

University of Pittsburgh

From the Selected Works of Michael J. Madison

2013

Book Review -- William Patry, How to Fix Copyright

Michael J. Madison



Available at: https://works.bepress.com/michael_madison/40/

PITT LAW

UNIVERSITY OF PITTSBURGH

Legal Studies Research Paper Series
Working Paper No. 2013-13
April 2013

**Book Review – William Patry,
How to Fix Copyright**

Michael J. Madison

University of Pittsburgh School of Law
3900 Forbes Avenue
Pittsburgh, Pennsylvania 15260-6900

www.law.pitt.edu

412.648.7855

E-mail: madison@pitt.edu

This paper can be downloaded without charge from the
Social Science Research Network Electronic Paper Collection:
<http://ssrn.com/abstract=2256260>

The IP Law Book Review

IP Law Center, Golden Gate University School of Law

Vol. 3 No. 2 (April 2013) pp. 29-35

HOW TO FIX COPYRIGHT, by William Patry. Oxford University Press, 2012. 336 pp. Hardback \$21.95.

Reviewed by Michael J. Madison, University of Pittsburgh School of Law.
madison@pitt.edu

I have long enjoyed reading William Patry's scholarship on copyright, not only because I agree with most of his prescriptions but also, and mostly, because his writing relies on a substantive modesty and a stylistic readability that makes his arguments inherently appealing. *HOW TO FIX COPYRIGHT*, his latest book (following on *MORAL PANICS AND THE COPYRIGHT WARS*)¹, delivers the goods once again. Patry assesses the entirety of modern copyright, from its foundations to its details, and finds it wanting. His prescription is that policymakers should simply start over, taking modern technologies, markets, and uses as their starting points rather than continuing to build atop the legacy of 18th century bookselling and historical practices of producing cultural commodities.

For the veteran observer of copyright debates, *HOW TO FIX COPYRIGHT* breaks little new ground but reviews a broad range of issues in an accessible and common sense way. For a reader who is less familiar with the details of what some (like Patry) refer to as "the copyright wars," *HOW TO FIX COPYRIGHT* is a helpful overview of the relevant landscape, accompanied by some gentle and some sharp proposals for reform. Regardless of background, one would be hard-pressed to find a better contemporary synthesis of what ails copyright today. Given the breadth of Patry's experience in copyright—as a staff member in the House of Representatives, as a scholar, and now as copyright counselor to Google—that comes as no surprise.

What is something of a surprise, coming from someone with Patry's reputation as a careful, ground-it-in-logic-not-ideology student of the discipline, is the strength of his current convictions. Copyright is not just broken but is broken *very badly*, in his judgment, and it is failing the very

people—authors and readers—that it was originally intended, according to the mythos of the law, to serve.

That said, I have a few quibbles with the book and one larger bone to pick. But first, a summary.

HOW TO FIX COPYRIGHT might have been better titled “What About Copyright Needs to be Fixed?”, because rather more of the book is given over to what is wrong with today’s copyright and rather less of it is devoted to prescriptions and solutions. But that would have deprived the author of the pun-ish title, and of the following deeper point. Technology and society are fast-moving substrates for any law that deals in creativity and culture. The challenge in “fixing” copyright is not merely to lay claim to the law’s concern with original works of authorship that are “fixed” in a tangible medium of expression, but also to identify the point where the law itself, as a stable institution, can safely and justly engage with the dynamic people and institutions that it touches.

What about copyright needs to be fixed, at least in that first sense? The answer, in a nutshell, is almost everything. In Patry’s telling, today’s copyright law and legislation is dominated by greedy, rent-seeking corporate copyright interests that invoke property rhetoric excessively and deprive the public—both first-generation and second-comer authors, readers, viewers, listeners, and users—of the full benefits available under a dynamic intellectual property regime. Historical copyright has been undone by modern changes to technology and markets. Restoring a healthy alignment between law and society means giving fuller weight in lawmaking to demand-based and consumer-based priorities. The question for copyright law is not “what do authors deserve?” so much as it is “what do consumers want?” And doing that effectively and fairly means restoring lawmaking processes that are based on the empirics of creativity, innovation, and commercialization, rather than on ideology and rhetoric.

The full argument can be summarized, then, in a handful of quotations:

- Laws must be consistent with prevailing markets and technologies because technologies play a large (though not exclusive) role in creating consumer demand; markets then satisfy that demand. Without consumer demand for your book or musical work, owning a copyright is meaningless. (p.2)

- I call for a moratorium on the introduction and passage of any new legislation until (1) we have established independent, rigorous, economically verifiable methodologies by which all proposals will be tested and later reviewed for their effectiveness, and (2) we have tested all existing laws by those methodologies and have repealed or suitably amended those that fail the review. (pp.5-6)
- My view is that copyright laws can serve valuable purposes: while they do not cause people to create in the first place and do not create economic or critical success, they do ensure that once works are created, those who wish to protect them and economically benefit can. (p.11)

There is much more to the book, of course, but through Patry’s entire text – covering copyright fundamentals (the concept of *the copy* should be revisited); copyright-based business models (current copyright serves the large-scale “winner take all” models of commercial creativity, not authors and other creators themselves); licensing and clearance complexities (Patry bemoans the absence of a worldwide system for simplifying clearance of rights in musical works); copyright enforcement (overbroad and punitive remedies foster disrespect for the law and undermine its legitimacy); and some specifics of doctrine (the unnecessary extension of property interests in the Digital Millennium Copyright Act; the overly-long length of the copyright term; the virtues of some copyright formalities; and a reprise of Patry’s “moral panic” argument about the proper uses of fair use)—a handful of common themes repeat: Copyright should be sensitive to market and technological context. Markets and technological contexts keep changing. Changing the law (or failing to change the law) without carefully considering the impact of the law runs the risk of disabling actual human beings, on a wide scale, from making beneficial use of—even profiting from—creative work. At almost every step, Patry illustrates his claims with data—not only data from today’s creative economy, but historical accounts. Unlike much cultural criticism of the excesses of contemporary copyright, this criticism is situated in the full range of modern copyright history rather than only in an account of the last 20 years. The virtue of the book lies more in the synthesis of these things in a single, breezy volume and less in their specifics.

Veteran observers (including me) will recognize many of the critiques and proposals from academic and other policy criticism of the last decade. At the margins, the book may be faulted for focusing too much on conflicts

between business interests and individual interests as expressed (on both sides) in legal terms, and not enough on other fora and frameworks: government institutions, both in the US and especially outside the US, that are devoted to cultural flourishing; and systems of informal interests collected as social norms, histories, formal institutions and informal practices that play important roles in both the production and distribution of creative works. The book takes a modestly critical attitude with respect to the foundational concept of the *copy* in copyright but does not dive more deeply into the phenomenal basis for the law. Why, it might be said, must copyright attach itself to *the work of authorship*? If Patry is really serious about stripping copyright to its core and building from first principles, taking evidence as a guide, then let's really start at the beginning. What do creators create, and what do consumers consume? Readers read? Viewers watch? And so on. But Patry is a pragmatist, not a theoretician. He engages where the argument is already well underway, and wisely, he does so where he thinks he can have impact.

Those are my quibbles. It almost goes without saying that a reviewer situated differently, say, grounded in Lockean philosophy or Coasean economics, or attached concretely to the benefits thought to be associated with existing cultural institutions (commercial publishers, film producers, record labels, and the like) might quibble differently and more aggressively. Patry's "readers first" approach conflicts directly with the "authors first" philosophy and economy that informs the other side of the copyright debates that he identifies.

But I promised a bit more. I have a bigger concern.

Patry makes no bones about his distaste for "corporate" creativity and for the arcane business architectures of the contemporary copyright community. He writes:

Our copyright laws are, and have always been, a winner-take-all system. If that is the desired policy, then our copyright laws are working fine. If, however, the policy is to create diverse works by diverse members of our society in order to create a rich cultural heritage, then it is important to realize copyright laws have never accomplished that purpose. Indeed, our copyright laws on steroids are impeding creativity. (p.80)

Yet HOW TO FIX COPYRIGHT offers "the market" as the ultimate arbiter of consumer (reader) interests in copyright. Patry again:

Many businesses that rely on copyrighted material have a problem: not enough consumers are paying for their works. While copyright owners like to portray this as a legal problem—a problem of piracy—the problem is a market problem, arising from the continuing failure of copyright owners to respond and adapt to changing markets and the technologies that drive consumer demand. (p.141)

Note the framing here. Markets drive demand. Technologies drive markets. As technologies change, markets change, and demand changes. Copyright owners need to adapt and respond to demand. Here and elsewhere, Patry builds on the work done in the UK via a report, commissioned by the British Government and published in the United Kingdom in 2011.²

Patry does not pause to consider the possibility that the abstraction he calls “markets” might plausibly and logically lead to the winner-take-all results that he decries. Markets today might be working just fine; consumers might simply prefer to spend their time and money on Hollywood blockbusters and sound-alike pop songs. Or markets might not work well at all; consumers might prefer documentaries and independent films and quirky folk/bluegrass blends. Patry’s money seems to be on the latter, but how might we ever know what consumers—who on the latter account really ought to be called readers, listeners, and viewers, as well as authors in their own rights—really want?

As I wandered through Patry’s argument, I recalled the work of another veteran copyright observer who commented, perhaps more optimistically, on how copyright and copyright owners should respond to changes in technology. In 1994, Paul Goldstein published *COPYRIGHT’S HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX*,³ a prescient book that considered the copyright system in comprehensive terms, bearing in mind history and emerging changes in technology. Goldstein came to the judgment—like Patry—that copyright and copyright owners needed to be attuned to the new landscape. And the best way to do that was to let the market mediate consumer demand. This was the only way, Goldstein concluded, and the best way, to figure out what was and is best for society:

The digital future is the next, and perhaps ultimate, phase in copyright’s long trajectory, perfecting the law’s early aim of connecting authors to their audiences, free from interference by political sovereigns or the will of patrons. The main

challenge will be to keep this trajectory clear of the buffets of protectionism and true to copyright's historic logic that the best prescription for connecting authors to their audiences is to extend rights into every corner where consumers derive value from literary and artistic works. If history is any measure, the result should be to promote political as well as cultural diversity, ensuring a plenitude of voices, all with the chance to be heard.⁴

Goldstein came across as an optimist about copyright's future; Patry comes across as a pessimist. Yet they each look to technology and to markets for sources and solutions. How can Patry and Goldstein come to such different judgments? Can they both be right?

One answer is that they are both wrong. "The market" is a monist metaphor, and a kind of black box, that conceals the plural ways in which creative work is created and enjoyed, and the ways in which many individuals are precluded from participating in "markets" as they wish to. Julie Cohen dives deeply into just this critique in her recent book, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE*.⁵

As a second answer, and the one that I prefer, I am inclined to give Patry (and Goldstein, too) the benefit of the doubt. I think that when William Patry argues that copyright lawmakers should listen to the market, the metaphor he invokes is not the metaphor that Paul Goldstein invoked—even though the phrase itself is, of course, identical.

Goldstein was laying out the Coasean argument for the design of transaction-centered copyright economics. If we take seriously copyright's prescription of aesthetic nondiscrimination and extend the judicial humility at its core by one more step—to a position of full epistemic humility—then there is no reason to suppose that policymakers know the shape of society's cultural welfare curve better than consumers themselves do. The only practical and possibly objective way to measure welfare under that curve is by price—that is, by consumer's willingness to pay. Market transactions measure utility; thus the aim of copyright policy should be to maximize the number and value of market transactions. If Britney Spears becomes rich and famous in part because copyright protects her record label's prices, then who are we to complain that Lucinda Williams has not gotten the hearing she deserves in the cultural marketplace?

Patry's market, while far from fully detailed, is a different thing, with a different aim. Patry's market, it seems to me, is not only or even primarily the market that results from made transactions in cultural works; it is not the market that follows, as Goldstein's does, from the specification of legal rights in copyright. Instead, Patry's market is the set of consumer (reader, etc.) choices that are made available and specified prior to policy decisions regarding the design of exclusive rights. Goldstein's transacting authors and consumers are free to choose rationally from the goods and services they produce and encounter; Patry's authors and consumers are differently enabled and disabled from choosing, based on the phenomena of digital networked technology. As a starting point, but not as an end point, in Patry's market creative works exist in their ideal sense in endlessly replicable digital abundance, rather than only in depletable analog copies.

In that market specified by digital abundance, does copyright need to be fixed? In the casual "does it need to be repaired?" sense, William Patry is clearly correct: It does, and he makes a persuasive case regarding the reasons. In the more subtle "can copyright be made effective as a static body of law?" sense, I am not sold, much as I liked this book. The technological specifications of Patry's market are changing day by day, and perhaps too swiftly for any body of law fully, and adequately, to deal with them. But may answering that challenge fully be part of Patry's next offering.

ENDNOTES

¹ William Patry, *MORAL PANICS AND THE COPYRIGHT WARS* (Oxford University Press, 2009)

² Ian Hargreaves, "Digital Opportunity: A Review of Intellectual Property and Growth", (2011) available at <http://www.ipo.gov.uk/ipreview-finalreport.pdf>

³ Paul Goldstein, *COPYRIGHT'S HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX* (Hill and Wang, 1994)

⁴ *Id.* at p.236

⁵ Julie E. Cohen, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* (Yale University Press, 2012)

Suggested Citation: 3 *The IP Law Book Review*: 29 (2013)

© 2013 Michael J. Madison