



Private Ordering, Industry Practices & What's Law Got to Do With It?

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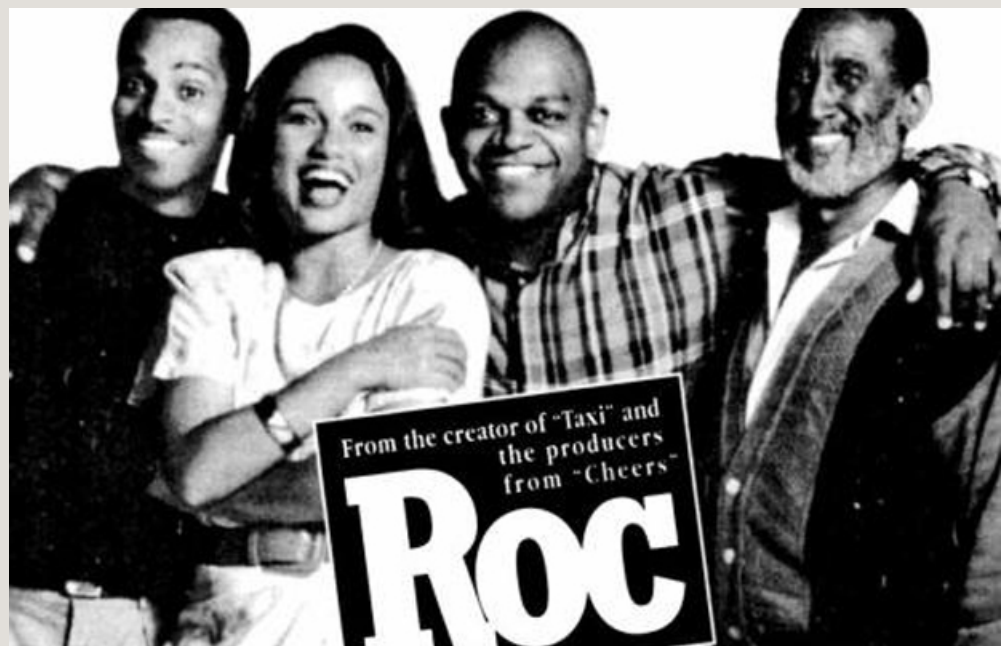
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Clearance Culture and Licensing Practices





Revise Section 107

Make explicit that the existence of licensing markets should not weigh against fair use solely because such licensing is customary.

(Note: the availability of licensing would still influence Factor 4 analysis, but we should try to eliminate the circularity problems created by risk-averse licensing of otherwise fair uses)



Formalized Trade Practices & Agreements

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AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS

WITH RESPECT TO BOOKS AND PERIODICALS

The purpose of the following guidelines is to state the minimum standards of educational fair use under Section 107 of H.R. 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

GUIDELINES

I. *Single Copying for Teachers*



Documentary Filmmakers' Statement of

BEST PRACTICES IN FAIR USE

Association of Independent Video and Filmmakers
Independent Feature Project
International Documentary Association
National Alliance for Media Arts and Culture
Women in Film and Video, Washington, D.C., Chapter

ASOC
CENTER FOR SOCIAL MEDIA
SCHOOL OF COMMUNICATION
AMERICAN UNIVERSITY

ARL
ASSOCIATION OF RESEARCH LIBRARIES

CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES

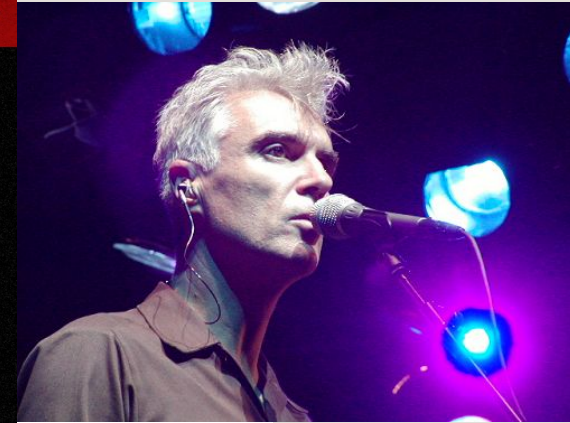
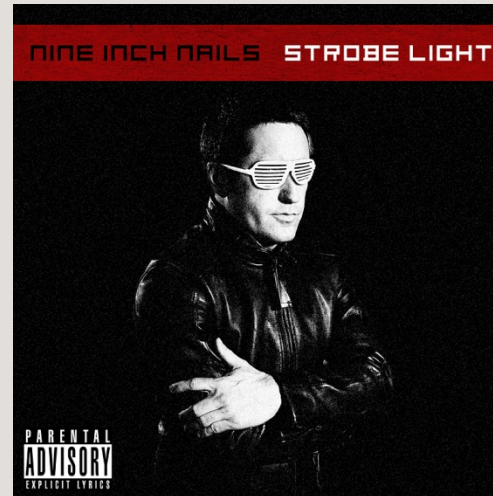
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- Clarify that Private Guidelines & Agreements Do Not Affect the Scope of Fair Use
- Consider New Educational Guidelines with More Diverse Representation & Explicit Statement that Does Not Limit Fair Use



Alternative Regimes: Creative Commons

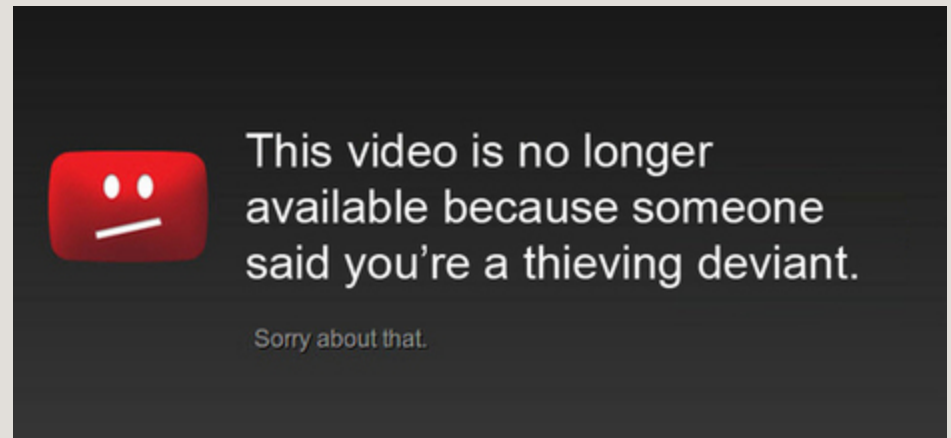




- Consider codifying Favoring of Attribution for Fair Use Analysis
(providing attribution should weigh in favor of fair use, but failure to attribute should remain neutral)
- Clarify that Violation of Private Contract Does Not Alter Analysis of Copyright Infringement or Fair Use



Contracting Around Copyright





Restrict the Ability of Contracts and Private Party Agreements to Limit Fair Use



What Can Copyright Laws Do?

- (1) Leave Breathing Room for Private Ordering and Experimentation
- (2) Adopt Good Ideas and Address Concerns (e.g., consider attribution & add safe harbors)
- (3) Protect Against Lock-in Effect
- (4) Protect Fair Use From Obsolescence



If Customs are Considered in Fair Use

Restrict consideration to customs that are:

- 1) Certain
- 2) Representative
- 3) Motivated by Efforts to Establish Fair & Appropriate Boundaries
- 4) Not Slippery Slopes



Questions or Comments:

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