

## **Commons, Piracy and Property: Crisis, Conflict and Resistance**

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### **Introduction**

In his first month in office, Donald Trump approved a law allowing states to dispose of federal land to private actors. In practice this meant that state parks could be sold to private companies who want to exploit their natural resources for almost no cost. It is significant that one of the first actions that Donald Trump took as a newly inaugurated president was to enable a large-scale enclosure of the commons. This tells of the priority that private property holds and how it can be used to impose a new regime.

What we see here is not only a transferal of resources, but a process of property creation: something that used to be a community resource is transformed into a privately owned commodity. A representative of the Natural Resources Committee motivated the decision with the argument that, 'in many cases federal lands create a significant burden for the surrounding communities', as they require maintenance but create no tax revenues. Allowing for a privatization and subsequent extraction of resources would thus transform this 'burden' into an asset. This logic relies on an implicit set of priorities where certain values – the creation of taxable revenues – are prioritized while environmental or social values are rendered invisible (Eilperin, 2017).

While property has always been taken for granted and often seen as a precondition for human civilization, under the emergence of neoliberalism we have seen a shift from the balance that has long existed between private lands and common resources. Be it in the material or immaterial world, property creation is now the driving force and rational of progress. This is why we need to pay extra attention to these particular moments where that act of property creation is exposed.

This also explains why the machineries driving that property creation use all the means at their disposal to hide these moments. The privatization of those parks was underpinned by a

set of gag rules that prohibited parks authorities – along with many other public institutions working with environmental protection – from communicating with the press or the public (Lartey, 2017; Kosoff, 2017). At the same time, the new administration cut funding for research that does not align with its agenda – for instance on environmental issues – and banned research agencies from commenting on it (Chen, 2017). This indicates that although primacy of private property might seem self evident, the enclosure of the commons is nevertheless part of an ideological discourse that is very deliberately, and sometimes even forcefully, constructed.

This could be conceptualised with Michel Foucault's 'triangle of power' (2003) where power is hidden behind the discursive production of truth and knowledge. In his lectures at *College de France* in 1976, Foucault discusses mechanisms that establish a link between 'power, right and knowledge' and asks, 'What rules of right are implemented by the relations of power in the production of discourses of truth?' (2003, p. 93). The triangle is sourced to a sovereign power – whether that of the monarch or 'King' (ibid., p. 94), the 'sovereign power' of states (Agamben, 2005), or the current neoliberal regime (Arvanitakis, 2007). This later regime has progressively re-shaped global economic priorities around deregulation: that is, the removal of economic and other safeguards in favour on unrestrained profit seeking.

In this context, the neoliberal property rights agenda is clear-cut and near universal. Property rights are perceived to be 'natural' and their construction innate (Hardt & Negri, 2004; Lewandowska & Ptak, 2013). In order to place a resource outside of the property order it has to be constructed as a state of exception – a reservation or a national park – that exists at the discretion of the current political power: a discretion that can easily be revoked which the American case shows.

It is important to note then when discussing neoliberalism, we are not only referring to a series of economic policies that prioritise the unregulated markets and private property rights (Dawson, 2013), but in the words of Giroux, 'a slavish celebration of the free market as the model for organising all facets of everyday life' (2003, p. 4). According to Mirowski (2001, p. 432), this ideological position leads to a predisposition to oppress alternatives leading to a single moral genealogy of our histories. Socialism, communism and fascism may all be

presented as ideological positions, but neoliberalism, is invisible, normalised beyond a tangible existence, simultaneously everywhere at once, yet nowhere to be seen. That is to say, the moral genealogy described by Mirowski (2001) and echoed by Hardt and Negri (2004) and Lewandowska and Ptak (2013) means that the private ownership of property and market dynamics are rooted 'in nature, rendering them autonomous and determined by the natural 'laws' of supply and demand' (Milberg, 2001, p. 411). And while the current Trump Administration is taking a populist and protectionist stance, the primacy of profit and private property remains.

Over the last decade, our research has focussed on alternatives to private property rights with specific attention to the commons. The commons have existed both in parallel to private property and as an alternative to it. The complex interplay between the commons and private property rights has been well documented (see Ostrom, 1990, 2009; Lessig, 2004) – as have the many processes of enclosure in both the material and immaterial world (Bollier, 2002; Linebaugh, 2014). Our interest here is to further explore the relationship between commons and neoliberal property rights, and also to look at how conflicts over the enclosure on immaterial resources, such as art and information, expose the arbitrary nature of property.

As such, this chapter has three broad aims: First and foremost it aims to set the theoretical framework for this collection by challenging the established, liberal understanding of property. Secondly, it present a theoretical overview of piracy. The third aim – which we address first – is to outline how a better understanding of the commons allows to problematize the concept of property which, as this collection highlights, is continuously destabilised through acts of 'piracy'. It will discuss the process of enclosure not as an isolated act, but as part of an ideology which prioritises private ownership over the common good. As will be discussed throughout the volume, this interplay of theft or piracy, property and commons is at the very foundation of contemporary liberalism.

### **The Commons: Their Existence and Enclosure**

The concept of the commons can be traced back to Ancient Rome with discussions of the *Res Commons* (Barnes et al., 2003). At the time, the Romans distinguished between three basic

types of property: *res privatae* was private property; *res publicae* was public property owned by the authorities and *res communes* – natural things used by all, such as air, water and wild animals. This latter category represented what everyone shared but no one owned (Arvanitakis, 2007).

Sophie Bloemen and David Hammerstein (2015, p. 13) define the commons as, 'shared resources, the communities that manage them, and the specific rules, practices and traditions that those communities devise'. This definition catches the multidimensionality of the concept as it indicates that the commons can be both, a *resource*, a *community* a *normative system* and, and as an extension of that also a *practice*.

Although the concept thus embodies a community and a set of practices, different kinds of commons are generally defined according to what kind of resources they apply to. The common lands of the United Kingdom in the Middle Ages, for example, were used by villagers for foraging, hunting, planting crops, and harvesting wood (Reid, 1995). These rights were set down in the Magna Carta of 1215 (Barnes et al., 2004). We also have global commons: the atmosphere and the high seas – oceans beyond the territorial zones of nation states. The concept has also been applied to represent other resources, including the infrastructure that allows our society to function (such as the water delivery and sewerage systems) and public space such as parks (Blomely, 2008). Within this broader category we can identify institutional commons: public hospitals, public broadcasters and public education – institutions whose benefits are spread throughout the community (Bollier, 2002).

This institutional dimension of the commons is also an important part of the work of renowned economist, Elinor Ostrom (1990). Ostrom argues that our relationship to commons such as water requires different institutional arrangements. Ostrom's (1990) behavioural economics approach proposes that while resource markets often fail, institutional arrangements focussed on the commons create robust management structures and programs built on cultures of context, cooperation, communication and reciprocity. As such, the institutional commons management includes structures based on principles that extend beyond commercial exchange, which she describes as 'adaptive governance'. This is not a free exchange, but one that requires institutional arrangements that assist all stakeholders to

identify the 'fair value' rather than create a market mechanism that excludes those who cannot afford to pay.

The concept of the commons has also been used to describe biodiversity, or 'genetic commons' (Shiva, 2000). Included here is the human genome that makes us a unique species and the biological diversity that makes Earth a unique planet (Robinson et al., 2014). As Fredriksson's chapter on biopiracy and bioprospecting in this volume discusses, this is a site of conflict and contestation.

The concept is not limited to the material, but is entering the immaterial. For example, David Bollier (2002) and Lawrence Lessig (2004) explore what they describe as the 'knowledge commons'. This is the information and knowledge that come to define communities and create common reference points. Knowledge commons range from literature to the performing and visual arts, design, film, radio, community arts and heritage sites. Bollier and Lessig are referring to the actual knowledge that emerges as well as the infrastructures of provision, such as the internet and public institutions that produce knowledge – universities, technical colleges, schools of art and drama. Recently, these kinds of immaterial commons have also been explored in relation to the material commons that Ostrom and her colleagues began investigating in the 1990s (Hess & Ostrom, 2006; Frishmann et al., 2014).

The immaterial conceptualisation spreads into the 'information commons' that has had a particular political impact in the copyright debates that emerged since the late 1990s. A cornerstone here is James Boyle's (2003) extensive research on the *Second Enclosure Movement*. In several works Boyle discussed how intellectual property rights (IPR) are used as a means to privatise a growing range of previously common resources. Many other scholars had made a similar point, but by speaking of a second enclosure process, Boyle conceptualised the privatisation of immaterial resources as analogous to the enclosure of public space and agrarian land (Boyle, 1997, 2003, 2008; c.f. Thompson, 1963) – and as we note below, a process of primitive accumulation.

Continuing Boyle's line of argument, it is also possible to track how each form of the commons has also been the subject of enclosure. From medieval English common land to the

ongoing enclosure and privatisation of public institutions, these commons have slowly disappeared (Lessig, 2004; Arvanitakis, 2007; Linebaugh, 2014). They have been privatised and gradually sold off, and like the enclosure of the lands, the benefits have been unevenly shared (Bollier, 2002 Lessig, 2004). And as the enclosure of the commons land in the United Kingdom drove the industrial revolution and led to unprecedented levels of highly concentrated material wealth, so have the benefits that flow from the enclosure of the institutional commons and knowledge commons been concentrated and led to the material expansion and benefit to very few (Boyle, 2008).

The slow progression of enclosure has been identified as inevitable and occurs in an almost invisible process (Blomley, 2008). Tracing back to E.P. Thomson's (1963) description of the commodifying tendencies of capital that led to the enclosure of the commons, to Garret Hardin's (1968) essay of the 'Tragedy of the Commons' that argued only privatisation could save shared space, to the 'end of history' thesis that argues for clear private property rights (Fukuyama 1992), commons have essentially been labelled as 'economically useless' (Wood 2003: 13). In fact, Bollier (2006) argues that both the concept and term 'commons' have become unfamiliar in the modern world and are often simply ignored in literature (Blomley, 2008). We see this in the majority of economic textbooks that argue, if private property rights are not or cannot be appropriately defined then market failure will result (see McTaggart et al., 2010). Those wanting to keep institutions in the public domain – or more accurately, in the domain of the commons – are accused of having a left-wing bias and retarding economic development (Hughes, 2004). As such, the transferal of institutions, which have been built over generations, from the commons to private hands is not ideology – it is presented as efficient, normal and a form of economic progression. This is the 'right' that was described by Foucault (2003).

In response to the invisible and 'natural' processes of enclosure, we want to argue that both the existence and reciprocated exchange of the commons is fundamental in the functioning of authentic and vibrant communities (Arvanitakis, 2009). The specific focus here is the knowledge commons and we can start this journey by concentrating on the community of academics. As academics and researchers, we rely on the knowledge commons for our community to function: the free and open sharing of our intellect, research, theorising,

reflection and hard work. This is the process of peer review, conference attendance, engagement, feedback and discussion.

### **Theorising Piracy: Transition, Disruption and Transformation**

Within this context, how can we theorise piracy? As this collection highlights, one way of theorising piracy is as an act of transition, disruption and transformation of property. That is, piracy emerges in places that are not clearly defined. As we have argued, this is a constant characteristic of property – explaining why piracy emerges everywhere, takes many shapes and transforms the relationship we have with property.

Piracy then, emerges for three key reasons. The first is that property rights are never easily defined – something echoed throughout this collection. Boydell et al (2009) argue this when describing the complex nature of property rights as a *constellation* because they are always connected to an intricate web of both obligations and rights.

Secondly, property rights must be understood as socially and culturally contextualised. They are not some universal truth. This is highlighted in everything from the Open Source Software movement (Lessig, 2008) to the cultural and spiritual association to 'land' by Indigenous peoples across Australia, the United States, the Pacific and Scandinavia (Arvanitakis & Boydell, 2012; Coq, 2014; Sehlin MacNeil, 2015, 2016). Property rights, as such, are continuously contested because of this tension: the myth of the universal truth comes into direct conflict with our lived reality and the way that they are constantly grounded within the socio-cultural context in which they operate.

Thirdly, the creation of private property is often an act of displacement and enclosure. From the first enclosure of the commons, to the assertion that non-productive land is worthless (Hughes, 2004) and the Trump Administration's disposition of public lands, displacement – both violent and diplomatic – is continuous. As this happens, private property ownership that had brought material wealth to small sections of the population has public origins (Varoufakis, 2011).

The three dimensions create tensions and openings – and it is here that we can theorise piracy. Piracy is a disruption highlighting both the myths associated with property – including the fiction that you can create clear, universal and uncontested property rights – as well as the displacement at its core. Acts of piracy, be they the illegal copying of textbooks in India (Liang, 2009) or the emergence of the Pirate Bay in Sweden, highlight the fragility of the global property rights regime. And as authorities react, we also see the forceful enclosure and displacement that follows.

Let us now unpack the three elements of piracy: transition, disruption and transformation. We see acts of piracy emerge as new areas or spaces emerge and change. This could occur as new industries take shape (such as space exploration or gene identification), experience disruption and are radically transformed (as occurred in the music industry).

It is during these moments that property boundaries are further blurred and distorted, creating uncertainty. As this occurs, mercantilist and oppositional opportunities emerge for those that can lay claim to what has previously been non-existent. This might be a momentary opportunity or part of a longer-term process – but regardless the prospect to re-shape the occurrence is there. It is here that pirates, in their many shapes, strategies and creations emerge. They identify these moments of uncertainty and react, creating new industries, opportunities, spaces and relationships to property.

This is not to romanticise acts of piracy that, as highlighted throughout this book, can be violent, illegal and also displace people and resources. Rather, it is to emphasise the need to see piracy as deeply embedded in the very systems that, for centuries, have attempted to eradicate it.

This creates a constant interplay between the normalised systems, be they processes of colonialism or neoliberalism, and acts of piracy. Piracy can thus only exist in combination with the systems that it is confronting. And ironically, piracy provides these very systems with the opportunities to expand, enclose, innovate and transform. Piracy, then, is not only oppositional and disrupting, it provides those who move to destroy it with the very tools to reassert their dominant ideology and strategic positions.



In theorising piracy we present a process that is simultaneously a state of exception while expanding the normalisation of dominant ideology. This contradictory dimension of piracy explains why it is so difficult to define, takes the many forms that it does and can be used both as an oppositional mechanism and one that expands the governance of the sovereign.

Through this collection, the researchers wrestle with the question, 'how do we understand property, the commons and piracy?' within various contexts. The answer then, if we may declare our theorising to cross the many dimensions covered here, is that they are all part of the same equation as attempts of universality, certainty and control create the environment for transition, transformation and disruption both within and outside the dominant system. And acts of piracy, despite their oppositional intentions, create the opportunity for the expansion. In saying that, piracy does destabilise the dominant ideology creating, what can best be described as, the potentiality of re-establishing spaces of equity and the commons. It is these acts of destabilisation that can threaten dominant systems and question why enclosure has been pursued with such aggression.

### **Enclosure and Displacement**

In this final section, let us bring together piracy, the commons, property and enclosure. As stated, it is our argument that the enclosures we see, which includes certain acts of piracy such as biopiracy, are not isolated acts, but part of an ideology which prioritise private ownership over the common good. As will be discussed throughout the volume, this interplay of theft or piracy, property and commons is at the very foundation of contemporary liberalism.

One example that highlights this is the growing importance of intellectual property (IP) regimes for contemporary capitalism. Intellectual property is a peculiar phenomenon that challenges many things we take for granted concerning property. In fact Intellectual Property can be broken down and analysed according to the three dimensions of commons identified by Bloemen and Hammerstein (2016): the resource, the norms of use and the community of users.

First of all, IP pertains to *resources* that are in many ways complicated to propertize. Carys Craig, Joseph Turcotte and Rosemary Coombe (2011) argue that:

Viewed through a proprietary lens, an author's intellectual expression is an object that is owned like any other. In the context of a market economy, it is simply a commodity to be exchanged and exploited in the marketplace. Nonetheless, the language of 'ownership', 'property', and 'commodity' obfuscates the nature of copyright's subject matter, and cloaks the social and cultural conditions of its production and the implications of its protection. Copyright law fundamentally enables controls to be exercised over expression and thus manipulates fields of communication—the law protects the author's voice by silencing the infringer's. Copyright is built around certain conceptions of the self, society and worth, which translate, through law, into norms about who can speak, who can listen, what can be said, and with what force of authority.

The discourse of property right holders tends to rely on concepts such as property, theft and piracy that convey parallels between intellectual property and tangible belongings. But a song is not a thing, and many have pointed out that the logics that dictate ownership of material and exhaustible resources, that can only be held utilized and consumed by one person at the time, do not apply to immaterial resources which can often be infinitely and simultaneously used.

That is why protecting this property calls for *laws and norms* of enforcement that are in many ways at odds with logic of the resource itself. By limiting distribution of culture and information with legal and technological means, such as licenses and digital rights management protection, IPRs impose scarcity on resources that are inherently infinite. To the users these measures often seem absurd (such as when a library can only lend an e-book to a limited number of users) or outright offensive (such as when patent holders prohibit governments in developing countries to produce affordable drugs that can save thousands of lives).

Thirdly Intellectual property also calls forward the arbitrary acts of attribution and questions who are entitled to *own or use* a resource. In fact the construction of authorship is strongly associated with white men. Scholars of art and literature (see Battersby, 1989; Krauss, 1985; Pollock 1999; Woolf, 1929/2005) have been deconstructing the male genius for decades, and

since the 1990s scholars of law have shown how that arbitrary character affects copyright law (Coombes, 1998; Craig et al., 2011; Homestead 2005). Likewise a large body of research has exposed how IPR are biased to disfavor authors and inventors who do not incorporate the ideal of a white, western creator (Boateng, 2011; Boyle, 1997; Halbert, 2005).

This book explores the nexus of three multifaceted ideas. Just as the idea of property is multifaceted (ALRC, 2016), so too is the notion of place and the idea of piracy. This explains our transdisciplinary approach and our engagement with authors drawn from a range of intellectual traditions. We have encouraged our contributors to explore the nexus of these multifaceted ideas of property, place and piracy through a diversity of theoretical lenses. A transdisciplinary perspective naturally challenges, or even breaks down, the conventional silos where for example we find overlapping 'rights' between real and incorporeal property or tangible and intangible places. To incorporate these ideas with notions of piracy, and better articulate emerging theory at the nexus of property, place and piracy, we have not been scared to conflate them.

Intellectual property is not an odd exception in the landscape of property right, but rather an example that uncovers the fragile and arbitrary nature of property in general. Most of the conflicts that IP uncovers are also applicable to property rights in general. But what is key for our processes is the ongoing expansion of IPR in multiple forms that exclude and displace rather than provide certainty.

This attempted universalization and certainty over IPR creates exclusion and displacement of resources, but also of people who are barred from the so-called knowledge society by licenses, paywalls and lack of resources in general. As argued, this is not something that simply happens in isolation, but is a continued process of enclosing the common ownership of humanity – and one that threatens the very relationships of our communities.

It is in these places that acts of piracy emerge – attempting to reclaim and establish new spaces of commons. It is, however, never a simple form of oppositional politics. As we have shown, acts of piracy allow the processes of enclosure to expand. It is this complexity that makes defining, theorising and working with piracy both challenging and exciting.

## **Conclusion**

In concluding, it is important for us to emphasise that we do not necessarily see piracy as a revolutionary moment, though it has been described as such by some pirate party activists and scholars (Özdemirci, 2014; Fredriksson, 2015); nor is piracy merely mundane and everyday, though such a description has been used by others (see Da Rimini & Marshall, 2014; Andersson, 2014). Piracy, as an act or an ideology, may not present a solution to all processes of enclosure, but it has an ability to articulate enclosure as a practical and political problem by showing how it interferes with people's everyday life and how it can be ideologically challenged (Arvanitakis & Fredriksson, 2016; Dahlin & Fredriksson, 2017; Fredriksson, 2012, 2014, 2015; Fredriksson Almqvist, 2016a, 2016b; Fredriksson & Arvanitakis 2014, 2015). Piracy can, as we have argued, also establish alternative spaces including new commons.

Regardless of exactly where an act of piracy falls along this spectrum – be it revolutionary or mundane – it highlights the myth of clearly defined property rights as well their contextual nature. As a revolutionary act to confront property rights that ruptures the neoliberal ideology, piracy presents us with alternative property rights regimes including the re-establishment of the commons. As a mundane act of the everyday consumer, it confirms that the universal truth claims of property rights are continuously questioned.

We see this in the straits of Somalia as the property rights of the shipping lanes are not respected nor can they properly be protected; in every piece of music that exists or movie made, book published, the potential for piracy emerges and, as such, highlights the precarious nature of the universal property rights regime.

Just how the concept of piracy can be expanded to challenge a wider range of property rights is highlighted by researchers such as Ravi Sundaram (2010) who explores the way piracy is intertwined with unauthorized use of urban space in third world cities. Sundaram, along with Lawrence Liang (2005), identify the prevalence of pirated products in the ungovernable slums and shantytowns of Delhi. Their research explores parallels between the distribution of pirated software, films and books and the various practices that provide illegal access to

public spaces such as squatting and the creation of new commons. The universal myth is again exposed.

This process represents a complex interplay, however, as neoliberalism uses the breakthroughs generated by piracy and the creation of new commons as a way to further enclose and commodify an expanding range of resources. Hardt and Negri (2004) have discussed the ambiguous and intimate relation between capitalism and the commons, where capitalism is inherently reliant on the commons to produce new commodifiable resources to ensure the constant growth of the market. This creates an irony: acts of piracy break down the very property rights that are meant to promote innovation, but are often at the same time highly creative and then become the subject of enclosure. And it is here we find both the potential and the threat to the new commons movement (Arvanitakis, 2007).

This 'exposure' of the fragility of property rights regimes is also repeatedly being highlighted by acts of piracy. Piracy, in this way, emphasises both the contextualised nature of property rights regimes, as well as the possibilities of alternative systems of rights.

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