

Redefining 'property'

Private Property, the Commons, and the Public Domain

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The pervasive culture of turning everything and anything into commodities that can be bought and sold is squeezing the space for common ownership. Exploitation for private gain has systematically diminished the commons and the public domain. This is happening not only in the case of tangible goods such as public services, utilities and public spaces like parks and highways, but also with the more intangible goods of ideas and information, now increasingly referred to as *"intellectual property"*. We are all impoverished as a result. *"In the end,"* as law professor James Boyle puts it, *"the public domain is whatever intellectual property is not."* He goes on to say, *"You have to be a lion- or jackal-lover of truly limited imagination or unlimited commitment to argue that gazelles are to be understood as no more than whatever is left over after their adversaries have finished feeding."*¹

But it is essential to recognise, particularly at a time when 'government' is systematically reviled and its social justice and social welfare mandate is degraded and deconstructed, that intellectual property is a social construct. This means that it is dependent for its meaning, legality and application on a strong central government and a legal system willing to enforce and extend the domain of private property at the expense of public good.

The relentless advance of private property

For the past three hundred years or so, industrialised societies (or at least the class of tangible property owners within them) have become increasingly preoccupied with property, its privatisation, and its 'protection,' meaning the accumulation of capital and control. The debate about property ownership has been framed as being between enclosure and commons, private property and public property.

¹ James Boyle (2003), "The Second Enclosure Movement and the Construction of the Public Domain", *Law and Contemporary Problems*, Vol 66, Nos. 1/2, www.law.duke.edu/journals/66LCPBoyle



Table 1: Rights and Responsibilities

	Private Property	Commons	Public Domain
Access	Exclusive	Limited access	Open access (on good behaviour)
Responsibility	Individual (includes corporate)	Village/community	Social

The ideology of personal (and now corporate) greed has become the unquestioned driver of the economy, with its assumption that humans are motivated only by the prospect of acquisition, and that progress results solely from increased production and consequent economic growth. Any semblance of a common/public property regime is simply a block, if not an enemy, to wealth and progress.

Over the past two decades many of us have criticised the concept and application of intellectual property rights (IPRs) on moral, spiritual and intellectual grounds. We have objected to the part they play, for example, in the relentless erosion of traditional practices of seed saving and medicine, accompanied by the theft of plant, animal and human genetic material, to say nothing of laying claim to the knowledge of indigenous peoples. All of this has been rationalised as reasonable activity by first conceptually reducing plants, animals and people to 'genetic resources' and then making this socially acceptable by labelling them 'the common heritage of humanity.'

The corporate and governmental pirates engaged in this 'resource' exploitation claim that it is in the public interest that they do so on the grounds of the public benefits of the products – mostly drugs – they promise to produce from these 'resources.' While they demand extensive state intervention to protect what they regard as their 'intellectual property,' they do not appear to consider it unreasonable to demand increasing limitations on any state or community action in the public interest or for the public good.

A failure of our imagination

Granting patents on plants, seeds, genes, gene sequences, ideas, data and information has accelerated dramatically in the past decade. But proponents of the public domain, public good, the commons, and community life seem to have been unable to gain any significant leverage on the institutions of domination and exploitation. We have allowed ourselves to be confined in a straitjacket of limited imagination and narrow concepts, and have failed to get to the root of the issue. Our language and analysis has not been sufficiently historically informed and incisive, and relies too much on slogans and emotional appeal.

We have been thinking only in terms of private property or a vague and perhaps romantic notion of commons, paying even less attention to 'public domain.' We should, however, recognise three quite distinct categories of property and space – private, common and public (see table 1).

Private is easily understood as belonging to a person or a family, but we have to recognise that corporate-owned property and space is considered just as much private as your home. The American shopping mall is perhaps the most obvious example of the both the property and the space within it being privately – that is, corporately – owned. With its pretense of being public space – and deliberately setting out to create the sense of a village square, but with political activity and anything that might interfere with commerce excluded, the healthy concept of public domain is further eroded. In fact, children growing up in the malls are deprived of any sense of the politics of public life. Such is our confusion over public and private property and space that a common fishery, or the fields of a village, are not even given the same recognition or status as the shopping mall.

Commons is wrongly used to describe what is considered as public. This misrepresentation can be attributed to Garret Hardin and his 1968 essay, *The Tragedy of the Commons*, in which he set out to demonise the concept of commons in order to finish off any notion of public interest or public good, and with it any positive connotations for public property and space. As James Boyle sarcastically puts it, "*Everyone' knows that a commons is by definition tragic, and that the logic of enclosure is as true today as it was in the fifteenth century. Private property saves lives.*"²

In reality, commons historically referred to property and space that was 'owned' communally – by a group of fisherfolk or a village, for example – and managed for the long-term good of the group, including succeeding generations. Access to the property and space – fields, fishing grounds, forests – was limited to the group 'owning' and managing it. It was not open to exploitation by outsiders, though limited use of the space could be extended to them. Thus a well-defined fishing area might be closed for fishing to all but the 'owners' while still permitting everyone to swim or paddle in it.

² James Boyle (2003), "The Second Enclosure Movement and the Construction of the Public Domain", *Law and Contemporary Problems*, Vol 66, Nos. 1/2, www.law.duke.edu/journals/66LCPBoyle



The *public domain*, on the other hand, is open to all, but that does not mean a 'free for all.' Access may be denied to those who refuse to play by the rules governing use of the public space and 'property.' Roads and parks are good examples. Access is open to all, but the rules of the road must be obeyed, and are usually enforced by agents of the 'state' – police of one sort or another. Village greens and market squares have also been socially and politically vital spaces for communities.

Breaking out of the straight jacket

Outside the culture of societies dominated by the vagaries of the market economy, the ideology of privatisation and private property is highly contested. There is also growing resistance to the dictatorship of IPRs in market-defined societies, as indicated by the following letter. It was sent by 59 high profile scientists including John Sulston of the Human Genome Project, to the Director General of the World Intellectual Property Organisation (WIPO), stating:³

"In recent years there has been an explosion of open and collaborative projects to create public goods. These projects are extremely important, and they raise profound questions regarding appropriate intellectual property policies. They also provide evidence that one can achieve a high level of innovation in some areas of the modern economy without intellectual property protection, and indeed excessive, unbalanced, or poorly designed intellectual property protections may be counter-productive. We ask that WIPO convene a meeting in calendar year 2004 to examine these new open collaborative development models, and to discuss their relevance for public policy."

WIPO initially welcomed the letter and talked about holding a conference on the subject, but was subsequently caved in when it was inundated with calls from trade groups and government representatives who said WIPO should not be wasting time on this, but should instead be putting its energy into protecting their IPRs.

In 2001, James Boyle (one of the letter's signees) and his colleagues at Duke University School of Law held a conference on 'the public domain,' which he describes as *"the 'outside' of the intellectual property system – the material that is free for all to use and to build upon."* This seemed to be the first conference of its kind, which according to Boyle, *"is surprising when one realises the central role of the public domain in our traditions of speech, innovation and culture."* Boyle compares the current lack of discourse on the public domain with that on the 'environment': *"Once upon a time there was no environmental movement. Before there could be an environmental*

movement, the concept of 'environment' had to be created, that is, a discourse about the environment had to be created before a social movement to protect it could emerge." We have to create a discourse about the concept of 'public domain' before a movement to promote it can rise up.⁴

Roots of the second enclosure

To identify the political-ideological context of the diminution of the public domain, Boyle points to the post-Cold War 'Washington Consensus', which claims that history teaches the only to growth and efficiency is through markets, and that property rights are an essential condition for markets. The phrase 'Washington Consensus' was coined originally *"to refer to the lowest common denominator of policy advice being addressed by the Washington-based institutions [World Trade Organisation, International Monetary Fund, etc] to Latin American countries as of 1989."*⁵ These policies included:

- Fiscal discipline
- Trade liberalisation
- Liberalisation of inflows of foreign direct investment
- Privatisation
- Deregulation (to abolish barriers to entry/exit)
- Secure property rights

Boyle mockingly dubs the Washington Consensus 'property saves lives,' explaining that: *"The world of the Washington Consensus is divided into two parts. In one, growing smaller by the minute, are those portions of the economy where the government plays a major regulatory role. The job of neo-liberal economic thought is to push us toward the privatisation of the few areas that remain. The second area of the Washington Consensus is an altogether happier place. This is the realm of well-functioning free markets, where the state does not regulate, subsidise, or franchise, but instead defines and protects property rights. While unintended consequences are rife in the world of government regulation, no such dangers should be feared if the*

³ See the open letter and signatories at: www.cptech.org/ip/wipo/kamil-idris-7july2003.pdf. Also, "Drive for patent-free innovation gathers pace", *Nature* 424, p. 18, 10 July, 2003.

⁴ James Boyle (2003), "The Second Enclosure Movement and the Construction of the Public Domain", *Law and Contemporary Problems*, Vol 66, Nos. 1/2, www.law.duke.edu/journals/66LCPBoyle

⁵ John Williamson, Center for International Development, Harvard University, www.cid.harvard.edu/cidtrade/issues/washington.html



Words designed to trap us

The following terms and images in current use can all be related to property rights in some form. If allowed to, each of these words could raise questions of access and exclusion. In the current context of individualism, materialism and market ideology, however, they customarily only raise questions about rights and innovation, progress and profit – and the appropriate penalties for violation.

Private property	Public domain	Genes
Resources	Intellectual property	Traditional Knowledge
Parks	Seeds	Common Heritage
Commons		

government is simply handing over a patent on gene sequences or stem cell lines, or creating a property right over compilations of facts. Property is good, and more property is better.”

The corporate grab for ‘genetic resources’ – plant, animal and human – is being called “the second enclosure” (see box) by activists around the world, who have been battling for farmers rights, retention of their seeds in their village commons and the

recognition of traditional/indigenous knowledge. But this terminology is definitely not the language of the public relations firms responsible for corporate image-making.

It wasn't always so black and white

While intellectual property rights as currently practiced and pursued are acts of enclosure for private gain, historically copyright and the public domain were born together as the outcome of a struggle between the vested interests of authors and publishers enjoying a perpetual property right and the interests of the broader public in a more open literary environment.

“The pre-history of copyright was not total freedom, but rather a set of guild publishing privileges that produced a framework of pervasive regulation. Instituting a copyright system with statutory time limits, particularly after the House of Lords rejected the author's claim of a perpetual common right, enabled a much freer and more open literary environment. It is only after the Statute of Anne [1709] . . . that certain classic works became available for any publisher to print in a competitive market.”⁶

In addition to the British focus on enclosures and commons, there is, as part of the same cultural history, Roman law, which recognised five different categories of what might be described as ‘impersonal’ property⁷. These categories are not tidy, as indicated by the word *res*, the Latin word for ‘thing,’ a fuzzy word if there ever was one. But they do offer more ‘property’ options than seem to be recognised today.

Res nullius: things that are unowned or have simply not yet been appropriated by anyone.

‘Unsettled’ land, traditional knowledge, herbal and medicinal plants and agricultural seeds and human DNA have all been treated as *res nullius*, ‘the common heritage of humanity’ open to appropriation by others – queens, governments and corporations. The establishment of botanical gardens like Kew and Singapore with material gathered from colonies around the world was an integral aspect of British colonialism, just as the St. Louis Botanical Garden is an integral aspect of Monsanto's imperialism.⁸ In recent years there have been innumerable examples of the collection and appropriation of human DNA as if it were *res nullius*, from the cell line of a Hagahai indigenous person from Papua New Guinea to John Moore's spleen to the entire population of Iceland.

Res communes: things open to all by their nature, such as oceans and the fish in them or the air.

The first enclosure of the commons

The ‘first enclosure’ was the enclosure of village commons by the feudal lords in Britain. The process began around 1700, and 4,000 Private Acts of Enclosure had privatised some 2.8 million hectares of commons before the Great Enclosure Act was passed in 1845, bringing an end to the economy of the commons upon which the welfare of the peasants depended. Deprived of their commons for growing and raising their own food, people were forced to provide the cheap labour for the Industrial Revolution.



The tragedy of the misunderstanding of the commons - as per Garrett Hardin

This is the understanding of the commons promoted and vilified by Garrett Hardin. It is closer to the truth to say that historically the commons has been a limited-access space managed by a distinct community according to its social norms, which excluded individual benefit at the expense of the community, whether referring to grazing rights or catching fish. Boyle comments that one might say that the function of intellectual property is to turn *res communes*, things by their nature incapable of ownership, into *res nullius*, things not yet owned but capable of appropriation.

Res publicae: things that are publicly owned and made open to the public by law.

This includes parks, roads, harbours, bridges and rivers. *Res publicae* are public spaces rather than wilderness. There is open access, but one is expected to behave according to social norms and laws.

Res universitatis: things owned by a public group in its corporate capacity.

The standard 'owner' for the Roman *res universitatis* was a municipality, but both private (churches, universities, hospitals) and public (villages, fishing communities) groups could own property in common, including lands or other income-producing property. Such limited common property regimes may be commons on the inside, but they are property on the outside, that is, vis-a-vis non-members.

Res divini juris; things 'unownable' (of divine jurisdiction) because of their divine or sacred status.

For many people, this would include seeds, plants, traditional knowledge, and even land. Obviously all this depends on your attitude and the cultural context.

All of the categories identified above are forms of 'public' property as opposed to what capitalist market societies regard as private property. There is nothing absolute about these five categories, but the characterisation does make the point that there is a far greater range of property-holding arrangements possible than either those of us who oppose privatisation or those who support it have been considering. There is a huge chasm between recognition of *res nullius* and *res divini juris* on the one hand, and the current push to enclose everything, including life itself, within the for-profit domain of intellectual property rights on the other.

Now is the time for legal and institutional creativity, not defensiveness or retrenchment. Now is the time to give new meaning to the 'commons' and 'public domain' in practice. 'Property Rights,' intellectual or otherwise, need to be pushed back and the public domain regained. Just as self-provisioning communities reduce the power of global agribusiness, so rebuilding the commons may drive out the exploiters. It is not a matter of rights, but of the integrity of persons and communities.

⁶ Mark Rose (2003), "Nine Tenths of the Law", *Law and Contemporary Problems*, Vol 66, Nos. 1/2, at www.law.duke.edu/journals/66LCPMarkRose

⁷ Carol Rose (2003), "Romans, Roads and Romantic Creators: Traditions of Public Property in the Information Age", *Law and Contemporary Problems*, Vol 66, Nos. 1/2 at www.law.duke.edu/journals/66LCPCarolRose

⁸ For more on this subject, see Alfred Crosby, *Ecological Imperialism - The Biological Expansion of Europe, 900-1900*, Cambridge, 1986.

After studying economics and theology in the US and the UK, **Brewster Kneen** produced public affairs programs for CBC Radio in Canada, and worked as a consultant to the churches on issues of social and economic justice. In 1971, he and his family moved to Nova Scotia, where they farmed until 1986, starting with a cow-calf operation and moving on to a large commercial sheep farm. It was through his work working with other farmers, raising awareness about how they were being squeezed by the industries controlling food production, and setting up co-operatives to bypass the middle men, that in 1980 Brewster and his wife Cathleen started publishing *The Ram's Horn*, a monthly newsletter of food systems analysis.

The Ram's Horn (www.ramshorn.bc.ca) dissects the dominant food system, reporting on the activities and analysing the strategies of transnational agribusiness and governments. In 1986, Brewster began devoting himself full time to writing and lecturing on the food system, with increasing attention to biotechnology. He is the author of many books including *Invisible Giant: Cargill and its transnational strategies*; *Farmageddon: Food and the culture of biotechnology*; *From Land to Mouth: Understanding the food system*; and *The Rape of Canola*. In his spare time, he plays an active role on GRAIN's board.

