Rulifying Fair Use

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Introduction

- The Trigger:

- Fair use is a standard.
  Are courts authorized to develop the standard into more concrete guidelines?
The Outline in a Nutshell

- Rules & Standards: not a dichotomy but rather two ends of a spectrum.

- Fair use was not meant to foreclose its evolvement into more concrete guidelines.

- Rulification of the fair use standard into more guiding rulings better serves copyright goals.
Unpacking the Rules/Standards Dichotomy

- Rules and standards are two ends of a spectrum.
- Rules tend to be standardized.
- Standards could be rulified.
Permissive and Mandatory Standards

- **Permissive Standard**
  - Allows the court to develop ancillary rules to assist the court in applying the standard (no rule against rulification).

- **Mandatory Standard**
  - Prohibits any future doctrinal development of rules (a rule against rulification).
Descriptively — Fair Use was initially designed as a permissive standard.
Fair Use — Legislative History

- Adoption of dialectic tension:
  discretionary nature + guiding factors

- *Folsom v. Marsh* (1841):
  “fair and reasonable criticism” + doctrinal framework of four factors
**Fair Use — Legislative History**

- **House Report:** “the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.”

  **Case-by-case basis is not a rule against rulification!**

- **House Report:** “Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”

  **Common-law is not a rule against rulification!**
Fair Use — Supreme Court

- Supreme Court
  - *Sony Corp. of America v. Universal City Studios* (1984)

No rule against rulification.

- Campbell v. Acuff-Rose Music, Inc.
  Case-by-case basis = open norm + guidance
Fair Use — Lower Courts

- Lower courts:
  Cautious development of case law, with some rulification

- The exception:
  *Cambridge Univ. Press v. Patton* (“Case-by-case basis” = no rulification)
Fair Use — A Permissive Standard

Normative Analysis — Fair Use should be interpreted as a permissive standard.
Advantages of Fair Use Rulification

Guidance
• Uncertainty creates a chilling effect;
• Rulification may facilitate both flexibility and certainty.

Transparency
• Manipulation of the fair use four-factor analysis;
• Rulification may force judges to fully disclose the underlying analysis.
Conclusion

Rulifying Fair Use

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Certainty + Flexibility

=  

Accomplishment of Copyright Goals
THANKS!