

DIGITAL COPYRIGHT

By Jessica Litman
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Digital copyright law is rapidly emerging as one of the basic legal structures underlying the Internet. The Ninth Circuit's recent decision in *A&M Records, Inc. v. Napster, Inc.*¹ exemplifies the vastness of this new legal regime. The Ninth Circuit concluded that Napster makes it easier for tens of millions of *individual* users to commit copyright infringement through the peer-to-peer transfer of MP3 files.² A related and possibly even more significant ramification was the widespread media attention that the decision received. The issuance of a preliminary injunction against a company founded by a college freshman was one of the top news stories around the world. Unlike prior offline copyright regimes, digital copyright law significantly regulates the private, noncommercial sphere of individual content use, subjecting to control the manner and extent to which millions of users access and interact with copyrighted material on the Internet.

Jessica Litman's *Digital Copyright* is thus a timely and thoughtful critique of the current digital copyright regime, embodied in the Digital Millennium Copyright Act ("DMCA") of 1998.³ Litman persuasively argues that a paradigm shift has occurred since copyright law has been extended to the digital realm: "Copyright is now seen as a tool for copyright owners to use to extract all the potential commercial value from works of authorship, even if that means that uses that have long been deemed legal are now brought within the copyright owner's control" (p. 14). Tracing the foundations of copyright law — from its constitutional basis⁴ to its incarnation in the 1909 and 1976 Copyright

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1. 239 F.3d 1004 (9th Cir. 2001).

2. *Id.* at 1014–17. As of February 14, 2001, Napster claimed to have fifty-eight million subscribed users. Matt Richtel, *Napster Charts a New Course After Ruling*, N.Y. TIMES, Feb. 14, 2001, at C1.

3. Digital Millennium Copyright Act, Public L. No. 105-304, 112 Stat. 2860 (1998) (codified at 17 U.S.C. §512).

4. The Constitution provides that "[t]he Congress shall have the power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S.

Acts,⁵ and finally to its recent “modernization” in the DMCA — Litman successfully shows the historical expansion of copyright owners’ control over their works at the expense of individual users.

As Litman describes, the DMCA is a remarkable and powerful extension of copyright owners’ control for two significant reasons: first, it legitimizes and institutionalizes the premise that because copyright law gives copyright owners the exclusive right to reproduce protected works, each appearance of any digital portion of a work in a computer’s RAM is a reproduction within the meaning of the copyright statute⁶ (p. 27); and second, the DMCA facilitates the use of technological protections that restrict both initial access to and subsequent use of copyrighted digital material⁷ (p. 27). Litman argues that the expansion of copyright law to the private realm of the individual user conflicts with a spectrum of public policy interests that have traditionally influenced information policy, such as free speech, privacy, competition, and diversity of views (p. 30). Litman’s proposed solution to the growing conflict between user and copyright holder is novel and concededly radical: policy should shift from a focus on the reproductive nature of copyright law, in which unauthorized “copying” forms the basis of copyright infringement, to a regime that draws distinctions between commercial and noncommercial uses of copyrighted material, and the effects that such uses have upon the copyright owner’s commercial market (p. 180). Although Litman’s analysis of the current state of copyright law is well-founded, her argument is susceptible to criticism. Litman’s response to the concerns of content owners regarding the lack of incentives in creating material for an insecure, “copy at will” online universe is somewhat anachronistic in a time when the commercial viability of content-based, free-to-user

CONST. art. I, § 8, cl. 8.

5. Copyright Act of March 4, 1909, 35 Stat. 1075, *repealed by* 1976 General Revision of Copyright Law, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

6. Thus, whenever someone accesses copyrighted digital content, that individual necessarily makes a reproduction of the content. The DMCA views individual transmissions of copyrighted material from one individual to another, even if owned legitimately by the first individual, as an unauthorized reproduction (p. 188). Litman argues that this prohibition on transmissions is in tension with the first sale doctrine, which historically has permitted the purchaser of a copy of a copyrighted work to sell, loan, lease, or display the copy without the copyright owner’s permission (p. 81).

7. The DMCA’s anti-circumvention measures make it illegal for any user to circumvent access-protection technology and thus gain access to protected content, even if the user has a legitimate fair-use reason to gain access to such material (p. 143). As Litman describes, it is unclear what “access” means under the DMCA — if “access” includes all subsequent attempts to access a work, then this would subsume circumvention of copy-protection as well, since users will normally need to gain access to a work to use it (p. 144).

web sites is increasingly questioned.⁸ Furthermore, Litman's proposed solutions, though intriguing and well thought-out, ultimately might not solve one of the book's biggest dilemmas: whether to impose liability for widespread copyright infringement on individual users who *do* harm a copyright owner's market share but do so on an individual, noncommercial basis.⁹

Chapters 1 and 2 of *Digital Copyright* flesh out the major arguments of the book and provide a succinct introduction to the theoretical premises underlying copyright statutes. In Chapter 1, Litman states that the goal of copyright law is to give financial compensation to those who create, by prohibiting the unauthorized copying and distribution of works, while also allowing the public to freely co-opt the ideas, facts, systems, or procedures, within the works, thus promoting public learning and knowledge (p. 17). Throughout the years, exemptions and licenses have been granted, such as fair use exceptions for academic reproduction and the first sale doctrine, which allows people who own legitimate copies of works to legally use them in a range of activities¹⁰ (pp. 17–18). Chapter 2 delves into Litman's major assertions, namely that copyright law's application to new technologies has traditionally excluded the public from the negotiating table, resulting in a series of arcane, complicated laws that make little sense to the public and are too temporary and industry-oriented to retain long-term viability as new technologies emerge (pp. 22–24). As Litman convincingly argues, the DMCA's vast expansion to cover most individual noncommercial uses of digital, copyrighted material thus presents a major problem: millions of people who were excluded from inter-industry negotiations in drafting the DMCA are potentially subject to stiff penalties under a statute that seems counterintuitive and simply wrong to them (pp. 29–30).

8. Merrill Lynch has predicted that online ad sales will drop by 25% in 2002. Internet companies such as Yahoo!, one of the most popular free-content-based sites on the Internet, have seen their stock prices crumble and their earnings diminish in recent months. Leslie Walker, *Not of the World, But the World as We Know It*, WASH. POST, Mar. 22, 2001, at E1.

9. Technologies like Gnutella and Freenet, which have grown in popularity in recent months, supply distributed peer-to-peer search and file-sharing capability, without the use of a central server, thus leaving no intermediary to sue and no centralized source of records to subpoena as to who transferred what file (p. 167). Gnutella is described on a devoted web site as "an open, decentralized, peer-to-peer search system that is mainly used to find files. Gnutella is neither a company nor a particular application. It is also not a Web site . . . It is a name for a technology, like the terms 'e-mail' and 'web.'" *What Is Gnutella?*, at <http://gnutella.wego.com>.

10. The first sale doctrine, as an essential element of the 1909 and 1976 Copyright Acts, permitted the purchaser of a copy of a copyrighted work to sell, loan, lease, or display the copy without the copyright owner's permission (p. 81).

Litman's historical overview in Chapter 3 of the creation of copyright law during the twentieth century is a fascinating contribution to her overall argument. Though Litman's detailed analysis can be dense, it supports her thesis that the adaptation of copyright law to new technologies has resulted in more control for copyright owners at the expense of the public. The continuous absence of the public from the negotiating table has culminated in statutes that cater more and more to industries and institutions that have possessed the political wherewithal to influence the legislative process. This, of course, has resulted in increasingly less attention paid to public interests.¹¹ Litman argues that pressures from new technologies have "sparked debates over whether the current copyright statute can adjust to the climate of rapid technological change" (p. 35). Interested parties, which are historically industries and large institutions, argue for solutions that reflect where their vested interests happen to lie. Some parties lobby for maintaining the status quo and allowing the current copyright law to adapt to new technology, while others argue that new technology calls into question the assumptions on which copyright law is based and, in turn, requires new legislative action (p. 36). For example, the creation of the 1909 Copyright Act, a product of inter-industry negotiations, resulted in very specific copyright rights with reference to the type of work in which the copyright was claimed. In the initial negotiation stages, the nascent piano player roll industry was not invited to the bargaining table, resulting in a draft copyright bill that overturned case law that piano roll use was not infringement (p. 38). Once the piano roll industry began paying attention to copyrights and opposed the draft bill through lobbying pressure, a compromise was reached among composers, music publishers, and the piano roll industry (p. 39). Litman's thorough examination of the subsequent negotiations is particularly telling.¹² The 1976 Copyright Act contains broad language for exclusive rights by copyright holders with very narrowly defined exceptions to accommodate new technologies that existed at the time the statute was drafted. Since such exceptions were defined so narrowly, technologies that emerged after 1976 have required either judicial action or new

11. Litman maintains that such detriments include the erosion of the first sale doctrine under the DMCA and the compromising of other important policy concerns such as privacy, free speech, diversity of views, and competition (p. 29).

12. Litman details the rise of the conference negotiating system, in which the federal Copyright Office has attempted to persuade groups unrepresented at prior conferences to attend new negotiations, though many groups have lacked representatives (e.g., software programmers). Though according to Litman private user interests have not been sufficiently represented at such conferences, Congress nonetheless habitually seems to pass whatever the various groups represented agree upon (p. 52).

statutes to address the specific issues they presented (p. 58).¹³ Litman draws a number of insightful conclusions, specifically that copyright statutes are inherently bent in favor of status quo interests and biased against absent interests (e.g., the public), thus resulting in inflexible laws that lack long-term stability as new technologies emerge (p. 62).

In Chapters 4, 5, and 6, Litman argues that a conceptual shift in digital copyright law is occurring and describes the most disconcerting consequences that it will have upon the content-consuming public. Chapter 4 contains an interesting hypothetical discussion between an everyday citizen and her lawyer regarding whether she should sign onto a copyright bill. Though redundant with Litman's prior arguments, the chapter does highlight, especially for non-lawyers, the tensions that emerge in applying complex and inconsistent statutes to the general public when such statutes are intended to serve the interests of affected industries (p. 73). Chapter 5 explores the metaphorical evolution of copyright doctrine from the idea of a "bargain" between the authors of works and the public to one of "control" by copyright holders over content access and use in the digital age. Litman explains:

Augmenting copyright law with legally enforceable access control could completely annul the first sale doctrine. More fundamentally, enforceable access control has the potential to redesign the copyright landscape completely. . . . Copyright law can give authors control over the initial distribution of a work, without permitting the authors to exercise downstream control over who gets to see it. Copyright law can give authors control over the use of the words and pictures in their books without giving them rights to restrict the

13. Litman presents two important examples. In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the unanticipated advent (at least to the drafters of the 1976 Copyright Act) of the VCR led the Supreme Court to hold that private consumer copying of recorded or broadcast content was in many cases privileged under the statute's fair use provisions (p. 60). In 1992, Congress passed the Audio Home Recording Act to resolve the emerging conflict between electronic manufacturers who produced digital audio tape ("DAT"), which allowed high quality copies of recordings, and the recording industry, which feared widespread piracy of recorded works. The parties agreed that every digital audio recording device would have technological copy controls, in which one could copy first generation copies an unlimited number of times, but could not reproduce subsequent copies (p. 59). See generally Audio Home Recording Act of 1992, Public L. No. 102-563, 106 Stat. 4237 (codified at 17 U.S.C. §§ 1001–1010). It is important to note that in both instances such "privileges" were granted through pressure by electronics manufacturers, and not through organizations that typically represent the interests of the consumer public.

ideas and facts those words and pictures express. . . . Once we permit copyright owners to exert continuing control over consumers' access to the contents of their works, there is no way to ensure that access controls will not prevent consumers from seeing the unprotected facts and ideas in a work (p. 83).

Chapter 6 continues this line of argument in its critical assessment of the 1994 Green Paper¹⁴ of the Lehman Working Group, a special committee created under the Clinton Administration to examine the impact of the new "information superhighway" on copyright owners. Operating under the assumption that copyright owners were in need of expansive online rights in order to provide them with an incentive to create new material for the Internet, the Green Paper reached a number of controversial conclusions that would later serve as the intellectual foundation for the DMCA (pp. 90–92). Such conclusions included the idea that users copy content every time their computers read content into RAM and that the current copyright law should (and does) assure the right to control each of these reproductions. Litman argues that such conclusions regarding the extant 1976 provision were dubious; when Congress awarded an exclusive right of reproduction, it is highly doubtful that they also intended to award an exclusive right to control the manner in which people engage and use such content (p. 96). The Green Paper also recommended two modest suggestions for improving the 1976 Act: first, that the statute needed to recognize that unauthorized transmissions violate the copyright owner's distribution right as well as reproduction, performance, and display rights; and second, that the statute needed to prohibit any device or service intended to circumvent the copyright owner's technological protection mechanisms, allowing no defenses for fair use (pp. 95–96).

A critical argument that Litman must rebut is the primary assumption underlying new digital copyright law: that increased copyright protections are necessary to create incentives for the production and dissemination of content on the Internet. In Chapter 7, Litman argues that this assumption is false, claiming that the Internet since its earliest days has contained a vast array of not only non-copyrighted content of value but commercial copyrighted content as well.¹⁵ Litman contends that the "link between production and

14. Information Infrastructure Task Force, *INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: A PRELIMINARY DRAFT OF THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS* (1994).

15. Litman describes how web sites such as <www.nytimes.com> and

dissemination of valuable protectible works and the degree of available intellectual property protection is equivocal" (p. 106). Though it is true that the advent of the piano player and the jukebox, which both gained copyright exemptions through specific licenses, did not halt the production of popular music, some would contend that the challenges the Internet presents are qualitatively different. Web sites that have been designed on free content-based models are a dying breed; even traditional content-based sites such as Salon.com are moving towards a subscription-based service.¹⁶ If the majority of website business models shift towards a subscription, pay-per-view basis, it is thus reasonable to believe that copyright protection will take on even greater importance for content-based online industries. Although Litman is correct in asserting that copyright immunity can stimulate nascent industries (p. 107), it is yet to be definitively shown that "new" forms of content on the Internet can continue to exist independently of strong copyright protection. If the pay-per-view model, at least for initial access of works, does become the predominant business model on the Internet, the anxieties of copyright holders might not be so easily dismissed. The protection of such content from widespread illicit copying is arguably necessary to maintain the viability of a for-profit website, spurring the crucial incentives needed for the creation of more online material.

A central concern of *Digital Copyright* is the fairness and plausibility of enforcing broad-based copyright laws against an ignorant public. Litman argues that if 137 million members of the public "copy, save, transmit and distribute content without paying attention to written copyright rules, those rules are in danger of becoming irrelevant" (p. 114). Chapter 8 asserts that since individuals neither understand nor seemingly agree with the current copyright regime, such a regime is potentially unworkable, since it will suffer from low levels of compliance and will subsequently be difficult to enforce on a broad scale. As Litman posits, such low compliance levels are hardly surprising; the DMCA, like the 1909 and 1976 Copyright Acts, was born of inter-industry negotiations that denied the public an adequate voice. Chapter 9 examines the power struggle between various industries and congressional committees through which the Lehman Working Group's Green Paper evolved into the DMCA.¹⁷ Like prior copyright statutes,

<www.wired.com> have posted free content in hypertext. Furthermore, she mentions how web sites such as Yahoo! have seen the value of putting free content online through online advertising and links to other sales (pp. 104–105).

16. For example, in a last-ditch effort to sustain itself, Salon.com is switching to a mix of large (intrusive) ads and, alternately, a subscription service that would allow the user to view the site without any ads. See Walker, *supra* note 8, at E1.

17. As Litman describes, the usual struggle between electronics manufacturers,

the public was never given an active role in the drafting of the DMCA.¹⁸ Although public-oriented organizations like libraries and universities eventually obtained specific exemptions under the DMCA, such provisions do not necessarily correlate with the interests of individual content users (p. 127). According to Litman, the DMCA contains two key pro-industry provisions: first, the DMCA has a safe harbor clause for Internet service providers under which they are not held liable for their subscribers' infringing transmissions so long as the provider has no reason to suspect infringement and so long as they agree to remove infringing material and shut down copyright violators; and second, it has an anti-circumvention provision that makes it illegal to "manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof" designed to circumvent copyright protection or access protection technology (p. 143).

Although the DMCA is less than five years old, it has spawned a variety of high-profile legal battles. Litman's presentation in Chapter 10 of these contentious cases, such as the ongoing Napster and DVD/DeCSS litigation, successfully highlights the DMCA's expansion into the private, noncommercial realm of the individual user and the conflicts that have subsequently surfaced.¹⁹ In Chapter 11, Litman explores the future of such copyright controversies, critiquing the position of content holders as suppressing new technologies and as being hopelessly out of sync with public sentiment. Litman focuses on the

libraries, universities, schools, and content industries surfaced in negotiations of the DMCA, but, this time, the negotiations were complicated by a struggle between the House Commerce and Judiciary Committees (pp. 137-40). The DMCA emerged through a complicated series of interactions between both committees, resulting in a compromise to preserve jurisdictional claims: the Librarian of Congress, in consultation with the Copyright Office and Commerce Department, now determines which classes of works, if any, should be temporarily exempted from the new statute (p. 144).

18. Litman does describe, however, the early attempts of the Digital Future Coalition ("DFC"), composed of concerned law professors and Internet civil liberty organizations like the Electronic Frontier Foundation, to block adoption of the Lehman Group's conclusions by Congress (pp. 124-27).

19. Litman discusses cases involving Napster, DVD/DeCSS, MP3.com, iCraveTV.com, and others (pp. 151-63). The Napster litigation involves the attempts of a number of major-label record companies to block Napster from allowing its users to distribute to one another MP3 files of copyrighted songs. Napster is currently attempting to comply with the preliminary injunction issued by the district court. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). The DeCSS litigation involves three separate suits by the motion picture industry against different websites that posted either the content scrambling system (CSS, which is software that controls access to DVDs), the decryption code (DeCSS), or links to sites containing the code. *See Universal City Studios, Inc. v. Reimerdes*, 111 F.Supp. 2d 346 (S.D.N.Y. 2000).

record industry's failure to provide secure digital music online while, at the same time, pursuing litigation against Napster, which has over fifty million users (pp. 167–68). To Litman, the industry's failure to give people what they want—widely available digital music—has naturally resulted in people looking toward alternative sources for music, such as Napster. Litman's critique of content holders and the DMCA continues in Chapter 12, where she argues that the DMCA's exclusive focus on content owners, through its technological anti-circumvention measures and prohibition on digital copies, could potentially result in owner control over every subsequent use of digital content, curtailing people's opportunities to purchase, read, view, hear, or use copyrighted works (p. 178).²⁰

Litman's proposed alternative to the DMCA in Chapter 12 is both innovative and controversial. In an attempt to make copyright law more understandable and synchronous with popular conceptions of what copyright law should be, while preserving some incentives for copyright owners, Litman proposes jettisoning the notion of reproduction as the central facet of copyright law (p. 180). Litman contends that policy makers should start with the widely-held idea that copyright should be the exclusive right of commercial exploitation (p. 180), drawing a distinction between commercial and noncommercial uses of content. Though noncommercial individual copying would not itself be actionable, copying that results in large-scale interference with a copyright holder's marketplace would constitute infringement under Litman's regime. Privileges and limitations would be articulated over time through an ad hoc interpretive process, relying upon judicial discretion. Thus, individual acts of "copying" digital content into one's RAM might be perfectly legal, but Napster's activities, because they arguably interfere with a copyright holder's marketplace, would be actionable. Litman argues that though such a system would not be as formally realizable as explicit statutory provisions, it would offer a more equitable, durable standard than the current regime (p. 181). Furthermore, Litman contends that her proposed regime would eliminate the structural advantages that the current negotiating process awards existing stakeholders, while conforming to popular expectations, and thus result in higher levels of compliance (pp. 181–82). Litman believes, however, that the public will need additional protection to guarantee

20. Copying is central to using digital content. Litman describes how digital technology, through access controls, can change the way individuals interact with content that they themselves have purchased, such as technological controls preventing one from sharing files with peers, or files that institute a pay-per-view subscription system for initial and subsequent access (p. 13).

individual user rights. Some of her proposals include privileging the creation of temporary copies in one's RAM; hypertext linking to sites that may contain copyright infringement; limited circumvention of any technological access controls under fair use; and the reproduction, adaptation, transmission, and performance required to access unprotected elements of works (pp. 183–84). Litman argues that disclaimers and citations or hypertext links to original copies should accompany all adaptations of works (p. 185).

As Litman highlights throughout *Digital Copyright*, one of the central dilemmas facing copyright owners is the growing absence of intermediaries in cases of large-scale content reproduction and transmission. For example, technologies like Gnutella and Freenet, which accomplish the same basic peer-to-peer transfers as Napster, do not have central servers or any sort of incorporated entity that can be found liable. In Litman's prognostic final chapter, she worries that this trend seems to necessitate finding millions of individual users liable under the DMCA in place of easy targets like Napster (p. 195). However, such server-free applications pose quandaries not only for the DMCA but for all copyright regimes, including Litman's proposal. If a Gnutella-like application becomes the dominant technology for peer-to-peer transfers, in which large-scale copying of copyrighted material occurs that *does* interfere with a copyright owner's share of the marketplace, would Litman's regime impose liability on individuals for their activities? Presumably not, since each individual would be committing noncommercial reproductions that, in a vacuum, do not interfere with the marketplace (unlike Napster, which abetted and, in a sense, organized large-scale copying that arguably did hurt a copyright owner's marketplace). However, if liability will not (or cannot) be imposed on individuals, which Litman persuasively describes as draconian and difficult to enforce given the low levels of public compliance, where does this leave content owners?²¹ Is it inevitable that copyright owners must accept *some* loss in the marketplace with the advent of the Internet? If this is the case, then one could arguably contend that this provides an even greater reason for stronger copyright laws with discretionary enforcement to deter future infringement that goes beyond an acceptable limit.²² And yet, as Litman illustrates, this

21. A further concern involving enforcement against individual users is logistical. As Litman describes, because technologies like Gnutella and Freenet do not possess central servers, they do not have centralized records concerning which individuals are transferring what files to one another (p. 167). Indeed, tracing down individual copyright infringers appears to be a daunting task.

22. In criminal law, the government frequently enforces laws on a discretionary basis to deter future cases of blatant non-compliance amongst the general public. The problem,

result would create an Internet that is dominated by the politics of control, in which seemingly arbitrary laws that are out of sync with societal norms are imposed on a blind-sighted public that lacks proper notice.

as Litman hints at, is this: if there is selective enforcement resulting in large pockets of non-compliance, is there proper notice to potential violators? *Cf. Wayne v. U.S.*, 470 U.S. 598 (1985) (holding that selective enforcement of draft laws is constitutional).