INTRODUCTION - DOES COPYRIGHT HAVE LIMITS: *ELDRED V ASHCROFT* AND ITS AFTERMATH?

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 he 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 Pennsylania, Trinity College, Cambridge (that is 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,* and *Code and Other Laws of Cyberspace,* 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* should be required reading for anybody with a serious interest in the proper and free

* Justice of the Supreme Court of Queensland. This keynote introduction was delivered at the Banco Court of the Supreme Court of Queensland on 19 January 2005 as part of the Open Content Licensing (OCL): Cultivating the Creative Commons Conference, presented by the Faculty of Law, Queensland University of Technology.

dissemination of ideas and information and the structure of the Internet as affecting those issues.

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 Center 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 Microsof't*' in 1997.

His contribution to this conference will deal with the decision in the US Supreme Court, *Eldred v Ashcroft,* where he was one of the counsel who unsuccessfully argued that the US Congress' *Sonny Bono Act,* 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 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 the QUT in advancing the progress of science.