

# A GUIDE TO BOOTLEGGING (MORALLY & ETHICALLY?) (F\*CK YOU CORPORATE MONOPOLIES)

What is bootlegging? A vague history of bootlegging. Same content/  
different form - publishing vs. pirating, why and how to bootleg.

Colophon

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This publication is a compilation of media in relation to the practice of bootlegging. In of itself, it is a demonstration of bootlegging.

If you go to the website, you can find all of the original source material the publication has been made of, along with the tools needed to print the publication yourself. And remember - steal, don't buy, from capitalism!

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A Note: As these resources are displaced from their original format, the citations are also out of context, and do not appear in this edit. However, the superscripts have been left in to indicate that the original author had drawn from a source.

# TABLE OF CONTENTS

01. Unlicensed: Bootlegging as Creative Practice  
Ben Schwartz
02. Digging in the Epistemic Commons  
Stephen Wright
03. Incidental Graphics: To Design in and Through Documents  
Tucker McLachlan
04. Liability vs. Leverage  
Cory Doctorow
05. Inherent Vice: Bootleg Histories of Videotape and Copyright  
Lucas Hilderbrand
06. Vanishing Culture: A Report on Our Fragile Cultural Record  
Luca Messarria
07. Caps Lock: How Capitalism Took Hold of Graphic Design, and How to Escape from It  
Ruben Pater
08. In Defense of the Poor Image  
Hito Steyerl
09. Bootlegging in the Music Industry: A Note  
Alireza Jay Naghavi & Günther G. Schulze
10. Copy This Book  
Eric Schrijver



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# UNLICENSED: BOOTLEGGING AS CREATIVE PRACTICE

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by Ben Schwartz



**UNLICENSED: Bootlegging as Creative Practice**



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This might all be futile. By its very nature, a bootleg defies definition. It travels in black markets and hides in unmarked record sleeves; it communicates in the errors of cheap production and escapes into the loopholes of property law. It cares little for the stability a definition might offer. To define a bootleg would be to contain it. It creates order where mess is much more welcome. Definitions, language, and names clarify, but they also tend to pin things down. A bootleg's survival is dependent on its ambiguity. Maybe we can talk about a bootleg while resisting the urge to define it. Maybe we can open it up, explore its edges, extend them outward, or destroy them altogether.

I began my bootleg research at the Walker Art Center in 2018, at a moment when the act seemed precariously balanced on a brink of either evolution or implosion. (As an aside I've come to appreciate the term "bootleg research," as not only a description of what I was studying, but also how: in the time and space outside of "legitimate" work, embracing an element of non-professionalism, and finding pleasure in the scrappy nature of my efforts.) My interest in the subject began with my background in music and grew further with a collision of creative observations. On one end, I became aware of a particular visual trend in graphic design, and on the other, I was witnessing an increasing number of unexpected fashion collaborations: Vetements/DHL, Telfar/White Castle, Balenciaga/Bernie Sanders. Where they overlapped was an awkward juxtaposition of high and low culture, corporate branding and lo-fi aesthetics, critical irony and authentic fandom. There were moments when I felt genuinely excited to see bootlegging embraced on such a public scale. Like how conversations around homage, appropriation, and theft—which feel

normal in the world of contemporary art—were now being reimagined in the spaces of popular culture, social media, and the creative industry as a whole. At other times I felt the gesture growing stale and superficial, reduced to a set of Photoshop effects implemented to tap into a viral cultural zeitgeist.

I began an interview series published by The Gradient<sup>1</sup> called Unlicensed in an attempt to learn from artists and designers who seemed to deploy bootlegging in unexpected or abstract ways. I questioned what the act meant at a time when copying is embedded in nearly every aspect of our culture. Could the gesture remain potent, liberating, subversive, transgressive? Could bootlegging transcend objects? Is it possible to bootleg yourself? And how might the act become a tool of resistance? In China, for example, where strict censorship policies prevent the dissemination of globalized media, bootlegging is an essential tool for freedom of expression and dissent. And while my research focuses on bootlegging as an artistic gesture, it's important to acknowledge that the act outside of this context is often one of economic or political necessity. Hopefully, these conversations will bring further awareness to the communities who depend on its effects in their day to day lives.

What follows is an attempt to begin to unpack the possibilities of bootlegging today... ways that the bootleg itself might be bootlegged, smuggled from its place in tradition and history into new contexts, concepts, and ideas.

### I. Cover Version

For one day in 2016, the art practice OOIEE draped the works on display at the Aspen Art Museum with

a textile printed with an image of the sky. Wrapped in pieces of the sky, works by Ryan Gander, Anna Sew Hoy, and Diana Thater became air... but they also became covers, like a punk version of a Robert Breer. In the act of covering the pieces, OOIEE also managed to *cover* the pieces. You know what I mean? A cover can envelop the work but it can also open it up. The best covers tend to create space; between the original and the reproduction, between "the artist" and OOIEE, between the thing and well... everything else, even the sky? A cover asks what is possible within what is given. These artworks, these amorphous sheets of blue, demonstrate what a cover is capable of when put to task... which is really a lot more than we've come to expect. Like on Cat Power's *The Covers Record* where she performs *Satisfaction* without even singing the chorus. Is it even the same song? Maybe we're asking the wrong questions.

Lately I've been thinking of a cover as a type of translation. A good translation is more than just semantic. A translator must find what is "unfathomable, mysterious, and poetic"<sup>2</sup> in the original and interpret this essence in a new language. Translation becomes "a form of displacement, a way to enrich life."<sup>3</sup> Coleman Barks, a renowned Rumi translator, describes his process as a trance. His translations prioritize feeling over fidelity. "It feels like a different kind of something outside the mind. I call it the heart of the soul, but it's somewhere different than my ordinary mentality."<sup>4</sup> A translation doesn't come *from*, it moves *through*. Like a translation or a cover, a bootleg might aspire to something greater than a reproduction. It should open up space for the possibility to transform and, when pushed, maybe even transcend. But of course not all covers are created with such grand aspirations. Let's

look at a cover in its simplest form, one that measures its success through the fidelity of its reproduction. Let's call it a mimetic cover.

In the global subculture of Elvis impersonation (which includes an intense competitive circuit), greatness is defined by how closely one can get to becoming the King. There is no intent to adjust or update, rather the self disappears and in its place is a white leather jumpsuit, thick sideburns, and gold rimmed glasses. But an Elvis impersonator must do more than look the part... it involves research, practice, and nuance. "My respect for Elvis should shine through. I know I'm not Elvis, but I hope that when I perform, people might forget that for a moment."<sup>5</sup> Elvis impersonators perform mimetic covers, an act perhaps closest to our traditional understanding of a bootleg. A counterfeit Louis Vuitton bag is successful only when it performs as the real thing. At the core of a mimetic cover is homage. But a cover's ability to celebrate its source can go further, and in doing so can become something else. Let's call this an interpretive cover.

Anthony Huberman describes homage as falling somewhere between admiration and research. "A tribute is neither an analysis nor just a party. Giving a toast is about making people care, not about making them understand." A cover, then, opens up the possibility to express admiration in a way that emphasizes *affect* over *effect*, "I love it" over "I get it."<sup>6</sup> Let me give you an example... The song *All Along the Watchtower* was written and recorded by Bob Dylan in 1967 and appeared on the album *John Wesley Harding*. The sparse and wandering track sparked curiosity for its enchanting lyrical mysticism. One year later, Jimi Hendrix, after hearing an early tape of the track, recorded a cover. Using the same foun-

dational elements as Dylan's original, Hendrix transformed the folk saga into a psychedelic anthem. "It overwhelmed me, really" said Dylan, "He found things that other people wouldn't think of finding in there. I took license with the song from *his* version, actually, and continue to do it to this day." Hendrix's cover is an interpretive one, an evolution through the stylistic sensibilities of a new performer. An interpretive cover begins to demonstrate how something new might come from within the constraints of the original. It's a powerful gesture of transformation, but still, maybe a cover can do more...

The song *Respect* was first recorded by Otis Redding and was released on the 1965 album *Otis Blue*. On top of the track's soulful groove, Redding chauvinistically demands respect from "his woman" after a long day at work. But the *Respect* most of us are familiar with isn't Redding's. Two years after the original, Aretha Franklin recorded her own rendition of the song. The track surpasses a stylistic interpretation with added lyrics that have become its signatures: the R-E-S-P-E-C-T breakdown and the repetition of "Sock it to me." The most powerful change, however, is the context of "respect" considering the realities of Franklin as a Black woman in the late 1960s, early 1970s. The song was able to tap into a much broader social consciousness. It aligned with the civil rights and women's rights movements, and propelled the track from a misogynist jingle into an anthem of liberation. "The song was a demand for something that could no longer be denied. She had taken a man's call for respect from a woman... and flipped it. The country had never heard anything like it."<sup>7</sup>

The track demonstrates that even in repetition there is always a "quality of difference"—a cover is

never *just* “the same thing but rather a progression or regression” providing “philosophical insight about the shape of time and history.”<sup>8</sup> “Respect” is a transcendent cover. If a mimetic cover repeats and a transformational cover shifts, then a transcendent cover “stutters.”

Just as Gilles Deleuze used the idea of making language stutter through exposing and subverting its constraints, so too can a cover infiltrate an original and reveal its borders. And despite this necessity of a cover to work within the limitations of its original, there remains a possibility (as demonstrated by Franklin) for these structures to be manipulated. Constraints can become expansive when turned against themselves. To consider a bootleg as a cover allows the gesture to unfold beyond celebration and homage. As we cover or bootleg we also update, evolve, shift, deconstruct; at times we even destroy.

## II. Anti-Illusion

In physics the term “dark matter” is used to describe that which makes up as much as 83% of the universe, yet is virtually undetectable. Dark matter can only be perceived by its effects on other things. “Dark matter neither emits nor scatters light. It is believed to be fundamentally important in the cosmos and yet there is essentially no direct evidence of its existence and little understanding of its nature.”<sup>9</sup> Taken outside of the realm of science, we can think of dark matter as a form of invisible social scaffolding... organizations, structures, attitudes, and ideals that are vague and indefinite yet produce very real effects. Take, for example, a pair of Nikes. These shoes are the result of the company’s corporate pol-

icies and culture, the legal frameworks it works within, wider societal fashions, creative trend forecasting, and various economic and environmental considerations... all of this is the dark matter.

Our current form of globalized capitalism is another form of dark matter. It is a considerable force in nearly every decision we make, yet manages to remain almost entirely undetectable. The products of such a society are complicit in keeping this dark matter (the violence and inequality upon which the system relies) dark. Its effects only become tangible in the detritus that falls outside of its oversight. A bootleg is an example of this debris. It's an anachronism, an inconsistency, a glitch in the capitalist matrix. A bootleg stares into the audience from its place on stage and breaks the fourth wall. It becomes a disruption to a much greater collective illusion... we might even call it an anti-illusion.<sup>10</sup>

Anti-illusionist theatre was developed by the playwright Bertolt Brecht, who considered traditional theater a "branch of the narcotics business." He believed that at any given performance the audience would "hang up their brains with their hats in the cloakroom."<sup>11</sup> Brecht had witnessed the power of political propaganda during both World Wars and understood how entertainment can easily distract from more pressing political and social issues. To break this spell, he devised the concept of "epic theater," a set of techniques to transform the grandiose into the grotesque. "Anti-illusions" (also translated as "alienation effects") were an essential element to this newly conceived theory. Brecht began formulating alienation effects following a performance by Mei Lanfang's theater company in Moscow. Throughout the play he was struck by the actors' expressed awareness of being

watched. "Their purpose, it seemed, was to appear strange and even surprising to the audience."<sup>12</sup> Brecht was interested in the way this level of absurdity created distance between the drama and the audience. The spectator becomes more inclined to engage with the play on a cerebral (rather than emotional) level and is less likely to be consumed by the illusion. Let me give you some examples...

**Narration:** A reminder that the play is a presentation of a story. This might involve revealing events before they happen so as to prevent the audience from getting invested in the storyline.

**Breaking the scene:** The character removes themselves from the current situation so as to comment, as the actor, on how that character might be feeling.

**Performing the mechanics:** The actor calls out stage directions such as "cue the violins" to bring attention to the methods that influence emotion.

Brecht saw these devices not just as creative techniques, but as social strategies of resistance. From the absurdity, we are brought back to reality. The bootleg works in a similar way. In its often absurd use of language, materials, and graphics, it becomes an anti-illusion calling attention to the oppressive and inequitable systems from which it was created. As it travels, it causes ripples and holes in the "grey curtain of capitalism."<sup>13</sup> The bootleg, even in the innocuous form of a T-shirt or mobile phone, yields power.

The GooApple is a bootleg smartphone from China that looks identical to the iPhone but uses an Android operating system that's customized to resemble Apple's iOS.<sup>14</sup> It's an example of shanzhai, a term used to describe a fake, copy, or counterfeit in Chinese culture. The neologism gained popularity around 2008 in the field of consumer electronics and has since evolved to encompass read/write culture, copy/paste creativity, and anti-authoritarian grassroots efforts. Shanzhai has infiltrated nearly every industry in China. There are shanzhai garments, shanzhai TV shows, shanzhai galas, and even a Shanzhai Nobel Prize. These products, once universally ridiculed, have become celebrated by creative think tanks for embracing a DIY attitude unbothered by copyright and IP. Their disregard for notions of "originality," "authenticity," and "ownership" is flaunted in their logo flips and brand name bricolage. The GooApple phone is a 21st century Dadaist collage, a rejection of the rationale of modern capitalist society. The device chooses to embrace the absurdity often hidden beneath the gleam of the surface.

The anti-illusionist language of Shanzhai culture might best be captured in the counterfeit graphic T-shirts archived by the collective Shanzhai Lyric. With their research, artists Ming Lin and Alex Tatarsky frame TikTok truisms from bootleg shirts into an ongoing poem sourced from the detritus of consumerism. With phrases like "ART IS WAY OF CHIC," shiny "broken" English becomes both decoration and description, indicating rupture on a wider level."<sup>15</sup> The smooth language of capitalism breaks down and the dark matter is exposed. The graphic design studio Metahaven understood the capacity of a joke to "resist and overturn the frame of reference imposed by any

political status quo.”<sup>16</sup> Shanzhai T-shirts, often humorous in their level of absurdity, might do the same. To consider the bootleg as an anti-illusion is to understand it as a disruptor, an agitator, an instigator. As it moves, it flaunts the scars left by dark matter to remind us of its dislocation, marginalization, and violence. Its refusal (or failure?) to conform serves as a reminder of the fragility of the capitalist illusion. It is a demonstration that one of the most powerful effects of the fake is to remind us of what is real.

### III. Alternative Archive

By 2025, MoMA will have 1.2 petabytes (1.2 million gigabytes) of artworks stored digitally on magnetic tape... Warhol's film archive alone takes up half a petabyte. The magnetic tape, necessary to account for file corruption or obsolete formats, is stored in small cases, which are collectively held in a black box in the basement of the museum. It's an example of various archiving systems working in tandem... physical works, occupying digital space, converted back to a tangible container, all hidden away in a dusty (albeit enormous) basement.<sup>17</sup> Traditional archives take on many forms: from specialized facilities with meticulously regulated rooms like those of MoMA, to a shoebox of photos kept underneath the bed. Archives can be libraries, or museums, or most recently digital spaces... the internet itself is even archived. But traditional archives double in their function of preservation, in that they also act as storage. And sometimes things in storage are easy to forget. Let me give you an example...

From 2016 to 2018 I worked as the graphic design fellow for the Walker Art Center in Minneapolis.

The museum is made up of seven galleries, spread out over five floors. The building, designed by Herzog & de Meuron, is intentionally disorienting, providing an opportunity for visitors to spend a day getting lost... after all, isn't that the purpose of contemporary art? Below the galleries, mostly unbeknownst to visitors, lies an equally complex and vast cultural labyrinth... the library. Although only a fraction of the size of the exhibition spaces above it, this "universe (which others call the Library) is composed of an indefinite, perhaps infinite number of...galleries."<sup>18</sup> Designers often sought the library as respite. Cell service was poor underground and a trip to the library meant an excuse to leave an email unanswered or dodge a co-worker looking for last-minute changes. On one particular occasion I decided to revisit the entire set of the Walker's in-house magazine, *Design Quarterly* and was struck by issue 89, 'Mindscapes.' The red cover was punctuated by silver display type: "SOTSASS" in layered lettering mimicking his Ultrafragola mirror, and "SUPER-STUDIO" in typography recalling the dimensional grids of the collectives' photomontages. We decided to bootleg the cover graphic onto a T-shirt. We produced a limited run and gave them to anyone interested. This small gesture transferred the *Design Quarterly* issue from one archive to another... from a library to a "cotton archive"<sup>19</sup> able to be accessed and disseminated by the simple act of wearing. 'Mindscapes,' once safely stored (and all but forgotten) in the stacks, was reactivated on an intimate level... quite literally enveloping any *body* interested in the radical Italian designers. The publication and the ideas within had been resurrected in a new and different form, liberated from the traditional archive and brought back to life to walk among us.

Walter Benjamin was also curious about the idea of resurrecting books. Benjamin all but names the act of bootlegging when listing the methods that a collector might apply to revive a forgotten treasure... “collecting is only one process of renewal; other processes are the painting of objects, the cutting out of figures, the application of decals...”<sup>20</sup> But what a bootleg makes up for in access, it forgoes in accuracy. A traditional archive is meticulous in its record keeping, a bootleg admittedly less so. Maybe there’s something to be learnt in this slippage...

Shakespeare’s First Folio, published seven years after his death, was thought to be the legitimate compendium of the playwright’s works. The texts were compiled by friends of Shakespeare who made it their goal to be as faithful as possible to the playwright’s original intent. The full title *Mr. William Shakespeare’s comedies, histories, & tragedies. Published according to the true original copies* is a mouthful, but the last section, *Published according to the true original copies* is worth noting....Throughout his career William Shakespeare chose not to authorize written versions of his plays, instead wanting them to be exclusively for the stage. But the absence of tangible copies only forced fans of the playwright to become more entrepreneurial. In the likeness of latter-day Deadheads, audience members at the Globe Theatre would transcribe versions of the plays for reproduction and dissemination. These copies, full of errors and editorial liberties, became known as the Bad Quarto. In these versions, Hamlet’s famous soliloquy goes as follows: “To be, or not to be; ay, there’s the point. To die, to sleep—is that all? Ay, all.” Despite the errors, the Bad Quarto (a Shakespeare bootleg) played a key role “in saving England’s finest body of drama

from oblivion.”<sup>21</sup> Some historians have even questioned if its discrepancies are the result of other contextual factors like an actor stumbling over his lines, or an early draft of a work in progress. Thought of this way, is the Bad Quarto any different from a live bootleg of The Beatles or The Stones? In such instances, it’s the slippage that makes them iconic. It has a way of bringing us closer, breaking down the divide of the stage or the studio...maybe even time?

As an alternative archive, a bootleg becomes a “parallel canon,” a version of history running alongside, supporting, or at times undermining authorized accounts of the past. “Bootlegs open up and mine an imaginative space” they can “fill in the gaps,” or leave room for “imagined artifacts.”<sup>22</sup> Looking at both the authorized and unauthorized versions of a history allows the actual image “to emerge out of the cloud of virtual similars and dissimilars.”<sup>23</sup> And the dissimilarities are significant, no matter how insignificant they might seem. Let me explain...

Leon Trotsky, in his text “The ABC of Materialist Dialectics,” makes the argument that “a letter A is never equal to another letter A—it is not even equal to itself.” In other words, to change is at the core of what it means to exist. Then perhaps the variations over generations of bootlegs are not the effects of shoddy production or the errors of an amateur archivist... they’re signs of life. They’re the bruises that occur when an idea or object is “compressed, reproduced, ripped, remixed, as well as copied and pasted into other channels of distribution.”<sup>24</sup> All of which are the risks of forgoing an archive for a continued, unpredictable existence.

Another thing about traditional archives is that they seem to appreciate a certain amount of dis-

tance... In a traditional archive, you're often asked to wear a pair of white gloves to handle the work, so that even when you're touching an object you're not really *grasping* it. The philosopher Roland Barthes thought about this distance when differentiating between the ideas of "Text" and "Work." As he describes it, a "Work" is something static and complete, analyzed and classified. A "Text," on the other hand, invites us in. It's malleable and prone to shift and stray and evolve and expand with each interaction. A "Text" "decants the work from its consumption and recuperates it as play, task, production, practice." Barthes calls on us to "play the text, release it, make it go."<sup>25</sup> A bootleg does that too, it invites us in. It requires no gloves or permissions. It asks us to engage so that it might remain in motion. But as we interact with bootlegs, how can we bring others into the process?

One last thing about a traditional archive, it's generally a solitary experience. But bootlegs are relational on community ... a shared "visual bond."<sup>26</sup> In 2012 artist/curator/publisher Shannon Michael Cane launched the first iteration of Printed Matter's Bootleg T-shirt Show.<sup>27</sup> The show featured bootleg shirts designed by a selection of artists and designers, with graphics from music, queer history, and capitalist critique. Its proximity to Printed Matter is no coincidence. Bootlegs, especially when thought of as tools for preservation, can be easily embedded into the world of independent publishing: "Similar to how zines work, these shirts are about finding people already within our small community that share a very 'deep' interest in something very specific."<sup>28</sup> The bootleg also becomes an archival mechanism for underrepresented communities. "It naturally becomes something that we perceive as aligned with diversity,

minorities, activist political voices, queer culture—because no one is censoring it, which is so often what is happening in mainstream publishing, fashion, music, media, et cetera. It's a platform for raw expression.”<sup>29</sup>

It's within these subcultures that we can understand the bootleg as a means of preservation in its most vital sense. As an alternative archive, a bootleg allows ideas and information to move through time, not as something fixed, but as something malleable. Walter Benjamin said, “to live means to leave traces,”<sup>30</sup> and that's what a bootleg does. Its existence is dependent on those around it to maintain it; it leaves traces and picks up new ones as it passes from hand to hand.

#### IV. Method Actor

A friend recently sent an article to me of an animal escape exercise at a zoo in Japan. In one photo, two people dressed up in a ridiculous zebra costume perform as the fugitive animal. The two actors not only look the part, they act the way you might expect a zebra to in this situation... skittish, confused, and weary of any passing human. In another image, the costumed creature stands outside the actual zebra's habitat, where the animal stares at the abomination with a look of sheer existential dread. I suppose you have to admire the zookeeper's dedication. The whole situation reminded me of another story...

In 1943 Marlon Brando began studying under Stella Adler, one of the teachers responsible for developing the method acting technique. In one exercise, she told her students to pretend to be chickens preparing for the attack of an atomic bomb. The students frantically waddled around the room. They made their arms into wings and they clucked and

screamed at their impending doom. Brando, however, sat still, stoic, a bit confused. When Adler asked Brando to give reason for his odd behavior, he replied, “I’m a chicken, what the hell do I know about bombs?” While Brando is often credited as the pioneering force for the method technique, it was in fact an actor by the name of Dilip Kumar who was the first to develop and employ the approach. In Indian cinema, he’s regarded as “the ultimate method actor.”<sup>31</sup> Kumar specialized in tragedy, and his work earned him respect for bringing a sense of realism to Bollywood. In fact, his connection with characters was so strong that he suffered a serious depression after performing a string of melancholy roles. A psychiatrist eventually gave him the advice to pursue comedy. Kumar developed his own technique out of a need to reconcile reality with the fantasy of cinema. “If the director comes up to me for a scene and says ‘This is your mother. And she is now dead.’ And every faculty of yours is against the idea that this woman is your mother...in a situation like that, your imagination needs to function. And that is when the brain starts to bring in memories of your own mother, and sometimes directly, sometimes indirectly, puts you in touch with your emotions.”<sup>32</sup>

Method acting involves foregrounding the “art of experience,” Kumar said. It requires a sense of embodiment greater than hitting marks and memorization. Method acting requires the actor to live in feelings analogous to those of the character in order to communicate authentically. To method act is to follow in the path of Jorge Luis Borges’s Pierre Menard in his attempt to rewrite *Don Quixote* not by copying it, but by *becoming* Cervantes... by creating the conditions necessary so that the words arrive

no differently to Menard than they did to their original creator. Or in the case of the artist Robert Gober who, upon first seeing an Ellsworth Kelly painting, was utterly confused, "I couldn't figure out whether it was a joke or it was really smart, but it was way beyond me, like a language I didn't know how to read. I remember I went home and in the basement of our house I remade the painting to try to understand it."<sup>33</sup> The bootleg as a method actor is a form of research, a way to better understand an original. It embraces copying as a process and acknowledges that creation "demands long intense engagement with what has been in order to move forward."<sup>34</sup>

In China, ancient practice considered it a high honor for a painter to infiltrate the collection of a connoisseur with a forgery of an Old Master. If one succeeds, the forger becomes equal to the master.<sup>35</sup> Today the area of Dafen Village, located in Shenzhen, China, has become renowned for its community of artists specializing in oil painted replicas of past masters like Van Gogh, Dalí, da Vinci, and Rembrandt. In 1989, an oil painting dealer from Hong Kong came to the small village to commission copies of iconic paintings. Today Dafen has over 8,000 workers in the oil painting industry and its output makes up nearly 70% of the commercial paintings in European and American markets. But as the artists were copying, they were also studying and learning. They grew a discerning eye for light, color, composition, and gesture which lead to a "synthesis of a new personal style expressive of the individual and the copied past; a seeing double."<sup>36</sup> It reminds me of a group of works by the artist Allen Ruppertsberg...

In 1973, the artist copied the entirety of Henry David Thoreau's *Walden*<sup>37</sup> by hand. For Rupperts-

berg, the process was a way of entering into a personal discussion with the author. It was a way to reactivate the text.<sup>38</sup> A year later, he copied the entirety of Oscar Wilde's *The Picture of Dorian Gray* onto twenty wall-sized canvases, working six days a week over the course of several months. The time-intensive method was "the only way of getting to the heart of the work. ... The second line of the poem which prefaces *Dorian Gray* reads: 'To reveal art and conceal the artist is art's aim.' Anonymity can be a strategy in an ego-centric culture."<sup>39</sup> In one last piece of epic transcription titled *The Singing Posters*, Ruppersberg copied the entirety of Allen Ginsberg's *HOWL* phonetically onto a series of fluorescent signs. "Generation" becomes "je-nuh-RAY-shin"... the phonetics are a way to inhabit the work, to decipher and resuscitate each word as if learning to speak for the first time. To read *The Singing Posters* is to perform it, and in the process we become Ginsberg... we become *HOWL*, we become the protest, we become the oral tradition, we become the words and we become their meanings.

The artist Matt Olson once told me a story about bootlegging Guy de Cointet. Olson and his studio at the time, RO/LU, were creating furniture pieces lifted from shapes and objects found in the scenography of the artist. Posters from de Cointet performances were reimagined in the studio's signature plywood. At a certain point in the process, as Olson tells it, one begins to think about time and money and efficiency and output... the sort of things that try and make art rational, which is never really how it should be. Fed up, he cried out "Why in the fuck are we even doing this?" to which someone in the studio replied, "We're learning from these things in ways that no

one could teach us.” It’s about process... not so much the thing, but what the thing does to us. How it changes us, how we “become the things, people, and ideas we love.”<sup>40</sup> It’s about method acting. The bootleg as a method actor is about transformation, it’s an act of *becoming*... but maybe not as we’d expect. As we learn through reenactment, through copying, through bootlegging, it is less about a relationship to a character from a script, and more about the process of becoming ourselves.

#### V: Knock Up

A knock up is not a knock off, it’s an important distinction to make. A knock off is a counterfeit produced to deceive and pass as “authentic.” A knock up is different. In China, there’s a rating system for how accurate knock off products are in their deception. AAA-rated knock offs are near perfect, at times even better than the original—like a pair of Adidas with an added Nike swoosh. On the other end, Z-rated counterfeits are so far off from the original that they operate better as jokes than actual products. In China, knock-off products are often manufactured in the same factories as their “official” counterparts. In these day-night factories “you make shoes for Nike during the day, then you make Nike shoes for you during the night.”<sup>41</sup> It’s a mode of production that only further blurs the line between the original and the fake, disrupting the hierarchy that each implies. But as I mentioned, a knock up is not a knock off. The term knock up was created by the designer Daniel Day, better known as Dapper Dan.

Dan was a hustler-turned-designer in Harlem during the 1970s and 1980s. His interest in clothing

stemmed from the realization that on the street in his neighborhood, fashion was power. Dan eventually opened up his own boutique selling fur coats and leather jackets, and soon evolved to making custom versions of each for select clients. It wasn't until Dan witnessed the excitement surrounding a customers' Louis Vuitton bag that he understood the cachet of aspirational brands. At the time, "luxury goods were becoming status symbols, and European heritage brands that nobody had ever heard of, like Louis, Fendi, and Gucci, were entering the mainstream."<sup>42</sup> But the power of a luxury brand is predicated on limited access and exclusivity. These brands cater to a wealthy white audience despite growing interest and demand from other communities. Dan's goal was, in his own words, to "blackenize"<sup>43</sup> these brands. To create a design and production strategy to reclaim their signs and symbols for his community.

His first custom piece was a jacket with patterned sleeves made from a deconstructed Gucci garment bag. The jacket created a considerable amount of hype in the neighborhood, and with each new customer Dan was challenged to continuously one-up the last. As the designs deviated further from the brand's standard offerings, it became increasingly more apparent to audiences that Dan's items were not "authentic." "I knew none of [my customers] would be caught dead in a knock off, so I had to convince them that, while it had the high-end materials and craftsmanship of a luxury item, it was something new and different. They had to see that I had taken these brands and pushed them into new territory. I knocked them up, I didn't knock them off."

A knock up is a copy that chooses difference as a sign of resistance. Unlike a knock off, which aspires

to pass as legitimate, a knock up displays its illegitimacy as a refusal to participate in the oppressive structures it was created to challenge. I am reminded here of the artist David Hammons, or rather how the artist, writer, and curator Coco Fusco frames the work of Hammons. In a 1995 essay for *Frieze* magazine, Fusco addresses Hammons's work in parallel to the idea of "signifyin," a concept first proposed by the literary critic Henry Louis Gates Jr. According to Gates, signifyin "involves taking, twisting and transforming English to make it otherwise. It implicitly revindicates 'imitation' as a creative gesture, over and against a legacy of negative, Eurocentric appraisal of black literature and culture as unoriginal." Thought of in the context of Hammons's work "signifyin allows the artist to be influenced (by Dada and Klein, for instance) yet to twist the influence, blacken it, pastiche it, own it."<sup>44</sup> For Dapper Dan, a knock up does the same. It becomes a tool for the marginalized to "benefit from a capitalist model intended to exclude."<sup>45</sup> A knock up embraces illegitimacy, and in doing so "refuses to rely on the violence that organizes the social space of annunciations."<sup>46</sup> In the 1980s, the popularity of Dan's "knock ups" led to intense copyright litigation. Unable to keep up with exorbitant court fees, Dan was forced to close his business.

Illegitimacy is tricky. Although it often leaves a visual trace, aesthetics alone can be deceiving. The recent trend of "official" bootlegs shows how quickly illegitimacy can be used as strategy. It's an easy way to claim something as "authentic"... which just makes the whole thing feel inauthentic. Let me give you an example...

In the 2018 Gucci Cruise Show, creative director Alessandro Michele premiered a jacket that was ba-

sically an exact replica of a piece by Dapper Dan from 1989 (the original was designed with Louis Vuitton monograms, which Gucci converted to Gucci Gs). Although the brand backtracked by justifying the jacket as an homage, the stunt felt ill conceived given Dan was never consulted. Also, Gucci was one of the corporations that had prosecuted Dan in the past for copyright infringement. (Let's consider the Gucci jacket as a "knock down.") In the same show, the brand premiered a dress prominently displaying the text "GUCCY," a clear allusion to the misspellings often found on the brand's bootlegs. The entire show might have been considered progressive—a brand recognizing its imitators as essential to its popularity—but since then, the Gucci legal team has become no more relaxed. Clearly, if anyone's going to knock off Gucci, it's going to be Gucci.

Because illegitimacy can be so easily manipulated, it's worth considering how the idea might move past something tangible. Is it possible to knock up an idea or institution? In 2019, Czar Kristoff, an artist in the Philippines, began a project called Temporary UnRelearning Academy (Temporary URL) in response to the country's monolithic art education. What began as a book-pirating workshop led to classes, research sessions, and lectures while squatting at cyber cafes: "The idea of doing a workshop or organizing a school is based on the conditioning of what a school is supposed to be. You could look at what we were doing as a bootleg of an institution."<sup>47</sup>

Thinking about a bootleg institution, I am reminded of Stefano Harney and Fred Moten's work *The Undercommons*. "It cannot be denied that the university is a place of refuge, and it cannot be accepted that the university is a place of enlightenment.

In the face of these conditions one can only sneak into the university and steal what one can. To abuse its hospitality, to spite its mission, to join its refugee colony ... to be in but not of — this is the path of the subversive intellectual in the modern university.”<sup>48</sup> Moten embraces the idea of unprofessionalism, bootlegging its definition as not beneath but beyond professionalization, an escape. A knock up, in its quest for illegitimacy, offers the same.

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Recently, I read an article on Hyperpop, a Gen-Z music genre that seems, even to its fans, both clear and confusing. It's one of those “you know it when you hear it” situations... more about a feeling than a definition. A.G. Cook is Hyperpop, but so is Kate Bush and J Dilla. Its very appeal is its resistance to classification. It reminded me of bootlegging. When I interviewed people for *Unlicensed*, I always began by asking them how they define a bootleg. The answers varied and at times contradicted themselves. Shirts were bootlegs but so were schools, sculptures, processes. Most people I spoke with never considered bootlegging a part of their practice; some failed to see the connection even after we spoke. That's what makes it so great, it's impossible to pin down. And really, these conversations and investigations might have only made things messier. Like I said... this might all be futile. Anthony Huberman says, “confusion is at the heart of wisdom” and as we remain open to the possibility of what bootleg is, or was, or might be in the future, it leaves us with far more questions than answers. But maybe that's OK. Maybe all that really means is that today the bootleg is

alive and well... and just when we think we've created any sort of definition, it slips away from us under the cover of darkness.

# DIGGING IN THE EPISTEMIC COMMONS

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by Stephen Wright



**Using the ideas of Gabriel Tarde, Ludwig Wittgenstein and George Herbert Mead, writer and critic Stephan Wright reflects on the question of how, in a capitalist knowledge economy, to prevent intellectual property from being commodified and knowledge from becoming increasingly privatized.**

*The gentrye are all round, on each side they are found,  
Theire wisdom's so profound, to cheat us of our ground  
Stand up now, Diggers all.*

—The Diggers' Song, Gerrard Winstanley and Leon Rosselson<sup>1</sup>

It is a perplexing anomaly of human anatomy that our ears are not equipped with shutters or lids of some description. We simply close our eyes and the visual field disappears, whereas we have to plug our ears with some makeshift stopper – like fingers – if we want to block out the ambient sound. This has contributed to the extraordinary epistemological privileges enjoyed by sight over the other senses, but also underscores the fact that we are in sound like fish in water. We are immersed in aural experience, which, on the basis of social and cultural criteria, we classify as noise, music, discourse and so on. However, we cannot but perceive sound and we often find ourselves humming a tune we didn't even know we were hearing in the mall, repeating an accent we heard in the street, an expression picked up on the car radio, a word overheard in the subway. Indeed, that is precisely how we learn foreign languages, just as it was how we learned our native language: by imitating what was out there, in a double

and inseparable process of individuation and socialization. Sound is not 'out there' in the public sphere; we are in sound, and in the absence of 'earlids' to demarcate the threshold between the public and the private, it seems reasonable to assume that what we hear is the basic material of all our sonic creations, from discourse to music.

But what if those sounds were somebody's private property? What if we had to hear them, but weren't allowed to play with them without paying user's fees? Wouldn't that be the end of folk music, a form of music based on reusing lyrics and music from previous works, incorporating it into new arrangements in keeping with changing contexts? Wouldn't that be the end of sound-based creation in general, in as much as it is about reacting to one's environment? In recent years, copyright law, and the assumptions about cultural ownership that inform it, have clamped down dramatically on the sonic 'commons'. Consider two symptomatic cases. In 1992, Island Records (the famous reggae label, ironically enough) in an example-making lawsuit, sued the group Negativland for enormous sums of money on behalf of the band U2, for using fragments of a U2 song in one of their songs. In the name of protecting U2's creative property, Negativland was driven to the verge of bankruptcy – making them into the extraordinary advocates of the creative commons, which they have subsequently become.<sup>2</sup> A still more telling point is made by Public Enemy's Chuck D about how copyright law has utterly changed the way the group and other hip-hop artists make their music. In 1988, Public Enemy released *It Takes a Nation of Millions to Hold Us Back*, by any account one of the most innovative-sounding albums ever. It sounded like nothing before it – it was frontloaded with sirens and squeals and squawks that merely augmented the collaged backing tracks – which is ironic given that what they were rapping to was entirely composed from samples of what had been heard before. As Chuck D puts it, 'sampling basically comes from the fact that rap music is not music. It's rap over music.' Rappers would take the sounds from their saturated media environment and, with the help of emerging sampling technologies, rap over it. The group got a lot of attention for rapping about black nationalism but the piece 'Caught, Can I Get a Witness' deals directly with the looming 'criminalization' of digital sampling: 'Caught, now in court 'cause I stole a beat / This is a

sampling sport / Mail from the courts and jail / Claims I stole  
the beats that I rail ... I found this mineral that I call a beat / I  
paid zero.' Chuck D argues that today it would be virtually  
impossible – or at least mind-bogglingly expensive – to make  
a record like *It Takes a Nation*, with its hundreds of samples,  
because by 1991, no one 'paid zero' for the sounds they sam-  
pled – they paid a lot. Yet that album changed significantly  
how we hear music. 'Corporations eventually found that hip-  
hop music was viable. It sold albums, which was the bread and  
butter of corporations. Since the corporations owned all the  
sounds, their lawyers began to search out people who ille-  
gally infringed upon their records.'<sup>3</sup> What, in the history of  
ideas, are the philosophical underpinnings and origins of the  
'ownership' of sounds, ideas and other inventions? And what  
forms of historical opposition has it encountered?

#### The Invention to End All Invention

It was the mercantile Venetians who came up with the idea of patenting inventions. In 1469, the Venetian Republic granted one of Gutenberg's assistants, to the exclusion of any other person, the privilege of making and operating a printing system using movable characters. The patent was bestowed for the term of his natural life, which, rather fortunately for print culture, turned out to be short. But as Pierre Papon observed, 'one can only imagine Europe's cultural backwardness if Gutenberg himself had sought to patent his invention.'<sup>4</sup> The notion of laying claim to the ownership of an invention has today become so widespread and self-evident that we may at first fail to appreciate just how staggering an innovation the patent system was in the history of private property. From today's perspective – faced as we are with literally *everything*, material and immaterial, becoming private property – it may appear to be just another logical step in an ongoing commercial process. Yet, it is no exaggeration to say that the innovation of the patent system was of an ontological order: though seemingly directed at the invention's objecthood (this machine, in this studio) what it really withheld from the public domain was the know-how required to build another one like it. It explicitly protected the brainchild by implicitly privatizing the brainpower. If only in incipient form, it made knowledge a commodity like any other. Or to put it differently, while seemingly laying claim to an external machine,

it opened the way to the privatization of an internal machine, generically described today as intellectual property. There is some irony in the fact that the first invention to be patented was one whose purpose was so bound up with knowledge production on a mass scale.

Prior to the Venetians, tools like printing presses could have owners. But the knowledge needed to build them and operate them could no more be exclusively owned than the alphabets and the arrangements of letters and words which they were used to print. Whole realms of life eluded exclusive ownership. It would be anachronistic to say that these domains were held in common, though it is tempting to do so in light of the colossal expansion of private property over the past several centuries – through patents, copyrights and other legal instruments. To have said so at the time would have sounded as tautological as to say that the air we breathe, or the words we speak, are held in common, though of course today those domains too are prey to capitalism's structural imperative for permanent expansion. From the perspective of capitalist accumulation, the patent system opened up a territory as vast as that of the New World, to which Europe would lay title several decades later; indeed one which is potentially vaster, for if horizontal – that is, geographical – expansion has attained global limits, there is no end yet in sight to the vertical expansion in the realms of knowledge.

The realization that the patent system was less about objecthood than about harnessing the subjectivity behind it only emerged over a long period of time. But what intellectual property rights seek to codify gives some sense of the ontological paradigm shift implicit in the very idea of patents: 'It had never been imagined that someone could, all alone, wrest from within himself a value that was not a thing. It had never been imagined that there existed a form of property that was not only immaterial but also inherent in the subject. It had never been imagined, for instance, that books were something other than tangible, material goods, which an author would yield to a bookseller who would, himself, sell them. Copyright was born of an unheard-of effort to wrest creation from the world of things, to make a value of the actual subject, thereby solving the squaring of the circle: although a work is not an object of property like another, it nevertheless belongs to its author who can exploit it.'<sup>5</sup>

Whatever else might be said about the patent system, it was indeed an extraordinary *invention* – every bit as historically consequential as any of the countless inventions to which it has been applied. However, its extraordinary success is due to its *imitation* by legislative bodies around the world. After all, if other powers had not imitated Venice's invention, it would have had very little effect. This is an obvious but highly significant point, because invention is usually opposed to imitation. It certainly is in patent law. Imitation and invention stand opposed the way individuality is thought to stand opposed to sociality – though both these oppositions are fallacious, as I shall argue. For what is extraordinary is that the phenomenal success of patents (or any other invention) can only be explained by the imitation of the initial logic – sole ownership not merely of an object and its use, in this case, but of the knowledge and know-how necessary to produce that object and use it – and its application today to literally every field of knowledge production. The success of any invention – even the invention to end all invention, which is how one might describe the progressive emergence of the privatization of knowledge – depends on imitation if it is to endure over time. To better understand this relationship between invention and imitation, it is useful to consider the philosophy of Gabriel Tarde.

#### The Powers of Imitation

'Desubjectivizing the powers of the mind to reach the level of impersonal psychological forces, to reach the level of experience prior to any separation between object and subject, between the sensible and the intelligible: such is the fundamental operation of Tarde's philosophy,' writes Maurizio Lazarato in a book which has been invaluable in rejuvenating the thinking of one of the founding figures of French sociology, whose work lay forgotten for nearly a century.<sup>6</sup> Tarde's thought is founded on a strange dialectic of inventiveness and imitation. Typically, inventiveness is venerated as an expression of triumphant individual authorship whereas imitation is deprecated as mere copying; but instead of hierarchizing and opposing invention and imitation, Tarde saw them as the mutually reinforcing dynamics of any process of innovation. The social group, he wrote, is 'any collection of beings who are in the throes of imitating one another or, without actually imitating one another at the moment, resemble one

another such that their common traits are old copies of the same model.<sup>7</sup> Tarde refused to distinguish between conscious and unconscious imitation (habitus, accent, etcetera), arguing they were part of a single process. Indeed, imitation can take place at great distance – it is an expanding field, where groups and individuals imitate one another without any need for proximity in space and time, and most often without being aware of it. But imitation is not merely the manifestation of a social bond, it is the veritable engine of the spread of invention, and the reason that innovation – in art, in knowledge production, and so forth – is always collective and never ‘private.’

Imitation is the movement through which something is repeated and spreads. But it is at the same time the movement through which, in spreading and being repeated, it is differentiated both qualitatively and quantitatively. As it spreads, it is shared; imitation ceases to be unilateral and becomes reciprocal. There is nothing homogeneous or homogenizing about imitation, for the effect of its spreading is that, even as it generates imitative series, it multiplies the likelihood of their intersecting with one another, inventing other new objects, which themselves will generate new clusters of series. This differentiating process, paradoxically inherent to imitation, is precisely what Tarde refers to as *invention*. ‘An invention is, after all, merely the effect of a singular intersection of heterogeneous imitations’<sup>8</sup>: it is the moment where two series of imitations come together in a nexus characterized by an utterly new combination. So if invention can be defined as the product of imitation, they are both integral parts of a process of differentiation. But Tarde goes further, arguing that *an invention which is not imitated simply does not exist socially*.<sup>9</sup> Imitation is thus the framework from which, through incremental shifts, invention emerges. And in order for an invention to be imitated, it has to capture the attention of other minds, engage with them, release their desires, their beliefs, memories and hopes through a process of social communication. The inventor deprives no one of anything, quite the contrary; and the imitator appropriates what he or she copies without dispossessing anyone else.

It is on the basis of this dialectic of invention and imitation that Tarde’s theory of society, based upon what he calls ‘intercerebral co-operation’, can be appreciated. In opposition to the tenants of political economy, Tarde held that it is

the co-operation between minds and its product, knowledge, which is at the very core of the productive process – and at the origin of the production of value. ‘Tarde’s surprising relevancy today,’ writes Maurizio Lazzarato, ‘lies in the fact that he identified the production of knowledge as a specific trait of modernity... . In making the production of knowledge the true production of modern society, he asserted the autonomy, the independence and the constitutive power of assembled minds and not the primacy of intellectual over manual labour.’<sup>10</sup> This concept of knowledge production is only imaginable if productivity is defined through the association of powers of invention and imitation, replacing the opposition between forces with *co-operation*. Whereas the social sciences tend to define human action negatively, as based upon lack, absence, suffering, Tarde pointed to the intersubjective pleasure inherent in collective action. Tarde’s concept has sweeping consequences for collective knowledge production. As Lazzarato explains:

‘Knowledge escapes the logic of rarity and economic measure for two basic reasons. Firstly, it is the production of a form of co-operation which is independent and autonomous from the division of labour. Collective linguistic patterns, communities of scholars, and of the sensitive, as well as public opinion result ontologically and historically from the action of assembled brains and not from the socialization of business and the market. Language, art, science, public opinion and affects all presuppose a common agency, which cannot be described by the logic of material production, as well as a form of co-ordination, which cannot be reduced to the market. Language, art, science, public opinion, affects are collective goods, indivisible and infinite, and consequently their measure can only be determined within the immanence of a collective agency, which, as we know, breaks down the alternative between the individual and the collective.’<sup>11</sup>

Thus for Tarde, knowledge production – including, explicitly, art production – is a collective endeavour. Any consumption of knowledge is, at one and the same time, production of new knowledge – an agreeably growth-yielding dialectic. Knowledge, Tarde believed rather optimistically, could never be reduced to a commodity and appropriated for the sole use of some owner. ‘It can, rigorously speaking, be neither lent nor exchanged, since whoever possesses it does not give it

up by communicating it to someone else. There is an act of emanation, and not alienation. It cannot be given, nor can it be stolen, for the same reason.<sup>112</sup>

But how does this sit with the proliferating privatization of knowledge? What could possibly prevent the exclusive appropriation of intellectual property in a knowledge-based capitalist economy? Tarde's answer is simple: 'Basically, because that would imply the non-existence of an essential function of our mind: memory.'<sup>113</sup> On the social level, memory functions as a synonym of imitation. In other words, teaching someone something – disseminating knowledge – by no means requires that one forget or relinquish anything one knows, in order to concede it to the other party, as is the case in the exchange of commodities. Not only is memory not alienated in its various embodiments (books, films, exhibitions, but also in concepts and so on), but it musters them to augment its powers of differentiation. Once the genie is out of the bottle, there is no putting it back in. This simple argument is appealing because it underscores the ontological difference between knowledge objectified in a product and knowledge-production as an inherently collective and expanding process based on invention and imitation.

Tarde's confident assertions notwithstanding, it is difficult to see what could stop capitalism, impelled by the need for accumulation, from imposing an objective mode of co-ordination (market), regulation (intellectual property law) and organization (based on private property), and privatizing all new configurations of language, perhaps even neologisms, source codes for software, and so on, despite their co-operative makeup. Not in order to withhold them from public use, but on the contrary, to generate income from their use: to rent out knowledge, perhaps even words, on a pay-per-use basis. There is an interesting ongoing legal battle in Germany involving an online knowledge-production initiative, known as [textz.com](http://textz.com). As the collective's rather Tardian motto suggests – 'We are the & in Copy & Paste' – its purpose is to make freely available, in the common space of the Internet, texts of philosophical and literary interest, including the works of Kafka, Benjamin and Adorno. The group explicitly invites any like-minded people ('all you need is a \$50 scanner') to imitate their example. In keeping with the reasoning that disseminating knowledge deprives no one else of it, the

collective posted two texts by Adorno – an act for which they were served notice by a bailiff that the Hamburg Foundation for the Advancement of Science and Culture was suing them for copyright infringement, and had obtained a preliminary injunction against them for ‘damages’ incurred through their illegally distributing works over which it held copyright. The law in this case is unambiguous: textz.com is in the wrong, and must either pay up or see its legal titleholder face a sentence of up to two years in jail. The open letter addressed to the Foundation’s director is worth quoting at some length – quite in keeping with the spirit of textz.com – because it is a strong statement of epistemic sovereignty in the face of legal fiction:

Threatening jail time for copying Adorno: that’s where you have crossed the line that separates ordinary copyright cases from extraordinary tales of copyright madness.... As ‘intellectual proprietor’ of Theodor W. Adorno and Walter Benjamin, you should be aware of the power that still emanates from their works: a negative, dialectical, weak and historical power that stretches far beyond the reach of any court of law, and that is impossible to contain in any of your archives. ‘Intellectually’, Adorno and Benjamin will always escape becoming commodities, and their works, even in the form of the private property they have become, have a peculiar tendency to vanish the very moment you try to get hold of them.

The question of ‘intellectual property’ is not about whether the producers of creative works should be denied their right to material reproduction through their creative work.... The question of ‘intellectual property’ is about when it will finally be acknowledged that people have a universal right to the reappropriation of the means of production, that creative works – however privatized and commodified they may have become – are such a means of production, and their reproduction is a fundamental and fully legitimate form of knowledge production itself.

Even confronted with ... the state of permanent emergency and institutionalized panic that is the ‘war against piracy’, people have never ceased to copy, paste, modify, save, upload, download, print and share digital data. In the case of ‘intellectual property’, the power of the factual exceeds by far the power of the law. People are perfectly aware of the historical fact that no law is ever just given. Law is created through factual struggle, and is eroded through factual struggle. Thus,

the critique of 'intellectual property' cannot remain individual, sporadic and theoretical – it has to become swarming, massively parallel and practical.

We are glad to announce that, effective today, every single work by Adorno and Benjamin that you claim as your 'intellectual property' has become part of the very public domain that had granted you these copyrights in the first place. Of course they will not be available instantly, and of course we will not publish them ourselves – but you can take our word that they will be out, in countless locations and formats, and that not even a legion of lawyers will manage to get them back.<sup>14</sup>

### Diggers All!

Though comparatively less serious than other legal battles around intellectual property (such as the WTO's insane demand that India conform to international law and pass legislation curtailing the production and export of affordable anti-retroviral drugs used to treat HIV), this issue is of interest because of its symbolic importance involving the works of the leading figure of the Frankfurt School. The issue is not about politicizing knowledge but about producing the political as knowledge. There are many examples of this kind, but among their common historical and intellectual antecedents is a somewhat forgotten moment in radical political history – one which was fundamental to the genealogy of all libertarian thought and practice with an emphasis on egalitarianism – that is, those movements in seventeenth-century England, at the time of the English revolution, ruthlessly crushed by Cromwell, but whose reputation has never ceased to inspire radicals, not least of all because of the groups' action-provoking names: the Levellers and the Diggers. The Levellers were formed first as a mass movement of anti-enclosure activists, generally acknowledged to be the first political group organized on principles of democratic self-government. The Diggers emerged several years later, calling themselves the 'True Levellers', their key demand being the 'free allowance to dig and labour the Commons'. Declaring the earth 'a common treasury', their spokesman, Gerrard Winstanley went further than the Levellers had dared, writing up a practical manifesto entitled *The True Levellers' Standard Advanced*. What gave the movement popular momentum was the widespread rural

poverty and dispossession, as the gentry shored up its power and regulated land use by erecting enclosures on what had hitherto been common land. As Winstanley put it:

The earth was not made purposely for you, to be Lords of it, and we to be your Slaves, Servants, and Beggars; but it was made to be a common Livelihood to all, without respect of persons: And that your buying and selling of Land, and the Fruits of it, one to another, is The Cursed thing, and was brought-in by War ...<sup>16</sup>

In 1649, forty or so Diggers and their families occupied a small area of common land at St. George's Hill, Surrey, and began to dig and cultivate it with vegetables. Their numbers more than doubled over the course of the year, but their activities did not go unnoticed by the local gentry, rival claimants to the common lands, who notified the Council of State that the Diggers 'had invited all to come in and help them, and promise them meat, drink, and clothes'; and that the Diggers claimed that their number would be several thousand within ten days. 'It is feared they have some design in mind.' Indeed they had, though it was not to materialize. The Council of State explained the situation to Lord Fairfax, lord general of the army, along with a dispatch stating:

By the narrative enclosed your Lordship will be informed of what hath been made to this Council of a disorderly and tumultuous sort of people assembling themselves together not far from Oatlands, at a place called St. George's Hill; and although the pretence of their being there by them avowed may seem very ridiculous, yet *that conflux of people may be a beginning whence things of a great and more dangerous consequence may grow.*

Hectoried by legal action and violence, by 1650 the Digger colony was dispersed – but like all socially useful inventions, it has been the object of ongoing, differentiating imitation. The movement was historically significant because it was the contemporaneous counterpoint to the possessive individualism as expressed in the political liberalism of Hobbes and Locke. And of course today, the Diggers' insistence on reclaiming the Commons has particularly acute relevance as initiatives such as the Creative Commons, CopyLeft dig in the knowledge commons. In researching this essay, I came across an artist collective called 'Nomoola', based in Hawaii, that among other projects, carried out an explicitly Digger-in-

spired initiative called 'Eating in Public'<sup>16</sup> The group planted twenty papaya seedlings on public land – 'public' land, not 'common' land. As they explain, 'in doing so, we broke the existing laws of the state that delineate this space as "public" and thereby set the terms for its use. Our act has two major purposes: one is to grow and share food; the other is to problematize the concept of "public" within public space.' In a scrupulously well-documented and lively narrative, the group describes the challenges to their attempts at 'commoning' in a society where every legal provision has been made to prevent it. The papaya trees were eventually uprooted before they bore fruit, and the land fenced off. The group has subsequently shifted its strategy to another commons: the Internet, where they have set up FreeBay ([www.nomoola.com](http://www.nomoola.com)), an on-line service something like eBay, with the notable exception that everything is free – including papaya seedlings ...

#### Wittgenstein's 'No-Ownership Theory'

In his own way, Ludwig Wittgenstein was something of a philosophical digger – though it seems strange to say so of such a socially awkward and solitary man, whose political sympathies were apparently staunchly Stalinist. But consider his lifelong opposition to the widespread use of the metaphor of 'ownership' in philosophical thought. From Descartes on, the political philosophy that accompanied the historical rise of the bourgeoisie made possessive individualism the very essence of freedom, human relations and the constitutive dynamic of society: the individual is free because he is the owner of his self and his actions, freeing him from dependency on the will of others; his freedom is based upon his possessions. This remains the mainstay of neoliberal ideology. Somewhat surprisingly, we find something akin to it in the philosophy of Bertrand Russell, for whom the ideal language of knowledge would necessarily be a *private language*.<sup>17</sup> It is of course not by chance that Wittgenstein was decidedly opposed to both the notion of an ideal language and that of a private language, for the dream of a private language is invariably based on the fact that it would enjoy a more direct, sincere and close correspondence to reality than common language. This was anathema to Wittgenstein's user-based theory of language, which had no use for privileged knowledge, invariably based on the conventional

distinction between immediate knowledge (Descartes' 'intuition', Russell's 'knowledge by acquaintance') and indirect, use-inferred knowledge. Wittgenstein definitively debunked the tenacious philosophical myth according to which there exists some sort of immediate 'knowledge' of our sensations, impressions and operations of our mind – a form of knowledge to which we are 'privy'; a private, privileged form of knowledge both in the sense that we alone possess it to the exclusion of all others and in the sense that it constitutes the paradigm and basis for all other knowledge. Insofar as it constitutes 'knowledge' at all, Wittgenstein argued, it is something that is necessarily mediated by the public use of language. For Wittgenstein's refutation of a private language is disarmingly simple: how, in that case, could I possibly know what I mean?<sup>18</sup>

Prior to his user-grounded philosophy, in the early 1930s, Wittgenstein had considered other ways of refuting Cartesian dualism, including what Peter Strawson called his 'no-ownership theory' of the subject. Anticipating post-structuralism by a half century, Wittgenstein argued that knowledge production was, logically speaking, a completely anonymous activity: no one owned their thoughts any more than they owned the language that mediated them. As one of his students noted, Wittgenstein was in the habit of quoting with approval Lichtenberg's remark that 'Instead of saying "I think", we should say "It thinks" ("it" being used the way it is in "It's raining").'<sup>19</sup> So who 'owns' thoughts if not the subject who articulates them? Does it not follow that they somehow circulate in an entirely informal collective trust?

#### Epistemological Collaboration, Collaborative Epistemologies

Invention requires a language – it can only take place against the relative stability of a given syntax, grammar and vocabulary. Thus, because no inventor invents his or her own language, but merely brings about a (infinitesimal) transgression in the existent language, he or she is (at best) co-author of any innovation. Gabriel Tarde felt it was impossible to oppose the collective to the singular, the society to the individual, arguing that the singular is the collective *in petto* – that is, organized in keeping with the same multiplicity of relations – and the individual is ontologically inseparable from his or her social

dimension. A human being is not a generically social being, but so to speak a society unto herself or himself. George Herbert Mead based his philosophy on a rather similar point. For Mead, identity formation occurs through the medium of linguistic communication, in a language which is always already there. And inasmuch as the subjectivity of one's own intentions, desires and feelings by no means eludes this medium, the agencies of the 'I' and the 'Me', or ego and superego, issue from the same process of socialization.<sup>20</sup> This is perhaps one of the keenest observations of twentieth-century social science, and Jürgen Habermas has placed it at the core of his theory of intersubjectivity. As he writes in his discussion of Mead, 'individuality is a socially produced phenomenon that is a result of the socialization process itself ... [T]he process of socialization is at the same time one of individuation.'<sup>21</sup> Put another way, intersubjectivity is not constituted by previously constituted subjectivities; it precedes subjectivity and constitutes its condition of possibility. We learn to speak a common language which predates us and which, whatever modest impact we may have upon it, is destined to outlive us. We are what we are in that language by observing how others interact with us and adjusting our relationship accordingly. In order to understand what someone means, I have to be familiar with the context-related conditions of validity of what they have said – and where could I possibly obtain such knowledge if not from the experience of the context itself? This, as we have seen, is Wittgenstein's central insight and the starting point for his use-theory of knowledge: I can understand the meaning of communicative acts only because they are embedded in contexts of action oriented to reaching understanding.

The embedded dynamics of understanding is the material that PUKAR (Partners for Urban Knowledge, Action and Research), a Mumbai-based, citizen-driven knowledge production network, has chosen to work with. The group is made up of researchers, artists and documentary filmmakers anxious to deploy their competence outside the constraints of academic institutions – whose methodologies and priorities are inevitably tied to funding structures like the World Bank – in order to look at research as a more democratic knowledge-production practice. The group engages in what might be described as *cognitive ecology*: 'There is a genuine

crisis in the way in which knowledge is being produced,' says co-director Rahul Srivastava. 'The minute you begin to look at knowledge as a discrete category, it becomes important to contextualize. We need expert knowledge and conceptual tools, for concepts are useful fictions; but somehow we overlook their fictional quality. Knowledge is always grounded in a particular context and form of life. Many of PUKAR's projects concern the everyday negotiation of difference through translation in Mumbai's public sphere. Language is chock-full of embedded, pre-reflexive cultural knowledge, common knowledge, and we are interested in how Mumbai assembles its nine or so linguistic selves in going about its daily business.'<sup>22</sup> One might say that the group's collaborative epistemology is based on knowledge as a cluster concept – perhaps in the image of urban space itself. The films, workshops and sound projects the group has produced on 'street cosmopolitanism' are compelling – and urgent in the light of the explosion of inter-communal violence in the city several years ago.

But what is knowledge? And what is *common knowledge*? Part of the problem is that we speak of knowledge as if we could 'know' what it is removed from the realities of its producers; as if it were some sort of discrete essence or phenomenon that could be cordoned off from other competing activities like emotion, feeling, belief, and so on. But knowledge is never removed from the pragmatics of context, always already skewed by inequality, which makes knowledge a form of power, and conceptual knowledge often a form of symbolic violence. All too often, what passes for knowledge actually ends up hindering or even thwarting genuine cognitive production by creating barriers to broader epistemological collaboration. Above all, though, as we have seen, knowledge production is not, and cannot be, a solitary activity. Wittgenstein's famous refutation of the idea of a private language also holds for knowledge as such, which is the very product of what Gabriel Tarde called 'intercerebral co-operation'. In our era so hell-bent on the privatization of knowledge, the harnessing of creativity, the instrumentalization of autonomy all in the name of producing consumerist subjectivity, this is a political issue. For either we accept that knowledge is collective, or we lose it altogether. Commodified knowledge is not really knowledge at all, any more than a strategic friendship is a friendship.

And what about art, is it knowledge? Most people would agree that art has a cognitive dimension, or that it can produce knowledge, but many would shy away from asserting that art actually is a form of knowledge. Art, too, is an experimental form of intercerebral co-operation, and it is explicitly and symbolically so in the case of collective production, when artists accept to work together. It is even more manifestly the case when artists collaborate outside of the framework of art, beyond the legitimating borders of the institutional art world, which partition art off from what analytical philosophers rather insolently call 'the mere real thing'. For in those cases, art must abandon its conventional pretences and get involved in working to produce knowledge. Autonomous knowledge production initiatives are cropping up in virtually every big city. PUKAR is one among several in Mumbai. In Buenos Aires, one finds the Mesa de Escraches, in which the artist collectives such as the Grupo de Arte Callejero, Grupo Etcetera and the Taller Popular de Serigraphia are actively involved.<sup>23</sup> The Universite Tangente founded by Bureau d'études in Paris is another.<sup>24</sup> But the academic overtones of 'university' are misleading, because the type of knowledge at issue is not academic, and is unconstrained by academic protocol, compromise, methodology and hierarchy. When one actually looks at the forms of knowledge being generated, one realizes the extent to which cognitive emotion and experimental epistemology is inherent to this kind of initiative. In some way, these deep-digging knowledge-producing initiatives stand in relation to the mainstream art world the way the Diggers did to nascent possessive individualism. Do the Diggers' demands for the abolition of monopolies and great landowners – of Private Enclosure, Wealth and Privilege, as Winstanley starkly put it – not resonate in contemporary demands for limits upon media concentration, surveillance technology and impunity for the happy few? The digging continues.



# INCIDENTAL GRAPHICS: TO DESIGN IN AND THROUGH DOCUMENTS

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by Tucker McLachlan



1.

Incidental graphics tend not to be designed. They materialize through existing formal conventions to house information that needs to be stored or communicated. They inhabit these conventions so completely as to become, with their world-making originality, undetectable. When removed from their contexts of immediate use (in which they function perfectly and without notice), incidental graphics appear merely as documents<sup>1</sup>

2.

(This can be very mundane, or very magical, or both. When I was five or six and first learning how to write, I added “pop-tarts” to a grocery list stuck to our fridge while neither parent was watching. To my astonishment, and even though my past requests for Pop-Tarts had always been rejected, they arrived amid the groceries my father brought home. He thought my mother had written them. This mischief was a source of much amusement for us, and was perhaps a formative experience.)

3.

Incidental graphics capitalize on the trust built up in form that follows function, in the expected relation between form and content that accrues in a genre over time. If graphic design handles form in relation to given content, incidental graphics handle content in relation to a given form.

4.

Graphics can manifest four possible combinations of form and content with respect to expectation:

- A. Expected form and expected content (unremarkable everyday graphics);
- B. Unexpected form and expected content (the celebrated graphics of the canonized genius designer);
- C. Unexpected form and unexpected content (unassimilable, alien graphics; the graphics of unfamiliar cultures); and
- D. Expected form and unexpected content (incidental graphics).

5.

Incidental graphics will succeed, unnoticed as assertions of an as-yet-unrealized state of affairs, so long as their content is not so unusual as to attract attention<sup>2</sup> On a practical level, this matters only when someone is trying to deploy incidental graphics deliberately, as in forgery, legislation or enactments of other kinds.

6.

To consciously attempt the creation of an incidental graphic risks exposing not only one's intentions, but also one's duplicity. The Japanese ambassador Chiune Sugihara defied his superiors to produce some 6,000 transit visas for Jewish refugees fleeing German-occupied Poland in 1940, and lost his job for doing so<sup>3</sup> Yet his documents worked. His handwriting, signature and stamp could not be regulated by the diplomatic protocol that intended to govern them; their graphic materiality afforded his civil disobedience. His visas can as easily be read as valid or invalid, forged or not forged, depending on one's point of view.

7.

Nineteenth-century British treaty artifacts signed by Indigenous leaders provide the legal foundation for much of Canadian territorial sovereignty even though the land surrenders consistently recorded within them are known fabrications<sup>4</sup> The document, and not the treaty itself, produces the truth required for Canadian claims to jurisdiction over land<sup>5</sup> This truth production occurs through a series of graphic gestures, yet the resulting graphics are so banal that they are scarcely understood as graphics at all. The same holds true for royal charters, preemptions, deeds and other documents of colonial land appropriation; design histories of Canadian

land ownership would reveal persuasive graphics amidst the roots of settler law.

8.

Affordances—the characteristics of an object that determine how it can be used—are the secret of incidental graphics. Affordances set the terms of an object's use not only by its nominal end user (the treaty signatory, the refugee, the grocery shopper), but also by the entity that supplies it. An incidental graphic can be an underline, an omission, a folder structure, a calendar invite, an outlined shape, a colour—or any number of other things in the right combination of circumstances.

9.

Most digital interfaces are incidental graphics by virtue of the software that performs behind them. Edward Snowden's 2013 disclosures might be used to mark the transition of graphic design's main economic function from producing information to providing a surface for quietly recording as much human activity as possible. Graphical user interfaces hide the action of software by their very grain<sup>6</sup> they provide the necessarily limited sets of representations and interactions that allow people to use machines made of code. Google, Facebook and many other organizations use this concealing characteristic of the medium with remarkable success to imperceptibly absorb and sell the details of our lives. While digital graphics continue to perform the visible communications that we expect of them— inherited from our expectations of paper and the printed page—they make their greatest contribution to the present as a central affordance of surveillance.

10.

To "keep the user informed about what is going on" is a declared aim of the design disciplines<sup>7</sup> yet in practice this refers almost exclusively to superficial, user-initiated interactions of minimal political consequence. Apple once planned to introduce an update to the iPhone that would have displayed a blue bar across the top of the screen any time an app was collecting location data, which would have made undeclared surveillance on iPhones far more visible and disconcerting<sup>8</sup> That this feature was shelved suggests how

much must be hidden from public audiences so public-facing software remains commercially viable and, at the same time, underscores the considerable potential for simple graphic interventions to modify social relations mediated by visibility. Snowden's disclosures surfaced a National Security Agency PowerPoint presentation that became an object of playful design critique online. The unfathomable scope of the spying described in the document seemed at odds with its apparently hasty, unconsidered appearance. Its publication seemed to demand better style, and made the slides a case study for designers to comment on and redesign to illustrate the value of professional design expertise. Though ironic, this response maintained a normative investment in graphic design as an end unto itself, in every context, without regard for the meaning of locally resonant visual codes or the contingent relation of clarity to the desired outcome at hand. It is possible that the appearance of the presentation was well crafted for its intended audience, just as it is possible that a clear presentation was not the goal<sup>9</sup>

#### 11.

Design history engages only the artifacts and authors available for public circulation, and leaves absent work whose function hinges on continued non-disclosure. Such graphics are disqualified from the public discourse of graphic design, and their absence haunts it. In this way, graphic design discourse is shaped by that to which it cannot refer: its apparent preoccupation with corporate image and visual identity reflects the presence of only those subsets of graphics most amenable to public reference. Perhaps contrary to popular understanding, graphic design production—unlike art, from which it derives its ideas of authorship and canon—does not produce artifacts for a public audience as a general rule. That it seems to do so reflects a sample bias that has been amplified and reinforced over time by the outwardly promotional strand of the field.

#### 12.

In light of this, an attempt to better understand graphic design might draw attention to the proprietary and unknowable majority of its corpus, perhaps by seeking out graphic histories whose need for secrecy has diminished through the passage of time.

13.

Histories of incidental graphics would unfold the graphic dimensions of other histories. They would do so with a primary interest in affordances and effects.

# LIABILITY VS. LEVERAGE

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Tools of Change for Publishing.

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by Cory Doctorow



### How much will your publisher pay you?

There's a short, easy answer to this: as little as they can. Not because they're heartless monsters, but because businesses pay as little as they can for their supplies, and charge as much as they can for their products\*.

But that's an abstract answer. The more concrete one — *exactly* how much will your publisher pay you? — hinges on how many other people have books that can fill the same niche for the publisher, and how many other publishers there are looking to fill that niche. In other words, the amount you get turns on supply and demand.

When you start out writing, you are in competition with all the other unpublished writers out there. There are a lot of you, with more publishable books than the big houses can absorb, and so, by and large, writers are paid very little for their early works. If you become a bestselling, big-name writer, you will command more money — not just because the publisher believes they will make more money from you, but because it is harder to replace an established writer than it is to replace an unknown. If JK Rowling writes for you, you can't fire her and hire JK Rowling II to write books of equivalent profitability for you. It's a poorly kept secret that very successful writers often draw "advances" that are so high that they'll likely never earn out — a sneaky way of paying an effectively higher royalty rate without setting business-wide precedent.

### Writers write because they can't stop

So, it's down to supply and demand, and the news isn't good. Writers write, by and large, because they can't stop. The writ-

ers who say that if they can't get paid they'll get a real job and stop writing are either kidding us, or kidding themselves. Most successful writers spend years working for pittances, with no reasonable expectation of breaking out. "I plan on writing for a living" is about as realistic as "I plan on buying winning lottery tickets for a living." If enough people try it, some will succeed, but it's not what you'd call *economically rational*.

This means that there's an oversupply\*\* of writing in the market. And to make things worse, there's a chronic, and accelerating undersupply of publishers. If you're a writer, you want there to be lots of publishers, in competition with one another. Competitors bid each other up, and whether you're a lucky beginner or a big name, the likelihood that someone else will pay you more for your book goes up when there are more companies vying to buy it.

For writers, an industry with a single publisher that publishes 10,000 titles a year is much worse than an industry with 100 publishers, each publishing 100 titles. If a company is the only game in town, then everyone has to play by its rules. Monopolies suck\*\*\*.

In a world where the number of "real" publishers is contracting, and where the remaining giants are stuck in the trap of wanting to innovate, but not at the expense of existing (but dwindling) business, you'd expect lots of innovative little "publishers" to spring up, each of them trying new things. That's what we've got today: from indie one-writer productions who do it all themselves to venture-funded startups trying all kinds of novel things, there is a burgeoning world of technologically enabled upstarts with nothing to lose by abandoning the traditional economics of publishing.

Which gets us back to how much your publisher will pay you. In an industry dominated by three or four players all making their money the same way, the offer made to writers is likely to be the same everywhere you go\*\*\*\*. When there are lots of players, making money in different ways, your product — your book — has lots of different parties bidding for different reasons, and when that happens, the seller\*\*\*\*\* commands a higher price in the deal.

All of this is straightforward Econ 101, the law of supply and demand, familiar to anyone who's played Dope Wars or Lemonade Stand (or who's run a business).

### The complex world of piracy

Now, let's talk about piracy. Piracy is complicated. We tend to assume that writers and publishers are on the same side — after all, when they lose, we lose, right?

That's true, to the extent that piracy actually results in fewer sales\*\*\*\*\*. But that's not the whole story. That's just an argument about whether the glass is half full or half empty, and this question only matters to writers if they *get some of whatever's in the glass*. Publishing lobbyists love the copyright enforcement tools the entertainment industry has gotten for itself, and publishing associations are always in the pack when Big Content bays at the government's doors for even more power to enforce copyright online.

If writers' and publishers' interests were the same, then proposals like last year's SOPA and the ongoing international Trans-Pacific Partnership treaty would stand to benefit both of them equally. But these proposals (like all Internet-era copyright laws) will only have a piddling effect on online infringement. What they will do is make it harder for writers to get fairly paid by publishers.

That's because, to a one, the indie publishers, upstarts, one-writer shops, VC-funded money-fountains, and everything in between, depend on public infrastructure provided by Internet services. They post their book trailers to YouTube. They use free mailing lists, Facebook, Pinterest and Twitter to promote their works. They take in money with Square, or Paypal, or Google Payments. They sell through Amazon Kindle self-publishing systems, or Lulu, or BookBaby. They put their wares in Google Play or the App Store. They rely on Goodreads and book-bloggers to get the word out, and they share their production files on Dropbox and YouSendIt, and get free, book-specific email addresses through Gmail. They buy search keywords on Bing and Google. You get the picture.

### Copyright enforcement

Here's the problem: these are exactly the services that the entertainment industry (and its members in the mainstream publishing industry) expect to bear the costs of copyright enforcement. In lawsuits like Viacom's suit against YouTube, in legal proposals like SOPA, in treaties like the TPP, and in heavily lobbied-for laws all over the world, the entertainment industry has taken the position that if there should be no "safe

harbors” online. If you process payments, you should be sure that none of that money is implicated in illegal file-sharing. If you host message-boards or social media, you must ensure that no infringing content or links are posted to your service. In other words, if you provide a service where all comers can post content, at low or no cost, you are responsible for reviewing tens — hundreds — of millions of individual pieces of content every day, and for removing any that infringe copyright. Of course, this is nonsense. YouTube receives three days’ worth of video every minute. All the copyright experts ever born, or yet to live, could not stem that tide. The only way it could work is if YouTube, Blogger, Twitter, and a thousand related services, all played by the same rules as cable TV, where nothing goes out to the public unless it is explicitly approved, negotiated, and lawyered-over.

#### Scaling back the Internet

In other words, by asking governments to ascribe liability to these “intermediaries” (services that sit between creators and audiences), the entertainment industry is demanding that the Internet be scaled back to something that’ll fit in cable TV’s bathtub. Something where only people with a lot of capital and clout can speak and be heard. Something where big entertainment companies can use their money and power as a wall to stop anyone from challenging their pride of place. When a big star goes into a record-company negotiations, she isn’t limited to saying, “Sorry, that deal’s not good enough, I’ll see what I can get across the street at your competitor.” Now she can say, “That’s not good enough, I can do better on my own, like Trent Reznor did.” Or, “That’s not good enough, I can hook up with a new kind of music business,” like Madonna did. But only if the intermediary liability is small enough to allow all these different kinds of companies to clamor for artists’ attention and products.

When a successful beginner like Amanda Hocking or EL James comes before a big publisher who wants to take her from indie to pro, the worst deal they can offer her has to be better than the best deal she could get for herself, or from one of the new startups.

Put it another way: There’s never been a time when tight controls over distribution were good for artists: fewer labels always means worse deals for musicians; fewer studios

always means worse deals for filmmakers, actors, and other film professionals; fewer publishers always means worse deals for authors.

#### Piracy, obscurity, and income

Tim O'Reilly famously once said "The problem for most artists isn't piracy, it's obscurity." That's true, but it's not the whole truth. These online services are, indeed, places where people infringe copyright a lot\*\*\*\*\*. It's true that being widely pirated can also make you widely known, but you can't eat fame.

In other words, 20,000,000 YouTube views and \$3 will get you a seat on the MTA.

But here's the thing about fame: although it's hard to turn fame into money in the arts, it's impossible to turn obscurity into money in the arts. It doesn't matter how you plan on making your money — selling books or downloads, selling ads, getting sponsorship, getting crowdfunded, getting commissions, licensing to someone else who's figured out how to make money — you won't get the chance unless people have heard of your stuff.

When the entertainment titans of the last century struggle to lock down the Internet, they claim it's to stop piracy and protect artists. But if they shut down the Internet and all the innovation and opportunity that comes with it, who will protect us from them?

# INHERENT VICE:

## BOOTLEG HISTORIES OF VIDEO- TAPE AND COPYRIGHT

Published 2009

by Lucas Hilderbrand



### Copyright and Access

The Hollywood studios were initially wary of home video. If audiences could tape movies and tv shows off the air, studio executives feared that the industry would be devastated by revenue losses. According to this line of reasoning, audiences would stop going to cinemas if they could watch movies for free at home, and advertisers would stop buying airtime for commercials if they thought home viewers would fast-forward through them. As it turned out, of course, neither the theatrical film nor broadcast television industries collapsed, and the studios did gangbusters business because video opened up additional revenue streams and aftermarkets. Home video probably increased film and tv consumption by making it more available. (If any industry was devastated by video, it was the 16 mm educational and industrial film market.) But before the home video market was developed and exploited by the studios, the studios waged litigation against VCRs in the famous *Sony v. Universal* (1976–84) case, and the charge was copyright violation.

Copyright law governs cultural works and creative intellectual property. In the United States, copyright law was enacted early on and was designed in tandem with the U.S. Constitution. It strove to inspire publication (literally, the making public) of books, pamphlets, and newspapers—and later photographs, films, and sound recordings—by protecting authors' or publishers' temporary, near-exclusive rights to profit from such publication. These rights were always conditional—such protection was a reward for sharing insights and arts—and audiences always had vested interests in publica-

tion and implied or judicially determined rights to use published materials. At the core of copyright is a contradiction between the public interest and private profit<sup>21</sup>—a conflict that might be called copyright's inherent vice.

Although home video was at first ostensibly a domestic system for private viewing, the regulation and uses of the technology have been linked to principles of the public interest. Copyright protection, fair-use exemptions, and the public domain were all established for the purpose of fostering a rich public culture. The fundamental concept is that each of these copyright categories—whether offering legal and economic incentives for creating original works or providing protections for others to create derivative works—stimulates artistic production and encourages distribution. In broadcasting, one of the major topics for policy and debate has been the extent to which broadcasters must serve public interests and the extent to which the public has rights of access to information that trump networks' and stations' financial interests. As I suggest in the case study on the Vanderbilt Television News Archive in chapter 3, off-air recording realized new forms of access—historical—that raised contentious issues of whether rights owners, politicians, the public, or intermediary institutions have the right to determine public access.

The principle of access is foundational to both copyright and videotape and in effect unites them in spirit and practice. In 1969 the U.S. Supreme Court proclaimed through its ruling on *Red Lion Broadcasting Co. v. FCC* that audiences have the right of access to information.<sup>22</sup> This interpretation of "access" relies on a fundamental belief that the availability of cultural texts, information, and knowledge to a general audience is a public good that serves the public interest. Although Federal Communications Commission regulations have no jurisdiction over copyright and vice versa, the Court's logic in the *Red Lion* decision indicates an indirect precedent for *Sony v. Universal*. In what became known as "the Betamax case," the Court ruled that "to the extent time-shifting expands public access to freely broadcast television programs, it yields societal benefits," and in effect legalized VCRs.

Perhaps the most famous, ambiguous, and debated of all users' rights under copyright is fair use. Fair use is a general loophole that protects otherwise copyright-infringing duplications of texts for culturally edifying educational, crit-

ical, or newsworthy uses. Fair use defined and defended the standard legal uses of home video, and videotape, in turn, provided the medium through which the Supreme Court set its first precedent on fair use. As I will discuss in more depth in chapter 2, the 1976 U.S. copyright code revision introduced the first statutory fair-use exemption. In 1984 the U.S. Supreme Court ruled in a landmark decision on *Sony v. Universal* that VCRs should be allowed in the domestic market because their dominant uses were fair and many potential ones were non-infringing. The eight-year lawsuit not only highlighted the tensions between copyright propriety and audience desires but also served as a major publicity boost for videotape recorders. Much of the early journalistic coverage of home video specifically addressed the lawsuit and the technology's questionable legal status; thus much of the formative public awareness of home video was articulated in relationship to copyright law—an articulation of technology and policy that resurfaced in relation to online file sharing and clouded speculations about the rise of YouTube.

The interdependence of videotape and statutory fair-use exemptions may have started out as a historical coincidence when both appeared in the 1970s, but through the 1984 Court ruling on the Betamax case, they became mutually constitutive as a matter of public policy. As media scholars argued in retrospect of this ruling, “Sony did more than legalize home taping and ‘time shifting.’ It opened up participation in the project of recording the collective memory of this dynamic nation.”<sup>23</sup> Fair use also remains critically important to videotape for another reason: individual recordings will not survive long enough, physically or technologically, to ever enter the public domain (when works no longer protected by copyright can be reproduced without permission). A tape’s ten-year or twenty-year shelf life before it decays falls far short of the ninety or so years before a work’s copyright expires, and preservative reformatting inevitably distorts the text. When the copyright term outlasts the text or the format, fair use may be the only recourse to accessing and using video-originated works.<sup>24</sup> Furthermore, fair use implies that audiences do not merely copy a preexisting work but make use of it by interpreting it, building on it, reinventing it. VCRs made television viewers into users, and videotapes introduced new uses of television.

At first, copyright regulations seemed to favor magnetic

recording technology's potential benefits rather than clamping down on potential violations. However, many home recording practices that users have become accustomed to were never explicitly protected by written law; rather, they were deemed legal in the absence of litigation or offered shelter through limited statutory exemptions or judicial rulings. As the technology's dominant uses became domestic, consumptive ones—that is, buying and listening to music or renting and watching movies rather than recording one's own copies—the general perception of magnetic tape shifted away from anxieties about its use as a panoptic means of social control and surveillance (keep in mind that tape technology burst into public consciousness through the Watergate scandal and paranoia thrillers) toward its being a more convenient means of entertaining the self.<sup>25</sup> Despite the music industry's attempts in the early 1980s to claim that home recordings were "killing" the music business or Hollywood's assertions that timeshifting constituted televisual piracy, even everyday recordings of copyrighted material quickly seemed to lack any transgressive edge. Magnetic tape lost its threatening taint, and so citizens perhaps began to take its relatively lax regulation for granted.

Copyright law and litigation have been the most prominent official means of regulating video technology, although increasingly the technology has been designed to go even further in restricting uses and access beyond play-back.<sup>26</sup> Restrictive copyright laws, most egregiously the 1998 Digital Millennium Copyright Act (DMCA), have aided and abetted this trend by criminalizing the act of undoing copy-protection hardware or software—even if it is to make otherwise legal or fair uses. These mechanisms are intended to prevent commercial forms of piracy but have seemingly forgotten about important fair and non-infringing uses of reproduction. Together, the law and encryption of digital formats have worked to override many of the fair uses and much of the potential functionality of video; thus, for the time being at least, users can still do more (legally, anyway) with videotape than with digital video, even though the newer formats can offer superior resolution and should allow easier copying and manipulation.

Fair use, I am arguing, is an analog copyright exemption. Fair use is a policy of conditions, ambiguity, and reasonable guesses. Only a judge can say for sure that a particu-

lar instance can be defended as fair use, and even then the Supreme Court has final say. Defined by a set of guidelines and few judicial precedents, fair use in the real world rarely operates in a binary way: yes, this is clearly fair use, or no, this is clearly not. Rather, fair use is inexact, approximate, and fluid. In other words, it's analog. The DMCA and especially extralegal technologies to prevent duplication (such as Content Scramble System encoding on DVDs or the absence of a record button on players) instead operate as binary laws: either it's legal or it's not; either it's functionally possible or it's not. These are distinctly digital ways of regulating users' activities and attempts to copy and share media. As a communications and copyright scholar has suggested, "Fair use is... antithetical to the design of technologically enforced rules."<sup>27</sup> Technological copy guards (often called DRM, or digital rights management) may prevent even the option of fairly cutting, copying, and pasting, and the DMCA makes it illegal to undo these technologies, regardless of the reason for doing so. Of course, DRM is often ineffectual because anything that can be encrypted can be hacked—and often is, though the law isn't quite so easy to bypass. Therefore, although it may seem that DVD has replaced videotape and the DMCA has to some extent overwritten fair use, videotape and fair use offer lessons in progressive media policy and remain essential tools of media access, even in the era of their apparent obsolescence or irrelevance.

#### Digital Dilemmas

Access and aesthetics have changed in the transition from analog to digital media and technologies. Even though the predominant analog home video format, VHS, has certain formal limitations, its contribution to the lives of cinephiles and casual viewers alike must not be discounted just because consumers have enthusiastically abandoned it for DVD, TIVO, and streaming video. Some digital formats have made innovations to make media more portable and to make duplication much quicker, and the standardization of letterboxing and higher resolution make DVDs preferable for film buffs. But there have also been trade-offs, losses, and glitches with the turn toward digital home video. Despite the hype, HDTVs are no more "realistic" than old-school tube televisions; instead they are often set to be supernaturally bright and colorful in

a way that is transfixing rather than authentic. And, of course, digital technologies are nowhere near as perfect as they are purported to be. Despite innovations in terms of resolution, interfaces, duplication, and distribution, digital media are not necessarily improvements on earlier analog media but rather may be more restrictive of use, duplication, and distribution.<sup>28</sup>

Digital networks have enabled the acceleration of access by reducing texts to data. Technological development does not follow a linear evolution, nor, despite celebrations of “new” media, should we think of current technologies as the final, teleological stage of research and development. The hype of digital resolution as “perfect” and preferable to analog lingers on, despite the failure of “virtual reality” to materialize in the early 1990s and more than a decade of blocky, jerky, and stalled streaming images.<sup>29</sup> Furthermore, as technologies have developed, they have typically become more complex and more dependent on devices and decoding to access texts or information. Contrary to the myth of increased immediacy, newer technologies typically mediate more than old ones, and they introduce new challenges for contemporary access and future preservation. The more advanced the technology, the more likely there will be multiple levels of mediation—hardware, delivery device, software, operating system, encryption, et cetera—and the more likely that one or more of these will break down, become obsolete, or be incompatible. Future media historians will likely have more trouble accessing electronic and digital content than indexical and analog materials simply because it will be harder to find the right device, reconstruct the proper version of software, or decode encryption. Probably the biggest myth promoted in the celebration of digital media is the technology’s infallibility; the more dependent on technology and software a file or format is, the less likely it will be to have longevity.<sup>30</sup> Digitization is not preservation. Although plastic digital discs may not disintegrate in the way magnetic tape eventually does, once a file is corrupted or a DVD is scratched, there is almost nothing to be done to restore it. In addition, digital technologies typically become technologically obsolete in less time than it would take a tape to deteriorate. In 2006, librarians and copyright experts assessed that “all digital materials are inherently unstable.”<sup>31</sup> In video history so far, analog formats have outlasted digital ones, regardless of physical durability.

Content and hardware companies have introduced anti-copy technologies, engineered incompatibility between platforms, and accelerated obsolescence—all of which work to inhibit how audiences access and use digital media. When technology fails to prevent copying, licensing agreements and the Digital Millennium Copyright Act legally determine what users can or cannot do. DVDs have not introduced more control over the content when FBI warnings and sluggishly paced animated menus cannot be skipped or discs are difficult to cue to specific moments in the middle of chapters. The menus and chapters dictate how the user interacts with the disc, and pity anyone who loses a DVD player's remote control, since the complete range of command keys is rarely replicated on the deck itself. The VHS user arguably has much more agency in videotape playback, and the tape stays on the spot where the user leaves it, which facilitates not only strategic viewing but also educational classroom or conference clips. Analog media, while slower, degenerative, and bound to tangible storage formats, is comparatively more flexible in terms of what users can do. Engineers, rights owners, and users of digital media have all learned from analog models for both progressive and repressive developments.

Digital copyright protections and technological encryption are premised on digital media's distinction from analog media; digital data can be replicated without change, whereas analog copies exhibit degeneration. Rights owners fear, therefore, that users will be less likely to pay for media if they can easily make digital clones that are the same as the original for free. Through online networks, digital data can also be exchanged rapidly, anonymously, and without analog technology's prerequisite baggage of tangibility—two more factors that have accelerated content sharing. Just as historians and communications scholars warn against technological determinism (the idea that the device determines how it will be used), so progressive legal scholars also argue against what might be called legal determinism: regulations that would likewise inhibit how technologies are designed and what potential uses can be engineered or rigged.<sup>32</sup>

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#### Bootlegging

videotape's formal properties and its fundamental purpose of accessibility. Taping and sharing works can derive from ethical impulses to preserve and provide access to content that may run counter to (and eventually change) the law. While compelling work already exists to advocate for the cultural benefit of appropriation, sampling, and remixing, I suggest that the argument for access should be expanded to include academic and everyday uses of complete works.<sup>33</sup> I advocate certain productive forms of copyright-infringing or legally dubious dubbing while also reflecting on the aesthetics of purloined media.

Bootlegging illuminates the aesthetics of analog videotape because it so often involves multiple generations of reproduction and offers practical models that have challenged, expanded, or provided alternatives to existing intellectual property paradigms. I define bootlegging broadly to include most noncommercial practices of timeshifting, tape dubbing, importing, and sharing of media content that is not reasonably available commercially. Bootlegging functions to fill in the gaps of market failure (when something has not been commercially distributed), archival omissions (when something has not been preserved for historical study), and personal collections (when something has not been accumulated or cannot be afforded). Extending the Supreme Court's Betamax definition of timeshifting, I consider bootlegging to be fair use of video technologies. In the digital video age, bootlegging also includes excerpting and sharing culturally significant or newsworthy corporate media clips. "Fairness," as a word or ideal, suggests both beauty and justice.<sup>34</sup> Fair-use bootlegging can be a beautiful thing.

Despite the often negative or criminal connotations of the term, I use "bootlegging" to reclaim its productively illicit meanings, its intoxicating pleasures, and its amorous relationships between texts and audiences.<sup>35</sup> In distinction, I define "piracy" as commercial duplication and sale of knock-offs of readily available videos.<sup>36</sup> Pirates steal for profit, not for the egalitarian or productive redistribution of culture and information. Though the terms "piracy" and "bootlegging" are often used interchangeably in industry rhetoric, there is a significant distinction between the two as I use them. Admittedly, gray areas and contradictions in my differentiation remain; bootleg vendors (such as those described in the book's first

and second video clips) make money at the same time that they make foreign or obscure tapes available to fans, scholars, and collectors. Yet even in such instances, videotape bootlegging has never really disrupted or threatened the mainstream political and economic power structures. In spite of numerous market misfires and whining about piracy, the technology manufacturers and studios still reap enormous revenues and will surely find new business models to continue doing so.

The Motion Picture Association of America and the Recording Industry Association of America have waged major publicity and legal campaigns against “piracy” in the wake of speculative and actual downturns in the film and music markets as a result of peer-to-peer file sharing and other modes of content reproduction and exchange. Jack Valenti and the MPAA devised rhetoric that suggested that the valuable content industry in the United States would collapse owing to piracy, though there was no actual economic evidence or necessarily even legal grounds for Valenti’s claims; rather, he relied on appeals to morality, patriotism, and fear—an all-too-familiar political strategy for the early years of the twenty-first century. The press, the government, and to a lesser extent the public have too often accepted these warnings without sufficiently distinguishing between piracy and productive, if legally ambiguous, non-infringing media reproduction and sharing. Such campaigns reduce the complexity of copyright to a binary of paid uses and piracy. Especially in educational materials aimed at schoolchildren, attempts to train youth to respect the law actually misrepresent it by eliding concepts such as the public domain, fair use, free use, and first sale—the elements of copyright law meant to benefit society.<sup>37</sup> As one of the most insightful digital copyright scholars argues, such lobbies have “succeeded in persuading a lot of people that any behavior that has the same effect as piracy must be piracy, and must therefore reflect the same moral turpitude we attach to piracy, even if it is the same behavior that we all called legitimate before.”<sup>38</sup> In part, I seek here to shift the discussion away from framing questions of piracy or creativity toward issues of users’ rights, access, and preservation, and from a focus on the digital present and future to the recent analog past. To be quite clear, I am advocating for bootlegging rather than piracy.

Geographically, I have focused this book on the impact and uses of videotape recording in the United States, in part because copyright laws, formats, and market factors are territory specific, but also in part because academic work on “piracy” has typically focused on illegal media circulation “over there” in Asia, Africa, and Eastern Europe while ignoring domestic activities.<sup>39</sup> Yet the entertainment and electronics industries have been working overtime stateside: they have restricted access to, and uses of, content through encryption and have successfully lobbied for laws that make circumventing such encryption illegal. Still, I should note that, perhaps even more than in the United States, video has been seen internationally as a threat to intellectual property claims and local governance—and has served a public good. A study of early VCR adoption suggested that the phenomenon was from the start global and largely facilitated by the black market, whether smuggled (in some cases, strapped to camels’ backs) to elude laws forbidding foreign media or simply to undercut import taxes. Alternately, migrant workers might bring VCRs back to their home countries, thus introducing the technology in places where it was not yet commercially available.<sup>40</sup> Of course, bootlegs imported from overseas to diasporic populations in the United States demonstrate that such borders and distinctions are porous, as suggested in my first video clip (after this introduction).<sup>41</sup> The materiality of the video image in such bootlegs testifies to the distance between audiences and their homelands and to the illicit network that smuggles videos into circulation: “Video decay is especially significant for emigrants and exiles who treasure old, hard-to-get, or bootlegged tapes from ‘back home.’ Because they are so hard to find, these videos quickly lose their status as mechanically reproduced media and become rare, unique, and precious objects.”<sup>42</sup> Here, there, and in between, the contemporary transition from analog to digital video necessitates a retrospective, qualitative consideration of the specific properties and practices of analog videotape before the format becomes obsolete.

Video taping and sharing can be understood as both public and personal. A scholarly study of concert bootleggers suggests that personal live recordings reclaim *popular* music as popular cultural production. “The larger implications of these bootleggers’ accounts is that they help reframe the meaning

of popular culture as an ongoing source of cultural production—one that is constantly renewed and revitalized through individual efforts to seek out personal and social relationships.... Bootleggers recognize themselves as law-breakers, overly-passionate fans, or self-appointed archivists.<sup>143</sup> Another study asserts, “Bootlegs call into question just what rights the public should have in copyrighted but unavailable material.”<sup>144</sup> Yet another proclaims, “An essential element of creativity separates the bootleggers from their piratical cousins.”<sup>145</sup> Analog reproduction changes the content recorded, and these variations can be read as personalizing individual recordings. Bootlegging—the private reproduction of copyrighted content for noncommercial personal, scholarly, creative, and community-building uses—is a dynamic practice where policy, preservation, and personal investments intersect.

At times, copyright restrictions erect barriers between what the law allows and our wants as audiences, our needs as scholars, or our intentions as preservationists. When the law acts against the people rather than for them, or when a text that has shaped our culture or our lives becomes inaccessible, what rights of access do we have? And how do we intervene? Often the best option is bootlegging, even though this covert practice may seem morally dubious or even alter the text itself. In response to an earlier incarnation of this project, Lawrence Lessig challenged me to think about copyright policies beyond fair use, the “analog hole” that has so long protected home taping. How else could one reasonably argue for bootlegging? It was a tough question, one for which I didn’t have a ready answer. In part, this was a problem of my intended historical frame: I was arguing (and still do) for prior interdependencies of fair use and home video, looking at past legal definitions and working through codes that already exist. Upon reading Lessig’s foreword to Kembrew McLeod’s *Freedom of Expression*, I realized that he was challenging me to think beyond copyright as we had known it and to advocate for an alternative, future form of copyright.<sup>46</sup> The law is to be questioned, interpreted, and expanded. This is exactly what the Supreme Court justices did in deciding that recording television programs with a VCR could be considered fair use. And it’s what they have so far failed to do in the age of digital technologies. I look to video recording practices that have reconceptualized copyright in progressive ways. This book, thus, is an ode to analog tapes and the virtues of their vices.



# VANISHING CULTURE: A REPORT ON OUR FRAGILE CULTURAL RECORD

Published 2024

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by Luca Messarra



### I. The Digital Memory Hole

The long history of hardware, software, and media obsolescence, from the papyrus scroll to the Commodore 64, tells us that if archivists and librarians do not actively collect and preserve cultural materials, then they risk being forever lost in the sands of time. Unlike Belloq's hypothetical watch in the sand, digital culture<sup>6</sup> is valuable *now*, and is vanishing from public access at an alarming rate: social media posts are deleted by censors and malicious agents seeking to erase political history;<sup>7</sup> culturally significant journalism such as MTV News,<sup>8</sup> alongside music,<sup>9</sup> films,<sup>10</sup> and television shows,<sup>11</sup> are abruptly taken offline by media conglomerates without explanation; and landmark video games created for old hardware fade from our memory under restrictive and lengthy copyright terms.<sup>12</sup> Furthermore, analog materials such as VHS tapes, 78rpm recordings, and filmstrips are deteriorating moment by moment, and require urgent attention to ensure their survival.

“Historical oblivion is the default, not the exception” to the human record, writes game designer Jordan Mechner in his contribution to this report.<sup>13</sup> Be it natural elements like fire or water, negligent or intentional people, or simple forgetfulness, practically all human expression will disappear or change without human intervention. Only through acts of repair and digitization will materials such as a grandmother’s cookbook, a groundbreaking game ahead of its time, or endangered languages continue to survive, and only through access will their survival prove meaningful to the next generation. In response to the risk of materials falling into oblivion, humanity has built libraries and archives big and small, and

developed rigorous preservation practices, so that the past need not be so easily lost. These institutions have not always collected fairly, nor have they always been accessible.<sup>14</sup> Yet now more than ever, with the help of dedicated individuals and communities, these institutions seek to ethically collect and preserve culture broadly. They also offer digital lending programs, so that anyone in the world with an internet connection can enjoy and learn from the past, not just those with the means to visit a physical location.

But as rights holders increasingly opt for provisional access by way of streaming platforms and temporary licenses, culture is vanishing from public access without any indication that it will return. These distribution methods inhibit the critical ability of individuals and institutions to own, and therefore preserve their historical record, placing public memory in the hands of media conglomerates and their interests. The absence of ownership not only erodes the public's ability to enjoy, learn from, and collaboratively build their own diverse cultural history: it creates an information ecosystem where history can be seamlessly rewritten by revising and deleting public information and popular content.

#### How Did We Get Here?

Corporate interests interfering with the library mission—that is, preserving and making culture accessible to the public—is far from new. Historically, legal protections for crucial library services such as interlibrary loan, electronic reserves for students, photocopying, and reformatting exceptions for patrons with print disabilities, were only secured after publishers attempted (and failed) to challenge these practices in court.<sup>15</sup> As copyright experts Kyle Courtney and Juliya Ziskina wrote in 2023: "The historical conflict between libraries and publishers reveals a predictable pattern. Libraries are fast to adopt new ways of providing greater access to knowledge to their patrons. Publishers react by obstructing libraries' efforts."<sup>16</sup>

Public-serving libraries and archives in the United States came of age and acquired their legal protections over the nineteenth and twentieth centuries, a media environment dominated by print books. The book is a marvel of human engineering: it is sturdy, portable, and easy to mass reproduce; it remains among the best long term data storage media ever created. We have bound works of ink on parchment that are

over a thousand years old, whose data remains nearly as parseable as the day it was first inscribed. Left alone in a temperature-controlled room, a book made today will remain usable for hundreds of years.<sup>17</sup> Cumulatively, these assumptions about book longevity and distribution have informed the way the public and lawmakers generally think about the work that libraries do: putting books on shelves, lending them out, and applying archival adhesive and book tape as needed.

But we no longer live in a print-dominant world. Libraries and archives collect and preserve television broadcasts, films, oral history recordings, ebooks, web pages, social media posts, and more. Yet, anyone who has ever tried to use a floppy disk lately—or who has discovered that their favorite meme has disappeared from Tumblr or TikTok (or that their favorite platform has all together shut down like Vine in 2017)—knows that digital materials tend to become obsolete, disappear, and physically decay far faster than books on bookshelves.<sup>18</sup> As Dale Flecker, former Associate Director for Planning and Systems at Harvard University Library describes, the constantly evolving nature of software and hardware creates a media environment in perpetual need of “conscious effort and continual investment” so as to remain publicly accessible. That effort and investment is the sort of labor-intensive and unprofitable work that caring individuals and public-serving institutions have long demonstrated a willingness to do, even when there is no clear economic gain in the act of preservation.

As the next section of this report will show, publishers across all media have demonstrated time after time that they will not preserve or make their publications commercially available when there is no economic incentive to do so. Worse, they will use the law to shut down non-commercial preservation and accessibility efforts that seek to extend the life of cultural materials.<sup>19</sup> Those activities, unfortunately, make perfect sense for businesses beholden to shareholder interests. After all, the fundamental principle of a large publisher seeking profit and growth is to keep costs as low as possible while keeping sales as high as possible. It is entirely logical for publishers to abandon publications when the economic incentive to continue distributing and preserving them is gone. Further, it makes business sense for rights holders to retain their long copyrights—now lasting the life of the author plus seventy years, or ninety-five years in the case of works

made for hire—in the event that a reissue may one day turn out profitable.<sup>20</sup>

Preserving and making works accessible within a profit-motivated distribution paradigm was manageable for libraries as long as human expression was predominantly published in book form. Over the twentieth century, the law empowered libraries to purchase, lend, and repair books so that they could be made available long after publishers decided to stop distributing them. These laws created a shaky balance between corporate and public interests in cultural preservation: publishers could cease book production whenever they saw fit, and libraries would do the work of collecting and preserving books for future generations, allowing the public to reevaluate the continued preservation of these works in a different historical moment. This balance, predicated upon media ownership, not only benefited the public by giving them access to old works, it also relieved publishers from the burden of keeping authors' works in-print, allowing publishers to focus on bringing new books to life, and giving less commercially successful authors the chance to continue being read.<sup>21</sup>

Opportunities for ownership across all media rapidly decreased over the course of the 2010s as digital content increasingly became distributed through streaming platforms alone, and as publishers' moved toward subscription-based licensing deals for libraries.<sup>22</sup> These changes in distribution have heavily shifted the balance of cultural posterity in favor of publishers. Juliya Ziskina details the crux of this issue, particularly in the case of ebook licensing, as such:

The shift from ownership toward licensing opened the door to the substitution of statutory property rights (such as the right to acquire, use, and dispose of property), replacing them with unilateral contract terms. As a result of this shift, publishers and platforms now routinely attempt to assert control over almost all library activities related to ebooks, including how, where, when, and to whom they can be shared.<sup>23</sup>

Instead of owning copies of digital materials, individuals and public-serving institutions now pay for temporary and conditional access to digital content. Even when consumers hit 'buy' on their favorite platform, what they are most often buying is a limited right to stream that content—using only the publisher's software of choice—with the caveat that the content can be removed or changed at any time.<sup>24</sup> While streaming

may offer convenience for consumers in the present who do not want to buy physical media, it poses much larger problems for the sustainability and possibility of a cultural record built by public interests.<sup>25</sup>

To summarize a few of these problems, specifically around ebooks:<sup>26</sup> proprietary file formats and DRM, coupled with the Big Five publishing houses' partnerships with Apple and Amazon, create ebook monopolies and monopsonies, locking readers into viewing books on their platforms, and preventing readers from engaging in the time-honored tradition of casually lending a good book to a good friend;<sup>27</sup> those platforms pose data privacy issues to consumers by forcing them to view books using software that mines and potentially sells their data.<sup>28</sup> Additionally, publishers offer temporary licenses to libraries (which often cost more than the physical books themselves), forcing libraries with limited funds to make difficult decisions about what content they are willing to acquire and for how long;<sup>29</sup> and in peak Orwellian fashion, publishers have retroactively applied changes to and deleted already-purchased ebooks.<sup>30</sup>

Perhaps above all is a concern for an equitable historical record: when the sole means of accessing culture is through licensing, we leave our cultural memory at the whim of corporate and shareholder interests, who have not hesitated to ax creators and communities from the record when they see no financial gain in their continued availability. Today's distribution practices fail the public, from which the title of "publisher" derives its name. The word "publish" comes from the Latin "publicare," meaning "to show or tell to the people, to impart to the public, make public or common."<sup>31</sup> In the absence of sustained public access, *public-ation* is a misnomer for works distributed in the platform era. What were once publishers might now be more appropriately called data brokers, whose interest is in maximizing profit by limiting public access and collecting user data.<sup>32</sup>

Indeed, the profitable datafication of cultural consumption has already taken over the connected television (CTV) industry (e.g. smart TVs like the Roku TV and its supported streaming platforms) at the expense of individual privacy. In an October 2024 report published by the Center for Digital Democracy titled *How TV Watches Us: Commercial Surveillance in the Streaming Era*, Jeff Chester, executive director at the Center

for Digital Democracy, and Kathryn C. Montgomery, Professor Emerita at American University's School of Communication, detail how "CTV networks and programming services have built far-reaching operations and partnerships to maximize the harvesting of data in order to serve the interests of advertisers."<sup>33</sup> The absence of sufficient government regulations against data collection and the inability for consumers to adequately opt-out of this collection, along with personalized advertising on connected television through the use of generative artificial intelligence, lead the pair to resolutely declare that "advertising and data collection are now the driving force in the connected television industry, shaping all of its operations, influencing its program offerings, and spawning a new generation of channels."<sup>34</sup> Chester and Montgomery's report identifies powerful industries, such as the pharmaceutical and food and beverage industries (alongside various political groups), who have significant interests in this consumer data, and who use it to generate hyper-targeted advertisements.<sup>35</sup> The surveillance threat posed by these televisions is so significant that Chester and Montgomery describe the purchasing of a smart TV as "akin to bringing a digital Trojan Horse into one's home."<sup>36</sup> Unfortunately, these smart TVs, and streaming in general, have become the "dominant way that people get television in the U.S."<sup>37</sup> Because of the monopolistic dominance of streaming giants like Netflix and Disney, alongside massive TV manufacturers like Roku, Samsung, and LG, anyone wanting to view the most popular contemporary cultural productions (or even the daily news) on connected television must also subject themselves to an intrusive data collection and advertising regime.

Publishing proper—that is, public distribution by way of digital ownership and physical media—allows the public the chance to build and preserve their own cultural records beyond corporate and government control, and in some instances, even beyond the control of large public-serving archives.<sup>38</sup> For example, VHS and DVD distributions historically allowed 'cult followings' to emerge around unorthodox films like *Dazed and Confused*, *Donnie Darko*, and *Fight Club*, causing these films to be critically reevaluated as culturally significant long after they originally flopped at the box office.<sup>39</sup> That same process of an independent and passionate public keeping subcultural expression alive cannot happen with media that the public

cannot own. Without physical distribution or digital ownership for individuals and libraries, digital content such as ebooks and audiobooks, streaming-only music, film, television shows, online news, licensed software, and more can completely disappear when licenses expire and when publishers decide that it is no longer profitable (economically and ideologically) to keep that content online.<sup>40</sup> And although content taken offline *might* exist in a publisher's private archive, there is no guarantee that it will ever be available to the public again.<sup>41</sup>

# CAPS LOCK:

HOW CAPITALISM  
TOOK HOLD OF  
GRAPHIC  
DESIGN, AND  
HOW TO ESCAPE FROM IT

Published 2021

by Ruben Pater



# CAPS LOCK



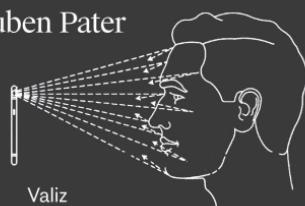
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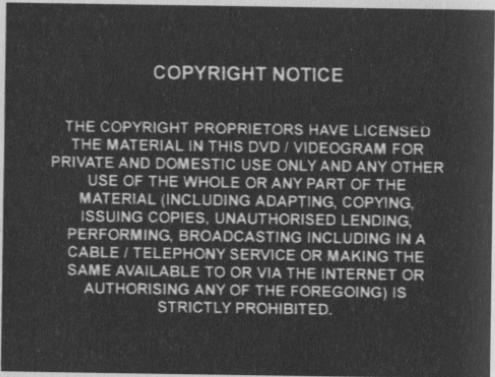


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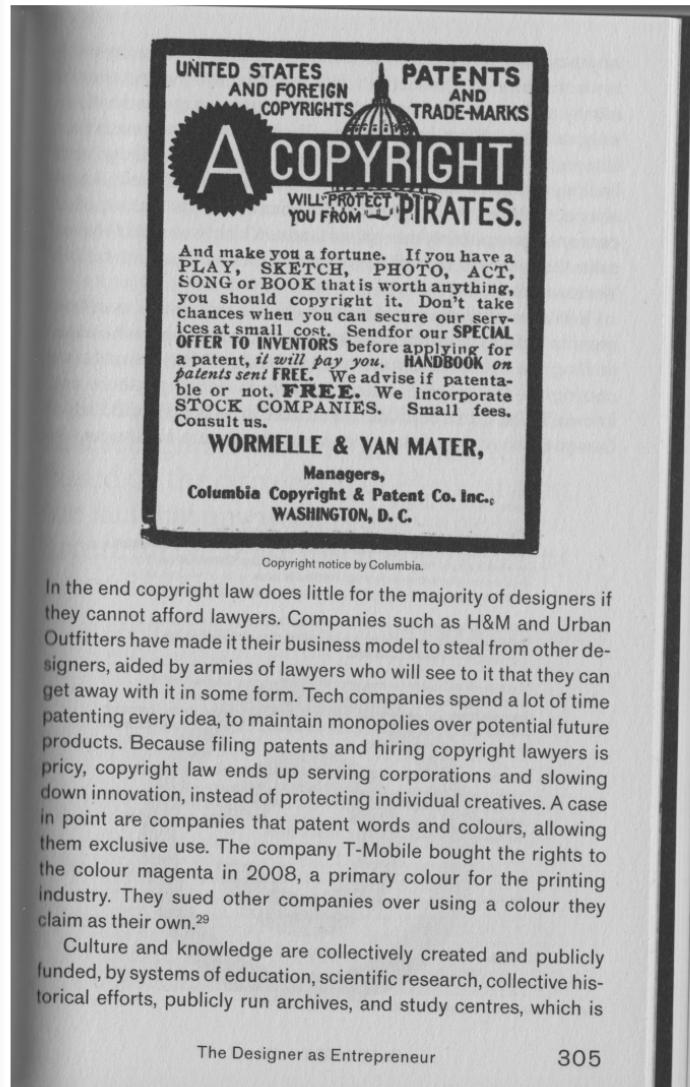
# INTELLECTUAL PROPERTY

Books on graphic design ethics use a lot of paper explaining the protection of intellectual property. Nothing is more sacred for designers than the right to originality, and nothing makes them angrier than others copying their work. Well-known designers employ lawyers to track down cases of copyright infringement.

This fixation on intellectual property is somewhat understandable as the work of graphic designers today is mostly immaterial and produces value through ideas, images, and concepts, which can be easily copied in digital form. Copyright law in itself seems benevolent, if it would protect the author against someone profiting from stealing ideas. There is nothing ethical about someone stealing another's work and profiting from it. However, copyright law doesn't really protect individual designers that well. It mostly hinders the sharing of information and blocks access to knowledge, even information and knowledge that was created publicly.



DreamWorks home entertainment copyright notice, 2001.



In the end copyright law does little for the majority of designers if they cannot afford lawyers. Companies such as H&M and Urban Outfitters have made it their business model to steal from other designers, aided by armies of lawyers who will see to it that they can get away with it in some form. Tech companies spend a lot of time patenting every idea, to maintain monopolies over potential future products. Because filing patents and hiring copyright lawyers is pricy, copyright law ends up serving corporations and slowing down innovation, instead of protecting individual creatives. A case in point are companies that patent words and colours, allowing them exclusive use. The company T-Mobile bought the rights to the colour magenta in 2008, a primary colour for the printing industry. They sued other companies over using a colour they claim as their own.<sup>29</sup>

Culture and knowledge are collectively created and publicly funded, by systems of education, scientific research, collective historical efforts, publicly run archives, and study centres, which is

why they have been called 'intellectual commons'. Like the common lands that offered a collective space for collective making of community and resources, knowledge and culture are created collectively, and are collectively improved by discourse and innovation. Copyright law is a way of privatizing collective knowledge, and limiting access to that knowledge for the purposes of profit, a process not unlike the enclosure of the common lands that expelled peasants from publicly accessible lands. Which is why Max Haiven calls this process of limiting access to knowledge and culture 'enclosure 2.0'.<sup>30</sup>

While capitalism is celebrated for its innovative qualities, patents actively restrict innovation by privatizing and therefore limiting the access to culture and knowledge.<sup>31</sup> By its fixation on copyrights, the graphic design industry is defining culture and knowledge as forms of property that have to be bought and traded. Designers should profit from the works they create, but the current

Dear friends at Linotype!

THIS is indeed an embarrassing situation. To our knowledge the site you refer to AND the activities taking place there does NOT violate SWEDISH law. As a matter of fact I'm quite sure doesn't even violate GERMAN law. You should also be pleased to notice that SWEDISH law, as far as one can tell, conforms to the specifications of the harmonisation directive 2001/29/EC.

But lets cut to core of the problem. The **Pirate Bay** does not in anyway handle your intellectual property or any of the data contained in the designs, NOR do we RELAY such data.

The site, and the tracker, is merely a way of connecting people; kind of what **NOKIA** does. The actual data IS stored on individual users' computers; if horrible crimes of bloody MURDER and such are being committed, AS we speak, it is them who are the criminals. One would not prosecute Nokia just because terrorists use THEIR phones.

However, this activity is not illegal in SWEDEN. There are some more or less relevant cases from the **Swedish Supreme Court**, but I doubt that they would be much of a concern CONSIDERING the current situation we feel that we are obliged to have the torrent on the site until the Swedish law is changed or the Supreme Court rules that what we do is illegal.

Best regards!

JUDAS, on behalf of The Pirate Bay

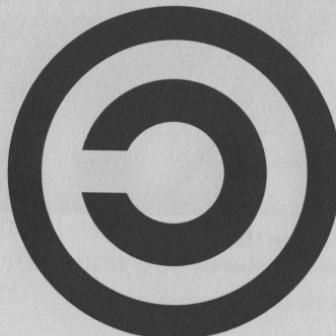
The Pirate Bay letter to Linotype, 2006.

copyright system does not live up to its claim that it serves everyone equally.

There are good alternatives to copyright that believe in the protection and care for intellectual commons. One of these is Creative Commons, a non-profit that offers various systems of open access to knowledge, promoting collaboration and creativity while protecting the creative's right to profit.<sup>32</sup> Another one is Copyleft, a reciprocal license from the software community that looks more at culture and knowledge in the long run. If you license a work as Copyleft, it should be publicly available and everyone is allowed to modify and adapt it, as long as any derivate is also licensed as Copyleft, which means all adaptations are also freely available, and no version can ever be restricted.<sup>33</sup>

OSP calls for a generous artistic practice that recognizes that culture is above all based on the circulation of ideas, and on the fact that any work is derivative by nature, in the sense that it is informed by preceding works.

OPEN SOURCE PUBLISHING



Copyleft logo.



### **The Hacker Ethic**

The data economy has proven to be just as exploitative and proprietary as the manufacturing economy that preceded it. The more digital the work of graphic designers is becoming, the more

The Designer as Hacker

389

the privately owned infrastructure will influence the production process and the aesthetics. The tools that graphic designers use are owned by companies that answer to shareholders: Adobe, Apple, Google, Facebook, and Linotype. They create the code, standards, platforms, colours, and filters that shape a lot of graphic design.

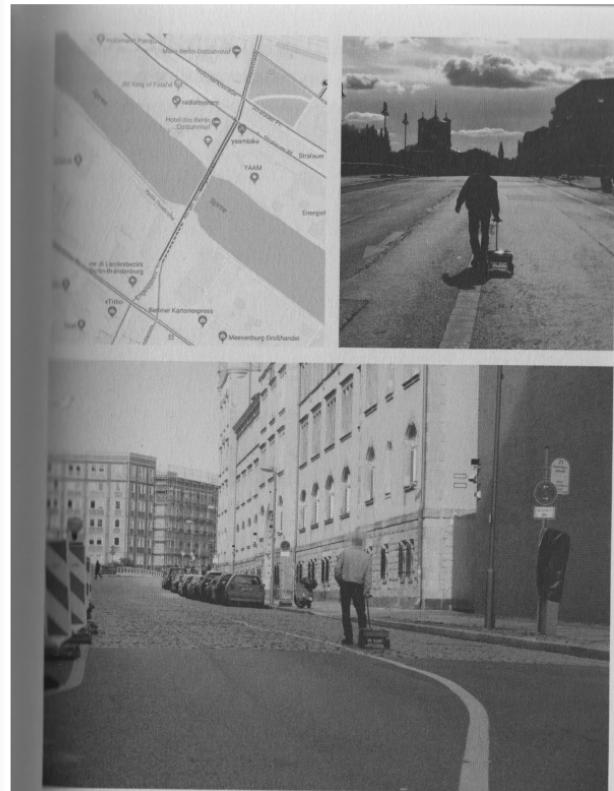
What designers can learn from hackers is that in order to use tools critically, they need to be understood, adapted, and customized. 'Designers need to learn how to write, read, and fix code. They need to get literate before they can call themselves hackers', says Anja Groten from Hackers & Designers.<sup>31</sup> This is why more and more design schools teach coding, so that designers can create their own tools and filters in order to customize their designed output. This makes designers less dependent on preformatted tools from media companies.

Some argue that designers don't need to learn to code in order to understand the tools they use. In his book *New Dark Age*, James Bridle warns that good programmers can be just as uncritical of the economic and social context of technology and that it is more about learning a critical understanding of technology than the skill of coding itself.<sup>32</sup> A good example is the traffic jam that artist Simon Weckert created in March 2020. He noticed that Google Maps uses location data from users to warn for traffic jams. Weckert put 99 smartphones with location tracking in a hand barrow, and walked with it through Berlin. This tricked Google Maps into thinking large buses were jamming the traffic, while there was in fact very little traffic. No matter how 'smart' technology is, a good idea can still outsmart it.<sup>33</sup>

### Open Source

The digital technology available today was developed by sharing source codes and hardware blueprints. Artist and developer Roel Roscam Abbing points out that early social media platforms were developed together with users, such as Twitter where the @ and the # were proposed by users before they became recognizable features.<sup>34</sup> Early computer users were also actively building and programming the platforms. The process of peer production is a form of collective making that is also used for websites like Wikipedia.

Richard Stallman echoes Bridle's concern that it's not about



Simon Weckert, Google Maps Hacks, 2020. Image via [simonweckert.com/googlemapshacks.html](http://simonweckert.com/googlemapshacks.html)

teaching everyone to code, but about open collaboration. 'Either the users control the program, or the program controls the users.' Free/Libre, or open-source software (FLOSS) can do just that. The source code of FLOSS is freely available so others can modify, improve, and redistribute it. Open source doesn't mean that all software should be free, or that the work of programmers has no value. Stallman explains that this is about software 'that respects

## Every non-free program is an injustice

RICHARD STALLMAN, DEVELOPER



Chaos Communication Congress, Leipzig, Germany, 2017.

users' freedom and community'.<sup>35</sup> More and more designers bring the hacker mentality into graphic design, for instance Open Source Publishing (OSP) from Brussels, Belgium. This graphic design collective only uses free and open-source software. One of their activities is designing typefaces with open-source tools, which are released as Libre fonts, 'meaning they are released under libre software licenses that allow modification, re-distribution and use'.<sup>36</sup> In the last chapter you can read more about how OSP makes graphic design using open-source software.

Activism surrounding open-source software reminds us that a reciprocal exchange of knowledge is not a given, but must be defended against continuous attempts at enclosure by capitalism.<sup>37</sup> The software and hardware that is now sold, was in large part collectively built using open-source software, by exchanging ideas and blueprints. Tech companies have understood well how collective sources can be enclosed and exploited. Platforms such as Airbnb and Uber have successfully appropriated resources that were first for free social use, like letting someone use your spare room, or giving someone a ride, and have turned it into the

'sharing economy'. These companies effectively have used a visual language that appears social and community-like, while in fact they are robbing us of our few remaining social potential spaces that we have for equal exchange, while profiting from it. A process that Max Haiven calls 'enclosure 3.0'.<sup>38</sup> This goes to show that these 'commons' where social exchange is possible outside the market, even if it is sharing a room or giving someone a ride, need to be defended against enclosure if we appreciate their social value.

#### Ethical Digital Design

As we have seen, hacker culture provides a valuable guideline for all critical makers—including designers—in the form of what is known as the hacker ethic. Although not limited to one manifesto or text, it is helpful to quote some of the texts associated with it. First the seminal book *Hackers* (1984), in which Steven Levy says: 'Access to computers should be unlimited and total', and that the hacking ethic is about 'all information should be free', and hackers 'should be judged by their skills, not by their background, ethnicity, gender, position, or education'.<sup>39</sup> The second one is from digital activist and designer Aral Balkan, who co-wrote an ethical design manifesto in 2017:

Technology that respects human rights is decentralised, peer-to-peer, zero-knowledge, end-to-end encrypted, free and open source, interoperable, accessible, and sustainable. It respects and protects your civil liberties, reduces inequality, and benefits democracy. Technology that respects human effort is functional, convenient, and reliable. It is thoughtful and accommodating; not arrogant or demanding. It understands that you might be distracted or differently-abled. It respects the limited time you have on this planet.<sup>40</sup>

The Dutch collective Hackers & Designers brings together disciplines for hybrid experiments. Anja Grotens is one of the founders, and writes: 'Hacking is not discipline-specific.' She sees hacking first and foremost as a social activity. 'The technologies we are building and using are created by a vast number of other people'.<sup>41</sup> Hackers & Designers invite both creatives and developers to

## Hacking is a way to emancipate users of technology from being passive consumers to becoming critical makers.

ANJA GRO滕, DESIGNER

experiment in workshops with critical making: a way of engaging with design and technology in a playful manner that challenges ownership of the network. Certain aspects of the hacker have already been appropriated by tech companies and used for profit motives. It is essential that the hacker ethic is not just practiced, but its values should also continuously be defended and propagated.

Designers who are intrigued by the hacking mentality, but don't know where to start: it's a good thing that hackers embrace the digital commons and often share their knowledge. Documentation, tutorials, and instructional videos can be found everywhere on the web for free. A good start are the annual hacker conferences such as Chaos Computer Congress in Germany, and Defcon in the US. All lectures can be viewed for free online at media.ccc.de and media.defcon.org. Artists and designers are regular visitors and speakers, and although some lectures are technically challenging, they often are practical. One of the lectures at Defcon 16 in 2013 explains in detail how to hack outdoor digital billboards.<sup>42</sup> What does the hackers mentality have to offer? Anja Groten from Hackers & Designers sums it up: 'Hacking is a way to emancipate users of technology from being passive consumers to becoming critical makers.'<sup>43</sup>

→ Disnovation.org, Profiling the Profilers, 2018–2019.



# IN DEFENSE OF THE POOR IMAGE

Published 2009

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by Hito Steyerl



The poor image is a copy in motion. Its quality is bad, its resolution substandard. As it accelerates, it deteriorates. It is a ghost of an image, a preview, a thumbnail, an errant idea, an itinerant image distributed for free, squeezed through slow digital connections, compressed, reproduced, ripped, remixed, as well as copied and pasted into other channels of distribution.

The poor image is a rag or a rip; an AVI or a JPEG, a lumpen proletarian in the class society of appearances, ranked and valued according to its resolution. The poor image has been uploaded, downloaded, shared, reformatted, and reedited. It transforms quality into accessibility, exhibition value into cult value, films into clips, contemplation into distraction. The image is liberated from the vaults of cinemas and archives and thrust into digital uncertainty, at the expense of its own substance. The poor image tends towards abstraction: it is a visual idea in its very becoming.

The poor image is an illicit fifth-generation bastard of an original image. Its genealogy is dubious. Its filenames are deliberately misspelled. It often defies patrimony, national culture, or indeed copyright. It is passed on as a lure, a decoy, an index, or as a reminder of its former visual self. It mocks the promises of digital technology. Not only is it often degraded to the point of being just a hurried blur, one even doubts whether it could be called an image at all. Only digital technology could produce such a dilapidated image in the first place.

Poor images are the contemporary Wretched of the Screen, the debris of audiovisual production, the trash that washes up on the digital economies' shores. They testify to the vio-

lent dislocation, transferrals, and displacement of images—their acceleration and circulation within the vicious cycles of audiovisual capitalism. Poor images are dragged around the globe as commodities or their effigies, as gifts or as bounty. They spread pleasure or death threats, conspiracy theories or bootlegs, resistance or stultification. Poor images show the rare, the obvious, and the unbelievable—that is, if we can still manage to decipher it.



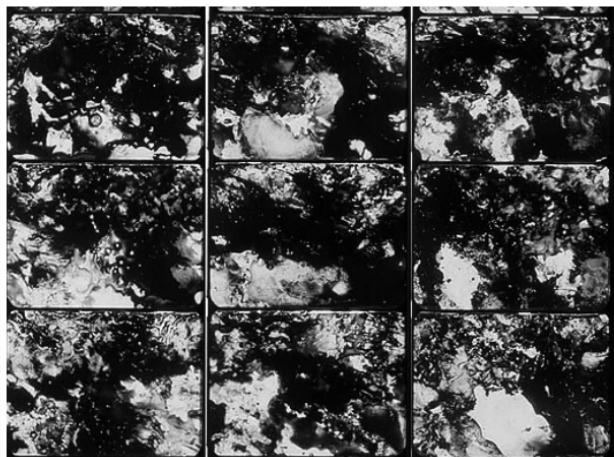
Shoveling pirated DVDs in Taiyuan, Shanxi province, China, April 20, 2008. From [here](#)

### 1. Low Resolutions

In one of Woody Allen's films the main character is out of focus.<sup>1</sup> It's not a technical problem but some sort of disease that has befallen him: his image is consistently blurred. Since Allen's character is an actor, this becomes a major problem: he is unable to find work. His lack of definition turns into a material problem. Focus is identified as a class position, a position of ease and privilege, while being out of focus lowers one's value as an image.

The contemporary hierarchy of images, however, is not only based on sharpness, but also and primarily on resolution. Just look at any electronics store and this system, described by Harun Farocki in a notable 2007 interview, becomes immediately apparent.<sup>2</sup> In the class society of images, cinema takes on the role of a flagship store. In flagship stores high-end products are marketed in an upscale environment. More affordable derivatives of the same images circulate as DVDs, on broadcast television or online, as poor images.

Obviously, a high-resolution image looks more brilliant and impressive, more mimetic and magic, more scary and seductive than a poor one. It is more rich, so to speak. Now, even consumer formats are increasingly adapting to the tastes of cineastes and esthetes, who insisted on 35mm film as a guarantee of pristine visuality. The insistence upon analog film as the sole medium of visual importance resounded throughout discourses on cinema, almost regardless of their ideological inflection. It never mattered that these high-end economies of film production were (and still are) firmly anchored in systems of national culture, capitalist studio production, the cult of mostly male genius, and the original version, and thus are often conservative in their very structure. Resolution was fetishized as if its lack amounted to castration of the author. The cult of film gauge dominated even independent film production. The rich image established its own set of hierarchies, with new technologies offering more and more possibilities to creatively degrade it.



Nine 35mm film frames from Stan Brakhage's *Existence is Song*, 1987.

## 2. Resurrection (as Poor Images)

But insisting on rich images also had more serious consequences. A speaker at a recent conference on the film essay refused to show clips from a piece by Humphrey Jennings because no proper film projection was available. Although there was at the speaker's disposal a perfectly standard

DVD player and video projector, the audience was left to imagine what those images might have looked like.

In this case the invisibility of the image was more or less voluntary and based on aesthetic premises. But it has a much more general equivalent based on the consequences of neoliberal policies. Twenty or even thirty years ago, the neoliberal restructuring of media production began slowly obscuring non-commercial imagery, to the point where experimental and essayistic cinema became almost invisible. As it became prohibitively expensive to keep these works circulating in cinemas, so were they also deemed too marginal to be broadcast on television. Thus they slowly disappeared not just from cinemas, but from the public sphere as well. Video essays and experimental films remained for the most part unseen save for some rare screenings in metropolitan film museums or film clubs, projected in their original resolution before disappearing again into the darkness of the archive.

This development was of course connected to the neoliberal radicalization of the concept of culture as commodity, to the commercialization of cinema, its dispersion into multiplexes, and the marginalization of independent filmmaking. It was also connected to the restructuring of global media industries and the establishment of monopolies over the audiovisual in certain countries or territories. In this way, resistant or non-conformist visual matter disappeared from the surface into an underground of alternative archives and collections, kept alive only by a network of committed organizations and individuals, who would circulate bootlegged VHS copies amongst themselves. Sources for these were extremely rare—tapes moved from hand to hand, depending on word of mouth, within circles of friends and colleagues. With the possibility to stream video online, this condition started to dramatically change. An increasing number of rare materials reappeared on publicly accessible platforms, some of them carefully curated (Ubuweb) and some just a pile of stuff (YouTube).

At present, there are at least twenty torrents of Chris Marker's film essays available online. If you want a retrospective, you can have it. But the economy of poor images is about more than just downloads: you can keep the files, watch them again, even reddit or improve them if you think

it necessary. And the results circulate. Blurred AVI files of half-forgotten masterpieces are exchanged on semi-secret P2P platforms. Clandestine cell-phone videos smuggled out of museums are broadcast on YouTube. DVDs of artists' viewing copies are bartered.<sup>3</sup> Many works of avant-garde, essayistic, and non-commercial cinema have been resurrected as poor images. Whether they like it or not.



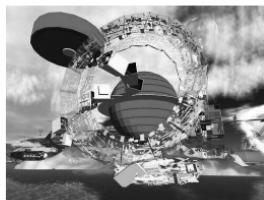
### 3. Privatization and Piracy

That rare prints of militant, experimental, and classical works of cinema as well as video art reappear as poor images is significant on another level. Their situation reveals much more than the content or appearance of the images themselves: it also reveals the conditions of their marginalization, the constellation of social forces leading to their online circulation as poor images.<sup>4</sup> Poor images are poor because they are not assigned any value within the class society of images—their status as illicit or degraded grants them exemption from its criteria. Their lack of resolution attests to their appropriation and displacement.<sup>5</sup>

Obviously, this condition is not only connected to the neoliberal restructuring of media production and digital technology; it also has to do with the post-socialist and postcolonial restructuring of nation states, their cultures, and their archives. While some nation states are dismantled or fall apart, new cultures and traditions are invented

and new histories created. This obviously also affects film archives—in many cases, a whole heritage of film prints is left without its supporting framework of national culture. As I once observed in the case of a film museum in Sarajevo, the national archive can find its next life in the form of a video-rental store.<sup>6</sup> Pirate copies seep out of such archives through disorganized privatization. On the other hand, even the British Library sells off its contents online at astronomical prices.

As Kodwo Eshun has noted, poor images circulate partly in the void left by state-cinema organizations who find it too difficult to operate as a 16/35-mm archive or to maintain any kind of distribution infrastructure in the contemporary era.<sup>7</sup> From this perspective, the poor image reveals the decline and degradation of the film essay, or indeed any experimental and non-commercial cinema, which in many places was made possible because the production of culture was considered a task of the state. Privatization of media production gradually grew more important than state controlled/sponsored media production. But, on the other hand, the rampant privatization of intellectual content, along with online marketing and commodification, also enable piracy and appropriation; it gives rise to the circulation of poor images.



Chris Marker's virtual home on Second Life, May 29, 2009.

#### 4. Imperfect Cinema

The emergence of poor images reminds one of a classic Third Cinema manifesto, *For an Imperfect Cinema*, by Juan García Espinosa, written in Cuba in the late 1960s.<sup>8</sup> Espinosa argues for an imperfect cinema because, in his words, “perfect cinema—technically and artistically masterful—is almost always reactionary cinema.” The imperfect cinema is one that strives to overcome the divisions of labor within class society. It merges art with life and science, blurring the distinction between consumer and producer, audience

and author. It insists upon its own imperfection, is popular but not consumerist, committed without becoming bureaucratic.

In his manifesto, Espinosa also reflects on the promises of new media. He clearly predicts that the development of video technology will jeopardize the elitist position of traditional filmmakers and enable some sort of mass film production: an art of the people. Like the economy of poor images, imperfect cinema diminishes the distinctions between author and audience and merges life and art. Most of all, its visuality is resolutely compromised: blurred, amateurish, and full of artifacts.

In some way, the economy of poor images corresponds to the description of imperfect cinema, while the description of perfect cinema represents rather the concept of cinema as a flagship store. But the real and contemporary imperfect cinema is also much more ambivalent and affective than Espinosa had anticipated. On the one hand, the economy of poor images, with its immediate possibility of worldwide distribution and its ethics of remix and appropriation, enables the participation of a much larger group of producers than ever before. But this does not mean that these opportunities are only used for progressive ends. Hate speech, spam, and other rubbish make their way through digital connections as well. Digital communication has also become one of the most contested markets—a zone that has long been subjected to an ongoing original accumulation and to massive (and, to a certain extent, successful) attempts at privatization.

The networks in which poor images circulate thus constitute both a platform for a fragile new common interest and a battleground for commercial and national agendas. They contain experimental and artistic material, but also incredible amounts of porn and paranoia. While the territory of poor images allows access to excluded imagery, it is also permeated by the most advanced commodification techniques. While it enables the users' active participation in the creation and distribution of content, it also drafts them into production. Users become the editors, critics, translators, and (co-)authors of poor images.

Poor images are thus popular images—images that can be made and seen by the many. They express all the con-

tradictions of the contemporary crowd: its opportunism, narcissism, desire for autonomy and creation, its inability to focus or make up its mind, its constant readiness for transgression and simultaneous submission.<sup>9</sup> Altogether, poor images present a snapshot of the affective condition of the crowd, its neurosis, paranoia, and fear, as well as its craving for intensity, fun, and distraction. The condition of the images speaks not only of countless transfers and reformatting, but also of the countless people who cared enough about them to convert them over and over again, to add subtitles, reedit, or upload them.

In this light, perhaps one has to redefine the value of the image, or, more precisely, to create a new perspective for it. Apart from resolution and exchange value, one might imagine another form of value defined by velocity, intensity, and spread. Poor images are poor because they are heavily compressed and travel quickly. They lose matter and gain speed. But they also express a condition of dematerialization, shared not only with the legacy of conceptual art but above all with contemporary modes of semiotic production.<sup>10</sup> Capital's semiotic turn, as described by Felix Guattari,<sup>11</sup> plays in favor of the creation and dissemination of compressed and flexible data packages that can be integrated into ever-newer combinations and sequences.<sup>12</sup>



Thomas Ruff, jpeg rl104, 2007

This flattening-out of visual content—the concept-in-becoming of the images—positions them within a general informational turn, within economies of knowledge that tear images and their captions out of context into the swirl of permanent capitalist deterritorialization.<sup>13</sup> The history of conceptual art describes this dematerialization of the art object first as a resistant move against the fetish value of visibility. Then, however, the dematerialized art object turns out to be perfectly adapted to the semioticization of capital, and thus to the conceptual turn of capitalism.<sup>14</sup> In a way, the poor image is subject to a similar tension. On the one hand, it operates against the fetish value of high resolution. On the other hand, this is precisely why it also ends up being perfectly integrated into an information capitalism thriving on compressed attention spans, on impression rather than immersion, on intensity rather than contemplation, on previews rather than screenings.

#### 5. Comrade, what is your visual bond today?

But, simultaneously, a paradoxical reversal happens. The circulation of poor images creates a circuit, which fulfills the original ambitions of militant and (some) essayistic and experimental cinema—to create an alternative economy of images, an imperfect cinema existing inside as well as beyond and under commercial media streams. In the age of file-sharing, even marginalized content circulates again and reconnects dispersed worldwide audiences.

The poor image thus constructs anonymous global networks just as it creates a shared history. It builds alliances as it travels, provokes translation or mistranslation, and creates new publics and debates. By losing its visual substance it recovers some of its political punch and creates a new aura around it. This aura is no longer based on the permanence of the “original,” but on the transience of the copy. It is no longer anchored within a classical public sphere mediated and supported by the frame of the nation state or corporation, but floats on the surface of temporary and dubious data pools.<sup>15</sup> By drifting away from the vaults of cinema, it is propelled onto new and ephemeral screens stitched together by the desires of dispersed spectators.

The circulation of poor images thus creates “visual bonds,” as Dziga Vertov once called them.<sup>16</sup> This “visual

bond" was, according to Vertov, supposed to link the workers of the world with each other.<sup>17</sup> He imagined a sort of communist, visual, Adamic language that could not only inform or entertain, but also organize its viewers. In a sense, his dream has come true, if mostly under the rule of a global information capitalism whose audiences are linked almost in a physical sense by mutual excitement, affective attunement, and anxiety.

But there is also the circulation and production of poor images based on cell phone cameras, home computers, and unconventional forms of distribution. Its optical connections—collective editing, file sharing, or grassroots distribution circuits—reveal erratic and coincidental links between producers everywhere, which simultaneously constitute dispersed audiences.

The circulation of poor images feeds into both capitalist media assembly lines and alternative audiovisual economies. In addition to a lot of confusion and stupefaction, it also possibly creates disruptive movements of thought and affect. The circulation of poor images thus initiates another chapter in the historical genealogy of nonconformist information circuits: Vertov's "visual bonds," the internationalist workers pedagogies that Peter Weiss described in *The Aesthetics of Resistance*, the circuits of Third Cinema and Tri-continentalism, of non-aligned filmmaking and thinking. The poor image—ambivalent as its status may be—thus takes its place in the genealogy of carbon-copied pamphlets, cine-train agit-prop films, underground video magazines and other nonconformist materials, which aesthetically often used poor materials. Moreover, it reactualizes many of the historical ideas associated with these circuits, among others Vertov's idea of the visual bond.

Imagine somebody from the past with a beret asking you, "Comrade, what is your visual bond today?"

You might answer: it is this link to the present.

## 6. Now!

The poor image embodies the afterlife of many former masterpieces of cinema and video art. It has been expelled from the sheltered paradise that cinema seems to have once been.<sup>18</sup> After being kicked out of the protected and often protectionist arena of national culture, discarded from com-

mercial circulation, these works have become travelers in a digital no-man's land, constantly shifting their resolution and format, speed and media, sometimes even losing names and credits along the way.

Now many of these works are back—as poor images, I admit. One could of course argue that this is not the real thing, but then—please, anybody—show me this real thing. The poor image is no longer about the real thing—the originary original. Instead, it is about its own real conditions of existence: about swarm circulation, digital dispersion, fractured and flexible temporalities. It is about defiance and appropriation just as it is about conformism and exploitation.

In short: it is about reality.

# BOOTLEGGING IN THE MUSIC INDUSTRY: A NOTE

Published 2001

by Alireza Jay Naghavi  
& Günther G. Schulze



### 3.1. Bands' attitudes toward bootlegging

As of today, it is still controversial whether bootlegging in general or only commercial bootlegging hurts the bands, if at all. That includes the bands themselves as bands' attitudes towards bootlegs vary considerably.

One approach is to directly fight bootlegs. For instance Bob Dylan and his record company Columbia officially released part of his bootleg "The Great White Wonder" as "The Basement Tapes" to abandon the bootleg market for it (Heylin 1994: 4247). The sales of the officially release version of the album were also very successful pointing towards a lack of correlation between demand for legitimate releases and bootlegs sales (<http://www.bootlegs.comhist.html>). Likewise, Frank Zappa licensed his record company to release a few of his bootleg recordings with the original bad quality bootleg sound and cover as "Beat the Boots."

Grateful Dead and other bands such as Phish used an alternative, more liberal strategy of fighting commercial bootlegs.<sup>18</sup> They allowed audience recording in their concerts as long as the music was not recorded for profit purposes. The idea was to let the fans obtain their live concert recordings for free, which should dry up the market for commercial bootleggers.

### 3.2. Copyright protection, pirating, and bootlegging

For a welfare assessment of copyright protection, the negative static effects of copyright protection need to be weighed against its positive dynamic effects. The static

effect is that the protected artistic product or the intellectual property receives only suboptimal-dissemination, i.e. it is underconsumed. Given that a product has been produced, it is optimal from a welfare point of view to sell it at its marginal cost, which is typically very low.<sup>19</sup> Yet, if it were sold at marginal costs it would not have been produced in the first place (provided the producer anticipated its sales price). The reason is that the production of artistic products and intellectual property incurs a large fixed cost component which requires above marginal cost pricing, at least average cost pricing, if it was to break even. Copyright protection puts the producer in a monopolistic situation for the duration of the copyright thereby ensuring positive profits. This establishes an incentive to produce innovations, but at the same time reduces consumption compared to a non-monopolistic situation. The optimal copyright protection balances the effect of increased incentives to produce market innovations from higher protection against the reduced consumption from it at the margin (Breyer 1970, Braunstein et al. 1979). This trade off has a time dimension as analyzed in the determination of the optimal patent duration (Nordhaus 1969, Tandon 1982), as well as a geographical dimension which has been studied to determine the optimal geographical coverage of a copyright (Deardorff 1995).<sup>20</sup>

Copyright issues including copyright violations in the arts have been extensively analyzed (e.g., O'Hagan 1998, sect. 4.3, Towse 1999 and the literature cited). In case of the music industry the traditional view holds that pirated CDs crowd out legitimate sales because they are direct substitutes for official releases and they are cheaper. Production costs are about half of the costs for legitimate CDs because pirates select only successful albums and therefore avoid marketing risk, free ride on the official advertisement and save the royalties (Burke 1996). Thus, pirating leads to a loss of royalties for the artists and of profits for the record companies, but increases the consumer surplus. An optimal copyright protection for artistic creations against pirating could then be calculated just as in the case for intellectual property. While the above considerations already suggest that absolute copyright protection may not and typically will not be optimal from a world welfare perspective, it is questionable whether copyright protection raises welfare at all.<sup>21</sup> If it does,

the question remains under which conditions a violation of copyrights (which might be limited in duration or geographical coverage) will actually harm producers. A more recent literature has identified situations in which pirating actually leads to enhanced profits for producers of intellectual property which implies no dynamic efficiency losses from copyright violations.

Such situations can arise in the presence of network externalities (Katz and Shapiro 1986), when the value of intellectual property such as computer programs depend on the overall user base, both legal and illegal (*inter alia* Reavis Conner and Rumelt 1991, Givon et al. 1995). Such a positive network externality exists because an increased user base raises the utility each individual user derives from the software: people can exchange files, ask for help, reduce learning costs as tutorials are available etc. If pirating increases the overall user base, the number of legitimate users may actually increase together with pirating due to this externality (Reavis Conner and Rumelt 1991). This has been shown for the diffusion word processor and spreadsheet software in the UK where pirating generated 80% of new software buyers (Givon et al. 1995).<sup>22</sup>

Producers may also indirectly appropriate some of the benefits from copying, if the increased demand for copies allows the producer to increase the price of the originals that are being copied as in the case of library subscriptions of professional journals (Liebowitz 1985, Besen and Kirby 1989). This presupposes that price discrimination is possible: library journals are more highly priced than copies for individual subscribers. Frey (2000) makes a similar argument for arts: He claims that copying produces a 'propagation effect' which makes the artist more renown and thereby allows her to charge higher prices for subsequent works.

In order to establish the welfare effects of *bootlegging*, we need first to assess whether bootlegs erode the monopoly power of the bands and their record companies by actually diverting demand from their officially released music to bootlegged music of the particular band. If that is not the case, bootlegged bands and their producers are not harmed. Furthermore, we have to consider the possibility that bootlegging increases the demand for legitimate CDs through positive network externalities. Only then can we

determine whether bootlegging is welfare deteriorating or welfare improving, depending on the actual level of copyright protection.

If bootlegs crowded out official sales we would have to weigh the increased choice set of consumers and increased profits of commercial bootleggers minus reduced profits of the bands and their record companies (static gain) against the dynamic losses of reduced incentives for the production and marketing of new artistic creations by the bootlegged bands. If, however, bootlegs do not crowd out official sales, there is no conflict between static gains and dynamic losses (as there are none) and bootlegs are welfare-improving as they increase consumer rents.<sup>23</sup> If bootlegs rather increase legitimate sales, dynamic gains are realized in addition to the described static gains.

Of course, in the absence of bootlegs consumers would have spent their expenditure for (commercial) bootlegs on other products, whether artistic or not. The entailed profit shifting is merely a redistribution between producers and does not constitute a net loss for the society, but since the consumers of bootlegs prefer to buy bootlegs it increases their overall utility and thus overall welfare (in the static sense).

For an overall welfare assessment we are thus concerned with the question as to whether the bootlegged band and its record company lose from being bootlegged, which depends on whether their official sales are being crowded out by bootlegs. This in turn depends on the quality and the price of the bootlegs as compared to the official releases.

### 3.3. Do bootlegs crowd out or increase legitimate sales?

As seen in section 2.1 and confirmed by many bootleggers the sound quality is regularly well below that of the official releases due to inferior recording technology. The only exceptions maybe soundboard recordings; but even if the sound quality were comparable with official releases the price would have to be below the price for official CDs to make up for increased risk. Then, bootlegs might crowd out official sales and therefore hurt the record companies (as is the case for pirated CDs). Given that the bootleg sound quality is considerably lower, the price differential would have to be even greater. Table 2 compares prices of legitimate CDs

Table 2. Price differentials of bootlegs and legitimate CDs

Band	Authorized internet shops					
	Tower records			Worldwide		
	Titles	Freq. prices	Titles	Amazon	Freq. prices	CDNOW
Grateful Dead	41	\$9.99, \$13.99	48	\$11.49, 12.99, 13.49	45	\$11.49, 12.99, 13.49
Pink Floyd	39	\$13.99	30	\$12.99	25	\$12.99
Elvis Presley	121	\$9.99, 13.99	126	\$11.49, 12.99, 13.99	137	\$11.49, 12.99, 13.99
Rolling Stones	47	\$13.99	50	\$13.49, 13.99	47	\$13.49, 13.99
Led Zeppelin	17	\$13.99	27	\$12.99	20	\$12.99
Bob Dylan	50	\$9.99, 13.99	53	\$9.49, 11.49	51	\$9.49, 11.49
R.E.M.	41	\$13.99	12	\$11.49, 12.99	22	\$11.49, 12.99
Bruce Springsteen	22	\$9.99, 13.99	22	\$11.49	20	\$8.38, 11.49
Frank Zappa	30	\$11.99, 13.99	77	\$11.49, 12.99	79	\$11.49, 12.99
U2	76	\$9.99, 13.99	20	\$11.49, 13.99	19	\$11.49, 12.58

Table 2. *Continued*

Band	Unauthorized bootleg internet shops							
	USA				Singapore			
	Tunnel Records		Electric Music		Kiss The Stone		Music Specialist	
	Freq. Titles	Freq. prices	Freq. Titles	Freq. prices	Freq. Titles	Freq. prices	Freq. Titles	Freq. titles
Grateful Dead	137	\$19.24	28	\$25.95 (CDR 19.95)	22	\$19.99	33	\$22
Pink Floyd	80	\$21.24	15	\$25.95 (CDR 19.95)	7	\$19.99	48	\$22
Elvis Presley	221	\$24	0	—	4	\$19.99	24	\$22
Rolling Stones	338	\$19.24	28	\$25.95 (CDR 19.95)	13	\$19.99	68	\$22
Led Zeppelin	153	\$22.24	12	\$25.95 (CDR 19.95)	4	\$19.99	25	\$22
Bob Dylan	310	\$22.24	24	\$25.95 (CDR 19.95)	15	\$19.99	128	\$22
R.E.M.	97	\$21.24	6	\$25.95 (CDR 19.95)	5	\$19.99	15	\$22
Bruce Springsteen	260	\$22.24	23	\$25.95 (CDR 19.95)	16	\$19.99	100	\$22
Frank Zappa	24	\$21.24	1	\$25.95 (CDR 19.95)	0	—	1	\$22
U2	114	\$21.24	18	\$25.95 (CDR 19.95)	19	\$19.99	52	\$22

Prices refer to a regular, single CD unless indicated by (2) which refers to a double CD. Frequent prices cover more than 80 percent of the supply for each internet store.

Prices refer to November 17, 1999.

Tower Records: <http://www.towerrecords.com>

Amazon: <http://www.amazon.com>

CDNOW: <http://www.cdnnow.com>

URLs of internet shops available upon request

and commercial bootleg CD for a representative selection of bands. Note that we include Grateful Dead who allowed non-commercial bootlegs as well as Zappa and Dylan who fought bootlegs. The selection also includes some of the most bootlegged classic bands and also more modern well-known bands to show the generality of our argument.

Tower Records, CDNOW and Amazon are among the biggest legal internet stores who sell authorized official releases. Their prices are compared to representative illegal bootleg stores chosen from USA, Japan, and Singapore to show that the results do not vary geographically. The selection has been made from the few existing internet bootleg stores. The internet shops found that resided in other countries were either immediately closed down at the time of writing or only carried products from one band.<sup>24</sup>

The overall picture is clear: commercially bootlegged CDs are considerably more expensive and have a worse sound quality than officially released CDs. This combination makes bootlegs collectors' items rather than substitutes for legitimate CDs. This is in stark contrast to pirated CDs which are always substantially cheaper than the legitimate CDs but have the same quality. In other words, bootleggers cater to a market segment which the official record companies mostly choose to ignore "hardcore fans" who buy low quality music of their favorite bands in addition to the legitimate records. In effect, bootlegs constitute a case of price discrimination over a range of products and the question arises why record companies do not do this themselves thereby effectively draining the bootleg market. In principle they could release competing live CDs of every bootlegged concert at a competitive price even though they would have to pay royalties, because the mark up on bootleg prices over legitimate CDs (which include royalties) is substantial. In fact they have done so at times by releasing 'unplugged' and live concert albums (see also section 3.1). In other words, because record companies always have the option to release a live album that would outprice the competing bootleg and have superior quality, the existing commercial bootlegs cannot constitute a profit opportunity that was illegally taken away from bands and their record companies.<sup>25</sup>

In contrast to the commercial bootlegs, non-profit bootlegs are much cheaper than the legitimate CDs. Their effec-

tive price includes costs for the medium of storage (CD-R or tape) and for shipping and rarely a small fee. Since they are lower in quality and in price, they might potentially crowd out official sales, as individuals might go for the low-price option instead of buying the higher priced legitimate CD. Presumably, however, this effect is extremely small because people interested in (illegal) low-price options will prefer pirated CDs (CD-Rs) over bootlegs as their quality is much higher. We have now established that bootlegs do not harm the bands or their record companies as they do not crowd out official sales and therefore do not reduce the monopoly power created by the copyright. Could, on the contrary, bootlegs actually benefit the bands through positive network externalities (see above)? Those could occur if the number of records of a certain band in circulation, both legal and illegal, determine how renowned a band is, and thereby reduce information costs and attract new customers for legitimate CDs. If that was true bootlegs would increase legitimate purchases. The idea behind this is that stars in the arts are created through the interaction of individuals the more people already know a certain artist, the easier it is for other people to acquire artist-specific knowledge (Adler 1985). Due to this snowball effect, stars may be born just because initially people happen to know them a little better than their competitors of equal talent. This translates into initially only somewhat lower search costs for people interested in this art form, an easier build-up of consumption capital and thus into higher marginal utility of consuming the art of a certain artist (Becker 1996).<sup>26</sup>

Unlike the case of software such network externalities will at best be very small for bootlegged music. The reason is that bootlegs will not increase the 'user base' for the music of a particular band because they are harder to find and have a less favorable price-quality mix than legitimate records. They are thus purchased only by 'hardcore fans' as a complement to the legitimate records. Those people, however, need not be convinced of the quality of their favorite bands and will convince others regardless, whether they have access to bootlegs or not.



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by Alireza Jay Naghavi  
& Günther G. Schulze



# Copy This Book

An artist's guide  
to copyright

Eric Schrijver et al.

115

Eric Schrijver

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**116**

## 4.2. An Ongoing Arms Race: Protecting Through Technology

The art of protecting from copying predates even copyright itself. Map-makers, for instance, would add “trap streets” (streets that did not exist) and dictionaries and directories would include fictitious entries. In this way, they could prove their competitors had copied them. The practice of adding identifying information to a work still exists today. In addition, contemporary works often include technological measures to make them harder to copy.

### Digital rights management

The digital world has made it easier than ever to create reproductions and copies. Indeed, a computer needs to make copies in order to function. Viewing an image online means copying it from the internet server to your own hard disk, then from the hard disk to the random-access memory (RAM), from which it is copied to the graphical processing unit, which sends instructions to the screen about which pixels get which colour. The EU had to add a copyright exception for such “temporary acts of reproduction”, otherwise each of these copies would constitute an infringement. ■

Interestingly, as the trade of digital goods has evolved, not all kinds of copies have been equally loved by publishers. If I want to play a computer game, I need to put a copy of that game on my hard disk. But if I copy those files

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Article 5.1.

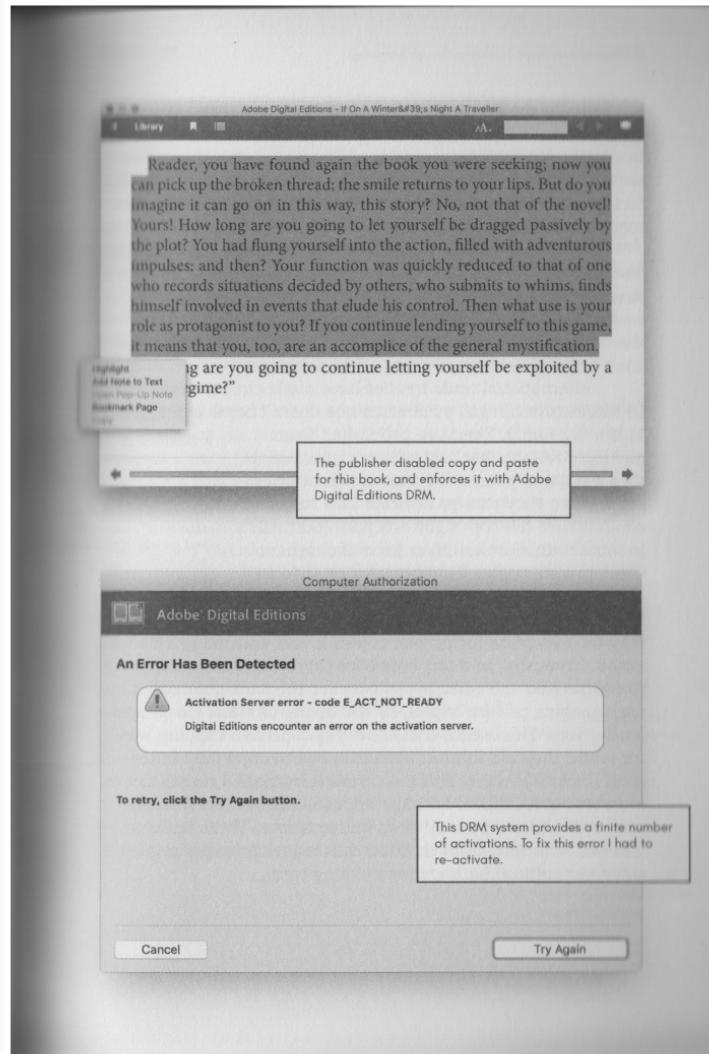
on a CD for a friend, the publisher may not be happy.

Publishers are on a constant search for technological solutions that prevent the kind of copies they don't like. This used to be called "copy protection." Computer games and other software were some of the first goods to receive such protection, as were VHS tapes followed by DVDs and Blu-ray discs. Today, the preferred appellation is "digital rights management," which sounds slightly more neutral.

Digital rights management (DRM) is a layer of software added to a media file to make it harder to copy. In general, the file is encrypted and requires a code or key to be decrypted. This code needs to be installed on all devices (computers, ebook-readers, mp3-players, smartphones, etc.) that can read the file in question. The most prevalent model today has the user connect to an online service that allows for the activation of the device by way of an encryption key. This key is personal and coupled to an account linked to the service. Thus, often there is a maximum number of devices that may be activated. The idea is that if the file is copied it is useless as the key is individual. Three examples of such schemes across apps, ebooks, software and music are Apple ID, Amazon Kindle and Adobe Digital Editions.

As an artist, does it make sense to use DRM techniques? You might not always have a choice. Publishing an app on Apple's App Store, for example, immediately means you must follow Apple's code-signing procedures. You might also work with a publisher who demands a specific DRM technology. If you have a say in it, though, you should consider the negative implications DRM can have for your public.

The problem with DRM is that, by definition, it puts a burden on the public. The file you sell will be accessible only when tied to a certain account (that the buyer could potentially lose access to) and a certain brand of device (whereas one day they might switch to another brand). There was a rumour Bruce Willis sued Apple over the clause in the iTunes end-user license agreement (EULA) that prevents him from transferring songs bought on iTunes Store to his children when he dies. Willis did



not actually sue but iTunes does prohibit transferring licenses, even in case of death, as do Google Play and Amazon Kindle. Ironically, if your file were ever to be pirated, the encryption would need to be broken, and the file shared by pirates will in fact be more useful to users than that which paying customers receive.

Another question is: Does DRM help to stop piracy? It is hard to tell. Most of the movies and books found through file-sharing sites had originally employed some form of DRM, which had to be reverse-engineered before the file could be shared. It seems, then, that those originally uploading the files have no trouble circumventing DRM measures.

International trade treaties have made circumventing DRM measures illegal, even when one doesn't break copyright. This is troubling. Users are prohibited from making a reliable back-up of a work for which they paid, and potentially shut out from accessing it when they change devices. This seems to conflict with the copyright exception that exists in most countries that gives users the right to make private copies. However, for most forms of DRM it's possible to copy the file without a key to the encryption: it's the access that is complicated. That's why the exception for private copies is still deemed to be honoured. Ironically, in many countries there is a system in place to compensate the cultural industry for the damages caused by users making private copies, by the taxing of blank CD-Rs and hard drives. This means users now pay a private copying levy for works they are in most cases allowed to copy only in the most limited of ways. These measures also pose a real threat to museums and cultural heritage organisations. Most DRM systems authenticate by way of an online server. These servers will not be around forever. DRM thus makes it harder to preserve our cultural heritage for the long term.

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Article 6.1.

### The logic of the leak

The first publication of a work of art is a moment associated with rituals, whether it's a gallery opening, a movie premiere or a book launch. These rituals remain important, even as artists move to share more and more of their artistic process through social media, public rehearsals and residencies. There is a reason why one of the moral rights is the right of divulgation: the right of the artist to decide when they are ready to share their work with the world. The ritual of making something public is an occasion for you to shape the reception of your work, a moment to work towards in order to create momentum.

A leak occurs when someone else makes your work public before you do. Not only does this mess with the public momentum you were planning for, it might also expose a version of your work that's not final and is not properly representative. Of course, it does happen that a leak is orchestrated by an artist and/or their publisher. Before a work is published, copies of it will already circulate the mastering engineer will hear the record, the copy editor will read the novel. Traditionally, journalists would get early access so they can publish a review at the time of release. Since these days these copies are all probably digital, and it's easy to copy and distribute digital files, leaking is much easier than it was in the past.

To avoid leaks, Beyoncé released her fourth studio album without any prior notice. ■ She started a trend. When it comes to avoiding leaking, artists and their collaborators can use every trick in the secrecy book. Keeping a secret is a lost art and it has both social and technological dimensions. Artists writing potential best-sellers, such as George R. R. Martin, apparently write their books on a computer that is not connected to the internet. ■

■ Anita Elberse and  
Stacie Smith, *Beyoncé*.

■ CONAN, *George R. R.  
Martin Still Uses A DOS  
Word Processor*.

### Piracy

Everything changes once a work is released to the public as you no longer have any physical control over the copies of the work. At this point it becomes easier for others to make copies and distribute them. This is what is commonly referred to as piracy.

You have a financial interest in combatting piracy when copied works are also available through channels that would make you money and when the pirate would have bought the work if they didn't find the pirated copy. If a pirate who would not have paid for your work downloads it, it is still a net positive: someone else in the world is affected by your work. If the pirate would have been ready to buy the work were they not able to find it through a file-sharing site, you can consider it a loss.

As an artist, you can even have an interest in piracy. That is the case if you and your publisher have conflicting interests, for example, when your work is not available anymore or if it's paying few royalties. In that case, your main concern is getting the work out there. I know a musician that uploaded the back-catalogue that their record label was not willing to re-issue; I know a scientist who uploaded the monograph that their publisher made prohibitively expensive. As academic publishing tends to be especially expensive to access and pays little or no royalties it's the perfect case for self-piracy. A piracy/self-piracy hybrid lead to the Sci-Hub platform. Launched by Kazakhstani scientist Alexandra Elbakyan, whose university could not afford the subscription fees of academic journals, the platform relies on academics inside richer universities sharing their passwords. Paper by paper, a database is constructed.

When talking about piracy, both industry lobbyists and file-sharing advocates tend to give a skewed view of the equation. The industry lobby will often give numbers about the financial damage of file-sharing. To arrive at these numbers, they typically calculate the volume of illegal file sharing over a certain period and calculate how much these media would have

cost were they to have been bought through official channels. This seems unfair because the amount of media bought by any given consumer, were there to be no file-sharing at all, would be not at all similar to the amount they acquire at no cost. The amount of money any consumer is able to spend on media has a ceiling. The potential losses of piracy, then, are the difference between what a consumer spends on media and the maximum of what they would be willing to spend.

In contrast, advocates of file-sharing networks often claim there is no real financial loss in file-sharing. There are studies, for example, that suggest those who download a lot of music through file-sharing also spend more than the average through official channels. This might be true but there are still two important considerations. First, the market for recorded music and books has been on the decline since the 1999 "Napster moment." Not all of this is the fault of piracy. It also has to do with the fact that our cultural consumption habits changed with the evolution of the internet. The internet offers texts to read, photos to browse, music to listen to without us having to pay. Major media conglomerates now make their products available for free. If I want to listen to the latest Rihanna single, I just visit her YouTube channel. It is not a long stretch, though, to imagine that file-sharing has a role in the falling profits of cultural goods traded on the market.

Second, while file-sharing might be proportionally related to a consumer's spending habits, this is only true on a macro and not a micro level. That is to say, if a user is able to pirate the work of one artist and not the work of another, they may choose to spend their money acquiring the work they could not pirate. Again, any given person only has a given amount of money to spend. Thus, for you as an artist there can still be financial benefit in your work not being available on file-sharing networks.

A typical example: "Using various measurements, the researchers came up with a figure of 47.8 billion illegal downloads of movies in 2015, which was multiplied by the average cost of legal movie consumption," in Hugh Stephens, *Calculating the Economic Impact of Counterfeiting and Piracy: It's in the Hundreds of Billions*.

Karl Bode and Emanuel Maiberg, *Study Again Shows 'Pirates' Tend to Be The Biggest Buyers of Legal Content* cites studies from 2018, 2012, 2011, 2009, 2005 and 2002.

### Getting illicit copies removed

If file sharing is detrimental, can you actually prevent the circulation of illicit copies? It depends. When it comes to file-sharing services that use a peer-to-peer structure, it is hardly possible. The sites that provide access to such files (torrents) are more like library catalogues than libraries they provide the metadata that allow users to exchange files amongst themselves. These catalogues are easily copied and once a certain tracker goes down, you immediately see proxies spring up. The upside is that for a file to remain available, users need to seed it—that means that torrent-based file-sharing sites are mainly reliable for recent, popular content. When it comes to having copies removed, one might have more success with content that is shared on websites, especially if they are based in Europe or the United States.

When undertaking such actions, you will probably want to work with a rights-collecting organisation if represented by one. If you are independent, you can work with a lawyer, however you are not obliged to do so. For more information, see chapter 4.1, *This Coin Has Two Sides: Suing and Getting Sued*.

Is the file hosted on a web service like YouTube, Scribd, Tumblr? The website will have a mechanism in place to report copyright infringements. Is the copy hosted on a website? Check for contact information. Most website-maintainers don't hesitate to remove material when rights-holders ask. As the rights-holder, you are also within your rights to ask for compensation. Whether to do so is another question.

Even more important than removing infringing copies is making sure your work is available legally. The legal options for downloading and streaming media have multiplied in the last 10 years. You want your audience to find a way to legally access your work when they search for it on the web or on legal streaming platforms. Push your publishers to be everywhere and try to make sure your contract reverts rights to you if the publisher doesn't exploit the work properly.

### Finding copies of your work

Technological innovations can help finding online copies. Create a Google alert for your name and the name of works you have published. Through an email message or an RSS feed you can keep up to date with new mentions of your work online. With images, one can do a reverse image search with Google Images or TinEye: Upload an image and see if versions of it exist elsewhere online.

### Watermarks and metadata

Most file formats allow the adding of extra information about their content: metadata. In many cases it is hard to identify the rights-holder for a given image but the metadata can provide such information. If you already allow others to reuse your work, for example through a Creative Commons license, the metadata can make this clear as well. Whatever program you used to author a file will in most cases also allow you to edit its metadata.

Unfortunately, web services like Facebook and Twitter routinely remove metadata from user-uploaded images, presumably to save bandwidth. As far as I understand, this is actually illegal in the EU under the same ruling that forbids reverse-engineering digital rights management implementations, although I don't think anyone has yet taken legal steps to address this.

You can also add information about the work's author in the medium itself. A book has its author directly on the cover; a video has credits. The tradition of shout-outs in music can be seen as a way to add a form of in-line credits to the medium of music. Photographic images in most cases do not reveal the identity of the creator. This is why photographers sometimes add visual watermarks with their name. If you want to do this, have a look at what your peers are doing. It can be an efficient

way of getting your name out there, but if in your scene no-one adds watermarks it could appear presumptuous to do so.

### Social DRM

Some online publishers use a less intrusive form of DRM dubbed “social DRM.” This means adding some identifying information about the buyer to the digital document. The buyer might have their email address printed in the corner of the PDF pages, for example. To consumers, this approach is vastly preferable to the standard DRM implementations. You can copy the file between devices as you like, even exchange it within your social circle. As your name is attached to the file, however, you will presumably be more careful with it than with a completely DRM-free file. If a file does get out into the file-sharing networks, the legal requirement will still be on the rights-holders to prove the consumer shared the work deliberately.

### The choice in this case

As a user, I really dislike digital rights management that locks down files, even if I don’t mind social DRM. I’m the kind of person who keeps a neatly-organised media library, with me for a decade and a half now, while I move between many kinds of devices and operating systems. DRM never translates seamlessly. It used to be one of the reasons I still bought CDs. Today, I’m lucky that there are plenty of websites where I can buy uncompressed, DRM-free sound files. When it comes to books, I should also vote with my wallet and only buy paper books or ebooks without DRM. Luckily, about half of the publishers in the Netherlands use social DRM instead of the technical kind. Some publishers, like the English publisher of science fiction and graphic novels Tor Books, pride themselves on not including any DRM. However, sometimes I can only find a DRM’ed version of an ebook. I could understand why

someone would be tempted to remove the DRM as soon as they'd buy the book, even if that's not a legal thing to do. Since I could make the decision myself for the electronic version of this book, I went with no DRM. I figured that I'm good enough at search-optimisation to make my version come up first. And that it will take a while before other copies start circulating: it will be after sales on my part have already peaked, I figure. Let's hope I'm right!





