Penalty Default Licenses

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The current statutory licensing regime for certain types of copyright-protected content is plagued by inefficiencies that may be improved by private ordering. These statutory licenses constitute open offers, which may be accepted by any prospective licensee willing to pay the statutory rate and meet the statutory terms. An effective, albeit inelegant, means of encouraging private ordering might be to eliminate the statutory license altogether, thereby leaving parties no other option. Recognizing the important role that it plays in ensuring access to content for all prospective licensees, however, this Article leaves the statutory license in place as a “penalty default license,” a concept introduced herein to identify the impetus behind an emerging phenomenon of statutory license circumvention in favor of private ordering. Where most of the licensing literature focuses on increasing stability to improve efficiency, this Article makes the contrary case: to increase efficiency, legislators should utilize price uncertainty as a means of encouraging private ordering. While not without its drawbacks – previous work identified, and ameliorated, some of these concerns – private ordering improves upon the conventional approach, and can be encouraged in a number of ways, including via price uncertainty in the form of a penalty default license that minimizes concerns around transaction costs and gamesmanship. Using the statutory license for sound recordings to motivate the analysis, this Article shows that price uncertainty surrounding 17 U.S.C. §114 makes it a penalty default license and suggests, contrary to received wisdom, that this uncertainty can actually increase efficiency in the market context. Awareness of the role price uncertainty plays in increasing market efficiency allows for more refined consideration of uncertainty in general, not only in the statutory licensing context, but for efficiency improvement in other areas of the law as well.