QUESTIONING STRICT LIABILITY IN COPYRIGHT

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Copyright is a strict liability regime under which any infringer, whether innocent or intentional, is liable for infringement. In this Article, the Authors argue that strict liability is neither justified nor necessary in copyright law, but rather is rooted in deeply flawed historical, conceptual, and economic misconceptions about intellectual property in general and copyright in particular. Worse, strict liability is affirmatively harmful to copyright's utilitarian goals of providing incentives to authors to create, and providing greater public access to works of authorship. For these reasons, the Authors call for Congress to abolish copyright's harsh strict liability regime and to substitute in its stead a liability regime that fairly accounts for the culpability of infringers.

I. INTRODUCTION

Federal copyright law sets forth a seemingly straightforward standard for copyright infringement: "[a]nyone who violates any of the exclusive rights of the copyright owner" is liable for copyright infringement.1 By branding as an infringer "anyone" who infringes a copyright, the Copyright Act casts a wide net that ensnares infringers of all different stripes. Indeed, the Act treats all infringers alike—from the most innocent to the most nefarious. In copyright's strict liability scheme, the infringer's faultlessness or culpability is of anomalously little relevance.

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Consider the late George Harrison who innocently incorporated the 1962 Chiffons' hit "He's So Fine" into his own "My Sweet Lord" during a recording session some eight years after the original song's release.\(^2\) Consider in contrast a rogue clothing manufacturer who reaps enormous profits by brazenly reproducing copyrighted cartoon characters and company logos on cheap t-shirts.\(^5\) Despite the markedly different levels of moral culpability of these infringers, American copyright law holds both strictly liable for infringement. Courts and commentators\(^6\) have consistently adhered to this strict liability framework for decades with little debate.\(^8\)

Times have changed. With the recent proliferation of the "information superhighway," and the attendant specter of strict liability looming over Internet service providers and other budding high-tech industries, the policy of holding innocent infringers strictly liable—a policy Judge Learned Hand once deemed "harsh" and worthy of "hesitation!"—is once again the subject of vigorous debate and scholarly criticism.\(^7\) Yet, while courts and commentators debate

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3. Ironically, (loveable?) rogue Napster recently threatened such a t-shirt manufacturer with a copyright infringement lawsuit. Robert Wright, On the Edge, THE TORONTO STAR, July 13, 2000, at FF03 (“For sheer gall [nothing] beats out... Napster’s recent threat to sue a clothing manufacturer that was making “Napster” t-shirts. The charge? Why, copyright infringement, of course.”).
4. See discussion infra note 8.
5. E.g., Fitzgerald Publ’g Co. v. Baylor Publ’g Co., 807 F.2d 1110, 1113 (2d Cir. 1986) (“[R]eliance—justified or otherwise—is irrelevant in determining whether [the defendant] infringed [the plaintiffs] copyrights. Even an innocent infringer is liable for infringement.”); see also Haas v. Leo Feist, Inc., 234 F. 105, 107 (S.D.N.Y. 1916) (“The plaintiff’s right to damages against the defendant Feist, regardless of its innocence, is unquestionable.”); Stern v. Jerome H. Remick & Co., 175 F. 282, 282 (C.C.S.D.N.Y. 1910) (“It is not necessary that the defendant should have intended to violate the copyright of the plaintiff.”); Reed v. Holliday, 19 F. 325, 327 (C.C. W.D. Pa. 1884) (“Intention, however, is a matter of no moment if infringement otherwise appears.”).
the merits of applying strict liability in the limited context of Internet commerce, the wisdom of applying strict liability in the first place remains largely unquestioned.\(^8\)

In this Article, we question the fundamental propriety of strict liability in copyright. After briefly surveying the strict liability framework of the 1976 Act, we consider the misunderstood role of strict liability in early British and American copyright law. Although

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The debate surrounding contributory and vicarious liability for online service providers has recently intensified in light of the controversy and recent litigation surrounding the wildly popular online music file-sharing program, Napster. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001). See generally Karl Taro Greenfeld, Meet the Napster, TIME, Oct. 2, 2000, at 60, 64 (describing the rise of Napster and explaining that “Napster is being accused not of violating copyright itself but of contributing to and facilitating other people’s infringement”); Wendy M. Pollack, Note, Tuning In: The Future of Copyright Protection for Online Music in the Digital Millennium, 68 FORDHAM L. REV. 2445 (2000) (describing the effect of recent copyright law on digital music technology).

8. See, e.g., 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.08 (2000) ("The injury to a property interest is worthy of redress, regardless of the innocence of the defendant."); 2 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 1142 (1994) ("Copyright is a strict liability tort."). It appears the propriety of the strict liability regime has never been exhaustively analyzed. See, e.g., EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 404 (Rothman Reprints 1972) ("The principle which eliminates from consideration, in cases of piracy, the intention on the part of the wrong-doer and the question of his ignorance, is reasonable and proper."); Comment, Innocent Participants in Copyright Infringement, 8 FORDHAM L. REV. 400, 400 (1939) ("Thus far, scant attention has been directed to the question of the extent of liability of innocent persons who participate in an infringement of copyright."). Notably, however, Professor Wendy Gordon has, in the context of broader intellectual property topics, expressed serious reservations about strict liability for innocent infringers. See, e.g., Wendy J. Gordon, On Owning Information: Intellectual Property and the Restitutionary Impulse, 78 VA. L. REV. 149, 227 (1992) [hereinafter Gordon, On Owning Information] ("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."); 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 Alan Latman & William S. Tager, Liability of Innocent Infringers of Copyright, Study No. 25, in 2 STUDIES ON COPYRIGHT 140 (Copyright Soc'y U.S.A. eds., 1963); Kent Sinclair, Jr., Comment, Liability for Copyright Infringement—Handling Innocence in a Strict-Liability Context, 58 CAL. L. REV. 940, 945 (1970) ("[T]he felt unfairness of the absolute liability imposed by the Act has been mitigated only indirectly through the courts' studied manipulation of the monetary remedies afforded against the infringer.").
strict liability is often justified as "grounded in history," early American and British copyright law in fact accounted for the culpability of infringers in several significant ways. Moreover, these early copyright laws, unlike modern American copyright law, provided significant safeguards for innocent infringers through strict systems of recordation and notice.

We then address a panoply of conceptual problems associated with applying strict liability in copyright law. These problems stem largely from the misplaced analogy of copyright to tangible property. Just as intellectual property is often compared indiscriminately to tangible property, copyright infringement is frequently analogized to "trespass to reality." Although the simplicity of this analogy is appealing, it is deeply flawed. Modern laws governing tangible property are far more accommodating and forgiving of its innocent trespassers than copyright law is of its own. But more fundamentally, copyright law, its entitlement, and its subject matter differ significantly from traditional property law, its entitlement, and its subject matter.

Turning next to economic analysis, we argue that strict liability in copyright is costly and inefficient. Scholars have contended that strict liability is necessary because an infringer is best able to "avoid the loss" of infringement, and that strict liability somehow fosters administrative efficiency. Both of these rationales are unsubstantiated. Innocent infringers, often unaware of the vagaries of copyright law or unaware that they are borrowing from copyrighted sources, are often incapable of avoiding the loss of infringement. Likewise, no evidence supports the contention that strict liability promotes administrative efficiency in copyright infringement litigation. On the contrary, the inevitable result of strict liability is a marked increase in the overall number of infringement suits, with each individual suit often requiring protracted litigation over complex, fact-specific issues.

For these reasons and others, we conclude that strict liability is both unjustified and unnecessary in copyright law. More troubling, however, is that strict liability is deleterious, counterproductive, and works against the very goals that copyright law purports to serve.

9. See discussion infra Part III.A.
10. Id.
11. Wendy J. Gordon, An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory, 41 Stan. L. Rev. 1343, 1390-91 (1989) [hereinafter Gordon, Inquiry into the Merits of Copyright] (describing the "trespass" character of infringement suits and explaining that "as in trespass to reality . . . even unconscious copying gives rise to liability in copyright cases").
12. See discussion infra Part III.B.
13. See discussion infra Part III.C.
Indeed, while copyright exists primarily to create market-based incentives for artistic creation, strict liability antagonizes that goal by reducing the demand for copyrighted works and encouraging bypass of the market that copyright strives to create. In light of these significant problems, we conclude with a call for Congress to recognize innocence as an affirmative defense to certain types of liability for copyright infringement.

II. BACKGROUND

Strict liability has long been a part of Anglo-American copyright law. Like much of our copyright law, strict liability is a vestige of British law that was imported into the United States during the colonial period. Indeed, the Statute of Anne, the "first" British copyright act, imposed liability even on the innocent. Under that statute, actionable copyright infringement occurred "[i]f any other bookseller, printer, or other person whatsoever . . . shall print, reprint, or import, or cause to be printed, reprinted or imported, any such book . . . without the consent of the proprietor . . . ."

Early colonial copyright laws, adopted by twelve of the thirteen colonies at the urging of the Continental Congress, closely followed the British model and established strict liability—in widely varying

14. The Statute of Anne, 8 Ann., c. 19 (1709) (Eng.), England's "first" copyright statute, is widely acknowledged as the basis of both the Copyright Clause of the United States Constitution and other early federal copyright acts. E.g., ALAN LATTAN, THE COPYRIGHT LAW 2 (5th ed. 1978) ("Our whole law relating to literary and artistic property is essentially an inheritance from England."); MARSHALL LEAFER, UNDERSTANDING COPYRIGHT LAW § 1.2, at 3 (1989) ("The Statute of Anne became the general model for copyright law in the United States."); L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 47 (1991) ("The 1710 Statute of Anne is the direct ancestor of American copyright law . . . the statute itself clearly served as the model for the Copyright Act of 1790, the first U.S. copyright statute."); Lyman Ray Patterson, The Statute of Anne: Copyright Misconstrued, 3 HARV. J. LEGIS. 223, 223 (1966) [hereinafter Patterson, Copyright Misconstrued] ("The Statute of Anne has deeply affected the American law of copyright . . . [i]t was used in this country during the 1780's as a model for copyright laws enacted by twelve of the thirteen states . . . [l]ater, it served as a model for the first federal copyright act, passed in 1790."); Russ VerSteeg, The Roman Law Roots of Copyright, 59 MD. L. REV. 522, 525 (2000) ("[L]ong before the Founding Fathers ever considered the issue of copyright, British legislators and courts had worked out the basic policies and principles. It was from these foundations that the Constitutional drafters borrowed.").

15. Although often acclaimed as the "first copyright law," the Statute of Anne was in fact enacted some one hundred and fifty years after the first copyright laws were promulgated in England. Patterson, Copyright Misconstrued, supra note 14, at 227. The first English copyright acts can be traced to 1557, a mere eighty years after William Caxton introduced the printing press to Britain. Patterson & Lindberg, supra note 15, at 19.

forms—as the standard for infringement. Later federal copyright legislation imposed strict liability on those who “printed, published, or imported” infringing copies without the consent of the author. This strict liability framework was retained in all of the major federal copyright acts that followed the 1790 Act, including legislation enacted in 1870, 1909, and 1976.

The Copyright Act of 1976—like its predecessors—prescribes a deceptively straightforward standard for copyright infringement. Under the Act, an individual infringes when he “violates any of the exclusive rights of the copyright owner . . . .” Noticeably absent from this standard is any scienter, intent, knowledge, negligence, or similar culpable mental state. On the contrary, liability for civil copyright infringement is strict. To establish copyright infringement a copyright owner need prove only two elements: ownership of a valid copyright, and copying of “constituent elements of the work that are original.”

Applying this statutory scheme, American courts—both before and after 1976—have consistently held that intent to infringe is irrelevant in determining liability for copyright infringement.

17. See Patterson, Copyright Misconstrued, supra note 14, at 223-27.
18. Latman & Tager, supra note 8, at 141.
19. Id.
21. Strict liability is commonly defined as “liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of a duty to exercise reasonable care, i.e., actionable negligence. [Strict liability] is often referred to as liability without fault.” W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 75, at 534 (5th ed. 1984). See generally David N. Weiskopf, The Risks of Copyright Infringement on the Internet: A Practitioner's Guide, 33 U.S.F. L. REV. 1, 13-14 (1996) (“Direct copyright infringement is a strict liability tort . . . any party who engages in the unauthorized exercise of any of the copyright holder’s exclusive rights is liable for copyright infringement under federal law, regardless of whether that party knew or intended to violate the copyrights of the work’s owner.”).
23. Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 198 (1931) (“Intention to infringe is not essential under the Act.”); Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 308 (2d Cir. 1963) (“While there have been some complaints concerning the harshness of the principle of strict liability in copyright law . . . courts have consistently refused to honor the defense of absence of knowledge or intention.”)
although some have been reluctant to implement this "harsh" doctrine. For example, in *De Acosta v. Brown*,24 the United States Court of Appeals for the Second Circuit found Hearst Magazines, Inc., liable for unknowingly publishing an excerpt from a screenplay in its popular *Cosmopolitan* magazine.25 Although the defendant publishers claimed to have infringed the original author's copyright "innocently" by erroneously relying on the assurances of the purported author,26 the court rejected these excuses, citing the "unanimity of view" that liability is strict, and holding that the "protection accorded literary property would be of little value if... insulation from payment of damages could be secured by a publisher by merely refraining from making inquiry."27 Significantly, the *De Acosta* decision could be seen as a refinement of the *F.2d 408 (2d. Cir. 1944).* cited above, where the court held that the innocent infringer was not entitled to a defense based on fair use, as the defendant had "masked" the copyrighted work by altering its appearance. In *De Acosta*, the court emphasized the importance of protecting the "original" work, even if it was not copyrighted, by imposing strict liability on publishers who distributed infringing materials.

(citations omitted); Am. Press Ass'n v. Daily Story Pub'g Co., 120 F. 766, 769 (7th Cir. 1902) ("It is not material, we think, that the appellant in publishing this copyrighted story was not aware that the story was protected by copyright. It published at its peril, and ignorance will not avail."); Lawrence v. Dana, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8, 136) ("Evidence of innocent intention may have a bearing upon the question of 'fair use'. . . but it cannot be admitted that it is a legal defence [sic] where it appears that the party setting it up has invaded a copyright.").

24. 146 F.2d 408 (2d. Cir. 1944).
25. Id. at 408.
26. Id. at 412.
27. *De Acosta*, 146 F.2d at 412. Understandably, the seemingly unfair result in *De Acosta* provoked vigorous debate among scholars and commentators. See, e.g., Decisions, Copyright—Indirect Copying of Unpublished and Uncopyrighted Literary Property, 45 COLUM. L. REV. 644, 646 (1945) ("[T]he extension of the doctrine of absolute liability without intent is questionable."); Recent Case, Literary Property—Innocent Subsequent Copier Held Liable to Owner in Damages, 58 HARV. L. REV. 615, 615-16 (1945) ("[W]here the owner seeks damages, the innocence of the subsequent copier should be a defense..."

The opinion also provoked a strenuous dissent from Judge Learned Hand, who, while also adopting the analogy of copyright infringement to the tort of conversion, arrived at a starkly different result. See *De Acosta*, 146 F.2d at 413 (Hand, J., dissenting). According to Judge Hand:

[I]t is true that if... I carry off as mine another's watch in my bag, it is no excuse that I think it mine. However, I do not convert it, whatever acts of
Acosta court analogized innocent infringement to the tort of conversion, finding the analogy so compelling and “complete” to justify recovery against even an innocent copier. 28 Since De Acosta, innumerable defendants have been held liable for copyright infringement irrespective of their innocent intent. 29

III. STRICT LIABILITY AS UNJUSTIFIED AND UNNECESSARY

Few have questioned copyright’s long-time adherence to strict liability. Even fewer have undertaken a principled analysis of the issue. Instead, courts and commentators have offered an eclectic mix of justifications, some grounded in history, some in analogy, and still others in economics. While these proffered justifications may adequately justify strict liability in other areas of law, they do not provide a principled basis for continued adherence to strict liability in copyright.

dominion I exercise over the bag, if I do not know, or am not chargeable with notice, that there is a watch in my bag, though I may have equally denied the owner’s right.

Id. (citations omitted).

Judge Hand’s dissent also reflects a greater concern with the potential effects of such a harsh rule on both First Amendment rights and Copyright’s utilitarian goals. According to Judge Hand, if the possibility of damages for innocent infringement “hover[s] over all publications, it would . . . be a not negligible depressant upon the dissemination of knowledge.” Id.; see also BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 72-73 (1967) (explaining that Judge Hand’s dissent was addressed to the specific “kind of innocence” involved in De Acosta, but questioning whether there is a “satisfying basis for distinguishing other cases of innocence”). According to Kaplan, “there is . . . a danger of assimilating too easily the case of a man unknowingly taking a gold watch with that of a bookseller selling a book which, unknown to him, contains a plagiarism.” Id. at 73.

28. De Acosta, 146 F.2d at 412. The harsh holding in De Acosta remains the subject of scholarly criticism. See, e.g., 2 PAUL GOLSTEIN, COPYRIGHT § 9.4 (2d ed. 2002) (“The rule excluding innocence as a defense may be particularly onerous for the publisher or printer that relies on a putative author’s misrepresentations about the originality of his work. Even the most careful clearance procedures may fail to uncover the fact that the putative author is not the true author.”); see also discussion supra note 27 (explaining additional problems with the De Acosta decision).

29. E.g., Repp v. Webber, 132 F.3d 882, 889 (2d Cir. 1997) (“The fact that infringement is ‘subconscious’ or ‘innocent’ does not affect liability, although it may have some bearing on remedies.”); D.C. Comics Inc. v. Mini Gift Shop, 912 F.2d 29, 35 (2d Cir. 1990) (“It is important to note that a finding of innocent infringement does not absolve the defendant of liability under the Copyright Act.”); CoStar Group, Inc. v. LoopNet, Inc., 106 F. Supp. 2d 780, 787 (D. Md. 2000) (noting that “the distinction between negligent and intentional infringement is irrelevant for purposes of liability”); Educ. Testing Serv. v. Simon, 95 F. Supp. 2d 1081, 1087 (C.D. Cal. 1999) (“There is no need to prove anything about a defendant’s mental state to establish copyright infringement; it is a strict liability tort.”).
A. The Historical Justification

Modern courts and commentators often rationalize strict liability in copyright by arguing from history. In essence, they argue that strict liability is justified in copyright today because it was a part of copyright yesterday. A close examination of both early British and early American copyright law, however, reveals that strict liability has not always been a key component of copyright's liability framework. On the contrary, the culpability of the infringer has long been an important factor in assessing liability, although its importance has waxed and waned over copyright's three-hundred year history.

The infringer's culpability played a critical role in the first Western copyright legislation, the Statute of Anne, enacted by Parliament in 1710. Although lauded for its decidedly "pro-author" protection of copyrighted works, the Statute of Anne contained several provisions expressly designed to protect innocent infringers, described in the statute as those who "may through Ignorance Offend against this Act." First, the statute contained stringent registration and notice requirements intended to protect the innocent from liability. Penalties for infringement were expressly conditioned on the pre-publication registration of the title of the copyrighted work in the registry of the Stationers' Company. This registry of works was designed to be easily accessible and available for inspection, without "fee or charge," by any "bookseller, printer, or other person," at all

30. See discussion supra Part II.
31. See discussion infra notes 33-43 and accompanying text.
32. See discussion infra notes 44-55 and accompanying text.
33. 8 Ann., c. 19 (1709) (Eng.).
34. 1 Patry, supra note 8, at 11 (explaining that "the Statute of Anne was the first act to directly protect the rights of authors ... by granting them the exclusive right to reproduce their intangible creations").
35. Id.; see also 8 Ann., c. 19 (1709) (Eng.).
36. Ruth Okediji, Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace, 53 Fla. L. Rev. 107, 155 (2001) (explaining that "in the early history of copyright law, copyright was granted only to authors that fulfilled certain formal requirements ... [e]arly American copyright acts also had a similar requirement"). According to Professor Okediji:
(R)egistration of title requirements for copyright ... performed central roles in the actual grant of the right itself because these 'formalities' facilitated access to the protected works ... [and] [t]he historic requirement of compliance with certain formalities prior to the grant of copyright makes clear that the copyright grant was not conceived as an absolute, unregulable right.
Id. at 155-56.
37. 1 Patry, supra note 8, at 11; see also 8 Ann., c. 19 § II (1709) (Eng.).
“seasonable and convenient times.” Subsequent British legislation required that notice of registration appear on every copyrighted work. And, as further protection of the “ignorant” infringer, assignments of copyrights were likewise subject to these strict recordation requirements.

Second, in contrast to modern American copyright law, the Statute of Anne distinguished among classes of infringers based, in part, on their relative culpability or innocence. According to the statute, booksellers, printers, and importers who “printed, reprinted or imported” or “caused to be printed, reprinted or imported” copyrighted works, without the consent of the author, were strictly liable for infringement. However, booksellers who merely sold, published or “expose[d] to sale” works that were printed or reprinted without the consent of the author, were liable only if they knew the works to be infringing. Thus, although drafted for the protection and “encouragement” of authors and other “learned men,” the Statute of Anne clearly addressed—and protected—the “ignorant” infringer.

Similarly, the infringer’s culpability played an important role in early colonial statutes, most of which were based largely—and in some cases exclusively—on the Statute of Anne. Many states followed the British model verbatim and carefully constructed their statutes to distinguish between innocent and willful infringers. Five states distinguished between those who printed an infringing work and those who merely distributed the work; the infringing printer was liable regardless of his state of mind, the distributor only if he knew the sale was unauthorized. Three other states predicated sellers’ liability for infringement on whether the seller knew the

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38. 8 Ann. c. 19 § II (1709) (Eng.).
39. 1 Patry, supra note 8, at 11.
40. Id. at 11-12.
41. 8 Ann., c. 19 (1709) (Eng.).
42. Id.
43. Id.
44. Bruce Bugbee, The Genesis of American Patent and Copyright Law 115 (1967) (explaining that “the influence of England’s Statute of Anne was strongly evident in the Maryland measure which bore what was almost a copy of its preamble and describing the registration requirements as “wording copied directly from the Statute of Anne”).
45. See Latman & Tager, supra note 8, at 140. Four states, Massachusetts, New Hampshire, Rhode Island, and Pennsylvania did not include a willfulness or scienter requirement. Id. at n.7. However, even these four “strict liability states” courts may have considered the defendant’s relative culpability in assessing damages. Id.
46. Connecticut, Georgia, New Jersey, New York, and North Carolina. Id. at n.9.
47. Id.
infringing copy was printed without authorization.\textsuperscript{48} Culpability played an important role in early federal copyright legislation.\textsuperscript{49} The first federal Copyright Act, enacted in 1790, retained the distinction between printers, publishers and importers, on the one hand, and sellers on the other.\textsuperscript{50} Generally, under the 1790 Act, those who published, printed or imported without the consent of the copyright owner were strictly liable for infringement, while those who merely distributed or sold infringing copies were liable only if they knew the copies were printed or imported without consent.\textsuperscript{51} Congress retained these important distinctions in the Copyright Act of 1870.\textsuperscript{52}

Strict liability, as we now know it, first came into American copyright law only in the Copyright Act of 1909.\textsuperscript{53} In that act, Congress eliminated the distinctions between innocent and culpable infringers previously contained in the 1870 Act. However, when Congress undertook its most recent overhaul of federal copyright law in the Copyright Act of 1976, it chose to maintain the strict liability approach of the 1909 Act rather than to reprise the more significant role culpability played in the 1870 Act and earlier legislation.\textsuperscript{54}

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48. Id. at 140-41. Significantly, the statutes of these three states, Virginia, Maryland, and South Carolina, served as the model for the first federal copyright statute, the Copyright Act of 1790. Unfortunately, because these early state statutes were supplanted by federal copyright legislation a mere ten years after their enactment, there appears to be no case law applying or interpreting these provisions. LYMAN R. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 187-88 (1968) ("It seems fairly certain that there was no opportunity for courts to interpret the acts.").

49. Generally, the innocent vendor was the only "innocent infringer" protected by federal copyright law. See Latman & Tager, supra note 8, at 141 (noting that "[t]he general features of the law of innocent infringement were shaped prior to 1909 . . . except for the innocent vendor, innocence or a lack of intent to infringe was not generally a defense to an action for infringement").

50. Id. at 141.

51. Id.

52. Id.

53. Notably, however, the Copyright Act of 1909 did expressly recognize the predicament of the "innocent infringer" misled by the absence of notice. Under the Act, which required both registration and notice, omission of notice would not prevent an action for infringement if the infringer had "actual notice" of the copyright. Copyright Act of 1909 § 20, reprinted in 3 PATRY, supra note 8, at 1504. However, under the act, an innocent infringer "misled by the omission of the notice" was not liable for damages and could further claim reimbursement from the copyright owner of "his reasonable outlay" if the copyright owner sought a permanent injunction. Id.

54. There were several noteworthy, though ultimately unsuccessful attempts to modify the harsh strict liability standard for infringement. In 1931, the so-called "Veisai bill," provided that the innocent infringer, while liable for infringement, would be assessed "only an amount equivalent to a fair and reasonable license fee, within the limits of $50 to $2,500." Julian Caplan, The Measure of Recovery in Actions for the Infringement of Copyright, 37 MICH. L. REV. 564, 587 (1939) (noting that "it seems preferable to fix the amount the unintentional defendant must pay on a license rather

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Thus, American copyright law has not always taken a strict liability approach to infringement. On the contrary, strict liability—at least in its present, harsh form—is a relatively recent addition to our law. Given this, the argument that strict liability is justified by the ages is, as an historical matter, unfounded.

B. The Justification by Analogy to Tangible Property

Copyright infringement today is firmly established as a "strict liability tort" largely due to a well-worn yet deeply flawed analogy than on a penalty basis). Unfortunately, although the Vestal bill passed the House of Representatives, as a result of the filibuster on another bill, it was never voted on in the Senate. Id. at 585. Similarly, "the Duffy bill" which proposed to eliminate minimum statutory damages, leaving the assessment of damages to the discretion of the trial judge, was also defeated. Id. at 584.

The Copyright Act of 1976 does provide for certain limited allowances for the innocence or culpability of the infringer, however, these provisions are almost entirely discretionary and courts confronting innocent infringement have arrived at widely varying and often irreconcilable results. See discussion infra Part III.D.2.e.

55. The proper role of history and "past-dependence" in law is the subject of frequent debate. See OLIVER WENDELL HOLMES, The Path of the Law, in COLLECTED LEGAL PAPERS 167, 187 (1920).

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Id.

Law is the most historically oriented... the most backward-looking, the most 'past-dependent,' of the professions. It venerates tradition, precedent, pedigree, ritual, custom, ancient practices, ancient texts, archaic terminology, maturity, wisdom, seniority, gerontocracy, and interpretation... it is suspicious of innovation, discontinuities, 'paradigm shifts,' and the energy and brashness of youth.


According to Judge Posner, "if the only reason that can be given for deciding one way rather than another is that this is how it was done in the past, it is a feeble reason, though good enough if there is no reason to change." Id. at 589; see also Anthony T. Kronman, Precedent and Tradition, 99 YALE L.J. 1029, 1057 (1990) ("The idea that we are bound, within whatever limits, to honor the past for its own sake, to respect it just because it is the past we happen to have, is an idea that is at war with the spirit of philosophy."). But see Homer Simpson, The Quotable Homer Simpson, available at http://www.people.virginia.edu/~der7s/homer.htm (last visited Sept. 6, 2001) ("I want to share something with you—three little sentences that will get you through life. Number one, 'Cover for me.' Number two, 'Oh, good idea, boss.' Number three, 'It was like that when I got here.'").

equating copyright to tangible property. That is, courts and commentators have justified the strict liability principles of

57. Gordon, Inquiry into the Merits of Copyright, supra note 11, at 1396 (explaining that "[a]s the tort cause of action denominated 'trespass' vindicates the duty to stay off strangers' land, the tort cause of action denominated 'infringement' vindicates the duty to refrain from copying others' works of authorship"); see also Laurie Stearns, Comment, Copy Wrong: Plagiarism, Process, Property, and the Law, 80 CAL. L. REV. 513, 536 (1992) (noting that the "development of copyright law in England and the United States has built upon this notion that the relationship between authors and their writings is that of owners to their property"). See generally Pamela Samuelson, Information as Property: De Buckelshaus and Carpenter Signal A Changing Direction in Intellectual Property Law?, 38 CATH. U. L. REV. 365, 398 (1989) ("Clearly, the word property is a very powerful metaphor that radically changes the stakes in legal disputes. Once a property interest is established, the law provides a wide range of legal protections for it . . .").

In addition to analogizing copyright and other forms of intellectual property to tangible property for purposes of infringement, commentators frequently explain copyright's liability framework as one protected by property rules:

[Intellectual property rights] are generally protected by 'property' rules, which authorize the owner to exclude others from certain uses of the property, as opposed to liability rules, which authorize others to use the property subject to an obligation to pay damages.


As one commentator has explained:

[Intellectual property rights] fit the criteria set up by Calabresi and Melamed for application of a property rule: (1) there are only two parties to the transaction; (2) the costs of a transaction between the parties are otherwise low; and, most importantly, (3) a court called on to set the terms of the transaction would have a difficult time doing so quickly and cheaply, given the specialized nature of the asset and the varied and complex business environments in which they are deployed . . . it is difficult for a court in an infringement case to properly value the right-holder's loss.


58. E.g., Waring v. Dunlee, 26 F. Supp. 338, 340 (E.D.N.C. 1939) ("Rights in personal property are of no less importance than rights in real property . . . [n]othing can with greater propriety be called a man's property than the fruit of his brain."); see also 4 NIMMER, supra note 8, § 13.08 ("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."); PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 8-9 (1994) ("An author's right to ward off unauthorized copying of his work is much like a homeowner's right to keep trespassers off his land.").

The copyright plaintiff need not even prove that defendants knew they were copying; as in trespass to reality, where a good faith and reasonable belief that one is on one's own land will not protect a defendant who ignorantly
copyright by likening them to the strict liability principles of tangible property law.59 Although "intellectual property" has long been compared to "property,60 and "infringement of copyright" compared to "tresspass to reality,61 these analogies are problematic because they reflect a fundamental misunderstanding of both the practical and theoretical underpinnings of modern copyright law.62

crosses a neighbor's boundary, even unconscious copying gives rise to liability in copyright cases.

Gordon, Inquiry Into the Merits of Copyright, supra note 11, at 1391.

[The restrictions which we may cast around the property of intellect must be made with the confession of rightfulness of that property . . . it has the same sanctities of other human interests, and that society is as much interested in maintaining its bounds as it is in protecting ancestral acres, or the other well accepted forms of property.

Thorvald Solberg, Copyright Reform: Legislation and International Copyright, 14 NOTRE DAME L. REV. 343, 359 (1939).

The concept of absolute liability for infringement appears to have stemmed from the early view that no property was more emphatically a man's own than his literary works, and that therefore they must be afforded legal protection to the same extent as his real or personal property.

Sinclair, supra note 8, at 945.

59. See Mark Rose, Authors and Owners 90 (1993) ("The reifying metaphor of literary property as a landed estate was . . . well established by the middle of the eighteenth century.").

60. See, e.g., Howard B. Abrams, The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright, 29 WAYNE L. REV. 1119, 1122 (1983) ("Copyright can be viewed as an inherent natural right or property right of the author stemming from the act of creation."); Gordon, Inquiry into the Merits of Copyright, supra note 11, at 1378 ("I suggest that copyright is functionally as well as structurally consistent with tangible property."); see also William B. Stoebruck & Dale A. Whittman, The Law of Property § 1.4 (3d ed. 2000) ("The list of 'things' that may form the subject matter of 'personal property' is long, including . . . patents, copyrights, and trademarks.").

61. See Gordon, An Inquiry into the Merits of Copyright, supra note 11, at 1391; Jessica Litman, The Public Domain, 39 EMORY L.J. 965, 970-71 (1990) (hereinafter Litman, The Public Domain) (explaining that "[t]he system creates legal rights akin to property rights . . . [t]he model for these property rights is real property . . . (and) invasion of these rights is actionable on a strict liability basis, akin to the traditional formulation of trespass to land").

62. Commentators frequently point to the many failings of this analogy. See, e.g., Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 HARV. L. REV. 281, 288 (1970) (explaining that one justification offered in defense of copyright is based "upon an intuitive, unanalyzed feeling that an author's book is his 'property,'" and questioning why we have such a feeling when "[a]n intellectual creation differs radically from land and chattels"); see also Mark A. Lemley, Romantic Authorship and the Rhetoric of Property, 75 TEX. L. REV. 873, 902 (1997) (book review) (hereinafter Lemley, Romantic Authorship) ("I happen to think that the 'proprietization' of intellectual property is a very bad idea . . . [w]e do not, after all, propertize other public goods (such as national defense or lighthouses), attempting to give their creators a legal right to exclude others."). According to Professor Lemley, "the public nature of a good seems to suggest
1. Origins

The copyright-as-property analogy is deeply rooted in Anglo-American law. As early as 567 A.D., the Irish King Diarmaid purportedly recited that theory when considering a student's infringement of his teacher's psalm book. The King ruled that both the original and the "infringing" copy rightfully belonged to the teacher, explaining, "To every cow her calf, and accordingly to every book its copy."

Despite these sixth century roots, the copyright-as-property analogy did not mature until the late seventeenth and early eighteenth centuries in the writings of Locke and in the Statue of Anne. Adopting—or perhaps co-opting—the Lockean theory of that propertization is a uniquely bad idea, precisely because the consumption of that good is 'nonrivalrous'—it does not take away from the creator of that good." Id.; see also Litman, The Public Domain, supra note 61, at 971 ("Treating intellectual property as if it were real property, of course, can be problematic."); L. Ray Patterson, Folsom v. Marsh and Its Legacy, 5 J. INTELL. PROP. L. 431, 443 (1998) ("The traditional view is that copyright, whatever its jurisprudential basis, is a property right, and thus is a subset of property law . . . this view is in error . . . copyright is best seen as a special kind of property created from public domain materials and . . . thus best treated as a subset of public domain law."); L. Ray Patterson, Free Speech, Copyright, and Fair Use, 40 VAND. L. REV. 1, 9 (1987) ("In view copyright as protecting property is to subject its regulatory aspects to proprietary concepts and thus to minimize, if not defeat, the goal of public access.").

63. The story of King Diarmaid is a favorite among copyright scholars. E.g., LATMAN, THE COPYRIGHT LAW, supra note 14, at 2; Linda J. Lacey, Of Bread and Roses and Copyrights, 1989 DUKE L.J. 1532, 1541 (1989) (describing the story of Diarmaid as a "graphic statement of the fruits-of-the-creator's-labor natural law theory"); Stearns, supra note 57, at 535 ("Diarmed saw the book as [the teacher's] property, the ownership of which entitled [him] to its product, the copy. The king's ruling thus pointed in the direction of the future development of copyright law.").

64. Stearns, supra note 57, at 535.

65. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 17 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690). According to Locke, "[w]hatsoever then [man] removes out of the state that nature has provided and left in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property." Id. Although historically Locke's theory has been used to both justify and defend copyright law, Locke himself did not foresee a system of property rights in intellectual property.

The analogy was easy enough: physical labour drew wealth from virgin land; intellectual labour produced mental constructs starting from the tabula rasa of the mind at birth. Eighteenth-century thinkers such as Diderot made just this connection: just as property rights prompted farmers to cultivate the land, copyright was needed to furnish incentives for authors to develop works of the mind.

labor-as-property,66 British booksellers, urging the passage of the Statute of Anne, "took advantage of the prevailing view that property arose from the labor of the individual[,]" and that, as a result, all copies were the property of the laboring author.67 Thus, as evidenced by the Statute of Anne and British case law, both legislators and courts in Britain applied this Lockean view of "property" to conclude that infringement is the equivalent of a "trespass" on the property of the author. Accordingly, as in trespass to property, intent was irrelevant in copyright infringement actions.66

The copyright-as-property analogy was readily imported to the American colonies. Indeed, the analogy was embraced by both the framers of the United States Constitution69 and the drafters of interpretations: "One... is that society rewards labor with property purely on the instrumental grounds that we must provide rewards to get labor." Id. at 296.
Alternatively, "a normative interpretation of this labor theory says that labor should be rewarded." Id. Hughes contends that either interpretation of Locke provides a compelling justification for intellectual property law. Id. at 296-97.

66. The "labor theory" of John Locke has been characterized as follows:
An equality-of-opportunity theory about the acquisition of property rights... whenever an individual joins his labor with a resource that previously belonged to mankind in common, the individual laborer acquires a private property right in that resource, at least so long as 'enough, and as good' of the resource is left for other potential laborers.


68. See, e.g., Lee v. Simpson, 136 Eng. Rep. 549, 554 (1847) ("The plaintiff's rights do not depend upon the innocence or guilt of the defendant. It seems to us, therefore, that... the allegation and proof of a scirent were not necessary to entitle the plaintiff to such protection. The statute would altogether fail to effect its object, if it were necessary to shew [sic] that the defendant had a knowledge of the plaintiff's right to property."); Campbell v. Scott, 59 Eng. Rep. 784, 787 (1842) (explaining that "if A. takes the property of B., the animus furandi is inferred from the act"); see also Hugh Ladder et al., The Modern Law of Copyright 2 (1980) ("If there has been copying it is not a complete defense [sic] that it was done innocently; thus a publisher who brings out a book which unbeknownst to him, was in fact largely derived from some existing book still in copyright cannot excuse himself by proving that he acted in good faith.").

69. The text of the Copyright and Patent Clause is generally attributed to James Madison and Charles Pinckney. Patterson, supra note 48, at 192-93. However, because the clause was adopted, on September 5, 1787, in "secret" and without public debate, little is known about the framers' intent in enacting the Copyright Clause. See Leaffer, supra note 14, § 1.4. It appears clear that the framers were influenced by prevailing copyright law and thought in England, a fact James Madison acknowledged in his only writing on the subject:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The right to useful inventions, seems with equal reason to belong to the inventors. The public good fully coincides in both cases, with the claims of
subsequent American copyright legislation.\textsuperscript{70} Although federal copyright law "got off to a slow start\textsuperscript{71}" in the United States, the Continental Congress recommended that states enact their own copyright laws—a recommendation that was followed by twelve of the thirteen young colonies.\textsuperscript{72} These early state statutes reflect the profound influence of Locke’s property theory on American copyright law. Many expressly acknowledged the goal of “securing to authors” a property right in their work.\textsuperscript{73} And like their English antecedents,
these early statutes proclaimed any infringement of copyright as a "trespass" on this right.

Modern American courts have dutifully adhered to the letter and "Lockean spirit" of the copyright-as-property analogy, relying on the corollary analogy (infringement-as-trespass) to justify strict liability in the context of innocent infringement. Indeed, courts attempting to explain seemingly harsh holdings, have analogized an author's copyright to many disparate forms of tangible property—from land, to cattle to horses. As one court succinctly explained, the "piratical

men, there being no property more peculiarly a man's own than that which is procured by the labor of his mind.

Id. at 1001 (quoting Mass. Act of Mar. 17, 1783, reprinted in Copyright Off. Bull. No. 3, at 11 (1903)); see also Abrams, supra note 60, at 1174 (noting that one of the two major themes to emerge from an examination of the early state copyright statutes is "that copyright is clearly regarded as an author's right, founded on the act of creation").


By the middle of the 17th century, the common-law recognized an author's right to prevent the unauthorized publication of his manuscript. This protection derived from the principle that the manuscript was the product of intellectual labor and was as much the author's property as the material on which it was written.

Id. (citations omitted). As the Supreme Court explained, "[a]ctions seeking damages for infringement of common-law copyright, like actions seeking damages for invasions of other property rights, were tried in courts of law in actions on the case." Id.; see also Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Orgel v. Clark Boardman Co., 301 F.2d 119, 120 (2d Cir. 1962) ("Appropriation of the fruits of another's labor and skill in order to publish a rival work without the expenditure of the time and effort required for independently arrived at results is copyright infringement."); Alibi, Inc. v. Standard Brands Paint Co., 323 F. Supp. 1400, 1404 (C.D. Cal. 1970).

75. Sony Corp. v. Universal City Studios, 464 U.S. 417, 433 (1984) (describing copyright infringer as one who "trespasses" onto the "exclusive domain" of the copyright owner); Brady v. Daly, 82 F. 1007, 1011 (2d Cir. 1897) (describing infringement as a "trespass"); Metro-Goldwyn-Mayer Distrib. Corp. v. Fisher, 10 F. Supp. 745, 747 (D. Md. 1935) ("The violation of a copyright is classed as a tort and for injunctive purposes may be considered analogous to trespassing on real estate."); Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc., 5 F. Supp. 808, 809 (S.D.N.Y. 1934) ("A copy which is substantially the same . . . is . . . a trespass on the plaintiffs' protected zone and entitles him to relief against the infringer."); Scribner v. Clark, 50 F. 473, 475 (N.D. Ill. 1888) ("The trespass charged in the bill, and established by the proof, is upon the property of the complainant, to which he has title by virtue of his copyright.").

76. Harms v. Cohen, 279 F. 276, 280 (E.D. Pa. 1922) (rejecting infringer's defense based on the plaintiffs' alleged violations of the Sherman Act). The court noted:

If he can set up an unlawful combination as a defense to his infringement of the copyright, then any one who wrongfully trespasses upon or takes the property of another may set up as a defense that the property was being held and used by a member of an unlawful combination . . . if one took possession of cattle or beef belonging to a corporation or individual . . . he would be
publication" of a copyrighted work, even if innocent, should no more deprive a copyright owner of his rights in his work than would the theft and subsequent "unlawful sale" of his horse to an innocent stranger.79

2. Misapplication

To the extent that tangible property law is sufficiently similar to copyright law to justify similar legal treatment, then the law should treat the two similarly. However, with regard to culpability, it does not. Copyright law is neither as accommodating nor as forgiving of the innocent and ignorant as is traditional property law.79 Although "innocence is no defense" to the trespass of copyright infringement,80 innocence is frequently a mitigating factor or a complete defense to trespass, conversion and other laws affecting tangible property.

Trespassing laws frequently account for the relative innocence or culpability of a trespasser. Indeed, contrary to popular copyright rhetoric, tort liability for trespass is expressly conditioned on intent.81

relieved from liability to pay for the property so taken . . . upon producing proof that the owner was engaged in such unlawful combination.

Id. 77. Am. Press Ass'n v. Daily Story Publ'g Co., 120 F. 766, 768 (7th Cir. 1902). The court determined:

The copyright of the appellee was property, of which it could not be legally deprived without its consent. Title to copyright is no more lost by the theft of the manuscript, or piratical publication of it, than is one's title to a horse lost by the stealing of it, or by the unlawful sale of it to a stranger.

Id. 78. Id. at 768. Likewise, many modern scholars continue to argue strenuously for the continued "propertization" of copyright law. The "propertization" of intellectual property law is a term coined by Professor Mark A. Lemley to describe recent trends in intellectual property law. Lemley, Romantic Authorship, supra note 62, at 895. According to Professor Lemley, "the rhetoric and economic theory of real property are increasingly dominating the discourse and conclusions of a very different world of intellectual property." Id.; see also Frank H. Easterbrook, Intellectual Property is Still Property, 13 HARV. J.L. & PUB. POL'Y 108, 113 (1990) ("Intellectual property is no less the fruit of one's labor than is physical property."). According to Judge Easterbrook, "[e]xcept in the rarest case, we should treat intellectual property and physical property identically in the law." Id. at 118; see also NIMMER supra note 8, § 16.02, at 16-5 ("A copyright owner possesses a property interest in this absolute sense.").

79. See generally James Thompson, Note, Permanent Injunctions in Copyright Infringement: Moral and Economic Justifications for Balancing Individual Rights Instead of Following Harsh Rules, 7 S. CAL. INTERDISC. L.J. 477 (1998) (arguing that in issuing permanent injunctions federal courts should "follow the evolution of real property law, balancing the interests of the parties, rather than blindly granting permanent injunctive relief whenever the plaintiff prove[s] infringement").


81. RESTATEMENT (SECOND) OF TORTS § 158, at 277 (1965) ("One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other if he intentionally (a) enters land in the
Furthermore, both the tort and property laws of trespass specifically address the "accidental intruder." Under tort law, if a trespass is neither intentional nor negligent, the trespasser is immune from liability even if the unauthorized entry "causes harm to the possessor." Liability for criminal trespass generally hinges on both adequate notice of boundaries and the intent of the trespasser.

Conversion, which is popularly analogized to infringement of copyright, likewise takes into consideration the culpability of the convertor. The infringement-as-conversion analogy, first memorialized in the Second Circuit's holding in *De Acosta v. Brown*, remains an accepted rationale for applying strict liability to copyright infringers. However, as Judge Hand argued strenuously—albeit unsuccessfully—reliance on the tort of conversion is clearly

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82. **Restatement (Second) of Torts** § 166, at 304.

[An unintentional and non-negligent entry on land in the possession of another . . . does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest.

*Id.; see also Roger A. Cunningham et al., The Law of Property § 7.1, at 415 (2d ed. 1993) ("Any knowing entry upon the possessor's land is wrongful: it is a trespass.") (emphasis added); 1A George W. Thompson, Thompson on Real Property § 219, at 204 (1980) ("An involuntary intrusion is not a trespass.").

83. *Id.* The one notable exception to this rule is "where the actor is engaged in an abnormally dangerous activity." *Id.*

84. The Model Penal Code provides:

A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by . . . (b) posting in a manner prescribed by law or reasonably likely to come to the intention of intruders; or (c) fencing or other enclosure manifestly designed to exclude intruders.

MODEL PENAL CODE § 221.2 (2) (1962).

The analogy of copyright infringement to the crime of theft fails for similar reasons. See Lemley, *supra* note 62, at 896 ("Intellectual property cases and arguments are replete with references to infringement as 'theft,' which it assuredly is not, at least in the traditional meaning of that word."); see also Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991). Lemley cites *Grand Upright Music*, where the court dramatically referred to the commandment "Thou shalt not steal" in reaching its decision, as an example of the rhetoric of theft. Lemley, *supra* note 58, at 896 n. 126 (citing Grand Upright Music Ltd., 780 F. Supp. at 182). Of course, the crime of theft traditionally requires intent. MODEL PENAL CODE § 223.2 (1) ("A person is guilty of theft if he unlawfully takes . . . movable property of another with purpose to deprive him thereof.").

85. 146 F.2d at 412 ("The analogy of the cases has always been that of the conversion of literary property; and . . . the analogy here is complete to justify recovery against even an innocent copier."); see also Sinclair, *supra* note 8, at 946-47 (discussing *De Acosta*).

86. See 4 Nimmer, *supra* note 8, § 13.08, at 13-280 (noting that "innocent intent should no more constitute a defense in an infringement action than in the case of conversion of tangible personality").
misplaced because liability for conversion, like trespass, is expressly contingent on the intent of the actor.\textsuperscript{87}

3. Conceptual Pitfalls

The copyright-as-property analogy is problematic because it has been incompletely applied with regard to culpability, and also because, as a conceptual matter, it should not have been applied in the first place. Significant differences between copyright law and tangible property law call into question the soundness of analogizing one to the other in an effort to justify strict liability.

First, the copyright-as-property analogy is flawed because the things protected by each body of law are dissimilar. Unlike most tangible property, copyrighted works of authorship are "public goods" which are both "nonexcludable" and "inexhaustible."\textsuperscript{90} As

\begin{quote}
\textit{De Acosta}, 146 F.2d at 413 (Hand, J., dissenting); see also RESTATEMENT (SECOND) OF TORTS § 222 A(1) ("Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.").
\end{quote}

The De Acosta court's sweeping analogy of infringement to conversion tangible property prompted Professor Benjamin Kaplan to question the propriety of applying any of the rules governing tangible property to intellectual property such as copyrights:

I agree that copyright questions should not live behind palisades of parochialism; they should be constantly measured against general principles; but there is at the same time a danger of assimilating too easily the case of a man unknowingly taking a gold watch with that of a bookseller, selling a book which, unknown to him, contains a plagiarism.

\textit{Kaplan, supra} note 27, at 73.\textsuperscript{88}

\textit{See William W. Fisher III, Reconstructing the Fair Use Doctrine, 101 HARV. L. REV. 1659, 1700 (1988) ("Unlike most goods and services, [works of intellect] can be used and enjoyed by unlimited numbers of persons without being 'used up.'"); 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, 1610-11 (1982) [hereinafter Gordon, Fair Use as Market Failure] (discussing public-good characteristics of intellectual property and copyrighted works); Lacey, supra note 63, at 1554 (explaining that intellectual property is a "public good"); William M. Landes & Richard A. Posner, An Economic Analysis of Copyright Law, 18 J. LEGAL STUD. 325, 326 (1989) ("A distinguishing characteristic of intellectual property is its 'public good' aspect."); see also Tom G. Palmer, Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects, 13 HARV. J.L. & PUB. POLY 817, 818 n.3 (1990). In contrast, the material object in which the copyrighted work is embodied is distinct from the copyrighted work, see 17 U.S.C. § 202 (1994), and is a "private" rather than a "public" good.

\textit{See Stephen L. Carter, Owning What Doesn't Exist, 13 HARV. J.L. & PUB. POLY 99, 102 (1990) (explaining that public goods are non-excludable and "can generally be taken by a second user at a cost close to zero"). But see Gordon, An Inquiry Into the Merits of Copyright, supra note 11, at 1388 (explaining that copyright, "like the right at the core of tangible property, can be viewed as a right of exclusion.").

\textit{Richard A. Posner, Economic Analysis of Law} § 3.3, at 41 (4th ed. 1992) ("A's use of some piece of information will not make it more costly for B to use the
nonexcludable public goods, copyrights can be enjoyed by a "second user" at little or no additional cost. As inexhaustible public goods, copyrights can be used—and reused—with virtually no diminution in value to either the author or the potential user.

Because copyrighted works are nonexcludable and inexhaustible public goods, the property rights in works of authorship created by copyright law are significantly weaker than the rights in tangible property. For example, unlike tangible property law, copyright law sometimes permits the public to use copyrighted works for free or upon the payment of a statutory royalty. Because another's use of a nonexcludable work of authorship does not prevent the owner from simultaneously using it, copyright law should, and does, treat intentional takers less harshly than tangible property law treats its unwanted interlopers.

Second, the copyright-as-property analogy is problematic not only because the things protected by each body of law are dissimilar, but also because the rights conferred by each are distinct. Indeed, the rights conferred by copyright, unlike the rights conferred by traditional property law, are subject to extensive limitations. Copyrights, unlike traditional property rights in tangible property are "neither unlimited nor perpetual." Although tangible property

_\footnote{same information.}; see also Breyer, _supra_ note 62, at 288-89 ("Since ideas are infinitely divisible, property rights are not needed to prevent congestion, interference, or strife."); John Cirace, _When Does Complete Copying of Copyrighted Works for Purposes Other Than For Profit or Sale Constitute Fair Use? An Economic Analysis of the Sony Betamax and Williams & Wilkins Cases_, 28 ST. LOUIS UNIV. L.J. 647, 657 (1984) ("Private goods are such that when consumed by A cannot be consumed by B, C, or D. An apple is an example. Public goods are those whose consumption by individual A does not preclude consumption by B, C, D, or others. Examples are national defense, open-air concerts, fireworks displays, and information in journal articles."); _Carter, supra_ note 89.

91. _See_ _Carter, supra_ note 89.

92. _Id._; see also _Posner, supra_ note 90 ("One striking difference between intellectual property and most other forms of property is the fact that the majority of works of art, once produced, can be reproduced an infinite number of times at little cost. Arguably . . . the harm to the copyright holder, when her work is 'stolen' through reproduction, is not as great as the harm to other property owners."); _Samuelson, supra_ note 57, at 371 (explaining that "use by one person does not diminish the supply available to others once the good is produced"); _Lacey, supra_ note 63, at 1553.


94. _Yen, supra_ note 67, at 557 ("Authors certainly create material in which they deserve property rights. The point is that the property rights authors deserve under natural law are neither unlimited nor perpetual."). According to _Yen, "even if property
owners are generally entitled to exercise "direct, immediate, and exclusive authority" over their property, and to "use, enjoy, and dispose" of their property "within the limits of the law." Copyright's "property right" is a set of limited rights of a limited duration, with the ultimate goal of all works entering the public domain. Similar limits or a right of reversion to public use applied to tangible property would surely be considered an anathema to American notions of private property, and would likely be proscribed by the Takings Clause of the United States Constitution. However, such limits are essential components of copyright law and are often beneficial to the copyright owner. These restrictions—both real and

rights are recognized, it is entirely appropriate to restrict those rights to a limited number of years." Id.; see also Hughes, supra note 65, at 296 ("Perhaps the greatest difference between the bundles of intellectual property rights and the bundles of rights over other types of property is that intellectual property always has a self-defined expiration, a built-in sunset."); Jessica Litman, Revising Copyright Law for the Information Age, 75 OR. L. REV. 19, 31 (1996) (explaining that "copyright owners . . . have never been entitled to control all uses of their works. Instead, Congress has accorded copyright owners some exclusive rights, and reserved other rights to the general public.").

95. See, e.g., LA. CIV. CODE ANN. art. 477 (West 1980) (emphasis added). One commentator has vividly described the nature of private property in terms of a "label" which reads: "To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private Citizen Endorsed: The state." Felix Cohen, Dialogue on Private Property, 9 RUTGERS L. REV. 357, 374 (1954).

96. LA. CIV. CODE ANN. art. 477.

97. L. Ray Patterson, Copyright and the "Exclusive Right" of Authors, 1 J. INTELL. PROP. L. 1, 28 (1993) [hereinafter Patterson, Copyright and the "Exclusive Right"] (describing this as the "limited-grant principle—copyright is the statutory grant of a monopoly limited in scope as well as time"); see also Gordon, Inquiry into the Merits of Copyright, supra note 11, at 1383 ("[C]opyright gives proprietors defined rights over specific ways in which people can benefit from a work, rather than giving authors a generalized right to all the benefits."); Merges, supra note 57, at 2668 (noting that "there are two general exceptions to the strong property rules for [intellectual property rules] . . . [c]ompulsory licenses . . . and various doctrines, best explained as responses to market failure of one kind or another, excuse infringement of otherwise protected work"); Okediji, supra note 36, at 157 (explaining that "[l]imited terms serve to ensure that protected works lapse into the public domain where they may be used freely in their entirety by others which aids public welfare"); see also Sony, 464 U.S. at 432 (explaining that "copyright protection has never accorded the copyright owner complete control over all possible uses of his work").

98. See U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."); see also STOEBUCK & WHITMAN, supra note 60, § 9.4, at 524 (explaining that "governments may not enforce land-use regulations that cause a 'taking,' or if they choose to enforce them, must pay the owner compensation"). The "taking issue" has been described as "the most important issue in land-use law, perhaps in all the law of real property . . . [y]et . . . courts and lawyers seem much mystified—show much confusion—about the so-called 'taking issue.'" Id.

99. See POSNER, supra note 90, § 3.3, at 41 (explaining that "it is more inefficient to have unowned land lying around . . . than to have unowned intellectual property").
temporal—further explain why copyright has been aptly described as
“both more and less than a property right.”

Third, the copyright-as-property analogy is flawed because
copyright law, unlike tangible property law, suffers from a severe
lack of demarcation. Boundaries establishing the limits of property
rights provide advance notice when an act will give rise to rights and
obligations established by property law. For example, “fences,”
“property lines,” and title records clearly define the boundaries of
traditional property. Because of the importance of boundaries,
rights affecting tangible property, such as liability for criminal
trespass of tangible property and acquisition of property through
adverse possession, have historically hinged on the posting of
boundaries or on “open and notorious” possession.

Unfortunately, works of authorship bear no similar delimiting
markings, boundaries or other demarcation. Copyright’s boundaries

Copyright owners themselves generally benefit from durational and other limits on
copyright protection because such limits decrease the cost of creating new work. Id. As
Judge Posner explains, “because most . . . creative works build heavily on other
creative works . . . [t]he greater the scope of the copyright protection of the earlier
works, the higher the cost of creating the subsequent works.” Id. In some cases, limits
on the copyright owner’s rights, such as fair use, may actually increase the value of
that right. Id. (offering example of book reviews as fair use that may increase value of
copyright by providing valuable free advertising).

100. See Patterson, Copyright and the “Exclusive Right,” supra note 97, at 37.
Professor Patterson has argued persuasively that the rights conferred by copyright
should be treated not as absolute property rights but rather as an “easement on
material taken from the public domain . . . the easement is a quid pro quo for the
author’s contribution to learning.” L. Ray Patterson, Understanding the Copyright

101. E.g., Gordon, Inquiry into the Merits of Copyright, supra note 11, at 1381 n.181
(“Boundaries and demarcation . . . help keep property rights from imposing
unanticipated obligations of payment on recipients of benefits.”); Wendy J. Gordon, Of
Harms and Benefits: Torts, Restitution, and Intellectual Property, 21 J. LEGAL
STUD. 449, 469 (1992) (explaining that “there must be demarcation; things that trigger
obligations of payment must be identifiable in advance and marked as such. The
legislature must define the covered subject matters . . . and producers must provide a
way to indicate which of the potentially covered subject matters . . . are owned and by
whom”); see also Wendy J. Gordon, On the Economics of Copyright, Restitution, and
“Fair Use”: Systemic Versus Case-by-Case Responses to Market Failure, 8 J. LAW &
INFO. SCI., 7, 16-17 (1997) [hereinafter Gordon, On the Economics of Copyright].

102. See STOEBUCK & WHITMAN, supra note 60, § 11.9, at 869.
Ownership of land can exist only because it is recognized and enforced by the
legal institutions of the state . . . it is not surprising that virtually all modern
governments have developed and operate systems of records designed to
permit interested persons to discover who owns any given parcel.

Id.

103. See generally 16 RICHARD R. POWELL & MICHAEL ALLAN WOLF, POWELL ON
REAL PROPERTY § 91.01 (2000).

104. Litman, The Public Domain, supra note 61, at 975 (“[T]he boundaries of
are difficult to discern, in part, because of the complex and evolving nature of intellectual property law.\textsuperscript{106} The current copyright law, encompassing hundreds of provisions within title 17 of the United States Code, is not only “long, complex, and counterintuitive,” but also “chock-full” of provisions that “don’t make a lot of sense.”\textsuperscript{106} Thus, unlike the relatively straightforward law of trespass—which generally provides for liability for any intentional trespass on the land of another\textsuperscript{107}—compliance with modern copyright law is often difficult, and in some cases nearly impossible.\textsuperscript{108} Moreover, the boundary-establishing provisions that do exist in copyright—fixation, the idea/expression dichotomy, originality and fair use—are subject to the ever shifting exceptions and exclusions that sporadically

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(\textsuperscript{106} The opponents of literary property argued that with no way of ascertaining whether the legal interest had been harmed, no means of identifying either the owner of the work or the work itself, and no means of drawing boundaries around the property to distinguish one person’s rights from another’s, intellectual ideas could not legitimately be considered as a species of property.

\textit{Id.} Although some scholars have argued that the requirements of fixation, the optional notice requirements, and other limits on copyrightability suffice to “identify the stakeholder over which others must respect the owner’s entitlements,” these boundaries fall far short of adequate notice to potential trespassers. Gordon, \textit{An Inquiry Into the Merits of Copyright}, supra note 11, at 1384.

\textsuperscript{105} This problem is getting worse not better. As copyright law has evolved, both jurisprudentially and statutorily, the boundaries between “invited entries” (such as fair use, parody, and the use of works in the public domain), and the “trespass” of infringement have become more difficult to divine.

\textsuperscript{106} Jessica Litman, \textit{The Exclusive Right to Read}, 13 CARDOZO ARTS & ENT. L.J. 29, 50 (1994) [hereinafter Litman, \textit{The Exclusive Right to Read}] (describing the Copyright Act as “remarkably education-resistant”). Professor Litman offers the compelling example of a bar owner attempting to comply with the licensing provisions of section 110(5) of the Copyright Act, who would surely be puzzled by the notion that a bar with one 27” television would not need a license, while another bar with two 13” televisions would. “Copyright lawyers might understand that the reason for this is that the words in section 110(5) say ‘single receiving apparatus of a kind commonly used in private homes,’ but there is nothing intuitively appealing about this distinction.” \textit{Id.; see also} Sheldon W. Halpern, \textit{The Digital Threat to the Normative Role of Copyright Law}, 62 OHIO ST. L.J. 569, 571 (2001) (“Complex legislation such as the law of copyright, can easily give rise to a fair amount of misunderstanding . . . . People generally are surprised to learn that singing Happy Birthday in a public restaurant is an infringing act.”).

\textsuperscript{107} \textit{Restatement (Second) of Torts} § 158, at 277 (1965) (“One is subject to liability to another for trespass . . . . if he intentionally (a) enters land in possession of the other, or causes a thing or a third person to do so . . . .”).

\textsuperscript{108} See Litman, \textit{The Exclusive Right to Read}, supra note 106, at 34 (“U.S. Copyright law is even more technical, inconsistent and difficult to understand; more importantly, it touches everyone and everything”).
\end{quote}
emerge from Congress and courts.\textsuperscript{109} Finally, and perhaps most
problematically, copyright no longer mandates notice\textsuperscript{110} and
registration.\textsuperscript{111} The elimination of these requirements, which were
hallmarks of the Statute of Anne and all federal copyright legislation
prior to the 1976 Act, has rendered current copyright law a fenceless
barren.

Although the copyright-as-property analogy has a venerable
history and many modern adherents, strict liability can not be
justified in copyright simply because it is justified in the realm of
tangible property law. Considering the "public good" nature of the
things protected by copyright, the limited extent of the copyright
entitlement and the imperceptibility of copyright's boundaries, those
who innocently infringe a copyright should not be treated as severely
as those who infringe rights in tangible property. Yet copyright
explicably holds all line-crossers—whether innocent or
malevolent—strictly liable for infringement.

C. The "Loss Avoidance" Justification

Commentators viewing strict liability in copyright from a law-
and-economics perspective have argued that strict liability is
appropriate under "loss avoidance" theory.\textsuperscript{112} Analogous to the
"cheapest cost avoider" principle in tort law,\textsuperscript{113} loss avoidance theory
justifies strict liability on the basis that as between owners and
infringers, it is more efficient for infringers to bear the costs of
infringement.\textsuperscript{114} Under this view, strict liability is warranted because

\textsuperscript{109} See, e.g., Litman, The Public Domain, supra note 61, at 975 ("The principle of
limiting copyright protection to only those aspects of a work that are original with its
author, while remarkably easy to state, proves to be impossible to apply.").

\textsuperscript{110} See 17 U.S.C. § 401(a) (1994) ("[A] notice of copyright as provided by this
section may be placed on publicly distributed copies from which the work can be
visually perceived." ) (emphasis added).

\textsuperscript{111} See id § 408(a) ("[T]he owner of copyright or of any exclusive right in the work
may obtain registration of the copyright claim by delivering to the Copyright Office the
deposit specified in this section . . . . Such registration is not a condition of copyright
protection.") (emphasis added).

\textsuperscript{112} See, e.g., Yen, Internet Service Provider Liability, supra note 7, at 1859 ("The
analogy between vicarious copyright liability for ISPs and strict products liability is
also fairly obvious. Both share the idea that one who introduces risk through
commerce should bear the costs associated with that risk . . . ."); Morril & Eaton, supra
note 8, at n.4 ("The commercial on-line service provider is in a position analogous to
the manufacturer as it launches into commerce a product . . . with the potential to do
harm . . . and the provider is best situated to prevent, or to allocate the cost of, that
harm.").

\textsuperscript{113} See Guido Calabresi & Jon T. Hirschoff, Toward a Test for Strict Liability in
Torts, 81 YALE L.J. 1055, 1060 (1972); see also Stephen G. Gilles, Negligence, Strict

\textsuperscript{114} DRONE, supra note 8, at 403 ("The theory of the law in this respect is, that
potential infringers are better able to avert infringement by, for example, taking precautionary measures such as inquiring into whether the work in question is copyrighted, or, by obtaining insurance for indemnity in the case of innocent infringement. Proponents of strict liability in tort law offer similar justifications, most notably in the field of products liability law. Scholars, led by Dean Guido Calabresi, have long advocated holding manufacturers of products liable without fault because they are presumably the “cheapest . . . cost avoiders” of accidents and injuries. According to

whoever avails himself of the labors of another must do so at his own risk, and must be held responsible for his acts without regard to the extent of his knowledge or ignorance.”; 2 GOLDSTEIN, supra note 28, § 9.4, at 9:17 (“The standard rationale for excluding innocence as a defense to copyright infringement is that, as between the copyright owner and the infringer, the infringer is better placed to guard against the mistake.”); LATMAN & TAGER, supra note 8, at 157 (“Perhaps the problem might be analyzed in terms of which of two innocent parties can more appropriately protect against infringement.”); LEAFFER, supra note 14, § 9.20(c), at 292 (“Liability . . . is not based on the doctrine of master-servant. The rationale is based instead on the right or power to control the infringing acts while financially benefiting from them.”); 4 NIMMER, supra note 8, § 13.08 (“As between two innocent parties (i.e., the copyright owner and the innocent infringer) it is the latter who should suffer because he, unlike the copyright owner, either has an opportunity to guard against the infringement by diligent inquiry, or at least the ability to guard against liability for infringement by an indemnity agreement from his supplier or by an ‘errors and omissions’ insurance policy.”); Sinclair, supra note 8, at 952 (“The argument is advanced on several levels that of the two innocent parties . . . the infringer is usually in a better position to protect against the chance of infringement.”); Recent Cases, 93 U. PA. L. REV. 459, 460 (1945) (“Practically, it would seem that the publisher is better able to prevent the added harm that occurs to the author of a plagiarized work . . . .”); Pinkham v. Sara Lee Corp., 983 F.2d 324, 829 (8th Cir. 1992) (rejecting defense argument based on apparent authority).

115. Perhaps the best example of this theory is found in Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304 (2d Cir. 1963). In Shapiro, the court found the defendant, a department store, vicariously liable for the sale of “bootleg” records by an independent concessionaire within the store, although the defendant had neither intent to infringe nor knowledge of the infringement. Id. at 308. Analogizing the department store owner to a dance hall owner, the court concluded that “the imposition of vicarious liability . . . cannot be deemed unduly harsh or unfair. . . . [The defendant] has the power to police carefully the conduct of its concessionaire . . . our judgment will simply encourage it to do so, thus placing responsibility where it can and should be effectively exercised.” Id.

116. Joseph H. King, Jr., A Goals-Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities, 48 BAYLOR L. REV. 341, 352-53 (1996) (“This goal requires appraisal of the actor's ability to systematically evaluate the risks of his activities and make sound cost-benefit decisions about the manner of operations as well as the level and location of the activity, safeguards, and alternatives.”); see also Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1962) (“The purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”).

this theory, injurers are appropriately held strictly liable because they were in "the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made."\textsuperscript{118}

Allocating liability pursuant to loss-avoidance ability may be justifiable in tort law, at least when "categories of activities" have been isolated in which "one type of actor is almost always the best minimizer of primary accident costs."\textsuperscript{119} This rationale, however, does not justify strict liability in copyright law.

Perhaps the most obvious and fundamental flaw in the loss avoidance justification stems from the very ignorance or innocence of some infringers. As a practical matter, an innocent infringer is incapable of avoiding infringement of which she is entirely unaware. This inconsistency has been described in the tort arena as a "fundamental contradiction" in the loss-avoidance rationale, "which purports to hold the innocent liable for a mistake . . . they somehow, 

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ANALYSIS 135 n.1 (1970) ("A pure market approach to primary cost avoidance would require allocation of accident costs to those acts or activities (or combinations of them) which could avoid the accident costs most cheaply."); see also Thomas C. Galligan, Jr. \textit{Strict Liability in Action: The Truncated Learned Hand Formula}, 52 LA. L. REV. 323, 344 (1991) ("[T]he manufacturer of a product, and to a lesser extent, the custodian of an unreasonably dangerous thing, are in the best position to detect defects in their products or things . . . . Calabresi-type liability would ideally cause those subject to it to take account of all of the costs of their activities."); David G. Owen, \textit{Rethinking the Policies of Strict Product Liability}, 33 VAND. L. REV. 681, 711 (1980) (explaining that "[m]anufacturers today, especially those of products that are technologically complex, often are in a far better position than consumers to discover, evaluate, and act upon, dangers that inhere in the products they make and sell"). This "loss avoidance" rationale is not without critics among tort law scholars. See, e.g., William C. Powers, Jr., \textit{Distinguishing Between Products and Services in Strict Liability}, 62 N.C. L. REV. 415, 427 (1984) ("This rationale is itself controversial . . . . [a]nd does not distinguish product injuries from other types of personal injuries. Victims of automobile accidents are often 'powerless' to protect themselves, and an alleged tortfeasor is in a better position to prevent the loss.").

\textsuperscript{118} See Calabresi & Hirschoff, supra note 113, at 1060 (emphasis omitted).

\textsuperscript{119} See DAVID W. BARNES & LYNN A. STOUT, THE ECONOMIC ANALYSIS OF LAW 108 (1992); see also RESTATEMENT (SECOND) OF TORTS § 519(1) (1977) ("One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm."). The Restatement sets forth six factors to consider in determining whether an activity is "abnormally dangerous." \textit{Id.} § 520. According to the Restatement, courts must assess the "existence of a high degree of risk of some harm;" the "likelihood that the harm that results from it will be great;" the "inability to eliminate the risk by the exercise of reasonable care;" the "extent to which the activity is not a matter of common usage;" the "inappropriateness of the activity to the place where it is carried on;" and the "extent to which the value to the community is outweighed by its dangerous attributes." \textit{Id.} See generally William K. Jones, \textit{Strict Liability for Hazardous Enterprise}, 92 COLUM. L. REV. 1705, 1715 (1992) ("The paradigm case is use of high explosives such as dynamite and nitroglycerin.").
although innocent, should have foreseen and avoided." Tort law mitigates the harshness of this "contradiction" by holding actors strictly liable for damages only when they engage in certain limited categories of activities—typically "ultra-hazardous" or "unreasonably dangerous" activities such as ownership of wild animals, the use of explosives, or the manufacture of products such as prescription drugs. Presumably, to avoid strict liability in tort individuals can simply avoid these types of activities.

In contrast, copyright law does not similarly limit the sweep of strict liability. On the contrary, copyright's broad strict liability regime ensnares those engaged in otherwise reasonable and socially desirable activity—the creation of works of authorship. The theoretical and practical failings of the "loss avoidance" rationale are perhaps most glaring in the context of unconscious infringement. Unconscious infringement is often the unfortunate result of the defendant's "memory play[ing] him a trick," causing him to forget that the plaintiff's work is actually "the source upon which he is drawing." In theory, loss avoidance expects the impossible: that in the midst of the "creative process" an author can successfully distill

120. King, supra note 116, at 353-54 ("On the one hand, strict liability may be imposed on a defendant even if that defendant is innocent. Yet, the very existence of loss avoidance goals by definition assumes that some aspect of the defendant's activity could have been changed for the better.").

121. See Jed Handelsman Shugerman, Note, The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age, 110 YALE L.J. 303, 307 (2000) (detailing the rise of strict liability in the United States and explaining that "ultimately, a series of terrifying experiences with the [industrial] revolution's darker side made the industrial age's risks more salient and triggered a wide imposition of strict liability").

122. See KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 169-70 (1997) (explaining that "the more dangerous and less-common the activity, the more likely it was to qualify as ultrahazardous").

123. See 4 NIMMER, supra note 8, § 13.08; see also Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936) ("With so many sources before them they might quite honestly forget what they took; nobody knows the origin of his inventions; memory and fancy merge even in adults. Yet unconscious plagiarism is actionable quite as much as deliberate.").

124. See Fred Fisher, Inc. v. Dillingham, 298 F. 145, 148 (S.D.N.Y. 1924) (noting that such a "trick" is "no excuse").

125. See 4 NIMMER, supra note 8, § 13.08; see also Jessica Litman, Copyright as Myth, 53 U. PITT. L. REV. 235, 240 (1991) (describing "the metaphysical question of differentiating independently created expression from subconsciously copied expression" and explaining that "an author who proposes to use a copyrighted work as a building block for the work she intends to create, or expects to rely on fragments of copyrighted expression mined from her subconscious memory, must seek the permission of the copyright owner . . . before she begins her work").

126. See Rochelle Cooper Dreyfuss, The Creative Employee and the Copyright Act of 1976, 54 U. CHI. L. REV. 590, 606-08 (1987) (describing the "intensely personal" process of "conceptualization" and explaining that "a host of influences operate on the
from his subconscious the portion of his work that is derived from
other works from that which is truly “original.” In practice, this
theory further assumes that an author can avoid infringement by
undertaking the herculean task of locating, and presumably
receiving a license from, each of his “muses.” Thus, although an
innocent infringer has not knowingly assumed the risk of strict
liability by engaging in a category of activities previously determined
to be “unreasonably dangerous” or “ultra-hazardous,” he will

creator at this stage... [s]he starts with certain innate abilities, a need to
communicate and to be recognized, as well as a desire to contribute to the cultural
heritage”). According to Dreyfuss, the creative process is largely “self-generating” and
introspective; “[m]any creators claim... that the value in their work depends entirely
on its fidelity to their inner vision.” Id. at 608.

127. There is a compelling argument that no expression is truly original. See
Litman, The Public Domain, supra note 61, at 1911 (“All works of authorship, even the
most creative, include some elements adapted from raw material that the author first
encountered in someone else’s work.”). According to Professor Litman, this “amnesia
is a “blessing that enables the work to proceed without the paralysis that would follow
from examining each accretion for echoes of prior work.” Id. Professor Zechariah
Chafee pointed out long ago that “the world goes ahead because each of us builds on
the work of our predecessor.” Zechariah Chafee, Reflections on the Law of Copyright I,
45 COLUM. L. REV. 503, 511 (1945). As Professor Chafee explained with an apt and
now-famous metaphor, such “building” should be encouraged because “the dwarf
standing on the shoulders of a giant can see farther than the giant himself... the very
policy which leads the law to encourage his creativeness also justifies it in facilitating
the creativeness of others.” Id.

128. Jessica Litman has persuasively outlined the flaws in this reasoning. See
Litman, Copyright as Myth, supra note 125, at 241. According to Professor Litman,
The metaphysical question of differentiating independently created
expression from subconsciously copied expression deserves a literature of its
own... We cannot tell the difference, but copyright law asks us all to
behave as if we could. An author who proposes to use a copyrighted work as
a building block for the work she intends to create, or expects to rely on
fragments of copyrighted expression mined from her subconscious memory,
must seek the permission of the copyright owner or owners before she begins
her work—or so the law would have it... [i]t can’t be done.

Id.; cf. Shira Perlmutter, Freeing Copyright From Formalities, 13 CARDozo ARTS &

What about the creative second author wishing to build on a prior work?... [s]he must assume that the work is protected by copyright, and that the full
range of statutory remedies will be available in any infringement suit. It is
far from obvious this is a negative.

Id. According to Professor Perlmutter, the “law abiding author” is presented with three
choices: “to refrain from using substantial amounts of her predecessor’s expression, to
rely in good faith on a fair use defense, or to locate the copyright owner and request
permission.” Id. Similarly, Professor Paul Goldstein has argued that strict liability
“operates well... in the case of the forgetful plagiarist” because the rule will “spur the
absentminded composer to improve his memory so that he is more likely to remember
the source as well as the content of the composition.” See GOLDSTEIN, supra note 28, §

129. It is the uniquely hazardous nature of certain activities that warrants the
nevertheless be held strictly liable if he innocently infringes the copyright of another.\textsuperscript{130}

Although most apparent in the context of unconscious infringement, the loss-avoidance rationale is equally vacuous as applied to other infringers. Unlike the comparatively static and predictable body of strict liability tort law,\textsuperscript{131} copyright law is

imposition of strict liability in tort. See Abraham, supra note 122, at 170.

... the more likely it is to destroy evidence that would enable to proof that the defendant conducted the activity negligently ... the more uncommon an activity is ... the more likely it is that the activity-level and research incentives created by the threat of strict liability will be most effective operating on potential injurers rather than on potential victims.

Id.; see also Posner, supra note 90, at 178 ("Through the concept of ultrahazardous activities the tort law imposes strict liability on activities that involve a high degree of danger that cannot feasibly be prevented by the actor's being careful or potential victim's being careful."); Victor E. Schwartz et al., Prosser, Wade and Schwartz's Torts 701-02 (10th ed. 2000) (describing the varied activities and materials subject to strict liability such as the transport of toxic chemicals, pile driving, crop dusting, poisonous gases, the testing of rockets, fireworks displays, hazardous waste disposal, oil wells, and water escape).

130. Courts have long struggled with cases of subconscious infringement, with seemingly irreconcilable results. For example, in Darrell v. Joe Morris Music Co., the United States Second Circuit Court of Appeals rejected a claim of infringement although the works of the plaintiff and defendant were "so much alike to the ear, that the supposed piracy appears almost inevitable." 113 F.2d 80, 80 (1940). However, according to the court, "[r]ecurrence is not ... an inevitable badge of plagiarism" because "while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear." Id. Courts since Darrell have not been as tolerant of unconscious infringement. See, e.g., Bright Tunes Music Corp. v. Harrisons Music, Ltd., 420 F. Supp. 177, 180 (S.D.N.Y. 1976), aff'd sub nom, 722 F.2d 988 (2d Cir. 1983) ("[T]he came to the surface of his mind a particular combination that pleased him as being one he felt would be appealing to a prospective listener ... Why? Because his subconscious knew it already worked in a song his conscious mind did not remember ... I do not believe he did so deliberately."). Recently, the United States Court of Appeals for the Ninth Circuit similarly found popular singer Michael Bolton and his co-author liable for subconsciously infringing the copyright of the Isley Brothers' song "Love is a Wonderful Thing." Three Boys Music Corp. v. Bolton, 212 F.3d 477 (9th Cir. 2000). Despite the original song's limited commercial success, the court accepted the plaintiff's theory of subconscious infringement, noting that "[i]t is entirely plausible that two Connecticut teenagers obsessed with rhythm and blues music could remember an Isley Brothers' song that was played on the radio and television for a few weeks, and subconsciously copy it twenty years later." Id. at 484.

131. See infra note 157 for a discussion of comparatively stable and predictable examples of strict liability in tort. But see Howard A. Latin, Problem-Solving Behavior and Theories of Tort Liability, 73 Cal. L. Rev. 677, 686 (1985) ("[L]iability rules ... must be known, understood, and actively considered before they can affect behavior. Many liability doctrines are not comprehended by the general populace, and numerous classes of actors ordinarily do not modify their behavior in light of legal rules.").
exceedingly complex and fraught with inconsistency and ambiguity. An author attempting to comply with copyright law to "avoid the loss" of infringement may incorrectly assess whether her work is "substantially similar" to the work of another. She may mistakenly believe that her copying is a permissible "fair use" of a copyrighted work. She may reasonably be deceived by false claims of ownership from another and be held liable for copyright infringement. She may assume that she is using public domain material, either because it was once copyrighted but has since lost protection, or because the

132. See Litman, Copyright as Myth, supra note 125, at 237 ("Copyright law turns out to be tremendously counterintuitive; that is why it is so fun to teach it, and why it can be such a good substitute for smalltalk and other species of cocktail party conversation."); see also Fisher, supra note 88, at 1794 ("The difficulty of predicting how courts will make such judgments has left many producers and users of copyrighted materials uncertain as to their legal rights.").

133. See Patterson, Folsom v. Marsh and its Legacy, supra note 62, at 450 ("Few judges know very much about copyright law, which, until recently, was a backwater subject in law school."); see also Litman, Copyright as Myth, supra note 125, at 237 ("Part of the reason that laypeople... find copyright law hard to grasp could be its mind-numbing collection of inconsistent, indeed incoherent, complexities."). Unfortunately, her efforts will go largely unrewarded—in spite of good faith attempts to avoid infringement, an infringer will nevertheless be held strictly liable.

134. The complexity and relative faults and merits of the doctrine of fair use have been the subject of exhaustive scholarship. See, e.g., Kenneth D. Crews, The Law of Fair Use and the Illusion of Fair-Use Guidelines, 62 Ohio St. L.J. 599, 605 (2001) ("The fair-use doctrine of American copyright law has been derided as among the most hopelessly vague of legal standards, requiring complex and often subjective interpretation."); Fisher, supra note 88, at 1693 ("[T]he disarray of the doctrine impairs the ability of the creators and users of intellectual products to ascertain their rights and to adjust their conduct accordingly."); Gordon, Fair Use as Market Failure, supra note 88, at 1604 (1982) ("[T]he ambiguity of the fair use doctrine and its statutory formulation obscure the underlying issues and make consistency and predictability difficult to achieve."); David Nimmer, An Odyssey Through Copyright’s Vicarious Defenses, 70 N.Y.U. L. Rev. 162, 168 (1996) ("Fair use is typically the most slippery defense in the entire law of copyright law."); Lloyd L. Weinreb, Fair Use, 67 Fordham L. Rev. 1291, 1306 (1999) ("[F]air use depends on a calculus of incommensurable.").

Several commentators have recently predicted the further convolution of fair use in light of rapidly evolving computer technologies. See, e.g., Okediji, supra note 36, at 112 ("Application of the complex fair use doctrine in cyberspace appears, at first blush, to be an unwieldy and extremely difficult task...[T]he problem of overlapping copyrights in cyberspace already poses fairly serious challenges to courts attempting to apply copyright rights to new technologies."); Lemley, Dealing With Overlapping Copyrights on the Internet, supra note 8, at 556 ("Exclusive reliance on fair use to justify the very existence of the Net seems unwise...the fair use analysis is extremely fact-specific, which means both that it is hard to predict in advance and that it will be expensive to prove.").

135. See Edward Samuels, The Public Domain in Copyright Law, 41 J. COPYRIGHT SOCY U.S.A. 137, 161-52 (1993) ("The category of the public domain that is on the strongest historical and theoretical footing is the collection of works in which copyright has expired because the term of protection has run its full duration.").
material consists of any one of many non-copyrightable categories of expression such as facts, ideas, utilitarian function, or scenes à faire. Thus, because of these "subtle and refined . . . almost

136. See generally, Robert C. Denicola, Copyright in Collection of Facts: A Theory for the Protection of Nonfiction Literary Works, 81 COLUM. L. REV. 516 (1981) (discussing the legally permissible use of facts in copyright law). Compare Hoebling v. Universal City Studios, Inc., 618 F.2d 972, 980 (2d Cir. 1980) ("In works devoted to historical subjects, it is our view that a second author may make significant use of prior work, so long as he does not bodily appropriate the expression of another.") (citation omitted), with Burgess v. Chase-Riboud, 765 F. Supp. 233, 240 (E.D. Pa. 1991) (finding that play Dusky Sally infringed copyright of Sally Hemings: A Novel and citing dearth of accurate historical information about the relationship of Thomas Jefferson and Sally Hemmings).


"[T]he idea-expression dichotomy . . . is doomed to fail . . . courts have no philosophical or objective basis on which to rely in trying to distinguish the ideas from the expression in works of art . . . the judge's assessment of the artistic value of the work . . . has filled the vacuum in infringement determinations.

Id.; Russ VerSteeg, Jurimetric Copyright: Future Shock for the Visual Arts, 13 CARDOZO ARTS & ENT. L.J., 125, 127 (1994) ("The distinction between idea and expression is one of the most difficult concepts in all of copyright jurisprudence."); Lori Petruzelli, Comment, Copyright Problems in Post-Modern Art, 5 DEPAUL-LCA J. ART & ENT. L. & POLY 115, 119 (1995) ("Courts will look at a creation and separate the idea, the unprotected part of the work, from its expression, the protected part of the work. This separation represents an important policy decision of what parts of a work authors should be allowed to monopolize and what parts belong in the public domain, so others are free to build on them."). See generally Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991); Baker v. Selden, 101 U.S. 99 (1879) (holding that blank form account-books are not protected under copyright law).

138. See Lloyd L. Weinreb, Copyright for Functional Expression, 111 HARV. L. REV. 1160, 1152-53 (1998) ("Copyright is said to protect expression, but not the ideas expressed; and, without further analysis, functional systems, methods, and the like . . . are assimilated broadly to ideas."). However, as Professor Weinreb points out, "the rules do not accommodate a significant category of works: the function of which depends on expression, because its performance implicates a variable human response." Id. at 1153. See generally Robert C. Denicola, Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles, 67 MINN. L. REV. 707 (1983) (discussing the importance of the creative process in copyright); Shira Perlmutter, Conceptual Separability and Copyright in the Design of Useful Articles, 37 J. COPYRIGHT SOCY U.S.A. 339 (1990).

139. E.g., Reyher v. Children's Television Workshop, 533 F.2d 87, 91 (2d Cir. 1976) ("[T]he essence of infringement lies in taking not a general theme but its particular expression through similarities of treatment, details, scenes, events and characterization."). Like much of copyright law, the scenes à faire doctrine is subject to widely divergent interpretations. Compare Metro-Goldwyn-Mayer Inc. v. Am. Honda Motor Co., 900 F. Supp. 1287, 1299 (C.D. Cal. 1995) (rejecting defense claims that the similarities between its commercial and plaintiff's films are non-copyrightable scenes à faire and explaining that "[t]here are many ways to express a helicopter chase scene but only Plaintiffs' Bond films would do it the way the Honda commercial did with
evanescent" distinctions within copyright law, "loss avoidance" is often an impossible task for authors.

In addition, the inconsistency inherent in a loss avoidance rationale is compounded by the elimination of the notice and registration requirements in modern copyright law. Unlike its English and American predecessors, American copyright law no longer requires either the registration of works in the Copyright Office or notice of copyright protection affixed to works themselves. Thus, even a well-meaning author attempting to avoid infringement has no method of insuring that her work is not infringing a pre-existing work. Moreover, in light of the fact that many copyright

these very similar characters, music, pace, and mood"), with Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930) ("A comedy based upon the conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of Romeo and Juliet"), and Alexander v. Haley, 460 F. Supp. 40, 45 (S.D.N.Y. 1978) (citing "[a]ttempted escapes, flights through the woods pursued by baying dogs, the sorrowful or happy singing of slaves, the atrocity of the buying and selling of human beings, and other miseries as examples of non-copyrightable scenes à faire"); see also Suntrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357, 1367 (N.D. Ga. 2001) (enjoining publication of The Wind Done Gone, an alleged parody of Margaret Mitchell's popular novel Gone With The Wind and noting that the defendant did not merely adapt scenes à faire but "utiliz[ed] a detailed encapsulation of the older work and exploit[ed] its copyrighted characters, story lines, and settings as the palette of the new story"). The United States Eleventh Circuit Court of Appeals ultimately vacated the injunction, concluding it was an "unlawful prior restraint in violation of the First Amendment." Suntrust Bank v. Houghton Mifflin Co., 252 F.3d 1165, 1166 (11th Cir. 2001).

140. Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (according to Justice Story, "[p]atents and copyrights approach . . . what may be called the metaphysics of the law").

141. The elimination of the notice and registration requirements was a condition of United States membership in the Berne Convention. Jane C. Ginsburg & John M. Kernochan, One Hundred and Two Years Later: The U.S. Joins the Berne Convention, 13 COLUM.-VLA J.L. & ARTS 1, 9 (1988) ("The most significant change in U.S. copyright law concerns the notice requirement: works published after March 1989 no longer need include a notice of copyright . . . . [N]otice remains optional . . . but a work will no longer risk falling into the public domain through omission of notice.").


The historic conception of copyright . . . seems to require that some assertion be made by those who wish to benefit from the monopoly. Notice seems most appropriate for this purpose; it can be easily accomplished by the author and directly warns the would-be copy or adapter that a copyright claim exists . . . .

Id. But see Perlmutter, supra note 128, at 582 (arguing that while "[i]t is true that marking, whether by notice or registration, gives some comfort to would-be users. The central problem with formalities . . . however, is that they give this comfort by
owners fail to affix notice to their works—much less register them—the recent relaxation of statutory formalities adds to the uncertainty of copyright law and serves to confound the potential infringer, who, unfamiliar with the intricacies of copyright law, may naively assume that because her sources lack notice and are not registered, they are in the public domain.\footnote{143}

In short, copyright infringers are quite often not the “cheapest cost avoiders” of infringement. Unlike those who deliberately engage in unreasonably dangerous activities, innocent copyright infringers are often liable for “subconscious” activity. Further, even an infringer who is conscious of her copying may miscalculate or misinterpret the many ambiguous and imprecise provisions of modern copyright law. Finally, because the Copyright Act no longer prescribes a uniform system of notice or registration, even the most cautious author has no means to determine whether a source is copyrighted or who owns the copyright. Thus, “loss avoidance” is a weak justification for strict liability in copyright law.

\section{D. The “Administrative Efficiency” Justification}

Courts and commentators frequently maintain that strict liability is justified and necessary in copyright because it reduces proof-related litigation costs and thereby furthers “administrative efficiency.”\footnote{144} The administrative efficiency rationale is premised on the notion that “innocence in a copyright action may often be easy to claim and difficult to disprove.”\footnote{145} Proponents of this justification argue that absent a strict liability framework all copyright infringement actions will devolve into expensive and time-consuming

\footnote{143. Note, Omission of Copyright Notice Under Section 405(a): What Kind of an Oxymoron Makes a Deliberate Error?, 60 N.Y.U. L. REV. 956, 963 (1985) (“[T]he 1909 forfeiture rule... enjoyed the distinct advantage of doctrinal clarity. Strict enforcement of the formal notice requirement and denial of copyright protection whenever notice was omitted... provided users with a substantially reliable indication of a work's copyright status.”); see also Litman, The Exclusive Right to Read, supra note 125, at 52 (“If the public is to play by copyright rules, then those rules must be designed with the public's interests in mind.”).

144. See 4 NIMMER, supra note 8, § 13.08, at 13-2870 to 13-2871 (“A plea of innocence in a copyright action may often be easy to claim and difficult to disprove.”); Wendy J. Gordon, A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property, 102 YALE L.J. 1533, 1578 (1993) (noting that “there are administrability problems whenever motives are part of a legal standard. States of mind are difficult to determine with accuracy”); Sinclair, supra note 8, at 950 (“It is sometimes suggested that innocence is easy for the defendant to allege and difficult for the plaintiff to disprove.”).

145. See 4 NIMMER, supra note 8, § 13.08.
battles of proof centered on discerning the thoughts and motives of the alleged infringer. Indeed, one court has sweepingly asserted that such protracted litigation may have a detrimental effect on copyright law because “the problems of proof inherent in a rule that would permit innocence as a defense to copyright infringement could substantially undermine the protections Congress intended to afford to copyright holders.”146 Moreover, if innocence were relevant, then every infringer could potentially “cry” innocence, making a fair and expedient determination of liability impossible.147 Finally, proponents of administrative efficiency argue that absent a strict liability framework for vicarious infringers such as dance hall operators,148 department stores, and presumably modern Internet service providers, these infringers could establish “dummy” corporations or concessionaires to “shiel[d] their own eyes from the possibility of copyright infringement, thus creating a buffer against liability while reaping proceeds of infringement.”149

146. See ABKO Music, Inc. v. Harrison Music, Ltd., 722 F.2d 999 (2d Cir. 1983) (rejecting defense arguments “that it is unsound policy to permit a finding of infringement for subconscious copying” because such a finding would “impose[s] a requirement of novelty” similar to patent law); see also Lawrence v. Dana, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8, 136) (“Mere honest intention on the part of the appropriation will not suffice . . . the court can look only at the result, not the intention in the man’s mind at the time of doing the act complained of . . . he must be presumed to intend all that the publication of his work effects . . . .”); Mitchell E. Radin, The Significance of Intent to Copy in a Civil Action for Copyright Infringement, 54 TEMP. L.Q. 1, 10 (1981) (“Since conscious intent to copy may not exist or may be difficult to prove, a policy mandating evidence of intent to copy could potentially cause a significant curtailment in the ability of an author to protect his copyrighted work.”). To the extent these arguments are based on the notion that copyright owners are entitled to enhanced protection and assurances to preserve their “incentive” to assert claims of infringement, they appear to be misplaced. The Supreme Court recently addressed this very issue in Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994). Significantly, in Fogerty, the Court held copyright defendants should be encouraged to litigate infringement claims to the same extent as plaintiffs are encouraged to litigate meritorious claims of infringement. Id. at 527. According to the Court, “a successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of the copyright.” Id.

147. See Gordon, Toward a Jurisprudence of Benefits, supra note 8, at 1028 (“Most obviously, allowing an ‘unconsciousness’ excuse might encourage a deliberate copyst to lie about his state of mind.”); see also Dror, supra note 8, at 404 (“If such defences [sic] were allowed to prevail, the facilities for fraudulent escape from the penalty of piracy would be largely multiplied.”).


149. Shapiro, Bernstein & Co. v. H. L. Green Company, 316 F.2d 304, 309 (2d Cir. 1963); see also Sinclair, supra note 8, at 951 (“It is argued that . . . a rule of exculpation for innocence would encourage the establishment of fictitious primary users of the material in order to gain insulation for the main, but now secondary,
Similar concerns have been offered in defense of strict liability in both tort\(^{150}\) and criminal law.\(^{151}\) Perhaps the most compelling example of this justification exists in products liability law where many consider proving negligence "unduly burdensome"\(^{152}\) for an injured plaintiff because any alleged act of negligence "occurred at a place controlled by the defendant before the plaintiff purchased the product."\(^{153}\) Thus, strict liability is thought to reduce administrative costs\(^{154}\) and improve overall efficiency by eliminating the need to prove fault and by drastically "simplifying the proof necessary to establish liability."\(^{155}\) Moreover, by enabling plaintiffs to recover even

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\(^{150}\) See, e.g., Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CAL. L. REV. 677, 677 (1985) (describing "familiar Calabresian tort goals" including "the reduction of administrative costs including litigation and insurance expenses"); John E. Montgomery & David G. Owen, *Reflection on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C. L. REV. 803, 809 (1976) (listing the "difficulties of discovering and proving" the negligence of manufacturers as one circumstance which gives rise to "[the need to substitute strict liability for due care] in products liability cases"); Cornelius J. Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225, 240 (1971) (noting that strict liability is often applied if "the person harmed would encounter a difficult problem of proof if some other standard of liability were applied"); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 826 (1973) ("It is often difficult, or even impossible, to prove negligence on the part of the manufacturer or supplier . . . . strict liability eliminates the need of the proof."). Courts have acknowledged similar administrative and cost concerns. See, e.g., Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 119 (La. 1986) ("The costs of administering the unreasonably dangerous per se category of products liability cases will be reduced by eliminating litigation over the date when a product's danger became scientifically knowable . . . . [The parties should not be forced to produce experts . . . . to speculate, and possibly confuse jurors, as to what knowledge was available . . . .].")

\(^{151}\) See, e.g., John Shepard Wiley Jr., *Not Guilty By Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1083 (1999) ("Defenders of strict liability historically have argued that law enforcement efficiency justifies dispensing with proof of moral culpability."). According to Professor Wiley, strict liability in criminal law is grounded in the "deeply flawed" notion that "crime costs will be very high if we require prosecutors to prove the facts needed to assure culpability, while any potential injustice will be minimal . . . . More accurately stated, the defense is that we can convict guilty people more easily if we are willing to imprison some innocent ones too." *Id.* at 1085.


\(^{153}\) *Id.*

\(^{154}\) See CALABRESI, *THE COSTS OF ACCIDENTS, supra* note 117, at 225 (describing the "expenses of deciding liability and valuing damages" as "tertiary costs" which are "as much and as primary an accident cost as a broken leg").

when evidence may have been lost, destroyed or otherwise unobtainable, strict liability ostensibly "improve[s] the overall administrative integrity of the system."\(^{106}\) For these reasons, strict liability is considered preferable to a fault-based system of liability in certain limited areas of tort law.\(^{107}\)

1. Strict Liability and Claim-Resolution Costs

Although strict liability may be efficient in tort law under certain circumstances, it does not serve the overarching goal of promoting administrative efficiency and reducing claim-resolution costs in copyright. First, even if strict liability decreases the costs associated with resolving individual claims, it likely increases the total costs associated with copyright claim resolution. Because establishing the culpability of an infringer can sometimes be a costly and time-consuming endeavor, eliminating culpability-related issues from copyright cases may serve to reduce the costs associated with resolving individual disputes. In so doing, however, strict liability may increase overall costs by markedly increasing the total volume of copyright infringement claims.\(^{108}\)

This adverse effect is mitigated in certain limited areas of tort law, where legal issues are relatively straightforward and the law operates at a "high level of generality."\(^{159}\) In those areas,

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of negligence reduces the complexity of individual suits...[t]hese administrative gains seem to be both real and substantial.").  
\(^{106}\) King, supra note 116, at 358.  
\(^{107}\) See Henderson, supra note 155, at 1579 (explaining that the "reduction of transaction costs, which include the costs of operating the accident reparation system" is one of the "efficiency objective[s] traditionally considered relevant in determining liability standards").  
\(^{108}\) See King, supra note 116, at 358.  
\(^{158}\) Even if strict liability cases are more efficiently resolved than their negligence cousins, adoption of strict liability may in some respects increase overall transaction costs. Broadening the reach of strict liability will increase the number of tort claims...[and] may magnify the overall inefficiencies of the tort system.  
Id.; see also WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 65 (1987) ("Under strict liability a claim arises every time there is an accident caused by someone worth suing; under negligence there is a claim only if the victim thinks that he can show that the defendant failed to use due care."). The number of copyright infringement lawsuits does appear to be on the rise. See Melvin Simensky & Eric C. Osterberg, The Insurance and Management of Intellectual Property Risks, 17 CARDOZO ARTS & ENT. L.J. 321, 321 (1999) ("There were 1198 more intellectual property infringement lawsuits filed in the federal courts in 1998 than there were in 1982...an increase of twenty percent over the five-year period.").  
\(^{159}\) See ABRAHAM, supra note 122, at 163. Cf. STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW 40 (1989) (citing the "extravagant administrative costs" associated with traditional tort law and explaining that "highly individualized and unpredictable tort law rules promote exorbitant claims administration, including
characterized by predictable procedures and per se rules "that admit of few exceptions,"¹⁶⁰ scholars have recognized that strict liability may be efficient because, in spite of the increased number of cases, each case is subject to relatively swift and efficient adjudication.¹⁶¹ In stark contrast, copyright law operates at a very "low level of generality," and is riddled with "context-dependent rules" that demand a detailed case-by-case analysis.¹⁶² This complexity and lack of predictability make copyright law¹⁶³ a poor candidate for strict liability. Because copyright law is both fact and context dependent, strict liability results in an increased number of cases, with each case requiring costly and time-consuming litigation over individualized legal

investigation costs and lawyer fees ").

¹⁶⁰ See ABRAHAM, supra note 122, at 163.

¹⁶¹ Compelling examples of predictable, generalized rules resulting in reduced administrative costs and increased efficiency are "no-fault" strict liability schemes such as workers' compensation. Under most workers' compensation frameworks, employers are exempt from traditional tort liability, but virtually every job-related injury, subject to certain limited defenses, is compensable through a state administrative system. See ABRAHAM, supra note 122, at 240 ("M)ost employees who enter the job uninjured and at the end of the day are injured have incontestably suffered a compensable event."). Acknowledging the efficiency and predictability of such no-fault systems, some commentators have likened workers' compensation to automated teller machines, where injured employees simply "punch in the right numbers and money will come out." PETER A. BELL & JEFFREY O'CONNELL, ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW 205 (1997); see also Martha T. McCluskey, The Illusion of Efficiency in Workers' Compensation "Reform", 50 RUTGERS L. REV. 657, 678 (1998) ("Workers' compensation often has been presented as a success story offering a calm and stable contrast to the tort system . . . and has become a model to replace tort liability with no-fault systems for other kinds of accidents."). But see Marc Feldman, The Intellectual Ordering of Contemporary Tort Law, 51 MD. L. REV. 980, 1000-02 (1992) (arguing that "n)on-tort compensation systems are as replete with discretion as the traditional system that they are 'imported' to replace,

¹⁶² See ABRAHAM, supra note 122, at 163.

¹⁶³ The determination of infringement may be the most nebulous and nettlesome issue in all of copyright law. See Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) (Hand, J.) ("The test for infringement of a copyright is of necessity vague . . . Decisions must therefore inevitably be ad hoc."); see also Amy B. Cohen, Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity, 20 U.C. DAVIS L. REV. 719, 722 (1987) ("The failure of Congress to address completely the issue of what constitutes infringement would be less troubling if the case law enunciated an adequate standard. However . . . no such enunciation exists."). According to Professor Cohen, "substantial similarity" is a "confused, ambiguous, and unhelpful concept which enables courts to obscure the real reasons behind their decisions." Id. at 767. This obstruction results in a lower degree of "predictability, integrity, and accountability" in infringement decisions. Id. at 766; 1 PATRY, supra note 8, at 687 (1994) ("Any general test of infringement is of limited usefulness due to the fact-based, ad hoc nature of the inquiry, the metaphysical problems posed by the idea-expression dichotomy, and the wide variety of subject matter.").
issues. Thus, although strict liability may offer administrative cost savings on a case-by-case basis, any savings in this regard are likely offset or overtaken by the added costs of administering an increased number of claims.

Second, strict liability may not reduce the transaction costs at the individual-case level. Indeed, strict liability has not alleviated the financial or practical constraints facing individual copyright plaintiffs. Although strict liability is often rationalized as necessary because proving intent is considered too “difficult” and costly, modern copyright litigation has proven to be neither “easy” nor inexpensive. On the contrary, copyright cases are exceedingly complicated, often protracted, and invariably expensive. The reasons for these high costs are manifold. Copyright law is considered a “specialty” among large law firms, with top “intellectual property” lawyers commanding steep hourly rates.

164. See, e.g., ROBERT E. LEE, A COPYRIGHT GUIDE FOR AUTHORS § 12.6, at 124 (1995) (“Most copyright cases are fact driven, and the law sometimes takes some strange twists as the courts try to do justice . . . . the side which has the best attorneys and best witnesses and which devotes the most effort to pre-trial preparation will usually prevail.”).

165. See ABRAHAM, supra note 122, at 163 (“[T]he costs of litigating additional cases under strict liability must be figured in if one is making a total-cost calculation.”).

166. Plaintiffs, particularly individuals and small corporations, often face an “uphill battle” in copyright infringement litigation. See, e.g., K.J. Greene, Motion Picture Copyright Infringement and the Presumption of Irreparable Harm: Toward a Reevaluation of the Standard for Preliminary Injunctive Relief, 31 RUTGERS L.J. 173, 182 (1999) (explaining that “plaintiffs rarely succeed in suits against motion pictures . . . . either the studios do not regularly appropriate copyrighted works, the suits are misguided, or the courts are hostile to such claims”).

167. An examination of attorney’s fees awarded under section 505 of the Copyright Act reveals the often exorbitant cost of modern copyright litigation. See 17 U.S.C. § 505 (1994); Jeffrey E. Barnes, Comment, Attorney’s Fee Awards in Federal Copyright Litigation After Fogerty v. Fantasy: Defendants Are Winning Fees More Often, But the New Standard Still Favors Prevailing Plaintiffs, 47 UCLA L. REV. 1381, 1392 (2000) (“For prevailing plaintiffs, the average award of costs and attorney’s fees was $51,000 . . . . [f]or prevailing defendants, the average award of costs and attorney’s fees was $107,000.”).

168. See Simensky & Osterberg, supra note 158, at 337 (citing the “soaring cost of litigation” and explaining that “many businesses simply cannot afford the expense of bringing an infringement suit, even if attorney’s fees may be recovered in the end”).


170. See, e.g., Yankee Candle Co., 140 F. Supp. 2d at 124 (stating that rates of $300}
Expert witnesses are routinely employed by both plaintiffs and defendants, often at great expense.\textsuperscript{171} Copyright infringement suits, like all lawsuits, are arduous, emotional ordeals for both plaintiff and defendant.\textsuperscript{172} Strict liability, although heralded for its "ease" and efficiency, has done little to allay these problems or to streamline this process for effective adjudication.

2. Culpability in Law and Copyright

It is curious that courts and commentators have expressed anxiety about factoring culpability into the copyright-infringement equation. Not only is culpability routinely considered by finders of fact in other areas of law, but it also plays a prominent role in other aspects of copyright law. The important role of culpability suggests to $320 per hour for partners "are quite reasonable for the Boston area"); Martin v. City of Indianapolis, 28 F. Supp. 2d 1098, 1104 (S.D. Ind. 1998) (finding billing rates of $300 per hour for a partner and $175 per hour for a senior associate reasonable for Chicago-based attorneys); Warner Bros. Inc. v. Dae Rim Trading, Inc., 695 F. Supp. 100, 111 (S.D.N.Y. 1988) (citing a 1985 report of the American Intellectual Property Association which found that the average cost of copyright litigation in New York City was between $58,000 and $107,000). This problem is likely compounded because, unlike many if not most personal injury attorneys, few top-shelf intellectual property lawyers undertake complex copyright infringement suits on a contingency-fee basis. See Simensky & Osterberg, supra note 158, at 337.


172. The emotional toll on individual parties is likely quite high in copyright litigation, where the artistic integrity and reputation of each is often at stake. Perhaps as a result, dramatic courtroom demonstrations and aggressive trial tactics are commonplace. See, e.g., Robert Lenzner, Steel Wrapped in Velvet: When Bruce Springsteen, Bob Dylan or the Rolling Stones Have a Date in Court They Call on Peter Parcher, FORBES, April 30, 2001, at 92 (explaining that "even sympathetic foes sometimes have to be verbally mutilated in court... representing the Larson family, [attorney Peter Parcher] skewered Thomson by asking her to recite the lyrics of the musical's centerpiece... [w]hen she couldn't he blasted her claim").
that the expenses associated with culpability-dependent standards are likely exaggerated.

First, culpability-related issues pervade American substantive law. Lay jurors routinely decide whether persons accused of crimes performed the actus reus of a charged offense with the requisite mens rea, typically, "purpose," "knowledge," "recklessness" or "negligence."\textsuperscript{173} Lay jurors routinely decide whether tort defendants "intentionally" or "negligently" caused injury to plaintiffs.\textsuperscript{174} Jurors routinely determine whether persons sued for breach of contract acted in "good faith."\textsuperscript{175} These are but a few of the hundreds of circumstances in which American law requires fact finders to resolve culpability-related issues. Given these examples, it is uncertain why proponents of administrative efficiency in copyright fear that lay jurors could not resolve fact issues bearing on the culpability of alleged infringers just as efficiently.

Second, culpability-related issues pervade copyright law. Courts and commentators are reluctant to give fault a role in the infringement analysis because the proof issues associated with doing so are thought to be "difficult."\textsuperscript{176} Nevertheless, fact finders routinely "crack skulls" in resolving issues arising in many other areas of copyright law, including copyrightability, ownership, infringement, fair use, and remedies.

a. Copyrightability

Courts frequently analyze the "intellectual production" and "thought!"\textsuperscript{177} of an author when making the threshold determination of copyrightability. Copyright protection extends only to "original

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\item See MODEL PENAL CODE § 2.02(2); id. § 2.02(1) (subject to rare exceptions, "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense").
\item See PROSSER AND KEETON, supra note 21, § 7, at 31 ("[E]very case in which [tort] liability has been imposed has rested upon one of three, and only three, grounds for imposing it . . . [i]ntent . . . [n]egligence . . . [and] [s]trict liability."). Id. § 8, at 37 ("There is a definite tendency to impose greater responsibility upon a defendant whose conduct was intended to do harm, or was morally wrong.").
\item See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 205 ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance."); id. § 241(f) (providing that "the extent to which the behavior of the party failing to perform . . . comports with standards of good faith" is relevant in evaluating whether a failure to perform is "material").
\item See, e.g., Russ VerSteeg, Rethinking Originality, 34 WM. & MARY L. REV. 801, 840 (1993) ("Courts always have been hard pressed to determine what it is that has gone on in a person's brain. This difficulty . . . has led to extensive problems with the meanings of terms like 'intent,' 'knowledge,' 'scienter,' and 'mens rea' in the areas of criminal law, torts, and contracts.").
\item See Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884).
\end{enumerate}
works of authorship. According to the United States Supreme Court, a work is copyrightable if it is "original," that is, the product of independent creation, and must be "creative," that is, reflect a "modicum" of "creativity." Both the "originality" and "creativity" components of "copyrightability" call on courts to examine an author's subjective intent at the time of creation.

Although not expressly defined in the Copyright Act, courts have long regarded "originality" as "a constitutional requirement" which is the "sine qua non of copyright." Determining whether a work is of "independent origin" is a deceptively simple task. This difficulty stems largely from the fact that, unlike patent law, copyright does not require novelty, thus a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. This potential for "fortuitous similarity" requires that courts assessing the "independent origin" of a work—whether in the context of determining threshold copyrightability or as a defense to a claim of infringement—must look to the author's

179. "[O]ne is original and... an author in both a constitutional and statutory sense, if the resulting work is the product of one's own independent efforts, i.e., has not been copied." 1 NIMMER, supra note 8, § 1.06[a], at 1-66.20.
180. See Feist, 499 U.S. at 346 (explaining that although "the requisite level of creativity is extremely low" originality nevertheless requires both "independent creation plus a modicum of creativity"); see also CRAIG JOYCE ET AL., COPYRIGHT LAW (5th ed. 2000) ("Some courts have attempted to clarify the two aspects of originality... independent origin and sufficient quantum of original matter-by describing the former characteristic as 'originality' and the latter as 'creativity'.").
181. See Feist, 499 U.S. at 346 (explaining that the Framers' use of the terms "authors" and "writings" in the Copyright Clause of the Constitution "presuppose a degree of originality").
182. Id. at 348.
183. Burrow-Giles, 111 U.S. at 59-60 (explaining that unlike the patent system, "our copyright system has no... provision for previous examination by a proper tribunal as to the originality of the... matter offered for copyright... [i]t is therefore much more important that when the supposed author sues for a violation of his copyright, the existence of those facts of originality, of intellectual production, of thought, and conception... should be proved...").
184. See Feist, 499 U.S. at 345; see also 1 NIMMER, supra note 8, § 1.06[B], at 1-66.20 ("Assuming such independent efforts, authorship will be recognized in the resulting work, even if, independently and unknown to the creator, a similar, or even identical, work created by another can be shown to have prior existence."). The most compelling and oft-quoted example of this fundamental principle was offered by Learned Hand who explained that "if by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's." Sheldon v. Metro-Goldwyn Pictures, Corp., 81 F.2d 49, 54 (2d Cir. 1936).
185. See 1 PATRY, supra note 8, at 149 ("There is also a defensive sense in which 'independent creation' is used. Where the defendant in an infringement suit is able to
“creative process” and subjective intent to determine whether a work was copied or “owes its origin” to the purported author. This originality analysis often involves a painstaking evaluation of the alleged infringer’s state of mind at the moment of creation. Was the author thinking of, and copying, the plaintiff’s work? Or was she instead drawing from her mind’s eye, from a work in the public domain, from an animal, or from a person? The result of such a prove that his or her work, although substantially similar to the plaintiff’s work, was created without copying from that work, independent creation constitutes a complete defense to the infringement claim.

186. See, e.g., Odegard, Inc. v. Costikyan Classic Carpets, Inc., 963 F. Supp. 1328, 1338 (S.D.N.Y. 1997) (noting that the defendants failed to prove independent creation because the were “unable to describe credibly their design process”).

187. See, e.g., Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1170 (7th Cir. 1997) (Posner, J.) (“[I]magine two people photographing Niagara Falls from the same place at the same time of the day and year in identical weather—there is no inference of access to anything but the public domain, and, equally, no inference of copying from a copyrighted work.”). Notably, in Ty, Judge Posner found that the allegedly infringing work, a stuffed pig, was “strikingly similar” to the plaintiff’s pig, but bore “little resemblance” to “real” pigs in the public domain. Id.; see also Animal Fair, Inc. v. Amfesco Indus., Inc., 620 F. Supp. 175, 182 (D. Minn. 1985) (rejecting defense claim of independent creation of bear claw slippers and noting that “[w]hile [plaintiff and defendant’s] slippers both purport to be a representation of a bear’s paw, neither slipper accurately reflects the actual appearance of a bear’s paw... both slippers differ from an actual bear’s paw in the same respects”).

188. See Franklin Mint Corp. v. Nat. Wildlife Art Exchange Inc. 575 F.2d 62, 65 (3d Cir. 1978) (“[T]he fact that the same subject matter may be present in two paintings does not prove copying or infringement. Indeed, an artist is free to consult the same source for another original painting.”). In Franklin, the court explained that “an artist’s style, genre or chosen subject matter may lend itself to infringement.” Id. While the subtlety of Monet’s impressionism may be difficult to recreate, “an artist who produces a rendition with photograph-like clarity and accuracy may be hard pressed to prove unlawful copying by another who uses the same subject matter and the same technique.” Id.

189. Esquire, Inc. v. Varga Enters., 81 F. Supp. 306, 307-08 (N.D. Ill. 1948), rev’d in part, 185 F.2d 14 (7th Cir. 1950) (finding that the defendant’s new paintings did not infringe the copyright of owner of earlier works although “the over one hundred paintings by defendant in evidence reveal that the defendant’s artistic talent is limited to the portrayal of the female figure in varying degrees of undress... [i]t is apparent from the testimony that this is all he has ever drawn and seems to be all he ever will draw”). According to the court, “all his future drawings will bear some similarity to his previous work, whether or not his past creations are before him at the time he is painting. He has a certain type of art in his mind and, consequently, that is all he is able to express on the drawing board.” Id. at 308. The Second Circuit Court of Appeals came to a different result in Gross v. Seligman, finding that a subsequent photograph of the same model by the same artist was infringing, because “[t]he identity of the artist and the many close identities of pose, light, shade, etc. indicate very strongly that the first picture was used to produce the second.” 212 F. at 931. According to the court, whether the artist created the infringing work “with a copy of the first
state-of-mind inquiry can be quite profound. If the author was thinking of a preexisting copyrighted work at the moment of creation, then she is liable for copyright infringement and disgraced as a plagiarist and pirate.\textsuperscript{190} If not, then she is free from liability and is the author of a new, copyrightable work of her own.\textsuperscript{191}

Similarly, courts frequently inquire into the author’s mental state and creative process when assessing the second prong of copyrightability—creativity.\textsuperscript{192} Although the Constitution demands only a “modicum” of creativity, courts, which must labor without a bright-line creativity rule,\textsuperscript{193} often analyze the author’s creative process to determine whether her work falls within the “narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually non-existent.”\textsuperscript{194} This creation-process

\textit{photograph physically present before his eyes” or through “mental reproduction” was immaterial. Id.}

190. See Kate O’Neill, Against Dicta: A Legal Method for Rescuing Fair Use From the Right of First Publication, 89 CAL. L. REV. 369, 374 (2001) (noting that “[i]n a judgment for the copyright holder, the judicial rhetoric often includes ignignant allusions to the copier’s greed or laziness in attempting to capitalize on another’s creativity . . .”).

191. As Justice Story succinctly explained, “[o]thers are free to copy the original. They are not free to copy the copy.” Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249 (1902); see also Ferguson v. NBC, 584 F.2d 111, 114 (5th Cir. 1978) (“It is not enough to place two works back to back, if both track their ancestries back to Bach.”).

192. See Howard B. Abrams, Originality and Creativity in Copyright Law, 55 LAW & CONTEMP. PROBS., Spring 1992, at 3, 14 (1992) (“The most important consequence of Feist is that it has interjected a distinct inquiry concerning creativity into the originality equation. In addition to the traditional originality inquiry into whether a work was independently originated, there must also be a determination that whatever was independently originated was sufficiently creative to satisfy Feist.”). Professor Russ VerSteeg has previously explained that “arguably, Feist requires that courts investigate the functioning of an author’s brain.” VerSteeg, Rethinking Originality, supra note 14, at 839 (discussing creativity in copyright law post-Feist). VerSteeg offers two alternatives for determining creativity: one involves an “examination of the networks of [an author’s] subconscious,” the other, and in VerSteeg’s opinion the preferable option, directs courts to assess “the nature of an author’s variations” on works in the public domain. Id. at 841. According to VerSteeg, “evaluating an author’s contribution from an objective standpoint instead of investigating her psyche may prove to be a more viable method of determining whether Feist’s creativity requirement has been satisfied.” Id.

193. See Joyce et al., supra note 180, § 2.02 (“Unfortunately there is no bright line rule or general principle of creativity that can be involved in every case.”); see also Dale P. Olson, Copyright Originality, 48 Mo. L. REV. 29, 31 (1983) (noting that “[d]espite extensive experience in imposing an originality requirement, the judicially developed doctrine remains uncertain and confused”); Mitzi S. Phalen, Comment, How Much is Enough? The Search for a Standard of Creativity in Works of Authorship Under Section 102(a) of the Copyright Act of 1976, 88 NEB. L. REV. 835, 835-36 (1989) (describing the creativity requirement as “nebulous” and “troublesome”).

194. See Feist, 499 U.S. at 359. The Supreme Court’s reiteration of the “creative spark” requirement seems to demand that all authors must, at a minimum, have the
inquiry is perhaps most evident in "compilation of fact" cases such as Feist Publications, Inc. v. Rural Telephone Service Co., in which the Supreme Court expressly held that a "garden-variety" alphabetical listing of names was "devoid of even the slightest trace of creativity," and thus was not copyrightable.\(^{195}\)

\[^{195}\] Feist, 499 U.S. at 362. Cf. Key Pub’n, Inc. v. Chinatown Today Pub’g Enters., 945 F.2d 509, 513-14 (2d Cir. 1991) (finding a telephone directory sufficiently creative because compiler “excluded from the directory those businesses she did not think would remain open” and included categories “of particular interest to the Chinese-American community and not common to yellow pages”); see also Matthew Bender & Co. v. West Pub’g Co., 158 F.3d 674, 689 (2d Cir. 1998) (copyrightable compilations require “subjective judgments relating to taste and value that were not obvious and that were not dictated by industry convention”); Lipton v. Nature Co., 71 F.3d 464, 470-71 (2d Cir. 1995) (arrangement of “terms of venery” was creative because it was the “product of his creative and aesthetic judgment”); Mid Am. Title Co. v. Kirk, 59 F.3d 719, 722 (7th Cir. 1995) (selection of facts in compilation not sufficiently creative because process was “not a matter of discretion based on . . . judgment or taste” but was “a matter of convention and strict industry standards”); Harcourt, Brace & World, Inc. v. Graphic Controls Corp., 329 F. Supp. 517, 523 (S.D.N.Y. 1971) (test answers sufficiently original because “[t]he creation of an answer sheet requires the skill, expertise and experience together with the personal judgment and analysis of the designer or author”); see also Abrams, Originality and Creativity in Copyright Law, supra note 192, at 17 (“[T]he Court seems to be insisting that there must be some injection of independent aesthetic or artistic judgment in the decisions concerning the selection, coordination, or arrangement of the facts in a compilation for it to possess the requisite ‘minimum level’ of creativity.”).

Of course, this design process analysis is not limited to compilations of facts. Compare Folio Impressions, Inc. v. Byer California, 937 F.2d 759, 765 (2d Cir. 1991) (finding fabric design copyrightable because the “decision to place the roses in straight rows was an artistic decision” and was not “designed to ease manufacturing”), and Runstadler Studios, Inc. v. MCM Ltd. P’ship, 768 F. Supp. 1292, 1295-96 (N.D. Ill. 1991) (rejecting defense assertion that sculpture was “simply a combination of uncopyrightable standard shapes” and finding that “[t]he choice of location, orientation
Courts have also inquired into an author's creative process in evaluating the copyrightability of derivative works. When considering the copyrightability of a derivative work, courts often weigh the creator's motives; if a "substantial variation" was motivated by mundane concerns such as "manufacture ease" or cost, the work is not copyrightable.\textsuperscript{196} If, on the other hand, the author was driven to modify the work by artistic or aesthetic judgment, courts have been more apt to classify the work as a copyrightable derivative work. Because of this "spark of creativity" requirement, evidence of "true artistic skill" and subjective judgment, rather than mere effort, "special training" or "physical skill" is essential to create a copyrightable derivative work.

Courts and commentators have proposed a similar creative-process analysis to address the nettlesome issue of copyrightability for "useful" or utilitarian works.\textsuperscript{199} Adopting the "design process" approach first advocated by Professor Robert Denicola\textsuperscript{200} in the early 1980s, the United States Second Circuit Court of Appeals in Brandir International, Inc. v. Cascade Pacific Lumber Co.\textsuperscript{201} attempted to reconcile conflicting decisions on the status of useful articles and

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and dimensions of the glass panes... show far more than a trivial amount of intellectual labor and artistic expression on plaintiff's part), with Past Pluto Prods. Corp. v. Dana, 627 F. Supp. 1435, 1441 (S.D.N.Y. 1986) ("This Court declines... to find artistic originality in a design feature composed of elemental symmetry and prompted most probably by the promise of convenience in manufacture.").

196. See, e.g., Gardenia Flowers, Inc. v. Joseph Markovitz, Inc., 280 F. Supp. 776, 781 (S.D.N.Y. 1968) ("The degree of creativity necessary to define objects as works of art is not supplied through innovations which are solely utilitarian or mechanical... [t]hus the fact that... certain practical features... facilitated their assembly and eliminated the need for certain manufacturing operations, does not overcome the absence of creativity inherent in the arrangements.").

197. See, e.g., Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 910 (2d Cir. 1980) (concluding that the originality requirement cannot be satisfied by "mere reproduction of a work... in a different medium, or by the demonstration of some 'physical' as opposed to 'artistic' skill").

198. L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 491 (2d Cir. 1976) (finding originality requirement is not satisfied by a demonstration of physical skill or special training).

199. Keith Aoki, Contradiction and Context in American Copyright Law, 9 CARDOZO ARTS & ENT. L.J. 303, 322 (1991) (describing history of industrial design issues in copyright law and explaining that "[b]y the mid-1970s, the distinction between art and utility had become an incoherent spectrum along which administrators and courts adopted contradictory, inconsistent and irreconcilable positions").


201. 834 F.2d 1142, 1147 (2d Cir. 1987) (adapting Denicola's approach and holding that "a copyrighted work of art does not lose its protected status merely because it subsequently is put to a functional use").
industrial design by focusing exclusively on the author's intent.\footnote{202} Under \textit{Brandir}, if utilitarian or functional "influences" drove the author's design, the work is considered to be a noncopyrightable useful article—in spite of its "artistic" features and commercial value.\footnote{203} If, however, the work reflects "the designer's artistic judgment exercised independently of functional influences," the work is copyrightable. Although not without critics,\footnote{204} many of whom offer the familiar criticisms of any fault-based standard,\footnote{205} the

\footnote{202} Courts considered evidence of the "design process" and author's intent before the Second Circuit formally adopted the Denicola approach. \textit{See}, e.g., \textit{Poe v. Missing Persons}, 745 F.2d 1238, 1243 (9th Cir. 1984) (noting that "evidence of [the author's] intent in designing the article may be relevant in determining whether it has a utilitarian function").

\footnote{203} \textit{See} \textit{Brandir}, 834 F.2d at 1145; \textit{see also Nat'l Theme Prods., Inc. v. Jerry B. Beck, Inc.}, 696 F. Supp. 1348, 1353 (S.D. Cal. 1988) (concurring with the "Second Circuit's adoption of the Denicola test to the extent it requires one to look to an artist or designer's creative process, and the decisions going into that process, in creating a useful article").

\footnote{204} \textit{See}, e.g., \textit{1 Patry, supra} note 8, at 279-80 n.704 (explaining that "the Copyright Act is manifestly not concerned with process... and, not surprisingly, Denicola does not cite any authority for so obviously ignoring the plain words of the statute"); \textit{Aoki, supra} note 196, at 344 (describing Judge Oakes's opinion in \textit{Brandir} as a "valorization of the artist and implicit derogation of the designer"); Mark A. LoBello, \textit{The Dichotomy Between Artistic Expression and Industrial Design: To Protect or Not To Protect}, 13 Whittier L. Rev. 107, 133-34 (1992) (noting that while "[a]n obvious advantage to such a standard is its embrace of abstract designs... there is at least one flaw to such an approach—the inability to clearly indicate an artist's intent"); \textit{Petruzelli, supra} note 137, at 137 ("Allowing an artist's intent to be instrumental in the determination of copyright protection can lead to arbitrary and unworkable results."). Commentators frequently lament that under the Denicola approach, much of today's "edgier" conceptual art, such as Marcel Duchamp's "readymades," may not be copyrightable. \textit{See}, e.g., \textit{J. Alex Ward, Copyrighting Context: Law For Plumbing's Stake}, 17 Colum.-VLA J. L. & Arts 159, 159 (1993) (describing how "[i]n 1917, Marcel Duchamp found a urinal in New York City's trash, named it \textit{Fountain} and submitted it, without ornamentation and without plumbing, to the New York Society of Independent Artists' 1917 exhibition"). In 1988, \textit{Fountain} sold for almost $70,000. \textit{Id.} at 164.

\footnote{205} \textit{See}, e.g., \textit{Ralph S. Brown, Design Protection: An Overview}, 34 UCLA L. Rev. 1341, 1351 (1987) ("Denicola's valiant attempt to find a normative theory that can operate within the constraints of the statute may fail... because of the ambiguities of reconstructing the designer's purpose. It seems to leave too much room for self-serving declarations of aesthetic aims, even if such declarations could be deflated by cross-examination or simple skepticism."); \textit{Perlmutter, Conceptual Separability, supra} note 138, at 374-75 ("Even outside of the useful article context, a focus on motive is out of place in the field of copyright law. The creator's intent is not the test of copyrightability for any other type of work... the issue is always the nature of the work itself—whether to an objective observer it contains sufficient original creativity to constitute authorship."). Professor Perlmutter echoes the "problems of proof" concern of most strict liability advocates, asserting that "while any issue of fact can be hard to prove, this particular test turns on motivation and subjective intent, calling for testimony from designers who are more than likely to have a personal stake in the
Denicola/Brandir approach serves as yet another compelling example of courts and commentators acknowledging the propriety of evaluating the author's intent and creative process in copyright.\textsuperscript{206}

b. Ownership

The intent of an author at the time of creation also has significant ramifications in determining copyright ownership. Intent is "the essential element" in determining whether a contributor or collaborator is entitled to joint authorship of work.\textsuperscript{207} Under the Copyright Act, a joint work is defined as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."\textsuperscript{208} Cognizant of the countless "contributors" who may offer minor suggestions, friendly advice, or even paid editorial assistance, courts have further refined this definition to distinguish between menial editorial or artistic contributions, such as those supplied by editors, research assistants, and even friends and family members, and true co-authorship.\textsuperscript{209} Surprisingly, in light of the longstanding adherence

outcome." \textit{Id.} at 375.

Professor Denicola answers his critics by acknowledging that "the standard is indeed difficult to apply," but further questioning whether "one [can] hope for a litmus-type test by which to describe criteria described as 'conceptual?'" Brown, \textit{Design Protection, supra}, at 1351 & n.51.

\textsuperscript{206} Judge Oakes expressly rejected administrative efficiency concerns, noting that the design process approach "will not be too difficult to administer in practice" because "[t]he work itself will continue to give 'mute testimony' of its origins." \textit{Brandir}, 884 F.2d at 1145; \textit{see also} Leonard D. Duboff, \textit{What is Art? Toward a Legal Definition}, 12 HASTINGS COMM. \& ENT. L.J. 303, 322 (1990) (noting that while "the Denicola test appears too subjective" it proves "to be a useful test").

\textsuperscript{207} \textit{See} LEAFFER, \textit{supra} note 14, \S 5.4(3), at 140.

\textsuperscript{208} \textit{See} 17 U.S.C. \S 101 (1994 \& Supp. VI 2001) (emphasis added). The meaning of "intent" in section 101 has been the source of considerable debate. \textit{See}, \textit{e.g.}, Rochelle Cooper Dreyfuss, \textit{Collaborative Research: Conflicts on Authorship, Ownership, and Accountability}, 53 VAND. L. REV. 1161, 1206 (2000) (arguing that the Copyright Act requires "intent to merge two works into an 'inseparable or interdependent part of a unitary whole' [not] intent to be co-authors").

\textsuperscript{209} \textit{See} Aalmuhammed v. Lee, 202 F.3d 1227, 1235-36 (9th Cir. 2000) ("Claimjumping by research assistants, editors, and former spouses, lovers and friends would endanger authors who talked with people about what they were doing, if creative copyrightable contribution were all that authorship required."); \textit{see also} Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1071-72 (7th Cir. 1994) ("The fact that one actor . . . suggested that [the author] include a passage from Macbeth and an introduction to the play does not make him a joint author."); Childress v. Taylor, 945 F.2d 500, 509 (2d Cir. 1991) (concluding that although the plaintiff "made some incidental suggestions . . . there is no evidence that these aspects . . . ever evolved into something else may have come from the cast, the directors, or the producers of any play . . . a playwright does not so easily acquire a co-author"); S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1087 (9th Cir. 1989) ("A person who merely describes to an author what the commissioned work should do or look like is not a joint
to strict liability for copyright infringement, the critical distinction between mere collaborators and full co-authors hinges exclusively on the parties' intent—"the touchstone"\textsuperscript{210} of joint authorship.\textsuperscript{211}

Intent is of additional relevance in distinguishing between joint works and derivative or collective works.\textsuperscript{212} Because intent to create one portion of a "unitary whole" is essential to creation of a joint work, an author who creates an independent work, which is later joined with another independent work to create a third work, is not an author—or even a joint author—of the new work.\textsuperscript{213} Conversely, if an author creates a work intending for it to be joined with another work, he is the co-author of any future work.\textsuperscript{214} Although the author need not know when, where, or with what his work will ultimately be joined, he must have intended that his "individual efforts would not

\footnotesize{\textsuperscript{210} H.R. REP. NO. 94-1476, at 120 (1976).}

\footnotesize{\textsuperscript{211} The "equal sharing of rights should be reserved for relationships in which all participants fully intend to be joint authors." Childress, 945 F.2d at 509 (emphasis added). The Childress court explained that joint authors need not "understand precisely the legal consequences of that relationship" and "joint authorship can exist without any explicit discussion... by the parties." Id. at 508. Courts have held that the amount and significance of each author's contribution is immaterial. See, e.g., Clogston v. Am. Acad. of Orthopaedic Surgeons, 930 F. Supp. 1156, 1162 (W.D. Tex. 1996) (acknowledging that the plaintiff contributed ninety percent of the photographs in the work at issue, but concluding that "the importance of the contribution is simply not a relevant inquiry").}

\footnotesize{\textsuperscript{212} The consequences of this classification may be far-reaching. Because joint authors are "tenants in common," both are considered full authors of the work, and either may exploit the work, subject only to a duty to account to his co-author. See Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266, 267 (2d Cir. 1944) (Hand, J.) ("When both plan an undivided whole... unless they stipulate otherwise in advance, their separate interests will be as inextricably involved, as are the threads out of which they have woven the seamless fabric of the work."). See generally Mary LaFrance, Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors, 50 EMORY L.J. 193, 193 (2001) ("Absent an agreement to the contrary, each author of a joint work has an equal claim to... profits and an equal right to exploit the work, even if the authors contributions were not equal. This legal consequence has led most courts to proceed with caution... ").}

\footnotesize{\textsuperscript{213} Under these circumstances, the new work would likely be classified as either a derivative work or a collective work. See 1 NIMMER, supra note 8, § 6.05, at 6-13 (explaining that "the distinction lies in the intent of each contributing author at the time his contribution is written"). In either case, "the contributing author owns only his contribution, while in the case of a joint work each contributing author owns an undivided interest in the combination of contributions." Id.

\footnotesize{\textsuperscript{214} See Marks, 140 F.2d at 267 ("It makes no difference whether the authors work in concert, or even whether they know each other; it is enough that they mean their contributions to be complementary in the sense that they are to be embodied in a single work to be performed as such."); see also 1 NIMMER, supra note 8, § 6.05, at 6-14 (contrasting a motion picture based on a screenplay—likely a joint work, co-authored by the screenwriter, producer, director etc., and a motion picture based on a novel or play—likely a derivative work).}
stand alone."215

Interestingly, this focus on "intent" seems to have provided a workable solution to the complicated and often emotional issue of joint authorship. Although long rejected as an element of infringement for fear of "difficult problems of proof," courts have developed consistent criteria and objective evidence to discern the intent of potential joint authors.216 While acknowledging the conflicting "feelings and intent" of estranged collaborators and former colleagues, courts recognize that "a subjective state of mind cannot of itself satisfy the objective criteria of the copyright law."217 Thus, rather than rely on self-serving statements of subjective intent,218 courts generally identify objective criteria such as decision making authority,219 "billing" or "credit,"220 agreements with third parties,221 and a variety of other objective evidence222 to assess the intent of joint

215. See Weissmann v. Freeman, 868 F.2d 1313, 1319 (2d Cir.1989); see also Susan Keller, Comment, Collaboration in Theater: Problems and Copyright Solutions, 33 UCLA L. REV. 891, 903-04 (1986) ("[I]ntent alone separates a joint work from a derivative or collective work and settles whether one owns an undivided interest in the whole or only one's own contribution.").

216. But see Keller, supra note 215, at 938-39 (arguing that "[a]llocation of copyright in theatrical settings has been rather arbitrary" and "the concept of joint work and joint authorship incorporated into the 1976 Copyright Act is woefully inadequate"); see also Dreyfuss, supra note 204, at 1209 ("[T]he intent test is fair only if participants in the creative process know each another's plans. Unfortunately, many collaborations have features, such as cultural differences, divergent disciplinary practices, and valuation gaps, that make misunderstanding quite likely.").


218. See Aalmuhammed, 202 F.3d at 1235 ("In the absence of a contract, the inquiry must of necessity focus on the facts."); Thomson v. Larson, 147 F.3d 195, 201 (2d Cir. 1998) ("[J]oint authorship intent does not turn solely on the parties' own words or professed state of mind."); Respect Inc. v. Comm. on the Status of Women, 815 F. Supp. 1112, 1121 (N.D. Ill. 1993) ("As with every judicial inquiry into intent, such objective evidence usually provides the most reliable clue to a person's mindset.").

219. E.g., Thomson, 147 F.3d at 202-03 ("An important indicator of authorship is a contributor's decision making authority."); Lindsay v. The Titanic, No. 97 Civ. 9248, 1999 WL 816163, at *6 (S.D.N.Y. Oct. 13, 1999) ("[W]here one contributor retains a so-called 'veto' authority over what is included in a work, such control is a strong indicator that he or she does not intend to be co-authors with the other contributor.").

220. See Thomson, 147 F.3d at 203 n.24 ("[B]oth the Off-Broadway and the Broadway playbills identify Rent as being 'by Jonathan Larson,' [the defendant] while Thomson [the plaintiff] is listed as 'Dramaturg.'"); Respect Inc., 815 F. Supp. at 1121 ("Certainly [the defendant] could not have made her intention more plain than by the way she billed herself in each of the books.").

221. Erickson, 13 F.3d at 1072 (citing a licensing agreement as evidence of the parties' intent).

222. See BTE v. Bonnecaze, 43 F. Supp. 2d 619, 624-25 (E.D. La. 1999) (explaining that "to proceed with this 'intent' inquiry, a court must engage in an examination of the factual indicia of ownership and authorship" and listing the relevant factors as: (1) decision making authority, (2) billing and credit, (3) written agreements with third
authors. By focusing on this objective evidence and "factual indicia" courts are able to address conflicting claims of joint authorship fairly while successfully avoiding dreaded "problems of proof"\textsuperscript{223} and any accompanying administrative inefficiency.

c. Infringement

The innocence or culpable intent of an infringer is also relevant—and often dispositive—in cases of contributory infringement. In spite of the longstanding "unanimity of view" in favor of strict liability for direct and vicarious infringers of copyright, courts premise liability for contributory copyright infringement, in part, on the intent or knowledge of the contributory infringer.\textsuperscript{224} Indeed, in stark contrast to other variants of infringement, knowledge is the very "touchstone" of contributory infringement.\textsuperscript{225}

The doctrine of contributory infringement, while not expressly set forth in the Copyright Act,\textsuperscript{226} evolved in American courts as a
derivative of the "enterprise liability" theory of tort law. Under this judge-made doctrine, an individual may be liable for the infringing acts of another only if he "induces, causes or materially contributes to the infringing conduct of another" with knowledge of the infringing activity. Thus, in contrast to the general rule of strict liability for copyright infringement, contributory infringement is described as "one area where knowledge is required," because to be liable "one must intentionally aid another to infringe."

d. Fair Use

Courts have long considered the motives of alleged infringers when evaluating the defense of "fair use." Although not enumerated among the nonexclusive fair use factors in the Copyright Act, "good faith" and "fair dealing" are factors that courts have contributory infringement if the product is widely used for legitimate, unobjectionable purposes." Id. at 442.

227. See, e.g., Gershwin Publ'g Co. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) ("[O]ne who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer."); Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F. Supp. 399, 403 (S.D.N.Y. 1966) ("[T]he basic common law doctrine that one who knowingly participates in or furthers a tortious act is jointly and severally liable with the prime tortfeasor is applicable in suits arising under the Copyright Act.") (emphasis added); see also LEAFFER, supra note 14, § 9.20, at 290 ("The easiest cases to find liability for contributory infringement are those where the related defendant has actual knowledge of and comes the closest to directly participating in the infringement."); A. Samuel Oddi, Contributory Copyright Infringement: The Tort and Technology Tensions, 69 NOTRE DAME L. REV. 47, 51 (1989) (explaining that "the theory underlying contributory infringement parallels that of trespass upon a property interest"); Alfred C. Yen, A Personal Injury Law Perspective on Copyright in an Internet Age, 52 HASTINGS L.J. 929, 931 (2001) ("The claim that Internet technology providers are liable for infringement committed by users resembles the application of enterprise liability in tort law.").

228. See Gershwin Publ'g Corp., 443 F.2d at 1162.

229. See LATMAN, supra note 14, at 232; see also LEAFFER, supra note 14, § 9.20, at 290.

230. See 4 NIMMER, supra note 8, § 13.05[A][1][d], at 13-167 ("At least one additional factor relevant to the 'character' of the use is the propriety of the defendant's conduct."); WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 130 (2d ed. 1995) ("Also of relevance to evaluating a claim of news reporting fair use is the presence of bad faith on defendant's part."); Lacey, supra note 63, at 1562 (explaining that "the first fair use factor...carries an explicit message that educators 'deserve' to use a copyrighted work for free, since their motives are not private pecuniary gain" and noting that "Jean Valjean might not have gone to prison if intellectual property law applied to loaves of bread"); Darrell L. Peck, Copyright-Infringement of Literary Works-An Elemental Analysis, 38 MARQ. L. REV. 180, 187 (1965) ("Obviously, if the defendant is guilty of an animus furandi, he cannot claim fair use.").

considered in evaluating the fairness of particular uses, with the
“bad faith” of a user militating heavily against a finding of fair use.232
Likewise, courts in fair use cases have examined objective
manifestations of motive—such as whether the plaintiff’s work was
“purloined,”233 or otherwise misappropriated and whether the
defendant sought to “pass off the work as his own.”234 This emphasis
on motive, although controversial,235 is gaining increased significance
in fair use determinations.

e. Remedies

Perhaps the most explicit example of routine “skull cracking” in
copyright occurs when courts assess remedies, including damages
and attorney’s fees. The relative innocence of a defendant may have a
drastic effect on the amount damages awarded in an infringement

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232. See, e.g., Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., Inc., 621
F.2d 57, 62 (2d Cir. 1980) (“We cannot ignore the fact . . . that [the defendant] copied
the work) while purporting to assess its value for possible purchase . . .”); Tin Pan
faith” and “evasive motive” as “additional factor[s] . . . mitigating against fair use”);
Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F. Supp. 1031,
1036 (N.D. Ga. 1986) (noting that although fair use presupposes good faith, the
defendant’s intentional copying with the purpose of appropriating and using the
reputation of the plaintiff and reaping the benefit of the demand for plaintiff’s product
is an element of bad faith”); N.Y. Tribune, Inc. v. Otis & Co., 39 F. Supp. 67, 68
(S.D.N.Y. 1941) (“While intent to infringe is not essential to plaintiff’s cause of
action . . . the defendant’s intention bears upon the question of fair use.”) (citations
omitted). But see Pierre N. Leval, Toward a Fair Use Standard, 103 HARV. L. REV.
1105, 1126 (1990) (“The inquiry should focus not on the morality of the secondary user,
but on whether her creation claiming the benefits of the doctrine is of the type that
should receive those benefits . . . no justification exists for adding a morality test.”).

233. Harper & Row, 471 U.S. at 563 (noting that “the Nation knowingly exploited a
purloined manuscript”).

234. Weissmann, 868 F.2d at 1324 (noting that the defendant deleted the plaintiff’s
name and substituted his own and finding that this conduct “undermine[d] the his
right to claim the equitable defense of fair use”).

235. The most persuasive argument against considering good or bad faith in the fair
use analysis has been offered by Judge Pierre N. Leval, who argues that “in all areas
of law, judges are tempted to rely on findings of good or bad faith to justify a decision
because such findings “permit[ ] us to avoid rewarding morally questionable conduct.”
Leval, supra note 232, at 1126. Judge Leval’s conclusion is based on a straightforward
utilitarian understanding of copyright law. “Copyright is not a privilege reserved for
the well-behaved. Copyright protection is not withheld from authors who lie, cheat, or
steal to obtain their information . . . [c]opyright is not a reward for goodness but a
protection for the profits of activity that is useful to the public education.” Id.; see also
Lloyd Weinreb, Fair’s Fair: A Comment on the Fair Use Doctrine, 103 HARV. L. REV.
1137, 1140 (1980) (responding to Judge Leval and explaining “my principal
disagreement is that [Judge Leval] would construe the fair use doctrine strictly
according to the utilitarian premises of the copyright scheme . . . to the exclusion of
every other consideration”).

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action. Under the damages scheme set forth in the 1976 Act, a prevailing copyright plaintiff may elect to recover either statutory or actual damages. Although the “floor” amount of statutory damages is $750, if a plaintiff elects to recover statutory damages in lieu of actual damages, a “court in its discretion” may reduce the award of statutory damages to a sum of “not less than $200” to account for the innocence of the defendant. However, to capitalize on this provision, the defendant—infringer bears the burden of successfully proving “that [she] was not aware and had no reason to believe that... her acts constituted an infringement of copyright.”

Likewise, if the copyright owner successfully proves that the infringement was committed willfully, the court may increase the amount of statutory damages awarded to “a sum of not more than $150,000.” Like the “innocence remittitur,” this “willfulness additur” is entirely discretionary; a court may decline to increase statutory damages even in the face of the most flagrant copyright violations. However, the efficacy of these provisions and their

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236. 17 U.S.C. § 504 (1994) (stating that remedies for infringement include damages); see also Fitzgerald Publ'g Co., Inc. v. Bayler Publ'g Co., Inc., 807 F.2d 1110, 1113 (2d Cir. 1986) (“Innocence is only significant to a trial court when it fixes statutory damages, which is a remedy equitable in nature.”).

237. 17 U.S.C. § 504(c)(1) (1994 & Supp. VI 2001). A copyright owner may elect to recover an award of statutory damages at any time before a final judgment is rendered. Id. According to the Act, the sum awarded, shall be “not less than $750 or more than $30,000” and shall encompass all acts of infringement with respect to any one work for which any one infringer is liable or for which two or more infringers are jointly and severally liable. Id.

238. Id. § 504(b) (“The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement...”).

239. Id. § 504(c)(1) (permitting statutory instead of actual damages). Statutory damages are sometimes referred to as “in lieu” damages. See 4 Nimmer, supra note 8, § 14.01[B], at 14-6.

240. 17 U.S.C. § 504(c)(2); see also 2 Patry, supra note 8, at 1175 (explaining that while § 504(c)(2) permits the court to award less than the minimum amount of statutory damages, the burden on the infringer “is a heavy one, and it is difficult to see how any commercial entity could satisfy it under normal conditions”). It is important to note that an innocence remittitur is entirely discretionary; a court is not obligated to reduce an award against even the most innocent defendant. See, e.g., Los Angeles News Serv. v. Tulle, 973 F.2d 791, 800 (9th Cir. 1992) (explaining that the defendant’s lack of knowledge “does not mandate a nominal award”); Major League Baseball Promotion Corp. v. Colour-Tex, Inc., 729 F. Supp. 1035, 1046 (D.N.J. 1990) ("[W]e may still award statutory damages in excess of [the minimum], despite a finding that the infringement was committed unknowingly.").


242. Id.

243. See, e.g., N.A.S. Import Corp., v. Chenson Enters., Inc., 968 F.2d 250, 253 (2d Cir. 1992) (reversing district court’s finding that infringement was not willful but acknowledging that “it still remains within the district court’s discretion, in light of
intended deterrent effect is likely diluted because, although the damages scheme purports to address and accommodate the relative willfulness or innocence of the infringer, the Act nowhere defines either “willfulness” or “innocence.”\textsuperscript{244} Predictably, without Congressional guidance, courts grappling with the issue of “innocence” or “willfulness” have developed inconsistent standards and have arrived at markedly different results.\textsuperscript{245}

\textsuperscript{244} Compare, e.g., Fallaci v. New Gazette Literary Corp., 568 F. Supp. 1172, 1173 (S.D.N.Y. 1983) (willfulness based on defendant’s publisher status), with Peer Int’l Corp. v. Pausa Records, Inc., 909 F.2d 1332, 1335-36 (9th Cir. 1990) (basing its finding of willfulness on defendant’s continued use of copyrighted work with knowledge that license was revoked). But see Hearst Corp. v. Stark, 639 F. Supp. 970, 980 (N.D. Cal. 1986) (explaining that a defendant’s infringement is not willful if he reasonably and in good faith believed his conduct was not infringing).

One court has attempted to explain this controversial statutory prescription by noting that “willfulness” and “innocence” are not the converse of one another. Fitzgerald, 807 F.2d at 1115 (“It is possible . . . for a plaintiff not to be able to prove a defendant’s willfulness, and at the same time, for the defendant to be unable to show that [he] acted innocently.”). However, the knowledge of the infringer is dispositive in both analyses. According to the court, “just as the lack of actual or constructive knowledge will establish an innocent intent, so a defendant’s actual or constructive knowledge proves willfulness.” Id.

\textsuperscript{245} Further complicating this predicament is the fact that “willfulness” for purposes of assessing statutory damages generally differs from “willfulness” in criminal copyright infringement and from “willfulness” in calculating the defendant’s actual damages. See 4 Nimmer, supra note 8, § 14.04[B][3], at 14-55 n.81.6; see also Kamar Int’l v. Russ Berrie & Co., 752 F.2d 1326, 1331 (9th Cir. 1984) (noting that “willfulness” has different meanings and explaining that while the defendant may have acted willfully to warrant an increase in statutory damages, because he did not “deliberately infringe” his actions were not willfull in the “broader sense” and thus did not mandate denial of deduction of overhead expenses or an award of attorney’s fees). Other courts have pointed out the murkiness in this arena. See, e.g., Allen-Mylan, Inc. v. Int’l Bus. Machs. Corp., 770 F. Supp. 1014, 1026 (E.D. Pa. 1991) (explaining that although “[n]either party cites authority to support the view that the concept of willfulness should be the same in separate contexts of determining statutory damages and determining whether overhead should be deducted from defendant’s infringement profits,” decisions “explaining willfulness under 504(c)(2) are useful to approach the
While the innocence of the defendant may potentially have a dramatic effect on the statutory damages awarded to the prevailing plaintiff, such innocence may also affect, to a lesser extent, an award of actual damages or infringer's profits. According to the Copyright Act, a prevailing copyright owner who elects to recover actual damages is also entitled to any profits "attributable to the infringement [which] are not taken into account in computing the actual damages."\(^{246}\) However, after a prevailing plaintiff has established the defendant's gross revenue, a defendant is entitled to prove certain expenses, most commonly "overhead" expenses,\(^{247}\) which the court may deduct from the ultimate damage award.\(^{248}\) Interestingly, although liability for copyright infringement is not fault-based, intent has surfaced in many decisions as one criterion for determining these allowable deductions. In assessing these deductions, courts have considered whether the defendant's actions were deliberate, conscious or willful.\(^{249}\)

\(^{246}\) 17 U.S.C. § 504(b).

\(^{247}\) Although the issue of willfulness arises most often in deduction of general overhead or "operating" expenses, courts have also examined the culpability of the defendant in assessing whether to allow a deduction for income tax payable on gross revenues. See 4 Nimmer, supra note 8, § 14.03[B], at 14-33 to 14-32 (citing Mfrs. Techs., Inc. v. Cams, Inc., 728 F. Supp. 75, 84 (D. Conn. 1989); Sheldon v. Moredal Realty Corp., 29 F. Supp. 729 (S.D.N.Y. 1939)).

\(^{248}\) 17 U.S.C. § 504(b); see also 4 Nimmer, supra note 8, § 14.03[B], at 14-36 ("The defendant has the burden of proving that each item of general expense contributed to the production of the infringing items, and of further offering a fair and acceptable formula for allocating a given portion of overhead to the particular infringing items in issue.").

\(^{249}\) Saxon v. Blann, 968 F.2d 676, 681 (8th Cir. 1992) ("Overhead may not be deducted from gross revenues to arrive at profits when an infringement was deliberate or willful."); Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505, 515 (9th Cir. 1985) (explaining that "[a] portion of an infringer's overhead ... may be deducted from gross revenues to arrive at profits, at least where infringement was not willful, conscious, or deliberate") (citations omitted); Sammons v. Colonial Press, Inc., 126 F.2d 341, 348 (1st Cir. 1942) (noting, in dicta, that "[p]ossibly a deduction for overhead should be allowed in such a case when the infringement is innocent and denied when the infringement is conscious and deliberate") (citations omitted).

Not all courts agree that the calculation of deductible expenses is the appropriate vehicle for addressing the culpability or innocence of the defendant. One court recently rejected such variances, cautioning that such an application may result in the unjust enrichment of the copyright owner. ZZ Top v. Chrysler Corp., 70 F. Supp. 2d 1167, 1168 (W.D. Wash. 1999) ("If an infringer were not permitted to deduct all costs incurred in generating the gross revenues, including overhead costs, the copyright owner would be awarded more than just profits and the infringer would ... also suffer affirmative punishment."). The court in ZZ Top further noted that "[w]here Congress intended to punish willful infringement by authorizing different remedies depending on the infringer's culpability, it clearly knew how to do so ... [but] there is no statutory basis for denying a deduction of overhead costs as punishment to willful infringers." Id.
Like the damages provisions, the costs and attorney's fees provisions of the Copyright Act afford yet another limited—and entirely discretionary—method of factoring the defendant's relative culpability or innocence into liability for copyright infringement. Section 505 of the Copyright Act provides that a court "in its discretion" may allow "full costs by or against any party" and may award "a reasonable attorney's fee to the prevailing party as part of the costs." Relying on this provision, courts often evaluate the relative culpability of the parties and, in particular, the moral blameworthiness of the defendant, when assessing and awarding attorney's fees.

Additionally, the Copyright Act provides for certain limited defenses to statutory damages based upon the innocence of the defendant. For example, if the defendant-infringer successfully establishes that she "believed and had reasonable grounds for believing that [her] use was a fair use" or the defendant was an employee of certain nonprofit organizations such as a library, or public broadcasting entity, the court "shall remit statutory


251. See 4 Nimmer supra note 8, § 14.10[D][1], at 14-155 ("[E]ven the cases that nominally disclaim reliance on culpability can be seen, at least sub silentio, to rely on an evaluation of the relative blame as between the parties."); see, e.g., Boz Scoggins, 491 F. Supp. at 915 ("[C]onsiderations that might justify the denial of fees include . . . the defendants' status as innocent, rather than willful or knowing, infringers . . . .").

The proper method of calculating awards of attorney's fees and costs in copyright infringement was the source of a longstanding split among the federal circuit courts of appeals. Some circuit courts adopted the so-called "dual approach," awarding attorney's fees to the prevailing plaintiff as a matter of course but to the prevailing defendant only upon a showing of bad faith on the part of the plaintiff. 4 Nimmer supra note 8, § 14.10[D][2][a], at 14-156 to 14-157. In contrast, other courts adopted an "evenhanded approach," awarding attorney's fees to the prevailing party, whether plaintiff or defendant. See id. at 14-157 to 14-158. The United States Supreme Court ultimately settled this issue in favor of the "evenhandedness approach," concluding that "[p]revailing plaintiffs and prevailing defendants are to be treated alike, but attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion." Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994). See generally Paul Marcus & David Nimmer, Forum on Attorney's Fees in Copyright Cases: Are We Running Through the Jungle Now or Is the Old Man Still Stuck Down the Road?, 39 WM. & MARY L. REV. 65 (1997).

252. See 17 U.S.C. § 504(c)(2)(i). This narrow exception applies to "employee(s) or agent(s) of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords." Id.

253. Id. § 504(c)(2)(ii). The impact of this exception, which applies to "a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity . . . infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of
Finally, unlike civil liability, criminal\(^{255}\) liability for copyright infringement does require a degree of culpability on the part of the infringer. Criminal copyright liability lies only if infringement is done "willfully" and "for purposes of commercial advantage or private financial gain."\(^{256}\)

In short, both basic economic theory and practical experience reveal the fundamental flaws in the administrative-efficiency justification for strict liability in copyright. While individual suits may be slightly less expensive under a strict liability regime, the increase in the overall number of suits likely results in increased net costs. In practice, strict liability has not reduced the staggering costs

such work," id., is likely negligible.

254. Often described as the "innocent infringer provision," section 504(c)(2) was ostensibly enacted to "protect unwarranted liability in cases of occasional and isolated innocent infringement... [and] offer adequate insulation to users, such as broadcasters and newspaper publishers who are particularly vulnerable to this type of infringement suit," while also preserving its "intended deterrent effect" by not allowing "an infringer to escape simply because the plaintiff failed to disprove the defendant's claim of innocence." H.R. REP. NO. 94-1476. In practice, this provision is cold comfort to innocent infringers; many plaintiffs will elect to pursue actual damages and the profits of the infringer, in lieu of statutory damages, which are subject to reduction. See 17 U.S.C. § 504(b).

255. Criminal copyright prosecutions are "relatively infrequent and are usually reserved for the most egregious violations," Sharon B. Soffer, Criminal Copyright Infringement, 24 AM. CRIM. L. REV. 491, 491 (1987); see also United States v. Wise, 550 F.2d 1180, 1188 (9th Cir. 1977) ("We find only two reported cases involving criminal copyright infringement.") (citations omitted), cert. denied, 434 U.S. 929 (1977). In prosecutions for criminal copyright infringement, the Government bears the burden of proving three elements: infringement of a copyright, that the infringement was willful, and that the infringer was motivated by profit. Id. at 1180. Additionally, persons who knowingly and willfully aid or abet copyright infringement are also subject to criminal prosecution. See, e.g., United States v. Schmidt, 15 F. Supp. 804, 807 (M.D. Pa. 1936) (denying motion to quash indictment for aiding and abetting copyright infringement).

of individual copyright infringement suits. More importantly, however, administrative efficiency is an inadequate rationale for strict liability because copyright law is replete with examples of routine and administratively manageable "skull cracking." Indeed, courts routinely account for the intent of both authors and infringers with consistency and celerity. Given that this state of affairs has led to equitable results without significantly compounding the "burdens" of infringement suits, administrative-efficiency concerns should not preclude courts from considering an infringer's culpability or innocence in all infringement cases.

IV. STRICT LIABILITY AS MALIGNANT

Strict liability not only lacks a sound justification in copyright, it affirmatively harms copyright's fundamental utilitarian goal. Copyright protection, according to the Constitution, exists "[t]o promote the Progress of Science."\textsuperscript{257} Legislation enacted pursuant to the Copyright Clause is simply a "means by which an important public purpose"—the production of new works of authorship—is furthered.\textsuperscript{258} To encourage authorship, the Copyright Act grants authors certain exclusive rights in their creations, including the rights to reproduce, adapt, distribute, publicly perform, and publicly display copyrighted works of authorship.\textsuperscript{259} These exclusive rights would-be users to bargain \textit{ex ante} with authors for permission to use copyrighted works,\textsuperscript{260} thus creating a market that spurs artistic creation.\textsuperscript{261}

Although performing an indispensable market-creation function,


\textsuperscript{258} Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); see Feist Publ'ns., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991) ("The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.' Art. I, § 8, cl. 8 ... "); \textit{see also} \textit{PATTERSON & LINDBERG}, supra note 14, at 138 (stating that copyright protection is "granted in return for quid pro quo—the creation of a work of authorship to benefit the public"); Gordon, \textit{Of Harms and Benefits}, supra note 101, at 449 ("Legal protection for intellectual products is based on the benefits the producers generate . . . ."); Sinclair, \textit{supra} note 8, at 942.


\textsuperscript{260} \textit{See}, e.g., Blair & Cotter, \textit{supra} note 57, at 5-15; Landes & Posner, \textit{supra} note 88, at 328-29; Sterk, \textit{supra} note 66, at 1204.

\textsuperscript{261} \textit{See} Gordon, \textit{Inquiry into the Merits of Copyright}, \textit{supra} note 11, at 1389 (noting that the "copyright statute . . . facilitates the use and development of copyrighted works through markets"); Gordon, \textit{On the Economics of Copyright}, \textit{supra} note 101, at 11 (stating that a "private market" for copyrighted works generates incentives for production).
these exclusive rights tug against the overarching goal of public access. This tension pervades copyright legislation, case law, and scholarship. In fact, "[s]triking the correct balance between access and incentives is the central problem in copyright law." To strike (or approximate) the proper balance, copyright protection must be no greater than necessary to create sufficient market incentives for creation. More expansive protection is undesirable. Indeed, unduly expansive protection—overprotection—threatens to raise the costs of creating and using copyrighted works. With rising costs comes decreasing demand, and eventually, a reduction in the number of works ultimately created for the benefit of the public. For these reasons, any consideration of strict liability in copyright's liability scheme must weigh the extent to which it promotes a satisfactory balance between access and incentives.

Unfortunately, strict liability does not facilitate an acceptable balance between access and incentives. On the contrary, it sacrifices access at the altar of incentives. But that sacrifice comes full circle: strict liability harms incentives by weakening the market for copyrighted works, both by reducing demand and by encouraging

262. See H.R. Rep. No. 94-1476 at 134 (1976) (balancing incentives and access in setting term of copyright protection); H.R. Rep. No. 60-2222, 60th Cong., 2d Sess. 7 (1909) (Congress must consider both incentives to "stimulate the producer" and extent to which exclusive rights will be "detrimental to the public").

263. See, e.g., Sony, 464 U.S. at 429 (courts must "balance between the interests of authors . . . and society's competing interest in the free flow of ideas"); Kern River Gas Transmission Co. v. Coastal Corp., 899 F.2d 1458, 1463 (5th Cir. 1990) (copyright balances "competing concerns of providing incentive to authors to create and of fostering competition in such creativity").


266. See, e.g., DAN B. DOBBS, LAW OF REMEDIES 382 (2d ed. 1993) ("Remedy should follow the right and reflect it . . . "); Andrew W. Coleman, Copyright Damages and the Value of the Infringing Use: Restitutionary Recovery in Copyright Infringement Actions, 21 AIPLA Q.J. 91, 104 (1993) (copyright remedies must be evaluated with goal of striking balance between incentives and access); Blair & Cotter, supra note 57, at 1606 (noting that "too strong a system of copyright protection may deter the creation of new works that build upon earlier ones"); Landes & Posner, supra note 88, at 332; Sterk, supra note 66, at 1204-05; Sinclair, supra note 8, at 943 (Copyright law must "protect authors only to the extent necessary to encourage continued production of works of merit. To extend protection beyond this point would be to lose sight of the very purpose of copyright law.").

267. See, e.g., Landes & Posner, supra note 88, at 332 (overprotection would "raise the cost of creating new works . . . and thus, paradoxically, perhaps lower the number of works created"); Lunney, supra note 264, at 495-98 (as copyright protection broadens "both the cost of creating new works and the deadweight loss associated with existing works . . . increase").
market bypass.

A. Reduction of Demand for Copyrighted Works

Copyright's strict liability regime reduces the market demand for copyrighted works. Under this strict liability regime, all infringers, whether innocent or culpable, are potentially liable for, among other things, paying damages or disgorging all profits attributable to the infringed work. Courts often "err on the side of generosity to the prevailing plaintiff" and order infringers, whether innocent or culpable, to pay significant damages or restitution in an amount approaching their total gross revenues. Moreover, because courts can enjoin all future sales of infringing articles and order the destruction of such articles, all infringers, whether innocent or culpable, stand to lose the value of the materials, capital and labor invested in the creation of infringing articles, irrespective of the proportion of infringing to noninfringing elements. These harsh effects may simply be fallout from a laudable effort to deter infringement. But such deterrence is costly.

268. 17 U.S.C. § 501(a) (1994) ("Anyone who violates any of the exclusive rights of the copyright owner .. is an infringer of the copyright.") (emphasis added); id. § 504(a)(1) ("An infringer of copyright is liable for .. profits of the infringer."); 1 George Palmer, THE LAW OF RESTITUTION § 2.7 (1978) ("Profits are recoverable from an innocent infringer.").

269. Ralph S. Brown, Civil Remedies for Intellectual Property Invasions: Themes and Variations, 55 LAW & CONTEMP. PROBS. 45, at 67 (Spring 1992); see also Wade R. Keenon, Comment, Monetary Recovery Under the Copyright Act: Calculation of Damages, 65 OR. L. REV. 809, 821 (1986) ("Almost all courts hold that doubts regarding the proof of allocation are to be resolved against the infringer.").


272. Id. at § 503(b).

273. See Gordon, Toward a Jurisprudence of Benefits, supra note 8, at 1029 (noting that an owner "may obtain an injunction against the new project, blocking not only the dissemination of copied elements but any newly-created ones that are intermixed as well").

274. Whether or not the threat of strict liability is an effective deterrent to copyright infringement is debatable. See Tom R. Tyler, Compliance With Intellectual Property Laws: A Psychological Perspective, 29 N.Y.U. J. INT'L L. & POL. 219, 234 (1997) (explaining that "reliance upon threats of punishment to enforce intellectual property laws is a strategy that is likely to be ineffective ..[i]nstead, legal authorities
Strict liability overdeters lawful and beneficial uses of copyrighted works. Because liability for infringement is not based on fault, innocent infringers face a risk of suffering severe financial consequences, even in the absence of wrongdoing. Innocent infringers come in many varieties. Some reasonably, but mistakenly, believe that the infringed work is not protected by copyright. Such a belief can arise from a misunderstanding that the infringed work is in the public domain, that the infringed work is not copyrightable, or that they have appropriated only noncopyrightable elements of the infringed work. Some innocent infringers reasonably, but mistakenly, believe that their own work does not infringe; others mistakenly predict how courts will evaluate their conduct. Such miscalculations can arise from the mistaken assumption that the infringing work is not, or will not be adjudged to be, "substantially similar" to the infringed work, that the use of the infringed work is "fair use," or that the use of the infringed work is authorized. Finally, other innocent infringers copy the infringed work unconsciously.

need to focus on creating the values that underlie voluntary compliance with the law. For a comprehensive analysis of the efficacy of deterrence in tort law, see Daniel W. Shuman, The Psychology of Deterrence in Tort Law, 42 U. Kan. L. Rev. 115 (1993). According to Professor Shuman, "(t)he lesson to be learned from cognitive psychology is that we do not process information in the manner assumed by the deterrence theory of tort law . . . people tend to rely on stereotypes and misuse information, rather than accurately calculate the risk of tort sanctions." Id. at 163.


279. See, e.g., ABRCO Music, Inc. v. Harrisons Music, Ltd., 722 F.2d 988, 998-99 (2d Cir. 1983); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936);
Given that innocent users face a real risk of supercompensatory strict liability, some likely curtail or even forego entirely their use of copyrighted works. This risk is particularly acute when, as in copyright law, substantial uncertainty exists as to the rights and obligations of those threatened with strict liability for severe penalties. Persons, including users of copyrighted works of authorship who are potentially subject to strict liability for their actions, typically reduce the extent to which they engage in the relevant activity. The deleterious effect of such a decline in activity levels in this particular context is perhaps obvious: depressed demand lowers the market price for copyrighted works in general.


280. See, e.g., PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 88 (1989) (restitutionary awards "will tend strongly to the sterilization of economic activity in the relevant situation"); POSNER, supra note 90, at 194 ("[S]trict liability encourages activity level changes by potential injurers."); id. at 243-44 ("[I]f there is a risk of . . . accidental violation of the criminal law . . . a very severe penalty will induce people to forego socially desirable activities at the borderline of criminal activity."); Blair & Cotter, supra note 57, at 1640 ("[T]he policymaker must be careful not to over-deter marginally lawful conduct through the imposition of draconian penalties."); id. at 1682; Peter Jaffey, Restitutionary Damages and Disgorgement, 3 RESTITUTION L. REV. 30, 46 (1995) (noting that disgorgement can "have the effect of deterring the defendant or others from carrying on the activity altogether"); see also William M. Landes, Optimal Sanctions for Antitrust Violations, 50 U. CHI. L. REV. 652, 655 n.4 (1983) (finding that harsh penalties "can deter socially valuable business behavior").

281. For example, what constitutes "fair use" has long troubled courts and commentators. See, e.g., Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam). See generally Leval, supra note 232, at 1106-07; Weinreb, Fair's Fair: A Comment on the Fair Use Doctrine, supra note 134, at 1137 ("[I]t is de rigueur to begin a scholarly discussion of fair use by quoting one of the judicial laments that fair use defies definition.").

282. See, e.g., POSNER, supra note 90, at 591 (noting that an uncertain law will "deter some legitimate activities . . . an effect particularly significant when the legitimate activity deterred by the vague prohibition is more valuable socially than privately. Then even a slight increase in costs (due to the threat of punishment) may greatly reduce the private demand for the activity, and in doing so may impose substantial social costs"); id. at 243-44 (finding that when there exists a risk of "legal error, a very severe penalty will induce people to forego socially desirable activities at the borderline"); Richard Craswell & John E. Calfee, Deterrence and Uncertain Legal Standards, 2 J.L. ECON. & ORG. 279, 298-99 (1986) ([U]ncertainty can change the incentives created by the legal rules in unexpected ways."). For a view that uncertainty in standards may actually promote infringement, see JOHN W. SCHLICHER, PATENT LAW: LEGAL AND ECONOMIC PRINCIPLES § 9.05[3], at 9-102 (1993) (noting that patent infringement "actions also involve a significant amount of uncertainty. Therefore, infringers may engage in too much infringement because they discount the potential damage award by the probability that it will in fact be imposed, a probability of less than one hundred percent.").

283. See, e.g., POSNER, supra note 90, § 6.5, at 193-94.
reduces authors' economic incentive to create, and, in turn, diminishes the potential volume of works available for public consumption, thereby countermuning the purpose for which copyright exists.

In addition to turning away risk-averse potential users, strict liability depresses the demand for copyrighted works in yet another way: by increasing the costs to those who nevertheless proceed to use such works. Those who bargain either for a license to use or ownership of a copyrighted work do so under the specter of strict liability for innocent infringement. For this reason, potential users must carefully investigate their grantor's or transferor's entitlement to the work.\textsuperscript{284} This task is inherently difficult, particularly considering the absence of systematic recordation of copyright ownership. Because the risk of supercompensatory strict liability looms over any such investigation, rational users will conduct more extensive, and hence more costly, investigations than they would in the face of less severe consequences.\textsuperscript{285} The detrimental results of such extensive investigations are clear: such investigations increase the costs associated with using copyrighted works, thus diminishing the demand for such works, lowering their market price, reducing the financial incentive for authors to create, which in turn diminishes the number of works to which the public has access, thus countermuning the purpose for which copyright exists.

\textbf{B. Encouragement of Market Bypass}

In addition to harming the market for copyrighted works by diminishing the demand for such works, copyright's strict liability regime may channel both owners and users away from the market that copyright strives to create. Such market bypass not only undermines the market-facilitating goals of copyright law, but also results in a less efficient allocation of resources than would occur

\textsuperscript{284} See GOLDSTEIN, supra note 28, § 9.4, at 9:18 ("[T]he strict liability rule should discipline an infringer, that might otherwise mistakenly conclude that its copying will not infringe the copyrighted work, to evaluate the legal consequences of its conduct more carefully.").

\textsuperscript{285} See, e.g., Peter K. Huber, Mistaken Transfers and Profitable Infringement on Property Rights: An Economic Analysis, 49 La. L. Rev. 71, 106 (1988) ("A rule granting [the owner] restitution in excess of the value of his right will create an incentive for [the user] to make inefficient expenditures in order to keep [the owner] from pursuing his claim."); see also POSNER, supra note 90, at 241; Dale A. Oesterle, Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in U.C.C. § 9-306, 68 Cornell L. Rev. 172, 203 (1983). Granted, some of these problems can be mitigated through the use of contractual indemnity terms in licenses and transfers. Nevertheless, such secondarily liability offers little comfort to a grantee when the grantor's financial means are insubstantial.
through voluntary market exchanges.\(^{286}\)

Strict liability potentially diverts copyright owners from the market with the alluring prospect of reaping supercompensatory windfalls. Take, for example, a songwriter whose copyright in a previously-distributed musical work has been infringed, albeit innocently, by a subsequent recording artist. Although the songwriter may have suffered only the loss of a statutory royalty,\(^{287}\) he nonetheless may recover all profits of the recording artist attributable to the musical work—even if such profits far exceed the amount that the songwriter would have received had the recording artist obtained a license \textit{ex ante}.\(^{288}\) But the songwriter’s potential recovery does not end there. He is also eligible to recover profits from downstream infringers who innocently and unwittingly infringed the copyright in the work,\(^{289}\) including any producers, manufacturers,
distributors, wholesalers, and retailers of infringing phonorecords.\textsuperscript{290}

Although the copyright owner may be the "accidental beneficiary"\textsuperscript{291} of a disgorgement order intended to deter infringement and to prevent unjust enrichment, the moral hazard which that remedy creates is undeniable: the lucrative windfalls associated with disgorgement of infringers' profits in strict-liability copyright cases should make owners prefer infringement to bargaining.\textsuperscript{292} If so, then strict liability for, among other things, infringer's profits, channels transactions away from the market which copyright strives to facilitate.\textsuperscript{293}

Finally, strict liability may play some role in the diversion of users from the market. The severity of the remedies recoverable from those strictly liable for copyright infringement may cause some courts to contort liability principles to avoid finding infringement.\textsuperscript{294}

\textsuperscript{290} Innocent infringement.”).

\textsuperscript{291} McCarey v. Assoc. News, Ltd. (No. 2) [1965] 2 QB 86, 107 (Diplock, L.J.); see Jaffey, supra note 280, at 37 (“The plaintiff is merely the ‘accidental beneficiary’ of a remedy whose purpose is to deprive the defendant of his gain.”).

\textsuperscript{292} 17 U.S.C. § 505 (1994); Saul Levmore, Probabilistic Recoveries, Restitution, and Recurring Wrongs, 19 J. LEG. STUD. 691, 712 (1990) (availability of multiple restitutionary recoveries creates "the moral hazard that it will be quite profitable to be a victim"); see also Gareth Jones, The Recovery of Benefits Gained from a Breach of Contract, 92 LAW Q. Rev. 443, 454 (1983) (noting that a claim to profits in a breach of contract case "would give a promisee a ‘windfall’ for which he has not bargained; and it would dissuade the promisee from mitigating his loss"). The moral hazard created by the infringer’s profits remedy is compounded by section 505 of the Copyright Act which permits the successful owner to recover, in addition, all costs and attorney’s fees incurred and to seek windfall profits.

\textsuperscript{293} In addition to this adverse affect on the market created by copyright, the infringer’s profits remedy also may cause unjust enrichment, something that the remedy exists to prevent. That is, if the plaintiff reaps a windfall, he arguably has been unjustly enriched at the expense of the innocent user. See Nicholas J. McBride & Paul McGrath, The Nature of Restitution, 15 OXFORD J. LEG. STUD. 33, 38 (1995).

\textsuperscript{294} DOBBS, supra note 266, at 382 ("[W]hen the only possible measure of restitution is a radical one that captures the defendant's profits, courts might be reluctant to recognize any substantive right at all if recovery of the profits would be likely to capture the gains from the defendant's own legitimate efforts."); Sinclair, supra note 8, at 963 (noting that courts sometimes bend the "rules for establishing and measuring liability" to protect innocent infringers); id. at 980 ("Many of the rules governing liability for copyright infringement have developed under the pressure of a
If so, then the harshness of strict liability in copyright may have the practical, though unintended, effect of weakening copyright protection and encouraging users to bypass the market for copyrighted works.

In sum, strict liability in copyright would be sensible only if reducing the activity-levels of users of copyrighted works were the most efficient method of preventing infringement. Copyright law exists, however, to increase such activity levels—not to reduce them. Because both users and owners have a role to play in preventing infringement, and because copyright law should encourage rather than discourage the use of copyrighted works, strict liability in copyright is both inefficient and affirmatively harmful to copyright.

V. CONCLUSION

Strict liability is neither justified nor necessary in copyright law. On the contrary, it is rooted in deeply flawed historical, conceptual, and economic misconceptions. Historically, copyright’s strict liability regime is flatly inconsistent with its British and American antecedents, both of which protected innocent infringers. Conceptually, strict liability is problematic because it is grounded in misplaced, sweeping analogies of intellectual property to land, horses, cows, and other forms of tangible property. From an economic perspective, strict liability is inefficient—not only because innocent infringers are not the “cheapest cost avoiders” of the “accident” of infringement, but also because strict liability, by increasing the overall volume of infringement cases, likely results in dramatically increased administrative costs.

More troubling, however, is that strict liability is affirmatively harmful to copyright’s utilitarian goals. Copyright exists to create a “thriving culture” that produces “as many original works available as possible.” But strict liability, particularly when coupled with
copyright's supercompensatory remedies, severely impedes this utilitarian purpose by inhibiting the artistic creation that copyright law seeks to foster. Indeed, potential authors, wary of the draconian penalties facing even the most innocent of infringers, likely refrain both from using other works and from creating new works, thereby reducing the demand for existing copyrighted works and the volume of original works created.\textsuperscript{297}

In addition to these compelling consequentialist arguments against strict liability in copyright, that regime is further undermined by many of the nonconsequentialist concerns traditionally posited in opposition to strict liability in general. Deontological scholars have long questioned the morality of holding innocent injurers liable without fault.\textsuperscript{298} They have done so in part because strict liability conflicts with traditional deontological notions of personal autonomy\textsuperscript{299} by imposing unpredictable consequences on welfare through the talents of authors and inventors in "Science and useful Arts.").

\textsuperscript{297} Consequentialist arguments similarly have been made in the context of strict criminal liability. See JEFFRIE G. MURPHY & JULES L. COLEMAN, THE PHILOSOPHY OF LAW 134 (1984) (noting that according to philosophers such as H.L.A. Hart, under a strict liability regime, "the only way to avoid a serious risk of criminal punishment would be to live our lives so cautious or curtailed that the meaning and satisfactions of liberty (our exercise of other choices) would be lost"). While perhaps acceptable in areas of strict criminal liability, which are often "dangerous areas of conduct" with "potential for adverse effects on public welfare," such "caution" and "curtailment" results in a depressed demand for copyrighted works and stands to undermine the fundamental goal of copyright law—the creation of new works. Id. at 134-36. Similar concerns have long underscored the argument against strict liability for the tort of defamation. See, e.g., Fleming James, Jr., Some Reflections on the Bases of Strict Liability, 18 LA. L. REV. 293, 298-99 (1958) (arguing that some principles which warrant strict liability in tort do not apply in defamation because it "would lead the owners of our modern channels of communication to restrict their use in public debate . . . .[this would be too high a price to pay for the additional protection given to private reputations by strict liability here").

\textsuperscript{298} JULES L. COLEMAN, MARKETS, MORALS AND THE LAW 177 (1988) (explaining that strict liability is considered immoral because "it requires the injurer to express morally inappropriate feelings of regret, shame, guilt or fault" and because it "involves making formal, official pronouncements of culpability in a judicial context . . . . require[ing] us . . . . to impute blame to blameless conduct"); see also Randy E. Barnett, Of Chickens and Eggs—The Compatibility of Moral Rights and Consequentialist Analyses, 12 HARV. J.L. & PUB. POLY 611, 615-16 (1989) (explaining that if both consequentialist and non-consequentialist methods "generally reach the same result . . . . each method can provide an analytic check on the other . . . . we can use one method to confirm the results that appear to be supported by the other"); Dale A. Nance, Owing Ideas, 13 HARV. J.L. & PUB. POLY 757, 757 (1990) (noting that "confidence in the justifiability of [intellectual property institutions] should depend upon the existence and convergence of coherent deontological and consequentialist theories that support the rights in question").

\textsuperscript{299} Bailey H. Kuklin, The Justification for Protecting Reasonable Expectations, 29 HOFSTRA L. REV. 863, 867-69 (2001); see also Heidi Li Feldman, Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law, 74 CHI.-KENT L. REV. 1431,
unsuspecting injurers—something which impedes the “autonomous” and “moral” life at the heart of Kantian thought. The deontological scholars have criticized strict liability as irreconcilable with Aristotelean notions of corrective justice. According to these theorists, most notably Ernest Weinrib, “the case for strict liability is not only unsupported, but wrong.” The “wrongness” of strict liability lies in its inherent inequality. Strict liability—in tort as in copyright—“reflects extreme solicitude for the plaintiff’s rights.” By protecting the plaintiff’s “person and property” as “a sacrosanct domain of autonomy,” without imposing a “correlative duty” on the defendant, strict liability is considered an unequal, and immoral standard of liability.

Because of these fundamental problems, Congress should abolish copyright’s harsh strict-liability regime. In its stead, Congress should substitute a liability regime that fairly accounts for the culpability of infringers. A workable model for such a regime exists in the provisions of the present Copyright Act itself. Indeed, the Act’s current statutory-damages provisions take into account the relative innocence or culpability of copyright infringers. Under these provisions, if the prevailing copyright owner successfully proves that the infringement was “committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000.” Conversely, “in a case where the infringer sustains the burden of proving . . . that [he] was not aware . . . that his . . .

1435 (2000) (explaining that “Kantian moral theory focuses primarily on questions of individual autonomy and equality”).

300. Id. at 867-68. According to Professor Kukin, “to be capable of exercising one’s autonomous will in a significant sense, one’s considered choices must not simply be shots in the dark . . . [when an individual is relegated to taking blind aim because of unpredictable consequences, the choice is not meaningfully reflective of her will].” Id. at 868.

301. Id. at 870 (noting that “strict liability, because it is unlinked to . . . mental state, was rejected by Aristotle and makes many observers uncomfortable . . . [the defenders of strict liability must look elsewhere for justification]”).


303. WEINRIB, supra note 302, at 179.

304. Id. According to Professor Weinrib, because it is “only retrospectively through the fortuity of harm does it then turn out that the defendant’s act was a wrong . . . under strict liability, the sufferer has a right to be free from the harm, but that right is not correlative to a duty, operative at the moment of action, to abstain from the act that causes the harm.” Id. But see Susan Randall, Corrective Justice and the Torts Process, 71 IND. L. REV. 1, 26 (1993) (arguing that Weinrib “fails to demonstrate the immorality of strict liability”).

acts constituted an infringement of copyright, the court... may reduce the award of statutory damages" to a minimum of $200.306

Congress should adopt a similar approach to accommodate culpability in all cases of copyright infringement in which the owner seeks retrospective relief. Specifically, Congress should establish innocence as an affirmative defense to monetary liability. Modeled after the statutory-damages framework of the 1976 Act, this approach to retrospective relief would function as follows: once the copyright owner establishes a prima facie case of copyright infringement, an innocent infringer could then undertake to prove that he "had no reason to believe that his acts constituted infringement." As under the Act's current statutory-damages provisions, the infringer would bear the burden of proving his own innocence by a preponderance of the evidence. If successful, the innocent infringer would be relieved of monetary liability. Significantly, however, the infringer's innocence would not preclude the copyright owner from seeking and obtaining prospective relief, including preliminary or permanent injunctions against future infringement. Indeed, any copying after the issuance of such an injunction could never qualify as "innocent."

Broadening the Copyright Act's innocent-infringement defense to cover liability for retrospective monetary relief would inject a much-needed culpability element into liability for copyright infringement. Given that the framework for this approach exists in current law, adopting it would be far from radical. Nevertheless, the effects of such a provision would be profound. Indeed, accounting for the innocence of infringers would increase the demand for copyrighted works and thereby facilitate a market for copyrighted works. Accounting for the innocence of infringers would further the fundamental purposes and underlying goals of copyright. Finally, accounting for the innocence of infringers would comport with basic notions of fairness by assuring that innocent singer-songwriters (like George Harrison), misled magazine editors (like those at Cosmopolitan), and faultless Internet service providers do not meet the same fate as brazen and malicious t-shirt pirates.

306. Id.