DEFENDING THE CULTURAL COMMONS

The argument: Even as market triumphalists work to extend the range of private property, a movement has arisen to protect the many things best held in common.

Most people act as if they had a private understanding, but in fact the Logos is common to all.

—HERACLITUS

"THEFT IS THEFT"

Some years ago in Thailand, when drug companies priced AIDS medications at an annual cost exceeding the average Thai income, the government stepped in and set more affordable rates. In response, the pharmaceutical industry called the move illegal and ill conceived, claiming it undermined the incentive to conduct the very research that produces AIDS drugs in the first place.

During the 2008 presidential campaign, Fox News insisted that YouTube remove from its site a John McCain commercial that used unauthorized video from a Fox-moderated debate. When the McCain campaign complained about suppression of political speech, YouTube replied that copyright law gave them no choice, though they “look[ed] forward to working with Senator (or President) McCain” to improve the law.
In 2000, a British scholar published a 1,300-page anthology of modern Irish writing, twenty-four pages of which were devoted to James Joyce. Asked for permission, the Joyce estate insisted on a fee of £7,000. When the editor wrote saying he couldn’t afford such a steep fee, the estate raised the price to £7,500, then changed its mind and refused permission outright. Ten years later, this anthology still lists Joyce’s work in the table of contents, but pages 323 through 346 are cut from the volume.

Each of these stories revolves around what we now call “intellectual property,” and as modern as these cases are, the question behind them is very old: in what sense can someone own, and therefore control other people’s access to, a work of fiction or a public speech or the ideas behind a drug? The literary part of this puzzle has, by itself, a long history. Three hundred years ago in England, writers and publishers engaged in a spirited, fifty-year debate over whether or not there could even exist such a thing as “literary property.”

Publishers in Scotland, for example, thought it made no sense for their competitors in London to claim exclusive ownership of, say, a book on oratory by Cicero or a popular poem like James Thomson’s *The Seasons*. As one aggrieved Scot tried to explain, if a writer were to “keep his Lucubrations to himself,” then perhaps “he may be said to have a Property in his Noddle.” But once “he prints . . . these Lucubrations,” and once someone else pays for the book and reads it, “the Person who buys has just the same Property that the Author had.”

“To lucubrate”: surely this is a key forgotten verb of the European Enlightenment, the root (“lux”) being light itself and the action indicated being the labor of studying long into the night by the flame of a lamp. Lucubrations are the mental harvest of midnight oil, and the only way to make them “property” in the usual sense (“this is mine; you keep out”) would be to keep them locked inside the skull, or so this Scottish publisher believed against the protestations of his London rivals.

Centuries have passed since arguments of this sort first appeared, but the years have neither laid them to rest nor brought much clarity to the terms of engagement. “Intellectual property” is the phrase now used to denote ownership of art and ideas, but what exactly does it mean? Does it make sense, to begin with, to say that “intellect” is the source of the “properties” in question? A novel like *Ulysses*, the know-how for making antiviral drugs, Martin Luther King, Jr.’s “Dream” speech, the poems of Rimbaud. Andy Warhol screen prints, Mississippi Delta blues, the source code for electronic voting machines: who could name the range of human powers and historical conditions that attends such creations? All that we make and do is shaped by the communities and traditions that contain us, not to mention by money, power, politics, and luck. And even should the artist or scientist think she has extracted herself from the world to stand alone in the studio, a tremendous array of faculties and mind-states may well attend her creativity.

There is intellect, of course, but also imagination, intuition, sagacity, persistence, prudence, fantasy, lust, humor, sympathy, serendipity, will, prayer, grief, courage, visual acuity, ambition, guesswork, mother wit, memory, delight, vitality, venality, kindness, generosity, fortitude, fear, awe, compassion, surrender, sincerity, humility, and the ability to integrate diametrically opposed states of mind into harmonious wholes . . . We would need quite a few new categories to fully map this territory—“dream property,” “courage property,” “grief property”—and even if we had that list, only half the problem would have been addressed.

For what exactly is “property”? The oil in a lamp, the light it sheds, the midnight scholar’s flash of insight: can each of these be “property” and, if so, by what ample definition of the term?

I will have more to say about these questions in the chapter that follows; here I’ll simply acknowledge that my own position is not as extreme as that of the Scottish publisher. I believe there can be property in all sorts of lucubrations and, in a rightly limited form, usefully so. The very first copyright law (Britain’s 1710
Statute of Anne) gave “the Authors and Proprietors” of books exclusive rights to their works for as long as twenty-eight years, provided that they paid a sixpenny fee and listed their works “in the Register-Book of the Company of Stationers.” For most of the twentieth century, the law in the United States was much the same: rights lasted twenty-eight years (and could be renewed once, if the owner cared) provided that works were duly registered with the copyright office. Both of these seem to me to offer sensible ways to manage the “intellectual property” found in books.

That said, part of the task of this book is to show the degree to which a phrase like “intellectual property” serves simply to obscure a long history of philosophical, legal, and ethical argument about what sort of property lies under that heading and, once that’s decided, what “rightly limited” should mean and why a limit to ownership might arise in the first place. Knowing the history of that debate not just well enough to follow the argument but well enough to engage with it, to take an informed position in the debate, is to my mind one of the prerequisites of cultural citizenship in the twenty-first century.

But here we come to another topic that informs this book, for cultural citizenship is itself now highly contested, sufficiently so that I take it to be the site of a new culture war. For a quick overview of the terms under which that war is being waged, one could do worse than begin with a look at the public relations campaigns that the U.S. entertainment industries have been funding, especially the antipiracy curricula that they have developed and distributed to public schools.

One such campaign, produced by the Motion Picture Association of America (MPAA), has now reached hundreds of thousands of children in classrooms from New York to Los Angeles. In most schools, teachers have been free to use the offered lesson plans or not, as they see fit, though not in California, where a 2006 law mandates that all public schools must develop an “education technology” plan in which, for example, “the implications of illegal peer-to-peer network file sharing” must be taught. (The law never mentions teaching the more interesting and revolutionary implications of legal file sharing.) The year 2006 was also when the industry persuaded the Boy Scouts in Los Angeles to offer a “Respect Copyright” merit badge; the MPAA wrote the curriculum for that, too.

Many of the assignments in these programs depend on role-playing exercises. The merit badge curriculum suggests, for example, that each Boy Scout “write and perform a skit about why copyright protection is important.” Elementary school children get to create greeting cards and posters and hold a “publication party,” at the culmination of which each child writes his or her name on a sticker that says, “You’re part of the TEAM!” and then affixes this notice to the back of the work. The sticker bears a stock “All rights reserved” copyright declaration.

In an even more elaborate exercise called “Living in a Fishbowl,” the teacher gives the students cards assigning each of them to one of six roles, five of which pertain directly to conventional motion picture production: actor, set carpenter, singer, director, and producer. The sixth role is a “computer user.” The movie people all have jobs and a clear story to tell: they work hard to make movies; copyright law rewards and protects that work, piracy threatens and destroys it. Online file-swapping, a typical character says, “is costing me big bucks . . . [It] just isn’t fair.” The computer user, on the other hand—pictured with the top of his head missing and stars shooting out of it—offers an incoherent ramble that mixes rhetorical questions (“How could it possibly be illegal . . . ?”) with dismissive remarks (“It’s really no big deal!”). He seems to have no job.

The students break into groups to talk about how to present each of these characters to the class; then one by one each student must sit in a circle of chairs—the “fishbowl”—and try to answer in character questions posed by the teacher. A spokesman for the
MPAA describes exercises like this as offering a good way for “students to reach their own conclusions about being a good digital citizen.” But of course the game itself has determined the conclusion. It is part of a program called “What’s the Diff?” intended to teach the young that downloading movies is the same as shoplifting from a store (“no diff”). No student, when asked by the teacher, “What’s the difference...?” is really expected to hold forth on, say, the classic economic distinction between corporeal and incorporeal goods.

The offered roles are narrowly selected and well scripted. There are no archivists preserving public domain films, for example, no librarians using ad clips to teach media literacy, no critics satirizing Mickey Mouse, no documentarians of the civil rights movement, no investigative journalists, no young musicians giving their music away to build an audience, no academics sharing scientific data, no remix artists laying sixties harmonies over fifties rhythms... Above all, there are no blank cards encouraging students to become the active authors of their own stories. In fact, there are no real “actors” at all in the civic or educational sense, only actors in the movie sense.

Moreover, the lessons meant to inform these roles teach a series of simplifications, even falsehoods, when it comes to the ownership of art and ideas. Teachers are told and children are taught:

If you haven't paid for it, you've stolen it.

Intellectual property is no different than physical property.

As the creator of your work, you should have the right to control what people can and cannot do with your work.

Never copy someone else's creative work without permission from the copyright holder.

Students who have learned to strictly respect the intellectual work of others in order to avoid plagiarism already have a solid foundation for understanding the laws of copyright.

Every one of these assertions is either false or misleading. Take the last one, for example: copyright infringement and plagiarism in fact have almost no connection with each other; infringement is a crime defined by statute, plagiarism is an ethical violation in some—but not all—creative communities. There can be plagiarism without infringement and infringement without plagiarism; to equate the two simply muddies a useful distinction. Moreover, learning to “respect” the work of others, while often a noble goal, has nothing to do with “the laws of copyright,” which contain carefully designed provisions meant precisely to protect disrespect wherever it deserves expression.

Or take the claim that “Intellectual property is no different than physical property,” this being the ungrammatical first sentence in the Boy Scout merit badge curriculum. In fact, as we shall see, the differences are striking and important, and have been a topic of philosophical and legal analysis for centuries. But these campaigns are not out to lead the young toward the pleasures of subtle thought; they are out to command a particular model of cultural citizenship, and to that end, they need a simple tale to tell.

That tale is often built around one endlessly repeated analogy: copyright infringement is the same as shoplifting. The Recording Industry Association of America produced a public service video, for example, in which the adult moderator quizzes a high school student, asking, “What really is the difference between shoplifting and illegal downloading?” to which the student dutifully replies, “Legally... nothing.” The answer is left to stand (though it would not stand in a court of law), and is followed quickly by the voice of a music retailer who seals the logical loop: “I don't think there's a difference, because theft is theft.”
The final thing to say about these campaigns is that they often present themselves as reflecting a long and well-settled tradition of American thought. The New York Times Magazine once published an interview with the head of the MPAA, Dan Glickman, in which he offered a typical view, saying that “we need to educate kids so they understand the value of intellectual property” and that “the founding fathers, in our Constitution, talked about copyright. They talked about the creative juices that are necessary for a free society and protecting property rights.” Here, too, we have a fable for a certain kind of citizenship, not a true attempt to educate, for Glickman’s version of U.S. history is an astoundingly narrow reading of what the founders actually thought, as we shall see.

The entertainment industry’s campaigns are best understood not as a late flowering of eighteenth-century thought but as a modern, post-1990 response to a striking convergence of at least three historical events. The first and broadest of these has been the rise of a “knowledge economy.” Since at least the Second World War, remarkable wealth and thus remarkable power have found their sources in the laboratories and studios of industrialized agriculture, medicine, computing, and entertainment. It therefore matters to companies like Monsanto, Pfizer, Microsoft, and Disney that they control the know-how behind the goods they produce, and as for the goods themselves—especially intangible ones like a digital music file or the description of a soybean gene—it matters that the law help them guard the rights that ownership is supposed to bring, especially the exclusive right to charge fees for access.

A second historical change has, however, made it much more difficult to maintain the fences needed to make exclusivity work. In the 1990s, digital copying and the global Internet appeared almost simultaneously, and all of a sudden many of the useful old fences simply disintegrated. Once upon a time, someone had to physically lift boxes of vinyl recording disks and put them on a truck; someone had to carry tins of celluloid film to every movie theater. Once, the media themselves were slow, sticky, and local, and copying was consequently fairly cumbersome, misbehavior fairly rare, and the tools for controlling access fairly modest. There were always cheaters, of course, but on the whole the commercial and moral economies had no trouble finding common ground, and no one needed to get fourth graders to put copyright stickers on their posters.

Then, in less than a decade, the heavy, slow, and local became light, swift, and global. As with the invention of movable type or the telegraph, the appearance of the digital Internet has amounted to a phase change in the media. The old boundary markers weren’t just moved, they were vaporized, and tacit understandings between owners and users got replaced by a kind of amateur anarchism on the consumer side, by ramped-up threats, lawsuits, and lobbying on the producer side, and by very little in between.

And while conventional owners are surely fighting a losing war against the material changes the Internet has brought, they nonetheless still have the kind of money and political clout that has allowed them to punctuate their propaganda campaigns with actual battles joined. The recording industry has fought hard to destroy or regulate one of the more revolutionary features of the Internet—peer-to-peer file-sharing systems—lobbying Congress to force universities to filter their networks, for example, and litigating aggressively.

Agribusiness producers have demanded that farmers who buy genetically altered seed not reproduce and save it from year to year but buy anew each spring (and they have successfully sued a Canadian farmer who, when he discovered that altered canola had accidentally appeared on his land, saved the seed and planted it again). Pharmaceutical producers have developed international trade agreements such that all nations must abide by the rules governing U.S. industrial knowledge or else be sanctioned for “piracy” (and thus managed to get the Indian Parliament to outlaw the making of generic copies of patented drugs, despite the fact that by their manufacture India had been supplying half the drugs for AIDS patients in nations too poor to otherwise afford them).
Beyond all these things, from the rise of a knowledge economy to the disruptions of the digital Internet, one final surprise of history managed to add ideological momentum to all “intellectual property” initiatives. The 1991 fall of the Soviet Union, I believe, served to remove the primary oppositional force that had kept free-market capitalism on its best behavior for half a century. Absent that force, the West entered a period of unabashed market triumphalism, during which many things long assumed to be public or common—from weather forecasting to drinking water, from academic science to the “idea” of a crustless peanut butter and jelly sandwich*—were removed from the public sphere and made subject to the exclusive rights of private ownership.

“COMMON TO ALL”

Here, however, we should come back to the thinly populated space noted earlier between the amateur anarchists of the digital age and the old-guard content owners, for even if Western free-market capitalism was in some sense triumphant, that did not mean that anyone really knew what it should look like nor, once capitalism’s exterior oppositional force had fallen, what interior forces might arise to check the unbridled greed it sometimes sets in motion. In what language, native to our own traditions, shall we speak of, say, farmers who wish to save their seed from year to year, or of patent laws designed to give the poor access to medicine, or of the remarkable new models of production that peer-to-peer file-sharing has allowed?

In answering that question, this book joins with others, and with a number of social movements, that have turned to the old idea of “the commons” as a way to approach the collective side of ownership. The next chapter will offer some history and a definition of this term; for now I want simply to note how widely deployed the language of the commons has become.

Many environmental issues are usefully approached in terms of common assets, from aquifers to wetlands to the oceans and the sky. There are, for example, many groups fighting to keep drinking water as a common resource, from Michigan’s Sweetwater Alliance (formed originally “as a grassroots response to an unprecedented plan by . . . a subsidiary of Nestlé to appropriate and sell millions of gallons of water belonging to the Great Lakes Basin”) to the Canadian Blue Planet Project working internationally to prevent “the private water industry, international financial institutions and others from interfering with the human right to water.”

Those who concern themselves with media technology find themselves more and more speaking in terms of a commons, especially in regard to software, the architecture of the Internet, and the broadcast spectrum. Since the mid-1980s, the Free Software Foundation has not only promoted the right to freely use, copy, modify, and share computer programs; it has also developed ingenious legal tools to guard the software community’s common properties against private capture. In 1991, one key innovation that led to the rise of the World Wide Web consisted simply of treating the methods by which computers communicate with each other (the Internet protocols) as common assets, not the property of some person or firm. In regard to the broadcast spectrum, there are many now who favor regulating wireless transmission as a public commons (“as we . . . regulate our highway system and our computer networks”) rather than through government licenses or a system of private rights.

Arguments that arise in regard to biotechnology—about seed lines, for example, or the ownership of genetic materials—also benefit from a clear model of what it means to place limits on the market and hold some things in common. Many organizations now advocate treating the great legacy of agricultural seeds as a common good, to be preserved and shared across the globe or in

*Yes, U.S. Patent 6,004,596 for a “Sealed Crustless Sandwich” actually exists.
their native settings, as the case may be. In the United Kingdom, the Heritage Seed Library has such a mission, as does Native Seeds/SEARCH in the American Southwest. As for genes, the biochemist and Nobel laureate John Sulston called the book he wrote about the mapping of the human genome *The Common Thread*. “I am one of those who feel that the earth is a common good,” he writes, and the book combines a passionate defense of “the common ownership of the genome” with a description of “the global consequences of ignoring common goods in the quest for short term profit.”

Finally and most fully, this book is not alone in conceiving of culture as a commons, especially since the digital Internet has made so many things light, swift, and global. As early as 1971, Michael Hart, then a student at the University of Illinois, launched Project Gutenberg, now an online resource offering tens of thousands of public-domain books free to anyone with a computer terminal. Hundreds of similar projects have followed. Wikipedia, the remarkable Internet encyclopedia, may be the best known, but there are many others. The Knowledge Conservancy acquires rights to “intellectual property,” then makes it available to the public for free in perpetuity. The Internet Archive is essentially a library offering permanent access to historical collections preserved in digital format. The Public Library of Science publishes a series of research journals whose authors grant to all users “a free, irrevocable, worldwide, perpetual right of access” to their work.

Other projects are not themselves cultural commons so much as their breeding grounds. Best known may be Creative Commons, a nonprofit dedicated to making it easier to share and build upon other people’s work, consistent with the rules of copyright. It provides free licenses and other legal tools “to mark creative work with the freedom the creator wants it to carry.” In a similar spirit, Science Commons, a Creative Commons offshoot, facilitates the sharing of knowledge in scientific research. Its NeuroCommons project, for example, is meant to enhance the study of neurodegenerative diseases by combining commons-based peer editing and annotation of data with project-specific open source software communities.

All these examples are relatively recent, to be sure, but the idea of treating knowledge as a commons is not. The aphorism from Heraclitus that stands at the head of this chapter (“the Logos is common to all”) was written two and a half millennia ago. “Human intelligence is like water, air, and fire—it cannot be bought and sold; these four things the Father of Heaven made to be shared on earth in common,” declares Truth in William Langland’s medieval allegory, *Piers Plowman*. The less mystical, more secular founding generation in the United States held similar beliefs, as in a typical remark from a letter Thomas Jefferson wrote during his presidency: “The field of knowledge is the common property of mankind.”

In fact, it is the founding generation in the United States that provides the primary source material for this book. The early Republic is the land I have chosen to visit in search of alternative visions of cultural ownership, and the founders are the allies I have enlisted to help me in that quest. What exactly, I’d like to know, did men like Jefferson—or John Adams, James Madison, Benjamin Franklin . . . —have to say when they “talked about” what has come to be called “intellectual property”? Not that I am looking for originalist answers; I don’t believe that positions held by earlier generations have any necessary force in the present. If I find much of what the founders wrote persuasive—and I do—it is not because they were there at the creation but because their ideas can be so fruitfully brought to bear on present circumstances. I find in them a usable past, especially in that they suggest a number of ways to widen the terms of engagement beyond the “theft is theft” approach whose seed is now being so widely sown.

I realize that in drawing much of my evidence from eighteenth-century American sources I run the risk of limiting my argument to one nation’s case. Perhaps I have, but I think not. Industrialized nations like the United States now aggressively export their
“knowledge laws” in much the same way that the British long ago spread their “land laws” to distant colonies. Late in the nineteenth century, in country after country, British colonial governments simply erased the rules of customary common land tenure and substituted their own. In New Zealand after the Native Land Act of 1865, for example, courts refused to “recognize” anyone who showed up claiming to own land in common. In India, the Forest Acts of 1865 and 1878 similarly extinguished centuries of customary rights in the rural villages.

What happened in the nineteenth century to tangible properties is happening now to intangibles. Take as a first example a recent change in Saudi Arabian law brought about by the World Trade Organization. As the historian Carla Hesse has noted, in traditional Islamic legal practice, authors did not own the ideas expressed in their books:

A thief who stole a book was thus not subject to the punishment for theft—the amputation of his hand. Islamic law held that he had not intended to steal the book as paper and ink, but the ideas in the book—and unlike the paper and ink, these ideas were not tangible property.

Thus when Saudi Arabia wished to join the WTO, its religious judges objected to the notion that bootlegged videos and software could be classified as stolen goods. The WTO flew a group of them to Geneva and persuaded them to change their minds.

Or take the “100 Orders” that L. Paul Bremer issued during the year that the Coalition Provisional Authority governed occupied Iraq. Issued mostly in 2004, these are a set of “binding instructions . . . to the Iraqi people” laying out a series of regulations, “penal consequences,” and “changes in Iraqi law.” Order 83 amends Iraqi copyright law in ways that Iraqi citizens might well have found worthy of debate: it allows ownership of “collections of works which have fallen into the public domain,” and of “collections of official documents, such as texts of international laws”; it protects databases (a practice much debated in the United States and Europe); it treats computer programs “as literary works” (a common formula worldwide, but worthy of discussion nonetheless). It even protects “public recitals of the Holy Koran”—oddly so, one might think, as the Koran is taken to embody the word of Allah and its principal means of transmission has always been oral recitation from teacher to student (the word “Koran” itself means “recitation”).

Another of Bremer’s decrees, Order 81, amends Iraqi patent laws no less boldly. For the first time in Iraq’s history, it adds “the protection of new varieties of plants” to the list of patentable things and it prohibits farmers from reproducing patented plants without permission of their owners. Most striking of all, it prohibits farmers from “re-using seeds of protected varieties.”

Among the many ironies of Order 81, as an essayist for The Ecologist pointed out, is the fact that Iraq lies in the original fertile crescent of the Tigris-Euphrates river system, where humankind first domesticated wheat ten thousand years ago. Worldwide, there are today over 200,000 varieties of wheat, most of them developed by indigenous farmers to fit local growing conditions. Hundreds of these are found in Iraq itself, and before the 2003 invasion, almost all Iraqi farmers saved their local seed, or bought it from neighbors who did. Order 81 does not necessarily wipe out the millennia-long tradition of local plant breeding, seed-saving, and exchange, of course, but it may well do so in practice, for it lays the legal groundwork through which these ancient practices can more easily be replaced by what the order calls “the international trading system.”

To come back, then, to my having chosen to base much of this book on eighteenth-century American sources, the point is that even if you are a farmer in Iraq—or a doctor in Chile, a composer in Australia, an Internet activist in China, a teacher in Zimbabwe . . . —the history of the cultural commons in the
United States should be of interest, especially given that (as we shall see) the early American Republic is itself a foreign land, as it were, in relation to the nation's present practice. Where citizens of other countries wish to resist or modify cultural policies being imported from elsewhere, it will help them to know that many U.S. citizens are not only engaged in a similar task, but have at their disposal a tradition of resistance that was in fact an intrinsic part of the American Revolution.

In 1983 I published The Gift, a book meant to defend and illuminate the noncommercial side of artistic practice. A second book, published fifteen years later, dealt again with matters of imagination, only this time from a more mischievous point of view. Trickster Makes This World used a group of ancient myths to argue for the kind of disruptive intelligence all cultures need if they are to remain lively, flexible, and open to change.

The present work has roots in both of these. As with The Gift, my focus is on the commerce of the creative spirit, though the emphasis in this case falls more on the social side of things, on how we treat art and ideas once they have entered the public sphere. I mean this book to be a defense of the cultural commons, that vast store of unowned ideas, inventions, and works of art that we have inherited from the past and continue to enrich.

In returning to themes from The Gift, however, I have tried not to forget some of the lessons offered by the old trickster tales. Tricksters are the mythic characters who threaten to take the myths themselves apart. Their task is to unsettle the eternals, the propaganda of the faith, the seemingly foundational truths. How do they do it?

In the Norse tales, the mischief-maker Loki once approached the goddess Idunn, who tends the orchard where the Apples of Immortality grow, and persuaded her to bring a sample of her fruit out of Asgard, the Norse heaven. To fool her into leaving her post, he claimed that he had found better apples elsewhere, and asked her to bring some of her own for comparison. As soon as Idunn left the orchard, disaster struck the gods: they began to grow old and gray.

It's a simple trick, really: to show that what was assumed to be unchanging and eternal can in fact be infected by time, simply leave the garden and compare what grows there to something else. Modern tactics are the same, if more mundane, when it comes to claims about cultural truths: compare them to those from some other time or place and see how they fare. Maybe it is currently true for schoolchildren in Los Angeles that "if you haven't paid for it, you've stolen it," but is that true for children in China? Was it true during the Protestant Reformation?

The bulk of this book engages in the simple mischief of comparing current claims about cultural ownership to claims made in the eighteenth century. Even that exercise, I realize, will not get us very far from the garden of the European Enlightenment, and I want to close these introductory remarks, therefore, with a short sample of the fruits to be found if we were to wander even further afield.

If we go all the way back to the ancient world, to the old bardic and prophetic traditions, what we find is that men and women are not thought to be authors so much as vessels through which other forces act and speak. Norse legend tells of a spring at the root of the World Tree whose water bubbles up from the underworld, carrying the dissolved memories of the dead. Odin drank from it once; that cost him an eye, but nonetheless empowered him to bestow on worthy poets the mead of inspiration. Homer is not the "author" of the Odyssey; he disappears after the first line: "Sing in me, Muse, and through me tell the story . . . " Hesiod's voice is not his own; in The Theogony he has it from the muses of Mount Helicon and in Works and Days from the muses of Pieria. Plato presents no ideas that he himself made up, only the recovered memory of things known before the great forgetting we call birth.
Creativity in ancient China was not self-expression but an act of reverence toward earlier generations and the gods. In the *Analects*, Confucius says, "I have transmitted what was taught to me without making up anything of my own. I have been faithful to and loved the Ancients." To honor the past was a consistent virtue for a thousand years in imperial China and thus to copy the work of those who came before was a matter of respect 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?"

A modern example of the same kind of nonproprietary assumption is given by the great Hindu mathematician Srinivasa Ramanujan, who used to say that "an equation for me has no meaning, unless it represents a thought of God." He directed his prayers toward Sarasvathi, the goddess of learning, and believed that his family deity, the goddess Namagiri, visited him in dreams to write mathematical equations on his tongue.

A long tradition in Christianity also takes the fruits of human creativity to have nonhuman origins and thus assumes that they cannot be bought or sold (nor can they really be forged, plagiarized, or stolen). Such was the traditional understanding for medieval Christians:

*Scientia Donum Dei Est,*
 Unde Vendit Non Potest.

"Knowledge is a gift of God, therefore it cannot be sold." 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. They believed especially in an obligation to develop God-given talent and to share its fruits with others. "Such a belief was stated stridently in the prefaces of many books as a reason for their publication," according to one scholar of early German music. The composer Martin Agricola, for example, begins his study of musical instruments imagining how God might address him at the Last Judgment: "I have heaped riches on you, so that through you you would serve your neighbor and communicate these things." Martin Luther himself inserted a *Warnung*—a warning—to greedy printers at the start of his 1545 German Bible. "Freely have I received, freely have I given, and I desire nothing in return," Luther declared, echoing the moment in Matthew when Jesus tells his disciples not to trade in the powers they have received.

The motives behind such declarations are as much pastoral as theological, for they recognize that we have duties to our neighbors as well as to God. The title page of a work by Johann Sebastian Bach displays a dedication containing this double focus: "To the highest God in his honor, To my neighbor that he may instruct himself from it." The immensely prolific composer Michael Praetorius noted that the many Lutheran chorales he had arranged were not exactly his but more precisely "the common...melodies that are sung at church and at home in various places and lands." Compositions, that is, can not only be conceived as having been given by God and passed along to others, but as having come from those others in the first place, worked upon, and then returned. "If I have written much," Praetorius might have said, "it is by standing on the shoulders of the common..."

In speaking of common melodies and of neighbors as recipients, these artists turn toward more humanist descriptions of creativity, and toward the future, that is to say, toward the destinations of art rather than its origins. No matter its sources, for whom does the creative artist or thinker make the work? The Polish-American Nobel laureate Czeslaw Milosz once offered a reflection on the Greek concept of *storge*, usually thought of as the kind of affection...
that a parent feels for a child or teachers toward their students. It is also possible, Milosz wrote,

that store may be applied to the relationship between a poet and generations of readers to come: underneath the ambition to perfect one's art without hope of being rewarded by contemporaries lurks a magnanimity of gift-offering to posterity.

This is really the same lesson that another laureate, the Italian Eugenio Montale, took from his study of Dante. "The greatest lesson Dante left us," Montale wrote, is "that true poetry is always in the nature of a gift, and that it therefore presupposes the dignity of its recipient."

In closing out my introduction with this brief tour of ideas about creativity from other times and other places, I have meant simply to get a bit of distance on the idea of "intellectual property." It is an idea not just new but historically strange. It belongs to our times, to be sure, but if we are to examine it with any care it helps to know how new it really is; it's newer than automobiles, newer than lightbulbs, newer than jazz. Bowing however briefly to other ways of imagining human creativity also helps us see how much any unthinking discussion of "intellectual property" will crowd out: not just the kinds of examples I have just rehearsed, but also much of what lies ahead in this book. "The field of knowledge is the common property of mankind": what precisely were Jefferson's assumptions when he made a claim like that? And what, for that matter, did he mean by "common"?

22 COMMON AS AIR

WHAT IS A COMMONS?

The argument: it would be wise for most creations of human wit and imagination to lie in a cultural commons rather than be subject to the rules of private property. But what is a commons?

The rights of man are liberty, and an equal participation of the commonage of nature.

—PERCY BYSSHE SHELLEY, "DECLARATION OF RIGHTS," 1812

A RIGHT OF ACTION

The "commons" means many things to many people. Take John Locke's Second Treatise of Government (1690), in whose chapter "Of Property" the commons is not to be found in the contemporary English countryside but in a time and place more reminiscent of the Book of Genesis. "God . . . has given the earth . . . to mankind in common," writes Locke. Nature is "the common mother of all," albeit a "wild common," for she lacks the improving hand of man. For Locke, that original wilderness resembles a thing called "America," whose "wild woods and uncultivated waste" call to mind the world before it was first peopled by "the children of Adam, or Noah." "In the beginning all the world was America . . .; for no such thing as money was any where known." Call it America or call it Eden, in this seminal document of modern liberalism the commons bespeaks an aboriginal first condition, one that existed