

Fair Use as a Collective User Right

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This Article puts forward a new theory that can enable us to redefine the nature of the fair use doctrine in copyright law. It first argues that the fair use doctrine has not yet unleashed its full energy in protecting the public interest. The failure is caused by a firmly ingrained notion in copyright law that treats fair use as an affirmative defense against allegations of copyright infringements. Such a fixed characterization of fair use has led legislators and judges to define it as merely an individual right enjoyed by users of copyrighted works. This characterization has allowed and nurtured a wide range of initiatives that harm the public interest in the free flow of information and knowledge.

Against this backdrop, this Article explores the ways in which fair use can be revitalized to protect the public interest. It argues for repudiating the narrow-minded characterization of fair use as a mere individual right. The Article then proposes that fair use should instead be redefined as a collective right held by the public, which facilitates and enhances their participation in communicative actions in what I call intangible public space. Moreover, it shows that we can tap into the collective right to fair use to generate a set of new legal techniques aimed at enriching copyright adjudication and policy-making discourse for protecting the public interest in the digital age.

The initial Part of this Article first examines the major cases and legislative documents that have defined fair use as an affirmative defense against copyright infringement allegations. Part II reveals that such a characterization inevitably reduces fair use to an individual right for users under copyright law. It further discusses how and why this individual right-based approach has caused a variety of harms to the public interest in the free flow of knowledge and information. Part III puts forward a new theory reconceptualizing fair use as a collective user right. It discusses why users of copyrighted works should be conferred with the collective right to fair use. It demonstrates that it is the users' collective right to participate in intangible public space that provides the theoretical foundation to redefine their interest in fair use as a collective right. Based on the reconceptualization of fair use as a collective user right, Part IV further discusses how this new vision of fair use would generate a set of new legal techniques to protect the public interest. It also shows how the new vision would further lead to a better-balanced approach to deal with many thorny issues that may arise in the process of copyright adjudication or policy-making.