

## *Copyright Exhaustion And The Personal Use Dilemma*

**Aaron K. Perzanowski & Jason M. Schultz<sup>†</sup>**

Copyright law has long struggled to provide a coherent framework for analyzing personal uses. Although there is widespread agreement that at least some such uses should be non-infringing, such as the reproductions made while shifting purchased music from a CD to an iPod, the doctrinal grounds for these conclusions remain unclear and often suspect. In particular, the common explanations of fair use and implied license are both flawed in important respects.

This Article will propose a better explanation for the favored status of certain personal uses. Drawing on the principle of copyright exhaustion articulated in our most recent article, *Digital Exhaustion*, 58 UCLA L. REV. 889 (2011), we will argue that many personal uses are rendered lawful, not by some socially-beneficial “transformation” or implicit permission but rather by virtue of the simple fact of copy ownership. Owning copies entitles one to make certain uses of the works on those copies, even in ways that appear inconsistent with the rights of copyright holders. When personal uses involve personally owned copies, they are justifiable on this basis.

An exhaustion-based approach to personal use offers a number of benefits. First, it avoids certain doctrinal challenges that have arisen when courts have attempted to apply unusual concepts, such as fair use’s “transformation”, to personal uses. Instead it offers a far more familiar consideration, copy ownership, to anchor judicial analysis. Second, it aligns with traditional personal property norms, which have historically given consumers relatively clear and reliable guidance on how to avoid copyright violations. Third, it helps reconcile several ongoing conflicts within copyright surrounding the limits of secondary and anti-circumvention liability, especially when the underlying accusations of direct infringement or circumvention involve personal uses. Exhaustion cannot resolve the legality of personal use in all cases, but it can provide an important new tool in the effort to balance the rights of consumers against those of copyright holders.

---

<sup>†</sup> Assistant Clinical Professor, and Director, Samuelson Law, Technology & Public Policy Clinic, UC Berkeley School of Law.