

*Predicting Fair Use:
An Empirical Study of Copyright's Fair Use Doctrine*

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Fair use is often criticized as unpredictable and doctrinally incoherent—a conclusion which necessarily implies that the copyright system is fundamentally broken. This article confronts that critique by systematically assessing the predictability of fair use outcomes in litigation. Concentrating on characteristics of the contested use that would be apparent to litigants pre-trial, this study tests a number of doctrinal assumptions, claims and intuitions that have not, until now, been subject to empirical scrutiny. This article establishes that, based on the available evidence, the fair use doctrine is more rational and consistent than is commonly assumed. Fair use is more than simply the right to hire a lawyer and take one's chances in court.

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