

Why Copyright Infringement is Not a Strict Liability Tort and Why That Matters

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Scholars and lawmakers refer ubiquitously to copyright infringement as a strict liability tort. Copyright's reliance on strict liability has been criticized as being immoral, inefficient and inconsistent with usual tort doctrine. 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 doctrinal and economic methods, the article explicates the role that fault plays in copyright infringement. Doing so reveals that copyright is not nearly as immoral, inefficient, and inconsistent as previously suggested. Furthermore, appreciating the role of fault in copyright infringement also enables us to learn something about the enigmatic fair use doctrine. From a tort perspective, the fair use doctrine exists to determine whether a defendant has acted wrongfully, and to prevent liability of those that have not.

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