

March 01, 2010 Monday

Lessig Scores Congress as Captive, Apple as 'Tone-Deaf' on Sharing

SECTION: Vol. 11 No. 39

LENGTH: 1186 words

Supporters of fair use and the digital remix culture are winning in the courts, but they can't get the copyright changes they need out of a Congress whose captivity to corporate money can only get worse with the Supreme Court's recent ruling on campaign finance, Harvard law professor Lawrence Lessig said on a webcast organized by the Open Video Alliance. Apple would do well financially to take a lead from Google and open its technology platforms -- but a push from 'free culture' supporters could help it along, he said.

'Amateur creativity' involving the use of copyrighted works should be exempted from charges of infringement, Lessig said: 'Not fair use -- free use.' There's no substantial commercial market for the mashups and they don't cut into demand for the works they sample, he said. 'Fair use is also important,' Lessig said, calling himself a 'reluctant proponent' of the doctrine. It doesn't mean unlimited P2P file-sharing, but it does mean a great deal of activity is off-limits to copyright enforcement, he said.

The conventional 'Britney Spears model' of centralized production and distribution for maximum profit must be protected, but to 'encourage the widest spread and development of culture,' so must a 'build-and-share-freely model,' Lessig said. He showed and praised clips from an online video on this point by the **Cato Institute's** Julian Sanchez.

Copyright law needs to change to get 'orphan works,' those whose rightholders can't be found, into the public domain, and to require holders to step forward every several years to maintain their rights, Lessig said. But this kind of 'copyright maintenance' requirement, like one in patent law, is considered 'almost a sin in the IP universe,' he said. Lessig called this view a 'perversion' of the law. The Google Book Search settlement showed 'genius in the way in which it solved' the orphan-works problem, he said: 'But the problem shouldn't be settled this way,' because it's a legislative issue.

'Congress has yet to make any progress at all' on fixing copyright law, Lessig said. 'It is a hopeless situation' under the established lobbying and campaign-finance setup. 'There will be no such thing as change until we change this culture.' He encouraged listeners to contribute time to his efforts to overhaul the relationship between Congress and corporate money. Meanwhile, though, 'the courts are increasingly getting it right' by 'shifting the line' to protect creative freedom, he said.

Time limits on U.S. copyrights should be 'much less' than they are now, and no copyright should be extended, because the possibility of prolonging rights gives holders great incentive to lobby to lengthen the time, Lessig said. He lost the Eldred case on the constitutionality of extension legislation in the Supreme Court.

Lessig took questions that viewers sent over Twitter and identica, a free-software microblogging service. The event hashtag 'trended' in the U.S. on Twitter as one of the most popular topics during Lessig's talk, organizers said.

Thousands of people around the world watched the 80-minute webcast, believed to be the largest streaming event ever using nonproprietary technologies, said Ben Moskowitz, the video alliance's general coordinator. He estimated that more than 1,000 people attended 32 formal viewing events on four continents. The largest crowds, of 150-200 each, were in Toronto and at Stanford University, where Lessig taught until this year, and in Cambridge, Mass., where he spoke. About 3,000 others watched the webcast on their own, as many as 700 at a time, Moskowitz said. A crush of traffic just before the scheduled start brought down the alliance's server, delaying the event about 20 minutes, he said. Moskowitz said he expects 10,000-15,000 people to have seen it within a week. The alliance hopes to do additional webcasts with speakers such as Wikimedia's Jimmy Wales and New York University's Clay Shirky, he said.

Internationally, allowing countries to take their own approaches to copyright is better than imposing uniformity, Lessig said. The U.S. Trade Representative's Special 301 Report listing of 'pirate nations' (WID Feb 23 p2) runs contrary to that principle, he said. Lessig said foreign governments can't 'experiment' with the 'full version' of the voluntary or mandatory collective licensing he supports without running afoul of the TRIPS Agreement on intellectual property. The idea that consumers in the U.S. and China should pay the same for a piece of content is 'crazy,' Lessig said.

Choosing between the fair-use approach of the U.S. and the more specifically defined copyright exceptions in European countries and Japan is difficult, Lessig said. Fair use sacrifices clarity for the benefit of flexibility, including in response to new technology, but only for suspects and defendants who can afford court fights, he said. There's a proposal in Japan for 'layering on fair use' to specific protections, 'which might make a nice hybrid,' Lessig said.

Leaders in Hollywood and the music industry have adjusted their thinking to the point that they now sound just like copyleft activists of several years ago, Lessig said. Established companies should recognize out of financial self-interest that they should take advantage of the interactivity of digital media to make use of content created by consumers, the way Amazon, Flickr, Google, Twitter and Yelp have, he said. But they shouldn't adopt the 'sharecropping vision' of the Star Wars mashup sites and David Bowie, soliciting works by fans but claiming all copyright in them, Lessig said. 'More and more businesses' will recognize that they'll do better respecting the creativity of users by allowing them the copyrights, he said.

'Google should be paying for the remixed content' posted on its YouTube, Lessig said. The law is 'backwards' now, he said: It makes users posting mashups liable for copyright infringement and immunizes companies that accept them.

Users should be allowed flexibility to download content in the formats most convenient to them and do with it what they want, Lessig said. It shouldn't be wrapped in DRM in a way that disables them' or put under unreasonable legal restrictions, he said. Blip.tv recognized this from the start, and YouTube is moving that way, 'maybe not quickly enough,' Lessig said.

'The urgency to solve these issues is becoming more intense as mobile technology becomes the default platform' for online communication and entertainment, Lessig

said. 'Heavy protection is going to make no sense' as users demand portability, he said. And 'we need a culture where you can hack devices as easily as you can content,' Lessig said. 'Platforms and hardware have got to be part of this.'

'There's something tone-deaf about Apple,' Lessig said. The company insists on full control of its technologies and is 'aggressive in attacking' anyone who tries to tinker with them, Lessig said. Google's Android operating system, in contrast, 'invites tinkering' -- 'free software development' -- and eventually will 'outcompete' Apple in applications, though 'it obviously hasn't so far.' -- Louis Trager