

Copyright as the Law of Intuition

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Copyright law has an image problem. Scholars have long insisted that our copyright system is outdated at best and harmful at worst: overbroad, incoherent, and doggedly indeterminate. Simmering beneath this century-old crisis is a growing sense of anxiety over the state of copyright doctrine. Debates over the future of copyright law, in turn, tend to focus almost exclusively on various flaws in the structure of current doctrine. The standard paradigm thus rests on a straightforward assumption: copyright doctrine is crucially important.

This Article questions the conventional narrative. It argues that copyright doctrine, for centuries a staple of bitter policy debates, has been undermined, eroded, or altogether displaced by an alternative mechanism: intuition. Far from relying on hard-edged doctrines alone, courts increasingly appeal to intuition — driven by what moral philosophers describe as “intuitionist” sensibilities — to settle core legal questions. In reality, intuitionist impulses pervade nearly every domain of copyright law, from the doctrine of copyrightable subject matter and the standards for infringement to the fair use doctrine and statutory remedies. The result is a muddled and devilishly fragile body of law. Copyright doctrine is dying a slow death, eclipsed by a volatile brew of instincts and intuitions.

With the mingling of law and intuition, flashpoint conflicts over the scope of copyright doctrine might seem inconsequential, waged over increasingly trivial terrain. This Article analyzes the apparent demise of copyright doctrine and the rise of what comes next: intuitionism. The Article first develops a taxonomy of intuitionist heuristics. It then situates the prevalence of intuition within a broader historical context, tracing the equitable roots of our copyright regime. It next offers a detailed account of how, where, and why intuition shapes copyright jurisprudence. Finally, it considers whether this intuition-inflected system can be justified on practical or normative grounds. Ultimately, the enduring dominance of intuition helps illuminate our past and our present — and it readies us for the future.