"Ten Years of Chilled Innovation"
That's the fallout from the Supreme Court ruling on file-sharing technologies, says Creative Commons chair and law prof Larry Lessig

For years, Larry Lessig has been at the increasingly contentious frontier where intellectual-property law meets technology innovation. A professor of law at Stanford Law School, he's the author of the books Free Culture, The Future of Ideas, and Code and Other Laws of Cyberspace.

He also chairs Creative Commons, a nonprofit project that offers flexible copyright arrangements for creative work. And most recently, Lessig argued before the U.S. Supreme Court in Eldred v. Ashcroft against extending copyright terms, though his client Eric Eldred ultimately lost the case in early 2003.

Lessig's experience makes him uniquely qualified to render his opinion on the landmark June 27 decision by the Supreme Court in MGM v. Grokster to side with recording studios and against companies distributing peer-to-peer file-sharing software that lets people trade commercial songs for free.

He's somewhat pleased that the court's decision to send the case back to the Ninth Circuit court in effect upheld an earlier Sony (SNE) decision involving the Betamax VCR, which declined to hold manufacturers liable for illegal acts by their users. But Lessig contends the Supreme Court's decision will chill innovation by introducing a new level of uncertainty about whether a technology creator had an intent to allow copyright infringement.

He spoke the day after the decision with BusinessWeek's Silicon Valley bureau chief, Robert Hof. Here are excerpts from their conversation:

Q: What do you think of the decision?  
A: This is a pretty significant defeat here. Certainly the result is better than what the MGM companies wanted -- because they wanted the Sony case modified -- and [Justice David Souter, who wrote the decision, isn't] modifying Sony. But still, this intent standard...will invite all sorts of strategic behavior that will dramatically increase the cost of innovating around these technologies.

Q: How so?  
A: Imagine that you're a company with a copyright and you see a company coming out with a technology you don't like because it's challenging your business model. We've seen lots of these -- for example, ReplayTV, or the VCR. Obviously, if the technology is illegal, you can just get it stopped.

But a second way to stop the innovation is just to litigate. Look what happened to ReplayTV: It spent years and millions of dollar litigating to defend its right to have the ReplayTV technology as it was. Essentially, it had to fold the company because the legal standard then was so uncertain that you had to get to trial before you could resolve the case.

Q: What's the alternative?  
A: Congress can regulate, as Congress has repeatedly regulated in the context of new technologies. They can decide whether technologies are good or bad.

The thing about Congress regulating new technologies is that if you're a new innovator, you're worried about it, but it's not the sort of thing on which you'll have to spend millions of dollars in litigation costs on the first day you walk out the door.

Q: So the problem with the decision is just that the Supreme Court rendered an opinion at all, rather than letting...
legislators decide?
A: Right. By making it a process that goes through the courts, you've just increased the legal uncertainty around innovation substantially and created great opportunities to defeat legitimate competition. You've shifted an enormous amount of power to those who oppose new types of competitive technologies. Even if in the end, you as the innovator are right, you still spent your money on lawyers instead of on marketing or a new technology.

In Congress, we might have a lot of argument about what the statute should look like. But that would be a process that would resolve this intensely political issue politically. Instead, Justice Souter engages in common-law lawmaking, which is basically judges making up the law they want to apply to this particular case. And not just Supreme Court judges -- what they've done is invite a wide range of common-law lawmaking by judges around the country trying to work out the details of what this intent standard really is.

Q: Do you think in fact we'll see a dampening of innovation?
A: Yes. Now, I don't think we're going to see tons of litigation. What you're going to see is innovation that's channeled in ways the copyright owners can agree to, or channeled in ways that avoids any kind of possibility of this kind of litigation.

That has already had its effect in the Valley, and already money has shifted into places which will avoid any conflict with the copyright holders. Why buy a lawsuit when you can buy a new innovation that doesn't get you a lawsuit? And you don't even see it -- you don't even know what you don't get because people are afraid.

Q: Why do you think the Supreme Court decided to take on this case rather than letting the issues get decided in Congress?
A: Increasingly, this court is oblivious to the costs of its own decisions. The Reagan Administration pushed the regulatory-impact statements. I think we need an equivalent Ronald Reagan to push the judicial-opinion-impact statement that tries to calculate the efficiency costs of certain legal rules. I continue to be disappointed in Justice Souter's obtuseness to the costs of the complexity that he adds to the copyright system.

The harm of what the Supreme Court did is totally independent of this particular case. It's about changing the way innovation happens. Now, when you innovate, you're going to have a legal review -- what can you say, what kind of things can you signal.

Q: How does the decision make the legal situation less certain for tech companies?
A: Take the number of [Apple (AAPL)] iPods sold and take the number of iTunes songs sold, and divide it, and it's something like 25 songs per iPod. You know there's more than 25 songs on every iPod. Where did people get their music? Well, they rip it from their CDs. Is that legal? Good question. It's not protected by the audio home recording act, which explicitly said you're allowed to make an analog copy of your CD. But on the iPod, it's a digital copy.

Ask [former Motion Picture Association of America CEO] Jack Valenti or ask the recording industry whether it's fair use to be copying CDs. Well, they don't think it's fair use. So in selling iPods...[Apple is] encouraging CDs to be ripped. If it weren't Apple, which is a relatively strong company, but another company that's starting with this new technology, what would happen if you filed a lawsuit against them? Your lawyer would tell you, you can't afford to fight this.

Q: One might say it's not Apple's strength protecting it, rather that it puts a wrapper on iPods that says "don't steal music," thus indicating a clear intent to discourage infringement.
A: I don't think that's right. Is a warning a sufficient step? Probably not, or at least there's a pretty good question whether it's enough.

Go back to the Sony Betamax case. The Sony Betamax was developed and advertised in a way that they knew they were encouraging certain kinds of behavior [copying movies], over 90% of which was illegal. Would that case have really survived the standard that was announced in Grokster? I don't know.

Q: So it's not at all clear what startups should do to avoid lawsuits?
A: No, [it's not clear]. It's going to take some time. It might take 10 years of litigation to get a clear sense of this. That's 10 years of chilled innovation. That's really quite costly.

Q: What role could or should Congress have now that the key issues in this case have essentially been decided?
A: All the pressure for Congress to pass a statute now has been removed because the Supreme Court has given the industry what it wanted. That's the perversity here. It's not like these were a bunch of poor immigrant workers who couldn't get Congress' attention. This is an industry that can get Congress to jump through hoops whenever it asks. And it was struggling because there's so much opposition to this kind of legislation that you never saw Congress able to pass something.
Q: What do you see doing personally or with your allies?
A: Too much of the attention on these issues has been focused on the "piracy" question. Instead, we've got to focus people on really much easier questions that the law is just as grotesque about. I'm more concerned about getting people to see how copyright generally is imposing such a burden on innovation and creativity in lots of areas that we ought to simplify it.

I want people to think about, for example, Wal-Mart (WMT) refusing to print images [if the chain decides the digital photographs a customer submits could be copyrighted]. When people see examples like that, they're much more likely to be on the side of reform.

Q: So this court decision could actually focus more attention on your efforts at Creative Commons?
A: If we had a stock price, our stock price would have shot up after the decision. One very effective way to architect your product to control illegal use would be to add Creative Commons licenses to it. So here we are, open for business, giving away free tools for avoiding Grokster liability.

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Nickname: beazle
Review: As I understand it, the key point in this decision has to do with intended product use as implied in the business model of the defendant. The gun industry might want to think about this. Innovative technology enables gun manufacturers to make gun surfaces that hide fingerprints of weapons users by making them unreadable. Who does this appeal to except for gun users who don't want their fingerprints found by law enforcement on the weapon they use. While there may be legitimate reasons for this, I can't think of any and the only explanation I have ever heard from gun manufacturers is that the special surface "resists rust." I would suspect that many of these weapons are used for illegal activities and that the gun manufacturers and their sales agents know that is the appeal of the product to the user. Based on the decision handed down in MGM v Grokster, prosecution of gun manufacturers and their sales agents for making and selling weapons of this type may now be appropriate.
Date reviewed: Jun 30, 2005 12:00 AM

Nickname: len
Review: Or maybe it is time for innovation to chill for 10 years. In an information ecosystem, there is no right or wrong-- just nodes sending, receiving, modifying, and deleting. The aggregate effect of push-back from the industries vested in selling information is entirely predictable, predicted, and normal. If the system decides it is time to sit down and ponder, it just does.
Date reviewed: Jun 29, 2005 10:33 PM

Nickname: Bruno
Review: Amazing to see the most powerful country--from an economical and perhaps technological--point of view behaving like a snake trying to bite its own tail. This situation moves me to laugh and/or to cry. The US is still an example for the rest of the world, but this time, an example of what should not be done.
Date reviewed: Jun 29, 2005 9:40 PM

Nickname: murph