

Reconstructing fairness in copyright exemptions

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Exemptions from copyright infringement play a pivotal role in the new digital economy. Many industries operating in online markets rely heavily on fair use, fair dealing and other statutory exceptions, as well as on safe-harbour limitations of liability, to offer innovative products and services. For some of these businesses, the availability of an exemption represents an asset that is as valuable, if not more, as other intellectual property rights in their portfolio. This is also reflected at policy level worldwide, where the so-called “copyright exceptions industries” now push for stronger exemptions with strategies and arguments that are very similar (albeit specular) to those used by traditional copyright industries to lobby for stronger copyright protection.

This changing role of copyright exemptions carries important doctrinal implications, which form the subject of this paper. The key point of discussion is that beneficiaries of exemptions are often in a position to create proprietary or quasi-proprietary entitlements around their copyright-exempted uses, thereby turning exemptions into de facto exclusive rights in reverse. The paper considers three paradigmatic cases that illustrate this point, namely mass digitization, text mining services and user-generated-content platforms. In the light of such “propertization”, classical justifications for permitted uses in copyright law lose their persuasive force. For instance, while exemptions from infringement are expected to curb monopolistic power of the right holders and foster competition and innovation, they may have in reality the opposite effect of strengthening market powers and reduce competition. Similarly, the public benefit that is supposed to derive from judicially-determined fair uses may in fact be entirely appropriated by a single subject, by virtue of market dynamics that courts are not equipped to assess when determining the “fairness” of a particular use. The paper discusses, from a normative perspective, how fairness should be defined when crafting, interpreting and applying copyright exemptions in the new digital environment.