

Copyright as Tort

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In these pages we seek to integrate two claims. First, we argue that, taken to their logical conclusions, the considerations that support a strict form of protection for tangible property rights do not call for a similar form of protection when applied to the case of copyright. More dramatically, these considerations demand, on pain of glaring inconsistency, a substantially weaker protection for copyright. In pursuing this claim, we show that the form of protecting property rights (including rights in tangibles) is, to an important extent, a feature of certain normal, though contingent, facts about the human world. Second, the normative question concerning the selection of a desirable protection for creative works is most naturally pursued from a tort law perspective, in part because the normative structure of copyright law simply is that of tort law.

INTRODUCTION

The *scope* of the legal protection for works of authorship — that is, copyrights — extends less ambitiously than tangible property rights, in part because of the limited duration of the former. However, much of this divergence dissipates when it comes to the *form* that the legal protection takes in both cases. Indeed, copyrights and tangible property rights by and large enjoy similar trespassory protections. Generally speaking, owners of tangible as well as intangible properties are vested with rights to exclude others, especially when these others threaten unilaterally to share in the incomes generated by the properties in question. Save for certain exceptions (such as necessity cases), the right to exclusive control renders non-owners

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strictly liable to the owners in cases of trespass (upon tangible property) and infringement (upon copyrighted works).

But in spite of the family resemblance of tangible property and copyright, it is not clear whether a similar form of protection is, indeed, appropriate. Among those who fear to invoke the property-talk in the area of copyright, the most dominant approach has advanced in two stages. The first is to identify important ways in which copyrighted works differ from tangible property — in particular, the lack of rivalry that is part of the nature of the former and the absence of privacy concerns.¹ The second is to introduce any number of changes in the legal protection of copyrighted works that correspond to the peculiar nature of these works.² And these changes are of a piece insofar as they call for abolishing or radically reforming the current form that copyright protection takes. The animating idea and (perhaps) motivation behind this line of thought is that the fundamental differences between tangible property and copyright — in particular, rivalry and privacy — warrant unchaining the latter from the shackles of the former.³

Our ambition is to develop a stronger claim, and in the following pages we shall seek to set the stage — to gather the normative materials, as it were — for this claim. Moreover, this claim does not turn on the former one (concerning the fundamental difference between tangible property and copyright). Nor does it attempt to refute the (arguable) necessity of according strict trespassory protection for tangible property rights.⁴ We shall argue that *for the very same reasons* that lead to the approval of a regime of strict protection for tangible property (including, in particular, real property),

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- 1 See Wendy J. Gordon, *Trespass-Copyright Parallels and the Harm-Benefit Distinction*, 122 HARV. L. REV. F. 62, 66-68 (2009), <http://www.harvardlawreview.org/media/pdf/gordon.pdf> (noting that non-rivalry and privacy figure prominently in the "standard account of how tangible and intangible products differ"); cf. Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 143 (2004) (noting that consumption of information is "nonrivalrous").
 - 2 See, e.g., Christina Bohannon, *Copyright, Harm, Foreseeability and Fair Use*, 85 WASH. U. L. REV. 969 (2007); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009).
 - 3 See, e.g., Lawrence Lessig, *Re-Crafting a Public Domain*, 18 YALE J.L. & HUMAN. 56, 80-81 (2006) ("[T]he understanding that copyright is property tends to support a simplistic view about the nature of that property.").
 - 4 Cf. Hanoch Dagan, *Property and the Public Domain*, 18 YALE J.L. & HUMAN. 84 (2006); Hanoch Dagan, *Exclusion and Inclusion in Property* (Oct. 2009) (unpublished manuscript, on file with authors) [hereinafter Dagan, *Exclusion and Inclusion*] (criticizing on conceptual, normative, and positive grounds accounts of property rights that emphasize the strict form of trespassory protection).

copyright should be approached in a more relaxed fashion, affording looser protections for copyrighted works.⁵ Negatively, *to the extent that* considerations of efficiency and equal freedom⁶ determine the form of the protection provided for both tangible property rights and copyrights, legal preference for a strict form in the case of the former need not extend to the latter. Affirmatively, *insofar as these considerations (arguably) require strict protection for the former, they must also require a substantially weaker protection for the latter*. As we shall seek to show, it is not so much the differences in terms of rivalry and privacy that set them apart (although that may sometimes be the case as well), but rather it is the circumstances surrounding both that make the cardinal difference. We analyze some of these circumstances — certain normal facts about the human condition that are partly constitutive of the form that the legal protection of property rights takes — to render vivid this widely neglected point. To forestall misunderstanding, it is important to note the sense in which our argument is stronger than has been occasionally advanced before. It is stronger in the sense that we grant, *for the sake of the argument*, that the legal protection of tangible property rights *should* be strict — in particular, that considerations of efficiency and freedom sanction, perhaps even require, the protection

5 That said, it also follows from our approach that there may be reasons to take a strict approach when necessary.

6 The Kantian notion that private property expresses society's commitment to equal freedom is elaborated in Ernest J. Weinrib, *Poverty and Property in Kant's System of Rights*, 78 NOTRE DAME L. REV. 795 (2003); ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 86-106 (2009). According to Kant, however, copyright is not derived from the concept of property, but rather from the rightful protection of the "[o]ne who *speaks* to the public in his own name." IMMANUEL KANT, THE METAPHYSICS OF MORALS § 6:289, at 71 (Mary Gregor trans. & ed., Cambridge Univ. Press 1996) (1797). For a recently Kantian elaboration of copyright, see Maurizio Borghi, *Copyright and Truth*, 12 THEORETICAL INQUIRIES L. 1 (2011).

Efficiency and freedom are certainly not the only considerations by which to assess private property institutions (consider, for example, the Hegelian personality theory of property). However, they are commonly cast as the most salient ones, especially among American scholars and practitioners. Hanoch Dagan, for example, insists on the communal values that property institutions may generate or otherwise sustain. But even on his account, they seem to take the backseat in the case of property regulation of economic-market interactions (or interactions between strangers, more generally), which is the case we address in this Article. See Dagan, *Exclusion and Inclusion*, *supra* note 4, at 5, 8 (resisting the incorporation of thick social responsibility and communal values into the property arrangement of market interactions).

against trespass of these rights.⁷ In short, we seek to defeat the argument for protection against trespass (of copyright) in its home court (i.e., tangible property).

Importantly, we pursue the argument from a tort law perspective, because we take this perspective to be both *necessary* and *illuminating* for the study of copyrights (as well as tangible property). Several scholars have, to be sure, sought piecemeal implementation of doctrinal aspects of tort law into copyright.⁸ The tort approach we shall marshal below, by contrast, takes a more comprehensive and systematic turn than the tort-based analyses offered before. Indeed, we shall argue that copyright law is tort law, *too*. This is a conceptual rather than a historical claim about the relationship between the two bodies of law, but it has ample historical support.⁹ By explaining why the normative structure of copyright law¹⁰ is in essence tortious, we seek to revive a historical insight according to which copyright protection is, in the end, a question concerning a selection among alternative regimes of tort liability.

7 Thus, it may still remain an open question whether tangible property rights warrant strict protection against trespass.

8 See, e.g., Gordon, *supra* note 1 (arguing for the substitution of negligence for trespassory protection of copyright); Balganes, *supra* note 2 (referring to foreseeability); Bohannon, *supra* note 2 (urging for greater deployment of foreseeability in fair use jurisprudence); Christopher M. Newman, *Infringement as Nuisance*, 59 CATH. U. L. REV. 61 (2009) (a nuisance-based approach to patent law); cf. Wendy J. Gordon, *Copyright as Tort Law's Mirror Image: "Harms," "Benefits," and the Uses and Limits of Analogy*, 34 MCGEORGE L. REV. 533 (2003) (taking a cautious stance toward tort-based analysis of copyright); Wendy J. Gordon, *Harmless Use: Gleaning from Fields of Copyrighted Works*, 77 FORDHAM L. REV. 2411, 2424 n.55 (2009) (discussing the main points of departure between negligence law and copyright law).

It is worth noting that Gordon's cautious approach to the tortification of copyright differs from our more embraceive approach for (at least) two important reasons. First, Gordon's conception of tort law is substantially narrower than ours. Indeed, she seems to equate tort law with accidental personal injury law, whereas we adhere to the traditional common law conception of torts as including all sorts of torts, including intentional wrongs against the person or property of another. Second, on her conception of tort law, harm is paramount, and she thus parts ways with copyright's emphasis on benefit. By contrast, we do not take benefit to be alien to tort law. After all, harm can include lost benefit (or opportunity cost).

9 See, e.g., Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 CAL. L. REV. 941, 996 (2007) (arguing that historically, the contours of copyright liability were fixed by reference to "principles of tort law"); see also *id.* at 996 n.295 (observing that "early tort treatises" contained freestanding chapters on copyright protection).

10 By *normative structure* we mean the obligations and responsibilities that purport to govern the interactions between right-holders and others.

The argument runs through the following stages. In Part I we shall consider the nature of the relationship between tangible property and torts. We then argue, in Part II, that a torts perspective can cast the analysis of ownership's scope into sharp relief. Part III explains the implications of deploying torts in the service of determining the appropriate scope of ownership in tangible objects. Finally, Part IV focuses on copyright, approaching it from the perspective of torts.

I. TANGIBLE PROPERTY AND TORTS: A REUNION

Students of tangible property law and their counterparts from the torts department are quite familiar with the important extent to which their respective fields of study converge.¹¹ Thus, property-talk of the right to exclude others from one's own premises seems to strike a familiar chord, insofar as tort-talk concerns duties of non-interference with possessory and ownership interests in external objects.¹² Leading treatises affirm this lived experience when they commonly emphasize the property/tort interface in connection with (property) rights and (torts) duties.¹³ These observations raise a question concerning the nature of this convergence. We shall reject the notion that property and torts are merely two distinct though converging bodies at best.¹⁴ Instead, we shall insist that property and torts represent two

11 We restrict the present analysis to tangible property in order not to prejudge the case of intellectual property (and, in particular, copyrights).

12 On the property side of the equation, see Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 281-82 (2008) (observing that the dominant approach in contemporary property theory casts ownership in clearly tort- based terms of a "duty" imposed on non-owners "not to cross over the boundary of the object owned without permission"); see also J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 128, 143 (1998) (same).

On the tort side, see Arthur Ripstein, *Tort Law in a Liberal State*, 1 J. TORT L. 1, 14-15 (2007) (noting that tort law features two kinds of wrongdoing: trespassing (relating to property or person) and harm-doing).

13 E.g., DAN B. DOBBS, *THE LAW OF TORTS* § 4, at 7 (2000) ("[O]wnership of property underlies many torts, and some tort actions are expressly brought for the purpose of establishing or confirming rights in property, while others are brought to vindicate or protect those rights . . . In defining the tort of trespass the courts necessarily define something of the incidents of ownership of real property."); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 13, at 70 (5th ed. 1984) ("[T]he right to exclusive use of property necessarily implies the correlative right to demand that others who wish to use the property should pay for that use.").

14 We say *at best* in recognition of prominent scholars who may even deny the convergence between property and torts. See, e.g., Henry E. Smith, *Intellectual*

(nonexclusive) perspectives of the same phenomena; namely, relationships between persons as mediated through external objects.

To begin with, the concept of ownership may be best characterized as picking out a special practical authority to fix the normative standing of others in relation to an object.¹⁵ Ownership, in other words, is a form of decisional authority over the legal status of others vis-à-vis an object.¹⁶ It manifests itself within a system of private property by generating, so to speak, *in rem* signals (good against the world), according to which the point of view of the relevant owner must, in some measure, be accorded respect and recognition in (almost) all sorts of interaction others have or intend to have with objects that are not theirs.¹⁷

Of course, these signals are not mere communications made on behalf of rights-holders to the world at large. Rather, they express the *obligations* that non-owners incur by virtue of the existence of an institution of property. More specifically, it is a condition of the possibility of ownership that obligations to respect the decisional authority of owners must be imposed. Whereas property-based analyses of these obligations sometimes leave them at an abstract level of a duty of non-interference *simpliciter*,¹⁸ the study of proprietary torts goes inward to elaborate on the precise forms that the abstract duty takes. Thus, contemporary tort law acknowledges, among other things, a duty not to trespass upon others' chattel or land, a duty against committing conversion, a duty against carelessly damaging the property of another, a duty not to create nuisance to the deprivation of another's enjoyment of her object, and so on.¹⁹ In fact, by articulating these or any other particular tort duties, tort law not only renders the abstract duty of non-interference more concrete

Property as Property: Delineating Entitlements in Information, 116 YALE L.J. 1742, 1745 (2007) ("Property differs from other areas like torts and contracts in its heavier reliance on . . . the exclusion strategy. The prototypical example [of this strategy] is trespass to land.").

15 This account of ownership is developed in Avihay Dorfman, *Private Ownership*, 16 LEGAL THEORY (forthcoming 2010) (manuscript at 14-20, on file with authors).

16 Apart from the *form* of ownership, there arises a question concerning the *content* of the owner's authority; in particular, about the scope of the decisional authority exercised by the owner. We analyze this question (from the tort perspective, though) in more detail below. See *infra* Part III.

17 See Dorfman, *supra* note 15, at 14; cf. JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 43 (1988).

18 See, e.g., PENNER, *supra* note 12, at 73 (discussing the generic duty of non-interference).

19 See KEETON ET AL., *supra* note 13, §§ 13-15, at 67-106 (discussing intentional proprietary torts).

(and, therefore, practical in the first place), but also *shapes* the very contours of ownership. Indeed, the content, say, of a duty to forbear from entering another's land is partly constitutive of what it means to hold property rights over that land. Thus, a court decision to limit the scope of this duty for tort-related reasons (say, due to *force majeure*) is a judgment concerning the content of ownership.

Proprietary torts, therefore, cannot be viewed merely as legal machinery that coincidentally affects the administration of the institution of property. They are just as essential to the institution as are property *rights*. To be sure, the insistence on establishing the property-tort relation on firmer and more precise grounds is not merely a feature of legalistic predilections on our part. As we shall seek to show, there is much to be gained (in terms of clarity, depth of analysis, and policy implications) by looking at property institutions from the angle of torts, which is a perspective widely underestimated by theoretical accounts of property²⁰ and, until this moment, under-theorized in the arena of copyright law.²¹

II. TANGIBLE PROPERTY: A TORT LAW PERSPECTIVE

Tort law features a collection of discrete torts — wrongs to which civil liability is attached. There are different methods that can be used to put them together in an orderly fashion, to render them worthy of being members of a single body of (tort) *law*. Perhaps the most familiar methodology grows out of putting together two sets of distinctions: intentional vs. non-intentional, fault vs. non-fault.

First, there exists a distinction between intentional and unintentional torts. This distinction is prone to misunderstanding, because, unlike intent in the

20 More than three decades ago Guido Calabresi and Douglas Melamed observed that "[o]nly rarely are property and torts approached from a unified perspective." Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089 (1972). With few exceptions (such as Calabresi's and Melamed's celebrated article), this observation has never lost its force. At any rate, it is important to note that, unlike Calabresi and Melamed, we are not calling for a unified perspective of property and torts. Rather, we prefer to view them as constituting two distinct perspectives regarding the same legal practice.

21 As noted earlier, however, there have been proposals to incorporate tort principles and doctrines (such as foreseeability) into copyright law. See sources cited *supra* notes 1-2, 8. However, these do not amount to a comprehensive account which sees copyright law as tort law.

criminal law, intentional torts require an intention to perform an act (say, enter this building), and the act turns out to be defined as tortious by the law. An intention to engage in wrongful action or harm-doing, however, is not an essential element of intentional torts.²² Unintentional torts, by contrast, are wrongs resulting from acts that are not intentionally performed by the actor (such as when a biker takes a clumsy turn, rolls over, and is thrown against a display window of a shop which is thereby shattered to pieces).²³

Second, whether or not the act that caused the loss is intended (in the appropriate sense explained above), there still remains the separate question of fault. Accordingly, it would be necessary to draw another distinction: fault-based and non-fault-based torts. This distinction focuses on the relation between adverse consequences (such as a loss) that have befallen a victim and the character of the injurer's conduct that is causally connected to them (in the appropriate sense). On the no-fault system of torts, the entire risk of interfering with the property interest of another is imposed on non-owners, regardless of the (intentional or unintentional) *character* of the interfering conduct.²⁴ On the other hand, fault-based liability divides this risk between owners and non-owners so that if the latter meets a certain standard (usually, an objective standard of reasonableness), the risk will lie where it falls; namely, upon the owners' shoulders. For instance, a biker planning to go for a ride across the countryside bears the entire risk of interfering with or otherwise carelessly impinging upon the properties of others when tort liability is fault-free. But under a fault-based regime, if she plans ahead and so takes appropriate precautions (such as restricting her route to public roads), liability need not lie on her for the adverse consequences (to others' properties) resulting from any interference with the properties of others.²⁵

22 See generally RESTATEMENT (SECOND) OF TORTS § 164 cmt. a (1965) ("If the actor is and intends to be upon the particular piece of land in question, it is immaterial that he honestly and reasonably believes that he has the consent of the lawful possessor to enter, or, indeed, that he himself is its possessor.").

23 The unintentional though wrongful act is represented in this example by the careless ride.

24 The term *entire risk* may be qualified, in the case of strict liability, to allow for conditions such as foreseeability and avoidability to restrict the primary duty (say, of no-trespassing) imposed on would-be injurers under a non-fault regime of tort liability. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 96 (Boston, Little, Brown & Co. 1881) (observing that common law torts acknowledge lack of foreseeability and/or avoidability as defeating liability, including non-fault-based liability); see also *id.* (observing that a system of tort liability, which renders unnecessary concerns for foreseeability and avoidability, amounts to "compel[ing] me [*qua* actor] to insure him [*qua* victim] against lightning").

25 This statement obtains even when the invasion of another's property rights is

Bringing together the two sets of distinctions gives rise to four paradigms or ideal types of tort regime:

1. Willful Wrongdoing: an intentional, faulty conduct.
2. Negligence: liability is predicated upon fault; intentional conduct is unnecessary.
3. Trespass or Strict Liability: liability is predicated upon intentional conduct; fault is inessential.
4. Absolute Liability (also known as enterprise liability²⁶): neither intentional nor faulty conduct is required for liability to lie (consider, for example, workers' compensation schemes).

Each of these alternatives can, in principle, protect ownership and thus determine its effective scope. Accordingly, this division suggests that there are two dimensions at play — analytic and normative — and that they give rise to different questions and concerns. Analytically, there is no *relationship of entailment* between the very idea of ownership and its extent or reach. In other words, it is an open question, *conceptually* speaking, whether or not the tort duties imposed on non-owners need accommodate any one of the four alternative regimes in particular.²⁷

Since the analytic dimension of proprietary torts renders the content of ownership conceptually flexible (to some degree), it would take an argument — a normative one, to be sure — to marry a particular tort

intentional (in the tort law sense of the word). Consider now the biker from the previous example in a private necessity case, seeking a shelter in a nearby privately-owned barn from an unexpectedly severe thunderstorm. Isn't it possible to suppose that, all else being equal, a fault-based liability would not lie for her intentional intrusion on the property of another?

²⁶ See Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1287 (2001) (distinguishing between "traditional strict liability" in which a person [intentionally?] acts at her own peril and "enterprise liability," according to which those who profit from the imposition of risk should bear the costs that are a price of their profit).

²⁷ For example, the no-fault liability regime announced in the famous case of *Fletcher v. Rylands*, [1865-66] 1 L.R. Exch. 265 has been the subject of intense controversies among courts and between tort scholars. See, e.g., Gary T. Schwartz, *Rylands v. Fletcher, Negligence, and Strict Liability*, in *THE LAW OF OBLIGATIONS: ESSAYS IN CELEBRATION OF JOHN FLEMING* 209 (Peter Cane & Jane Stapleton eds., 1998). Whereas English common law still adheres to *Ryland v. Fletcher's* unintentional, no-fault tort liability for escaping materials such as water, other jurisdictions have opted for a fault-based paradigm. For the former trend, see *Transco plc v. Stockport Metropolitan Borough Council*, [2004] 2 A.C. 1 (H.L. 2003) (appeal taken from Eng.). The latter trend is represented by the leading Australian case of *Burnie Port Authority v. General Jones Pty* (1994) 120 A.L.R. 42 (Austl.).

paradigm to the institution of tangible property and, thus, to determine the content (i.e., the reach) of ownership's authority over non-owners. A tort law perspective proves particularly important in this regard, since it elicits insights and considerations that are familiar to the tort lawyer from more general questions related to the law of private wrongs (including, among other things, wrongs to the *person* of another). More specifically, and more dramatically, we shall argue that the conventional property law perspective may fail adequately to account for the entire range of considerations that are necessary for fixing the appropriate content of ownership's scope. A tort law perspective, by contrast, is naturally geared toward the nuanced analysis that is needed to identify which tort paradigm should apply in any particular case (or class of cases).

Scholarly literature on the normative dimension of ownership's scope focuses on the ways property rights (ownership being the hallmark) affect the coordination of people's practical, including economic, affairs.²⁸ This approach seems to make perfect sense from a *property law perspective*, because in essence it asks how the right of ownership makes a difference in the ways people negotiate the world of external objects. It therefore commences by investigating how an individual holding ownership rights could shape the structure of reasons for action that an indefinite, large number of non-owners have with respect to the proper ways and extent of interacting with the object associated with these rights. In particular, the investigation emphasizes that the mode of protecting these rights from the mass of non-owners proves crucial to the economic and non-economic benefits of having a legal scheme of *in rem* property rights in external objects; these benefits are especially cast in terms of promoting either efficient market transactions or freedom (through the self-determined use of objects). On many occasions, moreover, there is a tendency to explore these benefits in terms of the choice between property and liability rules as competing ways of determining ownership's scope by way of offering (different modes of) protection from non-owners.²⁹ Indeed, property and liability rules, which *very* roughly and imprecisely parallel trespass versus negligence regimes of

28 See, e.g., PENNER, *supra* note 12, at 27 (arguing that duties of non-interference are akin to *in rem* duties, owed to "the plurality of property holders"); Thomas Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 789 (2001) (arguing that property law's duty of non-interference protects "a large and indefinite class of holders of [property] rights").

29 This includes variations on the Calabresi & Melamed theme (*supra* note 20). See, e.g., James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 470-71 (1995); Abraham Bell

liability,³⁰ might draw very differently on the structure of reasons for action that both the particular owner and the mass of non-owners have.

With some notable exceptions in favor of liability rules,³¹ the conventional wisdom emphasizes that a property rule (and, by implication, the extent of ownership's authority) has the upper hand in securing the conditions of efficient transactions³² and in sustaining self-determination through property rights.³³ The economic explanation insists that under a property rule's veto power, the owner has more incentives to produce information about the value of her object (including the productive uses it allows), in response to which non-owners have to place their offers.³⁴ Indeed, the owner stands to gain

& Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1 (2002) (exploring a dynamic model of integrating property and liability rules across time).

30 On our account, negligence liability is part of a regime that imposes a duty of care. A liability rule implies no such duty.

31 Preference for liability rules (and, by implication, for a narrower scope of ownership authority to fix non-owners' normative standing) may be grounded in the service of these rules to efficient market transactions. The reason is that a liability rule creates incentives on the part of an owner to reveal her valuation of her object to an interested non-owner not only when this valuation exceeds the amount of liability damages, but even when it falls below it. Accordingly, the latter incident of valuation-revealing implies that, in comparison to a property rule, more voluntary transactions would be made, and that these transactions would be efficient because they would be influenced by subjective valuation as opposed to a liability rule's objective measurement of damages. According to Ian Ayres and Eric Talley,

the owner may be willing to sell her entitlement for less than the liability amount, especially if the liability amount is sufficiently high so that the nominal owner believes that in the absence of such a sale, the potential defendant will not be willing to take and pay the liability amount.

Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1038 n.44 (1995).

32 For a representative statement, see Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1729 (2004).

33 See Jules Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1339 (1995) (arguing that liability rules offend against the autonomy of entitlements-holders); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 195 (1995) (rejecting damages as the primary remedy in cases of private nuisance and asserting that "Kantian right accounts for the injunction that remedies the nuisance").

34 Smith, *supra* note 32, at 1729 ("Ownership concentrates on the owner the benefits of information developed about — and bets placed on — the value of the asset."). Reflecting upon the assumptions underlying the information cost thesis, Smith has observed that

[o]wners are likely often to be the least-cost generators of information about assets, even if this information is not verifiable to third parties. Takers will likely be closer to assets than courts, and will be able to evaluate assets currently held

from the competition between non-owners bidding for her rights based (in part) on the produced information, rather than on the court's valuation of this information. To that extent, a property rule outclasses a liability rule, for under the latter regime "an owner may not be able to communicate to a court the value of a use (or nonuse) such that damages could be given to reflect it."³⁵ As a result, an owner protected by a property rule is in an optimal position to coordinate the conflicting use-claims of bidding non-owners, and the object in question could end up in the hands of the one who values it most. The non-economic preference for a property rule insists that the freedom of the owner (viz., the authority to determine the use of her object) is inconsistent with the liability rule's *de facto* authorization to appropriate the object without securing her approval *ex ante*.³⁶

Whatever side merits support in the debate over property versus liability rules, both are of a piece insofar as they take the normative question (concerning the scope that ownership's authority should have) to be one of coordination in a world entertaining an owner and a mass of non-owners.³⁷ On this view, the point of departure is the existence of ownership rights over an object and, accordingly, the competition between multiple non-owners over this object. Against this factual setting, the question concerning coordination arises: how would the different modes of determining the scope of ownership's authority affect the interactions between the mass of non-owners *inter-se*, and between each one of them and the owner of a particular object? As we observed above, this approach may seem natural from a property law perspective, for it ordinarily focuses on the distinctive ways property *rights* can influence people's practical affairs.

But this approach, insofar as it purports to settle the normative question, cannot but beg a question which, for the tort lawyer, is logically prior — under what conditions can competition-based coordination between non-owners arise to begin with? In other words, it is an open question, and

by owners. Under exclusion and property rule protection, people in this position have to make offers, but under liability rules . . . takers can use information about assets and their owners to cherry-pick those undervalued by damages rules.

Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 985 (2004) [hereinafter Smith, *Exclusion*].

³⁵ Smith, *Exclusion*, *supra* note 34, at 985-86.

³⁶ See Coleman & Kraus, *supra* note 33, at 1339; Dorfman, *supra* note 15, at 28-29 (arguing that a practice of private takings is inconsistent with the idea of private ownership).

³⁷ This observation holds even if the problem of coordination is approached from a non-economic angle (especially, freedom). An explicit, non-economic explanation along these lines is found in PENNER, *supra* note 12, at 27-30.

one that plagues the conventional property law approach, whether the world is such that, with respect to any particular object, the picture of non-owners potentially competing over an object held by a specified owner obtains. As we shall argue, this question about the world is partly constitutive of the scope that ownership's authority should take. This is especially true, as we shall argue in detail below, in the context of copyrighted works. For the meantime, however, we shall set the stage for this argument by demonstrating its normative bite in regard to tangible property.

Instead of investigating the ways in which property rights coordinate interactions between the mass of non-owners with someone else's object, a tort law perspective views the world through the lens of a non-owner encountering a material world regulated by a system of private property. That is, the opening scene, as it were, portrays a single non-owner in a vast sea of external objects that, to an important extent, may be divided among different owners. Against this backdrop, the tort lawyer begins with the duties (and, by implication, liabilities) an individual should owe others by virtue of acting in a world occupied by their privately owned objects. This is a classical tort law approach familiar from the tort category of personal injury (which includes torts such as negligence, assault and battery, and more).³⁸ Returning to the tort category of property, a tort law perspective renders transparent certain considerations that often have gone unnoticed by the property perspective.³⁹ And the duty-orientation of a torts perspective successfully captures the complexity (i.e., the full costs) against which non-owners negotiate the world. This includes, in particular, the very difficulty of identifying oneself as a non-owner (is the object mine or thine?); of whether there is an owner for *this* object; of whether the owner of *that* object is ascertainable; and of whether the owner is permissive with respect to certain uses of the object by non-owners. Alternatively, we could express these concerns (without thereby altering their pragmatic bite) in the weaker terms of the costs of these inquiries and their effects on the optimal and fair allocation of resource use.⁴⁰

38 The *locus classicus* is GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

39 We do not, however, claim that property lawyers *cannot* but fail to see these considerations (whatever they are). See Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285, 1295-96 (2008) (noting that property lawyers have largely ignored search costs associated with discovering the very existence, scope, and holders of property rights). Our argument, instead, is that a tort law perspective is far more likely to account for these considerations than the conventional approach in property theory.

40 See also *id.*

III. THE CIRCUMSTANCES OF TANGIBLE PROPERTY

Thus, the normative task of assigning proprietary torts (either trespass-based, negligence, or absolute liability⁴¹) to protect ownership must take into account, against the backdrop of the complexities just mentioned, the extent to which the putative tort paradigm satisfies the demands that efficiency and freedom place on the institution of tangible private property.⁴² And this investigation is influenced at almost every turn by what we shall call the *circumstances of tangible property* — that is, certain normal facts about the human condition that, at the get-go stage, render establishing private property institutions both possible and necessary; and, once these institutions are established, affect their ongoing administration.⁴³ At the get-go stage, these institutions become *possible* since scarcity is far from too extreme⁴⁴ and, moreover, because most members of society possess pro-social instincts;⁴⁵ they are *necessary* because (among other things) scarcity and disagreements about use and access are, nonetheless, far from trivial.⁴⁶ Following on from this, there are additional facts about the human condition that shape the

41 We set aside the duty against committing willful wrongdoing and focus on the other three, since the former is rarely considered as a plausible candidate for protecting rights (of property or otherwise).

42 See also *supra* note 6.

43 The notion of circumstances of tangible property is borrowed and substantively adapted from the circumstances of justice, which (since David Hume's day until the present) stand for the "normal conditions under which human cooperation is both possible and necessary." JOHN RAWLS, *A THEORY OF JUSTICE* 126 (1971). For Hume's articulation of the circumstances of justice, see DAVID HUME, *A TREATISE OF HUMAN NATURE* bk. III. pt. 2 § ii, at 486-501 (L.A. Selby-Bigge ed., Oxford Univ. Press 1978) (1740).

44 Extreme scarcity renders peaceful coexistence redundant insofar as only very few could survive in such a world.

45 The emphasis on pro-social instincts has been marshaled in particular by luminaries such as HUME, *supra* note 43, at 316-18; JOHN STUART MILL, *UTILITARIANISM* (1869), reprinted in JOHN STUART MILL, *UTILITARIANISM AND ON LIBERTY* 181, 207-08 (Mary Warnock ed., Blackwell Publishing Ltd. 2003).

46 Strictly speaking, private property is possible but unnecessary, as there are alternatives, especially collective and common property. The former — a state-owned property regime featuring a planned economy — was prominent in the former U.S.S.R. The latter — a scheme of unrestrained sharing among all — has been advocated by Plato to regulate the lives of the guardians in the ideal city of *The Republic*, but has seldom been implemented as society's preferred system of property regulation.

administration of these institutions, including, most importantly for our purposes, the selection of a proprietary tort paradigm with which to govern the practical affairs of non-owners and through which to construe the scope of private owners' authority over the former. Four such facts (of the latter kind) stand out as we steadily work our way toward delineating the scope of ownership's authority in the context of tangible property and, eventually, copyrights.

A. The Circumstances of Tangible Property: An Elaboration

The first fact pertinent to the administration of a system of private property is that tangible objects come with discrete, *spatial boundaries*, not merely metaphorical, but real: doors, gates, locks, bag zippers, picket fences, or walls, and the very *tangibility* of the objects as such is an obvious reminder.⁴⁷ It not surprising, then, that land, especially a discrete piece of land with a house built on it, is often considered "the central symbol for property."⁴⁸

The second fact is a conjunction of moderate scarcity and society's preference for a private property form of legal ordering (rather than other forms of regulating tangible property such as collective property). Call it the *saturate-ness* of privately owned objects. The lived experience of a private property institution is such that others already own most of the things out there in our vicinity, while the rest usually take the form of open access substrate (such as city streets and public parks). Rarely nowadays do people face *res nullius*,⁴⁹ and even when they might, people would normally have to

⁴⁷ The spatiality of tangible property has been so influential that William Blackstone once observed that "every man's land is in the eye of the law inclosed and set apart from his neighbor's." 3 WILLIAM BLACKSTONE, COMMENTARIES *209.

⁴⁸ Carol M. Rose, *Property as a Keystone Right?*, 71 NOTRE DAME L. REV. 329, 351 (1996); *see also id.* ("[F]or most people, a house (adorned with a picket fence) is very likely to come in mind when the unmodified noun 'property' is spoken."); JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 29 (2000) ("[T]he core image of ownership is ownership of a home."); Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1891 (2007) (noting the importance of "spatial boundaries" in a system of private ownership with a dominant right to exclude).

⁴⁹ Carol Rose wonders "[h]ow many times, after all, may we expect to get into disputes about our ownership of stray moose or long-buried pieces of eight?" Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985), *reprinted in* CAROL M. ROSE, PROPERTY AND PERSUASION 11, 12 (1994). She immediately responds that first occupancy of objects is not "entirely academic." However, she illustrates this assertion with "treasure-laden old vessels, and now more than ever, statesmen do have to consider whether someone's acts might support a claim to own

seek places such as the wilderness (to assume ownership over wild animals),⁵⁰ bottom of the sea (to salvage a long forgotten vessel's treasure),⁵¹ baseball stadiums (to catch a homerun ball),⁵² or just get lucky finding an abandoned object (say, a Pollock hiding in the garbage).⁵³

But although a world saturated with clearly defined, privately owned objects begins to strike a familiar cord in our perception of the material world, there is another fact that figures prominently in the everyday affairs of people living under a system of private tangible property. We shall call it *object-sociability*. Normally, privately owned tangibles convey clear signals with respect to whether or not non-owners are welcome to use them in certain ways. A residential house presents asocial (though not necessarily anti-social) signals, as non-owners are not invited unless expressly so. A restaurant, by contrast, conveys sociable signals, at least during business hours.⁵⁴ That said, were these signals to become confusingly muddier, non-owners would be hard-pressed to orient themselves through the maze of multiple objects generating mixed signs of "all welcome" and "no entrance." Take, for example, the *Mimouna* holiday, a traditional celebration held the day after Passover by Jews of North African origin. Commencing when night falls, the celebrating people throw open their homes and dinner tables to all. This openness often involves leaving entrance doors wide

the moon, for example, or the mineral nodes at the bottom of the sea." Certainly, the most important insight of Rose's excellent essay is the account of possession at the core of the institution of private property. But this influential insight is not confined to human encounters with unowned objects. Thus, there is no inconsistency in downplaying the practical significance of *original* possession, while emphasizing the centrality of possession *as such* to our understanding of private property.

50 See, e.g., *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805) (claiming original possession of a fox as the ground of title).

51 See, e.g., *Rickard v. Pringle*, 293 F. Supp. 981, 984 (E.D.N.Y. 1968) (arguing that ownership of a salvaged propeller of a vessel abandoned on the ocean floor for sixty years goes to the "the first finder lawfully and fairly appropriating it and reducing it to possession, with intention to become its owner").

52 See, e.g., *Popov v. Hayashi*, 2002 WL 31833731 (Cal. App. Dep't Super. Ct. Dec. 18, 2002) (assuming ownership over a homerun baseball).

53 We assume, for the sake of illustration, that the Pollock is indeed abandoned, rather than lost or stolen. There are, of course, other instances involving unowned objects. Fishing consists of assuming ownership over the unowned. But these instances are certainly not at the core of the lived experience of contemporary private property.

54 Certainly, these signals cannot discriminate between non-owners on the basis of race (to mention one unjustified basis for discrimination). By specifying the circumstances of private property, we set aside the normative question why these signals *must* meet basic requirements of fairness.

open. Now, consider a neighborhood of houses and building apartments with substantial numbers of celebrating families. Spatial boundaries and saturateness notwithstanding, a passerby seeking to attend the celebration might easily confuse a door that is merely open with the *Mimouna* celebration, trespassing against the property of a non-celebrating individual who is about to leave her house in a couple of minutes. The disorientation characteristic of this situation may well be exceptional. However, it casts into sharp focus the pervasive circumstance of object-sociability — the quite definite input non-owners can infer simply by virtue of seeing or otherwise sensing the tangible object in question.⁵⁵

A universe saturated with privately owned objects of well-defined boundaries is importantly insufficient as a characterization of the lived experience of private property, even as object-sociability obtains. To render this assertion vivid, consider a city taken by a devastating hurricane in which pieces of furniture and other household articles are scattered all over the place, many of them in quite good shape. Certainly, a well-functioning institution of private property can hardly be sought under this condition, partly because the connection between these objects and their owners becomes loose (perhaps) beyond repair. A fourth fact therefore presents itself: *ascertainable* owners. Indeed, privately owned objects are normally closely connected to their owners (or someone on their behalves). This connection can be cashed out in terms of the possessory interest often held by the owner (or by someone on her behalf). Indeed, the owner of the laptop at the café table across the street can normally be discovered by looking at the person currently using it; the owner of the car parked next to mine can be reached by posting a notice on her window (and, on her part, she can approach non-owners by posting a for-sale note on the back of the car). In other cases, the ascertainability of owners can be a feature of legal technology such as land registry, according to which simply locating the precise geographical place in which a particular plot of land lies can reveal the identity of the owner. More broadly, ascertainability reflects

55 It is important to note, to forestall misunderstanding, that object-sociability is not a feature of the nature of the object. There are objects that are naturally sharable, because they exhibit technology that renders sharing plausible. See Yochai Benkler, *Sharing Nicely: On Sharable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273 (2004). A sharable object may affect the kind of signals that can be reasonably inferred from an object — sociable or associable signals. However, this is not necessary, as there may be any number of reasons for owners to see to it that their objects generate social (or asocial) signals. These reasons can be economic, cultural, psychological, and so on.

the notion that objects governed by a system of private property *mediate* between non-owners and owners, facilitating engagements that are crucial to non-owners seeking to act in a world saturated with others' (well-defined) objects. As a result, even the complex society of the modern age can, nonetheless, sustain sophisticated schemes of social coordination among its members in and around tangible objects.

B. The Place of the Circumstances of Tangible Property in Private Property Institutions

The circumstances of tangible property, especially the four just mentioned, have an important practical influence on the articulation of the duties that the non-owner might owe owners of private property. Indeed, spatiality, saturate-ness, object-sociability, and ascertainability allow for a system of private property to provide a usefully simple (perhaps even costless) *guide to conduct* for all members of society in connection with external objects. For, under these circumstances, a system of private property can and, indeed, does give rise to, following Jeremy Waldron, an "organizing idea" about rules of "access to and control of material resources."⁵⁶ An organizing idea, in other words, is a cognitive shorthand for persons negotiating the complex set of rules of the private property system; for the most part, it is enough to grasp this simple idea in order to know how to conduct oneself in the light of other persons and objects, especially as regards objects that one does not own. The content of this organizing idea is cashed out in the formula of a name/thing correlation.⁵⁷ The system of private property thus understood consists of many discrete objects, each of which comes, metaphorically speaking, with a nametag referring to the fact that there is an owner (though not necessarily to any biographical details about her).⁵⁸ And this nametag, capturing nicely the cognitive guidance put forward by the institution of private tangible property, provides a "rough and ready"⁵⁹ idea of how others ought to act with respect to

⁵⁶ WALDRON, *supra* note 17, at 38.

⁵⁷ *Id.* at 39.

⁵⁸ Indeed, the "name" in the name/thing correlation does not speak for the actual identity of the owner (her name and face), but rather for the fact that there is such a person who has a special status in connection with that object and, as we explain below, whose identity can be ascertained when needed at a relatively low cost.

⁵⁹ WALDRON, *supra* note 17, at 43. Other leading property scholars have followed suit, emphasizing the centrality of practical guidance for an institution of private property. See, e.g., PENNER, *supra* note 12, at 27, 30; Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerous Clausus Principle*,

the tagged thing — namely, defer to the authority of the person whose name is imprinted on the thing.

The general preference of the law for sustaining ownership in tangible objects through trespassory protections, the view that ownership's authority may come only slightly short of the awesome Blackstonian depiction of ownership as the "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe,"⁶⁰ may be explained, therefore, by reference to the circumstances of tangible property.⁶¹ And insofar as external goals such as economic efficiency or equal freedom warrant the institution of private property (rather than, say, common property), it is not surprising to see that ownership has largely attracted a near absolutist scope of authority to fix the normative standing of others, which is expressed in the trespassory paradigm we find in the actual tangible proprietary torts, past and present.⁶²

The name/thing correlation, however, breaks down, and its "rough and ready" guide to non-owners' conduct becomes unhelpful, when spatial boundaries are, in some important measure, blurry. Moreover, it becomes incoherent when the saturate-ness of owned objects does not obtain, at least not as vigorously as it normally does. Likewise, it seems perplexing when object-sociability does not obtain and non-owners face confusing messages concerning objects that are not theirs. Furthermore, it loses much of its intuitive appeal as soon as the name/thing correlation amounts to an empty formalism due to the non-ascertainability of owners (as in the hurricane example mentioned above). In either case, it is far from clear why all the risks (and, of course, the costs of avoiding them) should fall, as in a trespass paradigm, on the non-owner acting in a society governed by an institution of private property. Why, then, should a trespass paradigm set the tone for the tort duties (of non-interference) imposed on non-owners faced with fuzzy spatial boundaries, close-to-trivial saturate-ness, indeterminate object-sociability, and prohibitively costly ascertainability? There are reasons to believe that an accident paradigm (which may include

110 YALE L.J. 1 (2000); Merrill & Smith, *supra* note 48, at 1850 ("Property is a device for coordinating both personal and impersonal interactions over time.").

⁶⁰ 2 WILLIAM BLACKSTONE, COMMENTARIES *2; *see also* HOLMES, *supra* note 24, at 246 ("The owner is allowed to exclude all, and is accountable to no one.").

⁶¹ Of course, there may be other grounds as well.

⁶² *See* sources cited *supra* notes 6, 32-37. As should have been apparent from the discussion so far, our analysis draws almost exclusively on Anglo-American common law, although we believe that the logic of this analysis applies, *mutatis mutandis*, to the civil law tradition.

owners' contributory or comparative negligence), because it allows for a more nuanced analysis of the various costs at stake and their appropriate allocation, makes more sense in terms of efficient coordination as well as sustaining equal freedom.⁶³ Indeed, under these circumstances, the possibility of entering into market-based transactions (between non-owners and owners) might be virtually infeasible.⁶⁴ And for that same reason, a duty against the commission of trespass might offend against the freedom of the non-owner, insofar as it reduces her to a mere means towards the end of preserving the near-absolute scope of owners' authority at virtually any cost (including the increasingly high costs that come with deficient spatiality, saturate-ness, object-sociability, and ascertainability).⁶⁵

C. The Circumstances of Tangible Property: A Note on Stable Contingency

The circumstances of tangible property mentioned a moment ago are, to an important extent, social and legal constructs. They are artificial rather than natural facts about the world out there. They can be changed at some cost. For instance, object-sociability may undergo radical changes when the social conventions pertaining to the use of privately owned objects move from the libertarian to the social-democratic. To account for the possibility of changing circumstances, we have defined these circumstances as *normal*, rather than essential, facts about the human condition. On our account, the contingency underlying the law's preference toward the appropriate scope of ownership derives precisely from the recognition that the circumstances in question just are contingent.

That said, their contingent character does not amount to a highly fungible menu of circumstances of tangible property. For example, the fact of saturate-ness of privately owned objects does not seem about to disappear

63 For more on the *accident paradigm*, see *infra* text accompanying notes 86-93. See also Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1544-56 (2003); Menachem Mautner, *The Eternal Triangles of the Law: Toward a Theory of Priorities in Conflicts Involving Remote Parties*, 90 MICH. L. REV. 95, 100-26 (1991) (applying a tort-oriented analysis of accidental harm to the arena of property disputes concerning priorities between conflicting contractual claims for the same title).

64 This is a particular application of the more general notion that a property rule proves inefficient as transaction costs (here, search costs) become intolerably high.

65 See ALAN BRUDNER, *THE UNITY OF THE COMMON LAW* 190 (1995) (noting the intimate connection between a no-fault liability regime and oppression).

from the tangible property landscape anytime soon. More generally, it would be a mistake to suppose that contingency stands for unstable, hodgepodge features of a rapidly changing world of tangibles. Thus, on the one hand, our ambition is modest, as we argue from the *contingency* of the human condition under which we live. Nevertheless, noting that the circumstances of tangible property we have articulated are both significant and enduring easily compensates for this modesty.

* * *

We have argued that there *should* be no single, fixed match between ownership and the various proprietary tort paradigms that construe its content.⁶⁶ As a result, now switching to the language of property rights, the scope of owners' rights to fix the normative standing of others in relation to objects is naturally open to variations in degree. Affirmatively, we have introduced certain important (though widely ignored) circumstances of tangible property, normal facts about the human condition that are necessary, though not sufficient, to the making and administration of private property institutions.⁶⁷ In particular, the preceding argument has shown that these circumstances, against the backdrop of the interests underlying private property, are partly constitutive of the choice between the different tort paradigms (especially trespass, negligence, and absolute liability), and thus between the appropriate scopes of ownership's authority. This point is worth emphasizing because it makes clear that the near absolutist overtones of "keep-off" often attributed to the institution of private ownership are, to an important extent, not a logical feature of ownership or private property, more generally. Rather, they are to an important extent a feature of certain facts about the world occupied by owners and non-owners of material objects. In other words, the considerations that support the current law's preference for trespassory duties as the default paradigm of regulating non-owners' conduct depend on (contingent) facts, rather than merely on abstract norms (of efficiency, freedom, or otherwise).

While these facts — the circumstances of tangible property — have often been left unaddressed by the standard theoretical accounts of private tangible property, we have argued that they are readily and clearly visible from a tort

66 We shall leave the effort to show the doctrinal footprints of our normative argument to another occasion.

67 More specifically, we do not seek to argue that the circumstances of tangible property (as defined in the main text above) provide a complete or sufficient explanation of ownership's scope. Rather, the argument is that any complete explanation of this scope cannot but invoke the circumstances in question.

perspective. Indeed, the standpoint of torts, because it approaches questions of private property through the lens of a non-owner seeking to negotiate the world of material objects, casts into sharp relief the important extent to which the circumstances of tangible property, contingent as they are, shape the contours of private property institutions. With these rough insights at hand, the argument going forward will consider the notion of copyright as tort and its various substantial theoretical and doctrinal implications.

IV. COPYRIGHT

The preceding discussion has argued that, save for sporadic exceptions, in the law of tangible property courts and legislators have consistently and persistently applied the trespassory strict liability form of protecting property rights.⁶⁸ Having such a firm position in the law of tangible property, it is hardly surprising that the same reasoning has been extended to the area of IP in general and copyright in particular.⁶⁹ Courts have over and over again stated that one who commits copyright infringement/violation engages in tort-doing⁷⁰ and that the copyright law imposes upon the defendant a strict

⁶⁸ It is important to note that both courts (at least for the most part) and legislators have treated the copyright strict liability regime as one that shares the same characteristics as an *intentional tort of trespass* and not as a type of *absolute liability*, a point on which we will later elaborate. Thus, copyright is treated as a proprietary right and the copyright owner as entitled to remedies for its invasion as such. In the typical case, when the owner's right is compromised, she is entitled not only to an injunction, but also to statutory damages or disgorgement of the infringer's profits. The message is clear — use the market. So long as one intends to use a work, any work, the risk is on her, whether the work has an owner or not. The copyright owner has veto power on the use of her work, allowing her to charge the "right" price for its use. Once her right has been breached, the remedy should not only put her in the position she would have been save for the breach, but also deter future users from bypassing the market, so to speak.

⁶⁹ The British legislature has made this connection even more explicit by incorporating it into the Copyright Act. Thus, the 1956 Copyright Act provided that "in any action for such an [copyright] infringement all such relief, by way of damages, injunction, accounts or otherwise, shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringing of other proprietary rights." Copyright Act, 1956, 4 & 5 Eliz. 2, c. 74, § 17(1).

⁷⁰ See, for example, *Ted Browne Music Co. v. Fowler*, 290 F. 751, 754 (2d Cir. 1923), where the court says "courts have long recognized that infringement of a copyright is a tort, and all persons concerned therein are jointly and severally liable as such joint tortfeasors," citing *Gross v. Van Dyk Gravure Co.*, 230 F. 412 (2d Cir. 1916). See also *Reeve Music Co. v. Crest Records, Inc.*, 190 F. Supp. 272, 276 (E.D.N.Y.

liability regime under which "any infringer, whether innocent or intentional, is liable."⁷¹ Intentions deliberately to infringe, as courts repeatedly say, are not essential under the copyright legal regime.⁷² Several courts indeed have referred to the fact that there are some concerns about the harshness of the principle of strict liability in copyright law,⁷³ but they have consistently refused to allow the defense of absence of knowledge or intention.⁷⁴

Courts have enumerated several reasons for this outcome, building on the rationales developed in and around the trespass tort paradigm of tangible property cases. For example, one court cited with agreement a letter from Melville Nimmer to the copyright office stating that "it is the innocent infringer who must suffer, since he, unlike the copyright owner, either has an opportunity to guard against the infringement (by diligent inquiry), or at least the ability to guard against the infringement by an indemnity agreement and/or by insurance."⁷⁵ Another court announced that "the protection accorded literary property would be of little value if . . . insulation from payment of damages could be secured . . . by merely refraining from making inquiry."⁷⁶ Yet another cited with agreement the notion that "the Act treats all infringers alike — from the most innocent to the most nefarious."⁷⁷ More than once courts have declared that under copyright law infringement of copyright is no less an infringement if subconsciously accomplished.⁷⁸

The link between tangible and intangible property is also expressed by

1959); *American Code Co. v. Bensinger*, 282 F. 829 (2d Cir. 1922). Indeed it is through the mechanism of joint and several tortfeasors that courts first expanded the realm of copyright law violation using the tortious doctrines of vicarious liability and contributory infringement. The mechanism of joint and several liability allowed the courts to avoid the issue of imposing liability for copyright violation upon those who did not commit the actual act of infringement.

71 *Gener-Villar v. Adcom Group, Inc.*, 509 F. Supp. 2d 117, 124 (D.P.R. 2007). In England, see, for example, *Paterson Zochonis v. Merfarken Packaging*, [1986] 3 All E.R. 522 (A.C.).

72 *See Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 199 (1931) (ruling that intention to infringe is not essential under the Act, and adding that knowledge of the particular selection to be played or received via radio is immaterial).

73 *Barry v. Hughes*, 103 F.2d 427 (2d Cir. 1939); *De Acosta v. Brown*, 146 F.2d 408 (2d Cir. 1944).

74 *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963).

75 *Id.* at 308.

76 *De Acosta*, 146 F.2d at 412.

77 *Gener-Villar v. Adcom Group, Inc.*, 509 F. Supp. 2d 117, 124 (D.P.R. 2007).

78 *See Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936); *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 181 (S.D.N.Y. 1976).

academic literature.⁷⁹ In this respect, the application of the brick and mortar rules to the IP world is a natural expansion of the time-honored common law tradition. Courts have cited this literature with great approval, mentioning this is also the legislature's intent. In the *Adcom* decision, the court stated that "[i]nnocent intent should no more constitute a defense in an infringement action than in the case of conversion of tangible personalty. In each case the injury to a property interest is worthy of redress regardless of the innocence of the defendant."⁸⁰

Courts have provided two kinds of arguments to substantiate the case for the trespassory form of protection in copyright law — evidential and substantive. As to the former, the argument was that in a copyright suit a plea of innocence can be easily claimed, but difficult to disprove.⁸¹ Requiring proof of intent would place the rights-owner at an unjustified disadvantage vis-à-vis the infringer and copyrights would lose much of their value.⁸² As to the latter argument, the courts somewhat drew on the tort analysis of loss minimization. In the *Adcom* decision, the court mentioned that as between the copyright owner and the infringer, the infringer is in a better position to guard against mistakes and that a strict liability rule should discipline an infringer, who might otherwise mistakenly conclude that his actions do not infringe the copyrighted work.⁸³ That would give him an incentive to evaluate the consequences of his conduct more carefully.⁸⁴

We argue in this Article that the analogy to trespassory torts and the expansion of the protection from the tangible to the intangible domain is inappropriate. On the conventional argument against this expansion, it is inappropriate *because* tangible property and intangible property (especially copyrighted works) are qualitatively distinct — the fact that we happen to use the term (intellectual) "property" and the tendency to view copyright-holders as owners are coincidental at best. We argue, by contrast, that the *same considerations* that call for the protection of tangible property through a regime of strict liability torts require (or may often require) abandoning this regime in the case of copyright. The same logic that informs the law's preference for strict tort liability in the former carries over into the latter

⁷⁹ See, e.g., *supra* notes 2-4 and sources cited therein.

⁸⁰ *Adcom*, 509 F. Supp. 2d at 125.

⁸¹ *Id.*

⁸² See *id.* (referring to 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.08, at 13-291 (1994)).

⁸³ See *id.* (referring to P. GOLDSTEIN, COPYRIGHT § 9.4, at 162 (1989)).

⁸⁴ *Id.*

arena, though manifesting itself through negligence or, perhaps, absolute liability.⁸⁵

Our analysis is based on a distinction between "non accident" and "accident" tort regimes. The "non accident" regime, as generally manifested in the intentional torts and their strict liability approach, carries with it a "package" ensuring that the wrongdoer will seek the consent of the right-holder and, thus, engage the latter in a market interaction.⁸⁶ If one does not seek permission prior to entrance — she will not only have to pay for the actual damage, but also be exposed to criminal liability, punitive damages, disgorgement of profits, etc. The accident regime, on the other hand, assumes that market transaction is not a viable option (whatever the reason may be). At the same time, it aims to promote productive activities, at least to a certain extent.⁸⁷ Therefore, the accident regime will allow actors to inflict damage on others: Negligence law would only require them to act in a reasonable manner,⁸⁸ while absolute liability would impose on them the entire risk of the materialized accident, regardless of reasonable care being taken.⁸⁹ Deciding which approach of accident law to pursue and implement — negligence or absolute liability — is based on several considerations, an important one being the desired activity level of both the tortfeasor and the injured party.⁹⁰ Thus, on the assumption that both absolute liability and negligence promote reasonable precautions, if society favors a higher activity level of the injurer it would opt

85 At this preliminary stage of the argument, we set aside the secondary question whether there may be good reasons to implement absolute in place of negligence liability. We say more about the distinction between negligence and absolute liability below. *See infra* text accompanying notes 88-94.

86 The paradigmatic examples are trespass to property, trespass to chattel, conversion, assault, battery, etc.

87 *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 29-31(1987).

88 *See* DOBBS, *supra* note 13, at 275.

89 In this respect, absolute liability and strict liability are different: While absolute liability promotes productive activity, placing the risks on one side if and when materialized, strict liability aims to channel the activity through a market transaction, while blocking the nonproductive activity. It aims to do so not only by paying compensation to the injured party, but through other "punitive" means as well. The idea behind the regime of strict liability, as manifested in the intentional tort, is to (over) deter the unilateral act of the tortfeasor. *See, e.g.*, LANDES & POSNER, *supra* note 87, at 31.

90 Other important considerations are the costs of gathering information, the higher implementation costs of the negligence regime, loss spreading, insurance, etc.

for negligence.⁹¹ The demands of justice may also affect the choice between the two alternatives in question.⁹²

When should we assess breach of copyright law through the lens of "accident"? In order to approach this question, we can take the law of tangible property as a reference in order to see where courts and legislatures draw the line between the different tort paradigms and consider this line, its logic and rationales, as our argument goes along. Recall that our contention is that copyright law should not be confined to strict liability, but may also incorporate, when appropriate, absolute and/or negligence liability regimes.

Richard Epstein, citing Oliver Wendell Holmes, can serve as a good starting point.⁹³ The case Epstein discusses deals with *D* who cuts down a tree on his neighbor's land on the assumption that the tree is growing on his parcel. "[T]hinking the land his own, he intends the very act or consequences complained of. He means to intermeddle with a certain thing in a certain way, and it is just that intended intermeddling for which he is sued."⁹⁴ This outcome strikes Epstein as being correct. He explains that "no person should profit from his own mistakes."⁹⁵ That, however, is too broad a characterization of the law. As a matter of positive law, negligence law exempts people from paying for their "mistakes," as long as they have acted in a reasonable manner. Epstein's assertion, however, is right in a more limited manner, as he later explains:

Normally if *D* wants *P*'s timber, he must buy it, and it is odd in the extreme that he should be able to keep without payment what he took by mistake. As between *D* who has taken the timber and *P* who has done nothing, the risk of *D*'s error ought to fall on *D*, since he is in the better position to prevent the error.⁹⁶

In other words, tort law seeks in this scenario to channel the parties into a

91 Absolute liability will induce the injurer to reduce her activity level as another way to minimize the loss, whereas under negligence law reducing activity levels would not be brought into consideration. This is particularly important when externalities are involved. If the actor does not internalize the full benefits of her level of activity, she might cut it back, reducing overall utility (and vice versa — if the actor does not pay for the overall costs of her activity, she will act above the efficient level).

92 Thus, corrective justice generally supports negligence liability, whereas distributive justice may sanction absolute liability. See, e.g., WEINRIB, *supra* note 33; and Keating, *supra* note 26, respectively.

93 See RICHARD A. EPSTEIN, TORTS 11 (1999).

94 *Id.*

95 *Id.*

96 *Id.*

market transaction. Don't take someone else's property unless you pay for it. If you want to use the car parked on the street you should ask its owner's permission. The risk whether it has an owner or not is on you. Thus, thinking it does not have an owner is no defense.

And, indeed, the car example captures the intuition behind this rule. The streets are packed with cars, all owned by flesh-and-blood owners. The chances of finding an abandoned car, or a car whose owner invites others to use it without her permission, are incredibly slim. Therefore, the entire risk should be placed on the user. Posner nicely explains that intentional torts "involve not a conflict between legitimate (productive) activities but a coerced transfer of wealth to the defendant in a setting of low transaction cost."⁹⁷ He adds that "when market transaction costs are low, people should, as we know, be required to use the market if they can and forgo the transaction if they can't."⁹⁸ If that is not the rule, Posner adds, and forced transfers are permitted, "owners will spend heavily on protection and thieves would spend heavily on thwarting the owners' protective efforts."⁹⁹ Both these expenditures are sheer social waste.

Posner further explains that in trespass (and other intentional tort) cases, the law readily provides awards of punitive damages because society wants to channel resource allocation through the market as much as possible. One must not be allowed to be indifferent between stealing and buying. For similar reasons, the plaintiff should not be allowed to use contributory (or comparative) negligence as a defense. Coercive transfer runs against the rationale of contributory negligence since, almost by definition, the cost of avoidance is "plainly lower to the injurer than to the victim."¹⁰⁰

The bottom line of this argument is therefore "use the market." So long as there is a market, the law will null all incentives to bypass it. But what about scenarios in which there are compelling reasons to the contrary — either because there is no market or because the costs of reaching an arm's-length transaction are prohibitive? This is one of the basic themes in the law of torts — the accidental harm. Productive activities create losses and, when there is no market, one is "entitled" to inflict accidental damage on someone else's property, provided she pays for the loss (i.e., absolute liability). In these cases, the injurer will not have to pay statutory damages or disgorge the profits of her productive activity. Moreover, and more pervasively, in a

97 See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 205 (1999).

98 *Id.*

99 *Id.*

100 *Id.* at 207.

negligence regime, as long as she acted with due care, liability will not lie on her at all.

Thinking about the problem from a tortious perspective, we know that access to markets is often limited. And when an arm's-length transaction is not a real option, tort law will provide instead "guidelines" about how to act with due care. In doing so, courts and legislators take into account not only the interests of the injurer and the injured party (in freedom and security, respectively), but also society's, attempting to maximize the overall welfare. In this Article we argue that this perspective should be extended to IP in general and to copyright law, in particular.

It is true that in the area of modern tangible property, with regard to the use of someone else's property, as opposed to destroying it, the cases in which there is no market are rare, and therefore, trespassory protection will dominate and regulate the use of the property by others. If I spot a car in the street, most probably it has an owner and it would be as easy for me to negotiate as to just take it and pay its bluebook value (or not pay at all). But as we have illustrated in the previous Part, this is not the case in all instances. Even in the realm of tangible property there are situations in which the market is not available or accessing it is too expensive. On such occasions, the legal system is expected to substitute accident law for market transactions. If this is right for tangible property — we argue that it must be right for copyright law as well.

It seems that while the tort paradigm of trespass in the tangible world was copied into copyright law, accident law was lost in translation. To make good on our argument, we must show that copyright law is shot through with cases in which the trespass paradigm should not have been used since the parties could not have reached a market transaction or because such a transaction is too expensive. In such cases, creating artificial incentives to encourage users to reach a market transaction is a social waste. Therefore, the legal system should switch to "accident law" and consider whether the "infringer" has taken the appropriate steps to avoid an infringement.¹⁰¹

Thus, when the use of markets is limited, whatever the reason may be, society should seriously consider "accident law" to handle the situation. At this point it would be a good idea to highlight some of the typical differences between the circumstances of tangible and intangible property and illustrate how these differences *can* and *should* affect the legal regime, pushing towards a more extensive use of accident law.

¹⁰¹ We set aside (at this stage of the argument) the question whether this switch should be assessed on a case-by-case basis or be carried out on a more categorical level.

The *first circumstance* we have noticed about tangible property is *spatial boundaries*. These boundaries ordinarily demark the outer limits of the object. A step outside one's property gate is perfectly okay, but a step inside is considered a trespass. Such clear boundaries are usually missing in intangible property. The question of the boundary — where does the object start and where does it end — often does not provide clear guidance to the user.

One can try to challenge this assertion and argue that the spatial boundaries are there: a story is a story — it has a beginning and an end, and therefore, just like a piece of land, it does provide clear guidance; hence, don't take anything that is in it. But, as every copyright lawyer knows, that is not really the case. In any given story one can find many features that are not protected and, therefore, one is perfectly entitled to use them without the writer's permission. The idea, for example, is not protected, only its expression. Drawing the line between idea and expression is not an easy task.¹⁰² Moreover, even the expression itself is not always protected. If the expression is based on a prior work in the public domain or if it lacks the minimum level of creativity, others are free to use it.¹⁰³ Being original is also not a bulletproof defense — if there is only one or a very limited number of ways to express the idea, the expression will not be protected. The merger doctrine will apply and the expression, like the idea, will be open to public use.¹⁰⁴ The characters in the story are not always protected either. Characters, which are not detailed in the depth and complexity required by courts and do not comply with the standard of "the story being told,"¹⁰⁵ can be used by

¹⁰² Courts struggle with this question over and over again and have a hard time deciding it in almost every other case. *See, e.g.*, Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321 (1989).

¹⁰³ *See, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

¹⁰⁴ Compare *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967), with *Baker v. Selden*, 101 U.S. 99 (1880). Both cases restrict the breadth of copyright protection. While *Morrissey* deals with a scenario in which the idea and the expression merge in *Baker* copyright was restricted due to the fact that granting a protection would grant the owner a monopoly over the unprotected art.

¹⁰⁵ *Warner Bros., Inc. v. Film Ventures International*, 403 F. Supp. 522 (C.D. Cal. 1975).

anyone to create a new story.¹⁰⁶ Facts, historical facts,¹⁰⁷ scenes a fair and external standards,¹⁰⁸ etc.,¹⁰⁹ all of these are also not protected even if they are part of a protected work. We could have added many more examples, but it seems that these suffice to make our point — the *protected* story, or to be more exact, *the author's rights in it*, are not delineated in a very clear manner, the story's spatial boundaries are missing, and there is no clear signal to the user about what is protected and what is not.

The *second circumstance* we have noticed is the *saturate-ness* of privately owned objects. The notion that most tangible objects are privately owned is so prevalent and embedded in the system that we rarely give it a second thought. If I spot a parked car or a pair of bikes, I will not even bother to check whether it has an owner. I would just assume that it has, and in 99.9 percent of the cases I will be right. Assuming that the car has an owner guides people to take the market mode of transaction. If the car has an owner and I want to use it, I had better find the owner and obtain her permission for doing so.

In the IP area in general and copyright in particular, this is not commonly the case.¹¹⁰ There are many works that are not protected and are free for common use. Moreover, since modern regimes of copyright law do not require registration or recordation of the work as a prerequisite for its copyright protection, and the mere creation and fixation (in a tangible form) of the work

106 The distinction between graphic and non-graphic characters makes this distinction between protected and unprotected materials even more complicated. *See Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*, 216 F.2d 945 (9th Cir. 1954). *But cf. Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978). The two cases apply different standards of protection to literary characters and graphic characters.

107 *Oliver v. St. Germain Foundation*, 41 F. Supp. 296 (D. Cal. 1941).

108 *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607 (7th Cir. 1982); *Kohus v. Mariol*, 328 F.3d 848, 858 (6th Cir. 2003) (elements dictated by efficiency or by external standards will not be protected).

109 This is true even before touching upon defenses such as fair use, which further cuts against the owners' rights.

110 Although there are many common characteristics in the various fields of IP law, there are also many differences that reflect upon our analysis. In this Article we have chosen to focus our analysis on copyright law. To highlight some of the differences that may affect our examination one needs only to juxtapose patent law with copyright — the fact that one needs to go through a long and tedious process to register one's rights and define their boundaries (by using the claim system) sends a clear message to the public that the work is protected, has an owner, and is not for use without permission. One can also check the patent files to easily verify when the patent expires. The same does not apply to copyrights.

gives rise to this protection, a work may be officially protected even if the author has never meant it to be.

By definition, when copyright expires the work moves to the public domain. This may happen 70 years after the death of the author, but also at other, mainly earlier, points in time.¹¹¹ In many countries there are different expiration dates for a work made for hire, a record, a joint work, etc.¹¹² Moreover, there are occasions on which the authors of their own volition renounce their rights in the work after a shorter period of time.¹¹³ When this is the case, the public can use the work without any restrictions, before the "official" expiration date of its copyright. On top of that, many works are part of the public domain from their early creation; for example, works made by the government.¹¹⁴

All of these examples are provided to illustrate why — unlike tangible

111 American copyright law is complicated in this respect for it sets different terms of protection based upon the date of creation or publication of the work. Different rules apply to works published prior to 1923, works published with notice between 1923 and 1963, works published with notice between 1964 and 1977, works created before 1978 but not published before 1.1.1978, and finally works created after 1.1.1978. But even if we limit the discussion to the last category, there are different terms of protection. Thus, anonymous and pseudonymous works or works made for hire are entitled to 95 years of protection from publication or 120 years from creation, whichever expires first. Copyright Act of 1976, Pub. L. No. 94-553, § 302(c), 90 Stat. 2541, 2572-73 (codified at 17 U.S.C. § 302(c) (1976)).

112 For example, the rights in a work made for hire or a joint work may expire according to the rules of one country, but still be protected by the laws of a different country. For example, while in the U.S. a work made for hire will expire after 95 years from publication or 120 years from creation, whichever expires first, in Israel there is no special rule for such a work. The expiration date is therefore 70 years from the death of the author. The treatment of pseudonymous works is another example for different duration of copyrights under the Israeli law and the U.S. law.

113 Furthermore, often there are complicated issues when authors jointly create a work or where several works are entangled, so that the expiration date of the rights is not clear. For example, a movie can combine different works with different expiration dates. Similarly, a collective work can carry different expiration dates for the individual works and for the collection. All of these cases make it hard to know when the rights in the work expire. Add to that the fact that the expiration date depends on the death of the author/s rather than the death of the current owner, and that the author can reclaim her rights and terminate transfer, and you get a rather fuzzy line when the rights in the work expire and when it enters the public domain.

114 See 17 U.S.C. § 105 (2006). However, if a work is transferred to the government, and not created by it, the rights in the work will not expire and the copyright protection will last to the end of legal protection. The owner, in the latter case, due to the transfer of rights, would be the government.

property, where saturate-ness commends a general assumption of ownership over objects — in the area of copyrights this general assumption cannot hold.

This leads us to the third circumstance — *object sociability*. In tangible property, the object itself conveys a clear signal whether or not you are invited to use it. One can make a crude distinction between private and commercial purposes, when the private usually conveys a signal of "no use" (at least without specific permission) and the commercial sends a signal that one can use the property on certain terms, mostly payment.

When dealing with tangible property, the "signal" of no use reflects the notion that strangers are not invited. They are not invited to use my land, nor are they invited to use my parked car. This is true even if I leave my car outside my land or park it on my neighbor's property. This general signal of "not for use without permission" builds on several notions, among which are the rivalrous nature of the use (a stranger's use prevents my use), the level of care of treating another's property (if you pass on my land you might trash it), notions of privacy (if you enter my property you might see things I don't want you to see), and so on. As was previously explained, in today's world it is hard to make mistakes as to the meaning of the tangible property signals, sociable or unsociable ones.

When we move, however, from tangible to intangible property, the signals become muddier. They become muddier because many authors invite others to use their works, with or without condition, and the works often do not speak for themselves. In short, they may often fail to clearly convey the right message. One should recall that in copyright law people don't ask for copyright protection — they get it. The author does not have to do *anything* to get a copyright protection. She has to do *something* to renounce it. Consider the following example: I have sketched a picture and posted it to the internet. I don't mind others using it. It would even be nice to see my picture spread through the internet. But I don't take the effort of announcing my invitation. The problem is that the users don't know whether I invite them to use my work or whether they will be sued for copyright violation — the work does not speak for itself.

It seems that this strong intuition was the driving force behind the Creative Commons (CC) project — let the work speak for itself and convey an accurate message. The project's popularity clearly illustrates that our assumption that many authors invite others to use their works is true. Still, many authors don't even bother to make this small effort of using CC's simple tools to convey the right signal — either for lack of familiarity with the project or out of sheer laziness. In addition, outside the realm of the internet this project is less prevalent and has many drawbacks. Moreover,

even the CC project itself does not provide a binary signal whether one is entitled to use the work or not. There are many different combinations, allowing participants to use the work based on different terms such as commerciality of the use, sharing of future works, no alterations of the work, attribution, and so on. Each author can set different combinations. The combinations may vary not only across different authors, but also across different works of a single author. In other words, various authors invite the public to use different works under different terms.

It is easy to understand a signal of "don't use." If the door is closed, let alone locked, don't enter.¹¹⁵ It is much more difficult to handle the variety of options under copyright law. CC does indeed facilitate the flow of information, but it has other drawbacks.¹¹⁶ Moreover, despite its popularity, it only covers a very small fraction of copyrighted works. Outside the realm of the CC project, there may be many authors who will be happy to invite others to use their works. Some will set no terms for such use, others will allow it only for specific uses, while still others will not allow it at all, or at least not unless payment is due. For example, many professors will be happy to allow free access to their papers, and will be even happier if someone actually reads their papers, not to mention citing them. Others may be more reluctant to give such extensive rights of use. Yet others may forbid it altogether.¹¹⁷ The public is therefore confronted with many different answers to the simple question: "may I use the work?" If we ask the professors the same question about their cars or houses, we assume that the answer will be more decisive: "forget about it!"

Having said that, we would like to clarify that our argument does not exclude areas in copyright law where the signal is clear or even crystal clear. If I buy a CD only to copy it and sell it for a very low price, the author will not allow it. Similarly, if the work is protected via electronic means, users can assume that by breaking that protection they run against the will of the

115 In this respect, the Digital Millennium Copyright Act can serve as a good example. Protecting a work with a "lock" sends a clear message to the users — don't cross the boundaries. Trespassing these boundaries is against the clear will of the rights-owners. 17 U.S.C. § 1201 (2006) ("Circumvention of Copyright Protection Systems").

116 See, e.g., Niva Elkin-Koren, *Exploring Creative Commons: A Skeptical View of a Worthy Pursuit*, in *THE FUTURE OF THE PUBLIC DOMAIN* 325, 326 (P. Bernt Hugenholtz & Lucie Guibault eds., 2006). ("[T]he lack of a core perception of 'freedom in information,' may lead to ideological fuzziness that would weaken the prospects for constructing a workable and sustainable alternative to copyright.")

117 One can also note conflicts among various right holders, like those between authors and publishers.

rights-owner.¹¹⁸ However, there are many other occasions where the public, based exclusively on the work, cannot really tell what the authors' attitude would be towards different uses of the work. They may be happy to allow every use, its use with few or many conditions, or they may disallow its use altogether.

The fourth circumstance is the owner's *ascertainability*. As mentioned above, in tangible property there is not only the assumption of ownership, but it is also easy to know who that owner is. This does not hold true in many of the cases in copyright law. Oftentimes, neither the work itself nor the circumstances reveal who the owner of the work is. There is neither a name nor an address on the work. The owner may live in another country, and ordinarily the work is not registered anywhere. So, even if one suspects that there is an owner, it is hard to know who that owner is. We all know the term "orphan work," but in tangible property this term is yet to be coined. The term "orphan house" has an entirely different meaning.

Moreover, we should bear in mind that the author and the copyright owner might not be (and often are not) the same person — the rights can be assigned or split between several people. Rights can also be reclaimed. So even if we know the author's name, we cannot be sure that she owns the rights. Add to this the rules of "work made for hire" and the different regimes that apply to employees and independent contractors and you get a muddy world of ownership. Things can get even more complicated when a work, by its nature, has several authors or several owners; a CD, software program or film are all good examples. Different rules apply when different authors have written different, yet distinct, parts of the work than when the parts are intermingled and cannot be separated. Sometimes the potential user will have to track down every one of the authors and ask their permission to use the work, while at other times one of the authors will be able to grant permission to use the entire work.

To complicate things even further — different countries have different legal regimes that also affect the status of the owners. For example, under British copyright law¹¹⁹ joint owners have to agree on each and every use of the work and each of them has veto power over any given use,¹²⁰ while American law only requires the permission of one of the owners.¹²¹ Another example is commissioned works. Different countries have different default rules as to

118 See *supra* note 115.

119 Copyright, Designs and Patents Act 1988, c. 48 (U.K.).

120 *Id.* § 173(2); see also WALTER ARTHUR COPINGER, COPINGER ON COPYRIGHT §§ 5-162 to -169 at 287-88 (15th ed. 2005) (discussing joint authors and joint owners).

121 See 1-6 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.10

who owns the work. It may be the party who initiated and commissioned the work and it may be the author. The parties can sometimes contract around the default rule, sometimes not. Since the market for many works is global, not only would it be difficult to figure out the facts behind the creation of each work, it would also be very difficult to follow the legal rules, their interpretation and application.

From the application of the circumstances of property to copyrights, it is clear that unlike the case of tangible property, in copyrights there are many occasions where market transactions can be rather costly.¹²² The trespassory tort regime implies that even if one made an effort to find out whether the work is protected and to what extent or who the real owner is, but made a mistake, she will be liable for copyright violation. That would be the case even if she came to the wrong conclusion based on information obtained from the authors she was negotiating with, or when the rights-holders could have easily minimized the probability of such a mistake. As already mentioned, the trespass paradigm does not allow a defense of contributory (or comparative) negligence. The consequences of this copyright violation can be an injunction that would bring to an end the current use of the infringing work, as well as punitive damages, damages for the author's actual loss, as well as disgorgement of all the infringer's profits.

Indeed, such a regime dominates the law of tangible property. When the market is a real and inexpensive option, economists will insist on using it. That would be the best outcome, for it would reflect the true value of the transaction to the parties involved. But what if the market is not a real option, either because it is too expensive, due to market failures, or because

(2010). This rule only applies to a Joint Owner's Grant of Nonexclusive Rights. It does not apply to a Joint Owner's Grant of Exclusive Rights.

122 Various types of costs are involved in a typical copyright transaction: the costs of locating the current owner when no registration or recordation is to be found; the costs of negotiating with her the license agreement; and also the costs of mistakes. Mistakes can happen for several reasons — users often cannot tell whether a work is protected or not. They may use a work thinking it belongs to the public domain or forgo using a public domain work, assuming it to be a private one. Mistakes can also occur with regard to the boundaries of a protected work — users may assume that a certain part of the work is not protected, though it is, and vice versa. A third type of mistake concerns the authors' invitation to use the work. One may assume she is invited to use the work only to find out she is in breach, but the opposite outcome is more likely — one may forgo the use of a work, even though the author has no objections to such use. Another type of mistake can take place when the user obtains permission to use the work, but gets it from the wrong person, or when she does not get permission from all the owners involved.

of various externalities involved? In such cases, insisting on the market may systematically lead to a suboptimal level of use of works by society. It may also impose burdensome restrictions on the equal freedom of people (non-owners included) to pursue their practical affairs. Our argument is that this is exactly the case in many areas of copyright law. Therefore, we suggest that in these areas an alternative regime of "accident law" should emerge. In this respect, the breach of copyright should be assessed by reference to a more relaxed set of considerations familiar in the law of torts: who the cheapest cost avoider is; who has better information and better ability to prevent the harm; who is better able to carry the final burden; how to balance between the competing claims of the parties (to freedom, security, and so on). It is also important to figure out what the respective costs of precautions were.¹²³

Our proposal is not radical. Even in the world of tangible property, when the market is not a real option, a second-best solution is to use accident law. Accident law entitles parties to act and inflict harms (within limits) on others. The notion of accidents is part of our day-to-day life and giving up accident law (such as the negligence and, perhaps, the absolute liability regimes), insisting only on market transactions, would bring many valuable activities to a complete stop. If we consider copyright law to be a tool for balancing between incentives to create and access to a work,¹²⁴ and if markets are not a real option — insisting on market transactions would give authors excessive protection (even in cases when the authors do not actually ask for it¹²⁵) at the expense of the public and its rights of access to the work. The goal of the constitutional copyright clause, namely to "promote the Progress of Science

123 Judge Posner in the *Aimster* case conducts a similar analysis with regard to the indirect infringer. In his opinion, Judge Posner argues that substantial non-infringing uses are not enough to shield from liability. He adds that "if the infringing uses are substantial then to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses." In other words, Judge Posner refers to a mechanism such as the Learned Hand formula, in which the legal system measures the costs of precautions vis-à-vis the expected loss. See *In Re Aimster Copyright Litigation*, 334 F.3d 643, 653 (7th Cir. 2003).

124 One does not have to accept this notion. Cf. Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29 (2011) (casting doubt on incentive-based analysis of copyright).

125 It does not matter that the authors may not sue or enforce their rights, since ex ante the infringer does not know what their reaction is going to be.

and useful Arts,"¹²⁶ will not be achieved. In such situations, a second-best solution of accident law should be adopted.

It should be clarified that, in treating the breach of copyright as an accident, our idea *is not* to abolish the concept of trespass altogether.¹²⁷ As in tangible property, the regimes of trespass and accident law can coexist and be applied to or *implemented* in different scenarios. The former can still be applied to cases in which one can easily know the work has an owner, know who that owner is, know she wants to have an arm's-length transaction, and yet use the work without reaching such an agreement. It is clear that in these scenarios the infringer will not only have to pay for the loss, but also have to stop the infringing activity and disgorge her profits.

It should also be clarified that in copyright law, the regime of accident law would be easier to handle since the paradigm of conflicting uses is different than that of real property. The accidental use of a work does not conflict with other uses and the copyright owner is still entitled to the use of the work, saving this particular accidental use. Thus, if I have accidentally incorporated part of your song into my film, the song will still be protected. Others will not be able to use it, and even I will not be able to use it for a different purpose. The accidental use will be approved either upon paying damages (absolute liability) or upon proving that I have been acting reasonably (negligence liability).¹²⁸

Among other things, our proposed approach calls for a reevaluation of the concept of contributory (or comparative) negligence. Under negligence and absolute liability, courts may consider the rights-owner's fault. Unlike the case of trespass, where, subject to few exceptions,¹²⁹ a defendant's precautions are not required, in the accident law paradigm the defendant is required to take precautions to avoid the loss and not doing so will be held against her. In accident law terminology, when the rights-owner is the cheapest

126 U.S. Const. art. I, § 8, cl. 8.

127 The abovementioned circumstances of intellectual property do not have to hold constant over time. Changing the circumstances might influence the market alternative and the occurrence of an arm's-length transaction. Thus, for example, if it is easy to locate the owner because of a clear registry, or to inquire whether the work has already expired, a market solution may be preferred.

128 While in an absolute liability regime, a breach of copyright, even if reasonable and un-intended, will always entitle the owner to be compensated, a negligence based regime may leave the owner with no compensation if the infringer acted with due care.

129 See Catherine M. Sharkey, *Trespass Torts and Self-Help for an Electronic Age*, 45 TULSA L. REV. 101 (2010) (promoting self help as a prerequisite to invoking legal process in trespass to chattels).

cost avoider she should bear the consequences of the infringement. The courts are already somewhat willing to take steps in this direction in IP cases, but they do so in an obscure manner. A good example is the case of *Field v. Google*.¹³⁰ In that case, the court took into account the fact that the rights-owner acted in bad faith and actually brought the infringement upon himself.¹³¹ However, instead of taking this factor into consideration under the fair use analysis (as the court actually did), a more systematic approach would have been to assess the defendant's behavior in terms of contributory or comparative fault — by a small investment she could have prevented the accidental infringement and therefore should be made accountable for it.¹³²

CONCLUSION

In this Article we have sought to integrate two claims. First, we have argued that, taken to their logical conclusions, the considerations that support a strict form of protection for tangible property rights do not call for a similar form of protection when applied to the case of copyright. More dramatically, these considerations *demand*, on pain of glaring inconsistency, a substantially weaker protection for copyright. In pursuing this claim, we have shown that the form of protection of property rights (including rights in tangibles) is, to an important extent, a feature of certain normal, though contingent, facts about the human world. Second, the normative question

¹³⁰ *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1110 (D. Nev. 2006).

¹³¹ An action for copyright infringement was brought by the plaintiff against Google. He contended that by allowing Internet users to access copies of 51 of his copyrighted works stored by Google in an online repository, Google violated Field's exclusive rights to reproduce and distribute copies of those works. *See id.* at 1109.

¹³² This, nevertheless, *does not mean* that the copyright's owner loses or is being deprived of her right against the rest of the world (as was the case in the common law rule of publication without notice) or even against the same infringer with regard to future works or future uses of the same work. What it does mean, however, is that the rights-owner will not be awarded full recovery for the accidental use.

A practical, yet important, question is how to define accidental use. Let's say I have incorporated a picture into my movie. I was not negligent and the owner carries a contributory fault. Should I be entitled to continue with the movie (maybe without paying) or should I only be shielded for the acts of the past? The latter option is problematic in terms of transaction costs and the fact that now I am "locked in." It creates a scenario of double monopoly with all the unwanted side-effects. Therefore, it seems that the specific use should be allowed without any fee or with a compulsory license. So we shall argue in a future work.

concerning the selection of a desirable protection for creative works is most naturally pursued from a tort law perspective, in part because the normative structure of copyright law simply is that of tort law.

The argument sets the stage for a more robust analysis, normative as well as positive, of the case of copyright as tort. In future work we shall offer a thorough examination of copyright theory and doctrine in the light of the critical, tort-based normative framework we have just established.

