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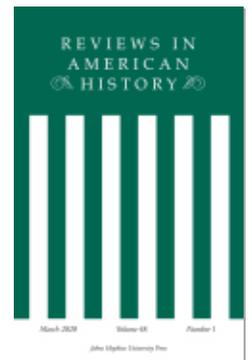
The Political Economy of Copying

David Suisman

Reviews in American History, Volume 48, Number 1, March 2020, pp. 152-158
(Review)

Published by Johns Hopkins University Press

DOI: <https://doi.org/10.1353/rah.2020.0020>



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THE POLITICAL ECONOMY OF COPYING

David Suisman

Paul Goldstein, *Copyright's Highway: From the Printing Press to the Cloud*. 2d edition. Stanford: Stanford University Press, 2019. ix + 230 pp. Notes and index. \$25.00.

Will Slauter, *Who Owns the News?: A History of Copyright*. Stanford: Stanford University Press, 2019. xii + 352 pp. Figures, notes, and index. \$30.00.

Much depends on copying. Yet, in today's digitally saturated world, copying is so pervasive that it can be difficult to take stock of its significance and ubiquity. Obviously, this includes the innumerable times per day that people around the world copy and paste passwords, sentences, and paragraphs. It also includes every instant when data is synced between computers and smartphones or backed up to the cloud. Every time you attach a file to an email, a copy of that file is created. Before you can read a story from a news website—or look at any webpage, for that matter—it must first be copied to your electronic device. Music downloads are based on copying, of course, but so too is streaming based on the reproduction of digital code. Copying shapes more than our commerce and communication; it shapes culture itself. It has become, to paraphrase Clifford Geertz, part of the stories we tell ourselves about ourselves. The poet Kenneth Goldsmith has made a career of copying—not only other people's poems but also newspapers and traffic reports and Hilary Clinton's emails.¹ "Influencers" on YouTube, Instagram, and other platforms are amassing fame and fortune by encouraging *other* people to copy.

It was not ever thus. In most forms, copying today occurs without people even taking notice, but it used to be painstaking, imperfect work, with greater or lesser amounts of respectability. The copying done by religious scribes was recognized as a spiritual practice. That of forgers and "pirates" was often scorned and condemned. And the accuracy in copies that we take for granted was once rare. "Books in seventeenth-century stalls," quipped historian Hillel Schwartz, "had typographical errors on neatly every page, double double lines, [and] mixΣed-up signatures."² Rather, the proliferation of copies and copying on which so much of contemporary society is based has a history. It has developed unevenly over time in various forms, driven by circumstances

in distinct historical contexts, taking on a range of different meanings. Copying has refracted political, economic, and technological change and affected how people experience the relationship between uniqueness and repetition. Processes and cultures of mechanical and digital reproduction have altered how people perceive and understand reality itself.³

When it comes to words, ideas, and facts, the conventions of copying have been especially complicated, shaped by the interactions of law, custom, politics, and technology. Over time, these conventions have repeatedly broken down or been challenged, and these changes have exposed the complex social underpinnings of ideas of originality and imitation and given rise to persistent questions about the rights of creators and the utility of sharing. The two books under review here highlight such questions, and taken together, they shed valuable light on who gets to copy, under what conditions, and to what effect. Nominally, both are studies of the history of copyright, but both—in different ways—also explore something broader: the political economy of copying. That is, both are attuned to the stakes in conflicts over copyright for society at large and concerned not only with the legal history of copying but also the social and political debates in which the law has been enmeshed.

The best writing on the history of copyright brings out not just the nuances of the law but also its real-world implications. It shows how recondite legal issues can be matters of practical urgency with material consequences for what and how we communicate. And it makes legible the relationship between the law and other social institutions. This is the achievement of Paul Goldstein's *Copyright's Highway*, which was recently published in its second edition, twenty-five years after the first. (A revised edition was also published in 2003.⁴) In lucid prose, Goldstein offers a brief yet potent overview of copyright history and incisive analysis of contemporary issues, penned by a leading authority on both domestic and international copyright law. For historians wishing to understand the causes, contexts, and consequences of changes in copyright—especially U.S. copyright—the book offers great insight into this dimension of copy culture.

Goldstein presents copyright as the answer to a problem of balancing private and public interests: how can a society protect individuals' creative work from unauthorized copying—that is, preserve their ability to reap the fruits of their labor—while also promoting the free flow of information? With too much protection, society suffers; with too little, individuals have less incentive to create. As devised in the British Statute of Anne in 1710 and transplanted to the United States in the Copyright Act of 1790, the solution was to grant a right to restrict others from copying one's work but only for a limited period of time. This compromise assured society's access to new ideas and information while preserving the motivation for individuals to create new works. Yet, as Goldstein makes clear, this resolution rested on difficult underlying ques-

tions without fixed or self-evident answers: what is a copy? what is a limited period of time? and what kinds of work are eligible for this protection? The persistence of these questions made the compromise inherently unstable.

With this instability, Goldstein argues, the history of copyright has been shaped by the ongoing tension between those whom he calls “copyright optimists” and “copyright pessimists.” The optimists favor ever-stronger protections (they see the copyright glass as half-full); the pessimists wish to limit protections in the name of access (they see the copyright glass as half-empty). He lays the groundwork for this argument with an opening chapter on the elusive “metaphysics” of copyright, differentiating copyright from other forms of intellectual property (e.g., patents, trademarks, trade secrets), and sketching out some of the challenges in maintaining the delicate balance between the two camps. The following seven chapters track the major contours of copyright law since the eighteenth century, including one contrasting U.S. copyright law with the European culture of copyright, which gives primacy to the author’s moral right (*droit moral*) to maintain control over her or his work. Over this time, he shows, the dynamics between the optimists and the pessimists have fluctuated, the technological capabilities for copying have expanded, and the remit of copyright has been stretched to include everything from circus posters to software.

First published in 1994, *Copyright’s Highway* is notable for its prescience. The internet as we now know it was then still in its adolescence—Microsoft’s ground-breaking browser Internet Explorer was not launched until the following year—but Goldstein foresaw its evolution as a “celestial jukebox,” capable of delivering “a vast range of films, sound recordings, and printed material” with only a quick “electronic command” (1st edition, p. 28). (His powers of prediction may have been informed by having done legal work on the ARPANET, predecessor to the internet, in the 1970s.⁵) Such access, he anticipated, would be a bonanza for consumers of news, information, and entertainment and would transform the political economy of copying. More specifically, the fidelity, compression, and malleability of digital copies would set them apart from earlier reproduction technologies, the combined effect of which would present new challenges of enormous scale and scope for copyright holders, with both domestic and global implications. Needless to say, Goldstein’s vision was, as it were, on the money.

As for the latest edition, those readers concerned about current and future copyright issues will be particularly interested Goldstein’s thoughts on the prospects for copyright in a world in which commercial providers are “competing with free” (p. 170) and the balance of power has shifted from the corporate copyright holders (film studios, music companies, book publishers) to the internet giants like Google and Apple. For historians, what stands out about the book is how it highlights the degree to which copyright operates at

the intersection of the private and the public, in two senses. First, as a limited-term monopoly, the very aim of copyright is to balance individuals' interest in benefiting from their labor and society's interest in promoting the circulation of information and ideas. Second, copyright law has wrestled with ways that new technologies can blur the line between copies made for public and private use. This issue stood most famously at the center of the 1984 "Sony Betamax case" (*Sony v. Universal*) in which the Supreme Court upheld the right to make private copies of copyrighted works. But it also reached back to the 1911 "Ben-Hur case" (*Kalem v. Harper Brothers*), which concerned the public exhibition of an unauthorized film adaptation of the novel *Ben-Hur*, and extended forward to a whole range of twenty-first-century digital-file-sharing cases, the most famous of which concerned file-sharing services Napster, Grokster, and Kazaa. If it is already well-established that the internet has erased previously clear divisions between public and private domains, Goldstein's work illuminates the legal substructure of this confusion. In so doing, it calls attention to the tension between the public and the private as an important recurring theme in the development of the culture of copying.

Like Goldstein, Will Slauter is concerned with the political economy of copying but with a more specific focus: news. Just as today's major news organizations have condemned online news aggregators like Google and Facebook, publishers of news have been fighting against unauthorized reuse of their material for centuries. Yet, as Slauter contends, news functions differently from other kinds of protected work when it comes to copyright. For one thing, its commercial value has a temporality distinct from other forms of expression; a novel, for example, retains far more of its commercial value a year after publication than a newspaper article. For another, news stories raise questions about what, exactly, is to be protected. Historically, copyright law has protected the expression of ideas, not ideas themselves, yet for news organizations, commercial value often rests in the ideas—i.e., the facts—more than the form or mode of expression. For these and other reasons, Slauter argues, a copyright for news has never fit comfortably into any legal framework, and questions about what news can be copied, when, and in what form have remained unsettled over hundreds of years.

Who Owns the News? encompasses developments in both Great Britain and the United States, whose answers to those questions about copying news have been linked and whose approach to copyright was distinct from the authors' rights tradition found in continental Europe. Slauter anchors this inquiry in the sixteenth and seventeenth century by tracking the origins of the commercial publication of news itself. At the outset, ordinary people had no right to be informed about "affairs of the state," and the British crown controlled the circulation of information through the state-sanctioned printers' guild, the Stationers' Company. News circulated via broadsides and pamphlets published

in response to specific occurrences, not at regular intervals, and generally in compliance with the strict censorship of the crown. By the eighteenth century, however, government censorship and restrictions on the number and location of printing presses had broken down, and this led to a proliferation of printers around the country. Only then did the newspaper—published with a stable, visible title and according to an ongoing schedule—become the dominant mode of selling news.

Newspapers emerged in what Slauter calls a “culture of copying,” in which unscrupulous publishers took one another’s titles, printed counterfeit editions, and republished individual articles at will. Publishers looking for relief from this unauthorized copying then looked to the copyright law (despite the fact that the Statute of Anne made no mention of newspapers or other periodicals as a protected class of publication). The courts have been wrestling with what “news” is, and what protections it is entitled to, ever since.

This, however, is not a simple story of news publishers’ endless pursuit of exclusivity; at times and in different ways, they have tolerated copying and actively shared stories as well. Over the course of the eighteenth century, the number of writers and publishers claiming exclusive rights over their work in Britain actually declined, Slauter explains, as the economics and culture of journalism led to a widely shared understanding of newspapers as interdependent and news articles as a shared resource. After the American Revolution, political leaders in the U.S. viewed the circulation of information about political and commercial affairs as vital to the young republic, prompting Congress to set preferential mailing rates for newspapers in the Post Office Act of 1792. In the next half century, reprinting news articles from other publications was a common editorial practice in American newspapers. As Slauter puts it, “claim[ing] copyright in news reports... would have been unthinkable in a world in which copying was what enabled the news to spread (p. 141).” Regulated by custom rather than by law, these copying practices constituted a system of exchange that most editors and publishers tolerated or even encouraged, provided they received credit.

Assigning credit was not always a straightforward proposition, however. If newspaper publishers in the eighteenth and nineteenth century derived benefits from the absence of copyright, they also complicated the meaning of *copy*. Over several chapters, Slauter dissects the processes by which news stories were resituated from one paper to another, demonstrating that republication of a story from elsewhere could be exceedingly complex. Publishers and editors cut and rewrote articles to suit their own layouts, and often copies were modified in ways that introduced distortions and ambiguities. This meant that when one newspaper took a story from another paper that had taken it from a third paper and so on, ascertaining what the proper source was became tricky business, especially if the story underwent changes along the way. News from

abroad frequently raised even greater problems when credit changed from the name of a specific paper to "A London paper writes..."

At the same time, the tolerance for republication was not universal. Building on the Lockean idea that a property right derived from the fruits one's labor, some publishers objected that unauthorized reuse of their material amounted to the "theft" of their "property." In particular, American publishers of business periodicals in the late eighteenth and early nineteenth centuries sought copyright protection for the market news that was their stock in trade. Like the British Statute of Anne, the U.S. Copyright Act of 1790 made no mention of newspapers, but numerous publishers of price currents and shipping lists registered their publications as books for copyright in the hopes that this would deter those who would republish their material. Then, in one of the first copyright trials in the United States, *Clayton v. Stone* (1828), the Supreme Court rejected the idea that newspapers were eligible for copyright on the grounds that they did not make a lasting contribution to learning. (This decision held until it was superseded by the Copyright Act of 1909, which specifically listed newspapers as eligible for copyright.)

In no way was the matter settled by *Clayton v. Stone*, and on both sides of the Atlantic, campaigns to secure a copyright for news continued, especially after the advent of the telegraph in the late 1840s, which increased the premium on breaking news to attract readers and advertisers. In London, the big newspaper publishers lobbied aggressively for copyright protection in the 1830s and 1850s, but their efforts failed in the face of arguments that copyright would restrict the flow of information in the public interest. The publishers renewed their efforts in the 1890s, leading to a partial victory in the British Copyright Act of 1911: British law finally recognized a copyright in the text of newspapers but still did not protect facts. Rival publishers were free to reprint competitors' news stories as long as they changed the words. In the U.S., efforts to secure legal protection for news began anew in the 1840s, when telegraphy and the rise of press associations like the New York Associated Press displaced the older networks of exchange and triggered a new desire for exclusivity. As in Britain, increased agitation for a news copyright in the late nineteenth century contributed to comprehensive copyright reform in the early twentieth century, but the outcome was somewhat inconclusive. The American Copyright Act of 1909 recognized text of newspapers as eligible for protection but left the issue of facts unresolved.

Slauter's argument that "news is different" from other types of copyright culminates in *International News Service v. Associated Press (INS)*, the controversial Supreme Court decision of 1918 to which he devotes the book's final chapter. "In *INS*," he writes, "the court recognized...a 'quasi property' in news that was entirely independent of copyright" based on the prior law of unfair competition (p. 227). News organizations were thus enjoined from

appropriating not just competitors' words but also their facts as long as they had "commercial value"—what has come to be called the "misappropriation doctrine" or "hot-news doctrine." Grounded not in the idea of ownership of the facts (i.e., independent of expression) but, rather, in the prevention of freeloading, the decision was assailed in dissenting opinions by Oliver Wendell Holmes, Jr., and Louis Brandeis, particularly for its protection of ideas even *after* publication. For Holmes, if a novel property right were to be granted in news, that was the business of the Congress, not the courts. In Brandeis's oft-cited dissent, the issue was more fundamental. Only "when public policy has seemed to demand it," he wrote, was it appropriate to extend a property right to ideas after they had been voluntarily shared with others; otherwise they became "free as the air to common use" (quoted on p. 249).

Over the years, from the age of radio to the era of online news aggregation, the *INS* decision has influenced a wide range of stances in media policy and jurisprudence, and Brandeis's dissent has become a standard for the limits of intellectual property. Together, they show how debates over the unusual characteristics of news illuminate the slippery "metaphysics" of copyright more generally. In this, Slaughter's work, like Goldstein's, can help us recognize the role that law and legal history play in structuring the political economy of copying—much of which now rests on copyright-protected computer software. At the end of the twentieth century, it looked like those who favored strong protections (Goldstein's "optimists") had the upper hand, as suggested by the passage in 1998 of both the Digital Millennium Copyright Act and the Copyright Term Extension Act. Since then, however, there has been substantial organized pushback against copyright expansion in the form of renewed arguments for "fair use" and the broad support for Creative Commons licensing, which promotes the free use of copyrighted works. These two books help us understand why permanent answers to copyright issues are, and will likely remain, elusive.

David Suisman is associate professor of history at the University of Delaware. He is the author of *Selling Sounds: The Commercial Revolution in American Music* and co-editor, with Susan Strasser, of *Sound in the Age of Mechanical Reproduction*.

1. Alec Wilkinson, "Something Borrowed," *New Yorker*, September 28, 2015; Annie Armstrong, "Hillary Clinton Visits Venice Biennale, Rereads Infamous Emails That Are Now Part of Kenneth Goldsmith Project," *Artnews*, September 12, 2019.

2. Hillel Schwartz, *The Culture of the Copy: Striking Likenesses, Unreasonable Facsimiles* (1996), 217.

3. Work on the significance of mechanical and digital reproduction is extensive, but much of it begins with Walter Benjamin, "The Work of Art in the Age of Mechanical Reproduction," in *Illuminations*, ed. Hannah Arendt, trans. Harry Zohn (1968), 217–51.

4. The first and revised editions were published with a different subtitle. See Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (1994).

5. John Delaney and Meredith W. Louis, "Twenty Years Down the Road: A Q&A with Paul Goldstein, Author of Copyright's Highway," *Socially Aware: The Law of Business and Social Media*, March 3, 2015, <https://www.sociallyawareblog.com/2015/03/03/twenty-years-down-the-road-a-qa-with-paul-goldstein-author-of-copyrights-highway/> (accessed December 12, 2019).