Osgoode Hall Law Journal

Volume 49, Number 2 (Fall 2011) Article 5

# A Paradigm Shift in Intellectual Property Discourse: Fresh Perspectives on Old Debates: Common as Air: Revolution, Art, and Ownership, by Lewis Hyde, In Praise of Coping, by Marcus Boon

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Review Essay

# A Paradigm Shift in Intellectual Property Discourse: Fresh Perspectives on Old Debates

## COMMON AS AIR: REVOLUTION, ART, AND OWNERSHIP, by Lewis Hyde[1]

## IN PRAISE OF COPYING, by Marcus Boon[2]

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**ON 29 SEPTEMBER 2011,** Canada's Conservative government introduced Bill C-11,[4] a dusted-off copyright reform bill, which had its last incarnation as Bill C-32.[5] Bill C-32 had been the latest instalment of a series of ill-fated copyright reform bills that died on the order paper in Parliament. Bills C-11 and C-32 are different from their predecessors[6] in some significant respects. Perhaps most notably, these bills bear certain hallmarks of citizen engagement in copyright debates. Due to the efforts of activists who organized Internet and Facebook campaigns on copyright reform, the government was pressured to consider the views of ordinary Canadians alongside those of the usual cast of industry lobbyists.[7]

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1. (New York: Farrar, Straus and Giroux, 2010) [Hyde, *Common as Air*].
2. (Cambridge: Harvard University Press, 2010).
3. Canada Research Chair in Information Law and Professor, University of Ottawa, Faculty of Law, Common Law Section. I gratefully acknowledge the helpful comments of Charles Sanders on an earlier draft of this essay.
4. *Copyright Modernization Act*, 1st Sess, 41st Parl, 2011, online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5144516>.
5. Bill C-32, *An Act to Amend the Copyright Act*, 3rd Sess, 40th Parl, 2010, online: <http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&query=7026&Session=23&List=toc> [Bill C-32].
6. Predecessors of Bill C-32 that have also died on the order paper include Bill C-60, *An Act to Amend the Copyright Act*, 1st Sess, 38th Parl, 2004-2005; and Bill C-61, *An Act to Amend the Copyright Act*, 2nd Sess, 39th Parl, 2007-2008.
7. See "Fair Copyright for Canada," online: <http://www.facebook.com/group.php?gid=6315846683>; Michael Geist, "Online Rights Canada Launches National

Predictably, this citizen input has not transformed Bill C-11 into a manifesto to meet the needs and desires of ordinary users of works. The gains for users are modest, but that they exist at all in a political climate that so favours large corporate interests is indeed remarkable.[8] Not surprisingly, those same corporate interests have been vehemently contesting the ground gained for users in the Bill,[9] and it remains to be seen how these exceptions will fare in committee.

Nevertheless, this moment in Canadian copyright history is worth acknowledging, and it is one that nicely frames two recent contributions to the broader literature on intellectual property law. *Common as Air: Revolution, Art, and Ownership*[10] by Lewis Hyde characterizes discourse about intellectual property law as discourse about citizenship and democracy, while *In Praise of Copying*[11] by Marcus Boon explores the social and cultural significance of copying. Both books speak to a reawakening of the link between how we live our lives—how we interact with our culture, with each other, and with our democratic institutions—and what this means, or should mean, for intellectual law and policy.

A great deal of ink has been spilled in the last two decades on the subject of intellectual property law generally and on copyright law in particular. This is not surprising given that they have become such a source of debate since the advent of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (*TRIPS*)[12]

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Consultations on Copyright Modernization," online: <http://www.michaelgeist.ca/content/view/1238/99999/>. In response to the citizen activism, the government launched a far more inclusive consultation process. See Industry Canada, News Release, "Government of Canada Launches National Consultations on Copyright Modernization" (20 July 2009) online: <http://www.ic.gc.ca/eic/site/icl.nsf/eng/04840.html>.

8. Some of these gains included changes to the fair dealing exception. These changes would permit fair dealing for the purposes of education, parody, and satire, as well as the inclusion of exceptions for non-commercial user-generated content, for reproduction for private purposes, and for home recording of broadcast content for time-shifting purposes. See Bill C-32, *supra* note 5, cls 29, 29.21, 29.22, 29.23. Of course, the gains are also counterbalanced by new provisions outlawing tampering with digital locks, even for purposes that would otherwise fall within the "users' rights" provisions of the *Copyright Act*. See *Copyright Act* RSC, 1985, c C-42.

9. See *e.g.* the Joint Statement of ninety members of the copyright industry on Bill C-32: Canadian Cultural Industries' Joint Statement on C-32, "Bill C-32 Weakens Canada's Global Competitiveness: New Exceptions to Copyright Would Undermine Canada's Digital Economy" (1 February 2011), online: <http://ccarts.ca/wp-content/uploads/2011/12/CopyrightStatement_ENG_JAN31.pdf>.

10. *Supra* note 1.

11. *Supra* note 2.

12. Being Annex 1C to the *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), online: <http://treaties.un.org/doc/Publication/UNTS/Volume%201867/v1867.pdf>.

in 1994. In a relatively short span of time, we have seen corporations move to lock up digital content alongside international developments aimed at providing legal protection for anti-circumvention measures used in digital works.[13] Terms of protection have grown longer,[14] exceptions are under challenge,[15] and individual users have become the target of large-scale enforcement activity that previously had only been aimed at organized or corporate malefactors.[16] Legislators devote increasing amounts of time and attention to intellectual property,[17] and it is a recurring topic in international treaty negotiations.[18] It is not surprising, therefore, that

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13. The WIPO Copyright Treaty, for example, requires signatories to make separate provision in copyright law to protect the technical protection measures used to lock up digital content. *WIPO Copyright Treaty*, 20 December 1996, 2186 UNTS 121, (entered into force 6 March 2002), arts 5, 11, online: <http://treaties.un.org/doc/Publication/UNTS/Volume%202186/v2186.pdf>.
14. In both the United States and the European Union the term of copyright protection has expanded from life of the author plus fifty years to life of the author plus seventy years. See EC, *Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related right*, [2006] OJ, L372/27 at 12-18; *Copyright Term Extension Act*, Pub L No 105-298, § 505, 11 Stat 2827 (1998).
15. For example, many have argued that amendments to prohibit interference with technical protection measures will limit the ability of users of works to exercise their fair dealing rights. See Ian R Kerr, Alana Maurushat & Christian S Tacit, "Technical Protection Measures: Tilting at Copyright's Windmill" (2002-2003) 34 Ottawa L Rev 9 at 47-48; Michael Geist, "Anti-circumvention Legislation and Competition Policy: Defining a Canadian Way?" in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 211 at 235 [Geist, *Public Interest*]; Carys Craig, "Locking out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 177 [Geist, *Digital Agenda*].
16. Ryan Bates, "Communication Breakdown: The Recording Industry's Pursuit of the Individual Music User, a Comparison of US and EU Copyright Protections for Internet Music File Sharing" (2005) 25 Nw J Int'l L & Bus 229.
17. In Canada, for example, copyright reform has been repeatedly on the legislative agenda. In addition, we have seen an amendment to the Criminal Code to prohibit the videotaping of movies in cinemas: *Criminal Code*, RSC 1985, c C-46, s 432. In the United States, the *Digital Millennium Copyright Act*, Pub L No 105-304, 112 Stat 2860 (1998), and the *Copyright Term Extension Act*, *supra* note 14, are two high profile examples.
18. For example, the recently negotiated *Anti-Counterfeiting Trade Agreement*, which has yet to be enacted into law, will require significant amendments to enhance the enforcement of intellectual property rights. See *Anti-Counterfeiting Trade Agreement*, open for signature, 1 October 2011, online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/intellect_property.aspx?view=d>. The proposed Canada-European Union Comprehensive and Economic Trade Agreement, which is currently under negotiation, also addresses a number of intellectual property issues: Foreign Affairs and International Trade Canada, "Canada-

lawyers and legal academics have engaged so thoroughly in the often acrimonious debates over the shape that intellectual property laws should take.[19]

There is another phenomenon that is a product of this upsurge in attention to intellectual property law and policy, and it is one that highlights the significance of what is at stake in these debates. In recent years there has been a rise in thinking and writing about intellectual property not by legal academics or lawyers but by authors trained in other disciplines.[20] Such authors observe and reflect upon the impact of intellectual property law and policy upon society and upon culture more broadly. Far from being an arcane and technical area of the law best left to legal specialists, intellectual property law has become a source of debate over what it means to think, to create, and to participate in culture and society. Many of these authors engage with issues of legal reform by highlighting how the current laws or policies negatively impact the production or communication of knowledge or culture within their respective disciplines.[21] Others move beyond specific flaws in legislation or policy and engage with broader underlying questions.[22]

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European Union: Comprehensive Economic and Trade Agreement (CETA) Negotiations," online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu.aspx>.

19. The volume of academic writing on issues of intellectual property law reform is too vast to cite here. In Canada, two edited volumes directed specifically at Canadian copyright law reform offer a good cross-section of articles on all aspects of this process. See Geist, *Public Interest*, *supra* note 15 and Geist, *Digital Agenda*, *supra* note 15. In the United States, a group of legal academics specializing in copyright law filed an amicus curiae brief in support of a challenge to the constitutionality of the *Copyright Term Extension Act*, *supra* note 14. See *Brief for Copyright Law Professors as Amici Curiae Supporting Petitioner, Eldred v Ashcroft*, 537 US 186 (2003). The brief can be found online: <http://cyber.law.harvard.edu/openlaw/eldredvashcroft/cert/copyprof-amicus.html>.
20. There are so many that this is only a sampling of books by those outside the discipline of law: Salah Basalamah, *Le droit de traduire: une politique culturelle pour la mondialisation* (Ottawa: Les Presses de l'Université d'Ottawa, 2009); Susan M Bielstein, *Permissions, a Survival Guide: Blunt Talk About Art as Intellectual Property* (Chicago: University of Chicago Press, 2006); Ben Klemens, *Math You Can't Use: Patents, Copyright, and Software* (Washington: Brookings Institution Press, 2006); Kembrew McLeod, *Freedom of Expression: Overzealous Copyright Bozos and Other Enemies of Creativity* (Toronto: Doubleday, 2005); Marilyn Randall, *Pragmatic Plagiarism: Authorship, Profit, and Power* (Toronto: University of Toronto Press, 2001); Jessica Reyman, *The Rhetoric of Intellectual Property: Copyright Law and the Regulation of Digital Culture* (New York: Routledge, 2010); Siva Vaidhyanathan, *The Anarchist in the Library: How the Clash Between Freedom and Control is Hacking the Real World and Crashing the System* (New York: Basic Books, 2004).
21. See *e.g.* Bielstein, *ibid*; Klemens, *ibid.*
22. See *e.g.* McLeod, *supra* note 20; Reyman, *supra* note 20; Vaidhyanathan, *supra* note 20; Randall, *supra* note 20; Basalamah, *supra* note 20.

It is within this movement that *In Praise of Copying* and *Common as Air* leave their mark. Both books offer original critical perspectives on contemporary intellectual property law and culture. They engage in a crucially important debate—that of the constitutive effect of property law (intellectual or otherwise) on society and the need, in a global community where intellectual property is taking on greater and greater importance, to talk about how this area of law shapes our society and whether it is doing so in a way that achieves the common good. Both of these books underline the point that discourse about intellectual property law is increasingly discourse about culture and society.

This broader engagement with intellectual property issues can itself be traced to the phenomena of globalization and digitization. Globalization has opened the discourse to new voices and compelling fresh perspectives. It has shifted the locus of the development of norms to international fora and has caused a lively resistance to the forces of global capitalism that so dominated the *TRIPS* agreement. Digitization has challenged traditional means of control over the publication and dissemination of works; it has changed how works are created and by whom, and it has gone a great distance towards empowering both those who consume and those who create works in the new media. Globalization has put intellectual property laws at the centre of debates about human health and international equity;[23] globalization and digitization have also facilitated the creation of networks of scholars and activists who challenge established institutions and shape new forms of discourse around the commodification of human knowledge.[24] This is the context in which both *Common as Air* and *In Praise of Copying* offer their insights and prescriptions for change.

Each book is quite different from the other. *Common as Air* engages directly with the foundational principles of intellectual property protection and argues for a rethinking of law and policy in light of these principles. *In Praise of Copying*, written from a Buddhist perspective, challenges our understanding of the concept of copying and places it at the centre of human culture and creativity. Yet the two books have commonalities as well. Both share membership in the grow-

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23. See *e.g.* Carolos M Correa, *Intellectual Property Rights, the WTO, and Developing Countries: The TRIPS Agreement and Policy Options* (London, UK: Zed Books, 2000); Chidi Oguamanam, *International Law and Indigenous Knowledge: Intellectual Property Rights, Plant Biodiversity, and Traditional Medicine* (Toronto: University of Toronto Press, 2006); Amir H Khoury, "The 'Public Health' of the Conventional International Patent Régime & The Ethics of 'Ethicals': Access to Patented Medicines" (2008) 25 Cardozo Arts & Ent LJ 26.
24. See *e.g.* McLeod, *supra* note 20; Vaidhyanathan, *supra* note 20; Susan Scafadi, *Who Owns Culture?: Appropriation and Authenticity in American Law* (New Brunswick: Rutgers University Press, 2005).

ing movement of alternate perspectives on intellectual property law. Both tackle issues at the heart of intellectual property debates and both challenge the reader to rethink, in a very fundamental way, how they conceive of this system of laws that gives monopoly rights over ostensibly original works of human intellect. Both address intellectual property law generally, although both also focus their discussion and examples primarily on copyright law.[25]

Lewis Hyde—an English professor at Kenyon College, a faculty associate at Harvard's Berkman Center for Internet and Society, and author of *Common as Air*—describes himself as "a poet, essayist, translator, and cultural critic with a particular interest in the public life of the imagination."[26] *Common as Air* is not his first book about culture and intellectual property law,[27] although it is the first, perhaps, to focus directly on an exploration of the cultural commons and "how we treat art and ideas once they have entered the public sphere."[28] Hyde identifies three key historical events that have led to a crisis of the cultural commons: the rise of the knowledge economy, the advent of digital copying and the Internet, and a dramatic increase in data speed and internet bandwidth. Hyde believes that we have lost our way. He sees a disjuncture between intellectual property law and the culture of creativity and innovation, the two being wedged apart by corporate capitalism and its excessive commodification of culture.

Hyde's solution is to return us to eighteenth-century America—more specifically, to the idealism and insights of the founding fathers. The founding fathers operated at a moment in US history when it was necessary to choose the norms and principles of citizenship and governance. It was also a time when liberty, both commercial and intellectual, had been hard fought and hard won. Hyde chooses this moment to explore the principles upon which America was founded and to compare the vision of the founding fathers—grounded upon small-r republican values—to a contemporary society of expanding intellectual property rights and increasingly aggressive claims to property in works of the mind. As he

25. Hyde engages a bit more with patents and in small ways with trademarks, while Boon incorporates a more extensive discussion of trademarks and very few references to patent law. This is perhaps symptomatic of broader difficulties that arise in contemporary discourse about intellectual property. While there is now a large box labeled intellectual property into which we can toss copyright, patents, trademarks, industrial design, semiconductor chip protection, plant variety protection, and other emerging rights, it is increasingly difficult to generalize effectively across these regimes and systems.
26. Lewis Hyde, online: <http://www.lewishyde.com>.
27. See *e.g.* Lewis Hyde, *The Gift: Creativity and the Artist in the Modern World*, 25th Anniversary Edition (New York: Vintage Books, 2007); Lewis Hyde, *Trickster Makes This World: Mischief, Myth, and Art* (New York: North Point, 1999).
28. *Supra* note 1 at 18.

explains it, "[T]his book engages in the simple mischief of comparing current claims about cultural ownership to claims made in the eighteenth century."[29] This is an interesting project, though it is obviously not one that is global or comparative in scope.[30]

The title of the book, *Common as Air*, makes reference to the concept of a commons. Hyde is not the first to consider the eighteenth-century enclosure of the commons in Britain as a metaphor for the ever-expanding scope of contemporary intellectual property law.[31] Indeed, for Hyde it is more than a metaphor. He considers the first enclosure to have been the capture of the agricultural commons in England; the second, occurring around us, is the capture of the cultural commons. Yet Hyde is careful with his definition of the commons, emphasizing the inherent normative values of such a concept. For him, the commons is not just a space that is free to all; rather, it is a shared space that has its own social norms, customs, and conventions.[32] In his words, "A true commons is a stinted thing."[33] It is "a social regime for managing a collectively owned resource."[34]

For Hyde, the crux of the matter is values. He argues for a value-based approach to intellectual property law that is sensitive to a much broader and more inclusive set of stakeholders. Thus, it is not enough to characterize intellectual property law as dealing with the rights of creators, with a corresponding emphasis placed on their needs and interests. This would be what he characterizes as the commercial version of the utilitarian theory of copyright law. Under the commercial version it is the market that determines the good to be achieved. By contrast, a very different version of utilitarianism, the civic version, seeks to articulate the social and public objectives of the law and then shapes the law to

29. *Ibid* at 19.
30. Boon is global in his analysis and his discussion. He writes about cultural production in a way that extends beyond any one culture. Boon situates his discussion of cultural attitudes towards copying within this global and globalized context and offers a very original and interesting critical approach. Hyde, by focusing on the US founding fathers in the eighteenth century, is more culturally specific.
31. See *e.g.* James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale University Press, 2008). The international movement to more freely share copyright protected works also makes reference to the concept of the commons in its use of the name Creative Commons. See "A Culture of Sharing," online: <http://creativecommons.org/videos/a-shared-culture>.
32. Hyde offers a critique of Garrett Hardin's famous essay, "The Tragedy of the Commons," arguing that it was premised on a level of freedom that simply never existed with the traditional English commons. See *supra* note 1 at 31, critiquing Garrett Hardin, "The Tragedy of the Commons" (1968) 162 Science 1243.
33. Hyde, *Common as Air*, *ibid* at 35.
34. *Ibid* at 43.

meet those ends. Hyde argues for an approach to intellectual property rights that is properly inclusive and public-minded.

Hyde is critical of the ever-expanding scope of intellectual property rights. He argues that the story of intellectual property protection is one of lost limits, observing that "it seems to be in the nature of all property rights that they expand all the time."[35] He notes how copyright law in the United States has steadily expanded the kinds of works protected and the duration of protection. The elimination of the registration requirement also expanded the number of works subject to copyright law. In the patent context, he considers the eroding boundaries between ideas and inventions, particularly with respect to emerging technologies, as well as the degrading of the utility requirement in the field of biotechnology.[36] He laments that the point of departure for intellectual property law has become the "assumption of exclusive ownership," as opposed to an assumption of a shared commons.[37]

Hyde argues that since the underlying intellectual property in works is intangible and difficult to control, industries have been built around creating and selling the containers for works (for example, books, CDs, or DVDs), particularly in the copyright context. He describes these containers as making the works "sticky"[38] and notes how digitization and the Internet has radically subverted those industries by separating the works from their containers. The industry response has been to use technical protection measures and end-user licence agreements to render digital works "sticky."[39] But in doing so they have gone further than what copyright law envisioned, eliminating fair use or prohibiting what were once common and accepted uses of works such as reading out loud or sharing.

Hyde's critique of these changes both to copyright law and to industry practice is "that we are redesigning this ship as we sail it, and no one can yet say how it should be fitted to serve all the ends we care about, nor what it might look like fifty years from now."[40] His solution is not to challenge or critique particular legislative choices but instead to engage with and explore the underlying values that should guide those choices. Hyde finds these values in the writings of the founding fathers of the United States. He notes that when these men addressed

35. *Ibid* at 56.
36. *Ibid* at 60-61.
37. *Ibid* at 58.
38. *Ibid* at 63.
39. *Ibid* at 67.
40. *Ibid* at 65.

themselves to intellectual property law, "it was always approached with skepticism under the assumption that exclusive control of ideas was at odds with many of the larger purposes toward which the new nation might be dedicated."[41]

Hyde is careful to distinguish between property rights and monopoly rights, and he argues that intellectual property rights fall into the latter category. He describes a monopoly right as a privilege rather than a natural right. The monopoly is permitted to serve a purpose; in the case of intellectual property, it is to encourage ingenuity and creativity. From the founding fathers, he draws on the view that monopolies should never be perpetual; they exist for the period of time necessary to achieve the desired public policy goals. According to Hyde, perpetual monopolies are despotic, anti-democratic, and silencing. They cannot serve the public good. In his view, it is important to keep the monopoly rights typical of intellectual property distinct from other property rights because of the need, in the case of intellectual property, "[t]o speak of privileges and the public good."[42] This in turn forces a public debate on what the good is that is meant to be served and how best to achieve it. Again drawing on the writings of the founding fathers, he argues that the goal of monopoly privileges was to "serve the ends of political and religious liberty."[43] This broad goal encompasses the dissemination of knowledge.

Hyde also argues that the small-r republicanism of the founding fathers valued civic virtue, which was defined as "the willing subordination of self-interest to the public good."[44] In the intellectual property context, this would mean a broad acceptance that intellectual property monopolies must be limited so as to preserve a balancing of private interests with the broader public good. Hyde writes: "In a democracy, therefore, intellectual property is ultimately a republican estate. It is the intangible equivalent of the tangible *res publicae* (roads, bridges, harbours) or of the Republic itself."[45] Hyde offers the example of Benjamin Franklin, who embraced the public good by refusing to patent his inventions and by publishing his ideas widely. While he does not advocate an abdication of intellectual property rights by authors and creators (and indeed, he claims copyright in his own book), Hyde nevertheless champions this idea of civic virtue—that is, championing the virtue of authors who, once rewarded for their contributions to society, dedicate their work to the public domain. Hyde argues that the progress of science requires a liberty to communicate, and therefore there must always be

41. *Ibid* at 77.
42. *Ibid* at 215.
43. *Ibid* at 106.
44. *Ibid.*
45. *Ibid* at 106-07.

limits on monopoly privileges.

For Hyde, the increasing enclosure of the intellectual and creative commons offers serious challenges to democracy and community. He reflects on the difficulties of being a citizen "in a mass culture dominated by corporate 'content providers.'"[46] He notes that the language of mass media and consumer culture is increasingly also propertized—through the vehicle of trademark law—contributing to an undermining of democracy. Between trademark and copyright law he laments an increasingly restricted sphere of discourse. Hyde argues that "our practices in regard to ownership enable or disable particular identities."[47] His passionate engagement is evident when he writes that

> those who have been the agents of the second enclosure seem such bad actors to those of us who would resist it; the higglers, hucksters, engrossers, forestallers, regraters, retailers and speculators who brought us copyright term extension and all its ancillary legal strategies have brought severalty to the public domain.[48]

Hyde draws an analogy between democratic civic engagement and engagement in the creation, consumption, and expression of culture. He writes, "If you want a viable democracy, you cannot sell your vote. If you want a lively cultural commons, you can't allow corporate media to enclose the public domain."[49] The structures of ownership limit and suppress creativity and engagement while acting to the detriment of the common good.

Hyde adds his voice to the many others that have argued that innovation and monopolies are not inseparably intertwined. Indeed, he notes that creativity itself depends upon the ability to borrow (and in this he would find common ground with the work of Marcus Boon). By way of example, he points to a variety of artists and scientists who, in their own work, borrowed either from the common stock of knowledge or culture or from others. For example, he notes how Bob Dylan drew heavily from folk music for his own work and suggests that his ability to do so—and his resultant success—owed much to the fact that he was creating his music prior to the onset of the second enclosure (the enclosure of the intellectual commons).[50] Hyde argues that the commodification of the legacy of Martin Luther King Jr., with his son using copyright and trademark law to exploit his works and image, "convert[s] a public voice into a chattel."[51] Indeed,

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46. *Ibid* at 108.
47. *Ibid* at 186.
48. *Ibid* at 176.
49. *Ibid* at 168.
50. *Ibid* at 45.
51. *Ibid* at 213.

Hyde uses this example as one that "re-enact[s] in miniature the history by which the founders' civic republicanism slowly mutated into its current commercial form."[52] Hyde argues that "our practices around cultural property allow us to be certain kinds of selves; with them we enable or disable ways of being human."[53]

Hyde laments that "the public domain has turned out to be highly vulnerable to private capture."[54] His solution is not so much an undoing of copyright as a rethinking of its goals and aspirations. He rejects the pairing of "copy-left" as the opposite of "copy-right," arguing that when used in this sense, copy-left implies that both concepts occupy a place along a political spectrum.[55] In his view, the more appropriate juxtaposition is between copyright and "copy-duty."[56] This flows from his argument that the monopoly right serves a broader public purpose and that those who are granted limited monopolies are committed to recognize and serve the public duties that underlie them. Just as the commons was a shared space governed by norms that operated for the common good, Hyde would reconstitute copyright as a means of managing the commons in the public interest rather than as a means of appropriating it for the sake of private interests.

Hyde's choice of the founding fathers as the departure point for his inquiry into the principles of copyright is particularly apposite when he links a vibrant public discourse to the goals of a vigorous democracy. He criticizes what he sees as an increasingly deceptive corporate and political discourse in which truth is hidden rather than disclosed to the public. Hyde writes, "In a democracy that honors listening, leaders do not so much decide policy as enable conversation, helping the public remain audible and visible to itself. A leader's obligations are to transparency and to keeping the noise low enough so that no speaker gets drowned out."[57] Where private ownership is favoured over public discourse, the goals of democracy are subverted. Hyde observes that "[i]f democratic practice (not to mention creativity) depends on plural speech and plural listening, then we should rightly be reluctant to give any modern form of Negative Voice a presence in the public sphere."[58]

Hyde's linking of contemporary politics and democracy to debates over intellectual property rights is particularly important, as these debates take place

52. *Ibid.*
53. *Ibid.*
54. *Ibid* at 216.
55. *Ibid* at 220.
56. *Ibid.*
57. *Ibid* at 231.
58. *Ibid* at 235.

within a broader information context. He offers several pages of examples of ways in which copyright law can be used to limit or suppress unpopular speech—or at least speech that is unpopular to copyright holders.[59] At issue, and increasingly intertwined with intellectual property laws, are questions about who is entitled to speak, what they can say, and who can participate in the formulation of speech and ideas. By situating his discussion of intellectual property norms in the context of the American Revolution, Hyde also reminds his readers of Thomas Jefferson's view that revolution is sometimes necessary to regain freedom in the face of oppression and repression. He notes that the founding fathers "were always concerned with questions of power and subordination."[60]

While Hyde's book approaches the subject of intellectual property law from the perspective of one who is outside the discipline of law, it is still a book about intellectual property law—or, at the very least, about intellectual property theory. Although he does not advocate for specific legislative reforms, it is clear that Hyde seeks solutions to contemporary challenges through a rethinking of the fundamental objectives and the philosophical underpinnings of the intellectual property system.

Marcus Boon's goal in his book *In Praise of Copying* is markedly different. While he does engage with the system of intellectual property law, his work takes us outside of the specific legislative framework to participate in a broader discourse about culture and creation. Indeed, Boon regards this view from outside as essential to contemplating the bigger issues; he is gently critical of Lawrence Lessig and James Boyle, both iconic critics of the copyright system, for failing to see outside of the legal paradigm.[61]

Boon, a professor of English at York University, is also a Buddhist, and his book is explicitly influenced by the tenets of this faith. Boon's objective is to explore the concept of copying, an activity at the heart of the exclusive rights of intellectual property holders. Indeed, intellectual property law is largely about the right to make copies—or to claim the legitimacy or authenticity of authorized copies or works, marks, or inventions. Boon draws on history, philosophy, arts, and culture in a wide-ranging exploration of what it means to copy and what role copying plays in culture, identity, and human society. Boon explores cultural

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59. *Ibid* at 235-39.
60. *Ibid* at 234.
61. Boon argues that both Lessig and Boyle offer critiques that "accept the capitalist system as it currently stands, and propose modifications of IP law that basically support the expansion of that system and its need to exploit creative labor, entrepreneurship of ideas, and so on." *Supra* note 2 at 239.

creation writ large, from visual arts to written work, music, drama, film, folk art, and artisanship. In this essay on copying, intellectual property law and the rights it confers recur as a theme, but it is by no means the core of the work, nor is it the lens through which the subject is approached. Intellectual property law is a reflection of certain attitudes towards copying that have been concretized as norms. Boon's interest in copying transcends these particular norms, even while it teases out the attitudes, fears, and desires that have shaped them.

Boon's first chapter launches the reader into the dilemma of copies and copying. Its centrepiece is an account of the struggles of the producers of luxury goods to protect and enforce their intellectual property rights. He moves us seamlessly between the Counterfeit Alley in New York and the Chinese sweatshops in which both authentic and counterfeit wares are manufactured. In the case of Louis Vuitton, he explores how the family owned business morphed into a multinational conglomerate by shifting to a model of mass-produced "unique" items.[62] He notes how the company allied itself with an appropriation artist, a pairing which led to an exhibit that challenged the distinction between original and copy. Boon goes on to use the burgeoning trade in high quality replicas of luxury goods as a platform for exploring the distinction between the original and the copy. Not only are replicas often indistinguishable from the originals, but they are sometimes more desirable. He writes, "When original and copy are produced together in the same factory, at different moments; when a copy is actually self-consciously preferred to the original, we must ask again: What do we mean when we say 'copy'?"[63]

Although it has become almost trite to say that creativity requires copying, Boon nevertheless offers an engaging and interesting account of cultural and subcultural innovation that is premised upon copying. Pursuing the concept of copy throughout history, Boon posits that "the concept of the original or authentic text, as something separate from the copies made from this original ... only emerged in the eighteenth century with the evolution of Romantic aesthetics."[64] He takes us from this to Beat and Pop artists who maintained "that the copy was more original than the original, precisely because it made explicit its own dependence on other things, signs, or matters."[65] Onwards to the mix tape and the mix CD, Boon again explores the self that is present in the act of creating these derivative works. Like Hyde, he also explores the role of copying in folk, blues, and rap music, as well as in other subcultures. Boon cautions that

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62. *Ibid* at 38-39.
63. *Ibid* at 18.
64. *Ibid* at 48-49.
65. *Ibid* at 49.

contemporary intellectual property regimes are hostile to this form of copying as abundance, and he asks, "[I]s it not the case that any attempt today to 'constellate' a people ... will find itself blocked by intellectual property regimes that refuse such nascent collectives the right to present and articulate themselves outside existing property regimes?"[66]

Boon explores copying in a wide variety of contexts, from human reproduction to art and to the expression of self and identity. He considers copying as a kind of transformation. Through repetition, differences emerge, and through these differences, things and selves are transformed. He also traces, through human history, resistance to transformations through rituals and taboos that sought to limit activities that might otherwise transform communities or cultures. He speculates that these taboos may be rooted in fear of change and a desire for greater permanence. Boon raises the question of whether we have fashioned, in contemporary times, a taboo around copying. Noting that taboo is a strong word, he nevertheless finds that it

> illuminates the irrational aspect of those prohibitions on copying today, and the strange violence that accompanies the enforcement of intellectual-property law: the raids on American working-class and immigrant neighbourhoods where counterfeits are sold, the involvement of mafias and gangsters, the sporadic global "war on copying" undertaken by the United States and other governments, with their discourses of moral hygiene (the protection of "economic health").[67]

Indeed, Boon observes that the proponents of strong intellectual property laws have linked copying to terrorism and organized crime, underlining the power of the taboo. In an era of widely diffused and accessible technologies for reproduction, the taboo "protects and naturalizes capitalist production modes, in particular the myth of the naturalness of the commodity and of private property."[68]

For Boon, the right to copy is a political issue; it is about the freedom of people to express, shape, and articulate identities—a process he describes as mimesis.[69] Indeed, he traces the reach of intellectual property laws into the human genome itself and writes about the creeping control over and propertization of reproduction (nature's copying) through intellectual property law. Ultimately, intellectual property laws "manipulate our fears of the remarkable plasticity of mimesis; they set standards for what is called 'original' and what a 'copy', what is 'real' and what is 'fake', who belongs and who is an imposter, what is fixed and

66. *Ibid* at 75-76.
67. *Ibid* at 97.
68. *Ibid* at 102.
69. *Ibid* at 105.

what is allowed to change, what is called 'natural' or 'unnatural'."[70]

Boon's remarkable and engaging exploration of copying includes an account of copying as deception. While copying (in particular counterfeiting) is considered wrong, at least in part because of the deception practiced on the public, Boon challenges us to think about who the audience is for certain works and where the deception lies. He notes that "[t]he argument that copying is wrong because it is deceptive rests on the belief that it is always possible to name and describe things correctly, to say what an original is, and for things to present themselves correctly via their outward appearance."[71] Yet, he maintains that it is possible to argue that all production is deceptive in some form or another. Further, he notes that in those cases where forgeries become virtually indistinguishable from the originals the distinction between copy and original erodes. In the case of digital copying, the distinctions between copy and original may lie in packaging and presentation and not in the contents themselves.[72] Boon states that "[t]he pathos of deception, and the supposed need to protect the public from its harmful effects, are used to enable corporations and wealthy individuals to legally enforce their right to extract maximum profits from a given situation."[73]

A real pleasure in Boon's work is the manner in which he explores, from a wide variety of angles, those concepts that are at the heart of discourse around intellectual property law. His examination of deception is but one example: It moves from bootlegged Harry Potter books in Asia, to the use of camouflage in nature and in war, to forged art, concepts of authenticity, and the representation of deception and illusion in philosophy, art, and film. His explorations of notions of authenticity, forgery, deception, and camouflage in their broader social and cultural contexts are engaging and thought provoking; he grounds these explorations in concrete examples that return us to the dilemmas of intellectual property. For example, he uses Turnitin.com, the online tool for detecting plagiarized student papers, as a vehicle to discuss copying as deception and to explore both the moral significance and the distinctions between authentic works and copies.[74] Boon observes that a lazy copy is on a par with a lazy original work in terms of its contribution to any broader social good. Yet, he argues "good deception, and the copy that it fabricates, can possess profound insight, not only into situational requirements, such as what the teacher is looking for, but also into the object

70. *Ibid.*
71. *Ibid* at 111.
72. This is a reference back to Hyde's "sticky" works. *Supra* note 1 at 63, 66-67.
73. *Supra* note 2 at 115.
74. *Ibid* at 137-38.

being copied."[75] This will be heresy to some, but it is an interesting perspective on, to borrow a term from Canadian copyright law, the "exercise of skill and judgement"[76] that is the hallmark of originality in copyright law.

Boon also addresses montage as a form of expression. Certainly, he is not the first to problematize contemporary forms of creation that cut and paste from other works to produce works that sit uneasily on the border between original and copy.[77] Yet his approach is different, in large part because he is not making an argument about how the law should treat montage; rather, he is simply exploring how we understand and process concepts of authenticity and copying. His argument here is that there is often something profoundly creative in the act of copying and that there may be a strong subversive element as well. He situates montage—in a sense that goes beyond specific works and speaks more to a way of making connections between things—as a form of intellectual freedom deserving of nurture rather than suppression.

Boon also gives special attention to the mass production of copies. He notes that "[c]opying is an act of repetition, and contains in it the possibility of repeating that repetition unto infinity."[78] A trace of this sense of the infinite is found on shelf after shelf of mass-produced items. Yet Boon looks beyond the mass production of commodities. He considers the replication of towns in which one can find the same features and stores; of businesses that adopt similar business models; of nations themselves; and of the social rituals that dictate how we dress and act in various contexts. He writes, "Mass production reminds us of that teeming biological mass that we come from and live in; and it contains an echo of that greater similarity which we are part of, and the limits to our own separateness and individuality."[79] In this reorientation towards mass production Boon notes that the individuality of items is lost; that copies come closer to the ideal of the object; and that "[c]apitalist commodities present themselves as 'perfect copies,' meaning

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75. *Ibid* at 141.
76. *CCH Canadian Ltd v Law Society of Upper Canada*, [2004] 1 SCR 339 at para 16. The Supreme Court of Canada determined that the standard of originality for copyright law in Canada required that a work not be copied and that it be the result of an exercise of skill and judgement.
77. A very few examples include: Lisa Veasman, "'Piggy Backing' on the Web 2.0 Internet: Copyright Liability and Web 2.0 Mashups" (2007-2008) 30 Hastings Comm & Ent LJ 311; Graham Reynolds, "A Stroke of Genius or Copyright Infringement?: Mashups and Copyright in Canada," (2009) 6 Scripted 641, online: <http://www.law.ed.ac.uk/ahrc/SCRIPT-ed/vol6-3/reynolds.pdf>; Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven: Yale University Press, 2006) ch 3.
78. *Supra* note 2 at 177.
79. *Ibid* at 183.

the embodiment of the ideal form in an object protected from history and the world."[80] Branding—and by extension trademark law—plays a role here as well: Boon argues that the brand reinforces the belief in the essence of the object and allows "identities to emerge out of a mass of copies."[81]

Boon also explores the idea of copying as appropriation. He notes that all copying "is an appropriation because it takes the outward appearance of one thing and brings it forth in another."[82] Beyond this, copying "involves positing a relationship between two objects, the name of one being given to another, the form of one being produced or recognized in the other."[83] In contrast to these forms of appropriation Boon presents the concept of depropriation, which abandons claims of ownership and, with this, notions of copying.[84] Yet Boon does not argue for a complete abandonment of notions of ownership and intellectual property. He argues that "[r]espect, care for the particularities of transmission and dissemination is important; and in this sense, some version of copyright law is 'appropriate.'"[85] By the same token, movements to expand the public domain are also appropriate. Boon would appear to seek a more organic balance between appropriation and depropriation, recognizing in each something that is essential to culture and the articulation of identities.

For Boon, a free culture is not to be found within the strictures of our capitalist system, nor is it necessarily enabled by our intellectual property laws. He is critical of the ideology of the intellectual property system, which he claims relies upon "a discourse of meeting needs, providing solutions, allowing access, getting jobs done, and of course compensating all interested parties fairly."[86] He cautions against the limits of this discourse when contemplating the role of mimesis in our cultures and societies. Intellectual property laws would contain and control copying and would limit it to particular circumstances and contexts. Yet, as Boon argues throughout his work, copying or mimesis is a fundamental part of who and what we are and of how we define and constitute ourselves. He argues that there is much to learn from Buddhism and from Indigenous cultures, which "articulate a vision of a universe and collectivity that actively engages and works with mimesis while abandoning all notions of property at their illusory roots."[87]

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80. *Ibid* at 185.
81. *Ibid* at 188.
82. *Ibid* at 221.
83. *Ibid* at 225.
84. *Ibid* at 223.
85. *Ibid* at 235.
86. *Ibid* at 241.
87. *Ibid* at 244.

In this respect, Boon, in contrast to Hyde, looks outside Western culture and values for alternative accounts and perspectives.

Both Hyde and Boon offer thought-provoking explorations of intellectual property from outside the legal paradigm. Neither book is really about what particular provisions of intellectual property law should be, nor how existing laws should be interpreted. Rather, the books are about what the law should seek to achieve as an instrument of cultural policy (or perhaps, what the law should simply leave alone). Both works are informed by their authors' formation as literary and cultural scholars and by their deep personal engagement in culture and creativity.

Notwithstanding the contributions of each author to a rich and textured discussion of culture and intellectual property, I feel compelled to note that each of these books offers an account in which women seem marginalized, both as thinkers and as creators. Perhaps because Hyde chooses to mine the attitudes and approaches of the founding fathers as a means of reworking contemporary approaches to the intellectual commons, he finds few female voices to draw upon in his work. Yet this erasure of women—somewhat explicit in the eighteenth century, more implicit in contemporary times—is nevertheless wearing. We hear of Benjamin Franklin, Thomas Jefferson, Arthur Rimbaud, William Blake, René Descartes, James Madison, Tom Paine, and many others. In his examples of artists and creators in more modern times we find Bob Dylan, John Cage, TS Eliot, the Grateful Dead, Pete Seeger, and Woody Guthrie. It is not as if female thinkers, writers, and artists are entirely absent from the book—references are peppered here and there. It is just that they occupy relatively little space or significance within the work as a whole. One would be forgiven for thinking that the human enterprises of writing, thinking, inventing, and creating were almost entirely the province of men. Perhaps it is worth questioning whether this small-r republicanism of the founding fathers—which was built on civic virtue enabled by the fruits of slavery and the unpaid labour of women and which protected and cherished the voices of some while ignoring or suppressing others—has other lessons for contemporary intellectual property discourse.

Boon is more expressly inclusive than Hyde. There are many more female artists, authors, and philosophers within his account. Yet the overall impression is once again of a universe of cultural creation that is dominated by men. It is not just a numerical imbalance; the contributions of men are discussed in greater detail. Thus, we hear of Bob Dylan, Marc Jacobs, Marcel Duchamps, John Cage, Bert Jansch, Woody Allen, Gunther Von Hagens, William Burroughs, Glenn Gould, Orson Welles—the list continues. The only female creator who receives as much ink as any of these men is JK Rowling, but the discussion around her

works is not about how they explore or subvert concepts of copying or authenticity, but rather how they are copied and transformed by others. While Boon does reference female artists, writers, and composers far more often than Hyde, they are less visible than the men in his account. This may simply be a reflection of the hard reality of women's marginalized role in culture and society, and indeed, Boon himself raises this question. In discussing human reproduction as copying, Boon notes that copying appears to be a stereotypically masculine activity, and he asks whether it is "a specifically male attempt to imitate, appropriate, fix and control the knowledge of becoming and transformation that is a part of women's experience of their bodies, through the menstrual cycle, pregnancy, giving birth and nurturing a child."[88] Essentialism aside, it is nonetheless worth exploring the relationship of women to the norms embedded in the mass of intellectual property prescriptions that we have fashioned. In their own ways, *Common as Air* and *In Praise of Copying* beg the question of whether women are truly participants in the formulation of the norms that give shape to intellectual property laws, the discourse about them, or any process of shaping or remaking culture.

Both *Common as Air* and *In Praise of Copying* tell us that the law reflects a series of cultural and contingent choices that may not be good or right. Both tell us that intellectual property law is about more than just the rules of use and ownership of a type of property—it is about how we constitute societies, how we share ideas and wealth, how we create, and how we define ourselves. Both texts implicitly make the argument that the discourse about intellectual property law is no longer the terrain of lawyers; it is fundamentally about culture, democracy, and society.

This change in who is participating in intellectual property discourse is important. It marks a shift in attention to intellectual property issues and a broadening of public and intellectual engagement with fundamental questions about the ownership of the fruits of culture and innovation. While Hyde sees the choices we make in copyright law and policy to be about how we constitute society—and ultimately democracy—Boon's approach is less policy oriented. By challenging or questioning the very idea of the copy, and of concepts such as authenticity, he challenges us to rethink our relationships to things, to the objects we create or alter, and to culture more broadly.

Both authors invite a broad audience to engage with fundamentally important questions that are central to contemporary culture and society. This is a message that was sent to legislators in Canada's latest round of copyright reform, and it is a message that stirred the ire and resistance of established cultural industries.

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88. *Ibid* at 84-85.

It is also a message that was heard in the context of the Doha Development Round of negotiations under the auspices of the World Trade Organization and that is increasingly rippling through international fora. The last two decades of expanding intellectual property protection and increasingly strident enforcement has brought new voices and new perspectives into a debate about laws that now reach so far as to be seen by many as a threat to the culture and innovation they ostensibly seek to foster. Both Hyde and Boon add their voices to this increasingly diverse chorus for change, and both make distinct and worthy contributions.