

## **Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity**

By Lawrence Lessig

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As software developers, the entertainment industry, lawyers, and Internet users anxiously await the Supreme Court's decision in the recently argued case, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*,<sup>1</sup> all would be wise to pick up a copy of Lawrence Lessig's *Free Culture* for a clear, in-depth analysis of a problem that goes well beyond the fight over peer-to-peer file sharing computer networks (p2ps). In this book, Professor Lessig argues that the all or nothing approach of the content industry toward intellectual property rights is unnecessary for protecting the property rights of creators and harms the way our culture is created. Through clear examples, Professor Lessig illustrates the problems that arise when a small group of powerful corporations are permitted to use the law as a way to impede technology, and use their economic influence to prevent the law from adjusting to accommodate new technology. Practical solutions are offered for restoring the balance between the property rights of creators and benefits to the public, while allowing new technology, such as the p2ps, to remain legal.

Article I, Section 8 of the U.S. Constitution grants to Congress the power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>2</sup> This gives Congress the power to grant copyright and patent protections to creators, which provides incentive for creators. The Constitution also specifies that these rights are to be “for limited times” so that the rights of

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<sup>1</sup> 380 F.3d 1154 (9th Cir. 2004), *cert. granted*, 73 U.S.L.W. 3247 (U.S. Dec. 10, 2004) (No. 04-480).

<sup>2</sup> U.S. CONST. Art. I, § 8.

creators will be balanced with benefits to the public.<sup>3</sup> Once the copyright period has expired, the creative work or innovation passes into the public domain where anyone is free to use it and to expand upon it.<sup>4</sup> Prior to a creative work passing into the public domain, anyone who wants to use that work must first obtain permission from the copyright holder, unless it is a clear case of “fair use” or an unregulated use.<sup>5</sup> Several recent developments, as described by Professor Lessig in *Free Culture*, have compromised the copyright system. First, there is no longer any requirement that a creator must mark their work as copyrighted, register their copyright, or even renew their copyright; the copyright is given automatically without requiring any record of the copyright.<sup>6</sup> This creates complications for people who would like to use existing creative material. It is extremely difficult, maybe even impossible, to find out if a particular work is currently protected by copyright and to find the copyright holder so that one can ask permission to use the work.<sup>7</sup> A second problematic development in copyright law is that Congress has been extending the copyright period, which results in less material passing into the public domain.<sup>8</sup>

Over the last decade, online technologies have expanded and Internet users have increased at a rapid rate.<sup>9</sup> This growth has changed the ways in which people share ideas and information, and has made it very efficient for people to share large amounts of creative work in digital formats via p2ps, whether or not that work is protected by copyright.<sup>10</sup> The content industry, most notably the RIAA and the MPAA, have been fighting against the p2p technology. In the latest example, the content industry wants to hold the distributors of a p2p vicariously and

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<sup>3</sup> LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 131 (2004).

<sup>4</sup> *Id.* at 133-35.

<sup>5</sup> *Id.* at 142.

<sup>6</sup> *Id.* at 137.

<sup>7</sup> LESSIG, *supra* note 3 at 288.

<sup>8</sup> *Id.* at 215.

<sup>9</sup> *Id.* at 7-9.

<sup>10</sup> *Id.*

contributorily liable for the illegal sharing of copyrighted material by users of the p2p.<sup>11</sup> If the content industry is ultimately successful, the most obvious result will be a chilling effect on innovation that will impede the creation of new and better technologies for sharing non-copyrighted materials.

In *Free Culture*, Professor Lessig does not argue for the end of copyright law. He makes clear that he does not condone copyright infringement, including that which occurs through the use of p2ps. However, Professor Lessig does argue that Congress has enabled copyright protections to morph into something much broader than the founding fathers ever intended, and the result is a burden on cultural development and innovation that benefits the content industry more than the creators and general public. Furthermore, he makes the point that because of the current copyright laws and shrinking public domain, cultural content is mostly controlled by the content industry. This results in creative works that are limited in amount and in diversity.

In terms of law reform, Professor Lessig suggests several steps for reclaiming free culture.<sup>12</sup> First, he argues that formalities for copyright are necessary because “[t]oday there is simply no way to know who owns what, or with whom one must deal in order to use or build upon the creative work of others,” “[y]et given the massive increase in the scope of copyright’s rule, getting permission is a necessary step for any work that builds upon our past.”<sup>13</sup> Professor Lessig’s suggestions include “marking copyrighted work, registering copyrights, and renewing the claim to copyright.”<sup>14</sup>

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<sup>11</sup> *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, F.3d 1154, 1158 (9th Cir. 2004), *cert. granted*, 73 U.S.L.W. 3247 (U.S. Dec. 10, 2004) (No. 04-480).

<sup>12</sup> LESSIG, *supra* note 3 at 287-306.

<sup>13</sup> *Id.* at 288.

<sup>14</sup> *Id.*

Another step that Professor Lessig suggests is shortening the copyright term.<sup>15</sup> In determining the appropriate length of the copyright term, he argues that it should be long enough “to give incentives to create, but no longer,” should be simple enough to clearly differentiate between the public domain and protected content, should have to be renewed periodically if the creator wants continued protection, and should be applied prospectively.<sup>16</sup> A third important step proposed by Professor Lessig is limiting the derivative rights that Congress grants under copyright, both in time and in scope.<sup>17</sup> As put so well by Professor Lessig,

“Think about all the creative possibilities that digital technologies enable; now imagine pouring molasses into the machines. That’s what this general requirement of permission does to the creative process. Smothers it.”<sup>18</sup>

Professor Lessig’s suggestions for a solution to the controversies surrounding the file-sharing of music seem logical and fair. He differentiates four types of file sharing; (A) sharing as a substitute for purchasing copyrighted material, (B) sharing as a way to sample music before purchasing it, (C) sharing to get access to copyrighted material that is no longer commercially available, and (D) sharing material that is not copyrighted or that the owner wants to give away.<sup>19</sup> Professor Lessig points out that “[f]rom the perspective of the law, only type D sharing is clearly legal” and “[f]rom the perspective of economics, only type A sharing is clearly harmful.”<sup>20</sup> To balance the clearly harmful file-sharing of type A against the use of clearly useful and beneficial file-sharing in an environment of changing technology, Professor Lessig suggests that commercially unavailable music (type C) could be “fair game” for sharing, or alternatively, a statutory license system could be put in place by lawmakers to ensure that the

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<sup>15</sup> *Id.* at 292.

<sup>16</sup> LESSIG, *supra* note 3 at 292-93.

<sup>17</sup> *Id.* at 294-95.

<sup>18</sup> *Id.* at 295.

<sup>19</sup> *Id.* at 68-69.

<sup>20</sup> LESSIG, *supra* note 3 at 69.

creators get something from the file-sharing of their creations.<sup>21</sup> For the type B and type C file-sharing, Professor Lessig supports a temporary system of taxation and compensation for the actual harm that is caused by these types of file-sharing while technology continues to evolve, instead of shutting down p2ps altogether.<sup>22</sup>

Finally, Professor Lessig notes that the extraordinary costs of our legal system “distort free culture in many ways,” and result in a system that “works well only for the top 1 percent of the clients.”<sup>23</sup> Many examples used throughout the book point out that often there is no choice but to settle a copyright infringement lawsuit because fighting is not economically possible, even if the alleged infringer hasn’t done anything illegal. This is a point well-taken and a reality that the content industry seems eager to exploit.

This book is highly recommended for anyone who would like to gain a better understanding of the current controversies involving copyright law and the Internet. It is written in a manner that is clear and thorough. There are more thought-provoking points in this book than can be touched upon in a book review, and enough clear examples and explanations of the controversy to fuel many wonderful discussions regarding this topic.

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<sup>21</sup> *Id.* at 299-300.

<sup>22</sup> *Id.* at 301-03.

<sup>23</sup> *Id.* at 305.