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Mark McKenna

Notre Dame Law School, markmckenna@nd.edu

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FIXING COPYRIGHT IN THREE IMPOSSIBLE STEPS: REVIEW OF *HOW TO FIX COPYRIGHT* BY WILLIAM PATRY

MARK P. MCKENNA*

William Patry is one of the world's best and most experienced copyright lawyers. In his distinguished career he has played nearly every imaginable role: full-time legal academic, treatise author, copyright litigator at a major firm, copyright counsel to the U.S. House of Representatives, policy planning advisor to the Register of Copyrights, and Senior Copyright Counsel at Google. When someone with that depth of experience pronounces the copyright system fundamentally broken, we have serious problems. And yet that is precisely what Patry has done in *How to Fix Copyright*.¹

Patry is at pains to insist that he does not advocate for the repeal of copyright law altogether, but one could be forgiven for believing he has made a compelling case for just that.² As Patry ably demonstrates, copyright is overwhelmingly irrelevant to creativity, and much of the current copyright system creates significant economic harm in its pursuit of ever greater control for copyright owners.³ Yet Patry believes this system can be salvaged, if only policymakers would embrace empirical evidence and focus on overall utility.⁴

To my mind, the most striking thing about Patry's reform proposals is their essential impossibility, given the political economy of copyright.⁵ I do not mean this as a criticism of Patry—his proposals are generally quite sensible, and they flow naturally from the evidence Patry insists ought to guide our copyright policymaking. But two of his major proposals—

*Professor of Law and Notre Dame Presidential Fellow, Notre Dame Law School.

1. WILLIAM PATRY, *HOW TO FIX COPYRIGHT* (2011).

2. *Id.* at 11.

3. *Id.* at 15–26, 29–32.

4. *Id.* at 50–52.

5. See generally Pamela Samuelson, *Is Copyright Reform Possible?* 126 HARV. L. REV. 740 (2013) (reviewing PATRY, *supra* note 1, and JASON MAZZONE, *COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW* (2011), and discussing mechanisms for possible reform).

shortening of the copyright term⁶ and reinstatement of formalities⁷—are, for all practical purposes, non-starters. Congress has a long and unbroken practice of lengthening copyright,⁸ and the United States' full entry into the Berne Convention, which largely prohibits formalities, makes re-imposition of formalities extremely unlikely.⁹ Patry knows this, and perhaps that is why he eschews a summary section with a list of specific recommendations, and why the book lacks detailed description of how these reforms would come to pass.¹⁰ It is hardly that Patry is unfamiliar with the mechanisms for copyright reform; it is instead that he so well understands the unlikelihood of his proposals that such a level of detail is not really worth the effort.

What then do we make of a book that offers such a devastating critique of copyright in its current form, identifies some reforms that would make the system more defensible,¹¹ and yet seems almost resigned to the impossibility of those reforms? One answer is that Patry's book tees up an existential crisis for copyright: if the current copyright system diverges so significantly from one rationally related to its purposes, and if reforms that would bring copyright closer to those purposes are essentially impossible, can copyright be justified at all? Put differently, is there any real difference between offering such unrealistic proposals and advocating abolition of copyright?

I will not try to answer those questions directly here. Instead, I will focus on three themes that I think are worth emphasizing even if Patry's ultimate proposals are unlikely to gain any traction. First is Patry's insistence that copyright policy be based on real-world evidence, a suggestion that should be uncontroversial but instead runs headlong into the near-religious commitments of copyright stakeholders.¹² Second is Patry's highlighting of the gulf between the interests of creators, on the one hand, and owners of copyright interests, on the other.¹³ Third, and finally, is Patry's focus on the

6. PATRY, *supra* note 1, at 189–90.

7. *Id.* at 203.

8. Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 278–80 (2004).

9. Berne Convention for the Protection of Literary and Artistic Works art. 5, Sept. 9, 1886; 1986 U.S.T. Lexis 160, *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html (entered into force for U.S. Mar. 1, 1989 (Sen. Treaty Doc. 99-27)).

10. *Id.* at 5–6; Samuelson *supra* note 5, at 741 (noting that Patry's book does not discuss how the reforms might be accomplished).

11. *More* defensible, but surely not entirely so, as Patry largely ignores copyright scope. Obviously scope would be less critical if the copyright term were shortened and affirmative claiming required, but in many cases questions about scope are inescapable. *Cf. id.*, at 741 (arguing that Patry's reform proposals are incomplete).

12. *Id.* at 50–51.

13. *Id.* at 30, 38–39.

copyright system's strong tendency to entrench business models and resist change, particularly in the face of new technology.¹⁴ All of these themes have received extensive discussion elsewhere. Patry, for example, is not the first to note that copyright law primarily serves the interests of publishers, record labels, and other distributors, or that owners' interests often diverge sharply from those of creators. Likewise, copyright's role in protecting business models is well understood. But Patry's discussion weaves these themes together more thoroughly than most other treatments, and he sometimes signals a much firmer commitment to reorienting copyright to protect creators' interests over those of the distributor/intermediaries than do other reform proposals.

EVIDENCE-BASED POLICYMAKING

Patry's overriding criticism of copyright is that the law is overwhelmingly developed on the basis of ideology rather than empirical evidence. Indeed, "[p]olicymakers have been operating in an evidence-free copyright law zone for many decades."¹⁵ It is received wisdom that authors would not create without copyright;¹⁶ that because copyright law is necessary for creativity, more copyright must lead to more creativity;¹⁷ that "creative industries" are the basis for the knowledge economy;¹⁸ piracy is a huge problem that is devastating the creative industries;¹⁹ and others do not really "need" access to a work because they can (and should) create their own works.²⁰ Virtually no evidence is demanded on these claims in the first place, and policymakers (Congress in particular) pay little attention to the evidence when it is available.

There are a couple of reasons for this failure to engage evidence. One is that copyright *is* enormously important to certain parties with economic interests in copyright. Many of the claims made regarding copyright are really focused on the economic effects of various policies on those particular parties. These claims are frequently made without any supporting data and/or are wildly overstated.²¹ But even if the claims were based on solid empirical evidence, they would still only reflect part of the story, because there is no reason to assume that the overall effects of copyright necessarily mirror the effects on particular parties. It is not as if the money made (or potentially made) by those who administer one set of rights to a

14. *Id.* at 2, 46–47.

15. *Id.* at 51.

16. *Id.* at 75–76.

17. *Id.* at 79.

18. *Id.*

19. *Id.* at 63–67.

20. *Id.* at 13.

21. *Id.* at 51–53 (discussing inaccurate information policymakers receive).

work (those who, for example, license sound recordings) would vanish into thin air if the copyright system did not maximally protect those parties' interests. Patry usefully reminds us of the difference between micro effects (the effects on particular parties) and the broader macro effects that ought to guide policy. He argues, for example, that copyright should be structured so that all of the rights to a particular work can easily be cleared at once, even if that requires eliminating the business models of some entrenched interests. Similarly, Patry suggests that the massive costs of clearing rights in out-of-print books indicate a serious problem. Those costs are consequences of excessively long copyright and the lack of any requirement that authors act affirmatively to secure or retain their rights.²² If we incur those costs for the benefit of only a few authors or intermediaries, we need to ask why the consequences for the few are allowed to outweigh the costs to the many.

Another reason copyright policy is so resistant to evidence, which operates mostly below the surface of Patry's discussion, is the persistence of *moral* claims that are used to backstop economic claims about the importance of copyright. On one level, we are told that copyright is critical to economic growth. Yet when economic evidence is brought to bear on questions relating to the proper scope of copyright, then copyright interests often shift to arguments that sound in "wrongfulness."²³ Copying someone else's work is simply "unfair", so it is "wrong" even if it has little or no effect on incentives. Such claims of unfairness, often predicated on or offered in tandem with allegations of "free-riding", have proven rhetorically powerful in intellectual property generally.²⁴ But aside from the fact that these arguments are selectively deployed (if copyright were primarily about moral claims of authors, then the constant claims about economic impact are beside the point), these moral arguments offer no logical stopping point. Free-riding is ubiquitous in a competitive economy, and emotional appeals to unfairness rarely offer principles on which to distinguish legitimate from illegitimate forms.²⁵

Here I think it would have been useful for Patry to lay more of his cards on the table in terms of the justifications for copyright. His criticisms of

22. See *id.* at 194–95 (discussing the cost of clearing rights).

23. *Id.* at 59 ("Since Mr. Burnham could not challenge any of the empirical conclusion in the Gowers report, he instead relied on a previously unarticulated and undefined 'moral case at the heart of copyright law.'").

24. See generally Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137 (2010) (criticizing free riding arguments in trademark law); Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149 (1992) (describing, and criticizing, courts' tendency to decide cases on intuitions of fairness and distaste for free riding).

25. See Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257 (2007) (noting the ubiquity of spillovers from intellectual creations and the positive value associated therewith).

policymakers for failing to follow evidence generally sound utilitarian: he chides Congress and the courts for paying too much attention to the interests of entrenched interests and not enough attention to the overall costs of overprotection.²⁶ But his suggestions that copyright ought to be more focused on creators, and particularly the implication that copyright should be geared toward enabling those creators to make a living,²⁷ indicate Patry's utilitarianism may not be so thoroughgoing. For it is not entirely clear that, *overall*, we would be better off providing more compensation to creators. To be sure, the creators would likely be better off under such a system. As Patry shows, however, we would get much of the creativity we desire without any protection at all.²⁸ Thus it seems that Patry's appeals to the interests of creators have at least a tinge of normative preference for creators as a class. That preference may well be justified – a system that rewarded creators might well give us more interesting work or a more just society – but it is not clear such a system would increase overall social utility, which the preponderance of Patry's analysis suggests is copyright's purpose.

I think there is at least one other important reason that copyright policymaking is so resistant to evidence, on which Patry only barely touches—the professional investment of lawyers in the prevailing wisdom of copyright. Intellectual property orthodoxy runs deep, so deep that despite his trenchant and wide-ranging criticisms of the copyright system, Patry repeatedly insists that he does not advocate abolition of copyright. In that respect it often seems that Patry is pulling his punches; his argument goes far beyond a critique of the current legal rules and actually undermines the narrative on which copyright is traditionally justified. Perhaps it is unfair to have expected a more robust affirmative defense of the idea of copyright. After all, Patry's book is focused on how *to fix* copyright, and he does suggest that any justification for copyright needs to focus on creators' ability to make a living. But given the impracticality of the major reforms Patry proposes, one might reasonably conclude that he may as well have advocated abolition.

The point here is not to criticize Patry for not having done so—I doubt I would have—but instead to point out how difficult it is for intellectual property lawyers even to entertain the idea of life without copyright, notwithstanding powerful arguments that undermine the central premises of the system. Copyright lawyers are deeply invested in a narrative of creativity in which copyright plays a necessary role, just as patent lawyers are deeply invested in the idea that patent protection is central to

26. PATRY, *supra* note 1, at 103–18.

27. *Id.* at 127 (arguing that “we do need [copyright] for those who do want to make a living from their works regardless of why they created them in the first place”).

28. *Id.* at 78–80.

innovation. Beliefs in these narratives are highly resilient to contrary information. Despite substantial evidence that patent law is doing more harm than good in most industries,²⁹ for example, no legal scholar has seriously advocated that patent law be abolished. Intellectual property lawyers, including academics, believe fundamentally in the correctness of the incentive narrative, which is firmly entrenched as the rule, and information about the harm patent law causes in various industries is cordoned off as exceptional. Scholars advocate modest reforms, but rarely (if ever) fundamental ones.³⁰

Non-legal scholars are, by contrast, sometimes willing to consider much more radical changes. Two economists, Michele Boldrin and David Levine, have argued strenuously that most intellectual property laws should be eliminated.³¹ A number of economists have devoted serious attention to prizes as alternatives to exclusive rights.³² Legal scholars, however, largely push back against these arguments or ignore them altogether, even though they rarely take on directly the evidence that Boldrin and Levine marshal.³³ The bottom line is that lawyers are entrenched interests too, and they are professionally invested in the system. It is therefore easy for lawyers to justify the current legal structure, at least in broad strokes. Modest changes to that system are tolerable, but radical ones (which might cost a number of lawyers substantial revenue) rarely are. I do not suggest that this explains Patry's positions; collectively his proposals are significantly more radical than most in the copyright area that I can

29. See, e.g., JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* (2009) (finding that the overall costs imposed by the patent system outweigh its benefits, and that patent law has net positive value only in a very few industries, such as the pharmaceutical industry).

30. This is not to say that none of the reform proposals would have real impact. For example, Mark Lemley's suggestion that functional claiming be limited seems likely to improve things considerably in the software area. See Mark A. Lemley, *Software Patents and the Return of Functional Claiming*, 2013 WISC. L. REV. ____ (forthcoming 2013) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117302.

31. MICHELE BOLDRIN & DAVID K. LEVINE, *THE CASE AGAINST INTELLECTUAL MONOPOLY* (2008). See also Michele Boldrin & David K. Levin, *The Case Against Patents* (Federal Reserve Bank St. Louis, Working Paper No. 2012-035A, 2012), available at <http://research.stlouisfed.org/wp/2012/2012-035.pdf>.

32. See Boldrin & Levine, *supra* note 31, at 4–5, 21.

33. For a rare example of direct engagement with Boldrin and Levine, see Mark A. Lemley, *A Cautious Defense of Intellectual Oligopoly with Fringe Competition*, 5 REV. L. & ECON. 3 (2009) (reviewing BOLDRIN & LEVINE, *supra* note 31). Legal scholars have taken prizes somewhat more seriously. See, e.g., Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 58 UCLA L. REV. 970, 985–88 (2012); Michael Abramowicz, *Perfecting Patent Prizes*, 56 VAND. L. REV. 115 (2003).

remember. But it is what Patry is up against, and one reason why evidence-free policymaking is so pervasive.

Efforts like Patry's could nevertheless do some good insofar as they put greater pressure on those who would claim even broader rights to make their case by reference to evidence. Much copyright expansion occurs because the policymakers hear only from those who stand to benefit. That, of course, is often not a mere oversight—as Patry notes, hearings before Congress are nearly always stacked such that only pro-copyright talking points get aired.³⁴ But courts face different institutional constraints, and they are often called on to make policy-based judgment calls. Focusing courts on the right questions and highlighting the available evidence on those questions might allow them to think in a more balanced way about some edge cases. It might, for example, help courts decide what kinds of uses ought to be regarded as fair use, when to ratchet up the originality requirement, or when to imply exceptions to the DMCA anti-circumvention provisions. These would be most improvements, but improvements nonetheless.

CREATORS VS. OWNERS

The most persuasive part of Patry's book, in my view, is his discussion of the divergent interests of creators (to whom copyright offers very little by way of incentives to create) and rights owners, who frequently are not creators and whose work is not especially creative at all.³⁵ As Patry demonstrates, many authors (indeed, for most types of works, the overwhelming majority of authors) have no use for copyright.³⁶ When authors once were required to claim copyright affirmatively by registering their works, very few did.³⁷ Even fewer re-claimed copyright when it was time to renew.³⁸ Having eliminated formalities, copyright now automatically sweeps into its ambit huge numbers of works that the creators do not really care to have protected. Why does it do that?

One answer is that we are concerned about protecting the smaller number of authors who do want to claim rights, and we are willing to be over-inclusive in order to reduce the burden on those authors. And there is no doubt that some of the old formality rules were quite byzantine, so some unsophisticated authors who did want to claim rights may well have been penalized by those rules. But if one assumes copyright law aims to maximize overall social utility, then it is hard to imagine how the benefits of eliminating those burdens on unsophisticated authors could outweigh the

34. PATRY, *supra* note 1, at 167–68.

35. *Id.* at 103, 107–08, 164.

36. *Id.* at 103.

37. *Id.* at 104–05.

38. *Id.* at 104.

massive transaction costs created by sweeping in so many works for which the owners have little interest in copyright. It is even harder to imagine extending the duration of all of those undesired copyrights to life of the author plus seventy years, allowing ownership of all of those works to be fragmented, and failing to create a mechanism through which would-be users could find information about the works and potentially locate their owners.

A more plausible explanation for copyright's overbreadth—and an explanation that is consistent with copyright law's history—is that authors are not (and have never really been) copyright's primary concern. After all, it has long been an open secret that very little of the money generated in “creative industries” (a term I used advisedly) actually flows to the creators. Patry illustrates this quite well, and his account is consistent with the longstanding sense that record label and movie studio accounting practices were themselves creative works.³⁹ If copyright law were really animated by creators' interests, it would be hard to imagine how this state of affairs could persist, notwithstanding attempts to rationalize the outcomes by suggesting (farcically) that they are simply the result of consensual transactions. At the very least the fact that so little of the money makes its way to the creators who nevertheless continue to create so much is powerful additional evidence of the irrelevance of copyright incentives, or perhaps the incredible power of the optimism bias.

More likely, authors are romanticized because they are sympathetic, which explains why copyright interests always advocate publicly for greater enforcement by suggesting (sometimes quite vividly) that users are taking food out of authors' mouths.⁴⁰ But this is much like trademark owners' cynical exploitation of “consumer interests” in trademark law—neither authors' nor consumers' interests really drive the law, and indeed many expansions that are contrary to their interests are achieved in their name. One contribution of Patry's book is to shine an even brighter light on these claims, and perhaps to focus our attention more clearly on copyright's real beneficiaries—the distributors—so that we can more honestly determine whether and when distributors' interests need protection, independent of rhetoric about creators.

Greater attention to the interests of creators might also influence some modest reforms that courts are well-situated to implement. For this to work, however, courts must first firmly reject the notion that copyright serves

39. *Id.* at 119–25.

40. *See, e.g., Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online*, RIAA (Sept. 8, 2003), <http://riaa.com/newsitem.php?id=85183A9C-28F4-19CE-BDE6-F48E206CE8A1> (quoting Bart Herbison, Executive Director, Nashville Songwriters Association International: “When someone steals a song on the Internet it is not a victimless crime. Songwriters pay their rent, medical bills and children's' educational expenses with royalty income.”).

creators' interests by providing an incentive to create or to distribute. Patry's discussion (which builds on empirical evidence developed by many others) makes clear that this is not copyright's real role.⁴¹ Copyright could be tailored to help creators by making it possible for them to earn a living as professionals.⁴² To achieve that for creators, courts would have to adopt rules that shift the balance of power away from copyright intermediaries and toward the creators themselves. They might do so by interpreting contracts more favorably to artists, being less willing to assume that authors have surrendered their rights in the absence of clear evidence, and by being exacting in their analysis of the work for hire doctrine. They might also recognize the inevitability of borrowing in the process of creation and therefore interpret fair use broadly and be more reluctant to find infringement in the absence of more substantial copying.

BUSINESS MODELS AND TECHNOLOGICAL CHANGE

The final major theme of Patry's that I wish to take up here has to do with copyright's role in structuring the markets in which works are exploited.⁴³ As Patry very ably demonstrates, copyright's complexity is to a significant degree a function of the fragmentation of ownership, each of the many stakeholders having developed their stakes under certain prevailing market conditions that may no longer obtain.⁴⁴ The distinction between musical work and the sound recording, for example, is a byproduct of the fact that music was once fixed in tangible form primarily by rendering notation on sheet music. Rather than reconceiving that paradigm when technology later allowed for fixation in recordings, Congress instead created new exclusive rights in sound recordings that are distinct from rights in the musical work.⁴⁵ That might have seemed workable (even if it added transaction costs) for as long as it was true that music was first fixed in written form and then only later recorded. But as Bob Brauneis has noted, that is no longer how musicians work.⁴⁶ Music is now often fixed for the first and only time in a sound recording, making it difficult, if not impossible, to determine where the musical work ends and the sound recording begins. The distinction between the musical work and the sound

41. PATRY, *supra* note 1, at 77–78.

42. *Cf.* ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* 195 (2011).

43. PATRY, *supra* note 1, at 143–45.

44. *Id.* at 144.

45. 17 U.S.C. § 106(6) (2012). According to the Copyright Act, a sound recording is a work “that result[s] from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.” 17 U.S.C. § 101 (2012).

46. Robert Brauneis, *The Musical Work in the Age of Sound Recordings* (draft on file with author).

recording, however, is practically quite important because sound recording rights are more limited,⁴⁷ and because rights to the musical work and those to the sound recording may well be owned by different parties.

Given the additional difficulties entailed in a system with such a duality of rights (multiplication of which makes certain kinds of uses essentially impossible),⁴⁸ why have we not streamlined? The obvious answer is that there are entrenched interests that have built business models around administration of these distinct rights, and one or more interests would be hurt by consolidation.⁴⁹ We could say something very similar about why owners of various interests have been so slow to adapt to new technologies, despite the fact that those technologies have nearly always added enormous economic value. Even if the VCR expanded markets and opened up new revenue streams for copyright owners, its introduction threatened existing distribution practices, just as downloading and streaming threaten physical distribution and sequencing of movies.

It is, of course, inevitable that economic interests will harden around existing rules and technologies. But that is all the more reason to be skeptical of claims by rights owners that new technologies threaten creativity— what they really mean is that those new technologies threaten certain entrenched interests. Patry usefully reminds us here that we ought to be particularly careful about crediting those claims in the face of technological change, as history teaches that new business models will develop around new technology.⁵⁰ That is, in effect, an argument in favor of copyright flexibility, and the need to revisit copyright's basic structure periodically. And Patry has given us the broad outlines against which to judge its condition at any particular time. That is a significant achievement.

47. See 17 U.S.C. § 114 (2012).

48. See Patry's discussion of the difficulty of sampling in this age. PATRY, *supra* note 1, at 182–85.

49. See, e.g. *In re Cellco P'ship*, 663 F.Supp. 2d 363 (S.D.N.Y. 2009) (rejecting the American Society of Composers, Authors, and Publishers' argument that a wireless company must pay public performance licensing fees for ringtones).

50. PATRY, *supra* note 1, at 142–45.