

A Functionalist Approach to Copyright's Lay Observer Standard

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This paper revisits copyright's lay observer standard in light of empirical, doctrinal, and aesthetic scholarship that suggest its many dimensions of failure. The lay observer standard does not operate as a proxy for actual readers and audiences, as either empirically oriented legal scholarship, or certain aesthetic theories of reading would dictate. Yet neither is it wholly abstracted from the realm of the actual, in its occasional reliance on evidence about some actual responses to a given work, and in its ratcheting up or down based on communities of users (or audiences). Instead, the category operates as an interpretively malleable catchall that promotes consequentialist reasoning and grants judges wide latitude to substitute their judgment for that of the mythical observer. What is presupposed by focusing on the lay observer as a fictive entity? What does this focus deliver, and what does it obscure? The paper explores reader-response theory in a deeper fashion than prior IP scholarship has done, to suggest changes to how the lay observer standard should be understood. In particular, I juxtapose Louise Rosenblatt's somewhat overlooked theory of transactional reading with Wolfgang Iser's implied reader theory to conclude that a less simplistic, more particularized, dynamic, and phenomenologically-informed model of reception is helpful in understanding the lay observer's function in copyright law.