

5. ‘Don’t Fence Me In’: Travels on the Public Domain

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Oh, give me land, lots of land under starry skies above

Cole Porter, *Don’t Fence Me In* (1934)

In 1981, still in the early days of copyright expansionism, David Lange wrote ‘Recognizing the Public Domain’, an article that 25 years later remains a central text in intellectual property scholarship. In 2006 the study of copyright, patents, and trademarks has grown exponentially to the point of generating an unsurveyable amount of books, articles, workshops, and conferences, extending far beyond law schools and into disciplines like economy, political science, cultural studies, book history, library and information science, anthropology, and literature studies.¹ Knowing what we

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1. Unfortunately, it is difficult to exemplify this disciplinary breadth without excluding important contributors, oversimplifying disciplinary boundaries, or falling victim to implicit (or explicit) academic geopolitical power relations. Legal scholars whose work is interdisciplinary in the respect of reaching a large constituency of readers include, for instance, J. Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge, Mass.: Harvard University Press, 1996); R.J. Coombe, *The Cultural Life of Intellectual Properties* (Durham: Duke University Press, 1998); P. Drahos and J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (London: Earthscan, 2002); L. Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: The Penguin Press, 2004). Historical studies include M. Woodmansee, *The Author, Art, and the Market: Rereading the History of Aesthetics* (New York: Columbia University Press, 1993); M. Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, Mass.: Harvard University Press, 1993); and more recently on the lesser explored question of gender and copyright, M.J. Homestead, *American Women Authors and Literary Property, 1822–1869* (Cambridge: Cambridge University Press, 2005). On the side of the humanities and social sciences more generally, see R.V. Bittig, *Copyrighting Culture. The Political Economy of Intellectual Property* (Boulder: Westview Press, 1996); D. Bollier, *Silent Theft: The Private Plunder of Our Common Wealth* (London and New York: Routledge, 2002); E. Hemmungs Wirtén, *No Trespassing: Authorship, Intellectual Property Rights, and the Boundaries of Globalization* (Toronto: The University of Toronto Press, 2004); K. McLeod, *Freedom of Expression: Overzealous Copyright Bozos and Other Enemies of Creativity* (New York: Doubleday, 2005); K. McLeod, *Owning Culture. Authorship, Ownership, and Intellectual Property Law* (New York: Peter Lange, 2001); S. Vaidyanathan, *Copyrights and*

know today of the utter pervasiveness of intellectual property in our daily lives, Lange was uncannily prescient back then, when he warned about the detrimental effect an overbloated intellectual property regime would have on the public domain; a resource where cultural expressions were left open to use and the features of which he compared to 'the public grazing lands on the Western plains of a century ago'.²

Even if Lange more recently has declared that status – for instance, arising out of citizenship – would be a more constructive way of conceptualizing the public domain than the explicit or implicit evocation of territory,³ his own contribution to the continued theoretization of the public domain precisely *as place* can hardly be overestimated. In one fell swoop he managed to establish a long-standing correlation between a mythical and geographical place in the United States, the 'West', and the public domain. The American West continues to remain a powerful allegory for a distinctive way of looking at the public domain that emphasizes freedom, wide-open spaces, ingenuity and creativity against all odds.⁴

An imagined 'Land Outside the Law' is not only an iconic metaphor playing on our collective celluloid fantasies, but adds a further dimension to *The New Shorter Oxford English Dictionary's* more mundane definition of the public domain as 'belonging to the public as a whole, esp. not subject to copyright'. We could broaden the scope even further and argue that a public domain simply presupposes a 'sphere in which contents are free from intellectual property rights',⁵ either because we have agreed that some things are unprotectable to begin with (not even Einstein owned the theory of relativity) or because the temporal protection granted by these rights has expired.⁶ An even more distinct way of putting it is Lawrence Lessig's 'lawyer-free zone'.⁷

Hence, we have a plethora of alternatives to consider when trying to understand what the public domain is; many of which (like Jessica Litman's description of a site that is possible to '*be mined* [my emphasis] by any

Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity (New York: New York University Press, 2001).

2. D. Lange, 'Recognizing the Public Domain', *Law and Contemporary Problems* 44 (Autumn 1981), 176.

3. D. Lange, 'Reimagining the Public Domain', *Law and Contemporary Problems* 66 (Winter/Spring 2003), 474–5.

4. For a longer discussion of this propensity see E. Hemmungs Wirtén, 'Out of Sight and Out of Mind: On the Cultural Hegemony of Intellectual Property (Critique)', *Cultural Studies* 20/2–3 (2006).

5. P. Samuelson, 'Mapping the Digital Public Domain: Threats and Opportunities', *Law and Contemporary Problems* 66 (Winter/Spring 2003), 149.

6. In addition to these two, Jessica Litman adds copyright being forfeited due to failure to comply with a statutory condition. J. Litman, *Digital Copyright* (Amherst, Mass.: Prometheus Books, 2001), 202.

7. Lessig, *supra* n. 1, 24.

member of the public'⁸) are constructed around implicit territorial references that, by extension, make the public domain conditioned on the Law, yet fundamentally independent of it at the same time.

Making sense of this relationship is not made any easier by the increasing presence and use of the term 'the commons' in the vernacular of intellectual property critique; an idiom that tends to be used somewhat flippantly and interchangeably as a synonym for the public domain because, like the first, it suggests a space where an alternative to private property is offered.⁹ Although an extended discussion on the very real differences between the two terms lies beyond the scope of this present chapter, as a working assumption their 'intertwined past and . . . interrelated present',¹⁰ nonetheless make it possible and even necessary to consider them in tandem. For that connection to work, however, we need to accept the proposition that both have fallen victim to what James Boyle calls a 'second enclosure movement' or 'land grab'.¹¹

In the following, my ambition is to make more distinct some of the reasons why the *idea* of the commons survives and even prospers in the networked and knowledge-intensive present and particularly, of course, why it has gained its current unparalleled status as a viable alternative to intellectual property maximalism. And that story begins more than seven hundred years ago, with one of the oldest of valuable assets: land.

1. THE COMMONS

In 1700 England still consisted of large tracts of open fields, pastures and grazing lands, but by 1840 most of it had been made into private property.¹² Beginning in earnest with the Statute of Merton from 1235 and continuing piecemeal during many centuries to reach its high point in the 20-year period between 1765–85,¹³ enclosure was an extremely protracted process of fencing in what once were open fields, known as *the commons*.

8. J. Litman, 'The Public Domain', *Emory Law Journal* 39 (Fall 1990), 975.

9. Pointed out by J. Boyle, 'Foreword: The Opposite of Property?' *Law and Contemporary Problems* 66 (Winter/Spring 2003), 8.

10. A. Chander and M. Sunder, 'The Romance of the Public Domain', *California Law Review* 92 (2004), 1338.

11. Now used broadly, both expressions gained wider currency through the work of James Boyle, see for instance 'The Second Enclosure Movement and the Construction of the Public Domain', *Law and Contemporary Problems* 66 (Winter/Spring 2003) and Boyle, *supra* n. 1, 9.

12. J.M. Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700–1820* (Cambridge: Cambridge University Press, 1993), 5.

13. R. Hunter, 'The Movements for the Inclosure and Preservation of Open Lands', *Journal of the Royal Statistical Society* 60/2 (June 1897), 379.

It is essential to underline that the commons was never a space of free access before Enclosure. Vested in the Lord of the Manor, the *de facto* ownership of common land was not in question: technically, they were the wastes of the manors in which they were situated.¹⁴ The tenants of the manor could be either copyholders (fixed tenure and customary rights), freeholders (who did not acquire right of property in their cottages, which were owned by the Lord) or, on the lowest rung of the ladder, landless commoners. The right to use the commons provided even the poorest with some sort of economy. Dung was made into manure, bushes and fallen trees could be used to heat houses, and loose wool caught on branches became blankets for cold winters. The common rights attached to respective categories of users were secured in a number of different ways.¹⁵ The profile of these usages was profoundly local and varied enormously depending on an almost infinite number of variables.¹⁶

In his *Commentaries on the Laws of England* William Blackstone famously discusses this tradition of customary rights from the perspective of time and memory, where such usage was seldom, if ever, written down or codified. The defense of a custom – either in a rural setting, or as it attached to a particular trade or group in London – ‘depends entirely upon immemorial and established usage’.¹⁷ A long-standing recognition of the common right to specific, often highly regulated and customary uses was therefore one of the reasons that prevented the wholesale and immediate enclosure of common land.¹⁸ More drastic measures also helped. On 29 July 1765 *The Northampton Mercury* advertised a ‘FOOT-BALL Play’ for ‘Gentlemen Gamesters and Well-Wishers to the Cause’.¹⁹ The cause in question was not so much the search for players who were in the mood for an innocent game of soccer, but rather a call for men able and willing to gather for an evening of fence-destruction. Such hands-on activism was not unheard of and illustrates well the non-rational forms by which E.P. Thompson saw a *rebellious* traditional culture resisting ‘in the name of custom, those economic rationalizations and innovations (such as enclosure, work-discipline, unregulated “free” markets in grain) which rulers, dealers, or employers seek to impose’.²⁰

14. G.J. Shaw-Lefevre (Lord Eversley), *Commons, Forests and Footpaths: The Story of the Battle During the Last Forty-Five Years for Public Rights over the Commons, Forests and Footpaths of England and Wales* (London: Cassell and Company, 1910), 1.

15. Neeson, *supra* n. 12, 59–71.

16. E.P. Thompson, *Customs in Common* (London: The Merlin Press, 1991), 102.

17. W. Blackstone, *Commentaries on the Laws of England, Volume 1* (Oxford: Clarendon Press, 1765–1769), 75, §3. Available at: <http://www.yale.edu/lawweb/avalon/blackstone/blacksto.htm>.

18. Neeson, *supra* n. 12, 1.

19. *Ibid.*, 191–2.

20. Thompson, *supra* n. 16, 9.

The commons offered a subsistence living that was coming under increased pressure, not only by enclosure, but also by a revolution in demographics; the growing demand for fuel that came with rapid urban expansion; and the crucial introduction of ‘improvement’ as a key element of agriculture.²¹ Critics of the commons and those in favor of enclosures made a case for the economy of the commons as primitive, argued that commoners were a ‘sordid race’, and that common right in general was one big obstacle to modernization.²² Accused by those in favor of enclosurers of being lazy (or, in light of their relative self-sufficiency, of being independent of wage labor), the ultimate crime committed by commoners was that they lived a life that could easily be classified as one of poverty.

In her seminal book *Commoners: Common Right, Enclosure and Social Change in England, 1700–1820*, J.M. Neeson convincingly argues that one of the major results of the enclosure movement was that, in tandem with industrialization, it turned commoners into laborers. That is, before enclosure the old peasant economy was a kind of ‘economy of enough’, consisting of an elaborate system of gifts and exchanges that vanished with the privatization of land. Both sides in the long policy debate on enclosure agreed on one thing: commoners became laborers through enclosure. The dispute centered on how this change should be interpreted: was it progress beneficial to the national economy or the definitive blow to common right and usage?²³ The idea of property was a crucial discursive weapon in this struggle. For those in favor of enclosure it was the very measuring stick by which commoners were judged: they were property-owners and patriots, *or* criminals and paupers.²⁴

If parliamentary enclosure in England was made in the name of national interest along the lines of improvement and development, so did colonial expansion rely on the same set of arguments for its successful implementation. Because of the very familiarity with the codes carried by enclosure, English settlers viewed failure to enclose, which was noted of Amerindians for whom it was both unnatural and unfamiliar, as evidence of failure to improve.²⁵ When fences were raised in the English New World colonies they indicated not only private property, but also improvement. Read as a story of the ‘husbandry of empire’,²⁶ the fence is one of the

21. *Ibid.*, 106.

22. Neeson, *supra* n. 12, 30–35. See also E.P. Thompson’s argument on the ‘indiscipline of working people’, Thompson, *supra* n. 16, 37–8.

23. Neeson, *supra* n. 12, 18.

24. *Ibid.*, 44.

25. B. Arneil, *John Locke and America: The Defence of English Colonialism* (Oxford: Clarendon Press, 1996), 141.

26. J.H. Casid, *Sowing Empire: Landscape and Colonization* (Minneapolis: University of Minnesota Press, 2005), 103.

formidable symbols of Daniel Defoe's *Robinson Crusoe* (1719). Even when there is nobody there to keep out, nobody for whom the fence means anything, it makes sense of the island, which without it is just *horror vacui*, a 'negative space . . . in search of a possessive content'.²⁷

2. THE INFORMATION COMMONS

Much, if not everything, has of course changed from when the Statute of Merton was written to the implementation of the Sonny Bono Copyright Term Extension Act or the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). But some things remain the same. Arguments for 'improvement' and against letting resources wither away as mere waste in the public domain have resurfaced in the call for increased intellectual property protection in the global, interconnected economy. At the same time, we talk with increasing passion about the incursions made on the 'intangible commons of the mind',²⁸ a decentered, deterritorialized, and digital commons whose challenges appear so fundamentally different from what was at stake three hundred years ago as to defy any kind of valid comparison. My point is that such an assumption is wrong.

At first blush, the information commons represents the ultimate *disconnection* from actual land; by using the term in the twenty-first century we picture a virtual and digital space, and not the verdant hills and fields of the English countryside. But when did the commons begin to make sense within this contemporary framework? When did it become commonplace to add the word information in front, or map a predominately historical and material concept onto symbolic rather than tangible space? To pinpoint the beginning of such a change is extremely difficult, if not downright impossible. That the information commons is somehow related to the emergence of the Internet and the World Wide Web would hardly be an exaggerated claim, nor that the structural transformation brought on by the Information Age has meant a profound shift from industrial to informational production, where, as Bronwyn Perry notes in regard to bio-information, 'what is of greatest value and requisite of most protection is no longer the *form* of the work but the *transmissible content* of that work'.²⁹

Our more recent understanding of the commons hinges directly on the recognition of the *specificity* of the informational resource. Even more

27. W. Schmidgen, *Eighteenth-Century Fiction and the Law of Property* (Cambridge: Cambridge University Press, 2002), 44.

28. Boyle, 'The Second Enclosure Movement', supra n. 11, 37.

29. B. Parry, *Trading the Genome: Investigating the Commodification of Bio-Information* (New York: Columbia University Press, 2004), 225.

importantly, it takes its bearings from refuting Garrett Hardin's influential concept of the Tragedy of the Commons; the idea that we are all self-serving, and in a situation where nobody can exclude anybody else and therefore is in no position to reap any rewards, there will be zero incentive to invest: hence Tragedy.³⁰ Rather than meadows, fish, or any other physical resource that may be subject to depletion or overuse, information, knowledge, symbols, and text make up the valuables we search for on never-ending digital grazing lands. Just how different this particular category is when compared to material, embodied assets, is obvious in the often-stated proposition that information-based resources are both non-rival (as opposed to the fact that herdsmen on Hardin's pasture compete for the use of the resource, my use of information does not hinder yours – in fact, you and I can use the same resource simultaneously with no detrimental effect taking place), as well as non-excludable (initially, information can be costly to produce, but new technology makes it difficult to hinder an infinite number of users at zero marginal cost).

It has become an entrenched truth that a tragedy in Hardin's terms is less likely to occur in the information commons and, although James Boyle recognizes that 'the exceptions to this statement turn out to be fascinating',³¹ interestingly enough he only dangles that juicy tidbit in front of us, not giving a single example of what no doubt would have proven to be a crucial addition to our understanding of the workings of this contemporary commons. That information is a productive resource that even increases with use, and consequently may outlive its tangible and anemic physical relatives, appears a fairly safe prognosis but, at the same time, such a stipulation makes information into a question of quantity and not much more. Perhaps it cannot be depleted, but information can still be manipulated, misused, withheld and corrupted. Things happen to information-based resources that involve misappropriation, and surely we must allow for the possibility that even though the original resource might not become exhausted, our use can cause some sort of impact that we may or may not find acceptable, perhaps even damaging.

Far more interesting than lending support to the narrative of the unique properties of information, and much less explored, is the double question of why and how the commons – based in a feudal economy that few would want to reinstate – has become the default defense against the tightening intellectual property challenges exacerbated by the information economy. Fences proliferate in this new dominion too and, while they are not made out of either wood or barbed-wire, they make it increasingly difficult to access

30. G. Hardin, 'The Tragedy of the Commons', *Science* 162/3859 (1968), 1243–8.

31. Boyle, 'Second Enclosure Movement', *supra* n. 11, 41.

information, knowledge, and cultural expressions. Locks need not be cast in iron to be effective, but do their job just as well when invisible and embedded in code; the accelerated use of licensing agreements adds to the complexities of what we think we can and cannot do as users; temporal and spatial limitations for use in certain digital forms of materials that should reside safely in the public domain; all such hindrances are ubiquitous in the jungle that surrounds valuable informational resources.

Hardly coincidentally, prominent contemporary institutions and organizations working against the further enclosure of the information commons, such as the non-profit civil liberties organization, the Electronic Frontier Foundation (EFF), or the Creative Commons movement (CC), owe a debt of gratitude to a long and complex tradition whose history I have only cursorily been able to outline. And as new as the concerns of the Open Source movement might be, it is not in name only that it follows in the footsteps of precursors such as the Commons Preservation Society (founded in 1865) and their struggle for Open Spaces.³² Likewise, the list of initiatives that attempts to regain some of the ground that already has been lost and to recapture the information commons in science, higher education, and culture, is impressive: The Public Library of Science, the Science Commons, to mention but a few.³³

Any number of interesting avenues open up and warrant further scrutiny in this intersection of past and present, but if I have to choose one common denominator, one thread that weaves all these various trajectories together through history, then it has to be how the information commons (just like its earlier predecessors on *terra firma*) relates to land only second, and custom and users rights first. The commons makes sense within the 'high-tech' present because the networked economy is based on the access and continuous recirculation of information, something that must involve some sustainable form of use rights. As a consequence, I would argue that it is the concept of common right (as the right to *use* the commons as symbolic or tangible land) we have in mind when we talk about the commons (whether it be in the 'old' meaning of territory or in the more modern metaphorical sense).

Key to the iconic role of the commons in the information-based environment is, therefore, its ability to turn consumers into producers. In the field of scholarly communication passive appropriators become active

32. For an overview of the history of the society, written for its centennial celebration, see W.H. Williams, *The Commons, Open Spaces, and Footpaths Preservation Society, 1865–1965. A Short History of the Society and Its Work* (London: The Commons, Open Spaces, and Footpaths Preservation Society, 1965). The Commons Preservation Society is today named the Open Space Society, www.oss.org.uk.

33. Websites at: <http://www.eff.org>, <http://www.creativecommons.org>, <http://www.plos.org>, <http://creativecommons.org/science>.

providers;³⁴ in the cultural sphere the consumer/record player/DJ turns into producer;³⁵ the couch potato rises from his or her insipid consumer existence to a 'life where one can individually and collectively participate in making something new';³⁶ the Electronic Frontier Foundation begin their mission statement by arguing that from the 'Internet to the iPod, technologies of freedom are transforming our society and empowering us as speakers, citizens, creators, and consumers';³⁷ and the Creative Commons licenses are there to 'offer creators a best-of-both-worlds way to protect their works while encouraging certain uses of them'.³⁸

The emphasis on use logically brings up the perspective of custom and in what way the information commons has any traditions to speak of in this respect. 'From time immemorial', the habitual measuring stick in defending customary rights, is a notion almost unfathomable to the modern file-sharer or rights holder (who, let us not forget, can be one and the same). That we are indebted to an older generation for rights that we in turn hold in trust until they are passed on to the next generation, and where instant gratification must be suspended and even abandoned in favor of a long-term commitment, is an old-fashioned attitude on the verge of becoming archaic. In the present global economy considerations of this kind are but vaguely recognized. Rights are championed today without any obligations whatsoever getting in the way; paradoxically it is an ideology that penetrates both rights owners as well as certain consumer groups. Absolute control or absolute freedom has no historical equivalents in the history of the commons, but when called upon as weapons in the copyright wars their rhetorical arsenal sounds very much as if produced by the same manufacturer.

One cannot fail to note that an aura of utopia surrounds the information commons. Partly as a result of intellectual property expansionism, the commons tends to be posited as a Lost Eden, happily devoid of the weaknesses associated with intellectual property.³⁹ It is now the idealized other, the unwavering defense against the missiles launched by the *blitzkrieg*-inclined copyright holders, a benevolent Dr Jekyll warding off Mr Hyde's hyper-aggression. To invoke the virtues of the public domain has become the Pavlovian response to the tensions of the current over-reaching intellectual property system. In order to counter the extremes of intellectual property rights we seem to have a need for a homogenous, rather than

34. C. Hess and E. Ostrom, 'Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource', *Law and Contemporary Problems* 66 (Winter/Spring 2003), 144.

35. McLeod, *Freedom of Expression*, supra n. 1, 72.

36. L. Lessig, *The Future of Ideas* (New York: Random House, 2001), 9.

37. <http://www.eff.org/about>, last visited 6 April 2006.

38. <http://www.creativecommons.org/about/history>, last visited 6 April 2006.

39. Hence the 'romance' in the title of Chander and Sunder's 'The Romance of the Public Domain'.

heterogeneous public domain. Arriving at such a position is not surprising, considering the polarization of argument that propels the copyright wars, but not without certain problems of its own. The implicit presumption that although there is plenty of outside pressure on the public domain and the commons, internally, bliss and consensus reigns, is problematic. Such a perspective tends to gloss over the geopolitical realities of the information commons, and underestimates the sophistication of its power relations globally.

3. CONCLUSION

We make sense of today's commons by comparing it with yesterday's; we learn more about the specificity of the information-based resources by lessons from how tangible resources have and are used; we recognize the same arguments of improvement and progress that were used throughout the history of enclosure in the fencing in of symbolic space today. True, Enclosure was about land. But what it brought about on a much more profound level was a radical change in traditions, uses and custom relating to the fabric of social life as a whole. The right to use was at the heart of the battle for the rural commons, just as it is when it comes to the contemporary challenges posed by the Internet and the digital environment. I am a firm believer in looking to history to understand the present. But when we do, we had better make sure that we are wise enough to learn from it.