The Death of Strict Liability in Copyright

In the article, I argue that the explosion in user-generated content, properly countenanced, has dramatic implications for the reform of copyright law. The most fundamental change mandated is that the liability standard should be shifted from strict liability to a three-pronged approach that would allow for the application of a fault-based standard, an intentional tort standard and a strict liability standard, depending on the particular facts of the underlying purported injury/infringement. This would in effect move the test for copyright infringement in line with the manner in which putative wrongs are treated in tort generally. In particular, I develop the concept of "accidental infringement" (as distinct from "innocent infringement") and argue that a great deal of unauthorized copying done by amateurs in creating UGC should be judged by a fault liability. The likely result is that much unauthorized copying that would count as an infringement now will not count as an infringement under a fault-based standard for the simple reason that the amateur creator may well have exhibited due care given the context (and such contexts will be favorable toward amateur creators of UGC). I will argue that applying a negligence standard has further important implications as well. First, in negligence law in tort generally, the burden lies on the plaintiff to establish fault. The parallel in copyright would be for the plaintiff to have the burden to establish a lack of fair use by defendant. In Lenz v. Universal, a court in the Ninth Circuit found that this burden may be shifted to plaintiffs in the context of a DMCA Notice & Takedown. I will argue that this shows that there is no practical reason that the burden cannot be shifted. Combine this with the positive argument in favor of shifting the burden such that the fault standard in copyright will function like the fault standard in tort generally, and one arrives at the conclusion that in fact patterns involving accidental infringement, the plaintiff should have the burden in her prima facie case of establishing defendant's fault, that is, lack of fair use. Finally, in regular tort law, any form of punitive or exemplary damages are thought to be inappropriate. I will argue that statutory damages in copyright are best viewed as a form of pro-plaintiff exemplary award of a sort that may have made sense in a strict liability regime but would be unjustifiably pro-plaintiff in a fault-based cause of action for accidental infringement. Overall, then, I will argue that UGC infringement actions should largely be judged by a fault standard and that doing so has dramatic implications—a shift in the burden of proof and the removal of statutory damages. This shift in legal rules would likely have a dramatic impact in practice—fewer findings of infringement due to a higher burden of proof, a shift in the burden of proof, making suits less likely, and lower prospective damage awards, also making suits less likely. In addition, the larger purposes of furthering the rationalization of the law would be served in as much as the law would no longer merely pay lip service to the notion that copyright infringement is a tort but would instead treat it with the normative complexity one finds in tort law generally, but that is conspicuously missing in copyright law. In this context, it should be remembered that strict liability was replaced by a multi-standard approach literally hundreds of years ago in tort generally. UGC makes it abundently clear that the time has come for this shift to come to copyright law as well.