Copyright's Missing Secondary Liability Factor: Cost

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Copyright law took a wrong turn in the 1960s. Confronted with an increasing number of plaintiffs seeking to hold commercial enterprises liable for the infringing acts of others, courts cobbled together tests for indirect liability from lines of copyright cases dating back to the 1910s that ultimately rested on bedrock principles of tort law. But something got lost in the transfer. It turns out that copyright's liability principles branched off from the evolution of tort law at the worst possible time. In the 1910s, tort law was on the cusp of a dramatic shift, from the formalism of the late nineteenth century to the realism of the early twentieth century. Among the most significant changes was the abandonment of the search for legal categories of fault and causation that would lead to negligence liability for accidents. Instead, tort law cast such decisions to the jury, applying a "reasonable person" standard, and erected limiting boundaries around fault-proximate cause, and more importantly, the Hand balancing test from *Carroll Towing*. These doctrines were applied to contributory as well as direct tortfeasors. Copyright law missed all this. When the framework for contributory liability was laid down in the 1960s, the test was derived from tort law as it existed in 1910. It contained only two elements: knowledge, and some form of causation. While such a definition may suffice to deal with infringement carried out by humans, it has proven entirely inadequate to determine the liability of manufacturers of machines and providers of automated services. As a result, courts have struggled to jury-rig limits on either the type of knowledge a secondary actor must have, or the sort of causal relationship, but these limits are ad hoc and artificial.

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