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THE *VOX POPULI* OF COPYRIGHT: A TRIBUTE TO LYMAN RAY PATTERSON

Kenneth D. Crews*

ORIGINALLY PREPARED FOR DISTRIBUTION AT THE
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Brutal honesty can be a great source of revelation and satisfaction, and Professor Ray Patterson brings his disarming charm and idiosyncratic wisdom to the understanding of copyright. After decades of investigation, he at once warns and reassures: “[t]he unfortunate truth is that copyright is a confused and confusing body of rules.”¹ For more than thirty-five years, this good son of the South has stood unhesitatingly before students, peers, the public, lawyers, and librarians—and even Congress and the courts—to tell them as a gentleman and as a scholar his honest views about the mistakes all of them are making when the subject turns to copyright. Professor Patterson has spent nearly every minute of his career nurturing a fresh understanding and advancing his cause to anyone who will listen, arguing that after centuries of legal evolution, we have systematically distorted and lost the central purpose of copyright law. Cautioning against repeated misunderstandings, he admonishes: “[i]f such fallacies go unchallenged long enough, they are likely to become a substitute for the truth.”²

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** Editor’s Note: The American Library Association at its Annual Conference in Atlanta in June 2002 presented the “L. Ray Patterson Award: In Support of Users’ Rights” to Professor Patterson. In bestowing the award on Professor Patterson and naming it in his honor, the ALA’s Office for Information Technology Policy recognized Professor Patterson for “his unparalleled contributions to our understanding of copyright and for his unfailing support for the public interest in information.” Frederick Emrich, Editorial, *We Stand on the Shoulders of Giants: Tributes to L. Ray Patterson*, info-commons.org Issue 2, October 2002, available at <http://www.info-commons.org/editor.html>.

¹ L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS* 3 (1991).

² *Id.* at 11.

These words may conjure images of the most obstreperous curmudgeon of an overbearing professor. Yet these are the revelations of a man who not only warmly greeted me at our first meeting, but who also poured cups of juice for my two young children at his own kitchen table in Athens, Georgia. Strolling under the shady trees of an August afternoon in Georgia a decade ago, I could immediately feel the penetrating heat of his arguments ("The *Texaco* decision is simply a shifting of wealth from a large company to the publishers."³), witness the historical atmosphere, and appreciate the cool, leafy protection of his personal touch and collegial respect. Professor Patterson is the ideal mentor and colleague, as well as friend and supporter.

Professor Patterson is a native of Macon, Georgia, and a graduate of nearby Mercer University. He had brief forays into northern territory to earn a master's degree in English from Northwestern University and an advanced law degree from Harvard University. He began his academic career as a faculty member at Mercer University in 1958, joining Vanderbilt University five years later. He worked briefly as an assistant United States Attorney in Tennessee, returned to academia at Vanderbilt, and later became Professor and Dean of the School of Law at Emory University. He moved to the University of Georgia in 1987, where he has been a leader, not only in the School of Law, but throughout the university. He currently holds the Pope Brock endowed chair.

Different people know this busy and complex man in different ways. To his law colleagues around the country, he is a thoughtful and prolific critic of copyright theory and its constitutional and historical foundations. To his students, he is a challenging and provocative teacher and promoter of their own studies, research, and publication.⁴ To his associates throughout the University of Georgia, he is a leader in institutional governance and policymaking.⁵ To the judiciary, he is a skilled and unapologetic advocate of his clients' interests.⁶ To the attorney general of his home state, he is a defiant ally in helping shape formal legal opinions.⁷ To the community of practicing attorneys, he is one of the foremost

³ He was referring to the district court's then-recent ruling in *American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1 (S.D.N.Y. 1992), *aff'd*, 60 F.3d 913 (2d Cir. 1994).

⁴ Professor Patterson has been a leader in founding and shaping the Journal of Intellectual Property Law, a student-edited journal based at the School of Law of the University of Georgia.

⁵ Professor Patterson was a leader in shaping an ambitious document guiding faculty and others through an understanding of copyright and fair use at the University of Georgia. For a published version, see L. Ray Patterson, *Regents Guide to Understanding Copyright and Educational Fair Use*, 5 J. INTELL. PROP. L. 243 (1997). The document is also available at: <http://www.usg.edu/admin/legal/copyright/copy.html>.

⁶ Professor Patterson has bravely served as the lead counsel, representing clients before the courts. For example, see *Pacific and Southern Company, Inc. v. Duncan*, 792 F.2d 1013 (11th Cir. 1986).

⁷ Professor Patterson served as "Special Assistant Attorney General" to help develop an

experts on attorney and judicial ethics.⁸ To librarians throughout the country, he is a most powerful voice explaining and justifying the importance of the public domain and the strength of fair use. To the publishing community, he is a pain in their side.

A central tenet of Patterson's writing in recent years has been his concern for the misplaced understanding of constitutional principles underlying copyright law and the fundamental importance of the public domain. The title of Patterson's most recent copyright book tells much. In *The Nature of Copyright: A Law of Users' Rights*, Patterson argues that copyright law has migrated from its original objective of defining the transition between works that enjoy legal protection and works that are in the public domain. Comprehending the public domain and preserving its existence are equally important as defining the legal rights of copyright owners. Through the centuries, however, and especially under contemporary law, the law has shifted away from articulating and preserving the public domain toward expanding and sanctioning legal rights of owners. To argue that copyright owners can and should be able to regulate and levy charges on a vast spectrum of common uses, asserts Patterson, is to bowdlerize the law and destroy the public interest: "[c]opyright, in short, is already being used as the basis for a user's tax on published—and therefore public—information."⁹

Nothing is safe from the determination and spirit of Patterson's discourse. He confronts defiantly the fundamental argument that copyright law serves as an incentive to the creation and dissemination of new works:

The notion that copyright is a muse for authors that must be managed so as to enable authors to use each other's works in creating their own is a classic example of phantom reasoning. Consider the fact that England's greatest authors—Chaucer, Shakespeare, and Milton—wrote without the benefit of copyright. Moreover, one can reasonably infer that it is not copyright, but the desire to express oneself as a result of talent that causes aspiring authors to occupy the proverbial garret in a starving state.¹⁰

"Unofficial Opinion" of the Georgia Attorney General regarding: "The scope of the Fair Use Doctrine, 17 U.S.C. § 107, for making copies for classroom use, for teachers who make copies for research and scholarship, and the potential liability of teachers, librarians, and employees of nonprofit institutions for exceeding the parameters of fair use." That opinion was issued on February 14, 1996 and is searchable at: <http://www.law.state.ga.us/opinions.html>.

⁸ L. Ray Patterson, *The Fundamentals of Professionalism*, 45 S.C. L. REV. 707 (1994).

⁹ PATTERSON & LINDBERG, *supra* note 1, at 105.

¹⁰ L. Ray Patterson, *A Response to Mr. Y'Barbo's Reply*, 5 J. INTELL. PROP. L. 235, 238 (1997).

Like any good scholar, Professor Patterson's views have not emerged suddenly, but have evolved with great care and research. His first book, *Copyright in Historical Perspective*, published by Vanderbilt University Press in 1968, is nothing less than astounding in its scholarship, original insight and analysis, and pragmatic implications for current copyright law. In some of his concluding reflections from 1968, Patterson seems downright tame: "[t]he Constitution's copyright clause is so general that it is impossible to infer any one theory of copyright alone from the language."¹¹ Contrast that caution with this blunt talk from a more recent symposium: "I should note that the panel's lack of attention to the copyright clause is not unusual. Congress, too, seems to ignore the copyright clause."¹² He further commented on the "very important lessons to learn" from the Copyright Clause.¹³ Patterson's recurring thesis is that the Copyright Clause of the American Constitution secured a public interest and identified the importance of the public domain: this was an explicit break from early English doctrines that favored owners' rights.¹⁴ The British Statute of Anne from 1709, as well as the American Copyright Clause from 1787, effected that departure by establishing "a very sophisticated copyright allocating rights to the public as well as to the author and to the copyright holder."¹⁵

Through the decades, Patterson's scholarship has become even more thorough, and his doctrine more soundly established. Accordingly, he has stirred even greater critical response, but nothing has held the professor back. He has advanced an aggressive view of fair use within his own home university. He has served as special assistant to the Georgia Attorney General to help the state define positions on policy issues and in litigation in ways that few other states would ever even touch. He has argued for a right of fair use in court cases, where other attorneys would perhaps see little reason to try. He has even exhibited no qualm about attacking a foundational court ruling in American jurisprudence. The case of *Folsom v. Marsh* is an 1841 ruling commonly cited as the first American elaboration of fair use.¹⁶ Deciding the case was the esteemed Joseph Story, who served thirty-four years on U.S. Supreme Court. Even Story was not safe from Professor Patterson's devastating wisdom:

¹¹ LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 195 (1968).

¹² Symposium, *Beyond Napster: Debating the Future of Copyright on the Internet*, 50 AM. U. L. REV. 389, 390 (2000) [hereinafter *Beyond Napster*].

¹³ *Id.* at 392.

¹⁴ U.S. CONST. art. I, § 8 ("The Congress shall have 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.").

¹⁵ *Beyond Napster*, *supra* note 12, at 392.

¹⁶ 9 Fed. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

Joseph Story was, no doubt, an honorable and decent man of high intelligence, but his service to the cause of jurisprudence must be downgraded by reason of his treatment of copyright. No doubt he was sincere, but he was also human, and the evidence is that he reshaped the concept of copyright infringement not for the public's interest, but his own. He was, after all, an author himself and the garret was not to him a desirable place to live. And it may be that, being an author of legal treatises, he viewed copyright as a muse. After all, to paraphrase Dr. Johnson, no one but a blockhead would write a legal treatise except for money.¹⁷

Perhaps to stave off such critiques in the years to come, when Justice Sandra Day O'Connor handed down her ruling in *Feist Publications, Inc. v. Rural Telephone Service Co.*,¹⁸ she cited favorably one of Professor Patterson's articles—citing it not merely once, but a half-dozen times—in one of the Supreme Court's most important copyright decisions.¹⁹

More recent developments in copyright law pose a growing challenge to Patterson's doctrine. The Digital Millennium Copyright Act,²⁰ the Copyright Term Extension Act,²¹ the squeeze of the public domain, the suppression of free speech through copyright, and the integration of copyright law into trade regulation all serve to advance property rights and devastate the public interest. The Supreme Court may have honored Patterson again with citations to his works in the recent case of *Eldred v. Ashcroft*,²² his writings informed both the majority and dissenting views. Yet in upholding the Copyright Term Extension Act, the decision defies and neglects the copyright and constitutional principles that Professor Patterson has cultivated throughout his career.

When the law seems to go astray, Patterson again looks to the historical record for caution and for guidance:

The cost of disregarding the past will be the diminution of the right upon which a free society depends, the freedom to learn, a right guaranteed by the First Amendment and promoted by the Copyright Clause. Proprietary rights in information and learning not

¹⁷ L. Ray Patterson, *The Worst Intellectual Property Opinion Ever Written: Folsom v. Marsh and its Legacy*, 5 J. INTELL. PROP. L. 431, 452 (1998).

¹⁸ 499 U.S. 340 (1991).

¹⁹ L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719 (1989).

²⁰ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

²¹ Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

²² 123 S. Ct. 769, 65 U.S.P.Q.2d 1225 (2003).

only reduce free speech rights to the status of an empty slogan, they also make a mockery of the limited copyright monopoly that the framers empowered Congress to grant.²³

On humid afternoons in the Georgia summer, one can feel the serenity of Professor Patterson's companionship and guidance, and discover with comfort and ease his inimitable erudition, honesty, and compassion. Professor Ray Patterson is the public's voice for the importance of copyright through history and for the future growth of new knowledge.

²³ L. Ray Patterson, *Copyright in the New Millennium: Resolving the Conflict Between Property Rights and Political Rights*, 62 OHIO ST. L.J. 703, 732 (2001).