

LAWYER'S

Bookshelf

Reviewed by Roger L. Zissu

Patry on Copyright

By William F. Patry, Thomson-West, Egan, Minn.
5,832 pages, \$1,498, 7 loose-leaf binders

For the first time in almost two decades, there is a new multivolume treatise on U.S. copyright law, a 5,832 page effort, "Patry on Copyright," published last January. Mr. Patry's marathon work surpasses not only the length of the multivolume works of Nimmer and Goldstein but also their scope, and is destined to join these and his own prior books on copyright as another staple in the field.

But the new Patry treatise is not just another book in the traditional mold. This is made clear by both the author's preface, an unusual self-inquiry into why he devoted so much of his time, seven years, to writing his new work, and Justice Sandra Day O'Connor's forward endorsing his endeavor.

To those in the copyright field, William Patry is already a legend as a prolific author and active lawyer and teacher. His newest contribution continues the independent and contrarian approach found in his highly regarded earlier two copyright treatises¹ and landmark fair use book²: he does 100 percent of the research and writes every word himself.

Although Patry's preface tries to tell us why he wrote the book, it contains an obvious omission: how he found time to do so. My guess is that he doesn't sleep as much as the rest of us because his dual career has included not only his significant writing and blogging (williampatry.blogspot.com), but also service as a counsel to the House Committee on the Judiciary, Subcommittee on Intellectual Property and Judicial Administration (three and one-half years); Policy Planning Adviser to the U.S. Copyright Office (four and one-half years); law professor at the Benjamin Cardozo School of Law (five years) and copyright practitioner (12 years). Patry completed his latest book just before joining Google, where he currently serves as Senior Copyright Counsel.

While I have not been able to read all seven volumes in their entirety in the months since publication, I have studied enough of "Patry on Copyright" and already used it sufficiently to have a good sense of what it has added to the field. In brief, Patry's book delivers what his Preface promises. Impelled by a dissatisfaction with the standard nature of his earlier treatises—he says these "suffered from specialists' tunnel vision"—his current work not only covers the basics at his usual high level but also goes further in placing copyright law within the real-life, personal, social and political contexts in which it was developed. He accomplishes this in each area by working from the ground up, starting with the history of each section of the current and pertinent earlier copyright statutes. In most sections he also breaks down the case law by circuits. This approach not only has added an extraordinary reservoir of background to the subject matter but also resulted in a work well-organized to assist the practicing lawyer in learning the strengths and weaknesses of his arguments in particular cases.

Patry is obviously a history lover. So, he begins his book with a deeper review than you can find in other treatises of the history of copyright from its earliest times to the present day. (Chapter 1). The book then moves on to an extraordinary, philosophical and practical dissertation on statutory interpretation to accompany a review of the structure of the current Copyright Act (Chapter 2). No previous copyright treatises have brought these topics together to this extent (183 pages) and with such a focus on the principles of statutory construction.

In a harbinger of how he will deal with other subjects, this discussion cites some 1,000 copyright cases, presented circuit by circuit, in which legislative history was either cited or discussed. Patry also furnishes a summary of all the Supreme Court's copyright decisions citing legislative history.

"Patry on Copyright's" ensuing chapters also bring into play important and often previously uncovered historical and other material, including views of commentators. Instead of digging this deep only in selected chapters or providing most of the legislative history in appendices, Patry, in discussing each topic, analyses the relevant parts of all of our copyright statutes from 1790 to date and of all their legislative history. His treatment of the fair use defense proceeds in the same way (Chapter 10). Its 498 pages also turn out to be the much-awaited update of the author's original, landmark 1985 book on this subject.

Patry forthrightly honors his commitment to place the evolution of our copyright law in its actual human context not only by providing historical background but also by examining the pros and cons of developments with incisive commentary. Most importantly, however, he does this without letting his views affect the accuracy or insightfulness of his discussion of the law.

His treatment of infringement exemplifies this. (Chapter 9) After a comprehensive review of the early judicial attempts to define actionable similarity, Patry summarizes all of the recent Supreme Court and lower court cases explaining the "substantial similarity" test, circuit by circuit. For each circuit, he first sets forth a short critical overview, pulling no punches. Thus, with regard to the Ninth Circuit, he warns that its 1977 *Krofft* opinion provides "a poor foundation" for infringement analysis because its "obvious weaknesses...have led the court of appeals to erect Rube Goldberg-like work-arounds, so that in the end one is left with a final structure that looks like an Escher drawing—one ascends a staircase but somehow ends up at a lower level than where one began."

Ironically, the only problem with the book is that so many of its components are too thorough and too good as stand-alone dissertations to be confined to this kind of work. Few readers will read it cover to cover, as most will be lawyers in a hurry, on a client's time, looking for answers to specific questions.

The daunting length and detail of the book can be overcome by searching through Westlaw. But the potential loss of Patry's many fascinating discourses can only be avoided by their publication as a collection or in a series of articles. Among these is Patry's commentary on Justice Antonin Scalia's antipathy to considering legislative history in interpreting a statute. As one who served as copyright counsel to the House's committee considering copyright legislation and drafted numerous bills, committee reports and floor statements, he debunks charges that committee reports typically contain material suggested by a lawyer-lobbyist or added by staffers to influence judicial construction. He compares the way legislation is developed with the Supreme Court's own decision-making in which inexperienced law clerks often write the opinions. Patry concludes with a demonstration of the ineffectiveness of Justice Scalia's views in any actual decisions.

Patry's style is lively and sometimes highly charged. His book reads like a story that brings the inherently complicated material to life.

This new treatise is a remarkable accomplishment that will be of great usefulness to practicing lawyers, even if too many of us will not take enough advantage of its more extraordinary insights and erudition, which go far beyond finding the rule and the cases necessary to answer a client's question.

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1. "Latman's The Copyright Law" (6th Ed. BNA 1986); "Copyright Law and Practice" (BNA 1988).
2. "The Fair Use Privilege in Copyright Law" (BNA 1985)

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