

**Moral panics and the copyright wars**, by William Patry, New York, Oxford University Press, 2009, xxiv + 266 pp., US\$29.95, ISBN 978-0-19-538564-9

**Common as air: revolution, art, and ownership**, by Lewis Hyde, New York, Farrar, Straus and Giroux, 2010, 306 pp., US\$26.00, ISBN 978-0-374-22313-7

### The comedy of the commons

Copyright has become a war zone in recent years. On one side are ranged the record companies and movie studios; on the other, the pirates and file-sharers – many of them customers of the record companies and movie studios. In this undeclared war, William Patry, author of *Moral Panics and the Copyright Wars*, probably qualifies as a full general. He is senior copyright counsel at Google Inc., and therefore a key player in Google's extraordinary campaign to digitise the world's libraries, and presumably in YouTube's copyright skirmishes with the movie studios – though he takes care to emphasise the independence of his writing. Patry's dust jacket profile has him as 'the most prolific scholar of copyright in history', no small claim in a surprisingly crowded field.

Even these credentials, however, dim slightly in the company of Lewis Hyde, celebrated author of *The Gift*, MacArthur Fellow, and now associate at Harvard's Berkman Center for Internet and Society (an affiliation instantly recognisable to copyright aficionados as the home of copyright dissidence). Hyde's new book, *Common as Air: Revolution, Art, and Ownership*, is a deeply considered defence of the cultural commons, 'that vast store of unowned ideas, inventions and works of art that we have inherited from the past and continue to enrich' (p.18). He has, I think, written a work that will sound like a bell in the worlds of writing, thinking, and the Web. It is a manifesto and a call to action – exactly what a good war needs.

Neither author is an abolitionist. Patry, for example, quickly states his argument: 'bad business models, failed economic ideologies, and the acceptance of inapposite metaphors have led to an unjustified expansion of our copyright laws' (p.xv). He does not want to throw copyright out, but to 'reform it, reduce it, tailor it so that it can serve its intended purpose' (p.xviii). Getting back on track is also Hyde's purpose. The track he has in mind is the one laid down by the founding fathers of the US constitution – the thinking that informed their decision to grant 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'. Hyde's book is a journey back down that founders' track to find the source of their inspiration.

### The use and abuse of metaphor

Patry and Hyde both spend a lot of time exploring the metaphors that have shaped thinking about copyright. Patry is suspicious of them:

Metaphors are powerful weapons and are employed in the Copyright Wars as weapons, not as figures of speech ... [W]e need to understand the political objectives behind them ... we can then reject them because they are not only wrong but dangerously so. (p.44)

He singles out for deconstruction 'the birth metaphor – authors as the parents of their works'; 'the agrarian metaphor – reaping what you haven't sown'; and the metaphors

of 'thieves and trespassers, pirates and parasites'. For Patry, their falsity lies in their overstatement of the case. Copyright is not a form of property, but a kind of privilege and therefore cannot give rise to the very strong rights suggested by these metaphors. They are nothing more than rhetorical ploys, put to work by copyright's propagandists. Patry, in fact, is not above a little rhetorical flourish himself. Those who push the copyright-as-property line are 'dwarves', with their 'twenty-first century version of medieval moats and armaments' and (sin-of-all-sins in these webocratic times) their 'hierarchical, top-down businesses'.

By contrast, Hyde's interest in metaphor is constructive: he wants to breathe life back into the old idea of the 'commons', and takes the reader on a long walk through the history of 'the many things best held in common'. He begins in England, before the Norman conquest, with an account of the English commons. This was a system of land tenure that lasted for more than 1000 years, where land was managed collectively and the people who worked it had rights in it that could not be sold or extinguished by the lord of the manor. The commons thus are 'not simply the land but the land plus the rights, customs, and institutions that organize and preserve its communal uses' (p.31).

One such institution was 'beating the bounds', when once a year commoners would 'perambulate the public ways and common lands armed with axes, mattocks, and crowbars to demolish any hedge, fence, ditch, stile, gate or building that had been erected without permission' (p.37). Hyde notes that these perambulations were convivial affairs, with labourers and crowds of boys accompanying the local constable, and the village providing them with cakes and beer. No prizes for guessing how the beating of the bounds might apply to the present day copyright domain!

Hyde is well aware that the idea of the commons has had a bad press in economic theory. An influential 1968 essay by US ecologist Garrett Hardin conjured the memorable phrase 'the tragedy of the commons' to describe a situation where, in a pasture open to all, 'the rational herdsman' keeps adding animals to his herd – and so does each and every other rational herdsman – until the pasture is trampled to dust; but as Hyde notes, the English commons were not open: their use was 'stinted' by conditions that limited the commoners' use rights. What Hardin was describing was not a commons at all, but an 'unmanaged common-pool resource'. A stinted commons, by contrast, where rights are mixed with obligations, gives rise to what Hyde happily names 'the comedy of the commons', a well-managed common resource, a story with a happy ending.

Hyde grounds his book's argument in this metaphor of the commons. The English commons were the physical counterpart of the public sphere, or cultural commons, 'that great and ancient storehouse of human innovation ... to which each newborn child is heir and beneficiary' (pp.47–48). In Hyde's account, it was this public sphere that America's founding fathers wanted to protect, seeing it as the guarantor of political freedom. He quotes founder Benjamin Franklin: 'the art of printing ... diffuses so general a light ... that all the window shutters despotism and priestcraft can oppose to keep it out, prove insufficient', and for good measure, Franklin's contemporary, the clockmaker Owen Biddle: 'This art [of printing] is of a perfect republican nature; without respect of persons, it diffuses its benefits alike to all' (p.131). For the founders, a free press and an informed citizenry were the New World virtues that would ward off the Old World vices of tyranny and dependency. In Hyde's summary, 'The founders believed that created works belong largely in the commons so as to enable democratic self-governance' (p.78).

### Hyde's complaint

In favouring the commons, how then did the founders plan to reward creators? Here Hyde describes what he calls the 'republican two-step'. Authors receive the monopoly privilege of copyright, but for a limited time only, after which their works pass into the public domain.

First something for the individual self, then something for the public good. First a contraction on behalf of the few, then a dilation on behalf of the many. Such is the dynamic of knowledge in a free republic. (pp.105–6)

The key words are those of the founders: the exclusive rights granted by copyright are for 'limited times' – originally just 14 years, renewable once. Hyde's complaint is that this small grant has been so enlarged. It stands now at author's life plus 70 years (or 95 years for works corporately created), a period not far short, in present value terms, of the ideal term professed by Jack Valenti, the Hollywood lobbyist: 'forever, minus a day'.

The history of copyright, Hyde says, is the story of 'a limit that has lost its limit'. Add to this the zealous policing of copyrights encouraged by the record companies and movie studios, the enlargement of copyright's reach to any medium, 'now known or later developed', and the ending of the requirement to register a work for copyright so that even a shopping list is automatically copyrighted, and you have what Hyde calls (echoing copyright scholar James Boyle) 'the second enclosure'. This is a reference back to the English commons and the great enclosures of the late 1700s and early 1800s, when most of the commons were turned over to private ownership, and the commoners turfed out. To call copyright's expansion a 'second enclosure' is to associate it with great injustice, a transfer of rights from the many to the few, something that should not be countenanced. Hyde's measured tone takes flight here:

... the higglers, hucksters, engrossers, forestallers, regraters, retailers, and speculators who brought us copyright term extension and all its ancillary legal strategies have brought severalty to the public domain. They have taken the comic good and plucked it like a bird. (p.176)

### Patry's complaint

For Patry, the grounds of complaint are economic. He believes the record companies and movie studios (his twin targets) have misused copyright to shut down innovation, nobble the competition, and short-change consumers.

The sin of copyright – and it is a large and growing sin – is that it provides the legal framework for ... an upside-down business model ... in which the copyright industries may safely engage in anti-consumer, anti-competitive, and anti-innovative conduct. (p.xx)

In Patry's analysis, corporate copyright owners (not individual creators) have adopted 'control' as their business model. They want to manage how and when people access creative works, on which devices, for what purposes, and on what terms. When innovation occurs, such as television in the 1940s, the VCR in the 1980s, and the web in the 1990s, their response is to try to head it off – to deny it, lobby against it, litigate,

and legislate it to a stand-still. Patry quotes Jack Valenti to great effect, testifying before Congress in 1982 about the need for protection from the ‘ravages’ of the VCR, pushing the moral panic button:

[Some say] that the VCR is the greatest friend that the American film producer ever had. I say to you that the VCR is to the American film producer and the American public as the Boston Strangler is to the woman home alone. (p.145)

It is true: the movie studios and record companies have opposed almost every major media innovation of the past century. They’ve used their control of content, their incumbency, and (when they failed), their political might to thwart change.

Of course, it is one thing to smile benignly, as Patry does, on the ‘creative destruction’ visited on the music and movie industries by technologies like file-sharing, and by new players like, well, Google, and quite another to expect these industries to just roll with the punches. Why would they? It is only to be expected that they will fight back with everything they have; but Patry is arguing something more. In embracing control, the music and movie industries have cut themselves off from the creative as well as the destructive power of technology. This has cost them dear. Ask the music industry, whose lunch has been eaten by Steve Jobs and iTunes while the record companies fiddled. Worse, both industries have allowed their own customers to become collateral damage in the copyright war they have waged. Instead of trying to satisfy customers’ demands for convenience and sharing, they have served them with summonses! As Patry says:

We will never be a productive country unless we focus on those who are innovative rather than on large entertainment corporations whose defining characteristics are quixotic battles against technologies, their own customers, and the very nature of capitalism as a dynamic, competitive force. (p.174)

### **A separate peace?**

What is to be done? Neither Patry nor Hyde spend much time on remedies. Their concern is to make the case for reform of copyright, and there they halt. Clearly, they have in mind that copyright’s expansion should be reversed, but they do not say how far – presumably somewhere in the vicinity of the limited times contemplated by the founding fathers. 28 years? 42? They also want to kill off the ahistorical idea that copyright is a form of property, and recast it as a privilege. This recasting, if it took hold, would have important consequences. Hyde wordplays the idea of ‘copyduty’, an idea that pretty much sums up these consequences: authors have duties to the commons, like fair dealing, and these duties are the *quid pro quo* for the temporary grant of ownership. (Such wordplay is something of a parlour game among copyright dissidents. It has also given us ‘copywrong’ and ‘copyleft’.)

Near the end of his book, Hyde makes a curious, near-throwaway remark: ‘Perhaps it makes sense within the entertainment industry to have every creation be owned in perpetuity and then to negotiate permissions and fees around use’. Of course, he goes straight on to say: ‘But that is not a norm appropriate to science, nor the creative arts ... and to extend it into those spheres is an insult to their integrity’ (p.223). In effect he is saying that entertainment might be different, and we might care less about it, but is he waving at the movie and record companies, inviting them to spear off from the ‘Sciences and useful Arts’ – in effect, waving goodbye? Perhaps

this is where the war ends, in a separate peace, the movie and record companies in their walled city, and all about them the unfenced commons.

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**The media were American: US mass media in decline**, by Jeremy Tunstall, Oxford, Oxford University Press, 2008, 465 + xiv pp., £31.99 (paperback), ISBN 978-0-19-518147-0

When I took Bill Clinton's *My Life* on a long flight as reading material some years ago, I was aware that there were two ways you could approach the book. You could start at page one, find out about Bill's childhood, who he dated before he and Hilary got together, his years on the National Governors' Association, and then his years as US President. You could go from page 1 to page 800, or you could start by going to the index, looking up a particular item of interest, say 'Monica Lewinsky', and read from there.

While Jeremy Tunstall offers nothing as salacious with *The Media Were American*, it is a book that can be approached in two comparable ways. You can follow Tunstall's encyclopedic and expansive analysis of media worldwide, with chapters such as 'India's Multi-Ring Media Circus' and 'China: Capitalist–Communist Media Stir-Fry', and his analyses of phenomena as diverse as the role played by radio in genocide in Rwanda, how cultural nationalism drives French media policy, or the 'singing revolution' through which the Baltic states were to leave what was once the Soviet Union. Or you can get the essentials of the argument in Chapter One, and read the main claims that are reinforced in the Conclusion.

Put at its simplest, Tunstall's argument in *The Media Were American* is that the global influence of US media in the world peaked in the mid-twentieth century, and is now in decline. In making this argument, Tunstall rejects many of the claims made about cultural globalization, instead proposing that it is still the case that:

Most people around the world prefer to be entertained by people who look the same, talk the same, joke the same, behave the same, play the same games, and have the same beliefs (and worldview) as themselves. They also overwhelmingly prefer their own national news, politics, weather, and football and other sports. (p.xiv)

The argument is not that US media has become insignificant, or that media content is not globally circulated. In fact, Tunstall estimates that the non-US world audience devotes roughly 10% of its media consumption time to US media product. The point is that this has to be read alongside national media content accounting for about 80% of media consumption, with the balance constituting content from other comparable geo-linguistic regions (e.g. Hong Kong film and TV in the Chinese diaspora, Spanish- and Portuguese-language content in Latin America, UK media in English-speaking countries, such as Australia). He proposes that there are five levels of media: the global; the regional (Europe, East Asia, the Arab world, etc.); the national; the national regional (regions within nations); and the local.