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**Can Copyright Become User-Friendly?
Essay Review of Jessica Litman, DIGITAL COPYRIGHT
(Prometheus Books 2001)**

BY

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version of 10/06/2001**

Forthcoming, 25 Columbia-VLA J. L. & Arts, No. 1 (2001)

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For 25 Columbia-VLA J. L. & the Arts No. 1 (2001)

Can Copyright Become User-Friendly?

Essay Review of Jessica Litman, *DIGITAL COPYRIGHT* (Prometheus Books 2001)

Jane C. Ginsburg¹

A few initial disclaimers are in order: Professor Litman is my friend and co-author (Trademarks, 3d ed. Foundation Press 2001, with Mary L. Kevlin, Esq.). We have discussed - and often warmly disagreed about - copyright law for over a dozen years. I like to believe that we are reputable representatives of currently opposing tendencies (not to say, even hostile camps) in copyright scholarship. From a welter of commentary, Professor Litman's work stands out as well-researched, doctrinally solid, and always, piercingly well-written. Much of it is also very persuasive. I might like to say that much of it is also wrong, but my reservations regarding some of her contentions or conclusions are more nuanced than that. This review of her recent book, *DIGITAL COPYRIGHT*, will attempt to explain why anyone interested in copyright, and particularly anyone who wishes to defend and strengthen it, should pay careful attention to Prof. Litman's arguments.

Copyright lawyers, however, are not Professor Litman's target audience, nor are lawyers of any kind. She has written this book for the general public, though lawyers, and especially copyright lawyers, would do well to read it. Professor Litman's message is straightforward: Copyright law is too complicated and counterintuitive. It has been written by and for copyright lawyers who represent many, but not all, of the players. Those left out include developers of new ways of communicating copyrighted works, and, most importantly, end users. But nowadays, copyright directly affects end users in ways more pervasive than could have been expected in the analog world. If copyright law doesn't make sense to those who are supposed to adhere to it, copyright will cease to be a meaningful constraint on users' activities.

In this review, I will first briefly address Professor Litman's evocation of the copyright law-making process. Her discussion of legislative history presents a valuable and compelling account, especially for those unfamiliar with copyright law. Nonetheless, it is not a principal focus of this review. For those who read the *Columbia-VLA Journal of Law & the Arts* (many of whom may well be copyright lawyers), the most provocative portions of the book, to which

¹Morton L. Janklow Professor of Literary and Artistic Property Law, Columbia University School of Law. Thanks for research assistance to Caroline Corbin and Tucker McCrady, both Columbia Law School class of 2001, and to Carolyn J. Casselman, Columbia Law School class of 2003.

I will devote most attention, are likely to be the chapters in which Professor Litman (a) reviews and challenges various metaphors for copyright policy (Chapter 5, “Choosing Metaphors”); (b) in which she recounts the rocky relationship between copyright owners and developers of new technological means of disseminating works (Chapter 10, “The Copyright Wars”); and (c) in which she offers her own prescription for a simple, fair and workable copyright law (Chapter 12, “Revising Copyright Law for the Information Age”). DIGITAL COPYRIGHT does not dispel our disagreements about copyright’s goals and proper scope; if anything, because Professor Litman is such an effective advocate, she has forced me to think harder about why, in many (though far from all) respects, I remain unconvinced. The following review therefore endeavors not only to present Professor Litman’s arguments, but to offer some reasons for continued resistance to those claims.

What’s Wrong with the Way Our Copyright Laws are Made?

Professor Litman devotes much of the book to demonstrating how our copyright laws came to be the unwieldy overprotective mess she describes. These chapters have considerable narrative drive, tinged, in the case of the most recent legislation, with intimations of a vast copyright-owner conspiracy to undermine fair use. But Professor Litman is even-handed in her criticism; the tale she tells also recounts the failure of groups that should have guarded the public interest to stick by that task. In part, the groups were not well-suited to the enterprise of collectively pressuring Congress for broad public-regarding changes. Offered compromises that seemed to shield their own separate interests, key members of the opposition to the legislation that became the 1998 Digital Millennium Copyright Act [DMCA] took their exemptions and ran. Others, perhaps more mindful of unorganized end-user concerns, gave up because the reworked bill was the best they could expect.

To her credit, Professor Litman does not shy away from acknowledging the resulting irony. Despite all the antagonism the first version of digital copyright legislation (and its proponents) attracted, particularly from the most self-proclaimed public-spirited members of the opposition, the version finally enacted turned out to be far more copyright-owner protectionist, far more verbose, and far less susceptible of creative judicial readjustment than the first bill.

This story invites more than one moral. One is a lesson Professor Litman has pressed throughout her academic career, beginning with her comprehensive and masterful investigations of the legislative history of the 1976 Copyright Act.² A statute structured to articulate broad protective principles,

²See Jessica Litman, *Copyright, Compromise and Legislative History*, 72 Cornell L. Rev. 857 (1987); Jessica Litman, *Copyright Legislation and Technological Change*, 68

tempered by narrow exceptions tailored for parties present to bargain for them, responds poorly to technological change because narrowly-crafted solutions may become obsolete, and more importantly, technology may give rise to future users whose interests could not have been represented when the deal was struck. This conclusion is unassailable. But, standing alone, it is not enough, for it does not tell us how else copyright legislation could be crafted, nor what it should look like. Happily, other chapters of the book do provide at least some of the normative prescription these devastating descriptions compel. I shall turn to these later.

Another lesson may not be one Professor Litman herself would urge, but it seems to me to emanate starkly from her story: if compromises do not produce the best copyright legislation, neither do confrontations. The pre-DMCA way of making copyright laws, if ultimately underinclusive as to the participant bargainers, was reasonably civil, perhaps because the included groups had to live with each other. This does not mean that disagreements failed to abound. On the contrary, for example, publisher-educator controversy prickled throughout much of the 1976 Act drafting process.³ But agreements were reached, thanks in large measure to the persistence and prestige of their principal broker, then-Register of Copyrights, Barbara Ringer.

During the four-year process that led to the DMCA, *ad hominem* (*ad personam*?) attacks seemed almost as plentiful as substantive objections. Professor Litman refers to threats of grievous bodily harm leveled by the Administration official leading the drive for legislation.⁴ (The threat, which she delicately declines to detail, menaced permanent preclusion of the unappreciated critic's ability to procreate.) The bills' detractors were scarcely less gentle, though their reproaches tended to tar their opponents with corruption and greed, rather than to promise physical impairment.⁵ My point

Oregon L. Rev. 275 (1989).

³See, e.g., Jessica Litman, Copyright, Compromise and Legislative History, 72 Cornell L. Rev. at 875-877 (describing negotiations for the 1976 Act regarding fair use provisions as "tortuous" and stating that authors, publishers and educators "disagreed violently about the scope of fair use").

⁴See DIGITAL COPYRIGHT, p.125 & n.6.

⁵See, e.g., DIGITAL COPYRIGHT at 125 ("noting that press response to initial DMCA proposals accused copyright-holders of "grabbiness"); Pamela Samuelson, "The Copyright Grab, Wired, Jan. 4, 1996 at http://www.wired.com/wired/archive/4.01/white.paper_pr.html (on file with Columbia Journal for Law and the Arts) ("Now a group of major motion picture producers, sound recording companies and print publishers have figured out a way to turn the threat of digital technology into an opportunity. Under this plan, they would retain all their rights under existing law and quietly attain a host of new ones"); James Boyle, "Overregulating the Internet," Washington Times, November 14, 1995, at A17 (commenting

is that these kinds of exchanges do not foster an atmosphere in which public-serving compromise can be achieved, perhaps especially not for newcomers to the lawmaking bargaining table.

Metaphors: From Compact to Property?

In “Choosing Metaphors,” Professor Litman contends that the rhetoric of copyright has moved away from an initial – and implicitly correct – public bargain paradigm, in which the public gave up some user rights in order to supply “a means to advance the public interest” by furnishing authors sufficient compensation to encourage them to create.⁶ Copyright seals a compact between authors and the public, with each giving something to the other for the greater good. Another version of this paradigm substitutes “balance” for “bargain,” but the import is the same: the copyright balance between copyright owners and copyright users justifies only so much copyright protection as will promote creativity. Accordingly, a level of protection that enhances rewards to authors but frustrates secondary creativity or public dissemination tilts the scales too heavily toward copyright owners, to the detriment of the public.

According to Professor Litman, the bargain paradigm left too large an unprotected zone for the liking of copyright owners. They therefore sought new paradigms that would produce better coverage. During the 1970s and 1980s, the emerging discipline of law and economics supplied the copyright owner-favorable slant toward incentive analysis. Incentive analysis, as viewed by Professor Litman, fundamentally changes the *raison d’être* for copyright, because

The economic analysis model focuses on the effect greater or lesser copyright rights might have on incentives to create and exploit new works. It doesn’t bother about stuff like balance or bargains except as they might affect the incentive structure for creating and exploiting new works. To justify copyright limitations, like fair use, under this model, you need to argue that authors and publishers need them in order to create new works of authorship, rather than, say, because that’s part of the public’s share of the copyright bargain. The model is not rooted in compensation, and so it doesn’t ask how broad a copyright would be appropriate or fair; instead it inquires whether

that the White Paper suggestions would “foreclose[] a lot of the Net’s innovative and exciting potential for the sake of a corporate welfare program”).

⁶DIGITAL COPYRIGHT at 78.

broader, longer, or stronger copyright protection would be likely to lead to the production of more works of authorship.⁷

Finally, in this story, we moved from bad to worse, from an analysis that prized production over fairness, to one that elevates control over both compensation and any semblance of balance.

The upshot of the change in the way we think about copyright is that the dominant metaphor is no longer that of a bargain between authors and the public. We talk now of copyright as property that the owner is entitled to control – to sell to the public (or refuse to sell) on whatever terms the owner chooses. Copyright has been transformed into a right of a property owner to protect what is rightfully hers. (That allows us to skip right past the question of what it is, exactly, that ought to be rightfully hers.)⁸

A practical consequence of this rhetorical shift is to change the default position of protection relative to exceptions (or, not to prejudice the inquiry, non protection). That is, back in the days of the “copyright bargain,” non protection supplied the default; authors who complied with formalities enjoyed limited rights designed to compensate, but no more. During the dominance of incentive rhetoric, the zone of protection grew, because more protection promotes more creativity, but the zone of non protection – perhaps now better characterized as exceptions – remained vibrant, if only because over-protection ultimately frustrates the purpose of protection in the first place, which is to enlarge the store of publicly available works of authorship. (All authors must to some extent build on their predecessors’ work, but we will not have second authors if first authors’ control over their work is absolute.) But when the metaphor moves to a property paradigm, justifications for protection are no longer needed, and justifications for exceptions seem less persuasive.

The progression Professor Litman describes is probably correct to the extent that today the control function of copyright may be more stressed than its role in ensuring compensation. Similarly, the emphasis on control may obscure the importance of exceptions. But it is misleading to suggest that these two functions are opposed. Copyright has always been about both compensation and control. And property rights rhetoric has persisted in U.S. copyright from the start. Similarly, the incentive rationale has also long been an integral feature of Anglo-American copyright thinking.

⁷DIGITAL COPYRIGHT at 80.

⁸Id. at 81.

The 1710 statute of Anne, the first copyright statute, wore its incentive policy on its title: “An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors of Purchasers of such Copies . . .”⁹ Similarly, the U.S. Constitution proclaimed Congress’ “Power . . . to promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . .”¹⁰ The Constitutional text in fact combines incentive, public benefit, and property right rationales: Copyright enabled the public to have “a supply of good books”¹¹ and other works that promote the progress of learning, by assuring authors “the exclusive Right to their . . . Writings.” Madison, in the FEDERALIST PAPERS, supported Congress’ power to legislate in the copyright field by emphasizing both the public benefit to be derived from authors’ private rights, and that the author’s exclusive right had already been recognized in England as “a right of common law.”¹² In eighteenth-century terms, “exclusive Right” meant “property,” for property meant the right to exclude.¹³ Similarly, the constitutional text’s employment of the word “securing” demonstrates that the property right was not one Congress was to *create*, but rather to reaffirm and to strengthen.

One might reply that early copyright legislation is inconsistent with a property right concept, because Congress recognized only the rights to “print, publish and vend,” and only with respect to certain subject matter: maps, charts, books.¹⁴ More importantly, Congress imposed a prerequisite of compliance with formalities: federal copyright covered published works, but publication without compliance forfeited the copyright.¹⁵ Congress recognized rights of public performance and of dramatization and translation relatively late,¹⁶ hence

⁹8 Anne c. 19, 1710.

¹⁰U.S. Const., art. I, § 8 cl. 8.

¹¹Thomas B. Macaulay, Speech before the House of Commons (Feb. 5, 1841), in T.B. MACAULAY, PROSE AND POETRY 733-34 (G.M. Young ed 1952).

¹²The Federalist No. 43 at 279 (Mod. Lib. Ed. 1941) (James Madison).

¹³See, e.g., William Blackstone, Commentaries 213 (George B. Chase, ed., New York, Banks and Brothers 1878) (observing that “it is agreed upon all hands, that occupancy gave also the original right to the permanent property in the *substance* of the earth itself: which excludes everybody else but the owner from the use of it”).

¹⁴Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831).

¹⁵See *id.*, sec. 3; *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

¹⁶Act of Aug 18, 1856, ch. 169, 11 Stat 138 (repealed 1870); Act March 3, 1891, ch. 565, 26 Stat. 1106 (repealed 1909).

the federal copyright law did not assure to authors control over the full economic value to be derived from their published works.

But it is important to recall that federal copyright law concerned only *published* works. As long as the work remained unpublished, the author's exclusive right was exclusive indeed, because the common law continued to govern. At first blush, it might appear that exclusive rights in unpublished works would be of little economic value. In fact, common law copyright protected not only the right to publish a work, meaning to make the first distribution to the public in copies, but also the right to public performance of unpublished works.¹⁷ In other words, publication, the all-important dividing line between common law copyright and its regime of exclusive control on the one hand, and federal copyright's limited protection on the other, did not mean the same thing as public *disclosure* or public exploitation of a work. So long as the work was not distributed to the general public in copies, the author or right holder was deemed to have retained common law copyright over the work,¹⁸ and to be entitled to enforce against unauthorized copying or publicly performing. Thus, a vast public might have seen an unpublished work performed, still, it remained unpublished, and therefore not subject to the limitations of federal copyright.

As a practical matter, this meant that copyright owners of works whose economic value derived from their performance, rather than their publication in copies, enjoyed a significant measure of legal control over their works. For works whose economic value also or primarily lay in distribution of copies, however, federal protection was quite slim, until supplemented by performing rights and derivative works rights. With the inclusion of those rights, as well as with the expansion of federal subject matter,¹⁹ copyright owners who complied with formalities could assert exclusive claims to perform publicly for profit,²⁰ to reproduce and distribute their works, or to make adaptations of their works. Copyright owners could, moreover, control access to a work, whether

¹⁷See, e.g., *Ferris v. Frohman*, 223 U.S. 424, 435-37 (1912); *Crowe v. Aiken*, Fed. Cas. No. 3,441 (N.D. Ill. 1870); *Tomkins v. Halleck*, 133 Mass. 32 (1882); 2 Story, *Equity Jur.* § 950 (1836).

¹⁸See, e.g., *American Tobacco Co. v. Werkmeister*, 207 U.S. 284 (1907); *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211 (11th Cir. 1999), reh'g denied, 207 F.3d 666 (11th Cir. Jan. 7, 2000).

¹⁹See, e.g., 2 Stat. 171 (1802) (prints); 4 Stat. 436 (1831) (musical compositions); 11 Stat. 138 (1856) (dramatic compositions); 13 Stat. 540 (1865) (photographs); 16 Stat. 212, Rev. Stat. § 4948-71 (1870) (paintings, drawings, sculpture, and models or designs for works of the fine arts).

²⁰See Act of Aug 18, 1856, ch. 169, 11 Stat 138 (repealed 1870) (granting right to dramatic compositions and the right to public performance thereof).

published or unpublished, that was made publicly available primarily through performances, and later, transmissions. Until the advent of mass market audio and video recording equipment, the public could not acquire access to a work without purchasing a copy, or borrowing one from a library or a friend, or viewing/listening to it through media licensed by the copyright owners.

In practice, then, copyright owners could exercise considerable control, even back in the “bargain” days. What about in the preaching? Nineteenth-century treatise writers stressed authors’ natural rights in their creations, rights that arose from the creation of the work, not from any bargain with the public.²¹ Admittedly, these were authors’ rights at common law, rights they traded in for the more limited protections of federal copyright (or forfeited) upon publication. But natural rights rhetoric pervaded even some discussions of statutory copyright.²² Moreover, the 1976 Copyright Act increasingly aligned federal copyright with natural property rights conceptions of common law copyright,²³ by vesting federal copyright upon creation, rather than upon publication together with compliance with formalities. This was a crucial shift: by making rights flow from the act of creation of the work rather than from public distribution of notice-bearing copies, the 1976 Act vaunts authorship over dissemination.

The 1976 Act contained other author-favorable provisions, which in their overall emphasis on creation and creators moved U.S. copyright toward the continental European author-centric approach to copyright.²⁴ U.S.

²¹See, e.g., EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 5 (1879) (arguing that ownership of property is created through production and observing “[this principle] cannot be applied to the produce of one kind of labor, and withheld from that of another. It matters not whether the labor be of the body or of the mind”); GEORGE TICKNOR CURTIS, TREATISE ON THE LAW OF COPYRIGHT 11 (1847) (“This right [to profit from the reproduction of copies] is to be derived, if at all, from the original, exclusive invention and possession by the author of the ideas themselves, and of the combination of characters which exhibits those ideas.”)

See also the “pre constitutional” copyright statutes that many of the 13 former Colonies enacted during the period of the Articles of Confederation, discussed in Francine Crawford, Pre-Constitutional Copyright Statutes, 23 Bull. Copyr. Soc. 11 (1975).

²²See, e.g., DRONE, *supra* note 21, at 13 (“To say that authors have rights of property in their literary productions, and that they are lost by publication, which is their only source of value, is absurd. It is destructive of the first principles, the essence, the very notion, of the right of property”).

²³See, e.g., L. Ray Patterson, Free Speech, Copyright, and Fair Use, 40 Vand. L. Rev. 1, 5-6 (1987).

²⁴See, e.g., 17 U.S.C. §§ 102(a) (subsistence of copyright); 201(a) (vesting of copyright in authors); 201(c) retention of copyright by authors of contributions to collective

adherence to the Berne Convention in 1989 further enhanced this *rapprochement*. Significantly, the Berne Convention announces a goal “to protect in as uniform a manner as possible, the rights of authors in their literary and artistic works”²⁵; although the Convention provides for a variety of exceptions to copyright,²⁶ it does not advertise itself as effecting a “bargain” or a “balance” of author and user interests,²⁷ nor, for that matter, does it appeal to incentive analysis to justify copyright.

This compressed review suggests that the metaphors undergirding copyright in the U.S. have long been more mixed than DIGITAL COPYRIGHT appears to suggest. Moreover, those partial to a more natural rights property-oriented concept of copyright are not only large, unsavory “content industries;” they also include advocates of the continental doctrine of authors’ “moral rights” to protect the integrity of their work and to receive recognition for it

works; 201(d) (divisibility of copyright); 203(b) (termination of transfers); 204(a) (transfer of exclusive rights requires signed writing); 304(c) (termination of transfers under extended renewal right). But see §§ 101, 201(b) (creator of a “work for hire” is not the statutory “author”; nonetheless, categories of commissioned works for hire are limited, and require writing signed by creator and hiring party). The Supreme Court has discerned an overall author-favorable cast to the 1976 Act. See, e.g., *New York Times Co. v. Tasini*, 121 S.Ct. 2381, 2389 (2001) (“The intent to enhance the author’s position vis-a-vis the patron is also evident in the 1976 Act’s work-for-hire provisions”). See also Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. Sch. L. Rev. 477, 490 (1977) (“taken as a whole, these changes [made by the 1976 Copyright Act] mark a break with a two-hundred-year-old tradition that has identified copyright more closely with the publisher than with the author”).

On similarities and differences between U.S. copyright and continental copyright (or “author’s right”) systems, see generally PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 8-10 (2001); ALAIN STROWEL, *DROIT D’AUTEUR ET COPYRIGHT: DIVERGENCES ET CONVERGENCES* (1993).

²⁵Berne Convention for the Protection of Literary and Artistic Works, as revised July 24, 1971, preamble, 102 Stat. 2853, 1161 U.N.T.S. 31.

²⁶See, e.g., *id.* arts. 9.2, 10, 10bis, 11bis.3, 13.1

²⁷Compare WIPO Copyright Treaty, CRNR/DC/94, Preamble ¶ 5: “Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research, and access to information, as reflected in the Berne Convention.” See also, Agreement on Trade Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C [TRIPS accord], art. 7, para. 1, Objectives, 33 I.L.M. 81 (1994): “The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge, and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

(albeit for different reasons).²⁸ Different justifications may be pressed into service to favor different goals, including to enhance copyright owner control, but conceiving of copyright as entitling the creator to control her work's disposition is not only the overreaching vision of user-unfriendly producers, it is also the expectation of authors who perceive their rights as flowing from the creative act.

That said, my criticism in this instance is ultimately one of degree rather than of kind: although all of these justifications have been advanced throughout our copyright history, different justifications receive greater emphasis at different times, and I will acknowledge that at the current time, the property right justification conveniently serves those who seek to strengthen copyright coverage, even (or especially?) at the expense of traditional limitations. Nonetheless, it is entirely possible to advance the other justifications to achieve the same goal. Indeed, copyright owners, in urging Congress to pass the DMCA's prohibitions on circumventing access controls, contended that without this reinforced protection, they would lack incentive to make their works available over the Internet.²⁹ Even social compact rhetoric might work. After all, the social compact formulation can be seen as a variant of the incentive argument: Professor Litman characterizes "bargain" copyright as "a way to permit authors to make enough money from the works they created in order to encourage them to create the works and make them available to the public."³⁰ And while "enough money" would not have meant untold riches, the quantum of "enough" encouragement may be rising steadily, not only because creators and/or producers may have become greedy, but also because the cost of

²⁸See, e.g., Edward J. Damich, "The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors," 23 Ga. L. Rev. 1, 47 (1988) (citing common law copyright as "recognition of the personal aspect of artistic creativity" and observing that "this protection was based on the natural property right than an author had by virtue of having created the work"); Neil Netanel, "Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law," 12 Cardozo Arts & Ent. L.J. 1, 16 (observing the rise in Continental legal history of a moral rights regime co-existing within a natural law concept of copyright and attributing this in part to a feeling that "the property analogy did not adequately express the growing emphasis on individual personality and the personal connection between authors and their creations").

²⁹See, e.g., S. Rep. No. 105-190, at 8 (1998) ("Due to the ease with which digital works can be copied...copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy").

³⁰DIGITAL COPYRIGHT at 78.

producing and publicizing works is ever-higher, particularly if successful works cross-subsidize more risky ventures.³¹

Ultimately, actions speak louder than words, so it may be instructive at this point to turn from metaphors to “The Copyright Wars” to consider what Professor Litman perceives copyright owners to have been doing with their rights, whatever the justifications invoked for them.

“The Copyright Wars”: Copyright Owners v. New Technology?

The story Professor Litman recounts in this Chapter (and the next, “Copyright Law in the Digital Milenium”) is a sorry one indeed. It is a tale of misplaced fears and missed opportunities, one the cause, the other the result of copyright owner overreaching. According to this account, from portable MP3 players through Napster and beyond, copyright owners consistently endeavored to suppress innovative and desirable ways of using the Internet to enhance the public’s enjoyment of copyrighted works. At the same time, copyright owners declined to devise owner-safe but user-friendly ways to exploit the emerging online market. While I disagree with Professor Litman’s suggestion that most of the innovators’ activities were in good faith and non infringing,³² her fundamental point is well-taken. The moral here is not quite “if you can’t beat ‘em, join ‘em,” but rather, “stop trying to beat ‘em; we’ll all be better off if you joined ‘em,” or even “if you copyright owners won’t join ‘em, you copyright owners should be beaten.”

³¹Schurz Communications Inc. v. Federal Communications Commission, 982 F.2d 1043, 1046 (7th Cir. 1992) (noting that “[m]ost television entertainment programs are losers” and that “losses are offset by the occasional hit that makes it into syndication after completing a long first run”); Donal E. Biederman, et al., *Law and Business of the Entertainment Industries*, at 585 (Praeger Publishers 2001) (observing that in the music business, “[a]s in other segments of the entertainment industry, the record company relies on one hit album...to pay for a raft of unsuccessful albums”); Judy Stoffman, “Rebel Takes on Big Booksellers,” *The Toronto Star*, November 14, 2000 (explaining that “risky books in the form of poetry or cultural studies could be cross-subsidized by the profits from more commercial titles”); Kay McFadden, “Bad TV! Bad TV! Not Even Cute Dogs Get the Ratings Anymore,” *Seattle Times*, November 30, 1998 (describing how cross-subsidization by a parent company allows Fox Television to purchase television airing rights for theatrical films).

³²For example, I find it difficult to credit any of Napster’s defenses, see Jane Ginsburg, *Copyright Use and Excuse on the Internet*, 24 *Colum.-VLA J. L. & the Arts* 1, 29-42 (2000). I note, however, that in a subsequent chapter, Professor Litman indicates that Napster’s activities might not be shielded by her ideal copyright law, either. See *DIGITAL COPYRIGHT* at 181.

In fact, however, in many of the cases that these copyright/technology clashes generated, copyright owners prevailed.³³ The leading exception concerns the “Diamond Rio” portable MP3 player, which the Ninth Circuit held was not a “digital audio recording device” under the terms of the 1992 Audio Home Recording Act, and therefore was not subject to an injunction or payment of a levy fee.³⁴ I believe the principal difference between “Rio” on the one hand and *Napster* and other suits in which the copyright owners prevailed on the other was the courts’ perception that, in the case of the “Rio,” copyright owners were attempting to eliminate a new technology without offering their own equivalent alternative, while in the other cases copyright owners were in fact licensing (or endeavoring to license) the uses with which the defendants were competing. In essence, when copyright owners attempt to beat down a new mode of enjoyment of copyrighted works, they lose, but when they seek to exploit the new market that new technology has opened, courts enforce the copyright law to preserve the copyright owners’ exclusive rights against innovative “upstarts.”³⁵

In other words, the outcomes in many of the Internet copyright cases meet the morals suggested above. Prof. Litman and I might nonetheless disagree over whether copyright owners really were trying to develop new modes of bringing their works to the public, or simply were trying to shore up old business plans while fending off outside innovators. We might also disagree over whether the copyright law in fact entitles copyright owners to block some of the new business schemes the Internet fostered. For example, Professor Litman points out that in several instances, the Internet entrepreneurs were essentially helping consumers do what the law entitled them to do themselves.³⁶

³³See, e.g., *UMG Recordings, Inc. v. MP3.com*, 92 F. Supp.2d 349 (S.D.N.Y. 2000); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) ; *RealNetworks, Inc. v. Streambox, Inc.*, No. C99-2070P, 2000 U.S. Dist. LEXIS 1889, (W.D. Wash. Jan. 18, 2000); *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp.2d 211 (S.D.N.Y. 2000) (preliminary injunction ordered January 29, 2000 against websites posting “De-CSS” software to neutralize DVD access-controls), No. 00-0277, 2000 U.S. Dist. LEXIS 11696 (S.D.N.Y. Aug. 17, 2000) (permanent injunction awarded).

³⁴*Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F. 3d 1072 (9th Cir. 1999) (construing 17 U.S.C. §§ 1001 et seq.).

³⁵I develop this thesis more fully in *Copyright and Control over New Technologies of Dissemination*, forthcoming, 101 Colum. L. Rev.(Nov. 2001). I also note that several of Prof. Litman’s articles, some of which were adapted into chapters of DIGITAL COPYRIGHT, largely inspired (or provoked) me to write *Copyright and Control*.

³⁶See, e.g., DIGITAL COPYRIGHT at 158 (My.MP3.com established a database of recordings to stream back to customers who already possessed the recordings; the customers were entitled to make their own copies of their recordings); 159 (Napster relied on subscribers’ entitlement to make personal noncommercial copies of recordings); 162

But there are two problems with this line of argument. First, it may be fair use for users to engage in certain kinds of noncommercial personal copying; it does not necessarily follow that it is fair use for a commercial third party to go into the *business* of facilitating end-users' copyright exempt activities, if that business entails making copies of the work.³⁷

Second, to the extent that the argument relies on what uses were exempt in the analog world to justify "an online analogue to an offline resource,"³⁸ it may be fallacious. Professor Litman decries throughout DIGITAL COPYRIGHT the endeavors of copyright owners to reduce or eliminate free use zones.³⁹ But the mere existence of a free use in the analog world should not suffice to warrant its transposition to the digital world. One should inquire *why* the use was exempt. (I acknowledge that this inquiry proceeds from a default assumption that most uses that entail copying or public performance fall within copyright control; under the opposite default, that may have characterized "bargain" copyright, what required justification was not the exemption but the coverage.) In some cases, the user was exercising dominion over a physical object. Copyright owners' control over an individual copy was "exhausted" with its sale.⁴⁰ Users therefore enjoyed chattel rights in exhaustion copies, at least up to the point at which the exploitation of those copies competed with copyright owner exercise of the reproduction and distribution rights.⁴¹ In the digital context, there is no physical original; every communication of the "copy"

(RecordTV relied on customer's entitlement to time shift television programming).

³⁷See, e.g., *Princeton Univ. Press v. Michigan Document Servs. Inc.*, 99 F.3d 1381 (6th Cir. 1996); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991) (educational institutions and professors may enjoy a fair use privilege to photocopy from protected works for purposes of teaching, but both courts held that it is not fair use for an off-campus, for profit, photocopy shop to prepare course packs at the professors' behest, without the copyright owner's authorization).

³⁸DIGITAL COPYRIGHT at 163.

³⁹See, e.g., *id.* at 27-32, 80-86, 95-96, 115, 131-33, 140-45, 167.

⁴⁰See 17 U.S.C. § 109(a). The U.S. rule is often called the "first sale doctrine"; the term "exhaustion" is more frequently used in Europe.

⁴¹See *id.* § 109(b) (limiting the first sale doctrine to accord a rental right to copyright owners of sound recordings and computer programs). Congress breached the chattel owner's first sale immunity because it was convinced of a high correspondence between rental and uncompensated private copying. See S. Rep. No. 98-162, at 2 (1983) ("The Committee has no doubt that the purpose and result of record rentals is to enable and encourage customers to tape their rented albums at home."). See also TRIPs art. 11 (requiring member states to extend rights to prohibit rentals of computer software and cinematographic works, but exempting the latter from "unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction . . .").

entails making more copies, and in any event, the risk of competition with the exercise of core exclusive rights of copyright may be substantially increased.⁴² Similarly, digital media and monitoring may substantially undermine the bases of a free zone grounded in the excessive transaction costs of enforcement.⁴³

These criticisms may be doctrinally sound (at least under my view of copyright doctrine), but they may not promote good results in the broader scheme. A copyright specialist may understand why the user is not entitled to equally autonomous enjoyment of digital as opposed to hard copies; the user may neither grasp nor believe these distinctions, as Professor Litman stresses in Chapter 8 (“Just Say Yes to Licensing!”).⁴⁴ The copyright system cannot infinitely absorb cognitive dissonance, at least not if users can themselves exercise the no longer so “exclusive rights” of reproduction, adaptation, public distribution, public performance and public display, and on a very grand scale. This is not necessarily a recipe for anarchy, but it does suggest a pressing need for a copyright law that users will respect, either because they will have no choice, as most users will be technologically and legally disabled from impeding the exclusivity of copyright, or because users will agree with the law’s goals and will therefore adhere to its prescriptions. The DMCA largely takes the former approach; Professor Litman counsels the latter.

A Copyright Law We All Can Learn to Love?

This brings me to Professor Litman’s prescriptions, set out in Chapter 12, “Revising Copyright Law for the Information Age.” She makes two

⁴²See, e.g., Copyright Office “Section 104 Report” available at <<http://www.loc.gov/copyright/reports/studies/dmca/sec-104-report-vol-1.pdf>> at 99-101 (discussing economic impact of proposed “digital first sale doctrine”).

I take the occasion of this reference to the Copyright Office to take issue with the characterization of the Copyright Office as “moving firmly in the content industry’s pocket” DIGITAL COPYRIGHT at 74. This is unfair and inaccurate; the Office has, I believe, endeavored to maintain a principled course, often under trying circumstances, between the interests of creators, producers, educators, exploiters, and other members of the wider public. See, e.g., *Public Performance of Sound Recordings: Definition of a Service: Final Rule*, 65 Fed. Reg. 77292 (Dec. 11, 2000) (ruling that FCC licensed broadcasters who simultaneously webcast were subject to same compulsory license obligations as other webcasters); *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Final Rule*, 65 Fed. Reg. 64,555 (Oct. 27, 2000) (identification of “classes of works” to exempt from § 1201(a)(1) prohibition on circumvention of access controls, pursuant to §1201(a)(1)(C&D)); *Report on Copyright and Digital Distance Education* (May 1999), available at <http://www.loc.gov/copyright/docs/de_rprt.pdf>

⁴³See, e.g., Robert Merges, *The End of Friction? Property Rights and Contract in the “Newtonian” World of On-line Commerce*, 12 Berkeley Tech. L. J. 115 (1997).

⁴⁴See e.g., DIGITAL COPYRIGHT at 112-17,

recommendations. First, and in admittedly utopian fashion, she suggests “a temporary period during which the Internet could be a copyright-free zone.”⁴⁵ Professor Litman’s review of copyright history persuades her that new technologies that exploit copyrighted works do not get developed or disseminated unless copyright owners are cleared away from obstructing the path of progress.⁴⁶ While I do not agree that the history warrants tarring copyright owners as such troglodytes,⁴⁷ I acknowledge that some spectacular infringements may in fact initiate new markets more rapidly and more broadly than they would be were they left solely to copyright owner development. I would put *Napster* in that category, for example: Napster was unambiguously a contributory infringer, but, by enabling its millions of subscribers to exploit the capacity of digital media to disaggregate, duplicate, and communicate individual recorded songs, Napster undoubtedly hastened the advent of licensed personalized downloads of popular musical offerings.⁴⁸

Professor Litman recognizes that her first prescription is unlikely to be followed. She devotes more detail to the second, that copyright be

recast[] . . . as an exclusive right of commercial exploitation. Making money (or trying to) from someone else’s work without permission would be infringement, as would large-scale interference with copyright holders’ opportunities to do so.⁴⁹

This recommendation requires significant, and probably salutary, reconceptualization of copyright law. As Professor Litman points out, our copyright law has generally made the copy the “compensable unit” that triggered the author’s right to be paid or to prevent.⁵⁰ But linking exclusive rights to *copies* becomes problematic in a digital world in which every use of the work, including by individuals for private non commercial purposes, entails

⁴⁵Id. at 174.

⁴⁶Id. at 172-73.

⁴⁷See *Copyright and Control*, supra note xx.

⁴⁸See, e.g., Matt Richtel, *Songwriters and Publishers Reach a Deal with Napster*, N.Y. TIMES, Sept. 25, 2001, at C10 (explaining that the the National Music Publishers Association remained in negotiation with the five major record companies regarding plans to start an online subscription service, but hoped the Napster settlement would “become a template in its negotiations”).

⁴⁹DIGITAL COPYRIGHT at 180.

⁵⁰Id at 175, 180.

making at least temporary copies.⁵¹ Actually, the situation is even more complicated, because copies are not the only compensable event in our copyright law, public performances and displays are too. So long as reproductions and public performances entailed different acts and different kinds of exploitations, it made sense to recognize different kinds of exclusive rights, and different owners of these rights. With digital communications, however, the same act can be considered a reproduction and distribution of copies on the one hand, *and* a public performance or display of the work on the other. For example, an on demand audio- or videostream of a work falls squarely within the definition of a “public performance or display,”⁵² but, because temporary copies are being made as part of the communication, the rights to reproduce and distribute the work in copies are also triggered, even if the stream does not allow for making a retention copy.⁵³ If different entities own the reproduction and public performance rights, the online entrepreneur may need to acquire licenses from both, even though, from the user’s perspective, the communication is *experienced* as a performance, rather than as the delivery of a copy. This “double dipping” would increase the cost of the online activity, potentially making it less attractive to entrepreneurs and to users. One way out of the problem would be to characterize the act as being *really* a public performance, and only incidentally, automatically and imperceptibly a reproduction and distribution of copies, and then to exempt the latter.⁵⁴

⁵¹European copyright scholars have also expounded on this problem, see, e.g. Jaap Spoor, *The Copyright Approach to Copying on the Internet: (Over)Stretching the Reproduction Right?*, in P. BERNT HUGENHOLTZ, ED., *THE FUTURE OF COPYRIGHT IN A DIGITAL ENVIRONMENT* 67 (1996).

⁵²See 17 U.S.C. §§ 101 (definition); 106(4)(5)(6) (exclusive rights).

⁵³See *id.* §§ 101 (definitions of “copies” and “fixed”); 106(1)(3) (exclusive rights). Courts have recognized that making copies available for downloading effects a “distribution” of copies, although in those cases the copies were for retention, not for transient communication. See, e.g., *Playboy Enters., Inc. v. Webworld, Inc.*, 991 F. Supp. 453 (N.D. Tex. 1997). See also *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503 (N.D. Ohio 1997); cf. *Religious Tech. Ctr. v. Netcom*, 907 F. Supp. 1361 (N.D. Cal. 1995) (volatile copies merely transited by service provider do not give rise to liability). Whether copies residing in the recipient’s computer for too long to be considered merely transient, but not capable of being retained also are copies that trigger the reproduction right depends on the RAM copying doctrine, under which temporary digital copies are “copies”. This doctrine has been strongly criticized, including by Prof. Litman, but I believe it is implicit in the text of the U.S. Copyright Act (as well as in European Union law), and has been applied by U.S. courts. See generally, Copyright Office “§ 104 Report,” *supra* note xx, at 106-29 (discussing text of U.S. Copyright Act, E.U. Directives, and U.S. caselaw).

⁵⁴This is the approach advocated by the Copyright Office, see “§ 104 Report,” *supra*, note xx, at 142-46. The Report also suggests that it might be appropriate to introduce a “symmetrical” exemption from the performance right when the digital communication is a

As long as we can tell when the economically significant act is a reproduction as opposed to a public performance (or vice versa), this kind of analysis and result make perfect sense. But will we always be able to tell when the act is mostly or more like one or the other? Imagine, for example, an online subscription service that will enable customers to program their music-listening day. From 12:00 to 12:03, the subscriber will hear “I Wanna Hold Your Hand;” from 12:03 to 12:07, “Don’t You Want Somebody to Love?;” from 12:07 to 1:00, a further selection of nostalgia, and so on. The subscriber is not receiving these songs in real time, however; the service has sent her hard drive the contents at the lower-traffic time of 4:00 AM, but timed them to “play” at the hours selected. Is this a reproduction and distribution or a public performance? Does it matter if, obsessed with Jefferson Airplane, the subscriber has programmed “White Rabbit” to play twice an hour all week, so that the copy the service sends stays in the subscriber’s hard drive continuously for a week? A month? But the subscriber hears it only at the pre-programmed times. Is this arrangement’s economic significance as a public performance? Or as a (temporary) copy? As both, because the subscriber enjoys the “public performance” experience of hearing the work on demand, but the “copy” convenience of having it temporarily on her hard drive?

Given the confluence of potentially conflicting exclusive rights, Professor Litman’s proposal to discard our current categories of rights and adopt an exclusive right of commercial exploitation has considerable appeal. Her articulation of the right’s scope also seems reasonable, as the “large scale interference” refinement would cover, for example, “routine free use of educational materials by educational institutions,”⁵⁵ and even Napster, given the scale of its facilitation of individual copying.⁵⁶ I suppose adaptations should also come within the scope of the commercial exploitation right, at least if “making a profit from someone else’s work” includes making a profit from a work *based on* someone else’s work. If derivative works would be covered, then an unauthorized adaptation without a commercial purpose would also run afoul of the standard if it significantly compromises the copyright owner’s market for new versions of its work. That standard may lead to considerable

download. The symmetrical exemption would be justified because separate administration and double dipping remain a problem when the end user is seeking to acquire a copy rather than a real time performance, as the delivery of the copy could be considered a public performance as well as a digital distribution of a copy. It therefore would follow that the reproduction right is the only one that should be paid for. *Id.* at 146-48.

For a general discussion of the “overlapping copyrights” problem, see Mark Lemley, *Dealing With Overlapping Copyrights on the Internet* 22 U. Dayton L. Rev. 547 (1997).

⁵⁵DIGITAL COPYRIGHT at 180.

⁵⁶*Id.* at 181.

uncertainty, though perhaps not notably more than under the fair use defense that a non commercial user would today invoke. But it would have been desirable to have had further exploration of how far the “from someone else’s work” concept reaches.

Professor Litman does address, and offers an innovative solution to, a related problem, alterations to works that violate their integrity. The integrity right may overlap with the adaptation right, but it secures interests that are not purely economic. In its original continental guise, moreover, the beneficiary of the right is the work’s creator, regardless of whether the creator remains the copyright owner.⁵⁷ In a digital environment, non creator copyright owners may also seek to ensure the authenticity of the documents they purvey. Professor Litman recognizes both that digital media permit works to be “altered, undetectably, and there is no way for an author to insure that the work being distributed over her name is the version she wrote,” and that the proposed right of commercial exploitation will not redress non commercial distortions of authors’ work.⁵⁸ Nonetheless, she does not conclude that the increased risk of alteration justifies enhanced control over digital documents; Professor Litman fears that the sympathetic goal of protecting integrity rights will prove to be the tail that wags the unattractive dog objective of limiting public access to works of authorship. The recommendation that would reconcile authenticity with access: “any adaptation, licensed or not, should be accompanied by a truthful disclaimer and a citation (or hypertext link) to an unaltered and readily accessible copy of the original.”⁵⁹

Will this work? Interestingly, the comparison shopping approach has been advanced before – in early 20th-century France, by the publisher of mass market reproductions of Millet’s painting *L’Angelus*. The reproductions altered the light, and added haberdashery to the female figures; the publisher of the distorted images contended – unsuccessfully – that the public could compare the published version against the original in the Louvre.⁶⁰ The transaction costs of consulting the original would discourage any meaningful comparison. But in the digital context, a hyperlink would remove that friction. Digital media might even enhance the comparison, by instantly identifying disparities between

⁵⁷See, e.g., Berne Convention, art. 6bis.

⁵⁸DIGITAL COPYRIGHT, at 184.

⁵⁹Id at 185.

⁶⁰ See John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L. J. 1023, 1029-30 and n. 19 (1976), citing Judgment of 20 May 1911 (Millet) Trib. Civ. Seine, 1911 Amm. I. 271. See also *Gilliam v. ABC*, 538 F.2d 14 at 25, n. 13 (2d Cir. 1976) (disclosure at the beginning of a television program that it has been cut without permission does nothing to alert those who tune in late).

the two versions. Of course, this is not a true integrity right, it is a full disclosure obligation. An author could not prohibit the dissemination of even a grossly distorted version so long as proper disclosure were made.

Professor Litman would also legislate affirmative user rights. These would include “a right to read,” which means “a right to engage in copying or other uses incidental to a licensed or legally privileged use.”⁶¹ The public would also enjoy a right to hyperlink, on the ground that this is simply “referring to an infringing work,” an activity that has never itself been infringement.⁶² Finally, Professor Litman would reinforce the idea/expression dichotomy and the public domain by according “a limited privilege to circumvent any technological access controls” for the purpose of “gain[ing] access to, extract, use, and reuse the ideas, facts, information and other public domain material embodied in protected works.”⁶³ She would also accord a privilege “to reproduce, adapt, transmit, perform or display as much of the protected expression as is required in order to gain access to the unprotected elements.”⁶⁴

What would these proposals mean in practice? Despite DIGITAL COPYRIGHT’s hostility to access controls,⁶⁵ the first user right is not inconsistent with an access-controlled pay-per-use scheme. The “licensed use” would be, for example, the single viewing of the video-streamed motion picture. RAM copies incidental to that viewing would be permitted (indeed, should be considered to be impliedly licensed), but the proposed user right would not here permit unlicensed retention copies. Would the same analysis apply to an access-controlled free-standing copy, such as a limited-viewing DVD that allows only 3 full plays? The “licensed use” here stops after the third viewing; further copies not incidental to those viewings should not be permitted. But this is beginning to sound like a slippery slope. Before concluding that the “licensed use” concept ends up giving copyright owners everything their greedy hearts desire, it is important to recall the “legally privileged use” standard that supplements it. Not all private acts are “legally privileged,” however. There should not be a “legal privilege” to buy three plays and get an additional unlimited number free. On the contrary, the extra viewings should be deemed infringements. Under the § 106 rights that Professor Litman would replace, the

⁶¹DIGITAL COPYRIGHT, at 183.

⁶²Id.

⁶³Id. at 184.

⁶⁴Id.

⁶⁵See, e.g., id. at 83, 167, 170, 176 (observing throughout that persistent access controls subject the public’s access to unprotected elements such as facts and ideas to the whim and unfettered discretion of copyright holders in a manner unprecedented in American legal history).

private viewing of the film engages no exclusive rights, but the RAM copies that enable the viewing do. Under the “exclusive right of commercial exploitation,” one could argue that getting something for nothing when the something was offered for sale is a kind of commercial exploitation.⁶⁶ One could also contend that deeming the extra copies privileged would constitute “large scale interference with the copyright holder’s opportunities” to profit from the work.

But what about restrictions not grounded in copyright-implicating acts? The most notorious example is region coding, that is, DVDs whose licensed viewing is limited by geography (actually, by compatibility with playback machines whose distribution is geographically segmented)? Is there a “legal privilege” to access a work that is fixed in a copy for which you paid? One might respond that the user paid to view the work in some places, but not in others, and that this is no different from the user who paid to view the work a certain number of times: If one can prohibit the user from viewing the work at all, surely one can impose the lesser prohibition of limiting where she can view it. But, at least under the § 106 rights regime, this argument clashes with the statute’s implementation of the first sale doctrine. The statute not only recognizes the chattel owner’s rights as to her copy in general, but also specifically overrides the copyright owner’s importation rights with respect to importation of a copy for private use.⁶⁷ In other words, one may discern in the 1976 Act an affirmative user right (or “legal privilege”) not subject to geographic conditioning. Region coding is arguably an improper end-run around this right.

Consider Professor Litman’s second proposed user right, to hyperlink, even to sites hosting infringing works. Here, the analogy to citations and other ways of referring to infringing works strikes me as too facile. RAM copying aside, a hyperlink makes subsequent copying far easier than do other forms of reference, given the relative friction of following up the analog citation. Nonetheless, if hyperlinking violates copyright, it should only be derivatively, as a contributory infringement, in which the linker’s intent to promote infringement, and the non infringing uses of the hyperlink, for example, to promote discussion of the alleged infringement, would be taken into account.

⁶⁶See, e.g., *Harper & Row Inc. v. Nation Ents.*, 471 U.S. 539, 562 (1985). (“The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (citing *Sega Enters. Ltd. v. MAPHIA*, 857 F.Supp. 679, 687 (N.D.Cal. 1994)) (use is commercial when users download video games “to avoid having to buy video game cartridges”).

⁶⁷17 U.S.C. § 602(a)(2).

Finally, there is the proposed user right to circumvent access controls in order to give effect to the idea/expression dichotomy and to keep the public domain public. I am assuming it is appropriate to interpolate the precondition that the user has obtained lawful initial access to the work, for example by an authorized online viewing, or by acquiring lawful possession (by purchase or loan, including free borrowing) of the copy in which the access-protected work is fixed.⁶⁸ But this interpolation begs the question whether it is appropriate to circumvent *subsequent* access controls. Let us return to the example of the 3-play DVD, and let us assume that the motion picture incorporates public domain historical film footage. I find it problematic to suggest that the user should be entitled to an unpaid fourth play on the ground that the user wants to re-view the historical footage, or on the ground that the user wants to review the work in order to identify its plot ideas. The proposition that users should be permitted to circumvent access controls under these circumstances seems to me share the fallacy earlier evoked of treating digital deliveries like exhaustion copies. The whole point of digital delivery, whether online, or in a limited-play freestanding package like our hypothetical DVD, is to permit price discrimination of a kind that consumers should find attractive. If the revised copyright law insists on treating these deliveries like exhaustion copies, there will be no point in offering works at differently-priced levels of enjoyment.

But if the proposition were changed to advocate circumvention of anti-copy controls on a lawfully-accessed work for the purpose of extracting non protected facts and other public domain elements, then the proposition becomes much more appealing, as least as to the *act* of circumventing for this purpose, including offering *services* limited to this purpose.⁶⁹ The problem, which Professor Litman and other commentators have noted, is that most users will be unable to effect this circumvention themselves; they will need services or devices to do it, and the DMCA bars the dissemination of any device whose purpose or use is not substantially confined to permitting non infringing uses. If machines cannot tell the difference between circumventing to copy information, and circumvention to copy protected works, then the DMCA

⁶⁸See DIGITAL COPYRIGHT at 144 (“If ‘access’ is understood to refer only to *initial* access, the statute’s distinction between circumvention of access-protection technology, and circumvention of copy-protection technology (almost) makes sense.”)

⁶⁹Moreover, I believe current copyright law would permit these activities, see 17 U.S.C. § 1201(b); Jane Ginsburg, *Copyright Legislation for the Digital Millennium*, 23 Colum.-VLA J. L. & the Arts 137,152-53 (1999).

effectively bans all copy-control circumvention devices⁷⁰ (albeit not services, except to the extent that the services rely on the devices).

One way out of this impasse would borrow from Professor Litman's approach to integrity rights: copyright owners who distribute works in access- or copy-protected form should also make them available in non protected formats, and should provide "a citation (or hypertext link) to [information about how and where to consult a] . . . readily accessible [unprotected] copy of the [work]."⁷¹

Ultimately, the circumvention problem comes down to identifying tails and dogs. For Professor Litman, the DMCA permits copyright owners to exercise unwarranted and unprecedented control over users' activities, in the name of securing protected works against infringement. Thus the copyright owner tail is wagging the public's dog of lawful uses of protected and unprotected works. For me, unrestricted distribution of circumvention devices would promote massive infringement in the name of facilitating fair use, even when lawful uses can be achieved by means other than circumvention. While I have elsewhere discussed aspects of the DMCA that I find quite troubling,⁷² I am nonetheless concerned that Professor Litman's prescription could mean that enhancing the convenience of lawful uses would be wagging the dogs not only of effective protection of authors' rights, but of new ways of offering the works to the (paying) public.

Finally, it is necessary to ask the question whether the public would be more copyright-compliant if the law made more sense. Under the current copyright law, I think Professor Litman could fairly be called a "copyright pessimist" or copyright skeptic, while I would be deemed a "copyright optimist."⁷³ Were some of Professor Litman's proposals enacted, I think the roles might be reversed. That is because I fear that I am rather skeptical of the optimism she expresses that the public, having a good intuitive sense of what

⁷⁰See, e.g., David Nimmer, A Riff on Fair Use in the Digital Millennium Copyright Act, 148 U. Pa. L. Rev. 673, 733 (2000) (observing that the interplay between exceptions and restrictions in Section 1201 "produces a most curious state of affairs" which "safeguards various rights to users but simultaneously bars third parties from assisting them to take advantage of those safeguarded rights").

⁷¹DIGITAL COPYRIGHT at 185.

⁷²See *Copyright Legislation for the Digital Millennium*, *supra* note 69, at 140-55.

⁷³I borrow the "copyright pessimist" and "copyright optimist" terminology from PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 15-20 (1994).

a fair and reasonable copyright law should be,⁷⁴ would adhere to one. I have a fifteen year-old son; if anyone should be sensitive to the basic aspirations of copyright (if not the content of its excruciating statutory minutia), he should be. But he also has on his hard drive a large collection of unpaid-for songs downloaded from Napster. Does he know that this is “wrong”? Of course. (He even put on an angelic smile one day to inquire, “Mom, you wouldn’t want me to be using Napster, would you?” Then his 11 year-old sister denounced him.) But he also likes “free music,” or, more accurately, music that he can get for free, even if its creators and performers had sought to be paid. The point: In the post-Napster world, it may require an optimistic copyright advocate indeed to trust that users’ consciences are quickened, or their acts forestalled, by a copyright law even as simple and sensible as the direction in the Decalogue: “Thou shalt not steal.”⁷⁵

That does not mean a “copyright police”-state is required, either. Somewhere in between the restrictive excesses of the DMCA and some of the more forgiving fancies of DIGITAL COPYRIGHT lies the right path. Professor Litman’s book has the great merit of provoking serious thought about how that path should be drawn, and of offering stimulating prescriptions to point the way.

⁷⁴DIGITAL COPYRIGHT at 180 (stating that the public generally believes copyright law “incorporates a distinction between commercial and noncommercial behavior” and arguing in favor of formalizing this belief by “recasting copyright as an exclusive right of commercial exploitation”).

⁷⁵Exodus 20:15.