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Introduction:
Property, Commoning
and the Politics of Free Software



J. Martin Pedersen

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0 Introduction: Property, Commoning and the Politics of Free Software

0.1 Set and setting.

In this essay I pull together several strings of inquiry with reference to Free Software. Three different angles characterise my approach: firstly, the perspective of anti-capitalist movements combined with insights from what we can loosely call critical political economy is my anchor, normatively as well as analytically. The anti-capitalist demands for a dissolution of exclusive private property rights in land and its resources, and the means of production and distribution are a normative starting point. The analysis, in great part jurisprudential, proceeds from there. Secondly, I bring in philosophical literature on property, which is a desolate province in academic and colloquial thought alike, resulting in quite a lot of ground work needing to be covered. Thirdly, the inter-disciplinary study that I am presenting will take as a point of departure - and then *depart from* - liberal analyses of the “networked information economy”.

Free Software is an interesting technological phenomenon, it has implications for studies of property, law and social organisation (and many other fields) and it constitutes an unusually successful narrative for a social movement. In order to define a common ground for understanding what anti-capitalist movements are and what they need to do, and in order to see how Free Software is relevant in that context, I will begin by interacting with Massimo De Angelis's reading (2005) of John Holloway's “Change the World without Taking Power” (2002).

The key point for De Angelis is the “problematic of organisation”, which he sees as absent in Holloway's account.

This essay is about the role that property plays in social organisation.

Holloway's starting point for action is the scream: a loud multitudinous "NO" to the suffering caused by capitalism. Albeit not multitudinous originally, rather lonely and lost, it was such a NO that Richard Stallman, the founder of the Free Software Foundation and movement, screamed when he found himself without the commons that had defined the early era of hacking (see Section 3.3). Privatisation entailed the enclosure of code, which came hand in hand with those aspiring to fame and fortune taking the money and running to business upstarts. That left Stallman with almost only *the ideal* of the values of sharing and cooperating, but no one to share those values *with* and very little code to *cooperate on*. Stallman then asked himself one question: how do I revive the collapsed hacker commons? This historical unfolding precisely supports De Angelis's critique of Holloway, which turns on the fact that screaming NO out of helplessness really signifies a clash of values. For Holloway the scream is a beginning, a negative starting point that has quite some appeal – who is not angry with capital and authoritarian powers? - and the scream is for me somewhat reminiscent of Frantz Fanon's anti-colonial anger. The colonial subject for Fanon is in a mental and physical cage, angry and uprooted. To recreate herself - to find and realise her own values – she must violently break free of the violence of oppression.

To be without the freedom to express and to *live and share values*, of course, does not mean that one has no values. Rather it means that those values are not given space for their realisation. The practice of values has been denied. In other words, the premise for the negation of the freedom to practice your shared values is that you have such values in the first place. Values are expressed – in terms of social relations – in practices that arise

from “needs, desires, aspirations, affects and relations” (De Angelis 2005a: 237). The scream and violence as an impetus are often the last resort and for Fanon the violence is *necessary* for a liberation of the psyche of the oppressed (Roberts 2004). Through violence against the coloniser of land and mind the post-colonial subject finds itself. Yet, there seems to be something missing from a political programme that takes as a starting point total despair and helplessness, whether it be a non-violent or a violent starting point. What is missing is the realisation that helplessness and despair are results of a denial by capital of the practice of values. It should perhaps be noted for good measure that one could imagine situations and circumstances of life that are so desperate and helpless and have been deprived of space and freedom to practice values for so long, that those values have been forgotten. Nevertheless, as De Angelis explains:

“The scream might well be an expression of negativity, but this scream of refusal, this “NO” underlines the frustration of a multitude of “yeses”. Understood positively this clashing is a clash among value practices” (De Angelis 2005a: 237.)

Instead of a multitude of NOs emerging from despair, we can hear the scream as a multitude of yeses or a cry of a culture or a community. That mediately leads us to the questions: what culture or community? And what are (were) their values? It is from asking such questions that “the challenges, the alternatives, the contradictions, the horizons” (ibid: 235) to and of the screaming can be approximated. In the multitudinous screaming, as a starting point, the question concerning *how* that multitude came to scream in concert in the first place is absent. We do not know how the “we” that Holloway wants us to start from came

about and that for De Angelis is “the absence of the problematic of organisation” (ibid.).

The problematic of organisation concerns “the how”. We are screaming, because our “needs, desires, aspirations, affects and relations” are unmet, have been denied us . These are practices through which we exhibit our shared, common values and, hence, “starting from the multitude of yeses, [Holloway] could not have avoided posing the question of their *alternative articulation as the central problematic of revolution*” (ibid: 237). In the *absence* of capitalism, conversely, how would we organise our community and constitute a space and freedom for living out – to the best of our abilities - all our needs, desires, aspirations, affects and relations?

In the ensuing discussion De Angelis juxtaposes *power-over* with *power-to*, where the “seizing of power is the seizing of *power-over*, of the structure of the hierarchies and powers over the social body”, while the “struggle to liberate *power-to* is not the struggle to confront a counter-power, but rather anti-power”; and thus the objective of the anti-capitalist revolution is the abolishment of *power-over* through a process of “living relations of anti-power” (ibid: 238). If the scream is a cry for help in a world where people have become objectified and the nature of commodities is what rules society, then the *power-to* question concerns in part how to be able to see ourselves not as objects, submitted to the power of objects, but as a multitude of yeses with shared values. De Angelis asks, “since commodity fetishism is no illusion, but relations between people really do take the form of relations between things, how do we break with it?” (ibid.); and answers:

“To break the spell of commodity fetishism, relations between things need not only to be recognised as relations between people, but acted upon. To de-fetishise is to recognise that the only constituent social force of those many yeses is your articulation with the other, a relational dance that produces life” (ibid.).

Space and freedom to practice your shared values are certainly necessary, but in turn also presupposes a process of establishing those values: how did the screaming yeses that are deprived of the practice of their shared values get to share those values in the first place? Where, how and when did they create those values? For David Graeber that is the core of the political. Referring to the anthropologist Turner (1978) he notes that:

“The ultimate stakes of politics ... is not even the struggle to appropriate value, it is the struggle to establish what value *is*. Similarly, the ultimate freedom is not the freedom to create or accumulate value, but the freedom to decide (collectively or individually) what it is that makes life worth living. In the end then, politics is about the meaning of life” (2001: 88).

Graeber is looking for an understanding of value that begins with flow, process and action, rather than a fixed substance of objects. Social action is understood to be closer to the meaning of life, so to speak, than the mere things with which humans are surrounded (and which in capitalism are excessively foregrounded).

In order to make his point, Graeber tells a story of the Baining (2001: 69-71), which is a society in Papua New Guinea that

“appear as close as one is likely to find a genuinely simple society” (ibid: 69). A people with next to no social structures and no political structures at all. The main observable action that glues together their society is the sharing of things. Neighbours exchange food in same-for-same transactions all the time and the most prestigious act is “being a good provider to children, thereby turning them into social beings” (ibid: 70-71). For the Baining “sweat” is the most quintessential human activity, which is “conceived largely in terms of the generation of heat: fire or “sweat” in gardening, which in turn is seen as the quintessential form of work” (ibid: 70).

The basic “value template” (Munn 1986), then, is the “application of human labour to transform nature into culture” (ibid.), but the ultimate aim is not to create “the thing”, but to be able to give it away. To be able to feed your children, re-creating social beings, and to share with your neighbour and in that way to reproduce society is the point of gardening for the Baining. It is not literally the fruits of your labour that are the crux of the matter for the Baining, but rather *the actions of sharing to continually reproduce society* that the fruits of your labour *make possible*. While it might sound like the Baining are also somehow condemned to labour on things all the time for the reproduction of society, their motivations are paradigmatically different. The value that they see in their work is the action of socialisation, rather than the production of things as such. In other words, at heart the Baining society is a society for the production of people and relationships, not things.

Hence, the Baining do not need to *de-fetishise* their society, because their relational dance is not subordinated to a commodity form. However, their relational dance is certainly involving the use and circulation of things in a very important way.

In this essay I am arguing that our ability to articulate our “relational dance” is greatly facilitated by a basic and general understanding of property, as well as an analytical grasp of its particular specifications and variations. I see a better understanding of property as a necessary element in breaking with the commodity fetishism that defines the “thing-like nature of social relations in capitalism” (De Angelis 2005a: 239). The tune to which we perform our relational dance is written in the language of property, as I will show.

Time is certainly “ripe for posing the question of *how* ... we relate to each other on this planet (ibid: 242) and “strategic self-reflection on “our powers to” is a moment of our own empowerment” (ibid: 244) and we must “recognise that [our] organising is always affirmative, positive, constituent, relational”, because the “the axis of revolutionary thought is another world, other modes of doing, other ways to relate to each other, other ways of organising our reproduction as species on this planet” (ibid: 245).

However, this power-to based revolution is not a projection into the future, not an imagined community after the revolution, “not a model to conform to, but ... a social force emerging in the present” (ibid.). On that basis De Angelis takes note of how the revolutionary relation between means and ends is a “powerful loop”:

“The end: other ways of organising our webs of relations. The means: our organising webs of relations in the here and now” (ibid.)

In the work of De Angelis and Graeber in the context of value and the political question of the meaning of life, we have identified action and the making of people and relationships as a

substitution for the commodity. In their forceful arguments concerning relating subjects and associated questions concerning their relational modalities they have reinstated the basic organisational question: what kind of society do we want? Rejecting the commodity form (as *not* the meaning of life) rightly foregrounds social relations. Active relationships replace the all-encompassing power of the commodity and the associated technological advances that keep us spell-bound *and* bound to the nature of things, rather than bound to the nature of the social. This is an important step: philosophically engaged, politically significant.

In our next step, then, we take careful note of the fact that *the thing* of course is *not always a commodity*. The Baining might be the most simple society known, revolving around the making of people and relationships, and capitalism might be the most advanced society known, revolving around the commodity form, but what they share in common is that the flow of things – and the relations that the flow of things make possible or hinder – is the most fundamental movement in their respective societies. In other words, we can follow Graeber to the Baining and leave behind the commodity form as the core of our social organisation, but we cannot leave the thing behind, once we have realised how important the sharing of things really is in the reproduction of society. That is probably why the magic spell of capitalism is so strong: it domesticates the flow of things, which (otherwise) brings meaning to our lives.

In other words, we cannot simply background the thing, and that is where property comes into the picture. Property brings “the thing” back in to our discussion about the meaning of life and its political realities. We acquire a capacity to articulate relational modalities when we acquire the language of property and “it is in

the relational doing of organising that ... oppressions are overcome” (De Angelis 2005a: 246)

Things are objects that surround us. Commodities are also things that surround us, but they are things that are configured within – i.e. loaded with – a very particular mode of production¹. The commodity form through its circulation perpetuates the values of capitalism – mainly self-interest – but the removal of “the commodity” from our social relations can never amount to the removal of “the thing”. Human beings are tool users, sculptors, collectors and collaborators and many of our social and creative relations unfold with reference to, through the use of, and result in things.

An “anti-capitalist commons” will be full of things, but they will not be commodities into which the anti-social value of self-interest is encoded. Anti-capitalist things are objects of cultural and creative significance: objects of connection that manifest our shared values and our capacity to cooperate *to realise* those values. Things emerge in the expression of values to the external world.

1 We may here speculate briefly on the relation between a thing and how it is organised. Perhaps it could be argued that the values inherent in or expressed through property protocols “follow” or “attach to” the respective thing; meaning that the social values in questions are thus, potentially, perpetuated through the circulation of the thing. Hence, if we accept that speculative proposition, *sharing perpetuates sharing; self-interest perpetuates self-interest*. This allows us to also see property on a different level, since we can say that property is protocols - *into which social values are encoded* - for the purpose of organising the care, production, distribution/circulation of goods and resources; and the values with which they are organised circulate with those goods and resources. This – with regard to Free Software - will become evident in Section 3.5.

In this *expression of values through things* we can recognise our own imagination – see our selves – and thus in part constitute our individual identity, but also relate to others. Things are inter-subjective and closely associated with the formation of identity. Importantly, the *power-to* that we imagine here and now, rather than project to *after* the revolution, can manifest in things. In remembrance of our ancestors and for our children to see, many of our value practices are embodied in objects, which circulate among us as a testimony to the fact that value practices are a process through which things flow and through which values are refined, rewritten, discarded or reaffirmed.

However, although not all things are commodities, it does not mean that a thing which is not a commodity cannot be the carrier of repressive (or any other kind of) values. We can remove the thing from the realm of commodities, but we cannot remove the potential power of the thing to embody and perpetuate power relations. Fundamental social change, therefore, necessarily (but not sufficiently) involves foregrounding the role of things and the significance they play in our social realities and, in short, our lifeworlds.

In other words, the process of revolution – of stepping into our power-to, right here and now – is not simply a matter of organising our social relations, but to organise our social relations *with regards to things*. In turn, social relations with regard to things is the minimal definition of property that I adopt in this essay (as will be explained in detail in Chapter 2). I understand property protocols – in their most basic form – as articulations of social relations with regard to things. The power to articulate your own property relations is the power to write one of the most fundamental narratives of your community or society. Property is not equal to the technical code that organises

the flow of commodities. That is a very particular instance of property.

Understanding the screaming yeses in terms of property allows us to account for the things that surround us – in and through which we relate - in articulations of our needs, desires, aspirations, affects and relations. While our needs, desires, aspirations, affects and relations could be inscribed upon the world in many other ways (not using the framework of property) it is for its recursive impact that such an exercise of constituting commons in terms of property is especially valuable.

The commons might not need property directly as a means of organisation, other terms and frameworks could possibly be imagined, but the commons need to inscribe themselves upon property, understood as a body of thought. The province of property is desolate, but it is the language of the technical code which rules most of the tangible realm, particularly with regard to land and its resources, and the means of production and distribution. In order to decode the current ownership of land and resources – and as such give new shape to the material foundations from which our needs, desires, aspirations, affects and relations arise or are met – we need to speak the language of property.

Moreover, in order to reconfigure these instances of property we need the language of the commons, of the screaming yeses, because it is in their affirmative actions and value practices that helpful new contours of property relations – i.e. social relations with regard to things - can be found.

The question of how – the question of how to step into our *powers-to* – then becomes not simply a question of relational modalities between people, but a question of the relational

modalities between people *with regards to things*, or, as it were, *property*.

With that insight consider De Angelis's conclusion that there "is no defetishising without context and scale, there is no context and scale without affirmation, discourse, and engagement in the organising terrain of the "how". There is no revolution, not even the one in which power is not taken but is exercised, without strategy thinking" (ibid: 249). The next step, then, becomes obvious: there is no strategic thinking without a careful analysis of property.

The purpose of my essay is in part to present a version of property that can be useful in critiques of existing property rights, for self-organisation of social movements, for commoning, and for public policy analysis and advocacy.

As we shall see, this is an urgent task, because there is a widespread tendency to conflate property *in general* with property *in particular*. This conflation is significant of an "impoverished concept of property that has dominated our political discourse in the twentieth century" (Mossof 2005: 38).

Current debate in the context of indigenous peoples' struggles reflects the same problem, revealing the need to reinvigorate informed and informative debate on property. It has been argued "In Defense of Property" that there is an:

"...emerging view, in scholarship and popular society, that it is normatively undesirable to employ property law as a means of protecting indigenous cultural heritage. Recent critiques suggest that propertizing culture impedes the free flow of ideas, speech, and perhaps culture itself. In our view, these

critiques arise largely because commentators associate “property” with a narrow model of individual ownership that reflects neither the substance of indigenous cultural property claims nor major theoretical developments in the broader field of property law” (Carpenter, Katyal and Riley 2009: 100).

We can here simply substitute Free Software for “indigenous cultural heritage” and we have – in great part – the *raison d’être* of the present essay: rethinking property is highly overdue, especially for anti-capitalists.

The starting point for the essay is the problematic of organisation and the role that property, as a concept and a relationship, plays in that context. The purpose of the essay is to bring these together in an anti-capitalist vision of commoning through a critical discussion of attempts to resist enclosure in cyberspace.

The line of argument presented in this essay is in great part inspired by my work with indigenous peoples and *campesinos* in Ecuador and Peru²: successful protection of the Free Software commons, similarly to successful protection of traditional medicinal knowledge, requires access to and use of the material foundations that make either of these types of cultural practices possible. There are thus clear conceptual parallels between the two: both are struggles for autonomy and over the configuration of property relations.

2 Between 2006 and 2008 I travelled extensively in Ecuador and Peru undertaking field research, working with social movements, communities and indigenous peoples’ NGOs and organisations to better understand property relations other than private property rights, which is a surprisingly under-theorised area in jurisprudence.

In the remaining part of this introduction, I will first present a map of the essay. Then I offer some notes on contemporary anti-capitalist movements, and provide a short narrative of the social history of enclosures of commons, which reveals perennial patterns of resistance to privatisation. The purpose is to locate the collective right of commoning – collective action based on shared values, particularly the principles of cooperation and self-organisation – as a counter-point to the kind of individual, private property rights that characterise capitalist democracy. This will help to orientate the discussion of the chapters that are to follow.

0.2 Map of the essay.

Chapter 1 – *Free Culture in context* - is a critical discussion of the way in which a number of key commentators are framing the politics of cyberspace. I argue that their framing of the debate is mistaken in two key ways. First, it conflates private property (a particular configuration of property) with the concept of property in general. Second, it relies on an untenable distinction between the tangible and intangible realm, which I examine in detail with reference to the commons of the land.

Section 1.2 – *Beyond property: promises of the networked information society* - introduces cyberspace in terms of libertarian values, the techno-social promise of a “single consciousness” in a “global village”, and the architecture of the Internet. It then discusses a liberal, economic conceptualisation of the novel co-creative social relations that cyberspace facilitates. The libertarian voices in cyberspace reject the industrial age governments, who have “no sovereignty where we gather”, and state that property does not apply to cyberspace, because it is a space without matter. A brief technical overview of the Internet reveals its end-to-end (E2E) architecture which

facilitates peer-to-peer (P2P) activities and ensures that all data flows equally through the Internet: the network is “neutral”, because all flows of data are equal before the law of the Internet. Network “neutrality” and E2E + P2P is seen as the foundation for a new mode of production of which the very successful example of Free Software is most significant. In his conceptualisation of Free Software, Benkler (2006) has coined the term “commons-based peer production”, which is a specific type of “peer production”, all of which he groups under the umbrella term “social production”. In presenting Benkler's work I also examine his sources of inspiration in order to locate his contribution within economic thought and hence illustrate how social production is framed and thus, to a significant extent, given shape.

Section 1.3 – *Information exceptionalism: protecting social production and the Internet commons?* - begins with a brief overview of the politics of intellectual property, which has become an important part of the global political economy. Next, I return to the two-fold claim that cyberspace has no matter and that property applies to matter only. It is a shared claim that defines the Free Culture movement, which has been inspired by the Free Software movement to protect the freedom to share and cooperate in cyberspace. This position with regard to property I refer to as “information exceptionalism”. While information exceptionalism sets out to protect social production and the cooperative potential of cyberspace, I argue that the insistence on a distinction between the “tangible realm” and the “intangible realm” has important political consequences. I show that information exceptionalism partly rests on a mistaken contrast between *property* and *policy*, and begin to develop the argument that understanding Free Software in terms of property is a recursive process through which the concept of property comes to be seen in a new light.

Section 1.4 – *Material foundations: on cables and machinery, food and shelter* – examines the material underpinnings of cyberspace to exhibit the effects and scale of material and energy use involved in information and communication technology. I illustrate how exclusive control and decision making authority over material foundations (given through private property rights) facilitates an extraction of wealth from activities unfolding in the intangible realm that is dependent on this materiality. I hence argue that the intangible realm is threatened by enclosure in the first instance *not* due to the expansion of private property rights into the intangible realm, but because of the existence of capital interests – based on private property rights – in the tangible realm. I thus conclude that the threat of cyberspace enclosure cannot be confronted simply by rejecting property rights in the *intangible* realm, because their existence in that realm is primarily an *effect*. It is also necessary to address the actual *cause* of enclosure as it exists in the *tangible* realm, and which arises from exclusive control over land, its resources, and the means of production and distribution. Moreover, by positioning themselves in this way, information exceptionalists fail to show solidarity with the commons of the land, that is, the real commons. The virtual commons are thus disembodied and left vulnerable to the exigencies of the material realm. Consequently, they are in perpetual need of a strong state for regulatory intervention in order to continuously limit the reach of capital.

Chapter 2 – *The properties of property* – is an analytical disentanglement of property in particular (as in the form of private property) from property in general (as social relations with regard to things). The purpose is to provide a framework within which the social relations of commoning can be understood alongside other variants of property relations, such as private or public property. The aim of this chapter is less normative than it is analytical: property is made up of

components that can be configured in different ways. Understanding the elementary structure of property facilitates its reconfiguration. While providing mainly a structural account of property, I nonetheless start from the normative assumption that private property can only be justified for real persons and only for a limited number of things. The institution of property distributes decision-making authority over access to and use of resources in societies. Private property invests such authority in individuals and quasi-individuals, such as firms, authorising their pursuit of self-interest. While private property as sovereignty might develop personal autonomy and identity, enable open-ended creativity, and constitute protection from external interference, in capitalist democracy, it primarily legitimises profiteering in the interest of shareholders. As against the popular myth of the “tragedy of the commons”, I hold that care for things such as land, its resources, and the means of production and distribution is best achieved collectively.

Section 2.2 - *Property in general, property in particular* – is an introduction to the complexity and elusiveness of the idea of property. It presents and relativises the idea of property as dominion: the absolute control of an individual over a thing of the external world. While this conception runs deep in much philosophical and everyday discourse, it is argued that no legal system has ever instituted property relations that were absolute in this sense. Limitations are part of all known property regimes. I will introduce the work of James Harris in this section, who has forcefully argued that despite the importance of limitations, the conception of property as dominion is presupposed in all legal systems.

Section 2.3 - *Property as social relations* - is an explanatory, gleaning journey through key texts and concepts in liberal jurisprudence. I begin this section with an exposition of W. N.

Hohfeld's matrix of jural relations which correlates rights and duties and powers and liabilities. Using an anthropological application of that matrix, and support from within liberal jurisprudence, I argue that property is *normative protocols guiding relations between people with regard to things*. Next I draw upon Harris's account of property as a mechanism for distributing control powers and use privileges with regard to resources. I adopt Harris's characterisation of private property as authorising self-seekingness in one's use of and control over things. While I agree with his view that all property relations in capitalist democracy are developments of the fundamental idea of dominion, I argue that it is crucial to begin an account of property with the open-ended idea of social relations with regard to things. To do so is to confront the hegemony of private property in political and legal theory, as a corollary of its confrontation in practice.

Section 2.4 - *A framework for property as social relations* – introduces three core variables of property as social relations with regard to things. The *relating subject* refers to the social unit within which property relations hold and are performed, usually a community; the *related-to object* refers to the thing or resource with regard to which property relations hold and are performed; and the *relational modality* refers to the way in which these relations are shaped through normative protocols, by guiding the behaviour of people with regard to one another and the use of things. I discuss these variables and their possible extensions at length, and argue that property relations are primarily about actions, and property protocols hence about enabling or constraining action. I also make the case that property protocols inhere in customary practices and values as much as in legal codes and otherwise articulated norms. This is important as I want to be able to account for commons, and traditional relations and practices of commoning, as property. I conclude that in order

to understand what it means to own something, an inquiry into the relational modality of any given form of property is indispensable.

Section 2.5 - *Specification of property: the configurations of relational modality* – is an examination of the elementary structure of private property. Following Harris, I show that basic private property consists of a collocation of legitimised control power and use privileges. Control power is legitimised in the sense that, short of contravening criminal and other law, whatever decision the owner makes with regard to the use of a thing is justified, simply by virtue of being *her decision*. I provide heuristic diagrams in order to bring to the fore the different elements which make up basic private property on the one hand, and capitalist private property on the other. Capitalist private property is characterised by a collocation of control power not only with use privileges, but also with wealth effects, or income rights. The collocation, however, is by no means a necessary one. Moreover, a justification of one of the elements (control power) does not amount to a justification of another element (wealth effects). I show by way of illustrative examples that changing the structure of private property, or *reconfiguring its specifications*, even if only in small ways, can lead to surprising transformations of the kind of community that this relational modality gives rise to.

Section 2.6 - *Property and commons* – discusses the ways in which *common property* forms are usually classified and distinguished from *private property*, and the ways in which commons can be understood as particular kinds of property configurations. I note that the values underlying private property are in important ways the *common values* of capitalist democracy. This points towards the view which I further develop later in this section, namely that capitalist democracy is, in some

not insignificant way, also a commons. A discussion of three different accounts of common forms of property (Benkler, Waldron, Harris), shows that the differences between different property forms are all differences in the configuration of, essentially, the same elements. The substitution of “social interest” for “legitimate self-seekingness” is identified as the key characteristic of non-private property forms. I argue that property protocols, whichever way they may be expressed, all provide answers to the question of who makes (or can make) decisions over the actions of people with regard to things, and by reference to what these decisions are legitimised. In order to develop an idea of a self-constituted commons within capitalist democracy, I use Harris's account of communitarian property, which he sees as a form of resource-holding that is recognised by, yet autonomous from, the wider legal system that surrounds it. I argue that the articulation of property protocols facilitate such self-constitution.

Chapter 3 – Free Software as property – is a detailed exposition of the Free Software movement, its history, practices, and legal innovations. I cast it as a commons that has autonomously constituted itself. The aim of this chapter is to show how and why it makes sense to understand Free Software as property. Not only is the central achievement of the Free Software movement the reconfiguration of core elements of copyright, that is, a transformation of property relations, but conceptualising the relational modalities of Free Software in terms of property also feeds back into the concept of property: mapping this understanding back onto the tangible realm reanimates debate about the range of possible property relations more generally.

Section 3.2 – *The nature of code* – provides a basic account of software in terms of how its code is written, developed, commented upon and finally converted into *executable* programmes that can be run on a computer. Because of the

inscrutability of *binary code* – readable only by machines – it follows that access to the *source code* – readable by humans – is a precondition for analysis, customisation and public scrutiny of software. Without this access to the source code, software represents a “black box” technology, the internal workings of which are hidden, and hence uncertain. Given that software is integral to many crucial systems, such as engines, brakes, flight control, ambulance dispatch, power stations etc., the creation of uncertainty constitutes not only a democratic issue, but a real danger.

Section 3.3 – *A brief history of Free Software and its imaginary, scientific and cultural origins* – begins with an examination of how the science of computing is embedded in the scientific commons which predates the rise of modern science. I provide a detailed account of the enclosure of the hacker commons that began in the 1970s, the consequent resistance to this privatisation which led to the establishment of the Free Software Foundation (FSF) in 1985, and the political disagreements that led to the formation of the Open Source Initiative (OSI). I argue that at the heart of Free Software lies a principled philosophy of freedom and community building, discarded as “ideology” by OSI. Stripped of FSF’s political origins, Open Source is hence best understood as an engineering methodology for a market-based economy.

Section 3.4 – *The Free Software movement as a recursive public* – discusses the main points of a recent study of Free Software and its cultural significance. Free Software is understood as a “recursive public” that is “vitaly concerned” with the conditions of and possibilities for its own coming into being (Kelty 2008). While the Free Software movement remains a paradigmatic example of a recursive public, I argue that its recursive nature does not include the crucial recursive relation between the

tangible and the intangible realm, as noted in Chapter 1. The Free Software commons remains ideologically and practically separated from the commons of the land and its material resources.

Section 3.5 – *The GNU General Public License: copyright subversion and constitution* – is an analysis of the software license that articulates the common values around which the Free Software community has emerged. The shared desire and need to cooperate on computer code has been condensed into “four freedoms” of Free Software. Using the framework developed in Chapter 2, I show how this license, the GPL, is an articulation of these common values in the form of sub-clauses to existing copyright, which ensures that once a piece of software code has been published under the GPL, it remains freely available for anyone to use for any purpose except enclosure. This self-articulated relational modality hence ensures *reciprocity in perpetuity* and uses copyright subversively to both constitute the software commons, and defend it against enclosure. The creation and maintenance of a commons within capitalist democracy necessitates an interfacing with its legal, political and economic dimensions. The example of Free Software shows that the articulation of property protocols on part of social movements and communities can make innovative use of trespassory protection provided by the overarching legal system through conventional property rights, in a way that undermines rather than strengthens the logic of capitalist private property. I also argue that the GPL acts as a constitution of the Free Software community.

Section 3.6 – *Defending the GPL: a recursive public defends itself* – reviews a small number of key legal proceedings which establish that the GPL is indeed sanctioned by copyright law. I show in this section how a self-defence mechanism has emerged

spontaneously within the Free Software movement, complementing the protection that copyright affords. I maintain that the Free Software example provides an embryonic model for other voluntary associations to autonomously constitute and defend themselves against enclosure.

Finally, I conclude that solidarity between the real commons of the land and the virtual commons of cyberspace and a recognition of the interpenetration of the tangible and intangible realm, as well as an anti-capitalist vision of politics are necessary elements in a defence against the enclosure of cyberspace.

In the rest of the introduction I want to present some notes first on contemporary anti-capitalism, before turning to a social history of the perennial resistance to capitalism.

0.3 Social history: a foundation for a networked information society from below?

The history of anti-capitalism is also the history of defending the commons and in the patterns of resistance to capitalism the relational modes of commoning are often revealed. I first very briefly present the notion of contemporary anti-capitalism and then turn to a historical view, showing that resistance is perennial and that struggles against capital are interconnected and intergenerational..

Contemporary anti-capitalism is often called a “movement of movements”. This “movement of movements” has recently been mapped ethnographically by Marianne Maeckelberg in “The Will of the Many: How the Alterglobalisation Movement is Changing the Face of Democracy” (2009) following the “militant

ethnography” by Jeffrey Juris in “Networking Futures: The Movements Against Corporate Globalization” (2008):

“Last week marked the ten-year anniversary of the “Battle of Seattle”, when tens of thousands of protesters successfully shut down the World Trade Organisation’s ministerial meetings on its opening day. Taking negotiators and the media by surprise, the mass mobilisation of diverse groups, from environmentalists to trade unionists, effectively stalled trade talks that many critics suggest would have consolidated global corporate power at the expense of the world’s poor and marginalised. Hailed ... as the global justice movement’s ‘coming-out party’, many commentators view the protests as a major inspiration for the transnational mobilisations for social, economic and environmental justice that are now a regular feature at international policy meetings” (White 2009).

Participating in social movements in England one discovers that it is often taken for granted that June 18, 1999 - more than five months before Seattle, when the financial district of London was “transformed by carnival as the G8 attempt to meet in Cologne, Germany” (Dissent 2005) - was a defining moment in the birth of the movement. Others will consider the human chain around the conference centre hosting the G8 in Birmingham in 1998 a beginning point. That is precisely why it is a *movement of movements*: it is not a singular movement with a leadership or central committee, but a global network of movements who protest and organise against capitalism and “the negative aspects of globalisation”. Through my participation in radical social movements and in the Free Software movement, I am, with particular reference to *property*, “teasing out the hidden ... logics

that underlie certain types of social action; how people's habits and actions make sense in ways that they are not themselves completely aware of" (Graeber 2007: 305)³.

To illustrate the perennial nature of anti-capitalist social movements – it will be instructive to review some perspectives from social history about the foundations *for*, the transition *into* and *through* capitalism. The historical perspective serves three specific purposes. Firstly, it reminds us of the inter-generational reality of the struggle. We are fighting with those who fought before us and for those who will fight after us. This is not a signal to follow some dogmas laid down in the course of revolutionary history, on the contrary, it is a measure to avoid

3 “[O]ne always learns more about a movement by studying it from the inside. "Inside" can mean various things. Actual participation is best, but is not possible if one is studying a movement of the past or one from which one is excluded, or which one has no sympathy for, etc. ... [I]t is especially important for those who study, teach or write about social movements to try to get inside their skins, so to speak. Otherwise the study of social movements is likely to become one more academic sub-field, of little help to the movements themselves, either in terms of the analysis that is made or in terms of the likelihood of students in the field themselves becoming involved in progressive social movements” (Barbara Epstein in DeWitt 1998). My participation in contemporary social movements against capital – in addition to many meetings, parties, protests, organisation, mobilisation and getting beatn up, shouted and shot at - has included reflection through cameras, interviews and analyses. Niko Apel, Nina Moeller and I, as Tortuga Films, made “genova città aperta” (2002 / 49 mins) and “DOGS RUN FREE” (2004 / 33 mins). The former provides impressions and expressions of the events that surrounded the Genoa Social Forum and the G8 meeting in July, 200, and has been shown widely at film festivals and social movement gatherings, as well as featured by an independent cinema in Frankfurt am Main, Germany and regional, public television. The latter is an analytical glance at the building of Fortress Europe through migration management, regulation, and control and the social movements resisting these processes. Used for teaching in various universities and shown at events organised by the No Border movement: www.noborder.org

just that. It is always good to know what battles have been fought. Secondly, it will reveal a crucial difference in the conception of rights. For the commoners, as we shall see, the concept of a right to – which essentially is an articulation of a *power-to* – is not an abstract ideal based exclusively on the legal concept of an “individual”. Rather, a right of commoning is a particular *collective power-to* with regards to some thing or resource. Thirdly, the value practices of anti-capitalist movements and their strong focus on access to land, resources and the means of production and distribution – if we assume common normative grounds in that respect – show us by implication that contemporary liberal, economic conceptualisations of Free Software and other forms of social co-production in the intangible realm are misguided. When economists such as Benkler (2006) posit the idea of agency and autonomy as achievable in virtual commons, but without specific reference to real commons, they are confining such agency and “autonomy” to the state and to capital. Without the body and the commons of the land, the virtual commons separated from the basic source of all wealth, namely the material realm, becomes a “capitalist commons”.

I begin with a brief introduction to the processes of enclosure, before turning to the way in which enclosure has been resisted.

Capitalist democracy has historically been justified - as well as criticised - through myths of “improvement” (Thompson 1993) and instituted by a central, coercive authority: the nation state.

“[We] should remember that the spirit of agricultural improvement in the 18th century was impelled less by altruistic desires to banish ugly wastes or – as the

tedious phrase goes – to “feed a growing population” than by the desire for fatter rent-rolls and larger profits” (Thompson 1963: 217).

Central to capitalist logic is the myth - understood both as a legend and as a falsehood (Christman 1994) - that “improvement” of the land and development of goods and resources are only optimal or indeed only realistically possible with the implementation of strong and strongly enforced exclusive, private property rights, given the natural, predominantly self-interested, rational character of the human being.

“The arguments of the enclosure propagandists were commonly phrased in terms of higher rental values and higher yield per acre. In village after village, enclosure destroyed the ... subsistence economy of the poor – the cow or geese, fuel from the commons, gleanings, and all the rest. The cottager without legal proof of rights was rarely compensated. The cottager who was able to establish his claim was left with a parcel of land inadequate for subsistence and a disproportionate share of the very high enclosure costs”. (Thompson 1963: 217)

Where the myths have been insufficiently persuasive, capitalist democracy has been violently imposed (Thompson 1977; Linebaugh 2006) and/or the power of persuasion inherent in the manifestations of material and technological progress has further

helped entrench private, industrial interest and solidify capitalist democracy by destroying commons⁴.

Enclosure and violence continue in particular in connection with extractive industries - timber, oil, gold, silver and other minerals. This is most visible in tropical forests and other resource-rich regions hitherto unexploited. The degradation of eco-systems – rivers, oceans, fish stocks, to name but a few major eco-systems – is severe, because “[c]apitalism as a growth economy is impossible to reconcile with a finite environment’ (Leahy 2008: 481). As John Urry writes:

“Capitalism is not able to control the exceptional powers which it itself generated, especially through new forms of excessive consumption that are changing climates and eliminating some conditions of human life and its predictable improvement” (2010: 3).

The detrimental social, economic and environmental consequences - by now well known - have generated movements of resistance that are increasingly globally networked in practices and ideas (Linebaugh 2008). Environmental problems are by

4 As noted above, informational flows have always played a central role in the spread of capitalism. Enclosure from within is an example hereof: the idea of the advantages to be gained from enclosure is an informational flow that reaches the commoner's imagination, who then decides to build a fence. Moreover, working with indigenous peoples in the Amazon teaches one about the power of the ideas and associated “needs of the city”, which are quickly taken on by people moving to the city from the forest. Enclosure from within, however, is driven by a very violent politics of privatisation. See Mo Hume's “The Politics of Violence: Gender, Conflict and Community in El Salvador” (2009) for an insightful case study on the violence of developmentalism.

definition global in nature and the ideas and the concept of “the environment” have the capacity to link together different forms of resistance in geographically different places, which is why, as we shall see in Chapter 1, the “cultural environmentalism” movement invokes the idea of the environment as a connective metaphor.

The social history of resistance to capitalism, whose marginal voices presented alternatives to the bourgeois revolution that actually took place, has been well documented since the 1960s. Christopher Hill has argued that the radical voices of the seventeenth century:

“...speculated about the end of the world and coming of the millennium; about the justice of God in condemning the mass of mankind to eternal torment for a sin (if anyone) Adam committed; some of them became sceptical of the existence of hell. They contemplated the possibility that God might intend to save everybody, that something of God might be within each of us. They founded new sects to express these new ideas. Some considered the possibility that there might be no Creator God, only nature. They attacked the monopolization of knowledge within the privileged professions, divinity, law, medicine. They criticized the existing educational structure, especially the universities, and proposed a vast expansion of educational opportunity. They discussed the relations of the sexes, and questioned parts of the protestant ethic. The eloquence, the power, of the simple artisans who took part in these discussions is staggering” (1975: 362).

Those voices – in their particular contemporary formats – can still be heard in social movements today, reflecting the often used motto: “the struggle continues”. The struggle over ideas of organisation and the flows of information that spread the word repeats itself.

The way in which social history literature, as established by Hill, E. P. Thompson and those who were to follow, has served to connect past and current social struggles cannot be underestimated. Silvia Federici has argued convincingly that the transition into capitalism involved and presupposed the repression of women, including religious burning of witches, men and women, and the confinement of the woman to the house of a nuclear family as a basic reproductive unit (2004). Although writing from a marxian feminist perspective, her work can be read for the purposes of connecting spiritual ideas and practices with anarchistic feminism and contemporary social movements. Moreover, Federici has also shown that the “development of capitalism was not the only possible response to the crisis of feudal power” (2004: 61) and that throughout “Europe, vast communalistic social movements and rebellions against feudalism had offered the promise of a new egalitarian society built on social equality and cooperation”, and she observes that by 1525 “their most powerful expression, the “Peasant War” in Germany or ... the “revolution of the common man,” was crushed” (ibid.). E.P. Thompson has systematically revealed the contours of enclosure and thus the origins and character of capitalist democracy:

“For example, in the enclosure of Barton-on-Humber, where attention *was paid* to common rights, we find that out of nearly 6,000 acres, 63% (3,733 acres) was divided between three people, while fifty-one people were awarded between one

and three acres: or, broken down another way, ten owners accounted for 81% of the land enclosed, while the remaining 19% was divided between 116 people. The average rental value of the arable land enclosed rose in five years (1794-9) from 6s. 6d. To 20s. an acre; and average rentals in the parish were more than trebled” (Thompson 1963: 217; emphasis added).

That enclosures fomented resistance, riots broke out and uprisings were attempted repeatedly throughout the realm is hardly of surprise. Neither is it very surprising that consequently repression intensified and social life turned tumultuous. “The profession of a soldier was held to be dishonourable” (Thompson 1963: 81), and “[r]esistance to an effective police force [instituted as a preventative force of control and surveillance, deterrence and threat] continued well into the 19th century (ibid.). A very wide range of new “thanatocratic” laws to manage the side effects of enclosure – vagrancy, poverty, despair, homelessness, hunger – were enacted. These processes have been covered in Peter Linebaugh's “The London Hanged: Crime and Civil Society in the Eighteenth Century” (Linebaugh 2006; particularly 42-73). In very brief, these draconian laws to keep the poor in check further show the origins of capitalist democracy:

“The year 1661 saw the promulgation of the first slave code in English history, enacting that human beings become “real chattels” ... Also in 1661 the thirty-six Articles of War were promulgated ... twenty-two of which provide the death penalty ... Besides that thanatocratic code, discipline in the navy was maintained by “customs of the sea” [including]: the spread eagle, ducking, mastheading,

keelhauling, marrying the gunner's daughter, and the cat-of-nine-tails. In addition to the slave codes, the military codes and the Irish penal code, the criminal code with its “new” capital offences formed the characteristics of this era of substantive British law” (Linebaugh 2006: 53).

This is the background setting: capitalist democracy is violent and expansive. I now look at some of the ways in which it has been creatively resisted.

Driven from the destroyed commons as a consequence of enclosure, or leaving the commons before they were destroyed in search for urban promises, many drifted and due to legal and economic pressures went into ships and into factories. On board the ships, many of the wretched sailors began to establish a global solidarity and became pirates to fight for their cause. They began to recreate commons.

The history of anti-capitalist piracy unfolded mainly between 1650 and 1730 and culminated in “The Golden Age of Piracy” (1716-1726), during which an estimated 2.400 vessels were plundered and captured by pirate ships with a multinational motley crew - or “multiracial maroon community” (Linebaugh 2008: 107) - creating “a crisis in the lucrative Atlantic system of trade” (Rediker 2004: 9; see also Linebaugh and Rediker 2000). Pirates, slaves, and revolting labourers established egalitarian alternatives to abysmal conditions of the working classes upon whose labour the modern world was founded and they, we may say, hacked the transatlantic network of capitalist expansion, recreating commons or establishing practices of *commoning* (explained below):

“Pirates and Buccaneers, are Princes to [Seamen], for there, as none are exempt from the General Toil and Danger; so if the Chief have a Supream Share beyond his Comrades, 'tis because he's always the Leading Man in e'ry daring Enterprize; and yet as bold as he is in all other attempts, he dares not offer to infringe the common laws of Equity; but every Associate has his due Quota ... thus these Hostes Humani Generis as great robbers as they are to all besides, are precisely just among themselves; without which they could no more Subsist than a Structure without a Foundation.” (Barnaby Rudge, 1709, in Rediker 2004: 60).

It has been shown specifically how slaves began to develop a notion of global solidarity in the bottom of the ships that were the essential engines of growth “in the rapidly growing Atlantic system of capital and labor” and that these ships “linked workers free, and unfree, and everywhere in between, in capitalist and non-capitalist societies on several continents” (Rediker 2009: 348).

The notion of global solidarity, or an anarchistic union of peasant, poor and working classes, has also been explored by Benedict Anderson (2005). He traces the origins of global solidarity – and the imaginary of the current global social movement of movements for globalisation from below - through anti-colonial fiction and non-fiction literature and correspondence between key figures in particularly the struggle for independence in the Philippines in the 19th Century. Anderson shows how this anti-colonial imagination not insignificantly was shaped by experiences in the “mother countries” and the association with the “transnational libraries” or “la république

mondiale des lettres” (ibid: 28)⁵. The anti-colonial imagination emerged by weaving contemporary narratives from avant-garde literature with sensibilities, tactics and strategies formed by anarchist movements into a revolutionary consciousness with a global perspective. A melting pot in the undergrowth of the global village. The global dimension to this emerging revolutionary global force from below - thrown together in factories, ships and colonies - took obvious inspiration from the realisation that the majority of all people around the world were subjected to the power of the few in very similar ways: it was realised that this was not just a question of race. Indeed, the suffering of the peasants and working classes in the mother countries were in many cases even worse than that suffered by the colonial subjects, thus giving shape to global networks of resistance from below:

“My dear fellow, I have myself gone to see an iron foundry, I spent five hours there, and believe me, no matter how hardhearted a person may be, the spectacle that I witnessed there made the deepest impression upon me. Despite all the evil that the friars commit over there, our compatriots are fortunate compared to this misery and death. There was a workshop there for grinding up sand and coal, which, converted into the finest dust by the action of the milling machine, swirled up in huge black clouds, and the whole room seemed swathed in smoke. Everything there was filled with dust, and

5 Whether pamphleteering or blogging, the arrival of new information technologies is almost always marvelled at by political commentators, or decried as a terrible fall from values.

the ten or twelve workers busy shovelling the coal and sand into the machine looked just like corpses” (José Rizal, 1891, in Anderson 2005: 106).

Having taken note of the perennial and global nature of resistance to privatisation I now explore the difference between rights of commoning and the private property rights that replaced them and continue to replace them worldwide. This difference will have implications for our efforts to understand commoning as property in Chapter 2.

In the latest addition to the social history library, Linebaugh makes his best effort yet to connect movements of old and today around the concept of the commons in “The Magna Carta Manifesto: Liberties and Commons for All” (2008). Linebaugh sets on par, rightly so, the mainly peasant and indigenous experiences of contemporary enclosure with the experiences of those whose lands – whose commons – were enclosed in the transition into capitalism, especially from the 13th century onward. He lists the leader of the indigenous peasants of Chiapas, Subcomandante Marcos, the Nigerian women who in outrage in 2003 occupied a Chevron oil terminal, women of the upland communities of Vietnam, whose forest reserves are enclosed with consequent suffering, the Native Americans of the Adirondacks, the seventeenth-century conquest of Ireland, colonial Kashmir, and Amazon rubber tappers:

“The red and green threads connecting these regions and historical moments are environmental havoc, expropriation, and ordinary peoples’ struggles to protect common rights, resources, and social norms” (Epstein 2009: 701).

In doing so, “Linebaugh extracts tendencies toward enclosure and environmental destruction in the name of commercial profit, the substitution of petroleum products as the world's base economy, and the expropriation of indigenous people” (Aldous 2008: 1) and presents this dark side of “capitalist democracy” as a fall from grace inherent in the political reality of the separation of the Magna Carta and the Charter of Forests. These two Great Charters of Liberties (hereinafter the Great Charters), when understood and interpreted together had a direct relation to “a world of use values” (Linebaugh 2008: 42-43) in that the common rights, the rights of the commoners, were “laid upon the land” (Thompson 1993). That is to say that the customs of the people, the customary practices that they had in common and that they practised when *commoning* were articulated in the Great Charters, thus integrating the political organisation and activities of the commons and establishing a freedom for the commoners outside of the state. “*Commoning*” is a verb, meaning what commoners customarily do “on the commons” (Linebaugh 2008). De Angelis in this regard writes:

“Commoning, a term encountered by Peter Linebaugh in one of his frequent travels in the living history of commoners’ struggles, is about the (re)production of commons. To turn a noun into a verb is not a little step and requires some daring. Especially if in doing so we do not want to obscure the importance of the noun, but simply ground it on what is, after all, life flow: there are no commons without incessant activities of commoning, of (re)producing in common. But it is through (re)production in common that communities of producers decide for themselves the norms, values and measures of things” (De Angelis 2006).

Moreover, commoning also means a community-based form of ecological sustainability. In practice and political reality, the Great Charters established that “the people”, i.e. the commoners, had a right to farm the land and hunt animals for food, use the forests for fuel, and as such be, largely, self-sustaining and independent of the economy of the nobles. That is how Linebaugh can claim that the Magna Carta, when considered with its companion, the Charter of the Forests, “goes deep into human history” (see below), because the freedom and liberties involved in customary practices of commoning included all aspects of human survival: food, fuel and building materials in an intimate relationship with the land to which they belonged. What concerned commoners were not abstract rights, but practical approaches to life, that nevertheless could be articulated into property relations with regard to land and natural resources. A commoner would not ask “What is my individual right?”

Commoners first think not of title deeds, but human deeds: how will this land be tilled? Does it require manuring? What grows there? They begin to explore. You might call it a natural attitude. Second, commoning is embedded in a labor process; it inheres in a particular praxis of field, upland, forest, marsh, coast. Common rights are entered into by labor. Third, commoning is collective. Fourth, being independent of the state, commoning is independent also of the temporality of the law and state. Magna Carta does not list rights, it grants perpetuities. It goes deep into human history” (Linebaugh 2008: 45).

This *belonging of commoners to the land* stands in sharp contrast to the post-enclosure arrangements where *land belongs exclusively to individuals*. Nevertheless, they refer to the same

organisational questions concerning social relations with regard to things: access and use of resources. And for a long time they co-existed as we shall see. The transition into capitalism, however, spells the end of commoning⁶.

Understanding Linebaugh's argument is helpful for an understanding of the transition into capitalist democracy and thus sets the scene well for this essay. In a time where most of Europe was in the thrall of war and conflict the Great Charters articulated peasants' demand for the right to their custom of control over their own existence; they delimited the brutishness of royal authority: "the sovereign power of the king could be bound and held accountable" by means of the Great Charters. However, Linebaugh makes explicit note of the ways in which the Magna Carta also protected the rights of the rising mercantile classes. Quoting from Chapter 41 of the Magna Carta, he writes that "All merchants shall be able to go out of and return to England safely and securely and stay and travel throughout England, as well by land as by water" to make it clear that the emerging capitalist market also took shape from the charter; and from Chapter 35 to note that in addition to providing freedom to exercise market relations the charter also defined the basic units (or parameters) for commodities, without which the industrial, contractual market relations and the commodity could not be imagined: "Let there be one measure for wine throughout our kingdom, and one measure for ale, and one measure for corn, namely 'the London quarter'; and one width for cloths whether dyed, russet or halberget, namely two ells within the selvedges.

6 Or, as we shall see, in Section 2.6, capitalism itself is based on a form of commoning – since all production is social – but it is a qualitatively different form of commons upon which it rests; indeed, to speak of a "capitalist commons" is somewhat oxymoronic.

Let it be the same with heights and measures” (Linebaugh 2008: 30).

There are therefore two different movements emerging from the Great Charter and the transition into capitalism can be understood as an ever narrower interpretation of the charters on a path toward the establishment of *exclusive private property rights* – privatisation - substituting for *collective rights of commoning*. While exclusive, private property rights are imposed, collective rights of commoning are emergent properties of the relations between commoners.

The American Declaration of Independence is in part a narrow interpretation of the Magna Carta that neglects “its pastoral and woodlands underpinnings” (Linebaugh 2008: 124), thus making it possible for American independence [to be] conducted in the name of Magna Carta [and to] occur in the midst of Atlantic expropriation of commons lands” (Linebaugh 2008: 135). The Magna Carta was a “document of reparations, returning the forest, whereas the declaration is a document of acquisition” (Linebaugh 2008: 124). In other words, the era between the Magna Carta (1215) and the American Declaration of Independence (1776), can be seen as an important period of the transition into capitalist democracy, where *the individual rights to property* came to override *the customary and collective rights to land and subsistence* that in great part had provided the inspiration for the democratic ideals of capitalism. The American Declaration of Independence and the founding fathers made explicit reference to the Magna Carta, but *not* to the Charter of Forests. Over time the Magna Carta became a document of individual freedom and liberties, while the rights of commoning were conveniently forgotten.

The American Declaration of Independence, therefore, is a milestone in the transition into capitalism, on Linebaugh's account. That is because the American Declaration of Independence justifies the power of the state and articulates *the right of an individual to private property*, while the Great Charters put limitations on sovereign powers and articulate *collective rights of commoning*. It is exactly this development - from an articulation of customary practices of commoning, i.e. collective rights to land access and use, to an abstract articulation of the individual right to private property - that defines the transition into capitalist democracy. It also defines the subjugation of people – thus rendered legal persons, citizens with abstract rights – to the nation state. The commoners' collective autonomy was lost in this process.

In this essay I explore how commons can be recreated with particular reference to property relations and social movements. By doing so, I begin to establish a framework for an anti-capitalist conception of property. Such a conception, I hold, is indispensable for social organisation beyond the nation state. My discussion starts with an exposition of the Free Culture movement, which shares important political views with the Free Software movement.