

RECONCILING PRO-CHOICE WITH PRO-CREATION:
A SUBTLE INCENTIVE THEORY TO COPYRIGHT LICENSING

Throughout copyright history, there has always been a demand for an accessible, simple, and efficient licensing scheme. This demand, however, has been often left unsatisfied in various creative markets for long periods of time. The lack of lawful licensing alternatives has long been considered conducive to the initiation and maintenance of piracy, as well as detrimental to further creation. Recognizing this state, legal scholarship has polarized into two competing positions: the first calls for the initiation of statutory licensing systems to allow specific uses of copyrighted works in return for administratively-prescribed fair fees, which, contrary to the proprietary nature of copyright, does not leave the licensing choice in the hands of the rightholder. The second approach objects governmental intervention and counts on the invisible hand of the market to respond to licensing demand, only when such reaction is indeed necessary, through market-based solutions and self-help means to facilitate efficient licensing or licensing bypasses.

This Article offers a middle ground by propounding the Subtle Incentive Theory. The Subtle Incentive Theory suggests that rightholders would be subtly incentivized to provide licensing choices if the existence of such licensing alternatives in the relevant market is appraised under the fourth fair use factor - the effect of the infringing use on the rightholder's market for the work. Within the inquiry, courts ought to consider whether a practical licensing alternative could have been secured instead of the unauthorized taking of the work. While the existence of licensing alternatives has been used to deny fair use starting in the 1990s, and most significantly in *American Geophysical Union v. Texaco*, the argument has not fully extended to reverse cases as well. The Subtle Incentive Theory also gives rightholders the liberty to choose – on the one hand it allows rightholders to avoid licensing if offering such alternative makes no economic sense for them, while on the other hand it empowers them to possibly change the classification of future uses from fair to unfair merely by offering a licensing choice. By introducing the Subtle Incentive Theory and a set of guidelines for its incorporation into the fair use doctrine, this Article sets the ground for a better-balanced fair use defense, while advancing more licensing alternatives in the market for secondary creation.