

Toward a First Amendment Grounding for Copyright Misuse

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The affirmative defense of copyright misuse has arisen largely by analogy to the anti-trust based patent misuse defense. While some courts have recognized that the expressive and speech elements of copyright law give rise to misuse concerns that simply do not arise in patent law, other courts have limited copyright misuse to claims of anti-competitive use of copyrights, or to claims of violation of explicit copyright law or doctrine. A number of scholars agree that copyright misuse must be carefully cabined within strict doctrinal or per se boundaries to avoid vague standards or-worse yet-excessive judicial discretion in determining copyright misuse. This paper breaks with such views and argues that because the First Amendment interests in being able to use another's copyrighted work for purposes such as critique, debate, scholarship, and factual/historical inquiry are vital to our semiotic democracy, a copyright holder who attempts to use his copyright to squelch such activities should be opened up to the affirmative defense of copyright misuse. This paper argues that the defense of fair use is not enough to balance the expressive interests at play, and that only by providing some tool to discipline overly-aggressive copyright holders can society's First Amendment interests in examination of one another's ideas and expression of those ideas be realized.