Reinvigorating Fair Use:
A Social Economics Approach

Benjamin J. Bates

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Current Contact Information:
Benjamin J. Bates
Professor,
School of Journalism & Electronic Media
University of Tennessee
Email: bjbates@utk.edu

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Recent efforts and revising and extending copyright law and
policy in the U.S. has seemed to forgotten a fundamental,
historic, tenets: that its goal is to foster social welfare by
encouraging both the creation and dissemination of
information, and that information creates social as well as
private value. This paper lays a foundation for, and develops, a
social economics approach which seeks to explicitly reinsert
those tenets into consideration of information policy,
specifically one set of policies that has more explicitly
embodied the recognition of the social value of information
dissemination and utilization -- "fair use." Employing a social
economics approach, this paper proposes a new formulation
of the fair use standards which should help to reinvigorate this
important (and increasingly challenged) component of social
information policy.
Reinvigorating Fair Use: A Social Economics Approach

Since time immemorial, societies have recognized the value of information to individuals and to society at large, and have devised mechanisms for encouraging the generation of new information of all types, from abstract and applied knowledge to more creative artistic endeavors. They have also recognized that some kinds of information may be costly or harmful, and have sought ways to restrict the use of such information. With the rise of the Industrial Age and Industrial Societies with their emphasis on the creation and consumption of goods, it was not unexpected that mechanisms to facilitate the creation and diffusion of information be based on the treatment of information as a good, as intellectual property. For most of the history of the United States, the predominant mechanisms for recognizing the value and utility of information as intellectual property, and for encouraging its creation, has been patent and copyright laws (Bettig 1996; Teeter & Le Duc, 1995).

The basic rationale behind this mechanism is that, in an economically-oriented society, the best way to encourage the creation of information is to ensure that those creators benefit economically from the creation and dissemination of their efforts. Both patent and copyright laws attempt to facilitate the return of economic benefits by granting legally enforceable property rights to information products, and providing legal mechanisms for enforcing those rights. Such information policies also took into consideration the idea that it is not only the creation of information that enriches society, but that the dissemination of information is also beneficial. Thus, both copyright and patent legislation included the idea that the essential information content of the good must be made available to the public, and that the duration of intellectual property rights was limited, finite. In addition, legislative and judicial history has emphasized that the essence of information contained in intellectual property is not copyrightable or patentable, that only the specific expression or application of that information can be. In the case of copyright, a second mechanism to further the use and utility of information products arose, the concept of “fair use.” This exception to copyright argued that there were conditions under which copyrighted material could be used without compensating the copyright holder.

While the basic concept of “fair use” may seem clear and straightforward, “fair use” has always been a bit vague and imprecise in its application. Rooted in common law, “fair use” denotes a set of circumstances where copyrighted material could be used without specific license or permission, and without directly compensating the copyright owner. The rationale for “fair use” was rooted in the idea that there are some circumstances where a greater social good is achieved by the use of copyrighted information than the loss to the copyright holder. Thus, there should be a mechanism for encouraging those uses, and the individual and social benefits that arise from such use. The application problem arises from this situationally-bound conceptualization. The concept is fuzzy because whether or not a use is “fair” has depended on the particular circumstances of the situation.

Historically, “fair use” has been defined by the courts on a case-by-case basis, generally following the basic principles set forth by Judge Story in 1843 with his decision in the case of Folsom v. Marsh (Lawrence, 1989). Over time, revisions of copyright law have extended copyright protections, and recently, have attempted to codify the concept of “fair use.” The 1976 Act did codify the basic principles used by courts for
years, as guidelines for determining “fair use.” More recently, however, attempts to revise the Copyright Act to accommodate new forms and venues of communication have also included attempts to more narrowly limit and specify the conditions under which fair use could be defined (Bettig, 1996; Litman, 1996; Samuelson, 1998).

These recent actions would seem to reflect a somewhat disturbing general trend towards a greater emphasis on narrow individual property rights to intellectual property, away from a balancing of private and social benefits. Several scholars have noted and expressed concern over the increasing commodification of information (Babe, 1995; Bettig, 1996; Schiller, 1989). Information is a unique form of economic good, with some very distinctive features. One feature is that the creation and utilization of information goods can create value beyond the immediate exchange of goods. Information can create what could be called ancillary individual and social benefits (Babe, 1995; Bates, 1988, 1990; Rescher, 1989; Wolpert & Wolpert, 1986). The failure to recognize and incorporate aspects of ancillary value, especially ancillary social value, can lead to distortions in the market for information and information goods. The attempt to minimize considerations of social value by restricting “fair use” is likely to reduce the broader social benefits derived from information and information goods.

This paper proposes that there can be a substantial degree of social value, and social costs, associated with the distribution and use of intellectual property, and that such value should not be ignored in information policy discussion. Thus, “fair use,” and the conceptualization of copyright as a balancing of individual property rights with valid concerns for social benefits and public welfare, are socially beneficial concepts that need to be stressed in contemporary copyright policy.

Rather than following the current legislative trend towards narrowing “fair use” applications and extending individual property rights, society would benefit from having a reinvigorated concept of fair use, one based on the consideration of both the individual private benefits and the social benefits of information use. As a final step, this paper will also derive and propose a social economics model that can be used as a framework for evaluating the appropriateness of proposed “fair uses.”

A Short History of Copyright and Fair Use

The concept of copyright originated in Europe after the development of the printing press. While recognition of the value of information and information creation has arguably existed since the creation of written languages, Bettig (1996) argues that it was the combination of cultural and technological factors that led to the rise of copyright in Europe in the 16th century. The first application of the concept of intellectual property as a commodity can be found in printing patent monopolies. It was a ostensibly designed to encourage investment in printing technology, but that also served to control who printed and what was allowed to be printed.

Bettig (1996) suggests that such patent monopolies arose first in Venice, then traveled throughout Europe as the printing industry expanded. In Britain, the Stationers Company had a monopoly on printing and publishing that lasted 150 years. These monopoly patents served to protect both state and printer interests, but generally did little to establish or protect the interests of authors- the creators of intellectual property. Concern over the failure of the existing Licensing Act to protect and encourage authors/inventors rights in intellectual property contributed to a failure to renew the Stationer Company monopoly license in 1694 (Bettig, 1996; Lawrence, 1989).
Over time, the intellectual debate over copyright, and whether control over intellectual property resided in those who created it (authors) or those who distributed it (printers/publishers) evolved into a policy geared more towards encouraging the creation of intellectual property, by securing enforceable property rights in intellectual property to its creator. This policy shift led to the passage of the Statute of Queen Anne in 1710, considered to be the first “modern” copyright law. The Statute focused on the act of copying, but also upheld the notion that authors had a “natural right” to their creations, a right based in common law (Bettig, 1996).

The statute also served to generally promote social benefits by encouraging the distribution of intellectual property. Statutory copyright applied only to published works, and the value of the copyright was based on making, and distributing, copies of the work. This linked the value of copyrighted material to its distribution, thus encouraging authors to make their work publicly available. The Statute of Queen Anne also placed a time limit on those exclusive rights to copy, over the common objections of authors and publishers (Teeter & Le Duc, 1995). The fixed and finite term of copyright protection ensured that information would continue to be available. Owners of limited intellectual property rights would seek to maximize their returns during the period of the term, and at the end of the term, the information product entered the public domain, for all to use freely.

The importance of information and the creation of intellectual property to the founding fathers of the United States is evident by their inclusion, in the Constitution itself, of language explicitly authorizing copyright and patent legislation. The first Congress complied, passing the first federal copyright statute in 1790. But even before that, most of the original states also had passed copyright laws between 1783 and 1786. These state laws were grounded in Locke’s natural rights theory, having as general goals the securing of authors’ rights, the promotion of learning, creating an ordered book trade, and preventing monopoly (Bettig, 1996). Two types of limits protected social rights and social benefits in these statutes, limits on the length of copyright protections, and clauses ensuring the availability of copyrighted materials at reasonable costs. The federal statute followed this balancing of the rights of authors and publishers versus the rights of the general public.

Society’s interest in balancing rights was not limited to these legislative efforts. In 1834, the Supreme Court enunciated the doctrine of common law copyright in *Wheaton v. Peters* (1834). That initial statement of copyright and patent policy showed an awareness of the dual goals of furthering both private and social value of information. The Court rejected arguments that authors had a perpetual rights in copyright, and that copyright protections continue after the sale or transfer of protected information goods (Bettig, 1996). Authors’ rights in their work, while exclusive, were also limited.

U.S. federal copyright legislation has been amended and revised several times. The first major copyright revision passed in 1909, extending both the length of copyrights and extending copyright protection to a host of new media forms. Continued innovations in media and information technologies, concern over the definition of copyright infringement, and the desire to come into greater compliance with the Berne Convention (the governing international accord on copyright), prompted another major revision in 1976 (Brennan, 1996). This revision further extended the length and scope of copyright coverage, while preserving the basic philosophical strands of copyright law (Carter, Franklyn, & Wright, 1996).
In 1988, the U. S. became a signatory to the Berne Convention accord, further extending proprietary rights to copyright holders. While these revisions have tended to expand the rights of copyright holders at the expense of the general public good, they still appeared to at least recognize certain social value aspects of information goods. The Clinton administration has made several efforts at formulating new patent and copyright legislation, ostensibly to help extend intellectual property rights to new media, and address issues arising from the ease in which digital forms of information can be copied and disseminated. The 1993 National Information Infrastructure (NII) Initiative established a Working Group on Intellectual Property Rights to examine these issues. That group issued a draft report the following year, which was generally supported by industry, and generally condemned by information user groups representing universities, libraries, and the general public. Criticisms were largely ignored in the final draft, the _White Paper_ released in 1995.

In large measure, critics argued that the proposed revisions significantly extended the intellectual property rights of copyright holders at the expense of public rights and the public welfare (Fujita, 1996; Litman, 1996; Samuelson, 1998). These, and other, critics argue that copyright laws have never allowed copyright holders to exclusively control all uses of their work, that copyright legislation has been a bargain between the public and owners of copyright. The Clinton-backed proposals outlined in the 1995 White Paper, however, appear to be a one-sided bargain. The proposed new copyright legislation would 1) give copyright holders absolute rights to control all digital forms of copyrighted information (including the right to distribute and read or view such information, and rights to control any digital means of distribution and display), 2) severely restrict “fair use” rights to two narrowly defined areas, and eliminate “first sale” rights to digital information. Later, the administration introduced and supported the Database Investment and Intellectual Property Antipiracy Act of 1996, which some critics suggested was an end-run around Supreme Court findings that factual information was not copyrightable (Brennan, 1996).

With vehement opposition to the language of the _White Paper_, particularly from educational groups, the Clinton administration did not actively pursue the _White Paper’s_ proposed initiatives. Rather, administrative efforts have focused on influencing the language of WIPO (World Intellectual Property Organization) treaties, and securing ratification of those treaties by the U.S. The shift was seen as an effort to achieve, through a back door, the goals and initiatives outlined in the original _White Paper_. Once again, a number of library, educational, and public interest groups expressed their concerns about the enabling legislation’s emphasis on creating and extending copyright holder’s exclusive rights, while making little or no effort to balance these rights against those of the public and society at large (Aoki et al., 1997; Digital Future Coalition, 1997).

Such a near-exclusive focus on proprietary rights is a recent phenomenon in the United States (Schiller, 1986). Between the Congress and the courts, several copyright policy doctrines have arisen over time which have recognized and supported public rights and the social benefits of information creation and dissemination. Perhaps the most crucial doctrine, in terms of protecting public interests and encouraging the creation of further information goods, is the principle that facts and ideas cannot be copyrighted. In other words, the central essence of the intellectual property, the fundamental information content contained in the media product, is not copyrightable. Individuals cannot obtain exclusive rights to ideas, facts, and knowledge, only to a specific application or expression of
information. Perhaps the next most important doctrine, and the focus of this study, is the doctrine of “fair use.” Another was the “first-sale” doctrine, which helped justify the establishment of libraries. Both facilitated the sharing and dissemination of information and knowledge.

While the courts furthered the social value goal, subsequent revisions, including current proposals, of the copyright law seemed to emphasize the extension of private property rights. This happened through some combination of three basic changes: a) by extending the length of time a copyright was valid and the exclusive rights upheld, b) by extending the scope of intellectual property covered by copyrights to cover more types of information goods, and c) by narrowing the definition of “fair use” in ways that restricted its application. A new wrinkle in some information policy is the attempt to also attack the validity of the “first-sale” doctrine.

Current proposals for a new revision of the copyright legislation not only seeks to further extend private property rights, they also appear to seek to restrict the conditions under which fair use and the first sale doctrines apply. These efforts seem to be increasingly ignoring the social benefits of information in favor of emphasizing the private marketplace. Whether this approach on maximizing private value depends is appropriate or desirable depends in large part on the question of the value of the social value component.

The recent passage of the Digital Millennium Copyright Act (Band, 1998), while allegedly not limiting "fair use", does implement WIPO (World Intellectual Property Organization) treaties, prohibits certain circumventions of copy-protection, and extends copyright protection to new types of information goods. Congress also passed the Copyright Extension Act, retroactively extending the term for copyrighted materials by an additional twenty years, and will again consider "fair use"

issues in the next Congress along with new legislation granting copyright protection to databases, and addressing the "first-sale" doctrine. These continuing efforts only augment the need for an approach to intellectual property rights that incorporates social concerns.

The Economics of Information and Intellectual Property: Creating a Social Economics Approach

As noted above, information policy has increasingly emphasized the treatment of information and information goods as intellectual property, with a reliance on economic policy to motivate and influence behaviors. Copyright law and policy has become, to a large extent, economic policy. And as with any economic policy, the key to the success of such copyright and patent law and policy lies in the ability to recognize and take advantage of the economic features of information goods as intellectual property, in order to promote or achieve specific social policy goals. Thus, an essential question in the consideration of information law and policy is asking what is intellectual property, what are the attributes and features of information goods? And how do these attributes influence or reflect the economics of information? Further, as noted above, a major issue in considering the validity of current policy arguments is the nature and degree of “social” value in information goods.

The short answer to such an analysis is that one has to look at the sources of value in information and information markets. Economics is largely about value – the creation, exchange, and distribution of value. Standard microeconomic theory focuses on the how value is created and the direct impact on value through exchange, but also recognizes (although not always incorporates) the fact that there may be other impacts of an exchange and the functioning of economic markets, in the form of what are called externalities. They are called externalities
because while their impact is real, those impacts are not normally considered when buyers and sellers interact in the open market. The foundation of the social economics approach I am presenting is that for many information goods, those externalities can be significant and substantial, and need to be integrated into economic analyses, particularly at the level of social policy considerations. In other words, the externalities need to be internalized by policy. In fact, that is one of the primary functions of social policy—to seek to correct market imperfections and externalities.

Clearly, information and knowledge has value. According to some estimates, the information sector is the largest sector in the American economy (Dordick & Wang, 1993). If knowledge is valuable, if, in other words, knowledge is power, then there is an inherent temptation to monopolize it. Information, like knowledge, can be hoarded and used to extract maximal benefit for monopolists, but, as with other monopolies, only at the detriment of society in general. Rescher (1989, pp. 34-35) noted:

“Information monopolies, however advantageous for some few favorably circumstanced beneficiaries, exact an awful price from the community as a whole . . . in most circumstances of ordinary life and above all in natural science it pays all concerned to share information. From an economic point of view, we confront the classical format of a cooperation-inviting situation, where the resultant gain in productivity creates a surplus which all can share to their own benefit."

One aspect of information and communication goods is that some aspects of the production of information are public goods, and the dissemination and use of information can have important external effects (Noll, 1991, p. 87).” Noll further noted that many of these external effects are non-economic phenomena, such as political participation and the socialization of cultural values, or deal with general efficiencies that are spread throughout economies. This shifts the motivation for public policy from the purely economic to the realm of fundamental political and social values. Economic considerations of information as intellectual property must integrate consideration of these externalities, these social costs and benefits.

**Information Goods as Economic Goods**

Information is not your typical economic good. Information goods have unique characteristics, and there are features and aspects of information that mirror both public and private goods (Babe, 1995; Bates, 1988; Melody, 1993; Noll, 1991; Rescher, 1989). These features suggest that information cannot be treated as just another typical economic good. One must consider how these unique characteristics influence how value is created and distributed if one is to accurately develop effective policy.

Perhaps the most significant of these peculiar characteristics is information is non-physical; it is what has been called an ethereal, intangible, or immaterial good. As such, information appears to violate some of the standard assumptions made about economic goods. Perhaps the most important of these, from an economic perspective is that once produced, the duplication of the information content consumes no other physical goods and thus imposes no direct costs. While the initial creation of information can clearly be costly, the duplication of the information component is essentially costless. In economic terms, there is zero marginal cost to the duplication of information. That doesn’t mean that there is absolutely no cost associated with the production and distribution of information; clearly there are costs associated
with the initial production of the information, and there may be indirect costs and benefits associated with production, duplication, and distribution of the goods that contain information.

This emphasis on distributing information raises a second problematic aspect of information as an ethereal good: that information is not used up when it is consumed. The knowledge still remains. Unlike the typical physical good, we retain the information content even when we pass it along to someone else. Consumption and distribution are not rival choices, the owner of information can do both. Both the information component, and its value, remains even after the exchange. In a similar way, information is “non-excludable,” in the sense that consumption of information by one person or group does not exclude others from the opportunity to acquire and consume the information good. To use the broadcast metaphor, reception of the TV signal by one person in the coverage area does not hamper the ability of others to receive the signal. These characteristics differ from those of more traditional goods, where the use or consumption of goods diminishes supply, and thus its availability to others. These attributes, in fact, are some of the distinguishing characteristics of what are called “public goods,” for which normal pricing mechanisms do not work. Other mechanisms, still based on issues of value, for allocating public goods need to be developed in order for “public goods” markets to work.

Another way of looking at these “public good” characteristics is to point out that selling or consuming information goods does not diminish their inventory. However, the value of this inventory may change with the distribution of information. As the information is used by others, that use can affect the value of the information for the distributor. Consider two examples: insider information on stocks, and an academic article. The value of insider information lies in the ability to profit from that foreknowledge of what some stock may do. The more people who know, the more who will act, and acting on that information will move stock prices at a faster pace, thereby reducing each person’s ability to profit from the knowledge. In this case, distribution has a negative impact on the value to the original information holder. On the other hand, an academic scholar who writes an article is happy to have it used by others, as that use will likely increase the inherent value of that article, as well as his own reputation (and value) as a scholar.

That leads us to another peculiar characteristic of information; that there can be indirect, or ancillary, costs and benefits associated with the production and distribution of information (Bates, 1988). One reason for this is because the essential value of information lies in its use. Historically, there have been several approaches to determining economic value; however, the most generally useful is the notion of utility. The utility value of a good or service is based on its usefulness. This raises the question of what makes information useful. Information is useful when it is used; when it entertains us, or provides information that influences decisions or actions. This emphasis on utility value also then places an emphasis on making information available, on distributing content to consumers. For only by making information available for use can value be created. But as noted earlier (Bates, 1988; Noll, 1991; Rescher, 1989), the use of information can be created for others outside the direct exchange. The dissemination of information can create not only private value, but also can impact social value and social welfare.

There is a social component to information as well as an individual component. There is a general value to information in a society. Economists concur that markets work more
efficiently when information is widely available. Political scientists have long pointed out the role that information, and an informed citizenry, have in making democracy work. Sociologists have focused on the role of socialization, on providing information about a society and its components, in allowing cultures to develop and function. For the academic, not only does distribution and use of that information increase its value to him, but society has also benefited from having that knowledge disseminated. Nations have long recognized the idea that the distribution and use of information can have economic consequences for both the individuals involved in the transaction as well as society as a whole. That is the foundation upon which intellectual property policies and laws are grounded. That use of information can have an impact on its value is seen clearly behind copyright and patent laws. However, those laws also recognize that there is also a social value in ensuring that such information is made publicly available. This is perhaps clearest in the concept of fair use, and the limited terms for patents, which help to diffuse information.

This discussion of value and information leads us directly to the next problematic feature of information goods. If the value of an information good lies in the information content, how can the value of information goods be determined without divulging the information in the first place, and if we do, then why would anyone be interested in paying for information already received? The answer to this apparent paradox lies with the concept of uncertainty. The market for information is one of high uncertainty and low information, what Rescher termed “risky.” To illustrate this, think about what you would be willing to pay for an unlabelled videotape or CD, when you have no idea what information content is contained within. Another consequence of this aspect of information is that to continue creating value, producers must continually supply new information goods. To a large degree, value lies in the “novelty” of the information good, and in the constant production of new content.

The characteristics of novelty and risk carry with it certain implications for information markets and the players in those markets. One general feature of markets with high levels of uncertainty, or high levels of risk, is that risk tends to lower perceptions of value. It also suggests that players in those markets seek to reduce their risks, and to attempt to spread those risks across goods and markets. One general way to reduce uncertainty is by providing more information. In particular, information sellers can provide limited peeks at the information content that ideally can indicate the likely value of the full product. Promotion thus tends to be associated with information goods.

These characteristics are at the heart of one form of "fair use," the use of portions of content in reviews and news reports. Here there is an almost explicit recognition that society benefits when risk and uncertainty are reduced in information markets, that society benefits when potential consumers are better-informed about the content and value of information products.

We should also note, in this general discussion of value, that the value of information can be not only positive but negative. That is, some information can be harmful when distributed and utilized. Examples of information which can have a negative value might be a false news report, or false or misleading advertising. If individuals act on that information, it may well have negative individual and social consequences. It is not only false information that can be potentially harmful, however. While some information is clearly socially beneficial, there is other information that can be seen as being harmful. Thus many countries have enacted laws on privacy,
or on censorship, in attempts to minimize the distribution of potentially harmful information.

There is a further complicating factor which may need to be considered. That is the perishability of information. There are several aspects to consider. The economic concept of perishability refers to the idea that many goods have limited lifespans. The good may, like fruit, become unusable after a certain period. Perishability may also refer to the situation where the value of a good declines with repeated use. Both concepts apply to information. In general, the value of information declines over time and with use, but the information content remains.

How do these attributes affect the economics of information? The ethereal nature of information as a good suggests several basic features. First, the ethereal nature suggests that while the initial production of video can be high, that the costs of duplicating the information content is very low. In economic terms, this suggests high start-up costs, but low marginal costs, providing for a declining average cost curve. As a general rule, the average cost curve will run above the marginal cost curve, suggesting that any pricing strategy for information goods will be socially inefficient. In other words, the fundamental economics of information as intellectual property suggests that the distribution of information goods will be restricted in a way that is detrimental to society. Society can help to ameliorate that by developing mechanisms which can bypass supply restrictions, such as the fair use doctrine.

Information is not a standard economic good. Information has several attributes that distinguish it from other, more typical, economic goods. As discussed by Bates (1988), there are several distinctive characteristics to information goods. Those particularly germane to intellectual property issues include the fact that the value of information comes from its use, that information goods often evidence aspects of public goods (in particular, issues of excludability and non-depletability), the high fixed costs and low marginal costs of most information goods, and the economies of scale and scope in production and distribution (Bates, 1988, 1990; Bettig, 1996)

The feature of perhaps the greatest relevance to this discussion is the fact the value generated by information goods comes not from its creation, but from its application, from the dissemination and utilization of the information content contained in the specific piece of intellectual property. One particularly unusual characteristic is that, unlike virtually any other good, it is possible that distribution of information can actually increase its value to the distributor. Information can have a negative marginal cost (Bates, 1988), where distribution benefits the distributor not from the returns of the sale, but because the distribution makes the information more valuable. Further, information is of value to potential consumers because of its ability to influence the consumer’s knowledge of reality, to impact their state of mind, to influence markets and contexts, to impact further actions. As individual consumers seek value through the utilization of information, that use changes markets and individuals, which can create subsidiary effects for others in the market as well, and thus ancillary value.

For example, consider price information delivered by advertising. The value of such information to consumers lies in their ability to update their knowledge about the market and the price and availability of that product, and the ability to influence subsequent decisions on whether or not to consume the product. It benefits the consumer of price information directly, and benefits the producer of that information
indirectly, by providing information that might increase sales of the advertised product (Simon, 1970). However, that knowledge and subsequent behaviors also changes the market, which can impact others in the market. Information makes the market more efficient, benefiting all those who participate in the market, and society as a whole (Hamelink, 1983; Laffont, 1989). In this way, the use of information can have secondary, or subsidiary, effects ancillary to the costs and benefits considered by the principals in the creation and/or distribution of information. Even entertainment and art can create ancillary benefits beyond the value of the enjoyment of the information good itself, as that enjoyment can change one’s state of mind, and how that person will act in the future.

The example of price information can also illustrate how information goods can have ancillary social effects. It is a basic axiom of microeconomics that the more information that individuals in the market have about the market, the more efficiently the market operates, and market efficiency benefits all in the market. Thus, information about markets helps not only individuals, but creates general social benefits as well. Similarly, arts and entertainment often embody social values, and help to disseminate those values, contributing to socialization and benefiting society at large.

The ability to influence behaviors can impact not only the immediate parties of the information transfer, the changing markets and behaviors can influence other parties in the market. The use of information can impact directly, but that such an exchange (and subsequent utilization) can also create what could be called ancillary private and social value. There is clearly a social aspect to information and the value of information that needs to be considered in decision-making, particularly at the market or social level. What is needed is an approach that explicitly considers ancillary value, particularly ancillary social values arising from the production, dissemination, and utilization of information and information goods. In other words, a social economics approach.

**Social Economics and Information Policy**

The concepts of ancillary private and social value accruing from the use of information goods is reflected in the concepts of copyright and fair use as well as other aspects of information policy. The heart and soul of copyright policy, throughout history, has been the argument that the creation and dissemination of information is socially beneficial and desirable, and needs to be encouraged by providing a mechanism for rewarding such efforts. The whole basis for fair use of copyrighted material is based on the presumption that there are conditions where a greater public good is achieved by the use of copyrighted material.

Other aspects of social policy have also supported the basic concept that there are ancillary public benefits, and upon occasion public costs, associated with the creation and distribution of information goods. Social policy supports libraries and schools as mechanisms for providing access to, and helping to disseminate information and knowledge. Museums and arts funding similarly support the dissemination of creative information goods. Many societies subsidize a variety of media that work to create and disseminate information goods. In contrast, libel, slander, pornography, and anti-defamation laws seek to restrict the dissemination of information thought to be individually and/or socially harmful. By such laws and policy, individuals and societies have conceptually recognized the social economics of information goods, even if they have not explicitly used those arguments.

A social economics approach to information policy would explicitly consider the ancillary social value of information,
and not base policy only on the immediate private costs and benefits of the exchange of economic goods. It recognizes that there may also be long term costs and benefits arising from the exchange, and that there may also be costs and benefits accruing to others than those directly involved in the exchange and consumption of information goods. In essence, the approach argues that one must move beyond consideration of the basic private values of the information and include consideration if ancillary sources of value, particularly consideration of social value.

The explicit consideration of these ancillary costs and benefits is not without its own difficulties. One reason that such values have not been explicitly considered before is that precise definitions and measurements of these externalities is difficult. What is the social value of a well-informed electorate, or of a literate population? What are the social benefits of movie reviews, or weather information? We know, almost as a certainty, that such things have social as well as private value. But how valuable? And how can we determine that value? It's difficult enough to place any kind of concrete value on information products, where so many factors influence their utilization, and thus the creation of value. Dealing, in any concrete, precise, way with ancillary values potentially far removed from the specifics of exchange and utilization may be next to impossible.

On the other hand, perhaps we don't need precision in policy considerations. It may be enough, in the case of copyright, to just explicitly consider the possibility of such value, to recognize the importance of ancillary sources of value. Recognizing that there is likely to be substantial and real social benefits from the creation and dissemination of information may be enough to return to the old balancing of private and social concerns. Recognizing that private property values are not the only source of wealth, and are not the only way that the creation and dissemination of information contributes to social welfare, can be a strong initial step in making appropriate social policy.

Clearly, one place where such a consideration can be made is in the area of fair use. The fundamental concept of that doctrine is based on the idea of recognizing the social value of information goods. The evolution of what has been accepted as reasonable applications of fair use has also tended to explicitly consider the specifics of both private and social value. Uses which had little impact on private value, but with strong social value potential, such as the use of limited portions of a copyrighted work for review or news commentary, were often held to be reasonable. Situations where private value impacts outweighed social benefits were often held to be invalid.

Further, the information policy-making climate would seem to be one which is shifting away from considerations of social value. As discussed earlier, general copyright discussions have tended to focus on strengthening private value through enhancing intellectual property rights. One component of this would seem to be attempting to narrow the definition of fair use, and narrowing its applicability, possibly to an explicit set of conditions (Brennan, 1996; Fujita, 1996; Litman, 1996; Samuelson, 1998). The kind of definition being talked about would seem to remove the flexibility to consider social economics, to consider ancillary private and social values.

It would seem, therefore, that the fair use concept would be a valid initial application for the social economics approach to information policy.
**Reinvigorating Fair Use: A Modest Proposal**

The development of the social economics perspective can be used to create a model for evaluating alternative conceptualizations of “fair use,” and examining the validity of the circumstances of proposed applications of fair use doctrine. This can be done by specifically incorporating consideration of the ancillary, as well as primary, impacts on value arising from a proposed use.

The modest proposal is to shift from attempting to define “fair use” as a narrowly constructed set of specific circumstances to a consideration of the social economics of the specific “fair use” application. There are several benefits to such an approach. First, it explicitly incorporates an awareness and understanding of the value of information, and thus the specific costs and benefits of its use. Of course, this also means that the consideration of fair use must remain context-sensitive. No one-size-fits-all approach can capture the inherent variability of the variety of value impacts of information goods. A second benefit lies in being aware of, and trying to take into consideration, the fact that the costs and benefits of information use do not accrue solely to the person using that information, that there may be other, ancillary effects. By placing an emphasis on ancillary value, and specifically social benefits, the adoption of a social economics approach can help to validate and further recognition of the social value of information.

Finally, such an approach will help to return us to the original concept of copyright and fair use in the United States, the idea that patents and copyrights exist not only to serve the interests of individual creators of information products, but that information policy exists to serve social interests as well. It will help to return current information policy to a social policy emphasis from its current emphasis on economic policy concerns and its focus on private value.

There are, admittedly, also difficulties inherent in the application of a social economics approach. The use of any kind of context-dependent criteria does create uncertainty about which uses might qualify as “fair uses.” That uncertainty might reduce appropriate use of information, or could encourage inappropriate use, again with negative consequences. Perhaps the most problematic aspect, though, is the difficulty inherent in measuring the impact of a particular use of information on private and social value. While measuring the precise value of any exchange can be difficult, determining the exact value of information and information exchanges is particularly problematic (Bates, 1988; Wolpert & Wolpert, 1986). However, it is not necessary to have precise determinations of value for economic analysis to work. In addition, what one would be looking for under a "fair use" are not cases where there may be marginal benefits, but where those benefits are likely to be substantial and real, even if, perhaps, difficult to measure. These potential difficulties, while real, should not be enough to preclude using a social economics approach.

**Defining Fair Use**

In essence, the tradition of "fair use" is that the concept applies to situations where a greater social good is served by the use of information than the loss of private value accruing from that use. An additional consideration was that the use not create private value for the person claiming "fair use," particularly at the expense of the copyright holder. That provides a solid foundation for a social economics approach, based on the consideration of both social and private costs and benefits.
While there are a number of ways that a social economics approach could be constructed, I would argue that there is a benefit to try to utilize a fairly simple set of guidelines. Recognizing the difficulty in determining precise value and the benefits of reducing uncertainty over the determination of the appropriateness of a particular use, there would seem to be a particular argument for simplicity in the specification of the conditions and standards for determining "fair use."

The first set of circumstances would seem to apply when the use of the information does not decrease the value to the copyright holder, or when the use actually increases the private value of the information to the copyright holder. It would seem that the principal concern of copyright is to protect the value of information to the copyright holder, and any use of information which would not harm that value, or could serve to enhance that value, should be supported and encouraged.

In considering the circumstances for such use, one does need to make a clear distinction between the impact on value and the direct impact on revenues. An argument could be made that any use could (or should) result in a payment to the copyright holder, and thus that any "free" or "fair use" would have a negative impact. Further, by placing a high price on that use, one could argue that the loss would be substantial. Price, however, does not necessarily reflect value, and should not be used as a substitute for value in social economics considerations. One needs to look at the longer term impact on the value of information inventories. In particular, one needs to consider whether the sale would be likely to occur in the absence of the fair use. If not, then there is no real impact on revenues, for there would be no exchange.

In addition, "fair use" could still be appropriate in cases where the use would have a possible negative impact on the copyright holder, if the use creates a substantial social, or public, benefit. In such cases, there is a need for a degree of balancing in consideration of alternative costs and benefits. In theory, one could simply argue that a use which created more social value than the private cost to the copyright holder should be considered to be a fair use. There is, however, the inherent problem of measuring social and public benefits. In order to simplify procedures, I would recommend the following set of circumstances in place of a strict comparison of values.

A use would be considered to be a fair use if there is a clearly identifiable public or social value arising from the use, and if one of the following circumstances holds: a) if the portion of the copyrighted material used is such a small proportion of the work that its use is not likely to affect the value of the entire work; b) if the copyrighted work is not readily available for such use (for instance, if the work is out of print, or if the copyright holder refuses to license the use); or c) if the cost of the license so clearly outstrips the value of the information that it would discourage a socially valuable utilization of the information. This last condition is likely to be the most controversial, but I would argue that a set of licensing conditions that seems designed to prevent the dissemination and use of information (whether by price or by other restrictive conditions) violates the fundamental principle behind information policy that information be publicly available, and should not be encouraged or permitted.

One advantage of this set of conditions is that it does not require the precise measurement of the impacts on value. In fact, the conditions do not require the measurement of social value at all-- only that the presence of such value be recognized. In addition, the first two conditions do not require direct consideration of the impact on the private value of the copyright holder. Under the first condition, there is an assumption that the use of only a small portion of a
copyrighted work will only have a negligible impact on the overall value of the work. While an assumption, it is an position is already embodied in existing fair use considerations, and the issue it raises is whether the portion used is substantial, or constitutes a substantial portion of the value of the work. The second condition also does not explicitly address the issue of value, only that of availability, which is more readily determinable. The final condition is one which does explicitly consider value. Even so, the determination of this condition still does not require any precise determination of value. In fact, this condition should only arise in those cases where the conditions of access are so restrictive that they are clearly and substantially unreasonable.

It does need to be clear, however, that even these considerations of value must focus on reasonable impacts. As indicated above, one should not automatically accept claims of economic harm, or that the value of information is reflected exclusively (and accurately) by its price. A fair and reasonable consideration of the potential harm of a fair use must include a consideration of whether the material would likely be used in the absence of "fair use." For example, would libraries actually make archive copies if they had to pay, or would they forego that activity. Or would a person making a cassette copy of a CD they owned, to play in their car, actually buy a copy of that cassette, or would they forego purchasing a second copy. If the additional use would not be likely to occur, it is not fair or reasonable to claim that it would harm the market for the product.

The fair use exemption, however, should not be used to deny reasonable returns to copyright holders. The primary goal of copyright policy, after all, is to encourage the production of information by rewarding its creation. Thus, in fairness to copyright holders, I would also indicate a negative condition in the specification of "fair use." Specifically, regardless of whether the use satisfies either of the above conditions, if the use shifts private value from the copyright holder to the user of the information, that use would not be considered to be a fair use. In other words, if the use creates a "profit," that is, a direct private benefit to the user, at a direct cost to the copyright holder in terms of lost revenues or profits, that use would be inappropriate. This negative condition should remove the incentive to use "social good" arguments as a blind for piracy.

This approach would accommodate most of the currently legally recognized conditions for "fair use." The 1976 Communication Act embodies four factors in the consideration of "fair use:"

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work (17 U.S.C.A. § 107)

My proposal largely concurs with those considerations. The social economics approach, by definition, includes consideration the particular nature of the copyrighted information good, and of impacts on the potential market for that good. The proposal also explicitly considers the amount and substantiality of the portion of the work used, and, through the negative condition, whether or not the use is commercial or
nonprofit in nature. The proposal does differ in the weight of the consideration given to the claims of economic harm, and in the specification of the consideration of the broader social benefits (as well as costs) of the use.

An additional benefit of a comprehensive, social economics approach to fair use, such as that proposed here, is that it would encourage copyright holders to make their information goods more accessible. Under the second set of circumstances, copyright holders could discourage "fair uses" by making sure their materials are accessible, at a reasonable cost. Thus, this definition of "fair use" conditions would tend to promote the wider use and dissemination of information, both through the fair use exemption and through encouraging copyright holders to maintain reasonable access to their products.

In conclusion, I would propose that a use of copyrighted material would be considered a fair use if:

1. the use would not harm the value of the information to the copyright holder, or
2. the use would have an identifiable social value and if one or more of the following conditions held: a) that the portion of the copyrighted material is small enough that it is not likely to substantially affect the value of the whole work; b) if the copyrighted material is not available for that use; c) if the conditions (costs) specified for that use are clearly and significantly higher than the actual value of the copyrighted work.

Providing that

(1) the use would not create profit for the user at the expense of the copyright holder.

**Conclusions**

This paper has argued that the history of copyright and the concept of "fair use" suggests that information policy in the United States has, until recently, been based on a balancing of social goals. One goal was to encourage the production of information and information goods by creating enforceable intellectual property rights. The creation of such rights, and the legal mechanisms for enforcing those rights, sought to guarantee that the creators of information would financially benefit from their efforts. A second goal was to promote the dissemination and utilization of socially beneficial information. This second goal was addressed by requiring information to be made publicly available in order to receive a copyright and the attendant intellectual property rights, as well as through a number of other policy initiatives.

A primary mechanism for balancing these goals was the concept of fair use, which implicitly recognized that there were circumstances where the use of information and information goods could create social benefits and value which might outweigh any potential loss of value to the copyright holder. The fair use recognized that the use of information could create value for those other than the copyright holder, and that such social and private values were real and should be addressed in information markets. It recognized that while information policy used economic incentives, it was still social policy, and needed to incorporate recognition of broader social benefits and costs.

Recent intellectual property policy efforts seem to have abandoned that awareness in favor of concentrating on advancing private intellectual property rights. In particular, efforts at restricting the fair use exemption seem to ignore, rather than incorporate, any consideration of the social value of information and its utilization within society. Since
information goods are characterized in part by the fact that they are prone to create ancillary private and social value indirectly, in addition to the normal private values created by the exchange of goods, it is particularly important for social policy to find ways in which to incorporate these externalities into information markets. Thus, modern information policy needs to incorporate, rather than minimize or ignore, considerations of what could be called the social economics of information.

This paper set out to describe those social economics, and discuss how those considerations could be incorporated into one particular aspect of information policy, the specification of the conditions for the "fair use" exemption. From these considerations, and incorporating a concern for creating a usable set of conditions, I proposed a set of criteria for identifying what would be considered to be "fair use" of copyrighted material. These conditions used a social economics approach, while trying to facilitate their ease of use by reducing the need to measure private or social value precisely.

In short, I proposed that a use of copyrighted material would be considered a fair use if: (i) the use would not harm the value of the information to the copyright holder; or (ii) the use would have an identifiable social value and if one or more of the following conditions held: a) that the portion of the copyrighted material is small enough that it is not likely to substantially affect the value of the whole work; b) if the copyrighted material is not available for that use; c) if the conditions (costs) specified for that use are clearly and significantly higher than the actual value of the copyrighted work; providing that (iii) the use would not create profit for the user at the expense of the copyright holder. A key aspect of this set of conditions is the recognition that considerations of impact must be based on considerations of actual likely harm, and not presume that either the price of a copyrighted work is an accurate reflection of the harm inflicted from its use, or that the use would occur in the absence of the fair use exemption. In addition, by extending the definition of fair use to situations where the information is not made reasonably accessible, this proposal should encourage copyright holders concerned about "fair use" to make their works more accessible to potential users.

This set of conditions should incorporate most or all of the currently specified condition for "fair use," while reinforcing the fundamental concept that copyright policy needs to balance recognition of the social benefits of both the creation of information, and of its dissemination and use within society. The scope of this paper does not permit a comprehensive or substantive consideration of how this proposal would apply to a broad range of examples, or how it would fit in with existing case law addressing the issue of fair use. Those areas for further analysis and consideration, as is the issue of how this social economics approach could be applied to other aspects of information law and policy.
Bibliography


