

Innocent Internet Infringement: Copytraps on the Information Superhighway

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Copyright's strict liability regime poses serious First Amendment problems in cyberspace. First Amendment jurisprudence disfavors punishing unprotected speech through strict liability, for doing so chills the exercise of protected speech. This simple principle applies to copyrighted expression. Copied expression is speech, i.e., copy-speech. In most instances, the exercise of copy-speech is unprotected by the First Amendment. However, where expression exists in the public domain, where the use of expression is fair, and where an author has given permission to copy, the exercise of copy-speech is protected. The First Amendment, then, disfavors punishing unprotected copy-speech through strict liability, for doing so chills the practice of copying in circumstances where exercising copy-speech is protected. Facing strict liability punishment, a copy-speaker is less likely to copy—even where an author has actually given permission—in order to avoid the risk of a mistaken belief. In effect, copyright's strict liability punishment thwarts copyright's very purpose—to encourage rightful copying. Such chilling contravenes the First Amendment.

This First Amendment argument is compelling in the circumstance of Internet downloading. It is not in other circumstances. In the circumstance of copying by publication, the interest in upholding an author's proprietary interest outweighs the First Amendment concern: one unauthorized publication—innocent or not—is sufficient to deprive an author of all value in expression. By contrast, innocent Internet downloading does not publish expression. Innocent Internet downloading deprives an author of only one person's demand for the expression. In the circumstance of copying in real space, strict liability punishment is permissible because a person can exercise copy-speech without making a copy. In real space, copy-speech may be exercised by procurement of a physical copy, which avoids the risk of strict liability altogether. Strict liability punishment is therefore permissible where copy-speech occurs through publication or in real space. It is not permissible, however, where copy-speech occurs for personal use in cyberspace. The exercise of copy-speech in cyberspace is possible only by copying. Accordingly, an innocent downloader risks strict liability punishment whenever the downloader exercises copy-speech. Copyright law requires a downloader to either risk punishment or remain silent, all to protect an author from minimal damage. The First Amendment should be read to preclude strict liability punishment of Internet downloading.