

Pragmatism, Knowledge, Copyright

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I am working on a series of papers that asks whether pragmatism provides a useful perspective on copyright policy. Drawing on C.S. Peirce's theory of concepts, this paper focuses on two relations. The first is between rhetoric and doctrine, and the second is whether doctrine demands factual investigation or makes it unnecessary.

As to rhetoric, I argue that most scholars and judges employ the vocabulary of utilitarianism as the basic language of copyright. That vocabulary is good to the extent it demands looking at both sides of problems but bad to the extent it tends to lean heavily on introspection and disguise normative claims in positive language. There is no shortage of rights-talk in such debates, of course, nor is there a shortage of basic moral assertions. These vocabularies have the opposite strengths and weaknesses of utilitarian rhetoric.

The use of introspection or moral assertion implies a relatively wide array of views on any given topic. In contrast, I assert, facts (again in Peirce's sense of the term) constrain the variety of views. Debate is therefore more likely to achieve consensus in proportion to the fraction of the discussion that can be grounded in factual assertions.

As the construction of networks or components may be said to influence behavior, so the construction of doctrine affects knowledge of conduct the doctrine governs. Doctrine may or may not require parties to adduce facts that could make more concrete the concepts used to discuss policy. As examples, I suggest *Mattel v. Walking Mountain Productions*, *Perfect 10 v. Visa*, *Grokster*, and *Sony* as fact-minimizing opinions.

Information necessary to discover facts is costly, of course, so information minimization may be desirable. Where information cannot be obtained, demanding it is pointless. *American Geophysical Union v. Texaco* and the market-effect portion of *Perfect 10 v. Google* exemplify this point.

Thus the ultimate question presented by this analysis is how to think in a practical about the costs and benefits of doctrinal construction relative to inquiry. I offer reasons to believe my first class of cases should opt more for inquiry than moralism, and offer more tentative suggestions for the necessarily more formal analysis in my second class of cases.