

BOOK REVIEW

An Introduction to Lessigian Thought

Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity, Lawrence Lessig, New York: Penguin Press, 2004, 306 pages.

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If you are a media and communications law or policy practitioner and you are unfamiliar with Stanford law professor Lawrence Lessig's work, you are quite simply missing out on the most important viewpoints and debates on today's most challenging legal and policy problems related to media and communications. It's as simple as that.

To the extent that you need any convincing, Lawrence Lessig authored two previously well-received books on media and communications policy.¹ Lessig is also a frequent commentator and staggeringly prolific writer² on media and communications topics. Finally, Lessig's weblog³ ("blog") remains the most successful media and communications policy forum in existence.⁴ It functions as an epicenter of

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1. Lawrence Lessig, *CODE, AND OTHER LAWS OF CYBERSPACE* (1999) [hereinafter *CODE*]; Lawrence Lessig, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001) [hereinafter *FUTURE OF IDEAS*].

2. Lessig's resume is available at <http://www.lessig.org/bio/cv/>.

3. See Lawrence Lessig, *Lessig Blog*, at <http://www.lessig.org/blog> (last visited Nov. 28, 2004).

4. At last count, Lessig's blog had approximately 18,700 backlinks. For more up-to-date backlink information on Lessig's blog, type the following phrase into the Google search engine: "link:<http://www.lessig.org/blog/>."

a robust policy debate that is sometimes unfocused, always lively and humorous, and extremely informative. As a former law professor of mine, Andrew Murray of the London School of Economics, recently stated, “[r]eviewers of Lessig’s work therefore must overcome a degree of anticipation, even reverence, when analyzing his work.”⁵

In addition to reviewing Lessig’s latest work, *Free Culture*,⁶ perhaps it is time to take a step back and consider Lessig’s many contributions to the field of media and communications policy. We should probably celebrate Lessig’s achievements and recognize them as simply an articulate body of legal principles and thought: *Lessigian*. What do I mean by *Lessigian* thought?

As an initial matter, *Lessigian* thought is deeply critical in nature. This is an important point, and one that contrasts Lessig with many of his (legal) professional readers and fans. In our day-to-day practice of communications law, we operate on a narrow, more analytical level, assessing policies that affect our clients and industries. Perhaps it is the luxury of academia, or his nature generally, but Lessig is not afraid to say (loudly) at times: This doesn’t work! We need to change. He says it often, and people are listening.

Lessig also forms a richer, more complex view to the world of media and communications policy, bringing in other influences such as the market, social custom, and architecture or design. It is a critical view that includes law (or what Lessig often calls “East Coast Code”), but realistically recognizes the limits and dangers of a solely legally-focused approach.⁷

Lessigian thought is also focused on the here and now and the meaningful effects of policy on the everyday. It is a mode of thought that confines itself to problems that affect people today, usually from a technological or creative perspective. Thus, in *Free Culture*, Lessig principally addresses the recording industry’s attempts to stamp out music piracy from a perspective of what will best work for the millions of Americans downloading music, instead of what approach most faithfully adheres to the traditions of copyright law or best clings to misapplied

5. Andrew D. Murray, Technological Determinism, Markets and Networked Cultures, at <http://www.100megsfree4.com/andrewmurray/lessigreview.pdf> (reviewing *The Future of Ideas: The Fate of the Commons in a Connected World*).

6. Lawrence Lessig, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004) [hereinafter FREE CULTURE].

7. Much of Lessig’s work in the area of regulatory and legal theory can be found in his seminal work, *Code*. In *Code*, Lessig introduced to the world his simple yet groundbreaking theory of “a dot’s life” and “what things regulate.” CODE at 86-95.

notions of property or piracy.⁸

Finally, Lessigian thought persuades and convinces by storytelling. Lessig avoids traditional case studies such as might be found in a business law or management consultancy journal, but instead offers richer stories about historical turning points in the law or comparisons to other cultures—often told from a highly personal point of view. While this approach lacks the empiricism otherwise common in the social sciences, it is nevertheless effective and very readable. Lessig also relates stories to make points that are intuitive in nature, making their informality, particularly in *Free Culture*, all the more charming.⁹

Lessig has wide-ranging interests in the law, but usually returns to one common theme: What elements of private or public control go too far in impeding our creativity and freedom? Thus, Lessig's body of work touches on copyright issues, radio spectrum policy, media ownership issues, and legal ownership and control of the physical platforms that deliver broadband content, among other things.¹⁰ In *Free Culture*, Lessig almost exclusively focuses on copyright policy.

Free Culture begins, quite unexpectedly, on a farm. A story is told. I will not spoil it here, but the story relates to what Lessig terms “how the law usually works,”¹¹ ensuring that common sense will ultimately prevail when the law encounters the application of new technologies. Lessig thereafter takes the reader on an enjoyable journey that explores a common sense, middle-ground position between those powerful interests that seek to lock up creative content, and those pirates that would seek to steal it. Lessig finds in that middle ground a group of innovators, collectors, transformers of content, and everyday people (who both enjoy, and also occasionally transform that content) who would benefit from a new regulatory scheme for copyrights.

Along this journey, Lessig brilliantly counteracts those who claim that the only issue the law should currently concern itself with is how we can protect digital property and those who own or control it from piracy. In chapter 4 of *Free Culture*, Lessig destroys that notion, demonstrating how the film, record, cable TV, and radio industries were essentially built on piracy, using the word in its traditional sense.¹² In each case, the industry

8. FREE CULTURE at 66-84.

9. For his part, Lessig says the stories spare the reader from “obscure French theorists” and “set a context within which these apparently simple ideas can be more fully understood.” FREE CULTURE at 13.

10. See CODE; FUTURE OF IDEAS; FREE CULTURE

11. FREE CULTURE at 2.

12. Lessig also catalogs the numerous situations in which the Disney Company used the intellectual works of others, such as the early Mickey Mouse cartoon, *Steamboat Willie*,

benefited from a limit on the power of property. These examples powerfully set the stage for Lessig's later argument that balanced thinking about the exploitation of use of copyrighted works is essential for the creative process.

The central premise of *Free Culture* is that American copyright policy needs to regain a balance that once existed and must continue to exist for everyone's sake. Lessig writes:

Zero tolerance has not been our history. It has not produced the content industry that we know today. The history of American law has been a process of balance. As new technologies changed the way content was distributed, the law adjusted, after some time, to the new technology. In this adjustment, the law sought to ensure the legitimate rights of creators while protecting innovation. Sometimes this has meant more rights for creators. Sometimes less.¹³

As noted above, empiricism or the use of statistical data to support his claims is often a weak point in Lessig's scholarship and writing. Lessig does introduce certain empirical elements, however, to support his claims regarding copyright duration. For example, in a brilliant section of *Free Culture*,¹⁴ Lessig uses several pieces of data to demonstrate how little American creativity is passing into the public domain at this time, compared to how much American creativity flowed into the public domain in previous years. Lessig claims that, over the twenty years following passage of the Sonny Bono Copyright Term Extension Act,¹⁵ one million patents will pass into the public domain, but zero copyrights will pass into the public domain "by virtue of the expiration of a copyright term."¹⁶ Lessig's empiricism is weaker, however, when addressing issues of media ownership concentration, where he claims that, "most expect that within a few years, just three companies [will] control more than 85 percent of the media." Data to support this otherwise remarkable claim are not forthcoming. In fact, Lessig proceeds to immediately contradict himself by citing market-specific information that suggests it takes more than three companies to control the media.¹⁷

which according to Lessig, is a parody of a Buster Keaton film, which is itself based on a song of that time. Lessig also states that many Disney films are based on Grimm fairy tales. As Lessig writes, "In all of these cases, Disney (or Disney, Inc.) ripped creativity from the culture around him, mixed that creativity with his own extraordinary talent, and then burned that mix into the soul of his culture." *FREE CULTURE* at 22-24.

13. *FREE CULTURE* at 74.

14. *FREE CULTURE* at 133-35.

15. Sonny Bono Copyright Term Extension Act, 17 U.S.C. §§ 108, 203, 301-04 (2002).

16. *FREE CULTURE* at 134-35. Of course, the effect of this on American creativity is mitigated by fair use and licensing or other permission schemes.

17. *FREE CULTURE* at 162-63. FCC Chairman Michael Powell claimed in a contemporaneous piece, "There are more media outlets, owners, variety and diversity now

Perhaps the best portion of *Free Culture* is Lessig's inside account of the *Eldred* case¹⁸ and his appearance before the Supreme Court in that matter. Lessig tells the tale from the standpoint of a lawyer who, in some respects, is confessing his mistakes in the case. But the reader is also treated to an insider's view of the process, replete with the gut-wrenching tactical decision-making that invariably accompanies such high-profile cases. Lessig writes of his oral argument before the Supreme Court:

As I read back over the transcript from that argument in October, I can see a hundred places where the answers could have taken the conversation in different directions, where the truth about the harm that this unchecked power will cause could have been made clear to this Court. Justice Kennedy in good faith wanted to be shown. I idiotically, corrected his question. Justice Souter in good faith wanted to be shown the First Amendment harms. I, like a math teacher, reframed the question to make a logical point. . . . There were a hundred places where I could have helped them . . . yet my stubbornness, my refusal to give in, stopped me.¹⁹

In an afterword, Lessig concludes *Free Culture* with an agenda for change—in his words, a sketch for Congress to follow “to better secure a free culture.”²⁰ Lessig's general proposals include: (1) a more formal copyright registration and renewal system to ensure protection of creators yet still allow others to more readily ascertain those works subject to protections; (2) a shorter term for copyrights, with the associated requirement that copyright holders periodically renew their protections and pay a small processing fee; and (3) a limit the duration and scope of copyright protection for derivative uses. Despite his book's provocative subtitle, Lessig's proposal is not ambitious, as his stated goal is simply a restoration of the law's balance.

than at any point in our nation's history.” Michael Powell, *New Rules, Old Rhetoric*, N.Y. TIMES, July 28, 2003, at A17, available at http://www.fcc.gov/commissioners/powell/mkp_072803.pdf. Powell further stated:

Some say the problem is media concentration, and point out that only five companies control 80 percent of what we see and hear. In reality, those five companies own only 25 percent of more than 300 broadcast, satellite and cable channels, but because of their popularity, 80 percent of the viewing audience chooses to watch them. Popularity is not synonymous with monopoly.

Id.

18. See *Eldred v. Ashcroft*, 537 U.S. 186 (2003). In *Eldred*, the Supreme Court upheld the constitutionality of the Sonny Bono Copyright Term Extension Act. Lessig relates essentially the same story in a personal account of the case. Lawrence Lessig, *How I Lost the Big One*, LEGAL AFFAIRS, March/April 2004, at 57-63, available at http://www.legalaffairs.org/issues/March-April-2004/story_lessig_marapr04.html.

19. FREE CULTURE at 244.

20. *Id.* at 275.

I suppose Lessigian thought is not terribly unique as an epistemological matter. There are many theorists who bring about a greater understanding of their field through the introduction of a more critical, richer approach. In this time of great change, however, media and communications law and policy needs this more reflective approach and Lawrence Lessig delivers it. It clearly offers somewhat less *gravitas* than Newtonian principles, but Lessigian thought definitely enlightens the world around us and should be celebrated accordingly.

One final note: Lessig makes *Free Culture* available free—as in “free beer”—to doubly borrow the phrase from the book’s preface.²¹ How very Lessigian of him. Notwithstanding this, I also urge my fellow practitioners to purchase the book if they find the free version to their liking. Let us be Type B sharers of digital content.²² To find out what kind of sharer you are (it is probably more a functional matter than a personality trait), you will have to read the book.

21. *Free Culture* is available for free on the Internet at <http://www.free-culture.cc/freecontent/>.

22. FREE CULTURE at 68.