Towards a Stewardship of Digital Music

Introduction

People seem not to see that their opinion of the world is also a confession of character

-Ralph Waldo Emerson, *The Conduct of Life*[1]

Perhaps it is necessary to begin with a confession. Since 1996, I have been an intellectual property outlaw. Only in junior high at the time, I remember discovering that by carefully navigating the internet, along with an endless labyrinth of FTP servers and passwords, I could download a single MP3 in mere hours. The journey to get my first track - Nirvana's "Lithium" - was an epic poem of bad gateways and even worse connection speeds. I remember feeling as though I was an explorer who had travelled into the dark recesses of the internet and emerged with sonic gold. Slowly - very slowly - I amassed a sparse collection, and eventually I wanted to be able to enjoy the songs outside the confines of the basement computer room. I remember buying a y-cable to connect the family computer to a cassette deck and recording mix tapes from it to share with my friends, family and crushes, cursing at the skips in the music caused by the inopportune launching of the screensaver. Strangely enough, as my taste in music grew so too did both the catalogs of tracks I would find at various FTP servers (which had expanded to include litanies of tracks and even full albums) and my ability to transfer those tracks (particularly when my parents finally bought a computer with a CD burner). I remember feeling as though the growth of my musical taste and identity was tied directly to the advent of the MP3.

[1] Ralph Waldo Emerson, *The Conduct of Life* (Boston: Houghton, Mifflin and Company, 1892) at 214.

I did not have the slightest inkling that anything I was doing was even vaguely illegal. My parents saw nothing more than another great trick the computer could do, not dissimilar in character to the shows they recorded nightly on their VCR.

Of course, looking back it would be more accurate to say the adolescent emergence of my musical consciousness - at this point a staple of Western youth identity politics - happened to coincide with the exponential rise in compression technology, storage capacity, transfer speeds, and client technology that would eventually lead to Napster, BitTorrent and beyond. When the music industry finally challenged the online gift economy by asserting its private rights both via a concerted and largely successful lobby to increase the scope of copyright[2] and a series of high profile legal suits beginning in late 1999[3], I had long been downloading music, and it was only as the suits began to target individuals some years later that I was struck by the possibility of my actions being either illegal or immoral. It would take a half decade from the first of those suits before music could be legally purchased online.

I make this confession for two reasons. First, it seems fair to flag early the self-interested aspect of this article - my sensibilities about music were developed in an online gift economy and I am certainly looking for a way to justify and preserve the space of access and growth I enjoyed in my youth. However, this paper will not attempt a *post hoc* vindication of leeching or free riding[4], but rather attempt to compass an entirely different legal approach that can achieve the

[2] For a chronicle of the expansion, see Deborah J Halpert, *Resisting Intellectual Property* (New York: Routledge, 2005) at 69-74.

[3] For an excellent history of those challenges, see Patrick Burkart & Tom McCourt, *Digital Music Wars: Ownership and Control of the Celestial Jukebox* (Lanham: Rowman & Littlefield Publishers) at 43-85. Burkart and McCourt assert that the aforementioned delay between lawsuits and legally available digital music was part of a concerted effort by the music industry to both eradicate gift economies but also buy some time for the development of technology to impose their own desired pay-for-play normativity, the digital jukebox.

[4] However, Geert Demuijnck's defence of file sharing should not be ignored, indicating that there are "two configurations in which [the] qualification of [file sharing] as unfair behaviour does not hold: insofar as they download 'winners', they take a free ride on an unfair system, and insofar as they lack purchasing power they are excluded from the regular market, what makes it questionable to call the free riding unfair." Geert Demuijnck, "Is

goals of copyright while leaving what has been built extra-legally intact. Second, I confess so as to stress that I am part of a generation for whom, in Larry Downes' words, "copyright is effectively dead"[5], but in an optimistic way. In my story there is not just an obliviousness and disregard for copyright, but also two key foundations. First, what I at one time understood to be the dark recesses of the internet were in fact the fledgling foundations of an extraordinary digital public good and cultural achievement - The Great Library of Music. And second, while my parents' and my misunderstanding of intellectual property law may seem quaint by 21st Century standards, they highlight that there is nothing natural or intuitive about the applicability of a private property regime to the digital realm. Undeniably my confession forms the basis of my intervention. It confesses my world view and my character, both of which I assert are redeemable in ways that cries of "pirate!" obscure.

The goal of this paper is to begin to work towards a *sui generis* property regime for digital music based upon the principles of stewardship which ostensibly could replace a copyright regime. It would treat file sharers not as pirates but as potential cultural stewards, whose possession of digital music would come with a duty to guarantee its sustainability and justice. It would also provide the space in which the benefits generated by sharing culture could be recognized. After all, to share is to promote, to create capital, benefits entirely missed or obfuscated by the temporality of the copyright equation. Treating digital music as private property has resulted in costly law suits with absurd penalties, a delegitimization of intellectual property law, a decrease in innovation and creation[6], and a pushing underground of one of our

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P2P Sharing of MP3 Files and Objectionable Form of Free Riding?" in Axel Gosseries, Alain Marciano & Alain Strowel, eds, *Intellectual Property and Theories of Justice* (New York: Palgrave Macmillan, 2008) 141 at 155.

[5] Larry Downes, "Why Johnny Can't Stop Sharing Files" *CIO Insight* (6 January 2006), online: <http://www.cioinsight.com/c/a/Past-Opinions/Why-Johnny-Cant-Stop-Sharing-Files/>.

[6] See Michael Carrier, *Innovation for the 21st Century: Harnessing the Power of Intellectual Property and Antitrust Law* (Oxford: Oxford University Press, 2009).

greatest cultural triumphs. Rather than continue to fight the normative current, a stewardship model of property attempts to take the facts on the ground and construct a legal order that would leave them intact but make them just.

Part I attends to three elements - digital music as an object of property, the Great Library, and the normativity of file sharers - which taken together point towards the creation of a stewardship regime. I shall argue that the failure of copyright is a failure to account for the qualities of the digital music object, whereas the achievement of the Great Library and its ongoing maintenance suggests that the law would do best anchoring itself not in a festishized copy but in the virtue ethics implicated in sustaining a public good. **Part II** will explore the range of meaning which has been attributed to the concept of stewardship, both as a limit existing within private property and as an alternative to private property. Traversing the plethora of varied writing on stewardship, I shall extract its key elements and translate them into a system of relations for digital music upon which a property regime could be constructed. Finally, **Part III** will examine how such a regime might be implemented, considering both top-down and bottom-up approaches. The goal here is not only to consider what form a state-instituted law might take, but also to contemplate how file sharers might themselves assert an alternate legality for legislatures to emulate. To that end, I will introduce a project I began a year ago with two colleagues, named the *Cultural Capital Project*, as one example of such an endeavour.

In sum, this paper will articulate the current reality of digital music, the direction in which that status points, and how we might pursue that path. It should serve as a map towards digital music stewardship.

Part I - Orientation

In orienteering, before trudging out into the woods an important first step is so simple it seems insipid to stress - you must determine your location. Without that basic information, every other aspect of navigation becomes difficult. Ignorance of your starting point almost inevitably leads to picking poor paths, navigating circuitous routes, and generally winding up lost. So too with policy - without a firm read on the present, inappropriate approaches can appear desirable and it is all too easy to go astray.

In the field, to determine one's position one picks two landmarks and triangulates between them, a process known as recession. There are thus three elements to recession - two prominent markers and one's aspect to them. The same approach here will also serve well. Two elements should loom large as landmarks in the modern copyright debate regarding online music: first, the object of property (the digital music file); and second, its extra-legal accretion which has resulted in the The Great Library of Music online. We must also include an assessment of the normativity surrounding digital music and The Great Library - our aspect to the phenomenon. Taken together, these three elements delineate a clear position from which to embark, and a virtue ethics analysis of that position reveals how proximate current normativity is to the goals of copyright. At the same time, such an analysis also produces a challenge to the extralegal status quo which the concept of stewardship can answer.

The Digital Music Object and Copyright's Copy Fetish

Repress the natural and it comes back even stronger: not everyone can be a fetishist.

-Philippe Lejeune, "Maupassant et le fétichisme"[7]

[7] Phillipe Lejeune "Maupassant et le fétichisme" in Jacques Lecarne & Bruno Vercier eds, *Maupassant, mirroir de la nouvelle* (Saint-Denis: Presses universitaires de Vincennes, 1988) at 91.

While many accounts of property focus on a "bundle of rights"[8] conceptualized as a relationship between individuals (such as the supposedly *sine qua non* right to exclude[9]), what is often cast to the side is the object of property. From this perspective, the object is the subject of the rights but not determinative of them. David Lametti, however, proposes a different metaphor from which we should approach property: "a relationship between or among individuals *through* objects of social wealth".[10] Forgetting the object in property analysis is to miss the limitations, purposes, and community interests in a property relationship that are a function of and organized by the object itself. Objects of property "force the asymmetry of private property, its teleology, and its social aspects into account".[11] To ignore the object is to be oblivious to the refraction of the property relation it produces, to not see that the object itself constitutes the relation as much as any actors or actions do.

The error of such an omission in analysis is exacerbated in copyright, where the object of property - the fixed expression - is not an object of inherent social wealth but rather is artificially given scarcity and value by statute for the purpose of rewarding creators. Lametti highlights that it is a prohibition on copying that reifies fixed expression into an object of property.[12] Unique to copyright, then, is a situation where an object of property (fixed expression) is constructed through another object of property (the copy); to adapt Lametti's metaphor, the copyright property relationship is between individuals *through* an object of social wealth *through another* object of social wealth. By choosing to construct an object of property (and as Lametti stresses,

[8] Tony Honoré, *Making Law Bind: Essays Legal and Philosophical* (New York: Oxford University Press, 1987) at 166.
[9] See Thomas W Merrill, "Property and the Right to Exclude" (1998) 77 Neb L Rev 730 at 730; a softer, more contextual version can be found in Kevin Gray's argument that a relative notion of excludability provides the outer limits as to what can be called property in "Property in Thin Air" (1991) 50:2 Cambridge LJ 252 at 295.
[10] David Lametti, "The Concept of Property: Relations through Objects of Social Wealth" (2003) UTLJ 325 at 326.
[11] *Ibid* at 377.
[12] David Lametti, "The Concept and Conceptions of Intellectual Property as seen through the Lens of Property" in G Comandé & G Ponzanelli, eds, *Science and the Law in the Prism of Comparative Law* (Torino: Giappichelli, 2004) 269 at 285.

the property relationship itself) via another object, inevitably that property relationship will mutate if the metaphysical properties of that constituting object change, typically complimented if not instigated by social and teleological shifts. And technology, the very force that produced a need for copyright in the first place, is ironically the very force that can produce such a shift in the constituting object of the copy. Unsurprisingly then, the accelerated pace of technological development beginning in the late 20th Century has ruptured copyright. By constituting the copyright property relation via the shifting copy, we unknowingly anchored the regime in the tide; little surprise now, with such a dramatic technological sea change, the regime seems entirely lost at sea.

A way of understanding copyright's reliance on the copy is through the concept of the fetish. In every sense of the word, copyright renders the copy a fetish. In anthropological parlance, the copy is a totem, imbued with magical powers through the superstitious proclamation of copyright. In psychoanalytic terms, copyright is a method of staving off the anxiety of mechanical reproduction, the copy fetishized to restore and control the wholeness of the original. And in a Marxian critique, copyright creates the copy as a site of commodity fetishism, wherein social relations are obscured by the perceived inherent value of the copy. However, the copy's fetish only effectively operates anthropologically, psychologically, and economically via the material copy - that is, in analog. The digital revolution undermined, or even completely obliterated, this carefully honed copy fetish at every site. Copyright's material fixation, in the digital age, is more Freudian than Marxian - that is, not an omnipresent, taken-for-granted premise, but a perversion.

For copyright, its foundations were laid in England's *Statute of Anne* of 1710.[13] Emerging when continued developments in the Gutenberg press put literary authors in direct competition with potentially infinite copies of their own work, the *Statute of Anne* ingeniously created copyright - a right in a copy - out of legal nothingness, a founding myth for a regime of private rights. It granted to authors or proprietors "the sole right and liberty of printing such book and books" and proclaimed that any violation would result in a fine of a cent a page, and the "forfeit [of] such book or books, and all and every sheet or sheets, being part of such book or books" to the rights holder, who was to "forthwith damask, and make waste paper of them".[14]

Looking at the totem in a Judeo-Christian context, it is clear that what the *Statute of Anne* accomplished was the fetishization of the copy. When it was put into effect, the legislation was for literary authors what the second commandment was for god -

> Thou shalt not make unto thee any graven image, or any likeness *of any thing* that *is* in heaven above, or that *is* in the earth beneath, or that *is* in the water under the earth: thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God *am* a jealous God visiting the iniquity of the fathers upon the children unto the third and fourth *generation* of them that hate me; and showing mercy unto thousands of them that love me, and keep my commandments.[15]

What is remarkable of the commandment's phrasing is that, taken literally, *any* copy of god's 'work' is assumed both mystic and transgressive, and so is rendered a fetish. God's anxious status as a jealous deity could not suffer counterfeit, and so god prohibits them by decree and three or four generations of iniquity; so too the author, in god's image, attempts to forbid the copy by statute and punishment. And so the Statute of Anne replicates the mechanic of the second commandment - it too is a mystical proclamation declaring the power of *any* (literary) copy-fetish by banning them outright. It simultaneously fetishizes and bans the graven image, the

[13] *Statute of Anne*, 1710 (UK), 8 Anne, c 19.
[14] *Ibid* at s 1.
[15] Exodus 20.4-6, King James Version, original emphasis.

copy, the 'Statue' of Anne.[16] From the *Statute of Anne* forward, the copy became the fetishized focus of all legality regarding intellectual property, fixing violation materially in a totem wherein it could be destroyed (as demanded by the *Statute of Anne*) and the law could be enforced. It is an outsider's god captured in an object, an anxious legal cage of enforcement and destruction, premised upon yet transcending its physicality.

The myth of a right in copy is one of an impossible whole[17], whereby every copy is seen to be inherently connected and controlled by its origin, rather than a totally dismembered piece in circulation. Pre-Gutenberg, this myth was sustained by the sheer costs and labour required to produce a copy, and so a technological limitation was mistaken for an essential quality of the connection between original and copy. The Gutenberg press forced the world to face the fact that the dissemination of text - and with it, knowledge, discourse, and power - was not limited by any inherent essence in the original; in fact, it was just the opposite, outside the rule of the original and dictated entirely by external technologies of reproduction. What the Statute of Anne accomplished was to imbue the copy with qualities it did not have, thus relieving the anxiety and drama the 'Gutenberg galaxy' had produced. In that sense, the law re-established the mythic whole by legally fetishizing the copy, tethering it to the concurrently reified original.

In legally proclaiming the expressed idea to be a property right constituted by the copy - separate from the property right in the raw materials of the copy - the Statute of Anne created a

[16] I am indebted to Sandy Pearlman for this pun.

[17] Freud's psychoanalytic conception of sexual fetish is also a tale of an incomplete whole. With his notorious patriarchal flair, Freud suggests that the source of fetish is the fantasy of an impossible whole - the phallic woman. According to Freud, when a boy first encounters female genitals, he interprets the lack of phallus not as disabuse but rather as confirmation of his fear of the father's castration, suddenly made real by a vagina seen as a wound. The discovery at once is "constitutive for male (sexual) identity" but also "awakens the idea that sexual identity has an arbitrary character: one can lose it". Unable to live with this contradiction - or as Freud terms it, 'splitting' - a fetish develops for things to stand in for the absent female phallus, thus reconstituting the fantastic whole psychologically. Andreas De Block, "Genital Constructions: A Critique of Freud's 'Fetishism'" in Christopher M Gemerchak, ed, *Everday Extraordinary: Encountering Fetishism with Marx, Freud, and Lacan* (Leuven: Leuven University Press, 2004) 83 at 89.

new commodity, one further degree abstracted from the material, a fetish in which real relations and sources of value could be further obscured. In copyright, there are two key fronts of commodity fetishism in operation. The first is the traditional site of Marxian critique, the means of production. While copyright on its surface claims to give rights to creators such as authors and artists, the social realities of power and control over the means of production create a multitude of ways, typically by contract, wherein proprietary rights are alienated in order to create or disseminate works. So while the copy-commodity may appear to link its value directly to that creator, the creation of a transferable property right opens up a legally validated space for what is commonly referred to as industry 'middlemen'. The potential for music industry exploitation is the result of the creation of an alienable right. The second front is what might be best described as the value in circulation, that is the innumerable moments wherein value is created for a copy beyond the creation and sale of the copy itself. While copyright legislation, as a balancing act between the need for just reward of a creator, and the broad good of a dynamic and healthy public domain, is certainly aware of the value works provide in circulation abstractly, its fetishization of the copy inevitably buries any value created post sale. Sharing, discussing, recommending, cataloguing, citing, curating - these are all acts of promotional and cultural labour, of creating value, which do not fit into the aforementioned, temporally limited copyright equation.

Each sense of copyright's paraphilia - anthropological, psychoanalytic, and economic - was fine-tuned for an analog age. The accelerated development of digital and online communications technology in the late 20th century undermined the efficacy of the copy fetish on every front. Anthropologically, digitization meant, according to Sandy Pearlman (channeling Gertrude Stein), that "there is no there there".[18] The material object of capture and destruction

[18] Sandy Pearlman, "Analog Copyright" (Lecture delivered at the Faculty of Law, McGill University, September 12

was rendered fluid, the fetishized copy no longer an efficient means of tracking transgression and enforcing the law. Psychoanalytically, the affective stop-gap measure of copyright that temporarily extended the myth of the origin-copy whole was revealed for the technological fallacy it truly was. As internet speeds and miniaturized storage capacity advanced at an exponentially accelerated rate, the copy fetish gave way, its adhesion unable to sustain the unnatural bond it presented as inherent. Economically, the internet has almost entirely ripped away the veil of the commodity fetish. Despite legal efforts to the contrary, the ability to directly connect with artists has rendered middlemen superfluous and their claim to copyright almost entirely unenforceable. The online traceability of the cultural labour of fans as promoters and cataloguers renders that labour visible where it was previously obscured.

In short, the previously efficient analog fetishes of copyright have been rendered dysfunctional in the digital age. Copyright no longer commands the same power, respect, or obedience amongst legal subjects when its fetish upon the copy is anachronistic and meaningless. The technological changes in the copy, because it was the object which constituted the object of property, have by extension made the copyright property relationship untenable. The digital copy is fluid, rhizomatic, dematerialized, and defined by its circulation - it can no longer serve its function as the fetishized fixation and constituting object of an intellectual property regime. Not everyone can be a fetishist.

2011), [unpublished].

The Great Library: Legal Impossibility, Extra-Legal Reality

*The Library has existed **ab æternitate**. That truth, whose immediate corollary is the future eternity of the world, no rational mind can doubt.*

-Jorge Luis Borges, "The Library of Babel"[19]

Over the last decade, the most striking failure of the music industry has been its inability to produce what technology promised and consumers wanted - a service that provides unlimited digital access to all recorded music. Arguably, copyright has strongly hampered the possibility of such a service. A private rights regime with so many stakeholders and layers of rights, music copyright appears to deny even the possibility of unifying the manifold, requisite rights under one roof necessary for such an entity to be created legally. However, online extra-legal networks that facilitate the sharing of vast amounts of music between users have succeeded where the atomized rights of copyright have failed, collecting and maintaining the functional equivalent of all recorded music online. In its essence, the problem is a simple market failure. The music industries cannot legally provide that which file sharers have achieved extra-legally: The Great Library of Recorded Music. And make no mistake, it is an epic achievement, a world wonder of the digital age.

To be fair, it is unlikely that stakeholders such as the major labels ever had such an extraordinary public good as their desired destination. Patrick Burkhart and Tom McCourt stress that the preferred industry end point was always the celestial jukebox, an infinite library coupled with a pay-for-play normativity, hoping to produce an equally infinite flow of capital.[20] It is in light of this goal that file sharers could be categorized pirates; glorified thieves profit(eer)ing off

[19] Jorge Luis Borges, "Library of Babel" in *Collected Fictions*, translated by Andrew Hurley (New York: Penguin Books, 1998) at 113.
[20] Burkhart & McCourt, s*upra* note 3 at 4.

of an artist and label's hard work, self-interested leeches on creativity and capital, a digital *hostis humanis generis* which needed to be eradicated to the fullest extent possible by the law.[21] Such a characterization is obviously dishonest, glossing and obscuring the aforementioned value sharing creates, which stands in stark contrast to the pillaging spectre of the pirate espoused between lawsuits by the recording industry. But the most destructive legacy of this projected pirate was that by one word we were thrust into the position of those with something to gain from anachronistic copyright and pay-for-play normativity. The problem is not just that legal avenues cannot provide what has been achieved extra-legally, it's that they obfuscate the potential these extra-legal achievements and norms have to offer.

This is precisely the problem Eduardo Peñalver and Sonia Katyal tackle in their book *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership.*[22] Because property is a key locus of power and social relations, Peñalver and Katyal argue it is seized by a "complex subtle tension: although property seems to be so stable and orderly, it also masks a latent instability stemming from the persistence of transgression".[23] This "productive instability"[24] is important because it plays a vital part in the evolution of law and society. Furthermore, transgression demonstrates an undeniable informational value, not just in the typically privileged form of expressive disobedience, but in acquisitive disobedience as well.[25] Peñalver and Kaytel's suggest informational value can be found both in attitudes towards intellectual property norms and consumer preferences, drawing largely from examples of market

[21] For an excellent discursive history of piracy, see Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates* (Chicago: University of Chicago Press, 2009).
[22] Eduardo Moisés Peñalver & Sonia K Katyal, *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership* (New Haven: Yale University Press, 2010).
[23] *Ibid* at 11.
[24] *Ibid* at 20.
[25] *Ibid* at 172.

failures and acquisitive innovation[26]. The question thus becomes what information and innovation The Great Library provides in the wake of perhaps one of the biggest market failures of the new century.

Sandy Pearlman has proclaimed that online digital music is in a state he refers to as "asymptopia".[27] Online music's expansion, he says, charts like an asymptote - a line that, while never quite reaching an axis, approaches closer and closer towards it *ad infinitum*. Pearlman also speaks of the unique character of file sharers, who are happy to upload and share music consistently and spontaneously with no immediate or potential financial reward. Consequently, asymptopia also incorporates utopia; in other words, asymptopia proclaims a utopian project which trends towards infinity. File sharers are engaged in an endeavour with its own self-valourizing aims besides the commodity logic of both the recording industry and copyright law.

The sum of asymtopia is The Great Library, a sprawling, openly accessible monument to the recorded musical creativity of humankind, the ultimate public cultural good. It is perhaps exemplified by (but not limited to) invite-only music sharing sites operating outside of copyright such as the defunct OiNK and its replacements, what.cd and waffles.fm.[28] These sites are carefully regulated communities where users must maintain healthy share ratios, which are maintained or increased by sharing ('seeding') files so that other users can download them. Failure to do so typically results in suspension from the site, whether temporarily or permanently. Users often comment how these libraries are both unmatched and unprecedented. When OiNK was shut down, Trent Reznor of Nine Inch Nails made these comments to *NY Magazine*:

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[26] *Ibid* at 198.

[27] Pearlman, *supra* note 18.

[28] For a history and exploration of OiNK, see Demonbaby, "When Pigs Fly: The Death of OiNK, the Birth of Dissent, and a Brief History of Record Industry Suicide" (24 October 2007), online: <http://www.demonbaby.com/blog/2007/10/when-pigs-fly-death-of-oink-birth-of.html>.

> I'll admit I had an account there [OiNK] and frequented it quite often. At the end of the day, what made OiNK a great place was that it was like the world's greatest record store. Pretty much anything you could ever imagine, it was there, and it was there in the format you wanted. If OiNK cost anything, I would certainly have paid, but there isn't the equivalent of that in the retail space.[29]

Online, we have reached asymptopia in calculus' terms - close enough for all practical purposes - but have done so without the law's consent.

Administrators and users on these sites often demonstrate a normativity that straddles or hybridizes Mark Schultz's norms of librarians and norms of hackers.[30] On the one hand, as hackers, they seek to undermine the existing legal structure of copyright, their interventions buttressed by a belief in free access to computers, the freedom of information, and a general mistrust of authority. On the other hand, as librarians there is a genuine belief in the power of the public information and a right to access, and they pour countless hours into maintaining the structure, integrity, and quality of file sharing trackers and archives. In his work, Schultz has labeled copyright a normative failure, but his few suggested solutions do not take the other normativities he charts as valid starting points, instead suggesting ways in which the existing structure can work to return norms to their pre-Library state.[31] A new, omnipresent normativity is not something to be controlled, but is first an indication that our legal normativity needs reworking, and is second a signpost reading: *Start Here*.

The Great Library looms large in our digital imagination. It is a superior product and a public good, and it stands in stark contrast to what is possible under the atomized and fractured landscape of rights and interests that copyright provides. Now more than a decade into the era of

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[29] Ben Westhof, "Trent Reznor and Saul Williams Discuss Their Collaboration, Mourn OiNK" *NY Magazine – Vulture Blog* (30 October 2007), online: <http://nymag.com/daily/entertainment/2007/10/trent_reznor_and_saul_williams.html>.

[30] Mark F Schultz, "Copynorms: Copyright Law and Social norms" in Peter K Yu ed, *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*, vol 1 (Westport: Praeger Publishers, 2007) at 212.

[31] *Ibid* at 224.

digital music, the closest private players have come to a legal Great Library have been in streaming services such as Spotify, a service which is limited to certain regions, still has many gaping holes in its library, does not provide the user with a digital file to store, and is in sum limited by the terms of the licences it procures from the plethora of private rights stakeholders.[32] A common, pre-iTunes refrain was that the music industries needed to find a way to monetize online music. However, such industry visions always left the proprietary copyright model intact, and the implication was the elimination of all digital sharing - the tearing down of The Great Library. In other words, the dominant legal and industrial normativity refused to take the emergent and widespread phenomenon of file sharing and its normativity seriously. The Great Library has existed, and it is a reality from which we must chart a path. Not only have the people chosen it, they also created it and sustained it under the floorboards of the law, and have demonstrated an inherent loyalty to the preservation of the library and a society's right to access it. There is a massive informational value in the transgression of the Great Library. It is a challenge to the law to find a way to make The Great Library just and sustainable *as it is*.

From Norms to Virtue Ethics

[I]n justice, every virtue is summed up

-Aristotle, *Nichomachean Ethics*[33]

It is important to stress that the emergence of the Great Library has not undermined the economic feasibility of the music industry by and large. In fact, just the opposite is true. In a study titled "The Sky is Rising", researchers found that the global music industry had increased

[32] Furthermore, these services still do not form a significant portion of artist revenues (though it is anticipated they will grow with time): Kristin Thomson, "Are Musicians Benefiting From Music Tech?" *Artist Revenue Streams* (23 February 2012), online: <http://money.futureofmusic.org/are-musicians-benefiting-from-music-tech-sf-musictech-presentation>.

[33] Aristotle, *Nichomachean Ethics*, translated by Robert C Bartlett & Susan D Collins (Chicago: University of Chicago Press, 2011) at 92.

by more than 35 billion dollars between 2005 and 2010, that the total overall sales transactions had more than doubled in the past decade, and that artists' revenue share was increasing, particularly in the sectors of touring, merchandise, licensing, and other non-traditional sales.[34] Appropriately, Mark Lemley has argued the content industries have "a Chicken Little problem", proclaiming the sky to be falling every time "a new technology threatens an old business model".[35] In the end, the emergence of digital music has provided ample opportunity for profit - in 2008, "there were more legal music sales of all types than ever before in history; 70% were digital downloads".[36] Along with the emergence of iTunes as the number one retailer of music[37], it is entirely dishonest to claim that any form of file sharing has atrophied sales. And while some have claimed that the growth in music sales is a result of the RIAA's harsh strategy of suing users, there has been no concurrent reduction in illegal music sharing to suggest such a causal relationship.[38] Business models are clearly adapting lucratively, and all while the Great Library has continued to thrive. Most importantly, it is clear that neither the existence of the music industry nor the possibility of creativity is at stake in this discussion.

However, while the Great Library stands as an impressive public good and appears to have had minimal effect on music industry sales, the Library's lack of any direct remuneration to artists is nonetheless ethically troubling. Certainly a partial retort to this problem is to highlight that the Great Library is as equally a system of promotion as distribution, and that the access it provides generates countless sales opportunities further down the line for albums, merchandise,

[34] Michael Masnick and Michael Hoe, "The Sky is Rising: A Detailed Look at the State of the Entertainment Industry" (January 2012), online: techdirt < http://www.techdirt.com/skyisrising/>.
[35] Mark Lemley, "Is the Sky Falling on the Content Industries?" (2011) 9 J Telecomm & High Tech L 125 at 132.
[36] *Ibidi* at 131.
[37] They surpassed Wal-Mart in 2008.
[38] The fallacious claim of RIAA strategy's effectiveness has been the subject of many blog posts since the late naughts. As an example see Mike Masnick, "Defining Success: Were the RIAA's Lawsuits a Success or Not?" *techdirt* (7 June 2010), online: < http://www.techdirt.com/articles/20100606/2308559704.shtml>.

concerts and the like. But if the Great Library remains in this form, an assembly of technological advancements and informal norms, it will forever be open to critiques of the worst leecher scenario: in Lametti's words, "the adolescent who is a serial uploader and downloader, but never pays a cent for music [and] merely uploads to make it available to strangers and downloads at will".[39] Even if this extreme case adolescent is also an ideal file sharer by the librarian / hacker norms of the community, they will fall short in every analysis of providing just compensation for creators. To illustrate, Lametti has performed a virtue ethics analysis of such a "worst leecher" and finds that regardless of the many virtue arguments which lend them support - "sharing knowledge, friendship, creating, inspiring"[40] - a virtue ethics critique will still find that since "some of this music was also bought and paid for in the past ... the free downloading is by some measure unfair".[41] He concludes optimistically that such a virtue ethics critique can act as an education as to when it is justifiable to share music, and that in turn would shape user behaviour.

It is worth lingering upon the concept of virtue ethics briefly if only because it seems to illustrate how close current file sharing normativity is to copyright's goals, or perhaps more precisely, how much more effective a legal regime anchored in virtue ethics could be. Broadly speaking, virtue ethics is an approach to decision making whose roots can be found in the works of Aristotle. Peñalver has stressed that virtues ethics is an "agent-centred approach"[42] that aspires to situational, ethical decisions derived from the moral reflections of an individual. Lametti too points to the contextual nature of virtue ethics, which looks to provide the right questions to ask in any situation in order to produce right action.[43] In those moments, virtue

[39] David Lametti, "The Virtuous P(eer): Reflections on the Ethics of File Sharing" in Annabelle Lever, ed, *New Frontiers in the Philosophy of Intellectual Property* (Cambridge: Cambridge University Press, 2011) 1 at 15.
[40] *Ibid* at 16.
[41] *Ibid*.
[42] Eduardo Peñalver, "Land Virtues" (2008-2009) 94 Cornell L Rev 821 at 864.
[43] Lametti, s*upra* note 39 at 4.

ethics are "a matter of finding mean-points between extreme states of character".[44] Importantly, these ethical reflections are typically informed by the circulating norms of both the legal system but also those regarding the position of the actor - what Lametti refers to as positionality, following Kate Bartlett.[45] In sum, a virtue ethics approach is a situated means by which we may foment ethical norms to produce virtuous action.

As previously stated, the law fits into this virtue ethics puzzle by being one of many suppliers of norms. While a virtue ethics analysis of a particular situation may lead to a violation of any given law, it is also possible that a law could help lead to virtuous action if it is formulated with an eye to virtue ethics - that is, it leaves space for principled action and evaluates it as such through its teleology. As Lametti notes, such spaces are overtly present in much of copyright law which needs virtue ethics to provide boundaries for its myriad open-ended standards, such as fair dealing[46]. They are spaces of "interpretive judgment"[47] to which virtue ethics is ideally suited.

Within property more generally, Lametti has written that the key to understanding virtue ethics is the metaphor "private in possession, common in use", stressing that it is virtue which makes property common.[48] To add, this metaphor has a purposive dimension - it is a "teleology given to private property and the public, ethical purposes to which property is put".[49] And as

[44] David Lametti, "The Objects of Virtue" in Gregory S Alexander & Eduardo M Peñalver, eds, *Property and Community* (New York: Oxford University Press, 2010) 1 at 17.
[45] Lametti, s*upra* note 39 at 9
[46] *Ibid* at 5. The 'fairness' of fair dealing in Canada is judged through six non-exhaustive contextual factors: purpose, character, amount, alternatives, nature of work, effect. See *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 at par 53.
[47] *Ibid*.
[48] Lametti, s*upra* note 44 at 12.
[49] *Ibid* at 35.

Lametti writes, the teleology is obvious and explicit in intellectual property, evident in its creation of limited property rights designed to achieve desired effects.[50]

In Canada, the regime of copyright has two clear and oft-cited purposes. As Binnie J. wrote in *Théberge*, copyright must strive to balance its twin goals: "promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator".[51] While the Great Library accomplishes the former in spades and exudes the virtue which makes property common in use, it falls short on the latter. But current copyright law can do no better than condemn the Great Library because of the presence of the fetishized copy; it provides no space for the ethical development of the use of the copy. The normativity of file sharers undeniably demonstrates a significant dedication to music and its public maintenance. It is difficult to imagine, through the lens of virtue ethics, that such a normativity is very far off from itself seeking out to justly reward creators, thus accomplishing virtuous action. There is a potential here for the law to pursue the teleology of intellectual property by drawing the already-ethical normativity of the administrators and patrons of the Great Library towards its own explicit purposes. What would a law look like that made such a normative connection without defining the property relationship via the criminalization of the copy? Can the 'common in use' Great Library and the ideal virtuous user instead form the basis for an intellectual property regime particular to the object of digital music?

Part II - Direction

As the trajectory of this paper makes clear, I believe that the concept of stewardship is precisely capable of lighting the way to a new *sui generis* regime of digital music copyright.

[50] *Ibid* at 36; Lameti, *supra* note 39 at 6.
[51] *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336 at para 30.

However without conceptual precision, to merely proclaim stewardship to be a desirable framework is desultory at best. Writers on stewardship have regularly noted that there is no unified system of stewardship that can be blithely applied to any object of property. William Lucy and Catherine Mitchell write that "[t]here is very little consensus about, or even consideration of, what the concept of stewardship actually entails"[52]; Helena Rebecca Howe notes that there is "not really an agreed formulation of what is meant by a 'stewardship' model of property"[53]; and R.J. Berry opines that as it stands stewardship "is a default word, not a considered concept"[54]. As a result, any account of stewardship must be self built, defining its particular parameters from a grab bag of concepts, priorities, and features drawn from the concerns of multiple sources typically dealing with land. Importantly, stewardship constructs are strongly guided by or derive from the object of property, and so use the limitations implied by a social interest in the object to guide their vision of the concept.

There are two broad ways to conceptualize stewardship - either as an irreconcilable alternative to private property, or as an internal limit of private property properly understood. First, I shall explore the debate, arguing that the absolute conception of property upon which the alternative formulation is premised does not exist, especially in copyright. Even though the copy would no longer be constitutive of a property relationship in a stewardship regime for digital music, this plan for stewardship is still best conceived of as a limit on private property whereby the owner / creator would still enjoy corollary rights. Next, I shall critique the assumptions regarding subject positions in a stewardship relationship. Traditionally, the duties of the

[52] William NR Lucy & Catherine Mitchell, "Replacing Private Property: The Case for Stewardship" (1996) 55:3 Cambridge LJ 566 at 584.
[53] Helena Rebecca Howe, *Developing restraints on property rights in the community interest: concepts of ownership and the limitation of property rights in land and copyright law* (DCL Thesis, Queen Mary University of London, 2010) at 48.
[54] RJ Berry, "Introduction: Stewardship: A Default Position?" in RJ Berry, ed, *Environmental Stewardship* (London: T&T Clark International, 2006) 1 at 2.

stewardship relationship are conceptualized as residing with the owner that are owed to the collective. For this proposed regime, it seems clear that the public, the possessors of digital music, can equally be treated as cultural stewards, their duty lying to the creator of the content. Finally, with stewardship understood as a limitation on property that can produce teleological duties not just for owners but for users, I shall assemble what I see as the defining features of this proposed regime. This section is not meant to be a summary of all the possible contours of stewardship, but rather a careful selection from a plurality of sources refracted through the concerns germane to digital music in order to address the needs delineated in Part I. By the end of Part II, the goal is that the bearing necessary to establish a stewardship of digital music - its structure and content - be articulated.

The Compatibility of Stewardship with Private Property

On the surface, the debate between whether stewardship is properly understood as either a part of or an alternative to private property may appear as abstract hair splitting. However, such a difference in opinion can have a large implication for the tact taken to reform. A position that stewardship is entirely separate and incommensurable with private property demands a more revolutionary tact, and cannot contemplate hybrid mixtures of the two. On the other hand, conceptualizing stewardship as part of the natural limits of property renders it an end of a sliding scale, able to be recalibrated or hybridized based on the particular demands of both the object of property and society itself. The paradigm of change in each case is extremely different and so conceptual precision is necessary.

The position that stewardship is alternative to and unable to coexist with private property is typically traced to William Lucy and Catherine Mitchell's appropriately titled piece "Replacing

Private Property: The Case for Stewardship".[55] In it, Lucy and Mitchell lambast any attempt to mix private property with stewardship (particularly a previous hybrid proposed by James Karp[56]) as a mistaken premise that "will not do":

> If our characterization of private property is correct, then the existence of a duty of stewardship cannot be compatible with a claim to have private property in land. It is not feasible to claim the most extensive rights of exclusion, control and alienation over a resource, and yet be subject to a vast range of duties in relation to that resource for the benefit of other person. [57]

Margaret Davies has observed that the debate over stewardship as an alternative to private property is as much a debate about the definition of private property as it is the definition of stewardship. She writes that one's position in the debate will boil down to whether one believes private property is the strongest form of rights over an object, or whether "it is a more dynamic concept which can carry obligations as well as rights".[58] Immediately clear in the Lucy and Mitchell passage is a vision of private property that approaches what James Harris calls full-blooded ownership, which gives the owner "unlimited use or abuse over [a] thing, and … unlimited powers over control and transmission so far as the exercise of these rights does not infringe upon those of others".[59] As such, Lametti's critique of Harris applies equally well to Lucy and Mitchell - they suffer from a conception of private property that is "too individualistic, too rights-based, and excessively ownership-driven".[60] In short, they have made a straw man of private property in order to set stewardship against it. As such, Emma Lochery is right to point out that Lucy and Mitchell's earlier admission that "our rights of exclusion control and alienation

[55] Lucy & Mitchell, s*upra* note 52.
[56] James P Karp, "A Private Property Duty of Stewardship: Changing Our Land Ethic" (1993) 23 Envtl L 735.
[57] Lucy & Mitchell, s*upra* note 52 at 586.
[58] Margaret Davies, *Property: Meanings, histories, theories* (New York: Routledge, 2007) at 131.
[59] JW Harris, *Property and Justice* (Oxford: Oxford University Press, 1996) at 30.
[60] Lametti, *supra* note 10 at 358.

... are severely constrained"[61] seems to directly contradict their assertion that private property and stewardship are incompatible.[62]

Instead, it has become clear first that the Blackstonian conception of property as "sole and despotic dominion"[63] is incomplete, and furthermore that land law itself is witnessing an emergence of stewardship from within. Joseph Singer provides perhaps the strongest assertion of this position, stating that "property is best understood as comprising limited and conflicting entitlements rather than absolute powers in title holders"[64] because "absolute property rights do not exist in a society that values individuals"[65]; and Eric Freyfogle has called the idea "a serious mistake of fact ... [there] is no such thing as absolute ownership, not even in the abstract".[66] As such, Kevin Gray and Susan Gray have asserted that in practice stewardship is becoming the dominant ideology in land law[67] and Howe's thesis work has found this is indeed the case, as limits have been articulated in the common law of land by judges in the name of community interests and sustainability.[68] Perhaps most importantly to the discussion of copyright, Lametti has highlighted that both private property and stewardship are always implicated together and subservient to the overall teleology of property.[69] In the end, stewardship is the dimension of property that accounts for the existence of others, always present within any system of property.

In its conception, copyright has never included an absolute property right, limited as it is by fair dealing and the idea-expression dichotomy. Even with the recent attempts to modernize

[61] Lucy & Mitchell, s*upra* note 52 at 70.
[62] Emma Lochery, *Does the contaminated land regime impose stewardship obligations on owners of land?* (DCL Thesis, University of Dundee, 2011) at 87.
[63] William Blackstone, *Commentaries on the Laws of England*, vol 2 (Chicago; London: The University of Chicago Press, 1979) at 2.
[64] Joseph William Singer, *Entitlement: The Paradoxes of Property* (New Haven: Yale University Press, 2000) at 209.
[65] *Ibid* at 208.
[66] Eric Freyfogle, *On Private Property: Finding Common Ground on the Ownership of Land* (Boston: Beacon Press, 2007) at 21.
[67] Kevin Gray & Susan Francis Gray, *Elements of Land Law* (Oxford: Oxford University Press, 2005) at 111-114.
[68] Howe, *supra* note 53 at 230.
[69] David Lametti, "Laying Bare an Ethical Thread: From IP to Property to Private Law" (forthcoming) at 12.

copyright by further increasing the scope of the legal rights of owners of copyright and the slippage of copyright rhetoric into absolutist territory, a Lucy and Mitchell conception of stewardship as an incommensurable alternative simply does not match the limited scope of property in copyright. Intellectual property, in its very conception, is a limited right, and so a stewardship regime applied to a portion of its purview is conceptually commensurable with its overall scheme.

Who is the Steward?

A brief look at the historicity of the positions in a stewardship relationship goes a long way to explicating the modern understood content of the relationship. However, I would suggest that the positionality of stewardship is a way in which our imagination for the concept is limited. A significant step forward will be to conceptualize stewardship not as a relationship between an abstracted interest and an owner, but rather as an interpersonal relationship between owner and user.

The concept of stewardship has a long history that John Passmore dates as far back as the third century AD, but he draws particular attention to its roots in Judeo-Christian thought.[70] In the bible, strands of a stewardship relationship can be seen as early as Genesis 2:15: "And the LORD God took man, and put him into the Garden of Eden to dress it and to keep it".[71] In Passmore's words, man was essentially "a farm manager, actively responsible as God's deputy for care of the world"[72]; or for Berry "not so much *vice-regents* for God (acting in his place) as *vice-gerents* (acting with delegated authority)".[73] Mankind was thus defined by his duty to take care of God's creation and celestially accountable to God for its failures. Stewardship was a

[70] John Arthur Passmore, *Man's Responsibility for Nature: Ecological Problems and Western Traditions* (London: Duckworth, 1974) at 28-42.
[71] Genesis 2:16, King James Version.
[72] Passmore, *supra* note 70 at 28.
[73] Berry, *supra* note 54 at 7.

metaphor by which "[e]verything belongs to God, who parcels out property in trust to civil authorities and private owners, who thereby have fiduciary obligations to God's ends".[74] Purposes are thus indispensable to this relationship, and in this view humanity's uniqueness was in its capacity to act as caretaker for an ecosystem, to guarantee another's purposes.[75] In short, humanity was a steward for God the creator.[76]

In modern, secular notions of stewardship, the position of owner / steward has remained constant, but the social collective has come to replace God. Lucy and Mitchell describes it as an enlargement of the concept "to incorporate the notion that man's responsibility as custodian of the natural environment is not necessarily a duty owed to God but to the wider human community, perhaps including future generations".[77] It is this version of stewardship that has found significant traction in the environmental community, as it prioritizes community interests and prescribes they be included in the decision making process for private property. However, Lucy and Mitchell criticize the replacement of God with the abstract notion of 'the public interest' for being empty when it is without a moral principle or theory to give it meaning, and suggest that any proponent of stewardship avoid the phrase all together.[78]

In the realm of intellectual property, Helena Rebecca Howe has made an admirable first attempt to apply stewardship principles to copyright law, but I find her proposal unconvincing largely because it unproblematically transposes and maintains the aforementioned modern, enlarged positionalities. "[C]opyright ownership" she writes "would be understood as involving substantial duties and only limited rights ... hold[ing] the copyright in the work for the benefit of

[74] Floyd W Rudmin, "Having: A Brief History of Metaphor and Meaning" (1991) 42 Syracuse L Rev 163 at 168.
[75] Lochery, *supra* note 62 at 53
[76] When necessary, I will refer to this position as 'the primary', largely since the taxonomy is lacking because of the future enlargement of this position to the collective.
[77] Lucy & Mitchell, *supra* note 52 at 583.
[78] *Ibid* at 587-8.

the community as well as themselves".[79] Much of her argument deploys the public domain as the public interest to which a copyright holder owes its community duty. I should stress that I do not necessarily disagree with some of the content of her proposals, which involve dialing back of certain owners' rights, and her insights help inform my next section on elements. But there is a discursive problem in referring to a potential *creator* of a work as its *steward*, which implies that to create is to owe duties. On its face, this would seem to fly in the face of copyright's stated goal to encourage creation. While it is true that a creator should not ignore the collective interests for which a copyright regime was created and thus to which they owe the rights they are granted, such a configuration seems to deny that any duty might be owed to them for their creation by their listeners.

Another way to come at this problem is through a sort of reverse engineering. In the battle over the modernization of copyright for the digital age, Jessica Reyman has detected the use of a stewardship rhetoric by the music industry regarding their clients. The story goes a little something like this:

> The property stewardship narrative identifies the conflict in the digital copyright debate as one of victimized businesses versus predatory technology developers and their opportunistic consumers ... [P]rotections are necessary because they protect the role of content owners - including the movie and music industry producers and publishers - as stewards of intellectual property, who secure for creators economic rewards for their efforts ... property stewards are essential for protecting artists from exploitations and ensuring that creators get paid for their contributions.[80]

A familiar cry for digital revolutionaries has been 'down with middlemen', the general argument being that digital technology has rendered the content industry's control over the means of distribution irrelevant and enabled a liberation from their notorious predatory practices. To

[79] Howe, s*upra* note 53 at 242.
[80] Jessica Reyman, *The Rhetoric of Intellectual Property: Copyright Law and the Regulation of Digital Culture* (New York: Routledge, 2010) at 59.

reverse engineer the appropriate stewardship positionality, we should take a cue from that spirit. It is the fans, the users and consumers, who can act as a stewards in the Great Library. The emergence of digital music and the internet has already made middlemen superfluous in terms of production and distribution, and they can be superfluous as stewards as well should that mantle be placed upon users.[81]

The appropriate parallel here is not to the modern notions of stewardship, but the Judeo-Christian formulation that came before it. God as creator is conceptually analogous to creators in the music industry, who bestow their creations to their fans. It is the users who have established the Great Library who are perfectly situated to be the shepherds of digital music. This conceptual organization addresses Lucy and Mitchell's critique of 'public interest' by two means. First, rather than a relationship between an abstracted entity and an owner, the stewardship property relationship here is direct between creator and user. Second, the teleology of copyright - the just reward of creators while ensuring the wide accessibility of works - is precisely the kind of morality Lucy and Mitchell demand to give duties shape and meaning. 'Public interest' is given clear direction by the goals of copyright, a purposive balancing act that is to be imported entirely into this proposed stewardship model. But the distinct power of this positionality is that by imposing duties on the file sharer, it normatively constructs them as stewards and would demand of them the kind of virtue ethic reflection stressed in Part I. Users are already excellent keepers of the music itself, why not extend that already present normativity as a duty to the creators as well?

[81] Not to mention that players such as the major labels, through their predatory practices, business model, and marketing approaches, have failed entirely as stewards for artists. For a review of the plethora of abuses, see Ian Dahlman, "A Big Beautiful Mess: Collectivity, Capitalism, Arts & Crafts and Broken Social Scene" (MA Thesis, Ryerson University and York University, 2009) at ch 1.

The duties that Howe proposes for copyright holders generally address themselves to the maintenance of a healthy and thriving public domain, exhibiting a concern with the expressive problems of copyright.[82] However, the Great Library expresses an acquisitive discontent with copyright, which is the focus of this proposed reform. Judeo-Christian conceptions of stewardship demanded that humanity preserve the gift of God's creation and its just purposes; digital music stewardship needs to make the same demands of those who are already managing digital music extra-legally. There is an extraordinary simplicity to Emma Lochery's insight that "[t]he person capable of being a steward will simply be the person who is best placed to make decisions about the future of the property".[83] The quick and easy dissemination of the digital music copy has rendered that person in control the user, the patron / librarian of the Great Library, and so it is appropriate to give them the title of steward.

The Constituting Elements of Stewardship for Copyright

To this point I have resisted providing a definition of stewardship. Because stewardship theory in practice is so idiosyncratic, so tied to its property object, and so tied to teleology of the relations involved, it was necessary that the essay operate inductively. It was essential to first flow through the object of property and the purposes in the current copyright regime, and use those exigencies to broadly structure this stewardship regime as a hybrid existing with other property rights organized not around the owner but the user (or in anachronistic property law terms, the possessor[84]). Stewardship is more a sensibility than a cohesive system, and it must always be adapted to both the object and teleology of a property regime to have meaningful content.

[82] Howe, *supra* note 53 at 241.
[83] Lochery, *supra* note 62 at 90.
[84] Given that the digital copy is so fluid, it is important to be aware of the temporal and cultural constructedness of 'having': see Rudmin, *supra* note 74.

With those elements in place, it is finally appropriate to turn to delineating the constituting elements of a stewardship regime for digital music. Again, this is not meant to capture every possible aspect of a stewardship relationship, but merely the ones that I think would best serve a stewardship of digital music. Often they will derive from definitions and lists of features that other authors have proposed, and many times these elements were implicitly engaged within the previous inductive sections of this paper. To close Part II, what follows aims to be an efficient list of features which will both precisely define what was discussed previously and suggest others which build upon that base.

Duties and Rights

It should be clear that the stewardship relationship is one primarily defined by the duty owed by the steward to the primary, but that does not mean stewardship is absent rights. Mitchell and Lucy are careful to emphasize that "the stewards is, in essence, a duty-bearer, rather than a right-holder, but this should not be taken to suggest that the steward has no rights" but rather that "the steward's control must, *in the main* be exercised in favour of others".[85] The fact that the steward is entitled to some benefit is precisely what distinguishes stewardship from the trust.[86] As Lochery succinctly captures for environmental discourses, "it is a mixture of right and obligation with a view to the future that is central to the notion of environmental stewardship".[87]

Stewardship is a vehicle that provides duties and right while making obligations predominant and as such is ideal for digital music. The Great Library must be guaranteed a future existence of open access, which can be accomplished through rights, but its existence must be predicated on a duty of just reward for creators, which is not only accomplished but drawn to the forefront by stewardship.

[85] Lucy & Mitchell, *supra* note 52 at 584.
[86] Howe, *supra* note 49 at 47.
[87] Lochery, *supra* note 62 at 45.

Importance of the Object

A benefit, Howe points out, to applying stewardship to copyright is a stronger differentiation between the objects of copyright, giving "differences in the works at issue ... [a] greater significance".[88] Rather than allowing that to be an effect of stewardship, I have made that the very basis upon which a stewardship regime is proposed. The characteristics of the digital copy and the Great Library discussed in Part I are precisely why a stewardship model is desirable. Typically, works on land stewardship (or in Peñalver's case, land virtue[89]) begin by exploring the unique character of land before addressing stewardship. While this may seem like a justification, it is equally a formative limit. As such, this stewardship model is intended only to be applied to digital music. That, as previously discussed, stewardship can cohabitate and act as a recalibration of private property further lends credence to the possibility for success of hybridized copyright law, wherein copyright can still operate elsewhere in the regime while this small pocket of digital stewardship is inserted.

Sustainability and Extended Temporality

In "Equitable Property"[90], Gray notes a trait of stewardship which he wishes his model to emulate whereby "ownership or possession of land is viewed as a trust, with attendant obligations to future generations".[91] While as discussed earlier, the obligations in this *sui generis* regime are to be owed to creators (or primaries) and not the collective (which is usually romanticized as future generations), there are two underlying principles here that can be distilled and emulated.

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[88] *Ibid* at 255.
[89] Peñalver, *supra* note 42.
[90] A concept which, according to Kevin Gray, seldom stands far apart from stewardship in dealing with questions of access: Kevin Gray, "Equitable Property" (1994) 47 Curr Legal Probs 157 at 171
[91] *Ibid* at 195.

The first is a common term in stewardship literature - sustainability. The need for sustainability in our environmental policies, for example, is what drives Karp to propose stewardship as a workable solution.[92] Even in Howe's proposed reform of copyright by stewardship, sustainability is invoked in relation to the public domain as a resource that must be maintained for future generations.[93] In this instance, the concern with sustainability is tied to the continued existence and flourishing[94] of the Great Library and indeed the purposes of copyright. Here it is best to conceptualize creators as providers of raw materials and labour for building the library, who should be compensated for their continued efforts. Sustainability in this regime is thus focused on making the Great Library just, allowing compensation for creators outside of a market transaction. The interest is not to sustain a marketplace, but to sustain an already existing space of open access to digital music legitimately.

The second principle to be understood is the strong shift in temporality that is implied by stewardship. Largely pitched as a reaction against sacrificing the future good for short-term rewards, stewardship's effect is to extend the time by which a decision or action is judged indefinitely into the future. As a result, the time of judgment for a steward's actions is continuous and contains all management of the property. For copyright, whose enforcement has simply one temporal point - the moment of violation - a digital, *sui generis* stewardship approach would demand that any violation of the steward's duties must be understood along its full temporality. This implies the inclusion in the formula of the many *post hoc* instances wherein consumers make value for artists online, activities such as recommending, blogging, sharing

[92] Karp, *supra* note 56.
[93] Howe, *supra* note 53 at 277.
[94] Human flourishing has been a theory of property developed by Gregory Alexander and Eduardo Peñalver to capture property's social dimensions. See *An Introduction to Property Theory* (Cambridge: Cambridge University Press, 2012) at 87, and applied to intellectual property at 200.

links etc. which can be categorized as promotion. The focus of any system of violation must be on the quality of management over time, not upon a single instance of violation.

Collective Participation and Access

Stewardship regimes explicitly assert the social value of the property to which they are applied. Victor Yannacone boils the stewardship relationship down to a simple equation for his title: "private property plus public interest equals social property".[95] Similarly, Gray describes the process as "engrafting the conscience of the community on to existing property relations".[96] At the core of these proposals is the reassertion of the community interest in property, the desire for it to play a preponderant role in any decision made with regards to the property, and for community to operate as a limit to any rights that may be exercised.

A key community interest is that of access, and Jerry Anderson's work on the right to roam in Britain proves an interesting case study in the possibility of providing access to a private resource, trumping an owner's right to exclude, while still maintaining a general system of private property.[97] According to Anderson, the legislation of a right to roam in England should be "viewed as an attempt to regain a balance between public and private rights to land that was upset during the enclosure period".[98] Costs that result from a right to roam are low and the amelioration of health, well being, and community, in Anderson's view, are undeniable[99].

The parallel between the original English enclosure movement and the modern increase in intellectual property rights in the digital era has been noted by James Boyle, who dubbed the

[95] Victor John Yannacone, Jr, "Property and Stewardship - Private Property Plus Public Interest Equals Social Property" (1978) 23 SDL Rev 71.
[96] Gray, *supra* note 90 at 213.
[97] Jerry L Anderson, "Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks" (2007) 19 Geo Int'l Entvtl L Rev 375. For an account of the deterioration of America's right to roam, see Freyfogle, *supra* note 66 at 29.
[98] *Ibid* at 379.
[99] He lists the benefits as follows: means of transportation, enjoyment of nature, mental health, physical health, connection of history and culture, and sense of community. *Ibid* at 413-7.

latter "the second enclosure movement".[100] Boyle's response mirrors Lawrence Lessig's call to reinvigorate the rhetoric of the commons and the public domain[101], a proposal which lays outside the confines of this stewardship system. I would suggest that an equivalent of a right to roam is an equally attractive solution, one which should play a role in digital music stewardship.[102] Instituted for digital music, a right to roam would preserves access to the Great Library while concurrently allowing primaries to maintain their private property rights. In order to be a steward, one must have access to the property itself, and such a right would be an indispensable corollary to the duties of stewardship.

Answerability

Lochery strongly emphasizes the need for answerability in any system of stewardship, a position not typically stressed or even broached in much of the academic writing on the subject. This proposal is also rooted in the Judeo-Christian vision of stewardship, where one would be answerable to God for any misuse. Lochery argues that because sanctions are constitutive of duties, and furthermore because stewardship only functions "if there is no systematic ambivalence to a breach," the presence of a possible penalty is normatively necessary for stewardship to function.[103] In other words, the bad steward must at least have a threat of some form of sanction for when they violate their duty - be it either in condemnation or in the removal of a benefit conferred by the stewardship.[104] In the realm of copyright, we have seen that the potential threat of an expensive lawsuit with extraordinary fines have really had no affect on the rate of extra-legal downloading, but arguably this has more to do with the lost legitimacy of

[100] James Boyle, "The Second Enclosure Movement and the Construction of the Public Domain" (2003) 66 Law & Contemp Probs 33.
[101] *Ibid* at 62-74.
[102] For example, the right to roam has been cited as an inspiration for Gideon Parchomovsky & Michael Mattioli's proposal for reform of patents: "Partial Patents" (2011) 111 Colum L Rev 207 at 225.
[103] Lochery, *supra* note 62 at 63.
[104] *Ibid*.

copyright than the ineffectiveness of sanctions. Because a stewardship regime for digital music aligns much more closely with the normativity of the users, I would argue that sanctions will be much more effective, even legitimate. For a user to lose legitimacy in a legal Great Library would, I think, have much more normative weight than the current copyright regime might lead one to believe. For its normative value and for giving the legal relation weight, answerability of some form is necessary. In practice, this could mean simply the removal of an immunity from copyright law originally granted by stewardship.

No Right to All Value Added

In order to avoid what Karp calls "the 'destabilizing disappointment' of common expectations"[105] any stewardship regime must deflate the expectation that labour creates an entitlement to every benefit created from that labour. This is not to say that no value can be taken, but rather when that value conflicts with the duties of stewardship, the stewardship obligations trump. In the context of the proposed regime, this cuts two ways, affecting the expectations of both the steward and the primary. Obviously for creators of musical works, the existence of the legitimated Great Library means they cannot expect to retain every piece of value generated by a work's circulation. This does not necessarily mean it will cost the artist anything - every download is not a lost sale and it is important to keep in mind Boyle's caveat that "[a] large, leaky market may actually provide more revenue than a small one over which one's control is much stronger".[106] But for our proposed stewards, the administrators and users of the Great Library who pour countless hours into its maintenance, the point is simple - the Great Library cannot be commercialized. The balance struck here is based on the public good of

[105] Karp, *supra* note 56 at 756.
[106] Boyle, *supra* note 100 at 43.

the Great Library, and the balance of copyright's purposes would be too far thrown off if these communities began profiting fiscally.

Part III - Destination

With a location and trajectory laid out in Parts I and II, what remains for this map is to try and envision how a pursuit of a *sui generis* stewardship of digital music might be realized. It is a question of praxis - how the delineated framework and elements might be assembled pragmatically. This section, by its very nature, must be somewhat incomplete, or perhaps more accurately a work in progress. I anticipate two ways such a scheme could be imposed - either from the top-down, driven by government legislation, or from the bottom-up, driven by user ingenuity. For the top-down, I will briefly consider a couple methods, each imperfect in their own way, that a government might assemble a stewardship regime. As for the bottom-up, I reserve it for explication of the *Cultural Capital Project*, a project begun a year ago with two colleagues, Andrew DeWaard and Brian Fauteux[107], which will serve as an example of how such a goal can be approached.

Top-Down Approaches

Management

Over the last half decade, the term "stewardship" has appeared in two pieces of Canadian legislation: the *Alberta Land Stewardship Act* of 2009[108] and Manitoba's *Tire Stewardship Regulation* in 2006[109]. In each instance, the legislation that was passed was essentially a

[107] The description of the project at the end of Part III is a section jointly authored by the three of us.
[108] *Alberta Land Stewardship Act* SA 2009, c-A-26(8) [*ALSA*].
[109] *Tire Stewardship Regulation*, Man Reg 222 2006 [*TSR*].

management scheme, but with very different approaches to stewardship, providing intriguing options for the implementation of stewardship principles for digital music.

The *Tire Stewardship Regulation* was of a simple variety, imposing a duty upon "stewards of tires" - defined as both the first seller and buyer - to subscribe to a tire stewardship program designed to reduce tire waste and encourage recycling. These programs are privately owned and operated, but must be approved by the government according to the standards set out in the regulation designed to guarantee the responsibility and sustainability of tire sale and disposal. A similar legislation could be envisaged for music stewardship programs. Prominent factions of the Great Library could be given the option to register with the government, and the success of their applications would hinge on the presence of infrastructure that provided the recirculation of capital back to the artists. If they met the requirements, the file sharing network could be declared a music stewardship program, it and its users granted immunity from copyright litigation, but that standing could be revoked if the program ever fell below standard. A stewardship program would thus serve concurrently as a vehicle for access, compensation for artists, and answerability - an ethical aegis for virtuous action. A regime such as this would thus be guided by government minimums but driven by users, the very engine already maintaining the Great Library.

The *Alberta Land Stewardship Act*, on the other hand, is more a guideline for consultation and decision making before any activity that navigates provincial standards or requires statutory approval can occur on land. While there is no practical value for such a consultation process with digital music, what is impressive about the legislation are the purposes of the act which are worth considering in full:

> (a) to provide a means by which the Government can give direction and provide leadership in identifying the objectives of the Province of Alberta, including economic, environmental and social objectives;
> (b) to provide a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples;
> (c) to provide for the co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment;
> (d) to create legislation and policy that enable sustainable development by taking account of and responding to the cumulative effect of human and other events[110]

Immediately perceivable in the stated purposes are important stewardship features that were detailed in Part II - community involvement and access, elongated temporality, sustainability and the like. While the rest of the legislation lays out the groundwork for an elaborate consultation process, providing the space that can allow stewardship to occur, it is the normative pressure of the purposes that makes the legislation one of stewardship. Any legislation relating to digital music stewardship should contain a purposes section which emulates the *Alberta Land Stewardship Act*. Embracing stewardship at its base is an effort to embrace and evolve digital music normativity, and a strong, principled purposes section can accomplish that. It both creates a space for a virtuous actor and encourages their ethical action. This formulation would be ideal for legislation that created a space of interpretive judgment for both the user, the purposes section thus explicitly a normative gesture.

I would be remiss not to mention tax models, the most well-know of which was proposed by Neil Netanel[111] who suggests instituting a non-commercial levy for file sharing on Internet Service Providers (who, by charging for data use, are really already

[110] *ALSA*, *supra* note 108, s 1(2).
[111] Neil Weinstock Netanel, "Impose a Non-Commercial Use Levy to Allow Free Peer-to-Peer File Sharing" (2003) 17:1 Harv JL & Tech 1.

profiting from the current system). I wholeheartedly support such ideas as an alternate approach to stewardship, but its implementation would be difficult to characterize as stewardship, besides perhaps as a duty to pay taxes. In such an approach, the state would be doing all the work that a stewardship regime would place upon the steward.

Stewardship Defence

An alternate approach would be to model stewardship after fair dealing, making it a legitimate justification for copyright violation when someone is faced with a lawsuit. If someone can demonstrate they were involved in a voluntary remuneration program, or show in court the plethora of other ways their actions create value for the work, the defence would be met and the lawsuit dismissed. The greatest difficulty would perhaps be that, like fair dealing, the precise standard for a stewardship defence would necessarily be largely contextual, judged on principles rather than a bright line rule, leaving both the defence somewhat indefinite and users perhaps timid to embrace the justification. However, the promise of a potential reprieve for acting as a good steward would have an enormous normative influence, and ethical action may rise in file sharing as people hedge their bets, provided they feel the defence is balanced and fair.

Bottom-Up Approach: Cultural Capital

In order for bottom-up, voluntary approaches to work in helping to establish a stewardship regime for digital copyright, the methods employed need to successfully demonstrate the feasibility of an alternative legality. According to Lawrence Lessig's *Code*, digital code itself is a way of accomplishing such a feat.

First published in 1999, when a utopian view of cyberspace as beyond regulation predominated, *Code*'s contrarian message was simple: code is law, its architecture is regulation, and freedom on the internet is a result not of immanence but structure. The internet has no

essential nature, but rather online "we are nature".[112] And as equally as the internet seemed to resist regulation at the time, it also represented the potentiality for perfect control, challenging the liberty that was previously preserved only by the high costs of control.[113] What is most troubling to Lessig is that this control can be achieved indirectly through regulating code.[114] For Lessig, we collectively sit at a crossroads where we need to make choices as to what values we wish the internet's code to reflect and entrench, as the space moves from its non-commercial roots through extensive commercial development.[115] If we do not see that code is law, an architecture targeted by both business and government to control behaviour, then we risk our values playing no role in these foundational choices.

Strangely, Lessig's development of the concept operates almost entirely from the top down. Lessig specifies four modalities of regulation - market, norms, architecture, law - which are experienced by a subject as constraints.[116] However, as to the relation between modalities, he only develops examples as to how law affects constraint either directly or indirectly through the other three modes.[117] What is lacking from his substantive analysis, but implicit in his construction, is that if code is law, then code can be written to effect new law. Certainly Lessig recognizes that a value can be implemented from the bottom-up: "the law could be rebalanced to encourage the freedom thought important, or this property could be redeployed to effect the freedom thought important".[118] A redeploying of property by code is most properly understood as a legal intervention, Lessig's Creative Commons being an obvious example. A code which enables behaviour, embraces and validates a normativity, and facilitates the flow of capital is

[112] Lawrence Lessig, *Code: Version 2.0* (New York: Basic Books, 2006) at 338.
[113] *Ibid* at 196.
[114] *Ibid* at 136.
[115] *Ibid* at 8.
[116] *Ibid* at 123.
[117] *Ibid* at 130.
[118] *Ibid* at 199.

affecting legal change. It proposes alternative legalities. And by doing so, new code can potentially render its values intuitive to a legal imagination in the legislative branch. If code is law online, then bottom-up codes can be legal interventions, paving the way to the possibility of an entirely different legal regime.

With that aim, the *Cultural Capital* project is currently developing an online platform in its effort to establish a non-profit infrastructure to facilitate a patronage system between artists and fans. It will operate as a social network and utilize an adaptable algorithm to allocate equitable compensation via micropayment. Redefining what it means to be a 'creator' of music, the *Cultural Capital* platform aims to realize the capital in both a listener's capacity for connection and desire to share music. No excess capital will be wasted on 'middlemen', and no power will be granted to 'gatekeepers'. Rather, generated profits will be redistributed to artists and the fans whose cultural labour propels them.

The *Cultural Capital* platform operates on two fronts. First, it is a network where social data is aggregated and users interact. Profile pages for both artists and users are generated dynamically from public social media data. For artists, these pages would include legally embedded music (such as Soundcloud) and video (such as YouTube), as well as official social media feeds such as Twitter and Facebook. Tour data would be gleaned from Songkick, and listener data could be pulled from Last.fm. User-generated content would also be featured, such as fan art from deviantART, remixes from YouTube, and photography from Flickr. The curation of this aggregated data would be handled by community of dedicated members, not unlike Wikipedia. Anyone could contribute, and the community would assure its quality. Rather than a market-based approach to selling fans a product through branded websites, artist pages on the

Cultural Capital platform would reflect the true dynamism of music in the digital age: mixed, mediated, discussed, curated, and above all, shared.

Second, the *Cultural Capital* platform would generate user-pages that aggregated a fan's engagement with their favourite artists. Every time they 'liked' a new artist, 'favourited' a new song, or shared a video with a friend, it would be catalogued in their profile page. An explicit reflection of 'cultural capital', these user pages would provide the data for the radical gesture at the heart of the *Cultural Capital* project: opt-in tracking software would monitor the musical consumption of users and suggest equitable payment through a micropayment subscription fee. Instead of being treated as mere consumers, forced to pay up front for a commodity, users would be encouraged to participate in the stewardship of their favourite artists, with whom a more intimate connection would be facilitated. Payment would be entirely in the hands of the user; they might decide to contribute as little as a few dollars a month, to be distributed to their favourite artists and songs based on their listening data, or they might be encouraged to start donating (or increase their donation) once they see their funds being allocated according to preference and distributed directly to the artists they support. Subscription - and the customizable micropayment that comes along with it - is completely voluntary, as the *Cultural Capital* project aims to nurture a relationship through transparency, not realize profit through exploitation.

In order to fully customize each user's payment plan, forging their bond with their favourite artists, subscribers would control a dashboard of sliding scales, with visualized payment distribution. For instance, a user may wish to base their payment on the artists or songs they individually choose to support, or they might prefer to let an algorithm allocate funds based on specific properties, such as 'most listened', 'most in need of funding for their next recording', 'most local', 'most shared in my social network', etc. A combination of any of these properties

would also be possible, and codes of conduct for cultural stewardship would be encouraged based on the principles delineated in Part II, promoting ethical consumption by users and ethical production/distribution by artists.

There would be much value-added for users participating in this system: cultural sustainability (most people *want* to support artists, just not the exploitative practices of an unfair oligopoly), status and distinction (a largely untapped motivating factor in the consumption of music), social connection (cultural consumption being a key medium for contemporary interpersonal relationships), and a subsequent addition to the system would be establishing a credit system that rewards users for their cultural labour. For example, access to exclusive material supplied by participating artists and record labels can be offered to users who have been particularly active in sharing an artist's music. But it is artists and creators who have the most to gain from the *Cultural Capital* interface. They will be compensated by receiving capital directly from users, circumventing industry intermediaries of the outdated big music industry model. Initially, the *Cultural Capital* system would actually realize surplus profit for the current record industry, but it would slowly shift the rules of the game; users and artists would become both distribution and promotion, legitimizing the unacknowledged roles which they already play.

In the end, the *Cultural Capital* project is a legal intervention. It seeks to demonstrate that copyright's goal unfulfilled by the Great Library - the just reward of creators - can be accomplished normatively without a private property regime. *Cultural Capital*'s code is a law best described as stewardship, enabling responsible consumption, sustainability by financing creators, and the best interests of the collective in regard to a public good. It rejects the criminalization of digital music sharing and instead seeks to validate the value and capital

created by sharing, its guiding normativity. It is a librarian's law for The Great Library, and if successful it would allow users to assert that they can and will act as cultural stewards.

Conclusion

As should be clear by now, the map to stewardship offered by this paper is closer to a sketch than an exact blueprint. Nonetheless, it can undoubtedly serve as guidance towards the creation of a *sui generis* property regime of stewardship for digital music, either by governments or by users. Part I triangulated the starting point of any reform, using both digital music and the emergent public good of the Great Library as landmarks. Part II charted a direction a pursuit of stewardship might take, proposing a framework where the regime could be hybridized with private property regimes, suggesting a positionality whereby the user / possessor would be appropriately treated as a steward, and finally articulating the key elements that would make a stewardship regime functional. Finally, Part III pointed towards ways these elements could be assembled together, either by government actors or by users who wish to assert an alternate legality.

In the end, I hope some of the lessons of stewardship are taken up. I hope that the musical sensibilities I developed so many years ago, and the fantastic space of exploration and development that produced them, can be made into just legal realities.

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