COPYRIGHT, PRIVATE COPYING, AND DISCRETE PUBLIC GOODS

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Abstract

Over the last few years, courts have decided that private copying by end consumers should be treated legally as copyright infringement, just as if it were copying by the competitors that have long been copyright’s exclusive focus. Yet, the economics of copying by end consumers is radically different from the economics of competitor copying. For consumers, the category “works of authorship” does not constitute a single public good, of which there can be more or less (a “continuous” public good). Rather, consumers typically consider each individual work of authorship a separate and distinct public good all its own (a “discrete” public good). This difference is critically important. Where markets generally fail to provide an adequate supply of a continuous public good in the absence of some government intervention, such as copyright, markets can efficiently produce discrete public goods without such intervention. This essay presents a simplified model to illustrate the difference in the market’s ability to produce continuous and discrete public goods. It then considers how we should modify copyright to incorporate the insights of the discrete public good model. At its simplest level, the key insight is that private copying by consumers does not have the same economic implications, and should not be treated legally the same, as competitor copying.