The Commons, Old and New

From Land Use to Information Sharing

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The idea of the Commons prospers today as a powerful trope of twenty-first century sharing. To tell the story of how yesterday's digging and grazing became today's googling and sampling, we need to look closer at the way the unique properties of the modern information landscape come into focus by reference to the old commons economy: through the concepts of user rights, openness and enclosure.

Openness and Enclosure

In her documentary *Les glaneurs et la glaneuse* (2000*)*, Agnès Varda revisits the traditional practice of gleaning within present-day France. Her cross-country travels searching for waste and miscellaneous discarded items begin appropriately with the land and tons of potatoes not uniform enough for the supermarket. Rummaging through the far-from-perfect heap, she quickly finds the first of the heart-shaped spuds that were to become a symbol of the successful film and her 2002 follow-up *Les glaneurs et la glaneuse: deux ans après*. From grapes and apples to art, collages, and installations, Varda seamlessly juxtaposed our use of tangible resources with more intangible ones – including that which 'falls in-between language,' as the viticulturist/psychoanalyst Jean Laplanche poetically described his own work. In this text, I want to use Varda's film as a starting point to explore the two parallel processes of *enclosure* and *openness*.

During the past few years, ubiquitous digitization and globalization have made knowledge, culture, and information into major assets for the twenty-first century. How to ensure sustainable use of resources that are easily sampled as well as disseminated is one of the most crucial (and contentious) issues we grapple with in contemporary society. New forms of collaboration have emerged in Internet-based fan communities as well as in academia. Long-established notions of what it means to be a creator as well as a user are challenged by an increasing flora of initiatives that have the idea of sharing in common; from Facebook to YouTube, from Open Access to Open Source to Open Innovation, from Creative

Commons to the Public Library of Science, digital access and openness is on everybody's mind.

There is no doubt that many of these initiatives have come about as a reaction to an expansion of intellectual property rights, the legal regime used to protect intangibles. We can include three areas in this enlargement: subject matter (protection covers not only text, music, and film, but also databases, software, DNA-sequencing, and potentially also traditional knowledge); time (we have witnessed a gradual prolongation of the period for which protection is granted); and space (while still subjected to national legislation, from the Berne Convention in 1886 to the Trade Related Agreement on Intellectual Property Rights [TRIPS] in 1994, intellectual property policy increasingly functions within an elaborate matrix of international agreements and conventions). Think about the controversy around the Pirate Bay, to the demonstrations and boycotts surrounding the Anti-Counterfeiting Trade Agreement (ACTA) and the Stop Online Piracy Act (SOPA) and you will have an idea of the stakes involved.

Some have described the way in which intellectual property rights increasingly seem to curtail and circumscribe creative activity as a 'second enclosure movement' or 'a digital land grab.' If digitization has brought about a movement appearing for the second time, then there must be a predecessor: a "first" enclosure movement. If we are to understand something of the tensions between enclosure and openness as they come to us today, we need to consider at least something of the underlying historical and theoretical principles that have shaped our understanding of and response to these developments. Although we perhaps like to think that we have done away with physical space, multiple representations of land permeate and structure the way we think about openness and the Internet. Inevitably, real and metaphorical land (a versatile trope used to argue for as well as against private property) will have a prominent place in that discussion.

The "First" Enclosure Movement

In 1700, England still consisted of large tracts of open fields, pastures and grazing lands, but by 1840 most of it had been fenced in and made into private property. Beginning in earnest with the statute of Merton in 1235, enclosure continued piecemeal during many centuries to reach its high point in the twenty-year period between 1765 and 1785. Enclosure was about fencing in what once were open fields, known as the commons. In the following, I want to make more distinct some of the reasons why the idea of the commons survives in the networked and knowledge-intensive present. To tell the story of how yesterday's digging and grazing became today's googling and sampling and how the commons prospers as a powerful trope of twenty-first century sharing, we need to look closer at the concept of *use* and *use-rights*.

The commons was never a space of absolute freedom before enclosure of the land. Vested in the lord of the manor, the de facto ownership of common lands was never in question: technically, they were the wastes of the manors in which they were situated. What prevented the immediate and wholesale enclosure of common land was a long-standing recognition of the right to specific, often highly regulated and customary uses of the land. Tenants of the manor privy to such uses included commoners who owned land, those occupying cottages, inns, and millhouses, and, on the lowest rung of the ladder, landless commoners. All were entitled to use parts of a commons themselves, for grazing or for gathering nuts. The common rights attached to each respective category were secured in a

number of different ways. Profoundly local, the profile of these usages depended on an almost infinite number of variables.

'Use' in the context of enclosure/openness spans across a complex spectrum of activities and agents. One of the most well-known of such traditions was the right to glean, or to collect the uncut or fallen grain left in the field after harvest, famously depicted in Jean-François Millet's painting *Les Glaneuses* from 1857, and, of course, in Varda's film. Beyond post-harvest pickings, gleaning was frequently mentioned in Victorian publications, and titles such as *Churchyard Gleanings* and *Gleanings from the Poets* recognize the inherently collective and consumerist nature of creativity at a period when the concept of authorship, much like today, underwent dramatic changes. Indicative of a much larger restructuring of practices that passed down through generations until becoming a ubiquitous part of commoner's lives, gleaning nonetheless went from custom-to-crime. It was a customary use that the logic of enclosure translated into trespassing or illegal incursion on private property.

Governed by *lex loci*, the local law of the manor, custom was used to invoke a usage so ancient as to take on the color of a right or privilege, one seldom, if ever, written down. Consequently, it is the concept of common right (the right to use the commons as symbolic or tangible land) that we talk about when we talk about the commons (whether it be in the 'old' meaning of territory or in the more modern metaphorical sense). Ostensibly, enclosure is about land. What it brought about on a much more profound level was a radical change in traditions and custom relating to the fabric of social life as a whole. A slow and contested process evolving over many centuries, we have witnessed agricultural and local economies being replaced by capitalism and industrialization, and industrialization being superseded by the information age. As we are confronted with a second enclosure movement—targeting the mind rather than the land—we should keep this history in mind and learn from it.

Openness

Even if we cannot reduce the call for *openness* to a simple cause-and-effect reaction to *enclosure*, it would be equally misleading not to see the two as intimately related. Many of the initiatives we have grown accustomed to as placeholders of the openness movement have developed around a critique of an over-bloated intellectual property rights regime. Vision statements such as that of the influential Creative Commons (CC) list a few recurring concerns: "Realizing the full potential of the Internet — universal access to research, education, full participation in culture, and driving a new era of development, growth, and productivity." While born digital and hardly twenty years old, the openness movement may be contemporaneous with the breakthrough of the Internet, however in a conceptual sense it draws inspiration from a history going back many centuries. As digital movements go, it is not a homogenous unit but a distributed Net-network of loosely connected and sometimes even conflicting initiatives, initiatives that include activists as well as academics.

Rooted in the arrival of free software and open source, the openness movement emphasizes access to knowledge, the virtue of sharing, and the ethics of participation and collaboration. As part of the Web 2.0 phenomenon and now with the next generation Web 3.0 on the horizon, to date we have seen a proliferation of digital platforms bearing the label "open," or drawing on the virtues of "the commons." The potential of networked innovation, crowd sourcing, and collaboration are seen as key elements in the openness movement. As part of the much-touted Europe 2020 strategy, "openness" is one of the key action points of the European Commission Innovation Union. Movements such as A2K

(http://www.cptech.org/a2k/), platforms such as Open Science (http://www.openscience.org) or Science Commons (http://sciencecommons.org), and the proliferation and impact of OA journals that eclipse traditional channels – such as the successful Public Library of Science (PLOS, http://www.plos.org/) are indicative of the importance of *openness* in an information economy and the fact that it now competes with intellectual property rights as a prerequisite for innovative activity. Openness spans a continuum from hacker-ethics to global corporate governance. UNESCO (2011) considers openness a global public good, supporting Open Access "for the benefit of the global flow of knowledge, innovation and equitable socio-economic development."

The Information Commons

Why then, has the idea of the commons gained such currency as a viable alternative to intellectual property expansionism in the networked and knowledge-intensive present?

The media-saturated, online, globalized information age depends on an information commons, a word familiar to any one who has ever used a well-stocked North American university library, where the clusters of computers servicing the needs of faculty and students alike usually is known by that very name. To talk of the commons within this present context is to speak of an environment on two parallel levels. One commons is still, despite evidence we might think we have to the contrary, highly tangible. However, there is also another one, which is intangible and informational, reducible to bits and zeros. The fact that both have spatial connotations allows us to include information, airwaves, and the Internet with centuries of elaborate irrigation management in Andalusia, and surfers sharing or excluding other surfers from the best waves on the beaches of Australia or California.

Decentered and deterritorialized, at first sight the concerns of this new commons appear very different from what was at stake many centuries ago. Rather than meadows, fish, or any other physical resource that may be subject to depletion or overuse, information, knowledge, symbols, and text make up the valuables we search for on never-ending digital grazing lands. The information commons represents therefore the ultimate *disconnection* from actual land; when using the term in the twenty-first century we picture a virtual and digital space, and not the verdant hills and fields of the English countryside. When did the commons begin to make sense within this contemporary framework? When did it become commonplace to add the word information in front, or map a predominately historical and material concept onto symbolic rather than tangible space? To pinpoint the beginning of such a change is extremely difficult, if not downright impossible. To suggest the information commons interdependency with the emergence of the World Wide Web would hardly be an exaggerated claim. Equally uncontroversial is assuming that the basic condition of globalization offers the surrounding structure within which we must conceptualize this particular development.

Primarily, the productiveness of the information commons as concept derives from a recognition of the specificity of the informational resource and its uses. The information commons is simply made of a very different raw material than soil, turf, and grass. Information-based resources are both non-rival (my use of information does not hinder yours; in fact, you and I can use the same resource simultaneously with no detrimental effect taking place), as well as non-excludable (initially, information can be costly to produce, but new technology makes it difficult to hinder an infinite number of users at zero marginal cost). The first criteria is essential for those who wish to disprove the applicability of Garrett Hardin's infamous 'tragedy of the commons' in a situation where information is both the outcome of,

and the prerequisite for, production. Indeed, the 'tragedy of the commons' is practically unavoidable in any study dealing with the management of the commons, regardless of epistemological inclinations. Hardin made one simple point: if you imagine a pasture open to all, each herdsman will not be altruistic, but instead he will try his utmost to keep as many cattle as possible on the commons, even when the end result will prove detrimental to himself. As long as there is a functioning balance between what the land can hold and the use of it, everything is just dandy. Unfortunately, this state of equilibrium is but a chimera, since 'the inherent logic of the commons remorselessly generates tragedy.'

Hardin describes is a situation where nobody has the power to deny anybody else's right to use, and where self-interest always wins out. If there are no possible benefits to be had, the incentive to invest is nil. Resources left to their own devices in the commons will simply vanish. Since the commons cannot govern itself and the voice of reason is not heard, something must be done. Hardin saw several possibilities for governance of the commons: making it into private property, allocating access by means of a lottery or perhaps on a first-come, first-served basis – all were conceivable options. Nobel Prize recipient Elinor Ostrom has argued very differently, and shows in her research that there is a remarkable plethora of examples from a middle ground, where the answer to the problems of the commons is neither complete privatization, nor absolute statist intervention. One of the major dilemmas of these two basic solutions that tends to be called upon to solve the risk of overutilization is that both are imposed from outside or above on those who use the commons, be they farmers or surfers. Both represent top-down solutions to bottom-up practices.

As it turns out, farmers in Andalusia manage very well on their own, successfully allocating water through complex systems of irrigation and settling disputes through the formation of a self-governing tribunal in the town square. Surfers rely on certain norms and informal codes in order to ensure that their usage of waves is consistent with what the community of surfers would expect and consider moral. In the end, the number of examples that punch a hole be specific, local, and limited, but they are sufficiently numerous to repudiate absolutist claims of a preordained unhappy ending. As Carol Rose suggests, there might be another genre Hardin never considered, and that is when the commons in fact should be considered a Comedy.

It is by now a truism that a tragedy in Hardin's terms is less likely to occur in the information commons. But fences proliferate in this new dominion too. Not made out of wood or barbed wire, they make it increasingly difficult to access information, knowledge, and cultural expressions. Locks need not be cast in iron to be effective; they do their job just as well when invisible and embedded in code. The accelerated use of licensing agreements adds to the complexities of what we think we can and cannot do as users. Temporal and spatial limitations for use in certain digital forms of materials that should reside safely in the public domain do exist. All such hindrances are omnipresent in the jungle that surrounds valuable informational resources.

As we surf the information commons some sections look, feel, and behave differently from the rural commons, while we can move about other parts almost blindfolded. The terminology is familiar enough; we speak of the Digital Commons movement, use the Creative Commons licenses, or support the work done by the Science Commons or the Electronic Frontier Foundation. It is hardly coincidental that prominent contemporary institutions and organizations are working against the further enclosure of the information commons. As brand new as the concerns of the Open Source movement might be, it is not in

name only that they follow in the footsteps of historical precursors such as the Commons Preservation Society and their struggle for Open Spaces in nineteenth-century London. Likewise, the list of initiatives that attempt to regain some of already lost ground and recapture the information commons in science, higher education, and culture is impressive: The Public Library of Science, the Science Commons, the Public Knowledge Project, and Project Gutenberg, to mention but a few.

Commons old and new: an emphasis on use

If I have to choose one common denominator, one thread that weaves through all these various trajectories, then it would be the fact that the information commons, just like its earlier predecessors on terra firma, relates to custom and users rights first and land, second. There is something paradoxical, however, in the ease with which the unique properties of this new resource land- scape come into focus by reference to the old commons economy. Yochai Benkler describes global peer-to-peer production of today as an activity where information technology enables direct participation in a decentralized network outside the relationships of the market. The commons makes sense within the high-tech present because the basis of the networked economy is access to and continuous recirculation of information, something that must involve some sustainable form of use rights.

The key to the iconic role of the commons in the information-based environment is therefore its ability to turn consumers into producers. In the field of scholarly communication, passive appropriators become active providers. In the cultural sphere the consumer/record player/DJ turn into producers. Couch potatoes rise from their insipid consumer existence to a 'life where one can individually and collectively participate in making something new.' The Electronic Frontier Foundation open their mission statement by arguing that from the 'Internet to the iPod, technologies of freedom are transforming our society and empowering us as speakers, citizens, creators, and consumers'; and the Creative Commons licenses are there to 'offer creators a best-of-both-worlds way to protect their works while encouraging certain uses of them.'

The emphasis on use logically brings up the perspective of custom and whether the information commons has any traditions to speak of in this respect. 'From time immemorial,' the habitual measuring stick in defending customary rights, is a notion almost unfathomable to the modern file sharer or rights holder (who, let us not forget, can be one and the same). That we are indebted to an older generation for rights that we in turn hold in trust until they are passed on to the next generation, and that instant gratification must be suspended and even abandoned in favor of a long-term commitment are old-fashioned attitudes on the verge of becoming archaic, especially on the Internet, where custom sometimes appears to be a misnomer for regulation, and hence worthy of only negligible attention. The commons was never an unregulated space. Its use depended on forms of conduct and customary rites, in other words, on forms of regulation. The same can be said for any the rural as well as the informational commons. Exactly how we achieve such governance in our global and networked society is a hotly contested issue, but the fact remains that we have very few, if any, institutions dedicated to the protection of the commons and our common informational resources.

One cannot fail to note that an aura of utopia surrounds the information commons. Because of intellectual property expansionism, there is a tendency to posit the commons as a Lost Eden, happily devoid of the weaknesses associated with intellectual property. It is at

present something of an idealized other, the unwavering defense against the missiles launched by the blitzkrieg-inclined copyright holders, a benevolent Dr. Jekyll warding off Mr. Hyde's hyper-aggression. Invoking the virtues of the commons becomes the Pavlovian response to the current weighted intellectual property system: it is an affirmative place. That it has arrived at such a position is not surprising, considering the polarization of argument that propels the copyright wars, but it is not without certain problems of its own. The implicit presumption that although there is plenty of outside pressure on the commons, internally bliss and consensus is problematic. Not seeing the internal lacerations, rips, and conflicts of interest contained within the commons is more than counter-productive; it is dangerous. It is never a good idea to over-romanticize. To view the commons as a free space, without any rules, regulations, or clear specifications of uses is deeply misleading. Just as problematic is to assume that commoners are philanthropic by nature, inviting every Tom, Dick, and Harry who so wishes to come join them on their commons. Xenophobia, separating 'us' from 'them,' is an element of the commons economy that displays its fair share of the parochial. Disregarding the more unsavory geopolitical realities of the information commons is to underestimate the sophistication of the power relations that underpin the openness/enclosure matrix.

We make sense of today's commons by comparing it with yesterday's; we know more about the specificity of information-based resources by lessons learned about how tangible resources have been and are used; we recognize the same arguments of improvement and progress that were used throughout the history of enclosure in the fencing in of symbolic space today. We look to history to understand the present.

Les Glaneurs, c'est nous

Varda's film makes a powerful case against the consumerism of modern society, made all the more conspicuous by advanced technology. Machines that have replaced manual labor may be both swift and economical, but they also leave perfectly fine fruits and vegetables on the ground following their automated maneuvers. Heart-shaped potatoes, apples that are somehow too small or too big, grapes that are left behind on the slopes of the vineyard – even though they fail to conform to the standard size or the quality of the appellation label they are as edible and drinkable as the cookie-cutter vegetables and grapes that do make it onto the supermarket shelves. If there is any sadness in Varda's otherwise affirmative documentary, it is perhaps when she notes that gleaning is no longer the collective and social act depicted in the Millet painting or in the other, less famous works of art she uncovers during her road trip.

Gleaning was a social activity, where you were seen and recognized by others. And rules and regulations around gleaning recur in all the regions Varda visits. Sometimes – as in the case of the Atlantic Noirmoutier oyster beds – there are as many suggestions about the number of oysters one is allowed to pick and how far away from the beds one must remain when doing so as there are people she interviews. Disagreeing on the finer points, no one questions that the use of the resource depends on elaborate rules and on respectful conduct. Varda talks to those who glean and those who make their apple orchards or potato fields available for gleaners to use. She visits the kitchen of the renowned two-star *Guide Rouge* chef who was taught frugality by his grandparents and never throws anything away in his restaurant. As she documents the vagrants, the unemployed, and the homeless, she never shies away from the fact that the line between gleaning and poverty is sometimes extremely fine. A necessity for some, a tradition and pleasure for others, revolt against society's consumerism for yet another – gleaning fills many functions.

In one of the film's most memorable scenes, Varda places Maître Dessaud in a cabbage field, as if, tongue-in-cheek, putting the law where it belongs. Clad in his formal black robe and clutching his red 'Bible,' the French *Code Pénal*, Maître Dessaud explains that once the harvest is over, one can glean the cabbages around him 'with absolute impunity.' Cabbages seem very different from cultural expressions, perhaps, but as Varda very perceptively notes as she moves from the cabbage field to the snippets of cultural expressions she picks up with the help of her small handheld camera: 'La Glaneuse, c'est moi.' How very true. *Les glaneurs, c'est nous*.

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