Intellectual Commons as a defensive response to the enclosure of knowledge: a critical view.

Mikel Díez Sarasola

University of the Basque Country / Euskal Herriko Unibertsitatea

mikeldiezsarasola@gmail.com

mikel10sarasola@berkeley.edu

DRAFT (All comments are very welcome)

Paper presented at the Third International Conference

on Cultural Political Economy, Lancaster University,

6th to 8th September 2017

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Abstract

Through recent years intellectual commons have multiplied. Intellectual commons cover many different and diverse realities, encompassing all of them knowledge and information shared by a community. In this paper, I highlight the close relationship between the multiplication of intellectual commons and the unprecedented expansion of Intellectual Property rights (IPRs) since the 90´s. I also distinguish intellectual commons and collective property regime. I finally make a critical reflection about how the notion of intellectual commons may prevent the necessary readjustment of IPRs and its today's treatment as absolute rights.

Keywords

Intellectual Commons; policy analysis; Critical Legal Studies; enclosure of knowledge;

For some time we have observed the appearance of multiple intellectual commons in many disciplines of science and culture. In this sense, it is especially remarkable some initiatives found in: 1) the digital realm with the open source initiative and free software movement as manifestations of intellectual commons; 2) in the scholar field with some initiatives such as the Digital Commons Network which provides free access to full-text scholarly articles and other research from hundreds of universities and colleges worldwide; 3) In the creative and cultural arena with the powerful tool of "Creative Commons" devoted to expanding the range of creative works available for others to build upon legally and to share. The organization has released several copyright-licenses known as Creative Commons licenses free of charge to the public. These licenses allow creators to communicate which rights they reserve, and which rights they waive for the benefit of recipients or other creators; 4) In the scientific research, particularly in the fields of biotechnology and biodiversity;

Following the open source software "movement" there are voices supporting the application of it as a framework for establishing commons in science. Initiatives such as the "open biomedical initiative" created to support the traditional Biomedical field and focused to collaboratively design, develop and distribute open source, low cost health and accessibility knowledge which is based on collaboration and knowledge sharing through digital platforms focusing on ideas and projects or the Traditional Knowledge Digital Library (TKDL) which is a pioneer initiative of India to prevent misappropriation of country's traditional medicinal knowledge at International Patent Offices.

All these different commons came about in the nineties following an undisguised tendency to enclose, commodify and/or *overpatent* knowledge. New technologies and new legislation form the substrate of these so-called new enclosures; first, plants, bacteria, gens and other living organisms which were previously out of the realm of IPRs started to be considered as potential subject matter of exclusive rights (commodification) so was it traditional knowledge of indigenous communities. Also, new legislation like the Digital Millennium Copyright Act (DMCA) was passed to regulate new uses of protectable knowledge permitted by the internet and the new information technologies and it sometimes erodes otherwise users' rights and prerogatives on copyrightable material. However, as we will explain next, this "assimilation" may be mistakenly conceived and it may carry unwanted consequences by perpetuating today's questionable IPRs regime.

Second enclosure

Some authors (Boyle 2003) have seen in this new expansion of intellectual property what they have called a second enclosure i.e., an analogous process to the enclosure of common land in England in the Eighteenth Century (May 2013). It has been said that today's appropriation (and previous commodification) of knowledge is following the same parameters than the enclosure of land operated in England.

Tragedy of the commons

In order to explain the first enclosure and somehow, to address the enclosure of knowledge and to contextualize the notion of intellectual commons, it is mentioned the phrase of the "tragedy of the commons", a phrase coined by Garret Hardin (Hardin 1968) which is used to highlight the eventual problems of overuse and underinvestment found in the absence of a property regime.

Elinor Ostrom (E. Ostrom 2015) and Charlotte Hesshave (Hess & Ostrom 2007) come up with the notion of commons and with that of intellectual commons to note that contrary to what Hardin suggests there are commons, -collectively shared resources- that far from being a tragedy show how they can be better run by a group of people, by a collectivity than being privately owned. In this sense, Ostrom frames knowledge or intellectual commons within the more general category of commons (deep seas, the atmosphere, the Internet or scientific knowledge she says).

Differences between limited tangible resources and knowledge.

Unlike knowledge, tangible resources are limited and rival (consumption by one consumer prevents simultaneous consumption by other consumers) and they imply an inherent conflict. Limitation in its consumption is an objective fact of nature which has to be addressed by law either by not doing anything (and presumably driving the situation to a tragedy of the commons context) or conferring private property rights over it to individuals, or permitting a collective management of the resource (democratic or not) or making the good be public property or property owned by the state or resorting to any other imaginable situation to cope with that inherent and objective limitation of private goods.

The sequence in time of the legal status of tangible resources and debates explained above would be the following:

1. *Res nullius*
2. Property / Commons

Collective Private

3. Tragedy of the Commons → enclosure individual private property
4. Eventual commons contradicting the announced tragedy of the commons. (Olstrom).

Notwithstanding that, we consider that this sequence is not applicable to the case of knowledge; the non-rivalry and non-excludability character of knowledge in nature place the regulation and the problems of knowledge, its creation and development in a totally different level of debate.

The challenges and problems around knowledge have a different nature. Far from being depleted, consumption of knowledge is unlimited and in fact, the more people who share useful knowledge the more valuable becomes the knowledge in social terms and the greater the common good.

Unlike what it happens with tangible resources, the exclusive rights conferred on non-rival knowledge do not attempt to solve a conflict of limited resources for an unlimited demand but they have a social purpose consisting mainly of creating incentives for the production of socially helpful knowledge. On the second level, and depending on the sort of intellectual creation or knowledge – for instance, it is not the same the lyrics created by a song writer than a new chemical compound produced by a lab team- exclusive rights may be intended to recognize the merits of the inventor or creator and sometimes, exclusive rights encourage to the inventors or creators to disclose knowledge which could be eventually secretive (other types of knowledge however cannot be kept in secrecy as the knowledge could be easily deducible and inferred from the specific tangible embodying the knowledge in question).

In this sense, in the case of knowledge it does not make sense to speak about the recovery of the commons and claim for their recovery versus

their commodification and privatization. On the contrary, Intellectual commons (those studied by Olstrom) would not make sense if IPRs or property rights did not exist since there is not objective scarcity in the case of the knowledge, and they have mostly emerged as a response to the excessive commodification and expansion of IP over knowledge which was previously part of the public domain. Therefore the logic sequence of the relationship between commons and IPRs regarding knowledge would be something similar to this:

1. Public domain.
2. Commodification.
3. Privatization.
4. Commons as a defensive reaction against excessive expansion of IP.

Intellectual commons as a reaction. "the tragedy of the anticommons".

Therefore, in the case of knowledge there was not a previous situation of collective property which became private property in the context of a new enclosure. Even if public domain and commons are often used as if they were interchangeable, and despite numerous grey lines among different realities referred as commons, it is important to clarify for our purposes the different conceptual categories and distinguish between:

1- Public domain: a sphere where knowledge is free from IPRs.

2- Public property: knowledge whose owner is the state and it is dedicated to public use.

3- Private property: ownership of property by a person or persons (or non-governmental legal entities).

4- Collective property: ownership of property by a collectivity, by all members of a group for the benefit of all its members.

5- Commons: it would refer to a situation where resources are held indivisibly by an organization, enterprise, community or society indivisibly

rather than in the names of the individual members or groups of members, as common property which guarantees open access to its members.

Even if sometimes public domain and commons and collective property and commons are used indistinctly there are some conceptual differences. Unlike public domain, intellectual commons can be subject to IPRs and its access to public can be open and free or restricted under their own norms of access and use intended to protect it or improvements thereof from private appropriation. On the other hand, commons would be a type of collective and shared resource which is not divisible between its members, a shared resource where there are not particular property rights.

Therefore, in the dialectic between public domain and private property, intellectual commons would refer to those intangible resources which are potentially the subject matter of IPRs but which are kept (sometimes limited for certain purposes) intentionally by agreement or *ope legis* outside the prerogatives given to IPRs owner(s) accessible to everybody without a central authority to manage the commons and as long as they fulfill the requirements provided by the commons.

So, intellectual commons would be defined in contraposition to private and particular property of knowledge and they have been the result of the reaction againsto 1) commodification of knowledge previously in the public domain or used by communities –indigenous and traditional knowledge- and 2) reaction against the restriction of knowledge and information flow instead of permitting its free dissemination under the consideration that IPRs may be counterproductive as IPRs may discourage innovation by reducing and impairing follow-on innovations based on improvement of IPR protected knowledge (biotechnology).

Also, the emergence of Intellectual Commons would be explained by the contradictions within capitalism. In this sense,

5. Intellectual commons as an insufficient response to the unjustified expansion of IPRs.

As we have indicated at the beginning of this presentation, we have observed a multiplication of initiatives related to commons, and free access. These commons attempt to cope with some contradictions emerged from the excessive commodification and expansion of IPRs. The material and territorial expansion of IPRs with international legal instruments as TRIPS are not justified either on empirical or theoretical grounds. More and more studies show how the expansion of IPRs does not imply a greater and intense level of innovation or an improvement on the common good. The pharmaceutical field or the agriculture or other scientific and cultural/creative fields are good evidence of this. Far from stimulating innovation, stronger IPRs create bottlenecks and impairments to the evolution and common good of many societies, especially among poorest countries and social sectors in need.

The most affected areas by this expansion of IPRs are the creative works in the digital media with more and more restrains on the user of copyright works which impair basic prerogatives of the licensees of copyright such as the fair use; the overprotection of certain scientific knowledge whose access become indispensable to ensure follow on innovation (upstream research) against the tradition of the scientific research community of sharing knowledge and keeping open dialogue (Madey versus Duke University); the protection by patent of living organism, genes or biological components in nature which sometimes imply an improper commodification of realities which were previously part of the public domain and other times intend to block or monopolize entire fields of research.

This expansion of IPRs do not respond to the logic of IPRs neither they are the result of a IPRs diagnostic about how to improve incentives for innovation or how to better promote technology transfer. This expansion is better explained by the accumulation of capital accumulation to a new phase of capitalism, global capitalism. Commodification of knowledge encompasses important contradictions; contradictions of approaching knowledge as if it were just simple commodity (B. Jessops); For each

capital wishes to pay nothing for its knowledge inputs but wishes to change for its intellectual output. Development of capitalism requires development of new products which are sometimes blocked my IPRs. As Professor Jessop indicates, at the same time as IPRs are mobilized and expanded to promote accumulation, they become major sites of contradiction in the circuits of capital and key stakes in capitalist competition and class and popular struggles. They can even become a means of self-blockage; while all capitalists would like to pay nothing for their access to ideas, discoveries, and innovations, they want to charge and get profit out of their own intangible property.

On the other hand, conflicts arise in the fields of scientific research, education, or use of information technologies with tensions between commodification and knowledge management and the traditional commitments to free circulation of ideas and knowledge sharing and the opposite trend to "wikify" knowledge from multiple contributions. Likewise, economists concerned with innovation and information, intellectual property lawyers, and students of innovation are also busy debating the limits of commodification of knowledge.

Critical dimension of the commons.

The Commons would be framed as one of the responses formulated to overcome these gaps, these shortcomings of the capital accumulation and its inherent contradictions. However, we think that the commons are an insufficient response to the challenges posed by the expansion of IPRs to the common good and to a more democratic allocation of resources.

Even if the Commons may be a healthy and effective instrument to identify problems into the commodification of knowledge, warn against the process of commodification and inoculate a philosophy and values anchored in democracy, ecology or collective actions outside the market and market exchange, Commons approach does not address the main reason explaining the observed failures/disfunctions of the system.

In effect, the perspective of the Intellectual Commons taken by the academic thoughts of Eleonor Ostrom takes for granted certain shortcomings produced by the legal protection of knowledge as being part

of nature instead of being the result of artificial scarcity operated by law. In this sense, this approach ignores the fact that property rights and IPRs are the result of social relations. Furthermore, knowledge is a more sensitive field of reality than tangible resources and IPRs a more discretionary institution than conventional property rights. In fact, while conventional property emerged as an instrument to cope with the limited and rival nature of tangible resources and the social conflicts around it, IPRs institution is a more discretionary, strategic instrument which rather than managing a previous conflict and due to the unlimited and non-rival nature of knowledge, reflects a more discretionary choice of the legislator in order to address the best incentive for the creation of knowledge and for the benefit of society.

In this sense, the social purpose of IPRs is even greater and more noticeable than in the case than conventional property. Also, the cumulative nature of knowledge and the fact that any knowledge is anchored in cumulative and previous knowledge makes it necessary to deal with IPRs in an extreme sensitive and intelligent manner in order not to upset the balance of interests intended by IPRs.

Social function of IPRs

Therefore, unlike today's trend to make IPRs an absolute property right, IPRs are especially instrumental institutions which should be understood as a means not as an end. Leaving apart binary choices about IPRs yes or no and without questioning some advantages and benefits brought by IPRs (incentivizing the production of new and helpful knowledge or disclosing knowledge otherwise under secrecy), IPRs application and interpretation has to be modulated and adjusted to its instrumental nature.

We would not need to resort to certain categories of commons if IPRs were interpreted properly and in accordance to their ends, i.e. if they were interpreted according to its instrumental character and in a coherent manner with the social function it has to play.

In this sense, some social functions/dimensions of knowledge would not be impaired by IPRs. In this sense, IPRs cannot impair or block follow-on innovation, neither can it prevent research. IPRs cannot privatize living

materials or resources which should be considered as heritage of the whole of humanity and neither can it erode basic rights and exceptions of the IPRs regime such as the fair use or the experimental exception.

Drawing the lines about what the social function is, it should be defined for each case in a deliberative manner taking into account the different circumstances and facts bearing always in mind that IPRs are an instrument rather than an end or an absolute and abstract category of rights.

To end up and citing Pamela Samuelson, *it is possible to construct a new politics of IP… it should be grounded on the realization that information is not only or mainly a commodity; it is also a critically important resource and input to learning, culture, competition, innovation, and democratic discourse. IP must find a home in a broader-based information policy, and be a servant, not a master of the information society.*

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