

CHAPTER 10

Conclusion

10.1. The Moral Dimension of the Intellectual Commons

This book asserts that the intellectual commons are of academic and, generally, social interest, because they have the potential to (i) increase access to information, knowledge and culture, (ii) empower individual creators and productive communities, (iii) enhance the quantity and quality of intellectual production, and (iv) democratise creativity and innovation. Therefore, it is argued that the intellectual commons ought to be regulated in ways that accommodate the potential mentioned above. The inherent values and net social benefit of aspects related to personhood, work, value and community within the sphere of the intellectual commons morally justify the enactment of a distinct body of law with the purpose of protecting and promoting commons-based peer production.

Throughout the book, the intellectual commons have been conceived as productive self-governed communities that generate and pool together intangible resources in conditions of relative equipotency. They consist of three main elements, which more or less refer to the social practice of pooling a resource, the social cooperation of productive activity among peers and, finally, a community with a collective process governing the production and management of the resource (Hess and Ostrom 2007a, 6; Caffentzis 2008; De Angelis 2009; Bollier and Helfrich 2015). Their main difference from the institutions of the state and the commodity market is that social power in the commons is not separated but, rather, remains immanent within the body of the community and is guarded and sustained as such.

Owing to their determining elements stated above, the intellectual commons exhibit propensities with a positive potential for society, which therefore bear ethical substance and are in need of protection and advancement under the

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auspices of law. The relation of such tendencies and manifestations with morality is exhibited in the table below.

Tendencies	Manifestations	Moral dimensions
Sharing	Sharing as cultural value-producing practice	No spoilage of the commons Counter-enclosure
Collaboration	Collaboration as economic value-producing practice	Joint authorship Collective work Inherent sociality of intellectual work Efficiency in production Quality in production Superiority of the mode of production
Open access	Use value as form of economic value	Work/commons mix Static efficiency Dynamic efficiency
Circular reciprocity	Mutual aid as form of cultural value	Infrastructure as a commons Efficient allocation
Self-empowerment	Self-empowerment as form of political value	No harm to others Freedom of science and culture Human dignity Personal autonomy Self-development Accommodation of multiple incentives
Self-governance	Self-governance as form of political value flow	Social justice Fairness Democratisation of intellectual production
Collective empowerment	Collective empowerment as form of political value redistribution	Counter-domination Collective empowerment Freedom of expression

Table 10.1: The tendencies, manifestations and moral dimensions of the intellectual commons.

Source: Author

The theories of the intellectual commons provide substantial justifications for the promotion of commons-oriented institutions in contemporary societies. Nevertheless, their perspectives as to the potential of the intellectual commons and capacity to generate progressive social change diverge. Rational choice theories provide consequentialist justifications of the intellectual commons criteria, by evaluating the efficiency of commons-oriented institutions for social utility. According to such theories, where the institutions of the state and the

commodity market are incapable of producing positive outcomes, commons-based practices ought to be established, protected and promoted by legislators and policymakers. As such, rational choice theories provide a theoretical framework for the evaluation of the intellectual commons in relation to their potential for social change, which limits the latter in a complementary position to intellectual property-enabled markets. Given the dominance of the capitalist mode of intellectual production, distribution and consumption, the vast asymmetries of power this dominance entails and its contentious relationship with the intellectual commons, this supposed complementarity is inevitably translated in reality as a patch to capital.

On the other hand, neoliberal theories justify the morality of commons-based peer production from a utilitarian perspective. Such theories consider the intellectual commons to be valuable owing to their potential for capital accumulation. Neoliberal theorists claim that commons-based practices tend to produce significant amounts of social value, are capable of resolving market failures in the management of strategic resources and, in certain respects, constitute a superior mode for the organisation of the social intellect in the contemporary techno-social context. The main objective of this approach is to unearth possible ways through which corporations can capture the immense social value that lies dormant within the intellectual commons, transform communally managed resources into commodities and, ultimately, enhance business profitability. On the basis of their potential for the generation of private profit, neoliberal thinkers claim that a relation of mutually beneficial co-existence between commodity markets and the intellectual commons is not only an attainable but also a desirable business and policy choice, on the grounds that it benefits social well-being. Their advocacy for such a choice thus opens the discourse for a more balanced intellectual property regime, which aims to reconstruct capitalist accumulation in knowledge-based economic sectors along rational lines. It is in this context that neoliberal thinkers consider that the commons could act as fix to capital and give birth to a more balanced economy, which would combine the best elements of both worlds. In Peter Barnes's words, '[t]he essence [...] is to fix capitalism's operating system by adding a commons sector to balance the corporate sector. The new sector [...] would offset the corporate sector's negative externalities with positive externalities of comparable magnitude' (Barnes 2006, 65–66).

In contradistinction, social democratic theories evaluate commons-based peer production as important in itself, because it promotes collective aims, such as democratic participation, human community, sociality and efficiency in intellectual production, distribution and sharing, without burdening individual freedom. As social democratic theorists see it, the intellectual commons have the potential to rebalance power in the networked information environment between civil society on the one hand and government and corporate

power on the other, while, at the same time, offering the opportunity for a mutually beneficial relationship with the forces of the market by ‘adding value’ to one another (Bollier 2008, 251). In addition, political economists within the social democratic tradition hold that the circulation of value under the existing power co-relations between capital and the intellectual commons operate to the detriment of the latter. Therefore, such thinkers believe that a productive ecosystem between intellectual commons communities and for-profit corporations is only attainable through deliberate state policies inclined to circulate value back to the sphere of the intellectual commons and shift power to the hands of civil society (Kostakis and Bauwens 2014). For these reasons, social democratic theorists advocate radical institutional and legal reforms within the state apparatus, which will render its transformation from the withering welfare state form into a new form of state in partnership with the communities of the intellectual commons.

Accordingly, critical theories hold that commons-based practices are morally justified on political grounds owing to their potential for the displacement of forms of domination by social relations oriented towards freedom, equality and collective empowerment. Critical theorists examine the commons within the wider context of social antagonism as unified practices without the confines of separate categories, such as intellectual, social or material. According to the critical approach, the interrelation between the commons and capital is conceived as a dynamic process of both domination and resistance between the conflicting forces of commodification and commonification. Commencing from an understanding of the labour/capital antagonism as inherently irreconcilable, critical intellectuals reject any possibilities for the ‘harmonious’ interrelation between the commons and capital and, instead, project two possible states of sublation between the two. Whereas in the one case the commons are co-opted and subsumed under capital, such theorists favour the alternative prospect, in which the forces of commonification openly contend capitalist relations of production and proceed to the socialisation of the economy and the polity. Eventually, the centre of gravity from which social change is ultimately generated becomes not the state but rather the communities of the commons and the wider movements for social emancipation. When forces of commonification at the social base reach a certain stage of development, the revolutionary act of force shall give birth to the new commons-based society.

The interrelation of the intellectual commons with existing institutional arrangements, especially the dominant institutions of the state and commodity markets and the dominant social power of capital, as viewed from each of the four theoretical perspectives mentioned above is summarised in Table 10.2.

Historically, the cultural commons have evolved in strong interrelation with the law, mutually shaping and being shaped by one another. In

	Potential	Relation	Justification
Rational choice theories	Complement to markets and the state	Patch to capital	Consequentialist
Neoliberal theories	Component of capital accumulation	Fix to capital	Utilitarian
Social democratic theories	Substitute to the welfare state	Synergy with capital	Deontological
Critical theories	Non-domination	Alternative to capital	Political

Table 10.2: The potential of the intellectual commons and their interrelation with capital in literature.

Source: Author

this agonistic narrative, the intellectual commons and the law have been determined by the battles between owners and commoners over counter-vailing modes of sharing and enclosure, collaboration and competition, self-governance and domination. Art and culture have been terrains of contestation between forces of commonification and commodification in interaction with institutions, norms and law.

Creativity and sociality are essential aspects of the human being, manifested in patterns of sharing and modes of collaborative artistic creation in the historical periods examined by the book. Yet, these human characteristics have been determined to a large extent by the dominant ways that intellectual production, distribution and consumption were organised. In modernity and in our ages, socialised creativity and inventiveness have been framed and organised according to the rule of capital, which institutionalises the enclosure and commodification of information, knowledge and culture in order to safeguard, circulate and accumulate its social power. The conclusion drawn from this historical analysis is that legal institutions from the Renaissance to our ages have systematically disregarded the prominent role of sharing and collaboration in art and culture, thus suppressing the social potential of the intellectual commons, instead of accommodating it.

The current surge of the intellectual commons is the outcome of an evolutionary process, which ought to be taken into account by legislators and policymakers. This book offers a historical narrative of the regulation of art and culture from the standpoint of the intellectual commons. This narrative reveals the role of regulation in framing practices of sharing and collaboration among creators. Since the Renaissance and throughout modernity, communal practices of producing and sharing culture have been systematically marginalised by property-oriented systems of law. In the present historical conjuncture, the intellectual commons acquire again a central role in cultural production,

distribution and consumption. In light of the lessons of the past, the law ought to recognise and accommodate commons-based practices, instead of suppressing their potential by framing them as incompatible with the current framework of intellectual property law.

The social research in this book provides empirical evidence about the existence of distinct sequences and circuits of social value circulating within and beyond the communities of the intellectual commons. The evidence further shows that these commons-based value circuits come into specific interrelations with monetary value circuits, resulting in value crises in the intellectual commons. In each social dimension, the circuits of commons-based value take two forms, i.e. one form in contestation with capitalist forms of value and one form co-opted by capitalist forms of value. Taking the foregoing into account, the circuits of commons-based value generally take the form of the following formulae shown in Table 10.3 (below).

Dimensions	Circuits	Formulae
Economic	Contested	Collaboration → Use value → Gift → Common pool resource → Gift (CL→UV→G→CPR→G)
	Co-opted	Competition → Exchange value → Commodity → Private appropriation → Commodity (CP→EV→C→PA→C)
Stricto sensu social	Contested	Productive contribution → Merit → Trust → Communal cohesion → Social cohesion (PP→MR→T→CC→SC)
	Co-opted	Financial contribution → Control of infrastructure → Monetary exchange → Social capital → No redistribution (F→MR→M→SCa→SC/N)
Cultural	Contested	Sharing → Mutual aid → Shared ethos → Communal identity → Mutuality ethics (S→MA→SE→CI→ME)
	Co-opted	N/A
Political	Contested	Participation → Self-empowerment → Collective empowerment → Community self-governance → Collective empowerment (P→SE→CE→CSG→CE)
	Co-opted	Deliberation → Self-empowerment → Collective empowerment → No accumulation → No redistribution (D→SE→CE)

Table 10.3: The formulae of commons-based value circulation.

Source: Author

Value flows show that the intellectual commons produce and redistribute to society immense amounts of value. In addition, the circuits of commons-based

value constitute the intellectual commons as value spheres interdependent and, yet, distinct from the dominant value system of commodity markets. Interdependence is manifested in the penetration of intellectual commons communities by the universality of money as the general equivalent of social value. Transvestment of value between these two worlds is thus unilateral. Most forms of social value generated by commons-based practices are generally capable of being transformed into money and commodities, whereas the opposite conversion has not been observed in practice. Given that commodity markets are the dominant system of value circulation in our societies, the unilateral flow of social value from the communities of the intellectual commons towards society without the existence of any counter-balancing flows to compensate for the expenditure of productive communal activity leads to value crises. Such crises exert significant pressure upon commons-based practices and direct communities towards forms of commodification. Hence, depending on the quantity and quality of their penetration by monetary values, the communities of the intellectual commons evolve either in contested or co-opted form vis-à-vis the power of capital.

Rather than being mere economic mechanisms for the allocation of resources, commodity markets have strong ethical repercussions, since they are capable of distributing rewards and retributions in the form of monetary remuneration or monetary scarcity to individuals and communities. In the framework of commodity market dominance, lack of transvestment renders commons-based values invisible, monetary scarcity obstructs the reproduction of intellectual commons communities, and value crises discredit the intellectual commons as social practices worth protecting and promoting. Given that, as already stated, the intellectual commons yield enormous value to society, their artificial devaluation and consequent displacement from affirmative policy choices is a detrimental social construct accruing from the ideological fixation on the commodity market as the exclusive and most efficient human mechanism for the allocation of resources and values. The need to sustain commons-based value spheres thus justifies the enactment of proactive statutory rules in favour of the intellectual commons.

10.2. The Justification of an Intellectual Commons Law

The overall analysis of this book supports the general ethical and political argument that the intellectual commons are a social regime for the regulation of intellectual production, distribution and consumption, which bears moral significance.

At a meta-level of analysis, the moral justification of the intellectual commons in the book evolves from the ontological to the normative level of analysis in spiral form. In particular, the ethical argumentation of the book commences with ontological, epistemological and historical analyses, pro-

ceeds with social research and concludes with the normative perspective of the intellectual commons. The latter is constructed through a back-and-forth movement between morally significant aspects of the intellectual commons discovered at previous levels of analysis and ethical judgements stipulated in the ninth, normative, chapter. This cycle of moral justification is exhibited in the figure below:

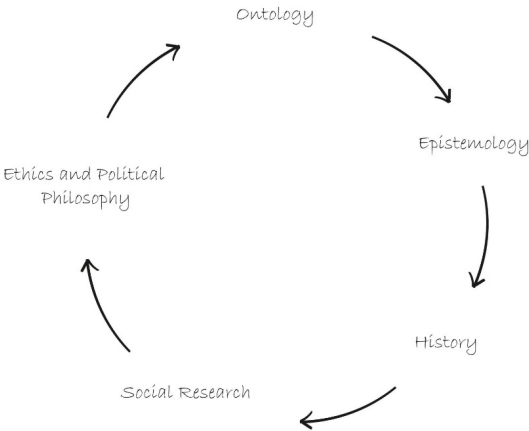


Figure 10.1: The cycle of moral justification.
Source: Author

In each level of analysis, the moral justification of the intellectual commons is conducted by adhering to the critical methodological choices stated below:

Level of analysis	Methodology
Ontological	Processual ontology
Epistemological	Critical theory
Historical	Critical history of law
Empirical	Critical realism and critical political economy
Ethical and political	Critical jurisprudence

Table 10.4: The methodology of moral justification.
Source: Author

The social potential of the intellectual commons is the overarching basis for their moral significance. Based on their potential, the intellectual commons are evaluated not on what they currently are but on what they are capable

of becoming. The concept of the social potential is capable of encompassing deontological, consequentialist and political modes of moral justification in an all-inclusive manner. Hence, it renders possible the formulation of a holistic normative model of the intellectual commons, which benefits from all the foregoing modes of justification. Along these lines, the social potential of the intellectual commons constitutes the nexus for the connection of the research results of all levels of analysis featured in the study.

Level of analysis	Actuality of the intellectual commons	Potentiality of the intellectual commons
Ontological	Characteristics of commons-based peer production ⁷⁶	Tendencies of commonification ⁷⁷
Epistemological	<ul style="list-style-type: none"> • Addressing state and market failure • Increasing private profit • Democratising intellectual production • The real movement of communism within the current capitalist formation 	<ul style="list-style-type: none"> • Complement to markets and the state • Component of capital accumulation • Partnership with the state • Alternative to capital
Historical	Alternative mode of contemporary intellectual production, distribution and consumption suppressed by intellectual property law	Main mode of intellectual production, distribution and consumption promoted by intellectual commons law
Empirical	<ul style="list-style-type: none"> • Contested and co-opted circuits of commons-based value • Value crises within the sphere of the intellectual commons 	<ul style="list-style-type: none"> • Contested circuits of commons-based value • Transvestment of monetary into commons-based value
Ethical and political	Protection by the law through: <ul style="list-style-type: none"> • The principle of the exceptional nature of exclusivity • The principle of the lawfulness of exclusivity • The principle of the proportionality of exclusivity • The principle of the temporality of exclusivity • Statutory rules for the protection of the public domain 	Promotion by the law through: <ul style="list-style-type: none"> • The principle of the freedom of non-commercial creativity and innovation • Statutory rules for the expansion of the public domain • Extensive rights to access, work upon and transform information, knowledge and culture for non-commercial purposes

Table 10.5: The social potential of the intellectual commons.

Source: Author

The contemporary formations of the intellectual commons feature elements of inherent moral value, produce outcomes of net social benefit and underpin freedom, justice and democracy in ways that justify their protection by the law. The aspects of commons-based personhood, work, value and community are realised in social practices with characteristics worthy of protection and promotion by an independent body of statutory rules.

Whereas the sets of arguments in relation to commons-based value follow a utilitarian line of justification, arguments related to personhood and work in the intellectual commons are primarily of a deontological nature. Finally, arguments related to communal practices within the intellectual commons highlight the political significance of the commons-based production, distribution and consumption of intangible resources. In combination, the foregoing argumentation forms a holistic normative model for the moral justification of the intellectual commons as a social totality.

Aspects	Characteristics	Justification
Personhood	Freedom of science and culture Human dignity Personal autonomy Self-development	Deontological
Work	Work/commons mix Joint authorship Collective work Inherent sociality of intellectual work No harm to others No spoilage of the commons	Deontological
Value	Static efficiency Dynamic efficiency Infrastructure as a commons Efficiency in production Quality in production Superiority of the mode of production Accommodation of multiple incentives Efficient allocation	Utilitarian
Community	Counter-enclosure Counter-domination Collective empowerment Social justice Fairness Freedom of expression Democratisation of intellectual production	Political

Table 10.6: The justification of an intellectual commons law.

Source: Author

In order to address the morality of the intellectual commons, the central argument of the book is that an intellectual commons law ought to be adopted in relative independence from intellectual property law. Such a field of law should embody statutory rules for the protection and promotion of the intellectual commons and effectively construct a non-commercial sphere of collaborative creativity and innovation in parallel to intellectual property-enabled commodity markets. The fundamentals of such a body of law would be as follows:

- The crucial first step is the reconstitution of the public domain as a common space of sharing, collaboration, innovation, and freedom of expression through policies for its protection, expansion and enrichment.
- Secondly, a commons-oriented legal framework ought to unconditionally recognise and protect the creative practices within commons-based peer production and guarantee the characteristics of societal constitutionalism encountered in intellectual commons communities.
- Finally, commons-oriented legal institutions ought to treat the freedom to take part in science and culture as the rule to the exception of private rights of exclusivity upon intellectual works, by introducing sets of extensive rights to access, work upon and transform information, knowledge and culture for non-commercial purposes.

10.3. Concluding Remarks and Political Implications

In contemporary societies, the powers of the social intellect are dominated by the actuality of capital, commodity markets of intangible goods, and intellectual property law. The effective enclosure and private ownership of intangible resources renders possible the imposition of commodity markets as the primal modes of regulation in our networked information economy. Intellectual property law conjoins the intellectual commons and the commodity markets into a unity of valorisation under the rule of capital. The ratio legis of intellectual property law reveals a delicate balance between private rights and the common interest. In particular, intellectual property law purports to strike an appropriate balance between the interests of authors, inventors or other right-holders in the exploitation of exclusive rights and society's opposing interest in the open access and free use of intellectual resources. The limited duration and the exceptions and limitations to intellectual property rights permit the incremental production of intangible resources. The doctrine of the public domain and the divide between exclusive rights and unprotected subject matter, such as ideas, discoveries and data, constitute a form of recognition of the intellectual commons by the law, albeit reduced to act as component to capital accumulation. From such a perspective, intellectual property law can be characterised as a semi-property/semi-commons institution, based on the recognition of both

exclusive private rights and privileges of shared or common use upon intangible resources (Heverly 2003; Smith 2007).⁷⁸ Nevertheless, such commons-oriented institutional characteristics within the body of intellectual property law do not seem to provide a sufficient counterweight to its inherently property-oriented essence. The semi-property prevails over the semi-commons element.

On the other hand, the intellectual commons are a non-legal concept referring to any communal regime of shared use of intangible resources, which constructs common spaces of collective creativity and innovation. In contradistinction to the power of exclusion conferred by the institution of property, institutions of the intellectual commons deal with the management and equitable allocation of rights of usage over resources. In these institutional arrangements, the sharing of intangible resources among members of a community or among all members of society displaces private or state enclosure and communal decision-making displaces the accumulation of political power at singular points of agency. The concept of the intellectual commons is thus broad enough to include both the open access regime of the public domain and spaces of regulated use encountered in 'copyleft' licensing regimes. Rather than proposing reforms within the property-oriented framework of contemporary expansive intellectual property laws, the current book advances a normative line of argumentation in favour of an independent body of law for the regulation of the intellectual commons, i.e. both the open access commons of the public domain and any other type of regime oriented towards the shared use of intellectual works. The appropriate protection and promotion of these two sectors of our intellectual commonwealth aspires to construct a vibrant non-commercial zone of creativity and innovation in parallel to intellectual property-enabled commodity markets of intellectual works.

The compatibility of an intellectual commons law with contemporary intellectual property laws provides a hard reality-check for commons-oriented policymakers. Transnational and international intellectual property law treaties form a sophisticated framework of legal rules, which prevail over contradicting national laws. This framework entrenches the property-oriented regulation of intellectual production, distribution and consumption at the global level and leaves space for reform only on the sidelines of intellectual property law, let alone radical changes such as the enactment of independent commons-oriented rules. Hence, the ambitious aim for the establishment of an intellectual commons law inevitably entails shifts in transnational correlations of power, which render possible the reform of intellectual property laws towards their becoming compatible with the construction of the non-commercial sphere of the intellectual commons.

10.4. The Way Forward

This study builds upon previous theoretical and empirical work on the reform of intellectual property law and the protection of the public domain.⁷⁹ At the same

time, it calls attention to the limitations of intellectual property law reformism, which remains confined within the property-oriented legal framework of the current condition. As an alternative, the current analysis supports the radicalisation of intellectual property law reformism through a shift in focus of the relevant discourse towards the intellectual commons as an independent source of moral value and object of law worth being affirmatively protected and promoted.

Of course, the approach described above has its own limitations. Debating on the morality of an imaginary body of law still to come in force in any jurisdiction in the world runs the risk of becoming wishful thinking, given the limited penetration of commons-oriented policymaking and the negative correlations of power in the relevant centres of decision-making. Yet, this study does not attempt to reinvent the wheel in the relevant field of law. Rather, its much more modest purpose is to reimagine the commons-based elements already present within intellectual property law, such as the public domain and the exceptions and limitations of exclusive rights, and reconstruct them in a novel and systematic way into an independent commons-oriented body of law with its own moral justification, general principles, *ratio legis*, doctrines of law and jurisprudence.

Given the immense extent of such a project, this study cannot but end far from fully describing what the law of the intellectual commons ought to look like. Future legal research ought to focus on the following fields of commons-oriented policymaking, as these have been stressed both in this study and in the relevant literature:

- A. The affirmative recognition of the public domain by positive law as a common space for the exercise of the freedom of science and culture, encompassing all uses upon intellectual works not restricted by exclusive rights (Benkler 1999, 361).
- B. The expansive definition of the public domain by positive law, encompassing all categories of intangible resources and all types of social uses, which are important for intellectual production, social justice and democracy owing to their infrastructural nature.
- C. The protection and realisation of the freedom of the public to access and use the public domain, both as negative liberty and as social right vis-à-vis the state to ensure to everyone an adequate minimum of such access and use.
- D. The specification of the freedom of science and culture in positive law through the enactment of new private rights to access, work upon and transform protected intellectual works to create derivative or new intellectual works for purposes of non-commercial creativity and innovation within and beyond the limitations of international intellectual property law treaties.
- E. The institutionalisation of the balancing act between, on the one hand, the freedom to take part in science and culture and, on the other hand,

exclusive rights engraved in intellectual property laws, through the enactment of appropriate principles of law and institutional mechanisms, which will guarantee the exceptional nature of enclosures upon intangible resources.

- F. The principled reform of intellectual property laws at the national and international level on the grounds of striking a fair balance and averting conflicts between the fundamental freedom of the public to take part in science and culture, as specified in affirmative statutory rules of an intellectual commons law, and the human rights of authors to their works.

Taking the foregoing into account, it is evident that a significant amount of further work is required to specify legal provisions compatible with existing international intellectual property law treaties and ready to be adopted by national parliaments and international organisations in the direction of an intellectual commons law. The role of this book is merely to spark off the relevant debate.