

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

What is bootlegging? A vague history of bootlegging. Same form/  
different content - publishing vs. pirating, bootlegging analogue.

### 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.

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# UNLICENSED: BOOTLEGGING AS CREATIVE PRACTICE

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UNLICENSED: Bootlegging as Creative Practice



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Ben Schwartz



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 reliant 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 under-represented 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, Dali, 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 Europe 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 Ruppersberg...

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

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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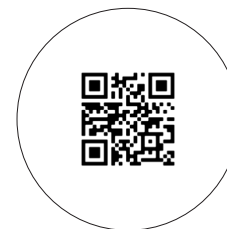
Recently, I read an article on Hyperpop, a Gen-Z music genre that seems, even to its fans, both clear and confusing. It's one of those “you know it when you hear it” situations... more about a feeling than a definition. A.G. Cook is Hyperpop, but so is Kate Bush and J Dilla. Its very appeal is its resistance 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 sampled – 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 illegally 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>12</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>13</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. 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>15</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.*

Hectored 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 mediatized 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 Université 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.

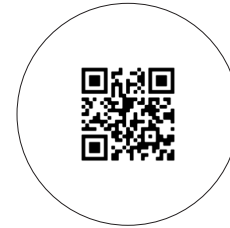
#### 13.

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

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 crowd-funded, 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 publi-

cation 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>

#### Bootlegging

Personal recording, within and outside the law, has consistently been practiced and, I argue, exposes analog vid-

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>43</sup> Another study asserts, “Bootlegs call into question just what rights the public should have in copyrighted but unavailable material.”<sup>44</sup> Yet another proclaims, “An essential element of creativity separates the bootleggers from their piratical cousins.”<sup>45</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.

