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The IP Law Book Review, Vol. 3 #2, April 2013

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The IP Law Book Review

IP Law Center, Golden Gate University School of Law

Vol. 3 No. 2 (April 2013) pp. 29-35

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

Reviewed by Michael J. Madison, University of Pittsburgh School of Law.
madison@pitt.edu

I have long enjoyed reading William Patry's scholarship on copyright, not only because I agree with most of his prescriptions but also, and mostly, because his writing relies on a substantive modesty and a stylistic readability that makes his arguments inherently appealing. *HOW TO FIX COPYRIGHT*, his latest book (following on *MORAL PANICS AND THE COPYRIGHT WARS*)¹, delivers the goods once again. Patry assesses the entirety of modern copyright, from its foundations to its details, and finds it wanting. His prescription is that policymakers should simply start over, taking modern technologies, markets, and uses as their starting points rather than continuing to build atop the legacy of 18th century bookselling and historical practices of producing cultural commodities.

For the veteran observer of copyright debates, *HOW TO FIX COPYRIGHT* breaks little new ground but reviews a broad range of issues in an accessible and common sense way. For a reader who is less familiar with the details of what some (like Patry) refer to as "the copyright wars," *HOW TO FIX COPYRIGHT* is a helpful overview of the relevant landscape, accompanied by some gentle and some sharp proposals for reform. Regardless of background, one would be hard-pressed to find a better contemporary synthesis of what ails copyright today. Given the breadth of Patry's experience in copyright—as a staff member in the House of Representatives, as a scholar, and now as copyright counselor to Google—that comes as no surprise.

What is something of a surprise, coming from someone with Patry's reputation as a careful, ground-it-in-logic-not-ideology student of the discipline, is the strength of his current convictions. Copyright is not just broken but is broken *very badly*, in his judgment, and it is failing the very

people—authors and readers—that it was originally intended, according to the mythos of the law, to serve.

That said, I have a few quibbles with the book and one larger bone to pick. But first, a summary.

HOW TO FIX COPYRIGHT might have been better titled “What About Copyright Needs to be Fixed?”, because rather more of the book is given over to what is wrong with today’s copyright and rather less of it is devoted to prescriptions and solutions. But that would have deprived the author of the pun-ish title, and of the following deeper point. Technology and society are fast-moving substrates for any law that deals in creativity and culture. The challenge in “fixing” copyright is not merely to lay claim to the law’s concern with original works of authorship that are “fixed” in a tangible medium of expression, but also to identify the point where the law itself, as a stable institution, can safely and justly engage with the dynamic people and institutions that it touches.

What about copyright needs to be fixed, at least in that first sense? The answer, in a nutshell, is almost everything. In Patry’s telling, today’s copyright law and legislation is dominated by greedy, rent-seeking corporate copyright interests that invoke property rhetoric excessively and deprive the public—both first-generation and second-comer authors, readers, viewers, listeners, and users—of the full benefits available under a dynamic intellectual property regime. Historical copyright has been undone by modern changes to technology and markets. Restoring a healthy alignment between law and society means giving fuller weight in lawmaking to demand-based and consumer-based priorities. The question for copyright law is not “what do authors deserve?” so much as it is “what do consumers want?” And doing that effectively and fairly means restoring lawmaking processes that are based on the empirics of creativity, innovation, and commercialization, rather than on ideology and rhetoric.

The full argument can be summarized, then, in a handful of quotations:

- Laws must be consistent with prevailing markets and technologies because technologies play a large (though not exclusive) role in creating consumer demand; markets then satisfy that demand. Without consumer demand for your book or musical work, owning a copyright is meaningless. (p.2)

- I call for a moratorium on the introduction and passage of any new legislation until (1) we have established independent, rigorous, economically verifiable methodologies by which all proposals will be tested and later reviewed for their effectiveness, and (2) we have tested all existing laws by those methodologies and have repealed or suitably amended those that fail the review. (pp.5-6)
- My view is that copyright laws can serve valuable purposes: while they do not cause people to create in the first place and do not create economic or critical success, they do ensure that once works are created, those who wish to protect them and economically benefit can. (p.11)

There is much more to the book, of course, but through Patry’s entire text – covering copyright fundamentals (the concept of *the copy* should be revisited); copyright-based business models (current copyright serves the large-scale “winner take all” models of commercial creativity, not authors and other creators themselves); licensing and clearance complexities (Patry bemoans the absence of a worldwide system for simplifying clearance of rights in musical works); copyright enforcement (overbroad and punitive remedies foster disrespect for the law and undermine its legitimacy); and some specifics of doctrine (the unnecessary extension of property interests in the Digital Millennium Copyright Act; the overly-long length of the copyright term; the virtues of some copyright formalities; and a reprise of Patry’s “moral panic” argument about the proper uses of fair use)—a handful of common themes repeat: Copyright should be sensitive to market and technological context. Markets and technological contexts keep changing. Changing the law (or failing to change the law) without carefully considering the impact of the law runs the risk of disabling actual human beings, on a wide scale, from making beneficial use of—even profiting from—creative work. At almost every step, Patry illustrates his claims with data—not only data from today’s creative economy, but historical accounts. Unlike much cultural criticism of the excesses of contemporary copyright, this criticism is situated in the full range of modern copyright history rather than only in an account of the last 20 years. The virtue of the book lies more in the synthesis of these things in a single, breezy volume and less in their specifics.

Veteran observers (including me) will recognize many of the critiques and proposals from academic and other policy criticism of the last decade. At the margins, the book may be faulted for focusing too much on conflicts

between business interests and individual interests as expressed (on both sides) in legal terms, and not enough on other fora and frameworks: government institutions, both in the US and especially outside the US, that are devoted to cultural flourishing; and systems of informal interests collected as social norms, histories, formal institutions and informal practices that play important roles in both the production and distribution of creative works. The book takes a modestly critical attitude with respect to the foundational concept of the *copy* in copyright but does not dive more deeply into the phenomenal basis for the law. Why, it might be said, must copyright attach itself to *the work of authorship*? If Patry is really serious about stripping copyright to its core and building from first principles, taking evidence as a guide, then let's really start at the beginning. What do creators create, and what do consumers consume? Readers read? Viewers watch? And so on. But Patry is a pragmatist, not a theoretician. He engages where the argument is already well underway, and wisely, he does so where he thinks he can have impact.

Those are my quibbles. It almost goes without saying that a reviewer situated differently, say, grounded in Lockean philosophy or Coasean economics, or attached concretely to the benefits thought to be associated with existing cultural institutions (commercial publishers, film producers, record labels, and the like) might quibble differently and more aggressively. Patry's "readers first" approach conflicts directly with the "authors first" philosophy and economy that informs the other side of the copyright debates that he identifies.

But I promised a bit more. I have a bigger concern.

Patry makes no bones about his distaste for "corporate" creativity and for the arcane business architectures of the contemporary copyright community. He writes:

Our copyright laws are, and have always been, a winner-take-all system. If that is the desired policy, then our copyright laws are working fine. If, however, the policy is to create diverse works by diverse members of our society in order to create a rich cultural heritage, then it is important to realize copyright laws have never accomplished that purpose. Indeed, our copyright laws on steroids are impeding creativity. (p.80)

Yet HOW TO FIX COPYRIGHT offers "the market" as the ultimate arbiter of consumer (reader) interests in copyright. Patry again:

Many businesses that rely on copyrighted material have a problem: not enough consumers are paying for their works. While copyright owners like to portray this as a legal problem—a problem of piracy—the problem is a market problem, arising from the continuing failure of copyright owners to respond and adapt to changing markets and the technologies that drive consumer demand. (p.141)

Note the framing here. Markets drive demand. Technologies drive markets. As technologies change, markets change, and demand changes. Copyright owners need to adapt and respond to demand. Here and elsewhere, Patry builds on the work done in the UK via a report, commissioned by the British Government and published in the United Kingdom in 2011.²

Patry does not pause to consider the possibility that the abstraction he calls “markets” might plausibly and logically lead to the winner-take-all results that he decries. Markets today might be working just fine; consumers might simply prefer to spend their time and money on Hollywood blockbusters and sound-alike pop songs. Or markets might not work well at all; consumers might prefer documentaries and independent films and quirky folk/bluegrass blends. Patry’s money seems to be on the latter, but how might we ever know what consumers—who on the latter account really ought to be called readers, listeners, and viewers, as well as authors in their own rights—really want?

As I wandered through Patry’s argument, I recalled the work of another veteran copyright observer who commented, perhaps more optimistically, on how copyright and copyright owners should respond to changes in technology. In 1994, Paul Goldstein published *COPYRIGHT’S HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX*,³ a prescient book that considered the copyright system in comprehensive terms, bearing in mind history and emerging changes in technology. Goldstein came to the judgment—like Patry—that copyright and copyright owners needed to be attuned to the new landscape. And the best way to do that was to let the market mediate consumer demand. This was the only way, Goldstein concluded, and the best way, to figure out what was and is best for society:

The digital future is the next, and perhaps ultimate, phase in copyright’s long trajectory, perfecting the law’s early aim of connecting authors to their audiences, free from interference by political sovereigns or the will of patrons. The main

challenge will be to keep this trajectory clear of the buffets of protectionism and true to copyright's historic logic that the best prescription for connecting authors to their audiences is to extend rights into every corner where consumers derive value from literary and artistic works. If history is any measure, the result should be to promote political as well as cultural diversity, ensuring a plenitude of voices, all with the chance to be heard.⁴

Goldstein came across as an optimist about copyright's future; Patry comes across as a pessimist. Yet they each look to technology and to markets for sources and solutions. How can Patry and Goldstein come to such different judgments? Can they both be right?

One answer is that they are both wrong. "The market" is a monist metaphor, and a kind of black box, that conceals the plural ways in which creative work is created and enjoyed, and the ways in which many individuals are precluded from participating in "markets" as they wish to. Julie Cohen dives deeply into just this critique in her recent book, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE*.⁵

As a second answer, and the one that I prefer, I am inclined to give Patry (and Goldstein, too) the benefit of the doubt. I think that when William Patry argues that copyright lawmakers should listen to the market, the metaphor he invokes is not the metaphor that Paul Goldstein invoked—even though the phrase itself is, of course, identical.

Goldstein was laying out the Coasean argument for the design of transaction-centered copyright economics. If we take seriously copyright's prescription of aesthetic nondiscrimination and extend the judicial humility at its core by one more step—to a position of full epistemic humility—then there is no reason to suppose that policymakers know the shape of society's cultural welfare curve better than consumers themselves do. The only practical and possibly objective way to measure welfare under that curve is by price—that is, by consumer's willingness to pay. Market transactions measure utility; thus the aim of copyright policy should be to maximize the number and value of market transactions. If Britney Spears becomes rich and famous in part because copyright protects her record label's prices, then who are we to complain that Lucinda Williams has not gotten the hearing she deserves in the cultural marketplace?

Patry's market, while far from fully detailed, is a different thing, with a different aim. Patry's market, it seems to me, is not only or even primarily the market that results from made transactions in cultural works; it is not the market that follows, as Goldstein's does, from the specification of legal rights in copyright. Instead, Patry's market is the set of consumer (reader, etc.) choices that are made available and specified prior to policy decisions regarding the design of exclusive rights. Goldstein's transacting authors and consumers are free to choose rationally from the goods and services they produce and encounter; Patry's authors and consumers are differently enabled and disabled from choosing, based on the phenomena of digital networked technology. As a starting point, but not as an end point, in Patry's market creative works exist in their ideal sense in endlessly replicable digital abundance, rather than only in depletable analog copies.

In that market specified by digital abundance, does copyright need to be fixed? In the casual "does it need to be repaired?" sense, William Patry is clearly correct: It does, and he makes a persuasive case regarding the reasons. In the more subtle "can copyright be made effective as a static body of law?" sense, I am not sold, much as I liked this book. The technological specifications of Patry's market are changing day by day, and perhaps too swiftly for any body of law fully, and adequately, to deal with them. But may answering that challenge fully be part of Patry's next offering.

ENDNOTES

¹ William Patry, *MORAL PANICS AND THE COPYRIGHT WARS* (Oxford University Press, 2009)

² Ian Hargreaves, "Digital Opportunity: A Review of Intellectual Property and Growth", (2011) available at <http://www.ipo.gov.uk/ipreview-finalreport.pdf>

³ Paul Goldstein, *COPYRIGHT'S HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX* (Hill and Wang, 1994)

⁴ *Id.* at p.236

⁵ Julie E. Cohen, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* (Yale University Press, 2012)

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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 others¹ 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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HOW TO FIX COPYRIGHT, by William Patry. Oxford University Press, 2012. 336 pp. Hardback \$21.95.

Author's Response by William Patry, Google, Inc.
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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 effectively 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' current 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.

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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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**DIE GEMEINFREIHEIT: BEGRIFF, FUNKTION, DOGMATIK
(THE PUBLIC DOMAIN: CONCEPT, FUNCTION, DOGMATICS),
by Alexander Peukert.** Mohr Siebeck, 2012. 321 pp. Paperback. €89.00.

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It is perhaps characteristic of the internet generation that it does not ask what it cannot do; if it asks at all, it asks what it *can* do. This behavior translates into an increased interest in the scope of the public domain – all the results of intellectual activity that are free for anyone to use without a license or permission. The internet has increased the public's interest in the public domain because the internet has made so many of us not only frequent users but also regular creators of publicly accessible works that often build on the creations of others. But the internet has certainly not been the only impetus for the increased interest in the public domain; the emphasis on the knowledge economy and the fact that many developed countries rely on the creations resulting from their intellectual capital as the major, or at least one of the major, outputs of their economies leads these countries to focus on the protection of intellectual property and the enforcement of intellectual property rights. The more that these countries concentrate on protection and enforcement, the more acutely the public is interested in defending the scope of the public domain.

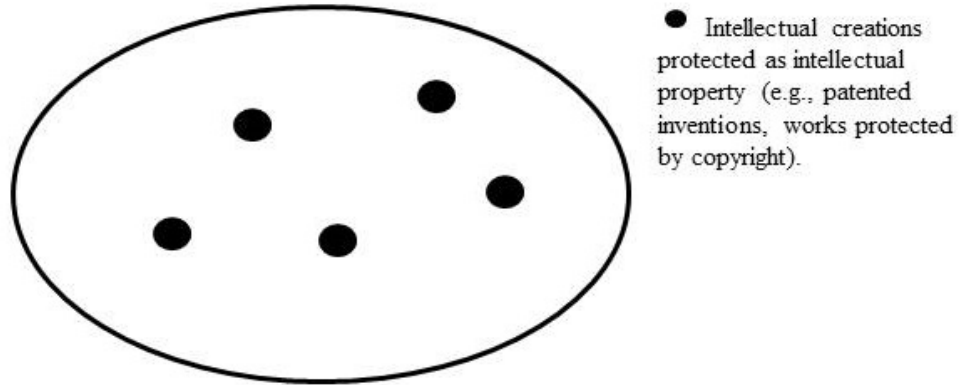
Alexander Peukert, a professor of civil and commercial law who specializes in international intellectual property law at Goethe University in Frankfurt am Main, Germany, has responded to the general interest in the public domain and devoted his latest book to the goal of defining its limits. As opposed to the situation in the United States, where the contours of the public domain have been discussed and where, as Professor Peukert has observed, the discussion has become somewhat of a fashion wave (p.18), in Germany the problem of delineating the public domain has not received much attention (p.16). In addition to filling the gap in the German

intellectual property literature, Professor Peukert works to alleviate the global lack of contextual discussion about the future shape of the public domain because, as he says, if one continues to look at particular legal issues and the future of the public domain from outside of the context of particular issues, the discussion “remains sterile and without consequences” (p.18).

The title of the book might surprise some German-speaking readers; although “Gemeingut” is the term that is typically used to translate the English term “public domain,”¹ Peukert chose the title “Die Gemeinfreiheit” for his book. The term “Gemeinfreiheit” is becoming more frequent than “Gemeingut” in current German legal practice, including in the decisions of German courts.² Peukert guides the reader through a useful review of the etymology of the two terms and the history of the terminological competition between them (pp. 8-18), and explains his preference for the term “Gemeinfreiheit.” While “Gemeingut” refers to the classification of a public domain work, “Gemeinfreiheit” emphasizes the relationship between the user and the public domain work—the user’s ability to freely enjoy that public domain work.

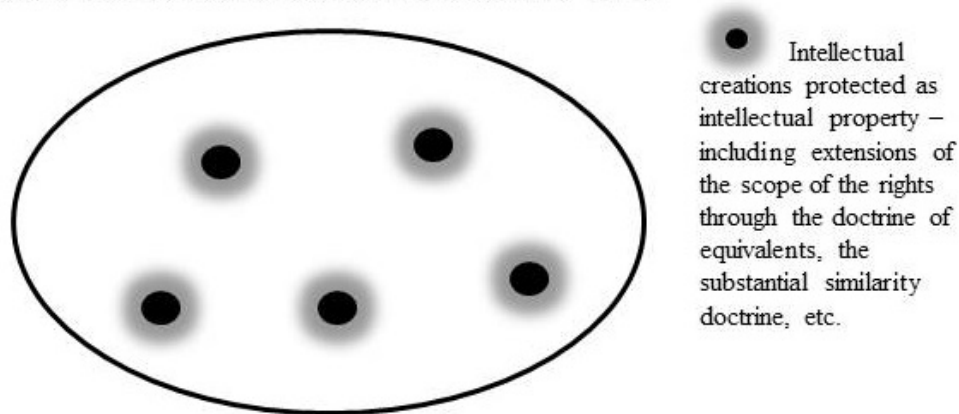
Defining the public domain is not a simple task; commentators typically use a negative definition that describes the public domain as everything that is not protected by intellectual property (see Figure 1).³ Peukert points out that international intellectual property law supports this prevailing practice of delineating the public domain with a negative definition because international law provides for minimum standards for protection of intellectual property rights and for exceptions to the rights, thereby ignoring the fact that being in the public domain should result from the default rule and that protecting a work with intellectual property rights should be understood as an exception to the default rule (pp.75-76).

Figure 1: A simple image of the commonly-used negative definition of the universe of intellectual creations, where the public domain (white area) is defined as everything that is not intellectual property (black circles).



One difficulty with the common negative definition of the public domain that Peukert does not discuss is that it only depicts rights with their positive “footprint”—rights that right owners can transfer, license, etc. The negative definition ignores the fact that intellectual property rights produce a larger footprint for a work than simply that which is contained in the copyrighted work itself or in the text of a patent. In infringement actions, doctrines such as the doctrine of equivalents in patent law or the substantial similarity doctrine in copyright law enlarge, de facto, the scope of the protected right beyond the letter of the patent or the image or sound of the copyrighted work. Therefore, a negative definition of the public domain would be better expressed as shown in Figure 2, where the footprint of the intellectual property is enlarged by the effect of the doctrines and the edges of intellectual property are blurry—thus reflecting the impact of the doctrines, which neither result in consistent decisions, nor offer a particularly high degree of predictability.

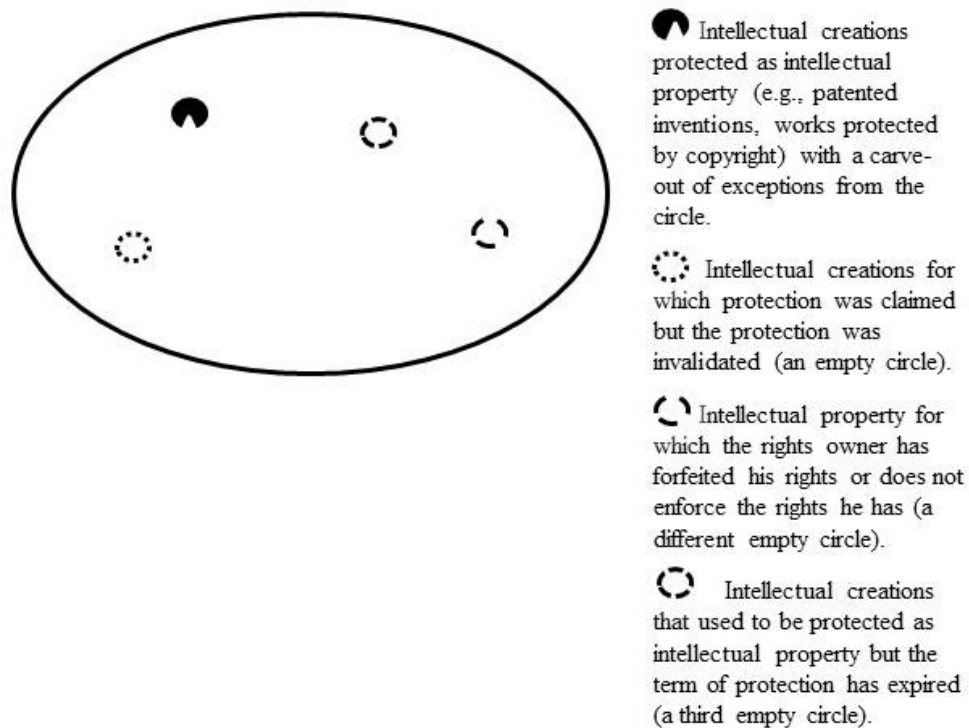
Figure 2: A more complex image of the universe of intellectual creations, which starts from the commonly-used negative definition; now the public domain (white area) is defined as everything that is not intellectual property (black circles), but the line between the two is blurry.



Peukert strives to present a positive definition of the public domain; his approach aligns his work with other authors who have suggested that the public domain should be viewed from the perspective of the rights of users who seek to utilize the intellectual creations of others.⁴ Peukert’s analysis leads him to identify four dimensions of the public domain: a “structural dimension,” a “time-determined dimension,” a “consensual dimension,” and a “specific dimension.” The structural dimension (pp.19 ff.) consists of intellectual goods that have never been subject to intellectual property, such as basic knowledge and small improvements. The time-determined dimension (pp.28 ff.) covers works that were once protected as intellectual property but whose term of protection has expired. The consensual dimension (pp.30 ff.) includes works that are protected as intellectual property, but the owner of the property decided to forfeit, or not to enforce the right. While this dimension is somewhat more clearly defined in the case of registered works (where a decision to forfeit the right might translate into a non-registration), the contours of the domain are more blurry in cases of non-registered rights, such as copyright, where replacements for registration, such as the system of Creative Commons licenses, strive to bring more certainty to the dimension. Finally, the specific dimension of the public domain (pp.32 ff.) is defined as a set of legally defined exceptions that allow the use of the works by a specific user in a specific manner.

Through his analysis of the four dimensions of the public domain Peukert offers a much richer picture of the contours of the public domain than does the negative definition. Peukert’s model is illustrated in Figure 3.

Figure 3: An image of the universe of intellectual creations based on Professor Peukert’s positive definition.



While Peukert’s definition as illustrated in Figure 3 provides a much more accurate picture of the public domain (the white area) than the commonly-used negative definition depicted in Figure 1, to capture the full complexity of the picture of the public domain, Peukert’s definition should be completed with the blurry edges of intellectual property—the extended scope of intellectual property rights protection pictured with blurry edges in Figure 2.

In practice, the complex public domain can maintain its shape only if it is properly safeguarded. Peukert reviews the various means of safeguarding the public domain and emphasizes the “careful attention to the limits of exclusive rights” (p.129) that courts need to pay to protect the public domain from unlawful extensions of intellectual property rights. Procedurally, the public domain is protected through the registration obligations imposed on some types of intellectual property; additionally, proceedings for a declaration of invalidity can help to correct registrations

that should not have been granted (pp.130 ff.). Attacks on validity in infringement proceedings can also help to clarify the contours of the public domain. Substantive law should protect the public domain from unlawful claims of exclusive rights and permit a right owner to forfeit his rights if he so chooses (pp.201 ff.). In a non-contractual context the public domain needs to be protected when unlawful cease and desist letters are used to claim nonexistent rights, or when technological protection measures are used to protect works beyond the boundaries of intellectual property rights.

Peukert not only describes the history and current state of the public domain, he also looks to the future and offers several proposals for changes in German and EU law. For example, after reviewing the proposal for the EU patent litigation system, he suggests that Germany consider abandoning its bifurcated system—in which different bodies decide on patent infringements and validity—and adopt a model similar to the proposed EU patent litigation system by creating a special federal court to adjudicate patent infringements and validity issues in one forum (p.168). Peukert's most intriguing proposal is for the creation of the positions of public domain protection officers—at both the EU and national levels.

Peukert proposes that a public domain protection officer be established to solve the enforcement deficit that he perceives in the current environment (p.276). He emphasizes that actions for enforcement of the public domain should not rely solely on the actions of individuals, who will act only when they have “significant commercial or other interests,” or actions by consumer protection organizations and business organizations (p.275). The public domain officer would be an independent governmental officer whose position would be similar to the position of data protection officers in the EU and in the EU member states.⁵ In Germany, establishing the position would be easier because of the previously existing function that is fulfilled by the Federal Commissioner for Data Protection and Freedom of Information, who is in charge of assisting with requests based on the freedom of official information act (p.277), as well as matters related to data protection.

Peukert outlines an agenda for the public domain officer, summarizes the budgetary requirements for running the office, and explains that the resources allocated for the position would pay off in increased freedom of movement of knowledge and innovation (p.279). His proposed agenda does not include any activities addressing potential future individual acts of limiting the public domain, which differs from the agenda of the data protection officers in the European Union, where the officers have been

responsible for the examination of data processing prior to the commencement of the processing—a responsibility that has been an important component of the officers’ agenda and a role that has helped define the EU’s approach to personal data collection and processing.⁶ However, it is not surprising that Peukert does not include such prospective activities in the public domain officer’s agenda because it is difficult to imagine that a similar prospectively-directed agenda concerning individual acts could exist to safeguard the public domain. As for the budgetary considerations, they would have to be accompanied by a full impact assessment that would need to clarify what greater level of freedom would be achieved if the independent officer were to take actions to supplement private actions by individuals with “significant commercial or other interests”; the question would be whether safeguarding the public domain outside of the “significant commercial or other interests” of individuals would warrant the expenditure of state funds.

Although Peukert’s proposals are directed at German and EU law, Peukert also offers a valuable comparative perspective on the public domain that reaches beyond EU borders. The comparative perspective is an important feature of the analysis; even though Peukert’s positive definition describes the four dimensions of the public domain generally as they exist in every country, the particular contours of the public domain vary logically country by country (p.18). In addition to sharing his extensive expertise in German and EU law, Peukert draws on his thorough knowledge of U.S. and other non-European literature and case law to explain the perception of the public domain in the works of numerous commentators, analyze differences in national contours of the public domain, and discuss various means of enforcement of the public domain. A reader unfamiliar with German law will learn about the German system from the book. A reader with limited knowledge of German intellectual property law will expand his knowledge and appreciate, for example, Peukert’s detailed discussion of Germany’s bifurcated proceedings in patent matters (in which issues of validity and infringement are decided not by a single institution or court but by separate institutions and courts) (p.166 ff.), and Peukert’s explanation of the monist system in copyright law, which does not allow a copyright owner to transfer or forfeit his copyright, thus creating a particular difficulty in the consensual dimension of the public domain (pp.205-211).

Peukert refers to current developments in intellectual property law, such as the extension in the European Union of the term of protection from 50 to 70 years for rights of performers and producers of phonograms, which EU member states must implement by November 1, 2013,⁷ and the proposal for

an EU patent and an EU patent litigation system (p.167). With an up-to-date picture of the trajectory of intellectual property protection and the public domain, Peukert offers an important snapshot of a moment in the global history of intellectual property law and development of the public domain. In addition to being a current review, the book is timeless because of its conceptual approach to the problem of defining the public domain.

Professor Peukert introduces a system for thinking about the public domain and promotes an understanding of its functions and the importance of various means to safeguard the public domain. While Peukert offers a positive rather than negative definition of the public domain, he maintains its reference to intellectual property and does not attempt to encompass the larger area of “commons” (pp.46 ff.).⁸ Peukert’s definition does not align with Professor Samuelson’s notion of the continuum of various legal states (which starts with intellectual property rights on one end and finishes with the “constitutional public domain” on the other end),⁹ but rather emphasizes the multidimensional character of the public domain, which does not lend itself to a linear gradation from the most to the least restrictive legal states. Some of Peukert’s proposals might be controversial, such as creating the position of public domain officer; however, his proposals are useful impetus, in any case, for considering positive steps that could be taken to create a counterbalance to the actions of supporters of stronger protection for intellectual property.

ENDNOTES

¹ See, e.g., Berne Convention for the Protection of Literary and Artistic Works, Article 18(1).

² See, e.g., the decision by the German Federal Supreme Court in Neuschwanstein, BGH, I ZB 13/11, March 8, 2012.

³ Pamela Samuelson characterized the definitions as providing for “the public domain of the ineligible and the expired.” Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 *Duke L.J.* 783, 790 (2006).

⁴ See, e.g., David Lange, *Recognizing the Public Domain*, 44 *Law & Contemp. Probs.* 147 (1981) (“[N]o exclusive interest should every [*sic*] have affirmative recognition unless its conceptual opposite is also recognized. Each right ought to be marked off clearly against the public domain.”); Jessica Litman, *The Public Domain*, 39 *Emory L. J.* 965, 968 (1990) (“The public domain should be understood not as the realm of

material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use.”); Tyler Ochoa, *Origins and Meanings of the Public Domain*, 28 U. Dayton L. Rev. 215 (2002); Carys J. Craig, *The Canadian Public Domain: What, Where, and to What End?*, 7 Can. J. L. & Tech. 221, 229 (2010) (“[T]he public domain should be understood as the domain of free use and unrestrained creativity, which furthers society’s long-term interest in future innovation.”). Professor Peukert lists provisions in German and EU legislation to show the grounding of the public domain as a positive right in the laws (pp.65 ff.).

⁵ E.g., Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

⁶ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Article 20.

⁷ Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, Article 2.1.

⁸ See also Samuelson, *supra* note 3, 815 (“IP-free definitions of public domain seem too dull, too tired, too old, too isolated, and too passive to express the positive values of the public domain that scholars who have been studying it perceive it to have.”).

⁹ See Samuelson, *supra* note 3, 821.

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