

Lawful Personal Use

-- Jessica Litman

Abstract

Whenever someone makes a copy of a copyrighted work, that copy is either authorized by the copyright owner, permitted by some express provision of the copyright statute (such as the ephemeral copy provision in section 112 or the fair use provision in section 107), or infringing. That's what we tell our colleagues and what we teach our students. But most of us don't actually believe it, and this article argues that that understanding of the copyright law is wrong.

I make this argument by examining the copyright law through the lens of personal use. Unlike many other jurisdictions, the United States has not troubled itself to nail down the lawfulness of personal copying and other personal uses. The statute prohibits infringement actions "based on the noncommercial use by a consumer" of "a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium," but is otherwise silent on the topic of personal uses. We have been comfortable with considerable uncertainty about the scope of lawful personal use because enforcing copyrights against personal uses seemed, until recently, unthinkable.

Two related developments have spurred a reexamination of the lawfulness of personal uses. First, in the last three years, record labels and motion picture studios have sued thousands of individuals for copyright infringement. Second, the Supreme Court in the *Grokster* case adopted a standard for contributory copyright liability for distributors of technology that turns on whether the uses that the distributors encouraged their customers to engage in are lawful or unlawful.

In this article, I argue that people's reading, listening, viewing, watching, playing and using copyrighted works is at the core of the copyright system. I revisit copyright cases that have attracted criticism for their stingy construction of copyright owners' property rights, and suggest that the narrow reading of copyright rights was motivated, at least in part, by courts' solicitude for the interests of readers and listeners. I then articulate a definition of personal use. Armed with that definition, I look at the range of personal uses that are uncontroversially non-infringing under current law. I focus in particular on personal uses that seem to fall within the literal terms of copyright owners' exclusive rights, and seem to be excused by no statutory limitation, but which are nonetheless generally considered to be lawful. I proceed in to offer an alternative test for assessing the lawfulness of personal uses. Finally, I return to the conventional paradigm of copyright statutory interpretation, under which all unlicensed uses are infringing unless excused. I suggest that that rubric is not only inaccurate, but potentially destructive of copyright's historic liberties.