Copyright Harm and Reform

Christina Bohannan[*]

Professor Jessica Litman's article *Real Copyright Reform*[1] is a tour de force, the culmination of years of important work in the field. The article is a reflection of Litman's extensive writings on the legislative and political realities of copyright law, the expansion of copyright holders' rights and the complexity of the current copyright statute, the need to protect user rights in order to serve copyright's purpose of "promot[ing] the Progress of Science and the useful Arts," and the current Act's potential for statutory failure. In the past, she has, perhaps more thoroughly than any other scholar, "chronicled a depressing history of copyright legislation, in which copyright lobbyists engaged in protracted negotiations with one another to arrive at copyright laws that enriched established copyright industries at the expense of both creators and the general public."[2] It is, therefore, somewhat heartening to read her predictions of, and proposals for, copyright reform.

Professor Litman makes several proposals for simplifying copyright law and empowering users. One of these is particularly compelling. She suggests that we can avoid confusion in the licensing of overlapping rights by adopting the following rule:

> Any transfer of a part of a copyright should be understood to carry with it any rights necessary to allow its exercise and license; entities who own copyright fragments should have a duty to account to one another if they grant a license that invades a different owner's turf, but it should not be the responsibility of the user seeking a license to track down and negotiate with all owners.[3]

This is an eminently sensible proposal. First, when a copyright holder grants a license to use a copyrighted work, the licensee understandably expects to be able to use the work in ways that are incidental to the licensed use. If the copyright holder does not wish to allow such incidental uses, the copyright

* Professor of Law, The University of Iowa College of Law.

1. Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1 (2010). Of course, other scholars should be credited for proposing copyright reform as well. *See, e.g.*, Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551; Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004).

2. Litman, *supra* note 1, at 7.

3. *Id.* at 46.

holder can always include language to that effect; otherwise, a default rule that allows incidental uses will avoid pitfalls for the unwary user. Second, by requiring the holders of overlapping copyrights to account to one another, Litman's proposal is both user-friendly and efficient. It puts the burden of negotiating fragmented rights on those who are in a better position to meet it: copyright holders are generally in a better position than end-users to identify and negotiate with, or account to, other copyright holders.

I also particularly admire her discussion, in this article as well as in her other work, of the potential for statutory failure in light of both copyright's complexity and the public's perception that copyright has lost its legitimacy.[4] Thus, she argues that in reforming copyright law, we should ask whether a particular proposed enactment is "likely to make the copyright system simpler, more effective, or more transparent," and whether it is likely "to shore up copyright's apparent legitimacy."[5] These are crucial questions for the success of modern copyright. In an age when high-school students run the risk of being sued by the Recording Industry Association of America, public school teachers cannot use copyrighted materials in the classroom without overstepping narrowly drawn educational guidelines, and the courts are likely to deem satire infringing unless it can somehow be characterized as parody, copyright law will either have a completely draconian effect on society or be ignored altogether. Along with many other scholars, Litman argues against the excessive expansion of copyright's substantive scope. Yet, Litman is wise to suggest that simplicity, transparency, and apparent legitimacy are independently important for achieving real copyright reform.

I am less confident about one of Litman's cornerstone proposals for reform—that copyrights should be defined as rights against "commercial exploitation." Because this is one of the central themes of her article, and because a good portion of my own work focuses on related issues, I will devote the remainder of this reply Essay to that proposal.

As I understand it, Litman's proposal would mean that personal (i.e., non-commercial) uses would be exempt from regulation while commercial uses would become copyright law's primary target, subject to traditional defenses such as fair use.[6] The first problem with this proposal is

4. *See id.* at 33 ("The copyright law is long, complex, counterintuitive and packed with traps and pitfalls, some of which were inserted intentionally to trip unwary new entrants, hapless authors, or pesky potential competitors."); *see also* Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 598 (2008) ("The most obvious danger of [overly expansive copyrights] is the threat it poses to copyright law's already wounded legitimacy."); Jessica Litman, *The Exclusive Right To Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 50 (1994) ("The current copyright statute has proved to be remarkably education-resistant. One part of the problem is that many people persist in believing that laws make sense. . . . Whatever the strengths of the negotiated legislation approach to an area as complex as copyright, the statutes that result from the process are long, complex, and counterintuitive.").

5. Litman, *supra* note 1, at 30.

6. *Id.* at 41–47.

definitional: how do we draw the line between personal use and commercial exploitation? Drawing the line between commercial exploitation and personal use is difficult in part because of intermediaries. We can probably all agree that a woman engages in a personal use of a copyrighted song when she videotapes her toddler dancing to Prince's song "Let's Go Crazy."[7] But what happens when she posts the video on YouTube for millions of people to see and hear?[8] YouTube earns millions of dollars through advertising revenue; therefore, there is a strong argument that the use becomes commercial and that, as a result, the copyright holder of Prince's song should be able to share in YouTube's revenues. Likewise, a college student probably engages in personal use when she copies a few pages from a textbook for one of her classes. Yet, if each student in a class makes the copies at a copyshop, or the professor asks the copyshop to make coursepacks for the students, then the use is almost certainly commercial because the copyshop earns revenue from making copies.[9]

Even without the presence of intermediaries it can be difficult to distinguish between personal and commercial uses. For instance, if a couple burns 150 CDs with ten of their favorite songs and gives one CD to each of the guests at their wedding, is the copying personal or commercial? The CDs are given away, not sold, yet one suspects that this use might exceed our notion of what constitutes a personal use. Likewise, peer-to-peer file-sharing software facilitates widespread sharing of music and movie files with no money ever changing hands. It is not unreasonable to think that such file sharing could affect (perhaps severely) the sale of copyrighted music, particularly if (as would be expected) file sharing becomes even more prevalent once it is no longer deemed an infringement of copyright law.

Litman understands "that the line-drawing difficulties are formidable" but nevertheless argues that "the difference between commercial exploitation and noncommercial enjoyment captures a distinction that is fundamental to our understanding of how the copyright system works."[10] I think she is right about that, in the sense that lawmakers, scholars, and even the general public tend to use the terms "commercial use" or "commercial exploitation" as shorthand for the types of uses that should fall within the domain of copyright protection.

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7. *See* Lenz v. Universal Music Corp., No. C 07-03783 JF, 2008 WL 962102, at *1 (N.D. Cal. Apr. 8, 2008).

8. *See id.* (Universal, owner of copyright in "Let's Go Crazy," sent a takedown notice to YouTube pursuant to the Digital Millennium Copyright Act).

9. *See, e.g.*, Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1385–89 (6th Cir. 1996) (holding that a copyshop's copying of coursepacks for university students was not a fair use because the copyshop profited from the copying and could have paid for permission through the Copyright Clearance Center).

10. Litman, *supra* note 1, at 44.

On closer inspection, however, there are problems with using "commercial use" as the touchstone for copyright infringement. This leads to a second, and more substantive, concern regarding this proposal. The concern is that, particularly in light of the definitional problem, the focus on commercial exploitation will not always get us where we want to go. Copyright's constitutional purpose is to "promote the Progress of Science and the useful Arts."[11] Thus, copyright law should protect against the kind of free-riding that is likely to undermine the incentives to produce and distribute creative works. Given copyright's purpose, what we really need to ask is whether a particular use is likely to harm incentives to create or disseminate a copyrighted work and whether the use itself benefits creativity and innovation. Commercial exploitation is not always a good proxy for assessing these harms and benefits.

"Commercial" does not necessarily mean "harmful." In *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme Court emphasized the importance of proving harm in copyright infringement cases.[12] The Court explained:

> [A] use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. . . . What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists.[13]

Attempting to apply the harm requirement, the *Sony* Court then distinguished between personal and commercial uses, saying that commercial uses should be deemed presumptively unfair.[14] Yet, the Court subsequently retreated from that position in *Campbell v. Acuff-Rose Music, Inc.*[15] In *Campbell*, the defendant created a parody of Roy Orbison's song "Pretty Woman" and distributed it commercially.[16] The Court held that the commercial nature of the use did not make it presumptively unfair.[17] Rather, the *Campbell* Court interpreted *Sony* as standing for the proposition that "when a commercial use amounts to mere duplication of the entirety of an original, it clearly . . . serves as a market replacement for it, making it likely that cognizable market harm to the original will occur."[18] By contrast,

11. U.S. CONST. art. I, § 8, cl. 8.

12. 464 U.S. 417, 451 (1984).

13. *Id.* at 450–51.

14. *See id.* at 451, 456 (holding that the manufacture and sale of home video recorders did not constitute contributory infringement because the principal use of recorders, which were intended to tape television shows for personal enjoyment at a later time, was a non-infringing fair use).

15. 510 U.S. 569, 572 (1994); *id.* at 599–600 (Kennedy, J., concurring).

16. *Id.* at 572–73 (majority opinion).

17. *Id.* at 584.

18. *Id.* at 591.

the Court reasoned that when a commercial use transforms the original work, as in the case of a parody, the commercial nature of the use does not render it presumptively unfair.[19] Thus, *Campbell* indicates that the commercial nature of a use does not weigh in favor of finding infringement unless the use is likely to compete against the copyright holder's original work or expected derivative works. In other words, the key factor is whether the use of a copyrighted work is likely to harm sales in the copyright holder's expected markets, not whether the use is commercial. Indeed, in some cases a new commercial product that borrows from another copyrighted work can actually serve as a complement to the original work or its usual derivatives, increasing the copyright holder's sales by stimulating demand for those works.

As I have argued elsewhere, harm to a copyright holder's expected markets should be the touchstone of infringement because the copyright holder relies on these markets for incentives to create and distribute the copyrighted work.[20] The use of a copyrighted work should be considered non-infringing when that use falls outside the range of uses a copyright holder would rely on for incentives to create the work, increases demand for the original work or its usual derivatives more than it decreases that demand, or is otherwise unlikely to reduce a copyright holder's ex ante incentives to create or distribute the work. By limiting infringement to those uses likely to decrease copyright holders' incentives, a harm-based approach promotes the creation and distribution of copyrighted works while also protecting the users' (readers'/viewers'/listeners') ability to enjoy or improve upon these works.[21]

Moreover, commercial uses can actually serve copyright's purpose by adding creative or informational value of their own. As the Supreme Court observed in *Campbell*, most of the uses traditionally favored under copyright's fair use doctrine—including news reporting, research, and the like—are performed for profit in this country.[22] Book reviews, another classic fair use, are typically written for monetary compensation and appear in commercial newspapers. Indeed, most new books, movies, or songs that borrow from existing copyrighted works constitute commercial uses, yet these products also offer new experiences to readers, viewers, and listeners. The fact that these products are commercial does not detract from their

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19. *Id.*

20. Christina Bohannan, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969 (2007).

21. To be sure, determining which markets a copyright holder is entitled to control and what constitutes "harm" to those markets involves definitional problems as well. By inquiring directly about harm, however, the law would force parties to submit information about real effects in the marketplace.

22. *Campbell*, 510 U.S. at 584 (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 592 (1985) (Brennan, J., dissenting)).

value but rather increases it—their commercialization facilitates their wide availability. By comparison, personal uses, while valuable to individual users and typically less harmful to the copyright holder's sales, are often less valuable to society as a whole.

In my view, a commercial-use rule does not reflect a concern about actual harm to copyright holders and their incentives to create and distribute copyrighted works. Rather, it seems to reflect an unjust enrichment or market failure theory of copyright law. The argument is that if someone profits commercially from using a copyrighted work without compensation, that person is unjustly enriched. Compensation should be required unless a market failure—typically high transaction costs—prevents payment from occurring. Yet, economic spillovers are pervasive in our society and are frequently uncompensated.[23] For instance, when bakers produce better bread, the demand for butter increases, but the butter sellers do not compensate the bakers for that benefit.[24] Nor does one neighbor compensate another for landscaping or other improvements that increase property values on their street.[25] Copyright was intended to be a limited monopoly for the purpose of promoting creativity.[26] To the extent that uses of copyrighted works do not impair that purpose, requiring compensation is not only inefficient but also counterproductive.

To be fair, Litman does not propose prohibiting all commercial uses of copyrighted works; rather, she proposes that there would still be fair use protection available for commercial uses.[27] Although this protection would help somewhat, re-orienting the law to make commercial uses copyright's primary target could make assertions of fair use for commercial uses significantly more difficult. Moreover, as previously discussed, line-drawing problems remain, and many non-commercial uses can in fact be harmful. An approach that focuses on harmful uses is preferable to one that focuses on commercial uses per se.

Second, I fear that a commercial-use rule would do damage to the First Amendment values at stake in copyright law. As copyright law prohibits more and more uses of copyrighted expression, it necessarily limits the ability of individuals to express themselves. Despite the obvious conflict

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23. *See* Brett M. Frischmann & Mark A. Lemley, Essay, *Spillovers*, 107 COLUM. L. REV. 257, 258–59 (2007) (arguing that uncompensated spillovers are ubiquitous and can be beneficial).

24. Christina Bohannan & Herbert Hovenkamp, *IP and Antitrust: Reformation and Harm*, 51 B.C. L. REV. 905, 986 (2010).

25. *See* Frischmann & Lemley, *supra* note 23, at 258–59 (noting that homeowners typically do not make improvements to their property in order to benefit their neighbors, but that such improvements often result in unintentional spillover benefits).

26. *See* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (concluding that the Framers of the Copyright Clause and the First Amendment intended the limited monopolies of copyright to promote free expression and creativity).

27. Litman, *supra* note 1, at 45–46 (noting that there will still be a need for fair use protection even if copyright protection is limited to uses involving commercial exploitation).

between copyright law and the First Amendment, the Supreme Court has held that First Amendment scrutiny does not apply to copyright regulations in the same way that it applies to other government regulations of speech.[28] Rather, the Court has held that copyright's own "traditional contours," such as the idea/expression dichotomy and the fair use doctrine, are generally sufficient to protect speech concerns.[29]

Litman argues that copyright's traditional contours include rights for readers, listeners, and viewers. She says that those rights historically have resided in the "white spaces" between copyright holders' statutory rights, and she argues that those white spaces "are part of the traditional contours the Supreme Court mentioned in *Eldred*—they advance copyright's goals and the First Amendment by securing liberty to read, listen, look at, and think."[30] She concludes that "[e]xpress recognition of reader, listener, and viewer copyright liberties could protect them from encroachment," and suggests that limiting copyright to a right of commercial use would be one way to protect those liberties.[31]

I fully agree that copyright's "white spaces" have been an important part of the traditional contours that have protected the rights of readers, listeners, and viewers. I am not sure, however, that the line between commercial and personal uses accurately delineates the boundaries of those spaces. Many commercial uses of copyrighted material, including uses for news reporting and scholarly books, were traditionally considered non-infringing even though they were undertaken for profit. Also, copying for the purpose of producing new creative works (including new works sold commercially) was traditionally considered a non-infringing use. Copyright issues aside, such commercial uses constitute speech and would be entitled to substantial First Amendment protection. Moreover, because commercial works are often circulated widely, the message[s] of these works are capable of producing a greater communicative impact than many personal uses.

Rather, the focus should be on whether the use of copyrighted material is likely to cause any meaningful harm to a copyright holder's incentives to create or distribute copyrighted works. Generally speaking, the First Amendment allows government regulation of speech only when the speech is likely to cause harm to the government interest underlying the speech

28. *Eldred*, 537 U.S. at 218–21 (refusing to apply heightened scrutiny to copyright claims and noting that "copyright's limited monopolies are compatible with free speech" because "copyright's purpose [as intended by the Framers] is to *promote* the creation and publication of free expression").

29. *Id.* at 221.

30. Litman, *supra* note 1, at 38. *See also* Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1904–08 (2007) (describing these rights as "copyright liberties").

31. Litman, *supra* note 1, at 39.

regulation.[32] In all varieties of speech cases, from those involving the incitement of unlawful activity to those involving defamation or fighting words, the nature and extent of that harm are central inquiries.[33]

The government interest underlying copyright law is to protect against the kind of free-riding that is likely to discourage the creation or distribution of copyrighted works. If a particular use of copyrighted material is not likely to decrease a copyright holder's incentives to create and distribute such works, then it is effectively harmless and should not be subject to copyright regulation.[34] As previously discussed, not all commercial uses are harmful, and not all personal uses are harmless. In order to safeguard First Amendment values in the use of copyrighted materials, courts must inquire directly about harm.

Despite my concerns about the commercial-use rule, I agree with Litman's fundamental premise that real copyright reform requires a return to first principles. At its core, Litman's article argues that "[c]opyright lobbyists have not shown that recent enhancements to copyright have made it easier or more rewarding for readers, listeners, and viewers to enjoy copyrighted works."[35] Therefore, she says that "[i]nstead of asking how to enhance copyright owner control, . . . we ought to be asking why."[36] We should be asking, among other things, whether "a particular proposed enhancement of copyright-owner prerogatives seem[s] likely to expand opportunities for creators or improve reader, listener, or viewer enjoyment of copyrighted works."[37]

I agree completely that this is a question we should be asking when considering proposed copyright legislation. I would, however, go one step further: this is a question courts also should ask when considering whether copying or another use of copyrighted material constitutes infringement. Currently, courts rarely, if ever, consider this fundamental question directly in deciding copyright cases. Rather, courts merely interpret and apply specific statutory provisions—provisions crafted by and for special interests—in determining infringement. Indeed, even when courts apply more general tests, such as the substantial similarity test in prima facie infringement or the fair use doctrine, courts do not generally consult first principles.

32. *See* Christina Bohannan, *Copyright Infringement and Harmless Speech*, 61 HASTINGS L.J. 1083, 1088–96 (2010) (discussing the necessity of proving harm when deciding if speech is unprotected).

33. *See id.* (describing cases).

34. *See id.* at 1106–07 ("All uses of copyrighted material—whether transformative or verbatim, commercial or personal—presumably should be protected except where necessary to prevent harm to copyright's constitutional and statutory purpose.").

35. Litman, *supra* note 1, at 29.

36. *Id.*

37. *Id.* at 29–30.

As a co-author and I have argued elsewhere, there are reasons to believe that reform in both copyright and patent law is more likely to occur in the courts than in Congress.[38] We look to intellectual property's ("IP's") neighboring field of antitrust law to show that at one time antitrust also began to elevate private interests over the public interest in furthering competition, and that reform took place in the courts.[39] Today, in nearly all antitrust cases, courts are explicit in saying that the determination of whether a challenged practice violates the antitrust laws turns on whether the practice is likely to decrease competition.[40]

The antitrust model arguably provides a useful model for IP reform for two reasons. First, innovation and competition are related and interdependent goals—"two blades of the same scissors" for furthering economic growth.[41] Second, antitrust statutes have been relatively less affected by special interests, so the antitrust experience might be deemed a quasi common-law baseline for IP reform.[42] Accordingly, although courts in copyright infringement cases are constrained to follow clear statutory directives, they often have a good deal of discretion. The courts should exercise that discretion in a way that is likely to serve copyright's purpose.

Just as courts in antitrust cases ask directly whether a challenged practice harms competition, courts in copyright cases should ask directly whether a challenged use of a copyrighted work harms the copyright holder's incentives. If the use does not cause any material harm to those incentives, the interest in users' enjoyment and improvement of copyrighted works should prevail. As previously discussed, this approach serves copyright's purpose of encouraging creativity while also protecting the First Amendment rights of users.

Moreover, a harm-based approach to copyright would have the salutary effect of requiring parties in infringement cases to bring forth evidence regarding the actual or likely market effects of various uses of copyrighted works. Such data is conspicuously absent from copyright infringement cases, likely because it is virtually never required before plaintiffs can maintain an action. Copying, not harm, is the touchstone for infringement. Once copying has been shown—no matter how unlikely it is that the copying will cause any meaningful harm to the copyright holder's incentives to create or distribute such works—there is prima facie infringement, and the burden of proof shifts to the user to show why the copying should be excused. Despite

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38. *See* Bohannan & Hovenkamp, *supra* note 24 (arguing that reform in both copyright law and patent law is more likely to occur in the courts than in Congress). *See generally* DAN L. BURK & MARK A. LEMLEY, THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT (2009) (arguing that the courts, and not Congress, should lead the way to copyright law reform).

39. *See* Bohannan & Hovenkamp, *supra* note 24, at 908–13, 992.

40. *Id.* at 983.

41. *Id.* at 914.

42. *See id.* at 918–20.

the fact that copyright's purpose is mainly to protect against copying in order to give people incentives to create and distribute copyrighted works, there is shockingly little consideration of the effects copying will have on those incentives. Although harm could be presumed in some cases, requiring proof of harm in all other cases could pave the way for a better understanding of how the markets for different types of copyrighted works function. As Professors Litman and David McGowan have noted, legislating in copyright is difficult because we currently do not have the data to determine how much copyright protection is the right amount.[43] Thus, a better understanding of the markets for copyrighted works could be hugely helpful in informing ongoing debates about copyright reform.

43. *See* Litman, *supra* note 1, at 29; David McGowan, *Copyright Nonconsequentialism*, 69 MO. L. REV. 1, 17 (2004) ("We do not have the data, so we cannot do the math, so we cannot say for sure.").