



Tragedy and Farce: An Analysis of the Book FREE CULTURE

by Thomas D. Sydnor II*

Recently, on the excellent website *Technology Liberation Front*, two thoughtful libertarian commentators disagreed about the merits of Professor Lawrence Lessig and his book *FREE CULTURE*.¹ One claimed that Lessig and *FREE CULTURE* seek to “demoniz[e]... property and profits” and “impos[e] a radical new utopian and quasi-socialist agenda on our imperfect but highly productive and creative capitalist economy.” The other disagreed, “Free Culture is about what its title suggests: freedom.” “[T]he central theme of Free Culture is something conservatives normally celebrate: reducing the role of government and lawyers into Americans’ ordinary lives....”²

Such disagreements about works like *FREE CULTURE* are common. Libertarians, conservatives, and liberals can and do disagree in good-faith about many aspects of intellectual property rights. Indeed, intellectual property rights are interesting partly *because* opinions about them rarely divide along the usual ideological lines.

Nevertheless, *FREE CULTURE* should be rejected by libertarians, conservatives, and liberals. *FREE CULTURE* does “demonize” property owners in order to convince the government to impose a form of “radical” and “quasi-socialist” utopianism. *FREE CULTURE* does *seem* to be about “freedom.” But the “freedom” that it would impose is not—as Lessig would say—freedom “in the sense that we in the West like to imagine it.”

This analysis of *FREE CULTURE* will focus on two disputed points in the debate noted above. First, it will assess whether Lessig and *FREE CULTURE* do, in fact, “demonize” property rights and property owners. Second, it will assess whether *FREE CULTURE* argues that the government should “impose” some “quasi-socialist” means of production to replace the exclusive rights that have helped make the United States the world’s most successful producer and exporter of expressive works.

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¹ LAWRENCE LESSIG, *FREE CULTURE* (2004) [hereinafter *FREE CULTURE*].

² Compare Brett Swanson, *\$0.00—the Abundance of Nothing—Free versus Free Culture*, TECHNOLOGY LIBERATION FRONT (March 7, 2008) <http://www.techliberation.com/archives/043431.php>, with Tim Lee, *Free Quasi-Socialist Culture?*, TECHNOLOGY LIBERATION FRONT (March 8, 2008) <http://www.techliberation.com/archives/043438.php>.

I. Lessig Does—Literally—Demonize Property Owners.

Disputes about whether Lessig “demonizes” property owners are easily resolved. He does so incessantly. Scholars are supposed to be disinterested, balanced and thoughtful.³ Lessig is an name-calling demagogue: In just one law-review article, he calls those who fail to agree with him sheep, cows, unimaginative, extreme, stupid, simplistic, blind, uncomprehending, oblivious, pathetic, resigned, unnoticed, unresisting, unquestioning, and confused—“most don’t really get it.”⁴

But the targets of this barrage need not worry: The roles of scholar and demagogue clash so fundamentally that anyone trying to be both will end up looking like an absurd hypocrite. That is what happened when Lessig literally demonized copyright owners.

Scholars are supposed to carefully analyze nuanced, difficult questions. Consequently, Lessig must occasionally intersperse his epithets with claims that copyrights and the Internet raise difficult issues that demand Deep Thought:

In this context, what we need – we who aspire to be academics, who aspire to work things out – is permission to work things out freely. We need a space around us where we can experiment with ideas without condemnation reigning [sic] down around us.... [T]his is not a battle about feminism or racism....⁵

Lessig claims “It is the job of an academic in times of craziness to point to sanity. The role of the academy is to provide balance and perspective.”⁶ He thus denounces the partisan who “with the self-righteousness that should terrify everyone, insists that the other side is the devil’s own work.” And then he offers the following analysis of copyright as “a timid picture of reason in this time of a certain lunacy”:

In the south [of California] they believe culture... is property. That it is controlled by property holders (hoarders) of culture.... Large numbers of artists (slaves) sell their souls to these culture makers in exchange for the right to sell their music to the future of music. They sell their soul forever in exchange for this right. And these holders/hoarders/plantation owners run this system of cultural production in a way that says our rights are absolute.⁷

Yes, that’s right: To Lessig, Justin Timberlake is a slave—a “modern day sharecropper.”⁸ To Lessig, African-American record executives are just like “plantation

³ Lawrence Lessig, *Innovating Copyright*, 20 CARDOZO L. REV. 611, 618 (2002).

⁴ Lawrence Lessig, *The Architecture of Innovation*, 51 DUKE L.J. 1783, 1785, 179, 180, 181 (2002).

⁵ Lawrence Lessig, *Foreword*, 52 STAN. L. REV. 987, 999 (2000).

⁶ Lessig, *supra* n. 3, at 618.

⁷ *Id.* at 622-23.

⁸ FREE CULTURE, *supra* n. 1, at 262.

owners” who whip slaves and sell children. To Lessig, copyright is even *worse* than slavery: Poor Justin has sold his “soul forever”—to a devil, an IMP of Hell.⁹

Lessig’s own words thus expose him as a hypocritical demagogue—one so terrifyingly self-righteous and hopelessly partisan that he could scarcely recite his pious ode to restraint before he resumed using the rhetoric of racism to brand the other side as the devil’s own. As he might say, “The hypocrisy reeks.”¹⁰

In *FREE CULTURE*, Lessig’s rush to demonize has similar comic results. It begins with his attempt to distinguish his “copyright war”¹¹ from a holy war:

The story that follows is about this [copyright] war. Is it not about the “centrality of technology” to everyday life. I don’t believe in gods, digital or otherwise. Nor is it an effort to demonize any individual or group, for neither do I believe in a devil, corporate or otherwise. It is not a morality tale. Nor is it a jihad against an industry.¹²

Unfortunately, these pious pledges appeared in book subtitled, *HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY*—a book that analogizes property rights to the pesticide DDT.¹³ And such demagoguery pervades *FREE CULTURE*. Only if you are starring in an Austin Powers movie—or a “jihad against an industry”—should you end up shrieking that the “aim” of “the other side” is “*to assure that all there is is what is theirs.*”¹⁴

II. “Quasi-Socialist Utopianism” Is a Sufficiently “Precise” Description of *FREE CULTURE*’s Plan for Copyrights on the Internet.

“Hegel observes somewhere that all great incidents and individuals of world history occur, as it were, twice. He forgot to add: the first time as tragedy, the second as farce.”¹⁵
—Karl Marx

⁹ See Peter K. Yu, *Intellectual Property and the Information Ecosystem*, 2005 MICH. ST. L. REV. 1, 4 & nn. 26-27 (noting proposals to replace the term “intellectual property rights” with the acronyms I.M.P.s (“imposed monopoly privileges”) or G.O.L.E.M.s (“government-originated legally enforced monopolies”)).

¹⁰ *FREE CULTURE*, supra n. 1, at 262.

¹¹ Lessig and the Movement declare “copyright war” incessantly. See, e.g., Lawrence Lessig, *The Creative Commons*, 65 MONT. L. REV. 1, 4 (2004); accord *FREE CULTURE*, supra n. 1, at 10, 11, 17, 18, 73, 74, 120, 169, 173, 179, 181, 183, 184, 194, 199, 200, 205, 207, 211, 254, 262, 296, 300, ; Lawrence Lessig, *Free(ing) Culture for Remix*, 2004 UTAH L. REV. 961, 970, 975, 996 (2004); Lawrence Lessig, *Law Regulating Code Regulating Law*, 35 LOY. U. CHI. L.J. 1, 5, 9 (2003); see also J.D. LASICA, *DARKNET: HOLLYWOOD’S WAR AGAINST THE DIGITAL GENERATION* (2005); JESSICA LITTMAN, *DIGITAL COPYRIGHT* 151-65 (2001) (Chapter Ten, titled “The Copyright Wars”); Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907 (2004); Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 658, 676, 677, 744, 745-46, 750-51, 755 (2005).

¹² *FREE CULTURE*, supra n. 1, at 11.

¹³ *Id.* at 129-30.

¹⁴ *Id.* at 255 (emphasis in original).

¹⁵ See Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* (1852), in *THE PORTABLE KARL MARX* 287 (E. Kamenka ed., 1983).

Lessig will brand its opponents “old Soviets” if he deems the comparison sufficiently “precise even if unfair.”¹⁶ And he should: If the term *is* sufficiently precise, then one should call proponents of socialism “socialists”—even if that links their ideas to the attempts to implement them that inevitably produced misery, murder, and poverty. So Lessig should concede that if the “quasi-socialist” shoe fits, FREE CULTURE must wear it.

FREE CULTURE consists of three components: 1) claims about how copyright laws and culture interacted in the past; 2) stories illustrating problems allegedly arising from present interactions between copyrights and the Internet; and 3) a forward-looking proposal for resolving these problems. Analysis of whether FREE CULTURE would impose “quasi-socialist utopianism” turns on its third, forward-looking component.¹⁷

For example, when viewed broadly, the arguments in FREE CULTURE merely remix those in the MANIFESTO OF THE COMMUNIST PARTY. Both the MANIFESTO and FREE CULTURE argue that diminishing appreciation for the “commons” created an oppressive fixation on property. Both predict increasing immiseration as property becomes ever more concentrated in a few hands. Even FREE CULTURE’s supporters make this point:

[T]here are extraordinary parallels between Communist ideology and the current battle war over the creation of cultural content.... [Marxist] philosophy reacted against the concentration of power in the hands of capital that came about as a consequence of the industrial age. Now, as the information age progresses, we see that the same concentration of power through the dominant property form of our era, that is, intellectual property.... And so we shouldn’t be surprised if we see a Marxist response to these developments.¹⁸

Granted, FREE CULTURE and the MANIFESTO can differ. For example, the MANIFESTO argued that capitalism was superior to feudalism, but FREE CULTURE equates expressive capitalism with feudalism.¹⁹ Nevertheless, neither these differences nor the many similarities can tell us whether FREE CULTURE is quasi-socialist: That must turn on

¹⁶ LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 146 (2001) [hereinafter *FUTURE OF IDEAS*]; see also FREE CULTURE, supra n. 1, at 128, 305.

¹⁷ Here, “quasi-socialist” should mean at least heavy government control, involvement or direction of the production of expressive works. That state of affairs has never before characterized U.S. copyright law. See FREE CULTURE, supra n. 1, at 10 (“Our [copyright] tradition was thus neither Soviet nor the tradition of patrons.”). Consequently, FREE CULTURE’s accounts of the past or the present cannot reveal whether it is quasi-socialist, so this paper will focus on FREE CULTURE’s vision for the future of copyrights. A forthcoming paper will analyze systemic flaws in its accounts of copyrights past and present.

¹⁸ Dan Hunter, *Culture War*, 83 TEX. L. REV. 1105, 1106 (2005). Given the consequences of the last “Marxist response” to capitalism—half of the globe mired in misery, murder, and poverty—some may be surprised to see a similar “response” recurring. Others may not. See JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 146-54 (Harper Perennial ed. 1976) (arguing that the wealth and rationalism generated by capitalism inevitably creates a class of disaffected intellectuals who ceaselessly undermine support for capitalism).

¹⁹ Compare Karl Mark, *Manifesto of the Communist Party* (1848), in *THE PORTABLE KARL MARX* 207-09 (E. Kamenka ed., 1983) with FREE CULTURE, supra n. 1, at xvi, 267 (equating copyrights to feudalism and arguing that our only choice now is whether that information society will be *free* or *feudal*’).

whether FREE CULTURE—like the MANIFESTO—advocates imposing at least heavy government control of, or involvement in, the production of expressive works.

FREE CULTURE's proposal for the future of copyright on the Internet would, indeed, "impose" "quasi-socialist utopianism." For example, when FREE CULTURE was published in 2004, file-sharing piracy was the most pressing problem confronting copyright/technology policy. What solution did FREE CULTURE propose for this problem?

It proposed that the United States should follow the example of the Soviet Union: It should eliminate copyrights and nationalize the production of speech. FREE CULTURE proposed that it should do so by having the government make "unavoidably vague" judgments about the value of expression, tax computer and Internet technologies, and then decide how to divide collected tax revenues among worthy artists by recording everything that U.S. citizens hear, watch, read and do in their homes, cars, and offices.

Nor should it be surprising that FREE CULTURE calls for abolishing property rights and nationalizing the production of speech. As to every real or imagined disease "threatening" the Internet—from "Y2K" to "net neutrality"—Dr. Lessig's prescription has been ever the same: Narrow property rights and overrule markets by increasing government regulation, intervention, and control. To achieve this, Lessig will even masquerade as a type of person that he has bitterly denounced—as a libertarian.

The road to FREE CULTURE thus began in Lessig's 1999 book, CODE AND OTHER LAWS OF CYBERSPACE. In CODE, Lessig declares his "impulse is to sympathize" with leftists "radically skeptical" about property rights and markets: "Property is said to commodify, to marketize, to monetize relations.... The last thing we need... is to have another sphere of our lives ruled by the market."²⁰

CODE thus lauds limitations on copyrights as "Communism, at the core of our Constitution."²¹ CODE also digresses repeatedly to record Lessig's "fascination with Communist states."²² He denies that "[c]ontrol is the model of communism; freedom is the model of the United States."²³

Indeed, when reporting on the Vietnamese Internet, "NamNet," Lessig praises the "effective freedom" in communist Vietnam: "[T]hough there is no 'liberty' in Vietnam *in the sense that we in the West like to imagine it* ... I could not escape the feeling that people in Vietnam, in their day to day existence, are far less 'regulated' than people in the United States.... Life there is remarkably free...."²⁴ Ignoring the contrary verdict of hundreds of thousands of Vietnamese boat people, the tourist Lessig thus proclaims:

²⁰ LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 161 (1999) [hereinafter CODE].

²¹ *Id.* at 134.

²² *Id.* at 189.

²³ *Id.* at 188; *see also id.* at 164 ("free speech in the United States means the right to be free from punishment by the government in retaliation for *at least some* (probably most) speech").

²⁴ *Id.* at 189 (emphasis added). Lessig is praising the "effective freedom" granted to those who do not question a government that has failed them so miserably that "barely any infrastructure" remains. *Id.* Similar "effective freedom" exists even today in countries like in Zimbabwe.

“Vietnam sets as its ideal the state in the service of the withering of the state; the United States sets as its ideal the withered state in the service of liberty.”

CODE thus informs us that the Marxist-Leninist communism of “Chairman Ho” is “not anything like the communism that gave birth to the cold war.” Nor was even the latter truly objectionable: CODE begins with, and returns to, the premise that bad advice about limited government led Russia and Eastern Europe to adopt anarchy to replace the “bland communism of the previous three generations.”²⁵

“Bland.” Dated from the collapse of the Soviet Union in 1991, a period of “three generations” would span from 1930 to 1990. It would thus include Stalin’s show trials and terror-famine, the Berlin Wall, the Airlift, the Iron Curtain, the Hungarian Revolt, Krushchev’s shoe-pounding, the Prague Spring, the Cuban Missile Crisis, the Chernobyl meltdown, and the August Coup against Gorbachev. All “bland.”

When Lessig is not channeling Jane Fonda or Walter Duranty, CODE argues that capitalism and democracy, (as we in the West like to imagine it), will soon destroy the Internet: Commercial online service providers, (Amazon, eBay, Google, etc.), will turn the Internet into a “panopticon”—into a prison of pervasive government surveillance.²⁶ Lessig warns, “Market forces encourage architectures of identity to facilitate online commerce.”²⁷ As a result, “An invisible hand now threatens both [liberty and openness].”²⁸

This pessimism about markets and democracy flows from pessimism about people. Lessig’s “bovine account” of human nature equates most people with witless cows:

A fundamental principle of bovinity is operating here and elsewhere. Tiny controls, consistently enforced, are enough to direct very large animals.... [W]e are large animals. I think it is as likely that the majority of people would resist these small but efficient regulators of the Net as it is that cows would resist wire fences. This is who we are....²⁹

By equating most Internet users with cattle—complacent “large animals”—CODE can argue that on the Internet, democracy, property rights, markets, and the “invisible hand” are threats and government by the Wise the only hope of avoiding catastrophe: “Some say this is an exciting time. But it is the excitement of a teenager playing chicken, his

²⁵ *Id.* at 4. For less fawning account of “NamNet” see *Open Internet Initiative, Internet Filtering in Vietnam 2005-2006* (2006) http://opennet.net/studies/vietnam/ONI_Vietnam_Country_Study.pdf.

²⁶ See JEREMY BENTHAM, PANOPTICON LETTERS 29-95 (Miran Bozovic, ed. 1995).

²⁷ CODE, *supra* n. 20 at 58.

²⁸ *Id.* at 60.

²⁹ *Id.* at 57. Lessig explains that democracy increasingly fails, in part because the government “listens too much” to the “views of the public” that are “often the product of ignorance.” To counteract this, he would have the government listen only to members of the public who have been tutored for at least a weekend by experts like himself. See *id.* at 227-28.

car barreling down the highway, hands held far from the steering wheel.... It is the age of the ostrich.”³⁰

Fortunately, the rule of the Wise will not mean totalitarianism: “A spying and invasive Net controlled by Washington is not our future. 1984 is in our past.” Nor will it mean bureaucracy: “Liberty is not to be found in some new D.C. alphabet soup ... of bureaucracy.”³¹

Instead, Lessig would have avoided the Y2K crisis by imposing inescapable, punitive liability upon programmers and service providers.³² We make Linus Torvalds strictly liable for any harm that his program causes, and we give everyone an inalienable, unwaivable right to sue him into bloody pulp. We also reform intellectual property law to take the “profit” out of “capturing and preserving knowledge.”³³ As one commentator noted, “CODE is, in short, a dense and multi-layered indictment of the invisible hand.”³⁴

Sadly, Lessig’s *Linus-Meets-ATLA* vision failed to persuade America to embrace “the idea of placing the design of ... the Internet into the hands of government.”³⁵ Lessig lamented, “I’ve advocated this, but without much hope. So central are the [libertarians] in our political culture today that I confess I cannot see a way around them.”³⁶

And then Lessig found a way around them: If you can’t beat ‘em, pretend to join ‘em. CODE argued that governments are better than markets, but markets better than anarchy. In 2002, Lessig *seemingly* reversed his rhetoric:

Should resources be controlled by the state, or controlled by the market? And this question, we all rightly believe, has been answered. In all but a few cases, for a wide range of reasons, we know this: that the market is a better tool for controlling resources than the state....

But this confidence obscures a distinct and more basic question.... Not the question of which system of control is best for any given resource, but instead the question—should a resource be subject to control at all. Not the market versus the state, but controlled versus free.

³⁰ *Id.* at 234.

³¹ *Id.* at x, xi.

³² *Id.* at 232 (“Y2K is our first real crisis in code. It is the first time that the culture as a whole will have to confront the environmental damage done by shortsighted coders.”).

³³ *Id.*

³⁴ David G. Post, *What Larry Doesn’t Get: Code, Law, and Liberty in Cyberspace*, 52 STAN. L. REV. 1439, 1442 (2000). Indeed, CODE sneers incessantly at markets and the “invisible hand.” See CODE, *supra* n. 20, at 5, 42, 43, 60, 83, 209, 234.

³⁵ CODE, *supra* n. 20, at 219.

³⁶ *Id.* at 233.

If communism versus capitalism was the struggle of the twentieth century, then control versus freedom will be the debate of the twenty-first century.³⁷

This is an old strategy: Collectivism is freedom; property is control. But in the 19th century, collectivists took decades to transition from anarchic freedom to state control. In 2002, Lessig took three pages.³⁸

After distinguishing the *old* debate about “the market versus the state” from the *new* debate about “controlled versus free,” Lessig then re-defined “free” to mean costly and state-controlled: “By a commons, I mean a resource that is free. Not necessarily zero cost, but, if there is a cost, it is a *neutrally or equally imposed cost*.”³⁹ A “Free Culture Movement” thus became indistinguishable from a “Fee Culture Movement.”

Then Lessig redefined “free” to mean state-controlled. He noted that resource is not “free” if an individual person has “a right to exclude, or to decide whether to grant access based upon his or her own subjective reasons.”⁴⁰ But “free” resources *are* controlled—just *differently*: “The point is not that no control is present, but rather that the kind of control is different from the control we grant to property.”⁴¹ Now, we are back where we started—confronting “the question of which system of control is best.”

So the “free” that Lessig contrasts with the “control” of private property is not “free” at all: It is not “free” in the no-cost sense of “free beer.” It is not “free” in the uncontrolled sense of “free speech.” Indeed, it is not “free” in any other “sense that we in the West like to imagine it.” Lessig says, “I’m not on the side of free music if free music means artists don’t get paid.... [T]he issue is not whether artists get paid, but how.”⁴²

But how? How are artists to be paid, if not through property rights and markets? *Who* will decide when “costs” will be imposed, *what* their amount will be, and *which* “neutrally or equally imposed” terms will attach? In 2002, Lessig did not answer these questions. In *FREE CULTURE*, he did: We turn the Internet into the panopticon. We build it around a new D.C.-alphabet-soup bureaucracy. We go back to our past—to 1984—to create a spying and invasive Net controlled by Washington.

In *FREE CULTURE*, Lessig advocates nationalizing the production of “all content capable of digital transmission.”⁴³ He proposes to do so through the “careful and

³⁷ Lessig, *supra* n. 4, at 1784-85; *see also*, *FUTURE OF IDEAS*, *supra* n. 16 at 12.

³⁸ Cf. *FREE CULTURE*, *supra*, n. 1, at xvi (“A culture without property, *or in which creators can’t get paid*, is anarchy not freedom. Anarchy is not what I advance here.”).

³⁹ 1788; *accord*, *FUTURE OF IDEAS*, *supra* n. 16 at 12.

⁴⁰ Lessig, *supra*, n. 4, at 1786; *accord* *FUTURE OF IDEAS*, *supra* n. 16 at 12.

⁴¹ Lessig, *supra*, n. 4, at 1788.

⁴² *Id.* at 1795; *cf.* *FREE CULTURE*, *supra*, n. 1, at xvi (“A free culture is not a culture without property; it is not a culture in which artists don’t get paid.”); *id.* at 276 (“the debate so far has been framed at the extremes – as a grand either/or: either property or anarchy....”).

⁴³ *FREE CULTURE*, *supra*, n. 1, at 28. Fisher agrees that his scheme “could be adapted to other media and jurisdictions” without “undue difficulty.” WILLIAM W. FISHER III, *PROMISES TO KEEP* 15 (2004). Lessig tends to call this a “compulsory” or “statutory” license. *FREE CULTURE*, *supra*, n. 1, at 57, 64, 77, 103, 194, 300,

comprehensive,” scheme outlined in PROMISES TO KEEP, by Professor William W. Fisher III of Harvard Law School’s Berkman Center for the Study of the Internet and Society. Lessig even analogizes Fisher’s scheme to CAPITALISM AND FREEDOM: “[A]s Rawls did in political theory, or Milton Friedman did in economics, Fisher provides an understanding that will color policy analysis for the generations to come.”⁴⁴

And Fisher’s scheme does begin from some rather Friedman-like premises: Fisher says that copyrights themselves have “worked reasonably well,” have “provided a crucial stimulus for creativity,” and have “generated an enormous stream of entertainment products.”⁴⁵ Then Fisher and Friedman diverge.

Fisher claims that copyrights corrupt “modern capitalist countries” because of their “market system.”⁴⁶ Fisher would thus “replace” copyrights with “a governmentally administered reward system” that makes works “free” to the rest of the world by taxing U.S. citizens.⁴⁷ To execute it, Fisher can “imagine creating a new administrative agency for this purpose....”⁴⁸ Here is what it will do:

- Annually, the agency will decide the aggregate worth of next year’s music and movies—works that do not yet exist: It will base these decisions on “an unavoidably vague criterion”: Its “judgments concerning the quantity and quality of the [works] currently being produced.”⁴⁹
- The agency will then impose a “tech tax” on Tivos, iPods, CD burners, blank CDs and broadband ISP services. Annually, it will determine the amount of the tax, the technologies to be taxed. Technologies with inelastic demand—those that people really like—will be taxed more heavily. At first, the average tech-tax rate may be as low as 12%, but it will soon rise to over 60%. And tech taxes will fund all creators: All “pornography” will be tax-funded; domestic-violence shelters will reward performers of “misogynistic rap.”⁵⁰
- The agency will then monitor everything that you watch, hear, read or do: “By observing what [people] are listening to and watching, we can get a decent sense of what they value.” Computers, home stereos, televisions, car stereos, and

Such licenses are, in effect, governmental price-fixing schemes. What Lessig and Fisher propose is something very different from any “compulsory license” that now exists.

⁴⁴ Reviews, Promises-to-Keep.org (http://sup.org/book.cgi?book_id+5013).

⁴⁵ FISHER III, *supra* n. 43 at 202.

⁴⁶ William Fisher, *Digital Music: Problems and Possibilities*, at 2 (Oct. 10, 2000) (<http://www.law.harvard.edu/faculty/ffisher/Music.html>).

⁴⁷ See FISHER III, *supra* n. 43 at 202.

⁴⁸ *Id.* at 204.

⁴⁹ *Id.* at 244, 215; see also *id.* at 244-45 (the agency would “have a substantial amount of discretionary power” and its “judgment would not be tightly constrained”). Fisher agrees that making the agency so powerful is “problematic” but he assures us that “we often do it,” citing the National Science Foundation. *Id.* at 244.

⁵⁰ *Id.* at 216-223 & n.37. Fisher claims that under this system, “your tax dollars don’t support smut unless you consume smut.” *Id.* at 222. That claim is absurd—it is like arguing that if you voted for Ralph Nader, then your taxes don’t support the war in Iraq.

iPods will be implanted with federal spyware “that [will] keep track not only of the [works consumed] but also of who within each household is [consuming the work] at a given time and then automatically transmit that information to [the agency].” This will ensure that no one “semi-deliberately ... forgets to report pornographic or juvenile programs...” So if you watch any tax-funded porn, the agency will record who you watched it—or whether you were alone.⁵¹

- The agency will then use its surveillance data to “make each artist’s share of the [tech-tax] pot proportional to the total value that during a given year, consumers derived from his or her creations.” But it will **not** let you vote on which works you valued. Fisher explains that while some might vote according to “commendable” criteria, like race or nationality, too many would vote foolishly. They might even “reward musicians they found physically attractive or personable”: “One of the features of the current entertainment industry that many artists find noxious is the need they feel to present an attractive persona.... A voting system might ...thus exacerbate, rather than alleviate, ‘the Britney effect.’”⁵²

Fisher would thus replace copyrights with condescending bureaucrats who judge the worth of your expression and then lurk your television and computer, recording everything you do—all to try to replicate the signaling and allocative effects of the price system that died along with copyrights and markets. Fisher explains that this will create a “semiotic democracy” that will reshape human nature itself.

In the phrase, “semiotic democracy,” the word “semiotic” can be ignored—it is just a four-syllable way to say “sign.” The operative word is “democracy,” and it is used ironically. The semiotic democracy rejects voting and corrupting attempts to peaceably assemble or “petition the government for the redress of grievances.”⁵³ It thus thwarts a corrosive effect of capitalism: “In most modern capitalist countries, the power to make meaning, to shape culture, has been concentrated in relatively few hands.”⁵⁴

The semiotic democracy thus encourages its citizens to stop parenting, volunteering, and participating in civic activities so they can “make meaning” by devoting the vast amounts of time needed to “remix” popular music and movies, the “[i]ncreasingly dense cloud of images, sounds and symbols through which [they] move....”⁵⁵ This will encourage “a different style of creativity—one more collaborative and playful, less

⁵¹ *Id.* at 224, 227.

⁵² *Id.* at 223, 232; *see also supra* n.29. Advocates of this “alternative compensation system” may claim that this account of it is too harsh. Actually, it is too kind, and I hope to discuss this system in more detail in the future—because doing so should show that no rational person should have advocated anything this absurd, dangerous, and economically suicidal.

⁵³ *Compare* FISHER III, *supra* n. 43 at 244 (noting the “danger” that the agency could be “subject to strong pressure from representatives of the groups who stand to be affected by its decisions”), *with* U.S. CONST. amend. I.

⁵⁴ William Fisher, *Digital Music: Problems and Possibilities*, at 2 (Oct. 10, 2000) (<http://www.law.harvard.edu/faculty/tfisher/Music.html>).

⁵⁵ WILLIAM W. FISHER III, *PROMISES TO KEEP* at 30. Lessig agrees that remixing recorded entertainment “will become increasingly central to how we understand our culture.” Lawrence Lessig, *Free(ing) Culture for Remix*, 2004 UTAH L. REV. 961, 970 (2004).

individualist or hierarchical... To some degree, at least, such habits could help ameliorate the oft-lamented disease of modern culture: anomie, isolation, hyper-individualism. Collective creativity could help us become more collective beings.”⁵⁶

And like the Borg, the semiotic democracy corrects the errors of those who decline to become “more collective beings.” It realizes, “The bottom line: for many Americans today—and increasingly for people in other cultures—recorded entertainment has come to seem as important as food and heat.”⁵⁷ But since “very few consumers of music or film have seen [that collective creativity] ... would be good for them—would enable them to lead richer lives—then it may be necessary for the law (that is, the government) to regulate the entertainment industry in ways that keep such opportunities alive.”⁵⁸

Predictably, the strain of reshaping humanity can make even professors a bit numb to tone—and history. In *PROMISES TO KEEP*, Fisher thus seconds Aldous Huxley’s claim that seemingly free State-funded entertainment could create a “brave new world.”⁵⁹ In *FREE CULTURE*, Lessig, “one of those crazy lefties who thinks that people should have the right to browse in a library without the government knowing which books you look at,” condemns “weirdly Orwellian” copyright laws, and then advocates “governmentally administered” surveillance that is *literally* Orwellian:

The telescreen received and transmitted simultaneously. Any sound that Winston made, above the level of a very low whisper, would be picked up by it [and] he could be seen as well as heard.... How often, or on what system, the Thought Police plugged in on any individual wire was guesswork.... You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and except in darkness, every movement scrutinized.⁶⁰

This is Lessig’s oft-reaffirmed vision for the future of copyright on the Internet—for “compensation without control.” Other descriptions might be warranted, but “quasi-socialist utopianism” will do.

Worse yet, this dreamy future of pervasive government control, funding, and surveillance has been embraced by *scores* of Free-Culture-Movement academics and “public interest” groups. Indeed, this may be why so many of these scholars and groups ended up on the wrong side of the Supreme Court’s unanimous decision in *MGM*

⁵⁶ FISHER III, *supra* n. 43, at 31

⁵⁷ FISHER III, *supra* n. 43, at 182.

⁵⁸ FISHER III, *supra* n. 43, at 184. Oddly, even Fisher’s daughter rejects “collective creativity”: His “daughter and her friends,” like most other people, share only “completed cultural artifacts.” *Id.* at 31. Lessig would say, “These are people who can’t imagine a world where culture is anything else but served on a platter. These are people for whom the idea of cultural production is only ever associated with the state (as in China) or the corporation (as in a production department).” Lessig, *supra* n. 4, at 1801.

⁵⁹ Compare ALDOUS HUXLEY, *BRAVE NEW WORLD* (1940) (describing a dystopian collectivist state that uses free, banal entertainment to stupefy its citizens), with FISHER III, *supra* n. 43 at 242 (“Marketing and promotion would remain critical functions in [my] brave new world.”).

⁶⁰ GEORGE ORWELL, *1984* (Plume 1983); see also *FREE CULTURE*, *supra*, n. 1, at 278. When he thought that it might support capitalism, Lessig was “against code that tracks reading.” *CODE*, *supra* n. 20, at 186.

*Studios, Inc. v. Grokster, Ltd.*⁶¹ Repeatedly, these balance-seeking *amici* argued that for-profit corporations should not be held liable just because they intended to induce the widespread piracy that gave them “no product costs to acquire music” and “the ability to get all the music.”⁶² Indeed, 64 professors of intellectual property law and 4 public interest groups argued that the Court *should* immunize such deliberate, pervasive piracy because that might encourage Congress to enact the Fisher scheme.⁶³

To be clear, I do not think that Lessig, Fisher, or other Free-Culture-Movement academics and interest groups are *literally* “communists” or “socialists.” They do not, for example, seem to advocate the violent overthrow of elected governments. But they do still display the flaws that made communists and socialists dangerous to themselves and others: Inherent distrust of and contempt for the utility of bilateral private exchange conjoined with boundless, unshakeable faith in the *potential* wisdom, foresight, and benevolence of vast and coercive governmental power.⁶⁴

For example, in FREE CULTURE, Lessig portrays property rights as threatening all of the unintended consequences of DDT, but all talk of unintended consequences ceases when Lessig waxes eloquent about the possibilities of expressive socialism:

If a different system achieved the same legitimate objectives that the existing copyright system achieved, but left consumers and creators much more free, then we’d have a very good reason to pursue this alternative—namely, freedom. The choice, in other words, would not be between property and piracy; the choice would be between different property systems and the freedoms each allowed.⁶⁵

But during the last century, humanity conducted many vast experimental investigations of the relative merits of these “different property systems and the freedoms each allowed.” Those experiments were run by well-intended people who sincerely believed that replacing systems of private property with “different systems” would improve the material and spiritual well-being of humanity. During those experiments, millions were murdered and billions were impoverished and enslaved. In short, history has shown

⁶¹ 545 U.S. 913 (2005).

⁶² *MGM Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966 (C.D. Cal. 2006).

⁶³ See Brief of Amici Curiae Internet Law Faculty In Support of Respondents at 23-24, Brief of *Amici Curiae* Sixty Intellectual Property and Technology Law Professors, et al. in Support of Respondents, at 29 n.57, Brief Amici Curiae of Innovation Scholars and Economists in Support of Affirmance at 28 & n.34, Brief of the Consumer Federation of America, Consumers Union, Free Press and Public Knowledge at 21, 27, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, No. 04-480 (March 1, 2005).

⁶⁴ I stress “potential” because a dilemma lurks in all collectivism: Collectivists want to grant vast powers to the very governments that they routinely denounce as stupid and corrupt. See CODE, *supra* n. 20, at 218. Violence was the purgative the let earlier collectivists escaped this dilemma: The Revolution would slaughter the unenlightened and clear the way for the Wise. But today’s Free Culture Movement does not advocate violence, and thus the old dilemma recurs. Hence Lessig’s latest crusade against “corruption”: He *must* purge government in order to make it worthy of the vast powers that he would bestow. See *generally* <http://change-congress.org>.

⁶⁵ FREE CULTURE, *supra* n. 1, at 204.

that one of these “different property systems” fails horribly. It has also shown that the other one works.

Lessig denies that these brute lessons of history could be relevant to his well-intended and sincere belief that replacing systems of private property with “different systems” would improve the material and spiritual well-being of humanity. He sneers, “[America] won the cold war; we believe property is the savior; we vilify or, worse, laugh, at anyone who questions the savior.”⁶⁶ Nevertheless, those who ignore the outcome of the cold war in their haste to replace property rights with “different systems” merely make themselves the farce that follows tragedy.

For example, here is FREE CULTURE arguing that Americans are too blind to see that property rights are a “monstrous” way to produce expression and innovation:

A simple idea blinds us.... So uncritically do we accept the idea of property in ideas that we don't even notice how monstrous it is to deny ideas to a people who are dying without them. So uncritically do we accept the idea of property in culture that we don't even question when the control of that property removes our ability, as a people, to develop our culture democratically. Blindness becomes our common sense.⁶⁷

And speaking of blindness to common sense and monstrous impediments to developing culture democratically, here is Fidel Castro using similar arguments to explain why he replaced copyrights with governmentally-administered rewards:

To our way of thinking, whatever is created by man's intelligence ought to be the patrimony of all mankind.

* * *

As of now, we announce our renunciation of all copyrights relating to our intellectual property and, *with Cuban intellectual producers protected by the Cuban government*, our country renounces all its copyrights.... That is, our books may be reprinted freely in all parts of the world, while we, on the other hand, assume the right to do the same. If all countries did the same, humanity would be the beneficiary.⁶⁸

Nor is FREE CULTURE's blindness to history accidental or isolated: One supporter of “government administered reward systems” actually laments that he cannot cite their obvious historic precedent because “*the visible example of rewards for authors in*

⁶⁶ Lawrence Lessig, *The Death of Cyberspace*, 57 WASH. & LEE L. REV. 337, 347 (2000).

⁶⁷ FREE CULTURE, *supra* n. 1, at 261; see *id.* at 270. This theme—“Americans are too stupid to think rationally about ‘property’”—pervades Free-Culture-Movement scholarship. See, e.g., Mark Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).

⁶⁸ FIDEL CASTRO SPEAKS, 214-219 (M. Kenner & J. Petras eds., 1969) (emphasis added). At least Castro made these arguments in 1967, when there was less blatant irony in Marx's claim that “communistic modes of producing and appropriating intellectual products” would work as well as its modes of producing and appropriating food. See Karl Mark, *Manifesto of the Communist Party* (1848), in THE PORTABLE KARL MARX 222 (E. Kamenka ed., 1983).

communist states was intimately linked with a highly objectionable system of censorship, on one hand, and state patronage of ideologically acceptable writers on the other."⁶⁹ Such feigned amnesia pervades the Free Culture Movement. Indeed, the philosopher Leszek Kolakowski—a non-tourist who experienced firsthand the “effective freedom” of a collectivist state—deems it characteristic of Lessig’s “crazy lefties”:

It would be difficult to think of books ... that explain and analyze... the [European or American] Leftists’ own misguided commitments, wrong beliefs, and false hopes. It seems that these people jumped from one fellow-travelership to another without explanation and without thinking about the past. The Soviet Union doesn’t look quite so good anymore? We have the glory of a new socialism being built in [Vietnam] and the immortal thoughts of Chairman [Ho]. Something wrong with [Vietnam], too? There is Cuba, the great hope of a people fighting the imperialist dragon. Fidel also not quite so perfect any more? Then let’s look for something else....⁷⁰

Worse yet, FREE CULTURE even suggests that history *indicts* property rights and markets. Lessig repeatedly implies that copyrights in particular and property rights generally caused the decline of the Soviet Union:

A world in which competitors with new ideas must fight not only the market but also the government is a world in which competitors with new ideas will not succeed. It is a world of stasis and increasingly concentrated stagnation. It is the Soviet Union under Brezhnev.

* * *

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.⁷¹

These claims fail even as metaphors. Even if excessive property rights *could* deter progress, not even tenure can make excessive private property rights “the reality of Brezhnev’s Russia.” Its “reality” was quite different, and while it was fading, economies

⁶⁹ Peter Eckersley, *Virtual Markets for Virtual Goods: The Mirror Image of Digital Copyrights?*, 18 Harv. J.L. & Tech. 85, 97-98 (2004) (citations omitted, emphasis added).

⁷⁰ Leszek Kolakowski, *The Heritage of the Left* (1995), in LESZEK KOLAKOWSKI, MY CORRECT VIEWS ON EVERYTHING 99-100 (2005). I substituted references to “Vietnam” and “Ho” for Kolakowski’s references to “China” and “Mao” because Kolakowski has nothing but contempt for “Leftists” who would praise the “effective freedom” of Vietnam. Compare *id.* at 101 (“Didn’t the Leftists of the 1970s know what Asiatic Stalinism meant?”), with CODE, *supra* n. 20, at 188 (claiming that the Vietnamese communism is “not anything like the communism that gave birth to the cold war”); but see COURTOIS, ET AL., THE BLACK BOOK OF COMMUNISM 565-76 (Harvard U. Press 1999) (recounting the similar programs and atrocities of Vietnamese and Chinese communism).

⁷¹ FREE CULTURE, *supra* n. 1, at 128, 305.

based on property rights and markets—those “regimes that require permission”—were generating innovation, expression, and widespread well-being.⁷²

At this point, one at least understands why Karl Marx would conclude that all human history must occur twice. Works like FREE CULTURE will scarcely let the tragedy subside before the farce begins.

III. Conclusion.

The preceding analysis shows that FREE CULTURE does demonize copyright owners and does urge the government to eliminate copyrights and impose “quasi-socialist utopianism.” Nor does this pattern stop with copyrights. Indeed, the preceding analysis shows Lessig has already claimed that to Save the Net, the government must nationalize or heavily regulate:

- The providers of Internet-access services that own the physical network infrastructure, (e.g., net neutrality);
- The providers of commercial internet applications and services, like eBay, Amazon, and Google (e.g., CODE); and
- The producers of digital content (e.g., FREE CULTURE).

In short, Lessig wants the entire Internet heavily regulated or nationalized. To convince America to do something so counter to both its practice and history, Lessig and other Free-Culture-Movement academics and groups must resort repeatedly to reality-defying histrionic prophesies of doom and gloom. Here, for example, is Lessig bewailing the demise of speech rights in Internet-Age America: “Only professionals get to address Americans on public issues.... The rest of us have a choice—listen, or be dispatched to the gulag of social lunacy.”⁷³

Those scary words were written by an Internet savant who has *no* computer-science or technology-related degrees. Free-Culture-Movement academics know all too well that Lessig is stunningly wrong. PROMISES TO KEEP shows that professors of intellectual-property law have moonlighted as critics of the music of Ms. Britney Spears. Conversely, singer Britney Spears has moonlighted as a commentator on intellectual-property law and the scope of the Supreme Court’s *Sony-Betamax* decision.⁷⁴ Neither professor nor singer were “dispatched to the gulag.” Indeed, Ms. Spears was rewarded: In *Grokster*, all nine Justices of the United States Supreme Court held, in effect, that

⁷² See, e.g., Leszek Kolakowski, *What Is Left of Socialism* (1995), in LESZEK KOLAKOWSKI, MY CORRECT VIEWS ON EVERYTHING 93 (2005) (noting that Marxism predicted that “the market will hamper technical progress”, while “[t]he exact opposite has quite obviously proved to be the case”); see also *id.* (noting that capitalism produced such abundance that its opponents had to reverse course and revile it “because it produces such abundance that it kills culture”).

⁷³ CODE, *supra* n. 20 at 166; see also *id.* at 41 (“Our democracy has atrophied.”).

⁷⁴ See Letter from Britney Spears to Senator Orrin Hatch dated July 22, 2004 (supporting an intentional-inducement rule as a “fair and balanced” exception to *Sony*)

Ms. Britney Spears understood *Sony-Betamax* better than 79 professors of intellectual property law, including five from Harvard Law School's Berkman Center for the Study of the Internet and Society.

FREE CULTURE—the copyright prong of the Movement's broad assault on property rights, markets, and commerce—also ignores basic realities. The author of FREE CULTURE, a declared “pessimist extraordinaire,”⁷⁵ sits in California, bewailing the anecdotal inefficiencies that arise when we use change-driving systems of property rights and markets to encourage production of socially valuable resources like expressive works. Never does he confront the antidote to his pessimism: Inefficiencies notwithstanding, both in California and across the United States, he is still surrounded by most of the world's most successful producers and exporters of both expression and innovation. Only by ignoring this can he shriek that in America, “it takes a studied blindness for people to continue to believe they live in a culture that is free.”⁷⁶

Actually, it takes a far more “studied blindness” to believe otherwise.

And it takes a contrived blindness to believe otherwise so firmly that you would tax technology in order to nationalize the production of expression. Doing so ignores a most relevant piece of history. During the latter half of the 20th Century, the United States emerged as a *uniquely* successful creator and exporter of a vast array of expressive works—from books, to music, to movies, to videogames and other software.

If you pause to ask why this might have happened, an interesting fact emerges: Unlike those in most developed countries, our government has traditionally supported expression *indirectly*, through market and non-market mechanisms that *minimize* the opportunities for government intervention in the content of expression.⁷⁷ No one should deny the consequences of breaking from that tradition.

Because, quite frankly, even those too tenured to foresee the consequences of spyware-powered Thought Police should still be able to admit that using taxes to fund expression will *inevitably* affect its content. PROMISES TO KEEP and FREE CULTURE refuse to confront this obvious result. And so they present us with a truly bizarre spectacle: Baby-Boomer-era academics arguing that while, sure, the kids may have been *alright*, the music of the 1960s and early 1970s would have been *so much better* had it been produced by Lyndon Baines Johnson and Richard Nixon.

⁷⁵ FREE CULTURE, *supra* n. 1, at 189; Lessig, *supra* n. 4, at 1790 (“my brand is pessimism, and so we need a good dollop of darkness”).

⁷⁶ FREE CULTURE, *supra* n. 1, at 187.

⁷⁷ See *generally*, TYLER COWEN, GOOD & PLENTY: THE CREATIVE SUCCESS OF AMERICAN ARTS FUNDING (Princeton U. Press 2006).

For these reasons, I submit that FREE CULTURE is a work that should be rejected by libertarians, conservatives, liberals, or anyone else concerned about reconciling the proven generative power of copyrights and other property rights with the now-obvious generative potential of the Internet. The many challenges inherent in that task *are* real, and grappling with them, *fairly*, is a job too important to be further delayed by collectivist histrionics. FREE CULTURE should thus be consigned to Trotsky's "dustbin of history"—along with PROMISES TO KEEP, KGB-style government surveillance of ordinary citizens, and "bland" communists like Stalin and Krushshev.

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