

How to Fix Copyright by William Patry
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In this engaging and accessible philosophical work, Patry takes on the ‘inconvenient truths’ about copyright. His central premise is that copyright is not about property rights, nor about supporting artists, creativity or culture. Nor are the entertainment industries struggling financially because of the arrival of digital markets. Piracy is not anywhere near the problem it is made out to be. Further, the alleged gross domestic product contribution and jobs created by copyright are based on selective calculations about the composition of the relevant economy, and do not take into account the costs created for consumers and innovators by monopoly rights. Patry argues that, in reality, copyright owners perpetuate property and creativity mythologies to mask the way the law really functions — copyright produces gatekeepers that can control distribution and access to works, creating ‘winner-take-all’ markets and monopoly profits, where owners are able to sell fewer works for more money. This problem is particularly acute today because, as he rightly notes, ours is no longer an economy based on owning fixed goods. The creative industries are comprised of markets based on access to experiential goods:

Owning is no longer the principal goal of many consumers, and therefore selling ownership of copies of works can no longer be the principal business model for the copyright industries...[A] legal regime in which the principal right is a right in copies — a *copyright* — should no longer be the principal focus of policymakers either...Instead, we must focus on the rules for access as well as on the social, interactive way people now relate to each other and to copyrighted works.¹

With ever-longer terms of copyright protection for works, coupled with risk-averse licensing practices and limited fair use rights, we are simply hindering the development of new technologies, markets and creative practices. Patry’s debunking of strong rights orthodoxy addresses a wide range of scenarios — the lone genius, trickle down theories of reward, executive incomes and wealth distribution in the US;² the fallacy of ‘balancing’ interests;³ problems with newspaper revenues;⁴ deterrence;⁵ the inefficiency of current approaches to licensing;⁶ moral panics around fair use;⁷ recourse to digital locks;⁸ and

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¹ William Patry, *How to Fix Copyright* (Oxford University Press, 2012) 12.

² *Ibid* ch 3.

³ *Ibid* ch 4.

⁴ *Ibid* ch 5.

⁵ *Ibid* ch 6.

⁶ *Ibid* chs 7–8.

⁷ *Ibid* ch 10.

⁸ *Ibid* ch 11.

enforcement strategies.⁹ He draws support from reference to statistics and economic analysis, where available, along the way.¹⁰

There is enlightenment fervour underpinning Patry's book, which serves as a clarion call for an evidence and ends-based rationale for copyright law reform:

For regulations to be effective, we must be able to quantifiably measure our success (or lack thereof) in achieving the intended purposes. The first step in fixing copyright laws, then, is fixing the way we enact them. Our current laws are based on rhetoric and faith, not on evidence. Unless our laws are based on empirically sound evidence tailored to meet the stated objectives, they do not stand a remote chance of achieving those objectives.¹¹

In ch 2, Patry argues that to fix copyright we need to force politicians and judges to engage rationally with existing criticisms and with sound economic analysis about the way the law functions. A major recommendation is for law reform proposals to be subjected to statistically robust independent impact statements, including an assessment of costs and benefits (including implementation costs and costs to social welfare). He is confident that any ensuing regulation would significantly alter current practice.

Patry is at pains throughout to emphasise that he is not at all anti-copyright. He does favour a 'use it or lose it' approach to rights. Copyright is not a natural right and most authors are forced to assign their rights in order to obtain a distribution deal. He backs up this claim with passing reference to his own battles with publishers, a retelling that will resonate with any published author. He notes the sad reality that the vast majority of published works are of very little, if any, commercial value after the first decade and therefore publishers have little interest in re-releasing them. The retention of owner control of copyright, however, operates to withdraw these 'in-copyright but out-of-circulation' works from our collective heritage altogether. This is a significant problem exacerbated by the recent extension of the copyright term, as that reform significantly increased the number of 'in-copyright but out-of-circulation' works, as well as the number of orphan works. Patry argues that rights owners benefit from this in two ways. First, owners get the benefit of a term extension for a small number of still-valuable works. Second, and perhaps more importantly, through controlling access to out-of-circulation works, coupled with the impossibility of accessing orphan works, owners are able to operate in a tightly controlled and significantly diminished marketplace dominated by a very select number of 'superstar' works — those that owners choose to promote.

Here, Patry's analysis, based on tracking the ability to access works over time rather than bare ownership of rights, departs from the more familiar divide of copyright into public and private domains. He effectively distinguishes three different, but related realms created by the law. First, there is the copyright

⁹ Ibid ch 12.

¹⁰ In particular, Patry refers to the Hargreaves Report, an independent review of intellectual property commissioned by the Cameron Government: Ian Hargreaves, United Kingdom Intellectual Property Office, *Digital Opportunity: – A Review of Intellectual Property and Growth* (United Kingdom Intellectual Property Office, May 2011) <<http://www.ipo.gov.uk/ipreview-finalreport.pdf>>.

¹¹ Patry, above n 1, 50 (citations omitted).

owner's domain as defined by current distributions and royalties (and dominated by a small number of multinational media conglomerates and geographically distinct collecting societies). Second, there is the 'in-copyright but out-of-circulation' domain that produces no royalties for anyone, while works remain inaccessible to all. And third, there is the more familiar public domain of out-of-copyright, royalty-free works. He explores both the idea of reversion of rights to artists for 'out of circulation' works¹² and strongly advocates the need for a return to formalities and a system of renewal of rights to make copyright laws work more effectively.¹³ He argues that these initiatives would re-invigorate the marketplace by enabling the public to access a much larger pool of currently inaccessible works, and open up 'uneconomic' works to less risk-adverse commercial actors. This would inspire the production and encourage the dissemination of more new, original and transformative works. It would also potentially create new, albeit modest, income streams for the original authors, where previously they had none.

Arguably, if he is right, Patry's strategy would also work to enrich the public domain, as the cultural value of any work ultimately delivered into the public domain is related to our familiarity with it from the time it was in copyright. Conversely, the value of the public domain is currently being diminished by our ignorance of many long out-of-print works. Patry consistently reminds us that it is access to works, not exclusive rights to control them, that creates economic and cultural value.

This publication could strike many Australian readers as characteristically American. To those schooled in common law traditions, the presumption of incentive-based copyright, the goal of economic growth, the good of innovation and free expression is a little off-key. While, from an advocacy point of view, it is important to rebut dodgy economic statistics produced about the benefits of strong rights, I am doubtful of the merit of deferring to 'law and economics' jurisprudence to resolve what are essentially normative issues of principle about the value of 'rights' and their impact on creativity, education, cultural vitality and harm.

Notwithstanding its American flavour, Patry's approach to copyright resonates with views from a much earlier time in British history.¹⁴ In 1692, John Locke wrote to his friend, Irish philosopher William Molyneux, seeking advice on revision and publication of a second edition of his controversial work, *An Essay Concerning Human Understanding*.¹⁵ Locke was concerned about his publisher's lack of motivation to publish a revision and spoke about his own interest in the work. He wrote:

For I flatter myself that I am so sincere a lover of truth, that it is very indifferent to me, so I am possessed of it, whether it be by my own, or any other's discovery. For I count any parcel of this gold not the less to be valued,

¹² Ibid ch 1.

¹³ Ibid ch 9.

¹⁴ See, generally, Kathy Bowrey, *Don't Fence Me In: The Many Histories Of Copyright* (SID Thesis, The University of Sydney, 1994) ch 3.

¹⁵ Letter from John Locke to William Molyneux, 20 September 1692 in John Locke, *The Works of John Locke in Nine Volumes* (Rivington, first published 1714, 1824 ed) vol 8, 292.

nor not the less enriching, because I wrought it not out of the mine myself. I think every one ought to contribute to the common stock.¹⁶

Locke passionately advocated that knowledge should be led by empirical evidence, rather than driven by ideology or blind faith. He also supported the property rights of authors but suggested a need for limited rights in order that the public may benefit from access to the great classics and, through competition, encourage the production of quality works. Like Patry, Locke was also a firm believer in public service and in the progress of humanity enabled through the free exchange of ideas, each contributing to and building on the common stock. Whether consciously or otherwise, Patry's 21st-century copyright fix draws on a much longer English heritage.

However, unlike Locke, Patry also has an active interest in creativity.¹⁷ He notes:

Creativity is furthered not by limiting success to a few superstars, but by opening up audiences and the channels of distribution to the many. Culture is the result of sharing creative experiences, not walling creativity off as the province of only a select few.¹⁸

Creativity requires the breathing space necessary to permit all authors to draw on the whole of culture.¹⁹

His genuine passion for the creative arts humanises his call for empirics-led reform. So much contemporary copyright scholarship is bereft of any connection with discussion of the act of creating culture and this aspect of the book will especially resonate with readers.

Patry is also correct to point out the irrationality of many justifications currently made for law reform. And, as he rightly reminds readers in ch 12, in an age where law reform is primarily nipped out in secret trade negotiations (underway again with the Trans-Pacific Partnership Agreement), it all too often comes without any serious scrutiny. It is no surprise that our judiciary is increasingly preoccupied with expensive, arcane and technically complex copyright litigation as it seeks to apply convoluted laws that issue from these negotiations. Our laws are increasingly based on the limited imaginings of self-reproducing participants in trade negotiations, who share belief systems but have little education in copyright law or contact with any broader constituencies. Nor is it surprising that the public is ever more disengaged from and dismissive of copyright, and by extension, from the law. In this regard, Patry's plain-speaking intervention is very timely and welcome.

¹⁶ Ibid 294.

¹⁷ Locke was suspicious of the arts to the extent that this involved a pursuit of pleasure and delight, when information and improvement could be pursued. See M H Abrams, *The Mirror and the Lamp: Romantic Theory and the Critical Tradition* (WW Norton & Co, 1953) 300.

¹⁸ Patry, above n 1, 89.

¹⁹ Ibid 91.