

**James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale UP, 2008)**

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In *The Public Domain*, James Boyle claims that recent expansions in intellectual property law constitute nothing less than an “enclosure of the intangible commons of the mind.”<sup>1</sup> The language of enclosure draws on Marx’s critique of the privatization of common lands in 18<sup>th</sup> century England as part of the process of primitive accumulation. For Marx, what distinguishes the process of enclosure from previous destructions or dissolutions of common property is that “the law itself becomes the instrument by which the people’s land is stolen.”<sup>2</sup> Enclosure is the legal justification of the violent appropriation of capital. According to Boyle, this is precisely what is happening today; that which up until now has been free for public use has been usurped by a process of privatization at a rate not seen since the grassy commons were enclosed. The 20<sup>th</sup> century enclosure, and the establishment of new property rules more generally, has had “a huge effect on the power relationships and bargaining positions.”<sup>3</sup> Especially with respect to technology and copyright, the domain of this enclosure may be more vast than one would suspect: “In a networked society copying is not only easy, it is a necessary part of transmission, storage, caching, and, some would claim, even reading.”<sup>4</sup> A “copy” is not just a tangible version of particular media, a downloaded movie or an MP3. As we interact with the Internet and other networks, temporary “copies” are created through activities we would never associate with copying—consequently copyright has a much longer reach than ever before. Thus, the imbrication of copyright, patent, and trademark law has come to constitute a field—intellectual property, or “IP”—that is as expansive as it is illegible.

While hardly surprising in light of the inexorable process of global capitalism, this second enclosure constitutes a genuine shift in the relations of production. If there is a conflict between these new relations of production and what came before,

it is certainly being overcome through a continuous expansion of property rights. Having come up against the finitude of material property, capitalism is likewise colonizing the intellectual sphere. It privatizes the intangible—both the immaterial and the intellectual—but the trick of this is that this privatization is couched in terms of patronage and artistic support. Looking back over the expansion of property rights, we would have to say that this sphere now constitutes almost the entirety of 20<sup>th</sup> century cultural production. This “tragedy of the anti-commons” is illustrated by the fact that the newly sealed vault of our cultural heritage is largely composed of “orphan works,” cultural artifacts without a known copyright holder—and therefore even if one were willing to pay for the right to use them, one cannot. Boyle illustrates that the sheer number of orphaned works is due to two relatively recent acts of enclosure: automatic copyright at moment of fixation and the extension of the copyright term. Therefore, the default for any cultural production is to be property—there is no longer even a requirement that you want your work to be copyrighted, no need to even draw the ©. The term of copyright was extended from only 28 years as recently as 1978 to the current term of life of the author plus seventy years, which means portions of this issue of *Polygraph* will most likely be under copyright until 2125 or later.

In his previous monograph, *Shamans, Software, and Spleens*, Boyle argued that IP law preserves a Romantic notion of authorship as original genius to justify exclusive, absolute property rights in a decidedly unromantic moment; indeed, intellectual property laws are applied to copies that are anything but original. In *The Public Domain*, Boyle extends this argument by situating authorship among a number of archaic legal models, including economic models of tangible property, that have been uncritically carried forward into the digital age under the auspice of intellectual property. The assumption at the heart of these models, according to Boyle, is that wherever things are cheap to copy, and therefore difficult to establish exclusive control over, there is a potential collapse of the market. The strength of intellectual property rights then must vary inversely with cost of copying; as copying gets cheaper, the economic disincentive to copy must be replaced by a legal one. For those who consider property incentives to be directly responsible for the innovation of the past two centuries, then, the Internet appears to strongly undermine cultural and scientific production. According to this logic of fear, without a strong legal impediment copying will run rampant, effectively removing the incentive for production. For such people expansion of intellectual property appears to would seem be necessary in order to preserve the vitality of American culture, much less the incentive to develop the next life-saving pharmaceutical.

The process of enclosure reaches beyond cultural production to privatize science and technology in ways heretofore unseen. Recent legislation and judicial decisions have done everything from recognizing computer code as a form of copyrighted speech to allowing patents on other people's genes. The “public goods” model in economic theory provides support for this set of practices. A somewhat misleading bit of legalese, a “public good” is a product that is both non-rivalrous and non-excludable. The term “non-rivalrous” indicates that one's consumption of a good does not prevent the simultaneous consumption of that good by another (e.g., broadcast television), while “non-excludable” denotes that it is impossible to prevent those who have not

paid for the good from consuming it. Essentially, one person's possession of a "public good" does not prevent another's possession of the same good at the same time without payment. The idealized vision of intellectual property rights purports to solve this problem by making the goods legally excludable and rivalrous, thus returning the competitive market to forms of public goods. This legal restoration of the market is credited with reinstating the incentive for innovation, which would otherwise not exist. And like all good free-market models, it is said to create a feedback system that ensures the best and brightest will rise to the top.

But, as Boyle points out, science and technology are also realms in which alternatives to property and proprietary production have emerged. The most notable is probably open source software and the General Public License (GPL). GPL, otherwise known as open-source coding, creates a "virtuous cycle" insofar as anyone is allowed to use the code so long as their work also is made accessible to others through GPL licensing. Boyle claims "the Internet should make us think seriously about the power of nonproprietary and distributed production."<sup>5</sup> Boyle doesn't attempt to offer a comprehensive understanding of what open source incentives are (to do so would be impossible), but the reality is undeniable: they exist. People produce without property incentive regardless of economic theory's inability to form a totalizing model explaining why. IP debunks the myth that collaborative creation leads to subpar products, and one immediately thinks of Wikipedia and the Internet in general as prime examples. *The Public Domain* never drifts into the utopian visions about the Internet as an end to hierarchy in production. According to Boyle, this is not even exclusive to the Internet; we can see a similar method of production in science, law, education, and musical genres. Boyle merely gestures towards the social significance of this development; in a list of lessons one can derive from the success of open-source coding, he only says "it might offer a new tool in our attempt to solve a variety of social problems."<sup>6</sup>

But those who see the Internet as a means of altogether displacing property relations have been all too cleverly termed "dot-communists." And some of the critiques of the public domain have been framed in terms of traditional anti-communitarian fears. For many, the absence of legal intervention and, thence, the restoration of the competitive market in the face of technology has produced what Garrett Hardin famously termed the "tragedy of the commons." In his 1968 article, Hardin argues that without a property incentive, the commons would necessarily be depleted. Using the example of a pasture shared by local herders, he argues that a rational herder would always overgraze the land because the gains are exclusive and internal whereas the costs are always distributed as an externality. Hardin's depiction epitomizes a foundational pessimism about the possibility that natural resources will be preserved if they are not privately owned. The model is adapted slightly when applied to intellectual property insofar as it is not that the commons will be overused and degraded like grassy commons, but that the allowance of commons would halt cultural and scientific production in the first place.<sup>7</sup>

Although the tragedy of the commons has proved historically to be a flawed understanding of the use of shared resources in both tangible and intellectual property, the conflation of the two kinds of property can prove detrimental even when the

model is appropriate for tangible property relations. One consequence of this slip-page is a presumptively absolute theory of rights in intellectual property. Due to this misplaced assumption, Boyle argues, any limitations on intellectual property rights are immediately framed as taxes on the property holders and subsidies for society at large.<sup>8</sup> This is most evident in the discourse surrounding fair use. Boyle shows that despite its treatment as a “narrow and grudging defense against copyright infringement,” fair use is actually a constitutive limitation on intellectual property rights, just as passage for public roads is a genuine limitation on landed property rights. It is fair use doctrine, and only by means of it, that copyright can coexist with the First Amendment. Reproduction for “purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright”(66);<sup>9</sup> these rightful appropriations, explicit in the law itself, should be not be mistaken for “permitted violations” but as legitimate in themselves. Therefore, drawing on Thomas Jefferson’s writings on intellectual property, Boyle shows that the promises of intellectual property are not only about exclusive rights, or solely about production incentives, but also about the dissemination of culture and a decentralized means of determining what is culturally valued. One of the few legal areas to actually have its justification written into the Constitution, intellectual property is about the furthering of science and the arts, and in this mission “the holes matter as much as the cheese.”<sup>10</sup>

One could argue that with the emergence of our information society a new paradigm of relations of production has been constituted, showing capitalism’s ability to adapt and constantly expand. But Boyle’s work illustrates that there has also been a positive side: the active production of a commons within this new framework—and, importantly, a discourse recognizing these commons. As few as twenty years ago, “the commons” and “communism” were words rarely spoken in the halls of the academy, let alone in the popular discourse. But the discourse of the commons is reemerging, and not only among politically committed academics but in popular culture through intellectual property. “Creative Commons” has come to be part of the popular lexicon in recent years for anyone who participates in various Internet communities, from Flickr to Google searches. Boyle was one of the original board members of the Creative Commons, and helped found the Scientific Commons and ccLearn, which focus on making educational resources part of the commons.<sup>11</sup>

Within this historical context, James Boyle offers a rhetorically powerful set of thought experiments to illustrate the profundity and consequence of these errors, and what he terms our “cultural agoraphobia.” One of these thought experiments asks the reader to create the greatest reference work the world has ever seen. Would you hire experts and divide the tasks so that each person contributed in the area of their own expertise, and then protect and reward that labor through rigorously controlled copyright laws, or would you merely open the platform and wait for hobbyists, government, scientists, and volunteers to produce and organize this vast sea of information? The former is the default for most modern institutions, but Wikipedia shows us that that impulse is not always correct. And Wikipedia is only one such cultural resource we would not imagine; the Internet in its current decentralized

incarnation is another. Through these thought experiments, Boyle very effectively shows that cultural production does not behave according to mainstream economic models, nor do we want it to.

Although this process of enclosure is daunting, it is not irreversible, at least not yet. Boyle intervenes at a moment when it is still possible to think a time prior to these property relations—something lost long ago regarding private property more generally. Therefore, Boyle doesn't want to remain in the negative mode of critique, but to move toward the positive construction of a politics. To do this, he turns to an unlikely source to think this politic project: the environmental movement. This appears a surprising choice in a moment when the insufficiency of the environmental movement to confront the ecological crisis is evermore apparent. However, Boyle argues that when viewed historically environmentalism appears as a vital form of politics with a markedly similar—if admittedly more urgent—project from which IP has much to learn. He begins by drawing a historical parallel between the current moment in intellectual property and the state of environmentalism prior to the 1950s. He argues that technological and scientific innovation have made us aware of the value of intellectual property, just as the industrial revolution forced us to come to terms with the importance of the environment. “The explosion of information technologies has precipitated an intellectual land grab; it must also teach us about both the existence and value of the public domain.”<sup>12</sup> Prior to the consolidation of the movement, there were people deeply invested in issues we now see as fitting neatly under the rubric of environmentalism who failed to see their projects as interconnected. The movement, that is, “‘invented’ the concept of the environment and used it to tie together a set of phenomena that would otherwise seem very separate. In doing so, it changed perceptions of self-interest and helped to form coalitions where none had existed before.”<sup>13</sup> They were supporters of the parks system, birdwatchers, conservationists, and hunters who failed to apprehend their common interest, just as now software engineers, librarians, artists, parodists, and biotech researchers fail to see their interests converging around the public domain. The public domain, like the environment, is not something that is self-evident or can be “discovered,” but must be discursively produced. For the environmental movement such discursive production pitted the insights of ecology about the interconnectedness of ecosystems against the exclusion of “externalities” from economic profits. Each confronts the question of how to build a politics of a perceived residue, and therefore has an important analogue in IP.

Connected to this is Boyle's strongest point regarding environmentalism, that its critique of the exclusion of ecological costs and benefits from capitalism's models is analogous to and vital for intellectual property's political project:

The environmental movement gained much of its persuasive power by pointing out that for structural reasons we were likely to make bad environmental decisions: a legal system based on a particular notion of what ‘private property’ entailed and an engineering or scientific system that treated the world as a simple, linearly related set of causes and effects. In both of these con-

ceptual systems, the environment actually disappeared; there was no place for it in the analysis.<sup>14</sup>

But is visibility enough? Boyle has a modest goal in this regard. He champions the fact that even if the environment is still not privileged the way it should be, at least in recent years it has become something we know we are exploiting, no longer an external or invisible cost. Even if it doesn't tip the scales of policy in the way that it should, it at least functions as a counterweight. The public domain's value must be apprehended through critique of the current discourse in order to mobilize people to preserve it.

However, there is danger in measuring the contribution of the public domain in strictly economic terms. The inclusion of intellectual property value in economic models to determine its market value fails to account for its cultural value. Just as John Bellamy Foster has argued that privatization of the environment and shifting accountability onto consumer behavior is not the solution to the ecological crisis, privatization is not the solution to intellectual property either. Boyle gestures towards the potential dangers of merely making the value of the public domain internal to market valuation. This economic translation can obscure or undermine the idea that cultural value is not always commensurable with economic value—and should be valued in its own right.

On one hand, Boyle's generative reading of environmentalism seems an important and refreshing one in a sea of profound disillusionment with environmentalism on both the right and on the Left. However, on the other hand, Boyle's project would benefit from more readily acknowledging that it is doing a positive reading of a failing model as opposed to merely eschewing what may prove to be critical flaws. Instead, he attends to the admittedly neglected positive aspects and avoids the readily apparent negative one. However, his championing of the environmental model is not uncritical. He recognizes ecology and environmentalism as incomplete and inadequate in confronting the problem at hand, but argues that they still offer a means of resistance to the more pernicious ideologies of late capitalism. The more contemporary history of environmentalism is put forth as a model of how to make things that seem "obscure, wonkish, hard to get excited about" into accessible political projects. For Boyle this is always the first step of any politics because what people understand, and *only* what they understand, will they be compelled to change. Environmentalism had to surmount (and still continues to struggle with) a series of scientific calculations that are not accessible to the lay audience. They have done so through the establishment of institutions, organizations, and coalitions whose sole purpose is translating and disseminating this otherwise inaccessible knowledge. *The Public Domain*, offering a generative reading of a movement in crisis, reminds us that there are still lessons to be learned from things that fail. Although perhaps not the elements that come most readily to mind when we think about environmentalism, the things Boyle draws on are crucial insights into the project that lies ahead for intellectual property. However, in an effort to recuperate environmentalism as a political model, Boyle's project is in danger of falling into some of the same traps. He

champions an environmentalism that “piggybacked on existing sources of conservationist sentiment—love of nature, the national parks movement, hikers, campers, birdwatchers.”<sup>15</sup> But as we have seen through the history of environmentalism, when this is done uncritically it can limit our ability to truly challenge the dominant framework, carrying forward the logic of capitalism even when attempting to change its terms. This is only frustrating because one of the more implicit but vital elements of Boyle’s reading of intellectual property is as a way to escape this logic.

Distinguishing the intellectual commons is their obvious constitution from fragments of other information products. It is this transparency of derivation that situates intellectual property as a unique vantage point from which to rethink property more generally—a means of escaping the dualistic framework of the property paradigm. It is a place where we can see a relationship to property which is neither about privatization nor about state control—allowing a tangible way to escape this binary. Therefore it is an opportunity to think the commons apart from immediate conflation with reified notions of communism. It emerged as a popular term that allows us to get out of the strict binary of privately-owned and state-owned—towards a third term without immediate conflation with communism and socialism. It is just an entrance point in the public discourse, but this characteristic of IP opens up other political possibilities.

The project set forth in *The Public Domain* is one of production—both discursive and material production. This is not an anarchistic rant about the Internet as utopian space. And although at first blush it seems to be undermined by the same refusal to challenge capitalist economic demands as mainstream environmentalism, there is a crucial difference. The planet is in crisis, as a direct result of capitalist pressures, and may be rendered uninhabitable as a result. By contrast, IP is in a critical moment, not a crisis. Implicitly, Boyle offers us the possibility that IP can foster a vibrant public domain compatible with capitalism. And perhaps if we were to extend this logic, the public domain might one day come to truly challenge capitalism as an alternative as emerging from within through a paradigmatic shift. Admittedly, Boyle’s project is far from being a cry for political radicalism, but that should not diminish the radical potential his project opens up. Whether or not one can overlook his pragmatism in the name of accessibility and political praxis or leaves frustrated that Boyle doesn’t exploit the true political potential of his own work is up for debate. So for every moment of theoretical frustration one experiences with this text, every time Boyle refuses to satiate our intellectual curiosity or desire for further nuanced elaboration, one can take solace in the fact that the text (released under a Creative Commons license through Google Books) embodies the form of discourse it champions as politically necessary. In reimagining intellectual property, Boyle is implicitly reimagining polity itself. ■

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- 1 James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale UP, 2008), 45.
- 2 Karl Marx, *Capital, Vol. 1* (New York: Penguin, 1992), 885.

- 3 Boyle 56.
- 4 *Ibid.* 51.
- 5 *Ibid.* 205.
- 6 *Ibid.* 190.
- 7 *Ibid.* 47.
- 8 *Ibid.* 55.
- 9 *Ibid.* 66.
- 10 *Ibid.* 69. The precise Constitutional language is “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” (Article 1, Section 8).
- 11 Boyle also founded The Center for the Study of the Public Domain at Duke Law School (<http://www.law.duke.edu/cspd> ) in 2002; the Center has an explicit mission to promote research and scholarship that foreground the contributions of the public domain to culture, science, and innovation, and to translate this academic research into public policy solutions.
- 12 Boyle xv.
- 13 *Ibid.* 242.
- 14 *Ibid.* 241.
- 15 *Ibid.* 242.