

Introduction to the SCRIPTed Special Issue 'Creating Commons'

Graham Greenleaf*

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This special issue of SCRIPTed is based on papers presented at the Conference *Creating Commons: The Tasks Ahead in Unlocking IP*, held at the University of New South Wales, Sydney, on 10-11 July 2006. The 'Unlocking IP' project, funded by the Australian Research Council, investigates the rapidly changing relationship between public and private rights in Australian copyright law and practice. It explores options for maximising the 'unlocking' of the potential uses of copyright works through sharing and trade in works involving public rights (open content, open source and open standards licensing) and through enhancement to the public domain. The papers in this Special Issue address all four main aspects of the project (i) theories and taxonomy of public rights (Greenleaf); (ii) voluntary licences and their consistency, simplicity, and effectiveness (Bond, Coates); (iii) technical issues in finding works with public rights more effectively (Bildstein); and (iv) incentives to expand public use rights (Clarke) and requirements to protect them (de Zwart). Nicol's paper deals with aspects of all four topics in relation to patent regimes and biotechnology, whereas the focus of the other papers is on copyright. One common theme in most papers is the national dimension of commons, the question of to what extent commons are created by and situated in the copyright regimes, institutions and practices (including licences) of particular countries. Is the 'Australian commons' significantly different in its features than the 'Scottish commons', or are both now largely homogenised in an US-flavoured international commons stew?

No surprises that voluntary 'commons licences' are the main focus of the Special Issue, so let's start there. Ben Bildstein in 'Finding and Quantifying Australia's Online Commons' asks some new questions: 'how are public rights in fact being expressed in the online commons?', and its converse 'how can you find works that are part of Australia's online commons, using current tools?'. He gives us a snapshot of the 'Australian online commons' in 2006, stratified by licence types, a baseline study for a longitudinal analysis of the 'down under' bit of the commons over the next few years. Watch <www.unlockingip.org> for developments.

Jessica Coates ('Creative Commons – The Next Generation: Creative Commons licence use five years on') provides an overview and analysis of the practical application of the Creative Commons licences five years after their launch. She takes a more qualitative approach to analysis of changes in licence use over time, who is using which licences, and their likely motivations for doing so. These licence use trends, she argues, help to rebut arguments that Creative Commons is a movement of academics and hobbyists, and has no value for traditional organisations or working artists.

More questions from Catherine Bond, who asks in 'Simplification and Consistency in Australian Public Rights Licences' how voluntary licences can be further simplified to increase both usage and ease of use? She suggests that this could occur through drafting a

longer version for potential licensors and a short version for licensees, with simpler language the goal of both. She also questions whether consistency between licences is important, concluding that while it may be desirable and feasible on a national level, but ideological differences may prevent its achievement at the international level.

In the final paper on commons licences, Roger Clarke rejects the application of conventional 'scarce resource' economics to content ('Business Models to Support Content Commons'), and argues that more appropriate forms of economic analysis show the critical role that accessibility to information plays in the process of innovation. He identifies a range of suitable business models for open content to demonstrate that the content commons is sustainable and appropriate for profit-oriented enterprises.

Every country's constitution is different when it comes to the question of protecting commons against the copyright maximalists. Melissa de Zwart ('The Future Of Fair Dealing In Australia: Protecting Freedom Of Communication') concludes that Australia's judicially articulated implied constitutional guarantee of freedom of political communication is too narrow to act as a control upon copyright law. However the doctrine of fair dealing encompasses elements of freedom of communication and provides some scope for the recognition of such rights under Australian law.

In 'Creating commons by friendly appropriation' I argue that the operation of Internet-wide search engines such as Google illustrate an unusual method of creating an intellectual commons, which I call 'friendly appropriation'. I suggest eight conditions conducive to the successful creation of commons by friendly appropriation, and give some examples of other situations either side of the line. These commons may be rare but are hardly insignificant: a fully-developed theory of intellectual commons needs to recognise them.

Diane Nicol's 'Cooperative Intellectual Property in Biotechnology' rounds off the Special Issue by reminding us that commons are not only about copyright. She explores the range of legal options for dealing with some of perceived problems with the exclusive rights model of patent management in biotechnology. She sets out alternative co-operative approaches including open access models to show their many parallels to issues concerning copyright and commons.

You can watch the Unlocking IP project unfold at <<http://www.cyberlawcentre.org/unlocking-ip/>> and more entertainingly on the project researchers' blog 'The House of Commons' <<http://www.cyberlawcentre.org/unlocking-ip/blog/>>.

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* [Cyberspace Law and Policy Centre](#). University of New South Wales.