

## Conference Keynote

### The Vision for the Creative Commons: What are we and where are we headed? Free Culture

**THE HON JUSTICE RONALD SACKVILLE, PROFESSOR  
LAWRENCE LESSIG**

*Welcome [as delivered at the conference]*

*The Hon Justice Ron Sackville, Professor Lawrence Lessig, ladies and gentlemen; on behalf of the Faculty of Law and the Faculty of Creative Industries, it is my very great pleasure to welcome you here today.*

*In a lot of ways it is said that the working year does not really start until Australia Day. I do thank you for coming to join us in January and it is obviously the first major event which the two faculties – Law and Creative Industries – are involved in this year. And it is a very important event.*

*We have brought together an exciting range of speakers and we will be hearing today from representatives from the judiciary, government, industry and of course, from academia, to expand our understanding and debate about the concept about Creative Commons. And it is an important debate. It is really very much at the cutting edge of what the 21<sup>st</sup> century is about: the capacity to take information, content, material which may be copyrighted, and get that material disseminated through a means which has minimum transaction impediments, which benefits not only the copyright owner, but the broader community and particularly the creative process. Over the next two days you are in for quite a treat. Our first speaker this morning is **The Hon Justice Ron Sackville** from the Federal Court.*

*Ron Sackville's career is in three parts. He started as an*

*academic at the University of NSW, a Professor of Law and for a period of time Dean of the Law Faculty. In 1985 Ron went to the private Bar in NSW, where he remained until appointed to the Federal Court in 1994. Probably Ron is best known for those periods prior to his appointment to the Federal Court: for his work in a number major Australian Enquiries and Commissions. Between 1973 and 1975 he was Commissioner for Law & Poverty in the Australian Government's Commission of Enquiry into Poverty. In the late 1970s he assisted the South Australian Government in a Royal Commission into the non-medical use of drugs.*

*It was my good fortune in 1994 to work closely with Ron when he undertook a major enquiry for the Commonwealth Government into the issue of access to justice. It is from that particular work, which lead to a blue-print for the reform of the Australian Civil Justice System and various elements of it, that much of the on-going reform that we see even now, a decade later, can be traced.*

*During his period as a Federal Court Judge, Ron has maintained an extremely active role, not only as a Judge but also in broader public debate. In particular, in various areas of law reform. Obviously it is in the issue of intellectual property and the underlying issue of Creative Commons which we now invite Ron Sackville to address you. Please join with me in welcoming The Hon Justice Ronald Sackville.*

**Professor The Hon Michael Lavarch**  
(Dean, QUT Faculty of Law)

**The Vision for the Creative Commons: What are we and where are we headed? Free Culture**

*This was the second visit by **Professor Lawrence Lessig** that I hosted. In 1999 he came to Australia to teach in the Byron Bay Summer School at a time when I was Head of the School of Law and Justice Studies at Southern Cross University. In those days he was less of a superstar; he was on his way up. Today he is very well-known internationally, very much at the leading edge of Creative Commons, law and technology, and law and the digital environment.*

*Professor Lessig has taken his degrees from the University of Pennsylvania, Yale Law School, and also Cambridge University in the UK. He has been for many people, including myself, an inspiration. Larry is very much a poet for the generation that has had to come to grips with the whole idea of the digital environment. His books, Code and Other Laws of Cyber Space, The Future of Ideas and Free Culture have certainly stimulated discussion throughout the world.*

*In this presentation Professor Lessig outlines his vision for a remix culture and his thoughts on the future of the Creative Commons Movement.*

**Professor Brian Fitzgerald**  
(Head, QUT Law School)

# Welcome

**THE HON JUSTICE RONALD SACKVILLE**

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Michael Lavarch, Brian Fitzgerald, Professor Lessig, ladies and gentlemen, it is a great delight to be introduced by Michael, who made the serious mistake of appointing me to the Federal Court during his time as Attorney General of the Commonwealth. My own career, such as it is, is a bit odd as far as the order of events is concerned, but Michael's is even weirder. He is the only person I know who has used the position as the First Law Officer of the Commonwealth as work experience for a real job, that is, being Dean of the Faculty of Law. If you think the Caucus is difficult, wait until you deal with a group of legal academics.

A conference on cultivating the Creative Commons, particularly one that I understand is sponsored by the modestly, if not tautologically, named Creative Industries Faculty, is not a place where you would expect to find old-fashioned people. But for those of us who are old-fashioned, like Richard Neville and myself, even Luddite, there is a special benefit in the opportunity to engage in face to face discussions on the proper role of, and boundaries to, intellectual property rights. In particular, notwithstanding the virtues of blogging, which my associates have attempted unsuccessfully to explain to me, the presence of Professor Lessig gives us all an opportunity to put a real, as opposed to a virtual, face on someone whose work on the Creative Commons and the future of ideas has been enormously influential.

As I am sure Professor Lessig knows, there is a long history of fruitful interchange between Australian and the United States' legal academics, even if the traffic has tended to be rather heavily in one direction. There are many Australians who have taught and studied at great Law Schools like Yale, Harvard, Stanford and Chicago, all of which Professor Lessig has been associated with at some stage. Given that I am a graduate of one of those institutions, the order in which I mentioned them is not entirely random. While academic exchange is nearly always mutually beneficial, this has not always been the experience of interaction between the leadership of our two countries, even though we seem to be in a phase of extended mutual admiration.

In 1919, the then Australian Prime Minister, Billy Hughes, was making a nuisance of himself at the Versailles Peace Conference. To the intense aggravation of Woodrow Wilson, Hughes insisted on ever more punitive

sanctions against a defeated Germany. Hughes' strident views prompted President Wilson to describe him as a 'pestiferous varmint' and I do not think he meant the phrase as a compliment. Having read a number of Professor Lessig's works, I suspect that there might be quite a few holders of copyright who would regard him as a 'pestiferous varmint', but I am sure that they would use that phrase in the nicest possible way.

For better or for worse, I bring to this area of discourse the perspective of a judge who is occasionally, and more or less randomly, exposed to the complexities and challenges of intellectual property law. Even from this limited and sporadic perspective, it is impossible to avoid being struck by how rapidly, to use the words of Peter Drahos and John Braithwaite in their book, *Information Feudalism*<sup>20</sup>, there has been a transfer of knowledge assets from the intellectual commons into private interest, private hands. This point, of course, was driven home recently, and forcefully, in Australia, by the debate concerning ratification of the *Australia-United States Free Trade Agreement* (FTA).

For a brief time patent and copyright law was actually at the forefront of public debate in this country. Intellectual property lawyers, or at least a smattering of them, enjoyed a fleeting moment of public exposure, if not fame. The word 'evergreening' temporarily entered the Australian vernacular as commentators debated the extent to which the holders of drug patents used dubious claims to extend their monopoly at the expense of generic drug manufacturers and, ultimately, the public. One of the most fascinating sections of Professor Lessig's recent book, which is catchily entitled *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*<sup>21</sup> (I have known some published articles as long as that) is his account in Chapter 13 of *Eldred v Ashcroft*<sup>22</sup>, in which he acted as Counsel for Mr Eldred. Despite Professor Lessig's best efforts, for which he modestly offers a *mea culpa* – and I must discuss with Professor Lessig how far counsel's arguments really do influence judges when they decide cases – the Supreme Court of the United States upheld the validity of the so-called *Sonny Bono Copyright Extension Act*.<sup>23</sup> This Act retrospectively extended the term of copyright by twenty years in the usual case to a period of the life of the author plus seventy years.

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<sup>20</sup> Peter Drahos and John Braithwaite, *Information Feudalism*, (2003) W. W. Norton & Company

<sup>21</sup> Lawrence Lessig, *Free Culture*.

<sup>22</sup> *Eldred v. Ashcroft*, 537 U.S. 186 (2003)

<sup>23</sup> *Copyright Term Extension Act* 1998

It is no coincidence that the FTA obliges Australia to enact precisely equivalent legislation. The Commonwealth has now done so in the implementing legislation. The *US Free Trade Agreement Implementation Act 2004* (Cth) has amended s33 of the *Copyright Act 1968* (Cth) to provide for a non-retrospective extension of copyright in exactly the terms upheld by the Supreme Court. Despite the Supreme Court's ruling, and the willingness of Australian negotiators to accept the position of the United States, it is extremely difficult to understand the policy justification for a further extension for the term of copyright, let alone the application of the extension to existing copyright.

Interestingly enough, one of the dissenters in *Eldred v Ashcroft* was Justice Breyer. Thirty years earlier as a young law professor he had written a famous article in the *Harvard Law Review* arguing that the supposed non-economic benefits of copyright did not justify the grant of monopoly rights to authors, and that the economic benefits of copyright, particularly with specific categories of published works, had been greatly over-stated.<sup>24</sup> In his opinion in *Eldred v Ashcroft*, Justice Breyer ridiculed the suggestion that a 20 year extension of copyright would act as an economic spur to authors to create new works. "What monetarily motivated Melville," he asked alliteratively, "will not realise that he could do better for his grandchildren by putting a few dollars in an interest bearing account?"<sup>25</sup>

In his dissenting opinion in *Eldred*, Justice Stevens, in words that echoed the famous speech given by Lord Macaulay in 1841 in the House of Commons, pointed out that "*ex post facto* extensions of copyright result in a gratuitous transfer of wealth from the public to authors, publishers and their successors and interests".<sup>26</sup> The real sting in the tail of this comment is, of course, that for the most part the beneficiaries of the extension will not be authors, or even their original publishers, but commercial entities which have acquired the rights long before the statutory extension of copyright.

Another significant feature of the FTA, which has not attracted a great deal of comment, is its insistence that the parties provide for criminal penalties to be applied where a person is found to have engaged "wilfully and for the

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<sup>24</sup> Stephen Breyer (1970). "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs". *Harvard Law Review* 84 (2): 281–355.

<sup>25</sup> *Eldred v. Ashcroft*, 537 U.S. 186 (2003) 14

<sup>26</sup> *Eldred v. Ashcroft*, 537 U.S. 186 (2003) 6

purpose of commercial advantage” in certain conduct infringing intellectual property rights.<sup>27</sup> These provisions in fact reflect a fairly well-established policy of criminalising deliberate commercial conduct which infringes intellectual property rights, particularly copyright.

There is probably nothing remarkable about this policy until you look at how it has actually been implemented in Australia. The *Copyright Act* provides that the person who distributes an article for commercial purposes, which that person knows is an infringing copy, is guilty of an offence punishable on summary conviction by a term of imprisonment of up to five years.<sup>28</sup> An offence punishable on summary conviction is one that can be dealt with by a magistrate sitting alone. This means, for example, that a local court in New South Wales, acting under Federal law – and of course in Australia State courts can be invested with Federal jurisdiction – can impose a sentence of imprisonment of up to five years for a deliberate infringement of copyright. The same court, under State law, can impose a sentence of no more than two years imprisonment for any summary offence in respect of which it has jurisdiction. The most plausible explanation for these extremely unusual arrangements about which I have had occasion to comment judicially in a case called *Ly v Jenkins*<sup>29</sup>, is that they are designed to accommodate the contention of copyright owners that not only severe criminal penalties but special summary procedures are needed to curtail the activities of copyright pirates. There are many commentators who have appreciated, in the words of James Boyle, an American academic, that we are in the middle of “the second enclosure movement”.<sup>30</sup> He sees that movement as exemplified by the recognition of patent rights in human genes.

Peter Drahos and John Braithwaite draw a parallel in their book between medieval feudalism and what they describe as ‘information feudalism’. Under the earlier variety, a lord of the manor exercised not only private power by virtue of his ownership of land, but public power through a system of manorial taxes, courts and prisons. In the modern form of feudalism, as Drahos and Braithwaite see it, the transfer of intellectual commons has been to media conglomerates and integrated life sciences corporations, rather than to individual scientists and authors. The effect,

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<sup>27</sup> *Australia-United States Free Trade Agreement* 17.11.26(a)(ii), 17.4.7(a)(ii) and 17.4.8(a)(iii)

<sup>28</sup> *Copyright Act 1968* (Cth) s132(6AA)-(6A) as at 1 January 2005

<sup>29</sup> *Ly v Jenkins* [2001] FCA 1640

<sup>30</sup> James Boyle ‘The Second Enclosure Movement and the Construction of the Public Domain’ 66 *Law & Contemp. Probs.* 33 (Winter/Spring 2003) 33

they argue, is to raise levels of private monopolistic power to dangerous global heights, at a time when states, which have been weakened by the forces of globalisation, have less capacity to protect their citizens from the consequences of the exercise of this power. William Cornish, a well-known intellectual property scholar, entitled his 2002 Clarendon Law Lectures *Intellectual Property: Omnipresent, Distracting, Irrelevant?*<sup>31</sup> in order to highlight the major dilemmas which enmesh intellectual property: *omnipresent* – to capture the case where intellectual property rights appear to be “spreading like a rash”; *distracting* – to describe rights which serve few of their intended purposes but which cause persisting itching; *irrelevant* – to refer to technology which in practice seems to render some forms of intellectual property nugatory.

Why have these developments occurred? From an Australian perspective, three major factors have combined to generate the pressures to which the Creative Commons movement is a response.

The first, obviously enough, is the power of interest groups whose economic well-being depends upon the privatisation of intellectual property resources. In general, the interest groups favouring the extension of intellectual rights are very well resourced, effectively organised and politically powerful, both at a national and an international level. Often they can enlist the support of national governments in multilateral and bilateral negotiations. The United States, in particular, has used trade negotiations to ensure, in the words of § 301 of the *Trade Act 1984* “adequate and effective protection” for the intellectual property of United States corporations in other countries. Trade benefits may be (and often are) withdrawn from countries which fail to grant such protection. The United States has played a leading role in the negotiation of multilateral arrangements, such as the *Trade Related Aspects of Intellectual Property Rights* (TRIPS) Agreement, which have done much to advance the interests of the holders of patents, copyright and other forms of intellectual property.

I do not mean to suggest that there are never powerful interest groups opposing the expansion of intellectual property rights. The history of copyright law, for example, is replete with battles between opposing interest groups, such as music publishers and the manufacturers of tape recorders and other electronic equipment. Even so, the struggle is often unequal.

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<sup>31</sup> William Cornish, *Intellectual Property: Omnipresent, Distracting, Irrelevant?* (2006) Oxford University Press



A second force for extending the boundaries of intellectual property is bilateral and multilateral international arrangements. Like the FTA, these agreements often require the parties to create new species of intellectual property or to enforce existing rights more effectively. The shape of much of Australia's intellectual property law has been determined by international agreement. Since the Commonwealth Parliament, pursuant to the external affairs power, can legislate to implement international agreements, the effect is that there is virtually no limit on Parliament's power to privatise intellectual resources.

Technological change is a third powerful force, since technological developments can quickly render obsolete or ineffective existing laws and enforcement mechanisms. As copyright holders, for example, realise that they cannot protect their interest by purely technological means there emerges, in the words of Professor Cornish:

a whole set of distinct demands for higher legal fences as part of the digital agenda, which politicians press at the behest of industry lobbyists and their star writers and performers.

When the new technology and international treaty obligations coincide the pressures for the extension of intellectual property rights become almost irresistible. An illustration is s116A of the *Copyright Act*, a provision designed to prevent a person from making so-called 'circumvention devices' which are capable of circumventing 'technological protection measures'. The origins of s116A, the construction of which was in issue in the recent case of *Sony v Stevens*<sup>32</sup> (now before the High Court)<sup>33</sup>, lies in two World Intellectual Property Organisation treaties which address the problems for copyright owners by changing technology.

The privatisation of intellectual property resources raises issues that transcend the particular concerns of intellectual property lawyers and their clients. They go to the nature of freedom in a society which, in equal measure, creates opportunities for astonishing innovations and severe restrictions on creativity.

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<sup>32</sup> *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2002] FCA 906

<sup>33</sup> Note: since this paper was presented, the High Court has handed down its decision and this matter - see *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58

# **The Vision for the Creative Commons: What are We and Where are We Headed? Free Culture**

**PROFESSOR LAWRENCE LESSIG**

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It is a great pleasure to be here and especially to be greeted this morning by Justice Sackville's extraordinary presentation, which reminds me that I spend most of my time living in the flat earth society with people who continue to insist the world is flat. To come out to a place where the obvious is obvious, especially to people with extraordinary influence and power, is a great relief. I am extremely happy to be here and share something of the vision of what Creative Commons is supposed to be about.

Here is the purpose of what my talk this morning is supposed to be: it is to place this movement in some context. I have struggled in the last couple of years to find a way to show what is really at stake here. To move the discussion beyond the really boring tired debate that seems to dominate most of the discussion about these issues, especially in the United States – whether you are in favour of intellectual property or against it. That is not the question. No one is asking that question, and until we can begin to recognise what's at stake for our culture, we will lose this extraordinary opportunity that technology offers us. That is my objective here, and I want to begin by introducing an idea that should be familiar: the concept of remix.

The idea, first, is that you take creative work, mix it together and then other people take it and they remix it; they re-express it. In this sense, culture is remix; knowledge is remix; politics is remix. Remix in this sense is the essence of what it is to be human. Companies do it. Apple Corporation says it took its iPod and remixed it. Politicians do it. Bill Clinton took the Republican Party's platform, remixed it, called it 'Democrat' and became President. Liberals do it. Here is a wonderful propaganda site that exists on the net for Liberal propaganda – 'daddy why didn't you or any of your friends from Enron have to go to war'?

We all do it, every day of our life. We go watch a movie by somebody, we whine to our friends about how either it is the dumbest movie we have ever seen or the most profound political insight America has produced in fifty

years. Whatever, we are remixing our culture by experiencing it and re-expressing it. In our choices every day, we decide what our culture will be by deciding what we consume and what we comment about. The choice whether to watch Disney or read H.C. Anderson is a choice about what our culture will become. We are remixing by consuming and we, by consuming, are constructing every single act. Creating and recreating culture is an act produced by reading, by choosing, by criticising, by praising. This is how cultures get made.

The critical framing point about this active remixing that we have to remember in the context of this debate about free culture is: remix is free. It is free. In our tradition it has always been free, free in the sense of unregulated by the law. You need no permission to engage in this act of recreating your culture by commenting or transforming or criticising or praising. You need no permission: it is free. It needs to be free. There need to be limits on the power of entities, whether government or corporate, to control us. It needs to be free if we are to avoid infantilising our culture. It needs to be free as an expression of a basic human right: the right to engage in this act of producing who we are. It needs to be free in all the ordinary ways in which we engage in this practice of remixing our culture, the ordinary ways in which we write. This is the idea. We ‘write’ our culture by what we say or praise or criticise; this act of writing needs to be free.

What are the ordinary ways in which we remix our culture today? What is the technology of remix today? By ‘today’ I do not mean literally today for those people who are really doing the most remixing out there, namely our kids using technology. I mean ‘today’ the way most of us over the age of 35 think about culture and how it is remixed. What is the technology for us today? And the answer to this is: it is a technology grounded in texts, in words, in the act of writing, in the act of remixing texts. We see a movie; we talk about it; we criticise it; we might write a letter to the editor criticising the free trade agreement – in fact I encourage you to do that regularly. We express these acts of remaking, using words and it’s that technology which today is free. It is the technology of text, which 400 years of culture and politics has produced as free.

We take it for granted that writing is free – not totally free; you can say things which are libellous and face consequences. Not totally free; you cannot lie about certain things. Not totally free; you cannot take my words and pretend that they are yours. But free, not in the sense of anarchy; free in the sense of the well-regulated society. Four hundred years of culture has produced a legal tradition that embraces this idea that writing is free.

Writing is allowed in our culture where writing is understood to be the writing we engage in through texts. This is second nature to us, we do not even notice it. We forget that for hundreds of years people had to fight for the right to write and publish what they thought. They had to fight for that right against monopolist publishers, controlled by the Crown. They had to fight for the freedom which we take for granted to use words and express and change our culture.

It is second nature to us to compare texts as a way to find contradictions, to contrast texts as way to understand differences. It is at the core of what education is, to imagine literacy in the sense of teaching children to remix texts as a way to understand what they, the children, mean. We think creative writing is to go in and take the words of Hemingway and mix them with the words of Shakespeare as a way to express something, both about the child that does that mixing and about the cultures he or she is remixing, to understand and to know. Knowledge requires this freedom to engage in this practice of remixing and this practice of remixing we know so far is text. This is the world we have inherited. It is a world filled with a tradition of freedom that we must pass down to our children, because here is the critical point: this technology, by which we remix our culture, is changing. The means by which we express ideas differently is changing. The ordinary ways in which we engage in this practice of re-expressing and understanding our culture is changing. There is a radical change in technology which will radically change what it means to remix our culture.

Again, those of us over the age of 35 cannot begin to recognise what this means. We need to see it to get a glimpse of some of what this might be so let me take some examples here. In the context of music, the Beatles created this amazing album *The White Album*, which of course inspired Jay-Z to create this album, *The Black Album*, which then in the expression of what remix is today, inspired this guy, DJ Danger Mouse, to create *The Grey Album*, which synthesises tracks from *The White Album* and *The Black Album* together to produce something different. Or in the context of film, in 2004 at Cannes *Tarnation* by Jonathan Caouette, an extraordinary film, was said to be one of the best in its category, a film made for US\$218. The most expensive item in this film was a set of wings that the kid had to buy for a particular scene. He made this film by taking video from his life and remixing it together at a level that could be qualified as one of the best films at Cannes. Most importantly for us in the future is going to be mixing in the context of politics. It is here where these techniques become the core of how a wider range of people communicate.

This is digital creativity; this is digital remix; this is what it can be. Changing the ordinary ways in which we express our ideas and criticise and praise the ideas of others. Changing what it means to write. This is how writing will happen. It is how writing happens for our children right now. This is what the technology of ordinary ways will be, changing the way we remix culture, changing the creative potential of that culture, changing the democratic potential of that culture, changing the freedom to speak, by transforming the power to speak – making it different. Not any more just broadcast democracy but increasingly a bottom-up democracy, not just *The New York Times* democracy but increasingly blog democracy, not just the few speaking to the many but increasingly peer to peer. This is what this architecture invites. It is in its nature to open up the opportunity to speak and criticise and transform to anybody connected to this digital network. This is the potential of this network, the potential.

We have got to begin to imagine that potential in the same way we understand text today. We need to imagine what a world would be like where people could engage with these objects in as freely a way as we engage with text today. Imagine it spread; imagine it as second nature. See it in the way our kids experience technology today.

There is a wonderful program that is going on in *Dog Kennel Hill School* in Britain, a school for children, not for dogs. They have a project called *The Living Image Project* in which these artists are participating. Their objective is to understand how the youngest of our children understand the act of creativity, by giving them the tools of creativity – all the way from crayons to the most powerful computers – and watching what they do with these tools. Ellen, age 5, drew two pictures. She did not like the colours on her first picture, so she remixed the colours on the second picture, and then she took the two together and began to produce what she understood creativity to be – the remixing of these different media into one form of expression. Or in this example, Tom, age 7, took a photograph of his bedroom, then drew a picture of a ‘happy story’. He then added to the photo every child he knew and then changed the colours to make it a happy picture. Or Lewis, age 10, who comes from a kind of dark place where his picture of his neighbourhood is pretty dark. They were a little bit worried when he first produced this really dark expression of life, but then he finished it with a more positive final expression. The point is, for them, remixing images and sounds through technology is as natural as it is for us using words, where we take a clever spin on someone else’s phrasing; that’s what creativity is for us. For them, it is taking the culture that is

around them and re-expressing it through these technologies. This is the difference between us and them.

We have just ended 80 years of a kind of Soviet culture, where culture is broadcast to us and this is our experience of it. We consume it. Made somewhere else, and we passively consume it. For them, culture is something different. For us the good in culture is – more channels. For them it is an active process of remaking and remixing culture, that is what they do with technology. The potential here for them is enormous. The potential for them to be able to argue and understand using this technology is enormous.

The potential progress for our culture is enormous as this power is exploded and given to them and they learn to use it. We need to begin to extrapolate from what we have seen to what could be. Imagine a graph of progress where we start at the very bottom corner with the embarrassingly crude technologies of power point. That is the beginning of the cut and paste culture. Business people are so excited, they go to the net, they download pictures and they put them up with thousands of words on their screen and that is what creativity is for them. It is just the beginning.

We can then imagine the next stage, kind of the iMovie picture, where people take images of their kids and they make them into movies and synchronise them with *Star Wars* episodes. I have a wonderful friend doing a project where he is doing little home movies and he is putting *Spiderman* clips into them, or clips from major movie studios, and he is writing to the studios and asking permission for these clips and saying, “I am just going to show it in my own home, just to my family, that’s what I want to do and can I have permission to do this” and, of course, he is getting these brilliant letters back from the studios, “no, I am sorry we cannot give you permission to take 3 seconds of *Spiderman* and mix it in. It would be impossible for us, consistent with intellectual property law, to give you that permission”.

Imagine a wider range of people engaged in the ability to make what *Read My Lips*<sup>34</sup> does all the time. This is the point. We cannot begin to see what our world would look like if this literacy were to explode beyond the tiny,

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<sup>34</sup> *Read My Lips* is a series of independent films lip-synced by Johan Söderberg and featuring some of the most hated and loved people in history to some of the most hated and loved songs of all times, including the Bush-Blair love duet. Available at <<http://www.atmo.se>> at 28 August 2006.

little ineffective corner of literacy that text is today. To the literate that is what we understand culture to be. We academics think text is the king, but it is irrelevant. Text is irrelevant. For 95 percent of the world, they cannot begin to understand what text is supposed to do. We engage in careful, elaborate arguments using text, however, it goes completely over some people's heads, because people experience culture differently. It is not that they are inferior in the way they experience culture, it is that the culture they know is a culture through these other forms of expression. We speak Latin, they speak a language that is embedded in their culture and we ought to build a world where they are free to use it. Imagine this cut and paste culture, imagine this world where that power is spread broadly, where that is ordinary, where the ability to engage in this form of speech is widespread and our culture is facile with it – not in the sense that some of these examples are facile, but in the sense that people are really good at it. Imagine that future.

Here is the problem with imagining that future. Right now, those activities, those forms of expression, those kinds of creativity, are all basically illegal. It is illegal to engage in that kind of creativity. These new uses of technology are illegal under the laws as they exist right now. The *Read My Lips* remix is illegal because of an explosion in the scope of law and in the reach of law, which together entail a simple rule. To engage in this act of creativity you need permission first. Permission is not coming. For example, DJ Danger Mouse knew the Beatles never give permission to do anything with their music. Jonathan Caouette makes a film for \$218; Cannes says it is a brilliant film; he then wants to distribute it internationally; he calls the lawyers; the lawyers tell him it will cost \$400,000 to clear the background music in the video clips that he made as a kid - \$400,000!

A favourite example of mine is the Bush-Blair Love Duet remix from *Read My Lips*. I want you to understand just how weird lawyers can be. I do not care what you think of Tony Blair or George Bush. I do not care what you think about the war – I have a good idea but I do not care – the one thing you cannot say about that remix is what the lawyers said when they sought permission to synchronise that music of Lionel Ritchie with those images. You need permission to do the synchronisation and distribute it. When they sought permission, the lawyers said “no, we will not give you permission”. Why? “It is not funny”.

The question we have to ask is: why are we in this world where on the one hand technology is giving us all this amazing power and on the other hand,

the law is taking it away. We need – we, meaning those of us on the free culture side of this debate – to be a little bit more honest about why we are here. We are here in this awful place because the very same technology that enables this powerful remix is a technology that enables something called piracy. The same technology does both. And, surprise, surprise, technology does good and it also does bad. This piracy has induced the only response that we in America seem to have to social or political problems – a war. A war which my friend Jack Valenti calls ‘his own terrorist war’ where apparently the terrorists are our children. This is the war that we are waging and we are developing. As we always do in the United States, amazing new weapons to fight this war – powerful law, which we then enforce in the United States and force other nations to adopt, not through international bodies alone but through bi-lateral trade negotiations. You want to get access to our country’s markets? You have to adopt our extraordinarily extreme intellectual property protections. In fact, we force developing nations, like China, to adopt intellectual property regimes that are more restrictive than the ones we live under today.

We have these amazing new laws and technology to fight this war. We aim to protect copyrighted work, but the consequence is that we kill this potential for remix; for with the very same weapons that will wipe out the pirates, we will wipe out the opportunity to engage in this cultural practice of speaking.

I want to be clear about something, intellectual property is good. I am in favour of it. Why are we pro-IP? Copyright is essential to the creative process. I am wildly on the side of pro-IP, and piracy is bad. Is that clear? IP is good; piracy is bad. But here is that really innovative suggestion: so too is war bad. Right? War is awful because war has consequences both unintended and intended, and the consequences of this war are extraordinarily profound. They will destroy the potential for this type of literacy to spread through our culture. They are doing it today by rendering this activity illegal and by doing this we say to our kids, “you are criminals when you engage in this behaviour”. We raise a generation who thinks their activity is criminal. But what do kids do when they are told they are criminals? They think, “Oh cool. I’m a criminal”. This is a deeply corrosive consequence from this war. Of course, the industry thinks the way to solve this problem is just to wage an ever more effective war against our children. “We will pacify the enemy”, they say. We have heard this before, right? Literally those words we have heard before ‘pacify the enemy’. We take time (we in the United States), to learn that war is a prohibition and wars such as the wars we waged in SE Asia are not wars that will be won



through pacifying the enemy. These children, these criminals, these quote ‘terrorists’, will learn something different about democracy if they think that activities that seem to them to be totally obvious and totally creative and totally productive, are called, by the great Soviet, ‘criminal’.

That is the first consequence, and the second, more profound consequence is: we cannot begin to teach this type of literacy within our schools. It is totally obvious that a teacher of English literature is allowed to take the children and say, “take the texts, mix them together and write an essay from them”. That is what we learned ‘freedom of text’ to mean. But you cannot take a film class and invite the children to take the work of George Lucas and mix it together with Hitchcock and produce a demonstration of how the work of these two film makers worked and interacted. You cannot do that because that is called piracy under the regime of understanding that exists in intellectual property law today. We cannot begin to teach this literacy in our schools, so the capacity, the potential, is destroyed because we call it illegal. That is the critical point.

People say, “well people will always be breaking the law”. Sure they will be breaking the law; they will be thinking of themselves as criminals, but we will never incorporate this practice into our ordinary school. But the consequence today is tiny compared to the consequence tomorrow. For right now it is possible to break the law. You can take these images, mix them together. You can do it because the technology allows you to do it. Tomorrow that possibility will be taken away. It will be impossible. There are always kids from MIT, or maybe from this University too, who will be able to crack the code and do whatever they want to circumvent the protection measures. But for ordinary people, it will be impossible because digital rights management technology will have been mandated by the law to be incorporated in every feature of this network, so that the permission to engage in these acts of creative remixing needs to be sought from the content owner, and guess what? Their permission will not be granted. We will build into this architecture a technology – digital rights management technology – that will take away the ability to engage in this kind of expression. It will remove it and there will be no capacity for the ordinary people to circumvent that. We will return, using these technologies, to this couch potato culture. They will feed us stuff; we will consume it; criminals will remix it, but the rest of us will be happy in our passive relationship to this culture.

When they started this digital rights management technology this idea that remix would be impossible was not part of the debate. Digital rights

management technology was first suggested and people started fighting for something called 'fair use', and what they thought fair use meant was the right to make an extra free copy of the CD. That was the critical right, that you got an extra bite at the apple. You buy the CD but you can copy it and put it on your computer. That is freedom for that part of the debate, and there is now a very important settlement that I think is going to become dominant. The settlement is we have strong digital rights management through all of our content, but a liberal quote 'fair use policy', where by fair use we mean we get to make 3 or 4 free copies.

If you buy this content, you get to make whatever number of free copies but those copies live only within the home. That is the settlement. But notice what this settlement does: it solves the architectural revenue problem for the current content industry; the twentieth century content industry gets its problem solved. They get to sell copies. They are going to adjust the price because to sell one copy is to sell really two and a half copies, but, they still get to sell copies. We solve their problem. But the weapons, both legal and technical, that have solved their problem have simultaneously destroyed the potential for this remix culture to occur because what remix culture needs is not the freedom to remix within your home; that is not what you need; you need the freedom to remix and to express it to others – the freedom which our tradition guaranteed to us when it came to text, but which we are not giving our children when it comes to anything beyond plain text.

What is the problem here? I do not think the problem is technology. I do not think the problem is something called 'copyright'. The problem here is a regime of copyright that does not fit to this technology. It is a regime of copyright which is, for this technology, too cumbersome, too bloated, too expensive, too lawyer-centric, which is just begging for reform. The costs of doing right under this regime of copyright are just too high and the scope of control under this regime of copyright is just too great.

Historically, in response to new technologies that challenge existing copyright regimes, we have had a fairly traditional response. The historical response has been balance. But perhaps because my country leads this response today, our present response is not balance but a kind of extremism, and it is an extremism that exists on both sides of the debate – 'they' refer to the 'terrorist war' that they are fighting; 'we' (I do not mean me, but people think this is me) – the other side – respond to this by basically rejecting intellectual property. Both responses are mistakes.

After Napster collapsed, Apple released a new advertisement to launch their new iTunes music store. They thought they would put together a hip new vision of what freedom would be in the digital age. You can imagine the advertising executives pride in the way they had captured the spirit of the age, which is the right to download music so long as you were drinking a Pepsi. You would think the health authorities would have been worried about that, because one in seven Pepsis gets you one song. Imagine the health consequences of people drinking all those Pepsis just to be able to download their song. Apple spread that advertisement out there on the Web, like that was their cool image of how they understood what the generation was about. It immediately produced a counter advertisement.

The point is that extremism on one side begets extremism on the other side, and both extremisms are wrong. It is sort of IP McCarthyism that lives in the United States right now, where if you question IP, you are called a 'communist', literally. It destroys the opportunity for any of the traditional historical balance in the legislative process to occur. This potential for what this technology could be is lost.

What do we do in response? We need to find a way to wage peace. That is what we need in the middle of any war, a way to wage peace. We need a way to use intellectual property to enable remix, to enable it to occur without threatening intellectual property. We need to make this system of creativity co-exist with the system of intellectual property regulation. The solution is found in an insight, which Richard Stallman had twenty-one years ago this year – a way to use IP to enable free software. We want to use IP to enable free culture. That is the aim of creative commons – to find a simple way to mark content with the freedoms that the author intends the content to carry, so that when you encounter such free content, you know what you are allowed to do consistent with the law.

You go to the Creative Commons website (<http://creativecommons.org>); you pick the opportunity to select a licence: do you want to permit commercial uses or not? Do you want to allow modifications or not? If you allow modifications, do you want to require a kind of copyleft idea that other people release the modifications under a similarly free licence? That is the core, and that produces a licence. That licence comes in three separate layers.

The first, most important layer perhaps, is a commons deed, which expresses in a human readable way what the freedoms are that go with this content. Second, is a lawyer-readable licence – which actually guarantees

the freedoms that are associated with this content. Third, critically, a machine-readable expression of the freedoms, that makes it so computers around the world can begin to gather content on the basis of the freedoms. We have a search engine that is now fantastically great at collecting content on the basis of the freedoms that are associated with that content. These three layers together are crucial. We need to find a way to make the freedoms understandable, unchallengeable and usable in a digital age – understandable by ordinary people, unchallengeable by lawyers, and usable by computers. That is the objective.

My favourite example of how this works is a guitar track composed by Col Mutchler, called ‘My Life’, who donated it to Opsound ([www.opsound.org](http://www.opsound.org)), a sound resource that makes all of their content available under creative commons licence. That inspired Cora Beth, a 17-year old violinist to add a violin track. She then released that back to the Internet, calling it ‘My Life Changed’. This hauntingly beautiful song now lives freely out there, free for other people to remix. Just last week, I came across a further remix, this time by Triad, a group that is dedicated to the public domain. They added an extraordinary vocal track and called it ‘Our Lives Changed’. I like what they have done with it.

Of course, everything is not amazing. There is no guarantee of quality. Anyway the critical point about this is that these remixes are all legal. And here is the part that it is hard for my colleagues, my lawyer friends, to recognise: these remixes are legal, and yet there was no lawyer required to make them possible. No lawyer stood between these creators. People who had never met each other were allowed to create, legally, consistent with the intellectual property regime and release their content because the freedom had been built into the content first. This is what remix culture could be, and we want to build the tools that make it possible, both the legal and the technical tools, to make it possible, to make it flourish.

What next in this process? Let us recognise what is the general principle, or we should say, the general principles; there are two that Creative Commons stands for. The first is that we want to find a way to lower the cost of the law, not eliminate the law, but lower the costs associated with the law in making creativity possible. Second, we want to enable ‘commons’ wherever they might help innovation, not in contrast to property, but complementing property, recognising that the complement of commons and property is what makes the greatest creativity possible. For example, the iCommons project is the most important part of this project right now, as 70 countries around the world port the licences to their local jurisdictions to

establish a common standard for expressing freedom internationally. In addition we have projects within the culture space to increasingly open the content that is out there to creative re-use. We have a project which we are about to announce called 'Save a Book' project, where authors whose books are out of print, but still under copyright, can release the content under our creative commons licence. We will guarantee that they are digitised and made available. The licence is non-commercial so that if the book becomes a hit again, they can re-release it in a commercial form. The aim of this project is to make the content available digitally, just the way libraries were intended to make the content available originally.

We are also talking about a project called the 'Remark the Public Domain' project. The problem with the public domain right now is that nobody knows what it is. Who knows what is in the public domain? In the United States we have an insanely complicated system for figuring out what is in the public domain and what is not. You have to pay hundreds of dollars to figure out whether a particular thing is in the public domain. It is the sort of project, a database-like driven project, which we could do collaboratively to begin to understand what is and what is not in the public domain.

The most important next project is the launch of something we did in early January 2005: the Science Commons. This project aims to take the same two principles and extend them to science, lower the cost of the law and build commons where commons might encourage innovation. We are looking at open access publishing, which of course has taken off internationally, and to support that with the licences that are necessary. We are looking at the problem of databases, which increasingly are bound up by restrictive covenants that make it impossible for that data to be used in the way data must be used today – meaning massive parallel processing on data to find insights about the underlying material. And also in the context of patents, to find ways to building patent commonses, as IBM has just announced with respect to 500 software patents, so that innovation can occur without confronting the extraordinarily high cost of dealing with patents.

Those are ideas that we have launched already. Increasingly we are beginning to toy with the idea of something called the Business Commons, which is to recognise that even business, commercial enterprise, depends upon certain features being un-owned as a way for them to build their commercial proprietary stuff. The point in all of these contexts is to find this common standard for expressing 'free'. As Richard Stallman has struggled to explain, not 'free' in the sense of 'free beer' but 'free' in the

sense of 'freedom', express freedom associated with content, to encourage this extraordinary range of creativity that could be realised.

Is there hope for this project? Last Christmas there was this wonderful article published in *Billboard* magazine, which is a kind of apologist for Hollywood, about our project. Here is what the article said: "A copyright theory [a theory] called Creative Commons promoted by an organisation of copyright practitioners and academics, has emerged as a serious threat to the entertainment industry" says Michael Suskind, member of the International Association of Entertainment Lawyers (IAEL). A serious threat, right, by the non-profit organisation, also known as Creative Commons.

We are not even creative enough to have a distinction between our theory and our name. We urge creators to give up their copyright protection (you might wonder where you would have seen that in anything we have been talking about but that is what *Billboard* reports it as). This position has "spread like a virus onto the international stage", Suskind explained, with anti-copyright forces adopting these arguments against the music industry. If that theory is accepted by legislators, copyright laws could change; copyright owners could lose protections and US [that is the important word] copyright income "could be at risk" he says.

The International Association worried about US copyright income, but of course they are not going to worry about US copyright income. They are worried about US lawyers' income. You might think is this the empire striking back? No, do not worry – it is the imps-for-hire striking back. That is the fear– that we are going to threaten lawyers in some sense. But it is not just them. Bill Gates, gave an interview, where he was asked about this intellectual property war. This is what he said:

There is some new modern-day sort of communists, who want to get rid of the incentives for musicians and movie makers and software makers under various guises, they don't think that incentives should exist.

Communists: is that who we are? I mean remember communism, whatever Marx said, was the world where all property was owned by the State. We are not for that. You might remember corporate fascism was the world where all property was owned by monopoly corporations. You might think we live in a world very much like that, but we are not for state ownership or monopoly capitalist ownership; we are for what this has always been about: authors expressing freedom associated with their content. We might

be called ‘commonists’ perhaps. I like to use the word ‘commoners’; that is who we are. The commoners’ movement here is Creative Commons. Are we a serious threat? Let us be a serious threat to lawyers in common. Not a big problem in the world. Are we a virus? Let us be a virus that enables artists to spread culture, to understand culture, to free culture; let that be what this virus does. Are we out to change law? No, that is not our purpose. That is the whole insight. We do not have to change one law to enable people, to enable this project to succeed, because we are using existing law.

It might be that this project, if it succeeds, does change the law. But the critical point to remember and emphasise over and over again, especially in the world where the earth is thought to be flat, is if we change the law, it is not to kill IP. We are not against IP. It is instead to bring IP into the 21<sup>st</sup> century, to make writing legal in the 21<sup>st</sup> century. Technologists have given us a way to write. The lawyers have told us that way is illegal today. We owe it to our children to give them the freedom to write that we knew, and that our forefathers spent hundreds of years creating.