

The Public Domain: Enclosing the Commons of the Mind

By James Boyle

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It is often overlooked by the general public that intellectual property rights in the United States are not conferred on a Lockean “sweat of the brow” theory, but rather as a means of rewarding creativity and thus propagating further creative action. Ideas for creative works, however, are not pulled from the ether, but are rather dependent upon what has come before. Bestowing intellectual property rights in authored works, then, must be done carefully so as to sufficiently incentivize creativity while still allowing swift entrance into the public sphere to provide the foundation for further works. In his book *The Public Domain: Enclosing the Commons of the Mind*, James Boyle¹ seeks to show that the current intellectual property policy of the United States has been concerned solely with conferring rights, and has been ignoring the effect that those rights have. Intellectual property rights have a reciprocal, give and take relationship with the creation of new matter, and, as Boyle puts it “the holes matter as much as the cheese.”² In other words, when designing intellectual property policy, drafters should be just as concerned with the freedoms that policy provides as the protections.

As such, a main premise of Boyle’s book is that the current system of protections, particularly in the realm of copyright, is severely unbalanced and does not provide the optimal incentive/public use scheme. Boyle espouses that the vast majority of copyrighted works

¹ Boyle is William Neal Reynolds Professor of Law at Duke University Law School, co-founder of the Center for the Study of the Public Domain, and a founding board member of Creative Commons.

² James Boyle, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 65-71 (2008).

outgrow their financial potential within five to ten years, a fact that makes a copyright term of life plus seventy years seem absurd.³ Not only is such an extended term inefficient in Boyle’s view, but it comes at the cost of preventing the work from influencing the creative flow of future works: “the goal of the system ought to be to give the monopoly only for as long as necessary to provide an incentive. After that, we should let the work fall into the public domain where all of us can use it, transform it, adapt it, build on it, republish it as we wish.”⁴

Boyle also seeks to hammer home the point that the way many tend to look at intellectual property—i.e. treating it the same as tangible property—is inherently flawed. He labels the dangers associated with doing so the “Jefferson Warning,” in relation to a letter that Jefferson wrote to Isaac McPherson that warned against the effects of extending intellectual property rights too far.⁵ To demonstrate the difference between tangible and intellectual property, Jefferson noted that a salient feature of tangible property is that ownership comes with the necessary exclusion of others (e.g. when you are sitting in a chair, you are also preventing others from sitting in that chair). Ideas, however, can be passed from person to person without depriving either.⁶

This way of thinking about intellectual property—separating the intangible idea from the fixed form—has become increasingly relevant since the advent of the Internet. Due to digitization, physical, exclusively owned fixed works have been replaced by intangible versions that are easily copied and transferred. This trend toward the digitization of information,

³ *Id.* at 11.

⁴ *Id.*

⁵ The thrust of the letter was regarding the patentability of an invention by one Oliver Evans, which involved buckets attached to a wheel for the purpose of moving grain. Jefferson noted that such a device, called a “Persian wheel,” had been in use for thousands of years as a means of transporting water, and that merely utilizing the apparatus to move a different substance should be insufficiently to be awarded a patent.

⁶ “He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.” *Id.* at 20 (quoting Jefferson’s letter to McPherson).

combined with the mass proliferation of the Internet, has led to what Boyle coins the “Internet Threat.”

The Internet Threat is the end-game embodiment of the idea that in order to maintain a working system of intellectual property rights, the level of protection that exists must necessarily increase as it becomes easier to make unauthorized copies.⁷ With respect to the Internet, that corresponding increase in control can be exerted over either the work itself or the medium through which copies of that work pass. Attempts at affording increased protections for authors have resulted in such half-measures as DRM encryption of music files and DMCA takedown notices, which can be directed toward websites hosting infringing content. The Internet Threat, however, warns that, given the degree of freedom enjoyed by users, there must be perfect corresponding control over the content on the Internet for copyright protection to survive. Given the Byzantine nature of the Internet’s infrastructure, however, such a task would be impossible, and the Internet Threat thus presupposes the extinction of copyrights.

Boyle himself does not take this view, however, and believes that the Internet need not result in the end of copyright protection, but that in order to maintain it, policy changes that deal with the holes, not just the cheese must arise. This is precisely the objective of Creative Commons, an organization that Boyle helped establish.⁸ Creative Commons provides simple, easy-to-use iconography for creators to stamp their works with, thus giving clear notice to others what they may or may not do in terms of changing, copying, or selling the work.

Overall, I found this book to be fascinating, and Boyle’s writing style is fluid and easy to read. He presents his arguments with enough background to allow a layperson to engage with

⁷ For instance, if no copying devices other than an individual armed with a quill and ink existed, copyright is not necessary because having physical control over a textual work is sufficient given the laborious nature of copying. *Id.* at 61.

⁸ <http://www.creativecommons.org>.

his discussion of the topic, but not so much as to bog down his thesis or frustrate a reader who possesses a background in intellectual property law. I do have two minor criticisms, however. First, I felt that in the book Boyle had the tendency to use the term “intellectual property” when discussing copyright law specifically, and although in some instances—such as the discussion of intellectual property as distinct from tangible property—this makes sense; in others it does not. I believe that Boyle should have more clearly delineated the distinct forms of intellectual property and touched on their unique issues, or focused solely on copyright alone. Second, I wish that the Boyle had delved deeper into the various motivations for engaging in creative enterprise. For instance, although he mentions the insatiable creative drive of some, he does not discuss how this, or other motivating factors such as a desire for notoriety, might factor into creating a more efficient intellectual property scheme.

The most important thing I took away from this book was Boyle’s call to study the effects of specific modes of intellectual property rights instead of merely guessing at what policies would be best and assuming that more protection is always better. Further, Boyle professes that we should combine this knowledge with a question: *what kind of system do we want?* Do we want a system that allows works to become lost or forgotten merely to protect an interest that we assume the author has, or do we want to celebrate that author and her work by freely distributing it and allowing others to use it for inspiration? The Internet does not merely represent a more efficient means of theft, but a grand medium for collaboration in which we can share and build upon the ideas of others. In deciding how to respond to a perceived Internet Threat, do we really desire an intellectual property regime that seeks to hamstring the most powerful creative collaboration tool humanity has ever invented?