The IP Law Book Review

IP Law Center, Golden Gate University School of Law

Vol. 3 No. 2 (April 2013) pp. 43-50

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

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Thanks to Professor Gallagher for the idea of this discussion, and for making it happen. Thanks, of course, to Mike Madison and Fred Yen for taking the time to read my book and write up a review. Theirs is, in some ways, a thankless task: if a reviewer is effusive in his or her praise, the author will be pleased, but you run the risk of alienating readers of your review who may dismiss it as puffery. On the other hand, if you are quite critical of the book, you can be sure the author will be upset, while readers of the review are likely to be divided by their own preconceptions of the author and the reviewer. Reviewing a book is tough work.

Reading reviews of your book is also tough. I have come to dread reviews of books I write. I dread reviews because they are rarely about the book, but are too often a mere platform for the reviewer to show how much smarter, how much more knowledgeable he or she allegedly is than the author of the book. This thinly disguised form of self-promotion usually takes the form of a lengthy discourse on what the reviewer would have written, or the reviewer's perspective on the subject. The author of the book being reviewed always falls short, and so even if there is praise, it is faint and misplaced. I had one such recent reviewer tell me I should be pleased that the review was being placed in such a prestigious law review. I wasn't pleased, since I was simply the foil to illuminate the reviewer's self-perceived brilliance.

Other reviewers have a baffling hatred for my employer, and falsely treat HOW TO FIX COPYRIGHT as corporate propaganda. As I note in the foreword, I could never get any of my colleagues to look at drafts of the book. A well-oiled propaganda machine should at least have some role in generating its own propaganda, but despite writing two books since joining

Google, I have not managed to ever get a Google employee to look at a draft single page of either book, despite many, many efforts. Moreover, I have been writing books on copyright since 1985, when my fair use treatise was first published. I didn't join Google until October 2006, 21 years later. Among other works I have written since the fair use treatise, is a 7,000-page treatise, all before I joined Google, creating a pretty big record to have to swallow if I had decided to become a corporate shill. Those who regard my books as corporate propaganda have never delved into such fine points, or sought to even examine my much larger opus. As my mother used to say to me when losing an argument, "Don't confuse me with the facts."

What I hope for in a book review—whether of my book or of someone else's—is an effort to understand what the author sought to accomplish, and then an analysis of how well the author did so. By this standard, Mike's and Fred's are exemplary reviews. I am grateful to them. They set out to dissect what they think I was saying, and then describe their areas of agreement or disagreement. Since language is imprecise, there can be differences of opinion about an author's intent, purpose, and meaning.

This response is intended to clear up a few aspects of the reviews where my intentions, purposes, and text diverge from Mike and Fred's assessments. The bottom line is this: I think the areas of disagreement are attributable not to different views, but to misunderstandings. I leave it to others to decide whether those misunderstandings are the result of things I said in the text, or to Mike and Fred's interpretation of my text. After all, as authors of their reviews, Mike and Fred are now subject to the same interpretative problems with their reviews as I have with my book.

Background

Even though I am a child of the 1960s and grew up across the Golden Gate Bridge in Marin County, I am not a radical or an ideologue. Indeed, my experiences during that wonderful era have made me skeptical of radicals and ideologues. I was very pleased that Mike said I have a reputation as "a careful, ground-it-in-logic-not ideology student of the discipline." The older I get, the more it seems to me that radicals and ideologues (and many are both) ignore the complexities of life, overlook the ambiguity of experiences, confuse correlation with causation, and forget that most of us just want to enjoy life, our family, and our friends. We are not out to remake the world so much as to find our place in it. We are pragmatic, and not theoreticians. I have no interest in ideology or theory, both of which remind me of the criticism of a current French politician about the U.S. economy: "Yes, it works in practice, but how does it work in theory?"

Yippie founder and political activist Abbe Hoffman (author of the appropriately named work "Steal This Book") found out that ideologues are generally held in low regard, especially by people just trying to enjoy themselves. Appearing at Woodstock in 1969, he rushed the stage during a performance by The Who. He was protesting the jailing of White Panther John Sinclair, but was chased off the stage by Peter Townsend, who is reported to have hit him (accidentally or not), on the back with his guitar, causing Hoffman to topple off the stage and into the pit. His fall was cheered by concert-goers.

We all want to improve things, to make our lives and those of our family and friends better, but we don't want to destroy things in the process. John Lennon made this point the year before Woodstock, in his lyrics for the song "Revolution":

> You say you want a revolution
> Well, you know
> We all want to change the world
> You tell me that it's evolution
> Well, you know
> We all want to change the world
> But when you talk about destruction
> Don't you know that you can count me out.

That's my view of copyright law too. I look at copyright law as a traditionalist, as someone who has practiced it for 30 years; as someone who spent 12 years in private practice representing copyright owners; and spent 7 years on Capitol Hill with the Copyright Office (hardly an anti-copyright institution) and the House of Representatives Committee on the Judiciary (ditto). I feel blessed to have spent my professional career in such a wonderful field of law. My disappointments with the current state of law, while real, are within-the-family disappointments, much like the disappointment with a favorite uncle who has a mid-life crisis and does really stupid things. You still love him, but you want him to get grounded again. That's my wish for copyright law: to be grounded in evidence and crafted so that it can effective accomplish realistic goals. That's why the book is called HOW TO FIX COPYRIGHT and not "Why We Need to Abolish Copyright." [1]

Mike is accurate in saying that I believe our current system is badly broken and that it is failing authors and readers. At the same time, Mike overstates my views when he says that I believe almost everything needs to be fixed in our current copyright laws. Many parts, especially the core principles of

judge-made law (e.g., who is an author, what is an original work, what is infringement, fair use) are working fine and have for over two hundred years. The problems—and they are big ones—are both relatively recent and political: (1) the misuse of copyright law to solve business problems; (2) the misuse of copyright law to thwart innovation; (3) the misuse of copyright law as a tool of international trade policy by a few, large countries; and (4) the over-promising of copyright as the essential element in competition and cultural policymaking. Since laws are tools and not ends in themselves, the problems as I see them stem not from any inherent nature of copyright law, but rather from law's misuse.

Things weren't always this way. The 1909 Copyright Act, while having some problems like all human efforts, was a perfectly fine copyright act. While I would be happier if we started from scratch in light of a changed digital environment, or happy if we at least thought things through from scratch, I would also be happy if we repealed our current laws and simply went back to the 1909 Copyright Act. Why? Unlike the 1976 Act, the 1909 Act was not ideological. It was pragmatic: how do we protect authors' (including corporate authors') investment and get more works to market? The use of a copyright notice, a renewal requirement, and a generous but not overly long term of protection, took care of most of our current difficulties. There were no analog much less digital locks. Copyright was not being misused as a way to control the features on consumer products (although that quickly changed after passage of the 1976 Act as reflected in the Sony Betamax case). Fair use lived purely as a common law creature. The sum of the 1909 Act was that the term of protection closely approximated commercial needs, fair use enabled subsequent authors to build on the works of their predecessors, and there were no orphan works.

I regard the 1909 Act as effective. I don't regard it, and no one at the time regarded it, as weak. It was based on empirically sound evidence of how long copyright needed to be (based on renewal records). Fred asserts I believe, as he puts it, that "a rational approach to copyright based on empirically sound evidence … should lead courts and Congress to weaken copyright significantly … ." This is not an accurate description of my views. I do not believe that an evidence-based approach to copyright would weaken copyright protection. "Weaken" is used metaphorically here by Fred, and I think inappropriately so. We think of weak as bad and strong as good, so weakening copyright protection is certainly bad. The one thing I do think of as bad is ineffective laws. Laws are ineffective when they are not fit for their purpose.

What is the purpose of copyright laws? Here is where the ideologues seize an opening to push aside an evidence-based approach. If the purpose of copyright law is to "secure" property rights, then the sky is the limit to its strength in a Blackstonian world. If the purpose is, as our current Register of Copyright has argued, "for authors first and the Nation second," then fair use and other principles that help subsequent authors and the public must be narrowly construed if not vigorously fought. If your purpose is to encourage the creation of new works, we need to figure out why people create, the different types of creativity that exist, and what type of incentives we need. I spend a great deal of time in the book on these questions, a discussion that is not discussed in the reviews. See Chapters 1 through 3. It is important to figure this out, if as is routinely claimed, copyright laws are necessary to further creativity. Copyright laws, in my opinion, suffer from over-promising. They are said to do many things they can't, and for those things they can do, we don't spend the time to make sure they do them well. This is a criticism of the process, not of any inherent feature of copyright.

Fred notes my belief that our current copyright laws are far stronger than are necessary to serve the public interest (I am careful to note that in my view the public interest includes authors), but he then adds that I blame "companies and executives who profit by acquiring and exploiting large numbers of copyrighted works in one-sided deals that generally siphon revenue away from creative authors." He later comments that I object to "heavy corporate ownership of copyrights because [I] consider[] it a form of trickle-down economics that enriches corporations and their executives while keeping money from creative individuals to whom the money should flow." This does indeed make me sound like a 1960s Marin County radical. But I'm not. My alleged anti-corporate bias is particularly ironic given that I work in-house for one of our leading corporations (Google). I believe that Google collectively and its employees individually are quite creative. The same can be said for many other corporations, including those in the motion picture industry. Corporations are not my Moby Dick or even my foil. (I don't believe they are "people" within the meaning of the First Amendment though).

Inequality in bargaining leverage between creators and distributors/patrons has been an economic fact of life for centuries. Joseph Haydn was a servant and didn't own rights in works he created for his patron, as was true for all other composers of the time. In England, passage of the Statute of Anne didn't improve the lot of authors over the prior Stationers Guild regime, even as authors were put forth Cyrano de Bergerac-like as the reason for the statute. I am hardly the first to note this. In 1774, Edmund Thurlow, then

Attorney General of England, argued before the House of Lords that booksellers had introduced authors into the copyright equation "to give a colourable Face to their Monopoly." I detail other comments on pages 107-108.

I fully recognize this inequality is not the result of copyright laws, but of the market place. The problem for copyright policy is that authors are put forward as the prime beneficiary or at least a principal of the system. (If you are the Register of Copyright, authors are prime.) They're not in practice though. How can a law be effective under such circumstances? We could be honest and say our copyright laws have always been designed to benefit those who trade in copyrighted works. If we did that, then our copyright laws are effective for that purpose. But we are given the false trickle-down argument: if we give authors the ability to make others rich off their works, some of the money will trickle back down to authors. Fred objects to this argument, both for copyright law and for the economy generally. But his objection equates ideological fervor with facts. I don't care about ideology, only facts. Our nation has a greatly diminished middle class, a growing poor class, and a huge concentration of wealth by the top 0.01 percent of families. This isn't ideology, it's a fact, as I set out on pages 107-113.

It is also a fact of our copyright distribution system, as fewer and fewer companies own more and more. Contrary to Fred's assertion, I don't object to corporate ownership of copyrights. What I object to is the claim that increasing the term of copyright and increasing penalties, along with digital locks, benefits everyone. It doesn't. It benefits the few at the expense of the many. I am fine with companies being successful. I want media companies to be successful. I am a big consumer of their products. I don't mind them buying copyrights from authors cheap and selling them dear. But let's be clear about whom our laws will benefit. They have never benefitted primarily individuals. If we want our copyright laws to benefit individuals then we need to make a number of important revisions, many of which I detail in the book.

Mike also misapprehends the role I believe copyright law should play. He states my view as asking not "what do authors deserve?" but rather "what do consumers want?" Mike believes I want lawmakers to give "fuller weight" to "demand-based and consumer-based priorities." I don't. I want copyright laws to stay out of the way, to not thwart consumer demand. What do consumers want is not a question copyright laws should try to answer. That's a business, not a legal answer. It becomes a legal problem only when laws are enacted that give copyright owners the ability to thwart

consumer demand, e.g., for unlocked phones, for making back-up copies, or for geo-neutral access. The two most important points I tried to make in the book are (1) law is not a solution for business problems, (2) many of copyright owners' currents problems are business problems, not legal problems. They should, therefore, solve them as business people. See chapter 5. The transformation of copyright law from regulating what people do with copyright works into a tool for allowing copyright owners to control consumer product/services features, as well as access to works, is profound and profoundly troubling.

What should be the relationship between markets and copyright laws? Mike first notes my description of copyright laws as having always functioned in support of a winner-takes-all system, but adds that I have (allegedly) not considered "the possibility that the abstraction he calls 'markets' might plausibly and logically lead to the winner-takes-all results that he decries." I not only accept that possibility, but I declare it: "the marketplace is fine for works by corporations and by the authors they support—but it does mean we need to find non-market ways for other authors and artists to obtain the necessary initial conditions to create" (p.17). The problem I write about is that copyright laws are claimed to be able to overcome market forces and to create diverse offerings by such works. Governments have been very vocal in supporting copyright-on-steroids as cost-free a way to increase cultural offerings, when this is impossible. If, as a matter of cultural policy, we want more bluegrass, klezmer and the like, then neither relying on the market or copyright laws is going to do it; we need other forms of support. That's my point.

I am therefore grateful that Mike accurately characterizes my view of markets as "the set of consumer (reader, etc.) choices that are made available and specified prior to policy decisions regarding the design of exclusive rights." I go further and argue that copyright by itself does not create value. Only the market creates value. Laws can protect that value, but they can't create it. The problem in calls for stronger and stronger copyright laws is that they are often based on the argument that doing so will create more value. I don't see how this is true: If you have a movie that no one wants to see, the strength of your copyright is irrelevant. And if the world wants to see Justin Bieber and not a klezmer clarinetist, that is the market at work. But please don't give Justin Bieber (or more accurately whatever company owns his rights) a huge grant of rights because it is either (a) necessary to create value or (b) will help klezmer musicians.

A final point. My call for effective laws is not a call for effective static laws. See, for example, pages 233-237 ("Innovation Requires a Dynamic

Legal System"). I argue that markets and the technologies that drive demand in them are dynamic and that the laws regulating them must be dynamic too. That will require creativity too.

ENDNOTES

[1] Mike claimed the title has a pun in it, using the word "fix," but that wasn't the intention. The title isn't even mine, it's my publisher's.

Suggested Citation: 3 *The IP Law Book Review*: 43 (2013)