

Faculty Scholarship

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**Lee, J.-A. (2012). Nonprofit organizations and the intellectual commons. Cheltenham, UK; Northampton, MA, USA: Edward Elgar.**

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How does one review a five-year old book that was apparently not previously reviewed in our field at the time of its original publication but which nonetheless remains current and even important? This is the question raised by Jyh-An Lee. (2012) *Nonprofit Organizations and the Intellectual Commons*. Northampton MA: Edward Elgar. When approached, my initial reaction was skeptical: It was unfortunately that it was overlooked when first published, but why review a five year old book? I decided to read it anyway, and that convinced me to produce this brief review.

According to the book's cover Lee is a graduate of Stanford University Law School (J.S.D.) and Harvard Law School (L.L.M.). then working at Chengchi University in Taiwan. I subsequently learned that he is now at the Law School of the University of Hongkong. Further investigation revealed that before and after the book, Professor Lee has produced a steady, stream of legal articles on intellectual property in the internet context. The signature concept of the book - intellectual commons - appears to be a middle phase in that overall design. It is not present in his earliest (2006) or latest (after 2013) work, but prominent in the middle phase (especially 2010-2012).

Professor Lee defines intellectual commons as “intellectual resources which anyone can use either without permission or with permission granted in advance.” From the vantage point of third sector studies, this is different from both the Ostrom resources approach and the commons theory of associations (Lohmann, 2016). In addition, that qualifying phrase after the “or” in his definition seems to extend the notion of the intellectual commons beyond the public domain as generally understood to include all of what is defined in U.S. law as “fair use”.

The list of internet-related nonprofit organizations discussed focuses on a range of nonprofits seldom discussed in these pages, but including many of the key nonprofit actors in the first three decades of the internet: Apache Software Foundation, Electronic Frontier Foundation, Free Software Foundation, GNOME Foundation, Knowledge Ecology International, Linux Foundation, Mozilla Foundation, Open Directory Project, Open Educational Resources, Open Source Initiative, Perl Foundation, Public Knowledge, Public Library of Science, Project Gutenberg, Python Software Foundation, Software Freedom Conservancy, Software Freedom Law Center, SourceForge, Symbian Foundation, Wikimedia Foundation, World Intellectual Property Organization and XMPP Standards Foundation.

Professor Lee's approach to nonprofits is built heavily on theoretical work first published in this journal and presented at ARNOVA conferences on nonprofit organization, non-distribution constraints, contract failure, market failure and government failure. Also covered are nonprofit organization, commons theory, gift culture, licensing, mutual benefit and public benefit organizations, public interest

grant-making, hacker culture, virtual communities, peer production, public good, taxation, transaction costs, and trust.

Among the nonprofit scholars discussed in this book are H. Anheier, A. Ben-Nur, W. Bielefeld, R. Dart, P. DiMaggio, J. Douglas, P. Frumkin, J. Galaskiewicz, K. Gronbjerg, B. Gui, P. Hall, H. Hansmann, B. Kingma, R. Lohmann, W. Powell, L. Salamon, R. Steinberg, M. Tschirhart, H. Tuckman, and B. Weisbrod. Perhaps the most obviously missing name is E. Brody. Unlike other discussions of nonprofit law, there is little or no attention in the book to U.S. state law, the IRS, charitable deductions or tax exemptions.

Lee's approach to what he calls intellectual commons is distinctive. In my view, his titular concept might more accurately be labeled intellectual *property* commons. The list of commons scholars whose work is discussed includes: Y. Benkler, D. Bollier, J. Boyle, G. Hardin, C. Hess, L. Lessig, M. Olson, and E. Ostrom. The list of information technology related names is even longer, but prominent are R. Stallman, the initial developer of GNU licensing, L. Torvald, the original author of Linux, and L. Lessig, the father of Creative Commons Licensing.

The major enduring contribution of the book for third sector studies is in Chapter 3, "Nonprofit organizations and the Commons Environment". There he identifies six functions of nonprofit intellectual commons: the establishment and enforcement of social norms and licensing terms; providing organizational support for peer-production projects; legal support; political advocacy; assuring information access and the establishment of repositories as diverse as SourceForge and Wikipedia; and public interest grant-making. In each of these cases, the author sketches the role of nonprofit organizations with numerous examples.

Some of Lee's early body of work applies concepts of the intellectual commons to problems of intellectual property. In Lee (2010) cultural environmentalism is studied as a case of commons as a social movement, with attention to nonprofit organization and norms, licensing terms, legal support, political advocacy, information access and repositories. However, his more recent work, such as an article on blogging (Lee, Liu and Li, 2013) does not use the commons or nonprofit organizations.

Because of its 2012 publication date, the book obviously cannot be an up-to-date resource on recent developments in social media, Wikipedia and the Wikimedia Commons, such as the growing photo archive and the licensing of Wikimedia software, or the internationally oriented Creative Commons 4.0 license, but the book's discussion of the earlier developments on which these recent events are based offers a solid frame for understanding the spreading international intellectual commons and the role of nonprofit organizations in it.

The book is structured as a legal article. Readers unfamiliar with that genre are strongly advised to read not just the main text but *all* of the notes, which are nearly as extensive and carry a significant portion of the argument and critical commentary.

This book offers no major new insights on nonprofit organizations. Rather, it applies standard nonprofit organizations approaches to issues of intellectual property and digital rights management. Even after the passage of five years, there are many important insights to be gained from this book, and the discussion pulls together a useful history of the role of nonprofit organizations in the online intellectual commons.

## Journal Articles by J.A. Lee

Lee, J.A. (2006). Government policy toward open source software: The puzzles of neutrality and competition. *Knowledge, Technology and Policy*, 18, 113-114.

Lee, J.A. (2006). New Perspectives on Public Goods Production: Policy Implications of Open Source Software. *Vanderbilt Journal of Ent. & Tech. Law*, 45.

Lee, J.A. (2010). Organizing the unorganized: The role of nonprofit organizations in the commons communities. *Jurimetrics*, 275-327.

Lee, J.A. (2010). The Greenpeace of Cultural Environmentalism. *Widener Law Review*, 16(1), 2-63.

Lee, J.A. (2012). Regulating Blogging and Microblogging in China. *Oregon Law Review*, 91, 609.

Lee, J.A. (2014). Non-Profits in the Commons Economy. In M. David & D. Halbert (Eds.), *The Sage Handbook of Intellectual Property* (p. 335~354).

Lee, J.A., & Liu, C.-Y. (2012). Forbidden City Enclosed by the Great Firewall: The Law and Power of Internet Filtering in China. *Minnesota Journal of Law, Science, and Technology*, 13(1).

Lee, J.A., Liu, C.-Y., & Li, W. (2013). Searching for Internet Freedom in China: A Case Study on Google's China Experience. *Cardozo Arts & Entertainment Law Journal*, 31(2).