

Book The Gridlock Economy

How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives

Michael Heller
Basic Books, 2008

Recommendation

Michael Heller has provided an informative, thought-provoking contribution to the discussion of property rights. Using real-life examples, he demonstrates the disaster that happens when too many people own small portions of a resource. Like squabbling siblings who inherit the family home, one holdout can prevent anyone from using or selling it. No one benefits. That’s gridlock. Similarly, overuse or neglect often spoil unregulated, unprotected public resources: Licensing requirements prevent companies from developing new drugs because all the potential components are separately patented. Overzealous trademarking and copyrighting undermine the traditions of fair use, blocking artists’ creativity. Heller’s book is surprisingly entertaining for a work on intellectual property, real-estate law and economics. After you read it, you will never think about resources and ownership in quite the same way again. *BooksInShort* recommends it to lawyers, artists, economists, research and development professionals, and anyone who’s been wondering why you rarely see the characters in a screen play singing the happy-birthday song when they blow out the candles. (Answer: It’s under copyright until 2030.)

Take-Aways

- A “commons” is a resource that everyone shares. The “tragedy of the commons” happens when too many people use a common resource, thereby destroying it.
- The underuse of a resource limits its benefit to society as much as its overuse does.
- Societies often try to avert the tragedy of the commons by creating private ownership – “anticommons.”
- A private owner of an anticommons may block the public from using it.
- Researchers have given up on some projects because of the licensing fees involved in gaining access to patented processes and materials.
- Anticommons harm society by stifling innovation and creativity.
- Lawmakers can end a black market by removing the reasons for its existence.
- Informal organizations can protect commons by imposing their own rules on users.
- Learning to see the hidden costs of underuse is a key step in fixing gridlock.
- Voluntary cooperation and philanthropy can solve some gridlock problems.

Summary

The “Commons” and the “Anticommons”

If everyone in a community decides to take advantage of a resource that the group holds in common, they may destroy it with overuse. Imagine a big-city parking lot with no gates or fees. You get there first and you have lots of room. You tell your friends and they tell their friends. When you return after a day of work, the lot is crammed, and cars are scratched and dented. You can’t even get out because cars are parked everywhere. This kind of overuse problem is sometimes called the “tragedy of the commons.”

“Gridlock is a free market paradox. When too many people own pieces of one thing, cooperation breaks down, wealth disappears and everybody loses.”

Regulation is one way to preserve common resources; private ownership, which gives owners an interest in preserving their assets, is another. For example, the city could sell the parking lot to a private owner, who in return for collecting fees would have to run it efficiently, maintain it and set prices to keep supply in line with demand. Privately owned resources are called anticommons.

“Unfortunately, privatization can overshoot. Sometimes we create too many separate owners of a single resource. Each one can block the others’ use.”

When the various owners of an anticommons resource decide to assert their exclusive rights to it, they can block everyone from using it. This kind of gridlock can be as destructive to its value as overuse. For example, imagine a regulating authority that decided to divide the lot into many pieces to prevent any one owner from making too much money. It might distribute the spots unfairly: Some people might have to share, while others might get a spot for a time they could not use. Some spots might be inaccessible because to get to them, you’d have to travel over another owner’s territory. The parking lot would become useless.

Phantom Tollbooths

This was the situation on the Rhine river in Germany during the Middle Ages. Back then, it was a major transportation route – but also an anticommons, controlled by “robber barons.” So many robber barons set up private toll-collection operations on their parts of the river that they destroyed the river’s usefulness as a commercial shipping route.

“English lacks a term to denote wasteful underuse.”

When air travel began a century ago, property owners assumed they owned the column of air above their land, all the way through the stratosphere. This meant that an airline company would have needed to obtain and pay for clearances from the long list of landowners along its routes. This was clearly unworkable, so Congress tweaked the law and declared that owners had rights to the airspace above their property only up to 500 feet in daytime and 1,000 feet at night.

“Even the staunchest private-property systems are always adapting rights to manage new resource conflicts.”

However, the U.S. has created other phantom tollbooths. In the 1980s, the U.S. Federal Communication Commission (FCC) divided the broadcast spectrum into 734 territories. Hundreds of small companies asserted their ownership of the airwaves, creating gridlock. The U.S. still lags behind many countries in the extent of its wireless broadband service, while the majority of its spectrum lies idle most of the time.

“The most important cause of gridlock in biomedical research... [is] the sheer multiplicity of rights that must be acquired to undertake innovation of any sort, including drug development.”

U.S. airports are similarly gridlocked. Although three times as many passengers fly now than before the deregulation of the 1990s, few airports have been able to expand to handle the increase. To ease the congestion, the country would need only 50 additional miles of runways at its 25 busiest airports. However, most of the communities around the airports have forbidden the construction of new runways for a variety of noise and environmental concerns.

Creative Gridlock

The narrowing of the concept of fair use of copyrighted material has gridlocked creativity. Sampling is a popular technique in commercial music, yet the courts have held even unrecognizably short samples to be violations of copyright. The documentary film *Eyes on the Prize*, about the civil rights movement of the 1950s and 1960s, remained unseen for decades because the filmmaker was unable to clear the images and music in it for subsequent release. He was able to rerelease it only with hundreds of thousands of dollars in donations over many years, and the alteration of some sections of the film for which he could not obtain rights.

“One economist estimates that ‘perhaps as much as \$1 trillion might be lost over the next decade due to present constraints on broadband development.’”

Western civilization has come up with various solutions to the tragedy of the commons over the course of its development. It now needs to concentrate on the problem of the anticommons.

Proliferating Patents

New drugs and treatments for diseases have saved the lives of many over the past several decades. But more recently, the drug industry has lobbied for revisions of the patent laws governing it. The companies want to protect their cash-cow drugs from low-cost, generic copies. As a consequence, an overgrown thicket of patents on products and processes raised costs, and now blocks the development of new drugs and treatments. Although courts have annulled roughly half these patents, the legal process consumes huge amounts of time and money. Researchers cannot afford either to risk lawsuits or to buy licenses to use patented material.

“As land passes down through the generations, ownership can become quite fragmented. Once there are too many owners, cooperation fails, and the farm is sold.”

This patent problem also blocked the development of “golden rice.” Between a quarter and a half-million children go blind each year from a diet deficient in vitamin A. Two professors modified a strain of rice so it produced its own vitamin A. However, they could not market it because of the tangle of patent rights. The humanitarian importance of this project inspired the Zeneca company to obtain clearances for the relevant patents so the rice could go to trial in India and the Philippines.

“The Constitution allows states to decide how to use their eminent domain power. There is little room for federal or judicial supervision. That is as it should be.”

Of course, patents also spurred innovation by protecting researchers from plagiarism and enabling them to make money from their work. However, these rights are not absolute. When patents end up blocking creativity rather than enabling it, society needs to change its approach.

Broadband Waste

Certain resources cannot be saved or conserved; they simply exist, like the broadcast spectrum. U.S. law keeps this spectrum underutilized. Various governmental organizations control about 22% of the available spectrum; about 7% is held as commons; 7% is for heavily regulated “private” use, and 60% is trapped in the anticommons. Appliances such as wireless phones, ham and citizens’ band radio, garage-door openers, baby monitors and microwave ovens use the common portion of the spectrum. The FCC has transferred more of the spectrum into this unlicensed but heavily regulated space, and much of it remains completely unused.

“Few remember the Oyster Wars today, but the conflicts bitterly split the Chesapeake for nearly a hundred years, until a truce was brokered in 1962.”

Analogue TV is a good example of an anticommons, with 67 licensed channels in 210 markets, most of which are small and therefore use only a few of the available channels. It consumes about 400 MHz of the spectrum, using more bandwidth for buffers between channels than for the channels themselves. Broadcasters have nevertheless held onto their parts of the spectrum tightly and resisted proposals to use their extra bandwidth to benefit society.

“Avoiding underuse in a tragedy of the anticommons is harder because we are just now discovering its pervasive reach and hidden costs.”

The U.S. has dropped out of the top 15 countries in broadband penetration. Americans pay more for high-speed broadband than the Japanese, while South Korea enjoys services unavailable in the U.S. Americans suffer with dropped calls and poor-quality sound in their wireless phones. They are too focused on their own patents,

licenses and lawsuits to see the damage that underusing the full spectrum does.

BANANA Republics

Regulatory roadblocks in urban and wealthy areas create “BANANA republics – Build Absolutely Nothing Anywhere Near Anyone.” The costs of delays and of satisfying the demands of regulatory organizations have bankrupted more than few development companies. With the blessing of the Supreme Court, some cities and states have resorted to using eminent domain and taken away the property rights of many small holders to facilitate development projects. Despite a huge public outcry against the court’s decision, it was in accordance with similar decisions from previous generations.

“Gridlock is a major source of waste and loss in every society, yet underuse is mostly hidden from view.”

Although their families may have started out as farmers in the South, African Americans own fewer and fewer farms over the years, because state inheritance laws fragment their land into smaller portions as they pass it from one generation to the next, often without wills. Some of these laws force the sale of a whole property if an owner sells a small piece of it. While many politicians recognize the need for reform, they also fear a political backlash and resort to the “NIMTOO” response: “Not in My Term of Office.”

Restoring Private Property

When the Soviet Union formed, the state had an easy time removing private property rights. However, since its dissolution, returning those rights has been difficult. Fearing that the Communists would return to power, reformers hastily and inequitably assigned property rights. A family might end up owning its mom-and-pop store, along with some government bureaucrats and their friends. This anticommons approach made operating or selling the store impossible unless all the new owners agreed – and often those owners demanded a reward for their consent. Businesses failed and buildings deteriorated.

“The simplest way to change the behavior of people stuck in gridlock is to tune up laws so that potential market makers have a reasonable opportunity to prevail.”

The USSR had a large, functioning black market. Some economists, such as Hernando de Soto, see these underground economies as net contributors to social good, because they offer benefits that the mainstream economy cannot or will not provide. If the official economy would recognize what the casual economy knows, lawmakers could align rules and regulations with public good.

Shellfish Solutions

Oysters are easy to harvest but difficult to protect, so some oysterers make the apparently logical choice to harvest all the oysters they can before anyone else gets to them. However, leaving nothing for the future hurts the oysterers and their customers – to say nothing of the oysters. Armed conflict over the Chesapeake Bay oyster beds began in 1632. Virginia and Maryland reached an agreement over them in 1785 and periodic adjustments kept the peace through the 19th century. Then, in 1871, oyster pirates led by Gus Rice attacked the bay, overwhelming the Maryland Oyster Navy. One day, Rice fired on what he thought was an Oyster Navy ship, which turned out to be a passenger ship. This sparked a huge public outcry. Maryland drove the oyster pirates from its area of the bay – but they simply moved to another area. The present state of oystering is a complex arrangement of state and private ownership, with commons and anticommons elements. Stakeholders resist reform because they fear they’d end up with less in a new system. However, the community would benefit from the conservation of at-risk resources.

Fixing the Problem

Recognize gridlock and call it by name. Using the right words clarifies the problem. For example, the term “antitrust” carries a lot of baggage, misleading lawmakers, regulators and the public. Merger or monopoly law is a more accurate term. Words such as “underuse” and “anticommons” can reveal suboptimal systems of ownership.

“Your cell phone drops calls, has scratchy sound, and lacks many useful services that you’ve seen in your travels abroad. Now you know why. Well-intentioned policies have led to gridlock.”

Pay attention to emerging markets and new technologies, which can make conventional methods obsolete. Look all over the world for new approaches; sometimes other people really do have better ideas. Don’t become sentimental about the past.

“Unlocking the grid” is easier said than done. Beware of rigid regulations. Analyze the system to see if it is harming or supporting innovation. Don’t allow gridlock to fester and spread. Systems of regulation and laws should include mechanisms for change. However, these are not always the best solutions. Parties can enter into voluntary agreements to resolve problems. Philanthropic organizations are sometimes willing to sponsor good causes as they did in gaining the necessary clearances for *Eyes on the Prize* and the golden rice trial. Public shaming or going after an individual’s or a company’s reputation can often break up gridlock in local situations.

About the Author

Michael Heller, a professor at Columbia University, specializes in property and real-estate law.
