

IP in Review

An information environmental manifesto

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Information Environmentalism: A Governance Framework for Intellectual Property Rights

Robert Cunningham (Ed.)

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Robert Cunningham has written an ambitious and thought-provoking book. Motivated and informed by James Boyle's proposition—that there is a strong correlation between attempts to protect the physical environment and the need to protect the information environment—Cunningham's is a challenging theoretical work that takes in the likes of Locke, Leopold, Adam Smith, Popper, Cicero, Plato and Thoreau. Cunningham hopes that by 'constructing an *information environmental governance framework*' (p. 1) he will provoke scholarship that will ultimately 'protect and nurture the information commons' (p. 200). In establishing his governance framework, he begins by emphasizing similarities between the physical and information environments. He then considers whether it is useful to apply four environmental analytic frameworks—welfare economics, the commons, ecology and public choice theory—to intellectual property. The four substantive parts of the book are organized around these analytical frameworks.

The starting point for Part I, Welfare Economics, is that, while the benefits of intellectual property are overstated, the costs tend to be overlooked. Focusing on the 'hidden' costs of intellectual property, Cunningham reveals various 'categories of costs' associated with the grant of intellectual property rights. He believes that the hidden costs of intellectual property are underpinned in large part by an 'information paradox' in which the free flow of information is crucial to markets and at the same time information is treated as a commodity that is subject to intellectual property protection. Further, according to Cunningham, the monopoly inherent in the 'propertisation' of information leads to distribution costs where the supply of information is artificially regulated and 'the whims of the wealthy are considered to be much more valuable than the needs of the poor' (p. 61).

Part II of the book sets out the information commons. Most broadly, Cunningham suggests that the commons is a place where 'no single person or organisation has exclusive

control over use or disposition of a particular resource' (p. 72). More fully, he argues that the information commons is an umbrella term that includes a narrow and broad information commons, as well as a narrow and broad public domain (see Table 4.2, p. 76). In addition, it is suggested that the complexity of the information commons is mediated by the notion of an information semi-commons which draws attention to 'the dynamic interaction between private and commons usage of information' (p. 81). As Cunningham acknowledges, though, one of the biggest obstacles to his project is defining and demarcating the information commons. I cannot agree more, though I am of the opinion that the information commons is an elusive concept that defies definition and demarcation, and instead requires a leap of faith. Numerous questions, therefore, remain. For example: assuming that there is an information commons, how does the information commons relate to, and interact with, intellectual property? While patents protect inventions (but not information, data or abstract ideas) and copyright protects works (but not ideas, information or facts), where does the information commons start and end? How does the information commons relate to open access initiatives in which information such as data, software and metadata are made publicly available?

In Part III, Ecology, Cunningham applies ecological principles such as resilience (the ability of a system to 'absorb new entrants and retain its basic function and structure' (p. 109)), diversity (the 'variety of species, people and institutions which operate within a social-ecological system' (p. 109)), and modularity (the 'manner in which the components of a given system are linked to one another' (p. 112)) to argue for an information environment ethic. According to Cunningham, an information environment ethic could be used to influence the development, or winding back, of intellectual property as it relates to information. Indeed, the most important question is whether intellectual property 'preserve[s] the resilience, diversity, and modularity of the information environment' (p. 193). Part III raises some interesting theoretical governance options including Information Commons Rights (ICRs), that would allow the public to speak on behalf of the information commons, and thus provide a counterbalance to intellectual property rights; and Informational National Parks, a metaphorical site that would encourage, support and provide a 'playground' for thinking about information.

Part IV, Public Choice Theory, is largely based on the idea that decision-making is problematic and detrimental when it is concentrated. Put in Cunningham's words: 'the

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opportunity for concentrated interests groups to shape law in their favour becomes increasingly pertinent as economic power becomes more centralised' (p. 151). In relation to intellectual property—and referring to scholars such as Lemley, Drahos and Samuelson—it is suggested that intellectual property rights holders have a disproportionate influence over law-making. This, according to Cunningham, has resulted in the rise of rent-seeking activities by intellectual property rights holders and advocates, which has in turn led to 'social waste' and a tendency towards 'IPR maximalism'. On this point the author quotes Lemley: 'the very process of government granting rights over creations encourages creators to petition Congress to give them still more rights' (p. 154).¹

The conclusions of *Information Environmentalism* are set out in Part V, and as it presents a clear overview of Cunningham's main arguments I suggest starting the book with this part. In this way you will get a summary of, and roadmap to, the complex theoretical thoughts and arguments contained in Parts I to IV. Part V also sets out future research directions, one of which is more practical applications of the framework championed in the book. For example, the author acknowledges that, while Part II of the book argues for a social net product analysis of intellectual property rights, the analysis still needs to be done.

Robert Cunningham's book on information environmentalism addresses an important issue. The author is concerned that intellectual property is accepted uncritically, and that this has detrimental effects on access to information, as well as the distribution and use of information. A book as ambitious as this is not without its limitations however. While Cunning-

ham explicitly acknowledges his politics and intention to produce a theoretical work, nonetheless, the concept of the information commons is problematic. As noted earlier, the information commons is a concept that defies definition and demarcation. In many ways scholars either believe in the idea of the commons, or they do not. As a consequence, the information commons is as much an ideological movement as an analytical framework, and I cannot help but think that the characterization and demarcation of the information commons will remain an ongoing challenge for those seeking to safeguard and cultivate it. This is a significant problem for scholars working in the area because, as Cunningham admits: 'the information commons cannot be protected unless there is some clarity about how it is delineated' (p. 191). Another (related) limitation of the book is the treatment given to the other central concept: intellectual property. Intellectual property is presented as a caricature of itself, where, for example 'IPR maximalists' are pitted against 'IPR minimalists'. In this way intellectual property tends to be dismissed out of hand as monopolistic and unethical. This, in my view, reduces intellectual property to a figurative idea or concept that operates outside of its processes and practices. Given the author's intention, however, these criticisms are perhaps unfair and miss the point. Cunningham's is a theoretical project, not a doctrinal or practical one, and he achieves his aim of 'mak[ing] a meaningful contribution' to protect and nurture the information commons. In *Information Environmentalism*, Cunningham has written a manifesto that provides a framework to rethink and reassess intellectual property as it relates to information.

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1 Mark Lemley, 'Property, Intellectual Property and Free Riding' (2004) 83 *Texas Law Review* 1031.