

# The Basement Interviews

## Free Culture

**Lawrence Lessig, professor of law at Stanford Law School, and leader of the Free Culture Movement, speaks to Richard Poynder**

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Lawrence Lessig was born in South Dakota in 1961. Two years later his family moved to Williamsport, Pennsylvania, where his father, Jack Lessig, started a steel-fabricating business that was ultimately to employ around 150 people.

Lessig, his father explained to the *Los Angeles Times* in 2002, was a very bright and able child. He was also decisive, and never seemed to fail in anything. Moreover, whatever he got into — be it starting a newspaper in the fourth grade or running a Jerry Lewis-style telethon — he became the leader. He was, added his father, "always about four or five steps ahead of everyone."<sup>2</sup>

Fascinated by the question of "how things ought to be", Lessig was soon drawn to politics, becoming president of the Pennsylvania Teenage Republicans, and running the campaign for a would-be state senator. He was also the youngest member of Pennsylvania's delegation at the Republican Convention that nominated Ronald Reagan in 1980. "I grew up", he explained to Steven Levy in a 2002 *Wired* feature<sup>3</sup> "a right-wing lunatic Republican."

Having enrolled to study economics and management at the University of Pennsylvania, Lessig rapidly concluded that business studies were really rather dull. He did, however, enjoy the history of economics. This led to an interest in philosophy, and after graduating from Penn in 1983 he decamped to Cambridge, England, to take an MA in philosophy. During the 1980s he also travelled extensively in Eastern Europe.

Lessig's sojourn abroad was to lead to his political transformation. What he calls the "thin conception of libertarianism" with which he left America proved inadequate when placed under the microscope of philosophical enquiry in Cambridge. It fared no better when his views on his home country, and its history, were juxtaposed with the very different "characterisations" he discovered in Eastern Europe. He eventually had to conclude that these other characterisations "were closer to the truth than my own understanding." As a result, he says, a "channel of scepticism" opened up in his head.

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<sup>1</sup> The interview took place in August 2005 (<http://poynder.blogspot.com/2006/03/basement-interviews.html>).

<sup>2</sup> *The Cultural Anarchist vs. the Hollywood Police State*, The Los Angeles Times Magazine, September 22<sup>nd</sup> 2002, <http://www.grailwerk.com/docs/latimes.html>.

<sup>3</sup> *Lawrence Lessig's Supreme Showdown*, Steven Levy, *Wired*, October 2002, [http://www.wired.com/wired/archive/10.10/lessig\\_pr.html](http://www.wired.com/wired/archive/10.10/lessig_pr.html).

On his return to the US, Lessig toyed with the idea of becoming a philosophy professor. Concluding, however, that it was "too removed from anything real" he turned to the law, studying first at Harvard and then at Yale. The law appealed to him, he explains, because it seemed to offer a remedy, and a defence, against power rights — not least the power rights he saw dominating American politics. Indeed, by now he had come to feel a "kind of disgust" with politics. For this reason, no doubt, he chose to specialise in constitutional law.

Between 1989 and 1991 Lessig served as a law clerk, first to Judge Richard Posner of the US Court of Appeals for the Seventh Circuit, and then to Justice Antonin Scalia of the US Supreme Court. Since both justices are conservatives the newly sceptical Lessig found himself frequently at variance with them on points of law.

Nevertheless, he says, he gained a "deep respect" for Posner — a respect that the justice clearly reciprocates. Commenting to the *Los Angeles Times* in 2002, Posner described Lessig as "like Ralph Nader, but brighter."

Lessig's academic career began in 1991, when he was appointed assistant professor of law in the Chicago Law School. It was not until 1993, however, that his attention was drawn to cyberspace. This came after he experienced an epiphany while reading an article in *The Village Voice* about a virtual rape.<sup>4</sup> Coming across it shortly after reading Catharine MacKinnon's book *Only Words*<sup>5</sup>, Lessig was struck that the author, Julian Dibbell, had been able to publish something in *The Village Voice* that — had it been written by MacKinnon — would have been rejected by the newspaper as contrary to First Amendment values.

Lessig concluded that cyberspace provided an ideal environment for exploring issues in a politically neutral way. As he puts it, "It was a moment to think: 'Wow, I could talk about the issues without people knowing the politics, and therefore get them to think about them originally.'"

In 1995, therefore, Lessig began teaching one of the first courses on the "Laws of cyberspace", and in 1997 he moved to the Berkman Center for Internet and Society at Harvard Law School.<sup>6</sup>

Having gained a reputation as a guru in the many legal conundrums posed by a world increasingly dominated by networks and computers, in 1997 Lessig was appointed "Special Master" in the Microsoft antitrust trial. Microsoft had been charged with monopoly behaviour after merging its web browser into the Windows operating system.<sup>7</sup>

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<sup>4</sup> *A Rape in Cyberspace*, Julian Dibbell, *The Village Voice*, December 1993.

<sup>5</sup> *Only Words*, Catharine A. MacKinnon, Harvard University Press, 1993.

<sup>6</sup> <http://cyber.law.harvard.edu/home>

<sup>7</sup> US District Court Judge Thomas Penfield Jackson appointed Lessig "special master" in December 1997. <http://news.com.com/2100-1023-206332.html>.

Lessig's task was to conduct hearings, take additional evidence, and issue a recommendation to the court — a job that he threw himself into with huge energy and enthusiasm.

Microsoft, however, was less enthusiastic, and within two months had persuaded a federal appeals court to have Lessig removed from the case. This was a great disappointment for Lessig: speaking to Levy four years later he said sadly: "Getting the appointment was a charmed thing. But I missed the chance to write the report."

The experience, however, contributed greatly to Lessig's thinking about the implications of living in a computer-mediated world. In particular, he had become fascinated by the way that software code shapes our experience in cyberspace. His concern was, however, that in doing so it was capable of restricting our freedoms. He was also convinced that the original Internet architects were too naïve to appreciate the threat — a naivety summed up by John Gilmore's much-quoted saying: "The Net treats censorship as damage and routes around it."

For Lessig there is no such thing as "the Net". Rather there is just a "a bunch of people who write code to define the Net." Consequently, the code could at any time be re-written to remove the freedoms that had been designed into it. In 1999, therefore, Lessig published *Code and Other Laws of Cyberspace*.<sup>8</sup> His aim was to warn people that as the Internet developed so its freedoms would come under threat, both from commercial interests and from governments intent on controlling their citizens.

In 2001 he expanded on his theme in his second book, *The Future of Ideas*.<sup>9</sup> Examining the various layers of the Internet's architecture Lessig set out to demonstrate how each one was in danger of being re-engineered to meet the proprietary interests of commerce, or the desire of governments to monitor and deter illicit behaviour — at the cost of freedoms like the right to anonymity, freedom of speech, and the freedom to innovate. As he put it: "How a system is designed will affect the freedoms and control the system enables."<sup>10</sup>

Above all, he argued, it was the Internet's end-to-end (e2e) principle — in which a dumb network merely passes traffic between intelligent computers connected to it — that is responsible for these freedoms. The threat to e2e was that the network could be appropriated by commercial organisations (e.g. Hollywood studios, record labels, and cable operators) who would then cordon off chunks of the born-open data network in order to bolster their proprietary interests.

As his thinking developed Lessig's focus began to shift from the network itself, to the content that flowed through it. His concern was that, rather than

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<sup>8</sup> *Code: And Other Laws of Cyberspace*, Lawrence Lessig, Basic Books, 1999.

<sup>9</sup> *The Future of Ideas: The Fate of the Commons in a Connected World*, Lawrence Lessig, Random House, 2001.

<sup>10</sup> *The Future of Ideas*, p. 35.

exploiting the new opportunities of the online world, large media companies were seeking to restrict access to their content, in a desire to preserve their increasingly outdated business models.

How were they doing this? First, they were starting to lock content up with digital rights management (DRM<sup>11</sup>) technology. While this could be justified on the grounds that it allows copyright holders to protect their legitimate interests, Lessig feared that, if only because of the nature of DRM, this would be done at the expense of consumers — not least the erosion of their traditional "fair use"<sup>12</sup> rights.

Second, they were successfully lobbying governments to introduce new legislation that not only sanctioned the use of DRM, but outlawed its circumvention, even when this was done in order to exercise fair use rights, or to engage in free speech. In 1998, for instance, the Digital Millennium Copyright Act (DMCA)<sup>13</sup> had made the act of circumventing DRM a criminal offence.

Lobbying was also leading to substantial changes to intellectual property laws. Copyright, for instance, had reached the point where it now regulated a far greater range of activities and, due to continuing extensions to the term of copyright, looked set to become an almost limitless monopoly right, seriously diminishing the public domain as a result.

Lessig concluded that these changes represented a threat not only to our *online* freedoms, but to our *offline* freedoms as well. This was the theme of his third book, *Free Culture*, published in 2004. As he explains, "Free Culture is about how a reaction to the network could threaten values off the network. This was a reaction primarily driven by the content industry, which was concerned about copyright infringement on the network."

In short, in the process of seeking to preserve the old order (and their outdated business models), content companies were also enlarging their realm, and their power. As a consequence, the traditional balance between the rights of copyright holders and the rights of consumers was being tilted away from

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<sup>11</sup> Digital rights management (DRM) is the umbrella term referring to any of several technologies used to enforce pre-defined policies controlling access to software, music, movies, or other digital data. DRM critics argue that the phrase "digital rights management" is a misnomer and the term "digital restrictions management" is a more accurate characterisation of the functionality of DRM systems. [http://en.wikipedia.org/wiki/Digital\\_rights\\_management](http://en.wikipedia.org/wiki/Digital_rights_management).

<sup>12</sup> The fair use doctrine is an aspect of United States copyright law that provides for the legal, non-licensed citation or incorporation of copyrighted material in another author's work under a four-factor balancing test. The term "fair use" is unique to the United States; a similar principle, fair dealing, exists in some other common law jurisdictions — e.g. the United Kingdom. [http://en.wikipedia.org/wiki/Fair\\_use](http://en.wikipedia.org/wiki/Fair_use).

<sup>13</sup> Signed into law by President Bill Clinton on October 28, 1998, the DMCA was passed in order to implement the 1996 World Intellectual Property Organisation (WIPO) [Copyright Treaty](#). The Bill included controversial anti-circumvention prohibitions that criminalise production and dissemination of technology that can circumvent measures taken to protect copyright, not merely infringement of copyright itself (i.e. DRM). It also heightens the penalties for copyright infringement on the Internet. <http://en.wikipedia.org/wiki/DMCA>.

consumers. Moreover, due to continuing media consolidation, more and more culture was becoming the exclusive property of a few large corporations.

As Lessig puts it, "never before in the history of free society has a fewer number of people exercised more legal control of the development and spread of culture."

Since creativity cannot take place in a vacuum, the erosion of the public domain consequent upon the changes in copyright law also threatened to stultify creativity, and impact negatively on cultural innovation. Creativity, after all, relies on being able to borrow from the past, and from other creators — in a process Lessig characterises as "rip, mix and burn".

In addition, Lessig had concluded that the increasing privatisation of culture, coupled with growing use of DRM, now posed a significant threat to free speech.

As well as teaching and writing about these dangers, therefore, in 1999 Lessig decided to do something proactive. Specifically, he spearheaded a legal challenge to the controversial 1998 Sonny Bono Copyright Term Extension Act (CTEA), which had extended copyright by an additional 20 years. Since it had done so retrospectively, it had also frozen the flow of content into the public domain, at least until 2019.

The first constitutional challenge to copyright limits to reach the US Supreme Court, *Eldred v Ashcroft*<sup>14</sup> (as the case became) was a once-in-a-lifetime opportunity for Lessig to stem the growing privatisation of culture that he had come to deplore.

In arguing the case, Lessig claimed that by effectively making copyright a perpetual right, the CTEA had violated the requirements of the Constitution's Copyright Clause, which specified that copyright should be a time-limited monopoly.<sup>15</sup>

He also argued that copyright law should be subject to scrutiny under the First Amendment, with the aim of ensuring a balance was maintained between freedom of speech and the rights of copyright holders. This, he argued, the CTEA had failed to do. To Lessig's great disappointment, however, in January 2003 the Supreme Court upheld the CTEA.

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<sup>14</sup> Before CTEA (under the Copyright Act of 1976), copyright lasted for the life of the author plus 50 years, or 75 years for a work of corporate authorship. The act extended these terms to life of the author plus 70 years and 95 years respectively. *Eldred v. Ashcroft* challenged the constitutionality of this. [http://en.wikipedia.org/wiki/Eldred\\_v.\\_Ashcroft](http://en.wikipedia.org/wiki/Eldred_v._Ashcroft).

<sup>15</sup> Article I, Section 8, Clause 8 of the United States Constitution, known as the Copyright Clause (or the intellectual property clause) empowers the United States Congress: *To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries*. The clause actually confers two distinct powers: the power to secure for limited times to authors the exclusive right to their writings is the basis for US copyright law, and the power to secure for limited times to inventors the exclusive rights to their discoveries is the basis for US patent law, [http://en.wikipedia.org/wiki/Copyright\\_Clause](http://en.wikipedia.org/wiki/Copyright_Clause).

Undaunted, Lessig concluded that in making its judgement the Supreme Court had, by implication, conceded that copyright law should be subject to First Amendment scrutiny — if it affected the "traditional contours" of copyright.

In March 2004, therefore, he launched a new legal challenge (*Kahle v Gonzales*<sup>16</sup>), asking a US district court to declare as unconstitutional — when considered collectively — the Copyright Act of 1976,<sup>17</sup> the CTEA and various other changes to the copyright law.

Essentially, *Kahle v Gonzales* raises the claim that by removing the need for creators to register and renew their works, Congress has indeed changed the contours of copyright, transforming it from a conditional to an unconditional system.

Until the 1976 Act, for instance, copyright protection in the US was only available to those who took affirmative steps to claim it — by registering their copyright, marking copies of their work with a copyright notice, and renewing it after a relatively short initial period of protection.

With these "registration formalities" removed, copyright automatically comes into existence at the moment of creation. Consequently, all forms of expression are now subject to copyright protection, generally for at least 150 years, regardless of whether the creators even want copyright,

The US Government responded by seeking a motion to dismiss *Kahle v Gonzales*, arguing that the case was little more than a vain attempt to re-litigate *Eldred v Ashcroft*.<sup>18</sup> To this, Lessig counters that since the changes to copyright law have transformed it from an opt-in to an opt-out system the case makes a very different point.

In December 2004, however, the US District Court, Northern District of California, did indeed dismiss *Kahle v Gonzales*. Unprepared to give up, Lessig and his fellow litigators responded by appealing the case to the Ninth Circuit. For the moment, therefore, the outcome remains unknown.<sup>19</sup>

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<sup>16</sup> In *Kahle v Gonzales* two archives (Brewster Kahle's [Internet Archive](#) and Rick Prelinger's [Prelinger Archives](#)) asked the US District Court for the Northern District of California to hold that statutes that extended copyright terms unconditionally, including the CTEA, the Copyright Renewal Act of 1992, the [Copyright Act of 1976](#), and the [Berne Convention Implementation Act](#), are unconstitutional under the Free Speech Clause of the First Amendment.  
[http://cyberlaw.stanford.edu/about/cases/kahle\\_v\\_ashcroft.shtml](http://cyberlaw.stanford.edu/about/cases/kahle_v_ashcroft.shtml)

<sup>17</sup> Coming into effect on January 1, 1978, The Copyright Act of 1976 is held to be a landmark statute in United States copyright legislation. It spelled out the basic rights of copyright holders, and codified the doctrine of "fair use". More radically, it ended the registration and renewal process, converting the term of copyrights from a fixed period requiring renewal to an extended period based on the date of the creator's death, although works registered before 1976 still had to renew. It

<sup>18</sup> <http://cyberlaw.stanford.edu/blogs/sprigman/archives/gov't%209cir%20opp%20brief.pdf>.

<sup>19</sup> No date has yet been set for oral argument," Chris Sprigman, one of the lawyers representing the plaintiffs, emailed me on 5<sup>th</sup> April 2006. He added: "That could take some time."

By now, Lessig had also opened a third front in the free culture wars: Having relocated to Stanford Law School in 2000,<sup>20</sup> he shortly thereafter (in 2001) co-founded Creative Commons.<sup>21</sup>

A San Francisco-based non-profit organisation committed to expanding the range of creative work available for others to legally build upon and share, Creative Commons provides alternative licensing and contract schemes to allow creators to waive some of the rights that copyright automatically assigns to them.

In effect, Creative Commons has taken the battle to the streets — by encouraging creators to reject the "all rights reserved" approach of traditional copyright, in favour of a "some rights reserved" model. The logic is that even if the copyright regime automatically grants excessive monopoly rights to creators, there is nothing to stop them from unilaterally waiving some or all of those rights.

Lessig's work on Creative Commons, coupled with his writing and his litigation, has made him the *de facto* leader of the "Free Culture Movement". Being a modest man, however, he is keen to share the credit. The ideas expounded in *Free Culture*, he insists,<sup>22</sup> are "'merely' derivative", since they are heavily based on the ideas of Richard Stallman<sup>23</sup> and the Free Software Movement.<sup>24</sup>

This is undoubtedly the case: Creative Commons licences owe a great debt both to Stallman's general notion of copyleft,<sup>25</sup> and to the specific model he created with the General Public Licence.<sup>26</sup>

Stallman, however, is less generous. Expressing disappointment with the book *Free Culture*, he describes Lessig's views as being "less ethically firm" than his. He has also asked Lessig to withdraw two Creative Commons licences, on the grounds that they do not give people the right "to distribute verbatim copies non-commercially".<sup>27</sup>

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<sup>20</sup> One of Lessig's first actions on arriving at Stanford was to set up the Stanford Center for Internet and Society. <http://cyberlaw.stanford.edu>.

<sup>21</sup> <http://creativecommons.org>.

<sup>22</sup> *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, Lawrence Lessig, Penguin Press, 2004, Preface XV.

<sup>23</sup> Richard Stallman is the founder of the Free Software Movement, the GNU Project, and the Free Software Foundation. [http://en.wikipedia.org/wiki/Richard\\_Stallman](http://en.wikipedia.org/wiki/Richard_Stallman).

<sup>24</sup> [http://en.wikipedia.org/wiki/Free\\_software\\_movement](http://en.wikipedia.org/wiki/Free_software_movement).

<sup>25</sup> Copyleft describes a group of licenses applied to works such as software (e.g. the GPL), documents, music, and art. Whereas copyright law is seen by the original proponents of copyleft as a way to restrict the right to make and redistribute copies of a particular work, a copyleft licence uses copyright law in order to ensure that every person who receives a copy or derived version of a work can use, modify, and also redistribute both the work, and derived versions of the work.

<http://en.wikipedia.org/wiki/Copyleft>.

<sup>26</sup> GNU General Public License (GNU GPL or simply GPL) is the most popular free software license, originally written by Richard Stallman for the [GNU Project](#).

<sup>27</sup> <http://poynder.blogspot.com/2006/03/interview-with-richard-stallman.html>.

What is the central point of difference between Stallman and Lessig? Stallman insists that people should have a fundamental right to copy creative works. Lessig, however, argues that the appropriate freedoms and rights must always be contingent on the specific circumstances of a situation — a reality reflected in the growing variety of different Creative Commons licences.

In some cases, for instance, the right to copy is actually superfluous, he says. Thus for an African child who speaks no English, having the right to copy an English-language textbook is worthless. What is far more valuable in such circumstances, Lessig argues, is the right to create a derivative work — in other words, to have the book translated.

Stallman is not the only critic of Lessig and the Creative Commons. In 2005, for instance, Debian<sup>28</sup> software programmer Benjamin Mako Hill<sup>29</sup> published an essay complaining that Creative Commons "sets no defined limits and promises no freedoms, no rights, and no fixed qualities."<sup>30</sup>

This, responds Lessig, is simply not true. Instead of carping, he adds, critics should show "a little bit of humility", and listen to what creators and consumers say is important. "Rather than marching in with a set of defined principles that come from who knows where, and imposing those regardless of the views of those who live in that particular domain, they should listen to what these people say to them."

What such disagreements surely demonstrate is that the wider free knowledge movement looks set to become more diffuse and more complex as it develops.

What is notable about the current debate is that where the disagreement between Open Source and Free Software advocates is expressed in terms of pragmatism versus ethics, both sides in the Free Culture debate take an ethical position, but disagree on the specific ethics and values that ought to be promoted.

What is perhaps most significant about the Free Culture Movement is that it has transformed a discussion that was primarily focused on specific types of information and knowledge (be it digitised books,<sup>31</sup> software code,<sup>32</sup> or news reports<sup>33</sup>), into a more wide-ranging debate about culture, and how it is produced. In doing so, it has underscored the importance of collaboration in

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<sup>28</sup> The Debian Project produces Debian GNU/Linux, a widely used distribution of free software. Based on the [Linux](http://en.wikipedia.org/wiki/Linux) kernel, it includes many components from Stallman's GNU project.

<http://en.wikipedia.org/wiki/Debian>.

<sup>29</sup> <http://mako.cc>.

<sup>30</sup> *Towards a Standard of Freedom: Creative Commons and the free software Movement*, [http://mako.cc/writing/toward\\_a\\_standard\\_of\\_freedom.html](http://mako.cc/writing/toward_a_standard_of_freedom.html).

<sup>31</sup> See the interview with Michael Hart: <http://poynder.blogspot.com/2006/03/interview-with-michael-hart.html>.

<sup>32</sup> See the interview with Richard Stallman: <http://poynder.blogspot.com/2006/03/interview-with-richard-stallman.html>.

<sup>33</sup> See the interview with Jay Rosen: <http://poynder.blogspot.com/2006/03/open-source-journalism.html>.

cultural production, and the dangers inherent in restricting that collaboration, not least by overly restrictive intellectual property laws.

In short, by getting us to think about the issue in terms of culture, Lessig has reminded us that in some areas of human activity too great an emphasis on private ownership impoverishes everyone. After all, if culture is impoverished, we are all impoverished — in a kind of reverse "Tragedy of the Commons."<sup>34</sup>

Seen from this perspective, copyright (and intellectual property generally) ceases to be an esoteric lawyerly preoccupation, and becomes a central part of a more wide-ranging debate about the future health and vitality of our collective endeavours in the digital, networked world.

Since this new world enables far greater collaboration it inevitably requires greater openness. Moreover, by seeking to cling to traditional closed models we are in danger not only of eroding freedoms we have long taken for granted, but of stultifying cultural innovation too.

It is important to stress, however, that this does not mean that copyright and intellectual property have no role in the new world — although its role may need to change. As Lessig points out, it's simply a question of balance.

The problem right now is the balance has gone seriously awry, and if we don't head the danger signs it will become even more skewed.

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Lawrence Lessig is a very busy man, so getting to speak to him proved challenging. I eventually succeeded by booking his time several months in advance, and splitting the interview into two telephone calls. This included a call to his office in Stanford, where I managed to stretch a half-hour slot into a 75-minute conversation, and a call to the Grand Hotel in Oslo — where he was staying for one of the many events he attends to promote free culture.

Built in 1874, the Grand Hotel seemed a fitting venue for a man Steven Levy has dubbed the Elvis of Cyberlaw:<sup>35</sup> over the years it has attracted heads of state, Nobel Peace Prize winners, and other high-profile personages like playwright Henrik Ibsen, and Roald Amundsen (who visited the hotel in 1912 on his return from a successful expedition to the South Pole).

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<sup>34</sup> The tragedy of the commons is a phrase used to refer to a class of phenomena that involve a conflict for resources between individual interests and the common good. The term derives originally from a parable published by William Forster Lloyd who was Drummond Professor at Oxford and a Fellow of the Royal Society, in his 1833 book on population. It was then popularised and extended by Garrett Hardin in his 1968 *Science* essay "[The Tragedy of the Commons](http://en.wikipedia.org/wiki/The_Tragedy_of_the_Commons)".

<sup>35</sup> *Lawrence Lessig's Supreme Showdown*, Steven Levy, *Wired*, October 2002, [http://www.wired.com/wired/archive/10.10/lessig\\_pr.html](http://www.wired.com/wired/archive/10.10/lessig_pr.html).

As a sign of the pressured life Lessig leads — or a demonstration perhaps of the dangers inherent in visiting a northern European city when you are accustomed to the temperate climate of the West Coast of America — Lessig had succumbed to a cold virus by the time I caught up with him in Oslo. As a consequence, our conversation was regularly interrupted by his coughs and sneezes.

I was also intrigued when later listening to the tape of our conversation to detect the sound of a child in the background. Was Lessig multi-tasking: engaged simultaneously in the itinerant care of his 18-month old son,<sup>36</sup> while being interviewed by a journalist? Or had our ether-borne voices become somehow mingled with another conversation, in another town, possibly in another continent? Whatever the explanation, it seemed an appropriate reminder of the vagaries and ambiguities of virtual encounters.

Certainly I was disappointed not to meet the Elvis of Cyberlaw in the flesh — if only to be able to compare my impressions with those of others. What I did know — if only from glancing at Lessig's picture on his blog<sup>37</sup> — is that he has a suitably professorial cranium, a characteristic that sees him invariably cast as the archetypal egghead. Referring to Lessig's "startlingly high forehead" in his *Wired* article, for instance, Levy commented: "it's almost as if, in an attempt to accommodate his brain, the top of his head was pulled up a couple of inches, like an image stretched by Kai's Power Tools."

Indeed, one is tempted to conclude that Lessig may be little over-intellectual — a characteristic that could explain his occasional naivety or, let's call it, impracticality.

When preparing the argument for the *Eldred v Ashcroft* case, for instance, Lessig's fellow litigators repeatedly insisted that the case would only be won if they were able to demonstrate to the Supreme Court that "dramatic harm were being done to free speech and free culture". Lessig, however, ignored this advice. As he put it in his subsequent *mea culpa*,<sup>38</sup> "as a law professor, I had spent my life teaching my students that this court does the right thing, not because of politics but because it is right." For that reason, he added, "I was not persuaded that we had to sell our case like soap."

After losing the case, however, he had to concede that he had "failed to recognise that however much I might hate a system in which the court gets to pick the constitutional values that it will respect, that is the system we have."<sup>39</sup>

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<sup>36</sup> Willem Dakota Neufeind Lessig was born on September 7<sup>th</sup> 2003  
[http://www.boingboing.net/2003/09/08/lessig\\_20.html](http://www.boingboing.net/2003/09/08/lessig_20.html).

<sup>37</sup> <http://www.lessig.org/blog>.

<sup>38</sup> *How I Lost the Big One*, Lawrence Lessig, Legal Affairs, March|April 2004,  
[http://www.legalaffairs.org/issues/March-April-2004/story\\_lessig\\_marapr04.msp](http://www.legalaffairs.org/issues/March-April-2004/story_lessig_marapr04.msp).

<sup>39</sup> Lessig was criticised at the time for playing up to the Court's known inclination for restricting the power of Congress, at the expense of sufficiently drawing to the justices' attention the First Amendment issues raised by an increased copyright term. See for instance: *Showdown between copyright, First Amendment turns into sideshow*, Tony Mauro, Freedom Forum, 10<sup>th</sup> October 2002,  
<http://www.freedomforum.org/templates/document.asp?documentID=17090>. Mauro argued: "Stanford

Equally striking was his confession, in late 2005,<sup>40</sup> that he had only just realised that the rapidly expanding set of free licences was not always compatible. This, he added, meant that, for legal reasons, content released under one free licence cannot always be combined with content licensed under another free licence.

This "embarrassing" oversight, he admitted, meant that the very tools designed to promote it were subverting a primary aim of the Free Culture Movement. As he conceded, "All of these licenses were written without regard to the fundamental value of every significant advance in the digital age — interoperability."<sup>41</sup>

In his *Wired* article Levy described Lessig as a "private, even shy, person" who before an audience suddenly becomes electric. Certainly I detected a striking contrast between his answers to personal questions, and those concerning his ideas.

In the former case he replied so briefly, and so quietly, that I was not always sure that he had indeed responded — a characteristic that played havoc with my voice-activated tape recorder, which repeatedly switched itself off at inappropriate moments, leaving me with a somewhat disjointed transcript. When Lessig felt able to take flight with an interesting idea, however, his voice became animated, full, and clear.

Nevertheless, in reviewing the tape I was left with a somewhat hazy understanding of Lessig's politics. How precisely, I wondered, did the right-wing libertarianism of his childhood differ from the "matured libertarianism" he professes today? Such distinctions were either too subtle, or too foreign, for my European sensibilities.

What is not in doubt is that Lessig is widely viewed as a liberal, and he supports a host of "right-on" causes. He is also prepared to walk the talk — in 1985, for instance, he smuggled a heart valve for a Jewish dissident into the Soviet Union, hiding it in the crutch of his pants.

He is clearly also committed to the sharing principles espoused by the Free Culture Movement. A new version of his book *Code*,<sup>42</sup> for instance, is being produced as "an online, collaborative book update" on a Wiki.<sup>43</sup> The aim is to draw upon "the creativity and knowledge of the community."<sup>44</sup> In addition,

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Law School professor Lawrence Lessig, the driving force behind the challenge to the law, seemed to shun the First Amendment for much of his half hour of argument."

<sup>40</sup> After this interview was conducted.

<sup>41</sup> <http://creativecommons.org/weblog/entry/5709>.

<sup>42</sup> *Code v2*, to be published by Basic Books. <http://www.perseusbooksgroup.com/basic>.

<sup>43</sup> A wiki is a type of website that allows anyone visiting the site to add, remove, or otherwise edit all content, very quickly and easily, sometimes without the need for registration. This ease of interaction and operation makes a wiki an effective tool for collaborative writing. The most famous example, of course, is Wikipedia, is cited extensively in *The Basement Interviews*.

<http://en.wikipedia.org/wiki/Wiki>.

<sup>44</sup> <http://codebook.jot.com/WikiHome>

Lessig has indicated that the royalties from the book will be donated to Creative Commons.

In 1999 Lessig married the German-born human-rights lawyer Bettina Neufeind — who investigated Kosovo war crimes, and now supports homeless people in San Francisco.<sup>45</sup>

Interestingly, Lessig's natal family are also German in origin. Arriving in North America as Hessian<sup>46</sup> mercenaries during the American Revolutionary War, Lessig's forebears were hired by the British to fight the rebels.

For Lessig — whom many now view as the Commander-in-Chief of the war for independence in Cyberspace — it is a strikingly apposite lineage except that, unlike his ancestors, he has chosen to fight on the side of the rebels, not the *ancien régime*



### **The interview begins...**

*RP: You were born in 1961, in South Dakota?*

**LL:** Yes. But we only lived in South Dakota for about two years, so I don't remember it at all. I grew up Williamsport, Pennsylvania.

*RP: And your father was an engineer?*

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<sup>45</sup> Bettina Neufeind is a German born human-rights lawyer, and currently a staff attorney at San Francisco's Bay Area Legal Aid ([BayLegal](#)), the largest provider of free civil legal services in the Bay Area.

<sup>46</sup> Hesse (German: Hessen) is one of Germany's sixteen federal states (Bundesländer). The capital is Wiesbaden. Wikipedia reports that during the American Revolutionary War, Frederick II, of Hesse-Kassel (a principality in northern Hesse), sold thousands of his subjects as mercenaries to Britain in order to pay for his extravagant lifestyle <http://en.wikipedia.org/wiki/Hessian>.

**LL:** Right, although more accurately he was a capitalist — he ran his own business.

**RP:** *Do you have siblings?*

**LL:** I do. I have a younger sister, and I have two half-siblings from my mother's first marriage. They are about ten years older.

**RP:** *What do they do?*

**LL:** My older brother paints houses, my older sister sells cars, and my younger sister is a computer consultant.

**RP:** *Tell me about your schooling. I understand you were a very able child.*

**LL:** I was. [coughs] I always did well. I attended public school in Pennsylvania for most of my childhood, although I went away for four years to a boy choir school in Princeton, New Jersey.

**RP:** *So you had a good singing voice?*

**LL:** I did.

**RP:** *After school you enrolled at the University of Pennsylvania, where you studied economics and management. You then went to Cambridge, England, to do philosophy, before returning to study law at Chicago, and then Yale. Eventually you became a law professor. Your education wasn't a straight line: did you have trouble settling on a career?*

**LL:** The way I see it is that each chapter made the next more interesting. I started at Penn really focused on business, but pretty quickly I found that not to be extremely interesting. But I got interested in the history of economics, which I did as a kind of dual degree at Penn.

That bit of history then led me to think about philosophy, and I began to take courses in philosophy. I liked that so much that, although I was scheduled to go to law school right after Penn, I escaped to Cambridge to pursue my interest in philosophy.

**RP:** *Was philosophy just an interesting side road?*

**LL:** Well, I did consider becoming a professor of philosophy. However, I worried that it would be too removed from anything real. I opted for law on the grounds that — even if I were an academic in law — I would be much closer to the real world.

**RP:** *You also had an early interest in politics. What was it about politics that appealed to you?*

**LL:** I don't quite know. I just found the issue of how things ought to be quite fascinating; and in politics how things ought to be is the fundamental issue.

*RP: In a Wired article in 2002 Steven Levy said that your visit to England changed your politics. He wrote that when you arrived in Thatcher's Britain in the 1980s you were a right wing Republican, but you left with a different, more liberal, perspective? Is that correct?*

**LL:** I wouldn't blame Thatcher's England. It was just philosophy. It is pretty hard to maintain [cough] the kind of thin conception of libertarianism that I had when I arrived in England once you begin to understand issues more extensively. So it was philosophy that really caused my political transformation.

I was not right wing in a conservative sense, by the way, but in the libertarian sense.

*RP: You also travelled around Eastern Europe during the 1980s. Presumably that influenced your political thinking too?*

**LL:** It did, although the most important thing that it did was to teach me how little I had understood about the history of the United States?

*RP: How do you mean?*

**LL:** There were many times when people in Eastern Europe would tell me stories about the history of the United States that I had never been taught: things like the history of how we treated Native Americans; and the history of our intervention in South America; and the nature of our intervention in South East Asia. All of those were stories we didn't tell ourselves in the most accurate and vivid form.

*RP: You accepted the versions you heard abroad?*

**LL:** Initially I was quite sceptical about these characterisations. But they led me to look at matters more extensively, and in that process I recognised that in fact the characterisations of our history that I was given in Eastern Europe were closer to the truth than my own understanding was. So that opened up a channel of scepticism in my head.

*RP: You are saying that when Eastern Europeans presented these alternative characterisations of America to you it caused you to look more deeply into the matter. In doing so you were compelled to change your views, and you became more sceptical about American's self-characterisation as a result?*

**LL:** Yes.

*RP: As part of your legal apprenticeship you clerked for Justice Richard Posner,<sup>47</sup> and then for Justice Antonin Scalia.<sup>48</sup> These are both conservatives whose views on*

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<sup>47</sup> Judge Richard Allen Posner is currently a judge on the United States Court of Appeals for the Seventh Circuit. He is a major voice in the "["law and economics" movement](#)", which he helped start while a professor at the University of Chicago Law School.  
[http://en.wikipedia.org/wiki/Richard\\_Posner](http://en.wikipedia.org/wiki/Richard_Posner).

<sup>48</sup> Antonin Gregory Scalia is an American jurist who has been a prominent conservative and [originalist](#) voice on the Supreme Court of the United States of America, and one of the most outspoken advocates

*the law are somewhat at variance to yours. I read that some of your friends therefore like to joke that you are like Oedipus, the mythical Greek king who killed his father.*

**LL:** I guess it would be accurate to say that my own work is [pause] in contrast to both Scalia's and Possner's work, although in very different ways. Despite our political differences I continue to have deep respect for Possner, and there is a lot of similarity in how we think about these issues. I would say this is less the case with Scalia.

**RP:** *What about Jack Lessig, your own father: he remains a Republican, so I guess your family haven't travelled with you politically. Do you have heated debates with them about politics?*

**LL:** Oh they haven't travelled with me and we don't have debates [laugh].

**RP:** *That all sounds very British to me!*

**LL:** [laughs] Well, I think there was some disappointment as my views changed, especially for my father. But after a period of taunting we basically settled into a British existence.

**RP:** *As a capitalist and engineer, rather than a professor, your father has a more pragmatic approach to life perhaps?*

**LL:** I wouldn't call it pragmatism. It is more that [pause] I think he had a narrower experience of life in many ways, and he had a very particular set of political ideas tied to being an engineer.

**RP:** *How many generations has your family been in America?*

**LL:** Oh, forever. The Lessigs were originally Hessians, from Germany. They were mercenaries hired by the British to fight the rebels.

## **Special Master**

**RP:** *You first attracted the public's attention in 1997, when Judge Jackson<sup>49</sup> appointed you as a special master<sup>50</sup> in the Microsoft antitrust trial.<sup>51</sup>*

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of [textualism](#) in statutory interpretation and original meaning in constitutional interpretation.

[http://en.wikipedia.org/wiki/Antonin\\_Scalia](http://en.wikipedia.org/wiki/Antonin_Scalia).

<sup>49</sup> Thomas Penfield Jackson was a US District Court Judge for the District of Columbia. He was appointed in 1982 after serving as president of the District of Columbia Bar Association. He is perhaps best known to the public as the presiding judge in the *United States v Microsoft* case, where his controversial handling of it was the subject of discussion by both legal professionals and the media alike. He is currently an attorney with the [Jackson and Campbell, PC](#), law firm.

[http://en.wikipedia.org/wiki/Thomas\\_Penfield\\_Jackson](http://en.wikipedia.org/wiki/Thomas_Penfield_Jackson).

<sup>50</sup> A court will sometimes appoint a special master to receive evidence and propose findings of fact and conclusions of law for consideration by the court.

<sup>51</sup> On May 18 1998 the United States Department of Justice (DOJ) and twenty US states filed suit against Microsoft Corporation alleging that the company had abused monopoly power in its handling

**LL:** Right.

**RP:** *That was clearly a huge career opportunity for you. I guess it also helped in the development of your thinking about the implications of living in a world mediated by computers and software programs?*

**LL:** Well, it was around that time that I began developing my thinking about the laws of cyberspace, and I had come to believe that it was essential to understand the interaction between technology and legal policy.

**RP:** *In what way?*

**LL:** You can't just take the technology for granted. Instead you have to think of technology as one of the tools, and then think about the particular way in which it interacts with policy. Sometimes it can support policy; sometimes it can undermine it. But you can never afford to be oblivious to the way in which technology interacts with legal policy.

**RP:** *What were the implications of this in the Microsoft case?*

**LL:** The Microsoft case was just a particular instance of that more general principle — because the issue at stake in the Microsoft case was something that antitrust law calls tying.<sup>52</sup> Tying is an economic concept of bundling one product with another, and that concept turns upon an understanding of how we should think about products and their relationship to each other. In the case of Microsoft it meant trying to understand that concept in a world in which products are defined by software.

**RP:** *Tying I think generally refers to a situation in which a company sells one product only on condition that the purchaser also purchases a second product, or agrees not to purchase that product from another supplier. The tying phenomenon is different with software?*

**LL:** It is. [cough] Basically you can code software however you want, to produce whatever kind of product you want. And that capability is unique with software: you can't, for instance, say that an automobile will be something that is a transmission and a radio wrapped in one. But you can do exactly that with software, because software is so plastic.

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of operating system sales and web browser sales (*United States v. Microsoft*). The issue central to the case was whether Microsoft was allowed to bundle its flagship Internet Explorer (IE) web browser software with its Windows operating system. Bundling them together is alleged to have been responsible for Microsoft's victory in the browser wars as every Windows user had a copy of Internet Explorer. It was further alleged that this unfairly restricted the market for competing web browsers (such as Netscape Navigator) that were slow to download over a modem or had to be purchased at a store. [http://en.wikipedia.org/wiki/United\\_States\\_v.\\_Microsoft](http://en.wikipedia.org/wiki/United_States_v._Microsoft).

<sup>52</sup> Tying is the practice of making the sale of one good (the tying good) conditional on the purchase of a second distinctive good (the tied good). Tying is normally regarded as anti-competitive as one or more components of the package are usually sold individually by other businesses as their primary product. As such, this bundling of goods is likely to hurt their business. <http://en.wikipedia.org/wiki/Tying>.

So my work in the Microsoft case was to understand the special nature of software, and how that interacted with antitrust law. As I say, it was just a particular example of a more general point about how you need to understand the way in which technology and policy interact.

*RP: Microsoft managed to have you removed from the case.<sup>53</sup> Do you think that that was because your understanding of these issues was better than they would have wished?*

**LL:** It is important to be clear here what it means to say that Microsoft had me removed. They charged me with being biased in the case, but we should note that that charge was never affirmed by any court. What the Court of Appeals eventually concluded was that the statute that created the ability to appoint a special master didn't apply in the context of this kind of antitrust case.

*RP: So Microsoft got you on a technicality?*

**LL:** Yes. And while it is true to say that it was because of Microsoft that I was removed, what no one ever recognises is that this was not because Microsoft established that I was "biased".

*RP: What are your thoughts on the way that the Microsoft trial played out?<sup>54</sup>*

**LL:** The conclusion the Court of Appeals reached in the case demonstrated that there was indeed a very serious antitrust issue, and the unanimous conclusion of that Court was pretty damning of Microsoft's behaviour. What we also learn, however, is that while Microsoft's behaviour was found to be illegal, it turns out that the antitrust process is pretty bad at working these things out.

*RP: In retrospect do you think that the success of Open Source software supports the view of those who argued that the monopoly issues associated with Microsoft could have been resolved by the market?*

**LL:** It's true that many of us — me in particular — have been surprised at how successful Linux has been, so far, in checking Microsoft's monopoly power. That suggests that independently of what the Court decided there is an argument that the market is a sufficient protector of competition, and that you don't need the government to step in.

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<sup>53</sup> In February 1998 a federal appeals court suspended Lessig from the Microsoft antitrust case. See <http://www.microsoft.com/presspass/press/1997/dec97/masterpr.msp> for a summary of Microsoft's objections.

<sup>54</sup> On April 3<sup>rd</sup> 2000, US District Judge Thomas Penfield Jackson ruled that Microsoft "maintained its monopoly power by anticompetitive means." Jackson ordered Microsoft to be split into two companies, one to produce the operating system, and the second to produce their other software products. In June 2001, a federal appeals court overturned part of the order to split Microsoft into two companies. Later, in September 2001, the Justice Department under the direction of a new President's administration (George W. Bush) announced it no longer sought to split Microsoft up, and instead sought a settlement with Microsoft. The Department of Justice eventually settled with the company in November 2001. [http://en.wikipedia.org/wiki/United\\_States\\_v.\\_Microsoft](http://en.wikipedia.org/wiki/United_States_v._Microsoft).

But even if that's correct there remains a lot to worry about in the long term: whether, for example, Microsoft will use its power over patents to reinforce the monopoly position that its operating system has.

For that reason I think there will always be a role for antitrust law, and I hope that we find a better way to make it effective.

## The laws of cyberspace

**RP:** *One of the reasons you were appointed to the Microsoft case was because, as you said, you had started to think about law and cyberspace. I'm told that the starting point for this was an epiphany you had after reading about a virtual rape that took place on LambdaMOO.<sup>55</sup> Is that right?*

**LL:** It's true that I first decided to think about the laws of cyberspace after reading an article by Julian Dibbell<sup>56</sup> in *The Village Voice*, which I read shortly after reading Catharine MacKinnon's *Only Words*.

**RP:** *What was striking about these two works?*

**LL:** What was striking to me was the way in which they interacted. Julian Dibbell was able to publish a story about the effect of words on the way people understand and experience reality that, had it been written by Catharine MacKinnon, would have been rejected by *The Village Voice*.<sup>57</sup>

**RP:** *How do you mean?*

**LL:** Catharine MacKinnon would have been absolutely ruled out as a contributor since she would have been seen as contrary to First Amendment values.<sup>58</sup> What that said to me was that *The Village Voice* didn't realise that, in effect, it *was* Catharine MacKinnon who was writing in their pages [laughs]!

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<sup>55</sup> A MOO (MUD object oriented) is a derivative of a [MUD](#) (Multi-User Dungeon: a multi-player computer game that combines elements of role-playing and social instant messaging chat rooms). Essentially, it is a text-based online virtual reality system to which multiple users are connected at the same time. <http://en.wikipedia.org/wiki/MOO>. LambdaMOO It is the oldest and most active MOO, and today has just under 3,000 regular members. <http://www.lambdamoo.info>.

<sup>56</sup> The article (*A Rape in Cyberspace*) describes a cyber rape, and suggests that words can be as powerful as actions.

<sup>57</sup> Catharine MacKinnon is a lawyer, a teacher, a writer, an activist, and a feminist. In the mid 1970s, she pioneered the legal claim that sexual harassment is a form of sex discrimination. Beginning in 1983, with [Andrea Dworkin](#), she conceived and wrote ordinances recognising pornography as a violation of civil rights. The US Supreme Court accepted her theory of sexual harassment in [1986](#). *Only Words*, a collection of three essays, is a polemic against pornography and its protection under the First Amendment. The book contends that pornography, racial and sexual harassment, and racial hate speech are acts of intimidation, subordination, terrorism, and discrimination, and should be legally treated as such. [http://en.wikipedia.org/wiki/Catharine\\_MacKinnon](http://en.wikipedia.org/wiki/Catharine_MacKinnon).

<sup>58</sup> *The Village Voice* is a weekly newspaper in New York City featuring investigative articles, analysis of current affairs and culture, arts reviews and events listings for New York City. Known for its left-liberal politics, it was the first and arguably the best known of the arts-oriented tabloids that have come to be known as alternative weeklies. <http://www.villagevoice.com>.

For me this was intriguing, and provided a pedagogical opportunity: I realised that you could get people to think about issues in cyberspace without the boring political valences that operate in real space.

*RP: So at this point cyberspace was for you merely a useful teaching aid?*

**LL:** Right. At the time I was interested in it primarily as a teacher. It was a place where you could get people to think about underlying legal issues, without being clouded with their own political views. It was a moment to think: "Wow, I could talk about the issues without people knowing the politics, and therefore get them to think about them originally."

That was what got me started. But of course ultimately I have developed a much stronger attachment to a different set of political values related to issues in cyberspace.

*RP: Right. This was before you started writing your book Code and Other Laws of Cyberspace?*

**LL:** Yes. The Dibbell article was published in December 1993. I began writing *Code* around 1996 or 1997, after I had taught the Laws of Cyberspace course I developed a couple of times.

*RP: So your thinking about Code was concurrent with your time as special master in the Microsoft case?*

**LL:** That's right. I had already started publishing articles that began talking about code, and arguing that there is a politics in code.

*RP: What were you hoping to achieve in Code?*

**LL:** What I did in the book was to play off an ambiguity in the English language, and how it is used both in terms of legal code and technical code. So when someone talks about the Criminal Code they are referring to the laws that govern criminal behaviour. We also talk about technical code, meaning the software that is written to produce certain behaviours in a computer system. I used that ambiguity to get people to see a link between the two different codes.

*RP: So in the way that the Criminal Code controls our behaviour in real space, software code defines what we can do in cyberspace?*

**LL:** Right. When I talk about cyberspace I am talking about your experience in cyberspace. How it feels as you go through cyberspace is defined by the software, the technology, or the code. If, for example, the code is written so that every place you go data will be collected recording where you have been, then it is defining the privacy of your experience in a certain way. After all, it could be written in a way that it did not collect that data.

To take another example, the code could be written in a way that made it difficult for you to go to sites that are controlled by governments that we don't like, but easy to go to sites controlled by governments we do like. In this case, the code would be effecting a kind of censorship between the two types of sites.

*RP: I guess this is what Mitch Kapor meant when he said "architecture is politics"?<sup>59</sup>*

**LL:** Yes. It means that the code, or the architecture, of cyberspace begins to define the freedoms and the opportunities available in that space — in the same way that the architecture of law defines the freedoms and opportunities of the physical space. We should note, however, that these are not equivalent: if you look at the practical consequences you see that the restrictions of code in cyberspace can affect someone's behaviour much more significantly than the restrictions of legal code in real space.

*RP: So in building the Internet we were working with a blank slate, and creating a new world. How that world then evolved and changed had political consequences?*

**LL:** Yes. When cyberspace began — because of the way it was designed — the architecture embedded a certain set of freedoms. Those freedoms included relative anonymity (it was pretty hard to track who you were, where you were, where you came from, or what you were doing); they included freedom of speech (you could say what you wanted and, because it was hard to track who you are or where you came from, it was hard to punish you for what you said); and they encouraged all sorts of innovation (because whatever you created for the network could be run and used anywhere on it). In addition, there was no network owner to control what was allowed and what was not allowed. Those were values that the original architecture defined.

*RP: And that has changed over time.*

**LL:** As technology evolved — and in particular as commerce became more significant in cyberspace — those values began to change. Technologies were developed, for instance, to make it easier to track people in cyberspace. That was a change in architecture; a change that reduced the effect of privacy in cyberspace.

*RP: Your point is that we need to be self-conscious about these changes, and how and why they take place?*

**LL:** Indeed. My view is that faced with these changes policymakers have to decide whether they like the resulting set of values that these changes produce. If they like them then they should encourage them: if they dislike them then they should think about how to intervene from a policy perspective to change them, or so as to preserve values that they believe are significant or important. There is no such thing as neutrality about this.

*RP: One of the reasons you gave for writing Code was that you felt the Internet pioneers were too naïve about the ability for technology and law to control and shape the virtual world?*

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<sup>59</sup> Mitchell Kapor (<http://www.kapor.com>) founded [Lotus Corporation](#) in 1982, and co-founded the [Electronic Frontier Foundation](#) in 1990. He reports that he first used the phrase "architecture is politics" in [1991](#).

**LL:** That is exactly right: they thought that the Net would take care of itself. But the problem with that view is that there is no such thing as the Net. What there is is a bunch of people who write code that defines the Net. While you might say that the people who write the code to define the Net can take care of themselves, it is not clear that commerce or the government — which is pretty significant in its role of defining the Net — would define a Net that protected the values that most people would feel should be central.

**RP:** *And over time we have seen both commercial organisations and governments (primarily by means of legislation) increasingly seeking to control and shape the Net — and often in ways with which you personally are not comfortable?*

**LL:** Yes.

## **Free Culture**

**RP:** *You published Code in 1999. Two years later you published The Future of Ideas. As I understand it, this broadened the discussion about the architecture of cyberspace, and outlined the ways in which you feel that governments and companies are re-shaping the Internet.*

**LL:** *The Future of Ideas* went deeper and broader than *Code*. It went deeper in that it talked about particular architectures that were especially salient — the architecture of end-to-end as a feature of the way the network is designed for instance. It then thought about architectures at three layers of the network: the physical layer,<sup>60</sup> the logical layers,<sup>61</sup> and the content layer<sup>62</sup> — in other words, the applications, the content and the protocols that run on those machines connected to the Internet.

In each of these three layers I attempted to identify the same trade-off that I had identified in *Code*. So you could take the modalities in each of these three layers, and identify the kind of freedom that resulted from different mixes of proprietary control and commons in each of those three layers.

**RP:** *By now there was clearly growing tension between proprietary interests and a commons,<sup>63</sup> or open, approach. In your third book — Free Culture — you shifted your*

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<sup>60</sup> The physical layer is the wires and machines that make up the network.

<sup>61</sup> The logical layer is the protocols that make the Internet run.

<sup>62</sup> The content layer is both content and all the programs that run on the machines connected to the Internet.

<sup>63</sup> The web site OnTheCommons expresses it thus: "The commons is a new way to express a very old idea — that some forms of wealth belong to all of us, and that these community resources must be actively protected and managed for the good of all. The commons are the things that we inherit and create jointly, and that will (hopefully) last for generations to come. The commons consists of gifts of nature such as air, water, the oceans, wildlife and wilderness, and shared 'assets' like the Internet, the airwaves used for broadcasting, and public lands. The commons also includes our shared social creations: libraries, parks, public spaces as well as scientific research, creative works and public knowledge that have accumulated over centuries."

<http://onthecommons.org/new?PHPSESSID=9d725666cfb698e18ee8428cf37de6da>.

*attention from the architecture of the Internet to the thorny issues raised by intellectual property in the context of cyberspace. In a sense you focussed in on the content layer perhaps?*

**LL:** As I said in the beginning of *Free Culture*, my first two books were really about the network: trying to get people to understand the network. *Free Culture* is about how a reaction to the network could threaten values off the network. This was a reaction primarily driven by the content industry, which was concerned about copyright infringement on the network.

**RP:** *Can you expand on that?*

**LL:** Sure. As we begin to build intellectual property laws to control the Internet we are finding that those laws are having radical consequences for the way that we produce culture off the Internet. In other words, the Internet — or the reaction to the Internet — is changing the non-Internet world. So *Free Culture* is much more about how the Internet affects culture, than it is about how we can affect the Internet.

**RP:** *I guess this is really a story about copyright. What are the issues with copyright in the digital age?*

**LL:** There are fundamentally two issues. One is that the term of copyright has been increased, so content has not been allowed to expire where it otherwise would have. If nothing else changed that would be bad enough; but at the same time the reach and scope of copyright has also changed dramatically.

**RP:** *In what way?*

**LL:** The reach of copyright has changed by virtue of the combined effect of a very simple technical feature in the architecture of copyright law — namely that it regulates copies — and a very fundamental feature of the architecture of digital technologies, which is that every use produces a copy. When combined these two features mean that copyright law now reaches an extraordinary range of activity that before the Internet would never have been within its reach.

**RP:** *When you say that every use produces a copy you are referring to the way, for instance, that when I access a web page that page has to be copied to my computer before I can read it?*

**LL:** Exactly.

**RP:** *Why is that significant?*

**LL:** Because when you read a physical book in real space copyright law does not come into play: reading is an unregulated use of the book, since it doesn't require producing a copy. When you do the same thing in cyberspace, however, you produce a copy, because to read a book in cyberspace necessitates producing a copy.

Suddenly, therefore, the act of reading now comes within the reach of copyright, where before it did not.

*RP: And how has the scope of copyright changed?*

**LL:** The scope has expanded because Congress has increased the number of things that are subject to the regulation of copyright law. Originally copyright regulated literarily copies, the publishing of copies of books, maps and charts. Today it reaches a wide range of other activities that go far beyond what it covered just 50 years ago.

*RP: Can you give me some examples?*

**LL:** Absolutely. Today copyright covers practically any creative work that is reduced to a tangible form. So, for instance, it covers music as well as architecture, drama as well as computer programs. Moreover, it not only gives the copyright owner of that creative work the exclusive right to "publish" it, but also the exclusive right of control over any "copies" of that work. And, most significantly, it gives the copyright owner control not only over his or her particular work, but also any "derivative work"<sup>64</sup> that might grow out of the original work.

When you put all of these changes together the scope, reach and duration of copyright law is far greater than it has ever been in a free society, anywhere. That is the point: never before in the history of free society has a fewer number of people exercised more legal control of the development and spread of culture.

*RP: Your book Free Culture, along with your activism, has proved the inspiration for what is now generally called the Free Culture Movement.<sup>65</sup> I'm interested that in writing your book you chose the adjective "free", rather than, say, "open". You also eulogise Richard Stallman in the preface of the book. I assume your choice of word was a deliberate acknowledgement of Stallman's work in creating the Free Software Movement.*

**LL:** Absolutely.

*RP: Why?*

**LL:** Richard's point is that this is an issue about values, not about business. While he makes that point about software (and I think he is right about software) it is a much more obvious point when you think about culture. In the context of culture the issue is

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<sup>64</sup> A "derivative work" is a work that is based on (or derived from) one or more already existing works. Derivative works include such works as translations, musical arrangements, dramatisations, fictionalisations, art reproductions, and condensations. Any work in which the editorial revisions, annotations, elaborations, or other modifications represent, as a whole, an original work of authorship is a derivative work, or a "new version". [http://en.wikipedia.org/wiki/Derivative\\_work](http://en.wikipedia.org/wiki/Derivative_work).

<sup>65</sup> FreeCulture.org, for instance, is a diverse, non-partisan group of students and young people who are working to get their peers involved in the Free Culture Movement. Launched in April 2004 at [Swarthmore College](http://www.swarthmore.edu), FreeCulture.org has helped establish student groups at colleges and universities across the United States. Today, FreeCulture.org chapters exist at thirty colleges, from Maine to California, with many more getting started around the world. <http://freeculture.org>.

undoubtedly one of values, and who gets to control how culture develops. It is also an issue about the extent to which that control gets backed up in legal form.

So the critical recognition that Richard made in the context of software is that we need — for value-based reasons — to define the space of freedom. That is the same claim I want to make in the context of culture: that for reasons of value we need to create spaces for free culture.

## ***Eldred v Ashcroft***

*RP: As you said, one of the problems free culture faces is that copyright now lasts so long. I understand that the US Congress has extended copyright eleven times in the last 40 years. This means that where initially copyright lasted just 14 years, today it extends for the life of the author plus 70 years for individuals, and 95 years for most copyrights held by corporations.*

*But you have not restricted yourself to writing about copyright and free culture. You have also sought to change the law, most notably in the challenge you mounted to the Sonny Bono Copyright Term Extension Act with Eldred v Ashcroft.<sup>66</sup> Interestingly, this was the first case to challenge copyright law on constitutional grounds?*

**LL:** Right.

*RP: The original plaintiff in the case was Michael Hart,<sup>67</sup> but he pulled out and the suit was subsequently filed on behalf of Eric Eldred.<sup>68</sup> In the Wired article I mentioned Levy says that Hart effectively fired you following a disagreement over how the case should be pursued. As Levy put it, Hart wanted to attach to the court documents "manifestos attacking the greed of copyright holders", but you felt that "populist views are great but you have got to frame a constitutional argument."*

**LL:** That's right [pause while Lessig turns away and blows his nose]. We knew that the most important decisions made by the Supreme Court in the past ten years had been decisions about restricting the scope of Congress' power in the name of framing

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<sup>66</sup>In January 1999, Lessig filed a lawsuit on Eldred's behalf in federal district court in Washington, DC, asking the court to declare the Sonny Bono Copyright Term Extension Act unconstitutional. It made two central claims: that extending existing terms violated the Constitution's "limited Times" requirement and that extending terms by another 20 years violated the First Amendment. [http://en.wikipedia.org/wiki/Eldred\\_v.\\_Ashcroft](http://en.wikipedia.org/wiki/Eldred_v._Ashcroft).

<sup>67</sup>Michael Hart is the founder of Project Gutenberg ([www.gutenberg.org](http://www.gutenberg.org)). The Basement Interview with Hart is at: <http://poynder.blogspot.com/2006/03/interview-with-michael-hart.html>.

<sup>68</sup>Eric Eldred is an American literacy advocate and the proprietor of the unincorporated Eldritch Press, a website which republishes public domain works (that is, works no longer subject to copyright). Eric Eldred has been described as a former computer programmer and systems administrator, a Boston writer, and a Massachusetts-based technical analyst. A co-founder and director of Creative Commons, Eldred is now on disability and lives in an Internet Bookmobile. He travels the US visiting schools, libraries and special events to show readers how to print their own free books. [http://en.wikipedia.org/wiki/Eric\\_Eldred](http://en.wikipedia.org/wiki/Eric_Eldred).

values,<sup>69</sup> of limited federal power. So we wanted to frame the Eldred case in a very sterile constitutional way.

**RP:** *Nevertheless, the decision went against you.*<sup>70</sup> *In an article you published in Legal Affairs*<sup>71</sup> *you conceded that you had failed to persuade the judges on constitutional grounds. You also said that the lawyers working with you — Dan Bromberg and Don Ayer — argued strongly that the case would only be won if you could show that "dramatic harm were being done to free speech and free culture." In retrospect, was Michael Hart right?*

**LL:** I can see the connection you are making, but I don't think that is the connection to make.

**RP:** *Why?*

**LL:** We didn't want to make it a big political cause — we just wanted to make it an extension of the existing Supreme Court jurisprudence, because we realised that the only way to win the case was to win the conservative's view, and the conservatives were not likely to be motivated by great attacks on media concentration.<sup>72</sup>

**RP:** *So how did you frame your argument?*

**LL:** We tried to make an argument that if you were an originalist<sup>73</sup> — in the way these conservative judges said they were in many other cases — then you should look to the original values in the Copyright Clause. And we argued that if you did that then you had to conclude that congress had wildly overstepped its constitutional authority, and so the law should be struck down.

**RP:** *Unfortunately that wasn't the conclusion they reached?*

**LL:** True. The conservatives didn't recognise another very conservative point — that is, that the extensive regulation of culture is harming all sorts of activities that have nothing to do with Hollywood.

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<sup>69</sup> I.e. the values that are implicit in the way that the US Constitution was framed.

<sup>70</sup> The Washington district court dismissed the claims without even hearing an argument. A panel of the Court of Appeals for the DC Circuit also dismissed the claims, though after hearing an extensive argument. The Court of Appeals for the DC Circuit as a whole was asked to hear the case, but the court rejected the request to hear the case *en banc* (in front of the full panel of nine judges). In February 2002, however, the Supreme Court granted a petition to review the DC Circuit opinion. In January 2003, however, the Supreme Court upheld the CTEA by 7-2.

<sup>71</sup> *How I Lost the Big One*, Lawrence Lessig, Legal Affairs, March/April 2004, [http://www.legalaffairs.org/issues/March-April-2004/story\\_lessig\\_marapr04.msp](http://www.legalaffairs.org/issues/March-April-2004/story_lessig_marapr04.msp).

<sup>72</sup> As Lessig later explains, conservatives have the majority in the Supreme Court.

<sup>73</sup> In the context of US constitutional interpretation, originalism is a family of theories that share the starting point that a Constitution (or statute) has a fixed and knowable meaning, which should be adhered to by judges. A neologism, "originalism" is a formalist theory of law, which is closely intertwined with textualism. Today, it is mostly popular among US political conservatives, although some liberals have also subscribed to the theory. <http://en.wikipedia.org/wiki/Originalism>.

The issue was how to get them to see that point. However, the Chief Justice,<sup>74</sup> who was a key person for us,<sup>75</sup> clearly thought that we were just a bunch of pirates who wanted to steal books. In doing so he failed to recognise that what was really going on was that a whole load of legal regulation was blocking access to all sorts of culture that otherwise would have been set free. In retrospect, therefore, I concluded that there should have been a better way to get to them to see that point.

*RP: So you think you should have argued the case in a different way?*

**LL:** To this day I believe that the only way we could have won the case was to get the conservatives, because the reality is that conservatives dominate the Court. So the scepticism that I have subsequently developed is about what would have been the best way to get the conservatives. I certainly am not convinced that Michael Hart's manifesto would have won the case. Nor do I know anybody who thinks that.

*RP: I didn't see Hart's manifesto. I do know he is very keen to put a dollar figure on what is likely to be lost to the public domain as a result of the extension of copyright.<sup>76</sup> If that was what he was trying to do in his manifesto perhaps it would have been a way of outlining the harm being done to culture?*

**LL:** We did offer lots of economic values around the harm, but that was not in Hart's manifesto. His manifesto was really what the word sounds like — a manifesto; one, moreover, effectively calling for the re-establishment of a feudal culture and blah, blah, blah. It was great rhetoric, but all it was going to do was make people think we were a bunch of crazies!

*RP: So while you still believe it was important to argue the case on constitutional grounds, you have come to believe that you should have demonstrated more vividly the harm that was being done to culture. Would that be fair?*

**LL:** I guess. The problem we faced, however, is demonstrated by the fact that the case got framed as one about Mickey Mouse.<sup>77</sup> Whereas the reality is: who gives a damn about Mickey Mouse [laughs].

*RP: How do you mean?*

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<sup>74</sup> Chief Justice William Rehnquist was a member of the Supreme Court of the United States from 1972 to 2005, and served as the 16th Chief Justice of the United States after being elevated from associate justice by President Ronald Reagan in 1986. He was the longest serving Chief Justice since Melville Fuller died in office in 1910. Rehnquist himself died from throat cancer in 2005.

[http://en.wikipedia.org/wiki/William\\_Rehnquist](http://en.wikipedia.org/wiki/William_Rehnquist).

<sup>75</sup> Key because it was under Rehnquist's command in the 1995 case *United States v Lopez* that the Court began to restrict the power of Congress where it felt Congress had overstepped the powers granted to it by the Constitution. This, Lessig argued, is what Congress did with the CTEA.

<sup>76</sup> Hart puts a \$10 trillion price tag on what will be lost. As he explained to me, "This is based on a calculation of just one cent per book per lifetime, and assumes only about 15% of the world are readers, and only one million books are being lost to the public domain."

<http://poynder.blogspot.com/2006/03/interview-with-michael-hart.html>.

<sup>77</sup> The CTEA was widely referred to as the Mickey Mouse Protection Act, a term that was widely encouraged by the press. See for example the coverage in *Wired*:

<http://www.wired.com/news/politics/0,1283,17327,00.html>.

**LL:** The really destructive feature of the Sonny Bono law is the way in which it locks up culture that has no continuing commercial value at all. It orphaned culture. So by focusing on Mickey Mouse the Court thought this was an issue of whether you believed in property or not. If, however, we had focused people on all the culture that is being lost because it is locked up by copyright we might have succeeded.

**RP:** *So the issue is that in extending copyright in order to protect works like Mickey Mouse, which still have commercial value, you inflict collateral damage on the far greater number of works that have no commercial value — since works without commercial value are likely to be discarded or lost, not least because it is often difficult or impossible for anyone wanting to reuse them to trace the rights owner in order to obtain permission to do so. Essentially, this is the so-called orphaned works problem?*

**LL:** That's right. In the end this culture just disappears.

**RP:** *Am I right in thinking that by extending copyright for 20 years, and doing so retrospectively, the Sonny Bono Act has effectively damned the river of content flowing into the public domain for 20 years?*

**LL:** Absolutely. Nothing will pass into the public domain due to copyright expiration now until 2019.

**RP:** *What are the implications of the Eldred case being lost?*

**LL:** Well we have a continuing case going on, which is a kind of follow on case. This is focused on orphaned works, and it opened up because the court in Eldred said that so long as Congress doesn't change the traditional contours of copyright then there is no need for a special First Amendment review of what they have done.<sup>78</sup>

**RP:** *You are talking about the Kahle v Gonzales case?*<sup>79</sup>

**LL:** Right. *Kahle v Gonzales* is raising the claim that when Congress radically changed the character of copyright law — as it did in 1976 — and extended the copyright term as it did in 1998, that was precisely the kind of change that should be evaluated under the First Amendment,<sup>80</sup> as the court in Eldred said it should.

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<sup>78</sup> In upholding the constitutionality of the CTEA the Supreme Court's judgement [concluded](#) "When, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."

<sup>79</sup> As we saw, the plaintiffs in *Kahle v Gonzales* argue that the various statutes that have extended copyright terms unconditionally are unconstitutional under the Free Speech Clause of the First Amendment, since together they create an "effectively perpetual" term with respect to works first published after January 1<sup>st</sup> 1964 and before January 1<sup>st</sup> 1978. This, they say, is in violation of the Constitution's [Limited Times and Promote...Progress Clauses](#). They have also asked the Court for a declaratory judgment that copyright restrictions on orphaned works — works whose copyright has not expired but which are no longer available — violate the constitution. In November 2004 a district court granted the government's motion to dismiss *Kahle v Gonzales*. In April 2005, however, the case was appealed to the Court of Appeals for the Ninth Circuit. [http://cyberlaw.stanford.edu/about/cases/kahle\\_v\\_ashcroft.shtml](http://cyberlaw.stanford.edu/about/cases/kahle_v_ashcroft.shtml).

<sup>80</sup> The logic here is that extending copyright term shrinks the public domain. This in turn limits free speech because monopoly control by authors, artists, and media corporations unduly restricts the ability of other authors, artists and corporations to copy, share, criticise, parody, or build upon copyrighted

So what we have tried to demonstrate in *Kahle v Gonzales* is that Congress has indeed changed the traditional contours of copyright — and in a way that is quite harmful. For that reason there is a need for a First Amendment review of Congress' actions. I think that this case frames nicely the issue that the court in *Eldred* didn't really see, and if we can get a court to recognise it then the long-term harm of *Eldred* will be minimal — because it means that all Congress can do is to extend work that has a continuing commercial value. It is not totally free to do whatever it wants.

**RP:** *Where is the case right now?*

**LL:** It is currently before the Ninth Circuit, to be considered under the First Amendment. In my view if the Ninth Circuit does do that then Congress will change the law before it ever gets to the Supreme Court.

**RP:** *Why?*

**LL:** Because if it gets to the Supreme Court and the Supreme Court agrees with us, then the Sony Bono Act is struck down.

**RP:** *To be replaced by an equally draconian law perhaps?*

**LL:** Sure, they can pass it again, but the problem is that whereas originally the political opposition to the extension was invisible, it is now huge. So they will try to avoid that by passing a law that basically gives us what we want — which is a copyright system that begins to filter between work that has continuing commercial value, and work that doesn't, and which allows that second class of work to pass into the public domain.<sup>81</sup>

## **Creative Commons**

**RP:** *As we have discussed, in addition to writing and teaching about the threat that copyright poses to the development of culture in the digital age, you have directly challenged copyright laws in the courts (both with *Eldred v Ashcroft* and *Kahle v Gonzales*). In 2001 you opened a third front in the free culture wars — co-founding the Creative Commons.<sup>82</sup> How and why did Creative Commons come into existence?*

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works. In fact, in *Eldred v Ashcroft*, the Court concluded that this was not so since copyright only protects artistic "expression" and not ideas [unlike patents for instance], and because fair use rights act as a safety valve. As we see later in the interview, however, dissenters like Lessig, argue that in any event growing use of DRM is eroding fair use rights.

<sup>81</sup> Presumably pre-emptively, the US Copyright Office was asked to investigate the so-called "orphan works" problem, and on January 31<sup>st</sup> 2006 it submitted a 200-page report to the Senate Judiciary Committee. The report confirms that there is a problem, and suggests that new legislation be introduced to address it. The report is available online at <http://www.copyright.gov/orphan>. The question now arises as to whether this report and/or the proposed [Public Domain Enhancement Act](#) could make the *Kahle v Gonzales* case moot.

<sup>82</sup> From the website: "Creative Commons licences provide a flexible range of protections and freedoms for authors, artists, and educators. We have built upon the 'all rights reserved' concept of traditional

**LL:** The objective of Creative Commons is to make it easy for artists to mark their content with the freedoms that they want their creativity to carry. The recognition was that copyright law automatically grants copyright owners, or creators, a wide range of rights that in a digital world many of them don't really need or want, or which would actually be counterproductive if they continued to hold.

Since it is relatively cumbersome to give away those rights in ways that are reliable — and can be relied upon by others — Creative Commons set up a series of standard-form licences.

*RP: Effectively, then, these licences help creators to separate out the basket of different rights that copyright provides, and then give some of those rights away but retain others. Moreover, they can do this without having to hire a lawyer, and in a way that provides advance notice of the freedoms attached to the content, obviating the need for others to seek them out to obtain permission. But how do they work in practice?*

**LL:** The licences are offered in three separate layers. One layer is the licence itself — an enforceable set of obligations<sup>83</sup> which release certain rights and retain other rights for the author; the second layer wrapped with this licence is a human readable expression of these freedoms, so you don't have to be a lawyer to understand what freedoms go with the content; and the third layer is a set of machine-readable expressions of the freedoms associated with the content — making it easy for computers to search and identify content based on these freedoms.<sup>84</sup>

*RP: Essentially Creative Commons is a pragmatic response to the problems posed by today's draconian copyright laws. It takes the struggle to the street, by providing tools to enable creators to opt out of those aspects of copyright law they do not need or want?*

**LL:** That's right. [cough] However, it does not try to tell copyright owners what to do: it just gives them a simple way to do something with their copyright that takes better advantage of the potential of the Internet. So it's a set of options for artists, with the objective of removing the complexity of the law from the process of creativity.

*RP: What has take-up been like?*

**LL:** Very good. Within a year of launching the project we had about a million link-backs to the licences; at a year and a half this had grown to around 1.8 million. By

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copyright to offer a voluntary 'some rights reserved' approach. We're a non-profit organisation. All of our tools are free." <http://creativecommons.org>.

<sup>83</sup> As with the Free Software Foundation's [General Public Licence](#) (GPL), there has been widespread speculation as to the enforceability of CC licences. In March 2006, however, a Dutch court confirmed that the conditions of a Creative Commons license automatically apply to the content licensed under it. <http://creativecommons.org/weblog/entry/5823>.

<sup>84</sup> Creative Commons has its own search engine (<http://search.creativecommons.org>). This allows web users to find photos, music, text, and other works whose authors are happy for others to re-use it for some uses, and without having to pay or ask permission. It does this by searching for pages that link back to the licences on the Creative Commons web site. In March 2005 Yahoo also released a CC search interface: <http://search.yahoo.com/cc>.

two years it was about 4 million, and today the number is over 20 million. So, the number is growing extremely quickly.<sup>85</sup>

*RP: As you say, most of the content covered by Creative Commons today is web content, although in theory Creative Commons' licences can be used off the Web too. However, I suspect it is often hard for creators to persuade traditional gatekeepers like publishers and music companies to adopt them?*

**LL:** Actually it is proving surprisingly easy in many contexts. What everybody is recognising is that we don't really have a good idea about how the Internet is going to work — and how creativity in the context of the Internet is going to work — so there is lots of desire to experiment. Many book publishers, for instance, are experimenting with the idea of allowing books to be released free online — as a way to market and spread access to the print version of the book.<sup>86</sup>

Musicians are also experimenting with Creative Commons licensing to encourage others to remix and build upon their creative work in a way that would be very cumbersome and expensive if they relied on the traditional copyright system. It was a very big event, for instance, when *Wired* magazine released a *Wired* CD<sup>87</sup> with music from 16 artists, including Gilberto Gil, Chuck D, and the Beastie Boys. They released their music in a way that made it possible for people to remix it — including in some cases the ability to remix it for commercial purposes.

Another interesting example is MIT, which has licensed all its open courseware projects<sup>88</sup> under Creative Commons licences.

*RP: You have also launched Science Commons.<sup>89</sup> What is special about Science Commons, and why is there a need to go beyond Creative Commons?*

**LL:** Science Commons is another project within the Creative Commons organisation. The difference between the two is that in the context of the arts we are not really moralising to artists about what they should be doing: we are not saying they should be giving away their rights, or that they have a moral obligation to give away their rights. We are simply giving them tools to make it easy to do that.

*RP: The implication of what you say is that you believe there is a moral obligation on scientists to make their work freely available?*

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<sup>85</sup> In December 2005 *Technology Review* reported that the number of CC "link-backs" had grown to 45 million. [http://www.technologyreview.com/InfoTech/wtr\\_16073\\_300.p1.html](http://www.technologyreview.com/InfoTech/wtr_16073_300.p1.html).

<sup>86</sup> E.g. in 2003 novelist [Cory Doctorow](#) persuaded his publisher to release his first novel [Down and Out in the Magic Kingdom](#) under a Creative Commons license. The license allowed readers to freely circulate the electronic edition, and that electronic edition was released simultaneously with the print edition. The novel was re-licensed under an expanded Creative Commons license in March 2003 — this now also allows non-commercial derivative works such as fan fiction. Doctorow's subsequent books have also been released under Creative Commons licences. He [argues](#) that the commercial success of his books is due, at least in part, to the free licensing terms, which he believes helps to build an audience for his work.

<sup>87</sup> <http://creativecommons.org/wired>.

<sup>88</sup> Open courseware is a free and open educational resource for MIT faculty, students, and self-learners around the world. <http://ocw.mit.edu/index.html>.

<sup>89</sup> <http://sciencecommons.org>

**LL:** Yes. People believe there is a very strong moral obligation attached to scientific work, and that there is an obligation for scientists to make their work available — at least where they can do so consistent with other constraints they might be living under.

**RP:** *One constraint, clearly, is that as a condition of publishing scientists are usually required to assign copyright in their papers to the journal publisher. Can you expand on the moral obligation scientists have?*

**LL:** For most of the history of scientific publication the very cost of publishing meant that it was impossible to make scientific work universally accessible, since publishers needed to control distribution in order to recover their costs. Now that we have the Internet, however, it is extremely inexpensive to spread scientific work broadly. So we think that there is moral obligation on scientists to recalibrate what they are doing, and instead of just producing knowledge, to produce universally accessible knowledge.

**RP:** *That is precisely what the Open Access Movement advocates. Given what you say about a moral obligation I am surprised that it took you personally so long to commit to Open Access.<sup>90</sup> Why was that?*

**LL:** [slightly peeved voice] I don't know what you are talking about.

**RP:** *I am referring to the commitment you made in 2005 to henceforth only publish in law journals that allow the articles they publish to be made freely available on the Web, rather than locked behind the financial firewall of a journal subscription?<sup>91</sup>*

**LL:** What I did was to say that I am never going to publish again a legal review article in a journal that doesn't permit Open Access. It's not that I didn't support Open Access before, or that I was converted in my belief: it was just that I hadn't decided that I was going to limit my publishing opportunities.

**RP:** *When you say that the decision limits your publishing opportunities you mean that you will now only be able to publish in journals that have made a commitment to Open Access?*

**LL:** Right. If you go to the Science Commons web site you will find a list of journals that have signed the pledge that permits Open Access. As we speak there are about 25<sup>92</sup> of them, including journals like *Michigan Law Review*.

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<sup>90</sup> Open access (OA) is the free online availability of digital content. It is best-known and most feasible for peer-reviewed scientific and scholarly journal articles, which scholars publish without expectation of payment. There are two roads to OA, with many variations. In open access publishing, also known as the "golden" road to OA, journals make their articles openly accessible immediately on publication. In open access self-archiving, also called the "green" road to OA, authors make copies of their own published articles openly accessible, generally in a subject or institutional repository.

<sup>91</sup> [http://en.wikipedia.org/wiki/Open\\_access](http://en.wikipedia.org/wiki/Open_access).

<sup>92</sup> <http://www.lessig.org/blog/archives/002780.shtml>.

<sup>92</sup> At the time of publication this had grown to 34.

But *Harvard Law Review* is not on that list, *Yale Law Review* is not on the list, and *Stanford Law Review* is not on the list.

*RP: This is the kind of problem I raised earlier: with bottom-up initiatives like Creative Commons it can be difficult to get traditional intermediaries to co-operate? This can limit the options of creators and authors?*

**LL:** Sure. The problem here is that typically a law professor will want to get his articles published in high-prestige journals, so if I were not a tenured professor at what I think is the best law school in the country [Stanford] it would clearly have been a harder decision for me to make.

*RP: So for untenured professors committing to Open Access is professionally risky?*

**LL:** Well, if I were advising an untenured professor I would say it is a hard choice to make. But my aim in making the pledge was to encourage a wider range of people to take this freedom.

*RP: So what are you encouraging: that professors publish only in so-called gold journals, where the publisher makes the papers freely available on the Web; or that they adopt the green strategy, and continue to publish in traditional subscription-based journals, but then self-archive their papers themselves in open access repositories?<sup>93</sup>*

**LL:** I'm not talking about self-archiving. In my view it isn't enough. It is a practical step, but it is not a step that guarantees any freedoms. Self-archiving leads to a whole bunch of documents for which the copyright status is uncertain. It is that uncertainty that I am trying to eliminate.

But neither do the journals have to be in the category of gold publishing: what they need to have done is to commit to the Open Access Law Principles.<sup>94</sup> This means that they have committed to allowing authors the right to engage in — and to enable others to engage in — republishing their work, at least for non-commercial purposes.

## **Being a Commoner**

*RP: In 2005 Creative Commons agreed to accept pro bono help from the "word-of-mouth" marketing firm BzzAgent<sup>95</sup> to help promote its licences. This attracted some criticism from the community, and the partnership ended shortly after the campaign began.<sup>96</sup> What happened?*

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<sup>93</sup> See here for “green” and “gold” descriptions:

[http://www.ercim.org/publication/Ercim\\_News/enw64/jeffery.html](http://www.ercim.org/publication/Ercim_News/enw64/jeffery.html).

<sup>94</sup> <http://sciencecommons.org/literature/oalawjournal>.

<sup>95</sup> BzzAgent (<http://www.bzzagent.com>) describes itself as "a network of volunteer brand evangelists who participate in Word-of-Mouth (WOM) campaigns."

<sup>96</sup> After accepting an offer of help in May 2005 Creative Commons faced a storm of objections to the partnership from its supporters, leading to the plug being pulled on a 12-week marketing campaign.

**LL:** BzzAgent is a great new innovative marketing tool, or business process, where they try to get really excited, genuinely interested people to talk about new products or new organisations to their friends — to create a buzz in areas where people wouldn't typically be exposed to these products.

This was a very attractive idea to us because, although we have had considerable success in the context of people on the Internet, and the cliquy crowd that knows about these issues, the next level of our success will depend on being able to spread the message into new environments. So we were eager to work with them to that end.

**RP:** *What went wrong?*

**LL:** We just made a mistake. We misunderstand how participation by BzzAgent would dilute people's support for Creative Commons. Our community responded strongly to the effect that if people were pushing Creative Commons not just because they believed it was a good idea, but also because they were in some way — either directly or indirectly — being compensated for it,<sup>97</sup> then people's support would be diluted. The feeling was that it is one thing to sell Coca-Cola, but quite another to go around and sell salvation.

**RP:** *Do you agree?*

**LL:** When we got this very strong reaction from our community we thought about it a bit, and we realised they were right. We wanted to create a movement of people who believe in the ideals of enabling this kind of freedom for authors and artists, and we didn't want anybody to be confused about why somebody was supporting Creative Commons: they should be supporting Creative Commons because they believe in it, not because they are being compensated.

**RP:** *Wired quoted you as saying: "What we've learned is we can't dilute or ambiguate what it means to be a [Creative] Commoner. When someone says, 'I'm a Commoner,' it has got to mean something."<sup>98</sup> What does being a Commoner mean?*

**LL:** I think at its core it means that people believe in artists' freedom to engage in the kind of flexible offering of their rights that we enable. So to be a commoner is to believe that there is space between 0 and 1 in the copyright field, and that a balance between 0 and 1 is much more productive than either absolute control of copyright, or the other extreme of not respecting copyright.

And in the context of Science Commons we are also pushing people to recognise a moral obligation to be committed to spreading scientific information in a way that is universally accessible.

**RP:** *The BzzAgent incident suggests that there is more than one view of the purpose of Creative Commons?*

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<sup>97</sup> BzzAgent compensates its agents with points that they can redeem for rewards, including music, gift certificates, sports gear, or donations to non-profit organisations.

<sup>98</sup> *Splitsville for CC and BzzAgent*, Daniel Terdiman, Wired, May 9<sup>th</sup> 2005, [www.wired.com/news/culture/0,1284,67450.00.html](http://www.wired.com/news/culture/0,1284,67450.00.html).

**LL:** It's true that some people who identify themselves as commoners have a stronger view than this. In the context of arts, for example, they believe that artists ought to be giving away their rights in a certain way. That is a view that I respect, but the organisation itself doesn't push that particular view. All we are pushing right now is a set of tools to enable people to experiment with the kind of freedom those tools allow.

**RP:** *Some "Commoners" appear to believe that a moral obligation applies to artists as well as scientists. In an essay published in 2005, for instance, Benjamin Mako Hill complained, "despite CC's stated desire to learn from and build upon the example of the free software movement, CC sets no defined limits and promises no freedoms, no rights, and no fixed qualities. Free software's success is built upon an ethical position. CC sets no such standard."<sup>99</sup>*

**LL:** Technically that quote is false: it is not the case that Creative Commons doesn't establish a certain set of freedoms that are driven by an ethical judgement about what is important. The difference is between freedoms other people think Creative Commons should support, and the freedoms Creative Commons does actually support.

**RP:** *Richard Stallman too is critical of Creative Commons. He told me that while he felt that the initial Creative Commons licenses were fine, he is unhappy about some of the new licences. For that reason, he said, he has asked Creative Commons to look again at them. Are you aware of this, and is it likely that any licences will be changed, or withdrawn?*

**LL:** I am aware of the conflict, and we have had lots of conversations about it. What Richard objects to are two specific licences: one is the Developing Nations Licence,<sup>100</sup> and the other is the Sampling Licence.<sup>101</sup>

**RP:** *What are his objections?*

**LL:** His objection to the Developing Nations Licence is that it doesn't guarantee everybody across the world the right to copy the licensed content. [coughs] However, what it does do is to allow content licensed under it to be freely used in developing nations, including for commercial purposes.

**RP:** *How would that work in practice?*

**LL:** It means that if I make a book with a Developing Nations Licence a publisher in a developing nation can take that book and republish it without getting my permission. In the rest of the world, however, traditional copyright pertains — which is what Richard objects to [slightly aggrieved tone to his voice].

**RP:** *What's Stallman's issue with the Sampling Licence?*

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<sup>99</sup> *Towards a Standard of Freedom: Creative Commons and the Free Software Movement*, Benjamin Mako Hill, 29<sup>th</sup> July 2005, [http://mako.cc/writing/toward\\_a\\_standard\\_of\\_freedom.html](http://mako.cc/writing/toward_a_standard_of_freedom.html).

<sup>100</sup> <http://creativecommons.org/license/devnations>.

<sup>101</sup> <http://creativecommons.org/about/sampling>.

**LL:** The Sampling Licence allows a musician to say: "Take my music, remix it, make new music out of it; just don't copy my original song, because I want to be able to control the distribution of it." Again, however, the licence doesn't guarantee the right for anyone to copy the music; and since Richard believes that copying should be a fundamental right he doesn't like that licence either.

**RP:** *You don't agree with Richard's point?*

**LL:** Our view is that both these licences give important freedoms — they just don't give the particular freedoms that Richard believes we ought to offer. That is why he doesn't support these two licences.

**RP:** *You said earlier that you called your book *Free Culture* because you believe that Richard is right to say that this is a matter of values, not business. When I asked Richard about the book he said: "The opinion Lawrence Lessig takes in that book is not a corresponding one to mine. His position is less ethically firm. He won't say that it is simply wrong to stop people sharing. So he is definitely in a different place on the spectrum."<sup>102</sup> The point of disagreement, then, is that Richard believes there is a fundamental right to copy: you do not?*

**LL:** Right. Richard believes there is this fundamental right to copy, and he wraps it in this idea that there is a fundamental right to share. Actually I think that that view trades on a similar confusion to the one that the record industry engages in when it criticises people for downloading music from the Internet.

**RP:** *How do you mean?*

**LL:** There is, for example, a difference between walking into Tower Records and picking up a CD and then walking out, and going on the Internet and downloading a song. I am not saying that either of those is right, or that either one is wrong, simply that there is a clear difference.

**RP:** *What is the difference?*

**LL:** The difference is that when you take a record from Tower Records, Tower Records doesn't have a record to sell, but when you download a song from the Internet it is not clear that you are in any way harming the commercial interests of the song writer, or of the song producer.

**RP:** *Why do you say that downloading a song from the Internet hurts no one?*

**LL:** Because you might not have bought the CD anyway, or you might now decide to buy the CD because you like it. You might also tell your friends about it. So it is a different issue to walking out of Tower Records with a CD.

This difference is fundamentally important, and the same logic applies when you talk about "sharing." If, for instance, my two-year-old gives me a glass of milk and offers to share it with me, that is significant act — because when I drink his milk he doesn't

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<sup>102</sup> <http://poynder.blogspot.com/2006/03/interview-with-richard-stallman.html>.

have any milk left. If, by contrast, a twelve-year-old takes all of the music on his iPod and gives it to his friend "to share", and his friend copies all the music from his iPod, that is a different kind of sharing.

Now you might think both types of sharing are good; you might think both are bad. The only point I am making is that they are different. Because when you share your music on your iPod the other guy has your music, and you do too. It is not like you have sacrificed anything in that sharing, in the way that ordinary sharing in real space is sacrificing something.

*RP: So to talk about a fundamental freedom to share, or a fundamental freedom to copy, is problematic because it ignores the difference between these two activities?*

**LL:** Right. Because if we accept that these two types of sharing are different it is hard to justify or defend the idea that the freedom to copy is a fundamental freedom. Moreover, in lots of contexts I don't think the right to copy is even important.

*RP: Why do you say that?*

**LL:** Consider, for example, the creative sense of being able to build upon and extend music. In this case the ability to copy music is not the important point: it is the right to make derivative works on top of it that is fundamental.

Or consider an African child who needs to get access to educational materials in his own language. He doesn't care that he can take a textbook from the United States and copy it. That isn't any use to him. What he needs is to have that book translated so that it can be useful to him. In that context, therefore, the right to copy is not what is important: once again it is the right to make a derivative work.

*RP: Clearly there are different views. Do you think we might see a similar split occurring within Creative Commons as occurred between the Open Source and Free Software Movements.*

**LL:** I strongly disagree with the suggestion that this is the same kind of battle — or division — that we can see between the Open Source and Free Software Movements. The difference in that case is a difference between pragmatism versus values: the open source people think it is not so important to talk about values — it is just important to be pragmatic, and get business into the habit of producing software whose code is accessible. However, Richard and the free software movement — I think rightly — see it as a question of values, and they believe that we ought to be selling the issue of values.

The division apparently emerging between Creative Commons and some others out there is not one between pragmatism and values, because we too believe this is a question of values. Rather it is a division over the particular set of freedoms we support. Effectively we offer more freedoms than the freedoms Richard thinks ought to be offered.

*RP: Ok. So this is not a matter of values versus pragmatism, but which particular set of values should be supported?*

**LL:** Right. So I would suggest that there ought to be a stronger recognition that there can be different judgements [frustrated laugh] about what values are out there, rather than people climbing up on a podium and declaring that they are standing for values, and everybody else is engaging in pragmatic compromise. People also need to realise that success in defending values is a function of how persuasive their particular values are.

**RP:** *So you agree with Richard Stallman that this is a question of values, and of freedom, but you disagree on the details of which freedoms should be defended?*

**LL:** I don't think there is a fundamental freedom to copy that is important in all contexts. What is important depends on the context. So I believe that those of us who are trying to navigate these freedoms should show a little bit of humility when talking about different disciplines.

**RP:** *How do you mean?*

**LL:** I work in the academic field, so I don't have much hesitation in saying what I think scientists ought to do. But I am not a musician, and I am not an artist, so I understand that the situation may be different for them, and I think it is incumbent on others to be a little bit more humble about their judgement when talking about different contexts.

**RP:** *You mean they should listen to what practitioners in different fields say are the important issues?*

**LL:** Yes. Rather than marching in with a set of defined principles that come from who knows where, and imposing those regardless of the views of those who live in that particular domain, they should listen to what these people say to them.<sup>103</sup>

**RP:** *There are quite a few open and free movements now, including the Open Source and Free Software Movements, Creative Commons, Open Access, Open Spectrum, Open Biology. Something significant is clearly going on. The Internet is surely an important common denominator, but what else do you see driving these various movements? What's the big picture?*

**LL:** I think we can say that there is something important and new, and there is something important and old.

**RP:** *Ok, let's start with something important and new.*

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<sup>103</sup>In reality these tensions will surely only intensify. In November 2005 Lessig conceded that many of the various free licences now available might not work together. The Free Software Foundation's GNU Free Documentation Licence (under which Wikipedia content is licensed), for instance, is not compatible with some CC licences. <http://creativecommons.org/weblog/entry/5709>. Conceding that the mistake was both astonishing and "embarrassing", Lessig has proposed resolving the problem by setting up a Creative Commons Legal Advisory Board ([ccLab](http://creativecommons.org/legal)) to serve as a standards body. However, it's clear from the criticisms of CC voiced by, amongst others, Stallman and Mako Hill that bridging the growing ideological gap may not be possible, at least in the short term.

**LL:** What is important and new is the way the technologies are facilitating a level of collaboration that was not feasible before. [coughs] The amazing thing about Open Source and Free Software, for instance, is that it is not just that people collaborate to produce it, but they collaborate from all around the globe to produce it.

This means they are never working in the same room or under the control of Bill Gates when they do so. They are producing it in these wildly disparate contexts, and they are able to do that because of the technological infrastructure that enables collaboration to happen.

So the new thing is that we have now got an infrastructure to enable collaboration that we didn't have before — not just in the software space, but also in the production of culture and the spreading of culture. That is something fantastic.

*RP: What is it that is important and old?*

**LL:** We need to recognise that collaboration was not born with the Internet: we have always been collaborating in order to build new things. So what we are seeing is that a lot of people are trying to craft ways to expand the opportunity for collaborating in the digital space.

The problem is that while our intellectual property laws have always recognised the need to collaborate — by the limitations that are built into the law — these laws were written for an analogue or non-digital world, and as these laws are being applied to the digital space they are producing blockage for this collaboration.

What Open Source and Free Software people are doing, for instance, is to try to guarantee access to the material necessary to collaborate and build upon other people's software. Likewise, Creative Commons tries to avoid having certain freedoms wiped away that would interfere with the right to collaborate, at least legally.

So what we are seeing are private responses to problems created by the architecture of a system of regulation that was not itself crafted for digital technologies — with the aim of allowing collaboration to continue.

## **A question of balance**

*RP: You sometimes complain that people incorrectly accuse you of being opposed to intellectual property. How would you characterise your views?*

**LL:** I believe that intellectual property protections are necessary. That means that I believe in copyright, which I think will continue to be an important and necessary feature of the creative process, even in the digital age.

**RP:** *You frequently voice criticism of software patents.<sup>104</sup> Are you anti-patent?*

**LL:** No. I believe patents are justified on utilitarian grounds. So I support the idea of patents where the benefit that comes from them outweighs the costs, and there are some areas of invention where it is plainly evident that the benefits outweigh the costs.

However, in the context of software patents — and in particular business method patents<sup>105</sup> — I do not believe this is the case. The economic research is at best ambiguous and generally suggests that the costs are greater than the benefits. So in the context of software and business methods I don't think we ought to be creating a system of regulation that sits on top of innovation.

**RP:** *It's a question of balance?*

**LL:** Right. We create the monopolies that patents represent in order to produce innovation that we don't think would otherwise be produced. So where we know that there is sufficient incentive to produce innovation without patents then there is no reason to create monopoly protection, especially where it will shut out a bunch of innovators who cannot bear the burdens that patent protection imposes.

**RP:** *So what is the solution? To return to the situation that existed prior to the State Street Bank<sup>106</sup> case?*

**LL:** Well, interestingly, *State Street Bank* said that it was only recognising a principle that had always been there. Yet 90% of patent lawyers thought that there was no such principle in patent law!

But what we need to do now is to find a way to distinguish between those areas where patent protection would help spur innovation, and those where protection would stifle innovation.

**RP:** *How do we do that?*

**LL:** Right now I'm not sure of the best way to do that. Historically there has been a lot of effort to draw a line in the context of software-based technology, most of which

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<sup>104</sup> Software patents and patents on computer-implemented inventions (CII) are the subject of intense debate, with many arguing that patents are entirely inappropriate in the software arena. [http://en.wikipedia.org/wiki/Software\\_patent](http://en.wikipedia.org/wiki/Software_patent).

<sup>105</sup> Business method patents are patents on "a method of operating any aspect of an economic enterprise". When this is accomplished by software, critics argue, the patent system is effectively encouraging wily entrepreneurs to take familiar business methods from the physical world, add the words "network" and then patent their use. There is, therefore, a sustained debate as to what extent such patents should be granted. [http://en.wikipedia.org/wiki/Business\\_method\\_patent](http://en.wikipedia.org/wiki/Business_method_patent).

<sup>106</sup> In *State Street Bank & Trust v. Signature Fin. Group* the US Federal Circuit court of appeal held that business processes could constitute patentable statutory subject matter, just as other processes may be statutory subject matter. The specific case referred to a new type of financial instrument. Although the *State Street Bank* and a later AT&T decision state very broadly that business methods are patentable, the US [Patent and Trademark Office](http://www.uspto.gov) (USPTO) has generally limited the business method patents that it issues to business methods that are accomplished or implemented with computers. Nevertheless, *State Street Bank* has helped to make software patents easier to obtain, and so increasingly common. [http://en.wikipedia.org/wiki/State\\_Street\\_Bank\\_decision](http://en.wikipedia.org/wiki/State_Street_Bank_decision).

has proved unsatisfactory. This is due to the complexity of software. But I'm still open to seeing a much more innovative way of drawing that line: recognising that some parts of innovation around computers might need patent protection, but that software patent protection as a general rule is not good.

*RP: What are your views on the outcome of the dispute that took place in Europe over software patents?*<sup>107</sup>

**LL:** The European example is a really good one for us all to look at, because European patents were stopped by a movement of software developers, who said: "We don't want your patent protection, so don't give us these problems." [laughs]

*RP: Clearly that carried more weight than criticism from activists?*

**LL:** Sure. Opposition wasn't perceived as coming from a bunch of people who wanted to steal other people's creative work in the way that debates over intellectual property often develop. (That is how supporters of Grokster<sup>108</sup> were viewed for instance). Rather it was seen as a bunch of creators who decided that they don't need this kind of monopoly granted to them by the government. That made their argument very strong and credible.

*RP: Another topic that continues to cause considerable conflict today is digital rights management. I guess DRM is the ultimate example of code being used to limit our freedoms and to control what we can do in a digital world. Moreover, new laws like the DMCA have reinforced content owners' ability to impose usage rules on consumers — by, for instance, criminalising the circumvention of DRM. Is this also just a question of balance? Are there times when DRM is acceptable?*

**LL:** Sure. If, for example, I have a bunch of secrets about financial matters on my computer I may want to use technology to enforce control over access to those secrets. There is nothing wrong with that. I am also sure that there are many businesses that need to control the distribution of copyrighted content in ways that makes sure that they can recover their investment. So I am not opposed to DRM in principle, or in every context.

*RP: What do you object to about DRM?*

**LL:** What I am opposed to is that DRM has become the default for digital content, and yet it cannot assure the type of freedoms that copyright law itself is designed to give us.

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<sup>107</sup> In July 2005 the European Parliament voted 648 to 14 to reject the Computer Implemented Inventions Directive. The vote took place after a huge political row and considerable opposition and lobbying, and after more than 100 amendments had been made to the original bill. <http://news.bbc.co.uk/1/hi/technology/4655955.stm>.

<sup>108</sup> *MGM v. Grokster* was an important US case in the ongoing campaign by content companies to stop consumers sharing music and films over the Internet. On June 27<sup>th</sup> 2005 the Supreme Court ruled that the providers of software that was designed to enable "file-sharing" of copyrighted works may be held liable for the copyright infringement that takes place using that software. The Court held that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." [http://en.wikipedia.org/wiki/MGM\\_v.\\_Grokster](http://en.wikipedia.org/wiki/MGM_v._Grokster).

*RP: How do you mean?*

**LL:** I mean that DRM cannot guarantee fair use<sup>109</sup> because fair use is designed to be contextually specific. So your use of content is deemed fair depending on a multi-factored test, each factor of which looks at the particulars of why you are using it, and how you are using it.

*RP: In other words, technology is simply not smart enough to understand the context in which content is being accessed, and so cannot apply fair use tests?*

**LL:** Right. It cannot make that type of assessment, and so cannot adjudicate on fair use. More fundamentally, it imposes a layer of complexity into the system of creativity that will stifle all sorts of unanticipated creativity, because the costs of negotiating or clearing rights — or even trying to figure out who to negotiate rights with — are extremely high.

*RP: So it doesn't encourage the culture of "rip, mix, and burn"<sup>110</sup> that you say underlies human creativity?*

**LL:** Exactly. We need to recognise that there are lots of way to secure access to work that doesn't include wrapping it in technology to control access. The fundamental problem with DRM is not that it uses technology to *express* digital rights — Creative Commons uses technology to do this — but that it uses technology to *enforce* digital rights.<sup>111</sup>

*RP: So what needs to be done?*

**LL:** We need to support digital rights expression technologies — again Creative Commons is one example of that — and we need to develop business models that use the expression of rights without trying to control rights, and continue to have that as an alternative to content delivery that inevitably has DRM attached to it.

## **Matured libertarianism**

*RP: Let's return to the topic of Lawrence Lessig. You got married in 1999, and you now have a son. Has your family altered your priorities in life?*

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<sup>109</sup> The fair use doctrine is subject to a four-factor balancing test, including the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. [http://en.wikipedia.org/wiki/Fair\\_use](http://en.wikipedia.org/wiki/Fair_use)

<sup>110</sup> A term first used by Apple in 2001 to promote the CD burning capabilities of its [iTunes](#) desktop software. It was somewhat controversial as it was seen by some as advocating piracy. <http://live.watchmactv.com/?p=174>.

<sup>111</sup> The distinction is between creators saying how they want people to use their content (by means, say, of Creative Commons licences and metadata expressing those licences) and the act of imposing usage rules by using electronic padlocks, encryption etc.

**LL:** Well, of course. [laughs] The opportunity cost of being on the road and away from home is much greater than it was before. It was already very great because I didn't want to be away from my wife. But being away from my son is itself extremely difficult for me. So that has become much, much more difficult and has changed my priorities.

**RP:** *What has changed?*

**LL:** I try to travel less. Although the reality is that for the next four months I am travelling every single week to events related to the Free Culture Movement.

**RP:** *The dedication in The Future of Ideas says: "To Bettina, my teacher of the most important lesson". Your wife is a human-rights lawyer who investigated the Kosovo war crimes, and who supports homeless people. Was it a political lesson she taught you, or a personal one?*

**LL:** [small quiet voice] It was personal.

**RP:** *You are clearly very committed to Free Culture and the reform of the intellectual property system. Many academics feel strongly about the issues they teach, and often write about them with fervour. Not many professors, I think, become activists. Why you?*

**LL:** Well, it was not my intention to become an activist. As I said, I got into intellectual property as a consequence of thinking about the interaction between technology and law. But over time I began to see the threats that were developing, and while they were developing for totally obvious reasons to do with special interests, I could also see that there was an extraordinary amount of ignorance about them.

In addition, while I could see why those special interests were behaving in the way that they were, at a certain stage I also recognised the extraordinary harm that lawyers were doing to the potential for cyberspace to develop. So I became a lawyer with a guilty conscience, and my activism flowed from a kind of outrage at the way the law had distorted the objectives of intellectual property in the context of digital technology.

**RP:** *Some might argue that activism is not consonant with the role of a professor.*

**LL:** Sure, a lot of people think that what it means to be a professor is to not try to affect things in the world. But I don't believe that is what it means: in being a professor you are affecting things all the time — in educating people. So what I do is just another way of educating people.

Indeed, you could argue that that is just what a professor is supposed to do: to profess what is the truth. Moreover, when you see that what is being said is just false, and producing great harm, is it activism to speak what you think is true?

**RP:** *You have spoken out on other topics too: you were, for instance, involved in a case that challenged an injunction against sites that carried software to crack the*

*program "CyberPatrol";<sup>112</sup> you also testified before Congress on the Child Online Protection Act.<sup>113</sup> You have also on occasions taken direct action: in 1985, for instance, you smuggled a heart valve into the Soviet Union for a Jewish dissident, (hidden in the crotch of your pants). How do all these things fit together in your head? What is it you see yourself defending?*

**LL:** If you ask how I piece together the synthetic whole of my whole life [laugh] I would probably have to answer by telling a long and boring story about how one set of recognitions led to another. Clearly the priorities I had when I was 21, or 19, are not the sort of priorities I have today.

What I can say is that the passion that motivates me today is the belief that the law in its deepest values is supposed to restrict arbitrary control over the freedom of individuals, not eliminate them. That is what drives me. I am not supporting anarchy, but the arbitrary control over the spread of creativity we have today is astonishing. And it is astonishing to me that it is not more obvious to more people.

**RP:** *So how would you describe your politics today?*

**LL:** At base I think of it as a kind of matured libertarianism. I am not a libertarian in the sense that I don't think there is a role for government — there is plainly a role for government. But I am a libertarian in the context of free speech issues. I believe there is something fundamentally wrong with regulation that can't be justified. So I am motivated by a desire to defend that freedom, and by a deep scepticism about regulations that interfere with that freedom. And that is what I believe has happened in the context of intellectual property.

**RP:** *You said earlier that an important moment for you was when you read Julian Dibbell's *A Rape in Cyberspace*.<sup>114</sup> You also say that you are a free speech libertarian. Dibbell's conclusion in his essay seemed to be that words are as powerful as acts, and so should be regulated in the same way. Presumably you would not support that?*

**LL:** As I said, what was significant for me in reading that article was that Dibbell was writing in a publication that staunchly supported the First Amendment, and staunchly opposed activists like Catharine MacKinnon — who in their fight against pornography make precisely that point: that words are effectively acts in the context of pornography, and they ought to be regulated like that.

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<sup>112</sup> <http://news.com.com/2100-1023-238888.html>,

<http://www.lessig.org/content/standard/0,1902,13533,00.html>.

<sup>113</sup> The Child Online Protection Act (COPA) is a law in the United States of America, passed in 1998 with the declared purpose of protecting children from harmful sexual material on the internet. The law was blocked by the courts and has never taken effect. Because it only limited commercial speech and only affected US providers, the effect on the availability of the regulated material to minors if the law was enforced was unlikely to be significant. Several US states have since passed similar laws.

[http://en.wikipedia.org/wiki/Child\\_Online\\_Protection\\_Act](http://en.wikipedia.org/wiki/Child_Online_Protection_Act).

<sup>114</sup> Dibbell concludes: "[T]he more seriously I took the notion of virtual rape, the less seriously I was able to take the notion of freedom of speech, with its tidy division of the world into the symbolic and the real... [As such] ... I can no longer convince myself that our wishful insulation of language from the realm of action has ever been anything but a valuable kludge..."

But while that article got me into thinking about the laws of cyberspace its argument was very different from what got me thinking about the particular set of issues that I am an activist for now. Those issues certainly aren't motivated by the thought that we ought to be regulating speech like acts.

While I have a lot of respect and sympathy for the views of Catharine MacKinnon, my views about copyright are certainly not inspired by her views on pornography. They are pushing at a very different set of fundamental values.

**RP:** *When you were at Yale you attended lectures given by Catharine MacKinnon didn't you?*

**LL:** Yes. I was her student.

**RP:** *You say you have sympathy for Catharine McKinnon's views. While I understand you are not saying that you support her claim that words are effectively acts, I'm wondering if maybe her views on feminism reverberate for you at a personal level. I read the John Heilemann article in the New York Magazine<sup>115</sup> concerning the lawsuit that John Hardwicke has taken out against the Princeton Boychoir School. That was the Boychoir School you attended as a child?*

**LL:** It was.

**RP:** *Hardwicke alleges that the school's musical director Donald Hanson abused him. Heilemann says that you too were abused by Hanson.<sup>116</sup> He quotes you saying that when you attended MacKinnon's lectures you began to see your relationship with Hanson "in a different, more sophisticated light".<sup>117</sup>*

**LL:** Well there is no doubt that the events that happened at the Boychoir School made the salience of what Catharine MacKinnon was teaching much more important to me. There is no doubt about that, and that is what that article was talking about.

**RP:** *You said earlier that what motivates you today "is the belief that the law in its deepest values is supposed to restrict arbitrary control over the freedom of individuals". Presumably you felt a victim of arbitrary control at the Boychoir School, and maybe you felt that the law should have stepped in, and stopped what was happening? Could there be any connection between your experiences at the Boychoir School and your decision to study the law?*

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<sup>115</sup> *The Choirboy*, John Heilemann, New York Magazine, May 30<sup>th</sup>, 2005, <http://newyorkmetro.com/nymetro/news/features/12061/>.

<sup>116</sup> In 2001 John Hardwicke sued the Princeton Boy Choir School (then known as the American Boychoir School in Princeton), alleging that he had been abused by the musical director Donald Hanson (*Hardwicke v. American Boychoir School*). Lessig spent his sixth-through-ninth-grade years there, from 1972 to 1976. In his article Heilemann says that when Lessig was head boy of the school he too was repeatedly molested by Hanson. After initially refusing to be involved in the case, in 2003 Lessig offered to argue it in court.

<sup>117</sup> Heilemann quotes Lessig as saying: "There was this moment when I realised that I had been, in the traditional way, a woman in all respects — totally passive, an object of sexual aggression ... I was his wife."

**LL:** I don't consciously have that kind of recognition around my decision to become a law professor. What was always appealing to me about the law [pause] is what I describe at the end of *Code*. That here is a field where power is ideally allocated according to reason.

This connects with a kind of disgust that I had growing up about the political process, which is a process in which power is not allocated according to reason, but according to power rights. What was appealing to me about the law, therefore, was that it offered a remedy and a defence — that it could create justice.

**RP:** *So you see no connection between your career choices and what happened at the Boychoir School?*<sup>118</sup>

**LL:** Well, I don't think that there is a direct or obvious connection between what happened there and, say, my opposition to the Sonny Bono Act. Maybe a shrink could find some connections, but I don't have the money to pay for a shrink!

The more salient feature of what happened to me in my own mind was what I call the "Good German Problem" — the problem where when great harm is being done hosts of people stand around doing nothing.

**RP:** *Yes. Heilemann quotes you saying: "The real evil isn't the Hitler. The evil is the good German. The evil is all those people who could've just picked up the goddamn telephone and stopped it."*

**LL:** Exactly. It would take *nothing* for them to stop what is happening, but they don't. So while we often think about the person actually directing or doing the harm as a kind of Hitler — in my case the choir director who was doing the abuse — the fact is that what drives them to be evil is a complicated problem to solve. What drives the people to sit around and do nothing is a much easier problem to solve.

For this reason my thinking about the law constantly focuses on actions that drive justice, as opposed to particular players who might be good or bad depending on what they do. That is what drives how I think about the law, and that obviously has a direct connection with events at the Boychoir School.

**RP:** *The school litigator, Jay Greenblatt, argues that you too were a good German. His point, I think, is that if you had put your hand on the phone you could have stopped Hanson?*

**LL:** That's right, and it's not like I totally disagree. At a certain stage I too could have put my hand on the phone. However, I don't think of myself as being in the same category, because part of the story Greenblatt didn't know anything about is that in

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<sup>118</sup> Heilemann says that after "landing a plum professorship at the University of Chicago Law School, Lessig went entered therapy." He adds: "What happened next is something Lessig refuses to discuss. But according to Hardwicke's lead attorney, Keith Smith, Lessig sued the Boychoir School and received a settlement. Both the suit and the settlement are officially under seal, with a confidentiality agreement that bars either side from disclosing their existence, let alone any of the details."

fact I was doing what I could to stop the abuse<sup>119</sup> — although retrospectively I can see I was completely naïve about my potential to have an effect.<sup>120</sup>

*RP: OK, great. Thanks a lot for your time.*

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<sup>119</sup>In 1978, two years after he left the choir school, Lessig persuaded the then head master Stephen Howard to appoint him as the alumni representative to the board of directors. He subsequently visited Hanson and extracted a promise that the abuse would end. Hanson nevertheless continued, and in 1981 was accused of molesting two students. At that point, after trying to kill himself, Hanson resigned and disappeared abroad.

<sup>120</sup>For further information on the alleged abuse at the school see: <http://www.americanboyschoir.com/boychoir.html>.