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COMPLEX COPYRIGHT: MAPPING THE INFORMATION ECOSYSTEM, by **Deborah Tussey**. Ashgate, 2012. 156 pp. Hardback \$104.95

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Why should things be simple? Or put another way, why should we ignore the complexity of things? Professor Tussey, in her engaging and thought-provoking new book, **COMPLEX COPYRIGHT: MAPPING THE INFORMATION ECOSYSTEM**, effectively raises this question about copyright. She argues that copyright policy makers should recognize how copyright operates as a complex adaptive system. As a result, copyright law will be more responsive to the needs of creative individuals and the promotion of creativity. She states her objectives clearly in her introduction. “[A]n ideal copyright law would create a self-regulating, homeostatic system in which market demand would create a feedback loop driving the creation of culture” (p.11). With that goal in mind, Professor Tussey weaves an argument that shows how copyright is akin to a prairie ecosystem and how sometimes more flexible copyright law can lead to more copyrighted works.

With all her references to systems, Professor Tussey may be labeled a structuralist, someone who thinks that there are hidden structures that define social relationships and our understanding of the world. But she makes clear at the start of her argument that her concern is with behavior, not just structures. What makes a system complex is different from what might make it simply complicated, with lots of bells and whistles and moving parts. A complicated system is at some level predictable, once the connections among the parts are identified. A complex system, however, has a degree of unpredictability as the remotest change might have unforeseen consequences. To manage complex systems, one has to be flexible and attuned to behavior. One has to take a bottom-up approach, starting from experience and ending with rules and principles, which in turn

shape experiences. Feedback and learning define complex adaptive systems. They should also define copyright law and policy.

Professor Tussey makes her case for copyright as a complex adaptive system carefully and meticulously. She starts from examining the legislative institutions which give rise to copyright law. She accurately portrays these institutions as a set of competing and deliberating economic interests that guide the drafting of laws. As I read her description, such a system is a closed one, seemingly impervious to outside influence, particularly that of deeper or long term consequences beyond the narrow interests of certain groups. How to break this closed system of law making?

Professor Tussey asks lawmakers, presumably with the aid of law professors and other advocates, towards a more empirical understanding of copyright law. Like the little boy who points out the emperor's nakedness, we need to confront the empirical reality that more copyright law does not necessarily lead to more works or to innovation. Professor Tussey does a nice job in collecting and summarizing the works of several scholars who have taken on such an obvious, yet protean, task. In fact, Professor Tussey argues that the scholarly literature supports the proposition that more copyright might lead to fewer works. Empiricism breaks the closed loop of copyright law making and adds a point of intervention. Copyright law must be held to the standard of empirically verifiable consequences. Copyright law must interact with the facts to reshape and reform in response to the effects on creative output. This loop is one type of complex adaptive system that Professor Tussey seeks to effectuate in her rendering of complex copyright.

Another system is that of creativity itself, which needs to respond to the changing environment of technology and social values. The Internet is the most obvious and salient example of the changing environment. Changing norms that push towards group creation or audience participation (and user generated content more broadly) are other examples. Copyright law can be a tool to prevent such shifts in creativity. For example, incumbent copyright owners use copyright law to fight technological change, such as the VCR, or file sharing, or Internet fora, like YouTube. These legal battles are ones over conflicting business models or ones over how to acquire the surplus created by new markets, media, and technologies. Nonetheless, within complex adaptive systems, creative practices and copyright law need to adapt to changes in the environment, instead of reacting to preserve obsolete forms of creating and distributing information. A dynamic copyright law that learns to adapt would be one that is, as she describes,

self-regulating and homeostatic, one that evolves in a self-directed and stable manner.

Professor Tussey does offer some specifics in designing and implementing her ideal copyright system. Drawing on the work of Elinor Ostrom, Professor Tussey asks how to more carefully consider the actual design of institutions that demonstrate how people actually do manage resources. A clear directive for her book is a more engaged empiricism. In addition, her book asks us to think of the law in dynamic terms, as opposed to a set of static rules and doctrines that are tailored to various facts. Law does not simply act on facts, but is shaped by them. Professor Tussey is urging us to move in that direction of thinking as well.

Professor Tussey gives us much to think about in understanding copyright law and policy. My first thought was to her reference to a copyright system. This reference is to the set of doctrines and policies that describe the ecosystem of copyright law. I wonder if this is the right system with which to begin the analysis of complex adaptive systems. More relevant in my opinion is the ecosystem of authors, artists, publishers, distributors, readers, consumers, and entrepreneurs that interact in the realm of creation, production, and distribution. The question is how to design a copyright regime to effectively and appropriately govern this complex ecosystem. In other words, the law is the means, and not the ends. The complexity of the copyright system is the tail that is wagged by the needs and wants of the various constituencies and interests that constitute the creativity ecosystem. The distinction I make is a relevant one. The complexity of copyright law may reflect and suit the needs of these constituencies. But the relevant landscape is not the legal one. While ultimately the copyright system is what we must design, we need to understand the complex relationships and behavior that copyright law has to serve.

In thinking of the creativity ecosystem, I was struck by Professor Tussey's reference to "market demand" which she describes as creating a feedback loop driving the creation of culture. If market demand is the keystone for copyright, there are two striking problems. First, why should consumer needs be the ones that drive creativity, and not the needs and desires of creative people? Steve Jobs famously stated that he viewed innovators as leaders, not followers. Henry Ford said that if he asked consumers what they wanted, they would have asked for a faster horse. Ford did something better. Analogously, consumers of culture may simply want more action movies, more explicit pornography, and more filling beer. *De gustibus non disputandum*, but at the same time, creative artists more often than not fill a need that many consumers never knew they had. It is not completely clear

how non-consumer interests would figure into Professor Tussey's identified ecosystem.

Even more vexing is the emphasis on market demand. I assume by her reference to a market, Professor Tussey means a price mediated institution that allows consumers to express a willingness to pay which serves a signal for how creative people should guide their creative energies. As a matter of reality, perhaps market demand is the correct way to frame the problem. But Professor Tussey should be more explicit in depicting this market. Is it price-mediated? Is there a dimension of non-price or quality-based competition? Is it a completely free market or does government regulation figure in somehow? Is there a market for speech and ideas as well as one for goods and services? If so, how are all of these to be recognized? These questions are not meant to be pedantic ones. If the goal is to address the ecosystem of creativity and if the market is to somehow figure into that ecosystem, then we need some account of what this market looks like and how it functions.

Professor Tussey's reference to market demand is even more telling in light of her appeal to complex adaptive systems. One example of a complex adaptive system is the economic vision of markets. A general equilibrium view of markets is a type of complex system, entailing the interaction of many demanders and many suppliers coordinated through the working of price mechanisms. There is no doubt that it is a complex system. It is also one that adapts, and its adaptation can be simulated through changes in the economic environment of technologies and preferences. But it is also a description of a complex environment that elevates the values of wealth maximization and efficiency over those of distribution and fairness.

My point is that referring to creativity and copyright as parts of a complex adaptive system requires more detail in order to have traction for law and policy. On this point, I think Professor Tussey offers a nice starting point, but more work has to be done to flesh out the institutional details of the complex system that she imagines. Despite her appeal to market demand, I think she does mean something more than the economic general equilibrium model of markets. New institutional theorists, following from Coase, and economic and legal historians of widely diverging stripes (North, Hurst, Grief) offer contrasting frameworks for addressing complex systems. Each bases the representation of the complex system on different assumptions and empirical understandings. In subsequent work, it would be interesting to see how Professor Tussey fleshes out the complexity of creativity and copyright based on her own understandings. The additional details will make her arguments stronger and more convincing.

I also wanted to see more discussion of the normative framework for assessing copyright law and the complex ecosystems. Is the concern with freedom to create? Or is there also a concern with the distributional consequences of such freedom? The normative framework can make a difference for assessing copyright policy as it shapes the ecosystem of creativity. The normative framework would also affect how we understand the big question raised by Professor Tussey's book. Even if an ecosystem is a complex one, does the law that governs a complex ecosystem also have to be complex? The copyright system may rest on simple principles that can effectively guide an adaptive creativity ecosystem. How about a rule like: transformative authors always win? Such a rule would support the creator of a movie against an unauthorized copier of a DVD. Such a rule would support the unauthorized creator of a funny YouTube parody against the author of the source work. I am not advocating such a rule, but I could see how such a simple rule could have traction in organizing and governing the complex ecosystem of creativity. I did not get a sense from Professor Tussey's book on how to choose among different institutional arrangements for copyright. If the sole criterion is one of creativity and the generation of more works, then simple rules like that one I propose would be quite appropriate.

In conclusion, Professor Tussey has written a thought-provoking book and is in good company with many recent books that address intellectual property reform. I recommend reading and thinking about her arguments, and I look forward to see how she builds on her important and provocative ideas.

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