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Copyright Non–Compliance (Or Why We Can't "Just Say Yes" to Licensing).

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Copyright Non-Compliance (Or Why We Can't "Just Say Yes" to Licensing)

JESSICA LITMAN*

. . . I have complained more than once over the past few years that the copyright law is complicated, arcane, and counterintuitive; and that the upshot of that is that people don't believe that the copyright law says

* 29 N.Y.U.J. INT'L L. & POL. 237, 238–42, 244–46, 251–52 (1997).

what it does say. People do seem to buy into copyright norms, but they don't translate those norms into the rules that the copyright statute does; they find it very hard to believe that there's really a law out there that says the stuff the copyright law says.

Of course we have many laws that people don't seem to believe in. Think of the laws prohibiting consensual sodomy, for instance. When I was a child and my father told me about those laws, I had a tough time believing that he wasn't making it up. Or, think about the national fifty-five-miles-per-hour speed limit law. Or the laws that say that minors can't buy cigarettes. These are all laws that people don't believe say what they say. And, since they don't think that familiar sexual activities, or driving at seventy miles per hour, or buying a pack of Marlboros from the cigarette machine in the cafeteria, are really against the law, they don't refrain from doing those things just because some law on the books says they can't.

People don't obey laws that they don't believe in. It isn't necessarily that they behave lawlessly, or that they'll steal whatever they can steal if they think they can get away with it. Most people try to comply, at least substantially, with what they believe the law to say. If they don't believe the law says what it in fact says, though, they won't obey it—not because they are protesting its provisions, but because it doesn't stick in their heads. Governments stop enforcing laws that people don't believe in. Laws that people don't obey and that governments don't enforce get repealed, even if they are good laws in some other sense of the word. The national fifty-five-miles-per-hour speed limit, for instance, (had it been followed) would have conserved fuel and saved lives, but it wasn't, so it didn't, and now it's history; Congress finally repealed it.

People are nonetheless attached to the symbolic significance of some of these laws. "They're good," people say, "because they make a statement. They express the norms of civilized society." You hear that sort of thing often when you are talking about the war on drugs; many people agree that the laws against drugs aren't working; indeed, are doing as much harm as good, but they are unwilling to give up the symbolic force of the prohibitions. That's one good reason to keep a law around even though nobody seems to be obeying it. It can be very expensive to cling to a law that is unenforced and unenforceable, but sometimes, with some laws, some people feel that it is worth the price for the symbolism. Certainly, you hear a lot of that in support of laws that legislate morality.

But laws that we keep around for their symbolic power can only exercise that power to the extent that people know what the laws say. If nobody knew that we had a law against selling cocaine, it wouldn't be serving much of a symbolic function. (To go back to the laws against consensual sodomy for a moment, they stopped performing whatever symbolic function they were supposed to perform once people stopped believing that there were real laws out there that made things like that illegal.) So, the answer to the question "Why is it a problem that people don't believe in the copyright law?" depends on the reason they don't believe in it. The reason people don't believe in the copyright law, I

would argue, is that people persist in believing that laws make sense, and the copyright laws don't seem to them to make sense, because they don't make sense, especially from the vantage point of the individual end user.

Copyright law is horribly complicated. Sometime around the turn of the century, we in the United States reached the collective judgment that copyright was too complicated for mere mortals (or indeed for mere senators) to appreciate, and we settled on an approach whereby we assembled all of the copyright experts—that is, the entities whose businesses involved printing, reprinting, publishing and vending—and assigned them the task of sorting out the relationships among them. So, whenever we need a major revision of the copyright law, it has become traditional to assemble all of the current stakeholders in informal negotiations and present whatever they agree on to Congress.

That, today, is common ground. The laws that come out of such a process have both strengths and weaknesses. At least in the short term, they tend to be laws the relevant industries can live with, because the relevant industries wrote them. Those laws can solve the problems posed by different entities' different needs by specifying, so that, e.g., video games can be treated differently from video tapes, or cable television can be treated differently from broadcast television, which can be treated still differently from satellite television. For that reason, though, the differences in treatment may not have much logical appeal. In addition, the negotiating process tends to divide users into discrete interests. Businesses and institutions who are at the bargaining table request and receive specific privileges, and nobody ends up being a proxy for the general public.

The current crisis has been precipitated by the widespread adoption of new digital technology, which enables members of the general public to print, reprint, publish, vend, and communicate with a vast audience without resorting to the traditional intermediaries. Estimates peg the number of current U.S. users of on-line services at anywhere between ten and twenty-four million people, and those numbers are growing all the time. Current stakeholders, who are accustomed to the current rules, would of course prefer that the rules that apply to the general public engaging in these activities be the current rules, or ones that work as much like them as possible. They have been seeking ways to maintain what they see as the appropriate balance in the law, by reinvigorating and extending their version of the current rules....

The trouble with the plan is that the only people who appear to actually believe that the current copyright rules apply as writ to every person on the planet are members of the copyright bar. Representatives of current stakeholders, talking among themselves, have persuaded one another that it must be true, but that's a far cry from persuading the ten or twenty million new printers and reprinters. The good old rules were not written with the millions of new digital publishers in mind, and they don't fit very well with the way end users interact with copyrighted works. If you say to an end user, "you either need permission or a statutory privilege for each appearance, however fleeting, of any work

you look at in any computer anywhere," she'll say "There can't really be a law that says that. That would be silly." Even copyright lawyers, who have invested years in getting used to the ways the copyright law seems arbitrary, have had to engage in several pretzels worth of logical contortions to articulate how the good old rules do and should apply to end users without any further exemptions or privileges.

Instead, though, of polling the old guard for its version of good rules to constrain the individual end users who, after all, are now threatening to compete as well as consume, and then foisting those on the public in a "just say yes—to licensing" campaign, it might be worthwhile to step back a step.

I take it that a law that folks complied with voluntarily would be superior on many counts to one that required reeducation campaigns, that depended on technological agents to be our copyright police, and that relied on felony convictions to be our deterrents. Nobody has proposed a law that might meet this description because the members of the copyright bar have all looked around and concluded that consumers will not voluntarily comply with the current collection of copyright rules. Stop and think about that for a minute. We can't rely on voluntary compliance because the great mass of mankind will not comply voluntarily with the current rules.

Well, why not? Is it that consumers are lawless, or ignorant? Is it, in other words, the consumers' fault? Or might there instead be some defect in the current rules—at least from the consumers' standpoint? To recast the question, can we look at the dilemma from the opposite direction? Are there rules that we believe consumers would comply with voluntarily? Do those rules potentially supply sufficient incentives to authors and their printers, publishers, and vendors to create new works and put them on the global information infrastructure, and, if not, can we tweak them so that they do? . . .

The other conclusion I draw is this: more than ever before, our copyright policy is becoming our information policy. As technology has transformed the nature of copyright so that it now applies to everybody's everyday behavior, it has become more important, not less, that our copyright rules embody a deal that the public would assent to. The most important reason why we devised and continued to rely on a copyright legislative process whereby the copyright rules were devised by representatives of affected industries to govern interactions among them is that it produced rules that those industries could live with. Now that it is no longer merely the eight major movie studios, or the four television networks, or the 6,000 radio stations, or the 200–some book publishers, or the 57,000 libraries in this country that need to concern themselves with whether what they are doing will result in the creation of a "material object . . . in which a work is fixed by any method," but rather millions of ordinary citizens, it is crucial that the rules governing what counts as such an object, and what the implications are of making one, be rules that those citizens can live with.

The White Paper suggests that we invest in citizen reeducation to persuade everyone that the current copyright rules are right, true, and

just. I am less distressed by this suggestion than I might be if I thought it were likely to work. There's something profoundly un-American about the campaign, at least as the White Paper describes it. But, instead of trying to change the minds of millions of people, instead of trying to persuade them that a long, complicated, counterintuitive, and often arbitrary code written by a bunch of copyright lawyers is sensible and fair, why don't we just replace this code with a set of new rules that more people than not think are sensible and fair? . . .