Open Content Licensing:

Cultivating the Creative Commons

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Does Copyright Have Limits? *Eldred v Ashcroft* and its Aftermath

THE HON JUSTICE JAMES DOUGLAS AND PROFESSOR LAWRENCE LESSIG

Introduction

The Hon Justice James Douglas *introduces Professor Lawrence Lessig, and provides background on the Creative Commons movement and the* Eldred v Ashcroft *case.*

Does Copyright Have Limits? *Eldred v Ashcroft* and its Aftermath

Professor Lawrence Lessig *discusses the 2003 US case of* Eldred v Ashcroft*, which challenged the 1998* Sonny Bono Copyright Term Extension Act *and its extension of US copyright terms by 20 years.*

Professor Brian Fitzgerald
(Head, QUT Law School)

Introduction

THE HON JUSTICE JAMES DOUGLAS

I am very pleased to welcome Professor Lawrence Lessig to speak to us tonight on the subject *Does Copyright Have Limits: Eldred v Ashcroft and its Aftermath?*

As I am sure most of you know Professor Lessig is now a professor at Stanford Law School and founder of the School's Centre for Internet and Society. Previously he was the Berkman Professor at Harvard Law School. My American friends tell me that Stanford is now the best American university for intellectual property law. Perhaps there is some connection.

Before his academic career Larry Lessig clerked for Justice Scalia of the US Supreme Court and Justice Posner of the US Federal Court's 7th Circuit Court of Appeals. Judge Posner is a leading judge, scholar and theorist who has written much about economics and the law. Appropriately Professor Lessig has degrees in economics, management, philosophy and law from several of the world's best universities, the Wharton School of Business at the University of Pennsylvania, Trinity College, Cambridge (the original Cambridge), and Yale Law School. He is the author of several influential books, including *The Future of Ideas: The Fate of the Commons in a Connected World*,[5] and *Code and Other Laws of Cyberspace*,[6] and numerous articles. He writes not just for lawyers but for intelligent members of the public and has a talent for making the complex lucid.

His interests lie in ideas and their future in a wired world. His work as a legal scholar concentrates on constitutional law, contracts, comparative constitutional law and the law of cyberspace. His rapid rise to fame comes from the force and timeliness of his ideas and the skill and energy with which he propounds them. His book, *The Future of Ideas*[7], should be required reading for anybody with a serious interest in the proper and free dissemination of ideas and information and the structure of the Internet as affecting those issues.

[5] (2001) Random House, New York.
[6] (1999) Basic Books, New York.
[7] (2001) Random House, New York.

His arguments are well illustrated. The freedom he espouses is that of free speech, not free beer. Resources are ‘free’ he argues if they can be used without the permission of others or the permission one needs is granted neutrally. In that context he argues that the question for our generation will be not whether the market or the state should control a resource but whether that resource should remain ‘free’.

Three organizations with which he is associated, the Creative Commons Project which he chairs, the Electronic Frontier Foundation and the Centre for the Public Domain, are leaders in the attempt to diminish the extent of the monopolies created by intellectual property law. But he is not opposed to private property or the need to reward the creative. To paraphrase him in a recent response to Bill Gates of Microsoft, he is not a creative communist but a creative ‘commonist’. His concern is that the monopolisation of intellectual property has gone too far and that it is infringing on our ability to draw on what most of us see as the commonly owned resources of society in the formation and expression of ideas.

What does he mean by the ‘commons’? Let me use my own analogy with a local flavour, particularly appropriate in the middle of a hot Queensland summer and dear to the heart of Professor Brian Fitzgerald, the organiser of this conference. Australian beaches are publicly owned and freely accessible to all. How different would our coastal society be if that resource were locked up in private hands, only accessible to the proprietors of the land bordering our oceans or to those whom they licensed? It is not an idle comparison. Many European countries and American States do just that – lock up much of what we perceive as a free, public resource.

When the decision is made to place such a resource in private rather than public hands the consequences are difficult to reverse. Those who have lived in Brisbane as long as I have will recognise how public access to our river banks has slowly increased over the last few decades and how much the city has benefited. The river’s development as a public resource has required imagination and significant expense because its banks were traditionally held in private hands. The floating walkway at New Farm is one example both of the imagination and the expense. It shows why it is important to make the correct decisions now needed to keep ‘free’ access to the still relatively new resource created by the Internet.

Professor Lessig first attracted broad public attention when he was engaged as an expert to assist Judge Thomas Penfield Jackson of the US Federal Court with the monopolization issues in what has been described as “the

mother of all tech litigation: *Department of Justice v Microsoft*[8] in 1997. His contribution will deal with the decision in the US Supreme Court, *Eldred v Ashcroft*,[9] where he was one of the counsel who unsuccessfully argued that the US Congress' *Sonny Bono Copyright Extension Act 1998*, extending the copyright period for most existing works to 95 years after the author's death and for new works to 70 years, was unconstitutional. For his efforts he was named one of *Scientific American's* 'Top 50 Visionaries', for arguing "against interpretations of copyright that could stifle innovation and discourse online".

The constitutional arguments were that the Act infringed the free speech guarantee in the first amendment and the copyright clause. The copyright clause gives Congress the power to promote the progress of science by securing to authors for limited times the exclusive right to their writings. When I first read of the impending case about two and a half years ago the argument that interested me was that the retrospective extension of copyright was not for a 'limited time' when added to the earlier statutory limitation and understood in the context of the power's focus on the progress of science.

The argument did not succeed but, if we had a similar provision in our Constitution, it may have had a rather better run in our High Court. It is not as deferential to Parliament as the US Supreme Court is to Congress in respect of what we would think of as jurisdictional facts. I suspect we have not heard the last of the argument, given the demanding appetites of American copyright holders and the powerful dissenting judgments. With the Free Trade Agreement between Australia and the USA the issue will remain important for us as well.

Congratulations to QUT, Professor Peter Coaldrake its Vice-Chancellor, and Professor Brian Fitzgerald, the Head of the Law School, for organising this conference and for securing such an outstanding speaker as Professor Lawrence Lessig. The Chief Justice, Paul de Jersey, is on leave but it was with his encouragement and cooperation that the Court's facilities have been made available. I would like to thank him also.

It is appropriate that the Court provide its facilities to allow the public free access to this speech and we embrace the chance to be associated with QUT in advancing the progress of science.

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[8] 87 F. Supp. 2d 30 (D.D.C. 2000).
[9] 537 U.S. 186 (2003).

Does Copyright Have Limits? Eldred v Ashcroft and its Aftermath

PROFESSOR LAWRENCE LESSIG

The last time I had the chance to stand in a Supreme Court and asked, "does copyright have limits?", I was standing on that side of the Bench and several of the Justices got the answer wrong. I am very eager to be standing on this side of the Bench and asking the very same question, and even more encouraged to learn that in Australia the question may get a serious answer.

Let me put this in context. Copyright law begins in the Anglo-American tradition in 1662. The *Licensing Act* of 1662 established monopolies for publishers in England in cooperation with the Crown, to guarantee that those who had the power to speak would use the press in a way that either benefited the Crown's political interest or the publisher's monetary interests. That statute expired in 1695 and what followed from the perspective of the publishers was chaos.

From the perspective of the public, what followed was freedom. There were no protected monopolies for publishing; there increasingly became competition in publishing and that competition was scary to these publishers so they increasingly lobbied in a frenetic way to re-establish monopoly controls. They were the inspiration for a scene from *Wizard of Oz* and by 1709 they had succeeded. In 1709, Parliament passed a statute to re-establish monopoly power in the context of copyrights. That was the *Statute of Anne*.

This Statute was originally proposed to establish monopoly for copyright for an unlimited term. It was to be perpetual copyright. But in the course of its passage through the Parliament the proceeding was amended in a way that terrified the publishers because the amendment stated that copyrights would extend for fourteen years for new works (renewable), and for existing works twenty-one years. The critical question for us, hundreds of years after this decision was made, is why would they limit copyrights? What was the purpose? From my perspective, our first intuition would be the idea of free speech; that it was important to limit copyright to promote speech. In fact, free speech had absolutely nothing to do with the ideas of limiting copyright terms.

The core motivating idea was the restriction of monopoly. The English, of course, had learned to hate monopolies; they had essentially fought a war over Crown granted monopolies. As the United States Supreme Court decided in one of its really good intellectual property decisions, the *Statute of Anne* was written against the backdrop of practices – eventually curtailed by the *Statute of Monopolies* – of the Crown in granting monopolies to Court favourites in goods or businesses which had long before been enjoyed by the public. For example, the printing of the Bible was a monopoly granted by the Crown. Writs of Courts of Common Pleas were a monopoly controlled by and rented by the Crown. Clay pipes were granted monopoly control, gold and silver thread and most famously, of course, playing cards. This tradition of granting monopolies over stuff that already existed created the ire in the British people that led to a revolution against these monopolies. These monopolies for existing things were the product of endless lobbying by those who produced those existing things, lobbying to protect their monopoly.

The key insight that economics has given us, about the dynamic that this public choice problem presents, is that the monopolist will be willing to stand the net present value of his monopoly to protect his monopoly against loss from the government no longer supporting it. To protect monopolies they will invest as much money as they expect to guarantee a continued control over that resource. The 1656 Parliament ended it with respect to ordinary products in the *Statute of Monopolies*. You could grant monopolies under this Statute only for new works in the sense of a patent as our current law gives. Because the British knew the corruption of permitting monopolies to be granted for existing works, they regulated around it. They forbade it in the context of real goods. The *Statue of Monopolies* excepted from its control publishers and in 1709 Parliament removed that exemption. Publishers were included within the scope of regulated Acts to ensure monopoly powers would not be too great.

There are many publishers today who have inspired the love of the public. We do not have a clear sense of who the publishers were for the British at this time. We should remember that publishers at this time were hated. John Milton describes them this way, “Publishers are all patentees and monopolisers and the trade of book selling . . . men who do not labour in an honest profession, to learning is indebted”.[10] These were a class of

[10] Phillip Wittenberg, *The Protection and Marketing of Literary Property* (1937) 31 cited in Lawrence Lessig, *Free Culture* (2005) E-prints in Library and Information

monopolists, particularly hated at the time. The London Monopoly is referred to as the *Conger* which worked to keep prices to British culture high and to restrict access to new works. The *Statute of Monopolies* in 1709 granted them a twenty-one year monopoly over existing works as a way to buy them off. The idea was that for twenty-one more years their existing monopolies would continue, but in twenty-one years those monopolies would end. What we all expected, of course, was that in twenty-one years they would come back to fight again to extend their monopolies. When these initial monopolies did expire, the publishers did return to try to extend them.

In 1735 and 1737 they proposed extensions of existing terms. Parliament rebuffed these extensions. Here is one pamphlet response:

> I see no Reason for granting a further Term now, which will not hold as well for granting it again and again as often as the Old ones Expire so that should this Bill pass, it will in Effect be establishing a perpetual Monopoly, a Thing deservedly odious in the Eye of the Law; it will be a great Cramp to Trade, a Discouragement to Learning, no Benefit to the Authors, but a general Tax on the Publick; and all this only to increase the private Gain of the Booksellers.[11]

These extensions were rejected. In fact three times they were rejected, leaving the publishers to turn to the next forum for extending their monopoly power – the Courts.

In the Courts it would not be possible for the publishers to plead for their own interests, hated as they were. Instead they pleaded for the interests of the authors. It was the author's rights the publisher was trying to promote. These rights, they said, were natural and as natural rights they were protected by Common Law. Furthermore they should be perpetual. The publishers' concern for authors is an interesting type of concern. Lyman Ray Patterson described it as, "the publishers had as much concern for authors as cattle ranchers have for cattle".[12] They were using the authors to advance their interests.

Science <http://eprints.rclis.org/archive/00002988/01/freecult.pdf> at 28 August 2006 (hereinafter Lawrence Lessig, *Free Culture*).

[11] Lawrence Lessig, *Free Culture*.

[12] Lyman Ray Patterson, 'Free Speech, Copyright and Fair Use' (1987) *Vanderbilt Law Review* 40, 28, cited in Lawrence Lessig, *Free Culture*.

They would fight for their cattle in this context, and that particular battle eventually resolved this conflict in British history by a Scot, Alexander Donaldson. In 1750 he set up in Edinburgh a publishing house for public domain books, meaning books whose copyright under the *Statute of Anne* had expired. The Conger sent him a very clear note – stop publishing your books, our copyrights are perpetual. Donaldson responded in a particularly Scottish way. He decided to move his business to London and sell books in London that were sold at 30 to 50 percent less than the going price. He did not believe he had to pay any royalties because he believed these books were in the public domain.

The Conger organised a series of law suits against Donaldson, designed to stop him and others from exercising what they thought to be their right under the *Statute of Anne*, and they won a series of early victories in the Common Law Courts. The most famous of these victories was *Miller v Taylor*,[13] which in 1769 upheld the idea that these terms were perpetual. Miller was a merchant who had purchased the rights to James Thomson's *The Seasons*. He sued Taylor who was reproducing Thomson's poems without permission from Miller. Lord Mansfield upheld the continuation of the Common Law copyright, holding that while the Statute of Anne supplanted Common Law copyright, it did not replace it. Copyright, according to Lord Mansfield, was perpetual.

This was the first round. For those who have lost first rounds, there is always hope for a second round. There was one in this case. On Miller's death, his estate sold the rights he had to a guy named Thomas Beckett. Donaldson then decided to take Beckett on directly by selling these works in the market without permission of the copyright owner. Beckett sued Donaldson. The House of Lords got the case in 1774 and decided that the *Statute of Anne* was meant to displace the Common Law, and that copyrights were, in fact, limited. Donaldson won in the House of Lords, and the *Statute of Anne* was held to mean that copyrights end. For the first time in British history, the works of William Shakespeare, John Milton, Francis Bacon and Samuel Johnson and many others passed into the public domain. Once in the public domain, the prices for works fall and, more importantly, competition among publishers increases, meaning the opportunity for new authors to find ways to publish their work increases as well.

[13] (1769) 4 Burr. 2303 (KB).

The view of this result was of course different depending on where you came from. In Edinburgh there was general celebration. No private cause had so engrossed the attention of the public. One paper wrote:

And none has been tried before the House of Lords, in the decision of which so many individuals were interested, great rejoicing in Edinburgh upon the victory of her literary property, bonfires and illuminations.[14]

In London the view was a little bit different. "Disaster," wrote one major paper:

By the above decision nearly 200,000 pounds worth of works was honestly purchased at public sale in which was yesterday thought property, is now reduced to nothing. The booksellers of London and Westminster, many of whom sold estates and houses to purchase copyright, are, in a manner, ruined and those, who after many years' industry thought they had acquired a competency to provide for their families, now find themselves without a shilling to devise to their successors.[15]

In 1789, the United States copied Britain, and passed a Constitution. Article 1 Section 8 Clause 8 says that Congress shall have the power:

> 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.

'To promote the progress of science' – that is the power – by 'securing for limited Time' – that is the restriction – 'the exclusive Right'.

This clause has two parts. You get the power to do *A* through the means of *B* to promote the progress of science by securing the right for a limited time. The idea of promoting was drawn directly from the *Statute of Monopolies*. The idea of limited times comes from the *Statute of Anne*.

In 1790 the Congress enacted a statute that granted copyright owners a 14-year term renewable once at the end of the first term and for existing works the same term was granted. Again, the motivation for these limitations was not free speech. The motivation for these restrictions was to limit monopoly. This birth of copyright often creates a misunderstanding

[14] Reported in the *Edinburgh Advertiser* and cited in Lawrence Lessig, *Free Culture*.
[15] Reported in the *Morning Chronicle* and cited in Lawrence Lessig, *Free Culture*.

because we do not really recognise the copyright to which the framers of the US Constitution were speaking. The copyright they were speaking of was tiny in respect to the copyright we have today.

The difference can be seen across a number of dimensions. Let us think of four: the term, the scope, the reach, and the force. Originally, the copyright term was relatively short – 14 years – renewable once. The scope of the copyright was limited to particular kinds of works: maps, charts and books. To get a copyright within that scope you had to go through a series of formalities. You had to register the work, you had to mark the work, you had to deposit the work and, after an initial term, you had to renew the copyright. The reach of the copyright pertained only to publishing. It explicitly said 'publishing' not 'copying' which meant that it was essentially regulating commercial actors, and the force of copyright was always mitigated by the courts. Its application was only as far as courts said it should apply.

These narrow contours around the regulation called copyright have seen significant change. First in term: the copyright term changed, both in its length and its structure in the United States. In its length it went from 14 years in 1790 which could then be multiplied if the term was continued to a maximum of 28. In 1831 the maximum term went to 42 years. In 1909 the maximum term went to 56 years. Beginning in 1962 the copyright term for existing works automatically increased, in fact eleven times, until in 1998 it was extended to 95 years for existing works. That is the difference in term. But the term changes in its structure too. Before 1976 to get the maximum term of copyright protection, you had to go through two grants of copyright. The initial term could be renewed and required an affirmative act. Between 80 and 90 percent of copyists, depending on the work or the particular period of history, never took that affirmative step. They did not renew their copyright because, presumably, the burden of renewing was not worth the benefit from the additional term.

In 1976 that changed. We adopted the international standard of one term, one grant of copyright, meaning that to get the initial copyright was to get the full term of protection, meaning in the United States the copyright term effectively tripled in 30 years. In 1973 the average term of copyright was 32.2 years, because 85 percent of copyrights never renewed after the initial term. Today the average term is the maximum term, which is 95 years. That is the change in term.

Think about the change in scope. Originally I said the scope was maps, charts and books. It has now been extended essentially to all creative work reduced to a tangible form, and appropriately so, because it should cover the widest range of creativity where there is a need for incentives to create. But the significant difference not remarked in our history so far is the change in the formalities and the consequence of that change. Between 1790 and 1800, no more than 10 percent of published work ever registered initially for copyright protection, meaning immediately 90 percent of that work was in the public domain. After the initial term of 14 years, over 90 percent did not renew the copyright, meaning after 14 years, 99 percent of work published had entered the public domain.

Between 1800 and 1976 the data is not as conclusive, not as certain. Probably 25 percent of all work published was actually registered for copyright after the initial term. Less than 3 percent of that work remained under copyright protection, meaning almost 97 percent was in the public domain. Copyright was a tiny regulation of a tiny part of the creative process – that part relating to commercial creativity. This changed in 1976 in the United States as formalities were abolished, which meant that copyright went from regulating a sub-set of published work to regulating all published work automatically, all creative work automatically, and after 28 years continued to regulate all creative work automatically. There is no filter to separate out work which needs the benefit of continued protection; protection is automatic and for the full term.

Think about the change in reach. Copyright law was born to regulate commercial publishers. It regulated the copying of the same book, meaning it did not regulate derivative works; those were free. And it did not regulate in the non-commercial space, which I am defining as those published works that did not register for the original copyright. In the first 100 years of copyright law this changed in just one way: transformative works, derivative works, are included within the scope of the original monopoly. Again, this extended only to commercial publication. Then in 1909, accidentally, because under copyright law this was an inappropriate way to refer to what they were trying to do, the word ‘publish’ was changed to ‘copy’. The law regulated as far as existing technology for existing copying. It did not matter in 1909, because in 1909 the technologies for copying were machines like printing presses. But it created a potential that has produced the most dramatic change in copyright law in our history because the law now was regulating for men with machines and as ‘men with machines’ turned into ‘women with machines’ and then ‘many more people with machines’ the scope of the regulation changed. In 1970, as

Xerox machines become more and more common, the scope of the law changed.

Something quite dramatic happened as the Internet entered our space. We can see that drama by thinking about copyright's regulation of the copies in the context of an ordinary book. Review all the possible uses of a book. A bunch of these uses are unregulated by copyright law, for example:

- reading a book does not produce a copy. It is therefore unregulated by copyright law.
- Giving a book does not produce a copy. It is therefore unregulated by copyright law.
- Selling a book does not produce a copy. It does not get regulated by copyright law.
- Sleeping on a book does not produce a copy. It is not regulated by copyright law.

At the core of these unregulated uses is a set of uses that are properly regulated by copyright law. For example publishing a book requires the permission of the copyright owner. In the American tradition, there is also a thin slither of exceptions called fair uses which otherwise would have been regulated by copyright law because they produced a copy but which the law says should not be regulated by copyright law because it is essential these uses remain free. You can quote my book, meaning copy my words, in a totally idiomatic review – I tell you many people have done that so far. I cannot control you, nor should I be able to control you because the law says these uses of my words are fair uses even if I, the copyright owner, do not authorise them.

That is the story balanced as it was before the entrance of the internet. The internet, which by its design, by its architecture, produces this single fact: every act is a copy. You cannot do anything on a digital network without producing a copy. To read a book produces a copy. Every act with a digital object is an act which produces a copy, meaning automatically that the scope of this regulation is extended. That which before was presumptively unregulated now is presumptively within the scope of the law. There may be exceptions – fair use is one – but the base line has changed because of this technical feature of the way in which copyright law interacts with digital networks. Ordinary uses are presumptively controlled.

Originally copyright laws regulated through law, but increasingly that is no longer the case. It is technology that regulates copyrighted works. A good example of this is my favourite version of my Adobe e-book reader, *Middlemarch,*[16] a book in the public domain. When you click on the permissions behind *Middlemarch* you may print 10 pages every 10 days and you may use the read aloud button to listen to this book. These are the restrictions on public domain books. With Aristotle's *Politics*,[17] which did not have much of a copyright life in the United States, you may not copy any text selections to the clipboard, you may not print any pages but you may use the read aloud button to listen to this book. To my great embarrassment, for my book, *The Future of Ideas*, you may not copy any text selections; you may not print any pages; and don't you dare use the read aloud button to listen to my book. Now the point is, where do these controls come from?

They certainly do not come from the law. You cannot exercise these controls on public domain books and you certainly can not restrict any person's ability to read a book aloud, even if it is copyrighted. The point is, these controls come through the technology which the content is embedded in, and as this technology develops to include Digital Rights Management (DRM) technologies, the scope of this control will increase, and increasingly, this control is backed up by the law. My favourite example is Sony's Aibo dog. This is a little creature that you can buy for about US$1500, and you can teach it to do all sorts of tricks. Some fans decided they wanted to set up a little fan site that gave information to others about how to teach their dog to do tricks.

They taught people how to hack their Aibo dog, not with a machete but with code, to teach the dog to dance jazz. When they did this, they received a letter from Sony that said, "your site contains information providing the means to circumvent Aibo wares copy protocol, constituting a violation of the anti-circumvention provisions of the DMCA".[18] To circumvent the code's restriction on your ability to do stuff with your dog is a crime, even if the underlying act is not a crime. Let me assure you I know foreign audiences are often confused about it – it is not a crime in the United States to dance jazz. Outside of Georgia, even your dog can dance jazz without legal regulation. Here code 'controls' and the law says you cannot circumvent the code even for a legitimate purpose.

[16] George Eliot (1872).
[17] Aristotle (350 BC).
[18] Letter sent to aibopet.com and cited in Lawrence Lessig, *Free Culture*.

Add these changes together – term, scope, reach and force. Then add into the mix a topic which I know you are all familiar with, increasing media concentration. If you put all these forces together you reach a conclusion which is very hard for us to accept about who we have become, because never in the history of our tradition have fewer exercised more legal control over the development and spread of our culture than now. Not even when copyrights were perpetual, because they only regulated the single copying of a book. Never has the scope of regulation been as powerful and never before has it extended as widely. This is the change that copyright has undergone – radically transforming the nature of its regulation in just a couple of hundred years.

In 1998 Eric Eldred decided he wanted to become a civil disobedient. Eldred was running an online website, which was publishing public domain materials and in 1998 he expected to publish the work of Robert Frost, because a series of Frost poems were to enter the public domain then. Congress decided in 1998 to extend the term of copyrights by 20 years, including existing copyrights, and Eric Eldred announced he was going to fight this change by just violating the law. A naïve law professor (namely me) called up Eric Eldred and told him this was a really bad idea, that copyright law was an extraordinarily punitive law to break in the United States, and this mode of testing it was likely to land him in prison, rather than achieving his ultimate objective of publishing this work freely. We said we would help him sue – to declare the *Sonny Bono Copyright Extension Act* unconstitutional, the Act otherwise known in the public press as the 'Mickey Mouse Protection Act'.

Our claim was that this violated the progress clause. The core idea behind the progress clause is a *quid pro quo* – 'this for that'. We grant you a copyright in exchange for your creative work. In 1923 the Government said to Frost, "we'll give you a 56 year monopoly, if you create something new" and Frost said, "fine" and he did create amazing poems and literature which earned the benefit of that 56 year monopoly. But when that monopoly was extended for works that already exist, the *quid pro quo* of this for that was breached. This was for nothing because the work existed that the copyright was being extended for, and no matter what Congress did it would not get Robert Frost to produce any new work in 1923. This was a monopoly in exchange for nothing. It is like a contract with the State to build a bridge for a million dollars and then at the end of your completion, you say to the State, "I want two million dollars before I deliver the bridge to you".

This extension of course was part of a pattern. There were eleven extensions of existing terms in the last forty years. Always these extensions occurred as famous copyrights were about to expire. That dynamic is totally predictable in a world where it is permitted to extend monopolies for existing works, because those who have the benefit of the monopoly for the existing work are willing to spend the net present value to guarantee that monopoly is extended. In a Supreme Court, seven, eight thousand miles away, the question was asked, "Are there limits on this copyright?" and the Supreme Court answered, "No". What Congress was doing was OK. "There was no reason to believe", the Supreme Court wrote, "that these copyright terms would be perpetual". They may be perpetual along the instalment plan, but all the Supreme Court believed the Constitution required was that Congress should give the perpetual terms in particular chunks. Congress was free to do this, the limited times clause notwithstanding. At least, and here is the silver lining, so long as it does not change the 'traditional contours of copyright'.

There were two dissents in that case: Justice Breyer and Justice Stevens. Justice Breyer's was the more ambitious dissent. He asserted that the existing copyright term was already a perpetual term. He asserted this because he could do some math, and what he calculated with his math was that a 95 year term, was the equivalent of 99.9998 percent of the value of a perpetual term. If you have the value of a perpetual term, and you put on the top of it the 95 year term, it already was 99.9998 percent of the value of the perpetual term. And Justice Breyer calculated that 98 percent of the work whose copyright was being extended was no longer commercially available anyway. This was an extension for a very small proportion of work, ignoring the burden on the balance of work.

Justice Breyer's dissent inspired follow-on litigation. This is what we call Eldred Version 2, the case of *Kahle v Ashcroft*,[19] which the Ninth Circuit is scheduled to hear arguments some time in 2005. The insight motivating Kahle is that 98 percent of authors are not benefiting from the copyright term extension. This case focused on the 98 percent and its focus is to use the First Amendment to assert limitations on Congress' power to restrict access to that work. How do we have the right to use the First Amendment? The silver lining gives us that right, because what the Court said in *Eldred* is that so long as Congress does not change the traditional contours of

[19] Decision of the Ninth Circuit was handed down 22 January 2007, and is available at <http://www.ca9.uscourts.gov/ca9/newopinions.nsf/1FABEA163F4C714A8825726B005A12F0/$file/0417434.pdf?openelement> (accessed 7 February 2007).

copyright further First Amendment reviews are not required. By implication, if Congress changes the traditional contours of copyright further First Amendment review is required. As I have demonstrated to you, Congress has changed, in as fundamental a way as possible, the traditional contours of copyright by changing the system of formalities.

For 186 years of our history, formalities defined the scope of copyright's regulation and that scope, of course, was tiny compared to its scope today, guaranteeing that its force would be felt by a narrow, filtered class of works and the balance of works would enter the public domain. That changed from a system that filtered out works not needing copyright's protection from works that did. This change is as traditional a contour of copyright as any could be and the claim is that that change in 1976 of a traditional contour of copyright gets us First Amendment review, and if we get First Amendment review, then the presumption of deference that led the Eldred Court goes out and ordinary First Amendment review means we win. Or at least we get Congress inspired enough to re-create a filter, to attempt to take the full range of works burdened by the extension of copyright and separate out those that need or could benefit from the continued extension from those that would not. This opens a way for those works that would not normally to pass to the public domain, so that the burden of copyright is narrowly tailored to those which would actually benefit from an extended term.

I do not predict the Court will go our way. I remember when I was explaining Eldred to one of the most cynical members of the American Legal Academy, he said to me, "while you have convinced me that you are right, that under the Supreme Court's jurisprudence you should win, according to the rules the Supreme Court has enunciated for limiting Congress' powers, and that this is precisely the kind of case where Congress' power has gone too far, when is the last time that the Supreme Court ever ruled against all the money in the world?" And I said to him, "that is an extremely cynical, boring way to think about the way courts function. I do not think that is the way courts function at all". But I had to stop and think, when is the last time the Court ruled against all the money in the world? Even when they struck down segregation, it was only a bunch of poor, southern racists they were actually acting against. The major actions have never been, in this context, where all the money in the world is against a bunch of crazy academics. This reminds us perhaps of the limits of what courts will do.

I offer these stories not to predict anything about the court, but to remind us of this question: "Does copyright have limits?" I think properly phrased, the answer to that question, right now in the United States, is: "no, it doesn't". But it is our objective I think to imagine: what if there were limits? What would they be for? Why would we have them?

For example, let me tell you a couple of stories about copyright's affect in the United States right now. In 2002, Robert Greenwald produced the movie, *Uncovered*. *Uncovered* is the story about America's involvement in the Iraq war and the decisions leading to our engagement in that war. In 2004, Robert Greenwald wanted to produce an updated version of that movie, including a one minute clip from an interview the President of the United States gave on NBC's *Meet the Press*. He requested permission from *Meet the Press* to include the one minute clip in the film. They denied him permission. What they said to him initially was, "it's not very flattering to the President". Now, what is going on in this dynamic? In a world where Presidents have fewer press conferences, in a context of increasing concentration and therefore vicious competition to get access to people like the President, there is a strong incentive for the press to be nice to the President, to create a protective space where he knows he can enter and speak without these words being used in ways that might embarrass him. It privatises the presidency and this is a predictable consequence of copyright extending its power and the concentration of the media interacting with that extension.

Here is a more dramatic example in this story. In 2004, Robert made another film, *Outfoxed*, about the Fox News Channel. The Fox News Channel sells itself as a 'Fair and balanced news channel' and you would think, if you know anything about the way truth is to function, 'fair and balanced' would produce 'truth'. People would understand the truth in such a context. There was a careful study done of what people who watched Fox News believe about the world. The survey found that the more likely you were to watch Fox News Channel, the more likely you were to have completely incorrect assumptions about what was happening.

Whatever your view of Fox News or Fox News commentators like Bill O'Reilly, this is a significant issue of political import in the United States right now. The charge of 'fair and balanced' is an issue which has been litigated and continues to be a defining feature of how the network thinks of itself. To make this film, it was important that Robert Greenwald have the right to use clips from this Network. The Network was not going to give permission for Greenwald to use these clips, so he needed to rely on a

doctrine called ‘fair use’. If these uses were fair he was safe; if they were not fair, then he is personally liable – not his corporation – for millions of dollars in damages. And here is the trick: you can only know whether the uses are ‘fair’ after you have been sued. You face this choice – whether to produce the work and risk millions of dollars in personal damage, or not to produce the work and stay safe and sound.

Fox’s response to the movie was significant in indicating what it thought about the copyright system. Fox called this ‘piracy’. Roger Ales, the President of Fox, said, “any news organisation that does not support our position on copyright is crazy. Everybody should stand up and say these people don’t have the right to take our product any more; it puts journalism at risk”. The idea that pointing out that someone is inconsistent puts journalism at risk shows just how far the concept of journalism has moved from what its ideals should be.

The risk here, the real risk, is a system that creates huge legal exposure for someone who wants to make political commentary about one of the most important forces in American political life. That is the free speech issue copyright risks. But it is not just that issue which is important, for of course, Fox presents the other side of the copyright question quite well. It was hugely successful as a film in the United States. DVD sales were No. 1 in Amazon for months. That drove penetration into theatres that otherwise was never expected. It was not a big success here in Australia. One reason we might speculate about that has to do with the decision made by certain companies about whether advertisements would be permitted. For when the film was advertised or advertising was sought for the film, certain organisations owned by this corporation refused to run the ad. You could not advertise this film that was critical of Fox because the owner of the advertiser sought not to have that message displayed. This is the monopoly issue that copyright raises – free speech and the monopoly issue rolled into one.

On 17 January 2005, the *Australian* ran a story about Sir Cliff Richard, the most successful singles’ artist in British history who launched a campaign to complain about copyright. His fifty year-old recordings are about to enter the public domain, and to cost the record companies a great deal of money – close to $1 billion estimated by this article appearing in the *Australian*. They claim that it is unfair, fundamentally unfair, that these copyrights expire. Why is it unfair? Because when his songs were recorded Sir Cliff Richard was promised fifty years of protection. He got it – 50 years of protection. His response is, yes, but the United States gives us 95

years of protection. But when he recorded his material, the United States gave him 56 years of protection. It then dollopped on another forty-some years to 95 years of protection. What does this unfairness boil down to? The unfairness is: it is unfair for you not to pay us twice, when the United States has paid us twice for the work which we have copyrighted.

It is not surprising that particular famous artists would be keen to extend the copyright term. We can predict that will always happen. We can predict that if any of us were as lucky as Sir Cliff Richard was to be successful in this world, we would be arguing to extend the term of our copyrights. What is surprising, is not Sir Cliff Richard, but that the other side of this debate is essentially invisible.

The *US Free Trade Agreement Implementation Act 2004* (Cth) which was passed recently (increasing the term of existing works) is probably thought of as a piracy of the public domain. Yet it too did not produce politically – as opposed to some particular activists – even a whimper. Not even to consider the modest suggestion that a means was adopted to separate out those works that need the benefit of an extended term, like Sir Cliff Richard, from those works that do not need any benefit from an extended term because they are commercially unavailable and just locked up under the existing copyright regime. Not even that idea was considered, and that is a reflection of how blind we, as cultures, have become to the balance which defines this debate. We need to recognise that because of this extraordinary explosion in technology we are at a critical time and have the opportunity to realise the potential innovation of this network, so long as this extraordinary and potential innovation is not zapped by monopolies.

Copyright, designed to benefit authors, if allowed to become too powerful becomes the tool of monopolies, and again we ask the question, “Does copyright have limits?” It does have limits. These limits are for us, forgotten. The powerful have used their power to buy the power to silence those who would question this explosion in power. And we stand silent. We have restored the Conger, precisely the entity we originally in our tradition designed copyright to dissolve; indeed worse than the Conger, for the power exercised is greater by the monopolists. Never in our history have fewer exercised more power over our culture than now. Nobody noticed this happening; nobody acts effectively to stop it. Yet the question which opens this lecture is an invitation for us to remember how we as a culture discovered those limits and how we could recreate them again.