

There's a lot of misunderstanding of by BX article. Some simplifying things:

There are ~~two~~^{three} types of "market failure" in copyright. The first inheres in the nonexhaustibility of the good; barring a right to post-dissemination control against copying, goods may be underproduced because potential users will refuse to pay for access, figuring they can get access to a friend's copy later for free or at lower cost than the creator would charge. Thus, relying only on the physical control which lets a creator charge for the "first look", will (except where the look won't make copying possible-- the trade secret case) result in underpayments as compared with the extent the thing is really desired. That's the first type of market failure, often called the "public goods" problem. However, unlike a full public good (nonexcludable) excludability is possible for i/p. Giving rights to exclude "cures" the underpayment problem.

This cure then has its own problem: unless perfect price discrimination is possible (Demsetz) underproduction (monopoly) may result as creators set p above mc in order to maximize profit. (This may or may not be a problem-- empirically there may be cross elasticity across i/p products etc minimizing the monopoly problem, or in any event, the monopoly may be traceable to "natural" advantages, like lead time, rather than to the law). Liebowitz tells us how to measure whether the cure is worth the result. (Explain.)

My approach isn't concerned with either of these types of market failure; they provide, instead the backdrop. The inefficiencies which markets-in-copyright pose do create a second-best problem for all analysis in the area, true.

My approach takes as given that the law wants to cure the public goods problem by creating post-purchase rights to exclude, and that the law is willing to tolerate the underproduction which comes with it, as the necessary price to get incentives high. That is, my approach takes as given that the law WANTS copyright owners and users to strike voluntary bargains between them-- and hopes that the result, over all, will be productive. (NOTE: Not perfectly "efficient.")

What I've tried to show is that in those cases where the owner cannot sell nor the potential user buy, no one gains if copyright is enforced. And that in those cases, the courts tend to give fair use treatment. A compulsory license would do just as well, or even better since under it the user gets the use and the owner gets some compensation; this is pointed out

in the article[1] For historical or institutional reasons that doesn't seem to be the usual route.

This isn't efficiency or Smithian in the absolute sense (how could it be, given the second-best background?) It's evolutionary[2]: having chosen markets, fair use tries to gets markets to work when markets fail.

1. cite to Nimmer misunderstanding here.
2. Adelstein