

It's Not Fair Use, It's Genericide

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In recent years, even those outside the legal community have come to know the two-word phrase "fair use." It's become a nouvelle vogue topic of sorts, the darling child of transformativeness and critical commentary meant to save the draconian and nonetheless-still-expanding intellectual property laws from overreach. Yet fair use is riddled with problems, as we all know: there are no bright-line rules; it's case-by-case; it's notoriously unpredictable. In recent years, what I like to call the "postmodern problem" has highlighted yet another glaring inadequacy of the fair use doctrine: its allowance for parodies, in which the copyrighted work itself is targeted, but not satire, in which the copyrighted work is used as commentary on something else. And yet the postmodern condition suggests that it is precisely the inability of a work to be unique enough TO parody that makes satire so urgent today. Yet there is a lesser-mentioned safeguard against intellectual property overreach that DOES acknowledge the inability of something to signify. It is genericide, and it is the bastard child of all defenses, relegated to the backseat of trademark law in a world in which fair use reigns. But genericide does everything fair use does not do: it eradicates a trademark from private control once and for all; it recognizes the right of the public, NOT the trademark owner, to decide a mark's fate. It is audience-friendly and First Amendment-approved. So why don't we talk about it enough? This Article makes a plea for genericide. It argues that rather than focusing on parody in the hopes of winning a fair use defense, artists should emphasize that they did NOT use the work as a means of targeting the work itself -- that is -- anti-parody. This Article first introduces the concept of genericide: what it is, instances in which it has occurred, and the audience-friendly rationales behind it. Then, it delves into problems with the fair use doctrine in contemporary case law. The third Part will focus on why genericide has become even more relevant today: in that it allows for satire -- nay, ENCOURAGES it -- and that it emphasizes an IDEA, or a CONDITION, rather than the ability of a trademark to signify, or MEAN. And, lastly, I outline what a genericide approach to artistic use would look like. I argue here that art, in a world where more genericide defenses are considered, may be headed toward brave new places.

Biography: I am a Visiting Fellow at the Yale Law School Information Society Project and an Intellectual Property associate at Skadden, Arps, Slate, Meagher & Flom in New York. I graduated with a B.A. from Columbia University and a J.D. from Yale Law School.

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