

"Towards a positive recognition of commons-based research and innovation in international norms"¹

by Philippe Aigrain

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It is essential that information and knowledge, as well as technologies allowing access to them, do not remain mere marketable goods subject solely to the logic of profit. If that were the case, then information society would lose all possibility of defining knowledge as a common global good belonging to all and benefiting all, its free exchange and access creating the necessary conditions for a truly multicultural world without enforcing the hegemony of any one culture over another. In order to make our civilisation humane, we also require non-monetary forms of trade as well as values that would serve as a foundation to new relations between people, social groups and countries. Access to and exchange of knowledge and information must become free, meaning that these goods must also be made broadly available free of charge. Only then would we be able to truly speak of the civilisational mission of information technologies, knowledge and information. Making them available to all also signifies the democratisation of information, enabling an understanding of and a responsibility for cultural and civilisational differences in a globalised world that is not homogeneous but rather one where we increasingly come across differences outlining ourselves as different from others, seeing fellow men as personalities, as citizens of a different system of knowledge and values, of a different culture.

Milan Kucan, former President of Slovenija, Co-President of the Collegium International of Ethics, Science and Politics, march 2004.

In the recent years, a powerful trend has developed internationally of creating voluntarily knowledge that can freely exchanged and used. This was in part a reaction against the extension of restrictive property-like rights. But it also built up as a natural possibility in the information era where knowledge and creations can easily be represented in information, and can be created, processed and exchanged using information and communication technology. As soon as information technology and information representations for knowledge in fields such as biology were born, researchers and users have started informally creating and exchanging information in a way that prefigured today's voluntary information and knowledge commons. From John von Neumann to John Sulston, from Donald Knuth to the creators of the Internet and the Web, it seemed simply the right thing to do to create and share knowledge in the information era.

Those willing to create information and knowledge commons did not have an existing legal concept which they could simply apply to the corresponding artefacts. They had to simulate it using contractual arrangements or permission notices. In parallel, those who wanted to make possible some public interest usage of copyrighted works or patented matter without going to complex or often impossible negotiations and transactions had

1 Talk at the session *Global IP Norms: Implications for Education & Research* of the seminar *New Tools for the Dissemination of Knowledge and the Promotion of Innovation and Creativity: global developments and regional Challenges*, organised at the Bibliotheca Alexandrina in Alexandria, Egypt.
<http://www.bibalex.org/a2k>.

recourse to exceptions and limitations provisions in laws and treaties. Remarkable achievements have been done under both the licensing and exceptions/limitations mechanisms. They range from free software to open science, from freely accessible publications to publicly accessible libraries and legal deposit. However, generalising these achievements to other fields, and making them possible in different areas of the world would be greatly facilitated by a direct recognition of the "voluntary commons" in international norms. Do not mistake me, I don't think that such a recognition would be a replacement for the existing IPR titles. It is a different layer of norms, and it can not be designed on the same basis, by copying the property-like approaches.

This recognition would affirm that knowledge, information and all types of information tools that are given a commons status are a common wealth of humanity and a great asset for the future advancement of knowledge. To these commons the public in all countries has positive rights of contribution and usage, users have responsibilities, and norm setters have duties (for instance any extension of IP titles or change in execution mechanisms must be assessed taking in account their effects on the commons before they can be enacted). The right of contribution seems obvious, but it is important to recall it because many indirect obstacles can arise in its path, in particular if one grants such monopolies on the usage of components of knowledge that there is hardly one piece of creative or innovative work that does not depend on obtaining and paying the right to use these components. It is also important to state an explicit right to contribute to the commons to remind ourselves that this right is deeply rooted in the individual freedom of authors and creators, and thus belongs at the core of the tradition that gave us articles 19 and 27 of the Universal Declaration of Human Rights. Moral rights of authors such as attribution were recognized to empower individuals, and it would be a perverse irony if some would today use them to deprive authors from the ability to contribute their works to humanity. Rights of usage for the information commons have to be universal, as the reasons that hold in the realm of physical commons (such as grazing land) for restricting the usage to a given community no longer hold in the non-rival field of information². Finally, for artefacts such as software, geographical information or some types of biological information that are highly interdependent, and thus can be appropriated from the commons by relatively minor extensions or simply because a company has an excessive power in one market, the

2 This may give rise to complex issues when one tries to ensure a fair return for the communities who have maintained and nurtured some forms of knowledge or resource for centuries, calling for both monetary remuneration and technology transfer. However, in my opinion, it remains a mistake to try to ensure this mechanism by property-like mechanisms or by licenses that discriminate among types of users. On the contrary, it is fully legitimate to create licenses that discriminate among types of usage (for instance commercial and non-commercial) when this enables synergy between -for instance- a commercial market for physical goods (books) and services (concerts) and a non-commercial ecosystem of information exchange. When one creates "partial commons" (artefacts that are part of commons for some usage only) one must make sure that the transaction cost induced by the distinction are not excessive;

commons need some protection against re-appropriation, and this is what the copylefting licenses have achieved with some success in software.

Why would one want to obtain a positive recognition of the commons in international norms? First of all, because it would help each of us to think right about these matters. The contract and transaction oriented approaches risk leading us to ignore some essential properties of what we are trying to do: when I contribute a text or a piece of software to the commons, I am not making a contract with someone, I contribute a resource to a (universal) community. And if you draw from it, you owe nothing to me, but only possibly have you some duty of reciprocity towards that community. Our joint contribution may lead to us becoming friends, but that is better thought of as an opportunity than as a duty. Of course beyond these philosophical aspects, the interest of such a recognition lies in how it would ensure that the production of other norms has to take the commons in account. Commons do exist, and recognising them at the level of international norms will ensure that they are not just some empty bit of territory that someone has forgotten to take hold of. New proposed norms or enforcement mechanisms will have to be assessed taking in account -among other things- their effects on the commons. Governments and international organisations will not become owners of the commons, but the citizens, the civic society will be able to question them on how well they have acted as trustees of the commons.

Is it realistic to think that such a recognition is at hand? There are some reasons to believe so. The first reason lies of course in the achievements of the commons-based approaches themselves: so much depends on them in societies or the economies that it seems a form of neglect that we have not yet better recognised them. In developing countries, commons-based approaches are often adopted under the pressure of necessity but their benefits are much deeper than simple cost issues: they make possible to start from the pre-existing global knowledge and develop original, endogenous approaches to innovation, growth and culture. They are not magical solutions to all problems, but in conjunction with efforts to provide basic education, health systems, and infrastructures, they can permit each country or region of the world to take original paths of development while still permanently interacting with others. If one takes the perspective of human development, cultural diversity or socially useful innovation commons-based approaches are no less vital in the developed world. So we have plenty of good reasons, but we all know that a good reason is not always enough. Fortunately, there are also true alliances working in that direction : developing and emerging countries, public interest NGOs, scientists and concerned intellectuals from the North and the South see each others more and more as partners in a common endeavour, each with its own role and competence. These alliances are not without contradictions: an emerging country for instance can stand for the commons in one domain and try to pre-empt them for the benefit of some strong local economic interest or under external pressure in another domain. But these informal alliances already proved to be able to overcome these contradictions in powerful initiatives

in WIPO³, WHO⁴, UNCTAD⁵ and UNESCO⁶. Another asset for the positive recognition of the commons is that it has no direct impact on the nature and scope of particular IPR titles. An excessive scope of IPR or creating extreme enforcement mechanisms is of course harmful for the commons, which means that recognising the commons has a bearing on the future evolution of IPR, but this recognition does not deprive directly anybody from anything. Finally, the recognition of the commons is not without precedent. Already in the 1910s the draft treaty for the Spitzberg used the notion of common heritage of humanity to describe a space, and more recent treaties (the Rio convention on climate change, the convention on biologic diversity, the convention on cultural diversity) have extended the scope of global common goods, even if it was done often with some confusion⁷.

There are challenges in defining commons in international norms, if only because the entity that “owns” them can not be represented by a physical or a legal person (a *personne civile*, an organisation). One needs to distinguish between humanity as the abstract owner, government and international organisations' duties regarding the conditions of existence of the commons, and open societal governance mechanisms. It is likely that the recognition of knowledge and innovation commons in international norms will only progressively occur, developing from today's situation of an umbrella world to more positive provisions. Having this recognition as a shared perspective along the path will help long before we reach its end.

About the author

Philippe Aigrain (born 1949) is the Founder and CEO of Sopinspace, Society for Public Information Spaces, a company that provides free software-based solutions for the public debate by citizens of policy issues and for collaborative work over the internet. He acts at international level as an advocate for the information and knowledge commons, and tries to address challenges in making commons-based cooperation sustainable.

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- 3 WIPO development agenda, <http://www.cptech.org/ip/wipo/da.html>; Geneva Declaration on the Future of WIPO, <http://www.cptech.org/ip/wipo/genevadeclaration.html>; Draft proposal for a treaty on Access to Knowledge, <http://www.cptech.org/a2k/consolidatedtext-may9.pdf>
 - 4 WHO resolution on "Public health, innovation, essential health research and intellectual property rights: towards a global strategy and plan of action", <http://www.cptech.org/ip/health/rndtf/117who-rnd.html>; Draft proposal on a treaty on medical R&D, <http://www.cptech.org/workingdrafts/rndtreaty.html>
 - 5 See http://r0.unctad.org/ecommerce/ecommerce_en/freeopen_en.htm.
 - 6 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, http://portal.unesco.org/culture/en/ev.php-URL_ID=11281&URL_DO=DO_TOPIC&URL_SECTION=201.html; Free and Open Source Software Portal, http://portal.unesco.org/ci/en/ev.php-URL_ID=12034&URL_DO=DO_TOPIC&URL_SECTION=201.html;
 - 7 An example of this confusion is the idea stated in commentaries of the CCD that one could have knowledge as a global public good with information remaining a proprietary commercial commodity. This idea is typical of the lack of understanding of the information revolution, where knowledge can increasingly be represented by information, and the border between knowledge and know-how that can not be separated from its human owner and knowledge that can be the object of free or proprietary exchange is permanently re-negotiated.

He is the author of 'Cause commune : l'information entre bien commun et propriété" (<http://www.causecommune.org>, Arabic translation to be published in the 1st quarter of 2007).

Philippe Aigrain was trained as a mathematician and computer scientist and active as a media (video, music, photographs) software researcher and in science policy. He was head of sector "Software technology" within the European Commission research programmes, where he initiated the policy in support of free / open source software innovation. He has authored many papers in computer and information science, sociology and history of technology, most of which are accessible under Creative Commons licenses from his blog at <http://paigrain.publicdebate.net>