

Hatch-Waxmanizing Copyright

Michal Shur-Ofry¹

This short article proposes a novel concept for counter balancing "copyright overflows". In the background of the discussion is the common reality of users succumbing to right-holders attempts to license uses which are most likely fair uses, or completely free of copyright protection. These practices have attracted considerable attention in recent literature. Most scholarly proposals in this context emphasize the need to clarify the contours of the fair use doctrine, and to remove doctrinal ambiguities. The article argues that these initiatives are probably insufficient for overcoming users risk-aversion in copyright markets. The analysis reflects an inherent structural imbalance within copyright law. While the law is designed around the prevailing narrative of providing an incentive for innovation, it is quite oblivious to providing an incentive to challenge copyright overflows. The article argues, then, that users should be provided with an actual incentive to challenge undue attempts to broaden copyright's scope.

The proposal is inspired by the unique system of incentives created under the "Hatch-Waxman Act" in order to increase challenging of pharmaceutical patents by generic pharmaceutical companies. These incentives have led to a significant rise in the number of patent challenges in the pharmaceutical field. In the spirit of the Hatch Waxman regime, the article discusses manners in which an incentive to challenge can be introduced into copyright law, so as to offset copyright overflows. It then proposes to develop an affirmative copyright misuse doctrine, which would entitle successful challengers of copyright overflows to statutory damages. Beyond the doctrinal proposals, the article's more fundamental conclusion is that copyright should be concerned not merely with an incentive to innovation but also with providing an incentive to challenge.

¹ The Hebrew University of Jerusalem Law Faculty.