

CREATION – the act of bringing something into existence is universally recognised and valued by every civilisation throughout the history of Mankind. This is further amplified in our present Information Age with knowledge-based industries requiring continuous creations of the mind.

But creativity is like the goose that lays the golden egg. It must be looked after carefully and provided with adequate nourishment to ensure productivity. In the context of creating intellectual property (IP), relevant materials must be made available to serve as the base for creating new works.

Lawrence Lessig ([www.CreativeCommons.org](http://www.CreativeCommons.org)), probably the most famous law professor in the United States if not the world, and tireless defender of the public domain, has this to say: “The public domain refers to that creative content which anyone can use without the permission of the content's creator.

“It is where, for example, all the works of Shakespeare are, and essentially where all works published before 1923 are. Anyone is free to use those works without asking the permission of anyone. The public domain is important because it frees creators to build upon and cultivate our past without unnecessary or harmful restrictions.”

Unfortunately, the public domain has steadily contracted over the last few decades. In the United States, and especially after the passing of the Sonny Bono Copyright Term Extension Act in October 1998, copyright protection that once was for 28 years following a work being first published has now bloated to cover 95 years.

And it might get worse in the near future should the big corporations persuade US Congress to pass yet another extension to further prolong their business advantage at the expense of public interest.

Lessig, who is also a board member of the Free Software Foundation ([FSF.org](http://FSF.org)), was one of the lawyers who represented programmer Eric Eldred in challenging the legality of the Sonny Bono Act. He had spent six months preparing for the US Supreme Court hearing.

### Protection period

On Jan 15 2003, the nine-member Supreme Court ruled in the government's favour: Congress can decide what the copyright protection period should amount to. This is a disaster for the champions of the public domain because it means Congress cannot be prevented from keeping works in perpetual copyright.

The “intellectual property tyrants” with their valuable copyrights, patents and trademarks look set to rule for life. The *New York Times* mournfully declared: “That grand experiment that we call ‘the public domain’ is over.”

But Lessig was not about to watch the public domain wilt and crumble just yet. The phase of aggression in challenging the government and the corporations, and the conflicts in court was over. They had lost. It was time to start a new phase that stresses instead on being proactive.

Lessig is aware of one important thing from the whole episode: The corporations and heirs are only interested in keeping their own economically valuable copyrights and have no concern about the fate of the other copyrights, which form the vast majority of works being locked out unnecessarily. They are extremely selfish but they are not against the public domain either when their interests are not threatened.

Lessig has put aside the bitter disappointments of the past and set his sights on productive and achievable targets. He is now with a motley coalition of persons and groups comprising librarians, archivists, bloggers, musicians, programmers, economists, lawyers and citizens at [eldred.cc](http://eldred.cc).

One of their current projects is to help move works that have no continuing commercial value into the public domain to help offset the damage of the Sonny Bono Act. And they intend to do this by getting a specific piece of legislation passed – The Public Domain Enhancement Act. Basically, it involves the payment of a tiny fee of US\$1 (RM3.80) per year for an owner who wants to renew his copyright upon 50 years of its publication (*not* life + 50). The work is forfeited into the public domain if the fee is not paid for three consecutive years. It is estimated that only 2% of the works from 1923 to 1942 (the 20 years affected by the Sonny Bono Act) have any economic value.

The economically valuable works will certainly be renewed. However, many owners will not do so despite receiving reminders on the matter. It is an indication that they, by default, are not against these works being put into the public domain.

If the proposal is adopted as outlined, the group estimates that over 90% of the copyrighted works between 1923 and 1952 will be in the public domain within three years!

### Who's property

However, not everyone has a benign view of the public domain. Some see it as a tragedy since it is antithetical to the capitalist right of owning property. Copyright, they say, is the kind of power that works in the interest of the author, who is also an entrepreneur. And this is fair and square for copyright provides the mechanism for the author to derive rewards and compensation for his hard work in creating.

This is the view of people like the late Sonny Bono, who was also a music composer and half of the early 1970s “Sonny & Cher” duet before being elected to the US House of Representatives. His widow Mary Bono, who replaced him as representative, had made public speeches in Congress in

favour of a permanent copyright protection regime – the public domain's worst nightmare.

Marilyn Bergman, who is president of the American Society of Composers, Authors and Publishers (ASCAP) is understandably also a strong supporter of the 1998 Sonny Bono Act. Bergman was the co-author of *The Way We Were*, a song made famous by singer Barbra Streisand.

“Why can't I pass on the fruit of my works to my grandchild? My songs too ... (just) like my house and other valuables? This is a property issue,” she insisted.

Dennis Karjala, a law professor with the Arizona State University certainly disagrees with these views – and more. The 66-year-old Karjala is not as well known as Lessig but he was the first among the US law professors to publicly oppose copyright term extension. And this is something he has been doing since 1994 when public knowledge of copyright law was practically non-existent.

Others have since followed Karjala and Lessig; the most notable being Peter Jaszi, Mary Brandt Jensen, Jessica Litman, David Lange and Tyler Ochoa. They have published books, essays and articles on intellectual property, copyright law and the public domain to help create better public understanding of an arcane and complex subject.

#### **The opposition**

In January 1998, Karjala drafted the self-explanatory Opposing Copyright Extension statement that analysed all the issues and arguments for the proposed act. It was signed by 59 other law professors throughout the United States and was sent to the House of Representatives and the Senate to be officially included in the proceedings (see [homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension](http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension)).

It failed to change the course of events, as was seen in October that year. However, it is highly influential in other circles and is regarded as one of the most important documents ever produced for the public domain's cause. Karjala is not a close observer of the technology world as Lessig but he reflected a point that accurately covers software development too:

“There is real cultural and economic value in allowing works to become part of the common heritage, so that other creative authors have the chance to build on those common elements.”

This is in perfect harmony and totally aligns with Richard Stallman's philosophy when he started FSF and the GNU Project ([www.gnu.org](http://www.gnu.org)) in 1984. The master hacker had talked about “free software” and other revolutionary concepts but was brushed off by many as being a “leftist loony,” “a communist” and “unrealistic.”

Stallman, in fact, was only reusing the successful method employed by Sir Isaac Newton who had explained: “If I have seen farther than others, it is because I was standing on the shoulders of giants.”

And suddenly Newton, Stallman, Karjala, Lessig and the law professors are one and the same – people who advocate and use the public domain, or its concept and spirit, as a foundation to create even better works.

This philosophy of reusing and improving is sensible, logical and prudent and it comes with Newton's seal of approval. It works too. And that is the most important measurement of all which validates the public domain as a significant factor in a knowledge-based world. – **AHMAD SAYUTHI**