

BIRTHING “CLA”: CRITICAL LEGAL ACTIVISM, THE IP WARS AND FORKING THE LAW[♦]

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When there’s a problem, you shouldn’t get angry with the gears—you should fix the machine.

—Aaron Swartz, weblog, Sept. 25, 2012¹

INTRODUCTION

If the last decade has been a moment to raise consciousness and “get angry” about an increasingly overprotective U.S. intellectual property regime, the last few months have been a moment to ask, “What exactly should be done?” While the SOPA/PIPA protests of January 2012 served as a critical rallying point for netroots activists to protest proposed copyright policy, the suicide of Internet activist Aaron Swartz served to both romanticize and heighten the narrative of the state’s overreach in both copyright policy and punishment for infringers. Swartz, who was 26, was indicted on federal charges of computer fraud and wire fraud for downloading 4.8 million articles and documents from JSTOR, a subscription database of scientific and literary academic journals. He faced 35 years in prison and \$1 million in fines. Swartz’s

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¹ Aaron Swartz, *Fix the Machine, Not the Person* (Sep. 25, 2012), <http://www.aaronsw.com/weblog/nummi>.

supporters and friends decried the government's overzealous prosecution and laid the blame for Swartz's decision to take his life at the feet of the U.S. Justice Department. "From the beginning, the government worked as hard as it could to characterize what Aaron did in the most extreme and absurd way," wrote Lawrence Lessig in an online post titled "Prosecutor As Bully."² The Computer Fraud and Abuse Act ("CFAA"),³ the statute under which Swartz had been charged, was sorely outdated and made little sense in the context of the kind of political acts Swartz engaged in, argued Swartz's supporters. After his death, a movement began to revise and reintroduce a new CFAA, dubbed "Aaron's Law," with Rep. Zoe Lofgren (D-CA) leading the effort to bring the bill to Congress.⁴ Not incidentally, Lofgren also sought out feedback on reddit, the social news website that contributed to the demise of the SOPA/PIPA in 2012.

While much has been made of the activism by individuals like Swartz and by sites like reddit and Wikipedia in the past year, it is the articulation of that resistance in new statutes like Lofgren's bill that may ultimately determine the success of such efforts. The progression of the decade-old copyright wars into this moment, we argue, is a critical one. It represents what we have previously labeled Critical Legal Activism ("CLA"), a kind of resistance in which untrained legal actors critically employ the controlling structures of society rather than simply fighting against them.⁵ This new wave of CLA was preceded by protest, both within and outside the confines of the law, and specifically within "copyfight" and free culture communities. But the copyfight has reached a new stage, what traditional social movement theorists might describe as "coalescence," in which discontent within the copyfight is "no longer uncoordinated and individual," but has "become focalized and collective."⁶ Online social movement scholar Dave Karpf might describe it more as a "non-membership advocacy organization" ("NMAO")—less a group and more a loosely organized coalition providing netroots infrastructure for the cause.⁷ At this juncture, we would argue that the copyfight is both centralized and decentralized. Lawmakers like Lofgren and groups like the Electronic Frontier

² Lawrence Lessig, *Prosecutor As Bully*, LESSIG BLOG, v2 (Jan. 12, 2013), <http://lessig.tumblr.com/post/40347463044/prosecutor-as-bully>.

³ 18 U.S.C. § 1030 (2013).

⁴ Ryan J. Reilly, *Zoe Lofgren Introduces "Aaron's Law" To Honor Swartz on Reddit*, HUFF POST POLITICS (Jan. 15, 2013, 11:33 PM), http://www.huffingtonpost.com/2013/01/15/zoe-lofgren-aarons-law-swartz_n_2483770.html.

⁵ Victoria Smith Ekstrand, Andrew Famiglietti & Cynthia Nicole, *The Intensification of Copyright: Critical Legal Activism in the Age of Digital Copyright*, 53 IDEA 291 (2013).

⁶ Rex D. Hopper, *The Revolutionary Process: A Frame of Reference for the Study of Revolutionary Movements*, 28 SOCIAL FORCES 270, 273 (1950).

⁷ DAVID KARPf, *THE MOVEON EFFECT: THE UNEXPECTED TRANSFORMATION OF AMERICAN POLITICAL ADVOCACY* 124 (2012).

Foundation serve as centralized rallying points, but the coalescence is in what Karpf and Daniel Kreiss describe as the “organizational level” of political advocacy in which “new repertoires of contention” help organize and mobilize both among and across different interested parties.⁸ It is here, in that organizing layer, that we think CLA may be instrumental in changing the nature of the debate and the nature of legal reform, more generally.

In this article, we expand on what we mean by critical legal activism and its significance to the critical legal project. First, we address what factors prompted the first wave critical legal movement to flounder, setting the stage for a revised critical legal project and how that “failure” ultimately informed a new fork in the movement. Then, we consider the unique and privileged position that copyright activists are in to advance legal reform. Finally, we highlight some of the concrete efforts we see as manifestations of CLA, particularly the nascent efforts of NMAOs like Fork the Law (forkthelaw.org) and the response to the SOPA/PIPA debates of 2012. We conclude on a cautionary note, mindful of the criticisms by writers like Evgeny Morozov, who warn against Internet “solutionism” and the use of “historical accounts inspired by Internet-centrism,” to make arguments that “make the Internet live forever.”⁹ CLA is, arguably, in its infancy, but represents a potentially promising development in realizing the goals of the critical legal project.

I. THE “FAILURE” OF CLS

Depending on the critic, the Critical Legal Studies Movement “failed,”¹⁰ “died,”¹¹ “paused,”¹² “disappeared,”¹³ suffered “self-inflicted”¹⁴ wounds, or was simply a missed opportunity. That so much confusion engulfs CLS is less important to us than acknowledging at the outset that such confusion provides an important and expected foundation upon which to consider the CLS project. Critical scholarship, and cultural studies, in particular, “tries, as best it can, to accept the fact that things are always more complicated than any one

⁸ *Id.* See also DANIEL KREISS, *TAKING OUR COUNTRY BACK: THE CRAFTING OF NETWORKED POLITICS FROM HOWARD DEAN TO BARACK OBAMA* (2012).

⁹ EVGENY MOROZOV, *THE FOLLY OF TECHNOLOGICAL SOLUTIONISM: TO SAVE EVERYTHING, CLICK HERE* 61 (2013).

¹⁰ Peter Goodrich, *Sleeping With the Enemy: An Essay on the Politics of Critical Legal Studies in America*, 68 N.Y.U. L. REV. 389, 390 (1993).

¹¹ Mark Tushnet, *Critical Legal Theory (without Modifiers) in the United States*, 13 J. POL. PHIL. 99 (2005).

¹² Peter Gabel, *Critical Legal Studies as a Spiritual Practice*, 36 PEPP. L. REV. 515, 528 (2009).

¹³ Richard A. Posner, *The State of Legal Scholarship Today: A Comment on Schlag*, 97 GEO. L.J. 845, 850 (2009).

¹⁴ E. Dana Neacsu, *CLS Stands for Critical Legal Studies, If Anyone Remembers*, 8 J.L. & POL’Y 415, 416 (2000).

trajectory, any one judgment, can thematize.”¹⁵ The “failure” of CLS is the opportunity to manage and embrace its complexity. If we are to approach CLS with any fidelity to the critical approach, we must resist the disjunctive and try not to reduce its experience to an all or nothing outcome.

Indeed, we have previously written that though many think CLS died, it may have been more accurately nascent. Like Mark Tushnet and Peter Gabel, we are convinced that CLS experienced a withering of sorts due to multiple factors. Its fits, starts, and struggles over the years—and whether it is or was a theory, method, group, movement or simply something to do for a bunch of privileged white male professors in the post-legal realist era—these have all contributed to this moment in which we ask whether the initial CLS project has in some way set a stage for the realization of legal reform.

In the 1970s, CLS scholars reacted to what they perceived as some of the problems with law (and particularly legal education) after the social upheavals of the 1960s. Building on (or some might argue “away from”) the work of the legal realists and the law and society movement—and grounding their work in theories of the Frankfurt School—they began to view the law as contradictory, indeterminate, and socially contingent. In making their critique, CLS scholars commonly demonstrated the law’s indeterminacy, supported and conducted interdisciplinary analyses that revealed the law’s effects, exposed how the legal system created its own realm of insiders, and argued for social visions and reform that the law effectively blocked.¹⁶ Some also engaged in a critique of rights.¹⁷

What CLS didn’t do was to convert those visions into actual reform. Peter Gabel might argue that it didn’t fully grasp the spiritual impulse to do so.¹⁸ CLS never became a social movement in the sense that individuals outside the legal academy felt compelled to take up its cause and resist. Here, we look back at the literature to tease out why attempts at real reform—and conversion into a broader social movement—may have sputtered. We consider in the next section how those struggles may have fueled an opportunity for non-legal actors, particularly those online communities invested in issues of intellectual property law, to act.

For those who viewed the initial CLS project as a “failure,” the reasons reflect a series of both internal and external factors leading to its

¹⁵ LAWRENCE GROSSBERG, *CULTURAL STUDIES IN THE FUTURE TENSE* 16 (2010).

¹⁶ *Critical Legal Studies Movement*, THE BRIDGE, <http://cyber.law.harvard.edu/bridge/CriticalTheory/critical2.htm> (last visited Apr. 28, 2013).

¹⁷ Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *LEFT LEGALISM/LEFT CRITIQUE* (Wendy Brown & Janet Halley eds., 2002), available at <http://duncankennedy.net/documents/The%20Critique%20of%20Rights%20in%20cls.pdf>.

¹⁸ Gabel, *supra* note 12, at 516.

“demise” or “dormancy.” We identify three primary internal forces in the literature: First, CLS was viewed as an attack on the legal academy itself. This quickly led to a virulent internal response of failed tenure cases and divided loyalties among academics and to a relocation of the project—from the Ivy Leagues and into, mostly, state law schools and programs like gender and culture studies. Secondly, the group began to disagree about not only the foundations of the CLS project, but also the specifics of group organization and the realization of its goals. Finally, the group, comprised mostly of privileged white male law professors (some of whom were quick to point out their own locations), were not themselves adversely affected by the law’s indeterminacies and contradictions. Their stake was in the scholarship, not the result. A social movement rooted in the professoriate is not the location for action. We examine each of these ideas in more detail below.

As Peter Goodrich has noted, it is the “ironic fate of the postmodern intellectual to be tied to a specific institution and its practice.”¹⁹ In the case of the CLS scholars of the 1970s, it was a herculean task to both seriously question the epistemology of legal doctrine and still churn out professional lawyers. As Goodrich writes:

The political goal of exposing legal doctrine to cultural analysis, of exposing the history of legal practice to theoretical reconstruction, is threatening because it challenges the boundaries of the discipline and particularly the seclusion—the innocence—of its practice. . . . CLS is thus also characterized by the distance between its theory and the discipline of law as a practice. The abstractionism of the theory disengages critical legal analysis from the politics of what is primarily, or, at least in the first instance, an educational practice, a politics of the discipline of law in an academic age.²⁰

Despite the fact that law students came to study law after the 1960s with a desire to “contribute to the creation of a more humane and just world,” most were “subtly talked out of their idealism by sophisticated law professors who were better at manipulating concepts than they were and could use the power relations of the law school classroom to make their instinctive idealism appear naïve or childish or dumb.”²¹ For those who did question the foundations of legal education, the consequences were significant and hostile.²²

One clash within Harvard Law School resulted in the denial of tenure to two CLS scholars, which had “a serious chilling effect on the institutional and intellectual development of CLS as well as of the legal

¹⁹ Goodrich, *supra* note 10, at 415.

²⁰ *Id.*

²¹ Gabel, *supra* note 12, at 517.

²² Goodrich, *supra* note 10, at 415.

academy generally. . . . These attacks had the net effect of freezing hiring and upward mobility of CLS thinkers in the academic world”²³ At Yale Law School, six junior faculty members were fired.²⁴ Duncan Kennedy’s polemic, *Legal Education and the Reproduction of Hierarchy*, cast him as an outsider along with his first-year property teacher at Yale, David Trubek. Trubek would ultimately leave Yale for the University of Wisconsin–Madison and become “the self-described leader of the Radical Yale School in Exile ‘Mafia.’”²⁵ Though the “crits,” as they were known, were seriously affected by the law schools’ negative reactions to their program of study, the schools themselves were not.

Trubek and Kennedy were at the heart of the Conference on Critical Legal Studies (“CCLS”), which assembled like-minded legal academics to participate in a radical critique of the law. But they were also at the heart of its early struggles, according to John Henry Schlegel.²⁶ Trubek, in exile from Yale, “gave up faith in the positive, progressive role of law in developing countries,” but he never gave up faith in social science and sociology. Kennedy’s work was increasingly post-Marxist in its orientation. Schlegel argues that these differing philosophical orientations created a dynamic within the CCLS that was inherently polarized. Where “Trubek’s sociology emphasized the importance of matters of material culture for the form and content of law,” Kennedy’s approach “began to stress the radical indeterminacy, and thus the unimportance, of material culture as an explanation of law.”²⁷

Besides this differing view of what constituted a critical legal approach, scholars have offered other internal reasons for the ultimate disintegration of the CCLS. Some point to a lack of a journal associated with the group and the desire of some group members to adopt a more formal structure (which offended those more strongly attached to post-Marxist theory).²⁸ Others point to institutional changes in the 1980s that began to see the hiring of more legal academics whose work was inherently interdisciplinary; these individuals came with advanced degrees in other fields and connected those fields with the law, even if they didn’t explicitly advocate for CLS.²⁹ The civil rights era also inevitably led law schools to hire more women and minorities, which

²³ Pierre Schlag, *Critical Legal Studies*, in THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 295, 298 (Stanley N. Katz ed., 2009).

²⁴ Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1530 (1991).

²⁵ John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 392 (1984).

²⁶ *Id.*

²⁷ *Id.* at 393–94.

²⁸ Tushnet, *supra* note 11, at 102.

²⁹ Posner, *supra* note 13, at 854.

administrators believed represented the marginalized groups often highlighted in CLS scholarship.³⁰ This, in turn, meant fewer openings for traditional CLS members, who were mostly white and male.

Some associated with the CCLS also identified the conference's predominantly male, white and elite composition as another pressure point. The group's composition made the advancement of social contingency arguments perhaps less plausible:

The radicalism of American CLS does not appear to extend to the lives of its practitioners. It does not threaten the institutional safety, tenured security, economic comfort, or frequently elite status of the critics. . . . The American law professor is too well paid to be politically committed, too status conscious to be intellectually engaged, and too insular—too bound to the parochial and monolingual culture of the law review—to be scholarly.³¹

But the ironies were not always lost on the men who were aligned with the conference and in recounting the CLS project, some were self-deprecating and quick to point out their contradictory positions in such a privileged critique.

In addition to these internal pressures on CLS, a number of external forces also worked to marginalize the effect of the CCLS on legal education and on legal reform, more generally. Peter Gabel notes that the “dissipation” of the 1960s social movements, the collapse of socialism and the Marxism that supported such visions, and the rise of the New Right, all contributed to a “lost confidence in the forward trajectory that had united” CLS.³² The Reagan Revolution, the rise of conservatism and the growth of the law and economics school in the 1980s “settled into the legal academy.”³³ Some scholars highlighted these factors in the demise of CLS and the lack of scholarship that might influence public policy, legislation or judicial practice and the subsequent growth of “high-end mediocrity” in law schools as a result.³⁴

In looking back on the “failures” of CLS, some writers noted that the divisions within the CCLS led it to be less radical than it should have been. The moral imperative to act on the ideas that CLS academics advanced never materialized, and legal education became increasingly professionalized and bureaucratized. It was never actually moved by larger societal forces:

³⁰ Tushnet, *supra* note 24, at 1521.

³¹ Goodrich, *supra* note 10, at 398–99.

³² Gabel, *supra* note 12, at 528.

³³ Tushnet, *supra* note 24, at 1537.

³⁴ Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening* (A Report on the State of the Art), 97 GEO. L.J. 803, 809 (2009).

CLS could be termed “critique without copula” in that it offers an order of succession of academics, a transmission of a self-referential and exclusory form of symbolic capital, which refers by way of only the most distant signals to the lifeworld of the legal pedagogue. . . . CLS has nothing to do with legal education, with the teaching practice of legal scholars, and it has only the most marginal of relations to the academic discipline of law³⁵

While there was a spiritual impulse to the work of the legal crits, Gabel argues that they ultimately refused to embrace or act on it:

We really were motivated by love, but it was a love that dared not speak its name. And in my opinion, that is because our movement was infected with the same fear of the other that underlay the injustices that we criticized in the wider society.³⁶

Instead, Gabel writes that the movement embraced the indeterminacy critique, which contributed valuable scholarship to the cause, but which was ultimately a “headless horseman, an analytical method without moral content that could not itself point the practitioner in any moral direction.”³⁷ What were readers to do armed with the information that the law led to different results for different participants? CLS academics never took the next step in such a critique:

In other words, the indeterminacy critique is basically a bummer, leaving the listener in a kind of secular liberal hell of scattered and disconnected individuals with no common passion or direction binding us together. Not only did this erasure of moral purpose disarm the CLS movement of its most compelling spiritual feature—namely its link to a powerful, transformative vision of a socially just world—it also seemed to dismiss as unimportant, and even trivial and misguided, the experience of moral dislocation, social isolation, and meaninglessness that is precisely the most spiritually painful aspect of modern liberal culture. While a few writers tried to justify CLS’s “nihilism” as a bracing affirmation of freedom, emphasizing that the critique was only a critique of the authority of reason and not of strongly held, freely affirmed values, this defense simply cast the listener back into the spiritual void of his/her liberal solitude rather than purposefully pointing the listener forward toward the moral world that would finally connect us.³⁸

³⁵ Goodrich, *supra* note 10, at 397–398.

³⁶ Gabel, *supra* note 12, at 516.

³⁷ *Id.* at 517.

³⁸ *Id.* at 519.

The crits, ultimately, were alienated from each other by these forces. They were insiders and were viewed as such. They called for change, but were unable to transform that call into a broader movement. They were marginalized by the rise of the New Right and the explosive growth of professional legal education. Those who read their work—and understood it—were ultimately left to wonder how and whether to respond.

II. CODERS AND “CRITICAL” COPYRIGHT

Ironically, if the expulsion of critical legal scholars from the University setting helped to “kill” critical legal studies, or at least drive it into dormancy, it was the expulsion of at least one coder from the University setting that helped to spark the modern critical copyright movement. In the 1970s and early 1980s, Richard Stallman was a computer scientist working in MIT’s AI Lab. He recalled the lab of that era as a space of shared intellectual resources and collaborative scholarly effort. He writes:

We did not call our software “free software,” because that term did not yet exist; but that is what it was. Whenever people from another university or a company wanted to port and use a program, we gladly let them. If you saw someone using an unfamiliar and interesting program, you could always ask to see the source code, so that you could read it, change it, or cannibalize parts of it to make a new program.³⁹

However, as the 1980s wore on, Stallman found his collaborative community under attack. Private companies hired away AI lab hackers, as the terms of their contracts included non-disclosure agreements that made collaboration with their former colleagues extremely difficult. Finally, Stallman left the lab, frustrated with the increasing privatization of the effort once housed there. “With my community gone,” he writes, “to continue as before was impossible. Instead, I faced a stark moral choice.”⁴⁰ For Stallman, the “stark moral choice” he faced was between joining “the proprietary software world,”⁴¹ and finding some way to rebuild the community of sharing and learning he had enjoyed at the AI Lab. To this end, Stallman exited MIT and, with the aid of a MacArthur genius grant, founded the Free Software Foundation (“FSF”). Under the auspices of the FSF, Stallman and a small number of collaborators had some success writing a suite of software utilities replicating the

³⁹ Richard Stallman, *The GNU Project*, in *FREE SOFTWARE, FREE SOCIETY: SELECTED ESSAYS OF RICHARD M. STALLMAN* 17 (Joshua Gay ed., 2002).

⁴⁰ *Id.* at 19.

⁴¹ *Id.*

basic functions of the Unix operating system, which they cheekily called the GNU (for “Gnu’s Not Unix”) system.

Ultimately, the GNU project’s most lasting legacy would be the license under which its software was released. The GNU General Public License, or “GPL”, used copyright’s protection against the logic of intellectual property itself, in that it contractually ensured users the right to view and modify the source code of programs. Furthermore, the GPL ensured that coder’s contributions to the collective project of free software would not later be privatized by outside entities by contractually requiring those who built on GPL licensed software to release their derivative works under the GPL.

The above story of GNU’s genesis, the origin story of the Free Software and later the Free Culture movements, and thus in many ways the beginnings of the contemporary anti-copyright movement, has been told many times. At this point it may seem to some almost teleological that the structure of copyright’s conflict with the open sharing process Stallman valued must produce something like the GPL. However, this obscures just how remarkable Stallman’s innovation was. The decision to deal with the challenge of copyright by evading and reversing it, rather than directly confronting copyright holders in an explicit political arena, was by no means an obvious or predetermined one. Remember that no less a mind than Lawrence Lessig, perhaps the most outspoken advocate of copyright reform, initially pursued two methods for confronting what he perceived as copyright over-reach. One was the development of Creative Commons, a licensing scheme inspired by the GPL and designed to give creators outside the software world access to the same sort of non-property production Stallman had helped create for coders. The other was a formal, legal confrontation with copyright law in the form of the case of *Eldred v. Ashcroft*.⁴² The formal legal challenge failed, an experience that soured Lessig on the contemporary politics of courts and legislatures. In his *Free Culture*, Lessig explains how he attributes his defeat in *Eldred v. Ashcroft* to his own overly idealistic view of the court as an institution above the influence of money and power, one that would reach conclusions based on constitutional principles. He writes:

Most lawyers, and most law professors, have little patience for idealism about courts in general and this Supreme Court in particular. Most have a much more pragmatic view. When Don Ayer said that this case would be won based on whether I could convince the Justices that the framers’ values were important, I fought the idea, because I didn’t want to believe that that is how this Court decides. I insisted on arguing this case as if it were a simple

⁴² *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

application of a set of principles. I had an argument that followed in logic. I didn't need to waste my time showing it should also follow in popularity.⁴³

Reading Lessig's account of events, his disappointment with the Court is palpable. He describes reading the Court's decision on the case, looking for an explanation of how and why he lost thusly:

I took the phone off the hook, posted an announcement to our blog, and sat down to see where I had been wrong in my reasoning. My *reasoning*. Here was a case that pitted all the money in the world against *reasoning*. And here was the last naïve law professor, scouring the pages, looking for reasoning.⁴⁴

Here we can clearly see Lessig's growing disillusionment with the formal process of legal reform in the face of powerful and entrenched interests. Clever legal reasoning cannot prevail in court against "all the money in the world." After the Eldred case was lost, Lessig turned to legislature, advocating for the so called "Eldred Act," or more formally the Public Domain Enhancement Act (H.R. 2408, 109th Cong. (2005)), which would charge copyright holders a nominal tax to renew copyright after 50 years of protection. This bill has been stalled in committee since 2006.

Where Lessig's formal, traditional challenges to the extension of copyright law floundered, Creative Commons' voluntary and contract-based approach, inspired by the GPL, thrived and grew. As of 2009, Creative Commons estimated that over 350 million works had been released under one of their licenses.⁴⁵ Included in this tally is the Wikipedia project, the remarkable and highly visible free encyclopedia project, which has organized the creation of millions of freely licensed encyclopedia articles since 2001. Where formal reform failed, the F/OSS inspired approach provided a method for interested parties to take direct action to bring about the legal environment they desired.

Of course, conflict between copyright holders and creators/innovators is far older than the world of free and open-source software. However, unlike previous alternative forms of production, such as folk music and the illegal comics of Dan O'Neill's Air Pirates, which tended to exist on the margins, free software's productive mode emerged, as Yochai Benkler put it, "at the core, rather than the periphery of the most advanced economies."⁴⁶ In order to survive this

⁴³ LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* 244 (2005).

⁴⁴ *Id.* at 241.

⁴⁵ *History—Creative Commons*, CREATIVECOMMONS.ORG, <http://creativecommons.org/about/history> (last visited Apr. 28, 2013).

⁴⁶ YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 3 (2006).

central position, free software needed the legal protection of the GPL and later free and open source licenses. The informal education in the law that learning to work with, and argue about, these licenses provided served to make coders more broadly aware of the legal issues surrounding intellectual property and prepared to engage with these issues. Gabriella Coleman's ethnography of the F/OSS community describes this educational process:

During the 1990s, when trade associations began in earnest to expand and strengthen the global reach of intellectual property laws while linking them with trade issues, free software production acted informally as a training ground for an army of amateur legal scholars, critical of the new intellectual property legislation. Free software hackers came to deeply value a legal morality other than the neoliberal credo spun by copyright industries. As part of this informal education process, hackers collectively learned a great deal about the law of copyrights, patents, trademarks, and the DMCA—a regime that many of them chose to resist, seeing it as a limitation on the pursuit of hacking.⁴⁷

Furthermore, as the first decade of the 21st century progressed, conflicts over intellectual property increasingly involved direct action in the realm of digital technology. The 1998 Digital Millennium Copyright Act ("DMCA") included provisions making the circumvention of copy control technologies illegal. This led to a cat-and-mouse technological game between coders interested in developing software to access and manipulate information and copyright owners interested in developing Digital Rights Management ("DRM") techniques that would prevent this manipulation. Perhaps the most famous of these battles was the conflict over DeCSS, a content descrambling system developed to allow users of the GNU/Linux operating system (the ultimate outcome of Stallman's GNU project, along with other development) to play DVDs on their systems, and opposed as illegal content control circumvention by the DVD Copy Control Association. Gabriella Coleman explains how hackers resisted this attempt to render DeCSS software illegal through creative technological means. For example, hackers translated the code of the DVD descrambling algorithm into a variety of novel forms, including a 456 stanza haiku, in an attempt to perform a larger legal argument demonstrating how code ought to be protected as free speech.⁴⁸

Thus, in both the realm of contract law and technological

⁴⁷ E. GABRIELLA COLEMAN, CODING FREEDOM: THE ETHICS AND AESTHETICS OF HACKING 86 (2013).

⁴⁸ *Id.* at 161.

development, the community of software developers developed sophisticated methods of direct action that engaged with the legal formation of intellectual property. This direct action provided a broad cross section of this community with a means for engaging with the law outside of the traditional channels of court and legislative action.

III. THE CLA LANDSCAPE: COPYFIGHTERS IN THE ORGANIZING LAYER

Our central thesis has been that the copyfight represents an important moment in the critical legal project. While crits within the legal academy outlined an agenda for legal reform, their project fell short and their audience remained internal. Their own philosophical (and personal) disagreements thwarted forward momentum, as did the rise of conservatism and the law and economics school. For the most part, crits wrote for other crits, and the critical legal project moved into other parts of the academy and away from the law schools. If the CLS project “failed,” it failed to connect with those most directly affected by the law’s indeterminacy in a way that resulted in political advocacy.

But as documented in the previous section, that changed. The Internet began to connect progressive legal thinkers to affected constituents, namely disaffected hackers and those affected by digital copyright policy. In the copyfight, academics such as Lawrence Lessig and Jessica Litman, among others, moved part or most of their scholarship out of the academy and into online communities in ways that became accessible and accountable to those who were directly affected by new copyright legislation. This helped to spark what we think of as critical legal activism. We have elsewhere documented the significant interdisciplinary effects the Internet fostered at this time by bringing together disparate members of the academy, interest groups, hackers, geeks, lawmakers, musicians, librarians and politicians.⁴⁹ Some of this dialogue also influenced the birth and growth of organizations like the Electronic Frontier Foundation and Public Knowledge. Some of this dialogue just simply resulted in yet more academics becoming copyright critics and talking to more academics.⁵⁰

But in terms of concrete political advocacy and direct action, there have been moments of coalescence and significant efforts toward legal reform. On January 18, 2012, Wikipedia and dozens of other websites shut down for twenty-four hours to protest the Stop Online Piracy Act (“SOPA”) and the Protect Intellectual Property Act (“PIPA”). SOPA and PIPA, the Senate version of SOPA, authorized the U.S. attorney general to take action against foreign websites found to be “dedicated”

⁴⁹ Ekstrand et al., *supra* note 5.

⁵⁰ See Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1 (2010).

to copyright infringement, including ordering U.S.-based companies to block access to these infringing sites.⁵¹ Opponents charged that the bills' provisions would have removed significant non-infringing content, including political and other speech from the Web. After the Internet blackout and a significant bombardment of phone calls to legislators, support for the bills was withdrawn.

The Research Works Act,⁵² a bill that would have prohibited federal agencies from distributing privately published (and in some cases taxpayer-funded) research, mobilized academics, researchers and open source advocates. The act would have effectively ended policies such as the National Institute of Health's public-access mandate, which requires that results of publicly-funded research be shared. In February 2012, more than 3,000 scholars signed The Cost of Knowledge petition,⁵³ protesting the exorbitant costs and bundling of journals to libraries by Elsevier, the publisher of more than 2,000 academic journals. Rep. Darrell Issa (R-CA) and Rep. Carolyn B. Maloney (D-NY), sponsors of the bill, withdrew their support shortly after the scholars' protest and additional opposition from groups like the Modern Language Association and the Council on Library and Information Sources.⁵⁴ Elsevier ultimately withdrew its support as well.

The death of Aaron Swartz, the online activist who took his own life in January 2013 after facing federal felony charges for violating the terms of service of an academic journal database, resulted in a huge outpouring of anger and grief, mostly in online communities. Since his death, online activists have mobilized to change the Computer Fraud and Abuse Act ("CFAA"). The CFAA, passed in 1984 to thwart malicious computer hacking, makes it illegal to intentionally access a computer without authorization or in excess of authorization. But the notion of exceeding authorized access has been subject to considerable debate. Furthermore, CFAA's criminal penalties have been severely criticized, particularly after Swartz's death. First-time offenses can be punishable by up to five years in prison for each offense (ten years for repeat offenses), plus fines. Violations of other parts of the CFAA are punishable by up to ten years, 20 years, and even life in prison.⁵⁵

The collaborative project to redraft the CFAA has been particularly notable since Swartz's death. As Techdirt writer Mike Masnick noted, whether or not Lofgren's bill is successful, the process

⁵¹ H.R. 3261, 112th Cong. (2011).

⁵² H.R. 3699, 112th Cong. (2011).

⁵³ THE COST OF KNOWLEDGE, thecostofknowledge.com (last visited Apr. 28, 2013).

⁵⁴ *Notes on the Research Works Act*, HARVARD OPEN ACCESS PROJECT, http://cyber.law.harvard.edu/hoap/Notes_on_the_Research_Works_Act, (last updated Feb. 14, 2013).

⁵⁵ *Computer Fraud and Abuse Act Reform*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/issues/cfaa>, (last visited Apr. 28, 2013.)

has been fascinating to watch unfold.⁵⁶ On Jan. 15, 2013, just four days after Swartz's death, Rep. Zoe Lofgren (D-CA) introduced her first version of "Aaron's Law," a new draft of the CFAA.⁵⁷ In early February 2013, she shared a second and revised version.⁵⁸ In June 2013, she introduced the bill with Sen. Ron Wyden (D-OR). The bill excludes breaches of terms of service or user agreements as violations of the CFAA. Changing an IP address is also excluded. In addition, the bill limits the scope of the CFAA by defining "access without authorization" as the circumvention of technological access barriers. Lofgren wrote:

The government was able to bring such disproportionate charges against Aaron because of the broad scope of the Computer Fraud and Abuse Act (CFAA) and the wire fraud statute. It looks like the government used the vague wording of those laws to claim that violating an online service's user agreement or terms of service is a violation of the CFAA and the wire fraud statute. Using the law in this way could criminalize many everyday activities and allow for outlandishly severe penalties.⁵⁹

In an unprecedented lawmaking exercise, Lofgren posted the text of her proposed bills to reddit, a popular social media site frequented by many in the tech community, seeking feedback. The response was extraordinary and revealed an initial exchange with 120 lawmakers, legal academics, hackers, and ordinary observers on Lofgren's first post.⁶⁰ In a subsequent post, more than 440 posted comments. Among the exchanges was a plea from Lessig, who urged reddit readers to support Lofgren's proposal:

Hey, this is a CRITICALLY important change that would do incredible good. The CFAA was the hook for the government's bullying of @aaronsw. This law would remove that hook. In a single line: no longer would it be a felony to breach a contract. Let's get this done for Aaron—now.⁶¹

And this response to Lessig's post:

⁵⁶ Mike Masnick, *Rep Zoe Lofgren Continues to Improve "Aaron's Law" Via Reddit*, TECH DIRT (Feb. 1, 2013, 5:28 PM), <http://www.techdirt.com/articles/20130201/15410021859/rep-zoe-lofgren-continues-to-improve-aarons-law-via-reddit.shtml>.

⁵⁷ *I'm Rep Zoe Lofgren & I'm introducing "Aaron's Law" to change the Computer Fraud and Abuse Act (CFAA)*, REDDIT (Jan. 15, 2013), http://www.reddit.com/r/technology/comments/16njr9/im_rep_zoe_lofgren_im_introducing_aarons_law_to/.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

Larry—

This looks good, but could you kindly elaborate in plain English for we non-lawyer plebs just how this changes title 18 USC? How exactly did this law nail Aaron? What are the ramifications if there are future activists' incidents (*e.g.*, the hijinks of Anonymous, et al.)? Is there a potential downside to Lofgren's proposed amendment, and if so, for whom? Right now, as welcome as it seems, there are more questions raised than answered. I am sure I would not be alone in my deep appreciation for you taking the time to educate all of us who are so profoundly unsettled just now, not only by losing Aaron but at the prospects for living a sane life under a ruthless and totalitarian regime.

Perhaps your blog might be the best venue to address it. May I suggest a note here and also something on Twitter to alert us when you've had an opportunity to jot down a few notes?

Many, many thanks,

Gus Gordon⁶²

Numerous blogs, including Lessig's, responded to questions like Gus Gordon's and weighed in on both the text of Lofgren's proposal and also the noteworthy manner in which she solicited input and support. Jennifer Granick at the Center for Internet & Society at Stanford Law School called it "a great first step" and offered a redlined markup of the proposed text on her blog.⁶³ What followed was a series of comments and responses from academics (namely Orin Kerr, James Boyle and Jennifer Granick) and interest groups (namely the EFF) about revisions to the law, with responses from Lofgren and affected constituents.⁶⁴

Such an extraordinary deliberative lawmaking exercise caught the

⁶² *Id.*

⁶³ Jennifer Granick, *Thoughts on Zoe Lofgren's CFAA Bill: A Great First Step*, THE CENTER FOR INTERNET AND SOCIETY (Jan. 16, 2013, 3:41 PM), <http://cyberlaw.stanford.edu/blog/2013/01/thoughts-zoe-lofgrens-cfaa-bill-great-first-step>.

⁶⁴ See Orin Kerr, *The Criminal Charges Against Aaron Swartz (Part 2: Prosecutorial Discretion)*, THE VOLOKH CONSPIRACY (Jan. 16, 2013, 11:34 PM), <http://www.volokh.com/2013/01/16/the-criminal-charges-against-aaron-swartz-part-2-prosecutorial-discretion/>; James Boyle, *The Prosecution of Aaron Swartz: A Reply to Orin Kerr*, HUFFINGTON POST (Jan. 18, 2013, 10:11 PM), http://www.huffingtonpost.com/james-boyle/prosecution-aaron-swartz_b_2508242.html; Cindy Cohn, Mark M. Jaycox & Marcia Hofmann, *EFF's Initial Improvements to Aaron's Law for Computer Crime Reform*, ELECTRONIC FRONTIER FOUNDATION (Jan. 17, 2013), <https://www.eff.org/deeplinks/2013/01/effs-initial-improvements-aarons-law-computer-crime-reform>; EFF's Initial Improvements to Aaron's Law for CFAA Reform (With Help From ACLU, CDT, and Stanford's Jen Granick), REDDIT (Jan. 17, 2013) http://www.reddit.com/r/technology/comments/16ryi4/effs_initial_improvements_to_aarons_law_for_cfaa/.

attention of many, including Christie Dudley, a longtime network engineer, security researcher and now law student at Santa Clara University. After Swartz's death, Dudley, like many Silicon Valley hackers, found herself wanting to have more input into congressional legislation, particularly lawmaking that affected her livelihood. With several colleagues, she founded Fork the Law (forkthelaw.org), which at this stage looks very much like one of Karpf's non-membership advocacy organizations. The group's immediate goal is to build a collaborative online platform for citizens to engage in drafting, lobbying, offering feedback and legislation markup, like lobbyists:

Right now everyone is passing around [legislative] documents and there's long, long email chains of what should this text [of the law] should look like. If we had just a place we could go, log in, start going, then I think we could move ahead a lot faster and more efficiently. . . . We're trying to help educate the lawmakers. That's currently a job that's being done by lobbyists mostly because [lawmakers] can't hire an expert in every field. You can get field experts but not somebody with in-depth knowledge with how every industry works.⁶⁵

Dudley says that she and her fellow designers are experimenting with different scripts and tools already in existence but they are looking to expand on these in ways that include input, comments and feedback from unlimited and open sources. She estimates they are anywhere from a few months to a year from having such a tool available. In the meantime, she is soliciting interest from programmers and legislators and has been invited to speak at the Council of Europe, which is interested in her project. Dudley is also engaged in an active dialogue with lawmakers and groups like EFF and Stanford's Information and Society Project. She has a mailing list of hundreds who responded to Fork The Law's initial call for help. Reaching out to the ordinary programmer is one of Fork the Law's key goals:

The tech people I'm talking to are like, "The law is something big and scary and powerful." I'm getting ready to say [to them] this isn't as big a deal as it sounds. You don't need to be afraid to put together something that's meaningful, and we can talk you through the pitfalls, because it's easy to hit pitfalls in forks where something doesn't always mean something you think it means. . . . We can talk

⁶⁵ Skype interview with Christie Dudley, Executive Director and Co-founder, Fork the Law (Mar. 14, 2013). Recording on file with the author.

you [the programmers] through it. You're the only ones who can write the code to make it happen.⁶⁶

Does this kind of critical legal activism—and tools like Fork The Law—represent the future of lawmaking and a more deliberative democracy in which untrained legal actors are more engaged in citizen lobbying and the direct markup of bills? Or is such an observation an idealistic view of online activism, yet another brand of Morozov's "Internet solutionism?"⁶⁷

Perhaps. But interdisciplinary scholarship and popular media continue to draw attention to significant shifts at work. The growing field of legal informatics combines the study of informatics—which focuses "on the study and properties of information, as well as the application of technology to the organization, storage, retrieval, and dissemination of information"⁶⁸—with the study of law, lawmaking, and legal education and advocacy. While historically this scholarship has focused on information retrieval and document creation (*i.e.*, the use of electronic databases to research and craft law), more recent scholarship has focused on open access retrieval, commoditized law, online licensing and citizen involvement.⁶⁹ In documenting changes afoot in the last two years—particularly in Europe—Penn State's Robert Richards has written that "there is a wealth of technological and policy innovation and insightful research currently underway in the area of citizen lawmaking."⁷⁰ UK citizens are now able to propose legislation online, with the most popular proposals "forming the basis for legislation" to be introduced in Parliament. A direct online democracy site run by the European Union called the European Citizens' Initiative provides another example. In Russia, an online forum called Wikivote, which allows citizens to assist in redrafting laws, seems to be "enjoying unlikely early success"⁷¹ although some commentators are skeptical about the longterm impact.⁷² Richards, who also documents international efforts in eRulemaking and online voter guides, is unmoved by such doubt:

⁶⁶ *Id.*

⁶⁷ MOROZOV, *supra* note 9, at 5.

⁶⁸ Sanda Edelez & Sheila O'Hare, *Legal Informatics: Application of Information Technology in Law*, 32 ANN. REV. INFO. SCI. & TECH. 367 (1997).

⁶⁹ Wilhelmina Randtke, Presentation on Legal Informatics (Dec. 13, 2011), available at <http://www.randtke.com/portfolio.html>.

⁷⁰ Robert Richards, *Citizen Lawmaking and Technology: What's New and What's Ahead?*, SLAW (Feb. 4, 2011), <http://www.slaw.ca/2011/02/04/citizen-lawmaking-and-technology-whats-new-and-whats-ahead/>.

⁷¹ *Citizen Lawmaking: Government by (all) the people*, THE ECONOMIST (Oct. 29, 2011), <http://www.economist.com/node/21534760>.

⁷² Luke Allnutt, *In Russia, Lawmaking 2.0 Or Sham 2.0?*, RADIO FREE EUROPE/RADIO LIBERTY (Nov. 3, 2011), http://www.rferl.org/content/in_russia_lawmaking_20_or_shame_20/24380346.html.

This activity involves creative partnerships among programmers, policymakers, technology administrators, scholars and their universities, government funding agencies, philanthropic organizations, for-profit firms, and the nonprofit community. Through cooperative efforts like these, the promise of technology-enabled citizen empowerment is becoming a reality.⁷³

Such efforts, though arguably “over-solutionized,” may suggest some realization of the CLS project. The interdisciplinary cooperation and participation by non-legal actors in such efforts may be forming the kind of organizing layer necessary for advancing CLS goals.

CONCLUSION

Critical Legal Studies was born of a social movement but never evolved into or directly attached itself to one. From its beginning, CLS was subject to a series of internal and external pressures which reflected a distinct and real anxiety about the role of legal education in exposing and overhauling legal institutions and the law itself. CLS was viewed as an attack on the legal academy. This contributed to a series of internal disputes, which ultimately led to disagreement about the purpose of such scholarship, and the disbandment of the group’s formal structure as it was embodied in the CCLS. Because scholars engaged in CLS scholarship were not themselves directly affected by the law’s indeterminacies and contradictions, the goals of CLS were never entirely made active, and the project was thought to have died.

Mindful of the critique that code alone does not solve society’s ills, we argue that the goals of the CLS project have been more or less serendipitously adopted and adapted by online actors disenchanted by copyright policies restricting their livelihoods. Some of this occurred through interdisciplinary exchange (legal academics talking to hackers and visa versa); some occurred by virtue of vocal opposition to legislative responses (the CTEA, DMCA and SOPA/PIPA debates) and to news events (the Jan. 18, 2012 “blackout,” Aaron Swartz’s suicide). Some of this was achieved by the need for code that simply worked. Interested and increasingly interdisciplinary hackers like Christie Dudley see their role in direct action and in fostering the “organizing layer” in political advocacy by introducing tools that contribute to deliberative and collaborative law and policy. This kind of critical legal activism is still a rather privileged dialogic among academics, lawmakers and hackers. But it is, we think, this decentralized community of hackers in the “organizing layer” of political advocacy, who offer the most promise for bringing the goals of CLS to a broader audience.

⁷³ Richards, *supra* note 70.