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Citation: Goold, P. (2014). Corrective Justice and Copyright Infringement. Vanderbilt Journal of Entertainment and Technology Law, 16(2), pp. 251-295.

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Corrective Justice and Copyright Infringement

Patrick R. Goold*

ABSTRACT

This Article demonstrates that one important goal of copyright infringement cases is the achievement of corrective justice. The importance of corrective justice to the copyright system is demonstrated by the law's continual reliance on a bilateral litigation model. Sadly, because scholars and lawmakers often conceive of copyright in solely economic terms, corrective justice is often overlooked and demonstrable unfairness occurs as a result. This Article discusses three areas of contemporary copyright law where the failure to consider corrective justice leads to unfair outcomes: the provision of statutory damages in civil copyright claims, the availability of attorney's fees, and mass copyright settlements.

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* The author would like to thank the following people for their invaluable assistance on this project: Pamela Samuelson, Talha Syed, Robert Merges, Peter Menell, Molly Van Houweling, Chris Hoofnagle, Jennifer Urban, Robert Cooter, Shyamkrishna Balganesh, Abraham Drassinower, Steven Sugarman, Mark Gergen, Oren Bracha, all of the participants at the Seton Hall Works in Progress in Intellectual Property Conference, all of the participants at the Cardozo Law School Intellectual Property Scholars Conference, and the editors of the *Vanderbilt Journal of Entertainment & Technology Law*. Any and all mistakes are due to the author. Please send feedback and comments to patrickgoold@law.berkeley.edu.

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Copyright law provides authors with an exclusive right to copy their literary and artistic works.¹ If someone copies the work without permission, the author can sue that person for a remedy.² Why is this the case? Why can the author sue the infringer for compensation? Unlike the dominant theories of copyright, this Article answers these questions by appealing to corrective justice theory. Although it is often forgotten, one central purpose of copyright infringement cases is the correction of past injustices. Sadly, as scholars, legislatures, and judges typically conceive of copyright solely in economic terms, this important function is often overlooked, and demonstrable unfairness occurs as a result.³

While the initial grant of copyright may be proprietary in nature,⁴ the act of infringing copyright is a tort.⁵ It follows that

1. 17 U.S.C. § 106 (2012).

2. See 17 U.S.C. § 501 (2012).

3. See *infra* Part III.

4. The question of whether intellectual property rights are proprietary or personal in nature is one of the longest standing issues of copyright law. For modern views on this issue, see, for example, Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108 (1990); Richard A. Epstein, *Liberty Versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1 (2005) [hereinafter Epstein, *Liberty Versus Property?*]; Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873 (1997); Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742 (2007); Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885 (2008). Other scholars have demonstrated concern for such discussion of intellectual property rights as analogous to real property. See, e.g., Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119 (1983); Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439 (2003); Mark A. Lemley, *Place and Cyberspace*, 91 CALIF. L. REV. 521 (2003); Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365, 396-97 (1989) (expressing desire that "the first amendment's protection of free speech interests will serve as some check on the reach of the information as property doctrine.").

understanding the function of copyright infringement cases requires consideration of the purposes of tort law generally,⁶ of which there are two: the promotion of economic welfare and the achievement of corrective justice.⁷ The former theory states that tort law is a tool for maximizing welfare.⁸ As accidents are costly for society, tort law exists to deter people from causing them in inefficient amounts.⁹

5. See, e.g., *Peters v. West*, 692 F.3d 629, 633–34 (7th Cir. 2012) (“Fundamentally, proving the basic tort of infringement simply requires the plaintiff to show that the defendant had an actual opportunity to copy the original . . . and that the two works share enough unique features to give rise to a breach of the duty not to copy another’s work.”); *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010) (“Here, the underlying action is copyright infringement, which is often characterized as a tort.” (citing *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 289 (9th Cir. 1997), *rev’d*, *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998))); *Lawrence v. Dana*, 15 F. Cas. 26, 61 (C.C.D. Mass. 1869) (No. 8,136) (“Rights secured by copyright are property within the meaning of the law of copyright, and whoever invades that property beyond the privilege conceded to subsequent authors commits a tort . . .”). Much like the case when someone invades the property right of another, they cause the tort of trespass, the infringement of copyright is a tort. See generally Shyamkrishna Balganesh, *Property Along the Tort Spectrum: Trespass to Chattels and the Anglo-American Doctrinal Divergence*, 35 COMMON L. WORLD REV. 135, 137–43 (2006) (analyzing the tort of trespass to chattels with a focus on the common law actual damage requirement).

6. In recent years, a number of scholars have started to examine how intellectual property overlaps with tort. See, e.g., Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009); Avihay Dorfman & Assaf Jacob, *Copyright as Tort*, 12 THEORETICAL INQUIRIES L. 59 (2011); 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) [hereinafter Gordon, *Mirror Image*]; Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 34 MCGEORGE L. REV. 541 (1992) [hereinafter Gordon, *Of Harms and Benefits*]; Bruce P. Keller, *Condemned to Repeat the Past: The Reemergence of Misappropriation and Other Common Law Theories of Protection for Intellectual Property*, 11 HARV. J.L. & TECH. 401 (1998); A. Samuel Oddi, *Product Simulation: From Tort to Intellectual Property*, 88 TRADEMARK REP. 101, 101 (1998); see also Ian C. Ballon, *Pinning the Blame in Cyberspace: Towards a Coherent Theory for Imposing Vicarious Copyright, Trademark and Tort Liability for Conduct Occurring Over the Internet*, 18 HASTINGS COMM. & ENT. L.J. 729 (1996); Peter S. Menell & David Nimmer, *Legal Realism in Action: Indirect Copyright Liability’s Continuing Tort Framework and Sony’s De Facto Demise*, 55 UCLA L. REV. 143 (2007); Peter S. Menell, *The Mixed Heritage of Federal Intellectual Property Law and Ramifications for Statutory Interpretation* (forthcoming 2013); Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 CALIF. L. REV. 941, 994–96 (2007); Victor S. Netterville, *Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary*, 35 S. CAL. L. REV. 225 (1962); A. Samuel Oddi, *Contributory Copyright Infringement: The Tort and Technological Tensions*, 64 NOTRE DAME L. REV. 47 (1989).

7. See Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997).

8. See, e.g., ROBERT D. COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 322–65 (5th ed. 2008); see also John J. Donohue III, *The Law and Economics of Tort Law: The Profound Revolution*, 102 HARV. L. REV. 1047 (1989); William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 851 (1980). Nevertheless, empirical studies suggest scholarly opinion is still divided on the efficiency of tort doctrines. See John C. Moorhouse, Andrew P. Morriss & Robert Whaples, *Law & Economics and Tort Law: A Survey of Scholarly Opinion*, 62 ALB. L. REV. 667, 694 (1998). But see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 167–212 (6th ed. 2003).

9. See COOTER & ULEN, *supra* note 8, at 346.

Nevertheless, it is unlikely that this is the only function of the law. Standing alone, the economic goal does not justify a central feature of tort law, i.e. the relationship between the plaintiff and defendant.¹⁰ It does not explain why the defendant should pay this particular plaintiff a remedy.¹¹ All that is needed to deter people from causing accidents is to make the defendant pay a penalty *to someone* when his conduct results in injury.¹² It does not matter greatly to the defendant who that someone is.¹³ The deterrence rationale will equally be fulfilled if the defendant's inefficient actions result in him paying a criminal fine, civil damages, or a donation to a third party (e.g., a charity).¹⁴

Tort scholars typically explain this feature by appealing to tort's second function: corrective justice.¹⁵ The relationship between the plaintiff and defendant exists because those who cause another harm have a duty to correct that harm.¹⁶ The desirability of correction itself flows from the importance of equality.¹⁷ People are equally entitled to the resources they hold (including their property and legal rights).¹⁸ When people interact with one another, they ought to respect the equality of the other individual.¹⁹ Tortious conduct is wrongful because it creates an inequality.²⁰ The action allows the tortfeasor to gain something at the expense of the victim.²¹ For example, if a tortfeasor steals a car, he gains what the victim loses: a

10. See, e.g., JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 13–24 (2001) [hereinafter COLEMAN, *PRACTICE OF PRINCIPLE*]; ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 46–48 (1995) [hereinafter WEINRIB, *IDEA OF PRIVATE LAW*]; Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233, 1248–53 (1988) [hereinafter Coleman, *Structure*].

11. See COLEMAN, *PRACTICE OF PRINCIPLE*, *supra* note 10, at 18; WEINRIB, *IDEA OF PRIVATE LAW*, *supra* note 10, at 47.

12. See COLEMAN, *PRACTICE OF PRINCIPLE*, *supra* note 10, at 18.

13. See *id.*

14. See *id.*

15. See *id.* at 1–63; JULES L. COLEMAN, *RISKS AND WRONGS* 361–85 (2002) [hereinafter COLEMAN, *RISKS AND WRONGS*]; ERNEST J. WEINRIB, *CORRECTIVE JUSTICE* 9–37 (2012) [hereinafter WEINRIB, *CORRECTIVE JUSTICE*]; WEINRIB, *IDEA OF PRIVATE LAW*, *supra* note 10, at 56–83. Other notable corrective justice theories in tort can be found elsewhere. See John Borgo, *Causal Paradigms in Tort Law*, 8 J. LEGAL STUD. 419 (1979); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992); Frederick L. Sharp, *Aristotle, Justice and Enterprise Liability in the Law of Torts*, 34 U. TORONTO FAC. L. REV. 84 (1976); Benjamin C. Zipursky, *Civil Recourse, not Corrective Justice*, 91 GEO. L.J. 695 (2003).

16. See COLEMAN, *PRACTICE OF PRINCIPLE*, *supra* note 10, at 15.

17. See WEINRIB, *IDEA OF PRIVATE LAW*, *supra* note 10, at 58–66.

18. See *id.* at 61–66.

19. See *id.*

20. See *id.*

21. See *id.*

car. The law exists to correct the resulting inequality.²² By making the defendant compensate the plaintiff, the law removes the wrongful gain and the wrongful loss arising from the interaction.²³ The remedy puts the parties back into their original positions and restores the antecedent equilibrium.²⁴ Tort therefore is not merely about efficiency; it is also about equity.²⁵

Copyright scholars and lawmakers typically say that copyright is also an economic tool for welfare maximization.²⁶ Society enjoys literary and artistic works, but these works may be underproduced due to a market failure.²⁷ Creating works entails high fixed costs.²⁸ Authors²⁹ must invest extensive resources, such as time and money, to produce the work's first copy.³⁰ Many authors would not undertake such an investment if they could not later recover those costs.³¹ Copyright solves this problem by providing the author with market exclusivity, allowing him to sell subsequent copies of the work at a price above marginal cost.³² This enables him to recover his fixed cost

22. See *id.*

23. See *id.*

24. See *id.*

25. For perspectives on both efficiency and equity considerations in tort, see, for example, Robert D. Cooter, *Liberty, Efficiency, and Law*, 50 L. & CONTEMP. PROBS. 141 (1987); Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981) [hereinafter Posner, *The Concept of Corrective Justice*]; Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1979); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997); Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621 (2002) [hereinafter Weinrib, *Deterrence and Corrective Justice*].

26. See, e.g., RICHARD WATT, COPYRIGHT AND ECONOMIC THEORY: FRIENDS OR FOES? 11–15 (2000); Stanley M. Besen & Leo J. Raskind, *An Introduction to the Law and Economics of Intellectual Property*, 5 J. ECON. PERSPECTIVES 3, 5–6 (1991); Dan L. Burk, *Law and Economics of Intellectual Property: In Search of First Principles*, 8 ANN. REV. L. & SOC. SCI. 397 (2012); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1610–14 (1982) [hereinafter Gordon, *Fair Use*]; William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 325–33 (1989) [hereinafter Landes & Posner, *An Economic Analysis of Copyright Law*]; Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167 (1934). But see Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421 (1966) (noting criticism of copyright as an economic tool for welfare maximization).

27. See Landes & Posner, *An Economic Analysis of Copyright Law*, *supra* note 26, at 326–33.

28. See *id.*

29. The term “author” throughout the article is used to include the first creator of the work as well people to whom the copyright is subsequently transferred.

30. See *id.*

31. See *id.*

32. See *id.*

and gives him an incentive to produce the work in the first place.³³ When infringement threatens his ability to recover the creative investment, the author can sue the infringer as a second-best way to recover his lost fixed costs.

It is often unrecognized, however, that the economic goal is unlikely to be the only function of copyright infringement suits. Once again, the economic goal does not justify the relationship between the two relevant parties. The economic theory does not state why the author must receive compensation from this particular infringer. If the only goal of copyright is to incentivize the author to create works, all the author needs is a reward for creation. It does not matter particularly where that reward comes from.³⁴ The government could subsidize creation, or prizes could be awarded for the publication of popular works.³⁵ In both cases, the author would have an incentive to

33. See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'" (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8) (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975))); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) ("It is evident that the monopoly granted by copyright actively served its intended purpose of inducing the creation of new material of potential historical value."); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (stating that copyright is "intended to motivate the creative activity of authors and inventors by the provision of a special reward"); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) ("It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius."); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1203 (1996) ("[I]t is incentive language that pervades the Supreme Court's copyright jurisprudence.").

34. This is demonstrated by the current discussion on alternative compensation mechanisms for authors where some academics favor abandoning the current copyright system in favor of an alternative system, which does not require authors to sue infringers. See, e.g., WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 199–258 (2004); Nancy Gallini & Suzanne Scotchmer, *Intellectual Property: When is it the Best Incentive System?*, in 2 INNOVATION POLICY AND THE ECONOMY (Jaffe et al. eds., 2002); Ville Oksanen & Mikko Välimäki, *Copyright Levies as an Alternative Compensation Method for Recording Artists and Technological Development*, 2 REV. ECON. RES. COPYRIGHT ISSUES 25 (2005) (discussing subsidizing creation through revenue gathered by levies on copying equipment).

35. See generally Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 281–91 (1970) (discussing the potential for government grants and prizes to accomplish the goals of copyright); Ruth Towse, *Copyright and Artists: A View from Cultural Economics*, 20 J. ECON. SURVEYS 567 (2006). This discussion also is found in patent law. See, e.g., William W. Fisher & Talha Syed, *A Prize System as a Partial Solution to the Health Crisis in the Developing World* (Harvard Law School, Discussion Paper No. 5, 2009), available at http://www.law.berkeley.edu/files/Fisher_Prizes12.pdf.

create.³⁶ Even if copyright is preferable to these methods, there is no particular reason why it is the infringer who should compensate the author. The author's incentives will be equally secure if, upon infringement, he is compensated by a government-compensation scheme, an insurance policy, or a random third party. All that is required is compensation from *someone*.

This Article argues that the relationship between author and infringer stems from copyright's second function: the correction of past injustices.³⁷ The law initially recognizes the author's copyright for a number of reasons: some economic,³⁸ some based on natural rights,³⁹ and others based on visions of a good society.⁴⁰ When a user interacts with the work, that user ought to respect the legitimate rights of the author. In turn, the author must equally respect the rights of the user, such as fair use.⁴¹ When the user infringes copyright, he creates

36. Some authors go as far as to say the existence of modern peer-to-peer technology makes copying so easy that we must partially abandon the traditional copyright protection model in favor of greater reliance on compulsory licensing. *See, e.g.,* Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003); Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653 (2005).

37. Other authors have discussed the issue of corrective justice in copyright, but no one has made a basic case for the existence of a corrective justice norm in copyright infringement. *See generally*, Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203 (2012) [hereinafter Balganesh, *Normativity*]; Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664 (2012) [hereinafter Balganesh, *Obligatory Structure*]; Eric R. Claeys, *Private Law Theory and Corrective Justice in Trade Secrecy*, 4 J. TORT L. 1 (2011) (taking the discussion of corrective justice in copyright and applying it to trade secret law); Abraham Drassinower, *Copyright Is Not About Copying*, 125 HARV. L. REV. F. 108 (2012); Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149 (1992) [hereinafter Gordon, *On Owning*]; Gideon Parchomovsky, *Fair Use, Efficiency, and Corrective Justice*, 3 LEGAL THEORY 347 (1997) (using corrective justice as a lens through which to view fair use).

38. *See* Landes & Posner, *An Economic Analysis of Copyright Law*, *supra* note 26, at 326.

39. *See, e.g.,* PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 13–33 (1996); ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 32–67 (2011) [hereinafter MERGES, JUSTIFYING INTELLECTUAL PROPERTY]; Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT L. REV. 609 (1993); Epstein, *Liberty Versus Property?*, *supra* note 4, at 20–27; Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988); Adam Mossoff, *Locke's Labor Lost*, 9 U. CHI. L. SCH. ROUNDTABLE 155 (2002); Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1 (1994); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH-CENTURY STUDIES 425 (1984); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990).

40. *See, e.g.,* William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 189–99 (Stephen R. Munzer, ed., 2001); Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

41. *See* 17 U.S.C. § 107 (2012).

an inequality. The author loses something and the infringer gains something. The author loses the work's market value, while the copyist receives a copy of the work without obtaining the author's consent and without paying the relevant license fee. The law operates to correct the wrongful losses and gains made. By making the infringer compensate the author, the law annuls the inequality and puts the parties back into the positions they occupied prior to the infringement.

While copyright scholars have recently expressed the need to supplement society's views of copyright with noneconomic theories,⁴² the academy has overlooked the importance of corrective justice. This is a serious failing. While this Article does not claim corrective justice is the sole purpose of copyright infringement cases, it does assert that corrective justice is important and too easily forgotten. Maximizing welfare may well be the primary purpose of the law, but it is pursued subject to the constraints of fairness and individual responsibility imposed by copyright infringement's secondary goal: corrective justice. When scholars and lawmakers forget this function of copyright, the law can become unfair. This Article will highlight three example areas in which the law is currently unjust from a corrective justice perspective: the availability of statutory damages for willful infringement in civil cases, attorney's fees, and mass copyright-infringement suit settlements.

Part I summarizes the literature on tort's purposes. While the economic theory struggles to explain the relationship between the plaintiff and defendant, corrective justice theory explains this relationship intuitively. Part II discusses the purposes of copyright infringement law. Again, the economic theory does not satisfactorily explain the relationship between the author and infringer, but the corrective justice theory illuminates this aspect of the law. Part III considers three areas where the law currently fails to achieve corrective justice and demonstrates how the law ought to be reformed.

I. CORRECTIVE JUSTICE IN TORT LAW

A. *The Economic Theory of Tort Law*

Accidents negatively affect welfare. To reduce the number of accidents, tort law exists to deter unreasonably dangerous conduct.⁴³

42. See, e.g., ROBERTA R. Kwall, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (2010); MERGES, *JUSTIFYING INTELLECTUAL PROPERTY*, *supra* note 39; MADHAVI SUNDER, *FROM GOODS TO A GOOD LIFE* (2012).

43. See Gordon, *Of Harms and Benefits*, *supra* note 6, at 544 ("[Tort] law imposes duties to avoid unreasonable behavior that could cause strangers harm . . .").

By making a tortfeasor responsible for the harm he causes, the law encourages people to internalize the costs of their actions, thus providing private incentives to prevent the accident.⁴⁴ This process is most clearly observed in strict-liability cases, such as liability for ultra-hazardous blasting.⁴⁵ A person who deliberately causes an explosion will be liable for any harm that results.⁴⁶ If the blasting harms a neighboring house, for example, the blaster must compensate the owner for the harm.⁴⁷ The blaster therefore takes these potential costs into account and will try to reduce the risk to nearby people and property.

This does not mean that tort law attempts to prevent all harm in all instances. Often the cost of prevention will outweigh the costs of the accident itself.⁴⁸ A common example is that of driving cars. Automobiles cause many accidents that could be eliminated by making motoring illegal. Naturally, such laws are not passed because the costs of prohibiting automobiles would outweigh the benefits of preventing accidents. In these cases, the law tries to minimize the aggregate costs of two variables: the cost of the accident and the costs of prevention.⁴⁹

Under a strict-liability standard, the defendant assumes responsibility for the costs of the accident and the costs of prevention and will accordingly act in a way to minimize that cost.⁵⁰ But more commonly, this tradeoff exists in the domain of negligence law.⁵¹ In such cases, the defendant shall only be liable for actions that are “unreasonable” (i.e., when the costs of the accident are greater than the costs of preventing the accident).⁵² For example, imagine a patron

44. COOTER & ULEN, *supra* note 8, at 325 (the economic essence of tort is that it internalizes externalities, thus providing the socially optimal incentives for private actors).

45. *See id.* at 338–41.

46. *See* RESTATEMENT (SECOND) OF TORTS § 519. For law on ultra-hazardous activity, see, for example, *Luthringer v. Moore*, 190 P.2d 1 (Cal. 1948); *Leatherwood v. Wadley*, 121 S.W.3d 682 (Tenn. Ct. App. 2003); Robert W. James, *Absolute Liability for Ultrahazardous Activities: An Appraisal of the Restatement Doctrine*, 37 CALIF. L. REV. 269 (1949); Andrew O. Smith, *The Manufacture and Distribution of Handguns as an Abnormally Dangerous Activity*, 54 U. CHI. L. REV. 369 (1987).

47. *See* Smith, *supra* note 46, at 382.

48. *See* COOTER & ULEN, *supra* note 8, at 336–38.

49. *See id.* at 336.

50. *See id.* at 340.

51. *See id.* at 342–45.

52. *See In re City of New York v. Agni*, 522 F.3d 279, 285 (2d Cir. 2008) (“[O]ur analysis under the Hand formula leads us to compare a relatively small burden of adequate precautions with a very small risk of great harm. . . . Judge Hand’s test is really more of an analytic framework than an actual formula into which we could plug rough numerical estimates of burdens and injuries”); *Shanklin v. Norfolk S. Ry. Co.*, 369 F.3d 978, 997 (6th Cir. 2004) (“When a jury makes a negligence determination, its determination can be likened, using the famous ‘Hand formula,’ to a balancing of the burden on the defendant in acting more carefully

who sues a café owner when that patron is injured after slipping on an uneven floor. If the harm caused totals \$100, and the cost of repairing the floor is \$50, then the defendant will be liable for taking unreasonable risk. On the other hand, if the cost of mending the floor is \$150, then the defendant's actions were not negligent.⁵³ In such cases, the tortfeasor is incentivized to prevent only inefficient accidents.⁵⁴

Yet, a question still remains. The law gives incentives for actors to take efficient levels of care, but who exactly should be given the incentive? Often more than one person could avoid the accident. In the ultra-hazardous blasting example, making the defendant liable for the harm incentivizes him to avoid the accident. Not making the defendant liable, however, results in the victim bearing the loss and therefore giving the victim an incentive to avoid the accident (e.g., by moving the property away from the blast zone).⁵⁵ Likewise, in the negligence example, either the café owner or the patron could have taken care to avoid the accident.

To answer this question, the law relies on the concept of the least-cost avoider.⁵⁶ This approach makes the person who can avoid the accident at the cheapest possible cost responsible for the loss.⁵⁷ In the strict-liability example, the neighboring property owner could avoid the harm by moving his house. But moving the property would be very costly. It is better to make the defendant liable in these cases because he can more cheaply avoid the accident (e.g., by limiting the effects of the explosion).⁵⁸

against the probability of harm multiplied by the magnitude of harm if the defendant does not so act." (citing *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947)), *rev'd on other grounds*, 529 U.S. 344 (2000)); *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (where Judge Learned Hand offered the infamous formula for negligence: "if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B [is] less [than] PL."); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32–36 (1972).

53. See generally KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 46–82 (2d ed. 1997).

54. See COOTER & ULEN, *supra* note 8, at 322–64.

55. See *id.*

56. Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972); see also Stephen G. Gilles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, 78 VA. L. REV. 1291, 1306 (1992).

57. See Calabresi & Hirschoff, *supra* note 56 at 1060.

58. See *id.*; Gilles, *supra* note 56, at 1306.

B. Problems with the Economic Theory of Tort Law

Tort law serves this economic function.⁵⁹ Nevertheless, as a positive theory of law, it is hardly unassailable. Scholars point out many problems with the theory, such as: (1) often people are not the rational welfare maximizers that economics supposes;⁶⁰ (2) the law does not actually deter accidents;⁶¹ and (3) the economic theory does not take seriously the views of those who actually practice the law.⁶² As a result, many of the economic theorists do not believe that the law is solely dictated by efficiency concerns, but displays other important functions.⁶³

It is unnecessary to repeat all of the problems with the economic theory here. Yet one of those problems will be salient in demonstrating how corrective justice works. That is, the economic theory struggles to explain the relationship between the plaintiff and defendant. This can be broken down into two further arguments: the theory's difficulty in explaining the bilateral structure of tort law and the theory's failure to account for the role of causation.

59. See sources cited *supra* note 8 and accompanying text.

60. See, e.g., Christine Jolls, Cass R. Sunstein, and Richard H. Thaler, *A Behavioral Approach to Law and Economics*, in BEHAVIORAL LAW AND ECONOMICS 13–59 (Cass R. Sunstein ed., 2000); Cass R. Sunstein, *Introduction*, in BEHAVIORAL LAW AND ECONOMICS 1–10 (Cass R. Sunstein ed., 2000); see also JUDGMENT AND UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982) [hereinafter UNCERTAINTY]; Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law & Economics*, 50 STAN. L. REV. 1471, 1488 (1998). These ideas have also had some impact on court decisions. See, e.g., *Schwade v. Total Plastics, Inc.*, 837 F. Supp. 2d 1255, 1274 (M.D. Fla. 2011) (“[O]ne possible attraction of hindsight bias is that it may be quite flattering to represent oneself as having known all along what was going to happen.” (quoting Baruch Fischhoff, *Debiasing*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 422, 429 (Kahneman, Slovic, & Tversky, eds., 1982))); *Abrahamson v. Bd. of Educ. of Wappingers Cent. Sch. Dist.*, 2002 WL 1354711, at *8 (S.D.N.Y. June 21, 2002) (“Of course, we do know that not everyone behaves in a way that economists deem ‘rational.’”). For the application of behavioral law and economics to copyright, see, for example, Christopher Buccafusco & Christopher Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31, 33 (2011); Christopher Buccafusco & Christopher Sprigman, *Valuing Intellectual Property: An Experiment*, 91 CORNELL L. REV. 1, 2 (2010); Christopher Buccafusco et al., *What’s a Name Worth?: Experimental Tests of the Value of Attribution in Intellectual Property*, B.U. L. REV. (forthcoming 2013) (manuscript at 106).

61. See, e.g., Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994); Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115, 152–53 (1994); see also Christopher J. Bruce, *The Deterrent Effects of Automobile Insurance and Tort Law: A Survey of the Empirical Literature*, 6 L. & POL’Y 67 (1984).

62. See William Lucy, *Method and Fit: Two Problems for Contemporary Philosophies of Tort Law*, 52 MCGILL L.J. 605, 610–12 (2007).

63. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 27 (7th ed. 2007) (“But there is more to notions of justice than a concern with efficiency.”).

1. Tort's Bilateral Structure

Tort litigation is bilateral, or two-sided. A plaintiff sues a defendant, asserting the defendant caused him wrongful harm and therefore owes the plaintiff compensation.⁶⁴ This bilateral structure is somewhat puzzling in the economic interpretation of tort.⁶⁵ The deterrence goal could be achieved through various mechanisms, none of which require treating the defendant and plaintiff together in this fashion.⁶⁶ This point can be illustrated through a number of questions.⁶⁷

To begin, why is it necessary for the defendant to compensate this particular plaintiff?⁶⁸ The economic theory states that threatening the defendant with such liability will result in the defendant taking efficient care to avoid the accident.⁶⁹ However, the need to deter accidents does not provide a reason why the defendant ought to pay this particular plaintiff. If the only goal is to deter the defendant from causing the accident, all that is needed is to make him pay someone a penalty for causing the accident. The defendant will be equally incentivized towards efficient behavior if non-efficient behavior results in him paying a fine to the government or a random

64. We can illustrate this bilateral structure by contrasting a typical tort scenario with a non-correlative method of resolving the issue. See PETER CANE, *THE ANATOMY OF TORT LAW* 12 (1997). When an accident occurs, both tort and insurance schemes provide compensation, but the relevant parties implicated by the operations are different. See *id.* In tort cases, the plaintiff will claim that the defendant has committed a wrong and therefore caused injury. See *id.* If the court agrees, liability will be imposed on the defendant who must then pay the plaintiff a remedy. See *id.* Alternatively, in insurance claims, the victim will receive recompense not from a particular wrongdoer but from a pool of resources. See *id.* The compensation does not come from one person but from the group of people that contribute towards the insurance scheme. See *id.* The insurance claim does not focus on a bilateral relationship but on a multilateral relationship between everyone associated with the resource pool. See *id.*

The bilateral relationship between the two parties may also be substantive as well as structural, and a number of texts have demonstrated that the substantive content of legal rights must impose correlative duties on the other party in the interaction. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–32 (1913); David Lyons, *The Correlativity of Rights and Duties*, 4 NOÛS 45, 47 (1970); Ronen Perry, *Correlativity*, 28 L. & PHIL 537, 539 (2009); see also *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928) (holding that the plaintiff cannot recover merely when someone breaches a duty resulting in harm, but can only recover when harm results from the breach of a duty owed to the plaintiff and correlated with his right).

65. See WEINRIB, *IDEA OF PRIVATE LAW*, *supra* note 10, at 46–48; Coleman, *Structure*, *supra* note 10, at 1250–53.

66. See, e.g., Don Dewees & Michael Trebilcock, *The Efficacy of the Tort System and Its Alternatives: A Review of the Empirical Evidence*, 30 OSGOODE HALL L.J. 57 (1992).

67. See COLEMAN, *PRACTICE OF PRINCIPLE*, *supra* note 10, at 13–24; see also WILLIAM LUCY, *THE PHILOSOPHY OF PRIVATE LAW* 33–43 (2007) [hereinafter LUCY, *PHILOSOPHY OF PRIVATE LAW*].

68. See COLEMAN, *PRACTICE OF PRINCIPLE*, *supra* note 10, at 18.

69. See *supra* Part I.A.

third party (such as a charity).⁷⁰ It is paying the fine that provides the necessary incentives, not where that fine ultimately ends up.⁷¹ As Judge Richard Posner explains: “that the damages are paid *to the plaintiff* is, from the economic standpoint, a detail.”⁷²

Or the same problem can be approached from the opposite direction. Why is it necessary that the plaintiff sue this particular defendant?⁷³ Economists would answer that this defendant is the least-cost avoider and therefore the person best placed to avoid the accident in the most efficient way.⁷⁴ By publicly holding this least-cost avoider liable, other similarly situated least-cost avoiders in the future will be given an ultimatum: act efficiently or bear the costs of liability.⁷⁵ But there is often little reason to think the defendant is the least-cost avoider. It may be true that he is the least-cost avoider—or, more precisely, a lesser-cost avoider—when compared to the plaintiff, but that says little about third parties. It is quite possible that a third party is in fact the best positioned to avoid the accident.⁷⁶ To return briefly to the automobile example, many car accidents are the result of excessive speed. It could be the case that the car manufacturer is best placed to avoid these harms, simply by restricting the speed at which its car can drive. Yet, the victim in such a case does not sue the manufacturer, nor is there any requirement on the victim to show that the defendant he does eventually sue is the real least-cost avoider.⁷⁷ This is the case even when the cost of identifying the real least-cost avoider is comparatively low.⁷⁸

One can also ask, why is it necessary for the defendant to pay anyone at all monetary damages? The costs incurred in the tort are sunk; the car in the road traffic accident is already dented, and the property near a blast site is already demolished.⁷⁹ No matter what the court does, that will not change. It does not matter if the court makes the defendant responsible for these costs or leaves them with the plaintiff. On the other hand, redistributing the costs from the plaintiff to the defendant creates further expenditure because litigation requires time and resources. The economic theory responds that

70. See COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 10, at 18.

71. See *id.*

72. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 143 (2d ed. 1977).

73. See COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 10, at 17–18.

74. See *supra* Part I.A.

75. See *supra* Part I.A.

76. See COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 10, at 18; Coleman, *Structure*, *supra* note 10, at 1241–42.

77. See COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 10, at 18–19.

78. See *id.* at 19–20; Coleman, *Structure*, *supra* note 10, at 1241–42.

79. See COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 10, at 16.

holding the defendant liable in this case will incentivize defendants in the future into taking efficient care.⁸⁰ But this does not justify redistributing the costs in any particular case.⁸¹ If lawmakers want to change the incentive structure for future actors, they can simply make a public announcement that, in the future, a fine will punish such conduct. The efficiency of future actors is important but it does not make costly litigation in this case necessary when there are other equally good ways to create incentives.

Underlying all of these related issues is one fundamental problem: the economic theory is entirely forward looking.⁸² It seeks to justify the tort case solely by the effects it will have in the future.⁸³ But the basic features of the tort case are backwards looking. The actors involved are determined by a historical event, and they argue over the details of something that already has occurred. It is not clear why these backward-looking features are necessary to produce good economic results in the future.⁸⁴ If the economic analysis were unquestionably correct, then defendants and plaintiffs would be selected by their relationship to the forward-looking goal of cost reduction. The law would define the injurer and victim in a way that would best reduce costs tomorrow.⁸⁵ Yet the law does not select defendants and plaintiffs due to their relationship to a forward-looking goal, but instead because of their relationship to one another.⁸⁶

80. See *id.* at 18; *supra* Part I.A.

81. See COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 10, at 16.

82. See *id.* at 16–18.

83. See *id.*

84. There is naturally a debate within the economic community over the efficiency of the bilateral litigation model. See, e.g., Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357 (1984); Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 J.L. & ECON. 225 (1993). There have been notable arguments that this system is not efficient. See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1097–1102 (2001); Stephen Sugarman, *Doing Away With Tort Law*, 73 CALIF. L. REV. 555 (1985). However, even if as an empirical matter economists could prove the efficiency of the system, non-economists would still find fault in the theory. In such a case, the problem would be that the economic theory makes the structure contingent upon its efficiency. Presumably, if it were not efficient, the economists would abolish it in favor of something else. However, it is not clear whether that would happen in reality, if this structure were inefficient. It is not clear that, upon a showing of inefficiency, the victim would automatically lose their right to receive compensation from their injurer. See, e.g., Lucy, *supra* note 62, at 613–14. Non-economists would say there is a fairness concern that would justify this practice nonetheless.

85. See COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 10, at 16–18.

86. See WEINRIB, IDEA OF PRIVATE LAW, *supra* note 10, at 47 (“Efficiency might as easily be served by two different funds, one that receives tort fines from inefficient actors and another that disburses the indicated inducements to victims. Instead of linking each party to the other, economic analysis construes the presence of both as a consequence of combining incentives that are independently applicable to each.”).

2. Actual Causation

The economic analysis also struggles to explain substantive doctrines that exist to link the parties together. One example is the requirement of actual causation.⁸⁷ A defendant will not be liable unless her particular actions cause the harm that the plaintiff complains about.⁸⁸ This is often known as the “but-for test”; that is to say, a defendant will not be liable unless the accident would not have occurred but for his actions.⁸⁹ It is the plaintiff’s task to show empirically how the defendant’s actions satisfy this test.⁹⁰

The economic theory struggles to explain why this is a necessary part of the law. The law’s goal in this theory is welfare maximization.⁹¹ By making the least-cost avoider liable, the law gives future least-cost avoiders the incentive to take efficient levels of care.⁹² Once that is considered the goal, however, the only relevant question for the judge in any case is which party is the least-cost avoider? If it was the defendant, then the defendant should be responsible for the loss; if it was the plaintiff, then the defendant should not be held responsible. But where then is the necessity of discussing causation? Discussion of who caused whom harm is simply a waste of time if the judge will decide purely on the basis of who is the least-cost avoider. Thus, the positive economic theory, as Richard Wright points out, “merely skips over” the causation requirement.⁹³ As a result, proponents of the economic theory have failed to define any content to the doctrine. Ronald Coase suggested focusing not on causation, but on whose actions were simply more efficient.⁹⁴ Likewise Judge Guido

87. See *id.* at 47–48; WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 229 (1987) (“[T]he idea of causation can largely be dispensed with in an economic analysis of torts . . .”).

88. See, e.g., W. PAGE KEETON, ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* §§ 41, 42 (5th ed. 1984); OLIVER W. HOLMES, *THE COMMON LAW* 73 (M. Holmes, ed., 1963).

89. See, e.g., D. M. A. Strachan, *Variations on an Enigma*, 33 *MOD. L. REV.* 378, 386 (1970).

90. See *id.* at 390.

91. See WEINRIB, *IDEA OF PRIVATE LAW*, *supra* note 10, at 46–47.

92. See *supra* Part I.A.

93. Richard W. Wright, *Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis*, 14 *J. LEGAL STUD.* 435, 438 (1985) [hereinafter Wright, *Actual Causation*]. It is true that today causation remains as one of the basic and most decisive features of tort cases. See, e.g., *Nassar v. Univ. of Tex. Sw. Med. Ctr.*, 674 F.3d 448 (5th Cir. 2012), cert. granted, 81 U.S.L.W. 3234 (U.S. Jan. 18, 2013) (No. 12-484) (certiorari granted for determining proper standard of causation of Title VII retaliation claims), vacated, 133 S. Ct. 2517 (2013); *Mitchell v. Gonzales*, 54 Cal. 3d 1041 (1991) (on the substantial factor necessity in California causation doctrine); *Cowart v. Widener*, 697 S.E.2d 779 (Ga. 2010) (holding that a plaintiff is required to provide expert evidence of causation in negligence cases involving specialized medical questions).

94. See Ronald Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1, 13 (1960).

Calabresi called the term “causation” a “weasel word”⁹⁵ devoid of meaning. Today’s modern proponents of the economic theory also acknowledge that the economic understanding of causation is “admittedly far from the language and concepts in which the courts analyze these cases.”⁹⁶

This economic view is unacceptable as a positive theory of the law.⁹⁷ Causation is one of the most prominent features of tort. It is historically one of the basic doctrines the law hinges on, and today no tort textbook or class could seriously omit it. Causation has been a central feature of tort since its inception, yet the classical economic analysis does not seek to explain or justify it.⁹⁸ Instead it begs the question; why still discuss causation at all? Are lawyers simply so ridiculous that they will cling to such vacuous and empty concepts? Or is the pure economic answer incorrect, and causation actually has some meaningful place in the law?

C. Corrective Justice Theory of Tort Law

Corrective justice theory views tort law as a system for correcting the wrongful losses and wrongful gains that arise from a tortious transaction.⁹⁹ It states that those who cause wrongful loss have a duty to repair the loss.¹⁰⁰ This Aristotelian theory begins from the position that people are equally entitled to their holdings (including their physical property as well as their legal rights).¹⁰¹ When people interact with one another, certain norms govern their interactions. They ought to respect the right of the other person to their holdings as much as they respect their own rights. Torts break that balance and cause an inequality;¹⁰² one party gains something and the other party loses something. When a thief steals a car, the

95. GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 6–7 n.8 (1970) [hereinafter CALABRESI, COSTS OF ACCIDENTS]; see also Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 105 (1975) [hereinafter Calabresi, *Concerning Cause*] (talking about the “alien language” of causation).

96. William Landes & Richard Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109, 134 (1983).

97. See Wright, *Actual Causation*, *supra* note 93, at 435.

98. See *id.*

99. See ARISTOTLE, NICOMACHEAN ETHICS bk. V, ch. 4 (Martin Ostwald, trans., 1962); Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 DUKE L.J. 277, 277 (1994).

100. See COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 10, at 15 (“[The] principle states that individuals who are responsible for the wrongful losses of others have a duty to repair the losses.”); WEINRIB, IDEA OF PRIVATE LAW, *supra* note 10, at 56–83; Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 349 (2002) (“Corrective justice is the idea that liability rectifies the injustice inflicted by one person on another.”).

101. WEINRIB, IDEA OF PRIVATE LAW, *supra* note 10, at 62.

102. *Id.* at 61–66.

thief gains something, and the victim loses something: the car. When an attacker strikes a victim, the attacker gains the freedom to serve his own purposes, while the victim loses freedom of action as he is forced into a situation not of his choosing. Tort law exists to correct the inequality.¹⁰³ By making the defendant compensate the plaintiff, the law rectifies the unjust exchange.¹⁰⁴ The remedy removes the wrongful gain and the wrongful loss while returning the parties roughly to the positions they occupied prior to the tort. The role of the judge, as Aristotle phrased it, is to be “justice ensouled.”¹⁰⁵ Like the statue of Lady Justice that stands outside the Supreme Court, the Aristotelian judge simply balances the acts of the parties and puts the actors back into equilibrium with one another.¹⁰⁶ This theory was the traditional understanding of tort law prior to the rise of the economic analysis.¹⁰⁷ It is still a view that many tort practitioners, as well as the public generally, hold.¹⁰⁸

The corrective justice account of tort law has validity as an explanation of the tort system because it renders intelligible something the economic theory fails to account for: the relationship between the plaintiff and defendant.¹⁰⁹ Whereas the economic understanding struggles to explain the significance of the plaintiff-defendant relationship, corrective justice makes this relationship intuitive.¹¹⁰ Most notably, it explains the bilateral structure of

103. See *id.*; COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 10, at 13–24; Coleman, *Structure*, *supra* note 10, at 1240–52.

104. See WEINRIB, IDEA OF PRIVATE LAW, *supra* note 10, at 61–66; COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 10, at 13–24; Coleman, *Structure*, *supra* note 10, at 1240–52.

105. Robert L. Rabin, *Law for Law's Sake*, 105 YALE L.J. 2261, 2269 (1996) (quoting ERNEST WEINRIB, THE IDEA OF PRIVATE LAW 5–6 (1995)).

106. See *id.*

107. See WEINRIB, IDEA OF PRIVATE LAW, *supra* note 10, at 58–66 (discussing the historical progression of Aristotle's views); James Gordley, *The Moral Foundations of Private Law*, 47 AM. J. JURIS. 1 (2002).

108. One strain of jurisprudence says that we cannot understand the law unless we understand the views of those who practice it and was famously articulated by Hart, as the law's “internal points of view” or “*internal aspect* of rules.” See H. L. A. HART, THE CONCEPT OF LAW 56, 89 (2d ed. 1994); see also RONALD DWORKIN, LAW'S EMPIRE 11–15 (1998). The two most well-known corrective justice theorists, Coleman and Weinrib, both ascribe to this view and believe it sets their account apart from the economic view. See COLEMAN, RISKS AND WRONGS, *supra* note 15, at 6–10; WEINRIB, IDEA OF PRIVATE LAW, *supra* note 10, at 8–16. Coleman calls this “middle-level theory.” See COLEMAN, RISKS AND WRONGS, *supra* note 15, at 6–10. Weinrib calls this the search for the “internal account” of tort law. See WEINRIB, IDEA OF PRIVATE LAW, *supra* note 10, at 8–16.

109. See Schwartz, *supra* note 7, at 1815–16.

110. See WEINRIB, IDEA OF PRIVATE LAW, *supra* note 10, at 56 (“Corrective justice thus treats the wrong, and the transfer of resources that undoes it, as a single nexus of activity and passivity where actor and victim are defined in relation to each other.”); see also COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 10, at 13–24.

litigation.¹¹¹ The plaintiff must sue *this* defendant because it is *this* defendant who gained something from the tort. Likewise, the defendant must compensate *this* plaintiff because it is *this* plaintiff who lost something in the encounter. Only the transfer of the wrongful gain back to the victim restores equilibrium. The redistribution in this case will not increase the amount of welfare because the costs of the accident are sunk, but it will equitably rectify an unequal distribution of harm.¹¹²

As a result, the law is naturally backward looking. If the function of the law is to correct a wrong that has occurred in the past, then the past will necessarily determine the aspects of litigation (e.g., the facts discussed and the litigating parties). The parties are determined historically by their connection to one another, not by their relationship to a forward-looking, normative goal.¹¹³ The law looks backwards to determine who committed a wrong, and then tries to address that, rather than looking forwards to improve efficiency tomorrow.¹¹⁴

This also helps illuminate the doctrine of causation. Corrective justice puts causation center stage.¹¹⁵ The theory states that only those who actually cause wrongful loss have a duty to repair the loss.¹¹⁶ The centrality of causation flows from corrective justice's position as a transactional norm.¹¹⁷ It states that, when people interact with each other, they ought to do so in certain ways and refrain from certain conduct.¹¹⁸ Disobeying these interactional rules

111. See WEINRIB, *IDEA OF PRIVATE LAW*, *supra* note 10, at 63 ("[B]ecause the plaintiff has lost what the defendant has gained, a single liability links the particular person who gained to the particular person who lost. Without some conception such as Aristotle's, private law's linking of the particular parties becomes a mystery").

112. The issue is therefore one familiar to economic discussion. The economic analysis of law focuses on the allocative efficiency properties, hoping to increase the total amount of welfare. But it does not question the ultimate distribution of welfare. See, e.g., STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 296 (1987) (discussing the unimportance of distributive concerns).

113. See COLEMAN, *PRACTICE OF PRINCIPLE*, *supra* note 10, at 18.

114. See *id.*

115. While economists picked up and ran with the realist disbelief in the cause concept, philosophers and jurisprudence scholars maintained there is a real meaning to the concept. See, e.g., H. L. A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 59–63 (2d ed. 1985); Richard A. Epstein, *Toward a General Theory of Tort Law: Strict Liability in Context*, 3 J. TORT L. 6 (2010); Wright, *Actual Causation*, *supra* note 93, at 435.

116. See Wright, *Actual Causation*, *supra* note 93, at 435. However some are not as sold on the consistency between corrective justice and tort's conception of causation. See, e.g., Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 L. & PHIL. 1 (1987).

117. See Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 410 (1987).

118. See *id.* at 430.

gives rise to an unequal situation where the tortfeasor gains at the victim's expense. On the other hand, in the absence of an interaction, the gains and losses are not connected to one another. In such cases the inequality is not the result of individual agency but merely good fortune.¹¹⁹ When asking whether the defendant caused the plaintiff's harm, the focus is whether these gains and losses are the result of a singular, identifiable interaction.¹²⁰ Causation is therefore the doctrine that requires the gains and losses to be linked together as flowing from the same wrong, rather than merely unconnected events.¹²¹

However, as so far explicated the theory is purely formal and not substantive.¹²² It tells us what to do once an injustice occurs but not what is an injustice in the first place.¹²³ Once legitimate holdings are not given equal respect, the law will rectify the situation. But what counts as a legitimate holding? And what is equal respect?¹²⁴ To these questions, corrective justice theorists respond that people have some natural right to determine the content of their lives.¹²⁵ Most notably, Professor Ernest Weinrib argues that Immanuel Kant's notion of autonomy is inextricably linked with Aristotle's theory of corrective justice.¹²⁶ Each person has an innate right to determine the purposes of his life.¹²⁷ Each person has an equal, natural right to live free from the interference of others.¹²⁸ When a tortfeasor causes harm to another, he uses the victim to further his own ends, without respecting the victim's equal right to lead his own life. The tortfeasor subjugates the victim's will to his own. The result is an inequality with benefits to the defendant and losses to the victim. The law corrects this situation to restore the balance.

119. *See id.*

120. *See id.*

121. *See id.*

122. *See, e.g.,* LUCY, PHILOSOPHY OF PRIVATE LAW, *supra* note 67, at 293–323 (discussing Weinrib's scholarship).

123. *See* WEINRIB, IDEA OF PRIVATE LAW, *supra* note 10, at 66–68.

124. *See* Hans Kelsen, *Aristotle's Doctrine of Justice*, in WHAT IS JUSTICE? JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE: COLLECTED ESSAYS BY HANS KELSEN 110, 125–36 (1957) (arguing that the lack of substance to the Aristotelian concept made in a pure tautology that justice is simply the process of giving someone what he deserves).

125. Coleman views this as stemming from theories of liberalism. *See* COLEMAN, RISKS AND WRONGS, *supra* note 15, at 433 (arguing that the law stems from “equality, respect for persons, and their well being”); *see also* LUCY, PHILOSOPHY OF PRIVATE LAW, *supra* note 67, at 309–10 (describing Coleman's approach).

126. *See* WEINRIB, IDEA OF PRIVATE LAW, *supra* note 10, at 84–113.

127. *See id.*

128. *See id.* Others also see some possibility for a substantive content to the concept of corrective justice capable of leading to definitions of justice. *See, e.g.,* Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 683 (1992).

This theory is attractive but still somewhat problematic. While it explains important features of the law that are otherwise unclear, the theory probably does not explain every part of the law.¹²⁹ Reliance on concepts such as autonomy to ground rights leads to indeterminacy in many instances.¹³⁰ It is often unclear when one person's autonomy should prevail over the autonomy of another.¹³¹ In a tort case, holding one person liable will often curtail their autonomy in order to uphold the autonomy of the other. And while deep reflection on Kantian theory may resolve these issues, there is very little indication from the judiciary that their focus is solely on upholding Kant's vision of autonomy.¹³² It seems more likely that, as Calabresi once said, tort law is a system of mixed goals.¹³³ Society recognizes rights for various reasons, some based on efficiency, and some based on the right holder's natural rights.¹³⁴ Each highlights a different, but equally important, aspect of the system.¹³⁵

II. CORRECTIVE JUSTICE AND COPYRIGHT INFRINGEMENT

Corrective justice is also an important function of copyright law. While the economic theory fails to make sense of the relationship between the author and infringer, the corrective justice theory explains this aspect of the law intuitively.

129. For critiques of corrective justice theory, see Posner, *The Concept of Corrective*, *supra* note 25, at 188; Sugarman, *supra* note 84, at 603–11.

130. See e.g., Gordon, *On Owning*, *supra* note 37, at 215 (“One might argue that the principle of autonomy gives no guidance because autonomy claims are always symmetrical. What one party wants, the other party does not want.”). Nevertheless Kantian approaches can be found in copyright. See, e.g., MERGES, JUSTIFYING INTELLECTUAL PROPERTY, *supra* note 39, at 68–101; Abraham Drassinower, *Copyright Infringement as Compelled Speech*, in *NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY* 203–24 (Annabelle Lever ed., 2012).

131. See Gordon, *On Owning*, *supra* note 37, at 157.

132. Tort cases rarely involve highly detailed discussion of Kantian theory.

133. See Calabresi, *Concerning Cause*, *supra* note 95, at 100–01.

134. See Gordon, *On Owning*, *supra* note 37, at 156–57, 245–46.

135. See Weinrib, *Deterrence and Corrective Justice*, *supra* note 25, at 629. Equally corrective justice is likely supported to some extent by another Aristotelian concept, distributive justice. See, e.g., TONY HONORÉ, RESPONSIBILITY AND FAULT (1999); ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW (1999); Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515 (1992); Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in *OXFORD ESSAYS IN JURISPRUDENCE: FOURTH SERIES* 237–63 (Jeremy Horder, ed., 2000). For a consideration of distributive justice in copyright, see Molly S. Van. Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005).

A. *The Economic Theory of Copyright*

The economic theory of copyright is based on the same principle of efficiency as tort law.¹³⁶ Resources should be allocated towards uses that produce welfare. In copyright, however, a market failure gets in the way of that goal.¹³⁷ Authors often do not have the socially optimal incentive to create works.¹³⁸ This is the result of the public-good nature of literary and artistic works. Creating the first copy requires substantial up-front investment.¹³⁹ A rational author would be unlikely to pay these up-front costs unless he will later recover the investment.¹⁴⁰ To add to the problem, as the works are public goods, a copyist can easily duplicate the work and compete with the author in the market.¹⁴¹ In the face of this price competition, the author's ability to recover the up-front expenses diminishes—and along with it the incentives to create the work.¹⁴² Copyright law intervenes to prevent this.¹⁴³ With market exclusivity, the author can recover the up-front costs and receive the socially optimal incentive to produce the work.

This theory is the “mirror image” of the economic interpretation of tort law.¹⁴⁴ The ultimate goal in each is welfare maximization.¹⁴⁵ Accomplishing this in each case requires manipulating the actor's incentives (whether incentivizing the tortfeasor into taking care or incentivizing the author into creating works).¹⁴⁶ The requirement for incentive manipulation stems in each case from a market failure caused by externalities.¹⁴⁷ In tort the

136. See *supra* notes 6–9 and accompanying text. For alternative theories to the standard incentive rationale, see, for example, Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317 (2005); Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 WM. & MARY L. REV. 33 (2004); Tom. G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 HAMLINE L. REV. 261 (1998); Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212 (2004).

137. See generally Gordon, *Fair Use*, *supra* note 26.

138. See *infra* note 140 and accompanying text.

139. See Landes & Posner, *An Economic Analysis of Copyright Law*, *supra* note 26, at 326.

140. See *id.*

141. See *id.*

142. See *id.*

143. See *id.*

144. See Gordon, *Mirror Image*, *supra* note 6, at 535.

145. See *id.* at 534; *supra* note 8 and accompanying text.

146. See Gordon, *Mirror Image*, *supra* note 6, at 535–37.

147. See *id.* The literature on how externalities affect intellectual property is varied and voluminous. See, e.g., Jerry L. Harrison, *A Positive Externalities Approach to Copyright Law: Theory and Application*, 13 J. INTELL. PROP. L. 1 (2005); Dennis S. Karjala, *Congestion Externalities and Extended Copyright Protection*, 94 GEO. L.J. 1065 (2006); Peter S. Menell, *An Analysis of the Scope of Copyright Protection for Application Programs*, 41 STAN. L. REV. 1045,

externalities are negative—the tortfeasor overproduces torts because others bear externalized costs.¹⁴⁸ In copyright they are positive—the author underproduces works because others would reap the externalized benefits.¹⁴⁹ In each case, resolving the problem requires the actor to internalize the externalities.¹⁵⁰ Holding the tortfeasor liable for damages internalizes those costs, creating a proper incentive for fewer accidents.¹⁵¹ Copyright protection allows the author to consider the long-term benefits of a work when deciding whether to invest in its creation. The result in both tort and copyright is socially optimal activity.

B. Problems with the Economic Analysis of Copyright Infringement

Because the economic theory of copyright is similar to the economic theory of tort, it suffers from exactly the same problem. It struggles to explain the relationship between the two parties, the author and infringer. This manifests itself in two ways.

1. Copyright's Bilateral Structure

Like in the tort context, copyright holders enforce their rights through bilateral litigation. The author sues the infringer for compensation.¹⁵² Using the same questions asked of tort law, it is clear that the economic theory does not provide a full explanation of why this bilateralism is necessary. To start, why does the author have

1058–71 (1989); Peter S. Menell, *Tailoring Legal Protection for Computer Software*, 39 STAN. L. REV. 1329, 1330 (1987); Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655 (1994); Lisa N. Takeyama, *The Welfare Implications of Unauthorized Reproduction of Intellectual Property in the Presence of Demand Network Externalities*, 42 J. INDUS. ECON. 155 (1994); Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 100 COLUM. L. REV. 257 (2007); Brett Frischmann, *Spillovers Theory and Its Conceptual Boundaries*, 51 WM. & MARY L. REV. 801 (2009).

148. See Gordon, *Mirror Image*, *supra* note 6, at 534.

149. See *id.* at 535.

150. See *id.* at 535–37.

151. See *id.*

152. See, e.g., Balganes, *Obligatory Structure*, *supra* note 37, at 1685 (demonstrating the bilateralism of copyright law). It is true that often modern copyright litigation is far more complex than a simple author versus infringer case. There are many third parties on both sides. On the right holder side there are assignees, license holders, publishers, record companies, collecting societies, etc., while on the infringer side there are websites that host infringing content, internet service providers, and peer-to-peer network operators. However, the existence of third parties does not change the basic case two-sided nature of the case before the court. Each case is a contest between one party that holds a right over the work and someone who has potentially infringed that right. Even in the case where there are more than one party on each side of the case, for example in mass copyright litigation, see *infra* Part III.C., the case is still one group of parties against another group of parties—much like a soccer match is a team sport but still bilaterally structured.

a right to sue this particular copyright infringer? Economists would answer that providing the author with the right to sue provides an ability for the author to recover the fixed costs of creating the work and therefore increases the incentive to produce the work in the first place.¹⁵³ If, however, the primary goal is to incentivize the creation of new works, then it is sufficient to reward the author for creating. This can be accomplished through non-bilateral means. The use of government subsidies is the leading example of this.¹⁵⁴ Creation could be spurred simply by providing ex ante lump sums of money to authors without the need for any adjudicative system.¹⁵⁵ Tax money would be allocated towards author's fixed costs as it is allocated towards the salaries of those working in national defense or in the welfare state.¹⁵⁶ Alternatively, institutions could award prizes to authors who produce the most popular works.¹⁵⁷ These systems would make an exclusive right to copy and lawsuits for infringements unnecessary and avoid the cost of copyright enforcement and litigation.¹⁵⁸

153. See *supra* notes 139–42 and accompanying text.

154. Some authors have already commented on the similarity between the grant and the grant of government regulation via subsidies. See, e.g., 56 PARL. DEB. H.C. (3d ser.) (1841) 341, 350 (U.K.) (Copyright is “a tax on readers for the purpose of giving a bounty to writers.” (statement of Thomas B. Macaulay)); Tom W. Bell, *Authors' Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229, 231 n.1 (2003); John F. Duffy, *The Marginal Cost Controversy in Intellectual Property*, 71 U. CHI. L. REV. 37, 39–41 (2004).

155. See INTELLECTUAL PROPERTY RIGHTS: INNOVATION, GOVERNANCE AND THE INSTITUTIONAL ENVIRONMENT 257 (Birgitte Anderson ed., 2006); *supra* notes 12–14 and accompanying text.

156. See Hal R. Varian, *Copying and Copyright*, 19 J. ECON. PERSP. 121, 136 (2005).

157. See *supra* note 34 and accompanying text.

158. Some commentators have already highlighted the potential efficiency of these alternative creation-incentivizing systems. See, e.g., Stan J. Liebowitz & Richard Watt, *How to Best Ensure Remuneration for Creators in the Market for Music? Copyright and Its Alternatives*, 20 J. ECON. SURVEYS 513 (2006); Steven Shavell & Tanguy van Ypersele, *Rewards Versus Intellectual Property Rights*, 44 J.L. & ECON. 525 (2001); Peter Eckersley, *The Economic Evaluation of Alternatives to Digital Copyright*, SERCIAC (2003) (preliminary version), available at <http://www.serci.org/2003/eckersley.pdf>; see also Mark S. Nadel, *Questioning the Economic Justification for Copyright*, SERCIAC (2003) (draft), available at <http://www.serci.org/2003/nadel.pdf>. While others recognize more generally that copyright litigation may be wasteful, see, for example, Michael J. Meurer, *Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation*, 44 B.C. L. REV. 509 (2003), equally, a number of lawyers have argued that creation will flourish in the absence of a copyright regime. See, e.g., KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* (2012); Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121, 1150 (2007); Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317 (2011). These studies mostly concern the creation of fictional work, for information on copyright alternatives for factual works, see INTELLECTUAL PROPERTY PROTECTION OF FACT-BASED WORKS: COPYRIGHT AND ITS ALTERNATIVES (Robert F. Brauneis ed., 2009).

Nevertheless, it might be that copyright itself is economically desirable. The advantage of creating a property right is that it allows the author to license and sell the work at a price that the market sets.¹⁵⁹ Because the market sets the reward, the author is given a price signal that accurately reflects the social value from the work. This therefore provides not merely an incentive to create the work but the socially optimal level of incentive.¹⁶⁰ In this case, the right to sue the infringer is a second-best tool for the author to recover the fixed costs.¹⁶¹ Ideally, the copyist would pay the author for the right to use the work; otherwise, the court will hold the copyist liable. Therefore, the author can still recover money to offset his initial investment. Yet, this theory still fails to explain why upon an infringement of the right, the copyist should receive compensation directly from this particular infringer. The author's incentive will be equally well served if, upon an infringement, a government-compensation scheme, an insurance policy, or a random third party compensates the author. The incentives do not rest on where the compensation comes from, only that someone (anyone) compensates the author and enables him to recover his costs.

One could approach the same issue from the opposite direction. Why is it necessary for the copyright infringer to pay this particular author compensation? The economic theory would say that making the copyist pay a penalty deters him and future copyists from breaking the law.¹⁶² But all that is required to deter infringement is to make the infringer pay a penalty to *someone* upon illegally copying the work. This could be in the form of a criminal fine to the government or a donation to a third party such as a charity.¹⁶³

159. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 355 (1967) (arguing that well defined property rights lead to internalization of externalities and efficient price signals). As a result some see the economics of property as the key to economics of intellectual property. See, e.g., Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VAND. L. REV. 1727, 1729–30 (2000). Others disagree fundamentally with this explanation for copyright. See, e.g., Brett M. Frischmann, *Evaluating the Demsetzian Trend in Copyright Law*, 3 REV. L. & ECON. (2006) [hereinafter Frischmann, *Evaluating the Demsetzian Trend*]; Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005). However, some of this desire for strong copyright protection also flows from a natural rights perspective that authors deserve to control all uses of their work. See PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 10–11 (rev. ed. 2003) (Copyright maximalists “assert that copy[ri]ght is rooted in natural justice, entitling authors to every last penny that other people will pay to obtain copies of their works.”).

160. See e.g., Frischmann, *Evaluating the Demsetzian Trend*, *supra* note 159, at 10.

161. See *id.*

162. See, e.g., *supra* notes 9–14 and accompanying text.

163. Criminal provisions are already partially relied upon for this goal. 17 U.S.C. § 506 (2012). The current potential for imprisonment up to five years certainly acts as a deterrent for the most serious forms of copyright infringement. See generally I. Trotter Hardy, *Criminal*

Once again, there is the question of why compensation is necessary at all. In tort law, the costs are sunk.¹⁶⁴ The welfare reducing aspect of the transaction has already taken place. This is exactly the same situation in copyright law. The welfare producing part of the transaction has already occurred; the work in question is already created. Nothing can change that fact. If the court fails to hold the infringer liable, that will not reduce the enjoyment society gains from the author's work. Therefore, the only economic reason for making the infringer liable is the effect it has on future creation. However, if all that matters is creating incentives for future action, why make anyone liable in this particular case? This forward-looking goal could equally be accomplished by stating that such copying in the future will result in the author receiving compensation from a third party.

The fundamental problem is that the economic view of copyright is entirely forward looking, but the main features of a copyright infringement case are backward looking.¹⁶⁵ The parties are not singled out because of their relationship to the goal of maximizing future welfare but because they are related to each other by some historical event. The author sues the infringer not because doing so will encourage future creation but because the author feels that the infringer has hurt him and should compensate him for the damage caused.

2. Copying and Independent Re-creation

The next point is that the economic theory of copyright law also struggles to explain doctrines that relate the two parties together. It

Copyright Infringement, 11 WM. & MARY BILL RTS. J. 305, 311 (2002); Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469, 472 (2011); Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. REV. 731, 778–79 (2003); Sharon B. Soffer, *Criminal Copyright Infringement*, 24 AM. CRIM. L. REV. 491, 506 (1987).

164. See *supra* note 78 and accompanying text.

165. Mark Lemley has already highlighted that two different forms of economic rationale are important in intellectual property theory. See Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129 (2004). There is an ex ante view which states that intellectual property rights must be provided in order to induce creation and an ex post view which states continued control after creation will lead facilitate management of the goods economic potential. See *id.* Lemley critiques the ex post view and finds it at odds with the fundamental public-goods nature of intellectual property. See *id.* This view aids the argument made here that the only valid economic approach to intellectual property is forward looking. However, the point of divergence between my argument and Lemley's is that I assert all of copyright cases (and probably all intellectual property cases generally) are necessarily backward looking in some measure. The issue before the court and the event they are concerned with are always ex post, or after the creation. The judgment the court provides has no forward-looking goals which relates to these two parties and this event which they fight about.

is unclear why the copyright holder should only be able to enforce his right against those who actually copy his work.¹⁶⁶ Unless the defendant actually duplicates an existing work, he will not be liable.¹⁶⁷ It is not a copyright infringement to independently re-create the work, even if the resulting works are identical.¹⁶⁸ The question is whether this requirement is welfare enhancing.

As an initial matter, one might think it is not. Two reasons would suggest this doctrine is inefficient. First, presumably the existence of identical works in the market place will harm the author's incentives to create, regardless of how it is created.¹⁶⁹ An independently produced work may still be a substitute for the author's work and therefore harm his ability to charge a price above marginal cost. This is largely the reasoning found in patent law, which does not have such an independent re-creation doctrine.¹⁷⁰

Second, independently re-creating works does not enhance welfare. Simply reproducing a work does not add something new that society desires and demands. For example, society already has produced *Don Quixote*.¹⁷¹ Anyone who obtains value from *Don Quixote* can already go out and read it. Re-creating *Don Quixote* does not add anything new to that picture. On the other hand, the process of re-creating *Don Quixote* actually harms social welfare. The re-creator spends resources on the re-creation of a work that ultimately satisfies no demand. This reasoning suggests society should deter independent re-creation rather than allow it. One way to do this would be to hold the independent re-creator liable.

166. See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936); *Roworth v. Wilkes*, 1 Campbell 94, 98, 170 Eng. Rep. 889 (K.B. 1807); 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 9.2, at 9:5 (3d ed. 2005 & Supp. 2008) [hereinafter GOLDSTEIN ON COPYRIGHT] (explaining that, in order "[t]o establish copying, a plaintiff must prove that the defendant mechanically copied the plaintiff's work"); see also Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, at 511-14 (1945).

167. See, e.g., *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1949) (stating that infringement consists of: "(a) that defendant copied from plaintiff's copyrighted work and (b) that the copying (assuming it to be proved) went to far as to constitute improper appropriation").

168. See, e.g., *Susan Wakeen Doll Co. v. Ashton-Drake Galleries*, 272 F.3d 441, 450 (7th Cir. 2001).

169. See Landes & Posner, *An Economic Analysis of Copyright Law*, *supra* note 26, at 344-47.

170. For a discussion of the efficiency of this doctrine in the patent context, see Mark A. Lemley, *Should Patent Infringement Require Proof of Copying?*, 105 MICH. L. REV. 1525 (2007); Stephen M. Maurer & Suzanne Scotchmer, *The Independent Invention Defence in Intellectual Property*, 69 ECONOMICA 535 (2002); Carl Shapiro, *Prior User Rights*, AM. ECON. REV. 92, 95 (2006); Samson Vermont, *Independent Invention as a Defense to Patent Infringement*, 105 MICH. L. REV. 475 (2006).

171. MIGUEL DE CERVANTES SAAVEDRA, *THE INGENIOUS GENTLEMAN DON QUIXOTE OF LA MANCHA* (1605).

In response to this argument, Professor William Landes and Judge Richard Posner make two counterarguments to show the efficiency of the independent re-creation doctrine.¹⁷² First, if the doctrine did not exist, future authors would spend time and incur additional cost searching for copyrights that they may infringe in the production of their works.¹⁷³ The independent re-creation doctrine allows them to create without incurring substantial search costs.¹⁷⁴ And second, the likelihood of re-creating a work is quite low.¹⁷⁵ Given the chance of re-creation is so low, it makes little sense to spend resources regulating the issue.¹⁷⁶

These arguments are not as conclusive as they may appear. Take the first argument. Landes and Posner acknowledge that these additional search costs must be weighed against the greater incentives for the author to produce works.¹⁷⁷ Nevertheless, they think that scrapping the independent re-creation doctrine would lead to many search costs and only few beneficial incentive effects.¹⁷⁸ Therefore, it makes sense to retain the doctrine.¹⁷⁹ But this approach seems to forget other important variables. Eliminating the independent re-creation doctrine would have additional economic benefits Landes and Posner do not consider. As discussed, independent re-creation is wholly wasteful. Deterring it would prevent such wasted resources. In addition, the independent re-creation doctrine makes copyright litigation substantially more expensive. In order to enforce the right, the author must demonstrate that the defendant copied the work.¹⁸⁰ But proving copying is very difficult. Copying takes place in private, and, unless there are witnesses, the author must rely on the infringer's admission of copying or circumstantial evidence.¹⁸¹

172. See Landes & Posner, *An Economic Analysis of Copyright Law*, *supra* note 26, at 344–47; see also Varian, *supra* note 156, at 128.

173. Landes & Posner, *An Economic Analysis of Copyright Law*, *supra* note 26, at 344–47.

174. See *id.*

175. See *id.*

176. See *id.*

177. See *id.*

178. See *id.*

179. See *id.*

180. See *e.g.*, *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1949).

181. Due to the difficulties of proving copying, the court has modified the author's burden. See, *e.g.*, *Novelty Textile Mills, Inc. v. Jona Fabrics Corp.*, 558 F.2d 1090, 1092 (2d Cir. 1977) ("In order to prove infringement a plaintiff must show ownership of a valid copyright and copying by the defendant. . . . Since direct evidence of copying is rarely, if ever, available, a plaintiff may prove copying by showing access and 'substantial similarity' of the two works." (internal citation omitted) (citing *Arnstein*, 154 F.2d at 468; *Whitney v. Ross Jungnickel, Inc.*, 179 F. Supp. 751, 753 (S.D.N.Y. 1960); 2 M. NIMMER, NIMMER ON COPYRIGHT § 141 (1976))). Now copying may be inferred through a mixture of evidence that the defendant had access to the work and the work he created was substantially similar. See *id.* However, the court has never abandoned the

Therefore, while the independent re-creation doctrine does reduce the search costs of the second author, it is not clear whether that benefit outweighs the combined costs of decreased author incentive, the costs of proving copying in court, and the cost of using resources to produce a work that does not enhance welfare.

Additionally, it may be the case that reintroducing some type of formality to copyright law could reduce the independent re-creator's search costs. Placing a requirement upon the initial author to insert a description of his work into a public database would substantially reduce the costs for follow-on creators while not requiring great expenditure on behalf of the original author.¹⁸² This, however, may not be a perfect solution in every case. Naturally, complex works such as *Don Quixote* would not be perfectly describable, and the value of putting an ill-fitting description into a formal database would be less than optimal. But even a limited description would give follow-on creators some indication of the works already in existence, and they could use that to start their search.

The second argument is also far from fully persuasive. The notion that independent re-creation is unlikely to occur depends entirely on how the law defines re-creation. A work will currently be considered a re-creation if it is substantially similar to the original.¹⁸³ If the law defines substantial similarity narrowly, then independent re-creation is unlikely. For example, if substantial similarity means verbatim copying, then it is very unlikely that a work like *Don Quixote* will ever be re-created. However, if substantial similarity is very broad, then the likelihood of re-creation rises greatly.

Currently, the courts favor a very broad view of substantial similarity. Consider *Roth Greeting Cards v. United Card Company*.¹⁸⁴

necessity that sufficient evidence must demonstrate that the infringer copied the work. *See id.*; *see also* 2 GOLDSTEIN ON COPYRIGHT, *supra* note 166, § 9.2, at 9:5–6 (3d ed. 2005 & Supp. 2008); Alan Latman, "Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1192 (1990). For a discussion on the merits of the independent re-creation doctrine, see William Patry, *Independent Creation: A Bulwark of Copyright*, THE PATRY COPYRIGHT BLOG (June 22, 2005), <http://williampatry.blogspot.com/2005/06/independent-creation-bulwark-of.html>.

182. For example, a number of authors have proposed reintroducing formalities recently. *See, e.g.*, STEF VAN GOMPEL, FORMALITIES IN COPYRIGHT LAW: AN ANALYSIS OF THEIR HISTORY, RATIONALES AND POSSIBLE FUTURE (2011); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004); Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 562–63 (2007). However, others are less certain about the merits of such a scheme. *See, e.g.*, Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311 (2010).

183. *See e.g., Arnstein*, 154 F.2d at 468–69; Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaningless of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719 (1987).

184. *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970); *see also* BSS Studio, Inc. v. Kmart Corp., 1999 WL 1427831, at *1 (N.D. Ill. 1999) (mem.); 2 GOLDSTEIN ON COPYRIGHT, *supra* note 166, § 9.3, at 9:24–38 (2005 & Supps. 2006, 2011, 2012-2). The concept of

In that case, the plaintiff produced greeting cards with some original illustrations and some public-domain sayings.¹⁸⁵ The defendant produced its own cards with somewhat similar illustrations and the same phrases.¹⁸⁶ The trial court determined that the illustrations were not similar enough to constitute an infringement and that the phrases were not protectable.¹⁸⁷ The appellate court did not dispute these holdings but found that if one aggregated the phrases, the illustration, along with the mood and sentiment of the two cards, there was substantial similarity between them.¹⁸⁸ The defendant was liable for copying the “total concept and feel” of the card.¹⁸⁹ This serves to demonstrate just how broad substantial similarity can be and accordingly demonstrates a high likelihood of re-creation. If one can re-create merely by producing a work similar in concept and feel to a preexisting work, then the chances of independent re-creation are not as small as Landes and Posner suggest. Therefore, there is substantial reason to believe that the necessity of copying does not further copyright’s economic goals.

C. Corrective Justice Theory and Copyright Infringement

The point of this Article is not to completely dismiss the economic theory of copyright. Copyright in common law legal systems is still primarily a tool for increasing social welfare.¹⁹⁰ However, beliefs and intuitions about fairness and individual responsibility constrain and structure what societies do in the name of welfare maximization.¹⁹¹ As a result, corrective justice is still an important part of the law. In deciding copyright cases, courts not only attempt to maximize welfare, but also try to correct a wrong that the infringer has inflicted upon the author.

The corrective justice theory of copyright infringement is as follows: Rights are assigned over the work.¹⁹² Primarily, the author receives the exclusive right to copy, and the user receives the right of

substantial similarity may indeed be so wide as to threaten other doctrines limiting copyright. See, e.g., Cohen, *supra* note 183, at 758–67.

185. See *Roth Greeting Cards*, 419 F.2d at 1109.

186. See *id.* at 1107.

187. See *id.* at 1109.

188. See *id.* at 1110.

189. See *id.*

190. See e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (stating that copyright is “intended to motivate the creative activity of authors”).

191. For a similar point on the relationship between personality interests and welfare maximization in copyright, see Balganes, *Normativity*, *supra* note 37.

192. See 17 U.S.C. § 106 (2012).

fair use.¹⁹³ Various arguments justify this distribution of rights. Some are consequentialist in nature, such as the economic theory or theories based on visions of ideal societies.¹⁹⁴ Other reasons are based in natural rights theory.¹⁹⁵ The author of a work has a certain amount of control over the work because he labored to produce it, and, in doing so, he imbued it with his personality.¹⁹⁶ Thereafter, when parties interact, they have a duty to respect the rights of the other. The user must respect the author's rights just as the author must equally respect the user's rights. When the user does not respect the author's rights, an inequality occurs. The infringement allows the infringer to gain something at the author's expense. At this point, corrective justice theory states that the person who has caused wrongful loss has a duty to rectify the loss. The function of copyright law is to restore the equality between author and infringer. This involves removing the wrongful gain from the infringer and using it to compensate the wrongful loss of the author.¹⁹⁷ In both tort and copyright infringement cases, the remedy puts the parties back in the positions they were in prior to the infringement and restores their antecedent equality.

The question is what are the wrongful losses and the wrongful gains? In a basic case, the wrongful loss is the owner's lost revenue from the work, while the wrongful gain is the money the infringer saves by not paying the author the relevant license to copy the work.¹⁹⁸ Take the situation where an infringer wrongfully produces a single copy of an author's work. The author loses the value that he could have made from licensing that copy, while the copyright infringer gains a corresponding amount, the amount of the unpaid license fee. For example, if the license fee is set at five dollars per copy, the plaintiff has lost five dollars while the infringer has avoided spending five dollars.¹⁹⁹ When the infringer pays the author the five dollars, it restores equilibrium and corrects the injustice.

193. See *id.* §§ 106–107.

194. See COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 10, at 4; WEINRIB, IDEA OF PRIVATE LAW, *supra* note 10, at 61.

195. See WEINRIB, IDEA OF PRIVATE LAW, *supra* note 10, at 74.

196. See Hughes, *supra* note 38, at 330–38.

197. It is less certain whether this is an appropriate goal of patent law and some have argued against such an approach. See Ted M. Sichelman, *Purging Patent Law "Private Law" Remedies*, TEX. L. REV. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1932834; cf. Jeremy W. Bock, *Neutral Litigants in Patent Cases*, 15 N.C. J.L. & TECH. 234 (2014) (arguing that the public's interest in efficiently resolving patent disputes should be considered).

198. See *Fitzgerald Publ'g Co. v. Baylor Publ'g Co.*, 807 F.2d 1110, 1118 (2d Cir. 1986) (citing 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §14.02 (1987)).

199. Courts sometimes use alternative language to measure the lost market value in these cases. Sometimes they say the lost market value is the lost sales themselves. See, e.g., *Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008) (actual damages set

Alternatively, consider the situation in which the copyist copies the work and freely distributes it to one thousand other consumers. Assume that the one-thousand consumers would have bought the work otherwise. The author therefore loses the revenue from the one-thousand sales. If he still charges five dollars per copy, he loses \$5000. On the other hand, the copyright infringer gains a corresponding amount by not paying for a license to distribute the work to the one-thousand consumers. If the infringer had originally sought a license from the author, the author would have charged a price equivalent or higher than the amount he would have gained from making those one thousand sales himself. The minimum license fee the copyright author would likely accept would be \$5000. By bypassing the market, the infringer has avoided a \$5000 license fee while causing \$5000 in loss to the author. Correcting this injustice requires the infringer pay the owner \$5000.

This theory makes the author-infringer relationship meaningful and intuitive. Copyright cases are bilateral because the infringer has a duty to correct an inequality he caused. The act of copying has allowed the infringer to gain something at the author's expense. To address this, the author must sue the infringer, and the infringer must hand over his ill-wrought gains. Naturally, the judicial task is a backwards-looking one. To do justice—undo the situation, redistribute the costs, and return the parties to the positions they existed in prior to the transaction—the court looks to the past.

The theory also explains why it is necessary that the infringer copy the author's work rather than merely re-create it.²⁰⁰ Like actual causation in tort law, the act of copying is the nexus between the two parties. When someone interacts with the author's work, the corrective justice norm requires that he treat the author's rights with respect. Copying the work unlawfully breaks that equality and results

at approximately \$50 because the defendant “infringed on the copyrights of 24 songs—the equivalent of approximately three CDs—costing less than \$54”); *Design Res., Inc. v. John Wolf Decorative Fabrics*, 1985 WL 2445, at *8 (S.D.N.Y. Sept. 5, 1985) (“[D]efendant’s infringing pattern was sold at a price only slightly lower than plaintiff’s. It is, therefore, reasonable to assume that plaintiff would have sold the same amount of the copyrighted fabric as defendant sold of the infringing fabric.”); *RSO Records, Inc. v. Peri*, 596 F. Supp. 849, 860 (S.D.N.Y. 1984). On the other hand, sometimes the court frames the loss in terms of a lost license fee. *See, e.g.*, *Oracle USA, Inc. v. SAP AG*, 2011 WL 3862074, at *4 (N.D. Cal. 2011) (“The jury was instructed as to both the fair market value license calculation for actual damages”); *Thoroughbred Software Int’l, Inc. v. Dice Corp.*, 529 F. Supp. 2d 800 (E.D. Mich. 2007) (holding that the actual damages were the license fees the plaintiff would have charged for the work’s use and distribution if it were not for the infringement); *see also* 2 GOLDSTEIN ON COPYRIGHT, *supra* note 166, § 14.1–1.1, at 14:4–22:3 (3d ed. 2005 & Supps. 2008, 2009, 2011-1, 2012-2, 2013).

200. Although not explicitly talking about corrective justice, Wendy Gordon has already shown how the copying requirement in copyright law is analogous to the cause-in-fact requirement in tort law. *See* Gordon, *Mirror Image*, *supra* note 6, at 536–37.

in correspondingly wrongful gains and losses. On the other hand, if there is no copying, it is not the interaction between the parties which gives rise to the gains and losses. The re-creation may benefit the user while causing losses for the author (who must now contend with a new work in the market), but these gains and losses are not linked together as the result of a singular interaction. Much like the case where an infinite number of monkeys with an infinite number of typewriters could duplicate the works of Shakespeare, the re-creation is not the result of human agency but of mere fate. The copying requirement is thus the judicial tool used to ensure that the gains and losses are connected as part of the same wrong.

1. Copyright Remedies

A basic function of copyright law is to correct the wrongful gains and wrongful losses that copying causes. The remedy imposed by the court makes this goal a reality. This is most simply seen in the actual-damages remedy. The actual-damages provision requires the infringer to compensate the owner for the lost market value of the work.²⁰¹ This situation corresponds to the examples just discussed. The infringer has bypassed the market and copied the work without paying the relevant license fee, while the author has lost the potential license fee or the profits to the unlicensed competitor. Compensation puts the parties back on the baseline they existed in prior to the infringement. But corrective justice can also be seen to operate in all of the copyright remedies, not merely in the provision of actual damages. As this section will illustrate, corrective justice exists in the author's ability to receive the infringer's profits, the statutory damage regime, and the availability of injunctive relief.

The law not only provides monetary remedies in the form of actual damages but also allows the copyright owner to receive "any additional profits of the infringer."²⁰² This additional remedy is a form of disgorgement damages and functions to compensate the author's lost right to profit from his work.²⁰³ The author's entitlement includes the right to receive profits through selling and licensing the work. When the copyist uses the work for financial gain, the author loses

201. See 17 U.S.C. § 504(a)(1) (2012).

202. See *id.*; see also *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 512 (9th Cir. 1985); *Sid & Marty Kroft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1172–73; 2 GOLDSTEIN ON COPYRIGHT, *supra* note 166, §14.1.2, at 14:22.3–38 (3d ed. 2005 & Supps. 2008, 2011, 2011-1, 2012, 2012-2); Andrew W. Coleman, *Copyright Damages and the Value of the Infringing Use: Restitutionary Recovery in Copyright Infringement Actions*, 21 AIPLA Q.J. 91, 92–93 (1993).

203. See *On Davis v. The Gap, Inc.*, 246 F.3d 152, 159 (2d Cir. 2001).

part of his right—the ability to profit from the work. This foregone gain is a loss and can only be remedied by the user returning the gain he has made from his unlawful exploitation of the work. Consider again the case where the defendant copies one work that carries a five-dollar license fee. Now imagine the defendant copies the work and sells the copy to someone else for one dollar. The copyright owner has not only lost the license fee of five dollars but has also lost the chance to make an additional one dollar from the sale to the third party. Therefore, the copyright owner must recover six dollars to correct the wrongful loss and wrongful gain.

What, then, of statutory damages? The law provides statutory damages in two situations. First, where actual damages are hard to prove, the copyright owner can elect to receive statutory damages.²⁰⁴ As Professor Pamela Samuelson and Tara Wheatland have already demonstrated, this provision exists to serve a compensatory goal.²⁰⁵ The owner frequently cannot prove actual damages, despite their probable existence.²⁰⁶ Take the previous example in which the copyist distributed the work to 1000 people.²⁰⁷ In order to prove actual damages, the owner must prove that these consumers would have bought the work from the owner were it not for the infringement.²⁰⁸ But such a hypothesis is almost beyond empirical proof; it requires demonstrating the existence of a counterfactual reality.²⁰⁹ Allowing the owner to select a statutorily set amount provides compensation for a harm that very likely has occurred but is difficult to show.²¹⁰ It is a form of rough justice, an attempt to correct the injustice that has occurred despite evidentiary difficulties. The alternative would be to let many injustices go completely without rectification. However, this cannot be said for the second case in which statutory damages are awarded. This second case involves providing additional damages (up to \$150,000 per infringed work) when the copying was both unlawful

204. See 17 U.S.C. § 504(c)(1) (2012); 2 GOLDSTEIN ON COPYRIGHT, *supra* note 166, §14.2, at 14:39–64.1 (3d ed. 2005 & Supps. 2006, 2007, 2009, 2012-2, 2013, 2013-1).

205. See Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009); see also Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, 25 BERKELEY TECH. L.J. 1427 (2010) (tracing the evolution of statutory damages from the British Statute of Anne 1710 to present day); Priscilla Ferch, *Statutory Damages Under the Copyright Act of 1976*, 15 LOY. U. CHI. L.J. 485, 489 (1984).

206. See, e.g., Samuelson & Wheatland, *supra* note 205, at 446–51 (discussing statutory damages under the 1909 Act).

207. See *supra* Part II.C.

208. See 2 GOLDSTEIN ON COPYRIGHT, *supra* note 166, §14.1.1, at 14:8–12 (3d ed. 2005).

209. It is often difficult to guarantee the certainty of empirical proof. See, e.g., *Steven Linen Assocs., Inc. v. Mastercraft Corp.*, 656 F.2d 11, 15 (2d Cir. 1981); *Williams v. Arndt*, 626 F. Supp. 571, 582 (D. Mass. 1985).

210. See, e.g., Samuelson & Wheatland, *supra* note 205, at 446–51.

and willful.²¹¹ This is a complex issue and will be discussed further in Part III.

Finally, injunctions awarded by the court against the copyright infringer also serve corrective justice.²¹² In corrective justice, the purpose of the remedy is to restore the equality after an infringement and maintain that equality in the future.²¹³ In this latter form, corrective justice may be better described as “protective justice.”²¹⁴ When there is a realistic threat that the infringer will continue to infringe in the future, the court will provide compensatory damages and an injunction. As a result, “corrective justice operates not only by requiring the defendant to repair a wrong once it has occurred, but also by granting the plaintiff an injunction that prevents the defendant from extending the wrong into the future.”²¹⁵

III. CORRECTIVE INJUSTICES IN COPYRIGHT INFRINGEMENT

Corrective justice is an important feature of copyright. The infringer’s duty to rectify the harm is the principle around which copyright infringement is structured. Sadly, courts and lawmakers often have forgotten this point.²¹⁶ The focus is almost entirely on economic concerns, which leads to unfair laws. This section highlights

211. See *infra* Part III.A.1.

212. See 17 U.S.C. § 502 (2012); see also *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); 2 GOLDSTEIN ON COPYRIGHT, *supra* note 166, § 13.2.1, at 13:33–46 (3d ed. 2005 & Supps. 2008, 2012-2, 2013-1). Although corrective justice supports the use of injunctions in certain cases, there is still considerable uncertainty as to the circumstances in which they ought to be used. For a discussion of this issue from a non-corrective justice perspective, see, for example, Richard Dannay, *Copyright Injunctions and Fair Use: Enter eBay -- Four-Factor Fatigue or Four-Factor Freedom*, 55 J. COPYRIGHT SOC’Y U.S.A. 449 (2008); H. Tomás Gómez-Arostegui, *What History Teaches Us About Copyright Injunctions and the Inadequate-Remedy-at-Law Requirement*, 81 S. CAL. L. REV. 1197 (2008); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998); Jiarui Liu, *Copyright Injunctions after eBay: An Empirical Study*, 16 LEWIS. & CLARK L. REV. 215 (2012); James Thompson, *Permanent Injunctions in Copyright Infringement: Moral and Economic Justifications for Balancing Individual Rights Instead of Following Harsh Rules*, 7 S. CAL. INTERDISCIPLINARY L.J. 477 (1998).

213. See Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 408 (1992).

214. Schwartz, *supra* note 25, at 1832.

215. WEINRIB, CORRECTIVE JUSTICE, *supra* note 15, at 94–95; see also James E. Duffy, Jr., *Punitive Damages: A Doctrine Which Should Be Abolished*, in DEFENSE RESEARCH INSTITUTE, INC., THE CASE AGAINST PUNITIVE DAMAGES 8 (1969).

216. For other instances of the corrective justice theory’s application to modern day issues, see, for example, Matthew D. Adler, *Corrective Justice and Liability for Global Warming*, 155 U. PA. L. REV. 1859 (2007); Alan L. Calnan, *Distributive and Corrective Justice Issues in Contemporary Tobacco Litigation*, 27 SW. U. L. REV. 577 (1997); Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997 (1990); Elbert L. Robertson, *A Corrective Justice Theory of Antitrust Regulation*, 49 CATH. U. L. REV. 741 (2000); Catharine P. Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348 (1990).

three areas that do not conform to the corrective justice function of copyright: statutory damages for willful infringement, attorney fees, and mass copyright-infringement settlements.

A. Statutory Damages for Willful Infringement

In copyright, the author in a civil case can often receive heightened damages against the infringer when the infringement is willful.²¹⁷ To the extent that these are punitive, these damages are unjust and in need of reform.

1. Punitive Civil Damages Are Unjust

Under the corrective justice theory, punitive damages are unjust.²¹⁸ Punishment is an appropriate goal of criminal law but is not appropriate in civil cases.²¹⁹ When employed in civil litigation, punitive damages overcompensate the plaintiff.²²⁰ Whereas compensatory damages return the parties to original position, punitive damages go one step further and create a new inequality. The court forces the defendant to pay an extra-compensatory lump sum, while the plaintiff receives a windfall payment that he has no compensatory claim to. This extra-compensatory fee is simply unnecessary to correct the injustice.²²¹ And rather than put the parties back in their original positions, these damages make the plaintiff better off at the defendant's expense.

In copyright, the statute authorizes heightened damages in cases of willful infringement (up to \$150,000 per infringed work).²²² Courts recognize the punitive function of these awards.²²³ This

217. See 17 U.S.C. § 504(c)(2) (2012).

218. See WEINRIB, CORRECTIVE JUSTICE, *supra* note 15, at 169–74. As a result, other common law jurisdictions have chosen to limit their reach. See, e.g., *Rookes v. Barnard*, [1964] A.C. 1129 (H.L.) (U.K.) (limiting punitive damages to the cases in which it already existed and preventing further expansion).

219. See WEINRIB, CORRECTIVE JUSTICE, *supra* note 15, at 169–74.

220. See *id.*

221. See *id.*

222. See 17 U.S.C. § 504(c)(2) (2012).

223. See, e.g., *On Davis v. The Gap, Inc.*, 246 F.3d 152, 172 (2d Cir. 2001) (“The purpose of punitive damages—to punish and prevent malicious conduct—is generally achieved under the Copyright Act through the provisions of 17 U.S.C. § 504(c)(2), which allow increases to an award of statutory damages in cases of willful infringement.” (citing 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.02[B], at 14-23 to 24 (1999); *Kamakazi Music Corp. v. Robbins Music Corp.*, 534 F. Supp. 69, 78 (S.D.N.Y. 1982)); *Nat’l Football League v. PrimeTime 24 Joint Venture*, 131 F. Supp. 2d 458, 478 n.17 (S.D.N.Y. 2001) (stating that statutory damages are “partially punitive” (citing *RSO Records, Inc. v. Peri*, 596 F. Supp. 849, 862 (S.D.N.Y. 1984); *F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 233 (1952); *U.S. Media Corp. v. Edde Entm’t Corp.*, 1998 WL 401532, at *18 (S.D.N.Y. July 17, 1998)); *U.S. Media Corp.*, 1998 WL

punishment rationale leads to damages that are very high and far beyond a compensatory amount.²²⁴ For instance, consider the case of *UMG Recordings v. MP3.com*.²²⁵ In that case, the defendant made digital copies of 4700 CDs to develop a music database.²²⁶ Sections of the database were then made available to customers who had lawfully obtained the CDs from elsewhere.²²⁷ MP3.com made little if any profit from its actions, and the plaintiff did not present adequate evidence to prove actual damage.²²⁸ Nevertheless, the court found willful infringement and awarded \$118 million in damages, which the parties later reduced to \$53.4 million through a settlement.²²⁹ Similarly, the Ninth Circuit affirmed a \$31.68 million statutory-damages award against the defendant in *Feltner v. Columbia Pictures* for the unauthorized retransmission of television programs.²³⁰ The punitive nature of these staggering awards has caused some commentators to call for their revisions.²³¹

401532, at *18 (recognizing statutory damages' "punitive purposes"); *Kamazkazi Music Corp. v. Robbins Music Corp.*, 534 F. Supp. 69, 78 (S.D.N.Y. 1982) ("The public policy rationale for punitive damages of punishing and preventing malicious conduct can be properly accounted for in the provisions for increasing a maximum statutory damage award [for willful infringements].").

224. See *Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1213, 1227 (D. Minn. 2008); Samuelson & Wheatland, *supra* note 205, at 441–43.

225. *UMG Recordings, Inc. v. MP3.com, Inc.*, No. 00 Civ.472(JSR), 2000 WL 1262568 (S.D.N.Y. Sept. 6, 2000). Some of the criticisms against this case have sounded remarkably corrective justice-like in tone. See, e.g., 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §14.04[E][1] (2008) ("Absent any nexus between damage to plaintiff and benefit to defendant at any magnitude even roughly comparable to that awarded, the result is to introduce randomness or worse into the litigation calculus.").

226. See *UMG Recordings, Inc.*, 2000 WL 1262568 at *2, *6.

227. See *id.* at *2.

228. See *id.* at *5.

229. See *id.* at *1, *6; Amy Harmon, *Deal Settles Suit Against MP3.com*, N.Y. TIMES (Nov. 15, 2000), <http://www.nytimes.com/2000/11/15/business/technology-deal-settles-suit-against-mp3com.html?n=Top%2fReference%2fTimes%20Topics%2fPeople%2fH%2fHarmon%2c%20Amy>.

230. See *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1189–91 (9th Cir. 2001).

231. See, e.g., Samuelson & Wheatland, *supra* note 205, at 445 ("The application of statutory damages has too often strayed from the largely compensatory impulse underlying statutory damages . . . and has focused too heavily on deterrence and punishment by holding many ordinary infringements to be willful, which has resulted in many awards that are punitive in effect and often in intent."); see also J. Cam Barker, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525 (2004); Stephanie Berg, *Remedying the Statutory Damage Remedy for Secondary Copyright Infringement Liability: Balancing Copyright and Innovation in the Digital Age*, 56 J. COPYRIGHT SOC'Y U.S.A. 265 (2009); Alan E. Garfield, *Calibrating Copyright Statutory Damages to Promote Speech*, 38 FLA. ST. U. L. REV. 1 (2010); Colin Morrissey, *Behind the Music: Determining the Relevant Constitutional Standard for Statutory Damages in Copyright Infringement Lawsuits*, 78 FORDHAM L. REV. 3059 (2010); Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103 (2009).

To the extent that statutory damages are punitive in nature, they are unjust. Punishing the copyist may be an appropriate goal, but it should be confined to the criminal copyright provisions. The current punitive nature of statutory damages for willful infringement allows the author to recover damages that go well beyond compensation and are unnecessary to rectify the wrongful gain and loss thereby arising. Instead of returning the parties to their equal pre-infringement positions, the remedy serves to create further inequalities. It inflicts a wrongful loss on the infringer, who must pay money for damage he did not inflict. Simultaneously, it confers a wrongful benefit on the author, who receives a windfall payment for a harm he has not suffered. This is simply not necessary to correct the injustice.

2. Statutory Damages for Willful Infringement as Dignitary Harm

It is not necessary, however, to abolish the concept of heightened damages for willful infringement. It is enough to recognize the situations in which such heightened damages perform a legitimate corrective goal. In various common law jurisdictions, courts award additional damages when the defendant's willful actions were so egregious and wanton that they caused a unique form of dignitary injury. In UK and Canadian tort law, courts award "aggravated" damages in cases in which the defendant's intentional conduct demonstrates a blatant disregard for the plaintiff's legitimate rights.²³² When a defendant intentionally harms a plaintiff's right, he not only harms a legitimate interest, but causes separate harm by treating the plaintiff's legitimate interest as less worthy than his own interest.²³³ In that case, the damage award is consistent with corrective justice theory because it still performs a compensatory function: it compensates for the harm to the rights holder's dignity.²³⁴ In the United States, this theory has had less explicit consideration. Nevertheless, the theory garners discussion.²³⁵ Professor Dan Dobbs's

232. See, e.g., *Rookes v. Barnard*, [1964] A.C. 1129 (H.L.) (U.K.); Allan Beever, *The Structure of Aggravated and Exemplary Damages*, 23 OXFORD J. LEGAL STUD. 87, 89 (2003); John Murphy, *The Nature and Domain of Aggravated Damages*, 69 CAMBRIDGE L.J. 353, 357 (2010).

233. See Beever, *supra* note 232, at 89.

234. See WEINRIB, CORRECTIVE JUSTICE, *supra* note 15, at 96.

235. See, e.g., 2 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION 262 (2d ed. 1993) ("[T]he idea does not seem to be that the plaintiff really has pecuniary loss and that the only problem is proving it. Nor does it seem to be that the plaintiff has actual substantial emotional harm that is unproven. Rather the idea seems to be that some rights are 'valuable' in an important although intangible way, even if their loss does *not* lead to either pecuniary loss or compensable emotional harm. The invasion of such a right *is* harm for which damages are recoverable.").

treatise on remedies notes that in certain cases damages may reflect the inherent value of rights and that this sometimes may justify damages compensating for harms beyond simple pecuniary or emotional losses.²³⁶

This suggests a legitimate reason for heightening the damage awards in cases of willful infringement. The owner is a legitimate rights holder, and attacks on that status are harmful in addition to any lost license fees that may also result.²³⁷ A copyist who willfully disregards a copyright owner's rights must compensate the owner for the affront to dignity as well as any economic losses. In cases like *MP3.com* and *Feltner*, the owner should be able to argue that the infringer treated his rights with impunity and therefore the infringer should compensate him for any lost dignity.

If, however, this is the only corrective justice rationale appropriate for imposing additional damages, the courts would necessarily impose these damages less often and in smaller amounts than is current practice. First, it is likely that statutory damages under this theory would result in lower damages than seen in the cases such as *MP3.com* and *Feltner*. The aggravated damage is still compensatory in nature, and therefore the damage is limited to the amount needed to compensate the copyright owner for his dignitary interest. Such a calculation for nonpecuniary harm is necessarily complicated, but it is unlikely to yield a very high value. Dobbs's treatise notes that such dignitary interests rarely "warrant significant awards of money."²³⁸ This is exemplified in defamation damages. If a defamed plaintiff cannot show any actual damage, courts will only award nominal damages to compensate for the harm done to his position as a right holder.²³⁹ These can often be as low as one dollar. This suggests that dignitary harm alone will yield small statutory damage awards, a conclusion that is buttressed by the fact that the plaintiff has the burden to prove the existence of a compensable dignitary loss.

Second, courts would not award these damages in cases in which the users reasonably believed that their actions were fair use or otherwise noninfringing. Unfortunately, courts have previously

236. See *id.*

237. For the economic theory of statutory damages, see Christopher Buccafusco & Jason Masur, *Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law*, S. CAL. L. REV. (forthcoming 2014).

238. See DOBBS, *supra* note 235, at 308.

239. See *id.* at 266; see, e.g., *Kassel v. Gannett Co.*, 875 F.2d 935, 950–51 (1st Cir. 1989); see also Charles T. McCormick, *The Measure of Damages for Defamation*, 12 N.C. L. REV. 120, 146 (1933).

shown willingness to impose liability in such cases.²⁴⁰ In *MP3.com*, the users had a plausible, although ultimately unsuccessful, fair use claim.²⁴¹ The copyists made little if any profit and the rights holders could show no actual market harm.²⁴² Nevertheless, the court held them accountable for heightened statutory damages.²⁴³ Such an outcome is nonsensical under the corrective justice view of aggravated damages. It is impossible to blatantly and wantonly disregard someone's rights while simultaneously believing that your actions do not harm the other person's rights. To make a nonfrivolous claim that one's use is noninfringing is the exact opposite of dignity harm. It is an acceptance that the author has rights but a reasonable denial that they apply in this case. Accordingly, honestly held beliefs that conduct is fair use or noninfringing should not result in heightened statutory damages for willful infringement.

B. Attorney's Fees

Corrective justice supports the position that the losing party should pay the winning party's reasonable legal fees.²⁴⁴ In a typical tort case in which the injurer harms a victim, the injury does not simply extend to the physical and emotional harms inflicted, but also includes the expense the victim incurred vindicating his right in court.²⁴⁵ The injurer's actions forced the victim into paying attorney's fees simply to uphold his legitimate right. In order to correct the entire injustice, the injurer must remove this element of the wrongful loss. Only by doing this will the victim be made whole and be restored to the pre-tort position he occupied.

Copyright litigation currently follows the rule that each party pays his own legal fees.²⁴⁶ This leads to the problematic situation in

240. See, e.g., Samuelson & Wheatland, *supra* note 205, at 443.

241. See *id.* at 462.

242. See *UMG Recordings, Inc. v. MP3.com, Inc.*, No. 00 Civ.472(JSR), 2000 WL 1262568, at *1, *6 (S.D.N.Y. Sept 6., 2000); Samuelson & Wheatland, *supra* note 205, at 462.

243. See *UMG Recordings, Inc.*, 2000 WL 1262568, at *5.

244. See generally Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 657–60 (1982).

245. See *id.*

246. See 2 GOLDSTEIN ON COPYRIGHT, *supra* note 166, §14.3, at 14:64.2–90 (3d ed. 2005 & Supps. 2007, 2010-1, 2012, 2013, 2013-1). The presumption is that fees will lie with each party and the court has discretion whether to shift those fees. For successful instances of fee shifting, see, for example, *Christian v. Mattel Inc.*, 286 F.3d 1118, 1121 (9th Cir. 2002); *The Crescent Publ'g Group, Inc. v. Playboy Enters., Inc.*, 246 F.3d 142, 147–48 (2d Cir. 2001) (requiring an evidentiary hearing to determine the propriety of fee awards); *Rosciszewski v. Arete Assocs., Inc.*, 1 F.3d 225, 233 (4th Cir. 1993); *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 418 (7th Cir. 1988). This is consistent with usual civil case practice. See *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796); 1 MARY F. DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY FEES ¶ 1.02[1]

which the party with the greatest ability to pay for litigation is more likely to win the case. In contrast, corrective justice suggests changing the rule so that the losing party pays the winning party's litigation fees.²⁴⁷ The infringement has not only caused the author to suffer lost market value but has also caused him to spend resources vindicating his rights. Only by making the infringer pay the author's legal fees will the injustice be completely removed.

Similarly, when the copyist wins the case, the author ought to pay the legal fees. This is particularly important in fair use litigation. Professor Peter Menell and Professor Ben Depoorter have recently highlighted that many copyists are wary of relying on the fair use doctrine because of its uncertain applicability.²⁴⁸ To rectify this situation, they propose a system in which the author would pay the fair user's litigation costs under certain conditions.²⁴⁹ Although Menell and Depoorter's argument is economic in focus, it is also consistent with corrective justice. The user's fair use actions were entirely lawful and within his right. The author has wrongfully brought a case and thus forced the user to incur losses in defending something that he was already legally entitled to do. Therefore, to correct the injustice the litigation has caused, the author must pay the wrongfully incurred legal fees of the user.

C. Mass Copyright Infringement Settlements

In the corrective justice view of copyright, the wrongdoer ought to pay for the wrong committed. This might seem a rather bland and unobjectionable statement. However, in some cases, the law operates so that innocent people must remedy an injustice they have not caused. This process can be observed in the current controversy surrounding mass copyright infringement enforcement campaigns.

The term "copyright troll" refers colloquially to an author (or more accurately, the copyright holder) that files mass numbers of copyright infringement cases in the hope of extracting a damage

(1992) (defining as the "American Rule" that each party pays their own legal costs); John Leubsdorf, *Towards a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984).

247. See Rowe, *supra* note 244, at 657–60.

248. See Peter S. Menell & Ben Depoorter, *Copyright Fee Shifting: A Proposal to Promote Fair Use and Fair Licensing* (U. Cal. Berkeley Pub. Law Research, Paper No. 2159325, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2159325; see also Charles Ossola, *Registration and Remedies: Recovery of Attorney's Fees and Statutory Damages Under the Copyright Reform Act*, 13 CARDOZO ARTS & ENT. L.J. 559 (1995). On the debate whether fair use is clear and predictable, see, for example, Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2537 (2009).

249. See Menell & Depoorter, *supra* note 248.

settlement from defendants as a revenue stream.²⁵⁰ The author works in conjunction with technology companies to monitor peer-to-peer networks.²⁵¹ After discovering Internet Protocol (IP) addresses that are using these networks, the copyright holder files a copyright-infringement lawsuit against numerous (sometimes thousands) unnamed defendants.²⁵² This allows the copyright holder to secure a subpoena against the relevant Internet Service Provider (ISP) to release the names and contact information of the people who own the computers associated with the IP addresses.²⁵³ After obtaining this information, the copyright owner sends out letters to all of the defendants threatening litigation for suspected copyright infringement, unless the defendant settles the case.²⁵⁴ The letters point out how high the statutory damage award can be in order to induce the defendant into settling the case quickly for only a few thousand dollars.²⁵⁵

One example of this practice surrounds Kathryn Bigelow's Oscar-winning film, *The Hurt Locker*.²⁵⁶ Voltage Pictures held the copyright to the film.²⁵⁷ In 2010, the law firm representing Voltage Pictures hired a company to monitor peer-to-peer networks for illegal downloading of *The Hurt Locker*.²⁵⁸ In March 2010, Voltage Pictures filed a lawsuit against five thousand unnamed defendants, later increased to 24,595.²⁵⁹ It then proceeded to send out copyright infringement notices to all of the defendants.²⁶⁰ More recently, the copyright holders of pornographic films have adopted this

250. See, e.g., James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79 (2012); Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. (forthcoming 2013).

251. See DeBriyn, *supra* note 250, at 90–92.

252. See *id.*

253. See *id.* at 94.

254. See *id.* at 98.

255. See Cindy Cohn, *Mass Copyright Litigation: New Challenge for the Federal Courts*, ELECTRONIC FRONTIER FOUNDATION (Apr. 19, 2011), <https://www EFF.ORG/deep links/2011/04/mass-copyright-litigation-new-challenge-federal>.

256. See Complaint at 1, Voltage Pictures, LLC v. Does 1 - 5,000, No. 1:10-cv-00873 (D.D.C. May 24, 2010), 2010 WL 4955131; First Amended Complaint for Copyright Infringement at 1, Voltage Pictures, LLC v. Vasquez, No. 1:10-cv-000873 (D.D.C. May 31, 2011), 2011 WL 2681946; see also Jared Moya, “*Hurt Locker*” Producers to Sue “Tens of Thousands” of File-Sharers, ZEROPAID (May 12, 2010), <http://www.zeropaid.com/news/89122/hurt-locker-producers-to-sue-tens-of-thousands-of-file-sharers>.

257. See Complaint, *supra* note 256, at 1.

258. See DeBriyn, *supra* note 250, at 93.

259. See *id.* at 80.

260. See *id.* at 98.

method of revenue generation.²⁶¹ In such cases, the copyright holders have relied partially on the stigma associated with their content in order to induce a quick settlement from people who would prefer not to be exposed as consumers—or even alleged consumers—of pornography.²⁶²

This presents an unhappy situation in which innocent people pay copyright settlement fees.²⁶³ This may happen because of a number of reasons. To begin, there is an evidentiary issue over whether the IP address identified actually downloaded the copyrighted work. To gather the initial IP addresses, the copyright owner relies on software and monitoring services of a private, for-hire company.²⁶⁴ There is no legal oversight of this process, and there is a high potential for abuse. From the author's perspective, discovering the names of as many people as possible is beneficial regardless of whether they actually infringed the copyright. A greater number of names offers a larger pool of defendants to whom the copyright owner can send infringement notices and settlement demands. Some copyright owners may therefore have a motive to pursue people without strong evidence that an infringement has actually occurred. Alternatively, even in cases in which there is no malicious intent, the chance of erroneously naming an innocent defendant is substantial. When the author targets several thousand potential defendants at once, there is a chance that human error will lead to the author pursuing some people who have not actually infringed the work.

Even when the author can definitively show that the named IP address downloaded the work, problems persist. The current practice of equating the owner of the named IP address and the infringer is at best questionable. Such a simplistic view does not take into account IP spoofing, whereby someone creates an IP address with the

261. See Mike Masnick, *More Porn Companies Filing Mass Lawsuits Against File Sharers*, TECHDIRT (July 21, 2010, 4:57 PM), <http://www.techdirt.com/articles/20100719/17330710283.shtml>.

262. For other instances of the same copyright enforcement behavior, see, for example, *Mick Haig Productions E.K. v. Does 1-670*, 687 F.3d 649 (5th Cir. 2012); *Combat Zone v. Does 1-1037*, No. 3:10-cv-00095-JPB-JES (N.D.W.V. Dec.16, 2010).

263. As a result, a number of such cases have been dismissed by courts. See Eva Galperin, *Over 40,000 Does Dismissed in Copyright Troll Cases*, ELECTRONIC FRONTIER FOUNDATION (Feb. 24, 2011), <https://www.eff.org/deeplinks/2011/02/over-40-000-does-dismissed-copyright-troll-cases>; see, e.g., *A.F. Holdings, L.L.C. v. Doe*, No. 3:12-cv-0519 (D.D.C. June 20, 2012) (dismissing the case on the grounds that an IP address was insufficient linkage between the defendant and the infringer).

264. In the *Hurt Locker* case the plaintiffs hired Guarddeley Ltd. to collect the data on potential infringers. See *Plaintiff's Opposition to Motions to Quash/Motions to Dismiss* at 5, *Voltage Pictures, LLC v. Does 1-5000*, No. 1:10-cv-00873-RMU (D.D.C. Oct. 18, 2010), 2010 WL 4954765.

intention of impersonating another IP address.²⁶⁵ Nor does it recognize that multiple people, not merely the owner, may use the infringing device.²⁶⁶ Even in cases in which the named defendant actually downloaded the work, his actions may well have been exempt from copyright infringement under a defense, such as fair use.²⁶⁷

These problems make it likely that authors in these cases are demanding damage settlements from some innocent people.²⁶⁸ Of the pool of innocent people receiving these demands, many would rather settle the case anonymously than fight publicly in court. Paying a settlement fee of a few thousand dollars may be preferable to litigation, in which the defendant would certainly pay substantial legal fees and risk incurring very high statutory damages if he loses the case.²⁶⁹

Enforcing copyright through such mass-infringement settlements may well have cost-saving properties and may be consistent with copyright's economic rationale. Grouping defendants together is far less costly than pursuing thousands of defendants through thousands of individual cases. The fact that the costs are reduced also enables the author to more effectively police his rights, thus increasing the probability of catching infringers holding them liable. This enhanced enforcement increases the effective deterrence of the copyright law.

However, to the extent that this practice enables targeting of innocent defendants, it presents a clear and unambiguous corrective justice violation. These two parties never interacted before the litigation. The innocent defendant has not copied the work and has not benefited at the author's expense. There is no injustice here to correct. On the contrary, it is the action of the author that creates an

265. See generally Toby Ehrenkranz & Jun Li, *On the State of IP Spoofing Defense*, 9 ACM TRANSACTIONS INTERNET TECH. (TOIT) (2009).

266. See e.g., Order & Report Recommendation at 6, *K-Beech, Inc. v. John Does 1-37*, No. 2:11-cv-03995 DRH-GRB (D.D.C. May 1, 2011) (Brown, G.) ("[I]t is no more likely that the subscriber to an IP address carried out a particular computer function—here the purported illegal downloading of a single pornographic film—than to say an individual who pays the telephone bill made a specific telephone call.").

267. See 17 U.S.C. § 107 (2012).

268. See, e.g., Order Vacating Prior Early Discovery Orders and Order to Show Cause at 1–2, *AF Holdings, LLC v. John Doe*, No. 2:12-cv-5709-ODW(Jcx) ("An IP address alone may yield subscriber information, but that may only lead to the person paying for the internet service and not necessarily the actual infringer, who may be a family member, roommate, [or] employee This Court has a duty to protect the innocent citizens of this district from this sort of legal shakedown, even though a copyright holder's rights may be infringed by a few deviants.").

269. See DeBriyn, *supra* note 250, at 98–99; Timothy B. Lee, *Enraged by Abusive Law Suits, Anonymous Troll Slayers Fight Back*, ARS TECHNICA (Feb. 26, 2013, 9:00 AM), <http://arstechnica.com/tech-policy/2013/02/enraged-by-abusive-lawsuits-anonymous-troll-slayers-are-fighting-back>.

inequality. The author wrongfully gains from the transaction; he receives a ransom masquerading as compensatory damages. On the other hand, the innocent defendant is forced into a wrongful loss in the form of the settlement fee. This is the injustice that the law should correct.

The problem would largely disappear if the law adopted the proposals mentioned above in Parts III.A and III.B.²⁷⁰ If statutory damages for willful infringement were limited to compensation for dignitary harm they would be imposed far less frequently and in smaller quantities by courts. Therefore, they would not pose the same threat to the innocent recipient of a settlement demand. Furthermore, if the loser of the copyright case were responsible for the winner's legal costs, the author would have an incentive to only send settlement demands to those who have likely infringed the work. If the author sends settlement demands to people who have probably not infringed the work, then he risks paying the defendant's court fees. He is therefore deterred from starting cases without proper evidence of infringement.

IV. CONCLUSION

That copyright functions to overcome a market failure is undoubtedly accurate. In the common law world, an important goal of copyright law is to incentivize the creation of an optimal number of works. However, it is simply a mistake to believe this is the only function of copyright. The forward-looking goal of welfare maximization may lead to socially desirable outcomes, but it fails to provide a meaningful explanation of the relationship between the author and the infringer. Instead, this bedrock feature of the law is the result of copyright infringement's second function: the correction of past injustices. The author has a right to copy the work. When the infringer disregards that right, he creates an inequality. The infringer bypasses the market, causing the author to lose revenue while the infringer copies the work without paying a license fee. The law tries to eradicate the wrongful losses and wrongful gains, and to restore the parties to their original positions. This process upholds the author's status as a legitimate rights holder whose rights deserve the infringer's respect.

Sadly, lawmakers and scholars often forget about corrective justice. Because copyright is understood in wholly instrumental terms, the noneconomic function of copyright litigation sometimes goes forgotten. This is seen in the three cases discussed in Part III:

270. See *supra* Parts III.A–B.

statutory damages for willful infringement, litigation fees, and mass copyright lawsuit filings. Ultimately, society may be happy to accept these instances of unfairness if it leads to greater economic prosperity. However, to the extent that they run counter to the corrective justice function of copyright, they ought to be reformed along the lines suggested.