



CRITIQUING COPYRIGHT CANARDS **BY PATRICK ROSS**

The Copyright Alliance is a non-profit, non-partisan educational organization dedicated to the value of copyright as an agent for creativity, jobs and growth.

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FORWARD

It is too easy in this world to apply labels to people and organizations. Labels serve to simplify the debate. Simplification is not always a good thing; in fact, it usually sacrifices critical nuance. It is this approach that has given us phrases like “Hollywood vs. Silicon Valley” and “Copyright vs. the Consumer.”

These conflicts only make sense in an overly simplified black-and-white world in which none of us are actually living. Some debaters prefer this artificial world because there are always a handful of arguments – canards – that can be used in any given occasion.

In the years in which I’ve been promoting the rights of artists, creators and copyright owners, I have repeatedly heard these tired canards and find that they too often go unchallenged. Like a politician lying about an opponent’s record, say it often enough and some people will think it’s true.

I have taken on these myths in isolation on numerous occasions, but in this publication I challenge a collection of ten of the worst.

These writings originally appeared in a five-part series on the Copyright Alliance blog, **blog.copyrightalliance.org**, and cover topics ranging from the impact of copyright on innovation to whether content companies are embracing new business models.

Proponents of these arguments will naturally find fault with my criticisms. Some will ignore my evidence that appear indisputable and instead seize on a phrase I may not have clearly articulated and present a counter-argument based on that misinterpretation. But some will make counter-arguments that are well-thought out and may be in some cases hard to rebut. I believe firmly that on the whole my themes here are sound but there could always be examples that I would have to consider at minimum exceptions to my theses. I don’t pretend to have all the answers.

But many making these ten pronouncements do seem to believe that, and it is unfortunate, because until we can get past such thinking, there will be an endless continuation of the unproductive Sturm and Drang so prevalent in this “debate.”



Patrick Ross
Executive Director

Critiquing Copyright Canards

By Patrick Ross

Canard #1. “Artists are being empowered by the Internet and digital technology, and copyright is stifling them.”

The first statement is absolutely correct. There have always been writers, software makers, film makers and recording artists who produced and distributed their own works, either out of a need for total creative control or because they couldn't find a professional partner. The Internet now makes it easier for these individuals to produce works and find an audience. Recent studies show that in the crowded and noisy Internet, they are unlikely to rise up to the heights of professionally distributed artists, but the potential is there, and they are still quite capable of doing better than they did before, with both reproduction and distribution costs lower (marketing costs are not necessarily lower, as free “viral” marketing has limits when millions are attempting the same thing).

Ultimately, all of these artists still own rights to their works, and they can find online models where they can sell or give away works while retaining any rights they choose. We should all be happy about that, and revel in the wider choices of creative works available to us in this new era.

But there seems to be a disproportionate focus on individuals who wish to take the works of others and use it in creating their own art. Note: this is not the tradition dating back to pre-history of building on the idea and message of a previous set of works to design your own one. No, this is using actual portions of another's work – imagery or sound, usually – to make your own. It's not unlike those collages of magazine photos we made as kids, only now we're told that this is the art of the new generation.

Again, it's interesting here how some creators are targeted more than others. Presumably if someone decided to write a mystery novel by lifting chapters from various best-selling authors and changing names, no one would defend this, not least of which the college professors who otherwise promote remix culture, because they have to fight plagiarism in their own classrooms. But it seems if I want to do a video for YouTube I must have a particular sound recording with that or the art is worthless.

It's unclear to me why these new artists must use actual portions of previous artists' works to create their art and not seek permission, and why they are incapable of producing truly original works. But it's also unclear to me why this issue is a major threat to our culture or our economy. Works along these lines appear by the thousands or more every day on user-generated sites, apparently out of the result of free use or the disinclination of copyright owners to sue; most seeking to reform copyright in this area can only seize on one troublesome incident involving a dancing baby, and there was no suit filed by the copyright owner in that case. Nearly none of these works are being distributed for profit in the market, so it is not as if these downstream creators are being harmed financially if they fail to gain access to a portion of someone else's work.

No, this appears to be one of those examples where opponents of existing copyright law seek to invoke the name of artists in their own defense, just as they often invoke the

name of consumers. In the vast majority of cases, artists would not support the end results of their cause, and in the vast majority of cases, consumers as they are living their lives would see no benefit from a change in the law, but could suffer losses as fewer creative works were produced.

Canard #2. “Purchasers of creative works have a right to use those works in any way they please.”

I see. Well, this rights flip is a very clever way to essentially make copyright disappear. As mentioned above, the Constitution gives an exclusive right to creators, not users. The creator or copyright owner has the right to determine how their work is performed, displayed, reproduced or distributed. Fair use takes those rights away under certain narrow circumstances. But businesses with creative works have been built from the beginning on the legal foundation that consumers could be sold a bundle of rights to works, with permissions and limitations at various price points.

If I, after purchasing a creative work in some form, can then do whatever I want with it, from making multiple copies to giving copies to friends to making available copies on file-sharing networks, that essentially guarantees that any work sold can only be sold at one price – a “do whatever you want with it” price. If my in-laws just want a DVD to watch occasionally at home, and feel no need to burn a back-up copy (they’ve never done anything that would cause an existing DVD to stop working so why back it up?) and have no desire to make copies for friends or join a P2P network to share it with strangers, under the scenario above they are paying the same price as someone who is doing all of those things. This is disenfranchising to all but the most digitally active consumers. (Not surprisingly, it is those active consumers who advocate this, although I use the term “consumer” loosely because in economics jargon that is a legal acquirer of goods and not everyone in this debate has legally acquired the creative works they’re duplicating or distributing.)

Does the digital age mean more uses are possible with creative works? Absolutely. Are copyright owners seeking to find business models and price points to meet those uses? Yes. Are they moving fast enough? Based on the demand of the population as a whole, it would seem very much yes, but for a vocal early-adopter minority, obviously not. Is the frustration of that minority justification for declaring the new existence of consumer rights to make use of works in ways not authorized by the copyright owner? No. They can protest with their wallets and not purchase creative works with terms they don’t like, but they do not help themselves by then acquiring those works in an infringing fashion. If they do that, they run the risk of discouraging new business models if owners fear the call for these models is all talk and ultimately these individuals will infringe anyway.

Canard #3. “Copyright stifles innovation.”

No one buys iPods, no one buys DVD players, no one buys video game consoles. Am I right?

Actually, I’m not. Throughout the consumer electronics industry there are success stories based on copyrighted material. In fact, if you wander the aisles of the Consumer Electronics Show as I do every January, you’ll see product after product after product that is solely designed to give us more ways to enjoy creative works, and those products are legal and work under existing copyright law.

Copyright spurs creativity, just as the Founding Fathers said in crafting the Constitution. Tremendous innovations in computer software have come as a result of the assurance copyright offered that the copyright owner would have an opportunity to net returns on the significant capital investment in the development of that software.

To the extent technologies relying on copyright are stifled, these would be designed by technologists who seek to evade our current system of rights. Why do they hate copyright? They hate not being able to take someone else's work and make money off of it through packaging and distribution without permission. I understand their frustration, but we shouldn't change the law to enable this odd form of innovation that exists only by relying on disabling the innovation rights of others.

Canard #4. "Copyright owners need to change their business models to recognize consumer demand. They should stop trying to make money on intangible goods and focus on revenue streams from tangible goods."

As to the first part of that statement, copyright owners are doing that every day, because they know if they don't they will go out of business. That is true in any industry, period. Some change quickly enough to survive (Southwest Airlines), some don't (Pan Am). But it is a peculiar digital-age argument indeed when people who are not creators and are not earning a living off of copyrighted works feel they have a right to dictate to those creators and copyright owners exactly how they should be earning a living. Do we have a right to change how they do business? I suspect not.

There are certainly some artists out there – mostly up-and-coming musicians – who are experimenting with giving away creative works and focusing on touring and merchandise. Likely that is, for their level of fame and success, the best economic strategy. But it is their choice. Copyright gives them the right to give their works away. But it also gives them the right to try to earn money on those works, whether they are in digital or physical form.

This argument is usually focused on music, where there are many copyright owners, many creators of varying levels of financial success, and many passionate fans. But let's look beyond that. Should authors and publishers make e-books available for free and set author speaking tours and sell T-shirts of authors, bestselling and not? Should software manufacturers all abandon proprietary models and place their works for free online, even though under copyright law (reinforced by a recent ruling) both proprietary and open-source models are fully valid and thriving under existing copyright law?

There are two key points to take away here. Copyright allows any creator or owner to do whatever they want with their works, and if they're looking to satisfy consumers, as most are, they will do as they're doing now and continue to find new ways to make works available legally. But consumers in this arrangement have every opportunity to walk away from any copyright owner's offer they don't like. That doesn't mean they are justified in taking that work without authorization if they don't like the terms offered legally. And it certainly doesn't mean they have any right whatsoever to dictate to other industries what their business models should be. Bitch about them? Sure, that's what the First Amendment is for. But recognize that there is a difference between not liking the way someone does business, and feeling you have a sense of entitlement as far as dictating how they do business.

Canard #5. “In the digital age, the marginal cost of reproduction and distribution of a creative work is zero, so that is the value of the work and should be its cost.”

First of all, this argument is rarely made by economists; it is usually made by tech bloggers who double as wannabe economists. I shouldn't have to point out that even when the marginal cost of reproduction or distribution approaches zero, there are fixed costs that led to that work being produced to begin with. Star-Kist isn't going to give away tuna fish even if the cannery and the trucking companies and the retail stores all agree to work for free. They still have to catch a whole bunch of tuna.

There's a larger factor at play here, however. Tuna is, in a way, a commodity, and it with commodity goods where you see prices driven down by marginal cost factors on the tail end of production and distribution. Some will buy Star-Kist, some (like Jessica Simpson) will buy Chicken-of-the-Sea, but most just want to buy tuna fish. That's fine.

But creative works are not commodities. A movie fan is generally not equally satisfied with either “Saw III” or “An Inconvenient Truth.” A music lover will not equally happily download either the Beatles or the Bee Gees as a rule. They may like both, but they are not perfect substitutes, and that is where marginal cost matters. Every creative work has its own market value, based on the value placed on it by consumers, and every creative work has a fixed cost involved in its development. When the creator offers a price that can potentially reimburse fixed costs and a consumer finds that price of value, a transaction occurs. This is called a market. Just because somebody wants something to be free doesn't mean the creator of that work has an obligation to make it free.

Canard #6. “In the digital age, creative works should be part of a collective licensing regime. Everyone would pay a token amount, we could download all of the creative works that we want, and those creators and copyright owners would be paid proportionately from those funds.”

I think everyone should pay a monthly grocery tax based on the number of people in one's household. Then we could all go to the grocery store whenever we wanted, take as much food as we wanted, and the producers of that food would be paid proportionately from those funds.

Critics of my statement will point out that groceries are finite products and digital reproductions of creative works are not. But the example still highlights some problems with collective licensing, and they all stem from one obvious fact – any collective licensing system takes away the primary right of a producer, the right to decide how his or her work is used.

One, even under a voluntary system, there would essentially be no chance for an alternative market system to thrive; consumers both individual and corporate would already be paying for the collective system, so there is no further incentive to pay beyond that. Every creator and copyright owner would be forced into the system, whether they wanted to enter it or not. Over time, that knowledge might dissuade future creators who would see little incentive to produce something only to see most of their rights to it immediately disappear.

Two, it is not surprising that this model is pushed by those who are the largest

consumers of creative works. This is not a platform of the AARP, it is a platform of EFF and other groups supported by young people with a hunger for music and video and often a lack of funds to pay for as much as they'd like. This obviously puts people like my in-laws, who rely on broadband to keep in touch with relatives and monitor their (dwindling) market-invested retirement funds, in a position to subsidize the downloaders and uploaders who are choking cable systems. There's an obvious inequity there.

Three, we often hear that this model would "decriminalize" millions of infringing downloaders. It would. But the cost would be not just the rights of creators but their potential for profit as well. Remember, there are fixed costs involved here, but the artist or copyright owner no longer has the ability to control any aspect of production or distribution, this making it more difficult to determine potential returns.

But the fourth point here is that, for the first time in history for most creators, they would be working under a ceiling that pitted one artist against another. For argument's sake, we'll pretend such a Byzantine system could be created. Let's say there are a million broadband connections in this country, and let's say a mandatory collective licensing system imposed a \$5 monthly download fee for music. (My in-laws would be pretty upset, as noted above.) That is \$6 billion annually, a ton of money. But remember, some will go to ISPs for transferring on the tax. Some will go to whatever organization is distributing funds, and that organization will have to be active in tracking download and upload activity across the increasingly decentralized Internet so artists could be paid accurately. So let's say, based on models that exist currently, \$4 billion is left for distribution to copyright owners, including performing artists and songwriters.

That is a fixed amount. No more can be distributed. The music industry for years grew and grew because more artists attracted more fans. Now, no matter how many artists, living and dead, were competing out there, a sale for one is a loss for another. If I download "Kashmir" from Led Zeppelin, that is a wee bit less than Fountains of Wayne will earn that year for "Peace and Love." Note I haven't even mentioned new releases here. Who would want to enter an industry where you are not paid based on your own success, but rather your financial return is capped and is relative to the success of everyone who has ever recorded in your industry and is still under copyright?

Finally, let us remember that this model is mentioned for recorded music, presumably to "decriminalize" infringing file-sharers, but with increases in broadband speed, memory capacity and screen displays for CE goods, videos are under near-equal siege to sound recordings. If we fit motion pictures and broadcast shows under that \$4 billion, we have diminished those industries' revenues by multitudes of magnitude.

It is extremely unreasonable to think "The Dark Knight" — which some bloggers this year cited as an example of how Hollywood can make money off of a well-made movie even when it is pirated — would ever be made, knowing its potential returns would likely fall vastly short of production costs under this capped regime? And what of video games? Business software? Books and magazines? All are copyrighted works, all involve creativity and expense, all are digitized. Why would we select a collective system for one entire creative industry and not others? International treaties intentionally do not extend more rights to one artistic group over another. We should not be tempted to do that either, whatever past precedents exist in any particular industry.

Canard #7. “Copyright is a monopoly.”

Yes, but it’s not clear why that is bad. Stick with me here.

The word “monopoly” has a sinister sound, and if Star-Kist were to suddenly gain a monopoly over tuna, I assume the Justice Department and the Federal Trade Commission would want to investigate, and rightfully so. (Although in “Forrest Gump” they gave a pass to Mr. Gump, who found himself with a near-monopoly in the shrimp business.)

When we say copyright gives artists a monopoly, that comes from Article I, Section 8, Clause 8 of the US Constitution, where artists and inventors are given “the exclusive Right to their respective Writings and Discoveries.” Note, the exclusive right is not given to someone over an industry; only to the work or works they produce. And it isn’t even truly exclusive there; the full clause says that it will be allowed for “limited Terms,” and we now have a statute that outlines fair use. If I write a poem I have a monopoly over it, but I have no control over someone else entering the poetry market and competing with me head-to-head, and I have no control over the price of poems in the market.

Those are the factors economists look at with monopolies, so in this sense the word has no meaning economically when it comes to copyrighted works. The word is merely used as a distraction by those who wish to flip the ownership relationship so that users control the use of works, not creators.

Canard #8. “Copyright is not a property right.”

Intellectual property, we’re told, is an oxymoron. Yes, a set of ones and zeroes is not the same as Grandma’s farm. But let’s look at some facts.

First of all, this debate didn’t begin with the advent of computers and the Internet. When you buy a novel, it is not the pieces of paper and the binding that are copyrighted, it’s the expression inside. That remains true when the book is turned into an e-book. So the idea of whether copyrighted works are property really has nothing to do with digital technology, specifically whether you can easily make another copy of a work and still have the original work in hand.

Copyrighted works are property because, like real property, the owners are in fact owners. Philosophically, you could adopt the thinking of John Locke (the primary philosophic influence of the Founding Fathers) and accept his notion that property results from what one does with the property, such as a farmer tilling the fields. That tilling extends ownership to land otherwise not owned. But the land already existed; a copyrighted work doesn’t exist until created by the artist, so one could argue under the Lockean definition an artist has more of a property right.

Yes, terms and fair use are limits on intellectual property rights. But are there not limits on real property as well? I have two easements running under my back yard; one for sewer and one for drainage. I can’t do construction over those easements without the county’s permission. There are numerous other things I can’t do without permission, from dumping toxic waste in my back yard to constructing a 100-foot statue of Jessica Alba in the front yard (actually, my wife would stop me long before the county got to me).

The list of restrictions on real property, in fact, tend to be much longer than those applied to intellectual property. So I would say that real property is not as much of a true property as far as ownership is concerned as intellectual property.

Canard #9. “The government shouldn’t be the big cop for copyright owners.”

This is a popular libertarian argument, as libertarians are allergic to the public sector. Those who know me know I’m sympathetic to that line of thinking myself, but one frustration of (some) libertarians is that they become so controlled by their own dogma they fail to see reality when it doesn’t fit their fixed world view.

Most libertarians support property rights, so let’s start with real property. Say I own a cattle ranch. Say someone comes onto my cattle ranch and starts stealing my steer. I seem to have two choices – bring in the authorities or take the law into my own hands.

In this case, if the cattle were sound recordings, the anti-copyright libertarian would apparently choose the latter course. Yet these are often the same people who balk when copyright owners use the civil courts to pursue copyright infringement claims. Sometimes these copyright opponents say contract law should be used, but contract law assumes there are parties to a contract. The cattle thief has no contract with me, nor do the people he will share the steaks with. This argument is a chimera.

So my cattle are being stolen, and I can’t call the sheriff and I can’t use my rifle. I can run wire along my split-rail fence but the thief can cut that. In fact, many libertarians also despise protections (in IP they’re called digital rights management tools, or DRM) because they ultimately fail if the opponent is determined enough. It seems a 100% performance record is needed before any deterrence can be used.

So I am left with only one choice. Stop trying to protect my steer, set them free, and maybe sell T-shirts with my ranch’s logo on it. Somehow I think there will be fewer steaks for sale at my local grocery store.

Canard #10. “Copyright is really just a vehicle for corporate greed.”

Yes, this is where we hear that artists should get paid, but infringers don’t want to reward big, bad companies. Of course, those artists chose to contract their copyrighted works with those big, bad companies. Presumably it was because they felt the companies’ marketing and distribution abilities would help them, but ultimately it is not our concern why they did so. If we really respect the artist, we will respect their choice in how they want their work distributed.

Corporations, of course, employ many people. It is likely that a lot of the people blogging and posting on blogs about their dislike of corporations work for a corporation. They may in fact hate their employer but I would suspect they are happy they are employed.

Certainly a great many people are employed in copyright industries. Take a motion picture. Each one features numerous full-time studio staff and many freelance workers that are a part of unions looking out for their interests. Just look at all of those below-the-line names whizzing by at the end of a movie. These are real people, who work very hard to entertain us and rely on copyright and residuals to pay the rent and get health care.

Creators are essential for the creative industries, but in fact millions of workers in this country who are not creators have their jobs because their employers and industries enjoy copyright protection. In these hard economic times that is very important. Anyone claiming they can infringe copyright because they want to stick it to the man (in this case the evil corporation) is rationalizing what they know to be an unethical act. If they otherwise intended to buy the work, they are depriving numerous individuals of a portion of their income. If they did not intend to purchase the work, there is no reason for them to download the work.

ABOUT THE COPYRIGHT ALLIANCE

The Copyright Alliance is a non-profit, non-partisan educational organization dedicated to the value of copyright as an agent for creativity, jobs and growth. For more information, please visit www.copyrightalliance.org.

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