

Abstract

Along with the enlargement of the scope and duration of copyright, it is generally believed that barriers to continual innovation and knowledge distribution also increase. How to leverage fair use to best preserve public interest thus becomes a very important issue. Nevertheless, fair use is called the most unpredictable and difficult problem in copyright law. Using the market failure theory proposed by Wendy Gordon to explain the scope of fair use, this research collects landmark U.S. fair use cases as the basis to develop propositions that help the judiciary to deal with fair use cases, makes management suggestions to copyright holders and proposes several legal reforms to the current Taiwanese fair use law .

This study suggests that a defendant's chance to prevail on his fair use defense increase as the transaction cost increases. For illustration, if the work in dispute is an orphan work, a defendant has a stronger fair use case because the transaction cost he has to incur to find the copyright owner and reach a deal is higher. Similarly, if the work in dispute carries with it clear copyright management information, is managed by efficient intermediaries or placed on an efficient transaction platform, a defendant has a weaker fair use case. The research also argues that the higher the positive externality brought by a defendant's uses, the stronger fair use case he has. If a defendant uses the work in dispute to create a parody or to facilitate information exchange, the defendant has a stronger fair use case due to the positive externality he creates.

As managerial suggestions to copyright owners, this study maintains that

copyright owners should make their best efforts to reduce transaction costs in connection with licensing and copyright transfers and actively engage in licensing to uses creating significant positive externalities. This helps reduce the possibility that potential users rely on fair use and end up paying nothing to copyright owners. To reduce transaction cost, copyright owners may consider building a licensing platform themselves, using intermediaries or forming strategic alliances with primary sale channels. As for positive externalities, it is suggested that copyright owners pay attention to the public interests recognized in the copyright law. This study also finds that technology breakthroughs, legal reshuffles and innovations in business model and management are inter-related. It is simply a mistake to regard one of the three constructs as being static if another construct has been changing.

This research also proposes the following amendments to the current fair use law in Taiwan. As a matter of practice, Taiwanese judges rarely consider factors outside the four listed factors in Article 65(2) of the Taiwanese Copyright Law, even though the statute gives them wide discretion to consider other factors. To encourage the Taiwanese judiciary to apply the market failure theory in fair use cases, it is suggested that “the cost at which a user must incur to obtain a license” be added as the fifth factor and that “the public interests a user creates” be added as the sixth factor in Section 65(2). Secondly, to give judges more flexibility in close cases, it is suggested that judges should be given discretion to reduce the damages a defendant has to compensate copyright holders and discretion to reduce or release him from his criminal duty, even if

the criteria for fair use are not fully satisfied. Lastly, if serious market failure occurs, it will be Pareto superior to allow defendants to use the work in dispute free of charge. It is generally recognized that most types of personal uses fall within the scope of serious market failure. This study thus proposes that Article 51 of the Taiwanese Copyright Law be amended to the effect that personal or familial uses are allowed so long as the profits copyright holders can reasonably expect are not adversely affected.