A Closer Look at the Public Domain

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Reviewing
James Boyle, The Public Domain:
Enclosing the Commons of the Mind
(Yale University Press 2008)

James Boyle's most recent book, *The Public Domain: Enclosing the Commons of the Mind*, brings to mind two anecdotes. One concerns the music industry, or lack thereof, in Ghana. Ghana has a vibrant musical tradition, but many of the country's most revered players prefer to operate from outside the country.[1] The reason, according to the numerous official and media accounts, is a lack of copyright enforcement.[2] Rampant piracy and confusion about copyright laws have discouraged private investment in do-

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[1] Mark F. Schultz & Alec Van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 Kentucky L.J. 126, 129 (2008).

[2] *See id.* at 129; Modern Ghana News, *African Music and Its Modern Challenges* (Feb. 23, 2007), www.modernghana.com/music/4036/3/african-music-and-its-modern-challenges.html (vis. Mar. 28, 2010); *Musicians Demonstrate Against Piracy*, Allafrica.com, 2006 WLNR *20433028 (Nov. 25, 2006). Ghana enacted a copyright law in 2005, but failed to design any legislation that would implement it. *See* Joseph Coomson, *Country Loses $3.7 Million, Jobs Due to Music Piracy*, Ghanaian Chron. Sept. 18, 2007, 2007 WLNR *18295260.

mestic music production.[3] As a result, most of the work produced within the country mimics American pop and relies heavily on synthesizers and indistinctive thumping bass tracks.[4] Presumably this is because these low-cost tracks can earn a profit even if immediately bootlegged.

According to Boyle, and also *Spin* magazine, a similar problem plagues the hip-hop music scene in the United States but results from over-enforcement of copyright (p. 146-51).[5] In its December 2008 issue, *Spin* claims that a series of court decisions requiring payment of royalty fees for even de minimus sampling has undermined the hip-hop industry.[6] The cost of negotiating licenses has led new artists to abandon borrowing from and reworking previous tracks.[7] The result: a loss of richly creative pastiche works in favor of electronically produced tracks heavy on synthesizers and indistinctive thumping bass lines.[8] A real "soggy-ass" form of music, according to one quoted musician.[9]

What do these two stories prove, other than a troubling pervasiveness of drum machines? These mirror-image anecdotes illustrate the difficulty of writing coherently about the optimal contours of copyright and intellectual property ("IP") protection. Currently a debate exists globally about the scope of protections for IP: creative

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[3] *See* Stephen Gyasi, *Piracy is 'killing' Ghana Music Industry*, AFRICAN BUSINESS (June 1, 2009), 2009 WLNR *11776874 (also available at www.thefreelibrary.com/Piracy+is+%27killing%27+Ghana+music+industry:+the+Ghanaian+economy+is+not…-a0202294948 (vis. Apr. 4, 2010)).

[4] *See*, *e.g.*, *Piracy in Ghanaian Music Industry*, ACCRA MAIL, 2007 WLNR *3150726 (Feb. 16, 2007); *African Music and Its Modern Challenges*, *supra* note 2; John Collins, *Ghana and the World Music Boom*, *in* WORLD MUSIC: ROOTS AND ROUTES 57, 64-65 (Tuulikki Pietilä ed. 2009) (noting controversy over the prevalence of drum machines and synthesizers in the local music market).

[5] Matthew Newton, *Is Sampling Dying? How greenbacks and red tape are tearing the heart out of hip-hop*, SPIN (Dec. 2008), www.spin.com/articles/sampling-dying?page=0%2C1 (vis. March 19, 2010).

[6] *Id.*

[7] *Id.* at 2-3.

[8] *Id.* at 3.

[9] *Id.* (quoting RZA).

works, technological innovations, scientific discoveries, and other works of the mind. Proponents of the current strong rules protecting intellectual property argue that a failure to reward innovation curtails investment.[10] Critics contend that many of today's rules have gone too far and actually stifle new creativity by overprotecting older works.[11] In a battle of anecdotes about the perils of too much or too little property, it is hard to know where to draw lines. Boyle's book about the importance of delineating a public commons in information correctly laments the lack of hard evidence about how much protection is appropriate, but similarly relies on anecdotes to make its points. The result is an engaging work, but one that ultimately fails to advance the conversation.

Boyle's identification of the problem with intellectual property protection is more compelling than his solutions. He is surely correct that we need more empirical evidence about the costs and benefits of property protection to evaluate how to encourage innovation in new technologies and subject matters (p. 206, 238). In later chapters of the book, Boyle goes on to suggest that ill-advised extensions of intellectual property rights are the result of a systemic "anti-openness" bias shared by lawyers, decision-makers and the public at large (p. 231). He therefore advocates that while we await better empirical evidence we should err on the side of openness to counteract our own innate pro-property biases (p. 207, 235). While I would agree with much of what Boyle argues in the book, I disagree that any evidence exists of such a bias, or that we would necessarily need to do much to counter-act it if in fact it does exist. Instead, in Part II I offer an alternative view of some of the devel-

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[10] *E.g.*, F. Scott Kieff, *IP Transactions: One the Theory and Practice of Commercializing Innovation*, 42 HOUSTON L. REV. 727, 735 (2005) (focusing on investment in commercialization); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471 (2003); William Landes & Richard Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

[11] *E.g.*, LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004); Mark Lemley, *Property, Intellectual-Property and Free-riding*, 83 TEX. L. REV. 1031 (2005).

opments narrated by Boyle: that open regimes can slowly stifle innovation and investment in ways similar to over-protection. Rather than a battle of anecdotes, what is needed is a more fine-grained appreciation of the interface between open and proprietary models of creation so that innovation of both kinds can flourish in tandem.

PART I: THE BOOK

Boyle's book is aimed at the intellectual property novice (p. xii, xv). He hopes to convince the reader unfamiliar with intellectual property that the subject is not arcane and technical, that it indeed forms part of the American cultural and political heritage of every citizen.

We all know what property is, and why it is wrong to take it from someone else. Boyle wants to explain what property is not, at least in the arena of information (p. xiv). He wants to make the case for areas of culture, technology and science that cannot be made subject to exclusive rights but should remain free for all to use. These arguments will be familiar to those who have followed similar crusades by authors such as Larry Lessig, Richard Stallman, and Yochai Benkler over the last few years.[12] Boyle's book is distinct from these in two respects: first he is aiming for the general audience, not the experienced technophile. Second, unlike those who seek to unwind intellectual creations from real property metaphors completely, Boyle wants to stimulate a kind of environmentalist movement for the mind. Just as an appreciation of nature's wild and undeveloped places motivates many land-use policy-makers, Boyle wants cultural policy-makers to appreciate creativity in its natural, un-owned state (p. 238-45).

The notion of a "public domain" of information that is freely available as raw material is increasingly important.[13] As has been

[12] *See*, *e.g.*, YOCHAI BENKLER, THE WEALTH OF NETWORKS (2006); Lessig, *supra* note 11; RICHARD STALLMAN, FREE SOFTWARE, FREE SOCIETY: SELECTED ESSAYS OF RICHARD STALLMAN (Joshua Gay, ed. 2002).

[13] There is no lack of ink spilled on this topic. *See*, *e.g.*, David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV, 652 (2010); Larry Lessig, *Recrafting a Public Domain*, 18 Supp. YALE J. L. HUM. 56 (2006); Dan Hunter, *Cyber-*

widely noted, in the twenty-first century economy, information and not tangible items are the source of value in economic transactions.[14] In part this results from the lower cost of reproducing and disseminating information in a networked society. As the costs of copying go down, customers increasingly pay a premium for the information itself as opposed to the form it is contained in.[15] Predictably, awareness of the commodity value of information has led producers to demand more and stronger ways to protect investments in information. Such investments include the development of new business models, or ways to sequence DNA, or process data, or the design of virtual worlds and interfaces, or the development and promotion of celebrity images. These demands have led to stricter rules on the use of information previously thought to be beyond the reach of proprietary regimes like patent and copyright.

At the same time, as Boyle and others – again Lessig and Benkler – have pointed out, changes in communication technology have brought greater numbers of small-scale users into conflict with corporate owners of information claims (p. 156).[16] Better technology brings the production and dissemination of creative works within the capabilities or more and more individuals. As Boyle engagingly documents, the creative products of one producer frequently form the raw materials for new discoveries and works (p. 124-56). The presence of information as both crucial input and valuable output forces the question of what kinds of information should be freely available to all in sharp relief.

With patience and humor, Boyle walks the reader through some of the more important intellectual property developments of the last twenty years, and then drops back to offer a historical perspective on why these developments are inappropriate. He then unveils

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space as Place and the Tragedy of the Digital Anticommons, 91 CAL. L. REV. 429 (2003); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990).

[14] *E.g.*, Mark Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 876 (1997).

[15] *See* JAMES BOYLE, SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 2-3 (1996).

[16] Lessig, *supra* note 11 at 161, 171.

a series of interesting case studies that underline the importance of a "public domain" of freely available expressive works and scientific discoveries for all to use. Anyone who has read one of a variety of works on this topic will recognize many of the arguments[17] and even some of the examples[18] marshaled here.

This book and its cousins showcase the pitfalls of blindly applying property concepts to culture and science. Highlights include the patent for the crustless peanut butter and jelly sandwich (p. xi-xii), or the use of copyright laws to prevent robot pet dogs from learning to dance.[19] Boyle, like Lessig, also painstakingly traces the genealogy of supposedly "original" cultural works to reveal the extent to which its creator copied from prior sources.[20] The evidence here is overwhelming. *The Public Domain* adds to the case in interesting ways, but doesn't mine any new territory or approach.

Because Boyle was one of the first to sound the alarm about excessive intellectual property protection, perhaps it should not be held against him that so much of his new book sounds familiar. Boyle wrote a brilliant book over ten years ago called *Shamans, Soft-*

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[17] *Compare*, *e.g.*, Lessig, *supra* note 11 at 21-23 (describing how many famous Disney films are actually recreations of the work of others – for example, the first Mickey Mouse film, *Steamboat Willie*, was a spoof on a Buster Keaton character who was himself based on a well-known song Steamboat Bill) with Boyle at 124-56 (tracing how Ray Charles' song, *I Got a Woman*, reworked an older gospel song, and in turn was reworked as a rap song by Kanye West); *compare also* Lessig, *supra* note 11 at 40 (noting the importance of mash-ups and blogging in reacting to important political events such as 9/11) with Boyle at 143-45 (noting the importance of mash-ups in expressing public rage at the political response to Hurricane Katrina) and Benkler, *supra* note 12 at 390-91 (discussing how restrictive copyright law might have suppressed a remixing of the Diana Ross/Lionel Ritchie ballad Endless Love produced to protest the invasion of Iraq in 2003).

[18] *See*, *e.g.*, Benkler, *supra* note 12 at 313-14 (discussing privatization of government produced data); Boyle at 221-22 (same); *see also* ADAM B. JAFFE & JOSH LERNER, INNOVATION AND ITS DISCONTENTS: HOW OUR BROKEN PATENT SYSTEM IS ENDANGERING INNOVATION AND PROGRESS, AND WHAT TO DO ABOUT IT, 25-26, 32-34 (2004) (discussing the patent on the crustless peanut butter and jelly sandwich).

[19] Lessig, *supra* note 11 at 153-55.

[20] *Id.* at 21-23.

ware and Spleens.[21] This book argued that romantic notions about individual genius in Western culture had led to overprotection of information works at the expense of real creativity. He was one of the first to connect disparate developments in medicine, culture and technology into a unified theory of an "information society." He was also an early and prescient critic of rules that rewarded innovation by fencing it off as potentially stifling this new networked culture. The interceding twelve years, with the embarrassing examples of ridiculous patents on obvious inventions, and the internet gold rush to stake out claims on information resources in new territories of "cyberspace" have only served to underline and amplify Boyle's points. What were then somewhat removed academic arguments about cultural freedom are now the stuff of social movements here and abroad. Boyle has his own success and insight to blame if a lot of the points made in his new book sound, well, old.

A more serious problem with a lot of these essays is that it's tough to find anyone reasonable who disagrees that absolute protection in all cases is unwise. Even Richard Epstein, a die-hard property rights booster, concedes that intellectual property should come with limits.[22] It's the fine line-drawing where the hard questions are, but these hair-splitting discussions make for less pithy chapter titles.

Let's take the example of the patent granted on crustless peanut butter and jelly sandwiches.[23] Admittedly, this is a silly patent and an outrageous use of government-granted private monopolies. But what does this anecdote about a silly patent actually prove? Even casual patent scholars would agree that existing exclusions for inventions that are not "novel" or that are "obvious" should have knocked out this application.[24] So maybe all this anecdotes shows is that the laws are not bad, but they are sometimes poorly applied.

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[21] Boyle, *supra* note 15.

[22] *E.g.*, Richard A. Epstein, *Intellectual Property: Old Boundaries and New Frontiers*, 76 IND. L.J. 802, 805-06, 823 (2001).

[23] U.S. Patent No. 6,004,596 (filed Dec. 21, 1999).

[24] Boyle himself admits as much (p. xi, n. 1).

Similarly, the story of how one Ray Charles song, *I Got A Woman*, with roots in the southern gospel tradition, became the basis for a popular rap version and then subsequent widely viewed political satires about Hurricane Katrina, is susceptible to more than one interpretation (p. 122-59). Specifically, readers may have two reactions to this story: one is that the cold hands of dead authors shouldn't be able to restrain today's vibrant artists. But the other is that Clara Ward, the original author of the underlying gospel arrangement, as revealed by Boyle's research (p. 134), should have gotten more credit and money when Charles used her melodies to build his career.[25] Copyright law may exacerbate the first problem, but properly applied, it might have cured the second.[26] That's hardly a devastating indictment of the current IP regime. Indeed Boyle's discussion of copyright's negative spaces concedes that in a lot of tough cases, courts and agencies have managed to draw a reasonable balance (p. 69-70, 78, 116, 207-20). Uncertainty about the scope of the law may chill innovation, but then again that may be an issue with implementation rather than design.

That's not what Boyle and Lessig and others want to say however. Their case is that the law itself is fundamentally flawed. Here is where things get murky. Boyle never explicitly articulates what kinds of information can be "in" that is subject to property rules,

[25] Charles also based his hit *This Little Girl of Mine* on Ward's arrangement of the gospel classic, *This Little Light of Mine*. (p.134).

[26] Boyle hypothesizes that Ward's song, *I Got a Savior*, fell into the public domain due to a failure to follow statutory formalities (p. 136-37). Other sources suggest that her mother sold the rights without comprehending their true worth. *E.g.*, WILLA WARD-ROYSTER & TONI ROSE, HOW I GOT OVER: CLARA WARD AND THE WORLD-FAMOUS WARD SINGERS 216 (1997). Either way, a lack of sophistication about copyright led to less compensation and control than she might have had. Boyle suggests that her lack of rights was key to the development of soul music. Based on Ward's public criticism of *This Little Girl of Mine* as "a slap against the gospel field," Boyle concludes that she probably would have been unwilling to license rights to Charles to rework her earlier song (p. 134 (quoting J.C. Marion, *Ray Charles: the Atlantic Years* JammUpp 2 no. 32 (2004)), 156). It is impossible to know, of course, but one could also read her displeasure as understandable annoyance that he used her melodies without crediting her.

and which should be "out," or in the free use zone. He seems to have a special antipathy for rules protecting certain kinds of information such as databases of facts, sequences of genes and methods of doing business (p. 68). But even where he sees a role for property protection, such as for works of creative expression such as music and movies, he wants to preserve open spaces for certain public uses of such works: mash-ups with a political purpose, development of technologies that can distribute such works in new ways even if such technologies may be used to facilitate some illicit copying, open and unfettered research on software flaws or program interoperability. Mostly he feels that the law has been extended to new technologies in an "evidence-free" zone; that is, without any indication that strict property rules are doing more harm than good (p. 205-06). This is all fine, but where Boyle goes next is not likely to cure the problem.

PART II: REVERSAL BY ANECDOTE

Where one might quibble with Boyle and others like him is in his sweeping embrace of "open" development models or "sharing" economies as solutions to the current propertization problem. Common examples here include Wikipedia, open source software development, and Creative Commons licensing for expressive works. Such projects point to the massive creative potential of computer networks when unleashed from legal restrictions. They each also showcase armies of largely unpaid individuals toiling in obscurity to create and distribute works free of charge. We therefore shouldn't assume that we need property rights to spur creativity, says Boyle.

That may be right, but Boyle discounts a lot that is troubling about the new "sharing" modes. For one thing, they do not provide an easy path to earning a living for creative professionals in the way that intellectual property ownership does. Research in the software industry suggests that the monetary benefits of these arrangements inures primarily to the benefit of big, established players.[27] Entre-

[27] *See* Jonathan M. Barnett, *Is Intellectual Property Trivial?*, 157 U. PENN. L. REV.

preneurs still need property rights to gain access to capital.[28] Even beyond start-ups, "crowdsourcing" of projects, for example, provides opportunity for those looking to break into a field, but by providing labor cost-free, undermines the viability of the very field participants wish to enter.[29]

Furthermore, not every aspect of these sharing models is truly shared. Those who engage in peer production donate their time and effort towards solving a problem or building a community. Often overlooked, however, is that the real recipient of these donations is a large private company. YouTube may look like a public commons of amateur videos, but it is owned by Google, which sells ads against the videos. Amateurs who send their photographs to iStockphoto may see themselves as part of a community, but it's a community owned and enjoyed by Getty Images.[30]

More globally, the problem with arguing by anecdote, as Boyle does, is that it leaves him vulnerable to reversal by anecdote. Sharing economies work well for some communities.[31] Some sharing economies, however, are built on top of old property models and cannibalizing them. Witness the treatment of newspaper content on the internet. Search engines aggregate and organize proprietary content and so facilitate the dissemination of information. Some blogs do the same with current news and add their own commentary. Currently almost all of this content is available to users for

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1691 (2009); Ronald J. Mann, *The Commercialization of Open Source Software: Do Property Rights Still Matter?*, 20 HARV. J. L. & TECH. 1 (2006); Ronald J. Mann, *Do Patents Facilitate Financing in the Software Industry?*, 83 TEX. L. REV. 961 (2005); Kieff, *supra* note 10 at 744.

[28] Mann, *Open Source Software*, *supra* note 27 at 26-29; Ventureblog, *Unique Technology Still Matters to Start-ups* (Feb. 6, 2006), ventureblog.com/articles/2006/01/unique_technolo.php (vis. Mar. 27, 2010).

[29] JEFF HOWE, CROWDSOURCING: WHY THE POWER OF THE CROWD IS DRIVING THE FUTURE OF BUSINESS xx-xxi, 2-3 (2008).

[30] *Id*. at 182-84.

[31] *See* Jonathan M. Barrett, *Sharing in the Shadow of Property: Rational Cooperation in Innovation Markets*, (draft October 2008), law.bepress.com/usclwps/lewps/art87 (finding that sharing regimes work best to facilitate circulation of knowledge assets within a defined community).

free, which is a lot better for readers than having to pay multiple subscription fees for access to "walled gardens" of content in diffuse locations. However, the "information wants to be free" ethic of the internet is undermining the revenue model for paid media. Advertisers have little reason to pay premium rates to news organizations if readers can find the same content all over the web. Every week brings news of new layoffs and bankruptcies in the media sector.[32] Snarky blog commentary is fun, but a common understanding of facts must come from somewhere. Right now it comes from newspapers and the work of paid journalists.

If newspapers fold, it is not clear what if anything will take their place. Citizen journalists can submit facts, but have little incentive to engage in the kind of sustained relationship-building and negotiation that it takes to get those in power to reveal information – especially information that they do not want to reveal.[33] Perhaps we will move to a press release culture where users have to navigate between self-serving information releases.[34] Or to a universe of very specialized niche publications serving only the communities directly affected by a particular issue or field of study. None of these seems a perfect replacement for the benefits that a general-interest news forum provides to citizens of a democracy.[35] Without some kind of

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[32] *See*, *e.g.*, the list kept at www.iwantmedia.com/layoffs.html (vis. Mar. 24, 2010).

[33] *See*, *e.g.*, Megan Garber, *The Freedom to Fail and the Need to Experiment: What Gives a Citizen-Journalism Project A Chance to Work*, Nieman Journalism Lab, www.niemanlab.org/2010/03/the-freedom-to-fail-and-the-need-to-experiment-what-gives-a-citizen-journalism-project-a-chance-to-work/ (vis. Mar. 22, 2010) (noting the difficulties of enlisting volunteer citizen journalists in investigative work).

[34] For example, Major League Baseball has started its own sports network to provide news "in-house." See mlb.mlb.com/network/ (vis. Mar. 28, 2010).

[35] This is not to denigrate the important role that "citizen" journalists and bloggers play in bringing some new facts to light. Benkler and Lessig both point to the example of Trent Lott's remarks praising the segregationist views of Strom Thurmond as an example of something overlooked by mainstream media until bloggers made it an issue. Lessig, *supra* note 11 at 43; Benkler, *supra* note 12 at 261. The story only forced Mr. Lott to step down as speaker, however, because mainstream media outlets amplified the gaffe to a wide general audience. *See*

incentives for news-gathering, we may lose this other kind of public domain of cultivated information spaces. As Boyle says, we don't yet have the data to know which is worse, or even which parade of horribles is more likely.

Curiously, Boyle thinks that we can make policy even in the absence of good evidence. Here he draws generally on the work of behavioral economists who have argued that people generally suffer from predictive irrational tendencies such as loss aversion and endowment effects. This means for example, that people tend to overestimate chances of loss and underestimate chances of gain.[36] Boyle argues for the recognition of another as-yet-unidentified common behavioral bias: that of "openness aversion" (p. 231). Boyle posits that the last twenty years of flawed intellectual-property rule-making reveals that that people systematically underestimate the gains of sharing and overestimate the benefits of property protection (p. 235). To correct against this automatic anti-sharing bias, Boyle argues that we should generally err on the side of sharing information in the absence of evidence that this is a bad idea (p. 207).

Although this is an intriguing possibility, this is where Boyle wanders into his own "evidence-free" zone. That the success of distributed peer production surprises those of us born before 1990 or so is not really evidence that we under-appreciate sharing generally. Here again, counter-examples abound. Community production of creative artifacts is as old as cave-painting and quilting. Even in modern times, evidence of appreciation of the benefits of sharing is prevalent. Blogs and social networking sites illustrate that many of us share even with total strangers. Indeed, such phenomena suggest that at least a few of us are too predisposed towards sharing. Even if we were born with innate anti-sharing tendencies, pro-sharing socialization instilled since kindergarten may allow us to correct for the trait at least on some occasions. Furthermore, it's not clear that

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Benkler, *supra* note 12 at 264.

[36] D. KAHNEMAN, P. SLOVIC & A. TVERSKY (EDS.) JUDGMENT UNDER UNCERTAINTY, HEURISTICS AND BIASES (1982).

behavioral biases are always maladaptive. If we are wary of sharing some kinds of resources, perhaps it's with good reason.

I am sympathetic to the appeal of easy heuristics to simplify line-drawing in IP cases. Unfortunately, there is no substitute for the work of collecting data about when and where property rules provide net benefits and harms. Luckily others are building on Boyle's prescient work in this area to try.

Recent scholarship examining the nature of "constructed commons" in informational works offers a refreshing change from the intractable more vs. less intellectual property debate.[37] Constructed commons are resource-governance arrangements, both formal and informal, that allow limited common access to works within a larger structure of property entitlements. Intermediate arrangements between complete exclusion and indiscriminate access can allow productive sharing of research and tools while still providing room for commercial exploitation at different stages in the process.[38] Examples include pooling arrangements of patents within an industry, open source licensing for software development, and informal sharing and exclusion norms within creative communities, such as stand-up comedians.[39] Acknowledging the vital role of these mediated "commons" requires abandoning "free culture" sloganeering in favor of highly contextual analyses that will vary by industry, resource and community.[40]

Indeed, as Boyle himself recognizes, property rules encourage investment in particular kinds of works and kinds of social structures – marketable drugs and complex novels and films, for example – that sharing norms may neglect (p. 201). Boyle misses though that the existence of a sharing economy, extended too far, could threaten the production of such goods. Participation as an anony-

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[37] *See*, *e.g.*, Michael Madison, Brett Frischmann, Katherine Strandburg, *Constructing Commons in the Cultural Environment,* forthcoming CORNELL L. REV 2010, papers.ssrn.com/sol3/papers.cfm?abstract_id=1265793 (vis. Mar. 24, 2010).

[38] *Id.* at 2, 9.

[39] *Id.* at 14, 17, 21.

[40] *Id.* at 2-5.

mous volunteer in a giant "hive" is different from sustained engagement with and control over a complex work.[41] In scientific and technological fields, institutional intermediaries such as university technology transfer offices facilitate movement of research projects and individuals from collaborative to commercial settings. Currently, however, no similar institutions mediate movement through "softer" fields such as music and film. For example, artists who release early works as "Creative Commons" can never revoke the gift. Even more worrisome, such artists risk access to investors that might provide autonomy and independence for later endeavors.[42]

Boyle may be right that more sharing of and less property protection for information will bring net benefits for society. But he may well be wrong. Just as Boyle cautions against an automatic bias against sharing models, I'm not sure it's not too soon to remind readers not to have an automatic bias in favor of them either.

Recall the two anecdotes at the start of this review. Although they appear to be mirror images, in fact the concerns they address are different. Boyle and Spin Magazine are concerned about development of the music itself, divorced from the people who create it. They want laws that allow creation of different kinds of music at lowest cost, and assume that the creative energy to supply this music will always be abundant. In one sense, the situation in Ghana supports this view. Even when destitute, musicians in Ghana still perform.[43] In the Ghanaian narrative, however, the concern is sustenance for a domestic industry and a professional class. The devel-

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[41] *Cf.* JARON LANIER, YOU ARE NOT A GADGET 76-85 (2010) (criticizing ideals of "open" or "free" culture as favoring aggregators and amateur remixers over professional authors).

[42] *See* Susan Butler, *For the Common Good?*, BILLBOARD 25 (May 28, 2005). Creative Commons licenses are not revocable per se, but of course there is a statutory termination right for copyright owners after 35 years under 17 U.S.C. § 203(a)(3). This is unlikely to help much because only a miniscule number of musicians have rights that are still valuable at this time, and downstream users can still keep any copies already distributed or make use of any derivative works already created. 17 U.S.C. §§ 109, 203(b)(3).

[43] *See*, *e.g.*, *African Music and Its Modern Challenges*, *supra* note 2.

opment of this class is assumed to provide spillover benefits to other members of society through increased tourism and international recognition.[44] At bottom these narratives describe different notions of sharing and of community. One is probably not more important than another, but a balanced innovation policy will make plenty of room for both.

[44] *See* Schultz and van Gelder, *supra* note 1 at 106.