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THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND by James Boyle. Yale University Press, 2008, 315 pp. Paperback \$28.50.

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In the age of the Internet, what are lawmakers doing to protect the public *from* copyright? This is the central question James Boyle considers as he explores the history, application, and future of intellectual property laws to works of authorship using contemporary technologies. On one hand, Boyle draws lessons from history, adroitly explaining the positions of legal theorists such as Thomas Babington Macaulay and Thomas Jefferson toward the possibilities and limitations of intellectual property. On the other hand, Boyle draws distinctions from pre-Internet thought, noting the transformations on traditional intellectual property that the age of instantaneous publication and distribution requires. The theme unifying the two is clear: In our history of expanding intellectual property rights, legislatures have consistently neglected to preserve the public domain as an important natural resource.

After briefly explaining the relevant intellectual property law for those not already versed in the field, Boyle focuses the reader on a letter from Thomas Jefferson to Isaac McPherson, dated 1813 (p.17). In that letter, Jefferson opines about the theoretical underpinnings of intellectual property, “[c]onsidering the exclusive right to invention as given not of natural right, but for the benefit of society”¹ (p.21). Boyle identifies a set of cautions in Jefferson’s letter, labeling the “Jefferson Warning,” akin to Miranda Warnings given suspected criminals (p.21). Those cautions include the difference between intellectual property and tangible property, the lack of entitlement to intellectual property rights, and inherent and proscribed limitations on intellectual property rights (p.21-22). Writings and orations of others, such as British Lord Thomas Babington Macaulay, mirrored this philosophy about intellectual property, questioning the assertion that

copyright is a natural right and upholding “a tradition of skeptical minimalism” that treated intellectual property rights warily (p.35).

If the Jefferson Warning is Boyle’s protagonist, its antagonist is the Internet Threat—the notion that “[w]ithout an increase in private property rights, ... cheaper copying will eat the heart out of our creative and cultural industries” (p.53). This Internet Threat, Boyle argues, is responsible for a pervasive belief that “[t]he strength of intellectual property rights must vary inversely with the cost of copying” (p.60). In turn, this belief has led to a system that ignores the benefits of the Internet and instead seeks merely to contain it, and in particular, the intellectual property its users may copy. The intended result is achieved by a conversion of previously common property into private ownership—a second “enclosure movement” reminiscent of the enclosure of English commons from the fifteenth to the nineteenth centuries (p.43).

Conversion is occurring in the form of piecemeal legislation intended to address specific needs of specific industries, effectively curtailing public access to information that would previously have been considered incapable of ownership. As an example, Boyle considers the Digital Millennium Copyright Act (DMCA).² The DMCA prohibits the circumvention of copyright protection systems, such as encryption and digital rights management. Application of the DMCA, by granting rights irrespective of traditional copyright analysis including fair use, operates contrary to the First Amendment, becoming “a congressionally created off-switch for fair use” created specifically as a reaction to the Internet Threat (p.97). Moreover, interpretation of the DMCA through the courts has stifled the competition that intellectual property rights are intended to foster.

Specific examples further illustrate the importance and recent enclosure of the public domain to creative and innovative industries, as well as those industries’ disparate reactions. In an interesting narrative, Boyle integrates pop culture and copyright law to demonstrate how the music industry, once reliant on the public domain for inspiration, now thwarts others in that same creative process with increased rules and heightened protection. Asks Boyle, “[a]re we in fact killing musical creativity with the rules that are supposed to defend it?” (p.156).

On the other hand, Boyle examines the cases of synthetic biology and computer code, reflecting that the successful steps taken to grant intellectual property rights in industry outputs have resulted in a countermovement to ensure the public availability of information. In the field of synthetic

biology, in which “the product or process involves biological materials not found in nature” (p.171), many scientists rebuff patent rights in the name of innovation. Notes Boyle, “I was depressed by the idea that scientists would have to spend their valuable time trying to work out how to save their discipline from being messed up by the law” (p.174). In the case of computer software, the creators took charge, offering the software as free and open source. Using the General Public License from the Creative Commons, Boyle notes that the:

...open quality of the creative enterprise spreads. It is not simply a donation of a program or a work to the public domain, but a continual accretion in which all gain the benefits of the program on pain of agreeing to give their additions and innovations back to the communal project (p.186).

One of Boyle’s stronger arguments is to recognize that these examples and arguments are just that, and the ultimate proof may be a “test case in which one country adopts the proposed new intellectual property right and another similarly situated country does not, and we can assess how they are both doing after a number of years” (p.207). To this end, he studies the European Union Database Directive,³ the *sui generis* right in effect in the European Union since 1996, and the resulting report by the Commission tasked with evaluating it ten years later. His conclusions, and the conclusions of the European Union Commission, are telling: even when given specific intellectual property rights to stimulate intellectual creation in a given industry, that protection actually hinders production of new databases, as opposed to facilitating it. The analogy is imperfect. It might be difficult to posit that the United States is a country “similarly situated” to any European country in the production of databases, and this example addresses creation of a new ilk of intellectual property as opposed to the extension of established intellectual property rights to new technologies. Despite these weaknesses, Boyle’s story of the Database Directive responds nicely to the question of whether governmental privatization of information has any social benefit at all.

Ultimately, Boyle calls us out on our cultural agoraphobia—our likelihood “to undervalue the importance, viability, and productive power of open systems, open networks, and nonproprietary production” (p.231). He identifies the major problems intellectual property faces—the relative obscurity of the issue, the implications for distinct and separate groups, the ideology shaping its adherents’ beliefs, and the lack of empirical evidence— and posits that this moment in time for intellectual property law

and policy is at the same point that the environmental law movement occupied in the 1950s (p.239). He calls for a “cultural environmental movement” (p.247), allowing us to see and preserve the public domain as a national resource just as important as clean air and water. And, while tempering his criticism with optimism, Boyle leaves us with a warning of his own:

Good intellectual property policy will not save our culture. But bad policy may lock up our cultural heritage unnecessarily, leave it to molder in libraries, forbid citizens to digitize it, even though the vast majority of it will never be available publicly and no copyright owner can be found (p.246).

ENDNOTES

¹ Letter from Thomas Jefferson to Isaac McPherson (August 13, 1813), in 13 THE WRITINGS OF THOMAS JEFFERSON, at 335 (Albert Ellery Bergh ed., The Thomas Jefferson Memorial Society of the United States, 1907), available at http://memory.loc.gov/ammem/collections/jefferson_papers/mtjserI.html.

² Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in sections of 5, 17, 28, and 35 U.S.C.).

³ Directive 96/9/EC on the legal protection of databases, OJ L 77, 27.3.1996, p. 20–28, located at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=31996L0009&model=guichett&lg=en.

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