Silent Theft
The Private Plunder of Our Common Wealth
By David Bollier

INTRODUCTION

It was a close call, but the West Publishing Company almost won its claim to *own* the law. Yes, until 1998, the law of the land as set forth in *Brown v. Board of Education*, *Roe v. Wade*, and tens of thousands of other federal cases actually belonged to a privately held company based in Eagan, Minnesota.

Technically, of course, all of the opinions rendered by the U.S. Supreme Court and lower federal courts belong to the public domain and can be republished by anyone. But as a practical matter, West enjoyed a lucrative monopoly control over the nation's legal rulings because it claimed a copyright on the *pagination* of the cases. The only acceptable way for attorneys to cite cases in legal proceedings has been to use West's proprietary page numbers, which effectively prevented any potential competitor from arising to offer its own, cheaper version of federal court rulings.

This meant that West Publishing had a pretty sweet deal: access to a huge, well-heeled market, an endless supply of new product financed by taxpayers, the ability to charge premium prices, and an impregnable wall against competition – in perpetuity![1] For the American people who finance the federal judiciary and must be governed by its rulings, the situation might be charitably described as a travesty.[2]

A century ago, when there was no centralized or comprehensive method for the courts to compile their rulings, West performed a valuable function in organizing access to the law and offering minor editorial enhancements. But even before the arrival of the World Wide Web in the 1990s, a number of critics argued that West's

de facto monopoly ought to be replaced with a uniform citation system that would allow legal opinions to be more broadly disseminated. After all, if access to our society's body of *law* is not available to all, and the official rulings of our judicial system can be exploited as a cash cow, what then of the moral authority of the law? It was Franz Kafka, prophet of the legal labyrinth, who admonished that "the Law...should be accessible to every man and at all times."[3]

Yet the struggle to wrest public control of the law from the grip of West Publishing (1998 revenues, $1.3 billion) proved how difficult it is to protect a commons in our market-dominated society, even when the issue is as utterly central as the rule of law. Over the decades the U.S. court system had settled into a cozy partnership with West Publishing. Federal judges and their clerks enjoyed unlimited access to West's online compilations. They enjoyed the company's help in assuring the accuracy of final opinions, and the lavish gifts and trips to exotic locales that West sponsored for federal judges, including at least seven Supreme Court justices. Politicians from Al Gore to Newt Gingrich to key congressional committee chairmen also enjoyed warm relationships with West Publishing, thanks to generous campaign contributions. Such favors were only too helpful in West's attempts to sneak through stealth amendments to defend its hammerlock on access to the law. In effect, West was claiming private ownership of the commons, the collectively owned resources that are fundamental to a democratic commonwealth.

Few of these facts might have received much visibility to the wider world but for the activism of James Love, director of the Ralph Nader-founded Taxpayer Assets Project. In 1993, he began to debunk West's arguments, expose its ethically dubious lobbying, and mobilize law librarians, bar associations, legal publishers and the press to take their own initiatives.[4] After years of legal and public relations skirmishes in 1998, a small New York CD publisher, HyperLaw, successfully challenged in a federal lawsuit West Publishing's copyright control over court

opinions.[5] In coming years, many companies will publish federal cases in various formats, including on the Web for free. But under pressure from West and Lexis, an online vendor of legal cases licensed by West, the U.S. federal courts have refused to adopt a public domain, technology-neutral citation system.[6]

What is the Commons?

West Publishing v. The People may be a parable for our times. It is but one of dozens of cases that pose the question, *Who shall control the commons?* In ways that are variously egregious, subtle, clever and obscure, business interests are gaining ownership and control over dozens of valuable resources that the American people collectively own. The American commons include tangible assets such as public forests and minerals, intangible wealth such as copyrights and patents, critical infrastructure such as the Internet and government research, and cultural resources such as the broadcast airwaves and public spaces.

We, as citizens, own these commons. They include resources that we have paid for as taxpayers, and resources that we have inherited from previous generations. They are not just an inventory of marketable assets, but social institutions and cultural traditions that define us as Americans and enliven us as human beings. Public education. Community institutions. Democratic values. Wildlife and national forests. Public spaces in cities and communications media.

Astonishingly, Americans are losing the right to control dozens of such commons that they own. While business and technology tend to be the forces animating this silent theft, as we shall see, our government is complicit in not adequately protecting the commons on our behalf. When it is not being seduced by what has been called the legalized bribery of campaign contributions, politicians may gamely try to defend our common assets, and occasionally succeed. But even well-meaning government leaders are often overwhelmed by the pace of technological

change and the complications of consensus-building and due process. The public, for its part, is often clueless and thus politically moot in many battles over the commons. (Throughout, I will use the collective noun "commons" instead of the more archaic term "common.")

This trend raises serious questions about the future of our American commonwealth. In an age of market triumphalism and economistic thinking, does the notion of "commonwealth" – that we are a people with shared values and control over collectively owned assets – have any practical meaning? Or have we 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?

Business, let it be said, is no more a villain than a lion whose metabolism needs gazelles. Companies are in the business of maximizing competitive performance in the market, and use of the commons simply represents an available resource, and frequently a path of least resistance. That is why fortifying the commons is not equivalent to bashing the market, which clearly generates many important benefits for our society.

It should be stressed that protecting the commons is about maintaining a balance, not bashing business. It is self-evident that we need markets. It is far less clear -- particularly to businesses operating within markets -- that we also need commons. A society in which every transaction must be mediated by the market, in which *everything* is privately owned and strictly controlled, will come to resemble a medieval society -- a world of balkanized fiefdoms in which every minor satrap demands tribute for the right to cross his land or ford his streams. The flow of commerce and ideas -- and the sustainability of innovation and democratic culture – will be seriously impeded. Furthermore, such a market-dominated society is not

likely to cultivate the sense of trust and shared commitments that any functioning society must have.

So the issue is not market versus commons. The issue is how to set equitable and appropriate boundaries between the two realms – semi-permeable membranes -- so that the market and the commons can each retain its integrity while invigorating the other. That equilibrium is now out of balance as businesses try to exploit all available resources, including those that everyone owns and uses in common.

Of course, the creative tension between business interests and our democratic polity is nothing new.[7] It may be one of the central organizing principles of our political culture. Clashes between the two have shaped the very framing of the Constitution, numerous Progressive era campaigns, the labor movement, and many New Deal and Great Society initiatives. But today we live in a troubling new stage of this struggle that differs in scope and ferocity from previous ones.

The market's role in American society has exploded. It now penetrates into nooks and crannies of daily life that could not have been imagined in an earlier generation. Video ads at gas pumps, marketing disguised as education in the public schools, and Broadway theaters named after airlines. Companies now obtain patents on genetic structures of life and on mathematical algorithms, and universities urge their students to consider themselves "the President of Me, Inc."

The floodgates of commercialization of the culture really opened up in the 1980s as powerful new electronic technologies – computers, cable television, the VCR, new telecommunications systems, and others – began to take root. Businesses began to penetrate more deeply into nature, knit together new global markets, and colonize our consciousness and public culture. As the government agencies that set socially acceptable boundaries for market activity were slowly sabotaged by budget

cuts and curbs on their authority, a wide array of commons in American life became open game for market exploitation: public lands, government R&D, information resources, and ethical norms for safety, health and environmental protection.

Still, the privatization of the commons has crept up slowly and quietly, in fits and starts. It has not been an identifiable juggernaut with a single battlefront or defining moment. It has had scores of manifestations, some prominent, most of them obscure. Which helps explain the wicked insight of the nursery rhyme. Why do we "hang the man and flog the woman/That steal the goose from off the common,/But let the greater villain lose/That steals the common from the goose"? Because, I fear, we no longer *see* the commons, and thus no longer understand its meaning.

Stealing the Commons from the Goose

The nursery rhyme comes from the period of the English enclosure movement, which flourished at various points from the fifteenth to nineteenth centuries. In order to exploit emerging markets and aggrandize their power, the feudal aristocracy prevailed upon Parliament to allow the ruthless seizure of millions of acres of commonly used forests, meadows and game. As economic historians such as Karl Polanyi have shown, enclosure helped lead to the creation of modern industrial markets while inflicting devastating social, environmental and human costs on once-stable rural communities.

With similar dynamics today, many business sectors are finding it irresistible to enclose common resources that were once commonly shared. If the mineral resources on federal lands can be mined for $5 an acre under an archaic 1872 law, a lucrative windfall that the mining industry can preserve through well-deployed campaign contributions, *why not?* If commonly used agricultural seedlines can be genetically re-engineered to be sterile, rendering them artificially scarce and thus

suitable for market control, *why not?* If new software technologies can lock up information that was once readily available to all, and if information vendors can convince Congress to allow compilations of *facts* to be owned through copyright law, *why not?*

It is no wonder that businesses find exploitation of the commons so easy and attractive. Most common resources are largely unrecognized by the American people *as* common resources. Not surprisingly, they have few legal protections or institutional defenders.

Such enclosures of the commons are aided by a Washington officialdom increasingly captive to business and indifferent to ordinary citizens; a journalism profession that has grown soft now that it competes with entertainment and marketing; and the dominion of market culture over our civic identities. We have become a nation of eager consumers -- and disengaged citizens -- and so are ill-equipped even to perceive how our common resources are being abused.

The abuse goes unnoticed as well because the theft of the commons is generally seen in glimpses, not in panorama, when it is visible at all. We may occasionally see a former wetlands paved over with a new subdivision, or acres of tree stumps on federal lands that timber companies leased for a pittance. If we listen closely through the cacophony of the media, we may hear about the breakthrough cancer drugs that our tax dollars helped developed, the rights to which pharmaceutical companies acquired for a song and for which they now charge exorbitant prices. It is not easy to connect the dots among these complicated, seemingly unrelated events and recognize the larger pattern of enclosure.

The truth is, we are living in the midst of a massive business-led enclosure movement that hides itself in plain sight. Government R&D laid the groundwork for

some of the most significant innovations in computing – the original Internet architecture and protocols, e-mail, the Mosaic software that gave rise to the Netscape browser, among others -- but these investments have essentially been privatized and recast as the singular product of entrepreneurial vision. Our government has given commercial broadcasters large portions of the public's electromagnetic spectrum worth tens of billions of dollars, in return for token gestures of public service. The public domain in intellectual property – the information and creative expression that everyone must draw upon to make anything new -- is rapidly being carved up by proprietary interests through radical extensions of copyright and patent law.

Some invasions of the commons, while quite egregious, are sanctioned because we no longer can muster a spirited commitment to the public sector. Hence the widespread acquiescence to Channel One, a pseudo-educational TV news program whose advertisements are forced upon millions of children in public schools every morning. Hence the naming of beloved sports stadia after corporate sponsors who have few valid claims to our civic respect beyond the payment of sponsorship fees. Sports itself, while always a business endeavor, has been radically transformed as companies such as Nike successfully market themselves as sources of transcendent meaning.

What makes this moment so different from many earlier ones in our history is the gross imbalance between the market and our democratic polity. The market and its values assert dominion over all, and in so doing, erode the sinews of community, undermine open scientific inquiry, weaken democratic culture, and sap the long-term vitality of the economy. If we are to arrest this trend, I believe we must begin to develop a new language of the commons. We must recover an ethos of *commonwealth* in the face of a market ethic that knows few bounds. This not only means reasserting democratic control over the "common wealth" – the vast array of publicly owned resources and traditions of social cooperation that constitute a vast reservoir of

wealth. It means recognizing the intrinsic importance of the commons as a sovereign realm whose integrity and subtle fecundity must be respected.

Honoring the common is not a matter of moral exhortation. It is a practical necessity. This book aspires to explain why.

The Effects of Market Enclosure

The increasing pace of market exploitation of the commons is troubling for five reasons.

First, enclosure needlessly siphons hundreds of billions of dollars away from the public purse every year that could be used for countless varieties of social investment, environmental protection, and other public initiatives. The public's assets and revenue streams are privatized, with only fractional benefits accruing to the public in return.

Second, enclosure tends to foster market concentration, reduce competition and raise consumer prices. The power to enclose generally belongs to the largest companies, which have the market clout and political influence to acquire public resources on favorable terms. These gains are often leveraged by industry leaders, in turn, to extend their market dominance even further. Large ranchers are the heaviest users of federal grazing lands, for example. Biotechnology firms use proprietary seeds to dominate the market for a given crop. Pharmaceutical companies use federally sponsored drug research to gain control over specific drug treatment markets.

Third, enclosure threatens the environment by favoring short-term exploitation over long-term stewardship. The family result is greater pollution of the earth, the air, and the water. Leading companies find it strategically useful to displace health and safety risks onto the public, or shift them to future generations. The flagrant abuses of public lands by timber, mining and agribusiness companies are prime examples.

Fourth, enclosure can also impose new limits on citizen rights and public accountability, as private decisionmaking supplants the open procedures of our democratic polity. Consider the privatization of Internet governance, through the creation of ICANN, the Internet Corporation for Assigned Names and Numbers. Instead of a democratic process of open standards, openly arrived at through public participation, a quasi-private replica of democratic governance was invented to manage domain names in the interest of commercial users. Large companies have also learned that they can freeze out democratic and market accountability by using sophisticated proprietary technologies. Microsoft's Windows operating system and Monsanto's bioengineered foods are two cases where companies have used exceedingly complicated technologies to confound democratic oversight and effectively prevent consumer choice.

And, fifth, enclosure frequently imposes market values in realms that should be free from commodification. The character of community values, family life, public institutions and democratic processes should not be blindly dictated by the market. Yet that is the effect when public schools sell their captive audience of youngsters to junk food vendors; the Smithsonian Institution lets corporate donors determine the content of its museum exhibits; and cost-benefit equations are used to dictate acceptable levels of contaminants in food. The problem, too often, is that economic gains tend to be measurable and culturally esteemed (Gross National Product, rising quarterly profits), while the larger societal impacts are fuzzy and

diffuse (community dislocations, ecological stress, public health risks). There are no simple yardsticks, no "bottom lines," for evaluating the pernicious effects of market enclosures. This naturally makes it easy to ignore them or dissociate them from market activity.[8]

Reclaiming the Commons

Developing a discourse of the commons – the burden of this book – is especially important at a time when Americans are beginning to believe that we have little in common and can accomplish little when we work together. Talking about the commonwealth reminds Americans of the things we share: the forests and minerals that we all own, the miraculous technologies that we all have helped finance; and the values – belief in equal opportunity, say, and due process of law – that we share.

A reckoning of what belongs to the American people is a first step to recovering control of common assets and using them either to generate new revenues for public purposes or to protect them from market exploitation. At a time when the public purse is raided for all manner of "corporate welfare," an analysis based on the "common wealth" offers some powerful ways to leverage assets that we the American people already own. [9]

Talking about the American commons has important strategic value too. It helps reassert public control over public resources without necessarily triggering the familiar dichotomy of the free market ("good") versus regulation ("bad"). Too often, attacks on regulatory shortcomings have been used to justify a return to the era when business wasn't regulated at all. Talking about the commons can help the American public identify both its distinct interests as well as policy options that include, but go beyond, traditional regulation. As we will see in Chapter 13, the commons can be preserved through stakeholder regimes that give citizens equity ownership,

government auctions of the right to use common assets, new extensions of legal principles such as public trust doctrine (environmental law) and the public domain (copyright law), and Internet vehicles that enable collaboration.

Finally, the idea of the commons helps us identify and describe the common values that lie beyond the marketplace. We can begin to develop a more textured appreciation for the importance of civic commitment, democratic norms, social equity, cultural and aesthetic concerns, and ecological needs. They need no longer be patronized as anecdotal and subjective, misconstrued through bizarre economic theories that purport to monetize human pleasure ("hedonics") or human choice ("contingent value"). The idea of the commons helps us restore to the center stage a whole range of social and ecological phenomena that market economics regards as sideshows – "externalities" – to the marquee events of the marketplace, economic exchange. A language of the commons also serves to restore humanistic, democratic concerns to their proper place in public policymaking. It insists that citizenship trumps ownership, that the democratic tradition be given an equal or superior footing vis-a-vis the economic categories of the market.

This is not just a moral argument, but also an intensely pragmatic one. 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. There must be an unregimented work space in which to imagine, tinker and execute new ideas. When all the white space is claimed and tightly controlled through commercial regimes that impose quantitative indices and quarterly profit goals, and that insist upon propertization and control of all activity, creativity is bureaucratized into narrow paths. There simply is no room for the visionary ideas, the accidental discoveries, the serendipitous encounters, the embryonic notions that might germinate into real breakthroughs, if only they had the

space to grow. An argument for the commons, then, is an argument for more "white space."

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The story of the myriad commons in our midst – and their relentless enclosure – traverses a wide terrain of subject matter. We will start by examining some basic ideas that will recur throughout – the notion of the commons as a counterpoint to the market, the workings of the gift economy and the dynamics of market enclosure (Part I). These concepts offer a fresh, insightful way of understanding the market's role in a range of disparate arenas: the exploitation of nature, the abuse of federal lands, the privatization of the Internet, the over-marketization of knowledge and creative expression, the corporatization of academic research, the giveaway of the public airwaves, and the commercialization of public spaces and institutions (Part II).

An inevitable question, after traversing this gauntlet of disturbing enclosures, is whether anything useful can be done. What larger conclusions about the commons might we make, and how might the commons be reclaimed? How might we invent the commons we need for the 21st Century?

Perhaps the preeminent lessons is that a commons need not result in a "tragedy." Through the right structures, a commons can use social and democratic means to manage a resource effectively. Indeed, certain commons, particularly in the Internet milieu, can even produce a *cornucopia* of shared wealth. The robust, innovative character of many commons stems from a key strength – the diversity and social equity of participants in a commons. Also, when "ownership" of resources in a commons is not alienated, but controlled by a stable, defined community, environmental sustainability and democratic accountability are more easily achieved.

What, then, can be done to preserve and fortify the commons?

The answer varies, of course, from one resource domain to another, and one community of interest to another. But here are some of the more useful initiatives (explored in Part III) that could be taken:

- New policy structures must be invented to assure a fair economic return on public assets and the protection of gift economies.
- More effective regimes must be devised to oversee and manage the private use of government lands and natural resources.
- New sorts of stakeholder trusts should be created to give ordinary citizens an equity interest in public assets, as the Alaska Permanent Trust does for that state's oil revenues.
- Congress should work to stop the enclosure of the Internet commons and public knowledge by fortifying the public domain and fair use rights. It should also refuse to grant sweeping new intellectual property rights to book publishers, film studios, the recording industry and software makers.
- Our government should insist upon some meaningful forms of public access to the airwaves, which have been surrendered wholesale to commercial broadcasters for virtually nothing.
- The fruits of federally sponsored research must be recovered for the American people, and not forfeited for fire-sale prices, and the independence and integrity of academic inquiry must be assured.
- The over-commercialization of public spaces, community institutions, childhood experience and culture should be stoutly resisted through public policy and social protest.

Our government is supposed to act as a steward for the public's economic, civic and environmental interests. It is revealing that our government has not even compiled a comprehensive inventory of common assets – the prerequisite for any accounting of lost revenues, lasting harm to the assets, and damage to gift economies. Business critics often cry that environmental regulations amount to unconstitutional "takings" of their private property. But as a commons analysis makes clear, the actual "takings" are often committed by the victors of our Darwinian market, and the victims are the unorganized public: the commoners. This book, then, is a first, rough draft of that much larger project, the reclamation of the common wealth – and the reinvigoration of the commonwealth.

NOTES

[1] By a rough estimate made by the Consumer Project on Technology based on a compulsory license that West granted to the U.S. Justice Department, the cost of renting access to a single year of federal court cases – some 15,000 cases – comes to $40,500 for a single user. "This is a high price to pay to simply avoid [public domain] numbering opinions and paragraphs," writes James Love. See http://cptech.org/legalinfo/cost.html.

[2] The most comprehensive history of the struggle to break West Publishing's monopoly and institute a regime of universal citation for federal cases is an essay by Jol Silversmith, "Universal Citation: The Fullest Possible Dissemination of Judgments," originally published in the now-defunct *Internet Legal Practice Newsletter* in May 1997, now available online at http://www.thirdamendment.com/citation.html. Another overview, from the perspective of 1994, is Gary Wolf, "Who Owns the Law," *Wired*, May 1994, p. 198.

[3] Franz Kafka, *The Trial* (translated by Willa and Edwin Muir, 1988), cited in Silversmith, *ibid.*

[4] See, e.g., Reuter, "Justices, Judges Took Favors from Publisher with Pending Cases," *Washington Post*, March 6, 1995.; John J. Odlund, "Debate Rages Over Who Owns the Law," *The Minneapolis Star Tribune*, March 5-6, 1995, reprinted in the *Congressional Record*, July 28, 1995 (Senate), pp. S10847-10855; and Thomas Scheffey, "Feds and West Publishing: Too Close for Comfort?" *Connecticut Law Tribune*, March 1997; and Doug Obey and Albert Eisele, "West: A Study in Special Interest Lobbying," *The Hill*, February 22, 1995, p. 1.

[5] *HyperLaw Inc. v. West Publishing.* See David Cay Johnston, "West Publishing Loses a Decision on Copyright," *New York Times*, May 21, 1997, p. D1.

[6] The courts in Great Britain, however, have adopted a public-domain, technology-neutral citation system based upon paragraph numbering. See "Neutral Citation of Judgments System is Introduced, *The Times* (London), January 16, 2001.

[7] The constitutional dimensions of this theme are discussed by Jennifer Nedelsky in *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (Chicago: University of Chicago Press, 1990).

[8] See, e.g., Clifford Cobb, Ted Halstead and Jonathan Rowe, "If the GDP is Up, Why is America Down?" *The Atlantic*, October 1995, pp. 2-15. See also Herman E. Daly and John B. Cobb, Jr., *For the Common Good: Redirecting the Economy Toward Community, the Environment and a Sustainable Future* (Boston: Beacon Press, 1989), pp. 62-84.

[9] The focus here is on tangible assets and property rights that belong to the American people, as opposed to government subsidies to business, which represent another form of corporate welfare. An excellent comprehensive overview of varieties of corporate welfare can be found in Ralph Nader's testimony before the Committee on the Budget, U.S. House of Representatives, June 30, 1999.