Inventing Publics

Kairos and Intellectual Property Law

> It is not a question any longer of appropriating their instruments, their concepts, their places, or to begrudge them their position of mastery. . . . Not to take possession in order to internalize or manipulate, but rather to dart through and to "*steal/fly.*"
>
> —Hélène Cixous, "The Laugh of the Medusa"

> To speak is to lie—To live is to collaborate. . . . There are degrees of lying collaboration and cowardice—*it is precisely a question of regulation.*
>
> —William S. Burroughs, *Nova Express*

If the pirate-as-hero model tends to perpetuate (however unwittingly) the very notion of property and individual authorship it seeks to challenge, then it is worth considering approaches to the consumption-invention dilemma for which "the public" does not depend on discrete pieces of cultural turf. One area within humanities scholarship where this approach is being explored is through a rethinking of the public as less a Habermasian "sphere" that must be protected from the invasive tentacles of the marketplace, than as "publics" as multiple and fluctuating bodies made possible through the circulation of texts. One prominent theorist of this approach is Michael Warner.

Warner's *Publics and Counterpublics* has been circulating widely through communication and cultural studies scholarship, creating a multiplicity of publics as it does so. Warner's preliminary essay on the subject appeared in *Public Culture* in 2000,[1] and a shorter version appeared in a 2002 issue of the *Quarterly Journal of Speech* as part of a forum of scholars commenting on his work.[2] Before the book even went to press, *Publics and Counterpublics*[3] had begun its process of creating publics. To wit: Warner argues that a public "comes into being only in relation to texts and their circulation."[4] That is, in a kind of reverse engineering of our traditional model of audience, Warner's publics only "exist by virtue of being addressed."[5] In Warner's model, publics do not exist a priori their textual interpolation, before they are called into being by the rhetoric that speaks to them. As such, publics are kinds of "fictions"—albeit fictions with identifiable properties and very real material effects. Publics, as Warner notes, "are queer creatures. You cannot point to them, count them, or look them in the eye. You also cannot easily avoid them. They have become an almost natural feature of the social landscape, like pavement."[6] However, as even a cursory read of his argument illustrates, Warner's "publics" are really nothing like pavement. They are, he argues, shaped by the temporality of circulation, an ebb and flow of discourses demanding our attention and building on one another. Indeed, our public rhythms are shaped and punctuated by an endless systolic and diastolic *pulsing* of newspapers, Hollywood films, twenty-four-hour news channels, sitcoms, movies of the week, banner ads, billboards, reality television, presidential debates, novels, fashion magazines, hip-hop videos, porn, blogs, talk radio, bumper stickers, anime, political smear campaigns—the texts of everyday life that constitute the teeming and multicitational field in which publics are made.

What may make Warner's conception of the public so attractive to many contemporary scholars in the humanities is that he augments and nuances the traditional conception of the public sphere we have inherited (sometimes ambivalently) from Jürgen Habermas. As Dilip Parameshwar Gaonkar notes, "Warner draws out a series of conceptual implications with such rigor and insight that they significantly extend and modify our modernist Habermasian understanding of the public sphere."[7] Unlike Habermas's public, a pure, uncontaminated public free from the undue influence of both governmental bureaucracy and commercial enterprise, Warner's

public has no clear telos. As Warner suggests, "I don't just speak to you; I speak to the public in a way that enters a cross-citational field of many other people speaking to the public"; hence, one can never predict where a particular public is going. We can only know that it moves in different directions, continually recalibrating in unexpected ways. This messier, dare I say "post-humanist" approach to publics, in Ronald Greene's words, "challenges the assumptions of communication models to explore the idea of a public through its relational understanding of self and other (speaker/audience; sender/receiver) and the norms envisioned for this communicative encounter."[8] If the Habermasian public sphere is a future and idealized space where interlocutors honor universal norms of discourse in the name of a common good, then Warner's is a fluctuating network, a self-reflexive and potentially infinite pattern of texts interpellating subjects in a variety of spaces and times.

At the risk of oversimplification, Habermas, heavily influenced by a Hegelian dialectic, offers a model of the public that is *centrally oriented.* Its goal is the reconciliation, or communion, of self and other. It longs for a space-time in which we can eradicate, or at least suspend, our differences in collective pursuit of a common goal. It is a telos organized around sameness. The appropriate inventional resources in this idealized public sphere are rational and universal norms of communication, including, paradoxically, the mandate that the matters discussed and the form itself be unregulated. He argues, for example, that in this ideal sphere, "citizens behave as a public body when they confer in an unrestricted fashion — that is, with the guarantee of freedom of assembly and association and the freedom to express and publish their opinions — about matters of general interest."[9] Many scholars have challenged Habermas's ideal public as one that superficially foregrounds freedom and communion but has the sublimation of difference written into its very code. Nancy Fraser's well-known critique that his model's failure to attend to the limitations of "actually existing" democracies is inherently masculinist is but one of many such challenges.[10] Although many scholars such as Fraser share Habermas's dream of a deregulated space for open democratic exchange, many reject the universalized and centralized identities such a sphere demands of its participants. The tensions that continue to surround Habermas's model illustrate the difficult challenge of imagining a commons that does not insist on commonality.

Many find Warner's conception of publics and counterpublics to be a productive alternative to Habermas's idealized public sphere. As I have suggested, Warner offers a more complex notion of publics as organic entities called forth and forced to respond to a "concatenation of texts through time."[11] This is a compelling model for scholars interested in public discourses. "Concatenation" gets at the interdependency of the texts that make publics and, hence, complicates models that, like Habermas's, insist upon the separation of certain textual worlds; for example, by keeping at bay the interfering interests of the market or the state.

Despite its fruitfulness, an important gap, or ambiguity, remains in Warner's discussion of publics, which may accommodate readings that ultimately domesticate the novelty of his insights — folding them back into the humanistic framework they seek to problematize. Specifically, if we are going to concede that publics are constituted by the circulation of texts, we need to consider seriously the political economies in which those texts are produced. *How* do they circulate? How does a text come to "be" in a manner that allows circulation? Without examining the conditions from which the texts that supposedly make publics emerge, there may be a temptation to read Warner in such a way that his model is taken as simply a hip analogue to Habermas. Might a reader, for example, see Warner's public as very different and revolutionary, but nevertheless weave a Habermasian call for deregulation into their reading? For example, Warner's metaphors such as "circulation" and "dissemination" might lend themselves to the position that the circulation of texts that constitute publics must be protected from obstructions of any kind. Put simply, one might find in Warner, as in Habermas, support for the position that regulation is the antithesis to healthy and diverse publics.

Through continuing the discussion started in chapter 4 of the debate over the regulatory effects intellectual property law has on the production of texts, I hope to discourage the temptation to conceive publics in this way. One of the most crucial issues facing the circulation of information today is the increased hoarding of intellectual material by the corporate sector. As many scholars and activists have recognized, the centralization of creative resources in the hands of the few is a potentially dangerous and antidemocratic tendency.[12] One might ask, as Kembrew McLeod does, what is the value of citizens' constitutional right to freedom of speech if corporate-sponsored legal restrictions increasingly pro-

hibit public access to the venues and even the content through which to speak? In an age when technologies allow us to disseminate information as never before, corporate owners of intellectual properties — such as literature, film, music, and software code — are radically intensifying their attempts to control the flow and usage of their products and services. In response, a vast movement of activists, lawyers, writers, musicians, academics, and authors has mobilized to fight the extensions and aggressive deployment of copyrights and trademarks. For many, at the heart of the debate is freedom of speech and the capacity to create new and innovative works. At stake for many of those involved are *the possibilities for freedom of expression itself.*

Some who agree with Warner's notion that publics depend on the circulation of texts might see the regime of intellectual property as increasingly threatening the dynamism in which publics thrive. Such persons might be concerned that corporations are taking over the very stuff from which publics are made; that copyright *centralizes* our cultural texts in private hands and cuts off their circulation, enabling them to be hoarded. In this view, intellectual property law in its current state limits the potential of invention and, hence, acts as a tourniquet, stopping the pulses and flows that give publics vitality. Recall, for example, the chilling effect observed by many appropriation artists that the free flow of discourse is becoming frozen and stagnant, that the dynamism on which artistic publics thrive is withering in the current legal climate. From this perspective, our capacity to invent and be invented is in grave danger.

My goal is to help resolve a potentially unproductive impasse in both a Warner-like conception of publics and in the monopolization of intellectual property. I suggest that, as we saw from looking at the rhetorical strategies of activists fighting to maintain a rich public domain of ideas, many activists are fighting for a *deregulation* of the discursive field, for a "lightening" of the burden of intellectual property. Their approach correlates to a reading of Warner that would assume that because circulation is what thriving publics require, the appropriate strategy of resistance ought to be to *lift* regulations that bind them, to decentralize power, and to return to the notion of ideas as *common property.* Toward this end, many anticopyright activists, such as the "appropriation artists" in chapter 4, act as modern-day Robin Hoods, artistically pirating (or hacking)

copyrighted and trademarked (that is, *owned*) material in an effort to call attention to corporate monopolies over information and to reinvigorate a sense of "the commons."

As I suggested, the copyright *pirate* model of resistance, despite its good intentions and often productive effects, perpetuates and solidifies the most harmful assumption girding current intellectual property law — that is, that intellectual materials can and should be treated as property. I suggest that the most compelling approach to this problem emerges from a public who may best understand current mechanisms of information circulation and innovation, from a public responsible for the speed and efficiency with which our digital and Internet culture has exploded — software programmers. As I will discuss, the open source software movement — which celebrates a mode of invention based on openness and collaboration, has become a model for some copyright activists. Now activists concerned with the private takeover of *cultural* material are adopting the shareware, peer-to-peer, hacker[13] ethic of open source, deploying it toward cultural production at large. In short, they are hoping to do for content what open source has done for code. The open content advocates I discuss in this chapter, particularly those at the Creative Commons project at Stanford Law School's Center for Internet and Society, demonstrate that successful publics need not function as centralized *or* decentralized networks. Unlike models advocated by other intellectual property activists — those who ostentatiously pirate corporate intellectual property in an effort to make a case for *deregulation* — the Creative Commons sharing model embraces a thoughtful and detailed *increase* in regulations; agreements that emerge in specific and ever-changing encounters between texts, the law, and publics.

I argue, perhaps controversially, that a conception of rhetorical and political innovation based on the classical Greek ideal of *kairos* (rather than property) offers a way of reimagining the public as being made *more* robust, *not less,* by regulations — albeit regulation of a different kind. Kairos, in the sense I propose here, is a rhetorical art for which, in Carolyn R. Miller's words, "the challenge is to invent, within a set of unfolding and unprecedented circumstances, an action (rhetorical or otherwise) that will be understood as uniquely meaningful within those circumstances."[14] My goal is to contribute to the conversation about publics by suggesting

that kairos is an inescapable component of text making and, indeed, of public making. In the case of contemporary intellectual property law, this conception encourages responses that improvise on *what is,* rather than mourn a fantasy of *what was.* Ultimately, this chapter argues that strategies seeking to augment or even *intensify* aspects of the current discursive field may yield more innovative rhetorical and political opportunities than opportunities yielded by those whose goal is simply to sabotage (through parody) or appropriate (through pirating).

The Commons

If the controversies surrounding intellectual property discussed in chapter 4 tell us anything, it is that appropriation artists and other copyright activists are concerned about the possibilities for innovation and free expression under our current legal structure. In addition to appropriating, hijacking, and pirating cultural material in an effort to free up inventional resources, many activists are responding by promoting the notion of "the commons" as a space to be protected and nurtured if creative publics are to thrive. The most familiar model of the commons is detailed in David Bollier's *Silent Theft,* a book that outlines the trend toward the privatization of public resources that, for Bollier, includes the infringement of copyright law on the public domains of knowledge and art. Bollier worries we have "lost sight of our heritage as a commonwealth and lost control of our assets, and perhaps our democratic traditions, as private interests have quietly seized the American commons."[15] Duke law professor James Boyle describes this takeover as the "second enclosure movement," referring to the nineteenth-century English enclosure movement, in which common lands were fenced off and turned into private property.[16] What is at stake for Bollier, Boyle, and others who share their concerns is the vitality of the public sphere and its resources, what many in the movement call "the commons." Echoing Habermas's legitimate fears about the monopolizing tendencies of private enterprise, scholars and activists such as Bollier mourn the loss of a free space in which public discourse can thrive.

Keeping in mind the appropriation artists discussed in chapter 4, I return to a question I implied at the start of that chapter: Does the current state of intellectual property law restrict the possibility for rhetorical

invention? Are corporations, as McLeod worries, saturating us with their imagery while forbidding us to respond? For the moment, I provisionally concede that yes, intellectual property law is increasingly prohibiting freedoms we have traditionally taken for granted. As Lütticken's comments on the art of theft suggest, appropriation has *always* been an integral component to artistic innovation. Many of our most notable and creative rhetorical texts, from Cicero's *De Oratore* to Jefferson's Declaration of Independence, are novel interpretations of works that came before. Their "authors," to appropriate the words of Sir Isaac Newton, unabashedly stood "on the shoulders of giants" during the invention process. As legendary literary critic Northrop Frye put it, "Poetry can only be made out of other poems; novels out of other novels."[17] Appropriation art is certainly not new, but it is making more politically explicit its suspicions of corporate ownership and monopolization of cultural content in a digital age.

The problems that copyright pirates and appropriation artists identify are quite real and are intensifying through the control mechanisms enabled by digital technology. As Lawrence Lessig reminds us, for example, it used to be that if I bought a book, the majority of things I could do with my book were unregulated. I could read it, sit on it, loan it to a friend, tear it to shreds, or wallpaper my bathroom with its pages. If I quoted from it, of course, I would have to cite it as a source, but that falls under the fair use provisions that protect certain kinds of speech, and I could do so without charge if I were publishing in a nonprofit venue.[18] The only thing that copyright could legally stop me from doing freely was copying and selling for profit the book or parts of it. However, in the digital age, things have radically changed. Our ability to copy and share digital information has exploded. So, however, has the ability of corporations to regulate every use of the material they own. Corporations can, in fact, write virtual stop signs and toll booths into the very code of digital texts. Lessig puts it thus: "Every act [on the Internet] is a copy, which means all of these unregulated uses disappear. Presumptively, everything you do on your machine on the network is a regulated use."[19] Texts can still circulate, but scholars such as Lessig worry that the nature of their circulation (and more importantly, the *publics* this circulation produces) is increasingly and more minutely controlled.

Although these fears are certainly valid, I suggest that the restrictions posed by intellectual property (for my purpose here, primarily copyright and trademark law) are more prohibitive if we accept the notion that intellectual material can *only* be imagined as property. Hence, I argue that the appropriation artists' strategy of "stealing" copyrighted material as an act of subversion is rhetorically productive, but is ultimately too limited. That is, perpetuating romantic notions of anticopyright artists as "pirates" or "Robin Hoods" stealing from monolithic corporate landlords leaves unquestioned the founding premise that ideas are *property* that can be hoarded. The most crucial argumentative terrain is ceded from the start.

The grounding premise of *this* version of the commons is an ironic concession to the concept of scarcity. In this version, the commons are described as a Habermasian ideal public sphere that is being blatantly stolen by private interests. Vaidhyanathan argues, for example, that "the corruptions of copyright have enforced, and been enforced by, the erosions of the public sphere."[20] Similarly, legal scholar Richard Posner, invoking the "marketplace of ideas" metaphor, argues "it is this marketplace, rather than some ultimate reality, that determines the 'truth' of ideas. . . . Such truths as we possess are forged in a competitive process that is distorted if potential competitors — unpopular or repulsive ideas — are forcibly excluded."[21] In other words, he argues that our *nomos,* the communal truths by which we live, are being subjected to the fickle whims of the market. This is an understandable and legitimate fear. The grounds for this fear, however, are exacerbated if we conceive the commons as only a discrete space that can be greedily appropriated by "the powerful" at the expense of "the people."

If we adopt this logic and preserve a nostalgia for an open public, free from government and corporate interference, a response to juridical restrictions as repressive, ideological, and prohibitive necessarily follows. Bollier's position serves as a clear example. He argues: "Any sort of creative endeavor — which is to say, progress — requires an open 'white space' in which experimentation and new construction can take place. There must be the *freedom* to try new things."[22] In *Silent Theft* he describes a private takeover of our commonly shared resources that diminishes our very ability to progress as a culture. Bollier idealizes an open, unregulated

terrain for civic invention, unsullied by the interests of Private Enterprise. As he says, "an argument for the commons, then, is an argument for more 'white space.'"[23]

Open Content: A Creative Revolution?

Lessig uses a similar rhetoric to Bollier's to describe the creativity crisis, arguing, for example, that "always and everywhere, free resources have been crucial to innovation and creativity; . . . without them, creativity is crippled."[24] However, Lessig and his colleagues at Stanford Law School's Center for Internet and Society are responding quite differently than the "copyright pirates" I described earlier—specifically by capitalizing on the distributive logic of the Internet.

The commons are, Lessig argues, characterized by the public's access to certain free resources. In his oft-cited lectures on free culture, he offers a four-part refrain that clearly articulates the case against our current copyright culture:

1. Creativity and innovation always build on the past.
2. The past always tries to control the creativity that builds upon it.
2. Free societies enable the future by limiting this power of the past.
4. Ours is less and less a free society.[25]

Like the rhetoric of others concerned with the state of the commons, Lessig's rhetoric mourns a past when publics and the texts that constitute them were freer. However, rather than responding with a call for *less regulation,* Creative Commons, the project he founded, actually *augments* copyright law, offering more specific and nuanced options intended to proliferate cultural texts and people's access to them.

Creative Commons began as a pet project of Lessig's. He and a group of students and colleagues began the project through the Berkman Center for Internet and Society at Harvard University, and it is now housed at the Stanford University Law School and partially funded by the Center for Public Domain. Creative Commons is part of a larger attempt to do for cultural content what open source has done for software. Initially, open source was the norm in software development: code was readily distributed and shared among members of the international programmer

community. Most in the industry agree that it is precisely this practical ethic of sharing that has enabled the so-called information revolution thus far. The logic of open source can best be described through Linus's Law, Linux founder Linus Torvalds's famous claim that "given enough eyeballs, all bugs are shallow." That is, making code open and available to users enables software to evolve more rapidly. In programmer Eric Raymond's seminal explication *The Cathedral and the Bazaar,* he compares the two competing models for the debugging of software, and offers perhaps the most influential case for open source. Whereas the "cathedral" describes the proprietary, protectionist model, in which corporations prefer to keep the inner workings of their products a secret from users, the open source model better takes advantage of Linus's Law, as it "resemble[s] a great babbling *bazaar* of differing agendas and approaches."[26]

Open source advocates assert that the *communal* mind of the bazaar, invested in finding and creatively addressing glitches, benefits everyone. Innovation, even if motivated by self-interest, can serve the whole community. Software designers and hackers have long recognized that what made the software industry so efficient and creative in its early years was a pragmatic ethic of information sharing. Even Bill Gates, who made his fortune on proprietary software, has said: "If people had understood how patents would be granted when most of today's ideas were invented and had taken out patents, the industry would be at a complete standstill today."[27] Indeed, the Microsoft empire, like the Disney empire, was built largely on the open appropriation of the creative visions of others. Mickey Mouse, the character formerly known as "Steamboat Willie," was based on Buster Keaton's "Steamboat Bill"; and Microsoft's Windows operating system was based on Apple's user-friendly Macintosh interface. A basic, governing assumption of open source is that sharing is not just more democratic, it is more pragmatic. It is simply more *efficient,* because it takes advantage of communal problem solving. If a programmer puts a program out into the world and allows the source code to be open to its users, they will collectively work out the bugs.[28]

It is easy to see why sharing information through an open distributed network might speed the evolution of software. But can what has worked for software source code work for cultural *content* as well? A variety of activists, lawyers, programmers, artists, and musicians who make up the experimental "open content," or "free culture" movement

are asking this question, and others. After all, films, novels, and images do not involve problems to be solved in the same way software does. They are valued in different ways; they "catch fire" as much through pleasure as practicality. As one writer explains:

> What started as a technical debate over the best way to debug computer programs is developing into a political battle over the ownership of knowledge and how it is used, between those who put their faith in the free circulation of ideas and those who prefer to designate them "intellectual property." No one knows what the outcome will be. But in a world of growing opposition to corporate power, restrictive intellectual property rights and globalization, open source is emerging as a possible alternative, a potentially potent means of fighting back.[29]

Borrowing from the open source liberal "copyleft" licensing agreement, open content attempts to free up cultural material — music, images, prose, etc. — so people can share and access it through clearly articulated agreements. For example, Creative Commons, the most prevalent venue, helps artists disseminate their work through a collection of Creative Commons licenses, which allow for easier use for others.

Creative Commons is an attempt to designate a multiplicity of ways to share art, information, images, and music. It makes more complex and detailed the current zero-sum model of intellectual property. The all-or-nothing conventional model is based on rivalry: If it's *mine,* it cannot simultaneously be *yours.* In contrast, the Creative Commons model adds options not predicated on a proprietary binary. As explained at their Web site: "Creative Commons defines the spectrum of possibilities between full copyright — *all rights reserved* — and the public domain — *no rights reserved.* Our licenses help you keep your copyright while inviting certain uses of your work — *a 'some rights reserved' copyright."*[30] Within this spectrum, one can tailor text-specific licenses by combining four different licensing conditions: "attribution" — a copyright holder can require they be given credit for the portion of their work used; "noncommercial" — a copyright holder can require their work not be used in commercial works without permission; "no derivative works" — allows others to copy and distribute copyrighted material if they agree not to alter it in any way; and "share alike" — one can use copyrighted material only if they agree to make the resulting work available under the same conditions determined by the original Creative Commons license. Copyright holders can com-

bine these conditions in any way they wish, for any project they choose. Creative Commons, or open content, is an attempt to augment the available materials for rhetorical invention—by advocating a public sphere shaped by textually specific permission, rather than by uniform prohibition. Importantly, Creative Commons does not seek to repudiate copyright altogether. Rather, it seeks to make it more nuanced and attentive to specific moments of textual production. As I argue, it promotes a mode of rhetorical invention characterized more by kairos than by property.

The open content movement is an attempt to develop a robust pool of creative resources "donated" by artists, musicians, and filmmakers—a creative commons—from which others can draw for their own work. Both the resources and the process of rhetorical invention are opened up in a way that promotes greater experimentation and, potentially, greater diversity of inventing agents than the current corporate model of cultural production. Following Lessig's assertion that "Creativity and Innovation always build on the past,"[31] these artists, scholars, and activists are trying to make the past a bit more accessible. They do this through localized exchanges in textually specific moments, framed by licenses designed to *open up* the possibilities for rhetorical play, not preclude them.

It is important to distinguish projects like Creative Commons from Bollier's insistence on a pristine "white space" or Oswald's dream of a creative field free from any restrictive legal fencing. Whereas Bollier, Oswald, and the many others who decry the corporate takeover of our public cultural trust fantasize about a chaotic, borderless place unfettered by the regulations of the market, Creative Commons takes markets and regulation quite seriously. The Creative Commons experiment seems to capitalize on those characteristics that make markets so attractive in the first place. For example, markets of a particular character can be good at inspiring production and innovation and at making the most of *opportunities.*

Kairotic Invention: "Propriety" versus "Proprietary"

If we read Warner's publics and counterpublics thesis in a way that recognizes that circulation is not necessarily the dialectical opposite of regulation, then we remain open to the ways in which the intensification of regulatory categories (as exemplified by Creative Commons) can

actually *increase* the circulation and vitality of our creative publics. In this section I propose that, for those interested in promoting a robust and democratic commons, the ancient rhetorical concept of kairos serves as a more appropriate rhetorical resource than property. During the golden age of Greece, Phillip Sipiora tells us, kairos was "typically thought of as 'timing,' or the 'right time,' although its use went far beyond temporal reference."[32] Unlike *chronos,* which was associated with linear, quantitative time, kairos was better understood as a moment of a particular *quality.* The word *kairos,* writes Sipiora, "carried a number of meanings . . . including 'symmetry,' 'propriety,' 'occasion,' 'due measure,' 'fitness,' 'tact,' 'decorum,' 'convenience,' 'proportion,' 'fruit,' 'profit,' and 'wise moderation.'"[33] To cite a prevalent example, it is kairos, not chronos, at the heart of this famous passage in Ecclesiastes: "For everything there is a season, and a time for every purpose under heaven: a time to be born and a time to die . . . a time to kill and a time to heal . . . a time to weep and a time to laugh" (Eccles. 3:1–8). The passage was appropriated and reworked into Pete Seeger's and the Byrds' call for "due measure" and restraint during that kairotic moment known as the Vietnam War.

In her essay "Kairotic Encounters," Debra Hawhee notes that rhetorical scholars have traditionally conceived the invention process in two ways.[34] The first imagines invention as "a process of discovery" in which the discerning rhetor simply apprehends existing rhetorical fodder. The second imagines it as "a creative process, emphasizing 'a generative *subjectivity*' in which discursive production depends on the rhetor's ability to produce arguments."[35] As an alternative to these conventional models — which both assume a discrete rhetorical subject who precedes the rhetorical moment — Hawhee, through the concept of kairos, promotes a notion of "invention-in-the-middle." In her analysis of Gorgias's *Encomium of Helen,* Hawhee demonstrates how "in the middle" reconceives the invention process as "'I invent and am invented by myself and others' (in each encounter)." She continues: "The middle, then, at once combines and exceeds the forces of active and passive. In the middle, one invents and is invented, one writes and is written, constitutes and is constituted."[36] A fuller consideration of kairos as a crucial component of rhetorical invention affords a better understanding of the disadvantages of perpetuating universal property metaphors in the debates over intellectual property and freedom of speech. Texts, publics, and rhetors are always in

motion, distributing and redistributing across communicative networks. As such, they require legal restraints that enable their movement, rather than restraints that try to stagnate them behind the locked doors of intellectual property holders (to be seen and heard, but not touched).

These kairotic qualities of balance, in-betweenness, and proper proportion are essential to the spirit of Creative Commons and the open content movement in general. It is an ethic concerned more with "propriety" than with the "proprietary." Models ascribing the traits of property to ideas rely more on a sense of chronos, while those inspired by an open source ethic embrace the temporality of kairos. Kairos does not codify time and space through measures of quantity, but through their specific character; their quality. Kairos demands the capacity to strike a balance between this moment and that, to *respond* to a particular occasion in a way that maximizes its possibilities. Similarly, the kind of nuance the open content movement is calling for is not a call for the abolition of intellectual property, but a challenge to its universality. As software programmers have long understood about source code, rhetorical content must be open and accessible enough to be adapted to specific *situations.*

The famed Roman rhetorician Quintilian had it right millennia ago: "If the whole of rhetoric could be thus embodied in *one compact code,* it would be an easy task of little compass: but most rules are liable to be altered by the nature of the case, circumstances of time and place, and by hard necessity itself."[37] Indeed, the space-time promoted by "one size fits all" and "copyright should be forever minus a day" premises of contemporary copyright culture severely misunderstand the nature of rhetorical invention. The collaborative strategies of open source and open content activists enact Quintilian's assertion that rules often require case-by-case calibration. As rhetorical scholars well know, innovation cannot thrive under cookie-cutter conditions. Again, it is important to note that Creative Commons, my example here, does not promote the dismissal of "property" altogether. Rather, they promote a more exacting and nuanced approach to the rules that govern its specific uses.

Malcom Gladwell, writing on copyright and plagiarism for the *New Yorker,* discusses Lessig's charge that "a certain property fundamentalism" has destroyed the sense of balance between the past and the future that has traditionally defined American innovation. Gladwell notes that "the arguments that Lessig has with the hard-core proponents of

intellectual property are almost all arguments about *where* and *when* the line should be drawn between the right to copy and the right to protection from copying, not *whether* a line should be drawn."[38] Both property and kairos are characterized by measures of time and space. But whereas property traditionally serves to make discrete a particular product or object for a set amount of time (chronos) and hence freezes both time and space, kairos suggests when and where to draw a line, when to seize and be seized by an opportune moment; and, in the case of collaborative invention, when and where to make the appropriate and prudent connection or contract with another artist.

Under an open content logic, users of cultural materials are encouraged to ask What can *I* do with this? This is not consumption of prepackaged products waiting docile on supermarket shelves, or passive eyes mesmerized by Spectacular images on a film screen. Rather, open content creates the conditions for invention to become an ongoing and public process. Its direction is somewhat unpredictable, because the lines that feed it and are produced by it are multifarious. Opening up cultural content to collaborative augmentation embraces rather than rejects the viral and distributive character of publics. Publics do not thrive in a white space, or uncodified vacuum. Collaborative projects such as open source and open content offer publics more opportunities to circulate their work — not by lifting obligations, but by providing more ways and opportunities *to oblige one another.* Because Creative Commons propagates regulations that create the conditions for future appropriation, it promotes voluntary obligation and responsibility to one's community, not fear of punitive legal action.

The movement I describe here — whether we call it "open source," "free culture," or "open content" — promotes an alternative to a notion of property defined fundamentally through scarcity and chronos. Through customized agreements that explicitly announce the conditions under which specific texts can be used, Creative Commons offers tools that allow both protection and freedom for artists. Again, this model does not abolish property per se, but it does reconfigure it in ways that allow for more "balance, compromise, and moderation,"[39] values that promote innovation and, indeed, kairos. As the group's mission statement notes: "A single goal unites Creative Commons' current and future projects: to build a layer of reasonable, flexible copyright in the face of increasingly

restrictive default rules."[40] Creative Commons rejects the bipolar dialectic that forces us to choose between a culture of total copyright control in which all rights are reserved, and utter anarchy in which artists are exploited and denied their livelihoods. Of course, should a dispute arise, traditional copyright is still in place to protect the artist. A Creative Commons license augments copyright by detailing the conditions under which use is permitted, rather than relying on the simple default of denial.

In essence, Creative Commons offers a model of property based more on *amplification* than scarcity. Opening cultural content through a "flexible layer" of regulatory options augments the possibilities for rhetorical invention. This more kairotic approach to property is achieved not through the wholesale repudiation of property, but through its intensification, its amplification, making it available to others. Erasmus, writing on the subject of amplification, suggested that it was "just like displaying some object for sale first of all through a grill or inside a wrapping, and then unwrapping it and opening it out and displaying it fully to the gaze."[41] Along a similar vein, Creative Commons provides free and easy tools that allow artists to open up their property to the public gaze. Doing so, as Lessig and others argue, lessens the past's grip on the future by "exploding" texts, by amping up their circulation. In other words, whereas traditional copyright offers prefabricated products for the public to consume under a priori conditions and restrictions, an open content approach opens cultural products to a public *process*, by "wrapping" content in a flexible, accessible layer of regulation.

The capacity for public texts to continuously mutate and differentiate enables them to thrive over time. Their "life" depends on the ever-shifting publics they infect, and which in turn infect them. That is, the vitality of texts and publics can best be measured by the degree to which they allow new meanings, codes, and interpretations to adhere to them, rather than by measures of integrity or coherence. The works of Shakespeare, for example, would have certainly withered on the vine many years ago had every instantiation been rendered as faithfully as possible. Although Shakespeare's work is often heralded for its ability to capture certain enduring truths about human nature, its malleability is at least as responsible for its lasting relevance for new generations. Rather than expecting texts to progress through time uncontaminated by new interpretations,

circulation depends on textual interruptions and augmentations. Dilip Parameshwar Gaonkar and Elizabeth A. Povinelli state it well:

> If it is no longer viable to look at circulation as a singular or empty space in which things move, it is also no longer viable to reduce a form-sensitive analysis of culture to the captivating dialectics of meaning and its innervation. Translation — the (im)possibility of meaningful commensuration — has long been circulation's double, its enabling twin. And translation and circulation have long been seen as *both the value and the price* of a truly democratic public sphere.[42]

So, in this sense, Warner's use of "circulation" as a diagnostic metaphor is extremely helpful toward conceiving publics as distributed networks. Unlike "progress," which implies a teleological advance toward reconciliation, or "sphere," which demarcates a finite and timeless space, circulation connotes a process predicated on differentiation, a process sensitive to a qualitative and kairotic space-time. However, as Gaonkar and Povinelli suggest, we should be wary of assuming, as some commons advocates do, that circulation depends on "a singular or empty space in which things move." Rather, as I discuss in my concluding comments, circulation is invigorated by a kairotic "response-ability" to a busy and complicated rhetorical field.

Creative Commons licenses deploy a model of rhetorical invention based on kairotic relationships, not on exclusivity. Creative Commons and the open content movement in general are a burgeoning attempt to make the conditions for these kairotic relationships more robust and diverse. In response to the question with which I began — Does the current state of intellectual property law restrict the possibility for rhetorical invention? — most students of rhetoric would likely agree that we can only conclude that, no, rhetorical invention is never denied, because kairos, a key component of invention, can always respond in a specific encounter. It is a skill, a practice, not a discrete object that, like property, works on scarcity. Kairos can neither be owned, nor stolen. As thinkers such as Bollier and Oswald argue, the juridical landscape of copyright and trademark law *is* increasingly difficult to navigate. However, bemoaning the loss of some mythical free past does not do enough to cultivate a rhetorical *responsiveness* to *this* kairotic moment.

A better understanding of rhetoric and public discourse can enrich the debates over the laws fostering and undermining the circula-

tion of texts. The metaphors, or "terministic screens," that govern our daily life *matter.*[43] In this case, it is by attending more specifically to the ways in which textual properties circulate, or can potentially circulate, that I hope to add a level of specificity to Warner's argument. A model in which the circulation of texts that transform subjects into publics is characterized exclusively by "circulation," and "punctuality" may not go far enough toward imagining the potential advantages of, say, *speeding up* the invention process by clearly designating rules for appropriation. Indeed, under our current model, intellectual property holders spend a staggering amount of time and money trying to ensure that every loophole is closed, that the proverbial wall around their property is impenetrable to would-be pirates. Likewise, artists wanting to incorporate fragments from existing culture into their own work must increasingly become amateur legal scholars in order to avoid the often costly penalties for ignorance.

Regarding the temporality of circulation, Warner argues that "the more punctual and abbreviated the circulation, and the more discourse indexes the punctuality of its own circulation, the closer a public stands to politics. At longer rhythms or more continuous flows, action becomes harder to imagine."[44] This dynamic, he suggests, attenuates the political efficacy of academic publishing, which relies on an archival model. Academic conversations, traditionally subject to the tortoise-like circulation of library stacks, are thus distanced from the pace of day-to-day politics. He writes, "In modernity, politics takes much of its character from the temporality of the headline, not the archive."[45] In other words, Warner juxtaposes the day-after-day-after-day temporality of newspapers (and, to a lesser degree, of magazines) to the dusty archival model of academe. Although I take Warner's point, I think an ambiguity remains that may too easily allow a reading in which the corporate control over the pace of this circulation is left uninterrogated.

Even Warner acknowledges that his concept of punctuality may be insufficient in the age of the Internet and digital media: "Highly mediated and highly capitalized forms of circulation are increasingly organized as continuous ('24/7 Instant Access') rather than punctual. At the time of this writing, Web discourse has very little of the citational field that would allow us to speak of discourse unfolding through time."[46] Indeed, given that our public texts are increasingly digitized (i.e., films, images, information, and sound are increasingly rendered in *one medium*), the

opportunities for collaboration abound. Sharing is easier and speedier than ever before. Of course, so is the property holder's ability to police the use of digital texts. Although Warner speculates that, under the new digital infrastructure, "it may even be necessary to abandon 'circulation' as an analytic category,"[47] I disagree. Instead, I believe we need to theorize circulation outside of chronological notions of time (e.g., punctuality) and discrete notions space (e.g., conventional property). Chronos and space are framed through the language of scarcity. Because the temporality of the headline serves to *chronicle* events deemed significant by corporate media owners, and the temporality of the archive too easily stagnates ideas, it is worth theorizing the possibilities for the invention of publics that relies neither on the chronicle nor on the archive.

I argue that *distributed* publics, such as those emerging from the open source and open content movements, promote localized interventions and lateral access to texts, rather than centralized control or decentralized chaos. Their model is punctuated, yes, but this punctuation is not necessarily in the service of corporate attempts to control the rhythms of the market. Indeed, as rhetoricians have long known, and as Warner and Hawhee remind us, in "making do," in availing herself of the kairotic moment in which she finds herself, the rhetorical subject is also *produced.* The rhetorical subject is less the *origin* than a coproduct of a rhetorical situation, of a kairotic encounter—caught somewhere between texts and publics. On this point, I want to augment Warner's analysis. While he sees publics as the outcome of the punctuated concatenation of texts, I suggest the process of publics is much less linear. Texts circulate, yes, and call forth subjects and publics as they do. But we must keep in mind that these circulations occur on a much more dispersed terrain than Warner's argument might suggest. Kairotic moments are singular, albeit connected, events; they are not progressive. And we make texts at least as much as they make us.

Conclusion, or What If Rhetorical Invention Worked like a Pinball Machine?

Although appropriation art is a compelling and necessary part of a multilateral attack on the corporate hoarding of cultural resources, it may not go far enough in terms of experimenting with alternative responses. This may in part be because the art of theft, arguing on the

ground of "rights," preserves the outdated and inefficient model of property it strives to undermine. Hence, it may unwittingly position publics as fighting for small scraps of property, rather than hastening a reconfiguration of the cultural field itself. Unlike many activists fighting the invasiveness of intellectual property law, I must conclude by arguing that rhetorical innovation is not precluded by intellectual property law, because intellectual property law, at least in part, structures the very cultural terrain over which artists and activists must navigate. So, while it is true that copyright and trademark constitute blockages to which artists and activists must respond, it is unproductive to approach these blockages as *antithetical* to the invention process—as restrictive tourniquets that, if removed, would reinvigorate the free flow of vital resources to atrophied publics. Instead, in this conclusion I argue that blockages and constraints have always been inextricably linked to invention.

I have suggested here that the pirating strategy of "theft," however unwittingly, perpetuates the very notion of property that it rejects. Perhaps more importantly, it celebrates as resistant a quality of discourse—its tendency to quote, appropriate, and steal—that is *inherent* to language's very function. In other words, appropriation is not antithetical to the law; it is mutually constitutive of it. The capacity to quote and play with language has all kinds of political effects, and not all of them are effects Lütticken and other proponents of the "art of theft" would so readily celebrate.

Although I believe that, as students of public discourse, we must support efforts to protect and even expand fair use, as well as a liberal approach to our cultural commons, I am left with many questions in the face of some critiques of copyright. As I have intimated throughout this discussion, I encourage us to be wary of models of rhetorical resistance in which democratic publics are perpetually on the losing side of an endless cat-and-mouse game with the corporate establishment. That is, I am not willing, after this brief exploration of the debate surrounding intellectual property, to merely conclude, "Yes, it stifles creativity." Certainly, corporations invoke and even lobby for laws so they can thwart certain kinds of critique; and it is true that copyright laws were never intended to be used ideologically—to silence political dissent. However, as may always be the case, when some kairotic moments are undermined, others are forgrounded. As Rosemary Coombe aptly notes in *The Cultural Life*

of Intellectual Properties, "The imagery of commerce is a rich source for expressive activity."[48] This rich source is available, not despite intellectual property, but at least in part *because of it.*

I began this conclusion with the strange supposition that the field of rhetorical invention may be something akin to a pinball machine. I invoke that image because, in response to Bollier's position that creative progress "requires an open 'white space,'" I want to propose quite the opposite. Just as a pinball would gather no momentum, no speed, no direction without bumpers and pins to respond to, neither is rhetorical invention possible without the constraints and obstacles that define its "kairotic encounters."[49]

With this perhaps juvenile analogy in mind, I would like to return to Oswald's assertion that "if creativity is a field, copyright is the fence." Oswald's description is quite useful, though maybe not in the way he intended (language is funny that way). Intellectual property is not merely a fence that confines and makes discrete a piece of stagnant property—an impermeable boundary along which powerful corporations successfully post their "No trespassing" signs. Rather, it is a fence that gives shape and substance to specific fields of discourse. Importantly, fences can be straddled. They can be climbed under, over, and through. They can be extended, and reconfigured into playful mazes. They can be walked on like a tightrope. Taking advantage of the capacity publics have to move *rhetorically*—deftly negotiating amongst and between available and emerging texts—is a more appropriate way for a democratic society to approach the invention process. As Deleuze and Guattari explain: "*Between* things does not designate the localizable relation going from one thing to the other and back again, but a perpendicular direction, a transversal movement that sweeps one *and* the other away, a stream without beginning or end that undermines its banks and picks up speed in the middle."[50] That ability to walk delicately and precisely, in a state of in between, is precisely what defines kairos, perhaps the most crucial condition for rhetorical invention. As Hawhee reminds us: "The mythical figure Kairos . . . was depicted as a well-muscled wing-footed figure perched on a stick or ball, balancing a set of scales on a razor blade"[51]—almost as if walking along a fence. He is often depicted with winged feet—presumably for those moments when, like a pinball hitting a bumper, he is propelled off in some new and unknown direction, possibly picking up speed in the

middle, as Deleuze might have it. Perhaps those of us interested in the possibilities for rhetorical and political invention in this age of increased corporate control of culture might take a cue from the ancient mythical figure of Kairos, who, like the contemporary mythical figure of the Who's Tommy, "plays a mean pinball" because he "plays by intuition"; and perhaps Kairos, like Tommy, knows that invention is about "becom[ing] part of the machine" and learning how to play it.