The Common Property Resource Digest

NO. 65 QUARTERLY PUBLICATION OF THE INTERNATIONAL ASSOCIATION FOR THE STUDY OF COMMON PROPERTY June 2003

The Missing Vocabulary of the Digital Age: The Commons

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As a theoretical matter, it's easy to believe in "paradigm shifts," the concept of erratic intellectual progress made famous by historian of science Thomas Kuhn. It's much harder to admit that our own consciousness may be imprisoned within the iron bars of invisible paradigms and that this captivity may limit our ability to see new realities and the Next Paradigm.

Alas, this is precisely the problem plaguing so many wars over the control of creativity and knowledge in the digital age. New modes of communication email, the World Wide Web, collaborative software, WiFi Internet access, rip-and-burn CDs, and dozens of other digital technologies are radically transforming the central nervous system of our society. They are changing the nature of creativity, public dialogue and social interaction. Entirely new genres of expression and knowledge are being created.

But to listen to the guardians of the Old Paradigm, you would think we still live in an age of printing presses and one-way mass media. In the name of copyright and trademark law which are intended to promote creativity — film studios, record labels, publishers and information vendors are seeking to carry out a massive cultural lock-down. Essentially, they want to protect their existing business models by controlling how digital content is transmitted and used. This increasingly requires a transformation of our open, democratic cultural environment into a strictly regimented marketplace.

This vision is being pursued through unprecedented extensions of intellectual property (IP) law, new technological controls over the flow of information, and one-sided retail licenses that strip people of their customary rights. Consumers who open the plastic wrapper of a software package or go to a website and click an "I Agree" button may unwittingly "agree" to surrender certain rights, such as the ability to sue for defective merchandise or the right to criticize the product. These legally dubious contracts are known as "shrink wrap" and "click-through" licenses.

Over the past decade, these forces have conspired to make copyright protection a virtually perpetual monopoly and to shrink the scope of fair use rights, which allow the excerpting of content for personal, scholarly and non-commercial purposes. Software encryption and digital rights management are thwarting legal forms of public access to and use of content. Some companies claim a cultural monopoly on common words, phrases, sounds and colors. A few examples suggest the dimensions of this reactionary crusade:

- **To control the flow of information from the Olympic Games in Sydney, Australia, so that it could sell website and broadcast rights, the International Olympic Committee prohibited athletes from talking with their hometown newspapers or chatting online with**

local reporters. Congress has already granted the IOC statutory control over the word "Olympics," leading to a ban on the phrase "Gay Olympics" but approval of "Special Olympics."

• McDonald's has asserted a proprietary claim in the Scottish prefix "Mc" when applied to food establishments, threatening legal action against mom-and-pop operations like "McMuffins" and "McSushi."

• Warner Brothers, producer of the Harry Potter films, has warned teenage fans that they may not use the name "Harry Potter" on their websites, claiming it constitutes a trademark infringement.

• ASCAP, the music licensing body, once told summer camps that singing copyrighted songs around the campfire constituted a "public performance," and demanded that the Girl Scouts and others pay licensing fees.

• The Los Angeles Times and Washington Post, who are otherwise notable defenders of free expression, have invoked copyright law to prevent a conservative website from posting their newspaper articles on the Internet as part of a political discussion about media bias.

However absurd such stories may seem, they are perfectly logical extensions of copyright and trademark law. IP law has distinct philosophical premises about how creative works originate and diffuse throughout our society through market transactions of content legally protected as property.

No wonder IP law is speechless in face of the fantastically productive "gift economy" of the Internet. It cannot explain how thousands of vibrant websites and listservs run by self-organized, voluntary affinity groups can create valuable content. The logic of contracts, property and markets cannot make sense of the free sharing of knowledge that is the hallmark of science or the improbable rise of Linux, the free-software computer operating system that has been assembled by a global corps of volunteers collaborating via the Internet. Not only has Linux been created without the costly apparatus of a corporation or a marketplace, many industry leaders consider it technically superior to Microsoft software.

The very idea that sharing material over the Internet can generate greater economic value than strict propertization or that it fulfills a high democratic purpose is regarded by many industries as ridiculous, subversive or communistic. I once witnessed a Sony attorney red-bait a proponent of online sharing of content. An official of the Association of American Publishers has criticized librarians who want to share all content for free as "radical factions, like the Ruby Ridge or Waco types."

Yet free access and sharing of information lie at the heart of an open, democratic society. In fact, all sorts of endeavors science, education, music, journalism and civic debate depend upon the free exchange of creativity and information. Scientists must be able to use previous research in order

to make new discoveries. Artists must be able to use the images, musical styles and plotlines of earlier artists. Journalists, scholars and citizens must be able to quote others' works.

The irony is that socially based genres of free information exchange are vital to our democratic society yet they are largely invisible to policymakers because they defy the premises of neoclassical economics and copyright law.

The public domain is the closest approximation we have for the concept that creativity is nourished has always been nourished through sharing, openness and community. Sadly, the public domain has always resembled a broom closet in the grand palace of copyright law. Our copyright laws instead celebrate individual authorship and the propertization of creativity, not the other fertile modes of knowledge-generation.

An urgent challenge of our time, as I see it, is to develop a new mental map and public language for describing new modes of cultural production in the Internet age. Like many others, I see great value in beginning to talk about the commons as a new framework for these issues. We need to invent some new cultural categories, much as ecologists and activists in the early 1960s literally invented the idea of "the environment."

As Duke law professor James Boyle has pointed out, fifty years ago American society had no overarching narrative for understanding that synthetic chemicals, dwindling bird populations and polluted waterways might be conceptually related. Few people had yet made the intellectual connections among these discrete phenomena. No analysis had yet been formulated that could explain how birdwatchers and bird hunters might actually share common political interests.

In a very real sense, the rise of environmentalism as a political and cultural movement was made possible by a new language. In the face of a new set of market excesses, we face a similar challenge today to invent a new language for protecting the cultural commons.

The functioning of our economy and culture has changed dramatically as a result of digital technologies, but our mental maps still tend to depict the landscape of another time. A handful of giant content industries continue to insist on expansive legal protections for a singularly narrow, Old Paradigm model of cultural production. This model requires centralized corporate control of nearly all significant creativity and information, after buying individual creators' copyrights in an unequal bargaining process. It also requires that works be strictly defined as property and disseminated through market transactions.

The idea that valuable cultural production might be carried out more efficiently and flexibly through a commons or in the lingo of the Internet, "peer production" is incomprehensible.

The commons is a useful discourse because it confers a theoretical respectability and standing on phenomena that are otherwise seen as isolated and aberrational. For example, it helps explain the actual dynamics of online scholarly publishing, scientific research and peer production, which have little standing, let alone legal protection, in the philosophical traditions of IP law.

The commons also helps us showcase the many realms being threatened by overly powerful

market forces while validating a new affirmative framework that recognizes our non-market interests as citizens. It's not that the market is bad in principle, but rather that its reach and influence are becoming too intrusive, dysfunctional or expensive.

The commons offers us a vocabulary for talking about these excesses. It gives us a language for talking about inappropriate commodifications of knowledge and the systematic privatization of resources that should belong to all of us as a civic right.

I like to talk about the commons because it helps identify roles, behaviors and relationships that cannot be adequately expressed by market theory. It gets us beyond market-speak in which everyone must be either a producer or a consumer. It gets us beyond property-speak in which everything must be strictly owned by an individual or corporation or government. It gets us beyond the short-term, profit maximizing mindset of the business enterprise, and allows us to entertain broader long-term
objectives that may or may not be profitable, but are nonetheless useful and socially constructive and now feasible using Internet technologies. In short, the commons re-situates our understanding of knowledge and creativity from a market context to the larger context of our political culture. This is a long- overdue paradigm shift.

Inevitably, the existing legal discourse of copyright and trademark will persist and dominate policy debates. But until we begin to talk about the commons and its importance to our shared creative and civic environment, we should not hold any illusions that the property-speak of copyright and trademark law will significantly advance our larger interests as commoners.

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