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The Digital Public Domain

From a Spatial Metaphor to Citizen's Cyber-right

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This essay explores the term "public domain," consciously suggested in discourses of liberal U.S. legal scholars, to be a problematic feature of copyright law. By critically reviewing popular spatial metaphors of the public domain as a sanctuary against the copyright regime, this article argues that the public domain should be regarded as part of the public rights of citizens, and restoration of the citizens' rights could be accomplished by pushing the liberal discussion of the public domain into the more counter-property ideal of a Marxist tradition. As alternative models of copyright and for underpinning the public domain, emergent forms of public licensing demonstrate how a new democratic deal between creators and the public can be rebuilt, without any governmental intervention or proprietary desire. These public licensing models go beyond the "formal" perspective that the tension between property and the public domain must be resolved within the scope of the legal codes and with the support of government as a mediator. Changing the direction from the critical analysis of copyright to alternative models of copyright will encourage a general attitude change in copyright research and promote experiments to build the public domain as a part of public rights in actual reality.

Keywords: public domain, copyright, public license, intellectual property(IP), authorship

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1. Introduction

> This book may be freely reproduced by any tendency in the revolutionary left movement. Copyright prevents it being poached by capitalists. Where material is reprinted, we would appreciate if you could say where it's taken from. — From the copyright page of Negri's (1988) book.

> *Free Culture* is available for free under a Creative Commons license. You may redistribute, copy, or otherwise reuse/remix this book provided that you do so for non-commercial purposes and credit Professor Lessig (2004). — From a book note posted in the Web.

In the above copyright notes of two books, we can perceive two strong traditions of information of both radicals[1] and social liberals.[2] As shown in an anti-copyright statement notified in Negri's book, radicals have voiced a long-standing antagonism to and disbelief of the contemporary capitalist system that has extended the scope of privatization from physical properties to intellectual properties. Liberals have also increasingly expressed strong antipathies to the rigid intellectual property system for commercializing the common cultural heritage of human beings, even though they do not aim to directly challenge the essential mechanism of capitalist reproduction or the system itself. Further, liberals have taken a leading social role in seek-

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1) The present study gives a title of "radicals" to a loosely defined group of Marxist scholars and practitioners, leftists, and critical intellectuals, who usually stick to a primary explanation of social change in terms of economic factors, essentially derived from the works of Karl Marx.

2) In this study, "liberals" are used to describe a kind of peoples favoring maximum individual liberty in political and social reform. As being slightly different from classical liberals, most of the "social" liberals usually credit a legitimate role of government in addressing economic and social welfare issues.

ing to ground the reform of copyright within the current copyright regime by facilitating a more relaxed application of the legal protection of authorship, thus allowing citizens more freedom to use intellectual resources.

This paper intends to explore how to restore citizens' rights to use intellectual knowledge freely without the rigid constraints of the copyright system. To extend the pubic rights of the citizen, this study mainly focuses on the term "public domain," consciously suggested in discourses of liberal U.S. legal scholars. The research question is to observe how we could cultivate the public domain as part of the public rights of citizens. Theoretically, this study aims at articulating the liberal views of the public domain with a radical tradition that has questioned the entire private property system of capitalism and thus creating an alternative communitarian vision of ownership. The purpose of articulating these two political camps — the liberal and the radical — is both to push the liberal discussion of the public domain into the more counter-property ideal and to break up the static state of critical theories through the use of a copyright agenda that will evoke wider echoes productive of critical theories. By examining this research question through rereading the renowned texts written by liberal U.S. legal scholars, the current study enables to reveal the complex mechanisms of copyright power and thus to construct alternatives to the dominant regime of property rights.

The present study considers the public domain to be a problematic feature of copyright law. In considering the theme of the public domain, I wish to explore two possible options. One is to raise the issue of citizens' loss of a common heritage caused by the current extensive copyright regime. The other option is to explore ways of rebuilding the public domain both as a resource of public goods and as an essential part of the public rights for the citizenry by critically reviewing popular metaphors of the public domain as a sanctuary or space. Further, I argue that a pervasive ideology such as the romantic

conception of authorship that deprives citizens of their public rights should be refuted, and on the basis of Marxist conceptions to private property, a crisis of civil rights that should guarantee free access to intellectual property will be discussed. In the final section, this study concludes that at the strategic level the construction of the public domain should be shaped by the communitarian ownership vision of intellectual heritage in a more radical direction, while at the tactical level it would lead to cultivating social authorship such as the public licensing model which is not entirely subject to the power of copyright owners.

2. Under Attack by "Thick" Copyright

A critical media law scholar, Bettig (1996) views intellectual property as serving as an instrumental basis for expanding market power in the digital economy. Global capitalism has begun to make profits mainly by "immaterial labor" — intellectual labor leading to the production of cultural goods and the commodification of intellectual creativity that must be protected by powerful intellectual property laws in order to realize market prices (Hardt & Negri, 2004, p. 109). What is significant is not so much the expropriation of value as "the *capture of value* that is produced by cooperative labor and that becomes increasingly common through its circulation in social networks" throughout the world (p. 113, emphasis added). Examples of "the capture of value" that is produced by intellectual labor are the Hollywood production system of films, Microsoft's software production, and the patenting of genetic information. The capture of value from human intellectual sources denotes a two-fold negative tendency of the "industrialization of culture" (Garnham, [1986] 2006) and the "culturification of industry" (Lash & Lury, 2007, p. 9).[3] As a result, the industrial age based on the hardware of production has been

transformed into the new age of "soft(ware)" and cultural production (Kroker & Kroker, 1996, pp. 75~88). The expropriation and privatization of the common cultural assets of humankind have become the ultimate goal of "cognitive" or "informationalized" capitalism, a mode of capitalism that depends primarily on the commercialization of information/culture and its protection by intellectual property mechanisms (Dyer-Witheford, 2005; Schiller, 2007).

Intellectual property rights such as copyright, trademark, and patent have served as suppressive instruments in the generating of economic wealth used in the cycle of capital accumulation to engender more wealth for the privileged. Although the intangible products of the human mind are not "real" assets, intellectual property (IP) owners regard them as being the same as physical property and re-appropriate the common heritage of humankind by branding and copyrighting them. The concept of scarcity, which justifies the market value of commodities, is absolutely irrelevant to the information sphere. The arbitrary restriction of the supply of information has become the central function of intellectual property laws. Thus the IP system is "designed to create artificial scarcities where none exist naturally" (Arrow, 1996, p. 125). This is the main reason why monopolies and oligopolies need the legal system, which encloses the intellectual commons from which future creators would otherwise be able to draw freely.[4)]

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3) As regards the capture of value, the "industrialization of culture" can be easily exemplified from the capitalist appropriation of sub-cultures such as grunge (the Seattle sound), punk, and hip-hop. Meanwhile, the "culturification of industry" depicts a typical condition of market in the hyper-capitalist phase in which the products are used to affect superstructure and even to create subculture. For instance, Apple's electronic products have been even creating a new cultural phenomenon named "i-culture," which has been spread exponentially and spontaneously by the Apple customers loyal to the i-products. Those two tendencies have made the capitalist scope universal so as to privatize the intellectual commons.

Moreover, copyright lobbyist groups such as the Recording Industry Association of America and the Motion Picture Association of America began to combine their tactics by suing both peer-to-peer file-sharing service operators and individual copyright infringers. At the international level, supranational economic institutions led by the U.S. and other advanced countries represent the global economic order of intellectual property regimes, in order to pressure developing countries to increase the legal levels of IP protection: these supranational institutions consist of such global regulatory entities as the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), the Berne Convention for the Protection of Literary and Artistic Works, and the World Intellectual Property Organization (WIPO).[5)]

Despite legislation in the U.S. Congress and the international IP treaties, the IP regime is imperfect without the insertion of technical codes within digital outputs or electronic products, which is being done with government backing (Lessig, 1999, p. x). Related to copyrighting culture, Lawrence Lessig, a professor of law at Harvard Law School and a founding board member of Creative Commons, notes

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4) For instance, the U.S. "Sonny Bono Copyright Term Extension Act" (also pejoratively known as the "Mickey Mouse Protection Act") of 1998 extended authors' copyright to the span of their lifetime plus 70 years. Directly influenced by the U.S. precedent, Korea will apply extended terms of protection (e.g., from the author's lifetime plus 50 years to her lifetime plus 70 years) for copyrighted works as a result of the Korea-U.S. Free Trade Agreement (KORUS FTA) negotiations in 2007.

5) In South Korea law and policy on intellectual property (IP) has been mostly subordinated to international agreements and the interests of domestic IP holders. Since the mid-1990s the Korean government has affiliated with international intellectual property institutions and has been rapidly incorporated into a worldwide IP system that aims to privatize intellectual resources of the knowledge society. South Korea became a party to the WTO Agreement on TRIPs in 1995, the Berne Convention in 1996, and the WIPO Copyright Treaty in 2004.

that "insidious" copyright inscribed into the code of digital technology could severely restrict the rights of amateur users. It is similar to Jaszi's (1998) notion of "paracopyright," which describes the technique of normalizing the locks that would encase much digital content. The IP regime legitimates its power as neutral not only by means of the legal apparatus but also by means of the technical architecture or code.

For example, digital watermarks, click-wrap contracts, trusted systems, and other developed digital security codes reinforce control in the hands of copyright holders, which are increasingly large media companies (Shapiro, 1999, pp. 80～81). "Digital Rights Management" (DRM) is one concrete example of proprietary codification.[6] The anti-circumvention provisions of the U.S. Digital Millennium Copyright Act have been potentially criminalizing such academic or non-commercial code-breaking activities as encryption research, reverse engineering, and security testing. In sum, these legal and technical regulations to protect the new property rights signify the fact that "copyright today is less about incentives or compensation than it is about control" (Littman, 2006, p. 80) of all kinds of information and cultural assets.

The privatization of the public commons has produced a general chilling effect on citizens' rights such as criticism, comment, news reporting, teaching, scholarship, and research, due to online users' liability for copyright infringement. Safety valves against the extensive power of copyright, including the "fair use doctrine,"[7] limited copy-

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6) CDs can be engineered by DRM so that it is difficult or impossible to rip tracks and upload them to the Internet. An array of technical protections are being developed, such as country or region coding, limited access, device control, and the number of allowable uses.

7) Similar to the "fair use doctrine" under the U.S. law, Korean Copyright Act defines it as the "limitations to the author's property rights." These provisions allow exceptional use of copyrighted material without requiring permission from the rights holders.

right term length, and "compulsory license,"[8] are under attack by the content industries through "thick" copyright protection. To borrow Lessig's (2004) phrases, the "unregulated" and "no rights reserved" cultural zone has been gradually changed into an "all rights reserved" copyright regime that has deprived citizens of "a freedom taken for granted before" (pp. 276~277). Lessig (2001, pp. 23~25) warns that all three layers (the code layer, the physical layer, and the content layer) of the Internet — an example of the electronic commons for innovation — are now moving toward the "permission culture" controlled by written copyright language.

The legal codes allow perpetual copyrights through repeated extensions of the "limited times" constraint and through the extension of copyright scope. Although the public grants authors exclusive rights in return for the immediate dissemination of the work to public audiences, copyright now upsets the balance between incentives for invention and public access in a destructive way. Lessig (2004, p. 147) describes it as "the disappearance of unregulated uses." In a tension between "remix culture" and "permission culture,"[9] he highlights the failure to balance copyright power and the needs of the public.[10]

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8) A compulsory license is usually defended as a government intervention to correct a market failure. As an exception to copyright, the government forces IP owners to grant users the use of copyrighted works so as to prevent the owners' abuses which might result from the exercise of the exclusive rights.

9) Lessig's (2008) term "remix culture," opposite to permission culture, describes free culture in a society that enables to encourage amateur users to use, change, modify, or otherwise remix the work of copyright holders. Remix itself means transformative or derivative work. He also contrasts the term "Read & Write (RW) culture" referring to remix culture, with "Read only (RO) culture" to permission culture.

10) Similarly, some popular liberal scholars enjoyed to use the similar metaphors to Lessig's comparison of "RO" and "RW": Goldstein (2003) describes a clash between copyright optimism and copyright pessimism. He observes that, metaphorically, "the view that copyright's cup is half full" rather than "the view

Samuelson (2003) also warns that various legislative initiatives to reinforce private property rights may cause "negative synergistic effects" that undermine the cultural rights of citizens. While each legislature that legitimates intellectual properties is a serious threat of the public rights of citizens, she stresses that the potential synergies among them could create even more serious threats to the public.

The increasing threat of private corporations to the cultural rights has been most strongly supported by an appeal that the property rights to individually or communally created intellectual products should revert to the private subjects who made it. Littman (1990) implies that treating intellectual products as if they were real property, even though they are intangible, is a malicious trick to alienate natural rights of the public to the intellectual assets of humankind that have been universally accumulated. To challenge the utilitarian tendency in intellectual property that reinforces cultural inequalities and breaks the social baseline, the next chapter traces the concept of "public domain" at the abstract and general level, particularly in relation to property.

3. From Public Domain as Space to Public Domain as Citizen's Right

Historically, during most of the nineteenth Century, two terms of

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that it is half empty" prevails. He warns that desire to fill up a half-full cup of copyright may limit future access to entertainment and information: "the celestial jukebox" will charge according to the value of the copyrighted work transmitted, at the cost of giving online users access to a vast range of contents (pp. 21~22). Vaidhyanathan (2001) also adds that copyright protection has become too "thick," which prevents the fair use of copyrighted material and threatens public domain, compared to "thin" copyright, which encourages new cultural expression and enriches free culture.

"public property" and "common property" were interchangeably used for designating inventions, works, and ideas not protected by patent or copyright, but from the time of the 1909 Copyright Act in the U.S. the phrase "public domain" displaced the earlier concepts of property (Ochoa, 2002). The public domain has become internationally used since 1886 when the Berne Convention adopted the term *domaine publique* from the French (Littman, 1990).

Public domain itself is an essentially contested concept, and categorical slippage is frequent in the literature between "common," "commons," "common-wealth" and "public domain" (Hardin, 1968; Lessig 2001, 2004, 2008; Benkler, 2003, 2006; Bollier, 2002; Boyle 2003; Ochoa, 2002; Rose, 1986; Berry, 2008). This topology is intended to raise the public value of a common space or sanctuary being free from property rights. The salient characteristic of public domain or the commons, as opposed to property, is that no single person has exclusive control over the use and disposition of any particular resource in this domain. The term public domain has been used as "an alternative form of institutional space, where human agents can act free of the particular constraints required for markets, and where they have some degree of confidence that the resources they need for their plans will be available to them" (Benkler, 2006, p. 144).

According to Benkler (2006), the commons can be divided by four types, which are based on two parameters, accessibility and reg-

〈Table 1〉 Four Types of the Commons

Open Access commons (e.g., the oceans, the air, highway systems)	*Limited-access commons* (e.g., collective ownership such as irrigation system and pastureland)
Unregulated commons (air intake such as breathing feeding a turbine)	*Regulated commons* (air outtake such as industrial exhalation, the sidewalks, streets, roads)

Source: adopted from Benkler (2006, pp. 61～62)

ulation (see Table 1). The first parameter is whether commons is open to the public or limitedly open to a specific group tied up with collective ownership. The second parameter is whether commons is free from any social constraints or not free from the institutional regulation. For instance, air is such a common and free resource, with respect to air intake (breathing). However, air is a regulated commons with regard to outtake. For individuals, breathing out is mildly regulated by social convention and rule. In fact, these specific categories of the commons allow us to understand the degree and scope of freedom to interact with resources and projects without seeking anyone's permission that marks commons-based production generally.

Differently from liberal legal scholars such as Benkler, Berry (2008) takes a slightly different approach to commons: he designs to develop a topology which can cast light on the concept of the commons through the lens of the Roman law classifications of things (*res*). As shown in Table 2, Berry (p. 81) investigates the genealogy of property forms, which had been once defined in Roman law and by doing so takes effect on revealing the various textures of common-based ownership, which has been gradually disappeared by modern private property system. For instance, in his citations of property forms in Roman law (see Table 2), we can consider as "commons"-based ownership the following three property forms: a lawyer-free zone (*res nullis*), the commons (*res communes*), publicly owned property (*res publicae*), and things belonging to a group or society (*res universitatis*). In Roman law, *res privatae*, which mean privately owned objects, is at best one of the various property forms at that time. Except this and *res imperium*, which are objects subject to ownership but outside of national jurisdiction, most of property forms were run either within the commons or in-between the boundary of public domain and private sphere.

According to Hardt and Negri (2009, pp. 50~51), in the course of the great Bourgeois revolutions of the seventeenth and eighteenth

〈Table 2〉 The genealogy of property forms

Node	Translation	Description
res nullis	Things belonging to no-one	Unowned/unclaimed objects not defined as any other category
res privatae	Private things	Privately owned objects such as privately owned cars, houses, and clothes
res publicae	Public things	Publicly owned objects such as army barracks, roads or state buildings
res universitatis	Things belonging to a group	Things owned in a group such as a local council, guild or society
res communes	Common things	Things held in common, such as common land, the sky or the sea
res imperium	Things owned in the international arena	Objects subject to ownership but outside of national jurisdiction, such as satellites or deep-sea probes

Source: taken from Berry (2008, p. 96)

centuries, the concept of *res communes* is wiped out from the political and legal vocabulary, and by means of this erasure the conception of *res publicae*, as well as *res privatae*, comes to be narrowly defined as an instrument to affirm and safeguard property. Since then, property has been gradually shrunk as the keyword that only defines capitalist ownership. In other words, Berry's citations of property forms originated from ancient Roman law demonstrates that our modern legal system captured by (bourgeois) property rights is the result of contingent moments in capitalist history rather than the outcome of rational, planned or natural trends. In sum, both of Benkler's divisions of the commons and Berry's categories of property forms enable us to rethink the way in which individuals and groups cultivate common resources under different types of constraints than those imposed by (bourgeois) property law. Our present conception of property rights is and should be open to contestation and change, and this also illus-

trates that we need to restore the rich ground of the commons and public domain anew as part of the citizens' rights from the dominant property system.

In another direction of sketching public domain, it is also significant to observe how this concept has been historically developed at the rhetorical level. This job is closely related to reappropriate the public value of public domain actively as an option in order to improve the users' public rights to use the legally protected works freely without any legal threat. In its original sense, the public domain referred to lands held by the Crown or, in the U.S., by the federal government, for leasing or granting to the public, who had very limited rights.[11] The linguistic metamorphosis of the term from "public property" to "public domain" signals a discursive shift from a legal agenda focused on property ownership to a spatial metaphor for reserved common territories. Hardin's well-known article, "The Tragedy of the Commons" (1968), which argued that "ego-centered impulses" ruin a common as a natural resource, had a central role in reinforcing the spatial metaphor, while warning about the overuse of physical commons by human beings.

Based on the spatial metaphor, we can observe the public domain being defined as a finite category or an intellectual sanctuary subject to a dominant proprietary logic: Wikipedia, a free online encyclopaedia and an example of a public domain, defines the public domain as an intellectual property designation for the range of content that is not owned or controlled by anyone. These materials are "public property," and available for anyone to use freely (the "right to

11) Korean copyright law does not mention the concept of public domain. Instead, it is quite interesting to observe the introduction of the Anglophone concept of public domain into Korean cultural and media industries. From mid-2000 onwards, the term has been misconstrued by those industries, less as a sanctuary to be protected against the extensive copyright regime than as a new intellectual resources pool to make profits.

copy") for any purpose (Wikipedia, 2010). Wikipedia's definition also promotes construing the public domain as a safe zone suggesting it is an isolated island located outside of, or as the opposite of, intellectual property. Similarly, Lessig (2004) names it "a lawyer-free zone" where no one can exercise the core of property rights (p. 24). This spatial metaphor of the pubic domain leads to the misconception of it as a "peripheral outland" which is the "shadowy obverse of intellectual property" (Bollier, 2002).

A new metaphor is needed here: the public domain should be reconceptualized from an egalitarian position as an indispensable public right. The metaphor of land and/or space implied in the term *domaine* or *demensne* has two weak points: first, as the historical origin of the terms shows, it suggests that the "public domain" is land owned by an aristocratic regime which that regime bestows *noblesse oblige* as a kind of charity on the common people. The implications inherent in this metaphor could induce us to exaggerate the regulative role of the government in the copyright culture. Second, the space metaphor territorializes the scope and boundaries of the public domain in one sanctuary or periphery. The defensive attitude of space metaphor is likely to emphasize its fragile status vis-à-vis the aggressive copyright regime, and thus results in bolstering the expanding desire of private corporations. Hence Lange (2003) revises his earlier view of the public domain as place and redefines it as conferring a political "status akin to citizenship."

Redefining the public domain as an essential human right or citizen's right takes a further step out of the passive defense of the commons into the field of political struggle. Regarding the public domain as a natural right of the public means that it is not only a cultural heritage that allows anyone to use and build upon the common resources of science, education, communications and culture without permission, but also a realm of a civil society that represents the public's interests and discourages the granting of monopolies on information

rights. Reconceptualization of the public domain as reflecting political rights turns the main discussion once again toward questions of capitalist ownership: individual authorship versus collective control, and the radical polarization of exclusion versus inclusion, since the logic of exclusion is facilitated by a handful of conglomerates' both increasing the commercialization of intellectual information and privatizing human knowledge that was originally in the public domain. In other words, Positioning the commons within the citizen's right could invoke change in attitude to the present conception of property rights and help us consider it as the public rights to be achieved by contestation.

Arguing for a slightly different position from the public domain as the citizens' rights, Boyle's (2003) idea of "ecology" moves the discussion into a political sphere. Although he retains the spatial metaphor of the public domain by citing the "enclosure movement" of property owners fencing off the common land, Boyle suggests something analogous to the "environmental movement" in order to develop the commons of the mind. Boyle recognizes that it is not sufficient merely to offer criticisms of the logic of enclosure and privatization, pointing out that we must shift to understanding that the public domain must be invented, constructed, and rebuilt: "like the environment, the public domain must be *invented* before it is saved" (p. 52). His metaphor of the public domain as an endangered area in need of an environmental movement reconfigures its scale and scope, suggesting that we can obtain universal benefits from the domain only if it is cultivated by our own endeavors and refined by political struggle, rather than leaving it to be protected by the market mechanisms of capitalism. Further, analogous to environmental movement decrying morally unjust activities through which the "pollution" industries have been dominated by the ideology of economic growth, the environment metaphor of Boyle can be used as a political agenda to restore the citizen's right that has been shrunk by the profit-driven priva-

tization of intellectual resources. Boyle understands exactly the tactical benefit of a "moral" overturn - that the ideas of environment and ecology will affect the languages of property, such as market "incentive," "progress," and "growth." Human beings have used such terms to justify the deconstruction of our eco-systems. Also, this ecological understanding encourages us to hope the public domain will be solved by "collective action," as seen in the global activism of environmental NGOs like Greenpeace against ruthless multinational mega-corporations (e.g., p. 73).

The metaphor of the public domain as part of a civil rights movement to build "a living ecology" gives us a positive motive to create practical strategies of how to gain public rights for the citizen. Further, the rhetorical turn leads towards understanding the public domain as part of citizenship and its extension to being part of the equal public rights of social individuals who can freely speak about, use, adopt, modify, and create new works from human "common-pool resources" (Hess & Ostrom, 2003).

4. For Communitarian or Social Ownership of Intellectual Resources

Parts of new works always "echo" the prior works of others. In other words, intellectual works come from humankind's common-pool of resources. Each author, even the most creative, takes and adapts her raw material from humankind's intellectual commons, which are social surplus values for the public. However, private corporations that represent individual creators appropriate the social surplus and insulate intangible value in the name of property to gain private profits from it. If we accept a concept of "authorship as a combination of absorption, astigmatism, and amnesia" of preexisting elements (Littman, 1990), the concept of pure originality is nonsense, be-

〈Table 3〉 Three layers of total information

Type of information	Type 1	Type 2	Type 3
Description	'core' information/invention	directly related information	indirectly related information
Appropriability	Mostly appropriable	Partially appropriable	Not appropriable
Legal products	Copyrighted works	Derivative works	Public domain
Examples	1 vs 100(by Endemol) (TV program)	1 vs 100(by KBS) (TV format market)	Quiz TV genre
	D-War(2007)	Related folklore stories, books, comics	Information about Korean mythical creatures, monsters, legends, and so on
	Drunken Tiger's hip-hop	Works using same words, samplings	Commentary on social ills, music beats

Source: adopted from Wagner's tables (2006, pp. 335~338).

cause it is an intellectual mixture created by the inter-permeable effect of shared intellectual assets.

Let us take a concrete look at a case of describing the "seepage effects" between someone's creation and intellectual resources: Wagner's (2006) "theory of incomplete capture" is suitable to illustrate the viewpoint that any given rights-holder cannot completely, or perhaps even substantially, appropriate (or control) the informational value of her creation (p. 342). In other words, there are the limits inherent in propertizing of information, because an intellectual property owner cannot possibly appropriate all of the information (and thus social value) generated by her creation. By dividing total information into the three layers (See Table 3), Wagner shows that Type 1, an expressive product of the author, represents only a portion, potentially a very small portion, of the total information that has been generated. In fact, Type 3 as a pool of intellectual resources from humankind — public domain — is an essential portion for enabling us

a variety of creative activities, as well as Type 2, equivalent to derivative works.

Through Wagner's (2006) anatomy of information confirms us the fact that an author-focused regime has made the contributions of intellectual sources, that is, Type 2 and 3, invisible or valued at zero. The romantic authorship vision has served as a kind of fence to exclude the public's discussion of the public domain. The copyright law consigns to oblivion the fact that virtually every author is also a user of prior works: it is the prevailing ideological presumption that creators make something out of nothing, *ex nihilo* (Boyle, 1996, p. 128). Furthermore, this robust logic of "author talk" ultimately omits the hidden process that an author sells all rights to the work to private corporations, as "alienability of the commodity aspects of his work, while requiring inalienability of the moral claims" (Benkler, 2003, pp. 193~194). While the author vision is used to alienate the commons from the public, the semi-permanent hindrance of citizens' access to intellectual property by legal protection expresses the crisis of the public domain in which the public only possess alienated and estranged rights, since they have lost free opportunities to access. If unjust realities produce alienation from the human intellectual heritage and even deteriorate the possible improvement of current citizens' rights, the next step is to design new critical alternatives to the rigid property ownership in order to restore our human rights.

A commercialization and privatization that diminishes access for all produces a contradiction like that found in the bourgeois epoch's system of unjust exploitation and private appropriation. To Marx, the privatization of intellectual products and ultimately the crisis of public domain would mean the capitalist appropriation of social and cultural capital by monopolizing public resources originally placed within the commons. To overcome this unjust reality, Marx's ideal is the establishment of a new society on the basis of "communal relationship," a society in which the individual obtains freedom in and through his or

her associations. In this community the individual has the means of cultivating his or her gifts in all directions (p. 197). Instead of his strong belief on the communal society, Marx (1980) had an antipathy to the authority of the government, saying that the (bourgeois) state "exists only for the sake of private property," and that such governments are thus illusory forms to be annihilated. To Marx, it was simply impossible that governmental institutions could be rational mediators acting in the public interest. Historically, government has instead been in charge of entirely endorsing both physical and intellectual property rights for the dominant or privileged class. As Marx observes, the state is a legitimating entity to prop up the monopolistic logic of market power by legitimating the property rights of capitalists at the price of the less advantaged. Since the privatization of intellectual resources is a collaboration of proprietary desire and governmental support, the public role of the government in building the public domain for citizens is suspect. Echoing Marx's pessimistic view, Boyle, as a critical legal realist, has a pessimistic view of the role of the state in rebuilding the public domain. To Boyle, "the state does not regulate, subsidize, or franchise, [but] instead defines and protects property rights" (Boyle, 2003, p. 51). In Boyle's perspective, the nation has spoken for the economic interests of the allied property right owners.

From his early optimistic view of the nation as a mediator of the public interest, Lessig (2004), a legal liberal, has gradually changed to the pessimistic view. Since Congress seems less and less able to adjust copyright laws to technological changes, Lessig expects little from the government in restoring the public's interests. He instead emphasizes the actual commons that could be created by collective and autonomous user groups. Rather than governmental intervention as a policy solution to copyright, he suggests how to establish socially constructed autonomous user groups such as the "Creative Commons" and encourage a healthy *laissez-faire* market itself. The

pessimism of liberals like Lessig on the role of the government comes from two directions. One disappointment springs from the government's policy, the other from the suppressive aspect of the copyright technology itself, which Lessig called a "technical code." He recognized at last that the U.S. government no longer held a neutral position mediating between public rights and private rights but rather behaves as a protector of private rights. Lessig also saw that "enabling technology to enforce the control of copyright means that the control of copyright is no longer defined by balanced policy" (2004, p. 147).

When even liberals have surrendered their last hope of changing the intellectual property system by governmental means, alternative structures should be launched to create a collective and communal ownership model to enhance emergent cultural patterns of information use among users, such as peer-to-peer file sharing, collaborative works of open source software, and the Internet piracy culture. The communitarian model of ownership should be managed by the cultural domain of users, not by either government or private subjects. Rose (1986) calls the reciprocal model of property, which springs from the bottom, as "inherently public property." Facing the new cultural production on the Internet, her concept implies that the anarchic but consistent practices of Internet users toward non-commercial uses of intellectual resources should be buttressed by social discussion on alternative property structures. Thus Rose claims that the "inherently public property" can enhance "sociability" of the public by means of "recreation of speech." On the basis of "custom" or "informal, unofficial practices" by Internet users in the public domain, Rose proposes a common property model of "property rights in groups," which resembles *res commune* or *res universitatis* out of the above-mentioned forms of property in Roman law. This suggests that the social ownership model could both supplement the established legal system of intellectual property and thus counteract the rigid property system of private agents.

As one way to avert commercial threats to the digital public domain, Samuelson (2003) stresses the public right to "refuse to accept laws that impede socially desirable uses." If we regard social ownership as the means to access the public right, it realizes the right of the public, systematically guaranteeing a communal process of knowledge production and uses. Otherwise, exclusive control of intellectual property by a handful of private agents seriously threatens the normative right of the public to have access to intellectual resources: such access should be arranged for the greater good of society, and inequalities and hindrances are tolerable or agreeable only if private logic works to the greatest benefit of the less advantaged members of society (e.g., Rawls, 1999). Emphasizing another aspect of counter-copyright, Atton's (2004) term "social authorship" as an antithesis to the romantic concept authorship stresses the communal basis of the production of human knowledge. Based on this concept, I argue that the common authorship of human cultural heritage should be established as a component of the public rights of the citizen, and that the citizens' rights are equal to those of institutional officers and private agents for creative products.

5. Reforming Visions of the Public Domain and Beyond

In this conclusive section of the paper, I will explore how to construct an egalitarian model of citizens' rights that reflects newly constructed cultural activities of information production, free from the attacks of both market and government. In general, the current copyright term should be shortened, the public domain must be expanded, and copyright should have to be renewed in a way that grants the user more freedom. Most liberal legal scholars, as well as radicals, in the case of the U.S., are somewhat pessimistic about whether safety valves such as the fair use doctrine or compulsory li-

censing can ultimately protect the public domain from copyright, even though, for public policy reasons, the law denies the owner any exclusive right over such fair use. Many legal scholars have observed the "fuzziness" of fair use between the public domain and copyright. Like the ideological effect of the romantic authorship that Boyle (1996) describes, the fair use doctrine is used not merely as a safety valve of freedom for the citizenry, but also as "a legitimating veil and an incisive theory of justice" (p. 189) expressed in copyright. On this point, a prominent liberal like Lessig (2004, p. 283) sees little benefit for the public domain in preserving traditional fair use or in talking about a public domain or in getting legislators to help build a public domain. To obtain access to intellectual resources, rather than formal legal status under copyright law, he suggests we need to go beyond the freedom promised by fair use.

One of the most successful of several well-known experiments for underpinning the public domain is the "Creative Commons" (CC), a non-profit foundation that grants public licenses, which Lessig played a leading role in establishing. The strength of the public license is that it grants the additional public right to use works released under it in ways otherwise prohibited by law. Although establishing a new deal between creators and the public will not be easy at first, this experiment will ultimately grant more freedom for both creators and users to become the real actors in knowledge production and distribution, and will eventually extend the public domain. To Lessig (2004), when everything becomes presumptively regulated, then the protection of fair use is not enough. He notes that, to restore the importance of the pubic domain, we should not talk just about the public domain itself but work to *construct* the public domain; that is, we need to build a collaborative "movement of customers and producers of content [···] who help build the public domain and, by their work, demonstrate the importance of the public domain to other creativity" (pp. 283~284).

Many other significant forms of public licensing have been developed, such as the Electronic Frontier Foundation's "Open Audio License," which is an archetype of the music-sharing license, and the "General Public License" (GPL), which ensures that source code of software is open and free of charge. A GPL written by Richard Stallman, founder of the Free Software Foundation, is designed to guarantee the freedom to share "copylefted" software. The public software model allows everyone the right to use, modify, and redistribute the program on the condition that the licensee also grants similar rights over the modifications he has made. A GPL is closest to the model of information as part of the public goods. It is also based on the public domain approach — the non-proprietary principle that the source code of program cannot be owned. A GPL requires that modified versions of the original software also be made available to other users on the basis of the unlimited openness of source code and thus encourages authors to voluntarily give up their private rights on the copyright of software.

IPleft, an organization for designing alternative public models to the rigid IP system in South Korea, distributes a public license model adequate for a locally-grounded copyright culture. The Korean license model called "Information Sharing License" (ISL)[12] was greatly

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12) It was October 2004 when IPLeft published the first official version of the alternative copyright license model called the Information Sharing License (ISL). The ISL is an attempt to create tactically advantageous tools to cultivate public values adequate for a locally grounded copyright culture that could invade entirely privatized realms, but it had not been greatly popularized among online users until early February 2005. Since then the Ministry of Culture and Tourism (old name of the Ministry of Culture, Sports and Tourism) announced that it would accept the ISL on its Web site, if IPLeft would refine the ISL in collaboration with the Commission for Copyright Deliberation and Conciliation. Such collaboration was previously unimaginable because policy issues related to copyright have been determined by the government alone, but IPLeft and the Copyright Commission worked on this project from April to August 2005, and

influenced by the U.S. idea of freedom on the Internet but reflects the cultural needs of local Internet users. Rather than solely residing in a framework of a formal or defensive principle to protect fair use, these experiments of public licensing are searching for tactically advantageous and even threatening tools to cultivate fertile public values that can invade entirely privatized realms. An alternative model of human knowledge, one which goes beyond the bourgeois zero-sum game governing the current intellectual property market, will encourage citizens to build the public commons in actual freedom. Following the environmental perspective of Boyle (2003), we should promote the extension of the ecosystem (the equal public rights of the citizen) rather than just "oppose the stuff (copyrighted work) that affects me badly" (pp. 67~69).

As alternatives to the current rigid copyright system, the CC, ISL, and GPL go beyond the "formal" perspective that the tension between property and the public domain must be resolved within the scope of the legal codes and with the support of government as a mediator. Changing the direction from the critical analysis of copyright to alternative models of copyright will encourage a general attitude change in copyright research and promote experiments to build the public domain or the commons as a part of public rights in actual reality.

Even though alternative experiments to copyrighting culture such as the above-mentioned public license models have been suggested by various U.S. liberal scholars and civil rights groups, they have serious limitations if we aim to evolve them into alternative models under the banner of communitarian values. For instance, in terms of *praxis*, Lessig's CC is quite successful in that the goal of a relaxed application of copyright has gradually gained a persuasive power among Internet users and creators. Nevertheless, while the CC's activ-

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IPLeft released the 'ISL 2.0' in September that year. See Lee's (2009) detailed description of how the ISL was born and has been evolved in Korea.

ities are in accordance with its attempts to create a well-run commons in which the creativity is exercised collectively, the CC public license (CCL) model is very vulnerable: most obviously, the CCL allows a creator to choose whether to grant others the right to freely create derivative works based on his or her original, or whether to forbid this. Such a "No Derivative Works" option[13] clearly discourages creativity, and it is essential that the rights of derivative creators be unrestricted. Before the appearance of the CCL, the weak fair use doctrine — and the first sale doctrine — was the sole safeguard against copyright owners' expansive derivative rights. With derivative creations regarded as acts of copyright infringement, the limited CCL option serves to restrict citizens' access to intellectual property.

The option to limit derivative rights in the CCL, as well as other undesirable features that limit citizen's rights, springs from the politically liberal point of view of the CCL model. From the start, Lessig's perspective on building the public domain has been to look for a "free culture" that can "complement" copyright, not replace it. His interest is to pursue the middle ground between "all rights reserved" copyright and "no rights reserved" public domain. Lessig's free culture movement of the Creative Commons, which refers to "some rights reserved," rather than the "all" or "no" extremes, has helped develop alternative licenses "within"the copyright regime (2004, pp. 283~284). Although the CCL has played an important role in constructing new ways of thinking about a flexible copyright system, it also shows a relatively closed vision of a practical alternative to copyright for the citizen, a vision springing from a politically liberal position that is vulner-

13) In the 1976 Copyright Act, the U.S. Congress gave copyright owners not only the exclusive right to reproduce their own work in copies, but also the right to "prepare derivative works based upon the copyrighted work" (17 U.S.C. 106(2), 1994, pp. 16~18) and broadly defined a legal boundary between original and derivative works.

able to the rigid copyright system.

For this reason, at the opening of the "Creative Commons Korea (CC-Korea)," a subsidiary office of the U.S. branch of the CC,[14] there was some conflict with a locally defined license model, the ISL of IPLeft. While CC-Korea was mainly constructed by Korean legal scholars in early 2005 and has adapted the U.S. CCL without a great deal of consideration of the local Internet culture,[15] IPLeft's ISL is a spontaneous product refined over a longer period by a NGO group fighting incessantly against the intellectual property system in a local scene. In October of 2004, when IPLeft published the first official version of the ISL, it was pursuing a more radical vision of communitarian ownership than that of the CCL. The option to restrict derivative works never existed in the local license of ISL in order to enable more freedom for citizens' to create derivative works.[16] In March of 2005, IPLeft issued an official statement that it would collaborate with CC-Korea to map out a combined version of a public license, if CC-Korea desired to work together with IPLeft. Unfortunately, these two groups were reluctant to share their activities commonly, and instead have focused to promote their public licenses separately to the citizens, by staying in their programs.

In summary, the conflict between IPLeft and CC-Korea sends us an important message that any attempt to enhance public rights

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14) The Creative Commons Korea Association (CC-Korea) was founded in January of 2009. CC Korea started its activities as the official CC project team in Korea. Available from URL: http://creativecommons.org/international/kr/

15) It was so ironic that, at the earlier phase for opening CC-Korea for the first time in Seoul, among Korean legal scholars, there was no one who understood essential ideas and principles of the public license suggested by the U.S. CC headquarter.

16) The ISL's removal of the license option such as "No Derivative Works" to encourage the third party's creativity tends to share the free/open philosophy of the GPL developed by the Free Software Foundation.

should be grounded on the commonly accepted base of a local copyright culture. Such conflicts must be solved first before uniting and enhancing counter-copyright movements in a global era. The solution of such conflicts may point towards a fruitful interaction between radicals and social liberals that can develop a more solid program to enrich free culture against the rigid application of the IP system.

A chasm between their political views never led to a wide gap in promotion of each public license. In fact, both of the licenses have occupied only a very small portion of the entire IP market, even though the CCL has become more popular than the ISL's use, which is lagging behind, due to the CCL's popular circulations among online users which have been mostly promoted by an educated elite class. Nevertheless, the essential limitation in the public licenses is that, regardless of a fair degree of the CCL's popularity, both licenses could have no influence on changing the legal conditions of the already copyright-protected works. This hindsight pushes us to envisage our copyrighted future in a more radical direction to guarantee that cultural benefits are directly returned to the public by shrinking the scope of authorship.

Firstly, as one idealistic goal beyond the reforming visions mainly represented by the CCL model, we need to recognize the positive abilities of radicals to create a more solid basis for the citizen's public rights. For instance, as Berry (2008) formerly suggested — describing a bundle of property form and of the commons related to natural resources — we need to develop useful legal and political tools that enable us to refine categories of capitalist ownership of intellectual property.

Secondly, it is obvious that, in a tactical sense, the reforming visions such as the promotion and dissemination of the public licenses to the citizens can help rethink true alternatives to the rigid system of copyright regime. We need to amplify the public licenses' actual benefits to the citizens'rights, by organizing the cooperative works of rad-

icals and social liberals. For instance, by integrating well-established experiences under the Marxist tradition on the communitarian model of ownership, liberal activists could obtain more radical ideas for creating an alternative model, while radicals could learn from social liberals the practical tools to surmount their political isolation from the citizen's popular attention and could extend their popularity for the purpose of establishing a more reasonable but progressive model of public rights. In such a fruitful interaction lies the way forward in the quest to secure the citizen's pubic rights in the public domain from the oppressive capitalist system of intellectual property.

Finally, as a descriptive inquiry into the contemporary conditions of the public domain, this study has limitations that need to be addressed by future research. Among others, this study can be extended by framing "cultural rights" as part of the citizen's public rights. Future research, thus, could extend its scope to perform an analytical research to investigate the prerequisites for and the principles of cultural rights. What I would like to say at this moment is that "cultural rights" should be firmly grounded on encouraging amateur users' creativity, promoting cultural diversity, and distributing cultural products at a fair level of enforcement of copyright laws. Further research can fill in the missing spot of the cultural right so as to use that as an intellectual catalyst for revitalizing the public domain as a resource of public goods for the citizenry, in the midst of weak-kneed national IP policies and rigid international IP regimes catering to cultural or creative industries.

References

Arrow, K. (1996). The economics of information: An exposition. *Empirica*, *23*(2), 119~128.

Atton, C. (2004). *An alternative internet: Radical media, politics and creativity*. Edinburgh: Edinburgh University Press.

Benkler, Y. (2003). Through the looking glass: Alice and the constitutional foundations of the public domain. *Law and Contemporary Problems, 66*(1&2): 173～224.

Benkler, Y. (2006). *The wealth of networks: How social production transforms markets and freedom.* New Haven, CT: Yale University Press.

Berry, D. M. (2008). *Copy, rip, burn: The politics of copyleft and open source*. London: Pluto Press.

Bettig, R. V. (1996). *Copyrighting culture: The political economy of intellectual property*. Boulder, CO: Westview Press.

Bollier, D. (2002). *Why the public domain matters: The endangered wellspring of creativity, commerce and democracy*. New American Foundation and Public Knowledge.

Boyle, J. (1996). *Shamans, software, and spleens: Law and the construction of the information society*. Cambridge, MA: Harvard University Press.

Boyle, J. (2003). The Second Enclosure Movement and the construction of the public domain. *Law and Contemporary Problems, 66*(1&2), 33～74.

Boyle, J. (2008). *The public domain: Closing the commons of the mind*. New Haven & London: Yale University Press.

Cohen, G. A. (1997). Where the action is: On the site of distributive justice. *Philosophy and Public Affairs, 26*(1), 3～30.

Dyer-Witheford, N. (2005). Cognitive capitalism and the contested campus. In G. Cox & J. Krysa (Eds.), *Engineering culture: On the "author as (digital) producer"* (pp. 71～94). New York: Autonomedia.

Garnham, N. ([1986] 2006). Contribution to a political economy of mass-communication. In G. Durham & D. Kellner (Eds.), *Media and cultural studies, keyworks* (pp. 201～229). (Revised ed.) Malden, MA: Blackwell.

Goldstein, P. (2003). *Copyright's highway: From Gutenberg to the celestial jukebox*. Stanford, CA: Stanford University Press.

Hardin, G. (1968). The tragedy of the commons. *Science*, 162(3859): 1243 ~ 1248.

Hardt, M. & Negri, A. (2004). *Multitude: War and democracy in the age of Empire.* New York, NY: The Penguin Press.

Hardt, M., & Negri, A. (2009). *Commonwealth*, Cambridge, MA: The Belknap Press of Harvard University Press.

Hess, C., & Ostrom, E. (2003). Ideas, artifacts, and facilities: Information as a common-pool resources. *Law and Contemporary Problems, 66*(1&2), 111 ~ 146.

Kroker, A., & Kroker, M. (1996). *Hacking the future.* Montreal: New World Perspectives.

Lange, D. (2003). Reimagining the public domain. *Law and Contemporary Problems, 66*(1&2), 463 ~ 483.

Lash, S., & Lury, C., (2007). *Global cultural industry*. Cambridge: Polity Press.

Lee, K.-S. (2009). The electronic fabric of resistance: A constructive network of online users and activists challenging a rigid copyright regime in Korea. In Kidd, D., Rodriguez, C. & Stein, L. (Ed.), *Making our media (Volume II): National and global movements for democratic communication* (pp. 189 ~ 206). Cresskill, NJ: Hampton Press.

Lessig, L. (1999). *Code: And other laws of cyberspace*. New York: Basic Books.

Lessig, L. (2001). *The future of ideas: The fate of the commons in a connected world*. New York, NY: Random House.

Lessig, L. (2004). *Free culture: How big media uses technology and the law to lock down culture and control creativity*. New York: The Penguin Press.

Lessig, L. (2008). *Remix: Making art and commerce thrive in the hybrid economy.* London: Bloomsbury Books.

Littman, J. (1990). The public domain. *Emory Law Journal*, *39*(4), 965 ~ 1023.

Littman, J. (2006). *Digital copyright*. Amherst, NY: Prometheus Books.

Marx, K., (1980). The German ideology: Part I. In R. Tucker (Ed.), *The*

Marx-Engels Reader (pp. 110～164). New York: W. W. Norton. (Original Work Published 1845)

Negri, A. (1988). Archaeology and project: The mass worker and the social worker. In *Revolution Retrieved: Selected Writings on Marx, Keynes, Capitalist Crisis & New Social Subjects* (pp. 203～228). London: Red Notes.

Ochoa, T. (2002). Origins and meanings of the public domain. *University of Dayton Law Review*, *28*(2), 215～267.

Rawls, J. (1999). *A theory of justice* (Revised Ed.). Cambridge, MA: Harvard University Press.

Rose, C. (1986). The comedy of the commons: Custom, commerce, and inherently public property. *The University of Chicago Law Review*, *53*(3), 711～781.

Samuelson, P. (2003). Mapping the digital public domain: Threats and opportunities. *Law and Contemporary Problems, 66*(1&2), 147～172.

Schiller, D. (2007). *How to think about information.* Urbana and Chicago: University of Illinois Press.

Shapiro, A. L. (1999). *The control revolution*. NY: PublicAffairs.

Stein, P. (1998). Rawls, John (1921～). In E. Craig (ed.), *Routledge Encyclopedia of Philosophy* (pp. 106～110). London: Routledge.

Vaidhyanathan, S. (2001). *Copyrights and copywrongs: The rise of intellectual property and how it threatens creativity*. New York: New York University Press.

Wagner, R. P. (2006). Information wants to be free: Intellectual property and the mythologies of control. In David Vaver (ed.), *Intellectual property right: Critical concepts in law* (pp. 329～368). London and New York: Routledge.

Wikipedia. (2010, 5 February). *Public domain*. from http://en.wikipedia.org/wiki/Public_domain

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