

## BOOK REVIEW

### **THE FIGHT OVER DIGITAL RIGHTS: THE POLITICS OF COPYRIGHT AND TECHNOLOGY**

*By Bill D. Herman*

New York: Cambridge University Press, 2013, 243 pp, £60.00, ISBN 978-1-107-01597-5

This book is not about the law, at least in the same way Trevor Hartley writes on European Union law or Donald Chisum on patents. It is also not about policy, advocating for how the law should be, although the author expresses his own opinions in this regard. Indeed, from a lawyer's perspective, it can be criticised for its failure to discuss in depth the legal and philosophical aspects that are important to the arguments being made (e.g. the section on "what copyright is for", is over simplistic and ignores the huge debate that revolves around copyright justifications). However, that is not the purpose of the book. Its aim is chiefly political and sociological (although a rigid separation can never be seriously undertaken).

As its subtitle aptly indicates, this is a book about the politics surrounding copyright and technology, focusing on digital rights management (DRM), defined as the use of technology "to build a heightened degree of copyright holder control into digital media". The author draws upon several sources and methodologies (legal, sociological, statistical, philosophical and historical) in order to provide the reader with a vivid picture of how the political issues arising out of copyright and technology are being debated, by whom and in which fora. The perspective is limited to the situation in the United States.

Concomitant with the rise of the digital technology allowing DRM, also arose the possibility for ordinary citizens to become lobbyists and activists in a more convenient and powerful way, bringing about "changes in policy advocacy". That could be a different way of using Charles Clark's famous saying "the answer to the machine is in the machine". As the author demonstrates, the debate has moved online, and so did the demonstrations. The most spectacular being the anti-PROTECT-IP Act (PIPA) and Stop Online Piracy Act (SOPA) black out on January 2012 and the surrounding protests worldwide (a picture from which is on the cover of the book), that also managed to stop the Anti-Counterfeiting Trade Agreement (ACTA) and galvanise the common citizen on copyright matters

This wide debate is examined from the perspective of two sects: the Strong Copyright coalition, as opposed to the Strong Fair Use group. The former benefits from more resources and

concentration, which has thus far translated into the expansion of copyright upwards.<sup>1</sup> The latter is "more densely populated by internet enthusiasts", and less organised but enjoys broader public sympathy. A third group, the "persuadable technology" division, mainly technological companies such as ISPs and members of the consumer electronics industry, play an important role and their support is the most coveted

The book is well organised, containing three parts, divided into twelve chapters. The first part provides a good historical account of the technological challenges to copyright and legal answers thereto, from 1987 to 2006, covering The Audio Home Recording Act (Chapter 2), The Digital Millennium Copyright Act (DMCA) (Chapter 3), what the author calls the "DRMs interlude" (Chapter 4) and the Digital Millennium Copyright Act Reform and the Broadcast Flag (Chapter 5). These chapters take a political view on the changes in the law but aptly describe what was happening and why.

DRM legal protection originated as a compromise solution between the music industry and the technology producers concerning digital audio tapes, though, as the author explains the Audio Home Recording Act "was outdated quickly after it became law". He later argues that "the copyright debate has not been 'Silicon Valley versus Hollywood' so much as it has been Hollywood versus a diffuse coalition of underfunded non-profits, public intellectuals, and technology writers" for the former have only "sought to avoid the reach of copyright into their core business models" without committing ideologically. However, from the political story told here, one can see the huge importance of corporate action, mainly from the persuadable technology division.

In fact, the DMCA (which is analysed beyond its DRM aspects) was pushed forward by the content industry, often relying on a false dichotomy and overstatements, presenting several radical proposals to change copyright (most of which did not find success in their entirety). The author rightly points out "the use of international law-making bodies to advance one's domestic agenda". This is all the more striking when one is aware of the US courts' and legislature's attitude towards international treaties in other instances. The solution provided, regarding online service providers, was also the result of a compromise. As wittily noted, "The kind of horse-trading between industries that went into the DMCA is not exactly the most democratic way to make law", which should be of particular concern taking into account the very wide reach of this regulation. And, indeed it was. The author shows how the radical proposals "scared opponents into coordinated action", the blooming of the fair use coalition and its impact on the final text of the DMCA.

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<sup>1</sup> Considering the IP chapter of the Trans-Pacific Partnership leaked by Wikileaks a few months ago, this tendency seems to subsist

The rise and fight against peer-to-peer technologies favoured non-governmental organisations and scholars prominence in the copyright debate, all of which contributed to heightened consideration and general public attention to copyright matters ("from obscurity to a topic of conversation across the country"). This was a period when DRMs were under dim light. Henceforth, both coalitions presented proposals according to their views and were able to block each other. So, in fact, nothing changed. The author presents this as a "remarkable victory for a coalition that was, by all rights just getting started".

After the political account of the debate, the second part of the book features statistical and data analysis with representative graphs and tables. The author provides us with a detailed account of how communication in Congress (Chapter 6), in print (Chapter 7), and online (Chapter 8) has evolved, comparing his results in a final chapter (Chapter 9).

Chapter 6 is based on documents produced in Congress classified as indicating a strong copyright, strong fair use or neutral/mixed position. As expected, the results in Congress mirror those passed into law, the prevalence of a strong copyright position in the early 1990's (73%) and its gradual shift to strong fair use (46% strong fair use, 42% strong copyright, between 2003-2006). The deadlock described in Chapter 5 is explained by these numbers. The author also analyses the origin of these documents and its distribution by sectors of activity, concluding that one of the factors for change must have been the growth in diversity of views expressed at Congressional hearings, shifting from a biased to neutral *status quo*.

Analysing the press was more challenging and the author limits himself to two major newspapers and convincingly explains why these are good proxies for general public opinion and policy advocacy. He also addresses, separately, the industry press, which is more concerned with industry-specific issues, and is consequently less representative. The (cheering) conclusion reached is that "newspaper coverage has been mostly balanced", with the Strong Fair Use coalition increasing coverage through time.

Chapter 8 is the *pièce de résistance* of the second part of the book. Here the author undertakes an analysis of the debate online, employing complex statistical analysis, which is comprehensively explained to the uninitiated, thus allowing an understanding of the results achieved. These were not surprising: online the fair use coalition prevails. The author submits that "the most technologically knowledgeable in society are the most likely to have the strongest opinion on copyright and their opinions are the most likely to be pro-[Strong Fair Use]".

These results are summarised and compared in Chapter 9, which might be very useful for the reader in a hurry.

The third and last part, entitled "The Present and Future of Digital Copyright and Digital Advocacy", documents the decline of the DRM debate (Chapter 10), the new strategies adopted by the Strong Copyright coalition and the massive uprising against SOPA and PIPA (Chapter 11), concluding with a short reflection on the future of the digital rights and the surrounding debates.

As is commonly known to those aware of the wider copyright debates, the strategy to use DRMs as a means to prevent and stop infringement failed miserably. As the author notes, "the law against circumvention has the same problems as the law against infringement". The reasons for this failure are explained and the consequent backing away from DRMs is reported. The author then turns to international treaties under negotiation, briefly describing ACTA, the Trans-Pacific Partnership and the secrecy surrounding them, setting the stage for unrest against the strengthening of copyright.

Chapter 11 starts by outlining the notice and takedown procedure and its shortcomings from the point of view of the strong copyright coalition, and the several proposals this coalition brought forward. The seizing of domain names related to copyright infringement, which began in 2010 (and is of dubious legality), is considered in detail. SOPA and PIPA appeared in this context as proposing radical measures including blocking access to websites, cutting access to advertisers, preventing search engines from linking to these sites and the aforementioned domain-name seizure. The outcome is not surprising - using the author's words: "The internet – already the bogeyman of the [Strong Copyright] coalition for its capacity to facilitate infringement – became the means for mobilizing millions of citizens who spoke out against SOPA and PIPA". Thus Herman concludes that this copyright debate and movement is just one major (and probably seminal example) of online advocacy that might become the rule in the future. This presents particular challenges for those studying the future and the author concludes by making some suggestions on how this could be addressed.

Overall, Herman offers an original approach to a subject that is far from settled. Beyond being very pleasant to read, it provides a different perspective on the copyright debate outwith the law. The book offers more on the sociological and political phenomenon surrounding the debate, rather than a reiteration of legal rules, principles and cases. It is less about the future of copyright and more about the future of policy and advocacy in general.

One very useful aspect of this book is the thorough description of the methodologies and sources used. There is a website with additional resources and the author expresses his availability and wish to receive any comments or suggestions, and to answer any further queries. (<http://www.billyherman.com/fight-bonus-content>)

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