

COPYRIGHT ACCIDENTS

*Oren Bracha**

Patrick R. Goold†

ABSTRACT

It is a deeply entrenched principle that copyright infringement does not require fault. The article reexamines this principle in the context of copyright accidents. Copyright accidents occur when ex ante it is not certain whether a proposed use will result in copyright infringement. In cases where the copyright status of a work is unclear, where the preferences of the copyright owner are reasonably in doubt, or where the copyist is unaware he is copying, there is merely a *risk* that a proposed use will infringe the right. And troublingly, the measures that any party could take to reduce that risk – for example searching for the copyright information, registering the work, or forgoing the use altogether – impose costs. Under modern conditions copyright accidents are ubiquitous, but they are invisible to copyright law. The law has no doctrinal or conceptual mechanism for dealing with them. In such circumstances the question becomes, how should the law be calibrated to incentivize both users and owners to optimally invest in measures to prevent the infringement?

To answer this question we apply, *mutatis mutandis*, the well-developed theoretical framework of tort law to copyright accidents. This framework compares the relative merits of alternative liability rules applicable to accidents. Typically, tort law deals with the problem of optimal accidents prevention through the application of negligence rules. Such rules incentivize both potential injurers and victims to invest optimally in prevention. We compare the relative advantages and disadvantages of the available liability rules in the context of copyright accidents. The article finds that employing one of the variants of a negligence rule in copyright would be justified by both efficiency and other consequence-oriented normative theories of copyright. Doing so would incentivize both the copyright holder and copyright user to take optimal measures to avoid copyright accidents and would allow sensitivity of the liability standard to externalities that are often associated with intellectual works. We demonstrate how adopting a negligence rule would positively affect numerous real world copyright controversies, such as the problems of mass digitization, orphan works, and subconscious copying. We conclude by discussing several alternatives for the doctrinal implementation of negligence-based rules to copyright accidents.