

Searching for Certainty Implying a Copyright Licence

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A person infringes copyright if he exercises an exclusive right without the licence of the copyright owner. Copyright law in most jurisdictions also provides for statutory exceptions to balance competing interests addressing specific instances of permitted uses of copyright works to achieve specific policy objectives. US law also has broader and more flexible fair use provision. If a person's actions are not covered by an express licence, by the statutory exceptions or by fair use provision, in common law countries it may be possible to imply a licence to cover these actions. In contrast to the rigidity of statutory exceptions, implied licences are characterised by their malleability to address more diverse circumstances as the need arises, achieving a fairer balance in allocation of interests. However, implication as a process is contentious and there are no established rules for implying a copyright licence. The uncertainty surrounding implying a copyright licence lies in not knowing the legitimate bases for implication and the extent to which the implied licence can extend under the given circumstances, resulting in courts not embracing implied licences as readily as they should. I argue that to allay the fears of uncertainty, one must address the process of implication itself, and make it more methodical and transparent. I draw inspiration from contract law, and in particular, the English common law rules of implication of a term into a contract, to guide the process of implying a copyright licence. Although much controversy also surrounds contractual rules of implication, contract law can inspire the legitimate bases for implication of a copyright licence. A term can be implied into a contract based on (a) the unexpressed joint intention of the parties to the contract; (b) a custom or usage in a particular trade; and (c) public policy to achieve broader objectives regardless of the intention of the parties. Applying these to copyright, a copyright licence can be implied based on (a) the unexpressed consent of the copyright owner ascertained from her conduct; (b) a custom or usage; and (c) public policy to achieve broader objectives. Having thus classified implied copyright licences based on the underlying justification for implication, at the next level certain frameworks can be developed under each basis for implication, in order to make the process of implication methodical and transparent, bringing certainty into the process of implication.