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## Dynamic Fair Dealing

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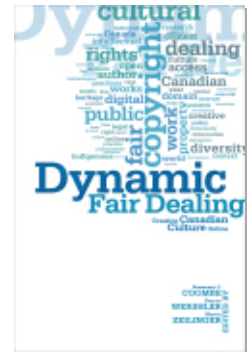
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# Pull Up the Stakes and Fill in the Ditches

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## The Materiality of Intellectual Property

DARIN BARNEY

*Mine! Mine! Mine! Mine! Mine! Mine! Mine! Mine!*

A flock of seagulls, expressing proprietary interest in Nemo the clownfish and Dory the blue tang in Andrew Stanton's *Finding Nemo*

Pierre-Joseph Proudhon's 1840 anarchist masterpiece, *What Is Property? Or, an Inquiry into the Principle of Right and of Government*, is most famous for the answer its author gives to the volume's titular question. "*La propriété*," Proudhon declares, "*c'est le vol!*" Property is theft. Aside from (or, perhaps, because of) its manifest clarity, the claim famously became a target in Marx's ongoing battle with anarchist thinkers for proprietary control over the revolutionary program in nineteenth-century Europe. In a letter to J.B. Schweizer, published in 1865 in *Der Social-Demokrat*, Marx praises Proudhon for his "muscular style" and "revolutionary earnestness," while chiding him for "only reproducing old stuff," pointing out that "the same words: "*La propriété c'est le vol!*" had previously appeared in 1789, in a text by the Girondist pamphleteer Jacques-Pierre Brissot. Beyond the charge of not having cleared his samples, Marx criticizes Proudhon for assuming the possibility of a generic form of property abstracted from the particular historical conditions – specifically the mode and relations of production – that alone give property its definitive character in any given milieu. It is not only that, as Marx points out, "theft, as a forcible violation of property, *presupposes the existence of property*" (original emphasis) but, moreover, that this "property" whose existence is presupposed is really just the historically specific form of bourgeois property raised to the level of an abstract, universal generality. Thus, the question *What is property?* "is so

badly formulated it cannot be answered correctly." According to Marx, "instead of regarding *economic categories as the theoretical expression of historical relations of production, corresponding to a particular stage of development in material production*, he garbles them into pre-existing *eternal ideas*, and in this roundabout way he arrives once more at the standpoint of bourgeois economy" (original emphasis). For Marx, there is no such thing as property outside property *relations*, historical relations that are specific to particular modes of production (ancient, feudal, bourgeois, etc.). Property is a material fact or, perhaps more accurately, a set of material relations, a "real form," not an abstract concept that exists independently of those relations. To treat property as a concept already concedes too much to the beneficiaries of its historically contingent bourgeois form.

The implication of Proudhon's declaration is that if we could just manage to start thinking of property as theft rather than, say, as the "natural" right to unlimited appropriation and accumulation of value promoted by bourgeois apologists such as John Locke (1980: 23–4), private property and the inegalitarian social relations it supports might vanish altogether. And so Proudhon proceeds to enumerate a list of ten "propositions" aimed at "demonstrating" the "impossibility" of property at the level of its very concept. These include the propositions that "Property is Impossible, because it demands Something for Nothing"; that "Property is Impossible, because, wherever it exists, Production costs more than it is worth"; that "Property is Impossible, because, if it exists, Society devours itself"; that "Property is Impossible, because it is the Mother of Tyranny"; that "Property is Impossible, because it is the Negation of Equality," and so on. As the essays in this volume attest, in the age of non-rivalrous "intellectual" property that is digitally produced, reproduced, circulated, and recycled, each of these reasons for the conceptual impossibility of property is amply demonstrated. And yet, despite its demonstrable impossibility – i.e., despite that, as Carys Craig writes, "almost everything ... in intellectual property law is a metaphor" or that, as Suzanne Zelazo argues, legal mechanisms of digital copyright are founded on an "illusion" – intellectual property and its attendant social relations remain a stubbornly material fact. This is not merely because intellectual property is being studiously cultivated as individual property, or because the legality and morality of fair dealing are being wilfully misrepresented. It is because for at least 250 years the economy of the capitalist world has been organized around the right of a minority to hoard wealth and exclude the majority of others

from its enjoyment, and a number of powerful people and institutions would like to keep it that way. For these people, the bonanza represented by the monetization of digital commodities is simply too great to pass up, and certainly not worth foregoing simply because the technological possibility of multiple, non-degraded copies at little or no cost also opens the radical prospect that all of us might finally learn to share.

Incidentally, among this volume's considerable virtues is the clarity with which it insists that, even under a system of widespread fair dealing, the material interests of those whose livelihoods depend on a degree of control over the distribution and use of the products of their culture and intellect would have to be protected somehow. Where you stand depends on where you sit. And as the contributions from Nicholas, Coombe, and Aylwin should remind us, unreconstructed calls for "free culture" sound a lot like colonialist plunder to those whose historical experience of others "taking what they need" has not been a happy one. Put bluntly: a tenured, salaried professor, fat on the public teat, hungry for nothing but affirmation and the veneer of coolness is in no position to tell a freelance poet or Indigenous Elder that information wants to be free.

Something of the current predicament is illuminated by this iconic passage from Rousseau's *Discourse on the Origins of Inequality*:

The first person who, having enclosed a plot of land, took it into his head to say *this is mine* and found people simple enough to believe him, was the true founder of civil society. What crimes, wars, murders, what miseries and horrors would the human race have been spared had someone pulled up the stakes or filled in the ditch and cried out to his fellow men: "Do not listen to this impostor. You are lost if you forget that the fruits of the earth belong to all, and the earth to no one!" (1987: 60)

It is tempting to believe that we find ourselves in something like this original moment as far as *intellectual* property is concerned – that the Internet is the state of nature and all we need to do in the face of powerful corporations who, like hungry seagulls, have seized upon it barking "Mine! Mine! Mine!" is to disbelieve them and demonstrate the impossibility of their concept. It would be nice if we could do away with what John Maxwell calls "copyright maximalism" simply by doing away with the thought of it. However, given that we have reached the point where intellectual property has become a material reality despite

its conceptual impossibility, and fair use of cultural material is presumptively regulated to secure the empires of Disney and U2, maybe covering our ears and shouting, "I can't hear you!" won't quite cut it. As Maxwell explains, "we are headed towards a 'total information awareness' model of IP rights, a world in which every piece of intellectual and cultural material is explicitly owned and licensed and/or marketed, with increasingly hefty and complex requirements for rights discovery, clearance, and marketing, even in the case of so-called free culture and open access movements." It is hard to believe that such a complex might succumb to the force of mere argument. Instead, the situation would seem to call for forms of action that more directly contest the ways in which the idea of intellectual property is being materialized on the capitalist model in concrete relationships. Perhaps confronting the crime of capitalist intellectual property is less about exposing the impossibility of its concept and more about pulling up the stakes and filling in the ditches.

This raises the question of the role of critique and its relationship to other forms of political action. Marx's (1865) attack on Proudhon was predicated on the view that while exposing the impossibility of the concept of property might serve the effort to "abolish" it in "a utopian manner," when it comes down to transforming the specific relations in which property is actually materialized, the job belongs to "history itself" (which is to say, it belongs to the political action of human beings in the world). Property is not a philosophical problem but rather a political one. Thus, as Marcus Boon puts it, the task is not so much "to think beyond or through the frameworks of appropriation that support concepts of property, intellectual or otherwise, towards a deappropriated subject and object" but rather, as he writes later, "to render visible once more the instability of all the terms and structures that hold together existing IP regimes, and to point to the madness of modern, capitalist framings of property." In this way, that which appears to be abstract, necessary, and generic is shown to be material, contingent, and historically specific – and, therefore, open to change. Demonstrating that intellectual property makes no sense is nothing compared with demonstrating that it is a system for making sure the rich get richer while the poor get user fees and restricted access, that this has nothing to do with the intrinsic character of property per se but rather is a function of who gets to make and enforce the rules (and design the tools), and that therefore there could be other ways of distributing access to cultural

goods and compensating those who create them. Critique will always have a role to play in denaturalizing reified structures and relationships of exploitation and domination, but adventurous endeavours such as UbuWeb suggest that, in relation to intellectual property, this work will probably be accomplished most effectively by simply pulling up the stakes and starting to do things differently.

What “history itself” will hold for the sustainability, extension, or transformation of social relations built on capitalist IP frameworks is impossible to predict. If property only becomes what it is in the context of a specific mode of production, then perhaps the question is whether the emergence of digital networks is facilitating a historical shift towards relations of production, circulation, and consumption that are significantly different from those that prevailed under the auspices of industrial capitalism. In many ways, the present volume is a series of meditations on this possibility, but the balance of evidence suggests it is probably premature to declare that the network society is something other than a capitalist society. As Marx (1854) writes in *The Eighteenth Brumaire of Louis Bonaparte*:

Men make their own history, but they do not make it just as they please; they do not make it under circumstances of their own choosing, but under circumstances existing already, given and transmitted from the past. The tradition of all dead generations weighs like a nightmare on the brains of the living. And just as they seem to be occupied with revolutionizing themselves and things, creating something that did not exist before, precisely in such epochs of revolutionary crisis they anxiously conjure up the spirits of the past to their service, borrowing from them names, battle slogans, and costumes in order to present this new scene in world history in time-honored disguise and borrowed language. (n.p.)

It is well known that the so-called digital revolution has borrowed not only the disguise and language, but also the basic substance and priorities of the capitalist mode of production. The circumstance we have inherited is a contradictory one, in which emergent technologies have intensified the extension of bourgeois property relations to the domains of art, culture, and intellect, even as these same technologies hold out the promise of a radical alternative (a promise upon which the technology itself cannot automatically deliver). The nightmare that presently weighs on the brains (and bodies) of those who would seize the digital moment to make the world more interesting and egalitarian

is the tradition of industrial capitalism that institutionalizes the right of powerful commercial interests to suck value out of the labour of producers and consumers by cultivating artificial scarcity. The digitization of intellectual and cultural material, and the networking of its producers and consumers, could trouble this arrangement, or they could confirm it. It is this contingency, and the stakes and risks it implies, that makes gambits such as UbuWeb and the fair dealing button not only material, but also political. Kenneth Goldsmith's candour – "Are we crazy? Yes. Are we exposing ourselves to great risk? Yes. Could we get screwed? Yes." – is no idle boast. In the digital gold rush, those who pull up the stakes and fill in the ditches are putting things on the line in more ways than one.

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