

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 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 both doctrinal and economic methods, this article explicates the role that fault plays in copyright infringement. Doing so not only corrects a fundamental mistake in our understanding of copyright law, but it also reveals that the rules governing copyright infringement are not nearly as immoral, inefficient, and inconsistent as previously suggested.

In the modern world, tort law has largely renounced the principle of strict liability.¹ Although for many centuries, the common law imposed civil liability upon a defendant for harm that was not his fault, today the law typically requires that a defendant act intentionally, recklessly or negligently before he will be held responsible for the consequences of his conduct.² For over a hundred years, jurists have applauded this transformation.³ 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,⁴ to the foremost minds of contemporary legal thought, who find holding someone responsible without fault is both immoral⁵ and inefficient.⁶ This transformation has resulted in the situation where strict liability

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¹ DAN B. DOBBS, *THE LAW OF TORTS* 941 (West, 2000) [hereinafter DOBBS]

² See e.g. Cornelius J. Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225, at 225 (1971) (“It is frequently assumed that with a few exceptions the principles of negligence comprise the field of tort law, and that fault is the most common basis for determining liability for harmful conduct.”); DOBBS, at 941 (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.”).

³ 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 unmeritorious or even culpable plaintiffs to use the machinery of the court as a means of collecting money from blameless defendants.”)

⁴ 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.”).

⁵ 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).

⁶ See e.g. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL. STUD. 29, 32-33 (1972) (“Perhaps, then, the dominant function of the fault system is to generate rules of liability that if followed will bring about at least approximately the efficient – the cost-justified – level of accidents and safety.”); Posner, *Strict Liability: A Comment*, 2 J. Legal Stud. 205 (1973) (arguing that existing literature fails to provide a reason for believing that strict liability is more efficient than a negligence rule); ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 338-341 (Prentice Hall, 2011) (explaining how strict liability give the victim inefficient incentives to take care).

exists “at the margins of tort”⁷ applicable in only “a few special situations”⁸ and a belief that it is a “medieval”⁹ concept that simply “does not fit”¹⁰ within the greater body of private law. For several decades, the goal has been to provide some theory as to why strict liability should continue to exist at all.¹¹

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 judges¹² and scholars,¹³ 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.¹⁴ 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.”¹⁵ 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

⁷ JOHN C.P. GOLDBERG & BENJAMIN ZIPURSKY, *TORTS* 265 (Oxford University Press, 2010).

⁸ GOLDBERG & ZIPURSKY, *supra* note 7, at 266.

⁹ *Norah Read v. J. Lyons & Co. Ltd.*, 1 ALL E.R. 113 (1945) (per Scott L.J.)

¹⁰ GOLDBERG & ZIPURSKY, *supra* note 7, at 267.

¹¹ 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).

¹² See e.g. *Shapiro, Bernstein & Co. v. H. L. Green Co.*, *supra* note 19; *Religious Technology Center v. Netcom On-Line Communication Services*, 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.”)

¹³ 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.”)

¹⁴ *Arnstein v. Porter* 154 F.2d 464 (2d Cir. 1946); see NIMMER *supra* note 13, at § 13.03.

¹⁵ 2 PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* § 8.1, at n. I (3d ed. 2014)

“harsh”¹⁶ and worthy of “hesitation.”¹⁷ More recently, commentators have maintained that exposing copyright defendants to strictly liability is immoral,¹⁸ inefficient,¹⁹ and inconsistent with the standard tort practice of only holding liable those defendants who have acted wrongfully.²⁰ To remedy this situation, a number of academic lawyers have proposed that copyright should reject strict liability in favor of a fault liability rule. In their vision, copyright law would be improved if it only imposed liability on those defendants who copy intentionally, recklessly, or negligently.²¹

However, as this article will demonstrate, the widespread and orthodox belief that copyright infringement is a strict liability tort is incorrect.²² In the U.S.A. and other countries that adopt a fair use doctrine, copyright is, in fact, a fault-based tort. To demonstrate the intuition behind this claim, one must remember the distinction between strict liability and fault liability in tort law. Strict liability 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. A defendant’s fault can be established in two

¹⁶ *Barry v. Hughes*, 103 F.2d 427, 427 (2d Cir. 1939); *See also Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 308 (2d Cir. 1963) (noting the “harshness of the principle of strict liability in copyright law”).

¹⁷ *De Acosta v Brown*, 146 F.2d 408, 410 (2d Cir. 1944)

¹⁸ Dane S. Ciolino & 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 (2013) (Even for affluent defendants, overcoming the Copyright Act’s strict liability standard is highly burdensome).

¹⁹ Ciolino & Donelon, *supra* note 18, at 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”).

²⁰ *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).

²¹ Ciolino & Donelon, *supra* note 18 (arguing that intention should be a defense to copyright infringement); Steven Hetcher, *supra* note 20 (arguing that copyright should adopt a fault liability regime for online amateur “remix” activity); Jacob & Dorfman, *supra* note 20 (arguing that copyright should adopt different liability rules – strict, negligence, and intention – in different situations).

²² 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.

ways.²³ Firstly, a defendant is at fault if he acts with a culpable state of mind. For example, a defendant is at fault for *intentionally* causing harm to another. Secondly, a defendant may be at fault because his actions fail to comply with a standard of conduct.²⁴ This is most commonly exemplified by the tort of negligence. In a negligence action, a defendant is not liable simply because he takes a risk that causes an accident, it must also be shown that the defendant's risk taking was *unreasonable*. In this second type of fault, the wrongfulness is not to be found in the defendant's subjective mental state, but in his objective failure to live up to a standard that society expects of everyone.²⁵ In the case of negligence, the social expectation is that we limit our risk taking activities to those that are "reasonable."

Copyright is a fault-based tort in exactly the same way that negligence is.²⁶ If copyright 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*. While much copying is necessary and beneficial to modern life, some copying may have negative consequences for the production of new expressive works. To separate out good from bad copying, the law introduces a standard: fairness. Through the fair use doctrine, society gives legal expression to its expectation that individuals ought to limit their copying to a fair level. When an individual copies unfairly, he fails to comply with a standard that the law expects of everyone, and accordingly he is at fault for any negative consequences that ensue. Copyright is, therefore, a fault-based tort, because it only imposes liability on those who actions wrongfully fail to comply with a standard of conduct.

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

²³ See e.g. PETER CANE, *THE ANATOMY OF TORT LAW* 36 (Hart Publishing, 1997); JULES COLEMAN, *RISKS AND WRONGS* 217 (Oxford University Press, 2002).

²⁴ *Id.*

²⁵ DOBBS, *supra* 1, at 275 (A bad state of mind is neither necessary nor sufficient to show negligence, and conduct is everything).

²⁶ It is important to note that the article is talking about direct infringement and not indirect infringement. It has always been the case that holding a defendant contributory liable required some faulty state of mind. See e.g. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 (1984); *Cable/Home Communications Corp. v. Network Prods., Inc.* 902 F.2d 829, 845-846 (11th Cir. 1990).

strictness of copyright liability is misplaced. As will be demonstrated, the rules governing copyright infringement are not as inconsistent, 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, normatively debating the issue of whether copyright should reject strict liability in favor of a fault liability rule is a fruitless exercise. Instead, we should be asking two more germane questions. Firstly, what *type* 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. And secondly, who should have the burden of proving fault (or the absence of fault) in copyright? Currently, 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. In response to these questions, this article argues the liability rule currently used in copyright is largely appropriate. Copyright should continue to condition liability upon the defendant's failure to comply with a standard of conduct and should not take mental state into account in the liability decision. However, the burden should be on the plaintiff to show that the copying was unfair and, therefore, that the defendant was at fault.

Part I of this article uses both doctrinal and economic methods to demonstrate the distinction 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 with many similarities to the tort of negligence. Finally, part III argues that, because liability is already conditioned upon fault, the liability rule in copyright law is largely justifiable. The only alteration that we need to make is on the issue of who has the burden of proving fault.

I. STRICT LIABILITY VERSUS FAULT LIABILITY

This section shall summarize the doctrinal and economic differences between strict liability and fault liability. The initial doctrinal section is formal: it aims to demonstrate how different liability rules can be ontologically grouped into the categories of strict liability and fault liability. The following section is substantive and

demonstrates the different economic effects caused by employing the different types of liability rule

A. *The Doctrine of Strict Liability and Fault Liability*

Before the court will hold the defendant responsible, the plaintiff must demonstrate the existence of certain factual conditions. These conditions vary depending on the type of liability rule the law adopts.²⁷ Generally speaking, tort uses two types 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 rules and outcome-based strict liability rules.²⁸ The former is the most plaintiff-friendly version of strict liability. Under this type of liability rule, the plaintiff only needs to show that the defendant volitionally performed some specific conduct before the defendant will be held responsible.²⁹ In such cases, the plaintiff need not demonstrate neither how this volitional conduct caused a certain outcome nor 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 voluntarily entered onto the plaintiffs land.³⁰ Consequences of this act,

²⁷ COLEMAN, *supra* note 23, at 212.

²⁸ CANE, *supra* note 23, at 45-49; There is a third category called “relationship-based strict liability” where one person is held liable for the torts committed by a third party. *See* CANE, *supra* note 23, at 46.

²⁹ CANE, *supra* note 23, at 45-46; *See also* PETER CANE, *RESPONSIBILITY IN LAW AND MORALITY* 78-84 (Hart Publishing, 2002).

³⁰ 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 35, 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

as well as the defendant's potential negligence, recklessness, or intention, are immaterial. Similarly, a defendant can be liable for taking a plaintiff's personal property, even if he was unaware of the plaintiff's ownership over the object and even if the property is not harmed.³¹

Conduct-based strict liability is distinct from outcome-based strict liability. In the latter cases, the plaintiff must not only demonstrate how the defendant conducted himself in a specific way, but also how that conduct caused a certain outcome.³² 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, it is not enough for the plaintiff to demonstrate that the defendant manufactured a defective product, he must also demonstrate that this product caused him some injury.³³ Or in cases where the defendant engages in abnormally dangerous activity,³⁴ it must be demonstrated how this dangerous activity caused an accident.³⁵ 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: that the defendant conducted himself in a certain way, that the defendant's conduct caused a specified outcome, and finally, that the outcome was somehow the defendant's fault.³⁶ Fault is synonymous with wrongdoing.³⁷ Therefore, fault rules only hold a defendant liable when he has done something wrong, whereas strict liability holds defendants liable regardless of the defendant's

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.").

³¹ CANE, *supra* note 23, at 45-46.

³² CANE, *supra* note 23, at 46-47.

³³ RESTATEMENT (THIRD) OF THE LAW OF TORTS: PRODUCTS LIABILITY §1 (1997); *Pasquale v. Speed Products Eng'g*, 166 ILL.2d 337, 654 N.E.2d 1365, 211 Ill.Dec.314 (1995); *Price v. Blaine Kern Artista, Inc.*, 111 NEV 515, 517, 893 P.2d 367, 369 (1995).

³⁴ RESTATEMENT (SECOND) OF TORTS §§519-520.

³⁵ *Id.*; *Spano v. Perini Corp.*, 25 N.Y.2d 11, 17, 302 N.Y.S.2d 527, 531, 250 N.E.2d 31, 34 (1969)

³⁶ COLEMAN, *supra* note 23, at 212.

³⁷ *Id.*

culpability. Consequently, innocent defendants are never liable under a fault rule, but can be liable under a strict liability rule.³⁸

Tort law recognizes two types of fault. In the first, the defendant's fault is a failure to act in compliance with a standard of conduct set by the law.³⁹ In the second, the defendant's fault is acting with a faulty state of mind. This section explains these two different types of fault rule.

i. Standard of Conduct Fault

Firstly, the defendant may be at fault for failing to act in compliance with a standard of conduct.⁴⁰ Sometimes a type of conduct is not always harmful, but it becomes so when performed at a certain frequency, or certain level, or in a certain way. In which case, the law uses a standard to differentiate between harmful and innocent conduct. Society expects that people will conduct themselves in conformity with the standard, and a failure to do so is a fault worthy of sanction.

Negligent conduct is the most prominent example of conduct that fails to comply with a standard.⁴¹ A defendant's conduct is negligent when it is unreasonable in the situation.⁴² The standard of conduct that the law therefore expects from the defendant is one of "reasonableness." Judging a defendant's conduct by the reasonableness standard is often referred to as a "negligence rule."⁴³

It is important to distinguish the "negligence rule" from the "tort of negligence."⁴⁴ The tort of negligence is a cause of action.⁴⁵ It sanctions defendants when they take unreasonable risks that cause accidents. By contrast, the negligence rule is not a cause of action, but the standard by which a defendant's conduct is judged.⁴⁶ Risk taking

³⁸ GOLDMAN & ZIPURSKY, *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.).

³⁹ COLEMAN, *supra* note 23, at 217-8.

⁴⁰ *Id.*; CANE, *supra* note 23, at 36.

⁴¹ *Supra* note 23.

⁴² DOBBS, *supra* note 1, at 275 ("Negligence is conduct that creates or fails to avoid unreasonable risks of foreseeable harm to others); George P. Fletcher, *Fairness and Utility in Tort Law*, 85 HARV. L. REV. 537 (1972) (Explaining negligence in terms of asymmetrical risk creation), *see also* the discussions of risk sharing and assumption of risk, *e.g.* Leon Green, *The Individual's Protection Under Negligence Law: Risk Sharing*, 47 NW. L. REV. 751 (1952); John W. Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5 (1962).

⁴³ *See e.g.* CANE, *supra* note 35, at 36; Marcel Kahan, *Causation and Incentives to Take Care Under a Negligence Rule*, 18 J. LEGAL. STUD. 427 (1989).

⁴⁴ *Supra* note 23.

⁴⁵ RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES, §3.

⁴⁶ CANE, *supra* note 23, at 36; WARD FARNSWORTH, TORTS 121 (Aspen, 2nded, 2009).

is not always wrongful. Some risk is an ordinary and necessary part of social life.⁴⁷ Therefore, the negligence rule is used in the tort of negligence to distinguish between wrongful and innocent risk creation. But equally, the negligence rule is applied in causes of action other than the tort of negligence.⁴⁸

When a defendant fails to comply with a standard of conduct, the fault is sometimes referred to as fault in the *action*, as opposed to fault in the *actor*.⁴⁹ The fault here lies in the defendant's external actions, not his internal mental state. This type of fault is accordingly objective, not subjective.⁵⁰ As a result, under a negligence rule, whether conduct is reasonable depends on whether taking the risk was reasonable for an ordinary person.⁵¹ It does not depend on whether the defendant thought his actions were reasonable. This is why it is sometimes said that "negligence is conduct, not a state of mind."⁵²

ii. State of Mind Fault

Fault may also be established by demonstrating the defendant acted with a blameworthy state of mind.⁵³ This is most commonly achieved by demonstrating that the defendant caused the outcome recklessly or intentionally. Recklessness has some similarities with

⁴⁷ DOBBS, *supra* note 1, at 275. it is usually the case that judges talk in terms of what risks a "reasonable person" would take. *See e.g.* Blyth v Birmingham Water Works Co., 11 Ex. 781, 156 Eng. Rep. 1047 (1856) ("Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do..."); Mansfield v. Circle K. Corp., 877 P.2d 1130 (Okla. 1994) ("the standard of conduct is that of a reasonably prudent person under the same or similar circumstances."). At least one philosopher has argued that the concept of risks a reasonable person would take and unjustifiable risks are in distinct philosophical concepts, *see* Kenneth W. Simons, *Negligence*, 16 SOCIAL PHILOSOPHY & POLICY 2, 52 (1999). However, this distinction is apparently not made by courts at a conscious level.

⁴⁸ *See e.g.* RESTATEMENT (SECOND) OF TORTS §652B (judging whether intrusion upon seclusion is actionable by a reasonableness standard); RESTATEMENT (SECOND) OF TORTS §652D (judging whether publicity given to an issue of private life is actionable by a reasonableness standard.); *Fowler v. Lanning* [1959] 1 QB 426 (confirming the position arguably reached before 1900 in *Holmes v. Mather* (1875) LR 10 Ex 261 and *Stanley v. Powell* [1891] 1 QB 86).

⁴⁹ COLEMAN, *supra* note 23, at 217-8.

⁵⁰ *See e.g.* Warren A. Seavey, *Negligence – Subjective or Objective*, 41 HARV. L. REV. 1 (1927)

⁵¹ 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).

⁵² Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, at 40 (1915).

⁵³ COLEMAN, *supra* note 23, at 217-8.

negligence.⁵⁴ In these cases, the defendant's conduct creates an unreasonable risk of harm to others.⁵⁵ However, unlike negligence, the wrongfulness in recklessness is not merely the risk creation, but the conscious disregard of, or ambivalence towards, that risk.⁵⁶ Thus, the fault is based on the defendant's blameworthy mental state.⁵⁷ Similarly, in intentional torts, the fault occurs within the defendant when he intends the harm he causes.⁵⁸ The most typical example of an intentional tort is battery.⁵⁹ In addition to recklessness and intentionality, some torts require that the defendant act either fraudulently⁶⁰ or maliciously (i.e. with bad motives).⁶¹ Yet these states of mind based torts are found far less frequently.

The fault in these cases is in the *actor*, not the *action*.⁶² The problem is not so much the defendant's external actions but his internal mental state.⁶³ In intentionally, recklessly, fraudulently or

⁵⁴ See CANE, *supra* note 23, at 33-34; James B. Brady, *Recklessness, Negligence, Indifference, and Awareness*, 43 MODERN L. REV. 380 (1980).

⁵⁵ DOBBS, *supra* note 1, at 52 (defining reckless conduct as mid-way between negligent and intentional conduct).

⁵⁶ Sometimes the phrase "wanton misconduct" is used also to describe recklessness. See DOBBS, *supra* note 1, at 51; RESTATEMENT (SECOND) OF TORTS, §500; Seeholzer v Kellstone Inc., 80 Ohio App.3d, 726, 610 N.E.2d 594 (1992).

⁵⁷ Examples of reckless conduct include intoxicated driving, see e.g. Booker, Inc. v. Morrill, 639 N.E.2d 358 (Ind.App.1994); Lewis v. Miller, 374 Pa.Super. 515, 543 A.2d 590 (1988); In some cases, the courts rely on the obvious nature of the facts to infer the defendant's awareness of the risk, see e.g. Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

⁵⁸ DOBBS, *supra* note 1, at 48 (Intent is the purpose to achieve a specific result); *Id.* at 47 (intent in tort means *tortious* intent); CANE, *supra* note 35, at 32 (Intent is the desire to bring about certain consequences). John Finnis, *Intention in Tort Law*, in D.G. OWEN, PHILOSOPHICAL FOUNDATIONS OF TORT LAW 238 (Oxford University Press, 1995); However, it is clear that intent is a complex philosophical concept and has been debated since the work of Aristotle. For some modern discussions see G. E. M. ANSCOMBE, INTENTION (1969); A. Kenny, *Intention and Purpose*, 63 J. PHILO. 642 (1966); ROY LAWRENCE, MOTIVE AND INTENTION: AN ESSAY IN THE APPRECIATION OF ACTION (1972); J.W. MELAND, THE NATURE OF INTENTION (1970); P.N. O'SULLIVAN, INTENTIONS, MOTIVES AND HUMAN ACTION: AN ARGUMENT FOR FREE WILL (1977).

⁵⁹ RESTATEMENT (SECOND) OF TORTS §13; DOBBS, *supra* note 1, at 52; Caudle v. Betts, 512 So.2d 389, 390 (La.1987) ("A harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff to suffer such a contact is battery.");

⁶⁰ CANE, *supra* note 23, at 34; Fraud is often labeled misrepresentation, see DOBBS, *supra* note 1, at 1343; Examples of tortious misrepresentation include the homeowner who induces a sale by falsely representing that the basement does not flood, see e.g. Wasson v Schubert, 964 S.W.2d 520 (Mo.App.1998), the employer who recruits desirable employees by falsely representing that it had no plans to move or close, see e.g. Meade v Cedarapids, Inc., 164 F.3d 1218 (9th Cir. 1999), and the adjuster who falsely says that a release to be signed by an injured person is merely a receipt, see e.g. Voilas v. General Motors Corp., 170 F.3d 367 (3d Cir. 1999).

⁶¹ CANE, *supra* note 23, at 35. DOBBS, *supra* note 1, at 49-50; Motive is often important in economic torts, such as interference with business opportunity, see DOBBS, *supra* note 1, at 1262; Cherberg v. Peoples Nat'l Bank of Washington, 88 Wash.2d 595, 564 P.2d 1137 (1977); Smith v. Ford Motor Co., 289 N.C. 71, 221 S.E.2d 282, 79 A.L.R.3d 651 (1976).

⁶² COLEMAN, *supra* note 23, at 217-218.

⁶³ *Id.*

maliciously causing the outcome, the defendant's mental state evinces a character flaw that the law considers morally unacceptable and therefore blameworthy.⁶⁴ Unlike fault in the action, this type of fault is subjective i.e. its existence depends on what the defendant was thinking at the time of the conduct.⁶⁵ Table one summarizes the different types of liability rule found in tort law.

Table 1: Elements of strict liability and fault-based Rules

<u>Strict Liability Rules</u>		<u>Fault Rules</u>	
Conduct-Based	Outcome-Based	Standard of Conduct	State of Mind
- Conduct	- Conduct - Outcome	- Conduct - Outcome - Failure to act in compliance with a standard set by the law	- Conduct - Outcome - Acting with a blameworthy state of mind

3. The Burden of Proof and Presumptions

So far, this part has shown how the conditions under which a defendant will be held liable are different depending on whether his conduct is judged by a strict liability rule or a fault liability rule. In both instances, the burden of proving the existence of these conditions normally lies with the plaintiff.⁶⁶ Typically he must prove, on the balance of probabilities,⁶⁷ the existence of each element of the claim. If the evidence is equally balanced, the plaintiff has failed to satisfy the epistemic burden he faces.⁶⁸

⁶⁴ *Id.*

⁶⁵ DOBBS, *supra* note 1, at 49 ("Since intent is a state of mind, it is necessarily subjective").

⁶⁶ DOBBS, *supra* note 1, at 359 ("The plaintiff has the burden of proving facts to establish each element of her claim."); *See generally*, 2 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE §§ 336-339 (1992).

⁶⁷ Also sometimes called the "preponderance of the evidence," *see* DOBBS, *supra* note 1, at 360.

⁶⁸ DOBBS, *supra* note 1, at 360 (Contemporary writers and judges often express this mathematically by saying the plaintiff must establish the facts necessary to the case by a probability greater than 0.5 or greater than 50%).

However, this is not always the case. Sometimes plaintiffs face substantial difficulties in providing the necessary evidence to establish the elements of the case. In recognition of this fact, the court will often presume the existence of one or more of the conditions.⁶⁹ It is then the responsibility of the defendant to rebut the presumption through evidence.⁷⁰ Typically the standard of proof required to rebut the presumption is lower than the standard of proof facing the plaintiff.⁷¹ That is, the presumption is rebut by demonstrating through substantial evidence that the condition did not exist.⁷² It does not, however, require the defendant to prove on the balance of probabilities that the condition did not exist.⁷³ This means that if the evidence is equal on both sides, the court must find for the defendant on that particular issue.⁷⁴

A good example of this can be found in the *res ipsa loquitor* doctrine.⁷⁵ This doctrine (the meaning of which translates into “the thing speaks for itself”)⁷⁶ applies in cases where there is a high likelihood that the injury resulted through the defendant’s negligence, but providing evidence of that fact is hard, if not impossible.⁷⁷ In such instances, courts presume that the defendant was at fault for the harm, and the defendant must try to rebut that presumption.⁷⁸ It was first used in the case of *Byrne v Boadle* where a barrel of flour fell from a second-floor loft and struck the plaintiff.⁷⁹ In Judge Pollock’s view, the barrel could not have fallen from the loft in the absence of

⁶⁹ DOBBS, *supra* note 1, at 365-69; *See generally* Francis H. Bohler, *The Effect of Rebuttable Presumptions of Law upon the Burden of Proof*, 68 UPENN L. REV. 307 (1920); Mark Shain, *Presumptions Under the Common Law and Civil Law*, 18 S. CAL. L. REV. 91 (1944)

⁷⁰ DOBBS, *supra* note 1, at 366 (“[t]he term presumption is reserved for cases in which proof of Fact A in some manner alters a burden of production or a burden of persuasion or both. In this usage, when the plaintiff proves Fact A, Fact B is taken as provisionally established.”)

⁷¹ DOBBS, *supra* note 1, at 368 (“the effect of a presumption is usually to shift the burden of going forward with the evidence...But if the defendant produces some evidence, the plaintiff will *not* get a directed verdict on the issue and the jury will *not* be told that the burden of proof has shifted. The plaintiff will still be required to persuade the jury by a preponderance of the evidence.”)

⁷² *Id.*

⁷³ DOBBS, *supra* note 1, at 373 (evidence establishing fault under *res ipsa loquitor* must establish fault was “more probable than not”), at 377 (the defendant must introduce at least some evidence to rebut the inference, and the jury must find negligence if he fails to do so.”); *see* Brown v. Poway Unified School District, 4 Cal.4th 820, 843 P.2d 624, 15 Cal. Rptr.2d 679 (1993); Jackson v. Oklahoma Mem. Hospital, 909 P.2d 765 (1995).

⁷⁴ *Id.*

⁷⁵ DOBBS, *supra* note 1, at 370.; *See generally* Mark F. Grady, *Res Ipsa Loquitor and Compliance Error*, 142 U. PA. L. REV. 887 (1994)

⁷⁶ *Id.*

⁷⁷ Dobbs, *supra* note 1, at 372.

⁷⁸ *Id.*

⁷⁹ (2 Hurl. & Colt. 722, 159 Eng. Rep. 299, 1863) (Eng.)

the defendant's negligence. Therefore, the burden was placed upon the defendant to demonstrate his lack of fault.⁸⁰ Today, this doctrine is most used in the field of medical negligence.⁸¹ For example, where a foreign object is found inside a person following an operation, the burden will be shifted onto the surgeons to demonstrate their lack of fault. Further examples of burden shifting can be found in the alternative liability⁸² and market share⁸³ doctrines.

4. Defenses

Once the plaintiff has established the elements of the claim, the defendant is considered responsible for the accident as a *prima facie* matter.⁸⁴ He is then given the opportunity to absolve himself by

⁸⁰ *Id.*

⁸¹ DOBBS, *supra* note 1, at 647; *See e.g.* Higdon v. Carlebach, 348 Mich 363, 83 N.W.2d 296 (1957) (dentist cutting tongue with rotating disk); Killingsworth v. Poon, 167 Ga. App. 653, 307 S.E.2d 123 (1983); However, the doctrine is applied generally and outside medical malpractice cases, such as in cases of airplane crashes, *see e.g.* Widmyer v. Southeast Skyways Inc., 584 P.2d 1 (Alaska 1978); Newing v. Cheatharm, 15 Cal.3d 351, 540 P.2d 33, 124 Cal. Rptr. 193 (1995) and automobile crashes involving stationary cars, *see e.g.* Sullivan v Snyder, 374 A.2d 866 (D.C.App.1977).

⁸² First used in *Summers v. Tice* 33 Cal.2d 80, 199 P.2d (1948). In that case, a man accompanied two hunters on a quail hunt. The two hunters negligently discharged their guns in presence of the victim who was shot in the face by one of the hunters. The victim could not demonstrate which hunter had actually caused the harm. The court held that both hunters would be held jointly liable unless one of them could establish they had not caused the harm. Now the rule is used more generally in cases of joint and several liability, *see* DOBBS, *supra* note 1, at 426; Mark A. Geistfeld, *The Doctrinal Unity of the Alternative Liability Doctrine and Market Share Liability*, 155 U. PA. L. REV. 447 (2006); Lawrence W. Kessler, *Alternative Liability in Litigation Malpractice Actions: Eradicating the Last Resort of the Scoundrels*, 37 SAN DIEGO L. REV. 401 (2000).

⁸³ The market share liability rule came about in response to DES cases, *see* Comment, DES and a Proposed Theory of Enterprise Liability, 46 FORD. L. REV 963 (1978). DES was a prescription drug manufactured by hundreds of drug companies and prescribed to pregnant women to prevent miscarriages. Many years later, they found that the drug caused various cancers. However, due to the elapse of time, many of the victims could not remember which companies drugs they took. In *Sindell v. Abbot Laboratories*, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 the court held that in such cases, the court would presume the existence of causation on behalf of all the defendants, unless they could demonstrate that their drug had not caused the harm. But before the burden would shift to the defendants, it must first be demonstrated by the plaintiff that the defendants in court constituted substantially the entire relevant market, that their products were fungible, they all operated during the relevant time period when the drugs were taken, and there was no proof that the plaintiff was at fault for the harm. This has subsequently been adopted in the RESTATEMENT (SECOND) OF TORTS §281 (1977); *See generally*, David A. Fisher, *Products Liability – An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623 (1981); Allen Rostron, *Beyond Market Share Liability: A Theory of Proportional Share Liability for Nonfungible Products*, 52 UCLA L. REV. at 152 (2004).

⁸⁴ DOBBS, *supra* note 1, at 56 ("When the plaintiff provides testimony about facts that show all the elements necessary for the tort she claims, she has made a *prima facie* case.").

introducing defenses.⁸⁵ To be successful in this regard, he must introduce evidence, which on the balance of probabilities establishes the existence of a valid defense.⁸⁶

The distinction between strict liability and fault can also be demonstrated by examining the defenses available under each liability rule.⁸⁷ Under fault rules, a defendant's liability is conditioned upon the existence of his fault, therefore he may defend any claim against him by demonstrating his lack of fault. As strict liability claims are not based on fault, proving the absence of fault is not a valid defense to claims under a strict liability rule.

i. Defenses in Fault Liability

As the defendant's liability under a fault liability rule is conditioned upon his fault, the defendant may absolve himself of any responsibility by demonstrating his absence of fault. He does this by excusing or justifying his conduct.⁸⁸ Whether he chooses to excuse or justify his actions depends on the type of fault that is alleged against him.⁸⁹

If it is alleged that the defendant acted with a faulty state of mind, the defendant must offer an excuse.⁹⁰ By offering an excuse, the defendant accepts that his actions were wrong, but denies that he acted with a blameworthy mental state.⁹¹ As the plaintiff alleges some internal shortcoming in his character, the defendant responds by demonstrating how his character was not found wanting.⁹² For example, against a claim of battery, the defendant can excuse his conduct by claiming he acted in self-defense.⁹³ In doing so, he acknowledges that the action of striking another is wrong, but negates the plaintiff's claim that it stems from a morally blameworthy failing. The action did not stem from a desire to inflict injury on another

⁸⁵ DOBBS, *supra* note 1, at 36 ("Facts showing affirmative defenses, if believed by the trier of fact, will exculpate the defendant.").

⁸⁶ DOBBS, *supra* note 1, at 361 ("The defendant does, however, have the burden of proving any affirmative defenses.").

⁸⁷ COLEMAN, *supra* note 23, at 217-218

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² DOBBS, *supra* note 1, at 157 (excuses "assert that the defendant's conduct was understandable given his personal condition and that he is not personally blameworthy for matters not within his control. Excuses focus on subjective mental or psychological characteristics of the actor.").

⁹³ RESTATEMENT (SECOND) OF TORTS §§ 63 & 64 (1977); DOBBS, *supra* note 1, at 167.

person, it stemmed from a character trait found in everyone: the desire to avoid pain and suffering.⁹⁴

If the plaintiff alleges the defendant's actions failed to comply with a standard, the defendant must offer a justification.⁹⁵ In providing a justification, the defendant argues that his actions did not actually fall below the appropriate standard; he denies that his actions were wrong, and in fact believes they were good for society.⁹⁶ For example, under a negligence rule, an argument to show why the defendant's actions were reasonable is a justification. On the other hand, excusing the conduct is no defense to this allegation. The charge against the defendant is the *action* was objectively wrong, therefore claiming a lack of blameworthiness in the *actor* simply does not negate the plaintiff's claim.⁹⁷

Excuse and justification are not the only ways the defendant can absolve himself of responsibility. The claim against him is that he *caused* the outcome through his faulty actions, therefore, he can also defend by demonstrating that he did not cause the accident. Most commonly, he may argue that a third party in fact caused the harm. For example, in a case where A strikes B with his arm, A can negate a claim of battery by showing that C moved his arm against his will.⁹⁸ Or he may use the superseding cause doctrine to demonstrate that a third party broke the chain of causation.⁹⁹ Finally, the defendant may also absolve himself of responsibility by demonstrating that the plaintiff was at fault for the injury.¹⁰⁰ This is most commonly used in the contributory negligence defense.¹⁰¹

⁹⁴ COLEMAN, *supra* note 23, at 217-218.

⁹⁵ *Id.*

⁹⁶ DOBBS, *supra* note 1, at 156 ("When a judge believes the defendant's harmful act was justified, the judge believes that people in general can rightly act as the defendant did.")

⁹⁷ See DOBBS, *supra* note 1, at 156-57 ("Justifications tend to invoke objective standards of reasonableness to modify the flat rules of trespassory torts.")

⁹⁸ See DOBBS, *supra* note 1, at 414; Richard W. Wright *Causation in Tort Law*, 73 CAL. L. REV. 1735 at 1777-17781 (1985).

⁹⁹ RESTATEMENT (SECOND) OF TORTS §183 (1977); *Loftus v. Dehail*, 133 Cal 214, 65 P. 379 (1901); *Miller v. Bahmmuller*, 124 App.Div. 558, 108 N.Y.S. 924 (1908); DOBBS, *supra* note 1, at 461.

See Lawrence H. Eldredge, *Culpable Intervention as Superseding Cause*, 86 U. PA. L. REV. 121 (1938); Terry Christlied, *Why Superseding Cause Analysis Should be Abandoned*, 72 TEX. L. REV. 161 (1993).

¹⁰⁰ COLEMAN, *supra* note 23, at 215.

¹⁰¹ RESTATEMENT (SECOND) OF TORTS §463 (1977); DOBBS, *supra* note 1, at 494; *Butterfield v. Forrester*, 11 East. 59, 103 Eng. Rep. 926 (1809) (first holding contributory negligence is complete bar to claim); See generally, Francis H. Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233 (1908); Flemming James Jr., *Contributory Negligence*, 62 YALE L. J. 691 (1952); Daniel Dobbs, *Accountability and Comparative Fault*, 47. LA. L. REV. 939 (1987)

ii. Defenses under Strict Liability Rules

Strict liability is often defined as liability “not defeasible by either excuse or justification,”¹⁰² meaning that neither excuse nor justification are valid defenses under strict liability rule.¹⁰³ As seen, the purpose of offering an excuse or justification is to deny that the defendant was at fault. In strict liability cases, the plaintiff does not argue that the defendant was at fault for the accident, therefore raising evidence to demonstrate the lack of fault does not negate any claim made by the plaintiff. As the defendant’s liability is not conditioned on fault, the absence of fault is simply irrelevant.

Although excuse and justifications provide no defense to strict liability claims, a defendant can still absolve himself of responsibility in these cases.¹⁰⁴ In cases of conduct-based strict liability, the defendant may demonstrate that he simply did not perform the unlawful conduct. For example, in a trespass case it is possible for the defendant to simply demonstrate that he did not in fact enter upon the plaintiff’s land.¹⁰⁵ Alternatively he may also argue that his actions were privileged.¹⁰⁶ The law recognizes narrow, tailor-made exceptions to the normal rule in some special cases where application of that rule would lead to absurd or unjust outcomes.¹⁰⁷ For example, firemen and policemen may enter into the land of another without permission in order to prevent fires or criminal activity.¹⁰⁸ Likewise a person may

¹⁰² COLEMAN, *supra* note 23, at 219; JULES COLEMAN, *MARKETS, MORALS, AND THE LAW* 173 (Cambridge University Press, 1988); JEFF MCMAHAN, *KILLING IN WAR* 44 (Oxford University Press, 2009).

¹⁰³ It is important to note the distinction here between strict liability in tort and strict liability in criminal law. In the criminal law, strict liability is still defeasible by justification, although not defeasible by excuse, *see* MCMAHAN, *supra* note 102, at 44.

¹⁰⁴ Admittedly, our understanding of the type and character of defenses that are available under strict liability rules is an under-theorized issue. *See* COLEMAN, *supra* note 23, at 215 (“with the exception primarily of Richard Epstein, few theorists have analyzed the role of positive defenses in the theory of liability.”); *See also*, Richard Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL. STUD. 165 (1974).

¹⁰⁵ For example, if the intrusion is only intangible, such as the case where smoke interferes with the defendant’s land, then there is no trespass, *see* RESTATEMENT (SECOND) OF TORTS §53 (1977); Additionally, some interference is simply not within the boundaries of the plaintiff’s land, although the plaintiff claims it is, *see e.g.* *Slotoroff v. Nassau Associates*, 178 N.J. Super. 292, 428 A.2d 956 (1980) (holding that intentional use of a scaffold in airspace above plaintiff’s three story building was not actionable).

¹⁰⁶ DOBBS, *supra* note 1, at 155 (“Many privileges are well established; many are called by commonly used names. But there is no closed master list of privileges any more than there is a closed list of claims. Courts can and do recognize new privileges or modify old ones as required by the changes in social conditions...”).

¹⁰⁷ *See* DOBBS, *supra* note 1, at 155 (separating privileges from defenses and immunities).

¹⁰⁸ DOBBS, *supra* note 1, at 206 (“One who enters land under legal authority is not liable for a trespass merely because of the entry...But one who enters land under a privilege escapes liability for the entry itself, not for any subsequent tortious misconduct.”); *The Six Carpenter’s*

enter the land of another to demand a return of his property,¹⁰⁹ or to stop a nuisance.¹¹⁰

In cases of outcome-based strict liability, the defendant may also employ these two defenses. Furthermore, he may argue that he did not cause the outcome. For example, in a products liability case, a manufacturer may demonstrate that it was not his, but another manufacturer's, defective product that caused the harm.¹¹¹ Additionally, he may argue that the plaintiff was at fault for his own harm.¹¹² For example, the manufacturer might demonstrate that the defendant's harm was the result of the plaintiff's misuse of the product.¹¹³

B. *The Economics of Strict Liability and Fault Liability*

The difference between strict liability and fault liability can also be illustrated using a law and economics methodology. To economists, strict liability and fault liability rules are used in different situations to encourage people to behave in welfare maximizing ways.

1. Law and Economics Foundation

In the economic tradition, whether an action is good or bad depends on whether it increases social welfare.¹¹⁴ An activity increases social welfare when the total benefit the activity provides to society is greater than the total cost it imposes.¹¹⁵ Acting to increase social welfare is also known as acting efficiently. As humans usually try to act in ways that bring about greater benefits than costs, we often act in social welfare increasing ways naturally.

Case, 8 Co. 146a (K.B. 1610) (when the officer causes damage to property, the trespass began at time of entry).

¹⁰⁹ *Mayland Tel. & Tel. Co. v. Ruth*, 106 M.d. 644 (M.d. 1907).

¹¹⁰ *Eccles v. Ditto*, 23 N.M. 235 (N.M. 1917); *See generally* DOBBS, *supra* note 1, at 204-208; Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, at 1371 (1993).

¹¹¹ DOBBS, *supra* note 1, at 1029 (discussing superseding cause).

¹¹² John W. Wade, *Products Liability and Plaintiff Fault – The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373 (1977).

¹¹³ *See e.g.* *General Motors Corp. v. Wolhar*, 686 A.2d 170 (Del. 1996) (seatbelt non-use admissible as supervening cause of injury); DOBBS, *supra* note 1, at 1029.

¹¹⁴ For debate over whether this is indeed a normatively attractive goal, *see e.g.* Richard A. Posner, *Normative Law and Economics: From Utilitarianism to Pragmatism*, in RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 95 (2012); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); RONALD DWORKIN, *A MATTER OF PRINCIPLE* 237-291 (1985).

¹¹⁵ COOTER & ULEN, *supra* note 6, at 16-18; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 10-15 (Aspen, 2007).

However, in a subset of cases, people fail to act in social welfare increasing ways. This occurs because the private costs and benefits that an individual incurs from an action often differ from the social costs and benefits. This happens in two situations. Firstly, when a person acts, the costs of his actions may be born not by himself but 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.”¹¹⁶ 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.

Similarly, sometimes a person will fail to take an action even when doing so would maximize social welfare. In some cases, performing an action may result in costs to the actor, while other people reap the benefits. This is known as a “positive externality.”¹¹⁷ In which case, the private cost is higher than the private benefit, giving the actor a disincentive to take the action. However, it may be that the action leads to greater social benefits than costs, and is thus good for welfare. This welfare is forgone by the actor’s decision not to take the action. In such cases, the law is used to reduce the presence of externalities, and thus provide people with the incentive to act in welfare enhancing ways. This explains and justifies the basic features of tort law.

2. The Goal of Tort Law

Tort law aims 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.¹¹⁸ 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 that would cost \$80. On these facts, it is clear that buying the device is good for social welfare. Buying the device will impose a cost of \$80, but will also produce a benefit through avoiding the \$100 in expected accident costs. However, A is unlikely to buy the device due to a negative

¹¹⁶ COOTER & ULEN, *supra* note 6, at 44; POSNER, *supra* note 186, at 72.

¹¹⁷ *Id.*

¹¹⁸ COOTER & ULEN, *supra* note 6, at 336; POSNER, *supra* note 186, at 185-86..

externality problem. By not buying the device, he benefits by saving \$80 and the expected \$100 cost of this action is born by B.

On the other hand, it is important to note that taking precaution to avoid causing harm is not always efficient. Imagine that the device costs \$110, not \$80. In this case buying the device would decrease social welfare. It would impose a total cost of \$110 on society and only result in a 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 it may result in causing damage to B's roof.

The goal of tort is to prevent this externality problem and give the actor an incentive to behave efficiently.¹¹⁹ It does this through the imposition of liability.¹²⁰ 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.¹²¹ Doing so forces the actor to internalize the costs of his conduct. Therefore, when performing his own private cost-benefit analysis while deciding how to act, he will consider the full cost of his action and only acts when the total benefit is greater than the total cost.¹²² When imposing liability, tort law primarily relies on two liability rules: strict liability and fault liability. The next sections

¹¹⁹ COOTER & ULEN, *supra* note 6, at 336-64; POSNER, *supra* note 186, at 167-211.

¹²⁰ Yet, the imposition of liability is not the only way this problem could be solved. Firstly, contractual solutions also exist. If the parties can freely contract with one another, they can bargain and come to an efficient solution. For example, through bargaining, B can offer to pay A \$81 to buy the device. Doing so costs B \$81 but saves a \$100 accident, meaning he benefits by \$19. On the other hand, now A makes a profit of \$1 which he otherwise would not have. However, although bargaining leads to efficient solutions, often bargaining is impossible or costly, making it an unfeasible solution, *see* Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960); Another, possibility is to tax behavior that is likely to lead to reductions in social welfare, *see* ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* (1920).

¹²¹ Although this is how tort law operates, there is a normative debate surrounding desirability of using private litigation to generate incentives for efficient action. Corrective justice scholars have pointed out that, in order for the actor to receive the incentive to behave efficiently, he need not be required to pay the externality bearer, he only need to pay *someone*. Paying a criminal fine therefore would work equally well to generate the necessary incentives, *see* JULES COLEMAN, *THE PRACTICE OF PRINCIPLE* 18 (Oxford University Press, 2003); ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* 46-48 (Harvard University Press, 1995). Additionally, scholars have shown that the administrative cost of private litigation is high, *see e.g.* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1097-1102 (2001); Stephen Sugarman, *Doing Away With Tort Law*, 73 CALIF. L. REV. 555 (1985). As private litigation may be an unnecessary and costly way to generate incentives, some suggest replacing tort law with in favor of administrative regulation, where the actor would not be required to pay the externality bearer, but an administrative body, *see generally*, Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357 (1984); Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 J.L. & ECON. 225 (1993).

¹²² This theory assumes that people are rational welfare maximizers. This is admittedly a contested proposition, *see e.g.* Eldar Sharif & Robin A. LaBoeuf, *Rationality*, 53 ANN. REV. PSYCH. 491 (2002); RICHARD H. THALER, *QUASI RATIONAL ECONOMICS* (1991).

demonstrate how both strict liability and fault liability rules encourage the actor to behave efficiently.¹²³

But before doing so, we must acknowledge a definitional difficulty. As demonstrated earlier, doctrinalists split liability rules into either strict liability and fault liability. Economists discussing tort law also adopt this classification. However, when writing about strict-liability, the discussion is almost invariably restricted to outcome-based strict liability. Likewise, when discussing fault, economists focus largely on negligence rules, with some attention going to intentional torts, and far less going to torts which are conditioned upon other types of fault, such as recklessness, fraudulency, or maliciousness. This being the case, the following section shall only outline the economic effects of outcome-based strict liability rules, negligence rules and intentional rules.

3. (Outcome-based) Strict Liability Rules

Under a strict liability rule, the actor is liable every time his action imposes a cost on someone else.¹²⁴ To see how this 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 (because the \$80 cost of the device is lower than the expected benefit of saving \$100 on accident costs). 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 decreases social welfare, A has the incentive not to buy it. If the device costs \$110, then the costs it produces are greater than the benefit. In such circumstances, A will not buy the device because the cost of the device is greater than his expected liability cost. Therefore, the operation of the strict liability rule creates incentives for the actor to behave efficiently. The next sections will demonstrate how fault liability rules also encourage efficient behavior.

¹²³ The article does not deal with intentional or other state of mind torts, partly to save space, and partly because the argument developed does not suggest that copyright infringement is a state of mind based tort. Nevertheless, for the economics of intentional torts, see COOTER & ULEN, *supra* note 7, at 323, 485-518; William M. Landes & Richard A. Posner, *An Economic Theory of Intentional Torts*, 1 INT. REV. L. & ECON. 127 (1981).

¹²⁴ COOTER & ULEN, *supra* note 7, at 338-41; POSNER, *supra* note 186, at 178-82.

4. Negligence Rules

Under a negligence rule, the actor is liable only when causing the accident was “unreasonable.”¹²⁵ Whether an action is reasonable depends on whether the action minimized the total cost imposed on society.¹²⁶ This was most clearly demonstrated by Judge Learned Hand in *Carroll Towing v US*.¹²⁷ In that case, a company chartered a barge and then moored it at a pier in the New York Harbor. The barge was then damaged when a tugboat tried to remove a different barge from the mooring. The accident would not have occurred if the charterer had stationed someone on the barge to ensure its safety. However, the charterer took a risk and did not take this precaution. The question presented was whether this risk was reasonable.

In answering the question, Hand stated that the charterer had two options: either take the risk or take precaution. Both options came with costs. If the charterer took precaution, then society would have to pay for the cost of that precaution (i.e. someone would need to employ a man to watch over the barge). On the other hand, if the charterer took a risk, then he saves the cost of precaution, but there is a probability that he will cause a costly accident. Whether the risk was reasonable depends on whether the cost of precaution is higher or lower than the expected cost of the accident.¹²⁸ If the cost of precaution is higher than the expected accident cost, then taking the risk is the least costly option and therefore reasonable. Alternatively, if the cost of the precaution is lower than the expected cost of the accident, then taking the risk is not the least costly option and therefore is unreasonable. In this particular case, the expected cost of the accident was greater than the cost of precaution. As the defendant’s actions did not minimize the potential cost, they were unreasonable.¹²⁹

Now reconsider the case of A and B under a negligence rule. Imagine first that buying the device costs \$80. In this situation, buying the device increases social welfare. Once again, A has two options: buy the device or do not buy the device. If he does not buy the device, he knows the court will ask whether his actions were

¹²⁵ *Supra* note 37.

¹²⁶ COOTER & ULEN, *supra* note 7, at 349-53; POSNER, *supra* note 186, at 167-171.

¹²⁷ 159 F.2d 169 (2d. Cir. 1947)

¹²⁸ *Id.* at 173.

¹²⁹ Whether the negligence rule accomplishes its goal depends largely on whether the court can determine what actions would have minimized costs. This itself is a difficult task, because it requires assessing what the probability of the accident was at the time in which the defendant made his decision. It is therefore possible that errors occur in the judgment process and therefore negligence creates incentives for inefficient behavior. See COOTER & ULEN, *supra* note 7, at 353-57.

reasonable if an accident does eventually occur.¹³⁰ As the cost of buying the device is lower than the expected cost of the accident, he knows that a court will consider the action unreasonable. He can, therefore, expect to pay \$100 in liability. On the other hand, he could also choose to buy the device at \$80 and completely prevent any liability. As buying the device is cheaper, he has an incentive to buy it. Thus the law guides A to acting in a manner that increases welfare.

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 device 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.

a. The Difference Between Strict Liability and Negligence

Both strict liability and negligence rules give the actor an incentive to behave efficiently. Nevertheless, the rules achieve this goal in different ways. The two rules distribute costs differently between the actor and externality bearer. Strict liability holds the actor liable whenever his actions cause an accident, regardless of whether his actions minimize cost. As the actor knows that he will be liable for every accident, the cost of his action 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 do not minimize costs. If he acts in a cost-minimizing way, then he faces no liability. Therefore, he only internalizes the cost of non-cost-minimizing behavior. On the other hand, when the actor does minimize costs, the externality bearer (i.e. the injured party) is the one who must bear the accident cost.¹³¹

¹³⁰ This also assumes that the parties can accurately predict what the court will describe as reasonable behavior, see Mark F. Grady, *A New Positive Economic Theory of Negligence*, 92 YALE L. J. 799 (1983).

¹³¹ 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 186, at 178-82.

Due to the difference in cost distribution, there are some circumstances where a negligence rule is preferable to a strict liability rule.¹³² This occurs when both the actor and the externality bearer can take care to prevent the harm and efficiency requires them both to do so. Consider once again the situation with A and B. Imagine that if A takes no precaution at all there is a 60% chance that the roof will burn down causing \$1000 worth of damage. In this case the expected total cost is \$600. If A buys a device, which now costs \$20, there is only a 30% chance of the roof catching fire. There is now an expected accident cost of \$300. The total cost of buying the device is therefore \$320. As it is lower than \$600, buying the device is efficient. However, imagine that B could also buy some fire-proof paint for his roof. The paint costs \$5 and as a result there is a 10% chance of the fire occurring. The total cost of buying the paint is therefore \$105, making this the most efficient option so far. Finally, imagine that both A buys the device and B buys the paint. The cost of buying each product together is \$25 and now there is only a 3% chance of fire, meaning the expected accident cost is \$30. The total cost of buying both the device and paint is therefore \$55, making this the cheapest and most efficient option yet.

In this scenario, it is most efficient for both A and B to take care. However, under a strict liability rule, only A has an incentive to buy the device and B has no incentive to buy the paint. We have already established that imposing strict liability on A will result in him behaving efficiently.¹³³ But now consider B's position. He knows that if a spark causes damage to his roof, he will be compensated for the loss by A. Therefore, it does not matter to him whether the accident occurs or not. If it does not happen, his roof is intact, saving him a \$1000. But if it does happen, then he initially loses \$1000 but gets it back again through A's liability. As it does not matter to him whether the accident occurs or not, he has no incentive to spend the \$5 on the fire proofing paint. As a result, the total cost of the scenario is \$320 when it could have been \$55.

Alternatively imagine the incentives under a negligence rule. We have demonstrated how imposing a negligence rule on A will give him an incentive to act efficiently.¹³⁴ Therefore, we can expect that he

¹³² COOTER & ULEN, *supra* note 6, at 341-44.

¹³³ If he does not buy the device his expected total cost will be \$600. On the other hand, if he buys the device his expected cost will be \$320 (the cost of the device plus the expected liability payment of \$300). As buying the device is cheaper for him, he has an incentive to buy it.

¹³⁴ Once again A has an incentive to take care. Buying the device costs \$20 but can be expected to reduce the expected accident cost from \$600 to \$300. As the benefit of buying the device (\$300) outweighs its cost (\$20), buying the device will be considered reasonable. If A does not buy the

will buy the device in this scenario. But now consider B's incentives. In comparison to the situation under strict liability, B now has an incentive to buy the paint. Because A has a clear incentive to buy the device, B can expect A to do so. If B does not buy the paint, he can expect a 30% chance of an accident. Furthermore, because A's actions were reasonable, then he will not be liable, leaving B to deal with the \$300 in expected damage to his roof. Alternatively, he could buy the paint. This would cost him \$5 but would further reduce the chance of accident to 3%. If he does this, he will pay \$5 on the device and expect to pay \$30 on the accident (the multiplication of 3% probability and the \$1000 accident cost). The total cost of this option for B is therefore \$35. As this option is cheaper than not buying the paint, he will buy the paint.

Therefore, strict liability and negligence rules both provide incentives for the actor to behave efficiently. However, only negligence rules provide incentives for both the actor *and the externality bearer* to act efficiently.

5. Intentional Rules

What then is the rationale behind the subset of cases where the court imposes liability upon a defendant only if he/she intended the outcome? To answer is that question, consider the case where A intentionally burns down B's roof. In doing so he causes \$1000 worth of damage to B. But as A is a spiteful person, he gains a hedonistic pleasure from inflicting this harm upon B. Hypothetically set the value of A's hedonistic pleasure at \$600. If B discovers A has caused this harm, then, under a negligence liability rule, A will be required to compensate B. However, imagine further that there is only a 50% likelihood that A will be discovered as the cause of the fire. In which case, A's expected liability is only \$500 (\$1000 multiplied by 0.5). As A's benefit is greater than his expected liability, it is rational for A to burn down the roof. This action is harmful to social welfare as it causes \$1000 worth of damage while only causing \$600 in benefit.¹³⁵

We see that the normal damage award associated with a negligence rule (i.e. compensatory damages), is not enough to deter inefficient behavior in cases where there is a significant chance that the defendant intentionally inflicts harm and where there is a chance that he may not be caught. To remedy this situation, the law imposes

device, his actions will be considered unreasonable and he can expect to pay \$600 in liability to B. Alternative, if he buys it, he will pay no liability.

¹³⁵ Cooter & Ulen, *supra* note 6, at ____

punitive damages on those who intentionally cause harm – such as in cases of assault, battery, false imprisonment etc. The extra damages the defendant must pay ensures that his expected liability will be equal or greater than the expected gain he can hope to make through the activity. For example, imagine the case of A and B under a rule where, if the defendant intentionally causes B damage, A will not only be required to pay B compensation, but also will be liable for \$250 in punitive damages. Given that there is still a 50% chance he will be caught, A's expected liability is now \$625. It is therefore no longer profitable for A to engage in the inefficient behavior.

However, the economic understanding of intentional torts has long been criticized. As one commentator points out, the position of intentional torts has always been “precarious and marginal” in the economic analysis of tort law.¹³⁶ The problem is the inefficient behavior is not the result of the liability rule, but the damages associated with that rule. As a result, the economic theory does not explain why the *liability rule* must be altered in order to ensure efficient behavior, it only explains why the *damages level* should be changed in a subset of cases. If the law adopted a negligence liability rule but imposed punitive damages when the harm was intentionally brought about, it would also result in the defendant behaving efficiently.

Consider the incentives for A and B in the case where A's conduct will be judged by a negligence rule, but where \$250 in punitive damages will be awarded if the court finds the damage was caused intentionally. A knows that if B discovers he was the cause of the fire, he will be sued and the court will judge his conduct via a negligence rule. That is, the court will ask whether his actions were unreasonable, where reasonableness is defined as minimizing costs. In this case, A had two options: either burn B's roof down causing \$1000 in cost, or alternatively refrain from doing so causing \$0 in cost. It is clear therefore that causing the harm to B's roof will be considered unreasonable. If the court also find that A's actions were intentional, he will be liable not simply to compensate A \$1000 for the roof, but will also be required to pay \$250 in punitive damages. Once again, imagine that there is a 50% chance that B will discover A was the cause of the harm. Therefore, A's expected liability will be \$625 and it will no longer be profitable to cause the harm.

¹³⁶ MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE GENDER AND TORT LAW* 62 (New York University Press, 2010). As a result, often the discussion of intentional torts is subsumed into the discussion of criminal law, *see e.g.* COOTER & ULEN, *supra* note 6, at ____.

I. WHY COPYRIGHT INFRINGEMENT IS NOT A STRICT LIABILITY TORT

The preceding part demonstrated the doctrinal and economic differences between strict liability and fault liability rules. This part will begin by summarizing the usually held belief that copyright infringement adopts a strict liability rule. Using doctrinal and economic methods, it shall then go on to demonstrate how this characterization is incorrect. In legal regimes like the U.S.A. that adopt a fair use doctrine, copyright adopts a fault liability rule.

A. *The Orthodox View of Copyright Infringement*

Lawmakers and copyright scholars ubiquitously refer to copyright infringement as a strict liability tort.¹³⁷ According to this view, in order to be successful, the plaintiff need only show that the copyist copied the work and, in doing so, produced a substantially similar work.¹³⁸ Fault is irrelevant, they claim, because the plaintiff need not demonstrate how the defendant copied intentionally, recklessly or even negligently.¹³⁹ Thus characterized, copyright is a form of outcome-based strict liability in which liability is conditioned upon two elements: the copyist's conduct (i.e. copying) and the outcome of that conduct (i.e. the production of a substantially similar work). Although, as Professor Shyamkrishna Balganesh has pointed out, copyright infringement is a slightly unusual form of outcome-based strict liability because the outcome need not be harmful in order for the copyist to be held liable.¹⁴⁰

Despite the widespread agreement that copyright is a strict liability tort, there is little consensus on whether this situation is desirable. Academics have mounted a sustained criticism of the supposed strict liability standard for decades. During this time it has been argued that the strict liability standard is inconsistent with usual tort practice, that it is inefficient and that it is immoral. Off the back of these attacks, scholars often argue that copyright should move

¹³⁷ *Supra* notes 13 & 14.

¹³⁸ *Supra* note 14.

¹³⁹ *Id.*

¹⁴⁰ Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664, at 1682 (2012).

away from the strict liability and towards a liability regime based on fault. We shall summarize these normative criticisms in turn.

1. Inconsistency

Firstly, it is argued that reliance on strict liability is anomalous within the greater field of tort law.¹⁴¹ 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. According to this narrative, tort law between the fourteenth and nineteenth centuries was based on the actions of trespass and trespass upon the case. These actions allowed the plaintiff to recover damages from a defendant upon showing that the defendant had directly and immediately applied force to him, resulting in injury. During the nineteenth century, however, a change began to occur. In particular courts began to require the plaintiff demonstrate not only how the defendant caused him harm but how this harm also resulted from negligent behavior. In the oft quoted case of *Brown v. Kendall*, 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.”¹⁴² Why this change occurred is hotly debated but most accounts attribute it in some way to the changing social and economic conditions caused by the industrial revolution.¹⁴³ Whatever the reason, the evolution towards a liability regime primarily based on fault was largely completed in the early twentieth century when both British and American judges announced that people have a general duty to take care when acting in ways that may affect those around them.¹⁴⁴ This brings us to

¹⁴¹ *Supra* note 20.

¹⁴² 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).

¹⁴³ *See* MORTON J HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at ____ (Harvard University Press, 1977); Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GEORGIA L. REV 925, at ____ (1981).

¹⁴⁴ *MacPherson v. Buick*, 217 N.Y. 382, 111 N.E. 1050 (1916) (“If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequence to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this

today, where it is believed that the bulk of tort liability involves negligence rules.¹⁴⁵

This historical background prompts us to ask a question: if tort law has historically moved away from strict liability and towards fault liability, why has copyright stuck unrepentantly to a strict liability standard? What is exceptional about copyright that justifies it occupying this anomalous doctrinal position?

One theory is that copyright has arrived at this position of strict liability almost by accident. Historical research by Professor Anthony Reese demonstrates that the early copyright regimes were not entirely based on strict liability and instead included numerous rules to safeguard innocent infringers.¹⁴⁶ Reese's comprehensive article shall not be wholly summarized in order to save space, but let us introduce two salient pieces of evidence that support his claim. Firstly, in early British and American regimes, copyright protection was only provided to authors who registered their copyright claim with a central authority and who affixed a copyright notice to the work. The practical effect of this was to make it much harder to commit a copyright infringement unknowingly. Furthermore, in some cases, the user's culpability was explicitly taken into account by the court when assessing liability. Those who did not copy the work, but merely distributed the work, would only be liable if they knew that the work was an infringing copy. And, in hard or borderline cases, where it was unclear whether a copyist had copied enough of the author's work to become an infringement, the court looked at the copyist's knowledge and intentions as a deciding factor.

During the twentieth century, these rules protecting unwitting copyists were gradually weakened. This weakening was largely a byproduct of other changes that were occurring in copyright law. For example, the registration and notice regime was abandoned in order to make U.S. copyright compliant with international treaties. While this occurred, very few people appreciated that an unintended effect of this change was to weaken the protections offered to unknowing copyists. The effect of this, and other similar doctrinal changes, was that

thing of danger is under a duty to make it carefully. That is as far as we need to go for the decision of this case If he is negligent, where danger is to be foreseen, a liability will follow.); *Donoghue v Stevenson* [1932] UKHL 100 (per Atkin J, "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.")

¹⁴⁵ 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").

¹⁴⁶ *Supra* note 19.

copyright ultimately drifted towards a strict liability without much conscious thought of whether that is the appropriate liability rule.

2. Inefficiency

Secondly, some have argued that the use of a strict liability rule in copyright may also be inefficient.¹⁴⁷ In particular, scholars highlight the potential for strict liability to deter beneficial copying. As will be expanded upon later, some copying is non-infringing and beneficial for society. This beneficial copying is to be encouraged, not deterred. 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 difficulty of dealing with intangible goods has led to copyright (together with patents) being called “the metaphysics of law.”¹⁴⁸ 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 in copyright law. 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.

It is argued that this problem would be alleviated if copyright infringement were to require some level of knowledge. In such cases, the defendant would be more confident in making use of the copyrighted work, because he can always make a plea to the court that he did so in good faith and under the belief that his actions were non-infringing.

3. Immorality

Finally, 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.”¹⁴⁹ Likewise Professor Earnest Weinrib argues that strict liability creates an unjust inequality between the plaintiff and defendant. In this view, strict liability reflects “extreme solicitude for

¹⁴⁷ *Supra* note 19.

¹⁴⁸ *Folsom v Marsh*, 9. F.Cas. 342 (C.C.D. Mass. 1841).

¹⁴⁹ *Supra* note 5

plaintiffs' rights" with little weight given to the defendant's equal interest in living an autonomous life free from liability.¹⁵⁰ 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."¹⁵¹ 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.

B. The Doctrine of Copyright Infringement

However, despite its widespread acceptance, this article maintains that the orthodox view of copyright as a strict liability tort is incorrect.¹⁵² As a result, the normative criticism made of copyright's liability rule is often overstated. To explain why this is so, it must first be shown how liability for copyright infringement is conditioned upon a third element: fault. If copyright infringement is a fault-based tort, then the existence or absence of the copyist's fault will play some role in determining the copyist's liability. Explaining how this is the case requires us firstly to introduce the fair use doctrine.

1. The Fair Use Doctrine

According to the Copyright Act, the copyright holder's exclusive rights are granted subject to the fair use doctrine.¹⁵³ This doctrine establishes that it is not an infringement to copy a copyrighted work, in cases where copying is "fair."¹⁵⁴ Over the last thirty years since its codification into statute, this doctrine has become a fundamental part of the copyright infringement analysis with application in a greatly broad variety of cases. It has been held fair to copy expression for the purposes of parody,¹⁵⁵ to time-shift a television program,¹⁵⁶ to copy

¹⁵⁰ *Supra* note 5.

¹⁵¹ *Supra* note 18, at ____.

¹⁵² It goes without saying that this article discusses copyright and not patent law. For a discussion of the strict liability regime in patent, see R.D. Blain & T. Cotter, *Strict Liability and Its Alternatives in Patent Law*, 17 BERK. TECH. L. J. 699 (2002); Robert P. Merges, *A Few Kind Words For Absolute Infringement in Patent Law* ____.

¹⁵³ 17 U.S.C. §107; WILLIAM PATRY, *PATRY ON FAIR USE* (West, 2012); GOLSTEIN, *supra* note 15, §12.1 at 12:1.

¹⁵⁴ *Id.*

¹⁵⁵ *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

¹⁵⁶ *Universal City Studios v. Sony Corp.*, 464 U.S. 417 (1984).

private letters for use in a biography,¹⁵⁷ to reproduce thumbnail versions of images,¹⁵⁸ to play a political opponent's campaign theme music,¹⁵⁹ to digitize books,¹⁶⁰ to quote from literary works, to reverse engineer computer programs in order to create interoperable programs,¹⁶¹ and to display cached websites in search engine results,¹⁶² to name just a few.¹⁶³

Despite becoming one of the most venerated and important doctrines in copyright,¹⁶⁴ it is also one of the most mysterious. The term “fair” has no exact definition, and ultimately whether a use is fair is a question left for judicial determination.¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷ Secondly, the act provides a list of four non-exhaustive factors that ought to be considered in determining whether a use is fair.¹⁶⁸ 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.

2. The Fault in Copying

¹⁵⁷ *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991).

¹⁵⁸ *Perfect 10, Inc. v. Amazon. com, Inc.*, 508 F. 3d 1146 (9th Cir. 2007)

¹⁵⁹ *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957 (D. N.H. 1978).

¹⁶⁰ *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y.2013)

¹⁶¹ *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992), amended by 1993 U.S. App. LEXIS 78 (9th Cir. Jan. 6, 1993).

¹⁶² *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006).

¹⁶³ For comprehensive discussion on the content of fair use, see Samuelson, *supra* note 56.

¹⁶⁴ See *e.g.* *Golan v. Holder*, 132 S. Ct. 873 (2012) (recognizing fair use is a constitutional necessity).

¹⁶⁵ *Time Inc. v. Bernard 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”).

¹⁶⁶ *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”).

¹⁶⁷ 17 U.S.C. §107

¹⁶⁸ *Id.*; 4 NIMMER, *supra* note 13, at §13.05[A]

Recall that tort law recognizes two types of fault. A defendant is at fault if he fails to comply with a standard of conduct required by the law or if he acts with a blameworthy state of mind. Is liability in copyright conditioned upon either of these forms of fault?

i. A Faulty State of Mind?

It is quickly apparent that the second type of fault is irrelevant in copyright law. A copyist's liability does not depend in any way upon his state of mind. There is no requirement that the defendant copied the plaintiff's work intentionally, or recklessly, fraudulently, maliciously, deliberately, or even knowingly. This was most famously demonstrated in the *Harrisons* case.¹⁶⁹ In 1971, former Beatle George Harrison was held liable for copying the Chiffon's hit single, *He's So Fine*. Harrison argued that he did not consciously copy the song, and that, if he did copy, he did so innocently without awareness of his actions. However, the court concluded that even subconscious copying constituted a copyright infringement, thus showing that copying completely absent a culpable mental state is still an infringement.

ii. Failure to Comply with a Standard of Conduct?

Although liability for copyright infringement is not conditioned upon the existence of a faulty state of mind, liability is nonetheless conditioned upon fault. Because of the fair use doctrine, the law only imposes liability on a copyist when he has failed to comply with a standard of conduct.

The defendant in a copyright infringement action is not liable merely because he copies a protected work and this causes the production of a substantially similar work, it must also be the case that the copying is *unfair*. While some cases of substantial copying

¹⁶⁹ See *Bright Tunes Music Corp v. Harrisongs Music*, 420 F. Supp. 177 (1976) (finding George Harrison had committed copyright infringement by subconsciously copying the Chiffon's hit, *He's So Fine*). 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. See e.g. Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009, 1031 (1990) ("When the subconscious copying rule is linked with the ubiquity of communications media, a real threat to new artists may emerge."); 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 unconscious copying, or requiring proof of a knowing use as a precondition for recovery, would help to preserve a vigorous creative environment.").

cause potentially negative consequences, in other cases it is a necessary and routine part of social life. Imagine, for example, a world where a literary critic could not quote from a novel in order to create a book review, or where a high school teacher could not distribute copies of poetry in the classroom. Therefore the law introduces a standard to distinguish between good copying and bad copying: fairness. People are expected to copy only when it is *fair* to do so. By failing to meet that expectation, and copying unfairly, the copyist does something wrongful. Failing to meet the standard that society expects of everyone does not evince some morally blameworthy character and accordingly the *actor* is not at fault, but his *actions* most certainly are. For that reason, copyright is a fault-based tort because only those who act wrongfully will ever be held liable.

As copyright infringement is a fault-based tort where the fault is the copyist's failure to comply with a standard of conduct, we see that copyright infringement is structurally the same as the tort of negligence. Although the tort of negligence and copyright infringement are two completely separate causes of action, and govern very different types of behavior, liability in each case is based upon the existence of three 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 an 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 will a copyist's unfair copying when it causes the production of a substantially similar work. 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	Accidents	Substantially Similar Work
Standard of	Reasonableness	Fairness

Conduct		
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We may also observe the similarity between the concepts of reasonableness and fairness. Both are standards of conduct that are used to separate wrongful from innocent conduct. In both cases, whether the defendant's conduct meets the standard is an objective, not subjective inquiry. An action is neither fair nor reasonable because a defendant thinks it is. Instead what is fair or reasonable is a fact that exists outside the defendant's own mind. We may therefore call judging a conduct by a fairness standard as a "fairness rule," given that judging conduct by a reasonableness standard is a "negligence rule."¹⁷⁰

Furthermore, although fairness and reasonableness are different concepts (the exact content of which is elaborated upon in the following economic section), the two terms have some definitional overlap. When people explain the concept of fairness in copyright, they often do so by appealing to the concept of reasonableness. Hence the fair use doctrine has been called an "equitable rule of reason"¹⁷¹ and as the ability to "use the copyrighted material in a reasonable manner."¹⁷² When Justice Story laid the judicial foundations of the doctrine in *Folsom v. Marsh*, he described it as the freedom to use the copyrighted work for "fair and reasonable" purposes.¹⁷³ Elsewhere fair use is defined as a "reasonable and limited" use of a copyrighted work.¹⁷⁴ Likewise, the concept of reasonableness in law is often explained by appealing to the concept of fairness. Black's law dictionary defines reasonableness as "fair, proper, moderate under the circumstances."¹⁷⁵ Scholars even lament in similar terms about the difficulty involved in defining these illusive concepts. It has been said that it is "extremely difficult to state what lawyers mean when they speak of reasonableness."¹⁷⁶ This is echoed by the claim that fair use is the "most troublesome doctrine in the whole of copyright law."¹⁷⁷

The reason why copyright is often incorrectly labeled as a strict liability tort is simply because copyright scholars have hitherto

¹⁷⁰ We could also call it a "copyright rule" but to do so would seem confusing. Using the term "negligence rule" to refer to the reasonableness standard already causes too much confusion as it leads people to muddle the distinction between the negligence rule and the tort of negligence.

¹⁷¹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 220 U.S.P.Q. 665 (1984).

¹⁷² HORACE G. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944).

¹⁷³ *Folsom v. Marsh*, 9 F. Cas. 342, at 344 (C.C.D. Mass. 1841)

¹⁷⁴ *Black's Law Dictionary* 676 (9th Ed., 2009)

¹⁷⁵ *Id.*, at 1379.

¹⁷⁶ John Salmond, *Jurisprudence* 183 n.(u)(Glanville L. Williams ed. 10th ed. 1947).

¹⁷⁷ *Supra* note 152.

adopted an unduly narrow conception of the term fault. Commentators discussing this issue have equated fault with a mental state, without realizing that fault can also be a failure to comply with a standard of conduct.¹⁷⁸ As a copyist's liability is not affected by the state of his mind at the time of copying, they dismiss the idea that fault is in any way important to the copyright system. In doing so they err. But the error is not only understandable, it is compounded by the oversight of tort scholars. Tort theoreticians often forget that copyright infringement is a tort.¹⁷⁹ Consequently, when they write about the legal understanding of fault, they completely fail to consider that copying unfairly might belong within that definition. As the two groups fail to engage with each other, it goes unnoticed that fault is inextricably woven into the fabric of copyright. Unfair conduct is different from intentional, reckless or even negligent conduct, but it is nonetheless a type of fault.

3. The Burden of Proving Fault in Copyright Infringement

While the preceding sub-section argued that copyright is a fault-based tort because the copyist's liability is conditioned upon his failure to comply with a standard, there is nevertheless an important counter-argument that must be examined. Fair use is often described as an affirmative defense¹⁸⁰ (although this point is far from uncontroversial)¹⁸¹. Those who view copyright infringement as a strict liability tort may argue that, even if fair use is a question of fault, it's procedural position as an affirmative defense means that copyright is still a strict liability tort. As fair use is an affirmative defense, the court will only consider it only when it is raised by the copyist. The corollary of this is that, in cases where the copyist does not raise the

¹⁷⁸ See e.g. *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.")

¹⁷⁹ See e.g. PROSSER ON TORTS (West, 5th Ed., 1984) (not discussing copyright); However, see DOBBS, *supra* note 1, at 1313.

¹⁸⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994); 4 NIMMER, *supra* note 14, at §13.05

¹⁸¹ See e.g. *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996) ("Although the traditional approach is to view 'fair use' as an affirmative defense, this writer, speaking only for himself, is of the opinion that it is better viewed as a right granted by the Copyright Act of 1976."); Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781 (2010); Hetcher, *supra* note 18, at 14-25.

defense, then the court will not consider whether the copyist acted wrongfully. This may lead to the situation in which the copyist is convicted even when no evidence of his fault has been introduced. In such cases, the court only requires evidence of conduct and outcome before liability is imposed. Therefore, how can copyright be a fault-based tort when, in many instances, defendants are convicted even though no one introduces any positive evidence to demonstrate the existence of fault?

To answer that question, this sub-section will firstly show how the position of fair use as an affirmative defense actually strengthens the claim that copyright is a fault-based tort, and thereafter will consider how to properly characterize the procedural role of fairness in a copyright infringement action.

i. Fair Use as An Affirmative Defense

It will be recalled that the defenses available under strict liability and fault liability rules differ because fault plays a different role in the two liability rules.¹⁸² Strict liability is not conditioned upon the defendant's fault, therefore the defenses of excuse and justification are irrelevant. By contrast, fault liability is conditioned upon the defendant's fault and therefore excuse and justification are relevant.¹⁸³ If fair use is an affirmative defense, then the question one must ask is what type of defense is it?

To answer this, we may begin by demonstrating what a claim of fair use clearly is not. Firstly, fair use is not a causal defense. Causal defenses exist to allow the defendant to demonstrate that his conduct did not cause the outcome. In negligence, for example, demonstrating how the defendant's risk taking did not cause the accident (due to the superseding act of a third party, for example) would be a sufficient defense.¹⁸⁴ Fair use does not fall into this category. A causal defense would be to argue that the defendant's copying did not cause the creation of a substantially similar work. This is a valid defense in copyright, but it is not the purpose of fair use.¹⁸⁵ Likewise, fair use is not a claim that the copyist did not copy

¹⁸² *Supra* part __

¹⁸³ *Id.*

¹⁸⁴ *Supra* note __.

¹⁸⁵ See e.g. *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004) ("even where the fact of copying is conceded no legal consequences will follow from the fact unless the copying is substantial."); *Little v. Twentieth Century-Fox Film Corp.*, 37 U.S.P.Q.2d (BNA) 1353, 1361-62 (S.D.N.Y. 1995)(finding that "no reasonable trier of fact could find the two works substantially

the work. Once again, while this is an appropriate defense, it is not the role of the fair use doctrine.¹⁸⁶

Nor is fair use a claim that the plaintiff was at fault for the outcome. Defenses like contributory negligence allege 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 the actions of the copyst.

Fair use is also simply far too broad to be a privilege. Privileges are narrow exceptions that permit some action because to do otherwise would lead to an absurd or unjust outcome. They are caveats and deviations from the normal rule that apply only in a highly specific factual circumstances, such as the fireman's permission to enter land for purpose of extinguishing fires. By way of contrast, the fair use doctrine is not restricted to some highly detailed factual scenario, but applies generally and in a potentially unlimited number of situations. For that reason, the doctrine covers activities as different from one another as quoting a scientific article to making remixes of song to upload to YouTube.¹⁸⁷

Nor is fair use an excuse.¹⁸⁸ Recall that when a plaintiff seeks to demonstrate how the defendant acted with a faulty state of mind, the defendant may absolve himself of responsibility by excusing his

similar" in case involving a book and a movie both under the name "Predator"); 4 NIMMER, at §13.03[A].

¹⁸⁶ Independent re-creation is no copyright infringement, *see e.g.* Hunt v. Wyle Lab., Inc., 997 F. Supp. 84, 89 (D. Mass. 1997) (absence of "scintilla of evidence of copying" is doom for a copyright claim).

¹⁸⁷ *See* Hetcher, *supra* note 18, at 1303-1315; Mary W.S. Wong, "Transformative" User-Generated Content in Copyright Law: *Infringing Derivative Works or Fair Use?* 11 VAND. J. ENT. & TECH. L. 1075, 1104-35 (2008).

¹⁸⁸ Sometimes the language of excuse is used in connection with the fair use doctrine. *See e.g.* Goldstein, *supra* note 15, §12.1 at 12.1 ("Courts have for more than a century excused certain otherwise infringing uses of copyrighted works as "fair" uses."). Likewise sometimes it has been called a "privilege," *see e.g.* HORACE G. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944). There are two reasons behind this. Firstly, fair use has changed substantially over time. Arguably the concept of fair use was different from our understanding of it today. For example, the theory that a use is fair if the author would have consented to it no longer seems descriptively accurate, *see* 4 NIMMER, at §13.05[A] (calling the suggestion that fair use is based on tacit consent a "fiction"), but at one point was seen as essentially accurate, *see* ALAN LATMAN, FAIR USE OF COPYRIGHTED WORKS, STUDY No. 14, COPYRIGHT LAW REVISION, STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS, S. COMM. ON THE JUDICIARY, 86TH CONG. 3, 2-3 (Comm. Print 1960); But even more likely this is simply lax use of language. The term excuse is used when justification is more appropriate, but as these terms are less frequently used in copyright than in traditional common law areas like criminal law and tort, authors tend to heed less attention to the subtle differences in definition between them.

conduct. In doing so, he admits that his actions were wrongful but denies they stem from some blameworthy mental state that exemplifies an internal failing in character. Immediately one can see that fair use does not fall into this category of defense. The fair use defense does not allow a copyist to claim he lacked the relevant state of mind to conduct copyright infringement. As seen in the *Harrisons* case, the copyist's state of mind is irrelevant to his liability. Offering evidence demonstrating the defendant's blameless character therefore does not negate any claim against him and is simply irrelevant to the liability determination.

If fair use is an affirmative defense, then it is doubtlessly a justification.¹⁸⁹ The claim of fair use is an argument that the copying was simply not wrong. Fair copying is not copying which we tolerate merely because the copyist was not morally blameworthy for his conduct, fair copying is simply good conduct. As discussed further in the following section, fair copying is necessary for the production of new works that contribute to a thriving market for art and literature, and is necessary to achieve a host of public interest goals. The fairness standard is therefore introduced to distinguish between wrongful and innocent copying, and fair copying falls into the latter of the two categories.

The fact that fair use is a justification dictates that the underlying cause of action is based on fault. By justifying his actions, the defendant argues that his actions were not wrongful. As he complied with the standard of conduct placed on him, he has fulfilled the legal and social expectation upon him only to copy in cases where it is fair to do so. Therefore, even if fair use is an affirmative defense, this only serves to provide further evidence that copyright infringement is a fault-based tort.

ii. The Procedural Role of Fairness

Nevertheless, there is still something unusual about the procedural role of fault in copyright infringement and labeling it as an affirmative defense. Normally in a fault-based tort, the plaintiff must

¹⁸⁹ And it is often called so by courts and commentators, *see e.g.* Samuelson, *supra* note 56, at 2596, ("fair use as a justification for court and West Publishing Co. Reproductions"); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, at 1106 (1990) ("Justification is sought in notions of fairness, often more responsive to the concerns of private property than to the objectives of copyright"); Campbell v. Acuff Rose, *supra* note 141, at 586, ("attention turns to the persuasiveness of a parodist's justification for the particular copying done"); Harper & Row Publishers v. Nation Enterprises, 471 U.S. 560., at 591 (1985) ("knowledge and information as the strongest justification for a properly limited appropriation of expression")

introduce at least *some* evidence establishing that the defendant was at fault for the outcome.¹⁹⁰ 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. Perhaps therefore, a better way to characterize fair use is an attempt to rebut a presumption. Viewing copyright infringement this way makes the fair use doctrine similar to the *res ipsa loquitor* doctrine. In both cases, the court presumes the existence of fault. In negligence, the court presumes the existence of fault if the plaintiff can show that his injury would not ordinarily have occurred without negligence. In copyright, if the copyright holder can prove the existence of copying and substantial similarity, then the court presumes the copying was unfair. In both cases, it falls to the defendant to rebut that presumption.

Yet characterizing fair use as an attempt to rebut a presumption of fault also comes with problems. In the case of rebuttable presumptions the burden of proving a given factual condition is normally placed on the plaintiff but in a subset of cases it will be shifted to the defendant providing the plaintiff proves the existence of a supplementary condition.¹⁹¹ For example, normally the plaintiff in a negligence case must prove the defendant's duty of care, breach of duty, and how the breach caused harm. In a subset of cases, when the plaintiff faces difficulty establishing fault, the court will place the burden of proof on the defendant to disprove fault, providing that the plaintiff can prove a supplementary condition i.e. that his injury is of the type not ordinarily caused without negligence. The burden then lies on the defendant to introduce substantial evidence demonstrating his lack of fault.¹⁹² Unlike an affirmative defense, however, he need not prove this on the balance of probabilities. In the

¹⁹⁰ COLEMAN, *supra* note 23, at 213.

¹⁹¹ *Supra* note 90.

¹⁹² *Supra* note 94.

case where the evidence on both sides is equally balanced, the defendant wins the argument.

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.¹⁹³ Furthermore, it is unclear what standard of proof the copyist must achieve before he establishes the absence of fault. On one hand, courts speak of fair use as an affirmative defense, thus suggesting that the copyist must go beyond introducing substantial evidence and must prove on the balance of probabilities that the copying was fair.¹⁹⁴ However, others have admittedly pointed out the lack of authoritative decision on this point. Professor Pamela Samuelson has noted that, ultimately we do not know what the court would do if the evidence were perfectly equipoise.¹⁹⁵

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 the burden should be shifted.

C. The Economics of Copyright Infringement

Although the law's decision to place the burden of proving the absence of fault on the copyist is somewhat unusual, it does not change the fact that liability for copyright infringement is conditioned upon the existence of fault. In the previous section we saw that copyright, like the tort of negligence, is doctrinally a fault-based tort

¹⁹³ 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").

¹⁹⁴ *Supra* note 140.

¹⁹⁵ Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORD. L. REV.* 2537, 2617 (2007).

because it only holds liable those who fail to comply with an expected standard of conduct. This section uses economics to expand on this finding. Using the economic framework established in part I.B, it will be shown that copyright infringement is not based on a strict-liability rule. Instead copyright adopts a liability rule that is similar in character to, yet distinct from, a negligence rule.

1. The Goal of Copyright Infringement

Copyright infringement is a tort and as such it has the same underlying rationale as any tort: in the absence of regulation, people face incentives to act in welfare decreasing ways due to the presence of externalities. However, where copyright is different from most torts is the problem targeted is a positive, not a negative, externality.¹⁹⁶

Imagine author A writes a novel. The action of writing the novel may increase social welfare. For example, the cost of writing the novel (the time, effort and resources it requires to produce the first copy) may cost \$100, while ten people in society may enjoy the novel and each value it at \$20. As a novelist, A may also gain some private enjoyment from the writing process, which we can hypothetically set also at \$20. On these facts, creating the book is good for social welfare. Although it initially costs \$100 to create, it will ultimately produce \$220 in benefit, meaning society gains a positive value of \$120. However, due to a positive externality, A may fail to create the work. Imagine one of the ten consumers, B, buys a copy of the work, copies it nine times and then sells the copies to the remaining nine consumers at a price of \$19, for example. Now the benefit of creating the work largely falls on B (he appropriates \$171 from the total benefit of \$220). Under these conditions, A faces an incentive not to create the work. If he does, he will face a private cost of \$100 but only receive a private benefit of \$40 (the sale of the work to B plus his own personal enjoyment). As the cost outweighs the benefit, he will not spend the resources writing the novel.

On the other hand, creating the work is not always welfare increasing. Imagine that the work costs \$100 to create but only two consumers actually enjoy it. As a result, the benefit of the work is \$60

¹⁹⁶ Wendy J. Gordon, *Copyright as Tort Law's Mirror Image: "Harms," "Benefits," and the Usage and Limits of the Analogy*, 34 McGEORGE L. REV. 533, at 535 (2002), ("In many ways, therefore, copyright is a mirror image of ordinary tort law. As tort law internalizes negative externalities to make an actor reduce or stop his harm-causing activity, copyright law internalizes positive externalities to make an actor increase or continue his beneficial activity."); Jeffrey L. Harrison, *A Positive Externalities Approach to Copyright Law: Theory and Application*, 13 J. INTELL. PROP. 1 (2005).

(the sum of two peoples' \$20 value from the work plus the author's \$20 enjoyment in creating the work). In this case, the total cost is greater than the total benefit, and the act of creating the work is inefficient.

The goal of copyright is to prevent this externality problem and give the author an incentive to behave efficiently.¹⁹⁷ Once again, it accomplishes this through the imposition of liability.¹⁹⁸ However, unlike the usual tort scenario, the liability is not placed on the actor (i.e. the author) but is placed on the externality bearer (i.e. the copyist). By imposing liability on the copyist, the law forces the copyist to pay a fee to the author (this fee could be transferred either before the copying in the form of a license or after the copying in the form of damages). In doing so, the law shifts the benefit the work creates from the copyist and onto the author. Once the benefit is internalized, the author may take it into account when deciding whether to create the work.¹⁹⁹

Once again, the law has a choice of liability rules to achieve this goal. The law could impose strict liability on the externality bearer or it could use a fault rule. The next section shows how copyright does not use a strict liability rule. The following section

¹⁹⁷ U.S. CONST. art I §8, cl. 8 (giving Congress the power to enact legislation to grant exclusive rights to authors in order "to promote the Progress of Science"). This phrase has been interpreted multiple times as meaning copyrights should be granted to give authors incentives to create works for the maximization of social welfare, *see e.g.* *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' "); *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) ("The copyright law, like the patent statutes, makes reward to the owner a secondary consideration ... It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius."); The economics of copyright incentives has also underwent formal modeling, *see e.g.* WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 71-84 (Harvard University Press, 2003).

¹⁹⁸ Much like the situation with general tort law, the imposition of liability is only one of the potential ways to solve the externality problem. Contractual solutions are once again a possibility. In which case, people can pay the author to create the work *ex ante*, *see* LANDES & POSNER, *supra* note 196, at 43. However, once again, the ability to contract is limited in many cases by high transaction costs. There are also self-help mechanisms that authors can use to prevent copying, *see* LANDES & POSNER, *id.* Alternatively, society could stop entirely relying on exclusivity and instead use the tax system to generate the relevant incentives. Tax money could be provided to authors as a subsidy to enable them to create. For a proposal of this nature, *see* WILLIAM FISHER, *PROMISES TO KEEP* 199-259 (Stanford University Press, 2004).

¹⁹⁹ There is debate about how much of the benefit the author must internalize. Some argue that, in order to have the correct level of incentive, the author must internalize the entire positive value that his work creates. On the other hand, some argue that he only needs to internalize enough of the benefit to cover his cost of creation. *See* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, at 1042-48 (1996).

explains how copyright uses a “fairness rule” which is economically similar to, yet distinct from, a negligence rule

2. A Strict Liability Rule in Copyright?

In most torts that deal with negative externalities, strict liability rules hold the actor liable every time he causes an accident. Every time he imposes a cost on the externality bearer, the law uses liability to shift that cost back to the actor.²⁰⁰ Therefore, the entire cost of the accident is internalized to the actor in every case. The corollary of this is the externality bearer (the injured party) never bears the cost of the accident under a strict liability rule. If copyright were to adopt a strict liability rule, we would see the same situation, but reversed due to the fact that we are dealing with a positive, not negative, externality. Under this rule, the copyist would be liable every time his copying creates a substantially similar work. This liability would mean that every time the copyist receives a benefit from the author’s work, he would be required to pay the author a fee (either before the copying takes place in the form of a license or after it in the form of a damage award). That way, the law would shift the benefit of creation back onto the author and the author would always internalize the external benefit his work produces. The corollary is that the externality bearer (the copyist) would never reap the benefit of creation.

Such a liability rule would establish incentives for the author to behave efficiently. Reconsider the case of author A under a strict liability rule. Once again, creating the work costs \$100 but brings \$20 worth of benefit to the author and \$20 worth of benefit to ten consumers. As the benefit outweighs the total cost, creating the work is efficient. Now copying results in liability. If B decides not to copy, A can expect to recover \$220 in private benefit. As each consumer is willing to pay \$20 for the work, the author will receive a \$20 sales fee from each of them. As the entire benefit of the work is internalized to the author, the private benefit A receives from creating the work outweighs his private cost, and he accordingly has an incentive to create the work.

Alternatively, imagine B still wishes to copy the work and distribute it to the other nine consumers. Due to the liability copying attracts, B must pay A a fee in order to copy. If they negotiate before the copying and work out a license, A will charge a fee of \$200 (if B is

²⁰⁰ *Supra* part I___

unwilling to pay \$200 then A will simply not license the work and distribute it himself to the consumers in which case he will once again make \$200 from them). If B refuses to obtain a license, he will be liable for all the lost license fees that A suffers as a result of this copying. Therefore, regardless of whether B pays the fee before or after, A can expect to receive \$200 from him. Once again, A's private benefit is still above his private cost and he has an incentive to create.

On the other hand, if the work does not increase social welfare, author A does not have an incentive to create the work under a strict liability rule. If only two people enjoy A's novel, then A can only hope to make two sales, and thus only receive \$60 in benefit (the sum of the sales plus his hedonistic benefit from creation). Alternatively, if B copies the work to distribute to the remaining consumer, the license fee charged by A can at a maximum only be \$40. At best, B can only hope to make one sale to the remaining consumer, bringing him a maximum of \$20 benefit. The maximum B will pay in a fees is \$40 (\$20 for his own copy, and \$20 to distribute it to the remaining consumer). In both cases, A can, at best, hope to make \$60 from this work. Therefore, his private cost is greater than his private benefit and he has no incentive to create this welfare-decreasing work.

However, it is clear that copyright does not adopt a strict liability rule. The copyist is not liable in *every* case in which he creates a substantially similar work. He may always argue that his actions were fair under the fair use doctrine. When the copying is fair, the copyist is under no obligation to pay the author, and as a result the external benefit is not internalized to the author. The next section demonstrates how the fair use doctrine makes copyright infringement function similarly to a negligence rule.

3. A "Fairness Rule" in Copyright

Under a negligence rule, liability is only imposed when an actor's conduct is *unreasonable*.²⁰¹ Whether the conduct is unreasonable or not depends on whether it minimizes total cost. By making the defendant liable when his acts do not minimize total cost, we guide him, towards acting efficiently.

Copyright adopts a "fairness rule." Under this rule, the copyist is only liable when his copying is *unfair*. The concept of fairness is the exact opposite of the concept of reasonableness. Because we are dealing with a positive, not negative, externality, whether conduct is

²⁰¹ *Supra* ____

fair depends on whether it maximizes total benefit. Nevertheless, this has the same overall function as the negligence rule. By making the copyist liable when his acts do not maximize total benefit, we ensure that the author acts efficiently.

To demonstrate how this fairness rule operates, we must firstly define the conditions wherein copying a copyrighted work will maximize benefit. Subsequently, we shall demonstrate how the fair use doctrine operates to distinguish between copying which maximizes benefit (which is considered fair) and that which does not (and which is accordingly unfair). Finally it will then be demonstrated how this liability rule affects the author's incentives.

i. Copying and the Maximization of Benefit

As noted previously, copying sometimes reduces total benefit. When people can copy freely, the author receives too little private benefit from his creation. This may result in the situation where his private benefit is lower than his private cost, and as a result he has no incentive to create. Society, therefore, is deprived of a beneficial new work. However, this is not true in every case of copying. Sometimes copying does not reduce the benefit society receives, but will increase it. This happens when two conditions are present: firstly, copying must not harm the author's incentives to create, and secondly, copying must produce additional benefits for society.

a. Incentives

While sometimes copying can harm the author's incentive to create, in other cases copying does not have this consequence. This happens in two situations. Firstly, sometimes copying can actually increase the author's private benefit.²⁰² This is the case where copying is used to create a complementary good.²⁰³ For example, imagine that B wishes to copy parts of author A's novel in order to review the book.²⁰⁴ The review B creates may actually stimulate interest in A's novel and lead to more consumers wanting a copy. Hypothetically, say B's review generates demand from a further three consumers. Now the remaining initial nine consumers, plus three more are willing to pay for a copy of the novel. Ultimately, A receives \$280 in private

²⁰² LANDES & POSNER, *supra* note 196, at 117-22.

²⁰³ See Glynn S. Lunney, Jr., *Copyright, Derivative Works, and the Economics of Compliments*, 12 VAND. J. ENT. & TECH. L. 779 (2010).

²⁰⁴ LANDES & POSNER, *supra* note 196, at 118.

benefit (\$20 from the private benefit, \$200 from the first ten consumers (including B) and \$60 from the three new consumers).

Secondly, some copying does not reduce the benefit the author receives.²⁰⁵ This is the case when copying does not result in the creation of a substitutable work. For example, imagine B buys a copy of the novel and then uses it to create a parody.²⁰⁶ The original ten consumers are unlikely to view B's parody as a substitute for A's novel because the parody actually mocks the work they enjoy. As a result, the remaining nine consumers still buy the novel from A, and the private benefit A receives is still \$220.

In these cases, A may still have a desire that the law impose liability on B. Doing so means that he can extract a fee from B for his copying. However, if the law refuses to do this, there is no negative consequence. As B's copying does not harm A's ability to recover the benefit of creation, this copying does not reduce the total benefit society receives.

b. Access

At the same time, copying can produce additional benefits. The benefit of copying can be split into two parts: dynamic benefit and static benefit. Together, these benefits are usually referred to as the benefits of access.²⁰⁷

Firstly, some copying produces a dynamic benefit. Although copying may reduce the author's incentive to create, some copying is necessary for the creation of new works.²⁰⁸ 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

²⁰⁵ LANDES & POSNER, *supra* note 192, at 115-117.

²⁰⁶ LANDES & POSNER, *supra* note 192, at 147-65.

²⁰⁷ See generally, Glynn S. Lunney, Jr., *Re-examining Copyright's Incentive-Access Paradigm*, 49 VAND. L. REV. 483 (1996); Sami J. Valkonen & Lawrence J. White, *An Economic Model for the Incentive/Access Paradigm of Copyright Propertization: An Argument in Support of the Orphan Works Act*, 29 HASTINGS COMMS. & ENT. L.J. 359 (2006).

²⁰⁸ LANDES & POSNER, *supra* note 196, at 58-60; Sony Corp. v. Universal, *supra* note 27, at 479 ("The fair use doctrine must strike a balance between the dual risks created by the copyright system: on the one hand, that depriving authors of their monopoly will reduce their incentive to create, and, on the other, that granting authors a complete monopoly will reduce the creative ability of others")

copied elements of *Romeo and Juliet* there would be no *Westside Story*,²⁰⁹ and without taking substantially from the *Sherlock Holmes* character, there would arguably be no *House M.D.* The dynamic benefit of copying is, therefore, that some copying produces new works that are themselves welfare enhancing.²¹⁰

For example, consider the situation again where B wishes to create a parody of A's novel. We established that this copying does not harm A's market. But even more importantly, in creating the parody, B opens up a new market. Imagine four consumer's do not like A's novel but do like B's parody. Once again each value the parody at a price of \$20. Imagine that creating the parody costs B \$10 to make (substantially less than it costs for A because B is copying large amounts). Therefore, in creating the parody, B creates a further \$70 of benefit (the \$80 for consumers minus his \$10 cost), which goes on top of the \$100 in total benefit produced by A's novel in the first place.

While the dynamic benefits of copying demonstrate how copying is necessary for the creation of new works, the static benefits demonstrate how copying is beneficial for society, not in the future, but today. This occurs because copying the work can aid the dissemination of information in society.²¹¹ In many cases, therefore, the copyist's private desire to copy results in positive externalities wherein other people benefit from the enhanced distribution of information.²¹² For example, in the case where B copies to produce a book review, the benefit to A is not reduced, while at the same time, society benefits from this review that allows consumers to make better informed decisions about whether to buy A's novel. Alternatively, imagine that a teacher copies a novel for use in an English literature class. The benefit is not limited to the private benefit the teacher gets from copying, but also includes the benefit that it creates for society in having better educated children. Or imagine a photograph is used in a news report. The benefit of copying not only falls on the news producer, but also on the viewers who are informed of important current events. In these cases and a myriad of others, copying

²⁰⁹ 4 NIMMER, *supra* note 13, at 13.03[A][1][b]

²¹⁰ Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos., 621 F.2d 57 (2d Cir. 1980) (fair use "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster.")

²¹¹ Wainright v Wall Street Transcript Co., 558 F. 2d 91, 94 (2d Cir. 1977) ("The fair use doctrine offers a means of balancing the exclusive rights of a copyright holder with the public's interest in dissemination of information the affecting areas of universal concern, such as art, science and industry")

²¹² Samuelson, *supra* note 194, at 2620 ("In recent years, courts have also been more demanding about evidence of market harm, more willing to consider positive externalities of a defendant's use (e.g., the public interest in having access to the defendant's work)...).

distributes information and in doing so produces spillover benefits for the wider population.

ii. Fair Use and the Incentive-Access Paradigm

We can now see that, in some circumstances, copying is economically beneficial and contributes to the maximization of the benefit the underlying work creates. This sub-section demonstrates how the jurisprudence that courts have developed under the fair use doctrine perfectly tracks this economic reasoning. Therefore, whether copying is fair depends on whether it maximizes benefit.²¹³

Courts find copying to be unfair when it reduces the author's incentives to create and therefore threatens to reduce the benefit that society can expect to receive. For this reason, whether copying harms the author's market is called "undoubtedly the single most important element" in determining fair use.²¹⁴ When copying does harm the authors' market, the copying will attract liability, thus re-establishing the author's incentives for creation. Alternatively, if the copying does not harm the author's market, but will instead provide additional benefits by enabling the creation of new works or the distribution of information, then the court will label this copying fair. The copyist is therefore under no duty to pay a fee to the author either before or after the copying takes place. As a result, the benefit that the copyist receives from copying is not transferred and internalized to the author, but remains with the copyist.

This distinction between fair and unfair copying can be observed through examining the Supreme Court fair use jurisprudence. Firstly, the Supreme Court has established that when it reduces the benefit to society, copying will be unfair. Consider for example, *Harper & Row v. Nation Enterprises*. Former President Gerald Ford wrote a memoir about his decision to pardon Richard

²¹³ Iowa State Univ. Research Found., Inc. v. American Broadcasting, *supra* note 221; *Wainright v. Wall Street Transcript Co.*, *supra* note 222; Groundbreaking work demonstrating the economic role of fair use was performed by Professor Wendy Gordon, Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982). Professor Gordon argued that fair use was used by courts and Congress to "permit uncompensated transfers that are socially desirable but not capable of effectuation through the market," *see id.* Under this theory, a use is fair if it maximizes the benefit to society and if would not occur if liability were imposed on the copyist. Although the idea that copying is fair when it maximizes benefit has received widespread acceptance, the notion that such uses are only fair when imposing liability would prevent them from occurring has been criticized, *see* Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 977 (2002).

²¹⁴ *Harper & Row v. Nation Enterprises*, *supra* note 177, at 566.

Nixon. Ford licensed the publication rights to Harper & Row. Harper & Row then contracted for excerpts of the work to be published by Time Magazine. However, before Time's magazine was published, a rival magazine, the Nation, obtained a copy of the memoir and published an article discussing it. The article quoted between three hundred and four hundred words from the book without permission. This caused Time to withdraw from the contract with Harper & Row. Harper & Row sued the Nation for infringement. The Supreme Court believed that there was a clear harm presented to Harper & Row's market: they had lost the contract with Time.²¹⁵ Due to the market harm, the use was held to be unfair.²¹⁶

Alternatively, when copying maximizes the benefit for society, the use is considered fair and no liability follows. For example, in *Universal City Studios v. Sony*, the Supreme Court was asked to consider whether copying television shows for the purpose of time shifting is a fair use. The court held that such use was fair because the plaintiffs had failed to show how time-shifting harmed their market and, at the same time, copying had particularly strong benefits as it allowed viewers to enjoy programs they otherwise would have missed.²¹⁷ Likewise, in *Campbell v. Acuff-Rose Music*, the Supreme Court held that creating a parody is fair use.²¹⁸ Creating a parody is unlikely to harm the author's market, because those who enjoy the author's work are unlikely to see the parody as an appropriate substitute. On the other hand, parodies are new works with the potential to open up new markets. Furthermore, parodies also generate strong positive externalities due to their ability to contribute to a robust democratic society where views are debated and questioned.

iii. Author Incentives Under A Fairness Rule

By comparison with a strict liability rule, the author who operates under a fairness rule does not internalize all the benefit his work creates. Nonetheless, because the rule does not permit copying that would harm the author's market, the author still has an incentive to create the work when doing so is efficient. To see how this works, re-consider A's position under a fairness rule. Under a strict liability

²¹⁵ *Id.* at 567.

²¹⁶ This conclusion was reached despite the court's conclusion that the copying "furthered the public interest" in the dissemination of ideas, *id.* at 591.

²¹⁷ *Supra* note ____.

²¹⁸ *Supra* note ____.

rule, A knows that B will be liable every time he copies, and can therefore expect to make \$200 from selling or licensing the work. By contrast, under a fairness rule, he knows that in some instances B will not be liable for copying. Nevertheless, he knows that the fair use doctrine only covers situations where B's copying does not harm his market, such as in cases of parody or review. A may still prefer that this copying attract liability, and therefore allow him to extract an additional fee from B. However the lack of liability for this copying does not reduce the benefit A can expect to receive. Therefore, A can still expect to recover \$200 by selling his work to the ten consumers. Once this is added to his hedonistic benefit of \$20, his total private benefit is once again \$220 meaning he has an incentive to create the work according to the demands of social welfare.

Alternatively, if creating the work does not increase social welfare, once again A has no incentive to create it. If only two people enjoy the work, then he can expect only to recover a private benefit of \$60, meaning that he has no incentive to create. The prospect that one of these consumers who buy the work may make a fair use of the work does not change the situation. Sadly for author A, the presence of fair use does not increase demand for his work, and therefore it will still be unprofitable to create it.

4. The Benefit of Fairness Over Strict Liability

So far this section has demonstrated that copyright does not adopt a strict liability rule. Instead, copyright uses a unique "fairness rule" which is most closely related to a negligence rule. Nevertheless, both strict liability and the fairness rule provide authors with the incentive to behave efficiently and create works when doing so is good for social welfare. This raises a question: why is using a fairness rule better than using a strict liability rule if they both provide authors with incentives to behave efficiently? The answer to this question is that under a strict liability rule, the author has an incentive to act efficiently, but in some cases this will prevent the copyist from acting efficiently. This problem is avoided through the use of a fairness rule. Like a negligence rule, the fairness rule creates incentives for both parties to increase social welfare.

Under a strict liability rule, the copyist would be required to pay the author a fee in every case of copying. In some cases, this would not produce any harm to welfare. For example, imagine B wishes to copy A's novel as part of a book review. As this causes no harm to A's market and has additional external benefits for the public, the copying

maximizes the benefit A's work ultimately produces. In some cases, B captures a proportion of this external benefit privately. Hypothetically let us say that B is provided with a \$15 payment from the magazine in which he publishes the review and, because he enjoys the reviewing process, has an additional hedonistic \$5 benefit. If B is liable for copying in this case, he will need to pay author A some fee. Once again, say A charges \$20 for the copying. In which case, B will pay the fee because his private benefit from copying is equal to the price charged, and will create the review. In doing so, the public not only can expect to enjoy A's novel, but they gain the additional benefit provided by the review.

However, there are some cases where imposing strict liability will result in the copyist not engaging in this beneficial copying.²¹⁹ This is particularly possible in two cases. Firstly is the case where transaction costs are present.²²⁰ Imagine that author A is particularly reclusive. In order for B to find A and pay him a fee, it will cost B \$2 (or alternatively, if he does not license before the copying, then he loses an additional \$2 in time and effort later while negotiating a settlement or disputing a damage award). Now the private cost of copying is \$22 and outweighs the private benefit. As a result, society is deprived of copying even when doing so would efficiently maximize benefit.

The second case occurs where copying produces large positive externalities and the copyist does not capture enough this benefit privately.²²¹ Imagine for example that B does not publish the review in a magazine but on a free online blog. The review still does not harm author A's market while adding additional public benefit, but now there is no payment to B for copying and as a result, his private benefit is \$5. If B is liable, then he must pay the author a fee. If author A charges \$20 in license fee,²²² then B will not create the review, because doing so involves greater private cost than private

²¹⁹ These are the market failure problems that copyright protection occasionally causes, *see* Gordon, *supra* note 212, at 1614-15.

²²⁰ LANDES & POSNER, *supra* note 196, at 115-17.

²²¹ Gordon, *supra* note 212, at 1630-31.

²²² One might ask, why would the right holder charge a fee of \$20, if the reviewer is only willing to pay \$5. Surely the right holder would be better off by charging a fee of \$5 and therefore making an additional sale? The answer is that although it is in the author's best interest to charge a price to each consumer based exactly on that individual's willingness to pay, such perfect price discrimination is not possible. Right holders therefore have to charge a price that meets the aggregate demand for his work. This results in setting a price which will be higher than some consumers' willingness to pay, even though those consumer would ideally like to pay some fee to obtain the work, *see e.g.* Michael J. Meurer, *Price Discrimination, Personal Use, and Piracy: Copyright Protection of Digital Works*, 45 BUFFALO L. REV. 845 (1997); Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55 (2001).

benefit (alternatively, if he decides not to license then he can expect to pay \$20 in lost license fee as a damage award later, and once again B's private cost will outweigh the private benefit).

In such cases, if liability is imposed, it will result in the author receiving an efficient incentive to create the work, but will prevent copyists from engaging in beneficial copying. By adopting a fairness rule, the law avoids this problem. As the copyist is not liable for engaging in beneficial copying, he faces no obligation to pay the author. Therefore it is unlikely that copying will result in any cost to the copyist.²²³ Presuming the copyist gains some private benefit from copying,²²⁴ no matter how marginal, then he has the incentive to create this valuable new copy. Thus, unlike a strict liability regime, both the author and the copyist have the incentive to take actions that ultimately benefit society.

II. WHY THIS MATTERS

So far the article has been an exercise in analytical jurisprudence. Through heightened attention to the details of tort theory, we have reached conceptual clarity and discovered that copyright is not a strict liability tort, but is a fault liability tort, closely related to the tort of negligence. But the benefit of this finding is not limited to conceptual clarity. As this part discusses, realizing that copyright infringement is a fault-based tort provides us with two benefits. Firstly, it demonstrates that the rules governing copyright infringement are not as inconsistent, inefficient, and immoral as previously thought. And secondly, through a clearer understanding of copyright infringement, we are now in a position to ask better, more pertinent, questions in relation to the standard of liability adopted in copyright.

A. The Inconsistency, Inefficiency and Immorality of Copyright's Liability Rule

As discussed in part II.A, a number of scholars have characterized copyright infringement as a strict liability tort, and, due to perceived problems with strict liability in general, have proceeded

²²³ Assuming that the cost of copying is zero.

²²⁴ Which by definition he must receive because otherwise he would no reason to engage in the copying.

to criticize copyright for adopting an inconsistent, inefficient, and immoral liability rule. However, as this article has shown, copyright is in fact a fault-based tort. As copyright infringement is based on fault, the rules governing copyright infringement are not as inconsistent, inefficient and immoral as some have previously thought.

1. 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.²²⁵ 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.

2. 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 in part II.C however suggests a different story. Here we have seen that the fairness rule adopted by copyright provides incentives for both the author to create the work when it is efficient to do so, and for the copyist to copy the work when that would be efficient.

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 copying that would benefit society. However, what the analysis does reveal is that this is not a problem with the liability rule *per se*.²²⁶ If people 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

²²⁵ *Supra* note 145.

²²⁶ This is despite statements to the contrary, such as Ciolino & Donelon, *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 altar of incentives."

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.

3. 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, but not applicable in the copyright context.²²⁷ 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 seems incorrect.²²⁸ 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

²²⁷ *Supra* note 150.

²²⁸ *Supra* note 151.

immoral than the large swathes of tort that hold defendants liable for their unintentional but nevertheless negligent actions.

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. However, this inquiry is somewhat meaningless because, as this article has sought to demonstrate, copyright does not adopt a strict liability rule in the first place. Nevertheless, the fact that copyright infringement is based on fault does not put an end to the discussion surrounding the liability rule adopted within copyright; in fact, the very opposite is true. Now we have an accurate understanding of copyright's liability rule, we are finally in a position to ask more pertinent questions about the desirability of that liability rule. While the question of whether strict liability in copyright is desirable is misplaced, there are at least two important questions that scholars must answer. Firstly, on what *type* of fault should copyright liability be based? And secondly, who should have the burden of proving fault (or the absence of fault)?

1. What Type 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.²²⁹

This raises the question, what *type* 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, should a finding of copyright infringement be conditioned upon a demonstration that the defendant intentionally

²²⁹ *Supra* note 18.

produced a substantially similar work? This article takes the view that the status quo ought to be maintained. As the rest of this section will show, the copyist's liability should not depend upon his intention, although the level of damages he pays should be influenced by this concern.

i. Should Copyright Infringement Require Intention?

In Part II.C we saw that the current liability rule creates incentives for both the author and the copyist to behave efficiently. This would be jeopardized if copyright were to adopt an intention rule. Once again, imagine A writes a novel. Doing so requires a fixed cost of \$100, but will provide \$20 of value for ten consumers, plus \$20 in hedonistic benefit to the author. Imagine one of the ten consumers, B, buys A's novel and reads it. Later, B writes his own novel, and without realizing, copies large parts of A's work. Imagine that B's novel does not create any new demand for A's work (i.e. no more than nine further consumers are interested in this work), and instead it simply splits the demand that already existed for A's work. Hypothetically, let us say that of the nine remaining consumers, three enjoy A's work and six prefer B's work. Now, A can only hope to receive \$60 in benefit from the remaining consumers. In addition to his hedonistic benefit, his private benefit stands at \$80. As this is below the cost of creation, A makes a loss. If A anticipates this scenario, he may forgo writing the novel in the first place. Alternatively, if B were required to pay A a fee for this copying (presumably after the fact in the form of damages to compensate for A's lost sales) then A's incentives to create would be restored.

What this hypothetical seeks to demonstrate is that, when it comes to the author's incentives to create, it does not really matter whether the copying occurs intentionally or unintentionally. Copies produced unintentionally have just as much probability of supplanting demand for an author's work as copies produced intentionally. If we allow a defendant to be exempted from liability because he acted unintentionally, we expose authors to competition in the market place that may harm their incentive to create welfare maximizing works. If authors perceive this as a realistic potential, then it is probable that some authors will forgo creating beneficial new works.

ii. Intention and the Damage Award

Although copyright liability should be imposed on those who copy unintentionally, that does not mean that intention ought to be irrelevant to the court. The discussion of intentional torts and damages in part I.B. demonstrates that, when the copyist copies intentionally, punitive damages ought to be awarded. Much like our example of A intentionally burning down B's roof, punitive damages in copyright are justified because of the low probability that the copyist will be caught.

Once again, imagine A creates his novel. As before, ten consumers enjoy this work at a value of \$20. One of the consumers, B, buys the work from A, copies it intentionally, and then sells it to the remaining nine consumers for a price of \$19, undercutting A by a dollar. In which case, A receives only \$20 in sales, while B receives \$171 (from which his \$20 fee to A will be deducted). If A discovers B is behind the copying, then A will sue him. In which case, B will be required to pay A damages of \$180 to compensate for A's lost sales. In which case, A's incentive to create the work is restored (he once again receives a private benefit of \$220) and B's incentive to engage in the copying disappears (because although doing so yields him an initial benefit of \$171, he must later pay \$180 in damages).

However, in the real world, detecting infringers is difficult. This is especially the case in the digital environment where the distribution of copies can take place anonymously online with the use of encryption software. Therefore, imagine the case of A and B where there is only a 25% probability that A will discover that it is B who has produced the unlawful copies. In which case, A knows that there is only a 25% chance that he will be compensated, and therefore only a 25% that he will recover his lost sales. Therefore, his expected benefit from creating this work is only \$85 (his \$20 hedonistic benefit plus the \$65 he can expect in license fees). As this is below the private cost he faces, he is unlikely to create the work in the first place. Meanwhile, due to the probability of detection, B's expected liability is only \$45 (the product of 0.25 multiplied by the damage award of \$180). This is below the \$171 in license fees he can expect to receive from the copying. Accordingly, it is still profitable for him to copy.²³⁰

The result is that, when the chances of detection are lower than 100%, compensatory damages may fail to deter copying, and result in author's forgoing economically beneficial creation. To prevent this

²³⁰ For a more thorough discussion of the need for supra-compensatory remedies in copyright in order to promote efficient behavior, see Christopher Buccafusco & Jason Masur, *Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law*, 87 S. CAL. L. REV. 276 (2014).

from happening, copyright infringement must award punitive damages in cases of intentional copying. Hypothetically, let us say that, if caught, B must pay A, in addition to compensatory damages, a punitive damage award of \$508. Therefore, if he is caught, B must pay A \$688 in damages (\$180 in compensation plus \$508 in punitive damages). There is still only a 25% likelihood that B will be caught, but now, B's expected liability is \$172. As B's expected damages are now greater than the gain he expects to make from selling copied versions of A's work (\$171), B no longer has an incentive to engage in copyright infringement. As a result, A can expect B not to engage in copyright infringement, and he can expect to receive \$200 in sales fees, making it profitable for him to create the work.

Therefore, in order to ensure both author and copyists act efficiently, we ought not adopt a rule making liability conditional upon the author's intention, yet we must allow the author to claim heightened damages when the intention to copy does exist. And, as copyright lawyers already know, this is largely what copyright does. As highlighted in part II, copyright liability is not conditioned upon intention. Furthermore, under §504(c)(2) of the Copyright Act, the court may award statutory damages of up to \$150,000 per infringed work when the copyright holder demonstrates that the copyist acted "willfully." These damages are seen to perform the necessary punitive function in order to make copyright infringement a meaningful deterrent in cases where the likelihood of liability is low.²³¹

2. Who Should Have the Burden of Proving Fault?

As demonstrated, liability for copyright infringement requires fault from the defendant, and therefore the argument that copyright is inconsistent with usual tort principles because it adopts a strict liability rule is incorrect. Nonetheless, the rules governing copyright liability are indeed still inconsistent with usual tort principles, albeit for different reasons than previously appreciated.

The usual rule in tort law is that the plaintiff carries the burden of proving that the defendant was at fault. We only derogate

²³¹ I do not mean to offer a complete defense of the current practice of statutory damages as they are contemporarily applied. I only mean to suggest that when probability of detection is low, the penalty must be higher in order to achieve deterrence of inefficient actions. Elsewhere I have argued from a moral perspective that they are quite unjust, see Patrick R. Goold, *Corrective Justice and Copyright Infringement*, 16 VAND. J. ENT. & TECH. L. 251, at ___ (2014). A thorough re-examination and critique of the statutory examination has been conducted elsewhere. See Pamela Samuelson & Tara Wheatland, *Statutory Damages: A Remedy in Need of Reform*, 51 WILLIAM & MARY L. REV. 439 (2009).

from that position in the select few cases like *res ipsa loquitor*. These occasional derogations are justified on the grounds that, in a subset of cases, the plaintiff faces substantial difficulties to prove the existence of the element and there is a high probability that the element does exist. Without an exception to the normal rule, some plaintiffs would be left without just compensation.

Yet in copyright, the decision to make the copyist prove fairness is not an exception, but is the normal rule. What's more, the decision to make the copyist prove the absence of fault cannot be justified using the same arguments that justify burden shifting in cases like *res ipsa loquitor*. Firstly, the copyright holder faces no substantial difficulties in proving that the copying was unfair. The copied work is usually an easily discoverable, publicly accessible document. It would place no injustice on the copyright holder to require him to examine the copied work and make an argument to show why this copying was unfair. Furthermore, in many instances it is easier for the copyright holder to establish unfairness than it is for the defendant to establish fairness. For example, it is simpler for the copyright holder to demonstrate how the defendant's copying caused harm to the copyright holder's market, than it is for the copyist to prove the absence of market harm.

Moreover, when a copyist creates a substantially similar work, there is not automatically a high probability that the copying was unfair. Fair use has dominated case law since its incorporation in the Copyright Act of 1976. It has played a vital role in apportioning liability in cases as distinct as the reverse engineering of a computer program in order to gain access to interface information and quoting from a book for the purpose of review. The frequency with which the doctrine applies across a range of factual circumstances suggests that copying is not automatically, or even routinely, unfair. The courts' presumption of unfairness seems, therefore, inappropriate and should be altered. By placing the burden of proving unfairness on the right holder, copyright law would be brought back into consistency with normal tort practice. This is something the courts are free to do, given that nowhere in the Copyright Act is it stipulated that the burden of proving fairness ought to be on the copyist.

i. Economic Reasoning And The Burden of Proving Fault

The fact that copyright requires the copyist to prove fairness is not only out of touch with standard tort principles, it is also economically wasteful. 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.²³² 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.²³³ 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."²³⁴

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 plaintiff 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 loquitor*, the burden of proof is shifted onto the defendant because it is easier, and therefore cheaper, for the defendant to prove the absence of fault than for the plaintiff to prove the existence of it.²³⁵

In copyright, a rule that the plaintiff must prove unfairness would reduce the prospect of right holders starting meritless lawsuits. As it stands, there is an incentive for right holders to bring claims against copyists regardless of whether the copying is fair. This is particularly a common problem in relation to online copying of material. In response to this problem, the court in *Lenz v Universal* held that where purportedly infringing material is hosted online, the right holder must at least consider whether the use is fair before demanding the material be deleted.²³⁶ However, such a solution does not go far enough. Despite the court's ruling, there is still no cost to filing a meritless claim, and accordingly no reason to refrain from starting such an action. Alternatively, by bringing copyright into conformity with usual tort practice, and requiring the right holder prove the existence of fault, we give him a strong incentive to only bring claims that are likely to succeed.

²³² Bruce L. Hay & Kathryn 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.")

²³³ 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 ensures that the legal system will-in general-only intervene in cases where there is a good reason (where relief is warranted)").

²³⁴ POSNER, *supra* note 186, at 646-7

²³⁵ *Id.*

²³⁶ 572 F. Supp. 2d 1150 (2007)

Furthermore, unlike the case presented by *res ipsa loquitor*, it is no more expensive for the plaintiff to prove fault, than it is for the defendant. In many cases, it would in fact be cheaper for the right holder to prove unfairness than requiring the copyist to prove fairness. As seen, the most important element of the fair use analysis is whether the use harms the right holder's market. Given that the right holder is the one who has an accurate understanding of his market and the revenue he will receive, it is much easier, and hence cheaper, for him to show how market harm has occurred, than it is for the defendant to do so.

III. CONCLUSION

This article has argued that, by copying unfairly, the individual disobeys a social expectation that is in place for the general welfare of society. In doing so, he acts wrongfully in much the same way as a defendant in a negligence action whose unreasonable risk-taking result in harm to others. Therefore, despite the widespread view to the contrary, copyright infringement is a fault-based tort because it requires the defendant to do something wrongful before liability will be imposed.

Although it is a mistake to call copyright a strict liability tort, it is an understandable mistake. Intuitively, many would agree that there is a gradation or spectrum within the concept of wrongfulness. Hence negligently, recklessly, intentionally, and maliciously causing harm are all wrongful, but nevertheless, they don't appear to be *equally* wrong. We are somewhat naturally inclined to believe that causing harm negligently is less wrongful than causing harm recklessly, while recklessly causing harm is less wrongful than intentionally causing harm, and so forth. As far as wrongful conduct goes, failing to obey a social expectation, as in the case of negligently causing harm or unfairly copying a work, seems the least wrongful wrong that an individual could commit. One may even argue that copying unfairly is slightly less wrongful than negligently causing harm to others, because in the latter case the defendant actually causes *costs* and *detriment*, whereas in the case of unfair copying, the consequence is not particularly *harmful*, but is rather the lack of benefit as society may miss out on enjoyable new works. Accordingly, it is perhaps accurate to classify copyright infringement as the strictest of the fault-based torts. Although it requires wrongfulness on

the part of the defendant, it does not require a great deal of wrongfulness.

Despite copyright infringement being the strictest of fault-based torts, this article has argued that the liability scheme is largely justifiable. It is true that the current position of fair use as an affirmative defense is untenable, as it creates the unusual and wasteful situation where the defendant is required to prove the absence of fault. However, that problem notwithstanding, the liability rule in place creates efficient incentives for both the author to create new works when doing so would be welfare maximizing, and for the copyist to copy when doing so would also be welfare maximizing. Changing this system to exempt unintentional copying from liability would jeopardize the efficient incentives it currently generates.

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.²³⁷ 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 how in recent years the fair use doctrine has been growing 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 fair use. 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 create economic growth in the so-called "digital economy." This author interprets this transformation as the rejection of strict liability in favor of the more efficient fault liability rule that the fair use doctrine instantiates. However, the exact

²³⁷ See generally, ED LEE & D. CHOW, INTERNATIONAL INTELLECTUAL PROPERTY: PROBLEMS, CASES AND MATERIALS, ____ (West, 2012);

motivation and significance of this global shift is the subject of another article.²³⁸

²³⁸ See Patrick R. Goold, *The Fair Use Revolution in Global Copyright Law*, (unpublished manuscript, on file with the author).