

## Steal This Review!

BY CHRISTOPHER KELTY\*

Adrian Johns. *Piracy: The Intellectual Property Wars from Gutenberg to Gates*. Chicago: Chicago University Press, 2009. 626 pp. ISBN 978-0-226-40118-8. \$35.00 (hardcover), \$7.00 (e-book, 30-day ownership), \$35.00 (e-book, perpetual ownership), Free (partial, Google Books), Free (complete, e.g., gigapedia.com).

Lewis Hyde. *Common as Air: Revolution, Art, and Ownership*. New York: Farrar, Straus and Giroux, 2010. 306 pp. ISBN 978-0-374-22313-7. \$26.00 (hardcover), \$12.99 (e-book).

In 2001, Houghton-Mifflin—the hoary Boston publisher of Emerson, Thoreau, and Hawthorne—printed a book called *The Wind Done Gone* by Alice Randall. It is a minor novel of historicist experimentation, in which the story of Margaret Mitchell's *Gone with the Wind* is retold from the perspective of Scarlett O'Hara's half-sister and slave, Cynara. I haven't read the book, and I don't know anyone who has. I do, however, know a large number of people who know the details of the copyright infringement case brought by the Mitchell Estate.<sup>1</sup>

That case became a cause célèbre among activists, lawyers, writers, and scholars as an example of the contemporary abuse of copyright law.<sup>2</sup> Whatever emotions Randall's book was designed to evoke—disgust at the pernicious lasting effects of slavery or sympathy with the minor character's version of the story—these are not the emotions the legal case evokes. The case evokes concern and anger about something more abstract: the right to make use of existing works in order to create something new, different, critical, or creative. For most people, the

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1. *Suntrust v. Houghton Mifflin Co.*, 252 F. 3d 1165 (11th Cir. 2001).

2. An early and influential example is Neil W. Netanel, "Locating Copyright within the First Amendment Skein," *Stanford Law Review* 54, no. 1 (2001): 1–86.

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book is not emblematic of the racial politics of a literary creation, as I imagine it was intended, but emblematic of a new culture war.

It is a strange kind of culture war, however. Gone is the angry talk about canons and multiculturalism, the fiery politics of Robert Mapplethorpe and Jesse Helms or the acrid debates about postmodernism. In their place has erupted a conversation more entangled in the abstruse techno-legal details of intellectual property law than the signifying practices of the subaltern. *The Future of Ideas*; *Free Culture*; *Remix*; *The Wealth of Networks*; *Copyrights and Copywrongs*; *The Public Domain*; *Copyright's Paradox*, *The Future of the Internet—and How to Stop It*; *Wired Shut*; *Access Denied*; *The Access Principle*; *Moral Panics and Copyright Wars*; and *Bound by Law*<sup>3</sup>: These books are not about any ideas in particular, but about the very possibility of ideas. Most of these books are heavily focused on the legal details of our current intellectual property system, for which *The Wind Done Gone* is emblematic of a diffuse anxiety about big corporations and their power, overly economic approaches to culture and education, a homogenized entertainment culture, and unclearly articulated fears about creativity in an economy where *possessing* creativity is tantamount to feeding one's family.

To date, most of the scholarship in this culture war has been frankly activist—concerned with changing policies, changing laws, or changing technology. New nonprofit organizations such as Creative Commons, Public Knowledge, or campus chapters of Free Culture lobby, propose alternatives, and stage protests.<sup>4</sup>

3. Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Vintage Books, 2001); Lawrence Lessig, *Free Culture: The Nature and Future of Creativity* (New York: Penguin Press, 2004); Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008); Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven, CT: Yale University Press, 2006); Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity* (New York: NYU Press, 2001); James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven, CT: Yale University Press, 2008); Neil Weinstock Netanel, *Copyright's Paradox* (New York: Oxford University Press, 2008); Jonathan Zittrain, *The Future of the Internet—and How to Stop It* (New Haven, CT: Yale University Press 2008); Tarleton Gillespie, *Wired Shut: Copyright and the Shape of Digital Culture* (Cambridge, MA: MIT Press, 2007); Ronald Deibert et al., eds., *Access Denied: The Practice and Policy of Global Internet Filtering* (Cambridge, MA: MIT Press, 2008); John Willinsky, *The Access Principle: The Case for Open Access to Research and Scholarship* (Cambridge, MA: MIT Press, 2007); William Patry, *Moral Panics and Copyright Wars* (New York: Oxford University Press, 2009); Keith Aoki, James Boyle, and Jennifer Jenkins, *Bound by Law: Tales from the Public Domain* (Durham, NC: Center for the Public Domain, 2006).

4. Creative Commons (<http://creativecommons.org/>), Public Knowledge (<http://www.publicknowledge.org/>), and Free Culture campus chapters (<http://freeculture.org/>) (last accessed on 4 Mar 2011).

Op-ed pieces about copyright law—once a most stultifying and unglamorous of legal callings—provoke outrage and debate. Into this fray, two new books throw history. And not just a little bit of history: 626 pages of it in the case of Adrian Johns's *Piracy*; and in Lewis Hyde's *Common as Air*, a cri de coeur that without knowledge of history there can be no cultural citizenship. Both books directly address themselves to this debate and to the audiences implied above—not primarily to a scholarly community. Both books are arguably combatants in this new culture war, taking issue with the obvious falsehoods and abuses of history marshaled by the intellectual property industries today, proudly reaffirming forgotten principles and offering speculations for the future of intellectual property. These books are not Switzerland; they wear their stripes proudly.

One might guess that this earnest soldiering is driven by contemporary concerns with relevance, engagement, and public or popular history. Certainly it is a feature of publishing today (unremarked upon by either author) that presses and editors—no matter how virtuous the press—are much more interested in works with a wider, “transitional” popular audience than they are in scholarly monographs. And definitions of success in academia are increasingly changing to reflect this as well. Though many historians might see “popularization” as a scholarly concession, many more are likely to see it as essential to the survival of the discipline—as the only way to avoid irrelevance.

And yet, neither book is an easy read, and not only because the public today demands its history in 140-character chunks. While *Piracy* is written as if someone other than Simon Schaffer might read it, it's nonetheless likely that most readers will have to make due with a partial appreciation of the depth and breadth of Johns's knowledge. The book contains seventeen chapters of richly detailed episodes spanning 400 years of history: from a story of the invention of piracy and literary property (the Restoration dispute between Richard Atkyns and the Stationers' guild), to the origins of peer review in the Royal Academy, to Ireland, America, and international intellectual property treaties, to the late nineteenth-century policing of sheet music printing, to the late twentieth-century practice of “phone phreaking.”

Hyde's *Common as Air* is, by its orientation, publisher, and marketing, a “popular book,” but it too builds a difficult and crystalline argument that a commons in intellectual property is essential to the possibility of a democratic republic. Hyde's erudition is well known, and his skill in making complex ideas accessible to be envied; but as he himself notes, not everyone

enjoys the “pleasures of subtle thought” necessary to become a citizen on his terms.<sup>5</sup>

Even more complicated, both books also seem to launch salvos at their own side: those against the expansion of intellectual property. In Johns’s case this is clearest: he takes aim at the relentless overemphasis (especially by legal scholars) on laws, regulations, and technology as the motors of history. *Piracy* is not a history of the writing of laws, their passage in legislatures, or dispute in the courtroom. Instead it revels in stories of how intellectual property laws (and their precursors) have been used, policed, challenged, ignored, contested, arbitrated, or abrogated in practice. It’s one thing to point out that laws stand or fall by what people do in relationship to them, but what Johns’s book does is to put those effects on display to scholars, legislators, judges, and politicians for whom this simple fact is all too easily forgotten, even by those contesting the expansion of the current regime.

Johns repeatedly reveals that the laws and systems of policing do not precede, but emerge in response to, a heated cultural and historical negotiation of values. Hyde for his part tries to explain in more detail what the content of those values are, and where they come from in our past. And while he seems less interested in correcting the perceptions of legal scholars and reformers, his work nonetheless stands as the first real attempt to give historical and cultural form to the idea of a commons—a concept much relied on in these culture wars to designate that collection of ideas, texts, materials, and performances from which we are said to proceed, and to which we ought to return.

Irony, therefore, might be too weak a word to describe this state of affairs: two books containing rich and complex ideas, whose aim is to intervene in a popular cultural war about the very possibility of forming, and circulating freely, rich and complex ideas. Such ideas might simply go unheard (a fate scholars know all too well); but should they be heard, how would we measure their impact? Is the test of the ideas their acceptance, or is it their accessibility, circulation, appropriation, or remixability?

5. Hyde’s most well-known work, *The Gift: Imagination and the Erotic Life of Property* (New York: Vintage Books, 1979), skillfully weaves anthropological and historical writing on gift exchange, currency, and theories of property and value together with analyses of Whitman, Pound, and others. A later work, *Trickster Makes This World: Mischief, Myth, and Art* (New York: Farrar, Straus and Giroux, 1998), does the same with the mythological figure of the Trickster. Tying all three works together is a close attention to the ethics of exchange and obligation in the creative process.

Consider Johns's book. Or rather, consider my experience of reading it. The editors of this journal had sent me a copy of the physical thing—we still entertain this small courtesy. But I already had a copy—not a physical one but one provided by the University of Chicago Press as a “free e-book,” part of a marketing scheme to introduce scholars to the digital format they offer, something called “Adobe® Digital Editions.” After a half-hour of clicking through licenses, downloading software, and repeatedly revisiting the University of Chicago website, I had a complete copy on my office computer. I promptly read Chapter 1, which begins with a startling story not of literary piracy, but of the nearly total piracy of *an entire firm*. It then goes on to introduce the very broad themes of the book. It discusses the necessity of an historical approach to piracy (but of course). It singles out two common and incorrect assumptions about piracy (that it is of recent origin and that it derives from intellectual property law) and at which Johns launches a first volley: “To be blunt, these assumptions are false in fact, and iniquitous in their consequences” (6). It proposes that piracy has always been entangled in a tension between state power and that of the artisans and partisans of the business of printing—first as a guild craft, later as a full-fledged industry, and today as the very motor of our economy.

By then it was time to leave my office, which turned out to pose a problem for reading Chapter 2. I sought to transfer my free e-book from my office computer to my laptop or my mobile device, an act either technically impossible or legally forbidden. (I'm not entirely sure which, nor am I sure if there is a difference any longer.) I was reduced to the unglamorous task of actually reading a very large book, on the bus, while surrounded by my hypermodern fellow citizens. As they texted, scrolled, swiped, and pinched, I read. I read Chapters 2 and 3, wherein the story of the invention of piracy and of literary property are told, the importance of the Register of the London Stationers' Guild is explained, and the late seventeenth-century chaos of the British Isles is narrated through the struggle to establish a system of printing and bookselling that could reconcile the revolutionary principles of liberty and property. Through this, Johns gives body and context to the passing of the Statute of Anne (frequently called the first copyright law, though the term is an anachronism), and drives home the point that it was piracy that drove the law of literary property, and not the reverse.

At home I read Chapters 4 and 5. They deal respectively with the operations of reading in the Royal Society (and the origins of peer review and scientific journals) and the invention of pharmaceutical piracy, the similarities of apothecaries and authors, and the problems of purity and propriety that led to a

medical patent system. Still frustrated by my experience with Adobe's "Digital Edition," sitting idly and uselessly on my office computer, I opened my laptop to search for other forms of the book. I could buy a Kindle version, but I would have to buy a Kindle. I could appropriate my spouse's iPad and buy the ePub version from Apple, but she was "reading a paper." I opened the Google Books version, but despite their monumental hubristic vision of a universal library (the eerily similar origins of which are discussed in Chapter 9 in a delightful story of the bizarre William Brydges concerning the relationship of genius, publication, and copyright and the requirements of "universal deposit" in libraries, which he opposed), I was allowed only Chapters 1–5, which I'd already read.

In a mood of desperation, emboldened by the stories I'd read so far, I visited one of the dozens of websites that specialize in the illegal distribution of scanned, OCR'd, pirated, and leaked PDFs of books. Johns's book, no doubt on account of its content, was immediately available for my disobedient delectation—and much easier to transfer among computer, laptop, and mobile phone. It's entirely possible some enterprising undergraduate had downloaded the free e-book version and, having more time and undoubtedly more hackish skills than I, cracked the Adobe software designed to protect their content from misappropriation (things like printing the book, transferring it between two computers, or annotating it), and uploaded a clean copy to the cacophonous cloud of our contemporary piratical ecumene.

Speaking of which, much has been made of America in the nineteenth century as a "pirate" nation. Usually in this new culture war, it is a fact trotted out in order to denounce America's contemporary global policing of intellectual property as an unfair restriction on the development of other nations, who might want to similarly engage in such activity. From this perspective, piracy is often seen as a model of development, not an unquestionably criminal activity. As you might suspect, this story contains some truth, but the reality is considerably more detailed. Such is the story I read—in my pirated copy—in Chapters 7 and 8. The case of Ireland, a "land without property" in which a vibrant literary marketplace nonetheless thrived, represents the first appearance of such an argument—and the first instance of the successful replacement of an indigenous customary system, labeled *piracy* by London (natch), with a legal system of copyright. America, of course, represents the continuation of this struggle—and a key point of comparison between Hyde's book and Johns's.

According to Hyde, America was most certainly a pirate nation: and we should be damned proud of it. Chapter 5, "Benjamin Franklin, Founding

Pirate,” spends no small amount of space detailing the ways in which Franklin’s practices of research, publication, and the importation of both books and people who could print books would look to today’s industries like outright theft. On the contrary, to Hyde they serve as a pure expression of civic republican freedom. Whereas Johns steers mostly clear of the ideological debates in the American story, Hyde brings out the details of John Adams’s feelings about the Stamp Act: it was not taxation as such which offended Adams, it was that a *stamp tax* was a tax on communication itself, and as such a direct attempt to restrict speech and thought.

In this republican spirit, I note that my pirated copy of *Piracy* granted me several new freedoms—freedoms from the arbitrary power of Adobe, Apple, and Amazon. I could cut and paste from, print from, and search within the book—the entire book. So at home a few days later, preparing for a trip overseas, I weighed (quite literally) the option of bringing the PDF on my mobile device, or the immobile encumbrance itself, with the option of printing out Chapters 10 and 11 to read (and scribble thereupon) on the plane. I opted for the last, only to later misplace the pages and my notes, which will account for my failure to review those particular chapters here (I do remember they were good).

I’d already read Chapter 12 in its original form in *Daedalus*—it is the story of the first “pirate hunters”—police forces specifically charged with hunting down and exposing sheet music printers, and about which Johns makes the point that piracy is always about which of several competing commercial networks will become the legitimate one. Chapter 13 I had read (and taught) in unlicensed manuscript form—the story of “listener pirates”—those unruly early twentieth-century experimenters who tuned in to early broadcast radio without a license to do so, and the development of the British Broadcasting Corporation’s response, as well as its surprising connection to Ronald Coase’s notion of “externalities” in a market.

All of this simply to point out that, without much effort, I acquired (and in various ways dis-acquired) a half-dozen different versions of the text—and spent no money doing so. Four of these versions (i.e., the various copies of the published work) are *identical* in terms of content—this is not a question of variorum editions. What is at stake is the *form* of these texts, in the sense of their technical containers, their legal existence, and the modes of circulation they are permitted to follow or not. It is the intense cultural and political negotiation over this formal structure that makes up the *content* of Johns’s book—and the diversity of versions is one sign of a contemporary destabilization of that form.

The fact that I paid no money is at the heart of this instability. Both books under review are concerned with the tension between commerce and creativity; both books are troubled by the paradoxes of a commercial commons: on the one hand it is the industry of printing that enables the circulation of ideas in the first place; on the other, it is the same industry that constantly seeks to restrict them through the laws of literary and intellectual property. Such a tension drives the University of Chicago both to send out gratis copies for reviewers and to experiment with forms provided by Adobe, Amazon, or Apple. Such a tension should, one might expect, drive authors like Hyde to opt for a more openly accessible form.<sup>6</sup>

It is Hyde in fact who identifies the struggle over a commons as a new culture war—and specifically one that affects a “cultural citizenship” that depends on “knowing the history of that debate not just well enough to follow the argument but well enough to *engage* with it” (6). His example of this war is not *The Wind Done Gone* but the entirely more insidious campaigns waged by the Motion Picture Association of America to indoctrinate grade school children with false information and misleading role-playing exercises concerning theft, property, and creativity. Without readily available, commonly read works that contradict and counteract the effects of such propaganda, Hyde suggests, our very capacity to act as citizens is at stake.

The language of “commons” has become more or less ubiquitous in this culture war, but it has rarely—perhaps never before Hyde—been considered in its proper historical light. Hyde’s book thus performs a kind of mediation or arbitrage between the work of historians of the early modern period (Hyde relies heavily on the work of J. M. Neeson in this respect) to expound on how the medieval commons in pasturage and agriculture functioned, and how that metaphor might work in the case of contemporary creativity and intangible goods.<sup>7</sup>

To explain the specificity of the idea of commons, Hyde treats it from the perspective of property. A commons is a peculiar form of property organized

6. Perhaps paradoxically, in Hyde’s case, the notice reads simply “©2010 Lewis Hyde, all rights reserved.” Culture warriors everywhere are arguing that especially scholars, but also novelists, musicians, filmmakers, and others should be rolling back those rights in the service of feeding a robust commons. Many of the books listed in footnote 3 above are made freely available under open copyright licenses, as well as being published in conventional form. My own work, *Two Bits: The Cultural Significance of Free Software* (Durham, NC: Duke University Press, 2008, <http://twobits.net/>), also followed this path.

7. J. M. Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700–1820* (Cambridge: Cambridge University Press, 1993).



around a set of things, sanctioned actions, and social relations. Commoners are not individuals, therefore, but “a species of public being.” The rules operative for these public beings are “stints” governing common use of land, a most important feature of which is the ritual practice known as “beating the bounds,” when mobs of villagers would march around destroying any fences or encroachments improperly placed. Enclosure destroyed this system, even as it freed individuals from a confinement and tutelage that, as Hyde notes, it is hard to feel much nostalgia for.

The now standard story of a “second enclosure” (told in Chapter 2) is the story of the growth of the intellectual property system from its origins in the eighteenth century to its fantastic expansion in the last thirty years. For many scholars, like James Boyle, who famously proposed the idea of a second enclosure movement, this enclosure is a detriment, not a liberation, and it demands resistance.<sup>8</sup> Hyde is the first person to argue why: because the very foundations of democratic republican government depend upon a commons in intellectual creations.

This is more than a claim for free speech and freedom of press—those rights (literally) go without saying in his book. Rather, Hyde’s argument is that if there is a property right in intellectual productions of any kind, it is an “al-lodial estate”—a notion that mixes private sovereignty over property with an obligation to public service. Such a notion is enshrined (however imperfectly) in the patent system itself: in return for a limited monopoly on something, inventors are obligated to make the designs publicly accessible.

For Hyde this version of “civic republicanism” is central to American identity and freedom—and it demands that we create not so much virtuous citizens as virtuous *systems*, such as the “incentive system” of intellectual property. In Hyde’s compelling portrait, patents do not give inventors an incentive to create, they give an inventor an incentive to *give back to the commons*. Johns, for his part, seems less convinced of the pat certainty of this vision. His stories reveal a much rockier terrain—no doubt because of the scale of his analysis, but also because the book so frequently insists that what matters is the renegotiation of concrete laws and systems of intellectual property management and defense, and not the principles or the philosophies that supposedly precede them. Hyde’s account is subtle, specific, and true to historical sources, but it remains

8. James Boyle, “The Second Enclosure Movement and the Construction of the Public Domain,” *Law and Contemporary Problems* 66, nos. 1/2 (2003): 33–74. Boyle, incidentally, attributes the idea for the comparison more generally on p. 12, n. 7.

committed to the power of *ideas* to move people to act. Justified perhaps given that the danger invoked in both books is an assault on this very power.

Finally, since both books address themselves to a culture war, one might ask what difference would they make to a case like *The Wind Done Gone*? Johns's book ends with a suggestion: we should proliferate our intellectual property laws and systems in order to match better the proliferating universe of things and devices and ideas that drive our economy today. A messy system might better match a messy reality than a parsimonious one: "The long ascendancy of the universal may be coming to an end" (518). For Johns, the decisions that are coming need history as a resource, not those that are past or current.

And in Hyde's book, at last, there is lingering anxiety concerning elitism. It mirrors the point I started with: that *The Wind Done Gone* is never invoked for its content, but rather for what it says about a system. It's clear Hyde feels it as well, since he returns repeatedly to figures like Frederick Douglass (who could not afford the modesty or anonymity Benjamin Franklin could); the Dawes Severalty Act, invoked to distinguish commons from allotments, but really illustrating better the raw power and corruption of the same government Hyde otherwise defends; or Martin Luther King, Jr., whose legacy and image are rigorously and jealously controlled by his son, Dexter King, who restricts public uses of MLK in favor of commercial ones (detailed in Chapter 9). It's not always clear just how to use history to make sense of cases like these, or whether Hyde's civic republican ideals can even make sense to those who view the story (and history) through the eyes of Cynara, the heroine of *The Wind Done Gone*, rather than those of Scarlet O'Hara or Margaret Mitchell. Although the new culture war seems to be about fighting for the possibility of ideas in general through the creation of a commons, or a new system of intellectual property—that may in fact just be one very specific idea, and not one that stokes everyone's fires of outrage equally.