sup> The amount of money equal to minimal incentives is the baseline he attacks. And normative support for such a baseline is indeed quite visible in the literature.<sup>68</sup> Thus, Christopher Sprigman asserts that "we understand copyright's concept of harm"; "copyright 'harm' arises from any use that threatens to suppress author incentives significantly below the optimal level."<sup>69</sup>

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Because no "respective" is applied to "Science" and the "Useful Arts," the progress preamble is capable of applying as a whole to the remainder of the clause. That is, instead of "the progress of Science" applying to copyright and the "progress of useful Arts" applying to patent, the progress of *both* Science and the useful Arts could have been intended apply to copyright *and* patent.

<sup>65</sup> Ladd, *supra* note 61, at 422.

<sup>66</sup> *Id.*

<sup>67</sup> The notion of what is "financially indispensable" not only could serve as a baseline from which to measure harm but it could also serve to define fault. Fault could be the failure to pay such fees (or to do such copying) as causes a shortfall from the baseline.

<sup>68</sup> Thus, Shyam Balganesh contends that "creators . . . need to be given just enough incentive to create in order to balance the system's benefits against its costs." Balganesh, *Foreseeability*, *supra* note 63, at 1571 (abstract). Note, however, that Balganesh does not recommend denying copyright protection to any author whose outlay has been compensated; his recommendation is that foreseeability be made part of plaintiff's obligation of proof.

<sup>69</sup> Christopher Sprigman, *Copyright and the Rule of Reason*, 7 J. Telecomm. & High Tech.L. 317, 320 (2009).

The incentive approach remains distinct from trespass; among other things, the incentive approach emphasizes the importance of inquiring into “recognizable” rather than “mere” copying. Unrecognizable copying is not something an author would have taken into account in deciding how much to invest in creation; it is unforeseeable. Foreseeability is a necessary but not sufficient basis for incentive effects; Shyamkrishna Balganesh has suggested that foreseeability *in general* be made a part of the plaintiff’s case.<sup>70</sup> Courts have not so far followed suit. Recognizability and similarity, too, are necessary but not sufficient bases for incentive effects. These the courts *do* require, as part of the inquiry into actionable copying. Both foreseeability and recognizability are distinct from anything required to prove trespass to land.

Let us return to the notion of harm that Ladd describes. If “what is financially indispensable” for creativity<sup>71</sup> could be determined, and the appropriate multipliers for uncertainty and the like could be defined,<sup>72</sup> then some of us who are indeed worried about copyright’s overreach might well want to implement the suggestion that Ladd so disdained. The courts or Congress could change the current rule that the plaintiff need not prove harm and might adopt “what is financially indispensable” as the baseline from which harm would be measured.<sup>73</sup>

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<sup>70</sup> Balganesh, *Foreseeability*, *supra* note 63.

<sup>71</sup> I question the relevance of publishers’ incentives to the analysis; despite the importance that publication incentives may have played in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), the Copyright Clause of the Constitution speaks of “writers” not “publishers.”

<sup>72</sup> Cf. Richard Craswell, *Deterrence and Damages: The Multiplier Principle and Its Alternatives*, 97 MICH. L. REV. 2185, 2186–87 (1999) (a broad discussion of multipliers in deterrence).

<sup>73</sup> Ladd’s notion is actually closer to what we know as the “fault” or “reasonableness” determination in negligence than it is to a finding of “harm,” because the approach he describes defines what duties are cost-justified. However, what is at issue in his targeted definition of copyright

There is something to be said for including into the copyright plaintiff's prima facie case some notion of incentive and the plaintiff being entitled to recoup his or her investment. Consider the prisoner's dilemma, one form of which I have described as the source of the economic impetus for copyright: in a world without copyright law it is the fear of harm – the fear that unauthorized copying will cause bankruptcy or the loss of years of investment – that discourages creativity.<sup>74</sup> Enacting copyright law changes the payoff structure, making unauthorized copying less likely, so that investments of effort in popular works can lead to survival rather than ruination. Awarding copyright only when necessary to effectuate that change in payoff structure might indeed be a good measure of minimal copyright.

But even advocates of this incentive notion of harm acknowledge that “this theory [of harm] is exceedingly difficult to apply in many

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harm is a duty to pay rather than a duty to act, so the parallel to “reasonableness” in negligence law is only partial.

<sup>74</sup> See Wendy J. Gordon, *Intellectual Property*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 617 (Peter Cane & Mark Tushnet eds., 2003); Wendy J. Gordon, *Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property*, 17 U. DAYTON L. REV. 853 (1992). Whether in fact the fear of negative financial payoffs will discourage creativity is much debated. See the literature addressing the importance of nonfinancial considerations in the decision to create works of authorship, including, for example, Jeanne Fromer, *Expressive Incentives in Intellectual Property*, 98 VA L. REV. 1745 (2012); Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQ. L. 29, 35 (2011); Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141 (2011); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1970 (2006); ROBERTA ROSENTHAL Kwall, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES (2010); Jessica Silbey, *Harvesting Intellectual Property: Inspired Beginnings and “Work-Make-Work,” Two Stages in the Creative Processes of Artists and Innovators*, 86 NOTRE DAME L. REV. 2091, 2112 (2011); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 522 (2009); Wendy J. Gordon, *Render Copyright Unto Caesar: On Taking Incentives Seriously*, 71 U. CHI. L. REV. 75 (2004).

cases.”<sup>75</sup> Empirical investigation of copyright’s effects is notoriously difficult and is further complicated by the important fact that much creativity needs motivation of a nonfinancial kind.<sup>76</sup> Moreover, deciding “how much incentive is necessary” calls for normative as well as empirical judgments, because someone needs to decide what works, and what quality of works, need to be incentivized. In addition, using a number representing minimal incentives as a baseline for determining harm causes fairness problems as between litigants otherwise similarly situated.

Unlike the negligence inquiry, where the cost-benefit balancing of incentives<sup>77</sup> is typically limited to a particular act by the defendant,<sup>78</sup> in copyright the particular defendant’s action is only one of many acts of copying that can contribute to whether the plaintiff receives enough income to meet the economic baseline. That would lead to giving perhaps unwarranted significance to the question of *timing*, for nonpayment by a defendant who copies early in the copyright’s life is likely to do damage to the “financially indispensable” amount, whereas a defendant who copies later is likely to escape liability on the ground that the “financially indispensable” amount has already been collected.<sup>79</sup>

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<sup>75</sup> Sprigman, *supra* note 70.

<sup>76</sup> See Zimmerman, *supra* note 73, and the other sources cited in the immediately preceding footnote.

<sup>77</sup> United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

<sup>78</sup> Also note that the cost-benefit balancing of negligence law pertains to the costs and benefits of the defendant’s action, over which the defendant has a good deal of control. By contrast, the Ladd picture of “harm” focuses on the costs and benefits related to plaintiff’s productivity, about which the defendant has comparatively little control. It better fits common law notions of fairness to hinge defendants’ liability on factors they can control, rather than on factors they cannot.

<sup>79</sup> A more flexible use of incentives, not tied to a specific monetary amount, can be more useful. I try to use such a flexible account of injury to incentives in Wendy J. Gordon, *Fair Use as Market Failure*, 82 COLUM. L. REV. 1600 (1982).

Although proposals to allow timing to affect copyright liability have been thoughtfully made,<sup>80</sup> and consideration of the plaintiff's incentives appears in many cases,<sup>81</sup> common law notions of horizontal fairness ("treating like defendants alike") make rigorous employment of the incentive-oriented baseline as described by Ladd problematic. That does not mean that the incentive-baseline test is fatally flawed: eventually our legal system might decide that the timing of the defendant's copying is just one more species of acceptable "moral luck" that the law rewards or penalizes.<sup>82</sup> And employing an incentive

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<sup>80</sup>Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 781 (2003) ("Viewing the market across time has one important effect: When a work is new, unauthorized uses are less likely to be fair uses; when a work approaches the end of its copyright term, unauthorized uses are increasingly likely to be fair."); Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 425 (2002) ("The proposal is simple: in deciding whether a given use of a copyrighted work is fair use, courts should take into account how much time has passed since the work was created. The more recent the work, all other things being equal, the narrower the scope of fair use; the older the work, the greater the scope of fair use.") For other proposals to adjust copyright to reflect a plaintiff's situation, see e.g., Shyamkrishna Balganesh, *supra* note 13, at 203 (2012); Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1 (2008)

<sup>81</sup> The fourth fair use factor, "the effect of the use upon the potential market for or value of the copyrighted work" 17 U.S.C. § 107(4) (2006), has been interpreted both as referring to plaintiff's private harm, and as referring to impact on incentives. Many fair use cases seem to be groping for a sense of how badly defendant's behavior would hurt incentives of people such as the plaintiff.

For explicit consideration of incentives see, e.g., *Williams & Wilkins Co. v. U. S.*, 487 F.2d 1345 (Ct. Cl. 1973) (discussion of the health of the publishing industries); *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 845 (2d Cir. 1997) (whether defendant's behavior would so impair incentives as to render a service unavailable to the public, ruled relevant to preemption).

<sup>82</sup> Common law notions of horizontal equity are not violated by making the amount a defendant pays depend on other luck-related aspects of the plaintiff's condition. The negligent driver who luckily hits no one has no liability in tort. The unlucky negligent driver who hits someone must pay. Moreover, the driver who negligently runs down a high-earning pedestrian must pay more compensation than the somewhat luckier driver who negligently runs down a low earner. These differences in outcomes are not attributable to differences in the defendant's behavior, and as to him or her

baseline might have a salutary effect: if defendants imagine that the later they are sued, the better are their chances for prevailing, then they are likely to postpone their copying until after the period when the plaintiff's work has its highest popularity. Nevertheless, the issue of horizontal fairness (and the difficulty of determining what *number* to use as "financially indispensable") must give us pause.

Nor can we know what was "financially indispensable" with any certainty. Even a measure of the plaintiff's customer base does not yield determinate answers standing alone. That is because the stream of customers may bring revenues in excess of what was needed to induce the work to come into existence, even if one takes into account discounts for probabilities.<sup>83</sup> Parents have long been concerned that the extremely high salaries paid to sports stars could distract their children from pursuing non-sports careers; over-reward can exist in the copyright sphere as well.

Mention of the copyright owner's customer stream brings us to our second candidate for baseline. In countless common law cases, a distinction is made between plaintiffs that are harmed and those that are not – with harm being measured not by a global inquiry into ideal incentives, but rather by a much more *local* inquiry into how the

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are matters of luck. The importance of such "moral luck" to the law may be a failure of consistency, but it is one that our traditions accept.

<sup>83</sup> What an author sees as her monetary remuneration is (very roughly) the range of possible revenue streams, each discounted by various possibilities of non-success. The higher the chance of non-success, the higher the actual amounts earned by successful authors of her type needs to be. Here is a simple example: If an author's cost of production (including opportunity cost) is \$1,000, and similar authors have a 50-50 likelihood of making \$2,002, then a new author will (very roughly) be willing to produce the creative work because she sees her likely income, \$1,001 (\$2,002 discounted by the 50% likelihood of failure) as greater than the costs she would have to bear. A market reward of \$1,000 would fall drastically below what is needed to incentivize her; a reward of \$20,000 would fall drastically above. Revenues in excess of what is needed to bring forth a resource are usually called 'rent'.



defendant has affected the plaintiff's de facto welfare. This local inquiry into the defendant's effect on the plaintiff is not thought to violate horizontal fairness.

When viewed from this local perspective on "harm" as used by the common law, harm is not as vague as Register Ladd believes. Admittedly, for this local inquiry, the law still needs to make policy decisions. (For example, is the plaintiff's current customer and licensee base the only baseline that should count, so that only decreases in that current base should count as harm? If the baseline is broader than that, should a copyist's failure to pay fees for new and unexpected uses count as local harm? How should shortfalls from whatever baseline is chosen be measured – e.g., by historical worsening or counterfactually?) But they are decisions upon which it is easier to get a handle than are the complex factual inquiries necessary to identify ideal incentives.

In the following, I do not employ the incentive baseline, but instead examine three alternative interpretations of local "harm." From these interpretations we will find much of use in understanding copyright. Among other things, parsing the various meanings of harm gives us information about how to handle the problem of foregone license fees in the doctrine of fair use. The next part addresses how localized concepts of individual harm could be applied to the various potential sources of loss in the copyright context.

### **III. Three Primary Definitions of Harm**

There are three primary ways a plaintiff's welfare can diverge from a designated baseline, and accordingly there are three major competitors for the definition of "harm." One set of definitions involves counterfactual comparisons, one involves comparison by historical positioning, and one involves the existence of a noncomparatively

defined state of being. The three approaches can also be used to define the converse term, “benefit.”

Most of American tort law uses a counterfactual approach, asking *what would have happened* but for the interaction with the defendant. This approach compares how the plaintiff fared in the real world after the interaction with the defendant, with how the plaintiff *would have fared* had the interaction not occurred. If the affected party would have been better off absent the interaction with the defendant, then the defendant has “harmed” him or her. If the affected party would have been worse off absent the interaction with the defendant, the defendant has “benefited” him or her. So when a negligent actor breaks a plaintiff’s leg, the broken leg is something that would not exist “but for” the interaction and is a harm.

This counterfactual or but-for test has variants. It is sometimes linked with violation of right<sup>84</sup> and is sometimes defined independently of whether there has been a rights violation. Additionally, although usually one inquires counterfactually into what “*would* have happened without the interaction with the defendant,” occasionally some find it appropriate to inquire into “what *should* have happened if the defendant had acted properly.”<sup>85</sup> In yet another variant, foreseeability is incorporated: “we could say that A harms B only if his wrongful act leaves B worse off than he would be otherwise *in the normal course of*

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<sup>84</sup> Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, 4 SOC. PHILOS. & POL. 145, 148 (1986); Herskovitz, *supra* note 32, at 1147. In my view, it makes little sense to say a harm can only arise where there has been a violation of right. Many harms are done that our law does not forbid. To the extent we wish to use concepts of ‘harm’ as a tentative guide to deontological moral reasoning, we need an independent definition of “harm.” Defining “harm” in terms of “wrongs” makes the inquiry into harms fairly useless for determining what might constitute a wrong.

<sup>85</sup> Feinberg, *supra* note 85 at 153, tentatively explores the alternative inquiry of what “should” have happened; I argue later against that interpretation, at least for use in law.

*events insofar as they were reasonably foreseeable in the circumstances.*"<sup>86</sup> Feinberg calls the latter "doubly counterfactual."<sup>87</sup>

A second popular set of approaches to defining harm adopts a "historical-worsening" approach. It asks whether the plaintiff's interests are in worse shape after the interaction than they were before. Like the counterfactual approach, the historical-worsening approach is comparative. It has two primary variants. In one, the plaintiff's condition before the interaction is assessed simply by what he or she has. In the other, the plaintiff's condition before the interaction is assessed also by looking at what options – what possibilities – were open to him or her at that time. (That is, this approach would consider the plaintiff's options as part of the baseline from which harm is to be measured.) The latter approach would count some loss of options as a historical worsening.<sup>88</sup>

The third major set of definitions is noncomparative. Here "harm" has to do with states of suffering, impairment of central interests, or interference with autonomy.<sup>89</sup> These definitions can differ one from another, but they have in common that the designated state of being can count as harm, *without comparison to* what came before. Under this view, for example, starvation is a harm even for a child who

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<sup>86</sup> Feinberg, *supra* note 85, at 153.

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

<sup>88</sup> Perry adopts the "options" approach. *See* Perry, *supra* note 63.

<sup>89</sup> It might feel natural to call noncomparative views of harms "state-based" views, because under the noncomparative approaches a finding of harm depends not on a change in position but on a person occupying a negative state, regardless of whether or not that negative state is worse than something experienced earlier. However, Matthew Hanser points out that comparative accounts are also state-based, in that they treat "suffering harm [as] a matter of coming to be in a comparatively bad state." Hanser, *The Metaphysics of Harm*, 77 PHIL. & PHENOMENOLOGICAL RES. 421 (2008) at 422. Hanser himself urges an event-based view of harm. *Id.* at 440–49.

has never known any other condition. David Lyons<sup>90</sup> implicitly attributes a noncomparative approach to John Stuart Mill.

Lyons argues that Mill's Liberty Principle, which prohibits the state from acting except to avoid harm, would allow the government to alleviate "harms" "such as malnutrition and starvation, emotional disturbances, illness and disease, vulnerability to attack, homelessness" by requiring cooperation. He argues that Mill would approve governmental coercion to reduce harm, and not simply against the *doing* of harm.<sup>91</sup> By implication, it does not matter under this interpretation how a harm arises; therefore, whether the state of being is different from a prior state or not would be immaterial. This noncomparative stance also is capable of distinguishing "harms" from "benefits." Lyons argues that for Mill the compulsions permissible to alleviate harms would not be permissible if their goal were to provide "benefits in general;"<sup>92</sup> Lyons provides as illustration, "providing

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<sup>90</sup> Lyons, *supra* note 37. Although Lyons does not explicitly disclaim comparative accounts, their abandonment is implicit in his position. Mill's principle is sometimes interpreted as allowing the state to use coercion only to prevent the "doing of harm," but Lyons makes a persuasive case that Mill would also approve state action to alleviate harmful states themselves. Further, consider his examples.

Writes Lyons, "Harms. .. are not to be understood in terms of mere existing preferences but rather as conditions that must be satisfied if one is to live well as a human being; they include physical necessities, personal security, social freedom (from oppressive custom as well as others' interference), and a variety of experiences and opportunities for self-development. To the extent that one is denied or deprived of such conditions, one suffers what Mill counts as "harm." *Id.* at 14.

Among "significant harms," Lyons includes examples "such as malnutrition and starvation, emotional disturbances, illness and disease, vulnerability to attack, homelessness, and so on." *Id.* at 8. He distinguishes the prevention of such harms from provision of "benefits in general," *Id.* at 7, such as "providing greater comforts and conveniences for relatively comfortable members of society." *Id.* at 8.

<sup>91</sup> *Id.* at 8.

<sup>92</sup> *Id.* at 7.

greater comforts and conveniences for relatively comfortable members of society.”<sup>93</sup>

If one’s inquiry into “harm” is motivated by Mill’s question – namely, what criteria must be met for government coercion to be justifiable – then the noncomparative view of “harm” makes perfect sense. The government is indeed justified in taxing us to help relieve the poverty of others (at least in my view). But the noncomparative view of “harm” has the disadvantage of not meeting the normal expectation of English speakers, for whom “harm” is a basically comparative notion.

A much-discussed noncomparative view is that of Seana Shiffrin, who emphasizes harm as the impairment of autonomy.<sup>94</sup> For her, the moral significance of harm comes not from its changing someone’s position but rather from a situation’s grave impact on someone’s ability to form his or her own life.<sup>95</sup> What distinguishes a “harm” from a “pure benefit” seems to be that the benefit has a comparative lack of impact on autonomy: a “pure benefit” is “a benefit

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<sup>93</sup> *Id.* If one imagines the inquiry into “harm” to be motivated by Mill’s question – namely, what criteria must be met for government coercion to be justifiable – then the noncomparative view of “harm” makes perfect sense. The government is indeed justified in taxing us to help relieve the poverty of others (at least in my view). But the noncomparative view of “harm” has the disadvantage of not meeting the normal expectation of English speakers, for whom “harm” is a basically comparative notion.

<sup>94</sup> Seana Valentine Shiffrin, *Harm and Its Moral Significance*, *supra* note 49, at 9; Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 *LEGAL THEORY* 117 at 123 (1999). In the latter, she writes, “[o]n my view, harm involves conditions that generate a significant chasm or conflict between one’s will and one’s experience, one’s life more broadly understood, or one’s circumstances. Although harms differ from one another in various ways, all have in common that they render agents or a significant or close aspect of their lived experience like that of an endurer as opposed to that of an active agent.” *Id.* at 123.

<sup>95</sup> *See generally* Shiffrin, *Harm and Its Moral Significance*, *supra* note 49.

that is not also a prevention of, removal from, or alleviation of harm.”<sup>96</sup> Shiffrin lists the following as examples of a pure benefit: “a new stereo, a coveted bicycle, or a large amount of desired, but unneeded cash,”<sup>97</sup> or remarkably enhanced physical attributes.<sup>98</sup> Although “pure benefits” should not be trivialized – pursuit of pure benefits can be an important part of “building a distinctive life”<sup>99</sup> – they differ from harm avoidance.

Thus in seeking to define “harm” and “benefit” we have counterfactual approaches, historical-worsening approaches, and noncomparative approaches. There are also combinations of them. For example, some authors suggest disjunctively combining the counterfactual and historical-worsening approaches. Or when seeking to figure out who caused harm for purposes of liability, one can combine a comparative account (did the defendant cause worsening in some counterfactual and/or historical sense) with a requirement, perhaps drawn from the noncomparative accounts, that the harm be serious and grave. Many philosophers indeed add a “gravity” component to their accounts, although, as one would expect, each defines the gravity differently. Interestingly, the *Bridgeport* case rejected a gravity inquiry altogether; it not only refused to adhere to the substantial similarity test but also turned its back on the rule that *de minimis* copying was not actionable.<sup>100</sup>

Results from the three main groupings of ways to define “harm” – counterfactual, historical worsening, and noncomparative—need not diverge. In a typical tort case, all three of these definitions are simultaneously satisfied.

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<sup>96</sup> *Id.* at 8.

<sup>97</sup> *Id.* at 20.

<sup>98</sup> *Id.* at 8.

<sup>99</sup> *Id.* at 34.

<sup>100</sup> *Bridgeport Music Inc. v. Dimension Films*, 410 F.3d 792, 798, 801–802.

Consider a careless driver who runs down a pedestrian. But for the driver's action the pedestrian would be healthy. So the counterfactual test is met. The plaintiff is in worse shape after the accident than he was before. So the historical-worsening test is met. And as a matter of objective welfare, he is seriously suffering, from a broken leg. So a noncomparative account is also probably satisfied.

But sometimes the results of the different definitions can diverge. What if, in the absence of this careless driver, another equally careless driver would have come from another direction a minute later and broken the plaintiff's leg? In that case, there would be no harm (except a minute's worth) under the counterfactual test, because "but for" the first driver, the pedestrian would have a broken leg anyway. (This is sometimes called the problem of "overdetermination." The common law has various approaches to dealing with the situation.) Although there is an absence of harm on the counterfactual test, there is significant harm under the historical-worsening test.

One reason for spelling out the alternative tests is that a finding of "harm" might weigh in the copyright plaintiff's favor. If what the defendant had done has harmed the plaintiff, a judge is more likely to find against the defendant (particularly if fair use is the issue).<sup>101</sup> If, in contrast, what the defendant has done is more properly defined as depriving the plaintiff of a benefit, the weight against the defendant is lighter. Harm is a standard part of the inquiry into whether the defendant's use is "fair" and thus non-infringing under copyright doctrine, and perhaps the philosophers' explorations can help us decide

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<sup>101</sup> Harm to the plaintiff's potential markets is factor four in the statutory fair use inquiry and is often said to be the most important of all the factors. Barton Beebe's empirical work suggests that factor four's importance lies less in its own salience than in the way it serves as a place for the court to summarize its reactions on all factors. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 620-21 (2008) (footnotes omitted).

what should count as harm for this purpose. Choosing how we define “harm” with open eyes is thus crucial.

To make a preliminary taxonomy, the following applies the three types of harm definitions (counterfactual, historical worsening, and noncomparative) to the three copyright scenarios: rivalrous diversion of customers, foregone defendant-license fees, and subjective distress. Unless otherwise specified, the baselines utilized will adopt the dominant common law approach of referring to the plaintiff’s actual or likely position, rather than to a notion of ideal or minimal incentives.

#### A. Rivalrous Diversion of Customers

The inquiry into rivalrous harm might help us examine nonconsequentialist reasons for copyright law. Admittedly, the formulation of the Intellectual Property Clause – with its preamble specifying the purpose of “promot[ing] Progress” – suggests it was primarily the need for economic incentives that persuaded the Founders to give Congress the power to enact copyright. The economic rationale puts little importance on the harm/benefit distinction. But if in addition copyright law prevented harm to authors, there might be an additional, deontological weight on the scale in favor of granting copyright protections.<sup>102</sup>

If one uses a counterfactual notion of causation – often known as the “but-for” test – and applies it to the world as it is usually envisaged without copyright,<sup>103</sup> we see a likely scenario of overdetermination: that the unconsented and unremunerated copying of the author’s manuscript by particular publisher *A* does not seem to cause the

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<sup>102</sup> Not all harms should give rise to legal action, of course, and deontological concerns other than harm avoidance could be operating.

<sup>103</sup> Copyright is premised on the supposition that, without a legal prohibition on copying, an author’s baseline level of welfare is low.



author harm. If *A* had not reprinted the manuscript, then probably publishers *B*, *C*, or *D* would have done so. Without copyright, there may be nothing to discourage any number of reprintings.<sup>104</sup> If *A*'s copying caused no shortfall from what would otherwise have come to the author, the copying causes no harm. Therefore, what the author wants in a world without copyright would be best described not as freedom from harm, but as a right to capture some of the benefits the publisher is capturing; the author wants to be better off than his or her baseline. We call a change that brings welfare *above* the baseline a "benefit." The law gives copyright to authors to remedy the possibility that "but for" the law of copyright, insufficient payment would be forthcoming. It is those extra payments that are, by definition, "benefits" to authors because they will not come to the authors except if the law is enacted. If the right to be paid for benefits generated is weaker than the obligation to pay for harms inflicted – and our intuitions suggest it is weaker – then under the counterfactual test the justification for copyright is not as strong as it might be. Under the historical-worsening approach, however, the first publisher who diverts the plaintiff's customers is doing a harm, regardless of how many other publishers stand ready to make unconsented copies. And under the noncomparative approach, it may well be (depending on circumstances) that it erodes an individual's basic interests or

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<sup>104</sup> This is of course empirically subject to challenge; other constraints – from "gentlemen's' agreements" to audience loyalty to lead time advantage – can make unconsented copying unlikely or unprofitable. For the classic warning that copyright might not be as necessary as the standard story suggests, see generally Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970). For an argument that unconsented copying can actually benefit the affected industry, see the discussion of how fashion thrives in the face of extensive (and lawful) copying of clothing design in Kai Raustiala & Christopher Sprigman, *THE KNOCKOFF ECONOMY* 1-55 (2012).

autonomy to devote a chunk of his or her life to creating a work of authorship that another plagiarizes and sells.

In this context, the historical-worsening test has some advantages. The counterfactual test is useful in contexts where a court is seeking to identify a particular person or persons to be liable; choosing a legal regime is less a matter of pinning responsibility on individuals than it is of raising the boat for all persons. Therefore, if a copyist interferes with an author's own plans for his or her work by diverting the author's customers, and the interference is grave enough to meet the demands of the historical-worsening or noncomparative approaches, it seems legitimate to say that the copyist harms the author.

At least two caveats apply, however. First, to the extent that avoiding the harmfulness of copying justifies copyright, the law must also be crafted so that assertions of copyright do no harm to the audience.<sup>105</sup> Second, if the author has not actually lost customers in whose pursuit he or she has invested heavily, the conception of harm is fairly weak as a moral matter.

Once copyright law is adopted, the diversion of customers is likely to satisfy both the counterfactual and historical-worsening approaches. Overdetermination becomes much less likely because the presence of liability and penalties discourages additional copyists from entering the field. And because we are speaking of *diverting* customers, the author has already invested in serving their interests,

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<sup>105</sup> This is the point of Locke's proviso that appropriation from the common becomes private property only if "enough and as good" is left for others. The laborer's claim to property rests on his right not to be injured (biblically based), and the public has just as good a right not to be injured. So the basis for the individual property right also limits it. *See generally* Gordon, *supra* note 30 (arguing that to the extent that Lockean theory might justify some IP rights in speech, it also demands an extensive freedom for the public to use speech authored by others).

and so some progress has already been made to satisfy any gravity requirement.

Admittedly, a test that finds harm only where an existing customer base exists can have bad economic effects. Such a rule could entice companies to enter markets prematurely to set up the basis for claiming “harm” if the need came to sue. Landes and Posner sensibly advise against adopting laws that push owners to rush into deploying their property before they are ready.<sup>106</sup> But it is likely that interference in an ongoing enterprise, with established customers, is likely to be more disruptive than would be interference with a business possibility that has not yet eventuated. One compromise that has been proposed is to require plaintiffs to prove that their entry into the claimed market was at least “foreseeable.”<sup>107</sup>

#### B. Foregone Defendant-License Fees

As you recall, the category of “foregone fees” includes those cases where the copyist is not impairing already existing or impending markets of the plaintiff. If the defendant serves no customers whom the author would have served, the historical-worsening test is not satisfied. Except for the abstract issue of losing exclusivity, the author would be no worse off after the copying than she was before the copying began. So nonrivalrous copying does not “harm” the author/plaintiff under the historical-worsening approach, and the failure of the copyist to pay license fees does not count as a “harm” under that test.

The plaintiff also has no harm under the counterfactual test, because in the absence of the defendant’s actions, the plaintiff would be no better off than he or she is. The customers the defendant is

<sup>106</sup> WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 93 (2003).

<sup>107</sup> See generally Balganes, *Foreseeability*, *supra* note 63.

serving are by definition not customers the plaintiff would have served. So when the plaintiff copyright owner seeks license fees from a nonrivalrous defendant, the copyright owner is merely seeking payment for “benefits” the defendant has reaped,<sup>108</sup> and any payment the copyright owner receives is also a “benefit” to the copyright owner. No harm is involved under the counterfactual test, just as no harm was involved under the historical-worsening approach.<sup>109</sup> So far it seems as if the harm inquiry will weigh in the defendant’s favor when the court evaluates the fairness of a nonrivalrous use.

As for how the foregone license fee situation would fare under the noncomparative approaches to defining harm, each case would depend on its own facts. In some instances the author might be left destitute if he or she lacks the ability to collect license fees from the defendant; in such a case the plaintiff might be able to claim noncomparative (grave) “harm.” In other instances the author might be prospering and providing an encouraging incentive model for other aspiring authors. In such a case it is hard to see a prospering plaintiff as suffering noncomparative harm, even though he or she might be an

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<sup>108</sup> If the baseline is what the copyright owner could do on her own, without the defendant’s causal contribution, then collecting fees from a nonrivalrous copyist would raise the copyright owner’s welfare above her baseline.

<sup>109</sup> I suppose one might argue that the revenues from the unlawful copying constitute a new baseline for the copyists, so that *they* are harmed in a comparative sense if a court makes them pay. It is to guard against such results that some philosophers, such as Feinberg, want to link “harm” to the violation of a right. (In Feinberg’s view, it would be inappropriate to say a judge “harms” a thief if the judge orders the thief to return a stolen television set, because the judge is not violating any rights of the thief.) I think Perry and Hanser have the better view, when they separate harm from violation of right.

In my view, even if the copyists are “harmed” by being made to pay, violation of law constitutes a justification for inflicting the harm. One might also work with the relevance of time frame and gravity: being given a benefit, and then being made to pay for it or return it before one has begun to rely on it, is merely the divesting of a benefit.

attractive candidate for legal protection under non-harm-based theories of liability.

Under the noncomparative approach, then, a prosperous author is merely seeking a “benefit” (payment) from the defendant. By contrast, under that same approach, a suffering author is seeking to be relieved from “harm.”<sup>110</sup>

This pair of characterizations intersects well with economic concerns. Any successful copyright lawsuit is likely to raise prices, and restrict distribution, of the work to the public. Where the plaintiff is suffering economically badly enough to be existing in a state of noncomparative harm, allowing him or her to succeed in a lawsuit against the defendant is likely to generate enough incentives to outweigh the costs of enforcement.<sup>111</sup> Counting the plaintiff as “harmed” is thus likely to be consistent with economic goals. By comparison, where a plaintiff is prosperous, it is less likely that allowing him or her victory in a lawsuit would serve the public’s economic good.<sup>112</sup> Although an inquiry into the parties’ prosperity may raise concerns regarding corrective justice,<sup>113</sup> it might nevertheless make sense to look at the plaintiff’s situation and motivations.<sup>114</sup>

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<sup>110</sup> I put to one side the question of whether there is a causal relation, sufficient to satisfy the correlativity concerns of corrective justice, between the defendant’s failure to pay and the plaintiff’s suffering.

<sup>111</sup> Or, speaking more strictly, the prospect of such a rule is likely to help generate incentives in the future. It may also permit the plaintiff to continue work as an author rather than seeking a day job.

<sup>112</sup> See Wendy J. Gordon, *Fair Use Markets: On Weighing Potential License Fees*, 79 GEO. WASH. L. REV. 1814 (2011).

<sup>113</sup> American lawyers have long assumed that judges must treat rich and poor alike (with distributional issues being left to the legislature), and that one party must have had some causal impact on the other in order for them to have a correlative relation necessary for a lawsuit. The correlative relation is here (for the defendant may be depriving the plaintiff of a benefit to which he or she is entitled), but the differential treatment of rich and poor raises specters of inequality and arbitrariness.

<sup>114</sup> See generally Balganes, *Foreseeability*, *supra* note 63; Loren, *supra* note 89.

Under current copyright doctrine, these observations are most likely to be helpful in cases where the question is whether a new use by a defendant is “fair.”<sup>115</sup> The fairness of the use depends in part on “the effect of the use upon the potential market for or value of the copyrighted work.”<sup>116</sup> The issue here is usually said to be harm;<sup>117</sup> using the noncomparative approach to defining harm helps us distinguish the copyright owner unable to create because of privation from the copyright owner whose enterprises are flourishing. Only the former is seeking to be relieved of (noncomparative) harm. One final note on foregone fees. It is sometimes said that the “harmful” status of foregone fees is a circular inquiry.<sup>118</sup> The argument goes like this: if the defendant is infringing, then the failure to pay is a harm. If the defendant is not infringing, then the failure to pay is not a harm. Because everything depends on the law, and the question to be decided is whether the law makes the defendant’s use “fair “ or infringing, inquiry into harm is merely circular and cannot be of assistance.

However, this accusation of circularity is valid only under one sub-definition of harm, one that is not much used: namely, that “harm” arises whenever the plaintiff is less well off than he or she would have

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<sup>115</sup> Arguably the doctrine of fair use should have a distributional component. See generally Molly Van Houweling, *Distributive Values in Copyright*, 83 TEXAS L. REV. 1535 (2005).

<sup>116</sup> 17 U.S.C. § 107(4) (2006).

<sup>117</sup> Harm is not the only issue relevant to the fairness of a nonrivalrous defendant’s fair use status. See 17 U.S.C. § 107 (only one of whose factors directly concerns harm); see also 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, 154-55 (2003) (describing several considerations regarding market failures/limitations whose resolutions should affect the fair use determination, only one of which is harm).

<sup>118</sup> See, e.g., Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1 (1997).

been had the defendant acted properly. This is indeed circular, because the definition of proper action will depend on what the law requires.

But this variant of the counterfactual approach is rarely used. Feinberg mentions the possibility of such a variant to solve a particular problem, but other resolutions of the problem are available. The troublesome hypothetical is this: a doctor helps his patient somewhat, but not as much as the doctor should have done.<sup>119</sup> To say that such a doctor “harmed” the patient is difficult under the usual counterfactual test, because without the interaction the patient would be worse off. The doctor actually improved the patient’s health, albeit not as much as he should have done.<sup>120</sup>

Feinberg takes the usual question, of whether an affected party’s condition was “in a worse condition. . . than it would be had *A* not acted as he did,” and says what happened to the patient can be called a harm “provided we interpret ‘as he did’ to refer in part to the defective aspects of *A*’s actions.”<sup>121</sup> Consistent with that potential approach, Feinberg goes on to speculate in a footnote that “the counterfactual condition should perhaps be revised to read: *B*’s personal interest is in a worse state than it would be had *A* acted as he *should have* instead of as he *did*.”<sup>122</sup> Under such a revised test, the patient would be said to be “harmed” if he received care that was helpful but below a reasonable standard.

There are real difficulties with Feinberg’s tentatively revised definition. (I say “tentative” because in the article Feinberg does not commit to it; he uses the locutions of “provided” and “perhaps”). As noted, a definition of harm that refers to what the other party *should* have done invites circularity; this is true in morals as well as in law.

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<sup>119</sup> Feinberg, *supra* note 85, at 149–50.

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

<sup>121</sup> *Id.* at 149.

<sup>122</sup> *Id.* at 150 n.5.

Whether an action causes “harm” sometimes usefully contributes to a decision regarding whether the action is wrongful, but a definition based on what the other party “should have done” undercuts that possibility by disabling “harm” from serving as an independent criterion. Further, as a legal matter, little is advanced by calling what happened to the patient a harm, because wrongs can exist *without* harms. (Trespass to land is an example.) In this case, the patient probably had no need to prove harm as philosophers define it; he was probably entitled under contract or the law of medical malpractice to the “benefit” of a standard of reasonable treatment.

A defender of Feinberg’s tentative revision might say that if the law gives someone an entitlement to a benefit, then that entitlement becomes the person’s new baseline, and any shortfall from a baseline is a harm. That is conceivable, but not helpful. Calling the doctor’s partial assistance a “harm” seems like a misuse of everyday speech. Calling foregone license fees a “harm” in the absence of rivalry for customers similarly seems like a misuse of ordinary speech.<sup>123</sup>

### **B** C. Subjective Distress

Subjective distress easily meets the historical-worsening test. After the unconsented copying, plaintiffs feel worse than they felt before it; they feel anger or some other form of emotional reaction that to them feels

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<sup>123</sup> Defenders of the tentative revision might also point out that tort law, including medical malpractice, usually involves proof of plaintiff’s harm. I would reply that “harm” in that context merely means “a physical result that was less than the result to which the patient was entitled” and that harm in moral discourse usually means something other than that. *See* Perry, *supra* note 61, who uses quite different standards for legal and moral definitions of harm. The instant essay contends that moral conceptions of “harm” can be useful in certain legal disputes, but does not contend that legal and moral conceptions of harm are always and necessarily the same.



like it requires recompense.<sup>124</sup> Similarly, subjective distress easily meets the counterfactual test. Without the interaction with the defendant copyist, there would be no distress. Should there be additional copyists in the wings, there are standard moves to cure the overdetermination (such as adding a disjunctive historical-worsening test or counting as a harm-causer any act that was “sufficient” to bring about the loss).

There are many problems with counting subjective distress as a “harm.” For one thing, subjective distress does not have a sensible analogue when addressing copyright owners that are corporations. Another difficulty with subjective distress is that it may lack the gravity that gives harm its usual moral significance.<sup>125</sup> Distress at being copied might be so widespread that, if it is given legal weight, it could squelch autonomous development in other persons.

The primary target that John Stuart Mill attacks in writing *On Liberty* is the notion that observers’ subjective moralistic distress might justify social control; Mill argued that paternalistic judgments of the state about what was good for people deprived the most-affected individuals of the opportunities for self-development that choice affords. Moralistic laws seem to be motivated by the anger, sense of outrage, and psychological distress that some classes of people seem to feel at the “deviant” behavior of other groups of people. For reasons such as these, philosophers have a hearty doubt about whether “distress” should count as harm. Judith Jarvis Thompson goes so far as

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<sup>124</sup> Thompson points out that some forms of emotional reaction to misfortune are not unpleasant; self-righteous anger can be one such. JUDITH JARVIS THOMPSON, *THE REALM OF RIGHTS* (1990) at 251–60. But because anger can conceivably discourage productivity, it is worth including it on a list of relevant subjective distress.

<sup>125</sup> This seems to be an important part of Shiffrin’s point, though she would put the analysis in terms of autonomy rather than welfare.

to say that any distress that rests on a belief should not count as harm.<sup>126</sup>

Distress experienced by copyright owners when their work is copied without their permission is indeed mediated by beliefs. Respecting their distress is unlikely to result in the kind of sexual moralizing legislation against which Mill's Harm Principle was probably intended to operate; nevertheless, if copyright law gave too much weight to their distress, that would pose strong dangers to free speech.

This is not to claim that subjective distress at being copied is inevitably minor. Jessica Silbey, in her interviews with creative persons, reports that emotional or dignitary harm arising out of reputational injury is more likely than minor loss of profits to trigger a desire to sue.<sup>127</sup> Feeling taken advantage of unjustly is part of the emotional distress. Ernst Fehr and others have proven that many people are willing to pay to satisfy their sense of justice,<sup>128</sup> suggesting that the taste for justice is not trivial. Jessica Silbey's interviews with the creative community suggest that noneconomic perceptions of harm really matter to the artists, filmmakers, and the like she has queried.<sup>129</sup> If incentives matter, then these frustrations and sources of anger might matter.<sup>130</sup>

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<sup>126</sup> THOMPSON, *supra* note 124; Shiffrin, *Harm and Its Moral Significance*, *supra* note 48.

<sup>127</sup> Jessica Silbey, *Harvesting Intellectual Property: Inspired Beginnings and "Work-Makes-Work," Two Stages in the Creative Processes of Artists and Innovators*, 86 NOTRE DAME L.R. 2091 (2011) at 2121. Ironically, Professor Silbey's respondents tended to phrase their sense of injury in such instances by using images and rhetoric from tangible property, *id.* at 2121-22.

<sup>128</sup> See, e.g., Ernst Fehr & Simon Gächter, *Cooperation and Punishment in Public Good Experiments*, 90 AM. ECON. REV. 980 (2000).

<sup>129</sup> Conversation with Jessica Silbey (March 5, 2012); see also Silbey, *supra* note 73.

too many issues remain to be resolved before it could be advisable to adopt a requirement that plaintiffs prove harm as a prerequisite to liability. This article thus specifies the preliminary foundations that must be laid—and the entailed decisions that must be made—before "harm" is given a more prominent place in the world of copyright. It also suggests some answers for the decisional challenges so outlined.

The essay begins by using the tort of "trespass to land" to highlight the roles that "fault" (in the sense of disserving social welfare) and the potential for "harm" play in copyright infringement.

A trespass plaintiff only need prove entry, and in trespass even a defendant acting rightfully (e.g., someone who enters another's land out of necessity) may need to pay money to the trespass plaintiff. By contrast, copyright law requires plaintiffs to prove more than an entry-equivalent; plaintiffs must also prove the possibility of harm (which is inherent in the doctrinal requirement that "substantial similarity" be shown). Further, plaintiffs must stand ready to disprove a defendant's showing of faultiness (under the doctrinal category of "fair use"). Copyright plaintiffs will not prevail, even on a liability rule, money-only, basis, should they fail either to prove substantial similarity (and its key component, recognizability), or should they fail to disprove a defendant's showing of social merit. Such showings are not required to save the plaintiff's route to recovery in trespass to land.

Having shown that harm and fault are absent from trespass but already play some role in copyright law, the essay then investigates what shape the tort of copyright infringement should take were it to be ideally reformulated; in particular, it investigates what kind of "harm" the new copyright tort should require a plaintiff to show. The essay surveys four candidates for copyright harm, namely, losses imposed by rivalry, revenue foregone because of a (nonrivalrous) defendant's failure to pay license fees, loss of exclusivity, and subjective distress.

Of these four, the essay argues that copyright should recognize only the effects of rivalry as constituting “harm”. That conclusion does not mean that foregone fees should always be irrelevant; although a nonrivalrous defendant’s failure to pay license fees is best viewed as a “benefit lost” rather than a “harm done,” foregone fees should be capable of substituting for proof of harm in a plaintiff’s cause of action when the need for such fees is sufficiently grave.

The essay canvasses three general philosophic approaches to harm, namely the historical-worsening approach, the counterfactual approach, and noncomparative approaches. Also examined are various baselines.

It is popular to urge the use of “minimum incentives” as the baseline for calculating authorial harm. Advocates of “minimum incentives” as a baseline for harm are implicitly urging a partly noncomparative approach. If a plaintiff had to prove injury to minimum incentives in order to prevail, two defendants who did the same kind of copying could receive very different treatment depending on business-context and timing. That lack of horizontal equity might not be fatal-- after all, other forms of tort law have long tolerated the lack of horizontal equity necessarily introduced by causation in fact. (For example, in the accident context, how much a careless defendant pays will depend on the “moral luck” of whether the victim had a thin skull or a sturdy one.) Nevertheless, the essay cautions against copyright law routinely requiring plaintiffs to prove a loss to minimum incentives, in part because of concerns with horizontal equity, and in part because of the difficulty of proving and even defining minimum incentives.

The essay does adopt, in one context, a noncomparative concern with gravity: I suggests that when a plaintiff can show grave need, either societal or personal to the plaintiff, that should serve (in our

future amended tort of copyright infringement) to make a defendant's failure to pay fees for unexpected uses weighable against that defendant in the fair use calculus.<sup>135</sup>

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<sup>135</sup> As a footnote, the article also argues that an overlooked word in the Intellectual Property clause (the word "respectively") plays an important role in that Clause. The way the Founders employed "respectively" implies that copyright incentives should be viewed with regard to the progress of *both* "Science" *and* the "Useful Arts". See *supra* at n.64.