A critical part of the Creative Commons strategy has been the ‘porting’ of the Creative Commons licences to national jurisdictions.

In this presentation leaders of the Australian iCommons movement (QUT’s Deputy Vice Chancellor Tom Cochrane and Ian Oi) along with the Assistant Director of Creative Commons, San Francisco (Neeru Paharia) talk about their experiences internationalising the Creative Commons.

Professor Brian Fitzgerald
(Head, QUT Law School)
TOM COCHRANE, DVC QUT TILS

My name is Tom Cochrane, Deputy Vice Chancellor here at QUT and on behalf of QUT I would like to add a note of welcome to this relatively temperate January day in Brisbane.

Brian Fitzgerald, whom I am sure, just about everyone here knows, first approached me over a year ago with a speculative question about the University’s attitude towards becoming formally connected with the Creative Commons initiative. Part of this involved the concept of an institutional affiliation. We did not hesitate. The reason for this was simply that our recognition of the universality of issues involved in this area meant that responses needed to be done rapidly.

In an atmosphere of increasingly polarised views, innovative and creative approaches to intellectual property law, particularly those which constitute interest in compromises, are increasingly attractive to a wider and wider range of concerned people. It is my view that the licensing issues that we are discussing here are themselves one of the best forms of response to some of the tensions that we have heard described earlier today.

I did have a few remarks that I was going to make about the free-trade agreement, but a fair few of those have been made already by Justice Sackville, and I would only add to those querulous observations. One is to ask, looking back, which sugar producer, which beef lobbyist in Australia, could possibly have entertained a view of the future in which they would understand, if they would care to, that half of the bill – physically the text of the bill – to implement the FTA in Australia (which is a 140 page document), 70 pages of those were concerned with the required amendments to the Australian Copyright Legislation.

My second querulous observation is to ask that, if one accepted that the United States may have a strategic international interest in effectively extending its own precedent setting copyright legislation – the well-known DMCA – to other jurisdictions by the most efficient means possible – this would be through bilateral trade negotiations. And with what more willing partner on the globe with which to have an experimental first step at
almost complete compliance? Perhaps content with those two questions we should pass to the main session. I merely make those comments to add to a view about the huge importance of the issues about which this conference is concerned at all levels. In building a different kind of future, it is my belief that a progressive and constructive approach is the iCommons Project.

Our first speaker is Neeru Paharia. Neeru is an Assistant Director of Creative Commons. She graduated from the University of California at Davis in 1997 and received a Master of Science in Public Policy and Management, concentrating on information systems from Carnegie Melon University in 2000. Prior to Graduate School Neeru spent a year in the Kyro Fellowship program, a leadership program in public affairs. Neeru comes to Creative Commons from McKinsey & Co where she worked as an associate consultant. She is also a film-maker, illustrator and blues guitar player and she has shown her work in various film festivals and publications. This is her first time in Australia.

Ian Oi is Special Counsel in the Canberra office of Blake Dawson Waldron. He practices primarily in the area of information technology, communications, intellectual property and cyberlaw. For a number of years, he has particularly focussed on the development of licensing, distribution and management of Open Content and Open Source Software. Among other things, Ian is Co-Project Lead and Leader of the Drafting Team for the iCommons Australia Project, which promotes Creative Commons licences in Australia. Ian has also drafted contractual frameworks for the development and deployment of Open Source Software and Open Source Software Licences in an Australian environment.

**Neeru Paharia**

Good morning, thanks for having me. I am filling in for Christiane Asschenfeldt who is our iCommons Coordinator. She could not be here today so I am here to talk about iCommons and to also tell you about a few of the other projects we are working on in Creative Commons.

First, congratulations on the Australian launch. It is fabulous.

To review very quickly: we offer copyright licences which are between a full copyright and the public domain. These are the attributes you can choose:
• Attribution
• No Commercial Use
• No Derivative Works
• Share Alike

You can choose a licence from our website. You will get a piece of code which you can paste into your webpage and it will display the ‘Some Rights Reserved’ logo next to the work you are licensing. That links to the Commons deed of the relevant legal code, which incorporate the chosen layers of the licence. The Creative Commons licence makes it clear to other people who wish to either download the work or re-use it in some capacity, that they can do that in the conditions specified under the licence.

iCommons

We started the project with licences that were based on US law. We found that it is necessary to translate these licences, at least the legal layer of the licences, not necessarily the Commons deed or the digital code into different languages and into different legal jurisdictions. We have done this by developing a porting process where we identify a project lead, they produce a draft, we go through a public discussion, we do another draft, a review and then finally adoption.

Here is a little bit of the Creative Commons timeline. In 2001-02 work began on the original Creative Commons licences. In December 2002, we launched the first versions of the licences. In April 2003, Christiane Asschenfeldt joined us to begin iCommons, working with institutions around the world to port the legal level of the licences into different legal jurisdictions. In March 2004 we launched our first country – Japan. Over the year, eleven more countries have launched licences. In January 2005 Croatia launched their Creative Commons and today we are here in Australia.

Here is an overview of some of the countries we have been launching. Australia has now moved into porting licences to join fourteen countries with licences. We are in discussions with over seventy countries, and hopefully we will have 84 soon. As iCommons evolves we are moving in a few different directions. We have been working on building the number of countries that have licences, talking to as many countries as possible. We also are hoping to build some infrastructure to increase the number of licence-adoptors, to build some community building efforts in countries to
work with institutions, artists, any kind of content-creators to licence their work. Hopefully the total amount of licensed content will grow by following these two different axes.

There have been some porting challenges, because laws are different all over the world. The most significant challenges that actually may impact on the Commons deed are to do with: attribution and moral rights, which have some impact upon derivative rights; and agreements with collecting societies where authors may not be able to waive either their Commercial or Non-Commercial rights.

So what else do we do?

Christiane Asschenfeldt runs the whole iCommons Project, so what do the rest of us do? We pretty much just hang out in San Francisco. There are other a lot of other things that we do at Creative Commons and I hope to share some of those things with you today, because I believe they are very exciting and they can also hopefully inspire you to do some of the same.

We think of what we do in three main buckets:
1. get as much content licensed as possible
2. make that stuff all searchable
3. get people to re-use that content

One of the aspects of the licences is this piece of machine-readable code. It is RDF Code, it actually goes into the html code of your webpage, and you never see it. However, computers can read this Code and can do really interesting things with it. One of the main things that we use the RDF for is to build a semantics search engine. What the search engine can do, is that it can go onto the web, it can find the subset of the web, that is under a Creative Commons licence, it can discern what kinds of items those are and what kinds of licences they are under. The semantic web is a vision of the World Wide Web consortium and Tim Berners-Lee as well.

We have built a first-instance of a semantic search engine using Creative Commons. If you have heard of Mozilla the Open Source Browser Software, they actually have a search box in the corner where you can find our search engine. You can, for example, do a search such as ‘find me all images of sunsets that I can modify and build upon’. You can download the chosen photo, alter it and republish it under the Attribution Non-Commercial Share-Alike licence. That is Creative Commons in action.
Also, Mozilla has a plug in, where if you visit a webpage that has a Creative Commons licence on it, the icons will show up in the bottom corner of the webpage, and that is also facilitated by the RDF Code that goes into the webpage.

Another project that we are working on, that we are really excited about, is called ccPublisher. This is the Internet Archive. They want to host everything they can. They have a bunch of different projects, but their main goal is to archive the whole Internet. They have this thing called the ‘Way Back Machine’ and you can type in a URL like Yahoo 1995 and get a page of what Yahoo looked like in 1995. It is very cool, especially if you have disputes with people about information which Professor Lessig can also tell you about. It is a very good tool to know about.

The other great thing about the Internet Archive is that they will host Creative Commons licensed works for free. We have capitalised off this by building a desktop tool called ccPublisher. What does it do? You can download ccPublisher, drag and drop your files and choose a Creative Commons licence. It will then imbed the licence information into the MP3 file itself, it will upload it onto the Internet Archive for you and return to you a URL where you can download your song (which can be converted into various formats for streaming and download). Now your song has been published to the Internet for free to the Internet Archive and it will be there forever. This tool also works with video and audio, and we hope it is a way that people can actually more easily publish their content to the web.

We recently did a project with Wired Magazine where they released sixteen songs under a Creative Commons Sampling Licence. What the licence allows you to do is to fileshare all of the songs and to sample them. In some cases you can sample the songs commercially and in some cases non-commercially, but you are allowed to fileshare all the songs. Among the artists are David Byrne, Gilberto Gil, the Beastie Boys and others.

It was really great that the CD came out, but we thought we really want people to start interacting with the CD – they have the rights to do it – let us find a way to get people excited about remixing this stuff. We have just launched a contest called ‘The Fine Art of Sampling Contest’ which you can find at CC Mixter (http://ccmixter.org/). If any of you are interested in music mixing or not interested in music mixing you should try it anyway and enter the contest. Basically you download the songs, throw them into a music editing software, mix them up and then upload them back into the system. There are two different categories. In one category the winner will
be in the next Chuck D *Fine Arts Militia* album. In the other category, we will be releasing the CD with *Wired* CD with the best remixes and just promote it as much as we can.

This is a good segue into talking about Mixter, the new content management system, another software project we have been working on. It is like Fenster and Orchid, which are social networking software programs which show how people are connected to each. Mixter Software is a content management system that basically does the same thing; however, it also shows how content is related to other content. For example, if I am on someone’s homepage and he or she likes, for example, Sound Forge, I can click on a link and see who else likes Sound Forge. This is exactly how Fenster and Orchid work. The more significant feature about Mixter is you can see how music is related to other music. You can listen to samples and you can visit other homepages as well. You can see how this content is related to other content and how people are remixing each other’s stuff. This is one of the most exciting things about Creative Commons, the whole concept of remixes, that Professor Lessig talked about. But we thought why not facilitate this, why not make this explicit in these kinds of communities, so people can really see how content is built and changed when different people interact with it.

We will be releasing this content management system under an Open Source GPL Licence, and anybody can start their own Mixter communities – blues guitar mixter, video mixter, mystery mixter, education mixter – which I think is one of the most compelling cases for it. With this particular case of Mixter we are going to start a web-stream, like a remix radio-stream. You can imagine you are listening to a stream of radio, you like a song, you click on, you download it, remix it and put it back into the queue.

These are some of the technology projects we are working on. There are a few more in the areas of:

- Business development
- Community development
- Content recruitment
Here are some examples of projects using Creative Commons licences.

*The Corporation*

I do not know if any of you have or heard of *The Corporation*. It is a documentary film that came out of Canada. About 75 percent of their B rolls came from the Prelinger Archives which is hosted on the Internet Archive, it is all public domain footage. There is a very compelling case for a pretty astounding film that made a significant use out of public domain material. It was all free.

*Magnatune*

Thinking a little about some of the commercial value of Creative Commons – what Magnatune (music label) does, is to release MP3 files for free under Creative Commons licences. They make their money by selling wave files and by licensing the music to videogame producers and for commercials. If you are a non-profit filmmaker, you can use it under the Creative Commons licence. They have a very innovative way of price-discriminating between different uses, and they use Creative Commons as one piece of that.

*Public Library of Science*

This is an Open Access journal that recently started in the San Francisco bay area. It has received a lot of attention. All their publications are under the Creative Commons Attribution Licence.

*MIT OpenCourseware Repository*

This is an open repository full of lesson plans, all under Creative Commons licences. They put all these lessons up and people from Vietnam and Spain and from all over the world are downloading these lesson plans, translating them and using them in their classes, all without any kind of transaction cost.

*ACRO Repository*

Australian Creative Resources Online (ACRO) is the concept of a digital junkyard where some of the footage you take is valuable and you use it, but then 90 percent of it you throw away. This is placed in the repository and people can use it for different things. I was in discussions with Phil Graham for about a year about this. I was glad to hear that it is coming along.
Youth Media Projects

Another very compelling case for Creative Commons, where young people want to make news and share content with each other, they can rip stuff off each other, edit it and make new stories in this collaborative way. We talk a lot to different organisations about integrating the licences into their systems. On a popular music community – garageband.com – you can upload your song and as you are uploading your song, you can choose a Creative Commons licence.

Morpheus

Another project we have been working on is with Morpheus in the peer-to-peer (P2P) basin. A lot of this is with embedding licence information into MP3s, which the ccPublisher and a few other applications do for you. What you can do is to embed your Creative Commons licence into the MP3 and then if you are on Morpheus and are searching for CC sampling it will show you a group of tracks that are under various Creative Commons licences and then you can download them. This is a very good tool to find non-infringing content on the P2P networks.

Flickr

Flickr image site is another positive Creative Commons project which already has over half a million images under the licences.

Sound Click

Sound Click music community has about 90,000 songs under Creative Commons licences.

That brings us to the question of how we curate this. We think there is an opportunity there for anybody who wants to go through the Creative Commons pool and find the good stuff and pull the good stuff out. iCommons is really about the community-building phase, about how to go out in partner with institutions, broadcasting services and artists’ associations to get people thinking about Creative Commons and interested in adopting the licences.

We have also been working on some legal innovations, such as: the Developing Nations Licence; the Sampling Licence; the CC GPL which is not a licence, but it is wrapping our metadata and commons deed model
around the GPL; the shared music licence; and the Science Commons, which Professor Lessig also mentioned.

Here are a few statistics to give you a sense of how we have been doing. As I mentioned before, we launched the original suite of licences in December 2002. At the current point in time, around 5 million webpages link back to our licences, and according to Yahoo’s index, one out of 1200 pages has a CC licence on it. This is pretty astounding considering the size of the Web. Our growth rate has been positive – around a 47-50 percent quarterly growth rate in terms of traffic. If you Google a search under Creative Commons there is a huge spike in the last couple of months – a very high growth rate.

I mentioned a little about the different attributes and we have also been able to see what people are choosing. Before, when you could choose Attribution, which you can no longer do, 97 percent of people chose to require attribution. In the case of Derivative Works about 67 percent of the people chose to allow people to make Derivative uses of their work. About 67 percent also, disallowed commercial use – some interesting statistics about how people think about their content. Most people are very happy that people take their work and do different things with it. They don’t want them to make money off it and they want credit for it.

To close, we also ran a moving-image contest last year where we asked people to make a video that explained our mission better than we could. We received a lot of different entries and the best one made use of public domain footage. He took a lot of public domain footage, he took Creative Commons licensed music and he mixed it up.

IAN OI

My presentation is decidedly low-tech. In fact it is the most mundane of the presentations here. What I am going to cover is a bit of the background on the iCommons Australia team in terms of where we came from, how we got our act together and how we got to this point, and some of the developments that we will be looking to develop in the near future.

I will preface it by saying that a lot of my material is in an article that Brian Fitzgerald, Tom Cochrane, myself and Vicki Tsamitas drafted for the book
The book is put together by our good colleagues at iCommons in France and collates together an excellent collection of materials from Germany, Netherlands, Taiwan, Sweden, Finland and Australia regarding the International Commons project. It is of course licensed under a CC Licence, and you can download it all off the Internet.

The process of iCommons coming together is in a sense crystallised in this book. But, in relation to the Australian aspect, I have to say that my personal involvement in iCommons really crystallised at a symposium of copyright lawyers in November 2001 when I met Brian and Tom. We were talking about Creative Commons and realised that no one to our knowledge was doing anything about implementing this into Australia. It took a while to get our act together, but in the course of doing so we developed a team of interested people, primarily lawyers from around Australia, from Brisbane, Sydney and even some expatriates over in the US. We started by looking at the US generic licence forms and following through the principles of the porting process. There were two kinds of considerations that we had to bear in mind. First, in the porting process, it was very important for us not to lose sight of the overall objective of providing and implementing a coherent, consistent international licensing regime for the Creative Commons licences, so that the same licensing elements (and the same things that we thought we were licensing in Australia) would be licensed in the same way anywhere else in the world. Of course, our US colleagues would say the objective was the other way around. Our perspective was that if you are an Australian licensor and you are using Australian licences you should have the same certainty around the world as you would in Australia, and the same effect.

Secondly, we also needed to ensure that particular aspects of Australian law that might not be present in the US or other jurisdictions were properly reflected so that you did get that same effect in general in those other jurisdictions. Even if the letter of the licence was not exactly the same, you would have the same effect, and you would not necessarily need a lawyer to interpret the licence to tell you that it had the same effect. You could simply look up the human readable code for that licence and be pretty certain that the same effect was carried out.

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<http://fr.creativecommons.org/iCommonsAtTheDigitalAge.pdf> at 1 February 2007
Arising from that, there were a couple of drafting things that we went through – three or four different things that were unique to Australia that we had to take into account. Sometimes the Australian law made itself into the drafting. At other times, we took the Australian law into account but said ‘no, we do not need to do anything with the licence, but we may need to follow this up’. One of those things was GST (Goods and Sales Tax) law, which has a very broad statutory definition of what is a supply and what the tax might possibly apply to. We had to consider whether we had deal with this in the licences. At the end of the day, we decided we do not have to deal with this in the licence, but what we will do as a follow-up activity is to provide some commentary to ensure that people who are using Creative Commons licences do not inadvertently fall into a situation where they will be subject to an Australian law regarding a particular tax that they did not realise would be imposed in that situation.

Another category of things we considered was liability provisions. The generic Creative Commons licences have a provision, drafted based on US law, that says ‘OK, no responsibility is taken, these materials are provided as is’ and if you want any more assurance, you need to obtain that assurance outside the licence. To make that effective in Australian law, we have to accommodate particular laws such as the Trade Practices Act, which make it very difficult to have a disclaimer of liability in certain kinds of transactions unless it is in a particular form. We drafted some wording in there, some legalese to deal with that. Consequently the net effect is the same as under US law, but the wording is slightly different because it accommodates Australian legal peculiarities.

There are two other areas which are a little bit more interesting. One of them is to do with commercial royalties in Australia, particularly as those royalties are collected by collecting societies. The second issue is moral rights. We have in Australia a statutory regime that is comprehensive regarding the moral rights of creators and authors and it has implications for the licences which we had to decide how to deal with.

Dealing with the commercial royalties issue, the generic form of the licence reserves to the licensor the exclusive right to collect royalties for any public performance of the licensed work or any cover version that may be created from that licensed work, if the performance or subsequent distribution of a cover version is intended for commercial purposes, effectively commercial advantage or monetary compensation.
There are a couple of things about the Australian environment that, we noted, make it a little bit different to the US. The first is, in relation to musical works and music that is going to be performed and communicated, that under Australian law, the performance rights collecting society (that is Australasian Performing Right Association (APRA)) cannot legally collect royalties for the exercise of the performance right of musical works – to perform a music work – unless APRA has first been assigned the rights.

All APRA’s 33,000 members have to assign to APRA all their public performance rights, before APRA can collect the royalties on their behalf. Those 33,000 members include all Australian song writers and composers whose works are applied commercially. That affects a significant proportion of the creators that are already out there and working, and who may wish to participate in the Creative Commons. This is something that APRA members and anyone who potentially wants to become an APRA member will have to be aware of. They will not be in a position to use a Creative Commons licence to license their works, unless they have reached some alternative arrangement.

The wording of the Australian licence accommodates this up to a point, but there is still a danger and a risk for potential APRA members who do not realise what they are doing to potentially get themselves into trouble by trying to license out something that they may have effectively signed away to someone else. This is a follow-up area of work, and the people at APRA have been very good at giving feedback and comments on the effect and the potential interaction with Creative Commons. I look forward to working with them to develop some further commentary and to get some guidance out, and to find easier ways for creators to both work with Creative Commons and to also collect royalties via APRA. That is one area of work that needs to be done: collaboration with collecting societies in Australia and other organisations that are relevant.

The last thing I am going to talk about from a legal point of view is the moral rights side. The Creative Commons licence has already recognised a right of attribution, that is to say, the right to have your name put on a work if you are the creator. In Australia, we have a statutory regime that recognises that particular attribution right. There is no inconsistency in principle of policy between the Creative Commons licence and our Australian statutory scheme, but we needed to tweak the licence wording a little bit in that area.
There is however another moral right which caused a bit more of an issue for us to think about, and that is the right of integrity. This is the right of the creator not to have their work used, altered or changed in a way that would be damaging to their reputation. This is something that is not directly dealt with in a Creative Commons licence. The Creative Commons licence rights are very broad. They would allow you to do anything that comprises the rights in copyright, except to the extent that the rights are reserved. This is where there is a little bit of ambiguity. The wording says that if there are rights that are not expressly granted, they are reserved. This wording in the licence potentially could be interpreted ambiguously, as to whether the moral right regarding integrity was being asserted under licence so that a user could do anything except alter it to damage someone’s reputation, or whether the silence means that the user can do anything regardless of the moral right of integrity.

We thought about this, and started correspondence with our international colleagues in Canada and UK and there was a lot of toing and froing of positions. One of the things that weighed on us in Australia at the end of the day was that, the person who is in a position to waive moral rights to consent to uses that would damage their reputation is the author and only the author, not the copyright owner, who may or may not be the author. In other words, the person who is in position to grant the licence of a Creative Commons’ work may or may not be in a position to grant that moral rights consent. Because of this potential gap, the interim position that we have adopted for this licence is to affirm that moral right of integrity. The licence provides that you can do anything you like except that you cannot damage the author’s reputation. I stress that this is an interim step. One of the things we and the Canadians (who are also in the same position - they have a similar statutory scheme), want to work towards is developing an option within one of the licence attributes for Creative Commons for this very issue. Do you want to go in and allow people to do anything they like? Or, do you want them to do whatever they like except if it damages your reputation? We see the best solution as being to give people this choice.

In terms of legal issues, those are basically the main features of what we considered and did. We changed the spelling of licence from LICENSE (the US usage) all the way through the documents to LICENCE (the Australian usage). I have to say that I did not care so much about this spelling change, but other people on the drafting team did care about it, so they won. We are at the stage now where the Australian licences have gone live. We have some work to do regarding: providing more guidance to make these licences more usable; cutting out the middle man of lawyers, by
way of working with other organisations such as collecting societies to make arrangements smoother; and putting out more information out there to make the Creative Commons Australia licences more practical.