Abstract

Making the 'Fair Use doctrine' in the 19th Century

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This paper studies on the transformation of 'fair and *bona fide* use doctrine' of the 18th century into 'fair use doctrine' of the 19th century in U.K. and U.S.A. Some scholars analyzed the history of 'fair use' without a consideration of contexts. But, this paper focuses on the problems and its solutions of 19th century's judges in the copyright infringement cases. In *Wilkins v. Aikin* and *Mawmann v. Tegg*, the judges were suspicious about the efficiency and the usefulness of the 'fair and *bona fide* use doctrine', because it was difficult to recognize how much of an author's book was his, and how much an user exploited that book. Since *Brawell v. Holcomb* and *Gray v. Russell*, the judges abandoned an application of quantity criteria and constituted the quality criteria about the fairness. And they constructed the duel code, such as, a quintessence / *caput mortuum* of the work, based on its exchange value in the market. Moreover, the judges discarded or devaluated the requirement of '*bona fide*' which was represented as the user's intent without *animus furandi* or substitute for author's work and the purpose with providing advantages to the world. In these results, the 'fair use' became understood not as the user's privilege but as the exceptions of copyright infringement.

Keywords

fair and *bona fide* abridgment, fair use, fairness, piracy, literary larceny, *animus furandi*, exchange value, system theory, Niklas Luhmann