

Fair Use and Copyright Overenforcement

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ABSTRACT: Economic analysis has long suggested that there are two distinct categories of cases in which the fair use defense, which permits the unauthorized reproduction and other use of copyrighted materials, should apply. First, fair use should apply when the transaction costs of negotiating with the copyright owner for permission to use exceed the private value of the use to the would-be user. Second, fair use should apply when the individual use is thought to generate some positive externality—such that the net social value of the use exceeds the value to the copyright owner of preventing the use—which in turn may exceed the value of the use to the individual user. Considerable anecdotal evidence, however, suggests that would-be users are often deterred from engaging in conduct that likely would fall within the ambit of fair use, due in part to concerns over incurring attorney’s fees and in part to the uncertainty and unpredictability of the fair use doctrine itself.

This Article presents a model of the private costs and benefits faced by would-be users of copyrighted materials in precisely those settings in which economic analysis suggests that the fair use doctrine should apply. The model demonstrates how, under current law, this balance of private costs and benefits may cause some users to forgo legitimate fair uses, particularly when those users are risk averse. It also suggests that, in cases in which fair use is justified by the presence of positive externalities flowing from the individual user’s use, the asymmetry between the individual user’s gain and the copyright owner’s loss may result in systematic copyright overenforcement. Put another way, the fair use doctrine suffers from an “appropriability” problem similar to that which is often cited as a justification for copyright protection itself. This Article then offers some observations on the likely effectiveness of six different types of fair use reforms.

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