University of Michigan Law School

From the SelectedWorks of Jessica Litman

May 2009

The Copyright Revision Act of 2026

Contact Author

Start Your Own SelectedWorks

Notify Me of New Work

Available at: http://works.bepress.com/jessica_litman/9

THE TWELFTH ANNUAL HONORABLE HELEN WILSON NIES MEMORIAL LECTURE IN INTELLECTUAL PROPERTY LAW*

THE COPYRIGHT REVISION ACT OF 2026

– JESSICA LITMAN**

As someone who teaches and writes about copyright law, I end up straddling two different worlds. On the one hand, I really do need to understand and be able to teach the details of the copyright statute and the case law construing it. My students need to know the difference between a public performance right under Section 106(4) and a public performance right by digital audio transmission under Section 106(6); they need to know the difference between the statutory licenses available under Section 114 and the statutory licenses available under Section 115.[1] So, I need to have all of those details pretty well nailed down. At the same time, as an academic who writes normative and historical articles and books about copyright, and who tries to explain to her students why the statute works, or fails to work, the way it does, I need to be pretty well grounded in copyright theory and in the normative premises that are supposed to underlie the law.

The disconnect between those two realms is serious, and growing. And, as a result, practicing copyright lawyers are finding much copyright

* Audio of the Twelfth Annual Honorable Helen Wilson Nies Memorial Lecture in Intellectual Property Law, held by Marquette University Law School (February 23, 2009) is available at http://law.marquette.edu/cgi-bin/site.pl?2130&pageID=919. This lecture is delivered each spring semester by a nationally recognized scholar in the field of intellectual property law.

** John F. Nickoll Professor of Law and Professor of Information, University of Michigan. Conversations with Jon Baumgarten, Abraham Drassinower, Dan Gifford, Kurt Hunt, Pam Samuelson, and Seana Shiffrin have been important to my thinking on the project that this speech is part of. In addition, for 25 years Jon Weinberg has read everything that comes out of my printer before anyone else is allowed to see it. Like all of my work, the speech is far better for his kibitzing.

1. *See* 17 U.S.C. §§ 106(4), 106(6), 114, 115 (2006).

scholarship less useful than they used to, and many copyright scholars are finding members of the copyright bar less thoughtful than they used to. This is a field in which conferences for CLE credit are common, and the conferences commonly include both speakers who are law professors and speakers who are practicing copyright lawyers, so one gets to actually see folks snipe at each other. When I read or listen to what august members of the copyright bar have to say about the work of copyright law professors, I read or hear grotesque caricatures of ideas no actual law professor I've ever met has read or said. I assume that many copyright lawyers feel something similar.

That's a pity, because I believe that we're about to embark on the beginning phases of another round of wholesale copyright revision. That's exactly the sort of situation in which the groups might have a fair amount to offer one another.

Why do I think that we are now in the initial stages of an effort to overhaul the copyright statute? There are moves that copyright lawyers make when the law isn't working well for them. They avoid inconvenient statutory language by persuading courts that the words of the statute mean one thing in one context and a different thing in another context. Under the 1909 Act, for example, the courts developed alternate definitions of the term "publication" for different purposes.[2] Copyright lawyers sit down with other copyright lawyers and negotiate a series of band-aid solutions in which they agree to behave with one another as if the statute on the books said what they wished it said. Under the 1909 Act, for example, music publishers and record labels devised "Harry Fox" licenses to track the compulsory mechanical license where they liked it and to vary its terms where they found the statute inconvenient.[3] Although copyrights under the 1909 Act were formally indivisible, publishers devised a series of customary practices to allow them to behave as if different copyright rights could be separately owned.[4]

In the ramp-up to actual copyright revision, copyright lawyers will meet in small groups to see if they can generate agreement on what the

2. *See* William S. Strauss, *Study No. 29: Protection of Unpublished Works* 8-15, *in* 1 STUDIES ON COPYRIGHT 187, 198-205 (1963).

3. *See* Harry G. Henn, *Study No. 5: The Compulsory Licensing Provisions of the U.S. Copyright Law* 44-52, *in* 2 STUDIES ON COPYRIGHT 877, 922-30 (1963); William M. Blaisdell, *Study No. 6: The Economic Aspects of the Compulsory License* 93-104, *in* 2 STUDIES ON COPYRIGHT 937, 941-52 (1963).

4. *See* Abraham L. Kaminstein, *Study No. 11: Divisibility of Copyrights* 18-25, *in* 1 STUDIES ON COPYRIGHT 623, 642-49 (1963).

law ought to look like. They will ask their pet legislators to float trial balloons. They will use the tools that good lawyers have in their toolboxes to try to position themselves to claim that whatever copyright reform they seek is already well-established under current law.[5]

We've been seeing a lot of that kind of thing recently. In the multiple meanings department, we have fixation. Copyright lawyers suggest that "fixed in tangible form"[6] means one thing for the purposes of investing copyright and a different thing in connection with infringement.[7] In the band-aid solutions department, we have notice and takedown: Lots of industry actors have informally agreed with each other to behave as if the notice and takedown provisions in Section 512 of the copyright statute[8] applied to a more expansive group of activities than the statute seems to contemplate. In the jockeying for position department, we have a series of efforts to claim that the exclusive right under 106(3) of the statute to "distribute copies to the public by sale or other transfer of ownership, or by rental, lease, or lending" covers a very wide swathe of acts, some of which include no distribution, copies, sale, transfer of ownership, rental, lease, or lending.[9] What happens next, if this era is like past ones, is a long, protracted process of negotiation to come up with what will be called something like *The Copyright Revision Act of 2026* (to be fondly known as the *'26 Act* for short).

---

5. For more detail on how these trends have manifested in the past, see JESSICA LITMAN, DIGITAL COPYRIGHT 22-69, 89-100 (2006).

6. *See* 17 U.S.C. § 101 ("[A] work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."). The same section defines "copies" as "material objects . . . in which a work is fixed by any method now known or later developed," and "phonorecords" as "material objects in which sounds . . . are fixed by any method now known or later developed . . . ." *Id.*

7. *Compare*, *e.g.*, *Digital Millennium Copyright Act (DMCA) Section 104 Report: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property, Comm. of the Judiciary*, 107th Cong. (2001) (testimony of MaryBeth Peters, Register of Copyrights), *available at* http://www.copyright.gov/docs/regstat121201.html ("we conclude that the making of temporary copies of a work in RAM implicates the reproduction right so long as the reproduction persists long enough to be perceived, copied, or communicated"), *with*, *e.g.*, *The Family Movie Act: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the House Comm. of the Judiciary*, 108th Cong. (2004), *available at* http://www.copyright.gov/docs/regstat061704.html ("when software instructs a DVD player to mute certain sounds or skip past certain images in a motion picture being played on the DVD[, t]he putative derivative work is never fixed").

8. *See* 17 U.S.C. § 512(c)(3).

9. *See*, *e.g.*, Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199 (4th Cir. 1997); Arista Records LLC v. Greubel, 453 F. Supp. 2d 961 (N.D. Tex. 2006).

The reason for all of this maneuvering is that the current copyright statute isn't working the way anyone would like it to. We all want the copyright system to nurture the creation, dissemination, and enjoyment of works of authorship. That's what copyright is for. When it works well, it should encourage creators to make new works, assist intermediaries in disseminating them widely, and support readers, listeners, and viewers in enjoying them. If the copyright system poses difficult entry barriers to creators, if it imposes complicated obstacles on intermediaries, if it inflicts burdensome conditions and gratuitous hurdles on readers, listeners, and viewers, then it is not going to work very well. The current copyright law is flawed in all three respects.

Let's start with authors: Encouraging authors to create is supposed to be copyright's central mechanism. In the real copyright system, though, writers, artists, musicians, and filmmakers face daunting obstacles in searching for opportunities to write, paint, play, or film anything the public will see. Every year, the news coverage of the South by Southwest music festival in Austin, Texas, marvels at all of the musicians who converge on the conference, some of them subsidized by governments in their home countries, in the hope of playing music that someone will actually hear[10] (despite the fact that listeners complain that the music they hear on any given commercial radio station is the same as the music they hear on any other commercial radio station). Independent filmmakers finance their films on credit card debt and family loans and submit them to multiple film festivals without ever finding a distributor (despite the fact that this week the movie *Friday the 13th* is playing on six different screens where I live). Apprenticeships and entry-level jobs in the recording, film, photography, or theater business are so rare that they make tantalizing grand prizes for television reality shows. There are about a zillion different how-to books and a fair number of monthly magazines on how to get your book published.

Even when creators succeed in publishing a book, cutting an album, placing an article, or selling a screenplay, moreover, they typically earn only a small share of the proceeds of the copyright in their work. A tiny minority get rich from copyright royalties. A somewhat larger number are able to make a living from creating works of authorship. The

10. *See*, *e.g.*, Jon Pareles, *Stoking Careers in Frenzy of South by Southwest*, NY TIMES, Mar. 22, 2009, at C1, *available at* http://www.nytimes.com/2009/03/23/arts/music/23sxsw.html; James Reed, *A Strong International Contingent plays well in Austin*, BOSTON GLOBE, Mar. 23, 2009, *available at* http://www.boston.com/ae/music/articles/2009/03/23/a_strong_international_contingent_plays_well_in_austin/.

majority of creators, though, need day jobs to supplement their income. I'd guess that's why some of you decided to go to law school.

Why is that? It's not that nobody values works of authorship enough to spend money for them. Studies of the size of the core copyright industries in the U.S. economy indicate that they generate nearly a trillion dollars.[11] The reason is that very few of those dollars end up in creators' pockets. The copyright statute incorporates a bias in favor of distributors. That bias comes at creators' expense. People argue that authors have very little bargaining power as compared with publishers, but that isn't inherent in the natural order. Rather, it reflects the fact that the American copyright law does now and always has tilted the playing field in distributors' favor. The disparity of bargaining power is at least largely an artifact of the way the copyright law works.

Until recently, that tilt made a lot of practical sense. Our copyright law was designed in an era in which mass distribution of copies of works required a significant capital investment. We needed to shape the law in ways that channeled the largest share of the proceeds from copyrighted works to intermediary distributors so that they would buy the paper, operate the printing presses, put up the broadcast towers, put together the motion picture production companies, rent the warehouses, and drive the trucks that moved copies of works of authorship from authors to readers, listeners, and viewers.

Today there are lots of ways to disseminate works to everyone in the world without having to spend much money. Indeed, that fact has caused a copyright panic–individual readers, viewers, and listeners can send copies to each other, for close to free, without having to get them from a licensed source.

Many of the large legacy distributors have good reason to find the current copyright climate uncomfortable. Reasonable people can disagree about how the law should respond to that. My own view is that if individuals can distribute copyrighted works less expensively than conventional distributors, it makes no sense at all to try to prevent the inexpensive, efficient distribution in order to protect the more expensive, less efficient distribution. Rather, we should accept the fact that the role of intermediaries in the copyright system needs to evolve, and that, in the 21st century, it may no longer make sense to award the

11. *See*, *e.g.*, STEPHEN E. SIWEK, ECONOMISTS INC., COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2006 REPORT (2006), *available at* http://www.iipa.com/pdf/2006_siwek_full.pdf.

intermediaries so large a share of the copyright bargain. Indeed, doing so may generate perverse results.

Even for lean, mean, innovative distributors committed to digital distribution, the current copyright system is a disaster. A distributor seeking to exploit works in new media faces daunting difficulties in identifying the rights-holders entitled to license its uses and negotiating the terms of any licenses. Even established industry groups have complained that the licensing provisions of the current law are simply unworkable.[12] Innovations like copyright divisibility, which seemed like a good idea at the time, have vastly complicated the licensing of copyrighted works by subjecting would-be licensees to multiple and sometimes inconsistent demands.[13] Small businesses who want to pay reasonable royalties for the opportunity to exploit works in new markets can face insuperable difficulties in arranging to do so. And, as new entrants like MP3.com, ReplayTV, and iCrave TV learned the hard way, trying and failing to cross the Ts and dot the Is, even with the advice of counsel, is a great way to find yourself sued into bankruptcy.[14]

There's a second class of intermediaries who have been important in the copyright system as a historical matter. These entrepreneurs have not, historically, owned copyrights or licensed copyright uses. Rather, they have invested in the copyright system by making instruments and objects that allow people to enjoy copyrighted works. I call them "makers." They make pianos and trumpets and televisions and computers and VCRs and iPods. The folks who make trumpets and the folks who make iPods are in the business of making money, sometimes lots of money, from music written by other people. Indeed, their entire business model is the commercial exploitation of other people's music. But, because they don't themselves engage in any of the actions that the copyright law reserves to copyright owners, they haven't had to worry about the copyright law. Until recently.

These days, distributor entrepreneurs are looking at maker entrepreneurs and demanding that they redesign their business models

12. *See Reforming Section 115 of the Copyright Act for the Digital Age: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property, Comm. of the Judiciary*, 110th Cong. (2007) (testimony of MaryBeth Peters, Register of Copyrights), *available at* http://www.copyright.gov/docs/regstat032207-1.html.

13. *See* Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673 (2003).

14. *See* Paramount Pictures Corp. v. RePlay TV, 298 F. Supp. 2d 921 (C.D. Cal. 2004); Country Rd. Music, Inc. v. MP3.com, Inc., 279 F. Supp. 2d 325 (S.D.N.Y. 2003); Twentieth Century Fox Film Corp. v. iCRAVETV, 53 U.S.P.Q.2D (BNA) 1831 (W.D. Pa. 2000).

to cut distributor entrepreneurs in. To put some teeth in what would otherwise be a nice, but futile, request, they're filing suit for contributory infringement or "inducement" of infringement and then offering to settle for a fat slice of revenue, a large dollop of digital rights management, and a fair amount of control.

So, the current copyright law isn't working well for creators. It isn't working well for distributors, and it's getting scarier and scarier for makers.

Well, how does it work for readers, listeners, and viewers? Traditionally, copyright law was designed to encourage reading, viewing, and listening by leaving readers (and viewers and listeners) alone. The works protected by copyright were few, the rights conferred by the copyright statute were narrow, and the boundaries outside them left huge free spaces that allowed readers, listeners, and viewers to enjoy copyrighted works as they wanted to without needing to worry much about what the copyright law said. There weren't many express user rights in the statute, and they were (and are) a peculiarly motley collection—basically Congress or the courts have stepped in to add express user rights only when copyright owners overreached the boundaries of these narrow exclusive rights. So, we have specific provisions allowing people to play videogames in public places or to use censorware in their homes to block the sexual or violent scenes in movies released on DVDs.[15] The provisions are exceptional, and most of them trace their origin from ill-considered lawsuits.[16]

Instead of setting out the scope of individual audience interests in explicit terms, the basic architecture of the system respected the rights of readers, listeners, and viewers by limiting the reach of copyright rights.

That's been changing, though. Part of what's fueling the change is that copyright owners are upset about unlicensed digital distribution and want to make sure that readers and listeners don't undermine the markets of publishers and record labels by giving away for free what copyright owners sell. That has inspired them both to identify unlicensed consumer uses as "piracy" and to persuade Congress to enact tough provisions making it illegal to circumvent copy protection.

15. *See* 17 U.S.C. §§ 109(e), 110(11).

16. *See* Red Baron-Franklin Park, Inc. v. Taito Corp., 883 F.2d 275 (4th Cir. 1989) (holding that playing a coin-operated video game in a video arcade constitutes a public performance within the meaning of 17 U.S.C. § 106(4)); Clean Flicks of Colo., LLC v. Soderbergh, 433 F. Supp. 2d 1236 (D. Colo. 2006) (holding defendants liable for making and distributing censored versions of copyrighted motion pictures).

Consumers are experiencing copy-protection as a modest but significant inconvenience that probably to some degree prevents reading, listening, and viewing that would otherwise happen. So far, it doesn't seem to have made much of a dent in unlicensed uses.

Another part of the story has been the relentless pressure to expand the scope of the individual bounded copyright rights so that they're no longer so bounded. Copyright owners need to do this in order to have any real hope of holding makers liable for enabling new uses by individual readers, listeners, and viewers. This expansion is, by and large, non-statutory. Copyright owners have been advancing liberal constructions of the individual copyright rights in courts, in treaty negotiations, and in their copyright rhetoric. Under these constructions, any unauthorized use of a copyrighted work is prima facie infringing. The goal isn't really to be able to bring copyright infringement suits against millions of individuals, notwithstanding the 20,000 John Doe suits brought by the record labels. Rather, copyright owners would like to be able to recover infringement verdicts against the maker intermediaries I mentioned earlier, who are facilitating unlicensed uses of copyrighted works. Typically, as I said earlier, the maker isn't itself doing anything the copyright law prohibits, but it's making money from selling individuals something—like a VCR, a DVR, an MP3 player—that allows them to make lots of individual unlicensed uses. Or, it's selling online advertising on sites where copyright infringement may be going on. In order to argue that the maker is liable as a contributory or vicarious infringer or an inducer, one needs to persuade a court that lots of individuals out there are violating the law.

Finally, copyright owners have been pushing these expansive constructions because they suspect things are going on that they can't prove, but they'd like to be able to get an injunction and damages for things that they *can* prove—even if what they can prove isn't really what the statute says is illegal.

Consumers are caught in these pincers. There's no evidence in any of the legislative history of any of the copyright laws that Congress ever intended to make most personal uses illegal. It didn't matter a lot, because, until recently, unlicensed uses by individuals in their homes were hard to monitor and hard to prevent. Today, though, anything that happens on a digital network can be monitored, and if it can be monitored, there are at least some efforts to use technological tools to either prevent it or to detect and avenge it. Many of those tools have other uses that can constrain how individuals read, watch, or listen to material or can facilitate massive surveillance. DVD players already

prevent consumers from fast-forwarding through coming attractions or watching a foreign DVD on a domestic DVD player. Copyright owners are pushing the federal government to require television manufacturers to equip all television receivers with tools that would allow monitoring and control of TV viewing.[17] Computers already come with technology that allows some monitoring of computer uses; copyright owners are pushing Internet service providers to engage in wholesale monitoring and filtering of Internet use.[18] Comcast, for one, has already been caught deploying some tools to mess with Internet connections to block the use of software that has disproportionately infringing uses.[19] Bottom line for consumers: their historic copyright liberties to read, view, and listen to works are shrinking fast, and a fair amount of reading, listening, and viewing that would otherwise happen is discouraged by the hassle factor.

So, we have a copyright statute that is currently failing its constituents in multiple ways. We have signs that copyright lawyers are gearing up for a statutory overhaul. If one were an optimist, this would seem like a perfect opportunity to fix what's broken.

I'm not an optimist.

I would like to be. I would like to think that we have a rare opportunity for copyright scholars and copyright lawyers to sit down with representatives of creators, distributors, readers, listeners, and viewers and come up with a workable replacement for the current law. It would be short—really short. In the best case, people affected by it would be able to understand it without consulting a copyright lawyer. It would correct the current tilt in the playing field toward distributors. By this I mean both that it would give creators more meaningful rights under the law and that it would reduce the current incentives for intermediaries to artificially constrain the dissemination and enjoyment of copyrighted works. It would preserve historic copyright liberties for readers, listeners, and viewers. It would nonetheless reward investment in creative endeavors with the opportunity to profit from the

17. *See Broadcast and Audio Flag: Hearing Before the Senate Comm. on Commerce, Science & Transportation*, 109th Cong. (2006), *available at* http://commerce.senate.gov/public/index.cfm? FuseAction=Hearings.Hearing&Hearing_ID= 4237da77-4ae9-4e2d-b03d-215dcc725eae.

18. *See* Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1, *available at* http://online.wsj.com/article/ SB122966038836021137.html.

19. *See* In re Free Press v. Comcast, FCC 08-183 (Aug. 2008), http://hraunfoss.fcc.gov/edocs_ public/attachmatch/FCC-08-183A1.pdf.

commercial and public exploitation of copyrighted works. It would try to provide easy licensing opportunities to make it simple for people who want to pay to use copyrighted material to do so, but without affirmatively encouraging investment in exclusionary, anti-competitive tactics.

Let me stop and defend that list of goals. My first goal is that the copyright law should be short and comprehensible to people without the aid of a copyright lawyer. That may seem odd. After all, the state of Michigan pays me to train copyright lawyers, so the more demand there is for copyright lawyers, the more value there is in what I do. But that doesn't make a need for lots of copyright lawyers a good thing. Consider bankruptcy lawyers. The current economic climate surely means that demand for bankruptcy lawyers is skyrocketing, but that doesn't make it good news. Or, to switch professions, consider physicians who study the transmission of terrible infectious disease. A massive outbreak of a dire plague would undoubtedly make their workdays more interesting, but if you asked them if they'd just as soon the disease were contained before anyone could catch it, it's pretty obvious what they would say. I think a law that didn't require creators, distributors, makers, readers, listeners, and viewers to have copyright lawyers at their elbow would be a big improvement over the one we have now, which does. So, short is important to me.

Next on my list is to rebalance the ways the law deals the cards to creators and distributors, to give creators a stronger hand and to give distributors a weaker one. The pervasive favoring of distributors in the current law is largely an artifact of their political clout. Still, when paper was expensive, when mass dissemination required a printing press, a broadcast tower, a CD stamping plant, it was an artifact that made a lot of practical sense. Today, we need to realize that if we're in the business of bribing distributors to invest in mass dissemination, we are able to bribe them with less because they can engage in mass dissemination much more cheaply. Moreover, if individual consumers can distribute copyrighted works to one another at minimal cost, we may not need to bribe commercial distributors to do it at all. For some sorts of works—scientific or legal research is one example—we may not need commercial publishers.

Moreover, some of the worst excesses of copyright—the ones that make it look illegitimate in the eyes of college students—are, arguably, at least partly a result of the fact that distributors' incentives to invest in copyright are too large. These incentives motivate them to behave in ways that are bad for the system. Once distributors have vested

interests in the copyright system, though, they may take advantage of opportunities to enhance their share of its benefits in ways that aren't healthy for the system as a whole. So long as distributors' incentive to invest in works of authorship encourages creation and enjoyment, it is a useful part of the copyright ecosystem. Once the incentive to invest is so large that it makes sense to try to suppress the creation, distribution, or enjoyment of works one controls, or works that compete with those one controls, the incentive has become counterproductive.

It seems to me that that's what has happened over the past thirty or so years. The copyright incentives for distributors to invest in acquiring copyrights to works have simply grown way too large. Those incentives apparently suffice to inspire distributors to divert resources to artificially constraining outlets for copyrighted works to better enable them to capture monopoly rents. By rebalancing the copyright bargain, we can both reduce distributor incentives to undermine the health of the system and also enhance the benefits we can afford to make available to creators. Who wouldn't want that?

My third goal is a copyright law that preserves historic copyright liberties for readers, listeners, and viewers. I don't know that this requires a lot of defense. The reason we want to encourage authors to create and distributors to disseminate works of authorship is so that people will read the books, listen to the music, look at the art, watch the movies, play the games, build and inhabit the architecture. That's how copyright law promotes the progress of science. Although some copyright rhetoric seems to imply that so long as the law gives strong incentives to create and distribute works, it doesn't matter whether anybody reads or listens to them, I don't think anyone actually believes that. In practical terms, that means we need to makes sure there's enough space, enough freedom, enough liberty built into the law to ensure that the law doesn't get in the way of reading, viewing, and listening.

Those are general goals that should shape the way that copyright law rewards creativity and investment in creative endeavors. I find it easy to imagine a variety of different new copyright laws that would meet those goals. Every few years, I ask all my copyright students to try to write one, and they've come up with very useful and very different ways of doing it.

When copyright lawyers and copyright scholars sit down at real tables in real conference rooms and try to talk about reforming the copyright law, though, everything is much more difficult. Copyright scholars have, by and large, no constituency and no political clout, so

folks are going to listen to us only if they feel we have something worthwhile to say. Recently, as I've said, the view of much of the copyright bar is that we don't. Indeed, I'll go further, and say that at least some highly respected copyright lawyers have suggested that copyright scholars advance dangerous and misleading views of the law that, if taken seriously, could undermine the integrity of the entire copyright system.[20] The copyright lawyers I've been talking with represent clients, some of whom do have some political clout. Because they have clients, of course, they've got good reasons to try to retain any advantages they believe they get from the law on the books while getting rid of the disadvantages. For some of them, the prospect of copyright reform is a way to both cement their most heroic (by which I mean least plausible) victories and reverse their unanticipated defeats. Since we have lawyers on both sides of those cases, we can throw the idea of a short law right out the window. The history of past revision efforts is a protracted negotiation in which everyone ultimately agrees to ratify the general concept of their historic victories while negating their application to the specific facts that generated the lawsuits. Doing that for lots of controversial cases can generate a very long, complicated law that doesn't seem to make a lot of policy sense.

That's why I'm not optimistic. The trouble with the laws that come out of a process like that is that in the long run, they aren't good for anyone. They undermine the public's sense that copyright law is legitimate and worth upholding.

So, I'd like to challenge you to a thought experiment. I assume that my assertion about the purpose of copyright is uncontroversial. I'll repeat it: We want the copyright system to nurture the creation, dissemination, and enjoyment of works of authorship. When it works well, it should encourage creators to make new works, assist distributors in disseminating them widely, and support readers, listeners, and viewers in enjoying them. We may individually disagree on which of the three interests should prevail in the event of a conflict. We may have different ideas about how one gets there from here. We may differ about, if there are extra statutory goodies to spread around, which interest has the strongest entitlement to be given them. We would all, though, agree that the current law leaves some things to be desired in how it accomplishes these three goals.

20. *See*, *e.g.*, Henry Horbaczewski, *Copyright Under Siege: Some Thoughts of a Publisher's Counsel: The Sixth Annual Christopher A. Meyer Memorial Lecture*, 54 J. COPYRIGHT SOC'Y 387 (2006).

Rather than looking at copyright reform as an avenue to nail some things down and pry other things up, I suggest looking at it as an opportunity to rethink the subject entirely. If this statutory revision is like the last couple, it will consume a bunch of years. That's going to be a substantial chunk of your professional lives. Instead of nibbling around the edges, let's imagine that everything is up for grabs. It won't be, but thinking about it as if it is will help each of us to figure out what is important to rethink and what we can get away with merely remodeling.

If we were writing on a blank slate, how could we craft a law that would meet those goals? Forget, for the moment, everything you know about copyright law. Forget the six exclusive rights, the exclusions and exemptions, the compulsory licenses, and the four fair use factors. Could you write a statute that is better for authors, distributors, readers, listeners, and viewers than the one we have now? Of course you could. What would it look like?

The first objection I expect to hear to this thought experiment is that we have treaty obligations that constrain us when we think about redesigning the copyright law. They constrain us less, though, if we don't assume that the current barnacle-encrusted design of the law is a given: It is okay under both the Berne Convention[21] and TRIPS,[22] for example, for us to redesign the law so that we move power and control away from distributors and towards authors. Imagine, for example, a real termination right that allowed authors to terminate any transfer at any time after 10 years had elapsed from the date of the grant. People might raise all sorts of objections to that proposal on a lot of policy grounds, but it would go a part of the way toward shifting the copyright balance from distributors to creators and it would be fine under Berne and TRIPS. Indeed, we can go much further than that: We could offer authors meaningful attribution and integrity rights. That's not only fine under Berne and TRIPS, Berne requires it. We're in breach of our treaty obligations because we promised we would do that and failed to follow up. Similarly, a host of private copying exclusions appear to be Berne—and TRIPS—compliant. A variety of different reformulations of the exclusive rights would pass muster under Berne and TRIPS.

21. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *last revised* July 24, 1971, 828 U.N.T.S. 221.

22. Agreement on Trade Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round vol. 31; 33 I.L.M. 1144, 1197 (1994).

This is to say that our treaty obligations leave us a fair amount of room.[23] More importantly, though, the kinds of incentives that made sense in the 19th or even the 20th century may not make sense in the 21st. If we figure out something that would work better than the current model of copyright law, and we figure out why, then from there we can try to sort out whether we can fit it within our treaty obligations or whether it's worthwhile to seek to vary the terms of the relevant treaties.

Besides, it's just a thought experiment. If everyone in the room went home and wrote down a draft statute, none of those bills would end up being enacted as *The Copyright Revision Act of 2026*. It seems entirely possible, though, that if we all indulge in this thought experiment or ones like it, the conversations we are doomed to have about copyright reform over the next eighteen or so years will be more civil, more interesting, and more useful.

23. *Accord* P. BERNT HUGENHOLTZ & RUTH L. OKEDIJI, CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT: FINAL REPORT (2008), *available at* http://www.ivir.nl/publications/hugenholtz/limitations_exceptions_copyright.pdf.