

PART TWO

THE UNITED STATES OF COPYRIGHT

ETHICS, REALITY AND REMIX

REMARKS INTRODUCING KEYNOTE SPEAKER PROFESSOR LAWRENCE LESSIG

The Hon Michael Kirby

Ladies and gentlemen and Professor Lessig, we are very lucky to meet on this day in this wonderful building and to have had such a fantastic session this morning. I mean, I missed the first couple of speakers because I had to attend an Australia Day Council Breakfast in Sydney (which is one of those awful American traditions that seems to be spreading to our country) and then came down here, but I came in time to hear the tremendous talk given by Professor Zines and also by Professor Sterling and I think we were very fortunate to have heard their input.

I knew all of those people – I knew Sir John Spicer – I appeared before him as a young barrister quite often when he was the Chief Judge of the Commonwealth Industrial Court. He was a very fine and very temperate judge and he had some very angry judges who would sit with him. I attended his funeral in Toorak and he was a very fine and intelligent man. I knew Sir Nigel Bowen – he was my Chief Judge when I was appointed to the Federal Court of Australia and he was a considerable intellectual property lawyer. And I knew Bob Franki, just as Franki, who was a very courteous (and as John Gilchrist and I were saying) a very dignified person who if he gave his word, that was it. And I was very glad to hear a tribute paid to Lindsay Curtis who was truly one of the most fantastic officers of the Commonwealth that I ever worked with.

When I was appointed Chair of the Law Reform Commission back in 1975, Lindsay was the officer of the Commonwealth Attorney General's Department who worked with me and he was truly a brilliant man and a really hard worker. He helped to get the Law Reform Commission established. He helped to get the Administrative Review Council established. He himself worked with John Ewen in drafting the *Administrative Decisions Judicial Review Act* (the ADJR Act) which is one of the most influential statutes of the Commonwealth in bringing the rule of law to a reality in our country. His daughter is Lyndal Curtis, whose name you would have heard quite often on the ABC. She contacted me recently to say would I record something for her children so that they would know what a magnificent person Lindsay was, who died too young? So I'll tell her of what was said about him today, because we should remember these

wonderful civil servants who give their all, and are anonymous, but they are really very influential in our nation.

Now, two little comments, if I may, just very briefly before we get into the business of this session. Number one, I would say to Ben Atkinson, don't change your script about the source of the constitutional power in relation to the original, or the second Copyright Act. Though the imperial rulers of Australia no doubt thought that all the colonial parliament out there in Australia was doing was implementing their will.

There is an alternative theory which has gained force during the course of the last century, that of the sovereignty of the people of Australia being the source of the Constitution, and their having voted in the referenda for it, that the source of the power of the Federal Parliament to do anything lay in the sovereignty of the people of Australia, and in the constitutional document of this country, and that therefore, in incorporating the imperial Act, they were doing what they thought was appropriate for the people of Australia, and the sovereignty of Australia.

Ben, you can put a footnote – I will let you put a footnote. There is an alternative theory about the source of the imperial statute in Australia, but don't ever give away, ever – ever give away the sovereignty of the people of Australia.

Now the second point is, when I walked in, did you see this? I was sitting down humbly and quietly after my address this morning, and Leslie Zines said “some judges in this country, a minority view, take the view that the Constitution is a living document”, and then pointed at me! Now, if you look at what judges actually do in the High Court – if you look at what they did on the meaning of the word “jury” – I mean they didn't go back and say “well only men can sit in juries in federal trials, only people of property can sit in juries” – they updated it. Was that originalism?

If you also look at *Sue v Hill*¹ about a subject of the Queen, there is no doubt that in 1900, a subject of the Queen would have been a subject of the Queen, and that would have been it, and therefore, by saying, well, this was a subject of the Queen in the United Kingdom and that [therefore] she was disqualified from being a member of the Parliament of the Commonwealth, then that was not an originalist view. This is a debate they have in the United States – I'm telling you Professor Lessig, we have it here, and there are some who adhere to the view that you have got to go back to that original text. They don't actually have to have 1776 dictionaries in this country, only 1900, but it's not what they do, and therefore, we've got to keep our eye on what is actually done. I didn't want that to pass. I just want you to have the benefit of my views on that.

¹ [1999] HCA 30. Hill, a dual citizen of Australia and the United Kingdom, won election to the Australian Senate, and a voter challenged her election on the grounds that, under section 44(i) of the Constitution, a “subject or citizen” of a “foreign power” is not entitled to stand for Parliament. The High Court found that the United Kingdom is, under s.44(i), a “foreign power”.

It was fantastic to hear Adrian Sterling in his tribute to Lindsay Curtis. Telling of Attorney General Bowen. Telling that this was legal, not political. I hope no-one in the room believes any of this is legal, not political. And saying the motto of this Conference – I took a note – tremblingly I wrote down “easy access with easy licensing”. I would suggest there may be an alternative theory, and I think this might be closer to the view of our speaker.

This is, “easy access with justifiable licensing”, because there is a question as to what is the justifiability of licence. See, we don’t want lots of easy licensing for unjustifiable purposes. We want easy, maybe easy technical, licensing, but only in circumstances where there is a true public interest, and I thought that that was the whole purpose of this conference to be talking about thinking again, conceptually and freshly, about what is the purpose of intellectual property law, and copyright law in particular. I really found the session this morning terrific.

Now, this afternoon, we have one of the great gurus of the intellectual property law world, Professor Lessig of Stanford, previously at Harvard and at Chicago, the great universities of the United States of America, the writer of all of those books that you know. I was the first to quote him in the High Court of Australia in an extended footnote, and also, I quoted Brian Fitzgerald. That’s why he loves me, just because I quoted him. What wonderful leaders we have here with Sam Ricketson and really fantastic people who think through and look deeper at these issues.

I had the privilege to go to a conference at King’s College in London and the keynote speaker was Lawrence Lessig, and he came along and he really conveyed two really original ideas to my mind and did it very, very clearly, as he will now do today.

The first was the idea of code, and how we are talking about a very important issue which has puzzled me since my law reform days. In this age of rapid technology and changes in biotechnology, information technology, and so on, how can a parliament keep up? The somewhat sobering news that Lawrence Lessig brought was, well, in part, that that is a question that has been bypassed, because now, often with information technology, and the multinational corporations that control it, the law is effectively embedded in the technology, and the local legislature is not always capable of changing how it works. The universality of the technology, which is what Professor Sterling was talking about, is really controlled by this phenomenon, and “code” is his word for it. I thought that was a really important point.

Professor Lessig really gave a fantastic presentation of the ideas that he has to the conference in London and I’m sure he is going to do so again today. So, without further ado, I would invite Professor Lessig to come forward, and to present, and then we are going to have an interaction afterwards, so that there will be a real dialogue at this meeting.

“CULTURE WARS”: GETTING TO PEACE

*Professor Lawrence Lessig*¹

KEYNOTE ADDRESS

I start with some stories and then an observation on the way to an argument about what we should do about “The Culture Wars”.

The first story

A long time ago in a place far away (Europe), the elite spoke Latin while the masses spoke “vulgar” languages (English, French and Germany). The elite ignored the masses. The masses ignored the elite.

The second story

In 1927, Huxley, wrote this:

In the days before machinery men and women who wanted to amuse themselves were compelled, in their humble way, to be artists. Now they sit still and permit professionals to entertain them by the aid of machinery. It is

¹ Professor Lawrence Lessig is Director of the Edmund J Safra Foundation Center for Ethics at Harvard University, a Professor of Law at Harvard Law School and former Professor of Law at Stanford Law School. He is a founder of the Creative Commons organisation, which enables copyright holders to license their work online for primarily non-commercial purposes, and Change Congress, an organisation dedicated to changing the system that requires members of Congress to solicit private donations in order to fund election campaigns. Professor Lessig is perhaps the world’s most famous exponent, and critic, of copyright policy in the United States. He has written seminal works on information policy, focusing on the social and economic effect of government regulation of the use of digital communications technology. He has written several seminal works, including *Code and Other Laws of Cyberspace* (1999) and *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (2008).

difficult to believe that general artistic culture can flourish in this atmosphere of passivity.²

John Philip Souza had uttered that very same idea about two decades before. Souza was testifying at the United States Capitol about what he called “the talking machines.” As he said:

These talking machines are going to ruin the artistic development of music in this country. When I was a boy ... in front of every house in the summer evenings you would find young people together singing the songs of the day or the old songs. Today you hear these infernal machines going night and day. We will not have a vocal chord left. The vocal chords will be eliminated by a process of evolution, as was the tail of man when he came from the ape.

This is a picture: the picture of young people singing the songs of the day or the old songs. It is a picture of culture that we might call, using modern computer terminology, a kind of “read-write” culture. It’s a culture where people participate in the creation and re-creation of their culture. In this sense it is read-write.

Souza’s fear was that we would lose the capacity to engage in this read-write culture because of these “infernal machines”. They would take it away – displace it – and in its place we would have the opposite of read-write culture, what could call, using modern computer terminology, a kind of “read-only” culture. A culture where creativity was consumed, but the consumer was not a creator; a culture, which was top-down, where the “vocal chords” of the millions of ordinary people have been lost.

If you look back at the 20th century, at least in what we call the “developed world”, it is very hard not to conclude that John Philip Souza was right. Never before in the history of culture had its production become as concentrated. Never before had it become professionalised. Never before had the ordinary people’s creativity been effectively displaced and displaced for precisely the reasons that Souza spoke of because of these “infernal machines”. The 20th Century was the century of read only culture, and it stands against a background of read-write culture from the beginning of man.

Why was it like this? The answer is technical, or at least largely technical. This was the age of broadcasting and vinyl. It produced a culture that could do little more than passively consume. It enabled efficient consumption, thus “reading”, but inefficient production, at least by ordinary people, thus “writing.” It was an age wired for mass reading; it was an age that discouraged mass writing.

² Huxley, Aldous, *The Doors of Perception* Harper & Bros, 1954.

The third story

In 1919, the United States voted itself dry. By a constitutional amendment, the nation launched a war against an obvious evil: the dependence upon intoxicating liquors. This was a war waged first by the progressives of the era, people who thought they could use law to make man better.

A decade later, this war was largely failing. The police found it increasingly difficult to stop the illegal trade of intoxicating liquor. They therefore adopted new techniques to fight back. One such technology was the wiretap. And in a case involving Roy Olmstead and other defendants,³ the Supreme Court had to consider whether this technique, the wiretap, was legal.

To answer that question, the Supreme Court looked at our Constitution — in particular to the Fourth Amendment. That Amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The question the Court had to answer was whether police attaching a wiretap to the telephones of Roy Olmstead and his associates, without any judicial authorisation, violated this prescription against “unreasonable searches and seizures”.

The Chief Justice of the Supreme Court, former President William Howard Taft, looked at the objectives of the Fourth Amendment. These, he held, were to protect against “trespassing.” Wiretapping, however didn’t necessarily involve any trespass. There was no need to enter the apartment of Mr Olmstead to tap his phones. The police just needed to attach an alligator clip to the telephone wire once it left the apartment. Since there was no trespass, Taft held, there could be no violation of the Fourth Amendment. And thus was there no constitutional proscription against the government tapping telephones in the United States until the Court reversed itself until 1968.

More important than the opinion of the Court was a critical dissent by Justice Louis Brandeis. There was a principle at stake here, Brandeis wrote. That principle

³ *Olmstead v United States* 277 US 438 (1928). The Supreme Court considered whether police wiretapping of the telephone of a bootlegger, Roy Olmstead, violated rights of privacy and against self-incrimination protected by the fourth and fifth amendments of the Constitution. The Court upheld Olmstead’s conviction for bootlegging and he served a four year prison sentence.

was to protect against a certain kind of invasion. It was, in other words, to protect “privacy.” But how you protect privacy is a function of technology. Citing an earlier case, Brandeis wrote, “time works changes” in those technologies. And thus the objective of the Court must be to translate old protections into a new context.

Brandeis lost, and the wiretap won. But by 1933, the war against intoxicating liquor had been deemed a failure. Increasing costs — the rise in organised crime, the fall in civil rights — and vanishing benefits — everyone drank, Prohibition notwithstanding — led the country to realise that perhaps costs outweighed the benefits. In 1933, Prohibition was ended and peace was declared by a constitutional amendment that repealed the constitutional amendment that had banned the sale of intoxicating liquors.

But the important point to recognise here was that what was repealed was not the aim to fight dependence on alcohol. All that was “repealed” was the idea of using war, or this metaphorical war, as a means to fight that dependence on intoxicating alcohol

Observations

Think about the idea of “writing”. Writing is a quintessentially democratic activity. I don’t mean that we vote upon what you are allowed to write. I mean instead that we expect everyone to have the capacity to write. Indeed, we teach our children how to write, and we measure the quality of their education on the basis of how well they write.

Why is it that we teach our kids how to write? I can understand why we teach them how to write in 1st grade to 8th grade, when they learn the basics to understand how to use words to communicate. But why do we waste our time teaching them to write from about 9th grade to college? Why do we tell them they have to write essays on Shakespeare or Hemingway or worse still, Proust? Why would anybody force their children into this activity? What do they expect to gain, because I can assure you, as a Professor who reads the writing of many students, that the vast majority of this writing is just “crap”. So why do we do it?

The answer is obvious, but we should remark it nonetheless. We all understand that we learn something in the act of writing even if what we write is no good. We learn, if nothing else, respect for just how hard this creativity is, and we learn the value of the ability to engage in that creativity.

Now within this democratic activity of writing, think about a particular activity called “quoting.” I had a friend in college who wrote essays that were essentially the stringing together, in the most elaborate and artistic way, of quotes that he had

gathered from other writing, in order to make a point that was the point of his essay. He always got the very highest grades for that writing. He took it for granted that he could take, and use, and build upon, other people's writing, without permission from anyone — at least so long as he cited the original source accurately.

So long as you cite, we believe you can take and build upon anybody's work. Indeed, imagine what it would be like the other way round, imagine having to ask permission before you quoted someone's work. Imagine how absurd it would be for my friend to call the Hemingway estate to ask for permission to quote Hemingway in his college essay. Imagine how absurd it would be, and then you would understand how you too believe writing and quoting are an essentially democratic form of expression. Democratic in the sense that we all take for granted the right to take, and use, other people's work freely.

Argument

Think about writing or creating in a digital age. What should the freedom to write, or the freedom to quote, or the freedom to remix, in a digital age be?

In answering that question, notice the parallels with the stories that I told you.

As with the fight over Prohibition, right now in the United States, we are engaged in a war, the copyright wars, war which my friend, the late Jack Valenti, Head of the Motion Picture Association of America, used to refer to as his own "terrorist" war, where the terrorists in this war are our children.

As with the fight Souza was engaged in, this war is inspired by artists and an industry terrified that changes in technology will effect a radical change in how culture gets made.

And as with the war that led to prohibition, there is a fundamental question about these copyright wars that we need to raise: are the costs of this war greater than the benefits?

To answer that last question — in my view, the critical question — we have to think first about the benefits of copyright.

Copyright is a solution to a particular kind of problem. In my view, it is an essential solution to an unavoidable problem. Without the restriction on speech that copyright is, we would, paradoxically, have less speech. Copyright limits freedom, the freedom to unreservedly copy other people's work, or compete with the original creator of creative work, in order to inspire more free speech.

We limit this freedom — through regulation — to give creators the incentive they need to create more free speech. But as with privacy, the right regulation is going to be a function of the technology of the time. As technology changes, the architecture of the right regulation will change as well. What made sense in one period will make no sense in another. Instead, we need to adjust the architecture of regulation, so the same value protected before in a different context can be protected now in the new context.

With copyright, what would that right regulation look like today?

I believe with Souza that we need to distinguish between the amateur and the professional, but recognise that we need a copyright system that encourages both. We need the incentives for the professional, but also freedom for the amateur.

How could we achieve that?

If we watch the evolution of digital technologies, we can begin to see how the law could cope with both.

Think of this evolution in two stages: The first stage begins around 2000. In this stage, digital technologies simply extend the read only culture from our past. Technologies that make it massively efficient to get and consume culture created elsewhere: Apple is the poster child of this vision of culture, with its iTunes music store, allowing you for 99 cents to download any song you want to your iPod (and only to your iPod), and in the United States, at least mark yourself as cool. This is the vision my colleague, Paul Goldstein, spoke of when he described the “celestial jukebox” — enabling you at any time, whenever you want, to access any culture you want.⁴ This is a critically important model for providing and supporting culture, facilitating an enormous diversity of culture, and the spread and support for culture. But it is just one model of culture supported by digital technology.

The second stage in this evolution begins around 2004. It is a revival of the read-write culture from our past. The poster child for this image of culture is Wikipedia, and the enormous energy directed to that project. But I want to talk here about a slice of that culture that is distinct from Wikipedia — what I call “remix“.

Some examples will make the idea clear.

In the context of music: Everyone knows the *White Album*, created by the Beatles. That album inspired the *Black Album*, created by Jay-Z. That then inspired DJ Danger Mouse to produce the *Grey Album*. Four years later, Girl Talk sets the

⁴ Paul Goldstein published *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (Stanford University Press) in 2003.

standard, mixing together hundreds of songs to produce a single album, *Feed the Animals*.

In the context of film: In 2004, the film *Tarnation* made its debut at Cannes. It was said by the BBC to “wow Cannes.” This was made with \$218: A kid took video that he had shot through his whole life, and using an iMac given to him by a friend, remixed it in a way to wow Cannes and win the 2004 Los Angeles Film Festival.

Or finally, in the context of politics: Consider Will.I.Am’s work, taking the words of Obama and mixing them with music. Or still my favourite, think about the work of Johan Soderberg, mixing images of George Bush and Tony Blair, with the song, *Endless Love*.⁵

This is remix. But these are still examples of creativity which is in some way broadcast, though by using the Internet.

More interesting is the way that this platform has become a platform for communities to remix the work of other communities. You Tube has become the best example of this. Take, for example, *Superman Day Parade*, or *Superman Retires*, which mixes cartoon footage of a mature Superman, Wonderwoman, Birdman, Mr T and others, and dubs dialogue that involves Mr T challenging “old man” Superman to a fight, and propositioning Wonderwoman. This video inspired a Simpsons remix on You Tube, which inspired a Bambi remix video.

Or one final example from You Tube: a performance of the Canon in D Major by Johann Pachelbel by Funtwo: This arrangement has been seen by more than 60 million people across the world, and more interestingly, it has inspired thousands of replications and remixes.

These remixes are conversations. They are the modern equivalent of what Souza was speaking of when he romanticised young people singing the songs of the day, or the old songs. But instead of gathering on the corner, or the back lawn, now people from around the world use this digital platform to engage in a form of read-write creativity, powerful and original and (to anyone who will listen), inspirational.

The importance in this has nothing to do with the particular technique: for the techniques have been available since the beginning of film or recorded music. The importance is that the technique has been democratised. It is the fact that anybody with access to a \$1500 computer can make sounds and images that remix the

⁵ Soderberg remixed audiovisual material to create a 2003 video of George Bush and Tony Blair ostensibly serenading each other with the words of *Endless Love*, the duet performed by Lionel Richie and Diana Ross. Posted on You Tube in 2007 the video became a viral sensation.

culture around him or her and spread them broadly in ways that speak more powerfully to a younger generation than any words could.

And here then is the key linking back to my first story.

This is “writing” in the 21st century. It is not the “writing” that most of us do. Most of us write with words and sentences — this essay, for example. But that sort of “writing” in the 21st century will be the equivalent of Latin in the Middle Ages. Writing with images, sounds and video in the 21st century is the writing of the “vulgar.” They engage in it and if we ignore it, they, the vulgar, ignore us.

Yet here’s the problem with this new way of writing: The norms and law from the 20th century, as applied to this “writing” in the 21st century, are different. The norms that we apply to media are different from the norms we apply to text. With respect to text, the freedom to quote is taken for granted. With media, the norms assume you need permission first.

Why did these norms develop and support such a difference in freedom? Again, the reason is technical. If you look at the architecture of copyright law, and the architecture of digital technologies, the reasons are clear. The architecture of copyright law triggers its regulation on the production of something called a “copy.” The architecture of digital technology says every single time you use culture you produce a copy. This is a radical change in the scope and reach of copyright law, for copyright law never purported to regulate every use of culture. Think about this point in the context of a book. Many uses of a book are simply unregulated by the law. To read a book is not a fair use of the book. It is a free use of the book, because to read a book is not to produce a copy. To give someone a book is not a fair use of the book, it is a free use of the book, because again, to give someone a book is not to produce a copy. To sell a book under the American copyright scheme is specifically exempted from the reach of the copyright owner because to sell a book is not to produce a copy. To sleep on a book is in no jurisdiction anywhere in the world a copyright relevant use of the book, because to sleep on a book is not to produce a copy.

These unregulated uses are balanced by a set of important regulated uses, regulated so as to create the incentives necessary for authors to create great new works. To publish a book you need permission from the copyright owner because that monopoly right is deemed essential to create the incentive in some authors to create great new works.

And then in the American tradition, there is a slim sliver of exemptions from copyright law called fair use: uses which would have otherwise been regulated by

the law, but which the law says are to remain free to encourage creativity or critique to build upon older work.

This balance between unregulated, regulated and fair uses gets radically changed when digital technologies are brought into the mix. Because now, every use produces a copy, and thus now, the balance between regulated and unregulated uses gets radically changed. Merely because the platform through which we get access to our culture has changed, the presumptive reach of copyright law has changed, thus rendering this read-write material presumptively illegal under the regime we inherit from the 20th century.

No one in any legislative body ever thought about this. There was no *Act To Massively Regulate Every Creative Activity Act* — anywhere. This is instead the unintended consequence of the interaction between these two architectures of regulation, copyright law and digital technologies.

This unintended consequence is what I think of as Problem 1 in the copyright wars. Law is out of sync with technology, and just as before with the Fourth Amendment, in my view, that law needs to be updated. Just as the Fourth Amendment needed to be updated to take account of new technologies, copyright law needs to be updated to take account of these new technologies.

Problem 2 is what people refer to as piracy, or peer-to-peer “piracy.” Here however, we must link to prohibitions. This is a war of prohibition, and this law of prohibition, like most wars of prohibition, has not worked, if by worked we mean reduced the “bad” behaviour. We have learned that kids who share files don’t read opinions of the United States Supreme Court. Here is a map of peer-to-peer file sharing in the United States. Here is the point where the Supreme Court declared this activity illegal, but we still see no drop off in the behaviour of peer-to-peer file sharing. Instead of reducing the bad behaviour, all this war has done is render a generation of criminals. This is Problem 2, a technology out of sync with the law, and just as with the Fourth Amendment, copyright needs an update to take care of this misapplication as well.

What we should do?

Abolitionism is growing among the denizens of digital culture. Copyright, in their view, may have been needed for a couple of hundred years. We don’t need it anymore. Other techniques (business models) and other technologies (digital rights management) provide all the “protection” creators need, on this view. Anything more is simply unnecessary government regulation.

I am not an abolitionist. But I do believe abolitionism will grow unless we find a way to update the law of copyright to better take into account new technology. We need a series of changes in law. I am going to outline two here.

First: the law has to give up its obsession with the “copy.” The idea of a law being triggered upon reproduction in the digital age is insane. Instead the law needs to focus on meaningful activities. “Copying,” in a digital age, is not meaning, meaningful.

“Meaningful” in turn should be determined by the function of use. If we distinguish between copying and remixing, and between professionals and amateurs, we get something like this matrix.

	Copies	Remix
Professionals	Copyright	
Amateurs		

The presumption of copyright law today is that all of this is regulated in the same way. Professional or amateur, copies or remix: it’s the same law that gets triggered. The first point to recognize: Never has the law of copyright purported to reach this broadly, and it makes no sense for the law to reach that broadly now.

	Copies	Remix
Professionals	Copyright	
Amateurs		

Instead of course the law has to regulate efficiently here with professionals controlling the distribution of copies of their work. For if it doesn’t regulate efficiently here, then we can’t create the incentives that some professionals need to create their work.

	Copies	Remix
Professionals	Copyright	
Amateurs		Free

But equally clearly, amateurs remixing culture should be free of the regulation of copyright law. There should be a simple clear directive that this activity should be set free of any regulation, without needing a lawyer to provide an opinion that such use is “fair.”

	Copies	Remix
Professionals	Copyright	Mixed
Amateurs	Mixed	Free

In the middle, we have two harder cases — instances where the law has some important role in restricting use, but where that restriction must be balanced with important freedoms. Amateurs distributing copies of work should, to some degree, be privileged (I should be free to share my favourite song with my brother), but in some sense controlled (I should not be free to share my favourite song with my 10,000 best friends). Likewise, professionals involved in remix need the freedom to remix without requiring the permission of every copyright owner, but plainly, some derivative work is rightly owned by the copyright holder.

This map of reform is essentially libertarian. I am arguing for a fundamental deregulation of a significant space of our culture, and for focusing the regulation of copyright law in those areas where it can do some good. If we need regulation here, that regulation should at least demonstrate its necessity. Too much regulation is allowed to pass without any such demonstration.

Second: We need a change of law in the context of peer-to-peer piracy. We need to recognise that this decade-long war has been a failure. Some respond to failed wars by waging an ever more vicious campaign against the enemy. My response is to sue for peace, and find a better way to achieve the objectives of the war. The objectives of this war are to compensate creators for the exploitation of their work. We can provide that compensation without waging war against our kids.

For the last decade, many of us here have been bouncing around from hearing many decent proposals to address this fundamental problem, compulsory licenses to the voluntary collective licenses that the Electronic Frontier Foundation has proposed. All of these proposals seek to compensate the artist for the exploitation of her work without also breaking the Internet.

When we reflect on these proposals, here’s the point I want you to see: if we had enacted any one of these proposals into law one decade ago, the world today would be very different, in very tangible ways:

1. Artists would have more money. The current campaign to sue peer-to-peer “pirates” has given nothing of value to artists. When students are sued by the RIAA in America, artists get nothing from those lawsuits. Instead, the money simply funds further lawsuits, which means, the money simply goes to the lawyers. Whatever copyright law is for, it is not to provide a full employment act for lawyers.
2. Businesses would have enjoyed more competition and more opportunity for innovation. If the rules had been clearer at the start of this last decade, then more companies than Apple could have stepped in to figure out how to exploit this opportunity for spreading culture more broadly.
3. And certainly most important by a mile: If we had enacted these proposals a decade ago, we would not have raised a generation of “criminals.” As it is, we have millions of kids who have spent the last decade engaging in activities that they are told is criminal, but that in their own head seems as sensible as any behaviour that any normal person who “gets it” engages in. That creates a dissonance. That dissonance is a cost. It is a tax on their soul, as it alienates them from doing what’s right.

When you weigh these different factors — profit to record companies on one side, and gains to artists, business, and the souls of our kids on the other — I suggest the cost of this war to this generation is high enough to force us to adopt a different way to secure the promise of copyright in the 21st century.

In Europe we see this battle being fought in a very distinctive way. In France, we have recently seen the consideration of a 3- Strikes proposal, which basically says “Violate copyright law three times and your ISP has an obligation to kick you off the internet.” By contrast, Germany is now considering the Green Party’s proposal of a cultural “flat rate,” under which everyone pays a given amount in exchange for legalising non-commercial peer-to-peer sharing of copyrighted material.

That contrast, in my view, frames the contrast of choices that we are facing around the world. The 3-Strikes proposal is the American response to hopeless wars — waging an ever more effective war against the enemy. The German cultural flat rate is a response that recognises that this war of prohibition has failed, and that we need a different way to secure the objectives of copyright: to ensure copyright owners get compensated for the use of their work.

Australia and New Zealand have an enormously important role to play in that debate. Of course, New Zealand has recently considered and rejected the 3-Strike proposal and at least is speaking about a fundamental reconsideration about the

way copyright law regulates in the 21st century. There is also here in Australia, a significant question about the way copyright law will regulate in the future.

My plea to you today is that you recognise the leadership you could play in this debate, and that you direct that leadership not to figuring out ever more fancy weapons to use against our kids, but to push all of us, and especially those of us in the United States, towards a position of sanity and sensibility for copyright in the 21st century.

* * *

I had the opportunity to speak at a conference at the Association of the Bar of the City of New York. The conference was held in a beautiful room, with luxurious red velvet curtains and a plush red carpet. The aim of the conference was to explain to creators how they could comply with the law of copyright, and how they could rely upon the law of fair use.

The law of fair use offers four factors that must be weighed by a judge before the judge can conclude that a particular use was “fair.” The lawyers organising the event decided that they would ask four lawyers to speak for 15 minutes each on each of the four factors — on the theory, I take it, that at the end of the hour the audience would be educated about fair use, and could go forward and create consistent with the law.

As I sat there and looked out at the audience, it wasn’t an understanding that I saw. It was total confusion. That confusion then led me to a day-dream about the event, and about its purpose.

Because as I looked around the room, I kept asking myself what that room remind me of. And eventually, it dawned on me. As a college student, I had spent a lot of time travelling throughout Eastern Europe and the Soviet Union. That room, I realised, reminded me of the soviet parliament. And that led me to ask:

When was it in the history of the Soviet system when you could have convinced the Soviets that their system had failed? 1976 was too early, as it was puttering along okay in 1976. 1989 was too late: If you didn’t get it by 1989, you were never going to get it. So when was it, between 1976 and 1989, that you could have convinced them that the system had failed and, more importantly, what could you have said to these Soviets to convince them that the ideology that they had romanticised had crashed and burned, and to continue with the Soviet system was to betray a certain kind of insanity.

Because, as I listen to lawyers insist that “nothing had changed,” and that “the same rules should apply,” and that “it is the pirates who are the deviants,” I recognised that it is we, lawyers, who are insane.

This existing system of copyright could never work in the digital age. Either it will force kids to stop creating, or it will force upon the system a revolution. In my view, both options are not acceptable.

Extremism invites extremism in response. And the extremism of the rights holders today has created the extremism of abolitionism. I think both extremes are wrong. Thus in this war, I am Gorbachev, not Yeltsin: an old communist who’s trying to preserve this old system in a new time against extremisms from both sides. Extremisms that would destroy the system of copyright that we have inherited.

Some of you might not care about destroying the system of copyright. So then allow me one final plea: We have to recognise this: We can’t kill this form of creativity; we can only criminalise it. There is no way we can stop our kids from engaging in this form of creativity; we can only drive their creativity underground. We can’t make them passive; we can only make them “pirates.” The question we have to ask is, is that any good? In my country, kids live in an age of prohibition, constantly living their life against the law. We need to recognise: that life is corrosive, and corrupting to the rule of law, at least the rule of law in a democracy. That is a cost of this war. In my view, it is large enough to say that our first moral obligation must be to find a way to stop this war. Now.

Thank you very much.

QUESTIONS AND ANSWERS FOLLOWING
PROFESSOR LESSIG'S ADDRESS MODERATED BY
THE HON MICHAEL KIRBY

THE HON MICHAEL KIRBY

Could I say that I left hanging in the air the second point that Lawrence taught in a very different lecture that he gave in London, but it is relevant, and I would like to ask him about it, and that was the lesson you taught about the difficulty of securing change because of the corruption of our political system by reason of the intermeshing of politics with reform.

In a week's time, I go to New York for a meeting with the Council on Foreign Relations,¹ and the UNAIDS Global Reference Panel,² which is relating to how, in the new Obama world, we adjust our response to the AIDS epidemic, given that President George W. Bush tripled the funding of AIDS assistance, which was a very good thing, but [in a way] designed to exclude the United Nations and the UN AIDS machinery – as some have sometimes unkindly said, because of the very large resources that were paid into his electoral funds by the pharmaceutical industry.

And I think it would be helpful, you have given us as it were, if I dare use this expression, the road map, but we really have got to know, does the road map lead anywhere given the intermeshing of industry and politics and the funding of politics in all of our countries?

PROFESSOR LESSIG

Yes, it's a great question, because in fact as some of you know, about a year ago I said that I was shifting my academic work away from these questions of free culture and balance in copyright to focus on what I call this problem of institutional corruption

¹ The Council on Foreign Relations is a non-profit think-tank based in New York City, the mission of which is to improve understanding of the 'world and the foreign policy choices facing the US and other countries.'

² UNAIDS Global Reference Panel on HIV/AIDS and Human Rights.

which is not the problem, of say, Rod Blagojevich, who was the Governor who tried to sell a Senate seat for money, or Randy Duke Cunningham, who would sell defence contracts in exchange for kick-backs to himself.

Not that kind of corruption, but instead the kind of corruption which is endemic in the American political system, where politicians spend between 30% and 70% of their time raising money to get back to Congress, and therefore become enormously sensitive to the wishes of those who provide the greatest amount of funding. I think this is a central part of the problem, fixing that problem.

And it's not, as you said, just an American problem. Take for example, the situation of the democracy gap that exists in Europe right now. The EU recently has been considering the question of whether to extend the term of copyrights for recordings. The recording term was 50 years. This of course was an issue at the centre of my work, because we began our organising around the Sonny Bono Copyright Term Extension Act, which extended the term of existing copyrights by 20 years in the United States. The EU wanted to extend the recording term from 50 years to 95 years.

And when that was being considered in the United States, we brought a challenge, when it was being considered as legislation, and then we brought a legal challenge to it once it was enacted, challenging the constitutionality of this extension. The extension challenge was supported by a brief that was signed by about 17 economists including five Nobel Prize winners including such lefty liberals as Milton Friedman, oh I'm sorry, wait, he's a right wing Nobel Prize-winning economist.

Milton Friedman said he would only sign this brief if it argued that there could be no public good that would come from extending an existing copyright, and if the term "no-brainer" was in the brief somewhere, so clear was it, that this could serve no public interest. When Europe was considering the same issue, a whole bunch of respected institutions around Europe considered the question.

Gowers ran a Commission in Britain about intellectual property generally, and concluded that it could "never make sense to extend the term of an existing copyright". In Holland, there was an equivalent study by a very respected intellectual property centre that made a similar conclusion about how this could not serve the public interest at all. Yet just last month, the EU voted to extend the term of existing copyrights for recordings, again, solely because the industry has such an enormous influence on policy makers. They acted independently of what makes good sense from a public policy perspective.

Now, you know, when I changed my work, there was this moment, this ah-ha moment, that kind of showed me that I wasn't as smart as I thought I was, because I should have figured this out a long time ago. But the ah-ha moment was watching Al Gore give his speech about global warming, and one of my closest friends was the director of his film, *An Inconvenient Truth*, so I got to follow him around and watch

him give this speech a bunch of times. But one of the points that Gore makes, less so in the film, more in his actual speech, is that the very same dynamic that I am complaining about in the context of intellectual property, has led the United States to make it impossible for them to address the question of global warming.

Even today, with Barack Obama as President, and the Democrats controlling both Houses of Congress, I would predict there is a 57% to 60% chance that this Congress will not be able to enact global warming legislation because 12 Democrats could not afford to vote against the oil or coal industries, and continue to raise the money they need to get back to Congress.³

The ah-ha moment was recognising, wait a minute, it's not just esoteric questions like copyright where this corrupting influence is driving bad policy. Absolutely every single fundamental public policy question America faces, including the most important questions, global warming, health care, the financing systems, are stopped because of exactly this corruption.

My view was that unless we find a way to deal with that, we won't be able to deal with copyright, or global warming, or any of these other issues either, and so, yes of course, I am sceptical that we can address these issues before we address the others. But what we can do is at least make it obvious to people who have the principles of copyright in their heart, that really are genuine scholars, or lawyers, focused on what copyright should be about. It is at least possible for us to get those people to recognise what is good policy and if we can't get policy makers to implement it, at least we can get the profession to recognise it. And that, I think, is an enormously important first step, that at least gets us towards the place where policy makers can be shamed into doing what we all recognise is the right thing.

THE HON MICHAEL KIRBY

Some of those comments would have caused ah-ha moments to us in Australia because we have certain similar issues as in the United States. Now Brian can we have five minutes for a few questions? Oh, we've got eight minutes.

Ok, short questions or comments. Yes – and if you wish to identify where you are from.

³ In 2009, 12 Democrats on the House of Representatives' energy subcommittee, all from auto-manufacturing, or coal or oil producing states, wavered on voting for President Obama's climate change bill. The bill stalled in the Senate in 2010.

BRIANNA LAW FROM WIKIMEDIA AUSTRALIA

In your talk about how copyright law might be reformed, you make a distinction between amateurs and professionals, and I wonder if with digital reproduction lowering the cost of producing and disseminating works, is that still meaningful and how can we define that?

PROFESSOR LESSIG

Yes, it's absolutely true that the line between amateurs and professionals is going to be a hard one to draw. But just because we lawyers are very good at turning any black and white distinction into grey, indeed that is how we are trained, that is why we are paid so much money, we can turn black and white into grey, we should recognise that there are radically different reasons that people create.

Some people create for the money and they should be respected because they are great creators, they are trying to be a professional, they are trying to make their creativity, make it so they are free to create.

But there are other people, the original meaning of the word amateur, who create for the love of their creating, not for the money. And when they engage in that act, what they are doing has nothing to do with money, and indeed, if you introduced money into the mix, it would change the kind of creativity. You from Wikimedia know this very well. Wikipedians are people who create access to knowledge because they want to share that knowledge. If Jimmy Wales⁴ were to institute a system of paying editors for editing Wikipedia entries, I think the quality of the editing would go down because people participate in that economy of creativity for the love of what they are doing. And we need to respect that there are those economies that we want to continue. Indeed, everybody wants to continue. Think about the sharing economy of two lovers, right. Introduce money into that economy, you have radically changed the nature of the interaction there, in ways that even conservatives who love the market would say no, no, no, we don't want the market to be functioning there.

The point is to see that we have these different motivations for creativity, and we need to respect them, and have a system that can respect them, even though there are going to be places where it's hard to tell the difference. We need to work hard to figure out how the law needs to negotiate the differences, but still not lose sight of the fact that there are important kinds of creativities on both sides of that line.

⁴ Co-founder and public face of Wikipedia.

THE HON MICHAEL KIRBY

Adrian Sterling, I've got to give you a fair go now. I think it might be a chance for you to ask a question.

PROFESSOR ADRIAN STERLING

Thank you very much. I'm one of those persons that Professor Lessig referred to as a person with copyright in his heart, and a little while ago, I heard lots of discussion about what Professor Lessig said and how bad for copyright it was, and how terrible it was. So I thought, well perhaps one should look to see what he actually says. So I got a copy of his book, *Remix*, published in October last year by Penguin and read it through and came to the conclusion that I agreed with everything that he said. This afternoon, I've heard him repeat some of that and also bring us up to date, and I still feel the same way.

And I want to make just one or two very quick remarks of how I would suggest one takes into consideration reaching that objective that Professor Lessig has brought before us. No abolition, but compensation for right-owners, and recognition of the rights of the amateur in *Remix*, and so forth.

The first thing is, I would say, I don't think that we need, or should have, a revolution. Revolutions sometimes don't end up where they want to be directed. What we need is an evolution, and I don't believe that evolution can be achieved, which we would all want to, by trying to get international changes to the conventions, which we would need, if we were going to change radically the conditions on exclusive rights of copying, reproduction and communication to the public that are granted by the conventions. We have to remember that in the Berne Convention diplomatic conferences, there must be unanimity of voting to change the Convention. We will not get unanimity on changes of that nature.

Therefore, my suggestion is that the road we follow is to consider what rights are in existence now, and how they should be administered. It's the administration of those rights, rather than changing the rights and I believe firmly that those who administer the rights of authors and others, have it within their power to evolve licensing systems and to evolve ways of administering rights, which will fully meet that matrix which Professor Lessig has showed us. That is, as it were, the free area, the regulated area for payment, and those where there's a cross-over.

I do believe, though, that we need to have everything specified in the sense that it is legitimated. I would like to see the situation reached, where my use of somebody else's work is legitimated either by a licence or by legal provision. But I want to know where I stand and I believe this can be achieved.

There is one area that I think Professor Lessig and all of us need to think about in order to achieve this great objective, which is moral rights. When my work is subject to remix in that unregulated area, what about my moral rights.

Now, we have to recognise that moral rights are under the Convention, so we have to see how we are going to meet that. Thank you.

THE HONOURABLE MICHAEL KIRBY

Ok, moral rights or licensing.

PROFESSOR LESSIG

First, I am grateful to you for doing what I have always thought too few of my opponents have done, which is to actually read what I have said, and to engage in that act of understanding. There has been too little of that, and I take responsibility for inflaming the passions of this, I understand. But my hope is to make peace by understanding, exactly the way that you have done.

Number two, I also agree that evolution is what's important here. As you will remember in my book, I talked about my colleague, Terry Fisher's, proposal for radically changing the way copyright law functions, through basically eliminating the property right character of copyright, and replacing it with a whole system of basically sampling use and compensating on the basis of that. And I say that I don't support that because it is too radical a change. But the German Green Party's proposal for the culture of flat rate is actually backed up with a very careful analysis of how that is consistent with the international conventions, and I think that's the kind of evolution that is needed here.

Finally, I'll confess with respect to moral rights, it might be here that there's the greatest potential for conflict. If there's a point of agreement, I would say it's this. My view is not that we should give up moral rights. Indeed we should encourage respect for moral rights in just the sense that people should identify and criticise people who misuse other people's work. So moral rights, in the sense not just of attribution, but in the sense of maintaining the integrity. The only difference we might have is whether that criticism should be engaged in a court as opposed to in the public sphere.

The principles of free speech from America would tend to say that, if you have an argument about how I'm respecting you, that is an appropriate argument to engage in contexts other than legal jurisdictions. It's kind of an engagement to have in the context of open public discourse. So, I should say, this person has misused that person's work, and we should say, shame on you for doing that, and we should punish

you in all of the ways that we punish people without using courts. But the burden of legal jurisdiction here is too great.

Now I understand there is room for disagreement here, and the European traditions are much stronger, and as they have been grafted into Japan and many parts of Asia, much stronger than in the American tradition, but I think this is a source of disagreement where we can genuinely understand each other, and try to make progress.

THE HONOURABLE MICHAEL KIRBY

Can we have one more question? Yes very well, I think this gentleman here.

MARK CALLAGHAN – AMPAL (AUSTRALASIAN MUSIC PUBLISHERS' ASSOCIATION LIMITED)

I was just going to make a couple of comments and like Professor Sterling, I was enthralled with today's presentation. I thought it was a breath of fresh air frankly. I also echo his concerns about moral rights and I think ironically, it could be an area that could be agreed upon perhaps more readily than many others yet it is the most complex. I mean, take your reference to the use of Lionel Richie's song to parody George Bush, I mean, he may genuinely have thought it wasn't funny. I mean, he may be a Bush supporter and, you know, we need to respect that.

I think one point that I would like to make, that I think is relevant to this debate, that doesn't get raised a lot, is that there's an additional difference I think in the context of comparing our modern re-write experience with a historical one, in that much of what goes on in that space in You Tube, and on the net and MySpace is commercialised activity. And I think that's a very different overlay to what has happened in the past. And I think I just wanted to make that comment and say that pirate sites, for example, are commercial activities, whereas they are portrayed as being about sharing, although the people that run the sites are making money.

PROFESSOR LESSIG

Yes, so I mean it is a weird inversion. I can only speak about the law in America here. But if you think about a kid taking some videos, and remixing them, he could be engaging in that activity for purely non-commercial reasons. He uploads it to You Tube and You Tube's use of it, in some sense, is deeply commercial. They are in the business of trying to make money. Yet the law says that what the kid does is illegal. But if You Tube takes the thing down within a certain number of days after having notice

of the copyright violation, YouTube is immune from any responsibility. And I think that is exactly backwards.

I think what the kid does, should be completely privileged, a free type of creativity. If it's uploaded to You Tube or the equivalent, then I think it's totally appropriate to say that there should be some, you know, flat rate license or some blanket license that is covering the music that's inside that, that has to be paid for by the commercial service, so that it compensates the artist for the commercial use of their work. Just like a public theatre has a blanket license for songs that are performed in the public theatre, so too in the context of what You Tube is doing. Yet we haven't got to that position at all yet and I think, you know, we certainly need to find a way to get there.

THE HON MICHAEL KIRBY

Brett Cottle – one last question or comment.

BRETT COTTLE CEO AUSTRALASIAN PERFORMING RIGHT ASSOCIATION

Professor, I just wanted to take you back to the map of Europe where you contrasted the French approach to the German approach, and the cultural flat rate being proposed by the Greens in Germany. I don't think you will be surprised to know that the authors' societies are in violent agreement with you about that approach. The problem, of course, is how to get to that solution. It is a very difficult legislative path, and, of course, the people who would be paying the cultural flat rate, would inevitably be the ISPs. My question to you really is, how do you think we can get, by regulation, to that path, to that position.

PROFESSOR LESSIG

Well, it's good to see you again. We had the pleasure of debating in Europe about these questions about a year ago. I think that there are two steps to getting us there. First, we need to have a debate which isn't the debate between three strikes and the culture of flat rate, but a debate that brings more traditional rights' holders into the space that says exactly what you have just said. That we support a move towards this, and lets figure out how to implement it.

Number two, we need some experimentation between jurisdictions. I don't think any of us has a clear sense of what's going to create the right balance between artists and the public, and we need to find some – we need to see something about how it's actually being implemented in different jurisdictions. Now, as you know, as was commented before, that turns out to be pretty hard, because of the uniformity of IP

rules enforced by agreements internationally. But I think that if we had a genuine and good faith conversation between the rights' holders, and the community, about this, and allow some diversity in the implementation, we could move towards a system that we begin to recognise as actually achieving those objectives.

One important thing, though, is to bring the whole of the artistic community into this discussion. And I'm sure you are aware there's this extraordinary Heidelberg manifesto that has been created in Germany by a bunch of authors who are absolutely against the internet, they are against anybody having access to their work on the internet, and they have created this huge public outcry against a lot of these changes, because they happen to be the most popular writers. They all happen to all be over the age of 60 too, but the most popular writers in Germany.

And I think there's a great amount of misunderstanding here about what exactly we should be achieving. I think if we found more ways for people like you, and people like me, to stand on a common platform, and point to the kind of answer that would be the right answer, then we can have lots more progress in getting to it than we've had in the last 10 years, I think.

Thank you very much for your attention.

THE HONOURABLE MICHAEL KIRBY

We've already thanked Professor Lessig, but I want to make two little comments in closing.

First, I tried to keep, out of the corner of my eye, an eye on you all, and I noticed you all looking at the text that was coming up, instead of looking at the man who was presenting, and doing it so eloquently. I've learned from having watched Professor Lessig before, it's a whole experience just watching him, instead of watching all the text, though he makes the text very watchable because he puts pictures and other things in there, and you're waiting to see what comes next.

The second thing is, and it won't go away, the issue of a democratic politic and how it copes with this issue. I mean we can have dreams of how one would have radical change, but Adrian put a little bit of a real issue into the mix there. And it's appropriate we should think about that in this House, because when I was young, when I was first the Chairman of the Law Reform Commission, this was the Parliament of Australia. It was a temporary or provisional Parliament House. It was opened in 1927, the Parliament having from the beginning of Federation been in Melbourne, in the Melbourne parliamentary building in Spring Street in Melbourne, and then they moved up here and King George VI as he later became, the Duke of York and his wife, the Duchess of York, later the Queen Mother, came here.

There's a wonderful portrait of it actually in the King's Hall, which shows them arriving, and the troops lined up, most of whom would have fought in Gallipoli and on the Somme, and it is important for us to remember, though we are a small country, we are very very mature democracy. We have the fifth oldest still working constitution in the world and this is the chamber of the fifth oldest continuous constitutional nation in the world. And therefore, when Professor Lessig throws out a challenge to us from his vantage point, and from his tremendous ability to see things conceptually, which is what we wanted him to come and do for us, and what he's done for us, then we've got to take that seriously.

Our Parliament has moved up the hill, but ours is still the fifth oldest Constitution in the world, and the fifth oldest continuous democracy, and this is its House, and we are privileged to sit in this House and to reflect on all of the battles and the democracy that were fought out here. And if you have time, just wander, just cast a glance into the old House of Representatives, green carpet as in the Congress, as in the House of Commons, and into the Senate, where there's red carpet.

And that is the heart of democracy in this nation. So we've really got to think about what we've said, and I think that on top of a magnificent morning of a great cake – what a cake we've had today. A terrific morning of history and of interest and of personalities. We've had this most insightful session and I'd ask you once again to thank Professor Lessig.

PROFESSOR BRIAN FITZGERALD

Well thank you both, I'm not sure which one of you travels more, or which one of you was more passionate about your topic, but all I know is I'm thankful that both of you are here. Tremendous presentation Larry. I know it's a very difficult time, you're moving from Stanford back to Harvard, and you're in the process of doing it, and it's a horrible time to have to travel across the world to a far-flung place like Australia. Thank you very much.

And Michael Kirby, the Honourable Michael Kirby, thank you for coming down in between all of the engagements that you've had yesterday, and today, for what has been truly a memorable session. Thank you.