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המרכז למשפט וטכנולוגיה

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Rulifying Fair Use

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Introduction

➤ The Trigger:

Cambridge Univ. Press v. Patton, 769 F.3d 1232 (11th Cir. Oct. 17, 2014): **a rule against fair use rulification.**

➤ 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 evolution 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).

Fair Use — A Permissive Standard

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)
- *Harper & Row v. Nation Enterprises* (1985)
- *Campbell v. Acuff-Rose Music, Inc.* (1994)

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

=

Certainty + Flexibility

=

Accomplishment of Copyright Goals

THANKS!