Why Art Should Be Free

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"Where there is no gift there is no art"
Lewis Hyde

Artists have been both instigators and beneficiaries of the digital revolution. But the delicate ecology that sustains that revolution is at risk of being overwhelmed by the business of art. In the war brewing over creativity in the digital age, artists are going to have to choose a side – and a lot rides on their decision.

The entrepreneurs have been waiting at the gate for some time now, perhaps fueled by journalists' obsession with how much a Web site should cost (1). Until recently, the brick-and-mortar art world had little economic incentive to take its online counterpart seriously. But now that a critical mass of museums has taken the plunge and commissioned artists' Web projects, the more adventurous dealers are testing the waters, wondering whether they should cast in a hook to see if any forward-thinking collectors would take the bait. Some artists – especially those who already have a beachhead in the art market – are delighted at this prospect. But exchange economies tend to steamroll gift economies; if the art market does take root in cyberspace, we have to make absolutely sure that it doesn't overrun the precarious ecosystem that gave rise to the rich global community we call digital art. For property, intellectual or personal, is the enemy of art.

This essay offers neither a Marxist attack on personal property nor a rosy vision of George Bush writing artists a fat check every year. It is simply an acknowledgment of the fact that a gift culture dies if people stop giving. Making art into property helps plenty of folks – even a few artists. The problem is, it cripples artists more than it helps them, by covertly impeding their power to create, to get paid, even to give.

Creating

Artist Ilya Kabakov claims that our society needs artists not to create more information or imagery – we've got enough of that already – but to recombine and envision the culture we already have. Fortunately, today's artists have tools that enable them to reinterpret culture as never before. Digital sampling has transformed music, data mining is a critical piece of Internet art, and the reinterpretation of classics is a rich source of contemporary literature. Yet as artists have been moving in this direction, lawyers have been moving in the opposite one, toward prohibiting the re-use of culture. So they've sued 2LiveCrew

for sampling *Oh Pretty Woman*, Arriba Soft for re-framing Leslie Kelly's photos, and Alice Randall for rewriting *Gone with the Wind* from the slave's perspective. Property – intellectual property – is their rationale.

Intellectual property lawyers running amok have extended the term of copyright eleven times in forty years. It is literally illegal to write software to fast forward past commercials on your DVD. If Senator Fritz Hollings'bill prevails, it will be illegal to sell a fully programmable computer that can run multimedia.

Intellectual property isn't all bad (2). We probably should fine those guys on Canal Street who sell hot copies of Photoshop for $30. The supposed attempt to protect *artists* via expanded copyright protections, however, is just a smokescreen for guarding corporate profits.

The root of this problem is not the "intellectual" part of intellectual property, but the "property" part. For intellectual property isn't the only possible pollution of the creative ecosystem. The art market's presumption that art is physical property also serves as a smokescreen – and not just for digital artworks.

Getting Paid

In principle, there is nothing wrong with wanting to make a living as an artist. What's wrong is the perception that our society's art market will ever make that possible for more than a token few.

The folks this market benefits most are the middlemen: auctioneers, dealers, critics, art school faculty. The meager salary I reap as a curator is premised on a plentiful supply of art to choose from, good and bad. If there are only three artists in town – no matter how good they are – you don't need museums and magazines to point them out to you. The plentiful supply of art in our culture is the product of the unrecompensed labor of countless artists working away in their studios. For no great art was ever made in isolation; indeed, good art plays off the expectations developed by bad artists. There is no way for a market-driven art world based on finding and immortalizing superstars to survive without a rich culture of art to draw from. Yet to say the art market helps the starving artist is tantamount to saying the lottery helps the poor: it profits a tiny percentage, and distracts the rest from their impoverished social position with dreams of sudden affluence.

Leaving aside artists as a class, the evidence that the market has encouraged art that better serves society is pretty scant. It's possible, to be sure, that the need to find a marketing niche is responsible for the pluralism apparent in recent contemporary art. Unfortunately, artists who find such a niche also find themselves caught in what Joseph McElroy has called "brand slavery" – the inability to sell works outside of a signature style for which they have become known. The market also discourages artistic paradigms that depart from the model of solitary genius; I've had dealers admit to my face that they can't take on collaborative work because it won't sell.

Even those selected by the market can end up hostages to it. Musicians and writers gladly sign away their rights for the chance to publish with a major record

or book label. Even terms written explicitly into a contract can be meaningless if the cost of litigation is prohibitive for the struggling artist (3). In my gallery experience as a visual artist, I've had to build pedestals, repaint walls, design, print, and mail my own announcements – and then lose 50% commission on anything I sell (4).

But what proof is there that artists would bother to make art – much less curators exhibit art and critics write about it – if there were no market to sell it and no copyright to protect it? It turns out there is a vast and vibrant artistic community for which the number of artworks ever sold to a willing buyer can be counted on one hand. Though scarcely a decade old, this community has produced more artistic genres and manifestos, public exhibitions, and critical writing than the market-driven artworld has in the past three decades. It's been more democratic and geographically diverse; statistics indicate that its audience is at least as large as visitors to galleries and museums. This body of evidence is right under your fingertips. It is the Internet.

The invisible hand is a theory. Copyright is a theory. The benefit of propertyless art is a fact – a global, instantly accessible fact.

But that may change, now that Internet art is finally gaining a foothold in galleries and museums. Ironically, it is online artists who have the most to lose from the grafting of an exchange economy onto this extraordinary refuge from property. For market influences threaten to carve up their vital public sphere into separate domains of private ownership. Say goodbye to connective art like Shredder, Netomat, and the Impermanence Agent. Internet artists eager to usher sales of their work may end up trading their wildlife refuge for a zoo (5).

Can't Internet artists have their cake and eat it too – sell their work and still have it accessible online? The problem is, dealers who play by the rules of property will want to offer collectors exclusive viewing rights. Even if artists try to sell those rights themselves – say, by offering art online via subscription or pay per view schemes – they may find themselves in the same predicament as their dot-com predecessors. Seventy percent of adults can't see themselves paying for *any* form of online content (6). Conditioned by Napster, free e-mail, and open source software, the general public has got it into their heads that the Internet is for everyone. And they're right.

Giving

Property's apologists might insist that giving art the status of property doesn't impede its ability to be given away. Wrong. Artists *are* constantly giving, in the sense of working without pay – yet property law makes sure that artists aren't the ones empowered by giving art. If you make art to give away, you won't show a profit on your income tax return, and the IRS will reject as a "hobby" expense your attempt to write off your studio rent. Even if you show a profit, you can only write off the cost of materials for any charitable donations, whereas the *collector* of your work can write off the market value. So if Robert Rauschenberg gives a white painting to the Menil Collection, he gets a $100 tax break to cover the stretcher

bars, canvas, and tube of titanium white. If he gives it to a Rockefeller and he gives it to the Menil, Mr. Rockefeller gets a $100,000 tax break.

If you think artists don't get an even break giving away art while they're alive, just wait until they're dead. My father, a second-generation abstract painter, was well known in the 1950s, but his market shrank when he moved away from New York City in subsequent decades. Nevertheless he continued to paint prolifically and had hundreds of unsold works in his studio when he recently died. As heirs, my brother and I were faced with the dire prospect that the IRS could take his asking price for a painting, multiply by the number of paintings in his inventory, and then levy taxes on this multimillion-dollar figure. But paintings aren't chairs or bolts; you can't just liquidate them at the drop of a hat. I'm sure my father thought of his artistic legacy as a financial safety net for his children, but it has become a road straight to bankruptcy.

Nor are there many options for artists and their heirs to avoid being saddled with "property debt." Establishing a foundation to support a dead artist's work sounds nice, but it requires gobs of liquid capital and entails self-dealing rules that prevent beneficiaries from being decision-makers. Non-traditional bequests are even more costly; gay or lesbian partners of deceased artists, for example, aren't allowed the million-dollar tax exemption of legal spouses. After participating in a conference on estate planning for artists, painter Philip Pearlstein summed up his assessment in the handbook published by the conference's organizers:

"When I die, my studio will have to be emptied of all my paintings... once the stuff is in the moving van, where will it go? After all these years of painting, have I simply created a terrible burden for my wife and children? They will have to give directions to the driver of that van. It almost seems that the easiest solution would be for them to take a few souvenirs and have the rest driven to the town dump."

Unfortunately, even Pearlstein's draconian solution wouldn't prevent his family from paying inheritance taxes, for they're based on the estate's value at time of death. You can't give property away to avoid inheritance tax; you can't even avoid throw it away. Attorney John Silberman once asked the IRS how they would judge a body of works that were made purely for art's sake, with little commercial potential. The response was, "If you do not want to pay taxes on them, destroy them before you die." (7)

Which is exactly what artists should do: destroy their artistic property before they die. But how can you destroy artistic property without destroying art?

The Open License

The answer is with an open license. Open licenses have rarely been applied to art (8), but they've been a driving force behind much of the software that runs the Internet (9). The archetype for open licenses is Richard Stallman's GNU Public License, which when attached to a piece of software guarantees that all works based on that software must inherit the same freedoms embodied by the original. Such freedoms can include a requirement that the source code be *transparent* to anyone who wants to see how it was made; that it be *recombinant*, meaning that

anyone can recombine elements of the original product to make a new one; that it be *credited,* so there is a record of all the collaborators who may have modified an original product; and finally that it be *circulating,* that recipients of the code not attempt to prevent others from freely distributing any derivatives based upon it (10).

While all of these terms are potentially applicable to code-based products like Internet art, the last criterion is applicable to any form of open culture, from paintings and sculpture to academic research and argument. Soon, artists will be able to learn about and apply such open licenses, thanks to the efforts of a group of affiliates of Harvard's Berkman Center for Internet and Society (11) who will soon launch a clearinghouse for open licenses at Creativecommons.org.

I'm not proposing that creators be locked into open licenses for all their projects. Individuals could choose on a project-by-project basis which works to be open licensed and which to be distributed based on the closed terms of traditional property. I'm just not sure there's a good reason to call the latter work art; "commercial art" strikes me as a contradiction in terms.

"You can't fight capitalism," I hear some readers say. "The art market has assimilated corners of fat and scribbled blackboards by Josef Beuys, even though there's little evidence he wanted them sold. If a dealer wants to sell your work, they will." Yeah, unless you make it illegal. The GNU Public License uses a strategy called copyleft – an ingenious twist on copyright – to enforce openness. Creators of copylefted products retain their copyright so they can sue anyone who tries to constrain access to work they distributed for free. Open licenses won't put dealers and appraisers and the rest of the middlemen out of business. But it will release the lock the market has on deciding the fate of art – just as GNU/Linux has released the Microsoft's lock on the fate of software.

But why would artists choose open licenses? How would they pay the studio rent and DSL bill? The same way their parents'and grandparents'generation did, the same way the overwhelming majority of them do now: a day job. Day jobs suck, but they help reinforce the line between the choices artists make for commercial reasons and the choices they make for their art. Ironically, Internet artists often complain about having to hold down a day job, despite the fact that they're the artists whose skills put them in the best stead for landing lucrative part-time jobs. Part of the problem is the expectations of comparable wage from the dot-com boom. Something tells me that Merce Cunningham and Nam June Paik never bitched about how much more money they could have made doing developees or smashing pianos for the commercial world (12).

The Benefits of Giving

Artists aren't the only ones whose illusions would be shattered by taking away the false promise of commercial success through selling art. Up to now, capitalist societies have been able to excuse their unwillingness to support artists by entrusting that responsibility to the art market. America, for example, ranks somewhere alongside Iran when it comes to public sponsorship of the arts: 6$ per capita, compared to Canada's $46, France's $57, or Germany's $85. Our

policymakers don't see this as a problem because they're under the impression American artists make a living on the market. When I try to breathe some reality into the stratospheric deliberations of NEA chiefs, copyright registrars, and arts organization policy wonks, they look at me like I'm crazy in the head. Without the pretense of market compensation, the wealthy and powerful might be under a little more pressure to sponsor free health care, grants, and other mechanisms to sustain this invaluable cultural production. But even if they don't, the difference would only be felt among the tiny percentage of artists who currently make any substantial living off their work. And even those artists wouldn't get pinched by the unfair laws preventing them from empowering themselves through giving.

There are also individual benefits to giving – altruistic and economic. To exclude art from an exchange economy doesn't imply it will have no economic value; it's just that its economic value won't be determined by exchange (13). I'm not talking about the benefits you get by being an Andrew Carnegie or John D. Rockefeller Jr. Those people gave with the expectation of getting something else in exchange: tax writeoffs, spin control, the ability to sleep at night. I'm talking about the currency of gift economies – communities that circulate rather than exchange gifts. Achilles and Odysseus had Kleos. The Impressionists of *fin-de-siècle* Paris had the Troc. Slashdot has egoboo; Everything2.com has experience points. They mean respect, they mean prestige, but they also mean people will listen to you and talk about you. And those things are just as important to the starving artist as the bread on his table. As writer Joline Blais puts it, to sell the products of artistic labor is to take away artists'power as the source of the gift.

Kleos and egoboo don't pay the bills, but no middleman has a cut of them either. And they *can* lead to grants, commissions, patronage, and other financial rewards that aren't based on property (14). Yet any creator who plays according to the rules of gift economies should be judged according to them – in the eyes of the Copyright office and IRS, among others. All of culture, whether protected by closed copyright or not – Mickey Mouse, Bart Simpson, the whole kit and kaboodle – should be fair game when it comes to appropriating material for an open-licensed work. Open-licensed artworks would have no clear sales value, and hence not be taxable as income or inheritance (15). If you get a grant to help you give more things away, you shouldn't pay tax on that money. The primary job of the executor of an artist's estate should be to give the inheritance away in the manner most consistent with the artist's intent.

There should also be consequences for the receivers of these gifts, who would be beholden to the circulation requirement of open licenses. For museums to acquire open-licensed art would require them to transform from collecting institutions to circulating institutions. This change would be just as dramatic for paintings as for online art, for museums commonly exhibit less than ten percent of the works in their collection; the rest gather dust in basements and warehouses. No schoolchild will ever see inspiration in a sculpture banished for eternity to a wooden box. Paintings on a warehouse rack are not common culture, but a dollar value in the assets column of some annual report handed out at board meetings. Art is cultural heritage, not an investment to be squirreled away in a vault as a form of commodity speculation. To acquire an open-licensed work, museums would have to drastically reshape their acquisitions policies to ensure the works in their collection spent the maximum possible time on public view – if not on their own walls, then

on loan to other institutions. In return, however, such *circulators* would qualify for regulatory tax benefits of their own (16).

Weaknesses of the License Approach

Voluntary licensing doesn't require any changes in intellectual property law; this is both its strength and its weakness. As the name "Creative Commons" suggests, open licenses have the potential to demarcate a public space immune from the restrictions of intellectual and physical property – in the same sense that a public park like the Boston Commons is a communal territory available to all citizens equally. But the rest of the digital world is already functionally a commons anyway – it's just not legally one. Software piracy is rampant; Napster and its variants permit unlimited music sharing; and Web designers routinely pilfer code from other online sites whether it's copylefted or not.

That leaves an enforceability dilemma for legislators. They could choose not to put any muscle behind enforcing their own laws protecting intellectual property, in which case those laws will only hurt law-abiding citizens. Or they could choose to enforce them by the only means possible: drastically curtailing the freedoms netizens currently enjoy in order to prevent unauthorized use of digital culture. Senator Hollings has already proposed such legislation: the *Consumer Broadband and Digital Television Promotion Act*. This act would mandate copyright-sniffing chips in every PC and make circumventing them illegal – effectively forbidding the sale of fully programmable personal computers and eliminating any hope of innovative approaches to recording, playing, cataloging, and distributing music or movies. To disable the Internet to save EMI and Disney is the moral equivalent of burning down the library of Alexandria to ensure the livelihood of monastic scribes. Unfortunately, these legislators don't know enough about the Internet to understand why Webarchivist and Google deserve more protection than Britney Spears and The Little Mermaid. It won't do artists any good to copyleft their movies if personal computers can only play videos produced by Hollywood studios.

The mutability of digital media creates another liability with voluntary licenses. Suppose digital artist Geoff Kuhntz scans a copyrighted postcard of seven puppies on a cushion, then uses Photoshop to replace all but one with a flowery background. Suppose Kuhntz then offers his image free of restrictions on a clearinghouse for open culture like Creativecommons.org. He's free to do that, because his "transformative use" of the original image qualifies for fair use protection against a copyright suit. Another artist downloads it, agreeing to abide by the terms of the license. She decides it would look better if there were seven puppies instead of one, so she clones them – and wham, gets hit with a copyright infringement suit by the original artist. You can imagine the same scenario taking place in other media – for example, if an excerpted Philip Glass riff were re-sampled into a minimalist composition that rivaled the original, or if a work of online art that depended on random combinations of image and text from other pages accidentally re-created something dangerously close to one of its victims'Web pages. For digital culture, fair use is a porous category, which makes open licenses no guarantee you won't be sued.

As Creative Commons consultant Wendy Seltzer has observed, these practical obstacles don't necessarily mean the open license approach is wrong, just that it's incomplete. Modest readjustments are not an adequate solution to a legal framework that is out of touch with digital reality. To complement open licenses, we need not a legal or illegal intervention, but a meta-legal one.

The Digital Sanctuary

The solution I'd suggest to the digital liability of open licenses is as practical as it is radical: a "digital sanctuary." Digital objects are like rabbits – they reproduce easily. It is this promiscuity that creates practical problems for the commons approach. Let's say you take your pet rabbit for a walk in a public commons. If it gives birth, the offspring are still your property, and you can prosecute anyone who takes them from you. But if your promiscuous bunny's offspring happen to hop their way into a wildlife sanctuary, they could go from property to heritage – at which point your exclusive claim on them could vanish.

The Internet could serve as such a sanctuary (17) for digital creativity, if our legal system were to treat any snippet of culture that found its way online as communal heritage. The effect of this rule would be that any form of streamable (18) creativity, be it a text file, JPEG, or MP3, is automatically copylefted. Streamable versions of fixed formats – such as the MP3 of a live concert or Quicktime bootleg of a movie playing in theaters – would be similarly protected, whether they were streamed by the fixed-format's rights holder or by an unauthorized fan.

While this proposal would radically change the judicial understanding of the Internet's role in stimulating innovation, it wouldn't change the actual everyday use of the Internet very much at all. Although you'd never know it by listening to Hilary Rosen and Jack Valenti, most citizens treat the Internet as a sanctuary already, surfing clear of online content that costs money.

In a global network, of course, enforcing open access – what Stanford cyberlaw guru Lawrence Lessig has called "copyduty" – may be as difficult as enforcing closed access. To this problem I propose a compromise. Hollywood, the record labels, and anyone else who wants restrict access to culture can try out innovative copy-protection schemes online, and hope that Jon Johansen doesn't crack them – or more importantly that his doing so doesn't cut into their profit margins. This "post at your own risk" policy would mean that the circumvention of locked culture would be legal, but not guaranteed. A pet owner may choose to walk her bunny through the sanctuary with a leash – but if that bunny wriggles and hops away, the owner has no legal recourse to getting it back. Should the bunny emerge from the sanctuary and re-enter normal space, the owner can again assert property rights – and the same would be true of digital culture. Under this system, netizens could post endless remixes of *The Phantom Menace* online with impunity, but once they tried to distribute them in movie theaters, George Lucas could sue them for infringement.

The digital sanctuary is not a wilderness, but a wildlife refuge – not beyond the law, but protected by it. Legal paradigms like the protection of privacy and the

prohibition on dangerous speech, which protect the public rather than rights holders, may still apply. We stamp out forest fires when they threaten parks; maybe we should also stamp out computer viruses that threaten the network. It's not entirely clear how to enforce these protections, but it is important to note that the copy-protection schemes proposed by Hollings aren't the way.

Of course, the media conglomerates and their content providers can continue to make money off of the things that *can't* be streamed: immersive projections in big theaters, live concerts, leather-bound books you can read at the beach. Painters and sculptors would still have a choice of open or closed licenses for the products of their labor – they just couldn't enforce copyright over online digital reproductions of their work. For their part, Internet artists determined to make a buck could put digital leashes on their Web sites and hope for the best (19). Or they could be grateful for what they have: a refuge from property, poor in cash but rich in gifts.

Notes

1) To be sure, headlines like "Tangible Dollars for an Intangible Creation" (http://query.nytimes.com/search/abstract?res=F30C11F83A5B0C7B8DDDAB0894DA404482) are not always the fault of the individual journalist, but may reflect the priorities of the periodical that prints them.

2) By comparison, Berkman affiliate Glenn Otis Brown sees constitutional impediments to legislating a blanket "copyduty" – Stanford law professor Lawrence Lessig's term for guaranteed access to copyrighted material.

3) At the 100th American Assembly on "Art, Technology, and Intellectual Property," Tim Quirk of Listen.com recounted how his record label blatantly reneged on their contract's guarantee for a second CD and music video for his band. The record industry lawyers he spoke to all told him he *might* recoup a few thousand dollars if he was willing to spend three years fighting the case.

4) I've also had a dealer who visited my studio communicate my unrealized ideas to his own artists so they could execute them. Like most artists, I had no realistic legal resource; the gallerist's defense was "I guess these ideas are just in the air." So much for copyright's supposed protection of the struggling artist.

5) Some critics argue that the art world may only assimilate Internet art that can exist in standalone versions or be shared by a "gated community." But why not ask the art world – which is simply a big network itself – to reinvent itself so as to accommodate the networked aspects of Internet art? Suppose galleries and museums told sculptors not to give them works that couldn't fit in their painting racks; what's the point of collecting sculptures if all of them are flat?

6) According to Jupiter Media Metrix analyst David Card (http://www.wired.com/news/ebiz/0,1272,51146,FF.html). Artist John Simon has developed a brisk market in very low-cost, personalized software sold online; his model, however, isn't scalable enough to sustain an entire artistic community (www.numeral.com).

7) Both quotes from *A Visual Artist's Guide to Estate Planning*, published by The Marie Walsh Sharpe Art Foundation and The Judith Rothschild Foundation (http://www.sharpeartfdn.org/estateplanning.htm).

8) An exception is Conceptual artist Lawrence Weiner's *Broken Off*, a work consisting of the words of the title printed on a wall (and hence easily duplicated). Weiner declared this work to be "Collection Public Freehold" – but like other works in the public domain, his declaration makes no guarantee that works based on it must also be public domain. Hence the advantage of copyleft over public domain. More recently, Michael Stutz (dsl.org) has posted a "Design Science License" for linear video and sound files, and the Electronic Frontier Foundation (eff.org) has come up with an "open audio license" for music.

9) The GNU/Linux operating system, Apache Web server, and Perl programming language are three prominent examples of open-licensed software.

10) Depending upon the exact terms of the license, this last requirement can prohibit *anyone* from making a profit by selling something based on the product, or it can simply require that sellers of the product not attempt to prevent others from distributing it for free. Red Hat Linux is a prominent example of a commercial distributor of noncommercial software. More at www.gnu.org.

11) These include Glenn Otis Brown, Wendy Seltzer, and Molly Van Houweling, working under the guidance of Stanford professor Lawrence Lessig.

12) When I was looking up historical reviews of Fluxus performances for the Guggenheim's Paik retrospective, many of the questions critics asked resonated with Internet art: Is it art? Is it good? But no journalist among the fifty-odd articles I read asked how these artists were going to make a living off their work.

13) To say art shouldn't be sold also doesn't imply it can't be collected, whether by private patrons or by public museums. According to the variable media paradigm I have proposed for collecting new media, an artwork's "heritage value" is the putative cost over time to re-create the work to keep it alive. More on variable media at www.guggenheim.org/variablemedia.

14) Sculptor David Smith was once rejected for a loan in his hometown of Paulding, Ohio. He went around the corner, bought a copy of *Time* magazine, showed it to the bank clerk, and was instantly approved. His face was on the cover.

15) If an artist open-licenses some works but sells others as property, then the extent to which she is eligible for social benefits could be pro-rated as to how she itemized her relative expenses for these projects.

16) As with artists, the extent of benefits would reflect the proportion of open activity within the organization.

17) The digital sanctuary I propose, of course, is not defined by spatial boundaries. In that sense, the digital sanctuary is akin to an endangered species list, since the animals it protects are defined by a predetermined criterion rather

than a predefined location or species. In terms of the criterion for protection, however, the digital sanctuary is the opposite of an endangered list: it protects not that which is most rare, but that which is most accessible.

18) I'm using the word "streamable" in the generic sense of anything that can conveniently be rendered in TCP/IP and circulated online.

19) Of course, the half-life of exclusive online art has historically been short: cf. Vuk Cosic's *Documenta Done* or 0100101110101101.ORG's remake of Hell.com.