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Keynote: The International Information Society

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KEYNOTE:

THE INTERNATIONAL INFORMATION SOCIETY[†]

*Lawrence Lessig**

LAWRENCE LESSIG: Copyright in the United States did not reach beyond the United States until 1891. For the first hundred years in the United States' history, we protected no foreign copyrights at all. We were, in the modern parlance, born a pirate nation.

In the context of patents, we have always had a tradition that respects the local reach of patent protection. That tradition has spoken importantly about protecting in a local context and argued increasingly about extending that local protection. But at this moment we are in a process of reforming that tradition. We stated the objectives of this practice, to reach an ideal of universal intellectual property protection. An ideal which is increasingly expressed as an *abstract right*, which reaches everywhere universally, which is to be *enforced everywhere*. This tradition now speaks of an absolute principle that should reach around the world without selectivity and without condition. I think this reforming of our tradition is a good thing, *generally*. I think in particular that patents are a good thing, *generally*. I think in particular that drug patents are a good thing, *generally*. I believe without them, without a system of patent protection for drugs, we would not begin to have the kind of investment and innovation and the creation of new drugs. That a system of producing ways to solve problems of disease depends upon this particular system of protection. And of all the areas of patent protection perhaps this one more than any, deserves the support of our tradition, *generally*.

But our problem is that this way of reforming a system of intellectual property protection, has taken this idea of "generally," and restated it as an absolute. This tradition that has taught us the importance of a balanced system of protection, especially in the context of things like drug patents,

[†] On March 15, 2003, the Stanford Law and Technology Association (SLATA) presented a symposium on creating and protecting intellectual property in the international arena, or "Ideas Without Boundaries." The following is an edited version of the keynote address and discussion. More information about SLATA and its conferences can be found at <http://slata.stanford.edu>.

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has now been conceived of as an absolute right that should extend without qualification everywhere. Now this expression of this new conception has occurred most dramatically in the context of an agreement which otherwise seems to be an agreement expressing a tradition of balance. We have recently seen the adoption of the TRIPS [Trade-Related Aspects of Intellectual Property Rights]¹ Agreement around the world. An agreement which attempts to assure the enforcement of intellectual property rights around the world, through a general system of protection, with the extraordinarily important exceptions built in for developing nations. These exceptions, while still not as broad as some of us would have preferred, express the fundamental ideal that our profession has always taught: that intellectual property protections are to be balanced across the contexts in which they get enforced, and in different contexts they need to be enforced differently.

But though this ideal expresses itself within the TRIPS Agreement we, the United States, have increasingly attempted to effectively change the TRIPS Agreement. Not by explicit modification of the TRIPS Agreement, but instead through a practice of bilateral negotiations which the United States has engaged in with developing nations, where the United States insists that developing nations impose upon themselves stronger obligations than the TRIPS Agreement requires. We use the power of our trading position to force developing nations to adopt what is effectively "TRIPS plus" protection. A regime which increasingly, effectively, does not express this tradition of *balance*, but instead expresses this tradition of *absolute* protection. Instead of manifesting what we as a profession know, that the reach of intellectual property protection needs to be conditioned depending upon the context, it expresses this *ideal*. And thus this system of balanced protection suffers. This tradition suffers. Because examples of its extremism become so extreme that no one can continue to stare at the system of intellectual property protection that we are defending and accept it.

A theorist's place in this extremism, manifests itself in opposition, is in the context of Africa, where thirty million people right now are infected with a disease which could be, to some important extent, treated—but is not. Where three million five hundred thousand people will die next year from this disease. People who could have had their life extended in treatments from drugs which will not be made available to them. Where fifty-eight percent of the people infected with this disease are women. With

1. See Agreement on Trade-Related Aspects of Intellectual Property Rights, http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

the ordinary mode by which this disease is spread is through heterosexual sex. No drugs effectively deal with this disease in this place. Increasingly, activists are getting people around the world to ask this question—why? What could possibly justify a situation where millions of people who could be saved are not being saved? Now the claim that is asserted against the argument that these drugs should be made available to these people is a claim increasingly framed in this rhetoric of *theft*. That to permit African nations to take the knowledge necessary to combine ordinary chemicals and turn them into a drug which could actually save human beings—to permit that—would be to facilitate a kind of theft. It is *stealing*. It is stealing the intellectual property which has been produced by drug companies through their own investment of resources into the production of knowledge about how to solve disease. This rhetoric frames the debate as if what happens in Africa when African nations demand the right to import these drugs free of patent protection, frames the debate to say what they are demanding is the right to steal. And increasingly, activists are getting people to recognize that this is an odd form of theft. Because unlike taking millions of tons of wheat, which might be produced in the middle of the United States, and shipping it to Africa to deal with the starvation, this taking of knowledge actually physically removes nothing from any of us. We lose nothing from the drug companies. It's an abstract taking, not a physical taking. And because these nations are so poor anyway, it's not even as if an opportunity cost is lost. It's not as if these nations could afford to pay the money necessary to pay for these drugs. So it's not even as if money is being taken from these people. So if no actual materials are being removed and no potential profits are being removed, what is it that motivates this extraordinarily strong desire to defend these intellectual property protections we face? Fifteen to thirty million people will die when drugs are not delivered in time.

Well, it's not my view the drug companies have no concern for this problem. It's not my view that they're callous in their concern for people dying in Africa. It's a much more invidious transaction that is going on to slow the spread of these drugs into the nations that are necessary. My judgment is that these companies would be completely happy to permit these drugs to be exploited in these nations at zero marginal cost, at the lowest possible price available. But they resist this because they recognize, not so much the danger that these drugs will end up on errant markets, but the danger that the fact that they make drugs available cheaply in African nations will be used against them. When politicians from rich nations say to them, "How is it that the drugs which you sell for fifty cents a pill in Africa, you charge \$1,000 a pill for it in the United States?" They're afraid

that the politicians will turn against them and cling to the fact that they've made drugs available at the economically rational price, practically zero, and then force them to accept the same pricing structure within the rich nation. So their behavior is not motivated by callousness. It's not motivated by a lack of concern. Their behavior is motivated by the recognition that we, the rich nations, will use the political process to force them into a pricing structure which is fundamentally inconsistent with their ability to support research in the context of innovation to solve these [problems]. This is a failure of a political process. And worse than the failure it reveals about our political process, it's a failure that will increasingly weaken the ability for intellectual property protections to be respected around the world.

Now we, in this tradition of professionalism, have an obligation to help this debate. We have an obligation to help people understand the complexity of this debate. To teach these people who would pervert our tradition, either by re-expressing the tradition in terms of an absolute, or by forcing companies to adopt pricing structures which have no relationship to the economic incentives that they need to produce. We need to teach those two extremes the importance of the balance that has defined our tradition of intellectual property exception, and that that tradition has always admitted exceptions. That the "generally," which is mushy and hard to articulate, the "generally" has admitted that there have been places where the reach of the IP right has not been demanded. We need to teach this as our past and teach people to embrace this ideal of exceptions. To help them understand how these exceptions don't define a compromise of the principle of intellectual property protection. These exceptions teach us where intellectual property protection makes sense, and where it makes no sense. And if we could teach this ideal of exceptionalism to the political process, then we could recognize the opportunity again that we *protect* intellectual property strongly in those places where it makes sense, and we *except* intellectual property protection strongly where that protection is doing harm.

Twenty years from now, we will look back at the decisions we are making today, when years from now we will know how many of these thirty million people died because they didn't have drugs which we could be providing at an extraordinarily low cost today. That number is certain to be more than ten million. It could be more than twenty-five million. Twenty years from now people will ask how we sat back while ten to twenty-five million people died. In the name of what will they die? What would stop us from allowing these elements of knowledge to spread around the world freely so that people could build the technologies to save ten to twenty-five million people? Twenty years from now it will seem

extraordinary that a simple *ideal* about an *abstract right*, which if violated takes nothing from us and costs nothing to people whose rights were violated—it will seem extraordinary that that simple ideal stood in the way of stopping the death of ten to twenty-five million people. Our children will look at us and they will have no understanding of what we are allowing to happen right now. They will have no comprehension of what we have done.

We are lawyers who come from a tradition that teaches us something different. That we have allowed our profession to allow this to happen is a criticism that we need to take seriously. Our tradition teaches enough to show the place where this exception should be allowed, and that place is Africa. It teaches enough to show us that we should defend the rights of drug companies to charge the money they charge in rich nations for the drugs which they are producing. Our tradition teaches us this balance and we have an obligation to stand outside of the interest of our clients and teach the political process this same lesson.

(CLAPPING)

AUDIENCE: INAUDIBLE

MR. LESSIG: It's a hard question that I think leads people to the absolute position. It's too hard to make the judgment of balance, so let's just insist on the extreme. And the extreme is insisted on both sides. One side of the extreme is "absolute protection everywhere," and the other side of the extreme is "destroy patents." No patents anywhere. I don't have much faith that we as a profession can teach this idea of balance and judgment. So, I'm not sure I have an answer that is actually implementable, but we need to try to say that we except places in the context of emergency. We seemed to recognize it when it was a drug called Cipro² in the United States. There was an emergency in the United States and immediately everyone spoke about the need for a compulsory license for Cipro in the United States.³ So, we recognize when it affects us. We need to recognize it in other places, too, and combine the recognition of places where we need an exception with the recognition that there are places that don't need an exception. The United States needs no exception from the rules that govern intellectual property with respect to drugs. If we believe in intellectual property with respect to drugs, then we should allow the market to price it

2. "Cipro (ciprofloxacin hydrochloride) is an antibiotic used to treat bacterial infections in many different parts of the body. Cipro is approved for the inhaled form of anthrax after an individual has been exposed." See Center for Drug Evaluation and Research website at <http://www.fda.gov/cder/drug/infopage/cipro> (last visited Nov. 14, 2003).

3. See Kevin Anderson, "Cipro Demand Outstrips Supply," BBCNEWS (Oct. 25, 2001), at <http://news.bbc.co.uk/1/hi/world/americas/1618783.stm>.

as the market will price it in a competitive way.

AUDIENCE: Do you have an example of something that we did that I can stop my binary thinking with?

MR. LESSIG: I think the example of saying that nations such as India and Brazil should be permitted to produce these drugs and sell them absent the patent protection that covers them—that India should be permitted to create factories within Africa to produce these drugs, is exactly the kind of exception that says there is someplace between the middle. That is to say, we except, we remove, certain types of intellectual property protection in the context of emergency, and admit that, while embracing the ideal that we insist on that intellectual property protection in the context where there isn't an emergency. Now, if we, as a political culture have lost the ability to say we can tell the difference between an emergency and a non-emergency, and so therefore, we need binaries all or nothing, then my main point is, at a certain stage, reason will catch up with that binary thinking. And when it does, what we have done will seem extraordinary to those who look back at these decisions right now.

AUDIENCE: If some of the pressure on drug companies not to reduce prices in other companies comes from what politicians in developed or rich nations might say, is that an indictment of the members of those countries that they don't have the empathy, or is it an indictment of our culture in developed countries?

MR. LESSIG: It certainly is an indictment of the political system. So the question was, is the fact that part of this problem is being caused by the unwillingness of rich nations to recognize the necessity of price discrimination in the provision of a monopoly product like a patented drug, is that an indictment of the political system? And the answer is, yes. It is an indictment of our political system. And I'm not even sure it's a failure of the politicians to recognize this point, because I'm sure drug companies sit down with them and say, you have to understand if you're going to embrace a system of monopoly protection for drugs, then you have to permit some kind of price discrimination here, and that means rich countries have to pay more. I think they understand that. But the point is, it's such a hard argument for other people generally to understand that it's very easy for them to pretend like they don't get it. And drug companies, I think quite reasonably, recognize that it would be very hard for them to stand up and say, "we have to have the right to charge high prices in rich countries so that lower prices can be charged in poor countries." But I think what that means is that people, other than drug companies, need to stand up and say exactly that. The people who are really interested in making sure that drugs are available cheaply in developing nations need to defend the

right of the drug companies to charge what the market bears outside of those poor countries. That unless we, activists, who want to spread the knowledge broadly, accept the consequence of the system we've embraced, there will be a continued political pressure that will force the drug companies to adopt exactly this strategy. So this is a criticism of the political system. I think in part it's a criticism, too, of those of us who just love the idea that everything could be free. Well, here's the world and everything isn't free. Drugs are not free. Drugs cost an extraordinary amount of money to produce. And someone's going to have to pay for that. And the simple social justice point is—if anyone's going to pay for that, we should. We should be paying for that. And the system we've embraced that is basically forcing them to pay for this with their lives, will be seen as extraordinarily outrageous at the time we have to defend it to our children.

AUDIENCE: INAUDIBLE.

MR. LESSIG: Let me summarize it like this. The question is, is the same argument extended in the context of something like software? And, would I differentiate software from the drug context? So, in one sense I wouldn't. In one sense I think that companies like Microsoft also face exactly this kind of problem. That if they had strong price discrimination across countries, they would get extraordinary political pressure. But also the pricing strategy of companies like Microsoft in a country like China is very complicated. And of course, they oppose, and I think rightly oppose, software piracy in China. But they recognize that if the whole world were to give up software piracy and just start using operating systems which they didn't have to pirate, like the Linux operating system, that would be a very bad thing for them. So, in some sense, there is a certain amount of piracy that is necessary to sustain the spread and reach of the Microsoft operating system. So I guess in that sense I think there's a similarity to it. But the part that I think is different is that, as all of us know when we attempt to get people to pay attention to intellectual property issues, it's hard to get anybody to care. The one place where they will begin really to care is in the context of drug patents. And so what I'm suggesting is that, this is the one place where we can get some real movement and gain an understanding about how the system works generally. Because those of us, and I'm counting myself in this class, there might be a small number of us but we hope it gets to be larger. Those of us who fundamentally believe in the system, but believe that the way the system is functioning right now is deeply wrong, also believe that the way the system is functioning right now will ultimately destroy the intellectual property system, *generally*. It will seem outrageous and the consequence of that outrageousness will be an extraordinary backlash against intellectual property protection, *generally*.

And the harm that will follow from that is to drug companies first, and then secondly to all of us since they won't have the money to invest to produce new drugs. So it's at this place we both have to try to find a solution that saves the biggest holocaust that you could imagine, saves fifteen million to thirty million people, and at the same time, moves the debate so that the consequence of saving fifteen million to thirty million people isn't destruction of a system that I, at least at this moment, think is necessary to create incentives to produce drugs.

AUDIENCE: It was suggested by one of the panelists this morning that the most efficient and economic way to provide drugs would be to eliminate patents and have government commissioned scientists to take care of this. Do you think that's a viable alternative to the patent system? And why not?

MR. LESSIG: I don't think it's viable right now. Even if I were convinced of its viability, I think it's too radical a change right now. I think what's necessary is a bit of murkinism right now. What is the change on the margin that we can make to have the most impact on saving lives? The change on the margin is not to eliminate the system completely. The change on the margin is to adopt an exceptionalism that recognizes the exception. I agree that there may be hard lines to draw. Certain cases will be extremely difficult. But the fact that there'll be hard lines to draw does not, should not, stop us from drawing what I think most people would think to be an extremely easy one. Knowing nations that are being ravaged by this disease should deserve the exception of saying that we will accept this for a period of time for these nations to save these lives. And the exceptionalism might actually help support decisions in other contexts because at least you are saying, it's not that patents are being violated, it's just that patents don't extend here. And patents not extending in different material contexts has been a part of the patent system from its beginning.

AUDIENCE: Why not propose to each of the pharmaceutical companies that for every quality of life drug for which you wish the full protection to be absolute, you must put one life saving drug into the exceptional regime, provided you either produce it yourself or you license them through another company?

MR. LESSIG: I hadn't thought about that yet. It's a nice one though. The problem, you know, I guess I should then just not say more, because I haven't thought about that yet. But let me pretend like I had thought about it. The problem with that is just to imagine that there's some structure in the creation of drugs that would make that one-to-one tradeoff easy or accessible. If I could be convinced of that, then that would be fine. But I wouldn't wait until I was convinced of that to say the drug, in taking steps

right now, to at least create exceptions, allow the exceptions to spread without creating continued pressure on drug companies. Now, what's the nature of that recognition for the exceptions that are necessary—you give one, the deal you strike with pharmaceuticals. I'm going to be very precise about where the problem is. We have in the United States a kind of special interest politics where companies come to the trade representative and say, we want you to use the United States' power to achieve the following modifications of bilateral negotiations with the TRIPS agreement. Now special interest politics is usually pretty harmless—who cares? It's the way the government works in ninety-eight percent of what it does. But sometimes the special interest politics is extraordinarily corrosive. It's corrosive not just of the world standing of the United States but corrosive of the very system it's trying to defend—intellectual property. What I've been suggesting is that we need recognition of how corrosive this process is to our moral standing in the world, and to the system of intellectual property that many of us are devoted to, in some sense, protecting. Because unless there is a recognition that this bilateral negotiation process corrupts the basic balance that the system is to be pursuing, then there will be no political pressure to stop. Unless people begin to say, this has to be stopped, then the corrosion and the weakening of the intellectual property system that I'm describing will take place.

AUDIENCE: Do the officers of the drug companies have a legal obligation to profit?

MR. LESSIG: I completely agree with the first part of what you're saying. You've got to recognize that the companies do what they do because they're under an obligation to make money. So what I was trying to suggest is the reason I think that they're not making this available cheaply is because they think they'll make less money. But they won't make less money because they're in a sense giving drugs away, they are worried that they'll make less money because they'll be forced to charge less for the drugs that they're able to charge for in the rich nations. So it's a complicated reason why they would make less money. So my response to that is, let's find a way to make it so that they won't make less money. Well, what is the way to make it so they won't make less money? To raise awareness about how wrong it is to insist that drug companies lower their prices in the rich nations in response to the fact that they are offering drugs cheaply in developing nations—like that argument has a moral consequence. The argument to say that the fact that you're charging a dollar a pill in Africa means you shouldn't be charging as much as you're charging in the United States, that argument has the consequence of leading drug companies to avoid lowering costs to the poor countries around the

world. So there's a moral status variable that I think we should recognize and then criticize. Now, it's not that they could do it on their own. In particular, I think drug companies are the last people in the world who should stand up and make the argument that I'm making. But the people who need to stand up and make the argument that I'm making are the people who are traditionally thought of as antagonistic to intellectual property, like me. People like me need to stand up and say, there's an important value protected by this intellectual property. It's necessary, and we can't erode it by allowing our desire to have cheap drugs lead to developing nations having no drugs. So it's part of our responsibility as much as it is the drug companies. We don't have an obligation by law to make money, and I can say that we failed if we do, so we should just admit it, and get on with making the correct arguments.

AUDIENCE: But in reality there are virtually no patents on AIDS drugs in sub-Saharan Africa, so patents really don't stop like you are suggesting. Indian manufacturers, for example, the manufacturing facility in Mozambique or India or wherever you want. I mean there are some patents in South Africa—you know, the Harvard study shows that there are no—virtually no patents on the retrovirals. So the problem is in my view somewhere else. The problem is in the lack of infrastructure, the need to have an infrastructure and also the health care budgets in these countries are, you know, like ten dollars per patient a year.

MR. LESSIG: Yeah, sure. And the GDP is one dollar a person. So, you're right. And so, let's be clear about where the source of the problem is. I'm not saying the fact that there are patents in Mozambique means that people are unable to get drugs there. But I am saying that the enforcement of the patent system directly or indirectly is making it impossible for Mozambique to afford drugs that are made elsewhere, and made without patent protection, to be imported into Mozambique. This is the pattern of protection that is done both directly, through law, and indirectly through political pressure. So, until Jamie Love's⁴ organization succeeded in stopping the United States' pressure on South Africa, the United States was pressuring South Africa into not excepting noncompliant drugs in a context. Now the other part of this that is extremely important to emphasize is that I'm not saying that the drugs would be even curable. Obviously they won't. These drugs, in particular, need to be administered in a very regular regime, and there is deep concern among health activists that there isn't enough of an infrastructure to support the regular consumption of the drugs

4. See Daryl Lindsey, "The AIDS-Drug Warrior," SALON.COM (June 18, 2001), at <http://dir.salon.com/news/feature/2001/06/18/love/index.html>.

necessary for them to have an effect. That is absolutely right. And so there's got to be lots of support for these other things, too. But the point is—here's one change that requires no massive expense to affect that change. The one change that can be achieved almost overnight would be a liberalization of the incentives to move drugs into this area of Africa.

AUDIENCE: To ask a more constructive question, what would you think about the consortium that is free from the antitrust laws combining basically pharmaceutical companies wherever they are, in India and in the United States just to target, to supply, you know, drugs at the cheapest possible price to these countries?

MR. LESSIG: Well, I'd like to see the details but I like the general idea. That's a simple way to get around the problem of incentives to get them to produce and distribute drugs.

AUDIENCE: Because one of the issues in the retrovirals is that many manufacturers, it's not one company supplying all the drugs.

MR. LESSIG: Right. But what is necessary for that to happen is a recognition that we create a special exception in this context. It can push that debate in light of the extraordinary pressure that will be put on the intellectual property system *generally* if we don't succeed, then I think that will be exactly the right solution. Thank you very much for letting me speak.

