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

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I: "Leeches have sucked the commonwealth"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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