

DIGITAL COPYRIGHT, by Jessica Litman

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BOOK REVIEW

DIGITAL COPYRIGHT. By Jessica Litman.* Amherst, New York: Prometheus Books, 2001. ISBN: 1-57392-889-5. Pp. 195.

I. INTRODUCTION

Recently, copyright law has emerged from its shadows of obscurity to become a topic in everyday discourse drawn from spectacular headlines splashed on the cover of newspapers and magazines. Before the advent of the Internet and the increased role of digital technology in our day-to-day lives, copyright law was best left to specially trained attorneys who focused their practice on copyright law. However, the emergence of Napster¹ and the debate surrounding online publishing rights for freelance journalists² has propelled copyright law into daily conversations, far removed from the exclusivity it maintained only a few short years ago.

Professor Jessica Litman explores how the complex body of copyright law developed from a single clause in the Constitution³ to fill the volumes of general rules and narrow exceptions currently found in Title 17 of the United States Code.⁴ After detailing numerous examples of provisions found in the Copyright Act that were promulgated specifically to pacify political interests, Litman proposes a revision of the entire body of copyright law.⁵ Litman's revision would place an increased focus on the needs of the end user of copyrighted works, as opposed to the needs of malcontent businesses and industries whose lobbying efforts negotiated their current stakes and rights as

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1. Napster, Inc., at <http://www.napster.com>, is an online service that, through the use of file-sharing software, allows users to download digitized music files (called MP3 files), for free. The Ninth Circuit recently held that Napster contributorily infringed the copyrights held by the original artists of the record companies who were assigned the copyrights. *See* A&M Records, Inc. v. Napster, Inc., 57 U.S.P.Q.2d (BNA) 1729 (9th Cir. 2001) (enjoining Napster from providing access to copyrighted works).

2. *See e.g.*, N.Y. Times, Co. v. Tasini, 206 F.3d 161, 54 U.S.P.Q.2d (BNA) 1032 (2d Cir. 1999).

3. U.S. CONST. art I, § 8, cl. 8. Congress is authorized "[t]o promote Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

4. *See* 17 U.S.C. §§ 101–1332 (1994 & Supp. V 1999).

5. JESSICA LITMAN, DIGITAL COPYRIGHT 171–186 (Prometheus Books 2001).

expressed throughout the 1976 Copyright Act and the amendments thereto.⁶ Throughout *Digital Copyright*, Professor Litman dissects the conferences and hearings of the past century to explain and elucidate the revolution that copyright law has undergone which has resulted in the codified copyright law that we have today.⁷

II. REPRODUCTION RIGHTS

Litman works from the underlying premise that, in theory, each time an image from the Internet is viewed through a personal computer, the viewer has reproduced the original image.⁸ The primary vehicle for Professor Litman's assumption that an image has been copied is that a computer's Random Access Memory (RAM) makes a temporary copy in order to allow the image to be viewed.⁹ The right of reproduction is a fundamental right to the owner of a copyright (hence the reason it is called a *copyright*); therefore, according to Litman, every time an image is viewed on a personal computer an infringing act has taken place.¹⁰

Indeed, Professor Litman is quick to point out that the entertainment industries such as television, film, and music were most concerned with the *potential* for copyright infringement through Internet use. Rather than presenting coherent arguments and evidence to support their contentions, the entertainment industry relied upon the possibility that copyright infringement *may* result from the proliferation of Internet usage to spur their lobbying efforts which ultimately resulted in the enactment of the Digital Millennium Copyright Act.¹¹

The fears and attitudes of the current stakeholders described throughout *Digital Copyright* implicate a changing dynamic in the role of copyright protection. Historically, copyright protection limited the unauthorized copying of protected works as opposed to the ability to freely read and view writings and images.¹² However, according to Professor Litman, "if every time a work appears in the [RAM] of your computer, you are making an actionable copy, then we have for the first time given copyright owners extensive control over the consumption of their works."¹³

6. *Id.* at 180.

7. *Id.* at 22–32.

8. *Id.* at 26–27.

9. *Id.*

10. LITMAN, *supra* note 5, at 26–27.

11. *See id.* at 33 (citing the Digital Millennium Copyright Act, Pub. L. No. 105-304 (1998) (codified at 17 U.S.C. §§ 101, 104, 114, 512 1201–1204 (1994 & Supp. V 1999))).

12. LITMAN, *supra* note 5, at 28.

13. *Id.*

III. UNDERPINNINGS OF THE COPYRIGHT ACT

After introducing the necessity of viewing recent developments in copyright law with a critical eye towards the lobbying and legislative process underlying enactments, Professor Litman escorts readers through the detailed history of the negotiation and lobbying that created the Copyright Act of 1976.¹⁴ Beginning approximately one hundred years ago, Congress implemented a procedure of revising copyright laws by encouraging representatives of architects, artists, authors, composers, photographers, and publishers to negotiate what they believed to be the appropriate changes and present their findings to Congress. The pattern of private stakeholders developing the law continues to this day. Professor Litman claims that a skeptic need look no further than the combined efforts of Disney Enterprises, Inc. to find a prominent example of copyright legislation that was incited by an organization with deep pockets and an interest that was anything but virtuous.¹⁵

Professor Litman's narrative and critical analysis of the conferences and hearings responsible for the past century of developments in copyright law compels a reader to become engrossed in a topic that few would pursue independently. The historical development of copyright law that Litman provides is critical to understanding the current subject matter challenges a court faces when examining copyrights in connection with the progressive advancements in digital technology and computer software.¹⁶ Upon analyzing the application of copyright laws written between 1950 and 1976 to the current technologies, a reader comes to appreciate the daunting task of understanding and applying antiquated laws to technology that was unfathomable to the authors of the original copyright statutes.¹⁷

Digital Copyright provides a timely commentary to the current legal drama surrounding Napster and the expanding amount of media coverage given to entertainment and educational material available online. While deftly avoiding a proposal for a legal solution to the current ills which plague copyright law, Professor Litman illustrates how distant the current copyright laws are from the public's perception of the subject matter that copyright laws protect.¹⁸ Litman relates that the majority of consumers understand that certain creations are protected through copyright law; however, Litman opines

14. *Id.* at 35–63.

15. *Id.* at 39.

16. *Id.* at 58–60.

17. LITMAN, *supra* note 5, at 23 (“As Mickey Mouse, who first appeared in 1927, came face to face with imminent expiration of his copyright, [p]roprietors of aging but still profitable works asked Congress to tack twenty additional years onto the term of every extant copyright.”).

18. *Id.* at 58.

that consumers of copyrighted material would be surprised to learn that a significant number of copyrights are infringed by actions that consumers would otherwise consider to be perfectly acceptable. Professor Litman illustrates several limitations on use in a digital context that frustrate both the purposes underlying copyright protection and the ability for consumers of works protected by copyright law to fully use the works as they were originally intended by the author.¹⁹

Throughout *Digital Copyright*, Professor Litman paints a picture of copyright protection as a body of law that is applied to advancements in technology that simply does not comport with the practical interpretations of copyright law. In response to the current “reproduction” limitations inherent in copyright law, Litman proposes a complete restructuring of the methods of protection.²⁰ While acknowledging the practical implications and barriers of rewriting the Copyright Act, Litman’s proposal nevertheless offers a pragmatic approach that balances the creators’ and stakeholders’ needs with the consumers’ ability to access information.²¹

After Professor Litman analyzes the negotiations over the past one hundred years that have resulted in the current copyright laws, Litman’s impact-focused approach seems like a distant hope given the current realities. One of the most poignant observations made by Litman as to reworking the copyright structure is that the current stakeholders are not going to support a Copyright Act that limits their current and future interests in the works they maintain.²² Nevertheless, Professor Litman presents a compelling argument for future drafts and developments in the law.²³

Professor Litman’s proposal for a revised Copyright Act is primarily focused on the commercial impact that results from the use of a copyright.²⁴ Therefore, a “minor” infringement of a copyright for personal use would be unactionable; however, copyright infringement that displaces or weakens the market for the protected work would be actionable according to Litman’s revised system.²⁵ In the context of Napster, Litman advocates that users of Napster within their home would not be liable for copyright infringement because the infringement has a *de minimis* impact on the commercial music market.²⁶ However, Napster, Inc. would remain liable for copyright

19. *Id.* at 70–71.

20. *Id.*

21. *Id.* at 180.

22. LITMAN, *supra* note 5, at 180.

23. *Id.* at 171.

24. *Id.* at 180–86.

25. *Id.* at 180.

26. *Id.*

infringement despite the fact that Napster does not receive compensation for either its service or software. This liability arises because Napster provides an opportunity for “large-scale interference” with the copyright holder’s potential market.

IV. CONCLUSION AND RECOMMENDATION

As a whole, *Digital Copyright* provides a valuable overview of many of the policy considerations that shape the current landscape of copyright law. To that end, Professor Litman’s work is an invaluable tool for academics and practitioners, in addition to non-lawyers and law students, who share an interest in a rational explanation to the copyright laws which shape the ability to read, listen, produce, and watch an inestimable variety of creative works. While Professor Litman’s proposal for an impact-based copyright system faces obstacles that make complete implementation nearly impossible due to the reluctance of current stakeholders to support any overhaul of the current system,²⁷ the academic exercise of walking through the development of the copyright doctrine forces a reader to think critically about who and what is actually being protected and whether the goals of Article I, Section 8, clause 8 of the Constitution are truly being furthered.²⁸

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27. LITMAN, *supra* note 5, at 180.

28. *Id.* at 181.

