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MARXIST-LESSIGISM

Computer users of the world have united behind Stanford law professor Lawrence Lessig—and what they're doing is much more important than his critics realize.

By Dan Hunter

AT SWARTHMORE COLLEGE, the crowd is mostly students, and maybe a few professors and interested outsiders. It's a typical turnout for a public lecture by a well-known law professor. But there is something different and a little odd about this group. Swarthmore doesn't have a law school, so the audience includes no young men in suits that still have the label attached, and no young women with high-heeled shoes so new the soles aren't scuffed. And there is something else, something funny about the T-shirts. Everywhere you look, there are T-shirts with slogans, not logos. No "Tommy Hilfiger" and "Ralph Lauren" here. Just shirts with references too obscure to parse. What is "Downhill Battle"? Or "Grey Tuesday"? One kid has a shirt with the picture of a skull and crossbones on it, and written boldly across it are the words "Home Taping is Killing the Music Industry." Look closer, and you'll see, in tiny type, "(And it's fun)."

A couple of students get up to introduce the speaker. They're nervous, disorganized, and rambling. Now you notice the handmade signs: "Swarthmore Coalition for the Digital Commons" is taped to the lectern, and "Free Culture" is written on the wall. It starts to become clear. This isn't just a lecture; it's a political rally. People start to shuffle; the students are losing their audience as the garbled introductions continue. But when the speaker gets up to start, the shuffling ends and there is a ripple of excitement. He is Lawrence Lessig, the Stanford law professor, known to this crowd as Larry. Dressed in black and wearing a pair of spectacles that could have been handed down by Ben Franklin, he waits until the crowd settles. And finally, you get it. Outside, lightning is cracking, but the smell in the air is not the ozone from the thunderstorm. It's the smell of revolution.

INTELLECTUAL PROPERTY—"I.P.," AS IT'S CALLED—revolves around three basic property interests granted by federal statute: copyrights, patents, and trademarks. Copyrights cover expression by authors of various sorts, including books, plays, music, and so on. Patents protect underlying ideas of useful inventions and processes, such as a chemical reaction or an inventive mechanical device. And trademarks cover business brands. For much of the 20th century, these I.P. interests (and other close cousins such as trade secrets, unfair competition, and celebrities' publicity rights) were narrow and uncontroversial. Businesses in the industrial era cared about the factory, the production line, and the land needed for them. But as the modern era rolled on, the importance of industrial production waned. No longer were heavy machinery and physical plants the predominant means of production; no longer was physical inventory central to industry. In the developed world, control over intangibles came to dominate the business agenda, and so too the political agenda.

First introduced in the United States in 1790, copyright was limited in its infancy to protecting musical, dramatic, literary, and artistic works for 28 years, and it was later broadened to encompass photography, video, and software for a period often in excess of 100 years. Patent scope was widened, first to include computer algorithms and then business methods—including those such as Amazon.com's patent for one-click online purchases—and then life itself. In 2000, companies including Celera Genomics and Incyte started receiving patents on sequences of the human genome. Trademarks too were set loose from their historical moorings. Not only was the trademark term extended, but the prototypical application of a physical brand to a physical product
was no longer the limit of trademark. The sound of the Harley-Davidson exhaust for motorcycles or a distinctive color of dry cleaning pads was equally protected.

Though I.P. rights are private property there has long been some sense that the public also has interests here. The concept of the public domain was first advanced in 1896, when the Supreme Court noted that upon the expiration of a patent the invention "fell into the public domain" and was free for anyone to use. But over the decades that I.P. rose in importance, the concept of the public domain was ignored, or defined at best in negative terms. It was the carcass left over after the I.P. system had eaten its fill.

Still, the seeds of the movement that Larry Lessig now leads blossomed. In the late '70s, prompted by cases examining whether the heirs of Bela Lugosi and Rudolph Valentino could control the current and future representations of these dead actors, a young Duke University law professor named David Lange attended an entertainment law symposium to present a paper on celebrities' rights to their public image. Lange was surprised at the distress of the screenwriters who attended his talk and who argued that expanded publicity rights would reduce their ability to adapt, use, or reimagine these characters and their histories. As Lange described it, "the law of publicity was dispossessing individual creators in order to benefit the interests of celebrities." From this epiphany, Lange recast the public domain. Rather than the negative leftovers, he wrote in an influential article 25 years ago, the public domain was a vital, affirmative entity, the publicly accessible collection of knowledge, ideas, history, and expression on which creators draw in order to make new works.

The movement in defense of the public domain soon started to grow. Academic works in the '80s and '90s by law professors Jessica Litman at Wayne State University, Wendy Gordon at Boston University, Pamela Samuelson at the University of California at Berkeley, and James Boyle at Duke University explored the public domain's importance. Then, with the 1998 introduction of the Sonny Bono Copyright Term Extension Act and the Digital Millennium Copyright Act (or DMCA), the public woke up.

These statutes extended copyright terms, renewed copyrights on some works that had already fallen into the public domain, and forbade cracking digital locks on copyrighted material like DVDs. But they also motivated public interest groups as never before. Before then, corporate interests lobbied for I.P. expansion without much public comment. This changed overnight as the acts were widely seen as driven entirely by corporate interests, particularly Disney's fear that the first film featuring Mickey Mouse would soon fall into the hands of the public. Unanticipated uses of the DMCA also drew widespread attention. The first incident occurred when a Princeton computer science professor was threatened with prosecution if he disclosed research that he and his lab had performed in breaking a music encryption system. Then a Russian student was arrested while presenting a conference paper that demonstrated how he had cracked digitally encrypted electronic books. By the time students at Swarthmore College were threatened in 2003 with a DMCA injunction against posting details of a potential e-voting election scandal, the message was clear. The restrictions on speech, the threat to research and inquiry, the quashing of dissent, the jailing of researchers—all of Lange's worst fears and then some—were now being realized.

The consequent backlash came at a bad time for I.P. owners. The rise of file-sharing systems threatened severe damage to the music and movie industries, and perhaps television networks. And social reformers were beginning to question other parts of I.P. For example, the patent system came under attack for the damage it inflicted on developing countries that had been strong-armed by the United States into adopting U.S.-style I.P. laws. This led to an increase in I.P. enforcement around the world, but it also demonstrated the clear injustices in forcing the poor to dance to the I.P. tune of the rich. American pharmaceutical manufacturers were vilified because they refused to provide drug therapies for HIV/AIDS in Africa for less than their patent-monopoly-controlled price. All the claims that drug manufacturers needed this monopoly to produce other important drugs rang hollow with the millions of people in the developing world dying from AIDS and their sympathizers.

Thus was the culture war joined. This is not a war between cultures, but a war over culture—who owns it, who can use it in the future, and how much it will cost. On one side are the I.P. owners, with the money and the ear of government. Against them stand research and advocacy institutes, with names like Creative Commons or the Center for the Public Domain, and political action groups such as the Electronic Freedom Foundation and the ACLU.

RECRUITING AND LEADING A BATTALION FOR THIS WAR is what Larry Lessig is doing at Swarthmore on a wet night in April. He's talking about his new book, Free Culture, in which he argues for scaling back the copyright system. Lessig is a prodigy of the legal academy. Now 43, he earned a B.A. in economics and a B.S. in management from the University of Pennsylvania, an M.A. in philosophy from Cambridge, and a J.D. from Yale Law School. He clerked for Richard Posner of the Seventh Circuit Court of Appeals and for Antonin
Scalia of the Supreme Court, and he was a professor at the University of Chicago and Harvard Law Schools before Stanford lured him in a competition with Yale and Harvard. His r2sumŽ lists four books and 61 law review articles produced in his 15-year career as a legal academic. But not everything he has touched has turned to gold. While he has written about aspects of the Constitution dealing with subjects other than intellectual property, the constitutionalists in the academy greet some of that work with derision and even his admirers often consider him an extravagant self-promoter.

With his dazzling academic record, fiery rhetoric, and prolific writing, however, Lessig has become the most recognizable voice to articulate why it was a bad idea to privatize the open environment of the Internet, and how the expansion of I.P. threatens future innovation. Tonight he's lending support to a student protest group, one formed by the students threatened when they exposed the electronic voting scandal. Like other student groups, this one is renouncing private I.P. interests, has the word "commons" in its name, identifies with the I.P. have-nots, and invokes a class struggle. Means of production, communal ownership, class struggle, students with slogans on their shirts. Sounds like a Marxist revolution.

LIKE MANY OTHER I.P. REFORMERS, Lessig is routinely denounced as a communist. The most recent such attack was by a high-profile technology columnist named Stephen Manes. In several vitriolic attacks prompted by Lessig's Free Culture, Manes described Lessig as "blustering" and "blovatiating," a "buffoon" and an "idiot," whose ideas ("droppings") were "nuts" and "laughable." Manes contrasted Lessig's "radicalism" on copyright policy with the stance of "responsible creators" like Walt Disney, and made it clear that the sort of reform Lessig advocates is ideologically suspect because it involves stealing property from copyright owners. Manes proposed renaming Lessig's book, Freeloader Culture: A Manifesto for Stealing Intellectual Property. The allusion to Karl Marx and Friedrich Engels's Communist Manifesto is hard to miss.

Manes's attacks, though startling in their bile, are hardly surprising. He is a columnist at Forbes, a magazine that urbanely styles itself as the "Capitalist Tool." If any organ is going to spy Marxist leanings in the intellectual property reform movement, it is this one. Manes is not the first to sniff Marxism in I.P. reform proposals. A senior writer at the Ayn Rand Institute accused Lessig of Marxism a number of years before, suggesting that his efforts in the case of Eldred v. Ashcroft, in which Lessig argued for overturning one of Congress's many recent copyright extensions, were shameful and would lead to "cannibalism" of property interests. Mouthpieces for high-profile I.P. owners such as Paramount Pictures also smell "whiffs of Marxism" in the reformer's distaste for corporate control of culture.

The Marxist slur is a simple rhetorical device that paints I.P. reformers as both dangerous and willfully ignorant. Not only do they desire a Bolshevik revolution, and probably a Stalinist purge, but these reformers don't realize that the communists lost the Cold War. Yet this use of the "Marxist" tag is shallow and empty.

When people such as Manes or those at the Ayn Rand Institute charge Lessig with Marxism, they refer to two features of Marxist-Leninism: the rejection of private property, and the civil uprising that Mikhail Bakunin and V.I. Lenin said was necessary to move from capitalism to communism. The kind of social reform of intellectual property proposed by Lessig doesn't involve either of these elements. Lessig isn't some modern-day Pierre-Joseph Proudhon claiming that "intellectual property is theft." His reform agenda is the I.P. analog of the New Deal social welfarism that ameliorated the worst excesses of capitalism, and rescued it from social disaster. It's the recognition that private property systems function better if some limits are placed upon the market. Even many of the most ardent capitalists have learned the Marxian lesson that unrestrained free market capitalism creates a permanent underclass that is much more likely to revolt and overthrow the system. It's a better idea for the wealthy to provide a safety net for the lumpenproletariat than to be the first up against the wall when the revolution comes.

ON THE OTHER HAND, WHILE LESSIG'S PROPOSED I.P. REFORM stops well short of the destruction of private property, it stirs a Marxian debate in a much more interesting and crucial sense. For starters, it is clear that I.P. reform is a conflict involving a significant class struggle. There are I.P. haves and I.P. have-nots. And in a world where the means of production are increasingly controlled by intellectual property, the dynamics exist for significant conflict. But the majority of the I.P. have-nots are in the developing world, which is why the globalization debate often involves intellectual property. Any Marxist-Lessigist revolution therefore is likely to be mediated through the cordon sanitaire of international trade, and through the World Trade Organization. The prospect of I.P.-induced violence, at least in the United States, is unlikely.

But more than this, I.P. reform arises out of a genuine Marxism, that of the open source movement. Open source, or "copyleft," as the movement is often called, involves the transfer of the means of cultural and creative production from capital to the worker. It is usually thought to be
limited to computer software. The Linux operating system was created by thousands of programmers and has been freely distributed on the understanding that others might amend, fix, improve, and extend it. But while software might be the paradigmatic example of open source, the revolution it promises reaches much further. The widest-read and most influential newspaper in South Korea is Ohmynews, whose motto is "Every Citizen is a Reporter." Ohmynews hires no reporters, and relies wholly on individual contributions of news stories by its readers. Another example is the Wikipedia, an open source, online encyclopedia that is entirely written, edited, and rewritten by anyone who cares to contribute to it. Even though there is no control structure—there are no editors, nor is there a publisher—it rivals commercial encyclopedias in scope and quality of coverage. Or consider the Distributed Proofreader's Project, a group of people who volunteer to proofread and edit vast reams of scanned documents for inclusion in Project Gutenberg, another open source initiative that puts out-of-copyright books online.

Though Bill Gates recognizes Linux as a threat to Windows, it is easy to miss the truly revolutionary nature of this type of cultural production. If you give people the opportunity to create, they will do so, even without economic incentives. The core justification for intellectual property protection is that, without it, no one would have any reason to produce cultural, creative content. They would undertake a rational calculus and go off to become tax attorneys. But the dynamism of the open source movement shows that this fundamental justification doesn't hold. Many people will produce creative content even outside what we can think of as the capitalist underpinnings of I.P. It's a small step to go from this to a Marxist revolution: The open source movement promises to put the means of creative production back in the hands of the people, not in the hands of those with capital.

It is not an accident that open source and Marxist-Lessigist I.P. reform have occurred at the same time, or that Lessig is a prominent advocate of Linux. Open source software demonstrated that the "incentive justification" for I.P. wasn't supported once you put the means of creative endeavor and the means of dissemination in the hands of individuals, as the Internet has done for many fields. So, when the DMCA and other corporate-controlled I.P. expansions came about, programmers weaned on open source code no longer bought the corporations' arguments that these new laws were necessary for innovation and progress to continue. The I.P. movement began with software, but it is moving into all types of cultural material: newspapers, magazines, commentary, music, even movies. Given the experience we now have with open source, this is not strange. A Marxist might suggest that it is inevitable. What is unusual is how, in their rush to vilify Marxist-Lessigism, I.P. owners and copyright apologists like Stephen Manes miss the importance of open source, which, as the true creative workers' revolution, threatens the core of their industries. While copyright and patent reform might be the most visible aspect of the Marxist-Lessigist revolution, it is the least significant.

IT'S STILL RAINING AT SWARTHMORE. Larry Lessig is explaining the importance of the public domain as a source for future creativity, when a series of thunderclaps shakes the auditorium. For a moment everybody stops. Lessig jokes about the "black helicopters" of the I.P. owners, and people relax.

At the end of his presentation, student activists swamp him with requests for guidance about what they should do next. They plot how to reverse the enclosure of the public domain. If nothing else, these students are engaged with the political process of intellectual property in a way that has never been seen before. The expansion of I.P. has led to the creation of a movement that is fascinating in two ways: It guarantees that the public will have a voice in future I.P. policy making, and it has created a new kind of student movement that is one of the more active political movements on college campuses. There are no riots, but this movement promises a more socially conscious intellectual property system, one achievable without bloodshed.

But away from the zeal of the student activists, the real revolution is taking place. None of the revolutionaries recognize themselves as such—they're just open source programmers or "citizen journalists." But they promise to upend the intellectual property system because they are creating things for the sake of curiosity, or for the approbation of their peers, or because it's fun. This revolution will just happen, as people take up the means of production for themselves—and even if it won't be televised, it will surely be reported in Ohmynews.

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