

The Dual-Grant Theory of Fair Use

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Fair use is one of modern law's most fascinating and troubling doctrines. Yet, scholars have struggled to explain why and how fair use should work. Following Wendy Gordon's immensely influential article, the most dominant theory of fair use is inextricably related to the notion of transaction costs. Gordon's article argues that the fair use doctrine is best understood as a mechanism for enabling the use of copyrighted works without authorization when the cost of transacting the authorization is prohibitive.

This article, offers a fundamentally different understanding of fair use that accords with recent Supreme Court cases by conceptualizing fair use neither as an exception nor as an anomaly, but rather as a central feature of the copyright system. The article claims that copyright law should be viewed as granting not one, but two large blocs of uses: a grant of fair uses to the public and a grant of exclusive uses to authors. The grant of exclusive uses to authors (such the right to copy, distribute or display) is intended to give authors the ability to profit enough from their expressions to make it worthwhile for them to continue creating. The grant of fair uses to the public, by contrast, is intended to give the public the privilege of utilizing creative expressions for uses that are of relatively high value to the public at large (such as criticism, news reporting, scholarship and political speech). Importantly, fair use is a grant of privileges as fundamentally important as the grant of rights to the author, albeit in service of a different aim.

The article's point of departure is that the optimal incentive structure involves giving only some rights and powers to authors—just enough to motivate creation of original works—while reserving the remaining rights and powers to the public. The fair use doctrine is a sorting mechanism for filtering protections so that authors receiving those with the greatest incentive effect, while not receiving those that impose the highest social cost.

The article suggests that any use of an expressive work motivated by one of the aims of fair use should be considered *prima facie* "fair" and permitted. The article further suggests as a rule of thumb that any uses that create significant non-pecuniary benefits to follow-on users (i.e., subsequent consumers of the expression that will be utilizing the use that is now claimed to be "fair") should be considered one of the aims of fair use. Such high public value uses are promotive of the ends that the copyright system strives to advance and should therefore enjoy a presumption of legitimacy irrespective of how they fare in the four-factor fair use tests that predominate contemporary fair use jurisprudence.