"What Exactly Are You Implying?": Rethinking the Legal Basis for Implied Copyright Licenses

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While U.S. Copyright law requires that a "transfer of ownership" take place via signed writing, it leaves open the possibility that a nonexclusive license may arise by implication from a copyright owner's actions falling short of an express grant. Federal courts have developed what amounts to a body of federal common law jurisprudence governing the formation and scope of such "implied licenses." With a few exceptions, they have not seriously considered choice of law questions in doing so. To the extent that judges and commentators have addressed the nature of such licenses (or copyright licenses in general), they tend to regard them as creatures of contract law, raising the possibility that federal courts ought to look to state contract law in deciding whether such an obligation has arisen. This paper argues that even though most licenses are granted by means of entering into a contract, it is a mistake to analyze a license as a form of contract. A license is a form of property interest that may be granted independently of any contractual relationship. Whether such a license has been granted is a question analogous to the one whether ownership of a given piece of property has been effectively transferred from one party to another, or whether a party has effectively consented to be touched in a way that would otherwise constitute battery. I argue that this means the existence and nature of a copyright license is a matter properly governed by federal common law, and spell out some of the implications of this view for larger debates about the ability of copyright owners to choose to construe certain transactions as "licenses" rather than "sales."