

# ***A Theory of Noncommerciality in Fair Use***

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The commerciality criterion in U.S. fair use law is notoriously incoherent. Though seemingly intuitive and based on long-standing precedent, courts have struggled to find a consistent definition that could be applied to different uses. Accordingly, some cases require the adoption of a for-profit gain criterion, while others resort to market substitution or unpaid customary price. The focus of the definition swings between an emphasis on the user's gain or the copyright owner's loss, with no theoretical foundation fully explicating or grounding the choice. Moreover, the concept of "profit" in this context is incredibly broad, with some rulings encompassing such non-monetary gains as "professional reputation," and others attempting to disambiguate incidental from intrinsic profit-making. The inconsistencies expose a missing theoretical link which would explain how commerciality and noncommerciality correspond to the broader goals of copyright law of balancing between authorial remuneration and public access. This article offers a framework for navigating this problem, rooted in the integration of two competing conceptions of commerciality which implicitly operate in the background of many decisions. The first part of the article traces several contradictory definitions, identifying and critiquing several different elements commonly found in fair use cases. Part II highlights the role of both a semantic profit-based conception and a categorical social-value conception operating implicitly in the background of many commerciality discussions. The article's central argument is that both are necessary for a full account of noncommerciality, and that attempts to define it by relying only on one will inevitably lead to a narrow, unreliable and unsatisfying conception which cannot guide decisionmaking in many fair use cases.