

# Fair Use in the Digital Age

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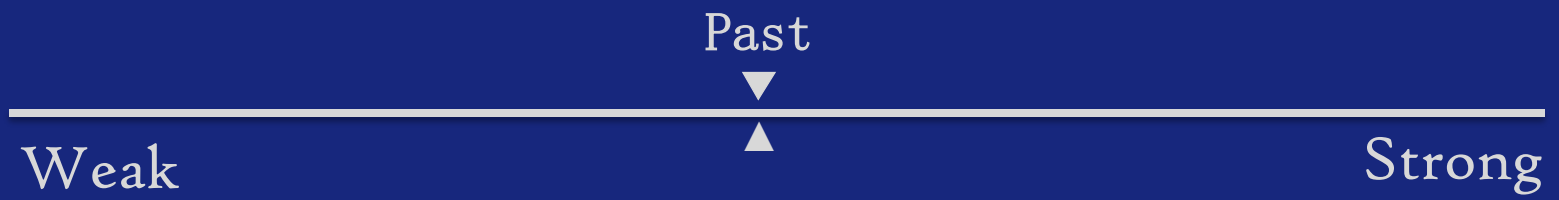
“Copyright laws weren’t created for the digital age.”

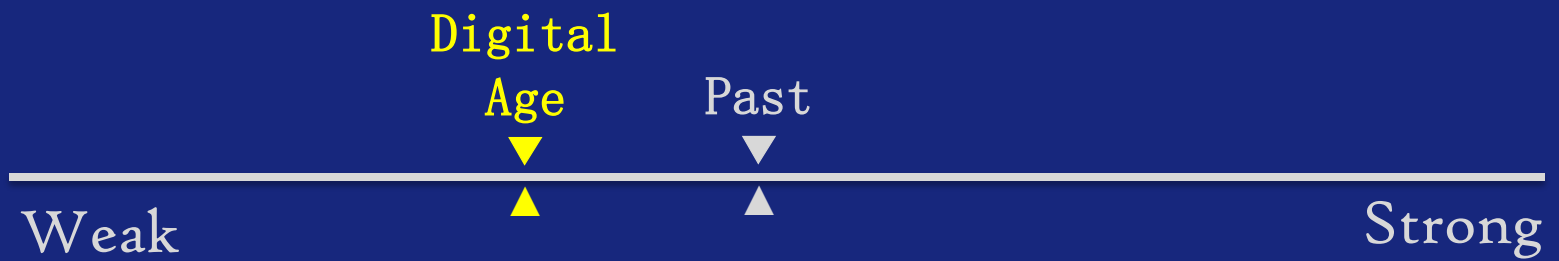
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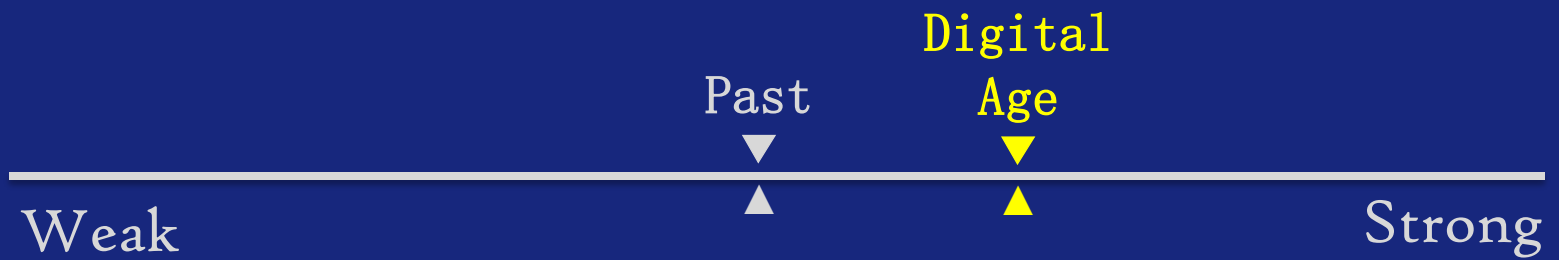
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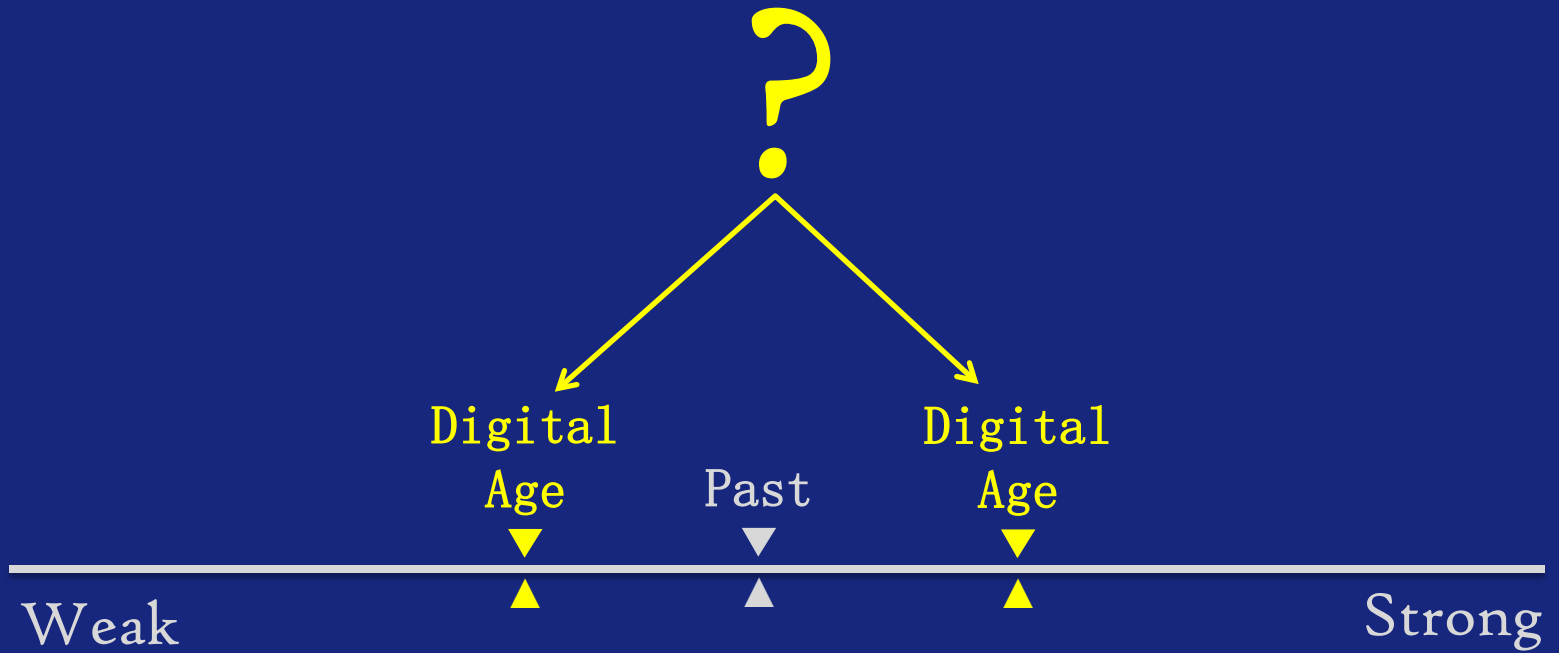
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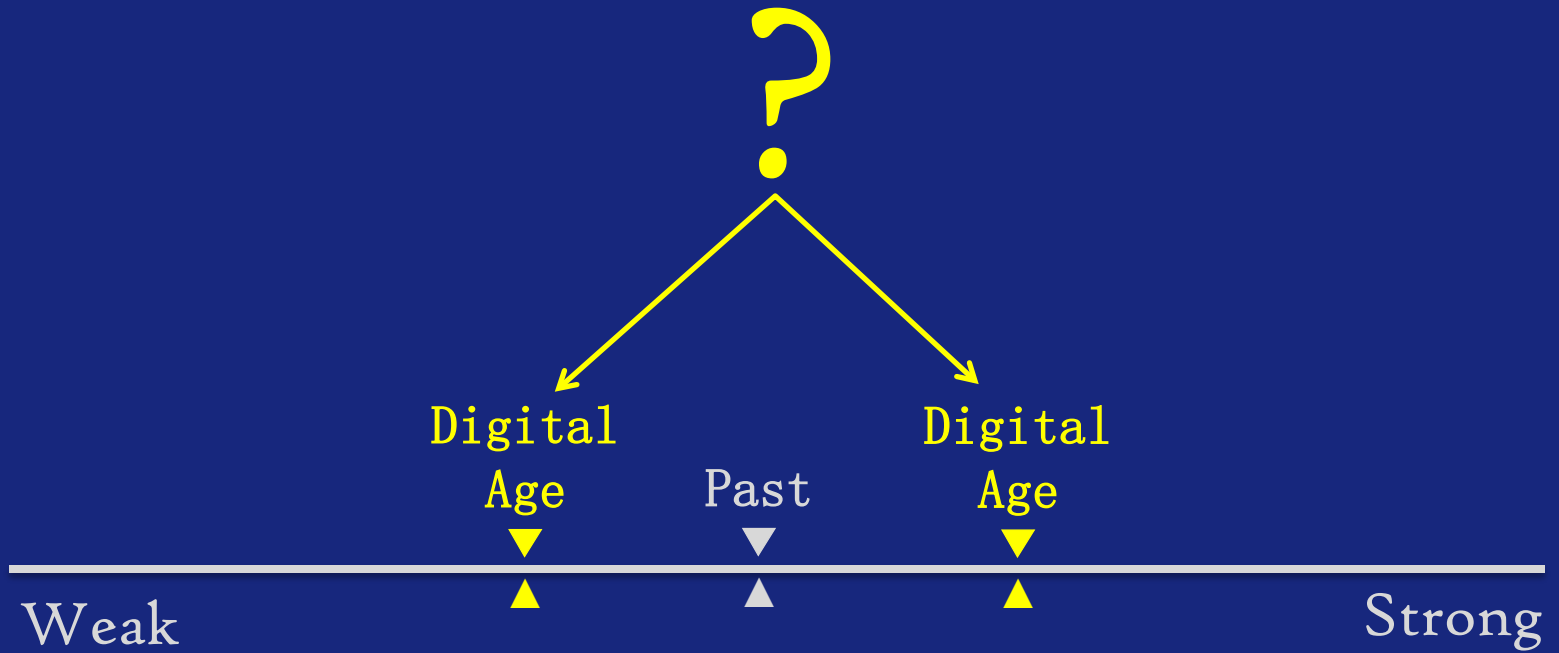
Strong













*Fair Use*

*Fair Dealing*

What is *The Digital Age*?

# Ease of Reproduction

M.B. Peters (Register), *The Challenge of Copyright in the Digital Age: How Copyright Law Should Respond to Technological Change* (2008).

# Ease of Dissemination

M.B. Peters (Register), *The Challenge of Copyright in the Digital Age: How Copyright Law Should Respond to Technological Change* (2008).

# Ease of Modification

# Ease of Creation

**Section 107** ... the fair use of a copyrighted work [] for purposes such as **criticism, comment, news reporting, teaching, scholarship, or research**, is not an infringement of copyright.

## Factors to be considered shall include:

1. the purpose and character of *the use*;
2. the nature of the *copyrighted work*;
3. the amount and substantiality used; and
4. the effect of the use upon the potential market for or value of the copyrighted work.



Factor 4: the effect of the use upon the potential market for or value of the copyrighted work.

*“undoubtedly the single most important element of fair use”*  
Harper Row (1985)

# *Transformativeness*

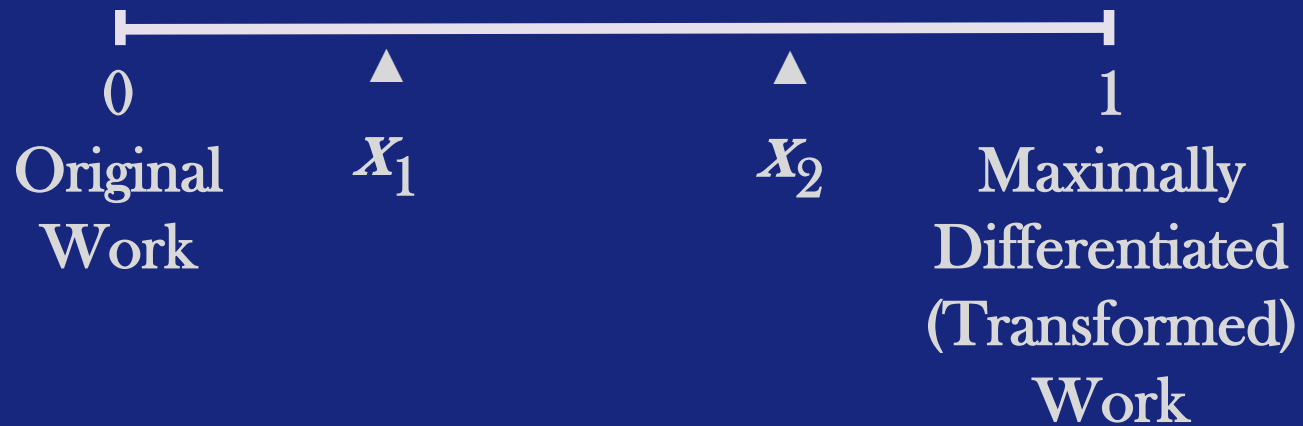
# *Transformativeness*

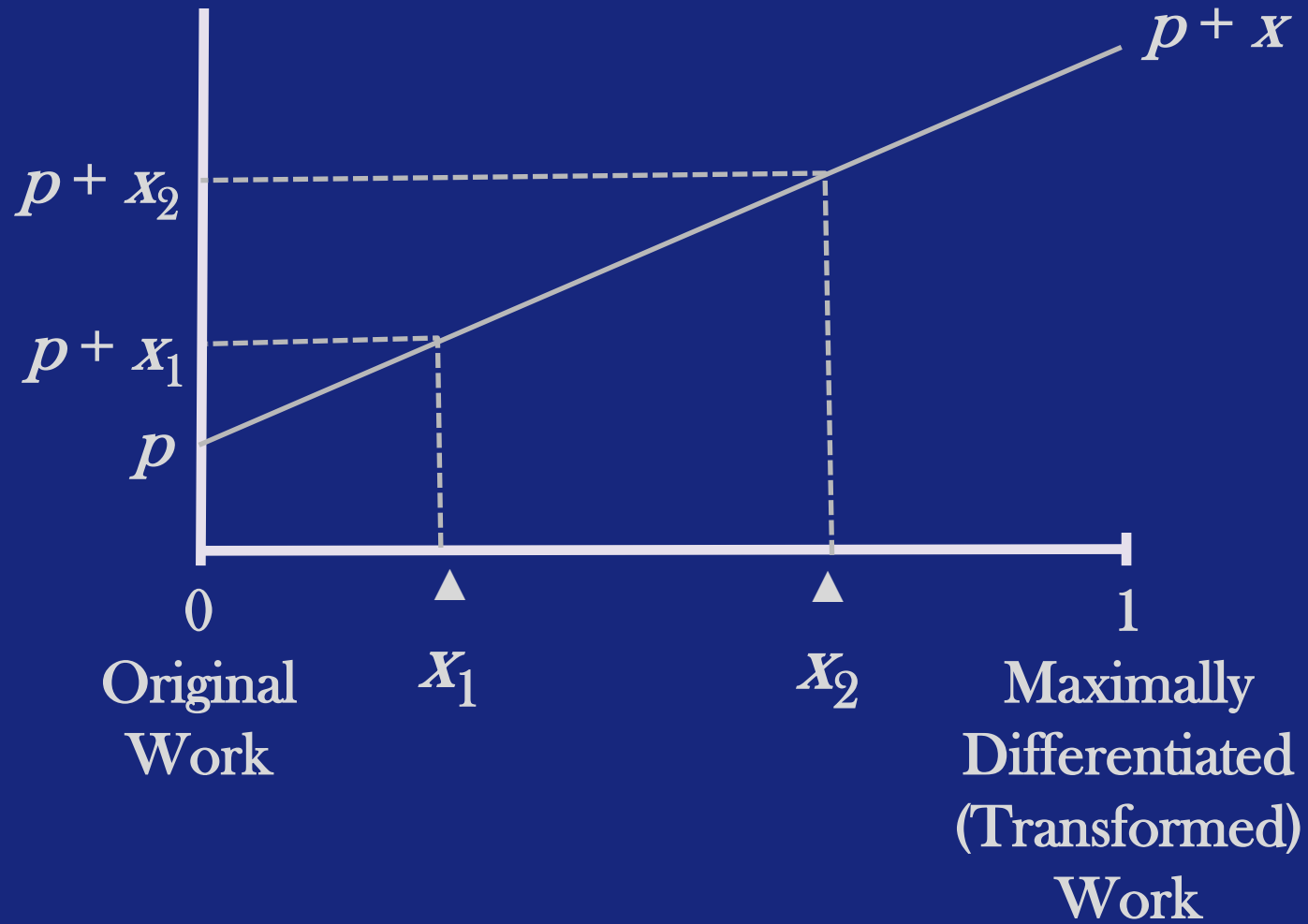
*“alter the first with new  
expression, meaning, or message”*

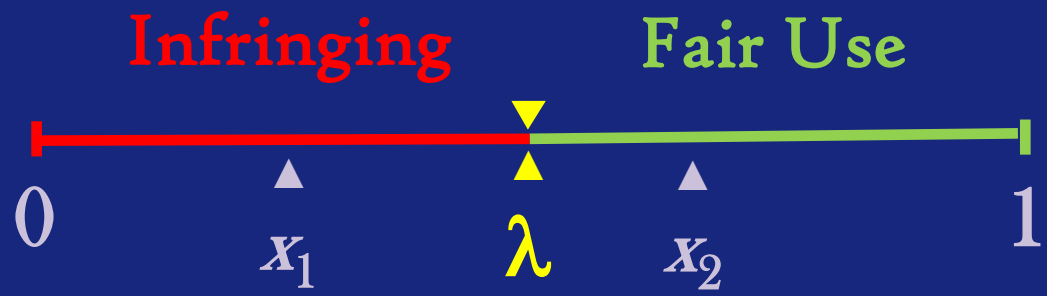
*Authors Guild v Google*



*Degree of Transformation*  
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*What is the optimal  $\lambda$ ?*



purpose of copyright – “to stimulate creativity among potential authors by enabling them to earn money from their creations”

*Authors Guild v. Google*

# *Modeling the Digital Age?*

Piracy/Enforcement are leakages to market size  $(1 - \tau)S$ .

Reduction in distribution cost disparity ( $c$  versus  $c + \alpha$ ).

Reduction in fixed cost of creating secondary work.

**Objective.** Choose  $\lambda$  to maximize consumer surplus subject to  $R = A$ ; *revenue equals the opportunity cost of creation for the original work.*

$$\lambda^* = \sqrt{\frac{8A}{(1 - \tau)S}} - \alpha$$

$$\lambda^* = \sqrt{\frac{8A}{(1-\tau)S}} - \alpha$$

Bigger  $A$ , Bigger  $\lambda$

$$\lambda^* = \sqrt{\frac{8A}{(1 - \tau)S}} - \alpha$$

Bigger  $S$ , Smaller  $\lambda$

$$\lambda^* = \sqrt{\frac{8A}{(1 - \tau)S}} - \alpha$$

Bigger  $\tau$ , Bigger  $\lambda$

$$\lambda^* = \sqrt{\frac{8A}{(1-\tau)S}} - \alpha$$

Smaller  $\alpha$ , Bigger  $\lambda$



Smaller opportunity cost of  
creating secondary work,  
Bigger  $\lambda$ .

# Fair Use in the Digital Age

Bigger  $\tau$ , **Bigger  $\lambda$**

Smaller  $\alpha$ , **Bigger  $\lambda$**

Smaller (fixed) opportunity cost of secondary work, **Bigger  $\lambda$ .**

Weakening copyright is not prescribed, but rather strengthening it.

At minimum, Expanding fair use/dealing should be accompanied by reducing piracy and other leakages.

# Adjudicating Fair Use

# Model of infringement, generally

Pierre Leval's “two essential and intimately intertwined questions.”

Does the secondary work copy from the original in pursuit of a different objective—a “transformative” purpose?

Does the secondary work compete significantly with the original, by offering itself as a significant substitute in markets that the copyright law reserves to the original author?

# Justification for the Taking.

“Fair use at its heart asks whether *any given use is fair.*”

A. Sims, IJLIT (2016)

This “open-ended” interpretation is not correct. The “such as” list is not extraneous. Consider *Authors Guild v. Google*:

“While such changes can be described as transformations, they do not involve the kind of transformative purpose that favors a fair use finding.”

“does not mean that any and all changes made to an authors’ original text will necessarily support a finding of fair use. \*\*\* [T]he would be fair user of another’s work must have justification for the taking.”



## Re-framing Leval's Two Questions.

Is the secondary work transformative in a way covered by fair use?

Is the transformation enough that the secondary work does not compete too much with the original? In answering that question, we must consider the nature of the *original* work ( $A$ ,  $S$ ,  $\alpha$ ,  $\tau$ ) and how much is taken.

“notoriously uncertain.”

“courts have no interest in clarifying  
fair use”

“sheer unpredictability”

“fast-paced, brain-teasing game”

# Empirical Evidence?