

ABSTRACT

Creativity and the Public Domain

*Professor Fiona Macmillan
School of Law
Birkbeck, University of London*

Intellectual property scholarship has become deeply involved in a discourse about the relationship of intellectual property with the public domain. This has been an important debate driven by serious concerns about the imperialistic tendencies of intellectual property, as it extends its boundaries horizontally to include new types of intellectual activity and vertically to confer wider powers of control on the relevant rights' holders. The frequent tendency of the debate is to create some sort of binary opposition, so that we divide the whole of intellectual space between that which is proprietised and that which is in the public domain. It is not just that the public domain is other than intellectual property and vice versa, the two are envisaged as butting up against one another so that, if we were to conceive of this in physical terms, each fits snugly against the shape of the other. The implication of this is that, if the two also take up the whole of intellectual space, altering the contours of intellectual property will alter those of the public domain (and vice versa). This Manichean approach, however, is fraught with the usual dangers of (metaphoric) over-simplification. In particular, it over-simplifies the effect on creativity of both the private and public domain and it ignores other legal devices that may affect the boundaries of the public intellectual domain.

In the light of these claims, this paper will focus on three issues: (1) an analysis of the relationship between intellectual property and the public domain of intellectual space; (2) the effect of this relationship on processes of intellectual creativity; and (3) the scope for altering the contours of the public domain in order to support creativity.