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Book Review: William F. Patry, How to Fix Copyright

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BOOK REVIEW

William F. Patry, How to Fix Copyright
(Oxford University Press, 2011)

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In *How to Fix Copyright*, William F. Patry, one of America's leading experts on copyright, calls for a "top-to-bottom, systemic overhaul" of copyright laws.[1] For a Canadian readership in the midst of our own process of copyright reform, such a call to action is both timely and relevant.

In his thirty-year career as a copyright lawyer, Patry has acted as copyright counsel to the U.S. House of Representatives, Committee on the Judiciary; as Policy Planning Advisor to the U.S. Register of Copyrights; as a law professor at the Benjamin N. Cardozo School of Law; and as a lawyer in private practice. He is currently Senior Copyright Counsel at Google Inc.[2] A prolific and well-respected author, Patry has written, among other works, an eight-volume treatise on copyright (*Patry on Copyright*)[3] and a treatise on the fair use doctrine (*Patry on Fair Use*).[4] *How to Fix Copyright*[5] is the second book that Patry has written for a broad, interested public on the topic of copyright reform. His first, *Moral Panics and the Copyright Wars* ("*Moral Panics*")*, was published in 2009.[6]

In both *Moral Panics* and *How to Fix Copyright*, Patry asserts that copyright

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[1]   William F. Patry, *How to Fix Copyright* (Oxford: Oxford University Press, 2011) at 6.

[2]   In a disclaimer that precedes the introduction to *How to Fix Copyright*, Patry emphasizes that the views set out in the book are "entirely [his], and should not be attributed to Google."

[3]   William F. Patry, *Patry on Copyright* (Thomson West, 2007-).

[4]   William F. Patry, *Patry on Fair Use* (Thomson West, 2010). Other works authored (or co-authored) by Patry include Craig Joyce and William F. Patry, *Copyright Law: Teacher's Guide* (M. Bender, 1989); William F. Patry, *Copyright Law and Practice* (Bureau of National Affairs, 1994); and William F. Patry, *Copyright and the GATT: An Interpretation and Legislative History of the Uruguay Round Agreements Act: 1995 Supplement to Copyright Law and Practice* (Bureau of National Affairs, 1995).

[5]   Patry, *How to Fix Copyright*.

[6]   William F. Patry, *Moral Panics and the Copyright Wars* (Oxford: Oxford University Press, 2009).

laws, as they are currently written, inhibit creativity,[7] suppress innovation,[8] and "too often harm authors and the public."[9] He does not, however, seek to abolish copyright.[10] Rather, Patry calls for reform of the existing copyright system. Both *Moral Panics* and *How to Fix Copyright* can be seen as part of Patry's larger goal of creating "effective" copyright laws — defined by Patry as laws that lead to an increase in the public good.[11]

In *Moral Panics*, Patry engaged with the problematic use of metaphors such as "thief", "trespasser", "pirate", "parasite", and "dinosaur" in the context of debates on copyright reform.[12] Among other issues, he discussed how the use of such metaphors to "demonize opponents and to create the impression there is an existential threat to society" has stifled debate on whether proposed copyright reforms serve the public good.[13]

In *How to Fix Copyright*, Patry moves beyond critiquing the role that metaphor plays in distorting the debate around copyright reform, and engages in the debate itself by providing numerous recommendations, both procedural and substantive, for "how to make our copyright laws work better."[14] In making these recommendations, Patry draws together research from numerous jurisdictions. Although he frequently grounds his discussion in the American context, Patry writes from a global perspective. *How to Fix Copyright* is thus relevant for readers interested in these issues, regardless of where they are based.

In terms of procedural reform, Patry advocates for the adoption of evidence-based policy-making in the context of copyright. Rather than relying on metaphor, "lobbynomics,"[15] or reliance on commonly held beliefs,[16] Patry asserts that copyright reform should proceed on a "sound, empirical basis."[17] Patry's assertion that copyright laws ought to be based on "empirically sound evidence tailored to meet

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[7]   Patry, *How to Fix Copyright* at 4.

[8]   Patry, *Moral Panics and the Copyright Wars* at xviii.

[9]   Patry, *How to Fix Copyright* at 5.

[10] In *How to Fix Copyright*, Patry points out that his title is not *How to Get Rid of Copyright* (*ibid* at 11).

[11] Patry, *Moral Panics and the Copyright Wars* at xviii; Patry, *How to Fix Copyright* at 11. Since *Moral Panics* and *How to Fix Copyright* can be seen as two pieces of Patry's larger project of copyright reform, it can be expected that some overlap will exist between these two works. However, although some overlap exists, it is minimal. For the most part, *Moral Panics* and *How to Fix Copyright* cover substantially different terrain.

[12] Patry, *Moral Panics and the Copyright Wars* at xviii.

[13] *Ibid* at xv.

[14] Patry, *How to Fix Copyright* at 5.

[15] *Ibid* at 6.

[16] *Ibid* at 1. Among other beliefs, Patry challenges "the fundamental beliefs that copyright laws directly cause people to create works they wouldn't otherwise create, directly put substantial money in authors' pockets; that culture depends on copyright; and, more recently, that copyright law is a key driver of competitiveness and of the knowledge economy" (*ibid* at 1).

[17] *Ibid* at *6*. This belief was originally articulated in Patry, *Moral Panics and the Copyright Wars* at xviii.

the stated objectives"[18] builds on the conclusion reached by Professor Ian Hargreaves in his 2011 report to the UK Government, and is not likely to attract too much criticism.[19]

Perhaps more controversially, however, Patry calls:

> 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.[20]

Given this recommendation, *How to Fix Copyright* would have benefited from a discussion on the possible drawbacks of a purely empirical approach to copyright reform. For instance, before such an approach is adopted, one question that should be asked is whether there are any values or policy goals that copyright law ought to promote that cannot be adequately quantified (such as the impact of expanding either authors' or users' rights on freedom of expression). If this is the case, proposals for reform based on these values or policy goals may not be able to be justified in a copyright reform process based solely on empirical analysis.

However, Patry's recommendation for a moratorium on the introduction and passage of new copyright legislation until "independent, rigorous, economically verifiable methodologies" can be developed to test and review its effectiveness should spark discussion regarding the feasibility (and desirability) of a purely evidence-based approach to copyright reform.[21] In so doing, it can be seen as a valuable and substantial contribution to debate in this area. Furthermore, *How to Fix Copyright* contains an excellent summary of empirical research in the area of copyright law. Scholars, lawyers, and policy-makers who are interested in pursuing evidence-based policy reform in the area of copyright would do well to read this book closely.

In terms of substantive reforms, Patry makes a wide range of recommendations on how to "fix" copyright, including exploring ways to directly fund artists (as opposed to relying substantially on copyright law to provide income for artists);[22] modifying copyright from a "grant of exclusive rights into a right of remuneration;"[23] re-imposing copyright formalities;[24] reforming collecting societies;[25] and "dramatically cut[ting] back" on the term of copyright protection.[26] As is evi-

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18   Patry, *How to Fix Copyright* at 50.

19   Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (UK: Intellectual Property Office, May 2011). In the Foreword, Professor Hargreaves states that: "We urge Government to ensure that in future, policy on Intellectual Property issues is constructed on the basis of evidence, rather than weight of lobbying."

20   Patry, *How to Fix Copyright* at 5-6.

21   *Ibid* at 5.

22   *Ibid* at 27.

23   *Ibid* at 42.

24   *Ibid* at 203.

25   *Ibid* at 182.

26   *Ibid* at 201.

dent from this list (which represents only a small portion of the total number of reforms suggested in *How to Fix Copyright*), Patry's recommendations extend across a wide range of copyright topics. Although many of the recommendations are not explored in depth (and in fact could easily be the subject of their own book), they provide an excellent jumping-off point for future research. Some of Patry's recommendations will be familiar to readers who have closely followed contemporary debates on copyright reform. By bringing these recommendations together in an accessible and readable way, Patry's book will help to introduce them to a broader public.

How to Fix Copyright does not contain a concluding chapter. Acknowledging that his publisher wanted him to include a final chapter in which all of his recommendations would be assembled, Patry, in the Introduction to *How to Fix Copyright*, explained his decision not to do so on the basis that "lists of recommendations cannot serve as a basis for the necessary self-examination because lists are divorced from the context that explains why the changes are necessary."[27] Although Patry makes a good point, a concluding chapter would have been an effective way to draw together Patry's recommendations and to crystallize his insights for the benefit of his readers.

How to Fix Copyright is well-researched and well-written. Patry presents a convincing case for the need to reform copyright, and offers a wide range of recommendations (both procedural and substantive) for reform. Although at times Patry relies a bit too heavily on rhetoric,[28] for the most part, he offers specific suggestions for evidence-based reforms through which copyright law can be reshaped to benefit authors, creativity, learning, and the public interest. As noted above, *How to Fix Copyright* will be of particular interest to anyone interested in studying the evidence-based approach to copyright reform. More generally, however, *How to Fix Copyright* will be of interest to lawyers, policy-makers, academics, and the broad interested public who "believe in the goals of copyright laws," who are concerned that "our current copyright laws too often harm authors and the public," and who would like to "make our copyright laws work better."[29]

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27   *Ibid* at 5.

28   For instance, see references to the "piracy-industrial complex" (*ibid* at 63) and the "theocracy of formality-free copyright" (*ibid* at 206).

29   *Ibid* at 5.