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## THE OBLIGATORY STRUCTURE OF COPYRIGHT LAW: UNBUNDLING THE WRONG OF COPYING

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### INTRODUCTION

Courts and scholars today understand and discuss the institution of copyright in wholly instrumental terms.<sup>1</sup> Indeed, given the forms of analysis that they routinely employ, one might be forgiven for thinking that copyright is nothing more than a comprehensive government-administered scheme for encouraging the production of creative expression and is therefore quite legitimately the subject matter of public law.<sup>2</sup> While this instrumental focus may have the beneficial effect of limiting copyright's unending expansion, it also serves as a source of distraction. It directs attention away from the reality that copyright is fundamentally a creation of the law and is thus endowed with a uniquely legal normativity that instrumental accounts find difficult to capture.<sup>3</sup> In so doing, it also glosses over the rather crucial fact that copyright law's basic structure is and indeed always has been that of private law.

In this Article, I argue that taking copyright's legal architecture seriously reveals a matrix of core private law concepts and ideas that are in turn a rich and underappreciated source of normativity for the institution. In the process, I make three interrelated claims. First, copyright theories and analyses ought to pay greater attention to the analytical structure of copyright's entitlement framework and the ways in

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<sup>1</sup> See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (observing that the Copyright and Patent Clause of the Constitution "is a means by which an important public purpose may be achieved" and "is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired"); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 85–123 (2003) (applying a formal economic model of copyright law to individual copyright law doctrines).

<sup>2</sup> See generally Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87 (2004) (describing the regulatory turn in copyright law).

<sup>3</sup> For leading accounts on the idea of legal normativity, see Lewis A. Kornhauser, *The Normativity of Law*, 1 AM. L. & ECON. REV. 3 (1999) and Stephen A. Smith, *The Normativity of Private Law*, 31 O.J.L.S. 215 (2011).

which this structure seeks to operate in the real world. Discussions of copyright law would do well to appreciate that the institution's exclusive rights framework functions almost entirely through its creation of an obligation not to copy original expression. Second, copyright can usefully be reconceptualized as revolving around the "wrong of copying," which originates in the right-duty structure that copyright creates. Reorienting discussions along these lines allows for a more direct focus on *why* copyright treats copying as a wrong, *what* actions constitute the wrong, and *which* plural values can fruitfully coexist within its private law structure. Third, focusing on copyright's internal logic need not come at the cost of its instrumentalism. To the contrary, such an approach entails mediating the institution's instrumentalism through its private law structure on a nuanced, pragmatic basis.

The idea of legal normativity is traced back to the seminal work of Professor H.L.A. Hart, who argues that the law always operates by imposing "obligations" on individuals.<sup>4</sup> Individuals, in turn, comply with these obligations not merely because of the consequences of compliance or noncompliance — that is, the rewards or sanctions that are likely to follow from obedience or disobedience — but because they have internalized the rule and accepted it, owing to its origins in the law. Hart terms this approach to understanding a legal rule the "internal point of view," and contrasts it with other approaches that neglect this practical attitude of rule acceptance.<sup>5</sup>

Viewing copyright from this internal point of view entails two important analytical moves. First, it entails trying to understand copyright in terms of its obligatory or duty-imposing directives, which are vested with independent normative significance. Commonly thought of entirely in terms of "rights" owing to its structural similarity to property law, copyright law is rarely, if ever, conceptualized as a duty-imposing system. When scholars do make mention of copyright's duty in their analyses, they do so without crediting this duty with any independent functional significance.<sup>6</sup> Ironically, though, absent the "duty not to copy" that copyright creates as an obligatory directive, copyright's entire structure of exclusive rights becomes functionally vacuous. Second, an internal approach to copyright law entails accepting

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<sup>4</sup> H.L.A. HART, *THE CONCEPT OF LAW* 79–88 (1961).

<sup>5</sup> *Id.* at 86–88 (internal quotation marks omitted); see also Scott J. Shapiro, *What Is the Internal Point of View?*, 75 *FORDHAM L. REV.* 1157, 1159–61 (2006) (offering a detailed taxonomy of the forms of analysis with which Hart contrasts the internal point of view).

<sup>6</sup> See generally, e.g., Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 *STAN. L. REV.* 1343 (1989); Karla M. O'Regan, *Downloading Personhood: A Hegelian Theory of Copyright Law*, 7 *CAN. J.L. & TECH.* 1 (2009); Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 *CORNELL L. REV.* 463 (2010); Lior Zemer, *What Copyright Is: Time to Remember the Basics*, 4 *BUFF. INTEL. PROP. L.J.* 54 (2006).

that copyright's legal framework — as an obligatory system — speaks most directly to potential copiers rather than to creators. Reframing copyright in terms of the “wrong of copying” that its right-duty structure anticipates provides a more useful basis for tying it to the internal point of view.

It bears emphasizing that in attempting to reorient our understanding of copyright law to focus on the duty that it imposes on actors (that is, potential copiers) and on the way in which that duty renders the institution's very structure of rights operational, my argument does not suggest that the idea of the “duty not to copy” needs to replace any and all discussion of “exclusive rights” in copyright law. I intend instead to suggest that while the two always go together, the systematic neglect of copyright's “duties” in copyright jurisprudence and scholarship has over time skewed our understanding of copyright's basic structure as an area of law endowed with an obligatory dimension — that is, where compliance is required and not merely optional.<sup>7</sup> In the process, copyright's very origins as a creation of the law, and as a branch of private law, have come to be neglected in discussions of the subject.

Part I focuses on copyright's private law edifice to show that much of copyright's analytical work is done through its creation and maintenance of a “duty not to copy,” which it directs at potential copiers, to create a “wrong of copying.” Part II unpacks the wrong of copying, shedding some light on its origins, examining the contours of the wrongdoing that it identifies, and showing how copyright's concept of copying is a defeasible one that allows the institution to expand sequentially. Part III then examines how a theory of copyright law can countenance both obligations and incentives by allowing them to operate at different levels.

## I. THE PRIVATE LAW ARCHITECTURE OF COPYRIGHT

In its instrumental conception, copyright exists in order to provide creators with an incentive to produce creative expression.<sup>8</sup> This incentive is in turn meant to operate through copyright's promise of a set of “exclusive rights” in relation to the expression, which vest with the creator automatically upon creation in a fixed medium of expression and endure for a limited period of time.<sup>9</sup> Obviously, this conception

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<sup>7</sup> See HART, *supra* note 4, at 6 (“The most prominent general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in some sense obligatory.”). For a lucid explanation of this point, see Danny Priel, *Sanction and Obligation in Hart's Theory of Law*, 21 *RATIO JURIS* 404 (2008).

<sup>8</sup> See Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 *HARV. L. REV.* 1569, 1573 (2009) (describing the instrumental account); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 285 (1996).

<sup>9</sup> See 17 U.S.C. § 106 (2006) (delineating copyright's exclusive rights).

focuses almost completely on the institution of copyright in its capacity as an affirmative “grant” of rights. It locates copyright’s justification — and functioning — entirely in its rights, without so much as alluding to the correlative duty that accompanies these rights and the constitutive role that it plays in the system.<sup>10</sup>

This Part shows that viewing copyright through the lens of private law highlights the incompleteness of the dominant instrumental account, which somewhat myopically understands the institution exclusively in terms of its rights. When reconceptualized in bipolar and correlative terms, under which a plaintiff’s right is coterminous with a defendant’s corresponding duty and derives color and content from it, copyright law is better understood as revolving around a duty — which the law imposes on individuals once a work obtains protection — not to copy original expression. Understanding copyright in these terms reveals that the institution’s principal focus — in terms of its legal directives — is in reality directed at potential copiers and that copyright law functions by creating a wrong of copying.

#### A. Copyright Law and the Duty Not to Copy

A characteristic feature of private law is the bipolar or plaintiff-defendant structure of its entitlements.<sup>11</sup> Private law entitlements invariably entail a direct correspondence between a plaintiff’s right and a defendant’s duty, both of which necessarily originate in the same normative source and remain incomplete without the other, a feature described as their “correlativity.”<sup>12</sup> The bipolarity of private law entitlements is of deep functional significance, since it serves to constrain the very scope and structure of both the action and the entitlement. It ensures that a plaintiff will seek relief only against a specific defendant (rather than the state or society), that a defendant will be ordered to

<sup>10</sup> See, e.g., William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989) (defining copyright protection as “the right of the copyright’s owner to prevent others from making copies” (emphasis added)).

<sup>11</sup> PETER CANE, *THE ANATOMY OF TORT LAW* 12 (1997); JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 13–23 (2001) (referring to this concept as private law’s “bilateralism”); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 63–66 (1995); Hanoch Dagan, *The Limited Autonomy of Private Law*, 56 AM. J. COMP. L. 809, 809–18 (2008).

<sup>12</sup> WEINRIB, *supra* note 11, at 114–44. The idea of describing the relationship between a right and its corresponding duty as a juridical relationship of “correlatives” can be traced back to the seminal work of Professor Wesley Hohfeld. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–32 (1913); David Lyons, *The Correlativity of Rights and Duties*, 4 NOÛS 45, 47 (1970) (describing the relationship as the “doctrine of correlativity”); Ronen Perry, *Correlativity*, 28 LAW & PHIL. 537, 539 (2009) (describing the relationship as the “correlativity axiom”). Correlativity is also referred to in other philosophical contexts as “bipolar normativity” or “bipolar deonticity.” See Michael Thompson, *What Is It to Wrong Someone? A Puzzle About Justice*, in REASON AND VALUE 333, 338–345 (R. Jay Wallace et al. eds., 2004).

compensate a specific plaintiff (rather than the collective), and perhaps most importantly, that the relief sought and recovery obtained will be determined entirely by the parties' actions rather than by any external determinants.<sup>13</sup> All of these constraints remain as true in copyright law as they do in other parts of private law.<sup>14</sup>

Strongly connected to this bipolarity is, of course, copyright's correlative entitlement structure. While it is common to speak of copyright in terms of the "rights" that it confers on creators, these rights invariably correspond (that is, correlate) to a duty that they impose on others. This duty thus forms the "analytic reflex" of the rights in question.<sup>15</sup> Even though the correlative nature of private law entitlements is taken as a given in the world of private law scholarship, it has received surprisingly little attention in copyright law. While a few have hinted at copyright's basic correlativity and the fact that it embodies a duty *as well as* rights, they too have failed to emphasize the analytical and functional role played by the duty.<sup>16</sup>

Professor Jeremy Waldron was perhaps the first to identify the functional and normative importance of duties to the analysis of intellectual property law when he noted that "the point of focusing on duties is more than merely analytic" because "legal duties are hard things for people to have — since they constrain conduct and in that sense limit freedom."<sup>17</sup> Conceding that "not all the problems of a legal institution are connected with the duties it imposes," Waldron nonetheless exhorts that "duties are a good place to start, since they will take us to whatever hardships are most intimately involved in the immediate recognition and enforcement of the rights."<sup>18</sup> This admonition is perhaps most true of copyright law, and yet copyright law continues to be discussed, analyzed, and understood almost entirely in terms of its "rights."

<sup>13</sup> See WEINRIB, *supra* note 11, at 120–29.

<sup>14</sup> An anomaly worth noting here is copyright's provision for statutory damages. Copyright law's regime of statutory damages was never intended to operate as a punitive measure. The damages prescribed by the statute are thought to represent the approximate actual harm that a plaintiff is likely to sustain by virtue of the defendant's copying and are meant to do no more than aid in the process of computation. See Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 449 (2009).

<sup>15</sup> WEINRIB, *supra* note 11, at 124.

<sup>16</sup> See, e.g., Gordon, *supra* note 6, at 1392 (noting that copyright contains "an exclusion right [that] imposes on the public a duty not to copy"); O'Regan, *supra* note 6, at 28 (identifying the duty in the context of developing a Hegelian account of copyright); Rothman, *supra* note 6, at 512 (discussing the duty in the context of advancing a liberty-based approach to copyright); Zemer, *supra* note 6, at 83 (parsing out copyright's analytical structure to establish that "copyright is a form of property").

<sup>17</sup> Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841, 844 (1993).

<sup>18</sup> *Id.*

While copyright law no doubt confers on creators a set of exclusive “rights” in relation to a work, all of these rights revolve around, or remain derivative of, *copying*. Indeed, what differentiates copyright from other forms of property and intellectual property is the fact that it *does not* confer on creators a set of exclusive use privileges, but instead gives them no more than the exclusive right to copy the work,<sup>19</sup> with copying coming to be understood in different ways, reflected in the complexity of the rights involved. Absent a showing of copying, there is rarely ever liability for copyright infringement. Copyright’s central right is thus the exclusive right to copy the work, a reality reflected in the etymological roots of the word “copyright.” This focus on copying matters because it highlights both the similarity and dissimilarity between copyright and property, which emphasizes the importance of the duty in copyright law as a functional matter.

The institution of property is commonly thought of in correlative terms. The owner of a *res* is said to be vested with a “right to exclude,” which correlates to a duty of forbearance, inviolability, or avoidance imposed on the world at large as an *in rem* duty.<sup>20</sup> Yet, in property both right and duty remain equally important from a functional standpoint, since they each perform a certain role in relation to the institution. The duty of forbearance, which operates once a resource is owned, signals to individuals to avoid interfering with the resource without the owner’s authorization. It thus performs an all-important coordination function. While the right to exclude is the analytic reflex of this duty, it is more than just a placeholder. Exclusion is important in property because it is crucial to, and protects, a set of use privileges in relation to the *res* with which the owner is vested.<sup>21</sup> The right to exclude, in other words, is a functionally critical feature in the traditional property context, since it is necessary for the effective use of the *res*, which is in turn conceived of as scarce and rivalrous in nature. Without the ability to exclude — *de facto* and *de jure* — all others from an apple, its owner would be unable to consume it exclusively. Exclusion and the right to exclude perform an important enabling function, which relates to the domain of positive use privileges that ownership confers upon the owner.

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<sup>19</sup> See, e.g., Clarisa Long, *Information Costs in Patent and Copyright*, 90 VA. L. REV. 465, 467 (2004) (“[C]opyright law prohibits only copying . . .”).

<sup>20</sup> See Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL’Y 593, 611, 618 (2008); Hohfeld, *supra* note 12, at 32; J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 724–25 (1996).

<sup>21</sup> See J.W. HARRIS, PROPERTY AND JUSTICE 128–30 (1996) (describing property as characterized by a trespassory right that surrounds a set of use privileges); J.E. PENNER, THE IDEA OF PROPERTY IN LAW 74 (2000) (describing exclusion and use as two sides of the same coin).

While copyright may seem to be endowed with a similar entitlement structure, the similarity is somewhat deceptive.<sup>22</sup> Unlike traditional property law, which focuses on enabling the “use” of the *res*, copyright law focuses on disabling the copying of the protected expression. It thus gives its rightholder the exclusive privilege to copy the expression. Expression, however, remains a perfectly nonrivalrous resource, meaning that it can be copied and consumed by multiple actors simultaneously without them interfering or competing with one another.<sup>23</sup> The bare act of copying, for the copyright holder, needs little independent protection or enabling for it to occur, in contrast to the use of a rival resource, which requires protection through exclusion. It would thus make little analytical sense to speak of a “right” to copy, since in effect everyone could be endowed with a similar right simultaneously. The key move lies instead in copyright law’s rendering this right *exclusive*. By vesting the right not just as a bare right but now as an exclusive one, copyright law does not just declare that the rightholder is allowed to copy, which he could have done even before, but instead allows the rightholder to copy *to the exclusion of everyone else*. And the only way that copyright achieves this exclusion is by forbidding all others from copying the expression — for which it relies on its correlative, the “duty not to copy.”

Thus, whereas property law’s “right” actively *enables* the exclusive use of the *res* and operates within the domain of positive liberty, copyright law’s right *disables* others from copying the expression and operates as a form of negative liberty.<sup>24</sup> It is precisely for this reason that copyright’s exclusive right to copy is heavily dependent on its correlative — the duty not to copy — for its disabling function, without which the right becomes functionally vacuous. It is in this sense, then, that copyright’s duty not to copy gives operational significance to the exclusive right to copy. Copyright law’s affirmative investiture of a right thus functions entirely through its negative divestiture of equivalent and analogous rights from others, for which it relies on the correlative imposition of a duty on all but the creator (that is, the rightholder). Waldron was therefore absolutely correct to suggest that for intellectual property rights — all of which deal with nonrivalrous re-

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<sup>22</sup> For a fuller treatment of this issue, see Shyamkrishna Balganesh, *Debunking Blackstonian Copyright*, 118 YALE L.J. 1126 (2009) (book review).

<sup>23</sup> See YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 36 (2006); Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635, 645–50 (2007) (providing a useful description of copyright law’s reliance on resource nonrivalry).

<sup>24</sup> Negative freedom by its very nature is freedom *from* some kind of interference that may be brought about by some human agency. This concept stands in contrast to positive freedom, which involves the affirmative *conferral* of the ability to undertake an action. SCOTT J. SHAPIRO, *LEGALITY* 61–62 (2011). This distinction is traditionally traced back to the work of Isaiah Berlin. See generally ISAAH BERLIN, *TWO CONCEPTS OF LIBERTY* (1958).

sources — we ought to start with the duty in trying to understand the structure of the right.<sup>25</sup>

Indeed, the centrality and priority of an institution's obligatory (or duty-imposing) dimension was key to Hart's account of legal rules as well. The "internal aspect of rules" or the "internal point of view," which Hart is credited with developing in *The Concept of Law*, requires that the normative force of legal rules be appreciated not just in terms of the consequences that they are likely to engender, but instead from the perspective of those to whom they actually relate and are directed, who in turn "internalize" these rules qua their status as law.<sup>26</sup> Hart further posited that from this point of view, legal rules can be understood as being either duty imposing or power conferring in nature.<sup>27</sup> The former impose obligations on actors to do or abstain from doing certain things, while the latter allow actors to create or alter unilaterally these obligations in relation to others.<sup>28</sup> Power-conferring rules thus provide individuals with a mechanism for altering the norms that others are placed under and do so often with the understanding that such a change serves important consequentialist purposes.

Understood in Hart's terms, then, copyright law can be understood as composed of both a power-conferring and a duty-imposing dimension. Its grant of exclusive rights remains its power-conferring dimension: it treats the unilateral act of independently creating original expression and fixing it in a tangible medium as altering everyone else's normative position by imposing a legal duty on others not to copy the expression. Additionally, power-conferring rules have been traditionally understood as existing to provide certain actors with a consequentialist reason for their actions. Professor Joseph Raz identifies an essential component of such unilateral power-conferring rules to be that:

[T]he law's reasons for acknowledging that it effects a legal change is that it is of a type such that it is reasonable to expect that actions of that type will, if they are recognized to have certain legal consequences, *standardly be performed only if the person concerned wants to secure these legal consequences*.<sup>29</sup>

In other words, a hallmark of power-conferring rules is that they exist in order to induce and enable actions that trigger the normative change in question.<sup>30</sup> Independent, original creation triggers a particu-

<sup>25</sup> Waldron, *supra* note 17, at 844.

<sup>26</sup> HART, *supra* note 4, at 56–57, 88–89.

<sup>27</sup> *Id.* at 26–49.

<sup>28</sup> *Id.* at 80–81 (observing how power-conferring rules lead "to the creation or variation of duties or obligations").

<sup>29</sup> Joseph Raz, *Voluntary Obligations and Normative Powers II*, 46 PROC. ARISTOTELIAN SOC'Y 79, 81 (1972) (emphasis added).

<sup>30</sup> See Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726, 1741–42 (2008) ("First, the law must be designed in a way that underwrites



lar legal consequence (namely the imposition of an obligation on others), and in this power-conferring dimension, copyright can be seen as working to induce the production of original expression.

Conversely, copyright's duty-imposing dimension relates to the obligations it imposes on others when its operation is triggered. The act of creation enables the actor to trigger a certain legal consequence, yet the mechanics of that consequence, as we have seen, emanate from the obligation imposed on others through the duty not to copy. The structure of copyright law thus embodies both duty-imposing and power-conferring aspects.<sup>31</sup> It should be fairly apparent from this discussion that the inducement of creativity — the instrumental account — focuses on its power-conferring dimension, since it assumes that the possibility of invoking copyright's exclusive rights framework induces creative expression.

The instrumental account of copyright, while not wrong in looking at copyright's power-conferring dimension, says nothing at all about copyright's duty-imposing dimension. And indeed, this account views the duty-imposing dimension as largely contingent, in the sense that the precise structure and content of that duty matters less than its nominal existence and availability. Interestingly enough, though, Hart regarded power-conferring rules as "parasitic" on the primary duty-creating ones, which to him formed the core normative content of a legal system.<sup>32</sup> The power-conferring dimension thus *always relates* to logically prior primary obligations that the legal system empowers actors to create or alter.<sup>33</sup> In other words, the normative significance of the power conferral derives from the consequences that its invocation entails — that is, the duty that it imposes. To Hart, then, power-conferring rules could never be understood and appreciated independent of duty-imposing ones, even if the opposite could hold true.

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an expectation of its purposive use — an expectation that persons will satisfy the law for the sake of the legal consequences. Second, that expectation must be the law's reason for attaching those legal consequences to acts of that type.").

<sup>31</sup> Building on Hart's categories, Professor Gregory Klass has in recent work suggested that some laws operate as hybrids between these two types of rules — as "compound rules" — and create both duties and powers. *See id.* at 1730–31. Such compound rules differ from traditional power-conferring ones in that they are never premised on an actor's showing of legal purpose (for example, legal formalities), but instead assume "that a significant proportion of actors subject to [the rule] are likely to have such a purpose and recognize[] and facilitate[] that purposive use." *Id.* at 1730. With copyright law's abandonment of formalities one might thus argue that copyright law, much like contract law, consists of such "compound rules." While it does not require creators to indicate their intent to assert exclusivity and place others under a corresponding obligation, copyright law readily presumes that most producers of original expression are likely to have that purpose in mind.

<sup>32</sup> HART, *supra* note 4, at 81 ("[Power-conferring rules] are in a sense parasitic upon or secondary to [duty-imposing rules] . . .").

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

Whether or not Hart's strong claim holds true for copyright, at the very least it suggests that the duty-imposing dimension ought to receive a more prominent treatment in copyright jurisprudence and thinking.

No less a realist (and avowed consequentialist) than Justice Holmes<sup>34</sup> also readily thought of copyright as a duty-imposing legal regime. In his concurrence in *White-Smith Music Publishing Co. v. Apollo Co.*,<sup>35</sup> an opinion otherwise characterized by its brevity, Justice Holmes went through the trouble of describing what he thought copyright law was all about. His observations in this regard are quite telling:

The right to exclude [in copyright] is not directed to an object in possession or owned, but is *in vacuo*, so to speak. It *restrains* the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a *prohibition* of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of *the wrong*.<sup>36</sup>

While Justice Holmes never used the word "duty" to describe copyright, he was clearly conceptualizing copyright's "right" entirely in terms of the obligations (that is, the restraints, prohibitions, and restrictions) that it imposes on others.<sup>37</sup> Copyright law was thus to Justice Holmes about the duty not to copy original expression, no more and no less.

Commencing the analysis of copyright law with the duty not to copy as a functional and normative matter need not detract from the basic correlativity of the entitlement as an analytical matter. Accepting copyright's correlative structure would thus involve no more than recognizing that the institution's "rights" are functionally *negative* in character, in that they involve an "abstention[], forbearance[], or non-interference" on the part of others.<sup>38</sup> They are thus in some sense the bases of claims against the doing of a certain act — that is, copying — which in turn inform the claimant's own claim to do that same act

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<sup>34</sup> See Harry W. Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 799 (1961) (describing Justice Holmes as "the hero figure of the realist clan").

<sup>35</sup> 209 U.S. 1 (1908).

<sup>36</sup> *Id.* at 19 (Holmes, J., concurring) (emphases added).

<sup>37</sup> Somewhat ironically, in the world of tort law, Justice Holmes was known to be a duty skeptic, believing that the idea of a "duty" in law was devoid of normative significance and operated as little more than a prediction of likely legal consequences. See O.W. HOLMES, JR., *THE COMMON LAW* 144 (1881); O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897); see also John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563, 1566–76 (2006) (elaborating on Justice Holmes's duty skepticism and discussing Hart's critique of it).

<sup>38</sup> Joel Feinberg, *Duties, Rights, and Claims*, 3 AM. PHIL. Q. 137, 139 (1966).

himself.<sup>39</sup> Indeed, even as a mere analytic reflex, the right serves the purpose of forming an important focal point for the alienability of the entitlement. All the same, beginning our understanding of the institution from the duty — instead of the right — sheds important light on the functioning of copyright. Copyright law can thus be seen to perform an important “guidance” function, independent of and in addition to any potential incentive it may provide to creators.<sup>40</sup> Copyright, in other words, comes to be conceptualized as a system that individuals in society need, by default, to navigate through (or around) when going about their everyday activities — much like most other obligatory areas of the law.

*B. From the Duty Not to Copy to the Wrong of Copying*

In the preceding paragraphs, I have argued that paying closer attention to copyright law’s analytical framework as a private law institution reveals a commitment to a correlative entitlement structure consisting of an “exclusive right to copy” and a “duty not to copy,” with the former deriving its functional significance from the latter. Bringing direct attention to copyright’s duty highlights the fact that the law speaks not just to creators but also — and perhaps more directly — to potential copiers. In establishing a set of exclusive rights and vesting it in a creator, copyright communicates a relational legal directive to potential copiers, to the effect that copying expression original to another can result in liability.<sup>41</sup> Despite its statutory origins, then, copyright’s legal directive mirrors other directives in the common law structurally, by identifying both an action and an agent in relation to whom the action can trigger liability, a feature often described as the “dyadic” or transitive nature of relational legal directives.<sup>42</sup> A breach of the duty as embodied in the directive is treated as an infraction of

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<sup>39</sup> For the distinction between “rights” and “claims,” see Joel Feinberg, *The Nature and Value of Rights*, 4 J. VALUE INQUIRY 243, 249–57 (1970), observing that “[t]o have a right is to have a claim against someone whose recognition as valid is called for by some set of governing rules or moral principles.” *Id.* at 257.

<sup>40</sup> Cf. Dale A. Nance, *Guidance Rules and Enforcement Rules: A Better View of the Cathedral*, 83 VA. L. REV. 837, 858 (1997).

<sup>41</sup> It is perhaps at this point that Justice Holmes’s understanding of duties in nonrelational terms finds its place in his opinion in *White-Smith*. 209 U.S. at 19 (Holmes, J., concurring). In observing that copyright contains an abstract prohibition detached from person or *res*, he seemed to be suggesting that it operated as a simple legal directive not to copy. *See id.* at 19–20. Yet, as an analytical matter, copying is wrong only when the subject matter is copyrighted, a process that always necessitates a human agent in whom a right comes to vest.

<sup>42</sup> For fuller accounts of relational legal directives in tort law, see John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 945–46 (2010); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 744 (2003) [hereinafter Zipursky, *Civil Recourse*]; and Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 59–60 (1998).

the right, and since both right and duty revolve around the act of copying, the inquiry focuses on the nature and consequences of this act. All of these observations indelibly point to copyright's core normative structure mapping onto that of tort law, the law of civil wrongs, through its creation of a *wrong of copying*.

In its simplest form, a "wrong" is understood as an actor's breach of a duty imposed on him or her.<sup>43</sup> Legal wrongs have thus been defined as constituting a simple breach of a duty imposed by law, no more and no less.<sup>44</sup> Understood in this sense, characterizing an action as constituting a legal wrong does not ipso facto entail any moral disapprobation of the action. If copyright begins with the imposition of a duty (not to copy) on everyone other than the creator, why then is the law of copyright not more appropriately understood (and analyzed) in terms of the breach of this duty, and the wrong that it engenders — that is, as the law of "*copywrongs*"?

The failure to conceptualize copyright law in terms of the wrong that it creates might be understood in terms of the idea of direct realization, made famous by Professor Peter Birks in his fourfold classification of the common law.<sup>45</sup> Noting that while almost all common law actions can in theory be understood as deriving from breaches of duties (that is, from wrongs), Birks claimed that the reason that some are rarely ever described and classified as such relates to the possibility of their being understood in terms of causative events that are logically and temporally antecedent to the wrong, which in turn generate rights "directly realizable in the courts."<sup>46</sup> Thus, contract law is rarely understood exclusively in terms of the "wrong" of breach of contract, even though in theory every action for breach must derive from such a wrong, because the consensual act of contracting generates primary obligations that courts often enforce directly, through specific performance.<sup>47</sup> This understanding contrasts with that of tort law, where the antecedent rights and events are both diffuse and nascent, necessitating a duty- (and wrong-) based characterization when courts "conceptualize the immediate reason for their intervention."<sup>48</sup> In a similar vein, one might thus argue that in copyright, the primary right and duty (that is, the exclusive right to copy and its correlative duty not to copy) preexist any invasion or act on the part of the defendant — an

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<sup>43</sup> Peter Birks, *The Concept of a Civil Wrong*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 29, 37 (David G. Owen ed., 1997).

<sup>44</sup> *Id.*

<sup>45</sup> See Peter Birks, *Rights, Wrongs, and Remedies*, 20 O.J.L.S. 1, 27 (2000).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*; see also ROBERT STEVENS, TORTS AND RIGHTS 320–25 (2007) (observing that tort law is parasitic on rights created elsewhere).

argument that explains why copyright is not dependent on the idea of a wrong for conceptualization. On closer analysis, however, this reasoning is somewhat suspect.

It is certainly true that a creator's act of creating an original work of expression quite independently generates a duty and a correlative right as part of the entitlement. Yet a peculiar feature of both the right and the duty so triggered is that, structurally, they always *anticipate* an infraction, without which (or indeed without the possibility of which) the entitlement becomes wholly unnecessary, given the nonrivalrous nature of the intangible — that is, of original expression.<sup>49</sup> Copyright's "exclusive right" to copy is, in effect, the right to have others not copy the work in question. This understanding contrasts with that of tangible property, where the ownership interest performs an important coordination function independent of anticipating an infraction and can thus be understood as generating primary rights that are directly enforceable. Nowhere is this idea clearer than in the law of trespass to chattels, where the law disallows an action unless actual physical harm to the chattel or an interference with possession is established.<sup>50</sup> Nonetheless, the disallowance of the action has no bearing on the validity (or existence) of the owner's interest in the property, in terms of the other exclusive use privileges that accompany such ownership. The owner continues to have sole agenda-setting authority over the *res* even in the absence of a functional right to exclude.

Taking copyright's structure seriously as a legal institution — by which I mean an institution that owes its origins entirely to positive law — thus entails focusing on its obligatory structure, which is about the imposition on actors of a legal duty not to copy. The institution therefore remains structured around the potential or actual breach of this duty — a wrong — for which it allows a mechanism of redress in the nature of an action for infringement. Analyzing copyright law in terms of the "wrong of copying" is thus neither superfluous nor optional but indeed demanded by the institution's core analytical structure.

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<sup>49</sup> This peculiar structure also contrasts with that of the law of unjust enrichment, which Birks tries to distinguish from the law of wrongs on the grounds that the original act (modeled on mistaken payment) independently generates a restitutionary right, which courts directly enforce. Birks, *supra* note 45, at 28. In unjust enrichment, however, neither right (to recover the payment) nor duty (to return the payment) anticipates an infraction, since they are couched in affirmative rather than negative terms.

<sup>50</sup> See RESTATEMENT (SECOND) OF TORTS § 218 cmt. e (1965). See generally Shyamkrishna Balganesh, *Property Along the Tort Spectrum: Trespass to Chattels and the Anglo-American Doctrinal Divergence*, 35 COMMON L. WORLD REV. 135 (2006).

## II. UNPACKING THE WRONG OF COPYING

Part I argued that copyright's analytical structure — when understood from an internal point of view — lies in its creation of a wrong of copying. This Part moves to unbundling the normative structure of this wrong, centered on the act of expressive copying. First, this Part looks to the source of the “wrong” and examines how a wrong-based approach allows copying to be understood as a legal wrong, a purely instrumental one, or indeed one influenced by morality. Second, it analyzes the type of conduct to which the law directs itself — namely, copying — to get at the notions of wrongdoing and the wrongfulness with which copyright is concerned. Third, it shows how the wrong of copying operates as a generative idea around which different values and devices in copyright coalesce.

### A. *Why is Copying Wrong?*

Attempts to justify the institution of copyright abound in the literature and, roughly speaking, can be classified into instrumental theories, which focus on copyright's effect on creativity, and deontic theories, which focus on the connection between an author and his or her creative expression.<sup>51</sup> Understanding copyright law in terms of the “wrong of copying,” however, adds a new and hitherto underexplored dimension to this justificatory endeavor. Most justifications offered for copyright law begin with the assumption that its analytical framework is limited to that of its “rights.” They thereafter proceed to do no more than look for an affirmative source for these rights and for actions or theories that serve to vest such rights in actors.<sup>52</sup> Almost never are copyright's duties independently justified. If we instead begin with the understanding that copyright law's core work is done by its “duty not to copy” coupled with its concomitant treatment of copying as a wrong, the search for a justification assumes a very different color. Stand-alone justificatory theories — such as labor- and personality-based ones — become unnecessary (and to some degree redundant), since they say nothing about the act of copying (which the duty proscribes) and why it ought to be treated as a wrong, other than describing it as an act of appropriation, which is then translated into

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<sup>51</sup> See generally, e.g., ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY* (2010); Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007); Gordon, *supra* note 6; Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455; Landes & Posner, *supra* note 10; Netanel, *supra* note 8; Barbara Friedman, Note, *From Deontology to Dialogue: The Cultural Consequences of Copyright*, 13 CARDOZO ARTS & ENT. L.J. 157 (1994).

<sup>52</sup> See Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1197 (1996) (inquiring “[w]hy give authors an exclusive right to their writings?” (emphasis added)).

property- and ownership-centric ideas.<sup>53</sup> Instead, the justification must provide some account of why copying is perceived by the law as wrongful and accordingly condemned. It must, in other words, root its “vestitive” account of copyright’s “rights” in the normativity of the institution’s core analytical apparatus — its creation of a wrong.<sup>54</sup>

Within the world of civil wrongs — the law of torts — scholars continue to disagree about the extent to which the law’s condemnation of a certain act as a private wrong embodies a moral dimension. On one view, the idea of a wrong does embody a moral aspect. This moral element is reflected either in the recognition that an individual is a moral agent and therefore responsible for an action and its consequences on others, or in a morality embodied in the relationship between a plaintiff’s right and a defendant’s duty.<sup>55</sup> On another view, made famous by Justice Holmes, rights and duties (and therefore wrongs) in the law have no moral element whatsoever in them and merely predict certain legal consequences that are likely to follow from antecedent actions.<sup>56</sup> Justice Holmes’s argument has in more recent times given rise to the view that tort law’s rights and duties — and infractions of them — are to be understood not just in terms of their immediate legal consequences but also in terms of their instrumental effects on society at large — that is, as a means of risk-spreading<sup>57</sup> or deterrence.<sup>58</sup> On yet another view, while the law of wrongs can relate to actions that are also morally wrong, they need not do so all the time. On this view, legal wrongs embody their own normativity, which is hermeneutically independent of morality.<sup>59</sup>

While the debate about the interface between law and morality may remain inconclusive, it nonetheless points to different ways of understanding the normative foundations of copyright’s reliance on the wrong of copying without having to locate the institution’s justifica-

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<sup>53</sup> For an excellent overview of this process, see MARCUS BOON, IN PRAISE OF COPYING 204–37 (2010).

<sup>54</sup> See JOHN W. SALMOND, JURISPRUDENCE 303 (2d ed. 1907) (noting that there can never be “any right without a basis of fact in which it has its root and from which it proceeds”); Richard A. Epstein, *The Not So Minimum Content of Natural Law*, 25 O.J.L.S. 219, 233 (2005) (“[W]hat lawyers do in practice is develop *first* a system of wrongs from which it is then possible to infer the outlines of an underlying system of rights.” (emphasis added)).

<sup>55</sup> See TONY HONORÉ, RESPONSIBILITY AND FAULT 69–70 (1999); Avihay Dorfman, *Can Tort Law Be Moral?*, 23 *RATIO JURIS* 205, 205–06 (2010); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *IOWA L. REV.* 449, 478–79 (1992).

<sup>56</sup> Holmes, *supra* note 37, at 458.

<sup>57</sup> See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499, 500–01 (1961).

<sup>58</sup> See Richard A. Posner, *A Theory of Negligence*, 1 *J. LEGAL STUD.* 29, 32–33 (1972); Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 *UCLA L. REV.* 377, 378 (1994).

<sup>59</sup> See Goldberg & Zipursky, *supra* note 42, at 930–32.

tion in notions of labor, desert, personality, or ownership. Each side of the debate offers us a different way of thinking about copyright law's treatment of copying as a wrong.

1. *Morality.* — From a deontic perspective,<sup>60</sup> copyright law treats copying as a wrong because copying original expression remains an independent moral wrong. Copying is morally wrong not because it operates as an infraction of an ownership or property interest, but because it directly interferes with an individual's ability to perform a speech act (that is, expression) and communicate with the public as speaker.<sup>61</sup> Kant is known to have made this argument very early on and, in the process, consciously distanced copyright law from the idea of property in order to establish the wrongfulness of unauthorized publication.<sup>62</sup> This view is particularly powerful in explaining why copyright law, unlike other types of intellectual property law such as patent law, insists on a showing that the defendant copied protected expression from the plaintiff's work, thereby emphasizing that the individuality of a speech act is protectable only against direct interferences and not in the abstract.

2. *Deterrence.* — Adopting a purely instrumental view of wrongs, one could argue that copyright law treats copying as a wrong because of its detrimental effects on creativity. In this conception, expressive copying is thought to diminish a creator's ability to exploit the market for original expression, and copyright's liability regime operates as a deterrent against such copying through its threat of monetary sanctions.<sup>63</sup> By deterring such copying, copyright law in turn preserves creators' incentives to produce more creative expression. The law treats copying as a wrong in this view only because of the law's commitment to inducing creativity by deterring copying. It is important to note how this particular instrumental approach differs from the standard inducement-through-rights approach encountered earlier. Whereas the previous account focused on copyright's power-conferring dimension, the deterrence-based account operates firmly within the institution's duty-imposing side. Additionally, this approach is far more modest about the connection between copyright law and creative in-

<sup>60</sup> By "deontic perspective," I mean the perspective that concerns moral obligations.

<sup>61</sup> See IMMANUEL KANT, *On the Wrongfulness of Unauthorized Publication of Books*, in PRACTICAL PHILOSOPHY 23, 30, 33 (Mary J. Gregor ed. & trans., 1996).

<sup>62</sup> *Id.* at 29; see also ARTHUR RIPSTEIN, FORCE AND FREEDOM 95 n.13 (2009). For a more recent extension of this theory, see Abraham Drassinower, *Copyright Infringement as Compelled Speech*, in NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY (Annabelle Lever ed., forthcoming 2012) (manuscript at 3–4), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1954858](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1954858) (describing all copyright infringement as involving a speech act).

<sup>63</sup> See Landes & Posner, *supra* note 10, at 346 (describing copyright's economic rationale as the prevention of "free-riding").



ducement, since it posits merely that by treating copying as a wrong, copyright law preserves the incentive to create, which may be constituted through different sources. This account is unlike the previous account, which claimed that copyright law was constitutive of the incentive to create.<sup>64</sup>

3. *Positivism.* — A third view might point to copyright law's normativity having an existence independent of both any underlying morality and any instrumental goals. In this view, copyright's reliance on copying as a private legal wrong is best understood in terms of the way in which the institution treats copying in practice. Here, copyright's condemnation of copying is best understood in pragmatic, positivist terms, as the law's provision for a mechanism of recourse, which, when availed of by a creator, entitles him or her to some redress.<sup>65</sup> Copying, in other words, is wrong because it interferes with an individual's interest that is important enough to merit legal protection. The reasons for such importance may be either completely internal to the individual (for example, morality), external to the individual (for example, social welfare), or some mix of the two. Yet what matters is the law's recognition of the wrong of copying — no more, no less.<sup>66</sup>

This outline of justifications for the wrong of copying suggests that there is not one clear answer to the question of why copyright law treats copying as a wrong. Indeed, each of them has obvious shortcomings and deficiencies. The moral view, for instance, relies on treating protectable expression as a speech act. Yet the expression covered by copyright law today may not be limited to speech in the same communicative sense as before, seen in examples such as computer software code. The deterrence-based account of incentives, much like deterrence accounts in tort law, is hard-pressed to explain why the peculiar bipolar arrangement of private law should be the ideal vehicle for deterrence, as opposed to, for example, criminal law. The constraint of bipolarity here seems more like a cost than a benefit. The positivist account in turn seems to need a logically prior identification of an individual "interest" for its completeness. Scholars using this approach in the law of torts typically fall back on property as a normative idea to serve as the interest in question.<sup>67</sup> Yet this outsourcing assumes away (or at best recasts) the problem, for it simplistically treats

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<sup>64</sup> The Supreme Court's observation that "[b]y establishing a marketable right to the use of one's expression, copyright *supplies* the economic incentive to create and disseminate ideas," amply supports this theory. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (emphasis added).

<sup>65</sup> Cf. Zipursky, *Civil Recourse*, *supra* note 42, at 734–35 (describing the tort system's provision of a method of redress for wronged plaintiffs and setting out the idea of a right of recourse).

<sup>66</sup> See Goldberg & Zipursky, *supra* note 42, at 937–38.

<sup>67</sup> See, e.g., *id.* at 938.

property as an explanatory rather than justificatory device.<sup>68</sup> To be sure, the three accounts offered here are simplified versions of these theories, and the deficiencies identified can perhaps be corrected through suitable alterations, an examination of which is beyond the scope of this Article.

My objective in offering these three possible ways of approaching the normative question of why copying is wrong is primarily structural rather than substantive. First, it reveals that the purely instrumental account becomes one of several plausible theories for the institution. To date, owing to the rights-centric approach to analyzing the institution, the only viable alternatives to the standard utilitarian theories that scholars have even considered are those analogous to the *droit d'auteur* regimes of civil law jurisdictions — where the author's status as creator is taken to automatically justify an innate personal right, natural in origin and independent of the state.<sup>69</sup> Given the U.S. Constitution's distinctively utilitarian description of copyright law,<sup>70</sup> coupled with Anglo-American law's rejection of the civil law model of *droit d'auteur*, the instrumental justification of copyright law has seemed to many to be an unavoidable default.<sup>71</sup> Reconceptualizing copyright law in terms of the wrong of copying, however, reveals that this default need not be inevitable, and that the justifications for copyright law can indeed invoke a wider array of sources as long as they connect to "copying," the core act that the institution regulates. Second, approaching the justificatory endeavor from the perspective of a wrong rather than a right allows for the various theories to blend together pragmatically and supplement each other as needed. In other words, it avoids a basic essentialism (or fundamentalism) that accompanies most discussions of rights.<sup>72</sup> Thus, in tort law, scholars have long sought to justify the idea of a wrong by invoking elements from different theories that may seem incompatible in the abstract to develop what some have referred to as "mixed theories."<sup>73</sup> Copyright might

<sup>68</sup> Cf. Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 98 MICH. L. REV. 138, 144–45 (1999) (making this point in relation to corrective justice theories).

<sup>69</sup> See HENRI DESBOIS, *LE DROIT D'AUTEUR EN FRANCE* 538 (1978); Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 992 (1990); Rudolf Monta, *The Concept of "Copyright" Versus the "Droit D'Auteur"*, 32 S. CAL. L. REV. 177, 178 (1959).

<sup>70</sup> See U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .").

<sup>71</sup> But see Ginsburg, *supra* note 69, at 996 ("A copyright regime's initial instrumentalist formulation does not preclude later reception of more personalist notions of protection.")

<sup>72</sup> This idea is famously captured in the phrase "rights as trumps." Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 152, 164 (Jeremy Waldron ed., 1984).

<sup>73</sup> See Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1815 (1997).

indeed demand a similar approach, which a wrong-based conception of the institution readily facilitates.<sup>74</sup>

### B. Copying as Wrongdoing

Reorienting copyright law around the wrong of copying obviously entails identifying the contours of the wrongdoing that triggers potential liability. While copyright law emphasizes that copying is required for liability, it remains equally true that “[n]ot all copying . . . [constitutes] copyright infringement.”<sup>75</sup> The range of copying around which liability is centered — and which forms the basis of the “duty not to copy” — is thus heavily circumscribed by the law.

Copyright law renders the copying of original expression actionable as a wrong quite independent of any actual fault by the copier.<sup>76</sup> It thus makes little difference for liability whether the copying was intentional, negligent, or a genuine mistake, though fault can affect the court’s computation of damages.<sup>77</sup> The wrong of copying is thus one of “strict liability.”<sup>78</sup> Strict liability is ordinarily thought to be either conduct-based or harm-based, depending on the law’s choice of triggering event for liability.<sup>79</sup> Copying, however, sits somewhat oddly in this scheme. While liability for copying is not harm-based in the sense that an affirmative showing of harm caused by the copying is not a precondition for liability, the law does not content itself with merely an analysis of the defendant’s conduct, either. Its structure of wrongdoing is best described as one of result-through-conduct. While the law requires the act of copying to trigger liability, such copying is rendered actionable only when it results in the creation of a “substantially similar” copy of the original expression — a standard that encompasses both qualitative and quantitative dimensions.<sup>80</sup> Copyright thus imposes on individuals an obligation not to produce a substantially similar copy of the original work through the act of reproduction (that is,

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<sup>74</sup> One might worry that the very characterization of copying as a *wrong* somehow privileges a moral theory for the institution. Recognizing and emphasizing that the wrong being identified is a “legal wrong” might go some distance toward alleviating this concern. Just as discussions of copyright’s “rights” are today understood in positivist terms, so too — hopefully — will the idea of the wrong of copying.

<sup>75</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

<sup>76</sup> See 17 U.S.C. § 501(a) (2006).

<sup>77</sup> *Id.* § 504(c) (granting courts the ability to assess higher penalties against intentional violators).

<sup>78</sup> Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 RUTGERS L. REV. 351, 351 (2002) (noting that liability in copyright law is strict and that “the infringer’s faultlessness or culpability is of anomalously little relevance”).

<sup>79</sup> See Gregory C. Keating, *Nuisance as a Strict Liability Wrong*, 5 J. TORT L. (forthcoming 2012) (manuscript at 7 n.20), available at <http://law.bepress.com/usclwps/lewps/art134>.

<sup>80</sup> ROBERT C. OSTERBERG & ERIC C. OSTERBERG, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW § 1:1 (2011).

copying). Neither the bare act of reproduction nor the mere production of a substantially similar work is sufficient to trigger liability without the other.<sup>81</sup>

Unsurprisingly, courts have struggled to come to terms with the unique result-through-conduct structure of copying as a wrong. Recognizing the difficulty inherent in proving the conduct element of the wrong through direct evidence, courts rely on evidence of “access” to the original work and the similarity between the works to infer the existence of copying.<sup>82</sup> Most courts, however, either employ an unduly broad understanding of access or use what is known as the “inverse ratio” approach,<sup>83</sup> under which independent proof of access becomes less relevant when the works are exceedingly similar.<sup>84</sup> Such similarity is thought to allow an inference of access — and therefore of copying — as a rule of *res ipsa loquitur*.<sup>85</sup> In practice, this approach places an insurmountable burden on a defendant and over time has caused courts and parties to pay scant attention to the conduct dimension of copying. To make things worse, courts routinely conflate the conduct and result dimensions of the wrongdoing because of their extensive reliance on inferences to satisfy the former.<sup>86</sup> Many courts mistakenly apply the inverse ratio approach not just to the act of copying, but to its result as well — that is, to their analysis of substantial similarity — without recognizing the analytical independence of the two.<sup>87</sup>

The result dimension of the inquiry is more than just a formality. In examining whether the defendant’s conduct resulted in a “substantially similar” copy of the plaintiff’s work, the law is not looking merely for some similarity between the works. Rather, the substantial similarity analysis entails examining whether the copy reproduced material of value and substance, or the essence of the work.<sup>88</sup> Once again, this

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<sup>81</sup> 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A] (2011).

<sup>82</sup> See, e.g., *Mag Jewelry Co. v. Cherokee, Inc.*, 496 F.3d 108, 117–19 (1st Cir. 2007); *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984); *Twentieth Century-Fox Film Corp. v. Dieckhaus*, 153 F.2d 893, 899 (8th Cir. 1946); *Arnstein v. Porter*, 154 F.2d 464, 468–69 (2d Cir. 1946).

<sup>83</sup> 4 NIMMER & NIMMER, *supra* note 81, § 13.03[D].

<sup>84</sup> For an overview of how courts have approached the question of access, see *id.* § 13.02. See also *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1170 (7th Cir. 1997) (observing that when the similarity is extensive, the issue of access need not be proved).

<sup>85</sup> See *Ty, Inc.*, 132 F.3d at 1170 (discussing the inference that one may draw regarding copying). See generally Charles E. Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. CHI. L. REV. 519 (1934); William L. Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936).

<sup>86</sup> For a description of this confusion and an attempt to eliminate it, see Alan Latman, “Probative Similarity” as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187 (1990).

<sup>87</sup> See, e.g., *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706, 714 (S.D.N.Y. 1987).

<sup>88</sup> OSTERBERG & OSTERBERG, *supra* note 80, § 2:4.

requirement relates to the intersubjective dimension of the copyright entitlement, since it emphasizes the defendant's reproduction of the part of the work that is most closely connected to the creator in an objective sense.<sup>89</sup>

Copyright law's focus on "copying" thus remains an unappreciated source of normativity and analytical nuance, which instrumental accounts of the institution gloss over or view as contingent. Reconceptualizing copyright as a wrong-based institution is likely to go some distance in reversing this shortcoming.

### C. *The Defeasible Structure of Copying*

Viewing copyright law through the lens of copying also illuminates its procedural structure, which is of deep substantive relevance. At its simplest, copyright law treats copying, in both its conduct and result dimensions, as a defeasible wrong, and therefore as creating a presumption of liability that is subject to defenses and rebuttals. The plaintiff bears the burden of establishing facts sufficient to raise this presumption — that is, the *prima facie* case.<sup>90</sup> As with the common law's treatment of strict liability, the defendant in a copyright suit then has three options: (i) denying the truth of the allegation, (ii) questioning its legal sufficiency, or (iii) seeking to avoid liability by introducing a new consideration.<sup>91</sup> These alternatives in turn introduce important substantive dimensions in the copyright adjudication.

In denying the truth of the allegation, the defendant effectively asserts that there was no copying, in the conduct sense of the term. The defendant thus avers that the copy was independently created. In questioning the legal sufficiency of the plaintiff's allegation, the defendant's argument focuses on the result of the copying, to show that it was not "substantial" enough (or wrongful), in either the qualitative or quantitative sense. In making this claim, however, the defendant can introduce several of copyright's substantive criteria into the inquiry, such as originality, the idea-expression dichotomy, the *scènes-à-faire* exception, and the like.<sup>92</sup> In exercising either of these options (that is, denial and sufficiency), the defendant is always responding to the plaintiff's averments.

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<sup>89</sup> See Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. (forthcoming 2012) (manuscript at 37–45), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2014395](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2014395).

<sup>90</sup> 4 NIMMER & NIMMER, *supra* note 81, § 13.01 (describing the elements for which the plaintiff bears the burden of proof).

<sup>91</sup> See Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556, 567–68 (1973) (describing the common law's system of pleading defenses in response to a *prima facie* case).

<sup>92</sup> See 4 NIMMER & NIMMER, *supra* note 81, § 13.03[B].

Copyright law's principal mechanism for defendants to introduce "new" considerations into the equation to avoid liability is the fair use doctrine.<sup>93</sup> And it is through the fair use question that the wrong of copying comes to address the question of harm, since a fair use defense in effect alleges that the defendant's actions did not cause the plaintiff any cognizable harm.<sup>94</sup> While fair use has expanded dramatically since its inception and now extends to elements that are not strictly harm-based, at its very core, fair use as an "equitable rule of reason" was and is meant to be about the absence of actual or potential harm from the defendant's act of copying.<sup>95</sup> In treating copying as a wrong, copyright law thus does not altogether ignore the question of harm. Rather, it relegates harm to a tertiary position after conduct and result — which together are thought to lead to a presumption of harm. The defendant can then rebut that presumption by showing that the copying was in fact harmless.

Copying is thus structured as a defeasible legal wrong<sup>96</sup> in that it contains an embedded "unless circumstances demand otherwise" condition for liability — a condition manifested most clearly in the fair use doctrine. It is important to note that this defeasibility operates bilaterally, with the defendant's new allegations remaining just as defeasible by the plaintiff as were the plaintiff's original claims in the *prima facie* case. The plaintiff can deny, demur, or avoid in response to the defendant's allegations. In this way, the system comes to accommodate a host of considerations related to and independent of copying as such, and in the process expands outward beyond a concern with just the wrong of copying.<sup>97</sup>

The defeasible nature of copying thus also points to its generativity, which in turn has two important implications. First, it allows for a significant degree of value pluralism to enter into the functioning of copyright law. The defeasible structure of the inquiry effectively sequences the introduction of various considerations at each stage of the

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<sup>93</sup> 17 U.S.C. § 107 (2006). For a recent account of the doctrine and its evolution, see PATRICIA AUFDERHEIDE & PETER JASZI, *RECLAIMING FAIR USE* (2011).

<sup>94</sup> See generally Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 991–1002 (2007) (arguing that several leading Supreme Court fair use opinions reveal a concern with the idea of harm).

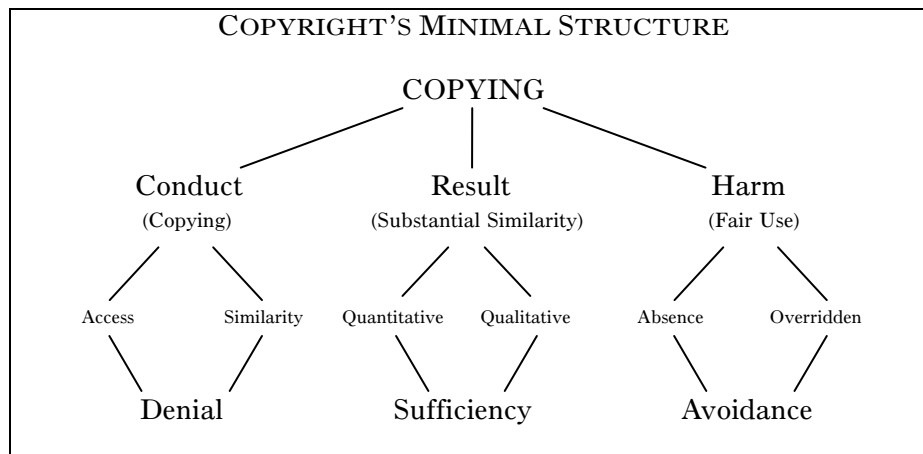
<sup>95</sup> H.R. REP. NO. 94-1476, at 65 (1974), *reprinted in* 1976 U.S.S.C.A.N. 5659, 5679; see also *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901).

<sup>96</sup> Defeasibility as an idea is usually traced back to Hart as well. See H.L.A. Hart, *The Ascription of Responsibility and Rights*, 49 PROC. ARISTOTELIAN SOC'Y 171, 174–75 (1949). For more recent work on the idea, see generally Frederick Schauer, *On the Supposed Defeasibility of Legal Rules*, 51 CURRENT LEGAL PROBS. 223 (1998); Richard H.S. Tur, *Defeasibilism*, 21 O.J.L.S. 355 (2001).

<sup>97</sup> Cf. Epstein, *supra* note 54, at 239 (arguing that the defeasibility of legal rules is "influenced by the same social considerations that lead to the recognition of the basic causes of action, and the expansion follows as a matter of course").

adjudication — thereby allowing courts to consider them independently without having to weigh them and trade them off against each other directly.<sup>98</sup> The cumulative legality of copying is thus determined in a sequential, pragmatic, and case-by-case manner. Second, the independent generativity of copying as a legal concept allows copyright law's core architecture to remain constant across subject matter and medium. Copyright law has expanded quite dramatically since its origins in the publishing industry and today covers a host of expressive products that have little resemblance to published books.<sup>99</sup> What has indeed permitted copyright law to expand in this manner is the reality that its minimal content has at all times maintained its focus on the wrong of copying original expression. Making copying its point of emphasis for different kinds of expression has allowed the institution to incrementally develop a host of add-on considerations suited to the peculiarities of the subject matter in question (for example, computer programs). The wrong of copying — not commodification — thus forms copyright's common analytical core.

The defeasibility and generativity of copying as a concept is illustrated in the figure below, which shows its layered nature: as a legal concept, its constituent conceptual elements, their translation into legal ideas in practice, and the defense to which each relates operationally.



<sup>98</sup> Cf. Bruce Chapman, *Pluralism in Tort and Accident Law: Toward a Reasonable Accommodation*, in *PHILOSOPHY AND THE LAW OF TORTS* 276, 308–16 (Gerald J. Postema ed., 2001) (showing how the defeasible structure of tort law contributes to its value pluralism).

<sup>99</sup> See 17 U.S.C. § 102 (2006) (describing the subject matter of copyright).

## III. OBLIGATIONS AND INCENTIVES IN COPYRIGHT LAW

The discussion thus far has endeavored to establish that copyright law can fruitfully be understood as revolving around a correlative entitlement whose obligatory structure imposes the “duty not to copy” on potential copiers. At the very outset, however, I noted that this account should not be seen as incompatible with the traditional utilitarian, instrumentalist account of copyright, but instead should be seen as rendering that account more complete. In this Part, I suggest how the two can be reconciled.

The incompleteness of the instrumental account derives from its treatment of copyright’s *legal* apparatus as less than integral to what copyright as an institution is. The instrumental account focuses on the message that copyright law sends to potential creators, in terms of its promise of exclusive rights in return for creative expression. Additionally, its emphasis on the alienability of these rights readily directs attention to the market-based incentive that this provides for creators. Viewed from the narrow perspective of creators and their exclusive rights, copyright law must of necessity be seen as *optional*, since creators are at liberty to reject what copyright has to offer them; just as with other power-conferring rules, actors remain at liberty not to invoke the conferral of power.<sup>100</sup> Refuting the validity of this account of copyright law as an optional legal regime for inducing creativity is thus an entirely empirical matter.

To the instrumental account, the precise structure of copyright’s entitlement — that is, its “rights” — matters very little. The inducement for creativity that it seeks to provide could thus be meaningfully achieved in principle through the grant of a government-sponsored subsidy or reward, a tax break, or perhaps more realistically, a compensation (or compulsory licensing) regime.<sup>101</sup> The instrumental account thus lacks *explanatory depth*, in that it does not extend beyond the surface of copyright’s operation to explain why it operates in the precise way that it does — namely, as a correlative entitlement.

Viewing copyright law as a branch of private law, however, enables us to look beyond the institution’s optional nature to see that a large part of its functioning is instead obligatory — a hallmark of any legal regime.<sup>102</sup> Especially since copyright law offers original expression protection by default, meaning that a creator is by default assumed to

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<sup>100</sup> See Klass, *supra* note 30, at 1730.

<sup>101</sup> See Hal R. Varian, *Copying and Copyright*, J. ECON. PERSP., Spring 2005, at 121, 134–36 (documenting alternatives to copyright and noting that the current system is not socially optimal).

<sup>102</sup> See HART, *supra* note 4, at 6.



have invoked the power so conferred,<sup>103</sup> the obligatory dimension remains both functionally salient and normatively significant.

The optional (instrumental) and obligatory (intrinsic or duty-based) accounts might be rendered compatible if they are seen to be operating at different levels of analysis, which accounts for their focus on different participants in the system. The process of justification can thus be parsed into two independent steps, which in turn allow seemingly incompatible values to coexist. This process can be traced back to Professor John Rawls's distinction between "justifying a practice" and "justifying a particular action falling under it."<sup>104</sup> The first step involves justifying the *existence* of an institution in society, while the second involves justifying the *particular working content* of that institution, once brought into existence.<sup>105</sup> These steps in turn track the distinction seen in Rawls's theory between a practice and its application. Rawls uses the distinction to offer a defense of utilitarian accounts of "punishment" and "promising" as institutions without having to justify individual instances of punishing and promise-keeping by reference to the same principle.<sup>106</sup> We see a similar process employed by other philosophers to reconcile instrumental accounts of institutions with intrinsic accounts of their individual components.<sup>107</sup> It is precisely by adopting this structure of justification for the institution of copyright that the obligatory account of copyright law offered here can operate without displacing the instrumental account justifying the very need for and existence of copyright as an institution.

Put in similar terms, then, the institution of copyright can be justified by the overall instrumental (that is, utilitarian) goal that it serves or is directed at realizing: namely, the inducement of creative expression. The instrumental account thus answers the question, "why copyright?" Yet in operationalizing the institution and applying it to indi-

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<sup>103</sup> See Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 491–99 (2004) (describing how U.S. copyright law moved away from a system of mandatory formalities as a precondition to copyright protection). See generally Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311 (2010) (providing an overview of the conceptual foundations of copyright formalities and examining the U.S. position on them).

<sup>104</sup> See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 3 (1955). Rawls, of course, readily admitted that he was not the first to identify and use this distinction. See *id.* at 3 n.2. For an account applying a similar distinction to contract law, see Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 PHIL. ISSUES 420, 422–26 (2001) (explaining how the autonomy and efficiency justifications of contract law can be reconciled through the "[l]exical [o]rdering of [c]ompeting [t]heories," *id.* at 422).

<sup>105</sup> See, e.g., Kraus, *supra* note 104, at 422–23.

<sup>106</sup> Rawls, *supra* note 104, at 5–8, 13–18.

<sup>107</sup> See, e.g., IMMANUEL KANT, *The Metaphysics of Morals*, in PRACTICAL PHILOSOPHY, *supra* note 61, at 353, 391–92; T.M. SCANLON, WHAT WE OWE TO EACH OTHER 151–52 (1998).

vidual instances, a decisionmaker need not make reference to the overall instrumental goals of the institution, but can instead adopt an analysis using the granular devices and concepts on which the liability regime relies — all of which revolve around the idea of copying.<sup>108</sup>

Even if such compatibility is conceded, it is crucial to understand what that compatibility does and does not entail. Most importantly, it avoids a direct conflict between the two accounts, which might otherwise pull the law in diametrically opposite directions. The layered nature of the account means that the overall justification for the institution should exert no normative constraint whatsoever on the underlying structure and content of the institution's devices and mechanisms.<sup>109</sup> In other words, the precise structure, content, and nature of copyright's obligatory devices can be seen as motivated by variables independent of the standard utilitarian or incentives-based account. They might be pragmatic, deontological, or indeed instrumental on their own, but the crucial point is that their content can be determined independently of the system's overall functioning. Copyright's obligations and incentives can thus go hand in hand, without impeding each other.<sup>110</sup>

Indeed, this pluralism is in some ways the promise that the New Private Law holds out for distinctively statutory (and therefore presumptively instrumental) institutions such as copyright law. By allowing institutional structure and justification to operate as independent yet overlapping variables, it in many ways allows the analysis to serve two disputatious masters simultaneously.

## CONCLUSION

Only rarely is copyright law — and indeed all of intellectual property — thought of as a branch of private law. Yet when so understood, copyright's core legal architecture comes to be seen as neither contingent nor incidental, but integral to what copyright *is*. Perhaps most importantly, though, it points to a new way of understanding the institution's goals and purposes. Attempts to analyze the institution of copyright today invariably rely on ideas that are best characterized as

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<sup>108</sup> This point was crucial to the distinction that Rawls draws. *See* Rawls, *supra* note 104, at 16–17 (observing how an individual actor would not be entitled to assert a general utilitarian defense to a breach even if it is conceded that as a matter of practice, keeping one's promises serves a utilitarian purpose). Somewhat ironically though, it seems to be common practice for courts to apply copyright's utilitarian mandate both while deciding individual cases and in interpreting and applying the institution's internal mechanisms. *See, e.g.,* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 557 (1985) (rejecting the respondent's fair use claim on the basis that it would work to diminish the incentive provided by copyright in future cases).

<sup>109</sup> *See* Kraus, *supra* note 104, at 435 (describing this purported limit as a “side-constraint”).

<sup>110</sup> For an analogous account in tort law, compare Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621, 624–26 (2002).

“foundational” in some sense, or “top-down” in that they do not originate in the institution itself.<sup>111</sup> Authorial autonomy, or utility-maximization (on which the incentives account relies) are prominent examples of this category. A private law-rooted, wrong-based understanding of copyright along the lines suggested in this Article would instead begin by looking at the way in which the institution and its legal directives affect actors within the system. This understanding looks to the language and concepts that the institution employs in order to suggest that there is a coherence (or structure) implicit in the working of the system, revolving around the idea of expressive copying, best described as a “middle-level” principle.<sup>112</sup>

Middle-level — or interpretive — principles by their very nature mediate the relationship between foundational theories and outcomes in individual cases. Their strength is thought to lie in their ability to remain analytically coherent while simultaneously explaining the workings of the institution in question, rendering them in one sense “pragmatic.”<sup>113</sup> The concept of “reliance,” for instance, is a well-known middle-level principle in contract law.<sup>114</sup>

As is to be expected, though, middle-level principles exhibit varying levels of compatibility with different foundational ideas. Given that the avowed goal of these principles is explanatory, they provide an area of law with a means by which to approach and assess the more abstract, justificatory theories. “Copying” in copyright law ought to be seen as playing precisely such a role, and as an idea, principle, or device through which the institution’s existing instrumental (and foundational) theories can be mediated. To be sure, this process may entail revising, adapting, or supplementing existing instrumental theories in order to account for the centrality of copying to the institution. The incentives story, for instance, might need to be supplemented by moral or distributive ideals in some parts. The net result, however, is likely to be a richer and normatively plural account of copyright law that pays sufficient attention to *both* its explanatory and justificatory ideals.

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<sup>111</sup> JULES L. COLEMAN, *RISKS AND WRONGS* 8 (1992) (describing a top-down approach).

<sup>112</sup> Richard Craswell, *In that Case, What Is the Question? Economics and the Demands of Contract Theory*, 112 *YALE L.J.* 903, 919 (2003) (explaining middle-level concepts and describing them as “interpretive” in nature).

<sup>113</sup> COLEMAN, *supra* note 11, at 3–12. See generally Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 *LEGAL THEORY* 457 (2000). I have elsewhere argued for a similar approach to thinking about property law in terms of the concept of “inviolability.” See Balganesch, *supra* note 20, at 635–38.

<sup>114</sup> See Craswell, *supra* note 112, at 919. See generally L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 *YALE L.J.* 52 (1936).