The Responsive Community

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A Movement for the Commons?

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Last October, the U.S. Supreme Court heard oral arguments about whether to strike down the Sonny Bono Copyright Extension Term Act. The Bono Act, passed unanimously in memory of the late singer and politician, retroactively extended the length of all existing U.S. copyrights to as much as 120 years from the moment of creation (if the author is a corporation). This was the 11th extension of copyright terms passed in 40 years; plaintiffs charged that it violates the Copyright Clause of the Constitution, which allows Congress to secure monopoly rights over intellectual property "for limited times ... to promote the Progress of Science and useful Arts." Plaintiffs argued that repeated, retroactive extensions of copyright terms were neither "limited" nor conceivably useful for promoting new creativity.

The lead lawyer for the plaintiffs was Lawrence Lessig, a law professor and prominent advocate of a social arrangement that he calls the "commons." He was joined in Washington by several fellow travelers, including the Duke law professor James Boyle, who has recently called for a movement in defense of the commons—modeled on environmentalism.

The success of environmentalism has spawned many imitators, but Boyle's proposal is more plausible than most. A pro-commons movement would have distinguished theorists, chiefly Lessig and Boyle; their fellow lawyer Yochai Benkler of Columbia; the writer David Bollier; and Elinor Ostrom, who is one of the most creative social scientists working today. It would have active support from

such organizations as Public Knowledge, the Media Access Project, the Center for Digital Democracy, the New America Foundation, the Free Software Foundation, the Electronic Frontier Foundation, Consumers Union, and the Berkman Center at Harvard Law School. It would have identifiable enemies—Microsoft, Disney, and AOL-Time Warner—and folk heroes such as Dmitri Sklyarov, a Russian programmer who was jailed for writing software that could be used to read books in the Adobe eBook format without the publisher's permission. What would a commons movement pursue? In the most general sense, a "commons" is a good or resource that belongs jointly to a collectivity. Its owner can be a village, a nation, or the human race (as in the case of the oceans). Proponents do not use the term to describe for-profit corporations, perhaps because stockholders own alienable shares of the firm—they do not share communal ownership.

There are several ways to manage a jointly owned resource, including the obvious expedient of turning it over to the government. Both the Boston Common and the House of Commons are state properties. But modern enthusiasts of the commons idea are not interested in this approach. They prefer a different—and somewhat paradoxical—method of achieving joint ownership, which is to *ban* private, exclusive control within a certain domain.

This approach generates an *unowned commons*. It would be a bad way to manage housing, because we all like to have privacy and exclusive control of our homes—even if we rent. But an unowned commons can work in other areas. One example is the array of books and music that have entered the public domain so that anyone can read, quote, and even reprint them for profit. That is the commons that the Sonny Bono Act threatens.

A different kind of example is the Internet, according to an interesting analysis best argued by Benkler. All the wires and computers and e-mail messages that constitute the Internet are privately owned and fall under someone's exclusive control. But computers that handle Internet traffic must be programmed to receive any "packet" of information that reaches them and to send that packet unchanged towards its intended recipient. This makes the whole Internet a kind of public thoroughfare. It belongs to us all because it belongs to no one in particular—not even to a state.

Yet another example is any software governed by the General Public License: for example Linux, the increasingly popular operating system. People who use such software enter into a contract that blocks them from asserting private control over the code they have received, or over any software of their own that incorporates it. A related idea is "open source" software—computer code that can easily be read and understood by any programmer who views the program (whereas most software is rendered unintelligible to human beings before it is sold). In theory, open source software can be covered by conventional patents. But it is difficult to prevent people from illicitly copying and imitating open source code, so in practice it is normally given away.

Finally, most early websites formed part of a commons, not because it was illegal to assert copyright over their contents, but because it was difficult to control unauthorized copying, and there was a genially anarchic culture of openness and gift giving on the early Internet. Many people made websites in the expectation (and even the hope) that they would be downloaded, adapted, and imitated. This is the ethos of "hackers," a subculture with roots in the universities of the 1960s. Northern Californian radical mores had a profound impact on the Internet, as Manuel Cassels has argued.

Proponents believe that a heterogeneous array of goods can be managed as commons. Leading candidates include the oceans and the atmosphere; films, books, and musical scores (after a limited period of copyright protection expires); scientific knowledge; community gardens in major American cities; and the broadcast spectrum. In the rest of this article, I will focus on three particular and interlinked goods that seem especially suitable for management as commons. These goods are software, digital material such as websites, and electronic networks such as the Internet. There is reason to believe that such goods can avoid the "Tragedy of the Commons" that often destroys unowned property. A field of grass becomes less valuable the more cattle are crowded onto it, so entry must be limited. However, a network grows exponentially in value as the number of users increases. (This is Metcalfe's Law.) Furthermore, a field loses value as cows consume the grass in it, but anyone can copy a digital file without degrading the original at all. Finally, creating a new pasture requires land and labor, but a new website or program can be built cheaply and easily.

Thus the most promising new forms of commons are all connected to computers. To be sure, the Sonny Bono Act deals directly with materials created before computers were invented. But even old works like *Snow White* and the *Grapes of Wrath* can be digitized, and this changes the economic arguments about copyright. Defenders of the Bono Act claim that publishers must retain ownership of old works or else no one will have sufficient incentive to distribute them. For example, venerable publishing houses should be able to profit from their "backlists" of old titles, because this keeps classics in print. But Jonathan Zittrain of the Berkman Center disagrees. "The argument that there must be an economic incentive to publish doesn't take into account the Net," he told *The New York Times*. "The Internet answer is you don't need [commercial] publishers to bring out cheap editions." Indeed, the lead plaintiff in the challenge to the Bono Act was an online publisher, Eric Eldred, who posts free classic books on his website.

Proponents make several arguments in favor of the unowned commons as a social form. It is free of bureaucracy and restrictions on individual creativity. It promotes innovation—a point that Lessig mentions on almost every page of his manifesto, *The Future of Ideas*, often citing economic arguments. It permits tremendous diversity, since anyone in any country can be a creator. It encourages virtues of generosity and openness. And it may support the development of robust communities by giving many people opportunities to contribute actively and cooperatively to a common store of goods. (Communitarians should be interested in this point.)

Protecting an unowned commons may also be a matter of simple justice. Since many unnamed people have usually contributed to an intellectual or cultural good, no one should be able to claim exclusive rights to it unless such monopoly control is absolutely necessary to "promote the progress of the useful arts." For example, Disney drew the story of Snow White from a cultural commons, European folklore. Therefore, the company has no moral right to the legend. Perhaps it was necessary to let Disney profit from making its 1937 movie version—to provide incentives for more such creativity—but the

details that Disney added to the story (e.g., Sneezy, Grumpy) should soon go back into the public stock from which Snow White herself was drawn. The same can be said about software, which often benefits from heavily subsidized past work in computer science.

If the unowned commons is a great idea, we could expand it. For example, the airwaves that are used to broadcast television and radio messages are national property that the government distributes (free of charge) to private firms for their exclusive use. Modern technology would allow the airwaves to be turned into a kind of Internet instead. Anyone could be a broadcaster, sending labeled packets of data onto the airwaves, and the audience would find what they wanted to see or hear by using search engines. Managed this way, the broadcast spectrum would be an unowned commons. There does not seem to be any technical obstacle to this approach.

But more likely, the new intellectual and cultural commons will contract. Corporations have vainly sought a profitable "business model" for exploiting the Internet, and they increasingly feel that it is hostile territory. Thus Amazon, the online bookseller, has patented its method for ordering goods and will sue anyone for imitating it. E-Bay has taken a rival auction company to court for investigating the prices in the E-Bay site, claiming that this constitutes trespass of private property because the rival firm's electrons entered E-Bay's computers. And Microsoft struggles against free software. Its most effective method is to imitate some existing free program, add wrinkles of its own, patent the results, and make only its version fully compatible with the Windows operating system.

Meanwhile, cable companies continually fight for the right to direct their Internet customers to special "portals" (entry websites that advertise corporate products); and they try to limit their customers' ability to publish material on the Internet. The latest trend is to increase connection speeds to websites that have a financial relationship with the Internet service provider (ISP), while subtly slowing down other sites. This means that if your favorite low-budget nonprofit seems to have a slow website, your ISP may actually be responsible.

Congress has not helped. Recent legislation has made it illegal to distribute tools that can defeat copy-protections, even if the person

trying to copy something has a legal right to do so. And with the Bono Act, Congress extended the copyright on works like "Steamboat Willie" (1928), lest these gems fall into the public domain.

It sounds like a good time for a movement. Supportive individuals and organizations could band together to demand policies such as the following:

- Looser copyright and patent rights that expire sooner than under present laws.
- Laws requiring providers of Internet connections to offer neutral services so that their customers may freely explore the World Wide Web and easily post their own material. These laws come under the heading of "common carrier" rules.
- Subsidies for software—and also for cultural and scientific material—that is open source and/or distributed under the General Public License. (Governments would not necessarily have to provide these subsidies; support could come instead from universities and foundations.)
- Aggressive antitrust enforcement, aimed not merely at lowering the price of software, but also at preserving values such as widespread creativity and free sharing of material.

These are attractive policies. But before I sign up for a commons movement, I want to raise some cautions.

First, moral arguments in favor of the commons need more development and refinement. Lessig leans heavily on the value of innovation, but some innovations are bad (think of child pornography, online auctions of stolen credit card numbers, privacy violations, massive plagiarism, and gambling sites). When I challenged Lessig on this point, he explained that he was in favor of innovation generally, but since he was not a libertarian he was willing to ban the really bad results. This is a good answer: the genius of liberal society is to permit inventions while prohibiting those that violate an important, articulated principle. But would we really ban mildly harmful innovations, such as free pornography that may now fall more easily into the hands of 12-year-olds? I doubt that we would or should. It is worth noting that we would not have to deal with online pornogra-

phy if Disney and Microsoft ran the Internet. There are advantages as well as disadvantages to corporate control. So before I sign up to participate actively in a pro-commons movement, I want to be persuaded that the benefits of a pro-commons movement outweigh the harms.

Second, a commons may not be subject to beneficial, democratic regulation. Consider the example of privacy. Surveys show that Americans are very concerned about the lack of privacy online. But it is hard to give legal protection to privacy in a commons, because no one can be held responsible for the confidentiality of e-mails that pass through unowned networks. A closed, corporate communications network like the old Bell Telephone system could be rendered private by act of Congress or court order; not so the Internet. If there is software that can intercept e-mails, it will be used in a commons. Some technologists note that we can protect our privacy by encrypting our own e-mails. But then even terrorists and criminals can hide their communications from the state. We need legislation to protect online privacy—with important exceptions. However, such legislation requires a level of control that is hard to achieve in an unowned commons.

Inequality is a third reason to worry about the commons movement. In my view, ordinary people need powerful, disciplined organizations to represent their interests. But the traditional mass-based organizations have not fared well in the digital age. As Lawrence Grossman wrote in *The Electronic Republic* (1996), "The big losers ... are the traditional institutions that have served as the main intermediaries between government and its citizens—the political parties, labor unions, civic associations, even the commentators and correspondents in the mainstream press." (One might add religious denominations to his list.) Their decline began decades ago and has many causes, but the Internet commons poses additional challenges for them. For example, in the past the parties could buy themselves prominence, but today the main websites of the Democratic and Republican parties are inconsequential among all the other political sites built by narrow interests and private citizens.

A digital commons is beneficial for individuals who have appropriate skills or enough capital to buy services. To be sure, some

successful Internet entrepreneurs began from disadvantaged positions as immigrants and adolescents. But the fact remains that most people lack the ability to create software or web content. They might be better off if a few massive, popularly based institutions dominated media and politics, but that is the opposite of a commons.

I have one more concern about the nascent commons movement. The last thing we need is another "movement" that consists of many Washington-based organizations with no active, participating, grassroots constituency. But it will be extremely difficult, I believe, to mobilize mass support for the unowned commons, since the issues are complex and technical; the benefits are diffuse and often speculative; and the main opponents are organized, motivated, and rich.

The commons movement did not need a grassroots base to reach the Supreme Court. All one requires for successful litigation is a team of pro bono (but in this case anti-Bono) lawyers and one client who can show harm. The copyright term extension act was a golden opportunity for the commons movement, because the text of the Constitution itself seems to bar private ownership of materials created in the distant past.

However, a constitutional strategy cannot defend other parts of the digital commons, such as open source software. And even in the Bono Act case, the plaintiffs lost, 7-2, when the Supreme Court decided to defer to Congress. I believe that the Court interpreted the Copyright Clause of the U.S. Constitution too cautiously. However, as a general practice, courts cannot—and should not—be the main protector of a commons. It is undemocratic and unsustainable to count on appointed legal experts to override legislative decisions, except in cases like copyright extension, where an explicit constitutional clause is involved.

Unfortunately, legislatures are likely to make bad decisions about the commons. The Bono Act originally passed Congress without dissent, because all the interests that could employ lobbyists were for it, and no one else noticed. Focused special interests usually beat diffuse public interests in a legislature. This is a version of the Tragedy of the Commons, which predicts that public goods will be degraded—in this case, because of politics. The passage of the Bono Act underlines the need for an active grassroots base.

But where can supporters be found? Some people who favor a commons hope to organize mass support on the conventional left, among citizens who are hostile to corporations. But this approach could easily alienate everyone else—including those who don't love corporations but who resist a reflexive opposition to their interests. Besides, people on the left have other causes to worry about, and the commons is likely to remain a low priority for them.

Other proponents of a commons movement would like to organize users of free goods, such as college students who share copyrighted music and hackers who trade unauthorized copies of software. Perhaps these people could be persuaded that weaker intellectual-property laws would serve their interests. For me, this strategy raises two problems. First, I think that there should be a *balance* between the property rights of authors and the freedom of users to copy and share material; but many hackers deny property rights altogether. Second, a movement that sought no-cost music and software would seem excessively consumerist; it would be about saving money, not creating public goods. To address these concerns, the commons movement could look for constructive ways to encourage and protect the creation of intentionally free art, software, and information. The movement would work with willing artists and programmers to help them get their work distributed outside of market systems, while earning a livelihood. This is the approach that Public Knowledge and allied organizations have chosen. I support them, although I doubt that a few artists and counter-cultural programmers will ever make much political headway against Microsoft and AOL-Time Warner—especially since most young people today are strikingly uninterested in political action and difficult to mobilize.

One more strategy has been proposed by "hacktivists" such as Declan McCullagh. McCullagh argues that programmers do not need legal reforms to achieve a commons (which is what "geektivist" organizations such as Public Knowledge advocate). Instead, hackers can simply invent and deploy pro-commons software. For example, no private company has the capacity to stop a hacker from copying and distributing its intellectual property if the hacker uses an "anonymous remailer" that conceals his identity. Similarly, music-sharing networks can be made impervious to regulation. The government forced Napster out of business because it was a company that allowed

people to share stolen music. But courts may not be *able* to close Gnutella, which is neither a company nor a piece of software, but rather an activity, comparable to sending e-mail. Gnutella users make computer files (mostly music) available for others to copy from their computers. Gnutella cannot be sued, so perhaps it cannot be stopped.

McCullagh may be right that software will create a commons without help from legal reformers. But anarchists have been predicting the triumph of individual freedom for decades, on the assumption that software inevitably undermines laws and corporate control. This is the meaning of the famous hacker slogan, "Information wants to be free." The actual trend has been just the reverse; Microsoft and AOL have grown steadily more powerful. Besides, a commons built by hackers only looks beneficial if you believe single-mindedly in individual freedom. I would not trust unsupervised "hacktivists" to construct the Internet of the future in ways that protected any values other than liberty (e.g., equity, democracy, security, solidarity, or justice).

Fortunately, there is a different conception of the commons that addresses the moral concerns I've raised so far and that also has a promising political strategy. For many centuries, in many European languages, some nonprofit, voluntary *associations* have been called "commons." Associations are not unowned goods; their assets are possessed by their members. But if the members of an association think of themselves as serving the public—as trustees of a public good—then they are managing a kind of commons. For example, many members of religious congregations believe that they own the assets of their own denomination (jointly, not severally), and that they must maintain these assets in the interests of humanity. Thus a church, synagogue, or mosque can accurately be called a "commons." It may demand tithes or dues and give special rights to its major donors. But it is not like a corporation; there is never a quid pro quo of membership for money.

Not all associations are good. (The Mafia is one.) But they have certain powerful advantages over unowned resources such as the oceans and the Internet. Associations can be regulated by a democratic state, since usually they have charters, articles of incorporation, and tax status. Yet they can defend themselves by lobbying and

litigating—in fact, some are powerful political agents. In order to raise money for their activities (political and otherwise), they may demand contributions in return for membership. People are often happy to join because membership provides profound psychological goods, such as solidarity and fellowship. In short, associations have ways of preventing the Tragedy of the Commons.

Thus I believe that we do not have to choose between the Internet as a playground of huge companies and the Internet as an anarchistic, unregulated, unowned commons. A third option is an Internet in which voluntary associations play a much greater role than they have hitherto. Already, many associations generate free material that they donate through websites, e-mail lists, or other technological means. Some are essentially "real-world" organizations that have adopted the Internet; others have formed exclusively online. Some have rules and defined membership lists; others are much looser. In the vast majority of cases, their goal is not to defend or promote a "commons" (a word that they may never use). Their purpose is rather to provide some kind of service to their own members or to the general public, either free or at subsidized rates.

What we need today is a movement that builds more such associations and links them together in defense of their shared interests. If there were a robust network or organized movement connecting nonprofit, voluntary associations that operate online, it would have a huge grassroots constituency and considerable power.

There is some reason to think that nonprofit associations would pursue commons-style regulations if they came together to deliberate about the management of the Internet. After all, nonprofits tend to suffer when copyright and patent rules are highly restrictive. Although they own intellectual property, they mainly want to be able to use other people's work conveniently and distribute their own ideas as widely and cheaply as possible. Also, their websites can be lost when Internet service providers discriminate in favor of their own financial partners, or when search engines charge for favorable placement. Thus a movement of online associations might choose to fight these developments and other threats to the commons.

However, I would not presume to say in advance what policies the movement would choose to pursue. That would be a decision for its members to make, based on their experience and values. All I am arguing is that we need an independent, nonprofit, democratic movement that can offer people opportunities to work creatively with the new electronic media, convene deliberations about how the media should be regulated, and then act politically.

There are two dangers to the strategy I advocate. Nonprofits might not have enough in common to gel into a movement; or they might form a robust movement that lobbied in its own self-interest, narrowly defined. For example, the movement might focus on obtaining state subsidies exclusively for its own leading member organizations. These are dangers inherent in any grassroots strategy, and they must be confronted early on by the activists, theorists, and philanthropists who are involved in civic media work. A movement will require coordinating bodies and organizations. These new institutions must have bylaws, charters, and mission statements that commit them to remaining democratic, transparent, and responsive to individual members with diverse views.

At the Universities of Minnesota, Wisconsin, and Maryland, some colleagues and I are trying an experiment. We are working in partnerships with members of our local communities to form democratic associations that create free products such as introductory computer courses, structured online discussions, and websites with searchable lists of local assets, interactive online maps, and news stories. We call these associations "Information Commons." People join because they want to serve their communities (or because they hope to acquire computer skills), not because they believe in the commons as a social form. Many participants are minority and low-income youth—not the usual constituency for reforming intellectual-property law. Indeed, we are not sure what policies, if any, the Information Commons will decide to pursue. As we encounter practical problems in trying to build public-interest associations, we may decide that we have to take collective political action. Or we may conclude that reform is unnecessary, since the corporate Internet serves us well enough. Our work is modest and only makes sense because many other people also want to forge links among related nonprofit associations that operate online. If these efforts begin to coalesce, we will have a commons movement that I will be proud to join.