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The Past and Future of Copyright Politics

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Bill Herman, _The Fight Over Digital Rights: The Politics of Copyright and Technology_ (2013).

In _The Fight Over Digital Rights_, Bill Herman, a professor in the Department of Film and Media Studies at Hunter College, explores the changing landscape of political debate over digital rights management between 1980 and 2012. This is a book about copyright, but it is also a book about political science and legislation.

You don't need to know anything about copyright to read this book and learn new things about how the process by which legislation is formed and amended dramatically affects substantive and procedural rights. Herman's book is about the rights and opportunities that copyright laws provide. And it traces the shape of those rights and opportunities as the legislative process has been affected by the rise of Internet activism since 1980.

One of the most refreshing aspects of Herman's book is that despite its subject being copyright, its framework is not economic or social welfare theories that claim to unify or explain copyright protection. Herman's book is about political history – the real nitty-gritty of coalitions, debates and compromises of copyright reform. Indeed, it is both a history and a road map of the copyright sausage factory. As such, it is a welcome departure from theories and reform proposals for what many consider to be a broken copyright system.

Herman gets real with this book. He demonstrates how a way forward to copyright reform that will enable creative practices of both users and authors (the dichotomy being a false one, in any case) requires both a comprehensive look at the path that produced the current Copyright Act and an understanding of how the digital tools the Copyright Act regulates are harnessed in a participatory democracy.

Herman begins with one of the first skirmishes between copyright and digital access that took place in the 1980s over the "digital audio tape" (or DAT) in the context of the passage of the Audio Home Recording Act (AHRA). He ends the book with a play-by-play analysis of the demise of SOPA ("Stop Online Piracy Act") and PIPA ("Protect IP Act") in early 2012. If the amount of acronyms in this paragraph isn't already a clue, this book is candy for the gloriously geeky in the ways of technology and politics. It is also uplifting for those who worry that the legislative factory makes only one kind of sausage.

Herman employs both quantitative and qualitative analysis of political activity in the shape of media coverage, legislative filings and on-line communication to demonstrate the trend in copyright reform that reflects the growing influence of the Internet on advocacy and policy choices. Herman concludes that the demise of SOPA and PIPA is "the best possible evidence of the profound shift in the politics of copyright – an exclamation point on the internet-fueled [strong fair use] coalition" (203) brought about by "a potent group of political actors" and their "political messages communicated through new media." (206)

Herman's conclusion is that the "strong fair use" coalition (what he calls the SFU – as if we need more acronyms!) has become an effective political force in the copyright legislative reform. This is in large part because of the Internet (the largest and most accessible copy-machine in the world) that the Copyright Act tried, but has largely failed, to regulate.

In telling the story of the turning tides of legislative power over copyright law reform, Herman's debt to Jessica Litman's _Digital Copyright_ is profound. ((Jessica Litman, **Digital Copyright** (2001).)) Litman was right in 2001 that

copyright legislative reform has been the work of only the strong-copyright advocates (the big six movie studios (the "MPAA"), the music recording industry (the "RIAA"), and the text publishing industry (the Author's Guild)). But Litman was writing only about the past – the 1978 Copyright Act and the 1998 Digital Millennium Copyright Act ("DMCA"). And her argument, although convincing and trustworthy, was also a battle cry for change.

Litman explained (and predicted) how captured legislative process concerning copyright results in benefits for an elite group of copyright holders and harms the everyday audience of copyright users and creators. (In today's parlance, we might call the beneficiaries of these legislative reforms "the 1%"). Litman forewarned that if the past legislative process were predictive of the future, regulation of digital copyright (the dominant form of expression going forward) would suffocate the constitutional mandate for "progress" that requires distribution and access.

Herman's book is less of a battle cry. Indeed, it is exhaustively descriptive of the legislative debates and media coverage of copyright reform over the past thirty years. Through the thicket of details about hearings, witnesses, publication venues, coalitions and media debates, Herman tells a normative story about the value of participatory democracy and his belief in its inevitability in the digital age. And that is because he believes the SFU coalition has begun to win some debates. (I question whether sinking SOPA and PIPA is a legislative "win" without the success of newly promulgated laws that instantiate the reasons those proposals were bad, but I will accept that their defeat is a step in the right direction for the SFU coalition).

Reading *The Fight Over Digital Rights*, I imagined Herman (metaphorically) taking Jessica Litman's hand and following her back in time, retracing the legislative hearings of the AHRA in the late 1980s, the DMCA in the late 1990s, and then doing a deep dive into the media coverage surrounding both as well as substantial online communication concerning the latter. He does so not to make an argument about the normative benefits of strong-copyright or strong-fair-use (although as I said, it is hard not to read into his book a preference for the latter). His comprehensive discourse analysis, historical case studies, and quantitative measurements of media coverage are primarily about the *value of evidence* – evidence of the legislative capture Litman describes. And the value of his evidence reads like an antidote to Litman's warning cry.

Herman shows how fights over copyright are between people, not only corporations, and this matters for how we mobilize on one side or the other and how successful our mobilization will be. And, because the Internet is the ultimate crowd-sourcing tool (in addition to a copy-and-distribution machine), the Internet has and will continue to affect politics and legislative change in the voice of the people using it.

Herman chronicles how the historic insularity of copyright reform has given way to public and political forums on the Internet. In the past, groups with greatest funding and political access have won policy outcomes of their choice by maintaining insularity and elite access; groups with less capital tend to take their case to the street, which lacked the continuity and strength of digital communication as it depended on everyday dedication of time and bodies. However, Herman says, the "internet reshapes policy advocacy … [and] mitigate[s] the problem of collective action." (13) Because Internet communication is cheap, facilitates the aggregation and identification of communities of interest, and because it is durable and repetitious, it can even out the fight for access and rupture the insular spaces where legislative reform occurs. Herman shows how regarding the debate over SOPA and PIPA, by 2012 when the gears of the Internet were fully harnessed, "underfunded, diffuse group of citizens and nongovernmental organizations scored a victory against … concentrated well-funded industry group[s], highlighting the potential for online communication to shape policy outcomes." (14)

Herman is not subtle about what he thinks the internet means for copyright reform and political processes generally. It is "nothing less than a fundamental reordering of the copyright policy subsystem." (19)

As a dense political history, there is a lot that is new in this book, featuring industry leaders and legislators as battling protagonists. But there is also a lot that is left implicit which could be made clearer (with evidence and analysis) about the changing nature of the substance of the debate as the breath of its participants grow. As the medium in which the

message circulates changes, how will the substance of the enacted policies also change? As the internet combines qualities of inestimable diffuseness with precision focus, Washington's power-centers are destabilized and the influences legislators experience are more diverse. But the language of property entitlements and financial incentives is also still very present. These were the baselines of all past copyright reform. Will we hear something different this time around? Will the testimony on behalf of individual people or loosely-affiliated groups as opposed to well-established organizations and companies change what we understand copyright law to be for and how it works?

Certainly, the interests of the new and dominant technology companies that make devices that facilitate the making and dissemination of creativity are being heard (hello Google, Apple and Microsoft). But what about the creative people who are both hobbyists and professionals, who are artists, engineers, scientists, videographers, writers? Is Internet advocacy going to help them too? To answer this question, Herman's book also traces the rise in public discussions of transparency in access to information, equality of opportunity to access intangible goods and the questionable benefits of exclusive entitlements. But his analysis on this score is thinner than on the expanding access to the legislative process more generally. Does his mention of these qualities mean that the individuals participating en masse through the Internet in debates over copyright care more about these issues than the other copyright interests (such as rights of excludability and maximalist revenue)? There is more research to be done on this score.

What do people who engage in creative practices and produce the work that companies sell need to continue their work? How do the existing laws (or hypothetical future laws) help or hurt their creative practices? Herman's research leaves the reader with the impression – left to be proven in subsequent analyses and legal reform battles – that the change in access to law reform over copyright has changed the debate over the scope and nature of the rights copyright law should affect. If Herman is right, and the growing discussions about substantive equality and distributive justice will be durable features of IP policy going forward, we can say with some certainty that copyright law and policy is experiencing a transformation of both its substance and practice.

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