

of the bandwagon, and marketing and advertising. Online as off, people's choices are influenced by circumstances beyond their control. The word "natural" is a mystification, given that the systems being discussed—technology, markets, and culture—are not found growing in a field, nurtured by dirt and sun. They are made by human beings and so can always be made better.

THE DOUBLE ANCHOR

Not long after the premiere of my documentary *Examined Life*, a film made up of a series of walks with contemporary philosophers, I found the entire thing online, ninety minutes posted in full or cut into random snippets spread across the Internet. I had expected such a thing to happen and had planned my response: a pleasant note that began in a tone of gratitude, thanking the various uploaders for their enthusiasm and support of the project. Then I told them that the movie had been quite costly to produce and we were about to release it in theaters and to home viewers. I'd like a few months, I went on, to try to recover some of the film's expenses by charging people to see it, in part to encourage future investment in similarly offbeat work. After this window I was prepared for people to post the film. Would they mind, I wondered, removing the clips in the interim?

Of the four or five people I wrote to, only two bothered to reply. One remarked that since my film was about philosophy and since philosophy, in a moral and historical sense, belongs to everyone in the world, my film does, too. It also should be accessible to people in

the developing world, this person added. The other respondent essentially took the same view while adding a few expletives, telling me that philosophy is free.

The movie clips remained online and I gave up on writing to strangers. I had naively dipped my toe into an angry debate about the future of media, the technical infrastructure of the Internet, computing capacity and software design, the history of intellectual property, theoretical questions about cultural value and ownership, utopian visions of open access to art and ideas, and quotidian considerations about the ability of creative types to make a living from their work. I had stumbled into the copyright wars.

My first documentary was about a Lacanian Marxist cultural theorist, so perhaps I'm more inclined to agree with the unrepentant uploaders than most filmmakers. Philosophy does indeed belong to everyone; knowledge cannot be owned and we have a responsibility to share it. Isn't that what the Enlightenment was all about? I also believe we makers of art and culture do not, in a strict sense, possess the work we make, at least not in the way I own the mug I'm drinking from or the socks I'm wearing. Like most cultural producers, I create to affect other people, which means, in a sense, that I want the audience to take ownership of the work, to incorporate it, to make it part of themselves.

As a documentarian it's particularly difficult to delude myself into thinking I'm somehow the sole proprietor of my productions; I didn't invent the reality I film or dream up my subjects or script what they say. The work is made from the world and is part of it; in a fundamental way, it is part of what people now call the cultural commons, the vast repository of art and ideas that is our collective inheritance, the fruits of human imagination and invention that all acts of creative expression build and expand upon.

My aim has been to make philosophy more accessible by using the power of cinema to convey ideas that might intimidate or bore

in another context. The problem is that making movies is not cheap, even in this age of digital video, and support for unusual projects is dwindling. My film, which had the backing of an independent production company in Toronto, cost over five hundred thousand dollars to create, a whopping sum I disbelieved until I began to compose the budget line by line. I was paid a flat fee of twenty thousand dollars for more than two solid years of work, a modest income but one for which I was incredibly grateful, given the opportunity it represented and basic survival it ensured, at least when coupled with a credit card.

The rest of the funds rapidly diminished, even though my crew and I stayed in one-star hotels with shared bathrooms and sublets found on Craigslist and I served as field producer, location scout, driver, production assistant, and coffee runner. There was gear rental, wages for sound and camera, travel costs, tape conversions, an editor, a sound mix, insurance, and so on. On one occasion I drove an interviewee around in my old station wagon, hands on the wheel, while trying to hold a conversation through the rear-view mirror.

Though the film was not conceived to make a profit, there was the hope that it would recoup some of the costs, or that the process of promoting and screening it might let us break even, a challenge given that many independent films lose money in theatrical release. Small companies in Toronto and New York City had invested scarce resources into the distribution, paying for film-outs and high-definition copies and DVD screeners and mailing lists and spending time and energy spreading the word. If not for such expensive efforts, I doubt anyone would have even heard of the film to upload it.

While we all know what "expensive" means, "free" has a fundamental ambiguity, an ambiguity central to the Internet. Free can mean something that no one can own, that belongs to all. It can also mean free in cost, like Socrates's teachings in the streets of

Athens for which he famously refused to take a fee. There's "free" as in speech and "free" as in beer, as the famous software programmer Richard Stallman likes to say.

In the digital world both kinds of free are heralded as the future. The Internet, as some techies point out, is nothing if not a copy-making machine, a place where replicating things and passing them along are effortless and essential, whether the file contains a short text message or a pornographic image or a movie that took me years to make. Every time you send an e-mail to a friend or refresh your Web browser, a facsimile is made. First something is copied into your computer's memory, then maybe to your computer's CPU, then it goes out into the network, and from there to the other people's computers, and the process repeats itself, replication occurring at every step. In a digital realm, unlike its analog counterpart, digital copies never degrade; each one is as perfect as the copy before it. We can share, endlessly, without diminishing our own stock.¹

Because of this capacity, we are moving from a creative economy of scarcity to one of abundance, in which the law of supply and demand dictates that the cost of something infinitely reproducible will be driven, inevitably, down to nothing. When creative work is available without limit, freely accessible, it tends also to become free of charge. This tendency leads us straight to what's long been called the "paradox of value," or the diamond-water paradox, first pointed out by economist Adam Smith: "Diamonds are valuable for being scarce, but water, which we need to live, is comparatively worthless." Similarly, art and culture are nonetheless vital, essential even, to what it means to be human, yet digital abundance has diminished our sense of their worth.

Does it follow that culture has value only if there is a limited supply to drive up demand? And what is it that makes some bits worth paying for—food for a virtual pet, a video game app, or a song on

iTunes—and others—an article, a streaming video, a photograph—not? How do we define the worth of a digital book, for example, given that it takes significantly fewer resources and effort to replicate and distribute one than the equivalent printed on paper and clothbound? Should copies be free since they are infinitely and easily replicable packets of data, or should they be priced to reflect the cost of creation?²

Traditional notions of cultural ownership are also being challenged. Online, creative works are decontextualized, remixed, and mashed up. We surf and skim, passing along songs instead of albums, quotes instead of essays, clips instead of films. Artists who share their work with the world (or find it leaked) see it repurposed in ways they didn't anticipate. The minute a film is released or an essay is published, it begins to race around the Internet, passed through peer-to-peer networks, posted on personal Web sites, quoted in social media streams. In one sense, therefore, any ownership claim is essentially fanciful, since, in practice, people's creations circulate in ways they cannot control.

In practice, though, the laws underpinning ownership are stronger than ever before, so strong that some experts warn we are living through a "second enclosure," a reference to the eighteenth-century privatization of collectively managed fields and forests in England. Something similar has been happening in the realm of art and ideas over the past few decades: cultural commons are being cordoned off by private interests. Virtually every cultural artifact we encounter is "owned," from the poetry of Emily Dickinson to the paintings of Georgia O'Keeffe to the songs we sing in the shower. Even single notes are licensed and paid for.³

The privatization of the cultural realm has made us poorer because the world is richer when art and ideas spread. Unlike many other industries, culture produces mainly positive externalities: ideas, melodies, phrases, images, and insights seep out into the wider world, infecting and inspiring others and furthering creative invention and

evolution. What's more, this sharing does not deplete the original store. If I read a passage of a book to you or repost a video I found online, there is no tangible loss to the creator, and both of us get to enjoy the work. In 1813 Thomas Jefferson made this point eloquently, influencing all subsequent understanding of the issue.

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation.

Half a century earlier in France, Denis Diderot, the impoverished editor of the famous *Encyclopédie*, took a rather different view, making the case that authors have a natural right in the work of their making: "What property can a man own if a work of the mind—the unique fruit of his upbringing, his studies, his evenings, his age, his researches, his observations; if his finest hours, the most beautiful moments of his life; if his own thoughts, the feelings of his heart, the most precious part of himself, that which does not perish, which makes him immortal—does not belong to him?"

Eventually the Marquis de Condorcet—a man born into wealth who didn't have to worry about living by his pen—issued a rebuttal, insisting that the public's interest in the free flow of knowledge eclipses any authorial prerogative. A property right that could be invoked to limit printing and publishing was "a constraint imposed on freedom, a restriction of the rights of other citizens." Condorcet blasted the idea that a literary work was property in any conventional sense: "One feels that there can be no relation between the ownership of a work and that of a field which a man can cultivate, or a piece of furniture that can be used by only one person, the exclusive ownership of which is consequently based on the nature of the thing." Ideas, he went on, arise from the world and so belong to all. A man of science, he dismissed originality as mere "style," emphasizing universal truth over subjective revelation or creative expression.⁴

Jefferson ultimately reached a position of compromise: while "the field of knowledge" may be "the common property of mankind," he came to believe that some regulation of culture was necessary in order, paradoxically, to ensure the production of more of it. The exclusive right to an idea was not a "natural right" but a provisional privilege granted "for the benefit of society." Wrestling with the concept of cultural property, Jefferson and the framers of the Constitution looked to Great Britain's Statute of Anne, drafted a century earlier to manage the emergent book trade. Formally called "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned," the statute gave "Authors and Proprietors" exclusive rights to their works for as long as twenty-eight years.

Copyright, from day one, was designed to be both an impediment and an incentive, a mechanism of enclosure (one that prevented the unlicensed printing of texts, thereby limiting access) and a catalyst of sorts, a structure to stimulate the production of literary goods by rewarding writers and publishers for their labor. Necessarily

imperfect, the system was conceived as a sort of quid pro quo to foster new work, an acknowledgment of the fact that printing technology made it more profitable to copy existing material than create from scratch, which requires time and effort and investment.

After much debate, the framers followed the lead of the British: copyright would be a temporary legal protection, a “limited monopoly privilege,” as it’s called, not to be mistaken for a perpetual property right or a natural one. Art and ideas, Jefferson and his colleagues determined, cannot be owned in the same way a chair or a table can be—intellectual property, in a sense, doesn’t actually exist—and they wrote this proviso into the U.S. Constitution. Article I, section 8, clause 8 gives Congress the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” This passage is now known as the “progress clause,” underscoring copyright’s generative aim.

At first, only a limited array of goods (maps, charts, and books) received copyright protection. But by 1978, the scope was expanded to apply to any “expression” that has been “fixed” in any medium, this protection granted automatically whether the maker wants it or not, no registration required. (That doodle you just drew? Protected.) And twenty-eight years has been extended to the life of the creator plus seventy years (works of so-called corporate authorship are protected for even longer: either 120 years after creation or 95 after publication, whichever ends first).

Given that the dead cannot write new books, compose new songs, paint new pictures, or think new thoughts (not to mention the fact that it is humans, not corporations, who author things), this prolongation shows the degree to which the law has been perverted, providing profit to those who had nothing to do with actually producing the work. As a consequence of this dilation, a handful of conglomerates have an incentive not necessarily to create new things but to buy up tremendous swathes of what already exists, like Bill Gates’s

purchase of an archive containing more than one hundred million images, many of them historic. Such companies now dominate the cultural field, their holdings encroaching into every corner of our lives. Driven by profit, not the public interest, they have become the custodians of our collective heritage.

New technologies threaten to overturn this situation. In the virtual world of the Web, stuff can spread like Jefferson’s flame, “incapable of confinement, or exclusive appropriation.” Yet many of the activities indigenous to the Internet, such as sharing and remixing, are in direct conflict with the law as it is currently written, forcing almost anyone who goes online into ambiguous gray zones. Simple uses of the Internet make us chronic violators of copyright, the fences of the second enclosure crumbling bit by bit as we copy and paste, download and post. One 2011 report to the UK government noted: “The copyright regime cannot be considered fit for the digital age when millions of citizens are in daily breach of copyright, simply for shifting a piece of music or a video from one device to another.”

The old equilibrium between access and control has been disturbed, leaving people like myself caught between two extremes—a world in which our work is free the minute it is finished (no matter how much it cost to produce) and one where it is regulated at every juncture (no matter how it is being used and even if the use is legal). The friction of the off-line world, which helped prevent copyright holders from overcontrolling their work and users from completely undermining that control, no longer exists.

Back when paper books and vinyl records were dominant, copyright holders had little power over what their audiences did with their products (the objects could be read or listened to anywhere, loaned to friends, sold in secondhand shops, donated to libraries, thrown away, and so on) and audiences couldn’t effortlessly distribute the products to thousands of people. Now things are more complicated. The very

same technologies that facilitate the free exchange of culture also empower the most determined copyright holders, who monitor their products with things like content ID systems, audio/video fingerprinting technology, and Digital Rights Management software—in effect, enabling owners to register every digital blip.

Material can be suddenly rescinded from electronic readers and algorithms can scan video streaming sites for copyright violations (sometime snagging legitimate uses in their automated dragnets).⁵ The devices we carry in our pockets duplicate and distribute cultural products but they can also be used to track our every action, conjuring a not-so-distant future in which all cultural encounters are classified as “copyright events” and every idle click surveilled by unaccountable automatons.

Tangled in the contradiction between freedom and restraint, access and control, copyright has become one of the most controversial topics of our time, the spark of seemingly unresolvable conflict. Two camps shout past each other: the intellectual property dogmatists on one side argue that culture can be owned outright, passed on from heir to heir without concern for the wider public; on the other, adherents of the new ideology of openness claim that any restrictions on the use of cultural artifacts is an assault on individual freedom.

The first camp—epitomized by the Recording Industry Association of America and the Motion Picture Association of America—sees art as akin to any other product, property pure and simple, painting dissenters as communists and criminals, parasites and barbarians, and even terrorists.⁶ Downloading is theft. The second camp, echoing Condorcet, argues that makers have no special claims over their creations, since they have inevitably built upon the work of others, which means they have an obligation to give their work away. People are only sharing what, in some essential sense, already belongs to them. The artists and culture makers themselves, more often than not, are left out of the conversation entirely.

While the RIAA and MPAA have made their position known mainly through lobbying and lawsuits, new-media thinkers helped launch a global movement for free culture, producing a mountain of books denouncing “overzealous copyright bozos” and “enemies of creativity” who deny the public access to their holdings. The free culture movement seeks to extend the principles of free and open source software production to art and culture. No one, they insist, creates in isolation and out of nothing; we all build on prior creativity, soaking like sponges on the banks of the cultural commons. Thus all art and culture should be free to use, study, redistribute, and modify, without having to ask permission first.

Creators who resist this proposal need to find a new way to survive that doesn't involve limiting access to their work. (According to the movement's official site, “We will listen to free music, look at free art, watch free film and read free books.” Free culture “is one where being a cover band doesn't lose you any street cred compared to doing your own music from scratch” and “bad old TV series and movies turn into brilliant remakes and fan fiction on a regular basis—and bad remakes and fan fiction themselves generate brilliant ones after a few years.”)

The free culture argument rests on two planks. First, technology is on the side of copying and the free flow of information: the clock cannot be turned back. Second, blocking access to culture props up outdated business models and stifles innovation and expression, as countless troubling instances prove: journalists sabotaged by individuals and institutions that abuse copyright to suppress free speech; home videos yanked from YouTube because a pop song is heard emanating from far-off speakers; filmmakers forced to cut scenes where families sing “Happy Birthday” because the song is not in the public domain;⁷ appropriation artists and colleagues whose compositions, however transformative (and thus likely legal), trigger litigation.

Consider the case of Canadian artist Jon Rafman who, in 2011,

used low-resolution renderings of a variety of iconic paintings as texture in a virtual online environment. He received cease and desist letters from rights-holding societies in the United States, France, and Canada demanding that all references to creative works by artists who had died less than seventy years ago be removed, even though many of the artists in question used similar techniques: Jasper Johns and the American flag, Andy Warhol and the Campbell's Soup can, Roy Lichtenstein and comic strip characters.

As a documentarian, I live in fear that some incidental image or sound in my films will be subject to a proprietary claim. Though my usage may technically be classified as "fair use"—the vital doctrine that defends our right to comment, quote, and transform copyrighted material without permission or payment (the doctrine that ensures you can quote from this book in a review)—I dread a lawsuit, even one without merit, since a legal defense could easily double my budget and statutory damages range up to \$150,000 for each work infringed upon.⁸

Without the support of a powerful benefactor, the safest thing to do is alter the reality I am documenting. I ask store owners to turn off stereos and televisions and subjects to set their phones to silent. I avoid archival footage because the licensing fees could bankrupt me. The past and present are, in many ways, effectively off-limits. Powerful corporate entities build their businesses by impeding the creative use of the sounds, sights, and symbols that surround us, making commenting on the world a privilege that must be paid for.

Thus the line between commerce and censorship can blur, making copyright a free speech issue. NBC, for example, refused to license Sam Green, an Academy Award-nominated documentary filmmaker, essential Vietnam War footage because it deemed it too graphic (a similar thing happened to the filmmaker Robert Greenwald, who has been denied the right to purchase footage from NBC, CBS, and WGBH to use in his political documentaries). "Cor-

porate control of our culture is like the Soviets altering history books," Green told me. "They get to decide what gets to be seen."

Creators are in a bind. At its most defiant and extreme, the anti-copyright choir denounces those who resist the free exchange of their work as Luddites who don't understand the Internet or controlling authoritarians who seek to govern how their work is received. Kenneth Goldsmith, the eccentric founder of UbuWeb, an online repository of experimental and obscure films, videos, and sound art, created a "Wall of Shame" to humiliate artists who asked him to take down their work, no matter what their reasoning. For Goldsmith, technology has transformed creative practice; digital abundance has made the mastery of disseminating information more important than its creation. "Writers don't need to write anything more," he says. "They just need to manage the language that already exists." (Lest you think Goldsmith is a fringe figure, in 2012 he was invited to the White House, where President Obama watched him read a poem consisting of excerpts from traffic reports from local radio stations.)

Free culture proponents present the copyright wars as a straightforward story of David and Goliath. Abolishing copyright and liberating information will lead to a better, more accessible culture and a more democratic, inclusive world; it will break up cultural monopolies, end artist exploitation, and eliminate the star system. If nothing else, the free culture proponents are laudable for their idealism. But because of the fundamental ambiguity of the word "free," the free culture movement has attracted people from across the political spectrum, with varying levels of power and influence and sometimes widely diverging agendas.

Philosophers and business writers, progressive scholars and techno-utopians, artistic renegades and established entrepreneurs have united in their criticism of copyright law. (Anarchists tend to dislike copyright because it turns culture into property; libertarians don't like it because it creates government-protected monopolies.)⁹

While some sincerely believe that the new digital order will create an inclusive cultural commons, others—the Web 2.0 venture capitalists and entrepreneurs—see the abundance of accessible content as a way to get rich. One group thinks freedom, the other profit. “Just because products are free,” Chris Anderson writes in *Free: The Future of a Radical Price*, doesn’t mean that it is not possible to make “huge gobs of money.”

In their battle against the old paradigm, new-media thinkers and free culture activists have aligned themselves with Silicon Valley (many of the most prominent organizations advocating for the free culture agenda, from Public Knowledge to Creative Commons, take funding from firms such as Google¹⁰). The struggle is not only between big copyright-hoarding corporations and besieged hobbyists but also between two very different ways of doing business.

“The basic divide at work here is between those capitalists that make money by selling *access to content*, and those that make money by controlling the content *distribution networks*,” explains sociologist Peter Frase. “For content sellers like the music business, extremely harsh intellectual property laws are desirable because they create the artificial scarcity on which their whole business model depends. Companies like Facebook and Google, in contrast, mostly make their money by controlling the platforms on which people distribute various kinds of media, and selling access to their user base to advertisers.” For the latter group, looser copyright laws don’t pose a threat to their profits but actually facilitate them; the more copying and sharing happen, the faster their revenues grow.

It’s no wonder that tech companies encourage their users to imagine themselves as remixers and DJs, curators and mash-up artists, frenetically passing around and repurposing bits of information (even as the same tech companies ferociously cling to their own intellectual property and jealously guard their trade secrets, snapping up patents at breakneck speed).¹¹ Nor is it any wonder that free culture activists tend to obscure the similarity between “author”

and “remixer.” The author, they argue, is a relatively recent invention, a romantic mystification that emerged during the Industrial Revolution and coincided with the development of the printing press and the rise of the art market—a social construct employed to justify an emerging economic and technological paradigm.

Yet the same basic observation could be made of the remixer, the DJ, the mash-up artist, and the curator; they, too, are “social constructs” that cannot be disconnected from the economic and technological realities of our time. Remix culture may possess a rogue, transgressive aura, but its methods of appropriation and distribution are perfectly aligned with the profit-making logic of digital capitalism: originality doesn’t pay online, quick aggregation does. Curation, not creation, we are told, is the next “billion-dollar opportunity.”¹²

That the battles between new and old media have come to resemble Goliath versus Goliath is nowhere more visible than the debate over piracy, the epitome of copyright violation since it involves the distribution of movies, television shows, music, and books in their entirety. On January 18, 2012, the tensions over piracy were spotlighted when the sites Google, Wikipedia, Reddit, and Tumblr, along with thousands of personal pages, participated in a massive day of protest, going dark or blackening their logos to draw attention to two controversial bills, SOPA and PIPA.

The Stop Online Piracy Act and the Protect Intellectual Property Act, both before the House for voting, were ostensibly designed to crack down on “rogue” foreign sites that traffic in pirated content for profit but, as critics noted, the bills were so vaguely worded that they would effectively trample both the First and Fourth Amendments, essentially legalizing censorship and eliminating due process. Instead of focusing on the removal of illegal material, the bills would give the Department of Justice the power to shut down entire Web sites without a trial on the grounds that they hosted infringing content or, going a step further, that they “facilitated” infringement,

which meant that Internet service providers, search engines, advertising networks, and financial intermediaries were under threat.

As the law currently stands, Web sites are immune from this problem as long as they act in good faith to take infringing content down upon notification, thanks to “safe harbor provisions” included in the Digital Millennium Copyright Act (DMCA) of 1998. The proposed laws, in contrast, would have forced Web site operators to monitor everything they hosted and linked to, giving them an incentive to preemptively block or delete material to avoid legal hassle, even though the material may well classify as protected speech.

In a joint letter to Congress, published as a full-page ad in the *New York Times*, Google, Twitter, eBay, Facebook, Yahoo!, AOL, and other companies argued that the legislation would undermine innovation and pose a major threat to user privacy by mandating the “monitoring of websites.” The public also rebelled. Thousands of concerned citizens spread the word about SOPA on social media, signed petitions, and telephoned their elected officials. Advocacy groups warned that entertainment companies—who invested heavily in lobbying for the bills—were trying to “break the Internet”; bloggers protested that they would not be able to link to other sites out of fear that those sites might contain violating links; librarians warned of the “potential to negatively impact fundamental library principles.” By pushing for such an extreme and indefensible position, the old-media moguls sparked a tremendous outcry, which caused the legislation to be redrafted and then scuttled, at least temporarily.

But the defeat, touted as a victory of civil society, was also a sign of the tech industry’s growing clout. For the first time, new and old media are spending similar sums to buy influence in Washington. While the entertainment companies have deep ties, professional and financial, to thirty-two SOPA sponsors, the tech industry is getting in on the game.¹³ Google is now one of the top ten spenders in Washington. In 2012, the company’s lobbying budget exceeded

most traditional media organizations, including Verizon and Comcast; according to Open Secrets, Google produced more reports on “Copyright, Patent & Trademark” issues in 2011 than the Recording Industry Association of America.¹⁴ As journalist Glenn Greenwald explained, “Citizen opposition, by itself, would never have been sufficient to overcome the pro-SOPA lobbying of the entertainment industry; it took a different powerful industry to stop it.”¹⁵

Only a few months after SOPA’s defeat, some of the same corporations who objected to the bill on privacy grounds supported CISPA (Cyber Intelligence Sharing and Protection Act), a cyber security bill that threatened constitutional rights by allowing technology companies to share user information with government intelligence agencies. “CISPA represents the first notable rift within the coalition of organizations and businesses that helped lead the charge against Stop Online Piracy Act.” David Segal, one of the leaders of the SOPA fight, wrote after Facebook endorsed the legislation. “SOPA’s opponents came together in a kumbaya moment, with almost anybody who cares about the Internet—as user, activist, or profiteer—lining up against the bill.”

This opposition, Segal observed, was self-interested: SOPA’s “passage would have hurt Facebook’s bottom line—and probably forced it to alter basic business practices—by forcing it to aggressively police alleged piracy. And now the profit motive is causing Facebook to support CISPA, at the expense of its users, because it would relieve certain regulatory burdens and provide attractive immunities for the company.”¹⁶

The piracy and the copyright wars might seem cutting edge—with all the talk of DNS (domain name system) blocking, streaming, and infinite storage—but what we are witnessing is actually the latest incarnation of a centuries-old debate, one reignited every time publishing technologies take a forward leap. The development of the

printing press, the phonograph, the radio, the cassette tape, the Xerox machine, the CD, and the Internet—each innovation sparked a heated struggle in which a predictable array of positions and opinions were ardently defended.

In the eighteenth and nineteenth centuries writers including Alexander Pope, Daniel Defoe, and Charles Dickens wrestled with the nature of authorship and the ethics of piracy, producing interesting, idiosyncratic ruminations quite unlike our own shrill industry panic. (“Hometaping is killing music!” said the record labels in the 1980s; “The VCR is to the American film producer and the American public as the Boston Strangler is to the woman alone,” the Motion Picture Association of America’s Jack Valenti famously proclaimed.) In response, much as they do today, pirates positioned themselves as principled defenders of liberty and advocates of the public interest.

Over a hundred years ago, a self-described “king of the pirates” ran the “People’s Music Publishing Company” in East London, using photolithography to reproduce sheet music, which he sold for a fraction of the going price. God, he said, intended for music to be shared (and, he told angry publishers, his cheap sheet music would lead to more sales of their legitimate versions). The king’s comments may have reflected a self-serving attempt to claim the moral high ground, but there’s no denying that over the years bootleggers have aided the spread of culture and learning, performing a service from which society has collectively benefited. Immanuel Kant—he of the Enlightenment maxim “Dare to Know!”—wrote an essay denouncing the injustice of counterfeited books. Yet knowledge, as historian Adrian Johns tells us, spread across Europe and overseas via affordable, unauthorized editions: “Enlightenment traveled atop a cascade of reprints. No piracy, we might say, no Enlightenment.”¹⁷

Sweden’s Peter Sunde, former spokesman for the Web site the Pirate Bay, is perhaps the most famous pirate of our time—freedom fighter or purloining pariah, depending on whom you ask. At the

2009 Open Video Conference in New York City, his image was beamed in via webcam so he could discuss the hugely popular Web site, which serves as the point of contact for peer-to-peer sharing of large files via a protocol called BitTorrent. The Pirate Bay’s notoriety, and the network’s enormousness (with twenty-five million users at its peak, it commanded a tenth of all Internet traffic), had raised the ire of the Motion Picture Association of America, which instigated a number of lawsuits against the site on behalf of various movie studios.

In the spring of 2009, Sunde and three codefendants were found guilty of copyright infringement and sentenced by Swedish court to one year in prison and the equivalent of \$3.5 million in damages, which they appealed. Sunde didn’t seem very worried. The Pirate Bay, he pointed out, doesn’t actually host infringing material but makes it easily findable, similar to a search engine such as Google. The next year, the Swedish Court of Appeal seemed to agree: “If the nature of a search service is such that it primarily is a valuable tool in lawful activities, and of general benefit to society, if this legitimate use predominates, but the distribution or transmission of illegal material in spite of precautions cannot be ruled out, the operation of such a service should be considered as legitimate.”¹⁸

There are many peer-to-peer file-sharing Web sites, but the Pirate Bay has been the most outspoken and conscientious about connecting freedom to share with freedom of speech. The site’s high-profile lawsuit made it an international cause célèbre, spawning political Pirate Parties around the world. In Sweden, where piracy has also been recognized as a religion (specifically the Church of Kopimism, derived from the words “copy me”), the Piratpartiet took more than 7 percent of the vote in the 2009 European parliamentary elections. Sunde, who has severed any formal ties to the Pirate Bay, announced that he would run for a seat in the EU Parliament in 2014 in Finland, where he is eligible for office, on the Pirate ticket. Though it has struggled recently in the polls, the Pirate Party has been the most

successful in Germany, with seats won at various levels of government, encroaching on the Green and Social Democrat parties' turf and threatening long-standing progressive coalitions.¹⁹

The Pirate Party takes pride in being politically unaligned, neither traditionally left nor right, while promoting a platform that emphasizes core issues of government transparency, online and off-line privacy, and copyright reform, including the right to download. The party stands, broadly, for what it calls Internet freedom, which has led members to fight online censorship in various ways, from providing hosting support for WikiLeaks to resisting German legislation that blocks access to sites containing child pornography.²⁰

The enthusiasm for pirate politics keeps spreading, particularly through academic circles, with a number of scholars writing elegies to "pirate philosophy." Pirate "practices exceed the limit of individual production and succeed in so far as there is a collective accumulation of knowledge to be shared" and "offer an alternative way to relate to the cultural artifacts," says one media theorist. Another argues that piracy is best understood in connection to "communitarian cultures of sharing, borrowing, copying, and openness"—after all, the vast majority of people, the author points out, aren't copying things for profit but for private use.²¹

Raising the stakes of the argument, University of Virginia professor Siva Vaidhyanathan insists that "peer-to-peer systems are about more than music. . . . The battles over control of cultural distribution can be read as a prelude to more overtly political battles to come."²² *Property Outlaws*, written by Eduardo Peñalver and Sonia Katyal, two law professors, opens by comparing purposeful violations of copyright law to the lunch counter demonstrations of the civil rights movement. They see the heroic actions of HIV-infected patients clashing with pharmaceutical companies, whose claim to exclusive patents blocks the manufacture of affordable, generic drugs, as akin to "peer-to-peer file sharers, who are challenging the

record industry's failure to offer digital distribution of music, and the Norwegian hacker who landed in jail after reverse-engineering Hollywood DVDs so that they could run on a Linux-based computer."²³ In the words of Vaidhyanathan, we've gone from "liberty, equality, fraternity" to "rip, mix, burn."²⁴

As a result of these connections, a growing number of people equate file-sharing with activism. A comprehensive study by the Social Science Research Council found that downloading is "widely understood in economic justice terms." At an event in Brooklyn with a founding member of the Pirate Bureau, Sara Sajjad, invitees were advised to bring their "laptop, USB stick or hard drive, and share, swap and propagate like the pirate you arrrrrrr!" The "Guerrilla Music Swap" was conceived as an anticapitalist statement, an affront to the greedy policies of the RIAA and MPAA. The idea that piracy is an effective form of resistance, a direct attack on the corporate empire, is confirmed by the reaction it has provoked: the excesses of digital rights management, the egregious lawsuits against music lovers (including children and even a deceased grandmother), and the desperate attempts to shut down file sharing through bills like PIPA and SOPA.

Thus creators have found themselves at the center of a bizarre struggle waged in their name. On one side, the giants RIAA and MPAA and, on the other, file sharers ("I'll stop downloading books when publishers stop ripping off writers," one self-proclaimed pirate announced on the popular literary Web site the Millions). Established corporate giants position themselves as protectors, defending the very artists they have exploited for so long, while downloaders pose as liberators, emancipating creative expression from the clutches of the market.

Defendants of file sharing often take pains to point out the old-media industry's duplicity, highlighting stories of creators taken advantage of by big business. They mention Peter Jackson, director of the *Lord of the Rings* films, who sued New Line Cinema for revenue

fraud, and the litany of complaints made by successful musicians who have been ripped off by their labels. They link to a recent story by NPR's *Planet Money*, which revealed the movie industry's questionable accounting. Walking listeners through the numbers on a recent action movie, they show how executives claim that the film lost money even though it grossed almost a quarter of a billion dollars at the box office. The trick lies in a series of maneuvers that the *Wall Street Journal* has likened to a "tranche of collateralized debt obligations," including the levy of a hefty fee, around 30 percent, by the very studio that produces the movie.²⁵ The result, according to the book *The Hollywood Economist*, "is that a film, after paying this enormous tariff, rarely shows a profit, even if the studio is making a profit from the distribution fee, and so the writers, directors, actors and other participants in the profit rarely see anything but red ink on their semi-annual statements."²⁶

Steve Albini, the legendary music producer, exposed the similarly unsavory practices of the record industry in his blistering critique of industry misconduct, "The Problem with Music." Breaking down what happens to a hypothetical band given a \$250,000 advance for an album that earns \$3 million in gross retail revenue, he reveals how they still end up owing the label money: the recording company makes about \$700,000 in profit; the producers, managers, agents, and lawyers get their cut; yet the band ends up "unrecouped" and \$14,000 short of earning royalties.²⁷

This structural greed is well documented and appalling. Under the corporate record and film studio systems, the companies that invest in a creative work also control the copyright attached to the finished product, which leaves the creators, the songwriters and performers or directors and crew, with no say over or stake in the work's afterlife. One strange outcome of this arrangement is that musicians—most famously the funk legend George Clinton—have been sued for sampling themselves. In the corporate music world,

it's not uncommon for five companies to own chunks of one song, while the artist is cut out of the arrangement completely.

The fact that artists have been dispossessed of their work has long been invoked as evidence of the immorality of the culture industries, and the music business in particular. Why should the label own recordings and not the musicians who composed or performed the actual sounds? Why should an essayist have to surrender all rights to a magazine that published his piece or a filmmaker be forced to assign ownership of her creation to a corporate entity? And yet the most vocal critics of these disagreeable practices increasingly share the assumption that artists must forfeit control of their work, only with control going not to executives but to what Jaron Lanier calls the "hive mind."

The problem, though, is that it is not clear how file sharing actually addresses financial improprieties or points the way to an arrangement that's more equitable: unlike a label or studio, where a percentage of profits trickles back to creators, peer-to-peer sites and online locker services return nothing to artists, though they can be incredibly lucrative for those who run them.²⁸ The Pirate Bay, for example, is bedecked by advertising. The now-defunct Megaupload (parent company of Megavideo and Megaporn) made its flamboyant owner, "pirate king" Kim Dotcom, over \$40 million in 2011 alone (wealth he famously flaunted all while comparing himself to Martin Luther King).²⁹ Meanwhile, piracy has set a new, low baseline for artists' negotiations. Where free culture enthusiasts justify their position by invoking the exploitation of artists under the old model, digital capitalists, looking to build profitable businesses by storing or streaming creative work produced by others, defend microscopic or nonexistent payments by arguing that the alternative is nothing at all.

Historian Adrian Johns calls piracy the "definitive transgression of the information age." Yet he also notes that while piracy signifies

"a repudiation of information capitalism at one extreme," it marks information capitalism's "consummation" on the other.³⁰ If Peter Sunde represents the first pole, Matt Mason, who took the conference stage at the Open Video Conference after Sunde's image flickered out, embodies the second. Mason, author of the book *The Pirate's Dilemma: How Youth Culture Reinvented Capitalism*, acknowledged that piracy can sometimes cut into profits. But in crisis, as they say, lies opportunity.

He gave the example of drug companies distributing widely pirated copies of their patent medicines without charge. "They started winning corporate social responsibility awards," Mason rhapsodized. "And all the advertising money in the world couldn't help them do that." Or take shoes; instead of suing a Japanese bootlegger for selling altered versions of their sneakers, Nike made a fortune appropriating the redesigns. "Pirates are taking over the good ship capitalism, but they're not here to sink it. Instead they will plug the holes, keep it afloat, and propel it forward," he promised. His message was clear: you can give up control of copies and still gain market share. The speech earned a hearty cheer. According to Mason's Web site, his speaking performances have left Procter and Gamble "delighted," struck the executives of Miller Genuine Draft as "amazing." Disney, only slightly more restrained, found Mason "very stimulating!"

Mason's argument also holds true for most mainstream culture. The most downloaded files are, without fail, the biggest blockbusters and mainstream hits. While peer-to-peer networks can be used to share amateur and independent creativity, in practice they are more often used to trade Lady Gaga or *Game of Thrones*. Of course, big business is loath to lose potential sales to free distribution (the push for SOPA and PIPA in the United States and the draconian "three strikes" laws abroad, which can slow or suspend Internet access to repeat copyright infringers, prove as much), but pirate sites also increase the reach of American commercial culture, spreading it

around to distant corners of the globe. Thus the pirates who run these sites are at once defenders of free expression and enablers of free consumption.

While the more politically conscious people who use these services might believe they are striking a blow against Hollywood and the major labels, they are also increasing the power of those institutions by helping people consume their products, shaping their desires and values as a result (strengthening commercial culture's hegemony, as the academically inclined might say). The best way to resist old media's dominance may be to abstain from its offerings entirely, free or not.

Free culture leaders and activists sincerely believe that violating copyright—illegally downloading films and music or remixing and recontextualizing pop culture products—is an effective way to subvert corporate culture and defy market values.³¹ "There's a pretty strong case to be made that 'free' has some inherent antipathy to capitalism," the writer Cory Doctorow has said.³² It's a view reflected in a documentary about the virtues of remix culture, *Steal This Film II*, which illustrates the rampant abuse of intellectual property by big business and the rise of file-sharing services. "This is the question that faces us today," the voice-over says. "If the battle against sharing is already lost, and media is no longer a commodity, how will society change?" The movement persists in maintaining a core, misguided assumption: if something is free, that means it has been de-commodified.

This misapprehension is applauded or at least tolerated by Silicon Valley, where the democratic impulse of liberal legal scholars and anarchist filmmakers finds a cynical echo and where open platforms have achieved massive stock market valuations. Likewise, there's no quarrel from those pirates who run file-sharing sites for private gain. Nor from television executives whose trade is offering up free shows in exchange for our attention, which they sell to advertisers.

Of course the advertisers themselves want nothing more than for all of us to encounter their offerings, to “engage” and “interact” with them. We have known for years that culture can be a commodity even when you don’t have to pay for it outright. Those who would protect the cultural commons must see that the challenge is not only copyright, but those who own the platforms and channels through which culture is increasingly shared. On their watch, the cultural commons has become little more than a radically discounted shopping mall, a consumers’ paradise of free entertainment propped up by advertising. What’s being hoarded now are the means of delivery, the channels through which the economic value of culture is realized. The commons can be commodified without being enclosed outright.

Jem Cohen was dismayed to find his recent film about the venerable punk band The Ex on file-sharing sites before its official release. An implicit social contract had been broken, Cohen felt. “The message was, don’t bother to make this movie next time,” he told me. “If something that I’ve made is just plain not accessible, then I’m not going to hold it against somebody for making it available,” he said, referring to movies that have fallen out of circulation. “But when I put out a documentary about a diehard progressive left-wing punk band that has been around for twenty-five years doing their hard work and I put it out on an independent label, that’s just insane.”

Cohen has stayed committed to independence despite plenty of invitations to join mainstream production companies and advertising agencies. An acclaimed filmmaker and photographer, he grew up in Washington, D.C., surrounded by people who founded the fabled punk band Fugazi and the label Dischord (the subjects of his 2003 documentary *Instrument*). Inspired by Fugazi’s example,

Cohen made a conscious decision to work outside the studio system, producing uncompromising work, including narrative features, documentary meditations, and experimental collages, as well as countless collaborations with musicians such as Patti Smith, Godspeed You! Black Emperor, Vic Chesnutt, and Elliott Smith. Cohen has to improvise the financing for each project, occasionally combining grants with support from museums and cultural institutions, including in Europe, which is more friendly to his unconventional approach. But without a paying audience at screenings or through DVD sales and other royalties, his work is not viable.

In an article for *Vertigo* magazine, Cohen made the case for something he called the double anchor. “Sometimes we need to remind ourselves that the relationship between those who make creative work and those who receive it should be one of mutual support,” Cohen writes. “Each end holds up the other.” With the Internet, Cohen continues, came the promise that artists would be able to eliminate middlemen, get rid of costly hard copies, and cultivate massive new audiences.

Yet the revolution hasn’t played out precisely that way. “I fear that an ugly dichotomy is sliding into place,” Cohen says. “On one side, there’s a receiver for whom, with a few clicks, everything is available, free, and exists to be shared without consideration or consequence. On the other side there are interests, usually corporate, envisioning how with more restrictive copyright and insistent branding, everything can become even more commodified than it already is.”

Cohen has no interest in protecting the assets of Hollywood, major music labels, or other conglomerates, nor does he support reprisals against those who don’t obey their dictates. Yet he thinks we need to be as conscientious about the culture we take in as we are about the food we eat. “When people want the option of a delicious organic tomato that actually has flavor, they don’t expect it

to be free," Cohen explained, mentioning those vegetable stands in the country, where a farmer places a small box next to the produce to collect payment.

"The people who pass by understand that if they want the vegetables to keep showing up on the table, they can't just grab them, even if no one is looking. The person who grows them doesn't put them out at exorbitant prices. The box solution is based neither on capitalist greed nor on some sense of entitlement to 'free,' but on mutual respect and mutual support. And that to me is the very simple kind of thinking that's getting lost. A factory farmer or a freegan are not the only two positions to take."

Cohen is highlighting a value that has long been central to any progressive movement: respect for labor. From this angle, it's clear that "copyleft," as the free culture position on copyright is sometimes called, is not "left" in the traditional sense. As Richard Stallman told me, he designed copyleft to ensure the freedom of users to redistribute and modify copies of software. Freedom to tinker is the paramount value it promotes, but a left worthy of the name has to balance that concern with the demand for equality, parity of wealth, and redistribution of power.

Copyleft, with its narrow emphasis on software freedom, even when broadened to underscore the freedom of speech implications of such a position, offers a limited political response to entrenched systems of economic privilege, and it does not advance limits on profitability or promote fair compensation. Free culture, with its emphasis on access, does not necessarily lead to a more just social order. To pay to watch an independent movie does not mean capitulating to the privatization of knowledge but rather recognizes the work that went into making it and provides some support so that the effort can continue.³³

Jem Cohen priced the DVD of his movie modestly. It "took me seven years to make—seventeen dollars doesn't seem like too much to ask. It is about an exchange that is fair," he says. In contrast to the

hyperinflation of the art world, where art stars like Jeff Koons and Damien Hirst sell their creations for millions of dollars, there's a countervailing hyper-devaluation of work online. "I think we have to return to sustainability as a key word," Cohen told me. "We have to be thinking about why we value things that are made by individuals, why we value that which is homegrown, how we can recognize the kind of labor value of things that are not made by corporations." To this end, Cohen advocates what he calls the "realizable dream" of "a new economy of fair trade for artists and audiences."

In discussions about digital culture, complex dynamics are reduced to stark, binary terms. There's the record industry ensnaring people in despotic lawsuits and ruining lives; Disney denying people the ability to reference its imagery in their creative projects; big corporations removing amateur videos from the Web for infringing copyright. And then there's a culture of free, where opposition to copyright and downloading is understood as a straightforward act of political resistance, and the remixer, mash-up artist, and pirate are portrayed as romantic rebels.

Most cultural producers, however, sympathize with both sides and wind up somewhere in between. There are artists who go to great lengths to prevent their music or films from leaking online, while others upload their own work to Torrent sites. Some individuals take different approaches, depending on the work at hand (there are large-scale projects that I want to introduce to the world with care and restraint, and others that I am happy to toss into the ether without consideration of credit or remuneration). Where copyright is concerned, there's often a kind of dual consciousness; people want to pilfer *and* protect, access *and* control.

Even those artists who have written eloquently on the fallacy of intellectual property, the ubiquity of creative influence, and the myth

of originality—figures like Lewis Hyde, Jonathan Lethem, Cory Doctorow, and David Shields—reserve some, if not all, of their rights. “Who owns the words? Who owns the music and the rest of our culture?” asks Shields. “Reality cannot be copyrighted,” yet the book I quote from is. Though Richard Stallman encourages copying, he releases his writing under a no-derivatives license; he believes people should be allowed to modify all software, but he is not convinced the same holds for expressive works. While there are exceptions, most people whose creativity depends on being able to incorporate outside material tend to be sensitive to conflicting perspectives, intuitively aware of the “bargain” copyright is supposed to provide in its ideal form.³⁴ Beyond a shadow of a doubt, we have lost sight of this equilibrium in recent decades.

We need to push back against the copyright extremists who abuse the law to guard entrenched interests from competition, lobbying for ever greater and arguably unconstitutional protections. First and foremost, we need to fortify two existing principles, fair use and *de minimis*—the principle that some uses are simply too trivial to regulate—by emboldening creators to stand up for rights they already have.³⁵ (And if copyright holders insist on outsourcing intellectual property enforcement to algorithms, they must also program them to account for these rights and exceptions.)

Second, we must shorten copyright's duration and eliminate the ability of corporations to endlessly and retroactively extend their monopolies on work made by deceased creators (related to this, we must also revamp the patent system, which is structured to encourage hoarding and litigation, too often thwarting technological progress instead of promoting it).

Third, we should require those who want to renew their copyrights beyond an initial limited period to register them, an arrangement that would likely flood the commons with new work and help solve what is known as the “orphan works” problem, where material is caught in a legal limbo because the copyright holders can't be

found. Intelligent proposals worth considering include more radical approaches, such as a “reverse liability rule” for sampling, which would require copyright owners to pay the government a small fee to block remixing of their work.

A compulsory or blanket license is probably the only way to turn music into a true public utility, and some have already put forth thoughtful plans detailing how this might work, including ways to distribute funds so that they do not all accrue to those with the biggest marketing budgets or who have benefited from cumulative advantage.³⁶ There are many possible solutions that honor and abide by copyright's legitimate purpose, granting the possibility of a limited period of private monopoly privilege followed by mandatory public service.³⁷

For all its flaws, copyright provides some incentive for people to take on the risk of creating new work by allowing for the possibility of some economic benefit. It also provides the only legal mechanism creators have to defend themselves from various forms of exploitation and misuse, granting what I believe is an important noneconomic right—the right, under certain conditions, to say no.³⁸ The band Minor Threat had nothing but copyright to stop Nike from using its album art in a marketing campaign it morally opposed; David Byrne forced the governor of Florida to apologize for using one of his songs in a political advertisement without his consent; the cartoonist Bill Watterson has maintained an embargo against ancillary products, preventing his beloved comic *Calvin and Hobbes* from being made into a Happy Meal toy or 3-D movie.

Perhaps no one embodies the idea of dual consciousness better than Public Enemy's Chuck D, an originator of sample-based hip-hop. “We looked at music as an assemblage of sounds, and you couldn't copyright a sound,” he has said. But Chuck D has spent plenty of time on the other side, instigating numerous copyright infringement lawsuits of his own over the years, including one against Notorious B.I.G.'s estate for unlawful sampling in the song

"Ten Crack Commandments" and against the Coors Brewing Company for the same.

The crux of the issue wasn't money, Chuck D has said, but the use of his work to promote messages at odds with his values. Early on in his career, Mr. Len, a rapper and producer featured in the documentary *Copyright Criminals*, was busted by composer Philip Glass for unlicensed sampling, a move that forced Len's label to recall his record. "It all depends on what side of the fence you're sitting on," he told the film's director. "Like, if you're the one infringing someone's copyright, of course you feel like, 'Hey man, this copyright law sucks.' But if it swings back and someone samples your music for a bestiality flick, you're gonna be a little pissed about it."³⁹

The problem comes down to power. Left unregulated, those companies with market dominance could make use of the world's creative output without crediting or paying the people who produced it. Nike could use any song on earth to peddle its wares, and companies like Google, Apple, Netflix, and Spotify could build their empires on top of the world's content and without kicking in even a small portion of their revenue to creators. Hollywood and the recording and publishing industries would no doubt be displeased by such a turn of events, but the cultural field would not suddenly become noncommercial.

Eliminating copyright could theoretically equalize opportunity, allowing everyone uniform access to everything ever made, but this is not necessarily the case. The commons has also historically been used as a source of raw materials for colonizers and corporations seeking to profit from traditional lands, assets, and knowledge, which well-capitalized entities are better positioned to take advantage of than comparatively poor locals. Not everyone benefits equally from openness. The ocean may be common, but a company with a large fleet of trawlers is uniquely situated to exploit its riches; Disney is better able to reach mass audiences

with films based on folktales in the public domain; Google holds an almost unassailable advantage when it comes to indexing all the public data posted on the Internet, spending billions annually on infrastructure.

The commons are accessed asymmetrically, like the massive repositories of genomic data that have been made available online by scientists who hoped the repositories would become a "global resource, shared equally," but which have been overwhelmingly used by private biotech firms in a handful of wealthy countries. The romance of the commons—the idea that a resource open to all will be accessed equitably and create a more just outcome, that differences evaporate online, openness ensures fairness, and the goods can be "free" to all without negative consequence—ignores the problem of inequality. In reality, differing circumstances, abilities, assets, and power render some better able to take advantage of a commons than others.⁴⁰

Elinor Ostrom, who won a Nobel Prize in economics for her work on the commons, provides an interesting complement to this view. Through her observations of lobster fishermen in Maine, farmers in Nepal, Swiss Alpine cheese makers, and other real-world communities, Ostrom rigorously proves that commons which actually last over the long term are not "open" or "free" by any means. Instead, they are "stinted"; true commoning always involves establishing limits of some kind.

Britain's Magna Carta and its lesser-known companion the Great Charter of the Forest promised a range of limited subsistence rights to the poor, protecting gleaning by law. People had the right to collect vestige crops, fish in streams, and graze animals or drive swine on land they did not explicitly own. Widows were permitted to gather estovers, or firewood, and freemen were allowed to take any honey they could find.

Thus it is wrong to think that the commons were a resource anyone could exploit at will. Instead, the commons were as much a

thing and an activity, both a noun and a verb—a set of social relationships, a bundle of rights and restrictions, a mode of being for mutual aid. The commons were neither completely open nor completely closed, but negotiated.⁴¹ “In one essay Ostrom and her coauthor, librarian Charlotte Hess, argue that this wisdom must be applied to Web-based “knowledge commons,” which, they warn, can produce outcomes that are “good or bad, sustainable or not.” New-media thinkers insist that the cultural commons, unlike their material counterpart, cannot be tragic because they cannot be depleted. Ostrom and Hess challenge this view. We are at risk, they argue, of a new kind of tragedy of the commons—a tragedy not of enclosure but of underinvestment. The issue is not simply control of culture but its creation.

To put it another way, the problem of the production of the commons is just as urgent as the problem of access. It is true that copyright maximalists pose a grim threat, gobbling up our shared cultural heritage and exploiting it for commercial gain, enclosing it into private preserve. Where the Charter of the Forest prohibited the fencing of “arable land” out of respect for one’s neighbors, today’s cultural commons is increasingly fenced in, the invisible barricades of copyright, trademark, and patent law locking down what should, to a significant degree, exist for the benefit of all. The more art and ideas are owned, the more people are kept out, denied access to the sights, sounds, and insights that make up the cultural environment they call home.

But there are challenges of production, too. New work involves allowing creators to build on the creativity of those who came before and they must be able to sustain their productions economically. We need new social protocols for a networked age: ethical guidelines for engagement and exchange, restrictions on both privatizing and freeloading, and fair compensation not predicated on perfect control. Instead of the defensive obsession with ownership, we should

foster an ethos of stewardship: a steward preserves and protects, looking both forward and back, tending to what is not his.

On the issue of economic sustenance, we might take some inspiration from the mounting push for open access to federally financed scholarship, a cause made more visible by the programmer and progressive activist Aaron Swartz, whose prosecution by the Department of Justice for downloading copyrighted documents from the nonprofit academic database JSTOR led him to commit suicide in 2013 (Swartz never shared the documents and JSTOR tried to get the charges dropped).⁴² In the wake of this tragedy, the White House Office of Science and Technology Policy issued a memorandum instructing federal agencies of a certain size to develop plans to make research they have supported freely available: “citizens deserve easy access to the results of research their tax dollars have paid for,” the program’s director declared.

A related, if reversed, logic could be applied to art and culture more broadly. Due to technological shifts, all manner of creative works have effectively become open access, and now we need to fund them. For the common good that’s free for all to enjoy, we will have to invest in it, which means reconsidering the role of public subsidy.

We will grapple with the ownership of culture—for how long? by whom? on what grounds?—as digitization continues. Yet it is just as urgent to ask why it is acceptable for a small and elite group of entrepreneurs to position themselves to capture the wealth generated by our collective creativity. Despite their passionate critiques of intellectual property and devotion to collaboration and “social production,” technology gurus never raise the possibility that the platforms through which we access and share culture should belong to people whose participation makes them valuable.

Surely if the rights of artists over their own work can be contested, there are grounds to challenge the proprietary claims of digital capitalists, particularly those who have acknowledged their

dependence on the creations, contributions, and uncompensated labor of others.

With this model in mind, we should strive to cultivate the cultural commons as a vibrant and sustainable sphere, one that exists for its own sake, not to be exploited by old-media oligarchs, new-media moguls, insatiable shareholders, for-profit pirates, or data miners and advertisers. The copyright wars prove that many people are frustrated by the current arrangement, but the remaking of our media system will not happen by downloading alone.

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6

DRAWING A LINE

When we talk about the cultural commons, it should be self-evident that production is a precondition of access. An article needs to be researched and written before it can be read; a canvas must be painted before it can be shown. Yet we live in a society oddly reluctant to recognize that this is the case. Dominant economic theories emphasize exchange: the value of a good has nothing to do with how it was made but, instead, the price it can command in the marketplace.

And when we try to break with the market to talk about gift economies, bestowing as opposed to buying, we still focus on the way things circulate rather than how they are created. More often than not, those who speak enthusiastically about the cultural commons stay safely inside what Karl Marx called “the noisy sphere” of consumption, “where everything takes place . . . in full view of everyone,” instead of descending into “the hidden abode of production,” which in fact shapes our world even if we choose to look the other way.

This means we are telling only half the story. Consider Thomas