BOOK REVIEW

LAWRENCE LESSIG'S DYSTOPIAN VISION

Julia D. Mahoney[*]

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

INTRODUCTION

OVER the past five years, Stanford Law School Professor Lawrence Lessig has published no fewer than three books expounding the claim that innovation and creativity are under ferocious assault from powerful corporate and political interests. In 1999's *Code and Other Laws of Cyberspace*, Lessig argued that those who assume that cyberspace is by its nature immune from centralized control are wrong, and that the actions of market participants and governmental entities threaten to turn virtual space into a highly regulated place, one where the behavior of individuals is even more tightly constrained than in real space.[1] Two years later, in *The Future of Ideas: The Fate of the Commons in a Connected World* ("*The Future of Ideas*"), Lessig argued that "our social and political institutions are ratifying changes in the Internet" that will have the likely effect of reducing "innovation on the

[*] Professor of Law and David H. Ibbeken Research Professor, University of Virginia School of Law. I thank Lillian BeVier, James DeLong, Ed Kitch, Paul Mahoney, Tom Nachbar, Dan Ortiz, and Tim Wu for helpful conversations and comments. Rachale Miller provided excellent research assistance.

[1] See Lawrence Lessig, Code and Other Laws of Cyberspace 6 (1999) [hereinafter Code and Other Laws of Cyberspace] ("[T]he argument of this book is that the invisible hand of cyberspace is building an architecture . . . . The invisible hand, through commerce, is constructing an architecture that perfects control—an architecture that makes possible highly efficient regulation."); see also id. at 61 ("[C]yberspace will not take care of itself. Its nature is not given. Its nature is its code, and its code is changing from a place that disabled control to a place that will enable an extraordinary kind of control. Commerce is making that happen; government will help.").

Internet and in society generally."[2] Now, in *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* ("*Free Culture*"), Lessig has ratcheted up his already heated rhetoric[3] to produce a book that warns that the health of the "environment of creativity"[4] has been endangered by the combination of changes in intellectual property law, increased concentration of media ownership, and transformations in technology.[5] Failure to reverse the degradation of this creative ecosystem is likely to result in the erosion of the "free culture" that is the cherished heritage of U.S. citizens.[6] Averting disaster, Lessig concludes, will require strong medicine in the form of significant overhauls of legal and social institutions.[7]

Free Culture has attracted a great deal of attention. Its author is a distinguished law professor who has gained public recognition as the director of the Stanford Law School Center for Internet and Society, the chairman of the board of Creative Commons,[8] and a

[2] Lawrence Lessig, The Future of Ideas: The Fate of the Commons in a Connected World 15 (2001) [hereinafter The Future of Ideas].

[3] See, e.g., Code and Other Laws of Cyberspace, supra note 1, at 233 (characterizing the then anticipated "Y2K problem" as a "code-based environmental disaster[]"); The Future of Ideas, supra note 2, at 145–46 (drawing a comparison between present day "leaders of dominant industries" and the leaders of the Soviet Union in its final years).

[4] Lawrence Lessig, Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity 130 (2004) [hereinafter Free Culture].

[5] See infra Section I.A.

[6] See Free Culture, supra note 4, at 30 ("Free cultures are cultures that leave a great deal open for others to build upon; unfree, or permission, cultures leave much less. Ours was a free culture. It is becoming much less so."). The dust jacket of the hardcover edition goes even further, claiming that "big cultural monopolists" have "drummed up" unease about new technologies "to shrink the public domain while using the same advances to control what we can and can't do with the culture all around us," and that what is at stake is "our freedom—freedom to create, freedom to build, and, ultimately, freedom to imagine."

[7] See id. at 275–306.

[8] Creative Commons is a nonprofit organization that seeks "to promote the sharing of high-quality content." Press Release, Creative Commons (June 10, 2004), at http://creativecommons.org/press-releases/ (on file with the Virginia Law Review Association); see also Free Culture, supra note 4, at 284–86. In addition to being published in book form, *Free Culture* is available online pursuant to a "Creative Commons License" which authorizes users to redistribute, copy, or otherwise reuse or remix the text of *Free Culture*, provided they do so only for noncommercial purposes and give full credit to the author. See Creative Commons Deed, Attribution-NonCommercial 1.0, at http://creativecommons.org/licenses/by-nc/1.0/ (last accessed

member of the boards of the Electronic Frontier Foundation[9] and Public Knowledge.[10] Lessig also served as counsel for web site operator Eric Eldred in the litigation that culminated in *Eldred v. Ashcroft*,[11] a case in which the Supreme Court rejected Copyright Clause and First Amendment constitutional challenges to the Sonny Bono Copyright Term Extension Act ("CTEA").[12] Moreover, the gloomy message conveyed by *Free Culture*, together with its urgent tone (bordering on the apocalyptic in some passages),[13] makes it impossible to ignore. We are told that what we face is akin to an environmental crisis, with the crucial difference being that our cultural—rather than physical—resources are under siege.

Curiously, though, *Free Culture* actually portrays a world that should elicit cautious optimism rather than fear of impending ca-

Nov. 9, 2004) (on file with the Virginia Law Review Association). Not all Creative Commons Licenses contain the identical terms as the ones that apply to *Free Culture*. See Creative Commons, Licenses Explained, at http://creativecommons.org/learn/licenses/ (last accessed Nov. 9, 2004) ("Offering your work under a Creative Commons license does not mean giving up your copyright. It means offering *some* of your rights to any taker, and only on certain conditions.") (on file with the Virginia Law Review Association).

[9] The Electronic Frontier Foundation ("EFF"), a San Francisco-based donor-supported nonprofit organization, was founded in 1990 to protect "rights to think, speak, and share . . . ideas, thoughts, and needs using new technologies, such as the Internet and the World Wide Web." See About EFF, at http://www.eff.org/about/ (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

[10] Public Knowledge describes itself as a "public-interest advocacy organization dedicated to fortifying and defending a vibrant information commons." See Public Knowledge, Mission Statement, at http://www.publicknowledge.org/about/what/mission (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

[11] 537 U.S. 186 (2003).

[12] Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, tit. 1, 112 Stat. 2827 (1998).

[13] See, e.g., Free Culture, supra note 4, at 11 (predicting "great harm to our tradition and culture" if the "hopelessly destructive war inspired by the technologies of the Internet" is not resolved soon); id. at 13 ("[O]ur government, pushed by big media . . . is destroying . . . . something fundamental about who we have always been."); id. at 194 ("[B]oth the courts and Congress have imposed legal restrictions that will have the effect of smothering the new to benefit the old."); id. at 211 ("The gasoline is about to hit the blazing car. And the fire that gasoline will ignite is about to ignite everything around."); id. at 275 ("[S]omething must be done to change where we are heading. . . . [T]his movement must begin in the streets."); id. at 305 ("Think about the amazing things your kid could do or make with digital technology . . . . Think about all those creative things, and then imagine cold molasses poured onto the machines. This is what any regime that requires permission produces. Again, this is the reality of Brezhnev's Russia.").

tastrophe.[14] By Lessig's own account, the expansion of the Internet has resulted in a constant stream of news and commentary—a great deal of it generated by individuals unbeholden to major media entities—with the happy result that thoughtful public discourse on substantive issues flourishes.[15] *Free Culture* also documents the myriad ways in which children and teenagers use digital technologies to develop their talents. Although the ability of the curious young to "tinker" with software code or online content is subject to some restrictions,[16] there is no indication (other than a bald assertion that Lessig chooses to quote[17]) that today's young are in any danger of being excluded from the benefits of new technologies. In addition, *Free Culture* is replete with references to the enormous trove of facts, fiction, musical performances, graphic design, and artwork that creators, innovators, and consumers have access to (sometimes for free, sometimes for payments ranging from the token to the significant), and makes clear that the resources now readily available dwarf those of yesteryear.

To be sure, the picture that emerges is far from a best of all possible worlds. Adjusting the contours of property regimes,[18] including intellectual property regimes, in response to social and technological changes can be difficult. As Lessig documents, ensuring that timely and sensible modifications take place poses challenges, and there is a constant danger that interest groups will promote property and regulatory regimes that injure their competitors or divert

[14] In his less fervid moments, Lessig comes close to admitting that this more sanguine view may have some merit. For example, in the chapter entitled "Conclusion" Lessig writes: "I've told a dark story. The truth is more mixed. A technology has given us a new freedom. . . . We can carry a free culture into the twenty-first century, without artists losing and without the potential of digital technology being destroyed." Id. at 271. Lessig makes clear, however, that such an outcome is contingent on the occurrence of substantial changes: "Common sense must revolt. It must act to free culture. Soon, if this potential is ever to be realized." Id.

[15] See infra Section I.A.

[16] See Free Culture, supra note 4, at 46–47.

[17] See Free Culture, supra note 4, at 45–47 (relating the conclusion of John Seely Brown, the "chief scientist of the Xerox Corporation," that "we are building a legal system that *completely suppresses the natural tendencies of today's digital kids*" (emphasis added)).

[18] By "regime," I mean property rights that result from both legal rules and social practices. See Robert C. Ellickson, Property in Land, 102 Yale L.J. 1315, 1319 (1993) (defining "land regime" to mean rules representing "amalgams of law and custom").

public or common property to their own use in possible contravention of the public interest.[19]

But while the problems detailed are of real concern, it is hard to understand why Lessig thinks that they have the potential to extinguish the promise of early twenty-first-century advances. Lessig has set himself a high hurdle, namely to convince his readership that the saga of intellectual property in recent decades represents nothing less than a modern-day Miltonian epic:[20] Paradise was lost when a property rights Eden was infested by the serpent of venal corporate interests, but might be regained through adherence to the reform program outlined in *Free Culture*.[21] Lessig fails to clear this hurdle for the simple reason that, taken together, the stories he offers in support of his thesis tell a richer, more complicated, and ultimately more interesting tale than the one he has in mind.

The remainder of this Review is organized as follows: Part I will detail the principal claims of *Free Culture* and explain why the examples employed by Lessig tend to undermine his assertion that American culture is in grave peril. Part II will turn to Lessig's prescriptions for restoring intellectual property to what he terms a healthy balance and will argue that the measures he proposes may not ameliorate the problems that do exist. Moreover, I will suggest that implementing many of the reforms urged by *Free Culture* will not return American culture to a previous condition. The Conclusion will offer some ideas for tailoring property regimes to social and technological transformations.

[19] See generally Saul Levmore, Two Stories About the Evolution of Property Rights, 31 J. Legal Stud. S421 (2002). Levmore observes that while legal scholars identified with the law and economics movement have endorsed the view that property rights have evolved in ways that promote economic efficiency, there is also reason to believe that "the prevailing arrangement of property rights may be the product of politics and interest group activity." Id. at S427; see also William M. Landes & Richard A. Posner, The Economic Structure of Intellectual Property Law 403–19 (2003). For a recent account of the attempts of various interest groups to influence intellectual property law, see Neil Munro, Off-Limits, Nat'l J., May 8, 2004, at 1411–16 (describing the prominent role self interest plays in the battle over copyrights, patents, trademarks and other intellectual property rules).

[20] See generally John Milton, Paradise Lost, bks. I, IX, X (Alastair Fowler ed., Longman 2d ed. 1998) (1667). An online version of *Paradise Lost* is available at http://www.book-worm.org/milton-john/paradise-lost/index.htm (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

[21] See infra Part II.

I. THE DEGRADATION OF THE CULTURAL ECOSYSTEM?

According to *Free Culture*, for most of U.S. history the intellectual property system, including copyright, functioned well.[22] Property rights were crafted to "balance the important need to give authors and artists incentives with the equally important need to assure access to creative work."[23] While new technologies from time to time transformed the way things worked and threatened this equilibrium, the law adjusted to these changed circumstances in such a way as to safeguard the "legitimate rights of creators" without sacrificing innovation.[24]

This balance, asserts Lessig, is a thing of the past.[25] Simply put, Lessig believes that intellectual property regimes are now out of whack and excessively burden the ability to create and innovate. Unless radical, prompt action is taken, *Free Culture* contends, the consequences for American culture will be disastrous. Although the bulk of *Free Culture* addresses copyright issues, Lessig makes it clear that his worries extend to areas of intellectual property law other than copyright.[26]

A. The Trouble With Copyright

In the area of copyright law, Lessig attributes the imbalance he detects to three factors: changes in legal rules, advances in technology, and a seismic shift in the structure of media ownership. In Lessig's view, the interaction of these factors yields a result nothing short of toxic.

---

[22] See Free Culture, supra note 4, at 172 ("American culture was born free, and for almost 180 years our country consistently protected a vibrant and rich free culture.").

[23] Id.

[24] Id. at 74.

[25] See id. at 261 ("For most of our history, both copyright and patent policies were balanced . . . . [W]e as a culture have lost this sense of balance.").

[26] See, e.g., id. (discussing the expansion of patent rights and decrying the absence of "a sensible patent policy" that would not "block the spread of drugs to a country not rich enough to afford market prices in any case"); see also The Future of Ideas, supra note 2, at 316 n.60 (noting some of the potential detrimental consequences of expansions in trademark law); id. at 203–04 (criticizing the expansion of the right of publicity); Lawrence Lessig, Stop Making Pills Political Prisoners, Wired, Feb. 2004, at 83 (expressing concern that "[t]here are millions of people in developing nations around the world who need lifesaving drugs but don't get them" because the price of the needed drugs "is kept high by patents").

1. Changes in Legal Rules

At one time, *Free Culture* argues, copyright law principally concerned itself with the prohibition of outright copying and drew a clear distinction between "republishing someone's work on the one hand and building upon or transforming that work on the other."[27] In Lessig's eyes, this distinction has largely vanished, as copyright has increased in scope to cover far more than appropriation followed by republication.[28] In contrast to earlier eras, holders of copyrights now have exclusive rights to produce copies in any medium (including the memory of a computer), to make derivative works, and to distribute work to the public.[29] And not only has the scope of the rights of copyright owners increased, so too has their duration.[30] While the copyright statute passed by the first Congress in 1790 provided for a fourteen-year term (renewable for an additional fourteen years in the event that the author survived the initial term),[31] subsequent Congresses have extended copyright terms on several occasions, including the passage of the Copyright Act of 1976.[32] The 1976 act, which marked a "significant philosophical departure" from earlier copyright regimes,[33] mandated a single term of copyright protection that generally amounted to the author's life plus fifty years. The most recent copyright term extension took place in 1998, with the enactment of the CTEA.[34] The term for works created by an identified individual now extends from creation until seventy years after the death of the author, while terms for works made for hire and anonymous works expire upon the earlier of 120 years after creation or ninety-five years after publication.[35]

[27] See Free Culture, supra note 4, at 19; see also Jessica Litman, Digital Copyright 15–16 (2002); Lyman Ray Patterson, Copyright in Historical Perspective (1968).

[28] See Free Culture, supra note 4, at 19; see also The Future of Ideas, supra note 2, at 106–07.

[29] See Robert A. Gorman & Jane C. Ginsburg, Copyright 42–44 (6th ed. 2002).

[30] See The Future of Ideas, supra note 2, at 107.

[31] Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790) (repealed 1802).

[32] See Copyright Act of 1976, ch. 3, §§ 302–05, 17 U.S.C. §§ 302–05 (2000).

[33] Gorman & Ginsburg, supra note 29, at 8.

[34] See Eldred v. Ashcroft, 537 U.S. 186, 189 (2003) (rejecting challenges to the constitutionality of the CTEA).

[35] See 17 U.S.C. § 302(e) (2000).

2. Technological Advances

By Lessig's own account, this expansion of property rights would not, in and of itself, have led to what he regards as a calamitous state of affairs. It is a core contention of the book that the advent of new technologies also plays a crucial role. For one thing, new technologies have increased the effect of the legal rules of copyright by decreasing the costs of monitoring and stopping copyright infringements.[36] Indeed, because it is technologically feasible to construct a system in which computers determine whether content is under copyright, some content owners are demanding that the government require computer makers to adopt technologies to prevent unauthorized distribution.[37]

New technologies have also contributed to the problems perceived by Lessig in another crucial way. Thanks to the Internet, millions of online customers are now capable of making multiple copies of works under copyright at little or no cost, sharing substantial amounts of content with an almost unlimited number of others, and incorporating works produced by others into their own creative products. As Lessig sees it, the promise of these wondrous new technologies is likely to go unfulfilled, because copyright law restricts the ability of would-be individual copiers and creators to exploit digital technologies.[38] That is, technology has bestowed upon us the opportunity to enjoy an explosion of creativity unparalleled in the history of the human society, but the ossified legal framework that governs these technologies ensures that creativity will be chilled.[39]

[36] See Free Culture, supra note 4, at 162 ("[A]s copyright is increasingly enforced through technology, copyright's force changes, too. Misuse is easier to find and easier to control. This regulation of the creative process . . . . is a massive expansion in the scope of the government's control over innovation and creativity; it would be totally unrecognizable to those who gave birth to copyright's control.").

[37] See id. at 193–94; see also Munro, supra note 19, at 1415; Electronic Frontier Foundation, The Broadcast Flag and "Plug & Play": The FCC's Lockdown of Digital Television, at http://www.eff.org/IP/Video/HDTV/ (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

[38] See Free Culture, supra note 4, at 8 ("For the first time in our tradition, the ordinary ways in which individuals create and share culture fall within the reach of the regulation of the law . . . .").

[39] See id. at 184–85.

While it is true that those who wish to make use of works under copyright may do so if they secure the consent of the copyright holder, in Lessig's opinion that solution is wholly inadequate. Seeking permission can be costly, and it is "not often granted to the critical or the independent."[40] In Lessig's mind, a "permission culture" is by definition the opposite of a free culture. Nor, Lessig insists, does the doctrine of "fair use," under which copyrighted material may be lawfully reproduced without the permission of the copyright holder for purposes such as "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,"[41] provide sufficient protection for creative endeavors.[42] In sum, *Free Culture* argues that to restrict the ability of ordinary citizens to exploit digital technologies is to run a serious risk of cultural impoverishment.

3. Media Concentration and Integration

According to Lessig, were it not for the transformation of media ownership that has taken place in the past twenty or so years, the combination of expanded formal legal protection and technology would in all likelihood be of limited detriment.[43] Although Lessig concedes that the "significance and scope" of the changes in media control are "not well understood,"[44] he nonetheless concludes that large, integrated media firms produce content that is "increasingly homogeneous . . . safe [and] . . . sterile."[45] And the criticisms leveled by *Free Culture* at modern day media conglomerates are not limited to their bad taste in products: One of the book's key claims is that they use their power and money to agitate for laws and regulations, such as the CTEA, that promote their welfare at a heavy cost to the public interest. To Lessig, the engagement of Disney, Fox Corporation, and other corporations in what he calls "our depress-

[40] Id. at 10.
[41] 17 U.S.C. § 107 (2000).
[42] See Free Culture, supra note 4, at 99 ("The fuzzy lines of the law, tied to the extraordinary liability if lines are crossed, means that the effective fair use for many types of creators is slight.").
[43] See id. at 161–62 (asserting that the increases in the "duration," "scope," and "reach" of copyright, as well as technological advances, "would not matter much" absent the "change in the concentration and integration of the media").
[44] Id. at 162.
[45] Id. at 166.

ingly compromised process of making law"[46] constitutes a form of "corruption"[47] that injures American cultural values.

B. Lessig's Stories

Lessig is not the only legal expert, of course, to have expressed concerns about the expansion of intellectual property rights[48] or how these augmented rights might interact with digital technologies and the growing importance of the Internet. Indeed, many intellectual property scholars harbor doubts about the advisability of the existing contours of copyright protection.[49] Lessig also has company in his worries about the potential injury to culture by the wave of mergers of media corporations that occurred during the 1990s. The voices sounding in protest of further media consolidation and integration are very loud, and have lately been joined by no less a luminary than Ted Turner, the founder of the Cable News Network and a major stockholder of Time Warner.[50]

But proof that an alternative regime would be superior to the current one—much less that the status quo is a road to ruin—is hard to come by. At the same time that many argue in favor of rules that permit creators to sample extensively from earlier works,[51] some holders of intellectual property rights defend the

[46] Id. at 13.

[47] Id.

[48] See, e.g., Landes & Posner, supra note 19, at 424 (concluding that "the last quarter-century has witnessed a considerable though not uniform expansion in the extent of intellectual property rights" and admitting that "answering the fundamental question of how extensive a system of intellectual property rights is required in order to generate adequate incentives for the creation of expressive and inventive activity" is, together with "explaining the evolution of intellectual property law," the most "important unfinished business of economic analysis of intellectual property"); Josh Lerner, 150 Years of Patent Protection (Nat'l Bureau of Econ. Research Working Paper No. 7478, 2000), at http://www.nber.org/papers/w7478 (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

[49] See, e.g., Landes & Posner, supra note 19, at 422; Mark A. Lemley, Property, Intellectual Property, and Free Riding 47 (Stanford Law School John M. Olin Law and Economics Working Paper No. 291, 2004), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=582602 (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

[50] See Ted Turner, My Beef With Big Media, Washington Monthly, July/August 2004, at 30–36.

[51] See, e.g., The Grey Album Story So Far, at http://www.illegal-art.org/audio/grey.html (last accessed Sept. 11, 2004) (on file with the Virginia Law Review Asso-

trend toward greater protections, on the theory that strengthening their rights will fuel growth in key sectors of the economy.[52] In the area of media concentration and integration, many contest the assertion that the overall trend in recent years has been toward consolidation,[53] and some would argue that even if consolidation is underway the benefits to society may well outweigh the costs. In all these disputes, discerning the best course of action requires good answers to a host of empirical questions, and knowledge of the likely real world impact of prospective changes in legal regimes is limited.[54]

One might imagine that in the face of this uncertainty, Lessig would turn cautious and admit that he is not completely sure what impact the changes in technology, intellectual property law, and societal organization have had or will have. But Lessig does not take this tack, for his faith that he is witnessing a cultural meltdown is unshakable. His problem, as he sees it, is not figuring out what is actually happening in a complicated world, but convincing others that his prophecies of imminent societal impoverishment are coming true. Lessig's commitment to this project is nothing less than total, in part because he believes the loss his client suffered in *El-*

ciation) (describing the work of DJ Danger Mouse, who "remixed the vocals from Jay-Z's The Black Album and the Beatles' White Album and called his creation The Grey Album").

[52] See, e.g., Press Release, Motion Picture Ass'n of America (June 23, 2004) (expressing support for the proposed Inducing Infringement of Copyrights Act of 2004), at http://www.mpaa.org/MPAAPress/2004/2004_06_23.htm (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

[53] See, e.g., Ben Compaine, Domination Fantasies: Does Rupert Murdoch Control the Media? Does Anyone?, Reason, Jan. 2004, at 26 (concluding that "[o]verall, the media industry—including broadcasters, newspapers, magazines, book publishers, music labels, cable networks, film and television producers, Internet-based information providers, and so on—is not substantially more concentrated than it was 10 or 15 years ago"); James Gattuso, The Myth of Media Concentration: Why the FCC's Media Ownership Rules Are Unnecessary, available at http://www.heritage.org/Research/InternetandTechnology/wm284.cfm (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association) ("Despite many mergers in the media industry in recent years, Americans today actually enjoy more diversity and competition in the media than at any other time in history, thanks to cable TV, Internet, the licensing of new broadcast stations and other factors.").

[54] See David McGowan, Copyright Nonconsequentialism, 69 Mo. L. Rev. 1, 1–5 (2004); Lemley, supra note 49, at 43–45; see also Levmore, supra note 19, at S450 (observing that "[t]here are some normatively unambiguous rearrangements of property rights, but these turn out to be few and far between").

dred v. Ashcroft was the result of his failure to persuade the Justices of the Supreme Court that the CTEA had caused "dramatic harm . . . to . . . free culture."[55] *Free Culture* thus represents an effort to accomplish what Lessig and the rest of Eric Eldred's squad of attorneys opted not to attempt in their briefs and oral argument:[56] to win converts to the view that the expansion of intellectual property rights is contributing to the destruction of American culture.

To convince readers that they should share in his perturbation, Lessig proceeds in a way that, in his words, "is not the usual method of an academic."[57] He relates a number of stories about both the past and present, in the expectation that, through these stories, readers will come to agree with the book's "core claim" that "our government, pushed by big media" is in the process of "destroying something very old" and "fundamental about who we have always been."[58]

The stories contained in *Free Culture* are, for the most part, well-chosen. All provide striking illustrations of the complexities of property rights and human society. A number of them also offer riveting accounts of the development and deployment of twentieth- and early twenty-first-century technologies. What these stories fail to do, however, is support the contention that American culture is in danger of losing creative and imaginative freedom.

1. Private Property and the Stifling of Free Culture

The conviction that a surfeit of property rights is asphyxiating American culture is a prominent theme of *Free Culture.* Although Lessig avows respect for property and stresses that the "free culture" he endorses is one "filled with property,"[59] he also makes clear that, in his view, too many private property rights, or rights of the wrong sort, can erode free culture. This erosion, according to Lessig, occurs by imposing costs on creators and innovators who

[55] Free Culture, supra note 4, at 230.

[56] See id. at 229–37 (discussing the strategic decision of the *Eldred* legal team to focus on structural arguments).

[57] Id. at 13.

[58] Id.

[59] Id. at xvi; see also id. at 28 ("We live in a world that celebrates 'property.' I am one of those celebrants.").

wish to make constructive use of resources to which others have forms of property rights. Lessig advances this thesis through a series of vignettes celebrating the achievements of creators who have appropriated, modified, or built upon the works of others without first obtaining permission. These borrowers are a highly diverse group, which is precisely Lessig's point in cataloging them. Some, including the Walt Disney Corporation of the 1920s, had no reason to secure permission from earlier creators because the material from which their inspiration was drawn lay in the public domain,[60] or its use constituted unambiguous "fair use" under the intellectual property regime then in force.[61] Others, such as the makers of the popular Japanese *doujinshi* comics,[62] or some members of the early twentieth-century film industry,[63] are or were "pirates" in the classic sense of the word, understanding full well their legal obligations, but choosing not to comply with them. Indeed, Lessig goes to great pains to demonstrate that "*every* industry" that vigorously defends a strong copyright system today is the "product and beneficiary" of "piracy," if you define "piracy" broadly to mean making use of creative property generated by someone else without getting prior authorization.[64]

To Lessig, the key insight is that the freedom to make use of previous work without first obtaining permission plays an essential role in creativity and innovation. The recent increases in intellectual property rights are troubling, he suggests, because they have restricted the ability of creators and innovators to do this, and

[60] The term "public domain" generally denotes resources and information that are unprotected by intellectual property rights and are thus freely available to all potential users. See Yochai Benkler, Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain, 74 N.Y.U. L. Rev. 354, 360–62 (1999); see also James Boyle, Foreword: The Opposite of Property?, 66 Law & Contemp. Probs. 1, 30 (2003).

[61] See Free Culture, supra note 4, at 21–29. Not all of Disney's creative endeavors during the early decades of the twentieth century were based on freely available works. As Lessig acknowledges, Disney also sought permission and paid for rights to use material. See id. at 309 n.2 (describing payments Disney made for five songs included in the cartoon feature *Steamboat Willie*).

[62] See id. at 25–29.

[63] See id. at 53–55 (recounting how "[t]he film industry of Hollywood was built by fleeing pirates" who concluded that, in California, they could elude the enforcement efforts of patent holders of film-related inventions).

[64] See id. at 55–61 (detailing episodes from the history of the recording, radio, and cable television industries).

turned them into "Oliver Twist-like"[65] supplicants. Lessig suggests that had past creators and innovators (or, in the case of the *doujinshi*, present day non-U.S. creators) been subject to current intellectual property regimes, they might well have been hamstrung in their efforts to accomplish things that we now look on with approbation. He also provides instances of modern-day creators who have spent significant amounts of money and time obtaining the multiple consents necessary for the making of a new work based on previous works. One example of this phenomenon is a retrospective on Clint Eastwood's film career issued on a CD-ROM, where the laborious process of negotiating with a slew of actors, musicians, directors, and various others took about a year.[66] As Lessig sees it, some creative projects never get off the ground because it simply is not worth it to expend the resources to secure the necessary rights.

The fact that a shift in a particular property regime makes some projects harder to accomplish, however, is hardly proof of its deficiency. As noted earlier, determining whether a change in property rights is on the whole beneficial or detrimental is hard.[67] It is true that the existence of numerous property rights can pose barriers to creativity and innovation, given that others who wish to make use of the property will suffer the costs of obtaining permission and (at times) paying compensation. Moreover, in some instances, these costs will be sufficiently high so as to deter valuable creative projects and innovations. But the fact that some projects are never undertaken or completed is not convincing evidence of actual or imminent cultural impoverishment, nor is it evidence that American culture is changing in some fundamental way.

Lessig insists that the pendulum is not only swinging too far in the direction of recognizing intellectual property rights, but that this trend is threatening American creativity and innovation. This argument would carry greater weight if he could point to evidence of a decline—or even a slowed rate of growth—in such creativity or innovation. If a vibrant public domain is an essential part of an innovative society, and the public domain is indeed being eroded or

[65] Id. at 10.

[66] See id. at 100–04. Lessig does not provide an accounting of the financial cost to Starwave, Inc., the producer of the CD-ROM.

[67] See supra notes 48–54 and accompanying text.

damaged in profound ways, as Lessig and others maintain,[68] then Lessig ought to be able to offer more telling anecdotes than the ones he provides. Lessig and others may well be correct in their suspicions that the system of intellectual property rights could benefit from tweaking or even an overhaul. His quest, however, to convince his readers that, absent radical reform, disaster awaits, is undermined by the stark reality that the United States is awash in intellectual outputs. In sum, although many advance cogent and persuasive arguments that recognizing particular intellectual property rights is likely to inhibit rather than promote further progress,[69] there is no reason to think the boom in science and technology is in danger of ending anytime soon. To say it is plausible that shortcomings in intellectual property regimes are preventing the realization of the full potential of some technologies[70] is a far cry from suggesting that we are witnessing the deterioration of the social conditions that make possible creative progress.

Lessig's claim that the plethora of private property rights is contributing to the erosion of fundamental cultural values would also be more convincing if he articulated a vision of what sort of public domain is necessary to undergird a flourishing culture. At no point, however, does Lessig undertake to do this, nor does he ever clearly state what he thinks is happening to the public domain. In places, *Free Culture* contends that the public domain is shrinking,[71] but Lessig neither offers any evidence to support this contention nor makes any effort to catalogue which resources and information are leaving the public domain and explain why these departures are reason for worry. More often, his expressions of alarm about the effects of legal regimes on the public domain concern the slowed growth of the public domain that resulted from the passage of the CTEA, which, by lengthening copyright terms, stalled the entry

[68] See, e.g., James Boyle, The Second Enclosure Movement and the Construction of the Public Domain, 66 Law & Contemp. Probs. 33, 38–39 (2003).

[69] See, e.g., Mark A. Lemley, Ex Ante versus Ex Post Justifications for Intellectual Property, 71 U. Chi. L. Rev. 129, 136–47 (2004) (rejecting rationales for retrospective extensions of copyright).

[70] See William W. Fisher III, Promises to Keep: Technology, Law, and the Future of Entertainment 133 (2004) (surveying property rights regimes that govern the production and distribution of music and film and concluding that "we have thus far failed to redeem the promise of" a number of new technologies).

[71] See, e.g., Free Culture, supra note 4, at 23–24.

into the public domain of such works as Robert Frost's poetry. But, because Lessig never lays out a conception of the relationship between the absolute size of the public domain, its qualitative aspects, its growth rate, and a healthy creative culture, readers are at a loss to gauge why Lessig believes this reduced rate of growth is more likely to prove a catastrophe than an inconvenience. To be fair, the question of how much freely available material creators and innovators need is a perplexing one, but Lessig fails even to acknowledge that such a question exists. Instead, *Free Culture* proceeds from the undefended premise that anything other than a rapidly increasing public domain must by definition pose a significant danger.

2. The Health of Democratic Institutions

Lessig's concerns about too much private property and the dangers of "Big Media" in general would also resonate more if he could draw a connection between the behavior of powerful corporate entities and a concomitant decrease in public spirit or discourse. This point is important because *Free Culture* raises the troubling specter that "the power of technology to supplement the law's control," together with "the power of concentrated markets to weaken the opportunity for dissent," might mean that "strictly enforcing the massively expanded 'property' rights granted by copyright" could reduce the "freedom within this culture to cultivate and build upon our past."[72] What Lessig appears to suggest is that certain social practices that are essential to the functioning of our democracy may be in peril. In fact, at one point *Free Culture* even goes so far as to assert that "[o]ur democracy has atrophied."[73]

To date, however, there is nothing to indicate that Lessig's worries are substantially grounded in reality. His speculation that a combination of strong intellectual property rights, technological power, and market concentration might somehow cause grave harm to the social fabric that supports democratic institutions remains just that—speculation—and is rather unconvincing specula-

[72] Id. at 169.

[73] Id. at 41. It is important to note that at other points in *Free Culture*, Lessig states that the United States' democratic institutions are functional, at least to a certain degree. See, e.g., id. at 275 ("We are still a democracy. What people think matters. Not as much as it should, at least when an RCA stands opposed, but still, it matters.").

tion at that. Indeed, the nation that is depicted in the pages of *Free Culture* refutes Lessig's pessimism, for it is one where public discussion and free expression thrive. As Lessig himself recounts, the Internet provided a public forum where people came together to share their reactions to events such as the September 11, 2001 tragedy,[74] and the Internet continues to serve as a virtual town square as well as a source of information for millions.[75]

Lessig's pessimism about the prospects of democratic institutions is especially perplexing in the face of indications that many of the institutions and social practices that nourish democracy appear, if anything, *more* robust than they were a decade or two ago. The growth of cyberspace, as *Free Culture* documents, has revitalized political debate.[76] The social norm against discussing politics, which often keeps people from talking about important issues even with close friends, does not apply in the online world, and political speech of all ideological stripes abounds.[77] Furthermore, the Internet enables the politically engaged to do more than just talk; it has become an effective vehicle for grassroots activism.[78]

This online political activity, moreover, has already had a significant impact on real world events. Howard Dean temporarily vaulted to front-runner status for the 2004 Democratic Party nomination by using the Internet to raise funds and coordinate volunteers.[79] The fate of then Senate Majority Leader Trent Lott provides another illustration. After national newspapers and television networks glossed over Lott's remarks in praise of centenarian and one-time segregationist Senator Strom Thurmond, several leading "weblogs" continued to criticize Lott's conduct. Eventually, Lott yielded to pressure and resigned his leadership post.[80]

[74] See id. at 40–41.
[75] See id. at 41.
[76] See id. at 41–43.
[77] See id. at 42–43.
[78] See Julie Kosterlitz, The Internet Shows Its Muscles, Nat'l J., Oct. 4, 2003, at 3060 (noting that political scientists hail the Web's nurturance of citizen involvement).
[79] See id.
[80] See id. at 3061; Daniel W. Drezner & Henry Farrell, The Power and Politics of Blogs 3, at http://www.utsc.utoronto.ca/~farrell/blogpaperfinal.pdf (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

3. The Uselessness of "Fair Use"

The existence of excessive private property rights is not, according to *Free Culture*, the only obstacle faced by aspiring creators who wish to draw on the products of earlier creativity. According to Lessig, creators are increasingly reluctant to rely on the doctrine of "fair use" to protect themselves against infringement claims.[81] This resulted from a proliferation of claims of infringement by copyright holders for uses of material that, under the law, constitute clear "fair use."[82] So frequent are the threats by copyright holders to block the release of works that incorporate even short snippets or fleeting images of copyrighted works (or to pursue other remedies available under copyright law) that movie studios, publishers, and other distributors of creative products now routinely demand that the rights to all copyrighted works quoted, sampled, or otherwise incorporated be "cleared"—that is, that permission be obtained from the copyright holder, regardless of whether use is indubitably "fair."[83]

Thus *Free Culture* contains a vivid account of the travails that filmmaker Jon Else encountered when he sought permission from the Fox Corporation to include a four-and-a-half-second excerpt from the television show *The Simpsons* in the background of a scene in a documentary about the staging of an opera.[84] Fox was intransigent in its demands for a $10,000 payment, notwithstanding that it represented an enormous burden for the producer of a creative work that lacked substantial commercial prospects. Even though Else believed that a court would agree that his inclusion of the excerpt was "fair use," he decided to delete the scene, fearing not only litigation but also problems with insurance companies.[85]

To Lessig, this assault on "fair use" is very upsetting, and it is easy to see why he is perturbed that corporate actors may be eager

[81] See Free Culture, supra note 4, at 96–98.
[82] See id. at 97–99.
[83] See id. at 95–99.
[84] See id. at 95–97.
[85] Id. at 96–98. Typically, television networks refuse to broadcast films unless the maker obtains an Errors and Omissions policy. Lessig quotes Else as recounting that insurance carriers "take a dim view of 'fair use,' and a claim of 'fair use' can grind the application process to a halt." See id. at 98.

to exploit the uncertainties and vagaries of the "fair use" doctrine[86] for selfish purposes. But Lessig fails to make out a convincing argument that these practices, however unattractive, are causing harms of such character and magnitude so as to pose anything approaching a serious threat to creativity and innovation. The interference with Else's creative vision, although unfortunate, was of a minor character, for there is no indication whatsoever that his inability to use the clip from *The Simpsons* forced Else to reconceive his artistic project. Lessig's stories of the difficulties encountered by Else and other creators add up to nothing more than a plausible claim that the law relating to "fair use" could benefit from clarification.[87]

4. The Importance of "Peer-to-Peer" Technologies

Lessig's worries about the possible destruction of the "ecosystem of creativity" are especially acute in the context of the struggle over peer-to-peer ("p2p") technologies. P2p refers to technologies that enable computer users to share files with one another over computer networks, sometimes through the use of a central server.[88] As Lessig observes, p2p file sharing permits volumes of content to be shared quickly and easily with large numbers of people in a way "unimagined a generation ago."[89]

To the film and recording industries, p2p technologies are cause for great worry, for it is possible, though far from certain, that the unrestrained use of p2p could destroy or severely reduce the value

[86] See United States Copyright Office, Fair Use, at http://www.copyright.gov/fls/fl102.html (June 1999) (informing the public that "[t]he distinction between 'fair use' and infringement may be unclear and not easily defined," and that "[t]here is no specific number of words, lines, or notes that may safely be taken without permission") (on file with the Virginia Law Review Association).

[87] In fact, since the publication of *Free Culture*, Lessig has become involved in a controversy that has the potential to lead to litigation that could clarify the meaning of fair use. See Lawrence Lessig, Fair use or 'fair and balanced'?, Daily Variety, July 15, 2004, at 31 (arguing that the clips from the Fox Network's news programs included in the documentary film *Outfoxed* constitute fair use).

[88] Kieren McCarthy, Sharing lightens the download, New Scientist, June 26, 2004, at 26.

[89] Free Culture, supra note 4, at 17; see also id. at 79 ("P2p technologies can be ideally efficient in moving content across a widely diverse network."); McCarthy, supra note 88, at 27 ("P2p networks are one of the most efficient, cost-effective ways of distributing large amounts of data.").

of their intellectual property assets.[90] To Lessig, p2p is a technology that must not be closed down, for although he describes himself as an advocate of "balance" in the file sharing dispute, he is forthcoming about his position that a new technology should trump existing property rights.[91] Lessig stresses that, although he is sympathetic to the wish of content providers to secure government protection from the injurious effects of a novel means of distribution, he is convinced that what the content industry is asking for is the metaphorical equivalent of the insecticide DDT.[92] According to Lessig, just as spraying DDT to kill insects inflicted unforeseen damage on the natural environment and has since proven to have been a bad idea, measures that protect copyright holders from the losses they will suffer if technologies such as p2p are not reined in will likely have similar "unintended consequences for the cultural environment."[93]

Two points must be made about Lessig's invocation of DDT to argue against the remedies sought by the content industry. First, it is unclear why Lessig is so quick to assume that an assault on p2p amounts to an assault on the cultural environment that undergirds creativity and innovation. While p2p can benefit creators and innovators, no one asserts that the principal function of p2p technologies is to provide inputs for others to build upon. It is important to bear in mind that the vast majority of those who avail themselves of p2p technology are consumers in search of music and other forms of entertainment, not creators in search of inspiration. For the government to regulate the means and manner by which consumers obtain goods is unexceptional, particularly when a key goal of the regulation is to protect the value of property. It is true that, in the case of p2p, some proposed limitations could have the unfortunate effect of retarding the spread of an exciting new technology. It is also true that there is a real danger that any restrictions im-

[90] See Mark A. Lemley & R. Anthony Reese, Reducing Digital Copyright Infringement Without Restricting Innovation, 56 Stan. L. Rev. 1345, 1373–83 (2004).

[91] See Free Culture, supra note 4, at 73 (acknowledging the potential of p2p to cause harm, but arguing that "consistent with the tradition that gave us Hollywood, radio, the recording industry, and cable TV, the question we should be asking about file sharing is how best to preserve its benefits while minimizing (*to the extent possible*) the wrongful harm" (emphasis added)).

[92] See id. at 129–30.

[93] Id. at 129.

posed on promising new technologies result not from the promotion of the public interest but from the "purposeful self-interested resistance" of those who stand to lose from technological change.[94] Nevertheless, in many contexts—most notably in the realm of environmental law and regulation—new technologies are often subjected to regulation in an effort to ensure that their adoption will not damage real and other property. *Free Culture* leaves unaddressed the question of why it is so important that deference be shown to new technologies in the context of intellectual property[95] when society fails to exhibit such deference in other contexts.

The second point is that there is a certain irony, and also a lesson, in Lessig's choice of metaphor. The discussion of DDT proceeds from the axiom that "the problems DDT caused were worse than the problems it solved, at least when considering the other, more environmentally friendly ways to solve the problems that DDT was meant to solve."[96] But the case against DDT is not the slam dunk that Lessig takes it to be. In the past several years, a number of environmental experts have argued that the stubborn belief of the United States public that DDT's costs necessarily exceed its benefits retards its use as an antimalarial measure in poor countries, including several in sub-Saharan Africa.[97] Although many malariologists believe that DDT does not pose substantial environmental dangers when properly applied and that its careful use would save many lives,[98] the fact that Americans know it only as a devastating poison means that officials of aid organizations of-

[94] See Joel Mokyr, The Gifts of Athena: Historical Origins of the Knowledge Economy 220–21 (2002) (noting that "throughout history technological progress has run into" the "powerful foe" of "purposeful self-interested resistance to new technology" and concluding that technological progress is a "vulnerable process, with many powerful enemies with a vested interest in the status quo or an aversion to change continuously threatening it").

[95] See Free Culture, supra note 4, at 194.

[96] Id. at 129.

[97] Tina Rosenberg, What the World Needs Now Is DDT, N.Y. Times, Apr. 11, 2004, § 6 (Magazine), at 38, 39–41.

[98] See, e.g., C.F. Curtis & J.D. Lines, Should DDT Be Banned by International Treaty?, 16 Parasitology Today 119, 119 (2000).

ten shy away from recommending its use, for fear of alienating their affluent American donors and supporters.[99]

In reaching for a convincing metaphor to persuade readers that the costs of the protections sought by content owners are sure to exceed the benefits, Lessig unwittingly makes another point altogether: namely, that it is easy to be overconfident about what will or will not damage an environment, be it natural or cultural. Over the course of its history, DDT has been hailed as an unalloyed boon to crop growers and condemned as a disastrous poison that should be forever banned.[100] The truth appears, at least right now, to lie somewhere in the middle. Deployed with thought and care, DDT can deliver significant benefits, although it retains the ability to cause devastation. Whether its use is a good idea or a terrible idea depends on multiple factors, and making the right decision requires careful evaluation rather than blanket assumptions.

II. LESSIG'S PRESCRIPTIONS

Having declared that the creative ecosystem is in deep crisis, Lessig offers a comprehensive program to restore it to health. In the "Afterword" to *Free Culture,* Lessig divides his recommendations into two categories. The first consists of steps that concerned citizens can take on their own, starting immediately. The second is made up of measures that require legislative action. For individuals, Lessig prescribes political activism that focuses on privacy protection and encourages forms of intellectual property that allow for full or limited public access, such as open-source software and Creative Commons licenses.[101] Lessig outlines a tougher program for Congress, one that entails an overhaul of copyright law. In dispensing his medicine to both citizens and legislators, Lessig repeatedly states that his goal is the restoration of a lost equilibrium. What the prescriptions contained in *Free Culture* in fact would amount to, however, is something quite different.

[99] Rosenberg, supra note 97, at 40; see also Cass R. Sunstein, Safe and Sorry, Forbes, July 5, 2004, at 48 (noting that "[a] reluctance to use DDT . . . is now having really bad effects in the Third World").

[100] See Rachel Carson, Silent Spring 20–27, 85–100 (1962).

[101] See Creative Commons, Licenses Explained, supra note 8.

A. What Individuals Should Do

In Lessig's view, individuals can help save free culture by becoming active in the political process as well as by undertaking and supporting voluntary efforts to distribute content in innovative ways. With respect to political participation, what Lessig has in mind is for people to lobby for the sorts of things that he believes are good public policy, most notably the protection of individual privacy and public access to knowledge. In the realm of privacy, Lessig asserts that citizens need to make sure that "affirmative steps" are taken to "secure a kind of freedom that was passively provided before."[102] Formerly, according to Lessig, individuals had little reason to fear that their privacy would be invaded because of the trouble and cost that would-be invaders would have to incur.[103] Technology, however, has made it far easier to keep tabs on everyone.[104] One puzzling aspect of Lessig's argument is his unquestioned assumption that the golden age of privacy he depicts is the norm from which we have deviated. This romanticized vision ignores the fact that, throughout American history, much of the population has lived in rural communities, small towns, and neighborhoods where personal privacy often was scarce for the precise reason that neighbors found it easy and cheap to monitor one another's actions. Lessig may be correct that the adoption of certain measures to prevent indiscriminate dissemination of sensitive information is a good idea, but it is far from clear that what Lessig has in mind is a return to traditional life, rather than a departure from it.

Lessig's discussion of the importance of guaranteeing public access to information, particularly scientific and medical information, poses a similar puzzle. He notes that some publishers of expensive journals have demanded that libraries deny electronic access to the general public, and that these denials can inhibit research by medical patients.[105] Previously, when libraries had hard copies of these journals, patients had greater access to important knowledge.[106]

[102] Free Culture, supra note 4, at 278–79.
[103] Id. at 277–78.
[104] Id. at 278.
[105] See id. at 281.
[106] Id.

Lessig's point is well taken, but his proposed solution—that the public have online access—goes well beyond the restoration of a "freedom taken for granted before, but now threatened by changing technology and markets."[107] The ability of laypeople to conduct research online has revolutionized the practice of medicine, because the Internet disseminates news of scientific advances far faster than the print medium ever did. What Lessig is advocating, in effect, is not a return to the old ways, when sick people in search of the latest medical news traveled to libraries and laboriously retrieved and paged through journal volumes, but a new way of doing things. Lessig's intuition—that greater public access to knowledge, especially health- and life-saving knowledge, is a worthy goal—is eminently defensible, but it is perplexing that he chooses to justify his endorsement by claiming that he is simply trying to return to the way things were, instead of saying flat-out that he thinks he has found a better way.

As a supplement to political participation, Lessig recommends that individuals support and participate in various voluntary efforts that aim to transform the "mix of rights that now govern the creative field."[108] The most prominent of these efforts are open-source software and the Creative Commons project.[109] Both represent true innovations, in that they permit creators and innovators some, but not unlimited, freedom to custom tailor their intellectual property rights.[110] For someone who expresses worry over the hazards of property rights, however, Lessig is cavalier about the potential complications of these new institutional arrangements. For example, Creative Commons licenses vary, which means that someone who wants to make use of content covered by such a license will have to incur the cost of learning precisely what rights the creator retains.

B. What Congress Should Do

Free Culture stipulates that the battle will not be won only through the actions of individuals. Large scale changes in the law

[107] See id. at 282.
[108] See id. at 286.
[109] See Creative Commons, Licenses Explained, supra note 8.
[110] See Free Culture, supra note 4, at 46, 282–83.

are also required, although Lessig admits that "[w]e have a long way to go" before lawmakers are likely to entertain seriously his reform program.[111] Lessig makes it clear that his prescriptions are not designed to provide a definitive program, but he nonetheless expresses confidence that the adoption of any one of them is sure to yield substantial societal gains. In fact, all his suggestions for congressional action are of uncertain benefit to the public interest.

1. "*More Formalities*"

Lessig's first proposal is to increase the formalities required to obtain and retain copyrights.[112] Lessig also has suggestions for encouraging copyright owners to mark their work, so as to reduce confusion about intellectual property rights.[113] The case for formalities is easy to make and exerts an undeniable appeal: Right now there is no simple means of figuring out who owns which copyrights, with the unfortunate result that, very often, someone who wants to ask permission cannot locate the rights holders.[114] Formalities, argues Lessig, would bring much needed clarity to copyright by requiring the submission of information to a central registry.

In articulating the case for formalities, Lessig glosses over their shortcomings. The fact is that the United States did once impose a number of formalities on copyright holders, and abolished them for good reasons.[115] Lessig agrees that abolishing the old formalities was the right thing to do, but asserts that his system of formalities would be much better, because he will make use of the Internet to minimize the burden of the formalities.[116] What Lessig neglects to mention is that all formalities impose burdens, and that those burdens are experienced most keenly by the inexperienced and uneducated. While it is by no means definite that the costs of more formalities would outweigh the benefits, Lessig should at least acknowledge that corporate copyright holders are likely to have a much easier time negotiating the system than the lone individual

[111] Id. at 287.
[112] See id. at 287–89.
[113] See id. at 290–91.
[114] See id. at 288.
[115] See id.
[116] See id.

creator, and that a turn to more formalities could bestow an advantage on none other than the "Big Media" interests Lessig abhors.

2. Shorter Average Terms for Copyrights

Free Culture also demands that copyright terms be shortened. Although Lessig mentions as possibilities terms ranging from fourteen to seventy-five years,[117] what he appears to have in mind is a return to the pre-1976 regime, for he states that "[u]ntil 1976, the average term was just 32.2 years" and that we should "be aiming for the same."[118] With average terms of roughly a third of a century, avers Lessig, there will be little need to worry about the complexities of fair use and other exceptions to copyright, for content will pass into the public domain faster.[119] What Lessig ignores in his discussion is that many of the frustrated creators and innovators he depicts in *Free Culture* were seeking access to content that was far younger than thirty-two years—indeed, even younger than the fourteen years Lessig mentions as the shortest possible term. Shortening copyright terms thus represents, at best, a highly inexact solution to many of the incidents that motivated Lessig to pen *Free Culture*.

3. Limit the Rights of Copyright Holders to Block "Derivative Uses"

Lessig makes a forceful argument that the growth of rights of creators to control derivative works made by others can deprive a culture of provocative and valuable works.[120] Lessig's call to trim back these derivative rights will find many sympathizers. To many, after all, it appears absurd that there was a genuine possibility that representatives of the heirs of *Gone With the Wind* author Margaret Mitchell would be able to prevent the publication of *The Wind Done Gone*, a novel by Alice Randall that described life on the plantation Tara from the perspective of a slave.[121] The trouble with

[117] Id. at 292.
[118] Id. at 293.
[119] See id. at 292–93.
[120] See id. at 294–95.
[121] See Alice Randall, The Wind Done Gone: The Unauthorized Parody (2001). SunTrust Bank, the trustee of the holder of the copyright to *Gone With the Wind*, sought and obtained a court order preliminarily enjoining publishing house Houghton Mifflin from "further production, display, distribution, advertising, sale, or offer for

Lessig's discussion, however, is that he is eager to suggest that the infirmities of the derivative rights regime are of recent origin,[122] even though the doctrine has blocked unauthorized derivative works for many decades.[123] The long existence of the derivative-rights doctrine—its origins in the United States can be traced back to the third quarter of the nineteenth century[124]—undermines Lessig's frequent averments that intellectual property rights were unproblematic for most of the nation's history.

4. Facilitate File Sharing

Free Culture's program for facilitating the spread of music and other content through digital technologies is nothing short of revolutionary. Lessig proposes that systems be put in place to measure the number of times that each particular content item is distributed digitally and that artists receive compensation based upon these numbers. Funding for this novel scheme is to be provided through taxation.[125] The beauty of this system, Lessig asserts, is that it ensures artists are paid while "protecting the space for innovation and creativity that the Internet is."[126] In advancing this proposal, Lessig assumes away his most vexing problem, which is how to determine what constitutes reasonable compensation for creators. In a market system where creators have, with rare exceptions, the right to refuse to sell their products at prices not agreeable to them, we can be confident that those transactions that take place benefit

sale of" *The Wind Done Gone.* SunTrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357, 1386 (N.D. Ga. 2001). The United States Court of Appeals for the Eleventh Circuit vacated the District Court's order, 252 F.3d 1165, 1166 (11th Cir. 2001), and *The Wind Done Gone* was published. The parties to the litigation subsequently agreed to a settlement in which "both sides affirmed their legal positions." David D. Kirkpatrick, Mitchell Estate Settles 'Gone With the Wind' Suit, N.Y. Times, May 10, 2002, at C6. The terms of the settlement were not made public, but Houghton Mifflin announced that it planned to make a donation to Morehouse College. Id.

[122] Free Culture, supra note 4, at 28–30.

[123] See Gorman & Ginsburg, supra note 29, at 511–43.

[124] See Paul Goldstein, Derivative Rights and Derivative Works in Copyright, 30 J. Copyright Soc'y 209, 213–14 (1983).

[125] Free Culture, supra note 4, at 300–04. This scheme is a modification of a program laid out in detail by Harvard Law School professor William Fisher. See Fisher, supra note 70, at 199–258.

[126] Free Culture, supra note 4, at 303–04.

both parties. In a world where third parties set the amount creators are paid, we will lack such confidence.

5. "*Fire Lots of Lawyers*"

Lessig's final prescription is to reduce markedly the scope of laws and regulations that affect intellectual property rights.[127] While there is a place for regulation, it should be limited to situations where it will do "good."[128] What Lessig appears to be arguing for is a strong presumption against regulation in this area. That is, he favors regulation only in the face of convincing evidence that it will yield good results. This is a heavier burden than laws and regulations typically face, either in their initial passage or in subsequent court challenges. Lessig does not explain why a higher bar is warranted for regulation in this area than in others. After all, many of the criticisms he levels against "Big Media" and its political activities in Washington apply with equal force to other corporate behemoths that lobby for and obtain laws and regulations that decrease competition while enriching their interests.

Moreover, Lessig's expressed hostility to the intellectual property bar is puzzling in the face of many of the problems he has detailed in *Free Culture*, for in a number of instances more legal assistance would have been useful. Lessig claims that the legal system "doesn't work for anyone except those with the most resources,"[129] but he fails to discuss the myriad ways in which effective, reasonably priced (or even free) legal help can be provided. Indeed, the Electronic Frontier Foundation, with which Lessig is affiliated, aims to provide precisely such services. Lessig neglects to explain why he is so certain that less regulation would be preferable to systemic reform that makes legal talent more widely available.

CONCLUSION

It is easy to wish that Lessig had decided to write another sort of book. Had he started from the premises that adjusting property rights to technological and societal change has posed significant challenges throughout U.S. history, and that it is impossible to state

[127] See id. at 304–06.
[128] See id. at 305.
[129] Id.

with complete confidence that any regime strikes (or has struck) the ideal balance between providing incentives to creators and innovators and ensuring appropriate access to the fruits of their efforts, Lessig might have produced a thoughtful meditation on intellectual property in the Internet age. Instead, Lessig has opted to tell a dark, sweeping tale of a nation that for most of its history adjusted to societal and technological change with ease, but now teeters on the edge of the abyss of corporate control.

The world depicted in the pages of *Free Culture*, however, is at odds with Lessig's dystopian vision, for it is a vibrant place where technological innovation, creative endeavors, and public discussion of political issues flourish to a degree that would have been scarcely imaginable to our forebears. That such a society faces some perplexing challenges should come as no surprise. Addressing these challenges will require a number of difficult determinations, including whether the hazards posed by various new technologies outweigh their benefits and how best to ensure that property rights evolve to promote the overall public interest. Regrettably, *Free Culture* promises to be of little help in crafting useful solutions to these genuine problems.