Abstract

An important recent development in the economic analysis of copyright has been the incorporation of insights from product differentiation theory. According to its most ambitious proponents, this approach provides a superior theoretical alternative to the traditional incentive-access framework, one which shows that concerns over the “monopoly power” conferred by IP rights are often misplaced, that offers a resolution of what has heretofore been taken to be an intractable tradeoff between incentives and access, and which commends, counter-intuitively, that increased access can and should be achieved primarily by strengthening copyright protection. Others, however, suggest that the approach simply identifies some important additional factors to supplement the traditional analysis, and, moreover, that these new factors primarily point in the opposite policy direction, of weakening protection.

In this Article, we take the opportunity presented by these developments to crystallize an overarching analytic framework for evaluating the consequences of copyright. We recast both the incentive-access and product differentiation approaches by embedding them within a single coherent frame, of examining the supramarginal and inframarginal benefits and costs of different levels of IP protection. Our framework draws together disparate existing elements within a unified rubric, identifying additional parameters to those of (supramarginal) incentive benefits and (inframarginal) access costs that are relevant to IP tradeoffs. It also corrects for some recurring, connected misimpressions in the IP literature, some of which have led to overstated claims on behalf of product differentiation theory and others of which also mar analyses carried out under that approach. Many of the policy implications derived from product differentiation theory are, we argue, one-sidedly incomplete, failing to attend sufficiently to countervailing effects that the supra-infrastructure framework keeps firmly in view. Relatedly, product differentiation increases, rather than reduces, the complexity of the analysis involved in efficient fine-tuning of doctrine. The substantive upshot is that the theory provides some, partial support for weaker copyright and only in rare instances does it justify stronger protection beyond that supported by the traditional incentive-access inquiry.

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