

An Information Society: Free or Feudal?

Lawrence Lessig

I'm honored to have the opportunity to address you today. I'm not often asked to be a "visionary" about the Internet. Most of my "visions" about the Internet are dark and pessimistic. And as most people confronting pessimism would prefer to avoid the conversation that pessimism begins, most seeking "visionaries" seek elsewhere.

But I will accept my role this afternoon by at least beginning with a story that is optimistic, before I turn to reasons why we should be worried about the promise in this optimism.

When I close my eyes and think about what the technologists have built, I see in their creation an extraordinary potential for humanity across the world. For the first time in a millennium, we have the opportunity to rebuild the library of Alexandria. For the first time in a millennium, we have the opportunity to make knowledge and culture available across the world at practically no cost. For the first time in a millennium, we have a technology to equalize the opportunity that people have to access and participate in the construction of knowledge and culture, regardless of their geographic placing.

Their technology creates this opportunity because it embraces a fundamental value that has been at the center of many cultural traditions. Through a design that technologists call "end-to-end," the Internet builds intelligence at the end, or "edge," of the network; the network itself is as simple as possible. Creativity and innovation can thus happen at the edge of the network without the control of the owners of the network. Creativity and innovation is therefore decentralized.

The consequence is a network that invites creativity from anyone. And that invitation has been accepted by innovators from around the world. The most important innovations in the history of the Internet were not innovations created by network owners, or more importantly, by innovators from the United States. They were instead by outsiders. The World Wide Web was born here in Switzerland, not at a telecommunications laboratory, but in a laboratory investigating ways to share knowledge about the way our universe is built. Hotmail, a technology that enabled people from across the world to get access to e-mail, was not built by an American. It was a technology built by an immigrant from India who had come to America. ICQ, the first peer-to-peer chat technology, was

also not a technology built in America. It was a technology built by a father and son in Israel who found a way to take very cheap machines and make them a platform for real time conversation around the world. These innovations were made possible by a technical design that embraced a kind of neutrality. That neutrality fueled the growth of the Internet. When I close my eyes and think about this technology, it is that potential that I see.

But for the last five years, my eyes have not been closed. My eyes instead have been wide open, watching the changes that this platform for innovation has suffered. I have been watching as those forces that have the objective to change the way this platform enables innovation and creativity have worked to change the nature of this platform. My work has been all about identifying this resistance to the design of the original Internet. It has been about finding a way to make others understand how the potential of this network is being threatened right now. Not by conspiring governments, and not by those who would like to destroy freedom in principle, but by those who have a different vision about how culture should be made. People who reject the idea that culture should be built at the end, or at the edge. People who believe that culture should be managed and controlled by concentrated media, and fed to consumers who simply accept what gets made.

This vision that is counter to the values of the original Internet expresses its ideals in a kind of extremism about intellectual property. This extremism is something this conference must address. It is an extremism in the vision of what information and culture is. It is an ideal that says that information and culture, like everything else, should be a kind of property, and hence owned and controlled. And like any bit of ordinary property, this property too, this vision holds, should be perfectly controlled and forever owned.

This extremism is false to our tradition. It is false to what we know about what makes an information society flourish. And yet this extremism has captured the debate about the legal rules that will define the conditions under which people around the world are free to share information and ideas.

I make lawyers for a living. That's my profession. I make lawyers from a tradition that I deeply love and respect—the American legal tradition. I cannot speak except as an American.

But I come to you today as a lawyer from America with a guilty conscious. Because the vision of freedom that typically defines who we are has been recently corrupted by this extremism. What we say

now is not what our tradition has always said. I offer two examples to give a sense of the extremism that I mean.

I recently had the honor of losing a case in the United States Supreme Court. The case was *Eldred v. Ashcroft*, a challenge to the United States Congress's recent extension of the terms of copyright. The Sonny Bono Copyright Term Extension Act extended the term of copyright by twenty years. It was the eleventh time that Congress had extended the term of existing copyrights in the last forty years.

The reason these copyrights get extended is that a small percentage of the work affected continues to have commercial life. According to the estimates of Justice Breyer, just two percent of the work affected by this extension continues to have any commercial life. And yet, because of the extension, all of the work created during this period remaining under copyright continues to be burdened by this system of control that copyright effects.

So, for example, in 1930 there were 10,047 books published in the United States. 174 of those books are still in print. If anyone wanted to make the 9,853 remaining books available on the Internet, they would have to track down the copyright owners for those 9,853 books.

How would one do that? For there is no place where the names of current copyright owners are kept. Instead, to publish these 9,853 books would require an army of private investigators to locate the owners of those rights to get permission to make this culture available in the way a library of Alexandria could promise. This extension to benefit two percent thus locks up the opportunity for the vast majority of this culture to be cultivated and spread.

Now the desire to extend the term of copyrights to benefit the two percent is not itself an evil desire. The desire to continue a profitable return to investors is completely understandable. But the extremism comes in extending the terms of all so that two percent might benefit. Congress could have chosen to extend the term of the two percent only; but oblivious to the burden of this form of control, it extended the terms of all. A more balanced view would avoid this burden. Let Disney prosper. But their prosperity should not burden the free spread of culture that has no continuing commercial value at all.

The second example is a statute passed by the United States Congress in 1998. The Digital Millennium Copyright Act, passed pursuant to international obligations, makes it a crime to circumvent technologies designed to protect copyrighted material. Again,

that objective itself is not evil. It is a good thing to assure that people cannot pirate copyrighted material. Copyright is an extraordinary important part of the incentives necessary to create innovation. It should be supported through legislation, and through technology if law is not enough.

But this law is not written to ban circumventions for the purpose of violating a copyright only. The DMCA also bans circumventions to enable uses that would otherwise be completely legal uses of the underlying material. If you circumvent a copyright protection measure for the purpose of “fair use,” for example—a use that is protected by our Constitution—the DMCA is still violated. The law does not distinguish between improper and harmless circumventions. Once again, extremism about control inspires this blindness. An extremism, again, that does not understand the balance that has defined the tradition of free culture.

This conference has been framed in a way that avoids confronting this extremism. The issues of intellectual property have been moved off the table. They have been left to a different forum, with different delegates. The suggestion has been made that these issues of intellectual property are separate from the questions about how one builds an Information Society.

I wish they were separate. But they are not. The last five years have demonstrated that the future of the world’s Information Society hangs fundamentally upon how these questions of intellectual property get answered now. Yet by separating that debate from the issues that you will consider here—by placing in one house questions about the Information Society and in another questions about intellectual property—you assure that the answers both houses produce will remain fundamentally at odds.

For the Information Society is a place where culture is both free and owned. It is a place where property coexists with the commons of the public domain. Like a city where parks coexists with private houses, the tradition of balance that has marked the protection of copyright seeks a world where copyright coexists with the public domain.

If you don’t resolve how these two traditions can live together, then you will never secure an Information Society that flourishes through balance. These two aspects of an Information Society—intellectual property and the public domain—must be considered together. And no effort to solve them separately can take seriously the demand of either.

My great fear—as a lawyer and an American—is that the power that we lawyers and Americans have will be aligned solely to the end of strengthening intellectual property, and ignoring the importance of the commons. That has been the pattern these last 10 years. That promises to be our future. And if it is, then the balance between property and the commons that has defined the American tradition will be lost as we construct an Information Society for the world. America developed its culture in a tradition of balance; but we are increasingly demanding that the world live under a different set of rules.

This threat should be a central focus of your work. There is no doubt that we will have an Information Society. The only question is whether that Information Society will be free or feudal. A free society does not mean that there is no property. It does not mean that there are no markets. Freedom is obviously built in a place where property and markets coexist with the free exchange of ideas and a free exchange of culture.

But freedom can only exist where the reach of property or the reach of control is balanced by something held in common. That balance must be found now, because the extremism that defines this debate right now will lead this world society into a place where the great potential of this technology will never be realized.

I ask you with me to open your eyes to this threat. Because the freedom which you gather here to celebrate—the potential of this society, and the opportunity that this architecture of technology could give us all—will only be preserved if it is allowed to exist in a legal culture that balances the demands for control with the necessity of freedom.

Feudalism was our past. It should not be our future.