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**The Constitutional Foundations of Strict Liability for Copyright Infringement**

by

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**I. Introduction and Summary**

Each year, owners of copyrighted movies, music, and other works suffer significant harm from online infringement. According to a 2017 report by Frontier Economics, the annual global value of digital piracy in movies and music will range between \$384 and \$568 billion in 2022. Since the U.S. is the biggest worldwide market for movies and recorded music, American copyright owners especially are hit hard by piracy, including online infringement. Copyright infringement civil actions constitute the primary means for the owners of creative works to enforce their rights.

However, the protections secured by copyright law risk being eroded by apparent confusion spawned by the "volitional conduct" requirement for infringement claims adopted by court decisions dating to the late-1990s. In order to help ensure a clear understanding of the law and to strengthen protections for creative works, it is important to reassert the natural rights understanding that impelled the Founders to include the Copyright Clause in the Constitution and that provides the basis for defining copyright infringement as a strict liability tort.

According to the moral and political philosophy of natural rights that was held by the American Founders and that formed the intellectual backdrop to the U.S. Constitution, a person has an

inherent right to engage in physical and intellectual labor. In other words, simply because he or she is a human being, by natural right, the produce of that person's labor is his or her own private property. Government exists to secure a person's rights to labor and to enjoy and use his or her property.

One way government secures private property is by adjudicating tort actions when property owners have been wronged or suffered losses. The natural rights philosophy held by the American Founders provides a basis for understanding key doctrines of tort law. As this paper is intended to show, natural rights principles reflected in American constitutionalism provide a persuasive rationale for defining copyright infringement as a strict liability tort.

As we explained in our book, *The Constitutional Foundations of Intellectual Property* (2015), the American Founders, as well as later statesmen and jurists, recognized that copyrights are a type of property rights, and therefore entitled to be secured by law. They included in the Constitution a provision by which copyrights are to be protected. The Article I, Section 8 Copyright Clause grants Congress the power "To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

In American constitutionalism, copyright ownership includes a right to exclude or right to exclusively determine how the fruits of one's labors will be used and enjoyed. As set forth in Section 106 of the Copyright Act, a copyright owner possesses exclusive rights to make copies of his or her creative works, prepare derivative works, distribute copies, and publicly display or perform his or her works. Infringement of any of those exclusive rights typically deprives copyright owners of opportunities to generate financial returns, and it diminishes the value of their creative works. The risk of infringement also undermines financial incentives to produce new creative works.

Significantly, infringement undermines a copyright owner's exclusive rights to decide how and when to use and enjoy his or her creative works. The risk of harm to a copyright owner's freedom is the primary basis for regarding infringement as wrongful. Moreover, this harm to a copyright owner's freedom exists even if the direct infringer did not act with bad intent or with negligence. Thus, beginning with the Copyright Act of 1790 and continuing to today, civil copyright infringement has been subject to a rule of strict liability.

Under the doctrine of strict liability, a person is liable simply because his or her acts cause another person harm. Neither intent nor negligence is required. Land-use torts such as nuisance and trespass are examples of strict liability torts involving property. Congress's consistent judgment that direct infringement does *not* require that an infringer act intentionally or negligently is defensible on natural rights grounds.

In "Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights," an article published in the *Notre Dame Law Review*, Professor Eric Claeys explained: "American natural-rights morality... holds that, in different situations, legal doctrine should use whichever rules of scienter best secure or enlarge the concurrent freedoms of all regulated actors to pursue their concurrent liberty and property interests." The Copyright Act reflects Congress's judgment, dating back to 1790 and reaffirmed by every subsequent revision of the Act, that a rule of strict liability best protects from risk of invasion the freedom of copyright owners to use and enjoy their works. Indeed, strict liability is well warranted because widespread availability of copying

technologies make creative works highly vulnerable to direct infringement. Additionally, strict liability is defensible because copyright owners' risk of harm to their exclusive rights is the same regardless of an infringer's state of mind.

A proper grasp of the natural rights basis of direct copyright infringement as a strict liability tort reinforces a clear understanding by courts and Congress that a claim for civil copyright infringement requires proof of infringing activity but *not* proof of intention or negligence. This is particularly important because of some apparent confusion surrounding the so-called "volitional conduct" requirement.

As we explained in our September 2019 *Perspectives* paper, "[Volition Has No Role to Play in Determining Copyright Infringements](#)," idiosyncratic use of the term "volition" by courts may create the false impression that direct infringement requires intent or negligence on the part of the infringer. In reality, the "volitional conduct" requirement means that a copyright owner must show that the alleged conduct *caused* the infringement. Importantly, courts applying the volitional conduct requirement acknowledge that direct infringement is a strict liability tort.

However, the Second and Ninth Circuits appear to have wrongly inferred from the volitional conduct requirement that an online platform owner does not engage in volitional conduct if the unauthorized display, distribution, or reproduction of a copyright work merely involves a service's automatic process. From that requirement, both circuits also appear to have inferred that either the online platform or the individual user of that platform can be directly liable – not both. But the Copyright Act contains no such bright-line rules.

By contrast, Section 512 of the Digital Millennium Copyright Act of 1998's conditional grants of immunity from infringement for automatic processes supports the inference that online platforms using automatic processes can be subject to direct infringement. Moreover, if online platforms can avoid liability simply by using automatic processes, then the importance of their complying with Section 512's notice-and-takedown and repeat infringer provisions is diminished.

Connecting the theory behind strict liability for direct infringement to the consistent policy of Congress should help reinforce a correct understanding of law's requirements and reduce occasions for confused judicial applications of the "volitional conduct" requirement. Furthermore, a proper recognition of the property rights and the type of harm that strict liability copyright infringement is intended to protect against may make policymakers less susceptible to accepting claims that direct liability should require intent or fault. Understanding the natural rights basis for a rule of strict liability for direct infringement is also important for members of Congress contemplating reforms to increase online platform accountability for infringements.

## **II. The Copyright Act Imposes Strict Liability for Direct Infringement**

In the Copyright Act of 1790, the First Congress provided to copyright owners a civil right of action when their works were reproduced or sold without their consent. That right of action entitled copyright owners to statutory damages and it also subjected infringing parties to forfeiture of unauthorized copies. Under the 1790 Act, copyright owners were not required to prove that alleged infringers acted knowingly or negligently in order to prevail on their claims. Although the 1790 Act precluded liability for vendors who innocently sold infringing goods, the Copyright Act of 1909

eliminated that narrow exception. For all later revisions of the Copyright Act, Congress declined to make knowledge or negligence an element of copyright infringement. Jurists and legal scholars from the early 19th century onward also have recognized that copyright infringement claims do not depend on intent or negligence and that ignorance is no defense to liability.<sup>1</sup> Rather, courts have consistently observed that copyright infringement is a strict liability tort.<sup>2</sup>

Section 501(a) of the current Copyright Act provides copyright owners a civil cause of action for infringement.<sup>3</sup> If the owner of a copyrighted work such as a sound recording or movie proves that another person, without authorization, reproduced their work, prepared a derivative work based on the copyrighted work, distributed copies of the work for public sale, or publicly performed a copyrighted movie or sound recording, the owner has established a claim for infringement.<sup>4</sup> Federal copyright law provides the owner remedies, including statutory damage awards as well as awards of attorney fees and costs.<sup>5</sup>

Copyright case law in the 20th century developed a distinction between "direct" liability and "indirect" or secondary liability. Pursuant to Section 501(a), "direct" liability is imposed whenever a person's conduct infringes one of the exclusive rights of copyright owners. Secondary liability doctrines for "contributory" and "vicarious" liability are not expressly provided in the Copyright Act. However, courts recognized those doctrines as implications of the Act according to common law principles. As the Supreme Court stated in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster* (2005): "One infringes contributorily by intentionally inducing or encouraging direct infringement... and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it."<sup>6</sup>

Direct liability is *not* predicated on a showing of intent to infringe or negligence. Thus, direct infringement is understood by courts and by most legal scholars to be a strict liability tort.

### **III. The Natural Rights Foundations of Tort Doctrines**

In "Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights," an incisive article published in the *Notre Dame Law Review*, Professor Eric Claeys suggested that American natural rights morality explains and justifies foundational tort doctrines.<sup>7</sup> A tort is a civil wrong or wrongful act by one person that harms another person or his or her property, and which entitles the other person to a legal remedy. Professor Claeys articulated a natural rights understanding of trespass, nuisance, and non-nuisance claims regarding accidental invasions of real property. Land-use torts secure from invasion a property's owner the freedom to choose how to use and enjoy his or her property.

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<sup>1</sup> For examples, *see* sources cited in Randolph J. May and Seth L. Cooper, "Volition Has No Role to Play in Determining Copyright Violations," *Perspectives from FSF Scholars*, Vol. 14, No. 21 (September 9, 2019), at: <http://fsfwebsite.wpengine.com/wp-content/uploads/2019/09/Volition-Has-No-Role-to-Play-in-Determining-Copyright-Infringements-090919.pdf>.

<sup>2</sup> For examples, *see* sources cited in *id.*

<sup>3</sup> 17 U.S.C. § 501(a).

<sup>4</sup> *See* 17 U.S.C. § 106.

<sup>5</sup> *See* 17 U.S.C. §§ 503-505.

<sup>6</sup> 545 U.S. 913, 930.

<sup>7</sup> Eric R. Claeys, "Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights," 85 *Notre Dame L. Rev.* 1379 (2010).

According to Professor Claeys, the version of natural rights that is set forth in the Declaration of Independence and that subsequently informed American law and politics better delineates the contours of basic land-use law than law and economics or corrective justice theory in isolation. In his article, Professor Claeys wrote that "American natural-right morality also explains why the basic land use torts strongly prefer strict liability over negligence."<sup>8</sup> He also wrote that "American natural-right morality" strongly prefers strict liability over negligence in land use because all trespasses to land "threatens an owner's entitlement to a domain of choice for secure use and enjoyment."<sup>9</sup> A rule of strict liability protects a property owner from the risk of such interference.

We find persuasive the natural rights understanding of land-use torts articulated by Professor Claeys. Additionally, we believe there is strong merit in his suggestion that natural rights theory explains and justifies foundational tort doctrines. This paper is intended to show that the classic liberal political philosophy of natural rights, which informed the understanding of the American Founders and is reflected in American constitutionalism, provides a persuasive rationale for defining copyright infringement as a strict liability tort.

#### **IV. Natural Rights and Copyright Infringement Doctrine**

According to the moral and political philosophy of natural rights that prevailed at the time of the American Founding, a person has an individual right to engage in physical and intellectual labor. The produce of a person's labor is his or her own private property. Natural rights to labor and property do not come from government. Rather, persons possess those rights by virtue of their humanity. Government exists to secure those rights to labor and property as well as to expand opportunities for their exercise. One way government secures private property is by adjudicating tort or civil wrong actions brought in courts of law where property owners have been wronged or suffered cognizable losses.

As we explained in our book, *The Constitutional Foundations of Intellectual Property* (2015), this classic liberal political philosophy is key to the original understanding of copyrights in the U.S. Constitution. The Article I, Section 8 Copyright Clause grants Congress the power "To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

As understood by the Founders and by later generations of statesmen, jurists, and legal scholars, creative works are the result of an individual's intellectual labors. Thus, copyrights are a type of property rights and they should be protected by law in a manner similar to property in land or houses. Like other types of property ownership, copyright ownership includes a right to exclude or right to exclusively decide how the fruits of one's labors will be used and enjoyed. As set forth in Section 106, a copyright owner possesses exclusive rights to make copies of his or her creative works, prepare derivative works, distribute copies for commercial purposes, and publicly display or perform his or her works.<sup>10</sup> Unauthorized copying, making derivatives, vending, and publicly displaying or performing another's creative works undermine a copyright owner's rights to use and enjoy what he or she has labored to produce. This basic point was made in *Sony Corp. of America v.*

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<sup>8</sup> *Id.* at 1414.

<sup>9</sup> *Id.* at 1414.

<sup>10</sup> 17 U.S.C. § 106.

*Universal City Studios, Inc.* (1984) when the Supreme Court stated that direct liability is imposed on those who "trespass[] into [the copyright owner's] exclusive domain by using or authorizing the use of the copyrighted work."<sup>11</sup>

Infringement typically harms a copyright owner by depriving him or her of opportunities to legitimately generate proceeds and by diminishing the underlying value of one's creative works. And the risk of infringements undermines financial incentives to labor and produce new creative works for public consumption.

Significantly, even in the absence of ascertainable financial losses, infringement undermines a copyright owner's exclusive right to decide how and when to use and enjoy his or her creative works. This undermining of a copyright owner's domain of freedom is the primary basis for regarding infringement as wrongful. Moreover, this harm to a copyright owner's freedom exists even if the direct infringer did not act with bad intent or with negligence. Accordingly, and as will be discussed in further detail below, beginning with the 1790 Act and continuing to today, civil copyright infringement is subject to a rule of strict liability.

## **V. The Natural Rights Basis for Defining Copyright Infringement as a Strict Liability Tort**

Torts are classifiable according to their scienter requirements, that is, according to the state of one's intent or knowledge of wrongdoing. For so-called intentional torts, such as intentional infliction of emotional distress, liability is imposed when someone knowingly acts in a way that causes another person harm. Negligence torts encompass a wide variety of claims based on someone's fault for not acting according to a duty of care that he or she owed and that causes another person harm. Personal injuries arising from run-of-the-mill auto accidents and slip-and-falls at commercial establishments typically give rise to negligence claims. Still other torts impose strict liability on a person's wrongful act. Under the doctrine of strict liability, a person is liable simply because his or her acts cause another person harm. Neither intent nor negligence is required in order to establish a strict liability tort claim. Nuisance and trespass, as described earlier, are examples of strict liability torts.

In his article, Professor Claeys explained: "American natural-rights morality... holds that, in different situations, legal doctrine should use whichever rules of scienter best secure or enlarge the concurrent freedoms of all regulated actors to pursue their concurrent liberty and property interests."<sup>12</sup> The Copyright Act reflects Congress's judgment, which dates back to 1790 and has been reaffirmed by every subsequent revision of the Act, that a rule of strict liability for direct infringement best secures the freedom and interests of copyright owners.

Strict liability protects copyright owners from the heavy risks of harm that infringement poses to their exclusive rights to use and enjoy their works. In many circumstances, widespread access to copying technologies, including digital copying technologies, render the exclusive rights of copyright owners highly vulnerable to direct infringement. And, as indicated previously, strict liability for direct infringement is supported by the fact that copyright owners suffer the same type of harm regardless of an infringer's state of mind.

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<sup>11</sup> 464 U.S. 417, 433. See also *BWP Media, USA, Inc. v. T&S Software Assoc., Inc.* 852 F.3d 436,439 (5th Cir. 2017).

<sup>12</sup> Claeys, 85 *Notre Dame L. Rev.* at 1416.

## **VI. Understanding the Natural Rights Basis for Strict Liability Copyright Infringement Ensures Correct Application of the Law**

There are at least three practical reasons why a proper grasp of the natural rights understanding of direct copyright infringement as a strict liability tort is desirable. First, comprehension of the theory and policy behind the rule of strict liability may assist courts and Congress in keeping a clear understanding that civil copyright infringement claims require proof of infringing activity but *not* proof of intention or negligence. Mindfulness of the law's requirements regarding direct infringement is particularly important because of some apparent confusion surrounding the so-called "volitional conduct" requirement.

Several court decisions dating back to the late 1990s recognize a so-called "volitional conduct" requirement in direct infringement cases, particularly in cases involving online services. According to those decisions, a direct infringement claim requires: (1) proof of copyright ownership; (2) infringement of an exclusive right secured under the Copyright Act; and (3) volitional conduct that caused the infringement.

The unusual and idiosyncratic use of the term "volition" by courts in direct infringement cases furnishes potential confusion. Given common usage of the term "volition," a less-than-careful reading of court decisions applying the "volitional conduct" standard may create the false impression that direct infringement claims require proof of intent or negligence on the part of the infringer. But as we explained in our September 2019 *Perspectives* paper, "Volition Has No Role to Play in Determining Copyright Infringements":

First, lower court decisions do not regard the "volitional conduct" requirement as a knowledge or negligence requirement for establishing liability for direct copyright infringement. This is in keeping with the understanding that direct copyright infringement is a strict liability tort under the Copyright Act.

Second, lower court decisions appear to treat the volitional conduct requirement as having to do with the connection between the alleged conduct and actual infringement under the law.

Connecting the theory behind strict liability for direct infringement to the consistent policy of Congress may help reinforce a correct understanding of law's requirements and reduce occasions for incorrect, or at least confused, judicial application of the "volitional conduct" requirement.

As discussed in more detail in our prior September 2019 *Perspectives* paper,<sup>13</sup> in *Perfect 10, Inc. v. Giganews, Inc.* (2017),<sup>14</sup> the Ninth Circuit appeared to hold that an online platform owner does not engage in volitional conduct if the unauthorized display, distribution, or reproduction of a copyright work merely involves a platform's automatic process. The Ninth Circuit also appears to suggest that under the volitional conduct requirement, only a single party can engage in direct copyright infringement in a given instance. Supposedly, either the online platform service provider or the individual user who uploaded copyrighted content to the online platform can be liable for direct

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<sup>13</sup> May and Cooper, "Volition Has No Role to Play in Determining Copyright Violations," *Perspectives from FSF Scholars*, Vol. 14, No. 21.

<sup>14</sup> 847 F.3d 657 (9th Cir. 2017), cert denied 138 S.Ct. 504 (2017).

infringement – but not both. Additionally, in *Cartoon Network, LP, LLP v. CSC Holdings, Inc.* (2008),<sup>15</sup> the Second Circuit appears to make those same extrapolations regarding automatic processes non-liability and single party liability.

However, the Copyright Act contains no express rule of immunity for platforms' automatic processes. Nor does the Act contain an express rule limiting direct liability to either an online platform or its user. Rather, those rules appear to be unwarranted inferences from the volitional conduct requirement. Indeed, rules of auto process non-liability and single direct infringer liability appear overstated at best given the fact that the volitional conduct requirement is itself an inference from the Copyright Act. By contrast, Section 512 of the Digital Millennium Copyright Act of 1998's grants of safe harbor immunity from infringement for automatic processes provided by online service platforms that meet certain requirements supports the inference that online platforms using automatic processes can be subject to direct infringement.<sup>16</sup>

Moreover, rules of auto process non-liability and single direct infringer liability appear to undermine the efficacy of Section 512's safe harbor provisions. If online platforms can avoid liability for reproducing, distributing, or displaying copyrighted works simply by using automatic processes, then the importance of their complying with Section 512's notice-and-takedown and repeat infringer provisions is diminished.

Additionally, as we explained in our September 2019 *Perspectives* paper, rules of auto process non-liability and single direct infringer liability are likely contrary to the Supreme Court's reasoning in copyright decisions such as *American Broadcasting Cos., Inc. v. Aereo, Inc.* (2014) and *New York Times Co. v. Tasini* (2001).<sup>17</sup> In *Aereo*, for instance, the Court rejected the position that a commercial service's automatic response to the subscriber's selection of copyrighted broadcast TV content meant that the subscriber and not the service transmitted the infringing performance to the subscriber's own computer equipment. The Court further observed that "[i]n other cases involving different kinds of service or technology providers, a user's involvement in the operation of the provider's equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act."<sup>18</sup> *Aereo* suggests that direct infringement claims involve a fact-specific inquiry into whether a service provider's conduct amounts to a violation rather than a bright-line rule of no liability for automatic processes.

Fuller consideration of the natural rights basis for the rule of strict liability for direct infringement and Congress's consistent reaffirmation of that rule may prompt courts to show restraint in applying the volitional conduct requirement and to avoid overextending that requirement through dubiously inferred bright-line rules of auto process non-liability and single direct infringer liability. But in the event that the courts continue to expand the volitional conduct requirement and thereby reduce protections for copyrighted content from mass online infringement, Congress should step in to preserve strict liability for direct infringement.

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<sup>15</sup> 536 F.3d 121 (2d Cir. 2008).

<sup>16</sup> See 17 U.S.C. § 512(a)-(b).

<sup>17</sup> 573 U.S. 431; 533 U.S. 483.

<sup>18</sup> 573 U.S. at 444.



## **VII. Understanding the Natural Rights Basis for Strict Liability Copyright Infringement Is Important for Defending the Rule**

Second, understanding the natural rights basis for a rule of strict liability for direct infringement is important for evaluating and resisting criticisms of the rule. Over the years, some academics and critics of copyright policy have criticized strict liability copyright infringement for supposedly being harsh or unfair. Some have urged replacement with intent and fault-based standards that would reduce protections for creative works.

Simply by recognizing the nature of the property rights to be protected and the unique type of harm against which strict liability is intended to protect, one is less likely to be taken in by claims that direct liability should be changed to require intent or fault. More particularly, a careful consideration of the natural rights basis for strict liability copyright infringement is helpful to resisting misguided arguments that natural rights should require a different knowledge or scienter rule. Natural rights philosophy regards individuals as moral agents who ought to be held accountable for their actions. In this regard, strict liability is a rule for rightly assigning legal responsibility for harm caused by a person's actions to property rights that deserve protection.

Furthermore, some critics have claimed that the idea of copyright infringement as a strict liability tort is rendered incoherent by the existence of the fair use exception. Under the fair use doctrine, codified in Section 107, a person is permitted unlicensed use of copyrighted works for certain limited types of uses, such as criticism, reporting, teaching, and research. According to one line of argument, because persons engaging in fair use are excused from liability, copyright infringement must have some sort of underlying knowledge or fault-based premise. Perhaps that line of argument would be persuasive if strict liability were rooted solely in amoral considerations such as utility or efficiency. In principle, however, the existence of fair use does not conflict with the natural rights basis of strict liability.

From a natural rights perspective, a person's rights to use and enjoy his or her creative works and the risk of harm to those rights are the primary moral bases for imposing strict liability for direct copyright infringement. Fair use reflects Congress's judgment that speech on matters of public concern is also matter of moral concern. Accordingly, Congress recognized fair use as one of the boundaries of a copyright owner's domain. The adjustment of copyright boundaries to accommodate those different rights claims reflects the measured judgment behind strict liability, not harshness.

## **VIII. Understanding the Natural Rights Basis for Strict Liability Copyright Infringement Is Important for Future Lawmaking**

Third, understanding the natural rights basis for a rule of strict liability for direct infringement is important for members of Congress tasked with considering reforms to the Copyright Act. Unauthorized distribution of copyrighted movie and music content on user-upload websites is a pervasive problem. According to Frontier Economics' 2017 report, "The Economic Impacts of Counterfeiting and Piracy," the annual global value of digital piracy in movies and music will range between \$384 and \$568 billion in 2022.<sup>19</sup> Since the U.S. is the biggest worldwide market for movies and recorded music, American copyright owners are hit especially hard by piracy.

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<sup>19</sup> Frontier Economics, *The Economic Impacts of Counterfeiting and Piracy* (2017), at: <https://cdn.iccwbo.org/content/uploads/sites/3/2017/02/ICC-BASCAP-Frontier-report-2016.pdf>.

And the core of federal copyright law dates back to 1976, well before the ubiquity of commercially available digital services and high-speed Internet connectivity. In the event Congress considers future reform legislation specifically targeting the problem of online infringement, or in the event it considers future comprehensive overhaul of federal copyright law to fit with Digital Age realities, copyright critics can be expected to publicly advocate for changes to Congress's long-standing rule of strict liability copyright infringement. If and when Congress engages such debates, being fully informed means understanding and respecting the natural rights basis for strict liability for direct infringement.

## **IX. Conclusion**

In American constitutionalism, direct infringement is a strict liability tort. This understanding of infringement is defensible on natural rights grounds. The need to protect against the risk of harm to a copyright owner's freedom to use and enjoy his or her creative works is the primary basis for regarding infringement as wrongful. This harm to a copyright owner's freedom exists even if the direct infringer did not act with bad intent or with negligence. Thus, beginning with the Copyright Act of 1790 and continuing to today, civil copyright infringement has been subject to a rule of strict liability. Under the doctrine of strict liability, a person is liable because his or her acts cause another person harm. Intent or negligence are not required.

A rule of strict liability best protects the freedom of copyright owners to use and enjoy their works from risk of invasion. Strict liability is warranted because widespread availability of copying technologies make creative works highly vulnerable to direct infringement. Also, strict liability is defensible because the risk of harm to a copyright owner's exclusive rights is the same regardless of an infringer's state of mind.

Connecting the theory behind strict liability for direct infringement to the consistent policy of Congress may help reinforce a correct understanding of law's requirements and reduce occasions for confused judicial application of the "volitional conduct" requirement. Also, recognition of the nature of the rights at stake and the type of harm that strict liability is intended to protect against may make policymakers less likely to be taken in by criticisms of the rule. Understanding the natural rights basis for a rule of strict liability for direct infringement is important for members of Congress contemplating reforms to increase online platform accountability for infringements.

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### **Further Reading**

Seth L. Cooper, "[Trade Agreements Should Strengthen Copyright Protections Against Piracy](#)," *Perspectives from FSF Scholars*, Vol. 14, No. 34 (October 23, 2019).

Seth L. Cooper, "[States Have No Rights to Infringe Copyrights: The Supreme Court Should Enforce the Copyright Remedy Clarification Act](#)," *Perspectives from FSF Scholars*, Vol. 14, No. 32 (October 16, 2019).

Randolph J. May and Seth L. Cooper, "[Volition Has No Role to Play in Determining Copyright Violations](#)," *Perspectives from FSF Scholars*, Vol. 14, No. 21 (September 9, 2019).

Randolph J. May, "[Trade Agreements Should Not Export Ineffective Copyright Laws](#)," *FSF Blog* (August 8, 2019).

Seth L. Cooper, "[Trade Agreements Should Include Stronger Online Copyright Protections](#)," *Perspectives from FSF Scholars*, Vol. 14, No. 12 (April 25, 2019).

Randolph J. May and Seth L. Cooper, "[Modernizing International Agreements to Combat Copyright Infringement](#)," *Perspectives from FSF Scholars*, Vol. 13, No. 42 (November 16, 2018).

Randolph J. May and Seth L. Cooper, "[Modernizing Civil Copyright Enforcement for the Digital Age: The Need for Notice-and-Takedown Reforms and Small Claims Relief](#)," *Perspectives from FSF Scholars*, Vol. 13, No. 8 (February 28, 2018).