

Digital Copyright

By Jessica Litman

Amherst, New York: Prometheus Books, 2006, ISBN 1-51902-420-X

Price \$18.00, pp. 216

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Journal of High Technology

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Laws governing our use of others' works predate the creation of the United States. When the first United States copyright statute was enacted in 1790, authors were given an exclusive right only in producing copies of their work.¹ However, as new technologies were discovered, people sought out additional and more extensive rights to protect their creative expression. As a result, copyright laws have become long, convoluted, and completely incomprehensible to the typical consumer, to the point that many are not aware when they may be infringing someone's copyright. In *Digital Copyright*, Professor Litman discusses how copyright law in the United States has gotten to this point and how it has become even more complicated with the application of copyright laws in the digital arena.

Copyright has become vital to our society because it affects people everyday in what they read, listen to, or view. It has become even more important in its application to works on the Internet, where it is much harder to enforce copyright laws and track infringing uses. These laws are incredibly difficult to understand, making them difficult for the average person to follow. Litman argues that copyright law should be significantly amended to become accessible to the public at large. She heavily criticizes the complexity of the current copyright law and suggests

¹ Copyright Act of 1790, Act of May 31, 1790, 1 Stat. 124 (1790).

that it is not realistic to expect people to comply with laws that they simply cannot understand without assistance from a copyright specialist.

Litman provides a relatively brief but detailed explanation of copyright law in the United States. She makes clear, however, that a thorough understanding of copyright law is not necessary to understand the concepts discussed in her book. It is written in terms that anyone can understand, allowing the everyday reader to grasp exactly what is going on in the world of copyrights. She also includes a glossary at the end of the book of commonly used words and their copyright-related definitions. This further shows her desire for a wide variety of people to understand copyright issues, allowing not only experts to find value in her argument but also the everyday consumer.

Litman begins by discussing basic copyright theories, setting forth her premise. Authors of creative expression are afforded several basic rights in their works including the right to make copies, the right to distribute those copies, the right to display their work, the right to perform their work, and the right to adapt their work. There are, however, very narrow exemptions in the law placed there by affected industries in order to protect them from claims of infringement as Litman points out. She then sets up the rest of the book by stating that the introduction of the digital marketplace has changed the face of copyright law.

The author goes on to explain the process of making copyright laws in the United States. The method, essentially set in stone at the beginning of the twentieth century, involves negotiations between the affected industries which then present their conclusions & proposals for

law to Congress.² Litman states that this is the reason that United States copyright laws have become so long and incomprehensible. No one will support a measure that will not benefit them; they want the law to be set in their favor, so the parties attempt to have exemptions placed directly in the statute to specifically excuse them from any liability. The author then describes the history of the conferences that have taken place in the United States which fashioned our current copyright rules and how the purpose of copyright law has morphed over the past hundred years. It has changed from something based on the idea that people will create more if they are compensated for what they do to the notion that it is only about the author's ability to control his work.

Litman makes a point of indicating that basically every time a new technology was introduced, the affected parties got together to change the existing copyright law to be in their favor. This was no different when the Internet made its splash on our society. She discusses how the Internet scared copyright holders when it was first introduced because they felt that people would take advantage of their ability to easily infringe their copyrights. They sensed that current copyright law was in jeopardy and jumped at the chance to amend the law to protect them from losing their rights. Litman spends a lot of time discussing the government's initial thoughts as to how copyrights should be protected in the digital world and the process that ensued, a process that is still continuing today as the Internet continues to grow. It was believed at that time that the only way to encourage people to invest in the Internet was to enhance their rights under the law. The government thought that if people did not have stronger rights, they

² The first time Congress used this method of revision was during the creation of the Copyright Act of 1909. Copyright Act of 1909, 35 Stat. 1075 (1909); JESSICA LITMAN, DIGITAL COPYRIGHT 23 (2006).

would not be willing to put their works online. The result of these long and protracted negotiations in the mid-1990s was the enactment of the Digital Millennium Copyright Act of 1998 (DMCA), which allowed for the introduction of anti-copying technology and measures to prohibit the circumvention of such technologies.³ However, the DCMA did not work like the parties thought it would as evidenced by the dawn of the peer-to-peer file sharing era. A slew of lawsuits were introduced against DMCA violators, including both large scale entities, such as Napster, and individual consumers, indicating a need to revise.

Litman is not shy about strongly indicating her feelings as to the current state of copyright law. Her belief that the current law is not working is clearly evident throughout the book. She goes so far as to state outright her cynicism over the ability of the negotiation process to create something that actually promotes the constitutional purpose of copyright law. She points out that the current issue facing Congress is figuring out how to make everyone comply with copyright laws, not just the major parties which the law actually takes into account. With the advent of the Internet, Congress is expecting to apply those same rules to the person next door, rules which any normal person would not believe due to an inherent tendency to doubt laws that do not make sense. Litman takes a radical approach to this situation and proposes doing away with the “copy” as the fundamental unit in copyright law. She suggests replacing the infringement issue of whether a copy was created with one that asks about the infringer’s effect on the market for the copyright holder’s work. Under her proposal, a person would be held liable for infringement if their actions had a substantial effect on the copyright holder’s ability to market their work. As a result, the teenager downloading music for personal, non-commercial use would not infringe the artist’s copyright because his actions have little effect on the

³ Digital Millennium Copyright Act of 1998, 112 Stat. 2860 (1998).

marketplace. However, a large company, like the original Napster, would likely be held liable because its actions would have a much greater effect on the overall market for music.

At the end of the book, Litman includes an afterword that discusses what has happened since the Napster lawsuit was decided in 2001. This section, however, only furthers her argument rather than showing any substantial change in copyright law. Decisions have been handed down in major copyright infringement cases⁴, making the public more aware of the issues while not having much of an effect on illegal file sharing.

Litman's proposition makes a lot of sense. Obviously, the current law is not working. The government and the courts are having trouble forcing people to obey the law. Instead, the law should be amended in response to what the public is doing. The government is never going to be able to stop the onslaught of Internet piracy, so it would appear to be in their better interest to embrace it and stop fighting the inevitable. In the end, they will be better off promoting a law that everyone believes is fair instead of one that practically everyone disobeys.

As is common with any rapidly developing technology, some of the issues in *Digital Copyright* may be out of date not long after this publication. However, Litman's argument will remain relevant for years to come. Unfortunately, considering the landscape of copyright reform over the past one hundred years, Litman's proposal will likely never see the light of day. The process has become sufficiently ingrained. The affected parties will continue to fight for their own rights and continue to ignore the effect that will have on the general public's ability to access works. However, if Congress really wants to settle the "copyright war" once and for all, they would be smart to consider Litman's suggestions.

⁴ See *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2000), *rev'd*, 545 U.S. 913 (2005); *A&M Records, Inc. v. Napster Inc.*, 284 F.3d 1091 (9th Cir. 2001).