

## Reclaiming a Commons

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"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 everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possess the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lites 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 at any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement, or exclusive appropriation. Inventions then cannot, in nature, be a subject of property."<sup>1</sup>

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It's been ten years since our victory in the cold war was declared: ten years since communism in Europe fell, and with it the last European regime where Karl Popper was an enemy, and Karl Marx a friend. We fought this cold war over many generations, for an ideal of the open society. For the ideal that political and social society should be a

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<sup>1</sup> VI WRITINGS OF THOMAS JEFFERSON, 1790-1826, at 180-81 (H.A. Washington ed., 1854) (letter to Isaac McPherson, August 13, 1813) (quoted in *Graham v. John Deere Co.*, 383 U.S. 1, 8-9 n.2 (1966)).

place where ideas run free, where creativity and progress is not directed from on top, where no one controls your mind. We won that war. The revolutions of 1989 were revolutions in the name of that open society.

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Two years ago, when I came to Harvard, Charlie Nesson was talking about building a commons in cyberspace. I had no idea what he meant. He spoke about the need to support the building of a space in cyberspace free from control – open and free, and there for the taking. It seemed to me just a little nuts. What could he possibly mean? The idea sounded old; the dreaming of a child of the sixties. And anyway, why would anyone need to build a commons? Cyberspace was not a limited space; there would always be more to build. It is not like the American continent was; we're not going to run into the Pacific Ocean some day. If there's something you don't have in this space, something you'd like to build, then add it. I thought.

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We are at a critical moment in the history of our future and we are, in an important sense, stuck. We are stuck, I suggest, because most think as I did. Most imagine this space to be infinitely expansible, and hence perpetually unclosed. Most think, as the world did a decade ago, that the open society has won and that the closed society has now scampered off stage; and most think that Jefferson is right – that nature protects ideas and that nothing can bottle them up.

But Jefferson was wrong. And because he was wrong, the closed society is not dead. And because the closed society is not dead, Charlie Nesson is right. We are at a critical

moment in the history of our future because we are now witnessing the defeat of what 2000 years had built – the defeat of the open society, the triumph of the closed society, and the destruction of an intellectual commons. And we are witnessing this defeat at the hands of an enemy who has coopted the rhetoric of our past—the rhetoric of freedom that was organized under this ideal of property.

Property.

Jefferson loved property. Jefferson loved small farms as property. He loved the production of the small farmer; the world where everyone was a farmer, and the pride that would go with the management of a small farm.

The open society loved property. Our battle against communism had as its ally, commerce. Freedom would come, libertarians said, through free markets. Open markets meant open societies. Property freely traded would mean human rights regularly respected. Property was the engine of freedom; it would be the power that would resist the tyranny of a state. And there was little danger from this engine of freedom itself; it could not get out of control; for as Jefferson taught us, "Inventions then cannot, in nature, be a subject of property."

But Jefferson, again, was wrong. Or partly wrong. Not wrong in his soul, for the one part of American constitution that Jefferson most worried over was the part that gave Congress the power to create monopolies in ideas, and monopolies in expression – the copyright and patent clauses. In letters to Madison, Jefferson harangued the founder Madison about the dangers of monopoly, especially the monopoly over ideas. But Jefferson was a nut in his time – a respected

and powerful nut, but certainly mainstream. And Madison was a dealmaker. Madison knew that we were still too merchantilist to give up the idea of state sponsored monopolies. So he convinced Jefferson that a small compromise was necessary. He convinced Jefferson that we could sell this tiny bit of our founding soul and nothing would happen.

And in the end, Jefferson was quieted. He thought the First Amendment would restrict the copyright clause; he thought nature would protect ideas; and he thought that if he was the first patent commissioner, then he could set a precedent that would guide the office for the indefinite future. (Which for Jefferson, was not very long. Jefferson believed in perpetual revolution; he believed in a bit of blood every 19 years; his horizon was short.)

But in his compromise, Jefferson suffered an illusion of "is-ism." That nature would protect ideas from property; that nature would assure no one could control the flow of air; that nature would guarantee ideas would expand like fire without losing their density at any one point - these were features of the world that Jefferson knew and he assumed that they were features of any world that anyone could know.

But they are not.

We have just entered the era where Jefferson's picture proves false. Not in a technical sense or in a literal sense, but in any sense that Jefferson would have meant it. We have entered an era when nature doesn't protect us - when, if we want ideas to flow freely, when if we want, as he said, ideas to flow "from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition," we have to make it that way. We have entered a time when

nature can be architected to control ideas and to control their spread; when nature can be architected to defeat the free flow of information; when nature can be architected to close the open society. And all this closing can be done in the name of property.

We have entered a time when the code of our time can be written such that people who own intellectual property have the power — through law and through this code — to close off, to stop, to own an idea, and to make criminal, or at least extremely difficult, any use of that idea beyond the owners permission. We have entered a time when we can construct the world against nature.

How?

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The last few years of internet politics has produced a lot of laws and the following slogan: The internet should be left to take care of itself; that government can do no good there. This slogan was given to us, surprising as this might seem, by a democratic president, through the words of his architect for national health care — Ira Magaziner. And so for the last few years, we have lived in this blissful state where we had this illusion that the net was taking care of itself free from government's influence.

But of course, it is not true that government has stayed out. It is not true that the government has not moved to regulate the internet. The last few years has seen an extraordinary expansion of intellectual property rights, from the extension of the copyright term to just about a billion years, to the criminalization of code that might circumvent copy protection (even if that circumvention would have been for the

purposes of fair use), to the unbelievable expansion of patent protection, through the birth of a doctrine called the business process patent, to the likely passage this congress of a data base protection bill.

This is government regulation on a massive scale. And it is regulation that is producing an extraordinary power to own and hence control ideas. And when tied, as it will be, to technologies that support it, it will produce a cyberspace that will defeat Jefferson's nature - that will make it possible perfectly to control the use and distribution of content. We are seeing the laying of a foundation for our future that will give to holders of "intellectual property" a power over that property that they have just never had. This will be a power that Jefferson thought impossible; a power that is wildly disproportionate to the balance that intellectual property was always to be; a power that will make it possible to close the society that we now call open.

The power through property to produce a closed society - where to use an idea, to criticize a part of culture, to quote "Donald Duck," one will need the permission of someone else. Hat in hand, deferential, begging, a society where we will have to ask to use; ask to criticize; ask to deploy; ask to read; ask to browse; ask to do all those things that in a free society - in a society with an intellectual commons, in a society where no one man, or no corporation, or no soviet, controls - one takes for granted.

We are building the foundation for the society we thought we defeated 10 years ago.

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I want to describe in real terms, with real examples, just what I mean. But before I

do, I want to note what increasingly strikes me as the most amazing feature of this change. Where is the ACLU? What's most amazing about this change - once you see it, and its potential - is that the leading civil rights group in America doesn't seem to get it. The ACLU is off fighting the important battle over pornography in cyberspace. Extraordinary resources are devoted to defeating Congress' attempts (now two, but no doubt there will be more) to keep porn away from kids. And while I'm all for defeating COPA or the CDA, or whatever "C" word they come up with the next time around, I am completely baffled about the priorities. Sure, civil liberties will be compromised if COPA stands; sure, cyberspace will be different if porn is not available at every turn. But compared to the threat that this enclosure movement presents? Compared with the threat to free speech that the propertization of ideas presents?

I have been told that there is an obvious answer to this question about priorities - the cynic's answer. Follow, the cynic would say, the money. Playboy might be our ally in the fight to keep speech free on the net; they won't be our ally in the fight against excessive copyright.

But I don't buy cynical explanations. Something more is going on. The better answer looks not to evil motives; the better answer is a cultural deficit. The better explanation is that we as a culture don't see what Charlie was talking about two years ago when he founded this Center. The better explanation is that we have been taken in by a bad-Chicago rhetoric that now gets whored about by content holders. We don't see a place for an intellectual commons, because we can only see a place for "property."

Now this is bad Chicago rhetoric, because even Chicago doesn't argue for the propertization of ideas and content that this new world will make possible. No one — certainly not I — is against intellectual property *properly conceived*. No one — and certainly not I — is against a limited but effective right of authors and inventors to control what they write or invent. The battle here is not against IP; the battle is against the end of *balance* in IP. It is against IP at an extreme, not IP in its historical form. I am arguing against something new, not rearguing the battle that Jefferson lost. For in my view, Madison had the better of the argument; some monopoly is needed. But the question is not whether some is needed; the question is how much.

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So to get a sense of the extreme that we are building now — to see just how different it is from the regime we had before — consider this:

Twenty five years ago, only companies like the New York Times could be a publisher; only companies like IBM could produce software; only companies like Sears could sell lots and lots of things. This was the "nature" of life in the 70s — terrible disco and an economic reality that meant big was all we could have. The economic constraints of real space life were such that only the big guys controlled. Nature made it so, the economists said, and you can't fool nature.

Dawn broke, Ronald Reagan said, in the 1980s. It was morning in America. Dawn broke on an era where power — here computing power — was given back to ordinary people. This was the PC revolution, where a boy named Bill could outwit the titan IBM and transform a tiny bit of second-rate code into the

dominant operating system on fastest growing computer platforms in the world. Power shifted because the economics had changed, as power became logic-embedded in silicon.

The 1990s were the 1980s, squared. As ordinary users became increasingly connected, the internet began to deliver on the extraordinary promise that the image of Bill Gates beating IBM created. It made possible a world where more than the New York Times could publish, where software could be made somewhere other than at IBM, and where anyone, not only Sears could sell. The internet removed all the barriers to entry that had produced this controlled world of bigness. It removed the structures that made it natural that there be just a few who decided what the rest of us would see.

Now the thing to understand – the point to get, the idea that Charlie saw, the *argument* – is this. The laws that Congress is writing – call that east coast code – and the laws that coders are writing – trusted systems, copyright management schemes, authenticated interactions, or west coast code for short – these two types of code together are rebuilding the world of the 1970s. These two types of code in conjunction are recreating the barriers to entry that the internet had removed. They are making it again the case that only the New York Times, or its 21<sup>st</sup> century equivalent, Ted Turner, and Sears, or its 21<sup>st</sup> century equivalent, Disney, and IBM, or its 21<sup>st</sup> century equivalent – well, let's let that go – control what gets built, or said, or sold in this space.

How?

All speech in cyberspace is "published" which means its all putatively at the hands

of copyright law.<sup>2</sup> When copyright law is forgiving, when penalties are slight, when enforcement is lax, when enforcement is expensive – when all that is true, then it doesn't matter that lots is within the domain of copyright law.

But when west coast and east coast code changes so as to make it easier to enforce copyright law – to make it a felony to breach copyright law, or the law of west coast code, to make it cheap to track the offender – then the fact that everything is within the possible domain of copyright law begins to matter a lot. It becomes extremely important. All speech in this space that isn't purely original (and what speech have we heard that is) is now speech within the domain of control of someone else.

But the IP maven will say, yes but even if everything is "published," not everything can be copyrighted. Copyright requires some originality. Not everything I write is "original."

True. And we have a Supreme Court case, *Feist*, which importantly establishes this important principle. But Congress is feverously trying to work around this Supreme Court case. It is feverously working to pass a database protection bill that will turn the uncopyrightable into the protectable. Data as property. Facts, controlled. A felony to "use" the data protected by the database protection bill. And if successful, then

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<sup>2</sup> Why this should be I am not sure. It seems to me that we need a much more convincing argument to show why every word I utter in cyberspace is considered "published" yet every word I utter in real space is not (only those fixed in a tangible medium in real space are published). It is just an accident of design that cyberspace fixes everything; why that accident should determine the law is unclear to me.

again this fact that everything is within the domain of Congress's law becomes all the more pressing. To publish, you must be the New York Times, or Disney, because only the New York Times or Disney could afford to negotiate the rights. Every use becomes a subject of negotiation of rights; and when this is true, only those who can afford negotiators will be able to use.

"Rights." Negotiate the rights. Because here is the first key to what a commons means. It means the right to speak, or to publish, or to produce, without having to get the permission of someone else in advance. It means a world without prior restraint; where there is a space to speak which depends upon the will of no one else.

To speak, and also to produce. To invent, or to create. For it is here that the second, and less well known threat to a commons in cyberspace is emerging. And this one, I fear in some sense, is worse than copyright.

Patents. A patent is a government regulation. Some bureaucrat in Washington decides whether your invention is novel enough to deserve a 20 year government monopoly. To know this, the examiner must examine the other inventions out there. The examiner must look to see whether someone else had the idea first. That's called a check of prior art. Only if your idea is truly novel will you have the right to a patent.

At least that's the way things are in theory. In practice, the world is very different. In practice, examiners spend less than 8 hours on average checking prior art. In practice, all the incentives are in favor of granting a patent, not denying it. The examiner gets a bonus for granting the monopoly; no incentive for finding that, in

fact, no monopoly should be granted. The scales are tilted in favor of handing out monopolies. We are paying bureaucrats money to give hand-out, state-protected monopolies.

But, the maven says, so what? If the patent is bad, you can challenge it. If it is bad, it will be declared invalid.

True, if you have on average 1.2 million dollars to challenge a patent, you can challenge it, and you may well win. But who exactly would have that incentive? Forget the cost: if you win, its not as if you get the patent. If you win, no one gets the patent. The idea is returned to the commons. And who benefits then?

The reality is that these monopolies are important barriers to entry. Big companies collect patents not for the purpose of making money from licenses; big companies collect patents to have something to trade. If it turns out they are infringing, they have something cheap to give away. But only they have something cheap to give away. If you start up a business on the net, run afoul of some patent, even if in reality is a bad patent, your choices are limited: pay or stop.<sup>3</sup>

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<sup>3</sup> A recent study suggested, for example, that the costs of securing a license to design a new integrated chip would be approximately \$100 million. In response to this point, a member of the audience suggested this wasn't such a large amount - after all, it costs, he suggested, about \$1 billion to build a chip factory, so the IP rights would be just 10%. In my view, 10% on the margin is significant. But in any case, it seems to me to understate the constraint. One need not build a chip factory in order to produce a newly designed chip. If production lines at existing factories can be rented, then the constraint of \$100 million before design can begin is still quite significant.

We are recreating the 1970s. We are creating the world where only the big can produce. And we are recreating it through law. *Laws*, not economics; legislatures, not nature.

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We need a way to resist this. We need a way to show just why this obsession with property is not the property our framers had in mind. We need a way to show that it will recreate the closed society. We need a way to show that IP has always been understood to mean balance between incentives and the commons. We need a way, as Jamie Boyle puts it, to build an environmental movement within this cause. We need some way to get people to see that the resistance to this propertization is not communism.

But we live at a time when we don't have those resources. We live in a time when the rhetoric is not there. We live in a time when even Barney Frank says about database protection, Why should I defend the right of someone to "steal" information.

"To steal." "An idea." Ideas, contra Jefferson, apparently are the stuff of property. For only property can be stolen.

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We need a way to counter this emerging imbalance in thought. The Berkman Center's Open Society project is a small contribution to that need. Our aim is to build links – to get people to see how in our past we have always understood the value of openness. Not just in Stallman's Free Software Movement, not just in the Open Source Movement, but throughout our tradition, this is our past.

And so we have launched a range of projects to stir up this idea that the

commons is the open society. Challenging the copyright extension bill, building open code for education, pushing open governance projects, funding open research, supporting open source: This is an effort not to coopt, but to argue in support. This is an effort to get people to see that there is an undeniable place for a commons in a free society, and that commons will only exist if it is built.

It is an effort to do what Charlie said to do two years ago. It's my nature to be pessimistic and dark about this future; forgive me for that. It is Charlie's perpetual nature to be optimistic and hopeful. We should be thankful for that. For when we look back on this era a generation from now – if we look back freely and openly – it will be the inspiration of the ideas of the Jeffersons like Nesson that will still inspire. My job in this opening is not to inspire. It is to scare.

Let this day open the open society again. In all its possible facets.