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IS COPYRIGHT INFRINGEMENT A STRICT LIABILITY TORT?

Patrick R. Goold[†]

ABSTRACT

Scholars and lawmakers routinely refer to copyright infringement as a strict liability tort. The strictness of copyright liability has long been criticized as immoral, inefficient, and inconsistent with usual tort doctrine. However, this Article questions whether copyright infringement really is a strict liability tort. It advances the thesis that copyright infringement in the United States is a fault-based tort, closely related to the tort of negligence. Using both doctrinal and economic methods, this Article explicates the role that fault plays in copyright infringement. Doing so not only demonstrates that copyright's liability rule is more normatively defensible than previously appreciated, but also provides a unique tort perspective on the nature of the fair use doctrine. By seriously engaging with the analytic question of whether liability for copyright infringement is strict or not, we highlight how the fair use analysis blends and confuses two separate issues: on one hand, did the defendant cause the plaintiff harm, and, on the other, was that harm justifiable? The Article concludes that, while no substantive changes need to be made to copyright's liability rule, judges ought to restructure the fair use analysis in order to keep these concepts distinct from one another.

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† IP Fellow at IIT Chicago-Kent College of Law. The author would like to thank dearly the following people for their advice and comments: Shyamkrishna Balganesh, Christopher Buccafusco, Oren Bracha, Mark Gergen, Wendy Gordon, Justin Hughes, Edward Lee, Jake Linford, Kylie Pappalardo, Matthew Sag, Pamela Samuelson, Rebecca Tushnet, Richard Wright, Peter Yu. In addition, the author would like to thank the organizers and participants of the 2014 Santa Clara Works in Progress in Intellectual Property Workshop, the 2014 UC Berkeley Intellectual Property Scholars Conference, and the 2014 Michigan State Junior Scholars in Intellectual Property Conference. A special note of gratitude goes to the patient editors of the Berkeley Technology Law Journal. All mistakes are solely the responsibility of the author. Please send comments to pgoold@kentlaw.iit.edu.

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I. INTRODUCTION

Modern tort law has largely retreated from the principle of strict liability.[1] Although for many centuries, the common law imposed civil liability upon a defendant for harm that was not his fault, today the law typically requires that a defendant act intentionally, recklessly, or negligently before he will be held responsible for the consequences of his conduct.[2] For over a hundred years, jurists have largely applauded this transformation. The voices decrying strict liability come from the greatest figures of common law jurisprudence, such as Oliver Wendell Holmes—who argued that strict liability would wastefully deter productive activity[3]—to the foremost minds of contemporary legal thought, who argue that holding someone responsible without fault is potentially immoral[4] and potentially inefficient.[5] This evolution resulted in the situation where strict liability exists "at the margins of tort"[6] applicable only in "a few special situations,"[7] and a belief that it is a "mediaeval"[8] concept that simply "does not fit" within the greater body of private law.[9]

1. *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, at 97–101 (1977); *see also* G. EDWARD WHITE, TORT LAW IN AMERICA 244–90 (1980); G. Edward White, *The Unexpected Persistence of Negligence, 1980–2000*, 54 VAND. L. REV. 1337, 1344–46 (2011). *But see* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA L. REV. 925 (1981).

2. *See, e.g.*, DAN B. DOBBS, THE LAW OF TORTS § 342 (2008) (after 1841, "negligence or intentional invasions would thereafter become the normal basis for tort liability"); Cornelius J. Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225, 225 (1971) ("It is frequently assumed that with a few exceptions the principles of negligence comprise the field of tort law, and that fault is the most common basis for determining liability for harmful conduct.").

3. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 95 (1881) ("As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard on what is at once desireable and inevitable upon the actor."); *see also* James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908) ("The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril.").

4. *See, e.g.*, Jules Coleman, *Moral Theories of Torts: Their Scope and Limits, Part I*, 1 LAW & PHIL 371, 374 (1982) ("[T]he substitution of fault for causation marked an abandonment of the immoral standard of strict liability under Trespass (which, after all, imposed liability without regard to fault) in favor of a moral foundation for tort law based on the fault principle."); ERNEST WEINRIB, THE IDEA OF PRIVATE LAW 170–203 (1995).

5. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 208–11 (6th ed. 2012) (describing how, without a defense of contributory negligence, strict liability gives the victim inefficient incentives to take care).

6. JOHN C.P. GOLDBERG & BENJAMIN ZIPURSKY, THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 265 (2010).

7. *Id.* at 266.

8. Read v. J. Lyons & Co., [1945] K.B. 216 at 229 (Eng.) (Scott L.J.).

9. GOLDBERG & ZIPURSKY, *supra* note 6, at 267.

For several decades, scholars have tried to provide a plausible normative justification for holding individuals liable even when their actions are without fault.[10]

As strict liability is typically seen as the exception, not the rule, intellectual property scholars have become increasingly concerned about the state of copyright law. Copyright infringement, according to most judges and commentators, is a strict liability tort.[11] A plaintiff can establish a prima facie case of direct infringement merely by showing that a defendant copied his protected work and that this resulted in the production of a substantially similar work.[12] As there is no requirement on the plaintiff to show how the defendant behaved intentionally, recklessly, or even negligently, it is commonly said that "innocence is no defense to an action for copy-right infringement."[13] This situation has struck many as normatively untenable. Over seventy years ago, Judge Learned Hand worried that the application of strict liability in copyright was "harsh" and worthy of hesitation.[14] More recently, academicians have maintained that exposing copyright defendants to strict liability is immoral, inefficient, and inconsistent with the standard tort practice of only holding liable those defendants who have acted wrongfully. To remedy this situation, a number of scholars have proposed that copyright reject strict liability in favor of a fault liability rule. In their vision, copyright law would be improved if it only imposed liability on those defendants who copy intentionally, recklessly, or negligently.[15]

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10. *See* JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW iii (2006) (explaining the Late Scholastic scholars' failed attempt to provide a rationale for strict liability inherited from Roman law); Richard A. Epstein, *A Theory of Strict Liability*, 2. J. LEGAL STUD. 151 (1973); Tony Honoré, *Responsibility and Luck: the Moral Basis of Strict Liability*, 104 L.Q. REV. 530 (1988).

11. *See infra* notes 128 & 129.

12. *See infra* pp. 327–28 and accompanying footnotes.

13. 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 8.1 n.1 (3d ed. 2014).

14. Barry v. Hughes, 103 F.2d 427, 427 (2d Cir. 1939) (per curiam) ("It has been held that one who copies from a plagiarist is himself necessarily a plagiarist, however innocent he may be, but that would be a harsh result, and contrary to the general doctrine of torts. . . . We should hesitate a long while before holding that the use of material, apparently in the public demesne, subjected the user to damages, unless something put him actually on notice." (internal citation omitted)); *see also* De Acosta v. Brown, 146 F.2d 408, 413 (2d Cir. 1944) (Hand, J., dissenting) ("Ordinarily an act does not become a wrong, when to make it so, one must resort to consequences arising from it in the actual sequence of events which reasonable persons would not anticipate. . . . I can see no reason why the ordinary rule of liability for torts should not apply to copying a copy . . . ."); *see also* Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 308 (2d Cir. 1963) (noting the "harshness of the principle of strict liability in copyright law").

15. *See, e.g.*, Kent Sinclair, Jr., *Liability for Copyright Infringement—Handling Innocence in a Strict-Liability Context*, 58 CALIF. L. REV. 940 (1970); Dane S. Ciolino & Erin A. Donelon,

However, despite the widespread and orthodox belief that copyright infringement is a strict liability tort, this characterization is questionable. A number of articles quickly classify liability for copyright infringement as strict, and then proceed with haste to the normative question of whether that state of affairs is desirable.[16] Sadly, there is precious little discussion that seriously engages with the positive question of whether copyright infringement in the United States actually is based on strict liability.[17] In an attempt to rectify the lack of descriptive theory in copyright law, this Article tries to answer the question in an analytically rigorous fashion. In doing so, the Article demonstrates that this issue is much more complicated than previous scholars have appreciated. Moreover, contrary to the dominant view of copyright infringement, this Article advances the thesis that copyright infringement is in fact a fault-based tort. In a nutshell, copyright infringement is not a strict liability tort because it does not hold the defendant liable simply on the basis that he infringed a right of the plaintiff. In addition, it must be shown that the defendant's copying was wrongful. The fair use doctrine exists, in part, to exculpate defendants who infringe a plaintiff's copyright but who do so in socially beneficial ways. Only those who infringe copyright unfairly, and who therefore wrongfully impose negative consequences upon the rest of society, are held liable.

At which point, one might ask: why does this matter? Even if one assumes the thesis presented here is correct, are not strict liability or fault

Questioning Strict Liability in Copyright, 54 RUTGERS L. REV. 351, 419–20 (2002) (arguing that lack of intent ought to be a defense to copyright infringement); Steven Hetcher, *The Kids Are Alright: Applying a Fault-Liability Standard to Amateur Digital Remix*, 62 FLA. L. REV. 1275 (2010) (arguing for a fault liability regime in relation to user-generated content); Assaf Jacob & Avihay Dorfman, *Copyright as Tort*, 12 THEORETICAL INQUIRIES IN LAW 59 (2011) (ARGUING that copyright infringement ought to adopt intentional, negligence, and strict liability rules in different contexts); Jacqueline D. Lipton, *Cyberspace, Exceptionalism, and Innocent Copyright Infringement*, 13 VAND. J. ENT. & TECH. L. REV. 767 (2011) (suggesting several ways in which innocence could result in findings of no liability); Tony Evans, *"Safe Harbor" for the Innocent Infringer in the Digital Age*, 50 WILLAMETTE L. REV. 1 (2013) (describing a DMCA-like safe harbor for direct unintentional infringement).

16. *See, e.g.*, Ciolino & Donelon, *supra* note 15, at 356 (copyright infringement requires no "scienter, intent, knowledge negligence, or similar culpable mental state. On the contrary, liability for civil copyright infringement is strict"); Lipton, *supra* note 15, at 768 ("Historically, copyright infringement claims have been litigated on a strict liability basis."); Evans, *supra* note 15, at 4 (referring to the "strict liability nature of copyright infringement that applies generally in all cases"). As will be shown, the issue is far more complex than such statements suggest. These statements overlook the fact that fault in law does not refer only to a defendant's subjective mental state. *See infra* pp. 314–19.

17. One exception comes from the work of Professor Steven Hetcher. *See infra* pp. 336–38 and accompanying footnotes. Similar lines of inquiry are also emerging in patent law. See Saurabh Vishnubhakat, *An Intentional Tort Theory of Patents*, FLA. L. REV. (forthcoming).

liability simply names? Characterizing liability as strict or not strict does not actually affect the underlying doctrine. Nevertheless, the problem arises in this context when we consider the normative debate that surrounds copyright's liability rule. As previous copyright scholars have paid little attention to the complex analytic question, they have erroneously characterized copyright as a strict liability tort and then proceeded to demonstrate why strict liability is normatively unattractive in this context. By arguing that copyright infringement is not strict, this Article demonstrates that much of the handwringing is misplaced. As copyright is already based upon fault, it is less inconsistent, inefficient, and immoral than previously supposed.

Furthermore, because previous authors have skipped over the complex analytic question and rushed to the normative one, they have missed an even more pressing concern: the formal structure of copyright infringement is a mess! Asking the question "is liability in copyright strict or not?" provides a unique tort perspective on the nature of copyright infringement generally, and the fair use doctrine in particular. The key insight this inquiry reveals is that the fair use doctrine currently blends and confuses two separate inquires, namely: (a) has the defendant caused the plaintiff harm and (b) was that harm justifiable? Sadly, this conflation is largely pernicious. As will be elaborated upon, it not only causes judges to fit cases of "no fault" into the language of "no harm," thus prejudicing defendants with legitimate "no fault" claims, but it also results in poorly assigned burdens of proof. Therefore, after showing that copyright is a fault-based tort where the standard of fault is normatively defensible, the Article demonstrates how judges could restructure the fair use analysis so that these concepts are separated from one another.

Part II of this Article uses both doctrinal and economic methods to demonstrate the distinction between strict liability and fault liability rules. Part III applies this framework to copyright infringement. Doing so demonstrates two things: firstly, the question of whether copyright is strict or fault-based is far more complex than previously appreciated, and secondly, there is an arguable case that copyright infringement is a fault-based tort. Once these analytic points are developed, Part IV enters into the normative debate surrounding copyright infringement's liability rule. If copyright infringement is already based on fault, then the system is more tenable than some have previously appreciated. Nonetheless, while courts need not alter the substance of the liability rule in place, they must pay more attention to the formal structure of this rule. In particular, they ought to distinguish more carefully the two separate concepts of harm and fault that are embedded in the fair use analysis. This Part offers a way in which such separation could feasibly be accomplished. Part V concludes.

II. STRICT LIABILITY AND FAULT LIABILITY

This Part shall compare strict liability and fault liability rules. The first Section is doctrinal. It explains the legal difference between these two types of liability. The second Section is economic and functional. It explains the utilitarian goal the law attempts to serve and illustrates how both strict liability and fault liability rules achieve that goal.

A. THE DOCTRINE OF STRICT LIABILITY AND FAULT LIABILITY

Before a court will hold a defendant responsible, the plaintiff must demonstrate that he has a legitimate prima facie case. To do so, he must prove the existence of several factual conditions. These conditions vary depending on the type of liability rule the law adopts. Generally speaking, tort uses two forms of liability rule: strict liability and fault liability. This Section demonstrates the conditions that must be established before a defendant will be held liable under a strict liability and under a fault liability rule.

1. Strict Liability

Strict liability is liability imposed when a defendant infringes the legal right of another person.[18] As legal rights differ in character, we find there are two different categories of strict liability: conduct-based strict liability and harm-based strict liability.

Autonomy rights confer upon the right holder a broad power to control an object.[19] This right of control is infringed whenever the defendant engages

18. This definition might seem a little unorthodox. More commonly strict liability is defined as liability imposed upon an individual whose conduct causes harm to the plaintiff. *See, e.g.*, GOLDBERG & ZIPURSKY, *supra* note 6, at 90 ("Under a regime of strict liability, an actor who causes harm to another is held liable simply by virtue of causing harm."); JULES COLEMAN, RISKS AND WRONGS, 212–34 (2d ed. 2002). Thus, strict liability is considered liability based on causation, while fault liability is liability based on causation plus fault. However, such a definition would apparently not cover cases such as trespass to land, where liability is imposed regardless of whether the defendant's conduct "caused" some form of "harm." In trespass, conduct alone seems to be the touchstone for liability, not causation of harm. Perhaps a better definition therefore is simply that strict liability is liability imposed "regardless of fault." *See* PETER CANE, RESPONSIBILITY IN LAW AND MORALITY 82 (2002). However, such a negative definition does not actually tell us what is the justification for liability in such cases; it merely tells us that fault is not the relevant justification. Therefore, this article prefers to define strict liability as rights-infringement. This view is supported by recent analytic theory of strict liability by Professor Greg Keating. *See* Gregory Keating, *Strict Liability Wrongs*, *in* THE PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 295 (John Oberdiek ed., 2014) [hereinafter Keating, *Wrongs*]; Gregory Keating, *Nuisance as a Strict Liability Wrong*, 4 J. TORT LAW 1 (2012) [hereinafter Keating, *Nuisance*].

19. Keating, *Wrongs*, *supra* note 18, at 296–300.

in conduct that is antithetical to that control. The right holder need not suffer any real world harm before the right is invaded. The only "harm" he need suffer is a legal one (i.e., the lost power to control the object).[20] For example, property rights are typically autonomy rights. One's property right in land is infringed if someone else enters the land without permission. There need not be any real world harm flowing from the entry before the right is infringed.

Autonomy rights are protected by conduct-based strict liability rules.[21] These rules attach liability to a defendant who engages in a form of proscribed conduct.[22] Importantly, the plaintiff need not demonstrate how this volitional conduct caused a harmful outcome before liability is imposed. The classic example of this is the tort of trespass to land. As the right to exclude is an autonomy right, the law imposes liability upon the defendant who volitionally enters the land even when that entry is not harmful.[23]

Alternatively, some rights do not confer broad powers of control, but instead only the right to maintain an object in a certain condition.[24] These rights can be infringed only if the defendant's actions cause some real world harmful consequence; harm, not the lost power to control, grounds liability in this instance. For example, one has a right to physical health and being "whole in body and mind."[25] As the right is to maintain one's health, the right can only be infringed if the defendant's action causes the victim's health to deteriorate or worsen.

Such rights are protected by harm-based strict liability rules.[26] These rules attach liability to a defendant who volitionally engages in a form of proscribed conduct that causes a harmful outcome. For example, products

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20. This may also be referred to as a "normative" loss. *See, e.g.*, John C.P. Goldberg & Benjamin Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 956 (2010).

21. Keating, *supra* note 19.

22. PETER CANE, THE ANATOMY OF TORT LAW 45 (1997); *see also* Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664, 1682 (2012).

23. Trespass to land is sometimes mistakenly called an intentional tort. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 158 (calling trespass an "intentional intrusion on land"). This mistake comes from confusing the concepts of volition, deliberateness, and intentionality. *See* CANE, *supra* note 22, at 32–33; *see also* DOBBS, *supra* note 2, § 51 ("Since the intent required to show a trespass is only an intent to enter land, and since that intent might be wholly innocent, the rules may sometimes impose a limited kind of strict liability.").

24. Keating, *Wrongs*, supra note 18, at 296–300.

25. *See, e.g.*, CANE, *supra* note 22, at 67 (discussing one's physical interest in good health).

26. CANE, *supra* note 22, at 47–49 (discussing "outcome-based" strict liability). *See also* Balganesh, *supra* note 22.

liability adopts a harm-based strict liability rule. Because the consumer has a right to bodily health, liability is imposed on the defendant who manufactures a defective product (the proscribed conduct) that in turn causes the consumer some physical injury (the harmful outcome).[27]

Importantly, however, neither conduct-based strict liability nor harm-based strict liability is conditioned upon fault. The defendant's infringement of the plaintiff's right need not be wrongful for liability to be imposed. Indeed, strict liability imposes liability even when the defendant's conduct is deemed rightful and a good thing for society. For example, abnormally dangerous activities are governed by strict liability rules.[28] Society acknowledges that engaging in abnormally dangerous activity is often a good thing. Sometimes we must engage in abnormally dangerous activities such as crop dusting or dynamite blasting for the overall benefit of society.[29] Accordingly, engaging in such conduct is not considered wrongful. Nevertheless, despite the fact that it is not wrong to engage in this conduct, the law still makes the person who does so liable to the plaintiff if it results in an infringement of a right.

2. Fault Liability

Fault liability rules are harm-based strict liability rules with one additional element: fault.[30] Liability is not imposed solely upon rights-infringement. A defendant is only held responsible if he has engaged in the proscribed conduct that in turn causes a harmful outcome, and when that conduct is deemed to be wrongful.[31] Tort law recognizes two categories of wrongful conduct.[32] Firstly, a defendant's conduct is wrongful if he acts with a blameworthy state of mind. Secondly, a defendant's conduct is wrongful if it fails to live up to a standard that the law expects. The following subsections explain these two different categories of fault.

a) State of Mind Fault

Fault may be established by demonstrating that the defendant acted with a blameworthy state of mind.[33] This is most commonly achieved by proving

27. RESTATEMENT (SECOND) OF TORTS § 402; *see generally* DOBBS, *supra* note 2, § 354.

28. *Id.* § 519(a).

29. *Id.* § 520.

30. *See* COLEMAN, *supra* note 18, at 212; *see also* GOLDBERG & ZIPURSKY, *supra* note 6, at 90–91.

31. COLEMAN, *supra* note 18, at 212.

32. CANE, *supra* note 18, at 78 (2002) ("Legal fault consists either of a failure to comply with a specified standard of conduct, or of failure to comply with a specified standard of conduct accompanied by a specific state of mind.")

33. COLEMAN, *supra* note 18, at 217–18.

that the defendant acted intentionally. By acting intentionally, the defendant engaged in the conduct with the aim of causing the harmful outcome.[34] Note, this is not the same as acting volitionally. Conduct is volitional when engaged in voluntarily;[35] conduct is intentional when that conduct is engaged in to cause some harmful consequence. For example, battery is an intentional tort.[36] To prove battery the plaintiff must show that the defendant volitionally touched the defendant, that this touching was harmful to the plaintiff (either by showing physical injury or that the touching was "offensive"), and that the defendant intended that such contact be harmful.[37] Hence, a leading treatise on tort states that, in an action for battery, "[a]n intent to cause actual harm is sufficient intent but not a necessary one. It is enough that the defendant intends bodily contact that is offensive."[38]

In other cases, the plaintiff can demonstrate the defendant's blameworthy state of mind by demonstrating that the defendant caused the harm recklessly (i.e., that he consciously disregarded an unreasonable risk), fraudulently (i.e., that he intended to deceive the plaintiff), or maliciously (i.e., that he acted with bad motives).[39] But these states of mind are less commonly required as the basis for liability.

b) Standard of Conduct Fault

Alternatively, a plaintiff may prove fault by demonstrating that the defendant's conduct simply failed to live up to a standard that the law expects of him. This is most commonly achieved by establishing that the defendant caused the harmful outcome negligently.[40] In such cases, the standard expected is that individuals will conduct themselves reasonably. A defendant's conduct is negligent if he failed to act in the manner of a

34. CANE, *supra* note 22, at 32–33.
35. *Id.* at 29–32.
36. RESTATEMENT (SECOND) OF TORTS § 13.
37. *Id.*
38. DOBBS, *supra* note 2, § 8.
39. *See generally* CANE, *supra* note 22, at 33–36.
40. *Id.* at 36 ("[D]eliberate, intentional and reckless conduct alike may attract tort liability for negligence if the conduct satisfies the definition of negligence, which is in terms of failure to attain a certain standard. In this way, the concept of negligence in tort law is rather different from the non-legal concept of carelessness, which implies inadvertence or lack of deliberation."); RESTATEMENT (SECOND) OF TORTS § 282 (stating that the fundamental question in negligence law is whether conduct falls below the "standard established by the law for the protection of others against unreasonable risk of harm"); COLEMAN, *supra* note 18, at 217 ("An action is at fault when it fails to measure up to the relevant standard of conduct."); COLEMAN, *supra* note 18, at 332 ("If she has failed to take reasonable care, then her conduct falls below an *objective* standard of conduct.").

"reasonable person."[41] Judging a defendant's conduct by a reasonableness standard is often referred to as the "negligence rule."

When discussing negligence, four points must be clear. First, unlike intentional, reckless, fraudulent, or malicious conduct, negligence does not depend upon the defendant's mental state. All that matters is the factual relationship between the defendant's conduct and the legal standard. Hence, a defendant who unintentionally engages in unreasonable conduct is just as negligent as a defendant who intentionally engages in unreasonable conduct. This principle informed Professor Henry Terry's statement that negligence is "conduct, not a state of mind."[42]

Second, the negligence rule is distinguishable from the "tort of negligence."[43] The tort of negligence is a cause of action that sanctions a defendant for taking unreasonable risks that cause harmful accidents.[44] The negligence rule, by contrast, is not a cause of action, but the standard by which the conduct is judged.[45] The negligence rule is therefore applied in the tort of negligence, but equally the negligence rule is also applied in other causes of action, such as private nuisance[46] or defamation.[47]

Third, the concept of "reasonableness" has no precise definition. It is a flexible standard that changes depending upon the facts of the case. Nevertheless, reasonableness is most commonly explained in consequentialist terms.[48] Whether conduct is reasonable depends upon whether it creates

41. DOBBS, *supra* note 2, § 117; Vaughan v. Menlove, (1837) 132 Eng. Rep. 490 (C.P.); 3 Bing. N.C. 468 (holding a defendant liable although he could not have done any differently due to a disability).

42. Henry Terry, *Negligence,* 29 HARV. L. REV. 40, 40 (1915); *see also* CANE, *supra* note 18, at 111 (2002) (law "recognises that failure to comply with standards of conduct can be culpable regardless of choice").

43. CANE, *supra* note 22, at 36.

44. *Id.*

45. *Id.*

46. RESTATEMENT (SECOND) OF TORTS § 822 (requiring "unreasonable" interference with land).

47. *Id.* § 558 (requiring "fault amounting at least to negligence").

48. I certainly do not mean that a deontological interpretation of reasonableness is impossible. But even deontological scholars have noted that negligence is usually discussed in consequentialist terms. *See e.g.* Heidi M. Hurd, *The Deontology of Negligence,* 76 B.U. L. REV. 249 (1996) ("It should be a great puzzle to those who consider themselves deontologists that the concept of negligence is most often, and certainly most clearly, defined in the moral language common to consequentialists."); *see also* George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972) (associating the "reasonableness paradigm" with the dominant instrumentalist and utilitarian philosophy in U.S. tort scholarship).

greater benefit or cost for society.[49] In these terms, the reason why negligent conduct is deemed wrongful is that it forces negative consequences upon the rest of society. In the tort of negligence, this takes the form of increased risk of harmful accidents.

Fourth, the types of cost and benefits that are salient to the consequentialist balancing determination are often different across different torts. For example, in the tort of negligence, where the proscribed conduct is risk-taking, the relevant cost is the increased probability of an accident and the benefit is the reduction of resources spent on avoiding the accident. As Judge Learned Hand explained, in the tort of negligence, it is reasonable to take risks where the cost of precaution exceeds the expected accident costs.[50] Alternatively, it is unreasonable to take risks where the expected accident costs exceed the cost of precaution. But this formula clearly does not apply to the negligence rule as it appears in other causes of action. For example, in certain circumstances, the tort of private nuisance may also be said to adopt a negligence rule.[51] A private nuisance is a substantial and unreasonable interference with the use and enjoyment of land. Whether a defendant's conduct is reasonable depends, in some interpretations, upon a consequentialist balancing test. But here the relevant costs and benefits of the action that are weighed are not the cost of precaution and benefit of avoiding an accident. Instead they are the gravity of the interference and the social utility of the activity.[52] Because the causes of action govern different types of conduct, the utilitarian balancing calculus necessarily is based on different parameters.

In addition to these points, we must also distinguish cases where the law uses a standard to judge the wrongfulness of a defendant's conduct from

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49. John C.P. Goldberg and Benjamin Zipursky, *Torts as Wrongs*, *supra* note 20, at 936 ("For utilitarians, it is said, the wrongfulness of conduct hinges on the probability that the conduct will produce net disutility (more pain than pleasure).").

50. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (holding that liability is imposed when the cost of the burden is less than the gravity of injury multiplied by probability of it occurring).

51. Cane, The Anatomy of Tort Law, supra note 22, 145 ("The requirement of unreasonableness is practically equivalent to a requirement of negligence: the interference with use and enjoyment must have been foreseeable, and it must be greater than it is reasonable to expect P to put up with."); William M. Landes & Richard A. Posner, The Economic Structure of Tort Law 41–53, 45 (1987) ("In most nuisance cases the standard is not strict liability but reasonableness, equivalent to nonnegligence.") In the economic interpretation of tort law, nuisance adopts a simple negligence rule but it is assumed that harm is certain, rather than merely probable. As a result, judges do not compare the costs of precaution against the ex ante expected cost of harm, but simply against the ex post total cost of harm.

52. RESTATEMENT (SECOND) OF TORTS § 826(a).

cases where the law uses a standard simply to define the scope of a legal right. This is a subtle distinction, and one that is under-theorized, but is best demonstrated by private nuisance. In some interpretations, land owners are deemed to have a right only to the "reasonable use and enjoyment of land."[53] The land owner has a right to maintain an object in a certain condition (i.e., that use and enjoyment be maintained at a reasonable level). Thus, if the court asks, "did the defendant's actions cause the plaintiff's use and enjoyment to drop below a reasonable level?" then the court is simply asking whether the defendant infringed a right.[54] By contrast, if, after deciding that the defendant's right to reasonable use and enjoyment has been infringed, the court proceeds to ask "did the defendant behave reasonably?" (where reasonable conduct is defined as producing greater benefits than cost), then the court is asking whether the defendant's conduct was wrongful.[55] Thus, in both cases, the law employs a standard to aid its determination, but in the former case, the court uses that standard to determine whether a right was infringed, and in the latter case, it uses a standard to determine whether the rights-infringement was wrongful.[56]

Finally, some more general points on the distinction between state of mind fault and standard of conduct must be highlighted. State of mind fault is often referred to as fault in the actor.[57] By contrast, standard of conduct fault is often referred to as fault in the action.[58] This refers to the fact that the fault in the former case is internal to the defendant, whereas in the latter case the fault is in the defendant's external actions. Similarly, state of mind fault is subjective (i.e., its existence depends on what the defendant was thinking at the time). On the other hand, standard of conduct fault is objective.[59] The existence of this fault does not depend on the actor's personal point of view; all that matters is the factual relationship between his conduct and the standard.[60]

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53. Keating, *Nuisance*, *supra* note 18, at 14.

54. *Id.* at 35–42; Richard Wright, *Private Nuisance Law: A Window on Substantive Justice*, *in* ANDREW ROBERTSON & DONAL NOLAN, RIGHTS AND PRIVATE LAW 491, 502–08 (2011).

55. *Id.* at 35–42; WILLIAM M. LANDES & RICHARD A. POSNER, ECONOMIC STRUCTURE OF TORT LAW 39 (1987) (calling the reasonable use nuisance rule and a negligence rule "essentially equivalent.").

56. Keating, *Nuisance*, *supra* note 18, at 39 (finding such balancing "akin to a judgment of fault in negligence"); *id.* at 40 (finding the balancing test in nuisance to be similar to the "application of the Hand formula with probability dropped out, because the harm is certain to occur").

57. COLEMAN, *supra* note 18, at 217.

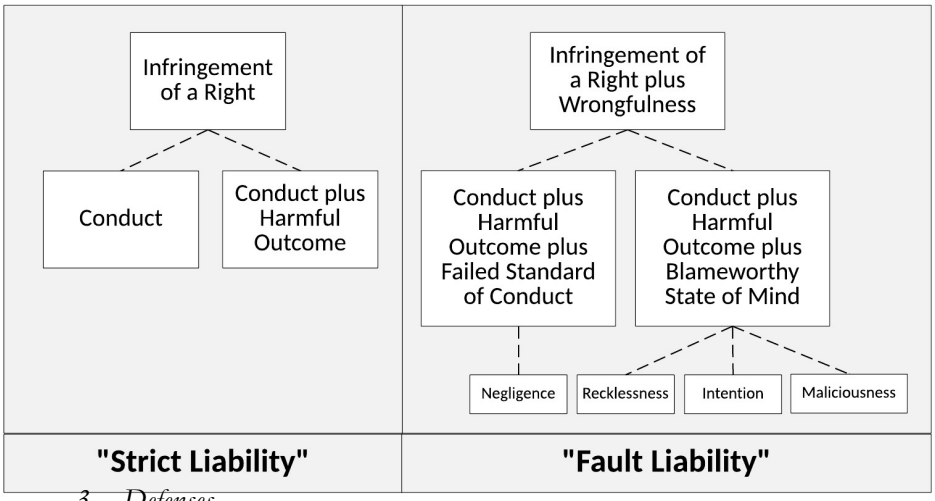
58. *Id.*

59. *See id* at 225, 228.

60. *See* Terry, *supra* note 42, at 40.

Diagram 1 summarizes the difference between the elements of the prima facie case under strict liability rules and fault liability rules. The left side of the diagram represents strict liability rules, demonstrating that liability is imposed only upon the infringement of a right, which sometimes require proof only of conduct and sometimes requires additional proof of harmful outcome. The right side of the diagram represents fault liability rules and demonstrates that such liability is conditioned not only upon rights-infringement but also on wrongfulness, where wrongfulness is understood as either the failure to comply with a standard of conduct or acting with a blameworthy state of mind.

Diagram 1



3. Defenses

Once the plaintiff has established the elements of the prima facie case, the defendant is considered responsible for the accident as an initial matter. He then has the opportunity to exculpate himself by introducing affirmative defenses. The distinction between strict liability and fault liability can also be demonstrated by examining the defenses available under each liability rule.

We must first begin by separating three classes of affirmative defenses: plaintiff fault, justification, and excuse. Plaintiff fault defenses assert that the defendant should not be held liable because the plaintiff was at fault for his injury.[61] The most common example of this is the contributory negligence

61. COLEMAN, *supra* note 18, at 227 ("an injurer is strictly liable but is given the opportunity to defeat his liability by showing the plaintiff himself is at fault"); Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974) (in addition to defenses of assumption of risk and plaintiff trespass, Epstein also believes the absence of causation is also a valid defense in strict liability actions; this Article takes the

defense.[62] If the defendant can prove that the plaintiff's negligence contributed towards his injury, then the defendant will be exculpated. Other examples include where the plaintiff has voluntarily assumed the risk,[63] or, in products liability cases, where the plaintiff has altered or misused the product, resulting in his injury.[64]

Justifications assert that, although the defendant has caused the plaintiff some harm, this conduct was not wrongful.[65] Instead, causing harm in this scenario was the right thing to do, and perhaps something the law aims to encourage. Classic examples include self-defense in battery cases[66] or truth in defamation cases.[67] Even though reasonable acts of self-defense may cause physical harm, and unfavorable published statements may cause reputational harm, the law takes the view that an individual can rightly engage in this conduct in certain situations.[68]

Unlike justifications, excuses do not assert that the defendant's conduct was rightful. Instead, excuses are assertions that the defendant's conduct was understandable given his personal condition and, therefore, he is not personally blameworthy.[69] For example, in certain circumstances, the defenses of mental disability, infancy, and mistake exist to exculpate the defendant from tort liability. Unlike justifications, which focus on whether the defendant's actions were objectively wrongful or not, excuses focus on the subjective characteristics of the defendant.[70] Excuses are less commonly

view that absence of causation is not an affirmative defense but a claim that the prima facie case has not yet been established).

62. *See generally* DOBBS, *supra* note 2, § 199.

63. *See generally* DOBBS, *supra* note 2, § 211.

64. *See generally* DOBBS, *supra* note 2, § 370.

65. DOBBS, *supra* note 2, § 69 ("When a judge believes the defendant's harmful act was justified, the judge believes that people in general can rightly act as the defendant did."); JAMES GOUDKAMP, TORT LAW DEFENCES 76 (2013) ("Justificatory defences have been defined as defences that enable the defendant to escape from liability because, in committing a tort, the defendant acted reasonably.").

66. RESTATEMENT (SECOND) OF TORTS § 65.

67. *Id.* § 581A.

68. Admitedly, whether truth is an affirmative defense or, alternatively, whether falsity is an element of the prima facie claim is a doctrinally uncertain issue. See DOBBS, *supra* note 2, § 410 (noting that although the "mainstream common law thus recognizes truth as an affirmative defense . . . [,] Constitutional decisions have shifted the burden of proof on the issue of truth or falsity in cases involving certain public officials, public figures, or public-concerning issues . . . .").

69. DOBBS, *supra* note 2, § 69 (excuses "assert that the defendant's conduct was understandable given his personal condition and that he is not personally blameworthy for matters not within his control. Excuses focus on subjective mental or psychological characteristics of the actor."); GOUDKAMP, *supra* note 65, at 83–85.

70. DOBBS, *supra* note 2, § 69.

available in tort law than justifications. This reflects the fact that the bulk of tort law deals with objective, not subjective, standards of liability.[71]

Crucially, the only class of defense available under a strict liability rule is plaintiff fault. Assumed risk, contributory negligence, and, in the case of products liability, unforeseen misuse and modification are the common methods of exculpation. However, as justification and excuse are not admissible affirmative defenses, strict liability is said to be liability "not defeasible by either excuse or justification."[72] By contrast, justification and excuse are admissible affirmative defenses under fault liability rules.

The reason for this distinction between strict liability and fault liability defenses is clear. Justifications and excuses both assert that the defendant was not at fault.[73] Justifications assert that the defendant's conduct was objectively not wrongful, and therefore there is no fault in the action.[74] Excuses assert that, although the defendant's conduct was wrongful, the individual is not morally blameworthy for the action; there is no fault in the actor.[75] As fault liability rules condition liability upon the existence of the defendant's fault, the defendant's claim that his actions were justifiable or excusable, and hence that he was not at fault, is relevant to the ultimate question of liability. By contrast, strict liability rules do not condition liability upon the existence of defendant fault, and hence the defendant's argument that he was not at fault does not affect the liability decision. In this case, asserting justifications or excuses is simply irrelevant.

B. THE ECONOMICS OF STRICT LIABILITY AND FAULT LIABILITY

The doctrinal Section explained the legal difference between strict liability and fault liability, but it did not explain why the law is structured this way. This Section uses economics to explain the function of the law and demonstrates how both strict liability and fault liability rules serve that function.

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71. COLEMAN, *supra* note 18, at 224 ("tort liability is not generally defeasible by excuses."); Joseph Raz, *Responsibility and the Negligence Standard,* 30 OX. J. LEGAL STUD. 1, 10 (2010) ("Excuses excuse from punishment and more, but are not relevant to compensation.").

72. COLEMAN, *supra* note 18, at 220; JEFF MCMAHAN, KILLING IN WAR 44 (2009) ("Strict liability in tort law is liability that is defeasible neither by excuse nor by justification.").

73. *Id.* at 217–20.

74. *Id.* at 217–18.

75. *Id.* Such defenses should also be distinguished from privileges or so-called "public policy defenses." *See generally* GOUDKAMP, *supra* note 66, § 5.3.

1. Economics Foundation

Economic analysis rests on a consequentialist philosophical foundation that whether an action is right or wrong depends on whether its consequences are good or bad.[76] Whether conduct is good or bad depends on whether it creates greater benefits or costs for society. Conduct that creates greater benefits than costs is known as social welfare maximizing conduct.[77] This conduct may also be described as efficient behavior, as such actions allocate resources towards uses that yield optimal welfare results.[78] As humans usually try to act in ways that bring about greater benefits than costs, we often naturally act in welfare-maximizing ways.

However, in a subset of cases, people fail to act in welfare maximizing ways. This occurs because the private costs and benefits that an individual incurs from an action often differ from the social costs and benefits.[79] Most commonly, this happens when the cost of an individual's actions are borne not by himself, but by someone else. In such a case, the actor receives the benefit of his action but does not suffer the cost. This is known as a "negative externality." Since the actor receives greater benefit than he does cost, he will take the action. However, it may be that, when all of the benefit and cost for everyone in society is taken into account, the social cost of the action is higher than the social benefit. Accordingly, in this case the actor has an incentive to act in a way that reduces social welfare.

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76. Specifically, it rests on a utilitarian basis. This article therefore departs from the view, once held by Richard Posner, that law and economics rests on a deontological (specifically Kantian) foundation. *See* Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); Richard Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980). For a critique of such a position, see, for example, Jules L. Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221, 237–47 (1980); Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization,* 8 HOFSTRA L. REV. 509, 525 (1980);

77. COOTER & ULEN, *supra* note 5, at 37–43; LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 15–38 (2002). In discussing the maximization of welfare, this Article takes a different approach to law and economics than those that rest on maximization of wealth. *See, e.g.*, Posner, *Utilitarianism*, *supra* note 76; Posner, *Efficiency*, *supra* note 76. This Article takes the view that wealth is at best a poor proxy for welfare. *See generally* Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980).

78. *See* RICHARD A. POSNER, THE ECONOMIC ANALYSIS OF LAW § 1.2 (2010). Accordingly, this paper uses efficiency in the sense of Kaldor-Hicks efficiency rather than Pareto Optimality. Resources are efficiently allocated in such a way that those better off could compensate those who are made worse off by the resource distribution.

79. COOTER & ULEN, *supra* note 78, at 39–40.

2. The Economic Goal of Tort Law

Tort law performs multiple functions. One aspect of the tort system is economic in nature. From an economic perspective, the function of tort law is to give people incentives to behave efficiently. In the absence of tort law, this would often not occur due to a negative externality problem. We can illustrate this problem with a hypothetical example.

Imagine that person A owns a house with a fireplace. There is a ten percent probability that a spark will escape and set fire to the roof of his neighbor's, B's, house. If this occurs, the damage to B's roof will be $1000. Multiplying the amount of damage with the probability of its occurrence provides the expected accident costs—in this case $100. Now imagine further that A has the option of buying a spark-catching device for a cost of $80 that will completely prevent sparks from escaping. In such a scenario buying the device would maximize social welfare. Buying the device will impose a cost of $80, but results in a benefit as $100 in expected accident costs are forgone. The marginal cost imposed by the device is outweighed by the marginal benefit. However, while buying the device maximizes social welfare, it does not maximize A's private welfare. By not buying the device, A benefits by saving $80 and the expected $100 cost of this action is borne by B. Alternatively, buying the device would require him to pay $80 and receive no benefit in return. Therefore, in the absence of legal regulation, A is unlikely to take the efficient action and buy the device.

On the other hand, in some cases the benefit of avoiding the harm would be outweighed by the cost of precaution. For example, imagine that the device costs $110, not $80. In this case buying the device would decrease social welfare: the cost of precaution outweighs the expected accident costs. Buying the device would impose a total cost of $110 on society and only result in saving $100. As the benefit is lower than the cost, the act of buying the device would be inefficient and therefore ought to be avoided, even though doing so may result in causing damage to B's roof.

The economic goal of tort law is to prevent externality problems like this one and provide individuals with incentives to behave efficiently. It accomplishes this goal through the imposition of liability. By making the actor pay a fee to the injured party (the externality bearer) the law shifts the costs of the action onto the actor. Doing so forces the actor to internalize the costs of his conduct.[80] Therefore, when deciding how to act, the actor's own

80. *Id.* at 190 ("The economic essence of tort law is its use of liability to internalize externalities created by high transaction costs." (emphasis omitted)).

private cost-benefit analysis will take into account the full cost of his action. Thus, he will only act when the total benefit is greater than the total cost.

When imposing liability, tort law relies on two categories of liability rules: strict liability and fault liability. The next sections demonstrate how both strict liability and fault liability rules encourage the actor to behave efficiently. Before moving onto the precise workings of these rules, we must point out a definitional difficulty. Both doctrinalists and economists discuss strict liability rules and fault liability rules. However, when economists talk about strict liability, they typically mean harm-based strict liability.[81] Likewise, when they discuss fault liability, they typically mean negligence rules. Economic literature contains little discussion of intentional fault in tort law; instead this is often covered in the discussion of criminal law.[82] In keeping with this pattern, this Section shall discuss only the economics of harm-based strict liability and negligence rules.

3. Strict Liability Rules

Harm-based strict liability is liability imposed any time that a defendant's conduct causes a harmful outcome. In economic terms, this means that the actor will be liable every time he imposes a cost on someone else.[83] To see how such strict liability promotes efficient behavior on the part of the actor, consider the situation once again with A and B.

Imagine that the fire catching device costs $80. In this situation, buying the device increases social welfare. Now, A has an incentive to act efficiently. When deciding whether to buy the device, A has two options: either buy the device for $80, or do not buy the device and expect to pay $100 in accident cost. Assuming that he is a rational welfare maximizer, A now has an incentive to buy the device. Doing so will result in him paying $80 on the device rather than $100 in expected liability.

Alternatively, if the device costs $110, then the cost it produces is greater than the benefit. In such circumstances, A will not buy the device. Once again, he has two options: either buy the device for $110, or do not buy the device and expect to pay $100 in liability. As liability is the cheaper option, he has an incentive not to buy the device. Therefore, the operation of the strict liability rule creates incentives for the actor to behave efficiently.

81. *See, e.g.*, *id.* at 201–04.

82. *Id.* at 188; MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 64 (2010) (calling the economic analysis's theory of intentional torts as "precarious and marginal").

83. COOTER & ULEN, *supra* note 5, at 201–04.

4. Negligence Rules

As discussed in the preceding Section, under a negligence rule, the defendant will be liable only when he causes a harmful outcome through engaging in conduct that a reasonable person would not engage in. As seen, the law deems that a reasonable person would only take actions when the marginal benefit of the action outweighs the marginal cost. Thus, in the economic interpretation, the determination of a reasonable person is a question of whether the defendant behaved efficiently. Under a negligence rule, defendants will not be liable when their conduct is efficient, but will be liable when it is inefficient.[84]

Consider the effects of this liability rule on the behavior of the hypothetical defendant, A. Firstly, consider the case where the device costs $80. Once again, A has two options: buy or do not buy. He knows that if he does not buy the device and an accident results, the court will ask whether taking this risk was reasonable. As the cost of the device is outweighed by the benefit of buying the device, the court will find this unreasonable. In this scenario, A's expected liability is $100. Alternatively, he could buy the device for $80 and thus avoid liability completely. Therefore, he has an incentive to buy the device.

Alternatively, imagine the device costs $110, and that buying it would decrease social welfare. Once again, A can either buy the device or not buy it. If he does not buy it and an accident occurs, he knows the court will ask whether this action was reasonable. As the cost of the precaution is greater than the expected cost of the accident, he knows that the court will deem his failure to take care to be reasonable. Therefore, if he does not buy the device, he spends no money on the device and pays no money in liability. As this is cheaper than buying the device for $110, A has an incentive not to buy it, and once again acts in accordance with the demands of social welfare.

5. The Substantive Difference between Strict Liability and Negligence

Thus, both strict liability and negligence rules give the actor efficient incentives and promote social welfare.[85] Nevertheless, the rules achieve this

84. *Id.* at 205–08.

85. However, a simple negligence rule is potentially superior over a simple strict liability rule when one considers not only the rule's affect on the actor's incentives, but also the incentives of the victim. A negligence rule provides incentives for efficient levels of care from both parties, whereas strict liability does not. *See* COOTER & ULEN, *supra* note 5, at 204–08. This defect in strict liability can be overcome through the supplementary addition of a contributory negligence defense. *Id.* at 208–11. In which case, both negligence and strict liability rules can provide incentives for bilateral care. In such circumstances, which is the superior rule depends on how the rules affect the parties' activity levels. *Id.* at 211–13.

goal in diverging ways. Strict liability and negligence differ in how they distribute costs between the parties.[86] Strict liability holds the actor liable whenever his actions cause an accident, regardless of whether his actions are efficient. As the actor knows that he will be liable for every accident, the cost of his action is always internalized to him. And the person who initially bears the externality, the injured party, is not required to bear the accident cost. Compare this to the situation under a negligence rule. Now the actor is only liable when his actions are inefficient. If he acts efficiently, then he faces no liability. Therefore, he only internalizes the cost of inefficient behavior. When the actor does act efficiently, the externality bearer is the one who must bear the accident cost. Hence strict liability is more favorable for plaintiffs than for defendants.

III. STRICT LIABILITY AND FAULT LIABILITY IN COPYRIGHT INFRINGEMENT

The preceding Part demonstrated the doctrinal and economic differences between strict liability and fault liability rules. This Part will apply these insights to decide whether copyright infringement is a strict liability or fault-based tort. Section A summarizes the main doctrinal features of the copyright infringement action. Section B discusses existing theories of copyright infringement, highlighting the orthodox view that copyright infringement is a strict liability tort. Sections C and D explain the thesis that copyright infringement is a fault-based tort. Section C discusses this thesis from a doctrinal perspective while Section D uses a law and economics method. Finally, Section E responds to criticisms of the thesis and introduces one caveat into the analysis.

A. BASIC COPYRIGHT DOCTRINE

This Section introduces the reader to the prima facie case in a copyright action before discussing the most important affirmative defense, the fair use doctrine.

1. The Prima Facie Case

Upon fixing an original work of authorship in a tangible medium, the author automatically receives copyright protection over the work.[87] Under the 1976 Copyright Act, copyright protection provides the author with a

86. In addition to substantive differences, the two rules also differ in the level and type of administrative costs they create for the legal system. *See id.* at 223–24; RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 178–81 (2007).

87. 17 U.S.C. § 102 (2012).

bundle of exclusive rights.[88] Taken together, these rights provide the author with the exclusive ability to copy the work.[89] In order to establish a prima facie case of copyright infringement, the plaintiff must demonstrate two facts.[90] Firstly, he must show that the defendant copied from the plaintiff's work. Secondly, he must demonstrate that through this copying, the defendant produced a substantially similar work.

In order to prove copying, the plaintiff must demonstrate that the defendant either mechanically copied the work (e.g., by photocopying the work) or alternatively that the defendant had the plaintiff's work in mind when creating a new work.[91] However, in this latter case, it is not necessary for the defendant to be consciously aware that he is copying from the plaintiff's work.[92] This was most famously demonstrated in the *Harrisongs* case.[93] In 1971, former Beatle George Harrison was held liable for copying the Chiffon's hit single, *He's So Fine*, when creating his song, *My Sweet Lord*. Harrison argued that he did not consciously copy the song, and that if he did copy it, he did so without awareness of his actions. However, the court concluded that even subconscious copying constituted a copyright infringement. Harrison had heard the Chiffon's song in the past, and, when creating *My Sweet Lord*, subconsciously brought it to mind and copied its main elements. This was sufficient copying to impose liability.

Once copying is established, the plaintiff must show that this copying resulted in the production of a work that is substantially similar to the copyright holder's work.[94] In cases where the defendant has copied the work verbatim, this is an easy requirement to satisfy. In cases, such as the *Harrisongs* case, where the defendant has not copied verbatim, the plaintiff must prove that the audience for the plaintiff's work would perceive substantial similarities between the two works. Lastly, it is important to note that the plaintiff only satisfies the prima facie case if he can prove that the production of a substantially similar work was the result of actual copying.[95] If the defendant creates a substantially similar work, but did so through a

88. *Id.*

89. *Id.*

90. Arnstein v. Porter 154 F.2d 464 (2d Cir. 1946); *see also* 4 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 (2010); 2 GOLDSTEIN, *supra* note 13, § 9.1.

91. 2 GOLDSTEIN, *supra* note 13, § 9.2.

92. *Id.*

93. Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976).

94. 2 GOLDSTEIN, *supra* note 13, § 9.3.

95. *See id.* § 9.2.

chance independent re-creation, then he is not liable no matter how similar the works are.[96]

2. Fair Use

If the plaintiff proves copying and substantial similarity, he has successfully established a prima facie case against the defendant. The burden then shifts to the defendant to exculpate himself through the introduction of affirmative defenses. The most important of these defenses is the fair use doctrine.

According to the Copyright Act, the copyright holder's exclusive rights are granted "subject to" the fair use doctrine.[97] This doctrine establishes that it is "not an infringement" to copy a copyrighted work in cases where copying is "fair."[98] If the planned copying is a fair use, the copyist need not receive the author's consent in order to copy, nor pay a license fee, nor pay damages after the copying takes place. Since its inception, and eventual codification into statute, this doctrine has become a fundamental part of the copyright infringement analysis with application in a great variety of cases. For example the fair use doctrine has been applied to legitimize copying for the purposes of parody,[99] time-shifting television programs,[100] reproducing thumbnail versions of images,[101] playing a political opponent's campaign theme music,[102] digitizing books,[103] quoting from private and unpublished letters,[104] reverse engineering computer programs in order to create interoperable programs,[105] and displaying cached websites in search engine results.[106]

Nevertheless, despite becoming one of the most venerated and important doctrines in copyright, it is also one of the most mysterious.[107] The term

96. *See, e.g.*, Calhoun v. Lillenas Publ'g, 298 F. 3d 1228 (11th Cir. 2002).
97. 17. U.S.C. § 106–07 (2012).
98. *Id.* § 107.
99. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
100. Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417 (1984).
101. Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).
102. Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957 (D.N.H. 1978).
103. Authors Guild, Inc. v. Hathitrust, 755 F.3d 87 (2d. Cir. 2014).
104. Wright v. Warner Books, Inc., 953 F.2d 731 (2d Cir. 1991).
105. Sega Enters. Ltd. v. Accolade, Inc. 977 F.2d 1510 (9th Cir. 1992).
106. Field v. Google, Inc., 412 F. Supp. 2d 1106 (D. Nev. 2006).
107. Professor Lawrence Lessig famously declared fair use so vague and unpredictable that it was nothing more than the "right to hire a lawyer." *See* LAWRENCE LESSIG, FREE CULTURE 187 (2004). However, more recently a number of empirical studies have sought to demonstrate that the doctrine is more consistent than first appreciated. *See, e.g.*, Barton Beebe, *An Empirical Analysis of U.S. Copyright Fair Use Opinions, 1978–2005,* 156 U. PA. L.

"fair" has no exact definition, and ultimately whether a use is fair is a question left for judicial determination. The breadth of the doctrine's application coupled with its lack of succinct definition has resulted in commentators calling it "the most troublesome" doctrine in copyright law.[108]

However, the Copyright Act does provide some guidance on the content and meaning of fairness. Firstly, it provides some illustrative examples of fair uses. According to the Act, copying is fair for the purposes of criticism, comment, news reporting, teaching, scholarship, or research.[109] Secondly, the Act provides a list of four non-exhaustive factors that courts ought to consider in determining whether a use is fair. Those factors are (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market or value of the copyrighted work.[110] It has been said that this last factor, often known as the market harm factor, is "undoubtedly the single most important element."[111]

When discussing the four factors, two further points are relevant. Firstly, each factor is vague and leaves room for substantial judicial interpretation. Hence, courts discussing the purpose and character of the use have decided that whether a use is "transformative" (defined as altering the original work by adding "new expression, meaning, or message") is an important consideration.[112] Likewise, when discussing the nature of the protected work, courts have drawn a distinction between fictional works (which receive greater protection) and factual works (which receive less protection).[113] And secondly, because the factors are non-exhaustive, the court has room to

REV. 549 (2008); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009); Neil W. Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV 751 (2011); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012).

108. Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939); *see also supra* note 107.

109. 17 U.S.C. § 107 (2012); although even for these enumerated uses, some may argue that they must also comply with the four factor analysis; *see, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985) (Congress "resisted pressures from special interest groups to create presumptive categories of fair use"); Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1258 (2014).

110. *Id.*

111. *Harper & Row*, 471 U.S. at 566. However, courts have arguably retreated from this position in subsequent decisions. *See* Sag, *supra* note 108, at 63.

112. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994); *see also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1994).

113. *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. at 563; *Campbell*, 510 U.S. at 586.

supplement them with other considerations. Consequently, we see other considerations, independent of the four factors, affecting fair use determinations. One such consideration is whether the defendant acted in accordance with customary standards of fair dealing.[114]

Given the complex and open-ended nature of this doctrine, various scholars have appealed to the normative foundations of copyright in order to clarify when fair use does and ought to apply. In the remainder of this Section, we shall introduce two of the most important theories: the "market failure" theory and the "balancing of public interests" approach.[115]

a) The Market Failure Approach

In an influential article, Professor Wendy Gordon argued that fair use exists to cure market failures caused by copyright protection.[116] Copyright protection attempts to cure a public-goods market failure: in the absence of exclusivity, expressive works will be under-produced. However, in some cases, the very existence of copyright protection will lead to further market failures. Most importantly, when transaction costs of licensing are high or when copying would lead to significant positive externalities for society, the market mechanism may break down. As the potential users cannot negotiate a license, society forgoes some socially beneficial copying. This suggests that fair use should exist to cure such copyright-induced market failures. That is, a use should be held fair when the planned use is socially beneficial and when the application of the normal copyright rights would result in a market failure which would prevent this socially beneficial copying from occurring.

The Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.*[117] subsequently cited Professor Gordon's article, and held that recording television programs for the purpose of watching them at a later time (i.e., time-shifting) is fair. One interpretation of this decision is that time-shifting

114. *Harper & Row*, 471 U.S. at 562; *see* Jennifer Rothman, *Copyright, Custom, and Lessons from the Common Law, in* SHYAMKRISHNA BALGANESH, INTELLECTUAL PROPERTY AND THE COMMON LAW 230, 237–40 (2013).

115. A third theory, a "harm-based" approach, proposed by Professor Christina Bohannan shall be discussed later in separating the concepts of harm and fault within copyright law. *See* Christina Bohannan, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969 (2007).

116. 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 (1982). I Have simplified Professor Gordon's Analysis slightly for brevity purposes. Professor Gordon's original analysis also required, as a third element, that the plaintiff would not be substantially harmed by the use. This present Article assumes that a work cannot be socially beneficial if it would involve "substantial" harm to the author's economic interests.

117. 464 U.S. 417, 478 (1984).

is considered to be fair because it is socially beneficial, but unlikely to occur if subject to the normal copyright rules. As Professor Gordon argued, it is likely that the home users that engaged in such time-shifting would find the transaction costs of negotiating licenses for this use to be prohibitively high.[118]

b) The Balancing of Public Interests Approach

More recently, the market failure approach has come under scrutiny. In 2002, Professor Glynn Lunney has argued that the market failure theory of fair use was fundamentally flawed.[119] In his understanding, this theory fails to adequately take into account the public goods nature of expressive works. Public goods are non-rivalrous, meaning that multiple people can use them at any given moment without depletion. From a static perspective, these uses are always welfare enhancing because they allow people to enjoy the work and obtain value from it without causing any cost to anyone else. In this case, creating legal exclusivity to prevent people from using the work always results in forgone welfare. Thus, we see the catch-22 in which copyright is situated. Without excludability, these works would not be created due to a public goods market failure, but when excludability is legally engineered, it necessarily results in another market failure where the good will be sub-optimally used. Ultimately, copyright always creates a market failure of some sort. Once it is acknowledged that copyright always results in market failure, the market failure concept "cannot serve as a useful guide" in determining when fair use ought to apply.[120]

If we then remove the concept of market failure from the fair use analysis, the only criterion left to judge whether a use is fair is whether the copying would be socially desirable. Thus, Professor Lunney argues that fair use ought to apply when the copying would better serve the public interest. Whether the copying serves the public interest depends on a balance between two variables. On one hand, if the copying is allowed to continue without compensation, then this may "lead to fewer works of authorship by reducing the incentives to create such works."[121] On the other hand, allowing such copying may "improve the public's ability to use, transform, or otherwise

118. Gordon, *supra* note 104, at 1653–57.

119. Glynn Lunney, Jr., *Fair Use and Market Failure: Sony Revisited,* 82 B.U. L. REV. 975, 993–96 (2002).

120. *Id.* at 996.

121. *Id.* at 977.

obtain access to the existing work."[122] This is known, infamously in copyright discourse, as the incentive-access paradigm.[123]

Furthermore, Professor Lunney believes that courts already use the incentive-access paradigm as a guide to fair use determinations. In *Sony*, the Supreme Court argued that fair use exists to provide a "sensitive balancing of interests."[124] According to the Court:

> The fair use doctrine must strike a balance between the dual risks created by the copyright system: on the one hand, that depriving authors of their monopoly will reduce their incentive to create, and, on the other, that granting authors a complete monopoly will reduce the creative ability of others.[125]

In Professor Lunney's interpretation, the Supreme Court held that time shifting was fair use because such time shifting "yield[s] societal benefits" by "expand[ing] public access to freely broadcast television programs."[126] While at the same time there was no evidence to believe that this time-shifting would cause significant market harm to the copyright holders. This reasoning reveals that the Court's ultimate focus is simply upon the question of whether the copying was socially beneficial. Such statements indicating that a balancing test lies at the heart of fair use continue to today.[127]

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122. *Id.*

123. This article does not intend to examine in great detail the nature of the incentive-access paradigm. Striking the balance between these two variables has been called "the central problem in copyright law." *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989). As a result, enough literature already explores this issue. *See particularly*, Glynn S. Lunney, Jr., *Reexamining Copyright's Incentive-Access Paradigm,* 49 VAND. L. REV. 483, 485–86 (1996); Oren Bracha & Talha Syed, *Beyond the Incentive-Access Paradigm? Product Differentiation and Copyright Revisited,* 92 TEX. L. REV. 1841 (2014).

124. Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 456 n.40 (1984).

125. *Id.* at 454.

126. *Id.*

127. *See, e.g.*, Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1151 (9th Cir. 1986) (holding that the fair use doctrine "is a means of balancing the need to provide individuals with sufficient incentives to create public works with the public's interest in the dissemination of information"); Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 551 (S.D.N.Y. 2008) ("In striking the balance between the property rights of original authors and the freedom of expression of secondary authors, reference guides to works of literature should generally be encouraged by copyright law as they provide a benefit readers and students." However, authors "should not be permitted to 'plunder' the works of original authors, without paying the customary price, lest original authors lose incentive to create new works that will also benefit the public interest." (citations and quotation marks omitted)); Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1273 (11th Cir. 2014) (noting that "fair use must operate as a 'sensitive balancing of interests' " (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994)); Corporation of Gonzaga Univ. v.

B. EXISTING THEORIES OF COPYRIGHT INFRINGEMENT

With an understanding of basic copyright doctrine, we are now in a position to ask whether the liability rule is strict or based on fault. This Section will summarize the existing scholarship on this question. We first introduce the orthodox view that copyright is strict and then turn to an alternative analysis provided by Professor Steven Hetcher.

1. The Orthodox View

Judges[128] and copyright scholars[129] routinely (if not ubiquitously) refer to copyright infringement as a strict liability tort.[130] Unfortunately for our

Pendleton Express, LLC, No. CV-14-0093-LRS, 2014 WL 4792032, at *8 (E.D. Wash Sept. 25, 2014) (holding that fair use "is designed primarily to balance the exclusive rights of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern, such as art, science and industry" (quotation marks omitted)).

128. *See, e.g.*, Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 308 (2d Cir. 1963) (noting the "harshness of the principle of strict liability in copyright law"); Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., 907 F. Supp. 1361, 1370 (N.D. Cal. 1995) ("Although copyright is a strict liability statute, there should still be some element of volition or causation . . . ."); Educ. Testing Serv. v. Simon, 95 F. Supp. 2d 1081, 1087 (C.D. Cal. 1999) (copyright infringement "is a strict liability tort"); King Records, Inc. v. Bennett, 438 F. Supp. 2d 812, 852 (M.D. Tenn. 2006); ("[A] general claim for copyright infringement is fundamentally one founded on strict liability."); Gener-Villar v Adcom Grp, Inc, 509 F. Supp 2d 117, 124 (D.P.R. 2007) ("[T]he Copyright Act is a strict liability regime under which any infringer, whether innocent or intentional, is liable."); Faulkner v. Nat'l Geographic Soc'y, 576 F. Supp. 2d 609, 613 (S.D.N.Y. 2008) ("Copyright infringement is a strict liability wrong in the sense that a plaintiff need not prove wrongful intent or culpability in order to prevail."); Jacobs v. Memphis Convention and Visitors Bureau, 710 F. Supp. 2d 663, 678 (W.D. Tenn. 2010) ("Copyright infringement, however, is at its core a strict liability cause of action, and copyright law imposes liability even in the absence of an intent to infringe the rights of the copyright holder.").

129. *See, e.g.*, A. Samuel Oddi, *Contributory Copyright Infringement: The Tort and Technological Tensions*, 64 NOTRE DAME L. REV. 47, 52 (1989) ("Liability for direct infringement is imposed on a strict liability basis."); Kelly Cassey Mullally, *Blocking Copyrights Revisited,* 37 COLUM. J.L. & ARTS, 57, 83 (2013) (criticizing copyright's "harsh strict liability standard."); Ben Depoorter & Robert Kirk Walker, *Copyright False Positives*, 89 NOTRE DAME L. REV. 319 (2013) ("[e]ven for affluent defendants, overcoming the Copyright Act's strict liability standard is highly burdensome").

130. The fact that copyright infringement is part of tort law is sometimes forgotten by both tort and copyright scholars. On a theoretical level, a tort is an actionable civil wrong. *See* GOLDBERG & ZIPURSKY*, supra* note 6, at 1. Tort law is the subject that defines and sanctions such wrongs. Copyright infringement is a wrong (i.e., an infringement of a right), see Balganesh, *Obligatory Structure*, *supra* note 22, that is actionable and occurs between private parties, and thus it is a tort and governed by tort principles in exactly the same way as battery, trespass, or nuisance are. Professor Hetcher has explained the relationship between copyright infringement and tort in some detail. Hetcher, *supra* note 15, at 1283–88; *see also* CANE, *supra* note 22, at 76. And, on a positive legal level, numerous courts have produced dictum recognizing the relationship between copyright and tort. *See, e.g.*, Ted Browne Music

concerns, when making this claim, authors typically do not explain exactly what they mean by strict liability or why copyright fits into that category. We are often left guessing on this issue. Nevertheless, it appears that two factors are important in affecting the views of these authors. First, as part of the prima facie case, the plaintiff need not demonstrate how the defendant acted intentionally or negligently.[131] The law apparently does not condition liability upon any of the common types of fault. And second, as evidenced by the *Harrisongs* case, copyright infringement can occur even when the defendant was unaware that he was copying from a previous work.[132]

While this orthodox view is usually presented in an unsystematic fashion, one exception can be found in the work of Professor Shyamkrishna Balganesh.[133] Professor Balganesh provides a deeper analysis of the issue and concludes that copyright infringement is a form of harm-based strict liability. In order to be liable, the defendant must copy the protected work (conduct), this must lead to a substantially similar work (outcome), and this substantially similar work must cause market harm to the plaintiff (harm). Nevertheless, Balganesh argues copyright infringement is strange form of harm-based strict liability. The strangeness is that the issue of harm is not part of the prima facie case. Instead, the copyright holder need only show that the defendant copied (conduct) and this resulted in a substantially similar work (outcome), before the defendant is held responsible as a prima facie matter. After which, the defendant may raise the defense of fair use. Within the fair use analysis, the question of market harm is assessed largely under the fourth factor. As highlighted earlier, this market harm question was once viewed as "undoubtedly the single most important element.[134] Thus, after the prima facie case has been established, the defendant may exculpate himself by demonstrating that his conduct did not cause the necessary harmful outcome

Co. v. Fowler, 290 F. 751, 754 (2d Cir. 1923) ("Courts have long recognized that infringement of a copyright is a tort."); Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F. Supp. 399, 403 (S.D.N.Y. 1966) ("[Copyright] infringement constitutes a tort."); Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F. Supp. 399, 403 (S.D.N.Y. 1966) ("[Copyright] infringement constitutes a tort."). A more theoretically interesting question is whether copyright infringement is a singular tort or, because copyright actually grants multiple different exclusive rights, whether copyright infringement is in fact composed of multiple different unique copyright-based torts, see Patrick R. Goold, *Unbundling the Tort of Copyright Infringement* (unpublished manuscript on file with author)

131. *See, e.g.*, Ciolino & Donelon, *supra* note 15, at 356 (noting that copyright infringement requires no "scienter, intent, knowledge negligence, or similar culpable mental state. On the contrary, liability for civil copyright infringement is strict").

132. *Id.* at 352 (discussing the *Harrisongs* case).

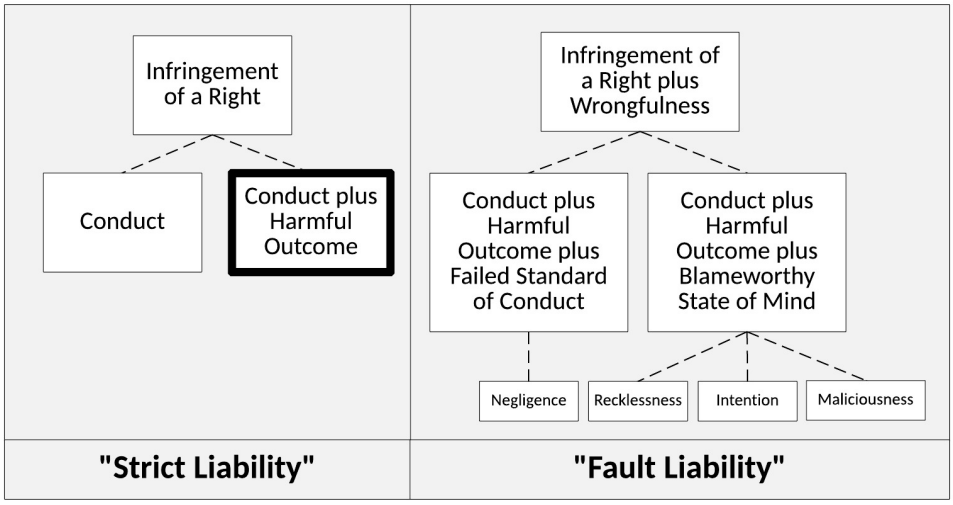
133. Balganesh, *supra* note 22, at 1682.

134. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

(i.e., harm to the plaintiff's market). Strangely, the law therefore relegates the question of harm to the defenses stage. Nevertheless, despite this strange treatment of the harm issue, fault is still not required. It "thus makes little difference for liability whether the copying was intentional, negligent, or a genuine mistake."[135]

We can place this interpretation of copyright infringement as a strict liability tort on the diagram created earlier. Copyright infringement in the orthodox view is a harm-based strict liability tort and, as a result, the "conduct plus harmful outcome" box is emboldened to reflect that view.

Diagram 2



2. Professor Steven Hetcher's Fault Liability View

However, more recently one scholar has called upon us to revisit the question of whether copyright is indeed a strict liability tort. Professor Hetcher has argued that copyright infringement is in fact a fault-based tort.[136] This subsection firstly explains Professor Hetcher's argument before offering a critique.

135. Balganesh, *supra* note 22, at 1682.

136. Steven Hetcher, *The Fault Liability Standard in Copyright*, *in* BALGANESH, *supra* note 114, at 431 [hereinafter Hetcher, *Fault*]; *see also* Steven Hetcher, *The Immorality of Strict Liability in Copyright*, 17 MARQ. INTELL. PROP. L REV. 1 (2013); Wendy J. Gordon, *The Concept of "Harm" in Copyright*, *in* BALGANESH, *supra* note 114, at 452, 455 (confirming Professor Hetcher's position, with the addition that the notion of fault is also embedded in the doctrines of improper appropriation and substantial similarity).

a) Professor Hetcher's Argument

Professor Hetcher defines strict liability as liability imposed when a person causes "justiciable injury to the plaintiff,"[137] whereas fault liability rules requires the proof of an additional element other than causation: fault. Turning to copyright, Professor Hetcher then argues that proving causation is not enough to find infringement. A defendant is not merely liable because his copying caused the production of a substantially similar work, but it must also be the case that the copying "is not a legally recognized" fair use.[138] This question of fairness introduces a moral test that, adds something to the liability decision beyond the bare question of causation.[139]

To clarify Professor Hetcher's position, it is helpful to compare it to that of Professor Balganesh. Balganesh argues that copyright is strict because liability is based upon conduct (copying), outcome (a substantially similar work), and harm (market harm).[140] When these elements are in place, a right has been infringed and liability follows; fault is irrelevant. By contrast, Professor Hetcher believes a right is infringed when the defendant engages in conduct (copying) and this causes a "justiciable" outcome (a substantially similarly work), and thereafter the defendant can escape liability for this infringement by claiming that causing this harm was not wrongful (fair use). Thus, Professor Hetcher's analysis is distinct from Professor Balganesh's in two ways. Firstly, Professor Hetcher defines the concept of rights-infringement differently (and more broadly) than Professor Balganesh. Secondly, Professor Hetcher believes liability is conditioned on fault.

b) Critique

While there is much to admire in Professor Hetcher's conclusions, his reasoning is underdeveloped in places and therefore subject to attack. There are at least four important and interrelated critiques that Professor Hetcher's analysis does not completely address.

First, it is questionable whether a right is infringed when a defendant's copying causes the production of a substantially similar work. As noted earlier, autonomy rights are infringed through conduct alone, but other rights are only infringed when conduct causes harm. Professor Hetcher does not seem to believe that copyright is an autonomy right, because he acknowledges that causation is relevant to the liability decision. However, if he believes that copyright infringement adopts a harm-based strict liability

137. Hetcher, *Fault, supra* note 136, at 435.
138. *Id.*
139. *Id.*
140. *See supra* note 133.

rule, then he must explain why creating a substantially similar work is a harm sufficient to infringe the right. It is not clear what real world, non-legal harm is occasioned by the emergence of a substantially similar work.

Second, if unfair copying is a type of fault, then Professor Hetcher fails to explain its relationship to the other types of fault. If we consider Diagram 1 again, we know that Professor Hetcher would put copyright infringement on the right hand side of the diagram, but we do not know where it would be placed on that side. If copyright adopts a fault-liability rule, does that mean liability is based on negligence, intention, recklessness, or maliciousness? Or, does copyright adopt a completely unique fault standard? Professor Hetcher does not fully explain this point.

Third, the most natural reading of Professor Hetcher's article suggests that unfair copying is a unique type of fault (i.e., that unfair conduct is different from negligent, reckless, or intentional conduct). However, if unfair copying is not the same as preexisting categories of fault, why is it a fault standard in the first place? One cannot simply state that this doctrine is irrelevant to the question of rights-infringement, and is therefore a question of fault. Such reasoning would allow us to label as a fault inquiry any part of the tort action that is not relevant to the question of rights-infringement. Instead, one must provide a positive definition of the legal concept of fault, then demonstrate how this definition of fault covers the usual categories of wrongful conduct (i.e., negligence, recklessness, and intentionality), and then finally show how unfair copying is also covered by this definition.

The final critique builds on the preexisting two. Because the article presents no definition of legal fault, the fair use doctrine might not be a fault inquiry, but may be something else entirely. In particular, it may be a doctrine designed to determine whether a right infringement has occurred. Recall that in some interpretations of private nuisance, the reasonableness standard is said to bound the scope of the right, and therefore asking whether the defendant's conduct interferes with the right to reasonable use and enjoyment is simply a question of whether the defendant infringed the right. Likewise, the concept of fairness may in fact define the scope of the plaintiff's right. That is, the copyright holder's right may only be to prevent unfair uses of the work. Thus, when the court asks whether a use is fair, it may simply be attempting to determine whether a rights-infringement has occurred. If so, copyright liability is strict because liability is imposed any time the right is infringed. In order to be complete, Professor Hetcher's analysis needs to show why a fair use is a rights-infringement that is not wrongful, rather than conduct that simply does not infringe a right.

C. A DOCTRINAL REINTERPRETATION

Despite the problems with Professor Hetcher's analysis, this Article argues that his conclusion is correct: copyright infringement is a fault-based tort. Whether liability for copyright infringement is imposed upon the defendant depends upon the existence of four elements: conduct (copying), outcome (substantially similar work), harm (market harm), and fault (unfairness).

Nevertheless, the fault-based nature of copyright's liability rule frequently goes unnoticed because the formal structure of copyright infringement is a mess. After the plaintiff proves conduct and outcome, the inquiry moves to the question of fair use. Asking whether the defendant's copying was fair is a question of fault for the same reasons that asking whether a defendant's conduct was reasonable is a question of fault in a negligence action. But, unlike other fault-based torts, copyright infringement treats the concept of harm strangely. As noted by Professor Balganesh, the question of harm is not discussed as part of the prima facie case, but instead slips into the fair use analysis. Thus, what is ultimately a question of fault now takes on a dual character. The fair use analysis must determine whether the copying was harmful, and thus whether a rights-infringement has occurred, and thereafter, whether the copying was wrongful.

To illustrate this odd structure, this Section firstly explains how the question of fairness is a fault inquiry, much like the question of reasonableness in negligence. Secondly, it will demonstrate how the question of harm is bundled into the fair use fault inquiry. Doing so explicates the four elements of copyright infringement. Thirdly, this allows us to turn back to the orthodox view and diagnose the flaws in its reasoning.

1. The Fault in Copyright Infringement

Up until a point, Professor Balganesh and Professor Hetcher are in agreement. They both believe that copyright infringement is conditioned upon conduct (copying) and outcome (substantial similar work). Taking this as the starting point, the next question is whether copyright infringement is also conditioned upon fault.[141] Is liability conditioned upon either the

141. Admittedly, by starting at this point, this Article must refrain from a detailed explanation of other doctrines in copyright that further refine the scope of the right, for example, the idea-expression doctrine, the first sale doctrine, and the list of additional limitations and exceptions appearing in §§ 108–122 of the Copyright Act. As these doctrines further refine the scope of the copyright, to engage in conduct covered by these doctrines is simply non-infringing. Therefore, to copy ideas or to sell a work after first sale is simply not a rights-infringement. Fair use has a different character, at least partially, because it justifies

defendant acting with a blameworthy state of mind or the defendant's failure to act in compliance with a standard of conduct?

a) A Blameworthy State of Mind?

Liability for copyright infringement is not conditioned upon the defendant's state of mind. The defendant need not copy intentionally, recklessly, fraudulently, with bad motives, or, as the *Harrisongs* case demonstrated, even consciously.[142] Of course, saying that liability is not conditioned upon the defendant's mental state does not mean that state of mind is completely irrelevant in copyright law. Most obviously, it is taken into account at the remedies stage. The court has the discretion to impose statutory damages up to $150,000 per infringed work when the infringement is "willful."[143] Importantly, however, these concerns are not relevant to the liability determination.

uses of certain works that are within the scope of the copyright holder's right on the grounds that such rights-infringemnent is simply not wrongful. My gratitude goes to Professor Rebecca Tushnet for pushing me towards greater clarity on this point.

142. One might argue that copyright infringement does take into account the copyist's mental state. Indeed, under the first fair use factor, the "purpose and character" of the defendant's use is important. The appeal to "purpose" does appear to make the defendant's subjective state of mind relevant. Additionally, some courts have, when assessing whether the use was transformative, asked whether the defendant had intended to communicate new meaning. *See, e.g.*, Blanch v. Koons, 467 F.3d 244, 259 (2d Cir. 2006) (quoting from Koons' affidavit explaining the defendant's artistic purpose behind the substantially similar use).

However, two points of clarification must be made in this regard. Firstly, even if mental state is relevant to the fair use determination, liability is not *conditioned* upon the defendant's mental state. While the relevant mental state may have some impact on the analysis, the absence of that mental state does not result in a finding of no liability. Unlike, for example, battery, there is no *requirement* that the defendant have a certain mental state before liability is imposed. The relevance of mental state to the fair use analysis is more akin to the relevance of mental state to negligent conduct: it might be some proof that the conduct was wrongful. If someone drives at 100 m.p.h. and is aware of that fact, his mental state may be taken into account when considering whether his driving was negligent. However, the tort of negligence is still based on standard-of-conduct fault because a certain mental state is not a requirement for liability. *See generally* Peter Handford, *Intentional Negligence: A Contradiction in Terms?*, 32 SYDNEY L. REV. 29 (2010).

Continuing this reasoning, one sees that the court's inquiry into the defendant's intent is something of a misdirection. Consider the transformative use cases. In such cases, the judge wishes to determine whether the use was transformative. Whether it is transformative or not has a bearing on the question of liability. To that end, the judge asks about the defendant's purpose when creating the use. He does so not because intent is legally relevant, but simply because the existence of an intent to communicate new meaning is some evidence that the use is transformative. Ultimately, the issue of whether the use is transformative, not the defendant's intent, has legal significance.

143. 17 U.S.C. § 504 (2012).

b) A Failure to Comply with a Standard of Conduct

Although liability is not conditioned upon a blameworthy mental state, liability is conditioned upon the defendant's failure to comply with a standard of conduct. The defendant in a copyright action is not liable merely because he copied a protected work leading to a substantially similar work; the copying must also be unfair. The fair use doctrine introduces a standard of conduct: fairness. It requires that when people copy, they do so fairly. It is only those who fail to reach this standard, and who copy unfairly, who will be held liable.

Therefore, copyright infringement is a fault-based tort in the same way that the tort of negligence is. Although these are very different causes of action, governing very different types of behavior, we see structural parity between them. In the tort of negligence, the defendant is not liable merely because he engages in proscribed conduct that causes an outcome (it is not enough that he takes a risk and this leads to some accident); it must also be the case that the conduct was unreasonable. Likewise, in copyright, it is not enough for the defendant to copy a work, leading to the production of a substantially similar work; it must also be the case that the copying is unfair.

Not only can we identify structural similarity between the tort of negligence and the tort of copyright infringement, but we can also see substantive similarity between the concepts of unreasonableness in negligence and unfairness in copyright infringement. As we refer to judging a defendant's conduct by a reasonableness standard as a "negligence rule," I suggest we refer to the practice of judging a defendant's conduct by a fairness standard as a "fairness rule." The remainder of this Section is dedicated to demonstrating the substantive relationship between these two liability rules.

i) The Relationship of the Negligence Rule and the Fairness Rule

It is greatly important to understand that the fairness rule and the negligence rule are not exactly the same type of liability rule. The fairness rule is not the negligence rule disguised in sheep's clothing. As a result, unfair conduct is not precisely the same type of fault as unreasonable conduct. Nevertheless, they belong in the same category of fault. The relationship of unfair conduct to unreasonable conduct is much like the relationship of intentional conduct to reckless conduct: they are part of the same category of fault, yet marginally different types of fault within the category. In both cases, the law sets a standard and sanctions those who fail to reach that standard. As a result, we see fundamental similarities between the concepts of reasonableness and fairness, three of which we will discuss here, before demonstrating the distinctions between these two types of fault.

(1) Both reasonableness and fairness are defined in consequentialist terms. As noted earlier, the reasonableness term has no precise or succinct meaning, but it is commonly defined in consequentialist terms. Whether conduct is reasonable depends on weighing the costs and benefits of the defendant's conduct. The only thing which changes in this regard are the types of costs and benefits that are salient to the calculation. In the tort of negligence, reasonableness requires a comparison of the costs of precaution and the benefit of avoiding the expected accident costs. Alternatively, in the tort of private nuisance, the reasonableness of the defendant's conduct requires comparing the gravity of nuisance and the social utility of the action.

Likewise, in copyright, fairness has no precise definition. But once again, whether conduct is fair seems to depend upon a cost-benefit analysis of the defendant's conduct. As Professor Lunney argued, whether copying is fair depends on the application of incentive-access tradeoff.[144] Copying is fair if the benefit that copying produces is greater than its cost in terms of reducing incentives for future authorial creation. On the other hand, copying is unfair if allowing it to continue absent liability will result in a reduction in future works and the value of this loss cannot be offset by benefits brought about by increased access. Therefore, if the copying has a net negative impact, then the copying will be considered unfair and the defendant will be liable to the plaintiff. The defendant must therefore pay damages for copying (or alternatively pay a license fee prior to the copying). On the other hand, if the copying has a net positive impact, then it will be considered fair and the defendant will not be liable.

Therefore, the incentive-access mantra of copyright plays the same role in guiding liability determinations as the Hand formula in the tort of negligence. In each case these formulas identify the variables that are relevant to the consequentialist balancing test, which in turn defines the relevant standard of conduct.

(2) The wrongfulness in unreasonable and unfair conduct. That fairness is defined in consequentialist terms also highlights the philosophical basis for labeling unfair copying as a type of fault. Both unreasonable conduct and unfair conduct are wrongful because they impose unwanted consequences on the rest of society. In the tort of negligence, unreasonable risk taking is wrongful because it exposes society to a greater than desirable number of harmful accidents. In copyright, unfair copying is wrongful because it deprives future society of new works that we find valuable. The future would seem much bleaker if it were to involve a vastly reduced number of expressive works.

144. *See supra* notes 122 & 123.

We can also view this feature from the opposite direction. Reasonable conduct is not faulty because it has good consequences for society: it saves resources by not spending them on needless precautions. Likewise, fair copying has good consequences for society because it results in greater access-benefits than incentive-costs.

(3) Fault in the action, not the actor. In both cases, therefore, fault occurs in the action, not in the actor. The individual who, with the best will in the world, negligently causes an accident has acted wrongfully because of the negative consequences he creates. The actor may not be at fault, but the action certainly is. Likewise, the defendant who unintentionally engages in unfair copying may not be personally blameworthy, but his actions are still wrongful because of their consequences. Thus, neither negligence nor copyright infringement depend upon the subjective mental state of the defendant. All that matters is the simple objective relationship between the conduct the defendant has performed and the standard society demands.

(4) Distinguishing the fairness rule and the negligence rule. Given the similarities, one may start to view the fairness rule as simply another version of the negligence rule. This is perhaps reinforced by the speed with which jurists turn to the concept of reasonableness when asked to explain the term "fairness" in a copyright context. The fair use doctrine has been called an "equitable rule of reason"[145] and as the ability to "use the copyrighted material in a reasonable manner."[146] When Justice Story first laid the judicial foundations of the doctrine in *Folsom v. Marsh*, he described it as the freedom to use the copyrighted work for "fair and reasonable" purposes.[147]

Nevertheless, fairness and reasonableness are different, and thus represent different types of fault. Elsewhere, Professor Gordon astutely pointed out that tort law is a law of harms.[148] Road traffic accidents, battery, private nuisance, defamation, all deal in the destruction or loss of something that society already has—whether that be physical health, use of property, or reputation. The situation is different in copyright. The social cost is not the destruction of something that society already possesses. Rather, the social cost is a foregone benefit. We enjoy expressive works, and hope they will be created in the future. Copying has the potential to reduce incentives, and thus result in future generations missing out on this benefit.

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145. Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 448 (1984).

146. HORACE G. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944).

147. Folsom v. Marsh, 9 F. Cas. 342, at 344 (C.C.D. Mass. 1841).

148. Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. LEGAL STUD. 449 (1992).

Against this backdrop we see the difference between reasonable conduct and fair conduct. Reasonable conduct is conduct that is simply the least harmful to society. Consider the hypothetical example of A and B once more. A could either expend a cost on buying the device to prevent an accident, or alternatively risk causing the accident. Neither situation is particularly desirable. It is simply the case that one choice is less bad than the other. While we term this conduct welfare maximizing, we may also think of it as incentivizing conduct that is simply the least welfare minimizing.

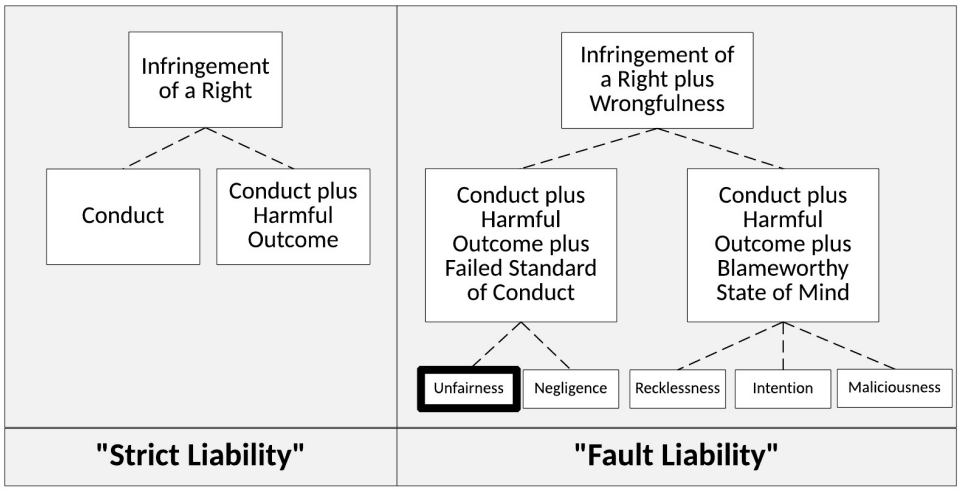
By contrast, fair conduct is much more positive. The copyist has two options: to refrain from copying or to copy. In cases where copying is unfair, and incentives are harmed, we mean that benefit is forgone, and society will lose out in the future. By contrast, when copying is fair, the benefit that is created in access is greater than the lost benefit resulting from reduced incentive. Unlike reasonable conduct, therefore, fair conduct is the maximization of benefit, not the minimization of loss. In engaging in benefit maximization, the defendant's conduct is rightful, and thus not subject to liability.

Thus unreasonable conduct and unfair conduct belong to the same class of fault—they both result in consequences that society would rather avoid. But society wishes to avoid unreasonable conduct because it results in unjustified detriment for society, while society wishes to prevent unfair conduct because it will result in the unjustified forgoing of benefit. As Professor Gordon highlighted, tort and copyright are "parallel mirror images" of one another; likewise so are unreasonable conduct and unfair conduct.[149]

We can now attempt to summarize how copyright infringement fits on the diagram of liability rules. As Diagram 3 attempts to illustrate, unfair conduct is within the class of fault of failing to comply with a standard of conduct, but is not the same as negligent conduct. As a result, copyright infringement (represented again by the emboldening) falls in the fault liability section of the diagram, but is not associated with any of the recognized other liability rules. Instead, copyright infringement adopts the unfairness rule, which itself is unique to the world of copyright law.

149. Wendy J. Gordon, *Copyright as Tort Law's Mirror Image: "Harms," "Benefits," and the Uses and Limits of Analogy*, 34 MCGEORGE L. REV. 533, 533 (2002).

Diagram 3



2. The Harm in Copyright Infringement

So far, this Part has argued that liability for copyright infringement is based upon copying (conduct), substantial similarity (outcome), and unfairness (fault). The question now becomes, where does the concept of harm fit? Fault liability rules impose liability if the defendant wrongfully engages in the proscribed conduct that causes a harmful outcome. If the wrongfulness is the failure to comply with a standard of conduct, what is the harm in copyright infringement?

a) Isolating the Harm in Copyright Infringement

To answer the question of harm, we must think about the nature of the underlying right in copyright law. Once we understand the nature of the right, only then can we identify the type of activity that will interfere with the right.

According to the dominant understanding of copyright law in the Anglo-American world, the copyright is not an autonomy right, but a limited monopoly[150] to earn the market revenue generated by the work.[151] It is not a

150. *See, e.g.*, Samuelson, *supra* note 107, at 2617 (discussing the "limited monopoly conception of copyright").

151. Not too long ago, scholars identified two different approaches to the scope of Anglo-American copyright. On one hand, there was the "minimalist" interpretation or the "incentives theory" approach. This approach viewed copyright (and patent) as a limited monopoly imposed to enable the author to receive a revenue for his work. The scope of the monopoly should be tailored narrowly so that the author should be able to recover his fixed

broad power to control all uses of the object. Instead, the right is an entitlement to satisfy the demand generated for the expression.[152] As Justice

costs, and thus be endowed with the relevant incentives, but no further. On the other hand, there was a "maximalist" interpretation or "neoclassical" approach. This approach argued that the author ought to have a broad power of control over all uses of the work. Doing so would supposedly allow the author to internalize all the social value produced by the work. Therefore, not only would he have the incentive to create the work, but he would have the right *level* of incentive (i.e., an incentive level set by the market). This view based its theory largely on the Demsetzian theory of property that internalization via private rights will lead to socially efficient use of the good. *See* Harold Demsetz, *Toward a Theory of Property Rights,* 57 AM. ECON. REV. 347 (1967). A number of scholarly works used this theory as grounds to interpret intellectual property rights broadly. *See, e.g.*, Edmund Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977). On the difference between these two approaches, see, for example, Neil W. Netanel, *Copyright and a Democratic Civil Society,* 106 YALE L.J. 283, 308–11 (1996); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1042–43 (2005); Anne Barron, *Copyright Infringement, Free-Riding, and the Lifeworld*, *in* LIONEL BENTLY ET AL., COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE 93 (2010). However, despite the existence of these two approaches, the dominant view in the academic community today is that Anglo-American copyright is not a broad power of control, but a limited monopoly to earn enough revenue to cover fixed costs. This is in large part due to the work of a number of scholars that successfully critiqued the logic of the broad maximalist stance. *See, e.g.*, Robert Merges & Richard Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839, 888 (arguing that a system of tailored incentives, not monolithic ownership, will best spur innovation); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1044–68 (2005); Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 CHI. L. REV. 129 (2004); Mark A. Lemley & Brett Frischmann, *Spillovers*, 100 COLUM. L. REV. 257 (2007); Brett Frischmann, *Evaluating the Demsetzian Trend in Copyright Law*, 3 REV. L. & ECON. 649 (2007).

152. In this respect, copyright in the Anglo-American world is arguably slightly different from the authors' rights systems of Continental Europe. Historically, many European jurists, basing their work on the philosophies of Kant in particular, viewed copyright not as a property right, but as a personal right. In this view, the author's expression is not an object that is separable from the author, but is simply part of the author. In Kantian theory, the author's speech is believed to be part of the author's person (just as one's organs, limbs, or thoughts are part of one's person). And, as one has an innate right to control one's person free from heteronomous interference, the author has a right to control how people interact with his or her speech. *See generally* Neil W. Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 363–82 (1993); ELEONORA ROASTI, ORIGINALITY IN EU COPYRIGHT 69–75 (2013). The result is that the author's right is more of an autonomy right, in which the author has the exclusive ability to control what happens to the expression. This, of course, does not mean that the right is limitless and unbounded. Professor Drassinower's work has demonstrated that a Kantian inspired right over expression in fact supports a robust public domain. *See* ABRAHAM DRASSINOWER, WHAT'S WRONG WITH COPYING (2015). However, it does mean that jurists must very carefully distinguish the author's expression from other non-expressive concepts such as ideas, and design laws that respect the equal freedom of others in society to express themselves.

Breyer articulated in *Golan v. Holder*, copyright is the right to "charge a fee to those who wish to use the copyrighted work."[153]

As the right is to satisfy the demand generated by the work, it follows that the legally relevant harm occurs when the defendant's actions interfere with the plaintiff's ability to satisfy that demand.[154] Only when the plaintiff loses the market revenue has the defendant caused an outcome that impinges upon the right. Thus, in order to interfere with the right, the defendant must copy, leading to a substantially similar work that is capable of serving as a substitute for the plaintiff's work, the existence of which diverts the market demand away from the plaintiff, resulting in lost sales and license fees.[155] In the absence of these elements, no rights infringement has occurred.

At this point, we can see that harm is also a necessary condition for copyright liability. As Professor Balganesh points out, harm is taken into account in the fair use analysis, particularly under the fourth factor. In the absence of market harm, the defendant's use will be considered fair, and thus no liability will follow. This is most clearly demonstrated by the parody cases. In *Campbell v. Acuff-Rose*, the Supreme Court held that parodies are fair use. Even though parodies are often injurious to the copyright holder, the court held that parodies do not cause "cognizable market harm."[156] As parodies merely suppress, and do not supplant, demand for the work, parodies belong to the class of cases where the defendant has copied (conduct) resulting in a substantially similar work (outcome), but there is no usurping of market

153. 132 S. Ct. 873, 899 (2012).

154. In this respect, this article's concept of copyright harm is slightly broader than previous definitions. Professor Bohannan, *see* Bohannan, *supra* note 116, at 989, argues that harm in copyright can only occur when the defendant "usurps the copyright holder's most foreseeable markets, or those markets which a reasonable copyright owner would have taken into account in deciding whether to create or distribut the coyprighted work." While this definition of harm is plausible, this article believes that courts currently take into account harm to markets that were unforeseeable at the time of creation.

155. Professor Wendy Gordon has produced a more detailed analysis of the concept of harm in copyright. Approaching the issue from a philosophic perspective, Professor Gordon concludes that "copyright should recognize only the effects of rivalry as constituting 'harm' " and licensing fees should only fall within the concept of copyright harm when the author has some "grave need" for them. Gordon, *supra* note 136, at 483. This Article agrees with Professor Gordon's analysis. Departing slightly, however, it notes that currently courts appear to define the scope of the right to market revenue so that the defendant's entitlement extends to "reasonable" licensing fees regardless of whether a "grave need" is present. *See* Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930 (2d Cir. 1994) (holding that the test is whether the defendant's use harms licensing market that are "traditional, reasonable, or likely to be developed."). Therefore, market harm, as the law is currently formulated, extends not only to lost sales but also to some, but by no means all, lost licensing fees.

156. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994).

revenue, and therefore no harm. As a result, cases such as these are instances in which no rights-infringement has taken place. These are "no harm" cases.

b) Harm and Fault in Fair Use

Isolating the role of harm in copyright infringement demonstrates a feature of copyright law that is often missed: the formal structure of this law is a mess. In other fault-based torts, whether the outcome was harmful and whether the outcome was wrongful are two separate questions. For example, imagine a battery where the assailant hits the plaintiff's jaw. In relation to this outcome, there are two distinct questions: was the outcome harmful (can the defendant prove the contact either caused physical injury or was offensive enough to cause dignitary injury)? And thereafter, was the harm wrongful (was it brought about intentionally)? Or, imagine a tort of negligence case. Some accident has occurred, the victim then initiates a suit in which he is required to prove that the accident was harmful (under the doctrinal heading of damages), and thereafter that it was wrongful (by application of the negligence rule under the doctrinal heading of breach of duty).

The copyright infringement analysis currently bundles the questions of harm and fault into the same doctrine: fair use. On one hand, some fair use cases are best interpreted as "no harm" cases. In cases like *Campbell*, the defendant's copying did not cause the legally relevant type of harm. On the other hand, there are "no fault" cases. As Professor Lunney demonstrated, the fundamental question rooted at the heart of the fair use analysis is whether the defendant's copying was socially desirable. The question of whether the copying was fair is of the same character as the question of whether risk-taking is reasonable. If the conduct is beneficial for society, then, despite the harm it causes to the victim, the defendant's actions are rightful and the defendant should not be held liable.

Interestingly, the demarcation between the "no harm" and "no fault" cases has become stronger since 2005. Prior to 2005, the fair use analysis was primarily concerned with the fourth factor issue of market harm. However, Professor Neil Netanel has demonstrated that post-2005, fair use analysis has undergone a paradigm shift.[157] Now, much intellectual heavy lifting is accomplished under the first factor. In particular, the issue that most prominently guides the outcome is the question of whether the use was "transformative." If the use can be characterized as transformative, this will militate heavily in favor of a finding of fair use.

157. *See generally* Netanel, *supra* note 107.

The transformative works doctrine is important for our concerns because courts accept two different conceptions of transformation. On one hand, a use is transformative if it changes the expression. On the other hand, a use is transformative if it adds no new expression, but nevertheless adds new meaning. The first type of transformation is tied to the concept of "no harm." In cases like *Campbell*, there was sufficient transformation of expression that the defendant's copying did not lead to market substitution, and thus no legally recognizable harm. However, the latter type of transformation is related to the concept of "no fault." In these cases, the courts often appeal to the social value produced by the copying. Although there is no new expression, and as a result there is potentially harm to the author's market, courts are willing to justify these uses on the grounds that the transformed meaning creates benefits for society that outweigh that private harm. Three cases in particular demonstrate this point.

Perfect 10, Inc. v. Amazon.com, Inc. concerned the Google Image Search Engine and its reproduction of images.[158] Perfect 10 was an adult men's magazine selling pornographic images of women. Google's Image Search Engine searches the web for images, indexes those images and reproduces them in thumbnail form. Through this service, users were able to search for Perfect 10's images. Google would then return to the user free thumbnail size versions of those photographs. Perfect 10 sought to obtain an injunction to prevent this.

The Ninth Circuit held that this was fair use. This conclusion followed despite the fact that there was arguable market harm. The trial court had found market harm existed because the reproduction of thumbnail images interfered with Perfect 10's ability to sell thumbnail images in the cellphone market.[159] However, despite this fact, the Ninth Circuit held that Google Image Search provided clear social benefit in terms of increasing access to information and therefore was "highly transformative."[160] As Professor Netanel notes, this is a case where Google's display of thumbnail images was held fair because of the "use's highly transformative, socially beneficial character despite possible harm to the plaintiff's potential market for licensing thumbnails."[161]

158. 508 F.3d 1146 (9th Cir. 2007).

159. Perfect 10 v. Google, Inc., 413 F.Supp. 2d 828. at 851 (C.D. Cal. 2006) ("Google's use of thumbnails likely does harm the potential market for the downloading of P10's reduced-size images onto cell phones.").

160. *Perfect 10*, *supra* note 158, at 1165.

161. Netanel, *supra* note 107, at 764.

A similar situation arose in *Bill Graham Archives v. Dorling Kindersley, Ltd.*[162] That case involved concert posters of the rock band The Grateful Dead. The defendant was a book publisher who shrunk seven of the band's concert posters down to a reduced size to illustrate a coffee table book that chronicled the band's career. The Second Circuit held this to be fair use. The court found that the book used the images as "historical artifacts" and this use was important in "enhancing biographical information."[163] This was a distinctly different purpose from the previous use of the posters and therefore could be classified as transformative and thus fair. Interestingly, the court held that the transformation warranted a finding of no liability despite the strong argument that this case involved cognizable market harm. Bill Graham Archives was already in the market for licensing reduced size images. As a result, Professor Netanel argues that this case is quite striking because it demonstrates that as long as the use is transformative in meaning, "even actual market substitution is not enough to negate fair use."[164]

Even more recently, the Google Books controversy also appears to fit into the "no fault" category.[165] Google copies and digitizes copyright protected books, and then allows users to access "snippet" views of the books. There is an arguable case that allowing users to access snippet views causes market harm.[166] As the user can access parts of the defendant's expression via Google, it is likely that some will use Google's search engine to access parts of the book rather than buy their own copy. However, the court found the use was transformative. Tellingly, the court held:

> Google's use of the copyrighted works is highly transformative. Google Books digitizes books and transforms expressive text into a comprehensive word index that helps readers, scholars, researchers, and others find books. Google Books has become an important tool for libraries and librarians and cite-checkers as it helps to identify and find books. . . . Similarly, Google Books is also transformative in the sense that it has transformed book text into data for purposes of substantive research, including data mining and text mining in new areas, thereby opening up new fields of research.[167]

162. 448 F.3d 605 (2d Cir. 2006).

163. *Id.* at 610

164. Netanel, s*upra* note 107, at 760.

165. Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282 (S.D.N.Y. 2013).

166. Putting aside momentarily whether the negative impact is outweighed by other beneficial effects, on which see *infra* note 224.

167. *Id.* at 291.

Later the court characterized these functions of the service as providing "significant public benefits."[168]

This author interprets these three cases, and others,[169] as ones in which the plaintiff has suffered market harm. The defendant has copied the expression in way that arguably leads to market substitution. Nevertheless, this harm is justifiable. In each case, the copying was associated with strong public benefits. Thus, in each instance, the copying was fair because it created greater access-benefits than incentive-costs.

Finally, the realization that fair use bundles these two inquiries together solves a longstanding problem in copyright law. For decades, a debate has surrounded the nature of fair use. On one side, some believe that a fair use is an infringement of a right that we merely allow.[170] On the other hand, some believe that fair use is simply not an infringement at all. This Subsection demonstrates that both sides of the argument are half-correct. Some fair uses are outside the scope of the right. The no-harm cases like *Campbell* involve no recognizable harm, and are therefore not a rights-infringement. On the other hand, the three cases just discussed are cases where harm is quite likely, and therefore involve rights-infringement, but we allow this infringement because the conduct is good/not wrongful.[171]

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168. *Id.* at 293.

169. *See* Williams & Wilkins v. United States, 487 F.2d 1345 (1973) (holding that a library's wholesale copying of journal articles was fair use).

170. *See, e.g.*, ALAN LATMAN, STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISIONS: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, STUDIES 14–16, at 6 (Comm. Print 1960) ("Fair use may be viewed from two standpoints. It may be considered a technical infringement which is nevertheless excused. On the other hand, it may be deemed a use falling outside the orbit of copyright protection and hence never an infringement at all."). Recognizing that some fair copying is simply good copying outside of the scope of copyright also pushes against the view that fair use will decrease in the future as potential licensing options increase. An alternative to viewing the fair use doctrine as primarily a fault doctrine is to view it as mere tolerated use. The theory goes that we tolerate such uncompensated use internalizing the external benefit to the author would be too costly. However, if this is the true nature of fair use, then as licensing becomes cheaper through the advent of better communications technology, then surely fair use will begin to shrink. *See generally* Rebecca Tushnet, *All of This has Happened Before and All of This Will Happen Again: Innovation in Copyright Licensing*, 29 BERKELEY TECH. L.J. 1447 (2014). Alternatively, if one views fair use as a fault standard which excuses those whose copying is socially beneficial, this shrinking seems less likely. It is not immediately apparent how improved licensing technology would change how a use would affect the incentive and access variables on which the fault determination rests.

171. One might also speculate as to the reasons why this bifurcation of fair use has become stronger post 2005. This Article offers a very tentative explanation. It is believed that tort law adopted fault liability in the mid-nineteenth century in order to meet the

3. Responding to the Orthodox View

Thus, copyright infringement is a fault-based tort. Liability is imposed on the basis of four elements: copying (conduct), substantial similarity (outcome), market harm (harm), and unfairness (fault). However, this characterization is often misunderstood because the harm inquiry is bundled into the fault inquiry. Nonetheless, with this knowledge, we are now in a position to evaluate some of the potential errors underlying the orthodox view that copyright is a strict liability tort.

Firstly, the orthodox view bases its belief that copyright infringement is strict on the premise that copyright law makes no mention of the usual types of fault. This is undoubtedly true; liability in copyright is not conditioned upon intentionality or negligence, nor recklessness, fraudulence, or maliciousness for that matter. It is nevertheless conditioned upon unfairness. Unfair conduct is not the same as intentional conduct or negligent conduct, but it is nonetheless a type of fault. The orthodox view has arrived at the conclusion that liability in copyright is strict through committing two errors. Its analysis begins by forgetting that failing to comply with a standard of conduct is a class of fault.[172] Thereafter, it fails to see that unfair conduct is just as much the failure to comply with a standard of conduct as unreasonable conduct. Yet, given that copyright law deals with a different scenario to most torts—the regulation of future benefits rather than the regulation of detriment—it is hardly outlandish to believe that that the law has developed a unique type of fault to judge defendants' conduct.

challenges of the industrial revolution. *See* HORWITZ, *supra* note 1, 97–101. Similarly, one could argue that in the twenty-first century, the global economy has become far more digital. It is plausible that, as informational goods become increasingly important to the economy, it no longer is efficient to hold all those who cause harm liable, and that, instead, before a court holds a particular defendant liable, it must first engage in a consequentialist balancing test, much as they do in negligence. Therefore, as tort adopted negligence in response to the changing economic conditions of the industrial age, likewise, copyright has adopted a form of fault liability rule in response to the challenges brought by the digital revolution.

172. Various judges and scholars incorrectly associate the concept of fault only with a blameworthy state of mind. *See, e.g.*, Ciolino & Donelon, *supra* note 15, at 356 (copyright infringement requires no "scienter, intent, knowledge negligence, or similar culpable mental state"); Jacobs v. Memphis Convention and Visitors Bureau, 710 F. Supp. 2d 663, 678 (W.D. Tenn. 2010) ("Copyright infringement, however, is at its core a strict liability cause of action, and copyright law imposes liability even in the absence of an intent to infringe the rights of the copyright holder."). It is interesting to note that in patent law, there is at least one article pointing out how the legal concept of fault is broader than the notion of culpable mental state; *see* Jason A. Rantanen, *An Objective View of Fault in Patent Infringement*, 60 AM. U. L. REV. 1575 (2011).

Secondly, the orthodox view argues that copyright must be a form of strict liability because it holds subconscious copiers liable. But once again, this argument rests on an unduly narrow view of fault. This view stems from the incorrect assumption that the only fault recognized in tort is acting with a blameworthy state of mind. As copyright holds liable those, like subconscious copiers, who act without a blameworthy state of mind, it must be a form of strict liability. However, as seen, fault may be established where the defendant simply fails to comply with a standard of conduct. In these cases, even if the defendant acts with the best possible state of mind or the complete absence of a state of mind, he is nevertheless at fault if his actions fail to comply with the standard. Hence many people are liable in negligence even though they do not act with a bad state of mind. Likewise, in copyright infringement, the copying must still be unfair, and therefore wrongful, before liability will be imposed. Even if the defendant copies subconsciously, he has performed conduct that is wrongful and will accordingly be held liable for the consequences of that action.

Interestingly, there is a better argument that the orthodox view could make in relation to the subconscious copying rule. Proponents of this view could argue that, because of the subconscious copying rule, defendants are held liable even when their conduct is not volitional. The argument would rest on the assumption that subconsciously produced conduct is not voluntary conduct. Nevertheless, while this assumption would seem plausible, the argument that is based upon it would still fail.

If subconscious copying is not volitional, copyright would not be a form of strict liability, as strict liability requires that conduct be volitional. If copyright were to ground liability on the basis of involuntary conduct, it would impose a form of ultra strict liability on defendants. This would breach basic notions of responsibility in tort law.

Moreover, while there is an arguable case that subconscious copying is not volitional, tort law as it currently stands does not take the same view. Subconscious activity may not be volitional for purposes of criminal punishment, but it is volitional for purposes of civil liability. This is most clearly demonstrated by examining how tort law approaches the issue of so-called "automatic" actions. As Professor Peter Cane describes:

> An experienced driver, for example, will do many things automatically or "without thinking" or "inadvertently" which a learner would do deliberately and attentively. The crucial difference between involuntary acts and automatic acts is that the former are uncontrollable whereas the later are controllable but not

> consciously controlled. Far from being exempt from tort liability, automatic behavior is frequently the very essence of tortiously negligent conduct.[173]

Automatic actions are a form of subconscious conduct. Such actions are not consciously brought about, but they are nevertheless technically within the defendant's sphere of control. This is sufficient volition for liability in tort law. Likewise, subconscious copying is volitional enough to find liability in copyright.

D. AN ECONOMIC REINTERPRETATION

The thesis that copyright infringement adopts a fault liability rule also gains support from economic theory. As this Section shows, the fairness liability rule distributes the cost of inefficient conduct from the externality bearer onto the actor in the same fashion as negligence rules.

1. The Economic Goal of Copyright Law

Like tort, copyright serves various goals. One of which is economic in nature. From an economic perspective, the function of tort and copyright is the same: to give people incentives to take efficient, welfare-maximizing action. In copyright, whether copying is welfare maximizing depends on the comparison of the effect of the copying on the incentive and access variables.

As in tort law, often individuals do not take welfare-maximizing action when dealing with copyrighted works because of a negative externality. When an individual unfairly copies, he forces a cost on future society—as authorial incentives will drop fewer works will be created. This cost may be greater than any benefit copying produces in terms of greater access. In such cases, copying is inefficient. However, from a private perspective, the copyist still has an incentive to engage in this behavior. Assuming that the duplication process requires no resources, then copying results in no cost to him personally, and only results in his benefit. The copyist discounts the cost this causes in terms of lost incentive to create because this cost does not fall primarily on him, but on future society.

As in tort law, copyright law uses liability to solve this problem. By holding the defendant liable for copying, we force him to internalize the costs of his conduct, and thus give him an incentive to behave efficiently. The question is, what type of liability rule is used to accomplish that goal?

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173. CANE, *supra* note 22, at 30.

2. A Strict Liability Rule in Copyright?

We saw earlier that, in the economic understanding, strict liability is liability imposed anytime the defendant inflicts a cost on someone else, regardless of whether creating that cost was efficient. In copyright, we have defined cost as the lost incentive for authors to create. However, this is a difficult variable to quantify. Such a determination requires the court to consider how the defendant's copying will affect the actions of a group of people who are not present before it and who all have diverse motivations for creating.

Given the difficulty of assessing this variable, the court uses a proxy in valuing the lost incentives: harm to the plaintiff's market.[174] From a static point of view, harm to the author's market is irrelevant. If market harm has occurred, this is a sunk cost. Imposing liability does not eradicate it in any way. Furthermore, the work in question is already created; harming the author's market mercifully does not change that fact. Statically, therefore, liability is simply an expensive redistribution of the cost from one party to another. The only way such redistribution can be justified is when it is viewed from a dynamic perspective. If the defendant's copying causes this author market harm, then allowing it to continue will likely cause market harm to authors in the future. Future authors will perceive this situation negatively and their incentive to create will consequently decrease.

If copyright adopted a strict liability rule and imposed liability every time the defendant's actions caused a cost, liability would be imposed any time the copying negatively affected future authorial incentives. Since market harm is the proxy for lost future incentives, this would result in liability every time the copying causes market harm. In every instance where the defendant's actions threaten to produce lost sales, the defendant would be required either to negotiate a license ex ante or pay a damage award ex post. Thus, the harm to the author's market would be internalized to the copyist and accordingly he would take the cost to authorial incentives into account when deciding whether to copy.

However, copyright does not impose liability on every defendant who causes the copyright holder market harm. Under the balancing approach to fair use, the defendant's suffering of market harm is not sufficient to find liability. As Professor Lunney elaborates, the existence of market harm is

174. Lunney, *supra* note 119, at 1014. Professor Lunney highlights that the author's market harm is merely a proxy for lost future incentives but also notes that it is far from a perfect proxy. Ideally, the defendant who suffers harm should also demonstrate how that harm is likely to translate into lost incentives for future creativity.

simply the first stage of the fair use analysis. The ultimate and final arbiter in the fair use analysis is not whether the defendant was harmed, but whether the defendant's conduct will lead to greater access-benefits or incentive-costs. Therefore, copyright does not always impose liability on the defendant for the creation of social cost. Instead liability is only imposed on defendants in relation to their inefficiently caused costs. Causation is not the touchstone of copyright liability, but instead liability follows an analysis of "whether, on balance, society would be better or worse off by allowing the use to continue."[175] Even in cases where copying probably "decreases revenues to some extent," such as private copying via file-sharing networks, copying "may nevertheless expand access to an existing work substantially more for any given reduction in revenue."[176]

3. A "Negligence Rule" in Copyright

Unlike the strict liability rules, negligence rules hold defendants liable only when the conduct was unreasonable. In the economic interpretation, this means liability is imposed only when the defendant's conduct is inefficient. Whether the conduct is inefficient depends on whether it produces greater benefits or costs.

Copyright infringement holds defendants liable when the copying is unfair. If the balancing interpretation of fair use is correct, then whether copying is fair depends on a balance of the cost to incentives versus benefits of increased access. Thus, whether copying is fair is a question of efficiency and welfare. Copyright has thus the same economic characteristics of a negligence rule in that a defendant's copying will only attract liability when it is inefficient.

As a result, we see that the liability regime in copyright distributes costs in the same way that a negligence regime does. We noted that, unlike a strict liability regime where the defendant always internalizes the total cost of his action, the defendant judged by a negligence rule only internalizes the cost of his inefficient action. In these cases, the cost of efficient action is borne by the externality bearer. In copyright, when deciding whether to copy, the defendant knows that liability will only result if his actions are inefficient. Thus, he only internalizes the harm to the author's market when the cost to incentives that such harm represents is not outweighed by the benefit of greater access. If his actions are efficient, the cost this causes in terms of lost incentive remains on the externality bearer: future society.

175. *Id.* at 1023.
176. *Id.* at 1026.

4. Incentives in Copyright: Strict Liability or Fairness?

Recall that Part I explained that both strict liability and negligence rules provide the defendant with an incentive to act efficiently. However, there is an important reason why this is not the case in copyright law. In the copyright context, adoption of strict liability would lead to inefficient action.

In tort law, the defendant usually captures the total benefit of his action, while the cost is typically borne by others. Strict liability holds the defendant liable for the cost he creates. The defendant's private cost-benefit analysis then accurately reflects a comparison of the total societal cost and total societal benefit. Thus, the defendant has an incentive to act in accordance with the demands of social welfare.

In some cases, applying a strict liability regime in copyright would have the same effect. Providing that the benefit of copying falls entirely upon the copyist, holding the defendant liable for all the market harm he creates will result in the defendant taking into account the entire social cost of his copying and the entire social benefit of his creation. The result of his cost-benefit analysis under such conditions will be efficient action.

However, the typical tort reasoning does not apply when the defendant's action creates not only negative externalities but positive externalities. If the defendant's action not only imposes costs upon one group of people, but also bestows benefits on another group, then strict liability will be inefficient. Such liability will result in the defendant taking into account the total social cost of his action, but not the total social benefit of his action. This raises the possibility that a type of action will be efficient—its total social benefit will outweigh its cost—but the defendant will fail to take it because the social/private cost outweighs the private benefit.

This is a problem that copyright law faces. While in some cases the total benefit of copying will fall on the defendant, in many cases the copying will result in positive externalities.[177] I noted previously that the benefit of copying is the benefit of access. Typically these access benefits fall largely upon people other than the copyist.[178] For example, when the defendant's copying results in a more competitively priced work, typically a large amount of the benefit is captured by the consumers who receive the work at a cheaper cost. Or, consider the case where the defendant copies to create a new work. It is unlikely that the defendant in such cases will be able to capture the entire positive value he creates in such an action, and much of the benefit will therefore remain with people who enjoy the new work. In

177. As is well known to copyright scholars. *See, e.g.*, Gordon, *supra* note 116, at 1630–32.

178. *See generally* Lemley & Frischmann, *supra* note 151.

such cases, adopting a strict liability rule would be socially harmful. It would result in the copyist's own cost-benefit analysis taking into account the total social cost of his action but not the total social benefit. Thus, it would be likely that some copying that is beneficial would not occur.

The fairness rule that copyright adopts, with its economic characteristics of a negligence rule, avoids this problem. If the copying is efficient and produces greater benefits in the access than harm to incentive, then the defendant does not internalize the cost. Therefore, his own private cost-benefit analysis takes into account whatever private benefit he receives from copying and none of the cost. Assuming that he faces no cost involved in actually making the copy, his private benefit outweighs the private cost, resulting in efficient action. Alternatively, if the defendant's copying results in greater harm to incentives than to access, the defendant will have no incentive to engage in this behavior. In this case, the defendant will be liable, forcing him to internalize the cost he creates. Thus, his own private analysis reflects a balancing of the total social cost against his own private benefit. As social cost is greater than social benefit, in such cases social cost will necessarily be higher than the copyist's private benefit. Therefore the defendant will have an incentive to refrain from copying. Accordingly, whereas strict liability may lead to inefficient action, the fairness rule adopted by copyright leads to efficient action.

E. CRITIQUES, COUNTER-ARGUMENTS AND A CAVEAT

So far, the thesis presented is that copyright is a fault-based tort because liability hinges upon four elements: conduct (copying), outcome (substantially similarly work), harm (market harm) and fault (unfairness). As the type of fault is a failure to comply with a standard of conduct, we see how copyright infringement distributes costs in a similar manner to negligence rules, thus leading to the copyist internalizing the negative externalities of his conduct and thereafter behaving efficiently.

However, this thesis may be critiqued in two important ways. Firstly, one may claim that fair copying is simply conduct that does not fall within the scope of the right. Secondly, some may believe that the position of fair use as an affirmative defense means ultimately that the underlying liability rule is still strict. This Section responds to each of these critiques in turn. Finally, one important caveat is highlighted.

1. Fair Copying Is Outside the Scope of the Right

The first critique is identical to the fourth question posed to Professor Hetcher earlier: is fair copying technically an infringement of the right that is justified because it is not wrongful, or is fair copying simply outside the

scope of the copyright, and thus not an infringement at all? So far, this article has argued that it is the former. However, one may argue that it is the latter. If this critique is correct, then copyright conditions liability solely upon rights-infringement, and is therefore strict.

a) Merit to the Critique

There is significant merit to this critique. Evidence in support of this argument can be found in two sources. Firstly, the statutory wording of the Copyright Act arguably substantiates this claim. The Copyright Act says that the copyright holder's exclusive rights are "subject to" fair use and that fair copying is "not an infringement."[179] Furthermore, the act says explicitly that "[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright"[180] and that infringers of rights are liable for damages.[181] Taken together, these statements provide some support for the view that (a) liability is imposed solely upon the infringement of a right, and (b) the concept of fairness qualifies the legal right, meaning that a fair use is simply not an infringement.[182]

Secondly, the history of copyright law in the United States suggests that fair use was originally conceived of as conduct outside the scope of the entitlement. Initially the right of the copyright holder was a simple right to prevent near verbatim copying. In 1841, this changed with the case of *Folsom v. Marsh*.[183] As Professor Oren Bracha explains, this case typically viewed as the origin of fair use, but ironically the decision actually expanded the scope of the copyright right. Whereas before, the right was simply to prevent near verbatim copies, this case altered the scope of the right so that any copying would be labeled as an infringement if it interfered with the market for the plaintiff's work. The concept of "fairness" that Justice Story introduced simply represented those instances of copying that did not interfere with the copyright holder's market and thus did not fall within the scope of the right.[184] However, the fact that fair use began its life as conduct outside the scope of the right does not mean this is the situation today. It is entirely

179. 17 U.S.C. § 106–107 (2012).

180. *Id.* § 501(a).

181. *Id.* § 504(a).

182. *See also* Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW. U. L. REV. 1607, 1609 (2009) ("[T]he fair use doctrine renders certain otherwise infringing actions relating to copyrighted works noninfringing.").

183. 9 F. Cas. 342 (1841).

184. Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright,* 118 YALE L.J. 186, 229 (2008); *see also* Matthew Sag, *Prehistory of Fair Use*, 76 BROOK. L. REV. 1371 (2011).

plausible that copyright has evolved over time and new meaning has been attributed to the fair use doctrine.

b) Counter-Argument to the Critique

To respond to this critique, we must distinguish between two concepts: on one hand, a standard that is employed to limit the scope of a plaintiff's right, and, on the other, a standard that distinguishes rightful from wrongful infringements of that right. Distinguishing these concepts is not easy and has gone under-theorized in tort law. However, we can find some answer to this question by looking into the literature on private nuisance.

As noted earlier, private nuisance contains the concept of reasonableness. But reasonableness has potentially a dual meaning. On one hand, the court could ask whether the defendant infringed the right to reasonable use and enjoyment, and on the other, the question could be whether the defendant's conduct was reasonable. As highlighted by Professor Gregory Keating and Professor Richard Wright, the difference between these two inquiries is a difference between impact and conduct.[185] In the first case, the question focuses solely on the impact to the plaintiff. Was the plaintiff harmed in a legally cognizable way? This is an impact analysis and the legal standard's role is to define the scope of impact that will be actionable. By contrast, the second case does not focus on the plaintiff but the defendant. The question is whether the defendant's actions were good or bad. This is not an impact analysis, but a conduct analysis. Here, the role of the legal standard is to define what conduct is rightful and wrongful.

When we take into account this distinction, it appears that, in some jurisdictions, private nuisance is a strict liability tort. As Professor Keating argues, this is most clearly demonstrated by *Boomer v Atlantic Cement*.[186] In that case, neighbors of a nearby cement factory complained that the smoke, dirt, and vibrations emanating from the factory constituted a nuisance. The court imposed damages but refused to impose an injunction. The factory employed three hundred people. Forcing it to close would have resulted in great unemployment. According to Professor Keating, the plaintiff in this case had a right to reasonable use and enjoyment of the land.[187] This right had been infringed and therefore liability in the form of damages was imposed. However, the defendant's conduct was not wrongful. The defendant's conduct was socially beneficial, and thus reasonable. As a result, the court refused to enjoin the production. Nevertheless, the court fundamentally

185. *See supra* note 54.
186. 26 N.Y.2d 219 (1970).
187. Keating, *Nuisance*, *supra* note 18, at 42–50.

applied a strict liability rule. The plaintiff had been affected in a legally relevant way (the right to reasonable use and enjoyment had been infringed). Therefore, liability followed, regardless of the fact that the conduct was not wrongful, and the defendant was required to pay damages for infringing a right.

Returning to copyright, the question posed is whether the fairness standard facilitates an impact analysis or a conduct analysis. In asking whether the copying was fair, does the court primarily ask: was the defendant impacted in a legally cognizable fashion? Or, is the court's question primarily: was the defendant's copying good or bad for society? If it is the former, then the fairness standard is relevant only to the issue of defining the scope of the right. If it is the latter, the role of the fairness standard is to separate rightful from wrongful conduct.

The answer is that the fairness standard is primarily a conduct analysis. As the balancing of interests theory highlights, the ultimate and final arbiter in fair use is the question of whether the defendant's copying is socially beneficial. The root of the fair use analysis is an examination of whether the defendant's conduct will produce greater access-benefits or incentive-costs. Conduct that produces negative consequences are labeled unfair; conduct that produces positive consequences are labeled fair. Thus, the fairness analysis seems primarily concerned, not with whether a right was infringed, but with whether the conduct was good for society and thus not faulty. The fairness standard therefore does not define the scope of the right, but distinguishes between rightful and wrongful conduct. As a result, copyright infringement is fault-based. Unlike nuisance, which imposes liability whenever the defendant's actions impact the plaintiff in a legally cognizable fashion, liability is only imposed in copyright if the copying is unfair (i.e., if this conduct is bad for society).

However, once again, this analysis is complicated by the presence of the harm concept in the fair use doctrine. While the question of fairness is primarily a question of conduct, the fairness analysis does contain an impact analysis within it, as demonstrated by cases such as *Campbell*. These cases are ones in which no liability follows because the court determines that the plaintiff was not impacted in the legally relevant fashion.

The fact that harm slips into the fault analysis explains the statutory wording in the Copyright Act. The Copyright Act currently says that fair copying is not an infringement of the right. This is half-correct. As harm finds itself in the fair use inquiry, some fair use cases, such as *Campbell*, represent instances where the copying causes no harm, and therefore no right has been infringed. The drafters' only mistake was simply a failure to write the statutory language in a sufficiently nuanced manner that would express

the dual character of fair use. While some instances of copying are fair because they involve no harm and thus no rights-infringement, other instances of copying are fair because, although they do involve harm and accordingly a rights-infringement, that harm is nonetheless justifiable because the copying is good for society.

2. Fair Use is an Affirmative Defense

The second critique arises out of the fair use doctrine's status as an affirmative defense. As a result, even if fair use is a fault inquiry, the plaintiff is not required to prove fault as part of the prima facie case; instead, the defendant must prove the absence of fault. On this basis, some may argue that the liability rule is in fact strict. Because the issue of fault only becomes relevant to the liability decision if the defendant pleads fair use, defendants who do not plead fair use will be held liable on the basis of copying and substantial similarity alone. It would appear therefore that fault is not a necessary condition for liability and frequently defendants are held liable even when no one has introduced any evidence about fault.

To respond to this claim, this Subsection shall first demonstrate that the position of fair use as an affirmative defense in fact strengthens the claim that copyright is a fault-based tort. Second, it shall then proceed to try to accurately characterize the procedural role of fault in copyright infringement.

a) Fair Use as an Affirmative Defense

Recall that the types of affirmative defense differ depending on whether the tort is judged by a strict liability rule or a fault liability rule. In strict liability cases, only defenses of plaintiff fault exculpate the defendant. Conversely, justification and excuse are admissible defenses in cases of fault liability. The question copyright scholars must ask, therefore, is what type of defense is fair use?[188]

To answer this question, we may begin by demonstrating what a fair use claim clearly is not. First, it is not a claim that the plaintiff was at fault for the outcome. Defenses like contributory negligence deny the plaintiff relief because he was at fault for the accident. In copyright, a similar defense would be to demonstrate how some conduct of the copyright holder was faulty and resulted in the copied work. But clearly the question of fair use centers not on the actions of the copyright holder, but on the actions of the copyist.

Nor is fair use an excuse. Recall that excuses focus on the subjective characteristics of the defendant. They argue that, although the conduct was

188. On other limitations and exceptions, see *supra* note 141.

wrongful, and there was fault in the action, the defendant did not act with any bad will, and therefore there is no fault in the actor. Clearly fair use does not fall into this category, as the impact of a defendant's mental state is not relevant to the fair use determination.

If fair use is an affirmative defense, then it is doubtlessly a justification. Like other justifications, its purpose is to demonstrate that the defendant's conduct was not wrongful. Rather fair use is rightful conduct. Fair copying produces benefits of access that outweigh any negative consequences it may have. Thus, by introducing a fair use claim, the defendant argues that there was no fault in the action, and instead demonstrates that this was actually good conduct. Therefore, if fair use is an affirmative defense, this simply provides another avenue for proving the same thing: that liability ultimately depends upon the defendant's fault.

b) The Procedural Role of Fault in Copyright Infringement

Nevertheless, there is something unusual about copyright's formal structure. Normally in a fault-based tort, the plaintiff must introduce at least some evidence establishing that the defendant was at fault for the outcome. The burden then shifts to the defendant to defend himself through excuse or justification. In copyright infringement, the copyright holder need not provide any evidence of the copyist's fault. He must only demonstrate conduct and outcome. Thereafter, the defendant can absolve responsibility by claiming the absence of fault under the paradigm of fair use. Although copyright is a fault-based tort, it is unusual because there is no burden on the copyright holder to prove any unfairness, only a burden on the copyist to prove fairness.

It would seem, therefore, that in a copyright action, the court apparently presumes the existence of fault. Copying is presumptively unfair until the copyist can be shown otherwise. This itself is not necessarily unusual. There are other situations where the court will presume the existence of fault until the defendant can rebut that presumption. This happens most classically under the *res ipsa loquitur* doctrine in negligence.[189] This doctrine, which in English means "the thing speaks for itself," is applied in cases where in all probability the accident could not have occurred without fault on part of the defendant. It is used commonly today in surgical malpractice cases.[190] Where

189. RESTATEMENT (SECOND) OF TORTS, § 328; Byrne v. Boadle, (1863) 159 Eng. Rep. 299 (Exch.); 2 Hurl. & Colt. 722.

190. *See, e.g.*, ZeBarth v. Swedish Hosp. Med. Ctr., 81 Wash. 2d 12, 18 (1972); Douglas v. Bussabarger, 73 Wash. 2d 476 (1968); Leach v. Ellensburg Hosp. Ass'n, Inc., 65 Wash. 2d 925 (1965).

a foreign body is found in a patient following a surgery, there is a very high likelihood that the surgeons were negligent, and accordingly the court will simply presume the fault unless the defendant can rebut that presumption. A similar presumption is found in defamation by libel.[191] Proving a case of defamation at common law traditionally required that a defendant publish some defamatory material concerning the plaintiff. More recently courts have also required that the statement be false, that there be some degree of fault on the defendant's part, and that it caused actual damages.[192] However, in cases where the defamation is in print, the courts have presumed fault and actual damages on the part of the defendant. In such cases, it is presumed that the defendant acted maliciously.[193] It is then up to the defendant to rebut that presumption at the defense stage.

However, characterizing fair use as an attempt to rebut a presumption of fault is problematic. Presumptions are exceptions to the normal rule that the plaintiff must prove conduct, outcome, and fault. In order for the court to apply this exception, the plaintiff must typically demonstrate some additional, supplementary factual condition. For example, in negligence, the plaintiff must typically prove conduct, outcome, and fault. However, in a subset of cases, the plaintiff can argue that he suffered a type of harm that does not normally occur without negligence, then he will gain the benefit of the *res ipsa loquitur* doctrine. Likewise, in defamation, usually the plaintiff must prove fault. However, if the plaintiff can make the additional showing that the defamatory material was published in print, then the court will presume fault.[194] In both cases, the presumption only operates after the plaintiff has demonstrated a reason why it should operate.

Copyright infringement does not easily fall within this mold. Once the copyright holder proves copying and substantial similarity, the burden of proving fairness is always placed on the copyist. If copyright adopted a rebuttable presumption, then typically the copyright holder would be required to prove copying, substantial similarity, and unfairness, unless he could prove some supplementary condition which would justify making the copyist prove fairness in a subset of cases.

In either case, it appears that copyright infringement is somewhat anomalous within the broader field of tort law. If fair use is an affirmative defense, then copyright infringement is unusual in that the plaintiff need not introduce evidence to prove the existence of fault before the defendant must

191. DOBBS, *supra* note 2, § 401.
192. *Id.*
193. *Id.*
194. *Id.* (on presumption of fault in libel).

offer a defense. Alternatively, if fair use serves to rebut a presumption of fault, copyright infringement takes the unusual position of placing the burden of proving fault on the plaintiff until he introduces evidence showing why that burden should be shifted.

3. A Caveat: The Market Failure Approach to Fair Use

Finally, before closing this Part, we must introduce one caveat into the analysis. So far, this Article has sided with Professor Lunney's interpretation that fair use is ultimately a consequentialist balancing test. If so, the thesis that copyright infringement is a fault-based tort is wholly plausible. A plaintiff's right is infringed when copying leads to a substantially similar work that displaces demand (i.e., when the proscribed conduct causes a harmful outcome). Such rights-infringement will, nevertheless, not result in liability in instances of fair use because, in such cases, the defendant's conduct was actually a good thing for society, and accordingly not wrongful: it is fair.

However, if the older market failure approach is correct, then the thesis is more dubious and copyright is probably a strict liability tort. Crucially, in the market failure theory, whether the copying was socially desirable is not determinative as to whether fair use should apply. Instead, if a defendant engages in socially desirable copying, the expectation is that he should still pay the copyright holder for the ability to do so (either in a license fee or in damages). This normal rule is displaced only in the case where a market failure occurs that would prevent the socially desirable copying. This would not only be a strict liability rule, but it would be the perfect example of a strict liability rule.

As noted above, strict liability does not take rightfulness or wrongfulness into account when imposing liability; all that matters is whether a right has been infringed. Thus, we see classic cases where the court accepts that the conduct was rightful, or not wrongful, but, because liability is strict, it imposes liability anyways. For example in the infamous trespass case of *Vincent v Lake Erie*, the court accepted that the defendant's action of tying his ship to the plaintiff's dock was not wrongful (it was instead socially beneficial), but held that nevertheless the resulting harm to the defendant's property amounted to an infringement of his right and therefore that the plaintiff ought to be compensated.[195]

If the market failure approach to fair use is descriptively accurate, then the same situation occurs in copyright. Even in the case where the defendant's copying is in fact socially desirable because the benefits of access

195. 109 Minn. 456 (1910).

outweigh harm to incentives, the defendant will nevertheless be required to pay the plaintiff. Thus, in this interpretation of the liability rule, even rightful conduct that is good for society and not wrongful results in liability. This is the canonical case of strict liability. Nevertheless, this Article has based its opinion on the newer balancing approach to fair use, which has critiqued the market failure approach.

IV. RESTRUCTURING FAIR USE

So far this Article has focused on an analytic exercise: our goal has been to determine whether copyright infringement adopts a strict liability or a fault liability rule. The thesis presented is that copyright adopts a fault rule, similar to a negligence rule. But why does this characterization matter? What is the real world relevance of labeling copyright strict or fault-based?

The answer to this question is twofold. Firstly, a number of scholars have argued that copyright's supposed adoption of a strict liability rule is normatively undesirable, and therefore they recommend that copyright be altered to a fault-based regime. In particular, frequent claims are made that copyright infringement ought be restructured as an intentional tort. However, as this Article has argued, it appears that copyright infringement is in fact a fault-based tort in the same way that negligence is. As a result, copyright's liability regime may not be quite as bad as previous scholars have suggested. As this Part demonstrates, the type of fault required before liability is imposed in copyright is currently optimal, given copyright's underlying normative structure.

Secondly, as Part III demonstrated, the formal structure of copyright infringement is a mess. The most obvious example of this mess is the way harm and fault collapse into one another in the fair use analysis. The second Section of this Part elaborates on the two problems this collapsing causes. Firstly, it results in courts trying to reach findings of no-liability by appealing to the concept of "no harm," when they really mean that there is no fault. Secondly, it results in the burden of proof being poorly assigned. It is therefore recommended that courts try to distinguish these concepts. This Part concludes by demonstrating how the fair use analysis could be restructured to accomplish this end.

A. THE NORMATIVE DEFENSIBILITY OF COPYRIGHT INFRINGEMENT'S LIABILITY RULE

This Section first summarizes the criticisms that are often presented against the supposed strict liability rule in copyright before showing that these criticisms are overstated given that copyright infringement is already based upon fault. It then goes on to evaluate whether copyright infringement

would be normatively improved if it were to be reformed as an intentional tort.

1. The Normative Critique

For decades, academicians have offered criticisms of the supposed strict liability rule. In answer to these criticisms, scholars typically recommend that copyright be altered to base liability upon some element of fault. We briefly summarize these critiques here.

a) Inconsistency

First, it is argued that reliance on strict liability is anomalous within the greater field of tort law.[196] The standard historical account of the common law states that the early law was based on strict liability, but over time tort has gradually replaced strict liability rules with fault liability rules. In particular, many accounts point to the mid-nineteenth century as the period when the common law moved from a regime based primarily on strict liability to becoming a regime primarily based on negligence. It is often said that the case of *Brown v. Kendall* is a key point within this evolution.[197] In an oft-quoted passage from this case, Chief Justice Marshall of the Massachusetts Supreme Court decided that in order for one to be liable for harm accidentally caused to another, it must be shown that the defendant failed to take "the kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case."[198] Clearly strict liability did not die off after this case,[199] but the change in attitude that it represented left us with a modern regime in which the bulk of tort liability is assessed through the use of negligence rules.[200] Why then is copyright any different? In a world where the common law has generally moved away from

196. *See, e.g.*, Hetcher, *supra* note 15, at 1283–99 (describing the historical evolution from strict liability to fault liability in tort generally), 1290 ("My present concern is not whether these are convincing arguments from a top-down normative perspective. For present purposes, what matters is that the fault standard won out in the case law. This doctrinal development is of interest because it raises the obvious question: if a heightened moral sensitivity toward fairness and social welfare dictated a move to the fault standard in tort generally, then why not in copyright as well?").

197. 60 Mass. 292 (1850).

198. *Id.*

199. Briefly, in the nineteen seventies, strict liability made a reappearance in the theory of enterprise liability. *See* WHITE, TORT LAW IN AMERICA, *supra* note 1, at 168–72.

200. COLEMAN, *supra* note 4, at 218 ("The bulk of fault liability involves negligence."); Richard A. Posner, *A Theory of Negligence,* 1 J. LEGAL STUD. 29, 29 ("negligence cases[] constitute the largest item of business on the civil side of the nation's trial courts").

strict liability towards fault liability, what justifies copyright's decision to maintain a strict liability standard?[201]

b) Inefficiency

Second, there is a concern that strict liability in this context may deter some cases of good, beneficial copying.[202] As previously discussed, some copying is simply good conduct because it creates benefits of greater access. Ideally, a social planner would wish to encourage this behavior. However, copyright law is notoriously complicated. Not only does the 1976 Copyright Act contain over thirteen hundred sections (a length that makes it comparable to the tax code), but the conceptual difficulty of dealing with intangible goods has led to copyright (together with patents) being called "the metaphysics of the law."[203] For the ordinary citizen, it is often very difficult to assess whether they have copied enough protected expression to infringe the copyright holder's exclusive right. In this context, we may see over-deterrence. Some may forgo copying that is beneficial because they cannot accurately assess whether the copying is lawful. This is exacerbated by the risk-aversion that many people demonstrate. Previously some scholars have suggested that this problem would be alleviated if liability turned on some question of fault.[204] If the defendant could argue that he did not copy intentionally, recklessly, or negligently, then he may feel more confident in engaging in beneficial copying.

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201. Professor Reese argues that U.S. copyright law drifted into this state of strict liability by accident. *See* R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS. 133 (2007) (arguing that traditional protections offered to innocent infringers gradually were stripped away during the twentieth century as a byproduct of other changes occurring in U.S. copyright law).

202. *See, e.g.,* Ciolino & Donelon, *supra* note 15, at 413 ("Strict liability overdeters lawful and beneficial uses of copyrighted works."); Reese, *supra* note 201, at 183 ("Because copyright law seeks to encourage such noninfringing copying, the possibility of holding innocent infringers liable should be worrisome if it deters potential users from using copyrighted material in ways that might ultimately be found noninfringing"); Eva Subotnik, *Intent in Fair Use,* 18 LEWIS & CLARK L. REV. 935, 963–64 (2014) ("Users (even those with legal counsel) often find themselves unable to predict with confidence whether a use would be deemed fair . . . . and risk aversion will lead some to abandon projects rather than come close to the boundary line between fair use and infringement.").

203. Folsom v. Marsh, 9 F. Cas. 342, at 344 (C.C.D. Mass. 1841).

204. *See, e.g.*, Ciolino & Donelon, *supra* note 15; Subotnik, *supra* note 202, at 976 (proposing that incorporating intent into fair use determinations will illeviate problems of over-deterrence and "depriving the public of socially beneficial uses.")

c) Immorality

Finally, there is an argument that strict liability in copyright is simply unfair. In the past, some deontological scholars have tried to demonstrate the immorality associated with strict liability rules. Professor Jules Coleman has argued that the "substitution of fault for causation marked an abandonment of the immoral standard of strict liability under Trespass (which, after all, imposed liability without regard to fault) in favor of a moral foundation for tort law based on the fault principle."[205] Moreover, Professor Ernest Weinrib argues that strict liability creates an unjust inequality between the plaintiff and defendant. In this view, strict liability reflects "extreme solicitude for plaintiffs' rights" with little weight given to the defendant's equal interest in living an autonomous life.[206] In the copyright context, Professor Dane Ciolino and Erin Donelon have argued that copyright's strict liability regime "conflicts with traditional deontological notions of personal autonomy."[207] By requiring copyists to pay damages for actions that they did not intentionally cause, copyright forces the individual to bear the responsibility for consequences that they have not willfully brought about. Instead they argue copyright should only hold individuals liable if they copy intentionally.

2. Answering the Normative Critique

The fact that copyright is not based on strict liability forces us to reconsider these criticisms. While this Article does not suggest that the rules governing copyright infringement are currently without flaw, the fact that they already require some element of fault reduces the impact of these normative arguments.

a) Inconsistency

Arguably the most misplaced of critiques is that copyright's reliance on strict liability is inconsistent with the rest of tort doctrine. Most torts require the defendant to act with fault before liability will be imposed. But even more salient is the fact that liability for most torts requires only negligent conduct. That is, in most cases, the fault is not based on the defendant's state of mind, but on whether he failed to comply with a standard of conduct. With this in mind, copyright's liability rule, which also requires the defendant

205. Coleman, *supra* note 4, at 374.

206. WEINRIB, *supra* note 4, at 179.

207. Ciolino & Donelon, *supra* note 15, at 419. In addition, other authors who have talked about the "harshness" of strict liability seem to suggest there is some unfairness involved in the current liability regime. *See, e.g.*, Mullally, *supra* note 129; Depoorter & Walker, *supra* note 129.

to fail to comply with a standard of conduct before imposing liability, seems not anomalous, but largely consistent with the broader field of tort doctrine.

b) Inefficiency

Perhaps most important, though, is the demonstration that copyright's liability rule is broadly efficient. The over-deterrence argument suggests that currently copyright produces incentives to act in inefficient ways (i.e., by forgoing economically beneficial copying). The analysis provided here, however, suggests a different story. If copyright adopted a strict liability rule, much efficient copying with great benefits in terms of access would be forgone. However, the fault inquiry that lies at the heart of fair use exculpates defendants when their copying is beneficial for society. The law is organized in such a way that economically beneficial copying does not result in liability.

This is not to say that over-deterrence does not happen. It is still highly possible that, due to the complexity of copyright, users of copyrighted works will be unable to accurately determine whether their copying is lawful or not and, as a result, may shy away from copying that would benefit society. However, what the analysis does reveal is that this is not a problem with the liability rule per se. If individuals act in conformity with the liability rule (copying when doing so is fair, refraining from doing so when it is not), then efficiency will be reached. People behave inefficiently not because the liability rule in place is inefficient, but because they do not fully understand what the liability rule requires of them. The complexity of copyright makes it difficult to determine whether they are acting in conformity with the standard the law establishes. This encourages people to shy away from uses that, while lawful, may be approaching the border between infringement and fair use.

Given that this is the case, the appropriate response is not to change an already efficient liability rule, but to better educate people of their duties established by the law. Informing people more clearly on what is a copyright infringement and what is a fair use will lead people to acting in conformity with the efficient liability rule that copyright infringement already adopts.[208] To that end, the promulgation of fair use guidelines is particularly important.[209] By establishing and distributing such guidelines, we can instill

208. Assuming that individuals try to follow formal law, which is perhaps a debatable assessment of behavior in this area. *See generally* TINY MURRY ET AL., PUTTING IP IN ITS PLACE (2014).

209. *See generally* Gregory Klingsporn, *The Conference on Fair Use (CONFU) and the Future of Fair Use Guidelines,* 23 COLUM.-VLA J.L. & ARTS 101 (1999); Robert Thornburg, *The Impact of Copyright Law on Distance Education Programs: How Fair Use and the CONFU Guidelines May Shape the Future of Academia,* 27 S. ILL. U. L.J. 321 (2003). The work of Professor Peter Jazi and Professor Patricia Aufderheide on improving fair use awareness in the documentary

some confidence in those who wish to copy for lawful and beneficial purposes.

c) Immorality

The fact that copyright is based on fault also demonstrates that our test for copyright infringement is not as immoral as perhaps once thought. Professor Weinrib's argument that strict liability offers "extreme solicitude" for plaintiff's rights without equally taking into account the legitimate interests of defendants is undoubtedly true in many instances, but it is not applicable in the copyright context. As demonstrated, the fair use doctrine applies in a multitude of highly diverse factual situations to protect the interests of the copyist. Whether the law upholds the interests of the right holder or the copyist depends not on some unjust favoritism, but on an objective determination about how to bring about the greatest social benefit.

Equally, Ciolino and Donelon's argument that strict liability in copyright fails to take seriously the notion of personal autonomy apparently forgets that the law often holds people liable for actions they did not intend. Defendants in negligence cases are frequently held liable, although they have not willfully brought about the harm they cause. If holding a defendant liable for unintentional copying is immoral because it fails to respect people as autonomous beings, then it is at the very least no more immoral than the large swathes of tort law that hold defendants liable for their unintentional but nevertheless negligent actions.

3. Reforming Copyright Infringement as an Intentional Tort?

Although copyright's liability regime may not be as inconsistent, inefficient, or immoral as previously has been suggested, that does not mean it is without flaw. While the liability rule may not be as bad as once supposed, there could still potentially be room for improvement.[210] Those who have

filmmaking community is also worthy of special praise. *See* Peter Jaszi & Patricia Aufderheide, *Untold Stories: Collaborative Research on Documentary Filmmakers' Free Speech and Fair Use,* 46 CINEMA J. 133 (2007); *see* AUFDERHEIDE ET AL., STATEMENT OF BEST PRACTICES IN FAIR USE OF COLLECTIONS CONTAINING ORPHAN WORKS FOR LIBRARIES, ARCHIVES, AND OTHER MEMORY INSTITUTIONS (2014), *available at* http://www.cmsimpact.org/sites/default/files/documents/orphanworks-dec14.pdf (last visited Feb. 27, 2015).

210. One flaw with the current liability rule comes in its application. In applying the fairness rule, courts assume that the a copyist can tell with certainty whether copying will harm incentives. As a result, when applying the fairness rule, courts compare simply the access-benefits with the incentive-costs. However, the assumption that the copyist can tell the incentive effects ex ante is unrealistic in many cases. Typically, the would-be copyist can only tell that there is a certain probability that the use will create some harm. Ideally in these cases, the court's assessment of the fairness of copying should not depend on an ex post

researched this topic in the past have usually suggested that copyright infringement become an intentional tort. Hence, Professor Ciolino and Donelon argue that the copyist's lack of intention should be a complete defense to copyright infringement.[211] Professor Jacqueline Lipton acknowledges this as one potential route, but also suggests that the plaintiff must prove intent as part of the prima facie case.[212]

This raises the question, what category of fault should copyright liability be based upon? It currently is based upon the failure to comply with a standard, but would the situation become normatively superior if liability were to be based upon the defendant's mental state? In particular, ought copyright infringement be reformed into an intentional tort? In response to these suggestions, this Article takes the view that the status quo ought to be maintained.

a) What Does Intent Mean in Copyright?

As an initial matter, we must firstly be careful to clarify what the concept of intent would mean in this context. Professor Eva Subotnik has wisely pointed out that "[t]hose who invoke user 'intent' in these contexts are often not precise in what they mean by that term and related concepts, such as 'good faith.'"[213] Professor Subotnik then proceeds to isolate three different types of intent that could potentially be relevant to the liability decision. Those are: the "intent to communicate new meaning, intent to comply with the law of fair use, and intent to be a good citizen."[214] However, while this Article applauds Professor Subotnik's serious engagement with a difficult analytic question that has gone under-theorized, it does not agree that these are the only types of intent that are relevant in copyright law, and in fact believes that her article has overlooked the most relevant definition of intent for copyright purposes.

As noted earlier, the intent concept in tort law, especially when used in reference to fault liability, connects the elements of conduct and outcome. In this manner, it is distinguishable from similar concepts such as volitional or

comparison of access-benefits and incentive-costs. Instead, courts should engage in an ex ante comparison of the access-benefits with the *expected* incentive-costs (where expected incentive-costs are defined as the potential harm to incentives multiplied by the probability of their occurrence). For a more detailed treatment of this issue, see Oren Bracha & Patrick R. Goold, *Copyright Accidents or: Should Copyright Have A Negligence Standard?* (unpublished draft on file with authors).

211. *See* Ciolino & Donelon, *supra* note 15, at 410, 420.

212. Lipton, *supra* note 15, at 804.

213. Subotnik, *supra* note 202, at 947.

214. *Id.*

deliberate conduct. "Intentional torts" are fault-based because the defendant has engaged in the prescribed conduct with the purpose of causing the legally cognizable form of harm.

The conduct in copyright is copying, while the harmful outcome is market harm flowing from the existence of the substantially similar work. Therefore, if copyright infringement were to become a fault-based tort based upon intention, liability would require that the defendant engage in copying with the intention of causing market harm. The intentional tort of copyright infringement would impose liability upon a defendant only when it is proved that she actually tried to divert the copyright holder's sales or reasonable license fees. The question is whether such a modification would be normatively desirable.

b) Ought Copyright Infringement Be an Intentional Tort?

This Article takes the position that copyright ought not become an intentional tort. While this may potentially improve the morality of the copyright system, doing so would interfere with the efficient liability regime already in place.

We have previously seen that the liability rule in copyright is broadly efficient. If the balancing interpretation of fair use is correct, then the law creates incentives for users to engage in copying when doing so produces greater benefits in terms of access than cost in lost incentives, and to refrain from copying in cases where such copying would cause harm to incentives that is not offset by benefits of access. As a result, we have a system that (at least theoretically) serves overall social welfare.[215]

Reforming copyright infringement into an intentional tort would jeopardize the efficiency that the current system creates. Crucially, whether a defendant's copying is good or bad from a welfare perspective is totally unaffected by the defendant's mental state. When assessing whether copying is good or bad from a social perspective, all we need to assess is whether the copying harms incentives greater than it benefits access. The upshot is that if we exculpate defendants who create unfair copies on the basis that they did not intend to produce the legally cognizable harm, then we permit individuals to create copies that will harm future incentives without any greater

215. One small caveat ought to be highlighted. So far, this Article has discussed the liability rule in copyright "under the simplifying assumption that there is a certainty rather than a probability of harm" flowing from the defendant's conduct. If the link between the conduct and the harmful outcome is certain, then the liability rule is efficient. It is not clear whether this would be the case if this assumption were to be relaxed. *See* LANDES & POSNER, *supra* note 55, at 29, 54.

offsetting benefit of public access. This is strongly antithetical to the normative goal of promoting social welfare.[216]

On the other hand, reforming copyright infringement into an intentional tort would arguably improve the morality of the system. As noted, the standard of conduct type of fault is frequently defined in consequentialist terms. Economic scholars have provided very few compelling reasons as to why intentional conduct is tortious and not simply dealt with by the criminal law.[217] Deontological scholars, by contrast, have the reverse problem. Arguing from Kantian ethics, it is, to some degree, intuitively demonstrable that intentionally causing harm is wrongful. But these scholars have found it much harder to explain negligence in such terms.[218]

If copyright scholars wish to see copyright adopt an intentionality requirement, the best possible argument to make would rest on the deontological position that whether an action is right or wrong depends on the will of the actor, not its consequences. Thus, the appropriate normative basis for holding the defendant's copying liable would be found in the blameworthy state of mind this represents. Nevertheless, such an argument would seem inappropriate in the Anglo-American context, given the frequent claims that the consequentialist and utilitarian goal of maximizing social welfare informs the entire system.[219] In particular, if the court begins to use

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216. This concern has already been highlighted. *See* Michael Madison, *A Pattern-Oriented Approach to Fair Use,* 45 WM. & MARY. L. REV. 1525, 1555–56 (2004) ("[W]hy the 'good faith' of the infringer should matter here is unclear. To the extent that copyright policy is informed by a utilitarian calculus maximizing social welfare in terms of 'creativity' and 'creative' works of authorship," the question is not "whether the defendant believed that he or she was acting legitimately," but is instead "whether the outcome of the defendant's efforts was more socially valuable than the outcome produced by allowing the copyright holder to enjoin the use or obtain payment."). Although, given the difficulties courts face in calculating the incentive-cost and access-benefit variables, room may still exist to employ the defendant's intent as a rough heuristic device for ascertaining the social welfare impact of the copying.

217. *See supra* note 82.

218. *See generally* Heidi M. Hurd, *Finding No Fault with Negligence, in* THE PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 387 (John Oberdiek, ed., 2014); Alan Calnan, *The Fault(s) in Negligence Law,* 25 QUINNIPIAC L. REV. 695 (2007).

219. *See, e.g.*, 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."); Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' "); United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) ("The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. . . . It is said that

deontological premises to define what counts as an actionable wrong in this area, coherency would require using deontological premises to justify the initial grant of right.[220] While such a prospect is hardly beyond the bounds of possibility, it would cut against the frequent statements made by academics that copyright is not about natural right, but instead about social welfare.[221]

B. THE FORMAL STRUCTURE OF COPYRIGHT INFRINGEMENT

While the liability regime need not require any modification given copyright's underlying normative goals, there is a strong case for altering the formal structure of copyright infringement analysis. As this Article has shown, the role of fault in copyright infringement is often obscured by the collapsing of harm and fault inquiries into the fair use analysis. As this Section elaborates upon, this results in "no fault" cases being shoe-horned into "no harm" language, and poorly assigned burdens of proof. After which, this Section demonstrates how restructuring the fair use analysis could address both of these problems.

1. Collapsing Harm and Fault

Theoretically, the fact that fair use contains two separate conceptual inquires is not itself problematic. As long as judges are aware that asking whether harm occurred and whether the harm was justifiable are two distinct and equally important questions, then it does not particularly matter whether both are discussed under the doctrinal label of fair use or disaggregated into their own separate doctrines.

However, in practice, the dual nature of fair use inquiry does lead to a problem. Professor David Nimmer previously highlighted the problem of "stampeding" in fair use cases.[222] By this he meant that judges make their

reward to the author or artist serves to induce release to the public of the products of his creative genius.").

220. This is certainly not to say that scholars in the Anglo-American traditional are completely blind to deontological foundations for intellectual property rights. *See e.g.*, ROBERT MERGES, JUSTIFYING INTELLECTUAL PROPERTY (2011) (justifying intellectual property rights from Lockean, Kantian, and Rawlsian perspectives); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988).

221. *See, e.g.,* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs,* 84 HARV. L. REV. 281, 291 (1970) ("In sum, none of the noneconomic goals served by copyright law seems an adequate justification for a copyright system.").

222. David Nimmer, *"Fairest of them All" and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 281 (2003) ("Courts tend first to make a judgment that the ultimate disposition is fair use or unfair use, and then align the four factors to fit that result as best they can. At base, therefore, the four factors fail to drive the analysis, but rather serve as

conclusion as to whether the use is fair and then use the four factors to justify their conclusion. The fair use factors do not drive the analysis, but instead are used to support the conclusion. This is particularly noticeable when it comes to the fourth factor on fair use. Because the presence of market harm has been considered the most important factor in the fair use analysis, judges who wish to find copying to be fair had better work particularly hard to show that this vital factor does not go against their overall conclusion.

But as noted earlier, if the balancing test for fair use is accurate, then the touchstone of fair use analysis is not whether the defendant caused harm, but whether that harm was justifiable. There are cases where the defendant causes the legally cognizable market harm, but this should not attract liability because that copying was still a good thing for society. However, in such cases, if a judge is subject to the stampeding effect, then it is likely he will try to align the fair use factors in a way that will suit his conclusion. Accordingly, there will be pressure for him to conclude that the fourth factor on market harm supports his finding of no liability, or at the very least does not cut against it. Therefore, in some cases where there is harm but that harm is justifiable, it seems plausible that judges will try to justify their finding of no liability by appealing to the concept of "no harm," rather than the concept of "no fault."

Perhaps the most salient example of this occurring comes in the Google Images controversy. As discussed earlier, there was a strong claim that Google's Image Search caused the plaintiff some cognizable legal harm because it arguably displaced sales in the cellphone market. Nevertheless, despite the arguable case of harm, the Ninth Circuit said that this harm "remain[ed] hypothetical" and thus concluded that the fourth factor favored neither side.[223] In doing so, the court appealed to the lack of empirical proof of harm. Yet such reasoning is questionable. Not only does the fourth factor only require harm to a "potential" market, but there was a theoretical reason to believe such harm was occurring.

This author interprets this case as one of stampeding. The court recognized that there was significant public benefit to Google's use and that, all things considered, the benefit in terms of access outweighed the harm caused to Perfect 10 and the lost future incentives this may cause. Nevertheless, because of the stampeding effect, the court believed that they could not justify a conclusion of no liability without at least demonstrating

convenient pegs on which to hang antecedent conclusions."). *But see* Beebe, *supra* note 107, at 588–94.

223. *Perfect 10*, 508 F.3d at 1168.

that the market harm factor did not cut against their overall verdict. There was an arguable case of market harm, but rather than acknowledge the harm and state clearly that this was a case in which the benefits outweighed the harm, the court tried to reason away the harm by appealing to the lack of empirical evidence.

On their own, isolated instances of such stampeding are unlikely to be too problematic. However, if this sort of reasoning is commonplace amongst the judiciary, then a serious consequence emerges. Routinely fitting "no fault" cases into the language of "no harm" creates a dangerous precedent. As the language of "no harm" increasingly dominates the body of fair use cases, the more pressure future litigants will experience to likewise fit their claim into such "no harm" language. This prejudices those defendants who engage in copying that does cause harm, but which is nevertheless socially desirable. The lack of fault in these cases should be enough to ground a conclusion of no liability. However, because there is a pressure to fit claims into the language of "no harm," defendants will need to formulate rather tenuous arguments as to why their use is not harmful. Indeed, we may already be in this position. In Perfect 10, Google tried to fit its "no fault" claim into the language of "no harm," but as there was a strong reason to believe harm existed in this case, the trial court dismissed its legitimate case. Only through rather questionable reasoning did the Ninth Circuit salvage Google's Image Search.[224]

224. Arguably stampeding can be seen in other legitimate "no fault" cases. In *Bill Graham Archives,* the Second Circuit found no market harm. The court reasoned that the defendant's use was transformative, and that the plaintiff could not prevent others from entering transformative markets. Bill Graham Archives v. Dorling Kindersley, Ltd., 448 F.3d 605, 614–15 (2d Cir. 2006). Again, this seems questionable. Under *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994), the test is whether the defendant's use harms licensing market that are "traditional, reasonable, or likely to be developed." In the *Bill Graham* case, the plaintiff was already in the market for licensing reduced sized versions of the posters. The case for market harm was at least plausible. Likewise, in *Authors Guild v. Google*, the court held that snippet views did not cause market harm. Firstly, the court reasoned that it was unlikely that "someone would take the time and energy to input countless searches to try and get enough snippets to comprise an entire book." Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 293 (S.D.N.Y. 2013). However, such reasoning forgets that copyright infringement can occur when someone reproduces a qualitatively important, yet quantitatively small, section. For example, if *Hamlet* were still under copyright, and someone were to reproduce part of the famous "to be or not to be" soliloquy, this would likely amount to an infringement despite the relatively small amount of copying. Likewise, Google's snippet views may well allow people access to qualitatively important parts of text, resulting in market substitution. Secondly, the court reasoned that Google Books allows authors to become noticed, and thus may increase sales as demand increases for the work. *Id.* However, there are a number of problems with such reasoning. Most fundamentally, as a matter of private law, it is not usually the case that the defendant's

2. The Burden of Proof

Finally, as the fair use doctrine bundles the harm and fault concepts, the burden of proof is assigned in the same fashion on each issue. As fair use is an affirmative defense, it is often believed that the burden of proving a fair use falls on the defendant. As a result, once the plaintiff has proved copying and substantial similarity, the defendant is burdened with proving that either this was a case of no harm or a case of no fault. However, as this Subsection argues, there is a reason to believe that the burden of proof should be assigned differently on these two issues.

a) The Theory of Burden Shifting

From a utilitarian viewpoint, the burden of proving harm and fault typically is placed on the plaintiff for reasons of minimizing the administrative costs of the litigation process.[225] According to the conventional view, if the plaintiff is not required to prove the existence of harm and fault he will be given an incentive to begin cases that are not

harm to the plaintiff is negated by proof that the defendant's actions also benefited the plaintiff. For example, consider the case in which A negligently crashes his car into B, causing B to break his leg. Further imagine that, had A not crashed into B, drunk driver C would have crashed into B later, causing total paralysis. A's actions have negatively affected B, but arguably caused a net positive because he saved B from even greater harm. However, this does not exculpate A from liability. The fact that A caused the legally cognizable harm is sufficient to hold him liable, despite the arguable case that his actions may have benefited B. Likewise, in Google Books, the fact that the service may cause market substitution is sufficient to find the right has been infringed. This is no less so because the service also produces benefits for the copyright holder. Furthermore, it is highly questionable that Google Books will affect every copyright holder in the same way. While it may increase sales for some authors, it seems equally plausible that it will reduce sales for other authors. Finally, the court's use of empirical evidence is questionable. In *Perfect 10*, the court argued that there was no empirical proof of harm caused by Google, in this case, the court gives the benefit of the doubt to Google, despite no empirical proof that the service actually benefited authors. It seems somewhat unfair to require empirical proof of harm before holding Google liable, but then not to require empirical evidence from Google to substantiate their claim that they actually benefit the copyright holders. This article takes the view that the courts in these cases have done themselves no favors. They have reached the correct conclusion, but in a fashion that made their own jobs harder and has prejudiced future litigants. The court has improperly tried to use the language of "no harm" to justify their conclusion. They could have avoided using convoluted reasoning by accepting that the defendant's actions more than likely harmed some copyright holders, but concluding that, nonetheless, such harm was justifiable and thus not wrongful. These should have been "no fault" cases.

225. Bruce L. Hay & Kathyrn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective,* 26 J. LEGAL STUD. 413, 413 (1997) ("Our principle claim is that courts can use the burden of proof to limit the costs of resolving a dispute.")

meritorious.[226] By requiring the plaintiff to introduce evidence of harm and fault, we ensure that the plaintiff only brings cases that are likely to succeed, and thus reduce courts' expenditure on meritless litigation. Thus, the normal assignment of burdens results in "economizing on the time of the tribunal."[227]

Of course, there are exceptions to this standard rule. As Richard Posner points out, saying that placing the burden of proving a particular element of the case on the plaintiff reduces administrative costs assumes that the cost to the to the plaintiff of gathering the evidence to prove his point is no greater than the cost to the defendant of obtaining contrary evidence.[228] In cases such as *res ipsa loquitor*, the burden of proof is shifted onto the defendant because it is easier, and therefore cheaper, for the defendant to prove the absence of fault than for the plaintiff to prove the existence of it.[229]

b) The Burden of Proving Harm and Fault

The question we are presented with is: how can we assign the burden of proof in order to reduce the administrative cost of the copyright system? But at this point, we are faced with the fact that the fair use analysis is composed of two different inquiries: firstly whether legally cognizable harm existed, and secondly whether fault existed. This Article takes the view that reducing administrative costs requires the burden to be assigned differently on these two distinct issues.

Turning first to the question of legally cognizable harm, it seems highly plausible that, in most cases, the plaintiff is far better suited to prove the existence of market harm than the defendant is to prove the lack of market harm. Not only does the plaintiff already have the most relevant information regarding his expected market and the loss in sales attributable to the defendant's copying, but requiring the defendant to prove the absence of market harm requires the proof of a negative. Given the complexity involved in proving a negative, this situation would seem to be much more costly than asking the plaintiff to prove the positive existence of market harm.

However, the same cannot be said on the issue of fault. Once market harm is proved, it then falls to the court to determine whether the copying

226. Bruce L. Hay, *Allocating the Burden of Proof,* 72 IND. L.J. 651, 656 (1997) ("The plaintiff, being the one pressing for judicial intervention, should therefore be required to show that she is entitled to the relief she seeks. Such a rule ensures that the legal system will—in general—only intervene in cases where there is a good reason (where relief is warranted).").

227. POSNER, *supra* note 86, at 646–47.

228. *Id.*

229. *Id.*

was in the public interest. This requires evidence that the copying will produce benefits in terms of access that is greater than the cost of reduced authorial incentives represented by the plaintiff's market harm. It would appear that the defendant is better placed to introduce such evidence. The defendant is the one using the copyrighted work in these instances. As the person most familiar with the purpose and character of the use, he seems better placed to demonstrate why this use is in the broader public interest. For example, if we reconsider *Perfect 10 v. Amazon*, while Perfect 10 is in the best position to prove that Google's use caused harm to their cell-phone download market, Google is ideally suited to explain why their product is so socially valuable that its access-benefits outweigh its incentive-costs.[230]

3. Solution: Restructuring the Fair Use Analysis

The most elegant solution would be to separate the concepts of harm and fault into their own doctrines. One plausible way to do this would be to integrate the harm inquiry into the outcome inquiry. That is, we would remove the market harm question from the fair use doctrine, and reinsert it into the substantial similarity doctrine. One could envision a regime in which the court uses the concept of market substitution in order to determine whether a substantially similar work exists. That is, a defendant's work will only be considered substantially similar if consumers view the two works as substitutes for one another in the market. In doing so, the burden of proving market substitution, and therefore that a rights-infringement has occurred, would fall squarely on the plaintiff.

The reality is, however, that such a drastic change is very unlikely to occur. The market harm question is bound into the fair use analysis by statute. Courts are unlikely to break up and segregate this congressionally mandated doctrine. Furthermore, post the enactment of the 1976 Act, courts have decided several hundred fair use cases.[231] In all of them, the question of harm has been an integral part of the fair use analysis. Changing direction now would be an unprecedented step to say the least.

Luckily however, such severe formal restructuring is not necessary. Instead, we could potentially restructure the fair use analysis in such a way as to facilitate the required conceptual separation. While Congress has indicated

230. In this respect, this article departs slightly from the prescriptive recommendation offered by Professor Hetcher. Professor Hetcher has suggested that the entire fair use doctrine ought to become part of the prima facie case. This would require the plaintiff to prove that the defendant's use was unfair before the defendant's prima facie liability is established. *See* Hetcher, *Fault, supra* note 136. Also on this topic, see Christopher Jon Sprigman, *Copyright and the Rule of Reason*, 7 J. TELECOMM. & HIGH TECH. L. 317 (2009).

231. *See generally* Samuelson, *supra* note 107.

that market harm is an element of the fair use analysis, there is no legislative requirements restricting how courts structure and apply the fair use analysis. The doctrine was left open-ended so that courts would have the ability to continue to shape it into a workable tool.[232] For example, the judiciary has the substantial interpretive room in defining the content of each factor; has the authority to add on additional factors; has the ability to weight the factors differently in different cases; can sequence their discussion of the factors creatively; and may decide how to assign the burden of proof. This raises the possibility that we can restructure the analysis that takes place under the heading of fair use in a way that puts some conceptual clear water between the issues of harm and fault.

Therefore, this Article suggests that copyright infringement analysis adopt the following structure. After the plaintiff proves copying (conduct) and substantial similarity (outcome), the defendant will be held liable as a prima facie matter. The defendant may then claim fair use. At which point, the burden should lie on the plaintiff to demonstrate that he suffered some market harm. If he fails to provide evidence that, on the balance of probabilities, establishes market harm, then he has not proved that his right has been infringed. The court then dismisses the case. Alternatively, if he does prove market harm, the burden ought to shift to the defendant to prove why there was no fault. That is, the defendant must prove, again on the balance of probabilities, that this use would lead to greater benefits in terms of access than cost in lost future incentives. Much of this argument would occur under the transformative doctrine. In cases like *Perfect 10*, *Bill Graham Archives*, and *Google Books*, the defendant would demonstrate that he has transformed the meaning in such a way that leads to great new social value. If the defendant successfully demonstrates that this was a case of "no fault," then the case is dismissed. Alternatively, if he fails to demonstrate no fault, the court holds him liable and proceeds to the question of remedies. In this way, not only are judges guided towards treating harm and fault distinctly, but the burden of proof on each of these issues is assigned within the fair use analysis in a way that shall minimize administrative costs.

232. According to the legislative history behind the Copyright Act 1976, the wording of § 107 was "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way. . . . Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis." *See* H.R. Rep. No. 94-1476, at 66 (1976).

V. CONCLUSION

Despite the widespread and orthodox belief that copyright infringement is a strict liability tort, the reality is far more complex. This Article has advanced the thesis that copyright infringement is not a strict liability tort, but a fault-based tort. Liability is conditioned upon four elements: conduct (copying), outcome (substantial similarity), harm (market harm) and fault (unfairness). The fundamental question in the fair use analysis is a fault question. Like the issue of reasonableness in negligence, liability is only imposed upon those who fail to live up to a standard set by society for the purpose of maximizing social welfare. Only those who fail to reach the standard, and thus wrongfully force negative consequences on others in society, are held liable. Sadly, however, currently the fair use analysis is not only composed of a fault inquiry but also includes a harm inquiry. The question of whether the defendant has caused harm, and thus infringed a right, falls away from the prima facie case, and slips into the fair use analysis, resulting in much confusion. It is unlikely that this state of affairs will change any time soon. Therefore, this Article has proposed a restructuring of the fair use analysis. While not an ideal solution, this will at least mitigate the negative consequences created by the current collapsing of the harm and fault inquiries into the same doctrine.

Although these arguments are directed primarily at intellectual property scholars, this Article also holds lessons for tort theoreticians. Ascertaining exactly what makes negligent conduct a type of fault is a complex question that has long plagued tort scholars. This difficulty has occurred along both moral and legal dimensions. Firstly, there is the question of why harm caused without any bad will on the part of the defendant is morally wrong. Secondly, as the legal concept of fault may or may not be exactly the same as the moral concept of fault,[233] the question emerges, what is the legal concept of fault and why does negligent behavior fit within that definition? At the moment, the best analytic theory states that failing to comply with a standard is a type of fault in law, and hence, negligence is faulty conduct. However, if failing to live up to a standard of conduct is a type of fault, then why is failing to live up to the requirement that people only copy fairly any less a type of fault? Thus, copyright infringement provides a test case and a challenge for our definitions of fault and negligence. This Article presents the view that failing to comply with a standard of conduct is a form of fault and therefore copyright infringement is a fault-based tort. If some cannot accept that

233. *See generally* H.L.A. Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593 (1958).

conclusion, then this Article calls upon those scholars to produce a clearer definition of fault—one that is simultaneously capable of demonstrating why negligent conduct is fault, but unfair conduct is not.

Finally, a last word must be made about international copyright. This Article's discussion of the "fairness" liability rule in copyright has been restricted to the United States, which relies heavily on the fair use doctrine. Yet, as scholars of international copyright law will accurately point out, most countries do not adopt a fair use doctrine. In these jurisdictions, copyright infringement is arguably still a strict liability tort. They impose liability on the basis of copying and substantial similarity, without regard to either the defendant's mental state or his conformity with a standard of conduct. However, it is interesting to note that in recent years the fair use doctrine has grown internationally. A number of countries, such as South Korea,[234] the Philippines,[235] and Singapore,[236] have adopted the standard. Some countries, such as Canada, have amended their existing exceptions to copyright infringement to become more fair use–like in character.[237] Meanwhile, other countries, such as the United Kingdom,[238] Australia,[239] and Ireland,[240] are seriously considering adopting the doctrine. In the discussions taking place in these jurisdictions, there is a recurrent belief that adopting fair use will provide the necessary incentives for authors and copyists to create and use copyrighted works in ways that will generate economic growth in the so-called "digital economy." This author interprets the internationalization of fair use as the rejection of strict liability in favor of the more efficient fault liability rule that the fair use doctrine instantiates. However, the exact

234. Byeon ri sa beob il bu gae jeong beop ryul [On Partial Amendment to the Patent Attorney Act], Act No. 11962, July 30, 2013 (S. Kor.).

235. An Act Amending Certain Provisions of Republic Act No. 8293, Otherwise Known as the "Intellectual Property Code of the Philippines", and for Other Purposes, Rep. Act No. 10372, § 12 (Mar. 22, 2013) (Phil.).

236. Copyright Act, Ch. 63, § 35 (2006) (Sing.).

237. THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT 157–81 (Michael Geist ed., 2013).

238. IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH 1 (2011); For an understanding of the U.K.'s current approach to copyright infringement and exceptions, see William Cornish & Graeme Dinwoodie, *Intellectual Property, in* ENGLISH PRIVATE LAW §§ 6.64–6.69 (Andrew Burrows ed., 3d ed. 2013).

239. AUSTL. LAW REFORM COMM'N, COPYRIGHT AND THE DIGITAL ECONOMY 3 (2014).

240. GOV'T OF IR., COPYRIGHT REVIEW COMM., COPYRIGHT AND INNOVATION: A CONSULTATION PAPER 89 (2012), *available at* http://www.djei.ie/science/ipr/crc_consultation_paper.pdf.

motivation and significance of this global shift is the subject of another article.[241]

241. Patrick R. Goold, The Fair Use Revolution in Global Copyright Law (unpublished manuscript, on file with the author).