

CPR RESPONSE FORUM

Innovation in the Information Commons

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In his excellent lead article, David Bollier argues that the commons offers a valuable paradigm for talking about, understanding and protecting free information exchange and knowledge-generation in the digital age. Online scholarly publication, scientific research and peer to peer production are only a few of the commons-based modes of production that have simultaneously been enabled by digital technologies, and threatened by recent intellectual property laws that expand and tighten private control over who may access information, and how they may use it. For Bollier and others, “commons” is not just a buzzword; it provides a rhetorical and descriptive framework to reorient debates about intellectual property policy, which have been dominated by the limiting language of private property and markets.

In an encouraging development, a growing body of scholarly literature is offering increasingly nuanced and extensive analyses of the information commons. As with a physical commons, an information commons is not simply a self-enabling space where shared resources can be accessed by anyone, without cost, for any subsequent use (although some would argue that this definition could describe the related concept of the “public domain”). The “commons” is also a way of managing shared resources, and consequently describes a set of rules, values and norms for accessing and providing resources within a given community. In the emerging literature, some scholars are beginning to demonstrate how the rules that govern a commons may manage resources more efficiently and democratically than the rules of intellectual property, and how a well-managed commons might actually serve the stated goals of intellectual property better than its regime of private property rights.

The grant of exclusive intellectual property rights rests on the theory that these rights are necessary to promote innovation and creativity, or in commons language, to prevent under-investment in resource development. (Avoiding overuse is not an issue with intellectual resources because they generally cannot be overused or depleted- for example, the content of this newsletter is not ruined or diminished when more people read it.) However, the trade-off with exclusive rights is that, in promoting innovation, they also allow private entities to control access to necessary resources - a gene sequence, drug, line of code, snippet of song - that others would use, improve and build upon. What if a commons could somehow promote innovation, without this trade-off of monopolistic control?

Consider the following two examples. Open source software for many an emblematic information commons is released under “copyleft” licenses that permit anyone to use, add to, or modify the underlying code, but only if their new program is covered by the same license, and therefore freely available for others to use. This licensing scheme preserves continued access to the necessary resource code and creates a commons, in the words of Eben Moglen, “to which anyone may add, but from which no one may subtract.” Outside of the framework of economic incentives and private control of property rights, the open source software movement has developed many successful innovations, including the Linux operating system.

Another type of commons, which is discussed much more extensively by scholars such as Jerome Reichman, allows anyone to access innovations, without having to secure permission from a rights holder, so long as they later pay a nondiscriminatory, flat-rate fee. This “take now, pay later”

system promotes innovation by offering to innovators the incentive of payment; but, unlike the intellectual property system, it does not allow them to impede subsequent innovation by withholding permission, or setting prices prohibitively high.

In both of these examples, the information commons may be superior to a regime of exclusive property rights. The concept of the commons becomes not only rhetorical and descriptive, but also prescriptive: it may provide a better alternative.

If we are to sustain and develop information commons, we need to engage in more thorough studies of how innovation and creativity occur within them, and how they may best be managed to optimize productivity. This type of research is already underway: Elinor Ostrom and Charlotte Hess, for example, have applied the methods and tools used to study real commons to a comprehensive analysis of scholarly information, and Jerome Reichman and Paul Uhlir have done considerable work on structuring a commons for scientific information. Hopefully, the more we understand and advance these “comedies of the commons,” poised to flourish in the digital age, the better we can prevent intellectual property laws from “enclosing” them.

For Further Information:

A thorough review of this literature is well beyond the scope of this response, but those who are interested in this subject will wish to look at the articles from Duke Law School’s Conference on the Public Domain, which are available online at <http://www.law.duke.edu/pd>.)

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