

Copyright's Private Ordering: Lessons For Congress

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Private ordering plays a significant role in the application of intellectual property laws, especially in the context of copyright law. In this Article, I highlight some of the dominant modes of private ordering and consider what formal copyright law should do, if anything, to engage with private ordering in the copyright space. I conclude that there is not one single approach that copyright law should take with regard to private ordering, but instead several different approaches. In some instances, the best option is for the law to get out of the way and simply continue to provide room for various approaches to flourish. In other contexts, the copyright statute should actively support private ordering efforts that may be jeopardized by the current regime. Private ordering may also highlight areas where the law is in need of reform. This is perhaps most noticeable in the context of fair use which has led to the proliferation of much of the private ordering - the combination of the unpredictability and expense of fair use litigation combined with the high cost of statutory damages has created a series of risk-averse litigation-avoidance practices and an underutilization of fair use. Reform of statutory damages and perhaps the adoption of several additional safe harbors could provide greater comfort to those who wish to use others copyrighted works without permission in contexts that we would like to facilitate. Legislation may also be necessary to prevent a lock-in effect of these industry practices and norms. In particular, courts should be barred from using these customs to set the standard for fair use. Some practices also reveal areas of agreement which might merit codification, such as faculty ownership of course materials and scholarship, and favoring fair use when attribution is provided.

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