SOCIAL THOUGHT AND COMMENTARY

Culture's Open Sources: Software, Copyright, and Cultural Critique

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Over the last two decades, there has emerged a practice of software programming and distribution which, when combined with novel uses of intellectual property law, has come to be known as "free software" or "open source software." It is distinguished from other forms and practices of software production for many reasons, but most interestingly because its practitioners discuss it not simply in technical terms, but as a philosophy, a politics, a critique, a social movement, a revolution, or even a "way of life." For practitioners, observers, and advocates who have been drawn into this net of zeitgeisty claims, it seems to offer an answer to the 21st century question of how we should live—or at least, how we should promise, share, code, hack, license, lawyer, organize, buy, sell, own, sing, play, or write. More recently, such talk has broken free of its connection to software and become common amongst artists, writers, scientists, NGOs, and activists. It has provided them with not only a new rhetoric, but a new set of practices concerning authorship, ownership, expression, speech, law, politics, and technology.

These papers are short pieces that represent new anthropological research on these phenomena in widely disparate social spaces and global locations.[1] They are meant to provoke anthropologists (even those who might be utterly

indifferent to information technology) to pay attention to arcane technical and legal issues and see them as no more or less arcane, and indeed no more or less cultural than those of the Kwakiutl, the Yanomami, or the Trobrianders. Anthropologists' interest might be piqued, for instance, by the widespread talk of "gift economies" amongst computer geeks or the extensive debates about private ownership, public domains, and collectively managed commons, or the somewhat contorted versions of the classical anthropological concepts of land-tenure, collaborative stewardship, political representation, formal and informal norm systems, resistance and domination, partially digested economic and evolutionary theories, and a great deal of talk of *culture* itself.

Or, one might find compelling the portentous discussions of intellectual property, free speech, and its relationship to technology, music downloading and its discontents, the transparency of governments, the endlessly diverse forms of intellectual property, and more generally, the increasingly everyday experience of living in multiple technically-mediated worlds in which intellectual property and software are densely intertwingled with basic activities like dating, creating, and political agitating. As these papers demonstrate, the people and practices analyzed here have significant relevance to many large and small theoretical issues long of interest in anthropology and social theory more generally.

Two broad concerns connect the projects of these papers: site and critique. First, the question of field-site has dominated discussions of late 20th century anthropology, both because of changed conditions in the world that render home and away grayer than ever before, and through a concern with methodological innovation in the very process of going, staying, participating and returning. Research into "cyber-culture," "online communities," or "virtual worlds" has promised much, but produced little that could fairly be called exemplary long-term, detailed, and careful qualitative research into the practices ostensibly denoted by these once alluring words, much less any single method for doing so. Most work in these areas tend to be either grand philosophical ruminations on "information society" or else detailed expositions of the subjectivity and computing practices of cyber-culture scholars. To be fair, such attempts may be necessary prolegomena to any careful delineation of the questions that might guide method in these areas—and given the speed and insanity with which the technologies and practices of cyber-culture have been trumpeted, marketed, distributed, embraced, upgraded, outdated, rejected, and denounced, it is certainly no surprise that scholarly deliberation on the precise nature of the conceptual problems specific to cultural and social analysis has been left in the lurch.

Speed and change notwithstanding, the papers collected here represent an avowed and perhaps incorrigible commitment to long-term, intensive, and technically detailed ethnographic fieldwork involving observation of and participation with specific practitioners (programmers, activists, lawyers, gamers, hackers, citizens, Peruvians, and Melanesians). Strategies for carrying this out include hanging out with hackers on and off-line, learning to hack, learning to write copyright licenses and reason legally, using fieldwork in Melanesia as a foil, participating in the creation and advocacy of a nonprofit, and working alongside political activists and software programmers in the streets of Peru and with Maori activists online. The provocations of "multi-locale" or "multi-site" research are answered here not by simply multiplying geographical sites, but by disentangling the notion of site as the locus of embodied observation from certain methodological questions that these authors consider just as relevant in the regions formerly known as the West (or any novel electronically mediated combination of East, North, West, and South) as anywhere else. All of the papers share something of Gabriella Coleman's sense that "the nature of this research makes more clear that normative and ubiquitous regimes of values, such as those posed by liberalism, science, and capitalism, have a much more variegated expression when located in particular institutions, social groups, or an assemblage between them," and they proceed by looking for and specifying differences within such regimes anywhere and at any scale. The differences explored here are great and small, but none of them map easily onto geographical location or any classic definitions of cultural difference. Instead they concern a host of human activities that are inherently technical and long-since global. Most prominently, this means practices concerning intellectual property and collective political activism.

Second, and perhaps as result of the concern with field-site, the papers share a commitment to extending the notion of "anthropology as cultural critique"—though in ways that are not uniform across them. At least two of the papers (Coleman, Kelty) propose that the practices of free software and open source programming *should themselves be understood as a critique*—of specific legal and political institutions—and therefore pose a conundrum regarding the definition, goal, or desirability of a "cultural" critique on top of that. What, specifically, is left for anthropologists to offer? Coombe and Herman, on the other hand, are more confident that such a critique is necessary and point to the rhetorical strategies of the various movements represented here as one location for a more nuanced critique. In all of the cases, however, it seems safe to say that the relation of methodology to cultural critique remains open

and familiar: how should social scientists approach the demands for objective analysis without falling into the critical and practical traps of co-optation or misrecognition? How should "cultural critique" proceed if it is true that one's informants are already busy de-familiarizing settled practices? This issue is especially poignant when one considers that, to date, it has been proponents and programmers of free software themselves who have been among the most vocal and successful in trying to explain or theorize it. When they aren't programming, and sometimes even when they are, many hackers evince an affinity for proposing explanations—cultural, psychological and quasi-scientific—for their own behavior. And because the practice of creating such software (and the discourse about it) is itself conducted by email, on mailing lists, in Internet Relay Chat channels, and on web pages, this has meant that "emic" explanations of free software and open source are publicly available and have been widely discussed. Such a phenomena raises the stakes for those of us studying these practices, and demands that we not only develop a characterization of such practices, but somehow learn to communicate, collaborate, argue, and write with people we can only uneasily term "informants."

The existing research ready to greet an observer of these new phenomena ranges from business and management theory to economics to legal scholarship to psychology.[2] For business and management scholars, free and open source software represents an alternative model of software development—one that seems to challenge the conventional wisdom of industrial organization by allowing geographically far-flung individuals to collaborate in real-time and with great success on large and complex software systems. For economists and economically-minded researchers, it has generated a veritable "infolanche" of speculation about the ostensible paradox of "motivation:" why anyone would spend so much unpaid time building software only to give it away for free online. It is here that the old anthropological standby of the "gift economy" has been given a new treble-mortgaged lease on life as a solution to the putative problem of motivation. For lawyers and legal theorists, free and open source software represent a new combination (a legal hack) of copyright and contract law—one that creates a "privatized public domain" or "commons" which has been the object of both opprobrium and advocacy.

In the end, only a handful of facts about the emergence of free software and its ilk can be fairly characterized as uncontroversial, and it is worth situating free software briefly, for the reader who might be unfamiliar with it. The broad definition of free software or open source is: software whose source code (the code humans read and write) is made freely available (generally on the inter-

net, without restriction) through the use of a special copyright license. The software is copyrighted by its creator and then distributed under one of several standard licenses that allow the licensee to use the software, to distribute it, to copy it, and even to modify it for his/her own purposes. Some licenses require that if the software is re-distributed, any changes need to be released under the same license used to offer it in the first place (this is variously referred to as reciprocal, recursive, or viral). The most famous of these licenses is the GNU General Public License created by the Free Software Foundation.

Three salient dates usefully situate the history of free software and open source. In 1984, Richard Stallman founded the Free Software Foundation and provided the first copyright license, some software components and an incomplete UNIX-derived operating system known as GNU (Gnu's Not Unix). Stallman's movement often emphasizes the political aspect of freedom with the slogan "Free as in Speech, not as in Beer." In 1992-93 there emerged widespread internet-based collaboration on an operating system using GNU software and a kernel written by Linus Torvalds called "Linux." Linux would go on to be the emblem of free software in the 1990s and, combined with a free web server called "Apache" (it was "a patchy web server"), would ultimately pose a significant challenge to the existing proprietary software makers such as Sun, Microsoft, IBM, and Apple (the latter two have since embraced open source software in their own businesses). Finally 1998 saw longtime hackers Eric Raymond and Bruce Perens propose to replace the term "free software" with that of "open source" in order to shed some of the "political baggage" and cash in on the manic internet economy of the late nineties. Since 1998 free software and open source have become serious topics of study across the disciplines and, as this collection evidences, have become flashpoints for discussions that extend far beyond the issues of software and copyright.

In brief, these papers address the following issues:

Gabriella Coleman's fieldwork amongst a signature and respected set of hackers—those working on the Debian distribution of Linux—is an excellent place to explore the issues of politics, political disavowal, free speech, and neutrality. Coleman's contribution raises one of the most interesting general questions about free software: what if writing software code is considered a kind of speech? The question has profound implications: how do we understand writing software code as something more than an economic or technical activity? If it is an expressive activity—one whose expressions are also literally tools—should some forms of intellectual property rights be seen as enabling corporate censorship? Coleman's paper relates how the "informal politics" of everyday

hacking (i.e., not just talking about hacking) actually serve to strategically disentangle some of the more sedimented distinctions between political rights (i.e., free speech) and forms of property (e.g., copyrighted source code).

Alex Golub takes seriously the challenge to compare a "traditional" anthropological subject with those of hackers, gamers, or online communities. Though he presents it only obliquely, Golub's primary field-site is Papua New Guinea (The Porgera Valley of Enga). He uses his subtle sense of how identity, corporeality, and taboo are connected in Papua New Guinea to shed light—through similarity, not contrast—on the practices of people enmeshed in complex life-worlds of software and intellectual property. So while taboo might be understood as a system of norms governing the circulation and expressive use of corporeal bits and pieces—hair, flesh, nails, etc.—in the case of the Porgera, such a description equally makes sense of the activities of the circulation of the creative bits of information, software code, writings created in online worlds (Golub uses the example of a new generation of online multiplayer games). What makes the example of online worlds significant here is that they come, more and more, to involve the use of real money and the granting of real intellectual property rights. Intellectual property law and norms have invaded everyday life to such an extent that they now seem easily comparable to the complex swine-centric taboos of the Porgerans. Golub's paper suggests that if the Porgerans can teach us how to investigate online gamers, then perhaps the reverse is not simply an imposition of "our" world and values on "them," but a methodological challenge to be faced by Melanesianists and hacker anthropologists alike.

Anita Chan's paper takes the investigation of free software outside of the Aeron chairs of Silicon Valley to the streets of Lima, Peru. She explores the emergence of legislation in Peru that would require the use of free software in government activities, unpacking the actions of the politicians, corporate actors, local activists, and international supporters that brought the bill to life and gave it expressive power. She analyses how Peruvian free software advocates actively engaged with conventional political channels and struggled to assert local politics as an entity that—like free software—is manipulable, recodable, and necessarily transparent to the publics that interact with it. Chan's essay highlights the tensions that emerge in different national settings when free software is treated one way online or in the US and quite differently when discussed on the streets of Lima and amongst locally committed activists.

Christopher Kelty's paper relates his participation with Creative Commons, one of many "commons" projects based on free and open source software, but aimed at covering materials other than software. He explains how—within

the detailed minutiae of the copyright license—notions of "culture" and "cultural norms" are used strategically to help define the limits of legality. His claim is that the strategic use of "culture" draws on, but is not strictly beholden to, anthropological and sociological theories of culture and cultural difference. In particular, he explores how a new generation of legal and economic thinkers—people directly involved in the creation of Creative Commons—have made strategic use of a "culture concept" in order to find legal and technical ways to change or influence people's behavior.

Rosemary Coombe and Andrew Herman recount recent events concerning the Lego Bionicle toy line, which made use of Maori imagery and myths, and the reaction by both Maoris and acolytes of the world of Bionicle. They use this practical struggle, which is suffused with issues of intellectual property, cultural autonomy, and the circulation of signs in the digital environment to develop a critique of the global capitalist hegemony of which it is part. They introduce the notion of the "ecumeme," as a particular "moral space" in which the rhetoric of intellectual property comes to reinforce itself with ever greater success. Coombe and Herman suggest that the practices of alternative intellectual property creation and circulation represented by free software or Creative Commons are less alternative than the practitioners would like to think. By exploring some of the ways in which 'propriety' and 'property' are linked in narratives of capital and moral virtue, they suggest that the understanding of identity and the modes of governance implied by free software or Creative Commons would also exclude certain "forms of communication and sociality" such as that represented by the Bionicle example. Rather than opening up any true space for alternative cultural practices, they suggest that this alternative simply re-inscribes the same "limited liability, responsibility, and accountability that its corporate nemesis has traditionally assumed."

Finally, Glenn Otis Brown, Executive Director of Creative Commons, agreed to write a brief commentary explaining the relationships between the practices of Creative Commons and the interests that anthropologists hold. In particular, he points to the gulf between current mainstream legal understandings of the purpose of copyright and the emerging norms of everyday culture visible to "norm entrepreneurs" who understand and even help shape the attitudes and norms of a culture. Creative Commons as an endeavor sees itself as intervening in between these two systems of laws and norms, and Brown articulates in detail how they see their role.

In the end, this special section aims not to circumscribe a particular subfield of anthropology or draw more scholars into its complicated weave, but

to challenge cultural anthropology at large to confront the implications of these movements and their transformations—whether it concerns intellectual property (and the familiar concerns of heritage and cultural property), the globalization of forms of information and organization into areas classically studied in anthropology, or the nature of sovereignty and state power. While it is easy (and increasingly risky) to constitute a field of research as "the anthropology of..." it remains much more challenging to translate the detailed and deliberate work of the increasingly wide range of possible specializations (especially technical ones) into a set of conceptional questions that get at broader, shared problems. The connections here to taboo, norms, issues of propriety, exchange, or sovereignty do more than pay lip service to anthropology's past concerns. They challenge not only anthropologists but our colleagues in law, political science, economics, and sociology to see anew the contingency and historicity of contemporary practices and to respond from unexpected places and surprising perspectives.

Christopher Kelty
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ENDNOTES

[1]These papers were first presented at the 2003 AAA meetings at Chicago on a Panel entitled "Culture's Open Sources" organized by Christopher Kelty and Gabriella Coleman. Thanks to the panelists for their patience and participation and to Richard Grinker for his assistance and encouragement.

[2]A representative collection of this material is available at the MIT Free/Open Source Research Community http://opensource.mit.edu/ run by Karim Lakhani.

CULTURE'S OPEN SOURCES

The Political Agnosticism of Free and Open Source Software and the Inadvertent Politics of Contrast

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Free and open source software (FOSS), which is by now entrenched in the technology sector, has recently traveled far beyond this sphere in the form of artifacts, licenses, and as a broader icon for openness and collaboration.[1] FOSS has attained a robust socio-political life as a touchstone for like-minded projects in art, law, journalism, and science—some examples being MIT's OpenCourseWare project, School Forge, and the BBC's decision to release all their archives under a Creative Commons license. One might suspect FOSS of having a deliberate political agenda, but when asked, FOSS developers invariably offer a firm and unambiguous "no"—usually followed by a precise lexicon for discussing the proper relationship between FOSS and politics. For example, while it is perfectly acceptable and encouraged to have a panel on free software at an anti-globalization conference, FOSS developers would suggest that it is unacceptable to claim that FOSS has as one of its goals anti-globalization, or for that matter any political program—a subtle but vital difference, which captures the uncanny, visceral, and minute semiotic acts by which developers divorce FOSS from a guided political direction. FOSS, of course, beholds a complex political life despite the lack of political intention; nonetheless, I argue that the political agnosticism of FOSS shapes the expressive life and force of its informal politics.

FOSS gives palpable voice to the growing fault lines between expressive and intellectual property rights, especially in the context of digital technologies. While free speech and property rights are often imagined as linked and essential parts of our American liberal heritage, the social life of FOSS complicates this connection while providing a window into how liberal values such as free speech take on specific forms through cultural-based technical practice: that of computer hacking.[2] Whereas, traditionally, censorship and state intervention were seen as the primary threats against the realization of free speech, the social practices of free and open software raise the idea that forms property can be antithetical to the principles of free speech, "principles" that are constantly under social revision though they might appear as timeless and obvious. Source code, the blueprint for programs that most non-technical users rarely see, is becoming an object to construct claims about vocational rights and the appropriate scope of First Amendment law;[3] FOSS has not only transformed the dynamics of software development but is also shifting understandings of the appropriate use of intellectual property instruments and the scope of free speech protections.

I argue that the wedge placed by practitioners between FOSS and politics is significant to an anthropological assessment of the liberal underpinnings and reformulations of FOSS and the wider socio-political effect of its vast circulations. My thesis is that the denial of FOSS' formal politics enacted through a particularized cultural exercise of free speech facilitates the broad mobility of FOSS as artifacts and metaphors and thus lays the groundwork for its *informal* political scope: its key role as a catalyst by which to rethink the assumptions of intellectual property rights through its use and inversion. It works because it recalibrates some of the distinctions and associations between free speech and intellectual property—it revises intellectual property law and channels it toward the protection of free speech, instead of its "conventional use" of securing property rights. Christopher Kelty aptly describes this as "openness through privatization, which makes it the most powerful political movement on the Internet, even though most of its proponents spend all their extra energy denying that it is political" (2000:6).

Political intent and subjectivity are indeed noticeably absent in the constitution of the free software and open source movement, which differs from more formal political endeavors and new social movements predicated on some political intentionality, direction, or reflexivity or a desire to transform wider social conditions. FOSS uniqueness as a "new social movement" stands precisely in the "extra energy" noted by Kelty to deny political associations of

various kinds.[4] While technical or economic rationalities are often the native explanation for FOSS, a taken for granted form of cultural liberalism and the pragmatics of programming mutually inform and reinforce the hacker aesthetic distaste for politics. In other words, political denial is culturally orchestrated through a rearticulation of free speech principles, a cultural positioning that simultaneously is informed by the computing techniques and outwardly expresses and thus constitutes hacker values. It is this practice that I refer to here as "political agnosticism."

The purported political neutrality of FOSS, inscribed into its technological artifacts through licenses, has facilitated an unfettered circulation of its technologies. FOSS is made visible to wider publics through its extensive use and resignification. The witnessable set of practices, such as collaborative production and the creative deployment of licenses, has become a social point of contrast by which the assumptions of the American legal intellectual property system are partially destabilized. It thus conveys an implicit critique of the opaque logics enveloped in the neoliberal drive to make property out of everything and, at this historical conjunction, seemingly out of very little.[5]

As noted by Herman and Coombe in this journal, the persuasive force of neoliberal rhetorics of property rights lie in their corporeality as an habituated ethos that defines the proper, veritable, and, thus, supposedly singular relationship between consumers, objects, and corporations. Though they astutely assert that intellectual property regimes are bent toward the "incorrigible" and are "resistant to revision," FOSS has inadvertently performed with some degree of success against this habituated stance. FOSS provides another existing and *transposable* model for new legal possibilities composed of an aggregate of practices, licenses, social relationships, artifacts, and moral economies and, thus, enters a wider public debate on the limits of intellectual property primarily though visible cultural praxis. Its "success" is that it transformed what is purported to be a "singular" field of intellectual property law into one that is now multiple, offering new instruments and justifications for their use.[6]

Political Agnosticism

To understand the logic of political denial, it is instructive to define the rationale for freedom formulated in the philosophical underpinnings of FOSS licenses. The moral and semiotic load of free software is *a commitment to prevent limiting the freedom of others.* This is done to realize a sphere for the unfet-

tered circulation of thought, expression, and action for software development. This vision is clear in three key documents that guide the choice and creation of every free and open source license: the Free Software Definition, the Debian Free Software Guidelines, and the Open Source Definition. In these charters, freedom underscores an individual's right to create, use, and distribute software in a manner that will allow exactly the same for others, so long as license rules are followed—the goal of which is to enact a *universal sphere* for the flourishing of free forms of action and thought. All provisions in these documents work through a logic of non-discrimination as to achieve universality. Within this purview, source code, the line-by-line directions that programmers write to make software applications, is treated implicitly and explicitly as a form of speech. Writing source code is thus akin to "speaking" while licenses establish the conditions that allow for the free and unrestricted expression of speech.

A utilitarian ethic of openness is increasingly seen as obvious and indispensable in order to develop the "state of the art." FOSS developers also place an extremely high premium on open technical production as an avenue for expressive activity. While hackers see the spread of free software as socially beneficial because it allows a diverse range of "others" to deploy their software (like you, me, the Mexican school system, the government, and even "Big Brother"), the primary significance of FOSS is personal: it is something which protects the "food" for them to "hack on" so that they can exercise their right to learn from and create more speech (source code) for others to share and extend. According to hackers, the fact that anyone can use FOSS and that it can be directed towards economic, political, and personal ends is a positive side-effect of openness; they consider it a testament to the power of a neutral political commitment.

The "free" of free software rests on yet reposes a wider Anglo-European socio-cultural sensibility for expressive rights, which underscores ideas of individual autonomy, self-development, and a value-free marketplace for the expression of ideas. As a number of critical scholars argue, forms of political neutrality are immanent to free speech doctrine (Brown 1995, Fish 1999, Marcuse 1965, MacKinnon 1993, Passavat 2002). These critiques treat decontextualized neutrality primarily as ideological scaffolding that justifies a politics of individual liberties over those of structural equality. While relevant in other ways, it is analytically deficient to analyze the free speech elements of free software as an example of these otherwise cogent analyses—that is, as an augmentation or verification of an already existing and mystified American liberal tradition.

The hacker aesthetic distaste for politics and their free speech codes can only be meaningfully ascertained as "cultural practice" if placed within the scope of their lived practical and material actions, not just in relation to how their values express or map perfectly onto some existing regime of value such as liberalism; If not, we construe their moral orders as vacuous and thus, decouple their values from a particular way of life and the historical conditions that enable and constrain what they do.[7] Also to simply assert that the free speech character of FOSS is an expression of liberal values occludes key questions of investigation, for example: why is a language of expressive rights compelling to programmers, and how does the local rearticulation of expressive rights shift the wider juridical and cultural face and expressions of liberal values? Continuity of liberal traditions does not mean sameness. In other words, it reminds us that free speech, privacy, and property right have complex histories born from material and discursive struggles over meaning, even if such principles are socially construed as beyond the turmoil of history.[8]

The freedom of free software, while influenced by wider liberal sensibilities, is fundamentally shaped by the pragmatics of programming and the social context of Internet use. My contention is that values for expressive rights as formulated in free software philosophy were and are compelling to programmers because they hold affinities with their technical *habitus* borne from "practical" (as in meaningful, embodied, and collective action) experiences formed around the pragmatics of programming and the aesthetics of technical architectures. In addition, in recent times, it has afforded a wider cultural and political language by which to objectify to themselves and larger publics the nature of their technical life world, an objectification buttressed within a hacker public sphere and as a political vector to make claims against the aggressive application of intellectual property restrictions.[9]

Programmers describe their craft as an activity that allows for personal unrestricted forms of creativity, expression, learning, and action, enacted through a medium, the digital computer, and preferably interfaced through a transparent and flexible, technical environment (like UNIX). Passion that is understood to be the basis of the hacker ethic (Himanen 2001, Levy 1984) is fueled by a practice that allows programmers great flexibility and control in creation (Turkle 1984), creations which are put to use and hence seen as highly valuable. Programmers over decades of intense interaction come to viscerally experience the computer as a general purpose machine that can be infinitely programmed to achieve any task through the medium of software written by humans with a computer language. The technological potential for unlimited programmable capabilities

melds with what is seen as the expansive ability for programmers to create. For programmers, computing in a dual sense, as a technology and as an activity, becomes a total realm for the freedom of creation and expression. In essence, computing is understood and experienced (sometimes reflectively, other times implicitly) by FOSS hackers as the very micro-sphere for the unfettered circulation of thought, expression, and action that freedom within the macro-sphere FOSS seeks to achieve through licenses.

Downloading music and watching movies, socializing in chat rooms, playing highly addictive mutli-player games, creating software *libre*, meeting future girlfriends and wives on chat channels, reading your news daily online—all these activities contribute to a strong practical orientation and embodied disposition that the activity of communicating on and creating through a computer is a space of freedom for entertainment, production, pedagogy, and sociality.

More than ever, hackers actively and self-reflexively constitute these values within a type of public sphere where hackers discuss the corporate and legal practices that are seen to impinge on their ability to engage in such forms of "free" expressive making (Coleman and Hill 2004). The indiscriminate application of patents to software algorithms and other encryption and copyright laws, such as the Digital Millennium Copyright Act (DMCA), are construed as threats to the free ability of programmers to write source code, which hackers and programmers have only recently come to conceptualize as a form of communication worthy of the broadest protections afforded by First Amendment law.

Despite this incipient cognizance of the legal threats to free speech, what grows out of this particular life world of intense, lifelong programming and networked sociality is an overt aesthetic dislike for politics and a culturally embodied experience of freedom that conceptually shuns politics. Put simply, political claims outside of software subtract from, tarnish, and censor the sphere for the free circulation of thought, action, and expression. It is felt that if FOSS was directed towards a political end, it would sully the "purity" of the technical decision-making process. Political affiliation also might deter people from participating on development, thus creating an artificial barrier to entry into this sphere whose ideal and idealized form is a transparent meritocracy.[10] A political tag is also perceived to curtail one's personal freedom for deciding how to best interpret this domain of activity—a form of censorship and thus a highly polluted association to conjure.

In addition, the pragmatics of computing is a means by which to typify political activity as distasteful, unappealing, and ineffective. While program-

ming is considered a transparent, neutral, highly controllable realm for thought and expression where production results in immediate gratification and something *useful,* politics tend to be seen by programmers as buggy, mediated, and tainted action clouded by ideology that is not productive of much of anything while it insidiously works against true forms of free thought. You can't tweak politics in an elegant and creative way to achieve something immediately gratifying, and thus it goes against everything programmers think and love about computing.

The Inadvertent Politics of Contrast

I now shift my discussion to assess the political implications of FOSS. The multiple uses of FOSS and its transposability and visibility are simultaneously conditions for what I call a *cultural critique through contrast*. To explain what I mean let's visit our own field for a moment. Anthropology has historically unsettled our essentialist and universal assumptions about human behavior by contrasting them with those of people from other places (cf. Benedict 1959, Mead 1928, Marcus and Fisher 1986, Mauss 1967, Sahlins 1976). The disciplinary vehicle for this, it has been noted eloquently, is ethnography which "serves at once to make the familiar strange and the strange familiar" (Comaroff and Comaroff 1992:6). FOSS, among many other things, functions as a form of critical ethnography *writ large*. While a critical anthropology is based on a consciousness of its politics, FOSS inadvertently has become a vehicle by which to rethink the naturalness of intellectual property law. It exemplifies what Marcus and Fisher call "defamiliarization by cross cultural juxtaposition" (1986), the difference being that juxtaposition arises out of an accidental cultural and not intentional anthropological practice. Its ability to conjure contrast, I argue, results from its marked visibility and transportability partially borne from its purported political neutrality.

Free and open source hackers have been effective in coding FOSS as politically removed—a "neutrality" made material and socially effective through licenses. The effect is that the freedom within FOSS exudes a similar productive ambiguity that Prakash (1999) locates in the sign of science in his study of Indian nationalists who directed the icon of sciences as "the sign of rationality and progress" towards justifying their anti-colonial liberation aspirations. Due to this productive ambiguity that resists political affiliation of left, right, and liberal, FOSS has circulated extensively, though the relevance of freedom and openness mutates along the way of its excursions, fueling economic, govern-

mental, popular, and leftist articulations as justifications and alternatives. For example, I.B.M and other business that use FOSS emphasize it for its "market agility" and its ability to empower the consumer. I.B.M. adopts a neoliberal language to interpret the significance of FOSS to its consumer publics. On the opposite side of the spectrum, leftist media websites such as Indymedia.net run almost entirely on FOSS while its activists adore it for its subversive, anti-capitalist potentialities. The commons movement, centered on the idea of creating public goods to reinvigorate democratic principles, pragmatically built their licenses and justifications around the already existing practice of FOSS (Bollier 2002, Lessig 2001). Each group situates it in ways that empowers and legitimates their own aspirations, but through their particular efforts they extend FOSS to wider publics. And though there are distinct imaginaries grafted onto FOSS, certain implicit political messages within the *labor and law* of free and open source software also gain visible prominence.

Through its visibility and use by multiple publics, FOSS makes apparent, and to some extent "strange," the assumptions that dominate the social landscape of intellectual property. It opens to critical scrutiny the liberal moral "habituations" that stringent intellectual property instruments are indispensable to foster innovation and creation. Thousands upon thousands of developers laboring to make software *libre* provides potent critiques and viable alternatives since it is realized by the social performance of collective labor and licenses that others can and now do use. Perhaps most significant is that FOSS enjoins others to become part of its performance in various ways: use of FOSS artifacts and licenses, participation in projects, reflection of the larger meaning of collaboration, and the reuse (and reconfigurations) of its licenses for other non-technological objects, such as college courseware, music, books, and movies.

Actualized labor in practice undermines current theories of labor in the law whose nature is to pose singular models for the proper relationship between legal means and ends. Licenses like the copyleft rupture the naturalized "form" of intellectual property by inverting its ossified and singular logic—through the very use of intellectual property—a move not unlike Marx's inversion of Hegelian idealism, which retained Hegel's dialectical method to repose history not as an expression of the "Absolute Idea" but as humanity's collective creation through labor. Using copyright as its vehicle, the copyleft places copyright literally on its head and in the process demystifies copyright's "absolute" theory of economic incentive. The copyleft says, we are not the passive "subjects" of an almighty, unchangeable law, but actually can create the law to serve us *for other ends*: in the case of FOSS, that of free

speech. While many hackers might think you can't tweak politics in an elegant and creative way to achieve something immediate and useful, Richard Stallman, the mastermind behind the copyleft, showed through a clever legal hack that politics can be gratifying and indeed very productive.

Conclusion

Over the course of the last thirty years, anthropologists have increasingly left for the field by staying home. Research in medical clinics, scientific laboratories, online communities, city neighborhoods, and high schools, to name a few such locations, has shifted the meaning of anthropological practice, the implications of theoretical critique, and the identity of the ethnographer (Marcus 1999). The nature of this research makes more clear that normative and ubiquitous regimes of values, such as those posed by liberalism, science, and capitalism, have a much more variegated expression when located in particular institutions, social groups, or an assemblage between them. In other words, the local is as much here as it is "there" in foreign or small scale societies, and part of the task of a critical anthropology is to conjoin the exercise of anthropological critique with the cultural processes of "defamiliarization" and critique located in historical practice, not in theory.

The source and the effect of political agnosticism has been the focus of this piece. FOSS, I have argued, is one local instantiation of liberal values, a rearticulation centered on reposing the relationship between intellectual property and free speech law by redirecting the use of licenses to protect expressive activity. FOSS sensibilities of freedom and the growing hacker assertion that source code is speech, largely regimented as politically neutral through liberal values, are also rooted in methodologies, values, and techniques constituted around the act of writing code and expressed visibly in a wider public social sphere of hacking. Through FOSS' visibility, circulation, and use, the juridical understanding of free speech is shifting while some of the ingrained assumptions of intellectual property law have already been partially destabilized, the wider effect of which has been to open up a social space for new legal possibilities.

The feature of critique that arises through the cultural struggle to recreate and redefine meanings and associations, I have come to learn, is much more ephemeral than the supposed ephemera of virtual social spaces. It is a moment in time whose nature is to shock other "socially situated actors" into a process of cultural rethinking that shifts practices in other areas of social

life. The nature of the shock is to lose its "shock value" so to speak and sink back into the natural state of affairs as soon as a set of practices are more or less stabilized. The journalistic, popular, and native narrative retelling of the rise and importance of new practices or political sensibilities often don't integrate this moment of cultural defamiliarization, focusing instead on the rubric of great men and their ideas or explanation through unintended consequences that may not have been part of its genesis. Thus, the task of a critical anthropology within complex multi-cultural societies is to keep a mindful orientation toward these powerful yet elusive processes of cultural contrast and defamiliarization so that its politics can be more effectively known, acknowledged, and directed.

ENDNOTES

[1]This is a short piece with many large ideas. Most of them have congealed through conversations with friends and colleagues. I would like to thank dmh, ck, rex, hacim, and mako for their comments and suggestions. A special thanks to Patrice Riemens whose works and insights are largely responsible for getting me to think differently about the unique nature of hacker politics.

[2]For an explicit defense and affirmation of the inseparability between strong property rights and civil liberties see Gray (1996) in his review of liberal political thought and more recently in Epstein (2003). However, legal scholars since at least the 1970s have perceptively analyzed the ways in which IP and expressive rights exist in tension with each other (cf Nimmer 1970, Benkler 1999). Copyright law limits access to and use of certain forms of "expressive content" and thus inherently curbs the deployment of copyrighted material in other expressive activity. However, the predominant legal rationale for the state sanction of intellectual property instruments is that they are mechanisms by which to "harvest" a marketplace of ideas so that any negative consequences of censoring speech are far outweighed by this purported public benefit. FOSS fundamentally challenges the rationale that censorship is a justifiable means to induce a marketplace of idea.

[3]It is important to appreciate that the links made between source code and free speech are historically recent. To my knowledge, it first appeared as a published argument in a paper among programmers in the early 1990s (Salin 1991). It increasingly became a prevalent association in the writings of Richard Stallman, the founder of Free Software Foundation. The "encryption wars"—the right to freely publish and use cryptography—also contributed to this consciousness. A notable case in these struggles was *Bernstein vs. the Department of Justice*, first filed in 1995. The Berkeley Professor Daniel Bernstein successfully argued that he had a First Amendment right to publish strong forms of encryption despite government restrictions that treat strong cryptography as munitions. While these legal contexts were crucial, neither Salin or Bernstein questioned the validity of copyright law as a barrier to speech. What free software added to the story of expressive rights among programmers was a more fundamental challenge to the idea of property for software.

[4]As many studies reveal, politics far exceeds activities formally designated as such. Healing rituals that integrate and reconfigure dominant signs (Comaroff 1985), dance (Martin 1998), popular festivals and literary genres (Bakhtin 1984), and everyday forms of workplace resistance such as foot dragging and ritualized fainting (Ong 1987; Scott 1985) are a small sampling of the wide array of phenomena treated as fundamentally political even though they

are not cast in those terms. My argument about the political agnosticism of FOSS draws from the starting point of these (and many other) works: that politics has a life beyond that of the obvious and directed. However, while many of the highlighted examples of "politics without intent" carry a politics, many of these forms are not premised on the very value and idea that these forms are not political, which I find analytically significant for this particular case.

[5]Currents in intellectual property law over the last thirty years are marked by the expansion of rights commandeered by intellectual property owners matched by the opening of new markets and materials for the scope of private property. Shifts in intellectual property application have been explored in relation to the academy and scientific production (see Slaughter and Leslie 1997, Mirowski and Sent 2002); its impact on cultural life, democracy, and innovation (see Betting 1996; Boyle 1996; Coombe 1998; Lessig 1999, 2001); and as a reconsideration of approaches of the relevance of IP for indigenous knowledge (see Graves 1994, Brush and Stabinsky 1995, and Shiva 1997).

[6]I am not claiming that traditional intellectual property rights have now lost any of their force to structure objects, property relations, and the organization of science. I also am not in the "business" of making predictions about the ways in which the rise of a novel application of intellectual property laws such as those of FOSS will dilute or strengthen current neoliberal property rights regimes. However, it is vital to point out that until FOSS, the American and European state of intellectual property law was largely a singular sphere of rights with little room to think outside their assumptive boxes.

[7]In other words, I want to conjoin the study of liberalism to wider socio-cultural processes. For two pieces that examine the cultural life and force of liberalism through the angle of governmentality see Joyce (2003) and Rose (1999). Both inform my understandings of liberalism as a mode of thought that is socially lived through practice, can be treated as a cultural and spatial force, and is productive of unique subject positions. Their emphasis on materiality, informed by the work of Latour, helps to situate broad values as significant to wider cultural processes. However, I depart from their framework as they offer a view in which the effect of liberal values take on widespread, uniform instantiations whereas my research interest is to show the more particularized expression of such values through cultural activity and the wider effect of such.

[8]See the collection in Bollinger and Stone (2002) for an examination of the complex juridical and socio-historical history of free speech doctrine in the American context.

[9]Here I refer to the mobilizations enacted by hackers between 1999-2003 to protest the DMCA and the arrest of two programmers, Jon Johansen and Dmitry Sklyarov. In my dissertation, I argue that these protests had the effect of stabilizing the association between free speech and source code that had been under cultivation for at least a decade as a social ethos within the context of the free and open source software movement. I would like to note that though I argue FOSS practitioners place a wedge between FOSS and politics and tend to dislike politics on an aesthetic level, this does not mean, of course, that they are culturally hardwired to avoid politics. However, the exceptional nature of these mobilizations confirm what I argue here: FOSS and their right to program should not be directed toward political ends. FOSS, and other forms of computing, should primarily be about the exercise of individual expressive activity protected under the dual rubric of academic freedom and free speech.

[10]A discourse of radical openness and accessibility, posited against the idea of politics, is often expressed by FOSS hackers and, I would say, enacted to some degree in the structure of many projects that try to stay away from the culture of bureaucratic monotony and frustrating "red tape" common to government agencies and some corporations. Of course, there are certainly informal and structural barriers for entry whether it is class, gender, or depth

of technical knowledge. FOSS hackers often mistakenly conclude that explicit forms of exclusiveness and discrimination are the only barriers to participation.

REFERENCES

Bakhtin, Mikhail. 1984. *Rabelais and His World*. Bloomington: Indiana University Press.

Benedict, Ruth. 1959. *Patterns of Culture*. Boston: Houghton Mifflin.

Benkler, Yochai. 1999. "Free as the Air to Common Use: First Amendment Constraints in Enclosure of the Public Domain." *New York University Law Review* 74:354-445.

Betting, Ronald. 1986. *Copyrighting Culture*. Boulder: Westview Press.

Bollier, David. 2002. *Silent Theft: The Private Plunder of our Private Wealth*. New York: Routledge.

Bollinger, Lee and Geoffrey Stone (eds). 2002. *Eternally Vigilant: Free Speech in the Modern Era*. Chicago: The University of Chicago Press.

Boyle, James. 1996. *Shamans, Software and Spleens*. Cambridge: Harvard University Press.

Brown, Wendy. 1995. *States of Injury: Power and Freedom in Late Modernity*. Princeton: Princeton University Press.

Brush Stephen B and Doreen Stabinsky (eds.). 1995. *Valuing Local Knowledge: Indigenous People and Intellectual Property Rights*. Washington D.C.: Island Press.

Comaroff, Jean. 1985. *Body of Power Spirit of Resistance*. Chicago: University of Chicago Press.

Comaroff, Jean and John Comaroff. 1992. *Ethnography and the Historical Imagination*. Boulder: Westview Press.

Coleman, E. Gabriella and B. Hill. 2004. "The Social Production of Ethics in Debian and Free Software Communities: Anthropological Lessons for Vocational Ethics." In *Free and Open Source Development*, Stefan Koch (ed). Hershey, Penn: Idea Group.

Coombe, Rosemary J. 1998. *The Cultural Life of Intellectual Property*. Durham: Duke University Press.

Coombe, Rosemary J. and Andrew Herman. 2004. "Rhetorical Virtues: Property, Speech, and the Commons on the World-Wide Web." *Anthropological Quarterly* 77(3):557-572.

Epstein, Ronald. 2003. *Skepticism and Freedom: A Modern Case for Classical Liberalism*. Chicago: University of Chicago Press.

Fish, Stanley. 1994. *There's No Such Thing as Free Speech and It's a Good Thing Too*. New York and London: Oxford University Press.

Gray, John. 1986. *Liberalism*. Minneapolis: University of Minnesota Press.

Greaves, Tom. 1994. *Intellectual Property Rights for Indigenous People: A Sourcebook*. Oklahoma: Society for Applied Anthropology.

Himanen, Pekka. 2001. *The Hacker Ethic and the Spirit of the Information Age*. New York: Random House.

Joyce, Patrick. 2003. *The Rule of Freedom: Liberalism and the Modern City*. London: Verso.

Kelty, Christopher. 2000. "Anthropology Monsters, Faces of the Gift." Paper presented AAA conference November 15-19.

Lessig, Lawrence. 1999. *Code and Other Laws of Cyberspace*. New York: Basic Books..

_____. 2001. *The Future of Ideas*. New York: Random House.

Levy, Steven. 1984. *Hackers Heroes of the Computer Revolution*. New York: Delta Books

MacKinnon, Catherine. 1993. *Only Words*. Cambridge: Harvard University Press.

Marcus, George E. (ed.). 1999. *Critical Anthropology Now: Unexpected Contexts, Shifting Constituencies, Changing Agendas*. Santa Fe, NM: Sar Press.

Marcus, George E. and Michael Fischer. 1986. *Anthropology as Cultural Critique*. Chicago: The University of Chicago Press.

Marcuse, Herbert. 1965. "Repressive Tolerance." In *A Critique of Pure Tolerance*. Boston: Beacon Press.

Martin, Randy. 1998. C*ritical Moves: Dance Studies in Theory and Practice*. Durham: Duke University Press.

Mauss, Marcel. 1954. *The Gift*. London: Cohen and West.

Mead, Margaret. 1928. *Coming of Age in Samoa*. New York: Morrow and Company.

Mirowski, Philip and Esther-Mirjam Sent (eds). 2002. *Science Bought and Sold: Essays in the Economics of Science*. Chicago, Illinois: University of Chicago Press.

Nimmer, Melvin. 1970. "Does Copyright Abridge First Amendment Guaranties of Free Speech and the Press?" *UCLA Law Review* 17:1181-86.

Ong, Aihwa. 1987. *Spirits of Resistance and Capitalist Discipline: Factory Women in Malaysia*. Albany: State University of New York Press.

Passavat, Paul A. 2002. *No Escape: Freedom of Speech and the Paradox of Rights*. New York: New York University Press.

Prakash, Gyan. 1999. *Another Reason*. Princeton: Princeton University Press.

Rose, Niklas. 1999. *Powers of Freedom: Reframing Political Thought*. Cambridge: Cambridge University Press.

Sahlins, Marshall. 1976. *Culture and Practical Reason*. Chicago: University of Chicago Press.

Salin, Phil. 1991. "Freedom of Speech in Software." Available at http://www.philsalin.com/patents.html, accessed on November 12, 2003.

Scott, James. 1985 *Weapons of the Weak: Everyday Forms of Peasant Resistance*. New Haven: Yale University Press.

Shiva, Vandana. 1997. *Biopiracy: The Plunder of Nature and Knowledge*. Boston: South End Press.

Slaughter, Sheila and Larry L. Leslie. 1997. *Academic Capitalism: Politics, Policies, and the Entrepreneurial* University. Baltimore: John Hopkins University Press.

Turkle, Sherry. 1984. T*he Second Self: Computers and the Human Spirit*. New York: Simon and Shuster.

CULTURE'S OPEN SOURCES

Copyright and Taboo

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One hundred and fifty years ago, stories were coming from the colonial frontier of natives who believed that twins were birds, that blood bound people together, and that people's fingernails could be used to ensorcel them. The going theory was that non-Europeans were confused. They had a "primitive mentality" which could not clearly distinguish between things which were in fact distinct. Levy-Bruhl (1978) argued that *mentalité primitif* confused nature and culture, humans and inanimate objects, and cause and effect while Frazer (1958) formulated his famous laws of similarity and contagion. The work of both authors—despite their current political incorrectness—marked a genuine step towards the culture concept. Both men based their theories on news from the colonies, from which stories about people in the "savage slot" (Trouillot 1991) were coming in thick and fast. One of the most common and enduring—albeit spurious—of these sorts of tropes revolves around cameras. "The natives" would not allow whites to take their picture because cameras could "steal their souls." The imperial explanation was simple: these people had a "primitive mentality" and confused their soul with their image. Rational Europeans knew better: they could tell the difference between a picture and the thing it depicted. Their thoughts were clear and distinct, freed from the miasma of an earlier, less discerning age.

It may come as a bit of a surprise, then, to consider the events of 8 April 2002 when Tipper Gore gave a speech at American University in Washington DC. During the course of the speech, a student protestor began video-taping Mrs. Gore and was asked to stop. When he refused, a scuffle ensued in which he was handcuffed, led away, and the tape confiscated. Amongst the charges laid against him by the disciplinary committee at AU was possession of stolen property—*by which was meant the image and likeness of Tipper Gore* (Argetsinger 2002).

It is ironic to note that now, nearly a century after The Golden Bough, contemporary thought on intellectual property undertakes contortions eerily similar to the "native point of view" that Frazer and Levy-Bruhl considered their first world compatriots to be above. Don't get me wrong—I would never tarnish the reputation of the world's indigenous people by ascribing to them the same level of civilizational development as Tipper Gore. And while I would use many terms to describe the colossal literature on intellectual property, "primitive" and "undeveloped" are not among them. However, I do believe that the cultural underpinnings of American intellectual property law and the more traditionally anthropological literatures on taboo and Melanesian personhood are related. In this paper I will metonymically gloss both these topics under the heading "copyright" and "taboo." How, I ask, can one shed light on the other, and how can such a combination allow us to understand the cultural forces at play in the Tipper Gore example?

In anthropology, particularly the anthropology of classically "savage slot" locations such as Melanesia, we have a tendency to draw a division between "us" and "them"—"they" have partible personhood (Strathern 1988, but see also her later work such as 1992) and "we" imagine ourselves as "possessive individuals" (MacPherson 1962). Anthropological critiques of American common sense such as Marshall Sahlins' critique of the "native anthropology of western cosmology" (2000) seek to undermine our assumptions by showing how culturally specific they are—we're prudish, but they (over in Samoa) are much more open about sex, and so forth. On this account, it's their *difference* from us that makes the critique powerful.

Here, I'll argue that copyright and taboo are *alike* because they are both responses to the same existential predicament: the fact that our identities and senses of self are always already rooted in the inevitableness of our bodies even as they exceed our corporeality. In realm of taboo, this troubling confusion is figured in terms of the body while copyright figures this dilemma in terms of an individual's creative output. In this paper, I'll compare two ethnographic examples in which the existential issues surrounding copyright and taboo are dealt

with in similar ways. In both massively multiplayer online games (MMOGS) and Melanesian sociality, we see a resolution to the problems raised by the disjuncture of our bodies and our selves. Both instances speak to us about the other. A study of Melanesian sociality helps us imagine ourselves as more than just isolated individuals, even as a study of online games shows us that the objects with which we entangle our subjectivity need not be physical. In both cases, we see an accommodation to the self/body disjuncture that is, perhaps, more satisfactory than that conjured up in the nineteenth-century imagination and American University's punitive actions. I'll begin with taboo.

Taboo

Taboo, of course, is one of anthropology's classic tropes. While the literature on taboo is wide ranging, I will limit myself here to Valerio Valeri's recent synthetic account of the topic in his magisterial *The Forest of Taboos* (1999). Valeri grounds taboo in the embodied nature of human subjectivity. Human subjects are "symbolically constituted, but necessarily located in the body" and, of course, "the body is not only a substance to be… turned into grist for the symbolic mill, but also a constant source of nonsense undermining the affirmation of sense" (Valeri 1999:111). This "nonsense"—the resisting, inarticulate physical nature of biology—haunts the subject. Thus, Valeri writes, "the body, particularly the constantly moving and transforming body which we experience in its processes of ingestion, excretion, reproduction, transformation, and decay" (1999:112) is the strongest expression of this fact. As a result, "the phenomenon of taboo and the various dangers that motivate it must be apprehended at the points of articulation and confrontation of the subject and the conditions—symbolic and presymbolic—of its existence" (1999:112).

Thus on the one hand, we recognize the immutable rootedness of our selves in our body while on the other we are keenly aware that our bodies are what lawyers refer to as "prior art:" amalgamations of other people's substances—our father's semen, our mother's milk, the meat of the animals we have killed and eaten. And just as the bodies of others have become separated from them so as to become part of ours, bits of our bodies such as fingernails, hair, feces, urine, blood can be separated from us and come into the possession of other people. We have *issues* about all of this—and it is these issues which Valeri takes as central to notions of taboo.

While Valeri sees the flow of identity through the body as a source of anxiety, Marilyn Strathern sees it as the building block of a distinct Melanesian

sociality. She has famously argued that where "the west" sees individuals whose interaction creates social relationships, "Melanesians" see social relationships whose interactions create individuals. To Melanesians, individuals are merely the physical nexus through which relations of consanguinity and affinity run, and people are "partible" in so far as their selves are encapsulated in objects that leave their control and, through circulation, create new relationships. "Relations," argues Strathern, "are objectified by persons and things being separable or detachable from one another… in this sense, the possibility of producing or creating relationships, of taking some action with respect to them, is itself a precondition to separation or detachment" (1988:178).

Thus Strathern argues that "mediated" exchange such as the flow of items surrounding Kula exchange, "draws on the indigenous image that persons are able to detach parts of themselves in their dealings with others" (1988:192). The circulation of Kula valuables and their entanglement in affinal relationships creates not an anxiety about the self, but the conditions of sociality itself. The complex relationship between a man, his wife, and his affines is maintained over time through prestations of garden produce and kula valuables. In this way, the women's labor for her husband which is lost to her natal community is compensated for—in fact, the relationship between all three parties is constituted by nothing other than the flow of these prestations themselves.

Copyright

The exchange of kula valuables and fears of pollution seem, at first, far from issues of intellectual copyright. What, you might ask, has Tipper Gore to do with armshells? But there are similarities. Concepts of copyright rests on the idea that a person's artistic creations are deeply a part of themselves, despite the physical separation between the body of an artist and the physical artifact—a written score, a poem, a statue, a canvas—that is the result of their creative work. At the heart of the concept of copyright lies the idea that works of art are expressions of the unique subjectivity of their creators.

As Martha Woodmansee (1984) and Mark Rose (1993) have argued, the idea of copyright has particular spatiotemporal coordinates—England and Germany in the eighteenth century. The spread of mass literacy and the proliferation of printing presses forced writers and publishers to seek new ways to defend themselves from those who illegally copied their works. While the philosophical form of this argument is best expressed in Kant's *Critique of Judgement* (1958) and

was to have [at least until Gadamer's (1992) thorough refutation of an aesthetics of *erlebnis*] a huge influence on aesthetics and philosophy, more down-to-earth arguments were made in legal and public debate. The framing of "the author" as a subject involved "the abstraction of the concept of literary property from the physical book" and was key to "the presentation of this new, immaterial property as no less fixed and certain than any other kind of property" (Rose 1993:7). While laborers (as Boyle 1996 sourly points out) were not seen as having residual property rights in the goods they created for their employers, artists did, because of their unique constitution as creative and inspired subjects. As we say today in American copyright law, it was the idea rather than its expression that was a result of the author's unique subjectivity, and hence he continued to retain control over it. On this account, artistic creation involved capturing a non-corporal part of the author's genius and binding it up with a printed page. While this page circulated out of the author's control, they were still his, and hence he still had a claim to them.

The partibility of the author's personhood underwrote the folk-theory of subjectivity which in turn legitimated copyright. Is this really so different from Melanesia? Compare Woodmansee's assertion that "To ground an author's claim to ownership, it would first be necessary to show that it is *an emanation of his intellect*—an intentional, as opposed to a merely physical object" (1984:50, emphasis added) with Strathern's analysis of the way nurturance mutually implicates subjectivities in Mt. Hagen: "If anything makes things grow in Hagen, it is *a detachable component of the 'mind:'* the wife's effort as a matter of her intellectual and emotional commitment towards what she is doing" (Strathern 1988:253, emphasis added). The parallels seem clear.

Virtual Objects and Deferred Bodies

But how much do the polemics of eighteenth-century Germans have in common with the cultural underpinnings of copyright in America today? Can we, in other words, take historical arguments and apply them unproblematically to the Tipper Gore example? I would argue yes—in fact, one example from the contemporary US demonstrates how fully this issue of partible personhood can be detached from corporeality all together: massively multiplayer on-line videogames.

Computer gaming in the United States is a growing industry rivaling Hollywood in size—total video and computer game sales totaled US$6.9 billion (IDSA 2004), as compared with Hollywood's US$8.4 billion dollars (MPAA 2003).

Demographics are changing as well—once the domain of stereotyped geeks, 26% of video game players are women over 18, while only 21% are teenaged boys (Ramirez 2003). Among the most popular new genre in computer gaming are massively multiplayer online games (MMOGS)—high rendered, beautifully detailed virtual worlds of surprising complexity and depth. Companies such as Sony charge a monthly fee for players with internet connections to participate in the world. As a result, games such as Everquest, Starwars Galaxies, Secondlife, There, Final Fantasy XI, have grown in popularity, and each game hosts literally tens of thousands of players online simultaneously at any one time. In fact, MMOGs have become so popular that those familiar with them have argued that they are not merely games, but complete on-line synthetic worlds. In a definitive survey of the virtual world of Norrath (where Everquest is set), for instance, Edward Castronova discovered that twenty percent of all respondents consider themselves denizens of Everquest who merely "visit" Earth. Thirty percent spent more time in Norrath than they did working at their jobs (Castronova 2001).

As a result, the most recently designed MMOGS, such as The Game Neverending, Second Life, and There, have jettisoned the typical game-structure of earlier MMOGS (in which, for instance, characters earn points by overcoming obstacles in order to advance in levels) for a more open-ended, goalless environment. Indeed, the companies that run them describe their products as "worlds" rather than "games." The bullet point advertisements for these games are no longer "kill monsters" or "achieve victory" but (in the case of Second Life) to "play, shop, explore, talk, create, [attend] events" (Linden Research n.d.).

The fact that There.com lists "shopping" as the second most important activity that can be undertaken in its gameworld is telling. The seriousness with which inhabitants of MMOGs take their synthetic existence is made clear by the economic consequences of their time online. Powerful magic items such as magic swords and armor are highly sought after in games such as Everquest for the abilities they give to the players who possess them. As a result, many of these virtual items are sold on sites such as Ebay for real world dollars and then, as a result of the contract, transferred to their owner's online personas. The size of the market is breathtaking—shadow pricing of the marketing of in-game objects reveals that the value of the booty accumulated during play is significant. The average players of Everquest earns an hourly "wage" of US$3.42 and has an annual income of over US$12,000 and a per capita GNP of US$2,366 (Castronova 2001). Castronova has estimated that Everquest has an economy roughly the size of Russia. In comparison, Papua New Guinea has a per capita GNP of US$580 (Unicef n.d.).

In the case of Secondlife and There, items are not used to overcome monsters and advance levels but are ends in themselves. Much of these games involve personalizing one's appearance, clothes, and house. In fact, a great deal of life in There and Secondlife involves *making* virtual objects such as clothes, houses, or appliances that can be used or sold to others who wish to use them. Here again we begin to see the theme of the creative genius. "Decorate your dream home or design your own fashion line," says the promotional material on There's website, "The only limit in There is your imagination" (There Inc. n.d.). Second Life offers a similar story: "Create anything you can imagine. Change your appearance to look like anything—an imaginary superhero, a mythical monster, or your own mirror image. Or, change your surroundings. Build your dream home. Make art. Become a world-famous clothing designer. Collaborate with others to build a major civic work—or an entire city. Let your imagination run wild!" (Linden Labs n.d.).

In the case of eighteenth-century copyright, the physicality of the book created a challenge for understanding the original, non-tangible contribution of the author. In the case of MMOGS, the material drops away and the virtual takes over. Nonetheless—or rather, perhaps *because*—of this fact, Linden Labs, the creators of Second Life, recently changed their Terms of Service with subscribers to *retain their intellectual property rights for virtual objects*. "Until now, any content created by users for persistent state worlds, such as EverQuest or Star Wars Galaxies, has essentially become the property of the company developing and hosting the world," said the CEO of Secondlife, Philip Rosedale. "We believe our new policy recognizes the fact that persistent world users are making significant contributions to building these worlds and should be able to both own the content they create and share in the value that is created. The preservation of users' property rights is a necessary step toward the emergence of genuinely real online worlds" (Haughey 2003).

Conclusion

It may seem odd at first to compare the arguments of Tipper Gore's lawyers with the affinal politics of Massim islanders. But on closer consideration we should see that this is not so. In the case of both Gore and copyright, there is a keen appreciation that one's self is not congruent with one's body. In each case the body—its image in the case of Gore, and the product of its labor, in the case of Melanesia—was key to understanding the rootedness of its personhood. With MMOGs, on the other hand, we see the way in which the physical

object is itself not all important—it is simply the transmission medium for a more intangible and more crucial sense of selfhood and identity.

But there are important differences between Gore's conduct and that of Melanesians and online gamers. As Valeri reminds us, the dispersal of identity beyond the bounds of the body means that others are implicated in our sense of self. In the case of copyright, the triumph of the ideal of the creative author required the suppression of our recognition of the importance of the "prior art" whose product we are, in order to validate the unique status of artistic subjectivity. Seen from the point of view of taboo, then, copyright derives its cultural legitimacy from the strange contradiction that creative output, like hair or fingernails, is at once deeply a part of one's own integral subjectivity, and yet can circulate out of one's own control. The same relations of contiguity and association that leads people to collect the hair of the person they seek to ensorcel underwrites the cultural logic that legitimates the Recording Industry Association of America's attempts to bust down Kazaa.

But in the case of MMOGs and Melanesia, the recognition of this fact, and the necessity of dealing with it in the course of everyday life, has been the spur to develop a sociality which is not afraid to admit what it owes to others. Rather than being seen as a conceptual problem, it is in fact the point of departure for an entire arrangement of licenses and feedings which are attentive to the inevitability of our entanglement. Is it foolish to compare the "real-life" consequences of, say, copyright infringement to the vagaries of the ownership of "virtual" property? Perhaps. But for Melanesians who grow their own food, build their own homes, and chop their own wood for fuel, the lifestyle of first worlders may not seem that removed from that of people who spend time in MMOGS. Citizens of synthetic worlds, after all, do have a body, albeit a deferred one. They still need to eat, sleep, and attend to other needs—indeed, if you're going to live online, you need an extremely good chair, not to mention an ergonomic keyboard. But the "alienation" from "real life" that many associate with synthetic worlds seems less shocking when one considers how removed many first worlders are from the physical work of subsistence. A Melanesian viewpoint helps us see the ways in which self-making involves a steady continuum of both physical and non-physical concerns rather than a bright and clear boundary between "the real world" and "an imaginary one."

And this brings me back to Tipper Gore. Gore's inability to distinguish between herself and her representation is not surprising, given that our legal regime's understanding of what it means to have a textual existence that exceeds one's corporeality is not much more nuanced than simply "stealing

souls." But people who are living with and through technology—like people who live with and through the animals they hunt, and the food they grow—fashion their own taboos and their own sense of limits. We may always have issues at the places where we stop and the world begins, but how we deal with this lack of limit varies. Although hedged about with taboo and slightly swine-centric, Melanesians have created a lifeway that makes eminent sense of their intimate articulations. Similarly, people who actively design virtual trousers and split-level condos in synthetic worlds are dealing with the complex questions that arise when laws of property—such as copyright—are applied to a virtual world which earlier legislators could hardly have imagined. An analysis of the details of their doings and a comparison of their copings appears to me to be in order.

REFERENCES

Argetsinger, Amy. 2002. "Student Gadfly Runs Afoul of American U., Taping of Tipper Gore Brings Sanctions." *Washington Post,* 22 July, p. B03.

Boyle, James. 1996. *Shamans, Software, and Spleens*. Cambridge, MA: Harvard University Press.

Castronova, Edward. 2001. "Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier." CESifo Working Paper No. 618.

Frazer, James. 1958. *The Golden Bough*. New York: Macmillan.

Gadamer, Hans-Georg. 1992. *Truth and Method,* 2nd Revised Edition. Continuum Press: New York.

Haughey, Matthew. 2003. "Second Life Residents to Own Digital Creations: Linden Lab Preserves Real World Intellectual Property Rights of Users of its Second Life Online Service." http://creativecommons.org/press-releases/entry/3906

IDSA [Interactive Digital Software Associaton]. 2004. "Essential Facts about the Computer and Video Game Industry: 2003 Sales, Demographics, and Usage Information." Pamphlet. http://www.theesa.com/EF2003.pdf

Kant, Emmanuel. 1958. *The Critique of Judgement*. New York: Oxford University Press.

Levy-Bruhl, Lucien. 1978. *Primitive Mentality*. New York: Macmillan.

Linden Research. n.d. "What is Second Life?" http://secondlife.com/about/

MacPherson, C.B. 1962. *The Political Theory of Possessive Individualism*. Oxford: Clarendon Press.

MPAA [Motion Picture Industry Association Industry of America]. 2003. "U.S. Entertainment Industry: 2002. MPAA Market Statistics." Pamphlet. http://mpaa.org/useconomicreview/2002/2002_Economic_Review.pdf

Ramirez, Charles. 2003. "Online Games Attract More Women, Females Becoming Dominant Group With Web Gaming Sites." *Detroit News,* 21 December. http://www.detnews.com/2003/technology/0312/21/b02-14334.htm

Rose, Mark. 1993. *Authors and Owners*. Cambridge, MA: Harvard University Press.

Sahlins, Marshall. 2000. "The Sadness of Sweetness; or, The Native Anthropology of Western Cosmology." In *Culture in Practice*. New York: Zone Books.

Strathern, Marilyn. 1988. *The Gender of the Gift*. Berkeley: University of California Press.

_____, 1992. *After Kinship: English Kinship in the Late Twentieth Century*. Cambridge: Cambridge University Press.

There Inc. n.d. "What is There?" http://www.there.com/what_is_there.html

Trouillot, Michel-Rolph. 1991. "Anthropology and the Savage Slot: The Poetic and Politics of Otherness." In *Recapturing Anthropology*, Richard Fox (ed.), 18-44. Santa Fe: School of American Research.

Unicef n.d. "Papua New Guinea at a Glance: Economic Indicators." http://www.unicef.org/infobycountry/papuang_statistics.html#6

U.S. Government. n.d. "CIA Factbook, Papua New Guinea." http://www.cia.gov/cia/publications/factbook/geos/pp.html

Vaidhyanathan, Siva. 2001. *Copyrights and Copywrongs*. New York: New York University.

Valeri, Valerio. 1999. T*he Forest of Taboos*. Madison: University of Wisconsin Press.

Woodmansee, Martha. 1984. "The Genius and Copyright: Economic and Legal Conditions of the Emergence of the 'Author.'" *Eigtheenth-Century Studies* 17:425-448.

CULTURE'S OPEN SOURCES

Coding Free Software, Coding Free States: Free Software Legislation and the Politics of Code in Peru

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In December 2001, a legislative proposal was introduced to the Peruvian Congress that would have mandated the use of free software on government computers. The introduction of the bill, dubbed the Law for the Use of Free Software in Government Agencies, or Proposition 1609,[1] added Peru to a growing list of countries pursuing legal measures for the adoption of free software by government. Similar measures had begun in Brazil, Argentina, France, and Mexico—and within a year, they would be joined by dozens of other national- and local-level efforts in Germany, Spain, Italy, and Vietnam—all seeking to establish official alternatives to the use of closed, proprietary software by government. But it was Peru alone that uniquely managed to capture international public attention in the work surrounding its legislative efforts.

Much of the publicity was spurred through the online circulation of a letter-mediated exchange between Microsoft's General Manager in Peru—who attacked the bill as a "danger" to the nation's security and to corporate intellectual property rights—and the congressional sponsor of the bill, Congressman Edgar Villanueva, who staunchly defended its support. The letters later became the focus of a wave of international media coverage around the South American nation and its legal proposal. Unlike any other nation considering similar legis-

lation, Peru's proposal and its Congressional author were suddenly transformed into prominently visible players in the global movement for free software. Or as one reporter from the online news publication *Linux Today* prophetically narrated: "In the course of everyday business and politics, once in a while something truly significant happens. At such a time, letters become road maps for change and a politician from a small mountain town in Peru can become a hero to those who believe in a cause: both amongst his countrymen, and around the rest of the world… Congressman Villanueva's reply [to Microsoft]… raised him practically to folk hero status over night" (LeBlanc 2002).

Envisioning Free Software

Despite the unusual media attention captured by the Peruvian legislative efforts, and the rapidly expanding adoption of similar initiatives by national and local governments worldwide, the dominant reaction of free software proponents to the bill in the months following its proposal was to treat it as simply further evidence of free software's continued global spread. Minimizing the local specificity of actors and contexts surrounding the emergence of legal proposals like Peru's, the prevailing reading of such developments in the developed North was as one extraordinary achievement within free software's history of other, similarly extraordinary achievements. For many free software practitioners, it was the seemingly uncontainable momentum of their movement and the sheer technical strength of free software itself—more than any particular local actions or activities—that were to credit for its global successes.

Yet a closer examination of the practices that surround the emergence of free software legislation in Peru reveals a distinctly different account. Far from presuming free software's steady advancement, the proponents of Peru's free software legislation undertook various forms of local and non-local work, advocacy, and activism to propel the visibility of their movement. Further, their practices departed from the language of technical and economic rationality that had been repeatedly invoked to explain free software's adoption. They insisted instead on a new framing of free software as necessarily engaged and invested in processes of governance and political reform. And while prominent factions of free software had previously read social linkages to formal political bodies as unnecessary or even counterproductive, Peru's free software advocates actively sought to build relations with bodies of governance, demonstrating a willingness to engage with traditional political channels. If free software had frequently expressed a confidence that it would and should spread without govern-

ment's intervention, Peru's legislative developments signaled a departure from such free market logics and signaled that something other than free software's technological spread were of most concern to its advocates.

Indeed, for participants who had witnessed free software advance from its modest origins as an isolated practice of Northern hackers to a phenomenon with global visibility and the support of some of the largest technology corporations, the emergence of legislative demands for free software appeared unnecessary. Free software's rapid transition from the margins to the mainstream of society, after all, had occurred without the aid of governments and with largely only the support of a network of active, individual coders. Both the computing industry and free software communities, further, came to position free software as a species of "disruptive technology" (Christensen 2000) that would inevitably displace outdated technologies. To the commercial software industry, such a reading signaled the need for dramatic self-transformation and adaptation to new technological environments. For free software participants, it served instead as a confident reassurance in their current practices, and a sign that all could proceed stably without change. Both framings, however, operated on a degree of technological inevitability, presuming that it would only be a matter of time before everyone came to see the objective, self-evident rationale for free software's use. Not unlike discourses around the progression of scientific facts, free software predicted the stable progression of what it saw as its inherent truths and technical merit (Kelty 2001).

Media coverage on free software legislation similarly advanced its own logic of inevitability. News articles repeatedly emphasized economic rationales for the state use of free software, presenting it as a drastically cheaper alternative to closed, proprietary software and stressing that national poverty coupled with the potential for financial savings drove government interest in free software (Dorn 2003, Festa 2001, Stocking 2003, Wired.com 2003). As Paul Festa described the legislative trend in Cnet.com: "This legal movement… is finding ready converts as governments struggle to close sometimes vast digital divides with limited information-technology budgets… Governments—especially those of poorer nations with less money to spend on information technology—are eager to reap the cost savings of using free software" (Festa 2001).

Unsurprisingly, the emergence of movements like Peru's to legislate state use of free software, and free software's deepened ties to conventional politics, were developments that many free software advocates—particularly in the developed North—viewed with deep skepticism and suspicion.[2] To actively seek the building of such ties between state governance and free software advocacy,

after all, was to risk diluting the rational and technically-based justifications for free software. And it further threatened to undermine what the movement had embraced as its essential belief in individual users' freedom of choice. Tony Stanco, a senior policy analyst at The George Washington University's Cyberspace Policy Institute, thus reacted to the growth of free software legislation in Latin America by warning against the imposition of politics over rational markets. Writing in *Linux Today*, Stanco asserted, "It is much better for governments to set up a real level playing field in procurement policy and then let the market decide on merit. If a product can't make it in the market without government mandates, then history has shown that it won't make it with government mandates either" (Stanco 2003). Stanco was echoed by other free software supporters, who, in a Brookings Institute publication aimed at government policy makers themselves (Hahn, 2002), collectively urged governments to maintain a stance of neutrality in software acquisition policy. Some insisted that free software would advance without the need for government involvement (Bessen 2002), while others argued that free software preferences would compromise consumer freedom of choice (Evans 2002). To such Northern free software advocates, politicized arguments for free software not only seemed to be a weak rationalization for a technology's use, but threatened to pollute more "legitimate" technologically-based justifications for free software's adoption.

Biella Coleman insightfully characterizes such an explicit disavowal of formal politics as free software's own "political agnosticism" (Coleman 2003). Practitioners' emphatic insistence on their non-politicization, she argues, advances free software's circulation by constructing a permissive terrain that allows its wide adoption by a multiplicity of parties. Such a political disavowal, she observes however, is also rooted in the lived experience of working with and through the culture of free software. Where programming and computing become vehicles through which the unrestricted expression of individual creativity and imagination are brought to life, "politics are seen by programmers as buggy, mediated, and tainted action clouded by ideology that is not productive of much anything while it insidiously works against true forms of free thought" (Coleman 2003:5).

The persistent boundary work that seeks to maintain a separation between free software and formal politics, critically, simultaneously displays a certain confidence in the rational workings of a free market. If government and political operations were regarded as flawed, non-rational, conservatively rigid, and tainted by ideological motives, free markets could be read as rational, pragmatic, flexibly adaptive, and ideologically neutral. And where politics was

positioned as an entity from which the purity of free software should be protected, free markets were understood as entities that could be relied upon to legitimately recognize the technical merit of free software applications and secure its steady advancement.

And yet, despite such deep suspicions around the realm of politics, sustained movements around the Peruvian legislation emerged. For Peru's local communities of free software practitioners, formal political channels existed not as an entity to explicitly avoid, but appeared instead as something that had to be actively, arguably unavoidably, engaged with. And just as Peru's free software proponents framed free software technologies as anything but pure, self-enclosed objects that could remain separate from politics, so too did they frame formal political channels as something other than static foils to free software's project. Rather, for Peru's free software communities, political channels came to serve as instruments that, like technologies themselves, were dynamic, reprogrammable, and recodeable in Diane Nelson's formulation of the terms (Nelson 1999). Much, then, as technologies under free software's framing, were interpreted as unfinished artifacts that could exist in permanent cycles of reprogramming to fit specified needs, so too were politics read as imperfect entities that could and should be recoded for local civic contexts.

It's arguably the recodability of political and civic bodies—rather than the recodability of technology and free software itself—that's most at stake in movements for free software legislation in Peru. For these free software advocates, technology was deployed as an instrument to reform state and national "bugs" that encompassed everything from the relentless, unflinching dominance of transnational corporations to a publicly unaccountable and non-transparent state. Where dominant framings of free software suggested that it was the progress of free software that was considered as most important, Peruvian free software participants' strategic utilizations of technology to engage with national politics suggested that it was the social context surrounding technologies, and not merely technologies themselves, what was seen as most critical. Peru's free software advocates thus combined a vision of the Peruvian state as needing independence from transnational corporate control with a distinct vision of the state as an institution whose own authority had to be restricted and checked by an active public. Such dual engagements exhibited not only Peruvian free software practitioners' understanding of the state and politics as variably recodable entities, but expressed their hope as well that it would be an engaged Peruvian public who would be entrusted with government's reprogramming.

Re-Coding The Debilitated State: Government and Transnational, Corporate Dependence

Presented before the Peruvian Congress in December 2001, Proposition 1609 proposed the mandatory adoption of the use of free software in all areas of Peru's government, making exceptions only where a developed enough free software application was not yet available. Addressing in its text issues of science, technology, and development, Proposition 1609's language emphasized the contemporary legal contradictions and constraints experienced by government in software use. It stressed that states' reliance on computational processing in nearly all administrative activities forced governments into "a situation of dependency… [on] technology created in other countries." The bill further cited the rapidity of software update cycles, stressing that the frequency of new releases forced governments to make choices between continually purchasing new licenses, operating with out-dated software, or pirating programs. It also referenced a government study that estimated Peruvian government's own use of pirated programs at 90%, and concluded, "This panorama [of factors] makes necessary that the State ensures alternative solutions that will allow the breaking of the vicious circle of dependency in which we find ourselves."

Proposition 1609 thus asserted legal and economic imperatives for the state to cease its use of closed, proprietary software. Moving beyond arguments that legitimized free software's adoption for practical, technical needs of the state, Proposition 1609 asserted a political narrative that critically implicated external, global relations of dominance and dependence. Through the lens of the bill, global dynamics of power that disproportionately privileged developed national and transnational corporate interests were exposed as piercing the inner workings of Peruvian government. What was for years assumed as the natural and inevitable object of adoption for the state—that is, closed proprietary software—was thus revealed instead as one choice among others. And if adopting and even the cost-free pirating of closed, proprietary applications were previously seen as relatively inconsequential acts on the part of government, Proposition 1609 made them visible instead as deeply politicized, socially expensive choices that would re-inscribe the nation within debilitating relations of dependence.

Free software in Peru became an instrument, then, to directly address the limitations of the state and its relation to global markets. Through free software, new demands to recode the state as a strengthened entity that could act independently from or in challenge to transnational corporate interests could be asserted. Previously framed as a mode of protecting users' fundamental

technological freedoms, free software in the Peruvian legislative efforts became a method too for defending states' political and economic sovereignty and for challenging the limitations in technological choice that resulted precisely from a denial of such freedom.

Reprogramming The Authoritarian State: Government and Debilitated Publics

Within months of Propositions 1609's presentation to Congress, the primary software vendor for Peru, Microsoft, intervened in an attempt to reaffirm its formerly unchallenged legitimacy as government's largest software provider. In a March 2002 letter addressed to Congressman Villanueva, Juan Alberto Gonzales, the General Manager of Microsoft Peru, issued his own projection of how free software would fundamentally compromise the state.[3] Positioning free software as a technology of risk, Gonzales foretold a whole swarm of domestic devastations that could be unleashed under Proposition 1609. Among the dangers he warned free software's adoption would inflict were immeasurable state expenditures for technological migration, the potential for non-interoperability of platforms between Peru's public and private sectors, the destruction of domestic corporate productivity and employment, and, finally, the de-motivation of "the creativity of the entire Peruvian software industry which would no longer have its intellectual property rights protected."

Arguing, too, that state decisions over technology should remain politically neutral and based on technical merit, Gonzales challenged, "If Open Source software satisfies all the requirements of State bodies, why do you need a law to adopt it? Shouldn't it be the market which decides freely which products give most value?" Crucially, the image he projected of a future with free software predicted conditions of economic and technical instabilities, and the devastation of what were presumed to be otherwise healthy and efficient public and private processes in Peru. Where Proposition 1609's imaging of an "illegally" operating government stressed the forced piracy of software, then, Gonzales' vision of governments' legal breaches instead emphasized the violation of laws to protect free enterprise.

Directed to Villanueva specifically, Gonzales' indictment was intended to persuade the congressman to revoke his support for the free software bill. Instead, the letter prompted Villanueva to begin to build new links between political channels and civilian bodies. In constructing his response to Gonzales' indictment, Villanueva sought out the expertise and help of an

international network of free software activists based in Cordoba, Argentina, named Proposición.[4] The group was originally founded to support an Argentinean free software bill that was proposed in 2001.[5] It later grew to encompass members from across Latin America, Europe, and North America and came to serve as a site for discussing states' use of free software more broadly. Recalling the processes around the use of Proposición's mailing list to construct the Argentinean bill, Federico Heinz, one of Proposición's co-founders, compared them to the construction of free software applications where programmers network online and openly contribute code to build a single working application. He explained that after a few list members "had hacked up some text, we brought it back to the list for it to be criticized until we reached something acceptable... It was very long work, but also very interesting, this construction model of creating legislation as if it were software. It was …really like a participative method of creating the law."[6] After being approached by Villanueva for its guidance in the Peru case, the group dedicated efforts to collectively authoring a response to Gonzales.

The document that the Villanueva-Proposición collaboration later produced was a 10-page, 5,800 word-long letter that meticulously enumerated and refuted each of Gonzales' assertions.[7] It reasserted the justification for Peru's Proposition 1609, but significantly under different terms than the original bill had. Unlike the legislation's original language, the letter opened by specifying that the bill was not motivated by economic rationales and specified instead that it was linked to the state's "fundamental" political guarantees and obligation to citizens. These included ensuring citizens' free access to public information, suggesting that citizens should be able to access and survey code that, for instance, stored tax records. These "fundamental guarantees" also included the state's role in ensuring the permanence of public data, under the rationale that if states were dependent on closed, proprietary software and were unable to purchase new licenses to keep systems updated, they would put public data at risk. Stressing the state's responsibility as guardians of citizens' records, the letter closed by reasserting the obligation of the state to protect public data: "The state archives, handles, and transmits information which does not belong to it, but which is entrusted to it by citizens... The State must take extreme measures to safeguard the integrity, confidentiality, and accessibility of this information."

Via the Villanueva-Proposición collaboration, a distinctly new justification for the bill and orientation toward the state had emerged. Internal, domestically-based politics and the relationship between the state and its own citizens now

figured prominently into the bill's defense. Where earlier arguments for Proposition 1609 emphasized the need to protect the state from external corporate intrusions, situating the state as the potential victim of transnational domination, new justifications positioned the state instead as an entity whose own political authority and capacity for control required mechanisms for restraint. By resituating the state as an agent of potential unchecked, authoritarian power, Proposition 1609's supporters advanced arguments for the state's political and technological transparency to its citizens. Heinz explained that it was a heightened consideration of the state's responsibility to citizens and public dependence upon government that prompted an expanded orientation toward the state: "Better software and lower cost may be necessary for a company, but… corporations just have to be accountable to their shareholders. We're all shareholders, though, in the state... [And] when we started to think about the possible insecurities and back doors in government systems that store personal data,… I as a citizen have an interest in the ways these things are guarded… It's a very scary prospect when you think about how dependent the software user is on software and you translate that into the public sphere."[8]

In dedicating their efforts to collectively responding to Gonzales' initial indictment, Proposition 1609's supporters operated in defense of the state's power and reaffirmed government's authority to act independently of corporate interventions. Through their reply to Microsoft, however, they also insisted upon a new relationship of the state to its citizens that would empower the public to both surveil and redirect state codings. Where the Microsoft letter had projected a future of risk and insecurity for *private and public institutions* with the adoption of free software, the response to it narrated instead a future of risk and insecurity in the protection of *citizens' rights* without it. And crucially, where Gonzales' letter sought to keep decision making processes bound within a closed exchange of letters between public official and private corporation, Villanueva's response unlocked a process of and increased potential for public scrutiny and participation in the decision-making process.

Proposition 1609's supporters' activities around free software were propelled, then, less by ideals of users' technological freedoms, than by notions of citizens' political rights. Such an interpretation of the imperatives for free software was indeed distinct from that within the general free software movement, where discourse focused explicitly on software users' rights to access, understand, and rework code. The interpretation they offered instead translated the general principles of free software from focusing on individual consumer freedoms to emphasizing collective social rights, where citizens bore

the right to access, understand, and rework public institutions. Critically too, free software for Proposition 1609's supporters involved the transformation of citizens, who were revisioned as actors with heightened capacities for political and technological activity. The reading of the state that Proposition 1609's supporters asserted, then, encompassed not merely a construction of politics as presently practiced, but was built around the future emergence of what was hoped to be an information-ready society where new sites of public political engagement could manifest and where one such crucial site would exist as technology and code.

Circumventing Politics, Circumscribing Publics

By mid-July 2002, less than a year after Proposition 1609's original proposal, Microsoft had orchestrated a meeting between Peru's President Alejandro Toledo and Bill Gates in the company's Redmond headquarters. Formally intended to announce Microsoft support of Toledo's Project Huascaran, an initiative to provide Internet access for Peruvian schools, the meeting also gave Gates the opportunity to present Toldeo with a $550,000 donation to fund other government projects. The Microsoft-Toledo agreement in fact also called for Microsoft to donate resources and services for other government IT projects, including: providing computer training for some 6,000 teachers, creating a Web portal to let citizens access government services, and building three Microsoft training centers to train hundreds of IT instructors. Without a trace of the defensiveness that characterized his letter to Villanueva, Gonzales endorsed the agreement in a press release, assigning Microsoft the status of a global corporate citizen in the process: "Microsoft Peru knows its role in society, and we know that only an informed society will achieve development; and we feel that our function is to provide society with the technological resources that will permit the spreading of access to information" (Microsoft 2002).

Seeming to take its cue from Proposition 1609 backers' response to Gonzales, which framed free software in government as an instrument to empower citizens, Microsoft now situated its technology as a tool for civic engagement. Where the company had previously insisted that its technology's place in government was merely the product of a healthy free market that elevated technical merit, it now asserted its ties to the state as founded on its support of civic processes. Notably absent from either Microsoft's or the Toledo administration's explanation of the accord was any mention of free software or its Congressional bills. Speculation began to emerge, however, that despite all official pretenses,

the Redmond meeting and the Microsoft donation had secured the rejection of the pending free software proposals (Lettice 2002).

Yet despite the attempt to circumvent public scrutiny around Proposition 1609's progression, the bill continued to enroll participation from a variety of national and international publics. In Lima, a number of free software advocacy organizations—including the Peruvian Linux Users Group,[9] GNU Peru,[10] and the Peruvian Association for Free Software[11]—began posting copies of the bill and the Villanueva-Microsoft letter exchange online. Copies of the documents appeared first on the Spanish *Free Software News* and discussion site, *Barrapunto*, and later on its English equivalent *Slashdot* (Slashdot.org, 2002, Slashdot.org 2002a). And by June 2002, dozens of articles would appear in such English language publications as the *San Jose Mercury News* (SiliconValley.com 2002), *Wired Magazine* (Scheeres 2002), the *Register* (Greene 2002), *Linux Today* (LeBlanc 2002), and *Linux Journal* (LinuxJournal.com 2002).

The groups also worked to publicize the legislation domestically, using decidedly more low-tech tactics such as handing out pro-free-software fliers on Lima's street corners and postering public walls. Equally telling however, were the responses Proposition 1609's developments produced among international audiences. A large study on free software and government use completed by the University of Maastricht's International Institute of Infonomics and funded by the European Commission drew its policy recommendations for governments directly from Proposition 1609 (Ghosh et. al. 2002). UNESO also approached Congressman Villanueva to help organize an international conference on free software and Latin American governments that took place in Cuzco, Peru in August 2003.[12] Significantly too, free software supporters across the globe began to contact Peru's advocates to volunteer to translate Villanueva's letter into other languages. Now available in more than a dozen different languages—including Dutch, Turkish, Greek, Hungarian and Portuguese—the Villanueva letter and bill, and the visions of free and proprietary software they constructed, acquired new mobilities and new audiences in each reproduction.

Conclusion

Reflecting back on global dimensions and mobility that Proposition 1609 came to acquire, Federico Heinz emphasized his own surprise and confessed, "We actually never expected any of it to reach international projections."[13] He spoke more assertively, however, when he elaborated on what he read as

a critical distinction between the dominantly-framed identity of free software and its identity as practiced by Proposition 1609 supporters: "The mainstream of free software [has been] very individualistic most of the time, where free software is [seen as] good because it is good for me… But technical needs and software in particular, is a secondary and not primary issue… What we are saying is that what you should see is whether you can accomplish things that are good for society—and that free software is right because it is so for absolutely everyone."[14]

The attempt by Heinz and other Proposition 1609 supporters to shift free software away from its focus on individual freedoms towards an emphasis on collective, civic freedoms echoes calls made by scholars of digital culture and politics. Such writers have cautioned against an over-adherence to the libertarian ideals that define much of online culture and that project cyberspace as a utopian arena of individual freedom that best exists outside of state regulation. (Escobar 1994, Lessig 1999, Nelson 1999, Sassen 2000). Insisting on the connections between the shaping of technology and the shaping of politics, and between coded virtuality and social reality, they warn of the risks of completely disassociating ideals of individual freedoms experienced online from real world states and polities.

The various engagements with Peru's political channels by Proposition 1609's supporters thus attempted to expose technology as something other than the pure, independently operating object that free software communities had predominantly defined it as. By Peru's free software supporters' framing, technology and technological development were entities that existed inseparably from the realm of politics and from the exercise of power. Similarly, traditional political channels were interpreted as something other than static foils to technological development and the project of free software. Politics, by Proposition 1609's supporters' interpretation, were understood instead as malleable and reprogrammable. Precisely such a dynamicism and recodability of politics allowed Peru's free software practitioners to cultivate multiple, differentially-oriented relations to the state. While practitioners articulated arguments for the protection of state independence and strengthening of national government against transnational corporate intrusions, they simultaneously insisted upon the establishment of mechanisms to limit and reform government control. The cultivation of such variable orientations toward the state by Peru's free software practitioners, and the work necessary to cultivate such diverse positions, reveal that it was more than the future and recodability of free software as a technology that was at stake in movements

for free software legislation. At stake too for such actors was the future of the country's political and civic institutions, as well as the modes of governing and being governed within Peru.

ENDNOTES

[1]http://www.gnu.org.pe/proley1.html

[2]Richard Stallman, for instance, reacted to the growth of the Latin American legislative strategies with a mild critique, asserting that free software activists' energies would be better spent preventing governments' over-regulation and infringement on user freedoms, than on fostering ties to legislative bodies. Paul Festa in a Cnet.com article of August 21, 2001, thus quoted Stallman as saying: "These laws are not the kind of help we most ask for from governments," said Stallman. "What we ask is that they not interfere with us with things like the Digital Millennium Copyright Act, with software patents, with prohibitions on reverse engineering that enable companies like Microsoft to make proprietary data formats and prohibit our work. Those are the main obstacles to satisfying the software needs of humanity."

[3]Original text in Spanish at: http://www.gnu.org.pe/mscarta.html. A translated text in English at: http://www.gnu.org.pe/mspemail.html.

[4]Proposición website at: http://proposicion.org.ar.

[5]Spanish text of the Argentinean bill, Bill 5613-D-00 at: http://proposicion.org.ar/proyecto/leyes/5613-D-00/texto_orig.html.

[6]Personal communication, March 23, 2003.

[7]Original text in Spanish at: http://www.gnu.org.pe/rescon.html. A translated text in English at: http://www.gnu.org.pe/resmseng.html.

[8]Personal communication, March 23, 2003.

[9]Peruvian Linux User Group (PLUG) website: www.linux.org.pe.

[10]GNU Peru website: www.gnu.org.pe.

[11]Asociación Peruana de Software Libre (APESOL) website: www.apesol.org.

[12]Website for the Latin American and Caribbean Conference for the Development and Use of Free Software at: http://www.lacfree.org.

[13]Personal communication, March 23, 2003.

[14]Personal communication, March 23, 2003.

REFERENCES

Bessen, J. 2002. "What Good is Free Software?" In *Government Policy toward Open Source Software*. R. Hahn (ed.), Washington, DC: Brookings Institution Press.

Christensen, C. 2000. *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail*. New York, NY: Harper Business.

Coleman, Gabriella. 2003. "The Political Agnosticism of Free and Open Source Software and the Inadvertent Politics of Contrast." Paper presented at the American Anthropological Association, Chicago, November 22.

Dorn, M. 2003. "The Free Software Tango," Salon.com, May 7. Electronic Document http://www.salon.com/tech/feature/2003/05/07/free_software_argentina/ accessed January 20, 2004.

Escobar, Arturo. 1994. "Welcome to Cyberia: Notes on the Anthropology of Cyberculture." *Current Anthropology* 35(3):211-231.

Evans, D. 2002. "Politics and Programming: Government Preferences for Open Source Software." In *Government Policy Toward Open Source Software*. R. Hahn (ed.) Washington, DC: Brookings Institution Press.

Festa, Paul. 2001. "Governments Push Open Source Software," Cnet.com, August 29. Electronic document, http://news.com.com/2100-1001-272299.html?legacy=cnet, accessed January 20, 2004.

Ghosh, Rishab Ayer, Ruediger Glott, Bernard Krieger, and G. Robles. 2002. "Free/libre and Open Source Software: Survey and Study." University of Maastricht, The Netherlands, International Institute of Infonomics. Electronic document, http://www.infonomics.nl/FLOSS/report/index.htm accessed January 20, 2004.

Greene, Thomas C. 2002. "MS in Peruvian Open-Source Nightmare." *The Register*. May 5. Electronic document http://theregister.co.uk/content/archive/25157.html accessed January 20, 2004.

Hahn, R. (ed.) 2002. *Government Policy Toward Open Source Software*. Washington, DC: Brookings Institution Press.

Instituto Nacional de Estatistica e Informatica. 2002. *Plan de Implementación de Software Libre en la Administracion Publica*. Lima, Peru.

Gray, Chris Hables. 2001. *Cyborg Citizen: Politics in the Post-Human Age*. New York: Routledge.

Kelty, Christopher. 2001. "Free Software/free science." *First Monday* 6(12). Electronic document http://firstmonday.org/issues/issue6_12/kelty/index.html accessed January 20, 2004.

LeBlanc, D. 2002. "Ending Microsoft FUD: An Interview with Peruvian Congressman Villanueva." *Linux Today*, May 21. Electronic document http://linuxtoday.com/news_story.php3?ltsn=2002-05-20-006-26-IN-LF-PB accessed January 20, 2004.

Lessig, Lawrence. 1999. *Code and Other Laws of Cyberspace*. New York: Basic Books.

Lettice, J. 2002. "Peru Mulls Free Software, Gates gives $550k to Peru Prez." *The Register*, July 16. Electronic document http://www.theregister.co.uk/content/4/26207.html accessed January 20, 2004.

LinuxJournal.com. 2002. "Conversations: An Interview with Dr. Edgar Villanueva." *Linux Journal*, May 21. Electronic document http://www.linuxjournal.com/article.php?sid=6099&mode=thread&order=0 accessed January 20, 2004.

Microsoft corporation. 2002. "Peru Begins a New Year of Technological Modernization Through Accord Signing between President Alejandro Toledo and Bill Gates." Electronic document http://www.microsoft.com/peru/convenioperu accessed January 20, 2004.

Nelson, Diane. 1999. *A Finger in the Wound: Body Politics in Quincentennial Guatemala*. Berkeley: University of California Press.

Sassen, Saskia. 2000. "Digital Networks and The State: Some Governance Questions." *Theory, Culture, and Society* 17(4):19-33.

Scheeres, J. 2002. "Peru Discovers Machu Penguin." Wired.com, April 22. Electronic document http://wired.com/news/business/0,1367,51902,00.html accessed January 20, 2004.

SiliconValley.com. 2002. "Peruvian Lawmaker's Effort Could Ban Microsoft on Government Computers." June 23. Electronic document http://www.siliconvalley.com/mld/siliconvalley/news/ 3531007.htm accessed January 20, 2004.

Slashdot.org. 2002. "Free Software Law in Peruvian Congress." Electronic document http://slashdot.org/article.pl?sid=02/05/04/220237&mode=thread&tid=117 accessed January 20, 2004.

_____. 2002a. "Peruvian Congressman vs. Microsoft FUD." Electronic document http://slashdot.org/ article.pl?sid=02/05/06/1739244&mode=thread&tid=109 accessed January 20, 2004.

Stanco, T. 2003. "Opinion on Brazil Making Open Source Mandatory in Government." *Linux Today*, July 13. Electronic document http://linuxtoday.com/news_story.php3?ltsn=2003-06-13-009-26-OS-LL-PB accessed January 20, 2004.

Stocking, B. 2003. "Vietnam Embracing Open-Source." *San Jose Mercury News*. Electronic document http://www.siliconvalley.com/mld/siliconvalley/business/columnists/gmsv/7139304.htm accessed January 20, 2004.

Wired.com. 2003. "Brazil Gives Nod to Open Source." Electronic document http://www.wired.com/news/infostructure/0,1377,61257,00.html accessed January 20, 2004.

CULTURE'S OPEN SOURCES

Punt To Culture

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Creative Commons, MedCommons, the Connexions Educational Content Commons, and the Biodiversity Information Commons are efforts to create collectively managed systems of electronically available and legally re-usable content (music, texts, video, sound, educational materials, scientific data, medical data, etc.). All of them share certain imaginaries—small-scale society, sharing, community, openness, collaboration, and collective stewardship—but do so principally in the most high-tech, globally far-flung and legally arcane manner. All see themselves as inheritors of a tradition of the free exchange of ideas as the basis of scientific, technical, and economic progress. Most speak of information environmentalism, copyright conservancies and preserves, or open, free, and collaboratively managed repositories of intangible but valuable content. None of them are anti-commercial, nor even anti-intellectual property—indeed, they all rely on the existence of intellectual property to create and maintain the "commons" that are an inevitable part of their names, even as they occupy a position of challenge or resistance to the dominant forms of intellectual property in circulation today.

Despite the fact that these people are elites, relatively affluent, highly technically sophisticated people who are generally found at the centers of power

in the North and the West, they nonetheless share something with the Native Americans, Peruvian farmers, or diasporic peoples so commonly studied in anthropology: they seem vitally concerned with developing new strategies for maintaining a threatened "way of life," which they see both as legitimate and as in need of innovative means of defense—it is their "culture."

At first glance, this comparison may seem absurd; I suggest it because these "commoners," like many indigenous peoples, have an increasing tendency to use (some variant of) the anthropological concept of culture to defend themselves, to agitate for rights or goods, to distribute blame and praise, to critique anthropology and even perhaps to explain themselves to themselves. Marshall Sahlins, for example, suggests "this kind of cultural self awareness is a worldwide phenomenon of the late 20th century. For ages people have been speaking culture without knowing it: they were just living it. Yet now it has become an objectified value—and the object too of a life and death struggle..." (Sahlins 2000:297). It is specifically the second-order or re-doubled use of the concept of "culture" by the people I refer to here that justifies this comparison—and not any scale of oppression, imperialism, or entitlement. It is not first the *articulation* of culture I am interested in, it is its *operationalization*—the strategies by which various, overlapping, even contradictory, articulations of "culture" serve as strategies for changing particular technically, legally, and corporeally embedded practices. Such practices, seen from this second-order position may well be labeled "culture" by the anthropologist (indeed, Sahlins argues persuasively that if they were so labeled and understood, "culture" could never be said to disappear), however to do so is a methodological nuisance. Articulation and operationalization need to be at least provisionally understood as separate, in order to make any practical headway out in the field. I suggest here that the lawyers and activists I study are both more savvy about the nature of such separations, and less hung up on them than anthropologists like myself tend to be.

While cultural studies, literary studies, film and media studies, education, and the popular media continue to speak of "the culture of x" or the "cultural logic of y," anthropologists increasingly disavow ownership of these theories—especially when they encounter them in transformed or re-appropriated forms. It is as if the theories had been renounced into some vast public domain of ideas, from which they have been transformed by various peoples into explanations, weapons, critiques, legal briefs, sacred rituals, and justifications. Anthropologists might denounce others for misunderstanding, but more often, they are broadsided by the unexpected interruption of these orphaned explanations. How should we approach these abandoned relics—as remnants, as

vintage goods, refurbished or transformed into yet more valuable and fascinating ways of narrating our existence? As a route to the hallowed "cultural" critique, which some of us still see as the distinctive offering of anthropology to the world? Or as an essential part of a continued but Sisyphean effort to outline a theory of "culture"?

The following story about Creative Commons is one I consider emblematic of this conundrum. The story concerns the uses of "culture" in legal practice and reasoning. It suggests two things: first, that what we may have once expected lawyers, economists, or others to learn from anthropological or cultural theory in its myriad forms, they have in fact learned (or knew already); second, that, as a result, we may yet have something to learn from lawyers and economists about how *methodology* can be related to both the theory and the practice of critique. It should be clear here that by methodology I mean more than the practices of being in the field, taking notes, collecting stories, and interviewing informants (I would call these skills, not methods). The question of method I raise in relating this story concerns objectivity and explanation, which I turn to at the end.

Creative Commons

Creative Commons was started in 2001 by lawyers Lawrence Lessig, James Boyle, and Michael Carroll; computer scientist Hal Abelson; publisher Eric Eldred and others with money from the Center for the Public Domain; space and facilities from Stanford Law School; and grants from the Hewlett and MacArthur foundations.[1] The project sees inherent value in the system of intellectual property but wants to achieve balance in its real application. Lessig describes it as part of a two-pronged approach, the first being conventional challenges to IP law in the courts (such as the Eldred v. Ashcroft case) and the other, Creative Commons, an unconventional attempt to achieve similar goals privately (outside of the courts and legislature but within the limits of existing law). As with its inspirational forerunner, the Free Software Foundation, Creative Commons is a non-profit organization whose only stated goal is to provide high-quality legal licenses and instructions on their use to whoever wants them. They don't do legal advice or legal defense; they don't do policy activism or academic legal analysis. Indeed, in describing the founding of Creative Commons, James Boyle explained how proud he was: they didn't just sit around talking about how it should be different, but *made something* to give to people. What they made were copyright licenses.

Through a series of connections I came to be involved, rather deeply, in the actual writing of the licenses that Creative Commons would launch in December of 2002. My role was that of an "expert" who held neither degree nor experience, only the proven lure of being an anthropologist—that is to say, someone who was presumed to know about *culture*. In this case, as in other cases of studying high-tech and legal elites, the word "culture" produces a general anxiety, especially when it refers not to high and low culture, but to some more amorphous aspect of human life which rests somewhere amongst manners, nurture (of nature vs.) and morality—i.e. a "way of life." More specifically, this anxiety concerns the question of whether other people's "culture" is so different as to be incommensurable with the goals and activities of the person or group imagining it to exist, hence: corporate culture, cultural sensitivity, the culture of the South, multiculturalism, etc. While much of the discipline of anthropology, it seems, has busied itself with either repudiating the need for a concept of culture or lamenting such widespread misinterpretations, a much larger and more diverse set of actors inside and outside of academia have filled the void and taken to incorporating it into their own speech and practices. The myriad theories of culture proposed by anthropologists in the 20th century are easily found littering the mental cities of people all over the world. In most cases, I would offer, these theories are less *articulated*, than *operationalized*. Consider my example of writing licenses.

The Creative Commons (CC) licenses took about a year to perfect, and the work was primarily directed by Glenn Brown (executive director of Creative Commons). Glenn is a young and hip lawyer, graduate of Harvard, and keen music lover. Glenn, always enthusiastic and charismatic, is an expert in intellectual property law and its discontents. At the request of James Boyle, I became involved as an emissary not only from anthropology, but more generally from the "scholarly" world (as a representative of the Connexions Project at Rice University), since the licenses would need to cover scholarly and educational material as well as "creative" work.

The Creative Commons license is interesting in that it allows authors to grant the use of their work in about eleven different ways—that is, it comes in versions. One can, for instance, require attribution, prohibit commercial exploitation, allow derivative or modified works to be made and circulated, or some combination of all these. These different combinations actually create different licenses, each of which grants IP rights under slightly different conditions. For example, say Marshall Sahlins decides to write a paper about how the internet is cultural; he copyrights the paper © 2004 Marshall Sahlins, and he

requires that any use of it, or any copies of it, maintain that copyright notice and the attribution of authorship (these two things can be different); furthermore he allows for commercial use of the paper. It would then be legal for a publishing house to take the paper off of Dr. Sahlins Linux-based web-server and publish it in a collection of famous articles about how the internet is cultural without asking directly (though Miss Manners would surely suggest they do so anyway). The only requirements would be that the paper remains unchanged and that his name is clearly and unambiguously listed as author of the paper. They do not get any rights to the work, and he will not get any royalties. If he had chosen non-commercial use, the publisher would instead have needed to contact him and arrange for a separate license (CC licenses are non-exclusive), under which he would wisely demand some share of revenue and his name on the cover of the book. But say he was a callow young scholar seeking only the recognition and approbation of peers for his work, then royalties would be secondary to maximum circulation. As they put it, Creative Commons allows authors to assert "some rights reserved" or even "no rights reserved."

Now consider the case where Dr. Sahlins had chosen a license that allowed *modification* of his work. This would mean that I, Christopher Kelty, whether in agreement or in objection, could download the paper, rewrite large sections of it, add in my own baroque and idiosyncratic scholarship, and write a section that purports to debunk (or what could amount to the same, "augment") the arguments Dr. Sahlins made in the paper. I am then legally entitled to re-release the paper "© 2004 Marshall Sahlins, with modifications © 2004 Christopher Kelty" so long as Dr. Sahlins is identified as the author of the paper. The nature or extent of the modifications is not legally restricted, but both the original and the modified version would be legally *attributed* to Dr. Sahlins (even thought he owns only the first paper).

It was this case that got me thinking—considering only the best interests of my scholarly peers—about the option of adding to the licenses a "disavowal clause." In the case where I produce a modified work that so distorts Dr. Sahlins's original argument that he no longer wants to be associated with the modified paper, then he should maintain the right not only to be identified as the author, but to repudiate that identification in the case of a dastardly modified work. Dr. Sahlins should, legally speaking, be able to ask me to remove his name from all subsequent versions of my hideous offspring, thus clearing his good name and providing me the freedom to go on sullying mine into obscurity. I brought the issue up with Glenn Brown, we organized a phone date with the lawyers (who were actually drafting the text), and we

talked through many of the possible ramifications. I suggested adding a clause that required licensors to remove the original author's name from the modified version when asked, and we ultimately settled on the following clause, which would be added to the licenses that allowed modification:

> If You create a Derivative Work, upon notice from any Licensor You must, to the extent practicable, remove from the Derivative Work any reference to such Licensor or the Original Author, as requested.

The bulk of our discussion centered around the need for the phrase, "to the extent practicable." Part of the motivation came from something Glenn had asked me: "How is the original author supposed to monitor *all* the possible uses of her name? How will she enforce this clause? Isn't it going to be difficult to remove the name from every copy?" Glenn was imagining a situation of strict adherence, one in which the presence of the name on the paper was the same as the reputation of the individual—regardless of who actually read it. On this theory, until all traces of the author's name were expunged from each of these teratomata circulating in the world, there could be no peace, and no rest for the wronged.

I paused, gave the kind of studied sigh meant to imply that I had come to my hard-won understandings of "culture" through arduous dissertation research, and explained: It probably won't need to be strictly enforced in all cases—only in the significant ones. Scholars tend to respond to each other only in very circumscribed ways, by writing letters to the editor or by sending responses or rebuttals to the journal that published the work. It takes a lot of work to really police a reputation, and it differs from discipline to discipline. Sometimes, drastic action might be needed, usually not. There is so much misuse and abuse of people's arguments and work going on all the time that people only react when they are directly confronted with serious abuses. And even so, it is only in cases of negative criticism or misuse that people need respond. When a scholar uses someone's work approvingly, but incorrectly, it is usually considered petulant (at best) to correct them publicly.

"In short," I said, leaning back in my chair and acting the part of expert, "it's like, you know, c'mon—it isn't *all* law; there are a bunch of, you know, informal rules of civility and stuff that govern that sort of thing."

Then Glenn said: "Oh, okay, well that's when we punt to culture."

With this phrase, I leant too far and fell over, joyfully stunned. Glenn had managed what no amount of fieldwork, with however many subjects, could

do. Some combination of American football, a twist of Hobbes or Holmes, and a lived understanding of what exactly these copyright licenses are meant to achieve, gave this phrase a luminosity I usually associate only with Balinese cock-fights. It encapsulated, almost as a slogan, a very precise explanation of what Creative Commons had undertaken. It was not a theory Glenn proposed in this phrase, but a *strategy* in which a particular, if vague, theory of culture played a role.

For those unfamiliar, a bit of background on American football may help. When two teams square off on the football field, the offensive team gets four attempts (called "downs") to get the ball either 10 yards down-field or into the end-zone for a touchdown (at which point possession changes hands, and the other team tries). The first three downs are usually all the same: run or pass, run or pass. Fourth down is different, however: on fourth down, one either "goes for it" (tries to run or pass), tries to kick a 3-point field goal (if close enough to the end-zone), or "punts" the ball to the other team. Punting is a somewhat disappointing option, because it means giving up possession of the ball to the other team, but it has the advantage of putting the other team as far back on the playing field as possible, increasing the likelihood that they will have to punt the ball back again.

To "punt to culture," then, suggests that these copyright licenses try three times to *legally* restrict what a user or consumer of a work can make of it. By using the existing federal IP law, the rules of license and contract writing, they articulate to people what they can and cannot do with that work according to law.[2] However, the licenses do not (they cannot) *force* people, in any tangible sense, to do one thing or another, but they can use the language of law and contract to warn them, and perhaps obliquely, to threaten them. If the licenses end up silent on a point—if there is no "score," to continue the analogy—then it's time to punt to culture. Rather than make more law, or call in the police, the license *strategy* relies on "culture" to fill in the gaps with people's own understandings of what is right and wrong, beyond the law. It operationalizes a theory of culture—one which emphasizes the sovereignty and the diversity of private systems of cultural norms. Creative Commons would prefer that its licenses remain legally minimalist. It would much prefer to assume—indeed, the licenses implicitly require—the robust, powerful existence of this multifarious, heterophysiognomic, and formidable opponent with neither uniform nor mascot, hunched at the far end of the field preparing to, so to speak, clean law's clock.

Creative Commons' "culture" thus seems to be a somewhat vague mixture of many familiar theories. Culture is: an unspecified but finely articulated set

of given, evolved, designed, informal, practiced, habitual, local, social, civil, or historical norms that are expected to govern the behavior of individuals in the absence of a state, a court, a king or a police force, at one of any number of scales. It is not monolithic (indeed, my self-assured explanation concerned only the norms of "academia") but assumes a diversity beyond enumeration. It employs elements of relativism—*any* culture should be able to trump the legal rules. It is not a genetic theory, but one that assumes historical contingency and arbitrary structures. It might even be the *habitus* (except "Punt to the *habitus*" doesn't have quite the same ring). It is nothing less than a *team* of theories, loosely coordinated, but lined up on the same side, all trained in some version of recent American and European cultural or social theory.

This team of theories of culture is neither peculiar to Creative Commons, nor does it represent all of legal practice, or even all of intellectual property law. However, it is used regularly by several related schools of thought in America which generally include the Law and Economics movement, (Critical) Legal Realism, and New Institutional Economics (to mark just a few of the very scholastic labels that designate them). Various people associated with, or trained in, these scholarly movements are more than sympathetic to the kinds of theories of culture, difference, and sovereignty proposed by anthropologists and cultural theorists over the last 30 or so years.[3] This in itself is hardly surprising—but what is surprising is that, in the form of lawyers, entrepreneurs, and activists, this sympathy informs the legal and technical *practice* of these new "resistance" movements busy building commons of intellectual property.

This team of theories of culture may not hold up in the court of anthropological opinion, but it need not be *right*—it only needs to be a good enough *strategy* for the creation of licenses used by hundreds of thousands of people, creating various kinds of content, in multiple jurisdictions. While some people involved might have lingering anxiety about the robustness of this theory of culture, it is deployed only in the interests of achieving specific, pragmatic goals: maintaining and furthering a particular way of life.

Other Cultures

The original 1960s Law and Economics movement focused on the use of *law* as a tool of coercion to achieve particular economic ends. Debates about the creation of legislation, or the impact of regulation or a particular judicial decision were (and very much still are) conducted in a language of positive and negative externalities, transactions costs, and Pareto optimality. A younger

generation—one labeled the "New Chicago School" by none other than Larry Lessig—has expanded this methodological commitment to law-as-economic-tool to include various versions of "social meaning," "private orderings," customs or norms as tools. Rather than relying on law as the sole mechanism for coercion or distribution, this younger generation has recognized the existence of multifarious systems of social order which have the same function as law, but at different scales.[4] From the perspective of anthropology, this recognition looks like the accidental re-discovery of culture; due payment for a too-long ignorance of anthropology and sociology's claims. But for lawyers and economists, it is simply a methodological insight that such cultural or social systems might be used to achieve particular ends—legally and extra-legally, as in the directly inspired case of Creative Commons. Lessig puts it this way:

> The regulation of this school [Law and Economics] is totalizing. It is the effort to make culture serve power, a "colonization of the life-world." Every space is subject to a wide range of control; the potential to control every space is the aim of the school...There are good reasons to resist this enterprise. There are good reasons to limit its scope. [1998:691]

For Lessig and sympathizers, there is no question of the *efficacy* of this approach, and they could care less whether it is a correct theory of culture. On the one hand, Lessig overstates the case: he implies that our "culture" or our "life-world" is a fragile sphere separate from the political, legal, or economic lives of people. For we anthropologists, whatever culture is or was, law, economy, and politics are part of it—and, as with Sahlins, we consider it impossible for culture to disappear in any meaningful sense (even if we also worry that *particular* kinds of practices are threatened by capitalism, imperialism, or neo-colonialism).

On the other hand, Lessig understates (with respect to anthropologists) the methodological innovation represented by this new way (for lawyers and economists) of thinking about culture as a congeries of "social meaning' or a collection of customs. He assumes that cultures—though diverse, creative, and fundamentally legitimate in their own right—can be treated as bounded entities that determine the actions of their members to some effective degree. Such an assumption can be flawed and yet still provide an effective way to treat "culture" as a means to either its own ends (the felicitous version) or to the ends of some "culture of no culture" situated in Washington D.C. and Chicago (the dark "totalizing" vision). If "culture" determines individual

action, even marginally, it can be manipulated alongside legislation to fight for one way of life rather than another.[5]

There is, I think, a valid critique of this approach to be made by anthropologists: such a vision of culture-as-tool evacuates it of its properly *symbolic* content and replaces it with a merely *functional* one. By doing so, it sacrifices an understanding of how subjectivities are remade or re-negotiated when norms and practices change. And Lessig's vision of culture shares with the original Law and Economics vision of law a methodological individualism that assumes human desire and reason are stable, interested, and robust enough to be buffeted about by coercive laws or attempts to change social norms. It differs only by suggesting that there are many different cultures—and perhaps therefore, many different subjectivities—all equally stable in the same *methodological* sense. Again, it matters little if it is correct, but it does institute a requirement for the actual, empirical, historical investigation of (or at least knowledge of) the entities that will be treated as "cultures" in order to locate, name, and then manipulate the norms they are assumed to adhere to.

It is this methodological practice, which in the end extrudes a more fundamental political commitment amongst lawyers and economists than that of all the cultural critique in the world. What frustrates the cultural anthropologist is the seeming refusal to recognize the situatedness of this political commitment. It is true; the aims of these commoners are clearly particular: to maintain and encourage a particular set of practices with respect to particular notions of authorship and ownership. The vision of an ecumenical, neutral intellectual property system, grounded in a very familiar, if often criticized, discourse of equality, freedom, and progress may well be seen as a veiled attempt to impose a particular practice (and hence, a particular kind of subjectivity) on as much of the world as possible. Yes, yes, they assert.

What makes it unusual, however, is that this particular set of practices is often seen by these commoners as *particular* but also as *threatened,* not as natural, inevitable, unique, or even necessarily correct. It is however, a culture for which are made various claims of equality, liberty, free circulation, cultural autonomy, cultural diversity, and progress through innovation (indeed the only naturalness ascribed to such practices is their enshrinement in the Constitution, which Lessig among others uses to great rhetorical effect). Such a vision is threatened, however, not by "other cultures" or by dissent from within, but by a dominant and powerful set of interests—principally that of the entertainment industry—who have re-made federal copyright law to serve an even more particular and more narrow definition of legitimate prac-

tice which they assume to be universal and would very much like to see imposed worldwide. It is only with respect to this perceived threat that commoners see their own practices as a defense of "culture"—a defense, in fact, of the very possibility of culture.

Such a state of affairs presents two options to the social sciences, and especially to the more philosophically inclined, qualitative social sciences. On the one hand, the desire to make anthropology relevant, to use it as a tool of critique, or to engage its findings and activities in a political sphere has much to learn from the emerging strategies of movements such as that of Creative Commons or the free and open source software movements. Not only do these movements represent a critique of particular practices (such as the overenthusiastic extension of intellectual property law by lawyers and corporations), but, in addition to reasoned critique, these movements also employ legal and technical tools that transform that critique into a viable system of *alternative* practices. Thesis eleven wins new life as versioning software and copyright licenses.

On the other hand, the door remains open to a certain version of objectivity—perhaps the kind Max Weber explored in "Objectivity in the Social Sciences" under the label of "technical criticism." Both the currently dominant intellectual property system and the alternative practices of commoners contain within them a particular configuration of *values* which Weber suggested it was the job of the technical critic to delineate and to distinguish from discussions about the relation of particular means to established ends. The ends foreseen by the dominant "culture" of copyright holders are in fact different from the ends of the commoners, and it is only the means that they share. However, both of these groups articulate these ends by reference to the same concepts: freedom, democracy, progress, innovation, individual choice, but also increasingly, cultural autonomy, and "community." The question is open, then, whether anthropologists can practice an objective (in Weber's sense) understanding of the values and concepts which inhere in both dominant and alternative systems without confronting the fact that articulation and operationalization of "culture" are so clearly and deeply intertwined.

For the lawyers and activists of these commons projects, what matters is only what one can *do* with an explanation (which depends only lightly on its legitimacy or believability), not whether it is the one that fits reality best. I would suggest that the anthropologist who harbors distrust of such a practice, and who critiques on the basis of misinterpretation, misreading, or misrecognition, risks having their finely wrought critique *understood all too well*—and

transformed anew into yet more curious and exotic technical and legal practices. But this is not the end; the question it poses is that of what kind of strategy and what kind of contribution anthropological research makes to the constitution of lively, timely, and urgent issues like those represented by current intellectual property debates and free software.

ENDNOTES

[1]http://www.creativecommons.org/

[2]Creative Commons licenses are copyright licenses—such as those that routinely accompany commercial software—which effectively specify which rights (guaranteed by federal law) will be granted, and which reserved. The licenses come in three flavors: a human readable license, which states fairly clearly what rights and restrictions exist, a "machine-readable" license, which uses XML metadata to specify which of the various license terms are in use, and a "lawyer readable" license which is written in the exceedingly strategic and exacting language lovingly known as legalese.

[3]A glance at the work and bibliographies of, for example, James Boyle, Larry Lessig, and Elinor Ostrom (to take 3 representative examples) reveals plenty of evidence of this engagement in the recent past.

[4]Among the recent crop, Robert Ellickson has perhaps been most widely known, with his study of dispute settlement by cattle ranchers in California settle land disputes.

[5]For an elaboration of this approach, see esp. Lessig (1995).

REFERENCES

Lessig, Lawrence. 1995. "The Regulation of Social Meaning." *University of Chicago Law Review* 62(3):944-1045.

_____. 1998. "The New Chicago School." *Journal of Legal Studies* 27(2):661-691.

Sahlins, Marshall. 2000. "Ethnographic Experience and Sentimental Pessimism: Why Culture is Not a Disappearing Object." In *Biographies of Scientific Objects,* Lorraine Daston, ed. Chicago: University of Chicago Press.

CULTURE'S OPEN SOURCES

Rhetorical Virtues: Property, Speech, and the Commons on the World-Wide Web

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Property, Propriety, and Appropriation

Our comments extend our mutual scholarly interest in the articulation of discourses of property in contemporary capitalist culture and how these are deployed in the narrative conjuring of capital as "salvific" moral virtue in global neoliberalism (Comaroff and Comaroff 2001). We are interested in how narratives of property and propriety, ownership, and entitlement come to be embodied and performed as moral stories in digital environments (Coombe and Herman 2000, Coombe and Herman 2001). As Marx argued "capital" is a "very strange thing, abounding in metaphysical and theological niceties" (Marx 1976[1867]:163). Capital is strange for Marx because it can apparently morph into so many different forms—as commodity, as debt, as labor, as knowledge, as brand image, and, underlying these, money as the universal, impersonal standard of value that makes these commensurable. Yet these strange and magical qualities of capital rest upon a foundation of metaphysics and theology—a particular set of ethical values that construe lifeworlds into monetary forms and human beings into autonomous individuals.

We offer here a small slice of our ongoing work on the rhetorics of intellectual property in the age of digital media and information-based capitalism.[1] We use rhetoric in the strong, Nietzschian sense of the term—as the "act of ordering the chaos of life" (Witson and Poulakis 1993:16). In this reading, rhetoric is a social and material practice of the pragmatics of power that punctuates the world with meaning and thereby renders social action possible. To use Barbara Biesecker's words, "it is in rhetoric that the social takes place" (Biesecker 1997:50). Indeed, it is rhetoric that makes the social a place of meaningful habitation. We do not mean "rhetoric" in the vernacular, pejorative sense as when someone says, "Oh, that's just mere rhetoric," thereby connoting a fount of frothy words without real consequence (McGuigan 2003:1); nor do we restrict it to discourse with persuasive force or intent.

One of our favorite moments in teaching is when we ask students to explain what the word "property" means. Given that the word is a fixture of our everyday language and speech, students are remarkably perplexed when this question is posed. Their reticence to give voice to their understanding of property clearly doesn't have to do with their lack of knowledge of the word or the concept. Rather, it is rooted in the seeming obviousness of the answer. "Property," one student will venture after an uncomfortably long silence, "is when I own something." This rhetorical statement is what legal scholar Jack Balkin (1998) calls a hegemonic *meme* in an argument that transports the concept of the meme from evolutionary biology to a critique of legal and political ideology. In brief, a meme is an idea or rhetorical construct—a "packet" of coherent information—that is passed on from generation to generation through the cultural transmission of communication, imitation, and replication called *memesis* (which should not be confused with the anthropological concept of mimesis). Cultures (Balkin shares none of the anthropologist's qualms about using the term as a noun) integrate such memes into quotidian ideologies because of their pragmatic utility in making sense of the world and allowing human groups to adapt to changing social environments. Through the memetic process of informational replication, to paraphrase Balkin, human beings become information made flesh.

We have many reservations about Balkin's evolutionary theory of ideology. Aside from the conceptual overlay of evolutionary biology and the language and tropes of information science and technoculture, there is not much in what Balkin has to say that hasn't already been said by Gramsci, Stuart Hall, Karl Mannheim, Berger and Luckmann, Foucault (especially), and even Marx himself. But the idea that the social power of ideology resides in its corpore-

alization, in how it is embodied and performed, and how its makes the world habitable in the Heideggerian sense as an *ethos*, is one worthy of further exploration when the location of this embodiment and performance takes place on the World Wide Web (the Web).

The problem with ideological memes, whatever their practical efficacy, is that they become incorrigible—resistant to revision. Property is not simply or even primarily a relationship between persons and things (as first year law students are swiftly taught). It is a social relationship between socially recognized persons with respect to real and intangible things (and between peoples who as nations may hold cultural properties) that is authorized and legitimized in particular cultural contexts. It is also a relationship of profound social power. The generalized failure to see the social relationships that produce the value of the things we consider property—the constitutive misrecognition that Marx referred to as commodity fetishism—is one manifestation of this power.

The cultural determination of property as a social relationship—and the ambivalences that are embodied in the commodity fetish—are inscribed in the etymology of the word itself. "Property" is derived from the Latin *propius*, which itself has two meanings: 1) that which one owns and 2) a standard of behavior or correct conduct that is "proper." The latter meaning of property is linked to *proprietas*, which means both propriety as well as the proper signification with words (Jones 1992:118). The ability to claim something as one's own is ritually performed in social interactions which operate to render the owner suitable and fitting to appropriate that from which he or she claims the right to exclude others. In the intrinsic alterity of claiming property as a function of propriety, the non-owner is a person who is not appropriate. In other words, the capacity to appropriate is contingent on being appropriate (Herman 1999).

The governmentality of property and propriety, although always central to the *logos* and *ethos* of capitalism, has assumed even greater significance in the age of globalized neoliberalism. Analyses of the scope and dimensions of globalization and neoliberalism abound, but for our purposes we will invoke a single statistic that will stand as a metonym for the dimension of the phenomenon we are exploring. Between 1983 and 2003 the value of assets of the Fortune Global 500 increased by over 300% (Henwood 2003:56). This increase in value is unprecedented in the history of modern corporate capitalism. Much of this enhanced value takes the form of intangible, symbolic, or informational capital that is protected as intellectual property: bits, bauds, and bytes of 'digitalia' that include patented business models, accounting methods, pharmaceutical formulas, and gene sequences; copyright protected soft-

ware, imagery, and music; trademarked jingles, logos, advertising slogans and branding strategies (Coombe 2004, Rifkin 2001).

At a time when corporations increasingly subcontract out the actual production of commodities—whether material production of X-Box gaming consoles to Mexico or intellectual production of software code to India—maintaining control over these intellectual properties is both crucial to profitability and central to corporate identity. For example, the most important assets that Nike owns as productive capital are its logo, brand name, and marketing persona (La Feber 2002). The deployment of the brand image as an avatar of the corporate persona is itself dependent upon the rhetorics of intellectual property law that bestow corporate investors with the authority of authorship.

One of the functions of intellectual property law (trademark law especially) is to construct and enforce particular notions of corporate identity as a property right. Intellectual property laws structure a field of semiosis and memesis and thereby shape forms of symbolic practice and performance (Coombe 1998). They create proprietary rights over intangible assets—the patented formulas, the copyright protected works, and the trademarked signifiers of corporate self-representations—and thereby create legal rights and obligations to control their appropriations and interpretations. Through intellectual property law, symbolic practice is transformed into symbolic capital—a "strange" sort of alchemy that even Marx couldn't imagine.

We can illustrate this by considering the social dimensions of trademark law. Its rhetorical performance involves signifying activities that connect the product (assume a computer operating system), the brand name (Windows XP), the corporate source (Microsoft), and positive feelings in the mind of the consumer towards these.[2] This performance constitutes a closed circuit of meaning and desire the law understands as 'goodwill' (an increasingly important form of intangible asset in and of itself within informational capitalism). This in turn provides the basis for the intellectual property owner's legal entitlement to fully exploit and appropriate the multi-faceted value of the commodity/sign in the market and to manage its social circulation.

The corporate persona is strengthened through strategic proprietary activities designed to constrain surplus meaning and prevent the dilution of symbolic value (Coombe and Herman 2001). Unauthorized appropriations of corporate intellectual property and alternative forms of signification that disrupt this closed circuit must be monitored and, ideally, strictly prohibited. The law functions as a form of governmentality by enabling corporate owners to manage the appropriate use of symbolic capital in mass-mediated commercial cul-

ture, but they can never wholly control the conversations in which their symbolic signifiers become enmeshed. We will illustrate this here by recounting one particularly animated dialogue about property and propriety on an internet website and then consider the adequacy of the dominant competing ethos of digital governance for addressing the issues it poses.

Whose Commons? Corporations, Consumers, and Cultural Others

In early 2001, the Lego Corporation (Lego) launched a new line of building toys called "Bionicle" in consumer societies. Lego has long been famous for its line of construction toys. Those of us with young children know how deeply embedded these have become in their lifeworlds. What is distinctive about the Bionicle line of toys is that they come with an imaginary lifeworld of their own—the Island of Mata Nui, home of the Toa, characterized by a unique cosmology, origin myths, a clan system, tribal alliances and rivalries, ritual practices of storytelling, and sacred iconography. All of these are capable of being held as the intellectual properties of Lego if and when they become associated with the corporation as their source (and given their extensive publicity, this is more than likely). The Bionicle line of toys (along with films and internet-based games) has become the most successful product in the Lego Corporation's history.

Soon after Bionicles made their appearance in New Zealand's toy stores, Maori lawyers representing indigenous NGOs wrote a letter of complaint to Lego. Asserting that much of the symbolic universe of Bionicle—from the origin myths to the names of spiritual powers and leaders— had been appropriated from Maori and other Polynesian cultures, they objected to the fantastic hybridizations of living cultural traditions and to inappropriate use of religious and spiritual terms (Holloway 2001). Rather than demand an instant end to the practice and a recall of the products (like the cease and desist letters that lawyers representing intellectual property owners send when their protected works are appropriated without consent), Maori groups offered instead to gather a number of indigenous peoples' experts to consult with Lego so as to develop a standard of practices that would enable more appropriate use of traditional knowledge in the manufacture and marketing of toys. Lego sent representatives to New Zealand to meet with the Maori, and they jointly agreed to develop a code of conduct for toy manufacturers. The corporation also agreed to stop misappropriating Maori language in the Bionicle toy

line. At this point, then, Lego appeared to be enhancing corporate goodwill through its expression of a desire to manage its intellectual properties in a fashion that went beyond building bonds with consumers. It seemed to affirm that corporate propriety with respect to cultural forms must also be grounded in social relationships of trust and responsibility.

Unfortunately, this creative rapprochement between first peoples and a representative of the digital culture industry never came to fruition; for reasons that are opaque, Lego never carried through on its promises. In response to this betrayal, a group of web-savvy Maori declared a form of "cyber-war" (Holloway 2001). They appear to have decided that if they could not compel the corporation to act with respect towards the integrity of their culture, they would compel Lego consumers to consider the propriety of the corporate appropriation of Maori cultural heritage. In short, they intervened to break the closed circuits binding consumers to the corporation by introducing alternative understandings of the meanings of things in Bionicle lifeworlds.

The locus of the Maori "hack attack" was a website called BZ Power run independently from Lego by Bionicle fans (www.bzpower.com).[3] In order to get consumer attention, Maori activists brought down the site with a series of sophisticated denial of service (DOS) attacks. This in turn brought retaliation from BZ Power partisans. They in turn hacked into one of the principal Maori activist sites (www.aotearoalive.com) and brought down its server. These attacks and counterattacks precipitated a lively and often angry discussion between Maori activists and Bionicle fans about the nature of intellectual property, the propriety of cultural appropriation, the scope of the public domain, and the constitution of the cultural commons.

The issue of ownership of language and possession of culture is foregrounded in the beginning of the debate by "Kataraina" one of the most vocal of the digital avatars of the Maori community in this contact zone who exclaims:

> I am angered and disgusted to see so many Maori words used for nothing other than a kids' game, pretending to teach others how to pronounce our language, and looking to a Maori dictionary to make up new names to role-play. What right do you have to abuse our tongue? Who of you here are actually Maori?
>
> Some of you have said in response to our anger about the use of the Maori language, such as the so-called "Kanohi Power Webmaster," "what gives you the right to use my English language in your post?"

> Permission: your site makes it clear that this is the language to use communicating here—and everyone is allowed to post. That's fair enough isn't it? If this was a French site and only French were to be used I would use that. A people have a right to say what they want done with their heritage. In this particular forum—a mini-culture if you like—the administration has made certain rules to abide by. Respect would be to abide by those rules because I am on "your turf" as it were. And I think how you can understand how that is fair.
>
> But when you use our culture—you are on *our* turf. You don't get to play with our heritage, culture, and spirituality or even to try to re-interpret and teach falsehoods about it to literally thousands of others without literally thousands of Maori challenging you on that score. Because we are the authors and creators of that not you or any other non-Maori. Your rules don't apply to that which you didn't author [BZ Power Forum, Kataraina, 12/05/01].

As the discussion unfolded, members of BZ Power resisted the Maori claim of collective and situationally specific conceptions and practices of property and propriety. Although some responses were more sophisticated and articulate than others, all rested upon a liberal individualist view of how language could properly be claimed and used. For many, the moral ground upon which they built their argument of propriety was simple: as individuals they possessed the ability to use the Maori language however they wanted "because the American consitution [*sic*] says we have the freedom of speech to do so" (BZ Power Forum, Pickle, 12/07/2001). In a fascinating if unintentional post-structuralist rhetorical move, other contributors argued that freedom of speech was itself contingent upon the arbitrariness of the sign. They argued that the Maoris were trying to claim possession of just "a bunch of words" that have no particular ground or firm anchoring of meaning and value. According to one of the more articulate contributors to the debate:

> To the non-maori, maori words are *just words* that hold no intrinsic value, either positive or negative. Therefore, the decision to use a particular word or translation is *mine*. As much as someone else is offended by what they consider to be improper or demeaning use of any given word or phrase, I still retain the right to use those words in any context I desire. This is a fact and it is the founding principle of the country in which I live. [BZ Power Forum, Binkmeister, 12/07/2001]

In a similar vein, one member of BZ Power argued that the Maori language, like all languages, was the common property and culture of all humanity. Any language, be it Spanish, Italian, or the Te Reo of the Maori, "are languages that any person can use or speak, not personal possessions" (BZ Power Forum, Bionicle Rex, 12/06/2001).

In a rejoinder to this logic Kataraina argued that from the Maori perspective, language was not a "personal possession" but "a cultural possession. It is, in fact, our people's treasure." Moreover, she claimed:

> Our language is not just about communication, it is about the activity of life... And given that our whole culture is built into the language, our spirituality is tied into the words. The language has a design to it that has many levels according to the context of the conversation so that words have both a prosaic meaning but also refer to a spiritual principle. I know it is difficult for outsiders to understand. That, however, is why our culture is unique. *It is not property or product—it is our life*. You are not only abusing our means of communication, but you are trivializing our spirituality. Why not make a Lego Jesus? *We* are the authors and keepers of our culture and determine what is good for us, not outsiders using our cultural and intellectual property for their entertainment [BZ Power Forum, Kataraina, 12/09/2001].

There are many noteworthy aspects to this exchange. It is remarkable how quickly commentary on the propriety of corporate behavior became expressed and construed as an attempt to curtail the creative activities of fans which itself builds corporate goodwill. It is also telling that Kataraina is compelled, ultimately, to express Maori claims in the language of property immediately after disavowing that Maori hold a proprietary relation to their language and expressing the relation as one of safekeeping. It is, perhaps, the failure of the dominant models of world wide web governance to accommodate any rights of collectivities, public goods, relations of trust, obligations to others, or respect for any integrities save for those of corporate personalities or individual creators that accounts for this. Our means for negotiating proprieties in cyberspace remain tied to notions of property and freedom more appropriate to a libertarian than a culturally pluralist public sphere in the digital environment.

Competing Ecumemes for Governance of the Web

Intellectual property law territorializes cultural practices in the form of a proprietary ecumene. The word and concept of the ecumene is an old one. In Classical Greece, it referred to geographical space that was inhabited and civilized (which, for the Greeks, only meant the Hellenic peninsula itself—everyone else being a barbarian). In early Christianity and then under Catholicism it gradually came to refer to the universal Kingdom of God that was coterminous with members of the faith, wherever they might reside. In both senses, ecumene referred to a particular place of morally legitimate habitation, a Heideggerian *ethos* with distinct boundaries. Those who lived within its boundaries, whether juridico-political or theological, had meaning, purpose, and moral value; those outside were marginal and abject. In classical and contemporary geography, the concept of the ecumene is more descriptive: it simply means land that is inhabited for a particular purpose. Within anthropology, Ulf Hannerz has deployed the concept of the "global ecumene" in order to evoke the complex processes of the hybridization and transnationalization of "local" cultures in the context of globalization (Hannerz 1992, 1996).

We have found it useful to coin a neologism, combining meme with ecumene to produce *ecumeme*. An ecumeme is a rhetorically constituted "habitat of meaning" (Hannerz 1996), a moral space to use Charles Taylor's (1989) term, the territory and boundaries of which are mapped and marked by particular notions of property and propriety. Two imaginary persons are the principal inhabitants of the dominant ecumeme of informational capitalism (or "the new economy")—the sovereign corporation and the sovereign consumer. Other possible inhabitants such as citizens, workers, and cultural communities are increasingly pushed to the margins and rendered invisible or irrelevant. This ecumeme is a veritable [Adam] Smithian world characterized by individuals whose primary social interaction and relations are constituted by the practice of market exchange. The ecumeme, in other words, is the global market place of exchange where corporations (legally constituted as individual persons) and persons constituted as individuated consumers, give full reign to the primordial Smithian desire to buy and sell. Intellectual property law provides the principal rhetorical means by which this territory is invoked.

The juridical expansion of this ecumeme over the past decade, especially into digital contexts such as the World Wide Web, has been dramatic and disturbing. In the United States, a series of laws have been enacted such as the Digital Millennium Copyright Act, the Anti-Cybersquatting Act, and the Sonny Bono Copyright Extension Act as well as interpretations of federal trademark

and patent laws that preserve and expand the entitlement of corporations as the proper owners of intellectual property. With the increasing transnationalization of a neoliberal regime of intellectual property law through the WTO administered Trade-Related Aspects of Intellectual Property Rights Agreement (the TRIPS Agreement), numerous bilateral trade agreements between the United States and countries hoping to access its significant consumer markets, and the patent harmonization treaties propounded by World Intellectual Property Organization, one can well imagine a time when this ecumeme will become truly catholic in the original Greek sense of being boundless and universal. This, in any case, is the fear expressed by those who would prefer to see the world of cultural production in cyberspace constituted differently.

The alternative ecumeme proposed by critical legal scholars in the U.S, such as Lawrence Lessig in his influential books *Code* (1999) and *The Future of Ideas* (2001) and deployed by digital intellectual property activist organizations such as the Electronic Frontier Foundation and the proponents of the Creative Commons invokes a rhetorical binary between two essentialist tropes: the "enclosure" on the one hand and the "commons" on the other. This binary is not a new one. As Karl Polanyi argues in his classic work of historical sociology, *The Great Transformation* (2001), the enclosure movement of early modern Britain—through which common lands were increasingly fenced off from public use and privatized—was one of the foundations for the emergence of modern capitalism. Those associated with the so-called "Copy Left" and the Centre for the Public Domain such as James Boyle argue that we are witnessing a "second enclosure movement" (2003). Today, capital seeks to fence off not the material landscape as private property, but rather the symbolic landscape of ideas and cultural creativity. The enclosure is thus the space territorialized by corporate capital where all cultural products and processes are transformed into fungible properties—commodities to be bought and sold in the marketplace—whose circulation is governed by the propriety of the proprietary.

In opposition to the second coming of the enclosure, these activists (they have been known to refer to themselves as a priesthood) promote a "commons of the mind" or an "informational commons" (Boyle 2003:41,42) inhabited by cultural creators whose ownership of what they create is strictly bounded, whose social relationships are characterized by collective sharing, and whose principal objective is to protect the individual's freedom of creative appropriation. The ethos of the informational commons is characterized by the creative collective effervescence of the sharing of ideas ruled by the

logic of the non-proprietary—the empirical exemplar here being the free or open source software (FOSS) movement.

Although the ecumeme of the commons has considerable political and emotional appeal, we have reservations about a few of its assumptions. Our primary critique of this particular articulation of property and propriety is that it assumes the identity of the ecumeme's inhabitants and its mode of governmentality. At one level, it certainly seems like a viable alternative to the dominant ecumeme: it encourages us to understand the Web as a space where cultural creators, rather than corporations and consumers, are the principal actors in a virtuous cycle of exchange that produces an excess of value that will return to everyone—a vision exemplified in the FOSS movement. It is important to recall, however, that historically the enclosure movement did not merely cut people off from livelihood resources; it also prohibited, disabled, and denied significant cultural practices that embodied and performed other forms of communication and sociality.

In many ways this digital counterculture is very much like the Romantic movement (Streeter 2003a, 2003b) that emerged in reaction to capitalist modernity. They share many significant features—a privileging of the expressive activities of autonomous creators and a quixotic romance of the medieval, the primitive, and the "indian" as generalized figures of alterity. Take the potlatch, often invoked in progressive techno-culture discourse as the Ur-text of the Internet "gift economy" (Barbrook 1998, Werschler-Henry 2001). Through symbolic exchange, the potlatch created relationships of respect and reciprocity that constituted enduring social ties and affective community. The ritual also served to establish and maintain social hierarchies of prestige and power. These social aspects of gift economies are conveniently ignored when these rituals are so casually evoked.

Indeed, the ecumeme of the creative commons appears to have more in common with the deterritorializing practices of global neo-liberal capital than it does with any of the primitive and aboriginal social rituals it claims as models. It celebrates informational environments precisely because they generalize the distinctive disembedding mechanisms of modernity (Giddens 1990). This enables them to negate the substantive qualities of texts and, as the Maori example suggested, their place in an ethos lived in practices of community.

The rhetoric of the digital commons also privileges a particular positionality with respect to cultural artifacts. Within this ecumeme we are, first and foremost, always individuals—independent authors and cultural creators projected (but never acknowledged) as privileged Americans with indisputable

First Amendment freedoms (Coombe 2003b). This unfettered individual appears to adopt the same limited liability, responsibility, and accountability that his corporate nemesis traditionally assumed. Although these critical partisans have created another ecumeme, they are not in fact "ecumemical." Alternative forms of personhood cannot be performed, and substantive communities characterized by social obligation rather than individual freedoms cannot be countenanced. As the comments by BZ Power fans suggest, because the individual's rights of expression by definition trump all others in this ecumeme, interlocutors who come with other values to engage in dialogue are pushed into positions that are likened to corporate censorship. This belief in the creative individual's own decontextualized disembeddedness is characteristic of an implicit cosmology found in the same fundamentalist faith in the metaphysics of globalizing flows (Perry 2003:331) held by proponents of neoliberal globalization.

Ethos and Ecumemes for Digital Futures

The Maori activist/Bionicle fan dialogue suggests that there are different responses to the corporate territorialization of the Web which entail different embodiments and performances of property and propriety in digital contexts. Rather than simply dividing the world of culture into the ecumemes of the enclosure and a global cultural commons, we want to suggest that there is much to be learned—and much to be hopeful about—in the liminal shadow lands in-between them, a place that is more ecumemical. The point of the Maori intervention in the symbolic economy of corporate goodwill was not necessarily to destroy the consuming pleasure of the Bionicle fans, but to recontextualize the semiotic meaning of the toy-object, reterritorialize the desire of the consumer, and redirect the memetic practice of the act of consumption. In other words, it sought to conjure a rather different ecumeme for the performance of cultural ownership and appropriation.

One of the more intriguing features of this dialogue is the manner in which it embodied a digital performance of what Mary Louise Pratt (1992) has famously termed the "contact zone" between cultural worlds of meaning brought together by the flows and mobilities of globalization. In Pratt's classic formulation of the concept, contact zones are "social spaces where disparate cultures meet, clash, and grapple with each other, often in highly asymmetrical relations of domination and subordination—like colonialism, slavery, or their aftermaths as they are lived out across the globe today"

(1992:4). Not only are social relations between cultural frames of reference previously separated by spatial distance asymmetrical, Pratt notes, they are also interactive and improvisational. In other words, the contact zone is a performative space for the negotiation of emergent identities.

In the case of this particular contact zone, the negotiability of identity revolves around the intertwined dynamics of the property and propriety, authorship and ownership, embedded in language as a source of collective self-understanding. The figure of the author performed in both the ecumemes of the enclosure and the commons is the romantic, autonomous individual who is the creator of culture and the consumer of its artifacts. One of the principal features of the contact zone between the Maori cyber-activists and the BZ Power virtual community of Bionicle fans was the rhetorical stratagems through which this romantic notion of authorship was provoked, invoked, and challenged.

For Maori activists, there was a profoundly positive moral valence given to the relationship between authorship and the propriety of ownership. However, the power of ownership is vested in the Maori community—"the literally thousands who will challenge" the improper use of their language—not in individual authors. Those who are not Maori cannot properly claim rights to the unbridled use of the Maori language; it is the Maori who have created the language, and it is the Maori who bear responsibility for its use. To the Maori, the Te Reo language is the very medium of their epistemology and ontology, their way of knowing and their way of being, which are inextricably linked. They bear a moral responsibility to future generations to preserve the indexicality of their language as a matter of cultural survival.

Kataraina's intervention also sought to disclose the collective social conventions by which the BZ Power virtual community (a "mini-culture" in her words) established rules of communication and interaction that governed their speech. Ownership of property and the sharing of culture is not only socially produced and recognized, it is also contingent upon the specific rules of sociality, reciprocity, and respect that are characteristic of a particular culture's social space or, to use Kataraina's term, the norms and values that are embedded in a particular community's "turf" upon which visitors are greeted and embraced. These cannot be established solely by corporate authors, consumers, or individual creators but will require new forms of collectivity and the negotiation of new forms of digital sociality.

Maori activists ultimately encouraged the users of BZ Power to consider their Lego toys not simply as things to be manipulated, commodities to be

consumed, and fantasy objects around which to build imaginary worlds, but as a portal to learning about Maori and other Polynesian cultures, the real faces behind the mask of the commodity fetish Lego had provided them. They linked BZ Power to a number of sites devoted to the preservation and celebration of Maori spirituality. The real point of the dialogue was to introduce an ethics of contingency (Coombe 1998) into cultural circulation. From the Maori point of view, non-Native peoples should recognize the contingency and peculiarity of their own concepts of property and propriety.

The abstraction, commodification, and separation of language and culture from peoples' social lives and from the active performances through which we express meaning and value in human communities represents only a partial, limited, and peculiar way of mapping and inhabiting the world of digital communications. Partial also are fictions of markets populated only by corporate authors and consumer citizens, or creative commons populated only by corporate censors and individual creators. More imaginative ecumemes with richer visions of sociality and more convivial relations between them must be envisioned and inhabited as we move forward into new phases of digital cultural practice.

REFERENCES

Balkin, Jack. 1998. *Cultural Software: A Theory of Ideology*. New Haven: Yale University Press.

Barbrook, Richard. 1998. "The High Tech Gift Economy." Electronic document http://www.firstmonday.dk/issues/issue3_12/barbrook/ accessed June 6, 2004.

Biesecker, Barbara. 1997. *Addressing Postmodernity: Kenneth Burke, Rhetoric, and a Theory of Social Change*. Tuscaloosa, AL: University of Alabama Press.

Boyle, James. 2003. "The Second Enclosure Movement and the Construction of the Public Domain." *Law and Contemporary Social Problems* 66:33-74

Comaroff, Jean and John L. Comaroff, eds. 2001. *Millennial Capitalism and the Culture of Neoliberalism*. Durham, NC: Duke University Press.

Coombe, Rosemary J. 1998. *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law*. Durham, NC: Duke University Press.

_____. 2003a. "Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property." *De Paul Law Review* 52:1171-1191.

_____. 2003b. "Works in Progress: Indigenous Knowledge, Biological Diversity and Intellectual Property in a Neoliberal Era." In *Globalization Under Construction: Governmentality, Law and Identity*, R.W. Perry and B. Maurer (eds.), 273-314. Minneapolis: University of Minnesota Press.

_____. 2004. "Commodity Culture, Private Censorship, Branded Environments and Global Trade Politics: Intellectual Property as a Topic of Law and Society Research." In

Companion Guide to Law and Society. Austin Sarat (ed.), 369-391. Malden, MA: Basil Blackwell.

Coombe, Rosemary J. and Andrew Herman. 2000. "Trademarks, Property, and Propriety: The Moral Economy of Consumer Politics and Corporate Accountability on the World Wide Web." *De Paul Law Review* 50:597-632

_____. 2001. "Culture Wars on the Net: Trademarks, Consumer Politics and Corporate Accountability on the World Wide Web." *South Atlantic Quarterly* 100:919-947.

Hannerz, Ulf. 1992. *Cultural Complexity*. New York: Columbia University Press.

_____. 1996. *Transnational Connections: Culture, People, Places*. New York: Routledge.

Henwood, Doug. 2003. *After the New Economy*. New York: New Press.

Herman, Andrew. 1999. *The "Better Angels" of Capitalism: Rhetoric, Narrative and Moral Identity Among Men of the American Upper Class*. Boulder, CO: Westview

Holloway, Grant. 2001. "Maori Challenge Lego Over Use of Culture." Electronic document http://www.cnn.com/2001/WORLD/asiapcf/auspac/06/01/newzealand.maori/index.html.

Jones, Steve. 1992. *Rock Formation: Music, Technology and Mass Communication*. Newbury Park, CA: Sage.

LaFeber, Walter. 2002. *Michael Jordan and the New Global Capitalism, New and Expanded Edition*. New York: Norton.

Lessig, Lawrence. 1999. *Code and Other Laws of Cyberspace*. New York: Basic.

_____. 2001. *The Future of Ideas: The Fate of the Commons in a Connected World*. New York: Random House.

Marx, Karl. 1976 [1867]. *Capital (Volume I)*. New York: Vintage.

Perry, Richard W. 2003. "Rebooting the World Picture: Flying Windows of Globalization in the End Times." In *Globalization Under Construction: Governmentality, Law, and Identity*, Richard Warren Perry and Bill Maurer (eds.), 315-355. Minneapolis: University of Minnesota.

Polanyi, Karl. 2001. *The Great Transformation; The Political and Economic Origins of Our Times*. Boston: Beacon.

Pratt, Mary Louise. 1992. *Imperial Eyes: Travel Writing and Transculturation*. New York: Routledge

Rifkin, Jeremy. 2001. *The Age of Access: The New Culture of Hypercapitalism, Where all of Life is a Paid-For Experience*. New York: J.P. Tarcher

Streeter, Thomas. 2003a. "The Deep Romantic Chasm: Libertarianism, Neoliberalism, and the Computer Culture." In *Critical Cultural Policy Studies: A Reader*. Justin Lewis and Toby Miller (eds.), 161-171. Malden: Basil Blackwell.

2003b. "The Romantic Self and the Politics of Internet Commercialization." *Cultural Studies* 17:648-668.

Taylor, Charles. 1989. *Sources of the Self: The Making of the Modern Identity*. Cambridge, MA: Harvard University Press.

Werschler-Henry, Darren. 2002. *Free as in Speech and Beer*. Toronto: Financial Times/Prentice Hall.

Whitson, Steve and John Poulakos, 1993. "Nietzsche and the Aesthetics of Rhetoric." *Quarterly Journal of Speech* 70:131-145.

ENDNOTES

[1]This comment is drawn from a larger work provisionally titled *Dancing Masks and Toy Wars on the Web of Virtual Capital: Intellectual Property and Digital Governmentalities*.

[2]There is a case to be made for using the concept of performativity in this context but the elaboration of the theoretical scaffolding necessary to make it adequate for our purposes is too extensive for the space allocated here.

[3]Relations between the cultural industries and the fans of their products are complex and ambivalent as owners of intellectual property try (not always successfully) to maintain control over cultural texts of value while diverting the excess symbolic value.

CULTURE'S OPEN SOURCES

Commentary

Glenn Otis Brown
Creative Commons

Copyright—the law, but also the very word—has an identity problem. To judge from most mainstream media coverage of intellectual property disputes, and the big-media talking points that tend to frame that coverage, copyright is binary, a single switch: when turned off, the result is *piracy*; in the on position, we have *property.* (It is not clear how or when these became perfect antonyms, but George Orwell might have a theory). A person or organization is either pro- or anti-copyright. New technologies are either good for copyright, or bad for copyright. One either *believes* or *does not believe* in file-sharing networks. There is no place for the agnostic.

Nor even the protestant: those who *believe* in this thing called "copyright" as a general matter—but who may differ over its particulars, who propose that the concept has many possible meanings, who dare to ask what the purpose of copyright should be—are cast as heretics. A generalization, of course, but nonetheless an accurate description of the conventional wisdom on copyright today.

If, though, you press an actual author—a writer, a musician, a coder, a teacher—on his or her religion, you're likely to get a more nuanced answer. I don't mean this as a hypothetical exercise; I do this daily as part of my job

managing the nonprofit organization Creative Commons. I push authors to describe precisely what they want other people to do or not do with their creations and, once we get past the knee-jerk Manichean response, a number of different values begin to emerge, values much more meaningful and precise than simply copyright, piracy, or property. Here are paraphrases of the kinds of things I hear regularly:

- I don't care if people trade my band's recordings online, but I don't want one of them to wind up in a political advertisement or something like that.
- I would like other people to build upon my software, but they should share the software that results from that work on the same generous terms I've offered.
- I would be happy for teachers to use my nanotechnology article in their classes or syllabi, but I wouldn't want some company using it to train their employees without telling or paying me.
- I love the Net because it makes it easy to get my poems out there, even to total strangers all the way across the globe. But I do worry about someone passing off my stuff as their own.
- I really like some of the remixes fans have made from my songs, but others are just awful.
- I have a low-resolution gallery of my photographs up on my website to attract interest and get more exposure. If people want the high-quality stuff, or prints, I charge them.
- I put the promotional trailer of my film onto a file-sharing network myself, without telling my distributor. But I would panic if I saw my whole movie online somewhere.

Context, reputation, exposure, commercial value, aesthetics, credit, presentation, formatting, partial use—these are a few of the many connotations that copyright conjures up for authors, the values and combinations of values that the single word represents to different people.

Do the same Rorschach exercise with a lawyer and you'll also get a multipart response—but a slightly different and more definite one. In law, copyright describes a group of many different rights; it is like a surname, or a genus. Copyright is a *series* of switches, or better still, dials. In the default setting, all the dials are set to the maximum. A copyright lawyer (like me) might explain it like this:

A copyright holder enjoys a set of rights in a bit of expression that is fixed in some tangible medium (a "work"). These separate rights include the exclusive rights:

- to copy the work
- to distribute copies of the work
- to exploit the copies commercially
- to make derivative works based upon the work, including but not limited to abridgments, arrangements, dramatizations, motion picture versions, or sound recordings
- to perform the work (in cases of dramatic or musical works) and others.

These exclusive rights can be configured in any number of combinations, at least by those who can afford to pay lawyers to custom-calibrate them. They are limited by a small set of countervailing legal doctrines—fair use and first-sale among them. But practically speaking, these limitations (1) offer little guidance to users of copyrighted material, (2) are very difficult to explain to most authors, and (3) can be very expensive to argue successfully in a court of law.

All this is meant to emphasize two points. First, copyright, despite its monochromatic reputation, is in both everyday practice and theory better described as a spectrum. Second, this spectrum looks different viewed through a legal lens on the one hand and a cultural one on the other. Indeed, in some respects, a massive gap separates copyright's social and legal meanings, the motley bundle of authorial values described above and the linear set of property rights set out by copyright act. This is particularly true the farther one moves from the corporate cultural centers of Hollywood and Madison Avenue and into the *real* source of most of the copyrighted material produced today: the legions of amateurs, in the purest sense of the word, building a massive body of culture online (and offline as well— though the gap between creative culture and the law that governs has expanded as a function of ever cheaper and faster distribution and editing technologies and the legal backlash against them.).

Copyright's forked spectrum *does* overlap in some important respects: authors' concerns about commercialization, the partial use of their works, and the circumstances under which they may be transformed map well onto the enumerated rights of copyright. But in many areas, the differential in values is striking: copyright law says nothing about reputational concerns (this is

trademark's domain), is deliberately silent about aesthetics, and offers little guidance on formatting or quality-of-media issues. Most important (by far), the full-bore protection of default copyright rules often directly clashes with authors' wishes to have their works re-distributed or shared—and by the same token clashes with readers' (and potential authors') expectations about what is proper or improper to do with those works.

The free and open source Software movements deserve the credit for pioneering an ingenious way to bridge this divide: not through litigation or direct policy advocacy—which is expensive and, in today's Hollywood-lobbied Congress, often fruitless—but rather through retrofitting copyright with voluntary licensing and contractual tools. Specifically, and most notable among the movement, Richard Stallman's GNU General Public License used private law tools to build into copyright law one of the bedrock principles of the coder culture: that, regardless of what else one might do with it, code must always remain accessible, free to build upon, and free to re-distribute. The GNU GPL, like all F/OSS licenses, crystallizes a norm the law has yet to acknowledge.

Creative Commons uses the same sort of legal hack to formalize norms in the world of non-software copyrights. Our tagline, "some rights reserved," not only invites people to recognize copyright for the multi-part spectrum that it is, it also reflects the preferences of most everyday authors on the Net (or so went our hunch, which is increasingly proving correct). We offer users who want to free up distribution of their work a set of conditions they may require in exchange: require attribution, prohibit commercialization, prohibit derivative works, require that derivatives be shared on the same terms as their source material. Each option is represented by an icon intentionally designed to echo the ubiquitous, and thus increasingly meaningless, copyright © (we like hacking cultural symbols as well as the laws they represent.). These options—norms made law via private ordering—grew out of informal surveys of and conversations with different kinds of authors.

So here's where anthropology comes in, and why its contribution to the copyright debate is crucial—indeed could very well form what values the next generation's copyright will reflect.

Lawyers are not very good at spotting normative trends. We're not trained for it. In fact we're trained against it: a good judge or lawyer, we learn, recognizes when she's strayed too far into the topsy-turvy world of culture, politics, or art. This is particularly true where norms involve questions of aesthetics: you don't want lawyers spotting beauty, and we're too scared to even try. As Oliver Wendell Holmes put it, in the seminal copyright decision *Bleistein v.*

Mazer: "The taste of any public is not to be treated with contempt." In deciding that even a simple promotional poster for a circus was copyrightable, Holmes articulated a broader principle about the institutional competence of judges: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."

This sounds wise, but here is the catch: copyright is about nothing *but* the regulation of aesthetic expression. On the one hand, Holmes says don't play art critic, but on the other, all copyright disputes come down to questions like, "What is the difference between parody and satire?," "What is originality?," "Are these works substantially similar?," "Is this alteration transformative?," "Is this work closer to a Platonic ideal, or more like a specific incarnation of that ideal?" What is a judge or policymaker to do?

They should punt to culture, to use Kelty's phrase (as appropriated from me, I should note—ego is another value embedded in the culture of copyright). The arbiters of copyright must defer to a consensus among those who *must* play art and cultural critic, a consensus identified through the adverse testimony of battling expert witness-artists, or through the development of a norm so deep and broad-based that legislators take it for granted as correct and true.

More often than not, however, copyright policymakers do not recognize the limits of their institutional competence. They declare recombinant forms of art artless, or simply piratical, without a hint of self-awareness that an aesthetic or cultural judgment is being made, that certain emergent tastes are indeed being held, if not in outright contempt, then to a higher standard than established forms of art. In the mouths of judges and politicians, copyright hysteria can sound uncannily like the rhetoric of obscenity wars of past generations (information itself is said to be "promiscuous," and indeed the Recording Industry Association of American argues, pretextually, that it wants to stop file-sharing because it wants to stop porn.) Like Justice Stewart Potter trying to define obscenity decades ago, many policymakers today operate on a hunch when trying to distinguish a clear-cut legal violation from a subtle bit of artistic innovation. It is hard to imagine anything further from aesthetic neutrality or transcendent principles than the jurisprudence of "I know it when I see it." And yet that's how it tends to work.

All of this is bad news for traditional legal activism in the copyright field—for progressive litigators and lobbyists—as I've mentioned before. But it also means that the battle over copyright has become a battle of attitudes, thus opening up new opportunities for the new brand of copyright policymakers, the

norm entrepreneurs: the legal hacker, the policy-savvy artist, the copyright-cult anthropologist. These opportunities take roughly two forms: first, if it is the case that judges' and policymakers' notions of creativity and regulation stem from unconsciously held background beliefs, it is the copyright entrepreneur's job to expose those taken-for-granted attitudes and begin to sow doubt among practicing authors and readers—to use the tools of analysis and critique to break up monolithic attitudes about copyright and spark real debate.

The second opportunity is more interesting, more promising, and insidiously more activist. I like to call this approach to copyright reform "creative civil obedience." The idea is to build a parallel system of copyright within the current system, to use contract and copyright law and technology to build a shadow copyright system, a more balanced system that better reflects the preferences of the emerging creative culture. This world of alternative copyright can act as a haven for copyright progressives, but its significance is larger: it also serves as a draft for copyright's future, a model for what copyright could or should look like. There has been little formal cooperation between lawyers and anthropologists in this area until now, but the more that the lawyers come to realize that the real action in the copyright debate takes place far from the courtroom, in the wilds of culture, the more they should turn to the natives of norms—anthropologist and artists—to lay plans for this new system.