

BOOK REVIEW***Copyright's Highway: The Law and Lore of Copyright from Gutenberg to the Celestial Jukebox*****by Paul Goldstein****Hill & Wang, New York, NY; 253 pages; \$21.00****Reviewed by Robert Chow †**

In the not too distant future, people will no longer drive to the video store and stand in line to rent the latest movies. Nor will they visit music stores to buy a copy of the latest hit single. Instead, people will have access to vast libraries of films, sound recordings, and printed material from the convenience and comfort of their homes. They will simply send electronic commands from their personal computers or consoles mounted on their television sets and whatever they desire will appear on the screen. This cache of movies, music and writings may take the form of either a satellite orbiting above the earth or an earthbound network of fiber optic cables and telephone wires. This technology is what Stanford Law Professor Paul Goldstein has coined the "Celestial Jukebox."¹ Others know it by the less elegant term, "Interactive Television."

But here's the rub. Copyright laws as they exist today may not protect copyrighted works distributed via the celestial jukebox. Presently, people are free to make copies of copyrightable works as long as such copies are made for non-commercial use in the privacy of their homes.² Even though private copying undercuts a copyright owner's ability to recoup the work's value, Congress and the courts have deemed such non-commercial copying noninfringing because it would be economically impracticable to collect licensing fees from each individual private user.

Goldstein, however, argues that the assumptions exempting home recordings from copyright infringement are no longer true. The same technology that will give people access to entertainment on demand will also make it possible to charge subscribers electronically for each use of a pre-recorded work.³ Goldstein predicts the price of access to such works could drop to the point where people, knowing they can access the work on the celestial jukebox anytime, would simply not bother making copies.⁴ Producers of copyrightable works would receive the full value from their creative endeavors and there would be little need for home recording devices.⁵ But to make it so, Congress must rewrite copyright laws so that they extend to private copying. Goldstein believes that "[i]f Congress and the courts continue to hesitate to extend copyright into the home, and copyright's public-private distinction persists and is not adjusted to the technologies of the celestial jukebox, the integrity of copyright will be threatened."⁶

Whether you believe that copyright laws need to be rewritten to accommodate the celestial jukebox, or whether you agree that copyright ought to reach as far as Goldstein urges, *Copyright's Highway: The Law and Lore of Copyright from Gutenberg to the Celestial Jukebox* is worth reading. Goldstein takes the reader on a splendid journey through the colorful history of copyright and offers a bold vision of the future. The author's lucid articulation and elegant presentation of the intriguing concepts underlying copyright law offer something for all readers, whether they be laypersons or lawyers, copyright scholars or the merely curious.

The author explains the dynamic force shaping copyright as the tug-of-war between two groups who argue whether copyright is a glass half full or half empty.⁷ He describes "optimists" as those who see the glass half full, believing copyright is a natural right, entitling authors to every last penny that other people will pay to obtain copies of their works. On the other side, "pessimists," those who see copyright as a glass half-empty, believe copyright owners should only get as much control over copies as is necessary to provide an incentive to produce creative works.

The author claims to have one foot in each camp. He is a pessimist when it comes to bringing new subject matter under the protection of copyright. "As new forms of technological subject matter claim copyright protection, lawmakers should carefully measure them against copyright's historic standards and resist the temptation to extend protection simply because copyright represents the most capacious and catholic intellectual property doctrine."⁸ He is dubious about the inclusion of computer software as copyrightable subject matter and describes the United States Copyright Office's registration of computer programs as "panglossian."⁹ He objects to copyright protection for software because he believes the duration of such protection is much too long for such fast-moving technology. Furthermore, copyright protection for software risks creating monopolies over things that belong within the public

domain.¹⁰

But once Congress has properly determined that something deserves copyright protection, Goldstein becomes a zealous optimist. He believes that copyright protection should then reach as far as practically possible so that authors and other creators of copyrightable works receive the necessary incentive to create new work and develop new markets.¹¹ "As new technological uses of copyrighted works emerge, lawmakers should be quick to extend copyright to encompass them, even if the uses are construed as private."¹²

Although numerous commentators see the digital revolution leading to the extinction of copyright,¹³ Goldstein finds a ray of hope. The author sees the digitization of data as simultaneously posing the greatest opportunity and the greatest challenge for copyright. The opportunity lies in the potential for using the celestial jukebox in a manner that will allow producers of creative works to recapture the economic value lost to private copying. Presently, producers of movies, television programs, music and other publicly performed works recover the value of their works through the imprecise method of blanket licensing fees from broadcasters. Broadcast audiences are for the most part free to listen to performances of copyrighted works without charge. Private copying further diminishes the compensation copyright holders receive for producing their works, as such copies displace retail sales and rentals of authorized originals from which publishers, movie studios and record companies earn their revenues. The law, however, permits such copying to continue because of the belief that it cannot be practically regulated.

Goldstein suggests that the celestial jukebox can correct these market and regulatory failures:

For copyright optimists, at least, one virtue of the celestial jukebox is that it can reverse the losses they see copyright owners suffering today when people make copies of films and sound recordings: by charging subscribers electronically for each use of the prerecorded works it offers—motion pictures, sound recordings, books, magazines or newspaper articles—the celestial jukebox will be able to compensate copyright owners each time their works are chosen.¹⁴

In fact, if Goldstein's vision is carried to its logical conclusion, there may be little need in the future for inexact devices like American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Musicians Inc. (BMI). For that matter, there may not be much need for television and radio stations, video rental shops, advertisers and a host of other media middlemen. Goldstein, however, does not believe the celestial jukebox will ever completely displace traditional copyright markets.¹⁵

The challenge, the author suggests, lies in convincing Congress to amend the copyright laws so that they prohibit private recording of works delivered over the celestial jukebox before it is too late:

By and large, copyright owners suffer and consumer electronic companies benefit any time Congress postpones a decision on home copying. As time passes, more and more consumers acquire new copying equipment and, with it, the expectation of free copying. As habits of free use proliferate, the prospects for dislodging them diminish. Ideal, balanced laws that might have been possible within a year or two of a new technology's arrival in the marketplace can, five years later, be politically impossible.¹⁶

Of course, getting Congress to act promptly is no easy task. Historically, Congress has waited 20 years before re-writing copyright laws to accommodate new technology—much too slow for present cycles of innovation. "As the pace of technological change quickens, Congress seems less and less able to adjust copyright laws to the changes,"¹⁷ Goldstein writes. The author describes two examples in which Congress' failure to respond to new technology led to the erosion of copyright: the invention of photocopiers, and home video cassette recorders.

In the absence of Congressional action, the courts have been reluctant to extend the reach of copyright. The author focuses in particular on the Court's decisions in *Williams & Wilkins Co. v. The United States*¹⁸ and *Sony v. Universal City Studios*.¹⁹

Goldstein's detailed account of *Williams & Wilkins* captures the drama behind publisher William Passano's copyright infringement suit against the National Library of Medicine and the National Institute of Health for the systematic photocopying of articles from journals published by Williams & Wilkins. The author draws from interviews with many of the principals in the case as well as from court opinions and transcripts to lead the reader step-by-step through the landmark case. In a 4-3 decision, the U.S. Court of Claims ruled against Passano because of concerns that finding copyright infringement would harm medical research, leaving the matter for Congress to resolve. An evenly divided panel of Justices let stand the U.S. Court of Claims decision. When Congress finally did act, it adopted 28 U.S.C. § 108 of the 1976 Act, which provided a statutory exemption from copyright for library photocopying.

In the chapter discussing *Sony v. Universal*, the author gleans new insight from the late Justice Thurgood Marshall's court papers, only

recently made public by the Library of Congress. Following oral arguments, the Supreme Court was poised to affirm the Ninth Circuit's holding that Sony's sale of Betamax recorders amounted to contributory copyright infringement. Justice Stevens, who had been originally assigned to write the dissent, persuaded four other justices to endorse his view, turning Justice Blackmun's opinion into a four-Justice dissent. Part of the Court's reluctance to hold Sony liable as a contributory infringer stemmed from distaste for the idea of characterizing the millions of home users of video recorders as lawbreakers.²⁰ But Goldstein believes the Court's concern was unfounded. Goldstein writes, "The Supreme Court should have realized that, even if it had ruled for Universal and Disney rather than for Sony in the Betamax case, the film companies would not have sought injunctions against home copiers. More likely, working together with VCR manufacturers, the studios would have negotiated a VCR and videotape royalty that reflected the value of VCRs and videocassettes in making home recordings of copyrighted films."²¹

Given the lessons of *Williams & Wilkins* and *Sony*, Goldstein fears that the celestial jukebox's potential for revitalizing copyright will be lost if producers of creative works fail to convince Congress to rewrite copyright laws to prohibit private copying.

Yet, Goldstein does not explain how Congress should go about prohibiting private copying. Video and audio recording devices are found in most homes today. Even though the celestial jukebox makes it possible to bill subscribers for the movies and music they select, what is to prevent them from recording as they view their selections? The author himself admits that Congress is loathe to adopt laws that cannot be effectively enforced.²²

The fact that the celestial jukebox provides copyright holders the ability to reap the full economic value of their works, however, begs the question of whether they ought to be entitled to reach that potential. As Stephen Breyer noted in his 1970 Harvard Law Review article, "The Uneasy Case for Copyright,"²³ few workers receive salaries that amount to the full value of their labor. Why should a producer of creative works be paid more than the cost of persuading him to create the work? Perhaps Goldstein's metaphor of the half-filled glass is backwards. The author and others who advocate extending the reach of copyright to recover the entire economic value are those who view copyright's glass as half empty and will not be satisfied until they see the other half filled.

The author's interest in seeing copyright "extend into every corner of economic value" may be more than academic. The author served as a consultant to the plaintiffs in the infringement suit against Sony, and he continues to consult for the movie and recording industry. Goldstein's perspective is certainly one that furthers the interests of producers of movies and musical recordings.

Goldstein suggests that extending copyright's reach as far as practically possible is justified even if one views copyright from a utilitarian perspective. He offers the economic theories of Chicago School economist Harold Demsetz, who reasoned that the more an author is compensated for economic value, the more accurately price functions as a signal of consumer preference. This encourages the most efficient channeling of private investment in the production of creative works.²⁴

Goldstein neglects to discuss other justifications for excluding private copying from copyright besides market failure. In *Twentieth Century Music Corp. v. Aiken*,²⁵ Justice Stewart noted the need for balancing the copyright holder's interest against the public's interest:

The limited scope of the copyright holder's statutory monopoly, like the limited duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.²⁶

Indeed, the digitization of copyrighted works provides for the recovery of the full economic value from such works precisely because of unprecedented control over access. Law Professor Pamela Samuelson notes that the ease with which works in digitized form may be replicated and transmitted to multiple users creates a strong incentive for copyright industries to move away from sales of copies, and toward greater control over the use of their works.²⁷ Such control over access, however, has the potential for allowing copyright holders to extend ownership of their works beyond the duration of the copyright term.²⁸ Goldstein himself recognizes the concerns over the public's access to copyrighted work by stating, "With the celestial jukebox, while the quantity of entertainment and information will doubtless increase for those who are able and willing to pay for it, it will probably shrink for those who are not."²⁹ The author, however, fails to address those concerns.

Regardless of one's point of view on copyright, *Copyright's Highway* raises an intriguing vision of the future for copyright. Whether the future develops as Goldstein envisions will depend on a multiplicity of factors: whether the technology will be implemented as Goldstein suggests;³⁰ whether consumers adopt the technology;³¹ and how Congress and courts shape and interpret the copyright laws to meet the challenge of the digital age.

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1. PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 28 (1994).

2. This doctrine has been explicitly applied to both audio recordings, *see* 17 U.S.C. § 1008 (1992), and video recordings, *see* *Sony v. Universal City Studios*, 464 U.S. 417 (1984).

3. GOLDSTEIN, *supra* note 1, at 28.

4. *Id.* at 30.

5. *Id.*

6. *Id.*

7. *Id.* at 15.

8. *Id.* at 202.

9. *Id.* at 203.

10. *Id.*

11. *Id.* at 216-17.

12. *Id.* at 202.

13. NICHOLAS NEGROPONTE, *BEING DIGITAL* 58 (1995) ("Copyright law is totally out of date. It is a Gutenberg artifact. Since it is a reactive process, it will probably have to break down completely before it is corrected."); *see also* John Perry Barlow, *The Economy of Ideas: A Framework for Rethinking Patents and Copyright in the Digital Age*, *WIRED*, March 1994, at 85 ("Intellectual property law cannot be patched, retrofitted, or expanded to contain digitized expression any more than real estate law might be revised to cover the allocation of broadcasting spectrum.").

14. GOLDSTEIN, *supra* note 1, at 30.

15. *Id.* at 224.

16. *Id.* at 134.

17. *Id.* at 32.

18. 420 U.S. 376 (1975).

19. 464 U.S. 417 (1984).

20. GOLDSTEIN, *supra* note 1, at 150.
21. *Id.* at 218-19.
22. *Id.* at 131.
23. Stephan Breyer, *The Uneasy Case for Copyright*, 84 HARV. L. REV. 281 (1970).
24. GOLDSTEIN, *supra* note 1, at 178-179.
25. 422 U.S. 151 (1975).
26. *Id.* at 156.
27. Pamela Samuelson & Robert J. Glushko, *Intellectual Property Rights for Digital Library and Hypertext Publishing Systems*, 6 HARV. J.L. & TECH. 237 (1993).
28. *Id.* at 253.
29. GOLDSTEIN, *supra* note 1, at 32.
30. *See generally* NICHOLAS NEGROPONTE, BEING DIGITAL (1995). Negroponte suggests that even with entertainment-on-demand, consumers will prefer to download copies of digitized works and store them for future viewing, rather than viewing the works as they are delivered. This approach will invariably require copying of the work. Furthermore, consumers will have competing demands on use of the fiber optic conduit into their homes from video telephoning and other services. Thus consumers will not want to tie up their fiber optic connections by watching digitized works in real time as they are being delivered. *Id.* at 46-48, 174-176.
31. EVERETT M. ROGERS, DIFFUSION OF INNOVATION, 120-22 (1995).