

# The moderator's opening remarks

May 5th 2009 | Kenneth Cukier

Copyright strangles creativity. Copyright rewards originality. It is a nuisance to the public that unduly enriches a few people. It is the backbone of our knowledge economy that fuels progress. Hate it, love it, break it, protect it; few people lack strong opinions about copyright and its place in society.

Copyright is just that—the right to make copies. Prior to the printing press there was no such thing. The act of duplication was so labour-intensive and imperfect that it was tolerated. After Gutenberg's technology made disseminating ideas easier and a better business, the act of publishing eventually became a matter of royal privilege (as much to control content as raise income). Books were expensive and quality was poor.

The introduction of copyright law 300 years ago was designed to liberate literary works by limiting the term of exclusivity before they entered the public domain for anyone to reproduce. Copyright was part of the march of capitalism and democracy against the power of monopolies and monarchies. It freed up knowledge and gave authors rights over their intellectual labour.

How things change. Today the system is regarded by many as a mechanism to unfairly restrict content in order to line the pockets of a few. Copyright's scope, duration and strength have expanded, even as new digital technologies have made it easier than ever for new works to be created. Does copyright still serve the public? Does it do more harm than good?

Our esteemed debaters are perfectly suited to wrestle with these issues. Supporting the motion is William Fisher III, a professor at Harvard Law School and the director of the Berkman Center for Internet and Society. He has long argued that the creep of copyright extracts a high but hidden cost to the public. Yet more than a trenchant critic, Professor Fisher puts forward thoughtful solutions, as in the book "Promises to Keep: Technology, Law, and the Future of Entertainment" (Stanford University Press, 2004).

His potent perspectives find their worthy adversary in Justin Hughes, a professor of intellectual property at Cardozo Law School, where he leads Cardozo's programme training Chinese officials in intellectual property. He helped craft America's copyright policies in the 1990s (and earlier clerked for the Lord President of the Malaysian Supreme Court in Kuala Lumpur). Professor Hughes is an articulate proponent of today's copyright system, noting that economic incentives are vital if

society is to benefit from high-quality works.

What is certain is that the issues are only becoming more contentious. As increasing numbers of people feel encumbered by copyright, a subject that has long been the purview of specialists has emerged into the sunlight of the public sphere, such as this hallowed debating ground. It is only appropriate, too, since copyright is meant to benefit society. Can our debaters sway The Economist's online audience in favour of their positions?

## **The proposer's opening remarks**

May 5th 2009 | Professor William Fisher

The copyright system has several important functions. It provides incentives for creative activities that otherwise would not occur and then facilitates public dissemination of the fruits of those activities. It gives creators fair rewards for their efforts. It protects the emotional bonds that many artists feel with their products. Most broadly, copyright laws, working in concert with many other laws, help cultivate a just and stimulating culture. These are all worthy objectives. Unfortunately, the current copyright system does a poor job of advancing them. If it is to perform well, and in particular if it is to adapt to modern information technologies, it must be reformed in fundamental respects.

What's wrong? Here are a few of the problems:

Copyright protection lasts too long. In many countries, including the United States, copyright protection for a creative work now persists for the life of its author plus 70 years. It was not always so. Under the original American copyright statute, the maximum term was 28 years. Over the centuries, it has grown like Topsy. Commentators are nearly unanimous in concluding that the current term is much longer than necessary to provide appropriate stimuli for creativity or to protect authors' legitimate interests in the sanctity of their creations. Just one example: in the Eldred case, in which the most recent extension of the American copyright term was challenged (unsuccessfully) on constitutional grounds, a group of 17 economists (including five Nobel prizewinners) submitted a brief arguing that "it is highly unlikely that the economic benefits from copyright extension under [this statute] outweigh the additional costs". (Milton Friedman reportedly agreed to join the brief only on the condition that it include the phrase "no brainer".)

Too many creations are protected. This problem derives primarily from a seemingly innocuous provision of the Berne Convention, a multilateral treaty to which most countries now adhere. Article 5(2) of the convention provides that "the enjoyment and the exercise of [copyrights] shall not be subject to any formality". Prior to the imposition of this rule, many countries required authors who wanted copyright protection for their works to comply with various formal requirements, the most important of which was the duty to attach a copyright "notice" (a "©" or something equivalent) to copies of those works when they were first published. Works that did not comply with those requirements fell into the public domain. No longer. Now every email message, every blog entry, every snapshot—indeed, every creation that evinces a bare minimum of creativity and is fixed in some tangible medium—is automatically protected by copyright law, whether the author is aware of it or not.

Partly for the same reason, there is no comprehensive national (to say nothing of global) registry, enabling one to ascertain the owners of copyrighted works and the uses that those owners will and will not permit.

The net effect of these three features is that the copyright system is badly over-inclusive. Most creative works produced since the 1920s either are or might be subject to copyright protection. Someone who wishes to put one of those works to productive use (reprint an out-of-print novel, "mashup" a song, include a film clip in a new documentary) faces serious obstacles: first, in locating the copyright owner, and then in obtaining permission. Most give up without trying. One reason this is troubling is that today more than ever creativity is achieved through the incorporation and modification of pre-existing works. By needlessly locking up portions of our cultural heritage, we also needlessly curb cultural progress and opportunities for self-expression.

But over-inclusiveness is not the only problem. In other contexts, the current copyright system gives creators too little aid. For instance, it fails effectively to protect the legitimate interests of the creators of audio and video recordings. To be sure, the "law on the books" purports to forbid the unauthorised reproduction and distribution of those recordings. But in practice, the legal system has been unable to prevent widespread violations of those prohibitions, primarily through peer-to-peer file-sharing. The result is that since 1999 the revenues of the music industry have been falling at an accelerating rate, and the movie industry is now teetering on the brink of the precipice. The response of the legal system has been to impose ever more severe penalties upon those who contribute to the problem: – lawsuits against

individual file-sharers and organisations that facilitate their behaviour; the recent criminal conviction in Sweden of the founders of Pirate Bay; the "three-strikes-and-you're-out" policy about to be adopted in France; and so forth. None of these initiatives has worked or is likely to work. The behaviour is too widespread. Even more seriously, as John Palfrey and Urs Gasser have shown, the belief that file-sharing is legitimate is now too deeply rooted, particularly among young digital natives. A fundamentally different strategy is necessary to protect creators. Various options have been proposed, including a tax-and-royalty system that would provide creators an alternative source of revenue. But thus far we have lacked the will or imagination to develop and implement them.

How did we get into this pickle? At least three intertwined causes seem to be at work. First, most recent adjustments in the copyright system have been spurred and shaped by interest groups that have stakes in expansion of copyright protection and that fail to take into account the interests of the public as a whole. Second, the multilateral intellectual-property treaties that now govern most countries establish floors, not ceilings. The result has been a ratchet: it is easy to increase the levels of legal protection, but hard to decrease them. Third, lawmakers are afflicted with the local maximum problem; they seek to alleviate problems by making modest improvements in the existing regime, unable to see across the valley to radically different approaches that would be much better.

Overcoming these obstacles will not be easy. But we must do so if we hope to produce a copyright system suited to the conditions and challenges of the coming century.

## **The opposition's opening remarks**

May 5th 2009 | Professor Justin Hughes

Intellectual property, like much public policy, is a matter of educated guesswork.

Those of us who think copyright law is a good idea—that it does more good than harm—believe that free market economic incentives are needed for the production (and often distribution) of all kinds of valuable expression and information, whether we are discussing educational value, civic value, or entertainment value. There is no question that much expression would be produced without copyright: the landed gentry was writing poetry before copyright. But to get both the desired amount and mix of expression, properly calibrated

copyright is the best tool. The words "properly calibrated" are important, because once the new expression or information is created, social welfare is usually increased by its widespread distribution.

Since the English Parliament passed the Statute of Anne in 1710, the history of Anglo-American copyright has focused largely on this instrumentalist justification for copyright, albeit with strong strains of justice and fairness to authors. Protection of the creator's "personality" also figured in copyright development, particularly in civil law jurisdictions. First applied to books, the exclusive rights of copyright were extended over time to engravings, sheet music, fine arts, photography, motion pictures, architectural works and software.

We have very few data points on how supplies of these expressive works would have developed without copyright law. During the French revolution, publishing privileges were suspended for a period. Interestingly, new book publishing did not stop, but did skew heavily towards news works whose costs could be recovered immediately from brisk sales, i.e. porn. In recent years video piracy has been so rampant in Ghana and Nigeria that these countries have had no operational copyright laws for audiovisual works. But audiovisual production continues within tight constraints: average investment in a new film in Nigeria is perhaps \$20,000 and maybe \$8,000-10,000 in Ghana: that is the amount that a producer can reasonably recoup through lead time, before piracy of his product takes over.

In contrast, the audiovisual industry in North America, Europe and Japan is a source of hundreds of thousands of jobs with 2008 worldwide box-office receipts just over \$28 billion. The US software publishing industry employs roughly 250,000 people in 2006; the numbers in India are much higher. Book publishers in the European Union generated approximately €23.2 billion in 2006 revenues (the last reported year) and roughly the same number for the United States. Getting people to make the kind of investment of time, energy and money needed to create and distribute these products requires, I am willing to guess, the promise of financial returns, a prospect we create through the exclusive commercial rights granted by copyright.

That has been the traditional equation, but it is fair to ask if it still holds true today. Critics of copyright make three main arguments against copyright today.

First, the critics argue that digital, networked technology permits expression to be generated and disseminated so easily that copyright is unnecessary—or substantially less necessary. Second, the critics also say that copyright prevents people from recombining and "recoding" existing works, thereby throttling the easy individual

expression and cultural progress the internet would otherwise enable. Finally, the critics argue that copyright is harmful because it stifles technological innovation.

The problem is that reality has never corresponded to these ten or so years of *Sturm und Drang*. Indeed, the third one, copyright's effect on new technologies, is really such a minimal concern that I will wait until my next statement to address it.

For now, let us focus on copyright's current relationship with creative expression.

On the first point, no one really thinks that uncompensated, collaborative, networked creativity can replace the richness of expressive works produced by a creative class, individuals and groups who earn their livelihood from selling their works (or access to their works). Even on YouTube the top three most watched YouTube channels are from the "content industry" and the majority of the ten most watched videos are professionally produced music or comedy videos. In a recent analysis, *Newsweek* concluded that Hulu, the web platform for content from Fox and NBC, was succeeding against YouTube because "better content wins".

Now consider the second point: are people being throttled in their self-expression? The past decade has seen an absolute explosion of expressive production and dissemination with little or no hindrance from copyright law: blogging, distribution of amateur photography through Flickr and Facebook, self-expression through websites and MySpace pages. Sure, the copyright minimalists will parade out their horror stories, like the mother who posts a video of her baby dancing and gets a takedown notice from Prince. But these examples have to be weighed against the enormous flourishing of non-commercial expression that has coexisted with the copyright system.

And copyright itself is a vast engine of expressive diversity. If all you care about is poetry from landed gentry or home videos or open source software from IBM engineers (largely funded, ironically, by patent royalties), copyright is not so important. But if you care about films targeted (and financed) for the African-American and gay communities, copyright matters more. If your image of cultural production is white men in ivory tower offices writing scholarly tracts, copyright seems of not much relevance. If your image is that of a musician or screenwriter waiting tables and still looking for a record deal or film financing, copyright matters more. I will say more about this in the coming days.

In truth, what we have now is a mixed economy for expression in

which some expression is produced under a patronage model (foundation grants, universities), some expression is produced under the open source model (Linux, blogs), and some expression is produced under a profit/incentive model of copyright. There are places where we need to curb some of copyright law's effects, that is, correct our educated guesswork, but in general copyright law works well in that framework.

I challenge my friend William Fisher to show us why this mixed economy for expression and copyright's role in it aren't great and wonderful things.

## Featured guest

Mr John Kennedy

### **Copyright laws are good for creators and consumers in the digital era, but they need to be made to work**

Creative industries are at a crucial moment of their evolution in the digital world. The music industry has embraced the new environment, yet still only a tiny fraction of its music is getting paid for. The film and TV industries are seeing the power of BitTorrent technology to make movies and TV programmes available to the world without payment or consent. Newspapers are seeing their readers desert them for free news online. And book publishers are warning about new popular websites like Scribd, where books can be downloaded for free, whatever the wishes of the author.

Music companies were the first to feel the impact of the internet and, although the industry is today still in decline (down 8% globally in 2008), there has been a sea-change in its approach and in its business models. Music companies have left behind the world of a single-format marketplace, and are now licensing music across multiple channels, including over 400 online download stores. New services like the advertising-funded Spotify are even fighting free illegal sites with a free-to-user legitimate alternative. Spotify fights free with free. Despite the severe problems we face, the innovation and the opportunities are abundantly clear.

At this critical moment, copyright laws have never had a more important role to play. They are the enabler of legitimate creative commerce. They make it possible for creative people, those who want to and who have enough talent, to make a living from music, film, design or writing. Copyright does not inspire great works, but it does allow them to have value. That value translates into a vast driver of

economic activity across the world. In the United States and Europe, copyright directly drives some 6% of economic activity. Indirectly the impact is much greater.

Governments neglect copyright and similar rights at their peril. I was told at a seminar in Prague that as long ago as June 2004 the Chinese prime minister said: "Future competition in the world is intellectual property competition." It is likely that Japan, Korea and India are of the same mind.

The music companies that I represent in this debate are often seen as the canaries down the mineshaft, struggling to "monetise" a business in the digital era. Certainly we have suffered terrible losses from internet piracy, a market down from US\$40 billion in 1999 to US\$28 billion today. We have developed a range of new business models. And we have no doubt made some mistakes along the way. But the greatest lesson we have learned is simply that the most brilliant innovation in the world is incapable of succeeding in an environment of 95% unauthorised free music.

Others are finding it is not as easy to monetise traffic on the internet as was originally thought. Those great poster children of the internet, Skype, My Space and Joost are finding it tougher than they expected and You Tube is having difficulty monetising one of the biggest online audiences there is.

One of my members, a small independent label, last week put it to me more bluntly: it is nearly over for him, he said. A few years ago he employed 22 people and invested in 17 artists. Today my independent label colleague employs seven people and invests in only four artists. His story is being replicated across the music business and across the world. But this decline is not, as some would suggest, an irreversible fact of new technology. It is down to decisions by governments and companies about how seriously they regard safeguarding creativity and promoting creative industries. It is the impossible task of competing with free.

One of the myths about copyright is the claim that it holds back technology. In fact copyright does not regulate technology: it influences behaviour and protects creators from the abuse of technology. This is where courts and governments can make an impact, be it in the Swedish criminal prosecution of the Pirate Bay or in the French government's proposed new law to engage internet service providers in curbing piracy.

Some argue today that the way to ease the path of creative sectors into the digital era is to weaken copyright laws. It is hard to give such

an idea any credence economically, commercially or culturally. Copyright laws have helped power the growth of modern economies. Good copyright laws help generate strong creative businesses and a strong repertoire. It is no coincidence that Britain, with one of the world's best and oldest copyright laws, is an international giant in exporting music nor that Canada, the only top ten music market not to have an up-to-date copyright law, had only one local artist in its top-ten albums chart for 2008. When copyright is eroded, investment in artists suffers directly. There are fewer artists being discovered and brought to market, and there are less revenues to plough back into new artists.

Copyright has played a vital role in shaping the modern digital environment today. A society that values creative works needs the copyright laws to protect them and be prepared to enforce them in practice. No one pretends that copyright laws today are perfect or that all jurisdictions move quickly enough to keep pace with technology. Exceptions and flexibility are needed to meet consumers' concerns. But the absence of an adequate legal regime to defend creators' rights has to be considered unthinkable.

The challenge for governments today is not to radically change copyright laws but to make them work in an effective way that promotes the future of legitimate creative businesses. France has pointed the way forwards sensibly, with measures that share responsibility for copyright protection with the internet companies, who are best positioned to make it work in practice.

Like all revolutions, the digital revolution is a mixture of change and continuity. In five years' time the business models of creative industries will look radically different from today, but the principles of rights protection underpinning them will be the same. The mistake is to think of copyright as relevant only to an old world: in fact it is the enabler of the new world and of the economic and cultural benefits it can bring.

Last but not least, copyright industries create jobs. We need them more than ever before.