

Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity, Lawrence Lessig. Penguin Books, 2004, 240 pp., \$24.95

Reviewed by Peter J. Gardner, Esq.

Stanford Law School professor Lawrence Lessig believes a free culture (as in free speech, not free beer) will protect today's creators and innovators and ensure tomorrow's relative freedom from the control of the past. Yet in Lessig's view, a dark force has crept across America's innovation landscape to control vast ranges of culture and creativity, and push us to the precipice of a permission culture.

That ominous force, Lessig writes in his book, *Free Culture*, is a "Byzantine complexity of copyright law" created by media conglomerates and a corrupt U. S. Congress to produce ever longer copyright terms¹ designed to defeat competition unleashed by the Internet. Lessig and other prominent lawyers and law professors, including Jonathan Zittrain of Harvard and Yochai Benkler of Yale, thus have taken up the fight against "a radical effort to turn copyright law into a tool for hoarding ideas."²

According to Lessig, three principal elements have coalesced to transformed creators into "modern-day sharecroppers": a huge shift in the effective power of copyright regulation; increased concentration of the content industry in fewer and ever more powerful hands; and technology and software that enable control over the use of culture.

In the United States today, copyright is no longer an "engine of free expression," Lessig writes, but "a brake." He argues that copyright law has never "protected such a wide range of rights, against as broad a range of actors, for a term that was remotely as long" as now, nor have "fewer had a legal right to control more of the development of our culture than now." In such a

¹ Copyright protection for individuals currently lasts for seventy years after the death of the author or, for corporations, ninety-five years after publication.

² Robert S. Boynton, *The Tyranny of Copyright?*, N.Y. TIMES, Jan. 25, 2004, § 6, at 40.

world, in which innovators must combat both the market and the government, writes Lessig, “competitors with new ideas will not succeed.”

Furthermore, United States hegemony over creativity and innovation seems not to stop at our borders. Lessig sees the U.S. exporting its brand of copyright law through its trade power “to force nations around the world to adopt the same restrictive regime” our government has created, and in some instances to adopt an even *more* restrictive regime than our own.³

When creativity involves reusing content created by others that is still under copyright protection, use of such material may be permitted under the “fair use” exception to copyright infringement. Fair use permits creators to use copyrighted work for such purposes as news reporting, teaching, scholarship, research, criticism, and comment, or to transform a copyrighted work.⁴ Such a transformative use, coupled it would seem with social commentary, is Alice Randall’s *The Wind Done Gone*, the retelling of Margaret Mitchell’s *Gone With the Wind* from a slave’s point of view.

Lessig argues, however, that the fair use exception—the contours of which are variable and uncertain in any given case—is now little more than a playground, indeed a gravy train, for lawyers. To reuse content in some creative way in the face of the liability specter copyright infringement invites, “you either pay a lawyer to defend your fair use rights or pay a lawyer to track down permissions so you don’t have to rely upon fair use rights. Either way,” Lessig writes, “the creative process is a process of paying lawyers.”

³ E-mail from Prof. Lawrence Lessig, Stanford University, to Peter J. Gardner, Oct. 2, 2004.

⁴ As the Copyright Act does not define fair use, such use is determined by balancing the following four factors: (1) purpose and character of the use; (2) nature of the copyrighted work; (3) amount and substantiality of the part of the copyrighted work used in relation to the whole; (4) effect of the use on the value of, or potential market for, the copyrighted work.

With uncertain and unlimited liability, Lessig warns, “we will have much less vibrant innovation and much less creativity. The opportunity to create and transform becomes weakened in a world in which creation requires permission and creativity must check with a lawyer.”

Though Professor Lessig recognizes the Internet, even still in its infancy, to be among the most powerful and liberating agents of social, economic, and cultural change ever known, he appears not to reject some eventual measure of state control or management of this far reaching new thread in the fabric of civilization. In his view, however, because it is too early to comprehend the full span and depth of the effects the Internet may produce in time, it would be premature and destructive to attempt to control those effects today. Of the socioeconomic policy to promote innovation that is the foundation of intellectual property law, Lessig writes that “balancing the good that comes from granting an exclusive right against the burdens such an exclusive right creates has historically been done *after* a technology has matured.”

Through the corruption of copyright law, Lessig argues, the Internet is being regulated too soon, too restrictively, and for ill-conceived and simply rotten reasons. Whatever the controllers of media and content gain today, that which will be denied or lost to creativity, innovation, and the advancement and enrichment of society will be incalculably greater.

Lawrence Lessig’s argument in *Free Culture* is forceful, reasoned and balanced, though his tone at times may be so emphatic as to seem to border on the strident. Whether one agrees or not with Professor Lessig, one could neither sensibly dismiss the emergence of the Internet medium as the message of our time,⁵ nor fail to appreciate that intended and unintended societal, cultural, and economic effects inexorably follow innovative leaps and accompanying or consequent

⁵ In 1964, Marshall McLuhan pronounced, in *Understanding Media: the Extensions of Man*, that “the medium is the message.” It would seem difficult to imagine a more remarkable illustration than the Internet of McLuhan’s insight in all its nuanced meaning.

changes in intellectual property law. To those attorneys given to reflection upon the human experience as the context for our profession, *Free Culture* will provide much to contemplate.

Peter J. Gardner, Esq., is an attorney with Stebbins Bradley Harvey & Miller in Hanover, N.H. and St. Johnsbury, Vt., and is chair of the New Hampshire Bar Association's Intellectual Property Law section.