

Secondary Fair Use

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ABSTRACT

Many copyright law doctrines provide authors with incentives to create by imposing liability on inventors of technologies that can be used to copy, manipulate or disseminate content. Inducing authors to create thus often comes at the expense of chilling innovators, and vice-versa. Courts and commentators have acknowledged the need to optimally trade-off between the provision of incentives to these two groups of creators, but to date no concrete instruction emerged as to how this should be done.

This Article studies the interaction between content and technology systematically. It highlights two central benefits of new technologies. First, they may raise the social value of content. Second, they may reduce the cost of producing and disseminating content. The increased differential between users' willingness to pay and the cost of production is the authorship-related value of these technologies. At the same time, these technologies may facilitate infringement and thus decrease authors' incentives to create. The value of these technologies lies in the net increased incentive to create that they provide authors as a class.

The Article suggests that society should encourage the production of technologies whose net affect on authorship is positive. The Article recommends that courts develop as a matter of case law, or that Congress legislate, a doctrine of secondary fair use. This doctrine may shield technology manufacturers from liability, regardless of the particular copyright law doctrine under which it was imposed, and would instruct judges to look at the factors relevant to determining the affects of a new technology on authorship, namely the enhancement of the value of content and the reduction in production and dissemination cost.