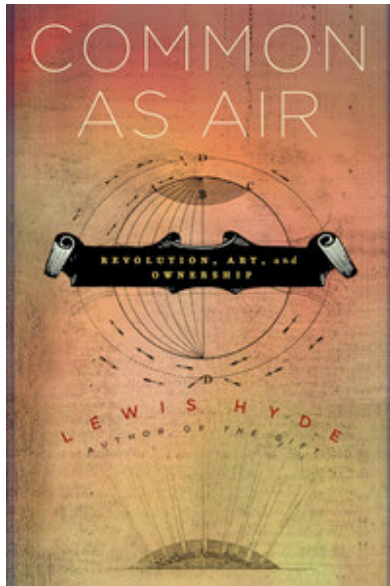


An Un-'Common' Take On Copyright Law

by MICHAEL SCHAUB



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It's probably safe to say that most Americans don't think about intellectual property laws on a daily basis. The closest most of us ever come to pondering copyright, trademark and patent issues is when we're trying in vain to fast-forward through the FBI warning on a DVD. That's not for lack of trying on the part of groups like the Motion Picture Association of America and the Recording Industry Association of America, which have in the past sued individuals for file sharing and sponsored public information campaigns with the goal of educating American youths about music and movie "piracy" (that is, copyright infringement).

The rise of e-books promises to bring up similar issues in the world of literature. But intellectual property laws affect our culture profoundly, in ways that go beyond college students being taken to court for downloading songs. Some people believe that not only

are current copyright laws too stringent, but that the assumptions the current laws are based on are artificial, illogical and outdated.

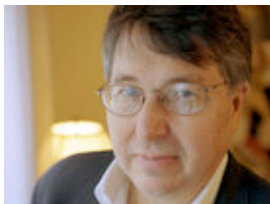
Among them is Lewis Hyde, a professor of art and politics who has studied these issues for years. In his new book *Common As Air*, Hyde says he's suspicious of the concept of "intellectual property" to begin with, calling it "historically strange." Hyde backs it up with an impressive amount of research; he spends a significant amount of time reflecting on the Founding Fathers, who came up with America's initial copyright laws.

***Common as Air:
Revolution, Art, and
Ownership***

By Lewis Hyde
Hardcover, 320 pages
Farrar, Straus and Giroux
List price: \$26

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Hyde is a contrarian, but he's not a scorched-earth opponent of all copyright laws. He does believe the national paradigm for intellectual property issues should be changed, though, at one point offering several examples of the absurd situations the current laws have created. (In one particularly weird example, an e-book publisher insisted its edition of *Alice's Adventures in Wonderland* "cannot be lent to someone else" and "cannot be read aloud.") Hyde advocates for a return to a "cultural commons" and quotes, approvingly, Thomas Jefferson, who believed that "ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man."



Reuben Cox

Lewis Hyde is the former director of undergraduate

If all that sounds too inside baseball for you, don't worry. Hyde, whom David Foster Wallace once called "one of our true superstars of nonfiction," is an infectiously enthusiastic writer. He's able to jump from topic to topic while never losing sight of his thesis, and the side roads he takes the reader down — from Emily Dickinson to Bob Dylan, from Benjamin Franklin (whom Hyde calls the "founding pirate") to John Cage — are fascinating.

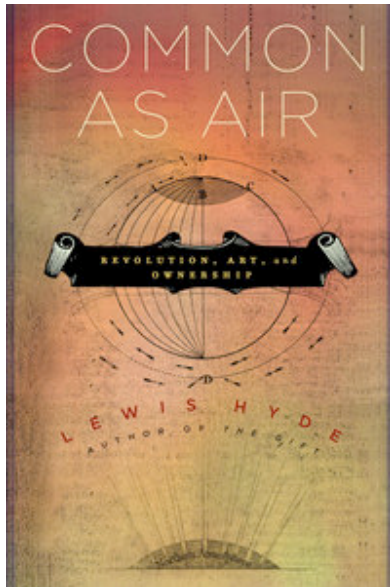
Most important, Hyde's argument is well-presented and convincing — of

creative writing at Harvard University, as well as the author of *Trickster Makes This World* and *The Gift*.

course not everyone's going to agree with him, but you'd be hard-pressed to find another book about the issue, either agreeing or dissenting, as well-researched or expertly laid out. America's intellectual property law hasn't changed much in the past few decades; it doesn't look like it's going to change anytime soon (at least not toward a larger public domain, one of Hyde's main goals). But Hyde has crafted a compelling argument that copyright is "a limit that has lost its limit," and it's one that every American who is concerned about our nation's cultural heritage should consider.

Excerpt: 'Common As Air'

by LEWIS HYDE



Some years ago in Thailand, when drug companies priced AIDS medications at an annual cost exceeding the average Thai income, the government stepped in and set more affordable rates. In response, the pharmaceutical industry called the move illegal and ill conceived, claiming it undermined the incentive to conduct the very research that produces AIDS drugs in the first place.

During the 2008 presidential campaign, Fox News insisted that YouTube remove from its site a John McCain commercial that used unauthorized video from a Fox-moderated debate. When the McCain campaign complained about suppression of political speech, YouTube replied that copyright law gave them no choice, though they "look[ed] forward to working with Senator (or President) McCain" to improve the law.

In 2000, a British scholar published a 1, 300-page anthology of modern Irish writing, twenty-four pages of which were devoted to James Joyce. Asked for permission, the Joyce estate insisted on a fee of £7,000. When the editor wrote saying he couldn't afford such a steep fee, the estate raised the price to £7,500, then changed its mind and refused permission outright. Ten years later, this anthology still lists Joyce's work in the table of contents, but pages 323 through 346 are cut from the volume.

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Each of these stories revolves around what we now call "intellectual property," and as modern as these cases are, the question behind them is very old: in what sense can someone own, and therefore control other people's access to, a work of fiction or a public speech or the ideas behind a drug? The literary part of this puzzle has, by itself, a long history. Three hundred years ago in England, writers and publishers engaged in a spirited, fifty-year debate over whether or not there could even exist such a thing as "literary property."

Publishers in Scotland, for example, thought it made no sense for their competitors in London to claim exclusive ownership of, say, a book on oratory by Cicero or a popular poem like James Thomson's *The Seasons*. As one aggrieved Scot tried to explain, if a writer were to "keep his Lucubrations to himself,"

then perhaps "he may be said to have a Property in his Noddle." But once "he prints . . . these Lucubrations," and once someone else pays for the book and reads it, "the Person who buys has just the same Property that the Author had."

"To lucubrate": surely this is a key forgotten verb of the European Enlightenment, the root ("lux") being light itself and the action indicated being the labor of studying long into the night by the flame of a lamp. Lucubrations are the mental harvest of midnight oil, and the only way to make them "property" in the usual sense ("this is mine; you keep out") would be to keep them locked inside the skull, or so this Scottish publisher believed against the protestations of his London rivals.

Centuries have passed since arguments of this sort first appeared, but the years have neither laid them to rest nor brought much clarity to the terms of engagement. "Intellectual property" is the phrase now used to denote ownership of art and ideas, but what exactly does it mean? Does it make sense, to begin with, to say that "intellect" is the source of the "properties" in question? A novel like *Ulysses*, the know-how for making antiviral drugs, Martin Luther King, Jr's "Dream" speech, the poems of Rimbaud, Andy Warhol screen prints, Mississippi Delta blues, the source code for electronic voting machines: who could name the range of human powers and historical conditions that attends such creations? All that we make and do is shaped by the communities and traditions that contain us, not to mention by money, power, politics, and luck. And even should the artist or scientist think she has extracted herself from the world to stand alone in the studio, a tremendous array of faculties and mind- states may well attend her creativity.

There is intellect, of course, but also imagination, intuition, sagacity, persistence, prudence, fantasy, lust, humor, sympathy, serendipity, will, prayer, grief, courage, visual acuity, ambition, guesswork, mother wit, memory, delight, vitality, venality, kindness, generosity, fortitude, fear, awe, compassion, surrender, sincerity, humility, and the ability to integrate diametrically opposed states of mind into harmonious wholes . . . We would need quite a few new categories to fully map this territory — "dream property," "courage property," "grief property" — and even if we had that list, only half the problem would have been addressed.

For what exactly is "property"? The oil in a lamp, the light it sheds, the midnight scholar's flash of insight: can each of these be "property" and, if so, by what ample definition of the term?

I will have more to say about these questions in the chapter that follows; here I'll simply acknowledge that my own position is not as extreme as that of the Scottish publisher. I believe there can be property in all sorts of lucubrations and, in a rightly limited form, usefully so. The very first copyright law (Britain's 1710 Statute of Anne) gave "the Authors and Proprietors" of books exclusive rights to their works for as long as twenty- eight years, provided that they paid a sixpenny fee and listed their works "in the Register- Book of the Company of Stationers." For most of the twentieth century, the law in the United States was much the same: rights lasted twenty- eight years (and could be renewed once, if the owner cared) provided that works were duly registered with the copyright office. Both of these seem to me to offer sensible ways to manage the "intellectual property" found in books.

That said, part of the task of this book is to show the degree to which a phrase like "intellectual property" serves simply to obscure a long history of philosophical, legal, and ethical argument about what sort of property lies under that heading and, once that's decided, what "rightly limited" should

mean and why a limit to ownership might arise in the first place. Knowing the history of that debate not just well enough to follow the argument but well enough to engage with it, to take an informed position in the debate, is to my mind one of the prerequisites of cultural citizenship in the twenty- first century.

But here we come to another topic that informs this book, for cultural citizenship is itself now highly contested, sufficiently so that I take it to be the site of a new culture war. For a quick overview of the terms under which that war is being waged, one could do worse than begin with a look at the public relations campaigns that the U.S. entertainment industries have been funding, especially the antipiracy curricula that they have developed and distributed to public schools.

One such campaign, produced by the Motion Picture Association of America (MPAA), has now reached hundreds of thousands of children in classrooms from New York to Los Angeles. In most schools, teachers have been free to use the offered lesson plans or not, as they see fit, though not in California, where a 2006 law mandates that all public schools must develop an "education technology" plan in which, for example, "the implications of illegal peer-to-peer network file sharing" must be taught. (The law never mentions teaching the more interesting and revolutionary implications of legal file sharing.) The year 2006 was also when the industry persuaded the Boy Scouts in Los Angeles to offer a "Respect Copyright" merit badge; the MPAA wrote the curriculum for that, too.

Many of the assignments in these programs depend on roleplaying exercises. The merit badge curriculum suggests, for example, that each Boy Scout "write and perform a skit about why copyright protection is important." Elementary school children get to create greeting cards and posters and hold a "publication party," at the culmination of which each child writes his or her name on a sticker that says, "You're part of the TEAM!" and then affixes this notice to the back of the work. The sticker bears a stock "All rights reserved" copyright declaration.

In an even more elaborate exercise called "Living in a Fishbowl," the teacher gives the students cards assigning each of them to one of six roles, five of which pertain directly to conventional motion picture production: actor, set carpenter, singer, director, and producer. The sixth role is a "computer user." The movie people all have jobs and a clear story to tell: they work hard to make movies; copyright law rewards and protects that work, piracy threatens and destroys it. Online file- swapping, a typical character says, "is costing me big bucks . . . [It] just isn't fair." The computer user, on the other hand — pictured with the top of his head missing and stars shooting out of it — offers an incoherent ramble that mixes rhetorical questions ("How could it possibly be illegal . . . ?") with dismissive remarks ("It's really no big deal!"). He seems to have no job.

The students break into groups to talk about how to present each of these characters to the class; then one by one each student must sit in a circle of chairs — the "fishbowl" — and try to answer in character questions posed by the teacher. A spokesman for the MPAA describes exercises like this as offering a good way for "students to reach their own conclusions about being a good digital citizen." But of course the game itself has determined the conclusion. It is part of a program called "What's the Diff ?" intended to teach the young that downloading movies is the same as shoplifting from a store ("no diff"). No student, when asked by the teacher, "What's the difference . . . ?" is really expected to hold forth on, say, the classic economic distinction between corporeal and incorporeal goods.

The offered roles are narrowly selected and well scripted. There are no archivists preserving public

domain films, for example, no librarians using ad clips to teach media literacy, no critics satirizing Mickey Mouse, no documentarians of the civil rights movement, no investigative journalists, no young musicians giving their music away to build an audience, no academics sharing scientific data, no remix artists laying sixties harmonies over fifties rhythms . . . Above all, there are no blank cards encouraging students to become the active authors of their own stories. In fact, there are no real "actors" at all in the civic or educational sense, only actors in the movie sense.

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