

Why Academia Needs to Rediscover the Commons

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It’s been clear from the past two days that the university needs to more aggressively serve public needs and use digital platforms to create and share knowledge. I think it’s time to connect the dots among various free culture projects – free software, free culture, open access publishing, collaborative websites and archives, the whole Open Educational Resources movement -- and show how they are all variations on a theme – the *generative logic of the commons*.

Although not everyone may realize it, academia has traditionally been a commons. It is an institution that sits apart from the marketplace and the state. It is built upon an ethic of openness, sharing and collaboration. It is animated by intellectual curiosity and the search for truth, not the quest for maximum profit and capital accumulation.

Today I’d like to explain why academia should begin to think about itself more self-consciously as a commons. I think we should begin to take the commons more seriously as a governance paradigm, and not just as a breezy buzzword. The commons discourse is important because it can help us *name, reclaim and defend* the value-proposition of the university, one of the oldest institutional commons of our time.

The Academy as a Commons

Let’s start with academia as a sharing institution. Academia is best understood as a massive ecosystem of knowledge commons. [2] In the May 2010 issue of the

Cornell Law Review – which is entirely devoted to the cultural commons -- Professors Madison, Frischmann and Strandburg call the university a “constructed cultural commons.”¹ They write: “Constructing, distributing and perpetuating the world’s knowledge across centuries and continents is an innovation and creativity problem of the highest order...”

They proceed to explain how the university as an institution has historically addressed – and mostly solved – a wide variety of classic commons problems. [3] There is, for example:

--**The “incentive-to-produce problem.”** How to get people to generate basic knowledge?

--**A “resource coordination problem.”** How to get diverse parties to come together to create knowledge?

--**An “access-to-knowledge problem.”** How to store and manage knowledge?

--**A distribution problem.** How to distribute knowledge within basic-knowledge communities and to adjacent “applied knowledge” communities?

--**A “self-perpetuation problem.”** How to assure that the basic knowledge enterprise survives in some stable form over time?

[4] In truth, the university is a complex ecosystem of commons made up of many smaller-scale commons structures -- the graduate and undergraduate college, the school, the department, the library, the archive, the lecture hall, the seminar room.

Now, anyone who lives within academia knows that the language of property rights and cash transactions is inappropriate for talking about the life there. It does not adequately describe the relationships or ethic that animate academia.

Yes, the university must venture out into the market to buy things and pay professors and so forth. Yes, there are fights and back-biting and recrimination within the university. I do not propose the commons as a Utopia.

¹ Michael J. Madison, Brett M. Frischmann, Katherine J. Strandburg, “The University as Constructed Cultural Commons,” 30 *University of Washington Journal of Law & Policy*, pp. 365-____.

But at heart, the internal governance of the university and its disciplines is in fact commons-based. Everything requires ongoing relationships of trust and reciprocity. There is a presumption that knowledge should be openly shared and preserved. While there is of course competition and rivalry, there is also intense collaboration and cooperation. Instead of trying to maximize profits, the university's bottom line is an open search for truth.

The whole academic enterprise is really a special type of commons, a *gift economy*. People make “contributions” to the field – through research, lectures, collegiality, etc. – and those contributions are shared by the community with no expectation of direct personal reward beyond recognition and respect.

[5] Lewis Hyde – whom some of you may know as a Berkman Center Fellow – once wrote a book called *The Gift: Imagination and the Erotic Life of Property* – which has become something of a classic. The book is about creativity as a mystery that has a lot to do with gift-giving.

[6] (I must quickly give a plug for Lewis' new book, coming out in August. It's called *Common as Air: Revolution, Art and Ownership*, and it's a major work of historical reinterpretation of the American Founding Fathers – Jefferson, Madison, Franklin, among others -- and their commitment to culture as a commons.)

In any functioning gift economy, Hyde points out, there is one key imperative: [7] *The gift must always move*. Gifts can replenish themselves only if they are shared. That's why a commons can be so generative: people give of themselves and share without the certainty of a return. They are willing to contribute and improve the gift so long as the gift keeps circulating. But if the gift is privatized and hoarded – that is, if it is turned into private property or capital – it begins to lose its generative power, and dies. People stop sharing with each other. No one wants to be a sucker.

I think the lessons for academia and free culture are fairly obvious. These commons flourish only because the gift is always moving. Software code can be re-used, music can be copied and shared, videos can be mashed up – only because no one is allowed to take something private (or at least, private hoarding can occur only in limited, socially acceptable ways).

It bears noting that this sharing is not automatic. It is cultural constructed, as Madison et al. point out. There are specific *governance structures* and *legal regimes* and *social practices and norms* that facilitate collective sharing. We must *build* the commons every bit as much as we build the marketplace.

The other notable thing about a gift economy is how it nurtures a set of inner commitments that the market cannot. It cultivates ethical duties and a sense of affirmative responsibility to a whole set of community ideals: sharing, mutual support, open debate, the quest for truth.

This ideals are not just “a nice thing.” They constitute the value-proposition of the modern university as a commons. They are what make an academic commons so productive. As sociologist George Simmel has written, gratitude to a community “establishes the bonds of interaction for the reciprocity of service and return service, even where they are not guaranteed by external coercion.”

[8] Inner commitments are how the commons protects its value-proposition. People feel a responsibility to patrol the boundaries of the academic commons in order to root out free riders – the plagiarists, the people who keep secrets, the researchers who are sloppy and deceitful, the vultures who steal the community’s work and patent it.

We need to understand the commons in this deeper sense – as a functional paradigm for creating value, as a governance system, as a mode of “stewarding knowledge,” as a cultural ethic. These are the reasons why the university plays such a constructive role in modern society, with significant independence from markets.

Market Enclosures of the University

[9] The big story of the past thirty years, however, is the market enclosure of academia – the privatization and commodification of its knowledge and relationships.

1980 was a major turning point in the history of the modern university, at least in the United States. **[10]** It’s when the market enclosures of academia got really serious. 1980 was the year in which Ronald Reagan and Margaret Thatcher both took power, which inaugurated an aggressive market fundamentalism as a kind of global religion. The market was invariably seen as smarter and more effective than

government, and the commons was still seen as “tragedy” of over-exploited resources, thanks to Garrett Hardin’s famous 1968 essay.

The marketization of the academy has taken many forms – through copyright and patent law and through corporate partnerships that have compromised the independence of the university. In the U.S., universities have entered into lucrative deals that treat their own student bodies as captive audiences to be sold to corporate marketers, helping their students get addicted to alcohol and credit card debt.

1980 was a very bad year. That was when the U.S. Supreme Court approved the patenting of life forms in its famous *Chakrabarty* ruling. This opened the door for all sorts of dubious patents, such as ones that claim ownership in genes that cause breast cancer and treatments for the AIDS. Harvard University owns patents in the so-called “onco-mouse” used for laboratory research as well as patents on 23 synthetic nano-scale substitutes for elements of the Periodic Table.

Also in 1980, at the behest of large pharmaceutical, chemical and biotech companies, the U.S. Congress passed the so-called Bayh-Dole Act. This major policy change authorized universities to privatize publicly funded research by patenting it. It also encouraged companies to look to the university as a cheap source of R&D that it should colonize and corrupt to serve its own needs.

Most of the people in this room are familiar with the relentless expansion of copyright and trademark law in the 1990s and beyond. [11] No need to rehearse this depressing history, but let me quickly reference it here. [Slide names key intellectual property battles: Copyright Term Extension Act; Digital Millennium Copyright Act & DRM; Expansions of trademark (“dilution,” “tarnishment”); Shrinking fair use/fair dealing rights; Ownership of common words, letters & math equations; One-sided shrink-wrap / click-through licenses; Rabid copyright enforcement; New international lock-downs / Anti-Counterfeiting Trade Agreement.”

As the ethic of market fundamentalism took root, university administrators have intensified their search for ways to monetize scholarly and scientific research. They started tech transfer offices and courted large corporations to fund major research institutes and let them dictate the research priorities.

[12] Instead of studying organic farming techniques and integrated pest management, for example, a university biology department will find it more lucrative to take money from Monsanto and focus on genetically modified crops. Instead of studying GNU Linux and open source software, a university may steer its students toward proprietary software projects, thanks to generous research partnerships with Microsoft.

Big Pharma has systematically corrupted the integrity of medical education in the United States, as Dr. Marcia Angell, a lecturer at Harvard Medical School, as documented.² The leading teaching physicians enjoy all sorts of cozy consultancies and junkets paid for by pharmaceutical companies -- and not surprisingly, the virtues of drug-based therapies are emphasized over cheaper, sometimes better alternatives. In the U.S., nearly half of all continuing education for doctors is financed by drug companies. You can imagine the objectivity of their teaching.

[13] The enclosure of the academic commons quickly has had all sorts of cascading effects, each of which contributes to the deterioration of the commons.

As more patents proliferate into a “patent thicket,” it becomes harder for academics to study certain diseases – the so-called “tragedy of the anti-commons” effect. A notorious example is the patents on breast cancer genes that have scared off academic scientists from studying the disease lest they violate the gene patents. (A U.S. federal court recently overturned these patents, but the anti-commons problem remains.)

Another cascading effect is on transparency and timeliness of research. There are many, many cases of scientists who have lost their jobs or had their research suppressed because their work proved embarrassing to a corporate partner. Or new research findings are delayed so that the sponsoring company can first get a patent.

Yet another effect of market enclosure is an abject dependence on commercial journal publishers, who capture the copyright for research even though a long chain of others, including the university, have paid most of the costs. Their reward: at American universities, journal publishers jacked up subscription rates by 273 percent

² Marcia Angell, “Big Pharma, Bad Medicine, *Boston Review*, May/June 2010, at <http://bostonreview.net/BR35.3/angell.php>.

between 1986 and 2004. Many publishers prohibit professors from self-publishing their articles on their own websites.

As universities treat academic research as “property” to be bought and sold in the market, they tend to subvert the gift economy that is the distinctive value-proposition of the university.

I had an epiphany about this topic when I learned that USC once sent a “copyright compliance” letter to all incoming first-year students. [14] The letter outlines situations that likely constitute copyright infringement, and it warns of “serious financial and legal consequences” for any infringement. It even invokes the fearsome specter of the Recording Industry Association of America and the Motion Picture Association of America and their take-no-prisoners enforcement policies.

Shockingly, USC states that its purpose as a university is “to promote and foster the creation and lawful use of intellectual property.” That was news to me.

Now, don’t get me wrong. I believe in copyright law and in the obligation of colleges and universities to respect the law. But the USC statement struck me as an unseemly category mistake, if not a retreat from academia’s central purpose. Academia is about *the liberal sharing* of knowledge with other scholars, scientists and the public. Sharing is a necessary precondition for learning and research.

The USC letter made no mention a student’s fair use rights under copyright law and therefore their lawful ability to copy and share information under certain circumstances. The University was more interested in asserting its role as a copyright enforcement police for the entertainment industry -- a regrettable case of “cognitive capture,” one might say.

[15] The USC letter got me to thinking – Why aren’t all students sent a letter from their college or university that reads:

“As a member of an academic community, you have an affirmative duty to share your work with your peers and as widely as possible. That is a major responsibility of belonging to an academic commons. By making your work freely available, it acknowledges your debt to prior generations of scholars. It also improves contemporary academic research by subjecting it to the widest, most rigorous scrutiny. And will make it easier for future

scholars to develop their own discoveries and innovations, and so contribute to a more bountiful future.”

Once you start to regard knowledge as “property,” you go down a dangerous path. For example, the general counsel of the University of Texas once declared that student notes taken in lectures should be legally regarded as “derivative works” that belong to the professors. Do we really want to start parsing out what constitutes a derivative work within academia. I don’t think so.

If we all stand on the shoulders of giants, as Isaac Newton famously declared, and that is the basis for the university’s progress, why should academia so willingly embrace the proprietary norms of the entertainment industry? Academic knowledge should be regarded as the inalienable resource of a commons – knowledge that ultimately belongs to everyone.

Academia and the Digital Commons

It should be clear by now that there are many obvious affinities between the university and what I call the Commons Sector – the free culture populated by free software, Wikipedia Open CourseWare, Creative Commons-licensed blogs, video and music, open-access journals, the Neurocommons project, the various Science Commons projects, and all the rest.

All of these projects share the same ideals -- of inclusiveness, participation, transparency and open accountability. They have similar moral and social visions based on mutual trust and reciprocity. They are self-regulating systems for generating and managing knowledge that show that the commons can frequently out-compete – or perhaps more accurately, out-cooperate – the marketplace.

The problem is, this sprawling set of knowledge ecosystems are terribly under-theorized as a class of related phenomena. They are not recognized as being commons and constituting a Commons Sector. The commons remains an insurgent idea with little public recognition, notwithstanding Professor Elinor Ostrom’s Nobel Prize in Economics for her work in studying the management of common-pool resources.

I want to suggest that one powerful way to combat the market enclosure of academia – and the pressures for privatizing knowledge, secrecy in research, ethical corner-cutting and so on -- is to *develop the framework of the commons*. [18]

The commons can provide a new master narrative for describing the relatedness of the various free and Open Educational Resource projects. It can “connect the dots” among them and reveal the outlines of a new picture of shared interested – which in turn can help build a new federated identity for commoners.

The “free market” has a tidy and compelling story for explaining how private property rights and market exchange create material growth and human progress, and so on. But academia, by comparison, does not have the well-developed intellectual schema for explaining why its mode of knowledge-creation is so important. By rediscovering its roots as a moral and social economy that stands apart from the market, the university can develop a new critique for combating market enclosures and fortifying its core capacities.

Finally, the commons can provide a *lingua franca* for making common cause with the various tribes of free culture, which share so many of the university’s values: openness, sharing and collaboration. It’s absurd that the university, the oldest knowledge commons, is not more aggressively partnering with the worlds of free software and free culture.

Recognizing the university as a commons will help it find its voice and develop new strategic leadership and partnerships. By framing its mission as commons-based, academia can better understand why it must take the initiative in *building* and *maintaining* new commons...why it must support free software and Creative Commons licensing...why it must work more closely with the OER movement.

Absent a conceptualization of the commons, I fear that the university will have less inclination to resist the tender entreaties of market players. If administrators see the resources of the university chiefly as feedstock for the marketplace, they will have less self-awareness of their obligations to act as stewards of the knowledge commons.

[19] What’s missing is a proper *propioception* of the commons. “Proprioception” is a physiological term that means the capacity to sense one’s own body – its various parts, their relationship to each other, whether they are moving,

and so forth. Proprioception has been called “a third distinct sensory modality that provides feedback solely on the status of the body internally” (Wikipedia).

Many academics – especially administrators – have no proprioception of the university as a commons. This is largely because they have no vocabulary of the commons – no way to see, name and claim the commons. They therefore have no way to mentally organize all the phenomena that in fact constitute the academic commons. And so the kinship between the university and free software and free culture and the OER movement remains unclear.

I submit that the commons can serve the indispensable function of mentally organizing the diverse, eclectic enterprises that constitute The Commons Sector – and building bridges between this Sector and the university. There are, of course, many complications to overcome, but I believe that the commons paradigm can provide an indispensable role in fighting market enclosures and reinvigorating the core values of the university.

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