

Information Cost Theory and the Shape of Copyright Law

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Information cost theory provides a unique perspective on property rights in general, and specifically on intellectual property. The basic insight is that property rights are always costly, and that designing the property system in a way that would minimize its costs is likely to enhance efficiency. The bulk of those information-related costs can be arranged in three categories: The **first category** covers information about the “thing” – its attributes, utilities, quality, condition, physical contours, and so on. For the property system to function, affected actors must be able to *recognize the subject matter* it governs. Obtaining the information necessary for making such basic determinations may involve nontrivial efforts, especially when the subject matter is intangible. The **second category** encompasses information about the *nature and scope of property rights* surrounding the “thing.” Property rights effectively curtail dutyholders’ general freedom to act. In this sense, dutyholders above all must comprehend the relevant limitations on their behavior in order to avoid liability. However, determining those limitations might involve some significant costs. The **third category** includes information about *rightholders themselves*, e.g., their identity, location and contact information. Such information is particularly relevant for facilitating licensing and various transactions.

Much of the legal literature that deals with the interplay between information cost and property focuses on descriptive aspects of applying information cost considerations to various property concepts and institutions. In this study, I frame the discussion more concretely around a specific property regime (*copyright*) in a specific context (*the digital environment*). Accordingly, I seek to explore both descriptive and prescriptive implications of information costs on the copyright system in the digital context.

Even a cursory examination of the positive law reveals that the existing baseline of copyright exclusivity is rather fragmented: It is broken into the several exclusive rights stipulated in Section 106 of the Copyright Act. Those rights, in turn, are tied to unique, and occasionally vague concepts such as fixation, copies, distribution to the public, public performance, etc. The exclusive rights are further coupled with specific, “governance-like” stipulations of exceptions, their beneficiaries, and the precise

conditions under which use of copyrighted material is permissible independently of rightholders' approval. This "governance-like" structure of copyright entitlements complicates the law and increases the information costs it imposes on society, especially second category-costs (i.e., information about the nature and scope of property rights).

In this light, I examine the merits and demerits of shifting the emphasis in copyright rulemaking from a "governance strategy" to an "exclusion strategy." Exclusion strategy here means that the exclusivity baseline becomes more uniform, whereby proprietary interests are defined more generally. Specifically, I analyze a proposal to "flatten the wrinkles" of copyright's exclusion baseline by virtue of introducing a single, more general right that would cover digital access to works. Evaluating the possible information cost advantages of this approach obviously must bring into consideration its impact on the system as a whole. Therefore, the analysis incorporates an information cost-sensitive examination of copyright exceptions, limitations and fair use.