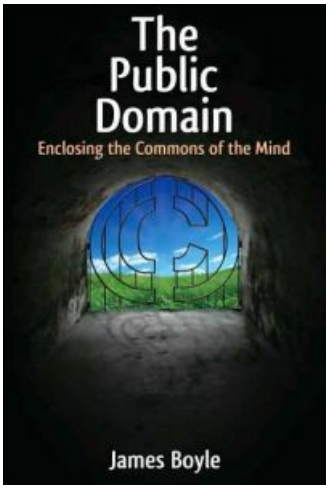

Book The Public Domain

Enclosing the Commons of the Mind

James Boyle
Yale UP, 2008
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Recommendation

If the current regulatory mindset regarding intellectual property had existed when scientist Tim Berners-Lee developed the World Wide Web in 1989, the Internet might never have grown into the remarkable communication, entertainment and archival medium that it is today. Jazz and many other forms of music might never have come into being if governments were as strict decades ago about copyright law as they are now. Today, warns author James Boyle, huge swaths of the world's artistic and cultural heritage – books, photographs, films, musical recordings – are locked up in governmental and private libraries and unavailable for distribution to the general public. Why? No one can identify the copyright holders or their heirs to obtain permission to copy them. The number of such "orphan works" is staggering: more than 95% of all books ever printed, and equally high percentages of film and music. Should the government wall off these potential treasures to protect the rights of nameless individuals, most of whom either don't care or are dead? Boyle, an expert on intellectual property law, thinks not, and he explains why in this heated discussion about trends in his field. *BooksInShort* recommends his illuminating book to writers, inventors, and anyone else involved in the creation of content, as well as to managers and executives who wish both to protect proprietary information and to encourage innovation.

Take-Aways

- Society's view of intellectual property determines the progress of technology, science and culture.
- Intellectual property protections can either spur or impede innovation.
- U.S. President Thomas Jefferson believed that preserving freedom of expression was more important than protecting intellectual property.
- Although it operates for the common good, the public domain has suffered repeated attacks over the centuries.
- The Internet is the greatest medium for "nonproprietary, distributed creativity" in history.
- Limits on intellectual property protection are as vital as rights.
- Copyright protection is now so extensive that it limits cultural development.
- Although intended to enhance progress, overly broad patents actually stifle it.
- Policy makers should weigh the costs and benefits before they alter existing intellectual property protections.
- Activists must engage the public in a discourse to challenge and change intellectual property laws.

Summary

Intellectual Property Law: A Runaway Train

Intellectual property law, which encompasses patents, copyrights and trademarks, has become much too broad. U.S. patents now exist to protect the peanut butter and

jelly sandwich, as well as basic algorithms and human genes. Recently, the U.S. Digital Millennium Copyright Act (DMCA) erected additional barriers that will greatly restrict future creativity. The DMCA overturns fair use, a venerable common-law principle that, until now, wisely limited copyright. Indeed, intellectual property safeguards are going from bad to worse. If you can think it, you can patent or copyright it.

> "The U.S. Olympic Committee has an expansive right akin to a trademark over the word 'Olympic' and will not permit gay activists to hold a 'Gay Olympic Games'."

Most people consider intellectual property to be an arcane discipline that is of significance only to lawyers. However, the way society conceives of intellectual property determines the pace of technological and creative development. Under the current overly protective mindset, the Internet would not exist; neither would jazz or other musical forms that depend on sampling or improvising on existing themes.

> "Should the U.S. Commerce Department be able to patent the genes of a Guyami Indian woman who shows an unusual resistance to leukemia?"

Nevertheless, in recent years the legal trend has been to protect intellectual property of all kinds. This is destroying the "public domain" – those ideas and developments that are or should be collectively owned. Companies and content providers are erecting rigid and exclusive barriers around basic knowledge and ideas, the free "commons of the mind." This is a recipe for creative disaster.

The Difference between Intellectual and Real Property

Real property is a "rivalrous good," that is, something you cannot share. If you own your home, no one else can own it at the same time. No one else can claim to own the herringbone suit you just bought or that piece of lemon pie on your plate. That would be impractical, even ludicrous. You and the presumptuous stranger cannot wear the same handsome suit or eat the same slice of pie at the same time.

> "Lawyers think about property differently from the way lay-people do; this is only one of the strange mental changes that law school brings."

Intellectual property is "nonrivalrous." The value of your software does not decrease because others use it at the same time; indeed, quite the opposite occurs. Nevertheless, like real property, intellectual property deserves legal protection. People should be able to benefit from their creations and inventions. Similarly, trademark law prevents unscrupulous companies from stealing and using the brands of established firms to fool the public. The absence of such intellectual property protection has the potential to diminish creativity. Indeed, without such safeguards, technological development as well as science and culture suffer.

> "It is not an overstatement to say that intellectual property rights are designed to shape our information marketplace."

Therefore, the trend in recent years has been to make intellectual property law as robust and all-inclusive as possible. This has had disastrous unintended consequences regarding the pace of innovation, and cultural and artistic production. It has limited the availability of information and decreased business transparency. In fact, as they currently exist, patents and copyrights are forms of "perpetual corporate welfare" that inhibit rather than encourage inventors and artists. As a result, progress is suffering.

The "Jefferson Warning"

In 1813, Thomas Jefferson, the third U.S. president and an astounding polymath, wrote a letter, which people now know as the Jefferson Warning, to one Isaac McPherson about intellectual property. McPherson had asked Jefferson for his opinion concerning a patent for the design of a "series of buckets to move grain." Jefferson told McPherson that the ancients had used a similar device called the "Persian wheel" to move water, and said that the device's longstanding use called the patent's legitimacy into question. He argued against the notion that inventors have a "natural and exclusive right to their inventions." Jefferson feared that strict enforcement of such a right could inhibit creative activities and believed that "ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man."

> "Copyright, intended to be the servant of creativity [and] a means of promoting access to information, is becoming an obstacle to both."

Jefferson did recognize the need for intellectual property laws. However, he did not consider intellectual property a "natural right" but rather a limited legal right that the state should carefully control and restrict. He said intellectual property differs from tangible property, such as land and possessions, in these three ways:

1. It does not carry any entitlement or permanence.
2. It poses "monopolistic dangers."
3. It should always be carefully assigned and delineated.

"The Second Enclosure Movement"

In recent years, lawmakers and regulators have been busy closing off every new idea, creation and development they can behind stout barricades of intellectual property law. This is hardly a new phenomenon. Indeed, the current "enclosure movement" follows an earlier one that took place from the sixteenth to the nineteenth century. During this period, kings, nobles and landowners conspired to appropriate what previously had been common land into their own vast, private estates, in what was essentially a "revolution of the rich against the poor." They rationalized their seizure of common property by arguing that it increased the efficiency of land use. However, some scholars now contend that society did not gain in the bargain: The winners were the rich landowners, who became wealthier.

> "Patents are increasingly stretched to cover 'ideas' that 20 years ago all scholars would have agreed were unpatentable."

Society is now under attack by a second enclosure movement that would fence off "the intangible commons of the mind." For example, many scientists and others believe that the human genome belongs to all of humanity – yet private companies have recently attempted to patent gene sequences. Similar legal incursions routinely occur in other areas of scientific and technical endeavor. The protection of intellectual property used to apply only to certain, exceptional cases; now it is the norm.

The "Internet Threat"

Content providers have created much negative publicity about what they perceive as the Internet threat. They claim that because users can easily copy creative materials from the Internet, this new medium must be rigidly circumscribed to safeguard intellectual property. They argue that surveillance, restrictions and penalties should characterize the Internet rather than the current freedom, openness and accessibility. They fail to acknowledge the huge economic benefits they receive from the vast new markets and distribution opportunities the Internet has opened up. For them, the "downside dominates the field, the upside is invisible."

> "In a networked society, copying is not only easy, it is a necessary part of transmission, storage, caching, and, some would claim, even reading."

These and related attitudes prompted the ratification of the DMCA in 1998. Indisputably, the Internet and digital technology make copying protected material easy. So, the DMCA makes attempting to get around encryption and other electronic safeguards of this material illegal. Unfortunately, along with legitimate protections, the law overturns the fair-use standard that copyright law, until now, has recognized. As a result, lending music or copying even small sections of digital creations may become illegal in the future. Until recently, copyright law was a balancing act between providing rights (copyright protection) while imposing limits (fair use). But the DMCA is wildly distorted. It places all the weight on the side of rights while ignoring needed limitations. The imbalance endangers freedom of speech and expression.

What about Culture?

Copyright law should enhance the creative impulse, not restrict it. It rests on the assumption that artists will be more inclined to create new works if they can benefit materially, and tries to help them to do so. However, finding the right equilibrium between rights and limits can be difficult. Take music for example. This is a tough creative area for copyright law to enclose because it is additive; each artist builds on the works of those who came before.

> "Intellectual property legislation had always been a cozy world in which the content, publishing and distribution industries were literally asked to draft the rules by which they would live."

Consider "I Got a Woman," the great rhythm-and-blues recording by Ray Charles, which he released in 1955, and which quickly made him a star. Charles used the melody of the gospel song "Jesus is All the World to Me," by Will Lamartine Thompson, published in 1904. Fortunately for Charles, by 1955, Thompson's copyright had expired. Since then, however, Congress has extended the length of copyright protection. If Charles had written "I Got a Woman" in the current era of super-robust intellectual property protection, he would have run afoul of the law. This is not an isolated example. Current laws severely restrain musicians and other artists from building on earlier works and musical traditions. Indeed, under today's laws, such musical forms as jazz, soul, rock and rap would never have developed.

Examining the Evidence

Businesses and their advocates claim that, without robust intellectual property protection, individuals and companies have no incentive to develop new content. Why should a firm invest its valuable resources in innovation if someone else can then come along and make use of its creation without any of the prohibitive development costs? On the face of it, this argument makes sense. But does it stand up to actual experience?

> "The variegated and evolving limitations on intellectual property are as important as the rights they constrain, curtail and define. The holes matter as much as the cheese."

In 1991, the U.S. Supreme Court ruled that databases, the "unoriginal compilation of facts," could not be copyrighted. However, at about the same time, Europe's "Database Directive," which said that databases were indeed subject to copyright protections, took effect. If the advocates for robust intellectual property protection were correct, database companies would not flourish in the U.S. but would in Europe. That's not what happened. The U.S. database industry is now 25 times larger than it was in 1979. And while the European database industry grew immediately after the issuance of the Database Directive, it reverted to its normal size and pattern shortly thereafter. The evidence is clear: In the U.S., which has no intellectual property protection for databases, the database industry thrives, while in Europe, the industry received only a short-term, temporary boost from the directive. The "anticompetitive costs of database protection" are now a burden in Europe.

Fixing the Problem

Clearly, well-paid and highly effective advocates for broadening intellectual property rights are winning the battle. For half a century now, whenever the question comes up, lawmakers have always decided to expand such rights. Without public engagement, this trend is sure to continue. The problem is, intellectual property is not a subject that inspires. It seems nerdy, technocratic and abstruse. People don't understand it, never mind get excited about it. Nevertheless, because of its immense implications for culture and technical progress, intellectual property is a subject everyone should think about carefully.

> "Democratic decisions are made badly when they are primarily made by and for the benefit of a few stakeholders, whether industrialists or content providers."

In many ways, the advocates who worry that current intellectual property policy is harmful to cultural and technological progress are like 1950s environmentalists. In those days, environmentalists were lonely voices in the wilderness. However, look at all they have accomplished in half a century. Most people now understand that a healthy environment is everyone's business, not just the idle concern of birdwatchers, park rangers and camping enthusiasts. Environmentalists convinced the public that it should strive for a cleaner planet. Like the environment, the public domain is eroding, and activists must engage the public in a debate on the new "politics of intellectual property." The public domain is an invaluable human resource that businesses and their advocates are attempting to wall off, brick by brick. Everyone has far too much to lose to allow that to happen.

About the Author

James Boyle is the William Neal Reynolds Professor of Law at the Duke University School of Law. He serves on the board of Creative Commons, a nonprofit organization that enables people to share and build upon the work of others, consistent with the rules of copyright.