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## OUT OF SIGHT AND OUT OF MIND

### On the cultural hegemony of intellectual property (critique)

*Based on E.P. Thompson's insistence that cultural hegemony involves the creation of blinkers that open up certain venues of sight while closing down others, this essay relies on the faculty of seeing (or not-seeing) to suggest a critique of the critique of intellectual property rights. In the current climate of increasing intellectual property expansionism, the public domain has emerged the positive other, a shield against the missiles launched by the blitz-krieg inclined copyright holders, even perhaps a benevolent Dr Jekyll to ward off Mr Hyde's hyper-aggression. I will argue that two powerful rhetorical devices have become commonplace in the critique against the current intellectual property system and in defense of the value of the public domain: creativity and free/dom (or the ideas of free and freedom), and that these, far from being simple and universal categories, in fact are constructions that need to be further problematized and discussed. The ongoing copyright wars have resulted in a polarization of debate and ways of thinking that sometimes hide the complexities of the problem at hand. Instead, a more constructive way to approach the private/public matrix is to envision them not as static opposites, but as constituents of a field in constant flux. As we consider the public domain, must we also deal with intellectual property rights, or rather with flows of ownership between spheres that we sometimes define as private, sometimes as public.*

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Most of the time I am unsure whether to laugh or to cry. The hair-raising absurdities of an ever-expanding intellectual property regime documented by David Bollier (2005), Kembrew McLeod (2005), and others appear to have no boundaries, moral or otherwise. The contour of this expansion, which has taken place in time, in subject matter, and in space, is well known and need not be repeated once again here by me. Many prominent scholars from various disciplines already have outlined eloquently the dangers associated with this

across-the-board tendency (Bettig 1996, Boyle 1996, Coombe 1998, Drahos and Braithwaite 2002, Lessig 2004, McLeod 2001, Vaidhyanathan 2001). And yet, my favorite description of how it is that we find ourselves in the present quagmire has nothing to do with intellectual property per se. In his book *Customs in Common: Studies in Traditional Popular Culture*, E. P. Thompson (1991) very effectively, but quite unintentionally, captures the essence of how today's intellectual property system works when he speaks of cultural hegemony more generally as something that defines the limits of what is possible, and inhibits the growth of alternative horizons and expectations. Despite this, he continues, there is:

[. . .] nothing determined or automatic about this process. Such hegemony can be sustained by the rulers only by the constant exercise of skill, of theatre and of concession. [S]uch hegemony, even when imposed successfully, does not impose an all-embracing view of life; rather, it imposes blinkers, which inhibit vision in certain directions while leaving it clear in others.

(Thompson 1991, p. 86)

So, while sustained successfully largely through skill, theatre and concession, intellectual property rights do not impose an all-embracing view of life. What they do, however, especially within the larger context of globalization, is to produce a very specific, unequal ordering of the global cultural and political economy, as well as to form more subtle blinkers like those Thompson envisioned. In this case, the blinkers tend to clear the way for our gaze in the direction of private property, while obscuring and even diverting it away from a closer inspection of an area where certain things are *not* privately owned, or rather, are supposed to be freely accessible: *the public domain*, or the *commons*.

Definitions of the public domain are many and confusing, as are indeed the penumbra of rights and uses that come with the territory in question. The same can of course be said for property itself, an equally bewildering, pliable, and historically contextual category, 'quintessentially and absolutely a social institution' (Underkuffler 2003, p. 54). Yet, partly as a result of intellectual property expansionism, the public domain has emerged as the positive other, the unwavering defense against the missiles launched by the blitz-krieg inclined copyright holders, a benevolent Dr Jekyll to ward off Mr Hyde's hyper-aggression. According to the *New Shorter Oxford English Dictionary*, being in the public domain means 'belonging to the public as a whole, esp. not subject to copyright'. Such an apparent lack of legal protection may have occurred because groups have agreed that some things are unprotectable to begin with (not even Einstein owned the theory of relativity), because the temporal protection granted by these rights has expired, or, where applicable, because of failure to comply with a statutory condition (Litman, 2001, p. 202). Another way of

putting it is to say that it is a ‘lawyer-free zone’ (Lessig, 2004, p. 24). In all three cases, the public domain seems to represent an alternative to private property; it is a space outside of the law, yet it also fundamentally related to the law.

But let us return to Thompson’s insistence on the faculty of seeing, or, as it were, not-seeing. At first sight his is a brilliant formulation of what we know is an historical affliction: to look first at the individual needs served by copyright rather than at the collective interests of civil society (Rose 2003, p. 85). However, my concern lies with an alternative reading of Thompson’s words: the possibility of using them to suggest a critique of *the critique* of intellectual property rights. In trying to do so, I no doubt will be polemical and undoubtedly fall victim at times to oversimplification. Yet, I remain convinced that the time has come to examine the presence of dominant discourses in this by now quite substantial and interdisciplinary body of work, represented for instance by the various contributions in this special issue. I want to open up a discussion around some tendencies that strike me – as an academic working within this interdisciplinary field – as increasingly discernible. Put in somewhat different terms, impediments are raised not only by the machinations of a bloated legal apparatus, but also are made possible by the perspectives we as academics choose (or choose to leave out) in our own analyses. To a certain degree all scholarly undertakings are about selection. We pick some angles and not others, just as we read some books and discard the rest; the only possible survival-technique in our line of business, it also is how we define ourselves and our work within academia.

My point is consequently not to question such an approach, nor to oppose per se the key tenets of the critique that I am about to critique, because I am guilty of doing the first myself as well as definitely subscribing, hopefully even contributing, to the second. The point I *am* making however, is that this propensity for selection is all the more reason to engage in self-reflexivity and, if it did not sound so terribly grand and pretentious, some good old epistemological soul-searching. In the following, then, I will focus on two powerful rhetorical devices that I believe have become fundamental to the critique of the current IP system and to the defense of the value of the public domain: *creativity* and *free/dom* (or the ideas of free and freedom). I ask why these concepts surface with more frequency and ease while others are left largely unexplored. And if doing so leads to the potential uncovering of underdeveloped approaches to IP in cultural studies and other fields, then all the better.

## Creativity

One of the most important counterarguments against the current intellectual property ‘land-grab’ is that increased control does not automatically lead to increased creativity. On the contrary, in searching for perfect control of

intellectual properties, adherents to the current system arguably delude themselves. More fences do not equal more creativity, just the opposite. Nobody finds inspiration in a vacuum. In a number of ways that we have yet to fully acknowledge, we depend on access to the work of others and we should not, indeed cannot, avoid partaking in culture's continuing intertextuality. The Western conception of authorship, based on ideas of individuality and originality – which emerges towards the end of the eighteenth century and which to this day exerts a prevailing influence over how we view ourselves and the world – is profoundly counterproductive in helping us to understand this collective nature of creativity, not to mention that it is an historically specific rather than a god-given or natural rule. 'Authorship', indeed, is one blinker that makes us see clearly that which we have been taught to recognize as 'correct' expressions of individuality and originality, and that wraps a dense fog around the significance of artifacts and practices that fall outside of what, in effect, is an extremely narrow idea of how cultural work occurs. The repercussions of this inclination are perhaps most acutely felt in the problems facing indigenous/native peoples as they seek access to a legal regime that has disregarded the specificity and value of traditional, collective knowledge and culture (Brown 2003).

Because of its enduring alliance with law and jurisprudence, most famously perhaps formulated by Michel Foucault (1984), authorship has become, if not the root of all evil, then at least a detrimental mental obstacle: both to our appreciation of different forms of cultural production as well as to their inherently collective functions. Within intellectual property critique, creativity is therefore called upon as an alternative term: book titles such as *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (Vaidhyathan 2001), *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Lessig 2004), and *Freedom of Expression<sup>®</sup>: Overzealous Copyright Bozos and Other Enemies of Creativity* (McLeod 2005), are indicative of the way in which creativity seems to signal something positive that is threatened by intellectual property, locked down by Big Media, and under siege by its enemies. No doubt all of this is true. However, I want to argue that instead of helping us to reconceptualize creativity as a collective, perhaps even 'non-original', and extremely culturally diverse activity, the symbolic usage of the idea of creativity as it has taken a foothold in the discourse of intellectual property critique more generally appears not to do away with the old individual, original author. In fact, this usage infuses him with new life (and I will return to the distinctly gendered nature of this construction of creativity further down).

Disney – meaning both the company owning the Mouse that ate the public domain (Sprigman 2002) and the man Walt – is the best example of this propensity I can think of. At least for as long as the overly-generous terms granted by the 1998 US copyright extension, nobody beats Disney for the

doubtful honor of being the ultimate über-crook of the copyright wars, with a corporate appetite of the public domain a bit like Mr Creosote's in Monty Python's movie *The Meaning of Life* (1983). Superfat and supergreedy, Mr Creosote finally exploded of that last, tiny, mint chocolate. What will put a stop to Disney's gobbling still remains to be seen. Much more interesting than being everybody's favorite villain however, is that there is also a 'good' Disney; a role filled by Walt Disney himself, who from the very beginning was designated the artist, whereas Roy, his brother, became known as the 'businessman' (Bryman 1995, p. 32). Even those who go to great lengths to underscore the cookie-cutter format of the Disney films are equally eager to underline how Walt's importance as an *auteur* never should be underestimated (Bryman 1995, p. 26, Shortsleeve 2004, p. 5). Disney: on the one hand the killer of creativity, on the other, the very embodiment of it.

It is at the precise moment when the company emerges as the big, bad, copyright wolf, that it becomes essential to show how the genius vouched for by one man, Walt Disney, was made possible by the public domain and, even more importantly, *perhaps never could have occurred* if the misdirected and overzealous IP protections with which the Disney of today has become synonymous, had been implemented at the time Walt was starting out. Analytically speaking, the company and the man are compelled to part ways; creativity becomes 'bad' when corrupted by corporate domination, and 'good' when guaranteed by the brilliance and innovation of personality. Once, this storyline goes – and it could have been written with Frank Capra in mind to direct – the American entrepreneurial spirit was truly pure and based on imagination rather than crassness and greed, a construction that is absolutely necessary because it reaffirms once and for all that corporations *benefit* from the public domain and that it lies in their best interest to encourage, not restrict it.

When Byrne and McQuillan refer to Disney as engaged in 'literary vandalism' (1999, p. 1), they voice a critique based on hierarchies of value that used to be taken for granted within literary studies. And yet such arguments, which generally emphasize how Disney constantly simplifies and misrepresents literary texts – predominantly those that have fallen into the public domain – offer a viewpoint more or less absent from the field of intellectual property scholarship. From this perspective, the sadness relates not so much to the uses and abuses of the text itself than to the way in which the company forecloses new interpretations by their litigation culture, thus causing a specific form of 'market vandalism'. Placed center-stage, here is the notion of creativity as *innovation* – or rather the lack of it, if Disney and other such companies continue to command the copyright wars.

This particular articulation, creativity = innovation, ironically tends to dispose us not to question ideals of uniqueness and originality, the very principles which cause so many headaches when named 'authorship'. Instead, it

reaffirms the basic soundness of these categories by giving them a different, more neutral and less ideologically-charged name. Instead of exploring the possibilities of various 'creativities', and defining tools by which the fallacy of authorship can be dismantled and rethought, this construction actually re-invents the author and smuggles him in through the back door, but this time as hacker, programmer, DJ, whatever. It does not require too much of a strain on the part of readers to understand this positive form of creativity, for the very reason that it contains some of, if not the most important, features that we have come to take for granted as signals of authorial uniqueness.

Perhaps the most striking feature of this approach is not that it needs the individual cases of 'good' creativity for its argument, but that an overwhelming majority of those who both exemplify it and exalt it are male. Few have been as influential in shaping the general awareness of the dangers of an overbloated intellectual property regime as Lawrence Lessig, in practice as well as in his writings. His 2004 book *Free Culture* is an important call for opposition to tendencies that we should all be vigilant about. Taken in by a vivid writing style made all the more convincing because it relies on clear and plentiful examples of how creativity is threatened by the present obsession with control, it is not until I reach the final pages that I realize that John Seely Brown, Jesse Jordan, Jon Else, Alex Alben, Brewster Kahle, Richard Stallman, and, of course, Eric Eldred, all those whose creativity is, in one way or the other, so clearly stifled by the wrongdoings of intellectual property rights and who throughout the book represent the virtues of innovation, creativity, and even genius, are all men. Is this because women are poor creative role models? I think not. Is it because there are no women whose work exemplifies how innovation and creativity are challenged by the media conglomerates? Hardly likely. Or is it just an insignificant detail, an omission without importance in the larger scale of things? Perhaps. Yet, I would suggest that there is a remote possibility that the innovator/creator paradigm is just as gender-biased as the old author/genius combination.

Be that as it may, I am perfectly willing to accept that the lack of women in this case is an unfortunate lacuna, which might be completely irrelevant to the overall analysis and that just replacing men with women changes little, if anything, regarding the fundamental assumptions that are made either by claiming authorship or creativity. Not seeing certain things while foregrounding others is fine, as long as the possible consequences of such choices are addressed and problematized, if only in a footnote. It is the non-discussion of this lopsidedness that bothers me, not the exclusion in itself. Either way, we are left with a paradox: why is it that the exclusionary narrative of male individuality and originality are part of the problem when it comes to intellectual property and 'authorship', and part of the solution when it comes to the public domain and 'creativity'?

## Free/dom

An even more powerful discursive tool used by scholars, activists, and cultural producers in order to defy the dominance of intellectual property law and to defend the public domain is in fact not one, but two: the concepts of 'free' and 'freedom'. Firmly rooted in the Western liberal tradition, both are extremely difficult to address, because who would want to say that they are against freedom, or opposed to culture being free? I may be critical, but suicidal I am not.

More than 20 years ago, David Lange wrote a highly influential, and as always in his case, beautifully written essay where he argued for the importance of the public domain by comparing its contemporary version to 'the public grazing lands on the Western plains of a century ago' (Lange 1981, p. 176). Lange's contribution to the continued theoretization of the public domain cannot be overestimated, but his text also helped to set the stage for what E. P. Thompson might see as a form of theatricality; that is, Lange's forging of a persuasive analogy between a very precise geographical place in the United States, the 'West', and the public domain. Indeed, the American West is a powerful metaphor for a distinctive way of looking at the public domain, one which emphasizes freedom, wide-open spaces, ingenuity and creativity against all odds. This place and spaceness of openness and freedom stand in stark contrast to the negative, elitist, and by now quite classic example set by the fencing in of common land through the Enclosure movement in pre-industrial England. New World freedom, Old World enclosures. Perhaps it is no coincidence, then, that the discourse and interest surrounding the public domain have gained momentum primarily in the United States, partly by drawing attention to the way in which lessons from the environmental movement can help to conceptualize the digital challenges of the Information Age (Boyle 1997).

The public domain, and to an even larger degree the commons, operate with and can be approached from a number of perspectives that all somehow relate to place and space, be they primarily natural or virtual, tangible or symbolic. And as new as the concerns of our contemporary digital environment are, the impetus behind the formation of the Electronic Frontier Foundation and the Creative Commons are not that different from what prompted the launch of the Commons Preservation Society in Britain in 1865. Rural, urban, or digital, land is still essential to the way we think about the public domain.

Freedom resonates well within this matrix of nature and the land out West (for some and not others one might add, considering the history of its conquest both in terms of people and territory), but there are other definitions of the public domain that rely on making territorial connotations, like Jessica Litman's description of the public domain as a site that can be 'mined by any member of the public' (1990, p. 975).

The most influential use of 'free' within this particular context occurs, however, in combination with the idea of 'culture', a pairing of two amorphous and treacherous terms with one another in one fell swoop. 'Free' in this construction relates first and foremost to the presumably productive, non-rivalrous nature of information and culture, or to the notion that my use of an idea does not in any way lessen the availability, quality, or experience of yours. The problem that I have with this particular articulation and what it appears to signify stems not from any disagreement with its fundamental soundness. It stems, rather, from *the very ease* with which we can identify with its argument; therein lies an unfortunate tendency to shut our eyes to the fact that the culture to which the notion of free most readily appears to apply is a very specific one, the one of peer-to-peer, music-downloading and sampling, those very activities that have come to symbolize the misdirected increase in copyright policing. As we cannot really argue with free, nor with the general productiveness of the culture it is combined with, this may in effect (and as I have tried to argue elsewhere) hinder us from recognizing that we have non-digital resources in the public domain that, for various reasons, never have been protected by intellectual property rights and that we perhaps should remove *from their state of freedom into one of increased protection* (Hemmungs Wirtén 2004) or see them vanish altogether. Whether intellectual property should or should not be the regime by which to secure such protection is another, extremely complicated and difficult question, albeit one that deserves much more attention.

Regardless, culture unfortunately *is* possible to deplete, languages *do* disappear, and while the powerful idea of free is applied only to a distinct set of cultural expressions, it operates under implicit universalistic assumptions that hide the complexities of cultural production and consumption under globalization. In certain instances culture is perhaps best served by *not* being free, by *not* being allowed to be used freely, by *not* being subjected to free markets, and by *not* being free from governmental interventions. Read my lips. Sometimes, *not* always.

## Conclusion

A major danger of the problems addressed in this issue of *Cultural Studies* and in critical studies of intellectual properties more generally is that they seem to invite polarization of debate and ways of thinking: *intellectual property rights v. the public domain*; *free v. control*; *private v. public*; *owned v. unowned*, perhaps even, (although I would have thought that division long buried) *droit d'auteur v. copyright*. All of these concepts are placeholders in a binary system of discourse that sometimes leads well-meaning scholars and activists to misrepresent the complexity of the problem. It is almost as if we *need* the perfect oppositions of



*good v. bad* in order to make an expedient case against the increasing encroachment of greedy intellectual property rights holders. This is understandable, perhaps even necessary. But I have a problem with the fact that such a matrix of opposites makes it so easy, too easy in fact, to determine who are the bad guys, and thus quite logically, who are the good ones. It sets the stage for oversimplification, and when possible, oversimplification should be avoided.

Instead, a more constructive way to approach these pairs is to envision them not as static opposites, but as constituents of a field in constant *flux*. As we consider the public domain must we also deal with intellectual property rights, or rather with *flows of ownership between spheres* that we sometimes define as private, sometimes as public. Indeed, what is most striking about these spheres from an historical point of view is that they are never pure and fixed but always in motion.

This is why the circulation between 'owned' and 'un-owned', between free and governed, between legal restrictions such as copyrights or patents, and the expropriation made possible by the lapse or lack of protection, represents the continuous to and fro movement that in fact defines the relationship between the public and the private. Today the struggle between freedom and control may be a theater of war in which we all are enlisted, but it is also a geography (Sennett 1977, p. 87) that constantly allows us to map what we see as public in relation to that which we consider private. Thus, throughout this essay I have sought to use the notions of creativity and free/dom not as theoretical centers or *topoi* but as two boundary objects, objects that are imbued with value and ideology but that also traverse these two domains. My aim has been to stress how important rhetoric and discourse are to our analytical constructions, and how they sometimes result in navigation with one eye only.

Finally, it cannot be stressed forcefully enough how intellectual properties/the public domain are global issues. Yes, they are also about national laws and nation-state interests, but their ramifications cannot be countered without international mobilization; nor is it possible to move ahead analytically without collaboration. Self-reflexivity is an essential part of such a global, interdisciplinary dialogue that ultimately should be about lowering, not raising, blinkers.

## References

- Bettig, R. V. (1996) *Copyrighting Culture: The Political Economy of Intellectual Property*, Westview Press, Boulder.
- Bollier, D. (2005) *Brand-name Bullies: the Quest to Own and Control Culture*, John Wiley, Hoboken, NJ.
- Boyle, J. (1996) *Shamans, Software, and Spleens: Law and the Construction of the Information Society*, Harvard University Press, Cambridge, MA.

- (1997) 'A Politics of Intellectual Property: Environmentalism For the Net?', *Duke Law Journal*, vol. 47, no. 1, pp. 87–116.
- Brown, M. F. (2003) *Who Owns Native Culture?*, Harvard University Press, Cambridge, MA.
- Bryman, A. (1995) *Disney and His Worlds*, Routledge, London.
- Byrne, E. & McQuillan, M. (1999) *Deconstructing Disney*, Pluto Press, London.
- Coombe, R. (1998) *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law*, Duke University Press, Durham.
- Drahos, P. & Braithwaite, J. (2002) *Information Feudalism: Who Owns the Knowledge Economy?*, Earthscan, London.
- Foucault, M. (1984) 'What Is an Author?', in *The Foucault Reader*, ed. P. Rabinow, Pantheon, New York.
- Hemmungs Wirtén, E. (2004) *No Trespassing: Authorship, Intellectual Property Rights, and the Boundaries of Globalization*, The University of Toronto Press, Toronto.
- Lange, D. (1981) 'Recognizing the Public Domain', *Law and Contemporary Problems*, vol. 44, pp. 147–178.
- Lessig, L. (2004) *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, The Penguin Press, New York.
- Litman, J. (1990) 'The Public Domain', *Emory Law Journal*, vol. 39, no. 4, pp. 965–1023.
- (2001) *Digital Copyright*, Prometheus Books, Amherst, MA.
- McLeod, K. (2005) *Freedom of Expression<sup>®</sup>: Overzealous Copyright Bozos and Other Enemies of Creativity*, Doubleday, New York.
- (2001) *Owning Culture. Authorship, Ownership, and Intellectual Property Law*, Peter Lange, New York.
- Rose, M. (2003) 'Nine-Tenths of the Law: The English Copyright Debate and the Rhetoric of the Public Domain', *Law and Contemporary Problems*, vol. 66, nos 1–2, pp. 75–87.
- Sennett, R. (1977) *The Fall of Public Man*, Cambridge University Press, Cambridge.
- Shortsleeve, K. (2004) 'The Wonderful World of the Depression: Disney, Despotism, and the 1930s. Or, Why Disney Scares Us', *The Lion and the Unicorn*, vol. 28, no. 1, pp. 1–30.
- Sprigman, C. (2002) *The Mouse that Ate the Public Domain: Disney, the Copyright Term Extension Act, and Eldred v. Ashcroft* [online] Available at: [http://writ.news.findlaw.com/commentary/20020305\\_sprigman.html](http://writ.news.findlaw.com/commentary/20020305_sprigman.html)
- Thompson, E. P. (1991) *Customs in Common: Studies in Traditional Popular Culture*, The Merlin Press, London.
- Underkuffler, L. S. (2003) *The Idea of Property: Its Meaning and Power*, Cambridge University Press, Cambridge.
- Vaidhyanathan, S. (2001) *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*, New York University Press, New York.