COPYRIGHT AS TORTIOUS INTERFERENCE WITH A MARKET PROSPECT

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

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INTRODUCTION

Ever since its origins in the eighteenth-century, Anglo-American copyright law has attempted to understand its entitlement structure through the idea of property. Originally described as a form of “literary property,” \(^1\) courts and scholars today continue to analyze copyright’s grant of exclusivity through various doctrines from the common law of property. \(^2\) Ideas and concepts deriving from trespass to land and chattels, \(^3\) the law of licenses, \(^4\) first possession, \(^5\) choses in action, \(^6\) adverse possession, \(^7\) and more recently the law of theft, \(^8\) feature rather routinely in copyright jurisprudence and scholarship. Indeed, so pervasive is the influence of property thinking that the copyright statute’s refusal to cover certain categories of works at one time even raised concerns to some about “private property” being “taken” under the Fifth Amendment. \(^9\)

More recently, scholars have shifted their emphasis in using the common law to understand copyright, from the law of property to tort law. \(^10\) The move in this direction was initially prompted by a focus on property torts, i.e., tort

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5 See Richard Epstein, Liberty Versus Property? Cracks in the Foundation of Copyright Law, 42 San Diego L. Rev. 1 (2005) (arguing that the same policies and principles that motivate real property apply to copyright law).
6 See T. Cyprian Williams, Property, Things in Action, and Copyright, 11 L. Quart. Rev. 223 (1895); Spencer Brodurst, Is Copyright a Chose in Action?, 9 L. Quart. Rev. 311 (1893).
9 See Julie E. Cohen et al., Copyright in a Global Information Economy 162 (2010).
doctrines that protect private property such as trespass, since courts sporadically described copyright infringement actions in these terms. In due course, the comparisons expanded to tort doctrines that were less about property protection and more about balancing the interests of the plaintiff and defendant, such as the doctrines of negligence and nuisance. This latter move was underwritten by the increasingly instrumentalist and utilitarian orientation that American copyright thinking has taken on in the last few decades, which emphasizes the need to balance copyright protection against ease of access. The common law has thus proven to be a fertile source of conceptual guidance for copyright jurisprudence.

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

Consider in this light efforts to understand aspects of copyright law through negligence doctrine. Negligence law is seen to be about deterring harmful behavior, spreading the costs of harms once they occur, or realizing corrective justice between the wrong-doer and the victim through a regime of liability. Extended to copyright, each of these ideals proves to be grossly incomplete. Unlike with physical injury, the harm that copyright seeks to prevent is itself a contested and multi-faceted issue; similarly, cost-spreading in

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13 For a good summary of this utilitarian orientation and its effects, see: ABRAHAM DRASSINOWER, WHAT’S WRONG WITH COPYING? 17-53 (2015).
17 For an elaboration, see: Wendy J. Gordon, The Concept of “Harm” in Copyright, in INTELLECTUAL PROPERTY AND THE COMMON LAW, supra note __, at 452.
Copyright requires an account of when and how something is a cost to begin with (rather than a benefit or an accepted reality of human interaction) since the harm at issue in copyright is either notional or predictive; and the ideal of corrective justice is itself dependent on an underlying normative equilibrium that must be justified by an altogether independent set of principles about rights and wrongs. Consequently, to the extent that concepts from negligence law are of utility to copyright, their contribution lies primarily in their ability to structure copyright doctrine and thinking. This is seen to allow copyright to further its values that are in turn derived from other (i.e., non-common law) sources.

Copyright’s use of the common law has thus far been principally in the form of a structural analogy. Yet closely connected to, but nonetheless distinct from an analogy is the concept of a homology. An analogy focuses on a resemblance between two or more concepts or ideas, but makes no claim as to the relationship between the objects of the comparison. The similarity, in other words, may be attributable in its entirety to coincidence. Consequently, the process of analogizing one concept or doctrine to another requires no account of just why the comparison is independently justified, beyond the obvious existence of the similarities at issue. Drawn from evolutionary thinking, a homology on the other hand focuses on a resemblance between two or more ideas but in addition makes an implicit claim about the common origins of those ideas. It claims that the similarity under scrutiny is seen because of a commonality in source. That common source may be a shared institutional origin, or a shared set of motivating goals and ideals. As such then, the explanatory burden of a homology is significantly higher than that of a mere analogy.

In this Article, I argue that the common law can do more than just be a structural analogy for copyright thinking; it can instead provide a useful homology for copyright law. The basis for such a common law homology is to be found, not in the well-worn doctrines of property and tort law, but instead in an under-analyzed common law doctrine: tortious interference with a prospective economic advantage. This doctrine is a close sibling of a claim known as tortious interference with contract or “inducement to breach,” which allows recovery when a third party defendant intentionally interferes with a

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20 See generally MARY JANE WEST-EBERHARD, DEVELOPMENTAL PLASTICITY AND EVOLUTION 485 (2003) (discussing the concept of homology in evolutionary biology); STANLEY SHOSTAK, EVOLUTION OF SAMENESS AND DIFFERENCE 83 (1999) (discussing the origins of the idea in evolutionary thinking).
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contract between two others and procures a breach.\textsuperscript{21} Whereas inducement to breach is premised on the existence of a valid contractual relationship between two parties,\textsuperscript{22} tortious interference with a prospective economic advantage—or ‘tortious interference with a prospect’ for short—allows a claim when the economic benefit that was interfered with by the defendant was itself entirely probabilistic.\textsuperscript{23}

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

Reduced to its core, copyright law operates in an almost identical fashion, and for similar reasons. Like tortious interference with a prospect, it protects a zone of probabilistic benefits—the market for a work of expression—by assigning it to the author/plaintiff. Instead of just treating the work as the object of a property interest, copyright law focuses on protecting the prospect

\begin{thebibliography}{99}
\bibitem{carpenter} For early work on the doctrine, see: Charles E. Carpenter, \textit{Interference with Contract Relations}, 41 Harv. L. Rev. 728 (1928); Fowler V. Harper, \textit{Interference with Contractual Relations}, 47 NW. U. L. Rev. 873 (1952).
\bibitem{restatement} See Restatement (Second) of Torts § 766 cmt. f (1979) (“The particular agreement must be in force and effect at the time of the breach that the actor has caused.”).
\bibitem{dobbis} See Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, \textit{The Law of Torts} § 638 (2d ed. 2015).
\bibitem{fine} Id. §641 (recognizing that the prospect extends to any “opportunity [that] would have been realized” based on a “reasonable probability”).
\bibitem{fine2} Id. §640.
\bibitem{infra} See infra Part I.C.
\bibitem{fine3} For discussions of this property interest, see: Benjamin L. Fine, \textit{An Analysis of the Formation of Property Rights Underlying Tortious Interference with Contracts and Other Economic Relations}, 50 U. Chi. L. Rev. 1116 (1983); Note, \textit{Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort}, 93 Harv. L. Rev. 1510, 1522 (1980) (defining it as “contractual property”).
\bibitem{infra2} See, e.g., Restatement (Second) of Torts § 767 (1979).
\end{thebibliography}
through an elaborate focus on the nature of the defendant’s actions that interfere with the realization of the prospect. Copyright law has thus never treated all uses of the protected work as actionable.29 This focus on the prospective benefit (rather than the work as property) is captured in the highly specified forms of behavior (reproduction, distribution, performance, etc.) that each of copyright law’s rights extends to, the elaborate apparatus that constitutes its infringement analysis, and the considerations that motivate its balancing exercise under the rubric of fair use. In short, each of the common law’s analytical components that are seen in tortious interference with a prospect finds strong correspondence in accepted copyright doctrine.

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

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

Besides suggesting modifications to copyright doctrine, the homology between copyright and tortious interference with a prospect also brings out important lessons for copyright theorizing and law-making. It helps makes sense of copyright’s dominant theory of creator incentives, according to which

29 Indeed, this is a bedrock principle of copyright law that was confirmed by the Supreme Court in the nineteenth century. See Baker v. Selden, 101 U.S 99, 102 (1879) (concluding that copyright law gives authors no exclusive right to the use of ideas, methods, and processes embodied in a work, but merely a right to prevent others from copying the expression in a work when unrelated to such use).

30 For a general account of interpretive theory, see: RONALD DWORKIN, LAW’S EMPIRE 45 (1986).
copyright’s primary purpose is to “supply” creators with an incentive to create.\textsuperscript{31} The homology reveals this to be only partially true, and that copyright’s real function lies in protecting rather than supplying creators’ market incentives. The homology also pushes in the direction of thinking about copyright as a framework of liability, rather than entitlement, which is more than just of semantic significance. Lastly, it strongly recommends a more active role for courts in shaping the copyright entitlement and indirectly thereby contributing to copyright law and policy by engaging the discourse of copyright’s normative goals more directly.

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

\textbf{I. THE FORGOTTEN TORT ACTION: INTERFERENCE WITH A PROSPECT}

Despite having a long pedigree of their own, intentional torts—wrongs committed through a defendant’s intentional/volitional actions—have come to receive significantly less scholarly attention than have their fault-based counterparts (negligence).\textsuperscript{32} Even within the category of intentional torts, those focusing on harms to person and property such as assault and trespass, tend to dominate the discussion. Given this landscape, tortious interference with a prospective economic advantage is all but ignored in any serious discussion about tort law and comparisons thereto.

In addition to this benign neglect, tortious interference with a prospect also suffers from the problem of being overshadowed by its sister-action of


intentional interference with a contract (also known as inducement to breach a contract), which has received significantly more attention over the years. While similar in their broad structure, the two actions are distinct in many important analytical and normative respects.\(^\text{33}\) This Part provides an overview of tortious interference with a prospect. I.A describes the origins and development of tortious interference with a contract, the original tortious interference claim; II.B. then focuses on the distinctiveness of interference with a prospect from a doctrinal perspective; and II.C examines the theoretical considerations motivating the construction and application of tortious interference with a prospect.

A. Tortious Interference in General

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

The case arose out of a situation where a prominent opera singer, Johanna Wagner, had contracted to sing exclusively at the plaintiff’s theatre for three months.\(^\text{38}\) The defendant, who operated a competing theatre persuaded Wagner to break her contract with the plaintiff and to perform at his theatre instead.\(^\text{39}\) While the plaintiff commenced an action against Wagner for breach of contract, he independently brought an action against the defendant for

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\(^{33}\) See Dobbs et al., supra note __, §638 (noting the basic differences between the two even though “they are similar”).


\(^{35}\) Id. at 664-65; Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 Harv. L. Rev. 1510, 1514-15 (1980) (describing the evolution of such statutory protection and the basis for it, as reflected in case law).

\(^{36}\) Sayre, supra note __, at 666.


\(^{38}\) Id. at 752.

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

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

It wasn’t long before the case and its progeny received significant attention among American courts and scholars.\textsuperscript{47} The U.S. Supreme Court

\textsuperscript{40} This action became a celebrated contract law case in its own right: Lumley v. Wagner, (1852) 64 Eng. Rep. 1209 (Ch. Div.).

\textsuperscript{41} \textit{Gye}, 118 Eng. Rep. at 752-53.

\textsuperscript{42} \textit{Id}. at 753.

\textsuperscript{43} \textit{Id}. at 755.

\textsuperscript{44} Bowen v. Hall, (1881) 6 Q.B.D. 333, 339 (Eng.) (confirming the reasoning and holding in \textit{Gye}).

\textsuperscript{45} \textit{Id}. at 337.

\textsuperscript{46} Temperton v Russell (No.2), (1893) 1 Q.B. 715, 727-28 (Eng.) (finding the limitation of the principle to personal service contracts to be “not tenable”).

\textsuperscript{47} For early scholarly attention, see: James Barr Ames, \textit{Purchaser for Value without Notice}, 1 HARV. L. REV. 1, 10 (1887); Christopher Columbus Langdell, \textit{A Brief Survey of Equity Jurisdiction}, 1 HARV. L. REV. 55, 57 (1887); William Schofield, \textit{The Principle of Lumley v. Gye, and Its Application}, 2 HARV. L. REV. 19 (1888); Oliver Wendell Holmes, Jr., \textit{Privilege, Malice and Intent}, 8 HARV. L. REV. 1, 6 (1894); Ernst Freund, \textit{Malicious and Unlawful Interference}, 11 HARV. L. REV. 449 (1898). The case was cited for the first time in an argument before the Supreme Judicial Court of Massachusetts in 1855. \textit{See} Ela v. Smith,
endorsed the doctrine in 1894, with a majority of states doing the same shortly before. As this occurred however, courts applying the doctrine came to imbue it with an important modification. The element of “malicious” behavior came to be stripped of its independent analytical significance. As long as a defendant was shown to have known of the pre-existing contract and to have acted in an intentional manner thereafter to procure its breach, the action was deemed satisfied. Additionally, the defendant’s market-driven motivations underlying the inducement were also treated as largely irrelevant.

These developments caused one early commentator on the doctrine to lament that American courts had converted the doctrine “into a sweeping generalization, applicable to every case where a third party through his conduct causes the breach of a known contract.” Yet, in some ways this was hardly a mere product of American law-making. As seen above, the court in *Lumley* had itself equated malice with notice of the contract. Later courts signed on to the idea that a benefit (to the defendant) coupled with a detriment (to the plaintiff) also evidenced such malice, a structure that was common to just about any knowing breach. Rhetoric aside, malice therefore does not appear to have been a consciously designed constraint during the early framing of the doctrine. American courts and scholars interpreting the malice requirement came to understand it as connoting the absence of a justification or privilege for the defendant’s behavior and nothing more. The idea of malice as ill-will or bad intentions was certainly not a conscious design choice. Instead, it emerged from a common sense recognition that inducing a breach of contract was harmful and unjust.

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49 See, e.g., Beekman v. Marsters, 80 N.E. 817, 819 (Mass. 1907). The Supreme Judicial Court of Massachusetts had the following to say about the requirement:

> There are statements in opinions in Massachusetts and in England that a defendant is not liable for interference with a plaintiff's rights in both of these two classes of cases unless he acts maliciously. Within the meaning of malice as used in these opinions in the case at bar there was no necessity of proving spite or ill will toward the plaintiff. This is not a case where there was an abuse of what, if done in good faith, would have been a justification, but a case where the defendant with knowledge of the contract between the plaintiff and the hotel corporation intentionally and without justification induced the hotel corporation to break it. That is proof of malice within the meaning of that word as used in these opinions.

For a criticism of the case, see: Sayre, supra note __, at 676-77.

50 Beekman, 80 N.E. at 818 (holding that the “right to compete” was no justification under the doctrine).

51 Sayre, supra note __, at 677.


53 See, e.g., Bowen, 6 Q.B.D. at 338. See also Note, *Tortious Interference*, supra note __, at 1527 (“Since virtually all interference works to the benefit of the third party and the detriment of the plaintiff, this definition of malice enabled courts to impose liability in almost any case of inducement”).

54 See Charles E. Carpenter, *Interference with Contract Relation*, 41 Harv. L. Rev. 728, 735 (1928) (“Malice in the sense of bad motive is not a requisite of the prima facie tort.”). See also Cumberland Glass
motive therefore never quite took off. As long as a defendant knew that the act was likely to result in a breach, and did in fact produce such a breach, the element was deemed satisfied.

As should be apparent, the gradual crystallization of the doctrine around an identifiable interest of the plaintiff (contractual performance), and a concurrent expansion of the defendant’s behavior that might trigger liability, in effect created a property-like interest in the claimant.\textsuperscript{55} In other words, the tort had the direct effect of converting an\textit{in personam} contractual relationship (that existed between the parties to the contract) into a broader\textit{in rem} obligation against anyone with knowledge of the contract. That obligation was of course—unlike regular property—limited to not inducing a breach of the contract. Yet, it crystallized the propertization of the contractual obligation. Indeed, this point was brought home most forcefully in one court’s explicit observation that the doctrine allowed a contract to “impose[] on all the world, the duty of respecting that contractual obligation.”\textsuperscript{56} Tortious interference with a contract thus created a framework of exclusion—from the underlying contractual obligation—through a regime of liability, an analytical structure that has been described elsewhere as a form of “quasi-property.”\textsuperscript{57}

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

\textsuperscript{55} See Note, \textit{Tortious Interference, supra note __, at 1524 (noting how under the doctrine “breach of a contractual promise is a violation of property rights”); Fine, \textit{supra note __, at 1118 (describing the tort as creating a property right); Dan B Dobbs, \textit{Tortious Interference with Contractual Relationships, 34 Ark. L. Rev. 335, 350-56 (1980); Carpenter, \textit{supra note __, at 723. Even some early courts characterized it as such: Jersey City Printing Co. v. Cassidy, 53 A. 230, 232 (Ch. 1902) (“That the interest of an employer or an employee in a contract for services is property is conceded.”).}

\textsuperscript{56} Temperton, (1893) 1 Q.B. at 730.

\textsuperscript{57} See Shyamkrishna Balganesh, \textit{Quasi-Property: Like, But Not Quite Property, 160 U. PA. L. Rev. 1889 (2012); Dobbs, \textit{supra note __, at 373.}

\textsuperscript{58} See Note, \textit{Tortious Interference, supra note __, at 1537 (“Formal reasoning could not resolve the dilemma, nor could blind appeal to conclusory doctrines such as malice.”). For a general overview of this general current in legal thinking, manifested in the idea of Legal Realism, see: Brian Z. Tamanaha, \textit{Beyond the Formalist-Realist Divide: The Role of Politics in Judging} (2009).

\textsuperscript{59} Id. at 1537-38 (describing the two strategies that emerged to resolve this problem: new devices that limited the tort, and the attempt to balance competing interests).
Whether a privilege of invasion exists depends on whether it is of greater moment to society to protect the defendant in the invading activities than it is to protect and guard the plaintiff’s interest from such invasions. An evaluation and balancing of the social import of the conflicting interests of the respective parties and of the social interests per se are involved. The defendant may be privileged to invade an interest of the plaintiff although it is not for the protection or furtherance of a social interest of greater public import than is the social interest involved in the protection of the plaintiff’s individual interest.  

As should be apparent, the idea of balancing entailed examining both social and individual interests on both sides of the claim. And in due course, courts developed a fairly rich jurisprudence of privileges and defenses that justified defendants’ actions and exempted them from a claim of tortious interference.

This general approach—of balancing competing considerations—continued through the 1970s, and culminated in a specific provision in the Second Restatement of Torts, which set out the various considerations that courts had come to employ as part of this process. The commentary accompanying the provision highlights the ambiguity accompanying the exercise and notes the reality that the ultimate decision “depends upon a judgment and choice of values in each situation.” The Restatement suggested liability only when the interference was both intentional and improper, with the impropriety in turn depending on balancing competing considerations.

What is fairly intriguing about the tortious interference with contract action is that it enables courts to examine and balance competing normative considerations directly, and on an individual case-by-case basis. Rather than require that the balancing take place behind an abstract conceptual device, the mid-twentieth century evolution of the doctrine enabled the idea of the parties’ interests to be laid out directly during the litigation. This in turn required courts to confront their own roles as adjudicators not just of formal claims/criteria, but of the relative and situational importance of the competing considerations at stake. This approach continues to this day. A leading treatise on American tort law describes the balancing approach that courts developed as the “good sense” approach.

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60 Carpenter, supra note __, at 745.
61 For a useful summary of this jurisprudence, see: id. at 745-62.
62 See Restatement (Second) of Torts § 767 (1979).
63 Id. § 767 cmt. b.
64 Id. § 766 (“One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.”) (emphasis added).
65 DOBBS ET AL., supra note __, § 618 (“Most courts still decided what is an improper means or improper purpose in the way English courts did in the 19th century—by simply applying what the judge thinks is ‘good sense.’”).
As understood today then, tortious interference with a contract embodies six key elements. First, there must be a valid contract in existence. Second, the defendant must have known of the contract’s existence before its breach, since without which the intentionality question becomes obviously moot. The defendant need not have known the specifics of the contract (i.e., its individual provisions). Therefore, circumstantial evidence of knowledge is usually sufficient. Third, the interference must be intentional. Courts have interpreted this requirement to mean either the existence of a specific purpose—to interfere—on the part of the defendant, or instead the defendant’s knowledge that the interference was a “substantial certainty.” In practice, the intentionality requirement is hardly an onerous one. Fourth, the defendant’s actions must have occurred along with an “improper motive” or using “improper means.” In recent years, courts appear to be moving to the latter of these alternatives, and abandoning the former, which relies on an earlier conception of malice. Fifth, the defendant’s interference must have caused the breach; it should therefore not have occurred for reasons unconnected to the interference. And sixth, the breach must cause the plaintiff some harm or detriment.

Of the six elements seen in the modern formulation of the tort, the element of “improper means” is perhaps the hardest to satisfy in practice, given its slipperiness. Acts that are independently tortious or criminal form but one part of the category of improper means. Beyond crimes and actionable wrongs, breaches of accepted ethical and professional standards and other forms of behavior that independently (of the interference claim) invite an element of disapprobation seem to qualify as well.

Despite the claim having expanded to now cover a variety of different contractual situations and a diverse set of defendant behaviors, it is crucial to emphasize that it has yet to simplistically treat the act of “interference” as independently wrongful. Only when the interference is shown to be wrongful as an independent matter—either owing to the interests/rights involved, the defendant’s motives, or the independent impropriety of the actions as such—does liability attach. Thus, while liability under the tort has grown, it has done

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66 Id. § 619.
67 Id. § 621 (detailing how intent and knowledge are to be proven).
68 Id.
69 Id. §§ 622-629
70 Id. § 623 (describing a third—and most recent—stage in the development of this prong among courts wherein liability is based on the defendant’s “use of tortious or otherwise improper means of interference”).
71 Id. § 619.
72 Id.
73 Id. §§ 627-629.
74 Id. § 627.
75 See Dobbs, supra note __, at 344 (observing that “[t]o find a wrong in interference we shall have to add some factor besides the act of interfering by persuasion or honest representation” and arguing that we “should therefore put aside any notion that interference is in its nature ‘wrong’”).
so with close consideration of the normative issues at stake, a lesson that is important for copyright law.

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

As the previous discussion reveals, tortious interference with a contract effectively generates a property-like entitlement around the contractual benefit that is meant to accrue to the contracting parties as a legal matter. Given that the law guarantees either contractual performance or its monetary equivalent to the contracting parties, tortious interference with a contract treats the de jure guarantee of an economically valuable benefit as worthy of independent protection through a regime of liability.

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

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

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

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76 Indeed the very definition of a contract says as much, in understanding a contract as an agreement enforceable at law. See Restatement (Second) of Contracts § 1 (1981) (“A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”)

77 (1893) 1 Q.B. 715.
into a contract with the plaintiff, which he would otherwise have entered into, it is not actionable.\textsuperscript{78}

In short, the court in \textit{Temperton} saw (a) an interference with a valid contractual benefit, and (b) an interference with a benefit that was likely to culminate in a contractual arrangement, as largely equivalent. In one respect, the court’s logic is persuasive: the mere formalization of a benefit through a contract does little to transform its substantive basis. Preventing a contract from being formed and preventing a contractual performance from happening once the contract is indeed formed, both produce identical harm to the claimant. Yet from another perspective, the distinction is analytically significant.

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

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

Tortious interference with a prospect does not appear to have gained much acceptance in the U.S. until the middle of the twentieth century, when a few state courts began recognizing the action.\textsuperscript{82} It wasn't until the 1970s that

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\textsuperscript{78} Id. at 728.


\textsuperscript{80} Some therefore see this line of reasoning to correspond to some of the early landmark unfair competition cases. See Restatement (Second) of Torts § 766B (1979).

\textsuperscript{81} Id.

courts across the country began grappling with the contours of the tort, with some jurisdictions (e.g., California) adopting a more liberal approach to the tort, while others (e.g., New York) continuing to limits its scope and reach for fear of expanding liability to cover otherwise legitimate behavior.\(^8^3\) During this development, the action also took on different names: “interference with a business relation,” “interference with an economic opportunity,” or “interference with a prospective advantage,” within different jurisdictions even though they encompassed the same claim.\(^8^4\) As applied today, the action has four elements: (i) the defendant must have known of the plaintiff’s economic prospect and intended to interfere with it, (ii) the prospect must have been reasonably likely to be realized and not merely speculative, (iii) the interference must have been by improper means or with an improper motive, and (iv) the interference must have caused some harm to the plaintiff.\(^8^5\)

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

On the question of a qualifying “prospect” and defendant wrongdoing, case law appears to reveal an inverse correlation.\(^8^6\) The more certain a prospect is, the lesser is the proof of defendant wrongdoing that the law insists on. An actual contract is thus the most certain of all prospects, an executory contract or invalid agreements slightly less certain, and so on. As the certainty of the prospect diminishes, courts demand heightened proof of actual defendant wrongdoing for liability to attach. Or, as one treatise puts it, the defendant has far greater privilege to interfere with opportunities than it would with an “existing and enforceable contract.”\(^8^7\)

This inverse correlation is important to appreciate, because it gives the “right” underlying the working of the tort a distinctively relational dimension.\(^8^8\) Determining whether an action is potentially proscribed is dependent on the very nature of the interest involved and vice-versa, requiring an understanding of the probabilistic and contingent nature of both ideas. To the extent that the tort


\(^{8^4}\) DOBIS ET AL., supra note __, § 638.

\(^{8^5}\) Id.

\(^{8^6}\) Id.

\(^{8^7}\) Id.

\(^{8^8}\) For an elaborate theoretical account of this relational idea, see: Gideon Parchomovsky & Alex Stein, The Relational Contingency of Rights, 98 VA. L. REV. 1313 (2012).
recognizes a right in an economic prospect or opportunity, the nature of that right (and its violation) is itself dependent on the defendant’s actions and consequences.

1. Identifying a Protectable Opportunity

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

As a preliminary, courts insist that the prospect must be something more than a “mere hope.”\(^{89}\) It must instead be a “reasonable” as opposed to merely “subjective” expectancy.\(^{90}\) This distinction is hard to capture in the abstract, but appears to eliminate situations where the underlying facts, which form the basis of the expectation, are legally or factually incompatible with the expectancy. Thus, an at-will employee’s hope of long-term employment when the existing employment contract clearly suggests otherwise, would remain a subjective—and unreasonable—expectancy.\(^{91}\) Similarly, courts also insist that the prospect be one that was likely to have accrued to the plaintiff “but for” the defendant’s intervention.\(^{92}\) This conception appears more stringent than the reasonable/subjective distinction in so far as it demands proof of an actual benefit likely to accrue. It would therefore exclude situations where a plaintiff was precluded from making placing a bid, and yet the bid even if placed would have likely lost out to other offers.\(^{93}\) In all of these situations, courts place great emphasis on the background and surrounding factual circumstances before presuming the existence of a prospect.

Despite these somewhat stringent tests, in practice courts appear quite willing to find the existence of a prospect in a variety of situations. Indeed, one treatise notes the existence of a disconnect between courts’ abstract rhetoric about the identification of a prospect and their actual use of the factual record to then find a prospect, contradicting their abstract statements.\(^{94}\) Of the various jurisdictions that continue to endorse the tort, California appears to have the


\(^{90}\) Stehno v. Spring Spectrum, 186 S.W. 3d 247, 250 (Mo. 2006).

\(^{91}\) Id.


\(^{93}\) Santana, 401 F. 3d at 140.

\(^{94}\) DOBBS ET AL., supra note __, § 641 (“[C]ourts sometimes state the constraining rule and then later in the same opinion re-state it to eliminate its bite, undermining any confidence that the original statement was purposeful and exclusive.”).
most advanced jurisprudence. California courts have developed a process for identifying a protectable prospect that balances both analytical and pragmatic considerations. They insist on the plaintiff establishing a “reasonable probability” and a counter-factual causal relationship between the interference and the benefit to the plaintiff. All the same, to identify a reasonable probability, they look to how much “chance” is involved in the actual accrual of the benefit. In making this assessment, they rely on William Prosser’s admonition that the prospect usually reflect a “background of business experience on the basis of which it is possible to estimate with some fair amount of success both the value of what has been lost and the likelihood that the plaintiff would have received it if the defendant had not interfered.”

The case of *Youst v. Longo*, decided by the Supreme Court of California, is a good example of courts’ approach to identifying a protectable prospect. The plaintiff in the case was a racehorse owner who brought an action for intentional interference with a prospective economic advantage against the defendant, the rider of a competing racehorse. The plaintiff alleged that as a result of the defendant’s actions during the race (of striking the plaintiff’s horse), he was prevented from winning a larger cash prize than he actually did. The cash prize was thus the prospect that the plaintiff claimed an entitlement to, and which the defendant’s intentional actions were alleged to have improperly interfered with. Central to the court’s analysis was its recognition that the prize at issue was a mere contest, a “speculative expectanc[y].” The Court went on to observe:

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

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

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97 729 P. 2d 728 (Cal. 1987).
98 *Id.* at 730-31.
99 *Id.* at 731.
100 *Id.* at 730.
101 *Id.* at 731.
Equally important in the Court’s conclusion was its recognition that unlike in some other speculative situations, there was also no independent public policy reason to allow protection for probable expectancies in sporting contests. The Court thus left in place protection under the tort for other kinds of chance-based expectancies, such as a recovery against a defendant who lost (or destroyed) the evidence that a plaintiff needed in order to bring a personal injury claim for an accident. The interest in a “prospective civil action” was thought to overcome the lack of certainty underlying the entitlement (to actual damages in the litigation). Similarly, it also left undisturbed a prior case that allowed recovery from a defendant who had caused the plaintiff to lose an election by sending out false information about the latter. Even though the plaintiff lost the election by a large margin, the court in the case had held that the recovery was permitted since the uncertainty in the entitlement (to the office) was overcome by the importance of communicating accurate information to the public during an election.

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

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

102 Id. at 735. The case was Smith v. Superior Court, 151 Cal. App. 3d 491 (Ct. App. 1984).
105 Youst, 729 P. 2d at 734.
2. Interference as Wrongdoing

Perhaps even more so than with tortious interference with a contract, claims of tortious interference with a prospect involve the complex balancing of a defendant’s legitimate interests against the harm sustained by a plaintiff. The primary area where this nuance manifests itself is in courts’ marked reluctance to treat all loss-producing interferences with a prospect as per se actionable.\(^{106}\) The law instead pays close attention to differentiating between the mere result of the defendant’s conduct on the one hand, i.e., the plaintiff’s harm, and the means employed in such conduct on the other.

Some courts early on emphasized the element of motive in their analysis of the defendant’s wrongdoing.\(^{107}\) An “improper motive” was thus taken to be sufficient to find liability.\(^{108}\) In due course, this came to be abandoned, as courts came to appreciate the difficulty inherent in policing the boundary between a bad motive (one directed exclusively at harming the plaintiff, with no corresponding benefit) and a mixed one (one where the harm to a plaintiff is itself the basis for the defendant’s benefit).\(^{109}\) Consequently, the modern trend in cases of tortious interference with a prospect is a rejection of liability based exclusively on the defendant’s motive.\(^{110}\)

Courts instead focus on the means employed by a defendant in interfering with the identified prospective economic advantage. The jurisprudence on this topic reveals four principal categories of activities that qualify as actionable under the tort.\(^{111}\)

The first is independently unlawful means, which includes behavior that on its own, i.e., independent of tortious interference with a prospect, is actively proscribed by the law’s directives. These directives encompass not just criminal law prohibitions, but also relational directives that emanate from tort law.\(^{112}\) Included in this category are “violence, threats or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress,\

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\(^{106}\) Indeed, when viewed in the abstract some have noted that the rules seem to suggest that “the whole competitive order of American industry is prima facie illegal.” Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740, 745 (Cal. 1995) (quoting Professor Carl Auerbach at the ALI Proceedings leading to the passage of the Restatement).

\(^{107}\) DOBBS ET AL., supra note __, § 639 (“At one time judges stood ready to impose tort liability for ordinary business decisions… if a bad motive was perceived.”).

\(^{108}\) Id.

\(^{109}\) For a discussion of this distinction, see DOBBS ET AL., supra note __, § 625.

\(^{110}\) See, e.g., Speakers of Sport, Inc. v. ProServ, Inc., 178 F.3d 862, 867 (7th Cir. 1999) (“[T]he tort of interference with business relationships should be confined to cases in which the defendant employed unlawful means.”); Great Escape, Inc. v. Union City Body Co., 791 F.2d 532, 543 (7th Cir. 1986) (requiring that the means used rise to the level of “wrongfulness”); Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 713 (Tex. 2001) (requiring that the means be “independently tortious or unlawful”).

\(^{111}\) See DOBBS ET AL., supra note __, §§ 627-29.

undue influence, misuse of insider or confidential information, [and]... breach of a fiduciary relationship.” 113 Given that in these situations, a plaintiff ordinarily has recourse to an alternative claim for the defendant’s actions, courts often try to ensure that the tortious interference with a prospect claim isn’t redundant, before allowing the action to proceed. 114

The second category encompasses conditionally unlawful means. It covers behavior by the defendant that is unlawful in the abstract, but is nonetheless not actionable by the plaintiff. This non-actionability must however be a consequence of a defect unrelated to the defendant’s conduct (e.g., standing or the statute of limitations) rather than one going directly to such conduct. 115 Thus, a defendant’s fraudulent behavior towards a third party, which interferes with a plaintiff’s prospect might be actionable by the third party—but not the plaintiff—rendering it conditionally unlawful. 116 On the other hand, when the claim is defeated because a constitutive element of the tort is not satisfied, this affects the plaintiff’s claim as well. The same is true of defenses that the defendant could raise to defeat the claim to a third party. 117 Since such a defense eliminates wrongdoing altogether, the plaintiff cannot continue to claim that the defendant’s behavior was unlawful.

It is not only unlawful behavior of the defendant that qualifies as actionable wrongdoing for tortious interference with a prospect. Lawful behavior too, behavior that the law does not directly proscribe, can qualify under certain circumstances. The third and fourth categories represent this reality. The third category is therefore behavior that is lawful but legally discouraged. It covers behavior that does not give rise to an independent cause of action but nonetheless is discouraged by the spirit of the law, or through the law’s additional requirements. 118 Making intentionally false statements represents an example. While a fraudulent misrepresentation ordinarily vitiates a contract, it is hardly independently actionable when made to a stranger. 119 All the same, few would disagree that it is actively discouraged by the law. The fourth category moves farther away from the law and represents situations that are lawful but unethical. This category is the most nebulous to police, and usually covers behavior that is inappropriate owing to the existence of a strong norm/custom to

114 DOBBS ET AL., supra note __, § 627 (describing this as the concern with “surplusage”).
115 Kraemer v. Harding, 976 P.2d 1160, 1170 (Or. 1999) (statute of limitations). For a clear statement, see: Top Serv. Body Shop, Inc. v. Allstate Ins. Co., 582 P.2d 1365, 1371 (Or. 1978) (“[I]n a claim of improper interference with plaintiff's contractual relations, it is not necessary to prove all the elements of liability for another tort if those elements that pertain to the defendant's conduct are present.”)
116 See Top Serv. Body Shop, Inc., 583 Pd. 2d at 1371 n. 11.
117 DOBBS ET AL., supra note __, § 628.
118 Id. § 629 (putting “economic duress,” “undue influence,” and claims for “restitution” in this category).
119 Id.
the contrary. The source of that norm then becomes an independent variable that the plaintiff must prove, something that courts approach with varying degrees of comfort.

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

C. Underlying Rationale(s)

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

1. Incentives/Free-riding

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

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

121 For a reluctance to accept this category, see: Speakers of Sport, Inc., 178 F. 3d at 867 (“[T]he established standards of a trade or profession in regard to competition, and its ideas of unethical competitive conduct, are likely to reflect a desire to limit competition for reasons related to the self-interest of the trade or profession rather than to the welfare of its customers or clients.”).


123 For more on this conflict, see: Perlman, supra note ; Joseph M. Perillo, Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference, 68 FORDHAM L. REV. 1085 (2000).


125 Id. at 899.
highly specific to that prospect/contract and therefore without acceptable substitutes. As an example of such a scenario, BeVier identifies “a contract to purchase controlling shares in a corporation.” The process involves the collection and analysis of information specific to that particular corporation.

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

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

What is also important to appreciate in this account is that it quite accurately recognizes the incentive—to collect and produce prospect-specific information—as originating in the promisee’s own assessments of the market and its value. Protection against free-riding by a third party merely protects (or

126 Id. at 899-900.
127 Id. at 899.
128 Id. at 916.
129 Id. at 919-20.
130 Id.
131 As an instance of such an argument, see Cable Vision, Inc. v. KUTV, Inc., 211 F. Supp. 47 (D. Idaho 1962), where the plaintiff claimed that the defendant’s retransmission of a broadcaster’s signals was an interference with its own exclusive contract with the broadcaster. The essence of the plaintiff’s argument was that the defendant—by avoiding the payment of a license fee to the broadcaster—was competing unfairly owing to its own lower costs. The district court allowed the tortious interference claim, and expressly equated it with an unfair competition cause. Id. at 58-59 (“[T]he same result has been accomplished upon grounds of unfair competition in cases dealing with radio and television programs.”). On appeal, the Ninth Circuit reversed, principally on grounds of federal preemption. Cable Vision, Inc. v. KUTV, Inc., 335 F. 2d 348, 351-52 (9th Cir. 1964).
“increase[es]”)\textsuperscript{132} the incentive, and is hardly the origin/source of it. Independent of the promisee’s own belief (rational or otherwise) of the information being economically valuable, the mere existence of potential liability is quite incapable of incentivizing the production and collection of information.

2. Commercial Morality

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

This rationale tracks the role of the “improper means” requirement in the law of trade secrets, which similarly focuses on the propriety of a defendant’s behavior in acquiring the trade secret in question.\textsuperscript{133} And within that setting, courts have attempted to understand the requirement as enabling the law to convert the customary norms of commercial morality into legally enforceable standards.\textsuperscript{134} Indeed, the Restatement defines “improper means” as those that “fall below the generally accepted standards of commercial morality.”\textsuperscript{135}

Maintaining the standards of “commercial ethics” is therefore seen as an independently defensible goal for the law’s focus on the propriety of a commercial defendant’s market actions, both within the law of trade secrets and the tortious interference.\textsuperscript{136} In one well-known trade secret case where a defendant had obtained information about a competitor’s industrial plant through surreptitious aerial photography, the court had the following to say about the means employed by the defendant and the law’s commitment to commercial morality:

We introduce here no new or radical ethic since our ethos has never given moral sanction to piracy. The market place must not deviate far from our mores. We should not require a person or corporation to take unreasonable precautions to prevent another from doing that which he ought not do in the first place. … “Improper” will always be a word of many nuances, determined by time, place, and circumstances. We therefore need not proclaim a catalogue of commercial improprieties. Clearly, however, one of its commandments does say “thou shall

\textsuperscript{132} BeVier, supra note __, at 920.

\textsuperscript{133} See Restatement (Third) of Unfair Competition § 43 (1995) (defining the improper means requirement).

\textsuperscript{134} See, e.g., Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 481 (1974) (“The maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law.”).

\textsuperscript{135} Restatement (First) of Torts § 757 cmt. f. (1939).

\textsuperscript{136} Kewanee, 416 U.S. at 481.
not appropriate a trade secret through deviousness under circumstances in which countervailing defenses are not reasonably available.\footnote{137}{E. I. duPont deNemours & Co. v. Christopher, 431 F.2d 1012, 1017 (5th Cir. 1970).}

The reference to morality here certainly does not suggest that the rationale is imbued with a deontic character. It is instead deeply instrumental in orientation, and related to the recognition that industry norms and customs present an effective (and occasionally, efficient) method of rule development and coordination.\footnote{138}{See Robert G. Bone, \textit{A New Look at Trade Secret Law: Doctrine in Search of Justification}, 86 CALIF. L. REV. 241, 294 (1998).}

The commercial morality rationale embodies its own set of deep-seated problems. Scholars have criticized the ideal as being too vague and amorphous, and therefore unpredictable and ill-defined.\footnote{139}{See Mark A. Lemley, \textit{The Surprising Virtues of Treating Trade Secrets As IP Rights}, 61 STAN. L. REV. 311, 322 (2008); Bone, \textit{supra} note \_ at 295-96.} Additionally, to the extent that it seeks to build on existing custom and convert those norms into legally enforceable standards, it partakes of the myriad problems and concerns that accompany the production and policing of customary law in different settings.\footnote{140}{For an exhaustive account, see: Jennifer E. Rothman, \textit{The Questionable Use of Custom in Intellectual Property}, 93 VA. L. REV. 1899 (2007).} Perhaps most importantly though, when treated as a freestanding rationale for tortious interference with a prospect, the commercial morality argument effectively collapses the tort into just another claim for unfair competition, with little regard for the tort’s emphasis on policing the boundaries of a protectable prospect. To the extent that it is capable of functioning as a justification then, it must do so in conjunction with other, more far-reaching, accounts.

3. Ownership—Actual/Ostensible

A third plausible justification for tortious interference with a prospect attempts to convert its analytical basis into a normative theory. Recall that courts developing the tort in its early stages openly acknowledged that its effect was to convert a contractual entitlement into an \textit{in rem} obligation against third parties.\footnote{141}{Temperton, (1893)) Q.B. at 730.} The normative variant of this description would argue that tortious interference identifies a prospect as an appropriable/ownable asset, which it then protects with a tailored exclusionary framework. In other words, the rationale for the exclusionary regime created by the tort is the ownership of the underlying prospect by the plaintiff.

A version of this justification is seen in the work of Richard Epstein, on the inducement of breach.\footnote{142}{Richard A. Epstein, \textit{Inducement of Breach of Contract as a Problem of Ostensible Ownership}, 16 J. LEGAL STUD. 1 (1987). For a different version of the property argument, premised on first possession instead of self-ownership, see: Fine, \textit{supra} note \_, at 1139-42. Fine provides a more direct defense using}
an effort to solve the problem of ostensible ownership, Epstein argues that the action exists to "fill the void that the more traditional notions of property may not reach." The root of his argument derives from the recognition that ownership of labor is just as defensible and unproblematic as ownership of physical resources. From that basic idea, Epstein’s account then finds it straightforward to show that tortious interference works in identical manner as tort claims designed to protect against interferences with physical property. In his analysis however, Epstein distinguishes between interference with a contract and interference with a prospect, suggesting that the latter is fundamentally different as a normative matter, and interestingly enough, easier to justify in property terms. His reasoning for this is that “one tort falls squarely within the traditional prohibition against force and fraud while the other does not.” Since interferences with a contract are often treated as cases of “inducement,” Epstein seems to be suggesting that tortious interference with a prospect—rather than a contract—is indeed more straightforward, in so far as it purports to set up a standard form of protection against force and fraud. Actual rather than ostensible ownership is thus at the heart of tortious interference with a prospect, in Epstein’s propertarian account. While inducement of breach derives from gap-filling in the skein of standard property entitlements, tortious interference with a prospect appears as a straightforward instantiation of ownership principles. Epstein makes this abundantly clear when he concedes that in contrast to inducement of breach, which cannot be fitted into the standard mode, “the basic justification of the tort [of interference with a prospect] remains clear precisely because of the close connection between this class of economic losses and ordinary physical damages cases.” A protectable prospect is therefore just like any other ownable res.

But why? The argument appears to place primary reliance on the conceptual structure of the interference tort and its resemblance to traditional property torts. Indeed, Epstein has adopted the same argument to suggest that “intangible” forms of property such as patent and copyright are property rights analogous to tangible property owing to a common conceptual structure. The

property terms, especially as it relates to prospects rather than contracts, by treating prospects as an interest in a pursuit, which the rules of first acquisition seem to protect. Fine’s underlying normative logic however appears to be the equivalence in economic value being protected in both situations. Unlike Epstein, Fine does not go beneath the rules of pursuit to discern an underlying justification for them in the way in which Epstein does with ownership, albeit through Locke.

143 Id. at 19-20.
144 Id. at 20.
145 Id. at 21-29.
146 Id. at 21.
147 Id.
148 Id.
149 Id.
150 Richard A. Epstein, Intentional Harms, 4 J. LEGAL STUD. 391, 425 (1975) (arguing that patents and copyrights “create property rights” and “share the essential features of tangible property”); Richard A.
justification for treating a prospect as a *res* is therefore rooted in the analytical structure of the doctrine, and not vice-versa. A similar move is to be seen in work by another scholar, who also seeks to offer a property-based justification for tortious interference based on an analogy to property law’s rules of first possession and the pursuit of animals.  

The conceptual similarities in the doctrinal regimes (i.e., notice, privilege of pursuit, motive, etc.) are treated as generating a normative claim for treating tortious interference as a property tort. The shortcomings of this approach are but obvious. The conceptual and analytical similarity (of tortious interference) to property sheds important light on the working of the tort doctrine and suggests that it might well be less of an anomaly than some others have made it out to be. Yet, the idea of property as such (or of other economic interests such as a “right to trade”) are hardly justifications on their own right, and require the elucidation of additional normative criteria underlying their working.  

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

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

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152 Epstein, *Intentional Harms*, *supra* note __, at 425 (attempting to show how an interest in trade is largely similar to property).

153 For an early recognition of the idea that property is a concept in need of justification, see: *David Hume, A Treatise of Human Nature* 491 (L.A. Selby-Bigge and P. H. Nidditch eds. 1978) (1739).

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

155 For an extensive account, see: J.W. Harris, *Property and Justice* (1996).

156 See Epstein, *Inducement of Breach, supra* note __, at 21 n.60 (criticizing the inclusion of too many disparate categories of wrongdoing under one heading of “improper”).
II. COPYRIGHT AS TORTIOUS INTERFERENCE WITH A PROSPECT

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

A. Homology as Interpretive Legal Theory

As noted previously, the distinction between an analogy and a homology is subtle yet distinct. An analogy is a mere explanatory comparison between two ideas or concepts; while a homology does more. A homology compares two ideas or concepts, but in addition purports to identify a “fundamental truth” about their commonality that connects them in a way that is significantly stronger than a superficial structural resemblance.\(^{157}\) A commonality in origin/evolution is usually the basis of a homology.\(^{158}\) Such commonality in origin need not, however, relate merely to source. It can instead be a *shared normative basis* that influences the construction of the two ideas or concepts under study, which is of special applicability in legal comparisons. When a shared set of normative values accounts for a commonality in the analytical structure of legal rules or principles, the resemblance between the rules or principles may be appropriately characterized as a homology rather than an analogy.

In this understanding then, good swaths of what is often described as analogical reasoning in the law may indeed partake of a homology, in so far as it is driven by a purported identification of a common causal story or origin that is distinctively normative in orientation.\(^{159}\) As an example, consider the manner in which the “implied warranty of habitability” evolved.\(^{160}\) In a well-known

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\(^{157}\) See 5 CONGRESS OF ARTS AND SCIENCE, UNIVERSAL EXPOSITION 350 (Howard J. Rogers ed. 1906) (noting a difference in seriousness between discussions of homology and analogy).

\(^{158}\) Id. at 350-51.


case, *Javins v. First National*, Judge Skelly Wright of the D.C. Circuit developed the idea through a comparison with the “implied warranty of merchantability,” in turn a staple doctrine in the law of contracts. Clearly to him, the structure of both warranties had to be similar, i.e., they both had to be implied in every contract and non-waivable. The decision to model one on the other—i.e., to render them structurally similar—was driven by a common set of normative considerations, despite the differing contexts. And these were the obvious information asymmetry between the contracting parties and the gross disparity in bargaining position during their market interaction. The similarity was thus more than just structural and may be explained by a common evolutionary account grounded in the goals that motivated both doctrines.

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

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

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162 Id. at 1075-76.
164 Id. at 439. For a critique of the Court’s approach, showing that the argument was poorly reasoned and researched, see: Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 CALIF. L. REV. 941 (2007). By pointing to the Court’s use of the argument here, I am certainly not suggesting that it was correctly applied; merely that it represents an instance of a homology rather than a pure analogy.
165 See U.S. CONST., Art. I, § 8, Cl. 8.
166 LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 65 (1953).
167 Id. at 65-66.
resemblance” and it has since spawned an immense amount of secondary literature.\(^{168}\)

Of importance to us though, is the reality that Wittgenstein’s idea of family resemblance quite consciously conflates two core elements, both of which set a homology apart from an analogy. The philosopher Hans Sluga has identified this conflation most concretely in recent work, in the process shedding important light indirectly on the homology/analogy distinction.\(^{169}\) Sluga points out that the idea of family resemblance confuses two analytically distinct ideas. The first is what he calls the “similarity concept,” and represents the epistemically verifiable similarity, correspondence, or identity between the subjects under study.\(^{170}\) This is a structural reality, so to speak. The second is what he calls a “kinship concept,” or the existence of some “appropriate causal connection” between the subjects.\(^{171}\) Kinship concepts, to Sluga, are important in so far as they are critical to establishing “direct and real connections, causal links, dependencies and ‘influences’” between subjects of study.\(^{172}\)

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

In his elucidation of this distinction, Sluga also makes an additional observation of relevance. He notes that the relationship between the similarity and kinship concepts is often times reflexive.\(^{173}\) In other words, a comparison that begins using a similarity concept will sometimes assume a kinship dimension and vice-versa. Indeed, this has been shown to be true as an empirical


\(^{170}\) *Id.* at 15.

\(^{171}\) *Id.*

\(^{172}\) *Id.* at 19.

\(^{173}\) *Id.* at 19-20.
matter as well. When two things are revealed to have a common source/motivation, they begin to appear more similar to otherwise neutral observers. Homologies are therefore by definition interpretive in character.

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

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

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

As discussed previously, tortious interference with a prospect is justified by reference to three different normative ideals. The ex ante economic explanation sees it as essential to allowing a market participant (i.e., a prospective contracting party) to invest into the collection of prospect-specific information by deterring free-riding by a competitor, the moral explanation

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174 See, e.g., Shyamkrishna Balganesh, Irina D. Manta & Tess Wilkinson-Ryan, Judging Similarity, 100 IOWA L. REV. 267, 280-81 (2014) (finding that lay subjects observe greater similarity between objects when told that one was copied from the other).
175 RONALD DWORFIN, LAW’S EMPIRE 47 (1986).
176 Id. at 46-48.
177 Id. at 90 (arguing that all legal reasoning is interpretive).
178 See supra Section I.C.
179 See Section I.C.1.
treats it as affirming a set of market norms and customs that are required by a well-functioning market, and the property explanation treats the prospect as akin to a property interest and therefore deserving of exclusionary protection in its own right.

The crucial point to remember about these various justifications for the tort is that despite their divergence and varied normative inclinations, they each continue to subsist in the working of the doctrine, and find validation in one or more elements of the action. The ex ante perspective focuses on the intentional (or notice-driven) aspects of the tort, the moral one in the tort’s focus on improper behavior, and the propertarian one in the in rem nature of the action. Each of the three explanations is therefore, in a sense, incapable of complete invalidation as long as the tort retains its basic structure.

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

Copyright’s ex ante justification is also incentives-driven, and is today the institution’s principal justification. Beginning with the premise that copyright exists in order to “promote the progress” of the sciences and useful arts, an avowedly utilitarian goal, the incentives account posits that copyright law is designed to realize this goal—and therefore enhance overall social welfare—by inducing creators to produce creative work through the promise of temporally limited and narrowly tailored market exclusivity. The regime’s guarantee of a private action for an interference with such exclusivity is believed to contribute to the very production and dissemination of creative expression. This incentives argument dominates courts’ rhetoric about the reasons for the copyright system, and is often touted as a reason for individual decision-making as well, within the functioning of copyright. Much like with tortious interference, a good part of copyright’s incentive is itself seen as connected to the deterrent effect that the regime has on free-riding (which it renders actionable).

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180 See Section I.C.2.
181 See Section I.C.3.
182 Balganes, Foreseeability, supra note __, at 1569-71; Sara K. Stadler, Forging a Truly Utilitarian Copyright, 91 IOWA L. REV. 609, 629 (2006).
184 Balganes, Obligatory Structure, supra note __, at 1666-67.
186 Balganes, Obligatory Structure, supra note __, at 1679-80 (making this argument to explain copyright’s inducement theory).
The market morality explanation within copyright, while infrequently advanced, nonetheless informs certain parts of the system. In this conception, aspects of the copyright system operate as rules of “trade regulation” by proscribing specific forms of actionable copying, which is seen as anti-competitive or contrary to accepted market practices. Much as with tortious interference, this explanation has had fairly limited traction as a stand-alone explanation for the entire regime and has been relegated to specific domains of copyright’s doctrinal structure. Nonetheless, it maintains a role within a part of the overall system.

The property-based explanation on the other hand, is probably second only to the incentives argument in its influence on copyright thinking. In this argument, copyright law creates a property interest in the work that it then envelopes in a regime of exclusivity. The basis—and rationale—for that property interest are either secondary or irrelevant once brought into existence, much as the property arguments for tortious interference assume. The property-justification for copyright dates back to the very origins of copyright and the idea that the system is designed to protect an ownership interest in the same way that regular property law protects similar interests in tangible assets. This vision of copyright is best characterized as “Blackstonian copyright” in that it looks no further (or beneath) the owner’s despotic dominion to control access to the resource under protection, once brought into existence. While capable of co-existing with an economic argument, the two are nonetheless analytically distinct. Indeed, some scholars purport to justify the property-justification as capable of existing independent of an economic rationale, in the recognition of the author’s inherent dignitary/personality interest that is being protected through the regime’s set of exclusive right.

Each of the rationales offered for tortious interference with a prospect thus finds a strong parallel in copyright, both individually and as a collective. The foundational values that underlie them—efficiency, fairness, and ownership—each has an unmistakable parallel in the copyright setting. This is hardly to suggest that one evolved from the other or indeed was self-consciously

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188 *Id.* at 2010; Sara K. Stadler, *Copyright as Trade Regulation*, 155 U. PA. L. REV. 899, 927-42 (2007).


190 For a discussion, see: NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 55 (2008).

191 See, e.g., Epstein, *Disintegration*, supra note __, at 457 (noting how with copying “legal systems start to develop forms of copyright protection that echo, even if they do not precisely imitate, the constellation of property rights over tangible objects.”).

192 See NETANEL, supra note __, at 12; Balganesh, *Blackstonian Copyright*, supra note __, at 1129.

modelled on the other. Instead, it provides evidence of the kind of “kinship” relationship that renders the similarity more than just of epistemic significance and suggests that the two might have useful lessons to learn from each other.

It should therefore come as no surprise that some scholars writing about tortious interference have attempted to use the tort’s similarity to intellectual property in their arguments attempting to legitimize or undermine the continued growth and expansion of tortious interference. Richard Epstein was the earliest to do so, in arguing that intellectual property provided the “prima facie tort” with a justification. A few years later, Dan Dobbs examined the same analogy as a potential justification for tortious interference (with an expectancy) and found it to be lacking, in so far as it was the basis a simple property-driven justification for tortious interference. Very importantly though, all of these accounts use intellectual property to try and justify tortious interference, and never the other way round.

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

C. The Homology

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

Stripped down to its essentials, copyright law protects original expression that qualifies as a work of authorship by creating a cause of action for a defined set of acts when not authorized by the copyright owner. Copyright realizes this structure through the creation of a set of “exclusive rights” to

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194 See Epstein, Intentional Harms, supra note __, at 425. Much like Epstein, one other writer has drawn on intellectual property to explain tortious interference by suggesting that the analogy justifies the law’s willingness to recognize a property interest even without a heightened notice requirement. Fine, supra note __, at 1133-34.

195 Dobbs, supra note __, at 352-55. Dobbs’ simplistic treatment of intellectual property as just another form of property does little justice to the complex normative goals underlying different intellectual property regimes. Indeed, from his description, one suspects that he sees little justification for the expansion intellectual property, causing him to see its extension to tortious interference doubly problematic. Id. at 354.

196 See, e.g., Joseph Liu, Regulatory Copyright, 83 N.C. L. REV. 87 (2004) (discussing the move away from a simple common law framework to a complex regulatory structure for copyright).
conduct or authorize certain activities using the protected work. When another person does those acts without the authorization of the copyright owner, those actions qualify as an “infringement” of the owner’s exclusive rights, i.e., of the copyright entitlement. Most importantly, as a regime of private law, merely because something qualifies as an infringement does not mean that it will be penalized. It is only when the copyright owner chooses to commence an action—for copyright infringement—that the infringement becomes enforceable.

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

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198 Id. §501(a) (defining an infringement).
199 For a fuller account of this, see: Shyamkrishna Balganesh, The Obligatory Structure of Copyright Law, 125 Harv. L. Rev. 1664 (2012) (explaining the private law foundations of copyright law); Shyamkrishna Balganesh, The Uneasy Case Against Copyright Trolls, 86 S. Cal. L. Rev. 723, 771 (2013).
200 Mazer v. Stein, 347 U.S. 201, 218 (1954) (“Absent copying there can be no infringement of copyright.”).
203 Balganesh, Normativity, supra note __, at 242-61.
204 For an excellent recent discussion, see: Robert C. Denicola, Volition and Copyright Infringement, 37 Cardozo L. Rev. 1259 (2016) (discussing the existing legal position and the conceptual confusion underlying the idea in copyright jurisprudence).
205 Id. at 1284.
Exclusivity, copying, volitional conduct, and contextually privileged behavior thus form the four basic conceptual cornerstones of the copyright system. Each of these elements may however be understood and interpreted through the lens of tortious interference with a prospect, which sheds light on the important principles seen in their functioning, and in turn allows them to be infused with additional analytical content.

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

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

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

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208 See Mark Rose, Authors and Owners: The Invention of Copyright 3-4 (1993) (describing the origins of modern Anglo-American copyright and its emphasis on authors as proprietors).


210 Jaszi, supra note __, at 472-80; Mark Rose, Authors in Court: Scenes from the Theater of Copyright 181-84 (2016).

211 Jaszi, supra note __, at 477-80 (describing how the work plays an independent role in commerce, once brought into existence and recognized as a protectable entity on its own).

212 Jaszi, supra note __, at 473.

213 For a useful account, see: Michael J. Madison, The End of the Work as We Know It, 19 J. Intell. Prop. 1 (2012) (describing this conflation). See also Shyamkrishna Balganesha, Causing Copyright, 117 Colum. L. Rev. (forthcoming 2017) (discussing the problems that this has caused for authorship doctrine and idea of the author).

any originality is meant to be assessed from the face of the work.215 On the other hand, it extends to the author, who must have some connection to the work and its original components, for the originality to be authorial. The conflation is today crystallized in the Copyright Act, which defines its object of protection as a “work of authorship,” seemingly incorporating both the work and the author as the targets of protection.216

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

To begin with, it helps account for the reality that copyright has never in its history attempted to graft an exclusionary regime simply around the work, in the way that property law does for a tangible object.217 At the same time, neither has copyright law really ever engaged the idea of authorship or the construction of the author as a doctrinal matter.218 And yet, during the infringement analysis, in the fair use doctrine, and in its computation of damages, the prospective market for the work emerges as a functionally significant construct. The infringement analysis purports to examine the substitutionary effect of the defendant’s copying on the plaintiff’s work,219 while a central part of the four-factor fair use doctrine examines the effect of a defendant’s copying on the “potential market” for the work.220 Similarly, in computing actual damages, copyright law allows a plaintiff to claim lost profits (from a market) as a measure of damage.221 Each of these doctrines therefore hints at a prospective market (for the work) being the true basis of protection. The idea also fits well with copyright’s modern focus on market incentives as its principal justification.

Much like a prospective advantage that is protected against interference, the market for a protected work of expression remains a probabilistic entitlement. Its actual realization is far from certain; yet at the same time its

215 1 MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT §2.01 (2015).
217 See BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 4 (1967).
219 The focus on the ordinary observer during the infringement analysis has been commonly understood as assessing whether the “intended audience”—representing the market for the work—would find the two works at issue to be substitutes in their similarity to each other. For a judicial articulation, see: Dawson v. Hinshaw Music, Inc., 905 F. 2d 731, 734 (4th Cir. 1990) (justifying the intended audience approach in light of “copyright law’s purpose of protecting a creator’s market”). See also ROBERT C. OSTERBERG & ERIC C. OSTERBERG, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW §3:2.2 (2014) (discussing the market rationale).
221 Id. §504(b).
occurrence evinces a degree of plausibility that the legal regime treats as sufficient to warrant protection. Recall that in the tortious interference context, courts have adopted the general position that the expectancy/prospect needs to be more than just a subjective speculation, but must instead have a reasonable possibility of being realized—both causally and contextually.\footnote{222 See supra text accompanying notes ____ - ____ .} To be sure, courts have generally disfavored mere “lost opportunities” as protectable prospects, especially when they are largely speculative and show no proof of a specific relationship.\footnote{223 See, e.g., Westside Ctr. Associates v. Safeway Stores 23, Inc., 49 Cal. Rptr. 2d 793, 803 (1996); Blank v. Kirwan, 703 P.2d 58 (Cal. 1985); Asia Inv. Co. v. Borowski, 184 Cal. Rptr. 317 (Ct. App. 1982).} All the same, they have been willing to countenance lower probability expectancies when a compelling public policy reason required such encouragement.\footnote{224 See Youst, 729 P. 2d at 300.} Transposing these to the market for a work suggests that parallels might be easy to locate.

The very protectability of the work—in terms of the subject matter and the myriad criteria for copyrightability—imply the system’s legitimate belief that the work embodies some market potential. Indeed, the very market-based rationale of the copyright system, i.e., the idea that the logic of the market induces creative production, would be amiss if protectability did not correspond to a reasonable belief that the copyright system itself wants actors to rely on.\footnote{225 See Balganesh, Foreseeability, supra note __, at 1573 (describing the idea of creators being rational utility maximizers who can be induced by market prospects, and how this motivates copyright thinking).} It is of course another matter that the system’s criteria for protectability do not reflect an abiding concern with such market potential.\footnote{226 Id. at 1581-89.} Additionally, the whole premise of copyright—traceable back to the Constitution—is that the inducement of creative works inures to the public good as a whole and “promot[es] the progress” of society.\footnote{227 U.S. CONST., Art. I, §8, Cl. 8.} At its very roots, a strong public interest pervades the very existence of copyright protection. The system is therefore set up with the idea that people should rely on it to realize this public purpose. This reality should then allow for a significant leeway in the level of certainty demanded by the law for the protection of a prospect, and readily accommodate the idea of protectability being a useful proxy.

Even if one accepts protectability as a good proxy for the prospect, the precise boundaries of that prospect will require some delineation since in theory the market for a work is boundless. Especially given that the copyright system isn’t trying to preclude all uses of the work (as patent law purports to), the market for the work—actual and prospective—will require independent specification even when reframed as a prospect. This might be achieved through the use of objective expectations (e.g., reasonable foreseeability\footnote{228 Id. at 1603-25 (advancing a proposal that copyright infringement be limited to “foreseeable copying” in order to limit the scope of exclusive rights to the expected market).}), or through a
mechanism that is roughly similar to antitrust law’s “relevant market” determination.\textsuperscript{229} In either structuring, the device would seek to ensure that the market for the work—the protected prospect—tracks the objectively reasonable expectations that a creator might have, rather than a purely subject desire for a windfall. In crucial ways, such a process of delineation would represent a significant improvement over the current system, which delegates the determination of what the protected “work” is, to the individual plaintiff instead of adopting an objective standard.\textsuperscript{230}

The recasting suggested here would enter the fray as a mechanism for tailoring the plaintiff’s claim during an infringement action, rather than as a facet of copyrightability since it relates primarily to infringement rather than validity.\textsuperscript{231} The plaintiff’s action—both by claim and remedy—would then be limited to unlawful interferences with the market that the court/law identifies as a reasonable expectation for the work at issue. The court would now have to examine whether the plaintiff’s infringement claim pertains to a market benefit that constitutes a reasonable expectancy, i.e., whether it would have likely been realized/realizable by the plaintiff absent the defendant’s interference, similar to the inquiry in tortious interference with a prospect.\textsuperscript{232} Its most direct application would likely be in relation to the reproduction and derivative works rights, where the boundaries of the market remain uncertain in practice.\textsuperscript{233} Thus an author of a computer software program would, for example, ordinarily be unable to claim infringement when an aesthetically pleasing part of that code is reproduced in an art work and framed as such, unless the author can prove that such an aesthetically-focused reproduction or derivative use of the work is a “reasonable” expectancy for literary works based on evidence of a licensing market/practice related to such uses.

In addition to taking shape from the context of the work and associated market variables, the reasonableness of the expectancy would also be influenced by the overarching public policy motivating the regime, echoing the Court’s own “recognition that some works are closer to the core of intended copyright protection than others.”\textsuperscript{234} Purely factual, or minimally original works would thus have a narrower market domain, and conversely highly original works


\textsuperscript{231} For a fuller discussion of the difference, see: Mark A. Lemley & Mark P. McKenna, Scope, 57 WM. & MARY L. REV. 2197, 2204-14 (2016).

\textsuperscript{232} DOBBS, supra note __, §638 (“The plaintiff’s prospect or economic opportunity must be one that the plaintiff would likely have captured but for the defendant’s interference.”).

\textsuperscript{233} See Paul Goldstein, Derivative Rights and Derivative Works in Copyright, 30 J. COPYRIGHT SOC’Y U.S.A. 209 (1983) (offering a market based defense for the derivative works right).

would obtain a broader scope of expectation. In the abstract, this might seem like a complex task for courts to undertake; yet in practice, it has worked rather well in tortious interference and allowed courts to eliminate purely speculative claims from the system.

2. Copying as Interference and Improper Means

Not all uses of a protected work, however monetizable, amount to copyright infringement. Ever since its origins in the eighteenth century, copyright law has consciously chosen to avoid crafting its bundle of owners’ privileges in property-like terms. Some property scholars have described this as the copyright’s choice of a governance-based liability regime over a purely exclusion-driven one. As Ben Kaplan put it many decades ago then, copyright’s set of exclusive rights focus on describing exclusive rights in “way[s] to replicate the work.” Copying therefore forms the principal form of action that copyright law treats as an actionable infringement. The Supreme Court put the point most profoundly and directly, when it emphasized that “absent copying there can be no infringement of copyright.” With the development of new technologies, this has of course changed somewhat, such that today some forms of infringement—such as a public performance or public display—do not require copying in the strictest sense. Nonetheless, for the most part, copying is essential for infringement.

Despite the centrality of copying to infringement, “not all copying, however, is copyright infringement.” This obviously complicates things further. To qualify as infringement, the copying certainly must involve an act of appropriation—i.e., of accessing a protected work and replicating its expression in whole or in part without authorization. Yet, it must do more than just be an instance of unauthorized appropriation. It needs to be “improper” or “wrongful,” something that copyright jurisprudence has struggled to make complete sense of for over five decades now. In addition to involving an act of appropriation and crossing a quantitative threshold (i.e., not be de minimis), the copying must also be qualitatively significant for it to be actionable. Ordinarily a question for the jury, this evaluative dimension of copying has proven to be difficult to distill

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236 Kaplan, supra note __, at 40.
239 Feist, 499 U.S. at 361.
241 Arnstein v. Porter, 154 F. 2d 464, 468 (2d Cir. 1946). For a fuller discussion, see: Balganesh, Normativity of Copying, supra note __, at 214-33.
down using specific normative criteria, with the result that courts (and juries) adopt a range of approaches and criteria during the determination.242

In tortious interference with a prospect, the “interference” refers to more than just the defendant’s actions that produce a particular result, namely the non-realization of the economic prospect. It instead entails a close scrutiny of the particular means employed by the defendant, which must in addition evince components that are illegal, unlawful, or unethical.243 In focusing on the propriety of the means employed for the interference, the tort can be seen as doing two things simultaneously. First, it takes attention away from a simplistic focus on result for actionability.244 Second, it then examines—on an individual basis—whether the defendant’s behavior should be objectively understood as normatively problematic in the eyes of the action at issue, i.e., tortious interference, not just in the abstract. Consider a situation where a defendant willfully misrepresents information to a party, which in turn produces the non-realization of the prospect. In a claim for tortious interference with a prospect, the law now takes attention away from the mere non-realization of the prospect; and instead focuses on whether the misrepresentation—even if/when not actionable as an independent wrong—is of the kind that tortious interference with a prospect should consider problematic. The tort thus emphasizes a means-ends convergence for actionability.

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

Even when shown to exist as a factual matter, a defendant’s copying must be “improper” to be actionable.245 While it is true that the analysis of impropriety does not scrutinize the process of copying in the way that tortious interference does, a closer examination reveals that it does purport to examine the existence of a means-ends alignment within the act of copying. What ultimately makes an act of appropriation wrongful is the assessment that it amounts to a form of free-riding on the parts of a work that produces a copy with

242 Balganesh, Normativity of Copying, supra note __, at 230-33.
243 See supra Section I.B.2.
244 This is a corollary of the basic rule that bringing about an interference is not actionable as such, unless accompanied by improper means and the appropriate intention. See Restatement (First) of Torts § 766 cmt. d (1939).
245 Arnstein, 154 F. 2d at 468.
substitutionary potential in the marketplace. In other words, the law’s use of the word “substantial” is a stand-in for whether the substitutionary potential of the copy was real, rendering the free-riding wrongful. Mere substitutive similarity without such free-riding is insufficient, as is the mere act of free-riding without the production of a substantially similar copy. True, the evaluation of the means here is not one of examining the precise mechanism/method employed by the defendant during the copying, or of its ethics as such (e.g., bad faith, or use of a purloined copy). It is nevertheless a means-assessment in that it scrutinizes how the substitutive significance was realized during the appropriation, so as to warrant characterization as a wrongful act when of the kind that copyright law should consider problematic in light of its normative goals. We then see an analytical pattern emerge here that is largely identical to that of tortious interference with a prospect. Copyright law treats an actual or imputed economic loss (consequence) from the creation of a substantially similar copy (outcome) as an actionable wrong when the result of a defendant’s appropriation of expression (action) that is seen as an evaluatively undesirable instance of free-riding on the plaintiff’s work (defect).

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

Table: Analytical Parallels in Behavior under Scrutiny

<table>
<thead>
<tr>
<th>TORTIOUS INTERFERENCE</th>
<th>SEQUENCE</th>
<th>COPYRIGHT INFRINGEMENT</th>
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<tr>
<td>Economic Loss</td>
<td>CONSEQUENCE</td>
<td>Actual or Imputed Loss</td>
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<tr>
<td>Non-realization of Prospect</td>
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<tr>
<td>Interference with Realization</td>
<td>ACTION</td>
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</tr>
<tr>
<td>Ethically Suspect Behavior</td>
<td>DEFECT</td>
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</table>

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

The plaintiff's legally protected interest is ... his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts... The question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.

*Id.* at 473.

See also *Dawson v. Himshaw Music, Inc.*, 905 F. 2d 731, 734 (4th Cir. 1990).
The parallelism revealed by the homology also sheds light on how copyright’s analysis of wrongful copying might be recast to better realize its purported means-ends alignment. To the extent that the wrongful copying analysis examines whether the defendant’s actions are improper—as a form of appropriative behavior—copyright law would do well to set out the normative variables that it uses to judge such behavior. While the delineation may be difficult to achieve in abstract, it may well be realized through specific behavioral proscriptions that guide future defendants and aid courts (and juries) in their decision-making. In other words, the wrongful copying test might be better served by breaking it down into specific process-based components that are used to judge a defendant’s actions. Examples might include: the extent to which the defendant’s copying attempts to actively conceal its appropriation, whether it copies elements other than the plaintiff’s work, the ease/difficulty involved in the appropriation at issue, and whether such appropriative behavior is commonplace in the creative sector under consideration. Considerations such as these would most overtly convert the inquiry into a means-based scrutiny. In the end, what the parallelism reveals then is that “copying” in copyright law encompasses not just the interference (action), but also the very impropriety of that action, which renders it a wrong.  

3. Volition, Sub-Conscious Copying and Intention

For quite some time now, copyright jurisprudence has remained unclear on whether copyright infringement embodies an implicit requirement of volitional conduct, for liability to attach. In other words, must a defendant’s actions have been volitional, in the sense of being under the willing control of the defendant? Much of this debate arises from the fact that copyright infringement is often been characterized as a “strict liability tort,” implying that neither intention nor negligence were pre-requisites for the imposition of liability.

Despite this, a few courts that have considered the issue, have concluded that an infringement nonetheless requires an element of “volition[al]” conduct

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247 For a recent effort in this direction, see: Patrick Goold, Unbundling the ‘Tort’ of Copyright Infringement, 106 VA. L. REV. (forthcoming 2016). Goold proposes recasting the infringement analysis into five separate categories based on the particular normative goal at stake. See id. at 38. Yet, Goold’s framework does little by way of suggesting specific criteria that the analysis needs to focus on to connect the defendant’s actions to the notion of wrongdoing that the law is attempting to impose liability for.

248 See Denicola, supra note __, at 1260 (“Several federal court decision have expressed uncertainty about the existence of a volition requirement.”) (citations omitted).

on the part of the defendant, before liability can attach.\textsuperscript{250} Thus, one court held that the operator of a Bulletin Board Service (BBS) could not be liable for infringing content uploaded by a user without some volitional conduct on the part of the operator.\textsuperscript{251} Another court put the point even more directly, noting that while an infringement “does not require that the infringer know that he is infringing or that his conduct amounts to a willful violation of the copyright owner's rights, it nonetheless requires \textit{conduct} by a person who causes in some meaningful way an infringement.”\textsuperscript{252} And this requirement of conduct, in turn, must exhibit “a nexus sufficiently close and causal to the illegal copying that one could” impute the illegality to the conduct—i.e., classify it as an infringement.\textsuperscript{253}

These observations seem to confirm that the act of infringement embodies an element of voluntary conduct on the part of the defendant.\textsuperscript{254} They imply that (i) an act, as opposed to a mere omission, is crucial for conduct to be infringing; (ii) such act must be voluntary, in the sense of being under the willing control of the defendant; and (iii) no independent \textit{sciente} requirement attaches to the idea of a volitional act. “Copying,” as the term is understood in copyright law, must therefore embody an element of volition. On closer reflection however, the idea is more complicated than it first seems.

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

\textsuperscript{251} Id. at 1372-73.
\textsuperscript{252} CoStar Group, Inc. v. LoopNet, Inc., 373 F. 3d 544, 549 (4th Cir. 2004).
\textsuperscript{253} Id. at 550.
\textsuperscript{254} In its decision in \textit{American Broadcasting Companies, Inc. v. Aereo, Inc.}, 134 S.Ct. 2498 (2014), the Supreme Court appeared to eliminate the requirement of volition altogether in relation to the public performance right, which as noted previously, does not embody the requirement of copying. The dissent, in particular, took exception to this seeming omission by the majority. \textit{Id.} at 2512-14 (Scalia, J. dissenting). Yet, a more plausible reading of \textit{Aereo} is that the majority was adopting a presumptive approach to the question of causation, based on legislative history, which treated the broadcaster as having performed the broadcast, even when the viewing was under the immediate control of the end-user. \textit{Id.} at 2506. \textit{See also} Denicola, \textit{supra} note __, at 1293-95 (discussing \textit{Aereo}).
expression in the copier’s own use. For the copier to take expression, the copier must obviously know of the existence of such expression and have access to it. Absent the copier’s knowledge of the expression being copied, it is meaningless to allege copying. Without such minimal advertence, copyright’s core idea of independent creation would prove meaningless; mere similarity would form the basis of liability, without any concession for the possibility that such similarity was realized through means other than copying. The requirement of volition underlying copyright law therefore flows analytically from the type of action at issue, i.e., copying, and its simple pre-requisite of some minimal advertence.

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

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

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256 For a discussion, see: 3 NIMMER, supra note __, §13.08.
258 Id.
259 DOBBS, supra note __, §638.
260 See, e.g., Ramona Manor Convalescent Hosp. v. Care Enterprises, 225 Cal. Rptr. 120, 126 (Ct. App. 1986), as modified on denial of reh’g (Mar. 5, 1986). The Restatement puts the point most clearly:
contrast to the requirement of intention, which they hold to a much more stringent standard. A defendant must have acted with the purpose of interfering with the prospect, or with the substantial certainty that the actions will result in such an interference. A mere intentional act that incidentally results in an interference is insufficient to meet the requirement.

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

The idea of sub-conscious confirms the idea that copying—for infringement purposes—need not be conscious, in the sense of embodying a scienter requirement. It therefore reiterates the idea that liability for copyright infringement is strict. On the issue of copying, it also supports courts drawing an inference that copying did in fact occur, from the circumstantial elements of access and similarity even when a defendant quite credibly denies having engaged in a conscious taking of expression. In other words, sub-conscious copying does not negate the reality that the putative copier had some knowledge

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261 Dobbs, supra note __, §621; Restatement (Second) of Torts § 8A (1965) (“The word ‘intent’ is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”).  
262 Imperial Ice Co. v. Rossier, 112 P.2d 631, 633 (Cal. 1941) (“If the actor had no knowledge of the existence of the contract or his actions were not intended to induce a breach, he cannot be held liable though an actual breach results from his lawful and proper acts.”).  
263 See Oxford English Dictionary (17th ed. 2016) (defining an interference was the act of “meddl[ing] with” something “without having the right to do so”).  
264 Arnstein, 154 F. 2d at 468 (“If there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying.”).
about the expression that was eventually copied, which is a constitutive dimension of the very idea of copying, when stripped down to its fundamentals.

Thus, an individual who heard some popular music in his childhood, and many years later produced his own music incorporating into it elements of what he heard in his childhood might be said to have engaged in sub-conscious copying, in so far as he was unaware of his use of the prior expression in his own music and was not consciously deploying that knowledge.\footnote{Three Boys Music Corp. v. Bolton, 212 F. 3d 477, 483-85 (9th Cir. 2000) (relying on subconscious copying to find infringement).} Yet, even here we do not deny (a) the existence of knowledge (about the protected music) in the copier at some point in time,\footnote{Id. Indeed, in the case, the court looked at the defendant’s actions and admissions to effectively infer such knowledge circumstantially, since there was no direct evidence of such prior knowledge. The defendant himself “believe he may have been copying someone else’s song” even though he didn’t remember precisely which one it was. Id. at 484. Nonetheless, the court’s reasoning was clearly premised on the fact that such knowledge did exist at a prior point in time, however remote.} or that (b) the copier deployed this knowledge in his own use. Sub-conscious copying is therefore perfectly compatible with a volition requirement underlying copying and its core idea of advertence to the protected original. Indeed, another way to understand their compatibility—drawing on tortious interference—is in the recognition that the advertence demanded by volition is internal to the very idea of copying, whereas the consciousness or sub-consciousness that the jurisprudence on that question discusses goes to the defendant’s particular state of mind accompanying the copying, i.e., it is superimposed on the constitutive advertence. Volition is constitutive of the very act of copying, whereas the question of consciousness (or lack thereof) is about the defendant’s state of mind accompanying the act. Copying can therefore be both sub-conscious and volitional at the same time.

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

4. Fair Use as Privileged Interference

A plaintiff’s entitlement in copyright law is subject to several important limitations and exceptions, of which the privilege of fair use is the best known.\footnote{See 17 U.S.C. §107-122 (2012).} Originally a creation of courts in the nineteenth century and today codified in the statute,\footnote{17 U.S.C. §107 (2012). For an overview of the origins of the doctrine, see: Matthew Sag, The Pre-History of Fair Use, 76 Brooklyn L. Rev. 1 (2011).} the doctrine of fair use exempts an act of infringement from
liability if it complies with a set of four factors, each of which is to be weighed and considered using the facts of an individual case. These factors focus on the nature and purpose of the defendant’s use of the work, the amount and substantiality of the defendant’s copying, the nature of the protected work, and the effect of the defendant’s use on the market for the protected work.  

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

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

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

271 Latman, supra note __, at 1187-89.
272 Arnstein, 154 F. 2d at 473 (“The question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners.”).
273 17 U.S.C. §107(3) (“[T]he amount and substantiality of the portion used in relation to the copyrighted work as a whole.”).
274 The origins of the doctrine are traced back to the opinion of Justice Story in Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841). Folsom developed the central tenets of fair use as part of the question whether the defendant’s copying was exempt from liability for copyright infringement, rather than as a defense. Id. at 348 (discussing the issue as one of “no infringement”). For an account of the case and its influence since, see: L. Ray Patterson, Folsom v. Marsh and its Legacy, 5 J. INTELL. PROP. 431 (1998).
acquiescing in its existing structure.\textsuperscript{276} This triggered the need to identify a separate domain for the fair use doctrine.

To avoid some of this redundancy, some courts came to treat fair use as an “affirmative defense,” meaning that the defendant alone bore the burdens of persuasion and proof on the question.\textsuperscript{277} The plaintiff—and the court—were both under no obligation to consider it, if the defendant did not bring it up. As early as 1985, the Supreme Court confirmed the idea that fair use was an affirmative defense,\textsuperscript{278} and a decade later affirmed the idea most concretely by noting that this meant that the defendant bore the “burden of demonstrating fair use.”\textsuperscript{279} This position has persisted ever since.

Yet, it sits somewhat oddly with the plain language of the copyright statute, which defines a copyright owner’s exclusive rights with the opening observation that the exclusive rights are “[s]ubject to section[] 107,” the fair use provision.\textsuperscript{280} This has caused several academic commentators to forcefully argue that fair use was intended—and had always been—a part of the plaintiff’s prima facie case rather than an affirmative defense, especially given its close connection to the elements of the infringement analysis.\textsuperscript{281} Somewhat more recently, this argument has begun to receive limited judicial validation. In one case, the Eleventh Circuit rejected the characterization of fair use as an affirmative defense, and emphasized that it should be understood as a “right,” but nonetheless retained placing the burden for it on the defendant.\textsuperscript{282} The Ninth Circuit, however, took this logic one step further in a case involving a notice and takedown provision of the Digital Millennium Copyright Act (DMCA).\textsuperscript{283}

The provision in question, §512, enables a copyright owner to require a service provider to take down from its servers any content that infringes its copyrights.\textsuperscript{284} To enforce this request, the copyright owner sends the provider a “takedown notification,” which the provider complies with in order to avoid

\begin{itemize}
    \item [276] The infringement analysis finds no mention whatsoever in the copyright statute, or in the legislative history accompanying its enactment. \textit{Id.} at 863.
    \item [278] Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 561 (1985) ("[T]he drafters resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis.").
    \item [282] Bateman v. Mnemonics, Inc., 79 F. 3d 1532, 1542 (11th Cir. 1996).
    \item [283] Lenz v. Universal Music Corp., 815 F. 3d 1145, 1152 (9th Cir. 2016).
    \item [284] 17 U.S.C. §512(c) (2012).
\end{itemize}
liability.\textsuperscript{285} In its decision, the Ninth Circuit concluded that regardless of how one characterizes fair use, i.e., as a right or as an affirmative defense, in a takedown notification, the plaintiff (copyright owner) should bear the burden of addressing it.\textsuperscript{286} Unlike the Eleventh Circuit, the Ninth Circuit emphasized the consequences of the classification over nomenclature. For now, the court’s logic is of course limited to §512; yet, as an analytical matter it applies with equal force to the standard infringement case as well. And this in turn brings us back to square one: if fair use is indeed a part of the plaintiff’s prima facie case, how should the law account for the obvious substantive redundancy in the two?

In tortious interference with a prospect (and contract), the jurisprudence has similarly oscillated between identifying aspects of the defendant’s behavior as components of the prima facie case and as better suited to an independent privilege or justification, burden for which is placed on the defendant.\textsuperscript{287} One early commentator on tortious interference thus drew a distinction between the “prima facie tort” and the question whether the invasion was “privileged or justified.”\textsuperscript{288} In this dichotomy, the rational for the division appears to lie in its allowing the court to better realize the balancing exercise involved. Historically, the distinction came about owing to the tort’s relatively insignificant focus on the improper or wrongful nature of the defendant’s behavior, in comparison to its effect, i.e., the interference.\textsuperscript{289} The plaintiff therefore merely had to show an intentional interference, and the defendant then could prove that the interference was justified or privileged.\textsuperscript{290} Today, with the law having moved to incorporating an “improper means” element in its understanding, the division makes little analytical sense. Indeed, some cases even go so far as equating improper means with “unjustified” and placing the burden for it on the plaintiff, so as to eliminate all doubt.\textsuperscript{291}

The modern trend in tortious interference cases is therefore to treat what used to be the defendant’s privileges, as a part of the prima facie case.\textsuperscript{292} All the

\textsuperscript{285} Id. §512(c)(1)(C) & §512(c)(3).
\textsuperscript{286} Lenz, 815 F. 3d 1153-54.
\textsuperscript{287} See Dobbs, supra note __, §620 (noting how under the traditional rule “the defendant could escape liability only by showing a privilege and shouldering the burden of justifying the interference”).
\textsuperscript{288} Carpenter, supra note __, at 745 (discussing “justification or privilege” in intentional interference cases).
\textsuperscript{289} See Dobbs, supra note __, §620.
\textsuperscript{290} Id.
\textsuperscript{291} Id. As Dobbs observes:

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

\textsuperscript{292} See, e.g., Advance Sign Grp., LLC v. Optec Displays, Inc., 722 F.3d 778, 786 (6th Cir. 2013) (discussing a lack of justification as part of the prima facie case); Wagenseller v. Scottsdale Mem’l Hosp., 710 P.2d
same, this does not mean that the law has come to eliminate all use of affirmative defenses. As the leading treatise notes, in the modern understanding affirmative defenses in tortious interference actions represent situations where the defendant raises a claim unrelated to the culpability of its actions under the tort. In other words, when the defendant introduces a new consideration into the equation, that was not directly related to the action (as a substantive component), it rightly remains an affirmative defense. The Texas Supreme Court’s decision in Wal-Mart Stores v. Sturges is illustrative. In Sturges, the court concluded that it made little sense to speak of an independent defense or justification if it was merely a denial of some part of the plaintiff’s case. On the other hand, when it involved something completely unrelated, such as a claim of “complete or qualified privilege,” it rightly remained a defense. Since Texas law requires the defendant’s means under tortious interference with a prospect to be independently actionable but not recoverable, the court specifically held that exemptions from such actionability that arise from independent considerations remain defenses that are to be raised by the defendant.

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

Tortious interference provides us with a way to think about the right-versus-affirmative defense debate in fair use and potentially address the redundancy concern noted earlier. To the extent that the fair use inquiry deals with considerations that are more germane to the infringement analysis, they are better dealt with in the latter. Thus, questions about the quantum and significance of the defendant’s copying—relative to the plaintiff’s work, or the originality of the plaintiff’s work, are better dealt with in the plaintiff’s prima facie case. All the same, there remain additional considerations relating to liability (for copyright infringement) that are (i) specific to the defendant, and (ii) which the defendant is obviously best-positioned to introduce evidence and information about. Introducing these considerations into the equation does more than just negate/deny the plaintiff’s case, it raises a new claim. It mimics what theorists

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1025, 1042 (Ariz. 1985) (criticizing the old approach and making it a part of the prima facie case); Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 305 (Utah 1982) (same).

293 DOBBS, supra note __, §620 n.6.

294 52 S.W.3d 711 (Tex. 2001).

295 Id. at 726-27.

296 Id.

297 Id.

298 DOBBS, supra note __, §620 n.6 (“For example, the absolute judicial privilege may be an affirmative defense available even when the plaintiff has proved wrongdoing, say by a witness’ false testimony that leads others to breach contracts with the plaintiff.”).
of the common law refer to as a “plea of avoidance” or of “confession and avoidance.” 299 It operates as an affirmative plea, in that by introducing new considerations into the liability determination, the plaintiff must now be given an opportunity to respond to it. 300

In this re-formulation, the problem becomes less about mere nomenclature, and instead about differentiating between the different categories of claims that are today collectively described as “fair use” claims, based on the underlying normative considerations at work. 301 Claims that focus entirely on the amount and significance of the use, as well as the purpose (commercial or non-commercial) to which the use is put are likely better dealt with as part of the prima facie case. 302 On the other hand, when the defendant’s use involves a narrative about types and forms of art and the introduction of new meaning from a new context so as to claim a transformation, it directly implicates free speech and First Amendment considerations, which are better balanced against copyright’s utilitarian goals independent of the prima facie case. 303 Along the spectrum will obviously arise a variety of different situations, which courts should be willing to wrestle with as a normative matter to determine whether they are better dealt with under the prima facie case or as a defense—taking a cue from how tortious interference has arrived at a workable equilibrium on the very same question. While there may be no easy (and one-size-fits-all) answers to the problem, looking to tortious interference suggests a pragmatic method for arriving at them.

* * *

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

300 Id. at 567 (discussing the introduction of “new matter”). For an application to copyright law, see: Shyamkrishna Balganesh, The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying, 125 HARV. L. REV. 1664 (2012).
302 E.g., Cambridge Univ. Press v. Patton, 769 F.3d 1232 (11th Cir. 2014) (addressing whether a university’s electronic course materials copied too much from copyrighted works or whether it was a fair use).
303 E.g., Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013) (addressing appropriation art as fair use); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (considering whether a parody is fair use).
Table: Interpretive Parallels and Reform Insights from the Homology

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III. IMPLICATIONS AND LESSONS

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

A. From Incentive-Creation to Incentive-Protection

As noted previously, the most commonly advanced justification for modern copyright law today is the utilitarian theory of creator incentives. 304 According to this account, copyright operates by inducing creators to produce creative expression through the promise of limited market exclusivity—i.e., a set of exclusive rights—in the work so created. 305 The very rationale for copyright is seen as emanating from the regime’s ability to thus induce creators into producing work, which eventually inures to the benefit of the public by enhancing social welfare. 306

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

“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”

“The purpose of copyright is to create incentives for creative effort.”

“The provision of incentives for the creation of new works is surely an essential means to advance the spread of knowledge and learning.”

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

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

Thus, a novelist who believes that her book is likely to sell several copies on the market, which she can rely (with some confidence) as accruing to her because of copyright, might indeed be induced to write the novel. But if she knows that there is no market for the book to begin with—for whatever reason—assuming a basic level of rationality, under the incentives logic she will have no reason to write the novel in the expectation of thereby accruing profits. Without a realizable market potential, copyright’s ability to induce creative expression is a simple non-starter. When the novelist assesses the demand for the potential

310 See Harper & Row, 471 U.S. at 558; Sony, 464 U.S. at 450; Golan, 132 S. Ct. at 889.
novel to be non-existent, copyright cannot artificially and independently create a market for the work.311

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

Rebecca Tushnet has made a similar point in prior work, calling into question the presumptive analytical independence of copyright and market incentives.312 While characterizing it as a “failure of incentive,” she notes that “regardless of the strength of protection, it is the likelihood of success in the market—a highly unpredictable variable, and one that [copyright] law can do little if anything to affect—that is key to whether new authors reap rewards from creating works.”313 Of course, an unpredictable incentive can be an incentive nonetheless, especially when actors are overconfident.314 While the connection between the two may not itself point to the failure of the incentive theory, it reinforces the idea that copyright’s account of incentive-creation is dependent on the market (i.e., market demand).

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

The incentive, if any, lies in the market prospect that a creator sees as a potential source of returns when the work is created and marketable. Copyright recognizes that this incentive is a low probability one if unfettered free-riding (copying) is allowed, and therefore generates a structure of rights/liability to render the prospect easier to realize, i.e., it raises the probability of its realization

311 Another way of putting the point is to note that if copyright is about curing a market failure, a market failure presumptively requires the existence of a market to begin with, which must then fail. See generally Glynn S. Lunney, Jr., Fair Use and Market Failure: Sony Revisited, 82 B.U. L. Rev. 975, 991-96 (2002).
313 Id. at 518.
by the creator. It thus takes a major component of the uncertainty surrounding
the market prospect—relating to its appropriability, based on free-riding—
altogether out of the equation. This readjustment also confirms an insight made
famous by Ed Kitch many decades ago within the patent context, about the
ability of prospects to act as incentives for risky activity. 315

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

B. The Relationality of Right and Liability

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

Yet, the reality remains that each of copyright’s basic rights relates to
potential behavior (on the part of a potential defendant) that requires elucidation
on its own. In other words, each of the rights works by rendering such behavior
within the exclusive domain of the author to engage in or authorize. The
exclusive right to reproduce, copyright’s most fundamental right, is contingent
on an understanding of reproduction. It grants the author the exclusive to engage
in such behavior. However, without a clear understanding of what exactly such
behavior entails, it remains impossible to know what the author has an exclusive
right to. And for this, copyright looks to its understanding of “copying,”
developed as part of the standard infringement analysis. 319 So it is with the

(developing the prospect theory). For a recent elaboration, see: John F. Duffy, Rethinking the Prospect
316 Diane L. Zimmerman, Copyrights as Incentives: Did We Just Imagine That?, 12 THEORETICAL
INQUIRIES IN THE LAW 1 (2011) (noting the absence of any empirical validation of this theory).
317 The origins of this can be traced back to the Statute of Anne, which spoke of the “sole right and liberty”
of printing being granted to authors. 8 Anne c. 19 s. 2 (1710). This has continued for nearly two centuries
now. Both the 1909 and 1976 copyright statutes in the U.S. phrased their grant in terms of “exclusive
318 See 17 U.S.C. §106 (delineating each of the author’s individual rights); Copyright Act of 1909, 35 Stat.
1075, s. 1 (also delineating these rights).
319 OSTERBERG, supra note __, §1:1. For a detailed discussion of this origins of this analysis, see: Balganesh,
Questionable Origins, supra note __.
exclusive right to publicly perform the work too. Absent an understanding of a public performance that is unauthorized and potentially infringing, it is impossible to know what goes into the author’s exclusive right to publicly perform the work, or to authorize such a performance.

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

In Hohfeldian terms, copyright’s exclusive rights are in reality privileges rather than rights. As distinguished from a right, a privilege entitles its holder to engage in an action without anyone else having the ability to legally prevent such action. Its correlative is therefore a “no-right” in that no one has a legal claim to prevent its exercise. Perhaps most importantly though, the opposite of a privilege is a “duty,” and as Hohfeld emphasizes, the duty takes the “same content or tenor” as the privilege. Thus, a privilege to enter is the negation of the duty to stay off. The exclusive privilege to copy is therefore the opposite of the duty to not engage in such copying, but both take common color from the idea of copying, i.e., the behavior that is both privileged and proscribed by the directive.

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

Copyright law would do well to acknowledge and admit the existence of a similar relationality between its conceptions of right and liability (or

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320 17 U.S.C. §106(4) (granting the author the exclusive right to “perform the copyrighted work publicly”).
323 Id. at 32-33.
324 Id. at 33.
325 Id.
326 DOBBS ET AL., supra note __, § 638.
entitlement and wrongdoing). As noted previously, in tortious interference this relationality produces an inverse correlation in the plaintiff’s case: the greater the wrongdoing, the more willing are courts to find a protectable prospect and vice-versa. 327 Something similar already exists within copyright jurisprudence as well, which is rarely acknowledged. Works accorded weak—or “thin”—protection, owing to their minimal originality, are saddled with a higher threshold of copying to establish actionable wrongdoing. 328 Conversely, highly original works obtain thick protection, and courts require a lower standard to establish infringement. 329 In this variation, we have what is in effect a relational structure between the author’s “right” and the law’s measure of wrongdoing.

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

C. Trusting Courts

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

Courts therefore unhesitatingly engaged copyright policy at the retail level—as opposed to the wholesale/systemic level—asking whether particular

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327 See supra discussion accompanying notes 86-88.

328 Feist Pubs, Inc. v. Rural Tel. Service Co., 499 U.S. 340, 349 (1991) (“[C]opyright in a factual compilation is thin.”); Satava v. Lowry, 323 F. 3d 805, 812 (9th Cir. 2003) (“Satava possesses a thin copyright that protects against only virtually identical copying.”).


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

331 Pierre N. Leval, An Assembly of Idiots, 34 CONN. L. REV. 1049, 1061-62 (2002) (noting how “[c]ourts are regarded with suspicion when they interpret statutes, as if they were out to thwart the intentions of legislatures”).
goals were being furthered in individual cases and shaping the parties’ entitlements accordingly. The mid-twentieth century opinions of Judge Learned Hand represent a perfect example of this phenomenon at work. Working through copyright’s competing considerations and ideals, he developed nuanced techniques for delineating entitlements in different categories of copyrighted works. Only some of these have obtained the level of notoriety and admiration that they deserve, such as the abstractions formula of Nichols. Others, such as his idea of relying on the melody of musical works to identify their originality for infringement purposes—a method he called the “comparative method,” or his idea of the “embellishments” approach to delineating the scope of protection in a derivative work vis-à-vis the material that it is based on, are less well-known and rarely discussed.

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

332 Nichols v. Universal Pict. Corp., 45 F. 2d 119, 121 (2d Cir. 1930).
333 Hein v. Harris, 175 F. 875, 875-6 (C.C.S.D.N.Y. 1910), aff’d, 183 F. 107 (2d Cir. 1910).
335 See Leval, supra note __, at 1062 (“Rather than passing brief statutes and relying on courts to find sensible solutions to emerging problems of interpretation, legislatures now write statutes hundreds of pages long, which seek to answer from the outset every problem that can conceivably arise.”).
336 Id. (“Interpretation must hew as closely as possible to a statute's most literal terms, no matter how senseless such a reading may be.”).
337 For a useful discussion, see: 3 Nimmer, supra note __, §12.10. Nimmer notes that even when there are obvious areas that a judge—as opposed to a jury—is better positioned to decide, to the extent that the determination involves disputed facts, a jury needs to be empaneled. Id. §12.10[B].
339 4 Nimmer, supra note __, §13.03[B][2][a] (discussing the exclusion of ideas during the infringement analysis); NEC Corp. v. Intel Corp., No. C-84-20799-WPG, 1989 WL 67434, at *3 (N.D. Cal. Feb. 6, 1989); ICW Investments, Inc. v. Novelty, Inc., 482 F.3d 910, 917 (7th Cir. 2007).
340 4 Nimmer, supra note __, §13.03[B][2][e] (discussing the move towards treating merger as a part of the infringement analysis and describing it as the “better view”); Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1082 (9th Cir. 2000); Kregos v. Associated Press, 937 F. 2d 700, 705 (2d Cir. 1991).
341 See 4 Nimmer, supra note __, §13.03[B][2][b].
have ceased to be immune too from the jury. Most recently, the first ever jury trial on fair use took place.\textsuperscript{342} This growing insistence on juries for core copyright questions has quite understandably produced a good degree of reluctance among district courts to deal with complicated entitlement-delineation questions in copyright on their own, for obvious fear of reversal on appeal. In the end, the real loser has been copyright jurisprudence.

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

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

To be sure, scholars have previously proposed such retail level tailoring in different contexts,\textsuperscript{343} and a few courts have even attempted to instantiate such mechanisms in individual cases.\textsuperscript{344} These proposals have for the most part fallen on deaf ears, with recent discussions of copyright reform largely limiting themselves to the role of Congress.\textsuperscript{345} The solution may therefore well require a more overt statutory affirmation of the legitimacy, utility, and effectiveness of such judicial tailoring by courts (within the copyright statute), relying on the historical successes of the common law in this endeavor. Until this occurs, one suspects that the reform—if any—will have to occur incrementally.

\textsuperscript{342} Nick Wingfield & Quentin Hardy, Google Prevails as Jury Rebuffs Oracle in Code Copyright Case, N.Y. TIMES, May 26, 2016, http://www.nytimes.com/2016/05/27/technology/google-oracle-coppyright-code.html?_r=0.

\textsuperscript{343} See, e.g., Stadler, supra note __, at 942; Balganesh, Foreseeability, supra note __, at 1604; Chafee, supra note __, at 510 (noting how “protection should be shaped to do the most good”).

\textsuperscript{344} The idea of “thin” protection for works that embody significant unprotected content is a good example here. This was entirely a creation of the courts, with no guidance from the statute. The Supreme Court eventually affirmed the idea too. See Balganesh, Normativity, supra note __, at 221 (discussing the idea of copyright entitlement “thickness”).

\textsuperscript{345} See, e.g., Maria Pallante, The Next Great Copyright Act, 36 COLUM. J.L. & ARTS 315, 322-23 (2013) (suggesting that courts are “reflecting the wear and tear of the [copyright] statute” and proposing a comprehensive revision).
COPYRIGHT AS TORTIOUS INTERFERENCE WITH A PROSPECT

CONCLUSION

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

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

While tortious interference with a prospect has been in existence for quite some time now, it has received surprisingly little scholarly analysis. All the same, it remains a fairly robust stand-alone cause of action within the common law. Its fairly unique doctrinal and conceptual structure, and the plurality of goals that it embodies, make it well-suited as a lens through which to analyze different aspects of copyright law. Viewing copyright through tortious interference with a prospect sheds important light on a variety of problems within copyright jurisprudence and suggest easy fixes to them. It allows copyright’s entitlement structure to more fully capture its probabilistic nature and focus on the centrality of the potential market for the work, injects some analytical sense into the infringement analysis, enables the notion of volition to have a firmer grounding in determining liability for infringement, and suggests a workable means of differentiating between the plaintiff’s prima facie and a defendant’s fair use defense. Beyond these doctrinal lessons, it also recommends important theoretical and institutional implications for our thinking about the copyright entitlement and courts’ approach to it.

Perhaps more so than anything else though, the homology showcases the perils of copyright exceptionalism, the belief that copyright law is best understood as distinct from other areas of the law. While copyright law has been—and can be—fruitfully understood through the use of cognate disciplines in the social sciences and the humanities, it is only rarely that courts and policy-makers look to other areas of law for insights, both analytical and normative. The homology to tortious interference with a prospect shows us that copyright law can indeed glean invaluable and underappreciated operational insights from
such inter-doctrinal comparisons, in the recognition that the law is indeed “a seamless web”\textsuperscript{346}.