Tort Theory in Copyright Law: Thinking about Patrick Goold's Unbundling the "Tort" of Copyright Infringement

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Patrick R. Goold, *Unbundling the "Tort" of Copyright Infringement* 102 **Va. L. Rev.** 1833 (2016), available at SSRN

Patrick Goold's *Unbundling the "Tort" of Copyright Infringement* ("*Unbundling*") is an ambitious and remarkably illuminating article. Its central thesis is that "copyright infringement" is best understood as a cover term for five different "copytorts" ((Steven Hetcher, *The Immorality of Strict Liability in Copyright*, 17 **Marq. Intell. Prop. L. Rev.** 1, 4–5 (2013) (coining word "copytorts").)) related to the plaintiff's being a copyright owner. By way of comparison, "trespass" and "nuisance" in tort law are pleaded and articulated with different names even though they both pertain to wrongs related to a plaintiff's ownership of realty; this is because they are, conceptually and practically, quite different wrongs. Copyright law has never separated out its five different legal wrongs, either through statute or through judicial elaboration, either formally or informally. It has used the one phrase "copyright infringement" indiscriminately for all. It turns out, Goold argues, that much of the confusion and conflict within copyright case law can be traced back to the failure to draw distinctions among the five copytorts. The task of the article is to outline the distinctions, thereby beginning the process of solving a number of doctrinal problems.

The three doctrinal problems Goold presents pertain to *audience*, *harm*, and *analogy*. As to "audience," the question concerns the *observer,* or *arbiter*, or *audience* that courts should employ to determine whether allegedly infringing material is sufficiently similar to the copyrighted material: must it be such as to cause confusion to a reasonable person, an ordinary consumer, or an expert? As to "harm" (which arises in connection with a fair use defense) the question concerns "'the effect of the [copyist's] use upon the potential market for or value of the copyrighted work.'" (P. 1848 (quoting 17 U.S.C § 107 (2012)).) Courts have construed this factor to turn on "whether the copying caused the owner cognizable harm" (*Id.*); some courts in turn focus upon demand diversion, others on lost fees, and others on reputational, privacy, or other nonfinancial injuries. Finally, as to "analogy," the question is how copyright infringement ought to be modeled as a legal wrong: is it like trespass, like conversion, like an economic tort or unfair competition, or like unjust enrichment?

The neatest way to depict Goold's article is perhaps to start at the question of which common law wrong provides the best model for copyright infringement. Goold's answer is that it depends on what kind of copyright infringement claim it is. He outlines five different kinds of infringement: (1) consumer copyright invasion (e.g., downloading an MP3 file without paying for it); (2) competitor copyright invasion (e.g., selling artistic works that are knock-offs of the copyright owner's); (3) expressive disclosure claims (e.g., neglecting limitations on disclosure set by the owner in disclosing licensed materials); (4) artistic reputational injury (e.g., changing content or meaning or associations by editing); (5) breach of creative control (e.g., deviating from wishes of owner about how and when material is used). Goold contends that each of these five distinct wrongs has a distinct common-law analogue: for consumer copyright invasion the analogue is trespass; for competitor invasion it is unfair competition; for expressive disclosure it is public disclosure of private fact; for artistic reputational injury it is defamation or false light invasion of privacy; for breach of creative control it is conversion.

Goold's analysis is more nuanced than my summary suggests, and it is helpfully sprinkled with examples from the case law. But these first-cut answers to the "analogy" problem, he argues, point us toward solutions to the "audience" and "harm" problems. For example, the reasonable person provides the proper standard for determining similarity in a consumer copyright invasion case, whereas in the competitor case, the standard is properly set by reference to the target consumer. On harm/fair use questions, certain dignitary or privacy or reputational interests might be the appropriate kinds of harm to consider for the latter three categories, but demand diversion is likely to be more appropriate for consumer copying claims. The final section of the article reasonably suggests that it would not be worth the candle to try to amend the copyright statute explicitly to incorporate these five subcategories, but that the taxonomy should nonetheless be illuminating to courts as they interpret and apply the statute.

I was drawn to Goold's article in part because John Goldberg and I have consistently contended that IP law is really full of statutory torts, and Goold seems to pick up on this. Moreover, he is plainly taken by the metaphor "Gallery of Wrongs," which Goldberg and I developed at some length in our book *The Oxford Introductions to U.S. Law: Torts.* ((John C.P. Goldberg & Benjamin C. Zipursky, **The Oxford Introductions to U.S. Law: Torts** (2010).)) In this sense, Goold is a fellow traveler in at least three respects: our contention that the common law is not essential to the idea of torts; our resistance to the idea that tort law is accident law or is essentially about the allocation of losses; and our belief that the legal system creates wrongs of a variety of different forms, relating to a variety of different kinds of injuries. *Unbundling* illustrates the fecundity of legal-wrongs-based analysis as a form of scholarship that will be illuminating to courts and scholars.

In particular, whether or not Goold has his taxonomy exactly right, it is hard to believe that he could be wrong in his basic, and very deep, point: there are different kinds of legal wrongs at the base of a variety of different copyright infringement claims, and key doctrinal issues will need to be resolved in a way that is sensitive to these very basic differences.

I rarely blog when I have nothing negative to say, however, and I would not want to shortchange Goold by making him the exception. Three concerns come to mind. The first is more of an observation than a criticism: it strikes me as odd to suppose that most torts that go under a single label – for example, "battery" – reliably denote a single type of wrong. As for battery, there is even in the Restatement (Second) of Torts a distinction between harmful-contact batteries and offensive-contact batteries (largely predicated on type of harm), and a third, quite distinctive form of battery occurs in many medical cases that involve physicians wrongly performing procedures outside of the scope of consent, or with consent not tethered in adequate informational disclosure ("informed consent"). Similarly, acts that qualify as the various crimes called "rape" or "sexual assault" and crimes called "homicides" are all batteries. Much the same can be said about the tort of negligence, which covers car accidents and landowner liability and (in some jurisdictions) forms of professional negligence and products liability and negligence *per se* and *res ipsa loquitur*. Some of these mark different kinds of wrongs and some do not. The line is unclear. Indeed, there is sometimes value in not forcing plaintiffs or defendants or courts to distinguish among them.

A second concern is related to the first, and it strikes me as important in the context of *Unbundling* to explain what one means by "different wrongs." Do the differences reside in the character of the defendant's conduct, the type of interest being protected and invaded, the type of loss suffered by the plaintiff, some combination of these (or further considerations)? It is difficult to evaluate the central claim of the paper unless one is clear on the criteria for individuating wrongs.

The third concern, which is linked to the second, is more substantive. The right of redress in tort cases typically includes a right to a judgment in damages, but the financial loss – even when ultimately a component of a compensatory damages award – is not always (or even typically) the injury claimed. For

example, a judgment for a private plaintiff on a claim of misappropriation may well include disgorgement of profits or emotional harm damages for emotional distress as components of a judgment. But the wrongful injury aspect of this particular wrong is the deprivation of privacy or anonymity or reputation precipitated by an unconsented-to photograph, not the economic loss or emotional distress. Emotional harm or disgorgement would be appropriate remedies, perhaps.

With this in mind, I wonder whether Goold's latter three categories are really one category. All pertain to an exercise of control over the copyrighted material that exceeds the scope of the owner's actual or implied consent. There is a moral-right or abuse-of-right aspect to all three. The wrong, like that of trespass, is the interference with the right of exclusive control, even where (as with a hotel guest traipsing around the hotel's "Restricted Area" kitchens and laundries) the plaintiff may have had partial access or a license of some form. No doubt there are different kinds of damage or harm done by different kinds of abuse or misuses of the right and different levels of interference with control. But all are abuses of a right or a license (or a privilege of fair use).

More generally, it is important to recognize that, while it is tempting to conceive of a tort as a wrongful interference with a particular kind of interest, classic common law torts simultaneously protect several different interests, at least in a functional sense of the term "protect." The tort of libel, for example, plainly aims to protect reputation, but at the same time, it *de facto* deters conduct that damages emotional well-being and financial interests, and it certainly allows for recovery of damages in association with harm of those forms. The predicate injury, however – the one that is a component of the legal wrong of libel – is reputational injury.

The foregoing critical comments are meant to be constructive. No doubt, my ignorance of copyright law is providing me with blissful optimism about the soundness of my reconstruction of Goold's account. Nonetheless, here it is: Straight-up (A*) consumer copyright infringement* is analogous to straight-up trespass to land or trespass to chattels. (B) *Competitor copyright infringement* is analogous to unfair competition (both types of infringement, when done in a form sufficiently extreme to destroy all the value of the copyright, would merge toward conversion). The remaining three categories (interference with control of expressive disclosure, artistic reputational injury, interference with creative control) are part of one family – (C) *abuse of license or privilege* (which in some ways is analogous to the privacy tort of public disclosure of a private fact, in some ways like defamation, and in some ways like the civil law wrongs of invasion of moral right and abuse of right). This effort to distinguish among the last three versions (disclosure, reputational injury, control) tends to distract one from a much more salient and striking set of distinctions that Goold has made; the distinction between (A) *consumer copying* outright and (C) *abuse of license or privilege* is extremely powerful; so too is the distinction between (B) *competitor copying* (unfair competition, passing off) and both (A) *consumer copying* and (C) *abuse of license or privilege*.

In the end, these categories probably generate strong prima facie answers to the questions about audience and harm raised by Goold, and, I believe, many will be exactly the answers that Goold offers and explains. Meanwhile, those who believe that law professors ought to be using their time and resources to study practical problems (rather than conceptualistic taxonomies) need not worry that analytic work like Goold's is too academic. To the contrary – despite its great lure for taxonomists of wrongs, like myself – Goold's creative and analytically sharp article is poised to provide great value to judges and lawyers with copyright cases. And to those of us who love torts, well, it makes for a refreshing visit to a newly curated wing of the gallery of wrongs.

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Editor's note: *See also* David Fagundes, *The Plural Tort Structure of Copyright Law*, JOTWELL (August 4, 2016) (reviewing Patrick Goold, *Unbundling the 'Tort' of Copyright Infringement*, 102 **Va. L. Rev.**

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