

The Ins and Outs of the Public Domain

A Review Article by

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Terms of Use: Negotiating the Jungle of the Intellectual Commons

By Eva Hemmungs Wirtén

Toronto: University of Toronto Press, 2008. 223 pp.

ISBN: 9780802090461.

The Public Domain: Enclosing the Commons of the Mind

By James Boyle

London: Yale University Press, 2008. 315 pp.

ISBN: 9780300137408.

The Global Idea of “the Commons”

Edited by Donald M. Nonini

New York: Berghahn Books, 2007. 138 pp.

ISBN: 9781845454852.

The Future of the Public Domain: Identifying the Commons in Information Law

Edited by Lucie Guibault and P. Brent Hugenholtz

Amsterdam: Kluwer Law International, 2006. 377 pp.

ISBN: 9041124357.

A growing body of literature criticizes the expansion of intellectual property over new subject matter, its extension to new lengths, and the reduction of safeguards that protect intellectual property users and the public at large.¹ In the face of these critiques of intellectual property, one set of studies seeks to consider what has often been posed as intellectual property's opposite: the public domain. It is argued that focusing critique on the existing intellectual property system is not sufficient if we fail to give due attention to the contributions and problems of the public domain. Several new works examine the public domain, the information commons, and commons more generally, including Eva Hemmungs Wirtén's *Terms of Use: Negotiating the Jungle of the Intellectual Commons* (2008), James Boyle's *The Public Domain: Enclosing the*

Commons of the Mind (2008), Donald M. Nonini's *The Global Idea of "the Commons"* (2007), and Lucie Guibault and P. Brent Hugenholtz's *The Future of the Public Domain: Identifying the Commons in Information Law* (2006). These works join a number of recent classics, including Lawrence Lessig's *The Future of Ideas: The Fate of the Commons in a Networked World* (2001) and Yochai Benkler's *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006).

What is the Public Domain?

The idea of the public domain is bound up closely with the idea of the commons. Various distinctions can be drawn between "the public domain" and "the commons". In general, the term "the public domain" is used in the context of intellectual property and usually refers to the set of things not subject to intellectual property ownership, such as creative works and inventions where the copyright or patent has expired, facts, or fundamental elements of culture not subject to ownership, such as language. "Commons", on the other hand, can pertain to resources shared in common, whether or not they are subject to intellectual property rights. This can include common governments, natural resources, genetic resources, and health, as well as intellectual resources that are either not subject to intellectual property or that *are* subject to intellectual property but nevertheless available for common use.² Many commons are threatened by the tragedy of the commons—extinction through overuse, but the public domain and intellectual commons, being non-rivalrous resources, are often not subject to that same tragedy (Hardin, 1968).

Although distinct, the concepts of "the public domain" and "the commons" are intertwined. Both are contrasted with private property and both structure rights so that entire communities or publics may share access certain resources, whereas private property generally authorizes one person to decide how a resource will be used (Benkler, 2006). Both, it is argued, require defence against the incursions of private control.

The public domain needs to be more robustly understood and defended for a number of reasons, as Pamela Samuelson argues in her contribution to *The Future of the Public Domain*. We need to be able to describe the public domain, to understand its different parts and the varying importance of each of those parts, and to adequately judge the severity of threats to the various parts of the public domain (Samuelson, in Guibault & Hugenholtz, 2006). Samuelson argues that the public domain can be understood as serving a number of purposes:

The public domain serves at least eight distinct, if often complementary, values: as building blocks for the creation of new knowledge, enablers of competitive imitation, enablers of follow-on innovation, enablers of low cost access to information, enablers of public access to cultural heritage, enablers of education, enablers of public health and safety, and enablers of deliberative democracy.

(Ibid: 22)

These various uses can be boiled down to two: first, the public domain provides the building blocks for creativity. Second, the public domain is seen as a necessary element of democracy. When too much is controlled as private property, as the argument goes, we undermine creativity by raising the price of the building-blocks of creativity and threaten democracy by locking up information. According to Boyle, "The public domain is not some gummy residue left behind

when all the good stuff has been covered by property law. The public domain is the place we quarry the building blocks of our culture. It is, in fact, the *majority* of our culture. Or at least it has been” (2008: 40).

Threats

Julie E. Cohen, in her contribution to *The Future of the Public Domain*, gives an insightful history of the term “the public domain” and the scholarship surrounding it. The line of scholarship that continues in these books originated, according to Cohen, in 1981 with a piece by David Lange that identified the growth of intellectual property as a threat to the public domain. That article argued that the public domain should be characterized as a matter of public right.

The scholarship that has followed on Lange’s essay, as well as most of books under review here, follow this same general argument, with some variation: Lessig (2001) argues that it is technology and code—software locks on digital content—that threaten the public domain, Benkler (2006) argues that it is the tendency of governments to regulate information production on a proprietary model that threatens the commons, and James Boyle (2008) similarly argues that the tendency to perceive the Internet as a threat inspires forms of regulation that could choke off the public domain. Commons are viewed as being under threat by capitalism itself in Nonini’s *The Global Idea of “the Commons”*, and in Wirtén’s *Terms of Use* commons are threatened by our failure to recognize the ways that our ideas of “the commons” are bound up with the history of imperialism.

A Caution

Critics of the extension of intellectual property rights, as Scharper and Cunningham note in *The Global Idea of “the Commons”*, often argue that this extension is analogous to the enclosure movement in 17th century England, when:

in helping to create the precursor conditions for the Industrial Revolution, Parliament consolidated community lands into larger holdings and revoked indigent farmers’ rights to gleaning, thereby creating a large group of landless poor who became a source of cheap labor for the emerging factory system.

(Scharper & Cunningham, in Nonini, 2007: 57-58)

Just as the logic of imperialism justified the enclosure movement and “legitimized the pursuit of common land in America as well as in Surrey,” the logic of imperialism also infuses the history of the commons (Wirtén, 2008: 25). Wirtén thus cautions against being too idealistic about commons and the public domain. The tendency to idealize the public domain as a lost Eden in what has become a “Pavlovian response” to the overreach of intellectual property laws “overshadows the fact that for centuries the public domain ‘has been a source for exploiting the labor and bodies of the disempowered’” (Chander & Sunder, 2004: 1334-1335). The logic that presented natural and biological resources as the “common heritage of humankind” has legitimized takings from biodiverse regions and appropriations of culture from those who are unaware of their intellectual property rights, unable to enforce their rights, or whose works have been considered not to be eligible for intellectual property protection. “For some,” as Wirtén points out, “the unfortunate reality is that the public domain might be the problem, not the

solution” (2008: 145). Wirtén, in a fascinating and creative account of the history of the commons, uses the theme of a jungle to show the “geopolitical dimensions of the jungle and the unbroken liaison between imperialism and the public domain, contrasting the British Empire with the Empire of globalization and information technology” (Ibid: 141-142). She explores nineteenth century plundering of the Amazon by imperial powers, hunting as an imperial sport, the related imperial fad of taxidermy, Disney’s appropriation of “authorless” tales, and the imperial adventurism enshrined in Kipling’s *Jungle Book*, now Disney-property in potential perpetuity—all part, as she notes, of the variegated history of the commons.

Global Commons

The Global Idea of “the Commons” (2007), edited by Donald M. Nonini, connects the dilemmas of the public domain and intellectual commons with those of other commons, local and global. To the argument that commons are unviable as systems of good resource-management, Nonini responds:

Various kinds of commons have long existed as viable and durable arrangements for providing for the needs of human survival. This is best documented in...hundreds of case studies of long-term stable arrangements for the use of common-pool resources, such as land, waterways and irrigation works, forest stands, fisheries, and game and wild food plant catchment areas.... This research shows that Hardin’s (1968) supposed situation of the “tragedy of the commons,” in which users compete with one another to appropriate commons resources, thus beggaring one another and so exhausting the commons, is far from inevitable.

(2007: 1-2)

Nonini argues that what is happening to the intellectual commons is also happening to commons generally: they have been stripped, and large portions of the population have been dispossessed of commons resources by corporations, northern scientists, governments and international financial institutions. As a result, various movements have arisen to defend commons resources, and commons have emerged as a site of struggle. “The idea of the commons has emerged as a global idea, and commons have emerged as sites of conflict around the world” (2007: 3). “Much is at stake,” says Nonini. “Although this new counter-movement has many elements and articulates very heterogeneous interests, one of its axial, global ideas is that of the commons” (Ibid: 22).

Solutions

While Nonini (2007) portrays the commons and those who fight to defend it as being counterposed to capitalists and capitalism, and Benkler (2006) portrays “commons-based production” as a mode of production that is different from capitalist production:

The term “commons-based” is intended to underscore that what is characteristic of the cooperative enterprises I describe in this chapter is that they are not built around the asymmetric exclusion typical of property. Rather, the inputs and outputs of the process are shared, freely or conditionally, in an institutional form

that leaves them equally available for all to use as they choose at their individual discretion.

(Benkler, 2006: 62)

Benkler argues that information commons provide a source of autonomy by rendering

more robust the freedom to act without being susceptible to constraint from someone who holds asymmetrically greater power over the information resources one needs . . . a more expansive commons improves individual autonomy, while enclosure of the public domain undermines it.

(Ibid: 146)

For Nonini (2007) and Benkler (2006), commons are the solution; they provide a path out of capitalist exploitation into a world of greater individual autonomy. Other thinkers like Lessig (2001) and Boyle (2008) view threats to the intellectual commons as being posed not so much by capitalism as by an imbalance in policymaking—where policies are thrown off-kilter by the fact that governments have fallen too much into the pocket of the copyright industries. Further, governments and people are too much gripped by mental models and property theories that are blind to commons and the public domain. Commons, here, are not seen as an alternative to capitalism. Commons are, rather, an essential component of a well-functioning intellectual property system—and a crucial element of the democratic market system.

Boyle suggests that the problem of the policy imbalance is to be solved by making more visible societies' dependence on healthy commons and a healthy public domain, taking as a model the environmental movement, which popularized the idea of “the environment” such that “it came to be an abstraction with both the force of law and of popular interest behind it” (2008: 240). “We need a cultural environmental movement, a politics that enables us first to see and then to preserve the public domain, to understand its contributions to our art, our technology, and our culture” (Ibid: 247).

Such a movement is underway. The Access to Knowledge movement, the Free Culture movement, the Creative Commons movement, and the Open Source movement have all gained momentum in the past number of years. These movements look to technological openness, international treaties and private contract to protect and bolster intellectual commons and the public domain. The Access to Knowledge movement seeks to achieve an international treaty that would set minimum standards for access to knowledge, and the Creative Commons and Open Source movements provide standard licenses that allow intellectual property owners to make their work publicly available for common use. These are solutions that work within and on top of current systems.

Such solutions are immensely important. Benkler (2006) hails such movements as powerful forces that create platforms for creative autonomy. However, movements like the Creative Commons movement are criticized by Niva Elkin-Koren in her contribution to *The Future of the Public Domain* (Boyle, 2008) for producing solutions that do not contemplate a larger copyright reform or an “environmentalism of the mind”, but rather provide private solutions, through contract, that lessen the restrictions imposed by default copyright norms.

Movements like the Free Culture movement make commons and the public domain visible, but in particular and often narrow ways. Laura Murray has recently noted in her review of the 2009 film *RiP: A Remix Manifesto*, a film that stands as a free culture manifesto, that there

can be a tendency to belittle the issues at stake “by not acknowledging their connections or contrasts to other sorts of social struggle” (Murray, 2009). For example, there can be, as Murray points out, a tendency for such movements to appear as men’s movements, with male characters playing the leading roles. Wirtén also argues that “the kind of creativity hailed by critics as being sacrificed on the altar of the second enclosure movement is highly gender-biased, and relies to a substantial degree on recycling the ideology of genius and originality, but now in the innovator/hacker/activist-hero” (2008: 144-145). Women’s work, as it has been noted elsewhere, has often evaded enclosure, since some of it does not fall into the categories of works deemed worthy of protection (e.g. Bartow, 2007). Murray comments on the tendency of the Free Culture movement to concentrate on images of young American men remixing videos for YouTube: “I don’t think that copyright is a ‘man’s issue’—or a youth issue, or a white-only issue, or a North American issue. If it continues to be represented as such, the ‘fair copyright’ cause will wither into yet another ‘special interest’” (Murray, 2009).

The Access to Knowledge, Free Culture, Open Source, and Creative Commons movements sometimes appear to foreground North American issues or Western concerns above all else. The Access to Knowledge movement in particular has been criticized for failing to adequately take into account the interests of the South, one of its prime constituents, and focusing overly on issues related to the Internet “as if the access situation under debate was that prevailing solely in Boston or Berlin” (Story, Darch & Halbert, 2006: 162). Traditional knowledge has long been considered to be in the public domain, according to Western ideas of what constitutes a copyrightable work, what constitutes originality, and who is considered to be an author (e.g. Sherman, 1994). How far should protection of the public domain stretch? Can it accommodate the protection of traditional knowledge?

Fending off the reach of intellectual property is a part of protecting the public domain and the commons, but, as these authors note, it is not enough. As Boyle says, “we have to ‘invent’ the public domain before we can save it” (2008: xv). As Wirtén puts it, we must understand the public domain and the commons, their intertwined histories, their interconnected present, and the ways in which they are “continuously fashioned and refashioned to suit larger political, economical, and cultural agendas” (2008: 159). As these works highlight, an environmentalism of the mind must take into account the differences between, and the interconnectedness of, the commons and the public domain. An idea of “the commons” is being invented by these movements, and the shape of the commons and the public domain is as connected to political, economic, and cultural agendas as is the shape of intellectual property. An environmentalism of the mind must understand its relationship democracy and to capitalism, and it must better comprehend its relationship to power: not only *what*, but also *who* falls in and who falls out of the public domain.

Notes

- 1 For example, see works by Ronald Bettig; Michele Boldrin; David K. Levine; B. Zorina Khan; Lawrence Lessig; Jessica Litman; Pamela Samuelson; and Siva Vaidhyathan.
- 2 Open Source software and Creative Commons-licensed works are subject to intellectual property, but are licensed on terms that make them available for widespread use on contractual terms.

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