

## FREE CULTURE: CULTIVATING THE CREATIVE COMMONS

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[137] Throughout March and April 2004 we have been involved (along with fellow Project Leader QUT DVC Tom Cochrane) in a series of talks to brief the community about the further development of the Creative Commons Project in Australia.<sup>3</sup> In February 2004 Queensland University of Technology (QUT) became the institutional affiliate for the project and over the last few months has worked closely with Blake Dawson Waldron Lawyers, who have taken primary responsibility for drafting an Australian version of the Creative Commons licences. This overview of the project is based on a seminar delivered at Melbourne University Law School hosted by the Intellectual Property Research Institute of Australia (IPRIA).

Creative Commons aims to promote better identification, negotiation and reutilization of content for the purposes of creativity and innovation. It aims to make copyright content more 'active' by ensuring that content can be reutilized with a minimum of transactional effort. As the project highlights, the use of an effective identification or labelling scheme and an easy to understand and implement legal framework is vital to furthering this purpose.

Creativecommons.org a not for profit corporation based at Stanford University Law School and sponsored by the Centre for the Public Domain, the MacArthur Foundation and the Hewlett Foundation. The Creative Commons concept was given worldwide impetus through the release of Lawrence Lessig's book, *The Future of Ideas: The Fate of the Commons in a Connected World* in 2001 and is further reinforced by his latest release *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004).

### **New Mindset: Free Culture and the Creative Class**

Creative Commons represents a new mindset supported by a technologically aware movement. The mindset is a product of 21st century culture including the vast digital landscape that we increasingly inhabit. Two themes, recently the subject [138] of popular discussion, inform this project. They are the notions of free culture and the

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creative class.

### ***Free Culture***

Free culture outlined by Lessig in *Free Culture*, calls for open access to and reuse of content, in essence a commons. It builds on the 'cut and paste' negotiability that the digital environment provides and asks for a greater ability to negotiate and exchange content in the name of creativity and innovation.

Creative commons and the free culture mindset draw from the work of the free software movement. 'Free software' means free as in freedom (to access code) not price and has come to the fore in an environment of proprietary software distribution where source (human readable) software code is hidden from public view. The free software model is to distribute software with the source code open and accessible so that the recipient can easily and better understand the software. This in turn enhances further innovation, error detection and/or security testing. However the free software movement requires through its General Public License (GNU GPL) that if you use open code and innovate upon it and then *distribute* that code in a derivative work you must share all of the code of the derivative work back to the public or the commons. As has been written elsewhere:

The powerful insight that Richard Stallman and his advisers at the Free Software Foundation ... discovered was that if you want to structure open access to knowledge you must leverage off or use as a platform your intellectual property rights. The genius of Stallman was in understanding and implementing the ethic that if you want to create a community of information or creative commons you need to be able to control the way the information is used once it leaves your hands. The regulation of this downstream activity was achieved by claiming an intellectual property right (copyright in the code) at the source and then structuring its downstream usage through a licence (GNU GPL). This was not a simple 'giving away' of information but rather a strategic mechanism for ensuring the information stayed 'free' as in speech. It is on this foundation that we now see initiatives like the Creative Commons expanding that idea from open source code to open digital content.<sup>4</sup>

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<sup>3</sup> See <<http://creativecommons.org/projects/international/au/>>.

<sup>4</sup> A Fitzgerald and B Fitzgerald, *Intellectual Property in Principle* (2004) [11.100].

### ***Creative Class***

The other theme that underpins this project is the increasing significance of creative activity to social, cultural and economic prosperity. Richard Florida an economist and author of *The Rise of the Creative Class* (2002), speaking in Brisbane in March 2004 reminded us that the ‘creative class’ and ‘creative places’ build innovation and economic success. These ‘creatives’ employ modalities to foster creativity and free culture and creative commons are no doubt part of that story. Florida remarks that ‘[a]s we have seen, diverse and open communities have compelling advantages in stimulating creativity, generating innovations and increasing wealth and economic growth’.<sup>5</sup>

### **The Movement: The Creative Commons**

This mindset that calls for open access to and greater negotiability of content is backed by a movement that is employing new age modalities to meet its goals. The hallmark of open content licensing is easy to use licences that have low transaction costs and are non discriminatory in nature; in other words, they can be employed by everyone with a minimum of effort, for example by clicking a button.

Through the Creative Commons project a copyright owner of content, be it text, music or film, can place that material in the commons subject to a Creative Commons licence. The licence will provide that anyone can use the content subject to one or a number of the following conditions: attribution, no commercial use, share what is created with the work by giving it back to the commons, or verbatim copying only. The licence can be presented in common, legal or digital code language — by simply going to [creativecommons.org](http://creativecommons.org) and choosing a licence online. This is then linked to the work that you wish [139] to give or licence out through the commons. [Creativecommons.org](http://creativecommons.org) reports that in its first year of operation over one million objects were placed under a Creative Commons licence.

Like the free software movement, Creative Commons uses intellectual property rights as the platform on which to structure downstream user rights. By claiming copyright in the content that will go into the commons the owner can determine how that content can be used downstream e.g. to further develop the commons. However, unlike the free software movement, Creative Commons does not *require* utilisation of

material in the commons to carry with it an obligation to share further innovations back to the commons — this is only one of four conditions, known as 'share and share alike', the copyright owner might employ. The other conditions comprise the option to require attribution of the author of the licensed work, the option of prohibiting commercial use of the licensed work, and the option of prohibiting modifications of the licensed work. The 'share and share alike' option is inconsistent with the option of prohibiting modifications of the licensed work, but otherwise the options can be employed in combination.

### **Porting to the Australian Legal Jurisdiction**

Our first role has to been to draft and publicise an Australian version of the Creative Commons licences, tailored to meet the needs of the Australian legal system. Known as *iCommons*, and coordinated by Christiane Asschenfeldt in Germany, this process of porting the base licence to each national jurisdiction is well under way and will see momentum for the commons continue to grow. Alongside the further development of the CC licences is the work of other projects such as Australian Creative Resource Archive (ACRA) which are seeking to build repositories or conservancies of content.

An unaltered adoption of the US version of the CC licences would miss subtle differences in law and licensing practice between the two countries. The porting process has therefore required the Australian team to identify matters in which implementation in the local environment could be improved and to consider whether there are any inevitable tensions in the drafting, between aspects of the US and local law and practice. Arising from these analyses, a number of drafting changes have been suggested by the Australian team in the preliminary draft of the ported Creative Commons licence. These changes primarily address differences in copyright and licensing law and terminology, consumer protection law and moral rights under Australian legislation. Some of these issues — in particular, how the moral rights of authors should be treated in a commons environment — raise difficult issues of philosophy and principle that do not yield easy solutions. Other issues — such as the extent to which GST taxation matters should be directly confronted in a Creative Commons licence — are primarily matters of implementation and enforcement that can, nonetheless, materially influence the shape and substance of the Creative Commons. Throughout the porting process, it has been important not to lose sight of

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<sup>5</sup> Richard Florida, *The Rise of the Creative Class* (2002), 323.

the overall objective of providing a coherent, consistent international licensing regime through which Creative Commons licences with the same licensing elements will have the same legal effect, no matter where the licensor and licensee are located.

To date, the Australian porting process has been an exercise in the development of open law. This process continues in the current phase of public consultation on the preliminary draft of the ported Creative Commons licences, and we [140] welcome all who are interested to participate in the online discussion fora established for these public consultations.<sup>6</sup>

### **The Future**

The question remains whether the shape and substance of the Creative Commons will make a difference to the community. Free culture is the new buzz word. Free has an endless array of meanings. In this context it could mean: to free culture from the grip of multinational corporate control, free as in price/beer, or free as in speech/access. At very least there is an increased desire to be able to access the broadest possible choice of content in pursuit of innovation and creativity. To achieve this we have to know content exists and then be able to negotiate it in a diversity of ways. Creative Commons does not guarantee all internet content will be free as in price or in download — not everyone will contribute content to the commons — but more significantly it will allow the building of active and distributed repositories of copyright content that can be utilised by ‘creatives’ to build out the next layer of creativity. Free culture here may not currently mean ‘mp3 music for free’ but its significance — through the building of a solid foundation for open access through open content — must not be underestimated.

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<sup>6</sup> See <<http://lists.ibiblio.org/mailman/listinfo/cc-au/>>.