

DEFINING FAIR USE IN THE DIGITAL ERA

Joseph J. Raffetto *

ABSTRACT

The increasing prevalence of technology, and the ease with which the public and companies can reproduce, recombine, and reuse copyrighted works, has rendered the once-confusing fair use doctrine a virtual uncertainty. Given limited congressional guidance, courts have relied heavily on a secondary use's potential effect on the market for the original work. While this reliance is based on the valid concern of maintaining adequate creative incentives, the enormous growth of licensing markets has resulted in an overemphasis on economic concerns. Recent court decisions indicate that fair use now turns not on the protection of creative incentives, but rather the preservation of a maximum revenue stream for authors. Yet fair use, along with the copyright system, was designed for public, not private, benefit. Excessive concern for private gain will chill the development of new technologies. Therefore, the author concludes that when the social value of a secondary use is high, and its impact on the market is not only *de minimis*, but also unlikely to diminish an author's creative aspirations, the secondary use must be permitted for the public good.

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* Joseph J. Raffetto, B.S., 2004, Vanderbilt University, J.D., 2007, Washington and Lee University School of Law. The author wishes to thank Professor Sarah Wiant for her substantive guidance and assistance in developing this Note. This Note has been awarded first prize in the 2006 Nathan Burkan Memorial Competition sponsored by ASCAP at Washington and Lee University School of Law. The national results of this Competition are still pending at the time of the submission of this Note.