

Cyberspace, copyright and cynicism: Questions and answers

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Question: Many people who are supposedly fighting the draconian trends in copyright regulation, expect the technology to do the work for them – as if the technology will always look after itself. Proposals for digital rights management (DRM) may be awkward and difficult, but legislation will come out of them. And it will have disastrous effects – unless the people who think there is something wrong with copyright regulation are more responsible and less idealistic.

Siva: I can link this back to the [Cynics](#) [1]. They wanted to live in the polis of the whole universe, but they never actually *built* that polis. Wandering from town to town begging doesn't actually build that system; and declaring love of all mankind doesn't necessarily create a more just world.

The hacker community is very small slice of the people actually interacting with the information ecosystem, and their ability to hack through digital rights management at will, is the subject of public discussion – but it really doesn't help those of us who don't have that technical mastery. We still have to deal with the negative externalities of this highly technocratic regulatory regime, so the fact that [DCSS code](#) [2] is out there hasn't done much to free up information for the rest of us. We still can't buy a DVD in Paris and play it on our US-bought computers.

Now, I could go search for some hack that will solve my region code problem, but I'm not really sure I know how. In that sort of micro-sense it doesn't really get us anywhere. But in the macro-sense we have this incredible library of illicit films that are accessible – that is, if you want to spend eight hours downloading an imperfect copy of *The Matrix*. That sort of civil disobedience isn't necessarily changing the terms of discussion or understanding. All it's really doing is embodying and growing that sort of negative cynicism about copyright in general. It's the notion that content-holders are all bad guys, and we need to be messing with them, because they're all getting way too rich at our expense.

Anyone working in the content-industry knows that's not the case at all. The American movie industry is the only segment of this industry actually doing well enough to justify that sort of anger.

Question: Personally, I'm very much a libertarian; my impulse is to leave it all alone. If you were advising in party politics what would you say about copyright?

Siva: The problem with libertarian politics in these ventures is that you automatically assume that your argument will work, and you assume that deregulation will ultimately carry the day. At least in the United States, there's been a naïveté among libertarians, and they have been losing the battle steadily – even as their arguments have been getting stronger.

The problem with declaring yourself a libertarian upfront is that you're taking yourself out of the middle of the debate. Everyone knows what your answers are going to be. This is a big question in the United States, because we see several proposals on the table that are frightening: the CBPTA ([Valenti](#) [2] outlines this) is just one. Playing defence against these proposals means forming coalitions; and forming a coalition requires a set of a political slogans and principles that can appeal broadly, and are digestible. You can't bore people.

There are groups of activists who are trying to create rhetoric around these issues. Some of them adapt the language of the environmental movement saying: "We need to protect an information commons," a sort of national park. The environmental movement of the United States has been remarkably successful for the past 40 years, and they sort of want to tap into that. My concern is that it only influences people who are already committed to the environmental movement.

In the US, because we have such a deep libertarian tradition, we can actually use libertarian language to seek broad popular support. So, my favourite set of political tools involves talking about user rights and how they're being threatened. And this appeals to conservative religious communities as well, because they want to have the rights and the technology to take a DVD out of the store, pop it in a computer and edit it themselves, so they're kids don't have to see naked people. And right now Hollywood is trying to stop that type of technology. The [\[Digital Millennium Copyright Act\]](#) [3] is just one way.

Anarchy, oligarchy – or radical democracy?

Question: What makes you think that the legislators and the technocrats won't get it right as they learn from their mistakes?

Siva: The people who are losing out are those doing encryption research. That's where the chilling effect really is. Encryption plays a very complicated role in all of these stories. It is really a series of algorithms – in other words math. So what you have here is the US government (and possibly the European Union) saying that some kinds of math are OK and others are illegal. And to choose good math over bad math is a very troublesome thing for research, for encryption research, for banks trying to come up with better protection technologies, and so on.

Encryption has so many uses, and the politics of encryption are complicated on so many different levels. This is such a clumsy way of messing with its evolution. To give one example, a computer scientist at Princeton named [Edward Felten](#) [4], successfully broke the digital rights management scheme for digital music files that the music industry had planned to sponsor. The latter had said, "Hey, we're going to have a contest to see if anyone can hack it," and part of the deal with the contest is that you win several thousands of dollars, but you're not allowed to tell anyone how the hack works. And then, of course they go back and patch it.

But of course, the last thing you want to do as a hacker is play by the rules, so Felten decided not to enter the contest, but to do the research with his students anyway. In a matter of weeks they solved the problem, and he decided to explain the research at an academic conference. He promptly received a cease and desist letter from the recording industry, threatening legal action if he spoke. So he didn't. Some weeks later when the Recording Industry Association of America (RIAA) was embarrassed and [took back](#) [5] the threat, he presented [the paper](#) [6].

What we have is a real effect on those who are not the intended villains. If a librarian is dealing with a database, or any sort of content that has digital rights management, and there is technological failure – that librarian is going to think twice about evading the DRM to get the content he or she has already paid for, because to possess or distribute even the tools is against the law.

The problem is the perversity of the law itself. The real world effects we have now were not intended. It's just dangerous to move into this technocratic reform of information regulation – to say that we'll just build new and better machines that will solve our problems. Those sorts of assumptions never solved anything. It's *still* not working.

Question: The consequences for librarians and academics – to me, that's the real problem. Mainstream consumers CDs are not really as important as the knowledge held in libraries – now, increasingly, digital libraries.

Siva: Everyone thought the CD was the medium of the future. But there have been cases in the US of CD-roms with “time bombs” inside. Librarians would purchase it thinking their content would be there forever, and then the material just locked up and disappeared after a period of time. In more cases than not, the original vendor is long gone, and there's no way to call up and ask how to fix it.

The shift to digital material has been largely driven by cost questions, but this notion of archiving in the context of digital rights management support has been a huge problem for that very reason. I'd like people to think that in a hundred years, when all our DVD players are broken, we won't be able to play DVDs – if everyone adheres to the law – because you'd need the specific handshake within the DVD player.

Question: Isn't it also the case with recent copyright legislation, that even if there were no librarians or hackers being affected by it, the principle at stake is still important? For due process, notice and take down procedures can have knock-on effects on all kinds of areas of law. I've seen people from Yahoo! defend the notice and take down process on the grounds that very few people complain about it – as though the numbers were an expression of justice.

Siva: There's a lot of power in legal language, so when you get a notice and take down letter, it has the immediate effect of *law* when it's nothing close to that; it's simply a gesture that one office puts forward. The effect can still be censorship.

Question: You get the feeling that a lot of people must be thinking, “I'm OK, and I don't care about those other people who are being affected.” Like, the only people who will be affected are those *naughty* hackers.

Siva: Richard Clark's comments at the Business Software Alliance meeting earlier this year go straight to this. He was arguing that, “The commercial software industry *must* step in and create new protocols for the Internet.” He actually said, “We have to get beyond TCP/IP.”

Now TCP/IP [7] is generated by a community, regulated by a community, improved by a community, along open standards – and the reason the Internet works as well as it does, is that it is open, we can all mess with it and copy, install, and improve it.

But he and the commercial software industry are concerned that it hasn't so far enabled the level of security that they'd like to see. So he was actually calling for the commercial software industry to come up with proprietary protocols, which of course would create a proprietary Internet.

A lot of what I'm trying to do with my new book is show that these battles that pop up in the information world are actually linked along this theme; that there is a trend towards anarchy *and* a trend towards oligarchy. And neither one of these visions really works well with the comfortable republican methods that we've adapted over the last few centuries.

We may not be ready for radical democracy, but we may get it sooner than we think. We *certainly* know we don't want oligarchy, but we may get it because we're not being vigilant. Neither of these visions is completely attractive, but often times I find myself cheering for the anarchists – because the dangers of oligarchy are so much clearer.

The need for an ethical discourse

Question: What are the frameworks of this *ethical cynicism*, wouldn't a political economy approach be more appropriate? Is there any prospect of this working with the grain of these decentralised networks and desires, and any hope that legislators may understand?

Siva: First of all, the prime assumption of cynical ethics is that you must live according to nature. Our nature in cyberspace is open, liberal, radically free, and potentially responsible. To move towards responsible behaviour involves an open and forthright discussion of the costs and benefits of one's actions. This isn't a very satisfying answer, and it immediately opens up all sorts of questions about folks not adhering to the conventions, and it also doesn't yield any sort of control or enforcement mechanism other than shunning. And that may not be successful.

But I'm concerned that the very nature of the structure doesn't allow for any other sort of process. We haven't even begun to investigate if we could achieve that sort of ethical discourse – because we've been so focused on writing laws, creating technologies that have produced all sorts of other problems for the system.

I would love to have a real conversation about what it means to use peer-to-peer systems ethically. Is it ethical to go to [Gnutella](#) [8] and listen to three or four cuts of an album you're considering buying, and then decide you don't want to? Is that a lost sale? Is that harm? Is it on the other hand ethical to download all twelve songs on an album you *know* you want to buy? Those are the sorts of discussion we haven't yet reached because we're so busy with screams of theft or freedom.

I often ask myself: I have access to the greatest research libraries in the world – there's not a book I can't get – yet I still spend way too much money on books. Publishers *know* libraries don't hurt them, yet music publishers haven't yet figured out that peer-to-peer may not be harmful.

Question: I'm surprised to hear you say that the "nature" of cyberspace, is cynical. As [Lawrence Lessig says](#) [9], code and the structure of the Internet is a social construct, it's something that we've built a certain way. Human beings shape it.

Siva: As of today [Lessig's nightmare](#) [10] hasn't come true, largely because he underestimated the power of the hacker ideology in maintaining a certain level of freedom of the Internet. Yes, it's true that we can reengineer to make it more controlled, more commercial – the example of Richard Clark springs to mind. I'm not sure it really could happen, largely because the Internet has already grown beyond what Lessig saw in his book [Code](#) [11] from 1998. He was right to warn people about the possibility, and to make people aware of the power of architecture. I hope I'm right, but it may actually be too hard now to redesign the Internet in a macro-sense.

Question: I have to disagree with that. Lessig's says that it's a fallacy to think that the Internet has an inherent nature, and that nature is freedom. That may not have been borne out in terms of reengineering, but what of the erosion of due process in the DMCA, European legislation, and other initiatives? In countries like the UK where we don't have a libertarian tradition, we have things like the [Internet Watch Foundation](#) [12] that remove alleged pornography without any court process. There are all sorts of ways that Lessig's nightmare can come true. He may have placed a wrong emphasis on code, but it is an incredibly useful warning.

Siva: I agree with you. The "trick" of nature is really what we're getting at. I'm defining nature contingently. Today, the Internet is pretty crazy, and there's a whole lot of pornography, so that's what we're dealing with. But who's to say in six months it won't be different...

When minds open, can law be far behind?

Question: Looking at the [openDemocracy Copyright Timeline](#) [13] you see that copyright has never been stable. It's been changing over time, but there have been these long periods of equilibrium. Is there going to be a new equilibrium?

Siva: The moments of equilibrium were in many ways technological – moments of radical change when legislators had to sit down together and rewrite the rules. When people suddenly realised they could sell books across the Atlantic, they had to sit down and write some treaties, likewise when they realised film was a whole new way to view copyright questions. So the photocopy machine gave us the 1976 revisions and the Internet gave us the 1998 revisions. We're nowhere near a technological equilibrium. And the Internet is bigger, broader, and more powerful than it was even five years ago. Who had a CD burner three to four years ago? What's next? What's *very* different now, is that people care. There is an immense amount of awareness. Five years ago copyright was the most boring class you could take at law school. Now, everyone's curious. Everyone's aware of his or her interaction with the system in some way. And a lot of this comes from the fact that on the Internet you can be both the consumer and the producer at the same time. People realise that the party-tapes they've been making for years are a subject of some debate. That touches us. Soon enough, when we finally get digital television in the US we're going to find that we're not going to be able to make home video tapes of our favourite shows, because it'll be digitally encrypted. At that point the American public are going to say, "How did we get into this situation?" People will be very upset. So the discussions will get more interesting. I'm at least optimistic about the fact that we're finally having the discussion about it.

Question: So you think it will get worse before it gets better?

Siva: It's tough to say, because I have slivers of hope for court cases that may change the situation radically. If the US Supreme Court later this year tosses out the copyright extension act of 1998, then Congress has to sit back and create a whole new copyright system. It will mean a new copyright duration time that doesn't work retroactively, with lots of books entering the public domain. There will be an incredible amount of new scholarship done on books published in the 1920s and 1930s. Then, we'll have an international crisis because the US won't be able to adhere to the [World Intellectual Property Organisation](#) [14] (WIPO) treaty, or the [Berne Convention](#) [15]. They won't be able to match Europe in structure on 'life plus 70', and that will create a crisis – in a good way. Having to pay attention to our constitution for a change might be an interesting exercise! Our constitution demands that copyright be protected for a limited time; Congress hasn't been paying attention to that lately. As Lawrence Lessig says, we're not really bothered on following other international treaties – why the Berne Convention?

Question: I'm wondering why you chose the *cynical* metaphor rather than the *free gift economy* – the one Richard Titmuss writes [16] about. When I wrote my PhD I had to sign a paper saying all the ideas held in it were entirely original and all came from me. The fact that you can't write the English language, let alone write about English literature under those circumstances makes you wonder why you are asked to participate in such a lie. I'm very interested in the successes of the net, like scientific communities sharing their ideas, because they don't believe ideas should be property. How do we move towards something in that direction?

Siva: Again, consider the hackers as the actual cynics. It's a minority of the people inhabiting the space. The Free Software [17] movement has built an incredible number of actual structures that we all use to let information flow freely. I don't think the gift economy metaphor actually works to describe what's going on, on the Internet at large. It ignores that markets matter on the net. It's sort of wishful and idealistic, and I don't think it accurately characterises the plethora of uses that people undertake on this medium. People are into this gift economy metaphor because it comes from older sociology and from some attractive ideological positions, but it isn't really accurate in describing the Internet. There are certainly gifts, and sharing, but there is also harshness. The critical culture is *mean*, and not friendly at all. If you put a piece of code out to the world and say, "Tell me what you think about it," you subject yourself to a massive amount of criticism. The culture is not one of gifts. It's one of dogs barking at each other – which is not to say that this can't alter the outcome in positive ways.

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