

TRANSFORMING COPYRIGHT: FAIR USE IN THE DIGITAL WORLD

Glynn S. Lunney, Jr.

Over the last twenty years, in the United States, there has been a sharp, some would even say radical, expansion in the scope of fair use and a corresponding contraction in the protection copyright provides. Using the talismanic phrase “transformative use,” courts have redefined as fair, and hence, noninfringing, uses that would otherwise have fallen within the scope of a copyright owner’s exclusive rights. While some complain that this transformation has gone too far, the transformation of copyright has only just begun. In the end, the economics of creating, distributing, and remixing original works of authorship dictate what is fair. For the past four hundred years, copyright and its limits, such as fair use, were shaped by the natural monopoly economics of analog technologies used to author and distribute works of authorship. In that world, broad and long copyright, and correspondingly narrow fair use, made sense. With the transition from analog to digital production and distribution technologies, the economics of authorship have fundamentally changed. From cat videos to dancing babies, from fan-made Harry Potter lexicons to fan-made Star Trek movies, the radically lower costs of creating and distributing original works of authorship in today’s digital environment has fundamentally changed the economics of creativity. With these changing economics, copyright must change as well. To promote creativity and authorship in the new digital world, a narrow and short copyright, and correspondingly broad fair use, must become the new normal. Uses that were unfair in the analog world have become and must be recognized as fair in the digital world.