

This article explores the role that the concept of harm plays in mediating between copyright infringement and free speech interests in using copyrighted works. Despite free speech concerns at stake in copyright infringement cases, most courts have been unreceptive to arguments that the First Amendment should limit the scope of copyright protection, even when there is no proof that a defendant's use of a copyrighted work causes any meaningful likelihood of harm to the copyright owner. In sharp contrast, First Amendment theory and doctrine show that most areas of law are willing to tolerate tortious harm to individuals in order to protect free speech concerns. The article concludes that although the speech concerns at issue in copyright cases are different in some important ways, a harm requirement, properly defined, can go a long way toward balancing the interests at stake in copyright enforcement and free speech.