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

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In HOW TO FIX COPYRIGHT, William Patry offers his thoughts about the problems that beset copyright. Patry, like many others[1] believes that copyright does not serve its stated purpose of incentivizing the creation and dissemination of new creative works.[2] Instead, copyright enriches those who own copyright rights while inhibiting creativity and restricting access to creative works. Patry lays blame for this on a number of corporate-sponsored fallacies about copyright that support overly broad copyright rights. He uses this book to discuss these fallacies, how they affect the present shape of copyright, and his ideas for improving copyright.

Patry is one of America's most accomplished copyright lawyers and the author of an important treatise.[3] Accordingly, any book written by Patry is presumptively worth attention as an opportunity to learn from his vast experience in the field. Not surprisingly, HOW TO FIX COPYRIGHT showcases Patry's knowledge. He easily moves through basic copyright, multiple industries, technology, history, and international problems. The result is an engaging, accessible description of what ails copyright and how Patry thinks it might be fixed.

HOW TO FIX COPYRIGHT describes two separate, but related, problems. First, Patry claims that modern copyright is far stronger than necessary to serve the public interest. Second, Patry lays the blame for this on corporations and executives who profit by acquiring and exploiting huge numbers of copyrighted works in one-sided deals that generally siphon revenue away from creative authors. These wealthy actors understand that their profits depend on the value of the copyrights they hold, so they and their legislative allies have concocted a myth to justify the progressive strengthening of copyright (p.13). This myth holds that copyright "causes amazing things to happen for the benefit of everyone, and with no conflicts or tradeoffs" (p.13). Unfortunately, "villains" like file sharers and Internet companies threaten to disrupt the quasi-utopia supported by copyright, so society needs stronger copyright rights to fight these villains (pp.13-14).

Patry spends a good deal of the book attacking this myth. He observes that copyright doesn't make a person creative (pp.15-16). Copyright may create economic opportunities for copyright holders by stopping others from free riding, but creative talent and initiative – not copyright – make a work successful in the first place (p.16). Indeed, Patry contends, the economic opportunities created by copyright actually encourage the corporations who hold most valuable copyrights to shy away from creative efforts in favor of bland works that recycle popular themes in banal ways (pp.20-26). Patry suggests, with some justification, that true support for creativity and culture might better come from more direct subsidies such as government grants, tax breaks, and the development of infrastructure that supports authors trying to reach audiences (pp.17, 26-29).

Next, Patry attacks the claim that copyright boosts economic productivity and competitiveness (pp.32-33). Patry argues that copyright does no such thing. As evidence, he cites the European Union's database directive, which strengthened protection for databases (pp.33-34, 71-74). Although the directive was passed to strengthen the European database industry, American database manufacturers outperform their European counterparts without the benefit of specific database protection.[4] Patry goes on to argue that copyright does not improve competitiveness. Indeed, he claims it harms competition because copyright gets concentrated in the hands of large corporate actors who push for stronger copyright protection as a way to prevent competition (pp.34-35).

Finally, Patry attacks the assertion that copyright is necessary for the flourishing of copyright-based business. Here, Patry notes that traditional copyright-based industries have generally adopted business models that exploit copyright-supported artificial scarcity. He notes, however, that the world has fundamentally changed because digital technology enables the reproduction and distribution of works at no cost (pp.35-41). Such a world is fundamentally incompatible with business models based on scarcity because artificial scarcity will become impossible to maintain. Copyright therefore encourages copyright-based industries to cling stubbornly to old business models (such as selling compact discs full of music) that are doomed to fail as consumers migrate to digital forms of distribution. Patry argues that copyright-based businesses would benefit from recognizing the impact of digital technology and adopting business models that exploit, instead of resist, the benefits digital technology will bring (pp.42-47).

Having debunked the myth responsible for the present shape of copyright, Patry argues that society should replace blind faith in myth with a rational approach to copyright based on "empirically sound evidence" (p.90). According to Patry, this approach to copyright should lead courts and Congress to weaken copyright significantly because copying, not copyright's restriction of copying, promotes creativity. "If we genuinely want to encourage creativity, we must encourage copying" (p.90). And indeed, over the next few chapters Patry offers a number of general proposals for how this might be done. These include shortening the duration of copyright (pp.189-201), imposing formalities to maintain copyrights (pp.203-209) taking a more generous approach towards fair use (pp.211-229), and more effective use of payment methods like compulsory licensing, levies on recording materials, and collective licensing (pp.177-188).

On the whole, I agree with Patry's assertion that copyright is much stronger than it needs to be for society's overall benefit. Recent extension of copyright's duration surely does little to encourage new creation,[5] courts have adopted readings of fair use that interfere with the creation of new works,[6] and enactments like the Digital Millennium Copyright Act make it very easy for copyright holders to run roughshod over the rights of non-infringers who are not familiar with its complicated procedures and substantive copyright law.[7] Society would probably be well served by adopting many of Patry's recommendations.

I also agree that large corporate actors have played a significant role in promoting stronger copyright through rhetoric that incorporates the myth Patry identifies. However, I am unsure if corporate ownership of copyright is as troubling as Patry claims. Moreover, even if one concludes that concentrated ownership of copyright is undesirable, I do not think that Patry's suggested reforms will bring about the necessary change because social forces beyond copyright are probably responsible for the concentrated control he criticizes.

Patry objects to heavy corporate ownership of copyrights because he considers it a form of trickle-down economics that enriches corporations and their executives while keeping money from creative individuals to whom money should flow. Patry gives us statistics to show that four record labels control about 85% of the U.S. market for recorded music and that 5 motion picture studios control 80% of the U.S. motion picture market (pp.111-112). He also notes that in 2010, Viacom's CEO made $84.5 million, and that top executives at Warner Brothers made $83.9 million while the company was losing money (pp.112-113). For Patry, this concentration of wealth presents a "crisis in copyright policy" (p.113) because trickle-down economics does not work. Passing copyright laws that enrich corporations and corporate executives is the same thing as cutting taxes on corporations and wealthy individuals. It isn't wise policy for the general economy, so it can't possibly be good copyright policy either (pp.109-113).

For those who share Patry's general skepticism about trickle-down economics, this argument may be persuasive. However, there are plenty of reputable economists (not to mention members of the public) who have confidence in the general notion that helping the wealthy and large corporations inures to the benefit of society at large because their spending and investment create opportunities for others.[8] It is easy to imagine how these economists would conclude that Patry does not have "empirically sound evidence" to back up his claims about copyright. Indeed, they might dismiss Patry's argument as ideological rhetoric of the sort used to unfairly impugn conservative economic policies. They might well argue that corporate ownership of copyright exists because it is the most economically efficient way to market and distribute works to the general public. After all, most authors do not have access to printing presses, marketing experts, and distribution networks. Corporations provide these essential facilities and services at a fee that reflects bargains freely made.

Even if one accepts Patry's argument against the concentrated business ownership of copyright rights, it is not clear that his proffered solutions would decrease concentrated ownership or funnel revenue towards creative authors. Consider what would happen if Congress significantly reduced the duration of copyright. This would obviously reduce the power of corporately held copyright by more quickly dedicating works to free public use. It would not, however, decrease the corporate ownership of works still protected by copyright. The economic forces that cause authors to sign rights away to corporations will not disappear simply because Congress shortened copyright's duration. Authors who believe it is in their best interests to sign book contracts with corporate publishers will still do so. Corporations will therefore still reap the lion's share of copyright benefits, but for a shorter period of time.

A similar conclusion applies if, as Patry suggests, Congress required copyright holders to comply with new formalities as a condition of getting or maintaining copyright. Perhaps copyrights would expire unless copyright holders formally renewed them every 25 years, or perhaps failure to place notice on a copyrighted work would preclude the copyright holder from enforcing its rights. While such measures would probably result in some (mostly unprofitable) works reaching the public domain quickly, it's not likely that corporations will abandon profitable works very often. True, Congress could increase the abandonment rate by making it more costly and complicated to comply with formalities, but this could have the unintended effect of causing individual authors, and not corporations, to lose copyrights – a result the public might find unattractive.

HOW TO FIX COPYRIGHT is an enjoyable book written by an astute observer of its subject. However, it only partially addresses the problems that it identifies. Our copyright law is too strong, and Patry gives us some sensible ways to improve (if not completely fix) that problem. Our copyright law also makes it possible for corporations who own copyrights to earn significant profits at the expense of creative authors, and it incentivizes those corporations to push for copyright laws that don't serve the public interest. Unfortunately, HOW TO FIX COPYRIGHT does not tell us how to fix that problem, and perhaps it cannot.

Copyright works by giving authors the chance to profit from exploiting their works. Because authors are not experts in marketing and distributing their works, they generally must deal with commercial distributors to realize copyright's economic promises. Those businesses bargain hard to take what Patry thinks are an inappropriate percentage of the profits that are ultimately raised. This is a poignant observation that raises an understandable impulse to better compensate those who engage in the authorial labors that society admires.

Additional reflection suggests, however, that a real solution to this would have been impossible for Patry. The world is full of individuals like teachers and firefighters who arguably don't get paid what they deserve, and there are plenty of individuals and entities who probably make more than they "should". Society may be tempted to "fix" this problem through law, but it generally refrains from doing so because it would be unwise to try to figure out exactly what every deserving or undeserving person should really make. If this is true, then HOW TO FIX COPYRIGHT demonstrates how copyright simply reflects tensions that run throughout our society. Once economic rights are created, markets will emerge to allocate those rights, and society may not always be pleased with the result. Whether and how to "fix" those problems is one of the most vexing questions our society confronts today. If we ever figure out the answer to that question, perhaps then we will be ready to truly "fix" copyright.

ENDNOTES

[1] For a partial listing of others writing about the problems of copyright, see James Boyle, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND (Yale University Press, 2008); Neil Weinstock Netanel, COPYRIGHT'S PARADOX (Oxford University Press, 2010); Patricia Aufderheide and Peter Jaszi, RECLAIMING FAIR USE: HOW TO PUT THE BALANCE BACK IN COPYRIGHT (The University of Chicago Press, 2011); Lawrence Lessig, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (First Vintage Books Edition, 2002); Siva Vaidhyanathan, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY (New York University Press, 2001); Jessica Litman, DIGITAL COPYRIGHT (Prometheus Books, 2001). But see Robert Levine, FREE RIDE: HOW DIGITAL PARASITES ARE DESTROYING THE CULTURE BUSINESS, AND HOW THE CULTURE BUSINESS CAN FIGHT BACK (First Anchor Books Edition, 2012).

[2] See U.S. Const. Art. I, §8, Cl. 8 (granting Congress the power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."); Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 349 (1991) (the primary objective of copyright is to promote the progress of science and the useful arts).

[3] William F. Patry, PATRY ON COPYRIGHT (2012).

[4] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases**.**

[5] See Eldred v. Ashcroft, 537 U.S. 186, 255-56 (2003) (Breyer, J., dissenting and making the point that extended term of copyright does little to increase incentives for creation).

[6] See Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987) (biographer's quoting and paraphrasing of J.D. Salinger's unpublished letters not fair use); Castle Rock Entertainment, Inc. v. Carol Publishing Group Inc., 150 F.3d 152 (2d Cir. 1998) (book of trivia based on Seinfeld TV series not fair use); Dr. Seuss Enterprises v. Penguin Books, U.S.A., 109 F.3d 1394 (9th Cir. 1997) (commentary about the O.J. Simpson murder case in the style of Dr. Seuss not fair use).

[7] See Alfred C. Yen, Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment, 88 Geo. L. J. 1833, 1885-89 (2000) (describing how the notice and take down procedures of the Digital Millennium Copyright Act encourage taking alleged copyright infringements off of the Internet more quickly than would occur under traditional litigation procedures).

[8] See Gregory N. Mankiw, PRINCIPLES OF ECONOMICS, 5th Ed. (2008) at 169-171, 793, 839-41 (discussing supply side economics, lowering of tax rates, and possible benefits to the economy); Holman W. Jenkins, Jr., Chicago Economics on Trial, Wall Street Journal Online (Sept. 24, 2011), available at http://online.wsj.com/article/SB10001424053111904194604576583382550849232.html (noting advice by Nobel Laureate Robert Lucas to cut taxes on capital to stimulate growth in investment, productivity, and income) (visited December 11, 2012); Edward C. Prescott, So Why Do Americans Work So Much More Than Europeans?, 28 Federal Reserve Bank of Minneapolis Quarterly Review 2 (2004) (finding that marginal tax rates affect the labor supply in the United States and Europe).

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