Objective Factors in Fair Use Litigation

This project builds on the analysis in the Barton Beebe’s pioneering Empirical Study of U.S. Copyright Fair Use Opinions (156 U. Pa. L. Rev. 549 (2008)). Beebe’s exhaustive study of the contents of fair use opinions provides an insightful guide to what judges say they do, especially with respect to the four statutory fair use factors. In this new empirical study we now examine what judges actually do.

Over the past two years we have compiled a unique hand-coded dataset of more than 300 fair use cases. Our data includes a rich set of information on objective litigant characteristics which indicate the wealth/power of the respective parties. We have also coded a number of objective characteristics of the copyrighted works at issue in these cases and, where relevant, of the defendant’s work as well. Using this data we are able to investigate questions such as (i) does fair use favor the underdog? (ii) is fair use more likely to be found within or between industries? (iii) is a change in medium predictive of a finding in favor of fair use?