

## **LAWRENCE LESSIG**

### **Intellectual Property Rights & the Creative Commons Presentation at the Ford Foundation, October 3, 2005**

**Part 1:** It's extremely hard to frame it in a way that people see what's at stake. So I'm going to try here today another framing that might help you see what I think is the core problem we face in this area. And then I want to tell you a little bit how Creative Commons has responded and will plan to respond to some of these issues.

So here's the first point. We need to recognize, as a culture we need to recognize that there's been a digital inversion of copyright. A digital inversion in the sense of a fundamental distinction between analog space and digital space as copyright relates to analog space and digital space, in the sense that the default of these two spaces is inverted. So the default in analog space with respect to most creative work and most uses of creative work is that those uses are free of the regulation of copyright law. And the default in digital space is that the uses of creative work are by default regulated.

All right, so here's the way to see this. Think about books in physical space. If these are all the uses of a book in physical space, a significant set of these uses are unregulated by the law. So you read a book. That's not a fair use of the book. It's an unregulated use of the book. To read a book doesn't produce a copy. If you give someone a book, that's not a fair use, it's a free use of the book, because giving someone a book doesn't produce a copy. If you sell a book in American law, it's specifically exempted from the scope of copyright law reaches. If you sleep on a book, it's an unregulated use of the book. There are these uses that are outside of the reach of copyright law. And then at the core there are a set of uses that are properly regulated by the law of copyright, uses that need to be regulated to create the necessary incentives to produce creative work. And then in the American tradition there's a slim sliver of exceptions, uses called fair uses, uses which otherwise would have been regulated by the law, but which the law says ought to remain free despite the fact they fit within the traditional definition of what copyright law regulates.

So, you can take my most recent book, *Free Culture*, you can review my book, you can use my words in review. You can copy my text. You can write the most idiotic review imaginable, and I guarantee that's possible. I've seen some of those reviews. And there's nothing I can do about the fact that you've copied my words in my review because the law says that instance, which otherwise would have been regulated by the law should remain free because it's important for a free culture that such uses not be regulated. So, the point is in analog spaces most of these uses are free, and the target of copyright's regulation was essentially commercial uses of creative work.

Now the critical point to recognize is the digital world is radically different. It's radically different because of the architectural feature of the digital world, which is that every single use of creative work in digital space produces a copy. There is no way to use creative work in digital space without using a copy. And thus the architecture of copyright law, which regulates "copies," and the architecture of digital space, which produces a copy with every use creates this traditionally extraordinary presumption,

which is every single use requires permission. So this balance, which is the picture of what copyright law has been for 250 years of our tradition gets inverted simply because the architecture through which we get access to culture has this accidental technical feature, namely that everything produces a copy. It's a different default. We go from a world where regulation is the exception, targeted in narrow context where there's commercial purpose behind the particular creative work, to a default where regulation is the norm and freedom is the exception.

Now this default, radically different, matters. It of course helps some in the creative field, but the point is to recognize it hurts others. It hurts other creators, and it hurts others in culture. It imposes a layer of permission on top of the use of culture. And this layer of permission is new. And I want you to develop this technique. I want you to think about the closest analog equivalent to the things I describe about cyberspace here, and ask yourself whether the closest analog equivalent would have been regulated in the world before the Internet. And then ask yourself why is this closest digital equivalent regulated in the world of cyberspace? So I want to give you some examples of why this default is increasingly mattering.

So the first relates to this company in Britain called Naxos. Naxos is a record label. It specializes in restoring classical recordings, important classical recordings, which it then sells copies of these recordings. In the late 1990s it released a series of recordings from the 1930s, recordings made in England of famous English performances of certain classical works. These recordings were in the public domain in England. And so, when released in England there was no question about Naxos's right to release them. But EMI didn't like the fact that these recordings had been re-released. EMI thought that they ought to control the opportunity for these recordings to be re-released because they are the successor and interest of the original performing organizations that made these recordings. So EMI filed a lawsuit here in New York. These are recordings made in England, in the public domain in England, but they came to New York and filed a suit in New York and said they are not in the public domain in New York. And the reason was, they said, there's a common law of copyright in New York, which protects these recordings even though they're in the public domain in England.

Well, in April of 2005, the New York Court of Appeals, the highest court in New York, agreed with EMI. They agreed and said these recordings are protected, and under New York law, forgetting Federal law for a second, they would be protected "perpetually." Because New York common law grants protection to recordings, even after the recordings have been published, for an unlimited term, according the Court of Appeal of New York. Now Federal law has been designed to federalize the protection of recordings in 2067. So the consequence of this is in New York these recordings are protected by copyright until 2067. Now when this decision came down all the major content organizations celebrated it. "The ruling," one billboard said, "is a victory to the major labels that own most of the rights to recorded musical performances." So they're right. It's a major victory for them because to use or to restore these recordings now requires permission.

But here's the problem that this decision creates. If we think about this as the universe of all recordings (referring to slide graphic), which in New York are protected by copyright until 2067. Literally every single sound recording made in the history of man is protected in New York under copyright until 2067. If we think this is the total universe of such recordings (referring to graphic of large circle with very small circle inside), this is the proportion whose owners we can identify. Everything's protected by copyright, but we have no way of knowing who the copyright owner is, except for a tiny proportion that happen to have some continuing commercial life, where somebody like EMI claims it. So it's impossible for the vast range of these recordings legally to use these recordings subject to the restrictions of New York copyright law. And of course New York is a huge market and the opportunity to distribute work in the United States.

So for example, this organization – the American Musical Heritage Foundation – which has as its charter the restoring, archiving, and distributing of old recordings, has been told by counsel that it's presumptively illegal for them to engage in their practice in the State of New York until they can clear the rights. And of course there's no possible way to clear the rights with this.

Now the point I want you to recognize with this is there is no doubt, I think, that if you think about the closest analog equivalent to what we would do with restoring these recordings and making them available in cyberspace, the closest analog equivalent in analog space. There's no doubt that would be legal, the idea of collecting recordings, preserving them, making them available to people in a library. That clearly would be legal. There's no way that would have been regulated by copyright law. But the mere shift in the architecture of copyright law and the opportunity of digital technologies means the same digital equivalent is not legal in cyberspace. So that's one example.

Here's another example more familiar. So everybody knows this fantastic company, Google, and you've all been hearing about this fantastic new project of Google called Google Print. So what Google Print decided it wanted to do was digitize 20 million books from major research libraries around the United States and Googlize them, so you could search books just like you search the Web. So I have a little pilot example of it up here. I searched in Google Print for "Holmes." These were all the things from Holmes and his father that came up. If you click on a work in the public domain, you get the full contents of the book. You can view it completely, read it. If you click on a work that's not in the public domain, then what you get is typical Google snippets around the particular things that you've search for. So I search for economics. Here's a snippet on economics in *The Essential Holmes*, edited by Judge Posner.

Now, if you think about what Google has done here, and you have the kind of passion that I have, which is the passion of an academic, it can for you do what it literally did for me, bring tears to your eyes. Because think about what they're doing. They're making our universal set of knowledge in the United States accessible for free across the Internet. It is an extraordinary gift to culture. Of course they make money off it. Or at least they hope they do. It's a gift because for the first time we're guaranteed universal access to this knowledge for free. Now when this project was announced there were many rights

organizations that were “concerned” – the American Association of Publishers was “concerned” that there would be copyright infringement in this production. And where’s the copyright infringement? Well for Google to index 20 million books they need to scan the books. To scan the books is to produce copy, so the AAP said, where’s the permission to copy 20 million books - 90 percent of which are out of print, a chunk of which are out of copyright, a chunk of which might be in copyright and might not be in copyright. It doesn’t matter to them; their question is who gave permission to scan the books?

Now that question has a very important echo in recent copyright law history. There was a company called MP3.com, which was set up to build a different business for producing and distributing music. And one of their targets was to find a way to encourage new artists to create new work. And the way they would do that is they would try to match the preferences of customers for existing artists with style of new artists. So it would be like an Amazon recommendation for new artists, so new artists would have an easy way to become known because people would know if you like Lyle Lovett, you’re likely to like this new country artist. To do that they invented a technology called BeamIT. So here’s how BeamIT worked. You took your CDs, CDs you’ve bought. You put them into your computer. The computer would identify the CDs. It then would give you access to the music wherever you were. So you could be at work, you could sign into your music collection, you could listen to your music. You could be at home, you could sign into your music collection and listen to music. As you see, it’s a password-protected access so it was a lockbox for this music. But what it did was give you access to your music and simultaneously give MP3 access to your preferences. And MP3.com could use the access to your preferences to begin to produce this new market for producing music. So MP3.com thought, well what we’re doing is fair use because all we’re doing is giving people access to their music. And so they went out and they bought 50,000 CDs and they ripped them to their servers.

Well, of course, it didn’t take two weeks after they announced this project for the REAA and a bunch of other record companies to file a lawsuit against them. And when they got to court, the court asked the obvious question. Okay, I understand you’re making access available in fair use sense, but who authorized the original copy of the 50,000 CDs? And the answer was nobody authorized that copy. And so the court concluded, you’re a commercial entity, you engaged in copying 50,000 CDs, you’ve therefore violated copyright law, in fact you’ve willfully violated copyright law. And they issued \$140 million judgment against MP3.com. That’s 50,000 CDs. Take the same number and multiply it by 20 million because it’s the same principle here. That’s the same question that’s asked about Google. Who authorized the copying of 20 million books? And the answer is nobody.

In September 2005, the Authors Guild answered the question. They said that nobody has authorized these copies, that Google is engaging in “massive copyright infringement.” And before they make available works – at least works subject to copyright – they must ask permission first. Well let’s just be a little realistic about what that would mean. So presumptively in the United States, copyright reaches back to 1923, copyright law for

books. Recordings of course in New York is a different story. But copyright for books reaches back to 1923. So it may be the case that anything published after 1923 is under copyright. Whether it's under copyright depends on whether it was registered, and whether the copyright was renewed, at least for works before 1964. So normal people, logical people, think well that's simple, there must be a list somewhere of what was registered and what was renewed. Some database we could just ping to see which books are under copyright and which books are not. And the answer is apparently the copyright office was run by FEMA because there is no list. There's absolutely no simple way to know who owns this property.

So let me just adopt a purely pro-property way of describing this problem. We have a property system here, it's called copyright. It gives property owners certain legal claims. But the government has architected that system to make it the least efficient property system imaginable because you can't know who you need to ask in order to use the property at stake. There's no way to ask permission to copy, to scan these books. And so if permission is required, then Google Print cannot happen.

Now, you might actually think if Google Print can't happen, why can Google happen? Because what Google wanted to do to books is exactly what Google does to the World Wide Web. Google said they would be happy to remove any books from their index if a publisher says they want the books removed, or if an author says they want the books removed. That's exactly how Google indexes the Internet. They index everything. They copy everything and build an index on top of it. They say to everybody, if you don't want to be on our index send us an email and we'll take you out. And so what Google is increasingly reflecting on is, wait a minute, if we're not allowed to do it for books, why are we allowed to do it for the Internet. And the answer is if you can't do it for books, it's not at all clear why you can do it for the Internet. So once again this principle that copy triggers the law creates this extraordinary uncertainty.

Now again, think back to the question I asked you to think about at the beginning. I think there's no doubt if you think about the closest analog equivalent to what Google is doing, building an index of books, that would have been legal in real space. There's no doubt a publisher could restrict the opportunity of a library to build an index of their books. Yet the digital equivalent of building an index, obviously much more efficient and much more powerful, is not legal under our law. (End Part 1)

**Part 2:** So there's a fantastic book by this author, J.D. Lasica. Terrible, terrible title, *Darknet*. Who knows what that means? But it's a fantastic book. It's a story of struggles that creators are having in the context of these intellectual property battles. And he tells this fantastic story about home movies in this book. So I spend the majority of my life on the road, even though I have a two-year-old son. So my relationship to my son is increasingly defined by the home movies I make of him. So I have a little iSight camera when I'm traveling. And I take little pictures of him and I string them together into movies. And this is a hugely important part of my life (plays clip). So in this example what I've done is I took Gilberto Gil's music and I synched it to my home movie, and that is how I've made home movies.

Well, J.D. Lasica wanted to take it a step further. He wanted to make a home movie of his kids. He wanted to include music, but he also wanted to include little clips from popular movies like Superman or Batman, or even Snow White. So he did something that nobody ever does. He asked for permission. He wrote a letter to all the major studios asking for permission. This is what he said. I'm going to make a home movie. I'm going to show it to nobody except my family. I won't put it on the Internet. I won't distribute any copies. It's just for my family because my son has a deep connection to Superman. That's the kind of argument that he made.

All studios except for one answered his request with "no." So Universal Studios was asked for 39 seconds of a movie of theirs: "You'd be obligated to pay the appropriated license fees which would be \$900 for each 15 seconds." Warner was asked for two 10-second Daffy Duck clips: "We do not...allow our material to be edited or altered in any way." And then my favorite is Disney. So here's Disney's answer to J.D. Lasica: "Due to the growing number of request that we are receiving from individuals, school groups, churches, corporations and other organizations that wish to use clips from our productions...we have had to establish a general policy of," you guessed it, "no." And just to make him feel good they added: "Please understand that our denial is not arbitrary...we have consistently denied many similar requests."

So not 45 seconds, not 30 seconds, not 10 seconds, nothing. That's the mentality. No permission to use anything, and using anything violates their rights to control. Now again, in my view, there's no doubt if you think of the closest analog equivalent to what this is – telling a story, just even describing how your son and Superman share certain fundamental, or how your son and Popeye love spinach. All of these things that you could do in real space, in analog space, would have been legal. To remix culture into your life and tell stories how culture interacts with your life is totally legal. Yet the digital equivalent is not.

So these stories I offer to suggest a general point: that we've had a radical change in the way that the law regulates culture. At the same time that we've had this radical change in the way law regulates culture, we've also had a radical change in the creative potential of our culture. This is the contribution digital technologies have made. They have in a sense democratized the creative potential. Because now it's not just Hollywood or studios in New York that have the power to express ideas using what we've called multi-media, even though it's all now one form of media. It's anybody with a \$1500 computer.

Now you have to have a clear sense of what this "anybody" means. So I've pulled some examples together just to make sure we're talking about the same sort of thing. So the first example comes from extraordinary work done by Mimi Ito at USC, studying a new culture that she describes as the Anime Music Video culture. So everyone's heard of Anime, Japanese cartoon series. Well the Anime Music Video culture copies all of these cartoon series, takes them off the air, and then they re-edit them to fit them to music tracks. I'm going to show you a couple of examples. And you have to keep in your mind that the cartoons that you're going to see were not created for the music. They're all

found art and they're re-edited to fit to the music (shows examples). Okay, so this started with music videos, and now they've moved it beyond. They've begun to create their own kind of story, again, using just found art that they re-cut in this way (shows example). Then the next thing they've done is they've begun to make an art form out of remaking trailers. I think everybody knows this trailer (shows action trailer). So they take the soundtrack and then found art, and they remake the trailer exactly to the soundtrack (shows example).

Okay, so you think these are these extraordinary creators, these extraordinary Japanese creators. The extraordinary part of this story is it's not Japanese kids who are doing this. It is American kids primarily who are doing this. Mimi estimates there are more than 100,000 kids across the United States who are using their old iMacs to cut up and remake these creative works. You know, you wonder what your kids are doing upstairs in their bedrooms. This. In fact I told this story once at this conference, and afterwards this guy from Novell came up to me literally with tears in his eyes. And he said, you don't know how important Anime Music Videos are. Obviously I don't, because I didn't cry about it, but here he was. He said, my kid could not get into college until we sent copies of his Anime Music Videos to the college. And the college then saw what kind of creativity he had. Even though he couldn't write, he could produce. And they admitted him. Now he is in media production, that's what he does.

So this is what is happening with these technologies. They have a constrained form – music video tying into the music, or the trailers tying into the trailers. And there's competition within these communities to produce creativity against the background of these constrained form. One form of creativity building on another. Or other examples I'm sure you're familiar with. Here's the White Album, produced by the Beatles, that inspired the Black Album, produced by Jay-Z. And that of course inspired DJ Dangermouse to produce the Grey Album. What is the Grey Album? It's a synthesis of the tracks of the White Album and the Black Album together to create a new kind of creative work. Or in 2004, this film Tarnation made its debut at Cannes. The BBC said it "wowed" Cannes. This is a film made for \$218. The kid took video he had shot through his whole life. He was from New York. He used an iMac, given to him by a friend. Using the bundled software in the iMac, he produced a movie that could "wow" Cannes and win the 2004 Los Angeles International Film Festival.

And the examples of remix in this context are extending quite broadly across the Internet. Let me give you some particularly creative examples (shows video parody of Fox war coverage re-cut). Or here's a simpler example (shows video parody of Bush debate re-cut). Or this has got to be the best (shows video parody of Bush and Blair cut to love song).

So this is digital creativity. Let's recognize what it is really. It's speech. It's speech using sound and images from the culture around us that anyone with a \$1500 computer can begin to produce and, using a free digital network, share and spread. And as they do it well it becomes popular across this network because that's the architecture of the network. Not network owners choosing what gets distributed, but people at the edge of

the network choosing what they say. And think through each of those examples I showed you. The Fox example, or the re-cut of the debate, or this example, and ask yourself, how could I have produced as powerful an equivalent using text alone. Could it have been possible to produce that kind of message using text alone, at least possible for our culture? Could you have produced it in a way that would deliver the power of each of those messages using text alone? And the answer is, no. We are a culture that is trapped by understanding through media. And this is the first time that this capacity to speak through media gets distributed broadly. And it is a capacity to speak as important as any political speech could be.

And so you think about the closest analog equivalent here. Again, writing an op-ed about how “hard work” was at the center of George Bush’s message, or the love relationship between George Bush and... Any of the things you would do in the closest analog equivalent, it’s absolutely clear they would have been legal. To do those things in text would have been totally legal. But to do those things with the digital equivalent is not legal. So the point is just when this technology enables this extraordinary potential, the law takes the right to engage in this potential away.

You could call it a kind of mentality governing this space; a mentality that believes the respect for intellectual property is simply the respect for the right to control, and control broadly. But what I want you to recognize, in light of how I’ve described the flip in the default, is in effect it’s a land grab that’s going on here. The architecture of digital technologies has flipped the default. It used to be the default was freedom. Now the default is permission. And the land grab is taking advantage of that flipped default to exercise control over the way culture gets made and spread that we have never granted anyone in our past. There has never been a time when the law and technology together have given as powerful a control over the opportunity to develop and cultivate our culture as it does now. Never before.

And some point to this as part of a plan, not a conspiracy, but an obvious self-interested plan. And that plan is to demonstrate the “piracy” that goes on on the Internet. And no doubt there’s tons of piracy on the Internet. But it’s piracy both in the traditional sense of taking work and selling it without the permission of the copyright owner. And it’s also piracy relative to this new default. Because the default says you need permission first, and therefore anyone engaging in the act of creation and distribution of content without permission is presumptively a “pirate” - as the Sixth Circuit Court of Appeals referred to musicians who sample music without clearing any of the rights to the recordings as “pirates.” So the pirate rhetoric extends from the traditional conception as to what piracy is about to any use without permission. And that builds a kind of war mentality around the idea that we need to build technology to defeat “piracy.”

What is the technology? Digital Rights Management (DRM) technology. And what will DRM do? DRM will build into the architecture of the network the ability to literally control all of these uses that I’ve just shown you. So we will code away the capacity to engage in this kind of speech in the name of defeating “piracy.” So right now these acts of creativity are presumptively illegal – we’ll argue about fair use in a bunch of cases –



but presumptively illegal. But we won't even have the argument once DRM is the infrastructure, because DRM will remove the technical capability that the Internet right now has given us. So we have this new technology, both the new technology of speech that the Internet is, and the new technology of DRM that will destroy the potential of speech that the Internet is.

Now that's the state of the problem, I think. And what I've been struggling with for the last 100 years of my life is to figure out what's the way to respond to this problem. (End Part 2)

**Part 3:** We in our community have made a lot of mistakes in the way we have responded so far because a lot of the debate has been framed around the "piracy" question. So we've fought for the right to engage in file sharing, when 90% of the world thinks the right to file sharing is about the right to steal Britney Spears music. If I thought this was an issue about whether you should get Britney Spears' music for free, I'd be on the other side because I don't think you should get Britney Spears' music at any price. This is not about getting access to content for free, and yet that's the way the debate has been framed. And so what I suggest is that we start talking about framing the debate in a different way. And we lead by making it clear that we're not anti-copyright. I am fundamentally pro-copyright. But what we need to do is build a recognition that we're criticizing a particular version of copyright, a particular version built in the last part of the last century, which has now become dated because of the radical transformation in the underlying technology. The history of copyright has always been about updating the law in light of new technology. That's exactly what should be happening now.

Now to make this argument I think we should adopt three separate strategies. The first strategy is again for people like me, as clearly as we can say it, to assert again and again that we're not for piracy. We're against piracy. We could have arguments about what the scope of the law should be. And I'd love to have those arguments. But at the core this is not about the right to invade properly granted rights of others. That's not what we should be fighting about. And we need to push the debate in places where people don't hear it to be about a right to steal. So, number one, against piracy.

Number two; we ought to be developing reform of the copyright system to make it make sense of digital technologies. And I'm increasingly attracted to a suggestion a Yale researcher made, and never has fully written up, Ernie Miller, to take the "copy" out of copyright. One way to understand the problem as I have described it is that copyright law triggers on there being a copy. You might think how could there be copyright law without copies, but the fact is between 1790 and 1909, copyright law did not regulate "copies." It had nothing to do with making a copy. It regulated publishing or other particular activities that were directly tied to commercial activities. In 1909, literally as a mistake, it was a drafting mistake because in copyright law you wouldn't have used the word "copy" to refer to what you did with books, the law was changed to refer to copies. And now the scope of the law changed as the scope of copying technologies changed. So the trigger now became copying as opposed to particular activities like publishing, which

is what the tradition identified. Now in 1909 it didn't matter because who had technologies to copy? Publishers. So you were regulating publishers, just like you were regulating publishers before it said "copy." Technically the law banned somebody copying down a poem 50 times to memorize it, but nobody was ever punished for copying down a poem 50 times to memorize it. But the point is this word "copy" has now taken on a life of its own, and in the digital context it radically distorts the real objective of copyright law, which is to focus on activities which have some commercial part to them. So we could return to something like that model, and there's a lot of work to be done to try to understand what that would look like, so we identify the kinds of activities that are properly within the scope of the monopoly, and leave everything else outside the scope of the monopoly.

But the problem is right now in the United States there's a kind of IP McCarthyism that exists about this debate at least in Washington. If you question copyright the way it's architected right now, then you're referred to, as Jamie (Love) and I and a bunch of others were referred to, by Bill Gates as a "Communist." So to frame the issue of copyright reform is to place yourself right in the middle of a debate that sees this as a debate about Communism, and that of course is not a debate that will have any progress soon. And it's that point which has led me to spend so much of my life on the third point of this strategy, which is to find private reform here first. Private reform meaning changes that we can do voluntarily to begin to demonstrate the importance of public reform later. And that's the objective of Creative Commons.

So I'm going to describe for you Creative Commons and then that part I think most of you are probably familiar with, but then I'm going to describe for you what Creative Commons is going to do in the next year, which I know only two of you are familiar with. So that's the more exciting part, but let's start with the common ground.

The objective of Creative Commons is to find a simple way for creators – author and artists, scientists and scholars – to mark their content with the freedoms they intend their content to carry. So rather than the default of "all rights reserved," this is a system to make it simple to signal which rights you are effectively waiving, so "some" rights reserved. You affect this by going to our Website and selecting a license. The license basically asks you to answer some simple questions: whether you want to permit commercial use of your work; whether you want to allow derivatives of your work; and if you allow derivatives, whether you want to require the person who makes the derivative release that derivative under similarly free terms, a kind of "copyleft" idea. That produces a license.

So the substance of a license is something like this. We have basically four ideas: attribution; share alike, if you get it you must release it in a similar way; no derivatives is a component; and non-commercial is a component. And that produces these core six licenses (shows graphic). So attribution; attribution, no derivatives; attribution, non-commercial, no derivatives; or attribution, non-commercial, share alike; or attribution, non-commercial. So those are the six types. And those six types get expressed through a certain type of architecture. All our licenses come in three layers. So the first layer is a

human-readable Commons deed that expresses the freedoms with this content in ways that anybody should be able to understand. Second, and very different, is a lawyer-readable license, a billion-page document written by the best lawyers we could find that makes enforceable the freedoms associated with the content. And third, extremely importantly, it also includes a machine-readable layer that expresses in ways that computers can identify the freedoms associated with the content.

So about six months ago Yahoo! opened a portal where you can search the Web on Creative Commons licenses – show me all the pictures of the Empire State Building available for non-commercial use and bingo, there's a list of images that are no available in this way. And coming soon is another major search engine, but I'm not allowed to tell you which, that will do the same thing. So that this infrastructure now exists to identify and filter content on the basis of the freedoms associated with the content. Now in my view the critical thing is that these three layers function together, that we have the Commons deed that links to the legal code that links to the machine-readable code, so that the licenses are understandable, unchallengeable, and useable in a digital age. That's the essential architecture.

Now we launched this in the United States in December 2002, and then very quickly we launched what we call the iCommons project. The objective of the iCommons project was to take this simple architecture and then to add to it equivalent legal licenses from different jurisdictions. So it says legal code Germany, legal code Japan, legal code Brazil, and the idea is that these are equivalent licenses that get wrapped in identical machine-readable data, and then a translated Commons deed. So no matter where you are you can engage in this kind of free licensing consistent with local law, and purportedly enforceable internationally.

Right now this project has more than 70 countries participating. This is the state of it as of today (showing graphic). The green countries are countries that have already launched. The yellow countries will launch in the next six months. And the red countries are the countries yet to be liberated in this process. So essentially this is a huge swath that we're focusing on right now. And because of the spread of icons we've had an extraordinary spread in license uptake. So in the first year we counted a million link-backs to our licenses. At a year and a half that number was at about 1.8 million. At two years the number was at about 4 million. At two and half years, which was June (2005), the number was just over 12 million. The number at the end of August (2005), three months later, was 53 million link-backs to our licenses. So the growth rate of this adoption is increasing far beyond anything we ever imagined, at least according to Yahoo.

So the general objective here is to find code, both legal code and technical code, that makes it easy for people to begin to use these technologies consistent with the law. And the answer that we've developed is a little technology that we've developed called CC Publisher. So what CC Publisher does, it's a desktop app, it's available on all platforms now, where you take a little bit of content. Here's an MP3 file, you drop it on the desktop app. It pops up this little menu to allow you to pick the Creative Commons

license to be attached to that content, and then it uploads it. Now the question you're going to ask is, where is it going to upload it? Because obviously making the stuff available on the Internet is expensive.

Well we struck a relationship with the Internet Archive, which has now given us free hosting forever for all Creative Commons licensed content. So there's a place where anybody who licenses the content can for sure know that they can place this content and make it part of the archives. So when you upload it using CC Publisher, and you pick "next" on this (demonstrating on page), then you get "upload to the Internet Archive," and then you get back from the Internet Archive a URL. And the URL is your content up on the Internet Archive, which you can then give to anybody to get access to your content. And there's an extraordinary amount of music and increasingly films, and especially films from Brazil, that have been placed in this archive under Creative Commons licenses and now are freely accessible anywhere in the world. So that's the first problem, how do you make it easy for people to get access to this content? And CC Publisher is a GPL piece of software that's being adopted by many organizations, including OURMedia, to make it simple for people to get content onto the Web.

Second problem we faced is the problem that it's too hard to collaborate using existing technologies. The idea of using the technologies to collaborate in creativity is not yet the norm for how these technologies function. The answer to this problem that we've set up is first a kind of legal innovation, which is a license called the Sampling License. The Sampling License basically says, you're free to sample my work and remix my work; you're just not free to copy and distribute my underlying creativity. That license inspired Wired magazine to produce something called the Wired CD. The Wired CD included 16 creators including David Byrne, Gilberto Gil, Chuck D, Beastie Boys, Le Tigre, a bunch of people who released their content under this sampling license.

Then we built this technical code to make something usable, something called ccMixer. And what ccMixer does is it's a kind of Friendster for content. So we put all this content in ccMixer, and what you can do is then track how songs were remixed. So you have a particular song. You can say, this song was the product of these two songs, and this song has now been remixed by these four other artists. So here's my favorite artists right now (shows demo), a guy named, Minus Kelvin. Minus Kelvin, as you might guess, is a high school physics teacher. He joined ccMixer in February of 2005. And here he describes all of the kinds of music he's interested in. And then ccMixer lists the songs that he has produced and how they've been used. So for example *In the Setting Sun* uses samples from this work, *Be Brave*, which is just a single track laid down by this artist (plays excerpt). And then he took it and remixed it (plays excerpt). Or here's an example of a song that he produced, *Excepting this Fat Reaction* (plays excerpt), which then you can see is used in this song by fourstones, *Givin' it Back*. Fourstones is actually the programmer who develops this whole system.

So ccMixer has been used primarily for music, but now it's increasingly being used for what we might think of as poetry slam-like purposes. So this guy, Colin Mutchler, produced this little bit of expression of what free culture is (plays excerpt). And then you

see all of these people who've remixed it. So here are some samples. This is a trivial remix (plays excerpt), and then here's something a little bit more interesting (plays excerpt), or (plays another excerpt). So this is literally a community of thousands of musicians now, who are taking and remixing their music, all subject to licensing that legally permits this remixing. And in lots of cases remixing that can actually be used for commercial purposes.

So the common question we always get from artists in particular is, why would you ever use Creative Commons licenses? And the first answer we give exclusively to artists is that it may help you do what you want to do. And the examples to point to here are, some related to Creative Commons, some not, and my favorite example is the band Wilco, which had an album called *Yankee Hotel Fox Trot*, which they were going to release with their record label. Their record label listened to it and hated it. So they said to Wilco, change the record. And Wilco, of course being a bunch of young artists, said, no way, we're not changing the record. So they said, fine, we're not going to release the record. And Wilco said, fine, give it back to us. So they gave it back to Wilco. Wilco released it free on the Net under terms equivalent to what we would call the Noncommercial Use. It spread broadly on the Net. So much attention was driven to this album that another record label, in fact owned by the same parent company as the record company that gave the work back, bought the record back for three times that Wilco had sold it. And then issued it in traditional CD sales. And the result was that they sold more CDs than they had ever sold for any of their records. So the point is this mode made their objective easier to achieve if their objective is just the idea of selling CDs.

Or again, take the ccMixer example, my favorite, Minus Kelvin. Here's his artist's page and you can see what his objective is. He is seeking a record label. He joined in February (2005). He put a bunch of his music up there. In June he was signed by this record label (Runoff Records), who found him and a bunch of other artists inside of ccMixer. He never, at least probably never, would have had the opportunity to spread his work like this. But because he's made his work available, he achieved what he wanted, which was to get a record label.

Or from South Africa, there was this extraordinary story at this conference that we were just at at the HRSC, which is Human Sciences Research Council in South Africa. They were a traditional research house. They had 250 researchers in 12 different programs. And what these researchers traditionally did was write books. And they would try to sell these books. So basically, grandma got a copy of the book and maybe two other people, and then the storeroom at h HSRC was filled with books that were never sold. In 2001 they asked a consultant, Eve Gray, to come in and tell them what they should do. And Eve Gray said, stop publishing books, no more publishing of books. Instead, write books and give them all away for free electronically. Put them up on the Web for free to be downloaded. Then if you want you can sell print-on-demand versions of the book. So you give everything away, but if somebody wants a real printed version they can buy a print-on-demand version. Now focus on just one dimension here, consequence for sales of books. Remember they used to sell books, now they give them all away for free and only sell people books if they want to buy them through the print-on-demand service.

In four years the sale of their books has gone up by 300% relative to the time when they only sold books. And it's for obvious reasons. You make research books like this available. You spread the number of people who get exposed to the research book. The spread is actually more valuable than their restriction originally, so more people buy the books. More important to them was the spread of free media around the HRSC's work. They estimated 2.5 million Rand value every year because of free media. Because newspapers don't buy books, but they will download something off the Internet and then read it and write about it. And most important to them was the international reach of the HRSC's work. Nobody was buying South African books, but once it's available on the Web, then their research becomes internationalized in a way that it couldn't before. So the point is, again, they can do what they want to do more effectively using these tools to make their work more available. So the first answer to the question, why use it, is it helps you.

The second question which is increasingly happening in the context of science is because it's right. (End Part 3)

**Part 4:** We never lecture artists about what's right and wrong. We never tell musicians they ought to be giving away their work. We never tell artists that they shouldn't be collecting money for their work. It's their judgment. We're just giving them the tools to do it. But in the context of science, which has been the focus of our Science Commons project, there's a very different ethic out there. Scientists believe in an ethic, which is a kind of obligation, not just to produce knowledge, but to produce universal access to knowledge. So if you as a scientist have two ways to publish your work, one which guarantees universal access to everybody, not just privileged people at Harvard and Yale, and the other which just gives privileged access to people at Harvard and Yale, consistent with your ethic you ought to adopt the first rather than the second.

So Science Commons has initially supported the Open Access Movement. Public Library of Science uses our licenses. PubMed Central uses our licenses. But increasingly also thinking about the same issues as it relates to data, to tools for research, and obviously, of course, to patents. So the objective of Science Commons would be to apply the same kind of reasoning in the wide range of scientific research to make sure that these tools are accessible. Okay, so that's Creative Commons. Its aim is code, both legal and technical code, to enable creativity that is consistent with the law, respecting copyright without the existing burden of copyright.

Okay so what are we going to do next? I'm going to briefly touch on four projects, which I think are quite important for you to understand in this discussion. The first is a story about how Creative Commons is evolving. We started it as a single organization. And I described the iCommons movement that was inside that single organization. But we've, this year, separated the iCommons movement from Creative Commons. So the Creative Commons will continue to focus on the core legal issues that we're interested in, but these extraordinary communities that we have engendered through these international

projects can begin to step away from Creative Commons and do a wide range of work, some of which we'll be happy with, some of which we won't be happy with. So the important thing we needed to do was to separate the brand so we as Creative Commons could continue to say, look, we're just trying to make the copyright system function well. But when the people from Brazil start talking about the Free Culture movement, it doesn't get tied back too directly to Creative Commons, even though I wrote Free Culture. But we'll forget that for a second.

So we're doing two things in the iCommons movement. One is to internationalize all of these cc tools. So this is going to be the most important part. We're building publisher versions for each of these countries (indicates graphic for Britain, Japan, Africa), and we're identifying archives that will take free content in each in as many of these countries as we can. And then much more interesting is to imagine ccMixer for different countries, or for different schools. Imagine a school district that at the beginning of the year starts with a blank slate Mixer, asks people to make tracks of music that they add to Mixer. And each week they go back and mix the content, and by the end of the year you've produced the music out of a certain school district. Well we want to do that same idea in the countries context. So that's a spread of tools.

And secondly, by developing this network of organizations focusing on the Commons work, we want to internationalize this Commons work to make it local, and to begin to change it as these local factions become apparent. And also push a license, which Jamie Love was actually an inspiration for, something called the Developing Nations License. Developing Nations License basically says, if you're within a developing nation, you're allowed to use this content however you want, including commercially. You can republish it, or sell copies of it. If you're outside of developing nations, ordinary rules apply. So it's a way of enabling creators to create the market distinction that already exists out there. And to allow people within developing nations to take advantage of these resources without being called "pirates." So that's the first change.

Second change, and I think really fundamental to this project, is to build something we're calling a Free License Federation. So here's the general problem. When you have these free licenses, which have existed in the Open Source and Free Software movement, and now slowly in the culture space, you create free license ghettos, because a lot of these licenses are essentially incompatible. So the most pressing example, in my view, is the Wikipedia project, extraordinary project of creativity beyond anybody's imagination was this possible. It's licensed under the Free Software Foundation's Free Document License (FDL), only the FDL. So there's no way for content to be taken from this and licensed in any other license. Well if the license were great that wouldn't be a problem. The problem is the FDL is awful. It's a terrible, terrible license. And many people believe much of Wikipedia is invalid because of this license. So the point is because you have an architecture that ties content to license, the content is trapped. So Wikipedia is trapped.

Now that led us to ask this question: how could we avoid this problem generally, avoid content being locked up in a particular licensing structure? And here's the basic idea that we've adopted. We're going to build a Federation of Free Licenses. And that will work

like this. So if we have these as the basic components (indicates graphic) to the Creative Commons licenses, and I said that produces six types licenses. We're going to take some of these licenses, namely those that permit derivative use, and incorporate them into this project. Say we have three layers of the project, Commons deed, legal code, and digital code, the plan is to take these licenses that permit derivative use and say these are four license types. And you are an entity that produces a license that purports to be one of these license types, then we'll have a board that will certify compatibility of the licenses. So the board will say if it's compatible, if it adopts two layers of the Creative Commons architecture – so if it uses Commons deeds and meta-data (digital code) – so that freedoms are easily understandable and so that machines can identify content on the basis of their freedoms, and if you add a compatibility clause that basically says, any content licensed under this license can be licensed in a derivative work either under this license or under any equivalent compatible license. Then what you do is essentially set up a world like this, where these three in the center (indicates graphic) were country licenses; the three at the extreme are organizational licenses. So you can imagine PBS have a license equivalent to some of these licenses, or the Library of Congress, or, of course, BBC is essentially doing this right now.

The consequence of this architecture is that content can now migrate from one license to another so that as content owners decide that the Library of Congress license is not as good as the Japanese license, or not as good as some other entity license, you can have some movement among the licenses. We can get more institutions to participate in this process. So you can imagine, again, the Library of Congress license looks something like this (shows graphic), and it has cc-Metadata, cc-Commons Deed, and a Library of Congress license. But this migration, here's the critical point, begins to signal which licenses are the best. And that signaling, a kind of market signaling, protects the free ecology of these licenses. So the content never gets trapped in one license that turns out to be bad. It can move, and as it moves, people can learn which licenses actually function better. And it becomes like the Internet is right now, a place where licenses compete just like applications compete or Web services compete. And as they compete we produce a system that's more reliable than the existing system for free licenses. Okay, so that's the second project.

Third project, which will scare some of our friends, but here's what we're going to do. Think about the commercial side of creativity. So here's a picture of the CC Commons Deed. It says you require attribution, noncommercial, no derivative works. Of the 53 million licenses out there right now, two thirds are noncommercial licenses. Well the basic question that people have been asking us from the very beginning, that we're finally going to implement, is why can't you offer an option for people to then exercise commercial rights? So imagine the license now looks like this (indicates graphic): for commercial rights click here. And when you click there it clicks through to some commercial licensing organization, not us. But for example, CCC in the United States, or Axis Copyright, or a collecting rights society. Or it could even click through to the artist's home page. So you want to exercise commercial rights, click through and go to the artist's home page, and then pay the artist for the commercial rights. If you want to exercise the noncommercial rights, you've got these for free.



So the critical thing is this commercial half is administered by others. We're not going to be in the business of selling licenses. But it's supported by us in the sense that we facilitate artists passing their creativity through to a commercial licensing structure so that the message that we've been delivering from the beginning, namely, use this as a way to succeed better in what you want to do, can actually be implemented much more clearly by allowing artists to get some reward from their work.

Briefly two other small projects. So this is the TOT project. American law has this amazing thing called Termination of Transfers. What that means is if you're an artist or an author, and you've transferred your copyright to a publisher, even if the contract says, "I promise to transfer the copyright for the rest of the copyright's duration." And the contract says, "And I promise never to do anything to try to challenge that transfer," American law says you can terminate the transfer 35 years after the transfer and get the rights back. So you have an inalienable right to return the rights to the author. Now, of course, as you're not surprised to hear, though that's what the right is supposed to do the way Congress implemented the right, it's practically impossible to actually exercise because the complexity around the notices, and who you have to send notices to, and the timing of it is so hard that literally we have no good instances of Termination of Transfers actually functioning in a way that it was intended.

So we've built a widget now that in January (2006) we will have on our Web page as a beta version. Here's what the widget does. You are an author. You come to our Website. You walk through answering questions the way Turbo Tax would have you answering questions for your taxes. At the very end you click the button, and it says, yes, you're qualified for Termination of Transfer and we are transferring your file to a legal clinic. Affiliated legal clinics in the United States will then take the file and contact the author. And some student at a legal clinic will then work with the author to recover the copyright. So the point is we make this system functional so that authors can begin to exercise the rights, which the law gives them. And we, of course, will say if you'd like to make your work available under Creative Commons license, we'd be happy to do that. But nothing is conditioned upon authors giving the work over to Creative Commons license.

And finally, is a problem I know a lot of you have been thinking about that we may actually be on the verge of dealing with. So we all recognize there's a problem around the public domain. The problem is knowing, or recognizing, the public domain, because the system in each country is so complex that we can't easily get a database of material in the public domain. Well, I'm going to have to speak very vaguely about this because we're not yet ready to announce the particulars. But there is a country where there is a collecting society that has all published work from 1900 in a database. And in addition to all published work from 1900 being in a database, it also has some information about when the author died, not good information, but some information. And in that country copyright expires 50 years after an author dies, so you should be able to take that information and calculate what's in the public domain. But it's imperfect data. So we have an agreement in principle from this organization to take all this data and dump it

into a wiki. And we're talking to the Wikipedia Foundation to help structure and support this, so that the wiki would basically have three parts. One part is the bibliographic data that would be locked down. The second part is the key data that we're interested in finding out, namely, information about when the author died. And the third part would be extraordinary added value around these data. So for example book reviews or biographies of the author, or like Amazon reviews in the way that Amazon people begin to rate work. And using these three components, a wiki within this particular country will, using the Creative Commons organization in that country, run a Recover the Public Domain project where people are encouraged to participate in gathering this information necessary to calculate what's in the public domain. And then the database of this information would be freely accessible to anybody internationally. You could ping the database and get information back about whether something's in the public domain. And you'd get information back in the form with 90% confidence we can say this is in the public domain, or 100% confidence because the wiki process has demonstrated an obituary for the author. So we will be able to produce this information and set up a model for how this might be produced internationally, because, of course, no commercial interest has an interest in gathering this data. And no government, apparently, has an interest in facilitating the development of this data.

So that's where we're going. And our view is Creative Commons is a step in this process of reform. I think a necessary step to what we could think of as a rational system, meaning a system that shows the balance. And it's a necessary step because it develops in authors and in the public a taste for this balance through a common infrastructure we're going to pull people in that builds free content.

Now the last point I want to leave you with is the urgency of this project because all of this is possible only if DRM (Digital Rights Management) hasn't been deployed. And the architects of the next generation of the Internet are working as hard as they can to deploy DRM as quickly as they can, because in their minds the only important market to worry about is the content market. So they want to build the Internet to serve the content market. Now I'm not in principle against DRM. I don't think we should ban it completely, but I think that if we implemented DRM now we would destroy a huge amount of the potential value of the network. And more deeply, if you think about DRM, what is DRM? We had a network that built compatibility, inter-operability, into its core. DRM is a kind of intentional incompatibility. It is like taking a library and burning it down every 20 years, because we know that content that is locked in DRM will, as the companies that built the DRM go bankrupt, be inaccessible within just five years because we can't unlock the content. So we're building an infrastructure right now that essentially forgets this importance of history and access. And my point is unless we build a competing model, a competing infrastructure, urgently right now, this default of DRM will become deployed, threatening this information commons. So we have a current default that's destructive. What we need is a new, new default, produced in part through these voluntary actions marking content free in large part to resist what is the unintended consequences – I don't think there's anybody evil out there. It's really the unintended consequences of the emerging architecture of the content industry; architecture that

delivers total control without recognizing the consequence of that delivery is the destruction of much of the potential of the Internet. Thank you very much for your time.

### **Part 5 (discussion)**

**Pablo Farias, Ford Foundation:** Your thoughts in terms of what this tells you, and what you learn from this process in relation to the management of a different type of creativity, the genetic diversity embedded in forms of life, which obviously cannot be attributed to an author, or has this characteristic, but which is also an area of great debate and controversy in terms of who has access, who has control, how is that controlled through patents. And just to hear your thoughts about that in relation to this process.

**Lessig:** Very early on in the human genome project there was a recognition of the great harm that would happen if all of this genomic information were locked up in patents. And so there was a competition between the free knowledge world and the closed patent world. And one of the leaders of that process, Sir John Salston in Britain, is now one of the advisors on the Science Commons project. So I think that's a perfect model of how people were shown the value of free access to this data. And we can have all sorts of work done with access to this free data that's restricted what otherwise would have been a mind-numbingly complex system of patents. Now there remains still an insanely complex system of patents here. And if we were a rational policy maker what we would have done is asked Xante(?), was there any reason to believe these patents were going to do more good than harm for this kind of innovation? And before we start deploying them and giving out property rights, which in the United States we can't take back without compensation, we would have figured out if we believe that the system of regulation was going to be productive. We don't do that in the United States. We let lawyers define the scope of the patent protection rather than economists. And the consequence of that is that there still is a huge amount of what economists call anti-commons problem associated with research. And the anti-commons problem is the inverse of the tragedy of the commons. The tragedy of the commons is a resource is overused, and that's the tragedy. The anti-commons problem is the inverse. A resource is underused and that's the tragedy. How can you get an anti-commons problem? Well if you have a resource that has many different competing property claims on top of it, conflicting, overlapping property claims. The cost of clearing all of those property claims can be so high as to make it so you don't use the resource. And that's exactly what's being produced in this context. You've got resources that can't be deployed, researchers who can't do research in certain areas because of the blocking of these patents. And if there were some good showing that this was necessary to do some good, I guess I would accept it because I'm not in principle opposed to patents. But what drives me crazy about this is there was never any good showing that this was necessary or productive, and yet we just rolled the system out in a way that has produced this stifling of innovation around some of the most important research that we could be doing.

**Orlando Bagwell, Ford Foundation:** There's such a large body of work that already exists. And it appears that we're talking about with Creative Commons is new work that signs a license that allows it to exist in a space. How do we address that work out there

that so many people want to sample or use that already exists? Are you thinking about that or working on that as well?

**Lessig:** I think Creative Commons is a first step. It's a step that's designed to get people to recognize the importance of these freedoms. And as you get major artists like Gil or David Byrne to release work that permits this sampling, you encourage others to do it as well. But I think what we've been told from the very beginning in music from music industry executives is there's no way to change the existing industry. The only way to change it is to take the next generation and build a space where they can create, consistent with the law that begins to demonstrate the value of this. So let's be very precise about exactly what the law does to this new form of art right now. All of you know the way jazz works. Jazz works by improvisation upon earlier compositions. The law of copyright permits that improvisation because fair use protects it. Well according to the Sixth Circuit Court of Appeals there is no equivalent right with sound recordings. So this whole generation of musicians that's using computers to create music has no fair use right at all. Even one second of a sound recording used in your song violates copyright law unless you clear the permission first. So this generation of musicians that produced jazz and all the music in the history of man enjoys the freedom of fair use. But the new generation of musicians who are using technology to become creative doesn't. And when you begin to think about what that impact is. Kids who use computers to produce music are kids who primarily can't afford ten years of guitar lessons, can't afford to learn how to play a piano, can't afford to do all the traditional things that musicians require. Yet they're extremely creative using these technologies. But what the law is basically saying is okay the technology makes it possible for you to be a creator, but only if you have a lawyer sitting next to you can you do it legally and make it available in the commercial marketplace. So we build it so that technology gives this extraordinary opportunity for creators in a new generation of creativity, and the law takes it away. Well we want to demonstrate that. We're trying to work with Jenny Toomy, for example, in supporting a sampling project that would study sampling and study the history of sampling and study exactly how this works to begin to convince more artists to at least release the remix rights. Because while there are some artists who have made literally millions of dollars from people sampling their work, what we found when we talked to the artists on the Wired CD was that they recognize that they made their career building off the insights of earlier artists and they should facilitate the same for the next generation. And here they can do it in a way that protects their rights.

Now one more part of that. So we've gotten a bunch of artists to give away their remix rights for free, but a bunch of artists are like, well I'm okay if somebody remixes my work for noncommercial purposes, but what if their work turns into a Platinum record, and they become millionaires off the work, shouldn't I get something back? So as part of the commercial story that we were telling, we have a project to identify what you would think of as a schedule of rates that would go with sampling. So you basically say you're free to sample for noncommercial purposes without paying anything. But if your record goes Platinum, then here's how much you would have to pay for the things that you have sampled. So if you clear it up front you encourage a wide range of these creators to produce creativity. They'll produce stuff. Some of it will become commercially

successful. When it becomes commercially successful they and the original artists will benefit. Again, this is what the model of Creative Commons is. You use the structures of law to enable a market of creativity that the existing rules seem to stifle.

**James Love, Consumer Project on Technology:** This problem of, it comes up in patents a lot of times, is this thicket problem, is how do the people who want data shared or research shared or inventions shared, how do they protect themselves? And the same thing with the TK (Technology) community with misappropriation by someone who will take the body of work of a creative community, and then patent it and form a type of enclosure about it. It creates a lot of resentment and unfairness and problems in that area. So the human genome, they just thought they could move it fast enough into the public domain. They decided a completely public domain approach. The HapMap project, they put a license very much like you see in the software area. It would prevent people from filing patents for a certain period of time, but it created problems for them because the work was not as widely available for the kind of follow through type sharing of information and things that they wanted it to be. So it was sort of a compromise position. There's one proposal that we've worked on and other people have worked on. In the UK they have something called a license of right for patents. In copyright it's automatically copyrighted. There's no formalities. You write a letter to your mother, it's copyrighted and it doesn't cost you anything. And a patent it's expensive to obtain a patent. And it's expensive to maintain your patents. And so the kind of license you see in software in Creative Commons is very expensive to get, and people are reluctant to spend a lot of money to obtain patents and then license them for free. Who can afford that? So the UK has a system where if you dedicate, in Commonwealth countries, if you dedicate your patent to open licensing called a license of right regime, you actually get a discount on your fees. Typically in the UK system it's 50%. So there's been this proposal to create a category of social patent within the patent cooperation treaty system so that if you had much larger public interest obligations, your fees would go very low, possibly to zero. In other words, the idea that you would make it easier for people to use defensive patenting strategies. And I think this is a highly relevant thing for the kind of work that Larry's doing in the Science Commons in things like that. Also there's other approaches that have been suggested in the TK thing, which I won't talk about now, but are sort of more toward this copyleft system that you see in software between a sui generis regime and a patent regime modeled after the European biotech directive.

And then the last thing is I want to mention without taking too much time. There's this general problem of follow on research where you want to enable people to do it. And then there's this concern about what if it's a Platinum record that Larry talked about. Or what if there's money it? And it comes up in medicine and a lot of areas. And a lot of people are saying rather than thinking of exclusive rights as the right paradigm for intellectual property, they think more right to remuneration around some parameters. You cannot build a cell phone or a modern software program nowadays without violating patents, for example. It's just basically impossible. So Cisco and companies like this are very concerned about these things. So one idea is you could move forward and develop a product as long as you agree that something like 6% of your revenue, or something like that, would satisfy the right owners. Then people would go through an arbitration system

to divide the revenue. It would sort of give you the right, the absolute right, to move forward and cap your liability at some fraction of your sales. People have begun to think about exclusive rights as really being the problem, rather than giving money to people whose work contributed to something that became a commercial product.

**Joe Karaganis, Social Science Research Council:** I wonder if I could just ask about the applicability of the CC model to art forms that are dependent on unregulated spaces. I'm thinking particularly about whether there are areas where the CC model risks activating a notion of authorship, in so far as it depends on copyright and therefore an authorial model at the root in order to release rights. Whether that activation of authorship is something that can be detrimental to the artistic practices of traditional communities, or other kinds of unregulated cultural activity, where the health depends on that lack, precisely the imprecision of the ways that people think of sharing and ownership and of associated practices?

**Lessig:** Yeah, there are all sorts of communities. For example the creative community in India, which street culture in India, and Brazil too, that has an extraordinary range of creative work that comes from people creating taking for granted norms that much of the Creative Commons tries to produce. So they start from no property is the presumption, and we start from a world where property is the presumption. And we try to work, I would say, up to their model. And they're worried that the Creative Commons model will push them down to our model. And my view is that the best way to respond to that is not to push it into those spaces, except to the extent that the people in those spaces want to be able to enter a world market for what they're doing.

So when Gilberto Gil was eager to embrace the sampling license, he has in the back of his mind a project, which the Berkman Center at Harvard is supporting, to create an archive of Brazilian music that is licensed under a Creative Commons sampling license to encourage people from around the world to sample it to spread Brazilian music around the world because right now, of course, access to Brazilian music is extremely restricted because of the way it traditionally gets distributed. And the dilemma there is, on the one hand, a bunch of this music was produced without any rights system there at all. But if you just released it for free into the rest of the world then a lot of people would feel cheated when Sony picked it up and turned it into a record without paying anything back to the original community. So in my view it depends on what you want to produce. If you want to produce locally, not accessible to international work, then I see no reason to push Creative Commons into your space. But if you want a framework for protecting that work if it does move out of this, then I think Creative Commons is a kind of default model of how to make it protected. And so we're really pushing in those places where people do have this fear that their work gets used in certain ways without their permission, and want to encourage it to be used in ways that are consistent with they want.

**Ana Toni, Ford Foundation, Brazil:** When you started you talked about fair use. And I am not a lawyer but I understand that this is a very Anglo-Saxon piece of law. And I understand in the European continent they have, like Brazil, based on that is different.

We don't have fair use, and therefore students in Brazil at the university just for photocopying pieces of a book they've been asked to close the department of photocopying at the university. So we don't even have a fair use of that. Is that correct? How do other countries, like in Europe, if they don't have fair use of a work, how does the moral use come in terms of spreading the work? And also in relation to what you said about piracy, not being against piracy, and obviously nobody wants to further what legal and illegal is. But in the debate about development and the rights of developing countries, how much Japan or the U.S. has copied, and we don't have the framework that we have now in terms of what is permitted to copy or not. How can you argue not being against piracy when you take the degree of development into account?

**Lessig:** So with respect to fair use, the traditional European model is to pick certain categories of uses, which are exempted from copyright. So personal use is one category exempted from copyright in the European countries. And if you look at the list of exempted categories, it's pretty close to what you would assume fair use is driving at in the United States. The advantage of the European system is it's clear. The disadvantage of the European system is it's static, meaning to get anything added into the system you've got to actually amend the law to get it added. Conversely the advantage of the American system is it's dynamic. It's supposed to constantly be evaluating what should be fair use and what isn't fair use. But the great cost of the American system is the uncertainty around fair use. Now lawyers and judges in particular are typically oblivious to the cost of this uncertainty. And I had a run-in with my former boss Judge Posner about this where he ridiculed an example Jeff Rosen copied from me. It was an example of a filmmaker who included a scene with a three and a half second clip of *The Simpsons*, and he was told it would cost \$10,000 to clear the television clip in the background. And he had to cut it out of his film. Judge Posner said to me, "That's a ridiculous example, because clearly it's fair use." And I said to him, "Well, you know Dick you spend a lot of your time ridiculing people who don't do empirical work enough. Why don't you empirically go out and ask publishers and filmmakers what fair use means?" And he, to his credit, did. And he surveyed a bunch of publishers and talked to a bunch of film people, and he wrote this wonderful little piece in the *California Law Review*, outraged at the gap between what fair use is in theory and what it actually is on the ground. I do a lot of representation of filmmakers, documentary filmmakers, who are trying to use clips in their films. Most recently there was Robert Greenwald's *OutFoxed*. And the problem for filmmakers is that the norm in film is that you have to clear everything. There's no such thing as fair use. The norm is clear everything. The norm is enforced by the insurance companies that basically say, we're not going to insure your film until you can tell us you've cleared everything. You use the word "fair use" to the insurance companies and they're like, fine, go talk to another insurance company. We're just not going to insure it unless you've cleared all the films. I spend an extraordinary amount of time astonished at the presumptions that govern in that industry because of the uncertainty around what fair use is. And I think that, while I like the idea that it can be dynamic, I think the American law would be improved significantly if we added certain clear exemptions that we believe are fair use. And especially in the context of film, an exemption similar to the kind of exemption newspapers have because of the *New York Times vs. Sullivan* case, which says so long as it's not actual malice, if you produce something false you're not going to

be sued for it. There ought to be a similar idea with at least documentary filmmakers that if it's not blatant the way you're stealing other work then there's a cushion around you so that you're not fearful of being driven into court.

The second thing about piracy is, you're right. So I don't spend a lot of time defining what I mean by "piracy." And that's because I, along with economists from forever, most recently Joe Stiglitz, along with American history, which of course didn't protect foreign copyright until 1891, believe that it's inappropriate for developing nations to be burdened with the same level of copyright protection that exists in the developed nations. I think it's inappropriate. Stiglitz has made these very strong arguments about how it's economically destructive. But let's just take the more neutral claim. It's just inappropriate. So the idea that the United States exercises its power through trade negotiations to force developing nations not just to come to the United States' standards, but in the case of China to exceed the United States' standards is, I think, fundamentally immoral. It's unjust. So you're right. What I said actually was, properly defined, I'm against piracy. We can have a long conversation about what "properly defined" would include, and it wouldn't include the United States' definition of what IP should be internationally.

**Alison Bernstein, Ford Foundation:** In some sense, being an historian, there are really two parts to this. One is the creative commons that predates the new phenomena that you've been describing so thoughtfully, clearly, articulately. And I want to go back to the Naxos/EMI case because, in a sense, if I understand what you spelled out. EMI was claiming a copyright related to the production of those sound recordings that continues to this day in the U.S., but isn't the case in Britain. So we're not talking about developed countries versus non-developed. We're talking about two so-called regimes that were in conflict. What was the argument that Naxos provided to make the case that maybe there could be non-exclusive rights or some sort of shared rights? Because it goes very much back to a very current issue for us here with regard to the rights to Henry Hampton's material in *Eyes on the Prize*. Hampton is dead. I suspect we're talking about Bach and Telemann. They're not around to talk about whether or not they would open up this to Naxos or not. So I would like you to go a little deeper on the question of creativity, which is not current, where the individual can be identified, and how you would argue a slightly different regime so that EMI didn't walk away with everything and Naxos had a chance to distribute in the United States.

**Lessig:** A lot of this problem gets created by conceiving of these as exclusive rights. So that in the United States common law context that's the only way to conceive of the right. So what happened in the Naxos case, the judges looked at one commercial entity versus another commercial entity, and that's the only thing they focused on. And so the question is should one commercial entity be able to get something of value for free, or should they have to negotiate with at least someone who has some claim in the command in the title producing the value? And they adopted the second position and were oblivious to the fact that by protecting that 1% of recordings they basically obliterated the opportunity for the 99% of recordings that would be produced in a non-commercial way or in archives that wouldn't have any commercial relationship to them. The solution to



this, is again something Jamie was suggesting in his intervention, is to begin to think. I would prefer to think about these things entering the public domain. And the simple way to do that is to say, you can have, let's say 50 years after something is copyrighted, you've got to register it and pay one dollar. And if you don't pay one dollar it passes into the public domain and therefore it's free for anybody to use. So public domain is a non-exclusive space. Everybody gets to use it for free. But a middle position that I think actually has lots of plausibility politically is to create a kind of statutory right. So the statutory right is anybody can use it. If you make money off of it, then there's a certain percentage of your royalties that gets put into a fund and people can claim that royalty. But if what you're doing is building an archive of all these recordings then you're not making money off it. You don't have to pay anything. So there's a way to use a modification of the "property right" to think of it more as a liability rule that says you use the resource but you have to pay a certain flat price. That would block a lot of this problem. And I'd be really happy to see that as second best to the first best, which is to go back to a system where stuff clearly passed to the public domain. And the only stuff protected was stuff that was clearly registered or marked as protected.

**Alan Divack, Ford Foundation:** Given the urgency of the situation, is it appropriate to focus on developing private reform first if Digital Rights Management and threats like that are as imminent as they seem to be, shouldn't we be focusing on a more frontal assault, or frontal examination of the intellectual property system?

**Lessig:** I got into this battle around the Sonny Bono Copyright Term Extension Act, Congress's eleventh extension of copyright in the last 40 years. Copyright clause says that Congress has the power to "promote the progress of science by securing for limited times to authors exclusive right to their writings." I trained as a Constitutional scholar, having clerked for one of the most conservative justices on the Supreme Court, read that text, read the original meaning, read what Congress had done, and said, This is simple. It's unconstitutional. They can't extend the terms of copyright. It's inconsistent with what "limited times" meant. So put together a case, raced to the Supreme Court, totally confident that if those five conservative justices applied their principles to this question, we would win. A frontal assault would succeed. I remember just before I argued the case one of my friends, who was a critical legal studies guy said, you know, Larry, you've totally convinced me. You're right, as a matter of principle they cannot rule against you. But when was the last time the Supreme Court voted against all the money in the world? And you think about it, you know, *Brown vs. Board* was against a bunch of Southern racists. It wasn't all the money in the world.

So my point is what this experience, what I really felt in fighting that and losing in that experience, the problem was there wasn't a wide-ranging recognition in the ordinary populace about the significance and salience of this. You had the librarian associations in Washington in that case, but librarians around the world didn't recognize what was going on here. Teachers didn't recognize how these rules will make it impossible for them to use this media in a way that would really advance them. So my view is in our political system, where rights really are only protected as the democratic branch cares about it, not the judicial branch. The democratic branch is really what drives the protection of rights.

We've got to broaden the understanding of this issue. It's got to be we build a coalition of people who increasingly see this is ridiculous. So our strategy is we've got 53 million of these licenses out there, let's have 10 billion of these licenses out there. And when that happens then people see that there's a space between the zero and the one in the way this debate is framed right now. The debate is framed that either you're on Jack Valenti's side, which is perfect control to the copyright owner. Or you're an anarchist. You don't believe in property at all. And we've got a spectrum of positions here. People who believe in copyright, but they believe a lot of rights ought to be released. And I think it's essential that that recognition spread.

Now if you told me you controlled the Republican party, and you could get the Republican Congress and the Presidency and the Court to buy into the vision that I've tried to sell to them, I'd be happy to go home. I'm tired of this. I really just want to go and raise my kid. So I'd be happy to do it, but I don't think it's going to happen.