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

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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

**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
-- 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

This video is no longer available because someone said you’re a thieving deviant.

Sorry about that.
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
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