WHY COPYRIGHT INFRINGEMENT IS NOT A STRICT LIABILITY TORT AND WHY THAT MATTERS

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ABSTRACT

Scholars and lawmakers routinely refer to copyright infringement as a strict liability tort. Copyright’s adoption of strict liability has long been criticized as immoral, inefficient, and inconsistent with usual tort doctrine. A number of scholars have therefore suggested that copyright denounce strict liability in favor of a fault liability rule.

However, as this article shows, such a characterization is incorrect. Copyright is not a strict liability tort. In the U.S.A., and other countries that adopt a fair use doctrine, copyright infringement is in fact a fault-based tort, closely related to the tort of negligence. Using both doctrinal and economic methods, this article explains the role that fault plays in copyright infringement.

Appreciating the fault-based nature of copyright infringement is important for two reasons. Firstly, demonstrating that copyright infringement is already based on fault reveals that copyright is not as immoral, inefficient, and inconsistent as previously suggested. Secondly, through closer attention to the anatomy of copyright infringement, this article identifies a set of important questions that copyright scholars have so far not addressed. Rather than debating the normative desirability of strict liability in copyright, we ought to focus our attentions on a range of other, more nuanced, questions. Those questions include: what type of fault ought copyright liability require, what is the relation of harm to fault in copyright, and who ought to have the burden of proving fault?
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In the modern world, tort law has largely renounced the principle of strict liability. 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.\(^1\) For over a hundred years, jurists have applauded this transformation.\(^2\) 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 find holding someone responsible without fault is both immoral\(^4\) and potentially inefficient.\(^5\) This evolution has resulted in the situation where strict liability exists “at the margins of tort”\(^6\) applicable in only “a few special situations”\(^7\) and a belief that it is a “medieval”\(^8\) concept that simply “does not fit”\(^9\) within the greater body of private law. For several decades, scholars

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\(^1\) DAN B. DOBBS, THE LAW OF TORTS 941 (West, 2000) [hereinafter DOBBS] (“In 1850, with the decision of Brown v. Kendall the court expressly adopted fault and rejected strict liability based upon direct or forcible harm. Negligence or intentional invasions would thereafter become the normal basis for tort liability.”).

\(^2\) See e.g. J. Wigmore, Responsibility for Tortious Acts: Its History, 7 HARV L. REV. 315, at 316 (1894) (calling law not based on fault “primitive” guided by “superstition” and “vengeance”); JAMES BARR AMES, LECTURES ON LEGAL HISTORY AND MISCELLANEOUS ESSAYS 441 (Harvard University Press, 1913) (discussing the “unmoral character of early common law as an instrument injustice, as permitting unmeritious or even culpable plaintiffs to use the machinery of the court as a means of collecting money from blameless defendants.”)

\(^3\) OLIVER WENDELL HOLMES JR., THE COMMON LAW 84-85 and 95 (Howe ed. 1968) (“As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor.”).

\(^4\) See e.g. Jules Coleman, Moral Theories of Torts: Their Scope and Limits, Part I., 1 LAW & PHIL 371, 374 (1982) (“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.”); ERNEST WEINRIB, THE IDEA OF PRIVATE LAW ____ (Harvard University Press, 1995).

\(^5\) JOHN C.P. GOLDBERG & BENJAMIN ZIPURSKY, TORTS 265 (Oxford University Press, 2010).

\(^6\) Id.

\(^7\) Norah Read v J. Lyons & Co. Ltd, 1 ALL E.R. 113 (1945) (per Scott L.J.)

\(^8\) GOLDBERG & ZIPURSKY, supra note 6, at 267.
have tried to provide some theory as to why strict liability should continue to exist at all.\textsuperscript{10}

As strict liability becomes ever more marginalized, intellectual property scholars have become increasingly concerned about the state of copyright law. Copyright infringement, according to most judges\textsuperscript{11} and commentators,\textsuperscript{12} is today a strict liability tort. A plaintiff can establish a prima facie case of infringement merely by showing that a defendant copied his protected work and that this resulted in the production of a substantially similar work. 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 a copyright infringement action.”\textsuperscript{13} This situation has struck many as normatively untenable. Over seventy years ago, Judge Learned Hand argued that the application of strict liability in copyright was “harsh” and worthy of “hesitation.”\textsuperscript{14}

More recently, academicians have maintained that exposing copyright defendants to strict liability is immoral,\textsuperscript{15} inefficient,\textsuperscript{16} and inconsistent\textsuperscript{17} with the

\textsuperscript{10}Some impressive, but controversial, attempts have been made by Richard Epstein and Tony Honoré, see 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 LAW QUARTERLY REVIEW 530 (1988).

\textsuperscript{11}See e.g. Shapiro, Bernstein & Co. v. H. L. Green Co., supra note 19; Religious Technology Center v. Netcom On-Line Communication Servies, 907 F.Supp. 1361, 1370 (N.D.Cal. 1995) (“[a]lthough copyright is a strict liability statute, there should still be some element of volition or causation”); Educational Testing Service 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 (M.D.Tenn.2006); (“a general claim for copyright infringement is fundamentally one founded on strict liability.”); Gener-Villar v Adcom Group, Inc, 509 F. Supp 2d 177, 124 (D.P.R.2007) (“the Copyright Act is a strict liability regime under which any infringer, whether innocent or intentional, is liable.”); Faulkner v. National Geographic Soc., 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.”)

\textsuperscript{12}See e.g. 4 MELVILLE B NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, AT § 13.08 (rev. ed. 2010) [hereinafter: NIMMER] (“Innocent intent should no more constitute a defense in an infringement action than in the case of conversion of tangible personality. In each case, the injury to a property interest is worthy of redress, regardless of the innocence of the defendant.”); 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.”)

\textsuperscript{13}2 PAUL GOLDSIEN, GOLDSTEIN ON COPYRIGHT § 8.1, at n. 1 (3d ed. 2014)

\textsuperscript{14}Barry v. Hughes, 103 F.2d 427 (2d Cir. 1939);

\textsuperscript{15}15 Dane S. Cicino & Erin A. Donelon, Questioning Strict Liability in Copyright, 54 RUTGERS L. REV. 351, at 419-20 (2002); See also, 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
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.\(^1\) In their vision, copyright law would be improved if it only imposed liability on those defendants who copy intentionally, recklessly, or negligently. However, as this article will demonstrate, the widespread and orthodox belief that copyright infringement is a strict liability tort is incorrect. In the U.S.A. and other countries that adopt a fair use doctrine, copyright is, in fact, a fault-based tort.\(^1\)

To demonstrate the intuition behind this claim, one must remember the distinction between strict liability and fault liability in tort law. Strict liability typically holds a defendant liable when his conduct causes some harmful outcome. Under a fault liability rule, not only must the defendant’s conduct cause some harmful outcome, but the defendant must also be at fault for the outcome. According to tort theory, a defendant is considered to be “at fault” for a harmful outcome in two situations.\(^2\) Firstly, a defendant is at fault if he acts with a blameworthy state of mind. This occurs most commonly when the defendant intentionally causes harm. Secondly, a defendant may be at fault because his actions fail to comply with a standard of conduct. This covers the situation where the defendant negligently

\(\text{(2013)}\) (Even for affluent defendants, overcoming the Copyright Act’s strict liability standard is highly burdensome).

\(^{16}\) Ciolino & Donelon, supra note 15, 410-418; See also R. Anthony Reese, Innocent Infringement in U.S. Copyright Law: A History, 30 COLUM. J. L. & ARTS 133, 183 (2007) (“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”).

\(^{17}\) See e.g. Kent Sinclair Jr., Liability for Copyright Infringement—Handling Innocence in a Strict-Liability Context, 58 CAL. L. REV. 940 (1970); Steven Hetcher, The Kids Are Alright: Applying a Fault-Liability Standard to Amateur Digital Remix, 62 FLA. L. REV. 1275, ___ (2010); Assaf Jacob & Avihay Dorfman, Copyright as Tort, 12 THEORETICAL INQUIRIES IN LAW 59 (2011)

\(^{18}\) Ciolino & Donelon, supra note ___ (arguing that intention should be a defense to copyright infringement); Steven Hetcher, supra note ___ (arguing that copyright should adopt a fault liability regime for online amateur “remix” activity); Jacob & Dorfman, supra note ___ (arguing that copyright should adopt different liability rules – strict, negligence, and intention – in different situations).

\(^{19}\) I am not alone in making this claim. Steven Hetcher has also argued that copyright infringement is a fault-based tort. Steven Hetcher, The Immorality of Strict Liability, 17 MARQUETTE IP L. REV. 1, at 1 (2013). Although Professor Hetcher’s article is a step in the right direction, it is underdeveloped. He correctly identifies the fair use doctrine as transforming copyright from a strict liability to a fault-based tort, but does not adequately explain why it does so. He does not give any reason why copying unfairly is actually wrong. Therefore, in parts this article aims to strengthen the claim and provide a solid justification for viewing copyright as a fault-based tort.

\(^{20}\) See infra ___.
causes harm. Negligent conduct is conduct that fails to comply with a “reasonableness” standard. Only those who fail to reach this standard, and who behave unreasonably, are held liable. Reasonableness is typically defined in consequentialist terms. What counts as reasonable depends on whether the consequences of the action are more positive or negative for society. This sentiment was most famously expressed by Learned Hand, who held that reasonableness in the tort of negligence depends upon a comparison of the cost of precaution and the expected accident costs. Thus negligent behavior is considered wrongful and a type of fault because it imposes negative consequences on the rest of society. In the tort of negligence, this is represented by the increased risk of harmful accidents.

Copyright is a fault-based tort in precisely the same way that the tort of negligence is. If copyright infringement were a strict liability tort, liability would be imposed on a defendant simply on the basis that his copying resulted in a substantially similar work (i.e. that his conduct caused some unlawful outcome). However, this is not the case. In order to be held liable, the defendant’s copying must also be unfair. In the fair use doctrine, the law introduces a standard: fairness. It is only those who fail to reach that standard, and copy unfairly, who are held liable. And, like reasonableness in negligence, fairness is defined commonly in consequentialist terms. Whether copying is fair depends upon a balancing of two different variables: incentive and access. Whether copying is fair requires the court to assess whether the cost it produces in terms of reduced authorial incentives is outweighed by the benefits brought on by increased access to the original work. Thus, as in the case of negligence, the reason why failing to conform to the legal standard is considered a form of fault, is that such conduct imposes negative consequences upon the rest of society. Unfair copying unjustifiably deprives future society of the expressive works that we find so valuable.

Demonstrating that liability for copyright infringement is conditioned upon the defendant’s fault corrects the fundamental and oft repeated misconception that copyright infringement is a strict liability tort. This in turn has two benefits. Firstly, as copyright is already a fault-based tort, much of the handwringing about the strictness of copyright liability is misplaced. As will be demonstrated, the rules governing copyright infringement are not as inconsistent,

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21 U.S. v Carrol Towing, 159 F.2d 169 (2d. Cir. 1947)
22 See infra ___
immoral and inefficient as some have made out. And secondly, by accurately characterizing the liability rule in copyright, we finally are in a position to ask more pertinent questions about the rules defining copyright infringement.

As copyright infringement is already a fault-based tort, debating the issue of whether copyright ought to reject strict liability in favor of a fault liability rule is a fruitless exercise. Instead, we should ask three more nuanced questions. Firstly, what class of fault should copyright infringement be conditioned upon? Currently the fault required is the failure to live up to a standard of conduct, but one could argue that copyright should take into account the defendant’s mental state. Secondly, what is the relation of harm and fault in copyright law? Currently, as market harm is an issue discussed exclusively under the fair use doctrine, the law bundles the question of harm and fault into the same inquiry. And finally, who ought to have the burden of proving fault (or the absence of fault) in copyright? As fair use is an affirmative defense, copyright finds itself in the unusual position in which the plaintiff need not prove the existence of fault, but the defendant must prove the absence of fault. This article highlights these questions and attempts to provide preliminary answers to them. It is argued that liability should not depend on mental state; that harm and fault should be separated by placing the market harm inquiry primarily under the question of substantial similarity; and that the while the burden of proving market harm should lie on the plaintiff, the burden of introducing other evidence relevant to the fairness determination should lie on the defendant.

Part I of this article summarizes the doctrinal and economic differences between strict liability and fault liability rules. Part II applies this framework in order to demonstrate that copyright infringement is not a strict liability tort but is a fault-based tort much like the tort of negligence. Finally, part III uses this information to reframe the current debate surrounding copyright’s liability rule. Rather than debating the appropriateness of strict liability in copyright, we ought to focus our attention on a range of more nuanced questions.

I. STRICT LIABILITY AND FAULT LIABILITY IN TORT LAW
This part shall compare strict liability and fault liability rules as they are used in tort law generally. The first section is doctrinal and formal. It explains the legal difference between these two types of liability. The second section is economic and substantial. It explains the goals the law attempts to serve and how both strict liability and fault liability rules achieve those goals.

A. The Doctrine of Strict Liability and Fault Liability

Before the court will hold the defendant responsible, the plaintiff must demonstrate that he has a legitimate prima facie case. To do so, he must prove to the court 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 a fault liability rule.

1. Strict Liability

Strict liability rules can be split into two main categories: conduct-based strict liability and outcome-based strict liability. The former is more plaintiff-friendly. Under this type of liability rule, the plaintiff need only show that the defendant volitionally performed some proscribed conduct before the defendant will be held responsible. In such cases, the plaintiff need not demonstrate how this volitional conduct caused a harmful outcome or any fault on behalf of the defendant. These rules are typically used in relation to property rights. For example, the cause of action that is trespass to land adopts a conduct-based strict liability rule because the defendant is liable simply if he entered onto the plaintiff's land. It need not be demonstrated that this conduct caused any harmful outcome, or that the defendant was at fault for the outcome. However, the conduct

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23 JULES COLEMAN, RISKS AND WRONGS 212 (Oxford University Press, 2002).
24 PETER CANE, THE ANATOMY OF TORT LAW 36 (Hart Publishing, 1997). Note there is also a third category called “relationship-based strict liability” where one person is held liable for the torts committed by a third party. Id, 46.
25 CANE, supra note 24, at 45-46; See also PETER CANE, RESPONSIBILITY IN LAW AND MORALITY 78-84 (Hart Publishing, 2002).
must be volitional. Conduct is volitional if the defendant engaged in the conduct voluntarily. Someone who is pushed onto the land of another is consequently not a trespasser. While he has invaded the land of another, he has not performed this conduct voluntarily.26

Conduct-based strict liability is distinct from outcome-based strict liability. In the latter cases, the plaintiff must not only demonstrate how the defendant engaged volitionally in a proscribed conduct, but also how that conduct caused a certain outcome.27 Usually this outcome must be harmful or injurious to some interest of the plaintiff (such as his health or his property). For example, in products liability cases or cases in which the defendant engaged in some abnormally dangerous activity, it must be demonstrated how the product or the dangerous activity caused some physical injury to the plaintiff.28 But once again, it is not necessary in these cases to demonstrate that the outcome was attributable to the defendant’s fault.

2. Fault Liability

Fault liability rules require the plaintiff to prove three elements: volitional conduct, harmful outcome, and finally, that the outcome was attributable to the fault of the defendant.29 Fault is synonymous with wrongdoing.30 Therefore, fault rules only hold a defendant liable when he has done something wrongful, whereas strict

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26 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 terms volitional with intentional. An act is volitional if the tortfeasor performed it voluntarily, and not involuntarily, as in the case where the tortfeasor acts due to an epileptic seizure, see CANE, supra note 24, at 29. An act is intentional, by contrast, when the tortfeasor acts with the intention to bring about a consequence, see CANE, supra note 35, at 32. The “intentional” requirement found in the Restatement means only that the tortfeasor must act voluntarily, and does not mean that he had to intend some consequence of his action before he will be held liable, see CANE, supra note 35, at 33. The consequence of using the term “intentional” in the trespass context is it makes justifying certain decisions very hard. See e.g. Snow v. City of Columbia, 409 S.E.2d 797 (S.C.Ct.App. 1991) (holding a defendant liable for trespass when hazardous waste escaped from his property onto that of another. The court accepted that it would satisfy the intentionality requirement if the defendant merely was aware that the hazardous waste could escape his property); See also DOBBS, supra note 1, at 101 (“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.”).

27 CANE, supra note 24, at 46-47.


29 COLEMAN, supra note 23, at 212.

30 Id.
liability holds defendants liable regardless of the their culpability. Consequently, non-culpable defendants are never liable under a fault rule, but can be liable under a strict liability rule.\textsuperscript{31}

Tort law recognizes two classes of fault. One class of fault occurs when the defendant acts with a blameworthy state of mind. The second class of fault occurs when the defendant fails to act in compliance with a standard of conduct set by the law.\textsuperscript{32} This section explains these two different classes of fault.

\textbf{a. State of Mind Fault}

Fault may be established by demonstrating the defendant acted with a blameworthy state of mind.\textsuperscript{33} This is most commonly achieved by proving that the defendant caused the outcome \textit{intentionally}. The concept of intentionality relates to the consequences of an action. By acting intentionally, the defendant engages in the conduct with the purpose of causing the harmful outcome. Note this is not the same as acting volitionally. Conduct is volitional when engaged in voluntarily; conduct is intentional when that conduct is engaged in for the purpose of causing the harmful outcome. For example, battery is an intentional tort. 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. Hence Professor Dobbs says of battery that “[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.”\textsuperscript{34}

In other cases, the plaintiff can demonstrate a blameworthy state of mind by demonstrating that the defendant acted 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). But these states of mind are less common in tort law.

\textsuperscript{31} GOLDMAN \& ZIPURSKY, \textit{supra} note 7, at 267 (noting strict liability holds those liable who engage in “activities that are not wrongful in and of themselves, and without regard to whether they are undertaken in a wrongful (i.e. careless) manner.).

\textsuperscript{32} COLEMAN, \textit{supra} note 23, at 217-8.

\textsuperscript{33} COLEMAN, \textit{supra} note 23, at 217-8.

\textsuperscript{34} DOBBS, \textit{supra} note \_\_\_\_. 
b. Standard of Conduct Fault

Alternatively a plaintiff may prove fault by demonstrating that the defendant failed to comply with a standard of conduct. This is most commonly achieved by demonstrating that the defendant caused the harmful outcome negligently. In such cases, the standard of conduct is “reasonableness.” A defendant’s conduct is negligent if it is not reasonable in the factual context. Judging a defendant’s conduct by the reasonableness standard is often referred to as the “negligence rule.”

When discussing negligence, four points must be clear. Firstly, 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 is what Professor Henry Terry meant when he famously declared that negligence is “conduct, not a state of mind.”

Secondly, we must distinguish the “negligence rule” from “the tort of negligence.” The tort of negligence is a cause of action that sanctions a defendant for taking unreasonable risks that cause harmful accidents. The negligence rule, by contrast, is not a cause of action, but the standard by which the conduct is judged. The negligence rule is therefore applied in the tort of negligence, but equally the negligence rule is applied in other causes of action, such as private nuisance or defamation.

Thirdly, 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. Whether conduct is reasonable depends frequently upon whether the conduct creates greater benefit

35 CANE, supra note 24, at 36; COLEMAN, supra note 23, at 217-8.
37 I do not mean to say 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.”)
or cost for society. 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.

Fourthly, although in every cause of action where the negligence rule is applied the determination of reasonableness depends significantly upon a balancing of the costs and benefits of the defendant’s conduct, the types of cost and benefits that are salient to this determination are often different. For example, in the tort of negligence, where the proscribed conduct is risk taking, the relevant costs and benefits are the increased probability of an accident versus the reduced resources spent on avoiding the accident. As Learned Hand explained, in the tort of negligence, it is reasonable to take risks where the cost of precaution would have exceeded the expected accident costs.\textsuperscript{38} 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, private nuisance also embodies a negligence rule. The idea of private nuisance is that the plaintiff is being “subjected to an invasion of her interest in use and enjoyment of land that she cannot reasonably be required to suffer.”\textsuperscript{39} Once again, whether the defendant’s conduct will attract liability depends on whether it was reasonable. But here, the costs and benefits of the action that are weighed are not cost of precaution and expected accident costs, but typically the gravity of the interference and the social utility of the activity. Because the causes of action govern different types of conduct, the utilitarian balancing calculus necessarily is based on different parameters.

Finally, some more general points on the relationship of state of mind fault and standard of conduct must be highlighted. Firstly, state of mind fault is often referred to as “fault in the actor.” By contrast standard of conduct fault is often referred to as “fault in the action.”\textsuperscript{40} 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. By contrast, standard of conduct fault is

\textsuperscript{38} U.S. v Carrol Towing, 159 F.2d 169 (2d. Cir. 1947)
\textsuperscript{39} DOBBS, supra note\textsuperscript{___}
\textsuperscript{40} COLEMAN, supra note\textsuperscript{___}
The question of fault does not exist on any consideration of the actor's personal characteristics or feelings; all that matters is the factual relationship between his conduct and the standard. The difference between the elements of a prima facie case under a strict liability rule and a fault rule are summarized in Table one.

**Table 1: Elements of strict liability and fault liability rules**

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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 is then given the opportunity to exculpate himself by introducing affirmative defenses. The distinction between

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41 See e.g. Warren A. Seavey, Negligence – Subjective or Objective, 41 HARV. L. REV. 1 (1927)
42 DOBBS, supra note 1, at 277; Vaughan v Menlove (1837) 132 ER 490 (CP) (holding a defendant liable although he could not have done any differently due to a disability); Nevertheless, sometimes the court does apply a characteristic of the defendant to the reasonable person, see e.g. S.K. Whitty & Co., v. Lawrence L. Lambert & Associates, 576 So.2d 599 (La. App. 4th Cir. 1991) (applying characteristics of an engineer to the reasonable person); Butcher v. Gay, 29 Cal. App.4th 388, 34 Cal.Rptr. 2d 771 (1994) (using a reasonable dog owner standard); Greenberg v. Gidding, 127 Vt. 242, 246 A.2d 832 (1968) (using reasonable plumber standard).
43 DOBBS, supra note 1, at 36
strict liability and fault liability can also be demonstrated by examining the defenses available under each liability rule.\textsuperscript{44}

We must first begin by separating three classes of affirmative defense: 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.\textsuperscript{45} The most common example of this is the contributory negligence defense. 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, or, in products liability cases, where the plaintiff has altered or misused the product, resulting in his injury.

Justifications assert that, although the defendant has caused the plaintiff some harm, this conduct was not wrongful.\textsuperscript{46} Instead, causing harm in this scenario was the right thing to do, and perhaps something the law would even care to encourage. Classic examples include self-defense in battery cases or truth in defamation cases. Even though reasonable acts of self-defense may cause physical harm, and unfavorable published statements cause reputational harm, the law takes the view that an individual can rightly engage in this conduct in certain situations.

Unlike justifications, excuses do not assert that the defendant’s conduct was rightful. Instead, excuses assert that the defendant’s conduct was understandable given his personal condition and, therefore, he is not personally blameworthy.\textsuperscript{47} 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. Excuses are less commonly available in tort law than justifications. This reflects the fact that the bulk of tort law deals with objective, not subjective, standards of liability.\textsuperscript{48}

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

\textsuperscript{44} COLEMAN, supra note 23, at 217-218
\textsuperscript{45} DOBBS, supra note 1, at __
\textsuperscript{46} DOBBS, supra note 1, at __
\textsuperscript{47} DOBBS, supra note 1, at __
\textsuperscript{48} DOBBS, supra note 1, at __
modification are the common methods of exculpation. Justification and excuse are not admissible affirmative defenses to strict liability actions. Hence why it is said that strict liability is liability “not defeasible by either excuse or justification.” By contrast, justification and excuse are admissible affirmative defenses under fault liability rules.

The reason for this distinction is clear. Justifications and excuse both assert that the defendant was not at fault. Justifications assert that the defendant’s conduct was objectively not wrongful, and therefore there is no fault in the action. 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. 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.

1. **Economics Foundation**

Economic analysis rests on a consequentialist philosophical foundation that whether an action is right or wrong depends on

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49 In the title of his section on products liability defenses, Professor Dobbs goes as far as to put the word “defenses” in quotation marks. It is not explained why he does this. This author interprets Professor Dobbs as highlighting the limited nature of defenses under such a strict liability rule., DOBBS, supra note 1, at __

whether its consequences are good or bad. 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 or as efficient behavior. As humans usually try to act in ways that bring about greater benefits than costs, we often act in welfare maximizing ways naturally.

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. Most commonly this occurs when the cost of an individual’s actions are borne, not by himself, but by someone else. In which case, the actor receives the benefit of his action but does not also suffer the cost. This is known as a “negative externality.”\(^{51}\) As 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. In which case the actor has an incentive to act in a way that reduces social welfare.

2. The Economic Goal of Tort Law

Tort law serves many different goals. One important goal is economic in nature. In the economic interpretation, the function of tort law is to give people incentives to take efficient action. In the absence of tort law, this would often not occur due to a negative externality problem.\(^{52}\) 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 that happens, B will lose $1000. Therefore, in not buying the device, A can expect to create a $100 cost (the result of multiplying 0.1 and 1000). To prevent that from occurring, A could buy a spark-catching device. The question is whether buying the device would have positive welfare effects. In such a scenario, the relevant cost is the cost of precaution, and the relevant benefit is the benefit of avoiding the expected accident costs. Now

\(^{51}\) COOTER & ULEN, supra note 6, at 44; RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 72 (Aspen, 2007).

\(^{52}\) COOTER & ULEN, supra note 6, at 336; POSNER, supra note 51, at 185-86..
imagine that the device costs $80. In this case, buying the device would be efficient: an $80 cost will be spent on the precaution, but this will be outweighed by the benefit of avoiding an expected $100 accident cost. However, A is unlikely to buy the device due to a negative externality problem. By not buying the device, he benefits by saving $80 and the expected $100 cost of this action is borne by B.

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 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. Therefore, when deciding how to act, the actor's own 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 talk about strict liability rules and fault liability rules. However, when economists talk about strict liability, they typically mean outcome-based strict liability. Likewise, when they discuss fault liability, they typically mean negligence rules. Economic literature contains little discussion of intentional based fault in tort law.

53 COOTER & ULEN, supra note 6, at 336-64; POSNER, supra note ___, at 167-211.
54 There is some economic interpretation of intentional torts. See e.g. William M. Landes & Richard A. Posner, An Economic Theory of Intentional Torts, 1 INT. REV. L. & ECON. 127 (1981). Nevertheless, it is often assumed into the discussion of criminal law, see COOTER
instead this is often covered in the discussion of criminal law. In keeping with this pattern, this section shall discuss only the economics of outcome-based strict liability and negligence rules.

3. Strict Liability Rules

Outcome-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. 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. As the cost of buying the device is below the expected cost of his liability, he will buy the device.

Alternatively, if the device costs $110, then the costs it produces are 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.

4. Negligence Rules

As discussed in the preceding section, under a negligence rule, a defendant will be liable only when he causes a harmful outcome through engaging in "unreasonable" conduct. Reasonableness is assessed by comparing the costs and benefits of the conduct. In the economic interpretation, the determination of reasonableness is, therefore, a question of whether the defendant behaved efficiently.

55 See e.g. COOTER & ULEN, supra note 6, at ___
56 COOTER & ULEN, supra note 7, at 338-41; POSNER, supra note ___, at 178-82.
Defendants will not be liable when their conduct is efficient, but will be liable when it is inefficient.

Consider the effects of this liability rule on the behavior of the hypothetical defendant, A. Firstly, consider the case whether the device costs $80. Once again, A has two options: buy or not buy. He knows that if he does not buy 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 and only pay $80. 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 consider his risk taking 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 Difference Between Strict Liability and Negligence

Thus, both strict liability and negligence rules give the actor efficient incentives and promote social welfare. Nevertheless, the rules achieve this goal in diverging ways. Strict liability and negligence differ in how they distribute costs between the parties. 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 actions is always internalized to him. On the other hand, the person who initially bears the externality, the injured party, never is 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.\textsuperscript{57} Hence strict liability is more favorable for plaintiffs than for defendants.

II. STRICT LIABILITY AND FAULT LIABILITY IN COPYRIGHT LAW

The preceding part demonstrated the doctrinal and economic differences between strict liability and fault liability rules. This part will demonstrate that copyright infringement falls into the latter category. To demonstrate this, section A will summarize the main doctrinal features of the copyright infringement action. Section B will introduce the orthodox view that copyright infringement is a strict liability tort. Section C will demonstrate doctrinally how copyright infringement is in fact a fault-based tort, similar to negligence. Section D will use economics to reinforce this conclusion. Section E will lastly show that appreciating copyright’s fault-based nature highlights some quite unusual characteristics about how the copyright infringement action is organized.

A. The Copyright Infringement Action

This section shall first introduce 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

In order to establish a prima facie case of copyright infringement, the plaintiff must demonstrate two facts. Firstly, he must show that the defendant copied from the plaintiff’s work.

\textsuperscript{57} This is the substantive difference between strict liability and negligence. There are other procedural differences. Importantly the two rules often come with different administrative costs. Strict liability rules make proving tortious activity easier for plaintiffs, and therefore potentially increase the number of cases which courts must handle, while on the other hand, negligence cases involve complex determinations of fault, and may therefore lead to more costly litigation, see generally POSNER, supra note ___, at 178-82.
Secondly, he must demonstrate that through this copying, the defendant produced a substantially similar work.\textsuperscript{58}

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. 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. This was most famously demonstrated in the \textit{Harrisons} case.\textsuperscript{59} In 1971, former Beatle George Harrison was held liable for copying the Chiffon’s hit single, \textit{He’s So Fine}, when creating his song, \textit{My Sweet Lord}. Harrison argued that he did not consciously copy the song, and that, if he did copy, 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 \textit{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. In cases where the defendant has copied the work verbatim, this is an easy test for the plaintiff to pass. In cases, such as the \textit{Harrisons} case, where the defendant has not copied verbatim, it requires the plaintiff to 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. If the defendant creates a substantially similar work, but did so through a

\begin{footnotesize}
\textsuperscript{58} Arnstein v. Porter 154 F.2d 464 (2d Cir. 1946); see NIMMER \textit{supra} note 13, at § 13.03.

\textsuperscript{59} See Bright Tunes Music Corp v. Harrisons Music, 420 F. Supp. 177 (1976) (finding George Harrisong had committed copyright infringement by subconsciously copying the Chiffon’s hit, \textit{He’s So Fine}). \textit{See also} Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936); Northern Music Corp v. Pacemaker Music Co., Inc., 147 U.S.P.Q. 358, 359 (S.D.N.Y. 1965); However, this rule has come under significant questioning from scholars. \textit{See e.g.} Wendy J. Gordon, \textit{Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship}, 57 U. CHI. L. REV. 1999, 1931 (1990) (“When the subconscious copying rule is linked with the ubiquity of communications media, a real threat to new artists may emerge.”); \textit{See also} Wendy J. Gordon, On Owning Information: Intellectual Property and the Restitutionary Impulse, 78 VA. L. REV. 149, 227 (1992) (“Limiting the remedies for subconscious copying, or requiring proof of a knowing use as a precondition for recovery, would help to preserve a vigorous creative environment.”).
\end{footnotesize}
chance independent re-creation, then he is not liable no matter how similar the works are.

2. Fair Use Defense

If the plaintiff proves copying and substantial similarity, he has successfully established a prima facie case against the defendant. The defendant is then given the opportunity to introduce affirmative defenses to exculpate himself. 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. This doctrine establishes that it is not an infringement to copy a copyrighted work, in cases where copying is “fair.” 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. It has been held fair to copy expression for the purposes of parody, to time-shift a television program, to copy private letters for use in a biography, to reproduce thumbnail versions of images, to play a political opponent’s campaign theme music, to digitize books, to quote from literary works, to reverse engineer computer programs in order to create interoperable programs, and to display cached websites in search engine results, to name just a few.

Despite becoming one of the most venerated and important doctrines in copyright, it is also one of the most mysterious. The term “fair” has no exact definition, and ultimately whether a use is fair is a

60 17 U.S.C. §107; WILLIAM PATRY, PATRY ON FAIR USE (West, 2012); GOLSTEIN, supra note _, §12.1 at 12:1.
61 Id.
65 Perfect 10, Inc. v. Amazon. com, Inc., 508 F. 3d 1146 (9th Cir. 2007)
70 For comprehensive discussion on the content of fair use, see Samuelson, supra note 56.
71 See e.g. Golan v. Holder, 132 S. Ct. 873 (2012) (recognizing fair use is a constitutional necessity).
question left for judicial determination.\textsuperscript{72} The breadth of the fair use doctrine’s application, coupled with the lack of a succinct definition, has left some commentators scratching their heads and calling it the “most troublesome” doctrine in copyright law.\textsuperscript{73}

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.\textsuperscript{74} Secondly, the act provides a list of four non-exhaustive factors that ought to be considered in determining whether a use is fair.\textsuperscript{75} 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.\textsuperscript{76} It has been said that this last factor, often known as the “market harm” factor, is “undoubtedly the single most important element” in determining fair use.\textsuperscript{77} Although some more recent empirical research argues that the importance of the market harm factor has waned in recent years and that there is more discussion occurring under the first factor.\textsuperscript{78}

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”)\textsuperscript{79} is an important consideration. Likewise, when discussing the nature of the protected work, courts

\textsuperscript{72} Time Inc. v. Bernarnd Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968) (noting the fair use doctrine “is entirely equitable and is so flexible as virtually to defy definition.”); 4 NIMMER, supra note 14, at §13.05 (calling fair use “obscure”).
\textsuperscript{73} Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939); See also 2 GOLDSTEIN, supra note 26, 12.1 at 12:3 (“No copyright doctrine is less determinate than fair use.” This is a “source of frustration”).
\textsuperscript{74} 17 U.S.C. §107
\textsuperscript{75} Id; 4 NIMMER, supra note 13, at §13.05[A]
\textsuperscript{76} Some scholars have argued that fair use needs to be more certain and predictable in some important contexts. See e.g. Ed Lee, Technological Fair Use, 83 S. CAL. L. REV. 797 (2010) (discussing the need to recognize technological fair use as a distinct category within fair use jurisprudence).
\textsuperscript{77} Harper & Row v. Nation Enterprises, supra note 177, at 566.
\textsuperscript{78} Neil Netanl, Making Sense of Fair Use
\textsuperscript{79}
have drawn a distinction between fictional works (that will receive greater protection) and factual works (that will receive less protection). And secondly, because the factors are non-exhaustive, the court has room to supplement them with other considerations. Consequently, we see other non-factor based considerations affecting fair use determinations. One such consideration is whether the defendant acted in accordance with customary standards of fair dealing.80

B. The Orthodox View of Copyright Infringement

Lawmakers and copyright scholars routinely (if not ubiquitously) refer to copyright infringement as a strict liability tort.81 Sadly for our 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. Firstly, as part of the prima facie case, the plaintiff need not demonstrate how the defendant acted intentionally or negligently. The law apparently does not condition liability upon any of the common types of fault. And secondly, as evidenced by the Harrisongs case, copyright infringement can occur even when the defendant was unaware that he was copying from a previous work.

While this orthodox view is usually presented in an unsystematic fashion, one exception can be found in the work of Professor Shyamkrishna Balganesh’s work.82 Balganesh provides a deeper analysis of the issue and concludes that copyright infringement is a form of outcome-based strict liability.83 In this interpretation, liability is conditioned upon copying and the production of a substantially similar work. The former issue is a conduct requirement and the latter is an outcome requirement. It “thus makes little difference for liability whether the copying was intentional, negligent, or a genuine mistake, though fault can affect the court’s computation of damages.”84

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81 Supra notes 11 & 12.
83 Id. Or “result-through-conduct” to use Balganesh’s terminology.
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Nevertheless, Balganesh notes that it is a somewhat unusual form of outcome-based strict liability. Typically outcome-based strict liability requires the outcome be harmful. In copyright, there is no requirement that the plaintiff prove, as part of the prima facie case, that the defendant’s copying was harmful. Nonetheless, harm is still an important part of a copyright infringement case. One of the most significant parts of the fair use analysis is the question of whether the defendant’s copying caused harm to the plaintiff’s market. Such market harm is an injury to the plaintiff’s economic interests. Thus, an element of harm is important to the question of liability, but unlike other outcome-based strict liability torts, it is not part of the prima facie case, and is instead left to the affirmative defense stage. As Balganesh notes, the law “relegates harm to a tertiary position”\textsuperscript{85} to be discussed after conduct and outcome. Already we see that something seems different about the way the copyright infringement analysis is structured.

C. A Doctrinal Re-Interpretation

Despite its widespread acceptance, this article maintains that the orthodox view of copyright infringement as a strict liability tort is incorrect. As this and the next section will demonstrate, copyright is a fault-based tort, with much in common with negligence. This section explains this argument from a doctrinal perspective before offering a response to the orthodox view.

1. Copyright Infringement is a Fault-Based Tort

Recall that a fault-liability rule imposes liability on a defendant who (a) engages in volitional conduct, that (b) causes some harmful outcome, and that (c) this outcome was somehow the defendant’s fault. As Balganesh’s analysis highlights, liability is conditioned upon conduct and outcome, because it requires copying and a resulting substantially similar work. The next question is whether liability for copyright infringement is also conditioned upon a third element of fault. Is copyright liability conditioned either upon the defendant

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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. Although a number of scholars argue that the defendant’s subjective mental state should matter in the infringement analysis.86

   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.”87 Importantly, however, these concerns are not relevant to the liability determination.

   b. A Failure to Comply with a Standard of Conduct?

   The next question is whether liability is conditioned upon the defendant’s failure to comply with a standard of conduct. To this question, the answer is yes. A defendant is not liable merely because he copies a protected work and thus creates a substantially similar work. It must also be the case that this copying was 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, that will be held liable. Thus, a type of fault is integral to the question of whether a copyist can be held liable. As we refer to judging a defendant’s conduct by a reasonableness standard as a “negligence rule,” I suggest we refer to judging a defendant’s conduct by a fairness standard as a “fairness rule.”

   This argument that the copyright infringement action is based on a form of fault is counter-intuitive given the hegemony of the

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86 17 USC §504
orthodox view. Therefore, we must further unpack this claim. To shore up the argument that copyright infringement is a fault-based tort, the rest of this subsection shall demonstrate (i) the doctrinal similarity between the tort of negligence and the tort of copyright infringement; and (ii) while the negligence rule and fairness rule are different types of fault, they belong to the same class of fault.

i. The Doctrinal Similarity of The Tort of Negligence and the Tort of Copyright Infringement

The tort of negligence and the tort of copyright infringement are two completely separate causes of action and they govern very different types of behavior. Nonetheless, liability in each case is conditioned upon the same three basic elements conduct, outcome, and a failure to comply with a standard of conduct.

The conduct sanctioned by negligence is risk-creation; copyright infringement sanctions copying. In negligence, only risk-creation leading to a harmful accident will be actionable; in copyright, copying is only actionable when it results in a substantially similar work. In both cases, the defendant is liable only when his actions are inconsistent with a standard of conduct – reasonableness and fairness respectively. While a defendant’s unreasonable risk taking will be sanctioned when it causes accidents, likewise a copyist’s unfair copying will be sanctioned when it causes the production of a substantially similar work. Thus, fairness is to copyright infringement what reasonableness is to the tort of negligence. Table two lays out this structural similarity.

| Table 2: The Formal Similarity Between Copyright Infringement and the Tort of Negligence |
|----------------|-----------------|-----------------|
| **Tort of Negligence** | **Copyright Infringement** |
| **Conduct** | Risk-creation | Copying |
| **Outcome** | Harmful Accidents | Substantially Similar Work |
| **Standard of Conduct** | Reasonableness | Fairness |
ii. The Relationship of the Negligence Rule and the Fairness Rule

The negligence rule and the fairness rule are not exactly the same thing. The fairness rule is not merely the negligence rule in disguise. As a result, unfair conduct is not precisely the same type of fault as unreasonable conduct. Nevertheless, they belong to the same class 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 class of fault, yet marginally different types of fault within the class.

Both unfair conduct and unreasonable conduct belong to the standard of conduct class of fault. In both cases, the law sets a standard and sanctions those who fail to reach that standard. As a result, we see some similarities between the concepts of reasonableness and fairness. Three of which we will discuss here, before we then continue to demonstrate what distinguishes the two types of fault.

(1) Both reasonableness and fairness are defined in consequentialist terms. Although both reasonableness and fairness are flexible standards that have no precise and succinct meaning, both are defined most commonly in consequentialist terms. What is reasonable and what is fair depends on weighing the costs and benefits of the defendant’s conduct. The only thing which changes in this regard are the types of cost and benefit 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. In the tort of private nuisance, reasonableness requires comparing the gravity of nuisance and the social utility of the action. In copyright, whether conduct is fair depends on whether the conduct produces greater harm to future authorial incentives or greater benefits in terms of increased access. This is known, notoriously in copyright discourse, as the incentive-access tradeoff.

88 Once again, I do not mean to suggest that the only possible interpretation of this doctrine is consequentialist. Other deontological interpretations are clearly possible. See e.g. Lloyd Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137 (1990). I merely try to capture how it is most commonly understood.
Most readers will already be familiar with the incentive-access tradeoff. Thus a brief description will suffice. Copying creates a cost: it reduces the incentives of future authors to create expressive works. Society gains a lot of value from these works. They are the building blocks of culture, the means of distributing information, and the engine of free speech. But, due to a market failure, they are often under-produced. Creating these works requires a high fixed cost, which we assume that rational actors will not undertake unless they can later sell the work for a profit. Sadly for authors, expressive works are easy to copy. A copyist can cheaply copy the work and then sell the duplicate version in the market at a cheaper price than the original author. The original author may then be at a financial loss if he can no longer recover the fixed cost of his creation. The more this happens, the less incentive authors have to create new works in the future. Future society may therefore be deprived of many valuable works.

On the other hand, copying has beneficial qualities. Ideally we hope that authors will not only create new works, but that those works will be distributed to society. In order to give authors an incentive to create new works, we hope that people will refrain from copying and thus the author can recover the fixed cost of creation. However, the less copying that occurs, the more market exclusivity the author experiences. With greater market exclusivity comes greater market power, and the ability to raise prices to supra-competitive levels. As the price of the work goes up, fewer people can afford it. The result is the exclusivity that provides the incentives to create also results in sub-optimal distribution of the work thereafter. By contrast, copying forces the author into a price competition. The reduced price then allows more people to enjoy the work.

Furthermore some copying is necessary for the creation of new works. Famous figures from Oscar Wilde to Pablo Picasso to T.S. Elliot have been credited with formulating the now notorious adage that “good authors borrow, great authors steal.” While the term “steal” comes with pejorative overtones, the sentiment captures something vital about the creative process: no author creates in a vacuum. At some level, every author takes inspiration from previous generations and this involves borrowing elements of pre-existing works. For example, if someone had not copied elements of Romeo and Juliet there would be no Westside Story, and without taking from the

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89 4 NIMMER, supra note 13, at 13.03[A][1][b]
Sherlock Holmes character, there would arguably be no House M.D. Together, these beneficial qualities are known as the benefits of “access.”

Thus society has a tradeoff to make. Refraining from copying has the beneficial effect that it produces greater incentives for authors to create in the future. Nevertheless, the marginal benefit of greater incentives to create diminishes as fewer and fewer copies are produced. At some point, the marginal benefit of greater incentives is outweighed by the social benefit produced by greater access to the work. Whether copying has good or bad consequences thus depends on whether the harm it produces to future incentives is greater or less than the benefits it produces in terms of greater access. Therefore it has been said that “[s]triking the correct balance between access and incentives is the central problem in copyright law.”

In an infringement action, it is the fair use doctrine that most clearly allows the court to engage in this consequentialist cost-benefit analysis. As Professor Wendy Gordon has described, the fair use doctrine “seeks to accommodate the author’s need for remuneration and control while recognizing that in specific instances the author’s right must give way before a social need for access and use.”

Likewise Professor Glynn Lunney notes that the “incentive-access paradigm suggests that copyright should provide a means to identify and limit copyright’s usual scope of protection in such exceptional cases and that is the role of the fair use doctrine has come to play.”

These scholarly views have been understood and incorporated by the judiciary. The Supreme Court that has acknowledged that fair use exists to provide a “sensitive balancing of interests.” Thus, it has been said that:

[t]he 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

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93 Sony, supra note __, at __
granting authors a complete monopoly will reduce the creative ability of others.\textsuperscript{94} Elsewhere the judiciary has acknowledged that fair use seeks provide “sufficient protection to authors and inventors to stimulate creative activity, while at the same time permitting others to utilize protected works to advance the progress of arts and sciences.”\textsuperscript{95}

Applying the incentive-access paradigm to the fairness analysis means copying that is more harmful to incentives than beneficial to access will be labeled unfair. In such cases, the copying will attract liability and the defendant must pay the author a fee - either before the copying takes place, in the form of a license, or after the copying, in the form of a settlement or damage award. Alternatively, if the copying produces greater benefits of access than harm to incentives, the use is fair and the copyst is under no obligation to pay the author. We see therefore, that the incentive-access mantra of copyright plays precisely 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 defines the relevant standard.\textsuperscript{96}

\textit{(2) The Wrongfulness in Unreasonable and Unfair Conduct.}\n
That fairness is defined in consequentialist terms also highlights the philosophical basis for labeling unfair copying as a type of fault. Both negligent conduct and unfair conduct are considered wrongful because they impose negative consequences on the rest of society. In the tort of negligence, unreasonable risk taking is wrongful because it exposes society to a greater number of harmful accidents. In copyright, the wrongfulness of unfair copying is it’s potential to deprive 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.

\textsuperscript{94} \textit{Sony}, supra note __, at __

\textsuperscript{95} \textit{Goolge}, supra note __, at __

\textsuperscript{96} While I claim the incentive-access paradigm is largely the driving force behind fair use determinations, I do not mean to say that this paradigm is beyond criticism. Products differentiation scholars have produced insights into how the paradigm may be flawed. \textit{See} e.g. Oren Bracha & Talha Syed, \textit{Beyond the Incentive-Access Paradigm? Product Differentiation & Copyright Revisited}. 92 TEXAS L. REV. 1841 (2014).
(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, morally to blame, but his actions are still wrongful because of their consequences. Thus, neither negligence or 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 expects.

(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”\(^98\) and as the ability to “use the copyrighted material in a reasonable manner.”\(^99\) When Justice Story first laid the judicial foundations of the doctrine in \textit{Folsom v. Marsh}, he described it as the freedom to use the copyrighted work for “fair and reasonable” purposes.\(^100\)

Nevertheless, fairness and reasonableness are different, and thus represent different types of fault. As Professor Gordon astutely points out, tort law is a law of harms. Road traffic accidents, battery, private nuisance, defamation, all deal in the destruction or loss of something that an individual already has – whether that be physical health, property, or reputation. By contrast, the language of harms does not quite fit in copyright law. The “harm” we are trying to avoid is not really a harm at all; it’s more of a forgone benefit.\(^101\) We enjoy expressive works, and hope they will be created in the future. Copying has the potential to reduce incentives, and thus make future generations miss out on this benefit. The future in such cases is not

\(^{97}\) See generally, Eva S. Subotnik, \textit{Intent in Fair Use}, (forthcoming, Lewis & Clark L. Rev.)


\(^{100}\) \textit{Folsom v. Marsh}, 9 F. Cas. 342, at 344 (C.C.D. Mass. 1841)

really bad, but it is less good than it could have been. Professor Gordon notes that copyright is therefore, not a law regulating harms, but a law regulating benefits.

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 economic example of A and B once more. A could either expend a cost on buying the device to prevent an accident, or just risk the accident. Neither situation is particularly desirable. It is simply the case that one outcome is less bad than the other. While we term this conduct welfare maximizing, we may also think of it as simply incenting conduct that is 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, fair conduct is the maximization of benefit, not the minimization of loss.

Thus the unreasonable conduct and unfair conduct belong to the same class of fault – they both result in consequences that society would rather avoid. But unreasonable conduct is the unjustified detriment for society, while unfair conduct is 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.

2. Responding to the Orthodox View

With the understanding of why copyright infringement is based upon fault, we are now in a position to see the errors underlying the orthodox view of copyright as a strict liability tort.

Firstly, the orthodox view argues 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, fraudulentness, or maliciousness for that matter. It is nevertheless conditioned upon unfairness. Unfair conduct is not the

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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. Firstly it fails to realize that failing to comply with a standard of conduct is a class of fault. Secondly 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 benefits rather than the law of harms – it is hardly outlandish to believe that that the law has developed a unique type of fault to judge defendants' conduct.

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. Thus the defendant’s action must be wrongful before liability is imposed. Even if the defendant copies subconsciously, he has performed conduct that is wrongful and will accordingly be 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.

Firstly, if subconscious copying were not volitional, copyright would not be a form of strict liability. Strict liability always require 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.

Secondly, 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:

Doing things automatically is a typical result of repetition of tasks and the acquisition of skill. 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 tortuously negligent conduct.103

Automatic actions are a form of subconscious conduct. Such actions are not consciously brought about, but they are 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 Re-Interpretation

The conclusion that copyright infringement is a fault-based tort, much like that the tort of negligence, can also be reinforced using an economic methodology.

1. The Economic Goal of Copyright Law

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103 CANE, supra note 24, at 30.
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 copying’s effects on incentive and access.

However, 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 – the lost incentive to create new works. 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.\footnote{The copyist may be alive at this point in time. In which case, the cost does fall on him as well. But in which case, the cost is spread over so many people, that the cost to him individually is quite small, and still outweighed by the private benefit he gains from copying the work.}

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?

2. A Strict Liability Rule in Copyright?

We saw earlier that, in the economic understanding, strict liability is liability imposed any time the defendant imposes a cost on someone else, regardless of whether that creating that cost was efficient. In copyright, we have defined cost as the lost incentive for authors to create. However, this presents a problem for courts. This is a difficult variable to quantify. It 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 measured in lost sales. From a static point of view, harm to the author's market is irrelevant. If market harm has occurred, then 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 place mercifully does not change that fact. Statically therefore, liability is simply a costly redistribution of the cost from one party to another. The only way such redistribution can be justified is when it is viewed in a dynamic perspective. If the defendant's copying causes this author market harm, then allowing it to continue will likely cause market harm to other authors in the future. Future authors will perceive this as a threat and their incentive to create will consequently decrease.

If copyright adopted a strict liability rule, liability would be imposed any time the copying harmed future authorial incentives. As market harm is the proxy for future incentives, this would result in liability every time the copying causes market harm. The defendant would be required to pay the author a damage award equivalent to the market harm every time this market harm was the result of his copying (or alternatively, must pay a license fee prior to the copying). Thus, the harm to the author's market would be internalized to the author in every case, and accordingly he would take the cost to authorial incentives into account when deciding how to act.

However, clearly this is not the liability regime forced on copyists. Liability is not imposed any time incentives are diminished; it is always possible for the defendant to argue that the benefit this copying produces in terms of greater access outweighs any harm to future incentives. Thus, market harm is only one factor within the fair use analysis. Whether market harm is actionable requires the court to consider the weight of this factor against the weight of the other factors. As a result, we see cases, such as the parody and criticism cases, where market harm is not actionable. Parody and criticism (for example, in the form of a review) both involve copying from the author's work, and both have the potential to cause market harm. Through disparagement, the parody or criticism may reduce demand for the author's work. However, the benefit that these works create in terms of greater access outweigh the harm it causes to this author and to future authorial incentives. The copying is therefore considered fair.
3. A “Negligence Rule” in Copyright

Unlike the strict liability, 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.” 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 exactly the same economic characteristics of a negligence rule, and 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 harm represents is not outweighed by the benefit of greater access. Thus, if his actions are efficient, the cost this causes in terms of lost incentive remains on the externality bearer – future society.

4. Incentives in Copyright: Strict Liability or Negligence?

In the previous part, we noted that both strict liability and negligence rules both 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. Thus, the cost is internalized. The defendant’s private cost-benefit analysis then accurately reflects a comparison of the total societal cost and total
societal benefit. He then 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 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 must deal with. While in some cases the total benefit of copying will fall on the defendant (most likely in the case where copying is purely consumptive), in many cases the copying will result in positive externalities. We noted previously that the benefit of copying is the benefit of access. Typically these access benefits fall substantially upon people other than the copyist. 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 such cases, adopting a strict liability rule would be harmful to welfare. 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. The likelihood would be 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. Thus 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. Doctrinal Oddities in Copyright Infringement

Therefore, copyright is a fault-based tort with much in common with the tort of negligence. However, there are still some features of the copyright infringement action that seem unusual. These doctrinal oddities may have also contributed to the mistaken view that copyright is a strict liability tort. This section highlights these strange features of copyright law.

1. Harm and Fault

Professor Balganesh has already touched upon the first strange feature of the copyright infringement action. As Balganesh highlights, there is something strange in how copyright infringement treats the concept of harm. Usually a plaintiff must prove that the defendant engaged volitionally in the prescribed conduct and this caused a harmful outcome. This is true in cases of outcome-based strict liability and fault liability. Copyright is unusual in that the plaintiff need only prove that the defendant copied and this led to a substantially similar work. The question of whether, in creating a substantially similar work, the defendant harmed the plaintiff’s economic interest is left to
the defenses stage, and is discussed under the fourth factor of the fair use inquiry.

This unusual way of structuring a tort cause of action may obscure the nature of fair use as a fault inquiry. The way that fair use is currently configured means that it is simultaneously trying to determine two different questions: (a) did the defendant cause harm to the plaintiff, and (b) was the defendant at fault for that harm (where fault is assessed by comparing the copying’s effects on incentives and access). The fact that harm is an important element of the fair use inquiry could lead some to believing that fair use is not primarily a fault inquiry, but a harm inquiry.

Yet to reduce fair use to simply a question of market harm to the plaintiff seems incorrect. The market harm issue is but one factor in the overall analysis. As a result, we see some cases – such as the parody and criticism cases - where the defendant does cause harm to the plaintiff’s market, but nevertheless this is considered justified (not wrongful) and hence no liability attaches to the conduct. Fair use is not merely a question of market harm, but is ultimately a question of whether the copying produces greater cost in lost incentives or benefit in access. Using market harm as a proxy for the lost incentive value is clearly important, but it is only one part of the analysis.

2. The Burden of Proof and Fault

The second strange feature relates to how the law assigns the burden of proving fault. Fair use is an affirmative defense. Therefore, copyright finds itself in the strange position where the plaintiff is not required to prove fault as part of the prima facie case, and instead the defendant must prove the absence of fault. Given fair use’s position as an affirmative defense, some may argue that copyright infringement is still a strict liability tort. 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.

To respond to this claim, this subsection shall firstly demonstrate that the position of fair use as an affirmative defense in fact strengthens the claim that copyright is a fault-based tort. Secondly, 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. Alternatively, 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?

To answer this question, we may begin by demonstrating what a fair use claim clearly is not. Firstly, it is not a claim that the plaintiff was at fault for the outcome. Defenses like contributory negligence allege that that the plaintiff should be denied 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 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. 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 depends upon the defendant’s fault.

b. The Procedural Role of Fault in Copyright Infringement
Nevertheless, there is still something unusual about the procedural role of fault in copyright infringement and labeling fair use as an affirmative defense. 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. 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. Where 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. 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. 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. It is then down to the defendant to rebut that presumption at the defense stage.

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106 DOBBS, *supra* note 1, at __
107 *Id.*
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 loquitor doctrine. Likewise, in defamation, usually the plaintiff must prove fault. However, if the defendant can make the additional showing that the defamatory material was published in print, then the court will presume fault. 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.108

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 offer a defense. Alternatively if fair use is an attempt to rebut a presumption of fault, copyright infringement is unusual in that the burden of proving fault does not normally lie on the plaintiff until he introduces evidence showing why that burden should be shifted.

108 Although, in some cases, once the defendant raises the fair use defense, the court puts the burden of proving market harm on the right holder, see Campbell v. Acuff-Rose, supra note 141, at 593 (finding plaintiff had introduced no evidence of market harm); Sony, supra note 27, at 421 (respondents “were unable to prove that the practice has impaired the commercial value of their copyrights or has created any likelihood of future harm”).
III. REFRAMING THE STRICT LIABILITY VERSUS FAULT LIABILITY DEBATE IN COPYRIGHT LAW

So far this article has indulged in an exercise of analytical jurisprudence. Through heightened attention to the details of tort theory, we have reached conceptual clarity and discovered that, despite its doctrinal oddities, copyright is not a strict liability tort, but is a fault liability tort, closely related to the tort of negligence. But why does this conceptual clarity matter?

The answer to this is to be found in the current debate surrounding the strict liability standard in copyright law. 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. However, now that we see that copyright infringement is in fact already a fault-based tort, we see that this debate is operating on flawed premises. Copyright is not a strict liability tort and, as a result, debating whether copyright should become a fault-based tort is a fruitless pursuit.

That is not to say that the rules in copyright infringement are beyond criticism. There are a number of pertinent questions that commentators need to address regarding copyright’s liability rule, but they have been previously hidden by framing the debate as a choice between strict liability and fault. A few of the questions that should occupy our attention are: (1) what class of fault should liability for copyright be based upon; (2) should the question of harm be part of the fair use analysis, and (3) how should the law assign the burdens of proving harm and fault? After demonstrating how the rules governing copyright liability are not as normatively untenable as previously assumed, this part shall proceed to provide preliminary answers to these three questions.

A. The Normative Desirability of Copyright’s Liability Rule

This section shall first summarize 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.
1. The Normative Critique of the Copyright’s Supposed Strict Liability Rule

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 can summarize these critiques briefly here.

Firstly, it is argued that reliance on strict liability is anomalous within the greater field of tort law.\textsuperscript{109} 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 \textit{v. Kendall} is a key point within this evolution. 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.”\textsuperscript{110} Clearly strict liability did not die off after this case, 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.\textsuperscript{111} Why then is copyright any different? In a world where the common law has generally moved away from strict liability towards fault liability, what justifies copyright’s decision to maintain a strict liability standard?

Secondly, there is a concern that strict liability in this context may deter some cases of good, beneficial copying. As previously discussed, some copying is simply good conduct because it creates benefits of greater access. Ideally, a social planner would wish to

\textsuperscript{109} Supra note —.
\textsuperscript{110} 6 Cush. 292 (Mass. 1850); This decision is arguably the most celebrated and famous of the cases establishing the role of fault in tort. Oliver Wendell Holmes, Jr., called the case bold and virtually unprecedented, see Holmes, supra note 5 at 84-85, while Gregory states that Shaw gest “most of the credit for the establishment of a consistent theory of liability for unintentionally caused harm,” see C. Gregory, Trespass to Nuisance to Absolute Liability, 37 VA. L. REV. 359, 365-70 (1951).
\textsuperscript{111} COLEMAN, supra note 23, at 218 (“The bulk of fault liability involves negligence.”); Posner, supra note 6, at 29 (“negligence cases, constitute the largest item of business on the civil side of the nation’s trial courts”).
encourage this behavior. However, copyright law is notoriously complicated. Not only does the 1976 Copyright Act contain over eight 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 law.” 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. 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.

Finally, there is an argument that strict liability in copyright is 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.” Likewise 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. 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.” 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 who copy intentionally.

113 Supra note ___.
114 Supra note ___.
115 Supra note __, at ___
2. Answering the Normative Critique

The fact that copyright is not based on strict liability forces us to reconsider these criticisms. While I do not suggest that the rules governing copyright infringement are currently without flaw, the fact that they do already require some element of fault does reduce 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. The majority of torts require the defendant to act with fault before liability will be imposed. But even more salient is the fact that most torts are based on negligence. 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.116 With this in mind, copyright’s liability rule, which also requires the defendant to fail to comply with a standard of conduct before imposing liability, seems not anomalous, but perfectly 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, 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 determine accurately whether their copying is lawful or not and, as a result, may shy away from

116 Supra note___.
copying that would benefit society. However, what the analysis does reveal is that this is not a problem with the liability rule per se.\textsuperscript{117} 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 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. To that end, the promulgation of fair use guidelines is particularly important. By establishing and distributing such guidelines, we can instill 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 defendant’s is undoubtedly true in many instances, but not applicable in the copyright context.\textsuperscript{118} 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 a 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

\textsuperscript{117} This is despite statements to the contrary, such as Ciolino & Donelon, \textit{supra} note 18, at 411, who argue that “strict liability does not facilitate an acceptable balance between access and incentives. On the contrary, it sacrifices access at the alter of incentives.”

\textsuperscript{118} \textit{Supra} note \_\_\_.

seems incorrect.\textsuperscript{119} Such a statement 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 that hold defendants liable for their unintentional but nevertheless negligent actions.

\textit{B. Asking the Right Questions About Copyright’s Liability Rule}

In previous scholarship, the dominant question asked by scholars in relation to copyright’s liability rule was whether the strict liability rule was appropriate. As this question is misplaced, we have missed the far more relevant questions that we ought to address. This section identifies and answers these questions.

1. What Class of Fault Should Be Required?

The previous section has demonstrated that, because copyright liability is based upon some level of fault, it is not as inconsistent, inefficient, and immoral as previously suggested. However, that alone does not mean that the liability rule adopted is completely flawless. While the liability rule may not be as bad as once supposed, there could still potentially be room for improvement. Those who have researched this topic in the past have usually suggested that copyright infringement become an intentional tort. Hence Ciolino and Donelon argue that the copyist’s lack of intention should be a complete defense to copyright infringement.\textsuperscript{120}

This raises the question, what class 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 better if liability were to be based upon the defendant’s mental state? In particular, a number of scholars have suggested that intention should matter to the liability determination. In response to these

\textsuperscript{119} Supra note \underline{____}.
\textsuperscript{120} Supra note 1\underline{____}.
suggestions, this article takes the view that the status quo ought to be maintained.

Given that the concept of intentionality relates to consequences, author's claiming that intention ought to matter to the liability determination can be interpreted as arguing for the position that liability should require not only the existence of volitional copying, but also that the plaintiff intended for this copying to produce a substantially similar work. Importantly, they do not envision the inclusion of an intentionality requirement as a replacement for the fair use analysis, but as a supplement. Therefore liability should require the proof of four elements: conduct, outcome, failure to reach a standard of conduct and a blameworthy state of mind.

As an initial matter, one might worry about the mixing of the two classes of fault that such an option would present. Yet this is not entirely unfamiliar in tort law. Recklessness based torts represent a mix of both classes of fault. Reckless conduct (occasionally known as wanton conduct) occurs when the defendant creates an unreasonable risk and then consciously disregards that risk. This fault thus falls somewhere between negligence and intention. There must be the failure to comply with the reasonableness standard, and also mental awareness of that fact.

Nonetheless, this article takes the position that liability ought not be conditioned upon the defendant's intent. We have seen that the fairness standard encourages welfare maximizing behavior. Unfair copying is that which harms incentives for future authorial production. Crucially, how the copying affects future authorial incentives does not depend in any way upon the defendant’s state of mind. Unintentionally produced copies pose just as much threat to the author’s market, and thus future incentives, as intentionally produced copies. Thus, by exculpating unintentionally produced copies, we permit individuals to create copies that reduce incentives without offsetting benefits in terms of access.

There is, however, an empirical question about the size of the negative impact this would produce. One could argue that any negative impact would be negligible. This argument requires the assumption that, because unintentional copying occurs so infrequently, future authors effectively discount it as a realistic probability. As authors do not worry about the effect of unintentional copying, permitting it in the few occasions that it does occur should not harm authors’ incentives in any non-trivial way.
This argument is plausible. However, two counter-arguments are also important. Firstly, the empirical assumption it is based upon is untested and not beyond question. Certainly in some scenarios, such as music production and comedy, unintentional copying seems a non-trivial possibility. Therefore, unless meaningful empirical proof can be provided that authors do not take unintentional copying into account, then we must rely on the theory that it is likely to have negative welfare effects.

Secondly, and perhaps even more importantly, assuming that authors do not take this possibility into account, there is still little positive welfare created by unintentional copying. By recreating the work, even unintentionally, the copyist spends resources to produce something that society already has. Imagine, for example, that someone produced a substantially similar version of *Don Quixote* through subconscious copying. In order to produce his work, he will spend a significant amount of time and effort, and the result is a good for which there is no demand. Whatever demand there is for such work is already satisfied by the pre-existing work. This activity is not necessarily the type of activity that we seek to encourage.

Interestingly, if some wish to include intentionality as part of the copyright infringement analysis, their position would be better served by arguing from a deontological point of view. As noted, standard of conduct fault is typically addressed in consequentialist terms. On the other hand, economic scholars have provided very little compelling reasons as to why intentional conduct is tortious and not simply dealt with by the criminal law. Deontological scholars, by contrast, have the reverse problem. Arguing from Kantian ethics, it is somewhat intuitively demonstrable that intentionally causing harm is wrongful. But these scholars have found it much harder to explain negligence in these terms.

If copyright scholars wish to see copyright adopt an intentionality requirement, the best possible argument to make would be grounded on the deontological position that what makes an action 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.

This might be prove to be an interesting avenue of exploration. However, it would present the problem of how to deal with consequentialist concerns if the wrong in copying is the intentional
causation of harm to an author’s market. First and foremost, for the
sake of producing a coherent argument, this would also require a
deontological justification why an author should be entitled to this
market in the first place. And while this is not outlandish, and a
position supported by some authors, it would certainly cut against the
deply utilitarian sentiment in copyright discourse in the common law
world. In one classic expression of this belief, Stephen Breyer once
argued that “none of the noneconomic goals of copyright served by
copyright law seems an adequate justification for a copyright system.”
Beyond this concern, there would be the question of what to do about
fair use. If fair use is currently understood in consequentialist terms,
et the arguer proposes the wrongfulness in copying lies in the
defendant’s will, then is the fair use standard as it currently stands
still justifiable? It is clear therefore that such an avenue would require
deep thought.

2. How Should Courts Deal With Harm?

As noted at the end of part II, copyright is in a strange position
doctrinally. The plaintiff must prove conduct and outcome, but unlike
most other fault liability cases, he need not prove that the outcome
was harmful. The question of harm is relevant, but it falls away from
the discussion of outcome and finds itself fit into the discussion of
fault.

On the other hand, there is a clear reason why harm is
discussed in fair use. Market harm is our proxy for determining
whether the copying reduces future authorial incentives. In order to
determine whether the defendant’s conduct was good or bad, we must
necessarily consider the market harm it causes and weigh this against
the benefits of access it creates.

A solution to this problem would seem to be found in the tort of
private nuisance. Unlike trespass, this cause of action requires both
that the interference be harmful and that it be unreasonable. Hence,
when comparing nuisance to trespass, Professor Dobbs notes that “[t]o
say that the case is for nuisance is to insist that with some kinds of
interference, liability must be limited not only to the cases of actual
harm, but also to cases in which that harm was unreasonable.” Harm
in this context may be “tangible harm to the land, diminution of its
market value, or personal discomfort to its occupants.” Once the
plaintiff establishes that some harm occurs, the question then
becomes whether that harm was reasonable. The reasonableness question then is based on many different factors, including prominently the social utility of the activity and the gravity of the harm caused. Therefore, some harm must be established, and then gravity of that harm becomes relevant in the discussion of fairness.

In the copyright context, it would appear that a similar structure is necessary. If we value consistency with other areas of tort, the plaintiff should not only prove conduct and outcome, but conduct and harmful outcome. To produce this result, the question of substantial similarity should depend on the existence of market harm. Thus, in order to make out a prima facie case, the plaintiff would be required to demonstrate how the defendant copied, and this copied resulted in a substantially similar work, which is in turn proved by demonstrating the existence of market harm. The question then will turn to whether the copying was fair. The question of fairness will then attempt to determine whether the defendant’s copying was more costly to incentives than beneficial to access. As part of the determination of how this copying affects incentives, the gravity of the market harm must be assessed and weighed against the other factors.

Such restructuring would also provide some content to the substantial similarity doctrine. The law’s current attempt to separate outcome from harm has left the outcome prong of the analysis as something of an empty husk. Commentators have pointed out the “meaningless” of substantial similarity, and in particular noted the great variety of interpretations that accompanies this doctrine. Reintegrating harm into the equation will provide some clearer substance to the doctrine.

3. How Should the Court Assign Burden of Proving Fault?

Lastly, the final question is, how should the burden of proving fault be assigned? As copyright is an affirmative defense, copyright requires the defendant to prove the absence of fault, rather than require the plaintiff to prove fault. While not an unheard of situation, this is certainly unusual. How then should the burden of proving the existence or absence of fault be assigned? This subsection shall firstly summarize how, from an economic perspective, burdens of proof are usually assigned, and then proceed to apply these insights to copyright.
a. Assigning Burdens of Proof

From an economic viewpoint, the burden of proving fault typically is placed on the plaintiff for reasons of minimizing the administrative costs of the litigation process. According to the conventional view, if the plaintiff is not required to prove the existence of fault, he has an incentive to begin cases that are not meritorious. By requiring the plaintiff to introduce evidence of the defendant’s fault, we ensure that the plaintiff only brings cases that are likely to succeed, and thus reduce courts’ expenditure on meritless litigation. It is therefore said that the normal rule that the plaintiff must prove fault is in place to allow “economizing on the time of the tribunal.”

Of course, there are exceptions to this standard rule. As Richard Posner points out, saying that placing the burden of proving fault on the plaintiff reduces administrative costs assumes that the cost to the defendant of gathering the evidence to prove his point is no greater than the cost to the defendant of obtaining contrary evidence. In cases such as *res ipsa loquitur*, 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.

b. Assigning the Burden of Proof in Fair Use

The question we are presented with is how can we assign the burden of proof in order to reduce administrative costs? But in answering that question, we are initially confronted with a problem. Fair use contains various different factors – primarily the nature and purpose of the use, nature of the copyrighted work, amount and substantiality taken, and the effect on the market. When discussing

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121 Bruce L. Hay & Kathyrn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413, at 413 (1997) (“Our principle claim is that courts can use the burden of proof to limit the costs of resolving a dispute.”)
122 Bruce L. Hay, *Allocating the Burden of Proof*, 72 Ind. L.J. 651, at 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 ensares that the legal system will-in general-only intervene in cases where there is a good reason (where relief is warranted”).
123 POSNER, supra note 186, at 646-7
124 Id.
how to assign the burden of proof, it is crucial to note that it is easier and cheaper for the plaintiff to introduce evidence on some of these factors, but easier and cheaper for the defendant to introduce evidence on others. Reducing administrative costs of copyright litigation may therefore require the burden of proof to fall differently depending on the factor in question.

Most importantly, it is less costly for the plaintiff to prove market harm than for the defendant to prove the absence 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 the current situation of requiring the defendant to prove the absence of market harm requires the proof of a negative.

On the other hand, this argument does not seem to have the same applicability to the other factors. Particularly, it appears that the defendant is better positioned to introduce evidence on the issues of purpose and character (including whether the use was transformative or commercial), and amount and substantiality. The defendant presumably knows more about why he copied and how much he copied than the plaintiff.

The final factor associated with the nature of the copyrighted work seems to fall somewhere between these two poles. The copyright holder presumably is more keenly aware of whether the work was published or unpublished, and whether it is fictional or not. Yet, it seems likely the defendant will also be aware of these characteristics.

Ideally therefore, the plaintiff would be required to introduce evidence market harm, and thereafter the defendant would be required to introduce evidence relating to the remaining factors. In fact, this being the case, we are already moving towards that situation. An example of this can be found in the Sony case, in which the court found that the copyright holder “failed to demonstrate that time-shifting would cause any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works.”

But note, by incorporating the market harm inquiry into the question of substantial similarity, we ultimately arrive at this outcome. If we require the plaintiff show market harm in order to demonstrate that the defendant has produced a substantially similar work, then the burden of proving this issue automatically shifts. Then, the fair use analysis only requires the defendant to introduce evidence relating to the other factors.
IV. CONCLUSION

This article has been addressed primarily to copyright scholars. It has hoped to demonstrate that our previously limited understanding of the concept of fault has erroneously resulted in the orthodox view that copyright infringement is a strict liability tort. This article pays closer attention to the anatomy of copyright and tort law, and in doing so reveals that copyright is in fact a fault based tort. Doing so hopefully will reshape the debate surrounding copyright’s liability regime. Rather than focusing on how bad the strict liability rule is, we ought to spend more time on the more nuanced and pertinent questions presented here.

However, the benefit to this discussion is not limited to illuminating copyright law. This article also presents interesting findings for tort theoreticians. If copyright scholars have failed to engage with tort theory, tort scholars have engaged even less with copyright. As a result, tort theory has missed the fact that unfair conduct is a type of fault. Unlike intentionality or negligence, it is not the most common type of fault. In this respect, it much like recklessness or fraud; important types of fault but used in a relatively limited number of causes of action. The realization that unfair conduct is a type of fault, much like negligent conduct, in turn has great importance for the theory of negligence. In the past, some have previously argued that negligence is a unique form of fault. It is sometimes viewed as the only type of fault that is based upon the failure to comply with a standard of conduct rather than a mental state. Finding that unfairness in copyright is doctrinally and economically similar demonstrates that negligence is not as unique as previously thought.

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 U.S.A. and other regimes that also adopt a 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 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, Israel, and the Philippines, 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. Additionally, the United Kingdom, Australia, Ireland, and the European Community are all 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 motivation and significance of this global shift is the subject of another article.

125 See generally, ED LEE & D. CHOW, INTERNATIONAL INTELLECTUAL PROPERTY: PROBLEMS, CASES AND MATERIALS, ___ (West, 2012);