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## Introduction - L. Ray Patterson: Copyright (and Its Master) in Historical Perspective

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**SYMPOSIUM**

**ARTICLES IN HONOR OF PROFESSOR L. RAY PATTERSON**

**INTRODUCTION<sup>1</sup>**

**L. RAY PATTERSON: COPYRIGHT (AND ITS MASTER) IN HISTORICAL PERSPECTIVE**

*Craig Joyce<sup>2</sup>*

*There is no legal concept so important to so many that is understood by so few as copyright.*

—Lyman Ray Patterson<sup>3</sup>

During a long and distinguished career, L. Ray Patterson, Pope Brock Professor at the University of Georgia School of Law, has been called many things—most of them complimentary!<sup>4</sup>

No one else—not even Benjamin Kaplan, Mel Nimmer or Alan Latman, those other Masters of Copyright with whom Ray rightly can be compared—has had

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<sup>1</sup> The following remarks were solicited as the Introduction to this Symposium issue and delivered by the author at the Annual Banquet of the JOURNAL OF INTELLECTUAL PROPERTY LAW in Athens, Georgia, on April 17, 2003.

<sup>2</sup> Law Foundation Professor, and Co-Director of the Institute for Intellectual Property & Information Law, University of Houston Law Center. Joyce is the lead author of the widely adopted casebook, *Copyright Law* (6th ed. 2003, with Marshall Leaffer, Peter Jaszi and Tyler Ochoa), and, most recently, edited *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* (2003), by Sandra Day O'Connor.

<sup>3</sup> *Personal Use in Copyright Law: An Unrecognized Constitutional Right* (forthcoming).

<sup>4</sup> Delicacy precludes mention here of the oft-muttered imprecations of the latter-day descendants of the Stationers' Company whom Professor Patterson has dubbed "copyrightists," and whom he has skewered at every turn. They will want to read no farther here!

an annual "Copyright Hero" award named after him, and by no less a symbol of the centrality of learning in our society than the American Library Association.<sup>5</sup>

In presenting the first "L. Ray Patterson Award: In Support of Users' Rights" to none other than L. Ray Patterson in 2002, Lawrence Lessig of Stanford<sup>6</sup> referred to Professor Patterson simply as "our model."<sup>7</sup>

Lolly Gasaway of North Carolina<sup>8</sup> called him "a courtly Southern gentleman" whose looks "mask the fact that he is the most radical of copyright scholars."<sup>9</sup>

David Lange of Duke<sup>10</sup> described Professor Patterson as "the conscience of the copyright movement," whose "calls for restraint in the relentless extension of protection have never flagged," and whose "courage and good cheer in the teeth of resistance and indifference have never wavered."<sup>11</sup>

Kenneth Crews of Indiana,<sup>12</sup> noting Professor Patterson's "erudition, honesty, and compassion," described him as a "good son of the South" who, for more than thirty-five years, "has stood unhesitatingly before students, peers, the public, lawyers and librarians, and even Congress and the courts, to tell them as a gentleman and a scholar his honest views about the mistakes all of them are making when the subject turns to copyright."<sup>13</sup>

And Peter Jaszi of American<sup>14</sup> tellingly identified L. Ray Patterson as both a "scholar" whose work has "inspired a generation of scholars—and withstood the

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<sup>5</sup> Information regarding the American Library Association's presentation of the "L. Ray Patterson Award: In Support of Users' Rights" to Professor Patterson at its Annual Conference in June of 2002 can be found on the Web at: [www.info-commons.org/feature.html](http://www.info-commons.org/feature.html).

<sup>6</sup> Lawrence Lessig, Professor of Law at Stanford Law School, and Founder and Director of the Stanford Center for Internet and Society.

<sup>7</sup> E-mail from Carrie Russell, Copyright Specialist for the American Library Association's Office for Information Technology Policy to the author (July 1, 2002) titled *ALA Honors L. Ray Patterson with Award at Annual Meeting*, taken from the Library Journal Academic Newswire, an e-newsletter service (on file with the author). Information on the Library Journal Academic newswire is available at <http://www.libraryjournal.com/newswire/subscribe.asp> (last visited April 23, 2003).

<sup>8</sup> Laura Gasaway, Director of the Law Library and Professor of Law, University of North Carolina at Chapel Hill School of Law.

<sup>9</sup> Lolly Gasaway, *L. Ray Patterson: A Tribute*, <http://www.info-commons.org/gasaway.html> (last visited April 16, 2003).

<sup>10</sup> David Lange, Professor of Law, Duke University Law School.

<sup>11</sup> David Lange, *L. Ray Patterson: A Tribute*, [www.info-commons.org/lange.html](http://www.info-commons.org/lange.html) (last visited April 16, 2003).

<sup>12</sup> Kenneth D. Crews, Professor of Law, Indiana University School of Law-Indianapolis, and Director, Copyright Management Center based at Indiana University-Purdue University Indianapolis (IUPUI).

<sup>13</sup> Kenneth D. Crews, *L. Ray Patterson: A Tribute*, [www.info-commons.org/crews.html](http://www.info-commons.org/crews.html) (last visited April 16, 2003).

<sup>14</sup> Peter Jaszi, Professor of Law, and Director, Glushki-Samuelson Intellectual Property Law Clinic, Washington College of Law, American University.

test of that new generation's inquiry," and as an "activist" whose books and elegantly crafted articles (which Jaszi describes as "almost too good" for the traditional law reviews) have "made visible the hidden tectonic shift" that occurred with the passage of the Copyright Act of 1976 and "sketched a persuasive basis for constitutional reevaluation" of the developments since.<sup>15</sup>

What label, then, best describes Ray Patterson? Model? Scholar? Activist? Radical? Perhaps, before answering, we should take a few steps back in time to observe the journey that is Professor Patterson's life in copyright.

\* \* \*

The centerpiece of that journey, and also its beginning, was Ray's magisterial study of the history, and pre-history, of Anglo-American copyright, *Copyright in Historical Perspective*, published in 1968 by Vanderbilt University Press. It is the seminal work in our field—and the key to understanding both Ray's purpose, and his achievement, in the three-and-one-half decades of scholarly work he has erected on that foundation.

You may well ask why a young doctoral candidate at Harvard Law School might elect as the topic of his dissertation a subject so esoteric as copyright. The answer, as Ray himself relates, is that a fellow student suggested to him the history of copyright because "nobody know anything about it." At least, as events proved, nobody knew *much* about it.

Professor Patterson claims to have had great difficulty securing approval for his dissertation at Harvard. It seems that the "Georgia of the North" had no faculty member sufficiently ready, and willing, to essay the task. Accordingly, the school decided to go outside its faculty for a reader. The first reader chosen was a noted bibliographer in London, who proved, however, to be a Communist—a disqualifying condition at the height of the Cold War. The second reader died. In the end, the task fell to the Director of Harvard's rare books library, who heartily approved the dissertation—which, in due course, became *Copyright in Historical Perspective*—and thereby launched Professor Patterson's astonishing prolific career in academia.<sup>16</sup>

Ray's central idea was that copyright is a creature not of *natural law* but of *positive law*—not a *proprietary right*, but a species of *trade regulation*. The charter granted by Philip and Mary to the Guild of Stationers—the booksellers of London—in 1556 included power, administered by the booksellers themselves,

<sup>15</sup> Peter Jaszi, *L. Ray Patterson: A Tribute*, [www.info-commons.org/jaszi.html](http://www.info-commons.org/jaszi.html) (last visited April 16, 2003).

<sup>16</sup> For proof that "prolific" is no overstatement, see the Selected Bibliography appended to this Introduction.

to regulate privately all trade in books. Here, then, is one of the many ironies of copyright that Professor Patterson has brought to our attention over the years. Although today we regard copyright as the law of culture and learning, its pre-statutory antecedent was created by and for tradespeople. As *Copyright in Historical Perspective* amply demonstrated, the booksellers were more concerned with profit than the promotion of knowledge, and the regime they created reflected that fact. For the stationers' copyright was an exclusive right to publish books—the manuscripts of which the booksellers merely purchased from authors without contributing a whit of originality themselves—and its term was forever.

The reason why the sovereigns granted so much power to so small a group of tradesmen—the Stationers' Charter named but ninety-seven grantees—was the religious controversy spawned by Henry VIII when he broke with Rome. Thereafter, the sovereign, whether Catholic (Mary) or Protestant (Elizabeth I), believed that the security of the throne depended upon preventing the people from reading schismatical, heretical, seditious, or treasonable matter. Preventing the publication of such material made desirable, if not necessary, the printers and publishers as allies. The stationers' copyright was thus supported by the Star Chamber decrees of censorship and, finally, by the Licensing Act of 1662.<sup>17</sup> But when the Glorious Revolution of 1688 resolved the religious controversy in England and assured the Protestant succession, these measures ceased to have any function other than protecting the booksellers' monopoly. In 1694, Parliament allowed the Licensing Act to lapse for all time.

What followed in 1710 was the Statute of Anne.<sup>18</sup> That legislation created for the first time a statutory law of copyright and, as *Copyright in Historical Perspective* brilliantly demonstrates, provided an entirely new regime of trade regulation dramatically different from the stationers' copyright. Parliament set about to restore order to the book trade, and to provide reasonable returns in support of authors' economic interests in their creations,<sup>19</sup> *without* continuing the monopoly

<sup>17</sup> 13 & 14 Car. II, c. 33 (Eng.).

<sup>18</sup> Act for the Encouragement of Learning, 1710, 8 Ann. c. 19 (Eng.).

<sup>19</sup> *The Statute of Anne: Copyright Misconstrued*, 3 HARV. J. LEGIS. 223 (1966), published three years after submission of Professor Patterson's dissertation but two years before the dissertation appeared in book form as COPYRIGHT IN HISTORICAL PERSPECTIVE, first made the point in print that the Statute of Anne was *not* enacted primarily for the benefit of authors:

[C]opyright is an author's right only in a limited sense.

An author has two basic interests in his works, an economic interest and a creative interest, and it is the former alone which statutory copyright protects. The economic interest is the one the author shares with the publisher. Since copyright protects only the owner, when the publisher becomes the copyright owner, which is the usual case, the copyright protects the publisher rather than the author. Thus, copyright can be properly viewed as being in fact a publisher's right more than an author's right.

on publication which, protected by press regulation, had become so comprehensive as to place all printed works under the stationers' ownership and preclude the development of a public domain.

To avoid this problem, the legislators transformed copyright from a *plenary property right* that *inhibited* learning into a limited *competitive right* that *promoted* learning.

The title of the Statute of Anne not only stated the goal ("An Act for the Encouragement of Learning"), but also stated the means. Copyright was to be limited to the right to print and vend published works ("Vesting the Copies of Printed Books"), was to be vested initially in the authors of books ("in the Authors or Purchasers of such Copies"), and was to exist only for a limited time ("during the Times therein mentioned").

Remarkably, in only twenty-seven words, Parliament created three policies of copyright so important and so fundamental that the Founders of our own nation adopted them for the Copyright Clause of the U.S. Constitution:<sup>20</sup> the encouragement of learning (because the title of the Statute of Anne so stated); public access (because copyright was limited to published works); and the creation and enhancement of the public domain (because copyright was available only for new works and was to exist only for limited times).

All this and more—including the famous contests in *Millar v. Taylor*,<sup>21</sup> the 1769 decision in which the booksellers convinced the King's Bench to adopt their natural law theory of copyright, and *Donaldson v. Beckett*,<sup>22</sup> the 1774 House of Lords decision repudiating *Millar* and embracing definitively the positive law theory of the Statute of Anne; the twelve state copyright statutes in pre-constitutional America; the saga of the Copyright Clause itself; the Copyright Act of 1790,<sup>23</sup> which operationalized the *positive law, limited right* theory of copyright in the United States; and *Wheaton v. Peters*,<sup>24</sup> the Supreme Court's great decision vindicating that theory in this country, one would have hoped, for all time—you will find in *Copyright in Historical Perspective*.

Ray's masterwork is, in every sense, a classic. Its conclusions were stunningly original, in the very best copyright sense of that word. It has remained in print longer than most people in this room have been alive. And it has stood the test of time and succeeding scholarship, for much of which it has been the touchstone. Indeed, the publication of *Copyright in Historical Perspective* may well be the

*Id.* at 224.

<sup>20</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>21</sup> 4 Burr. (4th ed.) 2303, 98 Eng. Rep. 201 (K.B. 1769) (an anti-Statute of Anne decision).

<sup>22</sup> 4 Burr. (4th ed.) 2408, 2417, 98 Eng. Rep. 257, 262 (H.L. 1774) (a pro-Statute of Anne decision).

<sup>23</sup> Act of May 31, 1790, § 1, 1 Stat. 124 (repealed 1831).

<sup>24</sup> 34 U.S. (8 Pet.) 591 (1834).

single most important non-legislative, non-judicial event in contemporary American copyright jurisprudence.

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Ray, of course, has had much to say in the intervening years. Nor has he had a shortage on new ideas along the way. It seems fair, in fact, to characterize Professor Patterson as one of the most original thinkers that the Groves of Academe have produced in this country—an appropriate quality for a student of copyright. Here is but a brief sampling of ideas from his post-1968 *oeuvre*.

Copyright . . . is not a right of ownership in a given work, *but a right, or series of rights, to which a given work is subject*. . . [Whether or not decision makers grasp this distinction] has a great deal of impact on the scope of control [they conclude] a copyright proprietor [should] have over a copyrighted work.<sup>25</sup>

To give communications corporations a *proprietary interest in public information and public domain materials* would enhance their power to influence and shape the opinions of millions of people without any means of making them accountable for the responsible exercise of this enormous power.<sup>26</sup>

The law of copyright can be viewed most usefully as *statutory unfair competition* based on the misappropriation rationale. The law's function is to protect the copyrighted work against predatory competitive practices. . . . [I]t follows that the basic constitutional purpose of copyright—promotion of learning—is best served [not by encouraging the *creation* of works but] by encouraging [their] *distribution*.<sup>27</sup>

The originality requirement in copyright law is *constitutionally mandated* for all works.<sup>28</sup>

<sup>25</sup> L. Ray Patterson, *Private Copyright and Public Communication: Free Speech Endangered*, 28 VAND. L. REV. 1161, 1209 (1975) (emphasis added).

<sup>26</sup> *Id.* at 1168 (emphasis added). A scathing critique of the Digital Millennium Copyright Act in draft? No. A commentary on then-pending provisions of the Copyright Act of 1976 concerning television!

<sup>27</sup> L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 6-7 (1987) (emphasis added).

<sup>28</sup> L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 763 n.155 (1989) (emphasis added), cited in *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 347 (1991).

[P]ersonal use has been a part of American copyright law from the beginning. . . . To subject to restraints the use that an individual may make of a copyrighted work after it has been publicly disseminated would be contrary to the basic purpose of copyright, which is intended to facilitate the learning process.<sup>29</sup>

[Thanks to new communications technology, today] copyright owners are asserting a proprietary control of copyrighted works to an unparalleled extent . . . The primary intellectual weapon against this onslaught is the *fair use* doctrine. . . . Fair use[, however,] . . . should apply only to the *copyright owner's competitive use* of the copyright. It should not be used to restrict the right of personal use—the individual's use of the work, for his or her learning.<sup>30</sup>

[C]opyright law is *overextended*. . . The copyright statute today . . . [protects information from the public domain] far removed from the “writings” of “authors” that the Constitution empowers Congress to protect. . . . Therefore, it is desirable to remove low-authorship works [protected by what Professor Patterson calls “*neo-copyright*”] from the copyright statute and protect them with a [federal] trade regulation act . . . [affording] only limited protection against competitors, not plenary protection against users.<sup>31</sup>

While profit is not a four-letter word in terms of the free-market system, . . . a statutory guarantee of profit [poses] great risk to the public welfare. . . . The Constitution . . . imposes duties on the copyright owner that require him or her to validate the statutory permission to intrude upon the public domain for private profit. . . . [We must ensure] that copyright owners do not change their *temporary easement* into a fee-simple ownership of the public domain.<sup>32</sup>

[C]opyright can properly be viewed only as a *three-part concept which must serve the interest of three groups*: authors, entrepreneurs, and users. Each has a legitimate interest in copyrighted works—authors in reputation and monetary gain, entrepreneurs in profit, and users in learning. Each group thus has a legitimate claim to consideration

<sup>29</sup> L. Ray Patterson & Stanley W. Lindberg, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* 195-96 (1991) (emphasis added).

<sup>30</sup> L. Ray Patterson, *Understanding Fair Use*, 55 L. & CONTEMP. PROBS. 249, 265-66 (1992) (emphasis added).

<sup>31</sup> L. Ray Patterson, *Copyright Overextended: A Preliminary Inquiry into the Need for a Federal Statute of Unfair Competition*, 17 DAYTON L. REV. 385-87 (1992) (emphasis added).

<sup>32</sup> *Copyright and “the exclusive Right” of Authors*, 1 J. INTELL. PROP. L. 1, 41-43 (1993) (emphasis added).

by the others because the goals are interrelated, and the rights leading to those goals must be kept *in proportion*.<sup>33</sup>

[W]hile copyright protects the author's exclusive right to *publish*, the First Amendment protects the citizen's right to *read what is published*. . . . [T]here can be no complete understanding of copyright law without an understanding of [that] relationship. . . .<sup>34</sup>

[C]opyright is . . . a *subset of public domain law*. . . . [But] the law of the public domain is underdeveloped . . . . The reason is that . . . [t]he public domain designates material owned by everyone and thus by no one . . . . [But] freedom of speech depends in a large measure upon the existence of a public domain.<sup>35</sup>

[A] necessary condition for courts to fulfill their role as the protector of copyright is recognition of the fact that the limitations in the copyright clause *govern the courts in applying copyright statutes as well as to Congress in enacting them*. A copyright statute is not entitled to a presumption of validity and courts must examine its constitutionality *de novo*.<sup>36</sup>

And, most recently, here are twin comments by Professor Patterson on the events of October 27 and 28, 1998, when, on successive days, Congress enacted the Copyright Term Extension Act and the Digital Millennium Copyright Act on what Ray might well describe as "two days that will live in infamy":

[T]he CTEA serves the interest of no one except . . . copyright holders . . . and their heirs. . . . In terms of scope, copyright can be viewed as a *horizontal monopoly*; in terms of time, copyright can be viewed as a *vertical monopoly*. In combination, the result is to enhance the copyright monopoly in *geometric, not arithmetic*, terms. That is why the CTEA is so harmful to the public welfare.<sup>37</sup>

[T]he . . . DMCA . . . exemplifies the core issue of copyright in the new millennium—the *conflict between property rights and political rights* . . .

<sup>33</sup> *Id.* at 41.

<sup>34</sup> L. Ray Patterson & Stanley F. Birch, Jr., *Copyright and Free Speech Rights*, 4 J. INTELL. PROP. L. 1, 2 (1996) (emphasis added).

<sup>35</sup> L. Ray Patterson, *The Worst Intellectual Property Opinion Ever Written: Folsom v. Marsh and Its Legacy*, 5 J. INTELL. PROP. L. 431, 444 (1998) (emphasis added).

<sup>36</sup> L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPR. SOC. U.S.A. 365, 396 (2000) (emphasis added) (article cited with approval in *Eldred v. Ashcroft*, 2003 U.S. LEXIS \*751, \*810 (2003) (Breyer, J. dissenting)).

<sup>37</sup> L. Ray Patterson, *Eldred v. Reno: An Example of the Law of Unintended Consequences*, 8 J. INTELL. PROP. L. 223, 224, 239 (2001) (emphasis added).

Just as copyright was a device of public censorship in seventeenth-century England, the DMCA is a device of private censorship in the [twenty-first]-century U.S.<sup>38</sup> [T]he Digital Millennium Copyright Act . . . of 1998 in the United States is [simply] a modern version of the Licensing Act of 1662 in England.<sup>39</sup>

There is, of course, much, much more. Professor Patterson's piece in the present issue of the JOURNAL OF INTELLECTUAL PROPERTY LAW, *What's Wrong with Eldred? An Essay on Copyright Jurisprudence*,<sup>40</sup> more than ably speaks for itself. And his most recent piece with me, *Copyright in 1791: An Essay*,<sup>41</sup> arguing that the widely supposed "conflict" between the Copyright Clause and the First Amendment is an artifact of insufficient knowledge concerning the common origins of those two provisions of the Constitution, will be in the hands of a waiting world soon enough.

Suffice it to say here that reading Ray Patterson's work is both a joy, because of the sheer elegance of his writing, and a revelation, because doing so is a constant process of enlightenment.

Ray's role in the creation of ideas, and then setting them before us for our instruction, can be compared to the child in Hans Christian Andersen's "The Emperor's New Clothes." Like the child who pointed out that the Emperor had no clothes, Professor Patterson continually points out to readers—and, I have no doubt, to his students as well—that commonly accepted ideas are not always logically sound: for example, that the phrase "to Promote the Progress of Science" in the Copyright Clause is window dressing if it is merely recited, but without underlying substantive content.

Recall that, in the fairy tale, the fraud by the swindling weavers was based on their claim that one who could not see the magnificent cloth they did not weave was unfit for office. Ray's instruction to us is that the latter-day descendants of the booksellers, mimicking those weavers, claim that authors deserve copyright as a matter of natural law, that their entitlement should last at least until the end

<sup>38</sup> L. Ray Patterson, *Copyright in the New Millennium: Resolving the Conflict between Property Rights and Political Rights*, 62 OHIO ST. L.J. 703-04 (2001) (emphasis added).

<sup>39</sup> L. Ray Patterson, *The DMCA: A Modern Version of the Licensing Act of 1662*, 10 J. INTELL. PROP. L. 1 (2002).

<sup>40</sup> L. Ray Patterson, *What's Wrong With Eldred? An Essay on Copyright Jurisprudence*, 10 J. INTELL. PROP. L. 345 (2003).

<sup>41</sup> L. Ray Patterson, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted by Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. (forthcoming 2003).

of civilization (if not of time itself),<sup>42</sup> and that anyone who does not agree is unfit to comment.

One can, of course, carry the analogy too far, but the similarity of the claim of a magnificent non-existing cloth to the claim of an all-encompassing non-existing natural law copyright is not to be dismissed lightly, as Professor Patterson so often has reminded us. As his example teaches so eloquently, ideas—and the courage to propound them—can matter profoundly.

I would like, finally, to answer the question I posed at the beginning: What should we call Ray Patterson? Of all of the titles we might bestow on him, every scholar in the present issue of the JOURNAL OF INTELLECTUAL PROPERTY LAW who has learned at his feet, and every student who has attended one of his classes for the past forty years now, would agree on the label I propose tonight. In everything he has written over the years, and in every classroom he has graced with charm and wit and erudition and conviction, Ray Patterson has been above all, and to all, a *teacher*.

And so, a toast: To PROFESSOR PATTERSON. Copyright Hero. Model. Scholar. Activist. Radical. Teacher. And may I add with the greatest pride on this very special occasion: Friend.

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<sup>42</sup> Recall that the CTEA was named after a Member of Congress, who, the legislative history records, “wanted the term of copyright protection to last forever.” 144 Cong. Rec. H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono).