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Frames from the Framers: How America's Revolutionaries Imagined Intellectual Property

Lewis Hyde

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FRAMES FROM THE FRAMERS : HOW AMERICA'S REVOLUTIONARIES IMAGINED INTELLECTUAL PROPERTY

Lewis Hyde*

ABSTRACT

The men who framed the U.S. Constitution had inherited from the past several ways of thinking about cultural creations. The dominant metaphor in England for many years had compared creative work to the harvest of a landed estate. (“His Brain, which was his Estate, had as regular and different Produce as other Men's Land,” wrote Joseph Addison of an author friend.) The estate metaphor was bounded by two others, however: commonwealth and monopoly. For some, the fruits of creativity should be “common stock,” as free and general as air or water, and therefore the estate in question should not be a private holding but more like the old agricultural commons. For others, private estates were fine, but no one should monopolize their fruits. Copyright and patent were understood to be monopolies, and unchecked monopolies were understood as social evils.

Such was the discursive field available to men like Madison, Jefferson, and Adams. The latter part of the essay argues that the Founders resolved the tension between commonwealth and monopoly through a civic republican model that allowed for private ownership so long as intellectual property was not held in perpetuity but given, after a short time, to the public. The Constitutional proposition, therefore, is that intellectual property should ultimately be a republican estate, an intangible equivalent of tangible *res publicae* (roads, bridge, harbors), or of the Republic itself.

Keywords: copyright, monopoly, commons, framing, civic republicanism

* Fellow at the Berkman Center for Internet & Society; Richard L. Thomas Professor of Creative Writing, Kenyon College; author of *The Gift: Imagination and the Erotic Life of Property* (1983), and *Trickster Makes This World* (1998).

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Table of Contents

I: "Leeches have sucked the commonwealth"	4
II: The Framers' Estate	16
Sources	33

I: “Leeches have sucked the commonwealth”

The linguist George Lakoff has been insisting for some years now that progressives need to improve the way they frame their issues. Conservatives have become very good at framing--”the death tax,” “partial-birth abortion,” “the ownership society”--and, Lakoff argues, once a debate is joined in terms set by the frame, the debate is lost. You can speak of taxation as a way for groups to empower themselves toward worthy ends (schools, bridges, libraries), or you can speak of taxation as an oppressive tool of Big Government. When you let the debate begin in the Big Government frame, you never get your library funded.

If we turn from death and taxes to intellectual property and the public domain we’ll see that the entertainment industry has also been very good at framing its issues. Here is a typical assertion: “There’s no difference in our mind between stealing a pair of shoes in a shoe store and stealing music on-line. A theft is a theft is a theft.” If in fact there is a difference between downloading a digital MP3 file and stealing a pair of shoes this “theft frame” has neatly erased it and sealed the erasure with a tautology.

Many people think that there is a difference, of course, but what alternative frame might reveal it? In what imaginative or discursive universe should we be having our discussion about file sharing? Is a song really a pair of shoes? What is the apt rhetoric here? What metaphors should guide us?

My project in this essay is to suggest answers to these questions by looking at how the generation of thinkers who founded the United States imagined what we now call intellectual property. They inherited a long history of such imaginings, of course, and it will help to begin by sketching some of the models that they themselves might have found at hand.

The oldest model, I suspect, is one that takes the fruits of human creativity to be gifts from the gods, the muses, or the ancient ones and, as a corollary, takes it that such works therefore should not be bought and sold (nor can they be exactly forged, plagiarized, or stolen). Such was the traditional understanding for medieval Christians, their dictum being *Scientia Donum Dei Est, Unde Vendi Non Potest*--“Knowledge is a gift from God, consequently it cannot be sold.” [Hesse 28] To sell knowledge was to traffic in the sacred and thus to engage in the sin

of simony. Reformation Protestants were particularly sensitive to simony, having charged the Catholic church with the buying and selling of ecclesiastical preferments and benefices. Martin Luther said of his own created works, “Freely have I received, freely I have given, and I want nothing in return.”¹ [Hesse 28-29]

I suppose that in the present moment if you were a Lutheran choir director who download hymns for your congregation and the music industry sued, saying that the work had been copyrighted and that “theft was theft,” you ought to be able to shift the frame by replying: “simony is simony.” I doubt that you’d find much support in the American legal tradition, however, even in its early years. Reformation ideas about knowledge had been considerably altered by the time the founders framed their own.

The Enlightenment and the emergence of a middle-class public sphere stand between the Reformation and the American Revolution. In the seventeenth century, the idea of divine origins begins to be replaced or at least augmented by the humanist idea that creativity builds on a bounty inherited from the past, or gathered from the community at hand. Sir Isaac Newton famously spoke of himself as having stood “on the shoulders of Giants.” The phrase comes from a letter that he wrote to Robert Hooke in 1675, the context being a debate with Hooke about who had priority in arriving at the theory of colors. Newton manages to combine humility with an assertion of his own achievement, writing:

What Des-Cartes did was a good step. You have added much several ways, & especially in taking the colors of thin plates into philosophical consideration. If I have seen further it is by standing on the shoulders of Giants. [Merton 31]

The sociologist Robert K. Merton wrote an amusing book, *On the Shoulders of Giants*, in which he shows that this famous phrase did not originate with Newton; it was coined by Bernard of Chartres in the early twelfth century, the original aphorism being “In comparison with the

¹ Something along the same lines can be found in less theistic cultures. In *The Analects*, Confucius writes, “I have transmitted what was taught to me without making up anything of my own. I have been faithful to and loved the Ancients.” [Alford 29] To honor the past was a consistent virtue for a thousand years in Imperial China; thus to copy the work of those who came before was a matter of reverence rather than theft. Said the fifteenth-century artist Shen Zhou, “if my poems and paintings...should prove to be of some aid to the forgers, what is there for me to grudge about?” [Alford 34]

ancients, we stand like dwarfs on the shoulders of giants.” The image was a commonplace by the time Newton used it, his one contribution being to erase any sense that he himself might be a dwarf.

Newton’s self-conception aside, Alexander Pope’s praising couplet--“Nature and nature’s laws lay hid in night; / God said Let Newton be! and all was light”--shows that in the popular imagination no humanist sense of debt to one’s forebears ever wholly replaced the idea that divine forces were at work. At the same time, after the Reformation those forces were thought to be concentrated in certain heroic individuals, geniuses visited by a spark of celestial insight. In a 1774 speech made during Parliamentary debates over literary property, Lord Camden offered an evocative description of how we should conceive of created work if we begin with the assumption that creative individuals have been touched by a “ray of divinity”:

If there be any thing in the world common to all mankind, science and learning are in their nature *publici juris* [belonging to the public by right], and they ought to be as free and general as air or water. They forget their Creator, as well as their fellow creatures, who wish to monopolize his noblest gifts and greatest benefits.... Those great men, those favoured mortals, those sublime spirits, who share that ray of divinity which we call genius, are intrusted by Providence with the delegated power of imparting to their fellow-creatures that instruction which heaven meant for universal benefit; they must not be niggards to the world, or hoard up for themselves the common stock. [Camden 999]

Combining that Providential ray with his “great men” theory allows Camden to move from individual talent to a wider, common good. Figuring talent as among God’s “noblest gifts” also allows the link to all the other commodious gifts of creation, such as air and water. In Roman law those things whose size and range make them difficult if not impossible to own--all the fish in the sea, the seas themselves, the atmosphere--belong to a category of *res communes*, common things. To that list Camden is adding the fruits of science and learning (once they have been made public), and thus produces a frame that has descended into the present moment. In a Supreme Court opinion from 1918, Justice Louis Brandeis declared that “The general rule of law is, that the noblest of human productions--knowledge, truths ascertained, conceptions, and ideas--become, after voluntary communication to others, free as the air to common use.” Brandeis’s final phrase reappeared in 1999 in the title to a law review article by Yochai Benkler arguing that

the First Amendment should constrain the current push to extend copyright to areas that have been in the public domain for centuries. Camden's theological justification for treating ideas as if they were "air or water" may have eroded in the last 200 years, but the useful category of *res communes* still persists.

Not all early modern writers and thinkers shared Camden's free and open view of "the common stock." An oppositional group of metaphors appeared early on, one that began not with scientific giants and providential rays but with the puzzle of how to free creative talent from its dependence on patronage. From this distance in time we would also say that what was at stake was the problem of how to create a public sphere, a realm, that is, of thought and deliberation independent of the government, the aristocracy, and the church. Whatever the reason, early in the eighteenth century we begin to hear from authors who, even as they joined with others in speaking of noble gifts and sublime spirits, felt no need to distance themselves from the commercial book trade. An author without a patron needs to earn his keep and might not trouble himself so much with rumors about God's position on selling the fruits of imaginative labor.

The German dramatist Gotthold Lessig knew the rule Martin Luther had declared; Lessig reproduced it as "Freely hast thou received, freely thou must give!" and then dismissed it: "Luther, I answer, is an exception in many things." Lessig himself was involved in early movements to free the middle class, and writers especially, from subservience to the nobility. Why, he asks, should "the writer...be blamed for trying to make the offspring of his imagination as profitable as he can? Just because he works with his noblest faculties he isn't supposed to enjoy the satisfaction that the roughest handyman is able to procure?" [Hesse 34]

In England probably the prime spokesman for the commercial position was the novelist Daniel Defoe. In the period just prior to England's first true copyright act, the 1710 Statute of Anne, Defoe published both a pamphlet and a series of essays in defense of authors having "exclusive Right to the Property of published books." [M. Rose AO 35] When it came to offering reasons for this position Defoe repeatedly drew his metaphors from family life. The pirating and printing of other men's work is "every jot as unjust as lying with their Wives, and

breaking-up their Homes.” [M. Rose *AO* 35] After all, a later essay explained, “A Book is the Author’s Property, ‘tis the Child of his Inventions, the Brat of his Brain; if he sells his Property, it then becomes the Right of the Purchaser; if not, ‘tis as much his own, as his Wife and Children are his own.” [M. Rose *AO* 39]

Defoe’s familial analogy never caught on, however, probably because it becomes awkward when carried to its logical end. A man might sell the brat of his brain, yes, but he isn’t supposed to sell an actual brat, nor a wife for that matter. Partisans of individual rights to literary property, in any event, soon dropped all talk of women and children and turned instead to land, a man of genius being pictured as the owner or steward of an estate from which he harvests a marketable crop. Joseph Addison, writing at the same time as Defoe, said of an author friend, “His Brain, which was his Estate, had as regular and different Produce as other Men’s Land.” [cited M Rose *AO* 40; *Tatler* 101,1 Dec. 1709] Mark Rose, whose book *Authors and Owners* contains many such examples, reproduces a wonderful extended metaphor along these lines from Arthur Murphy, a playwright but also a lawyer much involved with legal wrangling over literary property. To cite but one fragment:

The ancient Patriarchs of Poetry are generous, as they are rich: a great part of their possessions is let on lease to the moderns. *Dryden*, beside his own hereditary estate, had taken a large scope of ground from *Virgil*. Mr. *Pope* held by copy near half of *Homer’s* rent-roll.... The great *Shakespeare* sat upon a cliff, looking abroad through all creation. His possessions were very near as extensive as *Homer’s*, but in some places, had not received sufficient culture. [M. Rose *AO* xiii]

This revisits the idea that moderns stand indebted to the ancients, but rather than figuring the relationship in terms of pigmies and giants we now get tenants who rent on various terms from freeholders.

As Rose explains, above all “it was on the model of the landed estate that the concept of literary property was formulated.” [M. Rose *AO* 7] It was soon an eighteenth-century commonplace. “The mind of a man of Genius is a fertile and pleasant field, pleasant as *Elysium*, and fertile as *Tempe*...,” wrote Edward Young in his 1759 *Conjectures on Original Composition*. [Young 9] “There are some low-minded geniuses,” wrote Catharine Macaulay in 1774, “who

will be apt to think they may, with as little degradation to character, traffic with a bookseller for the purchase of their mental harvest, as opulent landholders may traffic with monopolizers in grain....” [M. Rose (Duke) 82]

The estate metaphor splits nicely at one point during late eighteenth-century Parliamentary debates over laws governing literary property, Justice Joseph Yates once arguing against perpetual ownership by saying that while an author could surely own his own manuscript, publication made the work a gift to the public. “[W]hen an author prints and publishes his work, he lays it entirely open to the public, as much as when an owner of a piece of land lays it open into the highway.” [M Rose (Duke); & see C. Rose, “Comedy”]

In this instance, created works once they have begun to circulate are not like private estates but like public highways (or more precisely like land made public for having been used as a highway). They are not shoes in a shoe store but rather the sidewalks and roadways that enable the store to be in business in the first place. As such they belong to yet another Roman category of property, *res publicae*, things such as roads and harbors, bridges and ports that belong to the public and are open to them by operation of law. This phrase, *res publicae*, is also of course the root of *republic*, that form of governance in which the government belongs to the people as roads might belong to the people. [See C. Rose “Comedy”]

To simplify the argument so far, early-modern debates over intellectual property appear to have been framed in two ways. The frame we might call “common stock” or “free as the air” took up the old idea of a gift of God and preserved it in a form that honored individual talent. Divine power sometimes seems to be replaced by the gathered wisdom of the human community (as in Newton’s bow to giants past and present), though it is just as easy to say that theism and humanism augment one another: even those who reap what others have sown may still imagine God to be the source of the original seed.

The second frame does not necessarily conflict with the religious background of the “common stock” frame, but its point of departure is decidedly of this world, more focused on the problem of freeing individual talent from patronage and also, therefore, more at ease with

commerce. Here the dominant metaphor was the landed estate, an image that had the advantage, for partisans of strong intellectual property rights, of borrowing from people's assumptions about real estate. "We conceive [that] this property is the same with that of Houses and other Estates," declared London booksellers when first threatened with a limit to the term of their copyrights. [M Rose AO 44] They beg the question, of course, of what exactly we assume such property entails (there are many kinds of estates, as we shall see in the next section), but as with most compelling frames, the intuitive response is what matters, not complexities hidden beneath the surface. Shouldn't all property, even a bookseller's copyright, be "safe as houses"?

These two--the commons and the estate frames--were widespread in the centuries preceding the American Revolution. They do not, however, bring us to the end of our story; there was yet a third frame that regularly stood alongside these and gave more complex meaning to each. It has come up in passing in some of what we have already read, though it probably doesn't strike the modern ear with the resonance it must have carried some centuries ago. Listeners in 1774 would have found a range of associations at hand when Lord Camden spoke of those who would "monopolize [God's] noblest gifts." The same is true of the language in which Catherine Macaulay chooses to speak of "mental harvest." Macaulay actually stands in opposition to Lord Camden; the sentence I cite from her comes from a pamphlet published to dissent from his denigration of the commercial side of publishing (he had claimed that "Newton, Milton, Locke" never would have trafficked with "a dirty bookseller" [Cadmen col 1000]); nonetheless she joins her adversary in worrying about the figurative "monopolizers in grain." Monopoly is the third frame in this tradition and it can, it seems, threaten any harvest, no matter if it's gathered from a commons or from a freehold.

Monopoly had a marked historical meaning for early theorists of intellectual property, seventeenth-century Puritans having begun their argument with royal power over exactly this issue. As the historian and statesman Thomas Babington Macaulay explains in his *History of England*, Puritans in the House of Commons long felt that Queen Elizabeth had encroached upon the House's authority to manage trade having, in particular, taken it "upon herself to grant patents of monopoly by scores." [I 66] Macaulay lists iron, coal, oil, vinegar, saltpetre, lead,

starch, yarn, skins, leather, and glass, saying that these “could be bought only at exorbitant prices.” [I 66]

Macaulay doesn't list printing in his *History*, but it was the case that in the late sixteenth century the Queen's printer, Christopher Barker, held monopoly rights to the Bible, the *Book of Common Prayer*, and all statutes, proclamations, and other official documents. [Hesse 30] And Macaulay *does* mention monopoly in his 1841 Parliamentary speech in opposition to a proposed extension to the term of copyright. “Copyright is monopoly, and produces all the effects which the general voice of mankind attributes to monopoly,” he said, asking rhetorically if the Parliament wished to reinstate “the East India Company's monopoly of tea, or ... Lord Essex's monopoly of sweet wines”? [Macaulay (1841) 198]

The understanding of copyright as monopoly was not Macaulay's invention; it was almost as old as copyright itself. In 1694 John Locke--a strong supporter of property rights in other respects--had objected to copyrights given by government license as a form of monopoly “injurious to learning.” [Locke 208] Locke was partly concerned with religious liberty, the laws in question having been written to suppress books “offensive” to the Church of England, but mostly he was distressed that works by classic authors were not readily available to the public in well-made, cheap editions (he himself had tried to publish an edition of Aesop only to be blocked by a printer holding an exclusive right). “It is very absurd and ridiculous,” he wrote to a friend in Parliament, “that any one now living should pretend to have a propriety in ... writings of authors who lived before printing was known or used in Europe.” [Locke 208-09] Regarding authors yet living, Locke thought they should have control of their own work, but for a limited term only. As with Macaulay, his framing issue was monopoly privilege, not property rights. [Locke 202-09; see also M Rose AO 32-33; Starr 118-19]

To come back, then, to Macaulay's story of the initial resistance to monopoly, in Queen Elizabeth's time the Puritan opposition had led the House of Commons to meet “in an angry and determined mood.” Crowds formed in the streets exclaiming that the Crown “should not be suffered to touch the old liberties of England.” In the end, the Queen wisely “declined the

contest” and “redressed the grievance, thank[ing] the Commons ... for their tender care of the general weal....” [Macaulay *HE I 66*]

The Queen’s diplomatic capitulation seems not to have survived her death. Within two decades the Parliament felt called upon to pass a law directly forbidding “all monopolies.” The 1624 Statute of Monopolies also made one overt exception to its general prohibition: it allowed patents “of fourteen years or under” to be granted “to the first and true inventor” of “any manner of new manufacture.” Such was the first British patent law and its context makes two things clear: patents like copyrights were understood to be a species of monopoly, and in allowing them Parliament was granting a privilege, not recognizing a right.

This distinction, by the way, was central to debates over intellectual property for many years. One side argued that the history of the common law showed that authors and inventors had a natural right to their work, and that like other such rights it should exist in perpetuity; the other side replied that the common law contained no such record, that copyrights and patents “were merely privileges, which excludes the idea of a right,” [Yates *ER 96 186*], that such privileges come from statutes rather than nature, and that they could and should be limited in term. A 1774 British law case, *Donaldson v. Becket*, supposedly settled this question in favor of the latter camp, though in some sense the argument persists to this day.

Putting aside the question of how exactly monopolies should be described, it would seem that British monarchs found the prerogative to grant them an undying temptation for, despite regular Parliamentary resistance, the problem continued throughout the seventeenth-century. One final example of Parliamentary resistance can be usefully cited for the rhetorical flourish it brings to our topic. By mid-century the list of exclusive rights given by Macaulay had swollen to include monopolies on wine, salt, the dressing of meat in taverns, beavers, belts, bone-lace, pines, and even the gathering of rags. In the Long Parliament of 1640 Sir John Culpeper rose to denounce the lot of them. Monopolies, he declared,

are a nest of wasps--a swarm of vermin which have overcrept the land. Like the frogs of Egypt they have gotten possession of our dwellings, and we have scarce a room free from them. They sup in our cup; they dip in our dish; they sit by our fire. We find them in the dye-fat, wash-bowl, and powdering-tub. They share with the butler in his box. They will

not bait us a pin. We may not buy our clothes without their brokage. These are the leeches that have sucked the commonwealth so hard that it is almost hectical.
[Rushworth I 33]

I have sketched this history from the Puritans onward because I take the problem of monopolies to be a primary, albeit less obvious, contributor to the conceptual frame that the Founders inherited when they began to think about what we now call intellectual property. Monopoly was one of the opposing poles that organized that frame, the other being commonwealth.

Between these two lay the figure of the landed estate, a mediating term whose boundaries remained unsettled. If the wealth of human ingenuity, past and present, is a kind of “common stock” as Lord Camden says, should it be turned into private estates, enclosed as agricultural commons were then being enclosed? Or should concern for “the general weal” leave as much of the incorporeal commons as possible open to the public? Should the law reserve a “republic of ideas,” much as it might reserve highways, parks, and even government itself, as a “public thing”? Or if some combination of these two were possible, how should the parts be apportioned? Where should the boundaries fall?

Such questions were very much in play as the Constitution was being framed and are, in a sense, still in play today. And, however we may conceive of them today, in the late eighteenth century they were framed by way of an assumed struggle between monopoly and commonwealth, an opposition out of which arose the field of discourse available to the founders.

The constituents of that field are not hard to map. In the English tradition, the monarch’s power to grant monopoly privileges always appeared as a restraining force in the struggle for self-governance and religious liberty. Potentially the tool of despotism, it was especially at issue when extended to the printing trades, for there it served to suppress political and religious diversity and dissent. (Publishing monopolies, wrote John Locke, were designed to “let Mother Church” remain undisturbed “in her opinions”). [Locke 207]

Put in its positive terms, in this tradition a lack of monopolies is associated with representative government and, because self-governance depends on an informed public, with a

concern for the dissemination of knowledge and the liveliness of the public sphere. A lack of monopolies also meant, from the Puritans in 1601 forward, the kind of religious liberty that drew out of the established church the great plurality of Protestant sects we still have today. In this line, Lord Macaulay illustrates his opposition to publishing monopolies with the case of the Wesleyan Methodists, asking rhetorically what might have happened to them had John Wesley's writings been subject to seventeenth-century press restrictions. [Macaulay (1841) 206-07] In Locke's time, there were a mere twenty printers in London and if one died, it was the Bishop of London who chose his replacement; a century later, in Lord Camden's day, there were thirty thousand printers and booksellers, and the Church had nothing to do with them. [Locke 206; *Camden* col 963]

It is hard to say exactly what parts of the tradition the Founding Fathers knew directly; I doubt any of them had access to Lord Camden's parliamentary speeches, or to Locke's 1694 "Memorandum." At the same time, the way that they speak about authors and inventors shows that their approach proceeded within the frames I have been describing. I'll here give just a few examples, the first from correspondence between Thomas Jefferson and James Madison.

Jefferson was in Paris in the late 1780s when the Constitution itself was being framed, but he and Madison regularly wrote to each other about the work being done in Philadelphia. Jefferson's main complaint about the draft document Madison sent him was that it contained no Bill of Rights, and when enumerating the items such a bill ought to contain he always listed "restrictions against monopolies." [*Republic of Letters* I 512] Furthermore, the granting of patents is the one example he gives of what "monopoly" meant to him. In June, 1788, for example, he wrote Madison saying that while he was well aware that a rule against monopolies would lessen "the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time, as of 14. years," nonetheless, "the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression." [*RL* I 545]

Madison replied several months later, disagreeing with Jefferson but using the same frame to make his point:

With regard to Monopolies they are justly classed among the greatest nuisances in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced...? Monopolies are sacrifices of the many to the few. Where the power is in the few it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power, as with us, is in the many not in the few, the danger can not be very great.... [RL I 566]

Jefferson himself slowly came around to Madison's position--that limited monopoly privileges were useful incentives--but that is not the point for the moment; for the moment the point is that both men saw intellectual property in terms of monopoly privileges, not property rights, and both were concerned to know how "the many" were to be protected from monopoly's potentially corrupting power. In the background lay all that I have just sketched--political and religious liberty, the dissemination of knowledge, and so forth--as is clear, for example, from a memorandum on monopolies that Madison wrote many years later in which he declared that "perpetual monopolies of every sort are forbidden ... by the genius of free Governments," and where he expressly made the link to religious liberty. [Madison 552]

In all of this we have the negative pole of the monopoly Vs. commonwealth tension. To see the positive we need only turn to Jefferson's most famous statement on intellectual property, his 1813 letter to Isaac McPherson.

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lites his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density at any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement, or exclusive appropriation. [Complete Jeff 1015]

This is the pure commonwealth position. Jefferson may have substituted "nature" for Lord Camden's "Creator," and light and fire may replace air and water, but overall his language rises from the same ground.

Finally, it should be said that Jefferson's position was also his practice. To take but one example, two years after his letter to MacPherson, Jefferson himself invented an improved method for "the braking and beating [of] hemp." In a letter describing his device to a friend, Jefferson wrote: "Something of this kind has been so long wanted by the cultivators of hemp, that as soon as I can speak of its effect with certainty I shall probably describe it anonymously in the public papers, in order to forestall the prevention of its use by some interloping patentee." [Jefferson *JC* 432]

By the time of this letter Jefferson had, as I say, acknowledged the utility of rewarding authors and inventors for their work (a typical remark reads: "Certainly an inventor ought to be allowed a right to the benefit of his invention for some certain time. It is equally certain it ought not to be perpetual." [*Jeff Cycl* 679; *Writings*, Corr. 201]) But the benefit in question is not one he himself ever sought. He imagined himself, instead, as a commonwealth man, releasing his invention as an unsigned contribution to the public. Jefferson was wealthy, of course, so he has the freedom to detach himself from economic motive; self-sufficiency is a precondition of his altruism. But this, rather than mitigating the point, is the point, as we shall see in the next section where I'll return to the question of exactly what kind of "estate in land" a creative person might have in a republican democracy and, for that matter, what kind of "person" might be the owner of that estate.

II: The Framers' Estate

When his father died in the spring of 1761, John Adams inherited one of several family farms. That property made the younger Adams a freeholder and a taxpayer in the town of his birth, Braintree, Massachusetts, and it consequently empowered him to vote at town meetings, something he had not been allowed to do until then, even though he was twenty-five years old, a Harvard graduate, and a practicing lawyer. In colonial Braintree, only the owners of property could have political agency. Along with that agency came civic obligation: as soon as Adams could vote he was also elected the surveyor of highways (an unpaid office) and asked to attend to

a local bridge that needed to be replaced. Adams complained that he knew nothing of such work, but the town elders said that did not matter; everyone had to take a turn at the town offices. So Adams learned what he needed to know about bridges and oversaw the construction of a new one. [Smith I 57-59]

I read this story as an emblematic account of what has been called ‘civic republicanism.’ We have at least two republican traditions in this country, the civic and the commercial. The commercial comes later in our history and is the one most of us are familiar with. It values above all on the private individual seeking his own self-interest. Commercial republicanism assumes that property exists to benefit its owners and that owners gain virtue or respect in one another’s eyes by increasing the market value of the goods that they command. The government in such a republic leaves each citizen alone to follow his or her own subjective sense of the good life. Liberty is negative liberty, a lack of all coercion. Where questions of social well being or the common good arise, government is given little role in answering them, the assumption being that if answers are to be had at all they will arise automatically if paradoxically from the summed activity of private actors seeking private ends.

All of these things--self-interest, property, virtue, liberty, the public good--are situated differently in civic republicanism. Here autonomous individuals and private property are also valued, but property is assumed to exist in order to free the individual for public service. Liberty in this instance is positive liberty, citizenship being directed toward acknowledged public ends, above all toward creating and maintaining the many things that must be in place before there can be true self-governance (a diverse free press, for example, literacy, situations for public deliberation, and so forth). Social well being in this view cannot arise simply by aggregating individual choices; private interest and public good are too often at odds. Citizens acquire virtue in the civic republic, therefore, not by productivity but by willingly allowing self-interest to bow to the public good. Civic virtue is not something anyone is born with; it is acquired through civic action and, in the story just told, John Adams began to have it by getting a bridge built in the town of Braintree.

What might intellectual property look like in the context of civic republicanism? More particularly, how might American revolutionary ideals alter the old metaphor that linked created work to a landed estate?

A nicely nuanced answer to such questions is suggested by the first political essay that John Adams ever wrote. Published in 1765, “A Dissertation on the Canon and Feudal Law” was prompted by the Stamp Act of the same year. To the members of the British Parliament who passed it, that act was a just and simple way of raising revenue to pay debts incurred defending the Colonies during the French and Indian wars. To most Colonists and to later generations, however, the Stamp Act was a pure case of “taxation without representation.” Even if the tax were just, “the rights of Englishmen” entitled the Americans to participate in its passage and that was something the British Parliament consistently refused to allow.

The first thing that will strike a modern reader of Adams’s essay, then, is that he has almost nothing to say about representation. The essay is concerned almost entirely with intellectual freedom and the free flow of knowledge. Adams’s thesis is that for centuries the church and the aristocracy (the “canon and feudal” powers) controlled their subjects by controlling learning and that the Stamp Act was intended to do the same thing. In Adams’s reading of history, the “Romanish clergy” maintained its hold over the people “by reducing their minds to a state of sordid ignorance and staring timidity”; the same was true of the monarch whose grip over “the people in the middle ages” only loosened as they “became more intelligent.” The dual struggle against “ecclesiastical and civil tyranny” came to a head with the Puritans, who succeeded simply because they were “better read” than anyone else in England; these were the same “sensible people” who settled America, a land where “a native... who cannot read and write is as rare... as a comet or an earthquake.” [Adams 450, 448, 456]

Adams is describing the world of Protestant literacy that was a common source of pride and boasting in the American Colonies. Just to situate this with one more emblematic example, in his *Autobiography*, Benjamin Franklin writes that his “obscure family” had been “early in the Reformation” in England, and that they

continued Protestants through the reign of Queen Mary, when they were sometimes in danger of trouble on account of their zeal against popery. They had got an English Bible, and to conceal and secure it, it was fastened open with tapes under and within the cover of a joint-stool. When my great-great-grandfather read it to his family, he turned up the joint-stool upon his knees, turning over the leaves then under the tapes. One of the children stood at the door to give notice if he saw the apparitor coming, who was an officer of the spiritual court. In that case the stool was turned down again upon its feet, when the Bible remained concealed under it as before.
[americanhistory.com/history/BenFranklin/]

Queen Mary was the Catholic monarch who ruled England during the 1550s, who reestablished papal authority, and who relentlessly punished the Protestant opposition. But the focus here is not so much the sixteenth century as the eighteenth: Franklin is telling this family fable to his son in 1771. It is an origin myth for an American patriot, a man whose sense of self was largely grounded in having independent access to knowledge. The Bible is not to be read to you in church by the priest; you are to read it yourself, alone in your own home. And that is only the beginning, for there are “political Bibles” as well (as Tom Paine called the U. S. Constitution); once individual literacy is widely established, a public sphere of deliberation and debate can begin to form.

The creation and preservation of such a public sphere is exactly what’s at issue in Adams’s essay. The value of “knowledge diffused generally” and the need to guard “the means” of diffusing it are the overarching themes of the essay. Chief among those means for Adams were public education and the free press. The colonists “laid very early the foundations of colleges”; they passed laws assuring that every town had a grammar school; the “education of all ranks” was made a matter of public “care and expense.” As for the press, that most sacred of “the means of information,” those who settled America took care “that the art of printing should be encouraged, and that it should be easy and cheap and safe for any person to communicate his thoughts to the public.” [Adams 455-457] None of these things is an end in itself, however; all contribute to the autonomy of mind and conscience that citizens must have if they are to be self-governing.

In listing “the means of knowledge,” Adams was addressing himself by implication to the content of the Stamp Act, not to the question of representation in its passage. The Act placed

a “stamp duty” of varying amounts on the papers used in a wide range of public transactions. It covered legal affairs, real estate, trade, the sale of wine and spirits, shipping, printing, education, apprenticeships, even playing cards and dice. The seventh of the Act’s enumerated items displayed the typical formula and speaks to Adams’s concerns:

There shall be ... paid unto his majesty..., for every skin or piece of vellum or parchment, or sheet or piece of paper, on which shall be engrossed, written, or printed..., any ... certificate of any degree taken in any university, academy, college, or seminary of learning within the said colonies and plantations, a stamp duty of two pounds.

[¶7 lexrex.com/enlightened/laws/stampact.htm]

A later paragraph places a smaller duty on fees paid for an apprentice to learn a trade.

[lexrex.com ¶54]

Edmund and Helen Morgan, in their 1953 book on the Act, add an interesting note to these items dealing with education. The American duties were higher than similar charges then found in England, the report prepared by the treasury office in support of the Act having argued that “the Duties upon Admissions to any of the professions or to the University degrees should certainly be as high as they are in England; it would indeed be better if they were raised both here and there considerably in order to keep mean persons out of those situations in life which they disgrace.” [cited Morgan 57] The passage of the Act itself saw no change in British rates; in England the tax on a college degree remained at two shillings, sixpence while in the colonies it was set at two pounds, an expense whose rationale was precisely counter to one of Adams’s stated ideals, the “education of all ranks.”

Nine paragraphs in the Stamp Act concerned the press: pamphlets and newspapers were to pay half a penny to a shilling, depending on their size; advertisements, two shillings; and almanacs two to four pence, depending on size (it was Benjamin Franklin’s estimate that these duties would cut both newspaper sales and advertising in half). The duty on foreign language publications was double the rate for English publications, a provision that promised to destroy the German-language newspapers in Philadelphia. [See Starr 65]

A look at the British context will help us understand how to read this imposition of stamp duties on colonial newspapers. Paul Starr has outlined the details in his book, *The Creation of*

the Media. British government began instituting stamp taxes as early as 1712. Newspapers at the time were printed on half-sheets of paper; they sold for a penny and were taxed a half-a-penny, essentially a 50% sales tax. [Starr 38] The taxes rose for the rest of the century “until the retail price of a single copy of a newspaper hit 6d, nearly a day’s pay for a typical wage-earner.” As with the American case, these taxes were presented as sources of revenue, but they also had the effect--welcomed by many in the government--of controlling the size and reach of the press. “The stamp tax made it impossible to operate a popular press that was at once cheap and legal”; more subtly, Starr concludes, it assured that “the public” consisted of the wealthy. [39] As with stamp duties on learning, these taxes didn’t simply raise revenue, they helped to sort the low and mean from the high and refined.

Such a sorting was in accord with what might be called the anti-public sphere of earlier times in England. There, during a Parliamentary debate on stamp taxes, Lord North had once declared that “foolish curiosity” fed the demand for newspapers, and that they should thus be thought of as luxuries, well worthy of taxation. [Starr 39] Adams hardly saw the press in those terms, and it is not only his themes that make that clear but also the place and manner of his essay’s publication. His “Dissertation” appeared as an unsigned contribution in an independent paper, the *Boston Gazette*. Adams in fact pauses in the middle of one of his long paragraphs to address the printers of that paper:

And you, Messieurs printers, whatever the tyrants of the earth may say of your paper, are so much the more to your honor; for the jaws of power are always opened to devour, and her arm is always stretched out, if possible, to destroy the freedom of thinking, speaking, and writing. [Adams 457]

One of the printers Adams here apostrophizes was Benjamin Edes, an original member of the Boston Sons of Liberty, part of the resistance movement summoned into being by the Stamp Act.

The *Boston Gazette* is in fact a good representative of what was to become a lively public sphere in the young Republic. Newspapers of its kind were a departure from the norm in both England and the early colonies. All governments seem to prefer to control the flow of news, and one simple way of doing so is to grant monopoly power to some select group, understanding that

they are not likely to make trouble so long as their wealth and well-being depend on the government grant. Thus when the Stuarts came to power in England after the Revolution, Parliament passed a Licensing Act (1662) under which, as we saw earlier, just twenty master printers were allowed to operate in London. For the next three decades England had only one newspaper, the *London Gazette*. It displayed beneath its logo the phrase “Printed By Authority,” nicely proclaiming itself as good an example as any of “copy right” as monopoly privilege and of monopoly privilege as press control. [Starr 34-35]

Printers in the American colonies operated under similar constraints well into the eighteenth century. Where they displeased the authorities they were regularly jailed, censored, or run out of town. In 1690 the first newspaper ever to appear in Boston was banned after a single issue on the grounds that it was operating without a license. The first newspaper to publish regularly in the colonies--the *Boston News-Letter*--appeared in 1704; it survived by avoiding all controversy and by getting the governor’s advance approval for each issue. Like the *London Gazette*, it displayed the imprimatur, “Published By Authority.” [Starr 53-55]

In mid-century, then, newspapers like the *Boston Gazette*--call them the Not-by-Authority press--were both recent and unusual. These were the media by which British civic republican voices were heard in America, the *Gazette* for example having first published the radical Whig essays known as *Cato’s Letters* in 1755 and then reprinting them a half-dozen times in the following decades. [Starr 62] In the *Gazette* we have as good an example as any of the then-assumed link between liberty and a lack of monopoly privilege, and the “Messieurs printers” like Edes who produced that paper demonstrate the positive liberty demanded by civic republicanism: they worked to create a public good, one as useful as any bridge in Braintree, the kind of *res publicae* that makes for a lively, deliberative public sphere, that makes for a self-governing people.

Adams, as I say, published his essay as an unsigned contribution to the *Gazette*. Readers in both Massachusetts and England assumed that it had been written by Jeremy Gridley, a leading lawyer in the Colony, and in fact when it was included in a little book published in London in 1768, *The True Sentiments of America*, it bore Gridley’s name. [Adams 447] The

point is not so much the misattribution as the fact that Adams's self-effacement was of a piece with his themes. The man behind this work is not claiming his ideas as his property; he is offering his ideas up for public deliberation. If we are trying to answer the question "How did the founders imagine intellectual property?" then Exhibit A ought to be the way in which they themselves treated their ideas. In this case, ideas were released directly to the public domain, published in a manner that clearly subordinated self-interest to the common weal.

And if we now return to the old land metaphor, the one that compares a creative person's mind to an estate or a farm, and ask how it might appear in this civic republican setting we may note that it is in the context of his attack on feudal and canon law that Adams speaks of something called *allodial* land. The noun 'allodium' and the adjective 'allodial' distinguish a certain kind of individual land holding from feudal land holding. Feudal estates carried a set of social obligations with them, a 'feud' being land held from a lord on condition of homage and service (military service, typically, but there were also obligations to work the lord's land, to provide him with honey, and chickens, to give gifts when his daughters married, and so on). Vassals hold their feuds from the nobles above them; freemen hold their allodiums "from [to cite Thomas Hobbs] the gift of God only." [OED s.v. 'allodial']

The presence or lack of obligation is key to the distinction between feudal and allodial, but for the full flavor of these terms it helps to see how they have been deployed historically. The latter term became popular after the Puritan Revolution in England, used to denote one foundation of the new age. In that context it did not mean so much an estate held without obligation as one in which obligation had been relocated. The holder of an allodium had no service due to any overlord, but freeholders had duties nonetheless, ones that arose from the very fact of their autonomy.

Military service makes a good example of both the obligation and its shifting locus. As the historian J. G. A. Pocock has explained, after the Revolution a man's sword was no longer his lord's, it was "his own and the commonwealth's." An allodial landholder was still expected to be available for armed conflict if the need arose, but decisions about when and whom to fight

now belonged to him and his neighbors, not to any superior. Moreover, the literal sword here stands for the fact that authority itself has moved from the overlord to the conscience of the autonomous citizen. To free the sword is to free the man, free him to become that paradoxical being, a public individual. Allodial holdings served, Pocock writes, “the liberation of arms, and consequently of the personality, for free public action and civic virtue.” [Pocock *MM* 386]

This is not the end of the story, either, for once someone has been empowered for “free public action” the question remains, to what end? Once the personality has been liberated, what does it do? Freehold and free lance make a free man, but free for what?

There is no single answer to such questions; the ends of freedom will vary as the historical periods vary. In the case at hand, though, the period is seventeenth-century England and in those days, especially for ‘commonwealthmen’ such as the utopian writer James Harrington, the freedoms of allodial property were directed toward at least two acknowledged ends. One we have already seen--to free the property owner to be an actor in the public sphere, a true citizen. The other was to enable families to endure over time. Allodial land is land that can be bequeathed, passed from one generation to the next, and as such it is the vehicle for family continuity over time, for stability decade after decade.

Commonwealth economics is Greek in this regard; it is *oikonomia*, home economics, the management of an *oikos*, a home. And as with the Greeks, the end of land ownership for commonwealth idealists is not to make a profit, not merely to collect rents or harvest corn and wool, certainly not to trade or speculate in the soil itself. Allodial holdings may thus be contrasted not only with the feudal but with the commercial. Neither feudal nor allodial land is fully alienable the way commercial land is. Allodial holdings are meant to be passed to one’s heirs, and freeholders are distinct then not only from vassals but from speculators and entrepreneurs. [Alexander 53-54]

The founders of the American Republic were well aware of the distinction between feudal and allodial estates. Adams, as I say, mentions it in his essay, a point I’ll return to. Thomas Jefferson mythologized it. In *A Summary View of the Rights of British America*, his 1774 instructions to Virginia’s delegates to the Continental Congress, Jefferson declared

Americans to be descended from “Saxon ancestors” who, before the eighth century, “held their lands... in absolute dominion, disencumbered with any superior,” in the manner “which the Feudalists term Allodial.” The fall into feudalism unfortunately broke our link to these ancestors. After the Battle of Hastings in 1066, lands occupied by William the Conqueror were granted out on condition of vassalage and feudalism began.

By invoking "that happy system" of Saxon forebears, Jefferson made feudal holdings the exception to the rule, the rule being that land should be held “of no superior,” “in absolute right.” Bringing that rule to bear on British America, Jefferson first noted that “America was not conquered by William the Norman” and then asserted that American lands “are undoubtedly of the Allodial nature.” If most immigrants to Americans have not known that, if they have mistakenly believed “the fictitious principle” that some king was the original owner of the continent, that is only because they have been “laborers, not lawyers.” [*Papers* I 132-133]

As I said above, the ends of freedom will vary as the historical periods vary, and in that line it should be noted that by the time that British commonwealth philosophy got to Virginia it had undergone one important alteration. The founders understood family estates, in fact all estates held in perpetuity, as among the means by which the church, the nobles, and the monarchy had perpetuated their powers in England. They therefore looked on claims for continuity over time with some skepticism. Jefferson strongly believed that one generation had no right to bind those that followed. “*The earth belongs in usufruct to the living,*” he wrote to Madison; “the dead have neither powers nor right over it.” [*Republic of Letters* 632; Sept 6, 1789] Later in the same letter--written in Paris as the Constitution was being debated in Philadelphia--he expands on the point:

This principle that the earth belongs to the living and not to the dead is of very extensive application.... It enters into the resolution of the questions, whether the nation may change the descent of lands holden in tail [i.e., limited to a specified line of heirs]; whether they may change the appropriation of lands given anciently to the church...; whether they may abolish the charges and privileges attached on lands including the whole catalogue, ecclesiastical and feudal; it goes... to perpetual monopolies in commerce, the arts or sciences, with a long train of et ceteras.... [*RL* 635]

But what should replace perpetual holdings in land, or in art and science? How regularly should the grip of those who come before us be broken? For what length of time should the living be given their dominion?

To answer that question, Jefferson, ever the scientist, studied actuarial tables created by the Comte de Buffon in France and concluded that a new generation succeeds the old one every “eighteen years, eight months,” a period he regularly rounded off at nineteen years. [*Republic of Letters* 633] If the present government wants to assume a public debt, for example, it should be paid off within nineteen years and not settled on future generations. As for the creations of human art and intellect, if we are to grant their authors monopoly privileges those terms should also run no more than nineteen years. All this seems to do away with inheritance, of course, and in one sense it does, though in another sense it relocates it for purposes of democratic self-rule. If inheritance once helped to preserve great families, now it helps to enrich “the public.” The intangible creations of art and science, when treated as allodial estates, are bequeathed to the community at large, not to a single family or priesthood. Civic virtue is thus translated into the structure of the law such that the public domain can inherit from the private.

To return to John Adams and his own use of the term “allodial,” the first thing to note is that when Adams finally addresses himself directly to the Stamp Act it is to denounce it not as “taxation without representation,” but as a device to destroy the public sphere by injecting it with feudal hierarchy:

It seems very manifest from the Stamp Act itself, that a design is formed to strip us in a great measure of the means of knowledge, by loading the press, the colleges, and even an almanac and a newspaper, with restraints and duties; and to introduce the inequalities and dependencies of the feudal system, by taking from the poorer sort of people all their little subsistence, and conferring it on a set of stamp officers, distributors, and their deputies. [Adams 464]

It is in contradistinction to such feudal dependencies that Adams introduces the topic of allodial land. He begins by saying that the colonial Puritans did not “hold... their lands allodially,” explaining that “for every man to have been the sovereign lord and proprietor of the ground he occupied would have constituted a government too nearly like a commonwealth.”

What they did, instead, was “to hold their lands of their king” in an unmediated fashion, that is to say, with no hierarchy between them, no “mense or subordinate lords” and none of “the baser services.” [Adams 455]

In the usage Adams adopts, “commonwealth” is equivalent to “republic,” and he is saying that colonial Puritans were not ready for such a government, preferring a limited monarchy. It was probably the case that Adams himself was not ready for republican government in 1765 when he wrote this essay, but he was ready for it by the time the war broke out, as his letters make it clear. And from this early “Dissertation” we learn that, for Adams, in a commonwealth or a republic, each man will be “sovereign lord and proprietor” of his allodium.

By its themes and by the context of its printing we also learn what that means for a cultural creation such as Adams’s essay itself. *Republican intellectual property is an allodial estate*. It mixes private sovereignty and public service. Creators are autonomous “proprietors,” but they cannot know themselves as citizens nor acquire “public virtue” until they give their creations up to the public good.

I call this sequence the Republican Two Step. First autonomy, then service; first the private thing, then the *res publicae*. Note that allodial holdings as I have described them contain a built-in model of maturation. Holding land allodially allows one to become self-possessed, and self-possession allows one to become a public person, an agent not a servant. In feudal times it was, in a sense, each vassal’s *lack* of independence that made him a member of the community, and gave the community the feeling that it might exist in perpetuity. Now time, change, and above all the promise of agency enter the self. Those who realized the promise, taking the second step and acting so as to acquire civic virtue, become citizens in the true sense.

The intellectual property clause of the Constitution is modeled, I believe, on this Republican Two Step. Authors and inventors receive a monopoly privilege, but the privilege is limited, not perpetual, and the limit provides what I earlier called a structure of law such that the public domain might inherit from the private. First something for the individual self, then something for the public good. First a contraction on behalf of the few, then a dilation on behalf of the many. This is the heartbeat of knowledge in a free republic.

To summarize this inquiry into how America's revolutionaries imagined intellectual property it will help to begin by getting the terms in order. A discursive list of key words and phrases would look something like this:

- * Authors and inventors may control their work, but if we are to call what they receive "property" then it is a specific species known as **monopoly**.

- * This monopoly is a **privilege** created by statute, not a natural right.

- * For authors and inventors, monopoly privileges are an **encouragement to ingenuity** (these are the two words that both Madison and Jefferson regularly use).

- * Monopoly privileges must be limited, however, not perpetual. In the European experience, perpetuities were one of the tools of despotism. We've seen Madison's image of the American ideal: "**Perpetual monopolies...are forbidden...by the Genius of free governments....**"

- * Put in positive terms, limits on monopoly privileges serve the ends of **political and religious liberty**. Always at issue for John Adams, for example, was the freedom of "the means of knowledge," meaning the institutions we now think of as belonging to the **public sphere**.

- * These institutions, in turn, enable **republican self-governance**. Moreover, no republic can be self-governing unless its citizens are capable of **civic virtue**, the willing subordination of self-interest to the **public good**.

- * Given this ideal, intellectual property rights are best structured so as to make them allodial holdings. Monopoly privileges are granted under condition that private holdings ripen into **common wealth**. In a democracy, therefore, **intellectual property is ultimately a republican estate**. It is the intangible equivalent of the tangible res publicae (roads, bridges, harbors) or of the Republic itself.

These terms were deployed in what we might as well call the "democracy" frame. Directed ultimately toward citizenship and public life (not private property, not "theft"), the

democracy frame assumed that citizens can never be truly self governing until they have a lively public sphere, a free flow of knowledge, religious liberty, and so forth. It is not that the frame ignores “encouragements” to authors and inventors--it expressly provides them--but creating private wealth is only the near-term purpose of these rewards. Madison understood all incentives to ingenuity to be “compensation for a benefit actually gained by the community.” [Madison 551] That formulation embodies the Republican Two Step: first a private compensation, then a public benefit. Where monopoly privileges were granted, that is, they were means toward larger ends.

They were the means by which human ingenuity might be led to engender a republic of art, invention, and ideas. And this republic of knowledge, in turn, was taken to be an essential part of the larger political estate the founders were trying to create. The intellectual property clause of the Constitution is, after all, embedded in the Constitution itself, and the Constitution established a republican democracy on American soil. That is the outer boundary of this inquiry, the foundational frame within which our discussions of cultural creations should be held.

After all, democracy is democracy is democracy.

The question remains of how this foundational frame might be applied in the present. Here there will be much to say, the uses of any conceptual tool being as various as the issues it is brought to. Nonetheless, I will close with one sample line of thought, a response to a problem posed at the outset, the entertainment industry’s concern with “stealing music on-line.”

The history just told suggests how the framers might have approached the problem. In his 1694 “Memorandum,” John Locke tells the story of one Mr. Samuel Smith who “imported from Holland Tully’s Works, of a very fine edition, with new corrections made by Gronovius,” based on comparisons of several ancient manuscripts. The London printer who had from the Crown the exclusive right to Tully’s work seized these books as they entered the country. The law allowed this printer to extract from Mr. Smith a fine for having violated his copyright. It never occurs to Locke to speak of Mr. Smith’s action as “theft”; he attacks instead the printer’s monopoly calling it “absurd and ridiculous” and “injurious to learning.” [Locke 208 (Tully =

Cicero)] As for the law giving printers their privileges: “by this act scholars are subjected to the power of these dull wretches, who do not so much as understand Latin.” [Locke 204]

If we suppose that Mr. Locke himself had imported Tully from Holland, perhaps a copy of that great orator’s treatise *On Duty* or his dialogue on “the good,” and if we then ask how the framers of our Constitution would have responded to the case, the answer is clear: they would have understood it as Locke understood it, as a matter of liberty and learning, not as a matter of property and theft.

In the present moment, of course, we have no problem with the distribution of Greek and Roman authors; they are readily available in cheap editions, thanks to the centurylong struggle that ended as the American Revolution began. At issue now is the puzzle of how to be a citizen in a mass culture dominated by corporate “content providers.” All of us presently live in a soup of commercially and politically motivated stories, images, and music. I may take my children to the north woods for two weeks in August, hoping that the murmuring pines and the hemlocks will school their souls, but for the remaining fifty weeks of the year their learning takes place in the thickets and streams of electronic media. What form should the old model of personal autonomy and civic action take for those who come of age watching 40 hours of TV a week? How does a young person mature into a true citizen inside that forest of signs?

The music collective calling themselves Negativland suggests how citizens who are artists might answer:

As artists, we find this new electrified environment irresistibly worthy of comment, criticism, and manipulation.

The act of appropriating from this media assault represents a kind of liberation from our status as helpless sponges which is so desired by the advertisers who pay for it all. It is a much needed form of self-defense against the one-way, corporate-consolidated media barrage. [negativland.com/fairuse.html]

Fair enough; enter the forest and try to make its materials your own. And yet, as with Locke’s story of importing classics from Holland, it turns out that the law stands in your way. The Negativland collective has found it impossible to comply with the law and still make their work.

The recordings that they create are “typically packed with found elements, brief fragments recorded from all media.” One piece can have a hundred different parts, and the problem posed by the obligation to get permissions and pay clearance fees for all these makes it literally impossible for Negativland to make their work and also comply with the law.

That “absurd and ridiculous” fact is not actually the focus I want to have here, however; I’m more interested in the point being made about passive and active receivers of the mass media, for with that Negativland manages to return us to the question of agency and civic virtue that arose in the commonwealth model of citizenship. If the symbolic universe that contains us now derives largely from the media barrage, then shouldn’t its symbols at least be held in common? Shouldn’t a community’s speech belong to the community?

Remember Lord Camden’s 1774 commonwealth argument: created works should be *publici juris*, meaning they should belong to the public by right. *Black’s Law Dictionary* currently gives two examples of how this Latin phrase is used today:

“A city holds title to its streets as property *publici juris*.”

“Words that are in general or common use and that are merely descriptive are *publici juris* and cannot be appropriated as a trademark.”

The first of these makes *publici juris* synonymous with *res publicae*; even--perhaps especially--in a commercial culture, city streets are republican property. The second example links the phrase to common speech.

But what is common speech? To creators like the Negativland collective, common speech must now include the “canned ideas, images, music, and text” of the “media assault” that surrounds us.” Children not only watch 40 hours of TV a week, they see 20,000 commercials each year. [Bollier *ST* 154]. Each advertisement they see is proprietary and (as anyone knows who has tried to write a book about the industry) it is difficult, usually impossible, to get permission to reproduce them. Which is to say, in a mass media consumer culture, the young are taught a language that is not theirs to own.

In the early twentieth century, while most industrialized nations were building telephone networks, the Soviet Union was investing in loud speakers. [Starr 9] We need no better image of an antidemocratic public sphere: they speak, the people listen. In a democratic public sphere, on the other hand, the people can always speak back; they can respond to whatever comes their way as (to cite Negativland once more) a “source and subject, to be captured, rearranged, even manipulated, and injected back into the barrage by those who are subjected to it.” Doing so turns passive listeners into active speakers. It brings the kind of agency to individuals that, in the republican tradition, transforms them from vassals (or, now, consumers) into true citizens. If the monopoly privileges that we’ve granted to “content providers” stand in the way of such citizenship, then the privileges should be called into question.

After all, democracy is democracy.

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