

All of This Has Happened Before and All of This Will Happen Again

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Claims that copyright licensing can substitute for fair use are nothing new. This cycle's variation in the licensing debate, however, offers a few tweaks. First, the new licenses often purport to allow the large-scale creation of derivative works, rather than the mere reproduction that was the focus of earlier blanket licensing efforts. Second, the new licenses are often free, or even offer opportunities for users to profit. Rather than demanding royalties, copyright owners just want a piece of the action—along with the right to claim that unlicensed uses are infringing. In a world where licenses are so readily and cheaply available, the argument will go, it is unfair not to get one. These new attempts to expand licensing in ways that take into account the digital economy and the rise of "user-generated content" also face a fair use doctrine that is in some ways less favorable to copyright owners than it was several decades ago, when a few key decisions supported the rise of (allegedly) blanket reproduction licenses. While copyright owners have lost some significant cases in court, they are trying to change the facts on the ground to achieve many of the same benefits that they could get from a legally established right to license transformative uses. This short paper will describe recent innovations in licensing-by-default in the noncommercial or formerly noncommercial sphere and discuss how the licensed versions differ from their unlicensed alternatives in ways both subtle and profound. These differences, which change the nature of the communications and communities at issue, help explain why licensing can never substitute for transformative fair use, even when licenses are routinely available. Initiatives such as YouTube's Content ID, Getty Images' new free embedding of millions of its photos, and Amazon's Kindle Worlds all attempt to get internet users accustomed to copyright owner supervision - with a very light, rarely visible touch - of uses that are individually low-value but might produce some aggregate income, or at least some consumer behavior data that could itself be monetized. While there's room in the copyright ecosystem for these initiatives, it would be a grave mistake to conclude that the problem of licensing has finally been cracked and that fair use can now, at last, retreat to a vestigial doctrine. Ultimately, as courts have already recognized, the mere desire of copyright owners to extract value from a market - especially when they desire to extract it from third parties instead of licensees - should not affect the scope of fair use.

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