

to be standing out there on some hill all alone, surrounded by the fog and din of battle, doing the best he or she can under the circumstances.

But here is the point I want to make: standing alone does not mean standing alone and free. Even when the trial judge acts in the “open area,” there are true constraints on her decisional powers. When the usual or traditional guy wires disappear from the process, that does not mean that the judge floats off into outer space. Like astronauts performing their space walks far beyond earth’s gravitational pull, judges, too, remain tethered to the mother ship if they hope to survive the experience. The notion that there is some area of complete decisional freedom where judges are permitted to act out their libertine subjective preferences is a silly and uninformed illusion.

So what are the constraints on trial judges when they exercise these discretionary powers? Certainly, the most important one is the rule of law, which provides the fundamental backdrop. This is, after all, a legal process, not political science or sociology or even

economics (I say with particular deference to Judge Posner). The trial judge’s actions have to conform to the rule of law but also have to pass muster with the parties and the public and the appellate panels. I would put these latter requirements loosely in a category called “cultural restraints.”

Besides cultural restraints, there are also important practical parameters: the actions taken by a judge have to be enforceable—they have to work, to be realistic and within the reach of the court’s actual powers. The people on the receiving end of the court’s orders have to know precisely what they are being required to do, and if they don’t do it voluntarily, the trial judge has to be able to make them do it, often with the help of the United States Marshal. Finally, not only do the exercises of discretion and imagination in the trial court have to be legal, practical, and within cultural norms, they have to stay within the four corners of the case before the court—they have to be about the particular problems the court is being asked to solve. . . . ■

## Nies Lecture

# The Copyright Act of 2026

The annual Helen Wilson Nies Lecture on intellectual property law was recently delivered by Jessica Litman, the John F. Nickoll Professor of Law and Professor of Information at the University of Michigan. Professor Litman’s Nies Lecture was entitled “The Copyright Act of 2026.” The full text, including footnotes, appears at 13 Marq. Intell. Prop. L. Rev. 249. This excerpt begins after Professor Litman has posited that the goals of copyright should be to nurture the creation, dissemination, and enjoyment of works of authorship.

**T**hose 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. 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 agree, though, that the current law leaves some things to be desired in how it accomplishes these three goals.

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 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 and TRIPS, for example, for us to redesign the law so that we move power and control away from distributors and toward 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 farther 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.

This is to say that our treaty obligations leave us a fair amount of room. 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. ■

## Intellectual Property Law Review

### A Lesson from Swamp Rock

Mary Jane Saunders, general counsel to the Subway Franchisee Advertising Fund Trust Ltd., spoke to the *Marquette Intellectual Property Law Review* banquet last year. Her speech recounted three Supreme Court decisions involving intellectual-property law and can be found in full at 13 Marq. Intell. Prop. L. Rev. 451. This is an excerpt from her remarks.

**F**ogerty *v. Fantasy, Inc.* is a case that I have used to great advantage. John Fogerty was the lead guitarist and chief lyricist for Creedence Clearwater Revival, the group that brought you many timeless rock-and-roll classics, including *Proud Mary*, *Born on the Bayou*, *Have You Ever Seen the Rain?*, and *Bad Moon Rising*.

The Fogerty case is about my all-time favorite Creedence song—a little swamp rock ditty called *Run Through the Jungle*, which Fogerty wrote in 1970. Many people think that this song is about the Vietnam War and the extreme emotion nine years of the United States' active combat brought to this country, but Fogerty has said that the song is actually about gun control. He thought that Americans were simply too gun-happy.

I would describe *Run Through the Jungle* as a litigation-happy song. Creedence Clearwater Revival broke up in 1972 because the other members did not think Fogerty was giving them enough voice as artists and was cutting them out of financial decisions. He was apparently a bit of a control freak. After the band broke up, Fogerty got into a bunch of contract disputes with Fantasy, the band's record label. To settle the disputes and get out from under his contract obligations, Fogerty assigned his publishing and distribution rights to Fantasy. ▶▶

