The moderator's rebuttal remarks

May 8th 2009 | Kenneth Cukier

Copyright is meant to be a balance. It is about weighing society's benefit from having the content, albeit enduring temporary restrictions to content to the benefit of its creator. And unsurprisingly, the debate has quickly shifted away from fundamentals into whether the balance that has been struck is the best one.

Professor Hughes in his opening statement acknowledged that copyright laws, like all public policy, are merely "educated guesswork." Professor Fisher cites the late economist Milton Friedman, who called copyright's deficiencies a "no-brainer." The clash of ideas is underway.

Professor Hughes believes society enjoys a "mixed economy for expression" that encompasses patronage, open-source and the "profit/incentive model of copyright." The latter, he argues, is important because it produces better content. "To get both the desired amount and mix of expression, properly calibrated copyright is the best tool," he declares.

Meanwhile, Professor Fisher contends that copyright needs to be overhauled because protections last too long, too many creations are protected, and the laws only strengthen. This is especially problematic, he explains, because "today more than ever creativity is achieved through the incorporation and modification of pre-existing works."

Our online community has been especially vocal. "The problem is that we now have a public that is so totally devoid of a sense of honor, a sense of gratitude for someone's efforts in creating something useful to them," Philafifer wrote.

Paul West lauds Creative Commons, in which authors can craft the sorts of rights they wish to retain and people can reuse material. But he sees difficulties. It helps "overcome the limitations in the existing environment, but [is] not yet sufficiently understood by either author or user of the materials," he writes.

Some believe that copyright itself is unnatural, and so oppose it on its face. "Copyright are not natural to the learning of humanity," writes Jourdelune. "There is simply no natural right to our expressions," says drkoepsell. Extreme views perhaps, but legitimately made. The commentator manthano asks: "Where, exactly, does copyright stop and fair use rights start?" Michael S. Hart of Project Gutenberg frets about "the loss of information" as less popular copyrighted works moulder in obscurity over time.

A few commentators on the floor, notably Stephen Morris and grovest,

have pointed out that Professor Hughes is subtly mis-interpreting the motion to suit his interests: the point is not to argue in favour of copyright as a principle (which might do a lot of good), but how it is upheld in existing laws (which might do more harm).

Many say, echoing Professor Fisher's point (citing John Palfrey and Urs Gasser) that today's online acolytes have a different conception about content and believe in sharing it openly. The commentator from the floor who summed it up best was J.Sparrow, who wrote: "Whenever social behaviour that was previously considered unacceptable becomes a custom and laws are ignored, the most reasonable solution would be to change laws instead of trying to change people's ways."

John Kennedy, the head of the International Federation of the Phonographic Industry (IFPI) notes in his expert statement that "copyright laws have never had a more important role to play. They are the enabler of legitimate creative commerce."

In their rebuttals, Professors Fisher and Hughes respectfully challenge each other's opening statements. "My opponent fails to acknowledge the serious impediments that copyright law poses," declares Professor Fisher. Contends Professor Hughes: "We seem to disagree mainly on the negative effects of today's laws." But the gulf between them is actually getting wider. Where will it end up?

The proposer's rebuttal remarks

May 8th 2009 | Professor William Fisher

I agree with my opponent on two important issues. First, he rightly observes that "[i]ntellectual property, like much public policy, is a matter of educated guesswork". Second, he is correct that "what we have now is a mixed economy for expression", in which some creative expression is produced under a patronage model, some under an open-source model and some under a copyright-based profit/incentive model. My opponent goes astray, however, in contending that, for the most part, we have guessed right, that our current "mixed economy for expression and copyright's role in it" are "great and wonderful things".

Signs to the contrary are everywhere. The IFPI, the trade association for the worldwide recording industry, reports that global sales of recorded music fell 3% in 2005, 5% in 2006, 8% in 2007 and 8.3% in 2008. The IFPI trumpets rising online sales of digital recordings through iTunes and similar services, but acknowledges that they are

dwarfed by the volume of unauthorised peer-to-peer exchanges and are swamped by the diminution of sales of recordings in traditional formats. Not surprisingly, the collapse of the traditional business model is hurting both musicians and intermediaries.

The newspaper industry is in even worse shape. In the United States, the rate at which newspaper circulation is declining recently increased from roughly 2% per year to roughly 5% per year. The revenues that papers earn from advertising have been falling even faster, as subscribers increasingly rely on free online sources for information about products and prices. To staunch the bleeding, almost all newspapers have been cutting staff and content. (The *Los Angeles Times*, for example, recently laid off 300 employees, including 70 from its newsroom.) For a growing number, however, even these measures have failed to stave off bankruptcy.

My opponent points to the book publishing industry as an illustration of the effectiveness of the copyright system. He is correct that, until quite recently, total sales of books gradually increased: in the United States at roughly 2.5% per year. In 2008, however, they began to decline. The publishers are hoping that online sales plus revenues gleaned through the tentative settlement of their lawsuit against Google (assuming that the courts approve that settlement) will offset these losses. But therein lies a danger. Once books are readily available in digital form, and once electronic readers (such as Amazon's "Kindle") become affordable and convenient, we are likely to see the same sort of unauthorised peer-to-peer exchange network that is decimating the record industry. Most publishers acknowledge as much.

A crucial lesson lurks in these examples: copyright law supports business models in which people pay either to obtain authorised copies of creative works or to have those works "performed" for them. Information technology is rapidly corroding consumers' willingness to make such payments, either because unauthorised copies of those works are readily available for free, or because other free sources of information and entertainment strike consumers as superior.

What is to be done? We could, of course, sit on our hands and let the record industry, the newspaper industry and (eventually) the book industry collapse. But if one believes (as my opponent seems to) that each of these industries serves important social values, then we need either to alter radically the copyright system or to find something to take its place. (In my final contribution to this debate, I will suggest what those reforms or alternatives might look like.)

Another dimension of my opponent's opening statement is equally

troubling. He brushes aside the argument that copyright law "prevents people from recombining and 'recoding' existing works", suggesting that such adverse effects are limited to a few cases in which mothers have been forced to remove from websites videos of their babies dancing to the music of Prince.

This view is mistaken on two grounds. First, it obscures the extraordinary—and increasing—frequency with which artists are creating new works by refashioning existing works. This trend is apparent among professionals; hip-hop artists, for example, typically combine hundreds of "samples" of existing recordings with original material to create novel recordings. It is even more striking among amateurs. Palfrey and Gasser, for example, report that roughly a quarter of young "digital natives" throughout the world are remixing existing material into "their own artistic creations such as artwork, photos, stories, videos, or the like".

Second, my opponent fails to acknowledge the serious impediments that copyright law poses to such activities, both by granting copyright owners control over "derivative works" and by punishing the circumvention of the technological protection measures that encase many of the recordings to which the remixers want access. To be sure, in some countries, other laws afford the remixers some latitude. In the United States, for example, the fair use doctrine is helpful. But the notorious ambiguity and unpredictability of that doctrine makes it an unreliable defence; most countries have no such doctrine; and even in the United States it does not excuse encryption circumvention.

In many contexts, the threat of copyright liability chills creativity. Documentary filmmakers, for example, are commonly forced to purge their works of copyrighted material inadvertently picked up by their cameras. And most observers think that the hostility that American and European courts have shown towards digital sampling has taken much of the life out of hip-hop music.

To be sure, many remixers are undeterred. Students in film-studies classes, for instance, continue to use readily available circumvention software to "rip" DVDs, enabling them to include clips of movies in their projects. And the digital natives continue to make and post their mashups with little concern for copyright liability. But this is not a healthy state of affairs. An entire generation apparently sees the current intellectual-property system as unjust or nonsensical and not worthy of obedience. This is bad for many reasons, among them that it fosters disrespect for law in general. Somehow, we need to bring our norms and our behaviour back into alignment in a way that is capable of sustaining the creativity that we value.

The opposition's rebuttal remarks

May 8th 2009 | Professor Justin Hughes

As I guessed when we began this debate, William Fisher and I agree on a lot about copyright, including that existing copyright laws do a very great amount of good. We seem to disagree mainly on the negative effects of today's laws.

William Fisher's analysis of the harm done by copyright focuses on "overinclusiveness". I agree that compared with the ideal policy, our present copyright law is vastly overinclusive. It includes too many things that neither need the economic incentive of copyright nor merit the kind of control that some artists deserve. The question is how much harm this causes. Let us consider some of the issues Professor Fisher raises.

"Copyright protection lasts too long." I agree. The term of copyright in the United States has expanded greatly since the 14 year copyright term (with 14 year renewal) inaugurated in 1790. We are now at the maximum copyright term envisioned in 1694 by the philosopher John Locke; this is particularly interesting since he was one of the great intellectual influences on the present copyright system. Economists are unanimous on what business people see as obvious: that the present life+70 copyright term cannot be justified in relation to the economic incentives needed for creation of new works.

Still, this debate is supposed to be about the harm as opposed to the good caused by copyright law. Has the expansion of the copyright term adversely affected democratic discourse or civil society? The life+50 year copyright term was made part of the international copyright system in the revision of the Berne Convention in 1908. This became the law of Great Britain in 1911, and the United States' term continued to be 28 years with a possible renewal of 28 years. So we can make a direct comparison over the half century of a large difference in British and American copyright terms. Were British democracy and popular culture any less robust because of a longer copyright term? No one is willing to make a silly argument like that. (And, conversely, was production of British literature and film more robust because of a longer copyright term? No, no effect there either, because beyond a point, lengthening copyright term does not help incentives.)

"Too many creations are protected." Yes, but again there is relatively little practical harm. Sure, we do not need copyright on love letters,

business memos, grocery lists and family photos. But it is irrelevant with 99.999% of the world's expression of this sort. It becomes relevant only with the rare letters and documents that are important to historians, novelists, archivists and documentary filmmakers. For these people, the fair use doctrine already provides substantial protection against infringement claims, but we need to do more.

One of the ways copyright law needs to be improved—to address the harm caused by both these problems of overinclusiveness—is by an adequate doctrine for orphan works. An orphan work is any work whose owner cannot be reasonably located. Where the owner cannot be located, we need a law that eliminates the risk of statutory damages for unauthorised use of the work. Canada and Japan already have such laws; the United States needs a law that does at least as much as the Canadian system, preferably more.

"There is no comprehensive national (to say nothing of global) registry." Like many copyright commentators, Professor Fisher seems to favour a return to some kind of formalities system in which copyright protection depends on using a copyright notice (©) and registration at the Copyright Office. Reasonable people debate the virtues of re-imposing some kind of notice and/or registration requirement, at least for some levels of protection. (European countries led the world in eliminating these formalities a century ago.)

In some ways, we are already returning to a de facto registration system, particularly with internet-based distribution of copyrighted works. Internet service providers have long said that they cannot patrol for copyright violations because they cannot, in the vast universe of copyright, know whether each internet distribution is authorised or not. But today YouTube is filtering copyrighted works for those copyrighted works where the motion picture studios have provided information for the YouTube audiovisual fingerprinting system. In essence, a copyright owner can be protected on YouTube by registering on the database. We will see this same sort of approach percolate through the internet in the coming years, for hosting sites and probably for transmission activities: copyright enforced more for copyright owners who participate in a database, copyright enforced much less for copyright owners who do not.

Professor Fisher also thinks that copyright is not doing enough good, giving the example of how the music industry has been decimated by peer-to-peer (P2P) downloading. Of the various efforts to curb infringement on the internet, he says "[n]one of these initiatives has worked or is likely to work." Professor Fisher teases us a bit by implicitly calling for stronger copyright law, at least in the sense that

he seems to think all downloaders should pay, perhaps through a compulsory licensing system that would produce a one fee, unlimited downloading system.

I have a slightly different take on this. The repeated court decisions against P2P distributors in the United States, Japan, Australia, Sweden and other jurisdictions have had one effect: curbing commercial business models based on unauthorised P2P. That has dampened P2P to some degree, as have the lawsuits against end-users. The "graduated response" system of warning repeat infringers, then cutting off their internet access, may or may not work. But most importantly, the downloading of motion pictures through P2P applications is now consuming so much bandwidth that internet service providers have suddenly found their interests aligned with motion picture studios: both sides want to find a way to throttle the downloading. The obvious way to relieve the pressure on bandwidth is to make people pay the old-fashioned way: for each film they want, not a one-price, all-you-can-eat buffet.

All this assumes that enforcement of copyright—ample payments to creator—is a good thing. On that, my opponent and I seem to agree.

Featured guest

Ms Dale Cendali

From its inception, the United States has been a society of innovators. Americans place a high value on original thought and expression, and have benefited from innovation both in terms of technological advances and by a culture enriched by creative works. It is no coincidence that the constitution itself, inheriting the notion from protections already existing in the UK, seeks to boost creativity by empowering Congress "[t]o 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" (US Constitution, Art. I, Sect. 8, Cl. 8). The concept underlying current copyright law is elegant in its simplicity: In order to achieve "Progress of Science and the useful Arts", the law protects the ability of an author to recoup his or her investment in creating a work by granting exclusive rights to exploit that work for a limited time. The creation of films, computer programs and other creative works can be very costly and the possibility of returns risky. But individuals and firms are willing to invest resources in these projects in large part because of the prospect of greater future returns.

The constitutional wisdom in granting creators exclusive rights in order

to encourage innovation has resoundingly proved correct. Although studies differ on the exact magnitude of the impact, there can be little doubt that the so-called intellectual property industries are a vital part of the American and world economy. According to one study, these industries are "the most important growth drivers in the current U.S. economy, contributing nearly 40% of the growth achieved by all U.S. private industry and nearly 60% of the growth of U.S. exportable high-value add products and services", and core copyright industries contributed $33 billion in reported net export revenues in 2003 (Stephen E. Siwek, *Engines of Growth: Economic Contributions of the U.S. Intellectual Property Industries*, 2005). According to another analysis, information-communications-technology (ICT) -producing industries "increased 13.2 percent in 2007, accounting for nearly one-fourth of real GDP growth despite accounting for just 3.9 percent of current-dollar GDP," and "experienced double-digit real growth for the fourth consecutive year and the largest growth since 2000." Lindberg, Brian M. and Justin M. Monaldo, Advance Statistics on GDP by Industry for 2007 (2008). These sectors of the economy, whether producing films, television programmes, music, books, software, video games or other analogue or digital works, are vital to both the US economic engine and that of the global economy. Moreover, some studies indicate that developing nations that have simultaneously opened their economies to foreign technological investment while also providing stronger intellectual property protections have seen significantly increased productivity and other economic gains. Keith E. Maskus, "The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer," *Intellectual Property and Development* (2005). Similarly, evidence suggests that weak intellectual property protections in emerging economies can have a negative impact not only of foreign direct investment, but on the quality of intellectual property that is transferred. *Id*. In an age in which traditional manufacturing has become less important and we increasingly become a nation of intangible assets, protecting those assets is even more imperative.

Yet despite the overwhelming evidence of the success of the current incentive system, there have been calls to revise dramatically copyright law, including drastically shortening the current copyright term and greatly expanding fair use. Some have suggested abolishing copyright altogether. Proponents argue that current copyright law is an anachronism not suited to modern technology. Some advocate permitting second-comers to copy files, remix works and otherwise use someone else's intellectual property, notwithstanding the reward of exclusivity the constitution contemplated.

Proponents of radical copyright reform claim that authors will create works regardless of current incentives, but such thinking ignores reality. It is very expensive to create many types of creative works, and people and firms are unlikely to continue investing in the creation of new works without a reasonable prospect of return, particularly in trying economic times. As it is, these investments are often very risky, in many cases resulting in numerous failed efforts that must be supported by the revenue generated by a relatively small number of successful works. If copyright protection were reduced, then the incentives to innovate would also be reduced, undercutting the constitutional scheme. The scale, complexity and number of original works would likely drop.

Some advocates of sweeping copyright reform theorise that any harm to original creators would be counterbalanced by the development of new business models that capitalise on previously copyrighted material. But these theories are speculative. Without concrete proof that making such changes will actually prompt more creativity, we could jeopardise the health of copyright industries that we depend on both economically and in terms of the intrinsic value of what they produce.

Leaving aside business implications, the arguments extolling a reduction in copyright protection would also probably undermine an artist's natural desire to protect the manner in which his or her work is used, thereby creating further disincentives to share, or even create, such works in the first place.

Moreover, calls to abolish or radically change copyright law do not seem to take into account that existing protections are far from absolute, but rather already reflect a balancing of interests. This includes provisions such as fair use that permit others to use a work for purposes of "criticism, comment, news reporting, teaching, ... scholarship, or research" (17 United States Code, Sect. 107). Nor has the law remained static and unresponsive to the society it serves. Amendments to incorporate copyright protection for computer programs and adapt the law to the unique challenges of the internet age through the Digital Millennium Copyright Act have already been passed, and judicial application of the law has demonstrated that it is supple enough to respond to technological changes. It is a living, breathing law and while it should continue to be improved and adapted, we must take a hard look at the practical social, cultural and business consequences of radical reform before rejecting the constitutional underpinnings that have served us well thus far. Without a cautious, sober and realistic analysis, we could easily find ourselves worse off at the end of the day.

Advocates of massive copyright reform have yet to demonstrate the parade of horribles that would justify the sweeping revisions they champion, yet their proposals would not only destabilise current business models upon which many national economies rely, but would also introduce uncertainty for future creators. Proponents of freeing derivative works from a copyright owner's exclusive rights will quickly lead us to a derivative society, where original, innovative works are increasingly endangered. We can only wonder what content mash-up artists will remix when there is nothing original left to use.

Featured guest

Ms Jennifer M. Urban

In many ways, copyright is a wonderfully successful system. Copyright laws make possible the business of creation. They create limited exclusivity in an intangible good, causing markets to form. This allows creators to profit from their works. The exclusivity is limited, so follow-on creators can build from what came before and cultural expression can flourish. This is all to the good.

Copyright, however, has problems. Industries based upon the traditional distribution-channel control model of copyright are under severe strain from digital technologies. At the same time, copyright creates barriers to new forms of creativity. In recent years, my clinical students and I have worked with librarians, filmmakers, poets, practitioners of emergent art forms such as machinima, free and open source software creators, and others. Our clients are a diverse group, but they have at least two things in common: all are engaged in exactly the kinds of innovative activities that copyright ought to encourage, and all come to us with a common fear: copyright liability.*

An example illustrates. I recently visited my 93-year-old great-aunt, Katherine. While there, I discovered a box of photographs. Here was Katherine in her second world war nurse's assistant uniform. Here was Katherine in a dinner club with a dashing officer. Here she was meeting the king and queen of England as they reviewed the troops. And in a Monsanto publicity photo, striking a "Rosie the Riveter" pose in overalls. And in pearls, suit and heels, helping open Monsanto's New York office. There must have been hundreds of photos in that box, together creating a striking record of 1930s and 1940s America. If a documentary filmmaker wanted to use these photos in a film, however—or even if I wanted to take them to a photo shop to be

restored and preserved—copyright would make the prospect untenable. Why?

First, copyright terms are now incredibly long, often lasting several generations after the death of the creator, and are getting longer. In 1998, the United States tacked an extra 20 years on to copyright, making the term life plus 70 years for individuals and up to 120 years for corporations; last week, the European Union extended music recording copyrights to s70 years from 50.

These are phenonomenally long periods during which to keep track of copyright owners. It is likely that most of the now-anonymous people who took the photos in Aunt Katherine's box have died, and that their heirs neither know nor care about copyright in their snaps from 60years ago. Similarly, corporations often become defunct, are sold, or are merged with another company, making the copyright owner difficult to find, if it still exists. It is impossible to keep track of copyrights in such situations, yet they live on.

Second, most countries now accede to the Berne Convention, which prohibits "formalities". This means that a Berne Convention country cannot require registration, registration renewal or marking the work with a copyright notice for copyright to apply. While the Berne requirements have the laudable goals of making copyright easy and inexpensive to obtain, they have at least two pernicious effects. First, an unmarked, untracked work is a work that can easily be disassociated from its owner: an orphan. Second, the system requires no signal, no claim of ownership, for copyright to apply. The system therefore cannot distinguish between works the owner considers economically valuable and in need of protection and works that, although they may be culturally, historically or personally precious, have no economic value at all.

In practice, the lack of formalities means that copyright attaches to nearly everything that could plausibly be called creative (email, blog posts, your child's kindergarten collage). Wait a few years—certainly fewer than "life plus 70" years—and nearly all these unmarked, unclaimed works will be orphans. When a librarian wants to preserve such works, or a filmmaker wants to use them in an historical documentary, they may be prevented by uncertainty over the works' copyright status.

Third, copyright remedies, particularly in the United States and in a few other countries following its lead, are severe. A copyright owner can elect to receive statutory damages, which in the United States range from $750 up to $150,000 per work infringed. This leads to uncertainty, and allows legal threats of high damages to chill use.

Many photofinishers now will not copy photos, at all, without clear evidence of permission, which would be impossible to obtain for my great-aunt's box of photos, or for countless other families' boxes of photos. Further, injunctions are relatively easy to obtain, making it impossible for gatekeepers, such as insurers and distributors, to take a risk on a creative work for which permission is unclear.

In this world, where nearly everything is subject to copyright, where ownership is often unclear and even impossible to ascertain, and where the risk of liability is great, independent creators often cannot move forward. Copyright gets in the way. How can we fix these problems without negating copyright's benefits?

In some cases, the creative use of copyright itself mitigates. Creators who wish to make clear that others can use their works, within limitations, can use Creative Commons or free and open source licensing. In the United States, documentary filmmakers have created a guide to best practices in fair use. But these measures can only go so far. A flexible fair use doctrine (as opposed to the much more limited "fair dealing" or individual exceptions) is nearly unique to the United States. Most works are not under generous licences, and older works never are.

In the United States, Congress is considering a reform that will make it possible to use orphaned works. Professor Lawrence Lessig has suggested a tax system that would build a few of the benefits of formalities back into the system. But copyright reform in recent years has largely increased protection—lengthening terms, strengthening remedies—rather than address its unintended consequences. A broader view of reform is in order. If we want copyright to do more good than harm, then we need to consider the untold millions of works that have cultural, rather than economic, value—the boxes of photos in our grandparents' closets—and to draft reforms that make certain that they are not lost for ever because of copyright.

* Disclaimer: the opinions contained herein are merely my own academic opinions, and should not be ascribed to any Clinic client.