

Fair Use and Copyright Overenforcement

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Copyright's fair use doctrine permits the unauthorized reproduction and adaptation of copyrighted expression under a variety of circumstances. Economic analysis posits that these circumstances can be roughly grouped into two categories: first, when the transaction costs of negotiating with the copyright owner for permission exceed the value of the use to the would-be user; and second, when the net social value of the use exceeds the value to the copyright owner of preventing the use, which in turn exceeds 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 attorneys' fees and also to the uncertainty and unpredictability of fair use doctrine itself. This article presents a model of the private costs and benefits faced by would-be users of copyrighted materials in settings in which economic analysis suggests that fair use 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 potential copyright defendant's use, the asymmetry between individual user gain and copyright owner 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 property protection itself. The article then offers some observations on the likely effectiveness of six different types of fair use reforms.