

**Lawrence Lessig: Free Culture.  
How Big Media uses Technology  
and the Law to lock down Culture  
and control Creativity, New York:  
Penguin Books 2004, 368 Seiten.**

Rezensiert von  
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In 1998, Congress of the United States of America passed the Sonny Bono Copyright Term Extension Act (CTEA), which extended the duration of a work's copyright by twenty years – from its author's lifetime plus 50 to its author's lifetime plus 70 years (respectively 95 instead of 75 years after a work's creation). Consequently, all copyrights supposed to expire in 1998 were prolonged until 2018, hence, no creative work is supposed to be added to the public domain before.<sup>1</sup> Obviously, this law conflicted (and still does so) with the interests of those intending to publish original works or derivatives which originally should pass into the public domain during this time span. One of those enterprises attracted Lawrence Lessig's attention and caused him to contest the CTEA in court by trying to prove its unconstitutionality. Though the case was unpredictably accepted by the Supreme Court and argued in October 2002 and given a certain chance to be won, the attempt to stop the revision of copyright did not succeed.<sup>2</sup> Lessig challenged the CTEA by convicting its initiators of violating two important principles of the US Constitution and its First Amendment. In particular, he argued that the repeated prolongation of copy-

right would in praxi conflict with the Copyright and Patent Clause and the guarantee of free speech in the First Amendment. The contradiction to the first, which Lessig refers to as Progress Clause consists in the repetition of extending existing copyrights because this would equal a (at least possibly) perpetual copyright protection and "there would be no effective constitutional requirement that terms be 'limited'"<sup>3</sup>. Thereby, Congress would exceed its competence according to the Copyright and Patent Clause and act unconstitutionally. Second, the CTEA is contended to affect the freedom of speech since, due to market selection processes, a smaller percentage of all creative work would persist extended copyright terms and would be accessible, in particular, for the production of derivative work. Yet, this "surviving" fraction would mainly consist of commercially valuable products (qua their popularity) while others would cease to exist. Therefore, the extension of existing copyright terms menaces free speech as "Congress gives [certain] people an exclusive right to speak in a certain way, [and] that's just what the First Amendment is traditionally meant to block."<sup>4</sup>

Here, Lessig concentrates on the deontological facet of his argument insofar it is based on constitutional principles, the presupposition that the CTEA is unconstitutional and assuming that any "faithful interpretation" of the constitution obliged the Supreme Court to decide accordingly.<sup>5</sup> The revised line of argument in *Free Culture*, however, emphasises the harmful consequences of a restrictive copyright simultaneously altering its rhetorical attitude from an apolitical, "rational" to a political, passionate manner with regard to the pu-

blic who ought to be convinced rather by a worst-case scenario than by an academic legal disputation.

Given their temporal proximity, Free Culture appears to be another effort to defend the case Lessig brought to the Supreme Court. The modified argumentation serves as compensation for mistakes causing his failure and as justification of his and his client's position *ex post*. Despite its plausibility, Lessig's reasoning is based on particular interpretative assumptions concerning traditional American values, especially freedom, property, democracy and (cultural) progress from which contrary conclusions may be drawn with the same argumentative authority gained by applying traditional rhetorical techniques such as referring to *auctoritas* and *exempla* as well as to certain *topoi*, i. e. to frequently consulted persuasive issues.

The foundation fathers of the American Constitution together with the Constitution itself, incorporating the benevolence towards the American people and their welfare, are awarded the highest *auctoritas* among all examples Lessig applies to within Free Culture. The codification of essential practices and values the foundation fathers intended to persist over time despite of social and technological changes requires, Lessig argues, more than acting only according to the Constitution's semantics, but acting according to the intentions behind by transforming its immanent values into the present circumstances.<sup>6</sup> If due to substantial technological changes this is not possible the new scope of action ought to be organised by conventions based on a common consensus on the interpretation of original values in this specific context. In particular, this hiatus in constitutional

determination accrues when technological constraints of the executive power expire or new means of imposing control on certain actions or processes are developed giving way to the government (Congress) to expand its power on the expense of the citizens' liberty.

Lessig's appreciation of the constitutional values discords with his view of the Constitution's self-protection mechanisms which he considers to be ineffective given the mentality of both, the executive as well as the judiciary. In particular, he accuses them to use the opportunity of legally unregulated spheres in social life to enlarge the executive's control mechanisms – respectively to tolerate this practice. Therefore, he believes society's central values to be constantly threatened by those who influence legislation – be it directly or indirectly, e.g. by lobbyism.

Obviously, freedom, in particular free culture, is the central value Lessig advocates – due to the plausibility an argumentation supporting liberty imparts to his thesis. Although he defines free culture to be the balance between an “anarchic” culture (synonymous to “non-property”) on the one hand and a “permission” culture on the other, the notions of culture and cultural progress themselves remain undetermined: Cultural progress seems to contain a rise in the mere quantity of cultural products and the livelihood of a creative “scene”. However, Lessig refers to three aspects of freedom as an individual person's ability to act without underlying certain external restrictions, all of which belong to the columns of the American self-image. Freedom, defined positively (the individual's ability to act autonomously) and *ex negativo* respectively (the

absence of force or limitations imposed by others), is represented in the US Constitution as well as in Lessig's argument since he equally emphasises the importance of minimising control over cultural processes and the state's target to induce incentives for artists or authors to create. Additionally, both understandings of freedom are closely linked to the ideas of economic liberty and property rights as necessary conditions on the one hand and, on the other hand, to the idea of cultural, economical and scientific progress resulting from a liberal social order.

With respect to liberty, property, in particular private property is an ambivalent institution because the rights certain individuals hold by owning objects correspond to complement obligations of others to abstain from using them. Liberty derives from the rights concerning private property themselves, from privacy and independence from others, which they guarantee and, last but equally important, the freedom of speech and political attitude provided by the diversification of ownership of media and the "means of intellectual and political production".<sup>7</sup> Given this ambivalence of property, Lessig's position on intellectual property becomes more understandable: Based on the assumption that cultural progress is a value itself, he aims at avoiding a state in which creators are not inclined to create. This can be the case either if intellectual property does not exist at all ("anarchy"), if it cannot be unambiguously allocated to its owner or if it is overregulated viz. if a disproportionate fraction of intellectual goods underlies private property restrictions respectively is concentrated in the hands of few individuals or, even worse, corporations ("feudalism"). The em-

phasis on liberty as well as the dissociation of what Lessig calls feudalism are not far-fetched if one considers his historical allusions: the negative examples of the British monopolist system of intellectual property in the 17th and early 18th century and the insecure and arbitrary circumstances in the former Soviet Union.

The semantics of Lessig's criticism reveal some of his basic categories in perceiving and analysing social reality. The appreciation of the individuals' privacy and liberty rights is contrasted by Lessig's hostility towards agents such as economic corporations or Congress. This attitude shows a fundamental mistrust of any kind of collective agency (indicated by several references to the Soviet system) viz. any kind of social system in which groups or corporations – in some cases represented by a concrete person who can act and communicate on their behalf – function as full social agents. His attempts to change "common sense" or to start some culture liberation movement do not object this allegation since the commitment of wide sections of the population to a certain idea is, first, a genuine feature of democracy, second, involves the majority of the population in the ideal case and, third, primarily implies the participation of a score of individuals in a common goal. On Lessig's individualistic account of social agency combined with his preference for transparent structures, a suspicion about group agents whose structure and influence on social or political processes can neither unambiguously be defined nor be held responsible for certain developments seems to be only consequent.

His tendency towards personifying corporations or other collective agents is

supported by the implementation of examples illustrating creative progress and its consequences, eo ipso a classic means of delectation, relaxation and gain in plausibility and sympathy for the orator's position. These examples take the following general form: an individual creates or invents something which is able to improve an already existing technology and can as such contribute to increasing overall benefits, i. e. cultural progress. The public reacts in one of two possible ways – either, the innovation is gracefully welcomed (e.g. in Walt Disney's case) or contested, the latter resulting in the accommodation of common sense and the enforcement of the invention (e.g. the airplane), or in the contesters' victory – and the invention's delay or even disappearance to the public's detriment (e.g. the FM radio).

This structure again shows three assumptions on history Lessig implicitly bases his argumentation on: first, history appears as a directed, continuously advancing process tending towards a rise of positive and negative liberty insofar it includes the amplification of the individual scope of action as well as the increase of the cultivation of human beings and their cultural environment. Progress is therefore positively connoted promising further benefits for every member of society if it is unlimitedly left to itself. Second, the motor of history is represented, on Lessig's account, by individuals transforming the cultural reality they find into a higher, improved state with better living conditions obtaining. This explicates the cause for the pathos characterising Lessig's description of society's benefactors and the hideous picture he draws of reactionary opponents to progress whose interventions in cultural and politi-

cal enhancements are directed on behalf of protecting their private sinecure at all (social) costs. The observation of this unequal war on cultural protectionism gives, third, rise to an ambivalent attitude towards history contrasting the ideal of progress to the reality of regressive restrictions resulting in a pessimistic attitude towards political decisions and a descendent view of the development of liberty in history.

Rhetoric as *ars eloquentia* or *bene dicendi scientia* generally helps authenticating an argumentation – whether the arguments themselves are cogent or gain their plausibility from the form of their ventilation. The persuasiveness of Lessig's argumentation in *Free Culture* is by no means accidental, but entirely intended and achieved by exerting certain stylistic devices of classical rhetorics. In particular, his reasoning employs the *auctoritas* of genuine American values partly personalised in the exempla Lessig presents, thereby observing classical rhetoric as well as historiographic techniques. Thus, it is not surprising to conclude that Lessig's arguments in substance derive from values whose assumption and interpretation is based on Lessig's decision and the cultural context he stands in rather than on necessity. A systematic examination reveals the categories by which they seem to be "natural" or, at least, logically deducible from a certain cultural and constitutional background: This emerges as essentially depending on social conventions and even the same values can give rise to contrary implications for political actions given a modified interpretation – not to mention that taking values such as liberty, property or progress for granted itself is anything but self-evident. But this is exactly what Lessig does, though he fre-

quently reassures the importance of common sense and public discussion in establishing a society's values – he neglects that the normative validity of particular ends is a matter of decision, not of deduction.<sup>8</sup>

Annotations:

- 1 Unless the U. S. Congress does not extend copyright terms again. – Cf. L. Lessig, *Free Culture. How Big Media uses Technology and the Law to lock down Culture and control Creativity*, New York 2004, p. 214.
- 2 *Eldred vs. Ashcroft*, decided January 15th 2003, Syllabus, retrieved from <http://www.copyright.gov/docs/eldreds.pdf> on May 26th 2007.
- 3 Lessig, op. cit., p. 218.
- 4 Ibid., p. 234.
- 5 Ibid., p. 230.
- 6 L. Lessig, *Reading the Constitution in Cyberspace*, Harvard Law School Faculty Workshop, Cambridge, Mass. 1997; available from: <http://ssrn.com/abstract=41681>, retrieved on May 4th, 2007, p. 1.
- 7 M. Friedman, *Capitalism and Freedom*, Chicago 1962.
- 8 Cf. M. Weber, *Der Sinn der 'Wertfreiheit' der soziologischen und ökonomischen Wissenschaften*, in: *Gesammelte Aufsätze zur Wissenschaftslehre*, Potsdamer Internet-Ausgabe, retrieved from: <http://www.uni-potsdam.de/u/paed/pia/index.htm>, on May 23rd, 2007, pp. 507 n.

**Klaus Schwabe: Weltmacht und Weltordnung. Amerikanische Außenpolitik von 1898 bis zur Gegenwart. Eine Jahrhundertgeschichte, Paderborn: Ferdinand Schöningh 2007 (2., durchges. Aufl.), 560 Seiten.**

Rezensiert von  
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Klaus Schwabe, emeritierter Professor für Neuere Geschichte an der Technischen Hochschule in Aachen, hat 2006 – so der eigene Anspruch – „eine Jahrhundertgeschichte“ der amerikanischen Außenpolitik vorgelegt, von der bereits die zweite Auflage in den Handel gelangt ist. Dieser hohe Anspruch fordert zur kritischen Überprüfung heraus. Betrachtet man zunächst Umfang, Systematik, Informationsfülle und Lesbarkeit, ist zu konstatieren, dass die Monographie dem durchaus gerecht wird. Im Vergleich zu anderen deutschsprachigen Autoren, die sich während der letzten Jahre in Buchform zum selben Thema geäußert haben (wie St. Bierling und Ch. Hacke)<sup>1</sup>, beginnt Schwabes Jahrhundertgeschichte früher (nämlich 1898) und folgt in seiner Dreiteilung „Imperialismus“ – „Weltmacht“ – „Supermacht“ einer überzeugenden, bündigen und von profundem Kenntnis zeugenden Systematik. Dem Buch kommt dabei zweifellos zugute, dass dabei nicht (wie bei Ch. Hacke) die Amtszeiten der jeweiligen Präsidenten zugrunde gelegt, sondern thematische Schwerpunkte gesetzt werden. Die Poli-