Engaging on the digital commons

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Common Voices

Abstract

This article explores the dual role of Intellectual Property Rights (IPRs) in intangible commons, both as incentives for knowledge creation and potential tools for privatization and access restriction. The authors actively advocate for policy changes to preserve intangible commons, opposing initiatives like the Protection and Utilization of Public-funded Intellectual Property Bill and calling for copyright law reform. They also champion alternative licensing models, such as open source software and open content, which have fostered collaborative innovation. Additionally, the authors address telecom policy and Internet governance issues. Drawing parallels between tangible and intangible commons, they pose questions about the adaptability of resource management principles and ownership rights in the digital age.

We at the Centre for Internet and Society are very glad to be able to participate in the 13th Biennial Conference of the International Association for the Study of the Commons (IASC). Our interest in the conference arises mainly from our work in the areas of intellectual property rights reform and promotion of different forms of 'opennesses' that have cropped up as a response to perceived problems with our present-day regime of intellectual property rights, including open content, open standards, free and open source software, open government data, open access to scholarly research and data, open access to law, etc., our emerging work on telecom policy with respect to open/shared spectrum, and the very important questions around Internet governance. The article by Sunil Abraham and Pranesh Prakash was published in the journal Common Voices, Issue 4.

Our work on intellectual property reform are proactive measures at effecting policy change that go towards protecting and preserving an intellectual, intangible commons. We have opposed the Protection and Utilization of the Publicfunded Intellectual Property Bill (an Indian version of the American Bayh-Dole Act) which sought to privatise the fruits of publicfunded research by mandating patents on them. We are working towards reform of copyright law which we believe is lopsided in its lack of concern for consumers and that its current march towards greater enclosure of the public domain is unsustainable. Believing that not all areas of industry and technology are equal, and that patent protection is

ill-suited for the software industry, we have worked to ensure that the current prohibitions against patenting of software are effectively followed.

Defensively—that is working within the existing framework of intellectual property law—we seek to promote the various forms of copyright and patent licensing that have arisen as reactions to restrictive IP laws. Free/open source software and open content have arisen as a reaction to the restrictive nature of copyright law, such as the presumption under copyright law that a work is copyrighted by the mere fact of it coming into existence (for instance, this was not so in the United States until 1989, till when a copyright notice was required to assert copyright). While earlier the presumption was that a work was to belong to the public domain, after the Berne Convention, that presumption was reversed. This led to the creation of the idea of special licences, by using which one could allow all others to share his/her work and reuse it. This innovation in using the law to promote, rather than restrict, what others could do with one's works has enabled the creation and sharing of everything from Wikipedia, to Linux (which powers more than 85 percent of the world's top 500 supercomputers) and Apache HTTP server (more than 60 percent of all websites). The advent of the Internet has allowed the creation of intangible digital commons.

We are also starting to engage with the question of telecom policy around spectrum allocation, and believe that promotion of a shared spectrum would help make telecom services, including broadband Internet, available to people at reasonable prices. We also believe that Internet governance should not be the prerogative of governments, and should not happen in a top-down fashion.

Comparisons between tangible commons and intangible commons have been made by people like Elinor and Vincent Ostrom, who in 1977 contributed to our understanding of subtractability and public goods. James Boyle has written about the expansion of copyright law as "the second enclosure movement", following in the footsteps of the first enclosure movement against the take-over of common land which stretched from the fifteenth century till the nineteenth. Yochai Benkler, has written extensively on commons in information and communication systems as well as on spectrum commons. Just as Elinor Ostrom's work shows how Garrett Hardin's evocative 'tragedy of the commons' and the problems of free-riding are very often avoided in practice, Michael Heller's equally evocative phrase 'gridlock economy' shows that 'over-propertisation' of knowledge can lead to a 'tragedy of the anti-commons'.

Through this conference we wish to learn of the lessons that academic writings on tangible commons have to impart to intangible commons which are configured very differently (in terms of subtractability, for instance). Ostrom's work shows how individuals can, in a variety of settings, work to find institutional solutions that promote social cooperation and human betterment. As part of her nine design principles of stable local common pool resource management, she lists clearly defined boundaries for effective exclusion of external unentitled parties. How does that work, when even the existing mechanisms of boundary-definition in intellectual property, such as patent claims, are often decried as being ambiguous thanks to the legalese they are written in? What of traditional knowledge for which defining the community holding ownership rights becomes very difficult? As Ostrom and Hess note, "the rules and flow patterns are different with digital information", but how do these differences affect the lessons

learned from CPR studies? How do Ostrom's pronouncements against uniform top-down approaches to resource management affect the way that copyright and patents seek to establish a uniform system across multiple areas of art, science and industry (musical recordings and paintings, pharmaceuticals and software)? And how can Ostrom's work on management of natural resources inform us about the management of resources such as spectrum or the Internet itself? These are all very interesting and important questions that need to be explored, and we are glad that this conference will help us understand these issues better.