

Among the Digital Luddites

by T.J. Stiles*

I'm here to throw empirical salt on theory's slug. In discussions of copyright or the literary marketplace, there is too much generalization. We often see the experience of one author with one book presented as a template for everyone, but book publishing doesn't work that way. Each book is a unique product. One can take ten years to write, another ten weeks. It might be filled with photos and maps, or with none. What is true for one author will not be true for another.

I am a self-employed author of serious nonfiction in the commercial marketplace. My world is summed up by an episode of *The Simpsons*, titled "The Front."¹ Bart and Lisa take Grandpa Simpson to visit the studio that makes "Itchy and Scratchy" cartoons; they've been submitting freelance scripts in Grandpa's name. The studio chief says to Grandpa, "Are you *sure* you're a writer? You're so old!" Grandpa replies, "Where's my check!" The studio chief says, "Oh, you're a writer all right." Self-employed writers can't spend five minutes together without discussing money. If you think it's because we're greedy, let me quote *The Aviator*: "The only reason you don't care about money is that you've always had it."² Like all of you, we want to make a living doing what we do best. We know we might fail, but we want to be able to try.

But we face a structural problem. We are disaggregated individuals in a global economy dominated by large institutions that feel free to take advantage of us: huge corporations and sometimes, sadly, even universities. But our shared culture depends upon individual voices. Dissent comes from outside institutional thinking; creativity comes from the individual, often in opposition to majority opinion.

Some think us unnecessary. Because, you know—fan fiction. Academic monographs. But writers of serious nonfiction for the commercial market do what no one else can do: devote years of our lives to creating a work of knowledge *and art*, combining literary and scholarly virtues. Have any of you read Richard Rhodes' *The Making of the Atomic Bomb*?³ Probably no one in this room will ever

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1. *The Simpsons: The Front* (Fox television broadcast Apr. 15, 1993).
2. *THE AVIATOR* (Miramax 2004).
3. RICHARD RHODES, *THE MAKING OF THE ATOMIC BOMB* (1986).

contribute to the public good as much as he did with that one book. My academic friends, all your journal articles will not be so important a body of scholarship. My fellow writers, we will probably never equal it in artistry. *And he did it for money.* Who can argue that we would be better off without Joan Didion, Michael Lewis, Robert Caro, Rebecca Solnit or Taylor Branch? Whatever you think of my last book, *The First Tycoon*—and some people hate it—there had not been a serious biography of Cornelius Vanderbilt, one of the central figures in the making of the modern corporate economy, since 1942.⁴ The academy and hobbyists had nearly seventy years to produce a study, and didn't.

There are those who say they want to promote the public good by supporting authors who write to be read. First of all, the basic premise of the market economy is that the public good is served by people creating things that other people wish to buy. Second, the “author who writes to be read” formula confuses a part of the process for its end purpose. You might as well say humans live in order to breathe. No: authors write *to be valued*. I'll prove it with a thought experiment. Professor X publishes an academic study for free, giving up all rights. But reviewers scorn her book. Scholarly journals denounce it as a career-destroying pile of gibberish. Reviewers in newspapers mock it; the *New York Times* suggests that she should be legally barred from writing again. Now, does Professor X declare, “Hooray! They read my book! That's all I wanted! I'm so happy!” Of course not.

We write to be valued, and *to derive the rewards of being valued*. We are all embedded in reward systems—though they are not all the same. I want direct financial return from book sales. Not so in the academy. It has a prestige economy. Academic authors advance in their professions by acquiring prestige from their colleagues through their publications. That incentive directs their writing toward a closed professional audience; it puts a premium on questions of narrow disciplinary interest, on the use of jargon. I have heard more than one anecdotal account of a professor denied tenure because she wrote too well—and it's not surprising, and not necessarily wrong. I think a protected space for academic studies and discourse is *very* important for society. But our culture needs more than just academic writing.

Let's not forget that the market economy is merely masked for academics. The business model of universities is to *deny access to information*. They select a small percentage of student applicants, and grant them direct access to instructors. If you think the personal transmission of ideas from teachers to students doesn't have extremely high value, I had a much better college experience than you did. The more students denied admission—the greater the exclusivity—the higher the market price of that education.

But here I am generalizing. Back to me. I'm going to slightly fictionalize my personal story, so I don't broadcast my finances to the world. Let's say I have an idea for a book: the definitive biography of Hamilton Fish, the nineteenth-century

4. See Carlo Wolff, 'First Tycoon' Recalls the Robust Cornelius Vanderbilt, BOSTON GLOBE, Apr. 27, 2009, at G8.

Secretary of State.⁵ Is self-publishing an option? No. Experience shows it works best for well-defined, voracious, built-in audiences, such as for romance and science fiction, or for professional audiences seeking technical information. Most of my sales are still in print, as they are across the industry. Also, I need the financial support of an advance, due to the labor-intensive process of researching and writing a biography. I looked into the advances in self-publishing. They suck. When my book comes out, I will need the publisher's institutional expertise and contacts with vendors to produce maps, photographs, indexes and other supplementary material.

So I get a contract with Lemming Cerf House with a very, *very* good advance: \$200,000. But the publisher usually breaks the advance into four equal parts: 25% on signing, on delivery and acceptance of the manuscript, on hardcover publication and on paperback publication. That's \$50,000 each—minus \$7500 to the agent, who takes 15% of everything. Why have an agent? Commercial publishers only take proposals from agents. And, were it possible to do without one, I would get a lot less than \$200,000.

So I have \$42,500 with which to write the book. Remember, this is not extra money on top of a salary. This is everything. I've never taken less than four years to finish a book. Let's say, for argument's sake, that I go into a frenzy to finish in two years. My wife and children have no needs. I never move, or have to travel. I have no health issues. No crises with my children. No car trouble. (I dealt with all those things repeatedly over the last decade, by the way.) I have \$21,250 for each year. But I will have to pay self-employment tax, which is double the payroll tax. I have to buy my own health insurance. My last policy for myself alone cost \$200 per month; my current policy costs about \$1000 after the ACA subsidy, and also not counting the weeks I have spent on the phone fighting over that subsidy and with my insurance carrier—in part because I have to estimate my income for the coming year, in part because my income changes unexpectedly. I provide my own retirement benefits. I get no sick days, no paid vacation. Every moment not working is a financial loss. Talking to you people, right now, is costing me money.

One copyright denier loftily suggested to authors, "Let them have patrons!"⁶ *Patrons*. I guess that means grants. These are few and paltry, for the most part. Most are solely for academics, requiring a doctorate. Of those that are not so constrained, many are residential. I can't move my family of four across the country for a single year for \$30,000 or \$40,000—or even \$60,000—nor would I abandon them. When I do find a suitable grant, I do not have the network of colleagues that academics have to offer recommendations. Years ago, I was overjoyed when George Plimpton agreed to write a recommendation for me. As I sat holding his letter, promising his help, I heard on the radio that he had died. It's

5. See *Biographies of the Secretaries of State: Hamilton Fish*, U.S. DEP'T STATE, OFF. HISTORIAN, <https://perma.cc/73TH-E9YB> (last visited Jan. 22, 2015).

6. Laura Miller, *Your Favorite Author, Brought to You by a Wealthy Patron*, SALON (Oct. 4, 2011), <http://perma.cc/B57S-SKEC>.

like that. Let me tell you, independent authors hate to apply for grants. It's demoralizing, it's usually futile, and even when you get one they don't solve your problems. It's no substitute for commercial income from our work.

I have supplemented my income with secondary activities. I teach now and then on a freelance basis. I have done some freelance commercial writing. But two years ago I lost my big freelance client, and my income has dropped by twenty to forty percent a year. In the past, I have resorted to desperate measures. I like to say my last book is so big because it's a tombstone to the 401(k) that gave its life so the book could live. After the Pulitzer, I got paid speaking engagements for the first time. For a while. Believe me, it helped. But all of this was a distraction. Rather than prove royalty income is unnecessary, it proves the opposite. I estimate the necessity of making extra money has probably cut my productivity in half.

When I finish a book, I have to provide photographs out of pocket. For example, the Bancroft Library of UC Berkeley charges \$17 for each digital reproduction of an image in its collection, plus a \$12 service fee, and \$100 for reproduction rights.⁷ That fee applies even if the item was created 150 years ago. I have to assume the Berkeley Libraries are a big supporter of copyright protections. Just ten photographs like that takes a big bite out of the second advance payment. Then there are maps and indexing, which I pay for as a charge against royalties; at least they're not up-front costs, another argument against self-publishing. A year later, the book is finally published. If I'm lucky, the publisher sends me on tour. With other publicity work from home, that takes up a month of working time, at least.

Something like seventy percent of commercially published books lose money.⁸ That's important to remember when we hear some people claim that publishers should all die. Those authors are being subsidized; they are still getting advances, still getting at least some sort of attention and market presence, still building their careers. Self-publishing is awash in books that go nowhere, too, but the authors are getting a lot less for their efforts. Traditional publishing is hardly perfect, nor should it be the only path to releasing a book, but authors very much need access to business partners with capital to invest in their careers.

Let's say I get lucky, and I earn back my advance. Royalties are on a six-month cycle. A royalty check can take several months *after* the end of that six-month period to arrive. If my extraordinary good fortune holds up, I'll have some subsidiary rights sales. On my last book, we sold the audio rights, I think, for \$2000. That's two months of health insurance premiums. That's a surprise auto repair for our twenty-year-old car. Even such small income streams matter immensely to me. Despite the Pulitzer, my books have never hit the *New York Times* bestseller list.

I am not owed a living by the world. I may screw up, or get unlucky, and fail.

7. BANCROFT LIBRARY, UNIVERSITY OF CALIFORNIA, BERKELEY, PHOTOGRAPHIC SERVICES INFORMATION AND ORDER FORM (2013), available at <http://perma.cc/VMH3-BGSY>.

8. Michael Meyer, *About that Advance . . .*, N.Y. TIMES, Apr. 12, 2009, at A27.

And no human institution is perfect. But the copyright regime gives me hope of building my career, of accumulating income streams that make my work viable. But now authors like myself face the Digital Luddite culture: the bizarre return of a nineteenth-century belief system. Like the Jacksonians of the early steam age, who believed money could only be gold coin, Digital Luddites believe that only tangible stuff has worth—that the value of a creative work lies in its physical medium. If you're not buying paper or plastic, the tech world tells us, you're not getting anything worth paying for.

This assault on the value of our work is driven in part by the new robber barons, Amazon and Google. Amazon is convincing readers that all digital books, from joke books to serious biographies, are all worth the same: \$9.99. Or less. But reproduction has *never* been a large part of the cost of a book; we have always paid for the creation, not the printing. As Motoko Rich of the *New York Times* pointed out in 2010, out of the list price of a \$26 hardcover, the publisher might spend \$3.25 on printing, warehousing, distribution and returns.⁹ With such pricing, Amazon has been telling readers dishonestly that this \$3.25 is actually \$16, justifying an e-book price of \$9.99.¹⁰ It is coercing authors and their business partners, publishers, to conform, which can only mean a severe loss of income for authors. The classic robber barons had monopoly control over how farmers got their grain to market—but at least they didn't try to control grain prices, to force farmers to charge less. Amazon is actually undermining the free market. It is not allowing the market to allow e-book prices to find their equilibrium; it is imposing an artificial price based on its corporate strategy.

When authors want to add value to their works in digital form, to transform their *own works*, they find Google is squatting on their digital space. I understand that academics who write narrow scholarly studies might like people to find their work through Google. So, if Google had asked to digitize their works in their entirety, they could have said yes. I don't see, though, why Google didn't ask, and why I should be forced to say yes because someone else might have.¹¹ And if Google can appropriate our work, so can any other company. Remember, Google is legally obliged to try to make a profit, not promote the public good. If it didn't create its book-scanning program for profit, its shareholders could sue. It is monetizing my work *in its entirety* without my permission and without sharing a dime. That's not only unfair; it pushes me away from possible digital exploitation of my creation.

And then, of course, there is flat-out piracy. It is left to individual authors to combat it. We, the isolated individuals, struggling to survive, have to enforce the laws ourselves—with toothless takedown notices.¹² One recent pirate of my work

9. Motoko Rich, *Math of Publishing Meets the E-Book*, N.Y. TIMES, Mar. 1, 2010, at B1.

10. *See id.*

11. *See Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 105 (2d Cir. 2014) (holding “that the doctrine of ‘fair use’ allows defendants-appellees to create a full-text searchable database of copyrighted works and to provide those works in formats accessible to those with disabilities”).

12. For an overview of 17 U.S.C. § 512's provisions governing the notice and takedown process for removing infringing material, as well as several independent authors' experiences with the process'

has used Google Docs, generating revenue for Google through its piracy. Not surprisingly, Google is not particularly interested in helping me to stop it, law or no law. This infuriates us. People ask, “But do you really think pirates would buy an equivalent amount if you stopped them?” Please name one area of the economy in which we demand that kind of justification before we act against theft. We ban stealing to maintain the social contract under which you pay for something that was created for sale. No police officer refuses to arrest a shoplifter unless the shopkeeper presents an analysis of the financial loss.

I have heard the theory that so-called “artificial scarcity” of digital goods is unsustainable. First of all, intellectual property only exists because of government intervention in the economy. It isn’t a natural substance. Second, we hear nothing about that theory when it comes to money or securities, which exist almost entirely in digital form. Why not pirate some dollars, and double your bank account? They are just electrons, limited only by “artificial scarcity.” Because the FBI will arrest you, that’s why. Enforcement creates the norm, not some natural law.

Because there is no serious enforcement of intellectual property rights, an entire generation has come of age believing that physical stuff has value, but digital creations are literally worth nothing. Professors who would never steal a five-dollar stapler for a class steal hundreds of dollars of pirated chapters for digital course packets. Such income has dropped off dramatically with the shift from photocopying to digitization. Like their students, they don’t believe digital works have value. I must stress that I am not arguing for the prosecution of millions of individuals. We should *not* throw individual consumers in jail, but we should target the Kim Dotcoms, the big digital carriers who profit from wholesale piracy.¹³

I close by noting the consequences. In the nineteenth century, American magazines printed pirated British prose rather than pay American writers; the practice stunted the emergence of a national literary culture.¹⁴ We could read Dickens without paying him; was that worth sending Melville to work in the Customs House? Who knows what he might have produced with greater financial security? In my case, I planned a really expansive digital edition of my next book,

ineffectiveness, see Stephen Carlisle, *DMCA “Takedown” Notices: Why “Takedown” Should Become “Take Down and Stay Down” and Why It’s Good for Everyone*, NOVA SE. UNIV., COPYRIGHT OFF. (July 23, 2013), <http://perma.cc/EDA8-QPQR>.

13. Kim Dotcom is the founder of the file-sharing websites Mega.com and now-defunct Megaupload. Dotcom was indicted by a grand jury in the Eastern District of Virginia in 2012, charged with engaging in a racketeering conspiracy, conspiring to commit copyright infringement, conspiring to commit money laundering and two substantive counts of criminal copyright infringement. Press Release, U.S. Dep’t of Justice, Justice Department Charges Leaders of Megaupload with Widespread Online Copyright Infringement (Jan. 19, 2012), <https://perma.cc/7NAZ-CTDJ?type=source> (last updated Sept. 15, 2014). As of the writing of this Article, Dotcom has yet to be extradited from New Zealand, where he currently resides; his extradition hearing was most recently postponed until June 2015. Cyrus Farivar, *Why Kim Dotcom Hasn’t Been Extradited 3 Years After the US Smashed Megaupload*, ARS TECHNICA (Jan. 18, 2015), <http://perma.cc/WX56-DVLZ>.

14. See Bingchun Meng, *Property Right or Development Strategy?: Protection of Foreign Copyright in 19th Century America and Contemporary China* (Media@Ise, London School of Economics, Working Paper No. 11, 2007).

with dynamic interactive maps, embedded videos and ways for readers to explore the intertextuality of this book with my previous two. But why send readers to an edition that will earn me less than the hardcover, that will be pirated immediately and that Google might appropriate? I'm not running a charity. That is a digital work that will not come to be, because of piracy and the attacks on the value of digital creations.

Beware, my friends: If piracy reigns unchecked, if the attack on the value of digital work continues, you will see attempts at technical solutions that you won't like. You'll see e-books issued in multiple volumes to maintain the price. Even worse, you'll see book streaming, in which *no one* can possess the digital edition, but only pay to access it—for as long as the publisher keeps it on the server, of course. I don't want these solutions, but I see them coming. Government, the academy, libraries and the reading public should be the allies of individual authors, not of corporate behemoths that promote Digital Luddite ideology out of cynical self-interest. Scorn the market economy if you wish, but don't try to get rid of it by starting with its most vulnerable players. The point of copyright is to foster new art and knowledge, to create new riches, not to loot the tombs. The business of writing has never been more precarious, and that means copyright has never been more important.