THE FIGHT OVER DIGITAL RIGHTS

The Politics of Copyright and Technology

Bill D. Herman

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Hunter College, CUNY

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THE FIGHT OVER DIGITAL RIGHTS

In the political fight over copyright, internet advocacy has reshaped the playing field. This was shown most dramatically in the 2012 "SOPA blackout," when the largest online protest in history stopped two copyright bills in their tracks. For those not already familiar with the debate, this protest seemingly came out of nowhere, yet it was the culmination of an intellectual and political evolution more than a decade in the making.

This book examines the debate over digital copyright, from the late 1980s through early 2012, and the new tools of political communication involved in the advocacy around the issue. Drawing on methods from legal studies, political science, and communication, it explores the rise of a coalition seeking more limited copyright, as well as how these early-adopting, technology-savvy policy advocates used online communication to shock the world. It compares key bills, congressional debates, and offline and online media coverage using quantitative and qualitative methods to create a study that is rigorously researched yet also accessible to a general audience.

Bill D. Herman is an Assistant Professor in the Department of Film and Media Studies at Hunter College, City University of New York. He earned a Ph.D. from the Annenberg School for Communication, University of Pennsylvania, in 2009. His work has appeared in journals such as *Yale Journal of Law & Technology*, *Journal of Computer-Mediated Communication*, *Communication Law & Policy*, and *Federal Communication Law Journal*.

For Tina, Mom, Bob, Trinity, and Finnegan

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Preface

This study is the embodiment of an intellectual evolution more than a decade in the making. As an electronic and hip hop music DJ when I began my graduate studies in 2000, I became fascinated with remix culture, questions about creativity, and – with a nudge from Brian Ott – the socially constructed nature of authorship. The art of DJing and sampling became the locus where I began to investigate all of these questions over the course of my master of arts program in what was then the Department of Speech Communication (now Communication Studies) at Colorado State. As I progressed, I kept bumping up against questions of copyright. Was anything I was doing with my records on the weekends illegal – or, more realistically, was any of it legal? Could copyright evolve to keep up with new media technologies, in music and in other media, that had led to such a breakdown in the walls that separate individual copyrighted works? If authorship is socially constructed, and the romantic theory of authorship in particular is built on a problematically narrow view of the production of creative works, why should we allow copyright to restrict the other, equally valid means of being creative? Thankfully, for the sake of my academic progress, both Brian and my thesis advisor Denny Phillips encouraged me to save such questions of political economy for my Ph.D. program.

I began my studies at the Annenberg School for Communication at the University of Pennsylvania in 2003, intending to follow in the footsteps of Kembrew McLeod and Siva Vaidhyanathan – to add to our understanding of the system of cultural creativity, as well as of the poor fit between that system and the copyright law that governs it. While Annenberg Penn is indeed the home to first-rate qualitative work on communication cultures, it was also my first in-depth exposure to quantitative social scientific methods. I soon realized that not only do I like social scientific methods,

but these could allow me to make a more unique contribution to the growing interdisciplinary area that Vaidhyanathan would dub "Critical Information Studies."[1] With several nudges from Oscar Gandy, I also began to look at the communication around copyright as a subject ripe for investigation – as a means of saying something about the political and economic forces behind copyright. This began with a quantitative study of the first two triennial rulemakings to determine exemptions to the Digital Millennium Copyright Act's (DMCA) ban on circumventing digital rights management (DRM) technologies.[2] This rulemaking is a microcosm of the broader debate over DRM and copyright, pitting the content industries and mostly sympathetic policymakers against a more diffuse, growing coalition of public interest groups, librarians, scholars, and technologists. We found hundreds of people willing to communicate a pro–fair use message via the online submission process, but only a few had the funding and time to appear in person, making the in-person hearing a much friendlier forum for the voices for stronger copyright. Moreover, we found that policymakers in Congress and the Copyright Office were strongly inclined toward the strong copyright end of the debate.

Building on what Gandy and I had found, I sought to conduct a broader study of the major debates over proposed DRM legislation. I had noticed, though, that official debates in Congress and unofficial in-person discussions were not the only places where relevant policy information was shared. As an outsider, I had still been able to learn a great deal about ongoing debates over copyright via the websites of groups such as Public Knowledge and the Electronic Frontier Foundation, internet research centers such as those at Harvard and Stanford, and scholars such as Lawrence Lessig. Although they provide far less detailed coverage, mainstream news sources, such as daily newspapers, are a particularly important source of coverage for nonspecialists. For instance, in helping him organize a 2004 conference on copyright as an obstacle to research,[3] I saw firsthand that this was how Annenberg Professor Joseph Turow had learned of many of the stories around copyright – stories that echoed

[1] Vaidhyanathan, "Afterword: Critical Information Studies."

[2] Herman and Gandy, "Catch 1201."

[3] The conference, held in June 2004, was titled "Knowledge Held Hostage: Scholarly Versus Corporate Rights in the Digital Age." For a brief recap, see Tom Zeller Jr., "Permissions on Digital Media Drives Scholars to Lawbooks," *New York Times*, June 14, 2004, http://www.nytimes.com/2004/06/14/business/technology-permissions-on-digital-media-drives-scholars-to-lawbooks.html.

his own accidental interest in this area of law.[4] Combined, then, the very formal medium of congressional hearings, the still-stately outlet of major newspapers, and the totally unregulated online debate seemed like the most natural place to examine the debate over DRM. From 2006 to 2009, I did exactly this, and the resulting dissertation – supervised by Professor Michael X. Delli Carpini – became the basis for this book.

There are many perils to writing a book that is largely about the internet – print is not interactive, concerns about cost constrain the sharing of relevant documents and data, and the internet will surely change a good deal in the time between manuscript submission and when the book is in readers' hands. For all these reasons, I have created a companion website for the book, to be hosted on my personal site: billyherman.com. Of particular interest, readers will find interactive, full-color versions of the maps of the online copyright debate. With these, readers (or, in this context, users) can click on the circles representing individual websites to see how they relate to other sites in the map, zoom in or out, and click on site names to go to those sites. I have also included items that will be of particular interest to specific audiences. For social scientists, I have provided my complete dissertation, which contains much more methodological and statistical discussion than is provided here. I have also provided my complete dataset in SPSS and CSV formats, as well as additional graphs and charts to delve further into specific outcomes. For legal researchers, I am also placing copies of all of the congressional hearings in question on the book's website. In the case of older hearings, this may potentially save a future researcher from duplicating some of the hours I spent at the library's microfiche machine. I would love to provide complete sets of newspaper articles and web documents as well, although ironically, copyright concerns limit me from doing so. Readers who are interested in particular documents for their own research,

[4] Turow, not a scholar who had previously studied copyright, became interested once he encountered a staggeringly labyrinthine and expensive process to get permission to use brief clips of TV representations of doctors in a multimedia project that, by any reasonable analysis, made only fair use of the clips – and thus should have required no permissions or payments at all. Entitled "Prime Time Doctors: Why Should You Care?," the work was a multimedia essay on DVD, distributed to approximately 20,000 first-year U.S. medical students by the Robert Wood Johnson Foundation each summer from 2003 to 2008. Newspaper coverage had tipped Turow off to the fact that he was not alone – that even scarier stories had also led people such as Princeton computer scientist Edward Felten and then–Swarthmore undergraduate Nelson Pavlosky to become interested in copyright. This inspired him to organize the conference.

however, are encouraged to contact me. My website will always have my current contact information.

This book is intended to be readable for a general audience yet of interest to experts and those working in the field. I have done my best to write for those who may have little or no training in communication studies, political science, or copyright law – yet hopefully with enough rigor, theoretical grounding, and detail to satisfy those with expert training in one or more of these areas. I realize that I will not have succeeded on either count, let alone both, to the total satisfaction of all readers. In terms of readability for those who are not experts in one or more relevant areas, where I have unwittingly assumed too much background knowledge, I hope the cited literature can provide answers, and the materials on the companion website may provide the additional details and explanations a reader may need. If all else fails, please e-mail me; in addition to replying, I may post an explanation on the companion website that can assist other readers. In terms of pure readability, I have pushed a lot of the more detailed discussions into the footnotes, and I have substantially streamlined my citations, including a bibliography of all scholarly works, as well as the statutes and cases I discuss. Likewise, to maximize the use value of the bibliography for other researchers, full citations for other materials – bills, congressional hearings, news stories, and websites – are found in the first note of the chapter in which each item is used, or they are identified in sufficient detail in the text.

In terms of my effort to be rigorous and detailed enough to satisfy experts and practitioners alike, this book will surely be less than totally satisfactory to many readers. There are undoubtedly areas where I have overlooked important details, failed to cite or make proper use of important prior literature, made claims that belie my long time in the academy and very short time in the trenches, and generally failed to write the book that others may have wanted. I accept this as one of the perils of conducting a study such as this, and I look forward to learning more by way of criticism.

This book would not have been possible without the generosity and support of the countless people who have helped me along the way. I can never repay the debts owed to Oscar Gandy and Michael X. Delli Carpini for their support of and patience with me during my time at Penn, both leading up to and during my dissertation writing process. I also thank Bob Hornik for making the time to help me make sound methodological decisions and appropriate use of statistics, even though the study is very far indeed from his areas of interest. Thanks to all of the faculty at Penn

and CSU who helped turn me into the scholar I have become. In addition to those already named, the late Ed Baker deserves mention as having played a particularly vital role in shaping my work; being published by the same press that published his seminal works is an honor that I will always cherish.

My graduate school classmates at Penn and CSU have been some of the most amazing colleagues and friends one could hope for – too many to name – and I thank them for being there for me through the highs and lows of life. Thanks as well to the staff at each school, and in particular, Bev Henry. Additional thanks to my colleagues at Hunter College and the staff in our department and in research support offices. For helpful feedback and/or research assistance, thanks to Lokman Tsui, Lee Shaker, Tarleton Gillespie, Hector Postigo, Can Sun, Bill Rosenblatt, Peter Vardy, Joann Olivo (Hunter College Valedictorian, Spring 2011), Marisa Collins, Tina Collins, Charles Collins, Juan Medrano, and the reviewers and editorial staffs of the *Journal of Computer-Mediated Communication* and the *Yale Journal of Law and Technology*. Support for this project was provided by a Dissertation Research Fellowship generously provided by the Annenberg School, as well as a PSC-CUNY Award, jointly funded by the Professional Staff Congress and the City University of New York. Thanks as well to John Berger and everyone at Cambridge for the first-rate treatment I have received.

My family and friends have been amazingly nurturing and patient over the last six-plus years as this project has moved from conception to completion. Words cannot express my gratitude for my parents, Bob and Candy Appel; my niece, Trinity Herman; my extended family and my in-laws, especially my wife's parents, Charles and Pat Collins; and my son, Finnegan Connors. As a scholar herself, my wife Tina Collins has been more than just a supportive spouse – although she has been that and more, to a higher degree than I could possibly expect. She has also been my role model, editor, writing coach, and topical discussion group. The world is a much better place with her in it, and I am beyond lucky to have had her next to me for the last seven-plus years.

List of Abbreviations

AHRA:	Audio Home Recording Act
BPDG:	Broadcast Protection Discussion Group
BSA:	Business Software Alliance
COICA:	Combating Online Infringement and Counterfeits Act
DAT:	Digital Audio Tape
DFC:	Digital Future Coalition
DMCA:	Digital Millennium Copyright Act
DNS:	Domain Name System
DRM:	Digital Rights Management
EFF:	Electronic Frontier Foundation
IITF:	Information Infrastructure Task Force
IP:	Internet Protocol or Intellectual Property
ISP:	Internet Service Provider
MPAA:	Motion Picture Association of America
PIPA:	PROTECT IP Act, itself an acronym for Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act
RIAA:	Recording Industry Association of America
SC:	Strong Copyright
SCMS:	Serial Copy Management System
SFU:	Strong Fair Use
SOPA:	Stop Online Piracy Act
TLD:	Top-Level Domain
USTR:	United States Trade Representative
WCT:	WIPO Copyright Treaty
WIPO:	World Intellectual Property Organization
WPPT:	WIPO Performances and Phonograms Treaty

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1

Lightning in a Bottle

On January 18, 2012, the English language version of Wikipedia went dark. Instead of the usual homepage, visitors found an ominous warning cast against a dark gray background. The site warned:

> For over a decade, we have spent millions of hours building the largest encyclopedia in human history. Right now, the U.S. Congress is considering legislation that could fatally damage the free and open Internet. For 24 hours, to raise awareness, we are blacking out Wikipedia. Learn more.

In addition to linking users to a page with more information, the Wikipedia homepage also urged visitors to contact their elected representatives and included a box for looking up the representatives' contact information via the visitor's ZIP code. Wikipedia is the sixth most-visited site in the world, and it enjoys the same lofty ranking in the United States,[1] so this dramatic message on its homepage caught the attention of millions of people – a message that was amplified by near-universal news coverage of the blackout. Wikipedia was one of more than 115,000 sites that participated in spreading the message against this legislation.[2] Many others also blacked out their sites to illustrate the argument that the proposals, if passed, could lead to the censorship of legitimate, worthwhile content. Other sites did not go dark but instead used their homepages to further help spread the message. Most prominently, this included Google, the most-visited site in the world and in the United States. The search engine was still available, but the homepage featured a black banner over the Google logo and, under the search box, the plea that visitors "Tell Congress: Please don't censor the web!"

[1] Throughout this study, site rankings are reported based on rankings at Alexa.com and are current as of June 12, 2012.

[2] Fight for the Future, "January 18 Blackout."

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