

# FOREWORD

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Early in his film, *An Inconvenient Truth*,<sup>1</sup> Al Gore identifies an assumption that, if believed, leads most to think that “global warming” cannot really be a problem. The assumption is that humans cannot possibly affect something as massive as the environment of the globe. We are too small. We cannot see how our individual actions could ever aggregate to alter anything more than a defined locale. Sure, Los Angeles might suffer smog produced by too many automobiles. But look at a map. It is just a tiny spec on the scale of the whole world. And there is tons of empty space between cities as big as Los Angeles.

Yet when this assumption of locality is shown to be false—as it quickly is through Gore’s careful teaching—then we cannot help but look differently at the issues surrounding global warming. Once we see the truth about our responsibility for at least part of the change in world climate, we cannot help but at least think about how we might intervene differently.

About a decade ago, a small number of scholars began to focus our attention on a point parallel to Gore’s. Their point was not about the physical environment. It was instead about the cultural environment. Most could not see how a traditionally tiny corner of the law called “intellectual property” could significantly affect culture and the spread of knowledge. For most, such law was merely “technical.”<sup>2</sup> But like Gore’s point about man’s effect on global warming, these scholars argued that, whether or not “technical,” this law was in fact producing an increasingly significant, and largely unintended, effect on the growth and spread of culture and knowledge. That effect was, moreover, general, rather than limited to the small range of commercial culture that the law historically had concerned itself with. Its consequence would be, these scholars argued, to constrain radically important cultural and scientific progress—at least unless we reformed the structure and reach of the law regulating information. The aim of these scholars was thus to begin what has

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1. AN INCONVENIENT TRUTH (Lawrence Bender Prods. & Participant Prods. 2006).

2. James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 111 (1997).

now become a decade-long conversation about how such structures of cultural and scientific regulation might be reformed.

These scholars were many—Pam Samuelson, Jessica Litman, Rosemary Coombes, Peter Jaszi, and perhaps first in influence, L. Ray Patterson. But their common purpose was stated early on and, in my view, most effectively by James Boyle's *Shamans, Software, and Spleens*.<sup>3</sup> In a brilliant, compelling, and comprehensive review, Boyle offered an understanding of the law regulating information and its complicated, and uncomfortable, relationship to a dominant discourse of American law: economics. There was, Boyle argued, a complex, and for most of us, counterintuitive relationship between the ideals of economic efficiency and information regulation. Information law was increasingly missing that relationship. And unless we as a political culture became more aware of this relationship, we were likely to allow trends in information law to impair some of the most important aspects of our knowledge economy. Intellectual property had been born as author-centric, Boyle argued.<sup>4</sup> That author-centric regime, however, was increasingly difficult to justify distributionally, and it was increasingly "economically irrational."<sup>5</sup> The "romantic author" that defined historically the contours of information policy was now queering information policy in ways that weakened "both efficiency and justice."<sup>6</sup> Boyle thus argued—powerfully, in my view—for a political movement that might understand and reform this originally insignificant policy now spinning out of hand.

In the decade since Boyle's book first appeared, the understanding he pushed has matured into what we should now call the cultural-environmentalism movement.<sup>7</sup> For, like the global environment, more now see how relatively specific choices about how information gets regulated have radical effects upon the health and diversity of an information ecology. And just as we need to account for the global effects of our decision to heat with coal, or drive with oil, so too we need to account for the global cultural effects of the radical increase in regulation that marks information law. The claim is not for anarchy. Information environments, like physical environments, need regulation. None doubt that some regulation is good. But just because some is good, it does not follow that more is better. Or even if more is better for some purposes, it is not necessarily better for the spread of knowledge or the progress of culture.

It was my idea to take the occasion of *Shamans's* tenth anniversary to organize a conference that would reflect upon both Boyle's work and the work left to be done. The conference was not intended as a festschrift: Boyle is a

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3. JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* (1996).

4. *Id.* at x.

5. *Id.* at 119.

6. *Id.* at x.

7. This term Boyle coined just after his book was published. See Boyle, *supra* note 2.

young and vital scholar; his festschrift will not be planned for many years to come. But because his work so effectively framed a moment in the history of what we now recognize as the “cultural environmentalism movement,” my hope was that he would allow us the opportunity to use his work to frame the next stages as well.

This took some persuading. Boyle is not the sort to exaggerate his place; he is quick to signal the works of others that make similar points to his and that build upon his own in ways that have improved his work. The idea of a conference organized around a book he wrote a decade ago seemed, to him at least, inappropriately attentive. Whatever place *Shamans* had in the debate a decade ago, Boyle insisted that others had added to the debate in ways that made it “peculiar” to focus on his early work.

I am very happy, however, that in the end he let us organize our conference around the inspirations that his book provided. As our aim was the progress of this particular approach to cultural environmentalism, our attention was on young scholars just beginning their work in a field that Boyle helped frame. We asked these scholars to write papers for the next generation, building upon Boyle’s book, but not in any way limited by the scope or reach of the book. And then we asked some leading scholars of the day to comment upon their work. Thus, the new would be telling us what would be new, with a bit of reflection from those not quite as new.

The result is much more than I hoped. *Shamans* focused on a wider range of information-policy questions than is currently our focus today (we do not worry too much about the law of blackmail just now, and we do not worry enough about the law governing genetic engineering). Likewise, the papers in this volume move far beyond the particular issues that are our focus today. The volume thus suggests a direction for research, at least as some prominent young scholars see it today. And just as *Shamans* helped frame a discourse understood by just a few a decade ago, and which has now become perhaps the most important debate in public law, this symposium will help frame the next generation of that debate.