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Info–Communism? Ownership and Freedom in the Digital Economy

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Info-communism? Ownership and freedom in the digital economy

by Milton Mueller

Abstract

This paper takes a new look at the debate over commons and property in information and communications. It warns against recreating the old communist-capitalist ideological divide by framing the movement for informational commons as "info-communist." The spectre of communism haunts the movement because of an unresolved ideological tension in its ethical and philosophical foundations. The case for free software and open information contains both deontological appeals to the virtues of sharing, and consequentialist arguments against the growing intrusiveness of the institutional and technological mechanisms used to enforce exclusivity in the digital economy. The paper argues that the deontological case is a dead end that leads to info-communism. The strongest case for open access and freedom in information and communications is grounded in a liberalism that takes maximizing individual freedom as its objective and relies on creative complementarities between property and commons regimes as means to that end.

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Connect the dots: free software, creative commons and other forms of resistance to copyright; support for unlicensed radio spectrum; opposition to software patents; Wikis, open access. An intellectual and political movement has emerged to challenge exclusive property rights over informational goods and promote the concept of openness in communication-information policy (Benkler, 2006). The movement goes by various labels: some call it the "commons" movement (Kranich, 2004; Werbach, 2004); others "free culture" (Lessig, 2004), still others the "openness movement." The label that now seems to be acquiring hegemony is "Access to Knowledge" (A2K).

As the challenge to informational property rights has gained momentum, the word "communist" has re-entered political discourse. Indeed, both "leftists" and "rightists" are getting carried away with metaphors and parallels drawn from industrial-era communism. Free software advocate Eben Moglen pens a "dotCommunist Manifesto" (Moglen, 2003). Obliging, Bill Gates refers to the movement as being composed of "modern-day communists." A *Forbes* columnist accuses Stanford professor Lawrence Lessig of being a "radical" who advocates

"stealing intellectual property" (Manes, 2004). Dan Hunter, an academic writer who supports Lessig, nevertheless repeatedly refers to the copyright resistance as "Marxism-Lessigism" (Hunter, 2004).

A number of powerful symbolic and political factors conspire to fuel this turn in the discourse. Anti-capitalists stunned by global liberalization and rendered politically homeless by the repeated failure of efforts to eliminate private property and markets see in info-communism a new lease on life. The dichotomy is also useful to their rightist counterparts. What could be more convenient than to hang the albatross of failed, old Communism around the neck of an emerging social movement they don't like? Thus, a "new information right," capitalizing on rights-holding businesses willing to put their money where their mouthpieces are, responds to the challenge of "info-communism" with knee-jerk defenses of intellectual property, no matter how overextended and intrusive (Liebowitz and Margolis, 2004; DeLong, 2003).

This discourse, however, tends to radically dichotomize private and common property. The two property regimes are counterposed as hostile and mutually exclusive. On one side of the debate "the commons" (note the definite article) is presented as something large, public-spirited and inclusive while the role of private property rights is either ignored or denigrated as enclosed, restrictive, selfish. On the other side of the political spectrum, "commons" is equated with an all-embracing economic communism or overbearing regulation, and "the market" (note again the use of the definite article) defended rigidly as if it were the answer to all problems.

But this polarization, so convenient to ideologues of the past, short-circuits the future. It channels a vital debate over how to shape the twenty-first century information economy into a sterile replay of twentieth century politics. If Marxism is to be invoked, we should recall the opening sentences of Marx's (1852) *The Eighteenth Brumaire of Louis Bonaparte*:

Hegel remarks somewhere that all great, world-historical facts and personages occur, as it were, twice. He has forgotten to add: the first time as tragedy, the second as farce.

Current trends border on the farcical. We need a new rhetoric and political discourse, based on an updated, more accurate understanding of what the issues are and what is at stake.

This paper moves us in that direction. The first section describes and critically assesses the discourse around the application of the label "communist" to the politics of information property rights. It shows that there is more to this discussion than rhetorical posturing. The problem springs from a deep-seated and unresolved ideological tension within the information left. There are two distinct types of justification for informational commons. One is pragmatic, individualist and liberal; the other is moralistic and collectivist. This ideological tension, which first emerged in the fork between advocates of "free" and "open source" software, fuels the battles over the framing of the movement as "communist." Until it is resolved the problem will remain. Therefore there is a need to re-examine the ethical and philosophical foundations of the movement, and especially the definitions of "freedom" that underpin it. Richard Stallman's rigid and principled opposition to proprietary control of information contains important truths, but overlooks the forest for the trees. The case for freedom of information, I argue, must be grounded in a political commitment to liberalism; *i.e.*, individual freedom of action, not in an ethical obligation to share software or information as such. This is a principled approach that nevertheless transcends the narrow and easily co-opted pragmatism of some open source advocates. The concluding section contends that there is an important place for both commons and property in a free, complex information economy, and that it is unwise to emphasize one to the exclusion of the other. The structure of the Internet, which combines exclusive, private facilities and services with open, nonproprietary standards, is used as the prime example. Movements for freedom of information must recognize this complementarity and extract themselves from the imminent danger of becoming polarized along traditional left-right lines.

1. Red-baiting the common-ists: Frame or be framed

It is easy to dismiss invocations of “communism” as a political smear tactic. Undoubtedly, some participants in the debate would like to use it that way. But if one actually examines the discussions swirling around the epithet, one finds a much more ambivalent, diverse and revealing set of responses. There is, in short, real political content to this debate, an important clash over a movement’s identity.

Nowhere was this more evident than in the reaction to a 6 January 2005 interview with Microsoft chief Bill Gates, when Gates called intellectual property reformers “new, modern-day sort of communists.” Gates’ charge provoked a widespread and intense reaction in online news media and discussion blogs. But the incident merely raised the media profile of a low-level discursive conflict that had been going on for years [1].

Of course, PR-savvy spokespersons of most movement organizations were quick to disassociate themselves from the C-word. Lawrence Lessig, chairman of the board of Creative Commons, riposted that copyright reform advocates are “commonists,” not “communists.” One can only wonder how powerfully that one-letter distinction played to a mass audience. Glenn Otis Brown, executive director of Creative Commons, protested to *Wired News* that Gates could not possibly have been referring to them, a “voluntary, market-based approach to copyright.” He went on to wrap himself in a Cold War flag:

I get sad when people cheapen words like ‘communist’ or ‘fascist’ by throwing them around recklessly, especially given what those words meant in the not-so-distant past. My father was a CIA Cold Warrior for 35 years of his life; he wasn’t fighting against GPL’d software. Stalinist purges, the Berlin Wall, tanks in Budapest — that’s communism.

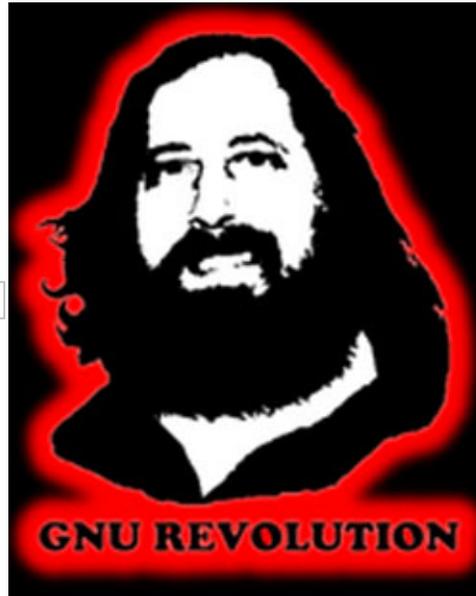
But on Slashdot, the online community of programmers where the real social roots of the free/open source software movement lie, people reacted in a less calculated and more revealing way.



Figure 1: Copyleft flag posted on “Boing!Boing!”.

Source: http://www.boingboing.net/2005/01/05/bill_gates_free_cult.html.

One response was an ironical embrace of communist symbolism. This camp was unable to resist the connotations of revolutionary change and an organized movement associated with “the Reds.” But irony was used to fend off too literal an identification. A copyleft flag (Figure 1) in which the reversed © replaces the hammer and sickle on the Soviet flag, was published and readers were urged, with a wink, to “Fly the flag with pride, comrades!”



Some of these symbolic embraces went beyond irony. As one Slashdot commentator noted:

I've visited the Free Software Foundation offices in Downtown Crossing in Boston. Among the other usual office tchotchkes were pictures of Che Guevara, with all the usual revolutionary slogans. No one there seemed to have any problem with this in the slightest. [2]

This symbolic embrace, whether ironical or not, provoked horror in others. They interpreted Gates' remark as a battle over the framing of public messages — and urged readers to “run screaming” from any such linkages to communism.

The last thing free software proponents need is to associate themselves with a failed economic ideology that has resulted in tens of millions of unnecessary deaths worldwide. Free Software has nothing to do with statist communism and everything to do with individual freedom of association and collaboration. When Bill Gates frames the debate between the capitalists on his side and communists on the other, the last thing to do is embrace the presuppositions of his frame! [3]

Thus, the association with communism is not just something foisted on the movement by Gates and other big business advocates of proprietary software. While some participants in the movement embrace the parallels and others reject them, no one can escape them. It is important, therefore, to address this issue head-on, and to do so accurately.

It is possible to resist the equation by calling attention to the statist, totalitarian nature of historical communism. Observers such as Glenn Otis Brown (cited above) and Eric Raymond, for example, have vehemently distanced themselves from communism on that basis. But that form of disassociation, effective at a superficial level, doesn't really work. Brown and Raymond are talking about Soviet and pre-reform Chinese communism, a product of Marxist-Leninist ideology. It is easy to disaggregate Marxism-Leninism from “communism” *per se*. Dan Hunter's conflation of the two is ill-informed and wrong. Communism is a generic term for a type of economic organization. It refers to communal, egalitarian economic relations and a rejection of institutions based on private, exclusive ownership and market exchanges. Marxism on the other hand ties the communist philosophy of ownership to a particular philosophy of historical materialism and a theory of politics based on class analysis and class struggle. Marxism was a powerful synthesis of the political, economic, historical, philosophical and pragmatic domains of thought into a comprehensive ideology. Lenin fleshed out the political aspects, replacing Marx's passive historical determinism (the victory of the proletariat is inevitable) with the notion of a “vanguard party” and a centralized organization that would seize and hold on to state power. Once combined with Leninism, Marx's theoretical edifice

became the Microsoft Windows of revolutionary social movements, absorbing and assimilating everything in its path — from European social democracy to peasant movements and national liberation struggles.

While it is true that Marxism–Leninism came to dominate all communisms, not all communisms are Marxist–Leninist. One does not need to believe in class struggle, historical materialism, the industrial proletariat, etc., to favor communal ownership [4]. So while we cannot avoid recognizing a distinctly communist approach to property relations as a significant strand in the information left, we must make it clear that recognizing this relationship need not tar any participants with the crimes of Marxist–Leninist (or Stalinist or Maoist) totalitarianism. One can be an info–communist without being Marxist–Leninist (at least, until one obtains state power and we can see what they do with it).

Public framing, however, is another matter. Students of social movements have for many years recognized the importance of “cognitive frames” or “cultural discourses” in motivating people to take collective action (Tarrow, 1998; Tilly, 2002). Cognitive frames are symbolic means of conveying the identity and agenda of a movement to the public in a way that ties them to something they are pre–disposed to support. Framing, as Sidney Tarrow [5] puts it, can be used to define the “us” and “them” of a movement, to create new identities or draw on inherited collective identities.

Here we are forced to acknowledge the appropriation of communist symbols, including symbolism drawn from Marxist–Leninist and even Maoist movements of the past, sometimes ironically and sometimes not, by certain elements of the information left. Why does this happen? Because communism affords them a readily available repertoire of symbols and historical connotations. The image is one of a mass movement challenging the powerful and wealthy and overturning the economic status quo. While recognizing that this appropriation of communist symbolism apparently is irresistible to some on the informational left (Hunter’s essay fell for it hook, line and sinker), we must also acknowledge that it is troublesome and actively contested by others. What the people who reject this framing realize, perhaps more clearly than the others, is that frames and labels can become *self–fulfilling prophecies*. Symbols can re–shape social movements in their own image. A movement that uses images of Che Guevara as a banner is going to attract different constituencies and follow a different path than one that uses other symbols.

2. Ideological tensions in the movement

So is the information left communistic or not? That issue is still unresolved. The battle over the framing of the movement corresponds to deep ideological differences within the movement, differences which have not been adequately confronted and discussed, much less resolved.

There is little doubt that the moral and political impetus that led Richard Stallman to create the Free Software Foundation was based on concepts very close to anarcho–communism. Based in a university research institute in the 1970s and early 1980s (MIT artificial intelligence labs) Stallman, like many other hackers, became acculturated to an ethic of total sharing of work product and almost complete freedom from organizational hierarchies. In the early 1980s, as the software developed in these research labs became valuable business assets, it began to be protected and enclosed in various ways; *e.g.*, by withholding the source code from publication, binding programmers with non–disclosure agreements, and copyright protection. Stallman was deeply angered and felt excluded and “victimized” by his initial encounters with the proprietization of software [6]. He also actively resisted the use of exclusive identities and passwords on computer systems. Significantly, he viewed the refusal to share code not in practical or policy terms but as a moral issue, a violation of the basic ethical command to “do unto others as you would have them do unto you.” Stallman’s rationale, insofar as it is rooted in a sharing ethic, is truly communalist.

But the “communist” label is belied by Stallman’s strategy of institutionalization. The free software movement pioneered a new economic institution, the software licensing concept embodied by the GNU General Public License (GPL). The GPL is based, ironically, on copyright law. It grants users the right to run, copy, redistribute, study, change, and improve the underlying source code of a program. The license is designed to prevent anyone from acquiring

exclusive, proprietary rights to software developed by the F/OSS community; as Stallman puts it, “instead of a means of privatizing software, [the license] becomes a means of keeping software free.” [7] That does not, however, prevent developers from selling copies of the software for profit or from commercializing services associated with it. The economy around that software can presumably remain capitalist, though this is an ambiguity we will explore later in the paper. Also, open source software advocates would later self-consciously pioneer new methods of virtual organization and collaboration, dovetailing with anarcho-syndicalist concepts of a “gift economy” wherein the people who actually produce the product interact with each other directly avoiding managerial hierarchies (Raymond, 1999; Benkler 2006).

Of even greater significance is the ongoing replication of this model in other domains of the information economy. The success of the free and open source software movement in constructing a community around specific licensing regimes and governance structures has made it into a model for other efforts at social change in the information economy. As noted by the Libre Movement Information Center:

The central idea underlying the open-source software movement is that of **freedom of action** — freedom to copy, freedom to modify, freedom to distribute. This key idea is not limited to just software. The same principles of openness, reproducibility, modifiability, and redistributability can be generalized in several new directions. [8]

A variety of new licenses seek to make different kinds of information — such as educational resources or artistic works — part of a commons that can be freely copied and distributed, while attaching restrictions on efforts to charge for or exclude others from the content. Creative Commons is the most prominent example, but there are many others, including the Open Content License, Open Game License, “research commons for scientific data,” (Reichman and Uhlir, 2003) and *Wikipedia*.

So instead of proposing to move toward communal forms of ownership by seizing control of the state apparatus and expropriating and regulating the economy centrally as Marxism-Leninism proposes, the new movement offers a seemingly voluntary, contractual form of building up an alternative world of “common” software and information, and non-hierarchical collaboration. People enter into the communal economy as a matter of choice. There will be no bloody revolution, no expropriating of the expropriators. This vision of the movement is fully compatible with a liberal market economy and may even be seen as a sophisticated extension of it.

The new movement thus presents us with a paradox. Apparently communalist ethical norms and nonexclusive property relations are somehow fused with copyright protection and individual choice to participate. That paradoxical combination creates a tension in the political movements associated with free software and free culture. This manifests itself most clearly in the oft-noted clash between pragmatist and moral motivations and rationales for adopting and promoting free/open source software.

The tension between *pragmatic* and *principled* approaches first appeared in the split that developed between the “open source” advocates and the “free software” advocates in the mid-1990s. As the rise of the Linux operating system revived free software’s fortunes, Linus Torvalds, Eric Raymond, Tim O’Reilly and others began to emphasize the practical aspects of free software as a development methodology and an alternative to Microsoft’s dominance. The pragmatic group deliberately adopted the term “open source” to differentiate themselves from the advocates of “free software” associated with Stallman and the Free Software Foundation, and organized themselves around the Open Source Initiative (OSI).

There is only one difference between Stallman’s definition of *free software* and the OSI’s definition of *open source software*. Free software requires reciprocity; that is, those who incorporate open source code into a derivative product must license the product as free software. Open source, on the other hand, does not require reciprocity; point 3 of the open source definition allows it but doesn’t require it. Thus open source licensed code can be incorporated into proprietary software. This seemingly small distinction has great political significance. Although both approaches are contractually based, the GPL is designed to be a one-way valve into the commons. Its intention is to cumulatively push all software into it through viral replication. Open source, on the other hand, lets users pick the license that suits

them best in a more utilitarian calculation, and is agnostic about the overall economic direction of the software industry. In effect, it envisions a mixed economy, a co-existence of proprietary and open information.

For the pragmatists, the basic appeal of open source is to the individual self-interest of the user. Open source development methods produce better software, and the products lower one's costs and help one avoid lock-in to vendors. As Eric Raymond put it, "Either open source is a net win for both producers and consumers on pure self-interest grounds or it is not. If it is, you cannot lose; if it is not, you cannot (and should not) win." [9] Looking beyond software to other kinds of informational goods, there are many reasons why individuals might choose to put valuable content into a commons on their own volition. They may enjoy collaborating, or believe that they have written or produced something important or beautiful that needs to be shared with the public. Or they may simply be altruistically motivated to give something away when it will help others significantly. By this standard, the role of an organized movement is to make this choice available, to publicize it, and to protect it against illegitimate or destructive forms of appropriation. Creative Commons is explicitly voluntarist in its presentation of its licensing terms. It speaks of "helping creators fine-tune the exercise of their rights to suit their preferences." They do not oppose copyright protection *per se*, but object to endless extensions of its term length and intrusive, anti-consumer efforts to enforce it.

Robert Merges (2004) provides a legal scholar's analysis of how purely pragmatic considerations can contribute to a commons. He notes that "firms and individuals are increasingly injecting information into the public domain with the explicit goal of pre-empting or undermining the potential property rights of economic adversaries." He discusses the use of "property-preempting investments" (PPIs) in biotechnology and open source software. Firms in biotechnology have invested in the creation of public domain databases that can prevent other firms from asserting exclusive rights over critical inputs to pharmaceutical research. And IBM's support for open source software is cited as another example of a PPI. Merges concludes that "strong rights lead to investments in the public domain" and that these represent a "private ordering response to the phenomenon of the anti-commons." [10]

But many others reject a purely pragmatic rationale for free information. For them, the option of non-proprietary software/information must be presented as more than an individual choice; it is a deontological "principle;" which sometimes translates into a religion or a morality. The Free Software Foundation holds up a vision of a software industry based entirely on non-proprietary products; GPL-ing software is not presented as a pragmatic choice, as a way to avoid buggy software or avoid high payments and lock-in to a vendor. It is presented as an ethical imperative, as something that will make society a better place. Free software will bring about a free society. This approach to the movement seeks to *replace* proprietary modes of interaction, not supplement them or provide an escape valve from them when they are dysfunctional or inappropriate. For many of these advocates, the boundaries of this logic are not so limited. It could be — and often is — extended to other areas of the economy besides informational goods. And if one believes that moral principle or the future of society is at stake, then coercion — at the moment perhaps only lighter forms such as boycotts and moral challenges, but possibly stronger forms later — might be justified.

The movements associated with free information are confronting the tension between pragmatists and moralists on a variety of fronts. One example is the growing number of attacks on Lessig and Creative Commons for being insufficiently "principled" in its approach to intellectual property issues. Elkin-Koren (2006), for example, offers a number of valid warnings about the practical limitations of contractually based solutions, but combines it with a communalist argument that CC is "reactionary" because it advocates the "original meaning" of the current copyright regime instead of pressing for changes in the law, and "does not involve a complete abandonment of rights." [11] David M. Berry and Giles Moss (2005) reject Creative Commons from the standpoint of a radical communalism replete with neo-Marxist jargon:

The Creative Commons ... is a commons without commonality. Under the name of the commons, we actually have a privatised, individuated and dispersed collection of objects and resources that subsist in a technical-legal space of confusing and differential legal restrictions, ownership rights and permissions. The Creative Commons network might enable sharing of culture goods and resources amongst possessive individuals and groups. But these goods are neither

really shared in common, nor owned in common, nor accountable to the common itself. It is left to the whims of private individuals and groups to permit reuse. They pick and choose to draw on the commons and the freedoms and agency it confers when and where they like.

Note the authors' disdain for the freedom of "private individuals and groups" to "pick and choose ... when and where they like." Note also the distinction between enabling "sharing" — which CC does but Berry and Moss find inadequate — and being "owned in common" and "accountable to the common itself." Communal relations of the sort they praise are possible only on a small social scale. They involve direct communicative and social relations among the parties and shared values, something that rarely works over a handful of households, much less on the scale of a major metropolitan area or a global polity. This worldview tends to shade inexorably into a belief that all forms of privatization and "commodification" of culture are intrinsically evil. Their opposition to commodification of culture exhumes a kind of romantic primitivism reminiscent of William Blake. Cultural expression is not considered authentic if it involves a complex division of labor, monetary compensation, and exchange over mass markets.

3. Back to basics: Ethical and philosophical foundations

As this split is constructed now, it is an unpleasant choice. On the one hand we are offered an unprincipled, purely calculating approach to free information, seemingly devoid of any awareness or concern about political values and the wider societal consequences of intellectual property. On the other hand we are given a rigid, quasi-religious, blindly categorical opposition to informational property rights which not only lends itself to public framing as info-communism, but actively encourages frame-bridging with historical anti-capitalist movements and alliances with contemporary ones.

One way to move beyond this is to re-examine the ethical and philosophical foundations of the free information movement. In particular, we need to pay careful attention to the concept of "freedom" embodied in the free software movement, and how it overlaps or conflicts with ideas about a free society based on freedom of contract and freedom of choice.

Stallman refers repeatedly to the "the moral unacceptability of non-free software." What is it that makes owned software morally unacceptable? The argument takes two distinct forms.

1. One is a simple appeal to the moral obligation to cooperate and share. Software ownership is wrong because we have a duty to let others use resources we have. "If your friend asks to make a copy [of software]," Stallman claims, "it would be wrong to refuse. Cooperation is more important than copyright." This is a deontological claim; *i.e.*, it holds that moral worth is an intrinsic feature of certain actions, and makes no reference to the practical consequences that the actions happen to have.
2. A second, clearly distinguishable aspect of the moral case for free software is that attempts to institutionalize proprietary information leads to unacceptable restrictions on the freedoms of end users. It is a "system of subjugation" and cannot be enforced without eliminating the transparency of source code and thereby impairing users' ability to modify, copy and redistribute the program. It extends the owner's control beyond the first sale into a set of ongoing restrictions on human action. This is a *consequentialist* ethical claim. It focuses more on the concrete effects of instituting proprietary software on end users and society.

Of these two prongs of thinking, I believe that the first is invalid and leads to the dead end of communism. The second is a far more important and substantive claim, but has not, I think, been consistently thought out. The clash between principled and pragmatist advocacy reflects this imperfection in the ideology. It reveals a widespread lack of clarity regarding which of these two claims is the basis for advocacy.

Is sharing information morally obligatory?

The first argument states that proprietary information is wrong because we are morally obliged to share things. This argument, however, is so sweeping that it leads logically to the view that software ownership is wrong because all ownership is wrong. As a deontological moral claim, there is nothing in it that separates software or information from any other resource. If we are always required to share things, then we are led into an economic communalism that militates against legal exclusivity of anything and everything, including one's home, food, car, house or money.

One might try to escape from this by arguing that software, like other informational goods, is non-rival; *i.e.*, my use of it does not preclude your use and does not "use up" any of the resource. Since it is physical scarcity that is thought to justify exclusive ownership and use of resources, the absence of such scarcity might indeed make it immoral to create exclusivity. Some moralists in the free software movement do invoke the special feature of non-rivalness.

But this argument doesn't work, either. The simple fact that information is non-rival doesn't make it categorically immoral to keep information secret or exclusive. I have, for example, thousands of document files on my computer. If anyone were to demand a right to copy all of them (or any one of them), I would be justified to refuse, even though giving out such copies would not diminish my ability to use them. My refusal might be based on a number of factors. Some files might contain highly personal pictures or thoughts, and so be withheld on privacy grounds. Others might be works-in-progress that I deemed too embarrassingly bad to see the light of day. Others might be the product of hours of work, and I would not want to let others benefit from that work unless I received appropriate payment or recognition. Each of these rationales seems to me to be, *prima facie*, ethically justifiable. The non-rival nature of the information doesn't trump my right to keep possession exclusive. Indeed, Stallman and almost everyone else who has challenged the economic or moral basis of copyright protection do recognize the right of programmers or other information workers to withhold their products for payment. The issue for them is only what happens after the first sale. But if the obligation to share is the basis of your moral claim, why is one form of exclusion (prior to the first sale) acceptable and the other (post first sale, based on copyright law) unacceptable? If there is a distinction between these two forms of exclusion, it is not based on the morality of sharing, but on something else.

This logic works both ways. Just as it is easy to find instances in which we all believe it is ethical to exclude people from access to non-rival resources, it is not that unusual to find public policy decisions to make resources for which consumption is rival available on an open, non-discriminatory basis. Think of public park lands, K-12 education, or universal health care — or, more directly relevant to information, the argument for common carriage in telecommunication infrastructure. In their discussion of public goods, Kaul and Mendoza (2003) make the point that one cannot derive the actual regime used to produce and deliver a good *a priori* from the characteristics of the good. For example, even though land resources are obviously rival in consumption and potentially excludable, it is not uncommon for societies to govern specific lands (*e.g.*, parks, grazing areas) as an open access commons. They call this the distinction between the resource's "basic properties" and its "socially determined status" [12] and note that "the properties of (non)rivalry and (non)excludability only signal a good's potential for being (public) private — not its *de facto* provision status." [13] This argument opens up new possibilities to treat things as public goods, but it also could be used to justify moving in the opposite direction. That is, if instituting legal regimes to enforce exclusivity creates widespread societal benefits, then we would be justified in doing so even for resources whose basic properties are non-rival. Public goods theory and its concept of non-rival goods is just an analytical tool for identifying the economic properties of a resource. It neither justifies nor forecloses exclusivity.

So far, I have made two arguments. One is that you can't justify an opposition to proprietary information solely on an ethical imperative to share, unless you are willing to extend that ethical imperative to all resources and thus embrace true communism. Second, an appeal to the non-rival nature of digital information can't get you off the slippery slope to info-communism if your case is built entirely around a deontological appeal to the value of sharing

and cooperation. For if information's non-rival nature makes exclusion morally impermissible, then it would not only prohibit all forms of post-sale copyright protection, but all non-disclosure agreements and all attempts to withhold information for the purpose of getting paid as well. This would pose deep problems for almost all information-based professions.

Does this mean that the case for freedom of information crumbles? No. It simply means that we have succeeded in identifying logical weaknesses in the free software movement's ideology. So what is the justification? Let's return to the second prong of Stallman's "moral" case for free software, which focuses on the impact of the software producer's property right on the freedom of the user.

The effect of informational property rights on human freedom

Stallman objects to proprietary software because once you have purchased software, you have a moral right to be free of ongoing restrictions on its reproduction, modification, and use. Proprietary software is different from simple copyright in the print age, he claims, because copyright "restricted only the mass producers of copies. It did not take freedom away from readers of books." Proprietary software and technological protection measures such as Digital Rights Management (DRM), in contrast, extend control directly into the lives of the users, by imposing restrictions on what someone else's computer may be programmed to do. As Stallman puts it, "[Society] needs information that is truly available to its citizens — for example, programs that people can read, fix, adapt, and improve, not just operate. But what software owners typically deliver is a black box that we can't study or change." He goes on: "Users cannot be free while using a non-free program."

This argument, while imperfect, is much more fruitful than a simple appeal to the ethics of sharing. It speaks more directly to the problems associated with copyright, patent and trademark maximalism in the twenty-first century. The problem most people have with property rights in the digital economy is not with markets for information per se, nor with the attempt by producers to withhold their products and services from the public in ways that allow them to make money for their work. The problem is the growing intrusiveness of the institutional and technological mechanisms used to create exclusivities in a digital context — their expansive scope, mechanical rigidity and growing encroachments on our freedom of action in culture, expression and business. We live in a world of publications that can "rat on you" (Samuelson); a world of government-mandated technical standards designed to impede what users can do with digital information, even when many of the blocked uses are legally and ethically justifiable; a world where Internet service providers might inspect your packets in transit and disrupt them if they use certain protocols associated with copyright violations.

But the consequentialist argument, as it exists now, is still incomplete and imperfect. It is still difficult to understand how one can categorically reject all "restriction after possession" in a digital world. Because of the perfection of digital copies, one may not be able to exclude effectively at all without some post-sale restrictions. Indeed, the GPL itself restricts users' freedom to do things with the software after possession. The GPL relies on copyright law to extend social control over the subsequent use of software once a user has it. Stallman and others who categorically oppose proprietary software cannot avoid recognizing, and in fact do recognize, that the GPL restricts freedom, too [14]. Unless free information advocates are to suddenly declare that the GPL is immoral, they must believe that the case for free software rests on optimizing some kind of balance or trade off among various individual and societal interests in freedom of action. The real issue is not *whether* there will be post-sale restrictions on digital products, *but what their purpose is* (whether they maximize freedom or not) and how onerous or reasonable the restrictions will be. Proprietary forms cannot be categorically rejected.

Consider the ethical status of the following situation: a fully informed user is given a choice between a free software product and a proprietary product, and consciously chooses the latter. This user may value the superior functionality of the proprietary software over the freedom to copy, alter, or review the source code. Moralistic free software advocates have a serious problem with this situation. If they are consistent moralists, they must contend that the

inherent evil of proprietary, concealed source code outweighs every other consideration — including the revealed preferences of the user herself. The moralist must contend that users are “more free” if they are prevented from making that choice. But the exercise of choice by users is fundamental to any concept of freedom. In this case, the choice of the user does not force anyone else to give up their freedom; the consequences are largely restricted to the person making the choice. Not allowing that choice does not simply constrain the freedom of “privateers” to appropriate and profit from software, it is constraining the freedom of users to use what they want, which is allegedly the *raison d’être* of the freedom movement. It is difficult to use concepts of freedom to justify complete and total elimination of the freedom to choose a proprietary product over a non-proprietary one.

A justification for free software grounded in individual choice could serve as the basis for a more consistent, realistic philosophy of freedom of information. It involves a principled moral and political commitment to individual freedom of action, not in an ethical obligation to share. It is a principled approach, but the first principle is freedom, not some communitarian moral imperative to share or to abjure all exclusion for private gain. It keeps its priorities straight: freedom of choice and freedom of contract take precedence over free software as such. Free software and open content licensing are means to an end, not ends in themselves.

4. Property and commons: Finding complementarities

The discourse on property rights in information can take a step forward by recognizing the primacy of individual freedom. Our freedom to act, to exchange and to contract is a higher-level principle that can encompass all aspects of the movement: resistance to forms of intellectual property that are overly intrusive; voluntarily constructed commons and the need for collaboration and sharing; the rationality of treating certain critical resources as open access commons in some cases; the benefits of markets organized around exclusive property rights in others.

We can move forward by recognizing the co-existence and interdependence of markets, exclusive property rights, and shared/unowned information. Commons and property are not mutually exclusive, totalizing principles for economic organization, but merely distinct methods of organizing access to resources. Historically, there has been a dynamic interaction between commons and private property. It is likely that neither could exist in socially productive forms without the other. Research on local music scenes in Brazil, for example, have explored how the absence of copyright on music leads to a robust private market for live performances and self-produced CDs (Lemos, 2005). There is a growing body of research on the diffusion of hybrid business models that mix the offering of open source software with the provision of proprietary software or software-related services (e.g., Bonaccorsi, *et al.*, 2006).

The Internet seems to be based on an unusually successful combination of private market and commons. TCP/IP internetworking is based on global, open and non-proprietary standards. The networking protocols can be freely adopted by anyone. They are published openly and can be used by anyone without paying a fee. At the same time, the Internet is a decentralized network of networks, the constituent parts of which are privately owned and administered by autonomous organizations: the private networks of households, small businesses, large enterprises and non-profit organizations as well as the (usually privately owned) public data networks, both large and small, of Internet service providers and telecommunication companies. This aspect of the Internet leads to privatization and decentralization of network operations and policies. By facilitating interoperability, Internet leads to privatization and decentralization of software applications and information content as well. At the endpoints of the Internet, the free market and privatization rule; at the core standards level, a commons is in place. The end-to-end principle has in the past ensured that commons and market complement each other. The market in applications, content and networking requires neutral coordinating mechanisms that enable interoperation. With end-to-end, the sharing and coordinating mechanisms are deliberately minimized to provide maximum scope for private initiative and innovation. There is a clear separation between the parts of the system that are subject to private initiative and control, and the parts that are subject to global coordination and non-exclusive access. In short, it is the combination of the two, private and common, that works.

There is a need to develop principles and criteria regarding when it is socially optimal to push for “commons” and when it is best to permit private appropriation. This will require levels of theoretical analysis and historical inquiry that go beyond the scope of this paper (for a start, see Mueller, in press), but the discussion above makes the essential points. It is better to create a new movement identity based on new insights into the property–commons relationship than to align with historical identities based on traditional left–right dichotomies. One could even argue that the success of liberal–democratic governance hinges on finding the right place for each model and exploiting the creative relationship between the two. A free, contractually based economy offers the best hope of finding the right mix. The movement should view information commons as a vital and constructive part of a free and open market economy, not as its enemy. **FM**

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Notes

1. A Slashdot comment from 1998 noted the connection, and a documentary film, *Revolution OS*, produced in 2001, raised the issue as well.

2. Re:Run screaming from this!!! (Score:2) by babbage (61057)
<cdevers` at `cis.usouthal.edu> on Thursday January 06, @03:57PM (#11279651)
(<http://devers.homeip.net:8080/blog/> | Last Journal: Tuesday April 12, @09:34AM).

3. NONONONONO!!! I know you’re trying to be funny, but I’m not laughing Down that road evokes an ideological wasteland of failure! Do copyleft supporters want to associate themselves with that? — M.

4. This, by the way, is why Moglen’s “dotCommunist Manifesto” is so stunningly misdirected — by closely following the structure of the Communist Manifesto it ties the free software/free culture movement to those “class struggle” aspects of Marxism that have the least in common with the modern–day information left.

5. Tarrow, 1998, pp. 21–22.

6. Williams, 2002, pp. 9–12.

7. Stallman, 2002, p. 20.

8. <http://www.mailmeanymwhere.org/aboutLibre/>.

9. Eric Raymond, “The Richard Stallman Saga, redux,” cited in Watson (1999).

10. Merges, 2004, p. 4.

11. Elkin–Koren, 2006, p. 21.

12. Kaul and Mendoza, 2003, p. 81.

13. Kaul and Mendoza, 2003, p. 82.

14. “Not all freedoms can co–exist: some must be selected above others” (Stallman, Heise interview, J.J. King, 18 August 1999).

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