

Park life

The commons and communications policy

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The Internet has many histories, technical and social, stretching back as far as the mid-twentieth century. There is one particular history, however, that spans half a millennium and begins with some geese in an English forest: the history of the Internet commons.

This chapter looks at the re-emergence of an old property concept as a way of understanding the Internet's design. Defined simply, the commons is a term to describe something that everyone owns and everyone can use. The commons has proved an important motif in theoretical and policy discussions concerned with the Internet's architecture; in particular, how the idea of open access can encourage or restrict the development of new ideas and technologies. We map out the broader intellectual history of property and enclosure in order to see how the commons critique might apply to the Internet in Australia.

A place to begin this story is the mid-eighteenth century when the British aristocracy persuaded parliament that they should be granted permission to take possession of large areas of forests and meadows which had previously been available for common use. Dominant land owners appropriated six million acres – a quarter of all cultivated land – through these measures.

Histories of enclosure focus on two themes: its place in the formation of contemporary economics, and the sentimentality and nostalgia that was used to describe the ‘end of peasantry’.¹ The ‘enclosure movement’, as it was known, devastated the rural communities who had shared the resources and game of those areas. It was a significant step, symbolically if not directly, in a wider trend in economic relations that had been taking form since the fifteenth century, involving methods of production, price movements and continuing changes in property relations. The people of the commons were romanticised in English literature as modern capitalism took hold – they were depicted as a noble community, ‘a bold peasantry, their country’s pride’.²

As was the custom of the time, the villagers used the dark and eerie format of a nursery rhyme to express their situation. How could the law

*Hang the man and flog the woman
That steal the goose from off the common
But let the greater villain loose
That steals the common off the goose?*³

Reviving the commons

Preserving domains for public use has remained a feature of capitalist democracies, despite the fact that capitalism presupposes the primacy of private ownership and control.⁴ The notion of public resources is evident in tangible assets (such as beaches, parks and roads), as well as intangible wealth (such as languages and scientific principles that are freely available to learn and use). Much of the responsibility for protecting and maintaining public resources was taken over by the state in the twentieth century and swept up in a discourse of the public and its ‘interest’.⁵

In community (or third sector) organisations, notions of collective responsibility and grassroots organisation have persisted. But where resources held in common have remained a feature of contemporary society, so has their perceived vulnerability. In regards to cultural policy, Australia has demonstrated its commitment to the public interest through a range of measures, including Australian content quotas for television, subsidies and tax incentives for film and television production, and the reservation of spectrum for public and community broadcasters. All these policies are intended to retain a ‘space’ for activities considered to stand over and above private, individual gain.

There is, however, a sense among many scholars that our technologies, communities and enterprises are no longer adequately described by straight-forward public interest language or policies of cultural protection. Old

rationales in which the state would know and select what was in the public's interest are seen to be problematic in a cultural sphere defined by complexity and diversity.⁶ The revival of the idea of the commons stems from a desire to reframe the importance of shared ideas and resources in relation to changes within economics and communications. It speaks to the dilemma of the public interest by taking into account the emergent cultural forms and characteristics of new media. The Internet – like the 'wastes' and cultivated fields that were appropriated by 'systematic owners'⁷ – is seen by the commons theorists to be facing the threat of market enclosure. The concern, however, is not simply that resources will be handed over to private interests, but that the activities and forms of production that take place within its space are now in danger. A prior form of organisation is said to be threatened – a system in which the inhabitants (depicted as akin to a 'bold peasantry', indeed) have pioneered their own forms of production and collaboration.

Lawrence Lessig describes the Internet as an 'innovation commons', largely because the norms and protocols that governed it during its formative years had allowed it to be accessible, open and free.⁸ As the architecture of the Internet was visible to anyone who wanted to see it, people were able to build upon and extend the technology, either individually or collaboratively, ensuring that development was both rapid and far-reaching. Furthermore, control of the Internet lay at the ends (that is, with the users) rather than at any central point. This meant that anyone could participate in its development without needing to gain permission. This represented an organisational system that from the start involved commercial ownership and investment: financial contributions that were important for the growth of the technology. It was not private ownership, therefore, that threatened to undermine the Internet commons, but rather activities and technologies designed to direct or restrict user involvement.

By describing the Internet as a commons and setting out to convince the community that its structure should not be further compromised, the commons advocates (with Lessig at the helm) now hope to establish a regime through which new and innovative ideas and technologies may continue to emerge.

To ground this discussion in a policy context, we will first trace the possibilities of the Internet commons in Australia. In the second half of the chapter, we examine its philosophical underpinnings and the social and political changes it claims to respond to.

Enclosure and the Internet

The analogy (and, indeed, history) of land use brings out some of the complexities in the notion of an Internet commons.

Our use of land today is restricted or permitted according to property rights. In economic theory, the word ‘property’ does not refer to resources, but to the system that governs the use of those resources. To speak of property rights, therefore, is to be concerned with ownership and the regulatory systems that determine how property is governed (for instance, how it can be acquired, for how long it may be possessed, and whether spaces must be put aside for collective use).

The commons is often mistaken for the absence of property – a situation better described as one of *open access*. In an open access regime, anyone can use a resource or object without infringing on someone else’s right, even to the extent that they may exploit that resource or make it their private property. The commons, on the other hand, is a property construct whereby the common use of the resource is protected by the state. In many cases, the regulation of the commons has been managed by the users themselves. As John Frow writes in regard to the European feudal commons, ‘the commons were highly regulated by a customary recognition of rights which (like native title) were coincident rather than exclusive’.⁹ In other words, rights existed in the commons – between individuals using the land and in terms of the existence of a rights regime in general – and were expressed through the customs of use. Frow’s example of native title is pertinent as it highlights a situation where open access was falsely assumed.¹⁰ It is an example we will return to.

An understanding of property as a regime of governance explains how the Internet commons movement has developed to encompass both copyright (intellectual property concerns) and the regulatory frameworks that govern infrastructure. It is not just about the use of an idea or a technology; it also involves consideration of the system set up to determine what kind of property rights will prevail.

How can property regimes be applicable to the Internet?

For Lessig, the norms and architecture of the early Internet allowed ideas and technologies to thrive without restriction. According to Lessig, the Internet commons rests on the principle that ‘code is law’. In *Code and other laws of cyberspace*,¹¹ he argues that the code – meaning the written computer instructions – is the key to understanding how the Internet might be regulated.¹² Each of the non-physical layers of the Internet is comprised of code – and that code has the ability to constrain, or regulate, the information flows

on the network. Lessig's approach emphasises the need to understand the Internet as 'regulable'; its layers are codified and open to manipulation.¹³

In his later book, *The future of ideas*, Lessig developed this conceptual model further to argue that if code is in fact law, the protocols that specify how information should be sent end-to-end through the network are the equivalent of a commons property regime. Open source technologies such as the Apache web server, the Linux operating system and Perl are cited as achievements of the innovation commons. These non-proprietary technologies were developed through the efforts of countless volunteers sharing and building upon each others' work. Dorothy Kidd, for instance, locates the commons in the culture of the Internet as identified by Castells,¹⁴ a culture informed by its historical roots in the academy (where peer review is practised) and driven by the open source software movement. She uses the open publishing example of Indymedia (see chapters 6 and 13 for further discussion), arguing that it represents a 'new commons regime'.¹⁵

These examples illustrate a key characteristic of the Internet. While many communications technologies are built on standards approved by bodies such as the International Standards Organisation or the International Telecommunication Union, the various layers of hardware and software that comprise the Net present opportunities for the evolution and subversion of code – and, arguably, standards. The clearest illustration of this is found in website development – developers often program specifically for the features found in the dominant web browser (Internet Explorer on the Windows platform) rather than the standards recommended by the W3C Consortium.¹⁶ As a result, the code that defines the web is no longer common property, but subject to the manipulation of unsupervised enterprises.

Similar tensions over the creation of Internet standards are apparent in the realms of digital media formats, and programming languages such as Java. For example, in digital music the MP3 file format, formalised as a standard by the International Standards Organisation, is under threat from the WMA standard, a proprietary format that has become widespread due to Microsoft's market dominance.¹⁷

If code is law, the choices made at the code layer can determine levels of control, security and accessibility. The argument that the Internet is experiencing a process of enclosure, however, reaches beyond code. Some of the enclosure is the result of communications regimes that predate widespread use of the Internet. For instance, in the US, legislative decisions that were once intended to protect and expand the cable television industry have led to a situation where cable companies now control access to the cable infrastructure and the code on which broadband Internet services are run. Broadband cable in the US is thus owned by a small number of players who are able to specify which ISPs can gain access to their network (for instance, AT&T

partnering with @Home and Roadrunner). These ISPs can then limit the end-to-end nature of the Internet by setting up restrictive technologies that prevent the use of certain applications, specifying a backbone provider, or filtering data.¹⁸ The most visible of these restrictions emerged in the wake of widespread music sharing on peer-to-peer networks. Some US ISPs are restricting the use of peer-to-peer software¹⁹ and limiting the uploading of data from user machines.

Australian broadband providers are no different. Most broadband ISPs limit upload bandwidth,²⁰ and have acceptable user policies with quite inhibitive terms. Optusnet, for example, does not permit users to run their own webservers on the network.²¹ While the user default response might be to take their business elsewhere, competition (and anti-competitive regulations) in small markets such as Australia can make this difficult.

This is one area where the complexities of the commons come into view. Although the commons could be seen as a new development in a long line of cultural policies intended to make technology available to all (such as universal service obligations), it simultaneously presents an argument for access and openness that resists familiar forms of government intervention. The question to be asked in Australia's case is whether access and industry stability can be made compatible, an issue we will return to below.

Copyright law is another important regulatory provision that impacts on the workings of the commons. The duration of copyright protection has been extended in the US from the life of the author plus 50 years to the life of the author plus 70 years. The effect of this adjustment is that ideas stay out of the public domain for longer; in effect prolonging the time that non-copyright holders have to wait to use a work after an originator's death.

In Australia, new media policy regimes have not yet embraced the concept of the commons. The strongest arguments for a communications commons have come out of community broadcasting advocacy and theory, dating back to the 1970s.²² Community broadcasters have successfully argued the need for broadcast spectrum set-asides for community use, giving innovation, diversity of ideas and cultures, research and development, and skills dissemination as outcomes. This differs somewhat from the Internet commons, largely because broadcast spectrum is a scarce resource – when there are too many broadcasters they will interfere with each other's transmission. As a result, broadcast spectrum has been carefully managed by the regulator, and community broadcasting has been strictly non-profit. In broader terms, it could also be argued that communications policy has favoured policies that speak more directly to the national interest by supporting existing cultural groups (multicultural policies and the establishment of SBS, for example). Commons arguments, including community broadcasting, have remained marginal within that framework.²³

More recently, the Broadband Services Expert Group paid lip service to the idea that ‘there will be an emphasis on creation and communication by and between individuals and communities.’²⁴ However, the reality of the policy response was largely ‘industrial’, ignoring practices that merge production and consumption in favour of encouraging top-down institutional media responses. Similarly, Creative Nation (the Keating Labor government’s 1994 cultural policy document) focused on the development of the ‘cultural industries’ (which in that document were coterminous with the arts),²⁵ rather than addressing the possibility of commons-style cultural production and consumption. In the new media realm, the policy emphasised the development of a multimedia industry, by funding multimedia enterprise. In addition, it argued for tougher copyright protection to meet the challenges of new technologies.²⁶ Those copyright challenges were eventually addressed in the Australian government’s *Copyright Amendment Act 2000*, also known as the ‘digital agenda’, which cast digital technologies as a threat to existing intellectual property rights, extending the existing copyright regime into new media forms without expanding fair use or remix possibilities.²⁷

In effect, the Internet has been drawn into the same regulatory framework as older media forms. The 1999 Online Services Amendment to the *Broadcasting Services Act* was significant in that it cast the Australian Broadcasting Authority (ABA) as the regulatory body responsible for Internet content.²⁸ It gave the ABA gatekeeper power to take down prohibited content, as well as giving it an oversight role for Internet co-regulation. An industry model has now been forced onto what can only be described as a loose amalgam of communities and disparate users.

The imposition of a gatekeeper runs counter to the reconfiguration of production and consumption in the information commons, where what we consume is integral to our participation through reuse and adaptation (as discussed below). Moreover, it ignores the reality of current Internet usage, in which information flows at tremendous speed in many directions simultaneously. Instead, it harks back to a regulatory ambition based on market protection and controlled cultural output. In its current incarnation, the gatekeeper role of the ABA ultimately serves little purpose other than to imagine the Internet in the mould of more traditional media forms; one that limits its creative possibilities.

The Australian policy approach also fails to properly address issues of representation in its regulatory choices. While the use of a co-regulatory framework appears to allow broader regulatory input, its implementation restricts input to a chosen few. Rather than allowing citizens some access to the regulatory mechanism, the policy shifts power over online content to the

private sector via a select body of participants. It does this by relying on an industry code of practice which enables the Internet Industry Association²⁹ to determine parameters for regulation. The code of practice's philosophy effectively cedes regulatory power to the manufacturers of filtering software. When online content is found to be prohibited and located overseas, the ABA only has to inform approved filter manufacturers of the existence of that content. There is no legislative requirement for those manufacturers to act on that advice. In effect, policy has handed enforcement to private filtering companies, disempowering citizens and placing control with corporate entities. The policy has removed power from end-users and placed it squarely in the hands of (largely American) IT corporations. Moreover, there is no legislative requirement for the filtering manufacturer to disclose the wider parameters of their filtering software. By privileging an Internet 'industry' assembled from corporate institutions intent on centralised information control, the Australian policy approach does not take into account the broader constituency of users.

There has been some promise for the commons, however. A report on innovation systems in digital content production in Australia produced for the National Office of the Information Economy (NOIE) in 2003 made three recommendations that are relevant to our discussion.³⁰ The first recommendation involved promoting the development of open content repositories in order to fuel creativity. Importantly also, cultural agencies such as the Australian Centre for the Moving Image (ACMI) would be given the role of acting as repositories. A second recommendation entailed the mandating of open access channels for pay TV and broadband, in effect allowing alternative distribution channels for independent producers while promoting content diversity and allowing easy access to the abovementioned repositories. The third recommendation was to make crown copyright material and intellectual property accessible. At the moment 98 per cent of copyright material in Australia is not subject to active commercialisation or use.

The history of the Internet commons is not yet over. It has captured the attention of intellectuals and activists who see it as a strong framework for information rights. It also lends context and precedent to what was once considered a new and exceptional structure. But it is not without its opponents. What Lessig describes as the old corporate interest 'bending the Net to protect itself against the new'³¹ is also a matter of old philosophies of property and entitlement being tested in a society undergoing immense change. The second half of this chapter is devoted to some of these issues.

Outside Australia, too, initiatives are being undertaken that might stimulate further development of the Internet commons. Under US copyright law, exclusive property rights are automatically assigned to any work that is

deemed to be an original expression. In order that authors may specify that a creation can be reused, licences have been developed whereby people can identify their works as existing in the public domain. The 'creative commons' initiative (pioneered by Lessig and Boyle) goes one step further and allows people to attach metadata to their works that will make it searchable for people trawling the commons for inspiration and information. In the United Kingdom, the BBC (also under the guidance of Lessig) has decided to release the contents of its archive into the public domain for non-commercial reuse.

Radical or common-place?

In the preface to a later edition of *The future of ideas*, Lessig tells of being a guest on a talk show and receiving a call from Hillary Rosen of the Recording Industry Association of America. Rosen accused Lessig of hypocrisy for selling his book, when 'if he actually went to his overall philosophy, he should essentially be giving it away on the Internet instead of selling it in a bookstore'.

Encounters such as these have made Lessig deeply pessimistic about the future of the Internet. He writes:

No one serious in this debate is promoting the abolition of copyright. Yet the Hilary Rosens and Jack Valentis of the world have convinced policy-makers and ordinary people that this is a war about basic American values, and that they, the lobbyists, represent America, while we, their opponents, are essentially communists.³²

The Internet commons is not a particularly radical concept. As we have said, it originates from a very old idea. What Rosen failed to understand in her talkback comment to Lessig is that the 'Internet as commons' theory abandons any question of the Internet as an anarchist space. Through the philosophy of the commons, idealised notions of the Internet as free from rule have been jettisoned in favour of an understanding that places it firmly within our social systems of rights, obligations and guarantees.

Importantly, the commons advocates have not argued that the Internet must be entirely free from control. Writes Lessig: 'Not everything served across the Net is free for the taking.' However, at the code layer:

the Internet was free.³³ So too was much of the content served across the network free. The Internet thus mixed both free and controlled layers, not just layers that were free.³⁴

If there is a threat to the corporate world in the idea of the Internet commons it is not that it aims to extinguish property rights, but that it provides a basis for a revision of the concept of property. The commons idea reflects the fact that society has changed, and the fundamentals of economic exchange and law must follow suit.

Proponents of the commons base their argument on utilitarian grounds, saying that it will produce the optimum social good for the greatest number (or the best situation for the most people). Utilitarianism is not opposed to private ownership, or the principle of property, but it does assert that we must adapt old systems to fit new situations where that will improve circumstances.³⁴ Writes Lessig: ‘we must think empirically and look at what works’.³⁵ Yochai Benkler suggests that ‘our law must again develop to accommodate another newly emerging mode of production, this time peer production.’³⁶ In her book *Digital copyright*, Litman³⁷ argues that, if nothing else, the simple fact that a great many people ignore digital copyright law (burning and swapping as they wish) should be cause enough to change the rules. This is fundamentally opposed to the Anglo-American tradition which sees property rights as ‘natural’ and therefore guaranteed against meddling by the state on the basis of social convention.

The area that the Internet commons seeks to improve is the realm of innovation and ideas. It relies on the existence, or at least the possibility, of a new economy that requires knowledge, ideas, information and creativity in order to progress. This is a conception of property that is not static and immovable, but one that must change over time as society does.

The deeper question, then, to ask of the commons, is: to what social and cultural changes does it respond?

The commons and the citizen-consumer

In its ideal form, the commons is a framework which allows (and encourages) multiple aesthetic and subcultural strands to emerge and thrive. It is predicated on creating the conditions in which citizens can act autonomously, and in so doing may construct and reconstruct the cultural identities to which they belong. Although it is utilitarian – seeking innovation as a social goal – it resists an understanding of citizens as *objects* that can be directed towards notional ends. Thus, the commons is about creating the conditions in which citizens can, and do, act autonomously, by providing the framework for active participation. Rather than there being a fixed understanding of nationhood, culture and the role of the citizen, citizenship is participatory, and ‘democracy [is] developmental for its participants’.³⁸ Some see the commons in a strategic sense, in opposition to the dominance of the

global marketplace ‘and the rapidly growing power of global corporations, which gravely threaten citizenship and democracy.’³⁹

Such discourses posit citizenship in *opposition* to corporatism, and argue that it provides alternative motivations that allow for both more democratic governance and more equitable outcomes.⁴⁰ However, this simplistic dichotomy between state and corporation ignores the fundamental aspiration of the Internet commons to build a future where economic prosperity is compatible with social and democratic goals.⁴¹ A purely oppositional model also overlooks the activity that occurs within the commons – a reality in which people balance consumer and cultural desires, seldom giving the regulatory stance of the state a second thought.⁴²

So the innovation commons needs to be seen as occurring at the intersection of consumption and production. The availability of ideas and technologies (consumption) is essential for new ideas and technologies to emerge (production) – in other words, what we produce is tied up with what we consume.

In this configuration, the consumer is no longer the destination of marketing strategies, but part of the cycle of production in an active, noisy and sometimes non-conformist way. John Hartley, in describing what he calls ‘DIY citizenship’, argues that electronic media forms in general (and television in particular) have created a new form of citizenship that ‘overlays the older, existing forms’.⁴³ Hartley argues that the media’s mode of address has shifted in the last half century to encompass an audience that is more savvy, knowledgeable and aware of diversity. Henry Jenkins further argues that through peer-to-peer technologies, consumers are contesting ownership and control of culture through ‘new kinds of economic and legal relations and not simply through making meanings’.⁴⁴ The commons is such a ‘legal relation’, challenging not only the cultural products and possibilities on offer, but suggesting new methods of governance to meet those demands.

Laying the golden eggs

If the commons has a weakness, it comes down to doubt about whether we can guarantee that the geese inhabiting it will produce rich and useful outcomes for all.

Those who are opposed to the commons argue that it is an indeterminate and incomplete concept, with no proof that any common good will result. The Anglo-American tradition has favoured a very different rights approach, whereby property is derived from our natural right to obtain sustenance and to reap the rewards of our labour. This is considered to be a

‘more substantial foundation for intellectual property rights’,⁴⁵ guaranteeing that the inventions of our personality and the products of our labour are not taken away from us. (Ironically, the notion of creative genius, the author as originator and rights holder, was achieved aesthetically by the Romantic poets who had idealised the rural commoners.)⁴⁶ So utilitarian arguments such as those in support of the innovation commons have proved to be vulnerable to a prevailing notion of property that relies on unassailable natural rights and the guarantee that the owner, at least, will benefit from their labour regardless of changing social structures.

In the American context, this longstanding argument may very well win in the battle over digital rights, to the detriment of the commons. In Australia, however, it may be the case that utilitarian arguments just don’t work. Here, there is a finer balance to strike between market stability and creating an environment for innovation. If the commons is an argument for systems and structures that encourage ideas, creativity and prosperity, it is possible that in a small economy this can only be achieved through some degree of corporate favouritism. For instance, in the case of the Foxtel and Optus agreement, the dilemma faced by the Australian Competition and Consumer Commission (ACCC) was whether to permit anti-competitive activities that could strengthen prospects for the struggling cable sector, but which could adversely impact upon the wider content production and broadband industries.⁴⁷ In the end, the ACCC approved the partnership. Possibly for this reason, the NOIE recommendations (mentioned above) appear limited to the economic realm. The approach encourages corporate investment in an information economy, but pays less attention to cultural considerations.

It may be time to rethink the commons. Environmental law scholar Daniel W Bromley has written that ‘the real tragedy of the commons is the process whereby indigenous property rights structures have been undermined and delegitimised.’⁴⁸ In the areas of environmental law and first people’s land rights, the Anglo-American (Lockean) tradition is being challenged on the basis that prior social and political structures should be acknowledged. As Rosemary Coombe writes, the commons critique has linked together ‘hitherto unimagined coalitions of environmentalists, feminists, farmers, food and health activists, indigenous peoples, and religious groups in the articulation of alternative moral economies of value.’⁴⁹ The question facing us in regard to the Internet commons is whether our current laws regarding digital information adequately serve a society that has come to recognise that the Internet has been characterised by a different regime of use and ownership from the one we are used to.

Perhaps the history of the Internet commons in Australia also dates back to the eighteenth century, to a place where property was claimed on a false

and terrible assumption that the land being occupied was lying waste (*terra nullius*). The starting point for conceiving of the Internet commons in the Australian context, then, would be to ask how current communications policies work from an outdated framework that ignores the prior existence of a commons arrangement on the Internet. That might entail not a departure from our own frameworks and systems of property, but a realignment to meet current social values and obligations. Investigation into the ways in which laws of intellectual property need to change to accommodate new media is already underway. Laws that presume ‘consumption [to be] strictly separated from production for most people and largely devoted to receipt of finished goods, not to creative utilisation of materials to shape one’s own environment’⁵⁰ are being rethought as a result of the commons debate.

Further reading

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Notes

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- 10 'Aboriginal hunter-gatherers were adjudged to have no property rights because of the way in which their place in time was construed by major seventeenth and eighteenth-century philosophical and legal authorities ... As they had no concept of property, their lands were deemed *terra nullius*, desert or waste. The 1991 Mabo decision overturned this assumption ...' B Atwood, 'The past as future: Aborigines, Australia and the [dis]course of history' in B Atwood (ed), *In the age of Mabo: history, Aborigines and Australia*, Allen & Unwin, Sydney, 1996, p.ix.)
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- 30 QUT CIRAC and Cutler & Company, *Research and innovation systems in the production of digital content and applications*, report for the National Office of Information Economy, Commonwealth of Australia, September 2003.
- 31 Lessig, *Future of ideas*, p.16.
- 32 Lessig, *Future of ideas*, p.xvi.
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