

The Commons as an Emerging Model for Knowledge Creation & Governance

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First, let me thank the Rockefeller Foundation for convening this group of people to discuss the commons and the problem of the anti-commons. It is a timely moment to address this topic. There is a great need to consolidate our knowledge of the topic; take stock of the technical, legal and political barriers to advancing the commons; develop some new strategic ideas; and forge a new network of thinkers, advocates, funders and irregulars who can advance a shared agenda.

This conference is not just about the problem of the anti-commons in knowledge – it is also about *the promise* of the commons. The anti-commons problem is chiefly about the over-properitization of knowledge resources, an alarming trend that is driven by powerful market and technological forces. The processes by which an anti-commons occurs is surely complicated – and I hope to learn more – but so are the processes for affirmatively creating, fortifying and legally protecting the commons.

This gathering fills a very important need. Some of the primary justifications for copyright and patent law are proving to be deficient, certainly in social and moral ways, but also in fundamental economic ways. The prevalence of the anti-commons problem seems to be symptomatic in some measure of dysfunctional markets. Patent rights and copyrights are either fragmented so broadly as to inhibit open, competitive markets – or they are so tightly consolidated that a single company or two can inhibit open, competitive markets. In either case, patents and copyrights are not serving to

spur innovation, competition and the satisfaction of social needs, as intended, but rather as a special form of market protectionism for large corporations.

In a sense, the prevalence of the anti-commons is a broader indictment of free market theory itself, or at least market performance. According to neoclassical market theory, markets are supposed to maximize efficiency and innovation. Markets are supposed to reward the highest quality and generate ever-cheaper products. Markets are supposed to generate plentiful supplies to meet evolving social needs. Yet isn't the story of copyright and patent law in contemporary times a betrayal of some of these central justifications of market theory?

The kinds of medical innovation needed by the poor, and particularly the diseases that are more prevalent in the developing world, are simply not being met by the so-called free market. Pharmaceutical research for common diseases affecting millions of poor people in the South is lagging far behind research for lifestyle and me-too drugs for the affluent consumers of the industrialized world. The market is simply not generating the supplies nor the competition to meet demonstrable social needs.

A similar dynamic is affecting knowledge protected by copyright law. Instead of promoting a broader diversity of knowledge and its cheap and easy dissemination, copyright law is more often invoked to tightly control its circulation. Oligopolies of "content aggregators" – in mass entertainment and in scholarly and scientific fields – are demanding sweeping new extensions of copyright protection in order to lock up and control knowledge for private gain. Meanwhile, the public need for the "fair use" of knowledge and creativity is being stifled under an assault of new copyright laws, technological locks and restrictive business practices.

What brings us to this point is not simply the rise of the anti-commons and its problems, but equally the emergence of the commons as a more attractive and

feasible alternative. Since the incremental cost of sharing knowledge is virtually nil, and since collaboration can be fantastically productive, the commons is perhaps the most natural vehicle for maximizing the value of knowledge. The Internet has dramatically proven this. In his wonderful essay, “Coase’s Penguin,” Professor Yochai Benkler explains why a knowledge commons can be vastly superior to the market in terms of efficiency, productivity and innovation.

Why the Commons?

The commons as an analytic paradigm is both very old and very new. It is old in the sense that mankind has traditionally organized valuable resources through collective management regimes, most having to do with kinship and/or local community. Indeed, the commons is arguably the default mode of economic organization around the world and throughout history, even though, of course, market exchange has always existed. The Romans had a category of law that explicitly recognized “inherently public property” – *res publica* – to be managed by government, and that which belongs to everyone as a commons – *res communes*.

It was not until John Locke, however, that the tensions between private property and the commons became a fundamental fault line in modern economic and political thought. He said, quite tellingly, “God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life and convenience.” In this one sentence from Locke’s *Second Treatise on Government* we have both an acknowledgement of the commons and a primary rationale for private property.

How shall the two coexist? Since the 1500s, the commons has been subjected to countless private enclosures. The market has steadily grown at the expense of the commons, at least within the industrialized world. Yet even though the epistemology

and cultural norms of the market have largely supplanted the commons, the history of the commons holds many valuable lessons for us. It teaches how scarce resources – chiefly land and natural sources like water, timber, meadows, orchards, and so forth – *can* be collectively and sustainably managed. If anything, knowledge commons represent the *cornucopia* of the commons – not the tragedy – because the resource is non-depletable. This is the bid divide in commons – depletable and infinite. It is one that the famous “tragedy of the commons” metaphor coined by Garrett Hardin does not adequately recognize.

I don’t propose excavating English history except in passing ways because I think its lessons are fairly general and metaphoric; the literal history of medieval enclosures may or may not be instructive for us today. Still, the commons of English history does illustrate some enduring lessons, namely:

- A finite natural resource can be successfully managed by a community of shared interests;
- A commons regime tends to be tightly integrated with other social and moral values, in contrast to the impersonal, monetary norms of the market;
- The market enclosure of the commons can both enhance investment in a common resource – and sometimes productivity – while also disenfranchising large numbers of people at the same time; and
- Market enclosures tend to generate significant social and economic externalities – externalities that market theory tends to discount or ignore.

These patterns are widely replicated throughout history – and especially in our times. They lie at the heart of my book, *Silent Theft: The Private Plunder of Our Common Wealth*, which describes the enclosures of public lands, the airwaves, academic knowledge, the open protocols of the Internet, public spaces and institutions, childhood experience, the public domain of creativity and knowledge, and much more. Incidentally, these realms are not traditionally regarded as commons, but they should be.

Market enclosure is a process that not only privatizes the resources of a commons – assets that belong to all citizens -- it separates *ownership* of the resource from *social obligation* and *moral consequence*. This may be the great rift that any discussion of the commons today seeks to traverse: *How can social and moral obligation be re-attached to ownership in meaningful ways?* It harks back to Karl Polanyi's idea of “the Great Transformation,” in which the market became the predominant ordering system for society, eclipsing the older, more traditional systems of community, kinship, morality and religion.

It is quite tempting to romanticize the commons. At a time when American individualism and corporate oligopoly seem to be running amok, there is surely great appeal to the commons, with its connotations of social egalitarianism and moral equity. And indeed, we need to acknowledge the moral and social appeal of the commons. But we also have an obligation to develop some tough-minded, empirical and analytic descriptions of why commons work and work well. We need to know, for example:

- What are the economic, legal and political factors that make a commons work? Why are they more efficient or socially benign than a given market system?

- How do traditional copyright and patent regimes affect the types of knowledge that are likely to be generated and the ways in which that knowledge can be shared?
- What sorts of legal and institutional innovation must occur for the new commons to flourish?

In short, we need to develop a more robust school of thought about the commons as a genre of knowledge management. We need to develop a new network of thinkers who can probe the dynamics of the commons and compare it with the regnant models of law, economics, politics and public policy. The market/IP paradigm is not the only model. The commons is a serious, robust alternative. That is a central message.

Currently, there are all sorts of knowledge commons whose existence as commons is barely recognized. For example, the Internet itself is regarded more as a giant venue for electronic shopping (or content piracy) than as the largest, most robust commons in history. We do not have a vocabulary for describing how peer-to-peer file sharing, online archives of scientific research, online collaborations sponsored by affinity groups, and free and open source software development, are all forms of the commons: a new vehicle for value-creation.

The commons confers a theoretical respectability and standing on phenomena that are seen as isolated and aberrational. We don't generally group all these diverse collaborative genres together and understand them as related. But they are. They are all different varieties of Internet-facilitated commons.

As an alternative to traditional regimes of property and markets, these commons exemplify certain common attributes that make them especially compatible with – if

not actively supportive of -- democratic values. This is a common denominator of the IP regimes we will be discussing; it is one of the most attractive features of the commons.

What attributes do most commons have that markets may or may not have?

First, the commons is based on *openness and feedback*. They thrive precisely because there is a social transparency and effective feedback loops. This is not necessarily the case in markets. Indeed, dominant firms in markets tend to want to disclose as little as possible and shut down feedback loops lest they spur disruptive changes in the company's fixed investments or business practices.

Second, successful commons are based on *collective participation and decisionmaking*. A commons is flexible yet hardy precisely because it draws information from everyone in a bottom-up flow. This means that the rules are "smarter" because they reflect knowledge about highly specific, local realities. Everyone has access and the right to participate and there is transparency in deliberations: hallmarks of democracy. In markets, of course, access and participation are granted only to those who can afford to pay and centralized control is a key priority.

Third, many commons thrive on *diversity*. Diversity combined with openness can yield phenomenal creativity – as we can see in scientific inquiry. It is also the story of America – *E pluribus unum*. Introduce barriers – especially proprietary barriers such as overly broad patents, non-disclosure agreements and the like – and you can shut down the engine of innovation. In a democratic context, they are the equivalent of political censorship. But open up the access to information and you get the kind of creative explosion we saw in the 1990s when the Internet served as an open, accessible platform for all kinds of innovators. Science is fabulously productive and creative because it honors openness, collective participation and diverse perspectives.

Fourth, a commons honors *a rough social equity among its members*. This, too, is a cardinal principle of healthy democracies. In a market economy, inequality is not only to be expected, it is celebrated. The average CEO earned 400 times the amount earned by the average worker a few years ago, a fact that *Forbes* magazine more or less touts with its annual list of the 400 wealthiest people on the planet.

Duke law professor Jamie Boyle, has pointed out that the idea of “the environment” literally didn’t exist in the 1950s and early 1960s. It had to be culturally invented. No one quite realized that bird hunters and bird watchers might actually share the same interests until the language of “the environment” helped articulate the common ground... “The environment” helped showcase the natural world and created an overarching narrative that helped make sense of seemingly unrelated phenomena. In so doing, the new language gave voice to – and made possible -- a political and cultural movement.

Today, I believe *the commons* helps us showcase the many realms being threatened by overly powerful and intrusive market forces – while validating a new affirmative framework for achieving our desires as citizens and consumers. It’s not that the market is bad in principle, but rather that its reach and influence are excessive – to the extent of undermining the market’s own performance. The anti-commons effect is becoming more pervasive. The commons offers us a vocabulary for talking about these excesses and about the systematic privatization of resources that should belong to all as a civic right. It gives us a language for talking about inappropriate commodifications of knowledge.

I like to talk about the commons because it offers a whole new vocabulary for talking about roles, behaviors and relationships that cannot be adequately captured by market theory. The commons gets us beyond market-speak in which everyone must be

either a producer or a consumer. It gets us beyond property-speak in which everything must be strictly owned by an individual or corporation or government. It gets us beyond the short-term, profit-maximizing mindset of the business enterprise, and allows us to entertain broader long-term objectives that may or may not be profitable, but are nonetheless useful and socially constructive. The commons *re-situates* knowledge from a market context to the larger context of our political culture. These are the reasons a commons discourse is valuable.

Part of our challenge is not only to take this message to a larger audience. We need to find new ways to tell others about the commons, both within academic disciplines and to the general public. We need to *popularize* the commons as a viable alternative to the market. The discussions we have here cannot be confined to academic conferences and scholarly journals. They must radiate out to popular venues and grassroots constituencies.

The diffusion of the commons discourse is a longer and different discussion, but one that also must be squarely addressed: how to popularize the themes of the commons to a wide array of constituencies.