

HAS THE DIGITAL REVOLUTION LED TO CULTURAL DEVOLUTION?

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The major question we might ask at a conference on the Digital Migration is: has the digital revolution improved the quality of our cultural output? But my guess is we won't touch this question. We are such techno-utopians that the very idea that the cornucopia of digital choice is not advancing the culture is slanderous.¹ But I believe we are in a cultural crisis and part of it is the fault of the digital revolution. Now, I am not a Luddite. I love my iPad just as much as the next person and I believe that technological innovation is the key to America's future. But I also started my working life in 1969, working for Bob Dylan and The Band. I know what good art looks and sounds like.

I was sitting with the art critic Dave Hickey on the terrace of the Bellagio Hotel, having a fine Italian lunch, *al fresco*. The fountains exploded at regular intervals as I asked Hickey if perhaps our cultural crisis is not anchored in some notion of the "postmodern."² "Postmodernism is bullshit" he howls. "What does 9/11 tell you? That the war between the medieval and the modern is not over."³ Well, I had no witty comeback to that and also felt, as a recent transplant to the academy, as much confusion about the rhetoric of the Postmodern philosophers as the linguist Noam Chomsky, who noted:

There are lots of things I don't understand — say, the latest debates over whether neutrinos have mass or the way that Fermat's last theorem was (apparently) proven recently. But from 50 years in this game, I have learned two things: (1) I can ask friends who work in these areas to explain it to me at a level that I can understand, and they can do so, without particular difficulty; (2) if I'm interested, I

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1. See *Technological Utopianism*, WIKIPEDIA, http://en.wikipedia.org/wiki/technological_utopianism (last visited Nov. 15, 2012) ("Technological utopianism . . . refers to any ideology based on the belief that advances in science and technology will eventually bring about a utopia, or at least help to fulfill one or another utopian ideal.").

2. Interview with Dave Hickey, Distinguished Professor of Criticism, Univ. of N. M., in Las Vegas, N.M. (Mar. 12, 2009).

3. *Id.*

can proceed to learn more so that I will come to understand it. Now (the postmodernists) Derrida, Lacan, Lyotard, Kristeva, etc. — even Foucault, whom I knew and liked, and who was somewhat different from the rest — write things that I also don't understand, but (1) and (2) don't hold: no one who says they do understand can explain it to me and I haven't a clue as to how to proceed to overcome my failures. That leaves one of two possibilities: (a) some new advance in intellectual life has been made, perhaps some sudden genetic mutation, which has created a form of "theory" that is beyond quantum theory, topology, etc., in depth and profundity; or (b) . . . I won't spell it out.⁴

Needless to say, Chomsky's choice (b) "spelled out" is Hickey's opening line — "postmodernism is bullshit."⁵

So I will not try to plumb the depths of deconstruction or the master narratives of progress and history, but rather ask a simpler question: Has the extraordinarily inventive 100 year era of American artistic genius we have been calling "modernism" come to an end? Utopian notions of the future always posed the vision that the automation of the soul killing work of society would leave man free to enjoy the arts and improve his mind.⁶ But thirty years into the digital revolution, the average white-collar worker, tied to his always-on Blackberry, works far more hours than his father did in the 1950's.⁷ The "Crackberry" is a nifty little tool for corporate productivity and even Marx would be amazed at the ability of companies to get employees to work 14-hour days while paying them for 8. Thoreau thought that the role of the Vanguard was as a "counter friction to stop the machine," but it could just be that his friend Emerson was more prescient: "Things are in the saddle and ride mankind."⁸ And so we find our modern heroes of the young like Steve Jobs, Larry Page and Sergey Brin doing their best to aid corporate America in keeping our nose to the grindstone rather than playing Thoreau's role of throwing the spanner in the works.

One of the great defenders of postmodernism, Walter Truett

4. Noam Chomsky, *On Post-Modernism*, Z MAG. LEFT ON-LINE BULLETIN BOARD (1995), <http://cscs.umich.edu/~crshalizi/chomsky-on-postmodernism.html>.

5. Hickey, *supra* note 2.

6. See generally EXISTENTIAL UTOPIA: NEW PERSPECTIVES ON UTOPIAN THOUGHT (Michael Marder & Patricia Vieira, eds., 2012); UTOPIAN THOUGHT IN THE WESTERN WORLD (Frank E. Manuel & Fritzie P. Manuel eds., 1979).

7. Joan C. Williams & Heather Boushey, *The Three Faces of Work-Family Conflict: The Poor, the Professionals, and the Missing Middle*, CTR. FOR AM. PROGRESS (Jan. 25, 2010), http://www.americanprogress.org/wp-content/uploads/issues/2010/01/pdf/threefaces_exec_sum.pdf.

8. HENRY DAVID THOREAU, CIVIL DISOBEDIENCE 11 (Forgotten Books, 1964); RALPH WALDO EMERSON, ODE, INSCRIBED TO WILLIAM H. CHANNING (1847), *reprinted in* THE OXFORD BOOK OF AMERICAN POETRY 35-36 (David Lehman & John Brehm eds., 2006).

Anderson, sees great opportunity in a Warholian world:

[I]n which individuals and groups struggle for starring roles (or at least bit parts) in the dramas of life . . . It is what happens when a lot of people begin to understand that reality is a social construction. The more enterprising among us see that there is much to be gained by constructing—and selling to the public—a certain reality, and so reality becomes a new art and business.⁹

On this desire to construct our own reality, rests the \$100 billion valuation of Facebook.¹⁰

Here is my great fear. The 180-year history of the American cultural project was based on an optimistic notion that progress could deliver on Thomas Jefferson's promises of equality, freedom and peace.¹¹ But of course progress has also delivered methods of atomic destruction unimagined by our founders, levels of misery in the face of extraordinary wealth, production and consumption of overwhelming waste in the face of natural resource shortages, and the creation of a media culture of vast stupefaction in the face of uncommon levels of social illiteracy. Daniel Boorstin wrote that we are obsessed with celebrities because they are the "receptacles into which we pour our own purposelessness. They are nothing but ourselves seen in a magnifying mirror."¹² The question we need to ask ourselves is if the media explosion of the postmodern era is not creating a "Gresham's Law of Culture."¹³ Let me explain.

We all know the basis of Gresham's Law, which is "bad money drives out good."¹⁴ But it took the Nobel Prize winning economist George Akerlof to clarify this notion of information asymmetry in a paper called, "The Market for "Lemons": Quality Uncertainty and the Market Mechanism".¹⁵ Thus the seller of a really good used car always

9. WALTER TRUETT ANDERSON, *REALITY ISN'T WHAT IT USED TO BE: THEATRICAL POLITICS, READY-TO-WEAR RELIGION, GLOBAL MYTHS, PRIMITIVE CHIC, AND OTHER WONDERS OF THE POSTMODERN WORLD* 5 (1990).

10. Olivia Oran & Alexei Oreskovic, *Facebook Exceeds IPO Range, Valuation Exceeds \$100 Billion*, THE HUFFINGTON POST (May 14, 2012), http://www.huffingtonpost.com/2012/05/14/facebook-ipo-range-public-offering_n_1516557.html.

11. See generally Martin Luther King Jr., Acceptance Speech at Nobel Prize Ceremony (Dec. 10, 1964); THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

12. DANIEL J. BOORSTIN, *THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA* 61 (Vintage Books, 2nd ed. 2012) (1992).

13. See Armstrong Williams, *Gresham's Law*, THE WASHINGTON TIMES (May 15, 2011), <http://www.washingtontimes.com/news/2011/may/15/williams-greshams-law/>.

14. *Gresham's Law*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/gresham's%20law> (last visited Nov. 16, 2012).

15. George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. OF ECON. 488, 489 (1970).

loses out. No one will pay for more than average quality.¹⁶ The average consumer of media in our broadband universe is like the buyer of the used car; she assumes the content is of average quality, and thus the rise of what *Wired Magazine* editor Chris Anderson calls *Free: The Future of a Radical Price*.¹⁷ If the YouTube video I'm about to watch turns out to be a "lemon," I have lost nothing so long as it is free, except my attention to the Google ad accompanying the video. Does bad content drive out good?

This problem of information asymmetry was solved throughout the American cultural history by the influence of the critic.¹⁸ I leaned on favorite critics to tell me which movie to go see, or which music was of above average quality. But certainly in the popular arts of cinema, TV, and music, it is quite evident that the importance of the critic as an arbiter of what is good or bad has faded since 1991, when the film critic Pauline Kael resigned from the *New Yorker* and the music critic Greil Marcus moved on to write about the larger culture.¹⁹ Both Kael and Marcus must have understood that their influence had already waned. The "critic-proof" movie had existed since the gross-out comedy *Porky's* made \$105 Million in 1982, despite the universal revulsion of the critics.²⁰ The critical establishment's disdain for The Backstreet Boys in 1997 did nothing to keep thirteen-year-old girls from buying millions of their pop confections.²¹ And while the role of the critic in both literature and fine art may still be significant, sales of Danielle Steel novels or Jeff Koons's "Michael Jackson and Bubbles" do not seem to have suffered from critical condescension.²² But what would the critic do with over 500 million YouTube Videos?²³ Would it make any sense to have a critic for the millions of existing blogs?²⁴ Our ability to turn out cultural artifacts

16. *Id.* at 491.

17. CHRIS ANDERSON, *FREE: THE FUTURE OF A RADICAL PRICE* 142 (2009).

18. See generally JERRY ROBERTS, *THE COMPLETE HISTORY OF AMERICAN FILM CRITICISM* (2010); PETER LOPATE, *AMERICAN MOVIE CRITICS: FROM SILENTS UNTIL NOW* (2008).

19. BRIAN KELLOW, *PAULINE KAEI: A LIFE IN THE DARK* (2011).

20. *Porky's*, IMDB, <http://www.imdb.com/title/tt0084522/business> (last visited Sept. 7, 2012); Roger Ebert, *Porky's*, ROGER EBERT (Jan. 1, 1981) <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/19810101/REVIEWS/101010354/1023>.

21. Releases: Backstreet Boys (US), BACKSTREET BOYS, http://www.backstreetboys.com/releases/backstreet_boys_us (last visited Sept. 9, 2012).

22. See generally Avril David, *The 10 Most Powerful Woman Authors*, FORBES (June 6, 2011, 11:28 AM) <http://www.forbes.com/sites/avril david/2011/06/06/the-10-most-powerful-women-authors/>; Jeff Koons, WIKIPEDIA, http://en.wikipedia.org/wiki/Jeff_Koons (last visited Sept. 13, 2012) (One of the Koon's "Michael Jackson and Bubbles" sculptures sold for \$5,600,000 in 2001).

23. YOUTUBE, <http://www.youtube.com> (last visited Nov. 15, 2012).

24. See generally About, TUMBLR.COM, <http://www.tumblr.com/about> (last visited Nov. 14, 2012) (Tumblr hosts over 80 million blogs); WORDPRESS.COM,

is not in question here. But how much of it passes the who cares test?

And then there is the question of theft. There is considerable evidence that we have constructed a knowledge economy in a world where knowledge is being massively devalued through piracy.²⁵ First, what we make that the rest of the world wants (movies, music, video games, software, drug patents) is all subject to the crushing disdain for our intellectual property on the part of most of the world's citizens (as well as our own public).²⁶ We have built a knowledge economy, but the Chinese government doesn't give a fig for our Intellectual Property regime.²⁷ If the people want cheap Viagra, China will tell Pfizer to pound sand and simply make the patented drug generic. We come here to the ultimate dilemma of the "information wants to be free" crowd.²⁸ Malcolm Gladwell recently posed this rhetorical question to Chris Anderson and the "copyleft:"

It would be nice to know, as well, just how a business goes about reorganizing itself around getting people to work for 'non-monetary rewards.' Does he mean that the New York Times should be staffed by volunteers, like Meals on Wheels? Anderson's reference to people who 'prefer to buy their music online' carries the faint suggestion that refraining from theft should be considered a mere preference.²⁹

The arrival of the cheap printing press in America not long before Emerson started publishing *The Dial* allowed the American author to escape the prison of patronage that was the lot of his European predecessors and make an independent living as a writer.³⁰ But because the marketplace and not the patron (government or private) became the sole source of cultural finance, there was always the possibility that the lowest common denominator would ultimately rule what could be

<http://en.wordpress.com/stats/> (last visited Nov. 14, 2012) (Wordpress hosts more than 57 million websites).

25. Stephen E. Siwek, *The True Cost of Copyright Industry Piracy to the U.S. Economy*, INST. POLICY INNOVATION 14 (Oct. 2007) (In 2007, copyright infringement cost the U.S. economy over \$58 billion in total output); see also BUSINESS SOFTWARE ALLIANCE, 2011 BSA GLOBAL SOFTWARE PIRACY STUDY 1 (9th ed. May 2012), http://portal.bsa.org/globalpiracy2011/downloads/study_pdf/2011_BSA_Piracy_Study_Standard.pdf.

26. See generally BUSINESS SOFTWARE ALLIANCE 1 (57% of computer users pirated software).

27. David Leonhardt, *The Real Problem With China*, N.Y. TIMES, Jan. 11, 2011, at B1.

28. See R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 Colum. L. Rev. 995, 999 n.14 (2003).

29. Malcolm Gladwell, *Priced to Sell*, THE NEW YORKER (July 6, 2009), http://www.newyorker.com/arts/critics/books/2009/07/06/090706crbo_books_gladwell.

30. *The Dial: A Magazine for Literature, Philosophy, and Religion* (Margaret Fuller, Ralph Waldo Emerson & George Ripley eds., Cambridge Press 1840) available at http://books.google.com/books?id=-ukAAAAAYAAJ&source=gbs_navlinks_s.

made.³¹ For the most part, the current American movie business has pretty much surrendered to this judgment—most movies are made for sixteen-year-old boys.³² And although in England the government funded BBC still produces quality television, we have made a conscious choice in the U.S. not to have a well-funded PBS, so there is no real alternative to commercial television in America.³³ Whether we would have the political will to finance a Public Media System to truly serve in “the public interest, convenience and necessity” is highly debatable, so here is a notion of how we might rethink the “information wants to be free” trope and provide financing for quality content.³⁴

To put it most starkly, the current “free” business models of even the most successful companies are unsustainable. Craig Moffett of Bernstein Research recently commented on Google’s YouTube:

In contrast to the latest wave of business articles about “free” as the new business model, we would argue there is no such thing as free – someone always pays. YouTube is an interesting case in point. Revenue estimates for 2009 are in the \$200 to \$250 million range, but costs are estimated to be somewhere in the \$400 to \$700 million range. Who makes up the difference? Google shareholders, of course. For those of us who lived through the “new economics of the Internet” in the late 1990s, seeing it happen all over again with Google brings a wry smile. In fact, what seems to be emerging is an Internet variant on an old GM adage: ‘we lose money on every car – but we make it up on volume.’ Substitute video for car and you have a pretty accurate description of YouTube’s current business model.³⁵

Google can afford to lose this kind of money because, as the New York Times pointed out, “last year, Google sold nearly \$22 billion in advertising, more than any media company in the world.”³⁶

But for Google or any other major Internet portal to believe they can

31. In the centuries following the development of the printing press, market forces drove the production and content of books. Zack Kertcher & Ainat N. Margalit, *Challenges to Authority, Burdens of Legitimization: The Printing Press and the Internet*, 8 YALE J. L. & TECH. 1, 16-17 (2005).

32. See Steve Rose, *Why Are There So Many Movies About Guys Who Won’t Grow Up?*, THE GUARDIAN, May 10, 2012, § G2 at 10, available at <http://www.guardian.co.uk/film/2012/may/10/movies-about-guys-who-wont-grow-up>.

33. See Andrew Feinberg, *Senate Republicans Introduce Bill to Defund NPR, PBS*, THE HILL TECH. BLOG, (March 4, 2011, 12:11 PM), <http://thehill.com/blogs/hillicon-valley/technology/226735-demint-lamborn-call-for-public-broadcasting-to-be-defunded>.

34. 47 U.S.C. § 307(a) (2011); Wagner, *supra* note 28.

35. Jonathan Taplin, *True High Capacity Networks; A Regulatory Framework* 6, <http://www-bcf.usc.edu/~jtaplin/pdf/High%20Band%20White%20Paper.pdf>, (last visited Nov. 14, 2012)

36. Miguel Helft, *Google Makes a Case that it Isn’t so Big*, N.Y. TIMES, June 29, 2009, at B1.

repeal the laws of supply and demand, is a fool's errand. By allowing every blog and Internet site in the universe to sell advertising, thus dumping an infinite amount of ad inventory on the market, they have managed to drastically devalue the price of an individual ad unit.³⁷ Thus even high quality journalism sites like the New York Times find their online ad prices plummeting.³⁸ Although the current situation may be working for Google and a few others (taking commission on tonnage), it points towards a future in which the notion of a purely ad supported media system is unsustainable. It is even possible that this could lead to the second Internet bubble bursting, with consequences as dire as the year 2000 bubble.³⁹ As Robert Thomson, Managing Editor of The Wall Street Journal said to Charlie Rose, "Google devalues everything it touches. Google is great for Google but it's terrible for content providers."⁴⁰

So that's what doesn't work (except for Google). Here's an idea that might work. In contrast to the parlous state of the CD business, the music publishing business is flourishing as never before because of one simple difference—the mechanical license.⁴¹ Every time you go into a bar or a Gap store that is playing music, they are paying a fee to ASCAP or BMI for that privilege and the songwriter is getting paid.⁴² They do a monthly sample on a small percentage of the retail, radio, elevator, Internet and other outlets and divvy up the money.⁴³ It works. For the U.S. Trade representatives meeting with China and Columbia in the next couple of months, the only solution to the real IP theft problem is a copyright license fee on worldwide broadband service.⁴⁴ Assume that some

37. See Rebecca Greenfield, *The Decline of Google (and the Internet's) Ad Business*, The Atlantic Wire (July 20, 2012), <http://www.theatlanticwire.com/technology/2012/07/decline-google-and-internets-ad-business/54835/>.

38. Amy Chozick, *New York Times Co. Posts \$88 Million Loss, Citing About.com Write-Down*, N.Y. TIMES, July 26, 2012, at B6 (advertising revenue companywide fell 6.6% in the second quarter of 2012).

39. See Nathan Vardi, *With Facebook Earnings, the Second Internet Bubble Is Over*, FORBES (July 26, 2012, 5:08 PM), <http://www.forbes.com/sites/nathanvardi/2012/07/26/with-facebook-earnings-the-second-internet-bubble-is-over/>.

40. Matt Asay, *Google, the Great Destroyer of Value?*, CNET (Feb. 14, 2009, 7:07 AM), http://news.cnet.com/8301-13505_3-10164284-16.html.

41. See *BMI Reports Increased Revenues for FY 2011*, BMI (Sept. 20, 2011), http://www.bmi.com/news/entry/bmi_reports_increased_revenues_for_fy_2011 (BMI's revenue exceeded \$931 million in fiscal year 2011); *ASCAP Reports Increased Revenues in 2011*, ASCAP (Mar. 8, 2012), http://www.ascap.com/press/2012/0308_ascap-reports.aspx (ASCAP's revenue during calendar year 2011 totaled \$985 million).

42. See *About BMI*, <http://www.bmi.com/about/> (last visited Nov. 14, 2012).

43. See *Royalty Policy Manual*, http://www.bmi.com/creators/royalty/how_we_pay_royalties/detail (last visited Nov. 14, 2012).

44. Scott Charney, Corp. Vice President, Trustworthy Computing, Keynote Address at

international body like UNESCO was collecting \$4 per month per subscriber from AT&T, France Telecom, China Netcom and every other provider and then doling out the money based on a sampling of worldwide broadband content usage. Instat says there will be one billion broadband users by 2013.⁴⁵ At \$4 per month per user, that would yield \$48 billion per year in fees for copyright holders. Perhaps a video file might get paid more than an audio file, but it would not be hard to sample the world's networks to see how to divvy up the funds. Companies like Big Champagne already do this.⁴⁶ Piracy is not a trivial issue. I can tell you from my own experience that no one gets any home video revenue out of Asia or South America, even though millions of DVD players are sold there.⁴⁷ We need to accept the reality of online file sharing and stop pretending there is some magic box Digital Rights Management fix to this problem.⁴⁸ America will not exist long as a knowledge economy if everyone steals that knowledge.

RSA 2010 Conference (Mar. 2, 2010) (transcript available at <http://www.microsoft.com/en-us/news/exec/charney/2010/03-02RSA2010.aspx>) (last visited Nov. 14, 2012).

45. Nick Wood, *Global Broadband Users to Hit 1bn by 2013*, TOTAL TELECOM (JAN. 20, 2010), <http://www.totaltele.com/view.aspx?ID=452271>.

46. *What is the BC Dash?*, BIGCHAMPAGNE, <http://bcdash.bigchampagne.com/what> (last visited Nov. 14, 2012).

47. *See generally* David S. Cohen, *CES Reports Rebound in Electronics Sales*, VARIETY (Jan. 4, 2011 6:53 PM), <http://www.variety.com/article/VR1118029739>.

48. *See* Peter Glaskowsky, *The Future of DRM*, CNET (Sept. 10, 2007), http://www.news.cnet.com/8301-13512_3-9774549-23.html.