

Putting the Fairness in Copyright Fair Use

Moral intuitions regarding when it is “fair” to engage in unauthorized copying or derivation from a copyrighted work may often take into account factors that the fair use statute, 17 U.S.C. s. 107, does not enumerate among fair use considerations. This project examines one such extra-legal factor that may weigh into a moral equation: the question of who owns the copyright in the underlying work, and who is accused of infringing. Is it more or less “fair” for a teen to sell unauthorized fanfiction based on their favorite movie; or for a movie studio to turn a kid’s fiction into a blockbuster movie without permission? A number of scholars have observed that copyright law has the potential to promote social justice, or conversely to establish or reinforce stubborn social, racial, or economic hierarchies. Fair use doctrine provides an example of this duality: it can allow less-privileged speakers to “talk back” to dominant culture, to find voices and audiences, and to forge paths to success; but can also allow more-privileged speakers to engage in cultural appropriation and exploitation with impunity. The differences between these scenarios may have more to do with who is on which side of the fair use coin, than with any of the doctrinally-prescribed fair use factors. This project suggests that fair use doctrine could better promote progress if it took into account considerations like party resources and cultural market share.