

Fair Breach

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In light of renewed scholarly attention to the relation between copyright law and mass-market licensing of information, this Article explores how a doctrine of fair breach would make lawful uses of information that would be non-infringing under copyright law but that would breach the terms of a mass-market license. The inspiration for this exploration is an article by Professor Jane Ginsburg from an earlier period of copyright/contract scholarly concern in the late 1990s in which she identified the need for a flexible, fair-use-like doctrine as a response to then-proposed Article 2B of the Uniform Commercial Code, a model law aimed at regulating the licensing of information resources, that seemed poised to displace copyright law.

Since then, licensing of information has become a ubiquitous feature of modern life in the digital age. After accounting for how existing law, such as federal preemption doctrine and contract law doctrines of mutual assent, interpretation of scope, and affirmative defenses, might be used to permit some uses of licensed information, this Article argues that it is worth articulating what a doctrine of fair breach might look like. We have identified numerous specific types of uses that would be plausible fair breaches. For example, courts in copyright cases have held that making copies of in-copyright works for purposes of making a database of digital information for purposes of text- and data-mining is fair use. But many ebook and other licenses forbid such uses. Fair breach would be a sound development in this age of ubiquitous licenses.