Fair Use, Transaction Costs, and Computable Contracts

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The fair use doctrine protects certain non-authorized uses of copyrighted works from copyright liability. Wendy Gordon and others have argued that we should understand some fair use contexts in terms of transaction costs. When transaction costs are high relative to the value of a use of a work, a market transaction authorizing the use will not occur. In these contexts, fair use can be justified to remedy this market failure. In this variant of fair use, the goal is to ensure that a class of desirable uses still occurs even when transaction costs prohibit explicit authorization. Such a fair use justification may require reexamination in light of increased automation in contracting.

Computable contracts are contracts expressed in terms of computer-processable data rather than in ordinary writing. Firms create computable contracts so that computer systems can understand and automatically assess compliance with some or all of the terms of the agreement. For example, in the last decade within the financial domain, firms have begun to routinely express contractual arrangements for standardized financial instruments in this data-oriented, computable form. There is reason to believe that similar data-oriented contractual and licensing arrangements will become more common in the intellectual property realm with impending electronic infrastructure advances.

Computable contracting has the effect of reducing certain transaction costs involved in contracting. This paper argues that market-failure fair-use justifications will be undermined as contracting transaction costs decrease due to increased automation. Current justifications are premised upon and presume a traditional contracting paradigm in which contracting transaction costs often result in a market failure for low-value uses of copyrighted works. Computable contracting changes this default assumption by reducing transaction costs for small valued uses in domains where they are applicable. This article explains how the fair use doctrine will require re-evaluation in light of these contextual changes concerning its foundational premises. Moreover, certain other *non-economic* fair-uses that are currently, but implicitly, protected by contracting transaction costs may also erode as an artifact of increased automation.