Book Review

Tom Zillner, Editor

Free Culture

How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity

By Lawrence Lessig. New York: Penguin, 2004. 240p. $24.95 (ISBN 1-594-20006-8).

This is the third book by Stanford law professor Larry Lessig, and the third in which he furthers his basic theme: that the ancient régime of intellectual property owners is locked in a battle with the capabilities of new technology. Lessig used his first book, *Code and Other Laws of Cyberspace* (Basic Books, 1999), to explain that the notion of cyberspace as free, open, and anarchic is simply a myth, and a dangerous one at that: the very architecture of our computers and how they communicate determine what one can and cannot do within that environment. If you can get control of that architecture, say by mandating filters on content, you can get substantial control over the culture of that communication space. In his second book, *The Future of Ideas: The Fate of the Commons in a Connected World* (Random, 2001), Lessig describes how the change from real property to virtual property actually means more opportunity for control, not less. The theme that he takes up in *Free Culture* is his concern that certain powerful interests in our society (read: Hollywood) are using copyright law to lock down the very stuff of creativity: mainly, past creativity.

Lessig himself admits in his preface that his is not a new or unique argument. He cites Richard Stallman's writings in the mid-1980s that became the basis for the Free Software movement as containing many of the same concepts that Lessig argues in his book. In this case, it serves as a kind of proof of concept (that new ideas build on past ideas) rather than a criticism of lack of originality. Stallman's work is not, however, a substitute for Lessig's; not only does Lessig address popular culture where Stallman addresses only computer code, but Lessig has one key thing in his favor: he is a master story-teller and a darned good writer, not something one usually expects in an academic and an expert in constitutional law. His book opens with the first flight osf the Wright brothers and the death of a farmer's chickens, followed by Buster Keaton's film *Steamboat Bill* and Disney's famous mouse. The next chapter traces the history of photography and how the law once considered that snapping a picture could require prior permission from the owners of any property caught in the viewfinder. Later he tells how an improvement to a search engine led one college student to owe the Recording Industry Association of America $15 million. Throughout the book Lessig illustrates copyright through the lives of real people and uses history, science, and the arts to make this law come to life for the reader.

Lessig explains that intellectual property differs from real property in the eye of the law. Unlike real property, where the property owner has near total control over its uses, the only control offered to authors originally was the control over who could make copies of the work and distribute them. In addition, that right—the "copy right"—lasted only a short time. The original length of copyright in the United States was fourteen years, with the right to renew for another fourteen years. So a total of twenty-eight years stood between an author's rights and the public domain, and those rights were limited to publishing copies. Others could quote from a work, even derive other works from it (such as turning a novel into a play), all within a law that was designed to promote science and the arts.

Fast forward to the present day and we have a very different situation. Not only has there been a change in the length of time that copyright applies to a work; a major change in copyright law in 1976 extended copyright to works that had not previously been covered. In the earliest U.S. copyright regimes of the late 18th century, only works that were registered with the copyright office were afforded the protection of copyright law, and only about five percent of works produced were so registered. The rest were in the public domain. Later, actual registration with the copyright office was unnecessary but the author was required to place a copyright notice on a work (e.g., "© 2004, Karen Coyle") in order to claim copyright in it. Copyright holders had to renew works in order make use of the full term of protection, and renewal rates were actually quite low. In 1976, all such requirements were removed, and the law was amended to state that any work in a fixed medium automatically receives copyright protection, and for the full term. That is true even if the author does not want that protection. So although many saw the great exchange of ideas and information on the Internet as being a huge commons of knowledge, to be shared and shared alike, all of it has, in fact, always been covered by copyright law—every word out there belongs to someone.

That change, combined with a much earlier change that gave a copyright holder control over derivative works, puts creators into a deadlock. They cannot safely build on the work of others without permission (thus Lessig's argument that we are becoming a "permission culture"). Yet, we have no mechanism (such as registration of works that would result in a database of creators) that would facilitate getting that permission. If you find a work on the Internet and it has no named author or no contact information for the author, the law forbids you to reuse the work without permission, but there is nothing that would make getting that permission a manageable task. Of course, even if you do know who the rights holder is, permission is not a given. For exam-

ple, you hear a great song on the radio and want to use parts of that tune in your next rap performance. You would need to approach the major record label that holds the rights and ask permission, which might not be granted. You could go ahead and use the sample and, if challenged, claim "fair use." But being challenged means going to court in a world where a court case could cost you in the six digits, an amount of money that most creators do not have.

Lessig, of course, spends quite a bit of time in his book on the length of copyright, now life of the author plus seventy years. It was exactly this issue that he and Eric Eldred took to the Supreme Court in 2003. Lessig argued before the court that if Congress can seemingly arbitrarily increase the length of copyright, as it has eleven times since 1962, then there is effectively no limit to the copyright term. Yet "for a limited time" was clearly mandated in the U.S. Constitution. Lessig lost his case. You might expect him to spend his efforts explaining how the Supreme Court was wrong and he was right, but that is not what he does. Right or wrong, they *are* the Supreme Court, and his job was to convince them to decide in favor of his client. Instead, Lessig revises his estimation of what can be accomplished with constitutional arguments and spends a chapter outlining compromises that might—just might—be possible in the future. To the extent that *Eldred v. Ashcroft* had an effect on Lessig's thinking, and there is evidence that the effect was profound, it will have an effect on all of us because Lessig is one of the key actors in this arena.

Throughout the book, Lessig points out the difference between copyright law and the actual market for works. There is a great irony in the fact that copyright law now protects works for a century or more while most books are in print for one year or less. It is this vast storehouse of out-of-print and unexploited works that makes a strong argument for some modification of our copyright law. He also recognizes that there are different creative cultures in our society, with different views of the purpose of creation. Here he cites academic movements like the Public Library of Science as solutions for the sector of society that has a low or nonexistent commercial interest but a need to get its works as widely distributed as possible. For these creators, and for "sharers" everywhere, Lessig promotes the CreativeCommons solution (at www.creativecommons.org), a simple licensing scheme that allows creators to attach a license to their work that lets others know how they can make use of it. In a sense, CreativeCommons is a way to opt out of the default copyright that is applied to all works.

When I first received my copy of *Free Culture,* I did two things: I looked up libraries in the index, and I looked up the book online to see what other reviewers had said. Online, I found a Web site for the book (http://free-culture.org) that pointed to two very interesting sites: one that lists free, downloadable full-text copies of the book in over a dozen different formats; and one that allows you to listen to the chapters being read aloud by volunteers and admirers. (I did listen to a few chapters and generally they are as listenable as most nonfiction audio books. In the end, though, I read the hard copy of the book.) Lessig is making a point by offering his work outside the usual confines of copyright law, but in fact the meaning of his gesture is more economic than legal. Although he, and Cory Doctorow before him (*Down and Out in the Magic Kingdom,* Tor Books, 2003), brokered agreements with their publishers to publish simultaneously in print with free digital copies, few authors and publishers today will choose that option for fear of loss of revenue, not because of their belief in the sanctity of intellectual property. If there were sufficient proof that free online copies of works increased sales of hard copies, this would quickly become the norm, regardless of the state of copyright law.

As for libraries—unfortunately, they do not fare well. He dedicates a short chapter to Brewster Kahle and his Way-Back Machine as his example of the need to archive our culture for future access. I admit that I winced when Lessig stated:

> But Kahle is not the only librarian. The Internet Archive is not the only archive. But Kahle and the Internet Archive suggest what the future of libraries or archives could be. (114)

Lessig also mentions libraries in his arguments about out-of-print and inaccessible works, but in this case he actually gets it wrong:

> After it [a book] is out of print, it can be sold in used book stores without the copyright owner getting anything and stored in libraries, where many get to read the book, also for free. (113)

Since we know that Lessig is very aware that books are sold and lent even while they are still in print, we have to assume that the elegance of the argument was preferred over precision. But he makes this error more than once in the book, leaving libraries to appear to be a home for leftovers and remaindered works. That is too bad. We know that Lessig is aware of libraries; anyone active in the legal profession depends on them. He has spoken at library-related conferences and events. Yet he does not see libraries as key players in the battle against overly powerful copyright interests. More to the point, libraries have not captured his imagination, or given him a good story to tell. So here is a challenge for myself and my fellow librarians: whether it means chatting up Lessig after one of his many public performances, becoming active in CreativeCommons, or stopping by Palo Alto to take a busy law professor to lunch, we need to make sure that we get on, and stay on, Lessig's radar. We need him; he needs us.—*Karen Coyle, Digital Libraries Consultant, http://kcoyle.net*