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Book Note

THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND, by James Boyle¹

YOAV HAREL

IN THIS BOOK, JAMES BOYLE SETS OUT TO EXPLAIN the meaning and significance of intellectual property in an information-driven society, to persuade readers that intellectual property law is in danger of developing along an errant path, and to demonstrate that current approaches to intellectual property can be improved by recognizing the importance of the public domain. The book is highly readable, but also provides detailed references for those with a research interest.

In the first two chapters, Boyle vividly illustrates why we should care about intellectual property law, and includes eloquent thinking on the topic that can be traced back to figures such as Thomas Jefferson. From the start, there has been recognition of the need to balance incentives to innovate with the dissemination of knowledge, and that new ideas are informed by previous ones. Chapter three compares the emergence of laws relating to the enclosure of land to that of laws concerning the less tangible concept of intellectual property. Boyle refers to the latter trend as the “second enclosure movement.”

Chapter four points out that the Internet was only allowed to take its highly effective present form because it was developed largely in advance of the increasingly restrictive intellectual property regimes that now govern it. Chapter five raises the *Digital Millennium Copyright Act (DMCA)* as an example of the legal trend towards over-enclosure. Readers fearing a too-simplistic call for “openness” will be reassured by Boyle’s stated aim of not eliminating intellectual property rights, but of deploying them with maximum effectiveness. For example, Boyle opposes extending copyright protection periods unless there are demonstrable benefits, but supports shutting down infringement tools such as Napster and Grokster.

1. (New Haven: Yale University Press, 2008) 336 pages.

Next, the arguments are brought to life with case studies. Chapter six focuses on the creation of popular music, revealing a fascinating process. For example, in 1955, Ray Charles released the seminal, "I Got a Woman," which was overtly based on an older gospel hymn. In 2005, Kanye West used "I Got a Woman" as the basis for his hit, "Gold Digger." Charles did not need permission to borrow from older material, but West had to obtain consent from Charles' estate and pay a fee. What if the estate had refused consent? Would creativity and culture have been stifled? Chapter seven provides examples from the critical fields of biotechnology and networked computing, and poses similar questions—the answers to which, this time, directly impact the advancement of scientific knowledge.

The remainder of the book looks to the future. Chapter eight presents Creative Commons as an organization that helps knowledge creators to "privately" create a "public" intellectual property space in the face of increasing restrictions imposed by legal regimes. A Creative Commons license allows the author of a work to reserve fewer rights than usual over subsequent use, but also to keep others from taking the work out of the public domain. Boyle is a co-founder of Creative Commons, and true to the principles espoused by that organization and this book (and with permission of the publisher), Boyle has made the full text of *The Public Domain* freely available on the Internet, allowing readers to add comments.

Chapter nine lobbies for intellectual property law to be based on facts and empirical research rather than on unfounded assumptions such as "more protection means more innovation." Competition between the European and American database industries is illustrative. The United States had a better performing database industry than Europe and lower copyright protections for databases. To close the gap, Europe imposed even higher protections (rather than aligning protections with those of the United States). The gap substantially widened after the increased protections, and a study found that increased protections might not aid industry performance. Nevertheless, European database companies opposed an easing of protections and argued for the opposite.

Chapter ten closes the book with a comparison of environmentalism to the "access to information" movement. Just as the value of open spaces and shared environmental resources eventually achieved societal recognition through the efforts of concerned people and organizations, the essential importance of the public domain or "commons" in intellectual property will also take hold. Boyle envisages an "environmentalism for information."