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Copyright As Tort Law's Mirror Image: "Harms," "Benefits," and the Uses and Limits of Analogy

Wendy J. Gordon*

I am truly delighted to be in Sacramento at McGeorge School of Law today. I say that not simply because of the charms of the campus and the hospitality of the deans and faculty. More importantly, McGeorge is a school where the skill of communicating ideas has been burnished like a fine necklace. It is quite an honor to be placed among your teachers, even for these few days.

The *McGeorge Law Review* is republishing an article of mine entitled *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*,¹ to which this talk is an introduction. The talk shares with the article the view that one can learn much about traditional common law doctrines on the one hand, and about statutory intellectual property on the other, by comparing the doctrines and logic of the two regimes.

However, in *Of Harms and Benefits*, my main concern had been to explain differences between the common law of restitution and the statutory law of intellectual property. Today's talk does not ignore those issues, but its primary focus is different: it focuses on the law of personal injury, and how tort law² compares with copyright law. I suggest some ways in which the law of personal injury and copyright law function as reversed but parallel mirror images of each other. In this talk, I shall also suggest, much more tentatively, some ways in which non-parallel treatment might be desirable.

One of my goals is to help students unfamiliar with copyright law to understand its underlying dynamics. Features of copyright law that may seem strange (such as term limits) actually implement goals whose operation we see every day in more familiar doctrines, such as tort law. Therefore, I shall begin by employing the neoclassical economic understanding of personal injury law³ to explain why, from a functional perspective, a legislature might find it a good idea to give authors a right to recover against copiers.⁴

* Copyright © 2003 by Wendy J. Gordon. Photocopies for class use are permitted. Wendy Gordon is Professor of Law and Paul J. Liacos Scholar in Law at Boston University School of Law. The article is dedicated to Allan Axelrod. I thank Bob Bone, Peter Goldberger, Alon Harel, Brandy Karl, Fred Moses, and David Nimmer for their comments, and, most of all, I thank the McGeorge community for its stimulating suggestions and generous discussions.

1. Wendy J. Gordon, *Of Harms and Benefits; Torts, Restitution, and Intellectual Property*, 21 J. LEGAL STUD., 449 (1982), reprinted *infra* at 541.

2. Let me stipulate that the word "torts" in the title of this article, and in the following discussion, functions as shorthand for the kinds of personal injury torts that are studied by first-year law students. As a formal matter, admittedly, the legal category "torts" is in fact larger: it includes virtually all non-contractual rights to recover for harms done or for invasion of right. (In fact, infringement of copyright is a tort.)

3. The canonical source here is GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (Yale U. Press 1970).

4. Economics is not the only possible source of copyright law. Authors have some justice-based claims as well. See Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1353-54, 1446-69 (1989). Nevertheless, current law gives copyright owners a scope and length of rights much in excess of what Lockean and related notions of

Central to the economic argument is the following notion: privately motivated decisions will also serve social ends if the decision-maker has sufficient reason to take social effects into account. As you might imagine, the interesting questions center not around this notion itself—it is virtually tautological, after all, to say that someone will take other people's interests into account if they have sufficient reason to do so. The interesting questions, rather, involve defining what those sufficient reasons might be.

Economics focuses on money as the incentive: neoclassical economics asks what goes into a decision-maker's calculus of self-interest. Will that calculus include an appropriate consideration of the costs and benefits that her decision will trigger for *other* persons,⁵ not just herself? If the prices the individual expects to pay (and the profits she expects to reap) are equal to society's costs (and benefits), then choices an individual makes to serve her own interest will also serve society's interests.

However, as we know, private and social effects may diverge widely. Economists use the term "externality" to identify the divergence. Lawyers too have come to use the concept of externality to help describe why some privately motivated decisions fail to serve social ends.

An externality is basically an effect that a decision-maker is not taking into account. It refers to some gain or loss that her actions *could* bring into being—but to which she is indifferent because it does not affect her personally. A driver who speeds through an intersection presumably is treating the risk to the pedestrians as an externality.

Conversely, an effect is said to become "internal" to an actor when something brings the impact of what she does home to bear on her. When effects are internal, private and social costs come into alignment, and the private decision-maker will reach decisions that serve society as well as herself. Thus, for example, negligence law tells the driver that she will have to pay if her speeding causes injury to a pedestrian. It thus internalizes the risks that her speeding imposes on others, giving her a private incentive to balance those risks against the thrills and benefits of arriving quickly at her destination. As a result, she may drive more carefully. A similar possibility of external costs arises as to a factory owner whose profitable activity causes pollution.

What tort and nuisance law are supposedly about is undoing the actor's indifference to such negative externalities—you might say it internalizes the externalities to the actor. Tort law can make the person who drives carelessly or the factory owner who pollutes take into account the costs she imposes on others. The internalization occurs because, if the actor drives too or pollutes too much, those injured can sue, and the actor will have to pay to cover the injuries she has caused. The victim's injuries become the actor's losses. Tort law, of the familiar kind from first-year law classes, is about internalizing negative externalities.

justice would support. See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1535-40, 1565-1609 (1993).

5. As is further discussed below, it is usually not necessary or desirable for *all* effects to be internalized to one actor.

What is copyright? It allows authors to control certain uses that other people make of their work.⁶ Through this device, copyright seeks to ensure that the benefits others reap from works of authorship will not be “external” to authors’ decisions to invest in creativity. In many ways, therefore, copyright is a mirror image of ordinary tort law. As tort law internalizes negative externalities to make an actor reduce or stop his harm-causing activity, copyright law internalizes positive externalities to make an actor increase or continue his beneficial activity.

Instead of worrying about people driving too fast or people pushing their factories beyond the capacity of filtration systems, the goal in copyright arises from a concern that people are not creating *enough*. Just as internalizing negative externalities can slow damaging behavior, internalizing positive externalities can increase productive behavior. Copyright law allows people to capture benefits they generate. In copyright law, “carrots” are given to plaintiffs to make them produce more creative works. In tort law, “sticks” are imposed on defendants to make them engage less in destructive behavior. In this way, torts and copyright mirror each other, operating in ways that are parallel but reversed.

You may object to this notion of reversal on the ground that a copyright defendant, like a tort defendant, will feel the law as a “stick” rather than a “carrot”—after all, both defendants have to pay if successfully sued. But from an economic perspective, the focus in copyright policy is not on discouraging the defendant. A copyist who publishes a cheap but unauthorized version of a copyright owner’s book is not necessarily imposing a social cost. In fact, the inexpensive version of the book reduces the public’s cost of obtaining information, and thus speeds dissemination. Standing alone, copying is a social good. What makes copying bad, from an allocative perspective, is its potential for interfering with the copyright owner’s incentives, its impact on the flow of rewards that would otherwise flow back to the author or her assignee and induce the author to continue investing in creative effort.

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6. The core of copyright appears at 17 U.S.C.A. section 106. The section provides that: Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
- (1) to reproduce the copyrighted work in copies or phonorecords;
 - (2) to prepare derivative works based upon the copyrighted work;
 - (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
 - (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
 - (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
 - (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C.A. § 106 (West 2003).

So far we have identified several mirror-like reversals:

- Personal injury law focuses on deterring *harms* that are not cost-justified, while copyright law focuses on encouraging *benefits* that are worth more to the public than they cost;
- Personal injury law focuses its incentives on changing the behavior of *defendants* (injurers) while copyright law focuses its incentives on changing the behavior of *plaintiffs* (copyright owners);
- Personal injury law primarily uses *sticks* while copyright primarily uses *carrots*.

Enough of reversals; what of the underlying parallels between tort and copyright? Negligence law here, too, has several important lessons for students of copyright. One involves factual causation; a second involves “relative fault”; and a third involves foreseeability.

Consider first the so-called “copying” element in the cause of action for copyright infringement. Its origins lie in the tort notion of factual causation.

In personal injury law, the plaintiff must ordinarily prove that the defendant’s behavior in fact contributed to the harm. The plaintiff will lose if the jury thinks the harm would have occurred even if the defendant’s bad act had never occurred. For example, consider this classic example: someone drowns by falling off a tour boat. His estate sues on the basis that the boat’s life preservers had been negligently under-inflated. If no one saw the passenger fall off the boat—if there was no one to throw him a life preserver—then the lack of air in the life preservers is irrelevant. Poor maintenance of life preservers is also irrelevant if someone saw the passenger fall and threw him a life preserver, but the passenger had already sunk like a stone. In either case, the defendant tour-boat company will not be held liable for faulty maintenance of its safety equipment. In such cases, there is said to be no “cause-in-fact,” no “but-for” connection between the defendant’s behavior and the plaintiff’s harm.

The parallel to “but-for cause” in copyright law is the notion of “copying”: in a copyright infringement suit, the plaintiff author must prove that the defendant in fact made use of the plaintiff’s work.⁷ If the defendant had no access to the plaintiff’s work, that would be like the negligence example where the under-inflated life preserver was never thrown: factual connection is lacking. Similarly, if the copyright defendant had access to the plaintiff’s work but did not use it, that is like an under-inflated preserver being thrown but arriving after the victim had sunk: again, the factual connection between the plaintiff and the defendant is lacking.

7. Note that the causation element is *separate* from the wrongfulness element. In negligence law, the plaintiff must both show causation and carelessness. In a copyright action, similarly, the plaintiff must show both copying *and* that enough expression was copied to constitute a wrongful appropriation. See *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), *cert. denied* 330 U.S. 851 (1947) (stating that “[i]f copying is established, [in a copyright infringement action] then only does there arise the second issue, that of illicit copying (unlawful appropriation).”). Too often, students and even judges conflate the question of copying with the question of whether the defendant copied so much as to be wrongful.

In short, the plaintiff will lose if the jury thinks the defendant's work would have looked and sounded the same even if the plaintiff's work had not existed. Without the factual contribution of the plaintiff's work to the defendant's benefit, the cause of action for copyright infringement fails.⁸

Personal injury law can also help us understand why copyright law has limits, such as the rule that only "expression" and not "ideas" can be controlled by the copyright owner.⁹ Tort law, too, does not order complete internalization. Just as "It takes two to tort"¹⁰ (victim and injurer), it also takes two to make a work of art valuable (author and reader). In fact, to maximize value from a creative work routinely requires even more participants, such as interpreters, critics, and follow-on innovators. Too much control by any one party (like putting all responsibility on one party) can mute the incentives that other parties need.

The reality of interconnection thus creates a central policy problem for both copyright and tort law. Consider the role of relative fault in tort law. If all damages are internalized to defendants, potential plaintiffs might grow careless. The law seeks to avoid such moral hazards by use of doctrines such as contributory negligence and, more recently, comparative negligence. These defenses, along with the requirement that plaintiffs be able to prove that the defendant was at fault,¹¹ assure that significant incentives remain on the potential victims to take care of themselves.

Just as a plaintiff's fault can reduce or eliminate his ability to collect damages in personal injury cases, in copyright there can be allocation between the parties. An infringer need not pay to a plaintiff all the profits that the defendant has reaped by adapting the plaintiff's work and selling it to a new audience. The amount he must pay can be reduced by the extent to which the defendant's success can be attributed to his own creativity and investments (i.e., what he has not borrowed from the plaintiff).¹² Just as negligence law recognizes that *both* driver and pedestrian can contribute to a harm occurring, copyright law recognizes that beneficial contributions can be made by *both* an initial author and a second author

8. Under patent law, even a coincidental replication by an independent inventor can infringe. Thus, unlike copyright law, patent law has no requirement of "cause-in-fact." Nevertheless, patent like copyright seeks to encourage creative activity by assuring that some of an invention's proceeds will flow to someone who has invested in its creation.

9. 17 U.S.C.A. § 102(b) (West 2003).

10. I first heard this apt phrase from Dean Saul Levmore.

11. Also note that it is primarily in areas where plaintiffs cannot effectively guard themselves (such as product liability law) that plaintiffs do not have course to prove that a defendant was at fault.

12. See 17 U.S.C.A. § 504(b) (West 1996).

The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

Id. As an alternative, the plaintiff has the option of claiming statutory damages. See *id.* § 504(c).

who “stands on the shoulders” of the first. To internalize everything to one party creates a new set of externalities for the other party.¹³

Let us consider one final parallel. According to the U.S. Constitution, Congress may only give authors rights that last a “limited [t]ime[.]”¹⁴ Copyrights, therefore, have a limited duration. Some observers see this as an anomaly: they ask, why should an intellectual property right expire when a “fee simple absolute” in land can last forever? The tort doctrines of proximate cause and foreseeability can help us understand the answer.

Begin with the following negligence hypothetical. You are walking down a hallway when a friend negligently trips you. You fall, rise, brush yourself off, yell at your friend to be more careful the next time, and graciously accept your friend's abject apology. Unhurt but delayed, you continue on your way. You reach your car five minutes later than you otherwise would have. As you begin to drive out of the parking space, a rotting tree falls on your car, breaking your arm. Had you arrived five minutes earlier, the tree would have missed you. Can you sue your friend for the broken arm, since her negligence is indeed a cause-in-fact of your injuries? You may sue your friend if you wish—but you cannot win.

The nomenclature describing the reasons why you would lose will vary. Some courts will say that your friend's tripping you was not a proximate cause of you falling victim to a tree. Other courts will say that, from the perspective of a reasonable person standing in your friend's shoes back in the hallway, the danger from the tree was not foreseeable. Yet other courts will say that your friend had no duty to protect you from falling trees. Whatever the language, the courts are saying the same thing: imposing a duty on individuals to be careful to avoid tripping each other will have no impact on reducing the number of people injured in cars by falling trees. Having the law force an internalization that has no impact is wasteful.

Now turn to copyright, and the constitutionally-mandated command that copyrights can only last for limited times. In two hundred years, all of today's copyrights will have expired. That is, an heir of a copyright owner who sues for nonconsensual copying two hundred years from now will lose. Why? The logic is the same as in the tort case of no foreseeability. Imposing a duty on a copyist to pay royalties two hundred years after a book or movie is created will have no impact on an author's willingness to work hard today. Given discount rates and the difficulties of predicting that far in the future, the expectation of current benefit from such a far-distant right is minuscule, virtually unforeseeable.¹⁵ To impose liability would be to raise the price of books above the physical cost of manufacturing and

13. If the two can bargain, however, then costs and benefits have the potential of being internal to *both* parties. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Nevertheless, where transaction costs or other difficulties impede bargaining, a legal duty that puts all costs or benefits on one party leaves the other with inadequate incentives to engage in efforts that are socially desirable.

14. U.S. CONST. art. I, § 8, cl. 8.

15. The current copyright term (which lasts generally for the life of the author plus seventy years) is already too long for appropriate incentives. See Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOYOLA L.A. L. REV. 159, 182-97 (2002), and sources cited therein. Nevertheless, the Supreme Court recently upheld the long term against Constitutional attack. *Eldred v. Ashcroft*, U.S., 123 S.Ct. 1505 (2003).

distributing them for no incentive payoff. This not only wastes administrative costs (as imposing liability for unforeseeable harms also would do), but also imposes a deadweight loss on society. So plaintiff loses.

In the law of personal injury, a defendant need not pay for a harm unforeseeably (and thus not proximately) caused. This rule makes sense because, if this were not the rule, the court would be expending its resources to make the defendant pay when the obligation would have no incentive effect. In the law of copyright, copyright terms expire. If that were not the rule and copyrights were perpetual, copyright law would make defendants pay at times so far distant that the prospect of such payment would not add anything to the original author's incentives to create new works, but would decrease the dissemination of information.

I do not want to overstate the parallels between tort law and copyright. But the general outline is clear: tort law internalizes bad effects to decrease carelessness, and copyright law internalizes good effects to increase productivity.

There is one last challenge I suspect some of you are thinking about. I have argued essentially that tort law expresses a sort of spirit of the common law, a spirit which says we want to internalize externalities. We want to internalize both good externalities, like the benefits of creating, and bad externalities like the costs of carelessness. If that is my thesis, you might object that the purported common-law preference for internalization does not square with the rule of law in restitution.

Restitution is the common law of benefits. One basic rule of restitution is that, if someone provides a service for another without a prior arrangement, the benefactor cannot sue for payment after the fact. It is called the "officious intermeddler rule." Assume you go away for vacation, and when you come home, you find that you have a beautiful new coat of paint on your house. You did not order it. Do you have to pay for it? No, says the law. It is true that an intermeddler gave you a benefit. Your house is now worth a little more than it was before. But you do not have to pay; the person who painted your house without a contract is an intermeddler without the right to sue.

Is there an inconsistency between copyright and this common law doctrine that cannot be explained? The challenge is that, in restitution law, people who volunteer to give other people benefits cannot use the law to force compensation after the fact. The painter must go to the homeowner and say, *in advance*, "Would you like your house painted, sir?" He needs a contract. Without a contract, the house painter or other intermeddler cannot require payment. Yet copyright law adopts an opposite approach.

In intellectual property law, if an author or inventor makes something that is beneficial and voluntarily sends it out into the stream of commerce, he is not considered an officious intermeddler. The author can use copyright law to stop people from making copies even though he has no contractual agreement with those whom he is stopping from making a productive use of the original work. The law gives him leverage to extract payment that it does not give to the house painter. This is one of the puzzles that *Of Harms and Benefits* seeks to solve. The article suggests that the answer lies in encouraging markets to form. In the law of

restitution, a rule that benefactors cannot sue encourages contracts. In copyright law, contracts are encouraged by a rule that benefactors *can* sue. In each instance, the law adopts the rule that encourages internalization by contract.

We see the difference in the example just canvassed. The burden on the house painter to make a contract is small. If he wants to be paid, he goes up to you and says, "Would you like your house painted?" By contrast, the burden on the author to obtain payment without a legal right would be much higher. Too many potential customers may refuse to pay, free-riding in the hope that others will pay the author and that the material will become available for free. As a result, it may not become available at all. If, however, the author has a legal right to stop others from copying, an individual publisher can come to the copyright owner and, with efficacy, bargain for a right to print. Strategic behavior is far less demanding and transaction costs are much lower when an author has rights than when she does not.

In summary, I think we can learn a great deal from comparing copyright law and its common law brethren, torts and restitution. By comparing copyright with torts, we can see how the internalization process works, and some of its limits. By comparing copyright law with the law of restitution, we can see how differential behavioral patterns can give rise to different legal rules.

Nevertheless, the analogies have limits. Personal injury law and copyright law should not be perfectly symmetrical. A generation of behavioral research suggests that people care about *context*.¹⁶ Harms and benefits do not exist in the abstract as numbers differentiated only by a plus and minus sign. The analysis in *Of Harms and Benefits* should not be taken to indicate that the two must be treated the same for all purposes.

As Ronald Coase emphasized in *The Problem of Social Cost*, legal duties are not the only way to achieve internalization.¹⁷ Morality, empathy, propinquity and payment all play important roles in creating human incentives, and they clearly will play differing roles in different circumstances. Even among copyright holders, motivations and industry patterns differ. It is hardly likely that authors and harm-causers need precisely the same kind of legal interventions.

Perhaps most importantly, the exchange of non-compensated benefits breeds community in a way that the exchange of non-compensated harms might not: gratitude is often an easier emotion to achieve than forgiveness.¹⁸ In many ways, then, using the law to internalize harm is *not* an appropriate precedent for using law to internalize benefit. The particular needs of creative communities and those they serve present a complex research agenda for the future.

16. See, e.g., CHOICES, VALUES, AND FRAMES (Daniel Kahneman & Amos Tversky eds., Cambridge U. Press 2000); see also Symposium: *Empirical Legal Realism: A New Social Scientific Assessment of Law and Human Behavior*, 97 NW. U. L. REV. 1075 (2003).

17. Coase, *supra* note 13.

18. For my preliminary observations on this topic, see Wendy J. Gordon, *Intellectual Property*, in OXFORD HANDBOOK OF LEGAL STUDIES 617, at 643-45 (Peter Cane & Mark Tushnet, eds., Oxford U. Press 2003).