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THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION, by Kal Raustiala and Christopher Sprigman. Oxford University Press, 2012. 280 pp. Hardback $27.95

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In THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION, Kal Raustiala and Chris Sprigman recount a series of engaging case studies from popular culture and leverage them to generate insights that challenge the foundational assumptions of the U.S. intellectual property system. The evidence in THE KNOCKOFF ECONOMY comes in the form of stories about fashion and football, finance and fonts. Raustiala and Sprigman make two simple observations about each of these areas: they are all subject to no (or very low) IP protection, and they are all characterized by thriving innovation.

These case studies, the authors observe, illustrate that copying is clearly not inimical to innovation, and that in many respects copying actually spurs more and better creative production. If this conclusion sounds counterintuitive, that is because it strikes at the conceptual heart of America's IP system, which has long assumed that inventors and authors will develop new inventions and works only if they enjoy strong legal protection against unauthorized copying. Raustiala and Sprigman's critique of this premise represents a major contribution to a growing body of work indicating that traditional assumptions about creative production require fundamental rethinking in the age of the internet and digital media.

Before delving into its case studies, THE KNOCKOFF ECONOMY begins with a succinct introduction that outlines the book's findings and summarizes its conclusions (p.3). THE KNOCKOFF ECONOMY operates against the background of the "monopoly theory" of innovation. This is the familiar story of IP in American law that innovation will arise and persist only if creators are given exclusive rights to stamp out unauthorized uses of their works. Yet many industries, such as fashion, appear not only to be surviving despite the presence of rampant copying, but to be thriving to a large extent *because of* rampant copying. Other industries follow this pattern: food, football, and stand up comedy are, like fashion, subject to low (or no) IP protection. Yet they, too, are characterized by robust degrees of creative production. Raustiala and Sprigman are careful to stress the nuance of their claim. They concede that laws preventing copying have an essential role to play in our economic and cultural life. But the notion that copying can spur as well as suppress innovation makes that role much more conflicted than the monopoly theory suggests.

Raustiala and Sprigman's first case study, "Knockoffs and Fashion Victims," adapts their previous work available elsewhere (p.19).[1] Even as fashion has gone from an exclusive province of the social elite to a popular obsession, it has remained a stranger to copyright protection. This has long permitted legal copying of the most popular designers' clothes, and the fashion industry has long attempted to counter this through pushing legal reforms and private anti-copying sanctions—so far, without success.

The fashion establishment's nearly century-old battle suggests that copying is devastating their industry. And indeed, copying is rampant, including by prominent designers. But copying appears to be sustaining, not killing, the fashion industry, thanks to a phenomenon Raustiala and Sprigman term the "piracy paradox." The paradox depends on the fact that people don't really need to buy new clothes as often as they do for functional reasons, so fashion must convince them to buy new clothes to remain consistent with the latest styles. This is the fashion cycle, and the faster trends rise and fall, the more consumer demand there will be for new clothes. And rules permitting copying fuel faster fashion cycles by accelerating the rate that fashion diffuses from haute couture to Canal Street knockoffs. Raustiala and Sprigman assemble data confirming that even as fashion piracy has exploded in the last decade, prices for women's dresses have remained constant and even, in the case of the top 10% of the market, risen substantially. (This does not, though, answer the concern raised by other scholars that piracy does hurt middle- and lower-tier fashion designers.[2])

The piracy paradox depends also on the tendency of fashion trends to anchor around a handful of styles every year. Again, it's copying that helps drive this phenomenon. How do we know who the "winners" in a given fashion season are? It's the styles that get ripped off the most, since all those knockoffs reflect the scale of popular demand for the original. And the beneficial effects of copying also derive from the gap between the release of new fashions and the moment when consumers figure out which styles have “won” that cycle. For while runway fashion can be copied instantly (and sometimes even before it’s released, thanks to pre-fashion week leaks), creating and distributing popular knockoffs requires some lag time while hit styles heat up. This lag time allows creators of new fashions a brief window of effective (if not legal) exclusivity before the winning styles become ubiquitous and it’s time to come up with something new for the next season.

In Chapter 2, “Cuisine, Copying, and Creativity” (p.57), Raustiala and Sprigman turn to copying in the world of cuisine. Like fashion, food has transformed over the last hundred years from a humdrum necessity to a national cultural obsession. This obsession operates at the high end, with fancy restaurants packing in customers and cooking reality shows raking in viewers, to the low end, with food trucks garnering long lines of patrons all over major cities. And also as with fashion, this explosion of enthusiasm for cuisine has happened in the absence of meaningful IP protection for most aspects of the commercial food industry. Recipes, for example, are uncopyrightable, though advertising slogans may be protected through trademark and distinctive restaurant décor through trade dress.

In light (though not necessarily because) of this relative lack of IP protection, copying is rampant in the culinary world. This copying operates at both the level of technique (such as the sous vide craze of several years back) and specific dishes (the once-haute, now-ubiquitous molten chocolate cake, now available at Arby’s). Yet as with fashion, food is characterized by thriving innovation despite widespread copying. Raustiala and Sprigman proffer several reasons to explain this apparent paradox. First, chefs tolerate copying but require one another to adhere to a well-understood set of social norms. Inspiration and homage are acceptable, but only if due attribution is paid to the source. If a chef fails to follow the norms of the food world, her peers may exclude her from that world. Second, even outright copying of recipes may fail to truly supplant the original. A diner’s experience of a dish is affected not only by ingredients and cooking times, but also by the chef’s skilled execution of a recipe as well as the atmosphere of the restaurant. Finally, even a perfectly copied dish may not garner the same popularity as the original, since many diners seek food prepared by the particular chef who originated it. You may be able to get pork buns at many places, but there is only one place to get pork buns made famous by David Chang—at one of his New York Momofuku restaurants.

The authors conclude their case study on copying and cuisine by signaling two general themes that pervade the rest of the book. First, the cuisine world operates pursuant to an open-source ethic. So long as chefs follow the relevant social norms, they are willing to share their innovations with one another, and they encourage rather than discourage copying. This ethic may be starkly opposed to the monopoly theory of innovation, but the richness of innovation in the cuisine world suggests that open-source may be a superior way to achieve creative production. Second, the actual food that ends up on your plate reflects only a fraction of what you are getting when you go to a fancy restaurant. You're really getting an experience—attentive service, flossy décor, the company of other fine diners, and proximity to a celebrity chef. In this respect, modern cuisine is as much a performance as a product. And since performances, in cuisine or other fields, must be seen in person to be truly experienced, they are virtually impossible to copy.

From food, Raustiala and Sprigman turn to the world of stand-up comedy. This chapter, "Comedy Vigilantes" (p.97), also adapts work that appears elsewhere.[3] Comedy has transformed itself over the second half of the twentieth century. Where comedians used to just recite snappy, generic one-liners, their sets now consist of individualized, and often deeply personal, comic monologues. Yet comedy too is almost entirely unprotected by IP, since the idea of a joke (as opposed to the particular expression of it) enjoys no copyright protection.

In comedy, too, there is substantial creativity despite the lack of IP protection. Unlike in fashion and food, however, the reason is not that the comedy world is characterized by frequent copying that spurs more innovation. Rather, comedians have developed and enforce social norms that preclude copying. These norms sweep more broadly than copyright law. Any comic who initially comes up with a premise for a joke, owns it. And this includes the idea of the joke, not just the particular expression of it.

Because comedians do not rely on law to protect their jokes, though, they have to enforce their informal rules themselves. And they do. When a dispute over joke stealing begins, the custom is to start by simply discussing the concern and asking the purported copier to stop. When that fails, though, aggrieved comedians may pressure peers and venues to refuse to deal with the copier. Robin Williams, for example, found himself ostracized from popular Los Angeles comedy venue The Comedy Store because of allegations of joke stealing. Comedians may also enforce norms by attacking the reputation of the copier. Louis C.K.'s repeated complaints that Dane Cook stole his jokes hurt Cook's credibility in the comedy world so much that Cook appeared on Louis C.K.'s television show to (quasi-fictionally) address the issue. Or aggrieved comedians may just attack the copier, as Joe Rogan famously did when he instigated an on-stage confrontation with Carlos Mencia at The Comedy Store.

The authors conclude this chapter by asking why comedy innovation thrives due to social norms preventing copying, while creativity in fashion and food because of the ubiquity of copying. First, the comedy world is small and close-knit enough that social norms can be both widely understood and enforced by shaming and shunning sanctions. Second, comedians feel compelled to create social norms rather than using IP law because the subject matter they seek to protect—the idea of jokes—lies on the unprotected side of copyright's idea/expression dichotomy. Finally, strong norm-based protection of jokes matches the detailed, highly personal nature of current comedy routines. When comedy was just about repeating generic one-liners, copying was rampant. But now that comedians invest much more time in their routines, and where those routines are so much more personal, the community has stronger incentives to protect the exclusivity of jokes.

Raustiala and Sprigman's final case study, "Football, Fonts, Finance, and *Feist*" (p.123), examines four different areas in which innovation thrives in the presence of frequent copying. Start with football. The sport is regularly transformed by major innovations like the West Coast offense, the zone blitz, or the spread offense. That these innovations persist despite a culture that freely permits other coaches to copy them is explicable largely by first-mover advantage. A coach who comes up with a great new innovation gets to enjoy the competitive edge it brings while other coaches struggle to catch up and use it themselves (often "tweaking" it to make marginal improvements that further develop its efficacy). And the innovating coach garners fame and career advancement as a result of being recognized as the creator of a revolutionary strategy.

Consider, by contrast, fonts. IP law, for formal and practical reasons, does not protect typefaces. Yet the number of available fonts has exploded in recent years, approaching 170,000 by some estimates, most of which are substantially based on preexisting fonts. Here, technology solves the paradox of massive innovation in the face of widespread copying. Making typefaces has become much easier in the age of digital technology, with much of the innovation coming from amateur rather than professional designers. Moreover, as printing technology changes at an accelerating pace, so does demand for font innovation, regardless of whether those fonts enjoy IP protection. Moreover, companies like Adobe want to be able to boast that their software comes with attractive bells and whistles—such as a profusion of typefaces. And since typefaces are typically ancillary to other products, they may bring more value when widely sharable and freely available than when held under proprietary lockdown.

The world of finance, too, is highly innovative—perhaps too much so, considering that the Great Recession of 2008 was brought on to a large extent by novel investment vehicles. And while courts have held business methods to be patentable, most financial firms do not seek patents for their innovations. The reason appears to be that firms just don't need IP, since those that develop major innovations typically retain a dominant market share for years regardless of how much they are copied. This powerful first-mover advantage may derive from the reputation and in-house expertise associated with firms that create financial innovations. Or it may simply be due to the fact that most firms that develop groundbreaking investment strategies are large, well-established entities with substantial market power and entrenched client lists.

Finally, the authors turn to the database industry. Since the Supreme Court's 1991 decision in *Feist v. Rural Publications*,[4] databases have received only very thin copyright protection in the United States. Their selection and arrangement of facts may be protectable, but the facts themselves are free to be copied. This contrasts sharply with the European Union, which (right around the time *Feist* was decided in the U.S.) passed a law granting a fifteen-year period of exclusive rights to databases. The monopoly theory of innovation would predict that this would have meant an explosion in database productivity in Europe and a concomitant diminishment stateside. But in what may be the most surprising reported finding of THE KNOCKOFF ECONOMY, just the opposite turned out to be true. European database production had flatlined or slightly declined in the decade-plus following the copy-preclusive EU law, while database production in the U.S. had swelled to a 70% share of the global marketplace. The reasons for this paradox are several, but most instructive among them is that the freedom of database copying in the U.S. has led rival producers to compete not in terms of gathering data, but in terms of thinking of new and creative ways to present that data. Some individual European firms are better off thanks to EU database law, but the overall European database industry has grown weaker.

Raustiala and Sprigman's "Conclusion: Copies and Creativity" (p.167) is actually the book's penultimate chapter. The authors first summarize the major themes that emerged from their case studies of creative industries with no (or low) IP. These include the dynamics spawned by trends and fads; the constraining influence of social norms; the ability to render copying less relevant by translating products into performance; the power of open-source methods to lower the costs of innovation; the market dominance that first-mover advantage brings even in the absence of IP protection; and the capacity of copies to serve as advertisements for brands.

These factors complicate the simplistic premise of the monopoly theory of innovation that copying always crushes creative production. But what does this mean for the future of innovation? The authors rightly stress that what matters for making this prediction is not merely restrictions on copying, but the return on innovation. Two factors warrant optimism that future returns will be positive. One is optimism bias. Creators systematically overestimate the success their products will achieve, as studies have repeatedly shown. And the advent of digital media has caused the costs of creation to drop precipitously in many fields. The combination of creators' overconfidence with ease of production suggests a future rich in creative production for many fields, even in the absence of strong IP rights.

The authors conclude their tour through innovation in low-IP creative industries with "Epilogue: The Future of Music" (p.213), which considers the book's implications for creative industries that are subject to full IP rights. This chapter begins with the important distinction between the music industry (typically referring to just the major record labels) and music itself. The popular notion that the music industry is dying is not far wrong (record company revenues declined almost 50% from 1999-2009), but music itself is thriving in terms of diversity and quality, availability and quantity. The music industry's decline may have been a self-inflicted wound due as much to pride as to illegal filesharing. The record labels' insistence on crushing rather than partnering with Napster only opened the door for Apple's iTunes to grab a stranglehold on the online music-purchase market.

How can other creative industries, such as Hollywood, avoid the fate of the record labels? There are glimmers of hope even from within the wreckage of the music industry. Music, like food, can be repackaged as an experience good, and going to a live performance is something that can't be copied. Bands now often earn more from touring than from record sales. Music has also succeeded when it has been linked with social networking, which allows artists to rocket from obscurity to commercial success by building fan bases via Twitter and Facebook and distributing their albums directly via their websites. And diversification of media (vinyl, for example, retains intrinsic appeal even in the age of MP3s) and markets (streaming options like Spotify) may allow enough choice to keep consumers coming back.

THE KNOCKOFF ECONOMY's readable style and fun subject matter make it suitable for a general audience, as well as well-versed IP experts. It is at once a modest and ambitious project. Its modesty lies in the constrained nature of its thesis. Raustiala and Sprigman do not argue that copying is an unalloyed good, or that all IP should be abolished. Rather, they claim merely that copying is not necessarily harmful to creative production and can even—contrary to what the monopoly theory of innovation suggests—spur innovation. That creativity and copying may coexist does not, of course, tell us whether low-IP worlds such as fashion, food, or fonts are achieving the optimal level of creative production. Chefs and clothes designers may do better in a world of strong IP rights. But Raustiala and Sprigman make a compelling predictive case that this is not, at least in the industries they have studied, at all likely. And this counterfactual uncertainty does not diminish the ambition of their thesis, which undermines the core presumption of the monopoly theory of innovation that copying is inimical to creative production.

Of the many promising directions for future work embedded within THE KNOCKOFF ECONOMY, one puzzle in particular stands out: if the authors are right that copying can be a boon to both owners and their works, why do so many creators react angrily to unauthorized use? Are they merely unaware of copying's upside, or does their resistance signal an instinctive aversion to unauthorized use that complicates this story even further? It is a measure of the richness of Raustiala and Sprigman's work that this is only one of countless intriguing questions raised by this provocative and eminently readable book.

ENDNOTES

[1] Kal Raustiala & Christopher Sprigman, The Piracy Paradox: Innovation and Intellectual Property in Fashion Design, 92 Va. L. Rev. 1687 (2006).

[2] Jeannie Suk & Scott Hemphill, The Law, Culture, and Economics of Fashion, 61 Stan. L. Rev. 1147 (2009).

[3] Dotan Oliar & Christopher Sprigman, There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-up Comedy, 94 Va. L. Rev. 1789 (2008).

[4] Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991).

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