

# Indigenous Peoples and the Commons

Preston Hardison

December, 2006

I begin by offering a koan: Creative commons or commons injustice?

The commons movement is providing a much-needed antidote to the disease of hyper-enclosure of the public commons and the need to restore a balance between monopolies and the public good. But there are some troubling aspects of this movement as it stands. By failing to take into account the many different commons that exist, the commons movement may be creating some injustices of its own, in ways that parallel problems of enclosure. In particular, the commons movement inadequately takes into account the rights and aspirations of indigenous peoples and local communities.

With the proliferation of global networks and spread of a social networking ethic, public interest in common property ideas, or the “commons,” has grown enormously in the last decade. A turning point in this movement came around the time of Lawrence Lessig’s book, *The Future of Ideas*, in 2001. To help protect creative collaboration on the Internet, Lessig and others began to provide some analytical and legal frameworks for opposing the new enclosures of information commons.

Over the past five years, a number of other movements have arisen to challenge the hyper-privatization and hyper-propertization of knowledge. “Access to knowledge” (A2K) advocates seek to protect the right of access to essential medicines and educational literature. The open-access publishing movement seeks to overcome the proprietary control over knowledge by commercial journals. Environmentalists are trying to protect the atmosphere, the oceans and the polar regions as the “common heritage of humankind.” Various scientific disciplines and civil society organizations are trying to establish their own “knowledge commons” to manage and share the information they collectively produce. There are differences in the ways each organizes their respective commons, but taken together, they have enough in common to be put under one banner, the “commons movement.”

Conceptually, these various campaigns are a response to arguments first articulated by Garrett Hardin in his essay, “The Tragedy of the Commons” (1968), which advocated privatization as a response to free riders who misappropriate and overuse commonly held resources. Critics rightly decry Garrett Hardin for confusing open-access commons with socially regulated commons. The former is not really a commons,

and is incapable of preventing over-exploitation of a resource. A socially regulated commons, by contrast, is an eminently stable and sustainable management system.

In an unfortunate irony, the new commons movement now risks making a similar “category mistake” about the commons that could foster its own enclosure-like injustices. The mistake is in believing that the “cultural commons” is a monolithic, unitary concept for describing a set of shared resources collectively owned by everyone. Lawrence Lessig’s 2005 book *Free Culture* starts with a claim about “our culture” in which he writes:

This is not how our culture gets made... . A free culture supports and protects creators and innovators. It does this directly by granting intellectual property rights. But it does so indirectly by limiting the reach of those rights, to guarantee that follow-on creators and innovators remain as free as possible from the control of the past.

This kind of statement suggests that there are two dominant forces involved - those who would overly privatize “our culture” and the members of a common and global civil society seeking greater openness for all.

But anthropologists, sociologists, indigenous peoples and local communities have for some time pointed out that Hardin’s open-access commons is not opposed by a single type of commons, but a vast plurality of local commons. Each of these commons is distinctively local and has its own social norms and institutions. Each is inalienably tied to the land inhabited by a people, and shaped by their cosmological beliefs, spiritual beliefs and other fundamental aspects of their identity. There are over 6,000 unique indigenous peoples around the world, and many more local communities, each having its own unique set of beliefs.

The literature on the misappropriation and intellectual property rights (IPR) of indigenous knowledge often overlooks these complexities. This is partly because so much of this literature is written by non-indigenous academics, who carry a number of cultural and professional assumptions into the debates. They assume the primacy of the western intellectual property norms, and then describe indigenous knowledge in terms of that framework. This leaves some fundamental concepts of indigenous culture unexamined.

For example, western commentators often assume that all knowledge naturally gravitates to a state known as the “public domain,” and that this body of knowledge belongs to everyone under a legal principle known as the “common heritage of humankind.” Once this concept is accepted, the main issue is to how to strike the right balance between a highly controlled set of private property rights (copyrights and patents); a more or less global body of privately owned works that allow liberal use rights (e.g., works licensed under Creative Commons licenses); and the public domain that allows for free and unfettered use of knowledge.

Many indigenous representatives take issue with this default framework of discussion, however, because it does violence to some core elements of their culture. Indigenous peoples do not share the same concepts of property that have descended to westerners from medieval and Enlightenment philosophers. Their cultural beliefs are often rooted in their spirituality and their cosmologies, which the secular language of intellectual property law cannot represent. It is not as if they don’t have social norms for regulating the movement and use of knowledge; it’s just that their regulation tends to be based on such ideas as “guardianship” and “custodianship” and not property rights.

Indeed, indigenous cultures tend not to make property/non-property distinctions, and so the very concept of the “public domain” is alien. Indigenous knowledge may superficially resemble the public domain in the sharing of it within a community. But there are often social restrictions on who, if anyone, may use certain knowledge, and under what circumstances. Some knowledge is considered secret, sacred, and an inalienable part of their own cultural heritage from time immemorial into time unending.

For example, while family or ritual songs may be shared openly on appropriate occasions, that does not mean that others have the right to use them, transform them, or transmit any part of them to someone else. Misusing knowledge and medicinal plants, it is thought, can unleash powerful and malevolent spirits or spiritual forces that can act at a distance. Misuse can harm both the misappropriators and the communities from which the knowledge or resources was taken. Misappropriation and misuse can cause an imbalance in the forces of nature.

Conventional IPR law obviously has a very different sense of misappropriation and exploitation of knowledge. Its “remedies” and penalties simply do not address the cultural realities. But just because indigenous societies do not have Western-like proprietary concepts does not mean that their cultural knowledge should therefore be considered equivalent to the “public domain” – unregulated and open to all.

While IPR law has an aversion to making any arguments that rely on what are considered to be personal or metaphysical issues, the spiritual dimensions of knowledge may lie at the heart of an indigenous culture. Its people are concerned about protecting sacred and spiritual knowledge, and in defending their self-governance as defined under their own customary laws. Cultural security is vital. This cultural security, moreover, is holistically based. That's why indigenous knowledge cannot summarily be bought and sold, as western IPR law assumes.

Even the notion of the "public domain," which many Western progressives regard as an unalloyed good, is highly problematic. The public domain may prevent biotechnology firms from acquiring (temporary) monopolies over knowledge via patent law or copyrights. But this is only one kind misappropriation of indigenous knowledge. Putting knowledge into the public domain may actually make problems worse by inviting everyone to enjoy the right of non-monopolistic exploitation. But just because everyone can have access to the knowledge does not mean that there is no misappropriation. Like the early solution of "solving" pollution by building higher smokestacks, putting indigenous knowledge into the public domain may simply shift the "bio-piracy" problem to other areas.

The Creative Commons raises similar concerns as the public domain. Works licensed under Creative Commons licenses are not in the public domain, and should not be confused with it. The Creative Commons is as much a property regime as the strict copyrights it opposes. It is merely a liberal use copyright regime. But a person may use a Creative Commons license to take from the public domain and transform material to a degree sufficient to claim a copyright and so also, the right to control access and use. Unlike most copyright holders, however, the CC licensor generally allows noncommercial follow-on use and transformation. Commercial use is sometimes allowed, as long as the received knowledge is not privatized. Typically, third parties may make only non-commercial use of any derivative products.

When considering indigenous knowledge, the CC licenses beg the prior question – by what system of law was the indigenous knowledge incorporated into the commons license? By what reasoning can the creator claim the right to set the terms of the follow-on uses for traditional knowledge? This issue is particularly pressing when indigenous originators of the knowledge oppose the follow-on uses.

Such problems help explain why, from the perspective of many indigenous cultures, there are enormous perils in working within the intellectual framework of IPR law. There are also tensions between indigenous representatives and the commons movement at such international venues as the World Intellectual Property Organization (WIPO), the Convention on Biological Diversity (CBD), the World Trade Organization (WTO) and the United Nations Permanent Forum on Indigenous Issues (UNFPII).

As an example, I often cite the American Association for the Academy of Science's Traditional Ecological Knowledge \* Prior Arts Database (TEK\*PAD). This project has received many positive reviews over the Internet, but it should be noted that most if not all of this support comes from non-indigenous reviewers. (I've not seen any indigenous reviews, but if anyone else has, let me know.) The AAAS Human Rights Division initiated this effort, with funding from the Center for the Public Domain. The project implementers have the best of intentions, which are commendable. TEK\*PAD is intended to address a serious problem facing indigenous peoples today – the practice by some biotechnology corporations of patenting traditional knowledge, remedies, medicinal plants and their derivatives, and genetic materials taken from indigenous peoples themselves. In patent law, if you can demonstrate that a process or product is already known and in the public domain (as documented by “prior art”), then the process or product cannot be patented. The AAAS project has stitched together several independent databases so that they can be searched simultaneously and display their output in a common format. There are over 40,000 records with ethnobotanical details available to the public.

There are a number of troubling aspects to this project. It has been funded from the Center for the Public Domain, so their interest in this is clear – to “keep” this knowledge into the public domain. For its part, the AAAS team is part of an organization that, at least on paper, seeks to promote science in the public interest and open access to knowledge. In an accompanying guidebook, the implementers of the project are quite clear in stating that if indigenous peoples want to protect their knowledge, they need to keep it secret. If it escapes beyond the boundaries of a community, it becomes a part of the public domain, available to all.

Although making this knowledge available out of the goodness of their hearts, the providers of the databases claim ownership in the database compilations they have assembled from knowledge they consider “in the public domain.” There have been no indigenous groups advising the project, and few or no consultations with North American indigenous communities from which the information was compiled. The only consultants listed were non-indigenous, and they came from Canada, the United Kingdom and India.

Bringing indigenous representatives into discussions about the commons and IPR is vital. They are generally accountable to their communities and their local leaders, while academics are rarely held accountable for any failures of their proposed policy experiments. This is not to say that the academic input is not appreciated or helpful. But if the commons movement is to remain vibrant and just, it needs to recognize and respect the values embedded in local commons of indigenous peoples. What better way to do this than inviting indigenous representatives to participate?

\*\*\*

There probably won't be a "one-size-fits-all" solution to traditional knowledge issues. Different regions have far different histories and traditions, so what is customary and regarded as "fair" in one region may be very different than in others. Wide sharing of general spiritual traditions may be acceptable in some societies but regarded as misappropriation in others. Some indigenous peoples have many secret cults, clans and practices. Others do not. What may work in India or the Philippines, may not work in the United States or Canada. Genetic resources related to food and agriculture may need to be treated differently than wild genetic resources. Folklore may be different from sacred ceremonies.

Even where there may not be a strongly religious, spiritual or customary reason for controlling the flow of knowledge, there may be social rules regulating knowledge (although, at least in my experience, even common daily activities in indigenous society tend to have a strong spiritual dimension to them). Many of the sharing regimes rely on reciprocity and "trickle-down" or "stream-across" benefits. These may be appropriate, for example, where knowledge is used to improve a community's livelihood, food, health, climate or environmental security.

But such sharing is problematic in many places, such as the Pacific Northwest, where the tribes are surrounded by a non-indigenous society in which misappropriation is common. Elders, who have treaty-guaranteed reserved rights to harvest from designated federal lands now often come to their areas to find every berry picked, shrubs cut down, and trees girdled and dying, stripped of their bark.

Indigenous peoples are highly concerned about the misappropriation of their knowledge and resources, especially when Big Pharma appropriates them using patents and copyrights. But indigenous peoples are not just concerned about their knowledge being "appropriated" for the public domain.

After all, what threatens an indigenous culture most – unjust enrichment by corporations who take their knowledge without authorization, or the inability of indigenous societies to maintain access to their traditional foods and medicines? The enclosure of indigenous knowledge via patents and copyrights is morally objectionable. But so is the lack of respect for customary law, tribal beliefs, treaty rights and collective human rights – and their abridgment may be equally harmful.

There are other questions that deserve attention: Is it right to expropriate knowledge from a local commons for the good of a global commons? What claims does a global civil society have on the knowledge and cultural heritage of indigenous cultures?

The global commons movements need to address these serious issues. They should reach out not just to the handful of indigenous leaders who have made it onto the international stage, but to the individual indigenous communities, tribes and first nations themselves to understand the aspirations they have for their knowledge and cultural heritage. It is heartening to learn that the Creative Commons is seeking to open up just such a dialogue.

Many indigenous peoples support efforts to build a global commons, and willingly share some of their worldviews, arts, stories, music and practices. They are proud of their heritage, and often would like to foster peace and understanding among all peoples. Their healers often have a sacred duty to heal, and may share some of their knowledge to help others.

But this should not be assumed. Nor should it be assumed that any knowledge that has “leaked” out beyond indigenous communities should be considered a part of the public domain. If indigenous and local communities make the express decision to share knowledge in the public domain, I have absolutely no objections. But if they wish to have the secrecy, privacy or sacredness of their knowledge and heritage respected and left to themselves, then that should be honored. And it doesn’t take an IPR law to do this.

Preston Hardison is a natural resources and treaty rights policy analyst for the Tulalip Tribes of Washington, although the views expressed here are his own and do not necessarily reflect the views of the Tulalip Tribes or any other indigenous peoples. He was a fellow of EcoNet from 1993-1997, and has worked on several initiatives since the early 1990s to establish commons-based biodiversity information networks. He has worked on access and benefit sharing and other indigenous issues at the Convention on Biological Diversity since 1996, and for the past six years has represented the Tulalip Tribes at the CBD and WIPO. He is currently working on a tribal intellectual property code for the Tulalip Tribes, including an aboriginal copyright model. He has recently established a prototype database on traditional knowledge, livelihood, biodiversity and common property information issues at: [www.culturalstories.net](http://www.culturalstories.net). He lives in Seattle, Washington.