

Confusion on the Commons

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At a time when the issue of intellectual property dominates the Internet, the struggle for control of the digital universe is increasingly known as the "second enclosure movement" - a misleading moniker, argues Allan Greer.

Responding to the galloping advance of intellectual property (IP) and its increasing domination of the Internet, a movement has developed to resist the intrusion of corporate interests into every corner of cyberspace. Inspired by the potential of digital media to distribute data, images and texts, and to share these widely for the benefit of all, activists campaign for a neutral network and open access to the growing global storehouse of information and creative works. Sites such as Wikipedia and various open-access software systems, they note, depend upon the free collaboration of millions of contributors around the world and they provide benefits without charge to anyone with a computer and an Internet connection. Arrayed against this applied ethic of sharing, they see a phalanx of corporate giants determined to privatize the intellectual resources of a connected world for their own profit. This struggle for control of the digital universe might seem to be completely unprecedented, the product of technological advances of the past two decades, yet many internet activists are at pains to suggest links with struggles over land in earlier centuries. The legal scholar James Boyle calls the expansion of digital IP rights “the second enclosure movement,” referring to a well-known phase of English agrarian history when common lands were divided up and fenced in for private use.¹ Others have adopted the same historical allusion, applying it not only to the internet, but to a variety of other spheres where corporations are laying claim to previously open or shared resources. Sometimes presented as a metaphor, sometimes as an analogy, the notion that we are experiencing an intellectual “enclosure of the commons” has gained considerable traction.

Land and Intellectual Property

When it comes to property, is information really like land? Ironically, it was the early proponents of intellectual property who were the first to propose this equation. The historian of science Mario Biagioli notes that, in the eighteenth century when copyright and patents first became a significant force in English law, their advocates argued that useful ideas were indeed similar to land and, like land, they ought to belong to those who made them useful. The philosopher John Locke had established a justification for property rights in the universal commons that is the earth by asserting that anyone who cultivates the soil has a natural right to control the land so improved and to benefit from its produce. Since land enjoyed prestige at the time as the paradigmatic form of property, early advocates of IP extended this logic to the realm of mental creativity. In an untamed

¹ James Boyle, « The Second Enclosure Movement and the Construction of the Public Domain », *Law and Contemporary Problems*, vol. 66, 2003, p. 33–74

environment of discussion and experimentation, they maintained, an individual genius could claim the benefit of that which bore fruit due to his creative efforts. This was a highly controversial claim at a time when thoughts were not generally seen as property, when inventions might be guarded as trade secrets but where the law rarely recognized exclusive rights, and when patents were denounced as unjust and economically unsound monopolies. The new view depended on an equation of land and ideas, as well as on a strongly delineated nature/culture dichotomy, such that property claims rested on the removal, through productive effort, of a portion of the earth or of the discursive environment from the state of nature.

Copyright and patents did triumph, in limited ways at first, more rapidly in the nineteenth and twentieth centuries, and with rapidly accelerating velocity in our own time; the tendency was for these privileges to cover more and more areas of human endeavor, to confer more exclusive benefits to creators and to last for ever longer periods. Now we see a profusion of copyrights for everything from commercial slogans to human gene sequences, while armies of lawyers labor to find clever new ways to transform data, words and techniques into profitable proprietary knowledge. Moreover, the beneficiaries of this intellectual property making are more likely to be corporations than the artists and scientists we normally associate with creativity.

I stand with those who are alarmed at this unbridled extension of the principle of property, but I wish they would stop leaning so heavily on historical allusions to the “enclosure of the commons.” One problem with this formulation lies in the irony that Biagiolo has identified: in eliding the difference between land and ideas, the critics of IP actually reinforce the highly questionable premises upon which IP was erected more than two centuries ago. A second problem with the “second enclosure movement” discourse is that it rests upon a distorted view of the history of landed property, a narrative that attaches universal meaning to a quite specifically national experience.

The Commons: a Very English Ideal

The term “the commons” has acquired overtones in English that go beyond the narrower meaning of the French phrase “biens communaux.” What makes the term particularly appealing is the suggestion of sharing, and also the populist association with the “common people.” It implies not merely a communal village pasture, but something much larger: land that is open to all. The language of “commons” and “communal” is attractive at a time when cutthroat economic competition and consumerist individualism threaten to dissolve communities for the benefit of the wealthy few. Hence the lexical expansion of “the commons” in English from its original meaning in relation to a particular agrarian regime to encompass all sorts of public spaces, open access resources and even mental processes and communications.

In the England of the Middle Ages and the early modern period, as in other European countries, rural life was characterized by a variety of collective practices and shared resources. Where there were moors and woodlands, there were usually customs that enabled local peasants to make use of their resources (reeds, wood, wild fruits and

berries, small game, etc.), but with limitations that ensured sustainability. In many places, for example, residents could gather firewood for their own use, but were prohibited from taking any away to sell. Additionally, in the fertile arable lands of central England (and in much of northern France), the open field system prevailed. Here, broad undivided expanses were typically devoted, in rotation, to spring wheat, winter wheat and fallow; the village cattle herd grazed over the stubble after each harvest. Collectively managed, the lands and the herd were nevertheless individually owned, with each great field being composed of narrow strips, each strip belonging to one of the community's constituent households; most families had several strips dispersed over the village's fields. Thus some zones within a given village were fully communal (the so-called "waste"), while others (the arable) were held individually, but subject to community control over the crops raised and the dates of sowing and harvesting.

Though collective, the commons were very much property and like all property, they were fundamentally about exclusion. They were not public lands open to the entire human race, but were maintained for the use of local residents only. Moreover, internally they were hardly egalitarian. Some villagers possessed substantial shares of the arable, while others had only microscopic plots. Some common pastures were stinted, meaning that different commoners were allowed to graze specified numbers of animals; in the absence of stints, richer commoners with more livestock benefited disproportionately. As an antidote to sentimentality about the traditional commons, we should also bear in mind the fact that lordly jurisdictions and seigneurial exactions formed an integral part of these societies. On the other hand, there was a place for the poor in the rural world of the commons: families with only a small cottage could eke out a living when seasonal wage-work was supplemented with commoner's rights to pasture a cow, gather faggots from the waste, glean the fields, and so on. Such customary entitlements provided a place for the economically marginal and helped ensure their survival.

Enclosure

In the fifteenth and sixteenth centuries, when England was the leading supplier of wool to the Flemish textile industry, large-scale sheep-raising became highly profitable. This provided an incentive to estate owners to assemble large tracts of land for this purpose. The operation involved fencing in (enclosing) what had been open fields and wasteland, displacing peasants and forcing them into wage-labor or destitution. Contemporaries denounced this heartless and socially destabilizing pursuit of profit.

After the wool boom subsided a second wave of enclosures followed in the period 1750-1850. This time, the objective was not stock-raising, but grain farming on a larger scale. Elite opinion supported the breaking up of open-field systems in the name of progress and efficiency and a series of parliamentary enactments forced enclosure on one community after another. In theory, the transformation was equitable: property was disaggregated from community control and consolidated tracts were awarded to commoners corresponding to their holdings in the open fields. In practice, the better off benefited disproportionately and the poorest commoners were left with nothing. The great English historian E.P. Thompson called enclosure "a plain enough case of class

robbery,”² a judgment that is difficult to contest. Even the claim that the transformation improved agricultural productivity has been questioned by many specialists. That this was a story of the destruction of common property for the benefit of private capital seems clear enough. What is not so clear is whether or not the enclosure movement deserve its transhistorical status as the paradigm of property formation and dispossession.

A Broader History of Common Lands

The classic enclosure of the commons was largely an English affair. There was enclosure in other countries, and triage had some analogous effects in parts of France, but nowhere but in England was there such a massive assault on common lands. Capital did indeed invade the European countryside, frequently playing havoc with customs that supported the poorest strata of the peasantry, but its intrusions took a variety of forms. In sixteenth-century Spain, one of the greatest threats to the subsistence of rural smallholders came from the great cattle-ranching enterprises of the period. In the system of transhumance, herds were driven between distant seasonal pastures, grazing as they went and frequently damaging crops and trampling fields. The Habsburg monarchs granted extensive grazing privileges to members of the *Mesta* (stock-owners' association), allowing them to make use of local commons as well as private lands. These regulations instituted what was in effect a national grazing commons primarily for the benefit of large investors and largely at the expense of subsistence cultivators.

Overseas, the Spanish set up a version of the *Mesta* in Mexico and before long huge herds of cattle, sheep, mules and horses were spreading across the Mesoamerican landscape. Stock-raising enterprises were known as *haciendas* and, as the French historian François Chevalier long ago noted, the term originally designated a herd licensed to graze on the public domain. Only rather late in the colonial period did ranchers claim a landed estate in full and exclusive property. Historians disagree over whether colonial *haciendas* were truly capitalistic, but they certainly were large-scale agricultural enterprises producing for a market. And they developed as a phenomenon of the colonial commons. The effects of the ranching boom on the subsistence of indigenous cultivators were devastating. Unfenced and unsupervised animals wandered into Indian corn fields and destroyed the crops; even more seriously, sharp bovine and ovine hooves tore the earth everywhere; that, together with their intensive grazing of native grasses, degraded the natural environment, further undermining Indian subsistence.

In countless other colonial settings, the dispossession of natives occurred to a significant degree through the operations of the commons, or more precisely through the imposition of settler-centric forms of common property in place of the existing indigenous commons. Pigs set loose by settlers rooted up Taino manioc crops on the islands of the Caribbean, while in early New England they broke into underground pits where natives stored their corn supplies. English North American settlers typically set their livestock free to roam the woods and, to the bewilderment of their Indian neighbors, insisted that these animals were still private property and therefore could not be killed as game, even if they interfered with native crops and native hunting. By such means, Old World

² E.P. Thompson, *The Making of the English Working Class* (London: Penguin, 1963), p. 218.

domestic animals, together with their offspring who went feral, contributed greatly to the death and dispersal of indigenous nations, clearing spaces that settlers would later enclose and claim as their own. To put it another way, the colonial commons competed with and largely destroyed the indigenous commons prior to the emergence of new forms of private property.

In the nineteenth century, the process repeated itself in places such as Australia, New Zealand and Southern Africa. Millions of sheep flooded the dry interior of Australia as the advance army of colonization, altering the natural environment that aborigines had relied on for subsistence and reducing the latter to a state of destitution and dependence by the time settlers came to the point of establishing individualized land holdings. Likewise, cattle ranching on the American plains began under a common property régime, the "open range" of western legend. To the extent that bovines crowded out native bison in the moister zones of the prairies, they contributed to the extinction of the latter, which in turn drove plains Indians to the edge of starvation. White hunters helped the process along by killing thousands of bison for their skins. In this clash of the colonial commons of the cowboy and the indigenous commons of the native bison hunter, two incompatible sets of rules and customs for managing the land and its resources were in play. From the colonizer's point of view, bison are wild, an open access resource that can be harvested by anyone, whereas branded cattle remain private property wherever they might roam. The US cavalry was on hand to enforce the colonial commons regime and to ensure the ultimate defeat of Indians who resisted. Individual ranches and farms could then be fenced off as the colonial commons gave way to property in severalty.

The historical record of "the commons" has been quite varied. In parts of early modern Europe it helped to sustain rural communities and to assure the survival of the poorest peasants. Elsewhere, it provided a vehicle for the wealthy to profit from animal husbandry, often at the expense of subsistence cultivators and indigenous foragers. In North America a particularly striking case of counter-enclosure occurred in the waters of the Pacific Northwest. This area was densely populated by rich indigenous societies who subsisted mainly on the bountiful salmon fishery. Property rights were highly developed here but they focused primarily on water rather than land: chieftains owned specific riverside fishing sites, as well as delineated portions of coastal bays and fjords, for the exclusive use of their respective clans. Colonial courts declared these proprietary rights over navigable waters contrary to human and natural law; citing the *Magna Carta*, they threw them open to "the public" and in the process wiped out an ancient system of managing and allocating precious marine resources.

A strictly English reading of history suggests a confrontation between money, power and individual property on one side versus a vulnerable populace supported by a communal property regime on the other. In Spain and America however, the associations are quite different: common property frequently served as an offensive weapon for the powerful against the subsistence-oriented property regimes of peasants and colonized peoples. In all these cases, the privileged parties were transforming land into a novel kind of property, imposing rules governing access to the earth's resources that were favorable to their interests and detrimental to those of the "little people" who depended on the land for

their livelihood. The particular mechanisms of appropriation varied: in some settings “enclosure” was the rule, elsewhere common property was deployed. The common factor uniting English enclosure, the Spanish *mesta* and Mexican *haciendas* is the role of capital. Whether invested in enclosed lands or in cattle herds that roamed the grazing commons, capital accumulated profit at least partly through the dispossession of subsistence communities. Perhaps property formation under capitalist auspices is the key to this dynamic, rather than the interplay of commons and enclosure.

Intellectual Property and the Digital Commons

I argued above that land and information are not really comparable, but if pressed to consider analogies linking early modern property formation and contemporary challenges to the public good posed by the technology of electronic data storage, processing and dissemination, I would say that “enclosure of the commons” is a strange choice of historical precedent. While Disney fights for complete control over images of Mickey Mouse in any and all media, an assertion of exclusive monopoly rights vaguely comparable to enclosure, other corporations seem to be in the business of opening up data, text and images to a wide public. When Google scans the contents of books and places them on the web, the authors of these copyrighted works might feel more like the victims of counter-enclosure than of enclosure. If the concept of a “digital commons” has any meaning, then surely Google, Facebook, Twitter and a host of other Internet corporations have to be recognized as major contributors. Of course, we all pay an indirect price for the facilities they provide. Our browsing habits and personal tastes are monitored, aggregated and commodified; at the same time, the net itself is powerfully shaped by the business strategies of these giant companies. This commons, like the grazing commons that were so profitably dominated by *hacienda* owners and ranchers in earlier centuries, is susceptible to the manipulation of the rich and powerful.

Non-profit approaches to the digital commons, including Wikipedia and the Creative Commons, are invaluable institutions, disseminating materials as they do according to a logic of public service. That is what distinguishes them from the digital corporations driven by the pursuit of profit. Rhetoric about an age-old struggle between commons and enclosure only serves to distract attention from the real issues.

For further reading:

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URL : <http://www.laviedesidees.fr/Passe-et-present-des-biens-communs.html>