

## Rulifying Fair Use

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The flagship of “openness” in American copyright law is the fair use doctrine. Fair use delegates to the courts the authority to crystallize the definition of permissible uses through adjudication. The underlying rationale is to allow for dynamism and flexibility in developing the law on a case-by-case basis, assuming that the highly complex issues covered by the doctrine cannot be settled with a concrete set of codified rules. At the same time, however, openness is accompanied by uncertainty and unpredictability, which may hinder the accomplishment of copyright goals. Consequently, while courts, scholars and practitioners strive for more certainty in fair use analysis, they are also concerned about losing the flexibility which comes with it. Advocates of a strict open standard often reject any attempt to deviate from a case-by-case adjudication of fair use as heresy.

This Article challenges the binary approach to rules and standards, arguing that they should not be treated as mutually exclusive. The open-ended nature of fair use should not be viewed as preventing courts from specifying the abstract standard into rules. To the contrary: the objective of copyright law mandates the court to elaborate the fair use standard into rules for particular creative contexts through a common law evolution of norms. While much attention has been given in scholarly writings to the standardization of rules, *i.e.* elevating concrete rules to a higher level of abstraction and generality, the opposite process of rulifying standards has been understudied. It is the purpose of this Article to fill this gap by offering a normative framework for rulifying fair use.

The Article further demonstrates how *courts* could develop rules—of various types and strengths— to facilitate the implementation of the fair use standard by the various stakeholders.