

## **Copyright's Highway: From Gutenberg to the Celestial Jukebox**

by Paul Goldstein

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The study of intellectual property law is often an intimidating and daunting task because of rapidly changing caselaw and statutory developments. The field is less overwhelming once it is broken down into its component parts – copyright, trademark, patent, and trade secret – but a good book is necessary to provide a roadmap to path of the intellectual property law. Paul Goldstein's *Copyright's Highway* is one such magisterial book helps to trace the path of a rapidly changing copyright law. Goldstein's book is a survey of historical developments as well as a study of how copyright law has been accommodated to changing information technologies. Overall, this is a well written book, though there are some rather dry sections of greater interest to the specialist than the general reader.

Professor Goldstein is the Lillick Professor of Law at Stanford University. In addition to *Copyright's Highway*, he is the author of a four-volume treatise on U.S. copyright law as well as a one-volume treatise on international copyright law. (*Copyright*, 2nd ed., New York: Aspen Law & Business, 2003; *International Copyright: Principles, Law and Practice*, Oxford University Press, 2001) He has also written two widely adopted law school texts on intellectual property: (1). *International Intellectual Property Law: Cases and Materials*, Foundation Press, 2001 and (2). *Copyright, Patent, Trademark and Related State Doctrine: Cases and Materials on Intellectual Property Law*, Fifth Edition, Foundation Press, 2002.

*Copyright's Highway* begins by introducing the reader to the concept of copyright, and how it compare and contrasts with other methods of protecting intellectual property.. Copyright is the right to make copies of a given work and to restrain others from making copies without one's permission. Copyright law is a direct response to Gutenberg's invention of the printing press in 1450 making it possible for many copies of written works to be reproduced.

The field of copyright is split into several different schools of thought who have very different perspectives on the functions of copyright law. "Copyright optimists," for example, view copyright's cup of entitlement as half full and believe authors are entitled to every penny others are willing to pay for their work. In contrast, "copyright pessimists" view the cup as half empty and believe that copyright should only extend so far as necessary to produce creative incentive. Examples of these two views can be seen in the French and American philosophies. The French copyright law sanctifies the moral rights of the author, while the U.S. has opposed applying moral rights in its copyright law. This divide has created two different cultures of copyright: a European copyright culture, following civil law traditions, and an American culture, following the English common law tradition. These markedly divergent traditions make it difficult to harmonize intellectual property rights in a global information age.

The history of copyright has long been characterized by doctrinal differences. The history of America's copyright laws traces their lineage to English statutory and common law developments. From the beginning, the law of copyright reflected a means of social control as well as economic power. For almost two centuries, the Crown controlled the dissemination of literary works and political treatises because they provided the royalty with a source of revenue and prevented sedition by the masses. The Crown granted an exclusive right to print particular works to a given bookseller, thus creating loyalty and income. By the mid-sixteenth century, the

Stationers' Company, a cartel comprised of scribes, bookbinders, and booksellers, replaced the Crown as the authority to print, bind, and sell books. However, under the Licensing Acts, the Stationers could only publish books licensed by the Crown. Writers had no place in this monopoly and were only allowed a say in the terms controlling the text's first publication. The "benefit" of such an arrangement was that the Stationers would reap the economic rewards while the Crown gained an efficient censorship enforcer.

This monopoly, however, did not last, as the rights of authors and readers alike began to emerge. Once the Licensing Act expired in 1694, the Stationers lost its ability to destroy and levy fines against offending works. The Stationers sought refuge in the court to regain its lost monopolistic powers. After a failed attempt to retain its monopoly, the Company put the interests of writers and readers at the forefront, with the Statute of Anne resulting. The Statute created a free market and copyright protection for 28 years after a works' publication. Despite intense debate and numerous lawsuits, this model of copyright prevailed, defeating the perpetual copyright laws that the publishers sought. The model was a balance of public and private interests, rather than a statutory development reflecting natural rights. The shaping of American copyright law took place in much the same way, with the notable difference that it was the writers rather than the booksellers, who led the movement for copyright protection.

Once new markets and technologies emerged, the law of copyright evolved. The debate over copyright law went well beyond natural rights. Exploitation of original works soon entered center stage. One of the key issues was whether a dramatization of a literary work infringed the author's copyright. Early problems centered on applying copyright protection to new technologies such as the invention of photography, player-pianos, radios, and other early musical devices. Groups such as the American Society of Composers, Authors, and Publishers (ASCAP)

organized to protect authors' rights, which it continues to do today. The ASCAP platform rests on the idea that American culture depends on the marketplace, and creative authorship is central. The assumption underlying ASCAP's position is that authors need the incentive of copyright in order to produce literary works. .

Prior to the invention of the Internet and digital devices, the two most significant threats to authors' copyright works were the invention of the photocopier and the VCR. In the case of the photocopier, the publishing business stood to lose big money if libraries and individuals were allowed to photocopy articles without paying a dime to the publisher. In a landmark case, Williams & Wilkins v. United States, 420 U.S. 376 (1975), the U.S. Supreme Court, equally divided, affirmed the Court of Claims decision, holding that libraries' own photocopying of medical journals did not constitute copyright infringement.

However, *Wilkins* was merely the first shot in the debate over library photocopying. In 1976, Congress passed a bill which set guidelines for library photocopying: libraries were prohibited from making photocopies in aggregate quantities, meaning more than five copies a year of any article published in a particular periodical within five years of the date of the request. Right on the heels of the bill, Universal City Studios and Walt Disney Productions filed a copyright infringement suit against Sony, alleging that by selling its Betamax video tape recorders, it was contributing to copyright infringement of the companies' televised films. Disney's strategy was to focus the court's attention on Sony, and not the direct infringers – individuals that owned the VCRs.

The central issue of the case was "fair use." Fair use allows the copying of copyrighted materials if it is done for salutary purpose and if other statutory factors weigh in its favor. The overall factors in determining whether specific usages of copyrighted material are "fair" or

"unfair" include: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the material used in relation to the copyrighted work as a whole, and the effect of the use on a copyright owner's potential market for and value of his work.

Individuals recorded shows for two reasons: to build up a collection of movies and to record shows that came on the air when the viewer was not able to watch them. The Court held that contributory infringement would be found only if the Betamax had no substantial non-infringing use, which it did not. This decision was based on fair use and the fact that the movie studios had not proved they suffered any harm from the alleged infringement.

The recent subpoenas filed against the downloaders of music on the Internet reflect the centrality of the Internet in today's battles over copyright protection. Today, the digital revolution and the expansion of the Internet challenge the underpinnings of copyright law. While the Internet promises new markets and faster access to information, it also poses the threat of widespread copyright infringement. Hundreds of millions of copyrighted work are downloaded and exchanged on the Internet without the permission of authors.

In addition, most copies made using the Internet, be they movies, music, or some other work, are made for private purposes, an area that the recording and movie industries have had little success in taming. Also, peer to peer services, such as KaZaA and Grokster make it more difficult to find one institution to hold accountable. Peer to peer services lack centralized servers which filter subscribers' media, resulting in millions of computers sharing files without centralized control. The position of the information industry is that millions of people worldwide are gaining access to copyrighted music and movies threatening the future of our information age economy.

In *Copyright's Highway*, Professor Goldstein discusses with great thoroughness all aspects of copyright and poses some solutions to today's copyright issues. The chapters that present the roots of copyright law are surprisingly interesting, and are a testament to the author's writing ability. They are fast paced, yet thorough. In addition, Goldstein uses several chapters to demystify leading cases shaping the future of copyright law. Goldstein is a masterful storyteller who weaves a seamless web of case law analysis and historical example. It is only the chapter discussing the two cultures of copyright that the book becomes slow and tedious. However, Goldstein should be commended for tackling a rather complex subject and presenting it in way understandable for the reader without a copyright law background. It is through Goldstein's clear and cogent writing style and storytelling ability that he is able to make a potentially dull subject interesting and provocative.

Professor Goldstein not only traces the history of copyright but discusses solutions to current problems and predicts what the future holds for copyright law. Goldstein is a strong supporter of copyright rather than copyleft. Professor Goldstein is not troubled by the rapid expansion of intellectual property rights over the past decade. He would take issue with intellectual property scholars who view the privatization of public domain as a "tragedy of the commons." (See, James Boyle, Foreword: The Opposite of Property?" 66 *Law & Contemporary Problems* 1 (2003).

Goldstein is a strong advocate for robust intellectual property rights. First and foremost, he argues, lawmakers need to provide new rights and remedies for copyright owners. His call to action is for Congress to act now to get copyright under control. This argument makes sense, as Goldstein notes, because the more individuals "infringe" for free, the more entrenched the use is and the harder it becomes for Congress to prohibit such use.

Goldstein's image of the "celestial jukebox" reflects his view of the future of entertainment. The celestial jukebox is described as a type of technology-packed system that can transmit entertainment and information at the touch of a button to one's home or office for a particular price. This image of the celestial jukebox has the potential to tailor prices to consumer preferences, and reduce transaction and infrastructure costs. In addition, it can create a more efficient central distribution avenue. However, there must be statutory exemptions for schools and libraries, for example, because of the desire to promote learning. Professor Goldstein also addresses the ethical issues raised by encrypting the digital material. The dark side of encrypting works of authorship is to place access restrictions for significant segments of the population.

While Goldstein's discussion of the Celestial Jukebox is intriguing, his concept is not flushed out completely. Predicting the future is hazardous especially when it comes to rapidly changing technologies. One potential problem I foresee is that there will be too much information on the Jukebox for one to sift through. Also, will there be just one Jukebox? Or will there be multiple ones owned by different media conglomerates? How will information be added to the Jukebox and how much will it cost? If the Jukebox turns into a vehicle solely for those that have the money to upload and download information, then one of the goals of copyright will be subverted.

Even though Goldstein has yet to work out many details about copyright's future, he's on the right path. The law of copyright must be accommodated to futuristic technologies just as it did for photography, piano rolls, and movie posters. It is likely that encryption is a possible solution to Internet-related distribution, but it cannot entirely prevent unauthorized distribution. Some sort of pay service is plausible, but the task of setting one up appears monumental.

Overall, Professor Goldstein's *Copyright's Highway* is an excellent read for those who want to get a general understanding of copyright law. It provides great insight into the history of copyright, keeps the reader interested by intertwining cases into development of copyright law, and presents issues and solutions that today's copyright law faces. While some sections are a bit dull and slow, I would recommend this book to anyone interested in how the law of copyright has been accommodated to new technologies.