



Protecting the Information Ecology

David Lange describes his colleague, James Boyle as being “a dynamo—someone who throws off ideas like sparks at a 4th of July celebration.”

Many of those “sparks” have been generated in Boyle’s continuing efforts to broaden the political debate about intellectual property policy. In 2003, he received the World Technology Award in Law for his theoretical work on the “intellectual ecology of the public domain.” The award focused on a series of articles over the last 10 years in which he traces out the analogies between the history of the environmental movement and the current tendency to narrow the public domain, a process Boyle calls “The Second Enclosure Movement.”

But, for all his work on protecting the public domain, Boyle sees himself as “one of the last defenders” of intellectual property.

“If you take the very valid function of intellectual property, which is to encourage people to produce new stuff—new books, new songs, new drugs—and you apply ‘legal steroids’ [such as copyright extensions] to it, so that it just bloats and grows and gets bigger and big-

ger without constraint, two things are going to happen. One is, people are going to lose all respect for it. The other is that you’re actually going to end up impeding the very process of creativity that you were trying to encourage,” said Boyle, speaking last fall at *Duke Magazine’s* Faculty Forum.

Boyle finds ways to bring his theories into the realm of practice—the Center for the Study of the Public Domain being only one example. Another is Creative Commons (<http://creativecommons.org>), a digital non-profit organization of whose board Boyle was a founding member.



“We have to ‘invent’ the public domain before we can save it.”

James Boyle

Creative Commons is a non-legislative solution to problems posed by copyright law’s current “default” rules. Until relatively recently, authors who wished to protect their works were required to indicate this by including a copyright notice with them. Today’s default rules make copyright protection automatic, whether or not authors intend for their works to be copyrighted, and without providing a mechanism for authors to express alternative preferences.

“On the Internet, the result is a vast morass of potentially useful content that is in legal limbo—with no indication of copyright status or allowable uses,” Boyle explains. “Obviously you can read or watch what is there, but are you allowed to use it in various ways? Can a teacher adapt a calculus exercise for her own school, or a digital filmmaker include a particular fragment of video? The author might be delighted to have you use the material, but it will take you a laborious search to find that out, and even then, you might be unsure.”

Creative Commons provides online licenses that enable copyright owners to specify their intentions with regard to uses of their works—for example, they can make them available only for non-commercial use, or only with attribution. The organization is only 18 months old, but by current estimates, over 1 million of these licenses are already in use, by everyone from individual “bloggers” and artists to institutions such as the Internet Archive and MIT, which has put all of its course materials online under Creative Commons licenses. While acknowledging that Creative Commons may be a “second-best solution” to legislative changes, which are unlikely, Boyle emphasizes its

instructive value for reform efforts.

“We constructed something that embodies the principles which we think are right, rather than offering a criticism of what is wrong,” Boyle says. “Often the most effective form of advocacy is a community of people who simply build an alternative that works. And in this case we are doing exactly what intellectual property is supposed to be doing, allowing authors to create and to share their works under the terms they choose.

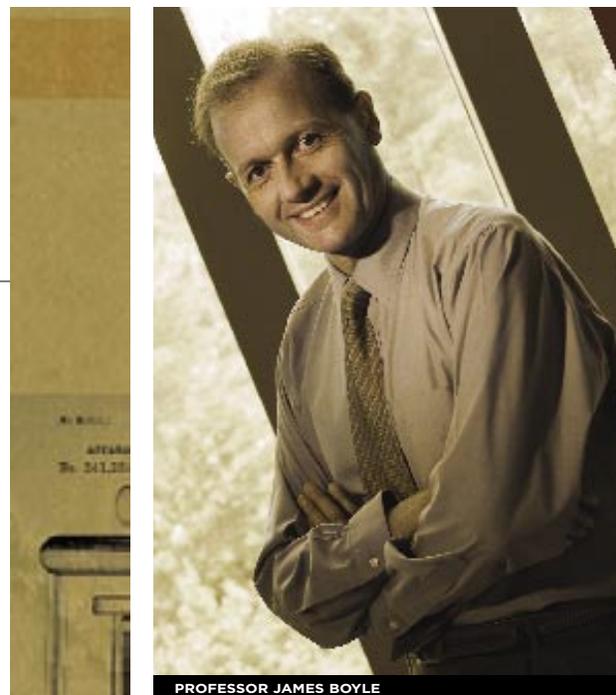
The reaction [including the 2004 “Prix Ars Electronica” and a new \$1 million grant from the Hewlett Foundation] has exceeded even our expectations.”

Creative Commons’ most recent projects range from a music “sampling” license, to an effort Boyle is focusing on particularly, the formation of a new entity called Science Commons, which will try to solve problems of access to scientific data. “That is something that dovetails nicely with the path-breaking work that Jerry Reichman is doing on science, Anthony So is doing on technology trusts and Arti Rai is doing on open source drug discovery. I literally have some

of the world’s leading thinkers on these issues just down the hall. It is an incredible luxury.”

Though it has interesting practical applications, Boyle’s theoretical work itself has

also been attracting interest beyond the ivy tower. A lengthy article in January’s *New York Times Magazine* called “The Tyranny of Copyright?” was devoted to the ideas that he, and a number of other academics, including Larry Lessig of Stanford and Yochai Benkler of Yale, have been propounding about copyright law in



PROFESSOR JAMES BOYLE

the digital era. Why was copyright theory gracing the pages of the *New York Times*? The author, Robert Boynton, labeled these scholars as the leaders of an intellectual reform movement that aims at preserving the Jeffersonian ideal of intellectual property in the age of the Internet, and opposing “the permission society” where each dab of culture is tightly controlled, passively consumed and accompanied by a fee. Boynton’s article concluded this way.

“James Boyle has likened the movement’s efforts to establish a cultural commons to those of the environmental movement in its infancy. Like Rachel Carson in the years before Earth Day, the Copy Left today is trying to raise awareness of the intellectual ‘land’ to which they believe we ought to feel entitled and to propose policies and laws that will preserve it. Just as the idea of environmentalism became viable in the wake of the last century’s advances in industrial production, the growth of this century’s information technologies, Boyle argues, will force the country to address the erosion of the cultural commons. ‘The environmentalists helped us to see the world differently,’ he writes, ‘to see that there was such a thing as “the environment” rather than just my pond, your forest, his canal. We need to do the same thing in the information environment. We have to “invent” the public domain before we can save it.’” ♣

James Boyle is one of four regular columnists for the *Financial Times* online-edition’s “New Economy Policy Forum.” Columnists debate regulatory and legal issues generated by—and also shaping—high-tech industries. The forum is published bi-weekly, on Thursdays, at <http://www.ft.com/techforum>