

BEYOND TRESPASS: UNBUNDLING THE TORT OF COPYRIGHT INFRINGEMENT

*Patrick R. Goold**

ABSTRACT

Courts frequently analogize copyright infringement to trespass to land. A defendant is liable for trespass when she enters upon land without authorization. Likewise, a defendant is liable for copyright infringement when she copies original expression without the owner's consent. In both cases, whether the defendant caused any actual harm or acted wrongfully is irrelevant. However, in recent years, copyright's trespassory liability model has drawn criticism. Although some see trespass as an appropriate way to protect the copyright owner's property interest, others argue that copyright, like most torts, should require proof of harm and/or fault.

In response, this article argues that copyright should adopt a diverse group of liability models. There are different ways that one may interfere with interests in land; not all are dealt with by trespass. While physical invasions are actionable under the trespass model, other property torts like nuisance require proof of harm and fault. Likewise, there are different ways to interfere with copyright. One may reproduce, adapt, publish, distribute, perform or display a protected work. These different interferences, what this article calls the "copy-torts," affect different interests of the owner and present different cost structures. Trespass should not govern all of the copy-torts, just as it does not govern all real property torts. Using a standard law and economic framework, broadened to take into account information costs, this article proposes that trespass is an appropriate liability model for reproduction, but the other copy-torts ought to require varying degrees of harm and fault. Courts should, and could easily, alter the infringement action in relation to each copy-tort to facilitate the required diversity of liability models.