

Asserting the Public Interest in Digital Media: The Challenge for Philanthropies

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It has now become abundantly clear that the Internet and other digital technologies are radically changing commerce and organizational behavior, politics and citizenship, social life and childhood, and much, much more. But what about philanthropy?

Even as Internet-driven innovations transform the book, toy, travel, recording and publishing industries – not to mention dozens of academic and professional milieus – much of the philanthropic world continues along a familiar path in its grant-making priorities and internal practices, as if little had changed. Sure, most have set up their own websites, and email usage is now routine. And support for online experiments and some policy advocacy have started to swell. But, at the risk of sounding churlish, I believe the foundation community could do a great deal more to intelligently advance the public interest in digital media.

This is a broad generalization, I realize. The foundation community is quite diverse, and has shown varying degrees of interest and sophistication toward the new media. That said, the philanthropic community as a whole could do much more to: 1) understand the long-term political, economic and social implications of the Internet; 2) identify vital strategic opportunities for advancing the public interest; and 3) change their own organizational practices in order to better exploit the dynamics of the Internet.

Let me confess my own prejudices here about grant-making in the digital universe. I regard the foundation world as a very special force for fostering democratic values in our culture and social equity in the marketplace. This role is especially important in today's climate of market triumphalism which collapses all values and preferences into a narrow economic calculus and willfully discounts the role of government in promoting social well-being and fair, competitive markets. Foundations are one the few institutions in our society with the resources and

expertise to nurture values that lie beyond the market. Their leadership is essential in helping re-interpret the values of democratic culture in the emerging digital society.

Too often, however, I have seen foundations lapse into a path-of-least-resistance approach, or grant-making that is more sensitive to reputational appearances than to actual needs or strategic opportunities. It is understandable how this happens. “Safe” grant-making entails lower risks of failure, a higher likelihood of favorable press coverage and simpler relations with a foundation’s board members. Truly innovative grant-making, by contrast, elevates the risks of grantee failure, critical press coverage and contentious board relations. It also tends to invite political controversy.

It is perhaps inevitable that the grant-making process will be buffeted by short-term pressures, philanthropic fads and parochial internal politics. But it bears remembering that the most significant innovations are likely to entail missteps and provoke criticism. As they say in Silicon Valley, the best way to innovate faster is to fail more often. And who could be better situated to weather such costs and risks than independent, endowed foundations? If foundations don’t sponsor bold, experimental initiatives in areas that the market finds unattractive, who will?

So first, I urge a more engaged and bracing *stance* toward the challenges posed by digital technologies. This entails a more venturesome temperament, a more sophisticated grasp of the technologies’ deeper implications, and a civic vision that is distinct from market priorities.

But this grand hope of mine perhaps begs a more basic question: How should we begin to understand “the public interest” in the digital media of 2000, and what sorts of grants would advance it?

What *Is* the Public Interest in the Digital Environment?

It used to be fairly easy to define the “public interest” in the mass media. It was the non-commercial content and legal accountability for broadcasters mandated by the federal government. It consisted of rules for candidate and citizen access to the airwaves, for example, through the Fairness Doctrine and the Equal Opportunities (“equal time”) Rule. There were also minimum amounts of public affairs, local and educational programming, limits on corporate ownership of media properties, and a handful of other regulations that tended to be broadly framed and irregularly enforced.¹

Alas, it is now clear that this regime for assuring the public interest in broadcasting was more marginal than substantive in impact. It was a well-maintained

fig leaf designed to hide the embarrassing fact that broadcast licensees provided exceedingly little in return for their absolutely free grant of a valuable public resource, the airwaves.

The proliferation of new media technologies and the ensuing deregulation of the Reagan/Bush years, culminating in the 1996 Telecommunications Act, swept aside the bipolar world of broadcast licensee versus a minimalist “public interest.” It enthroned a far more complicated, fragmented scenario of multimedia abundance -- VCRs, cable television, satellite television, and now, the Internet, the World Wide Web and a veritable hothouse of media innovations. This plenitude of media has made it harder to justify the “scarcity rationale” for broadcast regulation (even though, by any strict economic reckoning, scarcity remains as long as there are more applicants for broadcast licenses than licenses available).

But this debate has been made moot by politics. The consensus philosophy animating the 1934 Communications Act, that broadcasters would receive free use of the airwaves in return for a modest regimen of public trusteeship, is now all but forgotten. Nature abhors a vacuum, and so into this philosophical and political void, a chorus of high-tech CEOs and libertarians has declared the irrelevance of spectrum scarcity and government mandates. An unfettered market *is* the public interest, they insist. Now that individuals can supposedly self-organize themselves to assert their own interests in the cyber-marketplace -- fulfilling Adam Smith’s dream of a perfect market, it is claimed -- who needs government?

An imperial global marketplace is, in fact, supplanting many powers of our republican commonwealth, or at least rendering them more problematic. Which is one reason why the outcome of the Department of Justice’s antitrust case against Microsoft should be so revealing. It will be bellwether statement delineating the practical limits of the democratic polity and the scope of *laissez faire*.

Despite its apparent simplicity, the hardy, deceptively simple catechism of the idealized market is, in fact, just as incoherent as the public trusteeship regime in its dying stages. Media policymaking today is driven by a steady train of inter-industry squabbles about market structures, legal entitlements and public subsidies, which invariably require government intervention. So much for the free market. The terms of this government intervention are largely ad hoc and unpredictable, and driven by campaign contributions, lobbying clout, market muscle and technological design, rather than civic vision or consumer interests. So much, too, for the “public interest.”

Consider the more salient media policy disputes of the past 20 years: copyright control of videotape rentals; compulsory cable licenses for broadcast programming; pricing and leased access on local cable systems; rules for network ownership and syndication of programming; cross-media ownership limits; and the terms of public compensation for the government’s free grant of spectrum to digital

broadcasters; among others. I defy anyone to explain what consistent principles have guided these policy outcomes except the disingenuous plea of every industry, “I only want my fair advantage,” and the vagaries of Washington politics.

In such a turbulent environment, public interest advocates have been relegated to a secondary status, bravely trying to interject their civic and consumer arguments into the larger battles of media giants. Their views have sometimes prevailed, but usually by piggybacking the market interests of one media industry or another. How can any principled vision of “the public interest” be developed in such a volatile, market-dominated arena?²

In an unexpected way, the very power and concentration of market forces are helping to forge a new, more coherent account of the public interest. Although the lineaments of this new paradigm remain hazy, I believe much is clarified by the idea of an “information commons” besieged by market enclosure. Commercial interests are increasingly using their market powers, new technologies and federal law to commodify currently free information, as Professor Yochai Benkler has written.³ They are transforming the public domain into private property.

In the remainder of this paper, I want to sketch some of the key ways in which the public’s information commons is being colonized and degraded. I will then suggest some steps that foundations might take to confront this worrisome trend.

Can the Public Interest be Asserted? Some Pivotal Battlefields

As Larry Lessig brilliantly explains in his new book, *Code and Other Laws of Cyberspace*,⁴ control of the architecture of the Internet is critically shaped by the design of software code. This is enabling commercial interests to dominate a new Internet-based type of policymaking for privacy, consumer protection, free speech and many other policy realms traditionally controlled by government. A fierce market imperialism is laying claim to the information commons, subtly embedding certain values into the deep structure of markets, software, and law.

It is critical, therefore, that the foundation world keep its eye on core civic and democratic values as this unfamiliar new type of policy architecture evolves. It is easy to forget that the media/high-tech worlds spend billions trying to construct intoxicating market identities for their products. We must remember that the techno-visions of business are not necessarily identical with the long-term interests of an open, democratic society. If our civic culture is to remain robust, accountable and inclusive, I believe that citizens must be able to:

- Freely contribute to and use a robust public domain of information, protected from companies that would over-proprietize it through expansive intellectual property claims;

- Ensure that Internet governance, especially ICANN, is open and democratically accountable, and not dominated by corporate interests;
- Generate and use free software and open source code software without the prospect of legal or technical sabotage from the proprietary world;
- Check growing concentrations of corporate media power which threaten to undermine competitive markets and the integrity of our democratic polity;
- Assure the privacy of personal information through stronger, legally enforceable privacy protections;
- Enjoy competitive choices of Internet service providers which themselves have open, non-discriminatory access to the broadband cable platform; and
- Access more government documents and databases online, especially those of a timely political nature such as congressional bills and reports.

Below, I briefly review four particularly important policy challenges in which the foundation community could play an invaluable role.

1. Creating a New Politics of Intellectual Property.

There are times of confusion and transition when we sense that a problem exists but haven't yet found a way to talk about it in public, let alone politicize it. Then a vehicle is found which galvanizes new energies. So it was that the dilemmas facing women in the early 1960s were finally given voice by Betty Friedan in *The Feminine Mystique* (which catalyzed the women's movement); that the reckless uses of pesticides were documented by Rachel Carson's *Silent Spring* (which helped create environmentalism); and that the design dangers of automobiles were exposed by Ralph Nader's *Unsafe at Any Speed* (which galvanized the consumer movement).

We are living in a similar nether zone right now with respect to intellectual property rights. But will a movement materialize?

The civic, educational and political deficiencies of intellectual property rights in this digital age are *not* well-understood. But there is a growing anecdotal sense among the public that something is seriously wrong in cyberspace: Big Companies want to squelch the MP3 software that allows the downloading of music. They want to ban the DeCSS software that can de-encrypt access controls on digital video disks, thereby preventing fair use of DVD content. They want proprietary control over technical standards wherever it can be achieved. They want to impose restrictive

licensing agreements on users to control the uses of digital content, and institute micro-payment regimes to tightly control the flow of even small bits of information.

These and other attempts to enclose the information commons are diminishing the scope of free speech, artistic expression, research, pedagogy, and public dialogue.⁵ The depth of the proprietary incursions are not readily seen, in part because the public domain has historically been a vestigial, somewhat ill-defined realm whose replenishment is taken for granted. But like nature itself, the public domain can be depleted. Appropriations and assaults can be absorbed for only so long before the “ecosystem” of information itself is jeopardized.⁶ That is what is happening now, through a number of industry-backed initiatives:

- technological locks on information, which in effect voids the private/public bargain of copyright law by preventing information from being freely used by the public (Digital Millennium Copyright Act of 1998);
- a twenty-year extension on the term of copyright protection, giving content owners a windfall of billions of dollars and keeping thousands of books, music and other properties out of the public domain (*Eldred v. Reno* litigation over the constitutionality of the Sonny Bono Copyright Term Extension Act of 1998)⁷;
- new contractual provisions on software that would greatly enhance the protections of copyright law and impair the ability of users to fix bugs and return defective software (the proposed Uniform Computer Information Transaction Act, formerly known as Article 2B of the Uniform Commercial Code);
- private ownership rights in “public facts” such as stock quotations and the box scores of sporting events, a move which could in effect moot the fair use provisions of copyright law (Collections of Information Anti-Piracy Act); and
- broad patent protections for basic business innovations such as “one-click shopping” (Amazon.com), online auctions (Priceline.com) and online fantasy sports games (FantasySports.com). It is argued persuasively that such acts of proprietary overreaching are stifling competition, innovation and economic growth.⁸

The common denominator here is the great lengths to which companies will go to obtain sweeping new extensions of intellectual property rights at the expense of the public interest. In most cases, the politically powerful champions of “maximalist” copyright protection (in Pamela Samuelson’s phrase)⁹ have prevailed.¹⁰ Banding together as The Copyright Assembly, a new coalition of 30 industry trade associations has the audacity to wrap themselves in their publicly granted monopoly and then call the public “intruders” for wanting to enjoy its side of the copyright bargain, through fair use and public domain protections.

Why such fierce tenacity in seeking broader intellectual property rights? Because the value of such rights has increased dramatically as computers and the Internet have made “knowledge” a valuable form of capital. No wonder copyright maximalists aggressively seek new legal entitlements from a Congress amenable to influence-peddling and an intellectual property regime over-invested in some archaic premises.¹¹

James Boyle persuasively argues that we need “a politics, or perhaps a political economy, of intellectual property.”¹² I concur: We need a means to explain how the public’s vital interests in an information commons are being subverted – and why a popular movement to reclaim the public domain, fair use and other intellectual property rights must be launched. We need an “information politics” that articulates the public’s broader, long-term civic, artistic and *political* interests in information. How, after all, can the public use and share information -- how will our democratic culture thrive -- if the information commons is essentially privatized?

2. Making ICANN Democratically Accountable.

Given our times’ overweening faith in the market, it may seem only natural that governance itself is becoming outsourced to the private sector. A worrisome example is the U.S. Government’s surrender of authority over the Internet’s address system to ICANN, the Internet Corporation for Assigned Names and Numbers. With the sanction of the U.S. Department of Commerce, ICANN is chartered as a California non-for-profit corporation to administer policy for Internet addresses and various protocols.

ICANN likes to portray this authority as a fairly mundane, technical matter of domain administration, something inherently non-controversial. Yet in creating ICANN, the Department of Commerce itself repeatedly referred to the need to transfer policymaking authority over the Internet to private hands. The Commerce Department delegated this authority, furthermore, without spelling out clear, legally binding limits to ICANN’s authority.

This outsourcing of government authority means that ICANN’s mutant private policymaking is not subject to the customary accountability that we expect from government, as provided by the Federal Advisory Committee Act, the Administrative Procedures Act, the Government in the Sunshine Act, the Ethics in Government Act, and the Freedom of Information Act. The lack of a legal charter of specific scope and procedural accountability is especially troubling considering the early dominance of corporate interests on ICANN’s board. Policies were being adopted even though half of the anticipated board, representing the general public, had not been elected. Even when consumer/user representatives are seated, will they be able to afford to fly to meetings in Santiago, Cairo, Berlin and other world capitals

and match the policy resources of industry-affiliated representatives? Why should corporate interests have a privileged array of board seats, in any case, and by whose authority was this governance structure adopted?

There are serious questions, also, as to the constitutionality of ICANN's authority. The Property Clause of the U.S. Constitution (Article IV, Section 3) stipulates that Congress, and only Congress, can permit the sale or disposition of property belonging to the United States. And since the domain name addresses, root server and other technical protocols that control the Internet were created by the U.S. Government, and were once its property in a strict legal sense, a reasonable person could question the Commerce Department's constitutional right to give away this "property."

ICANN's authority may be questioned, furthermore, as an unconstitutional delegation of congressional authority. The Supreme Court has ruled that Congress may not delegate its law-making power to private parties, nor make overly broad delegations of authority to governmental bodies. But here we have a nonprofit organization registered by the State of California, with a questionable grant of broad powers from the Commerce Department, presuming to govern the core protocols and some substantive policies of the Internet!

These concerns matter, first of all, as issues of democratic accountability. But they also affect such issues as free speech and privacy. For example, ICANN has chosen to restate trademark law principles in a way that allows trademark owners to silence their critics. If a URL were seen as tarnishing the reputation of a trademark – say "gm-sucks.com" -- ICANN could allow the trademark owner to force the de-registration of the offending domain name. This represents a reversal of existing law, in which First Amendment principles prevail over trademark law. And since ICANN is a "private" body and not a government agency, the First Amendment would not apply. Free speech in the most basic sense would be diminished.

Now, if ICANN can lawfully forbid the *registration* of domain names offensive to trademark owners, one might just as easily ask why it could not restrict the *use* of domain names that contain *content* that may tarnish a trademark. It may seem far-fetched. ICANN may forswear any such intentions. But the *legal authority* to adopt such policies appears intact at present. It appears that ICANN could also legally set standards for digital signatures, enable intrusive surveillance of copyright usage on the Internet, or impose its own kinds of private taxes (such as the \$1 fee per domain that it sought to levy in 1999).¹³

I have focussed chiefly on ICANN here because it poses the most serious and urgent challenges. But other standard-setting, technical bodies, such as the Internet Engineering Task Force (IETF) and the World Wide Web Consortium (W3C), deserve the same kind of scrutiny and citizen intervention. Historically, these bodies

have been genuinely open, public-spirited and resistant to capture by any company or industry. But their potential impact on intellectual property, privacy, free speech, and open source software and other issues is significant. Particularly as the Internet becomes a central part of the world economy, it is imperative that the IETF and W3C remain transparent, democratically accountable organizations.

3. Nurturing the development of free software and open source code software.

The meteoric rise of the Linux operating system over the past two years validates a subversive principle of great significance. Not only is it feasible to develop world-class software in an open, non-proprietary environment, but such a process can have an invigorating impact on our economy and democracy.

I believe that the remarkable success of Linux and other free software/open source code software¹⁴ (which I will conflate here as “open code”) holds deep philosophical lessons for the architecture of governance and control. If software code is a mode of governance, as Larry Lessig argues, then open code is the equivalent of the scientific method and Jeffersonian democracy. It is a more politically enlightened, democratic, and efficacious process for managing change. All procedures and outcomes are subject to the scrutiny of all. Openness is embraced because it allows errors to be more rapidly identified and adopted. Innovation and improvement can be more readily embraced. Bottom-up accountability is built into the process of change, not grafted onto it later in piecemeal, ineffectual ways. Thus there are systemic checks against coercive, top-down mandates that violate the consent of the governed. There are built-in pressures to reject choices that may be harmful, inefficient or odious.

Closed, proprietary organizations, by contrast, tend to require far more coercive power, hierarchy, secrecy and compartmentalization of knowledge. Many businesses recognize the power of openness, especially in a networked environment, and are trying to build organizational structures that foster “transparency,” “flat hierarchies” and so forth. Some are even trying to ape the open code software development process by inventing quasi-open hybrid processes.¹⁵

The basic tension has been characterized as a division between “the cathedral” and “the bazaar,” the title of an influential essay by Eric Raymond, a champion of open source code software.¹⁶ Microsoft is the avatar of “the cathedral” – a commercial attempt to amass a corps of professional programmers under one roof to write a grand, complex piece of software, such as Windows 95/98. The Internet, by contrast, is the instrument that has given rise to “the bazaar” – the motley global assemblage of thousands of programming irregulars who develop software for free, chiefly for personal satisfaction and peer recognition. Their work has yielded Linux and many other critical operating components of the Internet.¹⁷

The Microsoft antitrust case has thrown a stark spotlight on the worst abuses of the proprietary world in a monopoly environment: bug-ridden software, artificially inflated prices, restrictive licensing terms, anti-competitive bundling agreements with hardware makers, the notorious “embrace, extend and extinguish” strategy of subverting open technical standards, and other software manipulations designed more to inhibit competition than to meet users’ needs. Open code re-positions the terms of competition to a matrix of quality and utility, and diminishes the advantages to be gained from seller-side manipulations. Software development can be driven by actual usefulness, based on direct and frequent consumer feedback.

Why do I mention the proprietary/open code in a list of public-interest battlefields? Because the outcome of this rivalry may have some far-reaching implications for market competition, citizen accountability of government and business, and the vitality of democratic culture more generally.

Open code software empowers users. It promotes competition that is fairer, more open and user-responsive; it essentially neutralizes the anti-competitive seller-side manipulations of code, contracts and public law. Furthermore, by allowing nonprofit users such as libraries, nonprofits, academic specialties and other affinity groups to bypass the rigid design structures and licensing/price schemes of proprietary vendors, open code software facilitates a structural shift of power from sellers to users. It allows them to develop a new kind of *knowledge- and community-building infrastructure* akin to a cooperative. In this sense it represents an entirely new form of media empowerment. The socially created gains of the Internet and of open code software can be shared among the entire community – a so-called *comedy of the commons*¹⁸ – rather than be privatized or subverted by opportunistic companies. This is the core vision, indeed, of Richard Stallman’s Free Software Foundation and GNU Project, which have played a critical role in the success of Linux.¹⁹

Numerous forces could derail this vision, however, as I detail in my essay, “The Power of Openness.”²⁰ Open code software must become far more user-friendly if it is going to become more widely used. Some novel sort of loose “organizational commitment” may be needed to stabilize and guide its development. Efforts must be made to thwart any patent and standards mischief that the proprietary world may attempt to neutralize Linux and other open-source initiatives.

4. Developing A New Citizen-Oriented Expertise on Media Concentration and Antitrust.

The frenetic land rush now occurring in electronic commerce disguises a contrary trend that is gradually asserting itself: the shakeout and consolidation of markets, in some cases fueling the growth of new anti-competitive practices, oligopoly and monopoly. Disturbingly, there is little expertise and organized advocacy among

consumers and citizen groups to challenge this trend. By default, much of antitrust policymaking is dominated by congressional leaders, economists, and industry-affiliated think tanks.

Challenging the new anti-competitive abuses of cyberspace is not just a matter of promoting fair competition and consumer well-being. As the original antitrust movement of the 1890s showed, concentrations of economic power tend to undermine democracy. Antitrust law and enforcement is not only meant to spur competition and protect consumers, it is meant to preemptively limit agglomerations of private economic power before they become too powerful for citizens (and their government representatives) to control.²¹

Robert Reich used the occasion of the proposed AOL/Time Warner merger to remind us of this neglected strand of antitrust analysis. He noted that the merger is likely to enhance the company's power to shape public opinion; to secure federal tax breaks and favorable FCC rulings and trade agreements; to threaten competitors and the government with deep-pockets litigation; and to deter elected officials and its own journalists from criticizing the company.²² There could be direct economic consequences for consumers, as well, if AOL's dominance of broadband cable networks allows it to shut out competitors and inflate prices.

Contrary to libertarian assumptions, it is not at all clear that electronic commerce will "level the playing field" among competitors. One theory that has gained currency in many circles is that networked markets enable a single competitor to gain an overwhelmingly dominant market position over time. The net result is to preempt new entrants to markets and to thwart robust competition and innovation. This phenomenon has been dubbed the "winner-take-all market" by Robert H. Frank and Philip J. Cook.²³ Microsoft may be the most egregious example of this dynamic, but it can also be seen in the markets for online audio (RealAudio), books (Amazon.com), among many other niche markets.

In effect, the apparent tendencies of the Internet to spur competition may be neutralized over time because of the overwhelming advantages that accrue to the first movers in a networked environment. This, in fact, is one of the premises driving so many Internet entrepreneurs – the conviction that they, as first movers, will preemptively obtain impregnable market advantages. Not only do first movers capture more "mind share" (public recognition and consumer loyalty) than newcomers can amass later, their dominance of large, electronically mediated markets gives them huge efficiencies that often allow them to drive out competitors that are only marginally less efficient and well-known.

My point is that electronic commerce has some distinct dynamics that affect market concentration and antitrust. But the public interest community generally does

not have the sophisticated expertise or advocacy resources to assert its keen interests in these developments.

A modest but focused expression of the citizen perspective can be tremendously influential, however, as James Love of the Consumer Project on Technology demonstrated in his successful one-person challenge to the Staples/Office Depot merger in 1998. Ralph Nader's conference on the anti-competitive abuses of Microsoft – held in November 1997, before the filing of the Justice Department lawsuit -- also had significant value in legitimizing a wider public assessment of Microsoft's abuses (then a taboo subject) and in fortifying the political resolve of antitrust enforcers. Since enforcement of antitrust law invariably takes place in a quasi-politicized context, it is important that citizen and consumer groups have the capacity to be serious players in this arena – as legal advocates, public educators and organizers of citizens and consumers.

What Foundations Can Do

The very breadth and complexity of issues surrounding digital media is understandably intimidating to the foundation world. How can one begin to make intelligent, strategic choices? My advice for program officers is to *get wet*. Become part of the conversation, consort with innovative practitioners whenever possible, and make mistakes faster so that you can innovate faster. Just as businesses have had to revamp their organizational dynamics and culture in order to compete in a networked economy, so the foundation community must learn how to respond nimbly to a more fluid, changing set of realities.

Some foundations do not seem equipped to identify, metabolize and respond to this new world. Instead, they are structured as if events were predictable enough to accommodate lengthy grant-approval processes; as if new projects should fit into departmental categories and programs; and as if prestige-laden grantees are more capable than entrepreneurial newcomers. The grant-making *process* of some foundations, in short, may sanction a constricted field of vision and privilege certain kinds of (non-strategic) grants. Such choices, in turn, are often ratified by the shared assumptions and norms of the funding community.

“Organizations make themselves blind to what lies outside the narrow tunnel of process,” writes Xerox PARC Director John Seely Brown and his coauthor Paul Duguid in *The Social Life of Information*. “Improvisation, for example, can be a useful indicator of problems or change in the environment. The greater the improvisation, the less adequate the routine. But routines and processes encourage employees to hide their insights and improvisations. So, by subordinating practice to process, an organization paradoxically encourages its employees to mislead it.”²⁴

The new tycoons of the Internet Age understand these dynamics, and are trying to actualize them in dozens of new family foundations. They talk about “venture philanthropy” and brashly put forward ambitious ideas about transforming one field or another. They are creating new for-profit intermediaries to solicit contributions from donors and skim 10-30 percent of the money they pass along to charities. Other novel ideas of varying merit are proliferating.

While some segments of this new generation of philanthropists are callow, presumptuous and naive, the challenges they pose to mainstream foundations should not be lightly dismissed. They are barking up the right tree. Digital technologies open up new doors and imply new organizational practices. Grant-making *should* become more innovative and daring. Old-line foundations must find new ways of understanding what’s happening on the periphery, where the truly fresh, innovative and improvisational flourishes, and then learn to deploy their resources in swift, smart and influential ways.

On the other hand, the more established foundations recognize something that the dot-com philanthropists generally don’t: that citizen policy advocacy really does matter. While foundations endowed by high-tech fortunes may be innovative in some ways, they tend to consider policy advocacy a *non sequitur*. Alternatively, they have their own self-serving, quite relevant policy priorities (such as the Gates Foundation’s grants to public libraries, aka, “strategic philanthropy”). The larger, more respected foundations have a richer sense of media history and civic commitment. They understand the pivotal role of public policy and, in many instances, have made highly cost-effective grants to inhibit further enclosures of the information commons.

Perhaps the biggest challenge facing civic-minded foundations is understanding the politics of the new digital media environment. This is the subtext of much of the discussion above. Because so many policy goals are necessarily political, effective grant-making must recognize that meaningful results will require forceful advocacy and public controversy. Many foundations shrink from such prospects. That helps explain why digital divide philanthropy has become so popular. Yes, it is an important issue, but it is also a conveniently apolitical issue for which there is a ready consensus. High-tech businesses want to expand their user base; other industries want their employees online; the Clinton Administration wants to be socially progressive without spending too much money or alienating business; and no industry feels that its market prerogatives are being taken away.

Unfortunately, most important policy issues don’t lend themselves to happy consensus resolution. Which is why, as a matter of strategic effectiveness, I believe that citizen advocacy must be full-throated and bold, rather than meliorist and eager to compromise. Citizen advocacy must assert its own sovereignty. Foundation/industry partnerships tend to be prescriptions for cooptation and third-best results because any “solutions” are forced to accommodate the market and policy

prerogatives claimed by business. But the whole point of citizen advocacy is to *expand* the scope of citizen and consumer rights, not simply to gather whatever crumbs can be had.

That is why the small and struggling community of public-interest media advocates in Washington, D.C., needs a special infusion of foundation support. Its ranks are thin, its financial support is quite limited, and its leadership is grayer than ever. There is a need for fresh infusions of young talent and innovative advocacy. Currently, there are few incubators of new advocacy talent, making it hard to develop a larger corps of sophisticated, career-minded public-interest policy advocates. That is something that the foundation community ought to rectify. Indeed, without foundation support, media policy for the next generation will simply be brokered among the competing industries, to suit their commercial ambitions, with scant concern for how the new media marketplace will (negatively) affect citizenship, democracy and a host of non-market values.

Public policy matters a great deal, but there are other ways to make a difference too. As the cost of digital technologies declines, I believe that foundations ought to capitalize some serious new experiments in public interest content production – journalism, niche publishing, artistic venues. Why not a video streaming network featuring independent journalists, activists and artists? As the quality of mainstream journalism declines (because of unavoidable competition with entertainment programming, the tabloids and Internet advertising venues), the economic base of mass-audience journalism looms as a serious question. Disturbing as this is, it also opens up opportunities to invent new web-based genres of reputable journalism.

Free software represents a similar opportunity. Many Third World nations, alarmed at the extraordinary costs of being Microsoft-dependent, have discovered the cost-efficiencies and flexibility of developing free software Linux-based applications. Why not help interested communities in U.S. higher education pursue such possibilities? Our democratic polity would be immensely strengthened if free software/open source software were to gain a secure foothold in more segments of American society.

There are disturbing signs that the proliferation of electronic networks tends to intensify inequality by super-empowering the affluent and educated, leaving the poor and uneducated doubly disadvantaged. While there are powerful pressures to address this problem domestically, as noted above, that does not seem to be the case among developing countries. Here, too, foundations could also play a valuable role in helping developing nations develop an infrastructure, community of innovators and economic orientation toward exploiting the Internet.

The speed of change enabled by the new technologies has created what might be called an “adaptation gap.” Circumstances are mutating more rapidly than our institutions can adapt. This makes it difficult to know if our working assumptions about the world are still valid. It makes it difficult to develop new categories of understanding and to build new organizational cultures.

I’ve tried to sketch some of the issues that I believe must be joined if our democratic values and institutions are to thrive in the unfolding digital environment. Foundations can play a key role in bridging this particular “adaptation gap.” Besides money, they can provide vision and leadership. They can convene and encourage. I’m hoping that we can look forward to some serious, smart and strategic commitments in the future.

Notes

¹ For a good overview of the history of the public interest standard in television broadcasting, see *Charting the Digital Broadcasting Future*, Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (Washington, D.C., December 18, 1998).

² This is not to say that public-interest forces should abandon their efforts to carve out some civic spaces, or non-commercial commons, in the vast TV wasteland. At this point, it may be impossible to recover the Fairness Doctrine or require more local programming; PEG-access channels on cable systems may never mature into a well-funded, professional venue; corporate sponsorships may have reduced public television to a shadow of its former self – but still, there are strong moral, legal and political cases for developing robust civic spaces in these traditional media. Broadcasting and cable TV will remain the predominant mass-audience platforms in our culture for years to come, notwithstanding the inroads made by the Internet and other new media.

³ Yochai Benkler, “Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain,” 74 *New York University Law Review* 354 (1999).

⁴ Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 2000). Lessig writes: “Architecture is a kind of law: it determines what people can and cannot do. When commercial interests determine the architecture, they create a kind of privatized law. I am not against private enterprise; my strong presumption in most cases is to let the market produce. But isn’t it absolutely clear that there must be limits to this presumption? That public values are not exhausted by the sum of what IBM might desire? That what is good for America Online is not necessarily good for America?” p. 59.

⁵ An excellent review of these dynamics in the context of Canadian political economy can be seen in Donald Gutstein’s *E.con: How the Internet Undermines Democracy* (Niagara Falls, NY: Stoddart Publishing, 1999).

⁶ A trenchant critique of how “the growth of intellectual property in recent years (late 1970s, early 1980s) has been uncontrolled to the point of recklessness” can be found in David Lange, “Recognizing the Public Domain,” 44 *Law and Contemporary Problems*, 4, (1981).

⁷ A good review of Eric Eldred’s constitutional challenge can be found in Daren Fonda, “Copyright Crusader,” *The Boston Globe Magazine*, August 29, 1999. See also the Copyright Commons, a project run by Harvard Law School’s Berkman Center for Internet & Society to promote the public availability of literature, art, music and film. [Http://www.cyber.law.harvard.edu/cc](http://www.cyber.law.harvard.edu/cc).

⁸ Michael Heller’s law review article, “The Tragedy of the Anticommons,” astutely describes how an over-extension of property rights blocks socially optimal uses of resources, in 111 *Harvard Law Review* 622 (1998). See also Seth Shulman, *Owning the Future* (Boston: Houghton Mifflin, 1999).

⁹ Pamela Samuelson, “The Copyright Grab: An Explanation of the White Paper,” *Wired*, January 1996.

¹⁰ One exception was the 1998 defeat of West Publishing Company – after a long, pitched battle – to claim ownership of the text of federal court decisions, based on the company’s pagination, which had become the standard method for citing cases.

¹¹ See, esp., James Boyle, *Shamans, Software and Spleens* (Cambridge, Mass.: Harvard University Press, 1996).

¹² James Boyle, "A Politics of Intellectual Property: Environmentalism for the Net?" <http://www.wcl.american.edu/pub/faculty/boyle/intprop.htm>.

¹³ See Statement of James Love, Director, Consumer Project on Technology, before the Committee on Commerce, U.S. House of Representatives, July 22, 1999.

¹⁴ Proponents of "free software" (as in freely accessible source code, not economically free) see distinct moral, social and civic value in the source code being legally available to anyone in perpetuity. Backers of the open source code movement are more concerned with the technical superiority of accessible source code and its intriguing commercial possibilities, and less concerned about the moral, social or political dimensions of accessible code.

¹⁵ One of the more notable attempts was Mozilla, the Netscape-sponsored group of programmers dedicated to extending and customizing Netscape's browser. Similarly, Sun has tried to start a community of open code developers for its Solaris software using a quasi-open code license which it calls a community Source License. The long-term viability of these experiments remains an open question.

¹⁶ See <http://www.tuxedo.org/~esr/writings/cathedral-bazaar>.

¹⁷ Sendmail is the program that routes over 80% of all email on the Internet. Perl is the programming language that allows dynamic features on many web sites. Apache is the most popular web server in use on the Internet. BIND, the Berkeley Internet Name Daemon, is the de facto DNS server for the Internet.

¹⁸ The term was coined by Professor Carol Rose in her essay, "The Comedy of the Commons: Custom, Commerce, and Inherently Public Property," which appeared as Chapter 5 in *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (Westview Press, 1994), and originally in 53 *University of Chicago Law Review* 711-781 (1986).

¹⁹ See <http://www.gnu.ai.mit.edu/fsf/fsf.html>.

²⁰ For more, see my essay, "The Power of Openness," at <http://www.opencode.org/h20>.

²¹ Eben Moglen, "Antitrust and American Democracy," *The Nation*, November 30, 1998, p. 1.

²² Robert B. Reich, "AOL—Time Warner's Kingly Prerogative," *The American Prospect*, February 14, 2000, p. 56.

²³ Robert H. Frank and Philip J. Cook, *The Winner-Take-All Society* (New York: Free Press, 1995).

²⁴ John Seely Brown and Paul Duguid, *The Social Life of Information* (Cambridge, Mass.: Harvard Business School Press, 2000), p. 110.